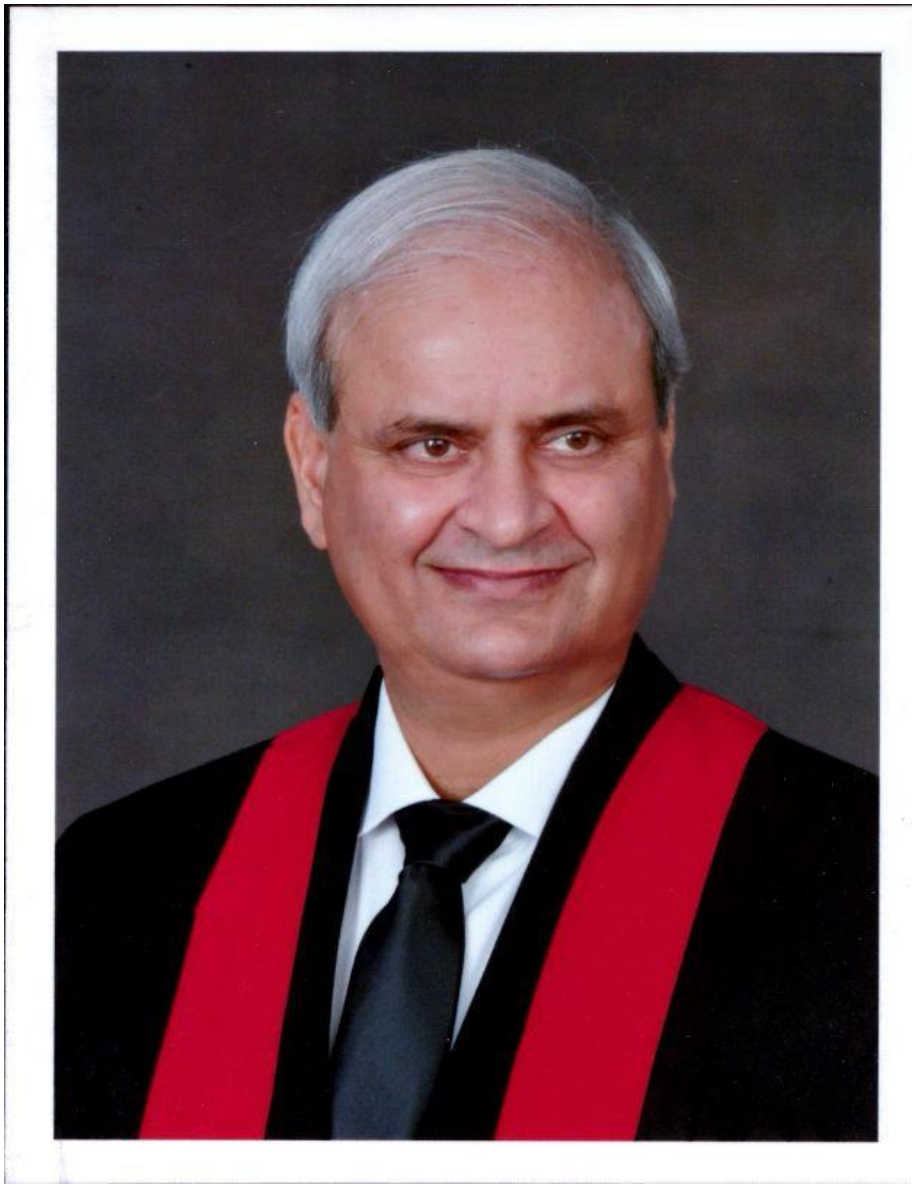

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PROFILE

Hon'ble Chief Justice Mr. Justice Malik Shahzad Ahmad Khan was born in Pindi Gheb on 15.03.1963 in a family filled with moral and ethical values. After his early education he attended Gordon College, Rawalpindi and earned Bachelor's degree. He then pursued his Bachelor of Laws (LL.B.) from the University of Punjab, Lahore and graduated in the year 1989. After his LL.B he was enrolled as an Advocate with the Punjab Bar Council in the year 1990 and entered into the legal profession. He was enrolled as Advocate of High Court in the year 1993. Later he became an Advocate of Supreme Court of Pakistan in the year 2004.

During his legal practice as an advocate of about twenty one years, he handled numerous cases of Criminal, Civil, Family and Rent Laws etc. He also assisted the Superior Courts of the country in the interpretation of different aspects of Criminal Law and settling principles of jurisprudence. His lordship also took active part in Bar politics. He was elected as Secretary General of High Court Bar Association, Rawalpindi in the year 2004. He was also elected as President of High Court Bar Association, Rawalpindi in the year 2009.

His professional excellence in the field of law, ability to understand and interpret true intentions and dynamics of the law and its applicability was acknowledged when he was appointed as an Additional Judge of Lahore High Court on 12.05.2011.

During his career as a Judge, he has authored number of judgments, including land mark cases. Known for his judicial philosophy grounded

in textualism and a commitment to stare decisis, his Lordship has been a pivotal figure in shaping contemporary legal discourse. His judgments reflect a careful balance between respect for historical legal principles and adaptation to evolving societal norms. Outside of his judicial duties, his Lordship remained member of Administrative Committee of Lahore High Court. He also remained inspection of judge of District Lahore. He also participated in a conference on the topic 'Criminal Justice in 21st Century' held in Francisco (United States) w.e.f. 05.07.2017 to 14.07.2017.

His Lordship served as a Judge of Lahore High Court for about 13 years. Whole journey of his lordship is illustrious and has left an indelible impression, setting a high standard of excellence and integrity for others to aspire to in the pursuit of justice. After serving as a judge of the Lahore High Court, Lahore, for more than a decade his Lordship took the oath as Chief Justice of the Lahore High Court, Lahore on March 07, 2024, marking a significant milestone in his illustrious legal career. As a Chief Justice, his Lordship accomplished several notable achievements. In such span of time of his judicial career his Lordship decided 42462 cases and delivered 216 reported judgments.

His Lordship is renowned for his unwavering firmness in his decisions, consistently upholding the principles of justice and the rule of law. Throughout his career, his Lordship has been a mentor to many young lawyers and judges, inspiring a new generation with his dedication and ethical standards. His courtroom demeanor is described as both stern and compassionate, a blend that commands respect and fosters a sense of fairness.

Recognizing his exemplary and profound legal expertise and stanch pledge to justice his Lordship has been elevated to Supreme Court of Pakistan. His elevation to the Supreme Court is seen as a natural progression for a jurist of his caliber. Colleagues and observers alike commend his Lordship's appointment, predicting that his presence on the highest court will bring a measured, insightful, and principled voice to the bench. As he dons the robes of a Supreme Court, his Lordship carries with him a legacy of integrity, intellectual rigor, and an unyielding commitment to justice. His journey to the Supreme Court is not just a personal triumph but a beacon of hope for all who believe in the sanctity of justice.

Government of Pakistan
Law, Justice and Parliamentary Affairs Division
*****

Islamabad, the 11th May, 2011

NOTIFICATION

No.F.5(1)/2011-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Additional Judges of the Lahore High Court for a period of one year with effect from the date they make oath of their office:-

1. Syed Kazim Raza Shamsi
2. Mr. Abdul Waheed Khan
3. Syed Iftikhar Hussain Shah
4. Mr. Abdus Sattar Asghar
5. Ch. Muhammad Younas
6. Mr. Mehmood Maqbool Bajwa
7. Syed Ijaz Hussain Shah
8. Mr. Ameen-ud-Din Khan
9. Mr. Muhammad Ameer Bhatti
10. Mr. Altaf Ibrahim Qureshi
11. Malik Shahzad Ahmad Khan

(MUHAMMAD MASOOD CHISHTI)
SECRETARY

The Manager,
Printing Corporation of Pakistan Press,
Islamabad- for favour of publication in
the Gazette of Pakistan, Extraordinary, Part-III

No.F.5(1)/2011-AII

Islamabad the 11th May, 2011

Copy to:-

1. Secretary General to the President, President's Secretariat, Islamabad.
2. Principal Secretary to the Prime Minister, Prime Minister's Secretariat, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Supreme Court Building, Islamabad
9. Registrar, Lahore High Court, Lahore (with one spare copy each for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. P.S. to Secretary, Law, Justice & P.A Division, Islamabad.
12. Record.

(Muhammad Siddique)
Section Officer

OATH OF ADDITIONAL JUDGE, LAHORE HIGH COURT, LAHORE

(In the name of Allah, the most Beneficent, the most Merciful)

I, ***MALIK SHAHZAD AHMAD KHAN****, do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That, as Additional Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:

That I will abide by the code of conduct issued by the Supreme Judicial Council:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:

And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.

(May Allah Almighty help and guide me (A'meen)

Shahzad Ahmed
ADDITIONAL JUDGE

OATH made before me, this 12 14 *day of May, 2011.*

Iftikhar Ahmed Chaudhry
CHIEF JUSTICE

TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III

Government of Pakistan
Law and Justice Division
*****

Islamabad, the 10th May, 2013

NOTIFICATION

No.F.5(1)/2011-A.II.- In exercise of the powers conferred by Article 193 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following Additional Judges of the Lahore High Court to be the Judges of the said Court with effect from the date they make oath of their offices:-

1. Mr. Justice Syed Iftikhar Hussain Shah
2. Mr. Justice Syed Kazim Raza Shamsi
3. Mr. Justice Malik Shahzad Ahmad Khan

JUSTICE (R)
(MUHAMMAD RAZA KHAN)
SECRETARY

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

No.F.5(1)/2011-AII

Islamabad the 10th May, 2013

Copy to:-

1. Secretary General to the President, President's Secretariat, Islamabad.
2. Principal Secretary to the Prime Minister, Prime Minister's Secretariat, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Supreme Court Building, Islamabad
9. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. Sr. P.S. to Secretary, Law and Justice Division, Islamabad.
12. Record.

(Saadat Iqtidar Alam)
Section Officer

OATH OF JUDGE,
LAHORE HIGH COURT, LAHORE

(In the name of Allah, the most Beneficent, the most Merciful)

I, Malik Shahzad Ahmad Khan, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That*, as Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

That *I will abide by the code of conduct issued by the Supreme Judicial Council:*

That *I will not allow my personal interest to influence my official conduct or my official decisions:*

That *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

And that*, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

(May Allah Almighty help and guide me (A'meen)

Shahzad Ahmad
JUDGE

OATH made before me, this 11th *day of May, 2013.*

CHIEF JUSTICE

TO BE PUBLISHED IN THE
GAZETTE OF PAKISTAN PART-III

Government of Pakistan
Ministry of Law & Justice
*****

770
09/03/24

Islamabad, the 07th March, 2024

NOTIFICATION

No.F.1(1)/2023-A.II.- In exercise of the powers conferred under Article 193 of the Constitution of the Islamic Republic of Pakistan, the President of Islamic Republic of Pakistan is pleased to appoint Justice Malik Shahzad Ahmad Khan, Senior Puisne Judge, Lahore High Court, Lahore as Chief Justice of the said Court with effect from the date he makes oath of his office.

(RAJA NAEEM AKBAR)
Secretary

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

Copy to:-

1. Secretary to the President. President's Secretariat, Islamabad.
2. Secretary to the Prime Minster, Prime Minister's office, Islamabad.
3. Secretary, Parliamentary Committee, Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. The Registrar, Supreme Court of Pakistan, Islamabad.
6. The Registrar (with one spare copy for the Honorable Chief Justice), Lahore High Court, Lahore.
7. The Secretary, office of Attorney General for Pakistan, Islamabad.
8. Chief Secretary, Government of Punjab, Lahore.
9. Secretary to the Governor, Punjab, Lahore.
10. The Accountant General Punjab, Lahore.
11. DS to Minister for Law & Justice Division, Islamabad.
12. PSO to Secretary, Law & Justice Division, Islamabad.
13. LIS Wing, Law & Justice Division, Islamabad.
14. No.F.5(1)/2011-A.II.
15. Record.

09/03

R-4

HR-I

Lahore High Court, Lahore
General Diary Receipt
09 MAR 2024
Receipt No. 5050

(FAISAL MALIK)
Section Officer

THE SCHEDULE

OATH OF CHIEF JUSTICE FOR THE PROVINCE OF PUNJAB

بِسۡمِ اللّٰہِ الرَّحۡمٰنِ الرَّحِیۡمِ

I, **Justice Malik Shahzad Ahmad Khan,** do solemnly swear that I will bear true faith and allegiance to Pakistan:

That, as Chief Justice of the High Court for the Province of Punjab, I will discharge my duties, and perform my functions honestly, to the best of my ability and faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law:

That I will abide by the Code of Conduct issued by the Supreme Judicial Council:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:

And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.

May Allah Almighty help and guide me (A'meen).

(Justice Malik Shahzad Ahmad Khan)
Chief Justice

At Lahore, this day of March, 2024

Muhammad Baligh Ur Rehman
Governor Punjab

Sworn in before me this March, 2024

حلفِ عُہدہ

(چیف جسٹس عدالت عالیہ پنجاب)

بِسۡمِ اللّٰہِ الرَّحۡمٰنِ الرَّحِیۡمِ

میں، **جسٹس ملک شہزاد احمد خان**، صدقِ دل سے حلف اُٹھاتا ہوں کہ میں خلوصِ نیت سے پاکستان کا حامی اور وفادار رہوں گا:

کہ، بحیثیت چیف جسٹس عدالت عالیہ صوبہ پنجاب میں اپنے فرائض وکارہائے منصبی ایمانداری، اپنی انتہائی صلاحیت اور وفاداری کے ساتھ، اسلامی جمہوریہ پاکستان کے دستور اور قانون کے مطابق انجام دوں گا:

کہ میں اعلیٰ عدالتی کونسل کے جاری کردہ ضابطہ اخلاق کی پابندی کرونگا:

کہ میں اپنے ذاتی مفاد کو اپنے سرکاری کام اور اپنے سرکاری فیصلوں پر اثر انداز نہیں ہونے دوں گا:

کہ میں اسلامی جمہوریہ پاکستان کے دستور کو برقرار رکھوں گا اور اس کا تحفظ اور دفاع کروں گا:

اور یہ کہ میں، ہر حالت میں، ہر قسم کے لوگوں کے ساتھ، بلا خوف ورعایت اور بلا رغبت وعناد، قانون کے مطابق انصاف کروں گا۔

اللہ تعالیٰ میری مدد اور راہنمائی فرمائے۔ (آمین)۔

بمقام لاہور بتاریخ مارچ 2024ء دستخط چیف جسٹس

میرے روبرو آج بتاریخ مارچ 2024ء حلف اُٹھایا دستخط گورنر

2024 P Cr. L J 147

[Lahore]

Before Malik Shahzad Ahmad Khan, J

QASIM ALI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 80274-J of 2022, heard on 4th July, 2023.

(a) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Non-availability of justification for the presence of witness at the time and place of occurrence---Chance witnesses---Accused was charged for committing murder of the brother of the complainant---Ocular account of the prosecution was furnished by complainant and an eye-witness--- Both the witnesses were real brothers of the deceased---Said witnesses stated that they were not residents of the village where the occurrence took place rather they were residents of other city situated at a distance of 25/26 kilometers from the place of occurrence---Both the eye-witnesses did not give any specific reason for their visit to the village where the occurrence took place on the relevant day---Complainant conceded that he had neither any business nor residence near the place of occurrence---Eye-witnesses were not residents of the village where the occurrence took place hence they were chance witnesses, therefore, their presence at the spot at the relevant time without establishing any convincing reason was not free from doubt---Appeal against conviction was allowed, in circumstances.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Sufyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Delay of nine hours in conducting postmortem examination upon the dead body of the deceased---Accused was charged for committing murder of the brother of

the complainant---According to the prosecution case, the occurrence in this case took place on 20.01.2022 at 03:20 p.m.---Complainant himself mentioned in the FIR that his brother (deceased) after receiving injuries died at the spot but according to post mortem report of the deceased, the dead body of deceased was brought in the hospital on 20.01.2022 at 11:50 p.m., and postmortem examination on the dead body of the deceased was conducted on 21.01.2022 at 12:10 a.m., i.e., after about nine hours from the occurrence---No plausible explanation had been given by the prosecution that as to why the dead body was brought to the hospital and post mortem examination was conducted with such a delay of about nine hours from the occurrence---Said delay in conducting the postmortem examination on the dead body of the deceased was suggestive of the fact that the occurrence was unseen and the delay was consumed in procuring the attendance of fake eye-witnesses---Appeal against conviction was allowed, in circumstances.

Muhammad Ilyas v Muhammad Abid alias Billa and others 2017 SCMR 54; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Sufyan Nawaz and another v. The State and others 2020 SCMR 192; Zafar v. The State and others 2018 SCMR 326 and Muhammad Ashraf v. The State 2012 SCMR 419 rel.

(c) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Ocular account and medical evidence---Conflict between---Accused was charged for committing murder of the brother of the complainant---In the contents of the FIR, complainant alleged that the accused gave two brick bat blows which landed on the head and chest of deceased whereas in the post mortem report and pictorial diagrams there was only one injury on the head of the deceased---No injury on the chest of the deceased was noted by the concerned Medical Officer---Both the eye-witnesses stated before the Trial Court that the accused inflicted one brick bat blow on the head and three/four brick bat blows on the chest and shoulder of deceased---Said witnesses were duly confronted with their previous statements and improvements made by them in that respect were duly brought on the record---Moreover, the prosecution witnesses made improvements in their statements while appearing before the Trial Court regarding the number of injuries sustained by the deceased on his chest and shoulder and their improved statements was also in conflict with the medical

evidence, therefore, their evidence was not worthy of reliance---Appeal against conviction was allowed, in circumstances.

Muhammad Ali v. The State 2015 SCMR 137; Irfan Ali v. The State 2015 SCMR 840; Usman alias Kaloo v. The State 2017 SCMR 622; Nadeem alias Kala v. The State and others 2018 SCMR 153 and Akhtar Ali and others v. The State 2008 SCMR 6 rel.

(d) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Unnatural conduct of eye-witnesses---Accused was charged for committing murder of the brother of the complainant---Record showed that the conduct of the prosecution eye-witnesses of the case was highly unnatural---Complainant and eye-witness were both real brothers of deceased---As per prosecution case the complainant was accompanied by eye-witness, other witness (not produced) and the deceased and as such, the complainant party was comprising of 04-adults members, whereas, the accused was alone but surprisingly they did not try to apprehend the accused after the occurrence nor tried to intervene during the occurrence to save the deceased from the accused---Accused was not armed with any formidable weapon at the time of occurrence and he was only armed with a brick bat---Thus, conduct of the prosecution eye-witnesses, who according to their claim witnessed the occurrence, was highly unnatural, therefore their presence at the spot was highly doubtful and their evidence was not worthy of reliance---Appeal against conviction was allowed, in circumstances.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(e) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Motive not proved---Accused was charged for committing murder of the brother of the complainant---Motive of the occurrence as stated in the FIR was that six days prior to the occurrence a quarrel took place between deceased and the accused but the same was patched up with the intervention of the respectables of the locality---No respectable of the locality, who patched up the matter between the parties appeared before the Trial Court in support of the motive part of the prosecution case---Moreover, the complainant while appearing before the Trial Court admitted during his cross-examination that neither he nor other witnesses

witnessed the occurrence of motive---Moreover, in his statement recorded by the Trial Court, complainant did not mention any specific date, time or place of occurrence of the motive, whereas, eye-witness did not utter a single word about the motive of occurrence---No reason of the earlier quarrel between the accused and the deceased had been brought on the record---Thus, the prosecution had failed to prove the alleged motive---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Recovery of weapon of offence---Inconsequential---Accused was charged for committing murder of the brother of the complainant---Record showed that a brick bat was recovered on the pointation of accused---However, recovery memo did not show that brick bat was stained with blood---Moreover, the said brick bat was never sent to the office of Forensic Science Agency to see as to whether the same was stained with blood or not, therefore, it was not safe to rely upon the said piece of evidence of the prosecution---Appeal against conviction was allowed, in circumstances.

Nasir Abbas Zafar Malik, defence counsel for Appellant.

Ms. Asiya Yasin, Deputy District Public Prosecutor with Ibrahim, Sub-Inspector for the State.

Complainant in person.

Date of hearing: 4th July, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.80274-J of 2022, filed by Qasim Ali (appellant), against his conviction and sentence.

2. Qasim Ali (appellant) was tried in case FIR No.95 dated 20.01.2022, registered at Police Station Khurrianwala Tehsil Jaranwala, District Faisalabad, in respect of offence under section 302, P.P.C. and vide impugned judgment dated 28.10.2022, passed by learned Additional Sessions Judge, Jaranwala, he (appellant) has been convicted and sentenced as under:-

Under section 302(b), P.P.C. to imprisonment for life as Tazir. He was

also ordered to pay Rs.10,00,000/- (rupees one million only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C. and in default thereof to further undergo six months simple imprisonment.

Benefit of section 382-B, Cr.P.C. was also extended to the appellant.

3. Brief facts of the case as given by Amir Mehmood, complainant (PW-1) in his complaint (Ex.PA), on the basis of which the formal FIR (Ex.PE) was chalked out, are that Amir Mehmood complainant (PW-1) along with his brother, namely Parvez Iqbal (PW-2) came to Chak No.266/RB Khurrianwala to see their real brother, namely Muhammad Naveed (deceased). They were told from the house of Muhammad Naveed (deceased) that Muhammad Naveed (deceased) had gone for duty to the Royal Nawab Marquee, Jand Wali Road, Khurrianwala, whereupon, he (complainant) along with his brother Parvez Iqbal (PW-2) came to the Royal Nawab Marquee. On 20.01.2022 at about 03:20 p.m. when they were having conversation with their brother Muhammad Naveed (deceased), all of a sudden Qasim Ali (appellant) son of Abdul Bari caste Rajpoot resident of Chak No.266/RB, Khurrianwala armed with a brick bat emerged at the spot and started hurling abuses. He was refrained from doing so but Qasim Ali (appellant) gave brick bat blows on the head and chest of Muhammad Naveed (deceased) who sustained injuries and fell on the ground. The complainant party raised hue and cry due to which Qasim Ali (appellant) fled away from the spot while brandishing brick. He (complainant) and Parvez Iqbal (PW-2) attended their brother Muhammad Naveed (deceased) who succumbed to the injuries at the spot.

The motive behind the occurrence was that six days prior to the occurrence a quarrel took place between the deceased and the appellant however, the matter was patched up by the respectables of the locality. The appellant nourished this grudge and committed the occurrence.

4. After completion of investigation by the police, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 03.06.2022, to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution produced nine witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Ex.PA) to (Ex.PJ). The statement of the appellant under section

342, Cr.P.C, was recorded, wherein he denied the allegations levelled against him. Neither the appellant opted to appear as his own witness on oath as provided under section 340(2) of the Code of Criminal Procedure, 1898 in disproof of the allegations levelled against him nor he produced any defence evidence.

The learned trial Court vide its judgment dated 28.10.2022, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

5. Amir Mehmood, complainant (PW-1) is present before the Court. He is duly identified by Ibrahim, Sub-Inspector of Police Station Khurrianwala District Faisalabad. The complainant submits that he does not want to hire the services of a private counsel in this case and will be satisfied with the arguments of learned Deputy District Public Prosecutor for the State. Even otherwise, it is a State case and learned Deputy District Public Prosecutor for the State is ready to argue the same, therefore, I proceed to decide the instant appeal after hearing arguments of learned defence counsel at state expenses for the appellant, learned Deputy District Public Prosecutor for the State and perusing the record.

6. It is contended by learned defence counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant party; that the prosecution witnesses are chance witnesses as they were not residents of the village, where the occurrence took place and they could not give any valid reason for their presence at the spot at the relevant time, therefore, their presence at the spot at the time of occurrence is highly doubtful; that the prosecution witnesses are closely related to the deceased, therefore, their evidence is not worthy of reliance without independent corroboration, which is very much lacking in this case; that the prosecution eye-witnesses made dishonest improvements in their statements recorded by the learned trial Court, which were duly brought on the record; that there is conflict between the ocular account furnished by the prosecution eye-witnesses and the medical evidence which has created further dent in the prosecution case; that the motive alleged by the prosecution was also not proved in this case and has also been disbelieved by the learned trial Court; that the recovery of brick bat (P.4) was falsely planted against the appellant to strengthen the weak prosecution case; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appeal filed by the appellant may be accepted and the appellant may be acquitted from the charge.

7. On the other hand, it is contended by learned Deputy District Public

Prosecutor for the State that the FIR (Exh.PE) in this case was promptly lodged, which rules out the possibility of any concoction; that the occurrence took place in the broad day light, therefore, there was no chance of any mis-identification of the accused; that the prosecution eye-witnesses were cross-examined at length but their evidence could not be shattered; that the medical evidence has also supported the ocular account of the prosecution; that the prosecution case is further corroborated by the recovery of brick bat (P.4) on the pointation of the appellant; that motive was also proved against the appellant through reliable evidence of the prosecution witnesses; that the learned trial Court has righty convicted and sentenced the appellant, therefore, his appeal may be dismissed while maintaining his conviction and sentence.

8. Arguments heard. Record perused.

9. Prosecution story as set forth in the complaint (Exh.PA), on the basis of which the formal FIR (Ex.PA/1) was chalked out has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

10. Occurrence in this case took place at the Royal Nawab Marquee situated at Jand Wali Road, Khurrianwala, District Faisalabad. The ocular account of the prosecution was furnished by Amir Mehmood, complainant (PW-1) and Parvez Iqbal (PW-2). Both are real brothers of Muhammad Naveed (deceased). Both the abovementioned witnesses stated that they are not residents of the village where the occurrence took place rather they were residents of Hajveri Town, Faisalabad City. They both stated that their residence was situated at a distance of 25/26 kilometers from the place of occurrence. The relevant parts of their statements in this respect read as under:

> Amir Mehmood (PW-1)
>
> "My residence is about 25/26 KM away from the place of occurrence. My brother Pervez resides with me."
>
> Parvez Iqbal (PW-2)
>
> "The inter se distance between my residence and house of my deceased brother is about 24/25 kilometers. Royal Nawab Marquee is located at the distance of about 1/1-2 KM from the residence of my deceased brother."

I have further noted that both the abovementioned prosecution eye-witnesses did

not give any specific reason for their visit to the village where the occurrence took place on the relevant day. Amir Mehmood complainant (PW-1) further conceded during his cross-examination that he had neither any business nor residence near the place of occurrence. Although he stated that there was a special function on the residence of his brother (Muhammad Naveed deceased) but he further conceded that he was not invited at his residence by his deceased brother in connection with any function. The relevant part of his statement in this respect reads as under:-

> "It is correct that neither I have any business nor residence near the place of occurrence. We went to meet my brother on our own and there was special function at his residence. My deceased brother has not invited at his residence in connection with any function."

The nature of the stated function i.e. marriage, engagement or any Qul-kwaani, etc. has not been mentioned even during cross-examination by the abovementioned prosecution eye-witnesses. As the abovementioned eye-witnesses are not residents of the village where the occurrence took place hence they are chance witnesses, therefore, their presence at the spot at the relevant time without establishing any convincing reason for their presence at the spot at the relevant time, is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the, crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall

within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the apex Court of the country was pleased to observe as under:-

> "..... ... .He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:-

> " .....Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence ... ..."

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove any valid reason of their presence in the village of occurrence at the relevant date and time, therefore, their very presence at the spot at the relevant time becomes doubtful.

11. It is further noteworthy that according to the prosecution case, the occurrence in this case took place on 20.01.2022 at 03:20 p.m. The complainant himself mentioned in the FIR (Ex.PE) that his brother Muhammad Naveed (deceased) after receiving injuries died at the spot but according to post mortem report of the deceased (Ex.PB), the dead body of Muhammad Naveed (deceased) was brought in the hospital on 20.01.2022 at 11:50 p.m., and postmortem examination on the dead body of the deceased was conducted on 21.01.2022 at 12:10 a.m., i.e., after about nine hours from the occurrence. No plausible explanation has been given by the prosecution that as to why the dead body was brought to the hospital and post mortem examination was conducted with such a delay of about nine hours from the occurrence. The abovementioned delay in conducting the postmortem examination on the dead body of the deceased is

suggestive of the fact that the occurrence was unseen and the delay was consumed in procuring the attendance of fake eye-witnesses. In the case of `Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the said judgment at page No. 55 reads as under:-

> "2. .....Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similarly, in the case of "Khalid alias Khalidi and 2 others v. The State" (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the apex Court of the country in the cases reported as "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192), "Zafar v. The State and others" (2018 SCMR 326) and "Muhammad Ashraf v. The State" (2012 SCMR 419).

12. It is further noteworthy that there is conflict between the ocular account and medical evidence of the prosecution. In the contents of the FIR (Exh.PE), Amir Mehmood complainant (PW-1) alleged that the appellant gave two brick bat blows which landed on the head and chest of Muhammad Naveed (deceased) whereas in the post-mortem report and pictorial diagrams (ExPB, Ex.PB/1 and Ex.PB/2) there is only one injury on the head of the deceased. No injury on the chest of the deceased was noted by the concerned Medical Officer. It is further noteworthy that both the eye-witnesses, namely Amir Mehmood complainant (PW-1) and Pervez Iqbal (PW-2) stated before the learned trial Court that the appellant inflicted one brick bat blow on the head and three/four brick bat blows on the chest and shoulder of Muhammad Naveed (deceased). They were duly confronted with their previous statements and improvements made by them in

this respect were duly brought on the record. The relevant parts of their statements in this respect are reproduced hereunder:-

(Amir Mahmood complainant (PW-1)

Examination-in-chief

"In the meanwhile, accused Muhammad Qasim present in the court raised lalkara and abused my brother Muhammad Naveed. Where after accused Qasim Ali inflicted a brick blow which landed on the right side of the head of my brother and accused Qasim Ali also inflicted brick blows on the chest of my brother three or four times. Where after accused escape from the spot while raising his brick."

Cross-Examination

"I got recorded in my application Ex.PA that accused Qasim Ali also inflicted brick blows on the chest of my brother three or four times (as per request of learned defence counsel) confronted with Ex.PA where the fact of three or four time is not mentioned."

(Parvez Iqbal (PW-2)

Examination-in-chief

"In the meanwhile, accused Qasim Ali came there while armed with brick and started inflicting brick blows which landed on head, chest and shoulder areas. My brother fell down. We forward ahead to rescue our brother but he went unconscious."

Cross-Examination

"I cannot recall whether I have got recorded in my statement under section 161, Cr.P.C. that my brother had sustained any brick blow on his shoulder."

(bold and underlining supplied for emphasis)

It is therefore, evident that there was conflict between ocular account and medical evidence of the prosecution regarding the number of injuries sustained by Muhammad Naveed (deceased), as mentioned in the contents of the FIR (Exh.PE) and as mentioned by the prosecution eye-witnesses before the learned trial Court and as noted in the post mortem report (Ex.PB) by Dr. Muhammad

Khurram Ijaz (PW-4). In the cases of 'Muhammad Ali v. The State' (2015 SCMR 137), 'Irfan Ali v. The State' (2015 SCMR 840), 'Usman alias Kaloo v. The State' (2017 SCMR 622) and 'Nadeem alias Kala v. The State and others' (2018 SCMR 153), the prosecution evidence was disbelieved on account of its conflict with the medical evidence regarding the number/nature of injuries sustained by the deceased. Relevant part of the case of 'Muhammad Ali' supra, reads as under:-

> "5.....In such circumstances, the presence of the eye-witnesses at the spot is doubtful. Had they been present at the spot and had witnessed the occurrence, they could have ascribed the correct role to the accused and explain all the injuries on the person of the deceased...."

Moreover, the prosecution witnesses made improvements in their statements while appearing before the learned trial Court regarding the number of injuries sustained by the deceased on his chest and shoulder and their improved statements was also in conflict with the medical evidence, therefore, their evidence is not worthy of reliance. Reference in this context may be made to the case reported as 'Akhtar Ali and others v. The State' (2008 SCMR 6).

13. The conduct of the prosecution eye-witnesses of this case is highly unnatural. Amir Mehmood complainant (PW-1) and Pervaiz Iqbal (PW-2) were both real brothers of Muhammad Naveed (deceased) As per prosecution case the complainant was accompanied by Parvez Iqbal (PW-2), Naeem Butt (PW not produced) and the deceased and as such, the complainant party was comprising of 04-adults members, whereas, the appellant was alone but surprisingly they (PWs) did not try to apprehend the appellant after the occurrence or even did not try to intervene during the occurrence to save the deceased from the appellant. It is also noteworthy that the appellant was not armed with any formidable weapon at the time of occurrence and he was only armed with a brick bat. I am, therefore, of the view that conduct of the prosecution eye-witnesses, who according to their claim witnessed the occurrence, is highly unnatural therefore, their presence at the spot is highly doubtful, hence their evidence is not worthy of reliance. I may refer here the case of "Liaquat Ali v. The State" (2008 SCMR 95), wherein at Para No.5-A of the judgment, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin

and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of "Pathan v. The State" (2015 SCMR 315) and "Zafar v. The State and others" (2018 SCMR 326). Under the circumstances, it cannot be safely held that the abovementioned eye-witnesses were present at the spot at the relevant time and they had witnessed the occurrence because their conduct is highly unnatural.

14. The motive of the occurrence as stated in the FIR (Ex.PA/1) was that six days prior to the occurrence a quarrel took place between Muhammad Naveed, deceased and the appellant but the same was patched up with the intervention of the respectables of the locality. It is noteworthy that no respectable of the locality, who patched up the matter between the parties appeared before the learned trial Court in support of the motive part of the prosecution case. Moreover, the complainant while appearing before the learned trial Court as PW-1 admitted during his cross-examination that neither he nor Parvez Iqbal (PW-2) or Naeem Butt (PW not produced) witnessed the occurrence of motive. Relevant part of his statement in this respect reads as under:-

> "I am not the eye-witness of said quarrel as alleged in the motive part even the same has not been witnessed by my brother Parvez Iqbal or Naeem Butt."

Moreover, in his statement recorded by the learned trial Court Amir Mehmood, complainant (PW-1) did not mention any specific date, time or place of occurrence of the motive, whereas, Parvez Iqbal (PW-2) did not utter a single word about the motive of occurrence. No reason of the earlier quarrel between the appellant and the deceased has been brought on the record. I am, therefore,

of the view that the prosecution has failed to prove the alleged motive. It is also noteworthy that even the learned trial Court disbelieved the motive part of the prosecution case in paragraph No.27 of the impugned judgment.

15. Insofar as recovery of brick bat (P.4) on the pointation of Qasim Ali (appellant) is concerned it is noteworthy that the recovery memo (Ex.PJ) does not show that brick bat (P.4) was stained with blood. Moreover, the said brick (P.4) was never sent to the office of PFSA to see as to whether the same was stained with blood or not, therefore, it is not safe to rely upon the abovementioned piece of evidence of the prosecution. Under the abovementioned circumstances, there is no corroboration of the prosecution case through the abovementioned alleged recovery of brick bat on the pointation of the appellant.

16. In the light of above discussion, I am of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, I accept Criminal Appeal No.80274-J of 2022 filed by Qasim Ali appellant, set aside his conviction and sentence acquit him of the charge by extending him the benefit of doubt. The appellant Qasim Ali is in custody, he be released from the jail forthwith, if not required to be detained in any other case.

JK/Q-2/L Appeal allowed.

2024 P Cr. L J 504

[Lahore]

Before Malik Shahzad Ahmad Khan and Farooq Haider, JJ

MUHAMMAD SARWAR and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 56707, 50403 and Murder Reference No. 275 of 2019, decided on 6th November, 2023.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Delay of one hour in lodging FIR---Not consequential---Accused was charged that he along with his co-accused committed murder of the brother of the complainant by firing---Record showed that the occurrence took place on 12.02.2017 at 12:30 p.m.---Matter was reported to the police and the FIR was also lodged on the same day i.e. on 12.02.2017 at 01:30 p.m., i.e., within a period of 01 hour from the occurrence---Distance between the police station and the place of occurrence was 1-kilometer---Even deceased who initially sustained injuries during the occurrence and later on, died, was also medically examined on the same day i.e., on 12.02.2017 at 12:47 p.m., i.e., within a period of 17 minutes from the occurrence---Keeping in view the time of occurrence, the place of occurrence, its distance from the police station and the time of medical examination of the injured (later on deceased), there was no deliberate or conscious delay in reporting the matter to the police and the FIR was promptly lodged---Circumstances established that the prosecution had proved its case against the accused however, due to some mitigating circumstances, the sentence was altered from death to imprisonment for life---Appeal was dismissed accordingly.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Ocular account supported by medical evidence---Accused was charged that he

along with his co-accused committed murder of the brother of complainant by firing---Ocular account of the prosecution was furnished by two witnesses including complainant---Occurrence took place in a cricket ground, at place "G"---Complainant was real brother of deceased and also resident of place "G"---Likewise, other witness was also resident of place "B" but in the same city---Both the eye-witnesses had plausibly explained the reason of their presence at the spot at the relevant time by stating that they were playing cricket along with deceased in a cricket ground at the time of occurrence---Occurrence in this case took place in broad day light i.e., at 12:30 noon and as such, there was no chance of any mis-identification of the accused during the occurrence---Both the eye-witnesses were cross-examined at length but their evidence could not be shaken and they corroborated each other on all material aspects of the case---Evidence of eye-witnesses was confidence inspiring and trustworthy---Record transpired that there was no conflict between the ocular account and the medical evidence of the prosecution to the extent of role played by the accused during the occurrence---In the contents of the FIR, as well as, in their statements, prosecution eye-witnesses stated that after sustaining firearm injury on the right side of the abdomen, deceased fell on the ground in injured condition and thereafter, the accused made two more fire shots on the deceased however, the same did not hit him---Under the circumstances, there was every possibility that one out of the two additional fire shots made by the accused had hit the deceased but the same could not be noticed by the prosecution eye-witnesses due to falling of the deceased on the ground, as well as, on account of sensation and panic created due to the firing by the accused---Moreover eye-witness could not give the photo picture of each and every injury sustained by the deceased due to the panic and sensation developed at the time of occurrence due to the firing---Circumstances established that the prosecution had proved its case against the accused however, due to some mitigating circumstances, the sentence was altered from death to imprisonment for life---Appeal was dismissed accordingly.

Ellahi Bakhsh v. Rab Nawaz and another 2002 SCMR 1842 and Abdur Rauf v. The State and another 2003 SCMR 522 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd, common intention---Appreciation of evidence---Withholding evidence of natural witnesses---Not consequential---Accused was charged that he along with his co-accused committed murder of the brother of complainant by firing---Allegedly, gardeners of the ground were present at the spot at the relevant time and they were the most natural witnesses of the occurrence but the prosecution had withheld their evidence and as such, an adverse inference under Art. 129(g) of the Qanun-e-Shahadat, 1984, might be drawn against the prosecution---However, it was the quality and not the quantity of evidence which weighed with the Courts regarding the decision of a criminal case therefore, non-production of the gardeners of the ground in the witness box was not fatal to the prosecution case---Even otherwise, the people/witnesses not related to the deceased/complainant party did not appear in the witness box to avoid enmity with the accused party and their non-appearance in the witness box was not fatal to the prosecution case---Circumstances established that the prosecution had proved its case against the accused however, due to some mitigating circumstances, the sentence was altered from death to imprisonment for life---Appeal was dismissed accordingly.

Zakir Hussain v. The State 2008 SCMR 222 and Abdul Haq and another v. The State 2015 SCMR 1326 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of weapon of offence on the pointation of accused---Safe custody of weapon not established---Accused was charged that he along with his co-accused committed murder of the brother of complainant by firing---Insofar as the recovery of pistol on pointing out of the accused and positive report of Forensic Science Agency was concerned, it was noted that Head Constable, who was Moharrar of Malkhana of the police station, had not uttered a single word that any parcel of pistol was handed over to him and thereafter, he kept the same in safe custody at the Malkhaana and finally handed over the said parcel to any prosecution witness for its onward transmission to the office of Forensic Science Agency---Thus, the safe custody of the parcel of pistol, allegedly recovered on pointing out of the accused, had not been proved in this case therefore, recovery of pistol and positive report of Forensic Science Agency were of no avail to the

prosecution---Circumstances established that the prosecution had proved its case against the accused however, due to some mitigating circumstances, the sentence was altered from death to imprisonment for life---Appeal was dismissed accordingly.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Motive not proved---Sentence, reduction in---Accused was charged that he along with his co-accused committed murder of the brother of complainant by firing---According to the prosecution case, motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between deceased and the accused party on account of fight of children---No specific date, time and place of the said quarrel had been mentioned by any of the prosecution witness---None of the prosecution witnesses stated that they were present at the time of said quarrel---Vague and general motive was alleged by the prosecution which had not been proved in this case---Circumstances established that the prosecution had proved its case against the accused however, due to some mitigating circumstances, the sentence was altered from death to imprisonment for life---Appeal was dismissed accordingly.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Sentence, quantum of---Mitigating circumstances---Accused was charged that he along with his co-accused committed murder of the brother of complainant by firing---Record showed that the recovery of pistol on pointing out of the accused had been disbelieved due to the reasons that safe custody of the said recovery had not been proved by the prosecution---Prosecution evidence qua motive had been disbelieved being vague and general one---No specific date, time and place of the prior quarrel had been mentioned by any of the prosecution witness---None of the prosecution witnesses stated that they were present at the time of said quarrel---Under the circumstances, the death sentence awarded to the accused was quite harsh and the sentence of imprisonment for life would meet the ends of justice---Hence, the conviction of the accused under S. 302(b), P.P.C awarded by the Trial Court was maintained but his sentence was altered from death to imprisonment

for life---Appeal was dismissed accordingly.

Barrister Aiyan Ali Bhutta for Appellants.

Munir Ahmad Sial and Nuzhat Bashir, Deputy Prosecutor General for the State.

Syed Farhad Ali Shah for the Complainant.

Date of hearing: 2nd November, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---By this single judgment, we proceed to decide Criminal Appeal No. 56707 of 2019 filed by Muhammad Sarwar (appellant) against his conviction and sentence, Criminal Appeal No. 50403 of 2019 filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar alias Shana and Muhammad Arslan Sarwar alias Fana (respondents Nos. 2 and 3) and Murder Reference No. 275 of 2019 sent by the learned trial Court for confirmation or otherwise of the sentence of Death awarded to Muhammad Sarwar (appellant) by the learned trial Court. We propose to decide all these matters by this single judgment as these have arisen out of the same judgment dated 11.07.2019 passed by the learned Additional Sessions Judge, Lahore.

2. The appellant, namely, Muhammad Sarwar along with Muhammad Zeshan Sarwar alias Shana (co-accused since acquitted) and Muhammad Arslan Sarwar alias Fana (co-accused since acquitted) was tried in case FIR No. 177 dated 12.02.2017 registered at Police Station Ghalib Market District Lahore in respect of offences under sections 302/34, of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 11.07.2019 has convicted and sentenced Muhammad Sarwar appellant as under: -

> Under section 302(b), P.P.C. to 'Death as tazir' for committing Qatl-i-Amd of Ahsan Aslam (deceased). He was also ordered to pay Rs.300,000/- (Rupees three hundred thousand only) to the legal heirs of Ahsan Aslam deceased as compensation under section 544-A of Cr.P.C, recoverable as arrears of land revenue, and in default thereof to undergo simple imprisonment for six months.

The learned trial Court however, vide the aforementioned judgment has acquitted Muhammad Zeshan Sarwar alias Shana (co-accused) and Muhammad Arslan Sarwar alias Fana (co-accused) by extending them the benefit of doubt.

3. Brief facts of the case as given by the complainant Asad Aslam (PW-8) in the complainant (Exh.PA) on the basis of which formal FIR (Exh.PA/2), was chalked out, are that he (complainant) was resident of House No. 50, Nasir Colony, Lahore. On 12.02.2017 at 12:30 p.m., (noon), he (complainant) along with his elder brother, namely, Ahsan Aslam (deceased) was playing cricket in Saint Marry Dongi Ground, where, Muhammad Sarwar (appellant) armed with pistol, his (complainant's) two sons, namely, Arslan alias Mana (co-accused since acquitted) armed with 'danda', Zeshan alias Shana (co-accused since acquitted) armed with 'danda' along with an unknown accused person entered. Zeshan (co-accused since acquitted) raised 'lalkara' that Ahsan (deceased) be killed and be not let alive upon which all the accused persons attacked and started beating the brother of the complainant. Ahsan (deceased) called him (complainant) to save him, whereupon, he (complainant) rushed towards his brother. In the meanwhile, Muhammad Sarwar (appellant) made fire shot with his pistol which landed on the right side of abdomen of Ahsan (deceased) who fell down while smeared in the blood. Thereafter, Muhammad Sarwar (appellant) made two consecutive fire shots which did not hit Ahsan (deceased) due to his fallen condition. The occurrence was witnessed by Hakeem Khan (given up PW), Haji Tahir (given up PW) and Sheraz Butt (PW-9). Ahsan (deceased) was shifted to the Services Hospital, Lahore, in injured condition.

Motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between Ahsan (deceased) and Sarwar (appellant) along with his two sons, namely, Arslan (co-accused since acquitted) and Zeshan (co-accused since acquitted) on account of a fight of the children of the locality and due to this grudge, the accused persons made firing at the brother of the complainant.

Initially FIR was lodged for offences under sections 324/34 of P.P.C. however, after the death of Ahsan (deceased) on 15.02.2017, offence under section 302 of P.P.C. was added in this case vide zimni No. 03.

4. Muhammad Sarwar appellant was arrested on 08.03.2017 by Razaqat Ali,

Sub-Inspector/I.O (PW-13) who on 19.03.2017 made disclosure and led to the recovery of pistol (P-7) along with four live bullets P-8/1-4 vide recovery memo (Exh.PH). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against Muhammad Sarwar appellant along with Muhammad Zeshan Sarwar alias Shana (co-accused since acquitted) and Muhammad Arslan Sarwar alias Fana (co-accused since acquitted) on 04.07.2017, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced thirteen witnesses during the trial and also produced documentary evidence in the shape of (Exh.PA to Exh.PW).

The statements of the appellant and Muhammad Zeshan Sarwar alias Shana (co-accused since acquitted) and Muhammad Arslan Sarwar alias Fana (co-accused since acquitted) were recorded under section 342 of Cr.P.C. The appellant refuted the allegations levelled against him and professed his innocence. The appellant neither opted to make his statement on oath as envisaged under section 340(2), Cr.P.C., nor produced any evidence in his defence.

The learned trial Court vide its judgment dated 11.07.2019 found the appellant guilty, convicted and sentenced him as mentioned and detailed above however, acquitted Muhammad Zeshan Sarwar alias Shana (co-accused) and Muhammad Arslan Sarwar alias Fana (co-accused) while extending them the benefit of doubt.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the police; that in fact, the occurrence was unseen; that the prosecution eye-witnesses are chance witnesses and they could not establish any reason of their presence at the spot at the relevant time; that Razaqat Ali, Sub-Inspector (PW-13), has admitted that two gardeners were present at the spot at the relevant time who had stated that they had witnessed the occurrence but the said gardeners were not produced in the witness box and as such, the prosecution has withheld the best evidence therefore, an adverse

inference can be drawn under Article 129(g) of the Qanun-e-Shahadat Order, 1984 against the prosecution; that there is glaring conflict between the ocular account and the medical evidence of the prosecution because according to the ocular account, Ahsan (deceased) was firstly beaten by the accused party and thereafter, one fire shot was made by Muhammad Sarwar (appellant) which landed on the right side of the abdomen of Ahsan (deceased) but according to the medical evidence, there was no blunt injury on the body of the deceased, whereas, there were two firearm entry wounds on his body and as such, the ocular account is contradicted by the medical evidence; that it is evident from the evidence of the prosecution witnesses that investigation in this case was conducted after two (02) days of the occurrence i.e., on 14.02.2017 which further created dent in the prosecution case; that safe custody of parcel of pistol, allegedly recovered on pointing out of the appellant, could not be established by the prosecution in this case as Anwar-ul-Haq H.C/Moharrar (PW-4) has not uttered a single word regarding handing over of the abovementioned parcel to him or its delivery to any prosecution witness for its onward transmission to the office of PFSA; that motive was also not proved in this case through any reliable evidence; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt. It is therefore, prayed that the appeal filed by Muhammad Sarwar (appellant) may be allowed and the appellant may be acquitted of the charge by extending him the benefit of doubt.

7. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of doubt; that the occurrence took place in the broad day light and as such, there was no chance of any mis-identification of the appellant during the occurrence; that the prosecution witnesses were cross-examined at length but their evidence could not be shaken and their evidence has substantially been supported by the medical evidence; that prosecution case against the appellant is further corroborated by the recovery of pistol (P-7) on pointing out of the appellant and positive report of PFSA (Exh.PW); that motive of the prosecution was also proved in this case through reliable evidence of the prosecution witnesses; that there is no substance in the appeal filed by the appellant therefore, his appeal may be dismissed, Murder Reference be answered in the positive and the sentence of death awarded to the

appellant by the learned trial Court may be upheld and maintained.

Insofar as Criminal Appeal No. 50403 of 2019 filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar alias Shana (co-accused) and Muhammad Arslan Sarwar alias Fana (co-accused) is concerned, learned counsel for the complainant submits that both the aforementioned co-accused were not only present at the spot but they also shared common intention with the principal accused; that they along with other accused gave beating to Ahsan (deceased) at the time of occurrence and as such, both the aforementioned acquitted accused actively participated during the occurrence and they have wrongly been acquitted from the charges. It is therefore, prayed that while allowing the appeal of the complainant, both the accused (respondents Nos. 2 and 3) may also be convicted and sentenced, in accordance with the law.

8. Arguments heard. Record perused.

9. Prosecution story as set forth in the complainant (Exh.PA) on the basis of which formal FIR (Exh.PA/2) was chalked out, has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

10. The occurrence in this case took place on 12.02.2017 at 12:30 p.m., (noon). The matter was reported to the police and the FIR (Exh.PA/2) was also lodged on the same day i.e. on 12.02.2017 at 01:30 p.m., i.e., within a period of 01 hour from the occurrence. The distance between the police station and the place of occurrence was 1-kilometer. Even Ahsan Aslam (deceased) who initially sustained injuries during the occurrence and later on, died, was also medically examined on the same day i.e., on 12.02.2017 at 12:47 p.m., i.e., within a period of 17 minutes from the occurrence. Keeping in view the time of occurrence, the place of occurrence, its distance from the police station and the time of medical examination of the injured (later on deceased), we are of the view that there was no deliberate or conscious delay in reporting the matter to the police and the FIR was promptly lodged.

11. The ocular account of the prosecution was furnished by Asad Aslam complainant (PW-8) and Sheraz Butt (PW-9). The occurrence in this case took place in the cricket ground of Saint Marry Dongi Ground, Gulberg Lahore. Asad Aslam complainant (PW-8) is real brother of Ahsan Aslam (deceased). He is also

resident of Gulberg, Lahore. Likewise, Sheraz Butt (PW-9) is also resident of Lahore though he is resident of Umar Park Baghbanpura, Lahore but both the abovementioned eye-witnesses have plausibly explained the reason of their presence at the spot at the relevant time by stating that they were playing cricket along with Ahsan Aslam (deceased) in the abovementioned cricket ground at the time of occurrence. The occurrence in this case took place in the broad day light i.e., at 12:30 noon and as such, there was no chance of any mis-identification of the appellant during the occurrence. Both the abovementioned eye-witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Their evidence is confidence inspiring and trustworthy. Although it is argued by learned counsel for the appellant that according to the statement of Razaqat Ali, Sub-Inspector (PW-13) gardeners of the ground, were present at the spot at the relevant time and they were the most natural witnesses of the occurrence but the prosecution has withheld their evidence and as such, an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984, may be drawn against the prosecution but it is noteworthy that it is the quality and not the quantity of evidence which weighs with the Courts regarding the decision of a criminal case therefore, non-production of the aforementioned gardeners of the ground in the witness box is not fatal to the prosecution case. Even otherwise, it is by now well settled that the people/witnesses not related to the deceased/complainant party do not appear in the witness box to avoid enmity with the accused party and their non-appearance in the witness box is not fatal to the prosecution case, as observed by the Hon'ble Supreme Court of Pakistan in the cases reported as 'Zakir Hussain v. The State' (2008 SCMR 222) and 'Abdul Haq and another v. The State' (2015 SCMR 1326) therefore, abovementioned argument of learned counsel for the appellant carries no weight.

12. Recovery memo of the blood stained earth dated 12.02.2017 (Exh.PD), recovery memo of the empties, recovered from the spot dated 12.02.2017 (Exh.PE), recovery memo of last worn/blood stained clothes of the deceased dated 12.02.2017 (Exh.PF), all these documents show that investigation of this case started on 12.02.2017 and as such, there is no force in the argument of learned counsel for the appellant that investigation in this case started on 14.02.2017.

13. Medical evidence of the prosecution was furnished by Dr. Ayad Akhtar (PW-5), Dr. Muhammad Owais Qureshi (PW-10) and Dr. Zulqarnain Haider (PW-11). Dr. Ayad Akhtar (PW-5) initially medically examined Ahsan (deceased), in injured condition, on 12.02.2017 at 12:47 p.m., i.e., within a period of 17 minutes from the occurrence. He noted two firearm injuries on the body of Ahsan (deceased). He further noted that the abovementioned injuries were caused by firearm weapon. Although it is argued by learned counsel for the appellant that according to the prosecution case, accused party firstly gave beating to Ahsan (deceased) and thereafter, Muhammad Sarwar (appellant) made fire shots out of which only one fire shot landed on the right side of the abdomen of Ahsan (deceased), whereas, the Medical Officer did not note any blunt weapon injury on the body of the deceased and two firearm injuries were noted on his body which contradicts the prosecution case but it is noteworthy that the allegation of giving beating to the deceased with the help of clubs was levelled against Muhammad Zeshan Sarwar alias Shana and Muhammad Arslan Sarwar alias Fana (co-accused) who have already been acquitted by the learned trial Court, whereas, the prosecution case against the appellant of making fire shot which landed on the right side of the abdomen of Ahsan (deceased) has substantially been supported by the medical evidence and there is no conflict between the ocular account and the medical evidence of the prosecution to the extent said role played by the appellant during the occurrence. We have further noted that in the contents of the FIR, as well as, in their statements before the learned trial Court, prosecution eye-witnesses stated that after sustaining firearm injury on the right side of the abdomen, Ahsan (deceased) fell on the ground in injured condition and thereafter, the appellant made two more fire shots on the deceased however, the same did not hit him. Under the circumstances, there was every possibility that one out of the two additional fire shots made by the appellant, had hit the deceased but the same could not be noticed by the prosecution eye-witnesses due to the falling of the deceased on the ground, as well as, on account of sensation and panic created due to the firing of the appellant. It is by now well settled that an eye-witness cannot give the photo picture of each and every injury sustained by the deceased due to the panic and sensation developed at the time of occurrence due to the firing of the accused. Reliance in this respect may be placed on the cases of 'Ellahi Bakhsh v. Rab Nawaz and another' (2002 SCMR 1842) and 'Abdur Rauf v. The State and

another' (2003 SCMR 522). We are therefore, of the view that there is no serious conflict between ocular account and medical evidence and the medical evidence has substantially supported the ocular account of the prosecution.

14. Insofar as the recovery of pistol (P-7) on pointing out of the appellant and positive report of PFSA (Exh.PW) is concerned, we have noted that Anwar-ul-Haq HC (PW-4), who was Moharrar of Malkhana of the police station, has not uttered a single word that any parcel of pistol was handed over to him and thereafter, he kept the same in safe custody at the Malkhaana and finally handed over the said parcel to any prosecution witness for its onward transmission to the office of PFSA. We are therefore, of the view that safe custody of the parcel of pistol (P-7), allegedly recovered on pointing out of the appellant, has not been proved in this case therefore, recovery of pistol (P-7) and positive report of PFSA (Exh.PW) are of no avail to the prosecution.

15. According to the prosecution case, motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between Ahsan (deceased) and the accused party on account of fight of children. No specific date, time and place of the said quarrel has been mentioned by any of the prosecution witness. None of the prosecution witnesses stated that they were present at the time of abovementioned quarrel. A vague and general motive was alleged by the prosecution which has not been proved in this case.

16. We have disbelieved the prosecution evidence qua the recovery of pistol (P-7) on pointing out of the appellant and motive of the occurrence due to the reasons mentioned in paras Nos. 14 and 15 above, however, if the prosecution evidence qua the recovery of pistol (P-7) and motive is excluded from consideration, even then sufficient incriminating evidence is available on the record to prove the prosecution case against the appellant. As discussed earlier, the prosecution case has been proved against the appellant through the reliable and confidence inspiring evidence of eye-witnesses, namely, Asad Aslam complainant (PW-8) and Sheraz Butt (PW-9). They stood the test of lengthy cross-examination but their evidence could not be shaken regarding the role played by the appellant during the occurrence. They corroborated each other on all material aspects of the case. The ocular account of the prosecution as given by Asad Aslam complainant (PW-8) and Sheraz Butt (PW-9) about the role of the appellant is

substantially supported by the medical evidence furnished by Dr. Ayad Akhtar (PW-5), Dr. Muhammad Owais Qureshi (PW-10), Dr. Zulqarnain Haider (PW-11), MLC of Ahsan (deceased) in injured condition (Exh.PC), as well as, postmortem report of Ahsan (deceased) (Exh.PJ) and pictorial diagrams (Exh.PJ/1 and Exh.PJ/2). The time of occurrence, the kind of weapon used, the nature and seat of injuries inflicted by the appellant to Ahsan (deceased), all these facts as stated by the abovementioned eye-witnesses were substantially supported by the aforementioned medical evidence. We are therefore, of the view that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

17. Now coming to the quantum of sentence, we have noted some mitigating circumstances in favour of the appellant. Firstly recovery of pistol (P-7) on pointing out of the appellant has been disbelieved by us due to the reasons mentioned in paragraph No. 14 above, Secondly, prosecution evidence qua motive has been disbelieved by us due to the reasons mentioned in paragraph No. 15 of this judgment. Under the circumstances, the death sentence awarded to the appellant is quite

harsh and the sentence of imprisonment for life shall meet the ends of justice.

18. While treating it a case of mitigation, the conviction of Muhammad Sarwawr appellant under section 302(b), P.P.C. awarded by the learned trial Court is maintained but his sentence is altered from death to imprisonment for life. The compensation awarded by the learned trial Court against the appellant and sentence in default thereof are maintained and upheld. The benefit of section 382-B of Cr.P.C. is extended in favour of the appellant.

19. Consequently, with the above said modification in the sentence of Muhammad Sarwar appellant, Criminal Appeal No. 56707 of 2019 filed by the appellant is hereby dismissed. Murder Reference (M.R. No. 275 of 2019) is answered in the negative and death sentence of Muhammad Sarwar appellant is not confirmed.

20. Insofar as Criminal Appeal No. 50403 of 2019, filed by Asad Aslam complainant against the acquittal of Muhammad Zeshan Sarwar alias Shana and Muhammad Arslan Sarwar alias Fana is concerned, it is noteworthy that the

allegation of giving beating to Ahsan (deceased) by the aforementioned accused has not been supported by the medical evidence as the Medical Officers did not note any blunt injury on the body of the deceased therefore, mere oral assertion of the complainant party is not sufficient to convict the said accused. Moreover, merely presence of the aforementioned respondents at the place of occurrence does not mean their participation in the alleged occurrence and prosecution has brought on record no evidence regarding sharing of the common intention by the aforementioned acquitted accused/respondents Nos. 2 and 3. The observations of the learned trial Court regarding acquittal of the aforementioned respondents are based on sound reasons which do not call for any interference by this Court. There is no substance in the appeal filed by the complainant (Criminal Appeal No. 50403 of 2019) against the acquittal of the said respondents therefore, the same is hereby dismissed.

JK/M-120/L Appeals dismissed.

2024 P Cr. L J 696

[Lahore]

Before Malik Shahzad Ahmad Khan, J

RAFAQAT ALI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 36587 of 2019, heard on 7th March, 2023.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Delay of six hours and fifteen minutes in lodging FIR---Consequential---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---According to the prosecution's own case, the occurrence in the present case took place in the house of the accused at 01:00 a.m., on the intervening night of 08/09.06.2018 but the FIR was lodged on 09.06.2018 at 07:15 a.m., and as such, there was delay of 06 hours and 15 minutes in lodging the FIR---Distance between the police station and the place of occurrence was 5-kilometers---Complainant had stated during his cross-examination that he had the facility of car at his disposal on the night of occurrence through which he shifted deceased from the place of occurrence to the hospital---Under the circumstances, the said gross delay in reporting the matter to the police had created doubt regarding the truthfulness of the prosecution story---Thus, the FIR was not promptly lodged in the present case therefore, possibility of deliberations and concoctions in the prosecution story could not be ruled out---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Akhtar Ali and others v. The State 2008 SCMR 6; Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473 and Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Delay of ten hours and forty minutes in conducting postmortem examination upon the dead body of the deceased---Consequential---Accused were charged for committing murder of the

son of the complainant by inflicting danda and sota blows---Record showed that postmortem examination on the dead body of deceased was conducted on 09.06.2018 at 11:40 a.m., i.e., with the delay of 10 hours and 40 minutes from the occurrence---Said delay was suggestive of the fact that the prosecution eye-witnesses were not present at the spot at the relevant time and the said delay was consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54 and Zafar v. The State and others 2018 SCMR 326 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Ocular account not proved---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Ocular account of the prosecution case was furnished by the complainant and other eye-witness---Prosecution case was that on the night of occurrence, the complainant on hearing the noise of hue and cry, woke up and went to the roof of acquitted accused who was his neighbor, wherefrom, he witnessed the occurrence, but during his cross-examination, complainant stated that his house was not situated in the street in which the house of the accused persons was situated---Said witness further stated that if one had to go from his house to the house of the accused persons then he had to enter his street and then to the street of the accused persons---Story narrated by the complainant during his cross-examination had negated the story narrated by him in the FIR---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

(d) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Unnatural conduct of eye-witnesses---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Conduct of the prosecution eye-witnesses in the present case was highly unnatural---According to the prosecution case, the complainant party was comprising of three adult male members---Complainant was real father of deceased and he stated during his cross-examination that an eye-witness was his paternal cousin---Prosecution case was

that the accused and his co-accused were armed with 'dandas' at the time of occurrence and as such, the accused persons were not armed with any formidable weapon like gun, pistol etc. but the eye-witnesses kept on standing like silent spectators and allowed the accused and his co-accused to inflict, as many as, 17 injuries on the body of deceased---Said witnesses did not try to rescue deceased from the accusedand his co-accused during the occurrence or to apprehend them at the spot, after the occurrence---Such conduct of the prosecution eye-witnesses was highly unnatural which further showed that they were not present at the spot at the relevant time---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Ocular and medical evidence---Conflict between---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Record showed that there was conflict between ocular account and the medical evidence of the prosecution---Medical Officer, who conducted postmortem examination on the dead body of deceased found 17 injuries on his body---According to his evidence, some injuries were the marks of burns and electric shocks but none of the prosecution eye-witnesses stated in his evidence that as to how the said injuries were received by deceased---Had the prosecution witnesses been present at the spot at the relevant time then they should have explained the said injuries on the body of the deceased---Notable that no electric wire or any other weapon which could cause burn marks or electric shock marks, had been recovered from the possession of the accused---Noteworthy that Medical Officer had neither mentioned the probable time that elapsed between the injuries and death, as well as, probable time that elapsed between death and postmortem examination in the postmortem report nor he mentioned the said details in his evidence recorded by the trial Court---Said witness frankly conceded during his cross-examination that he normally mentioned the duration between the injuries and death and between death and postmortem examination in the postmortem reports---Under the circumstances, it was not determinable in the case that what was the probable time of occurrence when deceased received injuries on his body---In such circumstances the ocular account of the prosecution did not support the medical evidence---Circumstances

established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Irfan Ali v. The State 2015 SCMR 840 and Usman alias Kaloo v. The State 2017 SCMR 622 rel.

(f) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Motive not proved---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Motive behind the occurrence was that few days earlier to the occurrence, hot words were exchanged between deceased and co-convict---No specific date, time and place of the motive occurrence had been brought on the record by any of the prosecution witnesses---No reason of the earlier quarrel which took place between deceased and co-convict had been stated by any of the prosecution witnesses---Vague motive was alleged by the prosecution which had not been proved in the case and the Trial Court had rightly disbelieved the motive part of the prosecution case---Moreover, the prosecution story of motive did not appeal to a prudent mind because if there was any earlier quarrel between the deceased and co-convict, then what was deceased doing in the house of accused persons at the odd hours of night (01:00 a.m.)---Prosecution evidence in that respect was completely silent, which made the prosecution story doubtful---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

(g) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Recovery of 'danda' on the pointation of the accused---Inconsequential---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Record showed that danda was recovered on the pointation of the accused---Said 'danda' was recovered after the joint disclosure of the accused along with his co-convict and as such, the said recovery became doubtful in the eyes of law---Noteworthy that the said 'danda' was not stained with blood and as such, there was nothing on record to connect the said recovery with the occurrence---Moreover, the recovered 'danda' was of common pattern and was available in the markets easily and as such, the same could be planted against the accused---Under the circumstances, it was not safe to rely upon such recovery of

'danda' against the accused---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

(h) Penal Code (XLV of 1860)---

----Ss. 302, 147 & 148---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Co-accused acquitted on same set of evidence---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Record showed that accused along with acquitted co-accused persons was assigned the joint role of inflicting 'danda' blows on the body of deceased by the prosecution eye-witnesses---Co-accused persons had been acquitted by the Trial Court whereas, appeal filed against the acquittal of the said co-accused had already been dismissed---Under the circumstances, the prosecution evidence which had been disbelieved against the acquitted co-accused could not be believed against the present accused without independent corroboration, which was very much lacking in the present case---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Akhtar Ali and others v. The State 2008 SCMR 6; Muhammad Ali v. The State 2015 SCMR 137; Muhammad Akram v. The State 2012 SCMR 440 and Ulfat Hussain v. The State 2018 SCMR 313 rel.

(i) Criminal trial---

----Police opinion---Scope---Police opinion becomes irrelevant after recording of prosecution evidence by the Trial Court.

Muhammad Ahmad (Mahmood Ahmed) and another v. The State 2010 SCMR 660 rel.

(j) Penal Code (XLV of 1860)---

----Ss.302, 147 & 148---Criminal Procedure Code (V of 1898), S.342---Qatl-i-amd, rioting, rioting armed with deadly weapon---Appreciation of evidence---Benefit of doubt---Inculpatory and exculpatory parts of statement of accused---Scope---Accused were charged for committing murder of the son of the complainant by inflicting danda and sota blows---Record showed that the accused had nowhere admitted in his statement or in the suggestions given to the prosecution eye-witnesses that he committed the murder of deceased rather he stated that on the night of occurrence when deceased entered his house to commit

the rape of sister of co-convict, they raised hue and cry, whereupon, a mob gathered at the spot and gave beating to deceased---Evidently, the accused did not admit that he gave beating to deceased on the night of occurrence---First and foremost duty of the prosecution was to prove its case and if the prosecution failed to prove its case then statement of an accused was to be accepted or rejected in toto---Legally it was not permissible to accept inculpatory part of the statement of an accused and to reject exculpatory part of the said statement---If after rejection of the prosecution evidence, statement of the accused was accepted in toto then no offence was made out against the present accused---Noteworthy that acquitted co-accused persons also made statements on the same lines as that of the statement of present accused recorded under S. 342, Cr.P.C. and the same suggestions were given by defence to the prosecution eye-witnesses---Since, the co-accused persons had been acquitted by the Trial Court and appeal against acquittal had already been dismissed therefore, the present accused could not be convicted and sentenced merely on the basis of his statement or suggestions given by his counsel to the prosecution witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Muhammad Asghar v. The State PLD 2008 SC 513 rel.

(k) Criminal trial---

----Benefit of doubt---Principle---If there is a single circumstance which creates doubt regarding the prosecution case, the same will be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Basharat Hussain Gondal for Appellant.

Nisar Ahmad Virk, Deputy Prosecutor General for the State.

Mujtaba Hassan Tatla and Aftab Ahmad Toor for the Complainant.

Date of hearing: 7th March, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN J.---By this judgment, I proceed to decide Criminal Appeal No. 36587 of 2019, titled 'Rafaqat Ali v. The State' filed by the appellant, namely, Rafaqat Ali against his conviction and sentence passed by the learned Addl. Sessions Judge, Daska District Sialkot vide judgment

dated 30.04.2019. The appellant, namely, Rafaqat Ali along with Muhammad Adeel (co-convict tried separately being juvenile), Muhammad Ali and Sultan Bakhash (co-accused since acquitted) was tried in case FIR No. 218 dated 09.06.2018 registered at Police Station Satrah District Sialkot offences under Sections 302/147/149 of P.P.C. by the learned Addl. Sessions Judge, Daska District Sialkot and after conclusion of the trial vide judgment dated 30.04.2019, the learned trial Court convicted and sentenced the appellant as under:-

> Under Section 302(c), of P.P.C. to undergo rigorou imprisonment for ten (10) years for committing the murder of Muhammad Adil deceased

Benefit of Section 382-B of Cr.P.C., was also extended in favour of the appellant. The learned trial Court however, acquitted Muhammad Ali and Rana Sultan Bakhash co-accused by extending them the benefit of doubt.

2. Brief facts of the case as given by the complainant Abdul Sattar (PW-10) in his complaint (Ex.PB/1), on the basis of which the formal FIR (Ex.PB) was chalked out, are that on the intervening night of 08/09.06.2018 he (complainant) was sleeping on the roof of his house. At about 01:00 a.m., (night) he suddenly woke up on hearing the noise of quarrel. The complainant went from his roof to the roof of his neighbour Rana Sultan Bakhsh (co-accused since acquitted) and in the light of electric bulb, he saw that Rafaqat (appellant), Muhammad Adeel (co-convict), Rana Muhammad Ali (co-accused since acquitted), Rana Sultan Bakhsh alias Sabir (co-accused since acquitted) and two unknown accused persons whom the complainant (PW-10) could identify on coming before him, were beating his (complainant's) son, namely, Muhammad Adil deceased with 'dandas' and 'sotas' while he (Muhammad Adil deceased) was lying on the ground. The complainant (PW-10) raised hue and cry to save his son on which Muhammad Iqbal (given up PW) and Muhammad Bilal (PW11) reached at the spot. In the meanwhile, the accused persons kept on beating Muhammad Adil deceased with 'dandas' and 'sotas'. The complainant party rescued Muhammad Adil deceased from the clutches of the accused persons. Accused persons fled away from the spot while extending threats of dire consequences and giving abused to the complainant party. They (complainant party) picked Muhammad Adil deceased in injured condition and shifted him to the hospital for medical treatment but he succumbed to the injuries on the way to the hospital.

The motive behind the occurrence was that a few days prior to the occurrence, hot words were exchanged between Muhammad Adeel co-convict and

Muhammad Adil deceased.

3. After submission of report under Section 173 of Cr.P.C., and completion of all the codal formalities, the learned trial Court framed charge against the appellant and his co-accused on 15.10.2018, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced twelve (12) witnesses during the trial. Prosecution also produced documentary evidence as Exh.PA to Exh.PN and closed its evidence. Statements of the appellant and his co-accused under Section 342 of Cr.P.C were recorded by the learned trial Court wherein they refuted the allegations levelled against them while stating that on the night of occurrence Muhammad Adil deceased entered the house of accused party to commit rape with the niece of the appellant, namely, Sana, whereupon, the accused party raised hue and cry due to which people gathered at the spot and Muhammad Adil deceased was tortured by the mob. The appellant or his co-accused however, neither made their statements on oath as envisaged under Section 340 (2) of Cr.P.C., nor they produced any witness in their defence.

5. The learned trial Court vide its judgment dated 30.04.2019 found the appellant, namely, Rafaqat Ali guilty for the offence under Section 302(c) of P.P.C. and convicted and sentenced him as mentioned and detailed above. The learned trial Court however, vide the same judgment acquitted Muhammad Ali and Sultan Bakhash co-accused while extending them the benefit of the doubt. Muhammad Adeel co-accused was separately tried being juvenile and he was convicted and sentenced for offence under Section 302(c) of P.P.C. vide the judgment of even date i.e., 30.04.2019 passed by the learned Addl. Sessions Judge, Daska District Sialkot.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that there is delay of more than six (06) hours in lodging the FIR which has created doubt in the prosecution story; that the occurrence was unseen and the prosecution eye-witnesses are chance witnesses; that there is conflict between the ocular account and the medical evidence of the prosecution as the prosecution eye-witnesses failed to explain injuries Nos. 8 to 11, which were burn marks of electric shocks, noted by the Medical Officer during postmortem examination on the dead body of Muhammad Adil deceased; that the prosecution has also failed to prove the motive part of the occurrence; that nothing has been recovered from the appellant and the alleged recovery of 'danda' has been planted against the appellant; that co-accused of the

appellant, namely, Muhammad Ali and Sultan Bakhash having the similar role have been acquitted by the learned trial Court and appeal against their acquittal has also been dismissed by this Court vide order dated 07.12.2022 therefore, the appellant cannot be convicted and sentenced on the basis of same prosecution evidence which is lacking independent corroboration; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, his appeal may be accepted and he may be acquitted of the charge by extending him the benefit of doubt.

7. On the other hand, it is contended by learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that FIR in this case was promptly lodged which rules out the possibility of any fabrication or concoction; that the appellant was specifically named in the FIR with the role that he along with his co-accused while armed with 'dandas' caused injuries on the body of Muhammad Adil deceased and the role attributed to the appellant by the prosecution eye-witnesses is fully supported by the medical evidence; that the prosecution case against the appellant is further corroborated by the recovery of 'danda' (P-1) on his pointation; that acquittal of co-accused is of no avail to the appellant because Sultan Bakhash co-accused was declared innocent by the police, whereas, Muhammad Ali co-accused was not resident of the place of occurrence hence, case of acquitted co-accused is distinguishable from the case of the appellant; that the motive was also proved by the prosecution through reliable evidence of prosecution witnesses; that there is no substance in the appeal filed by the appellant hence, the same may be dismissed.

8. Arguments heard. Record Perused.

9. According to the prosecution's own case, the occurrence in this case took place in the house of the appellant at 01:00 a.m., on the intervening night of 08/09.06.2018 but the FIR was lodged on 09.06.2018 at 07:15 am, and as such, there is delay of 06 hours and 15 minutes in lodging the FIR. The distance between the police station and the place of occurrence was 5-kilometers. Abdul Sattar complainant (PW-10) has also stated during his cross-examination that he had the facility of car at his disposal on the night of occurrence through which he shifted Muhammad Adil deceased from the place of occurrence to the hospital. Relevant part of his statement in this respect reads as under:-

> "I and my son Tahir took the deceased in injured condition in a car to hospital, situated at Satrah."

Under the circumstances, the abovementioned gross delay in reporting the

matter to the police has created doubt regarding the truthfulness of the prosecution story. I am therefore, of the view that the FIR was not promptly lodged in this case therefore, possibility of deliberations and concoctions in the prosecution story cannot be ruled out in this case. Reliance in this respect may be placed on the cases reported as 'Akhtar Ali and others v. The State' (2008 SCMR 6), 'Nazeer Ahmad v. Gehne Khan and others' (2011 SCMR 1473) and 'Mehmood Ahmad and 3 others v. The State and another' (1995 SCMR 127).

10. It is further noteworthy that postmortem examination on the dead body of Muhammad Adil deceased was conducted on 09.06.2018 at 11:40 am, i.e, with the delay of 10 hours and 40 minutes from the occurrence. The said delay is also suggestive of the fact that the prosecution eye-witnesses were not present at the spot at the relevant time and the abovementioned delay was consumed in procuring the attendance of fake eye-witnesses. In the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the judgment at page No. 55 reads as under:-

> "2.....Post mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Zafar v. The State and others' (2018 SCMR 326).

11. Ocular account of the prosecution was furnished by Abdul Sattar complainant (PW-10) and Muhammad Bilal (PW-11). It was the case of the prosecution that on the night of occurrence, the complainant on hearing the noise of hue and cry, woke up and went to the roof of Rana Sultan Bakhash (co-accused since acquitted) who was his neighbour, wherefrom, he witnessed the occurrence but during his cross-examination, he (complainant) stated that his house was not situated in the street in which the house of the accused persons was situated. He further stated that if one has to go from his house to the house of the accused persons then he had to enter his street and then to the street of the accused persons.

Relevant parts of his statement in this respect read as under:-

> "My house is not situated in the street in which house of accused persons is situated..... It is correct that my house is not adjacent to the house of the accused persons. If one wants to go from my house to the house of accused persons, he has to enter in my street and then towards the street of the accused persons. The distance between the door of my house and that of house of accused persons is 30/35 feet. If one wants to go from my house to that of the house of accused persons, he has to cross two houses and two Havelis of other persons before entering the house of accused persons."

The story narrated by the complainant during his cross-examination has negated the story narrated by him in the FIR.

12. It is further noteworthy that conduct of the prosecution eye-witnesses in this case is highly unnatural. According to the prosecution case, the complainant party was comprising of three (03) adult male members, namely, Abdul Sattar complainant (PW-10), Muhammad Bilal (PW-11) and Iqbal (given up PW). Abdul Sattar complainant (PW-10) is real father of Muhammad Adil deceased. He also stated during his cross-examination that Muhammad Bilal (PW-11) was his paternal cousin. It was the case of the prosecution that the appellant and his co-accused were armed with 'dandas' at the time of occurrence and as such, the accused persons were not armed with any formidable weapon like gun, pistol etc but the abovementioned witnesses kept on standing like silent spectators and allowed the appellant and his co-accused to inflict, as many as, 17 injuries on the body of Muhammad Adil deceased. They did not try to rescue Muhammad Adil deceased from the appellant and his co-accused during the occurrence or to apprehend them at the spot, after the occurrence. The abovementioned conduct of the prosecution eye-witnesses is highly unnatural which further shows that they were not present at the spot at the relevant time. The Hon'ble Supreme Court of Pakistan in the case of 'Liaquat Ali v. The State' (2008 SCMR 95) at Para No.7, observed regarding conduct of the witnesses of ocular account as under:-

> "2. The prosecution story briefly stated is that on the fateful day at about 8.00 a.m. complainant Shameer (P. W.7) was going to the "Lumberdar" (Revenue Officer) to pay " Abyana" and at that time his cousin namely Fazil deceased was going ahead of him at some distance. Suddenly within his view Liaquat Ali appellant armed with a knife appeared and raised a Lalkara that Fazil would not be spared and thereafter gave him successive knife blows on various parts of his body. On hue and cries raised,

Muhammad Siddique (P. W.8), Ranjha and Musa (not produced) were attracted to the spot. They tried to rescue Fazil but on being threatened by Liaquat they were unable to protect Fazil deceased and within their view he succumbed to the injuriesand died. ... ...

3 .....

4 .....

5 .

5-A. Having heard learned counsel for the parties and having gone through the evidence on record, we note that although PW.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them, therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaqat Ali was not armed with a firearm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful..... . ... "

Likewise, in the case of 'Pathan v. The State' (2015 SCMR 315) at Para No.4, the Apex Court of the country was pleased to observe as under:-

" .... The appellant was armed only with scissors not a formidable weapon of destruction. The complainant is the son of the deceased while Baradi and the other PW Muhammad Yousaf are also related to the deceased. The causing of such large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to the pause in between the first injury and the last one but all the three PWs including the son with a strong stature and built remained as silent spectators. They did not react or showed any response when the accused was causing the injuries. No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their

intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot."

Similar view was taken in the case of 'Zafar v. The State and others' (2018 SCMR 326).

13. It is also noteworthy that there is conflict between ocular account and the medical evidence of the prosecution. Dr. Kamran Malik (PW-8) conducted postmortem examination on the dead body of Muhammad Adil deceased and found 17 injuries on his body. According to his evidence, injuries Nos. 8 to 11 were the marks of burns and electric shocks. Injury No. 11 was burn scars total 5 in number which means that there were, as many as, nine (09) burn scars and electric shock marks on the body of Muhammad Adil deceased but none of the prosecution eye-witnesses stated in his evidence that as to how the abovementioned injuries were received by Muhammad Adil deceased. Had the prosecution witnesses been present at the spot at the relevant time then they should have explained the abovementioned injuries on the body of the deceased. I have further noted that no electric wire or any other weapon which can cause burn marks or electric shock marks, has been recovered from the possession of the appellant. In the case of 'Irfan Ali v. The State' (2015 SCMR 840), the Hon'ble Supreme Court of Pakistan in a similar situation observed in paragraph No. 11 at Page No. 844 as under:--

> "11. The most striking feature of the case is that in the FIR complete photographic narration of the entire tragedy has been given so much so, Muhammad Khan acquitted accused and the appellant were attributed causing specific injuries with the fire shots of 30 bore pistols at the deceased. With such degree of accuracy each and every detail of the incident was given however, it was not due to mental disorientation that the dagger blows not be noticed by the complainant. This doubt of reasonable nature and substance would strongly suggest that the complainant and the other eye-witnesses were not present at the spot, therefore, lodging the report after more than 3 hours and spending 1-1/2 hour at the spot with the dead body, no room was left for this glaring omission. This omission is very fatal to the prosecution case and it is established that crime was an unwitnessed one."

Likewise in the case of 'Usman alias Kaloo v. The State' (2017 SCMR 622), while reiterating the abovementioned principle of appreciation of evidence in criminal cases, the august Supreme Court of Pakistan extended the benefit of

doubt of the accused of the said case, inter-alia, on the ground that the eye-witnesses could not mention in their statements the exact number of injuries sustained by the deceased during the occurrence. Relevant part of the abovementioned judgment at page No. 625 reads as under:-

> "3 ... ... Some of the above mentioned eye-witnesses had maintained that deceased had received only one injury at the hands of the appellant but the Postmortem Examination Report shows that the deceased as many as 8 injuries on different parts of his body....."

It is further noteworthy that Dr. Kamran Malik (PW-8) has neither mentioned the probable time that elapsed between the injuries and death, as well as, probable time that elapsed between death and postmortem examination in the postmortem report (Exh.PH) nor he mentioned the abovementioned details in his evidence recorded by the learned trial Court. He frankly conceded during his cross-examination that he normally mentions the duration between the injuries and death and between death and postmortem examination in the postmortem reports. Under the circumstances, it is not determinable in this case that what was the probable time of occurrence when Muhammad Adil deceased received injuries on his body. Under all the abovementioned circumstances, I have come to this conclusion that the ocular account of the prosecution is not supported by the medical evidence.

14. Motive behind the occurrence was that few days earlier to the occurrence, hot words were exchanged between Muhammad Adil deceased and Muhammad Adeel co-convict. No specific date, time and place of the motive occurrence has been brought on the record by any of the prosecution witnesses. No reason of the earlier quarrel which took place between Muhammad Adil deceased and Muhammad Adeel co-convict has been stated by any of the prosecution witnesses. A vague motive was alleged by the prosecution which has not been proved in this case and the learned trial Court has rightly disbelieved the motive part of the prosecution case in the impugned judgment. Moreover, the prosecution story of motive does not appeal to a prudent mind because if there was any earlier quarrel between the deceased and Muhammad Adeel co-convict, then what was deceased doing in the house of accused persons at the odd hours of night (01:00 a.m.). The prosecution evidence in this respect is completely silent, which makes the prosecution story further doubtful.

15. Insofar as the recovery of 'danda' (P-1) on the pointation of the appellant is concerned, it is noteworthy that as per prosecution case, the aforementioned 'danda' (P-1) was recovered after the joint disclosure of the appellant along with

his co-convict, namely, Muhammad Adeel and Muhammad Ali (co-accused since acquitted) and as such, the said recovery becomes doubtful in the eye of law. It is further noteworthy that the aforementioned 'danda' (P-1) was not stained with blood and as such, there is nothing on record to connect the said recovery with the occurrence. Moreover, the recovered 'danda' (P-1) is of common pattern and is available in the markets easily and as such, the same can be planted against the appellant. Under the circumstances, it is not safe to rely upon the aforementioned recovery of 'danda' (P-1) against the appellant and the said recovery was rightly disbelieved by the learned trial Court.

16. It is further noteworthy that Rafaqat Ali appellant along with Muhammad Ali and Rana Sultan Bakhash (co-accused since acquitted) was assigned the joint role of inflicting 'danda' blows on the body of Muhammad Adil deceased by the prosecution eye-witnesses. Abovementioned Muhammad Ali and Rana Sultan Bakhash co-accused have been acquitted by the learned trial Court vide impugned judgment dated 30.04.2019, whereas, Crl. Appeal No. 36580 of 2019 filed against the acquittal of the said co-accused has already been dismissed as having been withdrawn after arguing the same at length, by this Court vide order dated 07.12.2022. Although learned counsel for the complainant has tried to distinguish the case of the appellant from the case of Rana Sultan Bakhash @ Sabir co-accused since acquitted on the ground that the abovementioned acquitted co-accused was declared innocent by police, whereas, the appellant was found guilty by the Investigating Officer but it is by now well settled that the police opinion becomes irrelevant after recording of prosecution evidence by the learned trial Court, as observed by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ahmad (Mahmood Ahmed) and another v. The State' (2010 SCMR 660), therefore, the case of the appellant cannot be distinguished from the case of acquitted co-accused merely on the basis of police opinion. Under the circumstances, the prosecution evidence which has been disbelieved against the abovementioned co-accused cannot be believed against the appellant without independent corroboration which is very much lacking in this case. Reliance in this respect may be placed on the cases of Akhtar Ali and others v. The State' (2008 SCMR 6), Muhammad Ali v. The State' (2015 SCMR 137), Muhammad Akram v. The State' (2012 SCMR 440) and Ulfat Hussain v. The State' (2018 SCMR 313).

17. Learned Deputy Prosecutor General assisted by learned counsel for the complainant has next argued that the appellant has admitted in his statement recorded under Section 342 of Cr.P.C., as well as, in the suggestions given to the

prosecution eye-witnesses that the occurrence took place in his house where Muhammad Adil deceased was done to death by a mob but the appellant did not produce any defence evidence in support of his claim and as such, he admitted the occurrence therefore, he was rightly convicted and sentenced by the learned trial Court. There is no substance in the abovementioned argument of learned Deputy Prosecutor General assisted by learned counsel for the complainant because the appellant has nowhere admitted in his abovementioned statement or in the suggestions given to the prosecution eye-witnesses that he committed the murder of Muhammad Adil deceased rather he stated that on the night of occurrence when Muhammad Adil deceased entered his house to commit the rape of sister of Muhammad Adeel co-convict, namely, Sana Tabassum, they (appellant and his co-accused) raised hue and cry, whereupon, a mob gathered at the spot and gave beating to Muhammad Adil deceased. It is therefore, evidence that the appellant did not admit that he gave beating to Muhammad Adil deceased on the night of occurrence. It is by now well settled that it is first and foremost duty of the prosecution to prove its case and if the prosecution fails to prove its case then statement of an accused is to be accepted or rejected in toto. It is legally not permissible to accept inculpatory part of the statement of an accused and to reject exculpatory part of the said statement. Reference in this context may be made to the case of 'Muhammad Asghar v. The State' (PLD 2008 Supreme Court 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference: -

> It is settled law by now that a statement of an accused recorded under section 342, of Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of Shabbir Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as 'Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, of Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went

against the appellant, and convicting him.'

If after rejection of the prosecution evidence, abovementioned statement of the appellant is accepted in toto then no offence is made out against the appellant. It is also noteworthy that Muhammad Ali and Rana Sultan Bakhash alias Sabir (co-accused since acquitted) also made statements on the same lines as that of the statement of Rafaqat Ali appellant has been recorded under Section 342 of Cr.P.C., and their defence counsel also gave the same suggestions to the prosecution eye-witnesses but the abovementioned co-accused, namely, Muhammad Ali and Rana Sultan Bakhash alias Sabir have been acquitted by the learned trial Court and appeal against their acquittal has already been dismissed by this Court vide order dated 07.12.2022 therefore, the appellant cannot be convicted and sentenced merely on the basis of his abovementioned statement or suggestions given by his counsel to the PWs.

18. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts regarding the truthfulness of the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5 . The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

> '13 ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If

there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In the light of above discussion, the instant appeal (Criminal Appeal No. 36587 of 2019) filed by Rafaqat Ali appellant is allowed, his conviction and sentence recorded by the learned Addl. Sessions Judge, Daska District Sialkot vide impugned judgment dated 30.04.2019 is hereby set-aside and he is acquitted of the charge by extending him the benefit of doubt. He is in custody. He be released forthwith if not required to be detained in any other case.

JK/R-13/L Appeal allowed.

2024 Y L R 23

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Amjad Rafiq, JJ

MUHAMMAD RAFIQUE and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No. 5537 and Murder Reference No.14 of 2022, heard on 27th March, 2023.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Grave and sudden provocation---Conviction under S.302(b), P.P.C. converted in S. 302(c), P.P.C.---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---First Information Report was lodged with the delay of 05 hours and 30 minutes from the occurrence---Distance between the place of occurrence and the police station was 12 kilometers and mere delay in reporting the matter to the police might not be fatal to the prosecution case---Insofar as the case of accused "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under S. 342, Cr.P.C., therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt--- However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C., was converted into S. 302(c), P.P.C. and he was sentenced to fourteen years---Appeal was partly allowed to the extent of said accused".

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Delay of 14 hours and 45 minutes in conducting the postmortem examination on the

dead bodies of the deceased persons---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---There was delay of 14 hours and 45 minutes in conducting the postmortem examination on the dead body of son of complainant whereas, there was delay of 15 hours in conducting the postmortem examination on the dead body of lady deceased---Said delay in conducting the postmortem examinations on the dead bodies of both the deceased persons was suggestive of the fact that the occurrence was unseen and the said delay was consumed in procuring the attendance of fake eye-witnesses---Insofar as the case of accused "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under S. 342, Cr.P.C, therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt---However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C., was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal was partly allowed to the extent of said accused.

Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Sufyan Nawaz and another v. The State and others 2020 SCMR 192; Zafar v. The State and others 2018 SCMR 326 and Muhammad Ashraf v. The State 2012 SCMR 419 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Night time occurrence---Source of light---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---Occurrence took place in the month of January at 04.45 a.m., meaning thereby that it took place during the darkness of night---Record showed that no source of light had been mentioned in the site plan or in the statements of the prosecution eye-witnesses rather complainant during his cross-examination had conceded that no light was installed in the street between his house and that of the accused---Insofar as the case of accused "R" was concerned, neither he made

any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under S. 342, Cr.P.C, therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt---However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C. was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal was partly allowed to the extent of said accused.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Unnatural conduct of witnesses---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---According to the prosecution case, as set forth in the FIR, on the night of occurrence, accused was present in his house, where complainant and his sons were also present along with his wife and deceased and as such, the complainant party comprised of total seven members---Witness/son of the complainant had conceded during his cross-examination that the house of his uncle was situated in front of the house of the complainant party and said uncle had six sons---Said witness further conceded during his cross-examination that he had not recorded in his statement before the police that any of his family members raised hue and cry when his brother was beaten and abducted by the accused persons nor he informed any neighbour in that respect though house of his uncle who had six sons was situated in front of his house---Noteworthy that the accused persons were not armed with any lethal firearm weapon like pistol, gun etc and according to the prosecution case, they were armed with 'kappas' and 'dandas' but the complainant party, who comprising of at least seven members did not try to rescue deceased from the hands of the accused persons---Thus, the conduct of the prosecution eye-witnesses, who were closely related to deceased was highly unnatural therefore, their presence at the spot was highly doubtful, hence their evidence was not worthy of reliance---Insofar as the case of other "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under

S. 342, Cr.P.C., therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt---However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C. was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal was partly allowed to the extent of said accused.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Ocular account in conflict with medical evidence---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---Record showed that ocular account of the prosecution in the present case was in conflict with the medical evidence---Prosecution case as set forth in the FIR, was that on the night of occurrence, accused persons while armed with different weapons came to the house of the complainant and forcibly dragged deceased while giving him 'sota' blows and took him into the house of the accused party where they committed the murder of both the deceased persons---According to the postmortem report of deceased, there was no injury on his body except one injury on his neck which was attributed to accused---Noteworthy that according to the postmortem report of lady deceased, there were two injuries on her body, one was on her right cheek, whereas, other was on the right side of her neck---None of the prosecution eye-witnesses explained injury No. 1 on the body of lady deceased---Even the Trial Court had partly disbelieved the evidence of the prosecution eye-witnesses regarding the forcible abduction of deceased and infliction of 'danda' blows on his body by the accused party---Co-accused, who were statedly armed with sotas, had already been acquitted by the Trial Court and petition for leave to appeal filed against their acquittal had also been dismissed---Said conflict between ocular account and medical evidence of the prosecution created dent in the prosecution case---Insofar as the case of accused "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the

deceased in his statement recorded under S. 342, Cr.P.C., therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt---However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C., was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal was partly allowed to the extent of said accused.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Recovery of weapon of offence on the pointation of accused---Inconsequential---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---Record showed that a blood stained "kappa' was recovered on the pointation of accused---Noteworthy that the 'kappa' was recovered on the pointation of the accused after 01 month and 03 days from the occurrence and during the said period, said accused had ample opportunity to wash way the blood on the 'kappa'---Moreover, blood disintegrated during the period of one month and three days---In the light of said fact, recovery of blood stained 'kappa' on the pointation of accused was not free from doubt---Insofar as the case of accused "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under S. 342, Cr.P.C., therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt---However, circumstances established that the prosecution had proved its case against the accused "A" however, due to grave and sudden provocation, he committed the murder of both the deceased---Consequently, the punishment awarded under S. 302(b), P.P.C. was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal was partly allowed to the extent of said accused.

Basharat and another v. The State 1995 SCMR 1735 and Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 rel.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b), 302(c), 364, 147 & 149---Qatl-i-amd, kidnapping or abducting in order to murder, rioting, unlawful assembly---Appreciation of evidence---Sentence, reduction in---Grave and sudden provocation---Accused were charged for committing murder of the son of the complainant and sister of one of the accused persons---Record showed that accused "A", while making his statement under S. 342 of Cr.P.C., had candidly admitted the occurrence with the stance that on the night of occurrence, he committed the murder of both the deceased on account of grave and sudden provocation and 'ghairat'---Occurrence in the present case took place on 29.01.2013 which meant that the same took place prior to the amendment brought in S. 311 of P.P.C. whereby it was provided that if the offence had been committed in the name or on the pretext of honour, punishment would be imprisonment for life---As the said amendment could not be applied retrospectively and as the occurrence of this case took place prior to the introduction of said amendment therefore, the said amendment in the relevant law was not applicable in this case---Notable from the statement of accused "A" recorded under Section 342 of Cr.P.C., that on the night of occurrence, he had seen his sister/ deceased with the deceased in objectionable condition in a room of his house, in the odd hours of night, therefore, due to grave and sudden provocation, he committed the murder of both the deceased---If the prosecution evidence was disbelieved then statement of an accused was to be accepted or rejected in toto---If the statement of accused "A" was accepted in toto, then to his extent, it was a case punishable under S. 302(c), P.P.C. and not a case punishable under S. 302(b), P.P.C.---Consequently, the punishment awarded under S. 302(b), P.P.C., was converted into S. 302(c), P.P.C. and sentenced him to fourteen years---Appeal of the said accused was partly allowed with the modification of sentence---Insofar as the case of other accused "R" was concerned, neither he made any confession before the Trial Court nor he had admitted the murder of both the deceased in his statement recorded under S. 342, Cr.P.C., therefore his appeal was allowed and he was acquitted of the charge by extending him the benefit of doubt.

Muhammad Shahzad Saleem Warraich for Appellants.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Malik Azhar Abbas Waseer for the Complainant.

Date of hearing: 27th March, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---By this single judgment we shall dispose of Criminal Appeal No. 5537 of 2022 titled as "Muhammad Rafique and another v. The State and another" filed by Muhammad Rafique and Arshad (appellants), as well as, Murder Reference No.14 of 2022, sent by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Muhammad Rafique and Arshad (appellants) in private complaint in respect of offences under Sections 302/ 364/147 and 149, P.P.C. We propose to dispose of both these matters by this single judgment as both these have arisen out of the same judgment dated 20.01.2022 passed by the learned Addl. Sessions Judge, Nankana Sahib.

2. Initially on the complaint of Abdul Ghafoor, complainant (PW-1) case FIR No. 51, dated 29.01.2013, was registered at Police Station Mangtanwala, District Nankana Sahib, in respect of offences under sections 302/147 and 149, P.P.C. but later on being dissatisfied with the police investigation, Abdul Ghafoor complainant (PW-1) filed private complaint (Exh.PB) against the appellants and four (04) others. The learned trial Court, after observing all the pre-trial codal formalities, framed charge under sections 302, 364, 148, 149, P.P.C. against the appellants and their co-accused, namely Shahbaz (since acquitted), Mubarik Ali (since acquitted), Qurban Riasat Ali (since acquitted) and Iftikhar alias Ghaffar (since acquitted) on 12.08.2013, to which they pleaded not guilty and claimed trial. After conclusion of the trial, the learned trial Court (Additional Sessions Judge, Nankana Sahib) vide its judgment dated 20.01.2022, has convicted and sentenced the appellants as under:-.

> Under Section 302(b), P.P.C. to 'Death' as tazir on two counts each for committing Qatl-i-Amd of Jamal Hussain and Mst. Rabia Bibi (deceased). Both the convicts were also ordered to pay Rs.5,00,000/- (rupees five hundred thousand only) each to the legal heirs of Jamal Husain (deceased) and in default thereof to further undergo six months simple imprisonment each.

However, the learned trial Court vide the same impugned judgment acquitted all the accused persons from the charges under Sections 364/149 of P.P.C. Shehbaz, Mubarik Ali, Qurban Riasat Ali and Iftikhar alias Ghaffar co-accused were acquitted by the learned trial Court from all the charges vide the same impugned judgment while giving them the benefit of doubt.

3. Brief facts of the case as given by the complainant in his private compliant (Exh.PB) are that he (complainant) was resident of Kot Bheeni Das. On 29.01.2013 at about 04:45 a.m., he (complainant) along with his wife Mst. Maqsoodan Bibi, his sons, namely, Jamal Hussain aged 24/25 years (deceased), Bilal (PW-2), Ali Shah, Sunny Abbas, Hammad Ali (given up PWs) was present in his house when Muhammad Rafique (appellant) knocked the door of his house and called Jamal (deceased) to open the door as he had some piece of work with him. Jamal (deceased) opened the door. The complainant and his wife Maqsoodan Bibi and his sons Bilal (PW-2), Ali Shan, Sunny Abbas, Hammad Ali (given up PWs) also came out of their house to inquire about Jamal Hussain (deceased). They saw that Muhammad Rafique (appellant) was armed with iron 'kappa', Shahbaz (acquitted co-accused) was armed with iron 'kappa', Mubarik Ali (acquitted co-accused) was armed with Sota Ghaffar (acquitted co-accused) was armed with sota, Arshad Ali (appellant) was armed with iron 'kappa' and they were taking away Jamal Hussain (deceased) while abducting him and were inflicting blows on his body with sotas. They (accused persons) threatened the complainant party that if anyone would come near, then he shall be done to death but the complainant party kept on chasing accused persons and the abductee. Accused persons took Jamal (deceased) in a room of their house while beating him. Rafique (appellant) and his co-accused pushed Jamal towards ground. Rafique (appellant) caught hold the deceased from his right leg, whereas, Shahbaz (acquitted co-accused) caught hold the deceased from his left leg. Qurban (acquitted co-accused) caught hold the deceased from his right arm, whereas, Mubarik (acquitted co-accused) caught hold the deceased from his left arm. Ghaffar (acquitted co-accused) sat on the abdomen of the deceased and Arshad (appellant) cut the throat of Jamal deceased with iron 'kappa' due to which he died at the spot. Then Muhammad Rafique appellant cut the throat of his niece and sister of Arshad Ali (appellant), namely, Mst. Rabia Bibi with iron 'kappa' and she also succumbed to the injury at the spot.

Initially the FIR (FIR No. 51 dated 29.01.2013 offences under Sections 302/ 147/149 of P.P.C. P.S. Mangtanwala District Nankana Sahib) was lodged on the complaint of Abdul Ghafoor complainant (PW-1) however, during the course of investigation, police declared all the accused persons except Arshad Ali (appellant) as innocent therefore, being dis-satisfied with the police investigation, Abdul Ghafoor Complainant (PW-1) filed the private complaint under Sections 302/ 364/147/149 of P.P.C. in which the aforementioned accused persons were tried.

4. The appellants were arrested in this case and after completion of investigation, the challan was prepared and submitted before the learned trial Court. In the private complaint, summary evidence was recorded and the accused were summoned to face the trial. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 12.08.2013 to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced three witnesses during the trial, whereas, statements of ten Court witnesses were also recorded. The prosecution also produced documentary evidence in the shape of Exh.PA to Exh.PE, Exh.CW-1/1 to Exh.CW9/3 and Mark-A to Mark-I.

6. The statements of the appellants and their co-accused under Section 342 of Cr.P.C. were recorded. Muhammad Rafique appellant refuted the allegations levelled against him and professed his innocence, whereas, while answering to a question that 'Why this case and why the PWs deposed against you' Arshad Ali appellant replied as under:-

> Arshad Ali
>
> "PWs are related inter-se, interested and are inimical towards me and my co-accused persons. In fact Mst. Rabia Bibi and Jamal Hussain deceased persons developed illicit relations. On the fateful night, Jamal deceased came into our house and Mst. Rabia Bibi and he went to her room. I saw both of them in the said room in an objectionable position; due to sudden provocation and Gairat, I picked up an iron KAPA lying in the room and cut the throats of both the deceased persons in the heat of passion. The occurrence was committed by myself alone and not by

any other accused persons. The complainant, PWs and the remaining accused persons were not present at the time and place of occurrence as alleged by Abdul Ghafoor complainant. After the occurrence, I myself went to the police station, narrated the incident to the SHO concerned and also produced the iron KAPA used by me in the occurrence. My arrest was not shown immediately by the police and they kept it awaiting and later on, according to the timings suitable to them they showed my arrest. Later on, the complainant, with false facts and after concocting a false story, got lodged FIR against me and others which was not substantiated during investigation. During investigation, I also offered to get record my statement under section 164, Cr.P.C. but the police, as it was league with the complainant, did not produce before me before the learned Judicial Magistrate for recording of my such statement. The occurrence had happened due to the reason that Jamal and Rabia Bibi deceased persons had developed illicit relations with each other. All the facts narrated by the PWs are false."

While answering to a question that 'Why this case and why the PWs deposed against you" Muhammad Rafique appellant replied as under:-

Muhammad Rafique

"PWs are related inter-se, interested and inimical towards me and my co-accused persons. In-fact, Mst. Rabia Bibi and Jamal Hussain deceased persons developed illicit relations and on the fateful night, Jamal deceased came into the house of Arshad my co-accused, where-after Jamal Hussain and Rabia Bibi went to her room where Arshad my co-accused saw them in an objectionable position and committed their murder due to sudden provocation and Gairat. All the story narrated by the complainant and the PWs is false."

In answer to another question that "Have you anything else to say?" Muhammad Rafique appellant replied as under:

"I am innocent."

The appellants and their acquitted co-accused neither opted to make their statements on oath as envisaged under Section 340(2) of the Code of

Criminal Procedure, 1898 in disproof of the allegations levelled against them nor they produced any evidence in their defence.

The learned trial Court vide its judgment dated 20.01.2022, found the appellants guilty, convicted and sentenced them as mentioned and detailed above. However, vide the same impugned judgment Shehbaz, Mubarik Ali, Qurban Riasat Ali and Iftikhar alias Ghaffar co-accused were acquitted by the learned trial Court while giving them the benefit of doubt.

7. It is contended by learned counsel for the appellants that the appellants are innocent and they have falsely been implicated in this case by the complainant being in league with the local police; that the occurrence was unseen; that there is gross delay in conducting the postmortem examinations on the dead bodies of Jamal and Mst. Rabia deceased and the said delay is suggestive of the fact that the eye-witnesses were not present at the spot at the relevant time therefore, the abovementioned delay was consumed in procuring the attendance of fake eye-witnesses; that there are material contradictions in the statements of prosecution witnesses; that there is conflict between the ocular account and the medical evidence of the prosecution; that the motive has also not been proved in this case; that the alleged recovery of 'kappa' has been planted against Arshad Ali appellant; that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt. It is therefore, prayed that the instant appeal may be allowed and the appellants may be acquitted of the charges by extending them the benefit of doubt.

8. On the other hand, it is contended by the learned Deputy Prosecutor General assisted by learned counsel for the complainant that the occurrence in this case took place on 29.01.2013 at 04:45 a.m., and the matter was promptly reported to the police on the same day and the FIR was also lodged on the same day i.e. on 29.01.2013 at 10:15 a.m., hence, promptness of the FIR rules out the possibility of any deliberation or concoction on the part of the prosecution; that both the eye-witnesses of the occurrence i.e., Abdul Ghaffor (PW-1) and Bilal (PW-2) were residents of the same house from where Jamal deceased was abducted by the accused persons therefore, their presence at the spot at the time of occurrence was quite natural and probable; that the prosecution's case against the appellants is supported by the medical evidence furnished by the prosecution through Dr. Uzma (CW-2), Dr. Muhammad Azhar Ameen (CW-3) and

postmortem examination reports, as well as, pictorial diagrams of Jamal and Mst. Rabia Bibi deceased (Exh.CW-3/1) and (Exh.CW-2/1) respectively; that the prosecution case is further corroborated by the recovery of 'kappa' from the possession of Arshad Ali appellant and positive report of PFSA, Lahore (Exh.PE); that motive has also been proved in this case against the appellants through reliable and confidence inspiring evidence of the prosecution's witnesses; that the prosecution has proved its case against the appellants beyond the shadow of any doubt therefore, their appeal may be dismissed, Murder Reference be answered in the affirmative and the sentences of death awarded to Arshad Ali and Muhammad Rafique appellants by the learned trial Court may be upheld and maintained.

9. Arguments heard. Record perused.

10. Prosecution story as set forth in the private complaint (Exh.PB) has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

11. We have noted that the occurrence in this case took place on 29.01.2013 at 04:45 a.m., but the FIR was lodged on 29.01.2013 at 10:15 a.m., i.e., with the delay of 05 hours and 30 minutes from the occurrence. Although the distance between the place of occurrence and the police station was 12 kilometers and mere delay in reporting the matter to the police may not be fatal to the prosecution case but we have also noted that postmortem examination on the dead bodies of both the deceased persons of this case, namely, Jamal and Mst. Rabia Bibi were conducted on 29.01.2013 at 07:30 p.m., and 07:45 p.m., respectively which means that there was delay in conducting the postmortem examination on the dead body of Jamal deceased of 14 hours and 45 minutes, whereas, there was delay of 15 hours in conducting the postmortem examination on the dead body of Mst. Rabia Bibi deceased. The abovementioned delay in conducting the postmortem examinations on the dead bodies of both the deceased persons is suggestive of the fact that the occurrence was unseen and the said delay was consumed in procuring the attendance of fake eye-witnesses. In the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence

therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the said judgment at page No. 55 reads as under:--

> "2. .....Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similarly, in the case of "Khalid alias Khalidi and 2 others v. The State" (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192),"Zafar v. The State and others" (2018 SCMR 326) and "Muhammad Ashraf v. The State" (2012 SCMR 419).

It is further noteworthy that the occurrence in this case took place in the month of January i.e., on 29.01.2013 at 04:45 a.m., meaning thereby that the occurrence in this case took place during the darkness of night. Bilal (PW-2) has stated during his cross-examination that Fajar Namaz used to be offered during the month of January at 06:20 a.m. Relevant part of his statement in this respect reads as under:--

> "It is correct that during January namaz of Fajar is performed at 06..20 a.m."

We have next noted that no source of light has been mentioned in the site plan (Exh.CW-7/1) or in the statements of the abovementioned prosecution eye-witnesses rather Abdul Ghafoor complainant (PW-1) during his cross-examination has conceded that no light was installed in the street between his house and that of the accused. Relevant part of his statement in this respect is reproduced hereunder for ready reference:--

> "No light has been installed in the street between my house and that of

accused"

None of the prosecution eye-witnesses stated that there was moon light at the relevant time. Under the circumstances, the identification of the appellants during the darkness of night is not free from doubt.

12. It is further noteworthy that conduct of the prosecution eye-witnesses is highly unnatural. According to the prosecution case, as set forth in the FIR, on the night of occurrence, Jamal appellant was present in his house, where Abdul Ghafoor complainant and his sons, namely, Bilal (PW-2), Ali Shan, Sanni Abbas and Hammad Ali (given up PWs) were also present along with his wife, namely, Mst. Maqsoodan Bibi and son Jamal (deceased) and as such, the complainant party was comprising of total seven members. We have further noted that Bilal (PW-2) who is son of the complainant, has further conceded during his cross-examination that the house of his uncle Manzoor was situated in front of the house of the complainant party and said Manzoor had six sons. He further conceded during his cross-examination that he had not got recorded in his statement before the police that any of his family members raised hue and cry when his brother was being beaten and abducted by the accused persons nor he informed any neighbour in this respect though house of his uncle Manzoor who had six sons was situated in front of his house. Relevant parts of his statement in this respect read as under:--

> "House of my uncle Manzoor is in front of our house... .....My uncle Manzoor have six sons named Imran, Arfan, Amir Shehzad, Gulfam, Qaisar, Faisal Mahmood. I cannot tell their exact ages however Amir Shehzad and Imran are married. Presently ages of Qaisar, Gulfram and Faisal are of about 24/25 years. Occurrence took place during winter on 29.01.2013 and in those days it was very cold.... .. I have not got recorded in my statement before police that I, my mother or any other witness raised hue and cry that accused are taking away my brother Jamal deceased. I have not got recorded in my statement before police that I went to any neighbour to inform that accused have forcibly taken away my brother Jamal deceased"

It is also noteworthy that the accused persons were not armed with any lethal firearm weapon like pistol, gun etc and according to the prosecution case,

they were armed with 'kappas' and 'dandas' but the complainant party, who was comprising of at least seven members did not try to rescue Jamal deceased from the hands of the accused persons. We are therefore of the view that conduct of the prosecution eye-witnesses, who were closely related to Jamal deceased is highly unnatural therefore, their presence at the spot is highly doubtful, hence their evidence is not worthy of reliance. We may refer here the case of "Liaquat Ali v. The State" (2008 SCMR 95), wherein at Para No.5-A of the judgment, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P. W..7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of "Pathan v. The State" (2015 SCMR 315) and "Zafar v. The State and others" (2018 SCMR 326). Under the circumstances, it cannot be safely held that the abovementioned eye-witnesses were present at the spot at the relevant time and they had witnessed the occurrence because their conduct is highly unnatural.

13. It is further noteworthy that ocular account of the prosecution in this case is in conflict with the medical evidence. It was the case of the prosecution, as set forth in the FIR, that on the night of occurrence, accused persons while armed with different weapons came to the house of the complainant and forcibly dragged Jamal deceased while giving him 'sota' blows and took him into the house of the accused party where they (accused persons) committed the murder of both the deceased persons but according to the postmortem report of Jamal

deceased, there was no injury on his body except one injury on his neck which was attributed to Arshad Ali appellant. It is further noteworthy that according to the postmortem report of Mst. Rabia Bibi deceased, there were two injuries on her body. Injury No.1 was on her right cheek, whereas, Injury No. 2 was on the right side of her neck. None of the prosecution eye-witnesses explained Injury No.1 on the body of Mst. Rabia Bibi deceased. Even the learned trial Court in Paragraph No. 8 of the impugned judgment has partly disbelieved the evidence of the prosecution eye-witnesses regarding the forcible abduction of Jamal deceased and infliction of 'danda' blows on his body by the accused party. Co-accused of the appellants, namely, Mubarak Ali, Qurban Riasat Ali and Iftikhar alias Ghaffar who were statedly armed with sotas, have already been acquitted by the learned trial Court and petition for leave to appeal filed against their acquittal has also been dismissed today by this Court through a separate order of even date, being barred by time. The abovementioned conflict between ocular account and medical evidence of the prosecution created further dent in the prosecution case.

14. Insofar as the recovery of blood stained 'kappa' (Exh.CW-9/2) on the pointation of Arshad Ali appellant is concerned, it is noteworthy that the occurrence in this case took place on 29.01.2013, whereas, 'kappa' (Exh. CW-9/2) was recovered on the pointation of the said appellant on 03.03.2013 i.e., after 01 month and 03 days from the occurrence and during the abovementioned period, Arshad Ali appellant had ample opportunity to wash way the blood on the 'kappa'. In the light of above, recovery of blood stained 'kappa' (Exh.CW-9/2) on the pointation of Arshad Ali appellant is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of 'Basharat and another v. The State' (1995 SCMR 1735) disbelieved the evidence of blood-stained dagger which was allegedly recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at Page No. 1739 is reproduced hereunder for ready reference:-

> "11. The occurrence took place on 20.04.1988. Basharat appellant was arrested on 28.04.1988. The blood-stained Chhuri was allegedly recovered from his house on 30.04.1988. It is not believable that he would have kept blood stained chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the

blood on it"

Moreover, blood disintegrates during the abovementioned period of 01 month and 03 days. Reliance in this respect may be placed on the case of 'Muhammad Jamil v. Muhammad Akram and others' (2009 SCMR 120). In the light of above, recovery of 'kappa' (Exh.CW-9/2) and positive report of PFSA (Exh.PE) are inconsequential for the prosecution.

15. We have disbelieved the prosecution evidence qua ocular account and recovery of 'kappa' but it is noteworthy that Arshad Ali appellant while making his statement under Section 342 of Cr.P.C., has candidly admitted the occurrence with the stance that on the night of occurrence, he committed the murder of both the deceased on account of grave and sudden provocation and 'ghairat'. The occurrence in this case took place on 29.01.2013 which means that the same took place prior to the amendment brought in Section 311 of P.P.C. whereby it was provided that if the offence has been committed in the name or on the pretext of honour, punishment shall be imprisonment for life. As the abovementioned amendment cannot be applied retrospectively and as the occurrence of this case took place prior to the introduction of above-mentioned amendment therefore, the said amendment in the relevant law is not applicable in this case. We have further noted from the statement of Arshad Ali appellant recorded under Section 342 of Cr.P.C., that on the night of occurrence, he saw his sister, namely, Mst. Rabia Bibi (deceased) with Jamal Hussain (deceased) in objectionable condition in a room of his house, in the odd hours of night, therefore, due to grave and sudden provocation, he committed the murder of both the deceased. It is by now well settled that if the prosecution evidence is disbelieved then statement of an accused is to be accepted or rejected in toto. If statement of Arshad Ali appellant is accepted in toto, then to his extent, it is a case punishable under Section 302(c) of P.P.C. and not a case punishable under Section 302(b) of P.P.C. Consequently, convictions and sentences of Arshad Ali appellant for the charge under Section 302(b) of P.P.C. are hereby set aside and his convictions and sentences are converted to the offence under Section 302(c) of P.P.C. He is therefore, convicted under Section 302(c) of P.P.C. and is sentenced to fourteen (14) years rigorous imprisonment on two counts. Compensation under Section 544-A of Cr.P.C., awarded by the learned trial Court against Arshad Ali appellant is however, upheld and maintained.

Sentences awarded to Arshad Ali appellant shall run concurrently. Benefit of Section 382-B of Cr.P.C., is also extended to Arshad Ali appellant. Insofar as the case of Muhammad Rafique appellant is concerned, we have disbelieved the prosecution evidence due to the reasons mentioned in Paragraphs Nos. 11 to 14 of this judgment and as the said appellant has neither made any confession before the learned trial Court nor he has admitted the murder of both the deceased in his statement recorded under Section 342 of Cr.P.C., therefore, he is acquitted of the charges by extending him the benefit of doubt. He is in jail. He be released forthwith if not required to be detained in any other case.

16. Consequently, with the above said modification in the conviction and sentence of Arshad Ali appellant, Criminal Appeal No. 5537 of 2022 filed by Muhammad Rafique and Arshad appellants is hereby partly dismissed to the extent of Arshad Ali appellant and partly allowed to the extent of Muhammad Rafique appellant. Murder Reference (M.R. No. 14 of 2022) is answered in the negative and death sentences of Muhammad Rafique and Arshad Ali appellants are not confirmed.

JK/M-84/ Order accordingly

2024 Y L R 372

[Lahore]

Before Malik Shahzad Ahmad Khan, J

LIAQAT ALI alias BAO---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 78954-J of 2019 and Criminal Revision No. 15587 of 2020, heard on 30th May, 2023.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 427 & 34---Qatl-i-amd, mischief causing loss or damage to the amount of fifty rupees or upwards, common intention---Appreciation of evidence---Benefit of doubt---Chance witnesses--- Non-availability of justification for the presence of eye-witnesses at the spot---Accused was charged for committing murder of the deceased by firing---Ocular account of the occurrence had been furnished by complainant and another eye-witness---Both the eye-witnesses were not residents of the village where the occurrence took place---Site plan showed that the occurrence took place at a road in a deserted area---On both sides of the road, there were agricultural fields and no residential house, shop, bus stop, petrol pump or any other building had been shown at the spot---Both the eye-witnesses simply stated in their statements before the police, as well as, in their statements recorded by the Trial Court that on the day of occurrence, they along with deceased were returning back from Mandi upon a motorcycle 'rikshaw' after sale purchase---Said witnesses did not state the specific reason of their visit to Mandi on the day of occurrence---Although during their cross-examination, said witnesses stated that they went to Mandi to purchase ghee, sugar and some grocery but it was noteworthy that no receipt regarding the purchase of any grocery items was produced during the investigation of the case before the Investigating Officer or during the recording of prosecution evidence by the Trial Court---Both the eye-witnesses made an excuse that in fact, items purchased by them along with 'rikshaw', driven by deceased at the time of occurrence, were burnt during the occurrence on account of firing of the accused persons but it was noteworthy that in the FIR there was no such allegation that 'rikshaw' of the complainant party caught fire at the time of occurrence---Since, both the eye- witnesses were not residents of the village where the occurrence took place

rather they were residents of another Chak, therefore, they were chance witnesses and they could not prove the reason of their presence at the spot at the relevant time, therefore it was not safe to rely upon their evidence for upholding the conviction and sentence of the accused---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 427 & 34---Qatl-i-amd, mischief causing loss or damage to the amount of fifty rupees or upwards, common intention---Appreciation of evidence---Benefit of doubt---Delay of ten hours in conducting the postmortem upon the dead body of the deceased---Consequential---Accused was charged for committing murder of the deceased by firing---Although as per contents of the FIR, the occurrence took place on 26.07.2016 at 08:30 a.m., and the FIR was lodged on the same day at 09:35 a.m., but it was noteworthy that postmortem examination on the dead body of deceased was conducted on 26.07.2016 at 06:30 p.m., i.e., with the delay of 10 hours from the occurrence---Medical Officer, who conducted the postmortem on the dead body of deceased, stated that dead body was received in the dead house on 26.07.2016 at 06:00 p.m., whereas, police papers were received on the same day at 06:30 p.m., which showed that there was no delay on the part of the Medical Officer in conducting the postmortem examination on the dead body of deceased---Delay in conducting the postmortem examination on the dead body of the deceased was suggestive of the fact that the occurrence was unseen and the said delay was consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Sufyan Nawaz and another v. The State and others 2020 SCMR 192; Zafar v. The State and others 2018 SCMR 326 and Muhammad Ashraf v. The State 2012 SCMR 419 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 427 & 34---Qatl-i-amd, mischief causing loss or damage to the amount

of fifty rupees or upwards, common intention---Appreciation of evidence---Benefit of doubt---Motive not proved---Accused was charged for committing murder of the deceased by firing---Motive behind the occurrence was that earlier accused made fire shots upon complainant due to which FIR under section 324, P.P.C., was lodged and the accused was pressurizing for compromise in the said case and on account of the said grudge, the occurrence of the present case took place---Under such circumstances, either complainant or eye-witness should have been the prime target of accused but both of them did not receive even a single scratch on their bodies during the occurrence, though according to the prosecution case, accused and co-accused (since P.O.) were armed with pistols and complainant and eye-witness were at their mercy---As per site plan said witnesses were sitting in the 'rikshaw' on the left and right side of deceased---Prosecution story did not appeal to a prudent mind because if the said motive was against complainant or against eye-witness, then question was as to why the said witnesses were spared alive and in their place deceased was murdered, meaning thereby that the said witnesses were not present at the spot at the relevant time---Although said prosecution eye-witnesses tried to justify the motive by stating that in fact, deceased was pursuing earlier case lodged against the accused but the FIR statedly lodged by the complainant party against the accused or order sheet of the Trial Court in the said case was never brought on the record during the trial of present case to establish that deceased was a complainant or a witness or he was pursuing the case---Thus, motive as alleged by the prosecution had not been proved in the case and even on the basis of said motive, the prosecution case was highly doubtful---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

Muhammad Zaman Mangat v. Muhammad Akhtar and others 2004 SCMR 757; Saleem Khan v. The State and others 2021 SCMR 1472 and Rohtas Khan v. The State 2010 SCMR 566 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 427 & 34---Qatl-i-amd, mischief causing loss or damage to the amount of fifty rupees or upwards, common intention---Appreciation of evidence---Benefit of doubt---Medical evidence---No specific injury assigned to accused---Accused was charged for committing murder of the deceased by firing---Record showed that no specific injury on the body of deceased was assigned to the accused or his co-accused and a general role was attributed to the accused and his co-accused that the fire shots

made by them landed on the different parts of the body of deceased---Said fact also indicated that the prosecution eye-witnesses were not present at the time of occurrence therefore, they could not assign any specific injury to any accused---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 427 & 34---Qatl-i-amd, mischief causing loss or damage to the amount of fifty rupees or upwards, common intention--- Appreciation of evidence---Benefit of doubt---Recovery of pistol on the pointation of the accused---Inconsequential---Accused was charged for committing murder of the deceased by firing---Record showed that pistol 30 bore was recovered on the pointation of the accused---Noteworthy that report of Forensic Science Agency in that respect was in the negative and as such, the same was inconsequential for the prosecution case--- Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was accordingly allowed.

(f) Criminal trial---

----Benefit of doubt---Principle---Single circumstance which creates doubt regarding the prosecution case will be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Ch. Imtiaz Hussain Bhatti and Syed Hassan Mehdi Rizvi (defence counsel) for Appellant.

Ms. Asiya Yasin, Deputy District Public Prosecutor for the State.

Rana Wazir Ali for the Complainant.

Date of hearing: 30th May, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN J.---By this single judgment, I proceed to decide Criminal appeal No. 78954-J of 2019, titled 'Liaqat Ali alias Bao v. The State' filed by the appellant, namely, Liaqat Ali alias Bao against his conviction and sentence, as well as, Crl. Revision No. 15587 of 2020 titled 'Arshad Mehrnood v. The State and another' filed by Arshad Mehmood complainant for enhancement of the

sentence of the appellant, as both these matters have arisen out of the same judgment dated 05.12.2019 passed by the learned Addl. Sessions Judge (MCTC-II), Sheikhupura. The appellant, namely, Liaqat Ali alias Bao was tried in case FIR No. 276 dated 26.07.2016 registered at Police Station Safdarabad District Sheikhupura offences under Sections 302/ 427/34 of P.P.C. and after conclusion of the trial vide impugned judgment dated 05.12.2019, the learned trial Court convicted and sentenced the appellant as under:--

> Under Section 302(b) of P.P.C. to Imprisonment for Life for committing Qatl-e-Amd of Muhammad Akram (deceased). He was also directed to pay Rs.20,00,000/- (Rupees two million only) as compensation under Section 544-A of Cr.P.C., to the legal heirs of Muhammad Akram (deceased) and in default thereof to undergo six months S.I.

The appellant was however, acquitted of the charge under Section 427, of P.P.C. Benefit of Section 382-B of Cr.P.C., was extended in favour of the appellant.

2. Brief facts of the case as given by the complainant Arshad Mahmood (PW-7) in his complaint (Exh.PC), on the basis of which the formal FIR (Exh.PC/1) was chalked out, are that he (complainant) was resident of Chak No. 34 Deputywala and was a labourer by profession. On 26.07.2016 at 08:30 a.m., he (complainant) along with Muhammad Akram (deceased), Anwar Hussain (given up PW) and Zafar Iqbal (PW-8) was returning home on motorcycle 'rikshaw', driven by Muhammad Akram (deceased), from Mandi Safdarabad after sale purchase and when they reached in the area of Nawan Pind Village Mananwala Road after crossing Dhup-Sarhi bridge, Liaqat Ali alias Bao (appellant), Waris Ali (co-accused since P.O.) along with one unknown accused while armed with pistols .30 bore were present there ambushed with a motorcycle 125/cc. The complainant party when reached near the accused party, they (accused persons) started straight firing. Liaqat Ali (appellant) made burst with his pistol which landed at different parts of the body of Muhammad Akram (deceased). The PWs rescued themselves after hiding behind the 'rikshaw'. Waris Ali and one unknown co-accused made fire shots with their respective pistols which caused huge damage to the 'rikshaw', whereas, fire shots made by Waris Ali co-accused (since P.O) also landed on the body of Muhammad Akram (deceased). Due to the firing of Liaqat Ali (appellant) and Waris Ali co-accused (since P.O), brother of the complainant, namely, Muhammad Akram became seriously injured. Accused persons fled away from the spot on motorcycle after making firing. Muhammad Akram (deceased) was being

shifted to the Shahkot Hospital in injured condition by the complainant party but he succumbed to the injuries on the way to the hospital.

Motive behind the occurrence was that the complainant lodged FIR under Section 324 of P.P.C. at Police Station Sadar Shahkot against Liaqat Ali (appellant) and others and the accused persons were pressurizing the complainant for compromise and due to this grudge, the accused persons committed the occurrence.

3. After submission of challan and completion of all the codal formalities, the learned trial Court framed the charge against the appellant on 22.05.2018, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fourteen (14) witnesses during the trial. Prosecution also produced documentary evidence in the shape of Exh.PA to Exh.PX and closed its evidence. Statement of the appellant under Section 342 of Cr.P.C. was recorded by the learned trial Court.

5. The learned trial Court vide its judgment dated 05.12.2019 found the appellant, namely, Liaqat Ali alias Bao guilty for the offence under Section 302(b) of P.P.C. and convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that the occurrence was unseen and the prosecution eye-witnesses are chance witnesses; that the prosecution eye-witnesses did not explain the injuries on the body of Muhammad Akram (deceased) which has made their presence at the spot highly doubtful; that pistol 30 bore (P-4) has been planted against the appellant and report of PFSA (Exh.PW) is in the negative therefore, the said recovery is inconsequential; that the prosecution has also failed to prove the motive part of the occurrence; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, his appeal may be accepted and he may be acquitted of the charge by extending him the benefit of doubt.

7. On the other hand, it is contended by learned Deputy District Public Prosecutor assisted by learned counsel for the complainant that FIR in this case was promptly lodged which rules out the possibility of any fabrication or concoction; that the appellant was specifically named in the FIR with the role that he along with his co-accused while armed with pistols 30 bore caused injuries on the body of Muhammad Akram deceased and role attributed to the appellant is fully supported by the medical

evidence; that the prosecution case against the appellant is further corroborated by the recovery of pistol 30 bore (P-4) on his pointation; that the motive was proved by the prosecution through reliable evidence of prosecution witnesses; that there is no substance in the appeal filed by the appellant hence, the same may be dismissed. Insofar as Crl. Revision No. 15587 of 2020 filed by Arshad Mahmood complainant for enhancement of the sentence of the appellant is concerned, it is argued by learned counsel for the complainant that the prosecution has discharged its onus by fully proving its case and no mitigating circumstance is available in favour of the appellant therefore, sentence of the appellant may be enhanced and he be awarded capital punishment provided for the offence.

8. Arguments heard. Record Perused.

9. The detail of the prosecution case as set forth in the complaint (Exh.PC) on the basis of which formal FIR (Exh.PC/1) was chalked out, has already been given in para No. 2 of this judgment therefore, there is no need to repeat the same.

10. According to the prosecution case, the occurrence of this case took place in village Nawan Pind within the jurisdiction of Police Station Safdarabad District Sheikhupura. Ocular account of the prosecution was furnished by Arshad Mahmood complainant (PW-7) and Zafar Iqbal (PW-8). Both the abovementioned eye-witnesses of the occurrence were not residents of the village Nawan Pind District Sheikhupura where the occurrence took place and they were residents of Chak No. 34, Deputywala District Nankana Sahib. It is noteworthy from the perusal of the site plan (Exh.PG and Exh.PG/1) that the occurrence took place at a road in a deserted areea. On both sides of the road, there were agricultural fields and no residential house, shop, bus stop, petrol pump or any other building has been shown at the spot. Both the abovementioned eye-witnesses simply stated in their statements before the police, as well as, in their statements recorded by the learned trial Court that on the day of occurrence, they along with Muhamad Akram (deceased) were returning back from Mandi Safdarabad upon a motorcycle 'rikshaw' after sale purchase. They did not state the specific reason of their visit to Mandi Safdarabad on the day of occurrence. Although during their cross-examination, they stated that they went to Mandi Safdarabad to purchase ghee, sugar and some grocery but it is further noteworthy that no receipt regarding the purchase of any grocery items was produced during the investigation of this case before the I.O. or during the recording of prosecution evidence by the learned trial Court, though Zafar Iqbal (PW-8) has stated that they (PWs) obtained receipts of items purchased from the

shops of Mandi Safdarabad. It is further noteworthy that both the abovementioned eye-witnesses made this excuse that in fact, items purchased by them along with 'rikshaw', driven by Muhammad Akram (deceased) at the time of occurrence, were burnt during the occurrence on account of firing of the accused persons but it is noteworthy that in the FIR there was no such allegation that 'rikshaw' of the complainant party caught fire at the time of occurrence. Likewise, there was no allegation in the statements of the abovementioned prosecution witnesses recorded by the police that the grocery items which were purchased by the PWs, were also burnt during the occurrence. Relevant parts of their statements in this respect are reproduced hereunder for ready reference:-

Arshad Mahmood (PW-7).

Examination-in-Chief.

"The rikshaw was burnt due to fire."

Cross-examination.

"There was Ghee and Sugar in the rikshcrw which were also burnt. Investigating Officer did not collect such burnt materials from the place of occurrence. I did not produce any receipt of purchase of any grocery or any material which I had purchased and loaded in the rikshaw at that time."

Zafar Iqbal (PW-8).

Examination-in-Chief.

"The fire shots of Waris hit to rickshaw due to which the rickshaw caught fire and burnt along with luggage over it."

Cross-examination.

"I stated before the police that luggage on the rickshaw also burnt, confronted with Ex.DA wherein it is not so recorded . "

"In Safdarabad we purchased one peti of Ghee, one sack of Sugar, some grocery. It is incorrect to suggest that we did not purchase any grocery from Safdarabad. We received bills from the shops for such purchase. We did not produce these receipts before investigating officer."

It is therefore, evident from the perusal of the statements of the abovementioned prosecution eye-witnesses that they did not state in the FIR (Exh.PC/1) or before the police that 'rikshaw' of the complainant and grocery items purchased by

them were also burnt during the occurrence. It is further note-worthy that abovementioned prosecution eye-witnesses though claimed that they received receipts from the shops regarding purchase of grocery items but the said receipts were neither produced before the I.O. nor in the prosecution evidence recorded by the learned trial Court. Moreover, no burnt items were recovered from the spot by the I.O. As mentioned earlier, both the above-mentioned eye-witnesses were not residents of the village (Nawan Pind), where the occurrence took place rather they were residents of Chak No. 34/ Deputywala therefore, they were chance witnesses and as such, they were bound to prove the reasons of their presence at the spot at the relevant time but as observed earlier, they did not mention the reason of their presence at the spot at the time of occurrence in the FIR (Exh.PC/1) or in their statements before the police and even the reason given by them during their cross-examination was not proved through the recovery of any burnt item or through the production of any purchase receipt of the said items. In the light of above, both the abovementioned witnesses are chance witnesses and they could not prove the reason of their presence at the spot at the relevant time therefore, it is not safe to rely upon their evidence for upholding the conviction and sentence of the appellant. The Hon'ble Supreme Court of Pakistan in the case of Mst. Sughra Begum and another v. Qaiser Pervez and others' (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as

under:-

> "... ... Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence ... ."

11. Although as per contents of the FIR, the occurrence took place on 26.07.2016 at 08:30 a.m., and the FIR was lodged on the same day at 09:35 a.m., but it is noteworthy that postmortem examination on the dead body of Muhammad Akram (deceased) was conducted on 26.07.2016 at 06:30 p.m., i.e., with the delay of 10 hours from the occurrence. Dr. Muhammad Kashif Bashir (PW-11) conducted the postmortem on the dead body of Muhammad Akram (deceased) and he stated that dead body was received in the dead house on 26.07.2016 at 06:00 p.m., whereas, police papers were received on the same day at 06:30 p.m., which shows that there was no delay on the part of the Medical Officer in conducting the postmortem examination on the dead body of Muhammad Akram (deceased). The abovementioned delay in conducting the postmortem examination on the dead body of the deceased is suggestive of the fact that the occurrence was unseen and the said delay was consumed in procuring the attendance of fake eye-witnesses. In the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay

was used in procuring the attendance of fake eye-witnesses. Relevant part of the said judgment at page No. 55 reads as under:-

> "2. ... ...Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similarly, in the case of 'Khalid alias Khalidi and 2 others v. The State' (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it

shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as 'Sufyan Nawaz and another v. The State and others' (2020 SCMR 192), 'Zafar v. The State and others' (2018 SCMR 326) and 'Muhammad Ashraf v. The State' (2012 SCMR 419).

12. It is further noteworthy that as per contents of the FIR and according prosecution case, motive behind the occurrence was that earlier Liaqat (appellant made fire shots upon Arshad Mahmood complainant (PW-7) due to which an FIR under Section 324 of P.P.C. was lodged and the appellant was pressurizing for compromise in the said case and on account of the said grudge, the occurrence of the present case was committed. Relevant parts of the statements of the prosecution eye-witnesses regarding the motive part of the case are reproduced hereunder:-

Arshad Mahmood (PW-7).

> "Motive behind the occurrence is that the accused Liaqat present before this court shot fires upon me in the chowk of village."

Zafar Iqbal (PW-8).

> "The motive behind the occurrence is that earlier there was a case against the accused under section 324, P.P.C. for shooting upon Arshad"

Likewise, Zafar Iqbal (PW-8) also stated that he had previous enmity with Liaqat All (appellant) prior to the occurrence. Relevant part of his statement reads a under:-

> "There is my previous enmity with the accused Liaqat prior to this occurrence."

Under the circumstances, either Arshad Mahmood complainant (PW-7) or Zafar Iqbal (PW-8) should have been the prime target of Liaqat Ali alias Bao (appellant) but both of them did not receive even a single scratch on their bodies during the occurrence, though according to the prosecution case, Liaqat Ali (appellant) and Waris Ali co-accused (since P.O.) were armed with pistols and Arshad Mahmood complainant (PW-7) and Zafar Iqbal (PW-8) were at their mercy. As per site plan (Exh.PG and Exh.PG/1) they (PWs) were sitting in the 'rikshaw' on the left and right side of Muhammad Akram (deceased). The prosecution story does not appeal to a prudent mind because if the abovementioned motive was against Arshad Mahmood complainant (PW-7) or against Zafar Iqbal (PW-8), then as to why the said witnesses

were spared alive and in their place Muhammad Akram (deceased) was murdered, meaning thereby that the abovementioned witnesses were not present at the spot at the relevant time. Although abovementioned prosecution eye-witnesses tried to justify the abovementioned motive by stating that in fact, Muhammad Akram (deceased) was pursuing earlier case lodged against the appellant but the FIR statedly lodged by the complainant party against the appellant or order sheet of the learned trial Court in the said case was never brought on the record during the trial of this case to establish that Muhammad Akram (deceased) was a complainant or a witness or he was pursuing the abovementioned case. I am, therefore, of the view that the abovementioned motive as alleged by the prosecution has not been proved in this case and even on the basis of said motive, the prosecution case is highly doubtful because in the light of said motive, either Arshad Mahmood complainant (PW-7) or Zafar Iqbal (PW-8) should have been the prime target of the appellant but they (PWs) did not receive a single scratch on their bodies during the occurrence. Reliance in this context may be placed on the case reported as 'Muhammad Zaman Mangat v. Muhammad Akhtar and others' (2004 SCMR 757), wherein the august Supreme Court of Pakistan at page 760 has held as under:--

> "10. The motive is the previous murder of one Safdar Iqbal. The FIR. of that case indicates that Ghulam Rasool complainant and his companion, Muhammad Azam were the nominated accused for the murder of Safdar Iqbal. Had they been present on the spot, they would have been the first target of the assailants. This is a strong circumstantial evidence which seriously points to the absence of complainant and his companions from the spot."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Saleem Khan v. The State and others' (2021 SCMR 1472) and 'Rohtas Khan v. The State' (2010 SCMR 566). Under the circumstances, I have come to this conclusion that neither motive has been proved by the prosecution against Liaqat Ali alias Bao (appellant) nor presence of the abovementioned eye-witnesses at the time of occurrence is free from doubt.

13. I have further noted that no specific injury on the body of Muhammad Akram (deceased) was assigned to the appellant or his co-accused and a general role was attributed to the appellant and his co-accused that the fire shots made by them landed on the different parts of the body of Muhammad Akram (deceased). This fact also indicates that the prosecution eye-witnesses were not present at the time of occurrence

therefore, they could not assign any specific injury to any accused.

14. Insofar as the recovery of pistol 30 bore (P-4) on the pointation of the appellant is concerned, it is noteworthy that report of PFSA, Lahore (Exh.PW) in this respect is in the negative and as such, the aforementioned recovery is inconsequential for the prosecution case.

15. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt regarding the truthfulness of the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

> '5 The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

> '13 It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. In the light of above discussion, the instant appeal (Criminal Appeal No. 78954-J of 2019) filed by Liaqat Ali alias Bao appellant is allowed, his conviction and sentence recorded by the learned Addl. Sessions Judge (MCTC-II), Sheikhupura vide

impugned judgment dated 05.12.2019 is hereby set-aside and he is acquitted of the charge by extending him the benefit of doubt. He is in custody. He be released forthwith if not required to be detained in any other case.

17. Insofar as Crl. Revision No.15587 of 2020, filed by Arshad Mahmood complainant for enhancement of the sentence of Liaqat Ali alias Bao (respondent No.2) is concerned, I have already disbelieved the prosecution evidence due to the reason mentioned in paras Nos. 10 to 14 above and in consequence thereof, the aforementioned respondent (Liaqat Ali alias Bao) has a already been acquitted of the charge by extending him the benefit of doubt. Under the circumstances, this petition has become meritless and the same is hereby dismissed.

JK/L-3/L Appeal allowed**.**

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***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

Sheikh MUHAMMAD ZAHIR SETHI and another--Petitioners

versus

SHO POLICE STATION CANTT, SIALKOT and 4 others--Respondents

W.P. No. 1684 of 2024, decided on 7.3.2024.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 561-A--Constitution of Pakistan, 1973, Art. 199--Quashment of FIR--Contradictory stance of complainant--No receipt or stamp paper was availed regarding handing over amount--Matter of civil nature--No cognizable offence was made out--*Mala fide* of complainant--Question of--Whether or not any probability of conviction of an accused on basis of evidence collected in a case during investigation--The ingredients of offence were not attracted in a case--No offence under Section 406 of PPC was made out from bare perusal of contents of impugned FIR mere submission of challan before trial Court ipso facto, did not create any absolute bar against quashment of FIR when no cognizable offence was made out from contents of same--There was no need to direct petitioners to first file a petition u/S. 249-A of Cr.P.C., before trial Court, which be a futile exercise--It was a case of civil nature for recovery of amount in question but complainant malafidely lodged FIR--It was a fit case to exercised discretion of High Court in favour of petitioners--Petition allowed. [Para 6] A, C & D

2000 SCR 122 & 1994 SCMR 798 *ref.*

Criminal Procedure Code, 1898 (V of 1898)--

----S. 561-A--Quashment of FIR--There is a difference between a case for quashment of FIR and a case for quashment of criminal proceedings--An FIR can be quashed under Article 199 of Constitution, if from bare reading B of FIR, no cognizable offence is made out in a case, and there is no need to evaluate evidence of prosecution collected by 1.0 during investigation. [Para 6] B

Ch. Babar Waheed, Advocate for Petitioners.

Nemo for Respondents No. 3 & 4

Mr. Ahsan Rasool Chatha, Assistant Advocate General for Respondent Nos. 1, 2 & 5.

Date of hearing: 7.3.2024.

JUDGMENT

Through this petition, the petitioners, namely, Sheikh Muhammad Zahir Seithi and Muhammad Imtisal seek quashment of the impugned FIR No. 1783 dated 12.08.2023 registered at Police Station Cantt, Sialkot offence under Section 406 of PPC.

2. As per police report, *Mst.* Ayesha Tayyab complainant/ Respondent No. 3, has duly been served with the notice of this case but no one is present on her behalf despite repeated calls with intervals. Even otherwise, it is a State case and the learned AAG is ready to argue the same, therefore, I proceed to decide the instant petition after hearing arguments of learned counsel for the petitioners, learned AAG and perusal of the documents annexed with the present petition.

3. Arguments heard. Documents annexed with the present petition have been perused.

4 As per brief allegations levelled in the FIR, on 17.03.2023, the petitioners, who were close relatives of the complainant came to the house of the complainant party situated in Sialkot city and requested them that some amount may be given to them as loan because they had suffered financial loss in their business. The petitioners further promised that they will return the abovementioned amount to the complainant party within a period of 2 months. On the abovementioned request of the petitioners, the husband of the complainant namely Tayyab brought an amount of Rs. 40,00,000/- and handed over the same to the complainant so that she may herself give the said amount to the petitioners. The complainant further alleged that she gave the abovementioned amount to the petitioners as trust with the promise that the petitioners will return the said amount to the complainant party. It is added that after two months, when the complainant party approached the petitioners for return of their amount, the petitioners started extending threats to the complainant party and refused to return the abovementioned amount, hence the above-referred FIR.

5. It has been argued by learned counsel for the petitioners that an identical FIR No. 2398 dated 31.08.2023, offence under Section 406 of PPC Police Station A-Division District Sheikhupura was lodged by one Bilal Sikandar, who was brother-in-law of the complainant of the present case namely *Mst.* Ayesha Tayyab and the said FIR has already been quashed by this Court *vide* judgment dated 22.11.2023. He added that the registration of instant FIR shows that two separate false FIRs have been lodged by the same family but Muhammad Shahbaz SI submits that he has no knowledge of the abovementioned relationship of the complainant of the present case with the complainant of abovementioned FIR No. 2398/2023, therefore, merits and demerits of above-referred arguments of learned counsel for the petitioners cannot be discussed.

6. In so far as merits of the instant case are concerned I have noted that there is neither any receipt nor any stamp paper available on the record regarding handing over of the abovementioned amount by the complainant to the petitioners. It does not appeal to a prudent mind that a huge amount of Rs. 40,00,000/- was handed over by the complainant to the petitioners without obtaining any document/ receipt/stamp paper from them. It is further noteworthy that as per contents of first part of the FIR, the petitioners demanded the amount in question as loan or trust but in the second part of the FIR it is alleged that the above mentioned amount was handed over by the

complainant to the petitioners as trust. Two self contradictory stances have been taken by the complainant while mentioning the amount in question in the FIR, as loan and trust. It appears that the word, "trust" has malafidely been used alongwith the word, loan in order to make it a criminal offence which was in fact a civil matter. It is by now well settled that by merely mentioning the word 'amanat (trust) in the contents of the FIR would not attract the provisions of Section 406 of PPC if otherwise, the ingredients of the said offence are not attracted in a case. Reference in this context may be made to the case of *'Miraj Khan vs Gul Ahmed and 3 others'* (2000 SCMR 122). Learned Assistant Advocate General has next argued that challan in this case has already been sent to the learned trial Court therefore, this petition may be dismissed with the direction to the petitioners to first file a petition under Section 249-A of Cr.P.C., before the learned trial Court for their acquittal in this case. In my humble view there is a difference between a case for quashment of FIR and a case for quashment of criminal proceedings. An FIR can be quashed under Article 199 of the Constitution, if from the bare reading of the FIR, no cognizable offence is made out in a case, and there is no need to evaluate the evidence of the prosecution collected by the I.O. during investigation. However, if from the contents of the FIR some cognizable offence is, prima facie, made out but it is claim of an accused that sufficient evidence is not available in the said case and there is no probability of his conviction, then the matter may be referred to the trial Court after submission of challan to evaluate under Section 249-A of Cr.P.C., that as to whether or not there is any probability of conviction of an accused on the basis of evidence collected in a case during investigation. As mentioned earlier, no offence under Section 406 of PPC is made out from the bare perusal of contents of the impugned FIR therefore, mere submission of challan before the learned trial Court ipso facto, does not create any absolute bar against the quashment of the FIR when no cognizable offence is made out from the contents of the same. No useful purpose shall be served by directing the petitioners to first avail the alternate remedy of moving a petition under Section 249-A Cr.P.C before the learned trial Court because in the instant case there is no probability of conviction and sentence of the petitioners in this case and there is no need to evaluate any evidence collected during the investigation of this case, hence further proceedings before the learned trial Court shall amount to abuse the process of the Court and the law. Reliance in this respect may be placed on the cases reported as *'Miraj Khan vs Gul Ahmed and 3 others'* (2000 SCMR 122) & *'The State vs Asif Ali Zardari and another'* (1994 SCMR 798). In the case of *"Miraj Khan" supra,* at page No. 3 the Hon'ble Supreme Court of Pakistan was pleased to observe as under:

> *"4. There is no absolute bar on the power of the High Court to quash an F.I.R. and it is not always necessary to direct the aggrieved person to first exhaust the remedy available to him under Section 249- A, Cr.P.C. It is caordinal principal of law that every criminal case should be adjudged on its facts. The*

facts of one case differ from the other and, therefore, no rule of universal application can be laid in a certain case so as to be made applicable to other cases. Even in the case reported in PLD 1997 SC 275, relied on by the learned counsel for the petitioner this principle has been recognized that the High Court in exceptional cases can exercise jurisdiction under Section 561-A, Cr.P.C without waiting for trial Court to pass orders under Section 249-A or 265-K Cr.P.C., if the facts of the case so warrant. The main consideration to be kept in view would be whether the continuance of the proceedings before the trial forum would be futile exercise, wastage of time and abuse of process of Court or not. If on the basis of facts admitted and patent on record no offence can be made out then it would amount to abuse of process of law to allow the prosecution to continue with the trail. If the facts of the present case are scrutinized on the touchstone of the above criteria then it would be obvious that the further proceedings in the Court on the basis of the impugned F.I.R. would be sheer wastage of time. It is admitted in the F.I.R. which is based on the written application of the complainant that the disputed amount was given as "Qarze-Hasna". It is obvious that the addition of word "Amanat" with "Qarze-Hasna" is ridiculous and appears to have been added so as to justify the registration of the criminal case. The cases relied on by the learned counsel for the caveator support the view taken by the High Court.

5. We are of the view that even on admitted facts no offence can be made out against the respondent as the dispute is entirely of civil nature which has been converted into criminal proceedings with ulterior motive. The High Court was, therefore, correct in quashment of the F.I.R. and no exception can be taken to the impugned order. Consequently, leave to appeal is refused and this petition is dismissed."

Under the circumstances, there is no need to direct the petitioners to first file a petition under Section 249-A of Cr.P.C., before the learned trial Court, which will be a futile exercise. At the most, it was a case of civil nature for the recovery of amount in question but the complainant malafidely lodged the FIR. It is a fit case to exercise the discretion of this Court in favour of the petitioners.

7. In the light of above, this petition is **allowed** and the impugned FIR No. 1783 dated 12.08.2023 registered at Police Station Cantt, Sialkot offence under Section 406 of PPC is hereby quashed.

(Y.A.) Petition allowed.

PLJ 2024 Cr.C. 449 (DB)

[Lahore High Court, Lahore]

Present: MALIK SHAHZAD AHMAD KHAN AND FAROOQ HAIDER, JJ

Mst. SHABANA KAUSAR--Appellant

versus

STATE--Respondent

Crl. A. No. 44164-J & M.R No. 118 of 2021, decided on 17.10.2023.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302/363--Qatl-i-amd--FIR registered--Supplementary statement--Recovery of the dead body--No direct evidence--Circumstantial evidence--Motive--Confession before police--Extra judicial confession--Medical evidence--DNA--Safe custody--Acquittal of--Complainant expressed his apprehension that someone had abducted his minor daughter, therefore, he lodged FIR u/S. 363 PPC, against unknown accused got recorded his supplementary statement on the same day--Appellant was arrested in this case--Appellant made disclosure and led to the recovery of the dead body of minor--There is no direct evidence and prosecution case hinges upon the circumstantial evidence--Appellant was admittedly the 3rd wife of complainant (PW-1)--Allegation against the appellant is that she committed the murder of minor aged about 06 years, who was the daughter from the 2nd wife of the complainant--No other witness of the prosecution including the parents of the deceased has stated the abovementioned motive while appearing in the witness box--Alleged confession of the appellant before the police while in custody qua the abovementioned second alleged motive is inadmissible in evidence--Motive alleged by the prosecution has not been proved--Appellant made extrajudicial confession before them, whereas, the other prosecution witness stated during his cross-examination that accused (appellant) was arrested by the police--At the date and time of alleged extrajudicial confession of the appellant--The appellant was already arrested by the police--There was no occasion for the appellant for making extrajudicial confession--Police officer is not a medical expert therefore, regarding the medical evidence, opinion of the Medical Officer is to be given preference--Medical Officer did not notice any injury on the entire body of minor (deceased) including her neck to establish that she was strangulated--Case of death of the deceased in this case was suffocation--Medical evidence has not supported the prosecution case--Room from where the dead body of minor Anaya Fatima was recovered was not under the exclusive possession of the appellant rather the same was also under the use of the complainant and the 3rd wife of the complainant--Wherefrom the dead body

was recovered was jointly owned, possessed and used by the complainant, his brother and three wives of the complainant--According to the evidence of Dr. (PW-6) the dead body was at the advance stage of putrifications as the same was swollen, skin was peeling off, small and large guts were coming out of genital orifice, the body colour was greenish black and foul small was also coming out of the dead body--PW-2 who is second wife of the complainant has made the appellant a scapegoat in this case of unseen occurrence due to her (appellant's) love marriage with the complainant as his third wife--The nylon sack was sent to PFSA after its recovery on the alleged pointing out and picking up of the said sack by the appellant--Neither nail swabs of the minor deceased nor hair recovered from the clothes of the deceased matched with the DNA profile of the appellant--Matching of the abovementioned swabs with the DNA profile of the appellant is of no avail to the prosecution--Recovery of the nylon sack (P-1) and its safe custody is also doubtful in this case--Safe custody of nylon sack (P-1) from stated place of recovery till its receipt in the office of PFSA has not been proved--If there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused--Prosecution has failed to prove its case against the appellant beyond the shadow of doubt--Set-aside her conviction and sentences recorded by the trial Court and acquit her of the charge by extending her the benefit of doubt.

[Pp. 452, 453, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465 & 466] A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X

2018 SCMR 2039; 2019 SCMR 608; 1995 SCMR 1345; 2009 SCMR 230 *ref.*

Circumstantial Evidence--

----In such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain a missing then its benefit must go to the accused. [P. 455] E

1992 SCMR 1047; 1996 SCMR 188; PLJ 1999 SC 1018; PLD 1956 FC 123; 2008 SCMR 1103 *ref.*

Extra Judicial Confession--

----Evidence of extrajudicial confession--Evidence of extrajudicial confession is a weak type evidence which can easily be procured in the cases of unseen occurrence to strengthen the weak prosecution case. [P. 459] K

PLD 2019 SC 64; 1996 SCMR 188; 2006 SCMR 231; 2011 SCMR 1233 *ref.*

Medical Evidence--

----Putrification--If a putrified body of advance stage was lying inside the residential room of a house and foul smell was also coming from the said dead body then as to why the presence of said foul smell and dead body in the house was not noticed by any other member of the complainant party, specially by the complainant who was living in the same room. [P. 463] R

2004 SCMR 197; PLD 2006 SC 538; 1985 SCMR 410; 1971 SCMR 756; PLD 1995 SC 516 *ref.*

Rai Zameer-ul-Hassan Kharal, Advocate for Appellant.

M/s. Munir Ahmad Sial, Deputy Prosecutor General & *Nuzhat Bashir*, Deputy Prosecutor General for State.

Mr. Ansar Shoaib, Advocate for Complainant.

Date of hearing: 17.10.2023.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall decide Criminal Appeal No. 44164-J of 2021, filed by *Mst.* Shabana Kausar appellant (through jail) against her conviction and sentence and Murder Reference No. 118 of 2021, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to *Mst.* Shabana Kausar (appellant). We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 28.06.2021 passed by the learned Sessions Judge, Hafizabad.

2. The appellant, namely, *Mst.* Shabana Kausar was tried in case FIR No. 486 dated 06.08.2020 registered at Police Station Sadar District Hafizabad, offences under Sections 363/302/201 of, PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 28.06.2021 has convicted and sentenced *Mst.* Shabana Kausar (appellant) as under: -

> ***Under Section 302(b), PPC*** *to 'Death' as Ta'zir for committing Qatl-i-Amd of minor Anaya Fatima (deceased). She was also ordered to pay Rs. 24,00,000/-(Rupees twenty four hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr.P.C., recoverable as arrears of land revenue and in default thereof, to further undergo simple imprisonment for six months.*

Under Section 201, PPC *to undergo 07 years R.I with fine of Rs. 100,000/-and in default thereof, to further undergo simple imprisonment for three months.*

3. Initially on the complaint (Exh.PA) of Liaqat Ali complainant (PW-1), FIR (Exh.PA/1) was lodged for offence under Section 363 of PPC, with the averments that he (Complainant) was resident of Ahmadpur Chatha District Hafizabad and an agriculturist by profession. On 05.08.2020 at 04:00 p.m., his (complainant's) daughter, namely, Anaya Fatima (deceased) aged about 06 years along with her mother, namely, *Mst.* Nabeela Bibi (PW-2) went to the cattle shed, where real brother of the complainant, namely, Riasat Ali (PW-4) was residing. *Mst.* Nabeela Bibi (PW-2) returned to her house after taking meat from the freezer, whereas, daughter of the complainant, namely, Anaya Fatima (deceased) kept on playing there. Minor Anaya Fatima (deceased) did not return to her house for some time, whereupon, the complainant along with Awais Babar (PW-3) and Tariq Hussain (given up PW) started to trace her out but she could not be found. The complainant expressed his apprehension that some one had abducted his minor daughter, therefore, he lodged FIR (Ex.PA/1) under Section 363, PPC, against unknown accused.

After registration of the FIR (Exh.PA/1) on 06.08.2020, Liaqat Ali complainant (PW-1) got recorded his supplementary statement (Exh.PB) on the same day *i.e.*, on 06.08.2020 by alleging that he (complainant) was standing in front of his '*havaili'* in order to trace out minor Anaya Fatima and in the meanwhile, his (complainant's) brother, namely, Riasat Ali (PW-4) and his (complainant's) nephew, namely, Awais Babar (PW-3) came there, one after the other, who told the complainant that second wife of the complainant, namely, *Mst.* Shabana alias Rani (appellant) confessed before them (PW-3 & PW-4) that she (appellant) had committed the murder of minor Anaya Fatima and had hidden her dead body. She (appellant) requested them (PW-3 & PW-4) to get herself pardoned.

The complainant also introduced the motive through the aforementioned supplementary statement/application (Exh.PB), while stating that his second wife, namely, *Mst.* Shabana Kausar (appellant) used to quarrel with his first wife, namely, *Mst.* Nabeela (PW-2) (real mother of minor Anaya Fatima

deceased) and that was the motive behind the occurrence. On the basis of aforementioned supplementary statement/application (Exh.PB), offences under Sections 302/201 of, PPC were added in this case.

4. *Mst.* Shabana Kausar (appellant) was arrested in this case on 06.08.2020 by Hafiz Ghulam Shabbir, Sub Inspector (PW-10). On 06.08.2020, appellant made disclosure and led to the recovery of the dead body of minor Anaya Fatima (deceased) *vide* recovery memo. (Exh.PC). After completion of investigation, report under Section 173 of Cr.P.C., was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 12.11.2020 to which she pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced twelve witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PP).

6. The statement of *Mst.* Shabana Kausar (appellant) under Section 342 of Cr.P.C. was recorded by the learned trial Court. *Mst.* Shabana Kausar (appellant) refuted the allegations levelled against her and professed her innocence.

The appellant neither opted to make her statement on oath as envisaged under Section 340 (2), Cr.P.C., nor produced any evidence in her defence.

The learned trial Court *vide* its judgment dated 28.06.2021 found *Mst.* Shabana Kausar (appellant) guilty, convicted and sentenced her as mentioned and detailed above.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and she has falsely been implicated in this case by the complainant party being in league with the local police; that *Mst.* Nabeela Bibi (PW-2) who is second wife of the complainant and real mother of the minor deceased was annoyed with the appellant due to her love marriage with the complainant as his third wife therefore, she (*Mst.* Nabeela Bibi PW-2) with the help of her other family members has made the appellant a scapegoat in this unseen occurrence; that the prosecution case hinges upon a very weak and unreliable circumstantial evidence; that no motive was alleged by the

complainant in the contents of the FIR and the motive subsequently introduced by the prosecution through supplementary statement of the complainant has not been proved in this case through any reliable evidence; that evidence regarding the alleged extrajudicial confession of the appellant made before Awais Babar (PW-3) and Riasat Ali (PW-4) is also not worthy of reliance because according to the statements of the abovementioned witnesses, *Mst.* Shabana Kausar (appellant) made extrajudicial confession before them on 06.08.2020 at 03:30 p.m., whereas, according to the statement of Liaqat Ali complainant (PW-1), the appellant was arrested in this case by the police on 06.08.2020 at 12:00 noon and as such, at the time and date of alleged extrajudicial confession of the appellant before the abovementioned PWs, she was already in police custody; that both the abovementioned witnesses of extrajudicial confession have admitted that they did not try to apprehend the appellant at the time of making of extrajudicial confession which is against the natural human conduct; that it is a common practice in our society that the evidence of extrajudicial confession is usually concocted by the prosecution in the cases of unseen occurrences to strengthen its weak case; that medical evidence has not supported the prosecution case because according to the prosecution case, *Mst.* Shabana Kausar (appellant), before committing the murder of minor Anaya Fatima (deceased), gave beating to her and also threw her on the ground but Dr. Anam Zafar (PW-6) did not notice any injury on the entire body of the minor deceased; that according to the prosecution case, the appellant committed the murder of minor Anaya Fatima while putting her head in a water bucket but no water bucket has been recovered in this case; that the recovery of dead body on pointing out of the appellant from the almirah of her house is also not reliable because in the same house, Liaqat Ali complainant (PW-1), as well as, *Mst.* Nabeela Bibi (PW-2), Riasat Ali (PW-4) and other family members were also residing; that key of the abovementioned almirah was not produced by the appellant therefore, the locks were broken to recover the dead body of minor Anaya Fatima (deceased); that positive report of PFSA regarding presence of DNA profile of the appellant on the nylon sack, wherefrom the dead body of minor Anaya Fatima was recovered, is of no avail to the prosecution because the said nylon sack was sent to the office of PFSA after the appellant was forced to get recovered and pick the said sack from the almirah of her house; that safe

custody of the abovementioned sack has also not been proved in this case; that even otherwise, mere recovery of dead body on pointing out of the appellant, by itself, is not sufficient to sustain conviction of the appellant under the capital charge in absence of other reliable corroborative evidence; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and she may be acquitted from the charges.

8. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has produced convincing and reliable circumstantial evidence against the appellant therefore, she was rightly convicted and sentenced by the learned trial Court; that motive of the prosecution has also been proved in this case through trustworthy evidence of the prosecution witnesses who stated that the appellant committed the murder of minor Anaya Fatima as she (appellant) used to quarrel with the mother of the minor deceased and it was also brought on the record that minor Anaya Fatima used to break and steal away the toys of the son of the appellant and due to this grudge, she (appellant) committed her murder; that according to the inquest report (Exh.PK), there were injuries on the body of minor Anaya Fatima (deceased) and clotted blood was also present in the ears and nostrils of the deceased which supports the prosecution case that minor Anaya Fatima (deceased) was firstly beaten by the appellant and thereafter, she was murdered by her; that recovery of dead body of minor Anaya Fatima (deceased) on pointing out of the appellant from the almirah situated in her room is a very strong piece of corroborative evidence against the appellant and the said evidence could not be shaken during the cross-examination of the witnesses of abovementioned recovery; that the positive report of PFSA (Exh.PF/3) regarding the presence of DNA profile of the appellant on the nylon sack wherefrom the dead body of minor Anaya Fatima (deceased) was recovered has further corroborated the prosecution case against the appellant; that the appellant also made extrajudicial confession before Awais Babar (PW-3) and Riasat Ali (PW-4) and the obliging statement of Liaqat Ali complainant (PW-1), who is also the husband of the appellant, regarding the time of arrest of the appellant is of no avail to the appellant because Hafiz Ghulam Shabbir Sub

Inspector/I.O (PW-10) has categorically stated that the appellant was arrested on 06.08.2020 at 05:30 p.m.; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

9. Arguments heard. Record perused.

10. The detail of the prosecution case as set forth by the complainant in the FIR (Exh.PA/1) and in the supplementary statement/application of the complainant (Exh.PB), has already been given in para No. 3 of this judgment therefore, there is no need to repeat the same.

11. Since there is no direct evidence and prosecution case hinges upon the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as *'Ch. Barkat Ali vs. Major Karam Elahi Zia and another '* (1992 SCMR 1047), *'Sarfraz Khan vs. The State'* (1996 SCMR 188) and *'Asad ullah and another vs. The State'* (PLJ 1999 SC 1018). In the case of *"Ch. Barkat Ali"* (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:

> *"... Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj vs. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused."*

In the case of "Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:

> *"7 .... It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches*

the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence."

Further reliance in this context is placed on the case of *'Altaf Hussain vs. Fakhar Hussain and another'* (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

"7 .... Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

Keeping in view the parameters, laid down in the above-mentioned judgments, we proceed to decide this case.

12. It is noteworthy that *Mst.* Shabana Kausar (appellant) was admittedly the 3rd wife of Liaqat Ali complainant (PW-1). Allegation against the appellant is that she committed the murder of minor Anaya Fatima aged about 06 years, who was the daughter from the 2nd wife of the complainant, namely, *Mst.* Nabeela Bibi (PW-2). On the other hand, it is stance of learned counsel for the appellant that *Mst.* Nabeela Bibi (PW-2) who is second wife of the complainant and real mother of the minor deceased was annoyed with the appellant due to her love marriage with the complainant as his third wife, therefore, the appellant has been made a scapegoat in this case of unseen occurrence. We have noted that in order to prove its case, the prosecution has produced different pieces of circumstantial evidence.

i) Motive.

ii) Evidence of extrajudicial confession of the appellant before Awais Babar (PW-3) & Riasat Ali (PW-4).

iii) Medical Evidence & reports of PFSA regarding visceras of the deceased.

iv) Recovery of dead body of minor Anaya Fatima on pointing out of the appellant.

v) DNA test report.

I. Motive.

13. Insofar as the motive part of the prosecution case is concerned, it is noteworthy that no motive whatsoever, was alleged in the contents of the FIR (Exh.PA/1) which was lodged on the next day of the occurrence as the occurrence in this case took place on 05.08.2020, whereas, the FIR (Exh.PA/1) was lodged against unknown accused on 06.08.2020. Liaqat Ali complainant (PW-1) however, introduced motive through his supplementary statement which was made on the day of registration of FIR, *i.e.*, on 06.08.2020, wherein he alleged that his 3rd wife, namely, *Mst.* Shabana Bibi (appellant) used to quarrel with his 2nd wife, namely, *Mst.* Nabeela Bibi (PW-2) and due to this grudge, *Mst.* Shabana Kausar (appellant) committed the murder of minor Anaya Fatima. It is an admitted fact that *Mst.* Nabeela Bibi (PW-2) has also a son from her wedlock with the complainant apart from minor Anaya Fatima (deceased) therefore, if the appellant wanted to teach a lesson to *Mst.* Nabeela Bibi (PW-2) due to the abovementioned grudge, then her son should have been the target of the appellant. It is also an admitted fact that the appellant has herself a son from the abovementioned wedlock. We have further noted that in order to prove the abovementioned alleged motive, the star witness in this case was *Mst.* Nabeela Bibi (PW-2) but while appearing in the witness box, said *Mst.* Nabeela Bibi (PW-2) did not utter a single word regarding the abovementioned motive that the appellant ever quarreled with her. It is true that Liaqat Ali complainant (PW-1) while appearing in the witness box has stated that the appellant used to quarrel with his other wife, namely, *Mst.* Nabeela (PW-2) but if the abovementioned subsequently introduced motive is presumed to be correct then, under the circumstances, it was *Mst.* Nabeela Bibi (PW-2), who should have been the prime target of the appellant. There is no allegation by Liaqat Ali complainant (PW-1) or by any other family member of the complainant party that minor Anaya Fatima ever teased or quarreled with the appellant. We have further noted that Hafiz Ghulam Shabbir, Sub Inspector (PW-10), who was the Investigating Officer of this case, stated that the appellant confessed before him (while in custody) that as minor Anaya Fatima deceased used to come to her room and break, as well as, steal the toys of her son therefore, she committed her murder but as mentioned earlier, no other witness of the prosecution including the

parents of the deceased has stated the abovementioned motive while appearing in the witness box. Furthermore, the alleged confession of the appellant before the police while in custody qua the abovementioned second alleged motive is inadmissible in evidence. Moreover, the prosecution evidence qua the motive is self-contradictory because Liaqat Ali complainant (PW-1) alleged the motive of quarrel of the appellant with his second wife, whereas, Hafiz Ghulam Shabbir Inspector (PW-10) alleged a different motive of breaking and stealing of toys of the son of the appellant by the minor deceased. We are therefore, of the view that the motive alleged by the prosecution has not been proved in this case.

II. EVIDENCE OF EXTRAJUDICIAL CONFESSION.

14. Insofar as the evidence of extrajudicial confession of *Mst.* Shabana Kausar (appellant) before Awais Babar (PW-3) and Riasat Ali (PW-4) is concerned, we have noted that both the abovementioned witnesses stated that on 06.08.2020 they were present in the house of Riasat Ali (PW-4). In the meanwhile, *Mst.* Shabana Kausar (appellant) came there and made extrajudicial confession that she had committed the murder of minor Anaya Fatima and she could get recovered her dead body. No time, date and place were mentioned by the abovementioned prosecution witnesses that as to when and where the appellant committed the murder of minor Anaya Fatima, according to her extrajudicial confession. Even the manner of occurrence was not disclosed by the abovementioned witnesses of extrajudicial confession that as to how the appellant committed the murder of minor Anaya Fatima deceased. We have further noted that the abovementioned prosecution witnesses were closely related to the complainant being maternal nephew and real brother of the complainant, respectively. They were two male adult members of the complainant party. On the other hand, *Mst.* Shabana Kausar (appellant) was alone and she was a female but both the abovementioned prosecution witnesses did not try to apprehend the appellant so that she may be handed over to the complainant or to the police. Statement of Awais Babar (PW-3) in this respect reads as under:-

> *"After alleged extrajudicial confession by Shabana Kausar, I and Riasat Ali did not try to catch her."*

The conduct of abovementioned witnesses is highly unnatural. It is also noteworthy from the statements of abovementioned witnesses of extrajudicial confession that the appellant made extrajudicial confession before them on 06.08.2020 at 03:30 p.m., whereas, the other prosecution witness, namely, Liaqat Ali complainant (PW-1) stated during his cross-examination that Shabana Kausar accused (appellant) was arrested by the police on 06.08.2020 at 12:00 noon. Relevant parts of the statements of the abovementioned witnesses in this respect read as under:

Awais Babar (PW-3).

> *"On 06.08.2020, I and Riasat Ali PW were sitting in verandah of Riasat Ali's House. Shabana Kausar accused came to us at about 03:30 p.m."*

Riasat Ali (PW-4).

> *"Shabana Kausar accused came to us at about 03:00/03:30/04:00 p.m."*

Liaqat Ali complainant (PW-1).

> *"Shabana Kausar accused was arrested by police on 06.08.2020 at about 12:00 noon."*

It is therefore, evident that at the date and time of alleged extrajudicial confession of the appellant given by Awais Babar (PW-3) and Riasat Ali (PW-4), the appellant was already arrested by the police, therefore, there was no occasion for the appellant to go to the house of Riasat Ali (PW-4) for making extrajudicial confession.

It is true that Hafiz Ghulam Shabbir Sub-Inspector/I.O (PW-10) has stated that *Mst.* Shabana Kausar (appellant) was arrested by him on 06.08.2020 at 05:30 p.m., but even regarding the time of arrest of the appellant, the prosecution evidence is self-contradictory because Liaqat Ali complainant (PW-1) has himself stated that the appellant was arrested by the police on 06.08.2020 at 12:00 noon. He was not got declared hostile by the prosecution. The prosecution has been heavily relying upon his other evidence qua the motive and recovery of dead body of the deceased. Furthermore, it is by now well settled that if a fact is capable of two interpretations then one favourable to the accused is to be

accepted. Liaqat Ali (PW-1) is the complainant of this case and he categorically mentioned the fact regarding the arrest of the appellant by the police as 06.08.2020 at 12:00 noon. Under the circumstances, there was no chance with the appellant to make extrajudicial confession before Awais Babar (PW-3) and Riasat Ali (PW-4) on 06.08.2020 at 03:30 p.m., when according to the statement of the complainant, she was already arrested by the police on 06.08.2020 at 12:00 noon. Moreover, it is by now well settled that evidence of extrajudicial confession is a weak type evidence which can easily be procured in the cases of unseen occurrence to strengthen the weak prosecution case. Reliance in this respect may be placed on the case of *'Mst. Asia Bibi vs. The State and others'* (PLD 2019 Supreme Court 64), wherein it was held as under:

> *"…. In this regard it is to be noted that this Court has repeatedly held that evidence of extra-judicial confession is a fragile piece of evidence and utmost care and caution has to be exercised in placing reliance on such a confession. It is always looked at with doubt and suspicion due to the ease with which it may be concocted. The legal worth of the extra-judicial confession is almost equal to naught, keeping in view the natural course of events, human behaviour, conduct and probabilities, in ordinary course."*

Similar view has been taken by the Hon'ble Supreme Court of Pakistan in the cases reported as *'Sarfraz Khan vs. The State and 2 others'* (1996 SCMR 188), *'Sajid Mumtaz and others vs. Basharat and others'* (2006 SCMR 231) & *'Hamid Nadeem vs. The State'* (2011 SCMR 1233).

Keeping in view all the abovementioned circumstances, we are of the view that evidence of extrajudicial confession brought on the record by the prosecution through Awais Babar (PW-3) and Riasat Ali (PW-4) is not worthy of reliance.

III. MEDICAL EVIDENCE and PFSA REPORTS RGARDING VISCERAS OF THE DECEASED.

15. Insofar as the medical evidence of the prosecution case is concerned, we have noted that according to the prosecution case, *Mst.* Shabana Kausar (appellant) committed the murder of minor Anaya Fatima after giving her beating, throwing her on the ground and drowning her head in a water bucket.

Medical evidence does not show the presence of any water in the lungs or in the stomach or in any other organ of the deceased. Likewise, no mark of violence was noted on the entire body of the deceased by the Medical Officer to support the prosecution case that the appellant first gave beating to the minor deceased, threw her on the ground and thereafter, committed her murder. Although learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant has argued that as per inquest report (Exh.PK), there were injuries on the neck and head of the minor deceased and there was also clotted blood in the nostrils and ears of the minor deceased but as mentioned earlier, no such injury or clotted blood on the entire body of the deceased was noticed by Dr. Anam Zafar (PW-6) at the time of her postmortem examination. It is by now well settled that the police officer is not a medical expert therefore, regarding the medical evidence, opinion of the Medical Officer is to be given preference.

Learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant has further argued that according to the final opinion of the Medical Officer, the cause of death of the minor deceased was suffocation but we have noted that even the said opinion does not support the prosecution case because according to the prosecution evidence the cause of death of the minor deceased was drowning and not suffocation as according to the prosecution case, the appellant committed the murder of minor Anaya Fatima while putting her head in the water bucket. It is further noteworthy that the Medical Officer did not notice any injury on the entire body of minor Anaya Fatima (deceased) including her neck to establish that she was strangulated by the appellant. We have further noted that initially, the Medical Officer kept her opinion pending regarding the cause of death of the deceased till the receipt of PFSA report. Relevant part of her statement in this respect reads as under:

> *"Nothing could be said at the time of postmortem examination, hence, final opinion was with-held till the receipt of reports of viscera from PFSA."*

However, after the receipt of the report of PFSA, she gave the abovementioned opinion that the cause of death of the deceased in this case was suffocation. We are unable to understand that as to how the Medical Officer has given the abovementioned opinion when she did not note any injury on the neck of the

deceased and kept her opinion pending till the receipt of report of PFSA regarding visceras of the deceased and when nothing incriminating was detected in the visceras of the deceased or mentioned in the report of PFSA (Exh.PF/3).

Keeping in view all the abovementioned facts, we have come to this irresistible conclusion that the medical evidence has not supported the prosecution case.

IV. RECOVERY OF DEAD BODY OF THE DECEASED ON POINTING OUT OF THE APPELLANT.

16. Insofar as the recovery of dead body of the deceased on pointing out of the appellant from the almirah situated in her residential room is concerned, we have noted that *Mst.* Nabeela Bibi (PW-2) has categorically stated that she was also living in the house of the complainant, where *Mst.* Shabana Kausar (appellant) was residing however, she (PW-2) was living on the 1st floor, whereas, *Mst.* Shabana Kausar (appellant) was living on the ground floor. She further stated that the said house was jointly owned by the complainant and his brother Riasat Ali (PW-4). Relevant part of her statement in this respect is reproduced hereunder for ready reference:-

> *"I and Shabana Kausar accused had been living in the same house with the complainant i.e. I on first floor while Shabana Kausar accused on ground floor of the house while Mst. Safia Bibi lives in the Haveli of complainant. Distance between the house and Haveli of the complainant is one Acre. The said Haveli and houses are co-owned by complainant Liaqat and his brother Riasat Ali PW."*

Mst. Nabeela Bibi (PW-2) also stated during her cross-examination that 3rd wife of the complainant, namely, *Mst.* Safia Bibi also used to use the household articles of Liaqat Ali complainant, kept in his room. She further clarified that household articles of Liaqat Ali complainant lying in the room of *Mst.* Shabana Kausar accused (appellant) were also used by *Mst.* Shafia Bibi, the other wife of the complainant. Relevant part of her statement in this respect reads as under:-

> *"The house hold articles of Liaqat Ali kept in his room were also used by Mst. Safia Bibi other wife. The house hold articles of Liaqat Ali complainant lying in the room of Shabana Kausar accused were also used by Mst. Safia Bibi other wife of complainant."*

It is therefore, evident from the perusal of the abovementioned evidence that room from where the dead body of minor Anaya Fatima was recovered was not under the exclusive possession of the appellant rather the same was also under the use of the complainant and the 3rd wife of the complainant, namely, *Mst.* Safia Bibi. It has also been brought on the record during the prosecution evidence that the abovementioned house wherefrom the dead body was recovered was jointly owned, possessed and used by the complainant Liaqat Ali (PW-1), his brother Riasat Ali (PW-4) and three wives of the complainant, namely, *Mst.* Shabana Kausar (appellant), *Mst.* Nabeela Bibi (PW-2) and third wife of the complainant, namely, *Mst.* Safia Bibi. We have further noted that almirah from where the dead body of minor Anaya Fatima was recovered while packed in a nylon sack was locked at the time of alleged recovery and key of the abovementioned lock was neither under the possession of the appellant nor the same was produced before the police by the appellant. According to the prosecution's own case, locks of the abovementioned almirah were broken and thereafter, sack containing dead body of the minor deceased was recovered from the said almirah. Abovementioned fact also shows that the almirah was not under the exclusive possession of the appellant.

It is also important to note that according to the evidence of Dr. Anam Zafar (PW-6) the dead body was at the advance stage of putrifications as the same was swollen, skin was peeling off, small and large guts were coming out of genital orifice, the body colour was greenish black and foul small was also coming out of the dead body. Relevant part of the evidence of Dr. Anam Zafar (PW-6) is reproduced hereunder for ready reference:

> *"The dead body was foul smelling. Eyes and tongue protruded. Body was swollen. Skin was peeling off. Small gut and large gut coming out of genital orifices. The colour of dead body was greenish black. No sign of any physical assault and torture."*

Under the circumstances, it is not understandable that if a putrified body of advance stage was lying inside the residential room of a house and foul smell was also coming from the said dead body then as to why the presence of said foul smell and dead body in the house was not noticed by any other member of the complainant party, specially by the complainant who was living in the same

room along with the appellant being her husband wherefrom the dead body of the deceased was recovered. Moreover, mother of the deceased, namely, *Mst.* Nabeela Bibi (PW-2) was also living in the upper story of the same house and she admitted that third wife of the complainant, namely, *Mst.* Safia used to use the household articles lying in the room of the appellant. She also admitted that the house of recovery of dead body of the deceased was jointly owned by her husband Liaqat Ali (PW-1) and his brother Riasat Ali (PW-4). None of them stated that they ever felt any foul smell in the abovementioned house/room. All these facts have also created doubt about the prosecution evidence qua the recovery of dead body of the deceased from the abovementioned place.

Moreover, we have already disbelieved the prosecution evidence of extrajudicial confession, medical evidence and motive therefore, the appellant cannot be convicted and sentenced merely on the basis of alleged recovery of dead body of the deceased on her pointing out which is only a corroborative piece of evidence. Reference in this respect may be made to the case of *"Muhammad Aslam vs. Muhammad Shafique and another"* (2004 SCMR 197), wherein the Hon'ble Supreme Court of Pakistan at page Nos. 443 and 444 was pleased to observe as under:

> *"It is reflected from the record that dead body of the deceased was found from the house at the pointation of respondent No. 1 Muhammad Shafique which was in joint possession of the parties.* ***There is no evidence on record that the house was in his exclusive possession. Apart from this, there is no incriminating evidence against respondent No. 1 except that the dead body was recovered at his pointation****. In these circumstances, since there is no other incriminating material available on record against respondent No. 1 and the learned counsel for the petitioner in spite of our repeated queries has failed to point out any legal infirmity in the impugned judgment, warranting interference by this Court. Resultantly for the foregoing discussion, the instant petition being without any force is dismissed and leave refused."*

(Underlining and bold is supplied for emphasis).

Similarly in the case of *"Abdul Mateen vs. Sahib Khan and others"* (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:

> *"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410."*

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of *"Muhammad Yaqub vs. The State"* (1971 SCMR 756), and *"Nek Muhammad and another vs. The State"* (PLD 1995 Supreme Court 516).

V. DNA TEST REPORT.

17. It is true that as per DNA test report (Exh.PF/3) DNA profile of swabs taken from the neck of nylon sack, wherefrom the dead body of minor deceased was recovered, have matched with the DNA profile of the appellant however, the said swabs contained the DNA profile of at least three individuals. We have further noted that it is claim of learned counsel for the appellant that *Mst.* Nabeela Bibi (PW-2) who is second wife of the complainant has made the appellant a scapegoat in this case of unseen occurrence due to her (appellant's) love marriage with the complainant as his third wife. It is also argued by learned counsel for the appellant that in fact, the appellant was forced by the complainant party to pick up the nylon sack lying in the almirah of the joint house of the parties. We have however, noted that it is not a case where the articles were recovered and sent to the PFSA for DNA test without touching the said articles by the accused. In that case the positive DNA report may be relevant but in the instant case, the nylon sack was sent to PFSA after its recovery on the alleged pointing out and picking up of the said sack by the appellant. It is further noteworthy that neither nail swabs of the minor deceased nor hair recovered from the clothes of the deceased matched with the DNA profile of the appellant. Under the circumstances, there is force in the argument of learned counsel for the appellant that as the appellant was forced to get nylon sack recovered from her house after picking the same and the nylon sack was sent to PFSA after its

recovery therefore, matching of the abovementioned swabs with the DNA profile of the appellant is of no avail to the prosecution.

It is further noteworthy that recovery of the nylon sack (P-1) and its safe custody is also doubtful in this case because there is nothing on record to show that parcel of nylon sack (P-1), was prepared at the spot at the time of its alleged recovery. It is case of the prosecution through Muhammad Arshad (PW-5) that the abovementioned nylon sack along with last worn clothes of the deceased, etc was handed over to the police by the Medical Officer after conducting the postmortem examination on the dead body of Anaya Fatima (deceased) and at that time its parcel was prepared but the Medical Officer (Dr. Anam Zafar PW-6) has not stated that she handed over the nylon sack (P-1) to the police after postmortem examination on the dead body of the deceased though she stated about handing over of last worn clothes of the deceased etc. The abovementioned fact was also not mentioned in the postmortem report of the deceased (Exh.PF) that the Medical Officer, after postmortem examination, handed over nylon sack (P-1) to the police. Under the circumstances, safe custody of nylon sack (P-1) from stated place of recovery till its receipt in the office of PFSA has not been proved in this case therefore, no reliance can be placed on the abovementioned positive report of PFSA (Exh.PF/3), as observed by the Hon'ble Supreme Court of Pakistan in the cases reported as *'The State through Regional Director ANF vs. Imam Bakhsh and others'* (2018 SCMR 2039) & *'Abdul Ghani and others vs. The State and others'* (2019 SCMR 608).

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of *"Tariq Pervez vs. The State"* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:

> *"5……..The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating*
>
> *doubts. If there is a 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."*

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *"Muhammad Akram vs. The State"* (2009 SCMR 230), at page 236, observed as under:-

> *"13……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."*

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No. 44164-J of 2021 filed by *Mst.* Shabana Kausar appellant, set aside her convictions and sentences recorded by the learned trial Court and acquit her of the charges by extending her the benefit of doubt. Resultantly, Murder Reference No. 118 of 2021 is answered in the negative. The appellant *Mst.* Shabana Kausar is in custody, she be released from the jail forthwith if not required to be detained in any other case.

(K.Q.B.) Appeal accepted.

2023 M L D 1769

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MURTAZA alias MURTI and another---Appellants

Versus

THE STATE---Respondent

Criminal Appeal No. 78948-J of 2019, decided on 23rd November, 2022.

(a) Criminal trial---

----Injured witness---Scope---Mere injuries on the bodies of the prosecution witnesses do not mean that they are stating the whole truth and their evidence is to be relied upon or discarded while keeping in view the other facts and circumstances of a particular case.

Muhammad Pervez and others v. The State and others 2007 SCMR 670 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appreciation of evidence---Benefit of doubt---Ocular account and medical evidence---Contradiction---Accused were charged that they along with their co-accused made firing upon the complainant party, due to which, father, brother and uncle of the complainant were hit and died while three other persons sustained injuries---Ocular account of the prosecution was furnished by complainant and two other witnesses---There was conflict between the ocular account as set forth in the FIR and statements of the said witnesses recorded by the police and medical evidence brought on the record by the prosecution through Medical Officers---According to the contents of the FIR accused made a fire shot with his 44 bore rifle, which landed on the right side of the head of brother of complainant/deceased and made its exit from the other side but according to the evidence of Medical Officer in post mortem report injury No.2 on the right side of the head was an exit wound whereas injury No.1, which was an entry wound, was on the left side of head of deceased---Other accused was assigned the role of making first fire shot which landed on the right side of the chest of deceased/father of complainant and thereafter he made second fire shot, which landed near the right armpit of the said deceased---Although, there was an entry wound on the right side of the chest of deceased i.e. injury No.3 but injury under the right armpit of the deceased i.e. injury No.6 was an exit wound and as such there was also conflict between the ocular account of the

prosecution as mentioned in the FIR, in the statements of the prosecution witnesses recorded by the police and in the medical evidence, which had created doubt in the prosecution case---Circumstances established that the prosecution had failed to prove its case against the accused persons beyond any shadow of doubt--- Appeal against conviction was allowed, in circumstances.

Saeedullah Khan v. The State 1986 SCMR 1027 and Muhammad Ashraf v. The State 2000 PCr.LJ 2021 ref.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appreciation of evidence---Benefit of doubt---Dishonest improvements made by the witnesses---Accused were charged that they along with their co-accused made firing upon the complainant party, due to which, father, brother and uncle of the complainant were hit and died while three other persons sustained injuries---In the present case, in order to bring their evidence in line with the medical evidence, the complainant and the witnesses while filing the private complaint and appearing before the Trial Court made dishonest improvements in their statements and changed the roles and seats of injuries attributed to both the accused---Said witnesses were confronted with their previous statements and dishonest improvements made by them were duly brought on the record---It was evident from the perusal of evidence that the prosecution witnesses made dishonest improvements in their statements while appearing in the witness box in order to bring their statements in line with the medical evidence---Circumstances established that the prosecution had failed to prove its case against the accused persons beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Akhtar Ali and others v. The State 2008 SCMR 6 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appreciation of evidence---Benefit of doubt---Co-accused acquitted on the basis of same evidence on which accused convicted---Accused were charged that they along with their co-accused made firing upon the complainant party, due to which, father, brother and uncle of the complainant were hit and died while three other persons sustained injuries---Record showed that the complainant party implicated as many as eleven (11) accused persons in this case and out of the said eleven (11) accused, two co-accused died during the pendency of the trial before the Trial Court, whereas the remaining seven (07) accused had already

been acquitted by the Trial Court---Prosecution had conceded that no appeal against the acquittal of seven accused had been filed either by the State or by the complainant---In the given circumstances, it was to be determined by the Court as to whether the same prosecution evidence, which had been disbelieved against the co-accused could be believed against the present accused and as to whether there was any independent corroboration of the prosecution evidence against the present accused---In such respect, case of one of the co-accused (since acquitted) was at par with the case of both the present accused because the said co-accused was assigned the role of making first fire shot, which landed on the back side of the chest near neck of deceased/uncle of complainant and in the post mortem report the said injury i.e. injury No.1 was available on the back side of the chest near neck of deceased---Said co-accused was also assigned the role of making second fire shot, which landed on the left leg and knees of injured and according to the medical evidence the said injury was also available as injury No.1 on the left leg of injured but the said co-accused had been acquitted by the Trial Court, which acquittal had attained finality---Although prosecution tried to distinguish the case of both the present accused with the case of acquitted co-accused on the ground that the said co-accused was declared innocent during the police investigation whereas the present accused had been found guilty---However, police opinion after recording of evidence by the Trial Court became irrelevant and the present accused could not be convicted and sentenced merely on the basis of said opinion in absence of any other independent corroborative piece of evidence---As the prosecution evidence had already been disbelieved against seven acquitted co-accused, therefore the same evidence could not be believed against the present accused without independent corroboration, which was very much lacking in the present case---Circumstances established that the prosecution had failed to prove its case against the accused persons beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Muhammad Ahmad (Mahmood Ahmad) and another v. The State 2010 SCMR 660; Akhtar Ali and others v. The State 2008 SCMR 6; Muhammad Akram v. The State 2012 SCMR 440; Muhammad Ali v. The State 2015 SCMR 137 and Ulfat Husain v. The State 2018 SCMR 313 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appreciation of evidence---Benefit of doubt---Weapons of offence recovered on the pointation of the accused---Reliance---Accused were charged that they along with their co-accused made firing upon the complainant party, due to which, father,

brother and uncle of the complainant were hit and died while three other persons sustained injuries---Prosecution alleged that no weapon was recovered from the possession of the acquitted co-accused, whereas rifles were recovered from both the present accused and as such case of the present accused was distinguishable from the case of acquitted co-accused---As per Forensic Science Agency Report the empties recovered from the spot did not match with the rifle recovered on the pointation of accused---Although according to Forensic Science Agency Report two empties recovered from the spot matched with the rifle recovered from the possession of accused but the rifle was recovered from the possession of accused on 23.06.2013 whereas the empties were deposited in the office of Forensic Science Agency on 10.07.2013, which meant that the empties and rifle were kept together at police station, therefore, it was not safe to rely upon the said piece of evidence of the prosecution---Under the said circumstances, there was no independent corroboration of the prosecution case through the said alleged recoveries of weapons of offence on the pointation of the accused persons---Circumstances established that the prosecution had failed to prove its case against the accused persons beyond any shadow of doubt--- Appeal against conviction was allowed, in circumstances.

Jehangir v. Nazar Farid and another 2002 SCMR 1986; Barkat Ali v. Muhammad Asif and others 2007 SCMR 1812; Mushtaq and 3 others v. The State PLD 2008 Supreme Court 1 and Mureed Hussain v. The State through Prosecutor-General Sindh 2014 SCMR 1689 rel.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appreciation of evidence---Benefit of doubt---Motive not proved---Accused were charged that they along with their co-accused made firing upon the complainant party, due to which, father, brother and uncle of the complainant were hit and died while three other persons sustained injuries---Record showed that general allegation in respect of the motive part of the prosecution case was leveled by the prosecution witnesses against the accused persons and their acquitted co-accused wherein they stated that few days earlier to the occurrence a quarrel took place between the complainant and the accused persons---Said motive was also alleged against the acquitted co-accused---No specific date, time and place of the quarrel of motive part of the occurrence had been mentioned by any prosecution witness---Moreover, the Trial Court had disbelieved the prosecution evidence qua the motive due to cogent reasons and as such there was no independent corroboration of the prosecution case against the accused with respect to the motive---Circumstances established that the prosecution

had failed to prove its case against the accused persons beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Akhtar Hussain Bhatti for Appellants who is absent today i.e. on 23.11.2022, however his arguments have already been heard on 22.11.2022.

Nisar Ahmad Virk, Deputy Prosecutor General for the State.

Muhammad Ramzan Nadeem Channer for the Complainant.

Date of hearing: 23rd November, 2022.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 78948-J of 2019, filed by Murtaza alias Murti and Muhammad Abbas alias Bagu (appellants), against their convictions and sentences in private complaint, in respect of offences under sections 302/324/148 and 149, P.P.C.

2. Initially on the complaint of Muhammad Ashfaq, complainant (PW-1) case FIR No.368, dated 08.06.2013, was registered at Police Station Saddar Depalpur, District Okara, in respect of offences under sections 302/324/148 and 149, P.P.C. but later on being dissatisfied with the police investigation, Muhammad Ashfaq complainant (PW-1) filed private complaint (Exh.PB) against the appellants and nine (09) others. The learned trial Court, after observing all the pre-trial codal formalities, framed charge under sections 302, 324, 148, 149, P.P.C. against the appellants and their acquitted co-accused on 02.04.2014, to which they pleaded not guilty and claimed trial. After conclusion of the trial, the learned trial Court (Additional Sessions Judge, Depalpur) vide its judgment dated 28.11.2019, has convicted and sentenced the appellants as under:-

> Murtaza alias Murti.
>
> Under section 302(b), P.P.C. to rigorous imprisonment for life. He was also ordered to pay Rs.4,00,000/- (rupees four hundred thousand only) to the legal heirs of Abdul Razzaq (deceased) as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.
>
> Muhammad Abbas alias Bagu.
>
> Under section 302(b), P.P.C. to rigorous imprisonment for life. He was also ordered to pay Rs.4,00,000/- (rupees four hundred thousand only) to the legal heirs of Muhammad Anwar (deceased)

as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

Benefit of section 382-B, Cr.P.C was also extended to the appellants.

However, vide the same judgment, co-accused namely Istafa alias Isti, Mumtaz alias Matti, Muhammad Hussain, Mustafa, Rehmat Ali, Sultan and Yasin were acquitted of the charges, whereas Allah Nawaz and Ghaffar, accused died during pendency of trial against them.

3. Brief facts of the case as given by the complainant in his private complaint (Exh.PB) are that he was employee at Army Stud Farm; that on 08.06.2013 there was marriage of one Muhammad Ikraam son of Jehangir. Muhammad Ashfaq, complainant (PW-1) along with his father Muhammad Anwar (deceased), brother Abdul Razzaq (deceased), uncle Muhammad Mushtaq (deceased), father-in-law Bashir Ahmad (given up PW), uncle Muhammad Altaf (PW-2) and cousin Safdar Hussain (PW-3), cousin Mazhar Sharif son of Shahmand (PW-8), uncle Muhammad Ishaq (given up PW) all Sial by caste were also invited on the said marriage and at about 04:00 p.m. were going by foot on road with the Barat of Ikraam towards the residence of Ahmad Ali son of Muhammad Sadiq caste Sial and when reached near Dhaari of Kumhaaran Wali, suddenly Muhammad Abbas alias Bagu (appellant), Yasin (co-accused since acquitted), Murtaza alias Murti (appellant) all armed with rifles .44 bore, Istfa alias Isti (co-accused since acquitted) armed with pump action gun .12 bore, Mustafa (co-accused since acquitted) armed with carbine .12 bore, Ghaffar (since died), Muhammad Hussain (co-accused since acquitted) persons armed with .12 bore guns, Mumtaz alias Munni (co-accused since acquitted) armed with pistol .30 bore, Allah Nawaz (co-accused since died), Rehmat Ali (co-accused since acquitted) and Sultan (co-accused since acquitted) all armed with fire arms, who all were hiding themselves besides the wall of Dhaari came in front of them. Rehmat Ali and Sultan (co-accused since acquitted) raised lalkara for teaching a lesson to Muhammad Anwar, etc. for quarreling with them upon which Muhammad Abbas alias Begu (appellant) made two fire shots with his rifle, which landed on the right and left side of chest of Muhammad Anwar (deceased) father of the complainant. Yasin (co-accused since acquitted) made fire shot with his rifle which landed on the right arm of Muhammad Anwar (deceased), who became seriously injured and fell on the ground. Murtaza alias Mufti (appellant) made fire shot with his rifle on Abdul Razzaq (deceased) brother of the complainant, which landed on the left side of his forehead. Mumtaz alias Munni (co-accused since acquitted) made fire shot with his pistol .30 bore which landed on the right thigh of Abdul Razzaq (deceased), who fell on the ground. After a while,

Muhammad Anwar, father and Abdul Razzaq, brother of the complainant succumbed to the injuries. Istfa alias Isti (co-accused since acquitted) made fire shot with his pump action gun, which landed on the back side of neck of Mushtaq Ahmad (deceased) uncle of the complainant. Second fire shot made by him landed on the left thigh of Safdar Hussain (PW-3). Ghaffar (co-accused since died) made a fire shot with his .12 bore gun which hit Bashir Ahmad (given up PW) on the left side of his chest. Muhammad Hussain (co-accused since acquitted) made a fire shot with .12 bore gun which landed at the right thigh of Muhammad Altaf (PW-2). Mustafa (co-accused since acquitted) made a fire shot with his carbine, which landed at the right thigh of Safdar Hussain (PW-3). Accused persons made indiscriminate firing due to which Yasin (co-accused since acquitted) also sustained minor injuries.

The motive behind the occurrence was that a few days prior to the occurrence a quarrel took place between the complainant party and the accused persons. Complainant party disgraced the accused persons, who nursed the grudge and on the day of occurrence when the complainant party was going with the Barat of Muhammad Ikraam and when they reached near Kumhaaran Wali Dhaari the accused persons who were sitting in ambush committed the occurrence.

4. In order to prove its case, the prosecution produced nine witnesses during the trial, whereas statements of seven CWs were also got recorded. The prosecution also produced documentary evidence in the shape of Exh.PA to Exh.PW and Exh.CW-1/A to Exh.CW-4/T/1.

5. The statements of the appellants and their co-accused under section 342 of Cr.P.C. were recorded. The appellants, refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" the appellants replied as under:-

> Ghulam Murtaza alias Marti
>
> "All the PWs are related inter se and with the deceased of this case. None of the independent person had supported false prosecution version. The alleged injured made their statements after considerable delay, which was an afterthought and concocted. During the course of investigation, the prosecution version was found false and baseless. During the course of investigation it was concluded by the I.O that the occurrence had not taken place in the manner as stated by the prosecution. Abdul Razzaq deceased of this case made fires in the Barat and one fire hit to Yasin accused of this case, upon which Ghafar

accused (since dead) also emerged at the spot and the Baraties and the said Ghafar exchanged indiscriminate firing inter-se which resulted into this occurrence. Neither I nor the other co-accused except Yasin, facing the trial was present at the place of occurrence at the time of occurrence, nor we were involved in this occurrence. The occurrence took place in front of the house of Yasin accused and his son Ghafar accused. The deceased party of this case were the aggressors. The complainant party had suppressed the true facts and falsely involved me and my co-accused while throwing a wide net and by fabricating a false and afterthought version. I was involved by the prosecution being the brother of Yaseen accused. However, I have not any nexus with the alleged occurrence. The Baraties including the Groom and his family members did not support the prosecution case. However the Baraties including Zulfiqar Ali son of Khushi Muhammad had also negated the prosecution case while appearing before the Investigating Officer. I was neither present at the place of occurrence at the time of occurrence, nor I was involved in this occurrence, I am innocent."

Muhammad Abbas alias Bagu

"All the PWs are related inter-se and with the deceased of this case. None of the independent person had supported false prosecution version. The alleged injured made their statements after considerable delay, which was an afterthought and concocted. During the course of investigation, the prosecution version was found false and baseless. During the course of investigation it was concluded by the I.O. that the occurrence had not taken place in the manner as stated by the prosecution. Abdul Razzaq deceased of this case made fires in the Barat and one fire hit to Yasin accused of this case; upon which Ghafar accused (since dead) also emerged at the spot and the Baraties and the said Ghafar exchanged indiscriminate firing inter-se which resulted into this occurrence. Neither I nor the other co-accused except Yasin, facing the trial was present at the place of occurrence at the time of occurrence, nor we were involved in this occurrence. The occurrence took place in front of the house of Yasin accused and his son Ghafar accused. The deceased party of this case were the aggressors. The complainant party had suppressed the true facts and falsely involved me and my co-accused while throwing a wide net and by fabricating a false and afterthought version. The Baraties including the Groom and his family members did not support the prosecution case. However the Baraties including Zulfiqar Ali son of Khushi Muhammad had also negated the prosecution case while appearing before the Investigating

Officer. I was neither present at the place of occurrence at the time of occurrence, nor I was involved in this occurrence, I am innocent."

Neither the appellants nor any of their acquitted co-accused opted to appear as their own witnesses on oath as provided under section 340(2) of the Code of Criminal Procedure, 1898 in disproof of the allegations leveled against them, however they produced two DWs in their defence evidence.

The learned trial Court vide its judgment dated 28.11.2019, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

6. It is contended by learned counsel for the appellants that the appellants are absolutely innocent and they have falsely been implicated in this case by the complainant being in league with the local police while using the wider net; that total eleven (11) accused persons were implicated in this case by the complainant party and out of the said eleven (11) accused persons, seven (07) co-accused have already been acquitted by the learned trial Court whereas two co-accused, namely Ghaffar and Allah Nawaz, died during the trial, hence the prosecution evidence, which has been disbelieved against the acquitted accused cannot be believed against the appellants without independent corroboration, which is very much lacking in this case; that although two (02) injured witnesses, namely Muhammad Altaf Hussain (PW-2) and Safdar Hussain (PW-3) appeared in the witness box but injuries on their bodies are not the stamp of their truth; that the prosecution case against the appellants has not been corroborated by the motive part of the prosecution story because a vague and general motive was alleged by the prosecution and the same has rightly been disbelieved by the learned trial Court; that the empties and weapons were kept together at police station, therefore, positive report of PFSA (Exh.PW) to the extent of gun recovered on the pointation of Murtaza alias Murti, appellant No.1 is inconsequential whereas according to PFSA report the empties recovered from the spot did not match with the rifle recovered on the pointation of Muhammad Abbas alias Bagu, appellant No.2; that there were contradictions in the ocular account as mentioned in the contents of the FIR and medical evidence of the prosecution to the extent of roles attributed to the appellants; that the prosecution witnesses made dishonest improvements in their statements while appearing before the learned trial Court, therefore, they are not worthy of reliance; that the learned trial Court has mainly convicted and sentenced the appellants and acquitting their co-accused while relying upon the police opinion, which was irrelevant after recording of prosecution evidence; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt, therefore,

the appeal filed by the appellants may be accepted and the appellants may be acquitted from the charges.

7. On the other hand, it is contended by the learned Deputy Prosecutor-General assisted by learned counsel for the complainant that the FIR in this case was promptly lodged wherein the appellants along with their co-accused were nominated while giving specific roles to both the appellants; that co-accused of the appellants were found innocent during police investigation and nothing was recovered from the possession of acquitted co-accused whereas the appellants were found guilty during the police investigation and weapons of offence were also recovered from their possession, therefore, acquittal of co-accused is of no avail to the appellants; that the prosecution case against the appellants is fully supported by the medical evidence and minor discrepancies between the ocular account and the medical evidence of the prosecution regarding the seats of injuries on the bodies of the deceased persons are inconsequential; that even the motive against the appellants has also been proved in this case through reliable and confidence inspiring evidence of the prosecution witnesses; that the prosecution case against both the appellants was further corroborated by the recoveries of weapons of offence on their pointation; that the prosecution witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that the learned trial Court has righty convicted and sentenced both the appellants, therefore, their appeal may be dismissed while maintaining their convictions and sentences. In support of his arguments learned counsel for the complainant has placed reliance on the judgments reported as "Saeedullah Khan v. The State" (1986 SCMR 1027) and "Muhammad Ashraf v. The State" (2000 PCr.LJ 2021).

8. Arguments heard. Record perused.

9. Prosecution story as set forth in the private complaint (Exh.PB), has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

10. It is true that two injured prosecution witnesses, namely Muhammad Altaf Hussain (PW-2) and Safdar Hussain (PW-3) appeared in the witness box in support of the prosecution case but it is by now well settled that mere injuries on the bodies of the prosecution witnesses does not mean that they are stating the whole truth and their evidence is to be relied upon or discarded while keeping in view the other facts and circumstances of a particular case. Reliance in this respect may be placed on the judgment reported as "Muhammad Pervez and others v. The State and others" (2007 SCMR 670). The Hon'ble Supreme Court of Pakistan at page 681 has held as under-

"It is also a settled law that injuries on P.W. only indication of his presence at the spot but is not informative prove of his credibility and truth. See said Ahmad's case 1981 SCMR 795".

11. The ocular account of the prosecution was furnished by Muhammad Ashfaq complainant (PW-1) Muhammad Altaf Hussain (PW-2) and Safdar Hussain (PW-3). I have noted that there was conflict between the ocular account as set forth in the FIR (Exh.CW-1/A) and statements of the abovementioned PWs (Exh.DA and Exh.DB recorded by the police and medical evidence brought on the record by the prosecution through Dr. Aadil Rasheed (PW-4 and PW-7) and Dr. Javed Akram (PW-5). According to the contents of the FIR (Exh.CW-1/A) Murtaza alias Murti, appellant No.1 made a fire shot with his 44 bore rifle, which landed on the right side of the head of Abdul Razzaq, deceased and made its exit from the other side but according to the evidence of Dr. Aadil Rasheed (P W-4) in post mortem report Exh.PD injury No.2 on the right side of the head was an exit wound whereas injury No.1, which was an entry wound, was on the left side of head of Abdul Razzaq, deceased. Muhammad Abbas alias Bagu, appellant No.2 was assigned the role of making first fire shot, which landed on the right side of the chest of Muhammad Anwar, deceased and thereafter he made second fire shot, which landed near the right armpit of the said deceased. Although there is an entry wound on the right side of the chest of Muhammad Anwar, deceased i.e. injury No.3 but injury under the right armpit of the deceased i.e. injury No.6 was an exit wound and as such there was also conflict between the ocular account of the prosecution as mentioned in the FIR (Exh.CW-1/A), in the statements of the prosecution witnesses recorded by the police Exh.DA and Exh.DB) and in the abovementioned medical evidence, which has created doubt in the prosecution case.

It is further noteworthy that in order to bring their evidence in line with the medical evidence, the complainant and the PWs while filing the private complaint (Exh.PB) and appearing before the learned trial Court made dishonest improvements in their statements and changed the roles and seats of injuries attributed to both the appellants. They were confronted with their previous statements and dishonest improvements made by them were duly brought on the record. The relevant parts of the said statements are reproduced hereunder for ready reference:-

Muhammad Ashfaq (PW-1)

".....I had got drafted in application Ex.PA that Abbas alias Bagho fired two shots with his rifle hitting my father Anwar on right and left side of chest. Confronted with application Ex.PA wherein the words "two fires

and left side of chest" are not recorded. I had not got recorded in my application Ex.PA that Mohammad Abbas alias Bagho made second fire with his rifle which landed underneath the right armpit. Confronted with Ex.PA where it is so recorded in portion A to A. It is incorrect that I have changed my stance regarding seat of injuries attributed to Abbas alias Bagho while recording my statement before court and deviated from my stance narrated of Ex.PA in order to make my statement in line with the post mortem examination after legal assistance. I had recorded in my application Ex.PA that Murtaza alias Murti accused fired with his rifle on my brother Abdul Razzaq hitting on his left forehead. Confronted with application Ex.PA wherein it is not so recorded. I had not sated in my application Ex.PA that Murtaza alias Murti accused made fire with his rifle on my brother Abdul Razzaq which landed on right side of head and made an exit underneath of left ear. Confronted with application Exh.PA wherein it is so recorded in portion B to B. It is incorrect I have changed my stance got recorded by me in Exh.PA while making my statement in the court just to make my statement in line with post mortem report of the deceased....."

Muhammad Altaf Hussain son of Muhammad Nosher (PW-2)

"..... .....I had stated in my statement Ex.DA that Muhammad Abbas alias Baghoo fired two shots hitting Mohammad Anwar on his chest on right and left side. Confronted with Exh.DA wherein on left side of chest is not mentioned. I had not stated in my statement Ex.DA that second fire made by Mohammad Abbas alias Baghoo landed on Mohammad Anwar deceased under his right arm-pit. Confronted with Ex.D.A, wherein it is so recorded in portion A to A. I had stated in my statement Exh.D.A. that Murtaza alias Murti fired with his rifle hitting Abdul Razzaq on his left forehead. Confronted with Ex.D.A wherein it is not so recorded. I did not state in my statement Ex.D.A. that Murtaza alias Murti made fire with his rifle at Abdul Razzaq which landed on right side of his head and made an exit from left ear. Confronted with Ex.D.A, wherein it is so mentioned in portion B to B. I had stated in my statement Ex.D.A that Istafa alias Isti accused fired with his pump action hitting Mushtaq Ahmad on the back of his neck. Confronted with Ex.D.A, wherein it is not so recorded in this sequence. I did not state in Exh.D.A that Istafa alias Isti made fire with his pumpaction which hit Mushtaq on the back of his chest and made an exit from the left side of his neck. Confronted with Ex.D.A. wherein it is not so recorded in this sequence. I did not state in Ex.DA that Istafa alias Isti made fire with his pump action which hit Mushtaq on the back

of his chest and made an exit from the left side of his neck. Confronted with Ex.DA wherein it is so mentioned in Portion C to C. I had stated in my statement Ex.D.A that second fire of Istafa alias Isti accused landed on left thigh of Safdar Hussain, Confronted with Ex.D.A, wherein it is not so recorded. I did not specifically stated in Ex.D.A. that second fire of Istafa alias Isti accused landed on left leg and left knee of Safdar Hussain. Confronted with Ex.D.A, wherein it is so recorded in portion D to D....."

Safdr Hussain (PW-3)

".....I had stated in my statement Ex.DB that Muhammad Abbas alias Baghoo fired two shots hitting Mohammad Anwar on his chest on right and left side. Confronted with Ex.D.B wherein on left side of chest is not mentioned. I had not stated in my statement Ex.D.B that second fire made by Mohammad Abbas alias landed Mohammad Anwar deceased under his right arm-pit. Confronted with Ex.D.B, wherein it is so recorded in portion A to A. I had stated in my statement Ex.D.B that Murtaza alias Murti fired with his rifle hitting Abdul Razzaq on his left forehead. Confronted with Ex.D.B wherein it is not so recorded. I did not state in my statement Ex.D.B that Murtaza alias Murti made fire with his rifle 01 Abdul Razzaq which landed on right side of his head and made an exit from left ear. Confronted with Ex.D.B. wherein it is so mentioned in portion B to B. I had stated in my statement Ex.D.B that Istafa alias Isti accused fired with his pump action hitting Mushtaq Ahmad on the back of his neck, confronted with Ex.D.B wherein it is not so recorded in this sequence. I did not state in Exh.D.B that Istafa alias Isti made fire with his pump action which hit Mushtaq on the back of his chest and made an exit from the left side of his neck. Confronted with Ex.D.B, wherein it is so mentioned in Portion C to C. I had stated in my statement Ex.D.B that second fire of Istafa alias Isti accused landed on left thigh of Safdar Hussain. Confronted with Ex.D.B, wherein it is not so recorded. I did not specifically stated in Ex.D.B that second fire of Istafa alias Isti accused landed on left leg and left knee of Safdar Hussain. Confronted with Ex.D.B, wherein it is so recorded in portion D to D....."

It is evident from the perusal of abovementioned evidence that the prosecution witnesses made dishonest improvements in their statements while appearing in the witness box in order to bring their statements in line with the medical evidence, hence the said witnesses are not worthy of reliance as observed by the Hon'ble Supreme Court of Pakistan in the cases of "Akhtar Ali and others v. The State" (2008 SCMR 6).

12. The next moot point for determination before this Court is that the complainant party implicated as many as total eleven (11) accused persons in this case and out of the said eleven (11) accused, co-accused namely Ghaffar and Allah Nawaz, died during the pendency of the trial of the case before the learned trial Court, whereas the remaining seven (07) accused have 'already been acquitted by the learned trial Court. Learned DPG for the State, as well as, learned counsel for the complainant have conceded that no appeal against their acquittal has been filed either by the State or by the complainant. In the given circumstances, it is to be determined by this Court that as to whether the same prosecution evidence, which has been disbelieved against the abovementioned co-accused can be believed against the appellants and as to whether there is any independent corroboration of the prosecution evidence against the appellants. In this respect, I have noted that case of Istafa alias Isti, co-accused (since acquitted) is at par with the case of both the appellants because the said co-accused was assigned the role of making first fire shot, which landed on the back side of the chest near neck of Muhammad Mushtaq, deceased and in the post mortem report the said injury i.e. injury No.1 was available on the back side of the chest near neck of Muhammad Mushtaq, deceased. The said co-accused was also assigned the role of making second fire shot, which landed on the left leg and knees of Safdar Hussain (PW-3) and according to the medical evidence the said injury was also available as injury No.1 on the left leg of Safdar Hussain (PW-3) but the abovementioned co-accused has been acquitted by the learned trial Court, which acquittal has attained finality. Although learned DPG for the State assisted by learned counsel for the complainant tried to distinguish the case of both the appellants with the case of abovementioned acquitted co-accused including Istafa alias Isti on the ground that the abovementioned co-accused were declared innocent during the police investigation whereas the appellants have been found guilty but it is by now well settled that police opinion after recording of evidence by the learned trial Court becomes irrelevant and the appellants cannot be convicted and sentenced merely on the basis of said opinion in absence of any other independent corroborative piece of evidence. In the case of "Muhammad Ahmad (Mahmood Ahmad) and another v. The State" (2010 SCMR 660) at page 676 the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> "It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department

> or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt".

In the light of above the police opinion given in this case is not relevant at this stage.

13. It is next argued by learned DPG for the State assisted by learned counsel for the complainant that no weapon was recovered from the possession of the acquitted co-accused, whereas rifles were recovered from both the appellants and as such case of the appellants is distinguishable from the case of acquitted co-accused but I have noted that as per PFSA report the empties recovered from the spot did not match with the rifle recovered on the pointation of Muhammad Abbas alias Bagu, appellant No.2. Although according to PFSA report (Exh.PW) two empties recovered from the spot matched with the rifle recovered from the possession of Murtaza alias Murti, appellant No. 1 but it is noteworthy that rifle (P.21) was recovered from the possession of said appellant on 23.06.2013 whereas the empties were deposited in the office of PFSA on 10.07.2013, which means that the empties and rifle (P.21) were kept together at police station, therefore, it is not safe to rely upon the abovementioned piece of evidence of the prosecution as observed by the Hon'ble Supreme Court of Pakistan in the case of "Jehangir v. Nazar Farid and another" (2002 SCMR 1986), "Barkat Ali v. Muhammad Asif and others" (2007 SCMR 1812), "Mushtaq and 3 others v. The State" (PLD 2008 Supreme Court 1), "Mureed Hussain v. The State through Prosecutor-General Sindh" (2014 SCMR 1689). Under the abovementioned circumstances, there is no independent corroboration of the prosecution case through the abovementioned alleged recoveries of weapons of offence on the pointation of the appellants.

14. Learned DPG assisted by learned counsel for the appellants has lastly argued that the prosecution case against both the appellants was corroborated by the motive part of the prosecution evidence but it is noteworthy that only a vague joint and general allegation in respect of the motive part of the prosecution case was leveled by the prosecution witnesses, against the appellants and their acquitted co-accused wherein they stated that few days earlier to the occurrence a quarrel took place between the complainant and the accused persons. The said motive was also alleged against the acquitted co-accused. No specific date, time and place

of the quarrel of motive part of the occurrence has been mentioned by any prosecution witness. Moreover, the learned trial Court in Paragraph No.42 of the impugned judgment has disbelieved the prosecution evidence qua the motive due to cogent reasons and as such there is no independent corroboration of the prosecution case against the appellants through the motive.

15. As the prosecution evidence has already been disbelieved against seven (07) acquitted co-accused, therefore, the same evidence cannot be believed against the appellants without independent corroboration, which is very much lacking in this case, therefore, the appellants also deserve acquittal as observed by the Hon ble Supreme Court of Pakistan in the cases of "Akhtar Ali and others v. The State" (2008 SCMR 6), "Muhammad Akram v. The State" (2012 SCMR 440), "Muhammad Ali v. The State" (2015 SCMR 137) and "Ulfat Husain v. The State" (2018 SCMR 313).

16. In the light of above discussion, I am of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, I accept Criminal Appeal No.78948-J of 2019 filed by Murtaza alias Murti and Muhammad Abbas alias Bagu, appellants, set aside their convictions and sentences and acquit them of the charges by extending them the benefit of doubt. The appellants Murtaza alias Murti and Muhammad Abbas alias Bagu are in custody. they be released from the jail forthwith, if not required to be detained in any other case.

JK/M-26/L Appeal accepted.

2023 P Cr. L J Note 8

[Lahore]

Before Malik Shahzad Ahmad Khan, ACJ and Muhammad Tariq Nadeem, J

MUHAMMAD ARSHAD alias ACCHA---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 193971-J and Murder Reference No. 155 of 2018, heard on 16th May, 2022.

(a) Criminal trial---

----Circumstantial evidence---Scope---Circumstantial evidence must be of the nature where all circumstances should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused---If any link in the chain is missing then its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State PLJ 1999 SC 1018 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Benefit of doubt---Motive not proved---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---Admittedly, the accused was real paternal uncle of minor/deceased aged about 04 years---Complainant was real brother of the accused---Said witness had not uttered a single word during his evidence recorded by the Trial Court or even in the FIR or in his supplementary statement regarding any motive against the accused to commit the murder of his minor daughter---No reason, whatsoever, had been brought on the record that as to why the accused had committed the murder of his minor niece---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Medical evidence---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---According to the evidence of two prosecution witnesses of extra judicial confession, the accused confessed before them that he had committed the murder of minor by throwing her into the canal---Medical evidence revealed by Medical Officer, the cause of death in the case could not be determined due to the advance stage of purification---In column No. 13 of the post-mortem report of the minor, her three vaginal swabs were taken for semen detection and DNA test but according to the report of Forensic Science Agency, no seminal material was detected on the vaginal swab therefore, no DNA test was conducted in the case---Medical evidence was silent regarding the rupture of hymen of the minor---No allegation against the accused by any prosecution witness that he committed rape/unnatural offence with minor before committing her murder---Medical Officer had not opined that cause of death of the minor was asphyxia due to drowning in the water, as claimed by the prosecution---Prosecution case did not support the medical evidence---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Extra-judicial confession---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---Record showed that the witnesses of extra judicial confession had stated in their statements recorded by the Trial Court that the accused came to them for extra judicial confession on 12.5.2017 but no time or place of making the alleged extra judicial confession by the accused had been mentioned by both the said witnesses---Although according to the statement of said prosecution witnesses, the accused made extra judicial confession before them on 12.5.2017 but according to the statement of one of the witnesses, the said witness made statement before the police under S. 161, Cr.P.C. after 18 days from making the alleged extra judicial confession by the accused, whereas, other witness stated that he never got recorded his statement to the Investigating Officer---Although, both the said witnesses of extra-judicial confession claimed that the accused made extra-judicial confession before them regarding the commission of a heinous offence about the murder of a minor girl of four years but they did not try to apprehend the accused who was alone at the relevant time, whereas the witnesses were two in number---Conduct of the said witnesses was highly

unnatural---Both the said witnesses were not enjoying any status of authority in the society which could have prompted the accused to make extra-judicial confession before them---Said witnesses were not in a position to pardon the accused from the complainant---Evidence of said witnesses was not worthy of reliance---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 and Tahir Javed v. The State 2009 SCMR 166 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Pointation of place of occurrence by accused---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---Complainant deposed regarding the pointation of the accused towards canal, where the accused had statedly thrown alive the girl in the canal but nothing was recovered from the said place, statedly pointed out by the accused---Medical Officer had not stated that the minor died due to drowning in the water, whereas, her dead body had already been recovered by the police therefore, the said evidence of the complainant regarding the alleged pointation of place, where the accused statedly threw the minor in the canal, was of no avail to the prosecution---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Recovery of CCTV footage---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---Insofar as the evidence of the prosecution regarding the recording of C.D of CCTV cameras, produced through witness and evidence of the shop keeper, on whose shop CCTV cameras were installed, was concerned, it was claimed by the prosecution that in the said CCTV footage, minor was last seen alive in the company of the accused---Said shop keeper stated that initially he refused the complainant party to see the recording of his CCTV cameras but subsequently, the complainant party approached him through the inhabitants of the area whereupon, he allowed them to see the recording of his CCTV cameras---Said witness also stated that one of the persons went inside and checked the recording of CCTV cameras and the said person took his USB---Said witness did not mention

the name of the person who checked the CCTV cameras of his shop and took USB of the said cameras---Statement of said witness in that respect was completely silent---Witness did not state that any Police Official also accompanied at the time of checking the recording of CCTV cameras rather he stated that he was approached by the inhabitants of the area but he did not disclose the name of any inhabitant of his area who approached him and took the USB of the recording of his CCTV cameras---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Contradictions in the statements of witnesses---Scope---Accused was charged for committing murder of minor daughter of the complainant after her abduction---Prosecution witness in whose shop CCTV camera was installed categorically stated during his cross-examination that he did not join the investigation in police station---On the other hand, Investigating Officer of the case had stated that he along with other Police Officials and the complainant reached at the shop of said witness and watched the recording of CCTV cameras which were installed at the said shop---Investigating Officer further stated that CD recording of CCTV cameras was handed over to him by said witness and as such, there were glaring contradictions in the prosecution case regarding the recovery and safe custody of CD of CCTV cameras---According to the evidence of Investigating Officer, the complainant had seen the recording of CCTV cameras of the shop of said witness and with the help of said recording, the complainant identified the accused in the company of his minor daughter on the relevant date and time but complainant did not utter a single word in his statement recorded by the Trial Court that he had seen the recording of CCTV cameras of the shop of said witness through which he identified the accused in the company of his daughter on the relevant date and time---Complainant did not state that he ever visited the shop of said witness or recording of CCTV cameras of said shop was seen by him and the same was taken into possession by Investigating Officer in his presence---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(h) Penal Code (XLV of 1860)---

----Ss. 302(b) & 363--- Qatl-i-amd, abduction--- Appreciation of evidence---Last seen evidence---Scope---Accused was charged for committing

murder of minor daughter of the complainant after her abduction---No prosecution evidence of last seen was available on the record against the accused---No witness had stated that he had last seen alive the minor in the company of the accused on the day of occurrence---Evidence of CCTV footage could be considered at the most as last seen evidence against the accused but it was noteworthy that the distance between the place where the minor was seen in the company of the accused and the place where the minor was allegedly thrown by the accused in the water or his dead body was recovered had not been brought on the record by the prosecution---Although CD of CCTV cameras recording had been produced in the prosecution evidence but no specific date and time had been mentioned by any prosecution witness that as to when the minor was seen alive in the company of the accused in the said CCTV cameras recording---In order to believe the evidence of last seen, there should be close proximity between the time and place of recovery of dead body of the deceased or the place of occurrence and the time and place where the deceased was last seen alive in the company of the accused, however, nothing in that respect had been brought on the record during the evidence of prosecution witnesses---Prosecution evidence of last seen was not worthy of reliance---Circumstances established that the prosecution could not prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Fayyaz Ahmad v. The State 2017 SCMR 2026; The State through P.G. Sindh and others v. Ahmed Omar Sheikh and others 2021 SCMR 873 and Zafar Abbas v. The State 2010 SCMR 939 rel.

(i) Criminal trial---

----Benefit of doubt--- Principle---Single circumstance creating doubt regarding the prosecution case will be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Abdul Majeed Chishti, Defence Counsel at State expense.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Nemo for the Complainant.

Date of hearing: 16th May, 2022.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, A.C.J.---This judgment shall dispose of Criminal Appeal No. 193971 of 2018, filed by Muhammad Arshad alias Accha (appellant) against his conviction and sentence and Murder Reference No. 155 of 2018, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Arshad alias Accha (appellant). We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 28.02.2018 passed by the learned Additional Sessions Judge, Faisalabad.

2. Muhammad Arshad alias Accha (appellant) was tried in case FIR No. 385 dated 28.04.2017 registered at Police Station Mansoorabad District Faisalabad offences under sections 302/363 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 28.02.2018 has convicted and sentenced Muhammad Arshad alias Accha (appellant) as under: -

> Under section 302(b), P.P.C. to 'Death' as Ta'zir for committing Qatl-i-amd of Aiman (deceased). He was also ordered to pay Rs.300,000/- (Rupees three hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C. and in default thereof to further undergo simple imprisonment for six months'.
>
> Under section 364-A of P.P.C. to imprisonment for life.

3. Brief facts of the case as given by Akbar Ali complainant (PW-6) in his complaint (Exh.PB) on the basis of which FIR (Exh.PB/1) was chalked out, are that he (complainant) was resident of Mohallah Mansoorabad and was labourer by profession. On 25.04.2017 at about 07:30 p.m., complainant's daughter, namely, Aiman aged about 04 years was playing with her brothers/sisters and other children of Mohallah who was witnessed while playing so by Muhammad Boota (PW-2) and Muhammad Shahzad Mehmood (witness not produced). At about 09:30 p.m., other children came back to their homes, whereas, Aiman did not return home upon which, he (complainant) started search but he could not find her till late night. On the next day i.e. on 26.04.2017 at about 12:00 p.m., the complainant received an information that dead body of an unknown minor girl was lying in the Allied Hospital (Faisalabad) upon which, he (complainant) along with his brother, namely, Akhtar Ali and nephew Ali Raza (given up PW) went to the Allied Hospital and identified the dead body of Aiman having bleeding from the back side of her head and from her nose. Hospital authorities told that Rescue 1122 shifted the dead body of minor Aiman to the hospital from the bank of Jhal Khanoo-aana canal on the information of

some person. The complainant further stated that he had apprehension that some unknown accused persons committed the murder of minor Aiman after abducing her due to unknown reasons. Initially the FIR was lodged against unknown accused persons however, later on, Akbar Ali complainant (PW-6) through application dated 13.05.2017 (Exh.PC) nominated his brother Muhammad Arshad alias Accha (appellant) as accused in this case with the allegation that the appellant had made extra-judicial confession about the murder of minor Aiman, before Qamar Ijaz (PW -4) and Sarfraz Ahmad (PW-5) and stated that he had thrown alive minor Aiman in the canal water.

4. Muhammad Arshad alias Accha (appellant) was arrested in this case on 29.05.2017 by Zafar Iqbal Sub-Inspector/I.O (PW-8). After completion of investigation, report under section 173 of Cr.P.C., was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 06.10.2017 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced fourteen witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PR).

6. The statement of Muhammad Arshad alias Accha (appellant) under section 342 of Cr.P.C. was recorded by the learned trial Court. Muhammad Arshad alias Accha (appellant) refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" Muhammad Arshad alias Accha (appellant) replied as under:-

> "I am innocent and have no nexus with the occurrence. We all the family members lived under one roof. I have been demanding my share out of the joint property (house), but I have not been compensated even on my numerous requests. Meanwhile the instant occurrence took place which by some unknown accused persons. I have been bracketed in the instant case just to put an end to my lawful and genuine demand of the share of the property."

The appellant neither opted to make his statement on oath as envisaged under section 340(2), Cr.P.C., nor produced any evidence in his defence.

The learned trial Court vide its judgment dated 28.02.2018 found Muhammad Arshad alias Accha (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

7. Notice was issued to the complainant but no one appeared on his behalf despite repeated calls. Even otherwise, it is a State case and learned Deputy Prosecutor General for the State is ready to argue the same therefore, we proceed to decide this case after hearing the arguments of learned defence counsel at State expense for the appellant, learned Deputy Prosecutor General for the State and perusing the record.

8. It is contended by learned defence counsel at State expense for the appellant that the appellant is absolutely innocent and he has falsely been implicated in case by the complainant being in league with the local police; that in fact, the complainant is real brother of the appellant and in order to usurp the share of the appellant from the joint property, he has falsely implicated the appellant in this case; that the occurrence was unseen and the prosecution case hinges upon very weak and unreliable circumstantial evidence; that there is no evidence of last seen, 'wajj takkar' or motive against the appellant and the appellant has been convicted and sentenced only on the basis of evidence of extra-judicial confession and recording of cctv footage; that the prosecution witnesses of extra-judicial confession were not holding the status of authority in the society therefore, there was no reason with the appellant to make extra-judicial confession before them; that the alleged recording of cctv camera was not proved in accordance with the law and even otherwise, the appellant cannot be convicted and sentenced solely on the basis of said evidence; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charges.

9. On the other hand, it is contended by the learned Deputy Prosecutor General for the State that the prosecution has produced convincing and reliable circumstantial evidence against the appellant therefore, he was rightly convicted and sentenced by the learned trial Court; that the prosecution witnesses of extra-judicial confession and recording of cctv footage were cross-examined at length but their evidence could not be shaken; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

10. Arguments heard. Record perused.

11. The detail of the prosecution case as set forth in the complaint (Exh.PB) on the basis of which formal FIR (Exh.PB/1) was chalked out, has already been given in para No.3 of this judgment therefore, there is no need to repeat the same.

12. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), `Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' (PLJ 1999 SC 1018). In the case of "Ch. Barkat Ali" (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:-

> "...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused."

In the case of "Sarfraz Khan" (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

> "7....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence."

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

> "7....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

Keeping in view the parameters, laid down in the above-mentioned judgments, we proceed to decide this case.

12. We have noted that there is no evidence of motive, `wajj-takkar' and last seen available on the record against Muhammad Arshad alias Accha appellant. The appellant has been convicted and sentenced by the learned

trial Court on the basis of his alleged extra-judicial confession before Qamar Ijaz (PW-4) and Sarfraz Ahmad (PW-5), as well as, on the basis of cctv footage which was produced before the learned trial Court wherein, minor Aiman (deceased) can be seen in the company of the appellant on the night of occurrence.

13. Admittedly, the appellant is real paternal uncle of minor Aiman (deceased) aged about 04 years. Akbar Ali complainant (PW-6) is real brother of the appellant. The said witness has not uttered a single word during his evidence recorded by the learned trial Court or even in the FIR (Exh.PB/1) or in his supplementary statement (Exh.PC) regarding any motive against the appellant to commit the murder of his minor daughter Aiman. No reason whatsoever, has been brought on the record that as to why the appellant had committed the murder of his minor niece.

14. According to the evidence of prosecution witnesses of extra-judicial confession, namely, Qamar Ijaz (PW-4) and Sarfraz Ahmad (PW-5), the appellant confessed before them that he had committed the murder of minor Aiman by throwing her into the canal but it is noteworthy that as per medical evidence furnished by Dr. Nadia Ali (PW-11), the cause of death in this case could not be determined due to the advance stage of putrification. It is further noteworthy that in column No. 13 of the postmortem report of the minor Aiman, her three vaginal swabs were taken for semen detection and DNA test but according to the report of Punjab Forensic Science Agency, Lahore (Exh.PL), no seminal material was detected on the vaginal swab therefore, no DNA test was conducted in this case. Medical evidence is silent regarding the rupture of hymen of the minor. There is no allegation against the appellant by any prosecution witness that he committed rape/unnatural offence with minor before committing her murder. It is further noteworthy that the Medical Officer has not opined that cause of death of the minor was asphyxia due to drowning in the water, as claimed by the prosecution. We are therefore, of the view that there is no support of the prosecution case from the medical evidence.

15. Insofar as the extra-judicial confession of the appellant before Qamar Ijaz (PW-4) and Sarfraz Ahmad (PW-5) is concerned, the evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as `Sajid Mumtaz and others v. Basharat and others' (2006 SCMR 231), wherein, at page 238, the Apex Court of Pakistan has been pleased to lay emphasis as under;

"17. This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra judicial-confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial-confession, the Court must inquire into all material points and surrounding circumstances to `satisfy' itself fully that the confession cannot but be true'. As, an extra judicial-confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial-confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule of prescribed by this Court.

19. It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

20. Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off, (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial-confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra judicial-confession have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confession. Such confessions by now have become the sings of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable, of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as 'Tahir Javed v. The State' (2009 SCMR 166), wherein, at page 170, the august Supreme Court of Pakistan, has been pleased to observe as under:-

"It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 PC 107 it has been time and again laid down by this Court that extra judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683 and (4) Sarfraz Khan v. The State and others (1996 SCMR 188)".

(Bold and underlining supplied for emphasis)

Seeking guidance from the above-referred case law, we proceed to discuss the evidence of extra-judicial confession of the appellant produced by the prosecution in this case. It is noteworthy that both the abovementioned witnesses of extra-judicial confession have stated in their statements recorded by the learned trial Court that the appellant came to them for extra-judicial confession on 12.05.2017 but no time or place of making the alleged extra-judicial confession by the appellant has been mentioned by both the above witnesses. It is further noteworthy that although according to the statement of abovementioned prosecution witnesses, the appellant made extra-judicial confession before them on 12.05.2017 but according to the statement of Sarfraz Ahmad (PW-5), the said witness made statement before the police under section 161 of Cr.P.C., on 30.05.2017 i.e., after 18 days from making the alleged extra-judicial confession by the appellant, whereas, Qamar Ijaz (PW-4) stated that he never got recorded his statement to the I.O. Relevant parts of the statements of abovementioned prosecution witnesses of extra-judicial confession read as under:-

> Qamar Ijaz (PW-4).
>
> "I did not get recorded statement to the I.O, therefore, I cannot say that I had got recorded in my statement under section 161, Cr.P.C. date 12.5.2017."
>
> Sarfraz Ahmad (PW-5).
>
> "We also did not immediately inform the local police or made any call to rescue-15. My statement under section 161, Cr.P.C. was recorded on 30.5.2017."

It is further noteworthy that although both the abovementioned witnesses of extra-judicial confession claimed that the appellant made extra-judicial confession before them regarding the commission of a heinous offence about the murder of a minor girl of 04 years but they did not try to apprehend the appellant who was alone at the relevant time, whereas, the abovementioned prosecution witnesses were two in number. Relevant parts of the statements of the abovementioned witnesses in their cross-examination read as under:

> Qamar Ijaz (PW-4).
>
> "We did not try to apprehend accused Arshad alias Accha when he admitted his guilt."
>
> Sarfraz Ahmad (PW-5).

"We did not try to apprehend the accused Arshad present in the court at the time of extra judicial confession."

The conduct of the prosecution witnesses was highly un-natural. We have further noted that both the abovementioned prosecution witnesses of extra-judicial confession were not enjoying any status of authority in the society which could have prompted the appellant to make extra-judicial confession before them. They were not in a position to get pardon for the appellant from the complainant. Qamar Ijaz (PW-4) stated that he was working in a private firm and his earning was Rs.20/25 thousands. He further stated that he never remained Chairman of the Union Council. Likewise, Sarfraz Ahmad (PW-5) stated during his cross-examination that he was carrying his own private business and his monthly income was 15/20 thousands. He also admitted that he never remained Chairman or Councilor of any Union Council. He further admitted that he never settled issues, disputes between the people of his locality. Relevant parts of the statements of abovementioned prosecution witnesses are reproduced hereunder for ready reference:-

Qamar Ijaz (PW-4).

"I am presently working in private firm earning about 20/25 thousands. I never remained Chairman of Union Council."

Sarfraz Ahmad (PW-5).

"I carry my own private business earning about 15/20 thousands monthly. I am father of 03-children. I never remained chairman or councilor of my union council. I never settled issues/disputes between people of my locality."

We are therefore, of the view that the prosecution evidence regarding the alleged extra-judicial confession made by the appellant before Qamar Ijaz (PW-4) and Sarfraz Ahmad (PW-5) is not worthy of reliance.

16. Insofar as the statement of Akbar Ali complainant (PW-6) is concerned, he has only stated regarding the registration of FIR against unknown accused regarding the abduction of his daughter Aiman and alleged extra-judicial confession of the appellant before the abovementioned prosecution witnesses, namely, Qamar Ijaz (PW-4) and Sarfraz Ahmad (PW-5). He did not state that the appellant made any extra-judicial confession before him. He also deposed regarding the pointation of the appellant towards Rakh Branch Canal, where the appellant had statedly thrown alive his daughter Aiman in the canal but nothing was recovered from the said place, statedly pointed out by the appellant. Moreover, the Medical Officer has not stated

that the minor died due to drowning in the water, whereas, her dead body had already been recovered by the police therefore, the abovementioned evidence of the complainant regarding the alleged pointation of place, where the appellant statedly threw the minor in the canal, is of no avail to the prosecution.

17. Insofar as the evidence of the prosecution regarding the recording of C.D of cctv cameras, produced through Shan Ali (PW-9) and evidence of the shop keeper, namely, Muhammad Shahzad (PW-10), on whose shop cctv cameras were nstalled, is concerned, it is claim of the prosecution that in the above-referred cctv footage, minor Aiman was lastly seen alive in the company of the appellant. We have however, noted that Muhammad Shahzad (PW-10) stated that initially he refused the complainant party to see the recording of his cctv cameras but subsequently, the complainant party approached him through the inhabitants of the area whereupon, he allowed them to see the recording of his cctv cameras. He also stated that one of the persons went inside and checked the recording of cctv cameras and the said person took his USB. He did not mention the name of the person who checked the cctv cameras of his shop and took USB of the said cameras. His statement in this respect is completely silent. It is further noteworthy that he did not state that any police official also accompanied at the time of checking the recording of cctv cameras rather he stated that he was approached by the inhabitants of the area but he did not disclose the name of any inhabitant of his area who approached him and took the USB of the recording of his cctv cameras. He categorically stated during his cross-examination that he did not join the investigation in police station, whereas, on the other hand, Zafar Iqbal S.I, who was Investigating Officer of this case has stated that on 04.05.2017, he along with other police officials and the complainant reached at Butt autos, Mansoor Abad (shop of Muhammad Shahzad PW-10) and watched the recording of cctv cameras which were installed at the said shop. He further stated that CD recording of cctv cameras was handed over to him by Muhammad Shahzad (PW-10) and as such, there are glaring contradictions in the prosecution case regarding the recovery and safe custody of CD of cctv cameras. It is further noteworthy that according to the evidence of Zafar Iqbal S.I (PW-8), the complainant Akbar Ali (PW-6) saw the recording of cctv cameras of the shop of Muhammad Shahzad (PW-10) and with the help of said recording, the complainant identified the appellant in the company of his daughter (minor Aiman) on the relevant date and time but Akbar Ali complainant (PW-6) did not utter a single word in his statement recorded by the learned trial Court that he saw the recording of cctv cameras of the shop of Muhammad Shahzad (PW-1) through which he identified the appellant in

the company of his daughter on the relevant date and time. He did not state that he ever visited the shop of Muhammad Shahzad (PW-10) or recording of cctv cameras of abovementioned shop was seen by him and the same was taken into possession by Zafar Iqbal S.I (PW-8) in his presence.

Insofar as the evidence of Shan Ali (PW-9) is concerned, although he stated that on 08.05.2017 Zafar Iqbal Sub-Inspector (PW-8) along with Akbar Ali complainant (PW-6) and others came to his shop and they produced before him a clip of cctv camera dated 25.04.2017 wherefrom he prepared copy of the said clip and handed over to Zafar Iqbal Sub-Inspector (PW-8) which was taken into possession vide recovery memo (Exh.PF) but during his cross-examination, he stated that he was middle pass and he had not passed any special diploma in computer science. Relevant part of his statement in this respect reads as under-

> "I am middle pass. I have not passed any special diploma in computer science."

It is therefore, evident that Shan Ali (PW-9) is not a duly qualified expert to prepare C.D from a footage of cctve camera. As observed earlier, Muhammad Shahzad (PW-10) has not stated that he handed over the cctv footage of the cameras installed in his shop to Zafar Iqbal, Sub-Inspector (PW-8). There is no prosecution evidence of last seen available on the record against the appellant. No witness has stated that he has lastly seen alive the minor Aiman in the company of the appellant on the day of occurrence. The abovementioned evidence of cctv footage can be considered at the most as last seen evidence against the appellant but it is noteworthy that the distance between the place where the minor Aiman was seen in the company of the appellant (Butt autos/shop of Muhammad Shahzad PW-10 situated in Mansoor Abad) and the place i.e. Jhal Khanoo-aana canal, where the minor Aiman was allegedly thrown by the appellant in the water or his dead body was recovered, has not been brought on the record by the prosecution. Although CD of cctv cameras recording has been produced in the prosecution evidence but no specific date and time has been mentioned by any prosecution witness that as to when the minor Aiman was seen alive in the company of the appellant in the said cctv cameras recording. It is by now well settled that in order to believe the evidence of last seen, there should be close proximity between the time and place of recovery of dead body of the deceased or the place of occurrence and the time and place where the deceased was lastly seen alive in the company of the accused, but as mentioned earlier nothing in this respect has been brought on the record during the evidence of prosecution witnesses. The apex Court of the country disbelieved the evidence of last seen in the case

of 'Fayyaz Ahmad v. The State' (2017 SCMR 2026), when the abovementioned facts/ingredients were missing in the prosecution evidence. Under the circumstances, the above-referred prosecution evidence of last seen is not worthy of reliance. Even otherwise, the appellant cannot be convicted and sentenced only on the basis of last seen evidence without strong independent corroboration of unimpeachable character which, in our view, is very much lacking in this case. Reliance in this respect may be placed on the case of 'The State through P.G. Sindh and others v. Ahmed Omar Sheikh and others' (2021 SCMR 873), wherein at page No. 953, it was observed as under:-

> "66. "Last seen" evidence is merely a circumstantial evidence, and that too a weak type of evidence, which alone cannot sustain the weight of a capital punishment, and would require other independent corroborative evidence to effect conviction. In a case of murder, where the prosecution case rests on "last seen" evidence, then corroboration would be required from other circumstantial evidence."

Similar view was taken in the case of 'Zafar Abbas v. The State' (2010 SCMR 939).

18. As per prosecution's own case, no weapon was used during the occurrence and as such, nothing was recovered from the possession of the appellant during the course of investigation.

19. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5.....The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

> "3.....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

20. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No. 193971-J of 2018 filed by Muhammad Arshad alias Accha appellant, set aside his conviction and sentence recorded by the learned trial Court and acquit him of the charges by extending him the benefit of doubt. Resultantly, Murder Reference No. 155 of 2018 is answered in the negative. The appellant Muhammad Arshad alias Accha is in custody, he be released from the jail forthwith if not required to be detained in any other case.

JK/M-144/L Appeal allowed.

2023 Y L R Note 58

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Tariq Abbasi, JJ

KHALID MEHMOOD--- Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 10444 of 2019, heard on 18th January, 2021.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Safe custody---Scope---Accused was alleged to have been found in possession of 1200 grams of charas---Moharrar stated that he gave the sample parcel to sample-bearer for its onward transmission to the Forensic Laboratory but the sample-bearer while appearing in the witness box did not say a single word regarding handing over of the sample parcel to him by Moharrar or deposit of the same in the Forensic Laboratory, therefore, it was not determinable as to where the sample parcel remained after its delivery to sample-bearer---Safe custody of sample-parcel was not proved beyond the shadow of doubt which had created serious dent in the prosecution case---Appeal against conviction was allowed, in circumstances. [Paras. 7 & 8 of the judgment]

Amjad Ali v. The State 2012 SCMR 577 and Ikramullah and others v. The State 2015 SCMR 1002 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9---Possession of narcotics---Standard of proof---Scope---Control of Narcotic Substances Act, 1997, provides stringent punishments, therefore, the proof has to be construed strictly and the benefit of the slightest doubt in the prosecution case must be extended to the accused. [Para. 7 of the judgment]

Muhammad Hashim v. The State PLD 2004 SC 856 ref.

(c) Criminal trial---

----Harder the sentence, stricter the standard of proof. [Para. 7 of the judgment]

Ameer Zeb v. The State PLD 2012 SC 380 rel.

Malik Matee Ullah for Appellant.

Muhammad Mustafa, Deputy Prosecutor General for the State.

Date of hearing: 18th January, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal is directed against judgment dated 09.02.2019, passed by the learned Additional Sessions Judge/Judge Special Court CNSA, Mianwali, whereby, in case FIR No.268/ 2018 dated 09.09.2018, registered at Police Station Daud-Khel, Mianwali, under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Khalid Mehmood appellant and sentenced him as under:

> Under section 9(c) of Control of Narcotic Substances Act, 1997 to four years and six months R.I. with fine of Rs.20,000/- and in default of payment thereof the appellant was directed to further undergo S.I. for five months. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Briefly, the accusation levelled in the FIR against the appellant is that on 09.09.2018, Hameed Ullah ASI (complainant / PW-5), along with other police officials was present at Pull Ganda. A person (Khalid Mehmood appellant), came from the eastern side by foot. On seeing the police party, the appellant tried to run away but he was overpowered by the police party. On checking, Charas weighing 1200-grams was recovered from the shopper, which the appellant was holding in his right hand. A separate sample parcel of Charas weighing 60-grams for Chemical Analysis, was prepared. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 15.10.2018, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced five witnesses to prove its case. The learned Additional Sessions Judge/Judge Special Court CNSA, Mianwali, after recording the statement of the appellant under section 342, Cr.P.C. and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that the appellant is absolutely innocent and he has falsely been implicated in this case by the police; that there are material contradictions in the statements of the prosecution witnesses, which have not been properly

appreciated by the learned trial Court while passing the impugned judgment; that safe custody of the sample parcel and the parcel of case property could not be established in this case; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; that the impugned judgment is result of misreading and non-reading of evidence, available on the record, therefore, the same may be set aside and the appellant may be acquitted from the charge.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant could not establish any mala fide on the part of the prosecution for his false involvement in this case; that the prosecution witnesses stood the test of lengthy cross-examination but nothing favourable to the appellant could be brought on the record; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well settled that since the provisions of The Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of the slightest doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of "Muhammad Hashim v. The State" (PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of "Ameer Zeb v. The State" (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the abovementioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case.

We have straightaway noticed that as per prosecution case, the ease property and the sample parcel were handed over by Hameed Ullah ASI (complainant/PW-5) to Fawad Iqbal SI (PW-3), who handed over the said parcels to Muhammad Shahzad Khan 936/HC/ Moharrar (PW-2). Muhammad Shahzad Khan 936/HC/Moharrar (PW-2) stated that he kept the abovementioned parcels in Mall-Khana of the police station intact and on 11.09.2018, handed over the sample parcel of 60-grams to Hameed Ullah ASI (PW-5) for its onward transmission to the office of Punjab Forensic Science Agency, Lahore but Hameed Ullah ASI, while appearing in the witness box as PW-5, did not utter a single word regarding handing over the sample parcel to him by Muhammad Shahzad Khan

936/HC/Moharrar (PW-2) or deposit of the same in the office of Punjab Forensic Science Agency, Lahore. It is, therefore, not determinable in this case that as to where the sample parcel remained after its delivery to Hameed Ullah ASI (PW-5) by Muhammad Shahzad Khan 936/HC/Moharrar (PW-2). Keeping in view the abovementioned prosecution evidence, the safe custody of sample parcel has not been proved in this case beyond the shadow of doubt, which has created serious dent in the prosecution case. Reliance in this respect is placed on the judgments passed by the august Supreme Court of Pakistan in the cases reported as "Amjad Ali v. The State" (2012 SCMR 577) and "Ikramullah and others v. The State" (2015 SCMR 1002).

8. In the light of above discussion, the instant appeal (Crl. Appeal No.10444 of 2019), is allowed, impugned judgment dated 09.02.2019, passed by the

learned Additional Sessions Judge/Judge Special Court CNSA, Mianwali, is hereby set aside and Khalid Mehmood (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith if not required in any other case.

SA/K-3/L Appeal allowed.

2023 Y L R 1418

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Amjad Rafiq, JJ

MUHAMMAD YAQOOB---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 236652 of 2018, heard on 20th June, 2022.

(a) Criminal trial---

----Circumstantial evidence--- Scope---Every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and the other the neck of the accused---If any link in the chain is missing then its benefit will go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt--- Extra-judicial confession---Scope---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---Allegedly, accused made extra-judicial confession before complainant and a witness---Notably, the accused was not nominated in the FIR and he had been implicated in the case through the supplementary statement of the complainant---Occurrence in the case took place on 26.09.2015 and the FIR was lodged on 27.09.2015, whereas, the supplementary statement of the complainant was recorded on 30.03.2016 i.e., after about six months from

the occurrence and the registration of the FIR---In the supplementary statement, complainant and a witness stated that on 30.03.2016, accused appeared before them and the given up witness, when they were present outside the house of the complainant and he made extra-judicial confession before them by stating that he had a burden on his mind therefore, he wanted to tell the occurrence to the complainant party---Accused further stated before the witnesses that minor deceased came to his shop for taking toffees and he took the minor inside the house, where he committed sodomy with him and killed him by strangulating his neck---Accused further stated that after committing the murder of minor, he packed his dead body in a sack and after loading the said body on his bicycle, he threw the same in a drain---As per Forensic Science Agency Report, no seminal material was detected on the anal swabs of the deceased to support the prosecution case---Moreover, there were contradictions in the statements of the prosecution witnesses of extra-judicial confession because one of the witnesses had stated that the accused allegedly confessed that after pressing the throat of minor, he dipped him in a water tub due to which he died but such fact was not stated by complainant---Complainant party comprised of three male adult members/witnesses and according to the evidence of said prosecution witnesses, the accused made extra-judicial confession regarding the murder of their kith and kin after about six months of the occurrence but they did not try to apprehend the accused at the time of making of his extra-judicial confession so as to hand him over to the police---No reason existed for the accused to make extra-judicial confession before the said witnesses---According to the alleged extra-judicial confession of the accused before the said prosecution witnesses, dead body of minor deceased was packed in a sack after his murder and thereafter, the same was thrown in a drain but according to the statement of Official Witnesses dead body was not packed in the sack and the same was lying open in the drain---No sack had been recovered in the case---Although according to the evidence of the prosecution, dead body of the deceased was thrown by the accused in a drain but Medical Officer did not mention in his evidence the presence of

any mud or particles of drain on the body of the deceased---Thus, the prosecution evidence qua extra-judicial confession of the accused was not worthy of reliance---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Judicial confession and extra-judicial confession---Contradictions---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---As per prosecution case, accused made judicial confession before Judicial Magistrate---Notably there were material contradictions in the prosecution case between the judicial confession made by the accused in the Court and the extra-judicial confession made by the accused before the prosecution witnesses---According to the judicial confession, the accused stated that he attempted to commit sodomy with minor deceased, whereas, as per statements of the witnesses of extra-judicial confession, the accused stated that he committed sodomy with the minor and thereafter, committed his murder---Further according to the statement made by the accused in his judicial confession, the mouth of the deceased was blocked by him with his hands due to which he died, whereas, according to the statements of the prosecution witnesses of extra-judicial confession, neck of the deceased was strangulated by the accused, whereas, according to the statement of witness, the accused, after strangulating the neck of minor deceased, drowned him in a water tub due to which he died but complainant did not state so in his statement recorded by the Trial Court and no such fact was mentioned by the accused in his judicial confession that after pressing the neck of minor deceased, he drowned him in a water tub---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Criminal Procedure Code (V of 1898), S. 164---High Court (Lahore) Rules and Order, Vol. III, Chap. 13, R. 5---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Judicial confession, recording of---Legally---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---Record showed that at the time of judicial confession, the accused was not told by the Judicial Magistrate that his custody would not be handed back to the police after recording of his confession which was in violation of Vol. III Chap. 13, R. 5 of the High Court (Lahore) Rules and Order on the subject---Although Judicial Magistrate stated that after recording of the confession of the accused under S. 164, Cr.P.C., he did not hand over his custody to the police rather the accused was sent to jail through staff of the Court but he was unable to tell the name of any member of his staff who handed over the custody of the accused to the jail authorities---On the other hand, Investigating Officer stated that he took the accused to jail---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Criminal Procedure Code (V of 1898), S. 164---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Recording of judicial confession---Contradictions---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---In the judicial confession of the accused, it had been stated by the accused that after five days of the occurrence, the dead body of the deceased was recovered on his pointation---On the other hand, according to the prosecution case, the dead body of minor deceased was recovered on 02.10.2015, as stated by complainant, as well as by Investigating Officer

and they did not state that the dead body was recovered on the pointation of the accused rather the accused had been implicated in the case through supplementary statement of the complainant on 30.03.2016, i.e., after more than six months of the occurrence---As per prosecution's own case, the dead body of minor was recovered on 02.10.2015, Investigating Officer---None of the prosecution witnesses stated that the dead body of the deceased was recovered on the pointation of the accused---Further no specific date or year of the occurrence had been mentioned in the judicial confession of the accused---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(f) Criminal Procedure Code (V of 1898)---

----S.164---Judicial confession---Scope---Mere judicial confession of an accused by itself is not sufficient to maintain his conviction and sentence---Judicial confession needs independent corroboration.

Muhammad Ashraf v. The State 2016 SCMR 1617; Muhammad Ismail and others v. The State' 2017 SCMR 898 and Hashim Qasim and another v. The State 2017 SCMR 986 rel.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Medical evidence---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---According to the medical evidence, eight swabs were sent to the Forensic Science Agency for detection of seminal and DNA test but according to the report of Forensic Science Agency, no seminal material was detected on the rectal swabs of deceased---Investigating Officer took nail scraping of deceased and the same was sent to Forensic Science Agency and according to its report, nail scraping of the deceased was mixture of at least two unknown male individuals, whereas, accused and his nephew were eliminated as being

contributors to the said DNA profile---Thus, the medical evidence and the reports of Forensic Science Agency had not supported the prosecution case against the accused---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(h) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Recoveries of bicycle and water tub on the pointation of accused---Reliance---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---Insofar as the recoveries of bicycle and water tub on the pointation of the accused was concerned, it was noteworthy that no incriminating material like blood stains or froth of the deceased were recovered from the said articles---Moreover, said articles were not sent to the office of Forensic Science Agency for detection of any incriminating material on them---Further complainant had admitted during his cross-examination that brother of the accused also lived in the same house wherefrom the said articles were recovered which showed that the house of the recovery was not exclusively under the possession of the accused---No ownership proof about the said bicycle in the name of the accused had been brought on the record---Under the circumstances, the said recoveries were of no avail to the prosecution---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(i) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Accused pointing out the place of occurrence and place of throwing dead body of the deceased---Reliance---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered

him---Prosecution had alleged that the place of crime and place where the dead body of the deceased was thrown had been pointed out by the accused but no incriminating material was recovered from the place of occurrence, as well as from the place where the dead body of the deceased was allegedly thrown---Further according to the prosecution case, on 22.04.2016, the accused pointed out the place of throwing of the dead body of minor deceased, whereas, the dead body was already recovered on 02.10.2015 and as such, the place of throwing of the dead body was already in the knowledge of the prosecution and no new fact was discovered or any recovery was effected from the said places---Thus, the said pieces of evidence were inconsequential for the prosecution case---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(j) Penal Code (XLV of 1860)---

----Ss. 302(b), 363 & 377---Qatl-i-amd, kidnapping, unnatural offence---Appreciation of evidence---Benefit of doubt---Motive not proved---Scope---Prosecution case was that accused allegedly kidnapped the minor son of complainant, committed unnatural offence and then murdered him---Motive behind the occurrence was that the accused committed sodomy with deceased and thereafter killed him---Notably there were material contradictions in the statements of prosecution witnesses regarding the motive---As per evidence of witnesses of extra-judicial confession, the accused made confession before the witnesses that he committed sodomy with the deceased and then killed him, whereas, in the judicial confession, the accused stated that he attempted to commit sodomy with the deceased---Moreover, as per medical evidence, no seminal material was detected on the anal swabs of the deceased---Thus, the prosecution had failed to prove the alleged motive in the case---Circumstances established that the prosecution failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed accordingly.

(k) Criminal trial---

----Benefit of doubt---Principle---Single circumstance creating doubt regarding the prosecution case will be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Muhammad Shahid Khan and Rizwan Afzal Tarar for Appellant.

Waqar Abid Bhatti, Deputy Prosecutor General for the State.

Ch. Liaqat Ali Anjum and Ch. Moazzam Tufail Gujjar for the Complainant.

Date of hearing: 20th June, 2022.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 236652 of 2018, filed by Muhammad Yaqoob (appellant) against his conviction and sentence and Murder Reference No. 312 of 2018, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Yaqoob (appellant). We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 15.09.2018 passed by the learned Addl. Sessions Judge, Lahore.

2. Muhammad Yaqoob (appellant) was tried in case FIR No. 644 dated 27.09.2015 registered at Police Station Wandat Colony District Lahore offences under Sections 302/363/377 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 15.09.2018 has convicted and sentenced Muhammad Yaqoob (appellant) as under:--

> Under Section 302(b), P.P.C. to 'Death' as Ta'zir for committing Qatl-i-Amd of minor Ahmad Javed (deceased). He was also ordered to pay Rs.500,000/- (Rupees five hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of

Cr.P.C. and in default thereof, to further undergo simple imprisonment for six months.

3. Initially the complaint (Exh.PG) and thereafter, FIR (Exh.PEE) were lodged against unknown accused person by Muhammad Javed Mughal, complainant (PW-5) by alleging that he (complainant) was resident of Street No.1 House No.3 Mohallah Karnalpura Masjid Street near Wahdat Colony, Lahore and on 26.09.2015 at about 08:00 p.m., his (complainant's) son, namely, Ahmad Javed aged about 61/2 years went out of the house while wearing red shirt and brown pent however, did not return home. It was further stated that the complainant party started the search of Ahmad Javed (deceased) on their own but in vain and it was asserted that Ahmad Javed (deceased) was abducted by some unknown accused. Hence, the FIR (Exh.PEE) was lodged under Section 363 of P.P.C. On 02.10.2015, on the information of Muhammad Ilyas, Sub-Inspector of P.S: Hanjarwal District Lahore the dead body of Ahmad Javed (deceased) was recovered from 'Kharak Nala', the complainant identified the dead body to be that of Ahmad Javed (deceased) and the offence under Section 302 of P.P.C. was added by the police. The complainant, thereafter, on 30.03.2016 got recorded his supplementary statement and nominated Muhammad Yaqoob (appellant) with the allegation that Muhammad Yaqoob (appellant) committed sodomy with Ahmad Javed (deceased), committed his murder and then threw his (Ahmad Javed's) dead body in the 'Nala'. Complainant also alleged in his supplementary statement that Muhammad Yaqoob appellant made extra-judicial confession before him in presence of Muhammad Khalid (PW-6) and Muhammad Danish (given up PW) regarding the commission of the occurrence.

4. Muhammad Yagoob (appellant) was arrested in this case on 09.04.2016 by Haji Maqsood, Sub-Inspector/I.O. (PW-12). On 22.04.2016, the appellant made disclosure and led to the recovery of cycle (P-4) and tub (P-5) vide recovery memo (Exh.PL). After completion of investigation, report under Section 173 of Cr.P.C., was prepared and submitted before the

learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 16.10.2017 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced fourteen witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PPP).

6. The statement of Muhammad Yaqoob (appellant) under Section 342 of Cr.P.C. was recorded by the learned trial Court. Muhammad Yaqoob (appellant) refuted the allegations levelled against him and professed his innocence.

The appellant did not opt to make his statement on oath as envisaged under Section 340(2), Cr.P.C., however produced (Exh.DA to Exh.DJ) in his defence.

The learned trial Court vide its judgment dated 15.09.2018 found Muhammad Yaqoob (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that the occurrence was unseen and the prosecution case hinges upon very weak and unreliable circumstantial evidence; that there is no evidence of last seen, or 'wajj-takkar' against the appellant and the appellant has been convicted and sentenced only on the basis of evidence of extra-judicial confession and judicial confession; that the prosecution witnesses of extra-judicial confession were not holding the status of authority in the society therefore, there was no reason with the appellant to make extra-judicial confession before them; that the alleged recoveries of cycle and tub have been planted against the appellant and in fact nothing has been recovered from him; that the prosecution could not prove any motive of the occurrence; that the

prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charges.

8. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has produced convincing and reliable circumstantial evidence against the appellant therefore, he was rightly convicted and sentenced by the learned trial Court; that the prosecution witnesses of extra-judicial confession and judicial confession were cross-examined at length but their evidence could not be shaken; that evidence of recovery of cycle and tub from the possession of the appellant has further corroborated the prosecution case; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

9. Arguments heard. Record perused.

10. The detail of the prosecution case has already been given in para No.3 of this judgment therefore, there is no need to repeat the same.

11. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases, every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' 1999 SCMR 1034. In the case of "Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:-

"...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 PC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused"

In the case of "Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

"7 ....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence."

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

"7 ....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

Keeping in view the parameters, laid down in the above-mentioned judgments, we proceed to decide this case.

12. We have noted that the prosecution case is based on the following pieces of circumstantial evidence.

i) Extra Judicial Confession of the appellant before Muhammad Javed complainant (PW-5) and Muhammad Khalid (PW-6).

ii) Judicial Confession of the appellant before Mudassar Hassan Khawaja, Judicial Magistrate (PW-9).

iii) Medical Evidence and PFSA reports.

iv) Recoveries of Tub and Cycle.

v) Pointation of the place of occurrence and place of throwing the dead body of the deceased by the appellant.

vi) Motive.

I. Extra Judicial Confession of the appellant before Muhammad Javed complainant (PW-5) and Muhammad Khalid (PW-6).

13. First of all we discuss the prosecution evidence of extra-judicial confession of Muhammad Yaqoob appellant made before Muhammad Javed complainant (PW-5) and Muhammad Khalid (PW-6). We have noted that the appellant was not nominated in the FIR and he has been implicated in this case through the supplementary statement of the complainant dated 30.03.2016. The occurrence in this case took place on 26.09.2015 and the FIR (Exh.PEE) was lodged on 27.09.2015, whereas, the abovementioned supplementary statement of the complainant was recorded on 30.03.2016 i.e., after about six months from the occurrence and the registration of the FIR. In the abovementioned supplementary statement Muhammad Javed complainant (PW-5) and Muhammad Khalid (PW-6) stated that on 30.03.2016, Muhammad Yaqoob (appellant) appeared before them and Danish Javed (given up PW), when they were present outside the house of the complainant. They further stated that the appellant made extra-judicial confession before them by stating that he had a burden on his mind therefore, he wanted to tell regarding the occurrence to the complainant party. The appellant further stated before the abovementioned PWs that on 26.09.2015 minor Ahmad Javed deceased came to his shop for taking toffees and he took the minor inside the house, where he committed sodomy with him and killed him by strangulating his neck. The appellant further stated that after committing the murder of Ahmad Javed minor, he packed his dead body in a sack and after loading the said body on his bicycle, he threw the same at 'Kharak' drain. We have noted that as per PFSA report,

no seminal material was detected on the anal swabs of the deceased to support the prosecution case that after committing sodomy with the minor, the appellant committed his murder. It is also noteworthy that there are contradictions in the statements of the prosecution witnesses of extra-judicial confession, because Muhammad Khalid (PW-6) has stated that the appellant also stated that after pressing the throat of Ahmad Javed minor, he dipped him in a water tub due to which he died but this fact was not stated by Muhammad Javed complainant (PW-5) that the minor was dipped in a water tub by the appellant. We have further noted that the complainant party was comprising of three male adult members, namely, Muhammad Javed complainant (PW-5), Muhammad Khalid (PW-6) and Danish Javed (given up PW) and according to the evidence of abovementioned prosecution witnesses, the appellant made extra-judicial confession regarding the murder of their near kith and kin after about six months of the occurrence but they did not try to apprehend the appellant at the time of making of his extra-judicial confession so that the appellant may be handed over to the police. We have further noted that Muhammad Khalid (PW-6) was not enjoying of any status of authority in the society and he stated during his cross-examination that he was an Assistant in the Accounts Branch of a Government College. Likewise, Muhammad Javed (PW-5) himself is the complainant of this case and there was no reason with the appellant to make extra-judicial confession before the abovementioned witnesses. We have further noted that according to the alleged extra-judicial confession of the appellant before the abovementioned prosecution witnesses, dead body of Ahmad Javed minor deceased was packed in a sack after his murder and thereafter, the same was thrown in the "Kharak" drain but according to the statement of Muhammad Akram Sub-Inspector (PW-2) and Muhammad Imran, 12321/C (PW-4) dead body was not packed in the sack and the same was lying open in the drain. No sack has been recovered in this case. Although according to the evidence of the prosecution, dead body of the deceased was thrown by the appellant in a drain but Dr. Zia ul Haq (PW-10), did not mention in his evidence the

presence of any mud or particles of drain on the body of the deceased. We are therefore, of the view that the abovementioned prosecution evidence qua extra-judicial confession of the appellant is not worthy of reliance.

II. JUDICIAL CONFESSION.

14. As per prosecution case, Muhammad Yaqoob appellant made judicial confession before Mudassar Hassan Khawaja, Judicial Magistrate (PW-9). We have noted that there are material contradictions in the prosecution case between the judicial confession made by the appellant in the Court and the extra-judicial confession made by the appellant before the prosecution witnesses i.e., Muhammad Javed complainant (PW-5) and Muhammad Khalid (PW-6). According to the judicial confession, the appellant stated that he attempted to commit sodomy with Ahmad Javed minor deceased, whereas, as per statements of the witnesses of extra-judicial confession, the appellant stated that he committed sodomy with the minor and thereafter, committed his murder. It is further noteworthy that according to the statement made by the appellant in his judicial confession, the mouth of the deceased was blocked by him (appellant) with his hands due to which he died, whereas, according to the statements of the prosecution witnesses of extra-judicial confession, neck of the deceased was strangulated by the appellant, whereas, according to the statement of Muhammad Khalid (PW-6), the appellant, after strangulating the neck of Ahmad Javed minor deceased, drowned him in a water tub due to which he died but Muhammad Javed complainant (PW-5) did not state so in his statement recorded by the learned trial Court and no such fact was mentioned by the appellant in his judicial confession that after pressing the neck of Ahmad Javed minor deceased, he drowned him in a water tub. It is further noteworthy that at the time of judicial confession, the appellant was not told by the concerned Magistrate that his custody will not be handed back to the police after recording of his confession which is in violation of Volume III Chapter 13 Rule 5 of the High Court Rules and Order on the subject. Although Mudassar Hassan Khawaja, Judicial Magistrate (PW-9) stated that after

recording of the confession of the appellant under Section 164 of Cr.P.C., he did not hand over his custody to the police rather the appellant was sent to jail through staff of the Court but he was unable to tell the name of any member of his staff who handed over the custody of the appellant to the jail authorities, whereas, on the other hand, Haji Maqsood, Sub-Inspector/I.O. (PW-12) stated that he took the appellant to Kot Lakhpat Jail. It is further noteworthy that in the judicial confession of the appellant, it has been stated by the appellant that after five days of the occurrence, the dead body of the deceased was recovered on his pointation. Relevant part of his statement, in this respect, reads as under:-

On the other hand, according to the prosecution case, the dead body of Ahmad Javed minor deceased was recovered on 02.10.2015, as stated by Muhammad Javed complainant (PW-5), as well as, by Muhammad Akram, Sub-Inspector (PW-2) and they did not state that the dead body was recovered on the pointation of the appellant rather the appellant has been implicated in this case through supplementary statement of the complainant on 30.03.2016, i.e., after more than six months from the occurrence. As per prosecution's own case, the dead body of Ahmad Javed minor was recorded on 02.10.2015, by Muhammad Ilyas, Sub-Inspector of Police Station Hanjarwal District Lahore. None of the prosecution witnesses stated that the dead body of the deceased was recovered on the pointation of the appellant. It is further noteworthy that no specific date or year of the occurrence has been mentioned in the judicial confession of the appellant. It is by now well settled that mere judicial confession of an accused by itself is not sufficient to maintain his conviction and sentence and the said judicial confession needs independent corroboration which is very much lacking in this case. There is no evidence of 'wajj-takkar', last seen etc, against the appellant in this case. As mentioned earlier, according to PFSA report (Exh.PHH), no seminal material was detected on the anal swabs of the deceased. In the circumstances, when there are material contradictions in the prosecution evidence regarding extra-judicial confession and the

judicial confession of the appellant and even otherwise judicial confession was not recorded in accordance with the law. Moreover, the retracted judicial confession of the appellant is not supported by any independent evidence hence, the same is not worthy of reliance. Reference in this context may be made to the cases of 'Muhammad Ashraf v. The State' (2016 SCMR 1617), 'Muhammad Ismail and others v. The State' (2017 SCMR 898) and Hashim Qasim and another v. The State' (2017 SCMR 986).

III. MEDICAL EVIDENCE AND PFSA REPORTS.

15. We have noted that according to the medical evidence, eight swabs were sent to the PFSA for detection of semens and DNA test but according to the report of PFSA (Exh.PHH), no seminal material was detected on the rectal swabs of Ahmad Javed deceased. It is also important to note that I.O. took nail scrapings of Ahmad Javed deceased and the same was sent to PFSA, Lahore and according to the report of PFSA (Exh.PPP), nail scraping of the deceased was mixture of at least two unknown male individuals, whereas, Muhammad Yaqoob appellant and Muhammad Ayub (nephew of the appellant) were eliminated as being contributors to the said DNA profile. We are therefore, of the view that the medical evidence and the abovementioned reports of PFSA have not supported the prosecution case against the appellant.

IV. RECOVERIES.

16. Insofar as the recoveries of bicycle and water tub on the pointation of the appellant is concerned, it is noteworthy that no incriminating material like blood stains or froth of the deceased were recovered from the abovementioned articles. Moreover, the aforementioned articles were not sent to the office of PFSA for detection of any incriminating material on the said articles. It is further noteworthy that Muhammad Javed complainant (PW-5) has admitted during his cross-examination that brother of the appellant also lived in the same house wherefrom the abovementioned articles were recovered which shows that the house of the

recovery was not exclusively under the possession of the appellant. No ownership proof above the abovementioned bicycle in the name of the appellant has been brought on the record. Under the circumstances, the abovementioned recoveries are of no avail to the prosecution.

V. Pointation by the appellant of the place of occurrence and place of throwing dead body of the deceased.

17. It is also noteworthy that the prosecution has alleged that the place of crime and place where the dead body of the deceased was thrown have been pointed out by the appellant but no incriminating material was recovered from the place of occurrence, as well as, from the place where the dead body of the deceased was allegedly thrown. It is further noteworthy that according to the prosecution case, on 22.04.2016, the appellant pointed out the place of throwing of the dead body of Ahmad Javed minor deceased, whereas, the dead body was already recovered in this case on 02.10.2015 and as such, the place of throwing of the dead body was already in the knowledge of the prosecution and no new fact was discovered or any recovery was effected from the abovementioned places. We are therefore, of the view that the abovementioned pieces of evidence are inconsequential for the prosecution case.

VI. MOTIVE.

18. As per prosecution case, the motive behind the occurrence was that the appellant committed sodomy with Ahmad Javed deceased and thereafter killed him. We have noted that there are material contradictions in the statements of prosecution witnesses regarding the motive. As mentioned earlier, as per evidence of PWs of extra-judicial confession, the appellant made confession before the witnesses that he committed sodomy with the deceased and then killed him, whereas, in the judicial confession, the appellant stated that he attempted to commit sodomy with the deceased. Moreover, as per medical evidence, no, seminal material was detected on

the anal swabs of the deceased. We are therefore, of the view that the prosecution has failed to prove the alleged motive in this case.

19. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5 ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating, the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

> '13...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

20. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No. 236652 of 2018 filed by Muhammad Yaqoob appellant, set aside his conviction and sentence recorded by the learned trial Court and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 312 of 2018 is answered in the negative. The appellant Muhammad Yaqoob is in custody, he be released from the jail forthwith if not required to be detained in any other case.

JK/M-173/L Appeal allowed.

2023 Y L R 1461

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Waheed Khan, JJ

SAMI ULLAH---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 258898-J and Murder Reference No. 390 of 2018, heard on 18th January, 2023.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Promptly lodged FIR---Accused was charged for committing murder of the father of complainant by firing---Occurrence in the case took place on 20.05.2017 at 06:00 a.m.---Matter was reported to the police on the same day through complaint and the FIR was also lodged on the same day i.e. on 20.05.2017 at 08:30 a.m., i.e., within a period of 02 hours and 30 minutes from the occurrence---Distance between the police station and the place of occurrence was 8-miles---Even the postmortem on the dead body of deceased was conducted on the same day on 20.05.2017 at 12:30 p.m. within a period of 06 hours and 30 minutes from the occurrence---Keeping in view the time of occurrence, the place of occurrence, its distance from the police station and the time of postmortem examination of deceased, it was of the view that there was no deliberate or conscious delay in reporting the matter to the police or in conducting the postmortem examination on the dead body of deceased---Circumstances established that the prosecution had proved its case against the accused, however, due to some mitigating circumstances, the conviction was maintained but sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---False implication of accused unlikely---Accused was charged for committing murder of the

father of complainant by firing---Record showed that complainant was son of deceased whereas eye-witness was brother-in-law of the deceased---Keeping in view the relationship of the eye-witnesses with deceased of the case, it was of the view that substitution in such like cases was a rare phenomenon because it was not expected by the near kith and kin of the deceased person to falsely implicate innocent person in the murder case of their near relative and to let off the real culprit---Both the said eye-witnesses were cross-examined at length but their evidence could not be shaken---Said witnesses corroborated each other on all material aspects of the case---Evidence of said witnesses was confidence inspiring and trustworthy---As the occurrence took place in the broad day light therefore, there was no chance of any mis-identification of the accused in the case---Circumstances established that the prosecution had proved its case against the accused, however, due to some mitigating circumstances, the conviction was maintained but sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Ocular account supported by medical evidence---Accused was charged for committing murder of the father of complainant by firing---Ocular account furnished by complainant and eye-witness had been fully supported by the medical evidence produced through Medical Officer who conducted the postmortem examination on the dead body of deceased within a period of 06 hours and 30 minutes from the occurrence---Although it was objected by defence that there was conflict between the ocular account and medical evidence of the prosecution because as per ocular account of the prosecution, deceased received four (04) firearm injuries, whereas, according to the medical evidence and postmortem report, there were five (05) injuries on the body of the deceased but it was noteworthy that one (01) out of the five (05) injuries mentioned by the Medical Officer i.e., injury No. 1 was a grazing wound on the right arm of deceased, whereas, injury No.2 was on the right armpit of the deceased---So it was evident that injuries Nos. 1 and 2 were

result of the same fire shot---Even the prosecution witnesses stated that first fire shot made by the accused after hitting right arm of deceased landed at his right armpit---Moreover, an eye-witness was not expected to give photo picture of each and every injury sustained by the deceased, with exactitude in the state of panic and sensation created at the time of occurrence due to the firing of accused---Circumstances established that the prosecution had proved its case against the accused, however, due to some mitigating circumstances, the sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

Abdur Rauf v. The State and another 2003 SCMR 522 and Ellahi Bakhsh v. Rab Nawaz and another 2002 SCMR 1842 rel.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Motive not proved---Effect---Accused was charged for committing murder of the father of complainant by firing---According to the prosecution witnesses, the accused committed the occurrence due to his quarrel with the son of deceased but no detail of the said quarrel like date, time and place had been mentioned by any prosecution witness---Noteworthy that no reason of the alleged quarrel between the parties had been given by any of the prosecution's witnesses---Vague and general statement had been made by the prosecution witnesses regarding the motive part of the occurrence---Thus, the motive alleged by the prosecution had not been proved in the case---However, if the prosecution evidence qua motive was excluded from consideration, even then sufficient incriminating evidence was available on record to prove the prosecution case against the accused---Circumstances established that the prosecution had proved its case against the accused, however, due to some mitigating circumstances, the conviction was maintained but sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

(e) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Recovery of weapon and crime empties---Scope---Accused was charged for committing murder of the father of complainant by firing---Record showed that rifle .222 bore was recovered from the possession of accused---Notable, the Investigating Officer had taken into possession six empties from the spot on the day of occurrence, whereas, rifle .222 bore was allegedly recovered from the possession of accused however, report of Forensic Science Agency in respect of the recovery was in the negative and the empties recovered from the spot could not be found to be fired from the rifle .222 bore, recovered on the pointation of accused---Thus, alleged recovery of .222 bore rifle on the pointation of the accused was inconsequential and no benefit could be extended to the prosecution on account of said recovery---However, if the prosecution evidence qua recovery of rifle .222 bore was excluded from consideration, even then sufficient incriminating evidence was available on record to prove the prosecution case against the accused---Circumstances established that the prosecution had proved its case against the accused, however, due to some mitigating circumstances, the conviction was maintained but sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

(f) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---Motive not proved--- Recovery of weapon in consequential---Accused was charged for committing murder of the father of complainant by firing---Record showed that prosecution had set a motive against accused but had failed to prove the same---Recovery of rifle .222 bore on the pointation of the accused had been disbelieved---Under the said circumstances, the death sentence awarded to the accused was quite harsh and the sentence of imprisonment for life would meet the ends of justice---Thus, the conviction was maintained but

sentence awarded to the accused was altered from death to imprisonment for life---Appeal was dismissed with said modification in sentence.

Barrister Danyal Ijaz Chadhar for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Tayyab Shaheen Dhillon and Malik Ahmad Nawaz Awan for the Complainant.

Date of hearing: 18th January, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Crl. Appeal No. 258898-J of 2018 filed by Sami Ullah appellant against his conviction and sentence and Murder Reference No. 390 of 2018 sent by the learned trial Court for confirmation or otherwise of the sentence of Death awarded to Sami Utah (appellant) by the learned trial Court. We proceed to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 14.11.2018 passed by the learned Addl. Sessions Judge, Arifwala District Pakpattan.

2. Sami Ullah (appellant) was tried in case FIR. No. 140 dated 20.05.2017 registered at Police Station Rang Shah District Pakpattan in respect of offence under Section 302 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 14.11.2018 has convicted and sentenced Sami Ullah appellant as under: -

> Under Section 302(b), P.P.C. to 'Death as tazir' for committing Qatl-i-Amd of Umar Hayat (deceased). He was also ordered to pay Rs.500,000/- (Rupees fine hundred thousand only) to the legal heirs of Umar Hayat deceased as compensation under Section 544-A of Cr.P.C. and in default thereof to undergo simple imprisonment for six months.

3. Brief facts of the case as given by the complainant Saif Ullah (PW-1) in his complaint (Exh.PA) on the basis of which formal FIR (Exh.PA/1) was chalked out, are that he (complainant) was resident of Chak No. 16/E.B and

was a cultivator by profession. On 20.05.2017 at 06:00 a.m., his (complainant's) father, namely, Umar Hayat (deceased) came from the house on a cart to take chaff from Square No. 49 Killa No. 23, where the complainant along with Munir Ahmad (PW-2) and Tazammal Hussain (given up PW) were already present. In the meanwhile, Sami Ullah (appellant) while armed with rifle came there and raised a 'lalkara' to teach a lesson for quarreling his (Umar Hayat deceased's) son, namely, Asad with him (appellant) and made a fire shot which hit at the right arm and armpit of Umar Hayat (deceased). Second fire shot made by the appellant landed at the left flank, whereas, the third fire shot made by the appellant landed on the back side of right thigh of Umar Hayat (deceased) who fell on the ground. The complainant party tried to rescue Umar Hayat (deceased) upon which Sami Ullah raised a 'lalkara' that if any body would come near then he shall face the same fate. On the hue and cry of the complainant party, people gathered at the spot, whereas, Sami Ullah (appellant) fled away from the spot while making aerial firing. Father of the complainant, namely, Umar Hayat (deceased) succumbed to the injuries at the spot.

4. The appellant Sami Ullah was arrested in this case on 28.05.2017 by Muhammad Iqbal Sub-Inspector/I.O. (PW-5). On 02.06.2017 Sami Ullah (appellant) made disclosure and got recovered rifle .222 bore (P-2) along with two live bullets (P-3/1-2) which was taken in to possession by the I.O. vide recovery memo. (Exh.PE). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 27.01.2018 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced nine witnesses during the trial and also produced documentary evidence in the shape of (Exh.PA to Exh.PO).

6. The statement of the appellant under Section 342 of Cr.P.C. was recorded. The appellant refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case

against you and why the PW's have deposed against you" the appellant Sami Ullah replied as under:--

> "It is a false case. All the PWs are related inter se. Neither I was present at the place of occurrence nor made any fire upon the deceased. Deceased was a notorious person having illicit relations with different women. Size and diameter of injuries are different which clearly show that different kinds of weapons were used upon the deceased by unknown accused persons. It is an un-witnessed occurrence. Recovery of gun is fake and planted one and due to this reason, the crime empties secured from the place of occurrence by the crime scene unit did not match with the gun. In fact, civil litigation remained pending between me and the complainant party and due to this reason and grudge, I was falsely involved in this false case."

The appellant Sami Ullah neither opted to make his statement on oath as envisaged under Section 340(2), Cr.P.C., nor produced any evidence in his defence.

The learned trial Court vide its judgment dated 14.11.2018 found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the police; that in fact the occurrence was unseen and the prosecution eye-witnesses are chance witnesses and they could not establish their presence at the spot at the relevant time; that there is conflict between the ocular account and medical evidence of the prosecution because as per prosecution's ocular account there were four injuries on the body of Umar Hayat deceased, whereas, as per postmortem report of the deceased there were five injuries on the body of the deceased; that the alleged recovery of rifle .222 bore (P-2) vide memo (Exh.PE) from the possession of the appellant is of no avail to the prosecution because the report of PFSA, Lahore (Exh.PN) in respect of the said weapon is in the

negative; that the motive was also not proved in this case against the appellant beyond the shadow of doubt. It is therefore, prayed that the appeal filed by Sami Ullah (appellant) may be allowed and the appellant may be acquitted of the charge by extending him the benefit of doubt.

8. On the other hand, it is contended by the learned Deputy Prosecutor General the State assisted by learned counsel for the complainant that the occurrence in this ease took place on 20.05.2017 at 06:00 a.m., and the matter was promptly reported to the police on the same day at 08:30 a.m., i.e. within a period of 02 hours and 30 minutes from the occurrence hence, promptness of the FIR rules out the possibility or any deliberation or concoction on the part of the prosecution; that the occurrence took place in the fields of Umar Hayat (deceased) and Saif Ullah (PW-I), whereas, Munir Ahmad (PW-2) is brother-in-law of the deceased therefore, their presence as the spot at the relevant time is quite natural and probable; that the occurrence took place in the broad day light therefore, there was no chance of any misidentification of the appellant by the prosecution's eye-witnesses; that the prosecution eye-witnesses were the inmates of the village where the occurrence took place therefore, they cannot be termed as chance witnesses; that the prosecution's case against the appellant is supported by the medical evidence furnished by Dr. Arslan Karim (PW-9), postmortem examination report of the deceased (Exh.PL) and pictorial diagram (Exh.PL/1); that the prosecution case is further corroborated by the recovery of rifle .222 bore (P-2) vide recovery memo (Exh.PE), on the pointation of the appellant; that motive has also been proved in this case against the appellant through reliable and confidence inspiring evidence of the prosecution witnesses; that the prosecution has proved its case against the appellant beyond the shadow of any doubt therefore, his appeal may be dismissed, Murder Reference be answered in the affirmative and the sentence of death awarded to the appellant by the learned trial Court may be upheld and maintained.

9. Arguments heard. Record perused.

10. Prosecution story as set forth in the complaint (Exh.PA) on the basis of which formal FIR (Exh.PA/1) was chalked out, has already been reproduced in para No.3 of this judgment therefore, there is no need to repeat the same.

11. The occurrence in this case took place on 20.05.2017 at 06:00 a.m. The matter was reported to the police on the same day through complaint (Exh.PA) and the FIR (Exh.PA/1) was also lodged on the same day i.e. on 20.05.2017 at 08:30 a.m., i.e., within a period of 02 hours and 30 minutes from the occurrence. The distance between the police station and the place of occurrence was 8-miles. Even the postmortem on the dead body of Umar Hayat (deceased) was conducted on the same day i.e., on 20.05.2017 at 12:30 p.m. i.e. within a period of 06 hours and 30 minutes from the occurrence keeping in view the time of occurrence, the place of occurrence, its distance from the police station and the time of postmortem examination of Umar Hayat deceased, we are of the view that there was no deliberate or conscious delay in reporting the matter to the police or in conducting the postmortem examination on the dead body or Umar Hayat deceased.

12. The ocular account of the prosecution has been furnished by Saif Ullah complainant (PW-1) and Munir Ahmad (PW-2). The occurrence in this case took place in he fields of Umar Hayat (deceased) situated in Chak No. 16/EB within the jurisdiction of Police Station Rang Shah District Pakpattan. Saif Ullah complainant (PW-1) is the son of Umar Hayat (deceased), whereas, Munir Ahmad (PW-2) is brother-in-law of Umar Hayat (deceased) and this fact was brought on the record during the cross-examination of Saif Ullah complainant (PW-1) who stated that Munir Ahmad PW was his maternal uncle. Both the abovementioned eye-witnesses are residents of the same village i.e., Chak No. 16/E.B where the occurrence took place. Saif Ullah complainant (PW-1) further stated during his cross-examination that the place of occurrence was situated at a distance of about two squares from his house. As mentioned earlier, the occurrence took place in the fields owned by Umar Hayat (deceased), as mentioned in the site plant (Exh.PK) therefore, presence of Saif Ullah complainant (PW-1) in his own fields situated in his village is quite natural and probable.

Likewise presence of Munir Ahmad (PW-2) at the spot at the relevant time being resident of the same village and closely related to Umar Hayat (deceased) is also quite natural and probable. The occurrence in this case took place in the broad day light. The appellant is single accused in this case. Saif Ullah complainant (PW-1) is real son, whereas, Munir Ahmad (PW-2) is brother-in-law of Umar Havat (deceased). Keeping in view the relationship of the abovementioned eye-witnesses with Umar Hayat deceased of this case, we are of the view that substitution in such like cases is a rare phenomenon because it is not expected by the near kith and kin of the deceased person to falsely implicate innocent person in the murder case of their near relative and to let off the real culprit. Both the abovementioned eye-witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Their evidence is confidence inspiring and trustworthy. As the occurrence took place in the broad day light therefore, there was no chance of any mis-identification of the appellant in this case.

13. The ocular account furnished by Saif Ullah complainant (PW-1) and Munir Ahmad (PW-2) has fully been supported by the medical evidence produced through Dr. Arslan Karim (PW-9) who conducted the postmortem examination on the dead body of Umar Hayat (deceased) on 20.05.2017 at 12:30 p.m., i.e., within a period of 06 hours and 30 minutes from the occurrence. He noted the following five (05) firearm injuries on the body of the deceased.

INJURIES:--

1. A fire arm lacerated grazing wound of 6 cm x 4.5 cm on the front of the right arm middle part.

2. A firearm lacerated entrance wound of 3 cm x 2.5 cm into going deep on the lateral side of right chest just below the right armpit.

3. A firearm lacerated wound of 1.5 cm x 1.5 cm into going deep. The lateral side of the right chest 4 cm lateral to injury No.2.

4. A firearm lacerated entrance wound of 3.5 cm x 2 cm on the lateral side of right iliac crest.

5. A firearm lacerated entrance wound of 3.5 cm x 3 cm on the back of right thigh.

Although it is argued by learned counsel for the appellant that there is conflict between the ocular account and medical evidence of the prosecution because as per ocular account of the prosecution, Umar Hayat (deceased) received four (04) firearm injuries, whereas, according to the medical evidence and postmortem report (Exh.PL), there were five (05) injuries on the body of the deceased but it is noteworthy that one (01) out of the abovementioned five (05) injuries mentioned by the Medical Officer i.e., injury No.1 was a grazing wound on the right arm of Umar Hayat deceased, whereas, injury No.2 was on the right armpit of the deceased. So it is evident that injuries Nos. I and 2 are result of the same fire shot. Even the prosecution witnesses stated that first fire shot made by the appellant after hitting right arm of Umar Hayat (deceased) landed at his right armpit. Moreover, it is by now well settled that an eye-witness is not expected to give photo picture of each and every injury sustained by the deceased, with exactitude in the state of panic and sensation created at the time of occurrence due to the firing of accused. Reliance in this respect may be placed on the case of 'Abdur Rauf v. The State and another' (2003 SCMR 522), wherein at page No. 526, the Hon'ble Supreme Court of Pakistan has held as under:--

> "We may observe that the minor discrepancies in the medical evidence relating to the seat of injuries would also not negate the direct evidence as the witnesses are not supposed to give photo picture of each detail of injuries in such situation, therefore, the conflict of nature of ocular account with medical as pointed out being not material would have no adverse effect on the prosecution case,"

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Ellahi Bakhsh v. Rab Nawaz and another' (2002 SCMR 1842). Under the circumstances, there is no material conflict between the ocular

account and the medical evidence of the prosecution and in our humble view, the ocular account of the prosecution has fully been supported by the medical evidence.

14. Insofar as the motive part of the prosecution case is concerned, we have noted that according to the prosecution witnesses, the appellant committed the occurrence due to his quarrel with the son of Umar Hayat (deceased), namely, Asad but we have noted that no detail of the said quarrel like date, time and place has been mentioned by any prosecution witness. It is also noteworthy that no reason of the aforementioned alleged quarrel between the parties has been given by any of the prosecution's witnesses. A vague and general statement has been made by the prosecution witnesses regarding the motive part of the occurrence. We are therefore, of the view that motive alleged by the prosecution has not been proved in this case.

15. Insofar as the recovery of rifle .222 bore (P-2) from the possession of Sami Utah (appellant) is concerned, we have noted that the Investigating Officer has taken into possession six empties from the spot on the day of occurrence vide recovery memo (Exh.PC), whereas, rifle .222 bore (P-2) was allegedly recovered from the possession of Sami Ullah (appellant) vide recovery memo (Exh,PE) however, report of PHA, Lahore (Exh.PN) in respect of the abovementioned recovery is in the negative and the empties recovered from the spot could not be found to be fired from the rifle .222 bore (P-2), recovered on the pointation of Sami Ullah appellant. In the light of above, alleged recovery of .222 bore rifle (P-2) on the pointation of the appellant is inconsequential and no benefit could be extended to the prosecution on account of abovementioned recovery.

16. We have disbelieved the prosecution evidence qua motive and recovery of rifle .222 bore (P-2) on the pointation of Sami Ullah (appellant) due to the reasons mentioned in paras Nos. 14 and 15 above, however, if the prosecution evidence qua motive and the recovery rifle .222 bore (P-2) is excluded from consideration, even then sufficient incriminating evidence is available on record to prove the prosecution ease against the appellant. As discussed earlier, the prosecution case has been proved against the

appellant through the reliable and confidence inspiring evidence of eye-witnesses, namely, Saif Ullah complainant (PW-1) and Munir Ahmad (PW-2). They stood the test of lengthy cross-examination but their evidence could not be shaken regarding the role played by the appellant during the occurrence and causing fatal firearm injuries to the deceased. The ocular account of the prosecution as given by Saif Ullah complainant (PW-1) and Munir Ahmad (PW-2) about the abovementioned role of the appellant regarding the commission of the murder of Umar Hayat (deceased) is fully supported by the medical evidence furnished by Dr. Arslan Karim (PW-9), postmortem report of Umar Hayat deceased (Exh.PL) and pictorial diagram (Exh.PL/1). The time of occurrence, the kind of weapon used, the nature and scat of injuries inflicted by the appellant to the deceased, all these facts as stated by the abovementioned eye-witnesses were fully supported by the aforementioned medical evidence therefore, we hold that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

17. Now coming to the quantum of sentence, we have noted some mitigating circumstances in favour of the appellant. Firstly prosecution has set a motive against Sami Ullah appellant but has failed to prove the same due to the reason mentioned in para No. 14 of this judgment. Secondly, recovery of rifle .222 bore (P-2) on the pointation, of the appellant has been disbelieved by us due to the reasons mentioned in paragraph No. 15 of this judgment. Under the circumstances, the death sentence awarded to the appellant is quite harsh and the sentence of imprison-ment for life shall meet the ends of justice.

18. While treating it a case of mitigation, the conviction of Sami Ullah appellant under Section 302(b), P.P.C. awarded by the learned trial Court is maintained but his sentence is altered from death to imprisonment for life. The compensation awarded by the learned trial Court against the appellant and sentence in default thereof are maintained and upheld. The benefit of Section 382-B of Cr.P.C. is also extended in favour of the appellant.

19. Consequently, with the above said modification in the conviction and sentence of Smai Ullah appellant, Criminal Appeal No. 258898-J of 2018 filed by the appellant is hereby dismissed. Murder Reference (M.R. No.

390 of 2018) is answered in the negative and death sentence of Sami Ullah appellant is not confirmed.

JK/S-4/L Appeal dismissed.

2023 Y L R 1752

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Waheed Khan, JJ

MUHAMMAD SARWAR---Appellant

Versus

MAGISTRATE 1st CLASS, DISTRICT GUJRAT and 6 others---Respondents

Intra-Court Appeal No. 12256 of 2023, heard on 15th March, 2023.

Criminal Procedure Code (V of 1898)---

----S. 30---Powers of Magistrate---Delay in filing application for medical examination---Effect---Mere delay in filing an application for conducting medical examination is not sufficient to dismiss such application.

Mansab Ali v. Asghar Ali Faheem Bhatti Additional Sessions Judge Nankana Sahib and 3 others PLD 2007 Lah. 176 and Ghulam Fareed v. Additional Sessions Judge D.G. Khan and 4 others 2010 PCr.LJ 4 ref.

Dr. Zia Ullah Ranjha for Appellant.

Waqar Saeed Khan, Addl. Advocate General and Nawaz, A.S.I. for the State.

Amjad Qayyum Baloch for Respondents Nos. 5 and 6.

Date of hearing: 15th March, 2023.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Intra-Court Appeal No. 12256 of 2023, filed by Muhammad Sarwar (appellant) against impugned order dated 23.01.2023, passed by learned Magistrate 1st Class Gujrat, whereby the application moved by the petitioner/complainant for re-examination of the victim of this case namely Mst. Aalia Sarwar by the District Standing Medical Board was dismissed, as well as, against order under appeal dated 08.02.2023, passed by learned Single Judge in Chamber of this Court, whereby the constitutional petition filed by the appellant i.e., Writ Petition No.8581 of 2023, against the abovementioned order was also dismissed.

2. Arguments heard. Record perused.

3. As per brief facts of the present case, Muhammad Sarwar petitioner/ complainant lodged FIR No.726/2022, dated 24.11.2022, under section 375-A, P.P.C., Police Station Kunjah, District Gujrat with the allegation that on the intervening night of 21/22-11-2022, his daughter namely Mst. Aalia Sarwar went out of her house to answer the call of nature but on her way, she was abducted by the accused mentioned in the FIR who took her to an under-

construction house of accused Zaka Ullah (respondent No.7), where the accused namely Yawar and Murad committed rape with her turn by turn, hence the abovementioned FIR. The alleged victim namely Mst. Aalia Sarwar was medically examined by the Medical Officer of Major Shabbir Sharif Hospital, Kunja, District Gujrat. In the relevant column of the medico legal report of the alleged victim regarding rupture of the hymen, the Medial Officer has mentioned that there was no rupture of hymen. It was case of the appellant that in fact rape was committed with his daughter namely Mst. Aalia Sarwar by the abovementioned accused persons and the Medial Officer has not issued correct medico legal report of the said victim, therefore, Mst. Aalia Sarwar may be re-examined by the District Standing Medical Board. We have noted that impugned order of the concerned Magistrate and order under appeal of the learned single Judge in Chamber of this Court were passed mainly on the ground that the appellant moved the application for re-examination of the victim by the District Standing Medical Board with a considerable delay but it is by now well settled that merely delay in filing an application for conducting medical examination is not sufficient to dismiss the application filed for the abovementioned purpose. Reliance in this respect is placed upon the judgments reported as "Mansab Ali v. Asghar Ali Faheem Bhatti Additional Sessions Judge Nankana Sahib and 3 others" (PLD 2007 Lahore 176) and "Ghulam Fareed v. Additional Sessions Juke D.G. Khan and 4 others" (2010 PCr.LJ 4). Moreover, re-examination of the alleged victim by the District Standing Medical Board shall be beneficial for the just decision of the case.

4. Keeping in view all the aforementioned facts, this Intra-Court Appeal is allowed and impugned order dated 23.01.2023, passed by learned Magistrate lst Class, Gujrat, as well as, order under appeal dated 08.02.2023, passed by the learned Single Judge in Chamber of this Court are hereby set-aside. Resultantly, the application moved by the appellant/complainant for re-examination of victim namely Mst. Aalia Sarwar is hereby accepted and the Medical Superintendent, District Headquarter Hospital, Gujrat is directed to get medically examined Mst. Aalia Sarwar from the District Standing Medical Board and hand over the report of the Medical Board to the police within a period of two weeks from the date of receipt of attested copy of this order. It is, however, clarified that consequences of late medical examination of the alleged victim by the Medical Board shall be determined by the learned trial Court after recording of evidence and the case shall be decided strictly in accordance with the law without being influenced by any observation made in this order.

SA/M-54/L Appeal allowed.

PLJ 2023 Cr.C. (Note) 33

[Lahore High Court, Lahore]

***present*: MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD TARIQ NADEEM, JJ.**

MUHAMMAD MUZAMMAL and another--Appellants

versus

STATE and another--Respondent

Crl. A. No. 104973 & M.R. No. 623 of 2017, decided on 7.9.2021.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Qatl-e-amd--Conviction and sentence--Challenge to--Quantum of sentence--Mitigating circumstances--No motive alleged--The motive in this case is shrouded in mystery--Prosecution did not allege any motive against appellant--It is not determinable in this case that as to what had actually happened prior to occurrence and what was real cause of occurrence which had resulted into present unfortunate incident, therefore, in our view death sentence awarded to appellant is quite harsh-- Prosecution failed to prove motive part of prosecution story and reason for this brutal incident which had taken place in odd hours of night at a place not surrounded by Abadi Deh and what happened immediately before incident provoking both appellants to cause such number of injuries with dattars on person of deceased is not known to anyone, as such, same shrouds in mystery--In such an eventuality same can be considered as a mitigating circumstance for showing leniency in favour of appellants in matter of punishment--Appeal dismissed. [Para 15] A & B

2011 SCMR 593, 2014 SCMR 1658, 2013 SCMR 583 &
PLD 2017 SC 152.

M/s. Rana Naveed Ahmad Khan, Muhammad Afzal Shuja, Ch. Imtiaz Ahmad Waince & Sheeba Qaisar, Advocates for Appellant.

Rai Asghar Hussain, Deputy Prosecutor General for State.

Mian Muhammad Awais Mazhar, Advocate for Complainant.

Date of hearing 7.9.2021.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall dispose of Criminal Appeal No. 104973 of 2017 filed by Muhammad Muzammal (appellant) against his conviction and sentence and **Murder Reference No. 623 of 2017** sent by the learned trial Court for confirmation or otherwise of the sentence of Death awarded to Muhammad Muzammal (appellant) by the learned trial Court. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 31.10.2017 passed by the learned Addl. Sessions Judge, Faisalabad.

2. Muhammad Muzammal (appellant) along with Muhammad Akram (co-accused since acquitted) was tried in case FIR. No. 624 dated 13.08.2016 registered at Police Station Millat Town District Faisalabad in respect of offences under Sections 302/34 of PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 31.10.2017 has convicted and sentenced Muhammad Muzammal appellant as under: -

> **Under Section 302 (b), PPC** to 'Death as tazir' for committing Qatl-i-Amd of Muhammaa Humayoun Wahla Advocate (deceased). He was also ordered to pay Rs. 3,00,000/- (rupees three hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr. P. C and in default thereof to undergo simple imprisonment for six months.
>
> However, the learned trial Court *vide* the aforementioned judgment has acquitted Muhammad Akram co-accused by extending him the benefit of doubt.

3. Brief facts of the case as given by the complainant Shah Jehan Babar (*PW-7*) in his complaint (Exh.PC/1), on the basis of which the formal FIR (Exh.PC) was chalked out, are that he (complainant) was serving as Deputy District

Attorney District Bhakkar. On 13.08.2016, he was present at his home due to leave. At about 07:00 p.m., the complainant along with his brother, namely, Muhammad Humayoun Wahla Advocate (deceased) came to Lawyers Housing Society Chak No. 198/R.B (Faisalabad) while riding a jeep, where Tanveer-ur-Rehman Randawa President Lawyers Housing Society (*PW-8*) and Tanveer Riaz, Advocate (given up PW) were already sitting on chairs in front of the office of Society. The complainant and Muhammad Humayoun Wahla (deceased) also sat on the chairs along with aforementioned PWs and started consultation. Outer lights of the office were on. At about 08:30p.m., Muhammad Mazammal (appellant) while armed with repeater gun .12 bore and Muhammad Akram (co-accused since acquitted) while empty handed came there. Muhammad Akram (co-accused since acquitted) pointed towards Muhammad Humayoun Wahla (deceased) upon which Muhammad Muzammal (appellant) made a fire shot with repeater gun .12 bore which hit at the face, neck and head of Muhammad Humayoun Wahla (deceased). The complainant along with his companions tried to apprehend the accused persons but they succeeded in fleeing away from the spot. The occurrence was witnessed by the complainant and the aforementioned PWs. The complainant and his companions attended to Muhammad Humayoun Wahla who succumbed to the injuries at the spot.

4. The appellant Muhammad Muzammal was formally arrested in this case on 08.09.2016 by Aftab Ahmad S.I/H1U (PW-10). On 14.09.2016, Muhammad Muzammal appellant led to the recovery of repeater gun .12 bore (P-5), which was taken into possession *vide* recovery memo. (Exh.PG). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 05.01.2017, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced ten witnesses during the trial. Shah Jehan Babar (*PW-7*) & Ch. Tanvir-ur-Rehman Randhawa, Advocate (*PW-8*) are the witnesses of ocular account. They also furnished the

evidence regarding the recovery of repeater gun .12 bore(P-5) on the pointation of the appellant. The medical evidence in this case was furnished by Dr. Muhammad Shafique, Senior Demonstrator PMC, Faisalabad (*PW-5*).

Muhammad Asghar, Inspector (*PW-9*) and Aftab Ahmad SI/HIU (PW-1*0*) were the Investigating Officers of this case.

Muhammad Naveed Aslam 4232/C (PW-1), Muhammad Nawaz Draftsman (PW-2), Muhammad Ilyas 2455/C (*PW-3*), Ehsan-ul-Haq 930/HC (*PW-4*) & Shahzad Waseem (*PW-6*) were the formal witnesses.

The prosecution also produced documentary evidence in the shape of scaled site-plan (Exh.PA & Exh.PA/1), memo of possession of blood stained clothes *i.e*. T-shirt (P-l), Pant (P-2), Underwear (P-3) and one glass bottle containing pellets (P-4) (Exh.PB), FIR (Exh.PC), compliant (Exh.PC/1), post-mortem report and pictorial diagrams of Muhammad Humayoun Wahla (deceased) (Exh.PD), (Exh.PD/1) & (Exh.PD/2), Injury Statement (Exh.PE), Inquest Report (Exh.PF), memo of possession of repeater gun .12 bore(P-5) (Exh.PG), rough site-plan of the place of recovery of gun .12 bore(Exh.PG/3), memo of possession of blood stained cotton (Exh.PH), memo of possession of empty cartridge (Exh.PJ), rough site-plan of the place of occurrence (Exh.PK), report of PFSA regarding DNA and Serology Analysis (Exh.PL), report of PFSA regarding weapon of offence (Exh.PM) and closed its evidence.

6. The statements of the appellant and his co-accused under Section 342 of Cr.P.C. were recorded. The appellant refuted the allegations levelled against him and professed his innocence. While answering to a question that 'Why this case against you and why the PWs have deposed against you" the appellant Muhammad Muzammal replied as under:

"I have no idea about my involvement in this case."

The appellant Muhammad Muzammal neither opted to make his statement on oath as envisaged under Section 340(2) Cr.P.C., nor he produced any evidence in his defence.

The learned trial Court *vide* its judgment dated 31.10.2017 found the appellant guilty, convicted and sentenced him as mentioned and detailed above however, Muhammad Akram co-accused was acquitted of the charge by extending him the benefit of doubt.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that there is delay of 03 hours in lodging the FIR which has created doubt regarding the truthfulness of the prosecution story; that there is delay of 11½ hours in conducting the post-mortem examination on the dead body of the deceased which is also suggestive of the fact that the prosecution's eye witnesses were not present at the spot at the time of occurrence and the above-referred delay was consumed in procuring the attendance of fake eye witnesses; that the complainant was posted as D.D.A at Chiniot at the time of occurrence therefore, he was not present at the time of occurrence; that both the eye witnesses were not residents of the place of occurrence as the occurrence took place in Chak No. 198/R.B of P.S: Millat Town Faisalabad, whereas, both the eye witnesses of this case are residents of Madina Town District Faisalabad and they could not establish their presence at the spot at the relevant time through any cogent and valid reason; that the occurrence took place at night time but no bulb was taken into possession by the I.O to establish that there was any light to identify the accused persons in the darkness of night; that recovery of repeater gun .12 bore(P-5) was affected from an open place which was accessible to public therefore, the said recovery cannot be relied upon; that no motive whatsoever has been alleged against the appellant; that an empty (P-6) was recovered from the spot on 13.08.2016 *vide* recovery memo. (Exh.PJ) but the same was sent to the office of PFSA, Lahore on 22.08.2016 *i.e*. with the delay of 09 days from the occurrence; that Shah Jehan Babar complainant (*PW-7*) could not tell during his cross-examination that as to who had informed the police about the occurrence and who had shifted the dead body of the deceased to the hospital; that it was alleged by the prosecution that Muhammad Akram (co-accused since acquitted) pointed towards the deceased whereupon Muhammad

Muzammal appellant made fire shot at the deceased but the abovementioned co-accused has been acquitted by the learned trial Court which has created serious dent in the prosecution story; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of any doubt. It is therefore, prayed that the instant appeal may be allowed and the appellant may be acquitted of the charge by extending him the benefit of doubt.

8. On the other hand, this appeal has been opposed by the learned Deputy Prosecutor General assisted by learned counsel for the complainant while contending that the FIR in this case was promptly lodged which rules out the possibility of any concoction or deliberation in the prosecution story; that both the prosecution's eye witnesses had no enmity with the appellant to falsely implicate him in this case; that both the eye witnesses are natural eye witnesses of the occurrence because the occurrence took place in the Lawyers Housing Society and both the eye witnesses are Advocates by profession; that the occurrence took place in front of the office of the Lawyers Housing Society where presence of electricity was quite natural and the same has duly been shown in site-plan (Exh.PA & Exh.PA/1); that Shah Jehan Babar complainant (*PW-7*) is real brother of the deceased and substitution in such like cases is a rare phenomenon; that the prosecution case is further corroborated by the recovery of repeater gun .12 bore (P-5) on the pointation of the appellant *vide* recovery memo (Exh.PG) and positive report of PFSA, Lahore (Exh.PM); that mere non-proof of motive does not extend any benefit to the appellant; that the prosecution has proved its case against the appellant beyond the shadow of doubt therefore, this appeal may be dismissed, Murder Reference may be answered in the positive and the sentence of death awarded to the appellant by the learned trial Court may be upheld & maintained.

9. Arguments heard. Record perused.

10. The occurrence in this case took place on 13.08.2016 at 08:30 p.m. The matter was reported to the police on the same night and the FIR (Exh.PC) was also lodged on the same night *i.e.* on 13.08.2016 at 11:15 p.m. The distance between the police station and the place of occurrence was 6 kilometers.

Keeping in view the time of occurrence, the place of occurrence and its distance from the police station, we are of the view that there was no deliberate or conscious delay in reporting the matter to the police.

11. The ocular account of the prosecution was furnished by Shah Jehan Babar complainant (*PW-7*) and Ch. Tanvir-ur-Rehman Randhawa, Advocate (*PW-8*). Shah Jehan Babar (*PW-7*) is the real brother of Muhammad Humayoun, Advocate (deceased). Even Shah Jehan Babar complainant (*PW-7*) himself is an Advocate by profession and he was performing his duty as Deputy District Attorney at Chiniot. It is further noteworthy that the occurrence took place in front of the office of Lawyers Housing Society situated in Chak No. 198/R.B within the jurisdiction of Police Station Millat Town District Faisalabad. Place of occurrence (office of Lawyers Housing Society Chak No. 198/R.B Faisalabad) has not been disputed in this case by the accused/defence. As both the eye-witnesses of the occurrence *i.e.* Shah Jehan Babar complainant (*PW-7*) & Ch. Tanvir-ur-Rehman Randhawa (*PW-8*) are lawyers by profession therefore, their presence at the spot at the relevant time is neither unnatural nor improbable. It is true that Shah Jehan Babar complainant (*PW-7*) was posted as D.D.A at Chiniot at the time of occurrence but he has categorically stated during his examination-in-chief that on the day of occurrence, he had come to Faisalabad on leave. It is a common observation that during the month of August of every year, the District Courts observe summer vacation. Moreover, it has been brought on the record during the cross-examination of Ch. Tanvir-ur-Rehman Randhawa, Advocate (*PW-8*) that he was President of Lawyers Housing Society. The abovementioned fact was not objected to by the defence during the cross-examination of abovementioned witness. We are therefore, of the view that presence of the abovementioned eye witness at the spot at the relevant time was quite natural. Both the abovementioned eye witnesses stated that on 13.08.2016 at 08:00 p.m., when they were sitting in front of the office of Lawyers Housing Society, the appellant while armed with .12 bore gun along with Muhammad Akram (co-accused since acquitted) emerged at the spot and thereafter, the appellant made a fire shot which landed on the face, neck and head of Muhammad Humayoun deceased. The abovementioned eye

witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Weaknesses pointed out by learned counsel for the appellant in the statement of the complainant that he could not tell the name of the person who had informed the police about the occurrence or who had shifted the deceased to the hospital are immaterial and the same have no relevancy with the material aspects of the case. Their evidence of both the aforementioned eye witnesses is trustworthy and confidence inspiring. It is further noteworthy that Shah Jehan Babar complainant (*PW-7*) is real brother of the deceased. It is not expected that he would let off the real culprit and would falsely implicate an innocent person for the murder of his real brother. Substitution in such like cases is a rare phenomenon. Although learned counsel for the appellant has argued that the occurrence took place at night time and identification of the appellant was not possible during the darkness of night and bulb has not been taken into possession by the I.O. but we have noted that in the site-plan (Exh.PA & Exh.PA/1), the presence of electric lights at the spot has been shown at point Nos. 6,7 & 8. As mentioned earlier, the place of occurrence has not been disputed by the accused/defence and as the occurrence took place in front of the office of Lawyers Housing Society therefore, presence of lights at the spot was quite natural. We are therefore, of the view that the defence could not establish any weakness in the abovementioned evidence of the prosecution's eye witnesses and there was no chance of any misidentification of the appellant in presence of electric lights at the spot. Muhammad Akram (co-accused since acquitted) was not assigned any injury on the body of the deceased, whereas, the appellant has been assigned the role of making a fire shot which landed on different parts of the body of the deceased and as such, case of the appellant is distinguishable from the case of the abovementioned co-accused therefore, acquittal of above-referred co-accused is of no avail to the appellant.

12. Medical evidence of the prosecution was furnished by Dr. Muhammad Shafique, Senior Demonstrator PMC, Faisalabad (*PW-5*). The said witness stated that on 14.08.2016 at 08:00 a.m., he conducted post-mortem

examination on the dead body of Muhammad Humayoun deceased and found the following injuries on his body:-

INJURIES:

1.A. A 1x1 cm wound of fire-arm entry was present in front of forehead in right side 4 cm from midline 8 cm above the right eye brow.

2.A. A fire-arm wound of entry 1x1 cm on right side of face 4 cm from the right eye 5 cm from right ear.

3.A. A fire-arm wound of entry 2x1 cm on right side of face on lower jaw 3 cm from right ear 8 cm from right corner of mouth laterally.

4.A. A fire-arm wound of entry 1x1 cm on chin of left side (lower part of chin) half cm from midline to left 1x1½ cm below the chin.

5.A. A fire-arm wound of entry 1 x ½ cm on right side of upper lip 2 cm from midline 2 cm from nostrial teeth and upper jaw was broken on right side.

6.A. A fire-arm wound of entry in front of neck 4 cm from midline to right side and 4 cm above the right clavical.

6.B. A bruised area of 4x5 cm on left side of chest 5 cm from midline 3 cm from mid of medial border of left scapula.

7.A&B. A fire-arm wound of entry and exit on upper part of right side of chest just close to the top of shoulder joint 1½ x 1cm in size 8 cm from base of neck 7 cm below from right shoulder joint top.

Note. On exploration of brain 3 metalic projectile were discovered in the brain tissue. Upper and lower jaw bone (maxilla and mandible) of right side also fractured.

It was case of the prosecution that fire shot made by the appellant with his .12 boregun landed on the face, neck and head of Muhammad Humayoun deceased and the evidence of abovementioned prosecution's eye witnesses has fully been supported by the medical evidence furnished by Dr. Muhammad Shafique (*PW-5*). It is true that there is delay of 11½ hours in conducting the post-mortem examination on the dead body of the deceased but it is noteworthy that Dr. Muhammad Shafique (*PW-5*) has categorically stated in his examination-in-chief that the dead body was received in the dead house on 13.08.2016 at 11:25 p.m. Under the circumstances, it cannot be held that the occurrence was unseen and the abovementioned delay was consumed in transporting the dead body to the hospital as the same remained lying unattended due to non-availability of any eye witness. As per opinion of Dr. Muhammad Shafique (*PW-5*), probable time that elapsed between the injuries and death was immediate and between the death and post-mortem examination was 10/15 hours. The said time of occurrence given by the Medical Officer coincides with the time of occurrence, given by the abovementioned prosecution's eye witnesses. We are therefore, of the view that the medical evidence furnished in this case through Dr. Muhammad Shafique (*PW-5*) has fully supported the evidence of prosecution's eye witnesses.

13. Prosecution case is further corroborated by the recovery of repeater gun .12 bore (P-5) on the pointation of the appellant *vide* recovery memo. (Exh.PG) and positive report of PFSA, Lahore (Exh.PM). It is noteworthy that empty (P-6) was recovered from the spot on 13.08.2016 *vide* recovery memo. (Exh.PJ) and the same was deposited in the office of PFSA, Lahore on 22.08.2016. Muhammad Muzammal appellant was arrested in this case on 08.09.2016 and repeater gun .12 bore(P-5) was recovered from his possession on 14.09.2016. The said gun was deposited in the office of PFSA, Lahore on 05.10.2016. According to the report of PFSA, Lahore (Exh.PM), empty recovered from the spot was found to be fired with gun (P-5), which was recovered on the pointation of the appellant, and as such, recovery of repeater gun .12 bore(P-5) and positive report of PFSA, Lahore (Exh.PM) have further corroborated the prosecution case against the appellant. Mere delay of 09 days

in sending empty to the office of PFSA is immaterial in absence of any proof of malafide of the police against the appellant. It is true that the abovementioned gun was recovered on the pointation of the appellant from a place adjacent to the Canal Link Road of Chak No. 198/R.B but the same was concealed in a pit and the appellant led to the recovery of said gun and got the same recovered after digging the earth. Under the circumstances, place of recovery of gun (P-5) was in exclusive knowledge of the appellant therefore, there is no substance in the arguments of learned counsel for the appellant that gun was recovered from an open place accessible to public because the said gun was not visible to any other person.

14. We have noted that no motive whatsoever has been alleged in this case by the prosecution. However, if motive has not been alleged by the prosecution, even then sufficient incriminating evidence is available on record to prove the prosecution case against the appellant. As discussed earlier, the prosecution case has been proved through the reliable and confidence inspiring evidence of eye-witnesses, namely, Shah Jehan Babar complainant (*PW-7*) and Ch. Tanvir-ur-Rehman Randhawa, Advocate (*PW-8*). They stood the test of lengthy cross-examination but their evidence could not be shaken regarding the role played by the appellant during the occurrence. The ocular account of the prosecution as given by Shah Jehan Babar complainant (*PW-7*) and Ch. Tanvir-ur-Rehman Randhawa, Advocate (*PW-8*) about the role of the appellant is fully supported by the medical evidence furnished by Dr. Muhammad Shafique (*PW-5*), as well as, post-mortem report of Muhammad Humayoun deceased (Exh.PD), pictorial diagrams (Exh.PD/1) & (Exh.PD/2). The time of occurrence, the kind of weapon used, the nature of injury inflicted by the appellant to the deceased, all these facts as stated by the abovementioned eye-witnesses were fully supported by the aforementioned medical evidence. The prosecution case is further corroborated by the recovery of repeater gun .12 bore(P-5) at the instance of the appellant *vide* recovery memo. (Exh.PG) and positive report of PFSA, Lahore (Exh.PM) therefore, we hold that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

15. Now coming to the quantum of sentence, we have noted a mitigating circumstance in favour of the appellant. The motive in this case is shrouded in mystery. The prosecution did not allege any motive against the appellant. It is not determinable in this case that as to what had actually happened prior to the occurrence and what was the real cause of occurrence which had resulted into the present unfortunate incident, therefore, in our view the death sentence awarded to the appellant is quite harsh.

While treating it a case of mitigation, we have fortified our views by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of *'Ahmad Nawaz and another vs. The State'* (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:

> *The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of 'Iftikhar-ul-Hassan v. Israr Bashir and another' (PLD 2007 SC 111), it was held that 'this is settled law that provisions of Section 306 to 308, PPC attracts only in the cases of Qatl-i-Amd liable to Qisas under Section 302(a), PPC and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under Section 302(b) PPC. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under Section 302(a) and 302(b) PPC respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302(b) PPC and exercise of this discretion in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in 'which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in 'Ghulam Muretaza v. State' (2004 SCMR 4), 'Faqir Ullah v. Khalilpuz-Zaman (1999*

SCMR 2203), 'Muhammad Akram v. State' (2003 SCMR 855) and 'Abdul Salam v. State' (2000 SCMR 338). The Court while maintaining the conviction under Section 302(b) PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B of Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-eAmd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:-)

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course" (underlining, italic and bold supplied)."

In the case of *'Muhammad Nadeem Waqas and another vs. The State'* (2014 SCMR 1658), the Hon'ble Supreme Court of Pakistan at Page No. 1661 has held as under:-

"8…… the prosecution failed to prove motive part of the prosecution story and the reason for this brutal incident which had taken place in odd hours of night at a place not surrounded by Abadi Deh and <u>what happened immediately before the incident provoking both the appellants to cause such number of injuries with dattars on the person of deceased is not known to anyone, as such, the same shrouds in mystery.</u> In such an eventuality the same can be considered as a mitigating circumstance for showing leniency in favour of the appellants in the matter of punishment"

(Bold & underlining is supplied for emphasis)

Similar view has been taken by the Hon'ble Supreme Court of Pakistan in the cases of *'Ahmad and another vs. Shafiq-ur-Rehman and another'* (2013 SCMR 583) and *'Amjad Shah vs. The State'* (PLD 2017 Supreme Court 152).

16. In the light of above discussion, the conviction of Muhammad Muzammal under Section 302(b), PPC awarded by the learned trial Court is maintained but his sentence is altered from **death to imprisonment for life.** The compensation awarded by the learned trial Court against the appellant and sentence in default thereof are maintained and upheld. The benefit of Section 382-B of Cr.P.C. is also extended in favour of the appellant.

17. Consequently, with the above said modification in the sentence of Muhammad Muzammal appellant, Criminal Appeal No. 104973 of 2017 filed by the appellant is hereby **dismissed.** Murder Reference (M.R. No. 623 of 2017) is answered in the **negative** and death sentence of Muhammad Muzammal appellant is not **confirmed.**

(A.A.K.) Appeal dismissed

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Presnt: MALIK SHAHZAD AHMED KHAN AND MUHAMMAD WAHEED KHAN, JJ.

MUHAMMAD USMAN ARSHAD--Appellant

versus

ADDITIONAL SESSIONS JUDGE and 3 others--Respondents

I.C.A. No. 64412 of 2022, decided on 18.10.2022.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 22-A--Law Reforms Ordinance, (XII of 1972), S. 3--Petition for registration of criminal case--Dismissed--Appeal--Dismissed-Challenge to--Order passed by Ex-Officio Justice of Peace and noticed that it has been passed in accordance with law keeping in view the facts and circumstances of the case--As far as Contention raised by counsel for appellant is concerned, it needs elaborate inquiry, which exercise can only be done by Investigating Officer during course of investigation after registration of formal FIR--Counsel for appellant has also failed to point out any illegality or infirmity in impugned order passed by Single Judge in Chamber--ICA dismissed. [Para 2] A

Rai Ashfaq Ahmad Kharal, Advocate for Appellant.

Ch. Akbar Shah Muhammad, Assistant Advocate General on Court's call.

Date of hearing: 18.10.2022.

ORDER

By filing the instant Intra Court Appeal under Article 3 of the Law Reforms Ordinance, 1972, the appellant has impugned the order dated 29.09.2022 passed by the learned Single Judge in Chamber, whereby Writ Petition No. 41290 of 2021 filed by the appellant was dismissed and the order dated 21.06.2021 passed by the learned Ex-Officio Justice of Peace was upheld.

2. Precisely, facts leading to the instant appeal are that four unknown accused persons in police uniform while armed with their respective weapons intercepted Respondent No. 4, who was going to his house on a motorcycle and forcibly snatched mobile phone, Rs. 2000/-and his motorcycle 125, however, during the occurrence veil of one of accused was removed to whom the respondent identified him and that person/accused was disclosed to be the present appellant. The application of the said respondent was allowed by the learned Ex-Officio Justice of Peace and accordingly the Station House Officer concerned was directed to record statement of the said respondent and proceed in accordance with the provisions of Section 154 Cr.P.C. Learned Single Judge in Chamber feeling satisfied with the observation given by the learned Ex-Officio Justice of Peace proceeded to dismiss Writ Petition No. 41290 of 2021 filed by the appellant *vide* impugned-order. We have gone through the order dated 21.06.2021 passed by the learned Ex-Officio Justice of Peace and noticed that it has been passed in accordance with law keeping in view the facts and circumstances of the case. As far as contention raised by learned counsel for the appellant is concerned, it needs elaborate inquiry, which exercise can only be done by the Investigating Officer during the course of investigation after registration of formal FIR. Even otherwise, learned counsel for the appellant has also failed to point out any illegality or infirmity in the impugned order passed by the learned Single Judge in Chamber.

3. In the light of above discussion, the instant Intra Court Appeal stands dismissed *in limine.*

(Y.A.) ICA dismissed.

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[Lahore High Court, Lahore]

Present: MALIK SHAHZAD AHMAD KHAN, J.

MUSTAFA--Petitioner

versus

STATE 3 others--Respondents

Crl. Rev. No. 879 of 2012, heard on 17.2.2023.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 324 & 337-F(v)--Conviction and sentence--Challenge to--Attempt to murder--Benefit of doubt--Moreover, if there was earlier rift between parties on abovementioned issue and they were not on speaking or visiting terms with each other despite their close relationship then as to why PW-2 accompanied petitioner on night of occurrence from his shop to canal bridge--These facts have created further doubt in prosecution case--It is noteworthy from perusal of impugned judgment of trial Court that co-accused were acquitted merely on basis of police opinion which becomes irrelevant after recording of prosecution evidence by trial Court--Prosecution could not prove its case against petitioner beyond shadow of doubt--**Held:** It is by now well settled that if there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to give benefit of doubt to accused, whereas, instant case is replete with number of circumstances which have created serious doubts in prosecution case--Prosecution has failed to prove its case against the petitioner beyond the shadow of doubt--Revision allowed. [Para 8, 9 & 10] A, B & C

2010 SCMR 660, 2008 SCMR 6, 2016 SCMR 1763, 1995 SCMR 1345 & 2009 SCMR 230 *ref.*

Syed Afzal Shah Bukhari, Advocate for Petitioner.

Ms. Asiya Yasin, Deputy District Public Prosecutor for State.

Mr. Muhammad Ishnaq Sahu, Advocate for Complainant.

Date of hearing: 17.2.2023.

JUDGMENT

Mustafa petitioner was tried in a private complaint lodged for offences under Sections 324/337-F(v) of PPC relating to Police Station Basirpur District Okara by learned Judl. Magistrate Section-30, Depalpur. After conclusion of the trial, the learned trial Court *vide* its judgment dated 22.03.2010 has convicted and sentenced the petitioner as under:

> **Under Sections 324, PPC** to undergo rigorous imprisonment for a period of four years for causing injury to Muhammad Ahmad injured (PW-2) with fine of Rs. 20,000/-(Rupees twenty thousand only) and in default thereof, to further undergo simple imprisonment for two months.
>
> **Under Section 337F(v), PPC** to undergo rigorous imprisonment for a period of four years of causing injury to Muhammad Ahmad injured (PW-2). He was also directed to pay Daman of Rs. 20,000/-(Rupees twenty thousand only) to the injured and in default thereof, he was directed to be kept in jail to serve out simple imprisonment.

The learned trial Court, however, *vide* the same judgment has acquitted *Mst.* Bushra Bibi and Niaz Ahmad co-accused while extending them the benefit of doubt. All the sentences were directed to run concurrently. Benefit of Section 382-B of, Cr.P.C., was also extended in favour of the petitioner. The appeal filed by the petitioner before the learned Addl. Sessions Judge, Depalpur was dismissed *vide* impugned judgment dated 30.08.2012 and the convictions & sentences recorded by the learned trial Court were upheld & maintained. Hence, the present Criminal Revision Petition before this Court.

2. As per brief facts of the present case, given by Muhammad Ali complainant (PW-1) in the private complaint are that he was resident of Faizabad and a labourer by profession, whereas, his son, namely, Muhammad Ahmad (PW-2) had made a shop of tailor master at Diggi Suddarke. On 02.09.2004 at 08:00 p.m., Mustafa petitioner called the son of the complainant and took him to

canal bridge, where, Niaz Ahmad and *Mst.* Bushra Bibi (co-accused since acquitted) were standing. The complainant & PWs followed them and witnessed that Mustafa petitioner made a fire shot with pistol which landed at the right elbow of Muhammad Ahmad (PW-2). Niaz Ahmad (co-accused since acquitted) made a fire shot hitting Muhammad Ahmad (PW-2) at his right flank and went through & through. *Mst.* Bushra Bibi (co-accused since acquitted) raised a *'lalkara'* that Muhammad Ahmad (PW-2) should not be let alive. Motive behind the occurrence was that Niaz Ahmad (co-accused since acquitted) wanted to marry his daughter, namely, *Mst.* Bushra Bibi (co-accused since acquitted) with son of the complainant, namely, Muhammad Ahmad (PW-2) however, Muhammad Ahmad (PW-2) refused to accept the proposal and due to this grudge, the accused persons committed the occurrence.

Initially FIR No. 483 dated 03.09.2004 was lodged at Police Station Basirpur District Okara for offences under Sections 324/337-F(v)/337-F(i)/34 of PPC, against the petitioner and his co-accused however, being dis-satisfied with the police investigation, Muhammad Ali complainant (PW-1) lodged the private complaint.

3. After completion of investigation, the challan was prepared and submitted before the trial Court The learned trial Court recorded cursory statements of the witnesses of the complainant party and thereafter summoned the accused to face the trial The learned trial Court after framing of charge, recording of the prosecution evidence, as well as, statements of the accused under Section 342 of, Cr.P.C., and after hearing the arguments of learned counsel for the parties has convicted & sentenced the petitioner as mentioned and detailed above *vide* impugned judgment dated 22.03.2010, whereas, the appeal filed by the petitioner was dismissed by the learned Addl. Sessions Judge, Depalpur *vide* impugned judgment dated 30.8.2012 hence, the present criminal revision before this Court.

4. Arguments heard. Record perused.

5. Star witness of this case is Muhammad Ahmad (PW-2) who is the sole injured in this case. The occurrence in this case took place on 02.09.2004 at

08:00 p.m., (night). In his statement recorded by the learned trial Court, Muhammad Ahmad (PW-2) did not mention any source of light that as to how he identified the petitioner in the darkness of night. In his cross-examination, he frankly conceded that it was dark night on the relevant date. He further admitted that the occurrence took place at the bridge of canal and there was no source of light at the canal. He also stated that there was no residential area around the place of occurrence. He further stated that there was no patrol pump at the place of occurrence. Relevant part of his statement in this respect reads as under:

"جائے وقوعہ پر پٹرول پمپ نہ ہے بلکہ نہر ہے ---------- رات اندھیری تھی نہر کے کنارے کوئی روشنی نہ تھی جائے وقوعہ کے ارد گرد آبادی نہ ہے۔"

Under the circumstances, the identification of the petitioner in the darkness of night is not free from doubt.

6. It is further noteworthy that Muhammad Ahmad (PW-2) in his examination-in-chief has stated that on the night of occurrence, he was present at his shop along with Muhammad Ali (PW-1), Muhammad Ibrahim and Muhammad Yasin (given up PWs) when Mustafa petitioner came there and asked him (Muhammad Ahmad PW-2) that Niaz Ahmad (co-accused since acquitted) and *Mst.* Bushra Bibi (co-accused since acquitted) were calling him at the bridge of canal, whereupon, he accompanied the petitioner to the bridge of canal and the occurrence took place at the said bridge. In his statement recorded by the learned trial Court, he has not stated that his father Muhammad Ali (PW-1) also followed him or reached at the place of occurrence or he witnessed the occurrence. Though he stated during his cross-examination that the police met him at railway crossing and his statement, as well as, the statement of his father, namely, Muhammad Ali (PW-1) was recorded there but no where in his statement, he claimed that his father, namely, Muhammad Ali (PW-1) also witnessed the occurrence. Under the circumstances, presence of Muhammad Ali (PW-1) at the spot at the relevant time becomes doubtful.

7. It is further noteworthy that during his cross-examination, Muhammad Ahmad (PW-2) stated that he received injuries from a distance of 2/3 *karams* from the accused. Relevant part of his statement in this respect reads as under:

"فائر 02/03 کرم سے لگے تھے۔"

It is therefore, evident that Muhammad Ahmad injured (PW-2) claimed that he received injuries on his body from a distance of 2/3 *karams* meaning thereby he received injuries from a distance of 10-15 feet from the accused but according to the evidence of Dr. Aftab Iqbal Rana (PW-3), blackening was present on the entry wound of right elbow of Muhammad Ahmad (PW-2) which injury was attributed to the petitioner. Even blackening was present on the skin deep wound on the abdomen of Muhammad Ahmad (PW-2) which was assigned to father of the petitioner, namely, Niaz Ahmad (co-accused since acquitted). It is therefore, evident that there was conflict between the ocular account and the medical evidence of the prosecution because blackening around the wound can only occur if fire shot is made from a distance of 3/4 feet. Reliance in this respect may be placed on the cases of *'Barkat Ali vs. Muhammad Asif and others'* (2007 SCMR 1812), *'Muhammad Ishaq vs. The State'* (2007 SCMR 108), *'Zahir Yousaf and another vs. The State and another* (2017 SCMR 2002) and *'Faiz Meeran vs. Muhammad Khan and others'* (2016 SCMR 1456).

8. According to the prosecution case, motive behind the occurrence was that the petitioner insisted Muhammad Ahmad (PW-2) to marry with his sister, namely, *Mst.* Bushra Bibi (co-accused since acquitted) and on refusal of the injured, the occurrence was committed by the petitioner and his co-accused. Muhammad Ahmad (PW-2) was duly confronted with his previous statement wherein no such allegation was levelled by the said witness and improvements made by him in this respect were duly brought on the record. He further stated during his cross-examination that he or his father, namely, Muhammad Ali (PW-1) were not even on speaking terms with the accused party of this case. He further stated that they never visited the houses of each other. He also stated that there was no discussion with parents of *Mst.* Bushra Bibi regarding her marriage with him prior to the occurrence and he never expressed his wish in this respect with the brother or father of said *Mst.* Bushra Bibi (co-accused since acquitted). Relevant parts of his statement in this respect read as under:

"میں نے اپنے بیان سرسری میں یہ بات تحریر کرائی تھی کہ ملزمان نے کہا تھا کہ تمہاری شادی بشری سے کرنا چاہتے ہیں میں نے انکار کر دیا۔ تقابل Ex.DA سے کیا گیا۔ ایسا

تحریر نہ ہے درست ہے کہ میرے والد محمد علی اور میرا ملزم فریق کے ساتھ وقوعہ سے قبل بول چال نہ تھا اور نہ ہی آنا جانا تھا۔ میرا والد اور نیاز احمد ملزم آپس میں خالہ زاد ہیں ---------- میری بشری کے والدین کے ساتھ وقوعہ سے قبل شادی کی بات نہ چلتی تھی۔ میں نے بشری ملزمہ کے والد اور بھائی کے بھی بشری کے ساتھ رشتے کی خواہش نہ کی تھی۔"

It is therefore, evident from the perusal of the abovementioned prosecution evidence that the story of the prosecution was result of dishonest improvement and when the parties were not even on visiting or speaking terms then there was no occasion for the petitioner to ask Muhammad Ahmad (PW-2) to many with his sister and refusal of the said witness to do so. Under the circumstances, the prosecution story *qua* the motive is not worthy of reliance. Moreover, if there was earlier rift between the parties on the abovementioned issue and they were not on speaking or visiting terms with each other despite their close relationship then as to why Muhammad Ahmad (PW-2) accompanied the petitioner on the night of occurrence from his shop to the canal bridge. These facts have created further doubt in the prosecution case.

9. It is further noteworthy that the prosecution also implicated *Mst.* Bushra Bibi co-accused & Niaz Ahmad co-accused in this case but they have been acquitted by the learned trial Court on the basis of same evidence, whereas, the petitioner has been convicted & sentenced without any independent corroboration of the prosecution evidence against him. It is noteworthy from the perusal of the impugned judgment of the learned trial Court that the abovementioned co-accused were acquitted merely on the basis of police opinion which becomes irrelevant after recording of prosecution evidence by the learned trial Court, as observed by the Hon'ble Supreme Court of Pakistan in the case of *'Muhammad Ahmad (Mahmood Ahmed) and another vs. The State'* (2010 SCMR 660) hence, the case of the petitioner is not distinguishable merely on the basis of police opinion. It is further noteworthy that Niaz Ahmad (co-accused since acquitted) was assigned the role of making a fire shot which landed on the right flank of Muhammad Ahmad (PW-2) and the said injury was available in the MLR of injured PW as Injury No. 3. Under the circumstances, case of the petitioner is not distinguishable from the case of Niaz Ahmad co-accused on merits but the said co-accused has been acquitted

by the learned trial Court and no appeal has been filed by the prosecution against acquittal of the said co-accused therefore, prosecution evidence which has been disbelieved against Niaz Ahmad co-accused cannot be believed against the petitioner in absence of independent corroboration which is very much lacking in this case. Reliance in this respect may be placed on the cases of *'Akhtar Ali and others vs. The State'* (2008 SCMR 6) & 'Shahbaz vs. The State' (2016 SCMR 1763).

10. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the petitioner beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts in the prosecution case. In the case of *'Tariq Pervez vs. The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:

> '5 ..... The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram vs. The State'* (2009 SCMR 230), at page 236, observed as under:

> '13 ..... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable

doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.''

11. In the light of above discussion, I have come to this irresistible conclusion that the prosecution has failed to prove its case against the petitioner beyond the shadow of doubt, therefore, I accept **Criminal Revision No. 879 of 2012** filed by Mustafa petitioner, set aside his conviction and sentence recorded by the learned trial Court *vide* judgment dated 22.03.2010 & upheld by the learned Appellate Court *vide* impugned judgment dated 30.08.2012 and acquit him of the charges by extending him the benefit of doubt. He is present before the Court on bail. His bail bonds are, directed to be released and his surety stands discharged from liability.

(A.A.K.) Revision allowed.

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[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD WAHEED KHAN, JJ.**

ALI AKBAR and another--Appellants

versus

STATE etc.--Respondents

Crl. A. No. 202898-J & M.R No. 175 of 2018, decided on 14.9.2022.

Sole eye-witness--

----It is by now well settled that evidence of even sole eye witness can be relied upon if same is trustworthy and confidence inspiring--We have noted that both abovementioned eye witnesses were cross-examined at length but their evidence could not be shaken--They corroborated each other on all material aspects of case--Their evidence is confidence inspiring and trustworthy. [Para 12] A

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Qatl-e-amd--Murder reference--Conviction and sentence--Challenge to--Ocular account--Medical evidence--Quantum of sentence--As mentioned earlier, occurrence in this case took place at night time i.e., at 8.15 p.m., therefore, substantial time must have consumed in transporting dead bodies from abovementioned village to Department of Forensic Medicine & Toxicology, Punjab Medical College, Faisalabad, where post-mortem examinations were conducted--Place of occurrence is situated in a backward village therefore, mere delay in 'conducting post-mortem examinations on dead bodies of both deceased is not fatal to prosecution case as observed by Hon'ble Supreme Court of Pakistan--It is further noteworthy that prosecution witnesses have not explained that as to whether it was deceased or appellant who had to pay any amount to other party--None of prosecution witnesses stated that they were present at time of earlier quarrel which took pace regarding consideration of mobile phone between appellant and deceased--Motive as alleged by prosecution could not be proved in this case--Now coming to quantum of sentence, we have noted some mitigating circumstances in favour of appellants--Firstly, Court

have disbelieved prosecution evidence qua recoveries of 'churris' (P-7) & (P-8) from possession of appellants on account of reasons mentioned in paragraph No--14 If, this judgment--Secondly, prosecution has failed to prove its motive part of case due to reasons mentioned in Paragraph No. 15 of this judgment--It is not determinable in this case that as to what had actually happened prior to occurrence and what was real cause of occurrence which had resulted into present unfortunate incident, therefore, in Court view death sentence awarded to appellants is quite harsh--Convictions of appellants under Section 302(b), PPC awarded by trial Court are maintained but their sentences are altered from death each to imprisonment for life each--The compensation awarded by trial Court against appellants and sentences in default thereof are maintained and upheld--The benefit of Section 382-B of Cr.P.C. is also extended in favour of appellants.

[Para 13, 15, 17 & 18] B, C, D & E

2020 SCMR 837, 2011 SCMR 593, 2013 SCMR 583 &
PLD 2017 SC 152.

M/s. Shabbir Hussain and Muhammad Haseeb Khalid, Advocates for Appellants.

Mr. Munir Ahmad Sial, Deputy Prosecutor General for State.

Mr. Falak Sher Bakhsh Gill, Advocate for Complainant.

Date of hearing: 14.9.2022.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall dispose of Criminal Appeal No. 202898-J of 2018 filed by Ali Akbar and Shahid Ali (appellants) against their convictions and sentences and Murder Reference No. 175 of 2018 sent by the learned trial Court for confirmation or otherwise of the sentences of Death awarded to Ali Akbar and Shahid Ali (appellants) by the learned trial Court. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 15.03.2018 passed by the learned Addl. Sessions Judge, Faisalabad.

2. Ali Akbar and Shahid Ali (appellants) along with Sarfraz Ali and Zahid Ali (co-accused since acquitted) were tried in case FIR No. 313 dated 03.07.2015

registered at Police Station Nishatabad District Faisalabad in respect of offences under Section 302/34 of PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 15.03.2018 has convicted and sentenced Ali Akbar and Shahid Ali appellants as under: -

ALI AKBAR.

Under Section 302(b), PPC to 'Death as tazir' for committing Qatl-i-Amd of Muhammad Saleem (deceased). He was also ordered to pay Rs. 400,000/- (Rupees four hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr.P.C., recoverable as arrears of land revenue, and in default thereof to undergo simple imprisonment for six months.

SHAHID ALI

Under Section 302 (b), PPC to 'Death as tazir' for committing Qatl-i-Amd of Muhammad Nadeem (deceased). He was also ordered to pay Rs. 400,000/- (Rupees four hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr.P.C., recoverable as arrears of land revenue, and in default thereof to undergo simple imprisonment for six months.

However, the learned trial Court *vide* the same aforementioned judgment acquitted Sarfraz Ali and Zahid Ali co-accused by extending them the benefit of doubt.

3. Brief facts of the case as given by Salamat Ali complainant (PW-4) in his complaint (Ex.PB), on the basis of which the formal FIR (Ex.PB/1) was chalked out, are that the complainant was resident of Chak No. 50-GB Burewal and was a cultivator by profession. On 03.07.2015, at about 08.15 p.m., (night), the complainant and his son namely, Muhammad Nadeem (deceased) along with guests, namely, Muhammad Khalid (PW since given up) and Ghulam Mustafa PW-5), were present in their house. The complainant's son namely Muhammad Saleem (deceased) was returning back to his house after taking milk from one Muhammad Ashraf and when he (Muhammad Saleem deceased), reached near his house, the accused persons, namely, Ali (appellant), while armed with *'churri'*, Shahid (appellant) while armed with *'churri'*, Sarfraz Ali (co-accused since acquitted) while armed with pistol .30-bore and Zahid Ali (co-accused since acquitted), while empty handed were

standing in the street. On hearing hue and cry, the complainant along with his son, namely, Muhammad Nadeem (deceased), Muhammad Khalid (PW since given up) and Ghulam Mustafa (PW-5), came out of the house and in the light of bulb, they (PWs) saw Zahid Ali (co-accused since acquitted), while raising a lalkara that Muhammad Saleem (deceased) should not spare alive and in their view Ali Akbar (appellant), made consecutive blows of 'churri', which landed on the front of chest and left flank of Muhammad Saleem (deceased), who fell on the ground. Muhammad Nadeem (deceased), came forward but Shahid Ali (appellant) made blows of *'churri'*, which landed on the right side of his belly and front of the chest. Muhammad Nadeem (deceased) also fell on the ground. Sarfraz Ali (co-accused since acquitted) threatened the complainant party that if anybody would come near, he shall be done to death. All the accused persons decamped from the spot after threatening the complainant party. The complainant along with the PWs attended Muhammad Saleem and Muhammad Nadeem and shifted them to Allied Hospital Eaisalabad in injured condition. Muhammad Saleem and Muhammad Nadeem succumbed to the injuries in the hospital.

The motive behind the occurrence was that earlier an altercation took place between Muhammad Saleem deceased and the accused persons on account of dispute regarding consideration of mobile and due to the said reason, the accused persons in-furtherance of their 'common intention, committed murder of Muhammad Saleem and Muhammad Nadeem.

4. The appellants Ali Akbar and Shahid Ali were formally arrested in this case on 21.07.2015 by Abdul Rehman Khan Inspector/I.O. (PW-15). On 04.08.2015 Ali Akbar appellant made disclosure and led to the recovery of *'churri'* (P-7) which was taken into possession *vide* recovery memo. (Exh.PF). On the same day *i.e*. 04.08.2015, Shahid Ali appellant made disclosure and led to the recovery of *churri* (P-8) which was taken into possession *vide* recovery memo. (Exh.PG). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 24.11.2015 to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced fifteen witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Exh.PA to Exh.PV) and closed its evidence.

6. The statements of the appellants and their co-accused under Section 342 of Cr.P.C. were recorded. The appellants refuted the allegations levelled against them and professed their innocence. While answering to a question that" *Why this case against you and why the PWs have deposed against* you" both the appellants replied as under:-

> *"I am innocent. I have been falsely implicated. I have been made an escape goat in this case due to some exterior reasons".*

The appellants did not opt to make their statements on oath as envisaged under Section 340(2), Cr.P.C., however, they produced the statement of Ghulam Mustafa (PW-5) recorded under Section 161 of Cr.P.C, as (Exh.DA), in their defence.

The learned trial Court *vide* its judgment dated 15.03.2018 found Ali Akbar and Shahid Ali appellants' guilty, convicted and sentenced them as mentioned and detailed above however, Sarfraz Ali and Zahid Ali co-accused were acquitted of the charges by extending them the benefit of doubt.

7. It is contended by learned counsel for the appellants that the appellants are absolutely innocent and they have falsely been implicated in this case by the complainant being in league with the local police; that the occurrence was unseen; that there is gross delay in conducting the post-mortem examinations on the dead bodies of Muhammad Saleem and Muhammad Nadeem deceased and the said delay is suggestive of the fact that the eye-witnesses were not present, at the spot at the relevant time therefore, the abovementioned delay was consumed in procuring the attendance of fake eye-witnesses; that there are material contradictions in the statements of prosecution witnesses; that though the prosecution has set a specific motive but miserably failed to prove the same through any independent and reliable evidence; that the alleged recoveries of *'churris'* (P-7) & (P-8) from the possession of Ali Akbar and Shahid Ali appellants, respectively, and positive report of PFSA to the extent of *'churri.'* recovered on the pointation of Shahid Ali appellant are inconsequential because the occurrence in this case took place on 03.07.2015, whereas, '*churris*' (P-7) & (P-8) were statedly recovered on the pointation of the appellants on 04.08.2015 and the same was deposited in the office of

PFSA, Lahore on 20.08.2015 *i.e.* after 01 month and 17 days from the occurrence and the blood disintegrates during the aforementioned period hence, the alleged recoveries of 'churris' and report are immaterial; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt. It is therefore, prayed that the instant appeal may be allowed and the appellants may be acquitted of the charge by extending them the benefit of doubt.

8. On the other hand, it is contended by the learned Deputy Prosecutor General assisted by learned counsel for the complainant that the occurrence in this case took place on 03.07.2015 at 08:15 p.m., and the matter was promptly reported to the police on the same day at 10:45 p.m., hence, promptness of the FIR rules out the possibility of any deliberation or concoction on the part of the prosecution; that Salamat Ali complainant (PW-4); was resident of the same locality where the occurrence took place, whereas, Ghulam Mustafa (PW-5) is brother-in-law of the complainant, therefore, their presence at the spot at the time of occurrence was quite natural and probable; that the prosecution's case against the appellants is supported by the medical evidence furnished by Dr. Ehsan Ahmad (PW-13) and post-mortem examination reports and pictorial diagrams of the deceased (Exh.PK) & Exh.PK/1) & (Exh.PN & Exh.PN/1); that the prosecution case is further corroborated by the recoveries of '*churris*' (P-7) & (P-8) from the possession of the appellants and positive report of PFSA, Lahore to the extent of *'churri'* recovered at the instance of Shahid Ali appellant (Exh.PV); that motive has also been proved in this case against the appellants through reliable and confidence inspiring evidence of the prosecution's witnesses; that the prosecution has proved its case against the appellants beyond the shadow of doubt therefore, their appeal may be dismissed, Murder Reference be answered in the positive and the sentences of death awarded to the appellants by the learned trial Court may be upheld and maintained.

9. Arguments heard. Record perused.

10. Prosecution story as set forth in the complaint (Exh.PB) on the basis of which formal FIR (Exh.PB/1) was chalked out, has already been reproduced in Para No. 3 of this judgment therefore, there is no need to repeat the same.

11. The occurrence in this case took place on 03.07.2015 at 08:15 p.m. The matter was reported to the police on the same day and the FIR (Exh.PB/1) was

also lodged on the same day *i.e.* on 03.07.2015 at 10:45 p.m., *i.e.*, within a period of 02 hours and 30 minutes from the occurrence. The distance between the police station and the place of occurrence was 10 kilometers. Keeping in view the time of occurrence, the place of occurrence and its distance from the police station, we are of the view that there was no deliberate or conscious delay in reporting the matter to the police.

12. Ocular account of the prosecution has been furnished by Salamat Ali Complainant (PW-4) and Ghulam Mustafa (PW-5). Both the eye-witnesses stated, that on 03.07.2015 at 08:15 p.m., they were present in the house of the complainant and on hearing the noise of hue and cry of Muhammad Saleem deceased (son of Salamat Ali Complainant), they along with Muhammad Nadeem decease came out of the house and witnessed the occurrence. Salamat Ali Complainant (PW-4) categorically stated that on the day of occurrence, his son Muhammad Saleem deceased went out of his house to fetch milk from the milk seller and when he was coming back and reached near his house, the occurrence took place which means that the house of the complainant party was very near to the place of occurrence. Salamat Ali Complainant (PW-4) was not subjected to cross-examination by the learned defence counsel on this point. Even no suggestion was put to the complainant during his cross-examination that his house was not situated near the place the occurrence. It is true that Ghulam Mustafa (PW-5) who was brother-in-law of the complainant, was resident of Chak No. 224/R.B Wazeerwali, Faisalabad, which was situated at a distance of 25/26 miles away from the place of occurrence but as Ghulam Mustafa (PW-5) was brother-in-law of the complainant and maternal uncle of both the deceased persons therefore, his presence in the house of his real sister could not be termed as unnatural or improbable. Moreover, if for the sake of arguments, evidence of Ghulam Mustafa (PW-5) is excluded from consideration on the abovementioned ground, even then, evidence of Salamat Ali Complainant (PW-4) remains in the field which cannot be discarded on the abovementioned ground because his house was situated in close proximity to the place of occurrence. It is by now well settled that evidence of even sole eye-witness can be relied upon if the same is trustworthy and confidence inspiring. We have noted that both the abovementioned eye-witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Their evidence is confidence inspiring and trustworthy.

13. Medical evidence of the prosecution was furnished by Dr. Ehsan Ahmad (PW-13). He stated that on 04.07.2015 at 10:00 a.m., he conducted post-mortem examination on the dead body of Muhammad Saleem deceased and found the following injuries on his body:--

INJURIES:

1. An incised wound 15x2 cm on front of left chest, muscle deep, 3 cm from left nipple, and 4 cm from mid line.

2. An incised wound 20 x 1 cm x skin deep on front of left chest, 8 cm from left nipple and 4 cm from midline.

3. An incised wound 4 x 2 cm on antero lateral side of left chest, 11 cm from mid line and 13 cm above hip bone. Injury is communicating with mediastinum.

4. An incised wound 4 x 1 cm on antero lateral side of chest, 2 cm from left nipple, 6 cm below the axilla, communicating with mediastinum.

5. An incised wound 7 x 5 cm just on tip of left stapula, the wound is communicating with mediastinum.

Dr. Ehsan Ahmad (PW-13) also conducted post-mortem examination on the dead body of Muhammad Nadeem deceased on 04.07.2015 at 09:35 a.m., and found following injuries on his body:-

INJURIES:

1. An incised wound 5x2 cm, on anterior chest, 2 cm from midline, 15 cm from right nipple, on front of right chest.

2. An incised wound 3x2 cm, in right hypochondrium, closed by two stitches, 5 cm from midline.

Nature and seat of injuries as noticed by Dr. Ehsan Ahmad (PW-13), as given by the said witness, coincides with the nature of weapon and seat of injuries stated by the abovementioned eye- witnesses. Dr. Ehsan Ahmad (PW-13) was cross-examined by the learned defence counsel but nothing favourable to the appellants could be brought on the record. We are therefore, of the view that the ocular account of the prosecution furnished by Salamat Ali complainant (PW-4) and Ghulam Mustafa (PW-5) has fully been supported by the medical

evidence furnished by Dr. Ehsan Ahmad (PW-13). Although it is argued by learned counsel for the appellants that there was delay of 13 hours and 45 minutes in conducting the post-mortem examination on the dead body of Muhammad Saleem deceased and delay of 13 hours and 20 minutes in conducting the post-mortem examination on the dead body of Muhammad Nadeem deceased but we have noted that the occurrence in this case took place in Chak No. 50/G.B Burewala District Faisalabad, whereas, post-mortem examinations on the dead bodies of both the deceased persons were conducted at the Department of Forensic Medicine and Toxicology, Punjab Medical College, Faisalabad. Nadeem Ahmad deceased was brought in the hospital in injured condition and Dr. Ehsan Ahmad (PW-13) stated that his death was hospital death which means that the complainant party remained busy to save his live. As mentioned earlier, the occurrence in this case took place at night time i.e., on 3.7.2015 at 8.15 p.m., therefore, substantial time must have consumed in transporting the dead bodies from the abovementioned village to Department of Forensic Medicine and Toxicology, Punjab Medical College, Faisalabad, where the post-mortem examinations were conducted. Place of occurrence is situated in a backward village therefore, mere delay in 'conducting the post-mortem examinations on the dead bodies of both the deceased is not fatal to the prosecution case as observed by the Hon'ble Supreme Court of Pakistan in the case of *'Muhammad Asif and another vs Mehboob Alam and others'* (2020 SCMR 837), wherein at page No. 840, it was held as under:

> *"7……In the instant case, one person lost his life, while there were two injured persons, those were evacuated to Mayo Hospital from the place of occurrence which is at a distance of 30/40 KM. Possibility of consuming the time in transportation might lead to delay in post-mortem examination which was still fairly good as the doctor has opined proximately that it ranges from twelve to twenty four hours. In a country where the medical facility cum availability of paramedics for the job assigned is not an easy task, the consumption of such a time seems to be quite reasonable hence, the prosecution evidence cannot be brushed aside on this score alone to extend the benefit of doubt as claimed……."*

14. Insofar as the recoveries of 'churri' (P-7) & (P-8) from the possession of Ali Akbar & Shahid Ali appellants and positive report of PFSA, Lahore

(Exh.PV) to the extent of '*churri*' allegedly recovered from Shahid Ali appellant are concerned, we have noted that the occurrence in this case took place on 03.07.2015, whereas, '*churris*' (P-7) & (P-8) were allegedly recovered on 04.08.2015 *i.e.*, after 01 month & 01 day from the occurrence. It is further noteworthy that the abovementioned '*churris*' (P-7) & (P-8), allegedly recovered on the pointation of the appellants were deposited in the office of PFSA, Lahore on 20.08.2015 *i.e.*, after 01 month and 17 days from the occurrence and during the abovementioned period, Shahid Ali appellant had ample opportunity to wash away the blood from '*churri'* (P-8) recovered on his pointation. The Hon'ble Supreme Court of Pakistan in the case of *'Basharat and another vs. The State'* (1995 SCMR 1735) disbelieved the evidence of blood-stained dagger which was allegedly recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:-

> *"11. The occurrence took place on 20.04.1988. Basharat appellant was arrested on 28.04.1988. The blood-stained Chhuri was allegedly recovered from his house on 30.04.1988. It is not believable that he would have kept blood stained chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it"*

Furthermore, *"churris"* (P-7) & (P-8) were deposited in the office of PFSA, Lahore on 20.08.2015 *i.e.*, after 01 month and 17 days from the occurrence therefore, the blood, if any, on them must have disintegrated in the meanwhile. Reliance in this respect may be placed on the case of *'Muhammad Jamil vs. Muhammad Akram and others'* (2009 SCMR 120). We are therefore, of the view that evidence qua recoveries of '*churris*' (P-7) & (P-8) and positive report of PFSA (Exh.PV) to the extent of *'churri'* recovered from Shahid Ali appellant are of no avail to the prosecution.

15. According to the prosecution case, motive behind the occurrence was that few days prior to the occurrence, a quarrel took place between Ali Akbar appellant and Muhammad Saleem deceased on account of consideration of mobile phone. No specific date, time and place of the quarrel regarding the motive occurrence has been mentioned by the prosecution witnesses. Vague and general statements in this respect have been made by them. It is further

noteworthy that the prosecution witnesses have not explained that as to whether it was Muhammad Saleem deceased or Ali Akbar appellant who had to pay any amount to the other party. None of the prosecution witnesses stated that they were present at the time of earlier quarrel which took pace regarding the consideration of the mobile phone between Ali Akbar appellant and Muhammad Saleem deceased. We are therefore, of the view that motive as alleged by the prosecution could not be proved in this case.

16. We have disbelieved the prosecution evidence qua recoveries of '*churris*' (P-7) & (P-8) on the pointation of the appellants and motive due to the reasons mentioned in Para Nos. 14 & 15 above, however, if the prosecution evidence qua recoveries of '*churris*' (P-7) & (P-8) on the pointation of the appellants and motive is excluded from consideration, even then sufficient incriminating evidence is available on record to prove the prosecution case against the appellants. As discussed earlier, the prosecution case has been proved against the appellants through the reliable and confidence inspiring evidence of eye-witnesses, namely, Salamat Ali complainant (PW-4) and Ghulam Mustafa (PW-5). They stood the test of lengthy cross-examination but their evidence could not be shaken regarding the role played by the appellants during the occurrence. They corroborated each other on all material aspects of the case. The ocular account of the prosecution as given by Salamat Ali complainant (PW-4) and Ghulam Mustafa (PW-5) about the role of the appellants is fully supported by the medical evidence furnished by Dr. Ehsan Ahmad (PW-13), as well as, post-mortem report of Muhammad Saleem deceased (Exh.PK) and pictorial diagram (Exh.PK/1), post-mortem report of Muhammad Nadeem (Exh.PN) and pictorial diagram (Exh.PN/1). The time of occurrence, the kind of weapon used, the nature of injuries inflicted by the appellants to both the deceased persons, all these facts as stated by the abovementioned eye-witnesses were fully supported by the aforementioned medical evidence therefore, we hold that the prosecution has proved its case against the appellants beyond the shadow of any doubt.

17. Now coming to the quantum of sentence, we have noted some mitigating circumstances in favour of the appellants. *Firstly,* we have disbelieved the prosecution evidence qua the recoveries of '*churris*' (P-7) & (P-8) from the possession of the appellants on account of reasons mentioned in Paragraph No. 14 of this judgment. *Secondly,* the prosecution has failed to prove its motive part of the case due to the reasons mentioned in Paragraph No. 15 of this

judgment. It is not determinable in this case that as to what had actually happened prior to the occurrence and what was the real cause of occurrence which had resulted into the present unfortunate incident, therefore, in bur view the death sentence awarded to the appellants is quite harsh.

While treating it a case of mitigation, we have fortified our views by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of *'Ahmad Nawaz and another vs. The State'* (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:

> *The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the ease of 'Iftikhar-ul-Hassan vs. Israr Bashir and another' (PLD 2007 SC 111), it was held that 'this is settled law that provisions of Sections 306 to 308, PPC attracts only in the cases of Qatl-i-Amd liable to Qisas under Section 302 (a), PPC and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under Section 302 (b), PPC. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under Sections 302(a) and 302 (b), PPC respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302 (b), PPC and exercise of this discretion in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender, is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in 'Ghulam Muretaza vs. State' (2004 SCMR 4), 'Faqir Ullah vs. Khalil-uz-Zaman (1999 SCMR 2203), 'Muhammad Akram vs. State' (2003 SCMR 855) and 'Abdul Salam vs. State' (2000 SCMR 338). The Court while maintaining the conviction under Section 302(b), PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B of Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it urns observed*

that "No doubt, normal penalty for an act of commission of Qatl-e-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan vs. Asghar Khan and another (2009 SCMR 502) it has been noted that:-)

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course" (underlining, italic and bold supplied)."

In the case of *'Muhammad Nadeem Waqas and another vs. The State'* (2014 SCMR 1658), the Hon'ble Supreme Court of Pakistan at Page No. 1661 has held as under:-

*"8. .... **the prosecution failed to prove motive part of the prosecution story** and the reason for this brutal incident which had taken place in odd hours of night at a place not surrounded by Abadi Deh and what happened immediately before the incident provoking both the appellants to cause such number of injuries with dattars on the person of deceased is not known to anyone, as such, the same shrouds in mystery. **In such an eventuality the same can be considered as a mitigating circumstance for showing leniency in favour of the appellants in the matter of punishment** ....."*

(Bold & underlining is supplied for emphasis)

Similar view has been taken by the Hon'ble Supreme Court of Pakistan in the cases of *'Ahmad and another vs. Shafiq-ur-Rehman and, another'* (2013 SCMR 583) and *'Amjad Shah vs. The State'* (PLD 2017 Supreme Court 152).

18. In the light of above discussion, the convictions of Ali Akbar and Shahid Ali under Section 302(b), PPC awarded by the learned trial Court are maintained but their sentences are altered from **death each to imprisonment for life each.** The compensation awarded by the learned trial Court against the appellants and sentences in default thereof are maintained and upheld. The benefit of Section 382-B of Cr.P.C. is also extended in favour of the appellants.

19. Consequently, with the above said modification in the sentences of Ali Akbar and Shahid Ali appellants, **Criminal Appeal No. 202898-J of 2018** filed by the appellants is hereby **dismissed**. Murder Reference (M.R. No. 175 of 2018) is answered in the **negative** and death sentences of Ali Akbar and Shahid Ali appellants are **not confirmed**.

(A.A.K.) Appeal dismissed

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[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD TARIQ NADEEM, JJ.**

MUHAMMAD NAWAZ--Appellant

versus

STATE and another--Respondents

Crl. A. No. 99880 & M.R. No. 605 of 2017, decided on 8.11.2021.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Qatl-e-amd--Conviction and sentence--Challenge to--Delay in FIR--Eye-witness--Appellant, made a fire shot which hit deceased at her right thigh and same went through and through, due to which she fell on ground--She succumbed to injuries--FIR has been lodged with delay of 8 hours from time of occurrence--The distance between police station and place of occurrence is 9-kilometers--Even postmortem examination on dead body of deceased was conducted with delay of 11 hours from occurrence--Neither doctor who first examined deceased in injured condition has been produced in witness box nor any MLR regarding medico legal examination of deceased in injured condition and her referral to Allied Hospital, Faisalabad has been produced in prosecution evidence--Eye-witnesses were not present at spot at relevant time and death of occurred on account of her excessive bleedings as she remained un-attended for a considerable period and in order to cover abovementioned lacuna in prosecution case, prosecution witnesses made false excuse that was provided bandage by doctor at RHC whereas, Lady Dr. CW-1 has categorically stated during her cross-examination that there was no bandage or stitches on injuries of deceased when she received her dead body--According to prosecution case, only one fire shot made by appellant landed on right thigh of deceased but according to medical evidence there was also an incised wound i.e. injury No. 3 measuring 4 cm x 1.7 cm on lower part of left leg and bone under said injury was also exposed--Fact shows that prosecution's eye-witnesses were not present at spot at time of occurrence therefore, they could not explain abovementioned injury--Motive alleged

by prosecution has not been proved in this case--Recovery of gun and positive report of PFSA are only corroborative pieces of evidence and same cannot be made basis for conviction of appellant, in absence of reliable direct evidence of prosecution's eye-witnesses--Set aside his conviction and sentence recorded by trial Court and acquit him of charge by extending him benefit of doubt--Appeal allowed.

[Para 4, 12, 13, 14, 16 & 18] A, B, C, D, E, F, G, H, I & J

2015 SCMR 840, 2015 SCMR 137, 2017 SCMR 622 &
1995 SCMR 1345.

M/s. Muhammad Akram Qureshi and Sheeba Qaiser, Advocates for Appellant.

Mr. Munir Ahmad Sial, Deputy Prosecutor General for State.

M/s. Anas Bin Ghazi, Muhammad Shahbaz Sharif and Sagheer Ahmad, Advocates for Complainant.

Date of hearing: 8.11.2021.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall dispose of Criminal Appeal No. 99880 of 2017, filed by Muhammad Nawaz (appellant) against his conviction and sentence and Murder Reference No. 605 of 2017, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Nawaz (appellant). We propose to dispose of both these matters by this single judgment as the same have arisen out of the same judgment dated 28.10.2017, passed by the learned Additional Sessions Judge, Tandlianwala.

2. Muhammad Nawaz (appellant), along with his co-accused Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu (since acquitted), were tried in private complaint filed by Allah Ditta (complainant), under Sections 302/34, P.P.C., Police Station Mamukanjan, Tendlianwala, District Faisalabad. After conclusion of the trial, the learned trial Court *vide* its judgment dated 28.10.2017, has convicted and sentenced Muhammad Nawaz (appellant) as under:

> **Under Section 302(b), P.P.C.** to 'Death' for committing Qatl-i-Amd of *Mst.* Ghulam Fatima (deceased). He was also ordered to pay

Rs.2,00,000/- (rupees two hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C. and in default thereof the same would be recoverable as arrears of land revenue and to further undergo simple imprisonment up to four months.

However *vide* the same judgment, accused Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu were acquitted of the charges.

3. Initially Allah Ditta complainant (PW-1) got registered case FIR No. 59/2016 dated 05.03.2016 offences under sections 302/34, P.P.C. at Police Station Mamukanjan, Tandlianwala, District Faisalabad against Muhammad Nawaz (appellant), Muhammad Sarfraz and Maqbool Ahmad (accused since acquitted). Feeling dissatisfied with the proceedings and investigation of the police, private complaint was filed by the complainant. After recording the cursory statements of the complainant, as well as, PWs the learned Additional Sessions Judge, Tandlianwala summoned the accused persons nominated in the private complaint to face trial.

4. Brief facts of the case as given by the complainant Allah Ditta (PW-1), in his private complaint (Exh.PC) are that on 05.03.2016, the complainant along with his son Rang Zeb (PW-2), Muhammad Waris (PW since given-up) and daughter namely *Mst.* Ghulam Fatima (deceased), was cutting fodder (Barseem), from his field bearing Killa No. 12, Square No. 42. Suddenly Muhammad Nawaz (appellant), while armed with .12-bore gun, Muhammad Sarfraz (co-accused since acquitted), while armed with pistol .30-bore and Maqbool Ahmad (co-accused since acquitted), with their common intention came there, while raising lalkara to teach a lesson to *Mst.* Ghulam Fatima for not marrying with Muhammad Nawaz (appellant). Muhammad Sarfraz (co-accused since acquitted), raised a lalkara to kill *Mst.* Ghulam Fatima (deceased) by making fire-shot. Muhammad Nawaz (appellant), thereafter, made a fire shot with his .12-bore gun, which hit *Mst.* Ghulam Fatima (deceased) at her right thigh and same went through and through, due to which she fell on the ground. Maqbool Ahmad (co-accused since acquitted), remained present there with his motorcycle. The complainant party attended *Mst.* Ghulam Fatima (deceased) and shifted her to the Civil Hospital of Chak No. 509-G.B. After examining *Mst.* Ghulam Fatima, the then injured, the doctor present there referred her to the Allied Hospital Faisalabad due to her

critical condition. The complainant party took *Mst.* Ghulam Fatima (deceased) to the Allied Hospital Faisalabad but she succumbed to the injuries.

The motive behind the occurrence was that the accused party was demanding hand 'rishta' of *Mst.* Ghulam Fatima (deceased) for Muhammad Nawaz (appellant), aged about 60/65 years but the complainant had given the hand 'rishta' of *Mst.* Ghulam Fatima (deceased) to one Bahawal Sher and the marriage was to be solemnized on 13.03.2016. Due to the said grudge the accused committed murder of *Mst.* Ghulam Fatima (deceased).

It was further alleged in the private complaint (Exh.PC), that Mazhar and Mannu (co-accused since acquitted), also played an important role during the occurrence as both of them informed Muhammad Nawaz (appellant), Muhammad Sarfraz and Maqbool Ahmad (co-accused since acquitted), regarding the movement of *Mst.* Ghulam Fatima, on the day of occurrence, which fact was confessed by Mazhar and Mannu (co-accused since acquitted), before Allah Ditta complainant (PW-1), Gul Muhammad (PW since given-up) and Muhammad Arif (PW-4), on 28.04.2016 and asked for pardon.

It was added by the complainant in his private complaint (Exh.PC) that the local police being in league with the accused party and without any legal justification, did not initiate proceedings against Mazhar and Mannu (co-accused since acquitted), despite the fact that on 28.04.2016, the complainant submitted an application before the police regarding involvement of the above-mentioned accused in the instant case, which necessitated the filing of the abovementioned private complaint.

5. Muhammad Nawaz appellant was arrested in this case on 29.03.2016 by Muhammad Aslam SI and on 07.04.2016, he (appellant) disclosed and then led to the recovery of .12-bore gun (P-1), which was taken into possession by the I.O *vide* recovery memo Exh.PB. As mentioned earlier, being dissatisfied with the proceedings and investigation of the police, Allah Ditta complainant (PW-1), instituted a private complaint. After institution of private complaint the cursory statements of the complainant Allah Ditta (PW-1) and other PWs were recorded. The appellant and his co-accused mentioned in the private complaint were summoned by the learned trial Court to face the trial. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant, as well as, against Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu (co-

accused since acquitted) on 21.12.2016, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced four witnesses during the trial. Five Court witnesses were also examined in this case. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PK). Documents in shape of Exh.CW-2/A, Exh.CW-2/B, Exh.CW-3/A, Exh.CW-3/B and Exh.CW-5/A to Exh.CW-5/D, were also produced during evidence of CWs.

7. The statements of Muhammad Nawaz (appellant), Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu (co-accused since acquitted), under Section 342 of Cr.P.C. were recorded. Muhammad Nawaz (appellant), refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" Muhammad Nawaz appellant replied as under:

> *"This is a false case. All the PWs are related inter-se with the deceased and they have made false statements against me and my co-accused due their enmity with us. None of the so-called eye-witness was present at the place of occurrence at the time of occurrence and it was a blind murder which was committed by unknown culprits. The complainant with consultation of the local police fabricated the present false version against me and my co-accused, much later after the postmortem examination of the deceased".*

The learned trial Court *vide* its judgment dated 28.10.2017, found Muhammad Nawaz (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

8. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the prosecution; that the prosecution's eye-witnesses were not present at the spot at the relevant time and in fact the occurrence was unwitnessed; that there is delay of 8 hours in lodging the FIR, whereas, there is delay of 11 hours and 45 minutes in conducting the postmortem examination on the dead body of the deceased and the abovementioned delay has not been plausibly explained by the prosecution; that there is conflict between the ocular account and the medical evidence of the prosecution because according to the site plan (Exh.CW-3/A), the appellant made fire shot with .12 bore gun from a distance

of 4-feet but there was no blackening, burning or tattooing on the entry wound of the deceased; that according to the postmortem report of *Mst.* Ghulam Fatima deceased, there were three injuries on her body out of which one injury i.e. injury No. 3 is an incised wound but the said injury has not been explained by any of the prosecution witnesses; that motive alleged by the prosecution has also not been proved in this case because Bahawal Sher with whom the marriage of the deceased was fixed, has not been produced in the witness box; that recovery of gun 12 bore (P-1) and positive report of PFSA, Lahore (Exh.PK) are of no avail to the prosecution because none of the prosecution witnesses stated regarding the date of arrest of the appellant; that in fact, the abovementioned gun was planted against the appellant and nothing was recovered from his possession; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charge.

9. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that delay in lodging the FIR has plausibly been explained by the prosecution's eye-witnesses by stating that initially they took *Mst.* Ghulam Fatima deceased in injured condition to RHC of Chak No. 509/G.B Faisalabad wherefrom, she was referred to the Allied Hospital, Faisalabad on account of her precarious condition; that both the prosecution's eye-witnesses of the prosecution i.e. Allah Ditta (PW-1) and Rangzeb (PW-2) are father and brother of the deceased and they cannot let off the real culprit and would not falsely implicate the appellant in this case because substitution in such like cases is a rare phenomenon; that evidence of the aforementioned prosecution's eye-witnesses is confidence inspiring and trustworthy; that the prosecution case is fully supported by the medical evidence furnished by Lady Dr. Uzma Andleeb (CW-1); that incised wound on the leg of the deceased might be the result of her falling on the ground and receipt of the said injury might be due to her hitting against the sickle which the deceased was carrying at the time of occurrence to cut the fodder; that the prosecution case against the appellant is further corroborated by the recovery of gun .12 bore (P-1) on the pointation of the appellant and positive report of PFSA, Lahore (Exh.PK); that motive of the prosecution case was also proved against the appellant through reliable and confidence inspiring evidence of the prosecution witnesses; that there is no

substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

10. Arguments heard. Record perused.

11. Prosecution case as set forth in the complaint (Exh.PC) has already been reproduced in paragraph No. 4 of this judgment therefore, there is no need to repeat the same.

12. We have noted that the occurrence in this case did not take place inside or near the 'abadi' of the village rather the same took place in the fields situated in the area of Chak No. 500/G.B District Faisalabad. Perusal of site plan (Exh.CW-3/A) shows that there was no residential house or 'Dera' near the place of occurrence. The occurrence in this case, as per prosecution's case, took place on 05.03.2016 at 09:00 a.m., but the FIR has been lodged on 05.03.2016 at 05:00 p.m., i.e. with the delay of 8 hours from the time of occurrence. The distance between the police station and the place of occurrence is 9-kilometers. It is further noteworthy that even the postmortem examination on the dead body of the deceased was conducted on 05.03.2016 at 08:45 p.m., i.e. with the delay of 11 hours and 45 minutes from the occurrence. In order to cover the abovementioned delay in lodging the FIR and conducting the post-mortem examination on the dead body of the deceased, the prosecution's eye-witnesses, namely, Allah Ditta (PW-1) and Rangzeb (PW-2) stated that in fact, they first took *Mst.* Ghulam Fatima in injured condition to RHC of Chak No. 509/G.B, where the doctor after examining referred *Mst.* Ghulam Fatima to the Allied Hospital, Faisalabad. Neither the doctor who first examined *Mst.* Ghulam Fatima deceased in injured condition on 05.03.2016 at RHC of Chak No. 509/G.B has been produced in the witness box nor any MLR regarding the medico legal examination of *Mst.* Ghulam Fatima deceased in injured condition and her referral to the Allied Hospital, Faisalabad has been produced in the prosecution evidence. Although Lady Dr. Uzma Andleeb (CW-1) has stated that *Mst.* Ghulam Fatima was referred to the Allied Hospital, Faisalabad due to her precarious condition but she admitted that she was herself on leave on 05.03.2016 and the hospital staff had referred the deceased to the Allied Hospital, Faisalabad. She did not mention the name of any member of the staff who had referred the deceased to the Allied Hospital, Faisalabad nor any such staff of the hospital appeared in the witness box before the learned trial Court.

Statement of Lady Dr. Uzma Andleeb (CW-1) regarding the referral of *Mst.* Ghulam Fatima deceased by the staff of RHC of Chak No. 509/G.B to the Allied Hospital, Faisalabad is hearsay evidence. It is further noteworthy that evidence of Lady Dr. Uzma Andleeb (CW-1) in this respect is contradictory to the statement of Allah Ditta complainant (PW-1) and Rangzeb (PW-2) because both the abovementioned eye-witnesses of the prosecution stated that in fact *Mst.* Ghulam Fatima deceased in injured condition was referred to the Allied Hospital, Faisalabad by the doctor of RHC of Chak No. 509/G.B. They did not state that the staff of RHC of Chak No. 509/G.B referred her to the Allied Hospital, Faisalabad, as claimed by Lady Dr. Uzma Andleeb (CW-1). Relevant parts of the statements of Allah Ditta complainant (PW-1), Rangzeb (PW-2) and Lady Dr. Uzma Andleeb (CW-1) are reproduced hereunder for ready reference:-

Allah Ditta complainant (PW-1).

> *"The injured Mst. Ghulam Fatima was shifted to hospital at Chak No. 509 G.B on car. The Doctor available there after examining referred the injured to Allied hospital Faisalabad."*

Rang Zeb (PW-2).

> *"Thereafter we attended Mst. Ghulam Fatima injured who was alive and we shifted her to RHC, Chak No. 509 G.B on a car where from the doctor referred her to Allied hospital, Faisalabad but she succumbed to the injuries after arriving there."*

Dr. Uzma Andleeb (CW-1).

> *"It is correct that the injured Mst. Ghulam Fatima was referred to Allied Hospital Faisalabad due to her precarious condition. On 05.03.2016 I was on leave. Voluntarily stated that the hospital staff had refereed her to Allied hospital Faisalabad. It is correct that the duty of the staff of RHC Mamu Khan did not give first aid to the injured prior to refer the injured to Allied hospital."*

Learned counsel for the complainant has also relied upon the Death Certificate of *Mst.* Ghulam Fatima (Exh.PI), issued by the Allied Hospital, Faisalabad in order to explain the abovementioned delay and to establish that in fact, *Mst.* Ghulam Fatima was taken to the Allied Hospital, Faisalabad in injured condition but it is noteworthy that no person from the Allied Hospital,

Faisalabad appeared in the witness box to prove the abovementioned Death Certificate. Moreover, there is nothing on the record to show that *Mst.* Ghulam Fatima deceased was referred by any doctor or staff of RHC of Chak No. 509/G.B, Faisalabad to the Allied Hospital, Faisalabad on account of her precarious condition therefore, the abovementioned delay in lodging the FIR and conducting the postmortem examination on the dead body of *Mst.* Ghulam Fatima deceased has not been plausibly explained by the prosecution. It is further noteworthy that Lady Dr. Uzma Andleeb (CW-1) stated during her cross-examination that dead body of *Mst.* Ghulam Fatima deceased was received in RHC Mamoon Kanjan at 06:00 p.m., on 05.03.2016. She further stated that police papers were received at 08:30 p.m., and she conducted the postmortem examination on the dead body of *Mst.* Ghulam Fatima deceased at 08:40 p.m. Relevant part of her statement in this respect reads as under:

> *"The dead body of Mst. Ghulam Fatima deceased was received in RHC Mamu Kanjan at 6:00 p.m. on 05.03.2016. The police papers to conduct the post-mortem examination and the other documents i.e. the inquest report and injuries statement were not received along with the dead body. The police papers were received at 08:30 p.m. and I conducted the postmortem examination at 08:40 p.m."*

The delay in conducting the postmortem examination on the dead body of *Mst.* Ghulam Fatima deceased of 11 hours and 45 minutes is suggestive of the fact that the eye-witnesses of the prosecution were not present at the spot at the relevant time and the said delay has been consumed in procuring the attendance of fake eye-witnesses. We may refer here the case of *'Irshad Ahmad v. The State'* (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the dead body conducted. Similarly, in the case of *'Khalid alias Khalidi and 2 others v. The State'* (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post-mortem examination on the dead body of deceased, to be an adverse effect against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as *'Muhammad Ashraf v. The State'* (2012 SCMR 419), *'Muhammad Ilyas v. Muhammad Abid alias Billa and others'* (2017 SCMR 54) and *'Zafar v. The State and others'* (2018 SCMR 326).

13. We have further noted that had the prosecution's eye-witnesses, namely, Allah Ditta complainant (PW-1) and Rangzeb (PW-2) been present at the spot at the time of occurrence then they would have provided the medical aid to *Mst.* Ghulam Fatima deceased in order to save her life and stop her bleeding because injury sustained by *Mst.* Ghulam Fatima was on her right thigh which was a non-vital part of her body. Even Lady Dr. Uzma Andleeb (CW-1) stated that if any injured in such like case remained un-attended for 1-2 hours then his death may occur on account of loss of blood. Relevant part of her statement in this respect reads as under:

> *"Hypovolumia means loss of blood and fluids from the body due to the excess of bleeding which ultimately develops in Hypovolum shock which ultimately result into the cardio pulmonary arrest. It is correct that the death in this case occurred due to hemorrhagic shock as to loss of blood from the body of the deceased. The injured in such like cases if remain unattended by the medical staff then death might have occurred within 1-2 hours. If the blood and fluids had been infused in the body of the injured Mst. Ghulam Fatima, there were chances of her survival in this case. The seat of injury No. 1 was on the right thigh of the deceased which is non-vital part of the body."*

We have further noted that in order to establish their presence at the spot at the relevant time and to show that they (PWs) tried to stop the bleeding of *Mst.* Ghulam Fatima, Allah Ditta complainant (PW-1) stated that doctor of RHC of Chak No. 509/G.B District Faisalabad had bandaged the wound of the injured and thereafter, referred her to the Allied Hospital, Faisalabad. Relevant part of his statement in this respect reads as under:

> *"The doctor at RHC Chak No. 509 G.B had bandaged the wound of the injured and thereafter referred her to the Allied Hospital Faisalabad."*

Whereas, Lady Dr. Uzma Andleeb (CW-1) stated that wounds of the deceased were neither stitched nor bandaged. Relevant part of her statement is reproduced hereunder:-

"It is correct that when I received the dead body of Mst. Ghulam Fatima deceased the wounds of the deceased were not found either stitched or bandaged. It is correct that in such like cases generally we provide the first aid, stitch the wound and apply the bandage for stopping hemorrhagic/oozing of bold."

We are therefore, of the view that the abovementioned eye-witnesses were not present at the spot at the relevant time and death of *Mst.* Ghulam Fatima occurred on account of her excessive bleedings as she remained un-attended for a considerable period and in order to cover the abovementioned lacuna in the prosecution case, the prosecution witnesses made false excuse that *Mst.* Ghulam Fatima was provided bandage by the doctor at RHC of Chak No. 509/G.B, whereas, Lady Dr. Uzma Andleeb (CW-1) has categorically stated during her cross-examination that there was no bandage or stitches on the injuries of the deceased when she received her dead body.

14. It is also noteworthy that according to the prosecution case, only one fire shot made by the appellant landed on the right thigh of *Mst.* Ghulam Fatima deceased but according to the medical evidence there was also an incised wound i.e. injury No. 3 measuring 4 cm x 1.7 cm on the lower part of left leg and bone under the said injury was also exposed. The abovementioned injury has not been explained by any of the prosecution's witnesses. Although it is argued by learned counsel for the complainant that said injury might have been caused to the deceased when she fell on the ground after sustaining firearm injury and hit the sickle with the help of which she was cutting fodder but we have noted that none of the prosecution witnesses had stated so in their statements recorded by the police or by the learned trial Court. Moreover, in the site plan (Exh.CW-3/A) or in the inquest report (Exh.PH), no sickle has been shown at the place of occurrence. It is not understandable that if the prosecution witnesses were present at the spot at the relevant time then as to why they did not explain the incised wound i.e. injury No. 3 on the body of the deceased in their statements recorded by the police or by the learned trial Court. The abovementioned fact shows that the prosecution's eye-witnesses were not present at the spot at the time of occurrence therefore, they could not explain the abovementioned injury. Reliance in this respect may be placed on the cases of *'Muhammad Ali v. The State'* (2015 SCMR 137), *'Irfan Ali v. The State'* (2015 SCMR 840) and *'Usman alias Kaloo v. The State'* (2017 SCMR 622). It is also noteworthy that according to the site plan (Exh.CW-3/A),

Muhammad Nawaz appellant made fire shot with 12 bore gun at *Mst.* Ghulam Fatima deceased from a distance of only 4-feet but according to the medical evidence, there was no blackening, burning or tattooing around the entry wound. Likewise, no wade of the empty was recovered from the entry wound which further contradicts the prosecution case. It is also noteworthy that in order to justify their presence at the spot, the prosecution's eye-witnesses stated that they along with *Mst.* Ghulam Fatima deceased went to the fields in order to cut fodder but neither any cut fodder nor any sickle has been recovered from the spot at the time of inspection by the I.O.

15. According to the prosecution case, motive behind the occurrence was that Muhammad Nawaz appellant wanted to marry with *Mst.* Ghulam Fatima deceased but the complainant party refused to give the hand of *Mst.* Ghulam Fatima deceased to the appellant and fixed her marriage with one Bahawal Sher for 13.03.2016 but neither any wedding card of the abovementioned proposed marriage has been produced in the prosecution evidence nor the abovementioned Bahawal Sher appeared in the witness box to prove the alleged motive. We are therefore, of the view that motive alleged by the prosecution has not been proved in this case.

16. Learned Deputy Prosecution General for the State assisted by learned counsel for the complainant has heavily relied upon the recovery of gun 12 bore (P-1) on the pointation of the appellant and positive report of PFSA, Lahore (Exh.PK) but it is noteworthy that no date of arrest of the appellant has been brought on record by the prosecution through the statement of any of the prosecution witness. Under the circumstances, it is not determinable in this case that as to whether empty recovered from the spot was sent to the office of PFSA, Lahore after the arrest of the appellant or the same was sent to the said office before his arrest hence it is not safe to rely upon the abovementioned prosecution evidence. It is by now well settled that if the empty is sent to the office of PFSA after the arrest of the accused then it is not safe to rely upon the positive report of PFSA and recovery of weapon from the possession of the accused. Reliance in this respect may be placed on the cases of *'Jehangir v. Nazar Farid and another'* (2002 SCMR 1986), *'Ali Sher and others v. The State'* (2008 SCMR 707) and *'Mushtaq and 3 others v. The State'* (PLD 2008 Supreme Court 1). As mentioned earlier, the date of arrest of the appellant has not been brought on the record through the statement of any of the prosecution witness therefore, the abovementioned recovery of gun from

the possession of the appellant and positive report of the PFSA are not safe to be relied upon. Moreover, recovery of gun and positive report of PFSA are only corroborative pieces of evidence and the same cannot be made basis for the conviction of the appellant, in absence of reliable direct evidence of prosecution's eye-witnesses.

17. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In the case of *'Tariq Pervez v. The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:

> '5. ..... The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram v. The State'* (2009 SCMR 230), at page 236, observed as under:

> '13. ..... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt,

therefore, we accept Criminal Appeal No. 99880 of 2017 filed by Muhammad Nawaz appellant, set aside his conviction and sentence recorded by the learned trial Court and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 605 of 2017 is answered in the negative. The appellant Muhammad Nawaz is in custody, he be released from the jail forthwith if not required in any other case.

(A.A.K.) Appeal allowed.

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[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

GOHAR AZEEM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 13226-B of 2023, decided on 7.3.2023.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), Ss. 9(1) & 3(b)--Recovery of charas--Post-arrest bail, grant of--The petitioner is in judicial lockup and he is no more required for further investigation--No useful purpose shall be served by keeping petitioner behind bars--The offence which has been alleged against petitioner does not fall within ambit of Prohibitory Clause of Section 51 of CNSA--Although it has been argued by learned Deputy Prosecutor General that petitioner is involved in one other criminal case but as per police report said case is still pending adjudication before concerned Court--**Held:** It is by now well settled that mere involvement of an accused in some other case(s) by itself is no ground to refuse bail, if otherwise, he is entitled to said concession on merits—Bail allowed. [Para 3] A

2012 SCMR 573 & 1997 SCMR 412.

Mrs. Naila Mushtaq Ahmed Dhoon, Advocate for petitioner.

Mr. Nisar Ahmad Virk, Deputy Prosecutor General for State.

Date of hearing: 7.3.2023.

ORDER

Through the instant petition, Gohar Azeem (petitioner) seeks post-arrest bail in case FIR No. 71/2023 dated 22.01.2023, offence under Section 9-(1)3(b) of the Control of Narcotic Substances Act, 1997 (XX of 2022), registered with Police Station Murad-pur, District Sialkot.

2. Arguments heard. Record perused.

3. As brief allegations levelled in the FIR, on 22.01.2023, the petitioner was apprehended by the police and on his search Charas weighing 820-grams was recovered from his possession, hence the abovementioned FIR. The petitioner is in judicial lockup since 22.01.2023 and he is no more required for further investigation. No useful purpose shall be served by keeping the petitioner behind the bars. The offence which has been alleged against the petitioner does not fall within the ambit of Prohibitory Clause of Section 51 of CNSA. Although it has been argued by learned Deputy Prosecutor General that the petitioner is involved in one other criminal case but as per police report the said case is still pending adjudication before the concerned Court. It is by now well settled that mere involvement of an accused in some other case(s) by itself is no ground to refuse bail, if otherwise, he is entitled to the said concession on merits. Reference in this context may be made to the cases reported as *'Jamal-ud-Din alias Zubair Khan vs. The State'* (2012 SCMR 573) & *'Muhammad Rafique vs. The State'* (1997 SCMR 412).

4. In the light of above, this petition is allowed and the petitioner is admitted to bail after arrest subject to his furnishing bail bonds in the sum of Rs. 2,00,000/-(Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed.

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[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN, J**

RAIYET ALI--Appellant

versus

STATE and another--Respondents

Crl. A. No. 1238 and Crl. Rev. No. 723 of 2013, heard on 13.2.2020.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Qatl-e-amd--Circumstantial evidence--Motive--Recovery of weapon of offence--Medical evidence--Extra-judicial confession--It is true that dead body of deceased was recovered from house of appellant and as per prosecution case, appellant, did not inform police regarding death of his wife deceased and he statedly fled away after occurrence but abovementioned facts are not sufficient to convict and sentence appellant under capital charge--The abovementioned circumstances at most may create a suspicion against appellant but it is by now well settled that suspicion how so ever strong cannot take place of conclusive proof, which is required for convicting and awarding sentence to an accused for a capital charge--The appellant cannot be convicted and sentenced merely on ground that he happened to be husband of deceased--At cost of repetition, that by now it is well settled that in 'absence of other reliable and cogent evidence, mere recovery of dead body of deceased from house of an accused by itself is not sufficient to convict and sentence chim under capital charge--Prosecution evidence is full of doubts--**Held:** It is by now well settled that if there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to give benefit of doubt to accused, whereas, instant case is replete with number of circumstances which have created serious doubts about truthfulness of prosecution story--Appeal accepted.

[Para 11, 13 & 16] B, C & F

2016 SCMR 1019, PLD 2003 SC 56, 2017 SCMR 724 & 2018 SCMR 772.

Circumstantial evidence--

----It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches dead body and other to neck of accused--But if any link in chain is missing then its benefit must go to accused. [Para 9] A

1992 SCMR 1047, 1999 SCMR 188 & PLJ 1999 SC 1018.

Medical evidence--

----It is by now well settled that medical evidence is a type of supporting evidence, which may confirm ocular account with regard to receipt of injury, nature of injury--Kind of weapon used in occurrence but it would not identify assailant. [Para 14] D

PLD 2009 SC 53, 2008 SCMR 1103 & 2009 SCMR 1410.

Confession of accused--

----It is by now well settled that confession of an accused while in police custody is inadmissible in evidence. [Para 15] E

2019 SCMR 872.

Mr. Muhammad Kashif Saeed Bhatti, Advocate for Appellant.

Ch. Muhammad Ishaq, Additional Prosecutor General for State.

M/s. Zafar Masud, Advocate and Ch. Abdul Hameed Gujjar, Advocate for Complainant.

Date of hearing: 13.2.2020.

JUDGMENT

This judgment shall Dispose of Criminal Appeal No. 1238 of 2013, filed by Raiyet Ali (appellant) against his conviction and sentence, as well as Criminal Revision No. 723 of 2013, filed by Muhammad Yahya petitioner/complainant for enhancement of sentence awarded to the Raiyet Ali (respondent No. 2), from imprisonment for life to death, as both these matters have arisen out of the same judgment dated 27.06.2013, passed by learned Additional Sessions Judge, Chunian, District Kasur.

2. Raiyet Ali (appellant) was tried in case F.I.R. No. 381/2010 dated 17.09.2010, registered at police station Kangan Pur in respect of offence under Section 302, PPC. After conclusion of the trial, the learned trial Court vide its judgment dated 27.06.2013, has convicted and sentenced the appellant as under:

> *Under Section 302(b), PPC to imprisonment for life. The Appellant was also directed to deposit an amount of Rs. 2,00,000/- (Rupees two hundred thousand only), as compensation in the bank account of the daughter of Mst. Khursheed Bibi (deceased) and in case of default to further undergo six months simple imprisonment.*
>
> *Benefit of Section 382-B, Cr.P.C. was also extended to the appellant.*

3. Brief facts of the case as given by the complainant Muhammad Yahya (PW-1) are that the sister of the complainant namely *Mst.* Khursheed Bibi (deceased) was married with Raiyet Ali (appellant) for the last fourteen years and from the said wedlock, a daughter was born, where-after the deceased remained issue-less, due to which Raiyet Ali (appellant), was annoyed and he used to beat *Mst.* Khursheed Bibi deceased). The complainant party several times asked the appellant to contract second marriage due to his desire of having more kids. *Mst.* Khursheed Bibi (deceased), didn't leave the house of the appellant for the sake of her daughter. Raiyet Ali (appellant), was having illicit relations with other women but even then *Mst.* Khursheed Bibi (deceased), continued to live with the appellant just for the betterment of her daughter. On the preceding night of registration of FIR *i.e*., 17.09.2010, Raiyet Ali (appellant), committed the murder of *Mst.* Khurhseed Bibi (deceased), either through strangulating her neck or through some other way but he (appellant) told everyone that *Mst.* Khursheed Bibi (deceased), died due to the electric shock. After committing murder of *Mst.* Khursheed Bibi (deceased), Raiyat Ali (appellant) informed his (appellant's) brother and then his (appellant's) sister-in-law about the death of his wife due to the electric shock, however, he (appellant) did not tell this fact to the complainant party, though the house of the complainant party was situated near to the house of the accused (appellant). On coming to know about the occurrence at 3.30 am, the complainant along with Hafiz Muhammad Tariq (PW-2), *Mst.* Surraya Bibi daughter of Muhammad Younis, Asghar and *Mst.* Surayya Bibi wife of Muhammad Yahya (PWs since given-up), reached at the house of the

deceased, where *Mst.* Khursheed Bibi (deceased) was lying dead in naked condition in the bathroom. The complainant party covered the dead body with a cloth and shifted the same on a cot and while doing so, they noticed ligature mark around the neck of the deceased, hence the abovementioned FIR.

On 22.09.2010, the complainant implicated Muhammad Aslam (co-accused), while moving application (Ex.PB), with the allegation that he (complainant), lodged the abovementioned case as his brother- in-law Raiyat Ali (appellant), committed murder of her sister namely *Mst.* Khursheed Bibi (deceased) through strangulating her neck but before committing murder, he (appellant) took intoxicated tablets from a fake doctor namely Muhammad Aslam (co-accused since acquitted) and administered the same to *Mst.* Khursheed Bibi (deceased) and her daughter Nadia Bibi, so that they could not offer any resistance. It was further alleged by the complainant in his application (Ex.PB), that Muhammad Aslam (co-accused since acquitted), is also involved in commission of offence of murder of his sister as strip of intoxicated tablets was found present in the dustbin, however, the learned trial Court acquitted the said Muhammad Aslam (co-accused since acquitted) while giving him the benefit of doubt vide the impugned judgment dated 12.10.2012.

4. The appellant was arrested In this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case the prosecution produced eight witnesses during the trial. The statement of the appellant under Section 342, Cr.P.C. was recorded, wherein he refuted the allegations levelled against him and professed his innocence.

5. The learned trial Court vide its judgment dated 27.06.2013, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that there was no eye-witness of the occurrence and the prosecution case is based upon mere suspicions; that even there is no circumstantial evidence on the record against the appellant and the prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Tariq (PW-2), merely expressed their suspicion against the appellant; that it was the case of the prosecution that the

appellant informed the complainant party through a mobile phone while giving a false information regarding the death of *Mst.* Khursheed Bibi, due to an electric shock but neither the mobile phone of the complainant party nor the mobile phone of the appellant has been taken into possession by the investigating Officer; that even no data of the mobile phone numbers mentioned by Hafiz Tariq (PW-2), has been taken into possession by the Investigating Officer; that time of death of the deceased as given by Lady Dr. Tasneem Naqvi (PW-5), does not coincide with the time of death of the deceased, as given by the prosecution witnesses; that according to the prosecution case, Raiyet Ali (appellant), made a disclosure that he had first given some material to *Mst.* Khurshid Bibi (deceased), which caused intoxication to her and thereafter the appellant committed her murder by strangulating her neck but visceras of the deceased were not sent to the Punjab Forensic Science Agency for detection of any material therein, which can cause intoxication; that even otherwise the abovementioned prosecution evidence is based on the alleged extra judicial confession of the appellant, while in police custody, which is in-admissible in evidence; that the alleged redovery of *Dupatta* (P-1), has been planted against the appellant in order to strengthen the weak prosecution case; that according to Imran Shahid 1144/C (PW-6), *Dupatta* (P-1), was of common pattern, which was not stained with any incriminating material, therefore, the alleged recovery of *Dupatta* (P-1), from the possession of the appellant is of no avail to the prosecution; that the motive as alleged by the prosecution against the appellant has also not been proved in this case; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

7. Learned Deputy Prosecutor General assisted by learned counsel for the complainant, opposed this appeal on the grounds that the prosecution has fully proved its case against the appellant beyond the shadow of any doubt; that the prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Tariq (PW-2), being brother and maternal nephew of *Mst.* Khursheed Bibi (deceased) had no previous enmity with the appellant to falsely implicated him in this case; that substitution in such like cases is a rare phenomena; that the dead body of *Mst.* Khursheed Bibi (deceased), was recovered from the house of the appellant, therefore, it was duty of the appellant to explain regarding the cause of death of the deceased but the

appellant neither lodged any FIR nor informed the police regarding the cause of un-natural death of the deceased rather he fled away from the spot after the occurrence and as such the conduct of the appellant has proved that he was guilty in this case; that the prosecution witnesses stood the test of lengthy cross examination but their evidence could not be shaken; that the prosecution case against the appellant is further supported by the medical evidence, which shows the un-natural death of the deceased by strangulating her neck and fracture of hyoid bone of the deceased; that the prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), are natural witnesses in this case because they are residents of close-by houses, which were situated near to the place of occurrence; that the prosecution case against the appellant is further corroborated by the recovery of weapon of offence *i.e.*; *Dupatta* (P-1), on the pointation of the appellant; that the motive as alleged by the prosecution has also been proved through straightforward and confidence inspiring evidence of the prosecution witnesses; that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that there is no substance in this appeal, therefore, the same may be dismissed. It is added by learned counsel for the complainant that there was no mitigating circumstance in this case, therefore, while accepting the *Criminal Revision No. 723 of 2013,* filed by the complainant the sentence awarded to the appellant by the learned trial Court may be enhanced from imprisonment for life to death.

8. I have heard the arguments of learned counsel for the parties, as well as, the learned Additional Prosecutor General and have also gone through the evidence available on the record with their able assistance.

9. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as *"Ch. Barkat Ali vs. Major Karam Elahi Zia and another"* (1992 SCMR 1047), *"Sarfraz Khan vs. The State"* (1996 SCMR 188) and *"Asadullah and another vs. The State"* (PLJ

1999 SC 1018). In the case of *"Ch. Barkat Ali* (*supra*), the august Supreme Court of Pakistan, at page 1055, observed as under:

> *"... Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See Siraj vs. The Crown (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the Accused."*

In the case of "Sarfraz Khan (*supra*), the august Supreme Court of Pakistan, at page 192, held as under:

> *7 .... It is well settled that circumstantial evidence should be so inter-connected that it forms such a Continuous chain that its one end touches the dead Body and other neck of the accused thereby excluding all the hypothesis of his innocence."*

Further reliance in this context is placed on the case of *"Altaf Hussain vs. Fakhar Hussain and another"* (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as Under:

> *"7 ..... Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."*

Keeping in view the parameters, laid down in the above- mentioned judgments, I will discuss each part of the prosecution evidence, separately.

10. The prosecution case is based on the following pieces of Evidence:-

> (i) Circumstantial evidence produced by the prosecution through Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), on account of a false information allegedly given by Raiyet Ali (appellant) to the complainant party regarding the death of *Mst.* Khursheed Bibi (deceased), due to electric-shock and disappearance of Raiyet Ali (appellant) after the occurrence.
>
> (ii) Motive

(iii) Recovery of weapon of offence *i.e.*, *Dupatta* (P-1), on the pointation of Raiyet Ali (appellant), as well as, recovery of dead body of *Mst.* Khursheed Bibi (deceased), from the house of Raiyet Ali (appellant).

(iv) Medical Evidence.

(v) Evidence of extrajudicial confession of Raiyet Ali (appellant) before Muhammad Yahya complainant (PW-1), while in police custody.

11. ***Circumstantial evidence produced by the prosecution through Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), on account of a false information allegedly given by Raiyet Ali (appellant) to the complainant party regarding the death of Mst. Khursheed Bibi (deceased), due to electric-shock and disappearance of Raiyet Ali (appellant) after the occurrence.***

Insofar as the evidence of prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), is concerned, it is an admitted fact that both the abovementioned witnesses are not the eye-witnesses of this case. They are also not the witnesses of last seen evidence and their evidence is mainly based upon the suspicion against the appellant, which was developed in the minds of above-referred prosecution witnesses due to alleged false information given by Raiyet Ali (appellant) to the complainant party regarding the cause of death of his wife namely *Mst.* Khursheed Bibi (deceased), because of electric-shock and conduct of the appellant subsequent to the occurrence as he (appellant) statedly fled away from the spot after the occurrence and did not report the matter to the police. It is noteworthy that Hafiz Muhammad Tariq (PW-2), during his examination-in-chief stated regarding the information given to him by Raiyet Ali (appellant) regarding the death of *Mst.* Khursheed Bibi (deceased), due to electric-shock in the following words:-

> *"At about 3.30 AM (night) accused Rayyat Ali telephonically informed me about death of Khurshed Bibi by electric shock"*

Furthermore, Hafiz Muhammad Tariq (PW-2), mentioned the cell phone number of Raiyet Ali (appellant), as well as, his own cell phone number during

his cross examination, while appearing in the witness- box. Relevant part of his statement in his cross examination reads as under:-

> *"The cell phone number of Rayyat Ali at the relevant time was 0300-6545733. My cell No. is 0302-6106180. I do not remember as to whether I have given my cell No. as 0306- 4311127 to the police for the purpose of any contact with me. My cell No. 's SIM is on my name. I got recorded the fact of telephone call by Rayyat Ali accused on my cell phone, giving information about the death of deceased. Confronted with Ex. DA, where it is not so recorded. I got recorded in my statements under Section 161, Cr.P.C. that when I received the information, we while going to the house of Rayyat Ali made hue and cry and on hearing Muhammad Yahya complainant andMst. Surrya Bibi (Mamani) came out and joined us. Confronted with Ex.DA, where it is not so recorded"*

It is, therefore, evident that Hafiz Muhammad Tariq (PW-2), has given his own cell phone number, as well as, the cell phone number of Raiyet Ali (appellant), during his cross examination but neither the said cell phone sets were taken into possession by the Investigating Officer nor their Data was collected by him, in order to establish that any wrong information was given by Raiyet Ali (appellant), regarding the death of *Mst.* Khursheed Bibi (deceased) to the complainant party. It is further noteworthy that the above-mentioned fact regarding giving information by Raiyet Ali (appellant) with regard to the cause of death of *Mst.* Khursheed Bibi (deceased), due to electric-shock **through phone** was not mentioned in the FIR or in the statement (Ex.DA) of Hafiz Muhammad Tariq (PW-2), recorded by the police under Section 161, Cr.P.C. Hafiz Muhammad Tariq was confronted with his previous statement and the dishonest improvements made by him in this respect were duly brought on the record. It is true that the dead body of *Mst.* Khursheed Bibi (deceased) was recovered from the house of the appellant and as per prosecution case, Raiyet Ali (appellant), did not inform the police regarding the death of his wife namely *Mst.* Khursheed Bibi (deceased) and he statedly fled away after the occurrence but the abovementioned facts are not sufficient to convict and sentence the appellant under the capital charge. The abovementioned circumstances at the most may create a suspicion against the appellant but it is by now well settled that suspicion how so ever strong cannot take place of conclusive proof, which is required for convicting and awarding

sentence to an accused for a capital charge. In the case of *"Muhammad Jamshaid and another vs. The State and others"* (2016 SCMR 1019), in paragraph No. 3, of the judgment, the Apex Court of the country was pleased to observe as under:

> *3 ……. It is trite that suspicion howsoever grave or strong can never be a proper substitute for proof beyond treasonable doubt required in a criminal case ….*

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case reported as *"Vijant Kumar and 4 others vs. State through Chief Ehtesab Commissioner, Islamabad and others"* (PLD 2003 Supreme Court 56).

12. ***(ii) Motive,***

According to the prosecution case as set forth in the FIR (Ex.PA/1), the motive behind the occurrence was that only a female child was born from the wedlock of Raiyet Ali (appellant) and *Mst.* Khursheed Bibi (deceased), during the subsistence of their marriage for fourteen (14) years due to which the appellant was unhappy with his wife Mst Rhursheed Bibi (deceased). It was also alleged in the FIR (Ex.PA/1) that Raiyet Ali (appellant) had illicit relations with the other ladies and due to the abovementioned reason, he committed murder of *Mst.* Khursheed Bibi (deceased). It is noteworthy that the prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), did not mention the above-referred motive while appearing in the witness box and Hafiz Muhammad Tariq (PW-2), only stated in his examination-in-chief that the attitude of Raiyet Ali (appellant), was not cordial towards *Mst.* Khursheed Bibi (deceased). He had not given any reason whatsoever for the abovementioned attitude of the appellant with the deceased. Muhammad Yahya complainant (PW-1), has conceded during his cross examination that he had not mentioned the name of any woman with whom Raiyet Ali (appellant) had illicit relationship. Relevant part of his statement in this respect reads as under:

> *"I did not mention the name of any woman, with whom Rayyat Ali has alleged illicit relations during his marriage time with my sister. It is incorrect that this fact is unfounded and I do not have any cogent reference in this regard"*

He further admitted that he never convened any Punchait to resolve the alleged issue of beating of Raiyet All (appellant) to *Mst.* Khursheed Bibi (deceased) or to resolve the issue of illicit relations of the appellant with any woman. Relevant part of his statement in this respect roads as under:

> *"No panchayiat was ever convened to resolve the issue of beatings. Given by the accused to may deceased sister as well as his illicit relations with the different women of easy excess"*

Similarly Hafiz Muhammad Tariq (PW-2), conceded during his cross examination that Raiyet Ali (appellant), never gave beating to his aunt *Mst.* Khursheed Bibi (deceased), in his presence. Relevant part of his statement in this respect reads as under:--

> *"Rayyat Ali never gave beatings to my aunt in my presence. Volunteer, that she disclosed so to me".*

Perusal of the statement of Hafiz Muhammad Tariq (PW-2), shows that his statement was based upon hearsay evidence as he himself never witnessed Raiyet Ali (appellant), while beating to his wife *Mst.* Khursheed Bibi (deceased) and he stated that he was told by *Mst.* Khursheed Bibi (deceased), regarding the abovementioned motive. No woman was named by the abovementioned prosecution witnesses with whom Raiyet Ali (appellant) had alleged illicit relationship. It is also an admitted fact that *Mst.* Khursheed Bibi (deceased) was living along with her minor daughter in the house of Raiyet Ali (appellant), till her death. It is further noteworthy that no family or civil suit filed by *Mst.* Khursheed Bibi (deceased), against Raiyet Ali (appellant), was produced in the evidence to establish that there was any matrimonial dispute between the parties. Both the prosecution witnesses namely Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), never stated that *Mst.* Khursheed Bibi (deceased), came to the house of her parents due to any dispute with the appellant. Keeping in view all the abovementioned facts, I have come to this irresistible conclusion that the motive as alleged by the prosecution has not been proved in this case.

13. ***(iii) Recovery of weapon of offence i.e, Dupatta (P-1), on the pointation of Raivet Ali (appellant), as well as, recovery of dead body of Mst. Khursheed Bibi (deceased), from the house of Raiyet Ali (appellant).***

According to the prosecution case, *Dupatta* (P-1), was used by the appellant for strangulating the neck of *Mst.* Khursheed Bibi (deceased), According to the evidence of Lady Doctor Tasneem Naqvi (PW-5), there was a bruise on the neck of *Mst.* Khursheed Bibi (deceased). It is also noteworthy that as per prosecution case, the dead body of *Mst.* Khursheed Bibi (deceased) was initially lying in the bathroom of the house of appellant in naked condition, however, the same was covered with a cloth by the ladies of the complainant party and was put on a cot. In order to prove the recovery of *Dupatta* (P-1), on the pointation of Raiyet Ali (appellant), the prosecution has produced Imran Shahid 1144/C (PW-6), in the witness box. The said witness has stated during his cross examination regarding the abovementioned recovery as under:

> *"I cannot describe the place, where "Petti" was lying as well as room from where Dopatta P-I was recovered, however, Dopatta was of common pattern which was easily available from the market. It is correct that P-1 Dopatta was not stained with mud, blood or soap"*

It is evident from the statement made by Imran Shahid 1144/C (PW-6), that he was even unable to describe the place, from where the recovery of *Dupatta* (P-1), was effected. He was also unable to describe the room where-from the said *Dupatta* (P-1), was recovered, which shows that he never visited the place of recovery, therefore, he was unable to describe the same. He has also admitted that *Dupatta* (P-1), was of common pattern, which was easily available in the market. He further conceded that *Dupatta* (P-1), was neither stained with mud, blood or soap and as such no incriminating material was available on *Dupatta* (P-1). Keeping in view all the abovementioned facts and as *Dupatta* (P-1), was not stained with any incriminating material and as *Dupatta* (P-1), was of common pattern, which is available in almost every house, therefore, the said recovery is inconsequential for the prosecution. Insofar as the recovery of dead body of *Mst.* Khursheed Bibi (decease), from the house of Raiyet Ali (appellant), is concerned, I have already given my findings in this respect in paragraph No. 11, of this judgment. The appellant cannot be convicted and sentenced merely on the ground that he happened to be the husband of the deceased. At the cost of repetition, it is observed that by now it is well settled that in absence of other reliable and cogent evidence, mere recovery of dead body of the deceased from the house of an accused by itself is not sufficient to convict and sentence him under the capital charge. In the case of *"Nasrullah*

alias Nasro vs. The State" (2017 SCMR 724), in paragraph No. 5, of the judgment, the Hon'ble Supreme Court of Pakistan observed as under:-

> *5 ……..... the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and on one else who would have committed that murder ……..*

Reliance in this respect may also be placed on the judgments reported as *"Nazir Ahmad vs. The State"* (2018 SCMR 787), *"Asad Khan vs. The State"* (PLD 2017 Supreme Court 681), *"Nazeer Ahmed vs. The State"* (2016 SCMR 1628), *"Muhammad Jamshaid and another vs. The State and others"* (2016 SCMR 1019) and *"Abdul Majeed vs. The State"* (2011 SCMR 941).

14. ***(iv) Medical evidence***

Insofar as the medical evidence of the prosecution is concerned, I have noted that the same is also in-conflict with the ocular account of the prosecution because the time of death of *Mst.* Khursheed Bibi (deceased), as given by Lady Doctor Tasneem Naqvi (PW-5), does not coincide with the time of death given by the prosecution witnesses Namely Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2). According to the prosecution case as set forth in the FIR (Ex.PA/1), the complainant party received information regarding the death of *Mst.* Khursheed Bibi (deceased), on the night of 17.09.2010 at 3.30 a.m. According to the statement of Lady Doctor Tasneem Naqvi (PW-5), she conducted the postmortem examination of the dead body of *Mst.* Khursheed Bibi (deceased) on 17.09.2010 and the time of postmortem examination mentioned in the postmortem report (Ex.PF), is 3.30 p.m. Lady Doctor Tasneem Naqvi (PW-5), stated that according to her opinion, the probable time that elapsed between the injury and death was immediate, whereas the probable time that elapsed between the death and postmortem examination was 7 to 8 hours. As postmortem examination was conducted on 17.09.2010, at 3.30 p.m, therefore, according to the evidence of Lady Doctor Tasneem Naqvi (PW-5), *Mst.* Khursheed Bibi (deceased), died approximately between 7.00 am to 8.00 a.m on 17.09.2010 but as mentioned earlier, in the FIR (EX.PA/1), it was alleged that on 17.09.2010, at 3.30 am, the complainant party received the information regarding the death of *Mst.* Khursheed Bibi (deceased). Even Muhammad Yahya complainant (PW-1) and Hafiz Muhammad Tariq (PW-2), while appearing in the witness box has

categorically stated that they heard the news regarding the death of *Mst.* Khursheed Bibi (deceased) at about 3.30 a.m (night). It is, therefore, evident that time of death of *Mst.* Khursheed Bibi (deceased), given by the abovementioned prosecution witnesses does not coincide with the time of death of *Mst.* Khursheed Bibi (deceased) as given by Lady Doctor Tasneem Naqvi (PW-5) and as such there is conflict between the ocular account and the medical evidence of the prosecution. Furthermore, it is by now well settled that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury. Kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of *"Muhammad Tasaweer vs. Hafiz Zulkarnain and 2 others"* (PLD 2009 SC 53), *"Altaf Hussain vs. Fakhar Hussain and another* (2008 SCMR 1103) and *"Mursal Kazmi alias Qamar Shah and another vs. The State"* (2009 SCMR 1410).

15. ***(v) Evidence of extrajudicial confession of Raiyet Ali (appellant) before Muhammad Yahya complainant (PW-1), while in police custody.***

Insofar as the alleged extrajudicial confession of Raiyet Ali (appellant) before Muhammad Yahya complainant (PW-1), while in police custody is concerned, it is by now well settled that confession of an accused while in police custody is inadmissible in evidence. Reliance in this respect may be placed on the judgment reported as *"Sajjan Solangi vs. The State"* (2019 SCMR 872), wherein in paragraph No. 3, of the judgment, the Apex Court of the country was pleased to observe as under:

> *3. ……. Sikandar Ali Malkani claimed that on 24.09.2003 petitioner Sajjan Solangi while in police custody during interrogation made extra judicial confession before him and the other witness but admittedly under the Qanun-e-Shahahdat Order, 1984 the said disclosure under the custody before the police in inadmissible whereas Muhammad Nawaz (PW-3) who is also a witness of the said confession, did not utter any word regarding such confession. The reliance made by the Courts below on such inadmissible evidence was unfortunate aspect of this case ……"*

16. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution evidence is full of doubts. It is by

now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story. In *"Muhammad Mansha vs. The State"* (2018 SCMR 772), the Hon'ble Supreme Court of Pakistan, at page 778, was pleased to observe as under:

> *4 ……. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxima, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted"*

Similarly in *Tariq Pervez vs. The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:

> *"5 ……. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."*

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *"Muhammad Akram vs. The State"* (2009 SCMR 230), at page 236 observed as under:

> *"13. ……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the*

accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the light of above discussion, I **accept Criminal Appeal No. 1238 of 2013** filed by Raiyet Ali (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Chunian, District Kasur vide impugned judgment dated 27.06.2013 and acquit him of the charge under Section 302(b) PPC by extending him the benefit of doubt. Raiyet Ali (appellant) is in custody, he be released forthwith, if not required in any other case.

18. Insofar the criminal revision i.e., Crl. Revision No. 723 of 2013, filed by Muhammad Yahya (complainant) for enhancement of sentence, awarded by the learned trial Court against Raiyet Ali (appellant) from imprisonment for life to death is concerned, I have already disbelieved the prosecution evidence due to the reasons mentioned in paragraph Nos.11 to 15 of this judgment and Raiyet Ali (appellant) has been acquitted by this Court due to the reasons mentioned therein, therefore, this criminal revision being devoid of any force is hereby **dismissed**.

(A.A.K.) Appeal accepted.

2022 M L D 350

[Lahore]

Before Malik Shahzad Ahmad Khan, J

ALLAH YAR---Petitioner

Versus

The STATE and another---Respondents

Criminal Revision No.17928 of 2020, decided on 2nd November, 2020.

(a) Penal Code (XLV of 1860)---

----Ss.324 & 337-F(vi)---Attempt to commit qatl-i-amd, ghayr-jaifah-munaqqillah---Appreciation of evidence---Ocular account corroborated by medical evidence---Scope---Accused was charged that he made firing upon the complainant and injured him---Motive behind the occurrence was that the accused had suspicion that the complainant had illicit relationship with his sister---Role attributed to the accused was that of causing three firearm injuries on the body of the complainant had fully been supported by the medical evidence of the prosecution produced through Medical Officer, as there were three entry and exit wounds on the left knee and left thigh of the complainant---Nothing on the record to establish that the said injuries were self-suffered or were caused by friendly hands---Although, defence plea was that the complainant had alleged that he was first caught hold by the accused from his neck and thereafter he made fire shots at the body of the complainant, however, there was no burning or blackening around the entry wounds of the complainant which had contradicted the prosecution story---Complainant was not a static object and he could have changed his position at the time of occurrence---Medical officer had categorically mentioned that complainant was wearing blood stained green colour shalwar/qameez and bunyan at the time of examination and corresponding holes were present on his shalwar---When complainant was wearing clothes and corresponding holes were present on his shalwar then absence of burning and blackening around his entry wounds was quite natural---Injuries on the body of the complainant were the stamp of his presence at the spot at the relevant time---Appeal against conviction was dismissed accordingly.

(b) Penal Code (XLV of 1860)---

----Ss.324 & 337-F(vi)---Attempt to commit qatl-i-amd, ghayr-jaifah-munaqqillah---Appreciation of evidence---Constitution of offence under S.324, P.P.C.----Injuries on non-vital put of lady---Scope---Ocular account corroborated by medical evidence---

Scope---Accused was charged that he made firing upon the complainant and injured him---Defence contended that ingredients of offence under S.324, of P.P.C. were not attracted because the accused caused injuries on the non-vital parts of the body of the complainant, however, the accused repeated firearm injuries and caused as many as three entry and three exit, total six wounds, on the body of the complainant---Repeated fire shots made by the accused did not hit on the vital part of his body and as such there was no substance on the plea of defence, in circumstances---Appeal against conviction was dismissed accordingly.

Malik Muhammad Suleman Awan for Petitioner.

Ch. Muhammad Ishaq, Addl Prosecutor General for the State.

Naseem Ullah Khan Niazi for the Complainant.

Date of hearing: 2nd November, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.----This judgment shall dispose of Criminal Revision No.17928 of 2020, filed by the petitioner, namely, Allah Yar against his conviction and sentence. The petitioner was tried in case F1R No. 96 dated 13.04.2017 registered at Police Station, Mitha Tawana, District Khushab offences under Sections 324/337 F(vi) of P.P.C., by the learned Magistrate Section 30, Khushab and after conclusion of the trial, vide judgment dated 02.10.2019, the learned trial Court convicted and sentenced the petitioner as under:-

> Under Section 324 of P.P.C. to undergo rigorous imprisonment for five years and. fine of Rs.30,000/- and in default thereof, to further undergo S.I for one month.
>
> Under Section 337-F(vi) of P.P.C. to pay daman in the sum of Rs.50,000/- to the complainant/injured, namely, Allah Yar son of Ahmad Khan and also awarded rigorous imprisonment for 05 years as Ta'zir.

2. All the sentences were directed to run concurrently. The benefit of Section 382-B of Cr.P.C., was also extended to the petitioner. Feeling aggrieved with the aforementioned judgment of the learned trial Court, the petitioner preferred appeal, whereas, Allah Yar son of Ahmad Khan complainant filed revision petition regarding the enhancement of the sentence awarded to the petitioner by the learned trial Court. Learned Addl. Sessions Judge, Khushab vide the consolidated judgment dated 26.02.2020, dismissed the criminal appeal, filed by the petitioner against his conviction and sentence, and the criminal revision, filed by the complainant for

enhancement of the sentence of the petitioner hence, the instant criminal revision petition before this Court.

3. As per prosecution case set forth in the FIR (Ex.PH), on 13.04.2017 at about 08:30 p.m., when Allah Yar son of Ahmad Khan (complainant) reached in front of the house of Muhammad Ameer, Allah Yar son of Khuda Bakhash petitioner while armed with pistol .30 bore came there and made fire shots at the complainant. First fire shot made by the petitioner hit at the left knee of the complainant. Second fire shot made by the petitioner also hit at the left knee of the complainant. The petitioner thereafter, made third fire shot which landed at the left thigh of the complainant. PWs attracted at the spot on hearing the firing and shifted the complainant to BBC Mitha Tawana. Motive behind the occurrence was that the petitioner had suspicion that the complainant had illicit relationship with his (petitioner's) sister.

4. After completion of investigation, the challan was submitted before the Court. The learned trial Court framed the charge against the petitioner under Sections 324/337F(vi) of P.P.C. on 11.09.2017, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced seven witnesses during the trial. The prosecution has also produced documentary evidence in the shape of Exh.PA to Exh.PJ and closed the prosecution evidence.

6. The statement of petitioner under section 342 of Cr.P.C, was recorded. The petitioner refuted all the allegations leveled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you", the appellant, replied as under:-

> "Complainant had feud enmity with Rub Nawaz and Ramzan. Haq Nawaz is real brother of above said Haq Nawaz. Said Haq Nawaz was married with the sister of complainant. Rub Nawaz and Haq Nawaz had intention to kill the complainant due to inheritance dispute of their land above said Rub Nawaz and Haq Nawaz injured the complainant while making firing but complainant twisted the story and substituted me while saving the skin of Rub Nawaz and Haq Nawaz and to save the house of Mehr Khatoon sister of the complainant. PW is close relative of the complainant. Sister of the complainant was married with the son of PW Sher Muhammad. Due to above said reasons complainant (sic) false case

against me while subsisting the actual culprits and PWs deposed falsely against me with the consent of the complainant."

The petitioner neither made his statement under section 344(2) of Cr.P.C., in disproof of the allegations leveled against him nor he produced any evidence in his defence.

7. The learned trial Court vide judgment dated 02.10.2019, found the petitioner Allah Yar son of Khuda Bakhash guilty and convicted and sentenced him as mentioned and detailed above. The petitioner preferred appeal against his conviction and sentence, whereas, the complainant filed revision petition before the learned Addl. Sessions Judge, Khushab and the said Court vide impugned consolidated judgment dated 26.02.2020 dismissed the appeal, filed by the petitioner, and revision petition, filed by the complainant and the judgment of the learned trial Court was upheld and maintained hence, the petitioner filed the instant criminal revision before this Court against his conviction and sentence.

8. Learned counsel for the petitioner, in support of this petition, contends that the petitioner has falsely been implicated in this case; that the impugned judgments of conviction of the Courts below are result of misreading and non-reading of evidence available on the record; that there is conflict in the ocular account and the medical evidence of the prosecution; that ingredients of offence under section 324 of P.P.C. are not attracted in this case because injuries are on the non-vital part of the body of the complainant; that the complainant had enmity with Rab Nawaz and Haq Nawaz, who are his (complainant's) relatives and had earlier litigation with each other and in fact the aforementioned persons injured the complainant and the complainant while twisting the real facts implicated the petitioner in this case with mala fide intentions; that this petition may be allowed and the petitioner may be acquitted from the charge.

9. On the other hand; learned Addl. Prosecutor General assisted by learned counsel for the complainant has opposed the contentions of learned counsel for the petitioner and argued that the judgments of conviction of petitioner of both the Courts below have been passed after appreciating evidence of the prosecution and the same do not call for any interferences this Court; that the learned trial Court and the learned lower Appellate Court have already taken lenient view regarding the sentence of the petitioner; that the instant petition has no substance therefore, the same may be dismissed and the conviction and sentence of the petitioner, passed by both the Courts below, may be upheld and maintained.

10. Arguments heard. Record perused.

11. I have noted that the role attributed to the petitioner of causing three firearm injuries on the body of the complainant has fully been supported by the medical evidence of the prosecution produced through Dr. Ghulam Hussain Qasmi (PW-3). There were three entry and exit wounds on the left knee and left thigh of Allah Yar complainant. There is nothing on the record to establish that the said injuries were self-suffered or were caused by friendly hands. Although learned counsel for the petitioner put the plea that the complainant has alleged that he was first caught hold by the petitioner from his neck and thereafter, he (petitioner) made fire shots at the body of the complainant, whereas; there was no burning or blackening around the entry wounds of the complainant which has contradicted the prosecution story but it is noteworthy that Allah Yar complainant was not a static object and he could have changed his position at the time of occurrence. Moreover, Dr. Ghulam Hussain Qasmi (PW-3) has categorically mentioned that Allah Yar complainant was wearing blood stained green colour shalwar/qameez and bunyan at the time of examination and corresponding holes were present on his shalwar. Under the circumstances, when Allah Yar complainant was wearing clothes and corresponding holes were present on his shalwar then absence of burning and blackening around his entry wounds is quite natural. Learned counsel for the petitioner next contended that ingredients of offence under. Section 324 of P.P.C. are not attracted in this case because the petitioner caused injuries on the non-vital parts of the body of the complainant but I have noted that the petitioner repeated firearm injuries and caused, as many as, three entry and three exit total six wounds on the body of the complainant. It was good-luck of the complainant that the repeated fire shots made by the petitioner did not hit on the vital part of his body and as such there is no substance in the abovementioned argument of learned counsel for the petitioner. Learned counsel for the petitioner lastly argued that the complainant was injured by Haq Nawaz and Rab Nawaz with whom he had earlier enmity of criminal cases and he (complainant) has also admitted the said fact during his cross-examination but it is not understandable that if the complainant had enmity with the abovementioned Haq Nawaz and Rab Nawaz then as to why he (complainant) would let off the real culprits and would falsely implicate the petitioner in this case. Substitution in such like cases is a rare phenomenon. Injuries on the body of Allah Yar complainant are the stamp of his presence at the spot at the relevant time.

12. Keeping in view all the aforementioned facts, I am of the view that the learned trial Court, after appreciating the prosecution evidence, has rightly convicted and

sentenced the petitioner and the said conviction and sentence has rightly been upheld and maintained by the learned, Addl. Sessions Judge, Khushab vide impugned consolidated judgment dated 26.02.2020 which does not call for any interference by this Court. Resultantly, there is no substance in this criminal revision, filed by the petitioner against his conviction and sentence therefore, the same is hereby dismissed, and the conviction and sentence awarded to the petitioner by the learned trial Court vide judgment dated 02.10.2019 and upheld by the learned Addl. Sessions Judge, Khushab vide consolidated judgment dated 26.02.2020 is hereby upheld and maintained.

JK/A-34/L Revision dismissed.

2022 P Cr. L J 1542

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Tariq Nadeem, JJ

MUHAMMAD NAWAZ---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 99880 and Murder Reference No. 605 of 2017, heard on 8th November, 2021.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of eight hours in lodging the FIR---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---Record showed that occurrence took place at 9.00 a.m., but the FIR had been lodged at 05.00 p.m. with the delay of eight hours from the time of occurrence---Distance between the police station and the place of occurrence was nine kilometres---In order to cover the said delay in lodging the FIR, the eye-witnesses stated that in fact, they first took the victim in injured condition to the Hospital where the doctor after examining referred the injured to other hospital---Neither the doctor who first examined the deceased in injured condition at Hospital had been produced in the witness box nor any Medico-legal Report regarding the Examination of deceased in injured condition and her referral to the other hospital had been produced in the prosecution evidence---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of eleven hours and forty five minutes in conducting the post-mortem examination on the dead body of the deceased---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---Post-mortem examination on the dead body of the deceased was conducted with the delay of eleven hours forty five minutes from the occurrence---Court witness/Medical Officer had stated that deceased in injured condition was referred to other hospital due to her precarious condition but she admitted that she was herself on leave and the hospital staff had referred the deceased to other hospital---Said witness did not mention the name of any member of the staff who had referred the deceased to the other hospital nor any such staff of the hospital

appeared in the witness box before the Trial Court---Statement of Medical Officer regarding the referral of deceased by the staff of the Hospital to other hospital was hearsay evidence---Evidence of Medical Officer was contradictory to the statement of complainant and eye-witness because both the said witnesses of the prosecution stated that in fact deceased in injured condition was referred to other hospital by the doctor---Eye-witnesses did not state that the staff of Hospital referred her to the other hospital as claimed by Medical Officer---Delay in conducting the post-mortem examination on the dead body of the deceased was suggestive of the fact that the eye-witnesses of the prosecution were not present at the spot at the relevant time and the said delay had been consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

Irshad Ahmad v. The State 2011 SCMR 1190; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Muhammad Ashraf v. The State 2012 SCMR 419; Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54 and Zafar v. The State and others 2018 SCMR 326 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Presence of eye-witnesses at the spot was doubtful---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---If the eye-witnesses were present at the spot at the time of occurrence, then they would have provided the medical aid to the deceased in order to save her life and stopped her bleeding because injury sustained by deceased was on her right thigh which was a non-vital part of her body---Even Medical Officer stated that if any injured in such case remained unattended for one to two hours then his/her death might occur on account of loss of blood---In order to establish their presence at the spot at the relevant time and to show that eye-witnesses tried to stop the bleeding of deceased, complainant stated that the Medical Officer had bandaged the wound of the injured and thereafter, referred her to the other hospital---Medical Officer stated that wounds of the deceased were neither stitched nor bandaged---Eye-witnesses were not present at the spot at the relevant time and death occurred on account of her excessive bleedings as she remained un-attended for a considerable period---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Ocular account and medical evidence---Contradictions---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---According to the prosecution case, only one fire shot made by the accused landed on the right thigh of deceased but according to the medical evidence there was also an incised wound measuring 4 cm x 1.7 cm on the lower part of left leg and bone under the said injury was also exposed---Said injury had not been explained by any of the prosecution's witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

Muhammad Ali v. The State 2015 SCMR 137; Irfan Ali v. The State 2015 SCMR 840 and Usman alias Kaloo v. The State 2017 SCMR 622 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Medical evidence---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---Site plan, showed that accused made fire shot with .12 bore gun at deceased from a distance of only four feet but according to medical evidence, there was no blackening, burning or tattooing around the entry wound---No wade of the empty was recovered from the entry wound which further contradicted the prosecution case---In order to justify their presence at the spot, the prosecution's eye-witnesses stated that they along with deceased went to the fields in order to cut fodder but neither any cut fodder nor any sickle had been recovered from the spot at the time of the inspection by the Investigating Officer---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Motive not proved---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---Motive behind the occurrence was that accused wanted to marry with deceased but the complainant party refused to give the hand of deceased to the accused and fixed her marriage with some one else but neither any wedding card of the said proposed marriage had been produced in the prosecution evidence nor the person to whom she was to be married appeared in the witness box to prove the alleged motive---Motive alleged by the prosecution had not been proved---Circumstances established that the prosecution had failed to prove its case against the

accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Recovery of gun 12 bore on the pointation of accused---Reliance---Scope---Accused were charged that they in furtherance of their common intention committed murder of the daughter of the complainant by firing---Record showed that .12 bore gun was recovered on the pointation of the accused---No date of arrest of the accused had been brought on record by the prosecution through the statement of any of the prosecution witnesses---Under circumstances, it was not determinable as to whether empty recovered from the spot was sent to the office of Forensic Science Agency after the arrest of the accused or the same was sent to the said office before his arrest---Such circumstances were not safe to rely upon the prosecution evidence---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(h) Criminal trial---

----Recovery of empty---Reliance---If the empty was sent to the office of Forensic Science Agency after the arrest of the accused then it was not safe to rely upon the positive report of Forensic Science Agency and recovery of weapon from the possession of the accused.

Jehangir v. Nazar Farid and another 2002 SCMR 1986; Ali Sher and others v. The State 2008 SCMR 707 and Mushtaq and 3 others v. The State PLD 2008 SC 1 rel.

(i) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Muhammad Akram Qureshi and Sheeba Qaiser for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Anas Bin Ghazi, Muhammad Shahbaz Sharif and Sagheer Ahmad for the Complainant.

Date of hearing: 8th November, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.99880 of 2017, filed by Muhammad Nawaz (appellant) against his conviction and sentence and Murder Reference No.605 of 2017, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Nawaz (appellant). We propose to dispose of both these matters by this single judgment as the same have arisen out of the same judgment dated 28.10.2017, passed by the learned Additional Sessions Judge, Tandlianwala.

2. Muhammad Nawaz (appellant), along with his co-accused Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu (since acquitted), were tried in private complaint filed by Allah Ditta (complainant), under sections 302/34, P.P.C., Police Station Mamukanjan, Tendlianwala, District Faisalabad. After conclusion of the trial, the learned trial Court vide its judgment dated 28.10.2017, has convicted and sentenced Muhammad Nawaz (appellant) as under: -

> Under section 302(b), P.P.C. to 'Death' for committing Qatl-i-Amd of Mst. Ghulam Fatima (deceased). He was also ordered to pay Rs.2,00,000/- (rupees two hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C and in default thereof the same would be recoverable as arrears of land revenue and to further undergo simple imprisonment up to four months.
>
> However vide the same judgment, accused Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu were acquitted of the charges.

3. Initially Allah Ditta complainant (PW-1) got registered case FIR No.59/2016 dated 05.03.2016 offences under sections 302/34, P.P.C. at Police Station Mamukanjan, Tandlianwala, District Faisalabad against Muhammad Nawaz (appellant), Muhammad Sarfraz and Maqbool Ahmad (accused since acquitted). Feeling dissatisfied with the proceedings and investigation of the police, private complaint was filed by the complainant. After recording the cursory statements of the complainant, as well as, PWs the learned Additional Sessions Judge, Tandlianwala summoned the accused persons nominated in the private complaint to face trial.

4. Brief facts of the case as given by the complainant Allah Ditta (PW-1), in his private complaint (Exh.PC) are that on 05.03.2016, the complainant along with his son Rang Zeb (PW-2), Muhammad Waris (PW since given-up) and daughter namely Mst. Ghulam Fatima (deceased), was cutting fodder (Barseem), from his field bearing Killa No.12, Square No.42. Suddenly Muhammad Nawaz (appellant), while armed with .12-bore gun, Muhammad Sarfraz (co-accused since acquitted), while armed with pistol .30-bore and Maqbool Ahmad (co-accused since acquitted), with their common intention came there, while raising lalkara to teach a lesson to Mst. Ghulam Fatima for not marrying with Muhammad Nawaz (appellant). Muhammad Sarfraz (co-accused since acquitted), raised a lalkara to kill Mst. Ghulam Fatima (deceased) by making fire-shot. Muhammad Nawaz (appellant), thereafter, made a fire shot with

his .12-bore gun, which hit Mst. Ghulam Fatima (deceased) at her right thigh and same went through and through, due to which she fell on the ground. Maqbool Ahmad (co-accused since acquitted), remained present there with his motorcycle. The complainant party attended Mst. Ghulam Fatima (deceased) and shifted her to the Civil Hospital of Chak No.509-G.B. After examining Mst. Ghulam Fatima, the then injured, the doctor present there referred her to the Allied Hospital Faisalabad due to her critical condition. The complainant party took Mst. Ghulam Fatima (deceased) to the Allied Hospital Faisalabad but she succumbed to the injuries.

The motive behind the occurrence was that the accused party was demanding hand 'rishta' of Mst. Ghulam Fatima (deceased) for Muhammad Nawaz (appellant), aged about 60/65 years but the complainant had given the hand 'rishta' of Mst. Ghulam Fatima (deceased) to one Bahawal Sher and the marriage was to be solemnized on 13.03.2016. Due to the said grudge the accused committed murder of Mst. Ghulam Fatima (deceased).

It was further alleged in the private complaint (Exh.PC), that Mazhar and Mannu (co-accused since acquitted), also played an important role during the occurrence as both of them informed Muhammad Nawaz (appellant), Muhammad Sarfraz and Maqbool Ahmad (co-accused since acquitted), regarding the movement of Mst. Ghulam Fatima, on the day of occurrence, which fact was confessed by Mazhar and Mannu (co-accused since acquitted), before Allah Ditta complainant (PW-1), Gul Muhammad (PW since given-up) and Muhammad Arif (PW-4), on 28.04.2016 and asked for pardon.

It was added by the complainant in his private complaint (Exh.PC) that the local police being in league with the accused party and without any legal justification, did not initiate proceedings against Mazhar and Mannu (co-accused since acquitted), despite the fact that on 28.04.2016, the complainant submitted an application before the police regarding involvement of the above-mentioned accused in the instant case, which necessitated the filing of the abovementioned private complaint.

5. Muhammad Nawaz appellant was arrested in this case on 29.03.2016 by Muhammad Aslam SI and on 07.04.2016, he (appellant) disclosed and then led to the recovery of .12-bore gun (P-1), which was taken into possession by the I.O vide recovery memo Exh.PB. As mentioned earlier, being dissatisfied with the proceedings and investigation of the police, Allah Ditta complainant (PW-1), instituted a private complaint. After institution of private complaint the cursory statements of the complainant Allah Ditta (PW-1) and other PWs were recorded. The appellant and his co-accused mentioned in the private complaint were summoned by the learned trial Court to face the trial. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant, as well as, against Muhammad Sarfraz, Maqbool Ahmad,

Mazhar and Mannu (co-accused since acquitted) on 21.12.2016, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced four witnesses during the trial. Five Court witnesses were also examined in this case. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PK). Documents in shape of Exh.CW-2/A, Exh.CW-2/B, Exh.CW-3/A, Exh.CW-3/B and Exh.CW-5/A to Exh.CW-5/D, were also produced during evidence of CWs.

7. The statements of Muhammad Nawaz (appellant), Muhammad Sarfraz, Maqbool Ahmad, Mazhar and Mannu (co-accused since acquitted), under section 342 of Cr.P.C. were recorded. Muhammad Nawaz (appellant), refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" Muhammad Nawaz appellant replied as under:-

> "This is a false case. All the PWs are related inter-se with the deceased and they have made false statements against me and my co-accused due their enmity with us. None of the so-called eye-witness was present at the place of occurrence at the time of occurrence and it was a blind murder which was committed by unknown culprits. The complainant with consultation of the local police fabricated the present false version against me and my co-accused, much later after the postmortem examination of the deceased".

The learned trial Court vide its judgment dated 28.10.2017, found Muhammad Nawaz (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

8. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the prosecution; that the prosecution's eye-witnesses were not present at the spot at the relevant time and in fact the occurrence was unwitnessed; that there is delay of 8 hours in lodging the FIR, whereas, there is delay of 11 hours and 45 minutes in conducting the postmortem examination on the dead body of the deceased and the abovementioned delay has not been plausibly explained by the prosecution; that there is conflict between the ocular account and the medical evidence of the prosecution because according to the site plan (Exh.CW-3/A), the appellant made fire shot with .12 bore gun from a distance of 4-feet but there was no blackening, burning or tattooing on the entry wound of the deceased; that according to the postmortem report of Mst. Ghulam Fatima deceased, there were three injuries on her body out of which one injury i.e. injury No.3 is an incised wound but the said injury has not been explained by any of the prosecution witnesses; that motive alleged by the prosecution has also not been proved in this case because Bahawal Sher with whom the marriage of the deceased was fixed, has not been produced in the witness box; that recovery of gun 12 bore (P-1) and positive report of PFSA, Lahore (Exh.PK) are of no avail to the prosecution because none of

the prosecution witnesses stated regarding the date of arrest of the appellant; that in fact, the abovementioned gun was planted against the appellant and nothing was recovered from his possession; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charge.

9. On the other hand, it is contended by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that delay in lodging the FIR has plausibly been explained by the prosecution's eye-witnesses by stating that initially they took Mst. Ghulam Fatima deceased in injured condition to RHC of Chak No. 509/G.B Faisalabad wherefrom, she was referred to the Allied Hospital, Faisalabad on account of her precarious condition; that both the prosecution's eye-witnesses of the prosecution i.e. Allah Ditta (PW-1) and Rangzeb (PW-2) are father and brother of the deceased and they cannot let off the real culprit and would not falsely implicate the appellant in this case because substitution in such like cases is a rare phenomenon; that evidence of the aforementioned prosecution's eye-witnesses is confidence inspiring and trustworthy; that the prosecution case is fully supported by the medical evidence furnished by Lady Dr. Uzma Andleeb (CW-1); that incised wound on the leg of the deceased might be the result of her falling on the ground and receipt of the said injury might be due to her hitting against the sickle which the deceased was carrying at the time of occurrence to cut the fodder; that the prosecution case against the appellant is further corroborated by the recovery of gun .12 bore (P-1) on the pointation of the appellant and positive report of PFSA, Lahore (Exh.PK); that motive of the prosecution case was also proved against the appellant through reliable and confidence inspiring evidence of the prosecution witnesses; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

10. Arguments heard. Record perused.

11. Prosecution case as set forth in the complaint (Exh.PC) has already been reproduced in paragraph No.4 of this judgment therefore, there is no need to repeat the same.

12. We have noted that the occurrence in this case did not take place inside or near the 'abadi' of the village rather the same took place in the fields situated in the area of Chak No. 500/G.B District Faisalabad. Perusal of site plan (Exh.CW-3/A) shows that there was no residential house or 'Dera' near the place of occurrence. The occurrence in this case, as per prosecution's case, took place on 05.03.2016 at 09:00 a.m., but the FIR has been lodged on 05.03.2016 at 05:00 p.m., i.e. with the delay of 8 hours from the time of occurrence. The distance between the police station and the place of occurrence is 9-kilometers. It is further noteworthy that even the postmortem examination on the dead body of the deceased was conducted on 05.03.2016 at 08:45 p.m., i.e. with the delay of 11 hours and 45 minutes from the occurrence. In order to

cover the abovementioned delay in lodging the FIR and conducting the post-mortem examination on the dead body of the deceased, the prosecution's eye-witnesses, namely, Allah Ditta (PW-1) and Rangzeb (PW-2) stated that in fact, they first took Mst. Ghulam Fatima in injured condition to RHC of Chak No. 509/G.B, where the doctor after examining referred Mst. Ghulam Fatima to the Allied Hospital, Faisalabad. Neither the doctor who first examined Mst. Ghulam Fatima deceased in injured condition on 05.03.2016 at RHC of Chak No. 509/G.B has been produced in the witness box nor any MLR regarding the medico legal examination of Mst. Ghulam Fatima deceased in injured condition and her referral to the Allied Hospital, Faisalabad has been produced in the prosecution evidence. Although Lady Dr. Uzma Andleeb (CW-1) has stated that Mst. Ghulam Fatima was referred to the Allied Hospital, Faisalabad due to her precarious condition but she admitted that she was herself on leave on 05.03.2016 and the hospital staff had referred the deceased to the Allied Hospital, Faisalabad. She did not mention the name of any member of the staff who had referred the deceased to the Allied Hospital, Faisalabad nor any such staff of the hospital appeared in the witness box before the learned trial Court. Statement of Lady Dr. Uzma Andleeb (CW-1) regarding the referral of Mst. Ghulam Fatima deceased by the staff of RHC of Chak No. 509/G.B to the Allied Hospital, Faisalabad is hearsay evidence. It is further noteworthy that evidence of Lady Dr. Uzma Andleeb (CW-1) in this respect is contradictory to the statement of Allah Ditta complainant (PW-1) and Rangzeb (PW-2) because both the abovementioned eye-witnesses of the prosecution stated that in fact Mst. Ghulam Fatima deceased in injured condition was referred to the Allied Hospital, Faisalabad by the doctor of RHC of Chak No. 509/G.B. They did not state that the staff of RHC of Chak No. 509/G.B referred her to the Allied Hospital, Faisalabad, as claimed by Lady Dr. Uzma Andleeb (CW-1). Relevant parts of the statements of Allah Ditta complainant (PW-1), Rangzeb (PW-2) and Lady Dr. Uzma Andleeb (CW-1) are reproduced hereunder for ready reference:-

Allah Ditta complainant (PW-1).

> "The injured Mst. Ghulam Fatima was shifted to hospital at Chak No. 509 G.B on car. The Doctor available there after examining referred the injured to Allied hospital Faisalabad."

Rang Zeb (PW-2).

> "Thereafter we attended Mst. Ghulam Fatima injured who was alive and we shifted her to RHC, Chak No. 509 G.B on a car where from the doctor referred her to Allied hospital, Faisalabad but she succumbed to the injuries after arriving there."

Dr. Uzma Andleeb (CW-1).

"It is correct that the injured Mst. Ghulam Fatima was referred to Allied Hospital Faisalabad due to her precarious condition. On 05.03.2016 I was on leave. Voluntarily stated that the hospital staff had refereed her to Allied hospital Faisalabad. It is correct that the duty of the staff of RHC Mamu Khan did not give first aid to the injured prior to refer the injured to Allied hospital."

Learned counsel for the complainant has also relied upon the Death Certificate of Mst. Ghulam Fatima (Exh.PI), issued by the Allied Hospital, Faisalabad in order to explain the abovementioned delay and to establish that in fact, Mst. Ghulam Fatima was taken to the Allied Hospital, Faisalabad in injured condition but it is noteworthy that no person from the Allied Hospital, Faisalabad appeared in the witness box to prove the abovementioned Death Certificate. Moreover, there is nothing on the record to show that Mst. Ghulam Fatima deceased was referred by any doctor or staff of RHC of Chak No. 509/G.B, Faisalabad to the Allied Hospital, Faisalabad on account of her precarious condition therefore, the abovementioned delay in lodging the FIR and conducting the postmortem examination on the dead body of Mst. Ghulam Fatima deceased has not been plausibly explained by the prosecution. It is further noteworthy that Lady Dr. Uzma Andleeb (CW-1) stated during her cross-examination that dead body of Mst. Ghulam Fatima deceased was received in RHC Mamoon Kanjan at 06:00 p.m., on 05.03.2016. She further stated that police papers were received at 08:30 p.m., and she conducted the postmortem examination on the dead body of Mst. Ghulam Fatima deceased at 08:40 p.m. Relevant part of her statement in this respect reads as under:-

"The dead body of Mst. Ghulam Fatima deceased was received in RHC Mamu Kanjan at 6:00 p.m. on 05.03.2016. The police papers to conduct the post-mortem examination and the other documents i.e. the inquest report and injuries statement were not received along with the dead body. The police papers were received at 08:30 p.m. and I conducted the postmortem examination at 08:40 p.m."

The delay in conducting the postmortem examination on the dead body of Mst. Ghulam Fatima deceased of 11 hours and 45 minutes is suggestive of the fact that the eye-witnesses of the prosecution were not present at the spot at the relevant time and the said delay has been consumed in procuring the attendance of fake eye-witnesses. We may refer here the case of 'Irshad Ahmad v. The State' (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the dead body conducted. Similarly, in the case of 'Khalid alias Khalidi and 2 others v. The State' (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post-mortem examination on the dead body of

deceased, to be an adverse effect against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as 'Muhammad Ashraf v. The State' (2012 SCMR 419), 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54) and 'Zafar v. The State and others' (2018 SCMR 326).

13. We have further noted that had the prosecution's eye-witnesses, namely, Allah Ditta complainant (PW-1) and Rangzeb (PW-2) been present at the spot at the time of occurrence then they would have provided the medical aid to Mst. Ghulam Fatima deceased in order to save her life and stop her bleeding because injury sustained by Mst. Ghulam Fatima was on her right thigh which was a non-vital part of her body. Even Lady Dr. Uzma Andleeb (CW-1) stated that if any injured in such like case remained un-attended for 1-2 hours then his death may occur on account of loss of blood. Relevant part of her statement in this respect reads as under:-

> "Hypovolumia means loss of blood and fluids from the body due to the excess of bleeding which ultimately develops in Hypovolum shock which ultimately result into the cardio pulmonary arrest. It is correct that the death in this case occurred due to hemorrhagic shock as to loss of blood from the body of the deceased. The injured in such like cases if remain unattended by the medical staff then death might have occurred within 1-2 hours. If the blood and fluids had been infused in the body of the injured Mst. Ghulam Fatima, there were chances of her survival in this case. The seat of injury No.1 was on the right thigh of the deceased which is non-vital part of the body."

We have further noted that in order to establish their presence at the spot at the relevant time and to show that they (PWs) tried to stop the bleeding of Mst. Ghulam Fatima, Allah Ditta complainant (PW-1) stated that doctor of RHC of Chak No. 509/G.B District Faisalabad had bandaged the wound of the injured and thereafter, referred her to the Allied Hospital, Faisalabad. Relevant part of his statement in this respect reads as under:-

> "The doctor at RHC Chak No. 509 G.B had bandaged the wound of the injured and thereafter referred her to the Allied Hospital Faisalabad."

Whereas, Lady Dr. Uzma Andleeb (CW-1) stated that wounds of the deceased were neither stitched nor bandaged. Relevant part of her statement is reproduced hereunder:-

> "It is correct that when I received the dead body of Mst. Ghulam Fatima deceased the wounds of the deceased were not found either stitched or bandaged. It is correct that in such like cases generally we provide the first

aid, stitch the wound and apply the bandage for stopping hemorrhagic/oozing of bold."

We are therefore, of the view that the abovementioned eye-witnesses were not present at the spot at the relevant time and death of Mst. Ghulam Fatima occurred on account of her excessive bleedings as she remained un-attended for a considerable period and in order to cover the abovementioned lacuna in the prosecution case, the prosecution witnesses made false excuse that Mst. Ghulam Fatima was provided bandage by the doctor at RHC of Chak No. 509/G.B, whereas, Lady Dr. Uzma Andleeb (CW-1) has categorically stated during her cross-examination that there was no bandage or stitches on the injuries of the deceased when she received her dead body.

14. It is also noteworthy that according to the prosecution case, only one fire shot made by the appellant landed on the right thigh of Mst. Ghulam Fatima deceased but according to the medical evidence there was also an incised wound i.e. injury No.3 measuring 4 cm x 1.7 cm on the lower part of left leg and bone under the said injury was also exposed. The abovementioned injury has not been explained by any of the prosecution's witnesses. Although it is argued by learned counsel for the complainant that said injury might have been caused to the deceased when she fell on the ground after sustaining firearm injury and hit the sickle with the help of which she was cutting fodder but we have noted that none of the prosecution witnesses had stated so in their statements recorded by the police or by the learned trial Court. Moreover, in the site plan (Exh.CW-3/A) or in the inquest report (Exh.PH), no sickle has been shown at the place of occurrence. It is not understandable that if the prosecution witnesses were present at the spot at the relevant time then as to why they did not explain the incised wound i.e. injury No.3 on the body of the deceased in their statements recorded by the police or by the learned trial Court. The abovementioned fact shows that the prosecution's eye-witnesses were not present at the spot at the time of occurrence therefore, they could not explain the abovementioned injury. Reliance in this respect may be placed on the cases of 'Muhammad Ali v. The State' (2015 SCMR 137), 'Irfan Ali v. The State' (2015 SCMR 840) and 'Usman alias Kaloo v. The State' (2017 SCMR 622). It is also noteworthy that according to the site plan (Exh.CW-3/A), Muhammad Nawaz appellant made fire shot with 12 bore gun at Mst. Ghulam Fatima deceased from a distance of only 4-feet but according to the medical evidence, there was no blackening, burning or tattooing around the entry wound. Likewise, no wade of the empty was recovered from the entry wound which further contradicts the prosecution case. It is also noteworthy that in order to justify their presence at the spot, the prosecution's eye-witnesses stated that they along with Mst. Ghulam Fatima deceased went to the fields in order to cut fodder but neither any cut fodder nor any sickle has been recovered from the spot at the time of inspection by the I.O.

15. According to the prosecution case, motive behind the occurrence was that Muhammad Nawaz appellant wanted to marry with Mst. Ghulam Fatima deceased

but the complainant party refused to give the hand of Mst. Ghulam Fatima deceased to the appellant and fixed her marriage with one Bahawal Sher for 13.03.2016 but neither any wedding card of the abovementioned proposed marriage has been produced in the prosecution evidence nor the abovementioned Bahawal Sher appeared in the witness box to prove the alleged motive. We are therefore, of the view that motive alleged by the prosecution has not been proved in this case.

16. Learned Deputy Prosecution General for the State assisted by learned counsel for the complainant has heavily relied upon the recovery of gun 12 bore (P-1) on the pointation of the appellant and positive report of PFSA, Lahore (Exh.PK) but it is noteworthy that no date of arrest of the appellant has been brought on record by the prosecution through the statement of any of the prosecution witness. Under the circumstances, it is not determinable in this case that as to whether empty recovered from the spot was sent to the office of PFSA, Lahore after the arrest of the appellant or the same was sent to the said office before his arrest hence it is not safe to rely upon the abovementioned prosecution evidence. It is by now well settled that if the empty is sent to the office of PFSA after the arrest of the accused then it is not safe to rely upon the positive report of PFSA and recovery of weapon from the possession of the accused. Reliance in this respect may be placed on the cases of 'Jehangir v. Nazar Farid and another' (2002 SCMR 1986), 'Ali Sher and others v. The State' (2008 SCMR 707) and 'Mushtaq and 3 others v. The State' (PLD 2008 Supreme Court 1). As mentioned earlier, the date of arrest of the appellant has not been brought on the record through the statement of any of the prosecution witness therefore, the abovementioned recovery of gun from the possession of the appellant and positive report of the PFSA are not safe to be relied upon. Moreover, recovery of gun and positive report of PFSA are only corroborative pieces of evidence and the same cannot be made basis for the conviction of the appellant, in absence of reliable direct evidence of prosecution's eye-witnesses.

17. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5……..The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

> '13……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No. 99880 of 2017 filed by Muhammad Nawaz appellant, set aside his conviction and sentence recorded by the learned trial Court and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 605 of 2017 is answered in the negative. The appellant Muhammad Nawaz is in custody, he be released from the jail forthwith if not required in any other case.

JK/M-231/L **Appeal allowed.**

2022 P Cr. L J 1852

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Amjad Rafiq, JJ

ADNAN---Appellant

Versus

The STATE---Respondent

Jail Appeal No. 173747 and Murder Reference No. 44 of 2018, heard on 7th March, 2022.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Delay of thirty three hours and twenty five minutes in conducting the post-mortem of the deceased---Scope---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blows---Property dispute was the motive behind the occurrence---Record showed that the occurrence took place at 08:20 a.m., and as per contents of the FIR, the matter was reported to the police and formal FIR was lodged on the same day at 09:30 a.m.---However, post-mortem examination on the dead body of deceased was conducted on the next day at 05:45 p.m., and as such, there was delay of 33 hours and 25 minutes from the occurrence in conducting the post-mortem examination---Medical Officer stated that dead body was brought to the department at 11:30 a.m., but the police documents were received on next day at 05:30 p.m.---Evidently, the police papers were not completed for conducting the post-mortem examination on the dead body of deceased and the said delay in preparation of police papers and conducting the post-mortem examination on the dead body of deceased was suggestive of the fact that the said delay was consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Sufyan Nawaz and another v. The State and others 2020 SCMR 192; Zafar v. The State and others 2018 SCMR 326 and Muhammad Ashraf v. The State 2012 SCMR 419 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Presence of eye-witness at the spot was doubtful---Chance witnesses---Scope---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blows---Ocular account of the occurrence had been furnished by complainant and ex-wife of the accused---Occurrence in the case took place inside the house of the deceased---Both the eye-witnesses were admittedly not residents of the house, where the occurrence took place---Both the eye-witnesses of the prosecution stated that they came to the house of deceased on the day of occurrence as deceased wanted to marry ex-wife---Complainant along with his brother came to the house of the deceased in order to discuss the issue of said marriage---Other blood relations and family members of deceased had gone to attend a marriage ceremony to the other city on the day of occurrence and said fact was brought on the record during the cross-examination of the complainant---Question arose that if on the day of occurrence the issue regarding the marriage of deceased was to be discussed, why on the said day, all the family members of deceased including his two brothers, who were residing in the house of occurrence, proceeded to other city to attend the marriage ceremony and in their place, complainant, along with his brother, who were paternal uncles of the deceased had come to the house of occurrence to discuss the matter of marriage---No valid reason of presence of ex-wife in the house of occurrence at the time of occurrence, had been given by the prosecution---Ex-wife of accused who was real maternal uncle of deceased and as such, ex-wife fell within the prohibited degree for the deceased therefore, they could not contract marriage with each other---As per statement of ex-wife, her marriage with the accused was dissolved and the occurrence took place after about seven days which meant that even 'Iddat' period of the lady had not expired on the day of occurrence---Both the eye-witnesses were chance witnesses and they could not establish any valid reason for their presence at the spot at the time of occurrence---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Sufyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Unnatural conduct of eye-witnesses---Scope---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blows---Record showed that the conduct of the prosecution eye-witnesses was highly unnatural---Accused was not armed with any formidable weapon like firearm at the time of occurrence and according to the prosecution case, he was armed with 'churri'---Complainant party was comprising of four members including deceased and said fact was admitted by complainant---Complainant and his brother were real paternal uncles of the deceased and they along with deceased were three adult male members of the complainant party but they did not try to save the deceased at the time of occurrence and gave free hand to the accused to inflict, as many as, nine injuries (as per post-mortem report) on the body of the deceased---As per site plan, there was a distance of only 13 feet between the prosecution eye-witnesses and the accused but they did not try to intervene during the occurrence or apprehend the accused after the occurrence---Eye-witnesses stood like silent spectators and gave free hand to the accused to inflict the injuries to their kith and kin---Conduct of the prosecution eye-witnesses, who were closely related to deceased was highly unnatural therefore, their presence at the spot was highly doubtful, hence their evidence was not worthy of reliance---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Ocular account and medical evidence---Confliction---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blow---As per contents of the FIR, accused inflicted only one injury on the abdomen of deceased with the help of churri---According to the post-mortem report and medical evidence furnished by Medical Officer, there were as many as nine injuries on the body of the deceased---Both

the prosecution eye-witnesses made dishonest improvements in their statements to bring their evidence in line with the medical evidence while stating that the accused inflicted churri blows which landed on the left nipple, ribs, abdomen, left flank, left arm, back side of left shoulder and on different parts of the body of the deceased---Both the prosecution eye-witnesses were confronted with their previous statements and dishonest improvements made by them were duly brought on the record---Record showed that the prosecution story as set forth in the FIR was in conflict with the medical evidence and in order to cover the weakness in the prosecution case, the eye-witnesses made dishonest improvements in their statements to bring their statements in line with the medical evidence and as such, evidence of prosecution eye-witnesses was not worthy of reliance---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.

Muhammad Ali v. The State 2015 SCMR 137; Irfan Ali v. The State 2015 SCMR 840; Usman alias Kaloo v. The State 2017 SCMR 622; Nadeem alias Kala v. The State and others 2018 SCMR 153 and Akhtar Ali and others v. The State 2008 SCMR 6 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Motive was not proved---Scope---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blows---Contents of the FIR show that motive behind the occurrence was that there was a dispute of property between sister of the accused and mother of deceased and deceased as the said sister of accused contracted second marriage after the death of father of deceased---No suit filed or pending between deceased and sister of the accused had been produced in the prosecution evidence---No application before any forum which was moved regarding the said dispute of property had been brought on the record by the prosecution---Apart from the said motive, prosecution also alleged another motive of proposed marriage of ex-wife of accused with deceased---Said lady was the best witness to prove the said second motive of the prosecution but her evidence in respect of second motive of the prosecution was self-contradictory---Although ex-wife stated that deceased called her as he wanted to marry her but at the same time she denied the suggestion that

she took divorce from the accused to marry deceased---As the evidence of ex-wife about the second motive of the prosecution was self-contradictory, therefore, the said motive had not been proved by the prosecution---High Court observed that it seemed that as ex-wife was divorced by the accused therefore, she tried to implicate the accused in the case through the second motive of the prosecution, whereas, the complainant who was paternal uncle of the accused was annoyed due to second marriage of mother of the accused with someone therefore, witnesses tried to implicate the accused in the present occurrence which appeared to be unseen---Although lady had stated about the first motive of the prosecution regarding the property dispute between the deceased and the accused but she did not allege the said motive in her statement recorded by the police and the improvements made by her in respect of the motive were also duly brought on the record---Second motive alleged by the prosecution did not appeal to a prudent mind that deceased wanted to marry with the wife of his real maternal uncle which fell under prohibited degree for him---Both the motives alleged by the prosecution could not be proved in this case---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.

(f) Penal Code (XLV of 1860)---

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Benefit of doubt---Recovery of churri (crime weapon) from the possession of accused---Reliance---Scope---Accused was charged for committing murder of the nephew of the complainant by inflicting churri blows---Recovery witness stated that the churri was recovered from a street near wall of Government Tube well under the bricks---Said churri was not recovered from the house or place which was in exclusive possession of the accused and the same was recovered from a street which was accessible to the public---Churri was allegedly recovered after 16 days from the occurrence and during the said period, the accused had ample opportunity to wash away the blood from churri---Furthermore, churri was deposited in the office of Forensic Science Agency after one month and ten days from the occurrence therefore, the blood, if any, on the same must have disintegrated in the meanwhile---Evidence qua recovery of churri and positive report of Forensic Science Agency were of no avail to the prosecution---Circumstances established that the prosecution had failed to prove its case against

the accused beyond the shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.

Basharat and another v. The State 1995 SCMR 1735 and Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 rel.

(g) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created doubt regarding the prosecution case, the same was sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Aiyan Tariq Bhutta for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General along with Musharaf, Assistant Sub-Inspector for the State.

Nemo for the Complainant.

Date of hearing: 7th March, 2022.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Jail Appeal No. 173747 of 2018 filed by Adnan (appellant) against his conviction and sentence and Murder Reference No. 44 of 2018 sent by the learned trial Court for confirmation or otherwise of the sentence of Death awarded to Adnan (appellant) by the learned trial Court. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 25.01.2018 passed by the learned Additional Sessions Judge, Lahore.

2. Adnan (appellant) was tried in case FIR No. 1133 dated 18.11.2011 registered at Police Station Ichra District Lahore in respect of offences under sections 302/109/34, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 25.01.2018 has convicted and sentenced the appellant as under:-

> Under section 302(6), P.P.C. to 'Death as tazir' for committing Qatl-i-amd of Ahsan Ali (deceased). He was also ordered to pay Rs.500,000/- (Rupees five hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C. and in default thereof to undergo simple imprisonment for six months.

3. Brief facts of the case as given by the complainant Mian Muhammad Asif (PW-1) in his complaint (Exh.PA) on the basis of which formal FIR (Exh.PA/3) was chalked out, are that he (complainant) was resident of Faisal Street Kareem Block Ravi Road Lahore. On 18.11.2011 at about 08:00 a.m., he (complainant) and his younger brother, namely, Muhammad Afzal (given up PW) went to see their nephew, namely, Ahsan Ali (deceased) at Munir Shaheed Road, Ichra (Lahore). Ahsan Ali (deceased) wanted to marry with ex-wife of Adnan (appellant), namely, Mst. Ayesha (PW-2) who was also present in the said house at that time and they (complainant party) were discussing about the marriage. In the meanwhile, some one knocked at the door which was opened by Ahsan Ali (deceased) and Adnan (appellant), who was maternal uncle (mamoon) of Ahsan Ali (deceased) forcibly trespassed into the house, whereas, an unknown accused kept on standing outside the house. Adnan (appellant) then gave a 'churri' blow which landed at the abdomen of Ahsan Ali (deceased) due to which intestines of Ahsan Ali (deceased) came out who fell on the ground and succumbed to the injuries at the spot. Adnan (appellant) fled away from the spot while brandishing his 'churri'.

Motive behind the occurrence was that there was dispute of property between Ahsan Ali (deceased) and his mother as mother of Ahsan Ali (deceased), namely, Mst. Nazia contracted second marriage with some one. The complainant party had suspicion that Adnan (appellant), who is brother of Mst. Nazia (mother of Ahsan Ali deceased) had committed the murder of Ahsan Ali on the abetment of Mst. Nazia.

4. The appellant Adnan was arrested in this case on 27.11.2011 by Rana Naseem Ahmad, Sub-Inspector (PW-12). On 04.12.2011 Adnan appellant made disclosure and led to the recovery of 'churri' (P-2) which was taken into possession vide recovery memo (Exh.PC). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 25.06.2012 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced twelve witnesses during the trial and also produced documentary evidence in the shape of (Exh.PA to Exh.PO).

6. The statement of the appellant under section 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" the appellant Adnan replied as under:-

> "The complainant of this case Mian Muhammad Asif PW-1 and Rauf Ahmad PW-4 are brothers of my late brother in law Arif Ali/father of Ahsan Ali deceased. Late Arif Ali had strained relations with his brothers and they were not on speaking terms. in the same way the brothers of Arif Ali were also inimical to Mst. Nazia, wife/widow of Arif Ali (who is my real sister) me and my family. I and my sister Mst. Nazia/mother of deceased Ahsan were involved and nominated falsely in this case due to enmity. Mst. Nazia was found innocent in the investigation of Police in this case. After the occurrence the complainant and his brothers Mian Rauf Ahmad PW-4 and Mian Muhammad Afzal PW submitted an application to the President Anjuman-i-tajran Hall Road, Lahore on 28.11.2011 stating therein "that a few days ago they received an information from the police station about the murder of their nephew Ahsan Ali son of Arif Ali... ..." and they requested to distribute the property of Arif Ali in his children according to law etc. Photo copy of this application is produced as Mark A. In reply to this the children of Arif Ali and his widow dis-agreed the proposal of complainant and his brothers and also disclosed the behavior of complainant and his brothers. Copy of their application is being produced as Mark B. Application Mark A itself reveals that the complainant and his brothers were informed by the Police Station about the murder of my nephew Ahsan Ali.
>
> The marriage ceremony of my elder brother Nasir Ali was solemnized from 17.11.2011 to 19.11.2011 in Gujranwala. I participated in all the functions of marriage of my younger brother. Mst. Nazia the mother, Hassan Arif and Mohsin Arif the brothers and Mst. Fatima Arif the sister of Ahsan Ali deceased were also present in Gujranwala to take part in the marriage ceremony of my brother. On the night of 17.11.2011 the function of Mehndi was solemnized which remained till late night. On 18.11.2012 there was Barat of my brother. I attended the Barat and then on 19.11.2011 there was Walima. I attended all the functions which were celebrated simply due to the death of Ahsan Ali. On the same day I came Lahore to

take part in the funeral of Ahsan Ali, where I surrendered myself before the police to prove my innocence. I remained in illegal custody of police till 27.11.2011. On the day of occurrence I was in Gujranwala. I produce the photographs of marriage Mark C, D and E. Photo copy of Nikah Nama of my brother Nasir Ali is Mark F and photo copy of Invitation Card Mark G.

Mst. Ayesha Akram PW-2 is my ex-wife to whom I married on 23.08.2011 and divorced her on her request on 11.11.2011. I produce attested copy of Nikah Nama Ex.DD, photocopy of agreement for surrender of dower Mark H, photocopy of Divorce Deed Mark I. On 17.11.2011 Mst. Nazia the mother of Ahsan Ali along with her two sons Hassan Arif Mohsin Arif and one daughter Mst. Fatima Arif went Gujranwala to attend the marriage ceremony of her brother Nasir Ali. The elder son of Mst. Nazia, Ahsan Ali deceased remained alone in his house at Lahore. Therefore, Mst. Ayesha PW-2 taking the advantage of his aloneness went Lahore in the house of Ahsan and stayed at night with Ahsan at his house. Mst. Ayesha asked the Ahsan deceased to marry her but Ahsan deceased refused to accept her proposal therefore, they had a quarrel between them and resultantly Mst. Ayesha PW-2 stabbed Ahsan Ali to death. Thereafter, in connivance with the complainant and his brothers who are inimical to Mst. Nazia and her family, Mst. Ayesha PW-2 my ex-wife involved me falsely in this case to save her skin."

The appellant Adnan did not opt to make his statement on oath as envisaged under section 340(2), Cr.P.C. However, he examined Abdul Samad as (DW-1) and produced documentary evidence in the shape of (Exh.DA to Exh.DD) and Mark-A to Mark-I in his defence evidence.

The learned trial Court vide its judgment dated 25.01.2018 found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. As per police report, Mian Muhammad Asif complainant has duly been served with the notice of this case but no one appeared on his behalf despite repeated calls. Even otherwise, it is a State case and learned Deputy Prosecutor General for the State is ready to argue the same therefore, we proceed to decide the instant case after hearing the arguments of learned counsel for the appellant, learned Deputy Prosecutor General for the State and perusing the record.

8. It is contended by learned counsel for the appellant that the prosecution eye-witnesses are chances witnesses; that the evidence of prosecution eye-witnesses is in conflict with the medical evidence; that `churri' (P-2) was deposited in the office of PFSA, Lahore with the delay of 01 month and 10 days from the occurrence and during the abovementioned period, blood must have disintegrated therefore, prosecution evidence qua the recovery of abovementioned 'churri' and positive report of PFSA, Lahore (Exh.PN) is inconsequential; that motive has also not been proved in this case; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charge.

9. On the other hand, it is contended by learned Deputy Prosecutor General for the State that the prosecution has proved its case against the appellant beyond the shadow of any doubt therefore, he was rightly convicted and sentenced by the learned trial Court; that the prosecution case against the appellant has substantially been supported by the medical evidence and corroborated by the recovery of `churri' (P-2), as well as, positive report of PFSA, Lahore (Exh.PN); that the motive was also proved in this case through reliable evidence of the prosecution witnesses; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative.

10. Arguments heard. Record perused.

11. Prosecution case as set forth in the complaint (Exh.PA) on the basis of which formal FIR (Exh.PA/3) was chalked out, has already been reproduced in paragraph No.3 of this judgment therefore, there is no need to repeat the same.

12. The occurrence in this case took place on 18.11.2011 at 08:20 a.m., and as per contents of the FIR (Exh.PA/3), the matter was reported to the police and formal FIR was lodged on the same day at 09:30 a.m., but we have noted that post-mortem examination on the dead body of Ahsan Ali deceased was conducted on the next day i.e. on 19.11.2011 at 05:45 p.m., and as such, there is delay of 33 hours and 25 minutes from the occurrence in conducting the post-mortem examination on the dead body of Ahsan Ali deceased. Dr. Burhan Ashrarf (PW-10) stated that dead body was brought to the department on 18.11.2011 at 11:30 a.m., but the police documents were received on 19.11.2011 at 05:30 p.m. It is therefore, evident that the police papers were not complete for conducting the postmortem examination on the dead body of Ahsan Ali deceased and the

abovementioned delay in preparation of police papers and conducting the postmortem examination on the dead body of Ahsan Ali deceased is suggestive of the fact that the said delay was consumed in procuring the attendance of fake eye-witnesses. In the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the said judgment at page No. 55 reads as under:-

> "2. ....Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similarly, in the case of "Khalid alias Khalidi and 2 others v. The State" (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192),"Zafar v. The State and others" (2018 SCMR 326) and "Muhammad Ashraf v. The State" (2012 SCMR 419).

13. Ocular account of the prosecution was furnished by Mian Muhammad Asif (PW1) and Mst. Ayesha (PW-2). The occurrence in this case took place inside the house of Ahsan Ali deceased. Both the abovementioned eye-witnesses are admittedly not residents of the house, where the occurrence took place. As mentioned earlier, the occurrence took place during the Winter Season i.e. on 18.11.2011 at 08:20 a.m. House of occurrence is situated at Munir Shaheed Road, Ichra, Lahore. Mian Muhammad Asif complainant (PW-1) is resident of Faisal Street Kareem Park Ravi Road, Lahore and Mst. Ayesha (PW-2) was resident of Islampura Gujranwala. Both the eye-witnesses of the prosecution stated that they came to the house of Ahsan Ali deceased on the day of occurrence as Ahsan Ali

deceased wanted to marry Mst. Ayesha (PW-2) and Mian Muhammad Asif (PW-1) along with his brother Muhammad Afzal (given up PW) came to the house of the deceased in order to discuss the issue of said marriage. Admittedly Mst. Ayesha (PW-2) is the ex-wife of Adnan appellant. It is also an admitted fact that Adnan appellant is real maternal uncle ("Mamoon") of Ahsan Ali deceased. Under the circumstances, the visit of both the abovementioned eye-witnesses to the house of the deceased on the day of occurrence for the purpose mentioned above (marriage of the deceased with his real Mumani), does not appeal to a prudent mind. We have further noted that the complainant was paternal uncle of Ahsan Ali deceased. Apart from the complainant, there were also other blood relations and family members of Ahsan Ali deceased but they had gone to attend a marriage ceremony at Gujranwala on the day of occurrence and this fact was brought on the record during the cross-examination of Mian Muhammad Asif (PW-1). It was also brought on record during the cross-examination of Mst. Ayesha (PW-2) that two other brothers of Ahsan Ali deceased were also residing in the house of occurrence. Relevant parts of the statements of Mian Muhammad Asif (PW-1) and Mst. Ayesha (PW-2) in this respect read as under:-

> Mian Muhammad Asif (PW-1).
>
> "When I reached in the house of Ahsan on the day of occurrence, I asked him about his other family members and he replied that he went to Gujranwala in connection with marriage ceremony of his maternal uncle."
>
> Mst. Ayesha (PW-2).
>
> "In the house i.e. the place of occurrence beside Ahsan his two brothers also lived."

It is not understandable that if on the day of occurrence, the issue regarding the marriage of Ahsan Ali deceased with Mst. Ayesha (PW-2) was to be discussed then as to why on the said day, all the family members of Ahsan Ali deceased including his two brothers, who were residing in the house of occurrence, proceeded to Gujranwala to attend the marriage ceremony and in their place, Mian Muhammad Asif complainant (PW-1), along with his brother namely Muhammad Afzal (given-up PW), who were paternal uncles of the Ahsan Ali deceased had come to the house of occurrence to discuss the abovementioned matter. No valid reason of presence of Mst. Ayesha (PW2) in the house of occurrence at the time of occurrence has been given by the prosecution. She was ex-wife of Adnan

appellant who was real maternal uncle of Ahsan Ali deceased and as such, Mst. Ayesha (PW-2) fell within the prohibited degree for the deceased therefore, they cannot contract marriage with each other. Moreover, as per statement of Mst. Ayesha (PW-2), her marriage with the appellant was dissolved on 11.11.2011 and the occurrence took place on 18.11.2011 which means that even 'Iddat' period of Mst. Ayesha (PW-2) had not expired on the day of occurrence. We are therefore, of the view that both the abovementioned eye-witnesses are chance witnesses and they could not establish any valid reason for their presence at the spot at the time of occurrence. As both the abovementioned prosecution witnesses are chances witnesses therefore, their evidence cannot be relied upon without proving the reason of their presence at the spot at the relevant time, which reason has not been proved in this case. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the Apex Court of the country was pleased to observe as under:-

> "... ....He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In

these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:-

"... ...Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence ... ."

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove any valid reason of their presence at the spot at the time of occurrence, therefore, their very presence in the house of occurrence at the relevant time becomes doubtful.

14. We have further noted that conduct of the prosecution eye-witnesses is highly unnatural. The appellant was not armed with any formidable weapon like firearm at the time of occurrence and according to the prosecution case, he was armed with 'churri'. The complainant party was comprising of four members including Ahsan Ali deceased and this fact was admitted by Mian Muhammad Asif complainant (PW-1). Relevant part of his statement reads as under:-

"We four persons including myself were present in the house when the accused came in the house. The other persons were Afzal, Ahsan and Mst. Ayesha beside me."

Mian Muhammad Asif complainant (PW-1) and his brother, namely, Muhammad Afzal (given up PW) were real paternal uncles of the deceased and they along with Ahsan Ali (deceased) were three adult male members of the complainant party but they (PWs) did not try to save the deceased at the time of occurrence and gave free hand to the appellant to inflict, as many as, nine injuries (as per postmortem report Exh.PE) on the body of the deceased. As per site plan (Exh.PD), there was a distance of only 13 feet between the abovementioned prosecution eye-witnesses and the appellant but they did not try to intervene during the occurrence or apprehend the appellant after the occurrence. They stood like silent spectators and gave free hand to the appellant to inflict the

abovementioned injuries to their kith and kin. We are therefore of the view that conduct of the prosecution eye-witnesses, who were closely related to Ahsan Ali deceased is highly unnatural therefore, their presence at the spot is highly doubtful, hence their evidence is not worthy of reliance. We may refer here the case of "Liaquat Ali v. The State" (2008 SMCR 95), wherein at Para No.5-A of the judgment, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of "Pathan v. The State" (2015 SCMR 315) and "Zafar v. The State and others" (2018 SCMR 326). Under the circumstances, it cannot be safely held that the above mentioned eye-witnesses were present at the spot at the relevant time and they had witnessed the occurrence because their conduct is highly unnatural.

15. We have further noted that there were glaring contradictions in the prosecution case as set forth in the FIR (Exh.PA/3) and the medical evidence. As per contents of the FIR, Adnan appellant inflicted only one injury on the abdomen of Ahsan Ali deceased with the help of `churri' but according to the postmortem report (Exh.PE) and medical evidence furnished by Dr. Burhan Ashraf (PW-10), there were, as many as, nine injuries on the body of the deceased. At the time of recording of their statements, both the prosecution eye-witnesses, namely, Mian Muhammad Asif (PW-1) and Mst. Ayesha (PW-2) made dishonest improvements in their statements to bring their evidence in line with the medical evidence while

stating that the appellant inflicted `churri' blow which landed on the left nipple, ribs, abdomen, left flank, left arm, back side of left shoulder and on different parts of the body of Ahsan Ali deceased. Both the abovementioned prosecution eye-witnesses were confronted with their previous statements and dishonest improvements made by them were duly brought on the record. Relevant part of their statements in this respect read as under:-

Mian Muhammad Asif (PW-1)

"I do not remember as to whether I had stated before the police in my statement under section 161, Cr.P.C. that as soon as Ahsan deceased opened the door, the accused Adnan present attacked upon Ahsan and started to give him churri blows who received churri blows at his chest, above left nipple, at ribs on upper part of abdomen, left flank, left arm and back side of left shoulder and also on different parts of the body. At this stage, this question has been re-asked on the request of learned counsel for the complainant. I did not mention with such a detail about injuries but I did mention which were apparent. Confronted with Ex.PA where only one injury has been mentioned whereas the remaining have not been penned down."

Mst. Ayesha (PW-2)

"It is correct that I mentioned in my examination in chief that Ahsan received churri blows at his chest above left nipple at ribs on upper part of abdomen left flank, left arm and back side of left shoulder and also on his different parts of the body. Confronted with Ex. DA where it is not so recorded and only injury in the abdomen has been specified."

It is therefore, evident from the perusal of the record that the prosecution story as set forth in the FIR (Exh.PA/3) was in conflict with the medical evidence and in order to cover the abovementioned weakness in the prosecution case, the abovementioned eye-witnesses made dishonest improvements in their statements to bring their statements in line with the medical evidence and as such, evidence of abovementioned prosecution eye-witnesses is not worthy of reliance. In the cases of `Muhammad Ali v. The State' (2015 SCMR 137), 'Irfan Ali v. The State' (2015 SCMR 840), `Usman alias Kaloo v. The State' (2017 SCMR 622) and 'Nadeem alias Kala v. The State and others' (2018 SCMR 153), the prosecution evidence was disbelieved on account of its conflict with the medical evidence

regarding the number/nature of injuries sustained by the deceased. Relevant part of the case of `Muhammad Ali' supra, reads as under:-

> "5 ... .In such circumstances, the presence of the eye-witnesses at the spot is doubtful. Had they been present at the spot and had witnessed the occurrence, they could have ascribed the correct role to the accused and explain all the injuries on the person of the deceased...."

Likewise, in the case of 'Akhtar Ali and others v. The State' (2008 SCMR 6), the apex Court of the country disbelieved the evidence of the prosecution eye-witnesses on the ground that they made dishonest improvements in their statements recorded by the learned trial Court in order to strengthen the prosecution case.

16. According to the contents of the FIR, the motive behind the occurrence was that there was a dispute of property between Mst. Nazia (sister of the appellant and mother of Ahsan Ali deceased) and Ahsan Ali deceased as the said Mst. Nazia contracted second marriage after the death of father of Ahsan Ali deceased. No suit filed or pending between Ahsan Ali deceased and Mst. Nazia (sister of the appellant) has been produced in the prosecution evidence. No application before any form which was moved regarding the abovementioned dispute of property has been brought on the record by the prosecution. We have also noted that apart from the abovementioned motive, prosecution also alleged another motive of proposed marriage of ex-wife of Adnan appellant, namely, Mst. Ayesha (PW-2) with Ahsan Ali deceased. It is noteworthy that Mst. Ayesha (PW-2) was the best witness to prove the said second motive of the prosecution but her evidence in respect of abovementioned second motive of the prosecution is self-contradictory. Although she stated that Ahsan deceased called her as he wanted to marry her but at the same time she denied the suggestion that she took divorce from the appellant to marry Ahsan deceased. Relevant part of her statement reads as under:-

> "It is incorrect to suggest that I asked Ahsan deceased that I took divorce from Adnan to marry him (Ahsan)."

As the evidence of Mst. Ayesha (PW-2) about the second motive of the prosecution is self-contradictory, therefore, we are of the view that the said motive has not been proved by the prosecution. It seems that as Mst. Ayesha (PW-2) was divorced by the appellant therefore, she tried to implicate the appellant in this case through the abovementioned second motive of the prosecution, whereas, the

complainant who was paternal uncle of the appellant was annoyed due to second marriage of mother of the appellant with some one therefore, they (PWs) tried to implicate the appellant in the present occurrence which appears to be unseen. Although Mst. Ayesha (PW-2) has stated about the first motive of the prosecution regarding the property dispute between the deceased and the appellant but she did not allege the said motive in her statement recorded by the police (Exh.DA) and the improvements made by her in respect of the motive were also duly brought on the record. Relevant part of her statement in this respect reads as under:-

> "It is correct that I mentioned the fact that there was a dispute regarding the property between Ahsan and his mother and mother of Ahsan contracted second marriage. Confronted with Ex.DA where it is not so written. It is correct that I mentioned in my statement before the police about the motive behind the police that the mother of Ahsan deceased got married and there was a dispute of distribution of the property between the mother of Ahsan and accused Adnan. Confronted with Ex.DA where it is not so written."

It is further noteworthy that the second motive alleged by the prosecution does not appeal to a prudent mind that Ahsan Ali deceased wanted to marry with the wife of his real maternal uncle which fell under prohibited degree for him. We are therefore, of the view that both the motives alleged by the prosecution could not be proved in this case.

17. Insofar as the recovery of `churri' (P-2) from the possession of the appellant and positive report of PFSA, Lahore (Exh.PN) is concerned, we have noted that Mushtaq Ahmad 577/C (PW-6) has stated that the abovementioned `churri' was recovered from Mehboob Street Lal Park near wall of Govt. Tubewell under the bricks. The abovementioned `churri' was not recovered from the house or place which was in exclusive possession of the appellant and the same was recovered from a street which was accessible to the public. Moreover, the occurrence in this case took place on 18.11.2011, whereas, `churri' (P-2) was allegedly recovered on 04.12.2011 i.e., after 16 days from the occurrence and during the abovementioned period, the appellant had ample opportunity to wash away the blood from `churri' (P-2). The Hon'ble Supreme Court of Pakistan in the case of `Basharat and another v. The State' (1995 SCMR 1735) disbelieved the evidence of blood-stained dagger which was allegedly recovered from the accused after ten days from the

occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:-

> "11. The occurrence took place on 20.04.1988. Basharat appellant was arrested on 28.04.1988. The blood-stained Churri was allegedly recovered from his house on 30.04.1988. It is not believable that he would have kept blood stained churri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it."

Furthermore, `churri' (P-2) was deposited in the office of PFSA, Lahore on 28.1.2011 i.e., after 01 month and 10 days from the occurrence therefore, the blood, if any, on it must have disintegrated in the meanwhile. Reliance in this respect may be placed on the case of 'Muhammad Jamil v. Muhammad Akram and others' (2009 SCMR 120). We are therefore, of the view that evidence qua recovery of `churri' (P2) and positive report of PFSA (Exh.PN) are of no avail to the prosecution.

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5... The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

"13.....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Jail Appeal No. 173747 of 2018 filed by Adnan appellant, set aside his conviction and sentence and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 44 of 2018 is answered in the negative. The appellant Adnan is in custody, he be released from the jail forthwith if not required to be detained in any other case.

JK/A-47/L **Appeal allowed.**

2022 Y L R Note 66

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Tariq Nadeem, JJ

MUHAMMAD IJAZ---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 115978-J, Criminal Revision No. 111926 and Murder Reference No. 636 of 2017, heard on 11th October, 2021.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Medical evidence---Scope---Accused was charged for committing murder of his wife/ daughter of complainant---Motive behind the occurrence was that accused did not like the deceased upon which they had dispute and accused wanted to contract a second marriage and due to that grudge, accused committed the murder of deceased---Medical evidence furnished by the prosecution in the case through Lady Medical Officer had not supported the prosecution case in any manner---Claim of the prosecution's eye-witnesses was that they reached in the house of the accused and thereafter, the accused raised noise that his wife had died---Post-mortem report as well as, according to the statement of Lady Medical Officer made during her cross-examination stated that dead body was received in the Dead House of the hospital at 05:00/ 06:00 a.m.---If the prosecution's eye-witnesses reached in the house of the accused at 05:00/06:00 a.m., and saw that the accused and deceased were present in their house at that time and thereafter, the accused raised noise that she had died then as to how the dead body was received in the hospital at the same date and time---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Delay of about 6 /7 hours in lodging the FIR---Effect---Accused was charged for committing murder of his wife/daughter of complainant---Occurrence took place on at 05:00/06:00 a.m., whereas, the FIR was lodged on the same day at 12:30 noon, i.e. with the delay of 6 /7 hours from the time of occurrence---Distance between the place of occurrence and the police station was 16-kilometers---Said unexplained delay in lodging the FIR was

fatal to the prosecution case---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Accused was charged for committing murder of his wife/ daughter of complainant---Delay of about twelve hours in conducting post-mortem--- Effect---Evidence of Lady Medical Officer showed that although the dead body was received in the dead house of the hospital at 05:00/06:00 a.m. but the police papers were produced before the said Medical Officer at 02:15 p.m., thereafter, post-mortem examination was conducted on the dead body of the deceased at 04:45 p.m., as such, there was delay of twelve hours in conducting the post-mortem examination---Said delay in conducting the post-mortem examination was suggestive of the fact that eye-witnesses of the prosecution were not present at the spot at the relevant time and the said delay was consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Irshad Ahmad v. The State 2011 SCMR 1190; Khalid alias Khalidi and

2 others v. The State 2012 SCMR 327; Muhammad Ashraf v. The State 2012

SCMR 419; Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54 and Zafar v. The State and others 2018 SCMR 326 rel.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Medical evidence not supported the ocular account---Scope---Accused was charged for committing murder of his wife/ daughter of complainant---According to the ocular account of the prosecution, the accused committed the murder of his wife with electric shock---According to the final opinion of Lady Medical Officer the cause of death of deceased was due to asphyxia---Record showed that it was not the case of any of the prosecution's eye-witnesses that the accused committed the murder of his wife by strangulating her neck rather the case of the prosecution was that deceased was murdered by the accused after giving her electric shocks---Medical Officer during her cross-examination had conceded that no mark of violence or abnormality was detected on the neck of the deceased---Medical Officer had not mentioned the probable time that elapsed between the injuries and death and the time that elapsed between the death and

post-mortem examination---Relevant columns in that respect of the post-mortem report were left blank by the Medical Officer---Medical evidence had not supported the ocular account of the prosecution rather the same had contradicted the evidence of the prosecution's eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond shadow of doubt---Appeal against conviction was allowed, in circumstances.

(e) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---No justification for the presence of eye-witnesses at the place of occurrence--- Chance witnesses--- Scope---Accused was charged for committing murder of his wife/daughter of complainant---Ocular account of the prosecution was furnished by complainant and a witness---Both the said eye-witnesses were real mother and real brother of deceased---Occurrence in the case took place in the house of the accused---Both the eye-witnesses were not residents of the village where the occurrence took place---Complainant stated during her cross-examination that her village was situated at a distance of 10-kilometers from the place of occurrence, whereas, village of brother of deceased/eye-witness was situated at a distance of 50-kilometers from the place of occurrence---Said witnesses had not given any valid reason for their presence in the house of occurrence at odd hours of the morning i.e. 05:00/06:00 a.m.---Prosecution eye-witnesses were chance witnesses and they could not prove any valid reason of their presence at the spot at the time of occurrence---Presence of the said eye-witnesses in the house of occurrence at the relevant time became doubtful---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(f) Criminal trial---

----Witness--- Chance witness--- Scope---If a chance witness is unable to establish the reason of his presence at the spot at the time of occurrence then his evidence would not worthy of reliance.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Sufyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(g) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence--- Benefit of doubt--- Un-natural conduct of eye-witnesses---Scope---Accused was charged for committing murder of his

wife/daughter of complainant---Record showed that conduct of the eye-witnesses/complainant party was highly unnatural---Accused was empty handed at the time of occurrence and he was not carrying any lethal weapon with him to intimidate the prosecution's eye-witnesses---Accused was alone at the time of occurrence, whereas, the complainant party comprised of three members, complainant and other eye-witness, whereas one of the eye-witnesses was given up---Complainant party comprised of two adult male members and a female member---Complainant was the mother, whereas, two male witnesses were real brothers of deceased, but none of the said prosecution witnesses tried to apprehend the accused at the time of occurrence---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(h) Penal Code (XLV of 1860)---

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Withholding material witness---Effect---Accused was charged for committing murder of his wife/daughter of complainant---Real sister of the deceased was married with the brother of the accused---Complainant had admitted during her cross-examination that said sister of deceased was present in the house of occurrence at the relevant time but she had not been cited by the prosecution as an eye-witness in the case without assigning any valid reason---Evidently, real sister of the deceased being inmate of the house of occurrence was natural eye-witness of the occurrence but she had not been produced in the witness box by the prosecution---Best evidence had been withheld by the prosecution, therefore, an adverse inference under Art. 129(g) Qanun-e-Shahadat, 1984, could validly be drawn against the prosecution that had the said witness been produced in the witness box she would not have favoured the prosecution case---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Lal Khan v. The State 2006 SCMR 1846; Muhammad Rafique and

others v. The State and others 2010 SCMR 385 and Riaz Ahmed v. The State 2010 SCMR 846 rel.

(i) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Motive was not proved---Scope---Accused was charged for committing murder of his wife/daughter of complainant---Motive behind the occurrence was that the accused wanted to contract second marriage and due to that reason, he committed the murder of deceased---Deceased was living with the accused till the time of her death---No proof of criminal or civil litigation had been produced in evidence by the prosecution to establish that there was any dispute between the accused and the deceased---Admittedly, a son was born from the wedlock of the accused and deceased, who was about 1/2 year of age at the time of occurrence---Complainant admitted during her cross-examination that she did not know as to where accused intended to contract second marriage---Such vague and general allegation had been levelled against the accused in respect of the motive and no convincing evidence had been produced to prove the same---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(j) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Accused was charged for committing murder of his wife/ daughter of complainant---Record showed that wire and a piece of cloth were recovered on the pointation of accused---According to the evidence of the Medical Officer, the cause of the death of deceased was asphyxia therefore, recovery of electric wire to corroborate the allegation that the accused committed the murder of his wife with electric shock was inconsequential---Piece of cloth had also been recovered on the pointation of the accused but none of the prosecution's eye-witnesses had stated that the accused committed the murder of his wife with the help of a cloth or by strangulating her neck---Medical Officer, during her cross-examination stated that she did not notice any injury on the neck of the deceased---Recovery of a piece of cloth on the pointation of the accused was of no avail to the prosecution---Circumstances established that the prosecution had failed to prove its case against the accused beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(k) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to the accused.

Tariq Parvaiz v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Ms. Saiqa Javed for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Farrukh Gulzar Awan and Wasif Javed Sipra for the Complainant.

Date of hearing: 11th October, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 115978-J of 2017 filed by Muhammad Ijaz (appellant) against his conviction and sentence, Criminal Revision No. 111926 of 2017 filed by Mst. Kalsoom Bibi complainant for enhancement of the amount of compensation awarded against the appellant by the learned trial Court and Murder Reference No. 636 of 2017 sent by the learned trial court for confirmation or otherwise of the sentence of Death awarded to Muhammad Ijaz (appellant) by the learned trial Court. We propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 31.10.2017 passed by the learned Additional Sessions Judge, Sargodha.

2. Muhammad Ijaz (appellant) was tried in case FIR No. 97 dated 18.03.2014, registered at Police Station Jhal Chakian, District Sargodha in respect of offence under section 302, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 31.10.2017, has convicted and sentenced the appellant as under:--

> Under section 302(b), P.P.C. to 'Death as tazir' for committing Qatl-e-Amd of Mst. Shabana Kausar (deceased). He was also ordered to pay Rs. 5,00,000/- (Rupees five hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A, of Cr.P.C. and in default thereof to undergo simple imprisonment for six months.

3. Brief facts of the case as given by the complainant Mst. Kalsoom Bibi (PW-4) in the FIR (Exh.PC) are that she (complainant) was resident of Skindarabad Colony Dakhli Chak No. 18 North (District Sargodha). Her daughter, namely, Mst. Shabana Kausar (deceased) was married to Muhammad Ijaz (appellant) three years earlier and from the said wedlock, there was a son, namely, Hashir Ali aged 1/2 year who was alive. On 18.03.2014 at 05:00/06:00 a.m., the complainant along with Nasir Mehmood (given up PW) and Ahmad Yar (PW-5) went to see Mst. Shabana Kausar deceased at her house situated at Chak No. 60 North (District Sargodha). Door of the room of Mst. Shabana Kausar (deceased) was closed and Muhammad Ijaz (appellant) and Mst. Shabana Kausar (deceased) were present inside the room of their house. On seeing the complainant party, Muhammad Ijaz (appellant) started to raise hue and cry that Mst.

Shabana had died. The complainant party, when saw Mst. Shabana Kausar, they noticed that there were marks of injuries on her both arms and body. The complainant party expressed that the appellant had murdered Mst. Shabana Kausar. The complainant party had suspicion that Mst.Kausar Bibi was murdered by the appellant with the help of electric shock. In the meanwhile, Muhammad Ijaz (appellant) fled away from the spot.

Motive behind the occurrence was that Muhammad Ijaz (appellant) did not like Mst. Shabana Kausar upon which they had dispute and Muhammad Ijaz (appellant) wanted to contract a second marriage with some one else and due to this grudge, Muhammad Ijaz (appellant) committed the murder of Mst. Shabana Kausar.

4. The appellant Muhammad Ijaz was formally arrested in this case on 18.04.2014 by Rab Nawaz, Sub-Inspector (PW-8). On 26.04.2014, Muhammad Ijaz appellant led to the recovery of electric wire (P-1) and a dupatta (P-2), which were taken into possession vide recovery memo (Exh.PB). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 18.07.2014, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced ten witnesses during the trial. Mst. Kalsoom Bibi complainant (PW-4) and Ahmad Yar (PW-5) are the witnesses of ocular account.

The medical evidence was furnished by Lady Dr. Qurat-ul-Ain (PW-10).

Rab Nawaz S.I (PW-8) and Muhammad Sadiq S.I (Rtd) (PW-9) are the Investigating Officers of this case. Nasir Hayat 293/C (PW-3) is the witness of recovery of electric wire (P-1) and dupatta (P-2), which were recovered on the pointation of the appellant vide memo (Exh.PB).

Maqbool Ahmad 1415/MHC (PW-1), Muhammad Saleem Draftsman (PW2), Akbar Mehmood 690/C (PW-6) and Zafar Iqbal (PW-7) are formal witnesses.

The prosecution also produced documentary evidence in the shape of site plan Exh.PA, memo of possession of electric wire (P-1) and dupatta (P-2) on the pointation of the appellant (Exh.PB), FIR (Exh.PC), memo of possession of blood stained cotton (Exh. PD), injury statement (Exh.PE), rough site plan of the place of occurrence (Exh.PF), memo of possession of seven sealed boxes and two envelops (Exh.PG), memo of possession of last worn clothes of the deceased (Exh.PH), postmortem report and pictorial diagrams of Mst. Shabana Kausar (deceased) (Exh.PJ, Exh.PJ/1 and

Exh.PJ/2), inquest report (Exh.PK), reports of PFSA, Lahore regarding visras of the deceased (Exh.PL) and (Exh.PM) and closed its evidence.

6. The statement of the appellant under section 342, of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that 'Why this case against you and why the PWs have deposed against you" the appellant Muhammad Ijaz replied as under:--

> "This false case has been registered against me due to suspicion and PWs have falsely deposed against me due to the relationship with deceased"

The appellant Muhammad Ijaz did not opt to make his statement on oath as envisaged under section 340(2), Cr.P.C. However he produced statement of Ahmad Yar PW, recorded under section 161 of Cr.P.C. as (Exh.DA) in his defence evidence.

The learned trial Court vide its judgment dated 31.10.2017, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. It is contended by learned counsel for the appellant that the appellant is innocent and he has falsely been implicated in this case by the complainant party merely on the basis of suspicion; that the prosecution's eye-witnesses were not residents of the village where the occurrence took place and as such, they are chance witnesses but they could not establish any reason of their presence at the spot at the relevant time and as such, their evidence is not trustworthy; that there is delay of 6-1/2 hours in lodging the FIR, whereas, there is delay of more than 12 hours in conducting the postmortem examination on the dead body of Mst. Shabana Kausar deceased which further shows that the prosecution witnesses were not present at the spot at the time of occurrence; that the medical evidence does not support the ocular account of the prosecution and there are material conflicts between these two pieces of the prosecution evidence; that conduct of the prosecution witnesses is highly unnatural because according to the prosecution story, the appellant was empty handed, whereas, the complainant party was comprising of three members including two adult male members but they did not try to apprehend the appellant at the time of occurrence; that sister of the deceased, namely, Mst. Farzana Kausar was admittedly married with the brother of the appellant, namely, Muhammad Mumtaz and the complainant, namely, Mst. Kalsoom Bibi (PW-4) has admitted during her cross-examination that she was present at the spot at the time of occurrence but she has not been cited as a prosecution witness in this case and as such, the best evidence has been withheld by the prosecution therefore, an adverse inference may be drawn against the prosecution; that the prosecution has not produced any convincing evidence to prove the alleged motive; that the alleged recovery of wire and

a piece of cloth from the possession of the appellant has been planted against the appellant and even otherwise, the Medical Officer has not stated that death of Mst. Shabana Kausar occurred due to the electric shock therefore, the said recoveries are inconsequential; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, the appeal filed by the appellant may be accepted and he may be acquitted from the charge.

8. On the other hand, it is contended by learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt therefore, he was rightly convicted and sentenced by the learned trial Court; that presence of the prosecution's eye-witnesses who are real mother and brother of the deceased, at the spot at the relevant time is neither unnatural nor improbable while keeping in view their relationship with the deceased; that the place of occurrence is situated at a distance of 16-kilometers from the police station and as such, there was no conscious or deliberate delay in reporting the matter to the police; that the prosecution's eye-witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that the prosecution case is further corroborated by the recovery of wire and a piece of cloth from the appellant through which the appellant committed the murder of Mst. Shabana Kausar deceased; that the motive was also proved in this case against the appellant through reliable and convincing evidence of the prosecution witnesses; that place of occurrence is the house of the appellant therefore, it was duty of the appellant to explain that as to how his wife Mst. Shabana Kausar died unnatural death but he absconded at the time of occurrence and his conduct shows that he was guilty of the offence; that there is no substance in the appeal filed by the appellant therefore, the same may be dismissed and murder reference be answered in the affirmative. It is further prayed by learned counsel for the complainant, while arguing Criminal Revision No. 111926 of 2017 that the amount of compensation awarded against the appellant by the learned trial Court is very meager and the same may reasonably be enhanced.

9. Arguments heard. Record perused.

10. Prosecution case as set forth in the FIR (Exh.PC) has already been reproduced in paragraph No.3 of this judgment therefore, there is no need to repeat the same.

11. We have noted that according to the prosecution's case and as per contents of the FIR, the occurrence in this case took place on 18.03.2014 at 05:00/06:00 a.m. The occurrence took place in a room situated inside the house of the appellant. The ocular account of the prosecution was furnished by Mst. Kalsoom Bibi complainant (PW-4)

and Ahmad Yar (PW-5). As per contents of the FIR when both the abovementioned eye-witnesses reached at the spot, they noticed that Muhammad Ijaz appellant and Mst. Shabana Kausar, who were husband and wife, were present in a room of their house and on the arrival of the complainant party, the appellant started to raise noise that Mst. Shabana Kausar had died, whereupon, the complainant party replied that the appellant had committed the murder of his wife Mst. Shabana Kausar with the help of electric shock as they noted injuries on her both arms and body. We have noted that the medical evidence furnished by the prosecution in this case through Lady Dr. Qurat-ul-Ain (PW-10) has not supported the prosecution case in any manner. As mentioned earlier, it was claim of the prosecution's eye-witnesses that they reached in the house of the appellant on 18.03.2014 at 05:00/06:00 a.m., and thereafter, the appellant raised noise that his wife Mst. Shabana Kausar had died, whereas, according to the postmortem report (Exh.PJ), as well as, according to the statement of Lady Dr. Qurat-ul-Ain (PW-10), made during her cross-examination, the dead body was received in the Dead House of the hospital on 18.03.2014 at 05:00/06:00 a.m. Relevant part of the statement of Lady Dr. Qurat-ul-Ain (PW-10) in this respect reads as under:--

> "The dead body was received in the dead house of the hospital at 05/06:00 a.m. on 18.03.2014 whereas the police papers were produced before me at 02:15 p.m. and thereafter I started the post mortem examination at 04: 45 p.m. "

It is not understandable that if the abovementioned prosecution's eye-witnesses reached in the house of the appellant on 18.03.2014 at 05:00/06:00 a.m., and saw that the appellant and Mst. Shabana Kausar deceased were present in their house at that time and thereafter, the appellant raised noise that Mst. Shabana Kausar had died then as to how the dead body was received in the hospital at the same date and time i.e. on 18.03.2014 at 05:00/06:00 a.m. We have further noted that according to the prosecution's case, the occurrence in this case took place on 18.03.2014 at 05:00/06:00 a.m., whereas, the FIR (Exh.PC) was lodged on the same day at 12:30 noon, i.e. with the delay of 7-1/2 6-1/2 hours from the time of occurrence. The distance between the place of occurrence and the police station was 16-kilometers. It is also noteworthy from the evidence of Lady Dr. Qurat-ul-Ain (PW-10) that although the dead body was received in the dead house of the hospital at 05:00/06:00 a.m. on 18.03.2014 but the police papers were produced before the said Medical Officer at 02:15 p.m., and thereafter, postmortem examination was conducted on the dead body of the deceased at 04:45 p.m., and as such, there is delay of 12 hours in conducting the postmortem examination on the dead body of the deceased. The abovementioned delay in

conducting the postmortem examination on the dead body of Mst. Shabana Kausar deceased is suggestive of the fact that eye-witnesses of the prosecution were not present at the spot at the relevant time and the said delay was consumed in procuring the attendance of fake eye-witnesses. We may refer here the case of 'Irshad Ahmad v. The State' (2011 SCMR 1190) wherein it was observed that the postmortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a postmortem examination of the dead body conducted. Similarly, in the case of 'Khalid alias Khalidi and 2 others v. The State' (2012 SCMR 327) the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse effect against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as 'Muhammad Ashraf v. The State' (2012 SCMR 419), 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54) and 'Zafar v. The State and others' (2018 SCMR 326).

We have further noted that according to the ocular account of the prosecution, the appellant committed the murder of his wife, namely, Mst. Shabana Kausar with the help of electric shock but according to the final opinion of Lady Dr. Qurat-ul-Ain (PW10), the cause of death of Mst. Shabana Kausar was due to asphyxia. It is noteworthy that initially the cause of death was not mentioned by the Medical Officer in the postmortem report of the deceased and visras of the deceased were sent to the Punjab Forensic Science Agency and after receiving the reports of Punjab Forensic Science Agency (Exh.PL) and (Exh.PM), the Medical Officer opined as under:--

> "Now, in light of the reports Exh.PL and Exh.PM I am of the opinion that death in this case was due to asphyxia."

It is not the case of any of the prosecution's eye-witnesses that the appellant committed the murder of his wife by strangulating her neck rather it is the case of the prosecution that Mst. Shabana Kausar was murdered by the appellant after giving her electric shocks, whereas, the Medical Officer has mentioned that the cause of death of the deceased was asphyxia. We have further noted that the Medical Officer during her cross-examination has conceded that no mark of violence or abnormality was detected on the neck of the deceased. We have also noted that the Medical Officer has not

mentioned the probable time that elapsed between the injuries and death and the time that elapsed between the death and postmortem examination of the deceased. Relevant columns in this respect of the postmortem report (Exh.PJ) were left blank by the Medical Officer. Relevant part of her statement, made during cross-examination in this respect, reads as under:-

> "I could not find the apparent cause of death at the time of post mortem examination and for this reason I had sent the internal organs to the relevant offices. No abnormality was detected on the neck of the deceased. I had not mentioned the probable time that elapsed between injury death and that between death and post mortem in the post mortem report."

Under the circumstances, even there is no medical evidence to support the prosecution case that the time of commission of murder of Mst. Shabana Kausar was 05:00/06:00 a.m., on 18.03.2014, as mentioned in the contents of the FIR (Exh.PC). Keeping in view all the aforementioned facts, we have come to this irresistible conclusion that the medical evidence has not supported the ocular account of the prosecution rather the same has contradicted the evidence of the prosecution's eye-witnesses.

12. As mentioned earlier, the ocular account of the prosecution was furnished by Mst. Kalsoom Bibi complainant (PW-4) and Ahmad Yar (PW-5). Both the abovementioned eye-witnesses are real mother and real brother of Mst. Shabana Kausar deceased, respectively. The occurrence in this case took place in the house of the appellant situated in Chak No. 60 (North) Jhal Chakian District Sargodha, whereas, Mst. Kalsoom Bibi complainant (PW-4) was resident of Chak No. 18/N.B Tehsil Bhalwal District Sargodha and Ahmad Yar (PW-5) was resident of Chak No. 22/S.B Tehsil and District Sargodha. Both the abovementioned eye-witnesses were not residents of the village where the occurrence took place i.e. Chak No. 60 (North). Mst. Kalsoom Bibi complainant (PW-4) stated during her cross-examination that her village was situated at a distance of 10-kilometers from the place of occurrence, whereas, village of Ahmad Yar (PW-5) was situated at a distance of 50-kilometers from the place of occurrence and as such, both the abovementioned eye-witnesses are chance witnesses. The said witnesses have not given any valid reason for their presence in the house of occurrence at odd hours of the morning i.e. 05:00/06:00 a.m. It is by now well settled that if a chance witness is unable to establish the reason of his presence at the spot at the time of occurrence then his evidence is not worthy of reliance. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance

witnesses as under:--

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the Apex Court of the country was pleased to observe as under:--

> ".....He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:--

> ".....Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence....."

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove any valid reason of their presence at the

spot at the time of occurrence, therefore, their very presence in the house of occurrence at the relevant time becomes doubtful.

13. It is further noteworthy that conduct of the abovementioned eye-witnesses/ complainant party is highly unnatural in this case. According to the prosecution's own case, the appellant was empty handed at the time of occurrence and he was not carrying any lethal weapon with him to intimidate the prosecution's eye-witnesses. The appellant was alone at the time of occurrence, whereas, the complainant party was comprising of three members, namely, Mst. Kalsoom Bibi complainant (PW-4), Ahmad Yar (PW-5) and Nasir Mehmood (given up PW) and as such, the complainant party was comprising of two adult male members and a female member. Mst. Kalsoom Bibi complainant (PW-4) was the mother, whereas, Ahmad Yar (PW-5) and Nasir Mehmood (given up PW) were real brothers of Mst. Shabana Kausar deceased but none of the aforementioned prosecution witnesses tried to apprehend the appellant at the time of occurrence. We may refer here the case of "Liaquat Ali v. The State" (2008 SCMR 95), wherein at Para No.5-A of the judgment, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of "Pathan v. The State" (2015 SCMR 315) and "Zafar v. The State and others" (2018 SCMR 326). Under the circumstances, it cannot be safely held that the above mentioned eye-witnesses were present at the spot at the relevant time and they had witnessed the occurrence because their conduct is highly unnatural.

14. It is further noteworthy that real sister of the deceased, namely, Mst. Farzana Kausar was married with the brother of the appellant, namely, Muhammad Mumtaz. Mst. Kalsoom Bibi complainant (PW-4) has admitted during her cross-examination that said Mst. Farzana Kausar was present in the house of occurrence at the relevant time but she has not been cited by the prosecution as an eye-witness in this case without

assigning any valid reason. Relevant part of statement, made by Mst. Kalsoom Bibi complainant (PW-4) during her cross-examination in this respect, reads as under:-

> "My other daughter namely Farzana Kousar is married with Muhammad Mumtaz brother of Ijaz accused. She is living happily in the house of her husband till today. She also resided in the same house. She was present in the house in which the occurrence took place at the time of occurrence but she is not a PW in this case."

It is therefore, evident that real sister of the deceased, namely, Mst. Farzana Kausar being inmate of the house of occurrence was natural eye-witnesses of the occurrence. She was admittedly present in the house of occurrence at the time of occurrence but she has not been produced in the witness box by the prosecution and as such, the best evidence has been withheld by the prosecution therefore, an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can validly be drawn against the prosecution that had the abovementioned Mst. Farzana Kausar been produced in the witness box then she would not have favoured the prosecution case. Reliance in this respect may be placed on the case reported as "Lal Khan v. The State" (2006 SCMR 1846). Relevant para No.7 of the said judgment is reproduced hereunder for ready reference:--

> Para No.7
>
> "There is no plausible explanation on the record that for what reason Mst. Noor Bibi did not disclose the story of murder of deceased till the registration of case after five days of the occurrence and why no other inmate of the house was examined in confirmation of her statement. The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutional misconduct which would not only be considered a source of undue advantage for prosecution but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."
>
> (Bold and underlining is supplied for emphasis)

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the judgments reported as "Muhammad Rafique and others v. The State and others" (2010 SCMR 385) and "Riaz Ahmed v. The State" (2010 SMCR 846).

15. Insofar as the motive part of the prosecution case is concerned, we have noted that according to Mst. Kalsoom Bibi complainant (PW-4), motive behind the occurrence was that the appellant wanted to contract second marriage and due to this reason, he committed the murder of Mst. Shabana Kausar deceased. We have noted that Mst. Shabana Kausar deceased was living with the appellant till the time of her death. No proof of criminal or civil litigation has been produced in evidence by the prosecution to establish that there was any dispute between the appellant and the deceased. Admittedly, a son, namely, Hashir Ali was born from the wedlock of the appellant and Mst. Shabana Kausar deceased who was about 1/2 year of age at the time of occurrence. Mst. Kalsoom Bibi complainant (PW-4) admitted during her cross-examination that she did not know that as to where Ijaz appellant intended to contract second marriage. Relevant part of her statement in this respect is reproduced hereunder for ready reference:--

> "I do not know where Ijaz accused had wanted to contract second marriage. It is incorrect to suggest that I have attributed a false motive to Muhammad Ijaz accused."

We are therefore, of the view that a vague and general allegation has been levelled against the appellant in respect of the motive and no convincing evidence has been produced to prove the same hence, we hold that the prosecution has failed to prove the motive part of its case.

16. It is true that the occurrence in this case took place in the house of the appellant but mere this fact by itself is not sufficient to hold the appellant is guilty of the offence. Apart from the appellant, his two brothers, namely, Rab Nawaz and Mumtaz along with their families were also residing in the house where the occurrence took place and this fact has duly been brought on the record during the cross-examination of Mst. Kalsoom Bibi complainant (PW-4) therefore, mere this fact that the appellant was also residing in the house where the occurrence took place by itself is not sufficient to hold that it was the appellant who had committed the murder of Mst. Shabana Kausar deceased. It was duty of the prosecution to prove its case against the appellant beyond the shadow of any doubt. Reliance in this respect may be placed on the cases of 'Asad Khan v. The State' (PLD 2017 Supreme Court 681), 'Nazir Ahmad v. The State' (2018 SCMR 787), 'Muhammad Jamshaid and another v. The State and others' (2016 SCMR 1019) and

'Nasrullah alias Nasro v. The State' (2017 SCMR 724).

17. Insofar as the recovery of wire and a piece of cloth on the pointation of the appellant is concerned, we have already observed in the earlier paragraphs of this judgment that according to the evidence of the Medical Officer, namely, Lady Dr. Qurat-ul-Ain (PW-10), the cause of the death of Mst. Shabana Kausar deceased was asphyxia therefore, recovery of electric wire to corroborate the allegation that the appellant committed the murder of his wife with the help of electric shock is inconsequential. It is true that a piece of cloth has also been recovered on the pointation of the appellant but none of the prosecution's eye-witnesses has stated that the appellant committed the murder of his wife with the help of a cloth or by strangulating her neck. Moreover, Lady Dr. Qurat-ul-Ain (PW-10) during her cross-examination stated that she did not notice any injury on the neck of the deceased. We are therefore, of the view that even the recovery of a piece of cloth on the pointation of the appellant is of no avail to the prosecution.

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

> '5 ... . The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

> '13 ... . It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that

there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No. 115978-J of 2017 filed by Muhammad Ijaz appellant, set aside his conviction and sentence and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 636 of 2017 is answered in the negative. The appellant Muhammad Ijaz is in custody, he be released from the jail forthwith if not required in any other case.

20. Insofar as Criminal Revision No. 111926 of 2017 filed by Mst. Kalsoom Bibi complainant for enhancement of the amount of compensation awarded against the appellant by the learned trial Court is concerned, we have disbelieved the prosecution evidence for the detailed reasons mentioned in paragraphs Nos. 11 to 18 of this judgment and acquitted the appellant by setting-aside his conviction and sentence therefore, there is no substance in the present revision petition hence, the same is hereby dismissed.

JK/M-212/L **Order accordingly.**

2022 Y L R 1981

[Lahore]

Before Malik Shahzad Ahmad Khan and Asjad Javaid Ghural, JJ

MUHAMMAD YOUNIS and others---Petitioners

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 151447-J, 151450 and Murder Reference No. 2 of 2018, heard on 7th February, 2022.

(a) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of three hours and twenty five minutes in lodging the FIR---Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---Occurrence in the case took place at 04:00 p.m. but the FIR was lodged on the same day at 07:25 p.m. i.e. after three hours and twenty five minutes of the occurrence---Distance between the place of occurrence and police station was only one Kilometer---Keeping in view the time of occurrence, the place of occurrence and its distance from the police station, it seemed that the FIR had not been promptly lodged in the case---No plausible explanation for the delay of three hours and twenty five minutes in lodging the FIR had been given by any prosecution witness specially when the deceased died at the spot and the police station was situated at a distance of only one kilometer from the place of occurrence---Circumstances established that the prosecution had failed to prove its case against he accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(b) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of eleven hours and thirty minutes in conducting post-

mortem examination on the dead body of the deceased---Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---Post mortem examination on the dead body of the deceased was conducted on the next day of the occurrence at 03:35 a.m., which meant that the post mortem examination on the dead body of the deceased was conducted after 11 hours from the time of occurrence---No plausible explanation had been given by the Medical Officer or by any other prosecution witness for the said delay in conducting the post mortem examination on the dead body of the deceased---High Court observed that said fact suggested that eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances.

Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Sufyan Nawaz and another v. The State and others 2020 SCMR 192; Zafar v. The State and others 2018 SCMR 326 and Muhanunad Ashraf v. The State 2012 SCMR 419 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---No justification was provided for the presence of eye-witnesses at the spot---Chance witnesses---Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---Record showed that the complainant had conceded during his cross-examination that photographs of the deceased were taken during investigation and in the said photographs, eyes of the deceased looked semi open---Said fact showed that the complainant, who was real son of the deceased and other eye-witness, who was son-in-law of the deceased, were not present at the spot because had the said witnesses been present at the spot at the time of occurrence then they would have closed the eyes of the deceased---Both the eye-witnesses did not give any valid reason for their presence at "J" on the day of occurrence and as

such they were chance witnesses, therefore, their presence at the spot at the time of occurrence was not free from doubt---Prosecution story did not appeal to prudent mind because if the accused party had planned to commit the murder of deceased and they had taken the deceased inside their house then as to why they kept on waiting for two and half hours till the arrival of witnesses to commit the murder of the deceased so that they the prosecution eye-witnesses might witness the occurrence and give evidence against them--- Prosecution eye-witnesses were not present at the spot at the relevant time---Circumstances established that the prosecution had failed to prove its case against he accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

Zahir Yousaf and another v. The State and another 2017 SCMR 2002 and Muhammad Asif v. The State 2017 SCMR 486 rel.

(d) Criminal trial---

----Witness---Chance witness---Scope---If a chance witness was unable to establish the reason of his presence at the spot at the time of occurrence then his evidence was not worthy of reliance.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Safyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditto and others 2017 SCMR 142 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Medical evidence and ocular account--- Conflict--- Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---Medical evidence of the prosecution was furnished by Medical Officer---According to the statements of the prosecution eye-witnesses the fire shot made by the accused landed at the left side on the back of head of the deceased but according to the medical evidence the entry wound was on the back of right side of the head behind right ear of the deceased and as such there was conflict between the ocular account and medical evidence of the prosecution, which had created doubt in the prosecution

story---Circumstances established that the prosecution had failed to prove its case against he accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Motive was not proved---Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---According to the prosecution case the motive behind the occurrence was that the deceased refused to teach demonography (AMLIYAAT) to the accused and due to that grudge the accused persons committed the murder of deceased---No cogent evidence had been produced by the prosecution to prove the said motive---No specific date, time and place as to when and where the accused and his co-accused asked the deceased to teach them demonography (AMLIYAAT) and refusal of the deceased to do so had been given by any prosecution witness---Only a vague and general motive had been alleged by the prosecution, therefore, the prosecution failed to prove the alleged motive against the accused---Circumstances established that the prosecution had failed to prove its case against he accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(g) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Recovery of weapon of offence on the pointation of accused---Reliance---Scope---Accused was charged that he along with his co-accused in furtherance of their common intention committed murder of the father of complainant by firing---Record showed that pistol 30 bore was recovered on the pointatoin of the accused and positive report of the Forensic Science Agency---According to the statement of Moherror, Investigating Officer handed over to him a parcel said to contain 30 bore pistol which he handed over to Investigating Officer for its onward transmission to the office of Forensic Science Agency---Investigating

Officer although stated that he handed over the parcel of pistol to Moherror for keeping the same in safe custody and for its onward transmission to the office of Forensic Science Agency but he did not state that he received back the parcel of pistol from Moherror and deposited the same in the office of the Forensic Science Agency--- Said facts suggested that the safe custody and transmission of parcel containing pistol to the office of the Forensic Science Agency had not been proved in the case by the prosecution beyond the shadow of doubt---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court, in circumstances.

(h) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Ms. Saiqa Javed and Raja Rafaqat Ali, Defence Counsel for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General for the State.

Mian Tabassum Ali for the Complainant.

Date of hearing: 7th February, 2022.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.151447-J of 2018, filed by Muhammad Younis (appellant) against his conviction and sentence, Murder Reference No. 02 of 2018, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Younis (appellant) and Criminal Appeal No.151450 of 2018, filed by Abid Hussain Shah (appellant/complainant) against acquittal of Ali Hasnain Hashim and Ali Hasnain Asim (respondents/accused). We propose to dispose of all these matters by this single judgment as the same have arisen out of the same

judgment dated 21.12.2017, passed by the learned Additional Sessions Judge, Jhang.

2. Muhammad Younis (appellant), along with his co-accused Ali Hasnain Hashim and Ali Hasnain Asim (since acquitted), was tried in case FIR No.96, dated 26.02.2017, under Sections 302/34, P.P.C. registered at, Police Station Satellite Town, District Jhang lodged by Abid Hussain Shah (complainant). After conclusion of the trial, the learned trial Court vide its judgment dated 21.12.2017, has convicted and sentenced Muhammad Younis (appellant) as under:-

> Under Sections 302(b)/34, P.P.C. to 'Death' for committing Qatl-i - Amd of Ghulam Abbas Shah (deceased). He was also ordered to pay Rs. 5,00,000/- (rupees five hundred thousand only) to the legal heirs of the deceased as compensation under section 544-A of Cr.P.C. and in default thereof to further undergo simple imprisonment up to six months.

However vide the same judgment, co-accused Ali Hasnain Hashim and Ali Hasnain Asim were acquitted of the charges.

3. Brief facts of the case as given by the complainant Abid Hussain Shah (PW-6) in his complaint (Ex.PA), on the basis of which the formal FIR (Ex.PA/1) was chalked out, are that on 26.02.2017 he (complainant/PW-6) along with Syed Ali Aoust Shah (PW-7) and Shabbir 'Hussain Shah (not produced), was present in his house, when Muhammad Younis (appellant) and Ali Hasnain Hashim (acquitted co-accused) came there on motorcycle, who asked complainant's father that deal for sale of their house has been struck and the property dealer was sitting in their house and offered complainant's father to accompany them for finalization of the deal. Father of the complainant namely Ghulam Abbas (deceased) went along with the accused on their motorcycle to the Kothi of Hashim Shah. The deceased did not return for quite some time, whereupon the complainant (PW-6) along with Syed Ali Aoust Shah (PW-7) and Syed Shabbir Hussain Shah (PW since not produced), went towards the Kothi of Hashim Shah for asking about Ghulam Abbas (deceased) and when they reached near the Kothi of Hashim Shah, they found the outer gate of Kothi lying open and heard hue and cry of Ghulam Abbas (deceased) upon which all of them rushed inside the Kothi and saw Ali Hasnain Asim, Ali Hasnain Hashim

(acquitted co-accused) and Muhammad Younas Ansari (appellant), present there and within their view Hashim Shah (co-accused) raised Lalkara to Younis Ansari (appellant) to teach a lesson to Abbas Shah for not imparting demonography "Amliyaat" to them and asked him to make fire. Upon which Muhammad Younas (appellant) took out a pistol from the fold of his Shalwar and made a fire shot, which landed on the back at the left side of head of the deceased, who fell on the ground. Ali Hasnain Hashim, Ali Hasnain Asim (acquitted co-accused) and Muhammad Younas (appellant) fled away from the spot while raising Lalkaras that whosoever would come near, will not be spared. The complainant along with the PWs tried to rescue the deceased but he succumbed to injuries at the spot.

Motive behind the occurrence was that Ali Hasnain Hashim, Ali Hasnain Asim (co-accused since acquitted) and Muhammad Younas (appellant), wanted to learn demonography from the deceased for their nefarious designs but the deceased refused them, due to which the appellant along with his co-accused committed the murder of Ghulam Abbas Shah (deceased).

4. In order to prove its case, the prosecution produced nine witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Exh.PA) to (Exh.PQ).

5. The statements of Muhammad Younis (appellant) and his co-accused under Section 342 of Cr.P.C. were recorded. Muhammad Younis (appellant), refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" Muhammad Younis appellant replied as under:-

> "All the witnesses are closely related inter-se. There is no independent evidence whatsoever. I am innocent and the prosecution has failed to prove its case beyond any shadow of doubt. All the PWs have falsely deposed against me ".

The learned trial Court vide its judgment dated 21.12.2017, found Muhammad Younis (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is

absolutely innocent and he has falsely been implicated in this case by the prosecution; that there is delay of about 3-1/2 hours in lodging the FIR (Ex.PA/1) whereas there is delay of 11-1/2 hours in conducting the post mortem examination on the dead body of the deceased and the abovementioned delays have created doubts in the prosecution story; that there is conflict between the ocular and medical evidence of the prosecution; that the prosecution witnesses have admitted during their cross-examination that they were residing at Lahore at the time of occurrence and as such they were chance witnesses, therefore, their evidence is not worthy of reliance; that Touqeer Abbas 1970/HC (PW-1) stated that he handed over the parcel of pistol to Akhlaq Ahmad, SI (PW-8) for its onward transmission to the office of the PFSA, Lahore but Akhlaq Ahmad, SI (PW-8) had not stated that he received the parcel of pistol from Touqeer Abbas, 1970/HC (PW-1) and deposited the same in the office of the PFSA, Lahore, therefore, the recovery of pistol (P-6) and positive report of the PFSA, Lahore (Ex.PQ) are inconsequential; that even the motive was not proved in this case by the prosecution; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appeal filed by the appellant may be accepted and the appellant may be acquitted from the charge.

7. On the other hand, it is contended by learned Deputy Prosecutor-General assisted by learned counsel for the complainant that the FIR in this case was promptly lodged and there is no conscious or deliberate delay in reporting the matter to the police; that the prosecution eye-witnesses have categorically stated that they used to visit their native village i.e. Jhang, therefore, their presence at the spot at the releyant time cannot be termed as unnatural or improbable; that both the prosecution witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that the prosecution case against the appellant is fully supported by the medical evidence furnished by the prosecution through Dr. Waseem Akram (PW-9); that the prosecution case against the appellant is further corroborated by the recovery of pistol (P-6) from the possession of the appellant and positive report of PFSA, Lahore (Ex.PQ); that motive against the appellant was also established through reliable and confidence inspiring evidence of the prosecution witnesses; that there is no substance in the appeal filed by Muhammad

Younis, appellant, therefore, the same may be dismissed.

Insofar as the Criminal Appeal No. 151450 of 2018 is concerned it is contended by learned counsel for the complainant that the prosecution proved its case against acquitted accused, namely Ali Hasnain Hashim and Ali Hasnain Asim, who shared common intention with Muhammad Younas, accused and committed the murder of Ghulam Abbas Shah (deceased); that the abovementioned accused have wrongly been acquitted by the learned trial Court, therefore, appeal filed against their acquittal may be accepted and the said accused may be convicted and sentenced in accordance with the law.

8. Arguments heard. Record perused.

9. The occurrence in this case took place on 26.02.2017 at 04:00 p.m. but the FIR was lodged on the said day at 07:25 p.m. i.e. after three hours and twenty five minutes of the occurrence. As per relevant columns of the FIR, the distance between the place of occurrence and police station was only one Kilometer. Keeping in view the time of occurrence, the place of occurrence and its distance from the police station we are of the view that the FIR has not been promptly lodged in this case. No plausible explanation for the abovementioned delay of three hours and twenty five minutes in lodging the FIR has been given by any prosecution witness specially when the deceased died at the spot and the police station was situated at a distance of only one kilometer from the place of occurrence. We have further noted that post mortem examination on the dead body of the deceased was conducted on the next day of occurrence i.e. on 27.02.2017 at 03:35 a.m., which means that the post mortem examination on the dead body of the deceased was conducted after 11-1/2 hours from the time of occurrence. No plausible explanation has been given by the Medical Officer (Dr. Waseem Akram, PW-9) or by any other prosecution witness for the abovementioned delay in conducting the post mortem examination on the dead body of the deceased. In the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the judgment at page No. 55 reads as under:--

"2. . Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution .."

Similarly, in the case of "Khalid alias Khalidi and 2 others v. The State" (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192), "Zafar v. The State and others" (2018 SCMR 326) and "Muhanunad Ashraf v. The State" (2012 SCMR 419).

We have further noted that Syed Abid Hussain Shah, complainant (PW-6) has conceded during his cross-examination that photographs of the deceased P-4(1-3) were taken during investigation and in the said photographs, eyes of the deceased looked semi open. The relevant part of his statement reads as under:

"The photo snaps of the deceased were taken during investigation proceedings by the investigating officer. In photo snaps P-4 (1-3) eyes of the deceased look semi open."

The abovementioned fact further shows that Syed Abid Hussain Shah, complainant (PW-6), who was real son of the deceased and Syed Ali Aoust Shah (PW-7), who was son-in-law of the deceased were not present at the spot because had the said witnesses been present at the spot at the time of occurrence then they would have closed the eyes of the deceased. Reference in this context may be made to the case of "Zahir Yousaf and another v. The State and another" (2017 SCMR 2002) wherein at Para No.4 it was observed as under:-

" We have also noted that as per the inquest report (Exh.PG) eyes of Ghulam Sarwar (deceased) were open which makes the presence of the witnesses of ocular account at the time of occurrence doubtful because had

they been present there they would have closed eyes of deceased who was their close relative ....."

Similar view was taken by the Apex Court of the country in the case of "Muhammad Asif v. The State" (2017 SCMR 486).

10. The ocular account of the prosecution was furnished through Syed Abid Hussain Shah, complainant (PW-6) and Syed Ali Aoust Shah (PW-7). We have noted that both the above mentioned witnesses were residing along with their families at Lahore at the time of occurrence. Syed Abid Hussain Shah, complainant (PW-6) conceded that he along with his children, brothers and sisters was residing at Lahore and his brother-in-law, namely Syed Ali Aoust Shah (PW-7), was also residing with him at Lahore during the days of occurrence whereas his father, namely Ghulam Abbas Shah (deceased) was living alone at Jhang. The relevant part of his statement in this respect reads as under:--

> "PW-7 Aoust Ali Shah is my brother-in-law and also my cousin. PW Shabbir Hussain Shah is my maternal uncle ( ). We are seven brothers and two sisters. I am the eldest. We two brothers and one sister are married. My un-married brothers and sisters are residing with me at Lahore. PW explained we all used to visit our house at Jhang of and on. I working as merchandising manager in Textile industry. My children are studying at Lahore. My father was living alone at Jhang. PW explained a servant was also residing with him. My father was prayer leader ( ) and remained engaged in spiritual rituals. Besides his own earning we also used to send money to him. PW Aoust Ali Shah is also residing and serving at Lahore with me."
>
> (Bold and underlining supplied (for emphasis)

Although the complainant stated that they (PWs) used to visit Jhang on and off but he has not given any specific schedule of their visit to Jhang from Lahore, which means that ordinary place of residence of both the above mentioned eye-witnesses was Lahore whereas the occurrence took place at Jhang. Both the above mentioned eye-witnesses did not give any valid reason for their presence at Jhang, on the day of occurrence and as such they are chance witnesses, therefore, their presence

at the spot at the time of occurrence is not free from doubt. It is by now well settled that if a chance witness is unable to establish the reason of his presence at the spot at the time of occurrence then his evidence is not worthy of reliance. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Safyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the Apex Court of the country was pleased to observe as under:-

> " ....He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circum-stances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under

" .. Muhammad Irshad complainant, (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence ....."

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove any valid reason of their presence at the spot at the time of occurrence, therefore, their very presence in the house of occurrence at the relevant time becomes doubtful.

If for the sake of arguments, the presence of the above mentioned eye-witnesses at Jhang on the day and time of occurrence is presumed to be correct even then it is noteworthy that the occurrence took place inside the house of one Syed Imtiaz Ali Shah (father of Ali Hasnain Hashim and Ali Hasnain Asim, acquitted co-accused). The abovementioned eye-witnesses could not give any valid reason for their presence inside the house of abovementioned co-accused at the time of occurrence. Although the said eye-witnesses stated that on the day of occurrence they (PWs) along with Ghulam Abbas Shah (deceased) were present in their house when the accused persons took the deceased along with them on the pretext to finalize the deal of sale of the house of the complainant party but when the deceased did not come back for a long time then they (PWs) reached at the house of abovementioned co-accused and witnessed the occurrence but it is noteworthy that the complainant has admitted during his cross-examination that they (complainant party) had old relationship with the accused party since 15/20 years and they frequently used to visit each other. He further stated that they (PWs) kept on waiting for the return of the deceased for 2-1/2 hours and thereafter they went out in search of the deceased. The abovementioned eye-witnesses did not explain that as to what had prompted them to start search for the deceased when the relationship between the deceased and the accused party was normal since 15/20 years. No plausible explanation in this respect to justify the presence of prosecution eye-witnesses inside the house of abovementioned co-accused at the time of occurrence has been given by the prosecution eye-witnesses. Moreover, the prosecution story does not appeal to a prudent mind because if the accused party had planned to commit the murder of Ghulam Abbas Shah (deceased) and they (accused party) had taken the

deceased inside their house then as to why they kept on waiting for two and half hours till the arrival of PWs to commit the murder of the deceased so that they (the prosecution eye-witnesses) may witness the occurrence and give evidence against them (accused party). Keeping in view all the abovementioned facts we are of the view that the prosecution eye-witnesses were not present at the spot at the relevant time.

11. The medical evidence of the prosecution was furnished by Dr. Waseem Akram (PW-9). According to the statements of the prosecution eye-witnesses the fire shot made by the appellant landed at the left side on the back of head of the deceased but according to the medical evidence furnished by Dr. Waseem Akram (PW-9) the entry wound was on the back of right side of the head behind right ear of the deceased and as such there is conflict between the ocular account and medical evidence of the prosecution, which has created further doubt in the prosecution story.

12. According to the prosecution case the motive behind the occurrence was that the deceased refused to teach demonography (AMLIYAAT) to the accused and due to this grudge the accused persons committed the murder of Ghulam Abbas Shah, deceased. No cogent evidence has been produced by the prosecution to prove the abovementioned motive. No specific date, time and place that as to when and where the appellant and his co-accused asked the deceased to teach them demonograrhy (AMLIYAAT) and refusal of the deceased to do so has been given by any prosecution witness and only a vague and general motive has been alleged by the prosecution. We are, therefore, of the view that the prosecution failed to prove the alleged motive against the appellant.

13. Insofar as recovery of pistol .30 bore (P-6) recovered on the pointatoin of the appellant and positive report of the PFSA, Lahore (Ex.PQ) is concerned, we have noted that according to the statement of Touqeer Abbas 1970/HC (PW-1) on 10.03.2017 Ikhlaq Ahmad, SI (PW-8) handed over to him a parcel said to contain .30 bore pistol and on 14.03.2017 he handed over the said parcel to Ikhlaq Ahmad, SI (PW-8) for its onward transmission to the office of PFSA, Lahore. On the other hand, Ikhlaq Ahmad SI (PW-8) although stated that he handed over the parcel of pistol to Touqeer Abbas 1970/HC (PW-1) for keeping the same in safe custody and for its onward transmission to the office of PFSA, Lahore but he did not state that

he received back the parcel of pistol from Touqeer Abbas 1970/HC (PW-1) and deposited the same in the office of the PFSA, Lahore on 15.03.2017. We are, therefore. of the view that the safe custody and transmission of parcel containing pistol (P-6) to the office of the PFSA., Lahore has not been proved in this case by prosecution beyond the shadow of doubt.

14. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In the case of 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5 .. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

> '13 . . It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. In the light of above discussion, we are of the view that the prosecution has

failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.151447-J of 2018 filed by Muhammad Younas appellant, set aside his conviction and sentence and acquit him of the charge by extending him the benefit of doubt. Resultantly, Murder Reference No. 02 of 2018 is answered in the negative. The appellant Muhammad Younas is in custody, he be released from the jail forthwith if not required to be detained in any other case.

16. Insofar as Crl. Appeal No. 151450 of 2018 filed by Syed Abid Hussain Shah complainant against the acquittal of Ali Hasnain Hashim and Ali Hasnain Asim (acquitted accused persons), is concerned, we have already disbelieved the prosecution evidence for the detailed reasons mentioned in paragraphs Nos. 9 to 14 of this judgment, therefore, the present criminal appeal has no force, hence, the same is hereby dismissed.

JK/M-41/L **Order accordingly.**

2022 Y L R 2233

[Lahore]

Before Malik Shahzad Ahmad Khan, A.C.J

MUHAMMAD RAMZAN---Petitioner

Versus

The STATE and 7 others---Respondents

Writ Petition No. 32866 of 2022, decided on 19th July, 2022.

Constitution of Pakistan---

----Art. 199--- Habeas corpus, writ of---Abduction of minor (son)---Proof---Petitioner alleged that respondents abducted his minor son and on a phone call someone demanded ransom for release---Validity---One stated eye-witness of occurrence was not traced out whereas the other stated eye-witness of occurrence denied claim of petitioner regarding abduction of his son---People of area of occurrence duly mentioned in inquiry report denied allegations of petitioner leveled in petition as no such occurrence had taken place in the area---Close relatives of petitioner also stated that neither petitioner was ever married nor there was any son of petitioner---As per police record petitioner was involved in sixteen criminal cases---Petitioner himself earlier filed eleven Constitutional petition before High Court and got filed eleven petitions before High Court through different persons---Petitioner was in the habit of filing frivolous petitions before High Court and he was a habitual criminal---High Court declined to interfere in the matter and imposed cost upon petitioner for filing false and frivolous petition on the basis of unture facts and forged documents, as the same resulted into wastage of precious time of Court and general public---Constitutional petition was dismissed in circumstances.

Javaid Iqbal Abbasi and Company v. Province of Punjab and 6 others 1996 SCMR 1433; Ahmed Nawaz alias Babal Khan Jakhrani v. The State and another PLD 1998 Kar. 180 and Muhammad Aslam v. District Returning Officer, Sheikhupura and 6 others 2007 CLC 188 ref.

Manzoor Hussain Khan for Petitioner.

Amjad Ali Chattha, Addl. Advocate-General with Raees, SI Police Station City Jhang and Maqsood, ASI Police Station Sanda, Lahore.

Raja Rafaqat Ali with Respondents Nos.7 and 8.

ORDER

MALIK SHAHZAD AHMAD KHAN, A.C.J.---The instant constitutional petition has been filed by Muhammad Ramzan, petitioner resident of Chak Janubi, Tehsil and District Jhang on the ground that on 22.05.2022 at 02:00 p.m. Asghar Ali, respondent No.7 and Yasmin, respondent No.8 along with two unknown persons came at his agricultural land and abducted his minor son, namely Muhammad Asad, aged about fourteen (14) years. It is further alleged in the present petition that on 23.05.2022 the petitioner received a phone call and the caller demanded from the petitioner an amount of Rs.300,000/- for the release of his son. The petitioner, therefore, filed the instant petition for the recovery of his son, who was statedly in illegal confinement of respondents Nos.7 and 8. This Court vide order, dated 31.05.2022, directed the S.H.O. Police Station Sanda, District Lahore (respondent No.6) to recover the alleged detenue and produce him before this Court on the next date. The case was fixed for 02.06.2022 and on the said date a proxy counsel (Mr. Habib Ullah, Advocate) appeared before this Court on behalf of the petitioner and sought some time for taking instructions from the learned principal counsel but thereafter neither the petitioner nor the abovementioned learned proxy counsel or principal counsel for the petitioner bothered to appear before the Court. The case was kept pending till 11:00 a.m. and thereafter the instant petition was dismissed on merits after hearing the arguments of learned counsel for respondents Nos.7 and 8, as well as, in the light of report furnished by the S.H.O. Police Station City Jhang, which report showed that neither Muhammad Ramzan, petitioner contracted any marriage nor he had any son as claimed by him in the instant petition. This Court observed that as the petitioner filed a frivolous petition before this Court, which resulted in the wastage of precious time of the Court and general public, therefore, this petition was dismissed with the cost of Rs.1,00,000/- (Rupees one hundred thousand only) vide order, dated 02.06.2022. The petitioner thereafter challenged the abovementioned order of this Court and the Hon'ble Supreme Court of Pakistan vide order, dated 14.06.2022, rendered in Civil Petition No.1854 of 2022, set aside the abovementioned order of this Court on the ground that the petitioner was not heard at the time of abovementioned decision of this case, therefore, the case was remanded back to this Court for decision afresh in accordance with the law.

2. On post remand proceedings i.e. on 30.06.2022 the petitioner appeared before this Court and reiterated his contentions voiced through the instant petition. On the other hand, there was a report of the S.H.O. Police Station City Jhang, which was supported by the verification of Muhammad Nadeem, Councilor Ward No.6, Municipal Committee, Jhang according to which neither Muhammad Ramzan,

petitioner had contracted any marriage nor he had any son as claimed by him in the instant petition. Even respondents Nos.7 and 8 present before the Court along with their learned counsel on the abovementioned date i.e. 30.06.2022 denied the allegations levelled by the petitioner in the instant petition. Mst. Yasmin, respondent No.8 also levelled the allegation of rape, blackmailing, taking cash amount through fraudulent means etc against the petitioner with the claim that she had also audio recording of the blackmailing of the petitioner. She further alleged that an amount of Rs.200,000/- was obtained by the petitioner from her for getting employment for her son, namely Ahmed Hassan, in LESCO Company and when the abovementioned amount was demanded back, the petitioner started filing frivolous petitions against her through different persons and reference in this respect was made to W.P. No.28200 of 2022 and W.P. No.31402 of 2022 statedly filed by one Mst. Feroza Bibi under the influence of the petitioner against respondents Nos. 7 and 8.

3. As disputed questions of facts were involved in this case, therefore, the DPO, Jhang was directed to hold an inquiry regarding the respective claims of the parties and regarding the fact that as to whether the petitioner has any son with the name of Muhammad Asad. It was further directed that a report shall also be submitted regarding the genuineness or otherwise of the birth certificate of the abovementioned son of the petitioner. In compliance of the above-referred order of this Court the District Police Officer, Jhang submitted his detailed report, dated 06.07.2022 (hereinafter to be referred as report), wherein it is reported that the allegations levelled by the petitioner in the instant petition were found to be false. It was further reported that the petitioner had earlier filed number of other writ petitions before this Court and he is also involved in number of criminal cases. On the next date of hearing i.e. 07.07.2022 the petitioner did not appear before the Court, however, he submitted a written application to adjourn the case. Consequently, the case was adjourned for 15.07.2022 with the clear understanding that no further adjournment shall be granted in this case. On 15.07.2022 the petitioner again did not appear before the Court and in his place Mr. Manzoor Hussain Khan, Advocate appeared before the Court and after filing his power of attorney on behalf of the petitioner he sought adjournment. He also undertook to produce the petitioner before this Court on the next date. It is pertinent to mention here that the instant petition was filed by the petitioner in person. Although on the earlier date of hearing i.e. 07.07.2022 this case was adjourned on the written request of the petitioner with the clear understanding that no further adjournment shall be granted in this case, however, in the interest of justice, last and final opportunity was granted to the petitioner and his learned counsel for arguments

in this case and consequently the case was adjourned for today i.e. 19.07.2022. Today the petitioner did not appear before the Court. The undertaking of learned counsel for the petitioner made on the previous date of hearing regarding production of the petitioner before this Court on the next date was not honored. Learned counsel for the petitioner made a request at the very outset that as the petitioner has filed a petition under section 22/A-B of Cr.P.C. before the concerned Justice of Peace for redressal of his grievance, therefore, he does not press this petition, hence, the same may be dismissed as having been withdrawn. On the other hand, abovementioned request of learned counsel for the petitioner has vehemently been opposed by learned counsel for respondents Nos. 7 and 8, as well as, by the learned Addl. Advocate-General on the ground that the petitioner is a habitual litigant/criminal, who has filed the instant petition on the basis of false and frivolous allegations/ documents, which facts have been established during the inquiry of the DPO, Jhang, therefore, in order to avoid the legal consequences, the above-mentioned prayer has been made by learned counsel for the petitioner to withdraw this petition.

The abovementioned prayer of learned counsel for the petitioner is rejected because the law has been set into motion. A detailed inquiry has been held in this case, precious time of the Court and general public has been consumed and appropriate order in this case has to be passed, therefore, allowing the petitioner to withdraw this petition would amount to subvert the cause of justice.

4. It has been established in this case that the petitioner is a habitual litigant, who has already filed number of writ petitions before this Court and he is also involved in number of criminal cases and when the abovementioned facts have been established during the inquiry of the DPO, Jhang, as well as, from the record of this Court, therefore, in order to avoid legal consequences the petitioner intends to withdraw this petition. The Hon'ble Supreme Court of Pakistan in the case of "Javaid Iqbal Abbasi and Company v. Province of Punjab and 6 others" (1996 SCMR 1433) observed that if the prayer to withdraw a writ petition has been made for perpetuating a fraud or injustice then the Court may decline withdrawal of the writ petition. The relevant para of the said judgment at Para 10 is reproduced hereunder for ready reference:-

> "10. From the above discussed legal position, we are of the view that normally the Court will not disallow an application for unconditional withdrawal of a writ petition filed under Article 199 of the Constitution after its institution but if the Court comes to the conclusion that the application for withdrawal of the proceedings has been made in order to defeat the right of

respondent or any other person to whom the right to pursue the petition has accrued after filing of the petition or withdrawal of the proceedings, would result in perpetuating a fraud or injustice, the Court may decline to allow the petitioner to withdraw the case. The Court may also in appropriate cases, where it comes to the conclusion that the purpose of withdrawal of proceeding is only to prevent the Court from passing an order undoing a wrong or an, injustice done to a party or the withdrawal would deprive the Government or a public functionary to receive or recover the public dues, or the withdrawal would otherwise defeat the ends of justice, decline the prayer for withdrawal of petition titled under Article 199 of the Constitution seeking equitable relief from the Court .."

Similar view was taken in the cases of "Ahmed Nawaz alias Babal Khan Jakhrani v. The State and another" (PLD 1998 Karachi 180) and "Muhammad Aslam v. District Returning Officer, Sheikhupura and 6 others" (2007 CLC 188) wherein the requests of the petitioners, to withdraw the writ petitions of the said cases were declined on the ground that once the law has been set into motion and cognizance has been taken by the Court then appropriate order has to be issued and if the prayer to withdraw the petition would amount to defeat the ends of justice then the said prayer may be declined. It was also observed in the case of Muhammad Aslam, supra as under:-

"4. Today the learned Returning Officer/Civil Judge has appeared and rebuffed the allegation. The learned counsel for the petitioner submitted peevishly that he wanted to withdraw this writ petition.

5. It is very unfortunate that it has become fashion to level false and wild allegations against the innocent persons disregarding their status and position, which is not only illegal, it is also a sin, in accordance with our religion. Under the constitution of Pakistan, to malign judiciary, is a serious offence, therefore, the request of the learned counsel for the petitioner cannot be granted.

6. This writ petition is dismissed with Rs.50,000/- as cost, to be paid by the petitioner. The office is directed to make arrangement for the recovery of the same in accordance with law and rules. The petitioner is also declared disqualified to contest the election in view of above false allegation against a member of the judiciary which he has miserably failed to prove or substantiate."

(Bold and underlining is supplied for emphasis)

5. In the light of above the request of learned counsel for the petitioner to withdraw this petition is hereby declined and I proceed to decide the instant petition on merits.

6. As mentioned earlier, in compliance of this Court's order dated 30.06.2022, the District Police Officer, Jhang has furnished his report. The perusal of the said report shows that Muhammad Ramzan, petitioner, as well as, Asghar Ali respondent No.7 and Mst. Yasmin respondent No.8 along with others were associated during the inquiry proceedings. The DPO, Jhang has reported that the petitioner is a habitual criminal, who is involved in as many as sixteen (16) criminal cases. The list of the said cases has been annexed as Annexure-H, with the report. It has further been reported that the petitioner himself earlier filed, as many as, eleven (11) writ petitions before this Court and he has also got filed eleven (11) other writ petitions through different persons in this Court. It is further reported that this is third petition filed by the petitioner before this Court for the alleged illegal detention of his son. I have also noted that earlier W.P. No. 24167 of 2010 was filed by Muhammad Ramzan, petitioner before this Court with the allegation that respondents Nos.13 and 15 of the said petition have illegally detained the son of the petitioner, namely Muhammad Asad. The DPO, Jhang informed the Court in the abovementioned writ petition that the petitioner is in a habit of filing writ petitions on frivolous grounds. Consequently, the abovementioned writ petition was dismissed with the cost of Rs.2000/- vide order, dated 29.11.2010 and the DPO, Jhang was directed to take necessary legal proceedings against the petitioner, in case he was found to have committed cheating or misrepresentation, after proper investigation. The above-mentioned order of this Court reads as follows:-

> "29.11.2010 Nemo for the petitioner.
>
> Mr. Jawad Hassan, Addl.A.G. with Dr. Muhammad Rizwan, District Police Officer, Jhang/ respondent No.3
>
> Respondents Nos. 13 to 15 in person.
>
> "Respondents Nos. 13 to 15 categorically denied that the son of the petitioner, namely, Muhammad Asad is in their illegal custody. They submitted that the petitioner never got married and as such, the question of abduction or keeping his alleged son in illegal confinement did not arise at all. DPO, Jhang has informed this Court that the petitioner is in habit of filing

writ petitions on frivolous grounds and his earlier petitions have already been dismissed by this Court.

2. In view of above, the instant petition is dismissed with a cost of Rs.2,000/- DPO, Jhang is directed to take necessary legal proceedings against the petitioner in case, he is found to have committed cheating or misrepresentation, after proper investigation."

In compliance of the above-mentioned order of this Court, FIR No.1483, dated 05.12.2010 under sections 419/420/468 and 471, P.P.C. was registered at Police Station Sadar Jhang, District Jhang and during the course of investigation the petitioner was found guilty by the Investigating Officer. It is further noteworthy that the petitioner also filed another W.P. No.8007 of 2022 before this Court with the contention that LESCO Officers have abducted his son, namely Muhammad Asad. In the said writ petition SHO appeared before this Court on 10.02.2022 and submitted that the son of the petitioner was not under the custody of LESCO Officers/respondents Nos.5 to 7 of the said case and abovementioned petition was false and vexatious. Moreover, in the said case, on 21.02.2022 SSP, (Operations), Lahore submitted inquiry report wherein it was reported that the petitioner filed the abovementioned writ petition to harass the Wapda/Lesco authorities for his ulterior motives and for getting benefits in respect of pending liability qua electricity dues and bills. It was further mentioned in the said report that the petitioner after taking benefits from the LESCO authorities intended to withdraw his abovementioned writ petition from this Court. On the next date of hearing of said writ petition i.e. on 21.02.2022 the abovementioned writ petition was dismissed as having been withdrawn without touching the merits of the case. It is, therefore, evident that the petitioner has filed the instant third habeas petition regarding alleged illegal detention of his son. He has earlier filed two writ petitions regarding the same grievance against the other respondents. The perusal of the report of the DPO, Jhang further reveals that Muhammad Ramzan, petitioner did not produce eye-witnesses of the occurrence mentioned in the case before the Inquiry Officer, however, the local police was directed by the inquiry officer to trace out the petitioner's eye-witnesses. One eye-witness, namely Ameer Shah could not be located while the other eye-witness of the petitioner, namely Muhammad Saleem, was traced out and he was associated in the inquiry proceedings. The said Muhammad Saleem, showed his ignorance about the occurrence as claimed by the petitioner. He further stated that neither incident of abduction took place nor he witnessed any incident. His statement has been annexed as Annexure-A with the report. Muhammad Nadeem, Muhammad Ali, Muhammad

Rafique and Muhammad Bakhsh, who were residents of the locality where the occurrence statedly took place, also joined the inquiry and denied the allegations levelled by the petitioner in the instant petition and they verified that no such occurrence as claimed by the petitioner, had taken place. Their statements were recorded and the same have been enclosed as Annexure-B with the report. Perusal of inquiry report further shows that according to the claim of the petitioner he (petitioner) was in the area of Chund Bharwana Tehsil and District Jhang at the time of occurrence, where the occurrence took place. In order to verify his claim the CDRs of mobile numbers of the petitioner and respondents Nos.7 and 8 were collected and it was found that on the relevant date and time the location of the petitioner, as well as, respondents Nos.7 and 8 was in District Lahore instead of District Jhang. The perusal of inquiry report further reveals that the petitioner claimed that he solemnized marriage with one Mst. Shaheen Fatima and from the said wedlock one son, namely Muhammad Asad (alleged detenue) was born who after divorce between the spouses in the year 2009 was grown up by his aunt, namely Mst. Sattan Bibi. However, the petitioner neither produced his Nikah Nama nor divorce deed or even the photo of his son before the DPO, Jhang. The petitioner, however, produced the birth certificate of his son issued by Union Council No.89, Civil Lines, Jhang but the Chief Officer, Municipal Committee, Jhang vide letter No.98/CO, dated 06.07.2022 has reported that birth register has been found tempered with, therefore, a request has been made to the Deputy Director, Local Government, Jhang for further inquiry regarding tempering in the above-mentioned birth register. The petitioner could not tell the whereabouts of his stated ex-wife, namely Shaheen Fatima. The Inquiry Officer with the help of identity card number mentioned on the above-referred birth certificate, traced out Mst. Shaheen Fatima, whose address was written as Mohallah Islampura, Noshehra Virkan, District Gujranwala in the relevant document. The abovementioned Shaheen Fatima categorically denied her marriage with the petitioner. She further stated that she has no child with the name of Muhammad Asad from the petitioner. The statement of Mst. Shaheen Fatima, is annexed as Annexure D with the report. In order to verify the factum of bringing up the alleged abductee by Mst. Sattan Bibi her house was traced out where her daughter-in-law Mst. Sakina Bibi and grandson, namely Shahid Abbas were found. They both stated that Muhammad Ramzan, petitioner was their relative, however, the petitioner neither solemnized marriage nor he had any child. They categorically denied the version that the alleged abductee, namely Muhammad A sad was grown up by Mst. Sattan Bibi. According to their statements, Mst. Sattan Bibi had already died. Statements of Mst. Sakina Bibi and Shahid Abbas, are also enclosed as Annexure-E with the report. In the above-referred

inquiry proceedings Mst. Yasmin, respondent N o.8 also made her statement wherein she stated that the petitioner had obtained an amount of Rs.200,000/- (Rupees Two Hundred Thousand Only) from her through fraud and blackmailing and he also committed rape with her after taking her to the ground floor of Dreamland Hotel, 9-Fan Road, Lahore. In view of the statement of Mst. Yasmin (respondent No.8), staff of the above said hotel was also associated in the inquiry proceedings and all the staff members confirmed that Muhammad Ramzan, petitioner obtained a room in the basement of the hotel on rent where he used to bring different ladies on different occasions. Consequently, Mst. Misbah, Mst. Asma Arooj and Mst. Tahira Parveen were also associated in inquiry proceeding and they also disclosed that the petitioner committed their rape on the pretext that he would help them to get jobs. They also levelled the allegations of blackmailing etc. against the petitioner. The DPO, Jhang in his inquiry report finally concluded as under:-

"After detailed proceedings, following facts came forth:--

a. Muhammad Saleem, eye-witness of petitioner categorically denied the allegations levelled by the petitioner.

b. No one from the locality endorsed the version of petitioner rather, all negated his version regarding his son and alleged incident.

c. During proceedings, petitioner contended that at the time of occurrence, he was in Chund Bharwna Jhang but as per CDR of his mobile phone numbers, his location was in District Lahore.

d. As per CDRs, the locations of Respondents Nos.7 and 8 have also been found in District Lahore on the day of alleged occurrence i.e. 22.05.2022.

e. The petitioner has neither contracted marriage with Mst. Shaheen Fatima nor he has any child. Petitioner's contention was categorically denied by Mst. Shaheen Fatima (alleged wife of petitioner).

f. The local people of vicinity confirmed that petitioner Muhammad Ramzan has neither solemnized marriage nor he has any child.

g. The version of petitioner that his son was grown up by his aunt Mst. Sattan Bibi has been negated by the close relatives of Mst. Sattan Bibi as petitioner has never solemnized marriage.

h. As per report of Chief Officer, Municipal Committee, Jhang, Birth

Register has been found tempered regarding registration of petitioner's son.

i. Ealirer, during the year 2010, petitioner also filed Writ Petition No.24167/2010 with the allegations that his son Muhammad Asad has been abducted by accused. The Honorable Court dismissed the petition with direction to register criminal case against him while, fine was also imposed upon petitioner. Consequently, case FIR No. 1483 dated 05.12.2010 under sections 419/420/468/471, P.P.C. was registered against him at Police Station Saddar Jhang.

j. Earlier, petitioner also filed Writ Petition No.8007/2022 titled as Muhammad Ramzan v. IGP Punjab, etc against LESCO for recovery of his son Muhammad Asad which was withdrawn by him.

k. The allegations levelled by respondent No.08 Mst. Yasmin Bibi regarding rape and blackmailing by petitioner Muhammad Ramzan have also been verified by the Hotel Staff, as well as, other ladies who were associated into the inquiry proceedings through local police.

In view of above made submission and circumstances, petitioner has never solemnized marriage and he has no son as contended in subject writ potion. While, record of birth certificate produced by the petitioner before the Honorable Court as well as during inquiry proceedings, has also been reported tampered by the concerned department. The petitioner is habitual litigant and it is pertinent to mention here that this is third time petition filed by the petitioner before the Honorable Court for recovery of his so called abducted son Muhammad Asad. All the allegations levelled by the present petitioner in this petition have been found false and baseless, therefore, it is most respectfully prayed that the subject writ petition having no substance may graciously be dismissed.

Submitted Please."

7. Learned counsel for the petitioner is unable to controvert the findings of the DPO, Jhang recorded in his inquiry report, dated 06.07.2022. It is, therefore, established in this case that there is no proof of the marriage of the petitioner with the abovementioned Mst. Shaheen Fatima and the said Mst. Shaheen Fatima has also denied the claim of the petitioner that she was ever married with the petitioner or any son was born from the wedlock as claimed by the petitioner. All the relatives of the petitioner also denied that the petitioner was ever married or he had a son as claimed

in the present petition. The earlier petition filed by the petitioner before this Court i.e. W.P. No.24167 of 2010 regarding alleged illegal detention of his son, namely Muhammad Asad has already been dismissed by this Court vide order, dated 29.11.2010 with the cost of Rs.2000/- and the DPO, Jhang was directed by this Court to take necessary legal proceedings against the petitioner, whereupon FIR No.1483 dated 05.12.2010 under sections 419/ 420/ 468/471, P.P.C. was registered against him at PS Saddar Jhang. One stated eye-witness of the occurrence was not traced out whereas the other stated eye witness of the occurrence denied the claim of the petitioner regarding the abduction of his son. Likewise, people of the area of occurrence, duly mentioned in the inquiry report also denied the allegations of the petitioner levelled in the instant petition and submitted that no such occurrence had taken place in the area. Even close relatives of the petitioner, namely Mst. Sakina Bibi and Shahid Abbas have also stated during the inquiry proceedings that neither the petitioner was ever married nor there is any son of the petitioner. As per police record the petitioner is involved in sixteen (16) criminal cases. He has himself earlier filed eleven (11) writ petitions before this court and he got filed eleven (11) writ petitions before this Court through different persons, which shows that the petitioner is in a habit of filing frivolous petitions before this Court and he is a habitual criminal.

8. In the light of above, it is crystal clear that the petitioner has filed the instant false and frivolous petition before this Court on the basis of unture facts and forged documents, which has resulted into the wastage of precious time of the Court and general public, therefore, this petition is dismissed with the cost of Rs.300,000/- (Rupees Three Hundred Thousand Only), which shall be deposited by the petitioner with the Deputy Registrar (Judl.) of this Court within a period of thirty (30) days from today, failing which the same shall be recoverable as arrears of land revenue. After recovery of abovementioned amount the same shall be paid to respondents Nos.7 and 8, after observing all codal formalities.

9. At this stage, learned counsel for respondents Nos. 7 and 8 submits that the allegations of demanding and taking cash amount from respondent No.8 through fraud, cheating and blackmailing, as well as, the allegations of commission of rape have been levelled against the petitioner by respondent No.8 and other ladies mentioned in the report of the DPO, Jhang, whereas the petitioner has also committed different other offences against respondents Nos.7 and 8, therefore, order for registration of FIRs may be passed against the petitioner. In this respect it is observed that respondent No.8 and other ladies mentioned in the report of the DPO, Jhang may submit applications before the S.H.O. Police Station Mozang, Lahore, who will

proceed on the said applications in accordance with the law. The DPO, Jhang is also directed that if the birth certificate of the stated son of the petitioner is found to be forged and fake then he shall initiate necessary legal proceedings against the petitioner. Respondents Nos.7 and 8 may also file applications before the S.H.O. Police Station City Jhang, District Jhang (respondent No. 5) in respect of the offences of fraud, forgery, cheating, blackmailing, etc. statedly committed by the petitioner, who will proceed on the said applications in accordance with the law. In case applications are moved by respondents Nos. 7 and 8 before the S.H.O. (respondent No.5) then the same shall be decided within a period of four (04) weeks from today. The DPO, Jhang shall furnish a report regarding the abovementioned directions within a period of six (06) weeks from today with the Deputy Registrar (Judl.) of this Court. It is further observed that respondents Nos.7 and 8 may move applications before other SHO(s) of the concerned areas for registration of FIR(s) against the petitioner and if any application is moved in this respect by the abovementioned respondents then the same shall be decided strictly in accordance with the law, without being influenced by any observation made in this order.

MH/M-175/L **Order accordingly.**

2022 Y L R 2323

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD AKRAM---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 43133-B of 2021, decided on 15th July, 2021.

Criminal Procedure Code (V of 1898)---

---S. 497---Penal Code (XLV of 1860), Ss. 376 & 337-J---Rape---Causing hurt by means of a poison---Bail, grant of---Case of zina with consent---Failure to recover utensil containing intoxicating material--- Further inquiry--- Scope---Prosecution case was that the complainant was called by accused on the pretext of giving her a job at a beauty parlor; that the accused along with co-accused took the complainant at an unknown place where some intoxicating material was administered to her through a bottle and that the accused persons thereafter committed rape with the complainant turn by turn---Complainant was admittedly a married lady therefore medico legal report showing her hymen to be old ruptured was inconsequential---True, DNA test report revealed that accused persons could not be excluded being contributors towards the semen detected on the vaginal swabs of the complainant but point for determination before the High Court was as to whether it was a case of rape as alleged by the complainant or it was a case of zina with consent, which was bailable offence---No allegation of forcible abduction was levelled neither was there any medico legal report in support of the allegation of intoxicating material being administered to the complainant nor the bottle containing intoxicating material was recovered---Allegation of rape levelled against the accused required further probe---Co-accused was released on bail by the Sessions Judge on the exonerating statement of the complainant---Case of accused was at par with the case of co-accused---Petition for grant of bail was allowed, in circumstances.

Kaleem Ullah v. The State and others 2017 SCMR 19 and Jamshaid Asmat alias Sheedu v. The State and others 2011 SCMR 1405 ref.

Rai Ashfaq Ahmad Kharal for Petitioner.

Ch. Muhammad Ishaq, Addl. Prosecutor General for the State.

Malik Zulfiqar Ali for the Complainant.

Farzana, Lady Sub-Inspector.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner, namely, Muhammad Akram through the instant petition seeks post arrest bail in case FIR No. 648 dated 26.02.2021 registered at Police Station City Raiwind District Lahore offences under sections 376/337-J of P.P.C.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 24.02.2021 at about 08:00 p.m., Mst. Saima complainant was called by the petitioner on the pretext of giving her a job at a beauty Parlor. The petitioner along with one unknown accused thereafter, took the complainant to Raiwind City at an unknown place where some intoxicated material was administered to her through a bottle and the petitioner and one unknown accused thereafter committed rape with the complainant turn, by turn hence, the abovementioned FIR.

4. It is evident from the perusal of the medico legal report of the complainant that she stated before the Medical Officer that she was living separately from her husband from the last 6/7 months. The complainant is admittedly a married lady therefore, her medico legal report showing her hymen to be old ruptured, is inconsequential. It is true that according to the DNA test report, the petitioner and Ghulam Murtaza co-accused cannot be excluded being contributors towards the semens detected on the vaginal swabs of the complainant but point for determination before this Court is that as to whether it is a case of rape as alleged by the complainant punishable under section 376 of P.P.C. or it is a case of 'zina' with consent punishable under section 496-B of P.P.C. which is a bailable offence.

In this respect, I have noted that no allegation of forcible abduction has been levelled by the complainant against the petitioner and the complainant herself stated that she accompanied the petitioner and one unknown accused as the petitioner promised to get a job for her in a beauty parlor. Although the complainant alleged that after taking her to an unknown place at Raiwind City, she (complainant) was administered some intoxicated material by the petitioner and one unknown accused through a bottle but neither there is any medico legal report in support of the abovementioned allegation showing that any intoxicated material was administered to the complainant nor any such material or bottle containing intoxicated material has been recovered in this case. Under the Circumstances the allegation of rape levelled against the petitioner requires further probe.

It is further noteworthy that asper DNA test report, Muhammad Akram petitioner and Ghulam Murtaza co-accused both, cannot be excluded being contributors to the semens detected on the vaginal swabs of the complainant. The complainant levelled the allegation of rape against Muhammad Akram and one unknown accuse in the contents of the FIR and she subsequently implicated Ghulam Murtaza co-accused in place of one unknown accused through her supplementary statement dated 26.02.2021 but the complainant later on, submitted her affidavit in the Court of learned Addl. Sessions Judge, Lahore wherein she exonerated the abovementioned Ghulam Murtaza co-accused from the commission of the offence and consequently, post arrest bail was granted to the abovementioned co-accused on the basis of exonerating statement of the complainant. According to DNA test report the case of the present petitioner is at par with the case of abovementioned Ghulam Murtaza co-accused to the extent of allegation of rape but as the complainant herself has exonerated the abovementioned co-accused from the commission of offence through her affidavit and statement made in the Court of learned Addl. Sessions Judge, Lahore therefore, prosecution case against the petitioner has also become one of further inquiry, as observed by the Hon'ble Supreme Court of Pakistan in the cases of Kaleem Ullah v. The State and others' (2017 SCMR 19) and Jamshaid Asmat alias

Sheedu v. The State and others' (2011 SCMR 1405).

5. In the light of above, this petition is allowed and the petitioner is admitted to bail after arrest subject to his furnishing the bail bonds in the sum of Rs.200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

SA/M-151/L **Bail granted.**

PLJ 2022 Cr.C. (Note) 9

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN AND CH. MUSHTAQ AHMED, JJ.**

STATE--Appellant

versus

ARSLAN WARIS--Respondent

Crl. A. No. 49969 of 2019, heard on 18.11.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 540--Control of Narcotic Substances Act, (XXV of 1997), Ss. 48 & 9(c)--Criminal appeal--Recovery of narcotic substances--Application of ANF u/S. 540, Cr.P.C. for summoning of Forensic Analyst to appear in Court as PW/CW--It is not understandable that if full protocols were complied with at relevant time then as to why said fact was not mentioned in Reports of Punjab Forensic Science Agency--Although learned Special Prosecutor for ANF has argued before Court that through abovementioned applications under Section 540 of, Cr.P.C., appellants have not been asking for retesting of contraband material rather they have only been praying that Forensic Science Expert/Analyst may be summoned as a prosecution witness or as a Court witness so that he may bring on record that full protocols were complied with or not at time of preparation of their Reports but along with abovementioned petitions under Section 540 of, Cr.P.C., no report showing compliance of full protocols by Forensic Science Expert/Analyst has been annexed to show that full protocols were complied with at relevant time--It is not understandable that if protocols were complied, with at relevant time then as to why same were not mentioned in concerned Reports--Report of Punjab Forensic Science Agency is per-se admissible and normally there is no need to call Expert in witness box--Real function of Forensic Science Expert/Analyst is to prepare report and give his opinion together with test protocols and reasons and to place same before Court so that the Court, on basis of said Report can pass a judgment regarding guilt or innocence of an accused--Forensic Science Expert/Analyst is not a witness of facts and he only gives his expert opinion in order enable Court to reach on independent judgment--Reports furnished in these

eases might not fulfill criteria laid down by Hon'ble Supreme Court of Pakistan--Appeal were dismissed.

[Para 6] A, B & C

2019 SCMR 930 and 2018 SCMR 2039 *ref.*

Mr. Zafar Iqbal Chohan, Special Prosecutor for A.N.F.

Malik Muhammad Aslam, Advocate for Respondent (in Crl. Appeal No. 49969 of 2019).

Mr. Naveed Afzal Basra, Advocate for Respondent (in Crl. Appeal Nos. 42067 of 2019, 50394 of 2019 & 43262 of 2019).

Mr. Nadeem Iqbal Chaudhary, Advocate for Respondent (in Crl. Appeal No. 41247 of 2019).

Mian Mehmood Ahmad, Advocate for Respondent (in Crl. Appeal No. 41249 of 2019).

Mr. Muhammad Usman Gujjar, Advocate for Respondent (in Crl. Appeal No. 43266 of 2019).

Nemo for Respondents (in Crl. Appeal Nos. 50254 of 2019 & 43261 of 2019).

Date of hearing: 18.11.2019.

JUDGMENT

Malik Shahzad Ahmed Khan, J.--While relying upon the case of *'The State through Regional Director ANF vs. Imam Bakhsh and others* (2018 SCMR 2039) whereby 07 appeals and one criminal petition were decided through a single consolidated judgment, we proceed to decide through this single consolidated judgment, the instant appeal bearing Crl. Appeal No. 49969 of 2019 titled *'The State vs. Arslan Waris'*, as well as, connected appeals bearing Crl. Appeal No. 42067 of 2019 titled *'The State vs. Muhammad Bilal Amin, etc*. Crl. Appeal No. 50394 of 2019 tilled *The State vs. Muhammad Nawaz. ctc*, Crl. Appeal No. 43262 of 2019 titled *'The State vs. Muhammad Awais Akbar*, Crl. Appeal No. 41247 of 2019 titled *"The State vs. Sardar Ali*, Crl. Appeal No. 41249 of 2019 titled *The Sate vs Muhammad Qasim*, Crl. Appeal

No. 43266 of 2019 titled *'The State vs. Muhammad Azam Khan* Crl. Appeal No. 50254 of 2019 titled *'The Sate vs. Khyber Khan and 2 others* and Crl. Appeal No. 43261 of 2019 titled *'The State vs. Arif Ullah'*. as common questions of law and facts are involved in all these appeals. Through the above-referred appeals the appellant/State has challenged the wires of the impugned orders dated 22.08.2019, 01.07.2019, 19.08.2019, 03.07.2019, 26.06.2019, 22.06.2019, 04.07.2019, 22.06.2019 & 02.07.2019 passed by the learned Judge Special Court CNS, Lahore, whereby the applications filed by the appellant/State under Section 540 of Cr.P.C. for summoning of the Forensic Science Expert/Analyst as a Court witness or prosecution witness and recording his evidence regarding compliance of full protocols were dismissed.

2. As per brief facts, different FIRs have been lodged against the private respondents of the abovementioned appeals on account of recovery of contraband materials (narcotics) from their possession. During the pendency of the trials, applications were moved by the appellant/State under Section 540 of, Cr.P.C. for summoning of Forensic Science Experts/Analysts so that the said Analysts/Experts may bring on the record that as to whether or not the protocols were complied with at the time of analysis of the materials/narcotics recovered from the possession of the private respondents/accused. Said applications of the appellant have been dismissed *vide* the impugned orders of the learned trial Court hence, the present appeals before this Court.

3. It is contended by learned Special Prosecutor for ANF that under Section 540 of Cr.P.C., the learned trial Court was competent to examine or re-examine any witness in order to reach at a just and fair conclusion of the cases. He adds that full protocols were complied with at the time of analysis of the recovered material but details of the said protocols cannot be inadvertently mentioned in the reports issued by the Punjab Forensic Science Agency therefore, in order to reach at a just decision of the cases, Forensic Science Expert/Analyst may be summoned either as a prosecution witness or as a Court witness so that he may explain that as to whether the full protocols were complied with or not at the time of analysis of the materials recovered in these cases; that even the Hon'ble Supreme Court of Pakistan in the case of *'Khair-ul-Bashar vs. The State'* (2019 SCMR 930), has observed that in case the veracity of the Report is

challenged by the accused or is being examined by the Court, compliance of full protocols can be called for from the Government Analyst and verified; that the impugned orders are not sustainable in the eye of law therefore, the same may be set-aside and the applications under Section 540 of, Cr.P.C., moved by the appellants before the learned trial Court may be accepted as prayed for.

4. On the other hand, these appeals have been opposed by learned counsel for the private respondents on the ground that after different judgments passed by the Hon'ble Supreme Court of Pakistan in respect of identical Reports, the appellants through the abovementioned applications under Section 540 of Cr.P.C., intend to fill in the lacunas in the prosecution case; that no valid reason has been mentioned by learned Special Prosecutor for ANF that as to why the compliance of full protocols was not mentioned at the time of preparation of the Reports by the Punjab Forensic Science Agency; that no Reports have been annexed with the petitions moved by the appellants before the learned trial Court which the appellants intended to produce in evidence through Forensic Science Expert/Analyst; that in the case of *'Khair-ul-Bashar vs. The State'* (2019 SCMR 930), the Hun'ble Supreme Court of Pakistan has rejected the request of learned DPG for retesting of the recovered material on the ground that it will amount to fill in the lacunas in the prosecution case; that there is no substance in these appeals therefore, the same may be dismissed.

5. Arguments heard. Record perused.

6. We have noted that in all the abovementioned cases, Reports of Punjab Forensic Science Agency have already been prepared and furnished before the learned trial Court. Through petitions under Section 540 of Cr.P.C. moved by the appellants before the learned trial Court, prayer has been made for summoning of the Government Analyst/Forensic Science Expert as a prosecution witness or as a Court witness so that the said witness may bring on the record that full protocols were complied with at the time of examination of the material/narcotics recovered from the possession of private respondents/accused. It is not understandable that if full protocols were complied with at the relevant time then as to why the said fact was not mentioned in the Reports of Punjab Forensic Science Agency. Provisions of Section 540 of Cr.P.C. cannot be invoked to fill in the lacunas in the prosecution case. We may refer here the

case of *'Khair-ul-Bashar vs. The State'* (2019 SCMR 930), wherein it has been observed that **"Re-testing of the drug, as argued by the DPG, in case of a deficient report would mount to given premium to the prosecution for its mistakes and lapses. In any case any flaw in the case of the prosecution must only benefit the accused. Sending the alleged drugs for re-testing would be giving another chance to the prosecution to build its case, which is not the role or business of the Court."** Although learned Special Prosecutor for ANF has argued before the Court that through the abovementioned applications under Section 540 of Cr.P.C., the appellants have not been asking for retesting of the contraband material rather they have only been praying that Forensic Science Expert/Analyst may be summoned as a prosecution witness or as a Court witness so that he may bring on the record that full protocols were complied with or not at the time of preparation of their Reports but we have noted that along with the abovementioned petitions under Section 540 of Cr.P.C., no report showing compliance of the full protocols by the Forensic Science Expert/Analyst has been annexed to show that full protocols were complied with at the relevant time. As mentioned earlier, it is not understandable that if the protocols were complied with at the relevant time then as to why the same were not mentioned in the concerned Reports. Report of Punjab Forensic Science Agency is per-se admissible and normally there is no need to call the Expert in the witness box. Real function of the Forensic Science Expert/Analyst is to prepare report and give his opinion together with the test protocols and reasons and to place the same before the Court so that the Court, on the basis of the said Report can pass a judgment regarding the guilt or innocence of an accused. Forensic Science Expert/Analyst is not a witness of facts and he only gives his expert opinion in order to enable the Court to reach at an independent judgment. It appears that as the appellants came to the conclusion that the Reports furnished in these eases might not fulfill the criteria laid down by the Hon'ble Supreme Court of Pakistan in the cases of *'Khair-ul-Bashar vs. The State'* (2019 SCMR 930) & *The State through Regional Director ANF vs. Imam Bakhsh and others*' (2018 SCMR 2039) therefore, they moved the abovementioned petitions under Section 540 of, Cr.P.C. for summoning of Forensic Science Expert/Analyst) as a Court or prosecution witness.

7. Keeping in view all the abovementioned facts, we have come to this conclusion that the above-referred impugned orders have rightly been passed by the learned trial Court. Learned Special Prosecutor for ANF has miserably failed to point out any illegality or material irregularity in the impugned orders. In the light of above, there is no substance in these appeals therefore, all the aforementioned appeals are hereby **dismissed.**

(A.A.K.) **Appeal dismissed.**

PLJ 2022 Cr.C. 15

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

IMRAN MASIH--Appellant

versus

STATE & another--Respondents

Crl. A. No. 233 of 2010, heard on 15.12.2020.

Dishonest improvement--

----If dishonest improvements are made by a witness on material aspects of case then he is not worthy of reliance--It is, therefore, not safe to rely upon evidence of above mentioned eye-witnesses who made dishonest improvements in their statements before Court in order to strengthen prosecution case.

[P. 22] B

2010 SCMR 385.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 295-A & 295-B--Conviction and sentence--Challenge to--benefit of doubt--Dishonest improvements--Derogatory rewarks about Muslims, Islam or the Holy Qur'an--Prosecution witnesses made dishonest improvements in their statements, recorded before learned trial Court regarding material aspects of case--It is therefore, evident from perusal of statements of abovementioned prosecution witnesses that appellant was living in their area since long (35-years) and there was no complaint against appellant that he ever tried to outrage feelings of Muslim Community--The said prosecution witnesses further conceded that appellant had many Muslim friends--None of prosecution witnesses stated that at time of occurrence or prior to occurrence, appellant ever spoke any derogatory remarks about Muslims, Islam or the Holy Quran--Underline circumstances, if for sake of arguments prosecution case is taken as gospel truth that appellant burnt some books containing Arabic words, even then prosecution failed to prove menseria of appellant that he intentionally committed offence to outrage feelings of Muslims because appellant might have burnt some books containing Arabic language while considering them waste papers and without realizing that there might be some Quranic versers written in said books--Court have

considered all aspects of this case and have come to this irresistible conclusion that prosecution could not prove its case against appellant beyond shadow of doubt--**Held:** It is by now well settled law that if there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to give benefit of doubt to accused, whereas, instant case is replete with number of circumstances which have created serious doubt regarding truthfulness of prosecution story--Appeal was allowed.

[Pp. 21 & 23] A, C & D

2017 SCMR 344, 2008 SCMR 6, 1995 SCMR 1345 and 2009 SCMR 230.

Sardar Khalil Tahir Sandhu, Advocate for Appellant.

Ch. Muhammad Ishaq, Addl. Prosecutor General for State.

Mr. Muhammad Javed Bajwa, Advocate for Complainant.

Date of hearing: 15.12.2020.

JUDGMENT

This judgment shall dispose of the aforementioned criminal appeal, filed by the appellant, namely, Imran Masih against his conviction and sentence. The appellant was tried in case FIR No. 622 dated 01.07.2009 registered at Police Station Sargodha Road District Faisalabad offences under Sections 295-A/295-B of, PPC by the learned Addl. Sessions Judge, Faisalabad and after conclusion of trial, vide judgment dated 11.01.2010, the learned trial Court convicted and sentenced the appellant as under:

> Under Section 295-A of PPC to undergo rigorous imprisonment for ten years with fine of Rs. 100,000/-and in default of payment of fine, the appellant was directed to undergo S.I for six months.
>
> Under Section 295-B of, PPC to undergo Imprisonment for Life.

Both the sentences were directed to run concurrently.

The benefit of Section 382-B of, Cr.P.C. was also extended to the appellant.

2. Brief facts of the case, as given by the complainant Faryad Ali (PW-1) in the complainant (Ex.PA) on the basis of which formal FIR (Ex.PA/II) was chalked out, are that he (complainant) was resident of Street No. 2 Mohallah Bilal Ganj Hajveri Town, Faisalabad and was ex-General Counselor of U.C No. 212, Faisalabad. On 01.07.2009 at about 03:30 p.m., Imran Masih (appellant) in order to spread religious hate

intentionally set on fire Quranic Verses, Holy Siparay and Arabic Books near Government M.C Primary School Chibban Road Hajveri Town, Faisalabad due to which Quranic extracts were burnt. In the meanwhile Muhammad Ashraf (PW-4), Haji Liaqat Ali (PW-3), Munir Ahmad, Mian Naeem Ahmad and Muhammad Nadeem (given up PWs) attracted to the spot and apprehended the accused (appellant). Local police was called at Phone No. 15 and the accused (appellant) was handed over to the police along with burnt extract of the Quran and Arabic books.

3. After completion of the investigation, the challan was submitted before the Court. The learned trial Court framed the charge under Section 295-A/295-B of PPC against the appellant on 20.08.2009, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced six witnesses during the trial. Prosecution also produced documentary evidence as Ex.PA to Ex.PC and closed the prosecution evidence. Statement of the appellant under Section 342 of Cr.P.C. was recorded by the learned trial Court.

5. The learned trial Court vide its judgment dated 11.01.2010, found the appellant Imran Masih, guilty for the offences under Sections 295-A/295-B of PPC and convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant due to the grudge that the complainant party wanted to get the shop of the appellant for extension of their business and this fact has duly been brought on record during the prosecution evidence but as the appellant refused to vacate his shop therefore, the complainant party after concocting a false and fabricated story, lodged the FIR against the appellant; that there are material contradictions in the statements of the prosecution witnesses which have not been properly appreciated by the learned trial Court while passing the impugned judgment; that no burnt/semi-burnt book was recovered from the spot by the police and semi-burnt books were produced before the police by the complainant himself; that the prosecution witnesses made dishonest improvements in their statements while appearing before the learned trial Court and as such, they are not worthy of reliance; that some of the prosecution witnesses also admitted that they cannot read Arabic language and as such, it has not been proved in this case beyond the shadow of doubt that the appellant burnt any extract or verse from the Holy Quran; that the prosecution miserably failed g to prove its case against the appellant beyond

the shadow of doubt therefore, this appeal may be accepted and the appellant may be acquitted of the charges.

7. On the other hand, learned Addl. Prosecutor General for the State assisted by learned counsel for the complainant contended that the prosecution has successfully proved its case against the appellant beyond the shadow of any doubt therefore, he was rightly convicted & sentenced by the learned trial Court; that the appellant is unable to establish any malafide on the part of the prosecution witnesses for his false involvement in this case; that the prosecution eye-witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that the prosecution case against the appellant is further corroborated by the recovery of ash and semi-burnt books containing verses of the Holy Quran; that there is no substance in this appeal therefore, the same may be dismissed.

8. Arguments heard. Record Perused.

9. I have noted that Imran Masih appellant in his statement recorded under Section 342 of Cr.P.C. while answering to question No. 4 took this plea that shop of Liaqat Ali (PW-3) was adjacent to his (appellant's) shop and both the shops were owned by one and the same owner who was a widow. He further stated that the abovementioned Liaqat Ali (PW-3) also wanted to get his (appellant's) shop on rent but as he failed to do so therefore, the complainant party nourished this grudge in their minds and involved him (appellant) in the instant false and frivolous case. The appellant further stated in his above-referred statement that he respects Muslims and their belief and cannot think to outrage religious feelings of the Muslim Community and all the allegations leveled against him were false and frivolous. Same was the case of the appellant during the trial of this case and recording of the prosecution evidence. Although prosecution witnesses denied the abovementioned grudge while appearing in the witness box but they have frankly conceded that owners of the shops of Liaqat Ali (PW-3) & Imran Masih appellant was the same. Faryad Ali complainant (PW-1) also conceded that the shops of the accused and Liaqat Ali (PW-3) are situated adjacent to each other. Relative part of his statement reads as under:

> *"The Shops of the accused are situated in front of M.C Primary School for Boys and Girls. The shop of Haji Liaquat is situated adjacent to the shop of the accused."*

Likewise statement of Liaqat Ali (PW-3), in this respect, reads as under:

"The owner of my shop as well as the shop occupied by Imran Masih is the same. It is incorrect to suggest that I want the possession of the shop occupied by Imran Masih accused."

It is therefore, evident that shops of Imran Masih appellant and Liaqat Ali (PW-3) were adjacent to each other and the same were owned by the same owner.

10. It is further noteworthy that according to the prosecution case as set forth in the FIR (Ex.PA/II), the occurrence took place on 01.07.2009 at 03:30 p.m., but the prosecution evidence regarding the date & time of occurrence is self-contradictory. Prosecution eye-witnesses, namely, Faryad Ali (PW-1) and Naseer Ahmad (PW-2) while appearing in the witness box stated regarding the date & time of occurrence as under:

Faryad Ali (PW-1).

"States that on 4th of July 2009 at 1.00 or 2.00 P.M. I went towards school side from my home, where I saw that the accused Imran Masih defiled the pages of Holy Quran, Qurani verses, gathered the same and get on fire."

Naseer Ahmad (PW-2).

"States that on 4th of July 2009 the accused Imran Masih defiled and set on fire the pages of Holy Quran bearing Quranic verses and other religious books. The said occurrence took place at 1.00 or 2.00 P.M."

Although other prosecution eye-witnesses, namely, Liaqat Ali (PW-3) and Muhammad Ashraf (PW-4) gave the date of occurrence as 01.07.2009 but their evidence regarding the date of occurrence of this case is in conflict with the evidence of Faryad Ali complainant (PW-1) and Nasser Ahmad (PW-2) who mentioned the above-referred date as 04.07.2009. It is also noteworthy that the time of occurrence given by Faryad Ali (complainant/PW-1), Naseer Ahmad (PW-2) as 01:00 p.m., to 02:00 p.m., and the time of occurrence as given by Liaqat Ali (PW-3) and Muhammad Ashraf (PW-4) as 02:00/02:30 p.m., is also in conflict with each other, as well as, with the time of occurrence, mentioned in the FIR (Ex.PA/II) as 03:30 p.m. Although it is argued by learned Addl. Prosecution General assisted by learned counsel for the complainant that there may be some typographical mistake or slip of tongue in the statements of Faryad Ali (PW-1) and Naseer Ahmad (PW-2) regarding the date of occurrence but I have noted that there may be typographical mistake or slip of tongue in the statement of one witness but the abovementioned date *i.e*. 04.07.2009 has been

mentioned in the evidence of two different prosecution witnesses. It is further noteworthy that admittedly till today, no application has been moved before the learned trial Court for correction of the record or the above-referred alleged typographical mistake in the statements of the above-said prosecution witnesses and as such, there is no substance in the abovementioned argument of learned Addl. Prosecution General assisted by learned counsel for the complainant.

11. It is further noteworthy that the most important piece of evidence in this case was the Books containing verses of the Holy Quran which were allegedly set at fire by the appellant but I have noted that in the site plan (Ex.PB), point No. 1 was mentioned that on the said point, Imran Masih appellant burnt the books containing Quranic verses but from the said point only the ash was recovered. It has not been mentioned in the site plan (Ex.PB) that any semi-burnt pages or books containing verses of the Holy Quran have been recovered from the place of occurrence. Perusal of the recovery memo (Ex.PC) further shows that at the time of spot inspection, Shaukat Hayat, Sub Inspector/I.O (PW-5) has mentioned that only ash was recovered from the spot and two semi-burnt books were produced before him by Faryad Ali complainant (PW-1). I.O. did not mention in the recovery memo that any verse of the Holy Quran was also written on the said books and he simply stated that some Arabic words were written on the said books and at the end of one book, National Anthem of Pakistan was written. Faryad Ali complainant (PW-1) has admitted during his cross-examination that he had not read the Holy Quran though he claimed that he can read the Quranic verses. He ..further admitted that he had not learnt Arabic language. It is further noteworthy that the prosecution evidence regarding recovery of the semi-burnt books which contained verses of the Holy Quran is also contradictory and material dishonest improvements were also made in this respect in the statements of the prosecution witnesses. The prosecution witnesses were confronted with their previous statements and dishonest improvements made by them regarding the material aspect of the case were duly brought on record. Relevant parts of their statements reads as under:

Faryad Ali (PW-1).

> *"The burnt pages of Holy Quran as well as ashes were taken into custody by the police itself. Those articles were taken into custody by the police from us. I can differentiate between Quranic Verses and ordinary arabic language. I*

have not read the Holy Quran, but I can read Quranic Verse. I have not learnt arabic language"

Liaqat Ali (PW-3)

"I got recorded in my statement before the police that Naseer Ahmad PW picked a partially burnt book on which there was Kalamah Tayyabah written confronted with Ex.DA where it is not so recorded…….. I got recorded in my statement before the police that Faryad Ali complainant picked second partially burnt book on which there was Kalamah Tayyab and Quranic Verses written confronted with Ex.DA where it is not so recorded."

Shaukat Hayat S.I (PW-5).

"I secured the ash and two books were handed over to me by the complainant, which were semi-burnt through recovery memo

Ex.PC ……It is possible that in those two books, there are some arabic poems and dialogues, written."

The abovementioned prosecution eye-witnesses made dishonest improvements in their statements regarding the material aspects of the case and their statements regarding the most important piece of evidence of this case *i.e*. recovery of semi-burnt books containing the verses of Holy Quran by the police itself are against the record (Recovery Memo Ex.PC & Site Plan Ex.PB). The other prosecution witness, namely, Shaukat Hayat S.I (PW-5) did not state that he himself took into possession the semi-burnt books containing verses of Holy Quran from the spot rather he stated that the said books were handed over to him by the complainant. It is, therefore, evident from the perusal of prosecution evidence that the prosecution witnesses made dishonest improvements in their statements, recorded before the learned trial Court regarding material aspects of the case, in order to strengthen the prosecution case and as such, they are not worthy of reliance. In the case of *"Sardar Bibi and another vs. Munir Ahmed and others"* (2017 SCMR 344, while discussing the evidence of a witness who made dishonest improvements in his statement, the Hon'ble Supreme Court of Pakistan observed as under:

"So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they were not trustworthy witnesses".

Similarly in the case of *"Akhtar Ali and others versus The State"* (2008 SCMR 6), the Hon'ble Supreme Court of Pakistan observed as under:

> *"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805."*

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of *"Muhammad Rafique and others vs. The State and others"* (2010 SCMR 385) wherein it was held that if dishonest improvements are made by a witness on material aspects of the case then he is not worthy of reliance. It is, therefore, not safe to rely upon the evidence of the above mentioned eye-witnesses who made dishonest improvements in their statements before the Court in order to strengthen the prosecution case.

12. It is further noteworthy that the prosecution witnesses, namely, Naseer Ahmad (PW-2), Liaqat Ali (PW-3) and Muhammad Ashraf (PW-4) stated that the appellant was living in their area since long (35-years) and he had many Muslim friends and there was no complaint against the appellant prior to the present occurrence. The relevant parts of their statements in this respect read as under:

Naseer Ahmad (PW-2).

> *"I know the accused since long. I had good relations with Imran accused. There are other Muslim friends of Imran accused. There is no previous complaint against Imran accused regarding similar act. I including the other Muslim friends of the accused had no complaint, whatsoever, with Imran accused regarding any of his such act."*

Liaqat Ali (PW-3).

> *"It is correct that Imran Masih accued has many Muslim friends. Prior to this occurrence there was no complaint of similar nature against Imran Masih accused."*

Muhammad Ashraf (PW-4).

> *"I am residing in St:No. 2, Hajweri Town for the last thirty five years. Imran Masih accused is living at the same place for the last thirty five years. There was no complaint of similar nature against Imran Masih prior to this case. Accused Imran Masih has many Muslim friends."*

It is therefore, evident from the perusal of the statements of abovementioned prosecution witnesses that the appellant was living in their area since long (35-years) and there was no complaint against the appellant that he ever tried to outrage the feelings of Muslim Community. The said prosecution witnesses further conceded that the appellant had many Muslim friends. None of the prosecution witnesses stated that at the time of occurrence or prior to the occurrence, the appellant ever spoke any derogatory remarks about Muslims, Islam or the Holy Quran. Under the circumstances, if for the sake of arguments the prosecution case is taken as gospel truth that the appellant burnt some books containing Arabic words, even then the prosecution failed to prove the menseria of the appellant that he intentionally committed the offence to outrage the feelings of Muslims because the appellant might have burnt some books containing Arabic language while considering them waste papers and without realizing that there might be some Quranic versers written in the said books.

13. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt regarding the truthfulness of the prosecution story. In *'Tariq Pervez versus The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under.

> '5. …… The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram versus The State* (2009 SCMR 230), at page 236, observed as under:

> '13. ….. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

14. In the light of above discussion, the instant appeal **(Criminal Appeal No. 233 of 2010)** filed by Imran Masih appellant is **allowed,** his conviction and sentence recorded vide impugned judgment dated 11.01.2010 passed by the learned Addl. Sessions Judge, Faisalabad is hereby set-aside and he is acquitted of the charge by extending him the benefit of doubt. He is in custody. He be released forthwith if not required in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2022 Lahore (Note) 87

[Multan Bench, Multan]

***Present*: MALIK SHAHZAD AHMED KHAN AND SADIQ MAHMUD KHURRAM, JJ.**

SHAHID MEHMOOD--Appellant

versus

DIRECTOR, ANTI-CORRUPTION ESTABLISHMENT, MULTAN REGION, MULTAN and 2 others--Respondents

ICA No. 379 of 2019, decided on 23.1.2020.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Consenting statement of counsel--Non-filing of application against counsel by appellant--Maintainability--Order, was passed on statement made by counsel for petitioner before Court--Appellant has not moved any application before any forum against his counsel, who represented him before Single Judge in Chamber of High Court, regarding his alleged misconduct--As impugned order was passed against appellant in light of statement made by his counsel before Court, therefore, appellant cannot challenge an order which was passed with consent and as per statement of his counsel--Appeal dismissed. [Para 1] A & B

Mian Asif Mumtaz, Advocate for Appellant.

Mr. Shakeel Javaid Choudhry, Advocate for Respondent No. 3.

Mr. Muhammad Ayyub Buzdar, Assistant Advocate General with *Mr. Muhammad Shahid Sharif*, Circle Officer, ACE, Khanewal.

Date of hearing: 23.1.2020.

ORDER

The instant Intra Court Appeal has been filed against order dated 03.10.2019 passed by the learned Single Judge in Chamber of this Court. Order under appeal dated 03.10.2019 reads as under:

> "Report has been submitted which indicates that inquiry on the basis of charges of getting irrigated land on less price and causing loss to government

exchequer is in progress. Grievance of the petitioner is that the Inquiry Officer is not being providing opportunity of hearing to him nor he is ready to collect documents from petitioner in support of his version.

2. In view of the above stated position, Deputy Director (Legal) A.C.E. Multan present in Court is directed to provide right of audience to the petitioner and collect all relevant documents from him and then finalize the inquiry strictly in accordance with law. With this direction, instant writ petition is disposed of."

It is evident from the perusal of the above-mentioned order under appeal that the said order, was passed on the statement made by learned counsel for the petitioner before the Court. Although learned counsel for the appellant argued that learned counsel representing the appellant before the learned Single Judge in Chamber of this Court has malafidely not pressed the first prayer of the petitioner which was made in the writ petition of the petitioner regarding inquiry pending against the petitioner before the Anti-Corruption Establishment, Multan, to be declared illegal and void but learned counsel for the appellant has conceded before the Court that the appellant has not moved any application before any forum against his counsel, who represented him before the learned Single Judge in Chamber of this Court, regarding his above mentioned alleged misconduct. As the impugned order was passed against the appellant in the light of the statement made by his counsel before the Court, therefore, the appellant cannot challenge an order which was passed with the consent and as per statement of his learned counsel.

2. Resultantly, this appeal is not maintainable and the same is hereby dismissed.

(Y.A.) **Appeal dismissed.**

PLJ 2022 Cr.C. (Note) 112

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMED KHAN, J.**

MUHAMMAD AKRAM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 43133-B of 2021, decided on 15.7.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 376, 337(j)--Bail after arrest, grant of--Further inquiry--Allegation of rap--Victim is a married lady--No allegation of forcible abduction--Victim accompanied petitioner, who promised her to get a job for her--Medico-legal report not showing that any intoxicated material was administered--Post-arrest bail was granted to accused and co-accused on basis of exonerating statement of complainant--Case was one of further inquiry--She (complainant) was administered some intoxicated material by petitioner and one unknown accused through a bottle but neither there is any medico legal report in support of abovementioned allegation showing that any intoxicated material was administered to complainant nor any such material or bottle containing intoxicated material has been recovered in this case--Under circumstances, allegation of rape leveled against petitioner requires further probe--Case of present petitioner is at par with case of co-accused to extent of allegation of rape but as complainant herself has exonerated co-accused from commission of offence through her affidavit and statement made in Court of Addl. Sessions Judge--Prosecution case against petitioner has also become one of further inquiry--Bail allowed. [Para 4] A & B

2017 SCMR 19 and 2011 SCMR 1405.

Rai Ashfaq Ahmad Kharal, Advocate for Petitioner.

Ch. Muhammad Ishaq, Addl. Prosecutor General for State.

Malik Zulfiqar Ali, Advocate for Complainant.

Date of hearing: 15.7.2021.

ORDER

The petitioner, namely, Muhammad Akram through the instant petition seeks post arrest bail in case FIR No. 648 dated 26.02.2021 registered at P.S. City Raiwind District Lahore offences under Sections 376/337-J of PPC.

2. Arguments heard. Record perused.

3. As per brief allegations leveled in the FIR, on 24.02.2021 at about 08:00 p.m., *Mst.* Saima complainant was called by the petitioner on the pretext of giving her a job at a beauty Parlor. The petitioner along with one unknown accused thereafter, took the complainant to Raiwind City at an unknown place where some intoxicated material was administered to her through a bottle and the petitioner and one unknown accused thereafter committed rape with the complainant turn, by turn hence, the abovementioned FIR.

4. It is evident from the perusal of the medico legal report of the complainant that she stated before the Medical Officer that she was living separately from her husband from the last 6/7 months. The complainant is admittedly a married lady therefore, her medico legal report showing her hymen to be old ruptured, is inconsequential. It is true that according to the DNA test report, the petitioner and Ghulam Murtaza co-accused cannot be excluded being contributors towards the semens detected on the vaginal swabs of the complainant but point for determination before this Court is that as to whether it is a case of rape as alleged by the complainant punishable under Section 376 of PPC or it is a case of 'zina' with consent 'punishable under Section 496-B of PPC which is a bailable offence. In this respect, I have noted that no allegation of forcible abduction has been leveled by the complainant against the

petitioner and the complainant herself stated that she accompanied the petitioner and one unknown accused as the petitioner promised to get a job for her in a beauty parlor. Although the complainant alleged that after taking her to an unknown place at Raiwind City, she (complainant) was administered some intoxicated material by the petitioner and one unknown accused through a bottle but neither there is any medico legal report in support of the abovementioned allegation showing that any intoxicated material was administered to the complainant nor any such material or bottle containing intoxicated material has been recovered in this case. Under the circumstances, the allegation of rape leveled against the petitioner requires further probe.

It is further noteworthy that as per DNA test report, Muhammad Akram petitioner and Ghulam Murtaza co-accused both, cannot be excluded being contributors to the semens detected on the vaginal swabs of the complainant. The complainant leveled the allegation of rape against Muhammad Akram and one unknown accused in the contents of the FIR and she subsequently implicated Ghulam Murtaza co-accused in place of one unknown accused through her supplementary statement dated 26.02.2021 but the complainant later on, submitted her affidavit in the Court of learned Addl. Sessions Judge, Lahore wherein she exonerated the abovementioned Ghulam Murtaza co-accused from the commission of the offence and consequently, post arrest bail was granted to the abovementioned co-accused on the basis of exonerating statement of the complainant-According to DNA test report the case of the present petitioner is at par with the case of abovementioned Ghulam Murtaza co-accused to the extent of allegation of rape but as the complainant herself has exonerated the abovementioned co-accused from the commission of offence through her affidavit and statement made in the Court of learned Addl. Sessions Judge, Lahore therefore, prosecution case against the petitioner has also become one of further inquiry, as observed by the Hon'ble Supreme Court of Pakistan in the cases of *'Kaleem Ullah vs. The State and others'* (2017 SCMR 19) & *'Jamshaid Asmat alias Sheedu vs. The State and others'* (2011 SCMR 1405).

5. In the light of above, this petition is allowed and the petitioner is admitted to bail after arrest subject to his furnishing the bail bonds in the sum of Rs. 200,000/- (*Rupees two hundred thousand only*) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed.

PLJ 2022 Cr.C. (Note) 123

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMED KHAN, J.**

SHERAZ and 3 others--Appellants

versus

STATE and another--Respondents

Crl. A. No. 77776 of 2021, decided on 10.1.2022.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Punjab Food Authority Act, (XVI of 2011), Ss. 22-A, 23, 28 & 32--Conviction and sentence--Challenge to--Punjab Food Authority raided on milk manufacturing unit of petitioners--No ownership of place of occurrence was proved by any documentary proof--It is also noteworthy that maximum sentences provided for abovementioned offences under law have been awarded to petitioners by learned trial Court but even said sentences being five (05) years are short one as observed by Hon'ble Supreme Court of Pakistan--Petitioners were on bail as they granted bail during pendency of their trial--There is nothing on record to establish that petitioners misused concession of bail, which was awarded to them during pendency of their trial and as such their case for suspension of their sentences during pendency of their appeal and grant of bail may be considered favorably--Petition allowed.

[Para 4 & 5] A & B 1999 SCMR 2589, 2005 PCr.LJ 657, 2008 MLD 1376, 2019 MLD 358, 2017 YLR (N) 241, 2021 PCr.LJ 1517 & 1994 SCMR 1206.

Pir Muhammad Masood Chishti, Advocate for Appellants.

Ch. Muhammad Ishaq, Addl. Prosecutor-General for State.

Date of hearing: 10.1.2022.

ORDER

Crl. Misc. No 01 of 2021

The petitioners Sheraz, Muhammad Abbas, Azhar Ahmad and Muhammad Ijaz *alias* Allah Rakha through the instant petition seek grant of bail after susrjensipn of

their sentences. The petitioners along with thier co-accused, namely Muhammad Farooq-ur-Rehman (since died) were tried in case FIR No. 34, dated 25.01.2019, registered at Police Station Ahmed Yar, District Pakpattan offences under Sections 22-A/23/28 and 32 of the Punjab Food Authority Act, 2011 as amended in 2016 by the learned Judicial Magistrate Section-30, Arifwala and *vide* impugned judgment dated 29.11.2021, they were convicted and sentenced as under:

> **Under Section 22-A of the Punjab Food Authority Act, 2011 as amended in 2016** to undergo rigorous imprisonment for five years each and payment of fine Rs. 20,00,000/- each or in default to undergo R.I for 15 months each.
>
> **Under Section 23 of the Punjab Food Authority Act, 2011 as amended in 2016** to undergo rigorous imprisonment for six months each and payment of fine of Rs. 10,00,000/- each or in default to undergo R.I for 45 days each.
>
> **Under Section 28 of the Punjab Food Authority Act, 2011 as amended in 2016** to undergo rigorous imprisonment for six months each with fine of Rs. 10,00,000/- each or in default to undergo R.I for 45 days each.
>
> **Under Section 32 of the Punjab Food Authority Act, 2011 as amended in 2016** to undergo rigorous imprisonment for one year each with fine of Rs. 500,000/- each or in default to undergo R.I for three months each.

All the sentences were ordered to run concurrently and benefit of Section 382-B of Cr.P.C. was also given to the convicts/petitioners.

2. Arguments heard and documents annexed with the present petition have been perused.

3. All the petitioners have been convicted and sentenced by the learned trial Court on the ground that on 25.01.2019 the officials of the Punjab Food Authority, Pakpattan Sharif, Food Safety Team of Sahiwal and Dairy Safety Team raided on the synthetic milk manufacturing unit of Petitioners No. 2 to 4 and Muhammad Farooq-ur-Rehman, co-accused (since died). Sheraz, Petitioner No. 1 who was an employee at the above mentioned unit was also present at the time of above mentioned raid. During the raid proceedings different articles of manufacturing

synthetic milk, etc. were recovered from the spot, whereupon the case was registered against the above mentioned petitioners and they were convicted and sentenced by the learned trial Court under the abovementioned provisions of law. It is evident from the perusal of the impugned judgment that no documentary proof regarding the ownership of the place of occurrence, in the names of the petitioners has been brought on the record to establish that the above mentioned unit was owned or taken on rent by the petitioners. Furthermore there is no mention of any report of the Punjab Forensic Agency in the impugned judgment to establish that any adulterated milk was prepared by the petitioners.

4. It is also noteworthy that the maximum sentences provided for the abovementioned offences under the law have been awarded to the petitioners by the learned trial Court but even the said sentences being five (05) years are short one as observed by the Hon'ble Supreme Court of Pakistan in the case of *"Abdul Hameed vs. Muhammad Abdullah and others'* (1999 SCMR 2589). Similar view was taken in the judgments reported as *"Nazeer Ahmed and 2 others vs. The State"* (2005 PCr.LJ 657), *"Mahmood Iqbal vs. The State"* (2008 MLD 1376), *"Rahim Bux Soomro vs. The State through Director General (NAB)"* (2019 MLD 358), *"Muhammad Ibrahim vs. The State"* (2017 YLR Note 241) and *"Muhammad Riaz vs. The State and others "* (2021 PCr. L J 1517). The appeal filed by the petitioners pertains to the year 2021 and the same has P already been admitted for regular hearing *vide* order, dated 13.12.2021. There is no probability of early decision of the main appeal in the near future, therefore, possibility cannot be ruled out that the petitioners may serve out the entire sentences awarded to them by the leaned trial Court before the decision of their main appeal on merits, which will amount awarding punishment to the petitioners in advance.

5. It is also noteworthy from the perusal of Para No. 41 of the impugned judgment that all the petitioners were on bail as they granted bail during the pendency of their trial. There is nothing on the record to establish that the petitioners misused the concession of bail, which was awarded to them during the pendency of their trial and as such their case for suspension of their sentences during the pendency of their

appeal and grant of bail may be considered favorably. Reference in this context may be made to the case of *"Rafaqat Ahmad vs. The State"* (1994 SCMR 1206). Resultantly, this petition is **allowed** and the sentences awarded to the petitioners by the learned trial Court *vide* the above mentioned impugned judgment are suspended and they are directed to be released on bail subject to their furnishing the bail bonds in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only) with one surety each in the like amount, to the satisfaction of the Deputy Registrar (Judicial) of this Court.

(A.A.K.) **Petition allowed.**

PLJ 2022 Cr.C. 135 (DB)

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN AND CH. MUSHTAQ AHMED, JJ.**

RIAZ AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. A. No. 11595 of 2019, decided on 12.10.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9--PFSA report--Protocols--CNS (Government Analyst) Rules, 2001--Appreciation of evidence--Acquittal of--Opium weighing 1110-grams was recovered from the shopper bag caught by the appellant--Since the provisions of The Control of Narcotic Substances Act, 1997, provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused--Any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under Section 36(2) of the Act--Rule 6 of CNS(Government Analyst) Rules, 2001 makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory--Report of PFSA, Lahore is not in line with the principles enunciated by the august Supreme Court of Pakistan--Report of the PFSA produced in evidence of this case by the prosecution as is also not worthy of reliance--Appellant is acquitted.

[Pp. 137, 138 & 139] A, B, C, D, E

PLD 2004 SC 856; PLD 2012 SC 380; 2018 SCMR. 2039; 2019 SCMR 930; 1995 SCMR 1345; 2008 SCMR 06; 2014 SCMR 749 *ref.*

Mr. Saleem Ullah Khan Balouch Advocate for Appellant.

Mr. Waqas Anwar, Deputy Prosecutor General for State.

Date of hearing: 12.10.2020.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This appeal is directed against judgment dated 30.11.2018, passed by the learned Additional Sessions Judge, Pindi Bhattian, whereby, in case F.I.R No. 135 dated 02.03.2017, registered at Police Station Jalalpur Bhattian under Section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Riaz Ahmad, appellant and sentenced him as under:

> ***Under Section 9(c) of Control of Narcotic Substances Act, 1997*** *to four years R.I with fine of Rs. 8,000/-and in default of payment thereof the appellant was directed to further undergo S. I for four months and fifteen days.*
>
> *The benefit of Section 382-B, Cr.P.C. was also extended to the appellant.*

2. Briefly, the accusation levelled in the FIR against the appellant is that on 02.03.2017 at 3:50 P.M., Muhammad Yaqoob, SI (complainant/PW-1), along with other police officials, on spy information, conducted a raid and apprehended Riaz Ahmad (appellant). During search of the appellant opium weighing 1110-grams was recovered from the shopper bag caught by the appellant in his right hand. The above mentioned recovered opium was sealed into a separate parcel and the same was sent for Chemical Analysis. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 31.03.2017, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced six witnesses to prove its case. The learned Additional Sessions Judge, Pindi Bhattian, after recording the statement of the appellant under Section 342, Cr.P.C. and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PD); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record Perused.

7. It is by now well settled that since the provisions of The Control of Narcotic Substances Act, 1997, provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of *"Muhammad Hashim v. The State"* (PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of *"Ameer Zeb v. The State"* (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the above mentioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of sample of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:-

Item No. Description of Evidence

01. One sealed parcel containing approximately 1110 gram(s) of suspected Opium.

Tests Performed on Received Item(s) of Evidence

1. Top-Load Balance was used for weighing.

2. Chemical Spot Tests were used for Presumptive Testing.

3. Gas Chromatograph-Mass spectrometry was used for confirmation.

Results and Conclusion:-

Item #01 **1115.6 gram(s)** of blackish brown resinous material in sealed parcel contains **Opium**.

Undisputedly, it is settled by now that any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under Section 36(2) of the Act *ibid*. In the report Ex.PE, it is simply mentioned that certain tests were conducted and contraband material recovered in this case was found to be Opium instead of mentioning the details of tests applied on the samples and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

8. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency, Lahore is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of *"The State through Regional Director ANF vs. Imam Bakhsh and others"* (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:

> 16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, *i.e.*, control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give

details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (*supra*)".

The above said view has been further fortified in the recent case law titled as *"Khair-ul-Bashar vs. The STate"* (2019 SCMR 930). We have also requisitioned the attested copy of FIR in case of ***"Khair-ul-Basher"*** (*supra*) *i.e.*, FIR No. 18, dated 15.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of ***"Khair-ul-Basher"*** (*supra*) is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of ***"Khair-ul-Basher"*** (*supra*) has not been relied upon by the august Supreme Court of Pakistan, therefore, report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

9. Learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the above mentioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but we have noted that the august Supreme Court of Pakistan in the case of ***"Khair-ul-Bashar"*** (*supra*), acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore. Even otherwise, it is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about the veracity of prosecution ease and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right. Reliance in this regard is placed upon the cases of *"Tariq Pervez vs.*

The State" (1995 SCMR 1345), *"Akhtar Ali and others vs. The State"* (2008 SCMR 06) and *"Muhammad Zaman vs. The State and others"* (2014 SCMR 749).

10. In the light of above discussion, the instant appeal (Crl. Appeal No. 11595 of 2019), is allowed, impugned judgment dated 30.11.2018, passed by the learned Additional Sessions Judge, Pindi Bhattian is hereby set aside and Riaz Ahmad (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

(K.Q.B.) **Appeal allowed.**

PLJ 2022 Cr.C. (Note) 163

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMED KHAN, J.**

SAJIDA BIBI *alias* SHAZIA BIBI--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, SHEIKHUPURA etc.--Respondents

Crl. Rev. No. 8596 of 2022, decided on 11.2.2022.

Criminal Procedure Code, 1898 (V of 1898)--

----Ss. 435/439--Criminal revision--Application to produce witness--Application to produce defence witness was submitted by accused himself whereas in instant case accused/petitioner has not moved any application for examination of Respondent No. 2 as a deferce witness rather she has categorically mentioned in her statement recorded u/S. 342, Cr.P.C. that she does not want to produce any witness/evidence in her defence--Application was moved by complainant to produce two doctors and report of medical board but as mentioned earlier in instant case neither complainant nor Public Prosecutor or accused moved any application for recording statement of Respondent No. 2 in this case--Likewise remaining judgments are also distinguishable on their own facts--Revision petition was dismissed. [Para 4] A & B

PLD 1971 SC 709, PLD 1984 SC 95, 2001 SCMR 308 & 2011 SCMR 713.

Rai Ashfaq Ahmad Kharal, Advocate for Petitioner.

Date of hearing: 11.2.2022.

ORDER

This revision petition has been filed by the petitioner against order, dated 29.01.2022, passed by the learned Addl. Sessions Judge, Sheikhupura whereby application filed by Waseem Mumtaz, Respondent No. 2 for recording his statement as DW was dismissed by the learned trial Court.

2. ***Heard***.

3. I have noted that Waseem Mumtaz, Respondent No. 2 moved an application before the learned trial Court for recording his statement as DW on the ground that in fact he had illicit relationship with the female principal accused of this case (petitioner) and on the night of occurrence the deceased, who was husband of the said accused (petitioner) saw them in compromising position whereupon he tried to commit the murder of above mentioned accused. The said Waseem Mumtaz snatched the pistol from the deceased and made four fire shots on him. He prayed that his above-referred statement may be recorded as DW.

4. The occurrence of this case took place on 26.01.2021 and the application was moved by Respondent No. 2 on 28.01.2022 *i.e.* with the delay of more than one year of the occurrence. Throughout the abovementioned period Respondent No. 2 never appeared before the police or high-ups of the police in support of his abovementioned claim. He did not move any application before any Court or *Ex-officio* Justice of Peace for bringing his above mentioned stance on the record. It is further noteworthy that even the petitioner/accused of this case, namely Sajida Bibi *alias* Shazia Bibi, while recording her statement under Section 342, Cr.P.C. categorically stated that she does not want to produce any witness/evidence in her defence. Respondent No. 2 at his own moved the above-referred application for recording of his statement as a defence witness whereas the petitioner/accused herself did not move any such application. Respondent No. 2 is neither cited as a prosecution witness nor his name has been given by the petitioner/accused as a defence witness. Under the circumstances, learned trial Court has rightly observed in the impugned order, dated 29.01.2022, that the abovementioned application has been moved by Respondent No. 2, who is not a party in this case at the time of final arguments of the case with *mala fide* intention just to linger on the proceedings of the trial in the instant case. The facts of the judgments cited by learned counsel for the petitioner reported as *"Rashid Ahmad vs. The State"* (PLD 1971 Supreme Court 709), *"Muhammad Azam vs. Muhammad Iqbal and others"* (PLD 1984 Supreme Court 95), *"The State vs. Muhammad Yaqoob and others"* (2001 SCMR 308) and *"Ansar Mehmood vs. Abdul Khaliq and another"* (2011 SCMR 713) are distinguishable from the facts of the present case. In the case of *Rashid Ahmad supra* the application to produce defence witness was submitted by the accused himself whereas in the instant case the accused/petitioner has not moved any application for examination of Respondent No. 2 as a defence witness rather she has categorically mentioned in her statement recorded under Section 342, Cr.P.C. that she does not want to produce any witness/evidence in her defence. Likewise, in the case of *Ansar Mehmood, ibid,* the application was moved by the complainant to produce two doctors and report of medical board but as mentioned earlier in the instant case neither the complainant nor the Public Prosecutor or the accused moved any application for recording the statement of Respondent No. 2 in this case. Likewise the remaining judgments are also distinguishable on their own facts. In the light of above discussion, there is no substance in this petition therefore, the same is hereby dismissed *in limine.*

(A.A.K.) **Revision dismissed.**

PLJ 2022 Cr.C. 397 (DB)

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD TARIQ NADEEM, JJ.**

MUHAMMAD ASHRAF--Appellant

versus

STATE and another--Respondents

Crl. A. No. 115212 & M.R. No. 672 of 2017, decided on 13.10.2021.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Appellant gave consecutive blows of *Churri* to (deceased), which landed on different parts of her body--Number of injuries inflicted on body of (deceased) shows that assailant was highly provoked against deceased--Motive alleged by prosecution was true even then there was no reason with appellant to inflict as many as fourteen injuries on body--Total twenty injuries were sustained by (deceased) during occurrence and as such there is conflict between ocular account and medical evidence of prosecution--There was possibility that injuries on body of (deceased) were caused with more than one weapon--Deelay in conducting post-mortem examination on dead-body of deceased is suggestive of fact that prosecution story has been cooked up and fake eye-witnesses have been introduced by prosecution in this case--Trial Court disbelieved prosecution story qua above-mentioned co-accused and acquitted them *vide* same impugned judgment--No appeal has been filed against acquittal--From perusal of evidence of prosecution eye-witnesses that they stood like silent spectators at time of occurrence and did not take a single step to rescue deceased--It is not save to rely upon prosecution evidence qua alleged recovery of *Churri* on pointation of appellant and positive report of Punjab Forensic Science Agency--Prosecution has failed to prove its case against appellant beyond shadow of doubt, criminal appeal accepted.

[Pp. 399, 404, 405, 406, 407, 408, 409 & 410] A, C, D, E, F, G, H, I, J & K

Statement of an accused--

----Statement of an accused is to be accepted or rejected in toto and it is legally not permissible to accept inculpatory part of statement of an accused and reject exculpatory part of same statement. [P. 403] B

Ms. Sheeba Qaisar, Advocate for Appellant.

Rai Asghar Hussain, Deputy Prosecutor General for State.

Ch. Naveed Aslam Randhawa, Advocate and Ch. Muhammad Saeed Gujjar, Advocate for Complainant.

Date of hearing 13.10.2021.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall dispose of Criminal Appeal No. 115212 of 2017, filed by Muhammad Ashraf (appellant) against his conviction and sentence and Murder Reference No. 672 of 2017, sent by the learned trial Court for confirmation or otherwise of the Death sentence of Muhammad Ashraf (appellant). We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 28.11.2017, passed by the learned Additional Sessions Judge, Faisalabad.

2. Muhammad Ashraf (appellant) along with Muhammad Amjad (co-accused since acquitted) and *Mst.* Najma Bibi (co-accused since acquitted) was tried in case F.I.R. No. 531/2016 dated 25.08.2016, registered at Police Station D-Type Colony, Faisalabad, in respect of offences under Sections 302/34, PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 28.11.2017, has convicted and sentenced the appellant as under:

> ***Under Section 302(b), PPC*** *to 'Death' for committing Qatl-i-Amd of Mst. Bashiran Bibi (deceased). He was also ordered to pay Rs. 3,00,000/-(rupees three hundred thousand only) to the legal heirs of the deceased and in default thereof to further undergo six months simple imprisonment.*

However, *vide* the same impugned judgment, the learned trial Court/ Additional Sessions Judge, Faisalabad acquitted Muhammad Amjad and *Mst.* Najma Bibi (co-accused), while extending them the benefit of doubt.

3. Brief facts of the case as given by Muhammad Akram complainant (PW-5) in his complaint (Ex.PG), on the basis of which the formal FIR (Ex.PC) was chalked out, are that on 25.08.2016, at about 3.30 p.m, wife of Muhammad Akram complainant (PW-5), namely *Mst.* Bashiran Bibi (deceased) went to Main Bazar Sohailabad for purchasing grocery items but she did not return back for a considerable period. Muhammad Akram complainant (PW-5), therefore, went to the Main Bazar in search of his wife *Mst.* Bashiran Bibi (deceased) and during the said search he (complainant) came to know that Muhammad Ashraf (appellant) had forcibly taken *Mst.* Bashiran Bibi (deceased) to his house. Muhammad Akram complainant (PW-5), went to the house of Muhammad Ashraf (appellant) and when he reached outside the house of the appellant, he (complainant) heard noise of quarrel of Muhammad Ashraf (appellant) with *Mst.* Bashiran Bibi (deceased) from the Bhaitik of the said house. The complainant opened the door and saw that Muhammad Ashraf was standing while armed with *Churri*. On hearing hue and cry, Abdul Sattar (PW since given-up) and Asghar Ali (PW-6), who were passersby, came at the spot. Within the view of the complainant and the witnesses, Muhammad Ashraf (appellant) gave consecutive blows of *Churri* to *Mst.* Bashiran Bibi (deceased), which landed on the different parts of her body. *Mst.* Bashiran Bibi (deceased), fell at the spot after sustaining injuries. The complainant party, when tried to apprehend Muhammad Ashraf (appellant), Amjad (co-accused since acquitted), while armed with pistol 30 bore came outside the house and threatened the complainant party that if anybody would come near, then he shall be done to death. The accused persons thereafter fled away from the spot, whereas *Mst.* Najma Bibi (co-accused since acquitted) put lock on the Bhaitik of the house from the out-side. The complainant party after breaking open the lock, tried to take *Mst.* Bashiran Bibi (deceased) to the hospital but she succumbed to the injuries in the way.

The motive behind the occurrence was that Muhammad Ashraf (appellant) wanted the "*rishta*" (hand) of the complainant's daughter for his son but *Mst.* Bashiran Bibi (deceased) did not accept this offer and she contracted the marriage of her daughter somewhere else, therefore, for the said grudge, the occurrence was committed by the appellant.

4. Muhammad Ashraf (appellant) was arrested in this case on 01.09.2016 by Muhammad Usman Inspector (PW-9). On 09.09.2016, he (appellant) disclosed and then led to the recovery of *Churri* (P-4), which was taken into possession *vide* recovery memo. (Ex.PJ). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 05.11.2016, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced nine witnesses during the trial. Muhammad Akram complainant (PW-5) and Asghar Ali (PW-6), are the witnesses of ocular account.

Shabbir Hussain (PW-7), is the witness of the recovery of *Churri* (P-4), which was recovered on the pointation of the appellant *vide memo.* (Ex.PJ).

The medical evidence was furnished by Lady Doctor Zuneera Misbah (PW-4).

Muhammad Usman Inspector (PW-9), is the Investigating Officer of the case.

Muhammad Nawaz draftsman (PW-1), Zahid Shareef 7018/C (PW-2), Waqas Akhtar 244/HC (PW-3) and Allah Rakha (PW-8) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of scaled site plan of the place of occurrence (Ex.PA), memo. of possession of blood stained, last worn clothes of *Mst.* Bashiran Bibi deceased (Ex.PB), complaint (Ex.PC), post-mortem report and pictorial diagrams of the deceased (Ex.PD & Ex.PD/1), application for conducting post-mortem examination of the deceased (Ex.PE), inquest report (Ex.PF), F.I.R (Ex.PG), memo. of possession of blood stained cotton from the spot (Ex.PH), memo. of possession of blood stained *Churri* (Ex.PJ), site plan of the place of recovery of *Churri* (Ex.PJ/1), rough site plan of the place of occurrence (Ex.PK), report of the Punjab Forensic Science Agency, Lahore about blood stained cotton and *Churri* (Ex.PL) and closed its evidence.

6. The statement of the appellant under Section 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While

answering to a question that 'Why this case against you and why the PWs have deposed against you" the appellant replied as under:

> *"It is a false case and I have been roped in this case falsely. In fact the deceased had illicit relations with me since long and she generally remained with me in my house. Due to this, Bashiran Bibi (deceased) demanded divorce from the complainant but he refused. On the day of occurrence deceased visited my house on her free will and remained with me for a long time. Meanwhile complainant along with PWs came there. They were angry with her (deceased). Complainant abused me and tried to kill me but I fled away from the spot to save my life but Bashiran Bibi (deceased) was caught by complainant and PWs and they inflicted Churri blows one after another till her death. Due to this grudge complainant falsely involved me and my co-accused persons in this false case. The PWs are inter se relation and also related with the complainant. They falsely deposed against me only to take grudge of my illicit relations with the deceased and to strengthen this false prosecution case".*

The appellant Muhammad Ashraf neither opted to make statement on oath as envisaged under Section 340(2) Of, Cr.P.C. nor he produced any evidence in his defence.

The learned trial Court *vide* its judgment dated 28.11.2017, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant contends that the appellant is absolutely innocent and has falsely been implicated in this case by the complainant being in-league with the local police; that in fact Muhammad Akram complainant (PW-5), who is husband of *Mst.* Bashiran Bibi (deceased) had suspicion of illicit relations of *Mst.* Bashiran Bibi (deceased) with Muhammad Ashraf (appellant), therefore, he committed the murder of *Mst.* Bashira Bibi and falsely roped the appellant in this case; that the story narrated by the prosecution eye-witnesses does not appeal to a prudent mind and there are glaring contradictions in the ocular account and the medical evidence of the prosecution because no number of injuries sustained by *Mst.* Bashiran Bibi (deceased) was mentioned by the complainant in the contents of the FIR, whereas the prosecution

eye-witnesses while appearing before the learned trial Court stated that the appellant inflicted fourteen injuries with the help of *Churri* on the body of *Mst.* Bashiran Bibi (deceased) but if the post-mortem examination report of the deceased is examined minutely, then it would reveal that in fact *Mst.* Bashiran Bibi deceased received total twenty (20) injuries on her body and as such there is conflict between the ocular account and medical evidence of the prosecution; that the conduct of the prosecution eye-witnesses is highly un-natural because according to the prosecution story, the complainant party was comprising of three adult male members but they did not try to save the life of *Mst.* Bashiran Bibi (deceased), when the appellant was not armed with any formidable firearm weapon; that there are glaring contradictions in the prosecution evidence because according to the evidence of the prosecution eye-witnesses namely Muhammad Akram complainant (PW-5) and Asghar Ali (PW-6), they took *Mst.* Bashiran Bibi (deceased) after the occurrence, in injured condition to the hospital but according to the statement of Muhammad Usman Inspector/I.O (PW-9), the dead-body of *Mst.* Bashiran Bibi (deceased) was lying at the place of occurrence at the time of his visit of the spot; that the daughter of the complainant has not been produced in the witness box to prove the alleged motive; that according to the report of Punjab Forensic Science Agency, Lahore (Ex.PL), *Churri* was deposited by Muhammad Usman Inspector (PW-9), in the office of Punjab Forensic Science Agency, Lahore but the said witness has not deposed in his evidence that he received the said *Churri* from the *Moharrar mall-khana* of the police station and deposited the same in the office of Punjab Forensic Science Agency, Lahore; that the impugned judgment is result of misreading and non-reading of evidence; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, he (appellant) may be acquitted from the charge.

8. On the other hand, learned Deputy Prosecutor General, for the State, assisted by learned counsel for the complainant has argued that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the occurrence took place on 25.08.2016 at 03.30 p.m, whereas the FIR was promptly lodged on the same day at 05.45 p.m and as such the promptness of the FIR rules out the possibility of any concoction or deliberation in the prosecution story; that the prosecution eye-witnesses stood the test of lengthy cross-examination but their evidence could not be

shaken; that the appellant is named in a promptly lodged FIR with the specific role that he inflicted repeated *Churri* blows on the body of *Mst.* Bashiran Bibi (deceased) and the role attributed to the appellant has fully been supported by the medical evidence furnished by the prosecution through Lady Doctor Zuneera Misbah (PW-4); that the appellant has himself admitted during the cross-examination of the PWs, as well as, in his statement recorded under Section 342 Of, Cr.P.C. regarding the commission of offence in his house and presence of the complainant and the prosecution witnesses at the time of occurrence; that the motive of the prosecution case was also proved through reliable and confidence inspiring evidence of the prosecution witnesses; that the prosecution case against the appellant has further been corroborated by the recovery of *Churri* (P-4), on the pointation of the appellant and positive report of Punjab Forensic Science Agency, Lahore (Ex.PL); that the appellant has committed a brutal and reckless murder of an innocent lady, therefore, he does not deserve any leniency, in the quantum of his sentence; that the sentence of death was rightly awarded to the appellant, therefore, the same may be maintained, appeal filed by the appellant be dismissed and Murder Reference be answered in the affirmative.

9. **We have heard the arguments of learned counsel for the appellant, learned counsel for the complainant, as well as, learned Deputy Prosecutor General and have also gone through the evidence available on the record with their able assistance.**

10. The detail of the prosecution case as set forth in the FIR (Ex.PC) has already been given in Para No. 3 of this judgment, therefore, there is no need to repeat the same.

11. We have noted that it was the case of the appellant in his statement recorded under Section 342 Of, Cr.P.C., as well as, during cross-examination of the prosecution witnesses that in fact *Mst.* Bashiran Bibi (deceased) had been murdered by her husband namely Muhammad Akram complainant (PW-5), because *Mst.* Bashiran Bibi deceased had illicit relations with the appellant and due to the said reason, when *Mst.* Bashiran Bibi (deceased) came to the house of the appellant on the day of occurrence, the complainant also came there and committed murder of *Mst.* Bashiran Bibi (deceased), whereas the appellant fled away from the spot. On the other hand, it is case of the prosecution that in fact Muhammad Ashraf (appellant) wanted "*rishta*"

(hand) of the daughter of the complainant for his son but *Mst.* Bashiran Bibi (deceased) refused to give "*rishta*" (hand) of her daughter to the son of the appellant, therefore, the appellant, on the day of occurrence forcibly took *Mst.* Bashiran Bibi (deceased) from the main bazar towards his Bhaitik and thereafter committed his murder by inflicting repeated *Churri* blows on her body. Insofar as the defence version of the appellant brought on the record through his statement recorded under Section 342 of Cr.P.C. and argument of learned counsel for the complainant that the defence (appellant) has thus admitted the presence of the complainant and prosecution eye-witnesses at the spot at the time of occurrence, is concerned, it is noteworthy that although the appellant admitted during his abovementioned statement that he had illicit relations with *Mst.* Bashiran Bibi (deceased) but he has not admitted that they ever committed zina with each other. The nature of above-mentioned illicit relationship is not determinable in his case because no detail of said relationship has been brought on the record by the defence, whereas, no such allegation has been levelled by the prosecution. No charge was framed by the learned trial Court for offence of zina. Insofar as the remaining part of the above-referred statement of the appellant is concerned, no offence is made out against the appellant from the perusal of said part of his statement because he categorically stated that he fled away from the place of occurrence at the time of murder of *Mst.* Bashiran Bibi (deceased) at the hands of the complainant and the PWs, therefore, no judgment of conviction can be passed against the appellant on the basis of abovementioned statement. It is by now well settled that statement of an accused is to be accepted or rejected in toto and it is legally not permissible to accept inculpatory part of the statement of an accused and reject exculpatory part of the same statement, when otherwise the prosecution evidence is not worthy of reliance. Reference in this context may be made to the case of *'Muhammad Asghar v. The State'* (PLD 2008 Supreme Court 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:

> *'It is settled law by now that a statement of an accused recorded under Section 342, of Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to*

the case of 'Shabbir Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as 'Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under Section 342, of Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him.'

We are, therefore, of the view that no benefit could be extended to the prosecution merely on the basis of above-mentioned statement of the appellant, without first determining that the prosecution has itself discharged its initial burden or not to prove its case against the appellant beyond the shadow of any doubt. We, therefore, proceed to decide the instant case after perusal of the prosecution evidence available on the record to determine the above-mentioned question.

12. Admittedly the occurrence in this case took place inside the *Bhaitik* of the house of Muhammad Ashraf (appellant). The motive alleged by the prosecution that the appellant committed murder of *Mst.* Bashiran Bibi (deceased) on the grudge that the deceased refused to give the "*rishta*" (hand) of her daughter to the son of the appellant does not appeal to a prudent mind because according to the post-mortem report of the deceased, there were fourteen stab and incised wounds on the body of the deceased. The number of injuries inflicted on the body of *Mst.* Bashiran Bib (deceased) shows that the assailant was highly provoked against the deceased, therefore, he inflicted the abovementioned large number of injuries on her body in a merciless manner. There was no reason to commit the murder of *Mst.* Bashiran Bibi (deceased) in such a merciless and brutal manner, only on the ground of her refusal to give "*rishta*" (hand) of her daughter to the son of the appellant. If for the sake of arguments, it is presumed that the abovementioned motive alleged by the prosecution was true even then there was no reason with the appellant to inflict as many as fourteen injuries on the body

of *Mst.* Bashiran Bibi (deceased) for the above-referred reason. Moreover, there was no need for the appellant to forcibly drag *Mst.* Bashiran Bibi (deceased) from the bazar towards inside the Bhaitik of his house for inflicting injuries on her body. The appellant could have done so in the bazar. It is further noteworthy that name of the daughter of the complainant or the son of the appellant regarding whom the deceased did not agree for giving "*rishta*" (hand) has not been mentioned by any prosecution witness. Furthermore, the daughter of the complainant did not appear in the witness-box to prove the abovementioned alleged motive. We are, therefore, of the view that the motive part of the prosecution story has not been proved in this case.

13. We have further noted that the complainant did not mention any number of injuries sustained by *Mst.* Bashiran Bibi (deceased), in the contents of the FIR. Although the prosecution eye-witnesses namely Muhammad Akram complainant (PW-5) and Asghar Ali (PW-6), while appearing in the witness box have stated that the appellant inflicted as many as fourteen injuries with the help of *Churri* on the body of *Mst.* Bashiran Bibi (deceased) but minute perusal of the post-mortem report of the deceased and evidence of Lady Doctor Zuneera Mishbah (PW-4), shows that against Injury No. 2, four independent stab wounds of different sizes have been mentioned on the left breast of the deceased. Likewise against Injury No. 13, four independent incised wounds of different sizes on outer part of left thigh of the deceased have again been mentioned by the Medical Officer. Meaning thereby that total twenty injuries were sustained by *Mst.* Bashiran Bibi (deceased) during the occurrence and as such there is conflict between the ocular account and the medical evidence of the prosecution.

It is further noteworthy that according to the prosecution's case, it was only Muhammad Ashraf (appellant), who inflicted all the above-mentioned injuries with the help of *Churri* on the body of *Mst.* Bashiran Bibi (deceased) but according to the medical evidence furnished by Lady Doctor Zuneera Misbah (PW-4), sizes of stab wounds against Injury No. 2 were 1.5 cm x 1 cm, 2cm x 1 cm, 1 cm x 1 cm and 1.5 cm x 1.5 cm, respectively, whereas against Injury No. 3, sizes of the stab wounds were 3 cm x 1.5 cm and against Injury No. 5, the size of the stab wound was 7 cm x 3 cm. Lady Doctor Zuneera Misbah (PW-4), during her cross-examination has

admitted that there was possibility that injuries on the body of *Mst.* Bashiran Bibi (deceased) were caused with more than one weapon.

14. We have also noted that the occurrence in this case took place on 25.08.2016, at about 3.30 p.m. The post-mortem examination on the dead-body of *Mst.* Bashiran Bibi (deceased) was conducted on the next day (26.08.2016), at about 10.00 a.m *i.e.*, with the delay of about 18½ hours from the time of occurrence. Lady Doctor Zuneera Misbah (PW-4) in her examination-in-chief has categorically stated that the dead-body was received in mortuary on 25.08.2016 at 6.30 p.m, whereas the police documents were presented to her on 26.08.2016 at 10.00 a.m and thereafter she conducted post-mortem examination on the dead-body of *Mst.* Bashiran Bibi (deceased) at 10.00 a.m. Although Muhammad Akram complainant (PW-5), in his examination-in-chief stated that when they (complainant party) took the dead-body of *Mst.* Bashiran Bibi (deceased) to the hospital, the time of post-mortem examination was already over but no such statement has been made by Lady Doctor Zuneera Misbah (PW-4) that when the dead-body of *Mst.* Bashiran Bibi (deceased) was received in the mortuary on 25.08.2016, at 6.30 p.m, the time of post-mortem examination was already over. On the other hand, she categorically stated that the police papers were handed over to her on 26.08.2016 at 10.00 a.m and thereafter she conducted post-mortem examination on the dead-body of *Mst.* Bashiran Bibi (deceased). The above-mentioned gross delay in conducting post-mortem examination on the dead-body of the deceased is suggestive of the fact that the prosecution story has been cooked up and fake eye-witnesses have been introduced by the prosecution in this case. We may refer here the case of *"Irshad Ahmad versus The State"* (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the deadbody had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted. Similarly, in the case of *Khalid alias Khalidi and two others vs. The State* (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post-mortem examination on the deadbody of deceased, to be an adverse fact against

the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as *"Muhammad Ashraf vs. The State"* (2012 SCMR 419), *"Muhammad Ilyas vs. Muhammad Abid alias Billa and others"* (2017 SCMR 54) and *"Zafar vs. The State and others"* (2018 SCMR 326).

15. It is further noteworthy that the conduct of the prosecution eye-witnesses at the time of occurrence is highly un-natural because according to the prosecution's own case, the accused party was comprising of two adult male members namely Muhammad Ashraf (appellant), Amjad (co-accused since acquitted) and a female member namely *Mst.* Najma Bibi (co-accused since acquitted), whereas the complainant party was comprising of three male adult members but they did not try to save *Mst.* Bashiran Bibi (deceased) at the time of occurrence and they allowed the appellant to inflict as many as twenty (20) injuries on the body of the deceased. Although the prosecution eye-witnesses have given the reason that as Amjad (co-accused since acquitted) threatened them (complainant party) with his pistol and after the occurrence *Mst.* Najma Bibi (co-accused since acquitted) locked the door of Bhaitik, where the occurrence took place, therefore, they could not save *Mst.* Bashiran Bibi (deceased) or apprehend the appellant at the time of occurrence but we have noted that both the abovementioned co-accused (Amjad and *Mst.* Najma Bibi) were declared innocent during the course of police investigation and the prosecution case to their extent was found to be false. Furthermore, no pistol was recovered from the possession of Amjad (co-accused since acquitted). Likewise no broken lock was recovered from the spot to support the allegation levelled against *Mst.* Najma Bibi co-accused. It is also noteworthy that the learned trial Court disbelieved the prosecution story qua the above-mentioned co-accused and acquitted them *vide* the same impugned judgment. No appeal has been filed against the acquittal of abovementioned Amjad and *Mst.* Najma Bibi (co-accused) by the State or the complainant, which fact has been conceded by the learned Deputy Prosecutor General for the State and learned counsel for the complainant, present before the Court. Under the circumstances, the acquittal of above-mentioned co-accused has attained finality, therefore, it is established that the abovementioned co-accused were not present at the

spot at the relevant time and Muhammad Ashraf (appellant) was alone at that time but the complainant party, which was comprising of three adult male members did not try to save *Mst.* Bashiran Bibi (deceased) from the hands of Muhammad Ashraf (appellant) and allowed him to inflict as many as twenty injuries on her body. They did not even apprehend the appellant after the occurrence, when the appellant was not armed with any formidable firearm weapon. They also did not try to stop *Mst.* Najma (co-accused since acquitted) from locking the door of Bhaitik from outside, where the occurrence took place. Relevant part of the statement of Muhammad Akram complainant (PW-5), in this respect reads as under:

> *……. I did not enter into the baithak and remained standing outside. Ashraf accused and Bashiran deceased were standing inside the baithak at the time of occurrence when I witnessed. I was still outside the baithak when PWs Asghar and Abdul Sattar reached the place of occurrence. We were three persons and we tried to save Bashiran deceased. We did not enter into the baithak despite the door was opened. We were standing outside baithak and in our view the accused gave blows of churrri to the Bashiran deceased……."*

……..

……..

> *……. "In our presence Najma accused locked the door from the outer side we did not intervened because she was a lady ……"*

It is evident from the perusal of the evidence of the prosecution eye-witnesses that they stood like silent spectators at the time of occurrence and did not take a single step to rescue the deceased. *Mst.* Bashiran Bibi (deceased) was wife of Muhammad Akram complainant (PW-5), whereas Asghar Ali (PW-6), was "behnoi" (brother-in-law) of the complainant and Abdul Sattar (PW since given-up) was "Bhatija" (nephew) of the complainant. They were closely related to *Mst.* Bashiran Bibi (deceased). Had the abovementioned eye-witnesses been present at the spot at the time of occurrence as claimed by them then they could have saved *Mst.* Bashiran Bibi (deceased) or apprehend the appellant at the spot. Their conduct is un-natural thus their evidence is un-trustworthy. We may refer here the case of *"Pathan v. The State"*

(2015 SCMR 315), wherein at Para No. 5, of the judgment, the august Supreme Court of Pakistan was pleased to observe as under:

> *"The presence of witnesses on the crime spot due to their unnatural conduct has become highly doubtful, therefore, no explicit reliance can be placed on their testimony. They had only given photogenic/photographic narration of the occurrence but did nothing nor took a single step to rescue the deceased. The causing of that much of stab wounds on the deceased loudly speaks that if these three witnesses were present on the spot, being close blood relatives including the son, they would have definitely intervened, preventing the accused from causing further damage to the deceased rather strong presumption operates that the deceased was done to death in a merciless manner by the culprit when he was at the mercy of the latter and no one was there for his rescue ……....."*

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of *"Zafar v. The State and others"* (2018 SCMR 326) and *"Liaquat Ali vs. The State"* (2008 SCMR 95).

16. We have further noted that according to the statement of Muhammad Akram complainant (PW-5) and Asghar Ali (PW-6), after the occurrence they shifted *Mst.* Bashiran Bibi (deceased), in injured condition to the Allied Hospital, Faisalabad but she succumbed to the injuries on the way, whereas according to the statement of Muhammad Usman Inspector/I.O (PW-9), he visited the spot on 25.08.2016, after receiving the information regarding this occurrence and found that the dead-body of *Mst.* Bashiran Bibi was lying there. He further stated that he dispatched the dead-body of *Mst.* Bashiran Bibi through Zahid Sharif 7018/C (PW-2) for the purpose of autopsy. Likewise in inquest report (Ex.PF), the dead-body of the deceased has been shown lying at Mohallah Sindhuwan 223-RB, Faisalabad. We are, therefore, of the view that the prosecution evidence is self-contradictory.

17. Insofar as the recovery of *Churri* (P-4), on the pointation of Muhammad Ashraf (appellant) and positive report of Punjab Forensic Science Agency, Lahore is concerned, we have noted that according to the report of the Punjab Forensic Science Agency, Lahore (Ex.PL), the *Churri* (P-4) was deposited in the office of above-

mentioned Agency by Muhammad Usman Inspector (PW-9) but Muhammad Usman Inspector (PW-9) while appearing in the witness box did not utter a single word that he received *Churri* (P-4), from the Moharrar mall-khana of the police station or deposited the same in the office of Punjab Forensic Science Agency, Lahore. We are, therefore, of the view that it is not save to rely upon the prosecution evidence qua the alleged recovery of *Churri* (P-4), on the pointation of the appellant and positive report of Punjab Forensic Science Agency, Lahore (Ex.PL).

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story. In the case of *'Tariq Pervez vs. The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> *"5. ……. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."*

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *"Muhammad Akram vs. The State"* (2009 SCMR 230), at page 236, observed as under:

> *"13. ……. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the*

guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept **Criminal Appeal No. 115212 of 2017** filed by Muhammad Ashraf (appellant), set aside his conviction and sentence recorded by the learned trial Court *vide* judgment dated 28.11.2017 and acquit him of the charge by extending him the benefit of doubt. He is in custody, he be released forthwith if not required in any other case. **Murder Reference No. 672 of 2017** is answered in the **NEGATIVE** and the sentence of death of Muhammad Ashraf (convict) is **NOT CONFIRMED.**

(A.A.K.) **Appeal accepted.**

PLJ 2022 Cr.C. 469

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMED KHAN, J.**

BILAL AHMED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 44877-B of 2021, decided on 16.7.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Post arrest bail, grant of--Allegation of--Dishonoured of cheque--Documentary evidence--Entire prosecution case is based on documentary evidence (dishonoured cheque and bank slip), which is already in possession of prosecution and as such there is no chance of tampering with same, therefore, in such circumstances no useful purpose will be served by keeping petitioner behind bars--Punishment provided for offence u/S. 489-F, PPC is imprisonment, which may extend to three years--Offence mentioned in FIR does not fall within ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--Mere involvement of huge amount is no ground to refuse bail to petitioner--Ordaining that where a case falls within non-prohibitory clause, concession of granting bail must favorably be considered and should only be declined in exceptional cases--Bail allowed. [P. 470] A, B & C

1996 SCMR 1132, 2011 SCMR 1708, 2009 SCMR 1488 & PLD 2017 SC 733.

Mr. Sajjad Hussain Tarar, Advocate for Petitioner.

Ch. Muhammad Ishaq, Additional Prosecutor General for State.

Mr. Muhammad Sharif Khokhar, Advocate for Complainant.

Date of hearing: 16.7.2021.

ORDER

Through the instant petition, the petitioner Bilal Ahmed seeks post arrest bail in case FIR No. 151/2021 dated 21.03.2021, offence under Section 489-F, PPC, registered at Police Station Phalia, District Mandi Bahauddin.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, a cheque amounting to Rs. 1,00,00,000/-, issued by the petitioner to the complainant was dishonoured on presentation by the concerned bank, hence the abovementioned FIR.

4. The entire prosecution case is based on documentary evidence (dishonoured cheque and bank slip), which is already in possession of the prosecution and as such there is no chance of tampering with the same, therefore, in such circumstances no useful purpose will be served by keeping the petitioner behind the bars. Reference in this respect may be made to the case of *Saeed Ahmad v. The State* (1996 SCMR 1132). Furthermore, the punishment provided for the offence under Section 489-F, PPC is imprisonment, which may extend to three years. The offence mentioned in the FIR does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. Mere involvement of huge amount is no ground to refuse bail to the petitioner. Reference in this context may be made to the case of *Riaz Jafar Natiq v. Muhammad Nadeem Dar and others* (2011 SCMR 1708). Thus, keeping in view the law laid down in the cases of *Zafar Iqbal v. Muhammad Anwar and others* (2009 SCMR 1488) and *"Muhammad Tanveer v. The State and another"* (PLD 2017 Supreme Court 733), ordaining that where a case falls within non-prohibitory clause, the concession of granting bail must favorably be considered and should only be declined in exceptional cases and because no exceptional ground has been pointed out by learned Additional Prosecutor General or learned counsel for the complainant to refuse bail to the petitioner, therefore, the instant petition is ***allowed*** and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 10,00,000/- (*Rupees one million only*) with two sureties in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2022 Cr.C. 817

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

NASIR--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 41394-B of 2021, decided on 27.10.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(1)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 148, 149, 109, 337-F(vi), 337-F(i), 337-A(i) & 337-L(ii)--Bail after, arrest, dismissal of--Allegation of--Specific role of committing murder of deceased--Petitioner has been assigned a specific role of making a fire shot, which landed on chin of (deceased)--The role attributed to petitioner is *prima-facie* supported by medical evidence because according to postmortem report of deceased, there was a firearm lacerated wound having graze mark on chin (Injury No. 4)--The petitioner has caused a firearm injury on vital part of body of deceased--A pistol has been recovered on pointation of petitioner and as per report of Punjab Forensic Science Agency, Lahore, two empties recovered from spot matched with said pistol--Empties were deposited in office of Punjab Forensic Science Agency, Lahore far earlier to arrest and recovery of pistol on pointation of petitioner--Offence under Section 302, PPC, falls within ambit of prohibitory clause of Section 497 of, Cr.P.C--The petitioner has been found guilty during course of police investigation--Bail dismissed. [P. 818] A

Mian Muhammad Rauf, Advocate for Petitioner.

Ch. Muhammad Ishaq, Additional Prosecutor General for State.

Malik Muhammad Siddiq Awan, Advocate for Complainant.

Rana Muhammad Shafique, Advocate/Legal Advisor PFSA.

Date of hearing: 27.10.2021.

ORDER

Through the instant petition, the petitioner seeks post arrest bail in case FIR No. 305/2019, dated 28.11.2019, offences under Sections 302/324/148/149/109/337F(vi)/337F(i)/337A(i)/337L(ii), PPC, Police Station Kur, Tehsil Tandlianwala, District Faisalabad.

2. Arguments heard. Record perused.

3. The petitioner is named in the FIR with the specific role that on the intervening night of 27/28-11-2019, at 12.30 (a.m), he along with his co-accused while armed with different weapons came to the house of the complainant party and committed murder of Zahid Bashir (deceased) and caused injuries to Riaz Hussain, Javed Iqbal, Mulazam Hussain and Ashiq Hussain PWs. The petitioner has been assigned a specific role of making a fire shot, which landed on the chin of Zahid Bashir (deceased). The role attributed to the petitioner is *prima-facie* supported by the medical evidence because according to the postmortem report of the deceased, there was a firearm lacerated wound having graze mark on chin (Injury No. 4). The petitioner has caused a firearm injury on the vital part of the body of the deceased. A pistol has been recovered on the pointation of the petitioner and as per report of the Punjab Forensic Science Agency, Lahore, two empties recovered from the spot matched with the said pistol. Empties were deposited in the office of Punjab Forensic Science Agency, Lahore far earlier to the arrest and recovery of pistol on the pointation of the petitioner. Offence under Section 302, PPC, falls within the ambit of prohibitory clause of Section 497 of, Cr.P.C. The petitioner has been found guilty during the course of police investigation.

4. In the light of above discussion, there is no substance in the present petition, hence the same is hereby **dismissed.**

(A.A.K.) **Bail dismissed.**

PLJ 2022 Cr.C. 835

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

JAVED AFTAB--Appellant

versus

STATE and another--Respondents

Crl. A. No. 1612 & Crl. Rev. No. 767 of 2010, heard on 26.1.2021.

Delay in Post-mortem--

----Hon'ble Supreme Court observed that delay of 11-hours in conducting postmortem examination shows that I prosecution eye-witnesses were not present at spot at time of occurrence, therefore, said delay was utilized for showing fake eye-witnesses in police papers. [P. 841] A

2018 SCMR 326.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd--Delay in post-mortem--Chance witness--Apex Court of Country was pleased to observe that delay of nine-hours in conducting postmortem examination suggests that prosecution eye-witnesses were not ' present at spot at time of occurrence, therefore, said delay was used in procuring attendance of fake eye-witnesses--Prosecution eye-witnesses were not present at spot at time of occurrence which resulted in delay of postmortem examination of deceased--Mother of complainant was residing in a different house and she was not residing in house where occurrence took place--The complainant also did not produce his mother in witness box to justify above mentioned reason--He is therefore, a chance witness and as such his evidence is not free from doubt--Prosecution eye-witness is a chance witness and he could not prove reason of his presence at spot at time of occurrence, therefore, his very presence at spot at relevant time becomes doubtful--Court have considered all aspects of this case and have come to this irresistible conclusion that prosecution could not prove its case against appellant beyond shadow of doubt.

[Pp. 841, 842, 843 & 846] B, C, D & F

2017 SCMR 142, 2015 SCMR 1142 & 2017 SCMR 54.

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 129(g)--There is a report of Chemical Examiner that the mentioned '*Chhurri*' was stained with blood but there is no report of Serologist to establish that above mentioned '*Chhurri*' was stained with "human" blood or not--As per report of Chemical Examiner, '*Chhurri*' was sent to office of Serologist to determine that as to whether or not blood detected on said '*Chhurri*' was 'human' blood but prosecution did not produce , in evidence report of Serologist--In light of above best evidence has been withheld by prosecution to establish that '*Chhurri*' was stained with 'human' blood, therefore, an adverse inference under Article 129(g) of Qanun-e-Shahadat der, 1984 can validly be drawn against prosecution that had e report of Serologist been produced in evidence then Same would not have favoured prosecution case.

[Pp. 845 & 846] E

Mr. Tayyab Shakoor Rana Advocate for Appellant as well as Respondent No. 1 (in Crl. Revision No. 767 of 2010.

Ch. Muhammad Ishaq, Additional Prosecutor General for State.

Nadeem son of Mubashar Ahmad (deceased) and Ahsan son of Mushtaq Ahmad for Complainant (as well as Petitioner (in Crl. Revision No. 767 of 2010.

Date of Hearing: 26.1.2021.

JUDGMENT

This judgment shall dispose of *Criminal Appeal No. 1612* of 2010, filed by Javed Aftab (appellant), against his conviction and sentence and *Criminal Revision No. 767 of 2010*, filed by the complainant Mushtaq Ahmad for enhancement of sentence awarded to Javed Aftab (appellant) from imprisonment for life to death, as both these matters have arisen out of the same impugned judgment dated 27.05.2010, passed by learned Additional Sessions Judge, Chiniot.

2. Javed Aftab (appellant) along with *Mst.* Nusrat Anjum (co-accused since acquitted), was tried in case F.I.R. No. 440 dated 22.08.2006, registered at Police Station Chenab Nagar. District Chiniot, in respect of offences under Sections 302/109, PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 27.05.2010, has convicted and sentenced Javed Aftab (appellant) as under:

> *Under Sections 302(b), PPC to imprisonment for life (rigorous) as tazir. He was also ordered to pay Rs. 50,000/- (rupees fifty thousand only) to the legal*

heirs of Mubashar Ahmad (deceased) as compensation and in default thereof to suffer simple imprisonment for six years.

Benefit of Section 382-B, Cr.P.C. was also extended to the appellants.

However, *vide* the same impugned judgment dated 27.05.2010, *Mst.* Nusrat Bibi (co-accused), was acquitted by the learned trial Court/Additional Sessions Judge, Chiniot while giving her the benefit of doubt.

3. Brief facts of the case as given by the complainant Mushtaq Ahmad (PW-8), in his complaint (Ex.PA), on the basis of which the formal FIR (Ex.PA/1) was chalked out, are that the complainant was resident of Factory Area Chenab Nagar and his mother, as well as, brother Mubashar Ahmad (deceased) had been residing in separate houses in Mohallah Naseerabad. The mother of the complainant was sick and he (complainant) often used to visit the house of his mother in order to see her. The character of wife of Mubashar Ahmad (deceased) namely *Mst.* Nusrat Bibi (co-accused since acquitted) was doubtful, who had gone to Karachi during the days of occurrence. Javed Aftab (appellant) was on visiting terms with Mubashar Ahmad (deceased). On the intervening night of 21/22-08-2006, at about 12.30 (night), the complainant along with his brother Zafar Ahmad and nephew Ayaz *alias* Pomi (PWs since given-up) were retuning back to Bait-ul-Ahmad, Chenab Nagar after attending his mother. In the meanwhile, after hearing hue and cry from the house of his brother Mubashar Ahmad (deceased), they entered the said house and saw that Javed Ahmad (appellant) was giving repeated churri blows to Mubashar Ahmad (deceased) on different parts of his body. The complainant party tried to apprehend the appellant but he (appellant) fled away from the spot while wielding the '*Chhurri*. Mubashar Ahmad succumbed to the injuries at the spot.

The motive behind the occurrence was that after committing murder of complainant's brother namely Mubashar Ahmad, Javed Aftab (appellant), wanted to develop illicit relations with the wife of the deceased namely *Mst.* Nusrat Bibi (co-accused since acquitted).

4. The appellant was arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 10.03.2007, to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced twelve witnesses. Prosecution also produced

documentary evidence in the shape of Ex.PA to Ex.PL. The statements of the appellant and his co-accused under Section 342, Cr.P.C., were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court *vide* its judgment dated 27.05.2010, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. Learned counsel for the complainant is again not available and request for adjournment has been made on his behalf. I have noted that the appellant is behind the bars since the year 2006 whereas the instant appeal is pending adjudication before this Court since the year 2010 and despite the laps of a period of more than 10-years, the same could not be decided so far. A lot of adjournments have already been granted in this case on the request of learned counsel for the complainant. Even, on the last date of hearing *i.e*. 20.01.2021, learned counsel for the complainant was not present and request for an adjournment was made on his behalf. Although, the said request was opposed by learned counsel for the appellant but the case was adjourned with the clear understanding that no further adjournment shall be granted in this case but even today, learned counsel for the complainant did not bother to appear before the Court. No valid ground for non-availability of learned counsel for the complainant has been pointed out by Nadeem son of Mubashar Ahmad (deceased) and Ahsan son of Mushtaq Ahmad (complamant). On the last date of hearing *i.e*. 20.01.2021, last and final opportunity to the son of the deceased, as well as, son of the complainant was granted to make arrangement for arguments on this appeal and it was made clear that in case of non-appearance of learned counsel for the complainant on the next date, the case shall be decided after hearing the arguments of learned counsel for the appellant, learned Additional Prosecutor General for the State and perusal of the record but the needful has not been done by the complainant party. It appears that son of the deceased and son of the complainant are not interested in the prosecution of this case. Under the circumstances, there is no other option with the Court but to decide the instant appeal on the basis of available recorded and hearing arguments of learned counsel for the appellant and learned Additional Prosecutor General for the State. Even otherwise, it is a State case and the learned Additional Prosecutor General for the State is ready to argue the same, therefore, I proceed to decide the instant case after hearing arguments of learned counsel for the appellant, learned Additional Prosecutor General for the State and perusal of the record.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that in-fact Mushtaq Ahmad/complainant (PW.8) who was brother of Mubashar Ahmad (deceased) had no good relationship with the deceased and the occurrence was committed by the complainant in order to usurp the property of the deceased and this fact regarding bad relationship between the complainant and the deceased has been admitted by the prosecution witness herself, namely, *Mst.* Aaliya Bibi (PW.7); that the evidence of Mushtaq Ahmad/complainant (PW.8) and Bilal Ahmad (PW.5) has been disbelieved by learned trial Court and the appellant has been convicted on the basis of evidence of *Mst.* Aaliya Bibi (PW.7) but the name of said *Mst.* Aaliya Bibi (PW.7) has not been mentioned in the FIR as an eye-witnesses, therefore, her evidence is not worthy of reliance; that the evidence of prosecution eye-witnesses is self-contradictory which has created serious dent in the prosecution story; that the motive of illicit relationship of *Mst.* Nusrat Bibi (co-accused since acquitted) and the appellant has been disbelieved by the learned trial Court and the above mentioned *Mst.* Nusrat Bibi, co-accused has been acquitted by the learned trial Court whereas Criminal Appeal No. 1706 of 2010 filed against the acquittal of said co-accused has also been dismissed by this Court *vide* order dated 03.04.2017; that the recovery of '*Chhurri*' (P-3) was planted against the appellant and even otherwise, the said '*Chhurri*' was recovered from an open place which was not in the exclusive possession of the appellant; that there are material contradictions in the prosecution evidence which have not been properly appreciated while passing the impugned judgment; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, appeal filed by Javed Aftab (appellant) may be accepted and the appellant may be acquitted from the charge.

8. On the other hand, it is argued by the learned Additional Prosecutor General for the State that the occurrence in this case took place on 22.08.2006 at 12:30 A.M. (night) and the FIR has promptly been lodged on the same night at 1:50 A.M. which rules out the possibility of concoction or fabrication; that the prosecution eye-witnesses were cross-examined at length but their evidence could not be shaken; that *Mst.* Aaliya Bibi (PW.7) was daughter of the deceased and she was natural eye-witness of the occurrence being resident of the house where the occurrence took place; that even the remaining prosecution eye-witnesses, namely, Mushtaq Ahmad/complainant (PW.8) and Bilal Ahmad (PW.5) have also given solid reasons for their presence at the spot at the time of occurrence but their evidence has wrongly

been disbelieved by the learned trial Court; that the ocular account of the prosecution has fully been supported by the medical evidence furnished by the prosecution through Dr. Imran Ahmad Khan (PW.10); that the prosecution case against the appellant is further corroborated by the recovery of '*Chhurri*' (P-3) on the pointation of the appellant and positive report of Chemical Examiner (Ex.PL); that the motive alleged by the prosecution in this case has also been proved through reliable and trustworthy evidence of the prosecution witnesses; that the prosecution has proved it case against the appellant beyond the shadow of any doubt, therefore, the appeal filed by the appellant may be dismissed.

Insofar as Criminal Revision No. 767 of 2010, is concerned, it is argued by learned Additional Prosecutor General for the State that there was no mitigating circumstance in this case, therefore, the appellant may be awarded the normal penalty of death sentence.

9. Arguments heard and record perused.

10. The detail of the prosecution case as set forth in the FIR (Ex.PA/1) and in the complaint (Ex.PA), has already been given in paragraph No. 3 of this judgment, therefore, there is no need to repeat the same.

11. The occurrence in this case took place on the intervening night of 21/22.08.2006 at 12:30 A.M. Although, as per relevant columns of FIR (Ex.PA/1), the matter was reported to the police on the same night *i.e*. on 22.08.2006 at 1:50 A.M. but I have noted that postmortem examination on the dead body of Mubashar Ahmad (deceased) was conducted on 22.08.2006 at 1:30 P.M. Dr. Imran Ahmad Khan (PW.10) stated during his cross-examination that as soon as he received the police papers and dead body, he conducted postmortem examination without any delay. The relevant part of his statement reads as under:

> "As soon as I received the police papers and dead body I conducted the post mortem examination without any delay on my part."

It is, therefore, evident from the perusal of the statement of Dr. Imran Ahmad Khan (PW.10) that the dead body and police papers were handed over to the said Medical Officer with a considerable delay of 13-hours from the time of occurrence. The said delay is suggestive of the fact that the occurrence was unseen and the above mentioned time was consumed in procuring the attendance of fake eye-witnesses. In the case of *"Zafar vs. The State and others"* (2018 SCMR 326), the Hon'ble Supreme

Court observed that delay of 11-hours in conducting the postmortem examination shows that prosecution eye-witnesses were not present at the spot at the time of occurrence, therefore, the said delay was utilized for showing fake eye-witnesses in the police papers." Likewise, in the case of *"Muhammad Ilyas vs. Muhammad Abid alias Billa and others"* (2017 SCMR 54), the Apex Court of the Country was pleased to observe that delay of nine-hours in conducting postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence, therefore, the said delay was used in procuring the attendance of fake eye-witnesses. I am, therefore, of the view that the prosecution eye-witnesses were not present at the spot at the time of occurrence which resulted in the delay of postmortem examination of the deceased.

12. The ocular account of the prosecution has been produced through Bilal Ahmad (PW.5), *Mst.* Aaliya Bibi (PW.7) and Mushtaq Ahmad/complainant (PW.8). I have noted that the names of Bilal Ahmad (PW.5) and *Mst.* Aaliya Bibi (PW.7) have not been mentioned as eye-witnesses in the contents of the FIR rather according to the contents of the FIR, the occurrence was witnessed by Mushtaq Ahmad/complainant (PW.8), Zafar Ahmad and Ayyaz Ahmad Pomi (given up PWs). Bilal Ahmad (PW.5) and *Mst.* Aaliya Bibi (PW.7) were introduced subsequently in this case by the prosecution as eye-witnesses of the occurrence. It is further noteworthy that the learned trial Court at Page-10 of the impugned judgment has disbelieved the evidence of Mushtaq Ahmad/ complainant (PW.8) and Bilal Ahmad (PW.5) inter-alia on the ground that they were chance witnesses and their evidence was not trustworthy. However, the appellant has been convicted and sentenced on the basis of evidence of *Mst.* Aaliya Bibi (PW.7). As mentioned earlier, the name of *Mst.* Aaliya Bibi (PW.7) was not mentioned in the FIR as an eye-witness or in any other capacity and she has been introduced subsequently in this case by the prosecution as an eye-witness of the occurrence. Even, I have noted that Mushtaq Ahmad/complainant (PW.8) was not resident of the house where the occurrence took place. He had admitted that he was resident of a house which was situated at a distance of two (02) Furlongs from the place of occurrence. He gave this reason for his presence at the spot at the relevant time that on the night of occurrence, he went to see his mother who was sick at that time and on his return when he reached outside the house of Mubashar Ahmad (deceased) he heard hue and cry coming out of the house of the deceased and thereafter he entered the said house and witnessed the occurrence. The presence of Mushtaq Ahmad/complainant (PW.8) at odd hours of the night (12:30 A.M.) at the

place of occurrence was not natural, therefore, he was bound to establish the reason of his presence at the spot at the relevant time. Though, the said witness made this excuse that at the relevant time, he was coming back from the house of his mother who was sick at that time but he did not produce any medical prescription to prove the above mentioned reason. It is also an admitted fact that mother of the complainant was residing in a different house and she was not residing in the house where the occurrence took place. The complainant also did not produce his mother in the witness box to justify the above mentioned reason. He is therefore, a chance witness and as such his evidence is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of *"Mst. Sughra Begum and another vs. Qaiser Pervez and others"* (2015 SCMR 1142) at Para No. 14, observed regarding the chance witnesses as under:

> *"14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."*

Similar view was taken in the case of *"Muhammad Irshad vs. Allah Ditta and others"* (2017 SCMR 142). Relevant part of the said judgment at Para No. 2 reads as under:

> *"……Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial Court through any independent evidence"*

As the above mentioned prosecution eye-witness is a chance witness and he could not prove the reason of his presence at the spot at the time of occurrence, therefore, his very presence at the spot at the relevant time becomes doubtful.

13. Insofar as the evidence of Bilal Ahmad (PW.5) is concerned, it is noteworthy that the name of said witness is not mentioned in the FIR as an eye-witness of the occurrence or as a witness in any other capacity. He has already been disbelieved by the learned trial Court being a chance witness of the occurrence and untrustworthy.

14. Insofar as the evidence of *Mst.* Aaliya Bibi (PW.7) is concerned, as mentioned earlier, she was not cited as an eye witness in the FIR and she has subsequently been introduced in this case by the prosecution as an eye-witness of the occurrence. The statement of *Mst.* Aaliya Bibi (PW.7) is in conflict with the statements of the remaining prosecution eye-witnesses. It is noteworthy that as per contents of the FIR, the occurrence was witnessed by Mushtaq Ahmad/complainant (PW.8), Zafar Ahmad and Ayyaz Ahmad Pomi (given up PWs) but according to the statement of *Mst.* Aaliya Bibi (PW.7), the occurrence was witnessed by her (*Mst.* Aaliya Bibi/PW.7), as well as, by the subsequently introduced eye-witness of the prosecution, namely, Bilal Ahmad (PW.5). She also stated during her cross-examination that all her relatives reached at the spot after the occurrence. She further deposed that Mushtaq Ahmad/complainant (PW.8) arrived at the place of occurrence on a telephone call. She also stated during her cross-examination that her parents had cordial relationship with each other and there was no quarrel between them. She further deposed that her father (Mubashar Ahmad deceased) had not good relations with Mushtaq Ahmad/complainant (PW.8) before the occurrence and they were not on visiting terms with each other. She also stated that after the death of her father, her uncle, namely, Mushtaq Ahmad/complainant (PW.8), illegally occupied their house alongwith its paraphernalia and he also sold the car and motorcycle of the deceased and sale consideration of the said articles was not paid to them. The relevant part of her statement made during the cross-examination reads as under:

> "My parents had cordial relations and there was never a quarrel between them. There was no litigation between them. I have two sisters and one brother. My father was a rich man and he had a car and motorcycle. On the day of occurrence my father was owner of a car. My uncle Mushtaq had sold that car. He has not paid amount of that car to my mother. My uncle Mushtaq

has also sold motorcycle and he has also not paid the amount of that motorcycle to us. My uncle Mushtaq PW had illegally occupied our house alongwith its paraphernalia after the murder of my father. Later on we got the possession of the house forcibly but the paraphernalia of the house were not returned. My father and Mushtaq had not good relations even before the occurrence and we were not on visiting terms. The house of my grandmother is on the western side of our house at some distance about 2 furlong.

……

My mother went to Karachi 5/6 days prior to this occurrence alongwith my brother, I, my sister and my father were at home on the night of occurrence. My father was sleeping in the Courtyard while I and my sister were sleeping in our bed room. I did not inform Sadar Mohallah regarding the occurrence. Mushtaq arrived at the place of occurrence on a telephonic call. All our relatives arrived at the place of occurrence after the occurrence."

It is, therefore, evident from the perusal of record that the ocular account produced in this case by the prosecution through the above mentioned eye-witness is highly self-contradictory and the same is not worthy of reliance.

15. Although, the prosecution witnesses stated that a mobile phone (P-4) of the appellant was left at the place of occurrence which was taken into possession *vide* recovery memo Ex.PD but I have noted that no proof regarding the ownership of the said mobile phone in the name of the appellant has been produced in the prosecution evidence. Likewise, no call-data record of the said phone was produced in the evidence by the prosecution under the circumstances the alleged recovery of mobile phone (P-4) is inconsequential.

16. Insofar as the motive alleged by the prosecution is concerned, it is noteworthy that Mushtaq Ahmad/complainant (PW.8) stated that as Javed Aftab (appellant) wanted to develop illicit relationship with *Mst.* Nusrat Bibi (co-accused since acquitted), therefore, he committed the murder of Mubashar Ahmad (deceased), who was husband of the said co-accused.

The above mentioned motive has been disbelieved by learned trial Court at Page-10 of the impugned judgment. I have also noted that the complainant did not allege that he had ever seen Javed Aftab (appellant) in any objectionable condition with *Mst.* Nusrat Bibi, co-accused. The prosecution's own witness, namely, *Mst.* Aaliya Bibi

(PW.7) has categorically stated that there was no quarrel between her parents (Mubashar Ahmad deceased and his wife *Mst.* Nusrat Bibi co-accused) and they had cordial relationship with each other. Even during the days of occurrence, *Mst.* Nusrat Bibi, co-accused (since acquitted) was not present in the village Chenab Nagar Tehsil Lalian District Chiniot where the occurrence took place rather she was admittedly at Karachi during the said days. The above mentioned co-accused has been acquitted by learned trial Court and appeal filed against her acquittal *i.e*. Crl. Appeal No. 1706 of 2010 has also been dismissed by this Court *vide* order dated 03.04.2017. I am, therefore, of the view that the prosecution could not prove the motive alleged against the appellant.

17. Insofar as the recovery of '*Chhurri'* (P-3) on the pointation of the appellant is concerned, I have noted that the alleged recovery of '*Chhurri*' (P-3) was effected from the field of maize crop which was not under the exclusive possession of the appellant and the same was an open place. It is further noteworthy that although there is a report of Chemical Examiner (Ex.PL) that the above mentioned '*Chhurri*' (P-3) was stained with blood but there is no report of the Serologist to establish that the above mentioned '*Chhurri*' (P-3) was stained with "human" blood or not. As per report of Chemical Examiner, '*Chhurri*' (P-3) was sent to the office of Serologist to determine that as to whether or not the blood detected on the said '*Chhurri*' was 'human' blood but the prosecution did not produce in evidence the report of Serologist. In the light of above the best evidence has been withheld by the prosecution to establish that '*Chhurri*' (P-3) was stained with 'human' blood, therefore, an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can validly be drawn against the prosecution that had the report of Serologist been produced in the evidence then the Same would not have favoured the prosecution case.

18. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt.

19. In the light of above discussion, I accept Criminal Appeal No. 1612 of 2010 filed by Javed Aftab (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Chiniot *vide* impugned judgment dated 27.05.2010 and acquit him of the charge under Section 302(b) PPC by extending him

the benefit of doubt. Javed Aftab (appellant) is in custody, he be released forthwith, if not required in any other case.

20. Insofar the criminal revision *i.e.*, Crl. Revision No. 767 of 2010, filed by Mushtaq Ahmad (complainant) for enhancement of sentence, awarded by the learned trial Court against Javed Aftab (appellant) from imprisonment for life to death is concerned, I have already disbelieved the prosecution evidence due to the reasons mentioned in paragraph Nos.11 to 17 of this judgment and Javed Aftab (appellant) has been acquitted from the charge, therefore, this criminal revision being devoid of any force is hereby **dismissed.**

(A.A.K.) **Appeal accepted.**

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[Lahore High Court, Lahore]

Present: MALIK SHAHZAD AHMAD KHAN, J.

FAISAL and another--Appellants

versus

STATE--Respondent

Crl. A. No. 224-J of 2009, decided on 9.12.2020.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b)/34--Conviction and sentence--Challenge to--Qatl-e-amd--Proverbial 'Lalkara'--Absconder--Compromise--No motive was alleged against appellant--It is noteworthy that for single deceased of this case, complainant has implicated as many as three accused persons in this case--As per prosecution case, it was (co-accused since acquitted) who made two fire shots which landed on right side of testicles and on right thigh of deceased whereas fire shot made by co-accused since acquitted) landed on left knee of deceased--Appellant has only been attributed role of making aerial firing and raising proverbial *'Lalkara'* at time of occurrence--As per prosecution's own case, appellant raised proverbial *'Lalkara'* when occurrence had already been committed by accused and co-accused since acquitted--It is not alleged by prosecution witnesses that after raising of *'Lalkara'* or on instigation of appellant, co-accused committed occurrence rather occurrence was committed by above mentioned co-accused prior to raising of *'Lalkara'* by appellant--Allegation of making aerial firing at time of occurrence leveled against appellant has also not been supported by recovery of any empty from spot--Insofar as recovery of pistol from possession of appellant is concerned, that there is no report of Punjab Forensic Science Agency, Lahore to establish that any empty recovered from spot matched with said pistol and as such, said recovery is inconsequential--As per prosecution's own case, fire-arm injuries were inflicted on body of deceased by accused and co-accused but complainant party/legal heirs of deceased have already effected compromise with said co-accused and they have been acquitted by High Court respectively on basis of compromised--Prosecution could not prove its case against appellant beyond shadow of doubt--Appeal accepted. [Para 11 & 13] A, B, C & E

2011 SCMR 646, 2009 SCMR 803, 2017 SCMR 144, PLD 2009 SC 53, PLD 2008 SC 298.

Absconder--

----It is true that appellant remained absconder in this case but it is by now well settled that in absence of other reliable and convincing evidence, his conviction cannot be maintained merely on basis of abscondence. [Para 11] D

2010 SCMR 566.

Mr. Nasir Mahboob Tiwana, Advocate for Appellant.

Ch. Muhammad Ishaq, Additional Prosecutor General with *Qaisar Elahi,* Inspector/SHO for State.

Date of hearing: 9.12.2020.

JUDGMENT

This judgment shall dispose of Criminal Appeal No. 224-J of 2009, filed by Asif (appellant) against his conviction and sentence awarded to him by the learned Additional Sessions Judge, Bhalwal through impugned judgment dated 17.06.2009.

2. Asif (appellant) along with two other co-accused, namely, Faisal (co-accused since acquitted) and Sajjad Hussain (co-accused since acquitted) was tried in case F.I.R. No. 422 dated 20.10.2003, registered at Police Station Bhalwal District Sargodha in respect of offences under Sections 302/34, PPC. After conclusion of the trial, the learned trial Court *vide* its judgment dated 17.06.2009, has convicted and sentenced the appellant as under:

> Under Section 302(b)/34PPC to imprisonment for life. The appellant was also directed to pay an amount of Rs. 50,000/- (Rupees Fifty Thousand only), as compensation to the legal heirs of Muhammad Anwar (deceased) under Section 544-A, Cr.P.C. and in case of default to further undergo six months simple imprisonment.
>
> Benefit of Section 382-B, Cr.P.C. was also extended to the appellant.

3. Brief facts of the case as given by the complainant Muhammad Younas (PW-8) in the FIR (Ex.PQ) are that on 20.10.2003, he was going back to his Chak. At about 9:00 P.M., the complainant went to Muhammad Anwar (deceased) in Amir Colony Bhalwal Town and at about 9:30 P.M. someone knocked at the door of the house of Muhammad Anwar (deceased) upon which Qurban son of Muhammad Anwar (deceased) opened the door. He came back and told that Sajjad Hussain, Faisal (co-accused) and Muhammad Asif (appellant) were present outside the house. He further told that they had asked to send Muhammad Anwar (deceased) out whereupon Muhammad Anwar (deceased) came out of his house. After sometime, when Muhammad Anwar (deceased) did not return back, the complainant alongwith Muhammad Khan and Nasir Mehmood came out to know as to why Muhammad Anwar (deceased) had not come back and when they reached near the house of one Nazir Mangut, they saw that the accused mentioned above were present there. Sajjad

Hussain (co-accused since acquitted) took out pistol from 'Naifa' of his 'shalwar' and fired at Muhammad Anwar (deceased) hitting near his testicles. Sajjad Hussain (co-accused since acquitted) made second fire shot which hit on the right thigh of the deceased. Then, Faisal (co-accused since acquitted) made a fire shot with his pistol which hit the deceased near the left knee. Muhammad Asif (appellant) kept on raising *'Lalkara'* and making aerial firing while saying that if anyone would come closer to them, he shall be done to death. All the three accused while making firing, ran away from the place of occurrence. Muhammad Anwar (deceased) succumbed to the injuries at the spot.

Motive of the case was that prior to the occurrence, a case FIR No. 377/2001 under Section 377, PPC was registered against Sajjad Hussain (co-accused since acquitted). The complainant and Muhammad Anwar (deceased) had been pursuing the above mentioned case due to which, the accused persons committed the murder of Muhammad Anwar (deceased).

4. The appellant was arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co- accused on 20.02.2008 to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced fourteen witnesses. Muhammad Akram and Ahmad Khan, PWs were given up being unnecessary. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PQ during the trial. The statements of the appellant and his co-accused under Section 342, Cr.P.C. were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court *vide* the impugned judgment dated 17.06.2009, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. Muhammad Younas (complainant) has statedly been murdered and this fact has been confirmed by Qaiser Elahi, Insepctor/SHO, Police Station Saddar Bhalwal District Sargodha present before the Court today. The younger brother of the complainant, namely, Muhammad Amjad and son of Muhammad Anwar, deceased of this case, namely, Qurban Ali are present before the Court. They are duly identified by Qaiser Elahi, Inspector/SHO. They both state that due to financial constraints they are not in a position to hire the services of a private counsel in this case and will be satisfied with the arguments of learned Additional Prosecutor General for the State. Even otherwise, it is a State case and the learned Additional Prosecutor General for the State is ready to argue the case, therefore, I proceed to decide the instant appeal after hearing the arguments of learned counsel for the complainant, learned Additional Prosecutor General for the State and perusal of the record.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has wrongly been convicted and sentenced by the learned trial Court; that there are material contradictions in the statements of the prosecution witnesses which have not been properly appreciated by the learned trial Court; that the appellant has not been assigned any role of causing injury on the body of Muhammad Anwar (deceased) whereas Sajjad Hussain and Faisal, co-accused who were attributed the role of causing injuries on the body of Muhammad Anwar (deceased) have already been acquitted by this Court on the basis of compromise effected with the legal heirs of the deceased because the complainant party received money from them but the appellant is behind the bars from the last 13-years because he could not fulfill illegal demands of the complainant party; that no motive was alleged against the appellant; that no empty was recovered from the spot to support the allegation of aerial firing leveled against the appellant; that in absence of any report of Punjab Forensic Science Agency, Lahore, the alleged recovery of pistol (P-4) is of no avail to the prosecution; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

8. On the other hand, it is argued by the learned Additional Prosecutor General for the State that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, he was rightly convicted and sentenced by the learned trial Court; that the prosecution eye-witnesses were cross-examined at length but their evidence could not be shaken; that the prosecution case against the appellant has been corroborated by the recovery of pistol (P-4) from the possession of the appellant; that the appellant remained absconder in this case for a period four years which further corroborates the prosecution case against the appellant; that there is no substance in this appeal, therefore, the same may be dismissed.

9. Arguments heard and record perused.

10. The detail of the prosecution case as set forth in the FIR (Ex.PQ) has already been given in Paragraph No. 3 of this judgment, therefore, there is no need to repeat the same.

11. It is noteworthy that for the single deceased of this case, the complainant has implicated as many as three accused persons in this case. It is further noteworthy that as per prosecution case, it was Sajjad Hussain (co-accused since acquitted) who made two fire shots which landed on the right side of testicles and on the right thigh of Muhammad Anwar (deceased) whereas the fire shot made by Faisal (co-accused since acquitted) landed on the left knee of the deceased. There is no allegation against the appellant that his fire shots caused any injury on the body of the deceased. The appellant has only been attributed the role of making aerial firing and raising proverbial *'Lalkara'* at the time of occurrence. As per prosecution's own case, the

appellant raised proverbial *'Lalkara'* when the occurrence had already been committed by Sajjad Hussain and Faisal (co-accused since acquitted). It is not alleged by the prosecution witnesses that after raising of 'Lalkara' or on the instigation of the appellant, the co-accused committed the occurrence rather the occurrence was committed by the above mentioned co-accused prior to raising of *'Lalkara'* by the appellant. The allegation of making aerial firing at the time of occurrence leveled against the appellant has also not been supported by the recovery of any empty from the spot. Insofar as the recovery of pistol (P-4) from the possession of the appellant is concerned, I have noted that there is no report of the Punjab Forensic Science Agency, Lahore to establish that any empty recovered from the spot matched with the said pistol and as such, the said recovery is inconsequential. It is further noteworthy that as per prosecution's own case, the fire-arm injuries were inflicted on the body of Muhammad Anwar (deceased) by Sajjad Hussain and Faisal, co-accused but the complainant party/legal heirs of the deceased have already effected compromise with the said co-accused and they have been acquitted by this Court *vide* judgments dated 07.09.2020 and 24.06.2010, respectively on the basis of compromised. Under the circumstances, there is force in the arguments of learned counsel for the appellant (Asif) that the above mentioned principal co-accused who were statedly responsible for the murder of Muhammad Anwar (deceased) by causing fatal fire-arm injuries on his body, have been let off by the complainant party after receiving money from them and as the appellant could not fulfill the demands of the complainant party/legal heirs of the deceased, therefore, he has been kept behind the bars for the last thirteen years. It is true that the appellant remained absconder in this case but it is by now well settled that in absence of other reliable and convincing evidence, his conviction cannot be maintained merely on the basis of abscondence. Reference in this context is made to the case of *"Rohtas Khan vs. The State"* (2010 SCMR 566), wherein the august Supreme Court of Pakistan at Paragraph No. 12, observed as 5 under:

> 12. The learned High Court gave importance to the abscondence of the appellant. No doubt it is a relevant fact but it can be used as a corroborative piece of evidence, which cannot be read in isolation but it has to be read along with substantive piece of evidence. This Court in the case of *Asadullah v. Muhammad Ali* PLD 1971 SC 541 observed that both corroborative and ocular evidence are to be read together and not in isolation. As regards abscondence this Court in the case of *Rasool Muhammad v. Asal Muhammad* 1995 SCMR 1373 observed that abscondence is only a suspicion circumstance. In the case of *Muhammad Sadiq v. Najeeb Ali* 1995 SCMR 1632 this Court observed that abscondence itself has no value in the absence of any other evidence. It was also held in the case of *Muhammad Khan v. State* 1999 SCMR 1220) that abscondence of the accused can never remedy the defects in the prosecution case. In the case of *Gul Khan v. State* 1999

SCMR 304 it was observed that abscondence per-se is not sufficient to prove the guilt but can be taken as a corroborative piece of evidence. In the cases of *Muhammad Arshad v. Qasim Ali* 1992 SCMR 814, *Pir Badshah v. State* 1985 SCMR 2070 and *Amir Gul v. State* 1981 SCMR 182 it was observed that conviction on abscondence alone cannot be sustained. In the present case, substantive piece of evidence in the shape of ocular account has been disbelieved, therefore, no conviction can be based on abscondence alone".

Similar view was taken by the apex Court of the country in the cases reported as *"Tahir Khan vs. The State"* (2011 SCMR 646), *"Haji Paio Khan vs. Sher Biaz and others"* (2009 SCMR 803), *"Muhammad Sadiq vs. The State"* (2017 SCMR 144), *"Muhammad Tasaweer vs. Hafiz Zulkarnain and 2 others"* (PLD 2009 Supreme Court 53) and *"Rahimullah Jan vs. Kashif and another"* (PLD 2008 Supreme Court 298).

12. It is further noteworthy that as per prosecution case, the motive behind the occurrence was that the complainant earlier lodged FIR No. 377/2001 under Section 377, PPC against Sajjad Hussain, co-accused and as the complainant alongwith Muhammad Anwar (deceased) was prosecuting the said case, therefore, the accused persons committed the occurrence. As mentioned earlier, the complainant party/legal heirs of the deceased have already effected a compromise with Sajjad Hussain, co-accused against whom the motive was alleged and he has been acquitted in this case on the basis of compromise. No motive was alleged against Asif (appellant).

13. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant (Asif) beyond the shadow of doubt.

14. In the light of above discussion, I *accept* Criminal Appeal No. 224-J of 2009 to the extent of Asif (appellant), also set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Bhalwal District Sargodha *vide* impugned judgment dated 17.06.2009 and *acquit* him of the charges under Sections 302(b)/34, PPC by extending him the benefit of doubt. Asif (appellant) is in custody, he be released forthwith, if not required in any other case.

(A.A.K.) Appeal accepted.

2021 M L D 157

[Lahore]

Before Malik Shahzad Ahmad Khan and Mirza Viqas Rauf, JJ

RIZWAN HASSAN---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 236319-J of 2018, heard on 19th February, 2020.

Explosive Substances Act (VI of 1908)---

----Ss. 4 & 5---Pakistan Arms Ordinance (XX of 1965), S. 13---Anti-Terrorism Act (XXVII of 1997), S. 7---Qanun-e-Shahadat (10 of 1984), Art. 121---Attempt to cause explosion or for making or keeping explosive with intent to endanger life or property---Possessing explosives under suspicious circumstances, unlicensed possession of arms, act of terrorism---Appreciation of evidence---Accused was alleged to have been found in possession of .30 bore pistol and a hand grenade, which was defused on the spot---Evidence of recovery witnesses had remained unshaken during cross-examination and nothing favourable to the accused was brought on record---Prosecution case was corroborated by the report of Bomb Disposal Commander and positive report of Forensic Laboratory---Safe custody of the parcels of defused hand grenade and pistol was proved beyond any shadow of doubt---Burden to prove defence plea under Art. 121 of the Qanun-e-Shahadat, 1984 was upon the accused but no witness was produced to prove that he was abducted by the police prior to registration of FIR---High Court observed that since the prosecution had failed to prove that the accused was a member of proscribed organization and was a previous convict in any other such like case, therefore, his sentences were reduced to the one, which he had already undergone---Appeal was dismissed accordingly.

Nasir Mehboob Tiwana for Appellant.

Jam Khalid Fareed, Assistant Advocate General and Muhammad Moeen Ali, Deputy Prosecutor General for the State.

Date of hearing: 19th February, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.236319-J of 2018, filed by Rizwan Hassan (appellant) against his convictions and sentences awarded to him by the learned District and Sessions Judge/Judge, Anti-Terrorism Court, Faisalabad vide judgment dated 20.07.2018.

2. Rizwan Hassan (appellant) was tried in case FIR No.09/2018 dated 28.02.2018, registered at police station CTD, Faisalabad in respect of offences under sections 4/5 of the Explosive Substances Act read with section 13 of the Arms Ordinance XX of 1965 and section 7 of the Anti-Terrorism Act 1997. After conclusion of the trial, the learned trial Court vide its judgment dated 20.07.2018, has convicted and sentenced the appellant as under: -

> Under section 5 of the Explosive Substances Act to five (05) years rigorous imprisonment.
>
> Under section 13 of the Arms Ordinance XX of 1965 to three years rigorous imprisonment with fine of Rs.50,000/- and in default thereof to further undergo three months' simple imprisonment.
>
> Both the sentences of imprisonment were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was also extended to the appellant.

3. Brief facts of the case as given by the complainant Liaqat Ali, S.I. (PW-5), are that on 28.02.2018, at about 3.00 p.m., he (complainant) along with Muhammad Shahid 720/Corporal, Muhammad Asim 465/Corporal, Asif Abbas 493/Corporal and other members of the operation team was present in front of Central Jail, Jaranwala Road, Faisalabad in connection with official duty. On spy information that an activist of proscribed organization "Tehreek-e-Jaffaria Pakistan" having small bag in his hand was standing near Punjtan Town Stop, Jaranwala Road, Faisalabad, after constituting a raiding party, a raid was conducted at the abovementioned place at 3.35 p.m. On seeing the police party, the appellant tried

to slip away but he was apprehended by the raiding party, who disclosed his name as Rizwan Hassan (appellant). On search of the appellant, one pistol 30 bore along with magazine and six bullets were recovered from the fold of his Shalwar, whereas a wallet containing an amount of Rs.3500/-, and identity card was recovered from the back pocket of the pent of the appellant. The bag, which the appellant was holding in his right hand was found suspicious, whereupon Bomb Disposal Squad was called. On checking of bag by the Bomb Disposal Squad, a hand grenade, wrapped in a piece of cloth was recovered, which was defused by the Bomb Disposal Squad and handed over to Liaqat Ali, S.I. (complainant). The appellant did not produce any licence or permit for keeping the hand grenade in his custody. Two separate sealed parcels i.e., one containing pistol 30 bore along with magazine etc and the other containing defused hand grenade were prepared and the same were taken into possession by the Investigating Office.

4. The appellant was arrested by the Counter Terrorism Department and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case the prosecution produced seven witnesses during the trial. The statement of the appellant under section 342, Cr.P.C. was recorded, wherein he refuted the allegations levelled against him and professed his innocence.

5. The learned trial Court vide its judgment dated 20.07.2018, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the prosecution; that in fact the appellant was arrested and kept in illegal confinement by the police of police station Shahzad Town, Islamabad, whereupon the father of the petitioner lodged FIR No.22/2018, dated 30.01.2018, offence under section 365, P.P.C., registered at police station Shahzad Town, Islamabad and in order to justify its illegal action, the police of police station Shahzad Town, Islamabad, handed over the appellant to CTD, Faisalabad, whereupon the instant false case

has been lodged against the appellant; that there are material contradictions in the prosecution evidence; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

7. On the other hand learned Law Officer has supported the impugned judgment of conviction and sentence of the appellant while contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, he was rightly convicted and sentenced by the learned trial Court; that the appellant could not establish any mala fide on the part of the prosecution for his false involvement in this case; that there is no substance in this appeal, therefore, the same may be dismissed.

8. I have heard the arguments of learned counsel for the appellant, as well as, the learned Law Officer and have also gone through the evidence available on the record with their able assistance.

9. The detail of the prosecution case as set forth in FIR (Ex.PA/I) has already been given in Para No.3 of this judgment, therefore, there is no need to repeat the same.

10. In order to prove its case the prosecution has produced the recovery witnesses namely Liaqat Ali SI (PW-5) and Muhammad Asim 465/Corporal (PW-6). Both the abovementioned witnesses have stated that on 28.02.2018, they along with other officials of Counter Terrorism Department of Faisalabad were present in front of Central Jail, Jaranwala Road, Faisalabad. On the basis of spy information that an activist of proscribed organization "Tehreek-e-Jaffaria Pakistan" having small bag in his hand was standing near Punjtan Town Stop, Jaranwala Road, Faisalabad, they conducted a raid at the abovementioned place, where the appellant was found present there. They further stated that on seeing the officials of Counter Terrorism Department, the appellant tried to slip away but he (appellant) was over-powered by them. They added that on search of the appellant, one pistol 30 bore along with magazine and six bullets were recovered from the fold of his Shalwar, whereas a wallet containing an amount of Rs.3500/-, and

identity card was recovered from the back pocket of the pent of the appellant. They further deposed that the bag, which the appellant was holding in his right hand was found suspicious, whereupon Bomb Disposal Squad was called and on checking of bag by the Bomb Disposal Squad, a hand grenade, wrapped in a piece of cloth was recovered, which was defused by the Bomb Disposal Squad and handed over to Liaqat Ali SI (PW-5). The appellant did not produce any licence or permit to keep the hand grenade in his custody. Two separate sealed parcels i.e., one containing pistol 30 bore along with six live bullets and the other containing defused hand grenade were prepared and the same were taken into possession vide memo (Fx.PD). Both the abovementioned recovery witnesses were cross-examined at length by the learned defence counsel but their evidence could not be shaken and nothing favourable to the appellant could be brought on the record. They remained consistent on all material aspects of the case. Their evidence is trustworthy and confidence inspiring.

11. The prosecution case against the appellant is further corroborated by the report of Bomb Disposal Commander, Civil Defence Office, Faisalabad (Ex.PC), the relevant portion of which reads as under:-

> Hand Grenade thoroughly checked under mentioned writing observed on hand grenade
>
> P. F engraved on its body
>
> No.36 MM and 44 Digits engraved on its base plug.
>
> This type of hand grenade can kill up-to 30 yard and it can injured up-to 100 yard

Whereas the report of Punjab Forensic Science Agency (Ex.PF), also corroborates the case of the prosecution against the appellant, the relevant portion of which reads as under:--

> Conclusion:-
>
> The item P1 pistol was examined and .found to be in mechanical operating condition with safety features functioning properly.

12. The safe custody of recovered defused hand grenade and pistol 30 bore along with magazine containing six bullets has been proved through the evidence of Liaqat Ali SI (PW-5), who stated that on 28.02.2018, he handed over the case property to the Investigating Officer namely Abdul Majeed Inspector (PW-7), whereas, Abdul Majeed Inspector (PW-7), stated that he received the case property from Liaqat Ali SI (PW-5) on 28.02.2018 and on the same day he handed over the same to Irfan Mehmood 5114/C (PW-2). Irfan Mehmood 5114/C (PW-2), stated that on 28.02.2018, he received sealed parcels said to contain defused hand grenade and pistol 30 bore along with magazine etc from Abdul Majeed Inspector (PW-7). He further stated that on 06.03.2018, he handed over the sealed parcel said to contain defused hand grenade to Muhammad Asim 465/Corporal (PW-6), for its onwards transmission to the office of Bomb Disposal Squad and on 07.03.2018, he handed over the sealed parcel said to contain pistol 30 bore along with magazine to Muhammad Asim 465/Corporal (PW-6) for its onwards transmission to the office of Punjab Forensic Science Agency, Lahore. Muhammad Asim 465/Corporal (PW-6) stated in his examination-in-chief that after receiving two sealed parcels of defused hand grenade and pistol 30 bore along with magazine etc on 06.03.2018 and 07.03.2018, respectively, he deposited the said parcels in the concerned offices on the same days intact i.e., 06.03.2018 and 07.03.2018, respectively. The abovementioned prosecution witnesses were also cross-examined at length by the learned defence counsel but their evidence remained consistent and straight-forward. Keeping in view the evidence of the above-mentioned production witnesses safe custody of the parcels of defused hand grenade and pistol 30 bore along with magazine has also been proved in this case beyond the shadow of any doubt.

13. Insofar as defence plea taken by the appellant that he was earlier abducted by the police of police station Shahzad Town, Islamabad and in order to save its skin he (appellant) was handed over to the Counter Terrorism Department of Faisalabad by the police of police station Shahzad Town, Islamabad, whereupon the present false FIR was lodged against him, is concerned, we have noted that the appellant took a specific defence plea, therefore, under Article 121 of the

Qanun-e-Shahadat Order, 1984, the burden was upon the appellant to prove the said plea but except producing in evidence rupt Mark "A" and FIR No.22/2018, dated 30.01.2018, offence under section 365, P.P.C., registered at police station Shahzad Town, Islamabad as Mark "B", the appellant did not produce any other evidence to prove the said plea. No witness was produced by the appellant to prove that he was abducted by anyone prior to the registration of present case. Even the appellant himself did not bother to appear in the witness box as envisaged under section 340(2), Cr.P.C. We are, therefore, of the view that the appellant could not prove his abovementioned defence plea.

14. Having considered all the pros and cons of this case, we have come to this irresistible conclusion that the prosecution has proved its case against Rizwan Hassan appellant beyond the shadow of any doubt through the above mentioned confidence inspiring and reliable evidence.

15. Insofar as the question with regard to quantum of sentence of the appellant is concerned, we have noted some mitigating circumstances in favour of the appellant. Firstly the appellant was also charged for offence under section 7 of the Anti-Terrorism Act, 1997, with the allegation that he was a member of the proscribed organization "Tehreek-e-Jaffaria Pakistan" but the learned trial Court after appreciating the evidence available on the record has acquitted the appellant from the said charge, secondly there is nothing on the record to show that the appellant is a previous convict in any other such like case.

16. As per record the appellant was arrested in this case on 28.02.2018 and he is behind the bars since his arrest and as such he has already undergone a period of almost two years of his imprisonment. In the light of above discussion, the convictions of Rizwan Hassan (appellant) under sections 5 of the Explosive Substances Act and 13 of the Arms Ordinance XX of 1965, awarded by the learned trial Court are maintained and upheld but his sentences for the said offences are reduced to the one, which he has already undergone. The sentence of fine awarded by the learned trial Court and sentence in default thereof is maintained and upheld.

17. Consequently, with the above said modification in the sentence of Rizwan Hassan (appellant), Criminal Appeal No.236319-J of 2018 filed by Rizwan Hassan (appellant) is hereby dismissed.

SA/R-17/L **Sentence reduced.**

2021 M L D 166

[Lahore]

Before Malik Shahzad Ahmad Khan , J

MUHAMMAD ASHRAF---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 33182-B of 2020, decided on 22nd September, 2020.

(a) Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 324, 148, 149, 337-A(ii), 337-F(i), 337-F(ii) & 337-L---Attempt to commit qatl-i-amd, rioting armed with deadly weapon, common object, shajjah-i-mudihah, damiyah, mutalahimah---Bail, grant of---Case of cross-versions---Scope---Allegation against accused was that he and co-accused, while armed with different weapons launched an attack upon the complainant party and caused injuries to prosecution witnesses---Accused was assigned the role of making a fire shot at the chest of eye-witness and inflicting butt blow of rifle on the head of another---Present was a case of cross-versions and the accused was also injured---Accused was medically examined on the day of occurrence and as per medico legal report, there was no possibility of fabrication of his injuries---Accused was medically examined through police---Complainant party had not challenged the medico legal report before any higher forum---Members of both the parties were injured during the occurrence, therefore, irrespective of their injuries, it was not determinable at bail stage, as to who started the occurrence---Petition for grant of bail was allowed, in circumstances.

Hamza Ali Hamza and others v. The State 2010 SCMR 1219 rel.

Syed Darbar Ali Shah and others v. The State 2015 SCMR 879; Abdul Hameed v. Zahid Hussain alias Papu Chaman Patiwala and others 2011 SCMR 606; Khalid Mahmood and another v. Muhammad Kashif Rasool and others 2013 SCMR 1415 and Saqib and others v. The State and others 2020 SCMR 677 ref.

(b) Criminal Procedure Code (V of 1898)---

----S. 497---Bail---Case of cross-versions---Scope---Nature of injuries is not relevant at bail stage, in a case of cross-versions.

Malik Muhammad Akbar Awan for the Petitioner.

Imdad Hussain Chatha, Deputy Prosecutor General with Muhammad Ashraf S.I. for the State.

Aftab Ahmed Qureshi for the Complainant.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Through the instant petition, Muhammad Ashraf petitioner seeks post arrest bail in case FIR No.53/2020, dated 20.02.2020, under sections 324/148/149/337-A(ii)/ 337-F(i)/337-F(iii)/337L(2), P.P.C., registered 'at police station Saddar Bhalwal, District Sargodha.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 20.02.2020, at about 7.30 a.m., the petitioner along with his co-accused while armed with different weapons launched an attack upon the complainant party and caused injuries to Sultan, Nawaz, Muhammad Noor and Saif PWs. The petitioner has been assigned the role of making a fire shot at the chest of Sultan PW and inflicted butt blow of rifle on the head of Nawaz PW.

5(sic). I have noted that it is a case of cross versions. The occurrence in this case took place on 20.02.2020, at about 7.30 a.m. The petitioner was also medically examined on the day of occurrence i.e., 20.02.2020, at about 11.30 p.m. As per

medico legal report, there were as many as three injuries on the body of the petitioner. Medical Officer in the relevant column of the medico legal report of the petitioner has categorically mentioned that there was no possibility of fabrication of his injuries. It is further noteworthy that the petitioner was got medically examined through Fiaz Ahmad 51/C, i.e., through police. Learned counsel for the complainant along with the complainant, present before the Court has conceded on instructions that the complainant party did not challenge the medico legal report of the petitioner before any higher forum. Although learned counsel for the complainant has argued that the injuries of the petitioner were simple in nature, whereas the injuries sustained by the complainant party are grievous but it is by now well settled that nature of injuries is not relevant at bail stage, in a case of cross versions. It is prima facie established in this case that members of both the parties were injured during the occurrence, therefore, irrespective of the nature of their injuries, it is not determinable at bail stage that as to who started the occurrence. In such like situation, the accused is entitled to the relief of bail. Reference in this context may be made to the case reported as "Hamza Ali Hamza and others v. The State" (2010 SCMR 1219), where injuries of the accused party of the said case were minor in nature and injuries of the complainant party were grievous but bail was granted to the accused on the ground that it is difficult to ascertain at the stage of bail that as to who was the aggressor. As it is a case of cross versions, therefore, it will be determined by the learned trial Court after recording of evidence that as to who was the aggressor and who was aggressed upon and as such a case for grant of post arrest bail is made out in favour of the petitioner. Reference in this context may also be made to the cases reported as "Syed Darbar Ali Shah and others v. The State" (2015 SCMR 879). "Abdul Hameed v. Zahid Hussain alias Papu Chaman Patiwala and others" (2011 SCMR 606), "Khalid Mahmood and another v. Muhammad Kashif Rasool and others" (2013 SCMR 1415) and "Saqib and others v. The State and others" (2020 SCMR 677).

5. Keeping in view all the aforementioned facts, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail

bonds in the sum of Rs. 2,00,000/- (Rupees two hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

SA/M-132/L **Bail granted.**

2021 M L D 1327

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD AFZAL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.66251-B of 2020, decided on 16th December, 2020.

(a) Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), Ss.506, 186, 109 & 34---Prevention of Corruption Act (II of 1947), S.5---Criminal intimidation, obstructing public servant in discharge of public functions, abetment, common intention, criminal breach of trust by public servant---Bail, refusal of---Third bail petition had been filed on the ground that the complainant had made a statement before FIA authorities that he was not present at the spot at the time of occurrence---Record showed that no application for grant of post-arrest bail on the said fresh ground had been moved by the petitioner before the court of first instance after dismissal of his second post arrest bail petition by that Court---Even otherwise there were also other prosecution witnesses apart from the complainant, therefore, mere obliging statement of one prosecution witness was of no avail to the petitioner---Even otherwise petitioner had not placed on the record any statement of the complainant wherein he stated that he was not present at the spot at the time of occurrence---Allegation against the petitioner was that he along with his co-accused was caught red handed while committing theft of electricity for the cotton factory---Although the offences mentioned in the FIR did not fall within the ambit of prohibitory clause of S.497, Cr.P.C., but accused could not claim bail as a matter of right if his case did not fall within the ambit of prohibitory clause of S.497, Cr.P.C---In the present case, petitioner and co-accused committed theft of electricity and as such he and co-

accused caused colossal loss to the Govt. Exchequer---Complainant also alleged that when he along with the other staff of Electric Supply Company tried to remove the electricity meter, the petitioner and co-accused started quarrelling with them and also gave them abuses as well as threats---Case of petitioner, therefore, fell under exceptional circumstances---Petition for bail was dismissed in limine.

Muhammad Siddique v. Imtiaz Begum and 2 others 2002 SCMR 442 and Haji Muhammad Nazir and others v. The State 2008 SCMR 807 rel.

(b) Criminal Procedure Code (V of 1898)---

----S.497---Bail, refusal of---Exceptional circumstances---Scope---Even in the cases which did not fall within the ambit of prohibitory clause of S.497, Cr.P.C., the concession of bail might be declined to an accused if his case fell under exceptional circumstances.

Malik Muhammad Rafi Ullah for Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner, namely Muhammad Afzal, though the instant petition seeks post arrest bail in case FIR No.C/52/2020, dated 01.06.2020, registered at P.S FIA Sargodha District Sargodha offences under Sections 462-K/H/I, 506/186/109/34, P.P.C. and 5(2)47, PCA.

2. Heard.

3. This is third post arrest bail petition filed by the petitioner before this Court. First bail application of the petitioner was disposed of vide order, dated 03.06.2020, on the ground that the investigation stood transferred to the FIA authorities, therefore, the petitioner should first file post-arrest bail petition before the Special Court (Central), Faisalabad. Second post arrest bail petition filed by the petitioner before this Court bearing Crl. Misc. No.39840-B of 2020 was dismissed as having

been withdrawn at the very outset vide order, dated 22.09.2020. The instant third petition has been filed before this Court on the ground that the complainant has made a statement before FIA authorities that he was not present at the spot at the time of occurrence. No application for grant of post-arrest bail on the above mentioned fresh ground has been moved by the petitioner before the Court of first instance after dismissal of his second post arrest bail petition by this Court on 22.09.2020. Even otherwise there are also other prosecution witnesses, namely Ghulam Ahmad, Ziaullah Khan, Ali Abbas and Saleem apart from the complainant, therefore, mere obliging statement of one prosecution witness is of no avail to the petitioner. Even otherwise learned counsel for the petitioner has not placed on the record any statement of the complainant wherein he stated that he was not present at the spot at the time of occurrence. The allegation against the petitioner is that he along with his co-accused was caught red handed while committing theft of electricity for the cotton factory situated at Musa Wali Piplan District Mianwali. Although the offences mentioned in the FIR do not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. but it is by now well settled that an accused cannot claim bail as a matter of right if his case does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. Reliance in this respect may be placed on the cases of "Muhammad Siddique v. Imtiaz Begum and 02 others" (2002 SCMR 442) and "Haji Muhammad Nazir and others v. The State" (2008 SCMR 807). It is also by now well settled that even in the cases which do not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. the concession of bail may be declined to an accused if his case falls under exceptional circumstances. In the instant case, the petitioner along with his co-accused committed theft of electricity and as such he along with his co-accused caused colossal loss to the Govt. exchequer. The complainant also alleged that when he along with the other staff of FESCO Sub Division Liaquatabad tried to remove the electricity meter, the petitioner and his co-accused started quarreling with them and also gave them abuses, as well as, threats. The case of petitioner, therefore, falls under exceptional circumstances. Under the circumstances, I am not inclined to exercise my discretion

in favour of the petitioner, therefore, the instant petition is hereby dismissed in limine.

JK/M-30/L **Petition dismissed.**

2021 M L D 2058

[Lahore]

Before Malik Shahzad Ahmad Khan, J

GHAFFAR alias KALI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.615-J of 2014, heard on 9th June, 2021.

(a) Penal Code (XLV of 1860)---

----Ss. 376 & 496-A---Rape, enticing or taking away or detaining with criminal intent a woman---Appreciation of evidence---Benefit of doubt---Accused were charged for snatching cash and gold ornaments from the sisters of the complainant and thereafter abducted one of his sisters/victim---Incident took place due to matrimonial dispute---Record showed that accused was not named in the FIR and he along with three additional accused was implicated in the case on the basis of statement of the alleged abductee (victim), recorded under S.164, Cr.P.C.---In her statement, the victim stated that after her abduction by the accused etc. she was taken to a house where accused and three co-accused committed rape with her, turn by turn---Three other accused who were tried in the case had been acquitted by the Trial Court---Remaining accused persons mentioned in the FIR were not tried in the case because they were declared proclaimed offenders---Neither any motorcycle nor any car or weapon of offence had been recovered from the possession of the accused---Likewise, neither any gold ornament nor any cash amount or mobile phone set through which the complainant party was allegedly threatened by the co-accused had been recovered from the possession of the accused---Appeal was allowed in circumstances and case was remanded with the direction that Trial Court would provide opportunity to the accused to hire the services of a private counsel of his own choice or to appoint a counsel on State expenses.

(b) Penal Code (XLV of 1860)---

----Ss.376 & 496-A---Rape, enticing or taking away or detaining with criminal intent a woman---Appreciation of evidence---Medical evidence---Scope---Accused were charged for snatching cash and gold ornaments from the sisters of the complainant and thereafter abducted one of his sisters/victim---No DNA test report had been brought on the record by the prosecution though in the Medico Legal Report of victim it was categorically mentioned that vaginal swabs taken in the case had been sent to the office of Forensic Science Agency for DNA test---In-spite of all the said facts, the accused had been convicted and sentenced by the Trial Court---Victim was not cross-examined by the defence and right of the accused to cross-examine the said victim and other prosecution witnesses was closed---Appeal was allowed, in circumstances and the case was remanded with the direction that Trial Court would provide opportunity to the accused to hire the services of a private counsel of his own choice or to appoint a counsel on State expenses.

(c) Penal Code (XLV of 1860)---

----Ss. 376 & 496-A---Rape, enticing or taking away or detaining with criminal intent a woman---Appreciation of evidence---Closing of right of cross-examination---Effect---Accused were charged for snatching cash and gold ornaments from the sisters of the complainant and thereafter abducted one of his sisters/victim---Perusal of the record showed that an advocate submitted his Power of Attorney on behalf of accused and acquitted co-accused---Perusal of order of the Trial Court further showed that said counsel made a statement before the court on behalf of co-accused persons that he did not want to cross-examine the prosecution witnesses---Further mentioned in the said order of the Trial Court that counsel for accused and co-accused, since acquitted, did not appear before the court on the said date due to the strike of the Lawyers, meaning thereby that there was some misunderstanding about the appointment of the counsel in the case on behalf of the accused because Power of Attorney of said Advocate showed that he was also appointed as counsel on behalf of the accused---Cross-examination on the prosecution witnesses on behalf of accused and co-accused, since acquitted, was reserved on the said date by the Trial Court---Orders of Trial Court showed that right of cross-examination of the accused on the prosecution witnesses was closed by the Trial Court on the ground that accused had not yet appointed his counsel in the case---Evident from the perusal

of record that trial of the accused had been conducted and concluded in blatant and flagrant violation of rule on the subject---High Court observed that if the accused was unable to hire the services of a counsel in the case which was a Sessions trial or counsel appointed by him refused to represent him or to cross-examine the prosecution witnesses on his behalf, then it was duty of the court to provide him a counsel at the State expense---Appeal was allowed, in circumstances and the case was remanded with the direction that Trial Court would provide opportunity to the accused to hire the services of a private counsel of his own choice or to appoint a counsel on State expenses.

(d) Qanun-e-Shahadat (10 of 1984)---

----Art.133---Cross-examination---Scope---Court could not come to just and fair decision of the case unless the credibility of a witness was tested on the touchstone of cross-examination---Cross-examination of the prosecution witnesses was very valuable right of the accused.

Ghulam Rasool Shah and another v. The State 2011 SCMR 735; Syed Saeed Muhammad Shah and another v. The State 1993 SCMR 550 and Abdul Ghafoor v. The State 2011 SCMR 23 ref.

Ghulam Rasool Shah and another v. The State 2011 SCMR 735; Abdul Ghafoor v. The State 2011 SCMR 23 and Syed Saeed Muhammad Shah and another v. The State 1993 SCMR 550 rel.

Faheem Altaf Raja for Appellant.

Ch. Muhammad Ishaq, Additional Prosecutor General for the State.

Date of hearing: 9th June, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.----This judgment shall dispose of Criminal Appeal No.615-J of 2014, filed by Ghaffar alias Kali (appellant) against his conviction and sentence recorded by the learned Additional Sessions Judge, Chunian District Kasur vide impugned judgment dated 21.10.2014.

2. Ghaffar alias Kali (appellant) along with his co-accused, namely, Jahangir, Iftikhar and Zulfiqar was tried in case FIR No.171 dated 26.04.2011 offences under sections

496-A and 376, P.P.C. registered at Police Station Changa Manga District Kasur. After conclusion of the trial, the learned trial Court vide its judgment dated 21.10.2014, has convicted and sentenced the appellant as under: -

> Under section 376, P.P.C. to rigorous imprisonment for 25 years and fine of Rs.100,000/-. In case of non-payment of fine, to undergo further six months simple imprisonment.

However, vide the same impugned judgment, Iftikhar alias Papu Shah, Zulfiqar and Jahangir (co-accused), were acquitted by the learned trial Court while extending them the benefit of doubt.

3. Brief facts of the case as narrated in complaint (Ex.PB), on the basis of which the formal FIR (Ex.PC), was chalked out are that Amanat Ali complainant (PW-4), was resident of Old Rehmanpura, Changa Manga. About 1-½ months ago, the complainant got contracted Nikah of his sister with one Muhammad Ramzan but the rukhsati had not taken place. Accused persons, namely, Jahangir etc. (named in the FIR) were annoyed from the said Nikah. On 25.04.2011, at about 1.00 P.M., the complainant was not present in his house, however, sisters of the complainant namely Mst. Zubaida (alleged victim) and Mst. Abida Bibi (PW-9), were present there. In the meanwhile Jahangir son of Muhammad Ilyas (co-accused since P.O), while armed with pistol, Arif (co-accused since P.O) while armed with pistol, Muhammad Jahangir son of Amir (co-accused since acquitted) while armed with gun, Sughra Bibi (co-accused since P.O) and Allah Rakhi (co-accused since P.O) along with two unknown accused while armed with firearms came to the house of the complainant and entered into the said house after knocking the door. Mst. Abida Bibi (PW-9) tried to make noise but the accused persons threatened her and wrapped 'dupatta' around her neck. The accused persons also tortured Mst. Zubaida Bibi (alleged victim/PW-5). Both the sisters of the complainant were taken to a room of the complainant's house where they searched an iron box and robbed 03-Tolas gold ornaments and cash amount of Rs.50,000/- from the said box. The accused persons also snatched 02-Tolas gold ornaments from Mst. Zubaida Bibi (alleged victim). The accused persons thereafter abducted Mst. Zubaida Bibi at gun point. Muhammad Ramzan (PW since given-up) and Malik Muhammad Anwar (PW-10), attracted to the spot and saw the accused persons while abducting Mst. Zubaida Bibi (alleged victim) in a car.

Initially the FIR was lodged under section 496-A, PPC but subsequently on 27.04.2011, on the basis of statement of Mst. Zubaida Bibi (alleged victim) recorded under section 164 Cr.P.C, beside addition of further accused persons in this case, namely, Ghaffar alias Kali (appellant), Iftikhar (accused since acquitted), Zulfiqar (accused since acquitted) and Mansha (accused since P.O), offence under section 376, P.P.C., was also added in this case.

4. The appellant was arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 03.07.2012, to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced eleven witnesses. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PO. The statements of the appellant and his co-accused under section 342, Cr.P.C, were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court vide its judgment dated 21.10.2014, found the appellant guilty, convicted and sentenced him as mentioned and detailed above, hence the instant appeal.

6. As per police report, the complainant of the case, namely, Amanat Ali had died and notice of this case has duly been served on his real brother, namely, Liaqat Ali who had been pursuing the instant case but despite repeated calls no one appeared on behalf of the complainant before this Court today. Even otherwise, it is a State case and the learned Additional Prosecutor General for the State is ready to argue the same, therefore, I proceed to decide the instant appeal after hearing arguments of learned defence counsel for the appellant, learned Additional Prosecutor General for the State and perusal of the record.

7. It is contended by learned defence counsel for the appellant that offence under section 376, P.P.C. was punishable with death and the same was triable by the Sessions Court but neither the appellant was offered by the learned trial Court to cross-examine the prosecution witnesses nor defence counsel at the State expenses was provided to the appellant as required under Rule 1, Part C, Volume 3, Chapter 24 of the High Court Rules and Orders; that the right of cross-examination on the

prosecution witnesses was a very valuable right of the accused/ appellant in order to test the credibility of the said witnesses but fair opportunity to cross-examine the prosecution witnesses has not been provided to the appellant/accused; that the appellant was not named in the FIR and accused person, namely, Jahangir son of Muhammad Ameer nominated in the FIR, as well as, Iftikhar and Zufliqar, accused persons implicated in this case through the statement of the alleged victim, namely, Mst. Zubaida Bibi (PW.5) recorded under section 164, Cr.P.C., have been acquitted by the learned trial Court vide impugned judgment on the basis of same prosecution evidence which has rightly been disbelieved by the learned trial Court but the appellant has been convicted and sentenced mainly due to the reason that he did not cross-examine the prosecution witnesses; that the prosecution evidence was highly doubtful and untrustworthy but the same has wrongly been relied upon by the learned trial Court; that neither any car or motorcycle nor any gold ornament or cash, mobile set or weapon has been recovered from the possession of the appellant; that no DNA test report has been produced in the prosecution evidence to connect the appellant with the alleged offence; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted while setting aside the impugned judgment. In support of his contentions, learned defence counsel for the appellant has placed reliance on the judgments reported as "Ghulam Rasool Shah and another v. The State" (2011 SCMR 735), "Syed Saeed Muhammad Shah and another v. The State" (1993 SCMR 550) and "Abdul Ghafoor v. The State" (2011 SCMR 23).

8. On the other hand, the learned Additional Prosecutor General has supported the impugned judgment on the ground that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the evidence of prosecution witnesses is trustworthy and reliable; that the prosecution case against the appellant is supported by the medical evidence according to which the hymen of the victim, namely, Mst. Zubaida Bibi (PW.5) was found to be ruptured; that the appellant could not establish any mala fide on the part of the prosecution witnesses for his false involvement in the instant case; that there is no substance in the this appeal, therefore, the same may be dismissed.

9. Arguments heard and record perused.

10. The detail of the prosecution case has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

11. I have noted that FIR was initially lodged under section 496-A, P.P.C. against Jahangir son of Ilyas, Arif, Jahangir son of Muhammad Ameer, Mst. Sughran Bibi and Mst. Allah Rakhi, co-accused alongwith two unknown accused persons, with the allegation that on 25.04.2011 at about 1:00 P.M. (Noon), the above mentioned accused persons forcibly abducted sister of the complainant, namely, Mst. Zubaida Bibi (PW.5) at gun point while boarding her in a vehicle. It was further alleged that the accused persons also robbed total five tolas gold ornament and cash amount of Rs.50,000/- from the house of the complainant at the time of occurrence. Consequently, FIR (Ex.PC) was lodged against the above mentioned Jahangir accused persons etc. Ghaffar alias Kali (appellant) was not named in the FIR. He alongwith three additional accused was implicated in this case on the basis of statement of the alleged abductee, namely, Mst. Zubaida Bibi (PW.5) recorded under section 164, Cr.P.C. wherein she stated that after her abduction by the above-referred Jahangir accused etc. she was taken to a house situated in village Lakhan-ke near Sarai Chimba, where Ghaffar alias Kali (appellant), Zulfiqar Dogar (co-accused since acquitted), Iftikhar alias Pappu Shah (co-accused since acquitted) and Mansha Dogar (co-accused since P.O.) committed rape with her, turn by turn. It is noteworthy that three other accused tried in this case, namely, Jahangir son of Muhammad Ameer, Zulfiqar Dogar and Iftikhar alias Pappu Shah have been acquitted by the learned trial Court. The remaining accused persons mentioned in the FIR (except Jahangir son of Muhammad Ameer) were not tried in this case because they were declared proclaimed offenders in this case. It is true that neither any motorcycle nor any car or weapon of offence has been recovered from the possession of the appellant. Likewise, it is also true that neither any gold ornament nor any cash amount or mobile phone set through which the complainant party was allegedly threatened by the co-accused has been recovered from the possession of the appellant. The argument of learned counsel for the appellant is also correct that no DNA test report has been brought on the record by the prosecution though the Medical Officer in the MLR of Mst. Zubaida Bibi (PW.5) categorically mentioned that vaginal swabs taken in this case had been sent to the office of Punjab Forensic Science Agency, Lahore for DNA test. In-spite of all the above mentioned facts, the appellant has been convicted and sentenced by

the learned trial Court because statement of Mst. Zubaida Bibi (alleged victim/PW.5) was not cross-examined by the appellant or his learned counsel and right of the appellant to cross-examine the said Mst. Zubaida Bibi (PW.5) and other prosecution witnesses was closed. The perusal of the record shows that on 27.09.2012, Ch. Muhammad Sajid Wains Advocate submitted his Power of Attorney on behalf of Ghaffar alias Kali (appellant) and Iftikhar alias Pappu Shah (co-accused since acquitted). Perusal of order dated 07.03.2013 of the learned trial Court further shows that said learned counsel made a statement before the Court on behalf of Iftikhar alias Pappu Shah and Zulfiqar Ali, co-accused that he does not want to cross-examine the prosecution witnesses, namely, Amanat Ali (PW.4) and Mst. Zubaida Bibi (PW.5). It is further mentioned in the above-referred order of the learned trial Court that learned counsel for Ghaffar alias Kali (appellant) and Jahangir (co-accused since acquitted) did not appear before the Court on the said date due to the strike of the Lawyers, which means that there was some misunderstanding about the appointment of the counsel in this case on behalf of the appellant because Power of Attorney of above-referred Ch. Muhammad Sajid Wains Advocate shows that he was also appointed as counsel on behalf of the appellant. However, cross-examination on the above mentioned prosecution witnesses on behalf of Ghaffar alias Kali (appellant) and Jahangir (co-accused since acquitted) was reserved on the said date by the learned trial Court. It is further noteworthy from the perusal of the orders dated 16.09.2014 and 22.09.2014 that right of cross-examination of the appellant on the prosecution witnesses, namely, Mst. Abida Bibi (PW.9) and Malik Muhammad Anwar (PW.10), as well as, on Amanat Ali (PW.4), Mst. Zubaida Bibi (PW.5) and Niamat Ali (PW.11) was closed by the learned trial Court on the above mentioned dates, respectively on the ground that Ghaffar alias Kali (appellant) had not yet appointed his counsel in this case. The above mentioned orders dated 16.09.2014 and 22.09.2014 read as under:-

"16-09-2014 Present	Learned DDPP for state Accused Ghaffar under police custody. Accused Zulfiqar, Iftikhar with their learned counsel Muhammad Sajad Veins, Adv. Accused Jahangir on bail without his learned counsel. PWs Abida Bibi and Malik Muhammad Anwar are present. Learned counsel for complainant Pir Mansha Bodla, Adv.

Evidence of PW-9 and PW-10 has been recorded and completed by closing right of cross examination of accused Jahangir and Ghaffar as accused Ghaffar did not yet appoint his learned counsel whereas accused Jahangir showed his inability to produce his defence counsel. No other PW is present. Now to come up for remaining prosecution evidence on 19.09.2014. Remaining PW/I.O. be summoned by SHO concerned."

"22-09-2014 Present	Learned DDPP for state Accused Ghaffar under police custody. Accused Zulfiqar, Iftikhar with their learned counsel Muhammad Sajad Veins, Adv. Accused Jahangir on bail without his learned counsel. PWs Abida Bibi and Malik Muhammad Anwar are present. Learned counsel for complainant.

Evidence of PW-11 has been recorded and completed by closing right of cross examination of accused Jahangir and Ghaffar as accused Ghaffar did not yet appoint his learned counsel whereas accused Jahangir showed his inability to produce his defence counsel. Similarly, their right of cross examination on PW-4 and PW-5 has also been closed due to above said reason. No other PW is left to be examined. Now to come up for closing the prosecution evidence and statements of accused under section 342 of Cr.P.C. on 24.09.2014."

It is evident from the perusal of the above mentioned orders of the learned trial Court that the right to cross-examine the prosecution witnesses of the appellant was closed merely on the ground that he (appellant) had not yet appointed his counsel in this case. Offence under section 376, P.P.C. is punishable with death or imprisonment for life and the same is triable by the Sessions Court. Under Rule 1, Part C, Volume 3, Chapter 24 of the High Court Rules and Orders, if an accused is unrepresented in a Sessions case or he cannot afford to engage a counsel, the Sessions Judge/Additional Sessions Judge is bound to make arrangement to employ a counsel at government expense for the said accused. The above mentioned rule reads as under:-

*[1. Presiding Officer to report whether accused can afford to engage counsel. If the accused is unrepresented in a Sessions case and cannot afford to engage a counsel, the Sessions Judge shall make arrangement to employ a

counsel at Government expense. Counsel in such cases should be appointed well in time to enable him to study the documents mentioned in section 265-C of the Code of Criminal Procedure."

It is, therefore, evident from the perusal of record that trial of the appellant has been conducted and concluded in blatant and flagrant violation of above-referred rule on the subject. If, the appellant was unable to hire the services of a counsel in this case which was a Sessions trial or counsel appointed by him refused to represent him or to cross-examine the prosecution witnesses on his behalf, then it was duty of the Court to provide him a counsel at the State expenses. Moreover, it is by now well settled that a Court cannot come to just and fair decision of the case unless the credibility of a witness is tested on the touchstone of cross-examination. Cross-examination of the prosecution witnesses is very valuable right of the accused. In the case of "Ghulam Rasool Shah and another v. The State" (2011 SCMR 735), the Hon'ble Supreme Court was pleased to observe that credibility of a prosecution witness cannot be tested unless he is subjected to cross-examination. It was further held that even the cross-examination conducted by an accused himself cannot be considered to be substitute of cross-examination conducted by a counsel. The relevant part of the said judgment is reproduced hereunder for ready reference:-

> 10. Notwithstanding the afore-stated observation, we are of the view that in a case of capital punishment a Court cannot come to a just decision unless the credibility of the witness is tested on the touchstone of cross-examination. Injustice is likely to occur in a case where cross-examination on the witnesses was not conducted either by the counsel provided at State expenses on account of unwillingness of the accused or by the accused themselves; Even, the cross-examination conducted by the accused himself has not been considered to be substitute of cross-examination conducted by a counsel."

Likewise, in the case of "Abdul Ghafoor v. The State" (2011 SCMR 23), the Hon'ble Supreme Court of Pakistan set aside the judgment of learned trial Court, as well as, of the High Court and remitted the case to the Sessions Court while providing opportunity to the accused/appellant of cross-examination on the prosecution witnesses on the ground that if, the counsel engaged by the appellant sought too many adjournments even then it was duty of the learned trial Court to provide defence

counsel at State expenses to the accused or could have given last opportunity to the accused to make arrangement to hire the services of another counsel. The relevant part of the said judgment reads as under:-

> "7. With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2-12-1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be provided one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of "Syed Saeed Muhammad Shah and another v. The State" (1993 SCMR 550).

12. In the light of above discussion, this appeal is allowed and the impugned judgment dated 21.10.2014 passed by the learned Additional Sessions Judge, Chunian District Kasur is hereby set aside. The case is remanded to the learned District & Sessions Judge, Kasur who shall either proceed with the matter himself or entrust the same to any other Additional Sessions Judge of his district. The appellant shall be treated as under-trial prisoner. The learned trial Court shall provide opportunity to the appellant to hire the services of a private counsel of his own choice and in case of refusal of the appellant to hire a private counsel then the appellant shall be given the choice to choose a defence counsel from the list of defence counsel maintained by the learned Sessions Judge, Kasur. The learned private counsel or defence counsel appointed at State expense to represent the appellant in this case, shall be provided three

opportunities to cross-examine the prosecution witnesses. As this is an old matter which pertains to the year 2011 and the appellant is behind the bars from the last more than nine years and five months, therefore, the learned trial Court shall decide the matter within a period of thirty (30) days from the date of receipt of attested copy of this judgment. The learned trial Court shall decide the case afresh on its own merits without being influenced by any observation made by this Court in the instant judgment or by any observation made in the impugned judgment dated 21.10.2014 passed by learned Additional Sessions Judge, Chunian.

13. The instant appeal is allowed in the above mentioned terms.

JK/G-16/L **Appeal allowed.**

2021 P Cr. L J 55

[Lahore]

Before Malik Shahzad Ahmad Khan and Raja Shahid Mehmood Abbasi, JJ

The STATE through Prosecutor General Punjab---Petitioner

Versus

IKRAM ULLAH KHAN, DUTY MAGISTRATE 1ST CLASS and another---Respondents

Writ Petition No. 22107 of 2020, heard on 3rd June, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Qanun-e-Shahadat (10 of 1984), Art. 8---Name of informer, non-disclosure of---Scope---Police was legally not bound to mention name of informer (spy) in FIR---Police had legal protection to keep secret the name of informer (spy).

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Criminal Procedure Code (V of 1898), Ss. 63 & 167---Discharge of accused---Complainant as investigating officer---Scope---Accused was arrested for recovery of 3800 grams of Charas from car driven by him---Duty Magistrate instead of sending accused to judicial lock up discharged him of the offence as complainant himself had investigated the case---Validity---No legal bar existed that complainant of case registered under Control of Narcotic Substances Act, 1997, could not be the investigating officer of that case---Functioning of police officer in a case of narcotics, in his dual capacity as a complainant and as an investigating officer, was neither illegal nor unlawful, so long as it did not prejudice the case of accused person---Question of prejudice (if any) could not be proved at the time of trial and an accused could not be discharged on such ground without recording of evidence by Trial Court---High Court set aside order passed by the Magistrate as the same was result of colourful exercise of his powers and was passed on the basis of extraneous reasons---High Court directed to take

accused in custody and remanded the matter to Magistrate to decide application for judicial remand---Constitutional petition was allowed, in circumstances.

Muhammad Hanif v. The State 2003 SCMR 1237; Surraya Bibi v. The State 2008 SCMR 825; Salah-ud-Din v. The State 2010 SCMR 1962; Zafar v. The State 2008 SCMR 1254; State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408; Muhammad Akram v. The State 2007 SCMR 1671 and The State v. Abdali Shah 2009 SCMR 291 ref.

Waqas Anwar, Deputy Prosecutor General and Fiaz, SI along with record for the State.

Respondent No. 2 present in person along with Amir Raza Bhatti, Advocate.

Date of hearing: 3rd June, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---The State through Prosecutor General Punjab has filed the instant petition against order dated 09.05.2020, passed by Duty Magistrate 1st Class, Karor Lal Esan, whereby the request of the Investigating Officer in case FIR No.220/2020, dated 08.05.2020, under section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Karor, District Layyah for judicial remand of Zafar Abbas (accused-respondent No.2), was turned down and the said respondent was discharged from the abovementioned case. Vide the impugned order, it was further directed that the recovered amount of Rs.4500/- (alleged sale proceed of narcotics), personal mobile phone and GLI car bearing registration No.LE-5842, be also handed over to respondent No.2.

2. Arguments heard. Record perused.

3. As per brief facts of the present case, FIR No.220/2020, dated 08.05.2020, under section 9(c) of the Control of Narcotic Substances Act, 1997 (hereinafter to be referred as the Act, 1997), was registered against Zafar Abbas (accused-respondent No.2), at Police Station Karor, District Layyah with the allegation that on 08.05.2020, at 9.30 a.m, Nazeer Ahmad ASI (complainant) along with other police officials of Police Station Karor was present near the railway crossing

situated at Layyah Road, Karor. In the meanwhile, he received a spy information that a notorious drug peddler namely Zafar Abbas (accused-respondent No.2), was coming in his GLI car bearing registration No.LE-5824, from Laskaniwala road towards Railway crossing situated at Layyah Road, Karor. On the abovementioned information, the police party installed a barricade at the above, mentioned road. In the meanwhile a car bearing registration No. LE-5824, driven by Zafar Abbas (accused-respondent No.2), came from the side of Laskaniwala road. On seeing the police party, Zafar Abbas (accused-respondent No.2), tried to turn back his car but he was apprehended by the police party. On checking the abovemeutioned car, 3800-grams Charas (in the form of four big pieces), wrapped in polythene bags, was recovered from beneath the driving seat of the said car. Sample parcel of 190-grams Charas and a parcel of remaining Charas were prepared. On personal search of Zafar Abbas (accused-respondent No.2), an amount of Rs.4500/- (alleged sale proceed of narcotics) and a mobile phone Nokia were also recovered, which were taken into possession vide recovery memo, hence the abovementioned FIR.

On 09.05.2020, Zafar Abbas (accused-respondent No.2), was produced before Duty Magistrate Ist Class, Karor Lal Esan and the Investigating Officer made request for judicial remand of the accused-respondent No. 2. The Duty Magistrate 1st Class, Karor Lal Esan instead of granting judicial remand of Zafar Abbas (accused-respondent No. 2), discharged the said accused-respondent No. 2 in the abovementioned case vide impugned order dated 09.05.2020, which reads as under:-

"ORDER

Present: Accused Zafar Abbas in custody.

Rana Javed Akhtar learned counsel for the accused.

I.O. Nazir Ahmad along-with record.

I.O. requested for judicial remand of the accused namely Zafar Abbas. Accused have been heard.

2. Arguments advanced by the learned counsel for the accused. Record perused.

3. After perusing the record it appears that the police has registered the FIR under section 9(c) of C.N.S.A., 1997 on information upon suspicion without mentioning the name of informer. The accused has been arrested by the mobile police at Phatak Layyah road Karor. The mobile police team did not give any statement before the I.O. regarding the source of information having Charas in his own personal car. The accused is the farmer having land 10 Acer and also has his house in city Karor as well as in village Chak No.100-B/TDA. The accused was driving the car GLI-LE-5824 moving towards his house. The mobile team has not mentioned the source as well as information relating the possession of the huge quantity of Charas by the accused in his own personal car. Moreover, the complainant of FIR who is the police official has not mentioned the purpose of possessing huge quantity of Charas in his own vehicle. Learned counsel for the accused has provided certified copy of previous trial case FIR No.637/18 of the accused in which the accused was acquitted on merit. The accused remained in judicial lockup for about 07 months without any proof of possessing of NARCOTIC SUBSTANCE in previous case. Neither the police has not got any evidence from locality or any other person through which it can be ascertained that the accused run the business of NARCOTIC SUBSTANCE. The accused having three child (sons) is a peaceful citizen and earn his livelihood by the agriculture. This the harvest season of the wheat crops, the accused time and again makes his movement on his personal car from village to city. The recovery memo has been prepared by Nazir Ahmad ASI after initial interrogation and put the accused before Muhammad Sharif ASI. Being complainant Nazir Ahmad ASI cannot initially interrogate the matter which is clear violation of section 103, Cr.P.C. Investigating Officer further mentioned in police Zemni No.1 and serial No.7 that no one is ready to give evidence against the accused relating to commission of offence. The FIR registered by the police is highly doubtful having no authentic source of information

relating to the commission of offence. An innocent person cannot be kept in judicial custody mere on suspicion and allegation. There is no incriminating material available on the record which connect the accused with the commission of offence. Therefore, the request of I.O. for judicial remand is hereby turned down and the accused person is hereby discharged, he be released forthwith if not required in any other case. The recovered amount i.e. Rs. 4500/-, personal mobile phone and the vehicle car GLI No.LE 5842 is handed over to the accused without any delay."

4. The Duty Magistrate 1st Class, Karor Lal Esan has passed the impugned order mainly on two grounds amongst others that the name of the informer (spy), who gave information to the police regarding transportation of narcotics by the accused (respondent No.2), has not been mentioned in the FIR and on the ground that the police did not record statement of any person of the locality to ascertain that accused-respondent No.2, runs the business of narcotic substances and as such violation of section 103, Cr.P.C, has been committed in this case. Insofar as the ground mentioned in the impugned order that the name of informer (spy) has not been mentioned in the FIR, is concerned, in this respect, we may refer here Article 8 of the Qanun-e-Shahadat Order, 1984, which reads as under:-

> "8. Information as to commission of offences:---No Magistrate or police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue."
>
> (bold and underlining supplied for emphasis)

It is, therefore, evident from the perusal of the abovementioned provision of law that the complainant (Nazeer Ahmad ASI), was legally not bound to mention the name of informer (spy) in the FIR and he had legal protection to keep secret the name of informer (spy). Likewise, the provision of section 103, Cr.P.C., is not applicable in the cases registered under the Act, 1997 as envisaged under section 25 of the Act ibid, which reads as under;-

"25. Mode of making searches and arrest.---The provision of the Code of Criminal Procedure, 1898, except those of section 103, shall mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of sections 20, 21, 22 and 23 to all warrants issued and arrests and searches made under these sections."

(bold and underlining supplied for emphasis)

It is clear from the perusal of the abovementioned provision of the Act, 1997 that association of private witnesses at the time of recovery of narcotics or recording the statement of any person of the locality to ascertain that as to whether or not, an accused runs the business of narcotic substances was not mandatory in the case in hand. Moreover, it is by now well settled that in the cases registered under the Act ibid, the police officials are as good witnesses as private/public witnesses. In the case of "Muhammad Hanif v. The State" (2003 SCMR 1237), the august Supreme Court of Pakistan observed as under:-

"4.....The police officials are equally good witnesses and could be relied if their testimony remains unshattered during cross-examination. In this regard reference can be made to Muhammad Naeem v. State (1992 SCMR 1617), Muhammad v. State (PLD 1981 SC 635)."

The same view was reiterated by the Hon'ble Supreme Court of Pakistan in the judgments reported as "Surraya Bibi v. The State" (2008 SCMR 825) and "Salah-ud-Din v. The State" (2010 SCMR 1962).

5. The next ground mentioned in the impugned order is that Nazeer Ahmad ASI being the complainant of the case has prepared the recovery memo, which shows that he initially investigated the case and then handed over Zafar Abbas (accused-respondent No.2), to Muhammad Sharif ASI/Investigating Officer of this case, which is clear violation of law. The said ground mentioned in the impugned order has also no blessing of the law of the country on the subject. Nazeer Ahmad ASI is the complainant of this case, who along with other police officials apprehended Zafar Abbas (accused-respondent No.2) and recovered 3800-grams Charas from the car driven by the said respondent, therefore, he has not committed any illegality, if he had prepared the recovery memo of the recovered Charas in this

case. Even otherwise, there is no legal bar that a complainant of the case registered under the Act, 1997, cannot be the Investigating Officer of the said case. It is by now well settled that functioning of a police officer in a case of Narcotic, in his dual capacity as a complainant and as an Investigating Officer is neither illegal nor unlawful, so long as it does not prejudice the case of the accused person. The question of prejudice (if any), can only be proved at the time of trial and an accused cannot be discharged on the above-referred ground without recording evidence by the trial Court. In the case of "Zafar v. The State" (2008 SCMR 1254), the apex Court of the country was pleased to observe as under:-

> "11. So far as the objection of the learned counsel for the appellant that the Investigating Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir- and others PLD 1997 SC 408, wherein it is observed that a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person....."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the judgment reported as "State through Advocate-General, Sindh v. Bashir and others" (PLD 1997 Supreme Court 408).

6. The finding in the impugned order that the Mobile Police Team did not give any statement before the Investigating Officer regarding possession of Charas by the accused (respondent No.2), in his car, is also against the record because it is not the case of the Prosecution that any Mobile Police Team played any role in this case. Learned counsel for accused-respondent No.2, has argued that it was the complainant and other police officials, who have been mentioned as Mobile Police Team in the impugned order because it was stated in the FIR that the official vehicle bearing registration No.LYG-19 was in the use of the complainant party. If it is so, then we have noted that the statements of the police officials (mobile team) mentioned in the FIR namely Muhammad Imran 854/c and Pervaiz Akhtar 577/c, have duly been recorded in this case under section 161, Cr.P.C. Both the abovementioned prosecution witnesses namely Muhammad Imran 854/c

and Pervaiz Akhtar 577/c, have also been cited as witnesses in the recovery memo and as such the abovementioned observation in the impugned order that Mobile Police Team did not give any statement before the Investigating Officer regarding possession of Charas by the accused (respondent No.2), in his car, is also against the record.

7. Learned counsel for accused-respondent No.2, next argued that as the complainant Nazeer Ahmad is an Assistant Sub-Inspector of police, therefore, he was not authorized to arrest Zafar Abbas (accused-respondent No.2) and lodge the above-referred FIR as provided under section 21 of the Act, 1997 and this fact was also considered by the Duty Magistrate, while passing the impugned order. The said argument of learned counsel for accused-respondent No.2, has no force because the provisions of section 21 of the Act, 1997, are not mandatory and they are only directory in nature, therefore, arrest of the accused by Nazeer Ahmad ASI, recovery of narcotics by him from the possession of accused-respondent No.2 and lodging of FIR on the complaint of said police official, do not vitiate the prosecution case. Reference in this context may be made to the judgments reported as "Muhammad Akram v. The State" (2007 SCMR 1671), "The State v. Abdali Shah" (2009 SCMR 291) and "Zafar v. The State" (2008 SCMR 1254).

8. The next ground mentioned in the impugned order is that learned counsel for the accused-respondent No.2, has provided certified copy of previous trial of the accused-respondent No.2, in case FIR No.637/2018, in which he was acquitted on merits and he remained in judicial lockup for about seven months in the said case without any proof of possession of narcotic substance. The said ground is also not a valid ground for discharge of the accused-respondent No.2, in the instant case because every criminal case has to be decided on the basis of its own peculiar facts and acquittal of an accused in an earlier case does not mean that he has to be discharged in all subsequent cases, irrespective of the merits of the said cases. Moreover, as per police record, the petitioner is involved in eleven other criminal cases of similar nature and he is also a previous convict in one other case i.e., FIR No.18/2010, dated 29.10.2010, under section 9(c) of the Act, 1997, registered at Police Station ANF, Mianwali. Zalar Abbas (accused-respondent No.2), present before the Court though claimed that he was acquitted in appeal in the above-

referred case but he has frankly conceded that he is a previous convict in another case registered under section 9(c) of the Act, 1997 and the said conviction was not challenged by him. It is, therefore, evident that the Duty Magistrate, Karor Lal Esan has passed the impugned order against the record of the present case.

9. The reason mentioned in the impugned order that no incriminating material was available on the record to connect Zafar Abbas (accused-respondent No.2), with the commission of offence, is also against the record. As mentioned earlier, incriminating material in the shape of complaint/evidence of Nazeer Ahmad ASI (complainant), as well as, statements of recovery witnesses namely Muhammad Imran 854/c and Pervaiz Akhtar 577/c, recorded under section 161, Cr.P.C. along with recovery of 3800-grams Charas is available on the record, which is prima facie sufficient material to connect the accused-respondent No.2, with the alleged offence.

10. The other observation made in the impugned order for the discharge of the accused, is that the accused is a farmer having 10- acres of land and he also owns houses in City Karor, as well as, in Chak No.100-B/TDA and he also owns a personal car. In this respect, it is observed that the ownership oi agricultural land/houses or a car does not give a license to any person to possess or transport narcotic and as such the said ground mentioned in the impugned order for discharge of accused/respondent No. 2, is also fanciful and absurd. It appears that Duty Magistrate, Karor Lal Esan was of the belief that the provisions of the Act 1997 are only applicable on the homeless/landless/carless and poor People.

11. It is also noteworthy that an accused can be discharged in a criminal case, when no evidence is available against him on the record or when the evidence available on the record is deficient, whereas in the instant case, as mentioned earlier, the evidence of Nazeer Ahmad ASI (complainant), as well as, evidence of recovery witnesses namely Muhammad Imran 854/c and Pervaiz Akhtar 577/c along with recovery of 3800-grams Charas is available on the record against Zafar Abbas (accused-respondent No.2).

12. In the impugned order dated 09.05.2020, a direction has also been passed for handing over of cash amount of Rs.4500/- (alleged sale proceed of narcotics),

personal mobile phone and GLI car bearing registration No.LE-5824 to the accused-respondent No.2. The said direction has been passed without assigning any valid reason and as such the same is also not sustainable in the eye of law.

13. It is, therefore, evident that the Duty Magistrate, Karor Lal Esan has passed the impugned order through colorful exercise of his powers. It appears that the impugned order has been passed on the basis of extraneous reasons. The impugned order is patently illegally and void, which has been passed against the abovementioned basic provisions of law and the same is also against the dictums laid down in the judgments of the superior Courts of the country on the subject. In the light of above discussion, the instant petition filed by the State is allowed and impugned order dated 09.05.2020, passed by Duty Magistrate 1st Class, Karor Lal Esan is hereby set-aside. The request for grant of judicial remand of respondent No.2, made by the Investigating Officer of the case in hand shall be deemed to be pending before the concerned Magistrate. Zafar Abbas (accused-respondent No.2), is present before the Court. He is directed to be taken into custody. Fiaz SI, who is the present Investigating Officer of this case shall produce Zafar Abbas (accused/respondent No.2), before the concerned Magistrate (Judicial Magistrate of the Area or Duty Magistrate other than Mr. Ikram Ullah Khan, Judicial Magistrate 1st Class, Karor Lal Esan) for grant of judicial remand and the Magistrate concerned shall pass an order in this respect in accordance with the law. Cash amount of Rs.4500/- (alleged sale proceed of narcotics), mobile phone of accused and GLI car bearing registration No.LE-5824, if already have been handed over to accused/respondent No.2, then the same shall be recovered from the said respondent, however, the fate of the above-mentioned cash/mobile phone/car shall be determined by the learned trial Court in accordance with the law without being influenced by any observation made in the instant order.

14. We may mention here that a separate confidential note has been written in this case for perused of the Hon'ble Chief Justice and Administrative Committee of the Court.

MH/S-35/L **Case remanded.**

2021 P Cr. L J Note 25

[Lahore (Multan Bench)]

Before Malik Shahzad Ahmad Khan and Sadiq Mahmud Khurram, JJ

KHADIM HUSSAIN---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 1113 and Criminal Miscellaneous No. 1 of 2019, decided on 6th February, 2020.

Criminal Procedure Code (V of 1898)---

----Ss. 426 & 497---Control of Narcotic Substances Act (XXV of 1997), S. 9(c)---Possession of narcotics---Suspension of sentence pending appeal---Bail, grant of---Scope---Accused was alleged to have been found in possession of 1250 grams of charas---Accused had already served one year, three months and seventeen days out of his sentence of four years and six months---Remaining portion of sentence to be undergone by accused was short---Appeal filed by accused had not been decided despite lapse of four months and sixteen days---No prospect of early hearing of appeal existed---Accused, if not released on bail during pendency of appeal, was likely to serve his entire sentence---Sentence awarded to the accused was suspended and he was admitted to bail, in circumstances.

Abdul Hameed v. Muhammad Abdullah 1999 SCMR 2589 ref.

Prince Rehan Iftikhar Sheikh for Appellant.

Muhammad Ali Shahab, Deputy Prosecutor General for the State.

ORDER

Criminal Misc. No. 1 of 2019

Khadim Hussain son of Talib Hussain, petitioner/appellant by way of the instant petition has sought for suspension of his sentence and release on bail during the pendency of his appeal.

2. The petitioner was tried in case FIR No.295 of 2018 dated 10.12.2018 registered at Police Station Ghaziabad, District Sahiwal in respect of an offence under section 9(c) of the Control of Narcotic Substances Act, 1997, and vide judgment dated 20.08.2019, passed by the learned Additional Sessions Judge/

Judge Special Court, CNSA, 1997, Chichawatni, the petitioner has been convicted and sentenced as under:-

> Under section 9(c) of CNSA, 1997 to Rigorous imprisonment for 04 years and 6 months with fine of Rs.20,000/- and in default thereof to suffer simple imprisonment for 05 months. The benefit available under section 382-B of Cr.P.C. was also extended.

3. We heard the learned counsel for the parties and perused the record.

4. As per the prosecution case, Charas weighing 1250-grams was recovered from the possession of the petitioner. According to the report of Superintendent, Central Jail, Sahiwal, the petitioner has already served one year, three months and seventeen days of his sentence out of the sentence of imprisonment passed by the learned trial Court being four years and six months. The remaining portion of sentence to be undergone by the petitioner is short. The impugned judgment was passed on 20.08.2019 and as such a period of four months and sixteen days has already elapsed from the date of impugned judgment but the appeal filed by the appellant could not be decided, so far. The petitioner has filed this appeal against his conviction and sentence which pertains to the year 2019 and there is no prospect of early hearing of the same in the near future. In case, the petitioner is not released on bail during the pendency of his appeal, there is every likelihood that, before the decision of his appeal, he would have undergone his entire sentence. Furthermore, it would certainly be impossible to compensate the petitioner for his detention in jail if ultimately he is acquitted, after having served out his entire sentence. On the contrary, in case of his release during the pendency of his appeal, the position would be different because in the event of dismissal of his appeal by this Court, he would be arrested for serving his remaining sentence. It will amount to awarding the petitioner punishment in advance. In this respect, we respectfully refer here the case of "Abdul Hameed v. Muhammad Abdullah" (1999 SCMR 2589).

5. In the light of above discussion, this criminal miscellaneous petition is allowed, the sentence of the petitioner is suspended and the petitioner namely Khadim Hussain son of Talib Hussain, is admitted to bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees Two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. The petitioner is directed to appear before the Court on each and every date of hearing of this case.

SA/K-4/L **Bail granted.**

2021 P Cr. L J Note 27

[Lahore]

Before Malik Shahzad Ahmad Khan, J

SAQIB ALI---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 671 and Criminal Revision No. 839 of 2016, heard on 10th June, 2020.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 363, 364-A & 201---Qatl-i-amd, kidnapping, kidnapping or abducting a person under the age of ten years, causing disappearance of evidence of offence, or giving false information to screen offender---Appreciation of evidence--- Benefit of doubt---Ocular and medical evidence--Contradictions---Scope---Accused was charged for abducting two minor sons of the complainant and thereafter committed their murders---Ocular account of the occurrence had been furnished by one witness, who had seen accused and co-accused while throwing two minor boys in the canal---Said witness stated that a girl was also sitting in the car along with accused and co-accused at the time of occurrence-Said witness had admitted during his cross-examination that his statement was recorded by the police on 22.01.2010---If said witness had witnessed the occurrence of a heinous crime and seen the accused and co-accused while throwing two boys in the canal on 16.11.2009, then as to why he remained mum till 22.01.2010 i.e. for a period of two months and six days from the date of occurrence---Said witness had also stated in his examination-in-chief that on the next day of occurrence, he visited Police Station in connection with personal affair where he identified all the accused persons of that case but even then he did not make statement regarding the above stated fact to the police on the said day and made his statement before the police for the first time on 22.01.2010---No plausible explanation had been given by the said witness for remaining mum for such a long period---Statement of said witness was in conflict with the medical evidence produced by the prosecution in that case---Medical Officer, who conducted post-mortem examination on the dead body of one minor/deceased stated the time that

elapsed between the injuries and death as immediate and the time that elapsed between the death and post-mortem examination as six to twelve days; meaning thereby that the death of minor deceased took place between 26.11.2009 to 02.12.2009 whereas according to the statement of witness, deceased was thrown in the canal by accused and co-accused on 16.11.2009 and as such there was difference of ten days regarding the date of death as given by witness and the Medical Officer---Moreover, said witness did not state that he had seen accused and his co-accused while throwing dead bodies of the minors in the canal rather he stated that he had seen the accused and co-accused while throwing two children in the canal---- Statement of witness showed that he had seen the accused and co-accused while throwing two children in the canal and not their dead bodies---On the other hand, according to the medical evidence, there were five injuries on the body of minor deceased which were ante mortem and bones under injuries were also found to be fractured, meaning thereby that minor deceased was murdered before throwing his dead body in the canal but witness did not state that the accused and his co-accused threw the dead body of any minor in the canal or the minors were thrown in injured condition in the canal and as such the evidence of said witness was in conflict with the medical evidence of the prosecution---Ocular evidence produced by the prosecution, in circumstances through sole witness was not worthy of reliance---Appeal against conviction was allowed, in circumstances.

(b) Criminal trial---

----Circumstantial evidence---Scope---Circumstances should be linked with each other and should form such a continuous chain that its one end touched the dead body and other to the neck of the accused---If any link in the chain was missing then its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 363, 364-A & 201---Qatl-i-amd, kidnapping, kidnapping or abducting a person under the age of ten years, causing disappearance of evidence of offence, or giving false information to screen offender---Appreciation of

evidence---Last seen evidence---Scope---Accused was charged for abducting two minor sons of the complainant and thereafter committed their murders---Last seen evidence was produced by the prosecution through two witnesses---Both the said witnesses stated that on 16.11.2009, accused brought one minor boy to the house of one of the witnesses, so that he played with goats and thereafter the accused left his house, however, after sometime, accused came back and took the minor boy with him---Other witness stated that on 16.11.2009, he lastly seen accused in the company of a minor boy to whom he later on recognized with the help of his snaps as deceased son of complainant but he made statement before police on 02.01.2010---Circumstances suggested that there was delay of one month and seventeen days in making the statement of witness before the police---Evidently, one of the witnesses was himself interrogated in that case as a suspect and he was under police custody when he made statement against the accused on 02.01.2010---To rely upon the evidence of last seen produced by the prosecution through said two witnesses could not be relied---Appeal against conviction was allowed, in circumstances.

(d) Qanun-e-Shahadat (10 of 1984)---

----Art. 140---Cross-examination---Non-conducting of cross-examination on the statement of witness---Scope---Statement of a witness, which was not subjected to cross-examination, was inadmissible in evidence and was of no legal effect.

Pir Mazharul Haq and others v. The State through Chief Ehtesab Commissioner, Islamabad PLD 2005 SC 63 and Jan Sher Khan v. The State 2013 MLD 1554 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 363, 364-A & 201---Qatl-i-amd, kidnapping, kidnapping or abducting a person under the age of ten years, causing disappearance of evidence of offence, or giving false information to screen offender---Appreciation of evidence---Recovery of shoes and feeder of deceased minor on the pointation of accused---Reliance---Scope---Accused was charged for abducting two minor sons of the complainant and thereafter committed their murders---In the present case, recovery of shoes and feeder belonging to deceased child was effected, but said articles were not mentioned by the complainant in his complaint---Complainant had alleged in the complaint that his minor son was wearing trouser suite of sky

blue colour and pink jacket---Although, the said clothes have been shown recovered in the recovery memo but the recovery witness, while appearing in the witness box, did not state that any such garments of deceased were recovered on the pointation of the accused---Recoveries of shoes and feeder of deceased on the pointation of the accused, in circumstances, were inconsequential for the prosecution---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b), 363, 364-A & 201---Qati-i-amd, kidnapping, kidnapping or abducting a person under the age of ten years, causing disappearance of evidence of offence, or giving false information to screen offender---Appreciation of evidence---Motive not proved---Effect---Accused was charged for abducting two minor sons of the complainant and thereafter committed their murders---Prosecution evidence qua the motive had been produced through complainant, who stated that accused was posing himself as a fake 'Peer' (Saint) and accused used to entice his family members, therefore, complainant forbade him from doing so; due to the said grudge, the accused committed murder of two minor sons of the complainant---Prosecution case was that the complainant who forbade accused from posing himself as a fake 'Peer' and enticing away his family members and it was not the prosecution case that the minor children of the complainant, aged about five years and aged about three years, ever forbade the accused from posing himself as a fake 'Peer'---If the motive of the prosecution was presumed to be correct then it was complainant who should have been the prime target of accused because even, according to the prosecution case itself, the accused had no grudge against the minors, therefore, there was no reason with the accused to commit their murder---Complainant also stated in his examination-in-chief that his family members were enticed by the accused while posing himself as a fake 'Peer' but he did not name any such person who was enticed away by the accused---No family member of the complainant appeared during the course of investigation or before the Trial Court in support of the motive alleged by the complainant---Motive as alleged by the prosecution, in circumstances, had not been proved---Appeal against conviction was allowed, in circumstances.

(g) Criminal trial---

----Medical evidence---Scope---Medical evidence tells about the probable time of death, the kind of injuries, kind of weapon used in the occurrence but it would not identify the assailant.

Muhammad Tasawar v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 rel.

(h) Criminal trial---

----Benefit of doubt---Principle---A single circumstance creating reasonable doubt regarding the prosecution case would be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345; Muhammad Akram v. The State 2009 SCMR 230 and Muhammad Mansha v. The State 2018 SCMR 772 rel.

M. Asad Manzoor Butt for Appellant (in Criminal Appeal No. 671 of 2015 as well as Respondent in Criminal Revision No. 839 of 2016).

Ms. Tahira Parveen, District Public Prosecutor for the State.

Rana Arif Mehmood for the Complainant (in Criminal Appeal No. 671 of 2015 as well as Petitioner in Criminal Revision No. 839 of 2016).

Date of hearing: 10th June, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.671 of 2016, filed by Saqib Ali (appellant) against his conviction and sentence, as well as Criminal Revision No.839 of 2016, filed by Muhammad Azam Butt petitioner/complainant for enhancement of sentence awarded to Saqib Ali (respondent of said criminal revision), from imprisonment for life to death, as both these matters have arisen out of the same judgment dated 09.03.2016, passed by learned Additional Sessions Judge, Lahore.

2. Saqib Ali (appellant) along with his co-accused was tried in case FIR No.905/2009 dated 17.11.2009, registered at Police Station Ghazi Abad, Lahore in respect of offences under sections 302/363/364-A/201, P.P.C. After conclusion of the trial, the learned trial Court vide its impugned judgment dated 09.03.2016, has convicted and sentenced the appellant as under: -

Under section 364-A, P.P.C. to imprisonment for life.

Under section 302(b), P.P.C. to imprisonment for life. The appellant was also directed to pay compensation of Rs.1,00,000/- (Rupees one hundred thousand only), to the legal heirs of Hashir (deceased), as provided under section 544-A, Cr.P.C. and in case of default to further undergo six months simple imprisonment.

Benefit of section 382-B, Cr.P.C. was also extended to the appellant. Both the sentences of imprisonment were ordered to run concurrently.

Through the same impugned judgment, the appellant was acquitted from the charges under sections 364-A, 302(b) and 201 of P.P.C. regarding the abduction and murder of Muhammad Ahmad (minor deceased) and disappearance of evidence to the extent of said deceased whereas, co-accused of the appellant, namely, Atif Zaman, Iftikhar Alam and Mst. Ayesha were acquitted from all the charges.

3. Brief facts of the case as given by Muhammad Azam Butt (complainant/PW-5) in his complaint Ex.PA, on the basis of which formal FIR Ex.PA/1 was chalked out, are that the complainant was employed in the Daily Express News. On 16.11.2009, at about 6.00 p.m. (evening), the children of the complainant namely Muhammad Ahmed aged about 5 years, Muhammad Hashir aged about 3, were playing with the brother-in-law of the complainant namely Saqib Ashrafi alias Saqib Ali (appellant), who came to the house of the complainant and stayed there for about 2 to 3 hours and thereafter he (appellant) left the said house. After half an hour from the departure of the appellant, the above mentioned children of the complainant also disappeared from his house. The complainant expressed his suspicion that his children had been abducted by Saqib Ashrafi alias Saqib Ali (appellant) because he (appellant) used to pose himself as a fake "Peer" and entice the family members of the complainant, therefore, the complainant forbade the appellant from doing so and posing himself as a fake "Peer", due to which he (appellant) abducted the children of the complainant, hence the abovementioned FIR.

Initially the FIR was lodged under section 363, P.P.C. On 02.12.2009, the dead body of an unknown minor was found in a canal situated within the area of Police Station Satto Katla, Lahore whereupon FIR No.1420/2009, under section 302,

P.P.C., was lodged at police station Satto Katla against unknown accused persons. Later on, the dead body of abovementioned unknown minor was identified to be that of Muhammad Hashir (minor son of the complainant), therefore, offences under sections 302/201, P.P.C., were added in the instant case.

4. The appellant was arrested in this case by the police on 15.12.2009 and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced sixteen witnesses during the trial. The statement of the appellant under section 342, Cr.P.C. was recorded, wherein he refuted the allegations levelled against him and professed his innocence.

5. The learned trial Court vide its judgment dated 09.03.2016, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case by the complainant being in league with the local police; that the evidence of Muhammad Yaqoob, PW.3 who allegedly saw the appellant and his co-accused while throwing two minor boys in the canal, is not worthy of reliance because the said witness appeared before the police with considerable delay of two months and six days from the date of occurrence; that the circumstantial evidence produced by the prosecution is very weak thus, the same is not worthy of reliance; that the dead body of Muhammad Ahmad, deceased has not been recovered in this case and the appellant has been acquitted from the charges of abduction and murder of Muhammad Ahmad, deceased; that insofar as the murder of Muhammad Hashir, deceased is concerned, according to his postmortem examination report, there were five injuries on his body but no weapon of offence has been recovered from the possession of the appellant; that the alleged recoveries of last worn clothes of the minor deceased, namely, Muhammad Ahmad and Muhammad Hashir were not stained with blood and the said recoveries were also rightly disbelieved by the learned trial Court; that the evidence of last seen produced by the prosecution through Roheel Ahmad, PW.11 and Atif Mehmood, PW.12 is not worthy of

reliance because they made their statements before the police with the delay of one month and seventeen days from the occurrence; that the prosecution evidence regarding the alleged pointation of the place of occurrence by the appellant is also inconsequential because nothing incriminating was recovered from the said place; that the motive alleged by the prosecution has also not been proved through any reliable evidence and the same has rightly been discarded by the learned trial Court; that the prosecution evidence has been disbelieved by the learned trial Court against Mst. Ayesha, Atif Zaman and Iftikhar Alam, co-accused, therefore, the same evidence cannot be believed against the appellant without independent corroboration which is very much lacking in this case; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charges.

7. On the other hand, it is argued by the learned District Public Prosecutor assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the co-accused of the appellant, namely, Mst. Ayesha, Atif Zaman and Iftikhar Alam were not nominated in the FIR or by the prosecution witnesses of last seen evidence, namely, Roheel Ahmad, PW.11 and Atif Mehmood, PW.12, therefore, their case is distinguishable from the case of Saqib Ali, appellant and as such the acquittal of the said co-accused is of no avail to the appellant; that convincing and reliable prosecution evidence is available on the record against the appellant in the shape of statement of Muhammad Yaqoob, PW.3, who saw the appellant and his co-accused while throwing the minor boys in the canal; that there is evidence of lastly seeing alive the minor sons of the complainant in the company of the appellant which was produced by the prosecution through Roheel Ahmad, PW.11 and Atif Mehmood, PW.12; that last worn clothes and articles of both the deceased boys were recovered on the pointation of the appellant and the recoveries of the said clothes/articles have been proved by the prosecution through Abdul Basit PW.4; that Muhammad Azam Butt, complainant/PW.5 also proved the motive alleged in this case that the appellant used to pose himself as a fake 'Peer' and he was forbidden by the complainant, therefore, due to the said grudge, he (appellant) committed the murder of his (complainant's) two minor sons; that the prosecution witnesses stood the test of lengthy cross-examination but their evidence could not

be shaken; that there is no substance in this appeal, therefore, the same may be dismissed. Learned counsel for the complainant while arguing Crl. Revision No.839 of 2016, contends that Saqib Ali, respondent (appellant in Crl. Appeal No.671 of 2016) has wrongly been awarded lesser punishment by the learned trial Court whereas there was no mitigating circumstance in his favour, therefore, he may be awarded capital punishment.

8. Arguments heard and record perused.

9. The detail of the prosecution case as set forth in the FIR (Ex.PA/1) and in the complaint (Ex.PA) has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

10. As mentioned earlier, all the accused including Saqib Ali, appellant have been acquitted from the charges of abduction and murder of Muhammad Ahmad, minor deceased, however, Saqib Ali, appellant has been convicted and sentenced only for the abduction and murder of Muhammad Hashir, deceased, as mentioned and detailed above.

11. I have noted that the prosecution has produced two types of evidence in this case. The prosecution produced ocular account of the occurrence through Muhammad Yaqoob, PW.3 and at the same time, the prosecution has also produced circumstantial evidence in this case through Abdul Basit (PW.4), Muhammad Azam (PW.5), Roheel Ahmad (PW.11) and Atif Mehmood (PW.12). It is, therefore, evident that the complainant party of this case was not sure that as to whether they (complainant party) should produce direct evidence in the shape of ocular account or to produce circumstantial evidence in this case against the accused persons. Insofar as the ocular account of the prosecution is concerned, I have noted that the prosecution has produced Muhammad Yaqoob, PW.3 who had seen Saqib Ali, appellant and his co-accused while throwing two minor boys in the canal.

Ocular account/Evidence regarding throwing two minor boys in the canal by the appellant and his co-accused.

The prosecution produced its ocular account through Muhammad Yaqoob, PW.3. He stated that on 16.11.2009, he was proceeding from cavalry ground to Harbanspura, Lahore along with his friend Tariq Hussain and when they were

crossing Harbanspura Bridge, they saw Saqib Ali, appellant, Atif Zaman and Iftikhar Alam, co-accused while throwing two minor boys in the canal. He further stated that a girl was also sitting in the car along with Saqib Ali, appellant and his co-accused at the time of occurrence. Muhammad Yaqoob, PW.3 admitted during his cross-examination that his statement was recorded by the police on 22.01.2010. It is not understandable that if Muhammad Yaqoob, PW.3 had witnessed the occurrence of a heinous crime and seen Saqib Ali, appellant and his co-accused while throwing two minor boys in the canal on 16.11.2009 then as to why he remained mum till 22.01.2010 i.e. for a period of two months and six days from the date of occurrence. Muhammad Yaqoob, PW.3 also stated in his examination-in-chief that on the next day of occurrence, he visited Police Station Ghazi Abad in connection with personal affair where he identified all the accused persons of this case but even then he did not make statement regarding the above mentioned fact to the police on the said day and made his statement before the police for the first time on 22.01.2010. No plausible explanation has been given by the said witness for remaining mum for such a long period. It is also noteworthy that the statement of Muhammad Yaqoob, PW.3 is in conflict with the medical evidence produced by the prosecution in this case. Dr. Liaqat Ali, APMO (PW.10) conducted postmortem examination on the dead body of Muhammad Hashir, deceased on 08.12.2009. According to his opinion the time that elapsed between the injuries and death was immediate and the time that elapsed between the death and postmortem examination was six to twelve days meaning thereby that the death of Muhammad Hashir, deceased took place between 26.11.2009 to 02.12.2009 whereas according to the statement of Muhammad Yaqoob, PW.3, Muhammad Hashir, deceased was thrown in the canal by Saqib Ali, appellant and his co-accused on 16.11.2009 and as such there is difference of ten days regarding the date of death as given by Muhammad Yaqoob, PW.3 and the Medical Officer (PW.16).

12. Moreover, Muhammad Yaqoob, PW.3 did not state that he saw Saqib Ali, appellant and his co-accused while throwing dead bodies of the minors in the canal rather he stated that he saw the appellant and his co-accused while throwing two children in the canal. His examination-in-chief in this respect reads as under:-

"Stated that on 16.11.2009, I was proceeding to obtain an installment from cavalry ground to Harbanspura at about 10:00/11:00 p.m. along with Tariq Hussain, my friend. When we were crossing Harbanspura Bridge, we saw a vehicle in which a girl was sitting, we saw Saqib, Atif and Iftikhar accused present in the Court throwing two children in the canal. Next day I visited Police Station Ghazi Abad in connection with a personal affair, there was a panchait and there we found out that panchait was regarding missing of two children who allegedly were thrown in the canal. There I identified all the three accused present in the Court. I prior to that did not have any acquaintance with complainant of the case and I told him what I saw the preceding night."

(Bold and underlining supplied for emphasis).

It is, therefore, evident from the statement of Muhammad Yaqoob, PW.3 that he saw the appellant and his co-accused while throwing two children in the canal and not their dead bodies. On the other hand, according to the medical evidence furnished by Dr. Liaqat Ali, APMO, PW.10, there were five injuries on the body of Muhammad Hashir, deceased which were ante mortem and bones under injuries Nos.1 to 4 were also found to be fractured meaning thereby that Muhammad Hashir, deceased was murdered before throwing his dead body in the canal but as mentioned earlier Muhammad Yaqoob, PW.3 did not state that the appellant and his co-accused threw the dead body of any minor in the canal or the minors were thrown in injured condition in the canal and as such the evidence of Muhammad Yaqoob, PW.3 is in conflict with the medical evidence of the prosecution. Under the circumstances, the ocular evidence produced by the prosecution through Muhammad Yaqoob, PW.3 is not worthy of reliance and the same has rightly been disbelieved by the learned trial Court in paragraph No.26 of the impugned judgment.

13. Insofar as the circumstantial evidence produced in this case is concerned, it is by now well settled that in a case of circumstantial evidence, utmost care and caution is required for reaching at a just decision of the case. In such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused but if any link in the chain is missing then its benefit must go to the

accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:-

> '…Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

> 7….It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other to the neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

> '7….Needless to emphasise that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the body of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

14. Keeping in view the parameters, laid down in the abovementioned judgments, I proceed to discuss separately, every piece of the prosecution circumstantial evidence produced in this case.

15. The prosecution circumstantial evidence is based on the following pieces of evidence:

i) Last seen evidence;

ii) Recoveries of last worn clothes and other articles of both the deceased;

iii) Pointation of the place of occurrence by the appellant;

iv) Motive;

v) Medical evidence.

i) Last seen evidence:

It is noteworthy that Muhammad Azam Butt, complainant (PW.5) while lodging the FIR did not level the allegation that he saw the appellant while taking away his two minor sons (Muhammad Ahmad and Muhammad Hashir) out of his house. He only alleged that on 16.11.2009 at about 6:00 P.M., Saqib Ali, appellant, who was his (complainant's) brother-in-law came to his (complainant's) house and kept on playing with his above-mentioned sons. He (complainant) further stated that Saqib Ali, appellant remained in his house for 2/3 hours and thereafter, he left his house. After half an hour from the departure of the appellant from the complainant's house, the minor sons of the complainant also disappeared from the said house. The complainant expressed his suspicion that his sons were abducted by Saqib Ali, appellant. It is, therefore, evident that the complainant had not seen the appellant while taking away his minor sons from his house. The last seen evidence was produced by the prosecution through Roheel Ahmad, PW.11 and Atif Mehmood, PW.12. Both the above mentioned witnesses stated that on 16.11.2009, Saqib Ali, appellant brought one minor boy to the house of Roheel Ahmad, PW.11 so that he may play with his goats and thereafter the appellant left the above mentioned house, however, after sometime, Saqib Ali, appellant came back to the said house and took the minor boy with him.

Insofar as the evidence of Roheel Ahmad, PW.11 is concerned, I have noted that cross-examination on the said prosecution witness on behalf of Saqib Ali, appellant was reserved on 06.07.2013. He appeared before the learned trial Court on some subsequent dates of hearing but thereafter he statedly left for Saudi Arabia, therefore, his statement could not be subjected to cross-examination. His bail-able warrants of arrest were repeatedly issued by the learned trial Court and eventually his non-bail-able warrants of arrest were issued vide order dated 15.04.2015 but he did not appear before the Court for cross-examination. There is no order of the learned trial Court to close the right of cross-examination of

Saqib Ali, appellant on Roheel Ahmad, PW.11. It is by now well settled that the statement of a witness which is not subjected to cross-examination is inadmissible in evidence and the same is of no legal effect, therefore, no benefit could be extended to the prosecution on the basis of examination-in-chief recorded in this case of Roheel Ahmad, PW.11. Reference in this respect is made to the cases reported as "Pir Mazharul Haq and others v. The State through Chief Ehtesab Commissioner, Islamabad" (PLD 2005 Supreme Court 63) and "Jan Sher Khan v. The State" (2013 MLD 1554).

Insofar as the evidence of Atif Mehmood, PW.12 is concerned, I have noted that the said witness stated that on 16.11.2009, he lastly saw Saqib Ali, appellant in the company of a minor boy to whom he later on recognized with the help of his snaps as Muhammad Hashir (deceased) but he made statement before CIA Police on 02.01.2010. There is delay of one month and seventeen days in making the statement of above mentioned prosecution witness before the police. Learned counsel for the complainant argued that Atif Mehmood, PW.12 was not known to the complainant and he was resident of the locality of the appellant, therefore, he had no information regarding the abduction or murder of minor sons of the complainant and as such the above mentioned delay in making the statement by Atif Mehmood, PW.12 before CIA Police is not fatal to the prosecution case. There is no substance in the above mentioned argument of learned counsel for the complainant because I have noted that Atif Mehmood, PW.12 has admitted during his cross-examination that his affidavit Ex.DD bears his signature. The perusal of affidavit Ex.DD shows that the same was sworn by Atif Mehmood, PW.12. In the said affidavit, Atif Mehmood, PW.12 deposed that Saqib Ali, appellant is absolutely innocent. Atif Mehmood, PW.12 further deposed in the said affidavit that Muhammad Azam Butt, complainant had lodged a false and fabricated case against Saqib Ali, appellant regarding abduction of his two sons. The backside of affidavit Ex.DD shows that the same was issued on 19.11.2009. The perusal of the above mentioned affidavit shows that Atif Mehmood, PW.12 was in the knowledge of the occurrence on 19.11.2009 but he made statement regarding last seen evidence before CIA police for the first time on 02.01.2010. Although, it is next argued by learned counsel for the complainant that Atif Mehmood, PW.12 has explained that affidavit Ex.DD was got executed from him under the pressure of "Mohallahdars" but the fact remains that the present occurrence was in the

knowledge of Atif Mehmood, PW.12 on 19.11.2009 but he remained silent for a period of one month and thirteen days from the date of swearing of his affidavit Ex.DD and made his statement before the police for the first time regarding last seen evidence on 02.01.2010. He did not give any reason for remaining mum for such a long period. Learned counsel for the appellant next argued that Muhammad Azam Butt, complainant (PW.5) was a journalist by profession and he was working in the daily Express News and 'Express News Channel', therefore, under his pressure, Atif Mehmood, PW.12 was arrested in this case as a suspect who gave false evidence of last seen against the appellant under the pressure of the police and the complainant. The said contention of learned counsel for the appellant is supported by the statement made by Atif Mehmood, PW.12 during his cross-examination who candidly conceded that on 02.01.2010 (the date when statement of the said witness was recorded by the CIA police), he (PW.12) was in police custody and being interrogated in this case. The relevant part of his statement reads as under:-

> "It is correct that on 02.01.2010, I was in police custody and being interrogated in this case. My 'Behnoi' Tariq constable came at CIA staff only to inquire why I was arrested. I was not guilty, therefore, I was released. It is incorrect to suggest that said Tariq was a Guarantor that I shall depose in the Court according to the desire of police. It is incorrect to suggest that to own the guarantee of my 'Behnoi' Tariq, I deposed falsely."

It is, therefore, evident that Atif Mehmood, PW.12 was himself interrogated in this case as a suspect and he was under police custody when he made statement against the appellant on 02.01.2010. I am, therefore, of the view that it is not safe to rely upon the above mentioned evidence of last seen produced by the prosecution through Roheel Ahmad, PW.11 and Atif Mehmood, PW.12.

ii) Recoveries of last worn clothes and other articles of both the deceased.

Abdul Basit, PW.4 is the witness of recovery of last worn clothes of Muhammad Ahmad and Muhammad Hashir, deceased on the pointation of Saqib Ali, appellant. He stated that on 28.12.2009, Saqib Ali, appellant led to the recovery of pent (P-1), shirt (P-2), Jogger (P-3), high neck T-shirt blue colour (P-4) belonging to Muhammad Ahmad, deceased and also got recovered shoes (P-5)

and feeder (P-6) belonging to Muhammad Hashir, deceased which were taken into possession vide recovery memo Ex.PC. As mentioned earlier, according to the evidence of Dr. Liaqat Ali, APMO (PW.10), there were five injuries on the body of Muhammad Hashir, deceased and bones under injuries Nos.1 to 4 were also found to be broken meaning thereby that multiple grievous injuries were inflicted on the body of Muhammad Hashir, deceased before his death which must have resulted into profused bleeding but neither in the statement of Abdul Basit, PW.4 nor in the recovery memo Ex.PC, it is mentioned that any of the above mentioned recovered clothes/articles was stained with blood. It is also noteworthy that the appellant has been acquitted from the charges of abduction and murder of Muhammad Ahmad, deceased by the learned trial Court and no appeal has been filed by the State or the complainant against the acquittal of the appellant from the said charges, therefore, the recovery of pent (P-1), shirt (P-2), Jogger (P-3), high neck T-shirt blue colour (P-4) belonging to Muhammad Ahmad, deceased allegedly recovered on the pointation of Saqib Ali (appellant), is of no avail to the prosecution.

Insofar as the recovery of shoes (P-5) and feeder (P-6) belonging to Muhammad Hashir, deceased is concerned, the said articles were not mentioned by the complainant in his complaint Ex.PA. In complaint Ex.PA, the complainant alleged that his minor son Muhammad Hashir, deceased was wearing trouser suite of sky blue colour and pink jacket and although the said clothes have been shown to be recovered in the recovery memo Ex.PC but the recovery witness, namely, Abdul Basit (PW.4) while appearing in the witness box did not state that any sky blue colour trouser suit or pink jacket of Muhammad Hashir, deceased were recovered on the pointation of the appellant.

In the light of above, the recoveries of shoes (P-5) and feeder (P-6) of Muhammad Hashir deceased on the pointation of the appellant are inconsequential for the prosecution. The learned trial Court has also rightly disbelieved the prosecution evidence qua the recovery of last worn clothes/articles of the deceased on the pointation of the appellant in Paragraph No.29 of the impugned judgment.

iii) Pointation of place of occurrence by the appellant.

Abdul Basit, PW.4 stated that on 28.12.2009, Saqib Ali, appellant pointed out the place of occurrence of throwing Muhammad Ahmad and Muhammad Hashir, deceased in the canal but no incriminating material had been recovered on account of the said pointation, therefore, the above mentioned piece of evidence is not sufficient to convict the appellant.

iv) Motive

The prosecution evidence qua the motive has been produced through Muhammad Azam Butt, complainant (PW.5). He stated that Saqib Ali, appellant was posing himself as a fake 'Peer' (Saint) and he (appellant) used to entice his (complainant's) family members, therefore, he (complainant) forbade him from doing do and due to the said grudge, the appellant committed murder of two minor sons of the complainant. It is noteworthy that as per prosecution case, it was Muhammad Azam Butt, complainant who forbade Saqib Ali, appellant from posing himself as a fake 'Peer' and enticing away his family members. It is not the prosecution case that the minor children of the complainant, namely, Muhammad Ahmad, aged about five years and Muhammad Hashir, aged about three years, ever forbade the appellant from posing himself as a fake 'Peer'. If, for the sake of arguments the motive of the prosecution is presumed to be correct then it was Muhammad Azam Butt, complainant (PW.5) who should have been the prime target of Saqib Ali, appellant because even, according to the prosecution case itself, the appellant had no grudge against the minors Muhammad Hashir and Muhammad Ahmad, therefore, there was no reason with the appellant to commit their murder. It is further noteworthy that Muhammad Azam Butt, complainant (PW.5) also stated in his examination-in-chief that his family members were enticed by the appellant while posing himself as a fake 'Peer' but he did not name any such person who was enticed away by the appellant. No family member of the complainant appeared during the course of investigation or before the learned trial Court in support of the above mentioned motive alleged by the complainant. In the light of above, I hold that the motive alleged by the prosecution has not been proved in this case and the same was rightly disbelieved by the learned trial Court in paragraph No.25 of the impugned judgment.

v) Medical evidence

The medical evidence in this case was produced by Dr. Liaqat Ali, APMO (PW.10), who conducted postmortem examination on the dead body of Muhammad Hashir, deceased on 08.12.2009. He noted five injuries on the body of Muhammad Hashir, deceased and it was further observed that there were fractures of bones under injuries Nos.1 to 4. According to his opinion, the above mentioned injuries were ante mortem and injuries Nos.1 to 4 were sufficient to cause death in the ordinary course of nature. The time that elapsed between the injuries and death was immediate and the time that elapsed between the death and postmortem examination was six to twelve days meaning thereby that death of Muhammad Hashir, deceased took place between 26.11.2009 to 02.12.2009. According to his opinion, the injuries were inflicted on the body of Muhammad Hashir, deceased by blunt means. As noted in Para No. 12(ii) of this judgment, there was conflict between the medical evidence and the ocular account of the prosecution produced through Muhammad Yaqoob, PW.3. It is further noteworthy that according to the opinion of the Medical Officer, the injuries on the body of Muhammad Hashir, deceased were caused by blunt means but no weapon has been recovered from the possession of the appellant. It is therefore, evident that the medical evidence has not supported the prosecution case. Moreover, it is by now well settled that medical evidence is a type of evidence which tells about the probable time of death, the kind of injuries, kind of weapon used in the occurrence but it would not identify the assailant. Reliance in this respect may be placed on the judgments reported as 'Muhammad Tasaweer v Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53), 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410).

16. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution evidence is full of doubts. It is by now well settled that if there is a single circumstance which creates reasonable doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story.

In the case of, 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

"5……..The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:-

"13……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In the case of, "Muhammad Mansha v. The State" (2018 SCMR 772), the Hon'ble Supreme Court of Pakistan, at page 778, was pleased to observe as under:-

"4……..Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxima, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted."

17. In the light of above discussion, I accept Criminal Appeal No.671 of 2016 filed by Saqib Ali (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Lahore vide impugned judgment dated 09.03.2016 and acquit him of the charges under sections 302(b) and 364-A, P.P.C.

by extending him the benefit of doubt. Saqib Ali (appellant) is in custody, he be released forthwith, if not required in any other case.

18. Insofar the criminal revision i.e., Crl. Revision No.839 of 2016, filed by Muhammad Azam Butt (complainant) for enhancement of sentence, awarded by the learned trial Court against Saqib Ali (appellant) from imprisonment for life to death is concerned, I have already disbelieved the prosecution evidence due to the reasons mentioned in paragraphs Nos.11 to 17 of this judgment and Saqib Ali (appellant) has been acquitted by this Court due to the reasons, mentioned therein, therefore, this criminal revision being devoid of any force is hereby dismissed.

JK/S-39/L **Appeal allowed.**

2021 Y L R Note 1

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. SHAUKAT BIBI and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeals Nos. 13978-J, 16609 and Criminal Revision No. 17261 of 2020, decided on 10th July, 2020.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Benefit of doubt--- Chance witnesses--- Non-availability of justification for presence at the place of occurrence---Scope--- Accused, two ladies, were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Motive behind the occurrence was that the accused lady firstly separated her husband/ deceased from his parents and started living separately and she thereafter wanted to shift to other city but deceased was not ready for that and due to the said grudge, the accused and her sister/co-accused, since acquitted, committed his murder---Ocular account of the prosecution was produced through two brothers of the deceased---Occurrence took place in the house of accused and her deceased husband at the odd hours of night---Both the said eye-witnesses were admittedly not residents of the house where the occurrence took place and they were living in a separate house which was situated at a distance of 10-minutes from the house of occurrence---Presence of the said eye-witnesses at the spot at the relevant time was not natural---Eye-witnesses were to justify their presence in the house of the occurrence at the odd hours of night through some cogent reason---In order to justify their presence at the spot at the relevant time, both the eye-witnesses stated that on the night of occurrence, they received information regarding a quarrel which took place between the accused and her deceased husband whereupon they reached the house of occurrence---Both the said eye-witnesses did not disclose that as to how and through whom they received the information regarding the quarrel---Complainant had conceded that he was not informed about the said quarrel by his deceased brother---Other eye-witness had stated that information regarding the quarrel was received by his brother/

complainant whereupon, he along with the complainant proceeded to the house of deceased---Statements of the eye-witnesses showed that brother of complainant/ eye-witness received information about the alleged quarrel between the accused and the deceased through complainant whereas, complainant did not disclose throughout the investigation the name or phone number of the person through whom he received the said information---Both the eye-witnesses, therefore, could not justify the reason given by them for their presence in the house of the occurrence at the odd hours of night; thus, they were chance witnesses and as such their evidence was not free from doubt---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Sufyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Unnatural conduct of eye-witnesses---Scope---Accused were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Record showed that conduct of the eye-witnesses was highly unnatural---. Evidence of the said eye-witnesses transpired that the complainant party was comprising of three male adult members, deceased, complainant and eye-witness, whereas, the accused party was comprising of only two female members, accused and her sister/co-accused, since acquitted---Accused were carrying dandas (clubs) and they were not armed with any lethal weapon like pistol or gun etc. to terrify the prosecution eye-witnesses from saving their brother/ deceased, when he was allegedly attacked by the accused and her sister---Eye-witness had stated during his cross-examination that at the time of infliction of first blow of danda by accused at the deceased he and his brother/complainant were standing at a distance of only seven feet from the accused---Said fact was not understandable that if the eye-witnesses, who were real brothers of deceased, were present at the time of occurrence, then as to why they did not interfere to rescue their brother when they were standing at a distance of only seven feet from the accused at the time of infliction of fist danda blow to

the deceased---Eye-witnesses allowed the accused and her sister/co-accused, since acquitted, to inflict second blow and then repeated blows on the body of the deceased and they kept on standing as silent spectators--Even eye-witnesses did not try to apprehend accused or her sister/co-accused (since acquitted)---Both the eye-witnesses, in circumstances, were not present at the spot at the relevant time and had not witnessed the occurrence---Evidence of eye-witnesses did not appeal to a prudent mind because if the accused and her sister had made a plan to commit the murder of deceased inside their house at the odd hours of night (2:30 a.m.) then they did not have to wait till the arrival of witnesses to start the occurrence, so that the said witnesses might give evidence against them before the police/court---Prosecution story did not appeal to common sense and the same was highly doubtful---Appeal against conviction was allowed, in circumstances.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315; Zafar v. The State and others 2018 SCMR 326 and Irshad Ahmed v. The State 2011 SCMR 1190 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Material contradictions in the statements of witnesses--- Scope--- Accused were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Material contradictions existed in the statements of the prosecution eye-witnesses---Complainant stated that after witnessing the occurrence, he filed a crime report in the police station on the same day whereas the same was got registered on the next day---On the other hand, eye-witness had stated during his cross-examination that they (prosecution witnesses) did not inform the police about the occurrence on the day of occurrence and straightaway escorted the injured to hospital---Said witness further stated that the police was not informed at any hospital---Furthermore, complainant stated that there was no chaddar (bed sheet) on the cot where deceased was lying at the time of occurrence whereas, eye-witness stated during his cross-examination that there was a chaddar (bed sheet) lying on the cot of his brother---No blood-stained chaddar had been recovered in that case by the police---Such contradictory statements of the prosecution eye-witnesses were not worthy of reliance---Mala fide of the prosecution in that case was also evident

from the facts that both the prosecution eye-witnesses stated in the first part of their examination-in-chief that after the occurrence, the accused and her co-accused washed the place of occurrence in order to screen themselves off from the offence but even then both the eye-witnesses stated in the later part of their examination-in-chief that blood was recovered from the spot which was taken into possession through cotton vide recovery memo---Trial Court had acquitted the accused and her co-accused from the charges under Ss.201/34, P.P.C. and the complainant or the State had not challenged the acquittal of the accused from the said charges through filing any appeal---Appeal against conviction was allowed, in circumstances.

(d) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Withholding material evidence---Accused were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Accused and deceased along with their children were living in a rented house where the occurrence took place---Widow of landlord, her daughter-in-law and her sons were also living in the same house at the time of occurrence and that fact was candidly conceded by complainant during his cross-examination---Said widow of landlord, her daughter-in-law and her sons were the natural witnesses of the occurrence being residents of the same house where the occurrence took place but they were not produced as witnesses in the case by the prosecution---Although, the complainant made an excuse that the said witnesses did not attract to the spot at the time of occurrence---Said excuse given by the complainant was not convincing because it was not probable that if the occurrence of the murder of a person had taken place in a house which attracted the said prosecution eye-witnesses to the spot who were living in a house situated at the distance of ten minutes from the said house then the persons living in the same house would not attract to the spot at the time of occurrence---Admittedly six daughters and one son were born from the wedlock of the accused and deceased, who were also living in the house of occurrence and they were natural eye-witnesses of the occurrence but none of them was produced in the witness box to support the prosecution story---Witnesses first took deceased to the Tehsil Hospital, wherefrom he was referred to the Civil Hospital, wherefrom he was

referred to the General Hospital---Deceased was first medically examined at the said hospitals but none from the said hospitals was produced in the witness box by the prosecution to establish that deceased was taken to the said hospitals by the said prosecution eye-witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Lal Khan v. The State 2006 SCMR 1846; Muhammad Rafique and others v. The State and others 2010 SCMR 385 and Riaz Ahmed v. The State 2010 SCMR 846 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Criminal Procedure Code (V of 1898), S. 342---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Defence plea---Scope---Accused, two ladies were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Claim of the accused was that in-fact deceased died due to a road accident and she also produced in her defence evidence the document Mark "A" issued by the Senior Registrar Neurosurgery Department of the General Hospital, which showed that the words "RTA" (road traffic accident) were written in the said document---Accused alleged that it was not understandable that if both the eye-witnesses accompanied deceased to the General Hospital then as to why they imparted information to the concerned staff of the said hospital regarding sustaining of injuries by deceased due to a road accident---Even the accused did not move any application before the Trial Court for summoning of any Medical Officer or staff member of the General Hospital, to prove the document Mark "A", therefore, the said document was of no avail to the accused---However, if the document Mark "A" was taken out of consideration even then, the fact remained that it was duty of the prosecution to prove its case and produce the Medical Officers or record of Tehsil Hospital, Civil Hospital or General Hospital but no Medical Officer or record from the said hospitals was produced---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Recovery of weapon of offence on the pointation of accused--- Reliance--- Scope--- Accused ladies, were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Record showed that danda was allegedly recovered on the pointation of the accused from the roof of the house---Prosecution witness conceded during his cross-examination that at the time of recovery of danda doors of the said house were unbolted---Danda was recovered from the roof of a house which was jointly possessed by the accused and the family members of the landlord and as such the place of recovery was not under exclusive possession of the accused---Such recovery was inconsequential---Appeal against conviction was allowed, in circumstances.

(g) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Delay in sending the crime weapon for analysis---Scope---Accused, ladies, were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Record showed that danda was deposited in the office of Chemical Examiner after one month and four days of the occurrence but even then the report regarding presence of human blood on the said danda was positive---Admittedly, blood disintegrated within a period of 3 to 4 weeks from the occurrence but the presence of human blood on danda after one month and four days from the occurrence showed the mala fides of the prosecution---Recovery of danda on the pointation of the accused was inconsequential, in circumstances---Appeal against conviction was allowed, in circumstances.

Faisal Mehmood v. The State 2016 SCMR 2138 and Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 rel.

(h) Penal Code (XLV of 1860)---

----Ss. 302, 201 & 34---Qatl-i-amd, causing disappearance of evidence of offence, common intention---Appreciation of evidence---Motive was not proved---Scope---Accused, ladies, were charged for committing murder of brother of complainant by giving repeated danda (club) blows---Motive behind the occurrence was that firstly

accused separated her husband/deceased from his parents and they started living separately in a rented house and thereafter she intended to shift deceased to other city but the deceased was not ready for the said purpose---Complainant and his brother/eye-witness while appearing in the witness box before the Trial Court also introduced a new motive and made dishonest improvements in their statements in respect of the motive part of the prosecution case by stating that deceased restrained accused from allowing two persons to come to his house as they had illicit relationship with co-accused and daughter of the accused and the deceased---Said motive of illicit relationship was not mentioned in the FIR---First motive alleged by the prosecution which was mentioned in the FIR did not appeal to a prudent mind because according to the prosecution's own case, deceased separated himself from his parents on the asking of the accused, therefore, it did not appeal to common sense that deceased would refuse his wife/accused to shift to other city on her asking---If deceased could leave his parents then he could also leave his village on the asking of the accused---Even otherwise, it did not appeal to sense that merely on the refusal of the deceased from shifting to other city, the accused and her sister would commit his murder---Moreover, it was not understandable that as to why co-accused (his sister-in-law) would commit the murder of deceased for the said reason---Admittedly, there was no litigation between the parties prior to the occurrence and the spouses were living together till the day of occurrence---Motive alleged by the prosecution could not be proved, in circumstances; however, it was duty of the prosecution to prove its case against the accused beyond the shadow of any doubt and it could not take benefit from any weakness in the defence of the accused---Appeal against conviction was allowed, in circumstances.

(i) Criminal Procedure Code (V of 1898)---

----S. 342---Examination of accused---Scope---Statement of an accused was to be accepted or rejected as a whole and it was not legally permissible to accept incriminating part of the statement of an accused and disbelieve the exculpatory part of the said statement.

Muhammad Asghar v. The State PLD 2009 SC 513; Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. Esab Khan and others 1991 SCMR 61 rel.

(j) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created reasonable doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345; Muhammad Akram v. The State 2009 SCMR 230 and Muhammad Mansha v. The State 2018 SCMR 772 rel.

Irfan Ghaus Ghumman for Appellant as well as for Respondent (in Criminal Revision No. 17261 of 2020).

Ms. Umm-ul-Baneen, Deputy District Public Prosecutor for the State.

Sadaqat Mehmood Butt for the Complainant as well as for Appellant (in Criminal Appeal No. 16609 of 2020 and for Petitioner in Criminal Revision No. 17261 of 2020).

Date of hearing: 10th July, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.13978-J of 2020, filed by Mst. Shaukat Bibi (appellant) against her conviction and sentence, as well as, Criminal Appeal No.16609 of 2020, filed by Ansar Iqbal, complainant against acquittal of Mst. Samina Bibi, accused (respondent No.2 of said appeal) and Criminal Revision No.17261 of 2020, filed by Ansar Iqbal (complainant) for enhancement of sentence awarded to Mst. Shaukat Bibi (respondent No.1 of said criminal revision), from imprisonment for life to death, as all these matters have arisen out of the same judgment dated 14.02.2020, passed by learned Additional Sessions Judge, Daska.

2. Mst. Shaukat Bibi (appellant) along with her co-accused, namely, Mst. Samina Bibi was tried in case FIR No.592 dated 24.07.2019, registered at Police Station City Daska, District Sialkot in respect of offences under sections 302/ 34/201, P.P.C. After conclusion of the trial, the learned trial Court vide its impugned judgment dated 14.02.2020, has convicted and sentenced the appellant as under:--

Under section 302(b), P.P.C. to imprisonment for life.

Benefit of section 382-B, Cr.P.C was also extended to the appellant.

Through the same impugned judgment, Mst. Shaukat Bibi, appellant was however, acquitted from the charges under sections 201, 34, P.P.C. whereas, co-accused of the appellant, namely, Mst. Samina Bibi (respondent No.1 of Crl. Appeal No.16609/2020) was acquitted from all the charges under sections 302(b), 34 and 201 of P.P.C.

3. Brief facts of the case as given by Ansar Iqbal (complainant/PW-5) in his complaint Ex. PD, on the basis of which formal FIR Ex.PA was chalked out, are that on 23.07.2019, real brother of the complainant, namely, Muhammad Amjad (deceased) was present in his rented house situated in Village Bharokey along with his children, wife (Mst. Shaukat Bibi, appellant), and sister-in-law Mst. Samina Bibi (co-accused since acquitted). At about 2:30 A.M. (night), the complainant received an information about a quarrel between his brother Muhammad Amjad (deceased) and his wife Mst. Shaukat Bibi (appellant). On this information, the complainant along with his other brother, namely, Shahzad (PW.6) reached in the house of his brother (Muhammad Amjad deceased). They saw that Muhammad Amjad (deceased) was sitting on a cot and within their view, Mst. Shaukat Bibi (appellant) gave first blow of "Danda" (club) on the head of Muhammad Amjad (deceased) which resulted into bleeding. Mst. Shaukat Bibi (appellant) then gave second blow of 'Danda' (club) on the head of Muhammad Amjad (deceased) whereupon he fell down. Mst. Shaukat Bibi (appellant) and Mst. Samina Bibi (co-accused since acquitted) thereafter gave repeated 'Danda' (club) blows which landed on the head and different parts of the body of Muhammad Amjad (deceased). Ansar Iqbal (complainant/ PW.5) and Shahzad (PW.6) took Muhammad Amjad (deceased) to the Civil Hospital, Daska in injured condition from-where he was referred to the Civil Hospital, Gujranwala and then to the General Hospital, Lahore where Muhammad Amjad succumbed to the injuries. It was further alleged in the FIR that the accused persons along with children, mobile phone and SIM left the above mentioned house for Chawinda City after washing the place of occurrence for screening themselves off from the offence.

Motive behind the occurrence was that Mst. Shaukat Bibi (appellant) firstly separated her husband Muhammad Amjad (deceased) from his parents and started living separately. She (appellant) thereafter wanted to shift to Chawinda City but Muhammad Amjad (deceased) was not ready for this and due to the said grudge,

the appellant and her sister Mst. Samina Bibi (co-accused since acquitted) committed his murder.

4. The appellant was arrested in this case by the police on 27.07.2019 and after completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and her co-accused on 25.10.2019 to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced thirteen witnesses during the trial. The statement of the appellant under section 342, Cr.P.C. was recorded, wherein she refuted the allegations levelled against her and professed her innocence. While answering to a question that why this case against you and why the PWs have deposed against you, the appellant replied as under:--

> "The occurrence did not take place as set out by the prosecution. All the PWs are interested closely related and are inimical towards me. PW.5, PW.6 and PW.7 are real brothers, whereas, PW.8 is Mamoon Zad of complainant, whereas, PW. 12 is Behnoi of complainant and PW. 9 is friend of complainant.
>
> I was married with the deceased since 18/19 years and from our wedlock, 06 daughters and one son were born. During this period, there was no quarrel and difference between us about any aspect. My deceased husband used to work of cooking in marriages and other functions etc., and he had an independent shop/business at Daska. On 15.07.2019, I was admitted in Civil Hospital Daska and 16.07.2019, I gave birth to a daughter there and I was discharged on the same date. My real sister Samina Bibi, co-accused had come there to care me and she was with me in my house.
>
> In fact, on the day of occurrence, my husband (deceased) took my daughter Maryam Bibi, student of 7th Class out of house and at evening time, my daughter Maryam Bibi told me that while coming to the house along with deceased during crossing the road of canal bridge Bharoke, he fell down on the road and a vehicle while passing smashed his head and consequently he received serious head injury, and her uncle Ansar Iqbal (complainant), brother of deceased attracted there and took him to a hospital for treatment, and she also complained serious pain in her abdomen and she

was also taken to Sajid Hospital Daska and during ultrasound, it was found that she was pregnant. Upon her reaching at home, I inquired about the matter and she deposed that my deceased husband used to commit sexual intercourse with her by extending threats of dire consequences on gun point. Thereafter due to that injury, the deceased expired. The complainant while joining hands with the PWs and local police while converting an accident into murder case, involved me, my real sister co-accused Samina Bibi, my father, my brothers and other relatives in this case so that we could not be able to pursue the case and to grab the property of my deceased husband. During the course of investigation, my daughter Maryam Bibi appeared before the police and narrated the above said version. No independent witness of locality as well as inmate of the house came forward to support the prosecution version. It is pertinent to mention here that I was unable to move frequently in those days as I had given birth to a daughter. I and my sister Samina Bibi, co-accused, had never committed any offence, rather no offence was committed in my house. I along with my sister have been falsely roped in this false case for ulterior motive. The local police only arrested us and sent to lock up and they did not conduct investigation and recorded our version correctly while joining hands with the complainant party."

The daughter of the appellant, namely, Maryam Bibi appeared in the defence of the appellant and got recorded her examination-in-chief as DW.1. Her cross-examination was reserved on 15.01.2020 on the request of learned DDPP and learned counsel for the complainant but thereafter, she admittedly died, therefore, she could not be cross-examined. No other witness was produced by the appellant or Mst. Samina Bibi (co-accused since acquitted) in their defence, however, they produced application moved by Ansar Iqbal (complainant) for registration of FIR as Ex.DA and certificate issued by the Senior Registrar, Department of Neurosurgery General Hospital, Lahore as Mark "A" and closed their defence evidence.

5. The learned trial Court vide its judgment dated 14.02.2020, found the appellant guilty, convicted and sentenced her as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and in order grab the property of Muhammad Amjad (deceased), Ansar Iqbal (complainant/PW.5) and Shahzad (PW.6) who are real brothers of the deceased, have falsely implicated the appellant in this case; that the prosecution eye-witnesses could not give any valid reason for their presence in the house of occurrence at the odd hours of night, therefore, their evidence is not worthy of reliance; that there are material contradictions in the statements of the prosecution eye-witnesses and their evidence has wrongly been believed by the learned trial Court; that the conduct of the prosecution eye-witnesses is highly unnatural because according to their evidence, they along with Muhammad Amjad (deceased) were comprising of three male adult members but they did not apprehend the appellant and her sister who were two female members and were not carrying any lethal weapon at the time of occurrence; that the recovery of 'Danda' (P3) was planted against the appellant in order to strengthen weak prosecution case and the said recovery has rightly been disbelieved by the learned trial Court in Para No.15(b) of the impugned judgment; that motive of the prosecution case has also not been proved in this case through any reliable evidence and even otherwise, it does not appeal to a prudent mind that only on account of refusal to shift to Chawinda City by the deceased, the appellant along with her sister would commit the murder of her husband; that the prosecution witnesses also made dishonest improvements in their statements in respect of the motive part of the occurrence by stating before the learned trial Court that Muhammad Amjad (deceased) restrained the appellant from allowing Shahzaman alias Kala and Kashif alias Kashi to come to his house as they had illicit relationship with Mst. Samina Bibi (co-accused since acquitted) and with daughter of the appellant, namely, Maryam Bibi, whereas no such motive was mentioned in the FIR; that even the motive evidence of the prosecution has been disbelieved by the learned trial Court in Paras. Nos.14(a)(e) and 28 of the impugned judgment; that in-fact Muhammad Amjad (deceased) died due to a road accident and this fact has duly been proved through the report of Senior Registrar of Neurosurgery Department of General Hospital Lahore, which was produced in defence evidence as Mark "A"; that in the said document (Mark "A"), the words R.T.A. (Road traffic accident) have been written and if the prosecution witnesses accompanied the deceased to the hospital then why did they give the information to the concerned staff of the hospital that the deceased

sustained injuries due to a road accident and the said fact has created further doubt in the prosecution case; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

7. On the other hand, it is argued by the learned Deputy District Public Prosecutor assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that ocular account of the prosecution was produced through Ansar Iqbal (complainant/PW.5) and Shahzad (PW.6) who stood the test of lengthy cross-examination but their evidence could not be shaken; that their evidence is fully supported by the medical evidence produced through Dr. Irfan Ikram (PW.4) and postmortem report of the deceased Ex.PC; that motive of the prosecution story was also proved in this case through reliable and confidence inspiring evidence of Ansar Iqbal (complainant/PW.5) and Shahzad (PW.6); that the prosecution case was further corroborated by the recovery of bloodstained 'Danda' (P-3) on the pointation of the appellant; that the appellant took a specific plea in her statement recorded under section 342, Cr.P.C. that her husband Muhammad Amjad (deceased) died due to a road accident but she did not produce any evidence in support of her above mentioned plea, therefore, she was rightly convicted and sentenced by the learned trial Court; that the appellant also levelled allegation of rape of her daughter, namely, Mst. Maryam Bibi against her husband Muhammad Amjad (deceased) but even the said allegation was not proved by the appellant, thus, an adverse inference was rightly drawn against the appellant by the learned trial Court. While arguing Criminal Revision No.17261 of 2020 for enhancement of sentence of Mst. Shaukat Bibi (convict) it is argued by learned counsel for the complainant that there was no mitigating circumstance in this case, therefore, Mst. Shaukat Bibi may be awarded the normal penalty of death. Insofar as, Criminal Appeal No.16609 of 2020, filed against acquittal of Mst. Samina Bibi (co-accused) is concerned, it is contended by learned counsel for the complainant that learned trial Court has wrongly acquitted the above mentioned accused vide the impugned judgment whereas ample evidence was available against her in the shape of ocular account produced by the prosecution through Ansar Iqbal, complainant (PW. 5), Shahzad (PW. 6) and medical evidence of Dr. Irfan Ikram (PW. 4), therefore, said Mst. Samina Bibi, co-accused may also be convicted and sentenced in accordance with the law.

8. Arguments heard and record perused.

9. The detail of the prosecution case as set forth in the FIR (Ex.PA) and in the complaint (Ex.PD), has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

10. The ocular account of the prosecution was produced through Ansar Iqbal, complainant (PW. 5) and Shahzad (PW. 6). It is noteworthy that as per prosecution case, the occurrence in this case took place in the house of Mst. Shaukat Bibi (appellant) and her husband Muhammad Amjad (deceased) at the odd hours of night i.e. on 23.07.2019 at 2:30 A.M. Both the above mentioned eye-witnesses are admittedly not residents of the house where the occurrence took place and they were living in a separate house which was situated at a distance of 10-minutes from the house of occurrence, as stated by Shahzad (PW.6). The presence of the above mentioned eye-witnesses at the spot at the relevant time was not natural. It was, therefore, mandatory for the above mentioned eye-witnesses to justify their presence in the house of the occurrence at the odd hours of night through some cogent reason. In order to justify their presence at the spot at the relevant time, both the above mentioned eye-witnesses stated that on the night of occurrence, they received information regarding a quarrel which took place between the appellant and her husband Muhammad Amjad (deceased) whereupon they reached in the house of occurrence. Both the above mentioned eye-witnesses did not disclose that as to how and through whom they received the information regarding the above mentioned quarrel. Ansar Iqbal (complainant/PW.5) has conceded during his cross-examination that he had not mentioned the name of the person who informed him regarding the quarrel between the appellant and the deceased. He further conceded that he did not mention the contact number of the informer and throughout the investigation, he never disclosed the name and number of said person. He also conceded that he was not informed about the above mentioned quarrel by his deceased brother. The relevant parts of his statement read as under:

> "It is correct that I have not mentioned the name of the person, who informed me about the quarrel between my brother and his wife. It is correct that I have also not mentioned the contact number of said informer. Throughout the investigation, I never disclosed the name and number of the person, who informed me about the quarrel."

"My brother (victim) did not apprise me through telephone about the quarrel. On getting information about quarrel telephonically, I did not reciprocated through telephone to our deceased brother to know the situation."

Shahzad (PW.6) stated that information regarding the above mentioned quarrel was received by his brother Ansar Iqbal (complainant/PW.5) whereupon, he along with the complainant proceeded to the house of Muhammad Amjad (deceased). Relevant part of his statement in this respect is reproduced here-under:-

"Stated that during the intervening night of 22nd and 23rd of July, 2019, my real brother Muhammad Amjad was present at rented house situated in Bharokay along with his children, wife and sister-in-law ( ) Mst. Samina Bibi. At about 02:30 a.m. my brother Ansar Iqbal got an information that my brother Amjad had quarrel with his wife Mst. Shaukat Bibi (present in the Court), whereupon, I along with my brother Ansar Iqbal rushed to the house of my brother Amjad....."

It is, therefore, evident from the perusal of statements of the above mentioned eye-witnesses that Shahzad (PW.6) received information about the alleged quarrel between the appellant and the deceased through Ansar Iqbal (complainant/PW.5) whereas, Ansar Iqbal, complainant did not disclose throughout the investigation, the name or phone number of the person through whom he received the above referred information. Both the above mentioned eye-witnesses, therefore, could not justify the reason given by them for their presence in the house of the occurrence at the odd hours of night. They are therefore, chance witnesses and as such their evidence is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

"14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily,

is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the Apex Court of the country was pleased to observe as under:-

"……..He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:-
-

"……Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence……."

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove the reason of their presence at the spot at the time of occurrence, therefore, their very presence in the house of occurrence at the relevant time becomes doubtful.

11. It is further noteworthy that conduct of the above mentioned eye-witnesses is highly unnatural. According to the evidence of the said eye-witnesses, the complainant party was comprising of three male adult members (Muhammad Amjad deceased, Ansar Iqbal complainant/ PW.5 and Shahzad/PW.6), whereas, the accused party was comprising of only two female members, namely, Mst. Shaukat

Bibi (appellant) and her sister Mst. Samina Bibi (co-accused since acquitted). The appellant and Mst. Samina Bibi (co-accused) were carrying 'Dandas' (clubs) and they were not armed with any lethal weapon like pistol or gun etc., to terrify the prosecution eye-witnesses from saving their brother Muhammad Amjad (deceased), when he was allegedly attacked by the appellant and her sister. Shahzad (PW.6) stated during his cross-examination that at the time of infliction of first blow of 'Danda' by Mst. Shaukat Bibi (appellant) at the deceased, he and his brother Ansar Iqbal (complainant) were standing at a distance of only seven feet from the appellant. The relevant part of his statement in this respect reads as under:--

> "At the time of conducting of first blow by accused Shaukat Bibi, we were standing at the distance of about 7ft."

Likewise, Ansar Iqbal complainant (PW.5) stated in this respect as under:--

> "We were at the distance of about 6/7 ft from the injured,...."

It is not understandable that if the above mentioned eye-witnesses, who were real brothers of Muhammad Amjad (deceased), were present at the time of occurrence, then as to why they did not interfere to rescue their brother when they were standing at a distance of only 7-feet from the appellant at the time of infliction of fist 'Danda' blow to the deceased. They allowed the appellant and her sister Mst. Samina Bibi (co-accused since acquitted) to inflict second blow and then repeated blows on the body of the deceased and they kept on standing as silent spectators. Even they did not try to apprehend Mst. Shaukat Bibi (appellant) or Mst. Samina Bibi (co-accused since acquitted) after the occurrence.

I may refer here the case of "Liaquat Ali v. The State" (2008 SCMR 95), wherein at Para No.5-A of the judgment, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat

> Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a firearm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

Similar view was reiterated by the august Supreme Court of Pakistan in the cases of "Pathan v. The State" (2015 SCMR 315) and "Zafar v. The State and others" (2018 SCMR 326). Under the circumstances, it cannot be safely held that both the above mentioned eye-witnesses were present at the spot at the relevant time and they had witnessed the occurrence.

It is also noteworthy that the evidence of above mentioned eye-witnesses does not appeal to a prudent mind because if the appellant and her sister had made a plan to commit the murder of Muhammad Amjad (deceased) inside their house at the odd hours of night (2:30 A.M.) then they did not have to wait till the arrival of above mentioned witnesses to start the occurrence, so that the said witness may give evidence against them before the police/Court. In the case of "Irshad Ahmed v. The State" (2011 SCMR 1190), at Page No.1193, the august Supreme Court of Pakistan has observed as under:-

> "Mukhtar Ahmed complainant (P.W.1) was the father of Shehzad Ahmed deceased whereas Shaukat Ali (P.W.2) was a brother of the complainant and a paternal uncle of the deceased. The occurrence in this case had taken place far away from the houses of the said witnesses and they had statedly seen the occurrence when they were in search of the deceased. We have found it to be quite strange that if the appellant had to murder the deceased then he did not have to wait for arrival of the said witnesses for starting infliction of injuries upon the deceased. It is also noticeable that despite their claimed presence at the scene of the crime at the relevant time the said eye-witnesses had not tried to stop the appellant from inflicting injuries upon the deceased especially when the appellant was not armed with any firearm to ward the said eye-witnesses off or to keep them away."
>
> (Bold and underlining is supplied for emphasis)

I am, therefore, of the considered view that the prosecution story does not appeal to common sense and the same is highly doubtful.

12. I have further noted that there are material contradictions in the statements of the prosecution eye-witnesses. Ansar Iqbal (PW.5) stated that after witnessing the occurrence, he filed a crime report in the police station on the same day whereas the occurrence in this case took place on 23.07.2019 at 2:30 A.M. and the FIR was lodged on 24.07.2019 at 11:40 A.M. On the other hand Shahzad (PW.6) stated during his cross-examination that they (PWs) did not inform the police about the occurrence on the day of occurrence and straightaway escorted the injured to THQ Hospital, Daska. He further stated that the police was not informed even at THQ Hospital, Daska, at Civil Hospital, Gujranwala or even at General Hospital, Lahore. Furthermore, Ansar Iqbal complainant (PW.5) stated that there was no 'Chaddar' (bed sheet) on the cot where Muhammad Amjad (deceased) was lying at the time of occurrence whereas, Shahzad (PW.6) stated during his cross-examination that there was a 'Chaddar' (bed sheet) lying on the cot of his brother. It is also noteworthy that no bloodstained 'Chaddar' has been recovered in this case by the police. The relevant parts of the contradictory statements of the prosecution eye-witnesses are reproduced hereunder for ready reference:-

Ansar Iqbal, complainant (PW.5)

(i) "After witnessing the occur-rence, I filed crime report in the Police Station on the same day. The police came to the place of occurrence on the same day. On that day, police did not accompany us to Hospital for the purpose of medical examination of injured person. Volunteered that we ourselves shifted the injured to THQ, Daska."

(Bold and underlining is supplied for emphasis)

(ii) "No bed-sheet or any other cloth was lying on the cot, whereon, my brother was lying at the time of occurrence, however, the cot was blood stained. Police did not seize the said cot, from the place of occurrence."

Shahzad (PW.6)

(i) "We did not inform the police about the occurrence and straightaway escorted the injured to THQ, Daska. We also did not apprise the police even at THQ, Daska. I was with my injured brother, when he was shifted to Gujranwala. We did not inform the police, even at Gujranwala Hospital.

Then we were referred to Lahore. We also did not apprise the police even at Lahore.

(Bold and underlining is supplied for emphasis)

"Death of my brother happened at about 11:30 p.m. on 23.07.2019. Police also came to the place of occurrence on 24.07.2019 and prepared un-scaled site plan on our pointation."

(ii) "There was Chaddar lying on the cot of my brother."

The above mentioned contradictory statements of the prosecution eye-witnesses are not worthy of reliance.

13. The mala fide of the prosecution in this case is also evident from the facts that both the above mentioned prosecution eye-witnesses (PW.5 and PW.6) stated in the first part of their examination-in-chief that after the occurrence, the appellant and her co-accused washed the place of occurrence in order screen themselves off from the offence but even then both the above mentioned eye-witnesses stated in the later part of their examination-in-chief that blood was recovered from the spot which was taken into possession through cotton vide recovery memo Ex. PE. It is further noteworthy that the learned trial Court has acquitted the appellant and her co-accused from the charges under sections 201/34, P.P.C. and the complainant or the State has not challenged the acquittal of the appellant from the above mentioned charges through filing any appeal.

14. I have also noted that as per prosecution case, Mst. Shaukat Bibi (appellant) and Muhammad Amjad (deceased) along with their children were living in a rented house of one Mansab Ali where the occurrence took place. The widow of said Mansab Ali namely, Mst. Khalida Bibi, her daughter-in-law namely, Yasmi n and her sons were also living in the same house at the time of occurrence and this fact is candidly conceded by Ansar Iqbal (PW.5) during his cross-examination. The relevant part of his statement in this respect reads as under:-

"My deceased brother was living in the house of another person owned by Mansab Ali son of Muhammad Ali. It is correct that widow of said Mansab namely Khalida, her daughter in law (Bahoo) Yasmin and her sons

were living in the same house, at the relevant time. None from said Khalida Bibi, Yasmin and her sons, attracted to the place of occurrence at that time."

The afore-mentioned Mst. Khalida Bibi, Mst. Yasmin and sons of the above mentioned Mansab Ali were the natural witnesses of the occurrence being residents of the same house where the occurrence took place but they were not produced as witnesses in this case by the prosecution. Although, the complainant made an excuse that the above mentioned witnesses did not attract to the spot at the time of occurrence but the above mentioned excuse given by the complainant is not convincing because it is not probable that if the occurrence of the murder of a person has taken place in a house which attracted the above mentioned prosecution eye-witnesses to the spot who were living in a house situated at the distance of 10-minutes from the said house then the persons living in the same house would not attract to the spot at the time of occurrence. It is further noteworthy that from the wedlock of the appellant and Muhammad Amjad (deceased) 06-daughters and one son were admittedly born who were also living in the house of occurrence and they were natural eye-witnesses of the occurrence but none from them was produced in the witness box to support the prosecution story, rather daughter of the appellant and Muhammad Amjad (deceased) namely, Maryam Bibi, aged about 14-years appeared in the witness box as (DW.1) and got recorded her examination-in-chief in favour of the version of the appellant. It is true that she later-on died therefore, her statement could not be subjected to cross-examination and as such the same cannot be read in evidence but the fact remains that none from the house of occurrence or children of the deceased was produced in the witness box by the prosecution to support the prosecution story though they were natural eye-witnesses of the occurrence being inmates of the house where the occurrence allegedly took place. I have also noted that as per prosecution case, the above mentioned prosecution eye-witnesses first took Muhammad Amjad (deceased) to THQ Hospital, Daska wherefrom he was referred to the Civil Hospital, Gujranwala wherefrom he was referred to the General Hospital, Lahore. Muhammad Amjad (deceased) was first medically examined at the above mentioned hospitals but none from the said hospitals was produced in the witness box by the prosecution to establish that Muhammad Amjad (deceased) was taken to the above mentioned hospitals by the aforementioned prosecution eye-witnesses. I have further noted that it was claim of the appellant that in-fact Muhammad Amjad (deceased) died due to

a road accident and she (appellant) also produced in her defence evidence the document Mark "A" issued by the Senior Registrar Neurosurgery Department of the General Hospital, Lahore which shows that the words "RTA" (road traffic accident) were written in the said document. Learned counsel for the appellant argued that it is not understandable that if both the above mentioned eye-witnesses accompanied Muhammad Amjad (deceased) to the General Hospital, Lahore then as to why they imparted information to the concerned staff of the said hospital regarding sustaining of injuries by Muhammad Amjad (deceased) due to a road accident. In this respect, it is noteworthy that even the appellant did not move any application before the learned trial Court for summoning of any Medical Officer or staff member of the General Hospital, Lahore to prove the document Mark "A", therefore, the said document is of no avail to the appellant. However, if the document Mark "A" is taken out of consideration even then, the fact remains that it was duty of the prosecution to prove its case and produce the Medical Officers or record of THQ Hospital Daska, Civil Hospital Gujranwala or General Hospital Lahore but no Medical Officer or record from the above mentioned hospitals was produced in the prosecution evidence. The prosecution could have established from the above referred evidence that the deceased was accompanied to the aforementioned hospitals by the above mentioned prosecution eye-witnesses. The said evidence could have also established the presence of the said witnesses at the spot at the relevant time but the needful was not done by the prosecution. Under the circumstances, the prosecution has not proved beyond the shadow of doubt that the above mentioned witnesses accompanied the deceased to the above mentioned hospitals and as such their very presence at the spot at the relevant time is doubtful. It is also established from the above mentioned facts that the prosecution has withheld the best evidence in this case as it did not produce in the prosecution evidence any member of the family of the above mentioned Mst. Khalida Bibi or any son/daughter of the deceased who were admittedly residing in the same house where the occurrence took place and as such they were natural eye-witnesses of the occurrence. Likewise, neither any Medical Officer nor any record from the above mentioned hospitals was produced in the prosecution evidence, therefore, an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can validly be drawn against the prosecution that had any inmate of the house of occurrence or any Medical Officer or record from the above referred hospitals been

produced in evidence then the same would not have favoured the prosecution case. Reliance in this respect may be placed on the case reported as "Lal Khan v. The State" (2006 SCMR 1846). Relevant para No.7 of the said judgment is reproduced hereunder for ready reference:-

Para No.7

> "There is no plausible explanation on the record that for what reason Mst. Noor Bibi did not disclose the story of murder of deceased till the registration of case after five days of the occurrence and why no other inmate of the house was examined in confirmation of her statement. The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutional misconduct which would not only be considered a source of undue advantage for prosecution but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."
>
> (Bold and underlining is supplied for emphasis)

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the judgments reported as "Muhammad Rafique and others v. The State and others" (2010 SCMR 385) and "Riaz Ahmed v. The State" (2010 SCMR 846).

15. The prosecution has also produced the evidence of recovery of 'Danda' (P-3) against the appellant. Sajjad Ahmad (PW.12) appeared in the witness box to prove the said recovery on the pointation of the appellant. As mentioned earlier, the complainant Ansar Iqbal (PW.5) has categorically admitted during his cross-examination that Muhammad Amjad (deceased) was living in the house of one Mansab Ali at the time of occurrence where other family members of said Mansab Ali, namely, Mst. Khalida Bibi, Mst. Yasmin Bibi and sons of Mansab Ali were also living at the relevant time. 'Danda' (P-3) was allegedly recovered on the pointation of the appellant from the roof of the above mentioned house. Sajjad

Ahmad (PW.12) conceded during his cross-examination that at the time of recovery of 'Danda' (P-3), doors of the above mentioned house were unbolted. The above referred 'Danda' was recovered from the roof of a house which was jointly possessed by the appellant and the family members of the above mentioned Mansab Ali and as such the place of recovery was not under exclusive possession of the appellant. It is further noteworthy that the occurrence in this case took place on 23.07.2019 but 'Danda' (P-3) was deposited in the office of Chemical Examiner on 27.08.2019 i.e. after one month and four days of the occurrence but even then the report regarding presence of human blood on the said 'Danda' is positive. It is by now well settled that blood disintegrates within a period of 3 to 4 weeks from the occurrence but the presence of human blood on 'Danda' (P-3) after one month and four days from the occurrence shows the mala fides of the prosecution in this case. I may refer here the case of "Faisal Mehmood v. The State" (2016 SCMR 2138), wherein at Page No.2142 the Apex Court of the country observed as under:--

> "Another piece of evidence relied upon by the prosecution was recovery of a blood-stained hatchet at the instance of the appellant during the investigation but even this piece of evidence is not free from serious doubts. According to the Memorandum of Recovery the alleged recovery had been effected from a cattleshed of the complainant which showed that the same had not been recovered from an exclusive custody of the appellant. The provisions of section 103, Cr.P.C. had clearly been violated in the matter of the said recovery. The report of the Chemical Examiner showing the recovered hatchet to be stained with blood is dated 20.12.2002 whereas the report of the Serologist showing the origin of the blood available on the recovered hatchet to be human blood is dated 25.05.2004. It was scientifically impossible to detect the origin of the blood after about two years of the occurrence because human blood disintegrates in a period of about three weeks."
>
> (Bold and underlining is supplied for emphasis)

Similar view was taken by the august Supreme Court of Pakistan in the case of "Muhammad Jamil v. Muhammad Akram and others" (2009 SCMR 120).

Under the above circumstances, recovery of 'Danda' (P-3) on the pointation of the appellant is inconsequential and the same has rightly been disbelieved by the learned trial Court in Para No.15 (b) of the impugned judgment.

16. According to the prosecution case as set forth in the FIR (Ex. PA), motive behind the occurrence was that firstly Mst. Shaukat Bibi (appellant) separated her husband, namely, Muhammad Amjad (deceased) from his parents and they started living separately in a rented house and thereafter she (appellant) intended to shift Muhammad Amjad (deceased) to Chawinda City but the deceased was not ready for the said purpose. Ansar Iqbal (complainant/PW.5) and Shahzad (PW.6) while appearing in the witness box before the learned trial Court also introduced a new motive and made dishonest improvements in their statements in respect of the motive part of the prosecution case by stating that Muhammad Amjad (deceased) restrained Mst. Shaukat Bibi (appellant) from allowing Shah Zaman alias Kala and Kashif alias Kashi to come to his house as they had illicit relationship with Mst. Samina Bibi (co-accused) and Mst. Maryam Bibi (daughter of the appellant and the deceased). The above mentioned motive of illicit relationship was not mentioned in the FIR.

The first motive alleged by the prosecution which was also mentioned in the FIR, does not appeal to a prudent mind because according to the prosecution's own case, Muhammad Amjad (deceased) separated from his parents on the asking of the appellant, therefore, it does not appeal to common sense that he would refuse his wife (Mst. Shaukat Bibi, appellant) to shift to Chawi nda City on her asking. If he can leave his parents then he can also leave his village on the asking of the appellant. Even otherwise, it does not appeal to sense that merely on the refusal of the deceased from shifting to Chawinda City, the appellant and her sister would commit his murder. Furthermore, it is not understandable that as to why Mst. Samina Bibi (co-accused since acquitted) would commit the murder of Muhammad Amjad (deceased) for the above mentioned reason. It is also noteworthy that Ansar Iqbal, complainant (PW.5) frankly conceded during his cross-examination that during the subsistence of marriage between the appellant and the deceased for a period of 15/16 years, no litigation of any sort ever occurred between the spouses. The relevant part of his statement reads as under:-

"My deceased brother and accused Shaukat Bibi were married about 15/16 years ago. During this period, no litigation of any sort ever occurred between the spouses i.e. my deceased brother and his wife Mst. Shaukat Bibi (accused)."

It is, therefore, an admitted fact that there was no litigation between the parties prior to the occurrence and the spouses were living together till the day of occurrence. In the light of above discussion, I have come to this conclusion that the motive alleged by the prosecution could not be proved in this case and the same has rightly been disbelieved by the learned trial Court in Paras Nos.14(a)(e) and 28 of the impugned judgment.

17. Now, coming to the arguments of learned Deputy District Public Prosecutor and learned counsel for the complainant that Mst. Shaukat Bibi (appellant) has taken a specific plea in her statement recorded under section 342, Cr.P.C. that her husband Muhammad Amjad (deceased) died due to a road accident but she did not produce any evidence in support of her above mentioned plea and as such she was rightly convicted and sentenced by the learned trial Court. It is further argued that Mst. Shaukat Bibi (appellant) also took this plea in her above mentioned statement that Muhammad Amjad (deceased) committed rape with his daughter Mst. Maryam Bibi, therefore, an adverse inference was rightly drawn by the learned trial Court against the appellant that on account of above mentioned grudge of rape by the deceased with Mst. Maryam Bibi, the appellant committed his murder.

There is no substance in the above mentioned arguments of learned Law Officer and learned counsel for the complainant because it was duty of the prosecution to prove its case against the appellant beyond the shadow of any doubt and the prosecution cannot take benefit from any weakness in the defence of the appellant. The prosecution has to stand on its own legs. Moreover, it was never the case of the prosecution that on the grudge of rape by Muhammad Amjad (deceased) with his daughter (Mst. Maryam Bibi), the occurrence was committed by the appellant. None of the prosecution witnesses stated that the appellant committed the murder of her husband due to the above mentioned reason, therefore, the appellant cannot be convicted and sentenced merely on the basis of surmises and conjectures.

Insofar as the statement of Mst. Shaukat Bibi (appellant) recorded under section 342, Cr.P.C. is concerned, the same has already been reproduced in Para No.4 of

this judgment. In her said statement, although the appellant stated that her daughter namely, Maryam Bibi told her that she was raped by her father (Muhammad Amjad, deceased) but the appellant did not confess that she committed the murder of her husband due to the above mentioned grudge, rather she stated that her husband died due to a road accident. I have already disbelieved the prosecution evidence due to the reasons mentioned in Paragraphs Nos.10 to 14 of this judgment, therefore, statement of the appellant recorded under section 342, Cr.P.C. is to be accepted or rejected in toto. It is by now well settled that after rejection of prosecution evidence, the statement of an accused is to be accepted or rejected as a whole and it is not legally permissible to accept incriminating part of the statement of an accused and disbelieve the exculpatory part of the said statement. Reliance in this respect may be placed upon the judgments reported as "Muhammad Asghar v. The State" (PLD 2008 Supreme Court 513), "Sultan Khan v. Sher Khan and others" (PLD 1991 Supreme Court 520) and "Ghulam Qadir v. Esab Khan and others" (1991 SCMR 61). If the statement of the appellant recorded under section 342, Cr.P.C. is accepted in toto then she cannot be convicted on the basis of said statement.

In the light of above, there is no substance in the above mentioned arguments of learned Deputy District Public Prosecutor and learned counsel for the complainant.

18. I have considered all the aspects of this case and has come to this irresistible conclusion that the prosecution evidence is full of doubts. It is by now well settled that if there is a single circumstance which creates reasonable doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story.

In the case of, "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> "5.….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan reiterated the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230).

Likewise, in the case of, "Muhammad Mansha v. The State" (2018 SCMR 772), the Hon'ble Supreme Court of Pakistan, at page 778, was pleased to observe as under:-

> "4.……Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxima, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted."

19. In the light of above discussion, I accept Criminal Appeal No.13978-J of 2020 filed by Mst. Shaukat Bibi (appellant), set aside her conviction and sentence recorded by the learned Additional Sessions Judge, Daska vide impugned judgment dated 14.02.2020 and acquit her of the charge under section 302(b), P.P.C. by extending her the benefit of doubt. Mst. Shaukat Bibi (appellant) is in custody, she be released forthwith, if not required in any other case.

20. As I have already disbelieved the prosecution evidence due to the reasons mentioned in Paras Nos.10 to 16 of this judgment, therefore, Criminal Appeal No.16609 of 2020, filed by the complainant against acquittal of Mst. Samina Bibi (co-accused) as well as, Crl. Revision No.17261 of 2020, filed by the complainant for enhancement of sentence, awarded by the learned trial Court against Mst. Shaukat Bibi (appellant) from imprisonment for life to death, are also hereby dismissed.

JK/S-44/L **Order accordingly.**

2021 Y L R 23

[Lahore]

Before Malik Shahzad Ahmad Khan and Ch. Mushtaq Ahmad, JJ

RIAZ AHMAD---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 11595 of 2019, decided on 12th October, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 9(c) & 36---Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 6---Possession of narcotics---Reports of Government Analysts---Report of test---Non-mentioning of full protocols---Effect---Accused was alleged to have been found in possession of 1110 grams of opium---Report of Forensic Laboratory did not contain the details of the protocols and the test applied at the time of analysis of sample of narcotic---Report failing to describe the details of the full protocols and the tests applied was inconclusive, unreliable, suspicious and untrustworthy and did not meet the evidentiary presumption attached to report of the Government Analyst under S.36(2) of Control of Narcotic Substances Act, 1997---Single circumstance creating reasonable doubt was sufficient to cast doubt about the veracity of prosecution case and the benefit of doubt had to be extended in favour of the accused not as a matter of grace and concession but as a matter of right---Appeal against conviction was allowed, in circumstances.

The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039 and Khair-ul-Bashar v. The State 2019 SCMR 930 rel.

Tariq Pervez v. The State 1995 SCMR 1345; Akhtar Ali and others v. The State 2008 SCMR 6 and Muhammad Zaman v. The State and others 2014 SCMR 749 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9---Possession of narcotics---Scope---Provisions of Control of Narcotic Substances Act, 1997, provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused.

Muhammad Hashim v. The State PLD 2004 SC 856 ref.

(c) Criminal trial---

----Sentence---Standard of proof---Scope---Harder the sentence, stricter the standard of proof.

Ameer Zeb v. The State PLD 2012 SC 380 ref.

(d) Control of Narcotic Substances (Government Analysts) Rules, 2001---

----R.6---Report of result of test---Scope---Rule 6 of the Control of Narcotic Substances (Government Analyst) Rules, 2001, makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/analysis by the laboratory.

Saleem Ullah Khan Balouch for Appellant.

Waqas Anwar, Deputy Prosecutor General for the State.

Date of hearing: 12th October, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal is directed against judgment dated 30.11.2018, passed by the learned Additional Sessions Judge, Pindi Bhattian, whereby, in case FIR No.135 dated 02.03.2017, registered at Police Station Jalalpur Bhattian under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Riaz Ahmad, appellant and sentenced him as under:

> Under Section 9(c) of Control of Narcotic Substances Act, 1997 to four years R.I with fine of Rs.8,000/- and in default of payment thereof the appellant was directed to further undergo S.I. for four months and fifteen days.
>
> The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Briefly, the accusation levelled in the FIR against the appellant is that on 02.03.2017 at 3:50 p.m., Muhammad Yaqoob, SI (complainant/PW-1), along with other police officials, on spy information, conducted a raid and apprehended Riaz Ahmad (appellant). During search of the appellant opium weighing 1110-grams was recovered from the shopper bag caught by the appellant in his right hand. The above mentioned recovered opium was sealed into a separate parcel and the same was sent for Chemical Analysis. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 31.03.2017, to which he pleaded not

guilty so the prosecution was directed to produce its evidence. The prosecution produced six witnesses to prove its case. The learned Additional Sessions Judge, Pindi Bhattian, after recording the statement of the appellant under section 342 Cr.P.C. and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PD); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well settled that since the provisions of The Control of Narcotic Substances Act, 1997, provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of "Muhammad Hashim v. The State" (PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of "Ameer Zeb v. The State" (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the above mentioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of sample of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:

Item No. Description of Evidence

01. One sealed parcel containing approximately 1110 gram(s) of suspected Opium.

Tests Performed on Received Item(s) of Evidence

1. Top-Load Balance was used for weighing.
2. Chemical Spot Tests were used for Presumptive Testing.
3. Gas Chromatograph-Mass spectrometry was used for confirmation.

Results and Conclusion:-

Item # 01 1115.6 gram(s) of blackish brown resinous material in sealed parcel contains Opium.

Undisputedly, it is settled by now that any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under section 36(2) of the Act ibid. In the report Ex.PE, it is simply mentioned that certain tests were conducted and contraband material recovered in this case was found to be Opium instead of mentioning the details of tests applied on the samples and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

8. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency, Lahore is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of "The State through Regional Director ANF v. Imam Bakhsh and others" (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:--

16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e., control of production, processing and trafficking of narcotic drugs

and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (supra)".

The above said view has been further fortified in the recent case law titled as "Khair-ul-Bashar v. The State" (2019 SCMR 930). We have also requisitioned the attested copy of FIR in case of "Khair-ul-Bashar" (supra) i.e., FIR No.18, dated 15.01.2016, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of "Khair-ul-Bashar" (supra) is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of "Khair-ul-Bashar" (supra) has not been relied upon by the august Supreme Court of Pakistan, therefore, report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

9. Learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the above mentioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but we have noted that the august Supreme Court of Pakistan in the case of "Khair-ul-Bashar" (supra), acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore. Even otherwise, it is by now well settled that a single circumstance creating reasonable doubt would be sufficient to

cast doubt about the veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right. Reliance in this regard is placed upon the cases of "Tariq Pervez v. The State" (1995 SCMR 1345), "Akhtar Ali and others v. The State" (2008 SCMR 06) and "Muhammad Zaman v. The State and others" (2014 SCMR 749).

10. In the light of above discussion, the instant appeal (Crl. Appeal No.11595 of 2019), is allowed, impugned judgment dated 30.11.2018, passed by the learned Additional Sessions Judge, Pindi Bhattian is hereby set aside and Riaz Ahmad (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

SA/R-19/L **Appeal allowed.**

2021 Y L R Note 67

[Lahore]

Before Malik Shahzad Ahmad Khan , J

Syed SAQLAIN SHAH---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 2227 of 2014 and Criminal Revision No. 24 of 2015, heard on 17th November, 2020.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt----Failure of prosecution to collect Call Data Record---Effect---Accused were charged for committing murder of brother of the complainant by firing---Motive behind the occurrence was that lady co-accused, since acquitted wanted to marry with deceased but the complainant's family members did not agree with the proposal and got contracted marriage of deceased at some other place and due to the said grudge, the accused persons, in furtherance of their common object committed the murder of deceased---In order to prove its ocular account, the prosecution had produced two eye-witnesses including complainant---Occurrence took place near Petrol Station situated at G.T. Road---Both the said eye-witnesses were not residents of the place of Occurrence---Complainant stated that on the day of occurrence, deceased received a phone call and on inquiry of complainant, deceased informed that lady co-accused had called him and he was going to meet her---On the said information, the complainant suspected something wrong and followed his brother/deceased---No telephone number of lady co-accused had been mentioned in the FIR or in the statement of any prosecution witnesses recorded by the police or by the Trial Court---Likewise, no phone number of deceased had been mentioned in the FIR or in the evidence of any prosecution witnesses recorded by the police or by the Trial Court---No call data record of the phone numbers of the deceased and lady co-accused had been collected in that case by the police to support the said story of the complainant---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---- Dishonest improvement made by eye-witness---Effect---Accused were charged for committing murder of brother of the complainant by firing---In the present case, although eye-witness made dishonest improvement during his cross-examination that he told the Investigating Officer that he along with another person went to the place of occurrence to see a plot in a housing scheme but he conceded that the said reason was not mentioned in his statements recorded under S.161, Cr.P.C. or even in his examination-in-chief---Evidently said witness made dishonest improvement during his cross-examination by giving another reason for his presence at the spot at the relevant time by stating for the first time in the court that he went to the place of occurrence to see a plot in a housing scheme---Witness could not give any valid reason for not getting petrol from petrol station situated near his house---Said fact did not appeal to a prudent mind that instead of getting petrol from the petrol stations situated near his house, in his own town, he would go all the way to another town situated at a distance of 15-kilometres just to get petrol for his motorcycle---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142; Sufyan Nawaz and another v. The State and others 2020 SCMR 192 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---- Non-availability of justification for the presence of eye-witnesses at the spot--- Chance witnesses--- Scope---Accused were charged for committing murder of brother of the complainant by firing---Record showed that both the eye-witnesses could not justify the reason given by them for their presence at the spot at the time of occurrence---Prosecution eye-witnesses were chance witnesses and they could not prove the reason of their presence at the spot at the time of occurrence, therefore, their very presence at the spot at the relevant time become doubtful---

Circumstances established that the prosecution had failed to prove its case beyond shadow of doubt---Appeal against conviction was allowed, in circumstances.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---- Delay of about more than twenty four hours in conducting the post-mortem--- Scope---Accused were charged for committing murder of brother of the complainant by firing---Record showed that the occurrence took place at 9:00 a.m. but as per statement of Medical Officer the post-mortem examination on the body of deceased was conducted at 9:15 a.m. with the delay of more than 24-hours from the occurrence---Although, complainant stated during his cross-examination that the said delay in conducting the postmortem examination on the body of deceased had occurred due to non-availability of the Medical Officer but no such statement had been made by Medical Officer that, no Medical Officer was available in the concerned mortuary---Said witness rather stated that the dead body was brought at about 12:15 p.m. without police papers and police papers were brought next day at 9:15 a.m. and then he conducted the post-mortem examination on the body of the deceased---Said delay in conducting the postmortem examination on the body of the deceased was suggestive of the fact that the prosecution eye-witnesses were not present at the spot at the relevant time and the said delay was consumed in procuring the attendance of fake eye-witnesses---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt--- Appeal against conviction was allowed, in circumstances.

Zafar v. The State and others 2018 SCMR 326 and Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---- Motive not proved---Effect---Accused were charged for committing murder of brother of the complainant by firing---Prosecution case was that the motive behind the occurrence was that family members of lady co-accused wanted to marry her with deceased but the family members of the complainant party did not agree with the said proposal and due to the said reason, the accused and co-accused (since acquitted) committed the murder of deceased---Complainant conceded that

deceased was already married prior to the occurrence---Complainant also conceded that lady co-accused was already married prior to the occurrence with accused---Said witness further conceded that no particular date, time, month and year of the alleged marriage offer made by lady co-accused or her family members with the deceased had been mentioned in the FIR---Witness also conceded that he did not produce any elder of his family regarding the offer and refusal of marriage proposal given by lady co-accused with the deceased during the investigation of that case---Motive was alleged against lady co-accused and she had been acquitted by the Trial Court and appeal filed against her acquittal had already been dismissed by the Court due to non-prosecution and restoration application filed by the complainant had also been dismissed being time barred---Motive was alleged against lady co-accused and no motive whatsoever had been alleged by the prosecution against the accused---Keeping in view all the said facts, the prosecution could not prove any motive against the accused---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt----Recovery of crime empties and weapon of offence---Reliance---Scope---Accused were charged for committing murder of brother of the complainant by firing---Record showed that the empties recovered from the spot and the pistol were deposited together in the office of Forensic Science Agency on 08.07.2014 by Police Constable---As the empties and pistol were deposited together in the office of Forensic Science Agency, which meant that empties and pistol remained together at the police station---Under the circumstances, possibility could not be ruled out that fake empties were prepared from pistol allegedly recovered on the pointation of the accused and the same were sent to the office of Forensic Science Agency, for their comparison with the said pistol---Witness, who deposited the empties and pistol with the Office of Forensic Science Agency had not been produced in the witness box by the prosecution---Recovery of pistol on the pointation of the accused and positive report of the Forensic Science Agency was of no avail to the prosecution---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Mushtaq and 3 others v. The State PLD 2009 SC 1 and Jehangir v. Nazar Farid and another 2002 SCMR 1986 rel.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt----Accused were charged for committing murder of brother of the complainant by firing---Record showed that the accused and co-accused were assigned a joint role of making fire shots at deceased which landed on the different parts of his body, however, the co-accused had been acquitted by the Trial Court vide the impugned judgment, whereas accused had been convicted and sentenced on the basis of same prosecution evidence---If the same prosecution evidence was disbelieved qua one accused then the said evidence could not be believed against the other accused without independent corroboration which was very much lacking in the case---Trial Court distinguished the case of the accused with the case of co-accused on the ground that accused was declared guilty during the police investigation whereas co-accused was declared innocent on the ground that no weapon was recovered from her possession whereas pistol had been recovered from the possession of the accused---Police opinion/ finding regarding innocence of accused became irrelevant after recording of evidence of the parties by the Trial Court---Opinion of the police was inadmissible in evidence---Case of the accused could not be distinguished from the case of co-accused on the basis of police opinion---Case of the accused was not distinguishable from the case of co-accused and as such, the prosecution evidence which had been disbelieved against co-accused could not be believed against the accused without independent corroboration which was very much lacking in the case, therefore, the accused was also entitled to acquittal from the charge---Circumstances established that the prosecution had failed to prove its case beyond the shadow of doubt---Appeal against conviction was allowed, in circumstances.

Muhammad Ahmad (Mahmood Ahmed) and another v. The State 2010 SCMR 660; Muhammad Akram v. The State 2012 SCMR 440; Akhtar Ali and others v. The State 2008 SCMR 6; Muhammad Ali v. The State 2015 SCMR 137 and Ulfat Hussain v. The State 2018 SCMR 313 rel.

Ch. Imran Raza Chadhar and Ch. Qasim Raza Chadhar for Appellant as well as Respondent No.1 (in Criminal Revision No.24 of 2015).

Ch. Muhammad Ishaq, Additional Prosecutor General for the State.

Sajid Hussain Butt for the Complainant as well as Petitioner (in Criminal Revision No.24 of 2015).

Date of hearing: 17th November, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.2227 of 2014, filed by Syed Saqlain Shah (appellant) against his conviction and sentence, as well as Criminal Revision No.24 of 2015, filed by Imran Haider petitioner/ complainant for enhancement of sentence from imprisonment for life to death awarded to Syed Saqlain Shah (respondent No.1 of the said criminal revision), as both these matters have arisen out of the same judgment dated 28.11.2014, passed by learned Additional Sessions Judge, Ferozewala.

2. Syed Saqlain Shah (appellant) along with Muhammad Saleem alias Kali Gujar (co-accused since acquitted), Syed Raza Shah (co-accused since acquitted) and Mst. Umm-i-Naila alias Laila (co-accused since acquitted) was tried in case FIR No.1130/2010 dated 16.12.2010, registered at Police Station Ferozewala District Sheikhupura in respect of offences under sections 302/148/149, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 28.11.2014, has convicted and sentenced the appellant as under:-

> Under section 302(b), P.P.C. to imprisonment for life. The appellant was also directed to pay an amount of Rs.2,00,000/- (Rupees two hundred thousand only), as compensation to the legal heirs of Kamran Haider (deceased) under section 544-A, Cr.P.C and in case of default to further undergo six months simple imprisonment.
>
> Benefit of section 382-B, Cr.P.C was also extended to the appellant.

However, vide the same impugned judgment Muhammad Saleem alias Kali Gujjar, Syed Raza Shah and Mst. Umm-i-Naila alias Laila (co-accused) were acquitted by the learned trial Court while extending them the benefit of doubt.

3. Brief facts of the case as given by the complainant Imran Haider (PW-7) in the FIR (Ex.PG/1) are that on 16.12.2010, at about 9.00 a.m., his brother namely Kamran Haider (deceased) received a call on his mobile phone. On the query of

the complainant, Kamran Haider (deceased) told that Mst. Umm-i-Naila alias Laila (co-accused since acquitted) had called him for meeting. The complainant suspected something wrong, therefore, he (complainant) along with his younger brother Farhan Haider followed Kamran Haider (deceased) on their motorcycle. Kamran Haider (deceased) proceeded towards Gujranwal a on G .T. road on his motorcycle Honda-CG-125 (black colour) bearing registration No.LEV-09/ 4030 and when he reached on G.T. Road Total Petrol Pump near Rice Farm, Kala Shah Kaku, Saqlain Shah (appellant), Kali Gujjar (co-accused since acquitted), Mst. Umm-i-Naila alias Laila (co-accused since acquitted), Raza Ali Shah (co-accused since acquitted) and Riaz Shah (co-accused since P.O), along with one unknown accused person emerged at the spot and intercepted him. Saqlain Shah (appellant) and Muhammad Saleem alias Kali Gujjar (co-accused since acquitted) thereafter, made indiscriminate firing with their respective pistols at Kamran Haider (deceased), which landed on the different parts of his body, who after sustaining serious injuries fell down on the ground. Upon seeing the whole occurrence, the complainant along with Farhan Haider (PW) stepped forward on which, the accused persons while making firing and raising 'Lalkaras' fled away from the spot while saying that they had taken the revenge of their insult. The occurrence was also witnessed by Abdul Rehman (given up PW), Durrab Hussain (PW.8) and Ahmad Subhani (given up PW). Kamran Haider succumbed to the injuries at the spot, hence the abovementioned FIR.

The motive behind the occurrence was that Umm-i-Naila alias Laila (co-accused since acquitted) wanted to marry with Kamran Haider (deceased) and family members of said co-accused also visited the complainant's house for 2/3 times for the said purpose but the complainant's family members did not agree with the proposal. The complainant's family got contracted marriage of Kamran Haider deceased at some other place and due to the said grudge, the accused persons, in furtherance of their common object, committed the murder of Kamran Haider (deceased).

4. The appellant was arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 26.10.2011 to which they pleaded not guilty and claimed trial. In

order to prove its case the prosecution produced ten witnesses. Aftab Ahmad, DSP and Abdul Aziz, 982/C were examined as Court witnesses (CW.1 and CW.2, respectively). Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PT during the trial. The statements of the appellant and his co-accused under section 342, Cr.P.C were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court vide the impugned judgment dated 28.11.2014, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has wrongly been convicted and sentenced by the learned trial Court; that both the eye-witnesses of the prosecution are chance witnesses because their houses were situated at the distances of 10/15-KMs and 20/25-KMs from the place of occurrence; that the prosecution eye-witnesses could not justify their presence at the spot at the relevant time through any cogent reason, therefore, their evidence is not worthy of reliance; that there is a delay of 24-hours in conducting postmortem examination of Kamran Haider (deceased) which also shows that the prosecution witnesses were not present at the spot at the time of occurrence; that the motive alleged against the appellant has also not been proved in this case by the prosecution and the same has rightly been disbelieved by the learned trial Court; that the recovery of weapon of offence and positive report of the Punjab Forensic Science Agency, Lahore (Ex.PT) is of no avail to the complainant party because the empties and pistol were deposited together in the office of Punjab Forensic Science Agency, Lahore; that the witness, namely, Shahzada Qeqous (837/C) who deposited the pistol and empties in the office of Punjab Forensic Science Agency, Lahore, did not appear in the witness box; that the appellant and Muhammad Saleem alias Kali Gujjar, co-accused were attributed a joint role of firing at the deceased but the said Muhammad Saleem alias Kali Gujjar, co-accused has been acquitted by the learned trial Court and criminal appeal filed against his acquittal i.e. Crl. Appeal No.39 of 2015, has also been dismissed by this Court vide order dated 20.11.2019, therefore, the prosecution evidence which has been disbelieved against the above mentioned co-accused, cannot be believed against the appellant without independent corroboration, which is very much lacking in this case; that the

prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

7. On the other hand, it is argued by the learned Additional Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, he was rightly convicted and sentenced by the learned trial Court; that the prosecution eye-witnesses were cross-examined at length but their evidence could not be shaken; that the occurrence in this case took place in the broad daylight and as such there was no chance of any misidentification of the appellant; that the appellant along with Muhammad Saleem alias Kali Gujjar, co-accused was given specific role of making fire shots at Kamran Haider, deceased and the said role is fully supported by the medical evidence; that the prosecution case against the appellant has further been corroborated by the recovery of pistol (P-5) from the possession of the appellant and the positive report of Punjab Forensic Science Agency, Lahore (Ex. PT); that motive against the appellant has also been proved by the trustworthy and reliable prosecution evidence and the same was wrongly disbelieved by the learned trial Court; that the acquittal of Muhammad Saleem alias Kali Gujjar, co-accused is of no avail to the appellant because the said co-accused was declared innocent by the police and nothing incriminating was recovered from his possession whereas the appellant was found guilty by the police and pistol (P-5) has also been recovered from his possession and as such his case is distinguishable from the case of Muhammad Saleem alias Kali Gujjar, co-accused (since acquitted), therefore, his criminal appeal may be dismissed. While arguing Criminal Revision No.24 of 2015 for enhancement of sentence of Syed Saqlain Shah (convict), it is argued by learned counsel for the complainant that there was no mitigating circumstance in this case, therefore, Syed Saqlain Shah may be awarded the normal penalty of death.

8. Arguments heard and record perused.

9. The detail of the prosecution case as set forth in the FIR (Ex.PG/1) and in the complaint (Ex. PG), has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

10. In order to prove its ocular account, the prosecution has produced in the witness box Imran Haider, complainant (PW.7) and Durrab Hussain (PW.8). The occurrence in this case took place near Total Petrol Pump situated at G.T. Road Kala Shah Kaku. Both the above mentioned eye-witnesses are not residents of the place of occurrence. Imran Haider, complainant (PW.7) has stated during his cross-examination that Durrab Hussain (PW.8) is resident of Wandala Dayal Shah Ferozewala which was situated at a distance of 20/25-KMs from the place of occurrence. He further stated that he himself was resident of Ferozewala and distance between Ferozewala and the place of occurrence was about 15-KMs. In order to justify his presence at the spot at the relevant time, Imran Haider, complainant (PW.7) stated that on the day of occurrence, Kamran Haider, deceased received a phone call and on inquiry of Imran Haider, complainant (PW.7), he (deceased) informed that Mst. Umm-i-Naila alias Laila, co-accused had called him and he was going to meet her. On the said information, the complainant suspected something wrong and followed his brother Kamran Haider, deceased. No telephone number of Mst. Umm-i-Naila alias Laila, co-accused has been mentioned in the FIR (Ex.PG/1) or in the statement of any prosecution witness recorded by the police or by the learned trial Court. Likewise, no phone number of Kamran Haider (deceased) has been mentioned in the FIR or in the evidence of any prosecution witness recorded by the police or by the learned trial Court. Furthermore, no call data record of the phone numbers of the deceased and Mst. Umm-i-Naila alias Laila, co-accused has been collected in this case by the police to support the above mentioned story of the complainant that he suspected something wrong due to phone call of Mst. Umm-i-Naila alias Laila, co-accused, therefore, he followed his brother, namely, Kamran Haider (deceased) on the day of occurrence and reached at the spot where he witnessed the occurrence. Similarly, Durrab Hussain (PW.8) has made this excuse for establishing his presence at the spot at the relevant time that he came to the spot which was situated in another town at a distance of 15-KMs from his town, in order to get petrol for his motorcycle but he conceded during his cross-examination that many other petrol pumps were situated near his house. He did not mention any valid reason for not getting petrol from the petrol pump situated near his house and for travelling all the way to another town which was situated

at 15/20-KMs from his town to get the petrol for his motorcycle. The relevant part of his statement during cross-examination reads as under:-

> "It is correct that I have no house, business place or business concern near the place of occurrence. It is correct that in my statement under section 161, Cr.P.C Ex.DB and in examination in chief, the only purpose was mentioned i.e., getting petrol from the petrol pump. The witness volunteered that I mentioned before the I.O that I along with Ahmad Subhani went there to see the plot in a SA garden but the I.O. did not record said portion of my statement. It is incorrect to suggest that my volunteered portion is dishonest improvement just to extent undue favour to the complainant party. It is correct that in my statements under section 161, Cr.P.C. Ex.DB and Ex.DC and in my examination in chief that fact has not been mentioned. The witness volunteered that I had disclosed that fact to the I.O. It is incorrect to suggest that my volunteered portion is incorrect and false. It is correct that there is PSO petrol located at Match factory just to near my house. It is correct that petrol can also be obtained from PSO petrol pump. It is correct that there is another PSO petrol pump from the first PSO petrol pump which is near Ferozewala bus stop. I cannot say that there is an Attock petrol pump at Rana Town bus stop. It is incorrect to suggest that I am suppressing this fact with mala fide. There might be a shell Sitara petrol pump near Toll plaza Kala Shah Kaku. It is correct that from all of the aforementioned petrol pumps petrol could be obtained. There might be seven petrol pumps on the opposite side of road."

Although, Durrab Hussain (PW.8) made dishonest improvement during his cross-examination that he told the investigating officer that he along with Ahmad Subhani went to the place of occurrence to see a plot in S.A. Garden Housing Scheme but he conceded that the said reason was not mentioned in his statements recorded under section 161, Cr.P.C. Ex.DB or Ex.DC or even in his examination-inchief. It is, therefore, evident that Durrab Hussain (PW.8) made dishonest improvement during his cross-examination by giving another reason for his presence at the spot at the relevant time by stating for the first time in the Court that he went to the place of occurrence to see a plot in S.A. Garden Housing Scheme. He could not give any valid reason for not getting petrol from petrol

pumps situated near his house. It does not appeal to a prudent mind that instead of getting petrol from the petrol pumps situated near his house, in his own town, he would go all the way to another town situated at a distance of 15-KMs just to get petrol for his motorcycle. Both the above mentioned eye-witnesses could not justify the reason given by them for their presence at the spot at the time of occurrence. They are therefore, chance witnesses and as such their evidence is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Likewise, in the case of "Sufyan Nawaz and another v. The State and others" (2020 SCMR 192) at Para No.5, the Apex Court of the country was pleased to observe as under:-

> "…….He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:--

> "…….. Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence……"

As the above mentioned prosecution eye-witnesses are chance witnesses and they could not prove the reason of their presence at the spot at the time of occurrence, therefore, their very presence at the spot at the relevant time becomes doubtful.

11. It is further noteworthy that as per prosecution case, the occurrence in this case took place on 16.12.2010 at 9:00 A.M. but as per statement of Dr. Khalid Bashir (PW.4), the postmortem examination on the body of Kamran Haider deceased was conducted on 17.12.2010 at 9:15 A.M. i.e. with the delay of more than 24-hours from the occurrence. Although, Imran Haider, complainant (PW. 7) stated during his cross-examination that the above mentioned delay in conducting the postmortem examination on the body of deceased had occurred due to non-availability of the Medical Officer but no such statement has been made by Dr. Khalid Bashir (PW.4) that on 16.12.2010, no Medical Officer was available in the concerned mortuary. The said witness rather stated that the dead body was brought on 16.12.2010 at about 12:15 P.M. without police papers and police papers were brought on 17.12.2010 at 9:15 A.M . and then he conducted the postmortem examination on the body of the deceased. The above mentioned delay in conducting the postmortem examination on the body of the deceased is suggestive of the fact that the prosecution eye-witnesses were not present at the spot at the relevant time and the said delay was consumed in procuring the attendance of fake eye-witnesses. In the case of "Zafar v. The State and others" (2018 SCMR 326), the Hon'ble Supreme Court observed that delay of 11-hours in conducting the postmortem examination shows that prosecution eye-witnesses were not present at the spot at the time of occurrence, therefore, the said delay was utilized for showing fake eye-witnesses in the police papers. Likewise, in the case of "Muhammad Ilyas v. Muhammad Abid alias Billa and others" (2017 SCMR 54), the Apex Court of the Country was pleased to observe that delay of nine-hours in

conducting postmortem examination suggests that prosecution eye-witnesses were not present at the spot at the time of occurrence, therefore, the said delay was used in procuring the attendance of fake eye-witnesses. I am, therefore, of the considered view that the prosecution eye-witnesses were not present at the spot at the time of occurrence which resulted in the delay of postmortem examination of the deceased.

12. As per prosecution case, the motive behind the occurrence was that family members of Mst. Umm-i-Nail a alias Laila, co-accused wanted to marry her with Kamran Haider, deceased and for the said purpose, her family members visited the house of the complainant party 2/3 times but the family members of the complainant party did not agree with the said proposal and due to the above mentioned reason, the appellant and his co-accused committed the murder of Kamran Haider, deceased. I have noted that Imran Haider, complainant (PW.7) conceded that Kamran Haider, deceased was already married prior to the occurrence. He also conceded that even Mst. Umm-i-Naila alias Laila, co-accused was also married prior to the occurrence with Syed Saqlain Shah, appellant. He further conceded that no particular date, time, month and year of the alleged marriage offer made by Mst. Umm-i-Naila alias Laila, co-accused or her family members with the deceased has been mentioned in the FIR. He also conceded that he did not produce any elder of his family regarding the offer and refusal of marriage proposal given by Mst. Umm-i-Naila alias Laila, co-accused with the deceased during the investigation of this case. It is further noteworthy that the motive was alleged against Mst. Umm-i-Naila alias Laila, co-accused and she has been acquitted by the learned trial Court and appeal filed against her acquittal i.e. Crl. Appeal No.39 of 2015 has already been dismissed by this Court vide order dated 20.11.2019 due to non-prosecution and restoration application filed by the complainant has also been dismissed being time barred vide order dated 09.06.2020. The motive was alleged against Mst. Umm-i-Naila alias Laila, co-accused and no motive whatsoever has been alleged by the prosecution against the appellant. Keeping in view all the above mentioned facts, the prosecution could not prove any motive against the appellant and the same was rightly disbelieved by the learned trial Court in Para No.32 of the impugned judgment.

13. Insofar as the recovery of pistol (P-5) from the possession of the appellant and positive report of the Punjab Forensic Science Agency, Lahore (Ex. PT) is

concerned, I have noted that as per report of the Punjab Forensic Science Agency, Lahore, the empties recovered from the spot and pistol (P-5) were deposited together in the office of Punjab Forensic Science Agency, Lahore on 08.07.2014 by Shahzada Qeqous (837/C). As the empties and pistol (P-5) were deposited together in the office of Punjab Forensic Science Agency, Lahore, therefore, it means that empties and pistol (P-5) remained together at the police station. Under the circumstances, possibility cannot be ruled out that fake empties were prepared from pistol (P-5) allegedly recovered on the pointation of the appellant and the same were sent to the office of Punjab Forensic Science Agency, Lahore for their comparison with the said pistol. Although, it is argued by the learned Additional Prosecutor General assisted by learned counsel for the complainant that Mukhtar Ahmad, 983/C (PW.1), Mukhtar Ahmad, ASI (PW.6), and Ali Ashraf, S.I (PW.9) have stated that empties were sent to the office of Punjab Forensic Science Agency, Lahore on 14.01.2011 whereas the pistol was recovered on the pointation of the appellant on 06.02.2011 and the same was sent to the office of Punjab Forensic Science Agency, Lahore on 22.02.2011 but the above mentioned oral evidence of the prosecution has been excluded by the documentary evidence i.e. report of the Punjab Forensic Science Agency, Lahore (Ex.PT) which shows that the empties and pistol (P-5) were deposited together in the above mentioned office. The said report has been produced in evidence and relied upon by the prosecution itself. The Apex Court of the Country in the case of "Mushtaq and 3 others v. The State" (PLD 2008 Supreme Court 1) disbelieved the prosecution evidence qua the recovery of firearm weapon and positive report of Punjab Forensic Science Agency, Lahore, when empties and firearm were deposited together in the office of Punjab Forensic Science Agency, Lahore.

Likewise, in the case of "Jehangir v. Nazar Farid and another" (2002 SCMR 1986), recovery of weapon of offence and positive report of Punjab Forensic Science Agency, Lahore were disbelieved on the ground that empties and rifle were kept together at the police station, therefore, possibility of preparation of fake empties cannot be ruled out under the circumstances. It is further noteworthy that as per report of the Punjab Forensic Science Agency, Lahore (Ex. PT), the empties and pistol were deposited in the said office by Shahzada Qeqous (837/C) but the said witness has not been produced in the witness box by the prosecution. Under the circumstances, the recovery of pistol (P-5) on the pointation of the

appellant and positive report of the Punjab Forensic Science Agency, Lahore (Ex.PT) are of no avail to the prosecution.

14. It is further important to note that as per prosecution evidence, Syed Saqlain Shah (appellant) and Muhammad Saleem alias Kali Gujjar, co-accused were assigned a joint role of making fire shots at Kamran Haider, deceased which landed on the different parts of his body. The above mentioned Muhammad Saleem alias Kali Gujjar, co-accused has been acquitted by the learned trial Court vide the impugned judgment dated 28.11.2014 whereas Syed Saqlain Shah (appellant) has been convicted and sentenced on the basis of same prosecution evidence. Criminal Appeal No.39 of 2015 filed against the acquittal of said co-accused has already been dismissed by this Court vide order dated 20.11.2019 due to non-prosecution and restoration application filed by the complainant has also been dismissed being time barred vide order dated 09.06.2020. It is by now well settled that if the same prosecution evidence is disbelieved qua one accused then the said evidence cannot be believed against the other accused without independent corroboration which is very much lacking in this case. The learned trial Court distinguished the case of the appellant with the case of Muhammad Saleem alias Kali Gujjar, co-accused on the ground that appellant was declared guilty during the police investigation whereas Muhammad Saleem alias Kali Gujjar, co-accused was declared innocent and on the ground that no weapon was recovered from the possession of Muhammad Saleem alias Kali Gujjar, co-accused whereas pistol (P-5) has been recovered from the possession of the appellant. Insofar as the police opinion regarding the innocence or guilt of an accused is concerned, it is by now well settled that police opinion/ finding becomes irrelevant after recording of evidence of the parties by the learned trial Court. It is further noteworthy that opinion of the police is inadmissible in evidence. Reference in this context may be made to the case of "Muhammad Ahmad (Mahmood Ahmed) and another v. The State" (2010 SCMR 660) wherein at page No.676 the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

> "……..It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be

> permitted to be exercised by the employees of the Police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an accused person could be let off or acquitted only because the Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt….."

It is, therefore, evident that the case of the appellant cannot be distinguished from the case of Muhammad Saleem alias Kali Gujjar, co-accused on the basis of police opinion.

Insofar as the recovery of weapon of offence from the possession of the appellant is concerned, even on the said ground the case of the appellant is not distinguishable from the case of Muhammad Saleem alias Kali Gujjar, co-accused because the recovery of pistol (P-5) on the pointation of the appellant and positive report of the Punjab Forensic Science Agency, Lahore (Ex. PT) have already been disbelieved due to the reasons mentioned in Paragraph No.13 of this judgment. Learned Additional Prosecutor General assisted by learned counsel for the complainant next argued that motive was alleged against the appellant and the same was not alleged against the above mentioned co-accused, therefore, case of the appellant is distinguishable from the case of Muhammad Saleem alias Kali Gujjar, co-accused but the motive alleged by the prosecution has also been disbelieved by the learned trial Court, as well as, by this Court on account of reasons mentioned in Paragraph No.12 of this judgment. Under the circumstances, the case of the appellant is not distinguishable from the case of Muhammad Saleem alias Kali Gujjar, co-accused and as such, the prosecution evidence which has been disbelieved against Muhammad Saleem alias Kali Gujjar, co-accused cannot be believed against the appellant without independent corroboration which is very much lacking in this case, therefore, the appellant is also entitled to the acquittal from the charge. In the case of Muhammad Akram v. The State" (2012 SCMR 440) the Apex Court of the Country at Page-446 was pleased to observe as under:-

"…… Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, as such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of both the eye-witnesses do not find any corroboration from any piece of independent evidence…."

Similar view was taken by the august Supreme Court of Pakistan in the cases reported as "Akhtar Ali and others v. The State" (2008 SMCR 6), "Muhammad Ali v. The State" (2015 SCMR 137) and "Ulfat Husain v. The State" (2018 SCMR 313) .

15. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt.

16. In the light of above discussion, I accept Criminal Appeal No.2227 of 2014 filed by Syed Saqlain Shah (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Ferozwala, District Sheikhupura vide impugned judgment dated 28.11.2014 and acquit him of the charge under section 302(b) P.P.C. by extending him the benefit of doubt. Syed Saqlain Shah (appellant) is in custody, he be released forthwith, if not required in any other case.

17. Insofar the criminal revision i.e., Crl. Revision No.24 of 2015, filed by Imran Haider (complainant) for enhancement of sentence, awarded by the learned trial Court against Syed Saqlain Shah (appellant) from imprisonment for life to death is concerned, I have already disbelieved the prosecution evidence due to the reasons mentioned in paragraphs Nos.10 to 15 of this judgment and Syed Saqlain Shah (appellant) has been acquitted from the charge, therefore, this criminal revision being devoid of any force is hereby dismissed.

JK/S-71/L **Appeal allowed.**

2021 Y L R Note 94

[Lahore]

Before Malik Shahzad Ahmad Khan, J

FIDA HUSSAIN---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 1 of 2021 and Criminal Miscellaneous No. 1191-B of 2021, decided on 28th January, 2021.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 302, 324, 109 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, abetment, common intention---Pre-arrest bail, grant of---Further enquiry---Accused was declared to be innocent by Investigating Officer--- Effect---Allegation against accused was that he was present at the time of occurrence being armed with firearm in order to protect his co-accused while they committed murder of two persons and caused injuries to others---Accused was not assigned the role of causing any injury on the person of the deceased or prosecution witnesses---Mere presence of accused at the spot by itself was not sufficient to refuse the relief of pre-arrest bail---Investigating Officer had concluded that the accused was not present at the spot at the time of occurrence rather he was present in the house of co-accused and the co-accused had left his house for committing the occurrence but the accused had remained present in his house---Case of prosecution against the accused was one of further inquiry because it would be determined by the Trial Court after recording of evidence that as to whether the story narrated by the complainant in the FIR was true or findings of the Investigating Officer were correct and as such, a case for grant of pre-arrest bail was made out in favour of the accused---Possibility of mala fide involvement of the accused by the complainant could not be ruled out, in circumstances---Petition for grant of pre-arrest bail was allowed, in circumstances. [Paras. 4, 5 & 6 of the judgment]

Muhammad Shakeel v. The State and others PLD 2014 SC 458; Muhammad Murad and others v. The State and others 2009 SCMR 348; Subeh Sadiq alias Saabo alias Kalu

v. The State and others 2011 SCMR 1543; Syed Darbar Ali Shah and others v. The State 2015 SCMR 879 and Nadeem v. The State and another 2016 SCMR 1619 ref.

Malik Matee Ullah with Petitioner.

Ch. Muhammad Ishaq, Addl. Prosecutor General for the State.

Athar Yar Khan Awan for the Complainant.

Anwar, Assistant Sub-Inspector.

ORDER

Crl. Misc. No. 01 of 2021.

MALIK SHAHZAD AHMAD KHAN, J.---This is an application for placing certain documents on the record, the same is allowed subject to all just and legal exceptions. C.M. stands disposed of.

Main Case. (Cr1. Misc. No. 1191-B of 2021).

2. The petitioner, namely, Fida Hussain through the instant petition seeks pre-arrest bail in case FIR No. 338 dated 19.11.2020 registered at Police Station Piplan District Mianwali offences under sections 302/324/109/34 of P.P.C.

3. Arguments heard. Record perused.

4. As per brief allegations levelled in the FIR, on 19.11.2020, a quarrel took place on mobile phone between the petitioner and Muhammad Saleem deceased over installation of a volley ball net in the house of one Sher Azam. Co-accused of the petitioner thereafter, committed the murder of abovementioned Muhammad Saleem and Muhammad Ijaz and caused injuries to Muhammad Ishaq and Sanwal Saleem PWs. As per contents of the FIR, the petitioner also remained at the spot at the time of occurrence while armed with firearm in order to protect his co-accused. Hence, the abovementioned FIR.

5. The petitioner has not been assigned the role of causing any injury on the body of abovementioned two deceased persons or on the body of any prosecution witness. Mere presence of the petitioner at the spot by itself is not sufficient to refuse the relief of pre-arrest bail to him. As per contents of the FIR, the petitioner was only present while armed

with firearm at the spot at the time of occurrence and had the petitioner any intention to commit the murder of abovementioned deceased persons or cause injury to any member of the complainant party then he could have used his firearm weapon at the time of occurrence therefore, question of vicarious liability of the petitioner requires further probe and inquiry. Reliance in this respect may be placed on the cases of 'Muhammad Shakeel v. The State and others' (PLD 2014 Supreme Court 458), 'Muhammad Murad and others v. The State and others' (2009 SCMR 348) and 'Subeh Sadiq alias Saabo alias Kalu v. The State and others' (2011 SCMR 1543). Although it is argued by learned counsel for the complainant that mobile phone data of the petitioner and Muhammad Saleem deceased has been collected in this case which shows that the petitioner made a telephone call to Muhammad Saleem deceased prior to the occurrence on mobile phone but admittedly, no recording of the mobile phone is available in this case to establish that any quarrel took place between the petitioner and Muhammad Saleem deceased prior to the occurrence. The petitioner and the complainant are closely related to each other and admittedly, the petitioner is maternal uncle of the complainant, as well as, Muhammad Saleem deceased therefore, mere availability of call data regarding making of any call by the petitioner to Muhammad Saleem deceased by itself is not sufficient to support the allegation of quarrel levelled against the petitioner by the complainant. It is further noteworthy that the Investigating Officer vide zimni No. 27 dated 27.12.2020, has concluded that the petitioner was not present at the spot at the time of occurrence rather he was in the house of Mohsin co-accused and Mohsin co-accused left his house for the occurrence but the petitioner remained present in his house. The abovementioned police finding is in conflict with the story narrated by the complainant in the FIR therefore, case of the prosecution against the petitioner is one of further inquiry because it will be determined by the learned trial Court after recording of evidence that as to whether the story narrated by the complainant in the FIR is true of findings of the I.O. are correct and as such, a case for grant of pre-arrest bail is made out in favour of the petitioner. Reliance in this respect may be placed on the cases of 'Syed Darbar Ali Shah and others v. The State' (2015 SCMR 879) and Nadeem v. The State and another' (2016 SCMR 1619). Possibility of mala fide involvement of the petitioner in this case by the complainant by using the wider net cannot be ruled out at this stage.

6. In the light of above, this petition is allowed and interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing the bail bonds in the sum of Rs.500,000/- (Rupees five hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

SA/F-2/L **Bail granted.**

2021 Y L R Note 133

[Lahore]

Before Malik Shahzad Ahmad Khan, J

WAHEED KHAN---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 1036 and Criminal Revision No.724 of 2013, heard on 10th March, 2021.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property--- Appreciation of evidence---Benefit of doubt---Accused was charged that he along with co-accused murdered the brother of the complainant after committing dacoity---Statements of the eye-witnesses revealed that they remained mum for a period of eight days after the occurrence and even after attending funeral ceremony of deceased they remained mum for a period of four days---Said witnesses did not give any plausible reason for remaining silent during the said period---Said delay in making statements before the police by the prosecution eye-witnesses had created serious doubt regarding the truthfulness of their evidence---Appeal against conviction was allowed, in circumstances.

Muhammad Safdar Bhatti v. The State 1987 SCMR 1215 and Muhammad Sharifan Bibi v. Muhammad Yasin and others 2012 SCMR 82 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property---Appreciation of evidence---Test identification parade---Scope---Accused was charged that he along with co-accused murdered the brother of the complainant after committing dacoity---Record showed that eye-witnesses claimed that they identified the accused during the identification parade, however, the accused was nominated in the case through the statements of witnesses of last seen evidence whereas the identification parade of the accused was held after sixteen days under the circumstances, identification of the accused through identification parade after his nomination in the case was highly doubtful and unreliable---If direct evidence of eye-

witnesses was available with the prosecution then why the circumstantial evidence was also produced in the case---Such fact showed that the prosecution itself was doubtful about the credibility of evidence of eye-witnesses, therefore, it chose to produce circumstantial evidence in the case---Appeal against conviction was allowed, in circumstances.

Amanat Ali alias Amanti v. The State 2013 YLR 1959; The State v. Mukhtar Ahmad and 5 others 2015 MLD 1840 and Naseeb Ullah v. The State 2012 YLR 2570 rel.

(c) Criminal trial---

----Circumstantial evidence---Scope---Every circumstance should be linked with each other and it should form such a continuous chain that its one end touched the dead body and other to the neck of the accused---If any link in the chain was missing then its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property---Appreciation of evidence---Last seen evidence---Scope---Accused was charged that he along with his co-accused murdered the brother of the complainant after committing dacoity---Record showed that in-spite of reaching in the house of the complainant at 5:30 am/fajr time, both the prosecution witnesses did not inform the police that they had lastly seen the deceased in the company of the accused and his co-accused rather both the said witnesses and the complainant remained busy in talking with each other about the occurrence in the house of the complainant and made their statements before the police---Police station was situated at the distance of only 2/3 kilometres from the house of the complainant---Circumstances showed that there was every possibility of deliberations and concoctions and the evidence of the prosecution witnesses of last seen evidence was not free from doubt---Delay in making statements by the prosecution witnesses before the police without any valid reason had created serious doubt regarding the truthfulness of their evidence---Prosecution's last seen evidence, in circumstances, was untrustworthy

and the same had rightly been disbelieved by the Trial Court---Appeal against conviction was allowed, in circumstances.

(e) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property---Appreciation of evidence---Statement of witness of last seen evidence---Scope---Accused was charged that he along with co-accused murdered the brother of the complainant after committing dacoity---Record showed that the Trial Court convicted and sentenced the accused on the basis of last seen evidence of Police Constable---Insofar as the evidence of last seen produced by the said prosecution witness was concerned, it was noteworthy that said witness stated that he was on duty when he stopped Shahzor "Dala" (Vehicle)---Said witness further stated that on presentation of I.D. Card by accused, who was present in the vehicle, he permitted the accused and co-accused to proceed ahead---Said witness next stated that a driver was also present in the said vehicle---Statement of said witness was of no avail to the prosecution because he did not name the driver of the said vehicle---Said witness did not state during his entire statement that deceased was driving the said vehicle at the relevant time, therefore, it could not be held on the basis of mere guesswork that it was deceased who was seen by the said witness in the company of the accused on the day of occurrence---Said vehicle had not been recovered from the possession of the accused or his co-accused during the investigation of that case---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property---Appreciation of evidence---Motive was not proved---Scope---Accused was charged that he along with co-accused murdered the brother of the complainant after committing dacoity---Prosecution evidence qua motive and recovery of Rs.21,500/- were interconnected---Allegedly, during the investigation of the case, it transpired that the accused and his co-accused committed the murder of deceased as they snatched the vehicle from the deceased and sold the said vehicle to co-accused (since acquitted), however, the said vehicle had not been recovered from the possession of the accused or co-accused during the investigation of the case---According to the prosecution case, the amount in question was recovered from the

possession of the accused as the same was sale proceed of the vehicle of the deceased which was sold by the accused and co-accused to the acquitted accused---Evidence produced by the prosecution in that respect had already been held to be highly doubtful and unreliable---Said vehicle had not been recovered from the possession of the accused or the co-accused---No documentary proof regarding sale/ purchase of the vehicle in question by the accused and his co-accused to the acquitted co-accused had been produced in evidence by the prosecution---Not believable that acquitted co-accused would purchase vehicle from the accused and his co-accused without any documentation---None of the prosecution witnesses mentioned in their statements recorded by the Trial Court any specific identification marks, denominations or the numbers of the currency notes which were handed over by co-accused to other co-accused---Prosecution evidence revealed that the amount in question was handed over by co-accused to other co-accused and the said amount was not handed over to the accused---Accused was merely present at the relevant time---Motive alleged by the prosecution could not be proved in the case and alleged recovery of the amount from the possession of the accused was inconsequential--- Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

(g) Penal Code (XLV of 1860)---

----Ss. 302, 392, 397 & 411---Qatl-i-amd, robbery or dacoity with attempt to cause death, dishonestly receiving stolen property---Appreciation of evidence---Recovery of weapon of offence from the possession of accused---Reliance---Scope---Accused was charged that he along with co-accused murdered the brother of the complainant after committing dacoity---Record showed that a pistol was recovered from the possession of the accused---Admittedly, the said pistol was not used during the occurrence because as per prosecution case and medical evidence, the death of deceased was caused by asphyxia due to strangulation---Alleged recovery of pistol from the possession of the accused, in circumstances, was of no avail to the prosecution---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against convic-tion was allowed, in circumstances.

(h) Criminal trial---

----Medical evidence---Scope---Medical evidence is a type of supporting evidence, which may confirm the prosecution version with regard to receipt of

injury, nature of the injury, kind of weapon used in the occurrence but it will not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 rel.

Muhammad Mumtaz Faridi for Appellant.

Ch. Muhammad Ishaq, Additional Prosecutor General for the State.

Syed Tahir Abbas for the Complainant.

Date of hearing: 10th March, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1036 of 2013, filed by Waheed Khan (appellant) against his convictions and sentences, as well as Criminal Revision No. 724 of 2013, filed by Tariq Mehmood complainant for enhancement of sentence awarded to Waheed Khan (respondent No.1 of said criminal revision) from imprisonment for life to death sentence, as both these matters have arisen out of the same judgment dated 26.06.2013, passed by learned Additional Sessions Judge, Mianwali.

2. Waheed Khan (appellant) along with his co-accused was tried in case FIR No.383/2010 dated 09.10.2010, registered at Police Station City Mianwali in respect of offences under sections 302/ 392/397/411, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 26.06.2013, has convicted and sentenced the appellant as under: -

> Under section 302(b), P.P.C. to imprisonment for life. The appellant was also directed to deposit an amount of Rs.1,00,000/- (Rupees one hundred thousand only), as compensation to the legal heirs of Asif Mehmood (deceased) as envisaged under section 544-A, Cr.P.C. and in case of default to further undergo six months simple imprisonment.
>
> Under section 364, P.P.C. to ten years with fine of Rs.25,000/- and in case of default to further undergo one month simple imprisonment.
>
> Under section 392, P.P.C. to three years with fine of Rs.25,000/- and in case of default to further undergo one month simple imprisonment.

Benefit of section 382-B, Cr.P.C was also extended to the appellant and all the sentences awarded to the appellant were ordered to run concurrently.

(It is pertinent to mention here that the nature of sentences i.e. rigorous or simple imprisonment, awarded to the appellant for offences under sections 364 and 392, P.P.C. has not been mentioned in the impugned judgment of the learned trial Court.)

However, vide the same impugned judgment, Khan Ameer Khan, Amanullah Khan and Qudratullah Khan (co-accused), were acquitted by the learned trial Court while extending them the benefit of doubt.

3. Brief facts of the case as given by the complainant Tariq Mehmood (PW-16) in his complaint Ex.PS on the basis of which, the formal FIR Ex.PS/1 was chalked out, are that he (complainant) was employee of Irrigation department. Asif Mehmood (deceased) was his younger brother, who was driver of Shahzor "Dala" bearing registration No.SGS-1333. On 05.10.2010, at about 4.00 p.m., Asif Mehmood (deceased) told one Ghulam Abbas, who was also a driver of "Dala" bearing registration No.SGP-2165, that he (Asif Mehmood deceased) along with the companions of one Nazeer alias Jeera was going to village Blot Sharif in order to get vegetables. Asif Mehmood deceased did not return back to his house on that day. On 09.10.2010, the complainant along with Raza Muhammad (PW-13) and Attaullah (PW since given-up) went to village Blot Sharif in search of Asif Mehmood (deceased) and in the way, they came to know that dead body of an unknown person was present in Nala Umarwala near Chasma Barrage. The complainant along with the PWs reached at the abovementioned place and identified the dead body Asif Mehmood deceased. They (PWs) shifted the dead body to the Civil Hospital, Mainwali on "Dala". There was also a rope around the neck of the deceased and no shirt was present on the dead body rather the same was lying near the dead body. The complainant further alleged that the unknown accused committed the murder of his brother while strangulating his neck.

Initially the FIR was lodged against the unknown accused but subsequently, on the basis of statements of the witnesses of last seen evidence, namely, Muhammad Imran (PW-4), Muhammad Nawaz (PW-5), Ghulam Hassan, 2265/C (PW.12), the appellant along with Khan Ameer Khan, Amanullah Khan and Qudratullah Khan (co-accused since acquitted) was implicated in this case. The prosecution subsequently also introduced the evidence of eye-witnesses in this case through

Raza Muhammad (PW.13) and Dost Muhammad (PW.14), as well as, evidence of identification of the appellant and his co-accused during the identification parade through the above-referred eye-witnesses.

4. The appellant was arrested in this case by the police on 21.10.2010 and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case the prosecution produced twenty two witnesses. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex. PZ. The statement of the appellant under section 342 Cr.P.C, was recorded, wherein he refuted the allegations levelled against him and professed his innocence, however, no defence evidence was produced by the appellant in this case.

5. The learned trial Court vide impugned judgment dated 26.06.2013, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that statements of Raza Muhammad (PW. 13) and Dost Muhammad (PW. 14) who were subsequently introduced by the prosecution as eye-witnesses of the occurrence, are not trustworthy because the said witnesses remained mum for a period of eight days after the occurrence and for a period of four days after attending funeral ceremony of Asif Mehmood (deceased); that apart from the evidence of above mentioned eye-witnesses, the prosecution case is based upon very weak type of circumstantial evidence which is not worthy of reliance; that the prosecution witnesses of last seen evidence also made their statements before the police with considerable delay and as such their evidence is highly doubtful; that the learned trial Court has rightly disbelieved the statements of the alleged eye-witnesses of the occurrence, as well as, witnesses of last seen evidence in Paragraphs No. 18 to 28 of the impugned judgment but the appellant has been convicted and sentenced on the basis of evidence of Ghulam Hassan, 2265/C (PW.12) who was also the witness of last seen evidence; that the above mentioned witness did not state that he saw the appellant in the company of Asif Mehmood (deceased) and he only stated that he saw the appellant in the company of a driver of "Dala" bearing registration No. SGS-1333 but he did not disclose the name of the said driver; that even the above mentioned "Dala" (carry van) was not recovered from the possession of the appellant or his co-accused; that no motive could be proved against the appellant by the prosecution witnesses and alleged recovery of

Rs.21,500/- from the possession of the appellant is inconsequential because there was no allegation that any cash amount was snatched by the accused persons from the deceased; that there is no evidence of extrajudicial confession or evidence of "Wajtaker" against the appellant or his co-accused; that the prosecution could not prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted from the charge.

7. On the other hand, it is argued by learned Additional Prosecutor General for the State assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt through reliable and trustworthy circumstantial evidence, as well as, evidence of eye-witnesses, namely, Raza Muhammad (PW.13) and Dost Muhammad (PW.14), therefore, he was rightly convicted and sentenced by the learned trial Court; that the appellant was also identified by Raza Muhammad (PW.13) and Dost Muhammad (PW.14) during the identification parade; that the prosecution case against the appellant is further proved through the statements of prosecution witnesses of last seen evidence, namely, Muhammad Imran (PW.4), Muhammad Nawaz (PW.5) and Ghulam Hassan, 2265/C (PW.12); that the motive of snatching of vehicle of the deceased by the appellant and his co-accused and sale of the said vehicle to Khan Ameer Khan, co-accused (since acquitted) was also proved through reliable evidence of Pervaiz Iqbal (PW.17) and Nematullah (PW.22); that the prosecution case against the appellant is also corroborated by the recovery of Rs.21,500/- from the possession of the appellant which was sale proceed of "Dala" snatched from the deceased; that the appellant could not establish any mala fide against the prosecution witnesses for his false involvement in this case; that there is no substance in the appeal of Waheed Khan (appellant), therefore, the same may be dismissed. Insofar as Crl. Revision No. 724 of 2013 is concerned, learned counsel for the complainant has argued that there was no mitigating circumstance in this case, therefore, normal penalty of death may be awarded to the convict.

8. Arguments heard and record perused.

9. The detail of the prosecution case has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

10. The prosecution case is based upon the following two types of evidence:

A) Direct evidence of eye-witnesses and identification of the appellant and his co-accused during identification parade through the eye-witnesses.

B) Circumstantial Evidence.

First of all, I take up the evidence of eye-witnesses and identification of the appellant by said witnesses in identification parade.

A) Evidence of eye-witnesses and I.D. Parade

11. Insofar as the prosecution evidence of eye-witnesses of the occurrence produced through Raza Muhammad (PW.13) and Dost Muhammad (PW.14) is concerned, I have noted that both the above mentioned prosecution witnesses stated that on 05.10.2010 at 8:30 P.M., they were coming back towards their village after paying "salam" at the Shrine of Bolt Sharif and when they reached on the eastern "Patri" of canal Umarwala, they saw three unknown accused persons who were giving beating to a person and they (accused) had also put a rope around his neck. The above mentioned prosecution eye-witnesses further stated that within their view, the said three unknown accused persons threw the body of the above mentioned person in the canal and thereafter went away while boarding on a Shahzor "Dala". They also stated that they did not intervene as they were threatened by the above mentioned unknown accused persons. They further stated that later on, they identified the appellant and his co-accused during the identification parade held on 28.10.2010.

It is evident from the perusal of the statement made by Raza Muhammad (PW.13) during his cross-examination that Asif Mehmood (deceased) was 'Bhanja' as well as, 'Damad' of the said witness. Relevant part of his statement in this respect reads as under:--

> "After offering Janaza prayer of Asif Mehmood deceased when I was in graveyard I came to know from the participants of Janaza prayer about the name of the deceased. (This portion of the statement of witness read over to witness, he stated that he did not state so rather he stated that as deceased Asif Mehmood was my Bhanja and Damad and he has already knowledge of the name of deceased."

Raza Muhammad (PW.13) claimed that he along with Dost Muhammad (PW.14) had seen three unknown accused persons while giving beating to a person on the night of occurrence i.e. on 05.10.2010 at 8:30 P.M. and also identified the said unknown accused persons with the help of their features and ages in the light of his motorcycle but surprisingly he could not identify his own 'Damad' and nephew, namely, Asif Mehmood (deceased) at that time. He did not state that he also identified that it was Asif Mehmood (deceased) who was being beaten by the

unknown accused persons and his dead body was thrown in the canal. He simply stated that he saw the accused persons while beating a person, and throwing his body in the canal. It is further noteworthy that Raza Muhammad (PW.13) and Dost Muhammad (PW.14) saw the occurrence of a heinous crime of murder on 05.10.2010 but they made their statements before the police for the first time on 13.10.2010 i.e. with the delay of eight (08) days from the occurrence. Both the above mentioned prosecution eye-witnesses stated that they also attended funeral ceremony of Asif Mehmood (deceased) on 09.10.2010 but even then they remained mum till 13.10.2010 i.e. for a period of four days even after attending funeral ceremony of the deceased and did not make the statements before the police. Relevant parts of the statements of the above mentioned prosecution eye-witnesses in this respect are reproduced hereunder for ready reference:-

Raza Muhammad (PW.13)

"On 09.10.2010 we came to the funeral prayer of Asif Mehmood deceased and we told Tariq Mehmood that we had seen the Dala and killing of Asif Mehmood on 05.10.2010 and we went to the P.S. on 13.10.2010 where I made my statement before Abdul Ghafoor SI."

Dost Muhammad (PW.14)

"On 09.10.2010 we went to perform funeral ceremony of Asif Mehmood deceased of this case where we told Tariq Mehmood complainant about what we had seen on 05.10.2010 at the Patri canal Umarwala. I made my statement to the IO on 13.10.2010."

It is evident from the perusal of the statements of the above mentioned eye-witnesses that they remained mum for a period of eight (08) days after the occurrence and even after attending funeral ceremony of Asif Mehmood (deceased), they remained mum for a period of four days. They did not give any plausible reason for remaining silent during the above mentioned period. The said delay in making statements before the police by the above mentioned prosecution eye-witnesses has created serious doubt regarding the truthfulness of their evidence. Reliance in this respect may be placed upon the judgments reported as "Muhammad Safdar Bhatti v. The State" (1987 SCMR 1215) and "Muhammad Sharifan Bibi v. Muhammad Yasin and others" (2012 SCMR 82).

It is true that both the above mentioned prosecution witnesses claimed that they identified the appellant during the identification parade but it is noteworthy that the appellant was nominated in this case through the statements of witnesses of

last seen evidence, namely, Muhammad Imran (PW.4) and Muhammad Nawaz (PW.5) on 12.10.2010, whereas the identification parade of the appellant was held on 28.10.2010. Under the circumstances, identification of the appellant through identification parade after his nomination in this case is highly doubtful and unreliable. Reference in this context may be made to the judgments reported as "Amanat Ali alias Amanti v. The State" (2013 YLR 1959), "The State v. Mukhtar Ahmad and 5 others" (2015 MLD 1840) and "Naseeb Ullah v. The State" (2012 YLR 2570).

Moreover, it is not understandable that if direct evidence of eye-witnesses was available with the prosecution then as to why the circumstantial evidence was also produced in this case. It shows that the prosecution itself was doubtful about the credibility of evidence of above mentioned eye-witnesses, therefore, it also chose to produce circumstantial evidence in this case. I have further noted that the evidence of the above mentioned prosecution eye-witnesses, namely, Raza Muhammad (PW.13) and Dost Muhammad (PW.14) has also been disbelieved by the learned trial Court in paragraph No.24 of the impugned judgment. I am, therefore, of the view that the evidence of the above mentioned prosecution eye-witnesses and evidence of identification of the appellant during the identification parade held on 28.10.2010 through the above-referred eye-witnesses are not worthy of reliance.

B) Circumstantial Evidence

12. Insofar as the circumstantial evidence produced in this case by the prosecution is concerned, it is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:-

> "...Law relating to circumstantial evidence that proved circum-stances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be

broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

> 7....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other to the neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

> '7 .... Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the body of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

Seeking guidance from the above-referred judgments of the apex Court of the Country, I proceed to discuss separately, every piece of circumstantial evidence produced in this case by the prosecution. It is noteworthy that the circumstantial evidence of the prosecution is based upon the following pieces of evidence:-

1) Last seen evidence.
2) Motive and recovery of Rs.21,500/- from the appellant.
3) Recovery of pistol.
4) Medical evidence.

Last seen evidence.

13. Last seen evidence of the prosecution has been produced through Muhammad Imran (PW.4), Muhammad Nawaz (PW.5), Ghulam Hassan, 2265/C (PW.12). I have noted that Muhammad Imran (PW.4) and Muhammad Nawaz (PW.5) stated that on 05.10.2010 at 4:30 P.M. they saw Asif Mehmood (deceased) in the company of appellant and his co-accused at Kundian Filling Station situated at Chashma Barrage road. They further stated that on 10.10.2010, they came to know that Asif Mehmood (deceased) had been murdered, whereupon they proceeded to Mianwali and reached there on 11.10.2010 whereafter they informed the complainant. They next stated that they made their statements before the police

on 12.10.2010. Muhammad Imran (PW.4) during his examination-in-chief stated that he along with other PW went to the house of the complainant for giving information on 11.10.2010 at 11:00 P.M. but during his cross-examination, he stated that they (PWs) reached the house of the complainant on 11.10.2010 at 5:30 A.M. He further stated during his cross-examination that police station was situated only at a distance of 2/3 kilometers from the residence of the complainant but even then they made their statements before the police on 12.10.2010 i.e. on the next day. Both the above mentioned prosecution witnesses also stated during their cross-examination that they remained busy in conversation with each other regarding the facts of occurrence after reaching the house of the complainant on 11.10.2010. The relevant parts of the statements of Muhammad Imran (PW.4) and Muhammad Nawaz (PW.5) read as under:-

Muhammad Imran (PW. 4) (examination-in-chief);

"On 10.10.2010 we came to know that Muhammad Asif has died and his dead body was recovered. On receiving this information we left our oil tanker at Mahmood Koat and came back to Mianwali on a car and went to the house of Tariq Mahmood complainant. We reached Mianwali on 11.10.2010 and informed complainant at 11:00 p.m. that we saw Asif deceased in the company of Waheed, Qudrat Ullah and Aman Ullah. I recorded my statement before the police on 12.10.2010."

Relevant parts of the statement of Muhammad Imran (PW.4) made during his cross-examination, read as under:-

"We went to the house of complainant for giving information on 11.10.2010 at 5:30 a.m."

…….

"P.S. is at the distance of 2/3 kms from the residence of complainant. I have not made statement before the police on 11.10.2010. Before making statement before the police I remained in the house of complainant for night. We remained busy in conversation with each other regarding the facts of the occurrence. I went to police for making statement on 12.10.2010."

Muhammad Nawaz (PW.5) (examination in chief) "On 10.10.2010 we came to know that Asif has died. We received this information when we were at Mahmood Koat. Muhammad Imran handed over his oil tanker to driver and I along with him left for Mianwali on a car and reached Mianwali early in the morning on 11.10.2010. We remained busy in Qul ceremony of the deceased and later on we informed complainant this fact after performing Qull Sharif. I recorded my statement before the police on 12.10.2010."

Relevant part of the statement of Muhammad Nawaz (PW.5) made during his cross-examination, reads as under:-

"We reached the house of complainant on 11.10.2010 at Fajr time. About 100 persons were present at the house of complainant at that time. We talked about the occurrence after Qull on that day. Qull ended at about 8:00 a.m. I made statement before the police on 12.10.2010. We remained busy in talking with each in the house of complainant about the facts of occurrence."

It is, therefore, evident from the perusal of above mentioned evidence that in-spite of reaching in the house of the complainant on 11.10.2010 at 5:30 A.M./ Fajr time, both the above mentioned prosecution witnesses did not inform the police that they had lastly seen Asif Mehmood (deceased) in the company of the appellant and his co-accused on 05.10.2010, rather both the above mentioned witnesses and the complainant remained busy in talking with each other about the occurrence in the house of the complainant and made their statements before the police on 12.10.2010. The police station was situated at the distance of only 2/3 K.Ms from the house of the complainant. Under the circumstances, there was every possibility of deliberations and concoctions and the evidence of the above mentioned prosecution witnesses of last seen evidence is not free from doubt.

The delay in making statements by the above mentioned prosecution witnesses before the police without any valid reason has created serious doubt regarding the truthfulness of their evidence. In the light of above, the prosecution's last seen evidence produced through Muhammad Imran (PW.4) and Muhammad Nawaz (PW.5) is untrustworthy and the same has rightly been disbelieved by the trial Court in Paragraphs Nos.18 to 20 of the impugned judgment.

It is however, noteworthy that the learned trial Court convicted and sentenced the appellant on the basis of last seen evidence of Ghulam Hassan 2265/C

(PW.12). Insofar as the evidence of last seen produced by the prosecution through Ghulam Hassan, 2265/C (PW.12) is concerned, it is noteworthy that Ghulam Hassan 2265/C (PW. 12) stated that on 05.10.2010, he was on duty at Check Post, Eastern Head Chashma when he stopped Shahzor "Dala" bearing Registration No.SGS-1333 coming from Mianwali side. He further stated that on presentation of I. D. Card by Waheed Khan, Constable/appellant, who was present in the above mentioned Shahzor "Dala", he permitted the appellant and his co-accused to proceed ahead. He next stated that a driver was also present in the above-referred Shahzor "Dala". The statement of Ghulam Hassan, 2265/C (PW.12) is of no avail to the prosecution because he did not name the driver of the above mentioned vehicle. He did not state during his entire statement that Asif Mehmood (deceased) was driving the above-referred vehicle at the relevant time, therefore, it cannot be held on the basis of mere guesswork that it was Asif Mehmood (deceased) who was seen by the said witness in the company of the appellant on the day of occurrence. It is further noteworthy that Shahzor "Dala" bearing registration No.SGS-1333 has not been recovered from the possession of the appellant or his co-accused during the investigation of this case.

Keeping in view all the above mentioned facts, the prosecution's last seen evidence is not worthy of reliance.

Motive and Recovery of Rs.21,500/-

14. Prosecution evidence qua motive and recovery of Rs.21,500/- are interconnected, therefore, I proceed to discuss these pieces of evidence together. The learned Additional Prosecutor General for the State assisted by learned counsel for the complainant has argued that during the investigation of this case, it transpired that the appellant and his co-accused committed the murder of Asif Mehmood (deceased) as they snatched Shahzor "Dala" bearing Registration No.SGS-1333 from the deceased and sold the said vehicle to Khan Ameer Khan, co-accused (since acquitted) but as mentioned earlier, the above mentioned vehicle has not been recovered from the possession of the appellant or his co-accused during the investigation of this case. The prosecution has produced the evidence of alleged motive through Pervaiz Iqbal (PW.17) and Nematullah (PW.22). Both the above mentioned prosecution witnesses stated that on 05.10.2010, they both were taking tea at a hotel situated at Adda Blot Sharif, where they saw that Khan Ameer Khan, co-accused (since acquitted) gave Rs.85,000/- to Qudrat Ullah, co-accused (since acquitted) whereupon Qudrat Ullah, co-accused (since acquitted) delivered key of Shahzor "Dala" bearing

registration No.SGS-1333 of the deceased to Khan Ameer Khan (co-accused since acquitted). They further stated that Waheed Khan (appellant) was also present along with his above mentioned co-accused at that time. Pervaiz Iqbal (PW.17) stated in his cross-examination that information regarding murder of Asif Mehmood (deceased) was received by him on 09.10.2010 and even his 'Beithak' was used for the funeral ceremony of Asif Mehmood (deceased) but he made his statement before the police on 14.10.2010. Relevant parts of the statement of Pervaiz Iqbal (PW.17) read as under:-

> "On 09.10.2010 information of murder of Asif Mehmood, deceased was received to me. Information was furnished to me by my family members. My family members including women of my family and my brothers might be attended funeral ceremonies of Asif Mehmood deceased. It is correct that my Baithak was being used in the funeral ceremony of Asif Mehmood deceased."
>
> "On 14.10.2010 I and Naimatullah PW went to Tariq Mehmood complainant and during talk we told the complainant that on 05.10.2010 accused Waheed Khan etc. were selling a Shahzor Dala No.SGS-1333 to Khan Ameer Khan accused then the complainant told us that Shahzor Dala SGS-1333 was sold to Khan Ameer Khan by Waheed Khan, Qudratullah Khan and Amanullah Khan accused and it was the same Dala on which my deceased brother was a driver."

The statement of Nematullah (PW.22) is also on the same lines except that Nematullah (PW.22) stated that he received the information regarding the murder of Asif Mehmood (deceased) on 14.10.2010. It is, therefore, evident from the perusal of the statements of the above mentioned prosecution witnesses that Pervaiz Iqbal (PW.17) received the information of the murder of Asif Mehmood (deceased) on 09.10.2010 and even 'Baithak' of the said witness was used for funeral ceremony of the deceased but he did not make statement before the police till 14.10.2010 i.e. for a period of five days. Nematullah (PW.22) was a conductor at the wagon of Pervaiz Iqbal (PW.17). It is not probable that if, Pervaiz Iqbal (PW.17) had received the information regarding the murder of Asif Mehmood (deceased) on 09.10.2010 and his 'Baithak' was also used for the funeral ceremony of Asif Mehmood (deceased) then Nematullah (PW.22) would not get the information regarding the murder of Asif Mehmood (deceased) till 14.10.2010. The delay in making statements before the police by the above mentioned

prosecution witnesses without any valid reason has also made their statements highly doubtful and un-reliable.

15. Insofar as the recovery of Rs.21,500/- from the possession of the appellant is concerned, it is noteworthy that according to the prosecution case, the above mentioned amount was recovered from the possession of the appellant as the same was sale proceed of the vehicle of the deceased i.e. Shahzor "Dala" SGS-1333 which was sold by the appellant and co-accused to Khan Ameer Khan, co-accused (since acquitted). The evidence produced by the prosecution in this respect through Pervaiz Iqbal (PW.17) and Nematullah (PW.22) has already been held to be highly doubtful and unreliable due to the reasons mentioned in Paragraph No.14 above. As mentioned earlier, the above-referred vehicle has not been recovered from the possession of the appellant or the above mentioned Khan Ameer Khan, co-accused. No documentary proof regarding sale/purchase of the vehicle in question by the appellant and his co-accused to the above mentioned Khan Ameer Khan, co-accused has been produced in evidence by the prosecution. It is not believable that Khan Ameer Khan, co-accused (since acquitted) would purchase vehicle from the appellant and his co-accused without any documentation. None of the prosecution witnesses mentioned in their statements recorded by the learned trial Court any specific identification marks, denominations or the numbers of the currency notes which were handed over by Khan Ameer Khan, co-accused to Qudrat Ullah, co-accused. Moreover, as per prosecution evidence, the amount of Rs.85,000/- was handed over by Khan Ameer Khan, co-accused to Qudrat Ullah, co-accused and the said amount was not handed over to the appellant. The appellant was merely present at the relevant time. In the light of above discussion, the motive alleged by the prosecution could not be proved in this case and alleged recovery of Rs.21,500/- from the possession of the appellant is inconsequential.

Recovery of Pistol

16. Insofar as the recovery of pistol (P-10) from the possession of the appellant is concerned, it is an admitted fact that the said pistol was not used during the occurrence because as per prosecution case and medical evidence, the death of Asif Mehmood (deceased) was caused by asphyxia due to strangulation. In the light of above, the alleged recovery of pistol (P-10) from the possession of the appellant is of no avail to the prosecution.

Medical evidence

17. Insofar as the medical evidence of the prosecution is concerned, it is by now well settled that medical evidence is a type of supporting evidence, which may confirm the prosecution version with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 Supreme Court 53), "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103) and "Mursal Kazmi alias Qamar Shah and another v. The State" (2009 SCMR 1410).

18. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant (Waheed Khan) beyond the shadow of doubt.

19. In the light of above discussion, I accept Criminal Appeal No.1036 of 2013 filed by the appellant (Waheed Khan), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Mianwali vide impugned judgment dated 26.06.2013 and acquit him of all the charges by extending him the benefit of doubt. Waheed Khan (appellant) is in custody, he be released forthwith, if not required in any other case.

20. Insofar as Criminal Revision No.724 of 2013 filed by the complainant is concerned, I have already disbelieved the prosecution evidence for the reasons recorded in paragraphs Nos.11 to 16 of this judgment, consequently, the appellant has been acquitted from the charge by giving him the benefit of doubt, therefore, the instant criminal revision without any substance, is hereby dismissed.

JK/W-1/L **Order accordingly.**

2021 Y L R Note 145

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD AZAM and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No. 586-J and Criminal Revision No. 1087 of 2014, heard on 2nd March, 2021.

(a) Penal Code (XLV of 1860)---

----S. 302(c)---Qatl-i-amd---Appreciation of evidence---Sentence, modification of---Delay of four hours and thirty five minutes in lodging the FIR---Effect---Accused was charged for committing murder of his wife and her paramour---Motive behind the occurrence was that the accused had suspicion of illicit relations of deceased with his wife, due to that grudge, the accused committed the murders on the abetment of his brother---Record showed that the occurrence in the case took place on 08.07.2011 at 02.00 a.m.(night) and the FIR was lodged on 08.07.2011 at 06.35 a.m. i.e. with the delay of 04 hours and 35 minutes from the occurrence---Post-mortem on the dead body of deceased lady was conducted on 08.07.2011 at 10.00 a.m. and on the dead body of male deceased on 08.07.2011 at 11.05 a.m.---As such, there was delay of 08 & 09 hours, respectively, in conducting the post-mortem examination on the dead bodies of the deceased persons---None of the witnesses went to the police station to lodge the FIR and they kept on waiting till 05.30 a.m. for the arrival of Investigating Officer at the spot---Statement of complainant was recorded by Investigating Officer at the spot therefore, a presumption could validly be drawn that FIR was lodged after due deliberation and concoction---Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Allah Bachaya and another v. The State PLD 2008 SC 349 and Muhammad Nawaz and another v. The State 2009 PCr.LJ 506 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(c)---Qatl-i-amd---Appreciation of evidence--- Sentence, modification of---Chance witnesses---Scope---Accused was charged for committing murder of

his wife and her paramour---Record showed that prosecution's eye-witnesses were residents of a place situated at a distance of 3/4 kilometres away from the place of occurrence---Occurrence took place at odd hours of night i.e. 02.00 a.m.---Prosecution eye-witnesses were, therefore, chance witnesses because ordinarily they were not expected to be present at the place of occurrence at the relevant time---Said eye-witnesses in order to justify their presence at the spot at the time of occurrence had stated that they were irrigating their land at that time---No khasra number, khatooni number or khata number of the land, which was owned or cultivated by the prosecution eye-witnesses had been mentioned in the FIR or in the statements of the said witnesses---Investigating Officer had admitted that the prosecution eye-witnesses did not produce any proof of their ownership or cultivation during the investigation of the case---Eye-witnesses had stated during their cross-examination that they had no 'kassi' with them at the relevant time to justify the reason of irrigation of land, as claimed by the prosecution eye-witnesses---Said witnesses did not explain that any other tool was with them through which they were irrigating the land at the time of occurrence---Other eye-witness had also admitted in their cross-examination that accused had the turn of water from 09.00 p.m. up to 08.00 a.m. on the day of occurrence, which had further negated the reason given by the prosecution eye-witnesses for their presence at the spot at the time of occurrence---No document of wara-bandi or any other record to establish the reason of presence of the prosecution eye-witnesses at the time of occurrence had been produced in the prosecution evidence---Complainant was specifically asked during cross-examination that accused had the turn of water from 09.30 p.m. up to 08:00 a.m. on the relevant day but he did not answer the same and stated that he did not know about it, whereas, according to his examination-in-chief, he was present at the spot at the relevant night in order to irrigate his land---As the eye-witnesses were residents of a place situated at a distance of 3/4 kilometres away from the place of occurrence and they could not establish the reason of their presence at the spot at the odd hours of night (02:00 a.m.) when the occurrence took place therefore, they were chance witnesses and their evidence was not worthy of reliance, thus, the same had rightly been disbelieved by the Trial Court---Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to

fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142 and Muhammad Irshad v. Allah Ditta and others 2017 SCMR 142 rel.

(c) Penal Code (XLV of 1860)---

----S. 302(c)--- Qatl-i-amd--- Appreciation of evidence--- Sentence, modification of---Unnatural conduct of eye-witnesses---Scope---Accused was charged for committing murder of his wife and her paramour---Record showed that conduct of the prosecution's eye-witnesses was highly unnatural---According to the prosecution case, accused was alone, whereas, the complainant party comprised of four persons at the time of first occurrence of murder of deceased, whereas, the complainant party comprised of five persons at the time of second occurrence of the murder of lady deceased---As per post-mortem reports, there were four injuries on the body of deceased and two injuries on the body of lady deceased---Accused was not armed with any formidable weapon like pistol or rifle and he was only armed with kassi--- Prosecution eye-witnesses were 'Chachazad' (paternal cousins) of deceased, whereas, given up witness was paternal cousin of the mother of deceased---Likewise, eye-witness and given up witness were real brother and father of lady deceased, respectively---Said eye-witnesses had seen the occurrence like silent spectators and they did not try to save deceased persons at the time of occurrence---Said witnesses did not try to apprehend accused at that time---Conduct of the prosecution eye-witnesses was highly unnatural which made their testimony as untrustworthy and unreliable--- Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S. 302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Liaqat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(d) Penal Code (XLV of 1860)---

----S. 302(c)--- Qatl-i-amd--- Apprecia-tion of evidence---Sentence, modification of---Motive was not proved---Scope---Accused was charged for committing murder of his wife and her paramour---Motive behind the occurrence was that the accused suspected illicit relations between deceased and his deceased wife---None

of the prosecution witnesses stated that they saw the deceased persons in any objectionable condition during their life time---Witnesses did not state that they ever heard the accused while expressing his said suspicion---No litigation was pending between the accused and lady deceased during her life time, in such circumstances, the motive part of the prosecution had not been proved in the case and the same had rightly been disbelieved by the Trial Court---Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

(e) Penal Code (XLV of 1860)---

----S. 302(c)---Qatl-i-amd---Appreciation of evidence--- Sentence, modification of---Recovery of weapon of offence from the possession of accused--- Scope---Reliance--- Accused was charged for committing murder of his wife and her paramour---Kassi (alleged weapon of offence) was recovered from the possession of accused---Recovery memo., had not mentioned that said 'kassi' was stained with blood---No report of Chemical Examiner or the Serologist to establish that the 'kassi' was stained with human blood therefore, the alleged recovery of 'kassi' from the possession of the accused was inconsequential---Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

(f) Penal Code (XLV of 1860)---

----S. 302(c)--- Qatl-i-amd--- Apprecia-tion of evidence---Sentence, modification of---Night time occurrence---Source of light---Scope---Accused was charged for committing murder of his wife and her paramour---As per prosecution case, the occurrence was seen and the accused was identified by the prosecution eye-witnesses with the help of emergency light---No emergency light had been taken into possession in the case by the Investigating Officer---Moreover, there was nothing on record to show that in the night of occurrence, there was moon light---Identification of the accused in the darkness of night was not free from doubt, in circumstances---Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S. 302(c), P.P.C., was altered

from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Zahir Yousaf and another v. The State and another 2017 SCMR 2002 rel.

(g) Penal Code (XLV of 1860)---

----S. 302(c)---Criminal Procedure Code (V of 1898), S. 342---Qatl-i-amd---Appreciation of evidence---Examination of accused--- Scope--- Accused was charged for committing murder of his wife and her paramour---Record showed that the prosecution evidence was not worthy of reliance and the same had rightly been disbelieved by the Trial Court---Accused had been convicted and sentenced by the Trial Court on the basis of his statement recorded under S.342, Cr.P.C., wherein, he stated that he had seen his deceased wife with his deceased paramour while committing zina with each other whereupon he committed their murder under sudden and grave provocation---Accused therefore had rightly been convicted by the Trial Court for the offence under S.302(c), P.P.C., instead of the charge under S. 302(b), P.P.C.--- Circumstances established that the prosecution evidence was not worthy of reliance---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Ali Muhammd v. Ali Muhammad and another PLD 1996 SC 274; Ali Ahmad and another v. The State and others PLD 2020 SC 201 and Raza and another v. The State and 2 others PLD 2020 SC 523 rel.

(h) Criminal Procedure Code (V of 1898)---

----S. 342---Examination of accused---Scope---If prosecution evidence was disbelieved then statement of accused was to be accepted or rejected in toto---Legally, it was not possible to accept the inculpatory part of the statement of the accused person and reject the exculpatory part of the same statement.

Muhammd Asghar v. The State PLD 2008 SC 513 rel.

(i) Penal Code (XLV of 1860)---

----S. 302(c)--- Qatl-i-amd--- Apprecia-tion of evidence--- Sentence, modification in---Mitigating circumstances---Scope---Accused was charged for committing murder of his wife and her paramour---In the present case, there were some mitigating circumstances in favour of the accused---Firstly: the motive alleged by the prosecution could not be proved; secondly, recovery of weapon of offence i.e. 'kassi' had also been disbelieved and thirdly, the accused made a fair statement

before the Trial Court that he committed the occurrence under grave and sudden provocation and he did not conceal the real facts from the court---Keeping in view all the said facts, sentence of imprisonment for life on two counts for the offence under S.302(c), P.P.C., as awarded by the Trial Court was quite harsh and the sentence of fourteen years imprisonment on two counts would meet the ends of justice---Quantum of sentence under S.302(c), P.P.C., was altered from imprisonment for life on two counts to fourteen years---Appeal against conviction was dismissed with said modification in sentence.

Shabbir Hussain for Appellants.

Ch. Muhammad Mustafa, Deputy Prosecutor General for the State.

Mian Muhammad Waheed Akhtar for the Complainant.

Date of hearing: 2nd March, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Crl. Appeal No. 586-J of 2014 titled 'Muhammad Azam v. The State and another', filed by the appellant, namely, Muhammad Azam, against his conviction and sentence, as well as, Criminal Revision No. 1087 of 2014 titled 'Muhammad Akram v. Muhammad Azam and 3 others' filed by Muhammad Akram complainant for enhancement of the sentence of Muhammad Azam appellant. The appellant along with Muhammad Aslam (co-accused since acquitted) was tried by the learned Addl. Sessions Judge, Sargodha in case FIR No. 363 dated 08.07.2011 registered at Police Station Sillanwali, District Sargodha offences under sections 302/109 of P.P.C. and after conclusion of the trial, the learned trial Court vide judgment dated 12.11.2014, has convicted and sentenced the appellant as under:-

> Under section 302(c) of P.P.C. to imprisonment for life on two counts for committing the murders of Muhammad Asif deceased and Mst. Shamim Bibi deceased.
>
> The benefit of section 382-B of Cr.P.C. was extended to the appellant. Muhammad Aslam co-accused was however, acquitted of the charges vide the same judgment.

2. Brief facts of the case as given by the complainant Muhammad Akram (PW-4), in his complaint (Ex.PJ), on the basis of which the formal FIR (Ex.PJ/1) was chalked out, are that on 08.07.2011 at about 02:00 a.m. (night), Muhammad Akram complainant (PW-4) and his paternal cousin, namely, Muhammad Asif

(deceased) were irrigating the land situated in Chak No. 147/148/N and emergency light was on. Muhammad Asif (deceased) was lying on a cot in the adjacent field. In the meanwhile, Muhammad Azam (appellant) while armed with 'kassi' came there and raised a 'lalkara' to Muhammad Asif (deceased) that he (appellant) would not let him (Muhammad Asif deceased) alive and thereafter gave 'kassi' blows to Muhammad Asif (deceased) which hit at his neck, face, head and different parts of his body. On hue and cry of the complainant, Sher Muhammad (given-up PW) and Noor Muhammad (PW-3), who were present in nearby area, attracted to the spot and witnessed the occurrence. Muhammad Azam (appellant) ran towards his 'Dera'. The complainant and other eye-witnesses attended Muhammad Asif (deceased) who succumbed to the aforementioned injuries at the spot. The complainant along with aforementioned PWs chased Muhammad Azam (appellant) to his 'Dera', where electric lights were on. Mst. Shamim (deceased), who was wife of Muhammad Azam (appellant) and Allah Yar (given up PW) were sleeping in the 'Dera' of Muhammad Azam (appellant). The appellant, on reaching his 'Dera', gave 'kassi' blows to his wife, namely, Mst. Shamim (deceased) which hit at her neck, face, head and different parts of her body. On hue and cry of the complainant party, Umar Hayat (PW-5), who was present in nearby area, attracted to the spot and he also witnessed the occurrence. Muhammad Azam (appellant) raised 'lalkara' that if any body would come forward then he shall be done to death. The appellant thereafter, fled away from the spot. Allah Yar etc attended Mst. Shamim (deceased) but she succumbed to the injuries at the spot.

Motive behind the occurrence was that Muhammad Azam (appellant) had suspicion of illicit relations of Muhammad Asif (deceased) with his wife Mst. Shamim (deceased) and due to this grudge, the appellant committed the occurrence on the abetment of his (appellant's) brother, namely, Muhammad Aslam (co-accused since acquitted).

3. The appellant was arrested in this case by the police on 16.07.2011 and after completion of investigation the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant, as well as, his co-accused, namely, Muhammad Aslam (since acquitted), on 06.04.2012, to which they pleaded not guilty and claimed trial. In

order to prove its case the prosecution produced thirteen witnesses. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PU. The statements of the appellant and Muhammad Aslam co-accused since acquitted under section 342, Cr.P.C, were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

4. The learned trial Court vide its judgment dated 12.11.2014, found the appellant guilty to the extent of offence under section 302(c) of P.P.C., convicted and sentenced him as mentioned and detailed above however, Muhammad Aslam co-accused was acquitted from the charges hence, the abovementioned appeal and revision before this Court.

5. It is contended by learned counsel for the appellant that the prosecution eye-witnesses are chance witnesses because their residences were situated at a distance of 3/4 kilometers away from the place of occurrence and they could not justify their presence at the spot at the relevant time; that there is a delay of four hours in lodging the FIR, whereas, there is delay of 8 and 9 hours in conducting the postmortem examinations on the dead bodies of Muhammad Asif deceased and Mst. Shamim deceased respectively, which delay has created serious doubt regarding the truthfulness of the prosecution story; that as per prosecution case, the appellant was armed with 'kassi' which was not a formidable weapon but the prosecution eye-witnesses did not try to apprehend the appellant or to save the lives of the deceased persons and as such, the conduct of the prosecution eye-witnesses is highly unnatural which makes their evidence untrustworthy; that occurrence took place on 08.07.2011 at 02:00 a.m. (night) and the prosecution eye-witnesses claimed that they saw the occurrence with the help of emergency light but no such light has been taken into possession by the Investigating Officer vide any recovery memo; that there is conflict between the ocular account and the medical evidence of the prosecution because as per prosecution case, the appellant inflicted three specific injuries along with other injuries on the body of Mst. Shamim deceased but according to the postmortem report of Mst. Shamim deceased, there were only two injuries on her body; that likewise, the role attributed to the appellant of inflicting 'kassi' blow on the head of Muhammad Asif deceased apart from other injuries has not been supported by the medical evidence because as per postmortem report, there was no injury on his head; that the prosecution could not prove the motive, as alleged against the appellant, and

the learned trial Court rightly disbelieved the motive part of the prosecution case in para No. 24 of the impugned judgment; that the alleged recovery of 'kassi' (P-1) from the possession of the appellant was not stained with blood and there is no report of Chemical Examiner or the Serologist to establish that the abovementioned 'kassi' (P-1) was stained with human blood therefore, the alleged recovery of 'kassi' (P-1) on the pointation of the appellant is inconsequential; that the prosecution evidence has been disbelieved by the learned trial Court however, the appellant has been convicted and sentenced on the basis of his statement recorded under section 342 of Cr.P.C. and if the said statement is taken in its entirety then no offence is made out against the appellant. In the alternative, it is argued by learned counsel for the appellant that even otherwise, the charge under section 302(b) of P.P.C. could not be proved in this case and the sentence of imprisonment for life, awarded to the appellant by the learned trial Court under section 302(c) of P.P.C., is quite harsh and the same is liable to be reduced substantially.

6. On the other hand, it is argued by the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant that the occurrence in this case took place on 08.07.2011 at 02:00 a.m. (night) and the FIR was promptly lodged on 08.07.2011 at 06:35 a.m. which rules out the possibility of any concoction or deliberation; that the place of occurrence was at a distance of 10-1/2 kilometers away from the police station and keeping in view the distance between the place of occurrence and police station, as well as, the time of occurrence, there was no deliberate or conscious delay in reporting the matter to the police; that the prosecution's eye-witnesses have given plausible explanation for their presence at the spot at the relevant time by stating that they were irrigating their land at the time of occurrence therefore, their presence at the spot at the time of occurrence was quite natural and probable; that the prosecution's eye-witnesses have given plausible explanation for not apprehending the appellant at the spot by stating that the appellant was armed with 'kassi' and he extended threats of life to them therefore, they (PWs) could not apprehend him at the time of occurrence; that the prosecution's eye-witnesses identified the appellant with the help of emergency light and as the appellant was earlier known to the prosecution eye-witnesses therefore, there was no chance of his mis-identification; that the prosecution eye-witnesses stood the test of lengthy cross-

examination but their evidence could not be shaken; that the motive alleged by the prosecution has also been proved in this case through reliable evidence of prosecution witnesses but the same has wrongly been disbelieved by the learned trial Court; that the recovery of 'kassi' (P-1) from the possession of the appellant has further corroborated the prosecution case against the appellant; that there is no substance in the appeal filed by Muhammad Azam (appellant) therefore, the same may be dismissed. Insofar as Crl. Revision No. 1087 of 2014 is concerned, learned counsel for the complainant contends that the appellant committed cold blooded murder of two innocent persons therefore, sentence awarded to the appellant may be enhanced and he may be awarded normal penalty of death on two counts.

7. Arguments heard. Record perused.

8. I have noted that the learned trial Court after disbelieving the prosecution evidence did not award any punishment to the appellant for the charge under section 302(b) of P.P.C. however, the appellant has been convicted and sentenced for offence under section 302(c) of P.P.C. on the basis of his statement recorded under section 342 of Cr.P.C, wherein the appellant stated that on the night of occurrence, he had seen his wife (Mst. Shamim deceased) and Muhammad Asif deceased while committing zina with each other at his 'Dera' when he (appellant) came back with 'kassi' to his 'Dera' after irrigating his land therefore, under sudden and grave provocation, he (appellant) gave them injuries with 'kassi'. Although no specific order has been passed by the learned trial Court regarding the acquittal of the appellant from the charge under section 302(b) of P.P.C. but non-conviction of the appellant for the said charge means that he has been acquitted from the abovementioned charge. Reference in this context may be made to the cases of 'Muhammad Arshad and others v. The State' (1998 SCMR 2146) and Shera and 6 others v. The Crown' (PLD 1954 Federal Court 141). It is further noteworthy that the complainant has not filed any appeal against the indirect acquittal of the appellant form the charge under section 302(b) of P.P.C. and he has only filed a criminal revision for enhancement of sentence of the appellant. Acquittal of the appellant from the charge under section 302(b) of P.P.C. cannot be converted into his conviction under the said charge in revisional jurisdiction as envisaged under section 439(4)(a) of Cr.P.C. It is therefore, evident that acquittal of the appellant from the charge under section 302(b) of P.P.C. cannot be disturbed by this Court

on the basis of Crl. Revision No. 1087 of 2014, filed by the complainant.

9. I have also noted that the occurrence in this case took place on 08.07.2011 at 02:00 a.m. (night) and the FIR was lodged on 08.07.2011 at 06:35 a.m. i.e. with the delay of 04 hours and 35 minutes from the occurrence. Postmortem on the dead body of Mst. Shamim Bibi deceased was conducted on 08.07.2011 at 10:00 a.m. and on the dead body of Muhammad Asif deceased on 08.07.2011 at 11:05 a.m., and as such, there is delay of 08 and 09 hours, respectively, in conducting the postmortem examination on the dead bodies of the deceased persons. It is further noteworthy that none of the PWs went to the police station to lodge the FIR and they kept on waiting till 05:30 a.m., for the arrival of Muhammad Boota, Sub-Inspector/I.O. (PW-11) at the spot. Statement of Muhammad Akram complainant (PW-4) was recorded by Muhammad Boota S.I/I.O (P W-11) at the spot therefore, a presumption can validly be drawn that FIR was lodged after due deliberation and concoction. Reference in this context may be made to the cases of 'Allah Bachaya and another v. The State' (PLD 2008 Supreme Court 349) and 'Muhammad Nawaz and another v. The State' (2009 PCr.LJ 506).

10. It is further noteworthy that prosecution's eye-witnesses were residents of a place situated at a distance of 3/4 kilometers away from the place of occurrence. The occurrence took place at odd hours of night i.e. 02:00 a.m. The prosecution eye-witnesses were therefore, chance witnesses because ordinarily they were not expected to be present at the place of occurrence (agricultural fields and 'Dera' of the appellant), at the relevant time. The abovementioned eye-witnesses in order to justify their presence at the spot at the time of occurrence have stated that they were irrigating their land at that time. No Khasra number, Khatooni number or Khata number of the land, which was owned or cultivated by the prosecution eye-witnesses have been mentioned in the FIR or in the statements of the abovementioned witnesses. Muhammad Boota, Sub-Inspector/I.O. (PW-11) has admitted that the prosecution eye-witnesses did not produce any proof of their ownership or cultivation during the investigation of this case. Noor Muhammad (PW-3) has stated during his cross-examination that they had no 'kassi' with them at the relevant time to justify the reason of irrigation of land, as claimed by the prosecution eye-witnesses. He did not explain that any other tool was with them (PWs) through which they were irrigating the land at the time of occurrence. Umar Hayat (PW-5) has also admitted in his cross-examination that Muhammad Azam

appellant had the turn of water from 09:00 p.m., up to 08:00 a.m., on the day of occurrence which has further negated the reason given by the prosecution eye-witnesses for their presence at the spot at the time of occurrence. No document of Wara-bandi or any other record to establish the reason of presence of the prosecution eye-witnesses at the time of occurrence, has been produced in the prosecution evidence. It is further noteworthy that Muhammad Akram complainant (PW-4) was specifically asked during cross-examination that Muhammad Azam appellant had the turn of water from 09:30 p.m., up to 08:00 a.m., on the relevant day but he did not answer the same and stated that he did not know about it, whereas, according to his examination-in-chief, he was present at the spot at the relevant night in order to irrigate his land. As the prosecution eye-witnesses were residents of a place situated at a distance of 3/4 kilometers away from the place of occurrence and they could not establish the reason of their presence at the spot at the odd hours of night (02:00 a.m.) when the occurrence took place therefore, they are chance witnesses and their evidence is not worthy of reliance thus, the same has rightly been disbelieved by the learned trial Court. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:--

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:-

> " ....Muhammad Irshad comp-lainant (PW-8) and Rab Nawaz (PW-9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence....."

11. It is further noteworthy that conduct of the prosecution's eye-witnesses is highly unnatural. According to the prosecution case, Muhammad Azam appellant was alone, whereas, the complainant party was comprising of four persons, namely, Noor Muhammad (PW-3), Muhammad Akram complainant (PW-4), Sher Muhammad (given up PW) and Muhammad Asif deceased at the time of first occurrence of murder of Muhammad Asif (deceased), whereas, the complainant party was comprising of five persons, namely, Allah Yar (given up PW), Umar Hayat (PW-5), Noor Muhammad (PW-3), Muhammad Akram complainant (PW-4) and Sher Muhammad (given up PW) at the time of second occurrence of the murder of Mst. Shamim (deceased). As per postmortem reports, there were four (04) injuries on the body of Muhammad Asif deceased and two (02) injuries on the body of Mst. Shamim deceased. The appellant was not armed with any formidable weapon like pistol or rifle and he was only armed with 'kassi'. Prosecution eye-witnesses, namely, Muhammad Akram complainant (PW-4) and Noor Muhammad (PW-3) were 'Chachazad' (paternal cousins) of Muhammad Asif deceased, whereas, Sher Muhammad (given up PW) was paternal cousin of the mother of Muhammad Asif (deceased). Likewise, Umar Hayat (PW-5) and Allah Yar (given up PW) were real brother and father of Mst. Shamim (deceased), respectively. The said eye-witnesses saw the occurrence like silent spectators and they did not try to save Muhammad Asif deceased or Mst. Shamim deceased at the time of occurrence. They did not try to apprehend Muhammad Azam appellant at that time. The conduct of the prosecution eye-witnesses is highly unnatural which makes their testimony as untrustworthy and unreliable. The Hon'ble Supreme Court of Pakistan in the case of "Liaquat Ali v. The State" (2008 SCMR 95) at Para No.7, observed regarding conduct of the witnesses of ocular account as under:-

> "2. The prosecution story briefly stated is that on the fateful day

at about 8.00 a.m. complainant Shameer (P.W.7) was going to the "Lumberdar" (Revenue Officer) to pay "Abyana" and at that time his cousin namely Fazil deceased was going ahead of him at some distance. Suddenly within his view Liaquat Ali appellant armed with a knife appeared and raised a Lalkara that Fazil would not be spared and thereafter gave him successive knife blows on various parts of his body. On hue and cries raised, Muhammad Siddique (P.W-8), Ranjha and Musa (not produced) were attracted to the spot. They tried to rescue Fazil but on being threatened by Liaquat they were unable to protect Fazil deceased and within their view he succumbed to the injuries and died.....

3. ..

4. ..

5. ..

5-A. Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P. W. 7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them, therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaqat Ali was not armed with a firearm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful ."

Likewise, in the case of "Pathan v. The State" (2015 SCMR 315) at Para No.4, the Apex Court of the country was pleased to observe as under:-

"..... The appellant was armed only with scissors not a formidable weapon of destruction. The complainant is the son of the deceased while Baradi and the other PW Muhammad Yousaf are also related to the deceased. The causing of such large number of injuries one after another to the deceased with scissors must have consumed

reasonable time due to the pause in between the first injury and the last one but all the three PWs including the son with a strong stature and built remain as silent spectators. They did not react or showed any response when the accused was causing the injuries. No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot."

Similar view was taken in the case of "Zafar v. The State and others" (2018 SCMR 326).

12. As per prosecution case, the motive behind the occurrence was that the appellant suspected illicit relations between Muhammad Asif deceased and Mst. Shamim deceased. None of the prosecution witnesses stated that they saw the deceased persons in any objectionable condition during their life time. They did not state that they ever heard the appellant while expressing his abovementioned suspicion. No litigation was pending between the appellant and Mst. Shumim deceased during her life time. In the light of above, the motive part of the prosecution has not been proved in this case and the same has rightly been disbelieved by the learned trial Court in para. No.24 of the impugned judgment.

13. Insofar as the recovery of 'kassi' (P-1) from the possession of the appellant is concerned, it is noteworthy that in the recovery memo (Ex.PK), it has not been mentioned that the said 'kassi' was stained with blood. There is no report of Chemical Examiner or the Serologist to establish that the abovementioned 'kaasi' was stained with human blood therefore, the alleged recovery of 'kassi' (P-1) from the possession of the appellant is inconsequential.

14. As per prosecution case, the occurrence was seen and the appellant was identified by the prosecution eye-witnesses with the help of emergency light but no emergency light has been taken into possession in this case by the Investigating Officer. Moreover, there was nothing on record to show that on the night of occurrence, there was light of moon. Under the circumstances, the identification of the appellant in the darkness of night is not free from doubt, as observed by the Hon'ble Supreme Court of Pakistan the case of 'Zahir Yousaf and another v. The State and another' (2017 SCMR 2002).

15. I have therefore, come to this irresistible conclusion that the prosecution

evidence is not worthy of reliance and the same has rightly been disbelieved by the learned trial Court. It is however, noteworthy that the appellant has been convicted and sentenced by the learned trial Court on the basis of his statement recorded under section 342 of Cr.P.C, wherein, while answering to a question that have you anything else to say, the appellant replied as under:--

> "I am innocent. I had seen my wife and Muhammad Asif deceased committing zina with each other at my dera when I came back with 'kassi' to my dera after irrigating my land and, under sudden and grave provocation, I gave them injuries with 'kassi'."

It is by now well settled that if prosecution evidence is disbelieved then statement of the accused is to be accepted or rejected in toto. It is legally not possible to accept the inculpatory part of the statement of accused person and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of 'Muhammad Asghar v. The State' (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:-

> 'It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of 'Shabbir Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as 'Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him.'
>
> If statement of the accused is accepted in toto then the present case falls

within the ambit of section 302(c) of P.P.C. because the appellant has categorically mentioned in his above-referred statement that he saw his wife Mst. Shamim deceased and Muhammad Asif deceased while committing zina with each other whereupon he committed their murder under sudden and grave provocation. I am therefore, of the considered view that the appellant has rightly been convicted by the learned trial Court for the offence under section 302(c) of P.P.C. instead of the charge under section 302(b) of P.P.C. Reliance in this context may be placed on the cases of Ali Muhammad v. Ali Muhammad and another' (PLD 1996 Supreme Court 274), 'Ali Ahmad and another v. The State and others' (PLD 2020 Supreme Court 201) and 'Raza and another v. The State and 2 others' (PLD 2020 Supreme Court 523).

16. Insofar as the quantum of sentence of the appellant is concerned, I have noted that the appellant has been awarded the maximum punishment by the learned trial Court for the offence under section 302(c) of P.P.C. but there are some mitigating circumstances in favour of the appellant. Firstly, the motive alleged by the prosecution could not be proved in this case and the same has already been disbelieved by the learned trial Court, as well as, by this Court due to the reasons mentioned in para No. 12 of this judgment. Secondly, recovery of weapon of offence i.e. 'kassi' (P-1) has also been disbelieved by this Court on the grounds mentioned in para No. 13 of this judgment. Thirdly, the appellant made a fair statement before the learned trial Court that he committed the occurrence under grave and sudden provocation and he did not conceal the real facts from the Court. Keeping in view all the aforementioned facts, I am of the view that sentence of imprisonment for life on two counts for the offence under section 302(c) of P.P.C., as awarded by the learned trial Court, is quite harsh and the sentence of 14 years Rigorous Imprisonment on two counts would meet the ends of justice therefore, the appeal filed by Muhammad Azam appellant is hereby, dismissed however, quantum of his sentence under section 302(c) of P.P.C. is altered from imprisonment for life on two counts to 14 years R.I. on two counts. The sentences of the appellant shall run concurrently. Findings of the learned trial Court whereby the compensation to the legal heirs of both the deceased under section 544-A of Cr.P.C. was not awarded, are however, upheld and maintained. Benefit of section 382-B of Cr.P.C. is also granted to the appellant.

17. Insofar as Crl. Revision No. 1087 of 2014, filed by Muhammad Akram

complainant for enhancement of sentence awarded by the learned trial Court to Muhammad Azam (respondent No.1 of the said Crl. Revision) is concerned, I have already concluded in the preceding paragraphs of this judgment that the sentence awarded to the appellant by the learned trial Court is quite harsh and the same has been reduced accordingly. Under the circumstances, the instant petition i.e. Criminal Revision No. 1087 of 2014 has no merits and the same is hereby dismissed.

JK/M-56/L **Order accordingly.**

2021 Y L R 584

[Lahore]

Before Malik Shahzad Ahmad Khan and Ali Baqar Najafi, JJ

AMEER AMAN ULLAH---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 8151 of 2019, heard on 24th June, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Scope---Accused was alleged to have been found in possession of 1500 grams of charas---Report of Forensic Laboratory did not give the details of full protocols and the test applied at the time of analysis of sample of narcotics rather it simply mentioned that certain tests were conducted and contraband material recovered in the case was charas---Appeal was allowed and the impugned judgment was set aside, in circumstances.

The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039 and Khair-ul-Bashar v. The State 2019 SCMR 930 rel.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9---Possession of narcotics---Scope---Provisions of the Control of Narcotic Substances Act, 1997, provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused.

Muhammad Hashim v. The State PLD 2004 SC 856 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

(c) Control of Narcotic Substances Act (XXV of 1997)---

----S. 36---Report of Government Analyst---Scope---Any report failing to describe therein the details of full protocols and the tests applied would be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary presumption attached to a report of the Government Analyst under S.36(2) of the Control of Narcotic Substances Act, 1997.

(d) Criminal trial---

----Benefit of doubt---Scope---Single circumstance creating reasonable doubt would be sufficient to cast doubt about veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right.

Tariq Pervez v. The State 1995 SCMR 1345; Akhtar Ali and others v. The State 2008 SCMR 6 and Muhammad Zaman v. The State and others 2014 SCMR 749 ref.

Mian Muhammad Awais Mazhar for Appellant.

Waqas Anwar, Deputy Prosecutor General for the State.

Date of hearing: 24th June, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal is directed against judgment dated 31.01.2019 passed by the learned Additional Sessions Judge/ Judge Special Court (CNS), Mianwali, whereby, in case FIR No. 335 dated 17.09.2018, registered at Police Station Sadar District Mianwali, under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Ameer Aman Ullah appellant and sentenced him as under:

> Under section 9(c) of Control of Narcotic Substances Act, 1997 to 04 years and 06 months S.I. with fine of Rs.20,000/- and in default of payment thereof the appellant was directed to further undergo S.I. for five months. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Briefly, the accusation levelled in the FIR (Ex.PC) against the appellant Ameer Aman Ullah is that on 17.09.2018 at 05:30 p.m., Ghulam Mustafa ASI (complainant/PW-1), along with other police officials was present near the Dairy Farm of Zaka Ullah Khan and in the meanwhile, the appellant who was pedestrian and was trying to escape from the spot, was intercepted by the police on suspicion and during his search, 1500-grams Charas Garda-numa was recovered from a shopper bag caught by the appellant in his right hand. Out of the recovered Charas one sample parcel weighing 75-grams was separated for Chemical Analysis. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 05.11.2018, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced four witnesses to prove its case. The learned Additional Sessions Judge/Judge Special Court (CNS), Mianwali after recording the statement of the appellant under section 342, Cr.P.C.

and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PE); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well settled that since the provisions of The Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of "Muhammad Hashim v. The State"(PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of "Ameer Zeb v. The State"(PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the abovementioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of sample of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:--

Item No. Description of Evidence

01. One sealed parcel said to contain 75 gram (s) of suspected Charas.

Tests Performed on Received Item(s) of Evidence

1. Analytical Balance was used for weighing.
2. Chemical Spot test(s) was/were used for presumptive testing.
3. Gas chromatograph-mass spectro-metry was used for confirmation.

Results and Conclusion:-

Items # 01

having net weight 72.93 gram(s) of dark brown resinous material in sealed parcel contains Charas.

Undisputedly, it is settled by now that any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under section 36(2) of the Act ibid. In the report (Ex.PE) it is simply mentioned that certain tests were conducted and contraband material recovered in this case was found to be Charas instead of mentioning the details of tests applied on the samples and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules, makes it imperative on an analyst to mention result of sample analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

8. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of "The State through Regional Director ANF v. Imam Bakhsh and others" (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:--

> 16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e., control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis in the shape of the protocols applied for the test become fundamental

and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (supra)".

The above said view has been further fortified in the recent case law titled as "Khair-ul-Bashar v. The State" (2019 SCMR 930). We have also recquisitioned the attested copy of FIR in case of "Khair-ul-Bashar" supra i.e., FIR No.18, dated 15.01.2016, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of "Khair-ul-Bashar" supra is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of "Khair-ul-Bashar" supra has not been relied upon by the august Supreme Court of Pakistan, therefore, the identical report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

9. Learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the abovementioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but we have noted that the August Supreme Court of Pakistan in the case of "Khair-ul-Bashar" supra, acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore. Even otherwise, it is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about the veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right. Reliance in this regard is placed upon the cases of "Tariq Pervez v. The State" (1995 SCMR 1345),"Akhtar Ali and others v. The State" (2008 SCMR 06) and "Muhammad Zaman v. The State and others"(2014 SCMR 749).

10. In the light of above discussion, the instant appeal (Crl. Appeal No. 8151 of 2019), is allowed, impugned judgment dated 31.01.2019, passed by the learned Additional Sessions Judge/Judge Special Court (CNS), Mianwali is hereby set aside and Ameer Aman Ullah (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

SA/A-79/L **Appeal allowed.**

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[Lahore]

Before Malik Shahzad Ahmad Khan, J

NASIR ABBAS and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No. 257189-J of 2018, heard on 11th February, 2021.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of two hours and forty five minutes in lodging the FIR---Effect---Prosecution case was that the accused/wife of the deceased and her paramour committed the murder of son of the complainant---Record showed that the occurrence in the case took place on 07.05.2017 at 08:30 p.m.---Relevant column of the FIR showed that the FIR was lodged on 07.05.2017 at 11.15 p.m., however, it was noteworthy that post-mortem examination on the dead body of the deceased was conducted with the delay of twelve hours from the time of alleged occurrence---Medical Officer stated during his examination-in-chief that the dead body was received in the dead house on 07.05.2017 at 11.00 p.m. and he received police papers on 08.05.2017 at 07.45 a.m., under the circumstances, it was evident that there was no delay on the part of the Medical Officer to conduct post-mortem examination on the dead-body of the deceased because the police papers were handed over to him with a considerable delay of about eleven hours from the time of occurrence---Said delay in conducting the post-mortem examination was suggestive of the fact that no eye-witness was present at the spot at the relevant time and the said delay had been consumed in procuring the attendance of eye-witnesses---Said delay of twelve hours in conducting post-mortem examination on the dead body of the deceased clearly showed that the FIR was not lodged at the given time---Said delay coupled with other facts had created doubt in the prosecution story---Appeal against conviction was allowed, in circumstances.

Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54; Zafar v. The State and others 2018 SCMR 326; Muhammad Ashraf v. The State 2012 SCMR 419 and Irshad Ahmed v. The State 2011 SCMR 1190 rel.

(**b) Penal Code (XLV of 1860)**---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Non-availability of justification for the presence of eye-witnesses at the spot---Chance witnesses--- Scope---Prosecution case was that the accused/wife of the deceased and her paramour committed the murder of son of the complainant---Motive behind the occurrence was that the wife of the deceased had developed illicit relations with co-accused, due to which a dispute arose between deceased and his wife/accused and because of the said grudge, accused persons committed the murder of the deceased---Ocular account of the prosecution had been furnished by complainant/father and brother of the deceased---Occurrence took place in the house of lady accused, who was wife of the deceased---Eye-witnesses were residing 35-kilometres away from the place of occurrence---Eye-witnesses being residents of a different city were chance witnesses because in the normal course of nature, they were supposed to be present in their house situated 35-kilometers away from the spot. where the occurrence took place---In order to justify their presence at the spot, both the eye-witnesses stated that on the day of occurrence, deceased made a phone call to his father/complainant, whereupon eye-witnesses came to the house, where the occurrence took place, however, it was noteworthy that the prosecution evidence in that respect was self-contradictory because complainant stated in his examination-in-chief that he received telephone call from his son/deceased on the day of occurrence whereupon he along with other witnesses reached at the spot and witnessed the occurrence but during his cross-examination, he stated that deceased made telephone call two days prior to the occurrence---Neither any telephone number of the complainant nor any telephone number of deceased had been brought on the record during entire prosecution evidence---No call data of the telephone numbers of the complainant and the deceased had been produced in prosecution evidence to establish the reason of presence of prosecution eye-witnesses at the spot at the time of occurrence---According to the prosecution's own case,

deceased contracted love marriage with accused without the consent of the complainant party, due to which the complainant party was unhappy with deceased---Evidently, the complainant party was unhappy with deceased, who was living in the house of his mother-in-law, therefore, it was mandatory for the prosecution to establish through any independent evidence like call data of phone numbers of the complainant and deceased that in fact any call was received by the complainant from the deceased on the day of occurrence to justify the reason of presence of the prosecution eye-witnesses at the time of occurrence in a different city but no such evidence had been produced by the prosecution, therefore, the prosecution eye-witnesses were chance witnesses and they could not justify their presence at the spot at the relevant time---Appeal against conviction was allowed, in circumstances.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Contradictions in statements of eye-witnesses---Effect---Prosecution case was that the accused/wife of the deceased and her paramour committed the murder of son of the complainant---Record showed that there were material contradictions in the statements of the prosecution eye-witnesses---Complainant stated that mother of lady accused was living in the house, where the occurrence took place but she was not present in the said house at the time of occurrence, whereas brother of deceased/eye-witness stated that mother of lady accused was present in the house at the time of occurrence---According to prosecution case co-accused was holding a "Churri" in his hand at the time of occurrence but both the accused committed murder of deceased with the help of 'Roras'(pieces of bricks)---Circumstances suggested that it was not understandable that if co-accused was carrying a "Churri"at the time of occurrence then as to why he did not use the said Churri"and instead committed the murder of deceased with the help of a 'Rora'(piece of brick)---As per prosecution case co-accused merely put the"Churri" on the neck of deceased and lady accused inflicted blows of 'Roras' (pieces of bricks) on the head of deceased and thereafter co-accused took a 'Rora' (piece of brick) from lady accused and inflicted a blow on the head of deceased---"Churri"' was not used by accused persons to commit the occurrence--- Complainant party comprised of four adult male members including

deceased, whereas the accused party comprised of only two persons out of whom one was a female---Eye-witness stated during his cross-examination that the accused persons threw away "Churri" and 'Rora' (piece of brick) on the spot, which were later on taken into possession by the police from the place of occurrence---No allegation in the FIR or in the statement of complainant that there were two 'Churries', one in the hand of co-accused and the other beneath the bed of deceased as stated during his cross-examination by other eye-witness---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Un-natural conduct of eye-witnesses---Scope---Prosecution case was that the accused/ wife of the deceased and her paramour committed the murder of son of the complainant---Evidence of eye-witness revealed that 'Churri' and 'Rora' (piece of brick), which were statedly in possession of the accused persons were thrown at the spot---Meaning thereby that the accused persons became empty handed after throwing their weapons of offence at the spot---If the accused persons threw away 'Churri' and 'Rora' (piece of brick) at the spot, then why the complainant party, which comprised of three male adult members at that time, did not try to apprehend the accused persons---Even one of the accused being a female was not apprehended at the spot by the prosecution eye-witnesses---According to the post-mortem report of the deceased, there were as many as thirteen (13) injuries on his body---All the said injuries were caused by blunt weapon---Infliction of large number of injuries on the deceased must have consumed reasonable time but the prosecution eye-witnesses neither tried to rescue their real son/brother at the time of occurrence nor they tried to apprehend the accused persons even when they threw away "Churri" and 'Rora' (piece of brick) at the spot and they became empty handed---Prosecution witnesses had seen the entire occurrence like silent spectators---Said conduct of the prosecution eye-witnesses was highly un-natural, therefore, their evidence was not worthy of reliance---Appeal against conviction was allowed, in circumstances.

Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315 and Zafar v. The State and others 2018 SCMR 326 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Weapons of offence were recovered from the accused persons---Reliance---Scope---Prosecution case was that the accused/wife of the deceased and her paramour committed the murder of son of the complainant---Record showed that the prosecution evidence against the accused persons regarding recoveries of 'Churri' and 'Rora'(piece of brick) from accused persons was also highly contradictory and unreliable---Investigating Officer stated that the blood stained 'Rora' (piece of brick) was recovered on the pointation of lady accused whereas Churri and 'Rora' (piece of brick) were recovered on the pointation of co-accused---According to the statement of eye-witness "Churri" and 'Rora' (piece of brick) were thrown away by the accused at the spot on the day of occurrence and the same were taken into possession by the police from the spot on the same day---Recovery of Churri and Rora (piece of brick) from co-accused and Rora (piece of brick) from lady accused was not worthy of reliancem, in circumstances--- Appeal against conviction was allowed, in circumstances.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention--- Appreciation of evidence---Motive was not proved---Scope---Prosecution case was that the accused/wife of the deceased and her paramour committed the murder of son of the complainant---Motive behind the occurrence was that the wife of the deceased had developed illicit relations with co-accused, due to which a dispute arose between deceased and his wife/accused and because of the said grudge, accused persons committed the murder of the deceased---Allegedly, the complainant party was unhappy on account of love marriage of deceased with lady accused, therefore, deceased along with his wife/lady accused was living in the house of his mother-in-law, whereas the prosecution witnesses were residents of a different city and as such there was no chance for the prosecution witnesses to see the accused persons in any objectionable condition so that it might be presumed that there was any illicit relationship between them---None from the prosecution witnesses stated that he had seen the accused persons in any objectionable condition---Motive as alleged

by the prosecution could not be proved---Appeal against conviction was allowed, in circumstances.

(g) Criminal trial---

----Medical evidence---Scope---Medical evidence is a type of supporting evidence, which may confirm the prosecution version with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it will not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 rel.

(h) Criminal trial---

----Benefit of doubt---Principle---If there was a single circumstance which created reasonable doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to the accused.

Tariq Parvaiz v. The State 1995 SCMR 1345; Muhammad Akram v. The State 2009 SCMR 230 and Muhammad Mansha v. The State 2018 SCMR 772 rel.

Ch. Rab Nawaz and Tasawar Hussain Chadhar for Appellants.

Ms. Maida Sobia, Deputy Prosecutor General for the State.

Malik Shahid Iqbal Awan for the Complainant.

Date of hearing: 11th February, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.257189-J of 2018, filed by Nasir Abbas and Mst. Gul Fishan (appellants), against their convictions and sentences recorded vide impugned judgment dated 02.10.2018, passed by learned Additional Sessions Judge, Bhalwal.

2. Nasir Abbas and Mst. Gul Fishan (appellants), were tried in case FIR No.287 dated 07.05.2017, registered at Police Station City Bhalwal, District Sargodha, in respect of offences under sections 302/34, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 02.10.2018, has convicted and sentenced Nasir Abbas and Mst. Gul Fishan (appellants) as under:--

Nasir Abbas:-

Under sections 302(b)/34, P.P.C. to imprisonment for life as tazir. He was also ordered to pay Rs.5,00,000/- (rupees five hundred thousand only) to the legal heirs of Shehar Yar (deceased) as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

Gul Fishan:-

Under sections 302(b)/34, P.P.C. to imprisonment for life as tazir. She was also ordered to pay Rs.5,00,000/- (rupees five hundred thousand only) to the legal heirs of Shehar Yar (deceased) as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

Benefit of section 382-B, Cr.P.C. was also extended to the appellants.

3. Brief facts of the case as given by the complainant Muhammad Riaz (PW-8), in his Fard Bayan (Ex.PD/1), on the basis of which the formal FIR (Ex.PD) was chalked out, are that about two years earlier, the son of the complainant namely Shehar-Yar (deceased) aged about 19/20 years contracted love marriage with Mst. Gul Fishan (appellant) and on the insistence of his wife namely Mst. Gul Fishan (appellant), he started living at Ashraf Colony, Bhalwal. The son of the complainant often used to make contact with the complainant through telephone. About 11/2 months prior to the occurrence, Mst. Gul Fishan (appellant) developed illicit relations with Nasir Abbas (appellant) and when it came into the knowledge of Shehar-Yar (deceased), a dispute arose between the spouses, which fact was told by Shehar-Yar (deceased) to the complainant. On 07.05.2017, the complainant along with his sons namely Muhammad Shahbaz (PW since given-up) and Zeeshan (PW-9), reached at Ashraf Colony, Bhalwal, at 8.30 p.m., in order to meet Shehar-Yar (deceased) and his wife Mst. Gul Fishan (appellant). The main door of the house was open and the bulbs of the courtyard and room were lit. The complainant along with PWs reached at the door of a room of the abovementioned house where they saw that Nasir Abbas (appellant) had put a "Churri" on the neck of Shehar-Yar (deceased) and with his left hand, the said appellant had pressed the face of the deceased, whereas Mst. Gul Fishan (appellant) was repeatedly causing injuries on the head of Shehar-Yar (deceased) with the help of 'Roras' (pieces of bricks). The complainant party tried to apprehend the appellants but Nasir Abbas (appellant) while wielding "Churri"' threatened that if anybody would try to come near, his fate shall be just like the fate of Shehar-Yar

(deceased). Due to fear, the complainant party did not step forward. Thereafter Nasir Abbas (appellant) took a 'Rora' (piece of brick) from Mst. Gul Fishan (appellant) and made a lethal blow on the head of Shehar-Yar (deceased) while pointing "Churri" towards the complainant party with his other hand. Shehar-Yar (deceased) succumbed to the injuries at the spot, whereas the appellants decamped from the place of occurrence.

The motive behind the occurrence was that about 1-1/2 months prior to the occurrence, Mst. Gul Fishan and Nasir Abbas (appellants) had developed illicit relationship with each other due to which a dispute arose between Shehar-Yar (deceased) and Mst. Gul Fishan (appellant) and because of the said grudge, the appellants committed the murder of Shehar-Yar (deceased).

4. The appellants were arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants on 25.10.2017, to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced twelve witnesses. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PL. The statements of the appellants under section 342, Cr.P.C, were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court vide its judgment dated 02.10.2018, found the appellants guilty, convicted and sentenced them as mentioned and detailed above, hence the instant appeal.

6. It is contended by learned counsel for the appellants that the appellants are absolutely innocent and they have falsely been implicated in this case by the complainant being in league with the local police; that the prosecution eye-witnesses have admitted that they were annoyed with Shehar-Yar (deceased), due to his love marriage with Mst. Gul Fishan (appellant) and they also admitted that they were residents of a city, which was situated at a distance of 35 kilometers away from the place of occurrence, therefore, their presence at the spot at the relevant time was neither probable nor natural; that the prosecution eye-witnesses were chance witnesses and they could not establish the reason of their presence at the spot at the time of occurrence through any plausible/independent evidence, therefore, their

evidence is not worthy of reliance; that there is delay of about 12 hours in conducting postmortem examination on the dead body of the deceased, which has further created doubt in the prosecution case; that there is nothing on the record to show that Mst. Gul Fishan (appellant) had any litigation with Shehar-Yar (deceased), prior to the occurrence, therefore, the motive as alleged by the prosecution could not be proved in this case; that the alleged recoveries of "Churri" and "Roras" (pieces of bricks), from the appellants have been planted against them by the prosecution because Zeeshan (PW-9), has himself admitted that the appellants threw away "Churri" and "Rora" (piece of brick), at the spot, at the time of occurrence but even then the said recoveries have been shown to be effected on the pointation of the appellants at a later stage of the case; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt, therefore, the appeal filed by the appellants may be accepted and the appellants may be acquitted from the charges.

7. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant contends that the prosecution has fully proved its case against the appellants beyond the shadow of any doubt, therefore, they were rightly found guilty by the learned trial Court; that the appellants could not establish any mala fide on the part of the prosecution for their false involvement in this case; that the roles attributed to the appellants of inflicting 'Rora' blows on the head and body of Shehar-Yar (deceased), have fully been supported by the medical evidence; that the prosecution eye-witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that presence of the prosecution eye-witnesses in the house of their son/brother at the time of occurrence is quite natural and probable; that the prosecution case against the appellants has further been corroborated by the recoveries of blood stained "Churri" and "Roras" (pieces of bricks), on the pointation of the appellants, as well as, through the report of Punjab Forensic Science Agency, Lahore (Ex.PL), which shows that "Churri" and "Roras" (pieces of bricks) recovered from the possession of the appellants were found to be stained with human blood; that minor contradictions in the prosecution evidence regarding the above-mentioned recoveries are immaterial because the statement of Zeeshan (PW-9), was recorded with a considerable delay from the date of occurrence, therefore, no benefit could be extended to the appellants on the basis of minor variation in his statement qua the recoveries of weapons of offence; that there is no substance in this appeal, therefore, the same may be dismissed.

8. I have heard the arguments of learned counsel for the parties, as well as, the learned Deputy Prosecutor General and have also gone through the evidence available on the record with their able assistance.

9. The detail of the prosecution case as set forth in the complainant (Ex.PD/1) on the basis of which the formal FIR (Ex.PD) was chalked out has already been given in Para No.3 of this judgment, therefore, there is no need to repeat the same.

10. As per prosecution case, the occurrence in this case took place on the 07.05.2017 at 08:30 p.m. Relevant column of the FIR (Ex.PD) shows that the FIR was statedly lodged on 07.05.2017 at 11.15 p.m., however, it is noteworthy that postmortem examination on the dead body of Shehar-Yar (deceased) was conducted on 08.05.2017 at 08:30 a.m. i.e. with the delay of twelve hours from the time of alleged occurrence. Dr. Muhammad Imtiaz (PW-5) stated during his examination-in-chief that the dead body was received in the dead house on 07.05.2017 at 11.00 p.m. and he received police papers on 08.05.2017 at 07.45 a.m. Relevant part of his statement in this respect reads as under:-

> "Dead body was received in dead house on 07.05.2017 at 11.00 p.m and I received relevant police papers at about 07.45 a.m. on 08.05.2017. I conducted autopsy at 08.30 a.m. on 08.05.2017"

He further stated during his cross-examination that a Doctor remains on duty round the clock in the Tehsil Headquarter Hospital, Bhalwal. Relevant part of his statement in this respect reads as under:-

> "A doctor remains at duty in THQ Hospital, Bhalwal round the clock".

Under the circumstances, it is evident that there was no delay on the part of the Medical Officer to conduct postmortem examination on the dead-body of the deceased because the police papers were handed over to him with a considerable delay of about eleven (11) hours from the time of occurrence and thereafter, postmortem examination on the dead body of Shehar-Yar (deceased) was conducted. The abovementioned delay in conducting the postmortem examination on the dead body of Shehar-Yar (deceased) is suggestive of the fact that no eye-witness was present at the spot at the relevant time and the abovementioned delay has been consumed in procuring the attendance of fake eye-witnesses. In the case of "Khalid alias Khalidi and 2 others v. The State" (2012 SCMR 327), it was observed by the Hon'ble Supreme Court of Pakistan that delay of ten hours in conducting post-mortem

examination on the dead body of the deceased clearly shows that the FIR was not lodged at the given time and it was concluded that the said delay coupled with other facts has created doubt in the prosecution story. Relevant part of the judgment at page No.332 reads as under:-

> ".... …. ….. ….. The incident in the instant case took place at 2.00 a.m., FIR was recorded at 4/5 a.m, Dr. Muhammad Pervaiz medically examined the injured persons at 4.00 a.m. but conducted the postmortem examination of the deceased at 3.00 p.m i.e., after about ten hours which fact clearly shows that the FIR was not lodged at the given time ....."

Likewise, in the case of 'Muhammad Ilyas v. Muhammad Abid alias Billa and others' (2017 SCMR 54), the Apex Court of the country was pleased to observe that delay of 09 hours in conducting the postmortem examination suggests that the prosecution eye-witnesses were not present at the spot at the time of occurrence therefore, the said delay was used in procuring the attendance of fake eye-witnesses. Relevant part of the judgment at page No. 55 reads as under:-

> "2. After hearing the learned counsel for the petitioner and going through the record of the case with his assistance we have observed that in the Inquest Report no time of death had been recorded which indicated that till preparation of the Inquest Report the FIR had not been registered. Post-mortem Examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that lime had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution. ..."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of 'Zafar v. The State and others' (2018 SCMR 326), "Muhammad Ashraf v. The State" (2012 SCMR 419) and Irshad Ahmed v. The State' (2011 SCMR 1190).

11. The ocular account of the prosecution has been furnished by Muhammad Riaz complainant (PW-8) and Zeeshan (PW-9). The occurrence in this case took place in the house of Mst. Gul Fishan (appellant), who was wife of Shehar-Yar (deceased), which was situated at Ashraf Colony, Bhalwal. Muhammad Riaz complainant (PW-8), is father and Zeeshan (PW-9), is brother of Shehar-Yar (deceased). Both the abovementioned prosecution eye-witnesses were residents of Reman Pura, Sargodha.

Muhammad Riaz complainant (PW-8), has admitted that he, as well as, Zeeshan (PW-9), were residents of Reman Pura, Sargodha, which was situated at a distance of 35-Kilometers away from Ashraf Colony, Bhalwal, where the occurrence took place. Relevant part of his statement in this respect reads as under:-

> "It is correct that Shehbaz and Zeeshan PWs are my real sons. Latif PW is my neighbourer while Ikram PW is my nephew. We all abovementioned reside in Reman Pura, Sargodha at a distance of 35 kilometers away from Bhalwal"

The abovementioned prosecution eye-witnesses being residents of a different city are chance witnesses because in the normal course of nature, they were supposed to be present in their house situated at Reman Pura, Sargodha, which was 35-kilometers away from Ashraf Colony, Bhalwal, where the occurrence took place. In order to justify their presence at the spot, both the abovementioned eye-witnesses stated that on the day of occurrence i.e., on 07.05.2017, Shehar-Yar (deceased) made a phone call to his father Muhammad Riaz complainant (PW-8), whereupon they (PWs) came to the house, where the occurrence took place. However, it is noteworthy that the prosecution evidence in this respect is self-contradictory because Muhammad Riaz complainant (PW-9), stated in his examination-in-chief that he received telephone call from his son namely Shehar-Yar (deceased) on 07.05.2017, whereupon he along with other PWs reached at the spot and witnessed the occurrence but during his cross-examination, he stated that Shehar Yar (deceased) made telephone call two days prior to the occurrence. Relevant parts of his statement read as under:-

> Statement during examination-in-chief.
>
> "After receiving telephonic call from my son, on 07.05.2017, I along with Muhammad Shehbaz and Zeeshan came at the house of my son Shehar Yar deceased in Ashraf Colony, Bhalwal at about 08.30 p.m"
>
> Statement during cross-examination.
>
> "Shehar Yar deceased made a telephonic call two days prior of this occurrence"

It is further noteworthy that neither any telephone number of the complainant nor any telephone number of Shehar-Yar (deceased) has been brought on the record during entire prosecution evidence. Moreover, no call data of the telephone numbers of the

complainant and the deceased has been produced in prosecution evidence to establish the abovementioned reason of presence of prosecution eye-witnesses at the spot at the time of occurrence. I have also noted that even according to the prosecution's own case, Shehar-Yar (deceased) contracted love marriage with Mst. Gul Fishan (appellant), without the consent of the complainant party, due to which the complainant party was unhappy with Shehar-Yar (deceased). The statements made by Muhammad Riaz complainant (PW-8) and Zeeshan (PW-9), in this respect are reproduced hereunder:-

> Statement of Muhammad Riaz complainant (PW-8).
>
> "Shehar Yar deceased and Gul Fishan accused entered into wedlock on the basis of love marriage without our consent".
>
> Statement of Zeeshan (PW-9).
>
> Shehar Yar entered into a love marriage against our consent and due to this reason we were unhappy with him".

In the light of above, it is evident that the complainant party was unhappy with Shehar-Yar (deceased), who was living in the house of his mother-in-law at Ashraf Colony, Bhalwal, therefore, it was mandatory for the prosecution to establish through any independent evidence like call data of phone numbers of the complainant and Sheher-Yar (deceased) that in fact any call was received by the complainant from the deceased, on the day of occurrence to justify the abovementioned reason of presence of the prosecution eye-witnesses at the time of occurrence in a different city but no such evidence has been produced by the prosecution, therefore, I am of the view that the prosecution eye-witnesses are chance witnesses and they could not justify their presence at the spot at the relevant time. The Hon'ble Supreme Court of Pakistan in the case of "Mst. Sughra Begum and another v. Oaiser Pervez and others" (2015 SCMR 1142) at Para No.14, observed regarding the chance witnesses as under:-

> "14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the

crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Similar view was taken in the case of "Muhammad Irshad v. Allah Ditta and others" (2017 SCMR 142). Relevant part of the said judgment at Para No.2 reads as under:-

"..... ...Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence ...."

I have also noted that there are material contradictions in the statements of the prosecution eye-witnesses. Muhammad Riaz complainant (PW-8), stated that mother of Mst. Gul Fishan (appellant) was living in the house, where the occurrence took place but she was not present in the said house at the time of occurrence, whereas Zeeshan (PW-8), stated that mother of Gul Fishan (appellant) was present in the house at the time of occurrence. Relevant parts of statements of the abovementioned prosecution eye-witnesses in this respect are reproduced hereunder for ready reference:-

Statement of Muhammad Riaz complainant (PW-8).

"Gul Fishan accused along with her mother were residing jointly in a house which is the place of occurrence. The mother of Gul Fishan accused was not present in the house at that time".

Statement of Zeeshan (PW-9).

"The mother of Gul Fishan accused was also residing with them. The mother of Gul Fishan accused was present in this house at the time of occurrence".

12. It is further noteworthy that the prosecution story does not appeal to a prudent mind and even the conduct of the prosecution eye-witnesses is highly un-natural. According to the prosecution case Nasir Abbas appellant was holding a "Churri" in

his hand at the time of occurrence but both the appellants committed murder of Shehar-Yar (deceased) with the help of 'Roras' (pieces of bricks). It is not understandable that if Nasir Abbas appellant was carrying a "Churri" at the time of occurrence then as to why he did not use the said "Churri" and instead committed the murder of Shehar-Yar (deceased) with the help of a 'Rora' (piece of brick). As per prosecution case Nasir Abbas (appellant) merely put the "Churri" on the neck of Shehar-Yar (deceased) and Mst. Gul Fishan (appellant) inflicted blows of Roras' (pieces of bricks) on the head of Shehar-Yar (deceased) and thereafter Nasir Abbas (appellant) took a 'Rora' (piece of brick) from Mst. Gul Fishan (appellant) and inflicted a blow on the head of Shehar-Yar (deceased). However, "Churri" was surprisingly not used by Nasir Abbas appellant or Mst. Gul Fishan (appellant) to commit the occurrence. It is not understandable that as to why Nasir Abbas appellant did not use "Churri" at the time of occurrence to commit the murder of Shehar-Yar (deceased) though he allegedly used the said "Churri" to threaten the PWs. It is further noteworthy that the complainant party was comprising of four adult male members namely Muhammad Riaz complainant (PW-8), Zeeshan (PW-9), Muhammad Shehbaz (PW since given-up) and Shehar-Yar (deceased), whereas the accused party was comprising of only two persons namely Nasir Abbas (appellant) and Mst. Gul Fishan (appellant), out of whom one was a female. Zeeshan (PW-9), stated during his cross-examination that the accused persons threw away "Churri" and 'Rora' (piece of brick) on the spot, which were later on taken into possession by the police from the place of occurrence. Relevant part of his statement reads as under:

> "The accused persons thrown away "Churri" and "Roras" in our presence. The police himself took into possession "Churri" and "Roras" allegedly used by the accused from the place of occurrence in our presence. There were two Churries one was in the hand of accused Nasir Abbas, the other was lying beneath the bed on which Shehar Yar was murdered. The "Rora" was also lying on the floor beneath the bed. The police recovered one "Churri" and one "Rora" in our presence"

There is no allegation in the FIR (Ex.PD) or in the statement of Muhammad Riaz complainant (PW-8) that there were two 'Churries', one in the hand of Nasir Abbas (appellant) and the other beneath the bed of Shehar-Yar (deceased) as stated during his cross-examination by Zeeshan (PW-9). However, it is evident from the perusal of evidence of Zeeshan (PW-9) that 'Churri' and 'Rora' (piece of brick), which were

statedly in possession of the appellants were thrown at the spot, meaning thereby that the appellants became empty handed after throwing their weapons of offence at the spot. It is, therefore, not understandable that if the appellants threw away 'Churri' and 'Rora' (piece of brick) at the spot, then as to why the complainant party, which was still comprising of three male adult members at that time, did not try to apprehend the appellants. Even Mst. Gul Fishan appellant being a female was not apprehended at the spot by the abovementioned prosecution eye-witnesses. It is also noteworthy that according to the postmortem report of the deceased, there were as many as thirteen (13) injuries on his body. All the said injuries were caused by blunt weapon. The infliction of large number of injuries on the deceased must have consumed reasonable time but the prosecution eye-witnesses neither tried to rescue their real son/brother at the time of occurrence nor they tried to apprehend the appellants even when they (appellants) threw away "Churri" and 'Rora' (piece of brick) at the spot and they became empty handed. They (prosecution witnesses) saw the entire occurrence like silent spectators. The abovementioned conduct of the prosecution eye-witnesses is highly un-natural, therefore, their evidence is not worthy of reliance. The Hon'ble Supreme Court of Pakistan in the case of "Liaquat Ali v. The State" (2008 SCMR 95) at Para No.7, observed regarding conduct of the witnesses of ocular account as under:-

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> "2. The prosecution story briefly stated is that on the fateful day at about 8.00 a.m. complainant Shameer (P. W. 7) was going to the "Lumberdar" (Revenue Officer) to pay "Abyana" and at that time his cousin namely Fazil deceased was going ahead of him at some distance. Suddenly within his view Liaquat Ali appellant armed with a knife appeared and raised a Lalkara that Fazil would not be spared and thereafter gave him successive knife blows on various parts of his body. On hue and cries raised, Muhammad Siddique (P. W.8), Ranjha and Musa (not produced) were attracted to the spot. They tried to rescue Fazil but on being threatened by Liaquat they were unable to protect Fazil deceased and within their view he succumbed to the injuries and died .....……..
>
> 3. ……..
>
> 4. ……..
>
> 5. ……..

5-A. Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P. W. 7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them, therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaqat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful. …

Likewise, in the case of "Pathan v. The State" (2015 SCMR 315) at Para No.4, the Apex Court of the country was pleased to observe as under:-

".....The appellant was armed only with scissors not a formidable weapon of destruction. The complainant is the son of the deceased while Baradi and the other PW Muhammad Yousaf are also related to the deceased. The causing of such large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to the pause in between the first injury and the last one but all the three PWs including the son with a strong stature and built remain as silent spectators. They did not react or showed any response when the accused was causing the injuries. No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot. "

Similar view was taken in the case of "Zafar v. The State and others" (2018 SCMR 326).

13. The prosecution evidence against the appellants regarding recoveries of 'Churri' and 'Rora' (piece of brick) from Nasir Abbas appellant and 'Rora' (piece of brick) from Mst. Gul Fishan appellant is also highly contradictory and unreliable. As per statement of Khalid Hayat SI (PW-11), the blood stained 'Rora' (piece of brick) was

recovered on the pointation of Mst. Gul Fishan appellant on 13.05.2017, whereas 'Churri' and 'Rora' (piece of brick) were recovered on the pointation of Nasir Abbas appellant on 21.05.2017 but as mentioned earlier, according to the statement of Zeeshan (PW-9), "Churri" and 'Rora' (piece of brick) were thrown away by the appellants at the spot on the day of occurrence i.e., on 07.05.2017 and the same were taken into possession by the police from the spot on the said day. Relevant part of the statement of Zeeshan (PW-9), in this respect has already been reproduced in paragraph No.12, above. Under the circumstances, the prosecution evidence qua recovery of "Churri" and 'Rora' (piece of brick) from Nasir Abbas appellant and 'Rora' (piece of brick) from Mst. Gul Fishan appellant is not worthy of reliance.

14. According to the prosecution case, the motive behind the occurrence was that about 11/2 months prior to the occurrence Mst. Gul Fishan and Nasir Abbas appellants had established illicit relations with each other due to which a dispute arose between Shehar-Yar (deceased) and Mst. Gul Fishan appellant and because of the said grudge, the appellants committed the murder of Shehar-Yar (deceased). Admittedly Mst. Gul Fishan appellant was living with Shehar-Yar (deceased) till the date of occurrence. Muhammad Riaz complainant (PW-8) and Zeeshan (PW-9), did not mention the date, time and place of the quarrel, which allegedly took place between Shehar-Yar (deceased) and Mst. Gul Fishan appellant on account of the abovementioned reason. Muhammad Riaz complainant (PW-8), has conceded during his cross-examination that no litigation was pending between Shehar-Yar (deceased) and Mst. Gul Fishan appellant in any Court prior to the occurrence. Relevant part of his statement in this respect reads as under:-

> "No dispute prior to this occurrence was pending in any Court between Gul Fishan accused and Shehar Yar deceased"

As mentioned earlier, the complainant party was unhappy on account of love marriage of Shehar-Yar (deceased) with Mst. Gul Fishan appellant, therefore, Shehar-Yar (deceased) along with Mst. Gul Fishan appellant was living in the house of his mother-in-law in city Bhalwal, whereas the prosecution witnesses were residents of Sargodha City which is a different city and as such there was no chance for the prosecution witnesses to see the appellants in any objectionable condition so that it may be presumed that there was any illicit relationship between them. None from the prosecution witnesses stated that he had seen the appellants in any objectionable

condition. I am, therefore, of the view that the motive as alleged by the prosecution could not be proved in this case.

15. Insofar as the medical evidence of the prosecution is concerned, it is by now well settled that medical evidence is a type of supporting evidence, which may confirm the prosecution version with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53), 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410).

16. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution evidence is full of doubts. It is by now well settled that if there is a single circumstance which creates reasonable doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> "5. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The apex Court of the country while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:--

> "13…. ….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the

guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case reported as "Muhammad Mansha v. The State" (2018 SCMR 772).

17. In the light of above discussion, I accept Criminal Appeal No.257189-J of 2018 filed by Nasir Abbas and Mst. Gul Fishan (appellants), set aside their convictions and sentences recorded by the learned Additional Sessions Judge, Bhalwal, District Sargodha vide impugned judgment dated 02.10.2018 and acquit them of the charge under sections 302(b)/ 34, P.P.C. by extending them the benefit of doubt. Nasir Abbas and Mst. Gul Fishan (appellants) are in custody, they be released forthwith, if not required in any other case.

JK/N-7/L **Appeal allowed.**

2021 Y L R 2282

[Lahore]

Before Malik Shahzad Ahmad Khan and Mirza Viqas Rauf, JJ

MAZHAR ABBAS---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 238458 of 2018, decided on 11th March, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S.9(c)---Control of Narcotic Substances (Government Analysts) Rules, 2001, R.6---Possession of narcotics---Report of test or analysis---Appreciation of evidence---Benefit of doubt---Non-mentioning of full protocols---Effect---Accused was alleged to have been found in possession of 1050 grams of charas---Report of Forensic Laboratory did not give the details of the full protocols and the test applied at the time of analysis of sample of narcotic---Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, had made it imperative on the analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report---Single circumstance creating reasonable doubt was sufficient to cast doubt about the veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right---Appeal against conviction was allowed, in circumstances.

The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039 and Khair-ul-Bashar v. The State 2019 SCMR 930 rel.

Tariq Parvez v. The State 1995 SCMR 1345; Akhtar Ali and others v. The State 2008 SCMR 6 and Muhammad Zaman v. The State and others 2014 SCMR 749 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Scope---Control of Narcotic Substances Act, 1997, provides stringent punishments, therefore, the proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused.

Muhammad Hashim v. The State PLD 2004 SC 856 ref.

(c) Criminal trial---

----Harder the sentence, stricter the standard of proof.

Ameer Zeb v. The State PLD 2012 SC 380 ref.

(d) Control of Narcotic Substances Act (XXV of 1997)---

----S. 36--- Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 6---Report of Government Analyst---Report of test or analysis---Scope---Any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary presumption attached to a report of the Government Analyst under S.36(2) of Control of Narcotic Substances Act, 1997.

Nasir Mehboob Tiwana for Appellant.

Muhammd Arshad Ali Farooqi, Deputy Prosecutor General for the State.

Date of hearing: 11th March, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal is directed against judgment dated 13.09.2018, passed by the learned Additional Sessions Judge/Judge Special Court CNS, Shahpur, District Sargodha, whereby, in case FIR No.65/2015 dated 14.03.2015, registered at Police Station Shahpur Sadar, District Sargodha, under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Mazhar Abbas appellant and sentenced him as under:

> Under section 9(c) of Control of Narcotic Substances Act, 1997 to four years and six months R.I. with fine of Rs. 20,000 and in default of payment thereof the appellant was directed to further undergo SI for five months. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Briefly, the accusation levelled in the FIR against the appellant is that on 14.03.2015, Muhammad Yar S.I. (complainant/PW-4), along with other police officials was present at Bangla Hussain Shah in connection with patrolling. On the basis of spy information, a raid was conducted at Garden of Bahadar Hargan, wherefrom Mazhar Abbas (appellant) was apprehended by the police party. On checking, Charas weighing 1050 grams was recovered from the shopping bag, which the appellant was holding in his right hand. A separate sample parcel of Charas weighing 10-grams, for Chemical Analysis, was prepared. The appellant was interrogated and challaned to face the trial. The charge was framed against the

appellant on 16.05.2015, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced five witnesses to prove its case. The learned Additional Sessions Judge/Judge Special Court CNS, Shahpur, District Sargodha, after recording the statement of the appellant under section 342, Cr.P.C. and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PE); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well-settled that since the provisions of The Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of "Muhammad Hashim v. The State" PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of "Ameer Zeb v. The State" (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the abovementioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of' sample of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:-

> Item No. Description of Evidence
>
> 1. One scaled parcel containing approximately 10 grams of suspected Charas.

Tests Performed on Received Item(s) of Evidence

> 1. Analytical Balance was used for weighing.
>
> 2. Chemical Spot Tests were used for Presumptive Testing.
>
> 3. Gas Chromatograph - Mass Spectrometry was used for confirmation.

Results and Conclusion:-

> Item # 01 09.84 grams of dark brown resinous material in sealed parcel contain Charas.
>
> Undisputedly, it is settled by now that any report failing, to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under section 36(2) of the Act ibid. In the report Ex.PE, it is simply mentioned that certain tests were conducted and contraband material recovered in this case was found to be Charas instead of mentioning the details of tests applied on the samples and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

8. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of "The State through Regional Director ANF v. Imam Bakhsh and others" (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:-

> 16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e., control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report

that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already, emphasized the importance of protocols in Ikramullah's case (supra),'.

The above said view has been further fortified in the recent case law titled as "Khair-ul-Bashar v. The State" (2019 SCMR 930). We have also requisitioned the attested copy of FIR in case of "Khair-u1-Bashar" supra i.e., FIR No.18, dated 15.01.2016, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of "Khair-ul-Bashar" supra is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of "Khair-ul-Bashar" supra has not been relied upon by the august Supreme Court of Pakistan, therefore, the identical report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

9. Learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the abovementioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but we have noted that the august Supreme Court of Pakistan in the case of "Khair-ul- Bashar" supra, acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/ full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore. Even otherwise, it is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about the veracity of prosecution case and the benefit of said doubt has to

be extended in favour of the accused not as a matter of grace or concession but as a matter or right. Reliance in this regard is placed upon the cases of "Tariq Parvez v. The State 1995 SCMR 1345, Akhtar Ali and others v. The State" (2008 SCMR 6) and "Muhammad Zaman v. The State and others" (2014 SCMR 749).

10. In the light of above discussion, the instant appeal (Cr. Appeal No.238458 of 2018), is allowed, impugned judgment dated 13.09.2018, passed by the learned Additional Sessions Judge/Judge Special Court CNS, Shahpur, District Sargodha is hereby set aside and Mazhar Abbas (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

SA/M-71/L **Appeal allowed.**

2021 Y L R 2349

[Lahore]

Before Malik Shahzad Ahmad Khan and Muhammad Tariq Abbasi, JJ

QALANDAR SHAH---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 1161 of 2019, heard on 13th January, 2021.

Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Preparation of consolidated sample---Effect---Accused was alleged to have been found in possession of 1160 grams of charas---Recovered contraband consisted of pieces, however, a consolidated sample parcel was prepared and no separate sample parcel of each piece was prepared---Prosecution could not bring on record the exact weight of each piece, therefore, consolidated sample parcel of charas weighing 66.25 grams, which was sent to the Forensic Laboratory, could not be considered as a representative sample of the whole contraband material so recovered---Prosecution could not prove its case beyond shadow of doubt against the accused to the extent of recovery of 1160 grams of charas, however, the prosecution had proved its case against the accused beyond the shadow of doubt to the extent of recovery of 66.25 grams of charas, which was sent to the office of Chemical Examiner for analysis---Safe transmission of the sample parcel to the office of Forensic Laboratory was also proved by the prosecution---Conviction of the accused was converted from Ss.9(a) 9(b) & 9(c) of Control of Narcotic Substances Act, 1997---Appeal against conviction with the modification in sentence was dismissed, in circumstances.

Ameer Zeb v. The State PLD 2012 SC 380 and Ghulam Murtaza and another v. The State PLD 2009 Lah. 362 ref.

Ch. Nazir Hussain and Muhammad Ashraf Sagoo for Appellant.

Irfan Zia, Deputy Prosecutor General for the State.

Date of hearing: 13th January, 2021.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal is directed against judgment dated 17.10.2018, passed by the learned Sessions Judge, Bhakkar, whereby, in case FIR No.130/2018 dated 29.06.2018, registered at Police Station City Darya Khan, District Bhakkar, under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted the appellant and sentenced him as under:-

> Under section 9(c) of Control of Narcotic Substances Act, 1997 to our years and six months RI with fine of Rs.20,000/- and in default of payment thereof the appellant was directed to further undergo S.I for 05 months. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Learned counsel for the appellant does not press this appeal on merits however, he seeks reduction in the sentence of the appellant in the light of the judgment of the Hon'ble Supreme Court of Pakistan in the case reported as 'Amer Zeb v. The State' (PLD 2012 Supreme Court 380).

3. On the other hand, this appeal has been opposed by learned Deputy Prosecutor General on the ground that the prosecution has proved its case against the appellant beyond the shadow of doubt therefore, he was rightly convicted and sentenced by the learned trial Court.

4. Arguments heard. Record perused.

5. Briefly, the accusation levelled in the FIR against the appellant is that on 29.06.2018, Ghulam Shabbir, S.I. (complainant/PW-3) along with other police officials, was present at Chungi No.5, Punjgirain Road, Darya Khan. On the basis of spy information, a raid was conducted at the corner of Qabristan situated near Dahantal Shah, wherefrom Qalandar Shah (appellant), was apprehended by the police. On search of the shopper, which the appellant was holding in his hand, Charas weighing 1160-grams was recovered. A separate sample parcel of Charas weighing 58-grams, for Chemical Analysis, was prepared.

6. As learned counsel for the appellant does not press this appeal on merits and he has only prayed for reduction in the sentence of the appellant in the light of the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of 'Ameer Zeb v. The State' (PLD 2012 Supreme Court 380), therefore, we have straightaway noted that although the prosecution witnesses stated that the recovered contraband material was consisted of one piece but during cross-examination of Ghulam Shabbir, S.I. (complainant/PW-3), the parcel of recovered contraband material was de-sealed in the Court and it was noted as under:-

> "At this stage, learned defence counsel requested that he wants to de-seal the parcel. The request is genuine. Allowed accordingly. The case property is available before the Court. The complainant of the case identified the same as sealed at the place of recovery. The parcel is de-sealed and smell of Charas is oozing. The Charas consists of one big piece in rectangular shape and others are small pieces i.e. 03 pieces are in size 04 inches in length with the width of 1/2 inch while other 6/7 small pieces of the same width"

It is, therefore, evident that the recovered contraband material was consisting of pieces, however, a consolidated sample parcel was prepared and no separate sample parcel of each piece was prepared. It has not been brought on the record that what was the exact weight of each piece, therefore, consolidated sample parcel of Charas weighing 66.25-grams, which was sent to the office of Punjab Forensic Science Agency, Lahore, cannot be considered as a representative sample of the whole contraband material recovered in this case. Reliance in this respect is placed on the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of 'Ameer Zeb v. The State' (PLD 2012 Supreme Court 380). We are therefore, of the view that the prosecution could not prove its case beyond the shadow of doubt against the appellant to the extent of recovery of 1160-grams of Charas, however, the prosecution has proved its case against the appellant beyond the shadow of any doubt to the extent of recovery of 66.25-grams of Charas, which was sent to the office of PFSA/Chemical Examiner for analysis through the evidence of recovery witnesses Ghulam Shabbir SI (PW-3) and Muhammad Bilal 54/C (PW-4) coupled with the positive report of Punjab Forensic Science Agency, Lahore (Ex.PD). The safe transmission of the sample

parcel to the office of Punjab Forensic Science Agency, Lahore is also proved by the prosecution through Qayyum Nawaz 716/MHC (PW-2), Ghulam Shabbir, S.I. (PW-3) and Qaisar Abbas, S.I. (PW-5). Consequently conviction of the appellant is converted from section 9(c) to section 9(a) of CNSA, 1997 and keeping in view the sentencing policy settled by this Court in the case of 'Ghulam Murtaza and another v. The State' (PLD 2009 Lahore 362), the appellant is convicted for the recovery of 66.25-grams of Charas and is sentenced to rigorous imprisonment for one year R.I. with fine of Rs.7000/- and in default thereof, to further undergo simple imprisonment for three months. Benefit of Section 382-B of Cr.P.C. is extended to the appellant.

7. With the abovementioned modification in the conviction and sentence of the appellant, the instant appeal is hereby dismissed. As per report, furnished by the Superintendent, District Jail, Bhakkar dated 16.11.2019, Qalandar Shah appellant has already served out one year, ten months and twenty eight days of his imprisonment, therefore, if the appellant is not required in any other case, then he be released forthwith.

SA/Q-3/L **Sentence reduced.**

PLJ 2021 Lahore (Note) 122

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

HAKIM ALI--Petitioner

versus

Mst. **KAUSAR, and 2 others--Respondents**

W.P. No. 9350 of 2011, decided on 23.12.2011.

Constitution of Pakistan, 1973--

----Art. 199--West Pakistan Family Courts, Rules, 1965, R. 6 r/w S. 7(2) of West Pakistan Family Courts, Act, (of 1964)--Fixation of interim maintenance allowance--Jurisdiction--Maintainability--Challenge to--Under Rule 6 of West Pakistan Family Court Rules, 1965 read with Section 7(2) of West Pakistan Family Courts Act, 1964, a suit for recovery of maintenance allowance can be filed before a Family Court, where wife resides--As plaintiffs have claimed that they are living in Lahore, therefore, issue of jurisdiction has rightly been decided by Judge Family Court, Lahore--So far as quantum of interim maintenance allowance of minor at rate of Rs. 2500/- per-month is concerned, Judge Family Court has rightly fixed same while keeping in view status of parties--Petitioner has challenged interim order of Judge Family Court, Lahore, which is always subject to final decision of case--High Court cannot go into disputed questions of fact and cannot determine status of parties in its Constitutional jurisdiction, therefore, instant writ petition, which has been filed against an interim order, is not maintainable--Petition dismissed. [Para 5 & 6] A, B, C & D

PLD 2005 SC 22 *ref.*

Mr. Atif Mehmood Chaudhry, Advocate for Petitioner.

Mr. Muhammad Zaman Bhutta, Advocate for Respondents No. 1 and 2.

Date of hearing: 23.12.2011.

ORDER

This petition has been filed to challenge the order dated 16.03.2011, whereby, interim maintenance allowance at the rate of Rs. 2500/- per-month of minor/Respondent No. 2 has been fixed, as well as, against the order dated 18.04.2011, whereby, preliminary objection taken by the petitioner/defendant regarding jurisdiction of the Court was decided in favour of the Plaintiffs/Respondents No. 1 and 2, passed by the learned Judge Family Court, Lahore.

2. It is contended by the learned counsel for the petitioner/ defendant that the petitioner is resident of Sahiwal, therefore, under Rule 6 of the West Pakistan Family Courts Rules, 1965, the learned Judge Family Court, Lahore has no jurisdiction to entertain the suit filed by the Plaintiffs/Respondents No. 1 and 2; that it was admitted in the plaint by Plaintiff No. 1 that she was ousted from the house of the petitioner, therefore, her plaint has illegally been entertained by the above-mentioned Court at

Lahore; that the quantum of interim maintenance allowance of minor at the rate of Rs. 2500/- per-month is beyond the means of the petitioner; that the said interim maintenance allowance has been fixed without keeping in view the status of the parties, therefore, the above-mentioned impugned orders may be set-aside.

3. On the other hand, this petition has been opposed by the learned counsel appearing on behalf of Respondents No. 1 and 2 on the grounds that the plaintiffs have been living at Lahore, therefore, under Rule 6 of the West Pakistan Family Courts Rules, 1965, the learned Judge Family Court, Lahore, has the jurisdiction to entertain the suit of the plaintiffs; that a specific ground was taken by the plaintiffs/ Respondents No. 1 and 2 in Para 10 of their plaint that they were living at Lahore, and there is no specific denial by the petitioner in his written-statement to the above-mentioned fact; that the interim maintenance allowance was fixed by the Courts below while keeping in view the status of the parties, because the petitioner/defendant has himself admitted in his written-statement that there were gold, ornaments weighing 13 tolas and a sum of Rs. 1,00,000/- in his house, which were, allegedly taken away by plaintiff/Respondent No. 1 at the time of desertion; that the instant writ petition has been filed against an interim order, which is not maintainable, therefore, the same may be dismissed.

4. Arguments heard and record.

5. Under Rule 6 of the West Pakistan Family Court Rules, 1965 read with Section 7(2) of the West Pakistan Family Courts Act, 1964, a suit for recovery of maintenance allowance can be filed before a Family Court, where wife resides. As the plaintiffs have claimed that they are living in Lahore, therefore, the issue of jurisdiction has rightly been decided by the learned Judge Family Court, Lahore. Reference in this context may be made to the case of *Muhammad Iqbal through Special Attorney Faiz Sultan vs. Parveen Iqbal* (PLD 2005 Supreme Court 22).

So far as the quantum of interim maintenance allowance of minor at the rate of Rs. 2500/- per-month is concerned, the learned Judge Family Court has rightly fixed the same while keeping in view the status of the parties. The petitioner/defendant has mentioned in Para No. 3 of his written-statement that there were gold ornaments weighing 13 tolas and a sum of Rs. 1,00,000/- in his house, which were allegedly stolen by plaintiff/Respondent No. 1 at the time of desertion. So, keeping in view the present state of inflation and price hike, the above-mentioned interim maintenance allowance cannot be declared to be exorbitant or excessive.

6. The petitioner has challenged interim order of the learned Judge Family Court, Lahore, which is always subject to final decision of the case. This Court cannot go into disputed questions of fact and cannot determine the status of the parties in its Constitutional jurisdiction, therefore, instant writ petition, which has been filed against an interim order, is not maintainable and the same is, hereby, ***dismissed.***

(Y.A.) **Petition dismissed.**

PLJ 2021 Cr.C. (Lahore) 228 (DB)

Present: **MALIK SHAHZAD AHMAD KHAN AND CH. MUSHTAQ AHMAD, JJ.**

MUHAMMAD SHAHZAD *alias* BILLA--Appellant

versus

STATE and another--Respondents

Crl. A. No. 185329 of 2018, heard on 14.10.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c)--Conviction and sentence--Challenge to--Benefit of doubt--Recovery of charas--It is by now well settled that since provisions of Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and benefit of any doubt in prosecution case must be extended to accused--Harder sentence, stricter standard of proof--Seeking guidance from abovementioned judgments of august Supreme Court of Pakistan, we proceed to decide instant case--Although he stated that on 03.08.2015, one sealed parcel said to contain Charas weighing 1430-grams was handed over to him and he kept same in Mall-Khana of police station for safe custody but said prosecution witness did not mention name of person, who handed over to him parcel of contraband material--Safe custody of parcel of case property has not been proved in this case, which has created serious doubt in prosecution case--Undisputedly, it is settled by now that any report failing to describe in it, details of full protocols and tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet evidentiary presumption attached to a Report of Government Analyst under Section 36(2) of Act ibid--In report it is simply mentioned that certain tests were conducted and contraband material recovered in this case found to be Charas instead of mentioning details of tests applied on recovered material and their protocols as required by law--evidentiary value of above said report has been evaluated by us in light of Control of Narcotic Substances (Government Analysts) Rules, 2001--Rule 6 of said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in report issued for test/Analysis by Laboratory--Above said view has been further fortified in recent case law titled as *"Khair-ul-Bashar vs. State"* (2019 SCMR 930)--Court have also requisitioned attested copy of FIR in case of "Khair-ul-Basher" supra *i.e.*, FIR No. 18, dated 15.01.2016, offence under Section 9(c) of Control of Narcotic Substances Act, 1997, registered at police station Westridge, District Rawalpindi, as well as, attested copy of report of Punjab Forensic Science Agency,

Lahore, exhibited as in said case before concerned trial Court--report of Punjab Forensic Science Agency, Lahore, produced in evidence in case of "Khair-ul-Basher" supra is identical with report of Punjab Forensic Science Agency, Lahore, produced in evidence of present case before learned trial Court--As identical report in case of "Khair-ul-Basher" supra has not been relied upon by august Supreme Court of Pakistan, therefore, identical report of Punjab Forensic Science Agency produced in evidence of this case by prosecution is also not worthy of reliance--Although learned Deputy Prosecutor General has argued that appellant cannot be acquitted on abovementioned sole ground of non-mentioning of protocols/full details of test applied, in report of Punjab Forensic Science Agency, Lahore but as mentioned earlier, prosecution has also failed to prove safe custody of parcel of case property--Even otherwise, august Supreme Court of Pakistan in case of *"Khair-ul-Bashar" supra,* acquitted accused of said case on abovementioned sole ground of non-mentioning of protocols/full details of tests applied in report of Punjab Forensic Science Agency, Lahore. [Pp. 231, 232, 233 & 234] A, B, C, D & E

M/s. Naila Mushtaq Ahmed Dhoon, Advocate and *M. Mushtaq Ahmed Dhoon,* Advocate for Appellant.

Mr. Muhammad Waqas Anwar, Deputy Prosecutor General for State.

Date of hearing: 14.10.2020.

JUDGMENT

Malik Shahzad Ahmad Khan J.--This appeal is directed against judgment dated 26.02.2018, passed by the learned Additional Sessions Judge/Special Judge CNSA Court, Sialkot, whereby, in case F.I.R No. 671/2015 dated 03.08.2015, registered at Police Station Muradpur, District Sialkot, under Section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Muhammad Shahzad *alias* Billa appellant and sentenced him as under:

> ***Under Section 9(c) of Control of Narcotic Substances Act 1997--****to four years and six months R.I with fine of Rs. 20,000/- and in default of payment thereof the appellant was directed to further undergo S.I for five months. The benefit of Section 382-B, Cr.P.C. was also extended to the appellant.*

2. Briefly, the accusation levelled in the FIR against the appellant is that on 03.08.2015, Ghulam Murtaza ASI (complainant/PW-2), along with other police officials was present at Pulli Palkhu Naala, Head Marala Road, Sialkot. In the meanwhile, a person came from the side of Maachi Khokhar, who on seeing the police party tried to turn back but he was

overpowered by the police. The said person disclosed his name as Muhammad Shahzad *alias* Billa (appellant). On checking, 1430-grams Charas was recovered from the shopping bag, which the appellant was holding in his right hand. A parcel of whole the recovered Charas was prepared for Chemical Analysis. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 06.10.2015, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced seven witnesses to prove its case. The learned Additional Sessions Judge/Special Judge CNSA Court, Sialkot, after recording the statement of the appellant under Section 342 Cr.P.C and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment, the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that there are material contradictions in the statements of the prosecution witnesses, which have not been properly appreciated by the learned trial Court while passing the impugned judgment; that the safe custody of parcel of case property could not be established in this case; that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PE); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well settled that since the provisions of The Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of

"Muhammad Hashim vs. The State" (PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of *"Ameer Zeb vs. The State"* (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the abovementioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have noted that Mehmood Ahmad 785/MHC, appeared in the witness box as PW-1. Although he stated that on 03.08.2015, one sealed parcel said to contain Charas weighing 1430-grams was handed over to him and he kept the same in the Mall-Khana of police station for safe custody but the said prosecution witness did not mention the name of the person, who handed over to him the parcel of contraband material. Keeping in view the abovementioned facts, the safe custody of parcel of case property has not been proved in this case, which has created serious doubt in the prosecution case. Reliance in this respect is placed on the judgments passed by the August Supreme Court of Pakistan in the cases reported as *"Amjad Ali vs. The State"* (2012 SCMR 577) and *"Ikramullah and others vs. The State"* (2015 SCMR 1002).

8. We have further observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:

Item No. **Description of Evidence**

01. One sealed parcel containing approximately 1430-grams of suspected Charas.

Tests Performed on Received Item(s) of Evidence

1. Top Load Balance was used for weighing.
2. Chemical Spot Tests were used for Presumptive testing.
3. Gas Chromatograph-Mass spectrometry was used for confirmation.

Results and Conclusion:-

Items #01 1404 grams of blackish brown resinous material in sealed parcel contains **Charas**.

Undisputedly, it is settled by now that any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under Section 36(2) of the Act ibid. In the report Ex.PE, it is simply mentioned that certain tests were conducted and contraband material recovered in this case found to be Charas instead of mentioning the details of tests applied on the recovered material and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

9. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of *"The State through Resional Director ANF vs. Imam Bakhsh and others"* (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:

> *16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e., control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give details of the full protocols of the test applied will be irxonclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (supra)".*

The above said view has been further fortified in the recent case law titled as *"Khair-ul-Bashar vs. The State"* (2019 SCMR 930). We have also requisitioned the attested copy of FIR in case of "Khair-ul-Basher" supra *i.e.*, FIR No. 18, dated 15.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered

at police station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of "Khair-ul-Basher" supra is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of "Khair-ul-Basher" supra has not been relied upon by the august Supreme Court of Pakistan, therefore, the identical report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

10. Although learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the abovementioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but as mentioned earlier, the prosecution has also failed to prove the safe custody of parcel of case property. Even otherwise, the august Supreme Court of Pakistan in the case of *"Khair-ul-Bashar" supra,* acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore.

11. It is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about the veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right. Reliance in this regard is placed upon the cases of *"Tariq Pervez vs. The State"* (1995 SCMR 1345), *"Akhtar All and others vs. The State"* (2008 SCMR 06) and *"Muhammad Zaman vs. The State and others"* (2014 SCMR 749).

12. In the light of above discussion, the instant appeal **(Crl. Appeal No. 185329 of 2018)**, is allowed, impugned judgment dated 26.02.2018, passed by the learned Additional Sessions Judge/Special Judge CNSA Court, Sialkot is hereby set aside and Muhammad Shahzad *alias* Billa (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2021 Cr.C. (Lahore) 357

Present: **MALIK SHAHZAD AHMED KHAN, J.**

ZULFIQAR ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1729-B of 2021, decided on 28.1.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail after arrest, grant of--Allegation of--Dishonoured of cheque--Entire prosecution case is based on documentary, evidence (dishonoured cheque and bank slip), which is already in possession of prosecution and as such there is no chance of tampering with same, therefore, in such circumstances no useful purpose will be served by keeping petitioner behind bars--Concluded by Investigating Officer that there was no *lain-dain* between petitioner and complainant--Abovementioned police findings are against story narrated by complainant in FIR according to which an amount of Rs. 55,00,000/- was handed over by complainant to petitioner and same was still outstanding against him--Furthermore, punishment provided for offence under Section 489-F, PPC is imprisonment, which may extend to three years--Offence mentioned in FIR does not fall within ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--Petition was allowed. [P. 359] A & B

2009 SCMR 1488 & PLD 2017 SC 733 *ref.*

Raja Tasawar Iqbal, Advocate for Petitioner.

Ch. Muhammad Ishaq, Additional Prosecutor General for Respondent.

Nemo for Complainant.

Date of hearing: 28.1.2021.

ORDER

Through the instant petition, the petitioner seeks post-arrest bail in case FIR No. 347/2020 dated 29.07.2020, offence under Section 489-F, PPC registered at police station Sajid Shaheed, District Sargodha.

2. On the previous date of hearing Nusrat Ali complainant appeared before the Court and sought an adjournment in order to hire the services of a learned counsel in this case but today no one is present of his behalf, despite repeated calls. Even otherwise,

it is a State case and learned Additional Prosecutor General is ready to argue the same, therefore, I proceed to decide the instant petition after hearing arguments of learned counsel for the petitioner, as well as, learned Additional Prosecutor General and perusal of the record.

3. Arguments decided. Record perused.

4. As per brief allegations levelled in the FIR, cheque amounting to Rs. 55,00,000/-, issued by the petitioner to the complainant, was dishonoured on presentation by the concerned bank, hence the abovementioned FIR.

5. The entire prosecution case is based on documentary, evidence (dishonoured cheque and bank slip), which is already in possession of the prosecution and as such there is no chance of tampering with the same, therefore, in such circumstances no useful purpose will be served by keeping the petitioner behind the bars. Reference in this respect may be made to the case of *Saeed Ahmad v. The State* (1996 SCMR 1132). Moreover, as per police investigation recorded *vide* Zimnee No. 05, dated 28.08.2020, only an amount of Rs. 6,00,000/-, was obtained by the petitioner on loan from the brother of the complainant namely Muhammad Ashraf and in this respect a cheque was handed over by the petitioner to the abovementioned Muhammad Ashraf, who after writing Rs. 55,00,000/-, in the said cheque got the same dishonoured and lodged th instant FIR through his brother namely Nusrat Ali complainant. It is further concluded by the Investigating Officer that there was no *lain-dain* between the petitioner and Nusrat Ali complainant. The abovementioned police findings are against the story narrated by the complainant in the FIR according to which an amount of Rs. 55,00,000/- was handed over by the complainant to the petitioner and the same was still outstanding against him. Furthermore, the punishment provided for the offence under Section 489-F, PPC is imprisonment, which may extend to three years. The offence mentioned in the FIR does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. Thus, keeping in view the law laid down in the cases of *Zafar Iqbal v. Muhammad Anwar and others* (2009 SCMR 1488) & *"Muhammad Tanveer v. The State and another"* (PLD 2017 Supreme Court 733), ordaining that where a case falls within non-prohibitory clause, the concession of granting bail must favorably be considered and should only be declined in exceptional cases, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2021 Cr.C. (Lahore) 414

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Syed **NASIR ALI--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 11003-B of 2020, decided on 11.3.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337-F(v), 148 & 149--Pre-arrest bail, confirmed--Cross-version case--No possibility of fabrication of injury--Determination--Abscondance of accused--Entitlement for relief--Medical officer in relevant columns of medico legal reports of accused of cross-version case has categorically mentioned that there was no possibility of fabrication of any injury of injured--As it is a case of cross-versions therefore, it will be determined by trial Court after recording of evidence that as to who was aggressor and who was aggressed upon and as such, a case for grant of pre-arrest bail is made out accused remained absconder in this case, therefore, he is not entitled to extraordinary relief of pre-arrest bail but it is by now well settled that mere abscondance of an accused does not disentitle him from relief of bail if otherwise he is entitled to said concession on merits--Petition allowed. [P. 416] A & B

2010 SCMR 1219, 2015 SCMR 879, 1991 SCMR 322, 2009 SCMR 299 and PLD 2012 SC 222 *ref.*

Mr. Muhammad Ijrar Haider, Advocate with Petitioner.

Ms. Maida Sobial, Deputy Prosecutor General for State.

Mehar Muhammad Iqbal, Advocate for Complainant.

Date of hearing: 11.3.2020.

ORDER

The petitioner Syed Nasir Ali through the instant petition seeks pre-arrest bail in cross-version of case FIR No. 453 dated 29.06.2017 registered at P.S. City Depalpur District Okara cross-version offences under Sections 324/337-F(v)/148/149 of PPC.

2. Arguments heard. Record perused.

3. As per brief allegations leveled in the cross-version of the aforementioned FIR, on 28.06.2017 at 03:00 p.m, Tanveer Aslam (complainant of cross-version case) along with PWs was going to his house on car and when they reached near Shell Patrol Pump of Meer Amanullah at Kasur Road, Muhammad Asif co-accused stopped the car of the complainant and raised 'lalkara' to teach a lesson for getting stay order against them (accused party), upon which, Mohsin Tariq co-accused made a fire shot

with pistol 30 bore at Tanveer Aslam (complainant of cross-version) but luckily the complainant escaped. The second fire shot of aforementioned co-accused was missed. In the meanwhile Nasir Ali (petitioner) inflicted 'sota' blow which hit at the left wrist of the complainant. Sajid co-accused inflicted 'sota' blow which landed on the back side of right shoulder of the complainant due to which the complainant fell down. On the instigation of the petitioner, Nadeem co-accused inflicted 'sota' blow which landed at the middle of left arm of the complainant. Thereafter, all the accused persons inflicted 'sota' blows at different parts of the body of Tanveer Aslam hence, the instant cross-version.

4. It is a case of cross-versions. The occurrence in this case took place on 28.06.2017 at 03:00p.m. Four members of the accused party of cross-version, namely, Syed Nasir Ali (petitioner), Syed Aftab Ali, Mohsin Tariq and Muhammad Shahbaz were also injured during the occurrence and they were medically examined on the same day *i.e*. on 28.6.2017 at 04:15 p.m. As per medico legal report of Syed Nasir (petitioner), there were 09 injuries on his body, which were declared to be punishable under Sections 337-A(i) & 337-F(i) of PPC. According to medico legal reports of Syed Aftab, Shahbaz and Mohsin Tariq, there were 02, 06 & 05 injuries, respectively, on the bodies of abovementioned members of the accused party of cross-version case. Medical Officer in the relevant columns of the medico legal reports of the abovementioned accused of cross-version case (injured of the State case) has categorically mentioned that there was no possibility of fabrication of any injury of the aforementioned injured. As it is a case of cross-versions therefore, it will be determined by the learned trial Court after recording of evidence that as to who was the aggressor and who was aggressed upon and as such, a case for grant of pre-arrest bail is made out in favour of the petitioner, as observed by the Hon'ble Supreme Court of Pakistan in the cases of *'Hamza Ali Hamza and others vs. The State'* (2010 SCMR 1219) & *'Syed Darbar Ali Shah and others vs. The State'* (2015 SCMR 879). Although it has been argued by learned DPG for the State assisted by learned counsel for the complainant that the petitioner remained absconder in this case, therefore, he is not entitled to the extraordinary relief of pre-arrest bail but it is by now well settled that mere abscondance of an accused does not disentitle him from the relief of bail if otherwise he is entitled to the said concession on merits. Reference in this context may be made to the cases reported as *'The State vs. Malik Mukhtar Ahmad Awan'* (1991 SCMR 322), *'Mitho Pitafi vs. The State'* (2009 SCMR 299) and *'Qamar alias Mitho vs. The State and others'* (PLD 2012 Supreme Court 222).

5. In the light of above, this petition is allowed and interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing the fresh bail bonds in the sum of Rs. 200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(Y.A.) **Petition allowed.**

PLJ 2021 Cr.C. (Lahore) 744

Present: **MALIK SHAHZAD AHMED KHAN, J.**

UMAR--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 69483-B of 2020, decided on 11.3.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/365/147/149--Post-arrest bail, dismissal of--Accused engaged his counsel after seven months from framing of charge and he (petitioner) himself sought adjournments to engage his counsel--As petitioner sought adjournments on crucial dates, when prosecution witnesses appeared before Court, therefore, he is not entitled to relief of post arrest bail on ground of delay--Although petitioner has argued that if period of adjournments sought by petitioner is excluded from consideration, even then a period of more than two years has elapsed from date of arrest of petitioner but there is no substance for petitioner because petitioner is unable to cite a single judgment, where PWs repeatedly appeared before Court and adjournments were sought on said date by accused and even then bail was granted to said accused after excluding period of his detention--Bail was dismissed. [Pp. 746 & 747] A & B

PLJ 1998 SC 1214.

Mr. Azam Nazir Tarar, Advocate for Petitioner.

Ch. Muhammad Ishaq, Additional Prosecutor General for State.

Syed Afzal Shah Bukhari, Advocate for Complainant.

Date of hearing: 11.3.2021.

ORDER

Through the instant petition, Umar petitioner seeks post arrest bail in case FIR No. 1319/2018, dated 26.06.2018, offences under Sections 302/365/147/149, PPC, registered at police station Kahna, Lahore.

2. Learned counsel for the petitioner submits that he will not argue the instant bail petition on merits as the same may prejudice the case of either party and will advance his arguments only to the extent of ground taken by the petitioner regarding delay in conclusion of his trial.

3. Arguments heard. Record perused.

4. I have noted that the petitioner was arrested in this case on 30.08.2018 and report under Section 173, Cr.P.C. was submitted before the learned trial Court on 20.02.2019, whereas charge was framed against the petitioner on 22.03.2019. It is evident from the perusal of attested copy of order sheet of the learned trial Court that on 06.04.2019, the complainant along with his PWs was present but the case was adjourned on the request of the accused/petitioner as he wanted to hire the services of a learned counsel in this case. On 22.04.2019, although the complainant was directed to produce his private witnesses but even on the said date, a request was made by the accused/petitioner to adjourn the case in order to engage his defence counsel. On 04.05.2019, the complainant was present and he was directed to produce his private witnesses but even on the said date, the accused persons (including the petitioner) also made a request to adjourn the case as they wanted to engage their defence counsel, however, the learned trial Court clarified that if the accused persons (including the petitioner) would not engage their counsel till the next date, then defence counsel on state expenses will be provided. On 21.05.2019, the complainant along with PWs namely Shakeel, Muhammad Amjad, Muhammad Bashir, Naveed Ahmad and Muhammad Yasin was present and they were ready to record their evidence but the accused persons (including the petitioner), submitted that they have not engage their counsel and requested for an adjournment, however, the learned trial Court repeated direction that in case the accused persons (including the petitioner) do not engage their counsel till the next date, then the defence counsel at state expenses will be provided in this case. On 27.6.2019, the complainant along with PWs namely Shakeel, Muhammad Amjad, Muhammad Bashir and Naveed Ahmed was present before the Court but the case was adjourned due to the strike of lawyers (including the lawyer of the petitioner). On 10.08.2019, the complainant was directed to produce his witnesses but at the same time, the accused persons (including the petitioner) were directed to ensure the presence of their counsel on the next date. On 28.08.2019, the complainant along with PWs Naveed, Rasheed and Amjad was present before the Court and

they were ready to record their evidence but the accused persons (including the petitioner) made request for an adjournment, therefore, the case was adjourned and it was noted by the learned trial Court in order dated 28.08.2019, that till the date, the accused persons had not engage their counsel and number of opportunities had already been obtained by them to engage a counsel, whereas the prosecution witnesses are appearing before the Court regularly, therefore, absolute last and final opportunity was granted to the accused persons (including the petitioner) to engage their counsel till the next date of hearing, otherwise, defence counsel at state expenses shall be provided to the accused persons. On 4.9.2019, the complainant along with the PWs namely Shakeel, Muhammad Amjad, Muhammad Bashir and Naveed Ahmad was present and they were ready to record their evidence but due to non-availability of learned defence counsel, the case was adjourned and it was noted in the said order that the accused persons namely Muhammad Usman (co-accused), Muhammad Umar (petitioner) and Muhammad Talha (co-accused) had not engaged their counsel and they were directed to ensure the presence of their counsel on the next date. On 18.9.2019, examination- in-chief of two PWs was recorded, whereas examination-in-chief of the complainant was partially recorded and on raising legal objections by learned defence counsel, his remaining examination-in-chief was reserved, however, the learned trial Court in order dated 18.09.2019, observed that accused persons namely Muhammad Usman (co-accused), Muhammad Umar (petitioner) and Muhammad Talha (co- accused) had not engaged their counsel and they were directed to engage their counsel till the next date of hearing. On 04.01.2020, the complainant along with PWs namely Bashir and Naveed was present but the case was adjourned on the joint request of learned vice counsel for the parties. On 20.10.2020, the complainant along with PW Naveed was present but the case was adjourned due to strike of lawyers (including the lawyer of the petitioner). On 04.11.2020, the complainant along with Muhammad Bashir and Muhammad Amjad was present but the case was again adjourned due to strike of lawyers (including the lawyer of the petitioner). On 19.12.2020, the complainant along with PWs namely Muhammad Bashir, Muhammad Amjad and Naveed Ahmad was present but due to non-availability of learned defence counsel, the case was adjourned. It is, therefore, evident from the perusal of attested copy of order sheet of the learned trial Court that the petitioner engaged his counsel in this case on 17.10.2019 i.e., after seven months from the framing of charge and he (petitioner) himself sought adjournments from the

learned trial Court to engage his counsel. As the petitioner sought adjournments on the crucial dates, when the prosecution witnesses appeared before the Court, therefore, he is not entitled to the relief of post arrest bail on the ground of delay in conclusion of his trial as observed by the August Supreme Court of Pakistan in the case of *"Abdur Rashid vs. State"* (PLJ 1998 SC 1241). Although learned counsel for the petitioner has argued that if the period of adjournments sought by the petitioner is excluded from consideration, even then a period of more than two years has elapsed from the date of arrest of the petitioner but there is no substance in the abovementioned argument of learned counsel for the petitioner because learned counsel for the petitioner is unable to cite a single judgment, where the prosecution witnesses repeatedly appeared before the Court and adjournments were sought on the said date by the accused and even then the bail was granted to the said accused after excluding the period of his detention.

5. In the light of above discussion, there is no substance in the present petition, hence the same is hereby dismissed.

(A.A.K.) **Bail dismissed.**

PLJ 2021 Cr.C. (Lahore) 749

Present: **MALIK SHAHZAD AHMED KHAN, J.**

SUNNY ABBAS--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 4453-B of 2021, decided on 8.2.2021.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392/411--Bail after arrest, grant of--Third post arrest bail petition filed by petitioner before High Court--Earlier 1st post arrest bail of petitioner was dismissed due to non-prosecution whereas, 2nd post arrest bail of petitioner was dismissed as having not been pressed after arguing case--Instant 3rd post arrest bail petition has been filed by petitioner on fresh ground of delay in conclusion of trial--Case was adjourned before trial Court on account of leave of Presiding Officer, due to non-production of accused persons from jail due to situation created by COVID-19 or on account of non-appearance of complainant and prosecution witnesses before trail Court--Complainant has been served with notice of instant bail High and despite service, he did not bother to appear before High Court which shows his lack of interest in prosecution of present case--Petitioner cannot be kept behind bars for an indefinite period without any fault on his part--Petitioner has therefore, earned statutory right to be released on bail as envisaged under 3rd provision of Section 497 (1)(a) of Cr.P.C--Petitioner is involved in four other criminal cases but he has conceded on instructions that there is no record of previous conviction of petitioner in any other case--**Held:** Moreover, it is by now well settled that mere involvement of an accused in some other criminal cases is not sufficient to refuse him bail if otherwise he is entitled to said relief on merits--Petitioner is previously convicted offender for an offence punishable with death or imprisonment for life or he is hardened, desperate or dangerous criminal or he is accused of an act of terrorism punishable with death or

imprisonment for life--As petitioner has earned statutory right under aforementioned provision of law therefore, petition was allowed

[Pp. 751 & 752] A, B & C

1997 SCMR 412, 2012 SCMR 573 *ref.*

Mr. Azhar Abbas Thaheem, Advocate for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for State.

Nemo for Complainant.

Date of hearing: 8.2.2021

ORDER

The petitioner, namely, Sunny Abbas through the instant petition seeks post arrest bail in case FIR No. 2421 dated 27.11.2019 registered at P.S. South Cantt District Lahore offences under Sections 392/411 of PPC.

2. As per police report, the complainant has been served with the notice of this case but no one appeared on his behalf despite repeated calls. Even otherwise, it is a State case and learned Addl. Prosecutor General for the State is ready to argue the same therefore, I proceed to decide the instant petition after hearing the arguments of learned counsel for-the petitioner, learned Addl. Prosecutor General for the State and perusing the record.

3. Arguments heard. Record perused.

4. This is 3rd post arrest bail petition filed by the petitioner before this Court. Earlier 1st post arrest bail petition of the petitioner bearing, Crl. Misc. No. 31826-B of 2020 was dismissed due to non-prosecution *vide* order dated 15.07.2020, whereas, 2nd post arrest bail petition of the petitioner bearing Crl. Misc. No. 56707-B of 2020 was dismissed as having not been pressed after arguing the case at some length *vide* order dated 17.12.2020. The instant 3rd post arrest bail petition has been filed by the petitioner on the fresh ground of delay in conclusion of the trial. I have noted that as per police

record, the petitioner has been arrested in this case on 19.12.2019. Report under Section 173 of Cr.P.C was furnished before the learned trial Court on 04.03.2020 & charge was framed against the petitioner on 19.10.2020. Learned counsel for the petitioner has produced before the Court today an attested copy of the complete order sheet of the learned trial Court. Perusal of the attested copy of the order sheet of the learned trial Court shows that neither the complainant nor the prosecution witnesses appeared before the learned trial Court on a single date of hearing of this case despite issuance of bailable & non-bailable warrants of arrest against them. Case was adjourned before the learned trial Court on account of leave of the learned Presiding Officer, due to non-production of the accused persons from jail due to the situation created by COVID-19 or on account of non-appearance of the complainant and the prosecution witnesses before the learned trial Court. It is also noteworthy that the complainant has been served with the notice of the instant bail petition and despite the service, he did not bother to appear before this Court which shows his lack of interest in the prosecution of the present case. The petitioner cannot be kept behind the bars for an indefinite period without any fault on his part. The petitioner has therefore, earned statutory right to be released on bail as envisaged under the 3rd provision of Section 497(1)(a) of Cr.P.C. Although learned Addl. Prosecutor General has argued that the petitioner is involved in four other criminal cases but he has conceded on instructions that there is no record of previous conviction of the petitioner in any other case. Moreover, it is by now well settled that mere involvement of an accused in some other criminal cases is not sufficient to refuse him bail if otherwise he is entitled to the said relief on merits. Reliance in this respect may be placed on the cases reported as *'Muhammad Rafique vs. The State'* (1997 SCMR 412) &*'Jamal-ud-Din alias Zubair Khan vs. The State'* (2012 SCMR 573). There is nothing on the record to show that the petitioner is previously convicted offender for an offence punishable with death or imprisonment for life or he is hardened, desperate or dangerous criminal or he is accused of an act of terrorism punishable with death or imprisonment for life. As the petitioner has earned statutory right under the aforementioned provision of law therefore, this petition is **allowed** and the petitioner is admitted to bail after arrest subject to his furnishing the bail bonds in

the sum of Rs. 200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2021 Lahore 464

Present: MALIK SHAHZAD AHMAD KHAN, J.

MUHAMMAD IDREES--Petitioner

versus

EX-OFFICIO JUSTICE OF PEACE, GUJRANWALA etc.--Respondents

W.P. No. 16823 of 2017, heard on 16.11.2017.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A & 22-B--Application for registration of case--Accepted--Purchase of wheat and rice--Submission of report by SHO--Receiving of amount by respondent--Non-disclosing of fact in petition for registration of case by respondent--Rendation of accounts--Challenge to--Respondent No. 3 is present in this Court alongwith his counsel--He has admitted before Court that he has already received an amount of Rs. 2,61,000/- from petitioner--His said admission is in conflict with story narrated by him in his petition under Section 22-A/B, Cr.P.C. because in said petition he did not disclose that he has already received amount from petitioner--It is a case if rendition of accounts or above mentioned respondent can file a suit for recovery of outstanding amount against above mentioned cheque which is a proper remedy for above mentioned respondent--Petition allowed. [P. 466] A

Mr. Zabi Ullah Nagra, Advocate for Petitioner.

Ch. Iftikhar Iqbal Ahmad, AAG for State.

Mr. Shahid Iqbal Qureshi, Advocate for Respondent No. 3.

Date of hearing. 16.11.2017.

JUDGMENT

This petition has been filed against the order dated 18.4.2017 passed by learned *ex-officio* Justice of Peace, Gujranwala, whereby, petition under Section 22-A/B, Cr.P.C. filed by Muhammad Afzal (Respondent No. 3) was allowed with the direction to the concerned SHO to record the statement of Respondent No. 3 under Section 154, Cr.P.C. and proceed in the matter in accordance with the law.

2. As per brief facts of the 0resent case, Muhammad Afzal (Respondent No. 3) filed a petition under Section 22-A/B, Cr.P.C. with the allegation that he sold rice and wheat to the petitioner of the value of Rs. 6,15,000/- and for payment of the said amount the petitioner handed over a cheque to him which was dishonored on its presentation by the concerned bank, therefore, an order for registration of FIR may be passed against the petitioner. The said petition filed by respondent No. 3 has been accepted *vide* the above mentioned impugned order passed by the learned *ex-officio* Justice of Peace, Gujranwala; hence the present petition before this Court.

3. It is contended by learned counsel for the petitioner that Respondent No. 3 alongwith his learned counsel appeared before the learned *ex-officio* Justice of Peace, Gujranwala and admitted that he has received an amount of Rs. 2,61,000/- from the petitioner and in the light of said admission it was a case of rendition of accounts and no offence under Section 489-F, PPC is made out in this case; that even the local police has reported in its report before the learned *ex-officio* Justice of Peace, Gujranwala that Respondent No. 3 has already received an amount of Rs. 2,61,000/- from the petitioner and only an amount of Rs. 3,54,000/- was outstanding against the petitioner and as such it is a case of civil nature regarding rendition of accounts, therefore, the impugned order is not sustainable in the eye of law.

4. On the other hand this petition has been opposed by learned counsel for Respondent No. 3 on the grounds that the cheque issued by the petitioner of the value of Rs. 6,51,000/- was dishonored on its presentation by the concerned bank, therefore, ingredients of offence under Section 489-F, PPC were fully attracted in this case and as such the impugned order was rightly passed against the petitioner by the

learned *ex-officio* Justice of Peace, Gujranwala; that the petitioner has raised disputed questions of facts in this petition which cannot be resolved in constitutional jurisdiction; that the signatures on the disputed cheque have been admitted by the petitioner; that there is no substance in this petition, therefore, the same may be dismissed.

5. Arguments heard and record perused.

6. It is claim of Respondent No. 3 that the petitioner purchased rice and wheat from him of the value of Rs. 6,15,000/- and for the payment of said sale consideration the petitioner handed over the cheque in question of the above mentioned value to him which was dishonored on its presentation by the concerned bank. On the other hand, it is claim of the petitioner that Respondent No. 3 has already received the disputed amount from him and he has *mala fidely* moved application under Section 22-A/B, Cr.P.C. for registration of case against him and got the impugned order issued. I have noted that the SHO of police station Qila Dedar Singh, District Gujranwala in its report submitted before the learned *ex-officio* Justice of Peace, Gujranwala has reported that Muhammad Afzal (Respondent No. 3) has admitted that he has already received an amount of Rs. 2,61,000/- from the petitioner against the above mentioned cheque and only an amount of Rs. 3,54,000/- is outstanding against the petitioner. Muhammad Afzal (Respondent No. 3) is present in this Court alongwith his learned counsel. He has admitted before the Court that he has already received an amount of Rs. 2,61,000/- from the petitioner. His said admission is in conflict with the story narrated by him in his petition under Section 22-A/B, Cr.P.C. because in the said petition he did not disclose that he has already received the above mentioned amount from the petitioner. In the light of above, it is a case of rendition of accounts or the above mentioned respondent can file a suit under Order XXXVII, C.P.C, for the recovery of outstanding amount against the above mentioned cheque which is a proper remedy for the above mentioned respondent. Under the circumstances, the learned *ex-officio* Justice of Peace, Gujranwala was not obliged to pass the impugned order against the petitioner. Resultantly, this petition is ***allowed*** and the impugned

order dated 18.04.2017 passed by the learned *ex-officio* Justice of Peace, Gujranwala is hereby ***set aside.***

(Y.A.) Petition allowed.

PLJ 2021 Lahore 821

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

SHAUKAT ALI--Petitioner

versus

STATE etc.--Respondents

W.P. No. 17081-Q of 2019, heard on 19.6.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 561-A--Pakistan Penal Code, (XLV of 1860), S. 406--'investment' and 'entrustment'--Quashment of FIR--Criminal breach of trust--Joint business partnership--After five days of execution of partnership deed between parties, petitioner closed his abovementioned hotel and shifted to some other place--Petitioner promised with complainant that he will keep remaining amount of complainant as a 'trust' with him and same shall be returned to complainant--The word 'trust' in FIR would not attract provisions of Section 406, PPC--There is a difference between 'investment' and 'entrustment' as envisaged u/S. 405, PPC--No person can be prosecuted and convicted on basis of vague and unspecific allegations--There was a joint business of Hotel of parties and there is a business dispute between them which is purely of civil nature--Petition is allowed and impugned is quashed.

[Pp. 822, 823, 824 & 825] A, B, C, D & E

2000 SCMR 122; 2006 PCr.L.J 1900; 1987 SCMR 795; 2014 P.Cr.L.J 487; 2014 P.Cr.L.J 1305; 2009 Cr.L.J 290; 2009 Cr.L.J 630 *ref.*

Mian Shahid Amin, Advocate for Petitioner.

Mr. Nisar Ahmad Virk, Deputy Prosecutor General for State.

Mr. Ajmal Mehmood, Advocate for Complainant.

Date of hearing: 19.6.2019.

JUDGMENT

Shaukat Ali, petitioner, seeks quashment of FIR No. 1674 dated 25.09.2018 offence under Section 406, PPC registered at Police Station Green Town, Lahore.

2. Arguments heard. Record perused.

3. As per contents of the FIR, Muhammad Ishtiaq Khan (complainant) alleged that he started a joint business of hotel with Shaukat Ali (petitioner) with the name and style of Masooma Grill Station Hotel. The complainant invested an amount of Rs.

500,000/-in the said business through written partnership deed dated 28.09.2017. It was agreed between the parties in the abovementioned partnership deed that after deduction of expenses, profit shall be distributed equally between the parties. However, Shaukat Ali, petitioner did not pay any amount of profit to the complainant. After five days of the execution of the partnership deed between the parties, the petitioner closed his abovementioned hotel and shifted to some other place. Later on, the complainant contacted the petitioner at his house, who, paid an amount of Rs. 200,000/-to the complainant and promised to pay the remaining amount within a period of one month but despite the lapse of six months, the petitioner did not pay the remaining amount to the complainant. The petitioner promised with the complainant that he (petitioner) will keep the remaining amount of the complainant as a 'trust' with him and the complainant may take back the said amount from the petitioner as and when desired by him. Later on, the complainant contacted the petitioner for return of his remaining amount on 27.07.2018 but the petitioner and his co-accused extended threats of life to the complainant. Shakir, co-accused also took out pistol and threatened the complainant that if he will make any demand of money, then, he shall be murdered, hence, the abovementioned FIR.

4. It is evident from the contents of the FIR that the complainant invested an amount of Rs. 500,000/-in the joint business of hotel with the petitioner and in this respect a written partnership deed was also executed between the parties on 28.09.2017. Later on, the hotel of the parties was closed and the petitioner returned an amount of Rs. 200,000/-to the complainant, however, he did not pay the profit of joint business or returned the remaining principal amount to the complainant. It is, therefore, evident that in-fact, it was a case of civil nature regarding recovery of money or rendition of accounts but the complainant has lodged the impugned FIR by merely mentioning a single sentence therein that the petitioner promised with the complainant that he will keep the remaining amount of the complainant as a **'trust'** with him and the same shall be returned to the complainant as and when desired by him. I have noted that a written partnership deed was executed between the parties on 28.09.2017, which is available on the record. There is nowhere mentioned in the said partnership deed that the amount invested by the complainant shall remain as a **'trust'** with the petitioner rather perusal of the contents of the said partnership deed reveals that the abovementioned amount of Rs. 500,000/-was invested by the complainant in a joint business of hotel with the petitioner. In the case of *"Miraj Khan vs. Gul Ahmad and 03 others"* (2000 SCMR 122), the Hon'ble Supreme Court of Pakistan has held that merely mentioning the word **'trust'** in the FIR would not attract the provisions of Section 406 PPC when otherwise, ingredients of the said offence are not made out, from the contents of the FIR.

Resultantly, FIR in the said case was quashed by the Apex Court. It is by now well settled that there is a difference between the **'investment'** and **'entrustment'** as envisaged under Section 405, PPC punishable under Section 406, PPC. This Court in the case of *"Shaukat Ali Sagar vs. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others"* (2006 PCr.L.J 1900), in a similar situation, quashed the FIR registered under Sections 405, 406, 506, PPC. Paragraph No. 2 at Page No. 1901 of the said judgment is reproduced hereunder for ready reference:

> "I have heard the learned counsel for the parties and have gone through the record of this case with their assistance and have straightaway found that the facts alleged in the impugned F.I.R. do not constitute the offences invoked therein. According to the F.I.R. some amount of money was given by the complainant to the petitioner for the purposes of doing business therewith and for giving profit to the complainant therefrom. An offence of criminal breach of trust defined by Section 405, P.P.C. is constituted and the same is punishable under Section 406, P.P.C. if some property is given on trust and the same property is to be returned. In the case in hand it was not the complainant's case that the same currency notes which had been given by him to the petitioner were to be kept by the petitioner by way of a trust and the same currency notes were to be returned to the complainant. It is a settled proposition by now that if some money is given to somebody for the purpose of investment in some business and an equivalent amount of money along with profits over the same are to be returned to the person giving the money in the first instance then such a business transaction does not attract the provisions of Section 405, P.P.C. read with Section 406, P.P.C. because in such a case the same property is not to be returned but what is to be returned is its equivalent property along with profits. In a case of this nature the matter is not of entrustment of property but is simply one of investment of property".

Similarly, in the instant case, it is not claimed by the complainant that the currency notes which he had given to the petitioner, were to be kept by the petitioner by way of **'trust'** and the same currency notes were to be returned to the complainant and as such provisions of Section 405, PPC punishable under Section 406, PPC are not attracted in this case.

5. Although, the police has not leveled offence under Section 506, PPC in this case but the complainant has leveled the allegation that the petitioner and his co-accused extended threats of life to him. No specific time of the threats of life allegedly extended by the petitioner and his co-accused has been mentioned in the

FIR and a vague allegation by only mentioning the date in this respect has been leveled therein. A vague allegation has been leveled by the complainant against the petitioner and his co-accused in respect of the alleged threats of life extended by them. It is by now well settled that no person can be prosecuted and convicted on the basis of vague and unspecific allegations. Under the circumstances, in case of submission of challan in this regard the learned trial Court shall not be able to frame a specific charge in that respect against the petitioner and his co-accused. Reliance in this respect is again placed on the judgment reported as "*Shaukat Ali Sagar vs. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others "* (2006 PCr.L.J 1900).

6. The petitioner has also placed on the record attested copy of suit for rendition of accounts and permanent injunction which has been filed by him against the complainant on 13.10.2018. An attested copy of suit for recovery of Rs. 300,000/- filed by Muhammad Ishtiaq Khan (complainant) against Shaukat Ali (petitioner) and others has also been placed on the record. The said suit has been filed on 05.11.2018. Both the abovementioned suits are pending adjudication before the learned Civil Judge, Lahore. It is evident from the perusal of the impugned FIR that there was a joint business of Hotel of the parties and there is a business dispute between them which is purely of civil nature and as such the parties have rightly filed the abovementioned civil suits against each other for the decision of their disputes by the Civil Court. It appears that by lodging the impugned FIR, the complainant has tried to convert the civil/business dispute into criminal case in order to blackmail and pressurize the petitioner and his co-accused and to get concession(s) in the civil litigation. I am, therefore, of the view that the impugned FIR is liable to be quashed as observed in the abovementioned judgments, as well as, in the judgments reported as *"Muhammad Ali and another vs. Assistant Commissioner, Narowal and another"* (1987 SCMR 795), *"Zulfiqar Ali vs. Station House Officer, Police Station Model Town, Gujranwala and 2 others"* (2014 P.Cr.L.J 487), *"Umair Aslam vs. Station House Officer and 7 others"* (2014 P.Cr.L.J 1305), *"Zahid Jameel vs. SHO, etc."* (2009 Cr.L.J 290) and *"Zahid Jameel vs. SHO, etc."* (2009 Cr.L.J 630).

7. For what has been discussed above, this petition is allowed and impugned FIR No. 1674 dated 25.09.2018, registered at Police Station Green Town, Lahore under Section 406 PPC is hereby quashed. The investigating officer of the said case is directed to make an entry in this regard in the relevant register.

(K.Q.B.) **Petition allowed.**

PLJ 2021 Cr.C. 969

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMED KHAN, J.**

MUHAMMAD SHAFAT--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 52463-B of 2019, decided on 4.11.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324 & 34--Bail before arrest, grant of--Allegation of--Petitioner along with co-accused while armed with different fire-arms launched an attack upon complainant--Petitioner lodged cross version case on same day with allegation that fact complainant party of State case was aggressor and caused different injuries on his body--According to medico legal report of petitioner, there are as many as seven injuries on his body--Injuries of petitioners have been declared by concerned Medical Officer to be punishable under Sections 337-A(ii) 337-F(v)/337-F(vi)/337-L(ii), PPC because concerned Medical Officer noted factures of different bones of body of petitioner--In relevant column of medico legal report of petitioner, Medical officer categorically mentioned that there was no--possibility of fabrication of any injury of petitioner--Counsel for complainant has conceded on instructions that complainant party of State case has not challenged medico legal report of petitioner before District Standing Medical Board--Moreover, ASI, who is Investigating Officer of this case, as well as, cross version case submits that he has declared five accused persons of cross version case as guilty during investigation of case--As it is admittedly a case of case versions, therefore, it will be determined; by trial Court after-recording of evidence that as to who was aggressor and who was aggressed upon and as such, case for grant of pre-arrest bail is made out in favour of petitioner. [P. 970] A

2010 SCMR 1219 and 2015 SCMR 879.

Mr. Nasir Mahboob Tiwana, Advocate for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for State.

Malik Ahmad Nawaz Awan, Advocate for Complainant.

Date of hearing: 4.11.2019.

ORDER

Through the instant petition, Muhammad Shafat petitioners seeks pre-arrest bail in case FIR No. 448/2018, dated 12.11.2018, offences under Sections 324/34, PPC, registered at police station City Joharabad, District Khushab.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, the petitioner along with his co-accused while armed with different fire-arms launched an attack upon the complainant party. Muhammad Shafat petitioner has been assigned the role of making a fire shot of carbine 12. bore, which landed on the right hand, right thigh and above tastical region of Muhammad Asif Aziz (PW).

4. It is a case of cross versions. The occurrence in the State case took place on 12.11.2018 at 11.05 a.m. The petitioner lodged cross version case on the same day *i.e.*, on 12.11.2018, at 1.00 p.m (noon), with the allegation that in fact the complainant party of the State case was aggressor and caused different injuries on his body. Muhammad Shafat petitioner was also Medically examined on the day of occurrence *i.e.*, 12.11.2018 at 1.50 p.m (noon). According to the medico legal report of Muhammad Shafat petitioner, there are as many as seven injuries on his body. The injuries of the petitioners have been declared by the concerned Medical Officer to be punishable under Sections 337-A(ii) 337-F(v)/337-F(vi)/337-L(ii) PPC because the concerned Medical Officer noted factures of different bones of the body of the petitioner. In the relevant column of the medico legal report of Muhammad Shafat petitioner, the Medical officer categorically mentioned that there was no possibility of fabrication of any injury of Muhammad Shafat petitioner. Learned counsel for the complainant has conceded on instructions that the complainant party of the State case has not challenged the medico legal report of the petitioner before the District Standing Medical Board. Moreover, Bashir Ahmad ASI, who is Investigating Officer of this case, as well as, the cross version case submits that he has declared five accused persons of the cross version case as guilty during the investigation of the case. As it is admittedly a case of case versions, therefore, it will be determined by the learned trial Court after-recording of evidence that as to who was the aggressor and who was aggressed upon and as such, case for grant of pre-arrest bail is made out in favour of the petitioner. Reliance in this respect may be placed on the cases of *"Hamza Ali Hamza and others v. The State* (2010 SCMR 1219) and *"Syed Darbar Ali Shah and others vs. The State'* (2015 SCMR 879).

5. In the light of above discussion, the instant petition is ***allowed*** and ad-interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail confirmed.**

2020 M L D 155

[Lahore]

Before Malik Shahzad Ahmad Khan, J

DILAWAR---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 15682-B of 2019, decided on 22nd April, 2019.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 365-B, 376 & 375---Kidnapping, abducting or inducing woman to compel for marriage, rape---Bail, refusal of---Principle of consistency---Applicability---Scope---Allegation against accused was that he along with another abducted the daughter of complainant on gun point and both accused persons committed rape with her---Accused was named in the FIR with specific role---Allegation against accused was prima facie supported by the medical evidence, according to which the hymen of the alleged victim was old torn---Medical examination of alleged victim was conducted after 10 days of abduction---Forensic Science Agency had reported that no semen was detected on the swabs taken from the vaginal area of the victim and after going through the said report medical officer had opined that no fresh intercourse was taken place but the alleged victim was abducted on 21-11-2018 and she was released from the custody of the accused on 26-11-2018, whereas her medical examination was conducted on 01-12-2018, therefore, non-presence of semen on the swabs taken from the vagina of alleged victim was quite natural---Penetration was sufficient to constitute the offence of rape---Penetration was established from the medico-legal report of the alleged victim---Accused was found guilty during the course of investigation and accused was unable to establish any mala fide on the part of the prosecution for his false involvement in the case---Co-accused had been granted post arrest bail by High Court but no allegation of rape was levelled against him and as such the case of the accused was distinguishable from the case of the co-accused---Accused, in circumstances, could not claim the relief of bail on the principle of consistency---Petition of accused for grant of bail was dismissed.

Akhtar Hussain Bhatti for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for the State with Umar Darazi A.S.I.

Ch. Amin Rehmat for the Complainant.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Through the instant petition, the petitioner Dilawar seeks post arrest bail in case FIR No.893/2018, dated

28.11.2018, offences under sections 365-B/376, P.P.C., registered at police station Factory Area, District Faisalabad.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 21.11.2018, at about 6.00 p.m, the daughter of the complainant namely Mst. Zohara Bibi, was coming back towards her house but she was abducted at gun point by the petitioner and his co-accused, who took her to an unknown place, where the petitioner and Shahzaib co-accused committed rape with her turn by turn. On 26.11.2018, Mst. Saima Bibi co-accused took Mst. Zohara Bibi alleged victim to her house, where the alleged victim namely Mst. Zohara Bibi raised hue and cry, upon which the people of the Mohallah attracted towards the spot and rescued Mst. Zohara Bibi, hence the abovementioned FIR.

4. The petitioner is named in the FIR with the specific role that he along with his co-accused abducted Mst. Zohara Bibi and took her to an unknown placed, where he and Shahzaib co-accused committed rape with her turn by turn. The allegation levelled against the petitioner is prima facie supported by the medical evidence, according to which the hymen of the alleged victim was old torn. It is noteworthy that Mst. Zohara Bibi was abducted on 21.11.2018 and her medical examination was conducted on 01.12.2018. Although as per report of the Punjab Forensic Science Agency, Lahore, no semens were detected on the swabs taken from the vaginal area of the victim and after going through the said report, the Medical Officer has opined that no fresh intercourse has taken place in this case but it is noteworthy that Mst. Zohara Bibi was abducted on 21.11.2018 and she was released from the custody of the accused on 26.11.2018, whereas her medical examination was conducted on 01.12.2018, therefore, non-presence of semens on the swabs taken from her vaginal area was quite natural. Moreover, under section 375, P.P.C., only penetration is sufficient to constitute the offence of rape. The penetration in this case is established from the medico legal report of Mst. Zohara Bibi alleged victim, according to which her hymen was old torn. The petitioner has been found guilty during the course of investigation. The petitioner is unable to establish any mala fide on the part of the prosecution for his false involvement in this case. It is true that the co-accused of the petitioner namely Iftikhar alias Babloo has been granted post arrest bail by this Court vide order dated 07.02.2018, passed in Crl. Misc. No.1314-B of 2019 but no allegation of rape was levelled against the abovementioned co-accused and as such case of the petitioner is distinguishable from the case of the abovementioned co-accused, therefore, the petitioner cannot claim the relief of bail on the principle of consistency.

5. Keeping in view all the aforementioned facts, there is no substance in the present petition, hence the same is hereby dismissed.

SA/D-8/L **Bail declined.**

2020 P Cr. L J 1243

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD TARIQ---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 2023 of 2011, heard on 5th June, 2020.

(a) Penal Code (XLV of 1860)---

----Ss. 376, 365 & 511---Rape, kidnapping or abducting with intent to secretly and wrongfully confine person, attempt to commit offence---Appreciation of evidence---Benefit of doubt---Enmity with accused---Non-production of victim---Contradictory statements---Un-natural conduct of witnesses---Delay in producing clothes of victim to police---Effect---Prosecution case against accused was that he abducted the daughter of complainant when she reached near his house; took her to his house; tore her clothes with intention to commit rape but the mother of victim while passing through the street saw the victim being abducted; which attracted two persons and the accused fled away from the spot---Admittedly, complainant party had enmity with the accused---No medico legal examination of the victim was produced which could have shown marks of dragging or violence on her body---Victim, although deaf and dumb, was not produced in the witness box---Statements of eye-witnesses were contradictory---Accused, despite being empty handed, was not apprehended by the complainant party even though it consisted of three adult members---Torn 'qameez' of the victim was produced before the police after seventeen days of the occurrence---Admittedly, accused and his brother lived in the house where the occurrence took place and it was not probable that the accused would attempt to commit rape where his family and family of his brother was living---Prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction, was allowed, in circumstances.

(b) Criminal trial---

----Witness---Related witness---Scope---Statement of related eye-witness can be relied upon to decide a case but such statement is required to be corroborated by independent evidence and it should be confidence inspiring and trustworthy.

(c) Criminal trial---

----Benefit of doubt---Scope---Single circumstance creating reasonable doubt in the prosecution case is sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Barrister Danyal Ijaz Chadhar for Appellant with the Appellant in person.

Ch. Muhammad Ishaq, Additional Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 5th June, 2020.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of the aforementioned criminal appeal, filed by the appellant, Muhammad Tariq, against his conviction and sentence. The appellant was tried in case FIR No. 128 dated 21.07.2009 registered at Police Station Harnoli District Mianwali offences under sections 376/511/365 of P.P.C. by the learned Addl. Sessions Judge, Piplan and after conclusion of trial, vide judgment dated 28.11.2011, the learned trial Court has convicted and sentenced the appellant as under:-

> Under section 376 of P.P.C. to undergo rigorous imprisonment for seven years with fine of Rs. 30,000/-and in default of payment of fine, the appellant was directed to undergo SI for three months.

The benefit of section 382-B of Cr.P.C. was also extended to the appellant.

2. Brief facts of the case, as given by the complainant Muhammad Siddique (PW-2) in the FIR are that he was resident of Harnoli City and was working at a Petrol Pump situated in Chak No. 19-A/ML District Mianwali. On 21.07.2009 at 11:30 a.m., her daughter, namely, Zahida Bibi aged about 16 years, who was deaf and dumb, was returning home from the house of her uncle, namely, Muhammad Aslam and when she reached near the house of Muhammad Tariq (appellant), the appellant forcibly abducted her and took her to his haveli, where one unknown person was also present. At the time of abduction, mother of Zahida Bibi, namely,

Mst. Safia Bibi was coming in the street after taking medicine, who raised hue and cry upon which Muhammad Ismail (PW-4) and Shahid (given up PW) attracted to the spot. On seeing the PWs, the appellant along with unknown accused fled away from the spot. Accused also torn the clothes of the daughter of the complainant and they had the intention to commit rape with her after her abduction.

3. After completion of the investigation, the challan was submitted before the Court. The learned trial Court framed the charge under section 365-B of P.P.C. against the appellant on 17.12.2009, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eight witnesses during the trial. Medical evidence regarding the potency test of the appellant was produced through Dr. Sana Ullah Malik (PW-1). Muhammad Siddique (PW-2) was the complainant of the case, whereas, Mst. Safia Bibi (PW-3) and Muhammad Ismail (PW-4) were the prosecution eye-witnesses. Hamid Ullah S.I (PW-7) and Muhammad Ijaz Ali S.I (PW-8) were the Investigating Officers of this case, whereas, Muhammad Bashir 129-C (PW-5) and Muhammad Ajmal S.I (PW-6) were the formal witnesses. Muhammad Hafeez, Special Education Teacher, Government Deaf and Defective Hearing School, Mianwali was produced as (CW-1).

The prosecution has also produced documentary evidence in the shape of MLR of the appellant (Ex.PA), complaint (Ex.PB), recovery memo of `qameez' of the alleged victim (Ex.PC), non-bailable warrants of arrest of the appellant and report over it (Ex.PD) and (Ex.PD/1), proclamation against the appellant and report over it (Ex.PE) and (Ex.PE/1), rough site plan of the place of occurrence (Ex.PF), application for issuance of non-bailable warrant of arrest of the appellant (Ex.PG), application for issuance of proclamation against the appellant (Ex.PH), and closed the prosecution evidence.

5. The statement of appellant under section 342 of Cr.P.C., was recorded. The appellant refuted all the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you", the appellant, replied as under:-

> "The complainant is the real father of victim and PW Mst. Safia Bibi is mother of complainant and Mohammad Ismail is a close relative of the

complainant. Due to previous enmity with complainant a false case was registered against me. PWs with mala fide intention deposed against me."

The appellant did not make statement under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him, however, produced certified copy of application under section 133, Cr.P.C. (Ex.DA), copy of challan FIR No. 183 of 2008 of P.S. Harnoli Mark-DA and copy of Crl. Revision titled 'Muhammad Aslam v. Muhammad Afzal and others' Mark-DB in his defence.

6. The learned trial Court vide its judgment dated 28.11.2011, found the appellant Muhammad Tariq, guilty for the offence under section 376 of P.P.C. and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case by the complainant due to his previous enmity with cousin of the complainant, namely, Aslam; that Muhammad Siddique (PW-2) has admitted that his cousin had enmity with the appellant; that no medico legal report of the alleged victim, namely, Zahida Bibi has been produced in the Court by the prosecution; that even the alleged victim did not appear in the witness box; that the allegedly torn `qameez' of the alleged victim was produced before the police after seventeen days of the occurrence; that no independent witness appeared before the learned trial Court against the appellant to prove the prosecution case; that evidence of related eye-witnesses is not corroborated by any independent evidence and same is self-contradictory; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of any doubt thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, learned Addl. Prosecutor General has opposed this appeal on the grounds that the prosecution has fully proved its case against the appellant beyond the shadow of any doubt; that evidence of the prosecution eye-witnesses could not be shattered during the process of cross-examination; that prosecution case against the appellant is further supported by the medical evidence of Dr. Sana Ullah Malik (PW-1), who has deposed that the appellant was capable of performing sexual intercourse; that there is no substance in this appeal therefore, the same may be dismissed.

9. Arguments heard. Record Perused.

10. Prosecution case as set forth in the FIR has already been reproduced in para No. 2 of this judgment therefore, there is no need to repeat the same. Muhammad Siddique complainant (PW-2) is father of the alleged victim, namely, Mst. Zahida Bibi. He admitted during his cross-examination that Aslam was his 'chachazaad' and he had enmity with the appellant. Relevant part of his statement reads as under:

> "Aslam is my chachazad. It is correct that Aslam and accused have enmity inter se."

Similarly, Mst. Safia Bibi (PW-3) (mother of the alleged victim) also admitted the abovementioned relationship of Aslam as paternal cousin of her husband and she also admitted that the said Aslam and the appellant had enmity with each other. Relevant part of her statement is reproduced hereunder:-

> "Aslam is "patrair" of my husband. It is correct that said Aslam and accused have enmity with each other."

It is therefore, evident that there was earlier enmity between the appellant and the complainant party. In this case, the prosecution produced eye-witnesses, namely, Mst. Safia Bibi (PW-3) and Muhammad Ismail (PW-4). As mentioned earlier, Mst. Safia Bibi (PW-3) is real mother of the alleged victim, whereas, Muhammad Ismail (PW-4) is paternal nephew of Mst. Safia Bibi. Their inter se relationship was brought on the record during the cross-examination of Mst. Safia Bibi (PW-3), who stated as under:-

> "Shahid PW is my mamuzad whereas Ismaeel PW is my Bhatija."

Although statements of the related eye-witnesses can be relied upon to decide a criminal case but the said statements are required to be corroborated by any independent evidence and the same should be confidence inspiring and trustworthy. I have noted that the alleged victim of this case was Mst. Zahida Bibi and it was case of the prosecution that she was dragged from outside the house of the appellant and was taken inside the said house. She (Mst. Zahida Bibi) offered resistance and her qameez was also torn during the occurrence but no medico legal examination of the alleged victim Mst. Zahida Bibi, which could have shown any marks of dragging or violence on her body, was conducted in this case and she was not medically examined in this case. Even the alleged victim, namely, Mst. Zahida Bibi did not appear in the witness box. It is true that the alleged victim

Mst. Zahida Bibi was deaf and dumb but Muhammad Ijaz Ali, AS1 (PW-8) stated in his examination-in-chief that he recorded the statement of the alleged victim Mst. Zahida Bibi on 02.09.2009 on her nodes translated by her mother. Statement of Muhammad Hafeez, Special Education Teacher was recorded as CW-1 but he stated that the alleged victim was not able to follow his sign language as she was uneducated and not able to understand his sign language. Moreover, the statement of the alleged victim, namely, Mst. Zahida Bibi was not recorded by the learned trial Court with the help of her nodes translated by her mother. It is also noteworthy that there is conflict in the statements of the prosecution eye-witnesses, namely, Mst. Safia Bibi (PW3) and Muhammad Ismail (PW-4). Mst. Safia Bibi (PW-3) stated in her examination-in-chief that when she along with the other eye-witnesses entered into the house of the accused/appellant, only her daughter was present in the said house, whereas, accused/appellant was not present there, whereas, Muhammad Ismail (PW-4) stated in his examination-in-chief that on the day of occurrence, he while following his 'phuphi' (Mst. Safia Bibi PW-3) entered into the house of the accused (appellant) and saw that Tariq accused was running away from the spot. Relevant parts of the statements of the abovementioned prosecution eye-witnesses are reproduced hereunder:-

> Mst. Safia Bibi (PW-3).
>
> "I along with Ismaeel and Shahid PWs entered inside the haveli of the accused and saw that accused was not present in the house and only my daughter was found present in the house of the accused."
>
> Muhammad Ismaeel (PW-4).
>
> "On 21.07.2009, at about 11:30 a.m., I was coming from bazaar and Shahid PW was coming behind me at some distance. When I reached near the house of Aslam, I saw that my Phuphi Safia Bibi was making noise and entering into the house of Tariq accused following my Phuphi. I also entered into the house of accused and saw that Tariq accused was running away and Zahida Bibi was lying on the ground."
>
> (Bold and underlining supplied for emphasis)

It is therefore, evident that there is conflict in the evidence of the abovementioned prosecution eye-witnesses regarding the material aspect of the case. I have also noted that there was no allegation against the appellant that he

was armed with any weapon at the time of occurrence. It is further noteworthy that as per prosecution case, the complainant party was comprising of two male and one female adult members, namely, Mst. Safia Bibi (PW-3), Muhammad Ismail (PW-4) and Shahid (given up PW). The abovementioned PWs were closely related inter se because Mst. Safia Bibi stated during her cross-examination that Shahid (given up PW) was her `mamoonzad', whereas, Muhammad Ismail (PW-4) was her 'bateeja'. It is therefore, not understandable that if the appellant was empty handed and the complainant party was comprising of three adult members then as to why the appellant was not apprehended by them at the time of occurrence, I have also noted that the torn `qameez' of the alleged victim was produced before the police after seventeen days of the occurrence. Hameedullah, Sub-Inspector (PW-7)/Investigating Officer of this case, stated in his examination-in-chief that Muhammad Siddique complainant produced the `qameez' of the alleged victim before him on 07.08.2009, whereas, the occurrence in this case took place on 21.07.2009. No valid reason for production of the torn `qameez' by the complainant to the police with the gross delay of seventeen days has been given by the prosecution. It is further noteworthy that Muhammad Ismail (PW-4) admitted during his cross-examination that at the time of incident, accused and his brother were living in the 'haveli', where the occurrence took place. Relevant part of the statement of Muhammad Ismail (PW-4) reads as under:-

> "At the time of incident, the accused and his brother had not shifted with family and using the place of occurrence as Haveli."

It is therefore, not probable that the appellant would attempt to commit rape with the alleged victim, namely, Zahida Bibi in a `haveli', where his (appellant's) family and family of his brother were also living.

11. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt regarding the truthfulness of the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

'5. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

"13. ..... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

12. In the light of above discussion, I am of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, the instant appeal bearing Criminal Appeal No. 2023 of 2011 filed by Muhammad Tariq appellant is allowed and his conviction and sentence is hereby set-aside and he is acquitted of the charge by extending him the benefit of doubt. He is on bail. His bail bonds are directed to be released and sureties are discharged from liability.

SA/M-91/L **Appeal allowed.**

2020 P Cr. L J Note 143

[Lahore (Multan Bench)]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD RIAZ---Petitioner

Versus

The STATE and others---Respondents

Criminal Misc. No. 1 of 2019 in Criminal Appeal No. 05/J of 2016, decided on 13th January, 2020.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-i-amd, common intention---Suspension of sentence---Scope---Petitioner convicted under S. 302(b), P.P.C. and sentenced to life imprisonment had sought suspension of his sentence---Validity---Record showed that petitioner was arrested in the case on 07.11.2014---Impugned judgment was passed on 26.01.2016 whereas petitioner filed the jail appeal on 11.02.2016---Four years had elapsed from the date of passing of the impugned judgment and a period of three years and eleven months from the date of filing of appeal but the main appeal of the petitioner could not be decided so far---Nothing was on the record to suggest that the petitioner contributed towards the delay in the decision of main appeal---Nothing was on record to suggest that the petitioner was a hardened, desperate or dangerous criminal or he was a previously convicted offender for an offence punishable with death or imprisonment for life or was accused of an act of terrorism punishable with death or imprisonment for life---Petitioner had earned the statutory right for suspension of his sentence and grant of bail as provided under subsection 1-A(c) to S. 426, Cr.P.C., in circumstances---Petition was allowed accordingly.

Prince Rehan Iftikhar Sheikh for Petitioner.

Muhammad Shahid Riaz, Additional Prosecutor General for the State.

Aurangzeb Ghumman for the Complainant.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Muhammad Riaz, petitioner, through the instant petition filed under section 426, Cr.P.C. has sought for suspension of his sentence and release on bail during the pendency of his appeal.

2. The petitioner was tried in case FIR No.516 dated 27.10.2014, offences under sections 302, 34, P.P.C. registered at Police Station Dera Rahim District Sahiwal and vide judgment dated 26.01.2016, passed by the learned Additional Sessions Judge, Sahiwal, the petitioner was convicted under section 302(b), P.P.C. and

sentenced to life imprisonment as Ta'zir with fine of Rs.50,000/-, for committing qatl-i-amd of Shabbir Hussain (deceased). In default of payment of fine, he was directed to further undergo four months' simple imprisonment. The petitioner was directed to pay Rs.50,000/- to the legal heirs of the deceased as required under section 544-A, Cr.P.C. All the sentences were directed to run concurrently. Benefit of section 382-B, Cr.P.C. was also extended to the petitioner.

3. The petitioner seeks suspension of his sentence on the expiry of statutory period provided under section 426(1)(c), Cr.P.C.

4. I have noted that the petitioner was arrested in this case on 07.11.2014. The impugned judgment of conviction of the petitioner was passed on 26.01.2016 whereas the jail appeal was filed by the petitioner before this Court on 11.02.2016 and as such a period of almost four years has already elapsed from the date of passing of the impugned judgment and a period of three years and eleven months from the date of filing of the appeal by the petitioner before this Court has elapsed but the main appeal of the petitioner could not be decided so far. There is nothing on the record to suggest that the petitioner contributed towards the delay in the decision of his main appeal because not a single adjournment has been sought by the petitioner from this Court. The main appeal of the petitioner was firstly taken up on 13.06.2016 and thereafter the same could not be fixed for hearing and as such the delay in decision of the main appeal of the petitioner cannot be attributed to the petitioner. Moreover, there is nothing on the record to suggest that the petitioner is a hardened, desperate or dangerous criminal or he is a previously convicted offender for an offence punishable with death or imprisonment for life or is accused of an act of terrorism punishable with death or imprisonment for life.

5. Keeping in view all the above mentioned facts, the petitioner has earned the statutory right for suspension of his sentence and grant of bail as provided under subsection 1-A(c) to section 426, Cr.P.C.

6. In the light of above discussion, this petition is allowed, the sentence of the petitioner is suspended and the petitioner Muhammad Riaz is admitted to bail subject to his furnishing bail bonds in the sum of Rs.500,000/- (Rupees Five hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. The petitioner is directed to appear before this Court on each and every date of hearing of his main appeal.

JK/M-52/L **Petition allowed.**

2020 Y L R 546

[Lahore (Rawalpindi Bench)]

Before Malik Shahzad Ahmad Khan and Ch. Abdul Aziz, JJ

QURBAN HUSSAIN---Appellant

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 280, 458 and Murder Reference No. 34 of 2014, heard on 24th May, 2018.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Delay of about two hours in lodging the FIR---Charge against accused was that he along with acquitted accused committed murder of the brother of complainant---Occurrence in the case took place at 11:30 a.m.---Matter was reported to the police by complainant on the same day at 01:15 p.m., whereas, the formal FIR was also lodged on the same day i.e. on 02.08.2011 at 01:35 p.m.---Distance between the place of occurrence and police station was 05 kilometres---Circumstances established that the FIR was promptly lodged and there was no deliberation or conscious delay in reporting the matter to the police.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Appeal against acquittal--- Broad day-light occurrence---Ocular account supported by medical evidence---Scope---Accused was charged of offence that he along with acquitted accused committed murder of brother of the complainant---Motive behind the occurrence was that accused and deceased had quarrelled with each other---Trial Court, however, vide the same judgement acquitted co-accused extending him the benefit of doubt---Ocular account of the incident had been furnished by two witnesses including complainant---Said witnesses being brother and maternal uncle of the deceased respectively had given plausible reason for their presence at the crime scene at the time of occurrence---Defence had brought the fact on record that the dead body of deceased was taken

to the hospital by the staff of Emergency Service 1122, which showed that the dead body was not brought to the hospital by the eye-witnesses, and it was established that the said eye-witnesses were not present at the crime scene, at the time of occurrence---Record showed that complainant had himself stated during his cross-examination that an unknown person had called rescue team, after the occurrence---Even otherwise, said eye-witnesses were not expected to take themselves the dead body of deceased to the hospital and if the dead body of the deceased was brought to the hospital in the ambulance of the Emergency Service then the same did not negate the presence of the eye-witnesses at the spot at the time of occurrence---Occurrence in the case took place in the broad day-light at 11:30 a.m.---Appellant was earlier known to the eye-witnesses as there was previous enmity between the parties which had been proved on the record through earlier FIR and as such there was no chance of any miss-identification of the appellant---Eye-witnesses were cross-examined at length but their evidence could not be shaken and they corroborated each other on all material aspects of the case and their evidence was confidence inspiring and trustworthy---Medical Officer, who conducted post-mortem examination on the dead body of the deceased, had opined that the time that elapsed between the injury and death was immediate i.e., less than five minutes, whereas the time that elapsed between the death and the post-mortem examination was 6 to 12 hours---Medical Officer conducted post-mortem examination on the dead body of deceased on 02.08.2014 at 07.00 p.m.---As per prosecution evidence, the occurrence in this case took place on 02.08.2011 at 11:30 a.m. and as such the time that elapsed between the death and the post-mortem examination of the deceased as given by the Medical Officer coincided with the time of occurrence, mentioned by the eye-witnesses in the case---Medical evidence had substantially supported the ocular account furnished to the extent of role attributed to the appellant---Circumstances established that the prosecution had fully proved its case against appellant beyond the shadow of any doubt, in circumstances---In the present case, certain mitigating circumstances in favour of the appellant were noted; Firstly, the prosecution implicated co-accused in this case but he was acquitted by the Trial Court, appeal filed against the acquittal of the said co-accused had been dismissed as having been withdrawn; secondly, prosecution evidence had been disbelieved qua the recovery of .30 bore pistol and

motorcycle from the possession of the appellant; thirdly, the appellant had been assigned the role of causing single firearm injury on the body of deceased and he did not cause any other injury on the body of the deceased---Said facts showed that it was not a case of capital punishment therefore, the death sentence awarded to appellant was quite harsh---Conviction of appellant under S. 302(b), P.P.C. awarded by the Trial Court was maintained by the High Court but his sentence was altered from death to imprisonment for life, in circumstances.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188; Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 and Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

(c) Criminal trial---

----Witness---Improvements in the statements of the eye-witnesses---Scope---Improvements in the statements of the eye-witnesses regarding irrelevant facts were not sufficient to discard their evidence.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Motive, proof of---Motive for the occurrence was that there existed previous enmity between the accused party and the complainant party---Complainant had stated in his examination-in-chief that about 1½-2 months prior to the occurrence, there was a quarrel between deceased and appellant and other for which criminal case was registered---Complainant had produced in evidence the copy of FIR regarding the occurrence of motive part of the case---Evidence of complainant and witness regarding the motive part of the occurrence was also subjected to lengthy cross-examination but they remained consistent on that point---Although it had been alleged by the appellant that complainant who could have been the prime target of the appellant but he had not been caused any injury by the appellant which showed that in fact the said witness was not present at the spot at the time of occurrence---Contents of FIR about the earlier occurrence which was lodged by the mother of appellant showed that it was deceased who was assigned the role of inflicting hatchet blow on the thumb of real brother of appellant and no injury on the body of any member of the complainant party of the said FIR was

assigned to complainant---Said circumstances showed that deceased was the prime target of the appellant---Motive, as alleged by the prosecution, had also been proved in the case through oral, as well as, documentary evidence i.e. FIR.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of weapon of offence, empties and motorcycle---Delay in dispatch of recovered weapon---Effect---Accused was charged that he along with acquitted accused committed murder of brother of the deceased---Record showed that 30-bore pistol was recovered from the possession of the appellant---Positive report of the Forensic Science Agency showed that the empties recovered from the sport were found to be fired from recovered pistol---However, it was noteworthy that 04 empties were recovered from the place of occurrence on 02.08.2011 and pistol was recovered from the possession of appellant on 17.10.2011 but as per report of Forensic Science Agency, the empties and pistol were deposited together in the office of Forensic Science Agency on 27.10.2011---Said facts showed that the empties and pistol were kept together at the police station therefore, possibility could not be ruled out that fake empties were prepared from pistol and then the same were sent to the office of Forensic Science Agency for their comparison with the said pistol---Prosecution evidence qua the recovery of pistol and positive report of Forensic Science Agency was not reliable, in circumstances---Although motorcycle had also been shown to be recovered from the possession of appellant which, according to the prosecution case, was used by the appellant for coming to the place of occurrence and for fleeing away from the spot after the occurrence---No registration number of the motorcycle which was used by the accused during the occurrence had been mentioned in the FIR or in the statements of the eye-witnesses recorded by the Trial Court, therefore, the alleged recovery of motorcycle from the possession of appellant was inconsequential.

Ch. Afrasiab Khan for Appellant.

Umar Hayat Gondal, Additional Prosecutor General with Abdul Rehman, Assistant Sub-Indspector for the State.

Barrister Usama Amin Qazi for the Complainant.

Date of hearing: 24th May, 2018.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No 280 of 2014 filed by Qurban Hussain (appellant) against his conviction and sentence, Criminal Appeal No. 458 of 2014, filed by Mst. Ghulam Ruqqia complainant against the acquittal of Liaquat Ali co-accused and Murder Reference No 34 of 2014 sent by the learned trial Court for confirmation or otherwise of the Death sentence of Qurban Hussain (appellant). We propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 02.06.2014, passed by the learned Sessions Judge, Chakwal.

2. Qurban Hussain (appellant) and Liaquat Ali (co-accused since acquitted) were tried in case FIR. No 325 dated 02.08.2011, registered at Police Station Sadar, District Chakwal in respect of the offences under sections 302/34, P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 02.06.2014 has convicted and sentenced. Qurban Hussain appellant as under: -

> Under section 302(b), P.P.C. to 'Death' for committing Qatl-i-Amd of Muhammad Zameer (deceased). He was also ordered to pay Rs.1,00,000/- (rupees one hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

The learned trial Court however vide the same judgment acquitted Liaquat Ali co-accused while extending him the benefit of doubt.

3. Brief facts of the case as given by the complainant Muhammad Jahangir (PW-10) in the written application (Ex.PI), on the basis of which the formal FIR Ex.PG) was chalked out are that the complainant was resident of Mauza Ordhwal. On 02.08.2011, he (complainant) along with Ghulam Murtaza (PW-11), Muhammad Zameer son of Sher Khan (given up PW) and his brother Muhammad Zameer (deceased) went to plough their fields situated in village Odharwal near Sargodha Bye-Pass road and after ploughing the fields they were returning to their home, and when at about 11:30 a.m. they reached near the main road of Sargodha Bye-Pass, Qurban Hussain (appellant) and Liaquat Ali (co-accused since acquitted) came

there on their motorcycle and raised lalkara to the brother of the complainant, namely, Muhammad Zameer (deceased) to teach him a lesson for quarrelling. About 02 months prior to the occurrence, Qurban Hussain (appellant) and Muhammad Zameer (deceased) had quarrelled with each other. Qurban Hussain (appellant) then, took out his pistol .30 bore from his fold (of shalwar) and made two consecutive fire shots. Liaquat Ali (co-accused since acquitted) also took out pistol from his fold (of shalwar) and made two fire shots. A fire shot made by Qurban Hussain (appellant) hit at the left eye of Muhammad Zameer (deceased) whereas a fire shot made by Liaquat Ali (co-accused since acquitted) hit at the middle of the hip of Muhammad Zameer (deceased) due to which Muhammad Zameer (deceased) fell on the ground. The complainant and his maternal uncle Ghulam Murtaza (PW-11) and maternal cousin Muhammad Zameer (given up PW) went forward while viewing the occurrence. The accused persons fled away from the spot while giving abuses. It was further alleged in the FIR that Qurban Hussain appellant) and Liaquat Ali (co-accused since acquitted) committed the murder of Muhammad Zameer (deceased). Motive behind the occurrence was a previous quarrel.

4. The appellant Qurban Hussain was arrested by Ijaz Abbas, SI (PW-13) on 07.10.2011. On 17.10.2011, the appellant Qurban Hussain led to the recovery of pistol (P-1), which was taken into possession by Ijaz Abbas SI (PW-13) vide recovery memo Ex.PB. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 24.11.2011, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced 13 witnesses during the trial. Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Haleem, (PW-8).

Ahmad Sher, SI (PW-12) and Ijaz Abbas, SI (PW-13) are the investigating officers of this case.

Zafar Mehmood (PW-5) is the witness of recovery of pistol on the pointation of the appellant vide memo Ex. PB.

Hamid Rasheed 525/HC (PW-1), Samand Khan Constable (PW-2), Rehmat Ullah HC (PW-3), Muhammad Safdar Patwari Halqa (PW-4), Tanveer Abid (PW-6), Azmat Ali Constable (PW-7) and Muhammad Hussain Shah, SI (PW-9) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of scaled site plans of the place Of occurrence (Ex.PA) and Exh. PA/1 memo of possession of pistol 30 bore P1 (Ex.PB), memo of possession of last worn clothes of the deceased (Ex.PC), postmortem report of the deceased (Ex.PD), pictorial diagrams (Ex:PD/1 and Ex.PD/2), application for post mortem of the deceased (Exh. PE), inquest report of Muhammad Zameer deceased (Exh. PF), copy of FIR of the instant case (Exh. PG), copy of FIR of the motive occurrence (Exh. PH), application of Muhammad Jahangir (complainant) for registration of FIR (Exh. PI), memo of possession of Honda 125 motorcycle, (Ex.PJ) memo of possession of blood-stained earth (Ex.PK) memo of possession of empties of pistol .30 bore (Ex.PL), memo of possession of Tractor Fiat/480 (Ex.PM), rough site plan without scale of the place of occurrence (Ex.PN), site plan without scale of place of recovery of Honda 125 (EX.PO), site plan without scale of place of pistol 30 bore (Ex.PP) report of Forensic Science Agency, Punjab (Ex.PQ), report of Serologist (Ex.PS), report of Chemical Examiner, Punjab Lahore (Ex.PR) and closed its evidence.

6. The statement of the appellant under Section 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that 'Why this case against you and why the PWs have deposed against you" the appellant replied as under:--

> "I have been falsely involved in this case, in the background of previous enmity and grudge, which the complainant was carrying on account of the registration of criminal case FIR (Exh. PH). In fact, this was an unseen occurrence. The deceased was murdered in a road side dacoity early in the morning on fateful day. Deceased was a well off person and despite of this fact, nothing like valuable article, i.e. mobile phone, watch, money wallet, ring etc were recovered by Investigating Officer or any other person from his

dead body. The story mentioned by the complainant is afterthought and this act was also negated by the documentary evidence which is Exh. DD. The dead body was shifted by Rescue 1122 from the place of occurrence at about 12.20 p.m. which is much prior to alleged story narrated in the FIR and alleged witnesses reached in the hospital at subsequent stage. Since the tracing of unknown culprits was a difficult task for the police, therefore, the police in connivance with the complainant party who were having suspicions and ill-conceived, motives against me. In the background of the aforementioned grudge, falsely involved me in this case through consultation, deliberation and concoction on the part of the police and the prosecution".

The appellant Qurban Hussain neither made statement on oath as envisaged under section 340(2), Cr.P.C. nor produced evidence in his defence.

The learned trial Court vide its judgment dated 02.06.2014 while acquitting Liaquat Ali co-accused, convicted and sentenced the appellant as mentioned and detailed above.

7. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and has falsely been implicated in this case by the complainant party; that the occurrence was unseen which took place at a deserted place in wee hours of the morning and this fact is also established from the time that elapsed between the death and post mortem examination, mentioned by Dr. Muhammad Haleem (PW-8); that there is gross delay of 02 hours and 05 minutes in lodging the FIR whereas, the occurrence took place on a metalled road which was situated at a distance of only 05 kilometers from the police station therefore, the abovementioned delay in lodging the FIR has created serious doubt regarding the truthfulness. of the prosecution story; that eye-witnesses of the prosecution, namely, Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) could not give any plausible reason for their presence at the spot at the relevant time and as such they are chance witnesses therefore, their evidence is not worthy of reliance; that there is only one person required to drive a tractor and plough the fields and as such, there was no need of presence of the eye-witnesses of the prosecution at the crime scene at the relevant time; that the story narrated by the complainant in the FIR is in conflict with the medical evidence because according to

the said story one fire shot made by Liaquat Ali (co-accused since acquitted) on the hip of Muhammad Zameer deceased, was not found by the Medical Officer at the time of postmortem examination of the deceased; that as the prosecution evidence has been disbelieved qua Liaquat Ali co-accused therefore, the same evidence cannot be believed against Qurban Hussain appellant without independent corroboration which is very much lacking in this case; that the prosecution witnesses made dishonest improvements in their statements in order to bring their evidence in line with the prosecution case by stating that Muhammad Zameer deceased alighted from the tractor prior to the occurrence and by mentioning that the motorcycle used during the occurrence by the accused was owned by Qurban Hussain appellant and they-were confronted with their previous statements and dishonest improvements made by them were brought on the record therefore, the evidence of such eye-witnesses is not reliable; that dead body of Muhammad Zameer deceased was not identified by the eye-witnesses of the prosecution, namely, Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) and the same was identified by Tanveer Abid (PW-6) and Niaz Ali (given up PW) which shows that the eye-witnesses were not present at the time of occurrence; that it, has also been brought on the record that the dead body of Muhammad Zameer deceased was taken to the hospital by the staff of Emergency Service "1122" which also negates the presence of eye-witnesses at the spot; that as per evidence of Ghulam Murtaza (PW-11), Muhammad Zameer deceased and Muhammad Jahangir complainant (PW-10) alighted from the tractor in order to beg pardon from the appellant but the blood was also seen on the tractor which further contradicted the evidence of the abovementioned eye-witness; that as per prosecution case in the earlier occurrence of motive, it was Muhammad Jahangir complainant (PW-10) who dragged Qurban Hussain (appellant) by putting a rope around his neck and if the abovementioned eye-witness (Muhammad Jahangir PW-10) was present at the spot at the relevant time then he would have been the prime target of the appellant but Muhammad Jahangir complainant (PW-10) did not receive a single scratch on his body which shows that he was not present at the spot at the time of occurrence; that as per evidence of the prosecution eye-witneses, fire shots made by the appellant and his co-accused also landed on the tractor, driven by Muhammad Zameer deceased but no mark of fire shots on the tractor of the deceased were noted by the Investigating Officer; that pistol (P-1) has allegedly been recovered from the possession of Qurban Hussain appellant but as

per report of the Punjab Forensic Science Agency, Lahore (Ex.PQ) the abovementioned pistol (P-1) along with the empties was deposited together in the office of FSA, on 24.12.2011, therefore, the above-mentioned prosecution evidence qua the recovery of pistol (P-1) and positive report of Punjab Forensic Science Agency, Lahore (Ex.PQ) is of no avail to the prosecution; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt therefore, this appeal may be accepted and the appellant may be acquitted from the charge and the murder reference be answered in the negative.

8. On the other hand, it is argued by learned Additional Prosecutor General assisted by learned counsel for the complainant that the occurrence in this case took place on 02.08.2011 at 11:30 a.m. and the matter was reported to the police by Muhammad Jahangir complainant (PW-10) through written application (Ex.PI), on the same day at 01:15 p.m. and the formal FIR (Ex.PG) was also lodged on the same day at 01:35 p.m. that as the FIR was promptly lodged therefore the same rules out the possibility of any concoction or deliberation; that the occurrence took place in the broadday-light and as the appellant was previously known to the complainant party therefore, there was no chance of any misidentification of the appellant; that acquittal of Liaquat Ali co-accused is of no avail to the appellant because the role attributed to the abovementioned Liaquat Ali co-accused in the FIR of making fire shot on the hip of Muhammad Zameer deceased was not supported by the medical evidence, whereas, the role assigned to Qurban Hussain appellant of making fire shot on the left eye of Muhammad Zameer deceased has fully been supported by the medical evidence; that prosecution case against the appellant is further corroborated by the recovery of .30 bore pistol (P-1) and positive report of Punjab Forensic Science Agency, Lahore (Ex.PQ); that the motorcycle which was used during the occurrence was also recovered from the possession of the appellant; that the motive of previous, enmity between Qurban Hussain appellant and Muhammad Zameer deceased was also proved through documentary evidence i.e. previous FIR Ex.PH and reliable oral evidence of the prosecution; that there is no substance in the appeal filed by Qurban Hussain (appellant); that as Qurban Hussain appellant has committed a heinous offence therefore, there is no mitigating circumstances in this case hence, his appeal may be dismissed, conviction and sentence of the said appellant may

be upheld and maintained and murder reference be answered in the affirmative. Insofar as Criminal Appeal No 458 of 2014, filed by the complainant against the acquittal of Liaquat Ali co-accused is concerned, learned counsel for the complainant does not press the said appeal.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. Prosecution story, as mentioned in the written application of Muhammad Jahangir complainant (Ex.PI) on the basis of which the formal FIR (Ex.PG) was lodged, has already been reproduced in para No.3 of this judgment therefore there is no need to repeat the same.

11. The occurrence in this case took place on 02.08.2011 at 11:30 a.m. The matter was reported to the police by Muhammad Jahangir complainant (PW-1) through written application (Ex.PI) on the same day at 01:15 p.m., whereas, the formal FIR (Ex.PG) was also lodged on the same day i.e. on 02.08.2011 at 01:35 p.m. The distance between the place of occurrence and police station is 05 kilometers., Keeping in view the time of occurrence, the place of occurrence and its distance from the police station, we are of the view that the FIR was promptly lodged in this case and there was no deliberate or conscious delay in reporting the matter to the police.

12. The ocular account of the prosecution was furnished by Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11). The occurrence in this case took place at Sargodha Bye-Pass Road within the area of village Odharwal Police Station Sadar District Chakwal. Muhammad Jahangir complainant (PW-10) is also resident of village Odharwal, where the occurrence took place. Although Ghulam Murtaza (PW-11) is resident of village Chakora but during cross-examination of Muhammad Jahangir complainant (PW-10), it was brought on the record that his village is situated only at a distance of 01 kilometer from village Odharwal, where the occurrence took place. Both the abovementioned witnesses being brother and maternal uncle of the deceased respectively, have given plausible reason for their presence at the crime scene at the time of occurrence by stating that on the day of occurrence, they along with Muhammad Zameer deceased went to plough their land on a tractor which was being driven by

Muhammad Zameer deceased and after ploughing the land when they were coming back to their home and they reached at Sargodha Bye-Pass Road, they were intercepted by the accused and the occurrence was committed. Tractor, (P-7) of Muhammad Zameer deceased was recovered from the place of occurrence on the day of occurrence i.e. on 02.08.2011 through recovery memo (Ex.PM) and the recovery of the said tractor was also proved through the evidence of Ghulam Murtaza (PW-11). It has been argued by learned counsel for the appellant that this fact has been brought on the record that the dead body of Muhammad Zameer (deceased) was taken to the hospital by the Staff of Emergency Service 1122, which shows that the dead body was not brought to the hospital by the abovementioned eye-witnesses, and it establishes that the said eye-witnesses were not present at the crime scene, at the time of occurrence but I have noted that Muhammad Jahangir (PW-10) has himself stated during his cross-examination that an unknown person had called rescue. 1122, after the occurrence. Even otherwise, the abovementioned eye-witnesses were not expected to take themselves the dead body of Muhammad Zameer (deceased) to the hospital and if the dead body of the deceased was brought to the hospital in the ambulance of the abovementioned Emergency Service, then the same does not negate the presence of the abovementioned eye-witnesses, at, the spot at the time of occurrence. Moreover, the minor contradictions in the statements of the eye-witnesses regarding the fact that the said eye-witnesses have, stated that Muhammad Zameer (deceased) alighted from his tractor, prior to the occurrence, whereas the blood was also seen on the tractor by the Investigating Officer is not sufficient to discard their evidence because both the eye-witnesses have not stated that Muhammad Zameer (deceased) after alighting from his tractor, covered some distance prior to the occurrence and if he was standing near to his tractor, then presence of blood on the tractor is quite natural. The other argument advance by learned counsel for the appellant that one of the eye-witnesses has stated that some fire shots made by the appellant also hit the tractor of the deceased, whereas no mark of bullet was noticed on the tractor by the Investigating Officer, has no substance because the same has no bearing on the material aspects of the case like the time of occurrence, the manner in which the occurrence took place, weapon used by the appellant and the role attributed to the appellant during the occurrence.

Moreover, it is by now well settled that an accused cannot be extended any benefit due to any weakness on the part of the Investigating Officer, which weakness has no bearing on the merits of the case.

The occurrence in this case took place in the broadday-light i.e. on 02.08.2011 at 11:30 a.m. The appellant was earlier known to the abovementioned eye-witnesses as there was previous enmity between the parties which has been proved on the record through earlier FIR (Ex.PH) and as such there was no chance of any mis-identification of the appellant. The aforementioned eye-witnesses were cross-examined at length but their evidence could not be shaken and they corroborated each other on all material aspects of the case. Their evidence is confidence inspiring and trustworthy.

13. The appellant also produced Kamran Rasheed (CW-1) in his defence, who was Incharge, Emergency Office Rescue 1122, Chakwal, who stated that on 02.08.2011, he received a telephone call regarding the presence of a dead body on Sargodha Bhoon Road, whereupon he reached at the spot and found that the dead body of Muhammad Zameer (deceased) was, lying un-attended on the road. During his cross-examination by learned DPP, assisted by learned counsel for the complainant, he conceded that he never joined the investigation of this case as a witness. He further admitted that one Arif Butt was the Station Coordinator in the office of Rescue 1122, Chakwal and after his resignation he was working as Assistant with Ch. Jalil-ur-Rehman, Advocate, who was representing the accused in this case. Although he furnished a report (Ex.DD) regarding the service, provided by the Rescue 1122 for shifting the dead body of Muhammad Zameer (deceased) to the hospital but he conceded during his cross-examination that the said report and entries referred therein were not in his handwriting. In the light of above, the abovementioned defence evidence produced by the appellant was not worthy of reliance and the same was rightly discarded by the learned trial Court.

14. The medical evidence of the prosecution was furnished by Dr. Muhammad Haleem (PW-8). He stated that on 02.08.2011, he conducted postmortem examination on the dead body of Muhammad Zameer deceased and found the following injuries on his body:

INJURIES:

1. A lacerated wound/eye ball "left side" was missing. Color of abrasion found around the wound. All the margins were inverted. It was an entry wound.

2. Evidence of bleeding from both ears was there.

As per opinion of Dr. Muhammad Haleem. (PW-8), the time that elapsed between the injury and death was immediate i.e., less than five minutes, whereas the time that elapsed between the death and the postmortem examination was 6 to 12 hours. As per postmortem report (Ex.PD), Dr. Muhammad Haleem (PW-8), conducted postmortem examination on the dead body of Muhammad Zameer (deceased) on 02.08.2011 at 7.00 p.m. (as stated by Dr. Muhammad Haleem PW-8 in his cross-examination). As per prosecution evidence, the occurrence in this case took place on 02.08.2011 at 11.30 a.m. and as such the time that elapsed between the death and the postmortem examination of the deceased as given by Dr. Muhammad Haleem (PW-10), coincide with the time of occurrence, mentioned by the eye-witnesses in this case. According to the evidence of abovementioned eye-witnesses namely Muhammad Jahangir (PW-10) and Ghulam Murtaza (PW-11) out of the different fire shots made by Qurban Hussain appellant, one fire shot landed on the left eye of Muhammad Zameer deceased. The abovementioned medical evidence has substantially supported the ocular account furnished by Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) to the extent of role attributed to Qurban Hussain appellant.

15. Insofar as the acquittal of Liaquat Ali co-accused is concerned, we have noted that in the FIR, the said co-accused was assigned the role of making a fire shot which landed on middle of the hip of Muhammad Zameer deceased but the abovementioned eye-witnesses at the time of recording of their statements did not assign any injury to the abovementioned co-accused. Moreover, as per medical evidence furnished by Dr. Muhammad Haleem (PW-8), there was no injury on the hip of Muhammad Zameer deceased and as such, the prosecution case as set forth in the FIR (Ex.PG) was not supported by the medical evidence to the extent of Liaqat Ali co-accused (since acquitted), whereas, the same has fully been supported against the appellant by the medical evidence and as such, case of Qurban Hussain appellant is distinguishable from the case of the abovernentioned

acquitted co-accused therefore, acquittal of Liaquat Ali co-accused is of no avail to Qurban Hussain appellant. Conflict between ocular account and medical evidence of the prosecution to the extent of injury attributed to Liaquat Ali co-accused (since acquitted) and discarding of the prosecution evidence of eye-witnesses in respect of the abovementioned co-accused is also of no avail to Qurban Hussain appellant, because the principal of "falsus in uno falsus in omnibus" has no universal application and it is by now well settled that the Courts in our country have to, "sift the grains from the chaff'. As the prosecution case against Liaqat Ali co-accused (since acquitted) was not supported by the medical evidence' whereas, the same has substantially been supported against Qurban Hussain appellant by the medical evidence therefore Qurban Hussain appellant has rightly been convicted and sentenced by the learned trial Court after sitting the grains from the chaff.

16. Learned counsel for the appellant has pointed out certain improvements in the statements of abovementioned eye-witnesses recorded by the learned trial Court regarding alighting of Muhammad Zameer deceased from the tractor prior to the occurrence and about mentioning the ownership of the motorcycle in the name of Qurban Hussain appellant, which was used during the occurrence, etc. but we have noted that the improvements made by the aforementioned eye-witnesses regarding the fact that as to whether the deceased alighted from the tractor prior to the occurrence or not etc are minor in nature and there is no improvement regarding the material aspects of the case, like the manner of occurrence, time of occurrence, weapon used during the occurrence by the appellant etc., therefore, the abovementioned improvements in the statements of the eye-witnesses regarding irrelevant facts are not sufficient to discard their evidence.

17. As per prosecution case, the motive behind the occurrence was that there was a previous enmity between the accused party and the complainant party. Muhammad Jahangir complainant (PW-10) has stated in his examination in chief that about 1½/2 months prior to the occurrence, there was a quarrel between Muhammad Zameer deceased and Qurban Hussain appellant and others for which criminal case was registered at Police Station Sadar District Chakwal. He produced in evidence the copy of FIR as Ex.PH regarding the occurrence of

motive part of the case. Evidence of Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) regarding the motive part of the occurrence was also subjected to lengthy cross-examination but they remained consistent on this point. Although it has been argued by learned counsel for the appellant that Muhammad Jahangir complainant (PW-10) had admitted during his cross-examination that in the motive occurrence it was he (Muhammad Jahangir complainant) who allegedly put a rope around the neck of Qurban Hussain appellant and dragged him on the ground and under the abovementioned circumstances, it was Muhammad Jahangir complainant (PW-10) who could have been the prime target of the appellant but he has not been caused any injury by the appellant which shows that in fact the said witness was not present at the spot at the time of occurrence but we have gone through the contents of FIR (Ex.PH) of the earlier occurrence which was lodged by the mother of Qurban Hussain appellant and the contents of the said FIR show that it was Muhammad Zameer deceased who was assigned the role of inflicting hatchet blow on the thumb of real brother of Qurban Hussain appellant and no injury on the body of any member of the complainant party of the said FIR was assigned to Muhammad Jahangir complainant/PW-10 therefore, under the circumstances, Muhammad Zameer deceased was the prime target of the appellant and as such, there is no force in the abovementioned arguments of learned counsel for the appellant. In the light of above we are of the view that the motive, as alleged by the prosecution has also been proved in this case through oral as well as, documentary evidence i.e. FIR (Ex.P4).

18. Prosecution also produced evidence qua recovery of .30 bore pistol (P-1) from the possession of the appellant and positive report of the Punjab Forensic Science Agency, Lahore (Ex.PQ) according to which the empties recovered from the spot were found to be fired from pistol (P-1). However, it is noteworthy that 04 empties were recovered from the place of occurrence on 02.08.2011 and pistol (P-1) was recovered from the possession of Qurban Hussain appellant on 17.10.2011 but as per report of Punjab Forensic Science Agency (PFSA), Lahore (Ex.PQ), the empties and pistol were deposited together in the office of PFSA on 27.10.2011, which shows that the empties and pistol (P-1) were kept together at the police station therefore, possibility cannot be ruled out that fake empties were prepared

from pistol (P-1), and then the same were sent to the office of PFSA Lahore for their comparison with the said Pistol. Under the circumstances, it is not safe to rely upon the prosecution evidence qua the recovery of pistol (P-1) and positive report of PFSA, Lahore (Ex.PQ). Although motorcycle (P-6) has also been shown to be recovered from the possession of Qurban Hussain appellant which, according to the prosecution case, was used by the appellant for coming to the place of occurrence and for fleeing away from the spot after the occurrence but we have noted that no registration number of the motorcycle which was used by the accused during the occurrence has been mentioned in the FIR (Ex.PG) or in the statements of the abovementioned eye-witnesses, namely, Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11) recorded by the learned trial court, therefore, the alleged recovery of motorcycle from the possession of Qurban Hussain appellant is inconsequential.

19. We have disbelieved, the prosecution evidence qua the recovery of pistol (P-1) and motorcycle (P-6) from the possession of Qurban Hussain appellant however, if the prosecution evidence regarding the recovery of pistol (P-1) and motorcycle (P-6) is taken out of consideration even then the prosecution case is proved against Qurban Hussain appellant through reliable and trustworthy evidence of eye-witnesses namely Muhammad Jahangir complainant (PW-10) and Ghulam Murtaza (PW-11). Both the aforementioned eye-witnesses were cross-examined at length but their evidence could not be shaken. The evidence of abovementioned eye-witnesses is further supported by the medical evidence furnished by Dr. Muhammad Haleem (PW-8), postmortem report of Muhammad Zameer deceased (Ex.PD) and pictorial diagrams (Ex.PD/1 and Ex.PD/2). Prosecution case against Qurban Hussain appellant is further corroborated by the evidence of prosecution witnesses qua the motive part of the occurrence and previous FIR lodged against Muhammad Zameer deceased (Ex.PH). The prosecution evidence in this respect is also consistent and reliable. We are therefore, of the view that the prosecution has fully proved its case against Qurban Hussain appellant beyond the shadow of any doubt.

20. Now coming to the quantum of sentence, we have noted certain mitigating circumstances in favour of the appellant, firstly, the prosecution implicated

Liaquat Ali co-accused in this case but he was acquitted by the learned trial Court and Crl. Appeal No. 458 of 2014, filed against the acquittal of the abovementioned co-accused, has been dismissed today by this Court as having been withdrawn by learned counsel for the complainant, secondly we have disbelieved the prosecution evidence qua the recovery of .30 bore pistol (P-1) and motorcycle (P-6) from the possession of the appellant due to the reasons mentioned in para No. 17 of this judgment thirdly, the appellant has been assigned the role of causing single firearm injury on the body of Muhammad Zameer deceased and he did not cause any other injury on the body of the deceased. Keeping in view, all the abovementioned facts, we are of the view that it is not a case of capital punishment therefore, in our view the death sentence awarded to Qurban Hussain appellant is quite harsh. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of 'Mir Muhammad alias Miro v. The State' (2009 SCMR 1188) wherein Hon'ble Supreme Court has held as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence"

In another case Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for awarding him the normal penalty of death. We are convinced that Qurban Hussain appellant in the peculiar circumstances of this case deserves the benefit of doubt to the extent of his sentence, one out of two provided under section 302(b) of P.P.C.

While treating it a case of mitigation, we have fortified our views by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State [2011 SCMR 593] wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:-

The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of 'Iftikhar-ul-Hassan v. Israr Bashir and another' (PLD 2007 SC 111), it was held that 'this is settled law that provisions of sections 306 to 308, P.P.C. attracts only in the cases of Qatl-i-Amd liable to Qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-i-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-i-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this discretion in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-i-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in 'Ghulam Muretaza v. State' (2004 SCMR 4), 'Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), 'Muhammad Akram v. State' (2003 SCMR 855) and 'Abdul Salam v. State' (2000 SCMR 338). The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit, of section 382-B of Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-i-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:-)

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course" (underlining, italic and bold supplied)."

21. In the light of above discussion, the conviction of Qurban Hussain appellant under section 302(b), P.P.C. awarded by the learned trial court is maintained but his sentence is altered from death to imprisonment for life. The compensation awarded by the learned trial Court against appellant and sentence, in default thereof are maintained and upheld. The benefit of section 382-B, Cr.P.C. is also extended to him.

22. Consequently, with the above said modification in the sentence of Qurban Hussain appellant, Criminal Appeal No 280 of 2014 filed by Qurban Hussain appellant is, hereby dismissed. Criminal Appeal No 458 of 2014 filed by the complainant against the acquittal of Liaquat Ali co-accused is hereby dismissed as having been withdrawn. Murder Reference (M.R. No 34 of 2014) is answered in the negative and death sentence of Qurban Hussain appellant is not confirmed.

JK/Q-5/L **Sentence reduced.**

2020 Y L R 1571

[Lahore]

Before Malik Shahzad Ahmad Khan and Mirza Viqas Rauf, JJ

Mian MUHAMMAD SHAHBAZ SHARIF---Petitioner

Versus

NATIONAL ACCOUNTABILITY BUREAU and others---Respondents

Writ Petition No. 4052 of 2019, decided on 21st February, 2019.

(a) Criminal Procedure Code (V of 1898)---

----S. 497---Bail---Tentative assessment of evidence--- Scope--- Deeper appreciation of evidence cannot be undertaken at bail stage, but bail petition cannot be decided in vacuum and tentative assessment of evidence/ documents is permissible.

Muhammad Hanif v. Manzoor and others 1982 SCMR 153 and Adrees Ahmad and others v. Zafar Ali and another 2010 SCMR 64 ref.

Awal Khan and 7 others v. The State through AG-KPK and another 2017 SCMR 538 and Zaigham Ashraf v. The State and others 2016 SCMR 18 rel.

(b) National Accountability Ordinance (XVIII of 1999)---

----S. 9(b)---Constitution of Pakistan, Arts. 199 & 184(3)---Bail, grant of---Jurisdiction of High Courts and the Supreme Court---Scope---Bail can be granted to an accused in a suitable case by the Supreme Court and the High Courts despite the bar contained under S. 9(b), National Accountability Ordinance, 1999.

Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others PLD 2001 SC 607; Haji Ghulam Ali v. The State through A.G., N.W.F.P. Peshawar and another 2003 SCMR 597 and Himesh Khan v. The National Accountability Bureau (NAB) Lahore and others 2015 SCMR 1092 ref.

(c) National Accountability Ordinance (XVIII of 1999)---

----S. 9---Constitution of Pakistan, Art. 199---Corruption and corrupt practices---Bail, grant of---Discriminatory treatment---Mala fide---Further inquiry---Scope---Allegation against accused was that he, being Chief Minister, on a self-managed request of a Member of the Provincial Assembly (MPA) approved for construction of a sullage carrier under the garb of a public utility scheme, whereas, the actual motive

behind its approval was to provide an effluent disposal mechanism to the mill owned by his son---Circle patwari had categorically mentioned that a pond measuring 86 kanals and 2 marlas was located in the revenue estate where the mill was situated---Validity---No complaint against the industrial effluent of the mill was ever filed against its management---Accused had no special need to construct a sullage carrier for the disposal of industrial effluent---Provincial Cabinet had also approved the said scheme and had released funds accordingly---Site plan of the scheme showed that the sullage was constructed for the benefit of public at large and not only for the benefit of the mill---Sullage carrier scheme was owned by the provincial government and the son of accused had been paying rent for its usage---Prosecution had not alleged that funds were not utilized on the scheme---Procedural irregularity, if any, in the exercise of jurisdiction did not amount to misuse of authority---Case of accused was one of further inquiry---Petition for grant of post-arrest bail was allowed, in circumstances.

The State v. Syed Muzafar Hussain Shah 1998 MLD 118 and Sarwar and others v. The State and others 2014 SCMR 1762 ref.

Tallat Ishaq v. National Account-ability Bureau through Chairman, and others PLD 2019 SC 112; C.P. No.1542 of 2016 dated 26.08.2016 and C.P. No.1618 of 2016 dated 03.08.2016 distinguished.

Muhammad Saeed Mehdi v. The State and 2 others 2002 SCMR 282; The State v. Anwar Saif Ullah Khan PLD 2016 SC 276 and Anwar Saifullah Khan v. The State and 4 others PLD 2000 Lah. 564 rel.

(d) National Accountability Ordinance (XVIII of 1999)---

---S. 9(b)---Constitution of Pakistan, Art.199---Bail, grant of---Scope---Tentative assessment---Scope---Where a court, from tentative assessment of evidence, comes to the conclusion that sufficient material is not available on record to establish the charges of the prosecution or that the case is one of further inquiry, it can grant bail to the accused.

Muhammad Saeed Mehdi v. The State and 2 others 2002 SCMR 282; The State v. Anwar Saif Ullah Khan PLD 2016 SC 276 and Anwar Saifullah Khan v. The State and 4 others PLD 2000 Lah. 564 rel.

Muhammad Amjad Pervaiz, Azam Nazeer Tarar, Muhammad Aurangzeb and Muhammad Nawaz Ch. for Petitioner.

Muhammad Akram Qureshi along with Syed Faisal Raza Bukhari, Ahsan Rasool Chatha, Yasir Siddique Mughal, Special Prosecutors for NAB along with Aftab Ahmad, Additional Director, Muhammad Ammad Ashiq, Deputy Director and Usman Iftikhar, Assistant Director, NAB for Respondents.

ORDER

The petitioner Mian Muhammad Shahbaz Sharif, through the instant constitutional petition seeks post arrest bail in Investigation authorized vide letter No. 1(61)HQ / 958 / NAB-L dated 07.12.2018, in Ramzan Sugar Mills Scam.

2. According to the prosecution's case, a complaint was received by the NAB/respondent wherein it was alleged that embezzlement has been committed in the public grant issued by the Government of Punjab, amounting to Rs.360-million, in 2015 for drainage scheme of the local bodies in District Chiniot. The said public grant had been misused and utilized for the construction of 9/10-KM's long waste water course for Ramzan Sugar Mills Limited, Chiniot, fraudulently showing it a drainage scheme of the local "Abadies". It was also alleged in the abovementioned complaint that Ramzan Sugar Mills Limited, Chiniot belongs to the Chief Minister Punjab (Mian Muhammad Shahbaz Sharif/petitioner) and his sons and due to the said reason, the concerned Government departments completed the project under the disguise of drainage scheme for the local "Abadies" whereas the actual object behind the said scheme was to save the expenses of Ramzan Sugar Mills Limited, Chiniot. On receipt of the abovementioned complaint, an inquiry was authorized by the competent authority vide letter No.1(09)HQ/1969-NAB-L on 04.07.2018, on the allegations of corruption and corrupt practices. The said inquiry was later on converted into investigation vide letter No.DY.305/ 2017/ L-III/ MW-1/ NABHQ dated 28.11.2018 and subsequently the investigation was authorized against Mian Muhammad Shahbaz Sharif (petitioner), Muhammad Hamza Shahbaz Sharif, co-accused, C.E.O. of Ramzan Sugar Mills Limited, Chiniot, as well as, against the Government functionaries and others vide letter No.1(61) HQ/958/NAB-L on 07.12.2018. During the investigation, it revealed that the petitioner being the then Chief Minister of Punjab, misused his authority in order to provide illegal pecuniary advantage to Ramzan Sugar Mills Limited, Chiniot, and his son Muhammad Hamza Shahbaz Sharif (co-accused) being the C.E.O/Director of the said mills at that time. The petitioner vide directive dated 21.05.2014, approved the execution of a scheme

for construction of a sullage carrier from Village Daruta and other allied "Abadies" to the seepage drain Bhawana and this was malafidely done in order to provide effluent drainage to Ramzan Sugar Mills Limited, which should have been arranged at the cost of the mills itself. As per investigation, the abovementioned act of the petitioner caused a loss of Rs.213-million to the national exchequer. It is further concluded during the investigation that it was the responsibility of the management of Ramzan Sugar Mills to make arrangements for disposal of industrial effluent of the mills, however, no such arrangement was made and eventually, the sullage carrier was constructed at the expense of the public exchequer for the personal benefit of the son of the petitioner. It was further found during the investigation that the petitioner managed an application through the then MPA PP-74, namely, Moulana Muhammad Rehmat Ullah in collusion with his son Muhammad Hamza Shahbaz Sharif, co-accused wherein the route/alignment of the sullage carrier was designed in such a way that Ramzan Sugar Mills Limited, Chiniot was included in it, without mentioning the same in the above application. The petitioner issued a directive dated 21.05.2014 on a self-managed request of Moulana Muhammad Rehmat Ullah, the then MPA PP-74, whereby he approved the execution of the scheme for construction of the above referred sullage carrier. Funds were arranged for the abovementioned project through re-appropriation of funds and supplementary grants for speedy execution of the scheme. As per NAB/respondent, Muhammad Hamza Shahbaz Sharif (co-accused) was the Chief Executive of Ramzan Sugar Mills Limited, Chiniot at the time of approval and execution of the scheme for the construction of the above said sullage carrier, therefore, he was the beneficiary of the directive issued by the petitioner.

The petitioner was arrested on 10.11.2018 by the NAB/ respondent in this case on account of the abovementioned allegations, he is now on judicial remand, hence, the present constitutional petition before this Court for grant of post arrest bail to the petitioner.

3. It is contended by learned counsel for the petitioner that the petitioner is absolutely innocent and he has mlafidely, been arrested in this case due to political victimization; that Ramzan Sugar Mills Limited, Chiniot was established in the year 1990 and since then there was no complaint against the said mills from any corner regarding its industrial effluent; that the prosecution's own witness, namely, Ameer Khan who is a Circle Patwari of the area and whose statement has been relied upon by the NAB/

respondent himself, has categorically stated that a pond comprising 86-Kanals and 02-marlas in the land of Ramzan Sugar Mills Limited, Chiniot is present for dumping the industrial effluent of the milks; that even in the application form for establishment of the abovementioned mills in the year 1990, it was mentioned in Clause-9 that the industrial effluent shall be discharged in the 'saim nala' situated near the site and the said application has duly been approved by the concerned authority where-after the mills in question were established and approval for establishment of the mills on the abovementioned application form shows that the 'saim nala' was also situated near the mills and as such, the petitioner's son had no problem with the dumping of industrial effluent of his mills, as he had himself constructed a pond over the land measuring 86-Kanals and 02-marlas and because of the availability of the 'saim nala' nearby the mills; that the construction of the sullage carrier was approved on the application of MPA of the area, namely, Moulana Muhammad Rehmat Ullah who made a written request in this respect; that feasibility reports of the scheme in question and all other proceedings were approved strictly in accordance with the law by the cabinet and budget of the said scheme was finally approved by the Provincial Assembly of Punjab; that apart from the abovementioned scheme, many other schemes for construction of sewerage system were also approved in the same district during the same period but the NAB did not raise any objection against any other scheme and objection against the scheme in question has mala fidely been raised only on the ground that the sugar mills of the son of the petitioner are also situated in the area where the said scheme was executed; that there is absolutely no allegation that the funds allocated for the abovementioned scheme were misappropriated by the petitioner or his any other family member or friend; that similarly it is not a case of the NAB/respondent that funds allocated for the abovementioned scheme were not used for the construction of said scheme; that the scheme in question is not owned by the petitioner or his son and the said scheme is still owned by the Government; that son of the petitioner has been paying Government expenses for using the sullage carrier in question through a written agreement in this respect with the Government and even the sitting Government has executed an agreement in this respect with Ramzan Sugar Mills Limited, Chiniot; that it was Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74) on whose application, the abovementioned project was approved and without conceding if, for the sake of arguments, it is presumed that any illegality, corruption or corrupt practice was committed in this case then the said

Moulana Rehmat Ullah, Ex-MPA (PP-74) should have been made an accused in this case but instead of making him an accused, he has been made a prosecution witness in this case by the NAB authorities which speaks of their mala fides; that the scheme in. question was bona-fidely approved by the petitioner in the welfare of the "Abadies" of the area; that as per site plan of the above referred scheme, there are as many as seven villages and a godown of the food department of the Government of Punjab which are being benefited through the abovementioned scheme; that the NAB has arrested the petitioner in this case without any legal justification; that the present case against the petitioner is based on mala fides and the same is one of further inquiry, therefore, the petitioner may be directed to be released on post arrest bail. 1n order to embellish his arguments, learned counsel for the petitioner has placed reliance on the judgments, reported as "The State v. Syed Muzafar Hussain Shah" (1998 MLD 118) and "Sarwar and others v. The State and others" (2014 SCMR 1762).

4. On the other hand, it is contended by the learned Special Prosecutor for NAB that as the petitioner is involved in corruption and corrupt practices, therefore, he has rightly been arrested in this case by the NAB/respondent; that Ramzan Sugar Mills Limited, Chiniot is owned by the real son of the petitioner, namely, Muhammad Hamza Shahbaz Sharif (co-accused) who was the C.E.O./Director of Ramzan Sugar Mills at the relevant time, therefore, the petitioner managed to get an application from Moulana Muhammad Rehmat Ullah, the then MPA (PP-74) and thereafter he approved a scheme for the construction of a sullage carrier near the abovementioned mills of his son at the expense of the Government exchequer, in order to benefit his son and as such the petitioner by misusing his authority is guilty of corruption and corrupt practices; that the sullage carrier from village Daruta to the seepage drain of Bhowana was constructed with the cost of Rs.213-million of the Government exchequer and the main object of the abovementioned scheme was to provide illegal benefit to the mills of son of the petitioner; that the management of Ramzan Sugar Mills at the time of submitting their application for establishment of the Mills and issuance of N.O.C. for the said mills undertook to make arrangements for discharge of the waste of the mills but they did not fulfill their abovementioned obligation and finally the above sullage carrier was constructed for the discharge of industrial effluent of the mills at the expense of Government exchequer; the learned Special Prosecutor for NAB while referring to the site plan and different other documents

which he produced before the Court during his arguments contends that after village Daruta, the route of the sullage carrier was turned towards Ramzan Sugar Mills in order to give undue advantage to the said mills; that funds were arranged for the abovementioned scheme through different measures like re-appropriation of funds and supplementary grants which clearly shows that the petitioner had special focus on the speedy execution of the abovementioned scheme in order to give undue advantage to his son; that in-fact there was no need for the construction of the abovementioned project and a managed application was received by the petitioner through MPA of the area in order to give the impression that the said scheme was approved for the benefit of local population; that huge amount of Rs.213-million from the Government exchequer has been used by the petitioner for the benefit of his son; that in the cases registered under the provisions of National Accountability Ordinance, 1999, the scope of bail is very limited and bail can only be granted to an accused if he is seriously ill or if he is behind the bars for a very long period/several years, whereas the above grounds of hardship are not available to the present petitioner; that offence falls within the ambit of prohibitory clause of section 497, Cr.P.C; that the arguments advanced by learned counsel for the petitioner require deeper appreciation of evidence which exercise cannot be undertaken at bail stage; that there is no substance in this petition, hence, the same may be dismissed, In support of his contentions, learned Special Prosecutor for the NAB has placed reliance on the judgments reported as "Tallat Ishaq v. National Accountability Bureau through Chairman, and others" (PLD 2019 Supreme Court 112) and un-reported judgments of the Hon'b1e Supreme Court of Pakistan passed in C.P. No.1542 of 2016 dated 26.08.2016 and C.P. No.1618/2016 dated 03.08.2016.

5. Arguments heard, Record perused.

6. We are fully conscious of the fact that the exercise of deeper appreciation of evidence cannot be undertaken at bail stage but at the same time, it is by now well settled that a bail petition cannot be decided in vacuum and tentative assessment of evidence/documents is permissible at bail stage. We may refer here the judgment passed in the case of "Awal Khan and 7 others v. The State through AG-KPK and another" (2017 SCMR 538) wherein at Paragraph No.8, the Hon'ble Supreme Court of Pakistan has observed as under:-

> "In a situation like this, this Court in the cases of:--

(1) Khan Mir v. Amal Sherin (1989 SCMR 1987)

(2) Muhammad Hanif v. Manzoor and 2 others (NLR 1981 SC 367)

(3) Syed Khalid Hussain Shah v. The State (2014 SCMR 12) held that when the medical evidence is in conflict with the ocular account then, benefit of doubt at bail stage must go to the accused. In the case of Muhammad Hanif v. Manzoor (supra), it was held as follows:-

"It is true that at the stage of deciding the question of bail, the Court does not enter upon a detailed appreciation and examination of evidence, but it is also clear that the question cannot be decided in vacuum and the Court has to look at the material available when the bail is applied for. Now, in the present case, result of medico-legal examination of the deceased was available and the learned Judge of High Court could not have refused to look at it."

(underlining and bold is supplied for emphasis)

The august Supreme Court of Pakistan in the case of "Zaigham Ashrat v. The State and others" (2016 SCMR 18) at Para-9, was pleased to observe as under:-

"To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a .fair and proper conclusion albeit tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy and casual manner as that will defeat the ends af justice……."

Similar view was taken in the cases of "Muhammad Hanif v. Manzoor and others" (1982 SCMR 53) and "Adrees Ahmad and others v. Zafar Ali and another" (2010 SCMR 64).

Moreover, it is by now well settled that despite the bar contained under section 9(b) of the National Accountability Ordinance, 1999, bail can be granted to an accused in a suitable case, by the Supreme Court of Pakistan and the High Court, while exercising jurisdiction under Article 184(3) or under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, respectively as observed by the Hon'ble Supreme Court of Pakistan in the cases of "Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others" (PLD 2001 Supreme Court 607), "Haji Ghulam Ali v. The State through A.G., N.W.F.P.

Peshawar and another" (2003 SCMR 597) and "Himesh Khan v. The National Accountability Bureau (NAB) Lahore and others" (2015 SCMR 1092).

We have further noted that the learned Special Prosecutor for NAB has himself referred and produced different documents before the Court during his arguments and at the same time, he argued that the documents produced by the learned counsel for the petitioner may not be looked into as the same will amount to deeper appreciation of evidence. As different documents have been produced by the learned Special Prosecutor for NAB in support of his arguments, therefore, it would be unfair if we do not tentatively look into the said documents to appreciate and answer the arguments advanced by him. Likewise, after tentative assessment of the documents produced before the Court by the learned Special Prosecutor for NAB, it would be unjust, if we do not tentatively look at and appreciate the documents produced before the Court by learned counsel for the petitioner. Even otherwise, it is not understandable that if the NAB has a strong case on merits against the petitioner then as to why it is afraid of tentative assessment of the evidence/record of this case. We, therefore, proceed to decide the instant petition after tentative appreciation of the record/evidence of this case.

7. As mentioned earlier, the main allegation levelled by the NAB against the petitioner is that he (petitioner) being the then Chief Minister Punjab, issued a directive dated 21.05.2014, on a self-managed request/application of Moulana Muhammad Rehmat Ullah, the then MPA (PP-74) and through the abovementioned directive, he approved execution of construction of a sullage carrier from village Daruta and other allied "Abadies" to the seepage drain Bhowana, under the garb of a public utility scheme, whereas, the actual motive behind the approval of the said scheme was to provide an effluent disposal mechanism to Ramzan Sugar Mills Limited, Chiniot owned by the son of the petitioner, namely, Muhammad Hamza Shahbaz Sharif (co-accused). It is further alleged by the NAB that through the abovementioned scheme, the petitioner provided undue monetary benefit of Rs.213-million to his son at the expense of the Government exchequer and as such he committed corruption and corrupt practices. We have noted that Ramzan Sugar Mills Limited, Chiniot was established in the year 1990 and from the date of its establishment till the date of abovementioned directive dated 21.05.2014, issued by the petitioner, there was no complaint whatsoever before any forum regarding the

industrial effluent of Ramzan Sugar Mills. During the abovementioned period of 24-years, the petitioner and his other family members were arrested by a Military Dictator in the year 1999 and they remained behind the bars for a considerable period but even during the rule of 10-years of the said Military Dictator, no complaint whatsoever against Ramzan Sugar Mills was lodged before any authority. The NAB has itself recorded the statement of Circle Patwari, namely, Ameer Khan as a prosecution witness in this case. In his statement, the Circle Patwari has categorically mentioned that in the concerned revenue record (Register Haq daran-e-zameen for the year 1993-94), a pond measuring 10-marlas is situated in Khata No.125 of the concerned revenue estate (where Ramzan Sugar Mills limited, Chiniot is situated). He further stated that a pond measuring 40- kanals 02-marlas was situated in Khata No.140 and the same has been mentioned in the revenue record (Register Haq daran-e-zameen for the year 1997-98). Similarly, a pond measuring 86-Kanals 02-marlas was mentioned in Khata No.146 in the concerned revenue record ((Register Haq daran--e-zameen for the year 2001-02). Same was the situation in the concerned revenue record for the year 2005-06 wherein a pond measuring 86-Kanals 02-marlas was mentioned in Khata No.151. He further stated that in the revenue record for the year 2009-10, a pond was also shown in Khata No.151, land measuring 68-kanals 06-marlas. The abovementioned statement of Circle Patwari and the fact that there was no complaint whatsoever against the industrial effluent of Ramzan Sugar Mills Limited, Chiniot for a period of 24-years have prima facie established that the management of Ramzan Sugar Mills Limited, Chiniot has adequately made arrangements for disposal of the industrial waste of the said mills and there was no special need of the petitioner to construct a sullage carrier for the disposal of industrial effluent of the mills of his son at the expense of Government exchequer. It is also noteworthy that directive dated 21.05.2014, was not passed on any application moved by the son of the petitioner but the same was issued on the written request of Moulana Muhammad Rehmat Ullah, the then MPA (PP-74). The abovementioned Moulana Muhammad Rehmat Ullah made a written request at his letter pad for the construction of a sullage carrier from village Daruta to the villages Jamia Abad, Thatha Fateh Ali Saghar etc. The abovementioned request of the concerned MPA was approved by the petitioner being the then Chief Minister. The Provincial Cabinet also approved the said scheme along with different other schemes of District Chiniot and also approved the release of funds for the said scheme, in its meeting held on 20.05.2015. The

documents regarding approval of the abovementioned scheme along with other schemes by the Cabinet have duly been produced before the Court by learned counsel for the petitioner. Even the budget wherein the expenses to be incurred on the scheme in question were mentioned, was placed before the Provincial Assembly of the Punjab and the said budget was also approved on 12.06.2015. The proceedings regarding the approval and execution of the scheme in question were prima facie carried out in accordance with the law. Even the approval of supplementary grants and re-appropriation of funds are permissible under the relevant rules i.e. the Punjab Delegation of Financial Powers Rules, 2006 (Amended Rules 2016). There is no allegation against the petitioner that he misappropriated the funds allocated for the abovementioned scheme or received any kickbacks from the Contractor who was awarded contract for the construction of the said scheme. Similarly, there is absolutely no allegation that the funds allocated for the abovementioned scheme were not utilized/spent on the said scheme or contract of the said scheme was awarded at an exorbitant rate.

8. The main grievance of the NAB is that as the mills of the son of the petitioner were also situated in the area where the scheme in question was executed, therefore, it should be presumed that the said scheme was not meant welfare the were of the local population rather the same was constructed to provide benefit only to the mills of son of the petitioner. We have noted that apart from the scheme in question i.e. sullage carrier scheme from village Daruta and other allied Abadies to the seepage drain Bhowana, many other schemes for construction of sewerage system in the same district i.e. District Chiniot were also approved during the same period (2015 to 2018). We have further noted from the documents placed on the record by learned counsel for the petitioner that approval of the abovementioned scheme has been mentioned at Serial No.1145 in the relevant document i.e. in the Mid Term Development Program 2015-18, whereas, at Serial No.1146 of the said document, approval for construction of sewerage schemes for Mohallah Fateh Abad, Usman-Abad, Rasheeda Abad, Paris Road, Moazzam Shah, Shahbaal Shah, Bhowana, Rajan, Maqsood Abad etc. of District Chiniot against a sum of Rs. 199.694 million was also approved. Similarly, approval of construction of two other sewerage schemes in the village Karak etc. of District Chiniot and Mouza Jhang District Chiniot of different amounts of funds were also approved during the same period for the same district and approval of the said schemes have been mentioned at Serial Nos.1512 and 1513 of

the abovementioned document. Apart from the approval for construction of the abovementioned sewerage schemes in the same district during the same period, many other development schemes were also approved for the same district (District Chiniot) during the same period. The NAB did not raise any objection against the other development works and construction of other sewerage schemes and the objection has been raised by the NAB only against the construction of sullage carrier from village Daruta to the seepage drain Bhowana of District Chiniot. The said objection has been raised merely on the ground that as the mills of the son of the petitioner were also situated on the route of the said sullage carrier, therefore, in the said area, no development work should have been carried out and if any development work is carried out then it should be presumed that the same was not for the benefit of the people of local area rather the same was executed only for the benefit of the son of the petitioner. If, the above reason of the NAB is allowed to prevail then it will amount to give a license and unlettered/unlimited powers to the NAB to file a reference against any member of the parliament on the execution of any development scheme, like construction of a road, or execution of gas, electricity, water supply scheme etc. in his area, on the ground that the said scheme was actually executed by the said member of the parliament for his own benefit instead of the benefit of the local population because his house/ property or house/property of his any relative or house/property of any of his friend (supporter) is situated near or around the development scheme executed in his area. This will create chaos in the country and the members of the parliament shall not be able to carry out any development work in their area/constituency and if they do so, they will remain under constant threat of the NAB, who may file a reference against them on the basis of above ground/ allegation. We have a lot of respect for the members of the parliament of our country irrespective of their party affiliations, except the members of parliament who, are virtually involved in corruption and corrupt practices or in any other crime. The members of parliament are true representatives of the great Pakistani nation. Our liking for the honest Members of Parliament and Politicians is quite natural because the founders of our motherland were also politicians. We therefore, cannot leave the Members of the Parliament of our country at the mercy of the NAB by declaring that as the property of a Member Parliament or his relative or friend is situated in the area where a development scheme was executed, therefore, it should be presumed that the said scheme was executed only for the benefit of the said Member Parliament and not

for the benefit of the local population. At the same time, we do not say that the NAB should not proceed against any Member Parliament or Politician, if he is involved in corruption or corrupt practices but our only concern is that it should not reflect from the case that any individual has been victimized by the NAB. There should be some prima facie case/evidence/material against him and the case should not be based merely on speculations and imaginations. We are therefore, not inclined to encourage the abovementioned practice of the NAB.

9. We have also noted from the site plan of the abovementioned scheme produced before the Court by the learned Special Prosecutor for NAB that the scheme/project in question starts from Village Daruta and apart from Ramzan Sugar Mills, a godown of the Food Department of the Government of Punjab and different villages like Dinpur Colony, Khizar Hayat village, Qamaryki colony, Adda Jamiabad, Bhutto colony, Chah Kamaryki, Khan ka Kot, Morian Wala Abadi and Mustafabad Colony are also situated on the sides of the abovementioned sullage carrier. It is, therefore, evident that the sullage carrier in question has not been constructed only for the benefit of Ramzan Sugar Mills, rather the public at large of the abovementioned villages is also being benefited from the said scheme. Even, it is evident from the report and parawise comments furnished by the NAB/ respondent and evidence of the NAB itself that Ramzan Sugar Mills is not the sole beneficiary of the abovementioned sullage carrier though the NAB/respondent has tried to establish that the major discharge of effluent in the sullage carrier is of the Ramzan Sugar, Mills. It is also evident from the statement of Ghulam Shabbir Shah (PW), Sub-Engineer, Public Health Engineering Department, Sub-Division Bhowana District Chiniot that apart from the water discharge of Ramzan Sugar Mills, there was discharge of local "Abadies", as well as, discharge of godown of the Food Department in the abovementioned sullage carrier which has clearly established that Ramzan Sugar Mills is not the sole beneficiary of the abovementioned scheme. It is true that after its start from the village Daruta, a turn of about 50-Yards has been given to the sullage carrier across the Jhang Road towards the Ramzan Sugar Mills but the fact remains that the site plan of the scheme with the abovementioned turn has duly been approved by the competent authority. Moreover, apart from Ramzan Sugar Mills, the godown of the Food Department of the Government of Punjab and majority of the villages like village Khizar Hayat, Adda Jamiabad, Qamary Ki colony, Bhutto colony, Chah Kamary ki, Khan ka Kot, Morian wala Abadi and Mustafa Abad colony are also

benefited due to the abovementioned turn in the route of the sullage carrier. It is further noteworthy that except from the villages Daruta and Dinpur, all remaining villages on the route of the abovementioned sullage carrier are situated on the south western side of the Jhang Road and turn in the route of the sullage carrier was also given towards the south western side of the abovementioned route, therefore, it is clear that the turn in the route of sullage carrier was given to benefit the maximum population of the area.

10. It is also an admitted fact that the sullage carrier scheme from village Daruta to the seepage drain Bhowana is owned by the Government of Punjab. Neither the petitioner nor his son is owner of the said scheme. The son of the petitioner, Muhammad Hamza Shahbaz Sharif, co-accused has been paying annual rent to the Government for the use of the abovementioned sullage carrier and in this respect annual agreements have repeatedly been executed between the Government and son of the petitioner. Even, the sitting Government executed an agreement with the son of the petitioner on 15.09.2018 and received an amounts of Rs.52,500/- on 26.09.2018, as fee for use of the said sullage carrier.

11. We have further noted some other important aspects of this case. It is the case of NAB that the scheme in question has not been constructed for the public benefit rather the same has been constructed only for the benefit of Ramzan Sugar Mills owned by the son of the petitioner and approval of the said scheme through the directive dated 21.05.2014 of the petitioner which was issued on a self-managed request/application of Moulana Muhammad Rehmat Ullah, the then MPA (PP-74), meaning thereby, it was abovementioned Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74), who played pivotal role by moving a fake application for the construction of the above mentioned scheme. Moreover, the said scheme was for the benefit of son of the petitioner, namely, Muhammad Hamza Shahbaz Sharif (co-accused). Under the circumstances according to the NAB case, Mian Muhammad Shahbaz Sharif (petitioner), Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74) and Muhammad Hamza Shahbaz Sharif (co-accused) were sailing in the same boat being main characters of the instant NAB case but we are surprised to note that the abovementioned Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74) has been made a prosecution witness in this case instead of an accused. If, the aim of the NAB was to only punish the petitioner then the NAB could have first made the

abovementioned mover of the scheme (Moulana Muhammad Rehmat Ullah) an accused and then an approver in this case which is now a common practice of the NAB. The other person who was also sailing in the same boat is Muhammad Hamza Shahbaz Sharif (co-accused) but despite the authorization of inquiry in this case on 04.07.2018 and subsequent authorization of investigation and lapse of more than seven months, the NAB authorities have not decided till-today to arrest him. He (Muhammad Hamza Shahbaz Sharif, co-accused) earlier moved a petition i.e. Writ Petition No.246619 of 2018 before this Court for grant of pre-arrest bail in this case wherein the learned Special Prosecutor for NAB appeared before the Court on 20.11.2018 and made a categorical statement that till that time neither the NAB was inclined to arrest him nor any warrant of his arrest had been issued by the competent authority. In the light of above as the NAB was not inclined to arrest Muhammad Hamza Shahbaz Sharif (co-accused) at that time, therefore, his pre-arrest bail petition was disposed of as having become infructuous vide order dated 20.11.2018 with the direction to the NAB authorities that if they find any ground for arrest of the said co-accused then the same would be communicated to him, so that he may have sufficient time of at least ten days, for approaching the Court of competent jurisdiction. Even today, we have repeatedly asked the learned Special Prosecutor for the NAB, as well as, Additional Director NAB and Deputy Director NAB, Lahore present before the Court that as to whether at present the NAB is inclined to arrest the said co-accused, the learned Special Prosecutor for the NAB, as well as, Additional Director NAB and Deputy Director NAB, Lahore did not state that they were inclined to arrest him rather they stated that as the abovementioned co-accused has been cooperating with the investigating officer, therefore, it was not deemed appropriate to arrest him. The learned Special Prosecutor for the NAB has further conceded that till-today the competent authority has not issued any warrant of arrest against the abovementioned co-accused which means that till-today the NAB authorities are not inclined to arrest the abovementioned co-accused, who, according to the NAB, was the sole beneficiary in this case. The entire prosecution case is based on documentary evidence which is already in possession of the prosecution. Even, the oral statements of the witnesses have also been recorded in this case but it is not understandable that what else is required by the NAB to take decision that as to whether Muhammad Hamza Shahbaz Sharif (co-accused) is to be arrested in this case or not. The conduct of the NAB authorities prima facie shows that they are satisfied that arrest of Muhammad Hamza

Shahbaz Sharif (co-accused) is not required in this case because the entire prosecution case is before them and prima facie nothing else is required to be collected in this case. Under the circumstances, the discriminatory treatment of the NAB/respondent in respect of three persons involved in this case, who, according to NAB's own case were sailing in the same boat, is not understandable.

12. As mentioned earlier, according to NAB's case, Mian Muhammad Shahbaz Sharif (petitioner) Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74) and Muhammad Hamza Shahbaz Sharif (co-accused) were sailing in the same boat but the NAB authorities instead of arraying Moulana Muhammad Rehmat Ullah, Ex-MPA (PP-74) as an accused in this case, has made him a prosecution witness, Till-today the NAB is not inclined to arrest Muhammad Hamza Shahbaz Sharif, co-accused (who, according to NAB's own case was the main beneficiary in this case but on the other hand the NAB has vehemently been opposing the release of the petitioner on bail. The abovementioned discriminatory treatment of the NAB authorities and pick and choose made by them regarding the different persons allegedly involved in this case and standing on the same pedestal, is not understandable for us. The said acts of the NAB/respondent speak loudly about the mala fides of the NAB against the petitioner. We may clarify here that we have given the abovementioned observations in order to show the mala fides of the NAB/ respondents and it is expected that the said observations shall not be made an excuse for the arrest of Muhammad Hamza Shahbaz Sharif (co-accused) by the NAB/respondent and decision of the NAB not to arrest him may be a right decision, while keeping in view the attending circumstances of the case.

13. We have also noted that the NAB has recorded the statements of some witnesses under section 161, Cr.P.C. wherein they stated that due to the industrial waste of Ramzan Sugar Mills Limited, the water of the area became polluted which resulted into the spreading of hepatitis-C and other diseases in the area whereupon they contacted the local MPA, namely, Moulana Muhammad Rehmat Ullah and consequently the abovementioned sullage carrier was constructed in the area but according to the said witnesses the said sullage carrier has been providing benefit only to the Ramzan Sugar Mills. It is not understandable that as to why the NAB authorities instead of taking a report from the Health Department of the area regarding spreading of the diseases as alleged by the prosecution witnesses of this case, namely,

Habib Ullah, Ghulam Martaza, Ghulam Hussain and Muhammad Sufyan, has recorded statements of the said witnesses, who, were simply laymen and no statement of any medical expert or employees of the Health Department has been recorded to establish that the abovementioned disease actually spread in the area. Moulana Muhammad Rehmat Ullah, Ex-MPA (PW) also stated that he moved an application to the petitioner for construction of a sullage carrier because the water of the area became contaminated due to the industrial waste of Ramzan Sugar Mills but we have noted that no such allegation about the industrial waste of Ramzan Sugar Mills has been mentioned in the written application of the abovementioned prosecution witness which he moved at the relevant time for the approval of the above-referred scheme. No other application containing receipt of the Chief Minister Secretariat has been placed on the record to support the abovementioned allegation of Moulana Muhammad Rehmat Ullah (PW). None of the abovementioned prosecution witnesses ever moved any application before any competent authority regarding the industrial effluent of Ramzan Sugar Mills and they made their abovementioned statements for the first time before the NAB authorities on 27.09.2018 and 14.11.2018 i.e. after the delay of two months twenty three days and four months and seven days, respectively, from the date of authorization of the inquiry in this case on 04.07.2018, though Ramzan Sugar Mills Limited, Chiniot was admittedly operating in the area from the last twenty four years. Prima facie, the above statements of the PWs are not sufficient to make an excuse for dismissal of this petition.

14. At the cost of repetition, it is observed that there is no allegation that the funds allocated for the abovementioned scheme were not utilized/ spent on the said scheme. It is also evident from the perusal of the record that the public at large of the area is being benefited from the said scheme. Moreover, there is nothing on the record that the petitioner received any kickbacks or commission in awarding the contract of construction for the above referred scheme. Under the circumstances, it is a fit case for grant of post arrest bail to the petitioner. We may refer here the case of "Muhammad Saeed Mehdi v. The State and 2 others" (2002 SCMR 282) wherein at Page Nos.285 and 288, it was observed as under:-

> Page-285 "Allegations against the petitioner are that in November/ December, 1993 while holding the office of Chairman, Capital Development Authority, he sanctioned an amount of Rs.0.6 million to the Environment

Directorate, CDA for landscaping near Gate No.3 of the Prime Minister's House, Islamabad in breach of procedure and without following the rules on the subject."

……
…..

Page-288 "7. As regards the nature of accusation against the petitioners, the truth or otherwise of such allegations can only be determined at the trial by the Court after deep analysis of the evidence that may be adduced by the parties. Without going deeper into the merits of the prosecution case, it may suffice to observe that prima facie the petitioner does not appear to be guilty of misuse of official position or misappropriation of public funds to his own use or in order to cause monetary loss of public funds or to obtain illegal gain for himself or for any of his relatives or friends. It is not the case of the prosecution that the amount sanctioned by him was not actually spent on the works for which it was approved."

If, for the sake of arguments, it is presumed that there was any procedural irregularity in the exercise of jurisdiction by the petitioner, even then the same may not amount to the misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999. We may refer here the case of "The State v. Anwar Saif Ullah Khan" (PLD 2016 Supreme Court 276). The relevant part of the said judgment is reproduced hereunder:-

"It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law....".

Reliance in this respect may also be placed on the case of "Anwar Saifullah Khan v. The State and 4 others" (PLD 2000 Lahore 564) wherein the learned Full Bench of this Court with majority decision, granted post arrest bail to the petitioner of the said case inter-alia on the ground that the main allegation against him was of the misuse of his political powers and as the massive documentary evidence was to be recorded in the said case to prove the above allegation, therefore, the petitioner of the said case was found entitled to the relief of post arrest bail. The relevant part of the abovementioned judgment of this Court at Page-584 reads as under:-

> "This is a case of misuse of political power. The accusations against him flow from a massive documentary evidence. The petitioner naturally needs an occasion to see these documents, prepare his defence and face the trial. This entitles him prima facie, the concession of post-arrest bail. Seeing from the above perspective, we are clear in our mind that he has a prima facie case calling for exercise of our jurisdiction to order his pre-trial release. This will enable him to prepare his defence."

15. The argument of the learned Special Prosecutor for the NAB that bail can only be granted in the NAB cases on the ground of extreme illness or if an accused is behind the bars for several years without any progress in his trial, has no substance. If, from the tentative assessment of the evidence, a Court comes to the conclusion that sufficient material is-not available on the record to establish the charges of the prosecution against him or if it is a case of further inquiry, even then, bail can be granted to the accused in NAB case as observed in the cases of "Muhammad Saeed Mehdi v. The State and 2 others" (2002 SCMR 282) and "Anwar Saifullah Khan v. The State and 4 others" PLD 2000 Lahore 564). We are afraid that we cannot dismiss this bail petition merely on the abovementioned hyper technical ground.

16. The judgments cited by the learned Special Prosecutor for NAB are distinguishable on their own facts.

17. Considering all the above-mentioned facts, we are of the considered view that it is a case of further inquiry and a case for grant of post arrest bail in favour of the petitioner is made out.

18. In the light of above discussion, this petition is allowed and the petitioner namely Mian Muhammad Shahbaz Sharif is admitted to post arrest bail subject to his

furnishing bail bonds in the sum of Rs.10,000,000/- (Rupees Ten Million Only) with one surety in the like amount to the satisfaction of learned trial Court.

19. The above detailed reasons be read as part and parcel of our short order of even date which is reproduced hereunder:-

> "We have heard the learned counsel for the parties at length and perused the record.
>
> 2. For the reasons to be recorded later on, this petition is allowed and the petitioner namely Mian Muhammad Shahbaz Sharif is admitted to post arrest bail in Investigation in Ramzan Sugar Mills Scam authorized vide letter No.1(61)HQ/958/NAB-L dated 7.12.2018, subject to his furnishing bail bonds in the sum of Rs.10 million (Ten million), with one surety in the like amount to the satisfaction of learned trial Court."

SA/H-11/L **Bail granted.**

2020 Y L R 1970

[Lahore (Multan Bench)]

Before Malik Shahzad Ahmad Khan and Sadiq Mahmud Khurram, JJ

MUHAMMAD SHAHBAZ alias CHAMMA TINDA---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 476-J of 2018 and C.M. No. 1 of 2020, decided on 3rd February, 2020.

Criminal Procedure Code (V of 1898)---

----S. 426---Control of Narcotic Substances Act (XXV of 1997), S. 9(c)---Possession of narcotics---Suspension of sentence pending appeal---Bail, grant of---Violation of policy of awarding sentence to accused---Scope---Petitioner sought suspension of his sentence and release on bail during pendency of appeal---Petitioner was behind the bars since the date of his arrest and as such he had already served a period of two years and ten months out of his sentence of six years---No prospect of decision of the main appeal in the near future existed---Possibility could not be ruled out that the petitioner might serve out his entire sentence before the decision of his main appeal on merits and in such eventuality, purpose of filing of appeal would become infructuous---Sentence awarded by the Trial Court was against the policy of awarding sentence, according to which in case of recovery of charas exceeding 1 kg and upto 2 kg, an accused had to be convicted and sentenced to four years and six months rigorous imprisonment---Quantum of sentence awarded by Trial Court required serious re-consideration---Petition was allowed.

Ghulam Murtaza and another v. The State PLD 2009 Lah. 362 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

Prince Rehan Iftikhar Sheikh for Petitioner.

Adnan Latif, Deputy Prosecutor General on behalf of the State.

ORDER

C.M. No. 1 of 2020.

Muhammad Shahbaz alias Chamma Tinda petitioner-appellant by way of the instant petition has sought for suspension of his sentence and release on bail during the pendency of his appeal.

2. The petitioner was tried in case FIR No.151/2017, dated 01.04.2017, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station City Burewala, District Vehari and vide judgment dated 28.03.2018, passed

by the learned Additional Sessions Judge, Burewala, the petitioner has been convicted and sentenced as under:-

> Under section 9(c) of CNSA, 1997 to rigorous imprisonment for six years with fine of Rs.20,000/- and in default thereof to suffer simple imprisonment for five months.
>
> Benefit of section 382(b), Cr.P.C. was also extended to the petitioner.

3. Arguments heard. Record perused.

4. As per prosecution case, on 01.04.2017, the petitioner was apprehended by the police and Charas weighing 1350 grams was recovered from his possession. It is evident from paragraph No.1 of impugned judgment dated 28.03.2018, passed by the learned trial Court that the petitioner was arrested in this case on 01.04.2017. Paragraph No.13 of the impugned judgment further reveals that the petitioner was under custody at the time of announcement of the said judgment. The petitioner is behind the bars since the date of his arrest i.e., 01.04.2017 and as such he has already undergone a period of two years and ten months of his imprisonment. There is no prospect of early decision of the main appeal of the petitioner in the near future as the same pertains to the year 2018, therefore, possibility cannot be ruled out that the petitioner may serve out his entire sentence before the decision of his main appeal on merits. In that eventuality, purpose of filing of appeal by the petitioner before this Court shall become infructuous.

5. It is further noteworthy that the sentence awarded by the learned trial Court to the petitioner on recovery of 1350-grams Charas, is against the sentencing policy, settled by this Court in the case of "Ghulam Murtaza and another v. The State" (PLD 2009 Lahore 362) and affirmed by the Hon'ble Supreme Court of Pakistan, in the case of "Ameer Zeb v. The State" (PLD 2012 Supreme Court 380), according to which in the case of recovery of Charas exceeding 1 K.G and unto 2 K.G, an accused is to be convicted and sentenced to four years and six months rigorous imprisonment with fine of Rs.20,000/- and in default to further undergo five months simple imprisonment. The quantum of sentence awarded by the learned trial Court to the petitioner also requires serious reconsideration.

6. In the light of above discussion, this miscellaneous petition is allowed, the sentence of the petitioner Muhammad Shehbaz alias Chamma Tinda is suspended and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. The petitioner is directed to appear before this Court on each and every date of hearing of his appeal.

SA/M-53/L **Sentence suspended.**

2020 Y L R 2636

[Lahore]

Before Malik Shahzad Ahmad Khan and Raja Shahid Mahmood Abbasi, JJ

The STATE through Deputy Director (Law)---Petitioner

Versus

SARDAR MUHAMMAD alias SARDARA GUJJAR and others---Respondents

Criminal Appeal No.667 of 2010, decided on 1st June, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 19---Forfeiture of assets---Pre-condition---If accused of offence punishable under Control of Narcotic Substances Act, 1997, is sentenced to imprisonment for a term exceeding three years only then Court can order that his assets derivable from trafficking in narcotics substances be forfeited.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 9 (c), 14, 15, 19, 37 & 48---Forfeiture of assets, refusal of---Acquittal---Accused was acquitted by Trial Court and the Court declined to forfeit his assets on the ground that his son and brother were involved in drug trafficking---Validity---Accused was tried for charges under Ss.9, 14 & 15 of Control of Narcotic Substances Act, 1997, along with other charges but he was not convicted and sentenced by Trial Court for the charge under S.9(c) of Control of Narcotic Substances Act, 1997, nor for abetment of the offence, as envisaged under S.15 of Control of Narcotic Substances Act, 1997---Accused was acquitted by Trial Court from all charges therefore, provisions of S. 37 of Control of Narcotic Substances Act, 1997, were not attracted against him---Authorities filed appeal malafidely against accused only on the ground that his son and brother were also accused in the case---High Court declined to interfere in the order passed by Trial Court as no illegality or material irregularity was pointed out in the order---Appeal was dismissed in circumstances.

Kashif Javed, Special Prosecutor for A.N.F.

Naveed Afzal Basra for Respondent No.5.

ORDER

This appeal has been filed against order dated 17.03.2010 passed by the learned Judge, Special Court CNS, Lahore, whereby application filed by Muhammad Amjad Ali (respondent No.5) for release of his forfeited property was accepted.

2. As per brief facts of the present case, Muhammad Amjad Ali (respondent No.5) was an accused in case FIR No. 18 dated 15.05.1995 registered at Police Station PNCB District Lahore offences under Articles 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 read with Sections 9/14/15 of the Control of Narcotic Substances Act, 1997 and Sections 324/332 and 353 of P.P.C. In the aforementioned case, Muhammad Amjad Ali (respondent No.5) has admittedly been acquitted by the learned trial Court vide judgment dated 27.07.2001. After acquittal, Muhammad Amjad Ali (respondent No.5) filed above-referred application for release of his freezed property i.e. bank account No. 100-5058-5, UBL, Renala Khurd Branch, as well as, his share in properties mentioned at serial Nos. 1, 9 and 10 of application bearing No. M.A.24/ 2012.2004. The abovementioned application of respondent No.5 was accepted vide impugned order dated 17.03.2010. Hence, the instant appeal before this Court.

3. Arguments heard. Record perused.

4. It is an admitted fact that Muhammad Amjad Ali (respondent No.5) was an accused in the abovementioned case FIR No. 18 of 1995 of Police Station P.N.C.B. District Lahore but he has been acquitted in the said case by the learned trial Court vide judgment dated 27.07.2001. No appeal against his acquittal has been filed before any forum by the State. In the light of above, there was no justification to forfeit/freeze the property of Muhammad Amjad Ali (respondent No. 5), mentioned in his above-referred application. In this respect, Sections 19 and 37 of the Control of Narcotic Substances Act, 1997 are relevant. Sections 19 and 37 of the Act ibid read as under:

> "19. Forfeiture of assets of an Offender.---Notwithstanding any-thing contained in section 13, where the Special Court finds a person guilty of an offence punishable under this Act and is sentenced to imprisonment for a term exceeding three years, the Court shall also order that his assets derivable from trafficking in narcotics substances shall stand forfeited to the Federal Government unless it is satisfied, for which the burden of proof shall rest on the accused, that they or any part thereof have not been so acquired.

(Bold and underlining supplied for emphasis).

37. Freezing of assets etc.---(1) Where the Special Court trying an offence punishable under this Act is satisfied that there appear reasonable grounds for believing that the accused has committed such an offence, it may order the freezing of the assets of the accused, his relatives and associates.

(2) Where in the opinion of the Director-General of an officer authorized under section 21 an offence is being or has been committed, he may freeze the assets of such accused and within seven days of the freezing shall place before the Court the material on the basis of which the freezing was made and further continuation of the freezing or otherwise shall be decided by the Court.

(3) The said officer shall trace, identify and freeze the assets during the investigation or trial for the purpose of forfeiture by the Special Court:

Provided that the Director General, or as the case may be, the officer freezing any asset shall, within three days, inform the Special Court about such freezing and the Special Court shall, after notice to the person whose assets have been frozen, by an order in writing, confirm, rescind or vary such freezing."

It is therefore, evident from the perusal of abovementioned provisions of law that if an accused of offence punishable under the Act supra is sentenced to imprisonment for a term exceeding 03 years, only then a Court can order that his assets derivable from trafficking in narcotics substances be forfeited, whereas, in the instant case, respondent No. 5 has been acquitted by the learned trial Court. Insofar as Section 37 of the Act ibid is concerned, although under the said provision of law, a Court can pass an order for freezing of the assets of an accused, his relatives and associates and learned Special Prosecutor for A.N.F has argued that father and two brothers of Muhammad Amjad Ali (respondent No.5), namely, Sardar Muhammad alias Sardara, Muhammad Asghar and Muhammad Ashraf, respectively, have been convicted and sentenced by the learned Judge, Special Court CNS, Lahore vide judgment dated 27.07.2001 therefore, assets of respondent No.5 being their relative, can validly be forfeited under the abovementioned provisions of law but there is no substance in the abovementioned argument of learned Special Prosecutor for ANF because in this case, Muhammad Amjad Ali

(respondent No.5) himself was an accused and he was tried for charges under Sections 9, 14 and 15 of CNSA, 1997 along with other charges but he has not been convicted and sentenced by the learned trial Court for the charge under Section 9-C of the Act ibid or for abetment of the said offence, as envisaged under Section 15 of the Act ibid rather, as mentioned earlier, he has been acquitted by the learned trial Court from all charges therefore, provisions of Section 37 of the Act supra are not attracted in this case against respondent No.5. It appears that the instant appeal has malafidely been filed by the State against Muhammad Amjad Ali (respondent No. 5) only on the ground that he is relative (son/ brother) of the abovementioned rest of the accused of this case. No illegality or material irregularity in the impugned order dated 17.03.2010 has been pointed out by learned Special Prosecutor for ANF.

5. In the light of above discussion, there is no substance in this appeal therefore, the same is hereby dismissed.

MH/S-36/L **Appeal dismissed.**

2020 Y L R Note 100

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD RIZWAN---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 14016-B of 2019, decided on 11th April, 2019.

(a) Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302, 109, 148, 149 & 34---Qatl-i-amd, abetment, rioting, armed with deadly weapon, common object, common intention---Bail, grant of---Scope---Prosecution case against accused was that he along with others murdered the brother of complainant---Accused was attributed the role of making a single fire shot on the right upper arm of the deceased---Prosecution had alleged that two empties, recovered from the spot, had matched with the pistol recovered from the possession of accused---Empties were sent to the Forensic Laboratory after four days of the occurrence---Deceased was an employee of the police department, therefore, possibility could not be ruled out that after the arrest of accused, fake empties were prepared and sent to the Forensic Laboratory---Recovery was only corroborative piece of evidence---Motive was attributed to other co-accused persons, as such, the accused had no motive to take part in the occurrence---Bail was allowed, in circumstances.

(b) Criminal trial---

----Recovery of weapon--- Scope---Recovery is only a corroborative piece of evidence.

Naseem Ullah Khan Niazi for Petitioner.

Ch. Muhammad Ishaq, D.P.G. for the State.

Syed Imdad Hussain Hamdani for the Complainant.

Rehmat, Sub-Inspector.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner Muhammad Rizwan through the instant petition seeks post arrest bail in case FIR No. 268 dated 05.07.2018 registered at Police Station City Jauharabad District Khushab offences under Sections 302/109/148/149/34 of P.P.C.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 05.07.2018 at about 11:00 a.m., the complainant along with PWs and his brother namely Ahmad Iqbal deceased, who was a police employee, went to Madina Hotel in order to take their lunch and when they reached in the street of Masjid Lari Adda near Madina Hotel, the petitioner and his

five co-accused emerged at the spot while riding on three motorcycles while armed with different weapons. As per contents of the FIR, the petitioner and his five co-accused made one fire shot each on the body of Ahmad Iqbal deceased and thereafter, they fled away from the spot. Motive behind the occurrence was an earlier FIR No. 35 dated 07.03.2018 offences under Sections 324/34/109 of P.P.C. registered at Police Station Sadar Jauharabad; wherein, Tasawar Elahi, Zafar and Ehsan Elahi co-accused were challaned and due to the said grudge, murder of Ahmad Iqbal was committed.

4. I have noted that there is one deceased in this case and for the murder of one person, the complainant has implicated, as many as, six accused while attributing one firearm injury to each of them on the body of the deceased. The complainant also implicated four accused persons in this case with the role of abetment and as such, for the murder of one deceased, the complainant has implicated, as many as, ten accused persons in this case. Fatal firearm injuries on the person of Ahmad Iqbal deceased have been assigned to other co-accused and the petitioner has been attributed the role of making a single fire shot which landed on the right upper arm of the deceased (injury No.3, in the postmortem report). According to the final opinion of the Medical Officer, the said injury was not the cause of death of Ahmad Iqbal deceased and injuries Nos. 4, 5 and 6, attributed to co-accused, were the cause of his death. Learned DPG assisted by learned counsel for the complainant has argued that as per report of the Punjab Forensic Science Agency, two empties recovered from the spot have matched with the pistol recovered from the possession of the petitioner but I have noted that as per contents of the FIR, the deceased was a police employee who was posted in D.C. House, Khushab at the time of occurrence. The occurrence in this case took place on 05.07.2018. The petitioner was arrested in this case on 06.07.2018 and the empties were sent to the Forensic Science Agency on 09.07.2018. As mentioned earlier, the deceased was an employee of the police department (Head constable) therefore, possibility cannot be ruled out that after the arrest of the petitioner on 06.07.2018, fake empties were prepared in this case and sent to the Punjab Forensic Science Agency for their comparison on 09.07.2018, with the pistol, which has shown to be recovered from the possession of the petitioner on 15.07.2018. Even otherwise, recovery is only a corroborative piece of evidence. Moreover, motive of registration of earlier FIR No. 35 of 2018 was against Tasawar Elahi, Zafar and Ehsan Elahi co-accused, who were challaned in the said case and as such, the petitioner has no motive to take part in the occurrence.

5. Keeping in view all the aforementioned facts, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to his furnishing the bail bonds in the sum of Rs.200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

SA/M-100/L **Bail granted.**

2020 Y L R Note 104

[Lahore (Multan Bench)]

Before Malik Shahzad Ahmad Khan and Sadiq Mahmud Khurram, JJ

MUHAMMAD NADEEM---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 60 and C.M. No. 1 of 2019, decided on 30th January, 2020.

Criminal Procedure Code (V of 1898)---

----S. 426--- Control of Narcotic Substances Act (XXV of 1997), S. 9(c)--- Possession of narcotics---Suspension of sentence---Petitioner was convicted and sentenced to imprisonment for four years and six months with fine of Rs.20,000/-, and benefit of S.382-B, Cr.P.C., was also extended to him---Perusal of jail report showed that the un-expired period of sentence of the petitioner was 02 years, 07 months and 22 days---Appeal was filed by the petitioner in the year 2019 but the same could not be decided so far due to heavy backlog---Possibility could not be ruled out that the petitioner might serve out his remaining sentence before the decision of his main appeal on merits, which would amount to awarding punishment to the petitioner in advance---Petition was allowed and sentence of petitioner was suspended and he was admitted to bail, in circumstances.

Prince Rehan Iftikhar Sheikh for Petitioner.

Muhammad Ali Shahab, Deputy Prosecutor General for the State.

ORDER

Muhammad Nadeem petitioner-appellant by way of the instant petition has sought for suspension of his sentence and release on bail during the pendency of his appeal.

2. The petitioner was tried in case FIR No.262 dated 16.07.2018, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station City Chichawatni District Sahiwal and vide judgment dated 21.01.2019, passed by the learned Additional Sessions Judge, Chichawatni, the petitioner has been convicted and sentenced as under:-

Under section 9(c) of CNSA, 1997 to imprisonment for four years and six months with fine of Rs.20,000/- and in default thereof to suffer simple imprisonment for five months.

Benefit of section 382-B, Cr.P.C. was also extended to the petitioner/appellant.

3. Arguments heard. Record perused.

4. As per prosecution case, Charas weighing 1440-grams was recovered from the possession of the petitioner. It is evident from the perusal of the impugned judgment of the learned trial court dated 21.01.2019 that the petitioner was arrested in this case on 16.07.2018. As per paragraph No.20 of the judgment, the petitioner was in custody at the time of pronouncement of the impugned judgment passed by the learned trial court and as such the petitioner is behind the bars since the date of his arrest i.e. 16.07.2018. This Court vide order dated 29.04.2019, requisitioned a report from the Superintendent, Central Jail, Sahiwal. As per report dated 20.05.2019, the petitioner has already undergone one year one month and twenty eight days of the sentence of his imprisonment and un-expired portion of imprisonment of the petitioner was three years, four months and two days. A further period of 08 months and 10 days has elapsed from the date of issuance of the above referred report meaning thereby the un-expired period of sentence of the petitioner is 02 years, 07 months and 22 days. Although, the main appeal was filed by the petitioner in the year 2019 but the same could not be decided so far due to heavy backlog, therefore, possibility cannot be ruled out that the petitioner may serve out his remaining sentence before the decision of his main criminal appeal on merits. It will amount to awarding the petitioner punishment in advance. In this respect, we respectfully refer here the case of Abdul Hameed v. Muhammad Ahdullah (1999 SCMR 2589).

5. In the light of above discussion, this miscellaneous petition is allowed, the sentence of the petitioner is suspended and the petitioner Muhammad Nadeem is admitted to bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. The petitioner is directed to appear before this Court on each and every date of hearing of this case.

ADN/M-50/L **Sentenced suspended.**

PLJ 2020 Cr.C. (Note) 29

[Lahore High Court, Lahore]

Present **: MALIK SHAHZAD AHMAD KHAN, J.**

FESCO--Appellant

versus

LIAQAT ALI and another--Respondents

Crl. A. No. 983 of 2016, decided on 10.5.2017.

Criminal Procedure Code, 1898 (V of 1898)--

----Ss. 249-A & 417--Electricity Act, 1910, S. 39-A--Appeal against acquittal--Allegation--FIR was lodged against respondent that he was stealing electricity, connecting wire with main cable and tampering with meter--Allegation against respondent was that he was stealing electricity while connecting wire to the main cable and tampering with the meter. The meter was admittedly not in the name of respondent--Although it has been argued by counsel for the appellant that the said meter was in the name of the father of above mentioned respondent but there is no eyewitness ad seen respondent while tampering with the meter or Stealing the electricity. No evidence was collected by the prosecution to establish that the premises wherein the tampered electricity meter was installed was in the name or occupation of respondent--Though the allegation of tampering the electricity meter was levelled against respondent but no tool, whereby, the meter was tampered with or theft of electricity was committed has been recovered from the possession of above mentioned respondent during the investigation of this case. It is noteworthy that charge was framed against respondent on 05.11.2015 and prosecution was granted repeated adjournments (five opportunities) to lead evidence but not a single witness was produced by the prosecution. Trial Court has rightly invoked the provisions of Section 249-A, Cr.P.C. and acquitted respondent vide the above mentioned impugned order.

[Para 5] A

Ch. Muhammad Shahid Iqbal, Advocate for Appellant.

Date of hearing: 10.5.2017

ORDER

The instant appeal has been filed against the acquittal of Respondent No. 1 in case F.I.R. No. 506/2014 dated 15.12.2014, offence under Section 39-A of the Electricity Act, 1910, Police Station Rajana, District Toba Tek Singh *vide* order dated 16.03.2016 passed by learned Senior Civil Judge/ Magistrate Section 30, Toba Tek Singh.

2. As per brief facts of the present case, the above mentioned F.I.R. was lodged against Respondent No. 1 with the allegation that the said respondent was stealing electricity while connecting wire with the main cable and tampering with the meter. The police investigated the case and submitted challan against Respondent No. 1. The charge was framed against Respondent No. 1 to wtiich he pleaded not guilty and claimed trial. During the pendency of trial, Respondent No. 1 was acquitted by the learned trial Court *vide* order dated 16.03.2016 by invoking the provisions of Section 249-A, Cr.P.C.

3. It is contended by learned counsel for the appellant that sufficient opportunity was not provided to the prosecution to prove its case and the provision of Section 249-A, Cr.P.C. has wrongly been invoked by the learned trial Court in a hasty manner; that sufficient material was available on the record against Respondent No. 1 to prove the case of prosecution; that the tampered meter was also handed over by the complainant to the I.O. through Receipt No. 8112 dated 19.05.2015; that the impugned order is result of misreading and non-reading of record, therefore, the same may be set aside and the case may be remanded back to the learned trial Court to decide the same afresh after providing opportunity to the appellant/complainant to produce evidence;

4. Heard. Record perused.

5. The allegation against Respondent No. 1 was that he was stealing electricity while connecting wire to the main cable and tampering with the meter. The meter was admittedly not in the name of Respondent No. 1. Although it has been argued by learned counsel for the appellant that the said meter was in the name of the father of above mentioned respondent but there is no eyewitness who had seen Respondent No. 1 while tampering with the meter or stealing the electricity. No evidence was collected by the prosecution to establish that the premises wherein the tampered electricity meter was installed was in the name or occupation of Respondent No. 1. Though the allegation of tampering the electricity meter was levelled against Respondent No. 1 but no tool, whereby, the meter was tampered with or theft of electricity was committed has been recovered from the possession of above mentioned respondent during the investigation of this case. It is noteworthy that charge was framed against Respondent No. 1 on 05.11.2015 and prosecution was granted repeated adjournments (five opportunities) to lead evidence but not a single witness was produced by the prosecution. Keeping in view all the aforementioned facts, the learned trial Court has rightly invoked the provisions of Section 249-A, Cr.P.C. and acquitted Respondent No. 1 *vide* the above mentioned impugned order.

6. In the light of above discussion, there is no substance in this appeal; hence the same is hereby ***dismissed***.

(A.A.K.) **Appeal dismissed.**

PLJ 2020 Cr.C. (Note) 111

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD QASIM--Appellant

versus

STATE & another --Respondents

Crl. A. No. 707 of 2016, decided on 9.5.2017.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 324, 302, 147, 148 & 149--Conviction and sentence--Challenge to--Attempt to murder--According to the FIR, Shazzil Hassan son of Safeer Ali was murdered in this case, whereas Mst. Bakhat Bibi wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz, Mst. Bakhat Bibi wife of Muhammad Mumtaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz sustained injuries during the occurrence--The role of causing murder of Shazzil Hassan was attributed to Tariq Mehmood (co-accused), who has already been acquitted from the charge under Section 302 PPC for causing murder of Shazzil Hassan, on the basis of compromise vide judgment dated 02.03.2016, passed by Additional Sessions Judge, Faisalabad--The role assigned to Muhammad Qasim (appellant) is that he (appellant) along with Tariq Mahmood (co-accused) and Iftikhar Ahmad (co-accused), while armec with fire; arms, attempted to commit Qatl-i-Amd of wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz and thereby caused injuries on different parts of their bodies--As the complainant, as well as, other injured prosecution witnesses of the case namely Mst. Bakhat Bibi, Mst. Sahib Bibi and Mst. Shabana Bibi, who were duly identifier by Qaiser Younas Inspector/Investigating Officer of this case have effected a compromise with the appellant (Muhammad Qasim) and they have no objection on the acceptance of this appeal and acquittal of the appellant from the case, therefore, while keeping in view their statements, as well as, their sworn affidavits (Mark "A" to Mark "D") and the fact that the offences under

Sections 324/33 7A(i)/337F(iii) PPC, in which the appellant has been convicted and sentenced by the trial Court, are Compoundable. [Para 8] A

Hafiz Allah Yar Sipra, Advocate for Appellant.

Mr. Nisar Ahmad Virk, Deputy District Public Prosecutor with Qaiser Younis Inspector/Investigating Officer for State.

Mr. Muhammad Mumtaz (complainant) in person along with injured ladies of the case namely Mst. Sahib Bibi wife Muhammad Riaz, Mst. Shabana Bibi daughter of Muhammad Mumtaz and Mst. Bakhat Bibi wife of Siraj Din for Complainant.

Date of hearing: 9.5.2017.

JUDGMENT

This criminal appeal has been filed by Muhammad Qasim (appellant) against his conviction and sentence. Muhammad Qasim (appellant) along with 05 other co-accused was tried in case FIR No. 103/2011 dated 17.03.2011, offences under Sections 302/324/147/148/149, PPC, registered at Police Station Sahianwala, District Faisalabad. After conclusion of the trial, the learned trial Court vide its judgment dated 02.03.2016, has convicted and sentenced the appellant as under:--

> *Under Section 324, PPC to rigorous imprisonment for seven years with fine of Rs. 10,000/- and in default thereof to further undergo three months simple imprisonment for making attempt to commit the murder of Mst. Sahib Bibi wife of Muhammad Riaz (sister of the complainant Muhammad Mumtaz), Mst. Shabana Bibi daughter of Muhammad Mumtaz and Mst. Bakhat Bibi wife of Siraj Din.*
>
> *Under Section 337F(iii), PPC to rigorous imprisonment for one year along with payment of Daman Rs.25,000/- to Mst. Bakhat Bibi (injured).*
>
> *Under Section 337A(i) PPC to rigorous imprisonment for six months alongwith payment of Daman Rs.20,000/- to list. Bakhat Bibi (injured).*

Benefit of Section 382-B Cr.P.C was also extended to the appellant and sentences of imprisonment awarded to the appellant were ordered to run concurrently.

2. Brief allegations levelled in the FIR (Ex.PQ), lodged by the complainant Muhammad Mumtaz (PW-11) are that on 16.03.2011 at 7.45 p.m, the appellant along with his 05 other co-accused, while armed with fire-arms, launched an attack upon the complainant party and Tariq Mehmood (co-accused) committed the murder of Shazzil Hassan and caused injuries to Sofeer Ali (PW) and Sahib Bibi (PW) wife of Muhammad Riaz. Muhammad Qasim (appellant) caused injuries to Mst. Bakhat Bibi wife of Siraj Din. Muhammad Qasim (appellant) along with Tariq Mehmood (co-accused) and Iftikhar Ahmad (co-accused) also caused injuries to Mst. Sahib Bibi wife of Muhammad Riaz, Mst. Bakhat Bibi wife of Muhammad Mumtaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz.

3. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused, to which they pleaded not guilty and claimed trial. The statements of the appellant and his co-accused under Section 342, Cr.P.C. were recorded. The appellant refuted the allegations levelled against him and professed his innocence. The learned trial Court vide its judgment dated 02.03.2016, found Muhammad Qasim (appellant) guilty and convicted and sentenced him as mentioned and detailed above.

It is pertinent to mention here that vide the same judgment dated 02.03.2016, the learned trial Court acquitted Tariq Mehmood (co-accused) from the charge under Section 302, PPC for causing murder of Shazzil Hassan, on the basis of compromise, however, he (Tariq Mehmood) was convicted by the learned trial Court under Section 337-F(vi), PPC and was sentenced to rigorous imprisonment for two years with Daman Rs.50,000/- for causing injury to Mst. Sahib Bibi wife of Muhammad Riaz. The learned trial Court *vide* the same judgment dated 02.03.2016, acquitted Muhammad Azam (co-accused) and Arif Hassan (co-accused), whereas convicted

Iftikhar Ahmad (co-accused) under Section 337-F(iii) and sentenced him to one year rigorous imprisonment with Daman Rs. 25,000/- for causing injury to Shabana Bibi daughter of Muhammad Mumtaz, while. Manzoor Ahmad (co-accused) was convicted by the learned trial Court under Section 337F(i), PPC and was. sentenced to three months rigorous imprisonment with Daman Rs.10,000/- for causing injury to Mst. Bakhat Bibi wife of Muhammad Mumtaz.

4. At the very outset, learned counsel for the appellant submits that the appellant was convicted and sentenced under Section 324, PPG read with Sections 337A(i)/337F(iii), PPC for making an attempt to commit Qal-i-Amd and causing injuries to Mst. Bakhat Bibi wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz. Adds that the complainant, as well as, the above-mentioned injured prosecution witnesses of this case have effected a compromise with the appellant and they have no objection on the acceptance of this appeal and acquittal of the appellant in this case. Further submits that as the abovementioned offences are compoundable, therefore, the appellant may be acquitted from the charges under Sections 324/337A(i)/337F(iii), PPC.

5. Mst. Bakhat Bibi wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz are present in the Court along with Muhammad Mumtaz (complainant) and they are duly identified by Qaiser Younis Inspector (Investigating Officer of this case). All the above-mentioned injured prosecution witnesses, as well as, the complainant of this case have stated one by one that they have effected a compromise with Muhammad Qasim (appellant) and they have forgiven him. They add that they have no objection if the instant appeal is accepted and the appellant is acquitted in this case by setting aside the impugned judgment dated 02.03.2016, passed by learned Additional Sessions Judge, Faisalabad. The complainant, as well as, the abovementioned injured prosecution witnesses have also placed on the record their affidavits Mark "A", Mark "B", Mark "C" and Mark "D" respectively, in respect of the compromise with the appellant and verify the contents of their affidavits. ,

6. Learned Deputy Prosecutor General submits that as the offences, in which the appellant has been convicted and sentenced by the learned trial Court are compoundable, therefore, he has no objection on the acceptance of this appeal and acquittal of the appellant from the charges.

7. Heard. Record perused.

8. I have noted that according to the FIR, Shazzil Hassan son of Safeer Ali was murdered in this case, whereas Mst. Bakhat Bibi wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz, Mst. Bakhat Bibi wife of Muhammad Mumtaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz sustained injuries during the occurrence. The role of causing murder of Shazzil Hassan was attributed to Tariq Mehmood (co-accused), who has already been acquitted from the charge under Section 302, PPC for causing murder of Shazzil Hassan, on the basis of compromise vide judgment dated 02.03.2016, passed by learned Additional Sessions Judge, Faisalabad. The role assigned to Muhammad Qasim (appellant) is that he (appellant) along with Tariq Mahmood (co-accused) and Iftikhar Ahmad (co-accused), while armec with fire-arms, attempted to commit Qatl-i-Amd of Mst. Bakhat Bibi wife of Siraj Din, Mst. Sahib Bibi wife of Muhammad Riaz and Mst. Shabana Bibi daughter of Muhammad Mumtaz and thereby caused injuries on different parts of their bodies. As the complainant, as well as, other injured prosecution witnesses of the case namely Mst. Bakhat Bibi, Mst. Sahib Bibi and Mst. Shabana Bibi, who were duly identifier by Qaiser Younas Inspector/Investigating Officer of this case have effected a compromise with the appellant (Muhammad Qasim) and they have no objection on the acceptance of this appeal and acquittal of the appellant from the case, therefore, while keeping in view their statements, as well as, their sworn affidavits (Mark "A" to Mark "D") and the fact that the offences under Sections 324/337-A(i)/337-F(iii), PPC, in which the appellant has been convicted and sentenced by the learned trial Court, are. compoundable, **I <u>accept</u> Criminal Appeal No. 707 of 2016** filed by Muhammad Qasim (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Faisalabad vide impugned judgment dated 02.03.2016

and acquit him of the charges under Sections 324/337A(i)/337F(iii), PPC PPC on the basis of compromise. Muhammad Qasim (appellant) is in custody, he be released forthwith, if not required in any other case.

(A.A.K.) **Appeal accepted.**

PLJ 2020 Lahore (Note) 131

Present: **MALIK SHAHZAD AHMAD KHAN AND SYED SHAHBAZ ALI RIZVI, JJ.**

IMTIAZ AHMAD, etc.--Appellants

versus

R.P.O., SHEIKHUPURA and others--Respondents

I.C.A. No. 209 of 2017, heard on 8.3.2018.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Application for change of investigation--Dismissed--Application for change of application before R.P.O.--Accepted--Filling of writ petition--Dismissed--Un-hearded condemnation--While passing impugned order appellant was not heard and same was passed in his absence--It is nowhere mentioned in impugned order that name of counsel for petitioner was printed in cause list issued relevant date and as such appellant has been condemned unheard--Case was pending adjudication before trial Court and trial Court after framing of charge had already taken cognizance in this case, therefore, above mentioned respondent had no authority to change investigation of case--Appeal was accepted. [Para 4] A & B

2014 SCMR 1499 & PLD 2007 SC 31 *ref.*

M/s. Mian Pervaiz Hussain and *Hafiz Allah Yar Sipra*, Advocates for appellant/complainant

Ch. Waqas Azeem, Advocate for Respondents. No. 7 & 8.

Mr. Amjad Ali Chatha, Additional Advocate General for State.

Date of hearing: 8.3.2018.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This Intra Court Appeal has been filed against the impugned order dated 02.02.2017 passed in writ petition No. 26175 of 2015 by the learned Single Judge in Chamber of this Court whereby the constitutional petition filed by the petitioner against the order dated 21.08.2015 of the Regional Police Officer, Sheikhupura Region, regarding the change of investigation of case FIR No. 563 dated 17.06.2014 registered for offence under Section 406 of Pakistan Penal Code, 1860, with Police Station B-Division, District Sheikhupura, was dismissed.

2. As per brief facts of the present case, the appellant is complainant of the above mentioned criminal case. The accused party of the said case filed an application for

the change of investigation. The District Standing Board dismissed the said application and thereafter the accused/Respondents No. 7 & 8 filed an application for change of investigation of the above mentioned case before the Regional Police Officer, Sheikhupura Region. The said application of the mentioned respondents was accepted vide above mentioned order dated 21.08.2015. The appellant/complainant challenged the above mentioned order passed by the Regional Police Officer, Sheikhupura Region through writ petition No. 26175 of 2015 but the same stands dismissed in the above mentioned terms vide impugned order dated 02.02.2017 hence, the present Intra Court Appeal before this Court.

3. Arguments heard and record perused.

4. We have noted that while passing the impugned order the appellant was not heard and the same was passed in his absence. It is nowhere mentioned in the impugned order that the name of the learned counsel for the petitioner was printed in the cause list issued the relevant date and as such the appellant has been condemned unheard. It is also noteworthy that challan in the above mentioned case was submitted before the learned trial Court on 06.11.2014 and the learned trial Court on 08.06.2015 framed the charge in the said case and thereafter the above mentioned order dated 21.08.2015 regarding the change of investigation was passed by the Regional Police Officer, Sheikhupura Region/Respondent No. 1. As the case was pending adjudication before the learned trial Court and the learned trial Court after framing of charge had already taken the cognizance in this case, therefore, the above mentioned respondent had no authority to change the investigation of the case. Reliance in this regard may be placed on *'Qari Muhammad Rafique v. Addl. Inspector General of Police (Inv). Punjab & others'* (2014 SCMR 1499) and *Muhammad Nasir Cheema v. Mazhar Javaid & others'* (PLD 2007 Supreme Court 31). In the light of above discussion, the instant appeal is accepted, impugned order dated 02.02.2017 passed in Writ Petition No. 26175 of 2015 by the learned Single Judge in chamber of this Court, as well as, order dated 21.08.2015 passed by the Regional Police Officer, Sheikhupura Region, for change of investigation in the above mentioned case are hereby declared null and *void* and the same are hereby set aside. It is however, clarified that any of the observations made in this order would not influence the case of either party before the learned trial Court.

(Y.A.) **Civil revision Accepted.**

PLJ 2020 Lahore 662

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

ASIF ALI--Petitioner

versus

STATE etc.--Respondents

Transfer Appln. No. 57896 of 2020, decided on 24.11.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 526--Transfer application of pre-arrest bail petitions--Illegal harassment--Respondent No. 4 was advocate--Bogus zimnees--Pendency of pre-arrest bail petitions more than two months--I have, noted that an inquiry report of Naseer Ahmad Khan, Inspector/SHO, police station Cantt, District Okara conducted in an earlier case *i.e.*, registered at police station City Depalpur has been annexed with present petition--Last paragraph of said inquiry report shows that abovementioned Muhammad Tanveer Aslam, who is beneficiary of above-referred case caused illegal harassment to Muhammad Asif petitioner of present case, who was accused in abovementioned earlier case *i.e.*,--It is also mentioned in inquiry report that Muhammad Tanveer Aslam Respondent No. 4 and his brother Naveed Aslam etc being in league with local police got recorded bogus zimnees and got declared Muhammad Asif Ali petitioner as a proclaimed offender--Said SHO further reported/recommended for initiation of departmental proceedings against concerned police officials of police station Cantt, District Okara--Counsel for petitioner has produced before Court a copy of licence of advocate in name of Muhammad Tanveer Aslam (Respondent No. 4)--Said licence has been issued by Punjab Bar Council--It is *prima facie* established that Respondent No. 4, is an advocate by profession--It is further noteworthy that pre-arrest bail petitions of Muhammad Tanveer Aslam (Respondent No. 4) and his co-accused are pending adjudication in abovementioned Court since September, 2020 and despite lapse of more than two months, same could not be decided, which *prima facie* shows that Muhammad Tanveer Aslam (Respondent No. 4), along with his companions has not been allowing,

local Court to decide abovementioned pre-arrest bail petitions--Petition was allowed.

[Pp. 663 & 664] A, B & C

Mr. Muhammad Ijrar Haider, Advocate for Petitioner.

Ms. Maida Sobia, Deputy Prosecutor General for State.

Mr. Muhammad Jamil Ashraf Chauhan, Advocate for Respondent No. 4.

Date of hearing: 24.11.2020.

ORDER

Instant petition has been filed by the petitioner for transfer of pre-arrest bail petitions of Respondents No2 to 5, titled *"Sarfraz and 2 others vs. The State" and "Zafar Iqbal alias Zafari vs. The State",* pending in the Court of Mr. Alam Sher, learned Additional Sessions Judge, Depalpur, District Okara to any other Court of competent jurisdiction out of District Okara.

2. ***Heard.*** This transfer petition has been filed by the petitioner on the ground that Muhammad Tanvir Aslam (Respondent No. 4), is an advocate by profession and he being in league with the members of the local Bar Association has made it impossible for the petitioner/complainant to prosecute his case before the abovementioned Court, therefore, the above-referred pre- arrest bail petitions may be transferred from the said Court.

3. Learned counsel for Respondent No. 4, though controverted the contentions of learned counsel for the petitioner/complainant by stating that no harassment or pressure has been caused against the petitioner by Respondent No. 4 but I have noted that an inquiry report of Naseer Ahmad Khan, Inspector/SHO, police station Cantt, District Okara conducted in an earlier case *i.e.*, FIR No. 453/2017, registered at police station City Depalpur has been annexed with the present petition. The last paragraph of the said inquiry report shows that the abovementioned Muhammad Tanveer Aslam, who is beneficiary of the above-referred case caused illegal harassment to Muhammad Asif petitioner of the present case, who was accused in the abovementioned earlier case *i.e.*, FIR No. 453/2017. It is also mentioned in the inquiry report that Muhammad Tanveer

Aslam Respondent No. 4 and his brother Naveed Aslam etc being in league with the local police got recorded bogus zimnees and got declared Muhammad Asif Ali petitioner as a proclaimed offender. The said SHO further reported/recommended for initiation of departmental proceedings against the concerned police officials of police station Cantt, District Okara.

4. Learned counsel for Respondent No. 4, after arguing the case at some length denied the fact that Muhammad Tanveer Aslam (Respondent No. 4), is an advocate by profession and he submitted that if any proof is produced before the Court that the abovementioned respondent is an advocate by profession then he will not oppose the instant transfer application.

5. At this juncture, learned counsel for the petitioner has produced before the Court a copy of licence of advocate in the name of Muhammad Tanveer Aslam (Respondent No. 4). The said licence has been issued by the Punjab Bar Council.

6. In the light of above, it is *prima facie* established that Respondent No. 4, is an advocate by profession. It is further noteworthy that the pre-arrest bail petitions of Muhammad Tanveer Aslam (Respondent No. 4) and his co-accused are pending adjudication in the abovementioned Court since September, 2020 and despite the lapse of more than two months, the same could not be decided, which prima facie shows that Muhammad Tanveer Aslam (Respondent No. 4), along with his companions has not been allowing the local Court to decide the abovementioned pre-arrest bail petitions.

7. Keeping in view all the abovementioned facts, this petition is allowed. Consequently the pre-arrest bail petitions of Respondents No. 2 to 5, titled *"Sarfraz and 2 others vs. The State"* and *"Zafar Iqbal alias Zafari vs. The State",* pending in the Court of Mr. Alam Sher, learned Additional Sessions Judge, Depalpur, District Okara are hereby withdrawn from the said Court and the same stands "transferred to the Sessions Court, Sahiwal. The learned Sessions Judge, Sahiwal may hear the! above-referred bail 'petitions himself or entrust the same to any other Court of competent jurisdiction. Parties are directed to appear before the learned Sessions Judge, Sahiwal on 1.12.2020 at 9.00 a.m. The transferee Court shall decide the said bail petitions within a period of

one week from 1.12.2020. The bail petitions shall be decided, on way or the other, on their own merits, without being influenced by any observation made in this order.

(Y.A.) **Petition allowed.**

PLJ 2020 Cr.C. (Lahore) 755 (DB)

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

KHURRAM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 70540-B of 2019, decided on 5.12.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 148 & 149--Post-arrest bail, dismissal of--Attempted to change water course of agricultural lands--As per contents of FIR, co-accused had been attributed role of causing one firearm injury each on chest of (deceased) and injuries were available on chest of deceased petitioner also caused injury on backside of chest of prosecution witness--Such role is also prima facie supported by medical evidence--Accused had been declared innocent during first investigation but in second investigation conducted instant case, petitioner has been found guilty--Kalashnikov was recovered from possession of petitioner--Accused remained an absconder for a period of almost one year as he was arrested after one year whereas occurrence took place on 25.04.2018--No convincing or valid reason was given by first investigating officer to declare accused innocent--FIR was promptly lodged and there are statements of PWs recorded under Section 161, Cr.P.C. which have prima facie been supported by medical evidence, therefore, under circumstances, *ipsi dixit* of first investigating officer is not binding upon Court--Offence mentioned in FIR *i.e*. Section 302, PPC falls within ambit of prohibitory clause of Section 497, Cr.P.C--Accused miserably failed to point out any *mala-fide* on part of prosecution for false involvement of accused, therefore, accused is not entitled for relief of post arrest bail. [P. 757] A

Mr. Tahir Hameed Bhatti, Advocate for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for Respondent.

Rai Ashfaq Ahmad Kharal, Advocate for Complainant.

Date of hearing: 5.12.2019.

ORDER

Khurram, petitioner, through the instant petition, seeks post arrest Jbail in case FIR No. 414 dated 25.04.2018 registered under Sections 302, 324, 148, 149, PPC at Police Station Ferozewala District Sheikhupura.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 25.04.2018, at about 4:00 P.M. petitioner alongwith his co-accused, attempted to change the watercourse towards their agricultural lands without having their turn on the said day whereupon, *Mst.* Rehana Bibi, mother of the complainant forbade them and thereafter the accused party went away from the spot. After that at about 5:30 P.M., the petitioner alongwith his co-accused, while armed with different weapons, again came at the spot and having the grudge of above mentioned quarrel with the mother of the complainant, launched a murderous assault upon the complainant party. In the incident Zubair, brother of the complainant was murdered at the hands of the assailants whereas Awais Ali and *Mst.* Rehana Bibi (PWs) sustained injuries, hence, the above mentioned FIR.

4. The petitioner is named in the FIR with the specific role that he alongwith his co-accused, while armed with Kalashnikov and different weapons, came to the spot and caused murder of Zubair (deceased) and also caused injuries to Awais Ali and *Mst.* Rehana Bibi (PWs). The petitioner has been assigned a specific role of causing firearm injury on the chest of Zubair (deceased). He has also been assigned the role

of causing firearm injury on the backside of the chest of Awais Ali (PW). The role attributed to the petitioner is prima facie supported by the medical evidence according to which there were two entry wounds on the chest of the deceased *i.e*. Injuries No. 8 and 14 whereas there was an entry wound on the backside of the chest of Awais Ali (PW). Although, it is argued by learned counsel for the petitioner that the petitioner, as well as, Nasrullah, co-accused have been assigned the role of causing injuries on the chest of the deceased and it is not clear that who, out of the above mentioned two accused persons, caused injury on the chest of the deceased, but I have noted that as per contents of the FIR, Khurram (petitioner), as well as, Nasrullah, co-accused have been attributed the role of causing one firearm injury each on the chest of Zubair (deceased) and the said injuries are available on the chest of the deceased as Injuries No. 8 and 14. Apart from the above mentioned injuries on the body of the deceased, the petitioner also caused injury on the backside of the chest of Awais Ali (PW). The said role is also prima facie supported by the medical evidence. Although, learned counsel for the petitioner contended that the petitioner has been declared innocent during the first investigation but in the second investigation conducted in this case, the petitioner has been found guilty. Kalashnikov has been recovered from the possession of the petitioner. The petitioner remained an absconder in this case for a period of almost one year as he was arrested on 10.04.2019 whereas the occurrence took place on 25.04.2018. No convincing or valid reason has been given by the first Investigating Officer to declare the petitioner innocent. The FIR was promptly lodged and there are statements of the prosecution eye-witnesses recorded under Section 161, Cr.P.C. which have prima facie been supported by the medical evidence, therefore, under the circumstances, *ipsi dixit* of the first Investigating Officer is not binding upon the Court. The offence mentioned in the FIR *i.e*. Section 302, PPC falls within the ambit of prohibitory clause of Section 497, Cr.P.C. Learned counsel for the petitioner miserably failed to point out any *mala-fide* on the part of the prosecution for false involvement of the petitioner in this case, therefore, the petitioner is not entitled for the relief of post arrest bail.

5. In the light of above discussion, there is no substance in this bail petition, therefore, the same is hereby dismissed.

(A.A.K.) **Bail dismissed.**

PLJ 2020 Cr.C. (Lahore) 757 (DB)

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

AKBAR ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2750-B of 2019, decided on 24.1.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Prohibition (Enforcement of Hadd Order), 1979, Ss. 3 & 4--Bail after arrest, grant of--Further inquiry--Illicit liquor was recovered--Accused was not driver of vehicle wherefrom illicit liquor was recovered--Driver of tanker managed to flee away from spot--There is nothing on record to establish that petitioner was owner of vehicle rather petitioner is admittedly not owner of vehicle--There was no evidence against accused that he sold liquor to any customer and only statement of accused had been mentioned in FIR that he was going to sell liquor to co-accused--Statement was recorded by police when petitioner was in police custody and as such same is not admissible in evidence--Accused had already been granted bail by ASJ and this fact has frankly been conceded by before Court--Driver of tanker who ran away from spot has subsequently been found to be co-accused and he has also been granted bail by A.S.J.--Moreover, offences mentioned in FIR do not fall within ambit of prohibitory clause of Section 497 of Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--No exceptional ground has been pointed out by DPG to refuse bail to accused. [Pp. 758 & 759] A

Rai Ashfaq Ahmad Kharal, Advocate for Petitioner.

Mr. Nisar Ahmad Virk, DPG. for Respondents.

Date of hearing: 24.1.2019.

ORDER

The petitioner Akbar Ali through the instant petition seeks post-arrest bail in case FIR No. 2177 dated 19.09.2018 registered at P.S. Shahdra District Lahore offences under Sections 3 & 4 of the Prohibition (Enforcement of Hadd) Order, 1979.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 19.09.2018 at 11:35 a.m, a tanker bearing Registration No. X.A/741 was intercepted by the police. Two persons were present in the said tanker who attempted to run away from the spot however, one person was apprehended by the police who disclosed his name as Akbar Ali (petitioner), whereas, driver of the abovementioned tanker managed to flee away from the place of occurrence. On checking, 28,000/- liters of illicit alcohol was recovered from the abovementioned tanker.

4. As per contents of the FIR, the petitioner was not the driver of the abovementioned tanker wherefrom the illicit liquor was recovered. Perusal of the contents of the FIR discloses that the driver of the tanker managed to flee away from the spot. There is nothing on the record to establish that the petitioner was owner of the abovementioned tanker rather the petitioner is admittedly not owner of the abovementioned tanker. There is no evidence against the petitioner that he sold the liquor to any customer and only the statement of the petitioner has been mentioned in the FIR that he was going to sell the abovementioned liquor to Siddique and Asim Akmal co-accused. The said statement was recorded by the police when the petitioner was in police custody and as such the same is not admissible in evidence. Moreover, the abovementioned Siddique and Asif Akmal have already been granted bail by the learned Addl. Sessions Judge, Lahore and this fact has frankly been conceded by Jamshaid, Sub-Inspector, present before the Court. It is also conceded by Jamshaid Sub Inspector that the driver of the tanker who ran away from the spot has subsequently been found to be Muhammad Khalid co-accused and he has also been granted bail by the learned Addl. Sessions Judge, Lahore. Moreover, the offences mentioned in the FIR do not fall within the ambit of Prohibitory Clause of Section 497 of Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. Learned DPG has conceded on instructions that the petitioner is not involved in any other criminal case. No exceptional ground has been pointed out by the learned DPG to refuse bail to the petitioner.

5. Keeping in views all the aforementioned facts, case of the prosecution against the petitioner is one of further inquiry therefore, this petition is **allowed** and the petitioner Akbar Ali is admitted to post arrest bail subject to his furnishing the bail bonds in the sum of Rs. 100,000/- *(Rupees one hundred thousand only)* with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2020 Cr.C. (Lahore) 776

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

ZESHAN ALI and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 7188-B of 2019, decided on 21.2.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324/448/148/149 & 511--Pre-arrest bail, confirmed--Accused made firing on complainant, luckily fire missed and they extended threats of life to complainant--Story narrated in FIR does not appeal to a prudent mind because according to story, as many as, 05 nominated and 3/4 unknown accused *i.e*. total 8/9 accused, who were armed with different firearms weapons like Kalashnikov, repeater guns made fire shots on complainant but complainant did not receive a single injury on his body, though fire shots made by accused landed on tyres of tractor of complainant--Even the tractor was not taken into possession on day of occurrence and same was taken into possession with delay of 09 days from occurrence--Due to civil litigation, accused falsely implicated by complainant--As no body has been injured during occurrence and story narrated in FIR does not appeal to common sense and there is previous litigation between parties, therefore, possibility of *mala fide* involvement of accused by complainant cannot be ruled out at such stage. [P. 778] A

Rai Ashfaq Ahmad Kharal, for Petitioners.

Mr. Nisar Ahmad Virk, DPG for State.

Nemo for Complainant.

Date of hearing: 21.2.2019.

ORDER

The petitioners Zeshan Ali and Muhammad Imran *alias* Umair through the instant petition seek pre-arrest bail in case FIR No. 815 dated 20.12.2018 registered at P.S. Bhikhi District Sheikhupura offences under Sections 324/448/148/149/511 of PPC.

2. As per police report, the complainant has duly been served with the notice of this case but no one appeared on his behalf despite repeated calls. Even otherwise, it is a

State case and learned DPG is ready to argue the same therefore, I proceed to decide the same after hearing the arguments of learned counsel for the petitioners, learned DPG and perusal of the record.

3. Arguments heard. Record perused.

4. As per brief allegations levelled in the FIR, 20.12.2018 at 10:00 a.m. the petitioners along with their co-accused while armed with different weapons launched an attack on the complainant and made firing on him but luckily the fire shots did not hit the complainant however, the fire shots made by the petitioners landed on the tyre of the tractor of the complainant. The petitioners and their co-accused also extended threats of life to the complainant party hence, the abovementioned FIR.

5. The story narrated in the FIR does not appeal to a prudent mind because according to the said story, as many as, 05 nominated and 3/4 unknown accused *i.e*. total 8/9 accused, who were armed with different firearms weapons like Kalashnikov, Repeater guns etc. made fire shots on the complainant but the complainant did not receive a single injury on his body, though the fire shots made by the petitioner landed on the tyres of the tractor of the complainant. Even the said tractor was not taken into possession on the day of occurrence *i.e*. 20.12.2018 and the same was taken into possession on 29.12.2018 *i.e*. with the delay of 09 days from the occurrence. Learned counsel for the petitioners has placed on record an earlier suit filed by Bilal Ahmad, brother of Zeshan Petitioner No. 1 against Muhammad Shafique complainant which suit was filed on 20.08.2015 wherein interim stay was granted by the learned Civil Judge Class-III, Sheikhupura on 20.08.2015. He submits that due to the abovementioned civil litigation, the petitioners have falsely been implicated in this case by the complainant. As no body has been injured during the occurrence and the story narrated in the FIR does not appeal to common sense and there is previous litigation between the parties therefore, possibility of *mala fide* involvement of the petitioners in this case by the complainant cannot be ruled out at this stage.

5-A. In the light of above, this petition is **allowed** and interim pre-arrest bail already granted to the petitioners is confirmed subject to their furnishing the fresh bail bonds in the sum of Rs. 50,000/-(Rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2020 Cr.C. (Lahore) 782 (DB)

[Multan Bench Multan]

Present: **MALIK SHAHZAD AHMAD KHAN AND SADIQ MAHMUD KHURRAM, JJ.**

MUHAMMAD SAJJAD (SHUJAAT WASEEM) and anothers--Appellants

versus

STATE and anothers--Respondents

Crl. A. No. 216 of 2016, PSLA No. 47 of 2016, M.R. No. 48 of 2016, heard on 27.1.2020.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302/337-A(ii)/337-A(i)/148/149--*Qatl-i-amd*--Appreciation of evidence--Contradiction in statements of PW's--Delay in post-mortem examination--Delay in recovery--Blood stained dagger--Forensic report--Benefit of doubt--Specific injuries were attributed--Acquittal of--Post mortem examination was conducted after about 14-hours--Possibilty that time had been consumed by police in procuring and planting eye-witnesses and cooking up a story for prosecution before preparing police papers and FIR was not lodged at given time--According to statement of Doctor, both eyes of deceased were half open at time of post-mortem examination--Inquest report showed mouth of deceased were semi-open which showed that witnesses were not present at spot--Out of nine injuries, Injury No. 2 was cause of death, which was an incised wound--None of PW's has attributed accused injury to accused--Material contradictions/conflicts/improvements in prosecution evidence--Complainant was confronted with his previous statements--House of three witnesses were not shown in site-plan--No blood-stained earth was recovered near pond, where first part of occurrence took place--It is highly improbable that a man after receiving dagger blows on his flank and inguinal area, cut femoral vessels, would cover distance of 370-feet by running--No specific date and time of of occurrence of motive was alleged in FIR--Motive was not established in investigation--Dishonest improvements made by PW were brought on record--Dagger was recovered from possession of accused after ten months from occurrence--Accused were acquitted.

[Pp. 785, 791, 792, 793, 794, 795 & 796] A, B, C, D, E, F, G, H, I, J, K, L, M, N, O & P

1974 PCrLJ 119; 2001 YLR 1467; 2005 YLR 2359 *ref.*

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302/337-A(ii)/337-A(i)/148/149--Evidence--It is quality of evidence and not quantity of evidence which weighs with courts to decide any case. [P. 791] C

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302/337-A(ii)/337-A(i)/148/149--Finding of investigating officer--After recording evidence by trial court opinion of investigating officer becomes irrelevant. [P. 791] D

2010 SCMR 660 *ref.*

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302/337-A(ii)/337-A(i)/148/149--Delay in post mortem examination--Post mortem examination was conducted after about 14-hours. [Pp. 791 & 792] E & F

2011 SCMR 1190; 2012 SCMR 327; 2012 SCMR 419; 2017 SCMR 54; 2018 SCMR 326 *ref.*

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302/337-A(ii)/337-A(i)/148/149--Blood stained dagger--Forensic report--Dagger was recovered from possession of accused after ten months from occurrence--Blood disintegrates within a period of three to four weeks after occurrence, therefore, presence of human blood on dagger statedly recovered on pointation of accused is highly doubtful and report of Forensic Agency are inconsequential.

[P. 795] O

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302/337-A(ii)/337-A(i)/148/149--Benefit of doubt--If there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to give benefit of doubt to accused.[P. 796] P

1995 SCMR 1345; 2009 SCMR 230 *ref.*

Mr. Muhammad Tariq Nadeem, Advocate for Appellants.

Mr. Muhammad Ali Shahab, Deputy Prosecutor General for State.

Mr. Abdul Sami Chaudhry, Advocate for Complainant.

Date of hearing: 27.1.2020.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This judgment shall dispose of Criminal Appeal No. 216 of 2016, filed by Muhammad Sajjad (Shujaat Waseem) appellant against his conviction and sentence, PSLA No. 47 of 2016, filed by Muhammad Yasin petitioner/complainant against the acquittal of Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad ldrees and Muhammad Shahid (Respondents No. 2 to 6 of PSLA No. 47/2016) and Murder Reference No. 48 of 2016, sent by the learned trial Court for confirmation or otherwise of the Death sentence awarded to Muhammad Sajjad (Shujaat Waseem) appellant. We propose to dispose of all these matters by this single judgment as the same have arisen out of the same judgment dated 28.01.2016, passed by the learned Additional Sessions Judge, Dunyapur, District Lodhran.

2. Muhammad Sajjad (Shujaat Waseem) appellant along with Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (accused since acquitted/Respondents No. 2 to 6 of PSLA No. 47/2016)), was tried in private complaint filed by Muhammad Yasin (complainant), under Sections 302/337A(i)/148/ 149/337A(ii) (added later-on), PPC, Police Station Sadar Dunyapur, District Lodhran. After conclusion of the trial, the learned trial Court *vide* its judgment dated 28.01.2016, has convicted and sentenced Muhammad Sajjad (Shujaat Waseem) appellant as under:

> *Under Section 302(b), PPC to 'Death' for committing Qalt-i-Amd of Muhammad Waseem (deceased). He was also ordered to pay Rs. 2,00,000/- (rupees two hundred thousand only) to the legal heirs of the deceased as compensation under Section 544-A of Cr.P.C. and in default thereof to further undergo simple imprisonment up to six months.*

However *vide* the same judgment, accused Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid were acquitted of the charges.

3. Initially Muhammad Yasin Complainant (PW-2) got registered case FIR No. 251/2012 dated 24.05.2012 offences under Sections 302/148/149, PPC and 337A(ii) (added later-on), at Police Station Sadar Dunyapur, District Lodhran against Muhammad Sajjad (Shujaat Waseem) appellant, Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (accused since acquitted). Feeling dissatisfied with the proceedings and investigation of the police, private complaint was filed by the complainant. After recording the cursory statements of the complainant, as well as, PWs the learned Additional Sessions Judge, Dunyapur, District Lodhran summoned the accused persons nominated in the private complaint to face trial.

4. Brief facts of the case as given by the complainant Muhammad Yasin (PW-2), in his private complaint are that he (complainant) was resident of Chak No. 356/W.B, Tehsil Dunyapur, District Lodhran and was a cultivator by profession. On 24.05.2012 at about 6.00 p.m. the complainant along with his son namely Muhammad Ishtiaq (PW-3), was cutting fodder in his Ahatta, whereas Muhammad Waseem (deceased), had gone to the nearby pond, so that his cattle may drink water. In the meanwhile, the accused persons namely Muhammad Sajjad (appellant) while armed with dagger, Muhammad Rafique (accused since acquitted) while armed with hatchet, Muhammad Ayaz (accused since acquitted), while armed with Sota, Muhammad Shahid (accused since acquitted), while armed with Sota, Muhammad Ijaz (accused since acquitted), while empty handed and Muhammad Idress (accused since acquitted), while empty handed came at the pond. Muhammad Ayaz (accused since acquitted) raised lalkara to teach a lesson to Muhammad Waseem (deceased) for beating him. Muhammad Idrees and Muhammad Ijaz (accused since acquitted), caught hold Muhammad Waseem (deceased) from his arms, whereupon Muhammad Sajjad (appellant), inflicted a dagger blow, which landed at the right flank of Muhammad Waseem (deceased). Second dagger blow inflicted by Muhammad Sajjad (appellant), landed on the left thigh near inguinal area of Muhammad Waseem (deceased). *Mst.* Nasreen Bibi (PW-4), came forward to rescue Muhammad Waseem (deceased), whereupon the accused persons left Muhammad Waseem (deceased) and Muhammad Rafique (accused since acquitted), inflicted a hatchet blow, which landed on the back side of the head of *Mst.* Nasreen Bibi (PW-4). Muhammad Waseem (deceased), ran towards the Ahatta of Muhammad Akmal PW, whereupon Muhammad Ayaz and Muhammad Shahid (accused since acquitted),

inflicted Sota blows to him, due to which Muhammad Waseem (deceased), fell in the Ahatta of Muhammad Akmal (given-up PW). On hearing hue and cry, the complainant along with Muhammad Ishtiaq (PW-3), reached at the spot and witnessed the occurrence. The accused persons fled away from the spot along with their weapons. Muhammad Waseem succumbed to the injuries at the spot.

Muhammad Yasin Complainant (PW-2), further alleged in his private complaint that the motive behind the occurrence was that a few days earlier, Muhammad Ayaz (accused since acquitted), had entered into the house of the complainant to steal pigeons, whereupon the said Muhammad Ayaz was beaten by Muhammad Waseem (deceased).

It was added by the complainant in his private complaint that local police being in league with the accused party and without any legal justification, declared Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (accused since acquitted), as innocent, which necessitated the filing of the abovementioned private complaint.

5. The appellant Muhammad Sajjad (Shujaat Waseem) was arrested in this case on 18.03.2013, by Muhammad Khalid Goraya SI (PW-11), whereas Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique and Muhammad Shahid (accused since acquitted), were arrested in this case on 05.07.2012, by Bashir Ahmad SI (CW-1). On 24.03.2013, Muhammad Sajjad (Shujaat Waseem) appellant, disclosed and then led to the recovery of dagger P-3, which was taken into possession by Muhammad Khalid Goraya SI (PW-11), *vide* recovery memo. Ex.PD.

6. As mentioned earlier, being dissatisfied with the proceedings and investigation of the police, complainant Muhammad Yasin (PW-2), instituted a private complaint. After institution of private complaint the cursory statements of the complainant Muhammad Yasin (PW-2) and other PWs were recorded. The appellant along with other accused mentioned in the private complaint were summoned by the learned trial Court to face the trial. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant, as well as, against Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (co-accused since acquitted) on 07.05.2013, to which they pleaded not guilty and claimed trial.

7. In order to prove its case, the prosecution produced twelve witnesses during the trial. Muhammad Yasin complainant (PW-2), Muhammad Ishtiaq (PW-3) and *Mst.* Nasreen Bibi (PW-4) are the witnesses of ocular account. Muhammad Ishtiaq (PW-3), also furnished the evidence qua the recovery of dagger P-3, at the instance of Muhammad Sajjad (Shujaat Waseem) appellant, whereas Dr. Irfan-ul-Haq (PW-6) and Dr. Shamas Shoukat (PW-10), furnished the medical evidence.

Muhammad Khalid Goraiya SI (PW-11), partially investigated the case.

Muhammad Akram (PW-1), Muhammad Asghar 226/C (PW-5), Muhammad Rafique 79/HC, Muzafar Hussain 08/H.C (PW-8), Muhammad Naveed 367/C (PW-9) and Sheraz Latcef SI (PW-12), are formal witnesses.

Two Court witnesses were also examined in this case. Bashir Ahmad SI (CW-1), is the second Investigating Officer of the case, whefeas Naseem Abbas 05/HC (CW-2), is a formal witness.

The prosecution also produced documentary evidence in the shape of memo. of possession of blood-stained clothes relating to Muhammad Waseem deceased (Ex.PA), complaint (Ex.PB), memo. of possession of blood-stained earth (Ex.PC), memo. of possession of blood-stained dagger P-3, at the instance of Muhammad Sajjad (Shujaat Waseem) appellant (Ex.PD), inquest report (Ex.PE), application for post-mortem examination (Ex.PF), injury statement of *Mst.* Nasreen Bibi injured (Ex.PG), rough site-plan of the place of occurrence (Ex.PH), scaled site-plan of the place of occurrence in duplicate (Ex.PJ/1 and Ex.PJ/2), post-mortem report of Muhammad Waseem deceased (Ex.PK), F.I.R (Ex.PL), medico legal report of *Mst.* Nasrcen Bibi injured (Ex.PM), site-plan of the place of recovery of dagger P-3 (Ex.PN), report of Punjab Forensic Science Agency, Lahore (Ex.PO), report of Chemical Examiner (Ex.PP) and closed its evidence.

8. The statements of Muhammad Sajjad (Shujaat Waseem) appellant, Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (co-accused since acquitted), under Section 342 of, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question that *'Why this case against you and why the PWs have deposed against*

you the appellant and his co-accused (since acquitted), gave identical answers. The answer of the appellant is reproduced as under:

> *"PW-2, PW-3 and PW-4 are close relatives inter-se, PW-3 Muhammad Ishtiaq is son of complainant Yasin, PW-4 Nasreen Bibi is daughter of complainant who are partisan. In year 2005, a land dispute arose between the complainant and my paternal uncle Muhammad Idrees (co-accused) filed a civil suit against complainant and his sons Muhammad Ishfaq, Muhammad Ishtiaq PW-3 and Muhammad Arshad. We favoured Muhammad Idrees in this case".*
>
> *Similarly, on 17.06.2005, the complainant and his son Muhammad Ishfaq, Muhammad Ishtiaq (PW-3) and Muhammad Arshad trespassed the house of my paternal uncle Muhammad Idrees and injured my cousin Shujaat Waseem. On this, a criminal case FIR No. 240/2015, under Section 452, 337AII/34, PPC was got registered at P.S Sadar Dunyapur on 28.06.2005 against complainant and his sons. We also favoured Muhammad Idrees and pursued the case along with him, due to this reason, complainant parly has a grudge against us.*
>
> *Similarly other PWs are public servants and they have deposed against me in connivance with the complainant party."*

Muhammad Sajjad (Shujaat Waseem) appellant, Muhammad Ejaz, Muhammad Ayaz, Muhammad Rafique, Muhammad Idrees and Muhammad Shahid (accused since acquitted), did not opt to make statements on oath in terms of Section 340(2) of Cr.P.C., however, in defence evidence, they produced attested copy of plaint titled *"Muhammad Idrees vs. Yaseen etc",* suit for permanent injunction along with order dated 24.02.2006 (Ex.DE), attested copy of FIR No. 240/2005, Police Station Saddar Dunyapur (Ex.DF), copy of identity card of Muhammad Sajjad (Shujaat Waseem) appellant (Ex.DG).

The learned trial Court *vide* its judgment dated 28.01.2016, found Muhammad Sajjad (Shujaat Waseem) appellant (appellant) guilty, convicted and sentenced him as mentioned and detailed above.

9. Learned counsel for the appellant contends that the appellant is absolutely innocent and has falsely been implicated in this case by the complainant being in-league with the local police; that the occurrence was unseen and fake prosecution eye-witnesses have been planted in this case; that according to the prosecution case, Muhammad Waseem deceased died in the Ahatta of Muhammad Akmal PW but the Investigating Officer of this case namely Bashir Ahmed SI (CW-1), has categorically stated that Muhammad Akmal PW had informed the elders of Muhammad Waseem deceased regarding the occurrence, which has proved that the complainant and other eye-witnesses were not present at the spot, at the time of occurrence; that there is delay of more than 14 hours in conducting post-mortem examination of Muhammad Waseem (deceased), which further shows that the prosecution eye-witnesses were not present at the time of occurrence the abovementioned delay in the post-mortem examination has been consumed to procure the attendance of fake eye-witnesses; that the cause of death of the deceased is Injury No. 2, which was on the right upper thigh (inguinal area) of Muhammad Waseem (deceased) but the said injury has not been attributed to the appellant by any prosecution eye-witness while making statement before the learned trial Court, whereas regarding the remaining injuries, there are material contradictions in the statements of the prosecution eye-witnesses, which further shows that they were not present at the spot at the relevant time; that the recovery of dagger P3 has been planted against the appellant and positive report of Punjab Forensic Science Agency, Lahore in respect of the presence of blood on the said dagger is highly doubtful because the occurrence in this case took place on 24.05.2012, whereas the dagger has been allegedly recovered from the possession of the appellant on 24.03.2013 *i.e.*, after ten months from the occurrence whereas, the blood disintegrates within a period of 3 to 4 weeks; that the prosecution has failed to prove the motive alleged against the appellant because no FIR was lodged against Ayaz co-accused, when he statedly entered the house of Muhammad Waseem deceased in order to steal his pigeons; that even otherwise, no specific date and time of the occurrence of motive has been mentioned by the prosecution eye-witnesses; that the impugned judgment of conviction and sentence of the appellant is result of misreading and non-reading of evidence, available on the record of the present case,

therefore, he (appellant) may be acquitted from the charge and Murder Reference be answered in the negative.

10. On the other hand, learned Deputy Prosecutor General, for the State, assisted by learned counsel for the complainant has argued that the occurrence in this case took place on 24.05.2012 at 6.00 p.m. and FIR was promptly lodged on 24.05.2012 at 7.10 p.m. and as such the promptness of the FIR rules out the possibility of any deliberation or concoction; that the appellant and his co-accused were named in the promptly lodged FIR with their specific roles; that the roles attributed to the appellant and his co-accused were prima facie supported by the medical evidence, furnished by Dr. Irfan-ul-Haq (PW-6) and Dr. Shamsa Shoukat (PW-10); that as the Medical Officers are usually not available at the night time at Tehsil Headquarter Hospitals, therefore, the minor delay in conducting the post-mortem examination on the body of Muhammad Waseem deceased is not relevant in this case; that the prosecution eye-witnesses stood the test of lengthy cross-examination but their evidence could not be shaken; that the prosecution case against the appellant is further corroborated by the recovery of dagger P3, on the pointation of the appellant and the positive report of Punjab Forensic Science Agency, Lahore (Ex.PO); that motive of previous quarrel between Muhammad Waseem deceased and Muhammad Ayaz co-accused is also proved in this case through reliable and trustworthy evidence of the prosecution witnesses; that there is no substance in the appeal filed by the appellant, therefore, the same may be dismissed and conviction and sentence of the appellant, as awarded by the learned trial Court may be upheld and maintained and Murder Reference be answered in the affirmative.

Insofar as the criminal PSLA No. 47 of 2016, Filed by the complainant against the acquittal of Muhammad Ejaz Respondent No. 2, Muhammad Ayaz Respondent No. 3, Muhammad Rafique Respondent No. 4, Muhammad Idrees Respondent No. 5 and Muhammad Shahid Respondent No. 6, is concerned, it is contended by learned counsel for the complainant that Respondents No. 2 to 6, were specifically named in a promptly lodged FIR, with the specific roles that Muhammad Ejaz Respondent No. 2 and Muhammad Idrees Respondent No. 5, caught hold Muhammad Waseem deceased from his arms, whereupon Muhammad Sajjad (Shujaat Waseem) appellant inflicted dagger blows on his body. Muhammad Ayaz Respondent No. 3 and Muhammad Shahid

Respondent No. 6, also inflicted Sota blows on the body of Muhammad Waseem deceased, whereas Muhammad Rafique Respondent No. 4, inflicted a hatchet blow, which landed on the back side of the head of *Mst.* Nasreen Bibi PW-4; that the injuries attributed to Muhammad Ayaz Respondent No. 3, Muhammad Rafique Respondent No. 4 and Muhammad Shahid Respondent No. 6, are fully supported by the medical evidence; that the abovementioned respondents have wrongly been acquitted by the learned trial Court *vide* impugned judgment; that although the abovementioned respondents were declared innocent by the police and no weapon was recovered from their possession but opinion of the police was not binding on the Court and mere non-recovery of weapon of offence by itself is not sufficient to acquit the abovementioned respondents; that the impugned judgment of the learned trial Court to the extent of acquittal of abovementioned respondents is against the law and facts of the present case, therefore, the same may be set aside and the above-mentioned respondents be convicted and sentenced in accordance with the law.

11. We have heard the arguments of learned counsel for the parties, as well as, learned Deputy Prosecutor General for the State and have also gone through the evidence available on the record with their able assistance.

12. First of all we take up the argument of learned counsel for the appellant that as Bashir Ahmad SI/Investigating Officer (CW-1), has admitted during his cross-examination that it was Muhammad Akmal Lumberdar/PW, who informed the elders of Muhammad Waseem deceased about the occurrence and the said admission has established that the prosecution eye-witness namely Muhammad Yasin (PW-2), Muhammad Ishtaiq (PW-3) and *Mst.* Nasreen Bibi (PW-4), were not present at the spot at the time of occurrence and the occurrence was unseen. It is true that Bashir Ahmad SI/Investigating Officer (CW-1), admitted during his cross-examination as under:

> *"It is correct to suggest that Akmal Lubardar got recorded his statement that he informed the elders of the deceased Waseem about his injuries. It is correct to suggest that he also got recorded that he informed to the elders of deceased that after receiving the injuries, Waseem fell down in his Ihata and died there. It is correct to suggest that he also got recorded, that Idrees was at some distance from the pond at that time. It is correct to suggest that according to my investigation said Akmal informed the elders of the deceased*

telephonically. It is correct to suggest that according to my finding in police Diary No. 25, the deceased Waseem fell in the Ihata of Akmal, who informed his elders telephonically. It is correct to suggest that Muhammad Akmal is the same witness, who also identified the dead body at the time of post-mortem."

It is also true that as per site-plan Ex.PJ, the dead body of Muhammad Waseem deceased was present inside the *Ahatta* of the abovementioned Muhammad Akmal PW and even in the FIR (Ex.PL), it was so mentioned that during the occurrence Muhammad Waseem deceased ran towards the *Ahatta* of Muhammad Akmal PW. It is also correct that the said Muhammad Akmal PW has been given up by the prosecution but it is by now well settled that it is the quality of evidence and not the quantity which weighs with the Courts to decide any case. The prosecution produced three eye-witnesses in this case to prove its case, therefore, non-appearance of Muhammad Akmal PW in the witness box is not fatal to the prosecution case. Moreover, the abovementioned statement of Bashir Ahmad SI/Investigating Officer (CW-1), is of no help to the appellant because the above-referred Muhammad Akmal PW was not produced in the witness box as a defence witness by the appellant. It is also by now well settled that after recording evidence by the learned trial Court, the opinion of the Investigating Officer becomes irrelevant. Reference in this respect may be made to the case of *"Muhammad Ahmad (Mahmood Ahmad) and another vs. The State"* (2010 SCMR 660). We are, therefore, of the view that there is no substance in the above-mentioned argument of learned counsel for the appellant.

13. Insofar as the prosecution evidence in this case is concerned, we have noted that the occurrence in this case took place on 24.05.2012 at 6.00 p.m and the FIR was statedly lodged on the same day at 7.00 p.m, however, the post-mortem examination on the dead body of Muhammad Waseem deceased was conducted on 25.05.2012 at 8.00 a.m, *i.e.*, with the delay of about 14 hours from the occurrence. Dr. Irfan-ul-Haq (PW-6), has categorically stated in his examination-in-chief that the dead body of Muhammad Waseem deceased was brought by the police on 24.05.2012, at 11.50 p.m. He further stated that the complete police papers were received on 25.05.2012 at 7.50 a.m and thereafter he conducted post-mortem examination of the deceased on 25.05.2012 at 8.00 a.m, meaning thereby that the police papers remained incomplete for a period of

about fourteen hours after the occurrence and as such the said delay of about fourteen hours in conducting post-mortem examination on the dead body of Muhammad Waseem deceased has created serious doubt regarding presence of the prosecution eye-witnesses at the spot at the relevant time. The abovementioned delay in conducting post-mortem examination and delivery of police papers to Dr. Irfan-ul-Haq (PW-6), is suggestive of the fact that the prosecution eye-witnesses were not present at the spot at the relevant time and the said delay has been consumed in procuring the attendance of fake eye-witnesses in this case. We may refer here the case of *"Irshad Ahmad versus The Slate"* (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the deadbody had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted. Similarly, in the case of *Khalid alias Khalidi and two others vs. The State* (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10/11 hours from the occurrence in conducting the post-mortem examination on the deadbody of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

Similar view was taken by the Apex Court of the country in the cases reported as *"Muhammad Ashraf vs. The State"* (2012 SCMR 419), *"Muhammad Ilyas vs. Muhammad Abid alias Billa and others"* (2017 SCMR 54) and *"Zafar vs. The State and others"* (2018 SCMR 326).

It is further noteworthy that according to the statement of Dr. Irfan-ul-Haq (PW-6), both the eyes of Muhammad Waseern deceased were half open, at the time of his post-mortem examination. Similarly according to column No. 8, of the inquest report (Ex.PE), eyes and mouth of Muhammad Waseem deceased were semi-open, which shows that the prosecution eye-witnesses namely Muhammad Yasin (PW-2) Muhammad Ishtiaq (PW-3) and *Mst.* Nasreen Bibi (PW-4), who were father, brother and sister of Muhammad Waseem deceased, respectively, were not present at the spot at the time of occurrence because it is a common observation in our society that when close relatives are present at the spot, at the time of occurrence, they first of all close the mouth and eyes of the deceased. Thus, the abovementioned fact has established

that the abovementioned prosecution eye-witnesses were not present at the spot at the time of occurrence.

We have further observed that there are glaring contradictions between the ocular account and the medical evidence of the prosecution regarding the number of injuries sustained by Muhammad Waseem deceased. As per evidence of Dr. Irfan-ul-Haq (PW-6), there were total nine injuries on the body of the deceased and the cause of death of Muhammad Waseem deceased was Injury No. 2, which was an incised wound on antro-medial side of left thigh but while appearing in the witness box, none of the prosecution witness has attributed the said injury to Muhammad Sajjad (Shujaat Waseem) appellant or to any other accused. Although the prosecution eye-witnesses attributed the injuries on the chest and below abdomen of Muhammad Waseem (deceased) to the appellant but even, in respect of the said injuries, there are material contradictions/conflicts/improvements in the prosecution evidence. Muhammad Yasin complainant (PW-2), did not mention in the FIR that any injury on the chest of the deceased was inflicted by the appellant or by any other accused. Although while appearing in the witness box, the complainant assigned the said injury to the appellant but he was confronted with his previous statement (Ex.DA) and the improvement made by him in this respect was duly on the record, which is reproduced hereunder:

> *"I did not got recorded in my statement Ex.DA that my son was stabbed upon chest"*

Although Muhammad Ishtaiq (PW-3), stated that the appellant inflicted injuries with the help of dagger on the left side of the chest and below the abdomen of Muhammad Waseem deceased but the injured eye-witness of the occurrence namely *Mst.* Nasrcen Bibi (PW-4), assigned only one injury to the appellant, which was inflicted on the left side of the chest of Muhammad Waseem deceased and she did not state that any injury below the abdomen or on the left thigh of Muhammad Waseem deceased was caused by the appellant, or by any other accused. It is, therefore, evident that there are glaring contradictions in the statements of the prosecution eye-witnesses regarding the number and seat of injuries inflicted by the appellant on the body of Muhammad Waseem deceased. As mentioned earlier not a single prosecution eye-witness while appearing in the witness box has assigned any injury to Muhammad Sajjad (Shujaat

Waseem) appellant, on the left thigh of the deceased, which according to the evidence of Dr. Irfan-ul-Haq (PW-6), was the cause of death of the deceased.

14. We have further noted that according to the prosecution case as described in the FIR. (Ex.PL), on the day of occurrence, Muhammad Yasin complainant (PW-2) along with his son Muhammad lshtiaq (PW-3), was busy at his house for cutting fodder, whereas his son namely Muhammad Waseem deceased was busy in drinking water to his cattle from the nearby pond and in the meanwhile, the occurrence took place. According to the prosecution case, Muhammad Waseem deceased was injured by the appellant and his co-accused near the said pond and after sustaining dagger injuries on his flank and on the left side of his thigh near the inguinal area, Muhammad Waseem deceased ran from the said place situated near the pond towards the Ahatta of Muhammad Akmal PW, wherefrom his dead body was recovered. We have noted that the house of Muhammad Yasin complainant (PW-2), Muhammad Ishtiaq (PW-3) and *Mst.* Nasreen Bibi (PW-4), has not been shown in the site-plan (Ex.PJ). It is not understandable that if the house of Muhammad Yasin complainant (PW-2), was situated near the pond, where the occurrence initially took place, then as to why Muhammad Waseem deceased instead of running towards his own house, ran towards the Ahatta of abovementioned Muhammad Akmal (given up PW) wherefrom his dead body was recovered. No blood-stained earth was recovered near the pond, where the first part of the occurrence took place and Muhammad Waseem deceased allegedly received injuries on his body. The blood-stained earth was only collected from inside the Ahatta of Muhammad Akmal (given-up PW). No trail of blood from the place nearby pond, where the occurrence first took place, to the Ahatta of Muhammad Akmal PW has been shown in the site-plan (Ex.PJ) or mentioned by Bashir Ahmad SI/Investigating Officer (CW-1). As per site-plan (Ex.PJ), the distance between Point No. 1, where Muhammad Waseem (deceased) first received dagger blows and Point No. 2, wherefrom his dead body was recovered inside the Ahatta of Muhammad Akmal (given-up PW), is 370 feet. It is highly improbable that a man after receiving dagger blows on his flank and inguinal area (left upper thigh) which according to the evidence of Dr. Irfan-ul-Haq (PW-6), cut femoral vessels, would cover the abovementioned distance by running. Keeping in view all the aforementioned facts, the evidence of the prosecution eye-witnesses is not worthy of reliance. Reference in this context may be made to the cases reported as *"Ibrahim and 3 others vs. The*

State" (1974 PCr.LJ 119), *"Muhammad Din and others vs. The State"* (2001 YLR 1467) and *"Muhammad Asif vs. The State"* (2005 YLR 2359).

15. According to the prosecution case as described in the FIR (Ex.PL), the motive behind the occurrence was that some time prior to the occurrence, Ayaz co-accused entered the house of the complainant party in order to steal pigeons, whereupon Muhammad Waseem deceased gave beating to him and due to the said grudge, the accused party committed his murder. We have noted that no specific date and time of the occurrence of the motive was alleged in the FIR. Muhammad Yasin complainant (PW-2), while entering in the witness box before the learned trial Court made dishonest improvements in his previous statement by stating that motive part of the occurrence took place about four months prior to the main occurrence. He was duly confronted with his previous statement (Ex.DA) and the dishonest improvements made by him in this respect were brought on the record. The relevant part of his statement reads as under:

> *"I got written in my statement Ex.DA that four months before the occurrence, the accused Ayaz came in my house for theft of pigeons. Confronted with Ex. DA, where word four is not mentioned rather word few is mentioned. It is incorrect to suggest that after the occurrence and upon the information of the murder, the women of family of accused. Rajique etc. and ours quarreled, we did not got registered any FIR against accused Ayaz for theft of pigeons"*

It is further evident from the perusal of the statement of the complainant that no FIR was got registered by the complainant party regarding the occurrence of the motive part of this case. We have further noted that the Investigating Officer Bashir Ahmad SI (CW-1), has candidly conceded during his cross-examination that the motive of stealing of pigeons was not established in this case by the prosecution. Relevant part of his statement reads as under:

> *"It is correct to suggest that motive of stealing the pigeons as mentioned in the FIR was not established during the investigation"*

We are, therefore, of the view that the motive as alleged by the prosecution has not been proved in this case.

16. Now coming towards the recovery of dagger P3, on the pointation of the appellant and positive report of Punjab Forensic Science Agency, Lahore (Ex.PO), we have noted that the occurrence in this case took place on 24.05.2012, whereas the dagger P3, was statedly recovered from the possession of the appellant on 24.03.2013 *i.e.*, after ten months from the occurrence. It is by now well settled that blood disintegrates within a period of three to four weeks after the occurrence, therefore, the presence of human blood on the dagger P3, statedly recovered on the pointation of Muhammad Sajjad (Shujaat Waseem) appellant, after a period of ten months is highly doubtful. Reference in this context may be made to the cases of *Muhammad Jamil vs. Muhammad Akram and others* (2009 SCMR 120) and *"Faisal Mehmood vs. The State"* (2016 SCMR 2138). Under the circumstances, the alleged recovery of dagger P-3, on the pointation of the appellant and report of Punjab Forensic Science Agency, Lahore (Ex.PO), are inconsequential.

17. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In *'Tariq Pervez versus The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:

> *'5 .... The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'*

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram versus The State'* (2009 SCMR 230), at page 236, observed as under:

> *"13 ..... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace.*

It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled, to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case, against the appellant beyond the shadow of doubt, therefore, we **accept Criminal Appeal No. 216 of 2016,** filed by Muhammad Sajjad (Shujaat Waseem) appellant, set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Dunyapur, District Lodhran *vide* judgment dated 28.01.2016 and acquit him of the charge by extending him the benefit of doubt. Muhammad Sajjad (Shujaat Waseem) appellant is in custody, he be released forthwith, if not required in any other case.

19. **Murder Reference No. 48 of 2016** is answered in the **NEGATIVE** and the sentence of death of Muhammad Sajjad (Shujaat Waseem) convict is **NOT CONFIRMED.**

20. Insofar as the criminal **PSLA No. 47 of 2016,** filed by the complainant against the acquittal of Muhammad Ejaz Respondent No. 2, Muhammad Ayaz Respondent No. 3, Muhammad Rafique Respondent No. 4, Muhammad Idrees Respondent No. 5 and Muhammad Shahid Respondent No. 6, is concerned, we have already disbelieved the prosecution evidence produced through the eye-witnesses namely Muhammad Yasin (PW-2), Muhammad Ishtiaq (PW-3) and *Mst.* Nasreen Bibi (PW-4) due to the reasons mentioned in Paragraphs No. 12 to 16, of this judgment. We have also noted that Muhammad Ejaz Respondent No. 2 and Muhammad Idrees Respondent No. 5, have only been attributed the role of catching hold of Muhammad Waseem deceased from his arms and no injury to any member of the complainant party whatsoever has been attributed to the said respondents. We have further noted that Muhammad Rafique Respondent No. 4, had been attributed the role of inflicting a hatchet blow, which landed on the back side of the head of *Mst.* Nasreen Bibi PW-4, whereas Muhammad Ayaz Respondent No. 3 and Muhammad Shahid Respondent No. 6, allegedly inflicted *Sota* blows on the body of Muhammad Waseem deceased. In this respect, the learned

trial Court has rightly concluded that according to the statement of Dr. Shamsa Shoukat (PW-10), injury on the head of *Mst.* Nasreen Bibi (PW-4) was a superficial wound and the said wound cannot be caused by a hatchet blow, which is a heavy weapon. Similarly it was rightly concluded by the learned trial Court that Dr. Irfan-ul-Haq (PW-6), had stated that Injuries No. 3 to 7 and 9, on the body of Muhammad Waseem deceased (attributed to Respondents No. 3 to 6) may be caused due to falling of the deceased on a hard surface. Keeping in view all the aforementioned facts, coupled with the fact that no weapon of offence was recovered from the abovementioned respondents, the learned trial Court extended to the abovementioned respondents the benefit of doubt. It is by now well settled that if an accused is acquitted by a Court of competent jurisdiction then he enjoys double presumption of innocence in his favour and very strong and exceptional grounds are required to interfere with the judgment of acquittal of an accused passed by a Court of competent jurisdiction but no such ground has been pointed out by learned counsel for the petitioner/ complainant.

21. In the light of above discussion, there is no substance in **PSLA No. 47 of 2016,** hence the same is hereby ***dismissed.***

(A.A.K.) **Order accordingly.**

PLJ 2020 Cr.C. (Lahore) 967

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Syed **MUHAMMAD MUSTAFA--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 59882-B of 2019, decided on 28.11.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 447, 511, 337-H(ii), 337-F(v), 342, 452, 506-B, 148 & 149--Bail before arrest, confirmed--Cross-version--Armed with different weapon and trespassed into house--Further inquiry--According to medico legal report there were as many as five injuries on his body, which were punishable under Sections-337A(i)/337F(i)/337L(ii), PPC--According to medico legal report of co-accused, there were three injuries on his body--According to medical legal report of co-accused, there were four injuries on his body, which were declared to be punishable under Sections 37F(i)/337L(ii), PPC--As it is a case of cross versions, therefore, it will be determined by trial Court after recording of evidence that as to who was aggressor and who was aggressed upon and as such, a case for grant of pre-arrest bail is made out in favour of petitioner. [P. 969] A

Petitioner in person.

Ms. Tahira Parveen, District Public Prosecutor for State.

Mr. Munir Hussain Bhatti, Advocate for Complainant.

Date of hearing: 28.11.2019.

ORDER

Through the instant petition, the petitioner seeks pre-arrest bail in case FIR No. 357/2019, dated 19.08.2019, offences under Sections 447/511/337H(ii)/337F(v)/342/452/506-B/148/149, PPC, registered at Police Station Shergarh, District Okara.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on 19.08.2019, at about 3.00 p.m, the petitioner along with his co-accused while armed with different weapons launched an attack upon the complainant party and trespassed into the house of Syeda Bibi Jugnu Mohsin in order to take possession of the said house. The petitioner Syed Muhammad Mustafa raised a lalkara and thereafter broke different articles of the house of the complainant. The petitioner then inflicted a butt blow of his pistol, which landed on the right thumb of Muhammad Imran PW. Irfan co-accused inflicted a butt blow of pump action gun, which landed on the back side of the chest of Muhammad Imran PW, where after all the accused persons gave several *Sota* blows on the body of

Muhammad Imran PW. The injury attributed to the petitioner on the right thumb of Muhammad Imran PW was declared to be punishable under Section 337F(v), PPC, hence the abovementioned FIR.

4. I have noted that it is a case of cross versions and three members of the accused side namely Syed Muhammad Mustafa petitioner, Irfan Ali co-accused and Saif Ahmad Shah were also injured during the occurrence. As mentioned earlier, the occurrence in this case took place on 19.08.2019, at about 3.00 p.m. Syed Muhammad Mustafa petitioner was medically examined on the same day *i.e*., 19.08.2019 at 5.40 p.m. Irfan Ali co-accused was medically examined on, the same day *i.e*., 19.08.2019, at about 6.50 p.m, whereas Saif Ahmad Shah was also medically examined on the same day *i.e*., 19.08.2019, at about 7.20 p.m. According to the medico legal report of Syed Muhammad Mustafa petitioner, there were as many as five injuries on his body, which were punishable under sections 337A(i)/337F(i)/337L(ii), PPC. According to the medico legal report of Irfan Ali co-accused, there were three injuries on his body. According to the medical legal report of Saif Ahmad Shah co-accused, there were four injuries on his body, which were declared to be punishable under Sections 3.37F(i)/337L(ii), PPC. In the relevant columns of the medico legal reports of the petitioner, as well as, Irfan Ali co-accused and Saif Ahmad Shah, the Medical Officer has categorically mentioned that there was no possibility of fabrication of their injuries. As it is a case of cross versions, therefore, it will be determined by the learned trial Court after recording of evidence that as to who was the aggressor and who was aggressed upon and as such, a case for grant of pre-arrest bail is made out in favour of the petitioner. Reliance in this respect may be placed on the cases of *"Raima Ali Hamza and others vs. The State"* (2010 SCMR 1219) and *"Syed Darbar Ali Shah and others vs. The State"* (2015 SCMR 879). Even learned counsel for the complainant submits that he has no objection on the confirmation of pre-arrest bail of the petitioner.

5. In the light of above discussion, the instant petition is ***allowed*** and ad-interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 50,000/- (*Rupees fifty Thousand only*) with one surety in the like amount to the satisfaction of the learned trial Court.

(S.A.Q.) **Petition allowed.**

PLJ 2020 Cr.C. (Lahore) 1266

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD ZAMAN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 12782-B of 2020, decided on 9.3.2020.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 357/337(ii)/337-F(v)337-A(ii)/148/149--Allegation of trespassed into house of complainant and injured--Specific Role was attributed supported by medical evidence--Non-bailable offence--Recovery of case property--Petitioner has been assigned a specific role of committing house trespass and inflicting 'danda' blow which landed on right arm of *Mst.* "Y" role attributed to petitioner is, prima facie, supported by medical evidence--Injury attributed to petitioner has been declared by concerned Medical Officer to be punishable under Section 337 F(v) of PPC, which is a non-bailable offence--Recovery of weapon of offence is still to be affected from possession of petitioner--petitioner is unable to establish any malafidean part of complainant for his false involvement in this case--Petition dismissed. [P. 1267] A

Ch. Adeel Ali, Advocate with Petitioner.

Ms. Maida Sobia, Deputy Prosecutor General for State.

Mr. Munir Hussain Bhatti, Advocate for Complainant.

Date of hearing: 9.3.2020.

ORDER

The petitioner Muhammad Zaman through the instant petition seeks pre-arrest bail in case FIR No. 46 dated 18.01.2020 registered at P.S. Bhikhi District Sheikhupura offences under Sections 354/337 L(ii)/337 F(v)/337 A(ii)/148/ 149 of PPC.

2. Arguments heard. Record perused.

3. As per brief allegations leveled in the FIR, on 10.01.2020 at 03:30 p.m, the petitioner along with his co-accused while armed with different weapons trespassed into the house of the complainant party and caused injuries to *Mst.* Salan Bibi and *Mst.* Yasmeen PWs. Hence, the abovementioned FIR.

4. The petitioner has been assigned a specific role of committing the house trespass and inflicting 'danda' blow which landed on the right arm of *Mst.* Yasmeen Bibi. The role attributed to the petitioner is, *prima facie,* supported by the medical evidence. The injury attributed to the petitioner has been declared by the concerned Medical Officer to be punishable under Section 337 F(v) of PPC, which is a non-bailable offence. Recovery of weapon of offence is still to be affected from the possession of the petitioner. The petitioner is unable to establish any *mala fide* on the part of the complainant for his false involvement in this case.

5. In the light of above discussion, there is no substance in this petition therefore, the same is hereby dismissed. Interim pre-arrest bail already granted to the petitioner is hereby recalled and withdrawn.

(S.A.B.) **Petition dismissed.**

PLJ 2020 Cr.C. (Lahore) 1436

Present: MALIK SHAHZAD AHMAD KHAN, J.

BUSHRA BIBI and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 28448-B of 2020, decided on 31.8.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail after arrest, grant of--Further inquiry--Although it is further argued by DPG assisted by counsel for complainant that as per statements of prosecution witnesses, deceased was lastly shifted from house of petitioners to hospital, therefore, it is for petitioners to explain death of deceased--There is no substance in above mentioned argument of DPG assisted by counsel for complainant because it is by now well settled that mere recovery of dead body from house of accused is not sufficient to hold him guilty--Are distinguishable from facts of present case--Moreover, as per prosecution's own case, was shifted alive from house of petitioners and his dead body was not recovered from house of petitioners--No poison or any other incriminating material has been recovered on pointation of petitioners--Prima facie, there is neither any motive, nor any other '0 convincing direct or circumstantial evidence available on record against petitioners, except suspicion expressed by complainant and above mentioned weak type of circumstantial evidence which requires further probe--Prosecution case against petitioners is one of further inquiry, therefore, instant petition is accepted and petitioners are admitted to post arrest bail.

[Pp. 1438] A & B

Cancellation of Bail--

----If petitioners will not cooperate during pendency of their trial with learned trial Court then complainant shall be at liberty to file petition for cancellation of bail--It is further clarified that observations made in this order are tentative in nature and shall not cause any prejudice to case of either party during trial or at time of final adjudication of case. [P. 1439] C

2016 SCMR 274, 2018 SCMR 787, PLD 2017 SC 681, 2016 SCMR 1628, 2016 SCMR 1019, 2011 SCMR 941 and 2015 SCMR 655.

Ch. Anees-ur-Rehman, Advocate for Petitioners.

Mr. Imdad Hussain Chatha, Deputy Prosecutor-General for Respondent.

Syed Afzal Shah Bukhari, Advocate for Complainant.

Date of hearing: 31.8.2020.

ORDER

The petitioners *Mst.* Bushra Bibi and Muhammad Zahid through instant petition seek post arrest bail in case FIR No. 137, dated 28.03.2020, registered at P.S. Saddar Pattoki, District Kasur offence under Sections 302/34 of PPC.

2. Arguments heard and record perused.

3. As per contents of the FIR on 27.03.2020 *Mst.* Bushra Bibi petitioner No. 1 called the son of the complainant, namely Ansar Ali, in her house. He went to the said house at about 08:30 p.m. Ansar Ali became sick in the house of *Mst.* Bushra Bibi petitioner No. 1. The said petitioner informed to the paternal cousin of the complainant, namely Mehmood that Ansar Ali was not fleeing well, who reached in the house of the above mentioned petitioner at ll:38 p.m. Mehmood and Muhammad Imran (PWs) took Ansar Ali to the Civil Hospital Pattoki and also informed the complainant on the telephone. Ansar Ali was referred from Civil Hospital Pattoki to Jinnah Hospital but he died on the way to the said hospital. The complainant further alleged that he had strong suspicion against both the petitioners, who are mother and son inter se" that they had administered some poisonous material to Ansar Ali deceased due to which he had died.

4. It is noteworthy that no motive whatsoever has been alleged in the FIR that as to why the petitioners, who are mother and son would administer poisonous material to Ansar Ali deceased. Even no motive has been alleged against the petitioners till today through any supplementary statement of the complainant. There is no eye-witness of the occurrence. The police has not recorded any statement of any witness till today, who had seen both the petitioners while administering poisonous material to Ansar Ali deceased. No crockery, cup or glass has been recovered from the house of the petitioners through which any intoxicated material was administered to Ansar Ali deceased. Although as per

police record a phial and mobile phone of the deceased containing his vomiting were recovered from the house of the petitioner but the learned DPG has conceded on instructions that as per report of PFSA no poisonous material was detected in the phial recovered from the house of the petitioners. He has further conceded on instructions that vomiting material on the mobile phone of Ansar Ali deceased allegedly recovered from the house of the petitioners was also not sent to the PFSA in order to determine that as to whether the said vomiting material on mobile phone contained any poisonous material or not. I have also noted that the occurrence in this case took place on 27.03.2020 at 08:30 p.m. but the FIR has been lodged on 28.03.2020 at 07:00 a.m. It is next contended by learned DPG assisted by learned counsel for the complainant there there is call data of the petitioners and the deceased which shows that on the day of occurrence the petitioners made telephone calls to the deceased but the learned DPG has conceded on instructions that no proof of ownership of the relevant SIMS in the name of the petitioners or in the name of the deceased has been collected by the Investigating Officer of this case. Under the circumstances, the evidentiary value of the above mentioned call data shall be determined by the learned trail Court after recording of evidence. Reliance in this respect may be place on the case reported as *"Azeem Khan and another vs. Mujahid Khan and others"* (2016 SCMR 274). Although it is further argued by the learned DPG assisted by learned counsel for the complainant that as per statements of prosecution witnesses, namely Mehmood and Muhammad Imran, the deceased was lastly shifted from the house of the petitioners to the hospital, therefore, it is for the petitioners to explain the death of Ansar Ali deceased. There is no substance in the above mentioned argument of the learned DPG assisted by learned counsel for the complainant because it is by now well settled that mere recovery of dead body from the house of the accused is not sufficient to hold him guilty. Reference in this respect may be placed on the judgments reported as *"Nazir Ahmad vs. The State"* (2018 SCMR 787), *"Asad Khan vs. The State"* (PLD 2017 Supreme Court 681), *"Nazeer Ahmed vs. The State"* (2016 SCMR 1628), *"Muhammad Jamshaid and another vs. The State and others"* (2016 SCMR 1019) and *"Abdul Majeed vs. The State"*(201l SCMR 941). The facts of the judgment cited by learned counsel for' the complainant reported as *"Muhammad Faiz alias Bhoora vs. The State and another"* (2015 SCMR 655) are distinguishable from the facts of the present case. Moreover, as per prosecution's own case, Ansar Ali was

shifted alive from the house of the petitioners and his dead body was not recovered from the house of the petitioners. No poison or any other incriminating material has been recovered on the pointation of the petitioners. As mentioned earlier, prima facie, there is neither any motive, nor any other convincing direct or circumstantial evidence available on the record against the petitioners, except the suspicion expressed by the complainant and the above mentioned weak type of circumstantial evidence which requires further probe. Keeping in view all the above mentioned facts, the prosecution case against the petitioners is one of further inquiry, therefore, the instant petition is accepted and the petitioners are admitted to post arrest bail subject to their furnishing the bail bonds in the sum of Rs. 500,000/- (*Rupees five hundred thousand only)* each with one surety each in the like amount to the satisfaction of the learned trial Court.

5. It is, however, clarified that if the petitioners will not cooperate during the pendency of their trial with the learned trial Court then the complainant shall be at liberty to file the petition for cancellation of bail. It is further clarified that the observations made in this order are tentative in nature and shall not cause any prejudice to the case of either party during the trial or at the time of final adjudication of the case.

(A.A.K.) **Bail allowed.**

PLJ 2020 Cr.C. (Lahore) 1622 (DB)

Present: **MALIK SHAHZAD AHMAD KHAN AND CH. MUSHTAQ AHMAD, JJ.**

JAVED IQBAL--Appellant

versus

STATE and another--Respondents

Crl. A. No. 205540-J of 2018, heard on 16.9.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----Ss. 9(c) & 36(2)--Allegation of recovery of charas--Conviction and sentence--Challenge to--Report of PFSA was without detail--Evidentiary value--Requirement of law--Benefit of doubt--Acquittal of--**Held:** It is by now well settled that since provisions of Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and benefit of any doubt in prosecution case must be extended to accused--Court have observed that report of Punjab Forensic Science Agency tendered in evidence by prosecution in this case does not give details of full protocols and test applied at time of analysis of sample of narcotics allegedly recovered from possession of appellant--**Further held:** It is settled by now that any report failing to describe in it, details of full protocols and tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet evidentiary presumption attached to a Report of Government Analyst under section 36(2) of Act *ibid*--In report it is simply mentioned that certain tests were conducted and contraband material recovered in this case found to be Charas instead of mentioning details of tests applied on samples and their protocols as required by law--It is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about veracity of prosecution case and benefit of said doubt has to be extended in favour of accused not as a matter of grace or concession but as a matter of right--Appeal was allowed and appellant was acquitted of charge by extending him the benefit of doubt.

[Pp. 1625 & 1627] A, B, C & F

2008 SCMR 6, PLD 2004 SC 856, 2014 SCMR 749 and PLD 2012 SC 380.

Control of Narcotic Substances (Government Analysts) Rules, 2001--

----R. 6--Report of PFSA--Evidentiary value--Rule 6 of said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols

applied thereon along with other details in report issued for test/Analysis by Laboratory--We also find that report of Punjab Forensic Agency is not in line with principles enunciated by august Supreme Court of Pakistan.

[P. 1626] D & E

2018 SCMR 2039 and 2019 SCMR 930.

Mr. Akhtar Saeed Bhatti, Advocate for Appellant.

Mr. Muhammad Waqas Anwar, Deputy Prosecutor General for State.

Date of hearing: 16.9.2020.

JUDGMENT

Malik Shahzad Ahmad Khan, J.--This appeal is directed against judgment dated 26.03.2018, passed by the learned Additional Sessions Judge, Tandlianwala, whereby, in case F.I.R No. 288/2017 dated 18.05.2017, registered at Police Station City Tandlianwala, District Faisalabad, under section 9(c) of the Control of Narcotic Substances Act, 1997, the learned trial Court convicted Javed Iqbal appellant and sentenced him as under:

> ***Under Section 9(c) of Control of Narcotic Substances Act 1997*** *to four years and six months R.I with fine of Rs. 20,000/- and in default of payment thereof the appellant was directed to further undergo S.I for five months. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.*

2. Briefly, the accusation levelled in the FIR against the appellant is that on 18.05.2017, Nosher Ali SI (complainant/PW-1), along with other police officials was present at Sabzi Mondi Chowk. On the basis of spy information, a police barricade was installed and after some time, three persons came from the side of railway station, who on seeing the police party started running, out of whom, one person was over-powered by the police party, whose name was disclosed as Javed Iqbal (appellant). On checking, 1070-grams Charas, wrapped in polythene shopper was recovered, which the appellant was holding in his right hand. A separate sample parcel of Charas weighing 55-grams for Chemical Analysis, I was prepared. The appellant was interrogated and challaned to face the trial. The charge was framed against the appellant on 21.6.2017, to which he pleaded not guilty so the prosecution was directed to produce its evidence. The prosecution produced three witnesses to prove its case. The learned Additional Sessions Judge, Tandlianwala, after recording the statement

of the appellant under section 342 Cr.P.C. and hearing the arguments, passed the impugned judgment, whereby, the appellant was convicted and sentenced as mentioned and detailed above.

3. Feeling aggrieved of the impugned judgment the instant appeal has been preferred by the appellant.

4. Learned counsel for the appellant in support of this appeal contends that full protocols were not mentioned by the office of Punjab Forensic Science Agency while preparing the report (Ex.PE); that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appellant may be acquitted from the charge while setting aside the impugned judgment.

5. On the other hand, the learned Deputy Prosecutor General has supported the impugned judgment of the learned trial Court by contending that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the appellant was rightly convicted and sentenced by the learned trial Court; that the appellant cannot be acquitted on the sole ground that full protocols have not been mentioned in the report of Punjab Forensic Science Agency; that there is no substance in the present, appeal, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. It is by now well settled that since the provisions of the Control of Narcotic Substances Act, 1997 provide stringent punishments, therefore, their proof has to be construed strictly and the benefit of any doubt in the prosecution case must be extended to the accused. Reference in this respect may be made to the case of *"Muhammad Hashim v. The State"* (PLD 2004 Supreme Court 856). Dealing with the same proposition, the Hon'ble Supreme Court of Pakistan held in the case of *"Ameer Zeb v. The State"* (PLD 2012 Supreme Court 380) that harder the sentence, stricter the standard of proof. Seeking guidance from the abovementioned judgments of the august Supreme Court of Pakistan, we proceed to decide the instant case. We have observed that the report of Punjab Forensic Science Agency (Ex.PE), tendered in evidence by the prosecution in this case does not give the details of the full protocols and the test applied at the time of analysis of sample of narcotics allegedly recovered from the possession of the appellant.

Relevant/operative part of the report of the Punjab Forensic Science Agency tendered in evidence by the prosecution as (Ex.PE), reads as under:

Item No.	**Description of Evidence**
	01. One sealed parcel containing approximately 55 gram (s) of suspected Charas.

Tests Performed on Received Item(s) of Evidence

1. Analytical Balance was used for weighing.
2. Chemical Spot Tests were used for Presumptive Testing.
3. Gas Chromatograph Mass Spectrometry was used for confirmation.

Results and Conclusion:-

Items #01 58.53 gram (s) of blackish brown resinous material in sealed parcel contains Charts.

Undisputedly, it is settled by now that any report failing to describe in it, the details of the full protocols and the tests applied will be inconclusive, unreliable suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under section 36(2) of the Act *ibid*. In the report Ex.PE, it is simply mentioned that certain tests were conducted and contraband material recovered in this case found to be Charas instead of mentioning the details of tests applied on the samples and their protocols as required by law. The evidentiary value of above said report has been evaluated by us in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001. Rule 6 of the said Rules makes it imperative on an analyst to mention result of material analyzed with full protocols applied thereon along with other details in the report issued for test/Analysis by the Laboratory.

8. We also find that the report (Ex.PE), of the Punjab Forensic Science Agency is not in line with the principles enunciated by the august Supreme Court of Pakistan in the case of *"The State through Regional Director ANF vs. Imam Bakhsh and others"* (2018 SCMR 2039). The relevant portion of the said judgment is reproduced as under:

> 16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, *i.e.*, control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore, details of the test and analysis

in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in *Ikramullah's case (supra)".*

The above said view has been further fortified in the recent case law titled as *"Khair-ul-Bashar vs. The State"* (2019 SCMR 930). We have also requisitioned the attested copy of FIR in case of *"Khair-ul-Basher"* supra *i.e.*, FIR No,]8, dated 15.01.2016, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at police station Westridge, District Rawalpindi, as well as, attested copy of the report of the Punjab Forensic Science Agency, Lahore, exhibited as Ex.PH, in the said case before the concerned trial Court. The report of the Punjab Forensic Science Agency, Lahore, produced in evidence as Ex.PH, in the case of "*Khair-ul-Basher*" *supra* is identical with the report of the Punjab Forensic Science Agency, Lahore, produced in the evidence of the present case before the learned trial Court as Ex.PE. As identical report in the case of "*Khair-ul-Basher" supra* has not been relied upon by the august Supreme Court of Pakistan, therefore, the identical report of the Punjab Forensic Science Agency produced in evidence of this case by the prosecution as Ex.PE, is also not worthy of reliance.

9. Learned Deputy Prosecutor General has argued that the appellant cannot be acquitted on the abovementioned sole ground of non-mentioning of protocols/full details of test applied, in the report of the Punjab Forensic Science Agency, Lahore but we have noted that the august Supreme Court of Pakistan in the case of "*Khair-ul-Bashar*" supra, acquitted the accused of the said case on the abovementioned sole ground of non-mentioning of protocols/full details of the tests applied in the report of the Punjab Forensic Science Agency, Lahore. Even otherwise it is by now well settled that a single circumstance creating reasonable doubt would be sufficient to cast doubt about the veracity of prosecution case and the benefit of said doubt has to be extended in favour of the accused not as a matter of grace or concession but as a matter of right. Reliance in this regard is placed upon the cases of "*Tariq Pervez vs. The State*" (1995

SCMR 1345), *"Akhtar Ali and others vs. The State"* (2008 SCMR 06) and *"Muhammad Zaman vs. The State and others"* (2014 SCMR 749).

10. In the light of above discussion, the instant appeal (Crl. Appeal No. 205540-J of 2018), is allowed, impugned judgment dated 26.03.2018, passed by the learned Additional Sessions Judge, Tandlianwala, is hereby set aside and Javed Iqbal (appellant) is acquitted of the charge by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required in any other case.

(S.A.B.) **Appeal allowed.**

PLJ 2020 Cr.C. (Lahore) 1689

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Mst. **ISBA HABIB--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 15077-B of 2020, decided on 7.4.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Prevention of Electronic Crimes Act, (XL of 2016), Ss. 20, 21 & 24--Pakistan Penal Code, (XLV of 1860), Ss. 420/109--Post-arrest bail, grant of--Allegation of--Complainant was overseas Pakistani--Accused and co-accused are females--They oftenly used to house of complainant in different gathering--Petitioner is a female--offences mentioned in FIR do not fall within ambit of Prohibitory Clause of Section 497 of, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--Assistant Attorney-General has conceded on instructions that no other FIR stands registered against petitioner--It is further noteworthy that allegation of giving any intoxicated material at time of preparing naked videos of complainant has not been levelled against petitioner and said allegation has been levelled against (co-accused)--No material which can cause intoxication has been recovered from possession of petitioner during investigation of this case--Similarly allegation of preparation of naked/objectionable video of complainant has also not been levelled against petitioner and said allegation has been levelled against (co-accused)--It is further noteworthy that demand of Rupees Fifty Crore and threat of making viral video of complainant in case of non-payment of said amount was also levelled against co-accused--It was simply mentioned in FIR that petitioner extended threats of dire consequences to complainant but allegation of making demand of any amount from complainant has not been levelled against petitioner--It is further noteworthy that above referred (co-accused who statedly demanded amount from complainant has already been granted post-arrest bail by Judicial Magistrate Section-30, Lahore, *vide* order, dated 06.03.2020 Insofar as contention of Assistant Attorney Genera as to

confessional statement of petitioner and Muhammad Iftikhar Ali *alias* Joji (co-accused) before FIA Authorities while in custody is concerned, it is by now well settled that confession of an accused/co-accused before police/arresting authorities while in custody is inadmissible in evidence--Offences mentioned in FIR do not fall within ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--No exceptional ground has been pointed but by Assistant Attorney-General to refuse bail to petitioner--Where a case falls within non-prohibitory clause of Section 497 of, Cr.P.C., concession of granting bail must be favourably considered and should only be declined in exceptional cases, this petition is allowed. [Pp. 1692 & 1693] A, B & C

PLD 2014 SC 760, 2013 SCMR 669, 2009 SCMR 1488 and PLD 2017 SC 733.

Mr. Zaheer-ul-Hassan Zahoor, Advocate for Petitioner.

Mr. Zahid Sikandar, Assistant Attorney-General with *Syed Ali Raza Gardezi,* Assistant Director Investigation, FIA, CCW for Respondent.

Mr. Abdul Rehman, Advocate vice counsel for Complainant.

Date of hearing: 7.4.2020.

ORDER

The petitioner, namely Isba Habib, through the instant petition seeks post arrest bail in case FIR No. 8, dated 11.2.2020, registered at P.S. FIA C.C.R.C, Lahore offences under Sections 20, 21 & 24 of PECA r/w Sections 420/109, PPC.

2. There is yet an-other written request for adjournment on behalf of learned counsel for the complainant. The said request has vehemently been opposed by learned counsel for the petitioner on the ground that there is no valid reason to adjourn this bail petition for indefinite period on the repeated requests of learned counsel for the complainant. I have noted that this post arrest bail petition was filed before this Court on 12.3.2020 and thereafter a number of adjournments have already been granted to the complainant party in this case. On 19.3.2020 learned proxy counsel after filing power of attorney on behalf of the complainant sought an adjournment due to non-availability of learned principal counsel for the complainant and on his request the

case was adjournment for 27.3.2020 with the clear understanding that no further adjournment shall be granted in this case. On 27.3.2020, again a written request for adjournment was made by learned counsel for the complainant. The said request was opposed by learned counsel for the complainant on the ground that on the previous date of hearing *i.e.* 19.3.2020 this case was adjourned on the request of learned proxy counsel for the complainant with the clear understanding that no further adjournment shall be granted in this case. However, in the interest of justice, on the previous date of hearing, *i.e*. 27.3.2020, again the case was adjourned for today's date of hearing *i.e*. 7.4.2020 while giving last and final opportunity to the complainant to make arrangements for arguments in this petition. It was, however, clarified that in case of failure to make arrangement to make arguments on this petition by the complainant, the same shall be decided on the basis of available record. The instant adjournment application has been filed by learned counsel for the complainant, on the ground that due to the prevailing situation created by pandemic coronavirus learned counsel for the complainant is on general adjournment from 28.3.2020 till 12.4.2020 but it is noteworthy that the above mentioned general adjournment is not applicable on the cases fixed by the Court and because the instant case was fixed by the Court, therefore, the said general adjournment is not applicable on the instant petition. Moreover, learned counsel for the complainant did not appear before the Court on 19.3.2020 *i.e*. before the date mentioned in his application for general adjournment.

3. In the light of above, there is substance in the objection of learned counsel for the petitioner and there is no valid reason to keep on adjourning this post arrest bail petition of a female for indefinite period on the repeated requests of learned counsel for the complainant. Even otherwise it is a state case and learned Assistant Attorney-General is ready to argue the same, therefore, written request for adjournment filed by learned counsel for the complainant is hereby turned down and I proceed to decide the instant petition on the basis of available record and after hearing arguments of learned counsel for the petitioner, and learned Assistant Attorney-General.

4. As per brief allegations levelled in the FIR Ibrar Hussain Bukhari (complainant) is an overseas Pakistani residing in Japan and Peru. *Mst.* Isbah Habib Ullah (petitioner) and *Mst.* Treeza Riaz Masih (co-accused) used to come to the house of the

complainant in different gatherings. *Mst.* Treeza Riaz Masih (co-accused) offered a juice to the complainant in one of the gatherings at his house and he (complainant) went senseless. *Mst.* Treeza Riaz Masih (co-accused) deceitfully captured his naked video and later on sent the same to his (complainant's) mobile number from a Dubai number. The said *Mst.* Treeza Riaz Masih (co-accused) along with Muhammad Iftikhar Ali *alias* Joji (co-accused) started to blackmail the complainant that if the complainant would not pay them Rupees Fifty Crore then the objectionable video of the complainant shall be put on the internet and made viral. The complainant further alleged that *Mst.* Isbah Habib Ullah (petitioner) was master mind behind the abovementioned occurrence, who also shared a poster consisting fake allegations and threats against the complainant through her mobile number. The petitioner also threatened the complainant of dire consequences. Eventually a raid was conducted at Office No. 5, 3rd Floor, Shalimar Plaza, Moon Market, Lahore. The petitioner and Muhammad Iftikhar Ali *alias* Joji (co-accused) were present in the above mentioned office. They were apprehended by the FIA Authorities. Two mobile phones were recovered from their possession. The alleged SIM No. 0323-9338366 was found active in the mobile recovered from the petitioner. The objectionable naked videos of the complainant were found stored in the mobiles of the petitioner and Muhammad Iftikhar Ali *alias* Joji (co-accused). Muhammad Iftikhar Ali *alias* Joji (co-accused) confessed before the FIA Authorities that the objectionable videos of the complainant were shared by the petitioner on his mobile phone. The petitioner also disclosed before the raiding party that she shared the above mentioned videos of the complainant with Muhammad Iftikhar Ali *alias* Joji (co-accused) and they used to exploit the image of the complainant. Hence, the above mentioned FIR.

5. Arguments heard. Record perused.

6. The petitioner is a female. The offences mentioned in the FIR do not fall within the ambit of Prohibitory Clause of Section 497 of Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. The learned Assistant Attorney-General has conceded on instructions that no other FIR stands registered against the petitioner. It is further noteworthy that the allegation of giving any intoxicated material at the time of preparing naked videos of the complainant has not been

levelled against the petitioner and the said allegation has been levelled against *Mst.* Treeza Riaz Masih (co-accused). No material which can cause intoxication has been recovered from the possession of the petitioner during the investigation of this case. Similarly the allegation of preparation of naked/objectionable video of the complainant has also not been levelled against the petitioner and the said allegation has been levelled against *Mst.* Treeza Riaz Masih (co-accused). It is further noteworthy that the demand of Rupees Fifty Crore and threat of making viral the video of the complainant in case of non-payment of said amount was also levelled against *Mst.* Treeza Riaz Masih (co-accused) and Muhammad Iftikhar Ali *alias* Joji (co-accused). It was simply mentioned in the FIR that the petitioner extended threats of dire consequences to the complainant but the allegation of making demand of any amount from the complainant has not been levelled against the petitioner. It is further noteworthy that the above referred Muhammad Iftikhar Ali *alias* Joji (co-accused) who statedly demanded amount from the complainant has already been granted post-arrest bail by the learned Judicial Magistrate Section-30, Lahore, *vide* order, dated 06.03.2020 Insofar as the contention of learned Assistant Attorney General as to the confessional statement of the petitioner and Muhammad Iftikhar Ali *alias* Joji (co-accused) before the FIA Authorities while in custody is concerned, it is by now well settled that confession of an accused/co-accused before the police/arresting authorities while in custody is inadmissible in evidence. Reliance in this respect may be placed on the cases of '*Alam Zeb another vs. The State and others*' (PLD 2014 Supreme Court 760) & '*Raja Muhammad Younas vs. The State*' (2013 SCMR 669). As mentioned earlier the offences mentioned in the FIR do not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. No exceptional ground has been pointed but by the learned Assistant Attorney-General to refuse bail to the petitioner, therefore, while keeping in view the law laid down in the cases of '*Zafar Iqbal vs Muhammad Anwar and others'* (2009 SCMR 1488) & '*Muhammad Tanveer vs The State and another*' (PLD 2017 Supreme Court 733) ordaining that where a case falls within the non-prohibitory clause of Section 497 of, Cr.P.C., the concession of granting bail must be favourably considered and should only be declined in exceptional cases, this petition is **allowed** and the petitioner is admitted to post arrest bail subject to his furnishing

the bail bonds in the sum of Rs. 200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2020 Cr.C. (Lahore) 1719

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

KAMRAN KHALIL--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 40947-B of 2020, decided on 23.10.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 354, 337-F(i), 337-F(ii)--Pre-arrest bail, grant of--Confirmed--Allegation of--As per brief allegations levelled in FIR, on 8.6.2020 at 8:00 a.m--*Punchiat* proceedings took place in house of petitioner regarding matrimonial dispute of me petitioner with his wife--During said *Punchiat* proceedings a quarrel took place whereupon petitioner inflicted a *Churri* blew, which landed on left arm of his wife--Hence, above mentioned FIR, Injury attributed to petitioner was declared to be punishable under Section 337-F(ii) of PPC--It is noteworthy that although occurrence of this case took place on 8.6.2020 at 08:00 a.m. but alleged injured of this case, was medically examined on next date *i.e.* on 9.6.2020 at 12:15 p.m.--Petitioner challenged MLR of before District Standing Medical Board and as per report of District Standing Medical Board alleged injured was summoned twice for her re-examination on 7.7.2020 and 12.7.2020 but she did not turn up for above mentioned purpose--Non-appearance of alleged injured of this case before District Standing Medical Board speaks of *mala fide*, which entitles petitioner to grant of pre-arrest bail--Although it is argued by APG that blood stained *Churri* is Still to be recovered from possession of petitioner butt have noted that occurrence in this case took place on 8.6.2020 and a period of four months and sixteen days has already elapsed from date of alleged occurrence, therefore, blood, if any, on *Churri* expected to be recovered from possession of petitioner, must have disintegrated in meanwhile,

therefore, possible recovery of *Churri* from possession of petitioner would not serve any useful purpose to prosecution and as such a case for grant of pre-arrest bail is made out in favour of petitioner--Possibility of *mala fide* this case due to matrimonial this stage--Resultantly, this pre-arrest bail already granted involvement of petitioner dispute cannot be ruled out at this stage--Resultantly, this petition is allowed and interim pre-arrest bail already granted to petitioner is confirmed. [Pp. 1720 & 1721] A, B, C & D

2012 SCMR 646, 2013 YLR 370, 2017 YLR Note 78, 2014 SCMR 1349 and 2009 SCMR 120.

Mr. Javed Iqbal Malik, Advocate the Petitioner.

Ch. Muhammad Ishaq, Addl. Prosecutor-General for State.

Date of hearing: 23.10.2020.

ORDER

The petitioner Kamran Khalil through the instant petition seeks pre-arrest bail in case FIR No. 656 dated 11.6.2020 registered at P.S. Ladhey Wala Warraich District Gujranwala offences under Section 354, 337-F(i), 337-F(ii) of PPC.

2. Notice was issued to the complainant but no one appeared on his behalf despite the fact that as per police report he has been intimated through telephone. Even otherwise, it is a State case and learned Addl. Prosecutor General is ready to argue, the same therefore, I proceed to decide the instant petition after hearing the arguments of learned counsel for the petitioner, learned Addl. Prosecutor General for the State and perusing the record.

3. Arguments heard. Record perused.

4. As per brief allegations levelled in the FIR, on 8.6.2020 at 08:00 a.m. *Punchiat* proceedings took place in the house of the petitioner regarding matrimonial dispute of the petitioner with his wife, namely *Mst.* Iqra Begum. During the said *Punchiat*

proceedings a quarrel took place whereupon the petitioner inflicted a *Churri* below, which landed on the left arm of his wife, namely *Mst.* Iqra Begum. Hence, the above mentioned FIR.

5. The injury attributed to the petitioner was declared to be punishable under Section 337-F(ii) of PPC. It is noteworthy that although the occurrence of this case took place on 08.06.2020 at 08:00 a.m. but the alleged injured of this case, namely *Mst.* Iqra Begum, was medically examined on the next date *i.e.* on 09.06.2020 at 02:15 p.m. The petitioner challenged the MLR of *Mst.* Iqra Begum before the District Standing Medical Board and as per report of the District Standing Medical Board the alleged injured was summoned twice for her re-examination on 07.07.2020 and 29.07.2020 but she did not turn up for the above mentioned purpose. The non-appearance of the alleged injured of this case before the District Standing Medical Board speaks of mal afide, which entitles the petitioner to the grant of pre-arrest bail. Reliance in this respect may be placed on the cases reported as *"Muhammad Essa vs. The State and another"* (2012 SCMR 646), *"Muhammad Fayyaz v. The State and another"* (2013 YLR 370) and "*Ghulam Abbas vs. The State and another*" (2017 YLR Note 78). Although it is argued by learned APG that blood stained *Churri* is still to be recovered from the possession of the petitioner but I have noted that occurrence in this case took place on 8.6.2020 and a period of four months and sixteen days has already elapsed from the date of alleged occurrence, therefore, the blood, if any, on the *Churri* expected to be recovered from the possession of the petitioner, must have disintegrated in the meanwhile, therefore, possible recovery of *Churri* from the possession of the petitioner would not serve any useful purpose to the prosecution and as such a case for grant of pre-arrest bail is made out in favour of petitioner. Reference in this context may be made to the cases reported as *'Malik Muhammad Aslam vs. The State & others'* (2014 SCMR 1349) and *'Muhammad Jamil vs. Muhammad Akram and others'* (2009 SCMR 120). Possibility of *mala fide* involvement of the petitioner in this case due to matrimonial dispute cannot be ruled out at this stage. Resultantly, this petition is allowed and interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing the fresh bail bonds in

the sum of Rs.100,000/- (*Rupes one hundred thousand only)* with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail confirmed.**

PLJ 2020 Cr.C. (Lahore) 1751

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Mst. **TAREEZA RIAZ--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 33463-B of 2020, decided on 13.10.2020.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Prevention of Electronic Crimes Act, 2016, Ss. 20, 21 & 24--Pakistan Penal Code, (XLV of 1860), Ss. 420/109--Pre-arrest bail, grant of--Confirmed--Allegation of--Petitioner was a female--Complainant was an overseas Pakistani, petitioner and her co-accused use to come to the house of complainant in different gatherings--Petitioner administered juice to him, whereupon he (complainant) became senseless and thereafter the petitioner captured her naked pictures/videos and shared the same with her co-accused and also sent the same on his (complainant's) mobile phone number--No specific date and time of the alleged occurrence, when the petitioner administered juice to the complainant--It is not understandable that if any juice containing intoxicated material was administered by the petitioner to the complainant then as to why the said act was not noticed by the other family members of the complainant and as to how the petitioner succeeded to record naked photos/videos of the complainant in presence of his family members--No medico legal report is available on the record to establish that any intoxicated material was administered by the petitioner to the complainant--Although in the later part of the FIR, the complainant alleged that mobile phone number 0304-4995242, is owned by the petitioner but no record is available on the FIA authorities to establish that any demand of money was made by the petitioner from the said mobile phone--Even the complainant has not alleged in the FIR that the petitioner made any demand of money from him through the abovementioned mobile phone and he only alleged that his objectionable pictures were shared by the petitioner with her co-accused through the said mobile phone number but in this respected--Complainant has already alleged in the first part of the FIR that his objectionable pictures were sent on his mobile phone number through the above-mentioned mobile phone number (+971554378030) and there is no proof on the record that the said mobile phone number was in the name of the petitioner--It is also evident from the perusal of the contents of the FIR that the complainant has

himself mentioned therein that he was blackmailed by (co-accused), who demanded money from him and who was mastermind behind the occurrence counsel for the petitioner has produced before the Court the copies of FIRs *i.e.*, FIR No. 286/2017, under Section 371, PPC and FIR No. 590/2016, under Section 406, PPC), to establish that the complainant is a blackmailer, who has lodged the abovementioned FIRs against different innocent persons--He further submits that the complainant is himself involved in immoral activities and in order to blackmail the petitioner, he has lodged the instant FIR against the petitioner so that, the petitioner may fulfill his immoral desires--Keeping in view all the aforementioned facts, possibility of *malafide* involvement of the petitioner in this case by the complainant, cannot be ruled out at this stage--Petition was allowed. [Pp. 1753, 1754] A, B, C & D

Mr. Zaheer-ul-Hassan Zahoor, Advocate for Petitioner.

Mr. Muhammad Matloob Sindhu, Assistant Attorney General for State.

Mr. Yasir Javed Malik, Advocate for Complainant.

Date of hearing: 13.10.2020.

ORDER

Through the instant petition, *Mst.* Tareeza Riaz seeks pre-arrest bail in case FIR No. 08/2020, dated 11.02.2020, offences under Sections 20, 21 & 24 of Prevention of Electronic Crimes Act, 2016 read with Sections 420/109, PPC, registered at Police Station FIA C.C.R.C, Lahore.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, Ibrar Hussain Bukhari (complainant) is an overseas Pakistani residing in Japan and Peru. Mst. Tareeza Riaz (petitioner) and Mst. Isbah Habib Ullah (co-accused) used to come to the house of the complainant in different gatherings. *Mst.* Tareeza Riaz (petitioner) offered a juice to the complainant in one of the gatherings at his house and he (complainant) went senseless. *Mst.* Tareeza Riaz (petitioner) deceitfully captured his naked photos/videos and later on sent the same to his (complainant's) mobile number from a Dubai number (+971554378030). The said *Mst.* Tareeza Riaz (petitioner) along with Muhammad Iftikhar Ali *alias* Joji (co-accused) started to blackmail the complainant that if the complainant would not pay them Rupees Fifty Crore then the objectionable video of the complainant shall be put on the internet and made viral. The complainant further alleged that *Mst.* Isbah Habib Ullah (co-accused) was master mind behind the abovementioned occurrence, who also shared a poster

consisting fake allegations and threats against the complainant through her mobile number (0323-9338366). The complainant further alleged that *Mst.* Tareeza Riaz (petitioner) also demanded money from him through different sources in order to blackmail him. Eventually a raid was conducted at Office No. 5, 3rd Floor, Shalimar Plaza, Moon Market, Lahore. *Mst.* Isbah Habib Ullah and Muhammad Iftikhar Ali *alias* Joji (co-accused) were present in the above mentioned office. They were apprehended by the FIA Authorities and two mobile phones were recovered from their possession. On further analysis, it was noticed that the objectionable pictures of the complainant were shared from mobile number of the petitioner *i.e.*, 0304-4995242. The complainant also alleged that he was blackmailed by the petitioner and her co-accused, who demanded money from the complainant. Hence, the above mentioned FIR.

4. The petitioner is a female. All the offence mentioned in the FIR, except the offence under Section 21 of the Prevention of Electronic Crimes Act, 2016, are bailable. Insofar as the offence under Section 21 of the Act *ibid* is concerned, I have noted that Ibrar Hussain Bukhari complainant has mentioned in the FIR that he was permanent resident of Japan and Peru. *Mst.* Tareeza Riaz (petitioner) and *Mst.* Isbah Habib Ullah (co-accused) used to visit his house, situated in Phase-V, DHA, Lahore in different gatherings. He (complainant) alleged that in one of the said gatherings, *Mst.* Tareeza Riaz petitioner administered juice to him, whereupon he (complainant) became senseless and thereafter the petitioner captured her naked pictures/videos and shared the same with her co-accused and also sent the same on his (complainant's) mobile phone number. No specific date and time of the alleged occurrence, when the petitioner administered juice to the complainant, due to which he (complainant) went senseless and the petitioner captured his naked pictures/videos, has been mentioned in the FIR. Ibrar Hussain Bukhari complainant was present before this Court on the previous date of hearing *i.e.*, 06.10.2020 and he submitted before the Court that his other family members were also present in his house at the time of occurrence. Under the circumstances it is not understandable that if any juice containing intoxicated material was administered by the petitioner to the complainant then as to why the said act was not noticed by the other family members of the complainant and as to how the petitioner succeeded to record naked photos/videos of the complainant in presence of his family members. No medico legal report is available on the record to establish that any intoxicated material was administered by the petitioner to the complainant. Although the complainant alleged in the FIR that his objectionable naked pictures were sent to him by the

petitioner from a Dubai number (+971554378030) but absolutely no proof is available on the record of FIA that the said mobile phone was in the name of *Mst.* Tareeza Riaz (petitioner). Although in the later part of the FIR, the complainant alleged that mobile phone number 0304-4995242, is owned by the petitioner but no record is available on the FIA authorities to establish that any demand of money was made by the petitioner from the said mobile phone. Even the complainant has not alleged in the FIR that the petitioner made any demand of money from him through the abovementioned mobile phone and he only alleged that his objectionable pictures were shared by the petitioner with her co-accused through the said mobile phone number but in this respected I have noted that the complainant has already alleged in the first part of the FIR that his objectionable pictures were sent on his mobile phone number through the above-mentioned mobile phone number (+971554378030) and there is no proof on the record that the said mobile phone number was in the name of the petitioner. It is also evident from the perusal of the contents of the FIR that the complainant has himself mentioned therein that he was blackmailed by *Mst.* Isbah Habib Ullah (co-accused), who demanded money from him and who was mastermind behind the occurrence. Learned counsel for the petitioner has produced before the Court the copies of FIRs *i.e.*, FIR No. 286/2017, under Section 371, PPC and FIR No. 590/2016, under Section 406, PPC), to establish that the complainant is a blackmailer, who has lodged the abovementioned FIRs against different innocent persons. He further submits that the complainant is himself involved in immoral activities and in order to blackmail the petitioner, he has lodged the instant FIR against the petitioner so that, the petitioner may fulfill his immoral desires. Keeping in view all the aforementioned facts, possibility of *malafide* involvement of the petitioner in this case by the complainant, cannot be ruled out at this stage.

5. In the light of above discussion, the instant petition is allowed and the interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to her furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only), with one surety in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2020 Cr.C. (Lahore) 505

Present: MALIK SHAHZAD AHMAD KHAN, J.

BILAL ANWAR--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 72565-B of 2019, decided on 19.12.2019.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-F(v), 337-L(2), 147 & 149--Pre-arrest bail, confirmed--Allegation of--"Lalkar"--Petitioner and his co-accused, while armed with different weapons, launched an attack on complainant party--Malik Khalid Farooq, co-accused raised a '*Lalkara*' and inflicted '*sota*' blow which landed on right side of head of Muhammad Arshad Ali (complainant)--Occurrence in this case took place on 30.09.2019 and a period of two months and nineteen days has already elapsed from date of occurrence, therefore, blood, if any, on '*sota*' expected to be recovered from possession of petitioner must have disintegrated in meanwhile, therefore, possible recovery of '*sota*' from possession of petitioner, at this stage, would not serve any useful purpose for case of prosecution and as such a case for grant of pre-arrest bail is made out in favour of petitioner--Possibility of *mala fide* involvement of petitioner in this case by complainant, by using wider net, cannot be ruled out at this stage--Petition was allowed.
[Pp. 506 & 507] A, B & C

2014 SCMR 1349 *ref.* 2011 SCMR 1719.

Rai Ashfaq Ahmad Kharal, Advocate for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for State.

Date of hearing: 19.12.2019.

ORDER

Bilal Anwar, petitioner, through the instant petition, seeks pre-arrest bail in case FIR No. 489 dated 14.10.2019 offences under Sections 337-F (V), 337-L(2), 147, 149, PPC registered at Police Station Saddar District Sargodha.

2. As per report furnished by the police, the complainant has duly been served with the notice of this case but no one is present on his behalf despite repeated calls. Even otherwise, it is a State case and the learned Deputy Prosecutor General for the State is ready to argue the same, therefore, I proceed to decide the instant petition after hearing arguments of learned counsel for the petitioner, learned Deputy Prosecutor General for the State and perusal of the record.

3. Arguments heard. Record perused.

4. As per brief allegations leveled in the FIR, on 30.09.2019 at 5:50 P.M., the petitioner and his co-accused, while armed with different weapons, launched an attack on the complainant party. Malik Khalid Farooq, co-accused raised a '*Lalkara*' and inflicted '*sota*' blow which landed on the right side of the head of Muhammad Arshad Ali (complainant). Thereafter, Bilal Anwar, petitioner inflicted a '*sota*' blow which landed on the finger of left hand of Mohib Ali (PW). Sadheer, co-accused then inflicted a '*sota*' blow which landed on the right shoulder of Mohib Ali (PW). Abdul Rehman, co-accused then inflicted a '*sota*' blow which landed near the left armpit of Mohib Ali (PW). Thereafter, all the accused persons gave beating to Mohib Ali (PW) and caused injuries on the different parts of his body.

5. As per medico-legal report of Mohib Ali (PW), there were two injuries on his body. Injury No. 1 on the left little finger was attributed to the petitioner which was declared by the concerned Medical Officer to be punishable under Section 337F(v), PPC, however, the Medical Officer, first kept his opinion pending regarding the possibility of fabrication of injuries and after obtaining X-Ray report, he categorically mentioned in the medico-legal report of Mohib Ali (PW) that possibility of fabrication of the injury on the little finger of Mohib Ali (PW) *i.e.* injury No. 1 attributed to the petitioner cannot be ruled out and he requested the investigating officer to investigate the matter in this respect. The investigating officer *vide* Zimni No. 12 dated 07.12.2019, has concluded that the petitioner reached at the spot after the occurrence and he was empty handed at the time of occurrence. It is further concluded by the investigating officer that the

petitioner tried to pacify the matter and during the said process he only grappled with the complainant party. The above mentioned findings of the investigating officer are in conflict with the story narrated by the complainant in the FIR because as per contents of the FIR, the petitioner was armed with '*sota*' at the time of occurrence and he inflicted the injury on the little finger of Mohib Ali (PW) with the help of said 'sota' but according to the above mentioned police investigation, the petitioner was empty handed at the time of occurrence. According to the police investigation the petitioner was empty handed at the time of occurrence, therefore, it is obvious that nothing is to be recovered from his possession by the police and as such no useful purpose shall be served by sending the petitioner behind the bars and as such a case for grant of pre-arrest bail is made out in favour of the petitioner. Reference in this context may be made to the case of "*Khalid Mehmood and others vs. The State and others*" (2011 SCMR 1719).

6. Although, it is argued by learned Deputy Prosecutor General that bloodstained '*sota*' is still to be recovered from the possession of the petitioner but I have noted that the occurrence in this case took place on 30.09.2019 and a period of two months and nineteen days has already elapsed from the date of occurrence, therefore, blood, if any, on the '*sota*' expected to be recovered from the possession of the petitioner must have disintegrated in the meanwhile, therefore, possible recovery of '*sota*' from the possession of the petitioner, at this stage, would not serve any useful purpose for the case of the prosecution and as such a case for grant of pre-arrest bail is made out in favour of the petitioner as observed by the august Supreme Court of Pakistan in the case of "*Malik Muhammad Aslam vs. The State & others*" (2014 SCMR 1349). B

7. Possibility of *mala fide* involvement of the petitioner in this case by the complainant, by using the wider net, cannot be ruled out at this stage. C

8. For what has been discussed above, this petition is allowed and ad-interim pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing of bail bonds in the sum of Rs. 50,000/- (Rupees Fifty Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

Petition Allowed.

(A.A.K.)

PLJ 2020 Cr.C. (Note) 34

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

MOAZZAM SHAFIQUE--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 241075-B of 2018, decided on 17.10.2018.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Pre-arrest bail, confirmed--Second pre-arrest bail first was dismissed due to non-prosecution--Dishonoured of cheque--It is further evident from perusal of contents of FIR that cheque, on basis of which instant FIR was lodged has been handed over by petitioner to complainant during inquiry conducted by police--Under circumstances, possibility cannot be ruled out that cheque in question has forcibly been obtained from petitioner under police pressure as fact of delivery of cheque in question by petitioner to complainant before police has been mentioned by complainant himself in FIR--Moreover, entire prosecution case is based on documentary evidence, which is already in possession of prosecution and as such there is no chance of tampering with same--Nothing is to be recovered from possession of petitioner, therefore, no useful purpose shall be served by sending petitioner behind bars and as such case for grant of pre-arrest bail is made out in favour of petitioner--Possibility of *mala fide* involvement of petitioner in this case by complainant due to business dispute between parties, cannot be ruled out at this stage--Petition was allowed.

[Para 5, 6 & 7] A, B & C

Ref. 2011 SCMR 1719.

Mirza Qamar-uz-Zaman, Advocate with Petitioner.

Mr. Nisar Ahmad Virk, Deputy Prosecutor General for Respondent.

Rana Asif Siddique, Advocate for Complainant.

Date of hearing: 17.10.2018.

ORDER

Through the instant petition, the petitioner Moazzam Shafique seeks pre-arrest bail in case FIR No. 485/2018 dated 15.05.2018, offence under Section 489-F, PPC, Police Station Hajipura, District Sialkot.

2. Arguments heard. Record perused.

3. This is second pre-arrest bail petition filed by the petitioner before this Court. Earlier pre-arrest bail petition of the petitioner bearing Crl. Misc. No. 224311-B of 2018, was dismissed due to non-prosecution vide order dated 01.10.2018. As the earlier pre-arrest bail petition filed by the petitioner was not decided on merits, therefore, while relying upon the judgment reported as *"Nazir Ahmad vs. The State and another"* (PLD 2014 SC 241), there is no bar against the filing of the instant second pre-arrest bail petition before this Court and decision of the same on merits.

4. As per brief allegations levelled in the FIR, Muhammad Farooq Butt (complainant) invested an amount of Rs. 11,50,000/- in the business of the petitioner and it was agreed between the parties that the petitioner will pay the profit to the complainant, however, later on neither the petitioner paid the profit to the complainant nor returned the principal amount to him, whereupon the cheque, which was earlier given by the petitioner to the complainant was presented before the bank, however, the same was dishonoured on its presentation. The complainant, thereafter moved an application before the local police against the petitioner. During the inquiry, on the application, moved by the complainant, the petitioner paid cash amount bf Rs. 1,75,000/- to the complainant and for payment of the remaining

amount, he handed over two cheques to the complainant, which were dishonoured on their presentation by the concerned bank.

5. It is evident from the perusal of contents of the FIR that there was business relationship between the parties and the complainant invested an amount of Rs. 11,50,000/- in the business of the petitioner on the condition that the petitioner will pay the profit to the complainant. The petitioner handed over a cheque of Rs. 11,50,000/- to the complainant as guarantee, however, the said cheque could not be en-cashed. It is further evident from the perusal of the contents of the FIR that the cheque, on the basis of which the instant FIR was lodged has been handed over by the petitioner to the complainant during the inquiry conducted by the police. Under the circumstances, possibility cannot be ruled out that the cheque in question has forcibly been obtained from the petitioner under the police pressure as the fact of delivery of cheque in question by the petitioner to the complainant before the police has been mentioned by the complainant himself in the FIR.

6. Moreover, the entire prosecution case is based on documentary evidence, which is already in possession of the prosecution and as such there is no chance of tampering with the same. Nothing is to be recovered from the possession of the petitioner, therefore, no useful purpose shall be served by sending the petitioner behind the bars and as such the case for grant of pre-arrest bail is made out in favour of the petitioner. Reference in this context may be made to the case of *"Khalid Mehmood and others vs. The State and others"* (2011 SCMR 1719).

7. Possibility of *mala fide* involvement of the petitioner in this case by the complainant due to the business dispute between the parties, cannot be ruled out at this stage. Keeping in view the aforementioned facts, the instant petition is ***allowed*** and the ad-interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

8. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned trial Court.

(A.A.K.) **Petition Allowed.**

PLJ 2020 Cr.C. (Note) 55

[Lahore High Court, Lahore]

Present: MALIK SHAHZAD AHMAD KHAN, J.

MUHAMMAD AFZAL--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 224621-B of 2018, decided on 26.9.2018.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-F(i), 337-F(v), 148 & 149--Bail before arrest, confirmed--Cross-version--Specific role of inflicting blow of hockey injury was declared to punishable u/S. 337-F(v), PPC--Medico-legal report was challenged--Injured did not attend for re-examination--Validity--Non-appearance of injured, before Medical Board for his re-examination speaks mala-fide of injured which act of prosecution witness entitles petitioner to grant of pre-arrest bail--Occurrence took place on 22.05.2018 and a period of more than four months has already elapsed, therefore, blood, if, any on hockey expected to be recovered from possession of petitioner, must have disintegrated in meanwhile, therefore, possible recovery of hockey from possession of petitioner, at such stage, would not serve any useful purpose for case of prosecution--As it is a case of cross-versions, therefore, possibility of *mala fide* involvement of petitioner by complainant of cross-version, cannot be ruled out, therefore, petition is allowed and *ad-interim* pre-arrest bail already granted to petitioner by High Court is confirmed. [Para 4, 5 & 6] A, B & C

2012 SCMR 646, 2013 YLR 370, 2014 SCMR 1349, 2009 SCMR 120 *rel.*

Mr. Qaisar Mehmood Sr, Advocate for Petitioner.

Mr. Nisar Ahmad Virk, Deputy Prosecutor General for State.

Date of hearing: 26.9.2018.

ORDER

The petitioner, through instant petition, prays for pre-arrest bail in cross-version case recorded under Section 337F(i), 337F(v), 148, 149, PPC in case FIR No. 185 dated 01-06.2018, registered at Police Station Sabz Pir Tehsil Pasrur District Sialkot.

2. Ijaz Ahmad, complainant of the cross-version present in the Court states that due to financial constraints, he is not able to hire the services of a learned counsel. Since, it is a State case, therefore, 1 proceed to decide this petition after hearing the

arguments of learned Deputy Prosecutor General for the State as well as learned counsel for the petitioner.

3. Arguments heard and record perused.

4. As per brief allegations levelled in the cross-version, on 22.05.2018 at about 6:00 PM, the petitioner alongwith his co-accused while armed with different weapons, launched an attack on the complainant party and caused different injuries to Mukhtar, Sajjad (PWs) and Ijaz Ahmad, complainant. The petitioner has been assigned the role of inflicting a blow of hockey on the left hand of Mukhtar Ahmad (PW). The said injury was declared by the concerned Medical Officer to be punishable under Section 337-F(v), PPC. The petitioner challenged the medico-legal report of the first Medical Officer before the District Standing Medical Board of Allama Iqbal Memorial Hospital, Sialkot. According to the report issued by the Medical Superintendent of Allama Iqbal Memorial Hospital, Sialkot dated 27.07.2018, the injured Mukhtar Ahmad, did not attend his office for his re-examination on 20.06.2018, 04.07.2018 and 18.07.2018. The non-appearance of the abovementioned injured, namely, Mukhtar Ahmad before the Medical Board for his re-examination speaks mala-fide of the said injured which act of the said prosecution witness entitles the petitioner to the grant of pre-arrest bail. Reference in this context can be made to the cases of "*Muhammad Essa vs. The State and another*" (2012 SCMR 646) and *"Muhammad Fayyaz vs. The State and another"* (2013 YLR 370).

5. Although, it is argued by the learned Law Officer that the bloodstained hockey is yet to be recovered from the possession of the petitioner but I have noted that the occurrence in this case took place on 22.05.2018 and a period of more than four months has already elapsed, therefore, blood, if, any on the hockey expected to be recovered from the possession of the petitioner, must have disintegrated in the meanwhile, therefore, possible recovery of hockey from the possession of the petitioner, at this stage, would not serve any useful purpose for the case of the prosecution. Reference in this context may be made to the cases reported as *"Malik Muhammad Aslam vs. The State & others"*(2014 SCMR 1349) and *"Muhammad Jamil vs. Muhammad Akram and others"* (2009 SCMR 120).

6. As it is a case of cross-versions, therefore, possibility of *mala fide* involvement of the petitioner in this case by the complainant of the cross-version, cannot be ruled out, therefore, this petition is allowed and *ad-interim* pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing of bail bonds in the sum of Rs. 50,000/- (Rupees Fifty thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(S.A.B) **Bail allowed.**

2019 M L D 346

[Lahore]

Before Malik Shahzad Ahmad Khan, J

MUHAMMAD IMRAN---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.239740/B of 2018, decided on 18th October, 2018.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S. 406---Criminal breach of trust---Ad-interim pre-arrest bail, confirmation of---Trust (Amanat)---Scope--- Detail of money allegedly entrusted was not mentioned in the FIR---Effect---Complainant, who had friendly relations with the petitioner, allegedly handed over Rs. 900,000/- to him (petitioner) as trust---Petitioner/accused contended that ingredients of criminal breach of trust were not attracted---Complainant contended that his amount was yet to be recovered from the petitioner---Held, question was when there were so many Banks in the city, then why the complainant handed over the Rs. 900,000/- to the petitioner for keeping the said amount as trust with him---Word 'amanat' (trust) had malafidely been mentioned by the complainant in the FIR, prima facie, in order to make the same a cognizable offence punishable under S.406, P.P.C.---Mere mentioning the word 'amanat'(trust), in the contents of FIR would not attract the provisions of S.405, P.P.C., punishable under S.406, P.P.C., when otherwise ingredients of the said offence were not attracted from the contents of FIR---No specific denomination, identification, marks or number of the currency notes, which were handed over by the complainant to the petitioner, had been mentioned in the FIR, therefore, bail petition could not be dismissed merely on the ground of possible recovery of the amount of the complainant from the petitioner---Possibility of mala fide involvement of the petitioner in the present case by the complainant due to money dispute, could not be ruled out at bail stage---Ad-interim pre-arrest bail already granted to the petitioner was confirmed, in circumstances.

Miraj Khan v. Gul Ahmed and 3 others 2000 SCMR 122 and Shahid Imran v. The State and others 2011 SCMR 1614 ref.

Naveed Inayat Malik for Petitioner.

Nisar Ahmad Virk, Deputy Prosecutor General for the State.

Rana Zia Ullah for the Complainant.

Shahbaz, A.S.I.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner Muhammad Imran through the instant petition seeks pre-arrest bail in case FIR No. 551 dated 18.05.2018 registered at Police Station Ichra District Lahore offence under Section 406 of P.P.C.

2. Arguments heard. Record perused.

3. As per brief allegations leveled in the FIR, the complainant had friendly relationship with the petitioner. On 28.02.2018 at 04:00 p.m., the complainant handed over an amount of Rs.900,000/- as trust to the petitioner in presence of the witnesses, namely, Ahsan Mudassar and Khadim and later on, when he (complainant) demanded the abovementioned amount, the petitioner refused to return the same hence, the abovementioned FIR. It is not understandable that when there are so many banks in the city of Lahore then why the complainant handed over the amount of Rs.900,000/- to the petitioner for keeping the said amount as trust with him. Prima facie, it appears that the word 'amanat' (trust) has malafidely been mentioned by the complainant in the FIR in order to make it a cognizable offence punishable under Section 406 of P.P.C. The Hon'ble Supreme Court of Pakistan in the case of Miraj Khan v. Gul Ahmed and 3 others (2000 SCMR 122), has held that by merely mentioning the word 'amanat' (trust), in the contents of the FIR would not attract the provisions of Section 405 of P.P.C. punishable under Section 406 of P.P.C., when otherwise ingredients of the said offence are not attracted from the contents of the FIR. No specific denomination, identification marks or number of the currency notes, which were handed over by the complainant to the petitioner, have been mentioned in the FIR therefore, this petition cannot be dismissed merely on the ground of possible recovery of the amount of the complainant from the petitioner. Reliance in this respect may be placed on the case of "Shahid Imran v. The State and others" (2011 SCMR 1614). Possibility of mala fide involvement of the petitioner in this case by the complainant due to money dispute between the parties cannot be ruled out at this stage therefore, this petition is allowed and interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing the bail bonds in the sum of Rs.100,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

MQ/M-153/L **Bail granted.**

2019 P Cr. L J 582

[Lahore]

Before Malik Shahzad Ahmad Khan and Mirza Viqas Rauf, JJ

Engineer Raja QAMAR UL ISLAM and others---Petitioners

Versus

NATIONAL ACCOUNTABILITY BUREAU through Chairman and others---Respondents

Writ Petitions Nos. 244287, 242354, 259386, 256528, 257523 of 2018, 3394 and 185 of 2019, decided on 30th January, 2019.

(a) Punjab Procurement Rules, 2014---

----R. 57(2) & (3)---Procurement---Negotiation of bids---Scope---Under R. 57(2) & (3) of Punjab Procurement Rules, 2014, a bid can be negotiated immediately after opening of bids, in case of goods of high technical nature (machinery, its parts, industrial equipment, plants etc.).

(b) National Accountability Ordinance (XVIII of 1999)---

----S. 9(a)(iv)(vi) & (b)---Punjab Procurement Rules, 2014, R. 57(2) & (3)---Constitution of Pakistan, Art. 199---Constitutional petition---Bail, grant of---Procedural irregularities---Negotiation of bids---Petitioners were accused of approving bid for installing water filtration plants allegedly in violation of Punjab Procurement Rules, 2014, by negotiating bids---Validity---No illegality was committed by petitioners in making post-bid changes and negotiations with supplier company, whereby bid price was substantially reduced from Rs.1.14 billion to Rs.989 million---Petitioners only recommended for placing of contract in favour of the supplier company on the basis of negotiated bid for approval of the same by Board of Directors of the Punjab Saaf Pani Company---Final approval was made by all fourteen directors/ex-officio directors of the Company present in the meeting---Prima facie, it was established that NAB authorities mala fidely proceeded against only two directors of the Company---No allegation of receiving any kickback, commission or illegal gratification against petitioners, their relatives or friends was on record---Only allegation against petitioners was that they misused their authority in violation of laws

and rules on the subject punishable under S. 9(a)(vi) of National Accountability Ordinance, 1999, but there was no illegality or violation of rule/law on the subject---Even if there was any procedural irregularity in exercise of authority by petitioners, even the same did not amount to misuse of authority so as to constitute an offence under S. 9(a)(vi) of National Accountability Ordinance, 1999---Truth of allegation levelled against petitioners that they violated certain rules whereby they succeeded to get the bid price of filtration plants reduced from supplier after opening of the bid and as such, they committed an offence punishable under S. 9(a)(vi) of National Accountability Ordinance, 1999, could be determined at trial after recording of evidence---Bail was allowed in circumstances.

Writ Petition No. 226785 of 2018, Order dated 19.07.2018; Writ Petition No. 212612 of 2018, Order dated 19.07.2018; Muhammad Daud and another v. The State and another 2008 SCMR 173; Muhammad Fazal alias Bodi v. The State 1979 SCMR 9; Fazil Khaliq alias Hafiz v. The State through Advocate-General, N.W.F.P. Peshawar and another 1996 SCMR 364 and Anwar Saifullah Khan v. The State and 4 others PLD 2000 Lah. 564 ref.

The State v. Anwar Saif Ullah Khan PLD 2016 SC 276 and Muhammad Saeed Mehdi v. The State and 2 others 2002 SCMR 282 rel.

Shazib Masud for Petitioner (in W.P. No. 244287 of 2018).

Mian Ali Ashfaq for Petitioner (in W.P. No. 242354 of 2018).

Asad Manzoor Butt and Hafiz Muhammad Numan Zafar for Petitioners (in W.Ps. Nos. 259386, 256528 of 2018 and 3394 of 2019).

Shahid Nazir Jarra for Petitioner (in W.P. No. 257523 of 2018).

Muhammad Zain Qazi for Petitioner (in W.P. No. 185 of 2019).

Syed Faisal Raza Bukhari, Special Prosecutor for NAB along with Syed Saqib Haider, Assistant Director, NAB.

ORDER

Through this single order, we proceed to decide the instant petition i.e. Writ Petition No.244287 of 2018 (Engr. Raja Qamar Ul Islam v. National Accountability Bureau and others) as well as Writ Petition No.242354 of 2018 (Waseem Ajmal v.

Chairman NAB and others), Writ Petition No.259386 of 2018 (Muhammad Younas v. Director General NAB and others), Writ Petition No.3394 of 2019 (Muhammad Moeen-Ud-Din v. Director General NAB and others), Writ Petition No.256528 of 2018 (Maj. (R) Adnan Aftab Khan v. Director General NAB and others), Writ Petition No.257523 of 2018 (Syed Masoud Ul Hassan Kazmi v. National Accountability Bureau and others) and Writ Petition No.185 of 2019 (Zahoor Ahmed Dogar v. National Accountability Bureau and others), as in all these petitions, common questions of law and facts are involved and all these petitions have arisen out of the same NAB Reference No.93 of 2018. In all the said petitions, the petitioners have prayed for their release on post arrest bail in the above NAB, reference.

2. The allegations against Engineer Raja Qamar Ul Islam, petitioner (accused No. 1 in the reference) have been mentioned in Para-11 of the reference and the same read as under:-

"That the accused No.1, being convener of Procurement Committee, willfully failed to exercise his authority and ensure due diligence in award of contract to Messrs KSB Pumps. He being convener/member Procurement Committee misused his authority and accepted allegedly negotiated bid price of KSB Pumps under garb of rationalization and malafidely and dishonestly recommended for approval of award of contract to KSB Pumps for installation of water filtration plants on the basis of unapproved Engineering Cost Estimates prepared at exorbitant rate. He also dishonestly recommended for approval from Board of Directors (BoD) regarding unsolicited proposal submitted by contractor KSB Pumps after opening of Bids in violation of Punjab Procurement Rules, 2014 and laid the basis of issuance of illegal addendum of 36x grid-based water filtration plants in violation of Punjab Procurement Rules, 2014 and thus has committed a culpable act under section 9 of the N.A.O., 1999."

3. The allegations against Waseem Ajmal/petitioner (accused No.2 in the reference) have been mentioned in Para-12 of the reference and the same read as under:-

"That the accused No.2, being Chief Executive Officer PSPC (South) dishonestly and malafidely made post bid changes in violation of Punjab Procurement Rules, 2014, illegally got approved and signed addendum of 36x additional water filtration plants to the original contract in order to give undue benefit to the Contractor, KSB

Pumps at the cost of Public Exchequer. He malafidely caused loss of amounting Rs.10.855 Million to the National Exchequer by illegally approving variation order No.5 submitted by Contractor, KSB Pumps for application of weather shield paint at external walls of plant rooms at exorbitantly higher rates. He willfully failed to exercise his authority in preparation of Engineering Cost Estimates, seeking approval of technical sanction from Competent Authority and initiation of re-tender for installation of 36x additional water filtration plants in Bahawalpur Region, thus he misused his position and authority."

4. The allegations against Zahoor Ahmad Dogar/petitioner (accused No.4 in the reference) have been mentioned in Para-14 of the reference and the same read as under:-

"That accused No.4 recommended award of contracts to KSB Pumps without getting approval Engineering Cost Estimates. Moreover, the accused No.4 attended 9th Meeting of Procurement Committee held on 08-05-2015, in which award of contract to KSB Pumps at an illegally negotiated bid price of Rs.989 Million was recommended to Board of Directors for approval, he therefore, has acted in a manner contrary to law.

5. The allegations against Major (Retd.) Adnan Aftab Khan, Syed Masoud Ul Hassan Kazmi, Muhammad Moeen-ud-Din and Muhammad Younas, petitioners (accused Nos.15, 16, 17 and 18 respectively in the reference) have been mentioned in Paras Nos.23 and 24 of the reference and the same read as under:-

"That the accused Nos.13 to 18 willfully failed to exercise their authority in preventing loss to the State Exchequer amounting Rs.40.385 Million on account of defective/substandard civil works executed in installation of water filtration plants in Tehsils of Bahawalpur region."

That accused Nos.2, 19 and 20 on the recommendation of accused No.15 caused loss in the National Exchequer to the tune of Rs. 10.855 Million by approving exorbitant rate or weather shield paint through variation order No.5 instead of distemper .....)"

6. All the petitioners were holding different posts in the Punjab Saaf Pani Company (PSPC) South at the relevant time. The company (PSPC) was established to provide, affordable hygienic good quality safe drinking water to the people living in semi-rural

and peri-urban areas of the province of Punjab. The petitioners were arrested by the NAB authorities on account of alleged different irregularities/illegalities committed by them in awarding of contract to KSB Pumps for installation of water filtration plants in Bahawalpur Region and due to the defective/substandard civil works in installation of water filtration plants in the above region.

7. All the petitioners have been sent to the judicial lockup and thereafter they filed the abovementioned petitions before this Court for grant of post-arrest bail.

8. Learned counsel for the petitioners contends that the petitioners are absolutely innocent and they have falsely been implicated in this case; that there is no allegation against the petitioners that any of them received any illegal gratification, kickback, commission or bribe; that no illegality has been committed in awarding the contract to KSB Pumps as the said company was the lowest bidder; that amount of bid furnished by KSB Pumps was reduced from Rs. 1.14 billion to Rs.995 million and the same was subsequently further reduced with the hectic efforts of Waseem Sajjad, petitioner who was the Chief Executive Officer of PSPC and Engr. Qamar-ul-Islam Raja (petitioner) who was convener/member Procurement Committee of PSPC at the relevant time; that all the rules and regulations on the subject were strictly followed by the petitioners and all the decisions were taken unanimously by the Board of Directors of the Company; that out of twenty members of the Board of Directors of the Company who approved contract in favour of KSB Pumps, only two Directors, namely, Engineer Qamar-Ul-Islam Raja and Waseem Ajmal (petitioners) have been made accused in this case which speaks of malafidies of the NAB; that there is no allegation that any of the petitioners received any kickback, bribery or illegal gratification; that the petitioners have been made scapegoats in this case by the NAB authorities; that the co-accused of the petitioners, namely, Nasir Qadir Bhadal, Ex-Chief Procurement Officer/Ex-Chief Financial Officer, Punjab Saaf Pani Company (South), Muhammad Waris Malik, Ex-Manager Projects and Capital Works-2 Punjab Saaf Pani Company (South), Muhammad Saleem Akhtar, Ex-Procurement and Contract Specialist, Engineering Consultancy Services of Punjab (Pvt.) Ltd., Khalid Nadeem Bukhari, Ex-Director/Deputy Secretary Housing and Urban Development and Public Health and Engineering Department and Muhammad Masud Akhtar, Ex-Managing Director KSB Pumps have already been granted post arrest bails by this

Court vide orders dated 26.09.2018 in Writ Petition No.226785 of 2018, order dated 19.07.2018 in Writ Petition No.212612 of 2018, order dated 19.07.2018 in Writ Petition No.221652 of 2018, order dated 19.07.2018 in Writ Petition No.220635 of 2018, order dated 19.07.2018 in Writ Petition No.220599 of 2018 respectively, whereas the case of the present petitioners is at par, rather the same is at better footing as compared to the case of abovementioned co-accused, therefore, the present petitioners are also entitled to the relief of post arrest bail; that at the time of decision of the abovementioned bail petitions of the co-accused, this Court has categorically observed that total plants installed in different Tehsils and Districts of Bahawalpur and Multan Divisions have been functioning properly, therefore, the question of defective/substandard installation of plants does not arise in this case; that keeping in view the abovementioned facts, these petitions may be accepted, and the petitioners may be released on post-arrest bail.

9. On the other hand, it is contended by the learned Special Prosecutor for NAB that during the course of inquiry/investigation conducted by the NAB, it was found that PSPC (South) awarded contract for installation of 84-water filtration plants at exorbitant rates in Bahawalpur and Multan Divisions; that the contract was awarded to KSB Pumps without approval of engineering cost estimates and technical sanctions; that Waseem Ajmal (petitioner) and Engr. Qamar-ul-Islam Raja (petitioner) made post bid changes in the bid amount which were violative of the Punjab Procurement Rules, 2014; that moreover the solar plants were illegally removed from the projects and area of the plants was also illegally reduced from 15-marlas to 5-marlas by the petitioners, without any approval of the Board of Directors of PSPC; that even the mode of construction of plant rooms was changed from concrete to pre-fabricated construction; that Tehsil Dunyapur was not included in the priority list of Tehsils but even in the said Tehsil water filtration plants were installed by the petitioners; that NAB has now obtained fresh reports regarding the quality of the surface water and the engineering cost or quality of water at Lahore and Bahawalpur which has established that filtration plants were installed in Bahawalpur region at a very high cost; that although, the abovementioned co-accused of the petitioners have been granted post-arrest bails by this Court but the NAB has already challenged their bail granting orders before the Hon'ble Supreme Court of Pakistan;

that the petitioners have committed very heinous offences, therefore, their petitions may be dismissed.

10. Arguments heard. Record perused.

11. We have noted that co-accused of the petitioners, namely, Nasir Qadir Bhadal, Ex-Chief Procurement Officer/Ex-Chief Financial Officer, Punjab Saaf Pani Company (South), Muhammad Waris Malik, Ex-Manager Projects and Capital Works-2 Punjab Saaf Pani Company (South), Muhammad Saleem Akhtar, Ex-Procurement and Contract Specialist, Engineering Consultancy Services of Punjab (Pvt.) Ltd., Khalid Nadeem Bukhari, Ex-Director/Deputy Secretary Housing and Urban Development and Public Health and Engineering Department and Muhammad Masud Akhtar, Ex-Managing Director KSB Pumps have already been granted post arrest bails by this Court on merits vide orders dated 26.09.2018 in Writ Petition No.226785 of 2018, order dated 19.07.2018 in Writ Petition No.212612 of 2018, order dated 19.07.2018 in Writ Petition No.221652 of 2018, order dated 19.07.2018 in Writ Petition No.220635 of 2018, order dated 19.07.2018 in Writ Petition No.220599 of 2018, respectively. The case of the present petitioners is at par with the case of abovementioned co-accused, who, have already been granted post-arrest bails by this Court, therefore, the petitioners are also entitled to the grant of post-arrest bails on the principle of consistency. Reliance in this context may be placed on the cases of "Muhammad Daud and another v. The State and another" (2008 SCMR 173), "Muhammad Fazal alias Bodi v. The State" (1979 SCMR 9) and "Fazil Khaliq alias Hafiz v. The State through Advocate-General, N.W.F.P. Peshawar and another" (1996 SCMR 364). The Ex-Managing Director of KSB Pumps, namely, Muhammad Masud Akhtar who could be the main beneficiary in this case has already been granted post-arrest bail by this Court, therefore, the petitioners cannot be denied the relief of post-arrest bail on the ground that they illegally awarded contract for installation of filtration plants to the abovementioned co-accused.

12. We have also noted that there is absolutely no allegation against the petitioners that they received any commission, kickbacks, illegal gratification while awarding contract in question to KSB Pumps. There is nothing on the record that a single penny was paid to the petitioners or transferred in their accounts or in the accounts of their relatives or friends. Similarly, there is no allegation that any moveable or immovable

property was transferred in the names of the petitioners, their relatives or their friends. The main allegation against the petitioners is that through post-bid negotiations they reduced the bid price of the contract from Rs.1.14 billion to Rs.989 millions through negotiations with KSB Pumps in order to adjust the bid price with engineering cost estimates of Rs.995 millions. There is no dispute that KSB Pumps was the lowest bidder in this case who furnished bid of Rs. 1.14 billion however, the petitioners immediately after the opening or the bid, through post-bid negotiations got reduced the bid price from Rs.1.14 billion to Rs.989 millions. The engineering cost estimate of the project was admittedly Rs.995 million. It is also an admitted fact that under the relevant rules, the petitioners/Board of Directors of PSPC were authorized to award contract at 4.5% higher amount than the amount mentioned in engineering cost estimate. Under Rule 57(2) and (3) of the Punjab Procurement Rules, 2014, it has been provided that in case of goods of high technical nature (machinery, its parts, industrial equipment, plants etc.) a bid cab be negotiated immediately after the opening of the bids. The abovementioned Rule 57 is hereby reproduced as under:-

"(1) Save as otherwise provided in these rules, a procuring agency shall not negotiate with any of the bidders.

(2) In case of goods of highly technical nature, (he procuring agency shall ensure that the bidders submit the revised financial bids immediately after opening of the financial bids in the same manner as the earlier financial bids were submitted and the procuring agency shall not allow extra time for submission of revised financial bids by the bidders.

(3) In this rule, the expression goods of highly technical nature means all goods including machinery, its parts and micro-components, industrial, scientific or electronic equipment, plant and tools which are sophisticated in nature costing more than fifty million rupees and procured by adopting the two stage-two envelope procurement procedures."

Keeping in view the abovementioned provision of law, the petitioners did not commit any illegality in negotiating the price of bid with KSB Pumps and reduction of the same immediately after the opening of the bids. It is also noteworthy that KSB Pumps further offered to Board of Directors, PSPC (South) that if the numbers of plants is increased from 84 to 102 plants, then the company will charge 20% less price of all

the plants. The said offer of the company was placed before the Board of Directors of PSPC (South) and all the Directors unanimously accepted the said offer, consequently, the price of the plants was reduced. Prima facie, all the proceedings in this case were taken in accordance with the law and rules on the subject and the contract was awarded after acceptance of the negotiated bid of KSB Pumps and even the contract was signed with prior approval of the Board of Directors of PSPC (South). There is nothing on the record to suggest that in any meeting of the Board of Directors of PSPC (South), the quorum was not complete. Recommendations for award of contract to the contractor (KSB Pumps) at negotiated price of Rs.989 million instead of Rs.1.14 billion, addition of 36-filtration plants and installation of the said plants, removal of solar plants from some of the projects, reduction of the area of plants from 15-marlas to 2-marlas and change in the mode of construction from concrete to prefabricated plant rooms etc., all these matters were done with the prior approval in writing of the Board of Directors of PSPC (South). Prima facie, there is no violation of any law or rule on the subject. The perusal of minutes of 23rd meeting of the Board of Directors of PSPC (South) held on 18th May, 2016 has established that as many as 09-directors of the Company including C.E.O./Director, namely, Waseem Ajmal Chaudhry (petitioner) participated in the said meeting along with five ex-officio Directors. The perusal of the minutes of the said meeting further reveals that quorum was complete and all the Directors of the Board unanimously approved the installation of 116-plants inclusive of additional 36-plants. It was further approved unanimously that additional 36-plants shall be installed without solar system. It was also decided unanimously in the said meeting that the plants shall be built of pre-fabricated material at approximately plot size of 2-Marlas. The copy of the minutes of 23rd meeting of the Board of Directors of PSPC (South) is available in Writ Petition No.242354 of 2018 and the said report has fully belied the allegations levelled against the petitioners by the NAB/respondents. It is also noteworthy that the proceedings in this case regarding the award of the contract to KSB Pumps, installation of additional plants, removal of solar system and reduction in the plot size etc., all these matters were approved in the meeting of the Board of Directors comprising of 09-Directors including C.E.O. of the PSPC, as well as 05-Ex-officio Directors but surprisingly only two Directors, out of the abovementioned fourteen Directors/ Ex-officio Directors, have been made accused in this case, for the reasons

best known to the NAB/respondents. The learned Special Prosecutor for NAB has tried to distinguish the case of Engr. Raja Qamar Ul Islam and Waseem Ajmal (petitioners) from the remaining Directors of PSPC, by stating that Engr. Raja Qamar Ul Islam was convener of the Procurement Committee and he, as well as, Waseem Ajmal (petitioner) being C.E.O. made post-bid changes in violation of the Punjab Procurement Rules, 2014 and recommended the same for approval by the Board of Directors and as such, their case is distinguishable from the remaining Directors of PSPC (South) Company, hence, they (remaining Directors) were not made accused in this case. There is no force in the said argument of learned Special Prosecutor for the NAB because firstly, as mentioned earlier, no illegality has been committed by the abovementioned petitioners in making post-bid changes and negotiations with KSB Pumps whereby the bid price was substantially reduced from Rs.1.14 billion to Rs.989 millions and secondly, the said petitioners only recommended for placing of the contract in favour of KSB Pumps on the bails of negotiated bid for approval of the same by the Board of Directors of PSPC but the final approval was made by all the 14-Directors/Ex-officio Directors of the Company present in 23rd meeting dated 18th May, 2016. Under the circumstances, it is prima facie established that the NAB authorities have malafidely proceeded only against two Directors of the Company, namely, Engr. Raja Qamar Ul Islam and Waseem Ajmal (petitioners). Although, it is argued by the learned Special Prosecutor for NAB that installation of plants in Tehsil Dunyapur was illegal because the said Tehsil was not included in the priority list of Tehsils but admittedly District Lodhran is included in the priority list whereas Dunyapur is Tehsil of the abovementioned District i.e. District Lodhran, therefore, in our view, apparently, no crime has been committed by the petitioners if they have installed filtration plants in Tehsil Dunyapur which was part of District Lodhran. We are unable to understand the allegation of prosecution that the price of the plants could not be further reduced so as to make compatible with the engineering cost estimates when there was no compromise with the quality of filtration plants. No laboratory report has been procured before the Court to establish that the plants installed by KSB Pumps were providing low quality/quantity of water from the installed plants. We have further noted that at the time of decision of the earlier bail petitions in the instant case, this Court has observed that as per record the total plants installed in Hasilpur, Minchap Abad, Bahawalnagar and Rahim Yar Khan are well functioning without any

interruption. It was further noted that the prosecution has not denied that the water filtration plants were installed as it was specifically required by PSPC. It was further admitted by the prosecution at the time of decision of earlier bail petitions that services are being provided till today at the sites of installed plants. Under the circumstances, there is no force in the allegations levelled against the petitioners, namely, Muhammad Masud Akhtar, Major (Retd.) Adnan Aftab Khan, Syed Masoud Ul Hassan Kazmi, Muhammad Moeen-ud-Din and Muhammad Younas that they willfully failed to exercise their authority in preventing loss to the State exchequer on account of defective/substandard civil works executed in installation of water filtration plants in Bahawalpur Region.

Although, the learned Special Prosecutor for NAB has argued that now the NAB has obtained a fresh report regarding the quality of surface water and the engineering cost quality of the water at Lahore and Bahawalpur which shows that the quality of surface water at Lahore and Bahawalpur is equal and the same establishes that the plants have been installed at exorbitant rate in Bahawalpur as compared to the plants installed at Lahore. In this respect, we have again noted that the abovementioned ground has already been addressed in the earlier bail granting orders of this Court wherein it was noted that the quality of the surface water and the engineering cost quality of the water at Lahore is different than in Bahawalpur, therefore, no benefit can now be extended to the NAB on the basis of any fresh report in this respect.

13. As mentioned earlier, there is no allegation of receiving any kickback, commission or illegal gratification against the petitioners, their relatives or friends. The only allegation against the petitioners is that they misused their authority in violation of law and rules on the subject punishable under section 9(a)(vi) of the National Accountability Ordinance, 1999 but as mentioned earlier we are unable to notice any material illegality or violation of any rule/law on the subject. If, for the sake of arguments, it is presumed that there was any procedural irregularity in the exercise of jurisdiction by the petitioners, even then the same may not amount to the misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999. We may refer here the case of "The State v. Anwar Saif Ullah Khan" (PLD 2016 Supreme Court 276). The relevant part of the said judgment is reproduced hereunder:-

"It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law....."

14. It is also noteworthy that there is no allegation against the petitioners that filtration plants were not installed in the light of contract awarded in this case to KSB Pumps or the same were not operational. Under the circumstances, truth of allegations levelled against the petitioners that they violated certain rules whereby they succeeded to get the bid price of filtration plants reduced from KSB Pumps after opening of the bid and as such, they committed an offence punishable under section 9(a)(vi) of the National Accountability Ordinance, 1999, can be determined at trial after recording of evidence and at present, a case for grant of post-arrest bail is made out in favour of the petitioners. Reference in this context may be made to the case of "Muhammad Saeed Mehdi v. The State and 2 others" (2002 SCMR 282) wherein at Pages-285 and 288, it was observed as under:-

Page-285 "Allegations against the petitioner are that in November/December, 1993 while holding the office of Chairman, Capital Development Authority, he sanctioned an amount of Rs.0.6 million to the Environment Directorate, CDA for landscaping near Gate No.3 of the Prime Minister's House, Islamabad in breach of procedure and without following the rules on the subject."

.....

.....

Page-288 "7. As regards the nature of accusation against the petitioners, the truth or otherwise of such allegations can only be determined at the trial by the Court after deep analysis of the evidence that may be adduced by the parties. Without going deeper into the merits of the prosecution case, it may suffice to observe that prima

facie the petitioner does not appear to be guilty of misuse of official position or misappropriation of public funds to his own use or in order to cause monetary loss of public funds or to obtain illegal gain for himself or for any of his relatives or friends. It is not the case of the prosecution that the amount sanctioned by him was not actually spent on the works for which it was approved.".

It is also noteworthy that the prosecution case is based on massive documentary evidence. The recording of the said evidence would definitely take considerable time. As mentioned earlier, there is no allegation that the petitioners took any pecuniary benefit in this case, and the allegation against the petitioners is that they misused their authority/official power and the said allegation needs to be proved at trial after recording of massive documentary evidence, therefore, their prayers for grant of post arrest bail can favourably be considered. Reliance in this respect may also be placed on the case of "Anwar Saifullah Khan v. The State and 4 others" (PLD 2000 Lahore 564) wherein the learned Full Bench of this Court with majority decision, granted post arrest bail to the petitioner of the said case inter alia on the ground that the main allegation against him was of the misuse of the political powers and as the massive documentary evidence was to be recorded in the said case to prove the above allegation, therefore, the petitioner of the said case was found entitled to the relief of post-arrest bail. The relevant part of the abovementioned judgment of this Court at Page-584 reads as under:-

"This is a case of misuse of political power. The accusations against him flow from a massive documentary evidence. The petitioner, naturally, needs an occasion to see these documents, prepare his defence and face the trial. This entitles him prima facie, the concession of post-arrest bail. Seeing from the above perspective, we are clear in our mind that he has a prima facie case calling for exercise of our jurisdiction to order his pre-trial release. This will enable him to prepare his defence.

The argument of learned Special Prosecutor for NAB that the NAB has already filed petitions against the earlier orders of this Court regarding grant of post arrest bails to the co-accused of the petitioners, is no ground to refuse bail to the petitioners when admittedly the post arrest bail granted to the abovementioned co-accused of the petitioners have not been cancelled so far by the Hon'ble Supreme Court of Pakistan. Even, the leave to file appeal has not been admittedly granted in any of the said

petitions filed by the NAB before the Hon'ble Supreme Court, despite the lapse of more than six months from date of order of the Court (dated 19.07.2018) whereby post-arrest bail was granted to co-accused, namely, Nasir Qadir Bhadal, Muhammad Waris Malik, Muhammad Saleem Akhtar, Khalid Nadeem Bukhari and Muhammad Masud Akhtar. We have also noted that post-arrest bail petitions of Waseem Ajmal (petitioner) and Engr. Raja Qamar Ul Islam (petitioner) have been pending before this Court since 15.10.2018 and 23.10.2018 respectively and despite the lapse of period of 3/3-1/2 months and the same could not be decided during the said period. These petitions cannot be kept pending for an indefinite period before this Court.

15. Keeping in view all the abovementioned facts, these petitions are allowed and the petitioners are admitted to post arrest bail subject to their furnishing of bail bonds in the sum of Rs.1,000,000/- (Rupees One million only) each with two sureties each in the like amount to the satisfaction of the learned trial Court.

MH/Q-1/L **Bail allowed.**

2019 P Cr. L J 1622

[Lahore]

Before Malik Shahzad Ahmad Khan, J

SHOUKAT ALI---Petitioner

Versus

The STATE and others---Respondents

Writ Petition No. 17081-Q of 2019, decided on 19th June, 2019.

(a) Penal Code (XLV of 1860)---

----Ss. 405 & 406---Constitution of Pakistan, Art. 199---Constitutional petition--- Quashing of FIR--- Criminal breach of trust---Civil litigation---Scope---Petitioner sought quashing of FIR wherein complainant had claimed that he had invested a certain sum of amount in the joint business with the petitioner and in that respect a written partnership deed was also executed between the parties---Business of the parties was, later on, closed and the petitioner returned partial amount to the complainant, however, he did not pay the profit of joint business or returned the remaining principal amount to the complainant---Validity---Present case was of civil nature regarding recovery of money or rendition of accounts but the complainant had lodged FIR by merely mentioning a single sentence therein that the petitioner had promised to keep the remaining amount of the complainant as a trust with him and the same would be returned as and when desired by complainant---Nowhere in the partnership deed was mentioned that amount invested by the complainant would remain as a trust---Provisions of S. 405, P.P.C. punishable under S. 406, P.P.C. were not attracted to the case---First Information Report was quashed.

Miraj Khan v. Gul Ahmad and 3 others 2000 SCMR 122; Muhammad Ali and another v. Assistant Commissioner, Narowal and another 1987 SMR 795; Zulfiqar Ali v. Station House Officer, Police Station Model Town, Gujranwala and 2 others 2013 PCr.LJ 487; Umair Aslam v. Station House

Officer and 7 others 2014 PCr.LJ 1305 and Zahid Jameel v. SHO and others 2008 YLR 2695 ref.

Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others 2006 PCr.LJ 1900 rel.

(b) Penal Code (XLV of 1860)---

----S. 506---Constitution of Pakistan, Art. 199---Constitutional petition---Quashing of FIR--- Criminal intimidation--- Vague allegations---Non-mentioning of exact time---Effect---Petitioner sought quashing of FIR (first information report) wherein complainant had levelled the allegation that petitioner and his co-accused extended threats of life---Validity---No specific time of threats of life allegedly extended by the petitioner and his co-accused had been mentioned in the FIR and a vague allegation by only mentioning the date in that respect had been levelled therein---No person could be prosecuted and convicted on the basis of vague and non-specific allegations---Trial Court would not be able to frame a specific charge in that respect against the petitioner and co-accused---First Information Report was quashed.

Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others 2006 PCr.LJ 1900 rel.

Mian Shahid Amin for Petitioner along with Petitioner in person.

Nisar Ahmad Virk, Deputy Prosecutor-General for the State.

Ajmal Mehmood for the Complainant.

Date of hearing: 19th June, 2019.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Shaukat Ali, petitioner, seeks quashment of FIR No.1674 dated 25.09.2018 offence under section 406, P.P.C. registered at Police Station Green Town, Lahore.

2. Arguments heard. Record perused.

3. As per contents of the FIR, Muhammad Ishtiaq Khan (complainant) alleged that he started a joint business of hotel with Shaukat All (petitioner) with the name and style of Masooma Grill Station Hotel. The complainant invested an amount of Rs.500,000/- in the said business through written partnership deed dated 28.09.2017. It was agreed between the parties in the abovementioned partnership deed that after deduction of expenses, profit shall be distributed equally between the parties. However, Shaukat Ali, petitioner did not pay any amount of profit to the complainant. After five days of the execution of the partnership deed between the parties, the petitioner closed his abovementioned hotel shifted to some other place. Later on, the complainant contacted the petitioner at his house, who, paid an amount of Rs.200,000/- to the complainant and promised to pay the remaining amount within a period of one month but despite the lapse of six months, the petitioner did not pay the remaining amount to the complainant. The petitioner promised with the complainant that he (petitioner) will keep the remaining amount of the complainant as a `trust' with him and the complainant may take back the said amount from the petitioner as and when desired by him. Later on, the complainant contacted the petitioner for return of his remaining amount on 27.07.2018 but the petitioner and his co-accused extended threats of life to the complainant. Shakir, co-accused also took out pistol and threatened the complainant that if he will make any demand of money, then, he shall be murdered, hence, the abovementioned FIR.

4. It is evident from the contents of the FIR that the complainant invested an amount of Rs.500,000/- in the joint business of hotel with, the petitioner and in this respect a written partnership deed was also executed between the parties on 28.09.2017. Later on, the hotel of the parties was closed and the petitioner returned an amount of Rs.200,000/- to the complainant, however, he did not pay the profit of joint business or returned the remaining principal amount to the complainant. It is, therefore, evident that in-fact, it was a case of civil nature regarding recovery of money or rendition of accounts but the complainant has lodged the impugned FIR by

merely mentioning a single sentence therein that the petitioner promised with the complainant that he will keep the remaining amount of the complainant as a 'trust' with him and the same shall be returned to the complainant as and when desired by him. I have noted that a written partnership deed was executed between the parties on 28.09.2017, which is available on the record. There is nowhere mentioned in the said partnership deed that the amount invested by the complainant shall remain as a 'trust' with the petitioner rather perusal of the contents of the said partnership deed reveals that the abovementioned amount of Rs.500,000/- was invested by the complainant in a joint business of hotel with the petitioner. In the case of "Miraj Khan v. Gul Ahmad and 3 others" (2000 SCMR 122), the Hon'ble Supreme Court of Pakistan has held that merely mentioning the word 'trust' in the FIR would not attract the provisions of section 406, P.P.C. when otherwise, ingredients of the said offence are not made out, from the contents of the FIR. Resultantly, FIR in the said case was quashed by the apex Court. It is by now well settled that there is a difference between the 'investment' and 'entrustment' as envisaged under section 405, P.P.C. punishable under section 406, P.P.C. This Court in the case of "Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others" (2006 PCr.LJ 1900), in a similar situation, quashed the FIR registered under sections 405, 406, 506, P.P.C. Paragraph No.2 at Page No. 1901 of the said judgment is reproduced hereunder for ready reference:-

> "I have heard the learned counsel for the parties and have gone through the record of this case with their assistance and have straightaway found that the facts alleged in the impugned FIR do not constitute the offences invoked therein. According to the FIR some amount of money was given by the complainant to the petitioner for the purposes of doing business therewith and for giving profit to the complainant therefrom. An offence of criminal breach of trust defined by section 405, P.P.C. is constituted and the same is punishable under section 406, P.P.C. if some property is given on

> trust and the same property is to be returned. In the case in hand it was not the complainant's case that the same currency notes which had been given by him to the petitioner were to be kept by the petitioner by way of a trust and the same currency notes were to be returned to the complainant. It is a settled proposition by now that if some money is given to somebody for the purpose of investment in some business and an equivalent amount of money along with profits over the same are to be returned to the person giving the money in the first instance then such a business transaction does not attract the provisions of section 405, P.P.C. read with section 406, P.P.C. because in such a case the same property is not to be returned but what is to be returned is its equivalent property along with profits. In a case of this nature the matter is not of entrustment of property but is simply one of investment of property".

Similarly, in the instant case, it is not claimed by the complainant that the currency notes which he had given to the petitioner, were to be kept by the petitioner by way of 'trust' and the same currency notes were to be returned to the complainant and as such provisions of section 405, P.P.C. punishable under section 406, P.P.C. are not attracted in this case.

5. Although, the police has not leveled offence under section 506, P.P.C. in this case but the complainant has leveled the allegation that the petitioner and his co-accused extended threats of life to him. No specific time of the threats of life allegedly extended by the petitioner and his co-accused has been mentioned in the FIR and a vague allegation by only mentioning the date in this respect has been leveled therein. A vague allegation has been leveled by the complainant against the petitioner and his co-accused in respect of the alleged threats of life extended by them. It is by now well settled that no person can be prosecuted and convicted on the basis of vague and unspecific allegations. Under the circumstances, in case of submission of challan in this regard the learned trial Court shall not be able to frame a specific charge in that respect against the petitioner and his co-accused. Reliance in this respect is again placed on the judgment reported as

"Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others" (2006 PCr.LJ 1900).

6. The petitioner has also placed on the record attested copy of suit for rendition of accounts and permanent injunction which has been filed by him against the complainant on 13.10.2018. An attested copy of suit for recovery of Rs.300,000/- filed by Muhammad Ishtiaq Khan (complainant) against Shaukat Ali (petitioner) and others has also been placed on the record. The said suit has been filed on 05.11.2018. Both the abovementioned suits are pending adjudication before the learned Civil Judge, Lahore. It is evident from the perusal of the impugned FIR that there was a joint business of Hotel of the parties and there is a business dispute between them which is purely of civil nature and as such the parties have rightly filed the abovementioned civil suits against each other for the decision of their disputes by the Civil Court. It appears that by lodging the impugned FIR, the complainant has tried to convert the civil/business dispute into criminal case in order to blackmail and pressurize the petitioner and his co-accused and to get concession(s) in the civil litigation. I am, therefore, of the view that the impugned FIR is liable to be quashed as observed in the abovementioned judgments, as well as, in the judgments reported as "Muhammad Ali and another v. Assistant Commissioner, Narowal and another" (1987 SCMR 795), "Zulfiqar Ali v. Station House Officer, Police Station Model Town Gujranwala and 2 others" (2014 PCr.LJ 487), "Umair Aslam v. Station House Officer and 7 others" (2014 PCr.LJ 1305), and "Zahid Jameel v. SHO and others." (2008 YLR 2695).

7. For what has been discussed above, this petition is allowed and impugned FIR No.1674 dated 25.09.2018, registered at Police Station Green Town, Lahore under section 406, P.P.C. is hereby quashed. The investigating officer of the said case is directed in make entry in this regard in the relevant register.

SA/S-43/L **Petition allowed.**

P L D 2019 Lahore 565

Before Malik Shahzad Ahmad Khan and Mirza Viqas Rauf, JJ

Mrs. IFRAH MURTAZA and another---Petitioners

Versus

GOVERNMENT OF PAKISTAN and others---Respondents

Writ Petition No.251566 of 2018, heard on 24th April, 2019.

(a) National Accountability Ordinance (XVIII of 1999)---

----S. 24---Constitution of Pakistan, Art. 199(1)(b)(i)---Writ of Habeas Corpus and quo-warranto---Scope---Locus standi---Detention in foreign country---Petitioner invoked jurisdiction of High Court under Art.199 of the Constitution on grounds that her husband was illegally detained in Dubai, United Arab Emirates by Interpol on basis of illegal orders and warrants of arrest issued against him by National Accountability Bureau authorities as well as by Accountability Court---Authorities objected to petition on plea that same was not maintainable---Validity---At time of filing of petition before High Court, Detenu was in restrained custody in Dubai, United Arab Emirates at the time of filing of petition before the High Court on account of red notices/warrants of arrest issued against him therefore, petition was filed by his wife---Petition having been filed in nature of Habeas Corpus therefore, same was validly filed by wife of detenu---Constitutional petition under Art.199 of the Constitution in matter of Habeas Corpus or petition of writ of Quo Warranto could be filed by any person and it was not necessary that such person should be an "aggrieved person"---Constitutional petition was maintainable in circumstances.

Bugum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan PLD 1977 SC 657 rel.

(b) Constitution of Pakistan---

----Art. 199(1)(b)(i)---Constitutional petition---Writ of Habeas Corpus---Scope---Release of detenue---Effect---Merely on account of release of detenue from custody petition does not become infructuous---High Court can see as to whether order on basis of which detenue was kept in confinement was issued in accordance with law or not.

Malik Ghulam Jilani v. (1) The Government of West Pakistan through the Home Secretary, Lahore and (2) The Deputy Commissioner, Lahore PLD 1967 SC 373; Zafar Iqbal v. The Province of Sindh and 2 others PLD 1973 Kar. 316 and Ali Ahmed v. Muhammad Yakoob Almani, Deputy Supreintendent of Police, Qasimabad Hyderabad and 5 others PLD 1999 Kar. 134 rel.

(c) National Accountability Ordinance (XVIII of 1999)---

----S. 24---Constitution of Pakistan, Art. 199(1)(b)(i)---Constitutional petition---Territorial jurisdiction---Maintainability---Petitioner assailed detention of her husband in a foreign country on basis of arrest warrants issued by National Accountability Bureau (NAB) in Pakistan---Objection raised by NAB was that "aggrieved person" was not in Pakistan therefore petition was not maintainable in Pakistan---Validity---Proceedings against husband of petitioner on account of which he was eventually arrested were initiated by NAB in Pakistan---Different orders were passed against husband of petitioner by Accountability Court in Pakistan in execution whereof husband of petitioner was first declared proclaimed offender, then his perpetual warrants of arrest were issued on basis of which his red notices were issues by Interpol and he was arrested in a foreign country thus cause of action had arisen in Pakistan---Constitutional petition was maintainable in circumstances.

Human Right Case No.1356 of 2009 decided on 8th October, 2010 PLD 2011 SC 17 and Suo Motu Case for Recovery of Minor Kids of Mst. Tahira Jabeen 2010 SCMR 1804 rel.

(d) National Accountability Ordinance (XVIII of 1999)---

----S. 24---Criminal Procedure Code (V of 1898), S. 87---Constitution of Pakistan, Art. 199---Constitutional petition---Arrest in foreign country---Mala fide---Proof---Petitioner assailed detention of her husband in a foreign country on basis of arrest warrants issued by National Accountability Bureau (NAB) and perpetual warrants of arrest issued by Accountability Court---Validity---National Accountability Bureau under S.24(a) of National Accountability Ordinance, 1999 could arrest any person at any stage of inquiry or investigation---Bureau had issued notice to husband of petitioner for his appearance before NAB on 25-04-2018 along with relevant documents in order to record his statement but two days prior to such date of arrest warrants were issued on 23-04-2018 by Chairman NAB; as such it showed

that NAB was out to arrest husband of petitioner right from beginning without providing him opportunity of hearing and without producing evidence in his defence---Such acts of NAB were not bona fide---No evidence was taken by Accountability Court to satisfy itself that husband of petitioner had absconded---Without taking any evidence in such regard application under S. 87, Cr.P.C. moved by NAB was allowed by Accountability Court without passing any order on order sheet of court rather same was passed on last page of such application---Such order passed by Accountability Court was "non-speaking order" and court did not apply its own mind before passing the same---High Court in exercise of Constitutional jurisdiction set aside perpetual warrants of arrest issued by Accountability Court and also set aside red notices issued against husband of petitioner---High Court declared proceedings of extradition of husband of petitioner on basis of such order/warrants as illegal and void, consequently same were also set aside and directed to remove name of husband of petitioner from the Exit Control List---Constitutional petition was allowed accordingly.

Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretry, Forest and Agriculture, Peshawar and others 1993 SCMR 618; Faisal Jameel v. The State 2007 MLD 355; The Federal Government through Secretary Interior, Government of Pakistan v. Ms. Ayyan Ali and others 2017 SCMR 1179; Rafique v. Federation of Pakistan through Secretary, Ministry of Interior Islamabad and 2 others 2018 MLD 579 ref.

Rahim Bakhsh and another v. The State PLD 2018 Bal. 8 and Nizam ud Din v. The State 1991 PCr.L.J.229 rel.

(e) National Accountability Ordinance (XVIII of 1999)---

----S. 17(c)---Criminal Procedure Code (V of 1898), Preamble---Provisions of Cr.P.C., dispensing with---Principle---Before dispensing with any provision of Criminal Procedure Code, 1898 Accountability Court has to give reasons for doing so---Dispensation of any provision of Criminal Procedure Code, 1898 does not mean that court adopt capricious, illegal and arbitrary procedure.

Noor Muhammad Khatti and others v. The State 2005 PCr.LJ 1889 and Sohail Zia Butt v. The State 2011 PCr.LJ 2 rel.

(f) Exit from Pakistan (Control) Ordinance (XLVI of 1981)---

----S. 2---Constitution of Pakistan, Art. 15---Placing name on Exit Control List---Principle---Inquiry, pendency of---Right of movement---Petitioner assailed placing name of her husband on Exit Control List---Validity---Right of movement of person was his Fundamental Right and same was guaranteed to him by the Constitution---Such right was infringed by Government without any valid reason and purportedly on grounds that inquiry was pending before NAB---Memorandum issued by Government for putting the name of husband of petitioner on Exit Control List was not sustainable in eyes of law.

Sohail Latif and 2 others v. Federation of Pakistan through Seretary, Ministry of Interior, Government of Pakistan, Islamabad and 2 others PLD 2008 Lah. 341 and Javed Khan v. Pakistan through Secretary Interior and 6 others 2017 YLR 2109 rel.

(g) Exit from Pakistan (Control) Ordinance (XLVI of 1981)---

----S. 2---Exit Control List---Condemned unheard---Effect---Where order of putting name of a person on Exit Control List is passed without providing opportunity of hearing to him and without application of its own independent mind by Government and such order is a non-speaking order---High Court directed to remove the name of said person from Exit Control List.

Tanveer Hussain Manji and 3 others v. Federation of Pakistan through Secretary Intrior and 3 others 2016 CLC 1534 rel.

Asad Manzoor Butt and Hafiz Nauman for Petitioners.

Mian Tariq Shafique Bhandara, Deputy Attorney General for Pakistan for Respondents.

Syed Faisal Raza Bukhari, Special Prosecutor for NAB.

Date of hearing: 24th April, 2019.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This petition has been filed on the ground that hasband of Mrs. Ifra Murtaza petitioner No.1, namely, Murtaza Amjad/petitioner No.2 has illegally been detained in Dubai (U.A.E) by the Interpol on the basis of red notices/warrants of arrest issued against him on account of alleged illegal proceedings conducted against Murtaza Amjad by the N.A.B, Lahore, as well as, in pursuance of wrong decisions passed by the Accountability Court, Lahore.

2. As no power of attorney of Murtaza Amjad petitioner No.2 is available on the record and as this constitutional petition in the nature of habeas corpus has been filed by Mrs. Irfah Murtaza petitioner No.I regarding stated illegal detention of her husband, namely, Murtaza Amjad (petitioner No.2) therefore, Mrs. lrfah Murtaza petitioner No.1 shall, hereinafter, be called as 'the petitioner' and Murtaza Amjad petitioner No.2 shall hereinafter be called as 'the detenu'.,

3. This constitutional petition under Article 199 of the constitution of Islamic Republic of Pakistan was filed when the detenu Murtaza Amjad was detained by the Interpol/C.I.D (Investigation), Dubai U.A.E and thereafter he was under restricted custody. It is claim of the petitioner that Murtaza Amjad detenu is absolutely innocent and he has falsely been implicated in the N.A.B inquiry which was subsequently upgraded to N.A.B Investigation i.e., Investigation No.1(9)HQ/1835-NAB-L. It is further averred in this petition that right from the beginning the proceedings of the N.A.B against Murtaza Amjad detenu were based on mala fides because the date for appearance of Murtaza Amjad before the N.A.B in the call up notice dated 18.04.2018, issued by the N.A.B under Section 19 of the National Accountability Ordinance, 1999, was fixed for 25.04.2018 but two days earlier to the abovementioned date, the N.A.B issued warrant of arrest of the detenu on 23.04.2018 which speaks of mala fides of the N.A.B/respondent. Similarly, subsequent proceedings initiated against the detenu for issuance of proclamation and declaring the detenu a proclaimed offender, as well as, regarding the attachment of his property have also been carried out in violation of the law on the subject and as such, the same are not sustainable in the eye of law. It is further averred in this petition that the order regarding the placement of the name of Murtaza Amjad detenu in the Exit Control List (E.C.L) is also an illegal order, which has been passed by respondent No.1 in a mechanical manner therefore, order dated 12.09.2018 of the learned Accountability Court, Lahore, whereby Murtaza Amjad detenu has been declared a proclaimed offender, order dated 27.09.2018 of the learned Accountability Court, Lahore whereby perpetual warrant of arrest of the detenu were issued, order dated 14.11.2018 of the Accountability Court whereby application filed by the petitioner for recalling of the abovementioned orders dated 12.09.2018 and 27.09.2018 was dismissed and order/warrant of arrest dated 23.04.2018 issued by the Chairman N.A.B for the

arrest of Murtaza Amjad detenu and memorandums issued by respondent No.1 dated 14.06.2018 and 20.11.2018 whereby the name of Murtaza Amjad detenu was placed on the E.C.L and proceedings initiated by the N.A.B through respondents Nos. 1, 4 and 5, Interpol Crime Police and Ministry of Interior for the execution of red notices and warrants of arrest dated 23.04.2018 and 12.09.2018, due to which, Murtaza Amjad detenu has been illegally detained in U.A.E and proceedings of extradition of the detenu, as well as, the abovementioned order dated 14.11.2018 passed by the learned Accountability Court, Lahore may be declared to be illegal and void as the same have been passed without lawful authority, jurisdiction and of no legal consequences and resultantly, the same may be set aside.

4. On the other hand, as per case of the N.A.B, parents of Murtaza Amjad detenu were owners of various projects of Eden Housing and Developers Ltd. Murtaza Amjad detenu later on also became a Director of Eden Housing and Developers Ltd. On 11.01.2018, N.A.B initiated an inquiry against the owners/management of Eden Housing and Developers Ltd because statedly different complaints were received from the general public against the abovementioned Housing Schemes. Chairman N.A.B delegated powers to the D.G, N.A.B, Lahore to authorize inquiry. The N.A.B Lahore, statedly issued different Call Up Notices against Murtaza Amjad detenu under Section 19 of the N.A.B Ordinance, 1999 and on account of his non-appearance, his warrants of arrest were also issued. As warrants of arrest of Murtaza Amjad detenu could not be executed at his local address, because he was residing in Canada therefore, proceedings under Section 87 of Cr.P.C were initiated against him. Proclamation as envisaged under Section 87 of Cr.P.C was issued against him by the Accountability Court, Lahore and as he did not appear before the said Court, therefore, he was declared a proclaimed offender. Proceedings for attachment of his moveable and immoveable properties were initiated. His name was put on the E.C.L. by respondent No.1 and his red notices/warrants of arrest were also issued in order to arrest him through the Interpol. Consequently, Murtaza Amjad detenu was arrested in Dubai, U.A.E through Interpol/C.I.D, Dubai and he was kept under restrained custody in Dubai (U.A.E) due to the red notices/warrants of arrest issued against him, whereupon, wife of the detenu, namely, Mrs. Ifrah Murtaza (petitioner) has filed the instant

constitutional petition before this Court which is not maintainable and the same is liable to be dismissed being meritless.

5. It is contended by learned counsel for the petitioner that Murtaza Amjad detenu is absolutely innocent and he has malafidely been implicated in this case by the N.A.B; that proceedings initiated by the N.A.B/respondent against Murtaza Amjad detenu are based upon ulterior motives; that mala fides of the N.A.B are apparent from the fact that vide Call Up Notice under Section 19 of N.A.O, 1999 dated 18.04.2018, Murtaza Amjad detenu was asked to appear before the N.A.B, Lahore on 25.04.2018 in order to produce document/evidence (in his defence) but before the said date i.e. 25.04.2018, the Chairman, N.A.B issued warrant of arrest of Murtaza Amjad detenu on 23.04.2018 meaning thereby that the N.A.B was out to arrest the detenu even before giving him an opportunity of hearing and to produce evidence in his defence; that mala fides against the detenu are also apparent from the fact that the respondent/N.A.B filed an application under Section 87 of Cr.P.C for issuance of proclamation against Murtaza Amjad detenu and the learned Accountability Court No. V, Lahore without recording any evidence as envisaged under the abovementioned provision of law (Section 87 of Cr.P.C), straightaway allowed the said application vide order dated 26.06.2018; that the learned Accountability Court did not bother to pass order dated 26.06.2018 on any order sheet of the Court rather the said order was written on the last page of the application submitted by the N.A.B; that order dated 26.06.2018 of the learned Accountability Court No. V, Lahore is a non-speaking order and the same is not sustainable in the eye of law; that order for issuance of proclamation under Section 87 of Cr.P.C was passed against Murtaza Amjad detenu on 26.06.2018 but, the proclamation was issued on 13.07.2018 wherein the date of appearance of the detenu before the Accountability Court No. V, Lahore was fixed for 26.07.2018 and as such, period of thirty days has not been provided to the detenu as envisaged under Section 87 of Cr.P.C; that although the Accountability Court can dispense with any provision of the Code of Criminal Procedure, 1898, as provided under Section 17(c) of the N.A.O, 1999 but for this purpose, the Accountability Court was bound to record its reasons for doing so but no reason whatsoever has been mentioned in the impugned orders for dispensation of provisions of the Code ibid; that the petitioner filed an application

before the Accountability Court No.V, Lahore for recalling of order dated 12.09.2018 whereby the detenu was declared a proclaimed offender and order dated 27.09.2018 whereby perpetual warrants of arrest of the detenu were issued, while pointing out the abovementioned illegalities in the earlier orders of the Accountability Court but the said application of the petitioner has illegally been dismissed vide the impugned order dated 14.11.2018 of the learned Accountability Court, Lahore; that name of Murtaza Amjad detenu has been put on the E.C.L by the Ministry of Interior, Government of Pakistan, Islamabad (respondent No.1) without application of its own independent mind and merely on the recommendation of N.A.B, Lahore and the detenu was not given any opportunity of hearing before putting his name on the E.C.L and as such, the orders of putting the name of Murtaza Amjad detenu on the E.C.L are also not sustainable in the eye of law; that the impugned orders have been passed in clear violation of the law/rules on the subject and the same are tainted with mala fides therefore, the same may be declared as illegal and void and consequently, the said orders may be set-aside.

6. On the other hand, this petition has been opposed by the learned Deputy Attorney General for Pakistan, as well as, by the learned Special Prosecutor for N.A.B on the grounds that the instant petition is not maintainable because Mrs. Ifrah Murtaza (petitioner) cannot file the instant petition regarding the orders issued against her husband, namely, Murtaza Amjad because the detenu is not in Pakistan and the petitioner Mrs. Ifrah Murtaza is not an aggrieved person in this case; that initially Murtaza Amjad was arrested by the Interpol at Dubai, U.A.E, on account of red notices/warrants of arrest issued against him, in pursuance of the impugned orders but later on, Murtaza Amjad detenu has been released by the Interpol/authorities at Dubai therefore, on account of release of Murtaza Amjad detenu, this petition has become infructuous. Insofar as, the merits of the case are concerned, it is comended that Murtaza Amjad detenu has rightly been implicated in this case by the N.A.B as there was ample evidence against him which connects him with the alleged offence; that repeatedly Call Up Notices were issued against Murtaza Amjad detenu by the N.A.B, Lahore but he did not appear before the N.A.B authorities, whereupon, his warrants of arrest were also issued by the Chairman, N.A.B and thereafter, proceedings under Section 87 of Cr.P,C were

initiated against him; that after completion of all codal formalities, Murtaza Amjad (detenu) was declared a proclaimed offender in this case by the Accountability Court No.V, Lahore and proceedings for attachment of his moveable/ immoveable properties were initiated; that as Murtaza Amjad detenu is an accused in the abovementioned case of N.A.B. therefore, the N.A.B. recommended for putting his name on E.C.L and the Ministry of Interior, Government of Pakistan, Islamabad (respondent No.1) has rightly put his name on the E.C.L and in this respect, the detenu has alternate remedy of filing a review petition under Section 3 of the Exit from Pakistan (Control) Ordinance, 1981 before respondent No.1; that there is no substance in this petition therefore, the same may be dismissed.

7. Arguments heard. Record perused.

8. First of all we take up the preliminary objection raised by learned Deputy Attorney General for Pakistan, as well as, by the learned Special Prosecutor for N.A.B regarding the maintainability of the instant constitutional petition on the ground that as Murtaza Amjad detenu was not in Pakistan at the time of his arrest in Dubai U.A.E, as well as, at the time of filing of this constitutional petition therefore, this petition is not maintainable and on the ground that as the impugned orders have been passed against Murtaza Amjad detenu therefore, the impugned orders can only be challenged by him and not by his wife (Mrs. Irfah Murtaza petitioner). The next objection regarding the maintainability of this petition is that as Murtaza Amjad detenu has subsequently, been released by the Interpol and authorities at Dubai (U.A.E) therefore, on account of his release from custody, this petition has become infructuous.

We have noted that this petition has been filed by Mrs. Irfah Murtaza petitioner on the ground that her husband, namely, Murtaza Amjad (detenu) has illegally been detained at Dubai, U.A.E by the Interpol on the basis of illegal orders and warrants of arrest issued against him by the N.A.B authorities, as well as, by the Accountability Court No. V, Lahore. At the time of filing of this petition, Murtaza Amjad detenu was admittedly in restrained custody in Dubai on account of red notices/warrants of arrest issued against him (as this fact has been admitted by the respondents in their report and parawise comments) therefore, this petition has been filed by his wife, namely, Mrs. Ifrah Murtaza (petitioner). As the instant

petition has been filed in the nature of habeas corpus therefore, we are of the view that this petition has validly been filed by the wife of Murtaza Amjad detenu. It is by now well settled that a constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, in a matter of habeas corpus, or petitions of writ of quo-warranto can be filed by any person and it is not necessary that the said person should be an aggrieved person. The Hon'ble Supreme Court of Pakistan in the case of 'Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan' (PLD 1977 Supreme Court 657) at page No. 675 was pleased to observe as under:-

> "Clause (1)(c) of Article 199 does indeed contemplate that an application for the enforcement of Fundamental Rights has to be made by an aggrieved person. Now, it is true that in the case before us the petitioner is not alleging any contravention of her own Fundamental Rights, but she has moved the present petition in two capacities, as wife of one of the detenus and as Acting Chairman of the Pakistan People's Party, to which all the detenus belong. In the circumstances, it is difficult to agree with Mr. Brohi that Begum Nusrat Bhutto is not an aggrieved person within the meaning of Article 199. In more or less similar circumstances in Manzoor Elahi v. State (1) this Court entertained, a petition under Article 184(3) of the Constitution although it was not moved by the detenu himself but by his brother. I consider, therefore, that both the preliminary objections raised as to the maintainability of the petition have no merit."

It is also true that subsquent to the filing of this constitutional petition, Murtaza Amjad detenu has been released from the custody by the Interpol/concerned authorities at Dubain, U.A.E, statedly on the ground that no convincing evidence/material was produced against him and this fact has been brought on the record by the learned counsel for the petitioner by placing on the record through C.M. No.01 of 2019, letter dated 26.12.2018, issued by the Technical Office of the Attorney General, Government of U.A.E. which is in Arabic language and English translation is attached therewith. This fact has also been frankly conceded by the learned Deputy Attorney General for Pakistan, as well as, by ihe learned Special Prosecutor for N.A.B that Murtaza Amjad detenu has subsequently been released from the custody by the concerned authorities in U.A.E. Now the

question for determination before this Court is that as to whether this petition has become infructuous, merely, on account of release of the detenu from the custody and as to whether this Court cannot see the legality of the impugned orders on account of which the detenu was arrested and kept in confinement for several weeks. In this respect, in our humble view, this petition has not become infructuous merely on account of the release of the detenu from the custody and we can see that as to whether the impugned orders on the basis of which the detenue was kept in confinement were issued in accordance with the law or not. In this respect, the reliance is placed on the case of 'Malik Ghulam Jilani v. (1) The Government of West Pakistan, through the Home Secretary, Lahore and (2) The Deputy Commissioner, Lahore' (PLD 1967 Supreme Court 373). In the said case, question regarding the illegality or otherwise of detention orders of three persons, namely, Malik Ghulam Jillani, Sardar Shaukat Hayat Khan and Nawabzada Nasrullah Khan came under discussion before the Hon'ble Supreme Court of Pakistan. The objection raised before the Hon'ble Supreme Court of Pakistan was that as the detenus had been released from the custody therefore, their appeals had become infructuous, The Hon'ble Supreme Court of Pakistan held that though the detenus were already released from the custody but even then the Court can determine the legality of the orders whereby they were kept in confinement. Relevant part of the said judgment at page 400 reads as under:-

> "It remains to mention that during the course of the hearing of these appeals all the three detenus were released by the Provincial Government. In the ordinary course, such release would have had the effect of causing the appeals to abate, but in these cases, learned counsel urged that since in each case the detention had exceeded a period of nine months, the detenus had thereby incurred disqualification in respect of their right to stand for elections to representative offices, by the effect of section 53 of the Electoral College Act and section 106 of the National and Provincial Assemblies (Elections) Act. Each of them was a politician of standing and was gravely prejudiced by this result in respect of his future political career and each of them was therefore, interested to establish that his detention was illegal. The court was therefore asked to record a decision as to the legality of the detention order of the 16th February, 1966.

..... I would hold that the detention of Nawahzada Nasrullah Khan under the Deputy Commissioner's order of the 16th February 1966, was illegal, but as to Sardar Shaukat Hayat Khan and Malik Ghulam Jilani, I would hold that the detentions were made in accordance with the law and under lawful authority. The two appeals relating to Nawabzada Nasrullah Khan should accordingly be allowed and since his detention was bad ab initio, he should have his costs in the appeal filed by himself. The appeals relating to Sardar Shaukat Hayat Khan and Malik Ghulam Jilani should be dismissed with no order as to costs."

Moreover, we daily appoint Bailiffs in different petitions of habeas corpus, for the recovery of the alleged detenus from the custody of the police and though in the case of illegal detention of any person by the police, Bailiff takes the custody of the said person and releases him with the direction to appear before the Court on the next date but even then the Courts determine the question of legality of detention of a person by the police and if it is established that the detention of any person was illegal then orders of imposition of fines, departmental actions and even registration of FIRs are passed by the Courts against the delinquent police officials, inspite of the fact that the detenu had already been released from the custody. Reference in this context may also be made to the cases of `Zafar Iqbal v. The Province of Sindh and 2 others' (PLD 1973 Karachi 316) and A1i Ahmed v. Muhammad Yakoob Almani, Deputy Suprintendent of Police, Qasimabad, Hyderabad and 5 others' (PLD 1999 Karachi 134).

9. Now coming to the last objection regarding the maintainability of this petition that as Murtaza Amjad detenu was not in Pakistan at the time of filing of this petition therefore, this petition is not maintainable. In this respect, we have noted that the proceedings against the detenu, on account of which he was eventually arrested, were initiated by the D.G, NAB, Lahore. Different orders were passed against the detenu by the learned Accountability Court No. V, Lahore in execution whereof, the detenu was first delared a proclaimed offender then his perpetual warrants of arrest were issued on the basis of which his red notices were issued by the Interpol and he was arrested in Dubai, U.A.E. It is therefore, evident that the cause of action has arisen in this case at Lahore, Pakistan, therefore, the instant petition is maintainable before this Court. We have noted that in different cases,

the Hon'ble Supreme Court of Pakistan entertained petitions in the matter of habeas corpus, though the detenus of the said cases were out of the country. In the case of 'Human Right Case No. 1356 of 2009 decided on 8th October, 2010 PLD 2011 SC 17, the Hon'ble Supreme Court of Pakistan has categorically held that while exercising the jurisdiction under Article 199 the Constitution of Islamic Republic of Pakistan, 1973, the question of illegal/improper detention of a person in a foreign country can validly be decided by the High Courts in Pakistan. Relevant part of the said judgment at page No.107 reads as under:-

> "5. This Court do experience variety of the cases where violation of fundamental rights of the citizens are noticed and the efforts are made to grant them relief but the more painful cases in this behalf belong to the category where police authorities show their inability to extradite the minors from outside the country; may be for some strong reasons in exceptional cases but ordinarily the lower Courts enjoying equal jurisdiction for enforcing the orders i.e., to make direction for bringing back the minors from outside the country either under section 491, P.P.C. or under Article 199 of the Constitution, if the matter is brought before learned Sessions Judges or the High Courts respectively, despite exercising jurisdiction the result are not achieved for not any other reason except that the law enforcing agencies abstain from involving itself fully with the commitment in effecting recovery of the minors.",

Similarly in the case of 'Suo Motu Case for Recovery of Minor Kids of Mst.Tahira Jabeen' (2010 SCMR 1804), the question of illegal/improper detention of a minor was decided, though the said minor was in a foreign country at the relevant time and eventually he was brought back to Pakistan and handed over to his mother. It is therefore, clear that if the cause of action has arisen in Pakistan then inspite of the presence of the detenu in a foreign country, this Court can validly entertain and decide a constitutional petition filed in the matter of habeas corpus, in order to determine the legality or otherwise of his detention. Moreover, it is not understandable that when the N.A.B, Lahore can get arrested Murtaza Amjad detenu in a foreign county on the basis of orders issued from Lahore, Pakistan then why this constitutional petition in the nature of habeas corpus cannot be filed at Lahore, Pakistan. If the abovementioned objection of the learned

Law Officers is accepted to be correct then the N.A.B may get any person arrested in a foreign country through Interpol, on the basis of orders issued by the N.A.B/Courts in Pakistan and the said person may languish in the jail of foreign country for indefinite time or for several years or he may even die there, but this Court would be unable to see the legality of orders of his detention, issued by the N.A.B/Courts in Pakistan, merely on the ground that the detenu is not ih Pakistan. We are therefore, of the view that there is no substance in the abovementioned objections of the learned Law Officers and the instant petition is maintainable before this Court.

10. Now coming to the merits of this case, we have noted that first Call Up Notice under Section 19 of the N.A.O, 1999 was issued against Murtaza Amjad detenu on 04.04.2018.The last Call Up Notice under Section 19 of the Ordinance ibid was issued against Murtaza Amjad detenu on 18.04.2018. In the said second Call Up Notice, the date of appearance of the detenu before the N.A.B, Lahore was fixed for 25.04.2018 but two days prior to the abovementioned date i.e. on 23.04.2018, the Chairman N.A.B issued warrants of arrest against Murtaza Amjad detenu. It is not understandable that when the N.A.B. itself issued Call Up Notice to the detenu to explain his position and provide information/evidence to the N.A.B in his defence and date for the said purpose was fixed for 25.04.2018, then as to why two days prior to the said date, the Chairman N.A.B issued warrants of arrest of the detenu on 23.04.2018. It is true that under Section 24(a) of the N.A.O, 1999, the N.A.B can arrest any person at any stage of the inquiry or investigation but in the instant case, as mentioned earlier, the D.G, Investigation N.A.B, Lahore, issued notice dated 18.04.2018 to the detenu for his appearance before the N.A.B, Lahore on 25.04.2018 along with relevant document in order to record his statement (in his defence) but two days prior to the abovementioned date, the Chairman N.A.B, issued warrant of arrest of the detenu on 23.04.2018. This shows that the N.A.B was out to arrest the detenu right from the beginning without providing him opportunity of hearing and to produce evidence in his defence. The abovementioned acts of the N.A.B/respondent speak volumes against the bona fides of the N.A.B because on the one hand, the detenu was called through Call Up Notice to appear before the N.A.B along with document/evidence (in his

defence) on 25.04.2018 and on the other hand, despite the said date fixed by the N.A.B itself, warrant of arrest of the detenu was issued on 23.04.2018.

11. We have further noted that application for issuance of proclamation as envisaged under Section 87 of Cr.P.C was moved by the N.A.B before the Accountability Court No. V, Lahore and the said application was allowed on 26.06.2018 without recording of any evidence, as required under Section 87 of Cr.P.C. The said provision of the Code of Criminal Procedure, 1898 reads as under:-

> "Section 87. Proclamation for persons absconding. (1) If any Court is satisfied after taking evidence that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.
>
> (2) …….
>
> (3) ……..

As mentioned earlier, no evidence was taken by the learned Accountability Court, Lahore to satisfy itself that Murtaza Amjad detenu has absconded and without taking any evidence in this respect, appliciation under Section 87 of Cr.P.C, moved by the N.A.B, was allowed vide Order dated 26.06.2018. It is also noteworthy that the order dated 26.06.2018 regarding the acceptance of abovementioned application of the N.A.B was not passed by the Accountability Court, Lahore on any order sheet of the Court rather the same was passed on the last page of the said application. The said order reads as under:-

"Allowed on the grounds mentioned in the application."

Perusal of the abovementioned order shows that same is a non-speaking order. It also shows that the learned Accountability Court did not apply its own mind before passing the said order. No independent reasoning for accepting the abovementioned application has been mentioned by the learned Accountability Court. It is further noteworthy from the perusal of the words 'any person against whom a warrant has been issued by it' mentioned in Section 87 of Cr.P.C that before issuance of proclamation, the Court shall "itself" issue warrant against an absconding person, but in this case, proclamation under Section 87 of Cr.P.C has

straightaway been issued by the Accountability Court No.V, Lahore without issuance of any warrant of arrest against the detenu by the Court itself and the same has purportedly been issued on the basis of warrants issued by the Chairman, N.A.B. Perusal of Section 87 of Cr.P.C further reveals that at least thirty days time shall be given in the proclamation for appearance of a person "from the date of publishing of such proclamation" but proclamation issued by the Accountability Court No.V, Lahore reveals that though order for issuance of proclamation against the detenu was passed on 26.06.2018 but the proclamation was issued on 13.07.2018 as the said date of issue i.e. 13.07.2018 is written on the top of the proclamation itself. In the proclamation dated 13.07.2018, the detenu was asked to appear before the Accountability Court on 26.07.2018 and as such the period of thirty days "from the date of publication of proclamation" as envisaged under Section 87 of Cr.P.C was not provided to the detenu which is another patent illegality committed in this case. Resultantly, impugned order dated 26.06.2018 and proceeding under Section 87 of Cr.P.C of the learned Accountability Court No. V, Lahore are not sustainable in the eye of law. Reference in this context may be made to the cases of 'Rahim Bakhsh and another v. The State' (PLD 2018 Balochistan 8) and Nizam-ud-Din v. The State' (1991 PCr.LJ 2229).

It is true that under Section 17(c) of the N.A.O, 1999, the Accountability Court may dispense with the provisions of Code of Criminal Procedure, 1898 but before dispensing with the said provisions, the Accountability Court was obliged to give reasons for doing so but no such reason whatsoever, has been mentioned in the impugned orders by the learned Accountability Court. Section 17 (c) of the N.A.O, 1999 reads as under:-

"17. Provisions of the Code to apply:

(a) ……..

(b) ……..

(c) Notwithstanding anything contained in subsection (a) or subsection (b) or in any law for the time being in force, the [**] Court may, for reasons to be recorded dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.

(d) ……

(Bold and underling is supplied for emphasis)

It is therefore, clear that if the Accountability Court is of the view that any provision of the Code of Criminal Procedure, 1898, be dispensed with then before dispensing with the said provision of the Code ibid, the Accountability Court was obliged to record the reasons for doing so but as mentioned earlier, no such reason has been given in the impugned orders of the Accountability Court. It, is by now well settled that dispensation of any provision of the Code of Criminal Procedure, 1898 would not mean that capricious, illegal and arbitrary procedure may be adopted by the Court. In this respect, we may refer here the cases of 'Noor Muhammad Khatti and others v. The State' (2005 PCr.LJ 1889) and 'Sohail Zia Butt v. The State' (2011 PCr.LJ 2), wherein proceedings of the Accountability Courts under Section 87 of Cr.P.C were declared illegal and the same were set-aside on account of violation of the procedure provided under the said provision of law, as well as, due to the violation of Section 17(c) of N.A.O, 1999. In the case of 'Noor Muhammad Khatti and others v. The State' supra, at paras Nos.9 and 10, learned Sindh High Court at Karachi was pleased to observe as under:-

> "9. …….Nevertheless section 17(c) of the Ordinance authorizes the Accountability Court to dispense with the procedure mentioned in the Cr.P.C. including its procedure; of Chapter XXII-A, It further authorises the Court to adopt any procedure as deems fit in the circumstances of the case on the condition that for dispensing with the said procedure the Accountability Court is required to record reasons for doing so. The section 17(c) reads as under:--
>
> "(c) Notwithstanding anything contained in subsection (a) or subsection (b) or in any law for the time being in force, the Accountability Court may, for reasons to be recorded, dispense with any provision of the Code and allow such procedure as it may deem fit in the circumstances of the case."
>
> 10. Dispensation of provisions of Cr.P.C and following any procedure does not mean that the arbitrary and capricious or the procedure against the natural justice should be adopted. The Judge should keep in mind that the procedural law is not merely formalities because it affects the liberty of citizen. The Honourable Federal Court in the case of Abdul Sattar

Molla v. Crown PLD 1953 FC 145, has held that the procedural requirements of Criminal Law are not mere formalities. Underlying the rules of procedure is an all pervading care to ensure, the liberty of the subject and due dipensation of justice." '

(Bold and underlining supplied for emphasis)

We have further noted that the learned Accountability Court No.V, Lahore while issuing proclamation against Murtaza Amjad detenu has mentioned in the said proclamation that a reference has been made before the Accountability Court against the detenu, whereas, the learned Special Prosecutor for N.A.B has frankly conceded that no reference has so far been filed in this case against any person. The mentioning of the fact that a reference has been filed against the detenu before the Accountability Court shows the level of application. of mind by the Accountability Court while passing the impugned orders. It appears that the learned Accountability Court mechanically passed the impugned orders and completed the proceedings under Section 87 of Cr.P.C. against the detenu merely on the wishes of N.A.B and without application of its own independent mind.

12. We have further noted that in pursuance of the abovementioned illegal order dated 26.06.2018, of the learned Accountability Court, Lahore Murtaza Amjad detenu was declared a proclaimed offender vide order dated 12.09.2018 and thereafter, his perpetual warrants of arrest were issued by the Accountability Court vide order dated 27.09.2018. As Murtaza Amjad detenu was in confinement/restricted custody therefore, his wife Mrs. Ifrah Murtaza petitioner filed an application for recalling of the abovementioned orders of the learned Accountability Court dated 12.09.2018 and 27.09.2018 but the said application has been dismissed by the learned Accountability Court vide the impugned order dated 14.11.2018 without looking into the legality of proceedings carried out against Murtaza Amjad detenu. We have further noted that no order regarding issuance of perpetual warrants of arrest of the detenu was passed by the Accountability Court on 12.09.2018 but the record shows that the perpetual warrant of arrest of the detenu was issued on 12.09.2018, without any order of the Court in this respect. The said illegality has been tried to be rectified later on, when on 27.09.2018, the Accountability Court No. V, Lahore passed an order for issuance of perpetual warrants of arrest of the detenu, whereas, his perpetual

warrants were already issued on 12.09.2018. It is also noteworthy that as the basic order dated 26.06.2018 of the Accountability Court No.V Lahore, whereby application for issuance of proclamation under Section 87 of Cr.P.C against Murtaza Amjad detenu was accepted, is illegal because the said order was passed without taking any evidence and as the subsequent proceedings of the even date (26.06.2018), under Section 87 Cr.P.C of the Accountability Court, Lahore are also illegal on account of the reasons mentioned in para No.9 of this judgment therefore, all the superstructure built on the said order/proceedings, is liable to crumble. Reliance in this respect may be placed on the cases of 'Muhammad Younus Khan and 12 others v. Government of N.-W.F.P through Secretary, Forest and Agriculture, Peshawar and others' (1993 SCMR 618) and 'Faisal Jameel v. The State' (2007 MLD 355). Under the circumstances, the abovementioned orders dated 12.09.2018, 27.09.2018 and 14.11.2018 of the Administrative Judge/Judge Accountability Court No. V, Lahore and perpetual warrant of arrest of the detenu dated 12.09.2018 are not sustainable in the eye of law.

13. As mentioned earlier, the Chairman NAB issued warrants of arrest of Murtaza Amjad detenu dated 23.04.2018 and thereafter NAB vide letter No.3-1(1)(283)L-II/NAB/Dy.Dir (RN), dated 14.05.2018, asked Section Officer (FIA), Ministry of Interior, Islamabad for issuance of red notices against Murtaza Amjad detenu and others. In the said letter the NAB mentioned in paragraph No.2 that proclamation order and perpetual warrants of arrest of Murtaza Amjad could not be submitted instantly, however, the same would be furnished at later stage but keeping in view the urgency of the matter, red notices be issued against the detenu. It is, therefore, evident that request for issuance of red notices against the detenu was made by the NAB without obtaining an order of proclamation of the detenu and without obtaining his perpetual warrants of arrest from the concerned Court. The red notices were eventually issued by the Interpol on 20.09.2018 (as mentioned in the report and para-wise comments of the NAB-respondent). We have already declared that the proceedings of declaring Murtaza Amjad as proclaimed offender and issuance of his perpetual warrants of arrest are illegal and void due to the reasons mentioned in the preceding paragraphs Nos.11 and 12, of this judgment, therefore, the red notices dated 20.09.2018, which were issued on the basis of above-referred orders/proceedings are also not sustained in the eye of law.

14. Insofar as, the issue regarding putting the name of Murtaza Amjad detenu on the Exit Control List (E.C.L) is concerned, we have further noted that the Ministry of Interior, Government of Pakistan, Islamabad (respondent No.1) put the name of Murtaza Amjad detenu on the E.C.L vide impugned memorandum No. 12/146/2018-ECL dated 20.11.2018 merely on the recommendation of the N.A.B. We have also noted that initially the name of Murtaza Amjad detenu was put on the E.C.L. vide Memorandum No.12/146/2018-ECL, dated 14.06.2018. In the said memorandum, it was mentioned by respondent No.1 that the name of the detenu has been placed on the E.C.L in compliance of the Supreme Court's order dated 03.06.2018. Against the abovementioned order of respondent No.1, the petitioner was of the view that no order regarding the placement of the name of the detenu was passed by the Hon'ble Supreme Court of Pakistan therefore, she approached the Hon'ble Supreme Court of Pakistan through C.M.A 8502/2018 in C.R.P.NIL/2018 in H.R.C. 18657-P/2018 for review/clarification of the order dated 03.06.2018 passed in HRC No. 18657-P/2018. The Hon'ble Supreme Court of Pakistan vide order dated 04.10.2018 clarified and observed that it was clear from order dated 03.06.2018 that initiation of proceedings for the issuance of red warrants of the persons mentioned therein was an independent action by the N.A.B and the Supreme Court did not direct the same vide the abovementioned order. It was further clarified/observed that the Supreme Court was informed that N.A.B had requested the Interior Ministry to place the names of the owners/directors of the company on the E.C.L and if the names of the said persons mentioned in the order dated 03.06.2018 were placed on the E.C.L. pursuant to the order of the Supreme Court then it shall be deemed that no such order was passed independent of the request of N.A.B however, if the names were put on the E.C.L, on the independent instructions of the N.A.B, then the same shall continue to be effective. It was further made clear by the Hon'ble Supreme Court of Pakistan vide the abovementioned order dated 04.10.2018 that the said Court (honourable Supreme Court) does not in any manner interfere in the proceedings/investigations and the modes and the manners in which the such investigations are conducted by the N.A.B. As the Hon'ble Supreme Court of Pakistan vide the abovementioned order dated 04.10.2018 clarified the situation, as well as, clarified its earlier order dated 03.06.2018 by observing that initiation

of proceedings for issuance of red warrants against the detenu and putting the name of the detenu on E.C.L were independent actions by the N.A.B and the said actions were taken by the concerned authorities on the recommendations of the N.A.B and the Supreme Court did not pass any direction for issuance of red warrants etc against the detenu and others because the Supreme Court does not in any manner interfere in the proceedings/investigations and modes and manners in which such investigations are conducted by the N.A.B therefore, after the abovementioned clarification/observation by the Hon'ble Supreme Court of Pakistan vide order dited 04.10.2018, the Ministry of Interior (respdndent No.1) issued a fresh memorandum i.e. memorandum No.12/146/2018-ECL dated 20.11.2018, wherein it was mentioned that name of the detenue has been placed on the E.C.L on the recommendation of N.A.B. It is therefore, evident that respondent No.1 was itself not sure that on which ground the name of the detenu was to be put on the E.C.L because in first memorandum dated 14.06.2018. it was mentioned that name of the detenu has been put on the E.C.L in compliance of the Supreme Court's order dated 03.06.2018 but when the Hon'ble Supreme Court of Pakistan vide order dated 04.10.2018 clarified the situation in above-referred terms, then respondent No.1 issued a fresh memorandum dated 20.11.2018 wherein it was stated that name of the detenu has been put on the E.C.L on the recommendation of N.A.B. It is therefore, evident that respondent No.1 has itself superseded/set-aside its first memorandum dated 14.06.2018 through its second memorandum dated 20.11.2018. It is further noteworthy that the abovementioned respondent did not bother to apply its own independent mind and memorandums dated 14.06.2018 and 20.11.2018 were mechanically issued against the detenu. No notice was issued by respondent No.1 to Murtaza Amjad detenu in order to provide him an opportunity of hearing before passing the abovementioned impugned memorandums. Respondent No. 1 arbitrarily passed memorandums dated 14.06.2018 and 20.11.2018, whereby the name of Murtaza Amjad detenu was put on the E.C.L. The right of movement of a person, is his fundamental right which is guaranteed to him by the Constitution of the Islamic Republic of Pakistan, 1973 but the said right has been infringed by respondent No.1 without any valid reason and purportedly on the ground that an inquiry is pending against him (Murtaza Amjad detenu) before the N.A.B. Under the circumstances, the

impugned memorandums issued by respondent No.1 for putting the name of Murtaza Amjad detenu on the E.C.L are not sustainable in the eye of law. Reliance in this respect may be placed on the cases of 'Sohail Latif and 2 others v. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islambad and 2 others ' (PLD 2008 Lahore 341) and Javed Khan v. Pakistan through Secretary Interior and 6 others (2017 YLR 2109). In the case of Sohail Latif and 2 others v. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islamabad and 2 others supra, a learned Division Bench of this Court at paras Nos. 13 and 14 has made the following observations:-

" 13. The question whether the right to travel abroad is part of the fundamental right of liberty, has engaged the attention of the apex Court, of the country as well as this Court. In Government of Pakistan and another v. Dada Amir Haider Khan (PLD 1987 SC 504), at page 509, it was held as under:-

"Moreover a citizen's right to travel abroad is an important aspect of the citizen's liberty, and is closely related to the rights of free speech and association. As nations in the world become politically and commercially more dependent upon one and another and foreign policy decisions have come to have greater impact upon the lives of the citizen, the right to travel has become correspondingly more important. Though travel, by private citizens as well as by journalists and Government officials, information necessary to the making of informed decision can be obtained. And, under our constitutional system ultimate responsibility for the making of informed decisions rests in the hands of the peoples."

14. Learned counsel for respondents have raised two objections. Firstly, that the discretion lies with the Federal Government to put the name of any citizen on the Exit Control List without disclosing any ground and secondly, the remedy of review under section 3 of the Ordinance by making a representation is available to the aggrieved persons. Both the questions have been answered by a celebrated judgment of his lordship Faqir Muhammad Khokhar, now the honourable Judge of the Supreme Court of Pakistan, in the case of Wajid Shamsul Hassan v. Federation of Pakistan through Secretary

Ministry of Interior, Islamabad (PLD 1997 Lahore 617), it was held as under:-

"In view of the above discussion, 1 have no doubt in my mind that the right of a citizen travel abroad is a fundamental right guaranteed by Articles 2-A, 4, 9, 15 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Abridgement of this fundamental right by the State through the legislative or an executive measure has to be tested on the touchstone of the constitutional provisions. The life, liberty or property of a citizen cannot be taken away or adversely affected except in accordance with law. However, the "law", I mean, a valid law which does not come in conflict with any of the provisions of the Constitution and should not be a law which is ex facie discriminatory. Section 2 of the Exit from Pakistan (Control) Ordinance, 1981, does not provide any guideline or reasonable classification for taking the action against a person prohibiting him from travelling abroad. Even the valuable rights of citizens of being heard and of knowing the reasons for such an action have been denied. The provisions of law are therefore, ex facie discriminatory as also capable of being administered in a discriminatory manner. If no reasons are assigned to an aggrieved person the remedy of review under section 3 of the Ordinance by making a representation becomes redundant. A citizen would not be in a position to make any effective representation in the absence of any reason or a speaking order. Prima facie, it may be difficult to sustain the validity of the Ordinance on the touchstone of Articles 2A, 4, 9 and 25 of the Constitution of Islamic Republic of Pakistan, 1973."

Likewise, the Hon'ble Supreme Court of Pakistan in the case of The Federal Government through Secretary Interior, Government of Pakistan v. Ms. Ayyan Ali and others (2017 SCMR 1179) has held that merely this fact that a case stands registered against a person is no ground to put his name on the E.C.L. Similar view was taken in the case of Rafique v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and 2 others (2018 MLD 579). Although it is argued by learned Deputy Attorney General for Pakistan that the detenu has the remedy of filing a review petition under Section 3 of the Exit from Pakistan (Control) Ordinance, 1981 before respondent No.1, against the abovementioned

impugned memorandums therefore, this petition is not maintainable but it is by now well settled that where the order of putting the name of a person on the E.C.L is passed, without providing opportunity of hearing to him and without application of its own independent mind by the Ministry of Interior and the said order is a non-speaking order then the power of review under Section 3 of the Ordinance ibid is not available in such case. Reference in this context may be made to the case of 'Tanveer Hussain Manji and 3 others v. Federation of Pakistan through Secretary Interior and 3 others (2016 CLC 1534), wherein at paras Nos. 9 and 10, this Court was pleased to lay emphasis as under:-

"9. (i) …….

(ii) ……..

(iii) ……..

(iv) In the case of Wajid Shamas-ul-Hassan v. Federation of Pakistan PLD 1997 Lahore 617 at 630, it was held inter alia by the learned Lahore High Court that right to travel is one of the most valued and cherished fundamental human right in all civilized societies, perhaps next only in importance to the right to life and personal liberty; the right of a citizen to travel abroad is a fundamental right guaranteed by Articles 2-A, 4, 9, 15 and 25 of the Constitution; abridgement of this fundamental right by the State through the legislative or an executive measure has been tested on the touchstone of the Constitutional provisions; section 2 of the Exit from Pakistan (Control) Ordinance, 1981, does not provide any guidelines or reasonable classification for taking the action against a person prohibiting him from travelling abroad.

(v) In Mian Ayaz Anwar v. Federation of Pakistan, PLD 2010 Lahore 230, it was held inter alia by the learned Lahore High Court that right to travel outside country is a fundamental right and an intrinsic part of the right to liberty which is granted under Article 19 of the Constitution; it was clear from the comments that the Ministry of Interior never applied its mind before placing the name of the petitioner in the cited case on the ECL as the impugned order was a result of the dictation from an agency/authority; and, the discretion excercises under dictation without reasons, was not lawful.

(vi) ……

10. As far as alternative remedy of review under section 3 of the Ordinance is concened, Section 3 envisages filing of representation for review of an order passed under Section 2(1) of the Ordinance. The order under section 2(1) of the Ordinance means a speaking order by giving reasons, however, the perusal of impugned memorandums shows that none of the aforesaid conditions and requirements are fulfilled, therefore, it does not amount to an order for the purpose of review under Ordinance. Even otherwise, the impugned order being passed without giving any prior notice or hearing to the petitioners and the same being also against the fundamental rights of the petitioner as enshrined under Articles 4 and 9 of the Constitution of Islamic Republic of Pakistan, 1973, remedy of review under the Ordinance is illusory and meaningless."

15. In the light of above discussion, this petition is allowed and the impugned orders/proceedings of the Accountability Court No. V, Lahore dated 26.06.2018, whereby application of the N.A.B for initiation of proceeding under Section 87 Cr.P.C against Murtaza Amjad detenu was accepted and proclamation against the detenu was ordered to be published, as well as order dated 12.09.2018 passed by the Accountability Court No.V, Lahore whereby Murtaza Amjad detenu has been declared a proclaimed offender and consequently proceedings for attachment of his moveable and immoveable properties were initiated, order dated 27.09.2018 of the Accountability Court, No.V, Lahore whereby perpetual warrant of arrest of Murtaza Amjad (detenu) has been issued, similarly perpetual warrants of arrest dated 12.09.2018 issued by the Accountability Court, Lahore against Murtaza Amjad detenue, order dated 14.11.2018 of the Accountability Court, Lahore whereby application for recalling of abovementioned orders dated 12.09.2018 and 27.09.2018 was dismissed, Memorandum No. 12/146/2018-ECL dated 14.06.2018 and Memorandum No.12/146/2018-ECL dated 20.11.2018 whereby the name of Murtaza Amjad detenu was put on the Exit Control List (E.C.L) by respondent No.1, proceedings initiated by the N.A.B through respondents Nos. 1, 4 and 6 (D.G. FIA, Head of Central Bureau, Director of Interpol Criminal Police Organization and Ministry of Interior) for execution of red notices/warrants of sarrest of Murtaza Amjad detenu dated 23.04.2018 issued by the Chairman N.A.B, and perpetual warrant of arrest dated 12.09.2018 issued by the Accountability

Court No. V, Lahore against Murtaza Amjad detenu, as well as, red notices dated 20.09.2018 issued against Murtaza Amjad detenue on the basis of abovementioned orders/warrants and the consequent proceedings of Extradition of Murtaza Amjad detenue on the basis of aforementioned impugned orders/warrants, are hereby declared as illegal and void and consequently, the same are hereby set-aside. The name of Murtaza Amjad detenu is directed to be removed from the Exit Control List.

MH/I-12/L **Petition allowed.**

2019 Y L R 415

[Lahore]

Before Malik Shahzad Ahmad Khan, J

NADEEM ASLAM---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.237490-B of 2018, decided on 10th October, 2018.

(a) Criminal Procedure Code (V of 1898)---

----Ss. 403 & 497---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Constitution of Pakistan, Art. 13---Bail, grant of---Double jeopardy, principle of---Applicability---Two FIRs---Accused was arrested by police for committing forgery and using forged "No Objection Certificate" for acquiring a driving license---Accused was earlier convicted and sentenced under Ss. 420, 468 & 471 P.P.C. for preparation of a fake driving license--- Effect--- First Information Report in question was registered for preparation of fake "No Objection Certificate" for same driving license---Second FIR amounted to double jeopardy and was barred under Art. 13 of Constitution read with S. 403, Cr.P.C.---Entire prosecution case was based on documentary evidence and same was already in possession of prosecution---No chance of tampering with evidence existed and no useful purpose would be served by keeping accused behind bars---Offences mentioned in FIR did not fall within ambit of prohibitory clause of S. 497, Cr.P.C. and grant of bail in such like cases was a rule while refusal was an exception---Bail was allowed in circumstances.

Saeed Ahmad v. The State 1996 SCMR 1132; Muhammad Abid Farooq v. The State and another 2015 PCr.LJ 224; Amin v. The State 1998 PCr.LJ 1677; Shamon Jatoi v. The State 1996 PCr.LJ 783; Tariq Bashir and 5 others v. The State PLD 1995 SC 34; Mitho Pitafi v. The State 2009 SCMR 299; Qamar alias Mitho v. The State and others PLD 2012 SC 222; Jamal-ud-Din alias Zubair Khan v. The State 2012 SCMR 573; Muhammad Rafique v. The State 1997 SCMR 412 and Muhammad Tanveer v. The State and another PLD 2017 SC 733 ref.

(b) Criminal Procedure Code (V of 1898)---

----S. 497(2)---Bail---Case of further inquiry---Previous conviction---Effect---No legal restriction existed on grant of bail to an accused due to his previous conviction for offence punishable with death or imprisonment for life if his case is covered under S. 497(2), Cr.P.C.

Rana Zahid Iqbal for Petitioner.

Nisar Ahmad Virk, Deputy Prosecutor General and Muhammad Yaqoob ASI for the State.

Muhammad Alamgir Khan for the Complainant.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Through the instant petition, the petitioner Nadeem Aslam seeks post arrest bail in case FIR No.63/2018 dated 28.01.2018, offences under sections 420/ 468/471, P.P.C. registered at Police Station City Arifwala, District Pakpattan.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, the petitioner was an accused in an earlier case FIR No.104/2016, under section 322, P.P.C., registered at Police Station Rang Shah, Arifwala. During the proceedings of bail petition, filed by the petitioner in the abovementioned earlier case, the petitioner produced a driving licence and a no-objection certificate (N.O.C), which were later on found to be fake, therefore, the offences under sections 420/468/47l, P.P.C., were added in the above-mentioned case FIR No.104/2016, for production of a fake deriving licence in the said case, whereas, the instant separate FIR No.63/2018, has also been lodged against the petitioner for production of a fake No-Objection Certificate (N.O.C), along with his driving licence in the abovementioned case FIR No.104/2016.

4. I have noted that on the basis of production of a fake driving licence, the petitioner has already been convicted and sentenced for charges under sections 420/ 468/471, P.P.C., in case FIR No.104/2016, though he was acquitted in the said case from the charge under section 322, P.P.C. vide judgment dated

23.02.2018, passed by the learned Magistrate Section-30, Arifwala. As the petitioner has already been convicted and sentenced under sections 420/468/471, P.P.C. for preparation of a fake driving licence, therefore, prima facie, the instant FIR, which has been lodged against the petitioner, on the basis of preparation of a fake No-Objection Certificate (NOC) for the same driving licence, amounts to double jeopardy, which is barred under Article 13 of the Constitution of the Islamic Republic of Pakistan, 1973, read with section 403 of the Code of Criminal Procedure, 1898.

5. Even otherwise, the entire prosecution case is based on documentary evidence, which is already in possession of the prosecution and as such there is no chance of tampering with the same, therefore, in such circumstances no useful purpose shall be served by keeping the petitioner behind the bars, thus he deserves to be released on post arrest bail. Reference in this respect may be made to the case of Saeed Ahmad v. The State (1996 SCMR 1132).

6. Moreover, the offences mentioned in the FIR do not fall within the ambit of prohibitory clause of section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. The learned Deputy Prosecutor General assisted by learned counsel for the complainant has argued that as mentioned earlier the petitioner is a previous convict for offences under sections 420/468/471, P.P.C., in the above-referred case FIR No.104/2016, therefore, he is not entitled to the relief of bail though the offences mentioned in the instant FIR do not fall within the ambit of prohibitory clause of section 497, Cr.P.C.

Now the crucial question for determination before this Court is that as to whether the previous conviction of an accused creates an absolute bar against the grant of bail to the said accused? In this respect 4th proviso of section 497(1), Cr.P.C. is the relevant provision of law, which is reproduced hereunder for ready reference:--

> "Provided, further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with

death or imprisonment for life or to a person, who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life "

(underlining and bold supplied for emphasis).

It is evident from perusal of the abovementioned provision of law that the previous conviction of an accused does not create an absolute bar against the relief of bail. The said provision of law has made it clear that in cases falling under third proviso of Section 497(1) Cr.P.C. (i.e., on the ground of delay in the conclusion of trial), the relief of bail shall not be granted to an accused "who is a previously convicted offender for an offence punishable with death or imprisonment for life". The words "previously convicted offender" have been used in the above mentioned provision of law, only in respect of a special category of offenders who have previously been convicted for "offences punishable with death or imprisonment for life" which means that even in the cases falling within the ambit of 3rd proviso of section 497(1), Cr.P.C., the previous conviction of an offender under other offences is not relevant. The petitioner is a previously convicted offender for offences under sections 420/ 468/471, P.P.C., which offences are punishable for imprisonment upto seven (07) years and the same are not punishable with death or imprisonment for life, therefore, previous conviction of the petitioner cannot create any legal bar against the acceptance of his bail petition and release of the petitioner on bail. Reference in this respect may be made to the cases of "Muhammad Abid Farooq v. The State and another" (2015 PCr.LJ 224), "Amin v. The State" (1998 PCr.LJ 1677) and "Shamon Jatoi v. The State" (1996 PCr.LJ 783). In the case of "Amin" supra, at page No.1679, it was observed as under:--

"The trial Court while declining the bail to the applicant has not considered the fourth proviso to section 497, Cr.P.C. in its correct perspective because simplicitor conviction of an accused in any offence would not deprive him of the bail being granted on the ground of delay in conclusion of the trial. In order to bring the case of a person within the four corners of the fourth proviso it is essential that he should be a

previously convicted offender for an offence punishable with death or imprisonment for life. Obviously the applicant was convicted for an offence under section 324, P.P.C., maximum punishment for which is 10 years. Hence, such conviction of the appellant will not come in his way for being released on bail under third proviso".

Similar view was taken in the cases of the "Muhammad Abid Farooq" and "Shamon Jatoi" ibid.

7. Learned Deputy Prosecutor General assisted by learned counsel for the complainant has next argued that the words "hardened, desperate or dangerous criminals" have also been used in the above-mentioned provision of law and as the petitioner is a previously convicted offender, therefore, he can be termed as a hardened, desperate and dangerous criminal, thus, he is not entitled to the relief of post arrest bail. There is no substance in the abovementioned argument because if the intention of the legislature was that a hardened, desperate or dangerous criminal means a person, who is a previously convicted offender, then there was no need to mention separately about the previously convicted offenders and the category of cases, (punishable with death or imprisonment for life) in which he has previously been convicted.

It is also clear from the perusal of section 497, Cr.P.C. that the previous conviction of an offender even for an offence punishable with death or imprisonment for life, would create a bar against the grant of bail to the said offender, if his bail petition is filed under 3rd proviso of the said provision i.e., on the ground of expiry of statutory period mentioned therein and delay in the conclusion of his trial, whereas there is no such restriction on the grant of bail to a previously convicted offender, if his case is covered under the remaining provisions of section 497, Cr.P.C. For example if the case of an accused is one of further inquiry covered under section 497(2), Cr.P.C., then his previous conviction even for offence punishable with death or imprisonment for life would not create any bar against the grant of bail to the said accused. We may take here the example of a case of murder which has been lodged against the accused "A"

and as per contents of the FIR of the said case, only the accused "A" was present at the spot, at the time of occurrence. Single fire arm injury on the body of the deceased is attributed to the said accused. It is not mentioned in the FIR that any other accused was also present at the crime scene, at the time of occurrence. The complainant party of the said case, after three months of the registration of FIR, malafidely implicates another accused "B" in the case with the allegation that he was also present at the spot along with accused "A", at the time of occurrence. No active role during the occurrence has been attributed to the accused "B" and as per improved prosecution version, he was merely present empty handed, at the spot, at the time of occurrence. In the abovementioned situation, it is the fittest case for grant of bail to the accused "B", on the ground of further inquiry as envisaged under section 497(2), Cr.P.C., but the argument is advanced that the accused "B" is a previously convicted offender for offence under section 302(b), P.P.C. and he was awarded life imprisonment in an earlier case, therefore, he is not entitled to the relief of bail. The question arises that as to whether the accused "B" can be refused the relief of bail merely on the ground that he was a previously convicted offender for an offence punishable with imprisonment for life, though his case is one of further inquiry, covered under section 497(2), Cr.P.C. The answer is in the negative because there is no legal restriction on the grant of bail to an accused due to his previous conviction for offence punishable with death or imprisonment for life, if his case is covered under section 497(2), Cr.P.C. Similarly, if an accused for offence under section 489-F, P.P.C., is behind the bars for a period of more than two (02) years and he did not play any role in the delay in the conclusion of his trial. He files a petition for post arrest bail under third proviso of section 497(1), Cr.P.C., on the ground of delay in the conclusion of his trial. His bail petition cannot be dismissed on the ground that he is a previously convicted offender for offence under section 489-F, P.P.C., in an earlier case because he has not been previously convicted for an offence punishable with death or imprisonment for life. In the light of above discussion, I am of the considered view that previous conviction of an accused does not create an absolute bar against the acceptance of his bail petition and the same is only relevant if he is a

previously convicted offender for an offence punishable with death or imprisonment for life and he has filed his bail petition only on the ground of expiry statutory period, mentioned in 3rd proviso of section 497(1), Cr.P.C. However, previous conviction of an accused is not relevant in the bail petitions falling under the other provisions of section 497, Cr.P.C. or if he has filed his bail petition under 3rd proviso of section 497(1), Cr.P.C. and he is not a previously convicted offender for an offence, punishable with death or imprisonment for life. It has lastly been argued by the learned Deputy Prosecutor General assisted by learned counsel for the complainant that in the case of "Tariq Bashir and 5 others v. The State" (PLD 1995 Supreme Court 34), the Hon'ble Supreme Court of Pakistan has observed that a previous convict is not entitled to the relief of bail. It is noteworthy that while delivering the abovementioned judgment in the case of "Tariq Bashir" supra, the Hon'ble Supreme Court of Pakistan has given the following exceptions for refusal of bail to an accused, whose case does not fall within the ambit of prohibitory clause of section 497, Cr.P.C.:--

(a) where there is likelihood of abscondence of the accused;

(b) where there is apprehension of the accused tampering with the prosecution evidence;

(c) where there is danger of the offence being repeated if the accused is released on bail; and

(d) where the accused is a previous convict.

It is most respectfully observed that the above-mentioned judgment of the Hon'ble Supreme Court of Pakistan was delivered on 31.08.1994, whereas the 4th proviso of section 497(1), Cr.P.C., has been enforced on 20.04.2011, through Act VIII of 2011. The said proviso was not available on the statute books, when the judgment in the case of Tariq Bashir ibid, was passed by the Hon'ble Supreme Curt of Pakistan. On 31.08.1994, 3rd and 4th provisos of section 497(1), Cr.P.C. stood omitted through Ordinance LIII of 1994 dated 25.07.1994, therefore, at the time of judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Tariq

Bashir ibid, 3rd and 4th provisos of section 497(1), Cr.P.C., were not available on the statute books. Prior to their omission vide Ordinance LIII of 1994, dated 25.07.1994, 3rd and 4th provisos of section 497(1), C.P.C., were added through Ordinance XXXII of 1983 dated 26.12.1983. 4th proviso of section 497(1), Cr.P.C., added through Ordinance XXXII of 1983, which remained on the statute books till 25.07.1994, is reproduced hereunder:--

> "Provided further that the provisions of the third proviso to this subsection shall not apply to a previously convicted offender or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal."

It is, therefore, evident that at the time of pronouncement of the judgment in the case of Tariq Bashir ibid, 3rd and 4th provisos of section 497(1), Cr.P.C., stood omitted vide Ordinance LIII of 1994, dated 25.07.1994, whereas prior to that the words "for an offence punishable with death or imprisonment for life" were not used in the relevant law, in respect of a previously convicted offender. Earlier under the 4th proviso of section 497(1), Cr.P.C., it was provided that provisions of 3rd proviso of section 497(1), Cr.P.C., shall not apply to a previously convicted offender, without specifying the category of offences, in which the previous conviction was passed against the accused. However, later on through Act XIX of 1994 dated 14.11.1994, 3rd and 4th provisos were again added in section 497(1), Cr.P.C. 4th proviso of section 497(1), Cr.P.C., which was added in a new form through Act XIX of 1994, reads as under:--

> "Provided further that the provisions of the third proviso to this subsection shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or involved in terrorism"

8. As it was clarified through the above-mentioned amendment/addition dated 14.11.1994 vide Act XIX of 1994, in section 497(1), Cr.P.C., that previous

conviction of an offender only for offence punishable with death or imprisonment for life shall create bar against the grant of bail to the said accused, on the ground of expiry of statutory period, mentioned in 3rd proviso of section 497(1), Cr.P.C., therefore, in the cases of Amin and Shamon Jatoi supra, which were decided after the abovementioned addition/amendment of 4th proviso of section 497(1), Cr.P.C., it was held that to bring the case of an accused within the four corners of 4th proviso of section 497(1), Cr.P.C, the accused should be a previously convicted offender for offence punishable with death or imprisonment for life and as the accused of the said cases were not previously convicted offenders for offences punishable with death or imprisonment for life, therefore, they were granted post arrest bails in the said cases, despite of their previous convictions for other offences. It may not be out of place to mention here that 3rd and 4th provisos of section 497(1), Cr.P.C., were again omitted vide Ordinance LIV of 2001 dated 10.10.2001, however, as mentioned earlier 3rd and 4th provisos of section 497(1), Cr.P.C., were added again in its present form (as mentioned in paragraph No.6, of this order) vide Act VIII of 2011 dated 20.04.2011.

9. Now the basic law has itself clarified that in what category of cases of previous conviction, the bail of an accused can be declined. Moreover, the Hon'ble Supreme Court of Pakistan in the subsequent judgments reported as "Mitho Pitafi v. The State" (2009 SCMR 299) and "Qamar alias Mitho v. The State and others" (PLD 2012 Supreme Court 222), has already indirectly over ruled the findings given in the case of Tariq Bashir supra that "post arrest bail cannot be granted to an accused, if there is likelihood of his abscondence" and observed that if an accused is entitled to the relief of bail on merits, then the said relief cannot be denied to him merely on the ground of his abscondance. Similarly the other observations given in the case of Tariq Bashir ibid that "the relief of bail cannot be extended to an accused, if there is danger that he will repeat the offence" have also been indirectly over-ruled by the Hon'ble Supreme Court of Pakistan through the subsequent judgments reported as "Jamal-ud-Din alias Zubair Khan v. The State" (2012 SCMR 573) and "Muhammad Rafique v. The State" (1997 SCMR

412), wherein it was held that mere involvement of an accused in some other cases by itself is no ground to refuse bail to him, if he is entitled to the said relief on merits. In the light of above discussion, there is no substance in the argument of learned Deputy Prosecutor General assisted by learned counsel for the complainant that merely on the ground of previous conviction of the present petitioner in the above-mentioned case FIR No.104/2016, he is not entitled to the relief of bail. Moreover, I have already observed that prima facie registration of the instant FIR against the petitioner amounts to double jeopardy.

10. As the offences mentioned in the FIR, do not fall within the ambit of prohibitory clause of section 497, Cr.P.C., therefore, keeping in view the law laid down in the cases of Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR 1488) and "Muhammad Tanveer v. The State and another" (PLD 2017 Supreme Court 733), ordaining that where a case falls within non-prohibitory clause, the concession of granting bail must favorably be considered and should only be declined in exceptional cases and as there is no exceptional ground in this case to refuse bail to the petitioner, therefore, the instant petition is allowed. The petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rupees one hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

MH/N-20/L **Bail allowed.**

PLJ 2019 Cr.C. (Note) 2

[Lahore High Court, Bahawalpur Bench]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD AHMAD--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 2159-B of 2016, decided on 10.10.2016.

Punjab Pure Food Ordinance, 1960--

----S. 23--Constitution of special Courts--U/S. 23-L(8) of Ordinance, 1960, if a Special Court is not established in an area, then a Magistrate exercising powers U/S. 30, of Cr.P.C. shall be deemed to be a special Court under Ordinance--The Additional Sessions Judge had jurisdiction to entertain bail before arrest--Case remanded back to Addl. Session Judge for decision afresh on application of pre-arrest bail. [Para 3] A

Mr. Jamshad Iqbal Khakwani, Advocate with Petitioner.

Mr. Khalid Pervaiz Opal, Dy. PG on Court's Call.

Date of hearing: 10.10.2016.

ORDER

The petitioner Muhammad Ahmad @ Shoaib through instant petition seeks pre-arrest bail in case FIR No. 481 dated 15.9.2016 registered at Police Station Sadar Khanpur District Rahim Yar Khan offences under Sections 269/270 of PPC read with Section 23 (C)(D)(E) of Punjab Pure Food Ordinance, 1960.

2. Learned counsel for the petitioner submits that the learned Addl. Sessions Judge, Khanpur has illegally dismissed the application for pre-arrest bail of the petitioner *vide* order dated 6.10.2016 on account of lack of jurisdiction.

3. Learned Deputy Prosecutor General, present in the Court, has informed that no special Court to deal with the cases under Pure Food Ordinance, 1960 has been constituted in the District Rahim Yar Khan. Adds that under Section 23-L(8) of the

Punjab Pure Food Ordinance, 1960, if a special Court is not established in any area then a Magistrate exercising power under Section 30 of the Criminal Procedure Code, 1898, shall be deemed to be a special Court under the Ordinance *ibid* and, as such, the learned Addl. Sessions Judge, Khanpur had the jurisdiction to entertain the bail before arrest of the petitioner.

4. In the light of above, the order dated 6.10.2016 passed by the learned Addl. Sessions Judge, Khanpur is declared to be illegal and void. The case is remanded back to the learned Addl. Sessions Judge, Khanpur for decision afresh on the application of the petitioner for grant of pre-arrest bail on merits after providing opportunity of hearing to the all concerned. In the meanwhile, the petitioner is granted protective pre-arrest bail till 18.10.2016 in order to enable him to approach the Court of learned Addl. Sessions Judge, Khanpur for grant of pre-arrest bail. It is however, clarified that this order shall stand automatically lapsed on the expiry of aforementioned date.

5. This petition stands disposed of.

Crl. Misc. 1 of 2016.

6. Dispensation sought for is allowed subject to all just and legal exceptions. C.M. stands disposed of.

(K.Q.B.) **Petition disposed of.**

PLJ 2019 Lahore 211 (DB)

***Present*: MALIK SHAHZAD AHMAD KHAN AND MIRZA VIQAS RAUF, JJ.**

QAISER AMIN BUTT--Petitioner

versus

NATIONAL ACCOUNTABILITY BUREAU through D.G. Lahore and another--Respondents

W.P. No. 255418 of 2018, decided on 23.1.2019.

National Accountability Ordinance, 1999 (XVIII of 1999)--

----S. 26(a)--Constitution of Pakistan, 1973, Art. 199--Tender of Pardon--Bail grant of--Powers of Chairman NAB--Investigation--Chairman, NAB is empowered under Section 26(a) of National Accountability Ordinance, 1999 to tender a full or conditional pardon to a person with a view to obtain evidence supposed to have been directly or indirectly concerned or privy to any offence, at any stage of inquiry/investigation or trial. [P. 214] A

National Accountability Ordinance, 1999 (XVIII of 1999)--

----S. 26(a)(i)--Constitution of Pakistan, 1973, Art. 199--Constitutional Petition--Bail, grant of--Tender of Pardon, grant of--Further inquiry--When an accused is granted full pardon then he shall not be tried for offences in respect of which pardon was granted--As full pardon has been granted to petitioner in this case and he is not to be tried for offence(s) of this case, therefore, no useful purpose shall be served by keeping petitioner behind bars as a punishment--As Chairman NAB, while exercising his powers bestowed upon him under Section 26(a) read with Section 26(c)(i) of National Accountability Ordinance, 1999 has granted full pardon to petitioner which has further been supported by statement of petitioner recorded under Section 164, Cr.P.C., therefore, this Court cannot withhold its benefit even at bail stage.

[Pp. 215 & 216] B & C

PLD 1975 Karachi 159 iref.

M/s. Peer Masood Chishti, Sahibzada Muzzafir Ali, Mir Haroon Rashid and Waqas Umar Sial, Advocates for Petitioner.

Syed Faisal Raza Bukhari, Special Prosecutor for NAB alongwith *Khawar Ilyas*, Director, NAB, *Zavar Manzoor*, Deputy Director/ Investigating Officer, NAB.

Mian Tariq Shafique Bhandara, Deputy Attorney General for Pakistan.

Date of hearing: 23.1.2019.

ORDER

The petitioner Qaiser Amin Butt/Director of M/s. Paragon City (Pvt.) Ltd. who is in the custody, through the instant petition filed in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, prays for his release on post arrest bail in Inquiry No. 1(9)HQ/1832/NAB-L dated 10.1.2018 facing the allegation that he alongwith other co-accused persons Launched Paragon City (Pvt.) Limited Housing Scheme, Lahore in the year 2005 on the basis of fake and forged documents which scheme in the year 2013, was merged into Lahore Development Authority but record of the same was not transferred to LDA. He is also facing the allegation that he with the connivance of his co-accused, cheated and defrauded the public at large and grabbed a sum of Rs. 250 million on the pretext of allotment of plots in Paragon Housing Scheme, Lahore by issuing bogus allotment letters. During the physical remand, it transpired that the petitioner being Director of M/s. Paragon City (Pvt.) Ltd. aided, connived, assisted and abetted Nadeem Zia, co-accused and others in commission of offences of cheating the public at large and misappropriation of funds collected from the general public.

2. Learned counsel for the petitioner submits that the petitioner has made full disclosure of the facts through his statement recorded under Section 164, Cr.P.C., in consequence whereof full pardon has been granted to him by the Chairman, NAB in terms of Section 26(a)(i) of the National Accountability Ordinance, 1999, and he (petitioner) is also committed to remain bound to appear as prosecution witness before the learned Accountability Court, Lahore where the reference would be filed. He further submits that since the reference has yet not been filed, therefore, further incarceration of the petitioner will not serve any useful purpose, particularly when the petitioner is not required for further investigation/inquiry into the matter. Lastly, he submitted that the NAB authority has also no objection on release of the petitioner from the jail, therefore, the petitioner may be granted post arrest bail.

3. On the other hand, the learned Special Prosecutor for NAB assisted by Khawar Ilyas, Director NAB, Lahore submits that since the Chairman, NAB, while exercising powers under Section 26(a)(i) of the National Accountability Ordinance, 1999, has granted full pardon to the petitioner, therefore, he has no objection on acceptance of this petition and release of the petitioner in consequence of the same.

4. Arguments heard. Record perused.

5. From the arguments advanced by learned counsel for the petitioner as well as the learned Law Officers and scanning of the record, it is gathered that Qaiser Amin Butt who is Director of M/s. Paragon Housing Society, Lahore is facing the allegation of aiding/abetting the co-accused Nadeem Zia and others who, in connivance with the petitioner embezzled a huge amount from the general public on the pretext of allotment of plots in the abovementioned housing society, which was not registered in accordance with law with the concerned departments i.e. LDA and TMA Aziz Bhatti Town, Lahore and at the time of merger of the abovementioned Paragon Housing Society into Lahore Development Authority, its documents were not handed over to LDA and the accused persons, allotted so many commercial plots on the basis of fake/forged documents.

6. It has surfaced on record that during the course of investigation, the petitioner requested for tender of pardon under Section 26 of the National Accountability Ordinance, 1999, which request of the petitioner has been accorded by the Chairman, NAB on 05.12.2018 and in consequence of the same statement of the petitioner under Section 164, Cr.P.C. has also been recorded by the learned Judicial Magistrate concerned. As a sequel to the above, the Chairman NAB has granted pardon to the petitioner.

7. The Chairman, NAB is empowered under Section 26 (a) of the National Accountability Ordinance, 1999 to tender a full or conditional pardon to a person with a view to obtain evidence supposed to have been directly or indirectly concerned or privy to any offence, at any stage of inquiry/investigation or trial. This provision contained the word **"Notwithstanding anything contains in the Code"** meaning thereby that being a provision of Special Law, the NAB Ordinance, 1999 shall have a preference over the Code of Criminal Procedure, 1898. The further perusal of this provision shows that it also deals with the effect of accepting such tender of pardon

to a person at the stage of inquiry/investigation or trial and it also stipulates that he would not be tried if had been granted full pardon, otherwise, would be tried partially be awarding a punishment or penalty not higher to the one specified in the law. Section 26 of the National Accountability Ordinance, 1999 is reproduced as under:--

"26. **Tender of Pardon[.. ....]**:

(a) Notwithstanding anything contained in the Code, at any stage of [inquiry, investigation or trial], the Chairman [NAB] may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise.

(b) Every person accepting a tender of pardon under sub-section (a) shall be examined [by a Magistrate and shall also be examined] as a witness in the subsequent trial.

(c) Subject to sub-section (d), the person to whom pardon has been granted under this section shall not--

(i) In the case of a full pardon be tried for the offence in respect of which the pardon was granted; and

(ii) In the case of conditional pardon be awarded a punishment of penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty authorized by law.

(d) Where the Chairman NAB certifies that in his opinion, any person who has accepted such tender has, either by willfully concealing anything essential or by giving false evidence through willful or reckless mis-statement, not complied with the condition on which the tender [of pardon] was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence, which he knows or ought or know is false.

(e) Any statement made before [a Magistrate] by a person who has accepted a tender of pardon may be given in evidence against him at [the] trial.

It is evident from the perusal of sub-section (c)(i) of Section 26 of the National Accountability Ordinance, 1999, that when an accused is granted full pardon then he shall not be tried for the offences in respect of which pardon was granted. As the full pardon has been granted to the petitioner in this case and he is not to be tried for the offence(s) of this case, therefore, no useful purpose shall be served by keeping the petitioner behind the bars as a punishment. Although, under Section 337, Cr.P.C. it is provided that an accused to be kept in confinement till final decision of the case but Section 3 of the National Accountability Ordinance, 1999 provides that the provisions of the said Ordinance shall override the other laws. As mentioned earlier, the NAB Ordinance, 1999 is a special law and in the light of Section 26(c)(i), no trial of the petitioner is to be conducted in this case. as he has been granted full pardon by the Chairman, NAB, therefore, bar contained in Section 337(3), Cr.P.C. is not applicable to the case of the present petitioner. Even otherwise, the bar under Section 337(3), Cr.P.C. is not absolute and bail may be granted to an approver under Section 561-A, Cr.P.C. in the cases of hardships or injustice as observed in the case of *"Abdul Latif vs. The State"* (PLD 1975 Karachi 159). As the petitioner is not to be tried in this case, therefore, keeping him behind the bars for indefinite period would amount to hardship and injustice.

8. As the Chairman NAB, while exercising his powers bestowed upon him under Section 26(a) read with Section 26(c)(i) of the National Accountability Ordinance, 1999 has granted full pardon to the petitioner which has further been supported by the statement of the petitioner recorded under Section 164, Cr.P.C., therefore, this Court cannot withhold its benefit even at bail stage. In the wake of abovementioned facts, the case of the petitioner squarely falls within the ambit of further inquiry entitling him to the concession of post arrest bail.

9. For what has been discussed above, the petition is hand is allowed and Qaiser Amin Butt, petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,000,000/- (Rupees One million only) with two sureties in the like amount to the satisfaction of the learned trial Court.

10. However, it is made clear that the petitioner shall surrender his passport with the NAB and his name be placed in the Exit Control List (ECL) forthwith before his release.

(M.M.R.) **Petition allowed.**

PLJ 2019 Cr.C. 511

[Lahore High Court, Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD IQBAL SHAH--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 7851-B of 2019, decided on 25.2.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302, 109, 148 & 149--Post-arrest bail--Grant of--Allegation of--Fire shot on head of deceased--Motive behind occurrence--Principle of consistency--Complainant has implicated, as many as, four nominated and two unknown accused persons *i.e.* total six accused persons in this case--Out of said six accused persons, three accused persons have been assigned specific roles of making firearm injuries on body of deceased--It is noteworthy that role of making one fire shot each on head of deceased was attributed to petitioner and co-accused but according to postmortem report of deceased, there was only one entry wound *i.e.* injury No. 1 on her head--Co-accused had not made any fire shot at deceased, whereas, petitioner has been found guilty and 12 bore gun has been recovered from his possession but fact remains that one injury on head of deceased has been assigned to two accused persons therefore, it is difficult to determine at this stage that as to whether said injury has been caused by petitioner or abovementioned co-accused--As per prosecution case four empties were recovered from spot and according to report of Punjab Forensic Science Agency, all said empties were found to be fired from gun recovered at instance of co-accused--Petition was allowed. [P. 513] A, B & C

Mr. Akhtar Hussain Bhatti, Advocate for Petitioner.

Mr. Nisar Ahmad Virk, DPG for State.

Syed Ali Raza, Advocate for Complainant.

Date of hearing: 25.2.2019.

ORDER

The petitioner Muhammad Iqbal Shah through the instant petition seeks post arrest bail in case FIR No. 20 dated 25.01.2018 registered at P.s: Satgarah District Okara offences under Sections 302/109/148/149 of PPC.

2. Arguments heard. Record perused.

3. As per brief allegations levelled in the FIR, on the intervening night of 24/25.01.2018 at about 01:15 a.m. (night), *Mst.* Sajida Perveen complainant came to see her daughter *Mst.* Sarwar Bibi deceased at her house. At the mid-night, she (complainant) along with the PWs woke up on the report of fire shot and saw that Muhammad Ahsan co-accused while armed with repeater gun, made a fire shot which landed on the head of her daughter, namely, *Mst.* Sarwar Bibi. The second fire shot was made by Muhammad Iqbal petitioner with repeater gun which also landed on the head of *Mst.* Sarwar Bibi deceased. The third fire shot made by Muhammad Saleem co-accused with his Carbine landed on the left flank of *Mst.* Sarwar Bibi deceased who succumbed to the abovementioned injuries at the spot. Motive behind the occurrence was the illicit relationship between the petitioner and one *Mst.* Meraj Bibi, due to which the petitioner and his wife *Mst.* Sarwar Bibi deceased had a rift with each other.

4. I have noted that for the murder of one deceased, namely, *Mst.* Sarwar Bibi, the complainant has implicated, as many as, four nominated and two unknown accused persons *i.e.* total six accused persons in this case. Out of the said six accused persons, three accused persons have been assigned the specific roles of making firearm injuries on the body of *Mst.* Sarwar Bibi deceased. It is noteworthy that the role of making

one fire shot each on the head of *Mst.* Sarwar Bibi deceased was attributed to Muhammad Iqbal Shah petitioner and Muhammad Ahsan co-accused but according to the postmortem report of *Mst.* Sarwar Bibi deceased, there was only one entry wound *i.e.* injury No. 1 on her head. This Court has already granted post arrest bail to the abovementioned co-accused, namely, Muhammad Ahsan *vide* order dated 26.11.2018 in Crl. Misc. No. 235279-B of 2018, inter-alia, on the ground that the prosecution has attributed two injuries with repeater gun at the head of *Mst.* Sarwar Bibi deceased to two accused persons, namely, Muhammad Ahsan co-accused and Muhammad Iqbal Shah petitioner, whereas, there was only one entry wound on the head of the deceased therefore, it is still to be determined in this case during the trial that as to whether the single injury on the head of the deceased was caused by the present petitioner or the abovementioned co-accused, namely, Muhammad Ahsan. The case of the petitioner is at par with the case of abovementioned Muhammad Ahsan co-accused therefore, the petitioner is also entitled to the relief of post arrest bail on the principle of consistency. Although it is argued by the learned DPG assisted by learned counsel for the complainant that according to the police investigation, abovementioned Muhammad Ahsan co-accused had not made any fire shot at the deceased, whereas, the petitioner has been found guilty and 12 bore gun has been recovered from his possession but the fact remains that one injury on the head of the deceased has been assigned to two accused persons therefore, it is difficult to determine at this stage that as to whether the said injury has been caused by the petitioner or the abovementioned co-accused. It is further noteworthy that as per prosecution case four empties were recovered from the spot and according to the report of the Punjab Forensic Science Agency, Lahore, all the said empties were found to be fired from the gun recovered at the instance of Muhammad Saleem co-accused.

5. Keeping in view all the aforementioned facts, prosecution case against the petitioner is one of further inquiry therefore, this petition is **allowed** and the petitioner

is admitted to post arrest bail subject to his furnishing the bail bonds in the sum of Rs. 200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Petition allowed.

PLJ 2019 Cr.C. 1392

[Lahore High Court, Lahore]

***Present*: MALIK SHAHZAD AHMAD KHAN, J**

MUHAMMAD BASHIR AHMAD--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No.22135/B of 2019, decided on 29.4.2019

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, 1860, S. 489-F--Bail grant of--Dishonored of cheque due to insufficient funds--Entire prosecution case is based on documentary evidence (dishonoured cheque and slip), which is already in possession of the prosecution and as such there is no chance of tampering with the same, therefore, in such circumstances no useful purpose shall be served by keeping the petitioner behind the bars--Bail allowed. [P. 1393] A

Rai Zamir-ul-Hassan Kharal Advocate for Petitioner.

Ch. Muhammad Ishaq, Deputy Prosecutor General for State.

Mr. Jalal Tariq Joiya Advocate for Complainant.

Date of hearing : 29.4.2019.

ORDER

Through the instant petition, the petitioner, namely, Muhammad Bashir Ahmad seeks post arrest bail in case FIR No.95 dated 23.2.2019, offence under Section 489-F, PPC, registered at Police Station Mustafa Abad, Kasur.

2. As per brief allegations levelled in the FIR, the petitioner purchased steel sheets for the value of Rs. 10,68,324/- from the complainant and in lieu of the payment of said material, he issued a cheque of the abovementioned amount in the name of the complainant which was presented for encashment but the same was dishonoured due to *'insufficient funds'*, hence, the abovementioned FIR.

3. Arguments heard. Record perused.

4. The entire prosecution case is based on documentary evidence (dishonoured cheque and slip), which is already in possession of the prosecution and as such there is no chance of tampering with the same, therefore, in such circumstances no useful purpose shall be served by keeping the petitioner behind the bars. Reference in this respect may be made to the case of *"Saeed Ahmad V. The State"* (1996 SCMR 1132). Furthermore, the punishment provided for the offence under Section 489-F, PPC is imprisonment, which may extend to three years. The offence mentioned in the FIR does not fall within the ambit of prohibitory clause of Section 497 Cr.P.C and grant of bail in such like cases is a rule while refusal is an exception. Learned Deputy Prosecutor General has not pointed out any exceptional ground to refuse bail to the petitioner. Mere involvement of huge amount is no ground to refuse bail to the petitioner. Reference in this context may be made to the case of *"Riaz Jafar Natiq v. Muhammad Nadeem Dar and others"* (2011 SCMR 1708). Although learned Deputy Prosecutor General assisted by learned counsel for the complainant has argued that the petitioner is involved in some other criminal cases of similar nature but it is by now well settled that mere involvement of an accused in some other cases is by itself no ground to refuse bail to him, if otherwise, he is entitled to the said relief, on merits. Reference in this context may be made to the cases of *"Jamal-ud-Din alias Zubair Khan Vs. The State"* (2012 SCMR 573) & *"Muhammad Rafique Versus The State"* (1997 SCMR 412). Thus, Keeping in view the law laid down in the cases of *"Zafar Iqbal v. Muhammad Anwar and others"* (2009 SCMR 1488) & *"Muhammad Tanveer v. The State and another"* (PLD 2017 Supreme Court 733), ordaining that where a case falls within non-prohibitory clause, the concession of granting bail must favorably be considered and should only be declined in exceptional cases, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 100,000/- (Rupees One Hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(S.A.B.) **Bail allowed.**

2018 C L C 748

[Lahore (Rawalpindi Bench)]

Before Malik Shahzad Ahmad Khan, J

Mst. AMNA BIBI and 5 others----Petitioners

Versus

Mst. NASEEM AKHTAR----Respondent

Civil Revision No.646-D of 2012, heard on 16th June, 2017.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Suit for pre-emption---Talbs, performance of---Attorney of Parda-Nasheen lady/plaintiff to adduce evidence on her behalf---Scope--- Execution of power-of-attorney after making of Talbs---Effect---Plea of plaintiff being a Parda-Nasheen lady was not taken in the plaint and power-of-attorney---Effect---Non-production of concerned postman as a witness---Effect---Defendants contended that Talb-i-Muwathibat was based on personal knowledge which evidence could not be adduced through an attorney so the two courts below had wrongly decreed the suit of the plaintiff---Validity---Plaintiff lady produced her husband as attorney who although mentioned the date and timing of making of Talb-i-Muwathibat by the plaintiff but did not mention the place of making of the said Talb---Plaintiff was duty bound to prove the specific date, time and place of making Talb-i-Muwathibat in order to establish that she made the Talbs in the same Majlis, before its dispersion, where she received information about the sale of property which she failed to do---Plaintiff though produced Registry Clerk and the Postmaster as witnesses but the concerned postman who stately effected the service of notice of Talb-i-Ishhad on the predecessor-in-interest of the defendants had not been produced in the witness box, which was fatal to the case of the plaintiff---Special power-of-attorney, showed that plaintiff had simply mentioned that she was a female, therefore, she had appointed her husband as her attorney to adduce evidence on her behalf and she had nowhere mentioned in the said document that she was Parda-Nasheen, sick or old lady---No such ground was taken by the plaintiff in her plaint, therefore, she could not lead evidence beyond her pleadings---Record revealed that special power-of-attorney was executed in favour of husband of the plaintiff after about two years from the making of Talbs---Husband of the plaintiff being not attorney of the plaintiff at the time of making of Talbs therefore, he could not prove the performance of Talbs, in the case,

on the behalf of the plaintiff---High Court set aside impugned Judgment and decree passed by the two Courts below---Revision was accepted accordingly.

Mian Pir Muhammad and another v. Faqir Muhammad PLD -2007 SC 302; Allah Ditta through L.Rs and others v. Muhammad Anar 2013 SCMR 866; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Bashir Ahmed v. Ghulam Rasool 2011 SCMR 762; Province of Punjab through Chief Secretary and 5 others v. Malik Ibrahim and sons and another 2000 SCMR 1172; Binyameen and 3 others v. Chaudhry Hakim and another 1996 SCMR 336; Salma and another v. Manzoor Hussain and another 1996 CLC 623; Mst. Salma Bibi v. Manzoor Hussain and others 1996 SCMR 1067; Mst. Waziran alias Faiq Elahi v. Abdul Sattar and others 1996 CLC 682; Muhammad Hanif v. Mst. Munawar Bi alias Munawar Noor1999 SCMR 2230; Falak Sher Khan and another v. Mir Qalam Khan and another 1995 CLC 1077 and Mst. Lalan Bibi and others v. Muhammad Khan and others 2007 SCMR 1193 ref.

Ms. Raheela Butt for Petitioners.

Nemo for Respondent.

Date of hearing: 16th June, 2017.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--- This civil revision under section 115 of C.P.C. has been filed against the impugned judgment and decree dated 20.02.2010, passed by learned Civil Judge, Sohawa, whereby the suit for possession through the right of pre-emption, filed by Mst. Naseem Akhtar (respondent/plaintiff), was decreed, as well as, against the impugned judgment and decree dated 30.05.2012, passed by the learned Additional District Judge, Jhelum, whereby the appeal filed by Mst. Amna Bi and 05 others (petitioners/ defendants) against the abovementioned judgment and decree dated 20.02.2010, passed by the learned Civil Judge, Sohawa, was dismissed.

2. As per brief facts of the present case, the respondent/plaintiff Mst. Naseem Akhtar, filed a suit for possession through the right of pre-emption, in respect of the land, fully described in the head-note of the plaint. The predecessor-in-interest of the petitioners/defendants namely Muhammad Shafi contested the said suit by filing his written statement but he died during the pendency of the suit and after his death the petitioners being legal heirs of Muhammad Shafi were impleaded as defendants in

this case. Out of the divergent pleadings of the parties, the learned Civil Judge, Sohawa framed the following issues:-

ISSUES.

1. Whether the suit is mala fide? OPD

2. Whether Rs.50,000/- was bonafidely fixed as sale price of the suit property and actually paid? OPD

3. If issue No.2 is answered in the aegative, what was the market value of the suit property at the time of alleged sale? OPPs -

4. Whether the plaintiff has superior right of pre-emption against the defendant? OPP

5. Whether the plaintiff has fulfilled the requirements of Talbs? OPP

6. Whether the plaintiff is entitled to the decree of possession through pre-emption as prayed for? OPP

7. Relief.

After recording of evidence and hearing arguments of learned counsel for the parties, the learned Civil Judge, Sohawa decreed the suit, filed by the respondent/plaintiff vide the impugned judgment and decree dated 20.02.2010. An appeal was filed by the petitioners/defendants against the said judgment and decree of the learned Civil Judge, Sohawa, which was dismissed by the learned Additional District Judge, Jhelum vide the impugned judgment and decree dated 30.05.2012, hence the present civil revision before this court.

3. On the last date of hearing the instant case was adjourned on the request of learned counsel for the respondent as he wanted to further prepare his case but today despite repeated calls since morning with different intervals, no one has entered appearance on behalf of the respondent. The name of learned counsel for the respondent is duly reflected in the cause list issued for today but there is no intimation regarding any reason of his absence. The court time is about to be over. As it is a civil revision, which pertains to the year 2012 and the same has been printed in the red cause list issued by the office regarding the category of oldest cases and it has specifically been mentioned in the said list that no adjournment will be granted in the "oldest case" category, therefore, the respondent is proceeded against ex-parte and I

proceed to decide the instant civil revision after hearing arguments of learned counsel for the petitioner and perusal of the record.

4. It is contended by learned counsel for the petitioners that the respondent/plaintiff has miserably failed to prove the performance of Talbs in accordance with the law; that respondent/plaintiff herself did not appear in the witness box and as the fact regarding the making of Talb-i-Muwathibat is based upon personal knowledge which cannot be proved through attorney, therefore, the suit filed by the respondent/plaintiff was liable to be dismissed; that the courts below have wrongly held in their impugned judgments that as the respondent/plaintiff was an old Parda Nasheen lady, therefore, she can produce evidence through her attorney because the abovementioned ground was not mentioned in the plaint of the respondent; that the attorney deed (Ex.P3) was executed by the respondent/plaintiff in favour of her husband namely Muhammad Jawan (PW-3) on 13.01.2007, whereas the Talbs in this case were performed in the year 2005 and as the attorney deed (Ex.P3) was not executed by the respondent/plaintiff before the making of Talbs, therefore, no evidence about the performance of Talbs can be produced in this case by the respondent/plaintiff through her attorney; that Muhammad Jawan (PW-3), who was attorney of the respondent/plaintiff appeared in the witness box as PW-3 but he did not mention the place of making of Talb-i-Muwathibat, which is fatal to the case of the respondent/plaintiff; that the respondent/plaintiff did not produce the postman in the witness box in order to establish that the notice of Talb-i-Ishhad was served upon the predecessor-in-interest of the petitioners/defendants and as such the suit of the respondent/plaintiff was liable to be dismissed; that the predecessor-in-interest of the petitioners was also a co-sharer in the suit land and this fact was admitted by the attorney of the respondent/ plaintiff namely Muhammad Jawan (PW-3) during his cross-examination but the Courts below have misread the evidence of the above-mentioned witness while passing the impugned judgments and decrees; that the impugned judgments and decrees have been passed against the law and facts of the present case and the same are result of misreading and non reading of evidence, therefore, the same may be set aside. In support of her contentions, learned counsel for the petitioners has placed reliance on the judgments reported as "Mst. Lalan Bibi and others v. Muhammad Khan and others" (2007 SCMR 1193), "Sh. Sajid Mahmood and others v. Fazal Ahmed and others" (2004 SCMR 86), "Falak Sher Khan and another v. Mir Qalam Khan and another" (1995 CLC 1077), "Mst. Gul Rangeena v.

Khushal Khan" (1999 CLC 831) and "Allah Ditta through L.Rs and others v. Muhammad Anar" (2013 SCMR 866)

5. Arguments heard. Record perused.

6. The pre-emption is a feeble right and the respondent/pre-emptor was bound to prove the performance of Talbs strictly in accordance with the law, as provided under section 13 of the Punjab Pre-emption Act, 1991. I have noted that Muhammad Jawan, who was attorney of the respondent/plaintiff appeared in the witness box as PW-3. Although he has mentioned the date and time of making of Talb-i-Muwathibat by the respondent/plaintiff but he did not mention the place of making of the said Talb. The abuvementioned omission on the part of Muhammad Jawan (PW-3) was fatal to the case of respondent/plaintiff because the respondent/plaintiff was duty bound to prove the specific date, time and place of making of Talb-i-Muwathibat in order to establish that she made the said Talb in the same Majlis, before its dispersion, where she received information about the sale of suit property and as no place about the performance of Talb-i-Muwathibat has been mentioned by the attorney of the respondent/plaintiff i.e., Muhammad Jawan (PW-3) in his statement recorded by the learned trial court, therefore, the suit of the respondent/plaintiff was liable to be dismissed on this score alone. Reference in this respect may be made to the case of "Mian Pir Muhammad and another v. Faqir Muhammad" (PLD 2007 Supreme Court 302).

7. It is also noteworthy that the predecessor-in-interest of the petitioners/defendants, in his written statement, denied the performance of Talbs by the respondent/plaintiff. In the circumstances, the respondent/plaintiff was obliged to prove the performance of Talb-Isahhad in accordance with the law and service of notice of Talb-i-Ishhad on the predecessor-in-interest of the petitioners/defendants. Although the respondent/plaintiff produced in the witness box Muhammad Farooq, Registry Clerk of the Post Office Sohawa as PW-1 and Muhammad Riaz, Branch Postmaster of the post office Gadarriam, Tehsil Sohawa as PW-2, but the concerned postman namely Muhammad Altaf, who statedly effected the service of notice of Talb-i-Ishhad on the predecessor-in-interest of petitioners/ defendants has not been produced in the witness box, which was also fatal to the case of the respondent/ plaintiff but the said fact has not been properly appreciated by the Courts below while passing the impugned judgments and decrees. Reliance in this context may be placed on the case of "Allah Ditta through L.Rs

and others v. Muhammad Anar" (2013 SCMR 866). Relevant part at page 868 of the said judgment reads as under:--

> "As regards, the issuance of notice of Talb-i-Ishhad is concerned, admittedly the postman has not been examined by the respondent pre-emptor in terms of the law laid down in `Muhammad Bashir and others v. Abbas Ali Shah' (2007 SCMR 1105). The argument of the respondent's side that the attorney of the petitioner while appearing as DW-1 has admitted the receipt of the notice and, therefore, the respondent-plaintiff was not obliged to prove the same, suffice it to say that the affirmative onus to prove Talb-i-Ishhad was on the plaintiff and as the petitioner had denied the factum in the written statement, therefore, notwithstanding any subsequent admission of the defendant's 'attorney, it was obligatory on the plaintiff-pre-emptor to have proved the sending of notice by leading affirmative evidence, which undoubtedly required the production and examination of the postman. This vital aspect has also eluded the attention of the two Courts below."

Similar view was taken by the apex court of the country in the cases reported as "Muhammad Bashir and others v. Abbas Ali Shah" (2007 SCMR 1105) and "Bashir Ahmed v. Ghulam Rasool" (2011 SCMR 762).

8. I have also noted that respondent/plaintiff did not appear in the witness box to prove the performance of Talbs and she attempted to prove the performance of Talbs through her husband/attorney namely Muhammad Jawan (PW-3). The learned Courts below accepted the evidence produced by the respondent/plaintiff through her attorney on the ground that the respondent/plaintiff was an old and Parda Nasheen lady, therefore, she can produce evidence through her attorney. Although Muhammad Jawan (PW-3) stated that his wife (respondent/ plaintiff) was a sick and Parda Nasheen lady, therefore, she has appointed him (Muhammad Jawan) as her attorney to adduce evidence in this case on her behalf but in the special power of attorney (Exh.P3), the respondent/plaintiff has simply mentioned that she was a female, therefore, she has appointed her husband namely Muhammad Jawan as her attorney to adduce evidence on her behalf. She has nowhere mentioned in the said document (Exh.P3) that she was a Parda Nasheen, sick or old lady. Moreover, no such ground was taken by the respondent/ plaintiff in her plaint, therefore, she cannot lead evidence out of her pleadings. The evidence produced in this respect by the respondent/ plaintiff which was out of her pleadings has wrongly been relied upon by

the courts below. Reliance in this respect may be placed on the judgments reported as "Province of Punjab through Chief Secretary and 5 others v. Malik Ibrahim and sons and another" (2000 SCMR 1172) and "Binyameen and 3 others v. Chaudhry Hakim and another" (1996 SCMR 336).

9. It is further evident from the perusal of record that Talb-i-Muwathibat was made by the respondent/plaintiff on 10.04.2005, Talb-i-Ishhad was made on 13.04.2005 and Talb-i-Khusumat was performed by her on 18.04.2005, whereas the attorney deed (Exh.P3), in favour of Muhammad Jawan (PW-3) was executed by the respondent/plaintiff on 13.01.2007. Talbs were made in the year 2005, whereas the attorney deed (Ex.P3) in favour of Muhammad Jawan (PW-3) was executed by the respondent/plaintiff in the year 2007 i.e., after about two years from the making of Talbs. It is, therefore, clear that at the time of making of Talbs Muhammad Jawan (PW-3) was not an attorney of the respondent/plaintiff. As Muhammad Jawan (PW-3) was not attorney of the respondent/plaintiff at the time of making of Talbs therefore, he cannot prove the performance of Talbs in this case on behalf of the respondent/plaintiff. I may refer here, the case of "Salma and another v. Manzoor Hussain and another" (1996 CLC 623), wherein at page No.626, this Court has held as under:-

> "Both the pre-emptors did not figure in the witness box to assert and establish this aspect of the matter and an adverse presumption can easily be drawn against them. I pass an order accordingly. The fact of the matter is that both Mst. Salma and Mst. Naziran petitioners/pre-emptors did not make Talb-i-Muwathibat as agitated by them. The statements of the P. Ws in this matter are nothing enough, Talb-i-Muwathibat made by Muhammad Ramzan husband of Mst. Salma and behnoi of Mst. Naziran has no legal force. It is in the cross-examination of the said Muhammad Ramzan that when Talb-i-Muwathibat was made by him he was not the Special Attorney of both the pre-emptors. According to Explanation I to subsection (1) of Section 13 of the Punjab Pre-emption Act, 1991 Talb-i-Mmvathibat means immediate demand by a pre-emptor in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of pre-emption. There is no provision in the Punjab Pre-emption Act, 1991 that a husband or a Behnoi, on behalf of the female pre-emptor is entitled to make Talb-i-Muwathibat. In the eyes of law the person includes a male and a female. In the scheme of Punjab Pre-emption Act, 1991 no distinction has

been made between the male and female in the matter of exercise of right of pre-emption starting from Talb-i-Muwathibat to Talb-i-Khushmat. The women in the country are demanding the equal rights on merits and no exception can be granted/allowed towards the enforcement of any statutory/legal right. As such within the purview of section 13 of the Punjab Pre-emption Act, 1991 it was incumbent upon both Mst. Salma and Mst. Naziran pre-emptors to establish that they made the demand of pre-emption in the sitting or meeting (Majlis) in which they had come to know of the sale. This being the factual and legal position the matter which emerges is that Talb-i-Muwathibat has not been established by both Mst. Salma and Mst. Naziran pre-emptors. (Underlying and bold supplied for emphasis).

Similarly in the cases of "Mst. Salma Bibi v. Manzoor Hussain and others" (1996 SCMR 1067) "Mst. Waziran alias Faiq Elahi v. Abdul Sattar and others" (1996 CLC 682), it was held that the performance of Talbs cannot be proved through an attorney, who was not appointed as an attorney of the plaintiff/pre-emptor, at the time of making of Talbs.

10. The judgment relied upon by the Courts below in this regard in the case of "Muhammad Hanif v. Mst. Munawar Bi alias Munawar Noor" (1999 SCMR 2230), is not helpful to the case of respondent/ plaintiff because the said judgment was passed on the ground that the plaintiff of the said case was a Parda Nasheen old lady, therefore, she had the right to produce evidence through her attorney, whereas, at the cost of repetition, it is observed that neither the ground of old age nor the ground of Parda Nasheen lady was taken by the respondent/plaintiff in her plaint or in her attorney deed (Ex.P3). In the case of Talb-i-Muwathibat, which is a pure act of personal nature, the performance of said Talb can be proved by the pre-emptor himself/herself as the said fact can only be described amicably by the party himself/herself. The bonafidies of a pre-emptor/plaintiff can only be checked when such plaintiff/pre-emptor volunteers as a witness and surrenders to subject himself/herself for cross-examination. The failure of the plaintiff/ respondent to appear personally in the witness box and to depose about the Talb-i-Muwathibat without furnishing any valid reason for her non-appearance is a factum that seriously reacted on the bona fidies and credibility of the respondent/pre-emptor. I may refer here the case of "Falak Sher Khan and another v. Mir Qalam Khan and another" (1995 CLC 1077), where in at page No.1079, it is observed as under:--

"5. Another damaging aspect of the case is that the suit was brought by two pre-emptors namely Mir Qalam and Mir Ghani Shah. The entire evidence qua Talb-e Muwathibat remains confined to Mir Ghani Shah who stands non-suited in the present case leaving ONLY Mir Qalam in the field who has never appeared in Court to allege as to when he made the Talb and when he attained the knowledge of the transaction. The technical argument that it is legal for him to appear through a special attorney, is not valid and appreciable in case of Talb-e-Muwathibat which is a pure act of personal nature and which can be described amicably by the party himself. The bona fides are also checked when such plaintiff volunteers as witness and surrenders to subject himself for cross-examination which, in case of 'Talabs' is lengthy as well as intricate. The failure of Mir Qalam, the only decree-holder to appear personally and to depose about 'Talb-e-Muwathibat', is a factum that seriously tells upon his credibility and bona fides. This factum was not appreciated by the two Courts below in its true perspective. They have fallen into material irregularity.

6. Consequently the revision petition is accepted, the impugned judgments of both the Courts below are set aside and the pre-emption suit of Mir Qalam Khan is hereby dismissed with costs".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of "Mst. Lalan Bibi and others v. Muhammad Khan and others" (2007 SCMR 1193), wherein at page No.1201, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

"Plaintiff has made first Talb on 2-9-1994 and second Talb was made on 5-9-1994. Ghulam Hassan was appointed by the plaintiff as his attorney on 12-9-1994. It is an admitted fact that plaintiff late Muhammad Khan did not appear before the trial Court, therefore, making of Talbs in terms of section 13 was not proved and this fact was not considered by all the Courts below in its true perspective. Judgments of all the Courts below are not in consonance with the law laid down by this Court in Mst. Salma Bibi's case 1996 SCMR 1067. The aforesaid proposition of law is also supported by the following judgments--

(i) Salma Bibi's case 1996 CLC 623, (ii) Mst. Wazeeran's case 1996 CLC 682.

The trial Court has decided the case in violation of the dictum laid down by the superior Courts in the foresaid judgments, therefore, trial Court has committed material irregularity. See Kanwal Nain's case PLD 1983 SC 53, Oil and Gas Development Corporation's case PLD 1970 Karachi 332 and Muhammad Hashim's case PLD 1971 SC 793. The First Appellate Court has also committed the same mistake which were not rectified by the learned High Court in the impugned judgment. The conclusions arrived at by all the Courts below that pre-emptor complied with the requirement of Talbs are erroneous, therefore, it was the duty and obligation of the learned High Court to exercise its revisional jurisdiction. See Hakim Muhammad Buta's case PLD 1985 SC 153"

11. Keeping in view all the aforementioned facts, I have come to this conclusion that the respondent/plaintiff has miserably failed to prove that she performed Talbs in accordance with the law, therefore, her suit was wrongly decreed by the learned Civil Judge, Sohawa, District Jhelum vide the impugned judgment and decree dated 20.02.2010 and the appeal filed by the petitioners/defendants has erroneously been dismissed by the learned Additional District Judge, Jhelum vide the impugned judgment and decree dated 30.05.2012.

12. As I have concluded that the respondent/plaintiff failed to prove the performance of Talbs in accordance with the law and her suit has wrongly been decreed which was liable to be dismissed on this sole ground, therefore, there is no need to discuss the findings of the courts below on the remaining issues.

13. In the light of above discussion, this civil revision is accepted, the impugned judgment and decree dated 30.05.2012, passed by the learned Additional District Judge, Jhelum, as well as, the impugned judgment and decree dated 20.02.2010, passed by the learned Civil Judge, Sohawa are hereby, set aside. Resultantly the suit for possession through the right of pre-emption, filed by the respondent/plaintiff stands dismissed.

MQ/A-98/L **Revision accepted.**

2018 P Cr. L J 656

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Syed NAYAB HUSSAIN SHERAZI---Petitioner

Versus

STATION HOUSE OFFICER, POLICE STATION SABZAZAR, LAHORE and 4 others---Respondents

Writ Petition No. 10296 of 2017, decided on 7th April, 2017.

(a) Criminal Procedure Code (V of 1898)

S. 491 Constitution of Pakistan, Art. 199---Penal Code (XLV of 1860), Ss. 361 & 363---Kidnapping from lawful guardianship, kidnapping---Constitutional petition---Prosecution case was that the petitioner, his brother and co-accused forcibly snatched the minors from the custody of their mother/complainant at gun point and took them away---Petitioner, an Advocate by profession, had alleged that he along with another person had malafidely been implicated in the case by the police being in league with the complainant---Complainant had taken self-contradictory stances in her habeas petition and in the FIR---Father of the minors (who was brother of the petitioner) was natural guardian of the minors, therefore, the ingredients of offence as envisaged under S. 363, P.P.C. were not attracted in the case as per exceptions provided under S. 361, P.P.C.---Minors had already been recovered by the police from the custody of brother of petitioner but their recovery had not been shown by the Investigating Officer in the police papers---Contention was that no probability of conviction of the petitioner and his co-accused existed in the present case, therefore, the FIR be quashed---Validity---Record showed that complainant filed habeas corpus petitions but the petitioner and his co-accused failed to produce minors in the lower court---Habeas corpus petition filed before the lower court was withdrawn on the ground that the place of confinement of the minors was not in the knowledge of complainant---Repeated directions for recovery of the minors were issued by the Court in habeas corpus petition to the SHO, SDPO, CCPO and despite the constitution of a special team by the CCPO for the recovery of minors, the minors could not be recovered by the police---First Information Report was registered by the police---Circumstances

suggested that the petitioner and his co-accused concealed the minors at some secret place, after their abduction and even the State with all the resources at its command was unable to recover the minors---Circumstances established that minors had been removed from the custody of the complainant, and they were illegally kept in concealment by the petitioner and his co-accused in order to avoid the legal proceedings initiated by mother of the minors for their custody---Admittedly, brother of the petitioner was father of the minors but that fact alone did not mean that he had a license to forcibly snatch the minors from the custody of their mother at gun point and conceal them at some secret place in order to frustrate the process of law and the court---Father could take the benefit of the exception of S. 361, P.P.C., if he established that he in good faith believed himself to be entitled to the custody of his minor children his act must not be for any unlawful or immoral purpose---Record transpired that petitioner and his brother (father) deliberately avoided to produce the minors before the Court---Petitioner, and his co-accused in circumstances, could not be believed in good faith to be entitled to the custody of minors or that their acts were for any lawful or moral purpose---Petitioner and co-accused, therefore, could not claim any exception on the ground that brother of petitioner was real father of minors---Admittedly, the petitioner was an advocate but said fact did not mean that he was above the law or he could claim any exception in respect of any offence on the basis of his being an advocate---Petitioner had been granted the license of advocate to practice the law and not for taking the law into his own hands and to commit crime---Record transpired that there was no contradiction between the story narrated by the complainant in her habeas corpus petition and the story narrated by her in the FIR---Allegedly, minors had been recovered from the possession of the brother of the petitioner, however, their recovery had not been shown in the relevant papers by the police---Said ground related to the disputed question of facts which could not be decided in the Constitutional jurisdiction---If the petitioner was not satisfied with the investigation of the case, he could file application for transfer of investigation before the concerned authorities---No substance, having been found in the Constitutional petition, same was dismissed in limine.

Amjad Shah v. SHO of Police Station Sukheki and another 2008 YLR 1507; Muhammad Ashraf v. SHO and others 2001 PCr.LJ 31; Abdul Ghafoor v. Mst.

Zubaida Bibi 1996 PCr.LJ 1228 and Muhammad Mukhtar v. SHO and 3 others 2008 YLR 2665 ref.

Mst. Bakhshi v. Bashir Ahmad and another PLD 1970 SC 323; Hafiz Abdul Waheed v. Mrs. Asma Jehangir and another PLD 2004 SC 219; Muhammad Imtiaz and another v. The State PLD 1981 FSC 308; Shabbir Hussain alias Papu v. SHO of Police Station Bumbanwala District Sialkot and 3 others 2006 PCr.LJ 1260 and Abdul Ghaffar v. Ishtiaq Ahmad Khan and another 1997 PCr.LJ 1150 rel.

(b) Criminal Procedure Code (V of 1898)---

----Ss. 154 & 173---Penal Code (XLV of 1860), S. 363---Constitution of Pakistan, Art. 199---Constitutional petition---Kidnapping---Partial quashment of FIR---Scope---Partial quashment of the FIR was not permissible under the law.

Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khan and others PLD 2013 SC 401 rel.

N.A. Butt for Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Through this petition the petitioner seeks quashment of FIR No. 368/2017 dated 16.03.2017 registered under section 363, P.P.C. at Police Station Sabzazar, Lahore.

2. As per brief allegations levelled in the impugned FIR, Syeda Laila Zainab (complainant) was married with the brother of the petitioner namely Kamyab Hussain alias Kake Shah. Two children namely Mehtab Hussain, aged about 4-1/2 years and Taieed Fatima, aged about 3 years were born from the said wedlock. On 23.01.2017 at 04.00 p.m., the complainant came out of the house of her in-laws in order to go to the house of her mother. In the meanwhile, the petitioner, his brother namely Kamyab Hussain alias Kake Shah and other co-accused reached at the spot in a white colour Corolla car, forcibly snatched the minors from the custody of the complainant at gun point and took them away. The complainant thereafter, filed habeas petition in the court of learned Additional Sessions Judge, Lahore, as well as, before the Lahore High Court but as the minors could not be traced out and recovered, therefore, the above mentioned impugned FIR was lodged against the petitioner and his co-accused;

hence the present constitutional petition before this Court for quashment of the said FIR.

3. It is contended by learned counsel for the petitioner that the petitioner is an Advocate by profession and he and his co-accused have malafidely been implicated in this case by the police being in league with the complainant; that the complainant has taken self-contradictory stances in her habeas petition moved before the learned-Additional Sessions Judge, Lahore and in the impugned FIR because in her above mentioned habeas petition, she stated that she herself left her minor children at the house of her husband, whereas, in the impugned FIR she has alleged that the minors were forcibly snatched from her custody by the petitioner and his co-accused; that brother of the petitioner is father of the minors and as such he is natural guardian of the minors, therefore, while keeping in view the exception provided under section 361, P.P.C., the ingredients of offence as envisaged under section 363, P.P.C. are not attracted in this case; that the minors have already been recovered by the police from the custody of brother of the petitioner but their recovery has malafidely not been shown in the police papers by the investigating officer of this case; that there is no probability of conviction of the petitioner and his co-accused in this case, therefore, the impugned FIR may be quashed. In support of his contentions learned counsel for the petitioner has placed reliance on the judgments reported as Amjad Shah v. SHO of Police Station Sukheki and another (2008 YLR 1507), Muhammad Ashraf v. SHO and others (2001 PCr.LJ 31), Abdul Ghafoor v. Mst. Zubaida Bibi (1996 PCr.LJ 1228) and Muhammad Mukhtar v. SHO and 3 others (2008 YLR 2665).

4. Heard. Record perused.

5. As per contents of the impugned FIR about eight years earlier to the registration of the impugned FIR, Sayeda Laila Zainab (complainant) was married with the brother of the petitioner, namely Kamyab Hussain alias Kake Shah. Two children namely Mehtab Hussain aged about 4-1/2 years and Taieed Fatima aged about 3 years were born from the said wedlock. On 23.01.2017 at about 04.00 p.m. when the complainant came out of the house of her in-laws, the petitioner who is brother-in-law of the complainant and Kamyab Hussain alias Kake Shah co-accused, who is husband of the complainant, along with other co-accused forcibly snatched the minors at gun point, from the custody of the complainant. The complainant then went to the

house of her mother and thereafter she filed different habeas petitions before the learned Additional Sessions Judge, Lahore, as well as, before this Court but the petitioner and his co-accused neither produce the minors in the court of learned Additional Sessions Judge, Lahore nor before this Court. The habeas petition filed by the petitioner in the court of learned Additional Sessions Judge, Lahore was withdrawn on the ground that the place of confinement of the minors was not in the knowledge of the complainant/mother. In the habeas petition filed by the complainant before this Court, i.e. Criminal Miscellaneous No. 2151-H of 2017, repeated directions for recovery of the minors were issued by this Court to the SHO of Police Station Sabzazar Lahore, SDPO/DSP Lahore, CCPO Lahore and despite the constitution of a special team by the CCPO, Lahore, for the recovery of above mentioned minors, the minors could not be recovered by the police. Ultimately on 14.03.2017, SP Operations, Lahore personally appeared before this Court and submitted that the special team visited different places to effect the recovery of minors but the minors could not be recovered, therefore, if the complainant would approach the police, then an FIR shall be registered about the abduction of minors. On the above mentioned assurance of SP, Operations, Lahore, the habeas petition filed by the complainant before this Court was disposed of. Subsequently, the impugned FIR was registered by the police at Police Station Sabzazar, Lahore. It is evident from perusal of the record that the petitioner and his co-accused concealed the minors at some secret place, after their abduction and even the State with all the resources at its command was unable to recover the minors. It is, therefore, established in this case that the minors have been removed from the custody of the complainant and they are being illegally kept in concealment by the petitioner and his co-accused in order to avoid the legal proceedings initiated by the mother of the minors (complainant) for their custody. There is no doubt that brother of the petitioner namely Kamyab Hussain alias Kake Shah is father of the minors but this fact alone does not mean that he has a license to forcibly snatch the minors from the custody of their mother at gun point and to conceal them at some secret place in order to frustrate the process of the law and the court. In my humble view, father can take the benefit of the exception of section 361, P.P.C., provided he satisfies two conditions, firstly, if he establishes that he in good faith believed himself to be entitled to the custody of his minor children

and secondly his act must not be for any unlawful or immoral purpose. Section 361, P.P.C. is reproduced hereunder for ready reference:-

> Section 361, P.P.C. **Kidnaping from lawful guardianship.** Whoever takes or entices any minor under fourteen years of age if a male or under sixteen years of age if a female or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, said to kidnap such minor or person from lawful guardianship.
>
> **Explanation.** The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor or other person.
>
> **Exception.** This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody, of such child, unless such act is committed for an immoral or unlawful purpose.

In the instant case, while keeping in view the personal law applicable to both the parties who are admittedly Muslims and the tender ages of the minors, the first right of Hizanat in respect of the minors lies with the complainant, who is their real mother. The complainant was, therefore, lawful guardian of the above mentioned minors. The petitioner and his co-accused forcibly took away the minors from the custody of a lawful guardian. It is also clear from the perusal of the record that despite repeated orders issued by the learned Additional Sessions Judge, Lahore, as well as, by this Court for production of the minors before the court and despite the constitution of a special team for the recovery of minors by the CCPO, Lahore, the minors could not be recovered and the petitioner and his brother deliberately avoided to produce the minors before the court. The petitioner and his co-accused attempted to make the process of the law and the court as infructuous/useless by removing and concealing the minors at some unknown secret place. Under the circumstances it cannot be held by any stretch of imagination that the petitioner and his co-accused believed in good faith to be entitled to the custody of above mentioned minors or their above mentioned acts were for any lawful or moral purpose, therefore, the petitioner and his co-accused cannot claim any exception in this case on the ground that brother of the petitioner namely Kamyab Hussain alias Kake Shah is real father of the minors.

6. If for the sake of arguments, it is presumed that brother of the petitioner, being father of the minors had any legal right to forcibly snatch the minors from their mother at gun point, without adopting legal procedure in this respect and he had any right to keep the minors at some secret place in blatant and flagrant violation of the orders of the courts, even then the petitioner himself and other co-accused had no right to join the above mentioned act of their co-accused Kamyab Hussain alias Kake Shah, regarding forcible snatching of the minors from the custody of their mother (complainant). As the allegation of forcible abduction of the minors has also been levelled against the petitioner himself, his nephew Abbas and two unknown accused persons, apart from the father of the minors, therefore, the impugned FIR cannot be quashed only to the extent of father of the minors because partial quashment of the FIR is not permissible under the law. Reliance in this respect may be placed on the case reported as Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khan and others (PLD 2013 SC 401).

7. There is another important aspect of this case that if the above mentioned practice is allowed to continue, then it will grant a license to every father to decide himself about the custody of his minor children, to forcibly snatch them from their mother and not to produce them before the court for determination of the question of their custody. It will make the provisions of section 491, Cr.P.C. as redundant. It would mean that instead of the Guardian Courts established under the Guardians and Wards Act, 1890, the questions of the interim or permanent custody of the minor children of the parties shall be decided by a father of the minors himself, which has never been the intention of the legislator. If we take another example of a case where a Muslim girl of 15 years of age has attained the age of puberty then she is presumed to be major under her personal law on attaining the age of puberty and can validly contracted marriage, even without or against the consent of her Waali/father. Reference in this respect may be made to the cases of Mst. Bakhshi v. Bashir Ahmad and another (PLD 1970 SC 323), Hafiz Abdul Waheed v. Mrs. Asma Jehangir and another (PLD 2004 SC 219), Muhammad Imtiaz and another v. The State (PLD 1981 FSC 308), Shabbir Hussain alias Papu v. SHO of Police Station Bumbanwala District Sialkot and 3 others (2006 PCr.LJ 1260) and Abdul Ghaffar v. Ishtiaq Ahmad Khan and another (1997 PCr.LJ 1150). In such a situation if a father kidnapes such girl in order to

commit her murder in the name of Ghairat (as it has already happened in so many cases in our society) then considering the above mentioned argument of learned counsel for the petitioner the police cannot lodge an FIR against the accused and protect the life of such girl on the ground that the accused of such case is real father of the minor and offence of kidnapping does not attract against him. This will lead to a disastrous situation in our society, therefore, in my humble view the exception provided to a father under section 361, P.P.C. is only attracted when the act of the father is taken in good faith and the same is not for any immoral or unlawful purpose.

8. It is noteworthy that most of the judgments on the issue in hand have been rendered while keeping in view the findings of this Court in the case of Asghar Ali v. The State (1971 PCr.LJ 982) but I have noted that even in the said judgment this Court has categorically observed in Para No. 5 at page No. 984 of the said judgment that if a father wanted to avoid the proceedings before the Guardian Court and by circumventing the law he wanted to take away the child with him that may be one example of an unlawful purpose. The relevant part of the aforementioned judgment reads as under:-

> ".....The second condition to be satisfied is that he should not have taken the child for an immoral or unlawful purpose. It is agreed that the purpose in taking away the child in this case was not at all immoral. **With regard to the subsidiary question whether it was unlawful, one may consider that if the father wanted to avoid proceedings before a Guardian Court and by circumventing the law he wanted to take away the child, that might be one example of an unlawful purpose.** But in this case, it is not necessary to give any final determination of the question, nor it is necessary to further examine the expression used in the Exception, i.e. unlawful purpose.....".

(Bold and underlining supplied for emphasis)

It is, therefore, evident that even in the above mentioned judgment, this Court observed that if a father takes away the child in order to circumvent the law or to avoid the proceedings before a court then his act would be an example of unlawful purpose.

9. It is also noteworthy that under section 363, P.P.C., no distinction has been laid down between a real father of the minors and an ordinary accused regarding the offence of kidnapping. Section 363, P.P.C. reads as under:-

> Section 363, P.P.C. **Punishments for kidnaping**. **Whoever** kidnaps any person from Pakistan or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

(Bold and underling supplied for emphasis)

The word **"whoever"** used in section 363, P.P.C. has made it clear that there is absolutely no distinction between an ordinary accused and a real father of the minor in respect of the offence of kidnapping. As discussed earlier, the exception provided to a father under section 361, P.P.C. is dependent upon the satisfaction of above mentioned two conditions that firstly a father should establish that he believed himself in good faith to be entitled to the custody of his minor children and secondly his act is not for any immoral or unlawful purpose. The aforementioned conditions are very much lacking in this case and, as noted earlier, while keeping in view the peculiar facts of this case, the petitioner and his co-accused cannot claim any exception in this case or they cannot ask for the quashment of the impugned FIR, on the ground that as the brother of the petitioner is real father of the minors, therefore, provisions of section 363, P.P.C. are not attracted against them. A father cannot be granted a license to play with the lives and custody of the minors according to his own wishes and desires by deliberately avoiding the due process of the law and the courts and while taking the law into his own hands.

10. It is true that the petitioner is an advocate but this fact does not mean that he is above the law or he can claim any exception in respect of any offence on the basis of his being an advocate. He has been granted the license of advocate to practice the law and not for taking the law into his own hands and to commit crimes. The petitioner who claims himself to be a law graduate, instead of adopting the legal procedure for the custody of the minor children of his brother has statedly snatched the minors at gun point from their mother (complainant). The petitioner never advised his brother to produce the minors before the court in order to establish that he (petitioner) believes in the supremacy of law and has any respect for the law of the country, rather the

petitioner and his co-accused while concealing the minors at some unknown place have made it impossible for the courts to decide about the custody of the minors in accordance with the law. Mere this fact that the petitioner is an advocate is by itself no ground to quash the impugned FIR.

11. There is prima facie no contradiction between the story narrated by the complainant in her habeas petition and the story narrated by her in the impugned FIR. In her habeas petition filed before the learned Additional Sessions Judge, Lahore, the complainant has categorically mentioned in Para No. 5 of the said petition that the minors were forcibly snatched from her custody after giving her merciless beating. Similarly in the impugned FIR it was also mentioned that on the day of occurrence the complainant when came out of the house of her in-laws, the minors were forcibly snatched from her custody by the petitioner and his co-accused at gun point. There is no material contradiction between the story narrated by the complainant in her habeas petition and in the story narrated by her in the impugned FIR. Furthermore, the impugned FIR cannot be quashed merely on the basis of above mentioned alleged minor contradiction which does not go to the roots of the case and which has no material effect on the merits of the case.

12. Although learned counsel for the petitioner has taken this ground for quashment of the impugned FIR that the minors have been recovered from the possession of the brother of the petitioner, however, their recovery has not been shown in the relevant papers by the police but the said ground relates to the disputed question of facts of this case which cannot be decided in the constitutional jurisdiction. If the petitioner is not satisfied with the investigation of this case, then he may move an application before the concerned authorities for transfer of investigation of the case. The impugned FIR cannot be quashed on the above mentioned ground.

13. The judgments cited by learned counsel for the petitioner are distinguishable on their own facts. Even in the case of Muhammad Ashraf supra (2001 PCr.LJ 31) cited by learned counsel for the petitioner, in Para No. 7 of the said judgment, this Court has categorically held that if a father takes the child from the custody of his wife for an immoral or unlawful purpose then it would amount to an offence. The relevant part of the said judgment reads as under:-

"..... Father of a child is always a natural guardian along with the mother. He can never be ascribed or attributed the offence of kidnapping of his own child. The exception appended to section 361, P.P.C. even goes to the extent of relieving a person from any criminal liability if he in good faith believes to be father of an illegitimate child, or, who in good faith believes to be entitled to the lawful custody of such child. **The only fetter placed upon the right of a father to the custody of the child is that when he takes the child from the custody of his wife for a purpose recognized in law as immoral or unlawful, in such a circumstance removal of the child, would amount to an offence**. No such allegation is made in the complaint recorded at the instance of respondent No. 2 ....."

(Bold and underling supplied for emphasis)

It is evident from the perusal of aforementioned judgment that if a father removes his own child from the custody of his wife for an unlawful or immoral purpose then the removal of the child by his own father would amount to an offence. At the cost of repetition, in the instant case, the minors have forcibly been removed by the petitioner and his co-accused and they have secretly been concealed at some unknown place for an unlawful purpose, i.e. to avoid the proceedings of habeas petition filed by the mother for the custody of minors and to avoid the process of the law and the court.

In the case of "Abdul Ghafoor" supra (1996 PCr.LJ 1228) referred by learned counsel for the petitioner this Court observed that there was a written Iqrarnama between the father and mother and according to the terms of said document, the child was to remain with the mother till the age of seven years, with the further condition that if the mother would contract second marriage, she will lose the right of custody of the child and as in the said case, the mother contracted second marriage and the minor also crossed the age of seven years, therefore, the father in good faith while believing himself to be entitled to the custody of the minor took his custody, whereas, no such ground is available to the accused of the instant case. Similarly the facts of remaining judgments cited by learned counsel for the petitioner are distinguishable from the facts of the present case. It is also noteworthy that in all the above judgments referred by learned counsel for the petitioner, no order for production of the minors was passed by any court, whereas, in the instant case the petitioner and his co-accused

did not produce the minors before the courts despite issuance of repeated directions in this respect, therefore, as mentioned earlier, the petitioner cannot take any benefit of exception provided under section 361, P.P.C. as he failed to establish that he and his brother acted in good faith or their act was not for any unlawful or immoral purpose. Under the circumstances, the judgments cited by learned counsel for the petitioner are of no avail to the petitioner.

14. In the light of above discussion, there is no substance in this petition; hence the same is hereby ***dismissed in limine.***

15. It is, however, clarified that observations made in this order shall not prejudice the case of either party at the time of final adjudication of the case by the learned trial court.

JK/N-21/L **Petition dismissed.**

2018 P Cr. L J Note 79

[Lahore]

Before Malik Shahzad Ahmad Khan, J

GHULAM MUSTAFA---Petitioner

Versus

NAEEM IQBAL alias MEHNGA and another---Respondents

Criminal Revision No. 327 of 2011, decided on 4th May, 2017.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 109, 148 & 149---Criminal Procedure Code (V of 1898), S. 439---Qatl-i-amd, abetment, rioting armed with deadly weapon, unlawful assembly---Revision petition---Maintainability---Revision petition for enhancement of sentence---Scope---Accused was charged for the murder---Trial Court concluded that deceased received injury due to the accidental act of accused, therefore, he was convicted and sentenced under S. 322, P.P.C. and was held liable to pay Diyat to the legal heirs of deceased---Accused was not convicted and sentenced by the Trial Court for the charge under S. 302, P.P.C.---Validity---Record showed that the impugned judgment did not mention that accused had been acquitted from the charge under S. 302, P.P.C.---Accused having not been convicted and sentenced for the charge under S. 302, P.P.C., it would be deemed that accused was acquitted from the said charge by the Trial Court---If the accused was deemed to be acquitted from the charge under S. 302, P.P.C., his acquittal from the said charge could not be converted into conviction in the revisional jurisdiction as per provision of S. 439(4)(a), Cr.P.C.---Revision petition was not maintainable in circumstances, which was dismissed accordingly. [Para. 8 of the judgment]

Zarin v. The State 1976 SCMR 359; Mushtaq Ahmad v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others PLD 2007 SC 405; Shaukat Ali v. The State PLD 1982 SC 280; Ghulam Murtaza v. The State 1975 SCMR 244; Mst. Zaib un Nisa v. Rehmat and 2 others 2011 PCr.LJ 666; Jeremy Frankel, General Manager, Avari Hotel, Lahore v. The State 2003 PCr.LJ 75; Bashir Ahmad and another v. Fayyaz Ahmad and others 2007 SCMR 445 and Syed Manzoor Hussain Shah v. Syed Agha Hussain Naqvi and another 1983 SCMR 775 ref.

Muhammad Yaqub v. The State 1985 PCr.LJ 2406 and Muhammad Sajjad and 2 others v. The State PLD 1960 (W.P.) Lahore 520 rel.

(b) Criminal Procedure Code (V of 1898)---

----Ss. 417(2) & 439(5)---Penal Code (XLV of 1860), Ss. 302, 109, 148 & 149---Qatl-i-amd, abetment, rioting armed with deadly weapon, unlawful assembly---Private complaint---Petition for special leave to appeal against acquittal---Scope---Revision petition---Maintainability---Record showed that the impugned judgment was passed in a private complaint, therefore the petitioner/complainant was supposed to file a petition for special leave to appeal against acquittal of accused from the charge under S. 302, P.P.C.---Remedy of filing an appeal with special leave of the court was provided under S. 417(2), Cr.P.C. against the acquittal of accused from the charge under S. 302, P.P.C.---Revision petition in circumstances was not maintainable under S.439(5), Cr.P.C., which was dismissed accordingly. [Para. 9 of the judgment]

Ch. Walayat Ali for Petitioner.

Nisar Ahmad Virk, Deputy District Public Prosecutor for the State.

Date of hearing: 4th May, 2017.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---The instant criminal revision has been filed for enhancement of sentence of Naeem Iqbal alias Mehnga (respondent No. 1) in case FIR No. 841/2008 dated 23.10.2008 offences under sections 302, 109, 148, 149, P.P.C. Police Station Bhikhi, District Sheikhupura, with the prayer that sentence of 'Diyat' amount awarded to the above mentioned respondent be altered from the charge under section 322, P.P.C. to the charge under section 302, P.P.C. by awarding the said respondent the death sentence.

2. As per brief facts of the present case, the petitioner/complainant Ghulam Mustafa lodged the above mentioned FIR against respondent No.1 with the allegation that on the intervening night of 22/23.10.2008 at 03.00 a.m. his 'Bhatija' (nephew) Shah Muhammad (deceased) was present in his agricultural fields and was irrigating his crop of `Shaftal'. Ghulam Mustafa (complainant), Ghulam Rasool and Muhammad Akram (PWs) were also present at the spot. In the meanwhile, Naeem Iqbal alias Mehnga (respondent No. 1) armed with rifle 44 bore and his co-accused namely Yasir armed with pistol, Sarang Farid armed with pistol and Khalid Sheikh armed with 12 bore gun

emerged at the place of occurrence and raised lalkara. On seeing respondent No. 1 and his co-accused, Shah Muhammad (deceased) started running, whereupon, respondent No.1 and his co-accused chased and encircled him. Naeem Iqbal alias Mehanga respondent No. 1 thereafter, made a fire shot with his rifle which landed on the chest of Shah Muhammad who fell on the ground and succumbed to the injury at the spot. The motive behind the occurrence was that in the previous B.D. Elections, the complainant party opposed the father of Yasir co-accused, namely Shahadat Bhatti. The said Shahadat Bhatti won the election, however, he was murdered afterwards. Due to the above mentioned grudge, the accused persons committed the occurrence.

3. After completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898, framed charge against respondent No.1 and his co-accused, to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced six witnesses during the trial, whereas, two witnesses appeared as Court Witnesses. The statements of respondent No. 1 and his co-accused under section 342, Cr.P.C. were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

4. The learned Additional Sessions Judge, Sheikhupura after completion of trial, vide judgment dated 08.03.2011, concluded that Shah Muhammad deceased received injury due to the accidental act of respondent No. 1, therefore, he was convicted and sentenced under section 322, P.P.C. and was held liable to pay Diyat of Rs. 11,02,680/- to the legal heirs of deceased. The above mentioned respondent was not convicted and sentenced by the learned trial court for the charge under section 302, P.P.C.; hence the instant criminal revision before this Court.

5. It is contended by learned counsel for the petitioner that the prosecution has fully proved that respondent No. 1 committed intentional murder of Shah Muhammad (deceased), therefore, there was no justification with the learned trial court to convict and sentence the above mentioned respondent under section 322, P.P.C. instead of the charge under section 302, P.P.C.; that the learned trial court has not mentioned in the impugned judgment that respondent No. 1 has been acquitted from the charge under section 302, P.P.C., therefore, the said respondent cannot be presumed to be acquitted from the above mentioned charge; that the learned trial court has wrongly held that it was a case of accidental occurrence, whereas, it was a case of premeditated murder; that the instant criminal revision is maintainable and this Court in revisional

jurisdiction can validly convert the conviction and sentence of respondent No. 1 from the charge under section 322, P.P.C. to the charge under section 302, P.P.C., therefore, the instant petition may be accepted and sentence of respondent No. 1 may be converted from the charge under section 322, P.P.C. to the charge under section 302, P.P.C. and the said respondent may be awarded the sentence of death. In support of his contentions, learned counsel for the petitioner has placed reliance upon the cases reported as Zarin v. The State (1976 SCMR 359), Mushtaq Ahmad v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others (PLD 2007 SC 405), Shaukat Ali v. The State (PLD 1982 SC 280), Ghulam Murtaza v. The State (1975 SCMR 244), Mst. Zaib-un-Nisa v. Rehmat and 2 others (2011 PCr.LJ 666), Jeremy Frankel, General Manager, Avari Hotel, Lahore v. The State (2003 PCr.LJ 75), Bashir Ahmad and another v. Favyaz Ahmad and others (2007 SCMR 445) and Syed Manzoor Hussain Shah v. Syed Agha Hussain Naqvi and another (1983 SCMR 775).

6. Arguments heard and record perused.

7. In this case it was claim of the complainant party that Naeem Iqbal alias Mehnga (respondent No. 1) committed intentional murder of Shah Muhammad deceased. On the other hand, it was claim of respondent No. 1 that it was not a case of intentional murder. Respondent No.1, claimed that on the night of occurrence he (respondent No. 1) was irrigating his land from the tube-well of his uncle Habib Bhatti. He had a rifle with him for security purpose. He (respondent No. 1), Shah Muhammad deceased, Muhammad Khalid Musali son of Ahmad Ali and Sarang Fareed son of Muhammad Arif were close friends and were sitting in the fields as they were waiting for the turn of water of Sarang Fareed. In the meanwhile, Shah Muhammad deceased asked respondent No. 1 to make a fire shot from his rifle and on his insistence Naeem Iqbal alias Mehnga (respondent No. 1) made a fire shot from his rifle which accidentally hit Shah Muhammad deceased. The learned trial court after scrutinizing the evidence of the prosecution came to the conclusion that the occurrence took place at 03.00 a.m. (night) but no source of light was mentioned in the FIR or in the statement of the prosecution eye-witnesses. There was inordinate delay in lodging the FIR, because the occurrence took place at 3.00 a.m, and the FIR was lodged at 8.55 a.m., whereas the distance between the place of occurrence and police station was 3 kilometers. It was also noted by the learned trial court that the post mortem examination of the deceased was conducted on the next day at 2.30 p.m. i.e, with the delay of about 11-1/2 hours from the occurrence. The motive part of the prosecution story was also

disbelieved and it was observed that admittedly the deceased or the complainant and prosecution eye-witnesses were not accused in the murder case of Shadat Bhati. It was further held by the learned trial Court that there were material contradictions in the statements of the eye-witnesses, therefore, the prosecution evidence was discarded. After rejecting the prosecution evidence the learned trial court relied upon the statement of Naeem Iqbal alias Mehnga (respondent No.1) and concluded that it was not a case of intentional murder rather the same was result of an accidental act of respondent No. 1, amounting to Qatl-i-Khata. Resultantly Naeem Iqbal alias Mehnga (respondent No.1) was not convicted and sentenced for the charge under section 302, P.P.C., however, he was convicted for offence of Qatl-i-Khata punishable under section 322, P.P.C. and sentenced to pay Diyat of Rs.11,02,680/- to the legal heirs of Shah Muhammad deceased.

8. Now the first and the foremost question for determination before his Court is that as to whether the instant criminal revision is maintainable in the light of prayer made by the petitioner in this petition that the sentence awarded to respondent No. 1 by the trial court be converted from the charge under section 322, P.P.C. to the charge under section 302, P.P.C. and the said respondent be awarded the sentence of death instead of the sentence of 'Diyat' only. As mentioned earlier, the learned trial court after recording of evidence has concluded that it was a case of accidental occurrence, therefore, respondent No. 1 was convicted and sentenced only for the offence of Qatl¬-i-Khata punishable under section 322, P.P.C. The learned trial court after evaluating the prosecution evidence has concluded that it was an unseen occurrence and the prosecution failed to prove its case against the above mentioned respondent, whereby, the allegation of intentional murder was levelled against the said respondent. Although it is not mentioned in the impugned judgment that respondent No. 1 has been acquitted from the charge under section 302, P.P.C. but as the said respondent has not been convicted and sentenced for the abovementioned charge, therefore, it would be deemed that he (respondent No. 1) was acquitted from the said charge by the learned trial court. Reference in this respect may be made to the case reported as Muhammad Yaqub v. The State (1985 PCr.LJ 2406) wherein at Para No. 6 it was observed as under:-

> "6. I have considered the submissions made by the learned counsel for the parties with care. I feel persuaded to agree with the learned counsel for the appellant. I find that the appellant was charged under section 409, P.P.C. on the allegation of criminal misappropriation of Rs. 2,550 received by him from

Jan Muhammad and Faqir Muhammad: that he having not been convicted under section 409, P.P.C. is deemed to have been acquitted of that charge....."

Similar view was taken in the case of Muhammad Sajjad and 2 others v. The State (PLD 1960 (W.P.) Lahore 520).

If respondent No. 1 is deemed to be acquitted from the charge under section 302, P.P.C. then his acquittal from the said charge cannot be converted into his conviction in the revisional jurisdiction of this Court. The provisions of section 439(4)(a), Cr.P.C. are relevant in this respect which are reproduced hereunder for ready reference:-

439. High Court's powers of revision.

(1) .....

(2) .....

(3) .....

(4) Nothing in this section shall be deemed to authorize a High Court;

(a) to convert a finding of acquittal into one of conviction;

(b) .....

(5) .....

(6) .....

As respondent No. 1 is deemed to be acquitted from the charge under section 302, P.P.C. by the learned trial court, therefore, while keeping in view the provisions of section 439(4)(a), Cr.P.C. this Court in the exercise of revisional jurisdiction cannot convert the findings of acquittal of respondent No. 1 from the charge under section 302, P.P.C. into one of his conviction.

9. It is also noteworthy that the impugned judgment was passed in a private complaint filed by the petitioner/complainant, therefore, the petitioner was supposed to file a petition for special leave to appeal against the acquittal of respondent No. 1 from the charge under section 302, P.P.C., by the learned trial court. The petitioner/ complainant filed Criminal Petition for Special Leave to Appeal No. 73 of 2011 and Criminal Petition for Special Leave to Appeal No. 78 of 2011 against the acquittal of Khalid and Sarang Fareed co-accused, respectively and the said petitions have been

dismissed by this Court vide orders of even date 26.10.2015. No petition for special leave to appeal has been filed by the complainant/appellant against the acquittal of respondent No. 1 from the charge under section 302, P.P.C. Under the circumstances as the remedy of filing an appeal with the special leave of the court (petition for special leave to appeal) is provided under section 417(2), Cr.P.C. against the acquittal of respondent No. 1 from the charge under section 302, P.P.C., therefore, while keeping in view the provisions of section 439(5), Cr.P.C. the instant criminal revision is not maintainable in the eye of law. The above referred provisions of law reads as under:-

417. Appeal in case of acquittal.

(1) .....

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.

(2-A) .....

(3) .....

(4) .....

439. High Court's powers of revision.

(1) .....

(2) .....

(3) .....

(4) .....

(5) "Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

(6) .....

As the remedy of filing an appeal with the special leave of the court, under section 417(2-A), Cr.P.C. is provided against the acquittal of respondent No. 1 from the charge under section 302, P.P.C., therefore, no proceedings by way of the instant

criminal revision are entertainable at the instance of the petitioner/complainant who could have filed an appeal with the special leave of the court against respondent No.1.

10. Admittedly the amount of Diyat has rightly been fixed by the learned trial court according to the notification issued by the government for the relevant year. Even otherwise, there is no prayer in this petition for enhancement of the amount of Diyat.

11. The judgment cited by learned counsel for the petitioner in the case of Zarin v. The State (1976 SCMR 359) has been rendered on the point that the High Court was not barred from enhancing the sentence of a convict after his release from the jail. It was not held in the said judgment that in the exercise of revisional jurisdiction, the acquittal of an accused from a specific charge could be converted into one of his conviction by the High Court. Likewise in the case of Shaukat Ali v. The State (PLD 1982 SC 280), it was simply held by the apex court that a High Court can suo motu enhance the sentence of a convict and it was not held in the said judgment that while exercising revisional powers under section 439, Cr.P.C., a High Court can convert the findings of acquittal of an accused into one of his conviction. Similarly, the remaining judgments cited by learned counsel for the petitioner are not relevant for the determination of issues involved in the present petition.

12. Keeping in view all the above mentioned facts, the instant criminal revision petition is not maintainable; hence the same is hereby dismissed.

JK/G-15/L **Petition dismissed.**

2018 Y L R Note 173

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. SADAF ABBAS---Appellant

Versus

The STATE and another---Respondents

Criminal Appeals Nos.257, 444 and Criminal Revision No.314 of 2015, heard on 10th April, 2017.

(a) Penal Code (XLV of 1860)---

----Ss.302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Complainant had lodged FIR against two accused persons for committing murder of his son on the basis of suspicion with the allegation that deceased had eloped lady co-accused and both were staying at the house of accused---Complainant had insulted his neighbor brother-in-law of accused, many times and due to that grudge, the accused persons committed the occurrence---After registration of FIR on 15.5.2011, prosecution introduced two eye-witnesses to furnish the ocular account---Evidence of the said witnesses showed that they had seen the occurrence regarding commission of murder of deceased at the hands of the accused persons on 12.5.2011 at 5.30 p.m. but they did not report the matter to the police for a period of three days---Said witnesses, later on appeared before the police on 15.5.2011 to make their statements against the accused persons and explained that parents of the deceased were not known to them, therefore, they did not report the matter to the police in time---Witness of ocular account stated that after the occurrence, he straightaway went towards his house as weather was very hot those days---Explanation by the said witness was not plausible---Admittedly, accused persons were empty handed at the time of occurrence, but the witnesses did not try to apprehend them---Witnesses could have at least apprehended co-accused who was a female but they did not attempt to do so---Unnatural conduct of the said witnesses had established that they were not present at the time of occurrence---Post-mortem report and evidence of Medical Officer showed that there were three injuries on the body of the deceased---Both the eye-witnesses had not explained the said injuries in their statements recorded by the police or by the Trial Court, which indicated that they were not present at the spot

at the time of occurrence---Evidence of said witnesses was not trustworthy, in circumstances---Witnesses of ocular account had admitted that lady co-accused was not known to them prior to occurrence but no identification parade for her identification took place---Circumstances established that prosecution had failed to prove its case beyond any shadow of doubt, benefit of which would resolve in favour of accused persons---Accused were acquitted by setting aside conviction and sentence recorded by the Trial Court in circumstances. [Paras. 9, 10 & 11 of the judgment]

Muhammad Asif v. The State 2017 SCMR 486; Muhammad Khan v. Maula Bakhsh and another 1998 SCMR 570; Liaquat Ali v. The State 2008 SCMR 95; Pathan v. The State 2015 SCMR 315; Irshad Ahmad v. The State 2011 SWCMR 1190 and Irfan Ali v. The State 2015 SCMR 840 rel.

(b) Penal Code (XLV of 1860)---

----Ss.302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Enmity of witnesses towards accused---Effect---Defence was unable to establish any enmity of the eye-witnesses with the accused persons---Evidence of the witnesses could not be relied upon merely on the ground of having no enmity with the accused persons, when their evidence was otherwise not worthy of reliance. [Para. 12 of the judgment]

Haroon alias Harooni v. The State and another 1995 SCMR 1627 and Ghulam Mustafa alias Ziau v. the State PLD 1991 SC 718 rel.

(c) Penal Code (XLV of 1860)---

----Ss.302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of different articles from accused---Scope---Shirt of the deceased had allegedly been recovered on the pointation of accused but the same was never got identified by the complainant to be of the deceased---Record showed that occurrence took place on 12.5.2011 while accused was arrested on 27.5.2011 and Identity Card of the deceased was recovered from his possession on 30.5.2011---Record was silent and it did not appeal to a prudent mind that as to why the accused would keep the Identity Card of the deceased with him for a period of more than fifteen days after the occurrence---Said recovery, in the circumstances could not be used against the accused. [Para. 13 of the judgment]

Muhammad Sajjad v. The State 2009 SCMR 1248 rel.

(d) Penal Code (XLV of 1860)---

----Ss.302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Motive not proved---Effect---Prosecution had alleged that motive of the occurrence was that neighbor of the complainant was many times insulted by the complainant---Accused was brother-in-law of neighbor of the complainant and he had provided residence to deceased and his wife/co-accused at his house---Due to the said grudge (of insulting the neighbor) accused persons committed the murder of the deceased---Complainant and a witness had appeared to prove the motive part of the occurrence---Complainant made dishonest improvements in his statement by stating that accused and lady co-accused had developed illicit relations inter se and wanted to marry each other---Due to said reason and insult of neighbor of complainant, accused persons committed the murder of deceased---Complainant conceded during his cross-examination that he did not get recorded in FIR about illicit relations between the accused persons---Witness of motive part of the occurrence had stated in his cross-examination that motive part was told to him by the complainant and he had no personal knowledge of the same---Neighbor who was allegedly insulted by the complainant and due to whose insult the accused persons allegedly committed the murder of the deceased, was not made accused in the case---No private complaint was filed by the complainant against his neighbor---As the motive alleged in the FIR was directly attributed against the neighbor of complainant and said neighbor had not been tried in the case, therefore, the motive to the extent of the accused persons could not be believed---Other motive of illicit relations inter-se the accused persons was not mentioned in the FIR---Prosecution had failed to prove the motive in circumstances. [Para. 14 of the judgment]

Akhtar Ali and others v. The State 2008 SCMR 6 rel.

(e) Criminal trial---

----Benefit of doubt--- Scope--- Single circumstance creating doubt regarding the prosecution case, would be sufficient to give benefit of doubt to the accused. [Para. 15 of the judgment]

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Malik Saleem Iqbal Awan for Appellant (in Criminal Appeal No.444 of 2015).

Javed Imran Ranjha, Malik Sofera Khan Waseer, Ch. Safdar Hussain Tarar and Aftab Hussain Qureshi for Appellant (Criminal Appeal No.257 of 2015).

Nisar Ahmad Virk, Deputy District Public Prosecutor for the State.

Nemo for the Complainant.

Date of hearing: 10th April, 2017.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 257 of 2015 filed by Mst. Sadaf Abbas against her conviction and sentence, Criminal Appeal No. 444 of 2015 preferred by Muhammad Imran appellant against his conviction and sentence and Criminal Revision No. 314 of 2015 filed by Muhammad Sarwar appellant/complainant for enhancement of the sentence of Mst. Sadaf Abbas and Muhammad Imran convicts from life imprisonment to death sentence. I propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 30.01.2015 passed by learned Additional Sessions Judge, Piplan, District Mianwali.

2. Mst. Sadaf Abbas and Muhammad Imran appellants were tried in case FIR No. 88/2011 dated 15.05.2011 offences under sections 302/ 34, P.P.C. registered at Police Station Piplan District Mianwali. After conclusion of the trial, the learned trial court vide its judgment dated 30.01.2015 has convicted and sentenced the appellants as under:-

> Under section 302-B, P.P.C., sentence of imprisonment for life was awarded to each appellant, for committing Qatl-i-Amd of Muhammad Usman (deceased). They both were also ordered to pay Rs. 50,000/- each to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. and in default thereof to suffer simple imprisonment for four months each.
>
> The benefit of section 382-B, Cr.P.C. was also extended to them.

3. Brief facts of the case as given by the complainant Muhammad Sarwar in FIR Exh. PF are that he (complainant) was running a shop of spare parts in Toba Tek Singh City and Muhammad Usman (deceased) was his real son who about three months earlier eloped with Mst. Sadaf Abbas (appellant) and left his house. During

the search, it came to the knowledge of the complainant that Muhammad Imran (appellant) had provided accommodation to them in his house situated at Gol Chowk, Piplan, District Mianwali. On 15.05.2011, Muhammad Sarwar complainant along with his son Muhammad Suleman and nephew Muhammad Siddique was going on a car in search of Muhammad Usman (deceased) and when at about 12.30 p.m. they reached near the bridge Nani Wala of Thal canal (within the jurisdiction of Police Station Piplan), they saw that large number of people had gathered there. They stopped and it was told to them that deadbody of a person was floating in the water of the canal and when they came out of the car, they identified that it was the deadbody of Muhammad Usman (deceased). They managed to take the deadbody out of the water with the help of other people. The complainant expressed his strong suspicion against both the appellants that they had murdered Muhammad Usman (deceased) and threw his deadbody in the canal.

According to the prosecution story narrated in the FIR Exh. PF, the motive behind the occurrence was that one Iqrar Shah was neighbour of the complainant who was many times insulted by the complainant. Muhammad Imran appellant was brother-in-law of the above mentioned Iqrar Shah. Muhammad Usman deceased and Mst. Sadaf Abbas appellant were residing with Muhammad Imran at his house and due to the above mentioned grudge (of insult of Iqrar Shah), the appellants committed the murder of Muhammad Usman deceased.

4. The appellants were arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced eleven witnesses during the trial.

Muhammad Sarwar (PW5) is the complainant of this case. He and Muhammad Siddique (PW-6) are the witnesses of the motive part of the prosecution case, whereas, Abdul Aziz (PW7) and Ghulam Muhammad alias Gamaya (PW8) are the eye-witness of the occurrence. Abdul Ghafoor, SI (PW9) is the investigating officer of the case.

The medical evidence was furnished by Dr. Bilal Ayyub Niazi, (PW10).

Mst. Zenab Bibi, 638/LC (PW1) is the recovery witness of mobile phone recovered from Mst. Sadaf Abbas deceased. Muhammad Bashir 129/C (PW3) is

the recovery witness of motorcycle used by the accused during the occurrence. He is also witness of the recovery of shirt (P2) and mobile (P4) of the deceased from Muhammad Imran (appellant). Muhammad Zubair 1266/C (PW11) is the recovery witness of mobile phone of the appellant, recovered from Muhammad Imran appellant at the time of his arrest.

Sher Muhammad 1052/C (PW2) and Muhammad Shafiq draftsman (PW4) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of recovery memo of mobile phone P-2 recovered from the possession of Mst. Sadaf Abbas appellant Exh. PA, recovery memo of last worn clothes of the deceased Muhammad Usman Exh. PB, recovery memo of motorcycle Exh. PC, recovery memo of mobile phone of Muhammad Usman deceased Exh. PD, scaled site plan of the place of occurrence Exh. PE, FIR Exh PF, Inquest report Exh. PG, Injury statement of the deceased Exh. PG/1, rough site plan of the place of occurrence Exh. PJ, rough site plan of the place of recovery of mobile phone recovered on personal search of Mst. Sadaf Abbas appellant Exh. PK, recovery memo of the place of recovery of mobile phone recovered on personal search of Muhammad Imran appellant Exh. PL, rough site plan of the place of recovery of mobile phone and shirt of the deceased recovered at the instance of Muhammad Imran appellant Exh. PM, Post mortem report of the deceased Exh. PN, pictorial diagram of the deceased Exh PN/1 and closed the prosecution evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded, wherein they refuted the allegations levelled against them. While answering to a question that 'Why this case against you and why the PWs have deposed against you" the appellants replied as under:--

Muhammad Imran

> "The complainant party developed an idea that it was 1 who provided shelter to deceased and his wife Mst. Sadaf Abbas after their marriage at Piplan. After the death of Usman deceased, the complainant tried his best to take revenge from Sadaf accused and due to the same, complainant introduced a false motive of illicit relations between me and Sadaf accused. Both the PWs Abdul Aziz and Ghulam Muhammad alias Gamya are stock witnesses. Abdul Aziz is running his business at Fateh Pur and is under the influence of Muhammad Siddique PW who is a big landlord

of Fateh Pur. PW Ghulam Muhammad alias Gamay is a history sheeter and a permanent police tout. Both the PWs above said belong to Joeya and Ghayas Mehdi political group of Piplan whereas I belong to Sher Dil Khan Kilia Khel group. Presence of Ghayas Mehdi Khan has been shown even on the place of recovery of deadbody at the time of first visit of I.O. at there. Both the PWs tried their level best to blackmail me and to grab a big amount from me in consideration of resiling from their statements but I was unable to manage their required amount due to which both the witnesses deposed against me ".

Sadaf Abbas

"Deceased Usman solemnized marriage with me against the wishes of his parents, after the marriage the complainant published an announcement in a local newspaper about desertion of his son, the complainant became inimical with me and in his view the deceased solemnized marriage and left his house on my instigation and motivation. To teach me a lesson and to take revenge the complainant concocted a false story of illicit relation between me and Imran accused and provided stock and false witnesses to the police. PWs Abdul Aziz and Ghulam Muhammad alias Gamaya tried their level best to blackmail me and to grab a big amount from me in consideration of resiling from their statements but I was unable to manage their required amount due to which both the witnesses deposed against me."

The appellants opted not to make statements on oath as envisaged under Section 340 (2), Cr.P.C., however, in defence evidence the appellant Muhammad Imran produced proclamation of newspaper Millat Lahore dated 01.02.2011 as Exh. DF.

The learned trial court vide its judgments dated 30.01.2015 found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

5. No one is present on behalf of the complainant, despite repeated calls. The name of learned counsel for the complainant is duly reflected in the cause list issued for today but there is no intimation regarding any reason of his absence, therefore, I proceed to decide these cases after hearing learned counsel for the appellants and learned Deputy District Public Prosecutor for the State, as well as, after perusal of the record.

6. It is contended by learned counsel for the appellants that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; that the name of any eye-witness was not mentioned in the FIR which was lodged merely on the basis of suspicion and guess work; that the alleged eye-witnesses of occurrence namely Abdul Aziz (PW7) and Ghulam Muhammad (PW8) claimed that they had seen the occurrence on 12.05.2011 but they did not report the matter to the police for a period of three days without any plausible explanation, therefore, their evidence is not worthy of reliance; that even otherwise the conduct of the above mentioned eye-witnesses is highly unnatural because they had seen the appellants while committing the offence of murder but they did not try to apprehend the appellants in spite of the fact that both the appellants were empty handed and one of them is a female and the above mentioned witnesses claimed that they had seen the occurrence from a distance of only 15/16 Karams; that there are material weaknesses and inherent defects in the statements of above mentioned eye-witnesses because there were three injuries on the body of the deceased but the eye-witnesses had given no explanation in respect of the aforementioned injuries which shows that in fact the occurrence was unseen and the alleged eye-witnesses were not present at the spot at the time of occurrence; that the prosecution eye-witnesses admitted that Mst. Sadaf Abbas appellant was earlier not known to them but no identification parade of the said appellant was conducted in this case; that the prosecution alleged a specific motive but miserably failed to prove the same; that the complainant made dishonest improvements in his statement in respect of the motive part of the case and he was confronted with his previous statement and the improvements made by him were duly brought on the record; that the other witness namely Muhammad Siddique (PW6) produced by the prosecution to prove the alleged motive has frankly admitted during his cross-examination that he had no personal knowledge about the motive and the same was told to him by the complainant, thus, his statement which is based on hearsay evidence is of no avail to the prosecution; that only a cell mobile phone has been recovered from the possession of Mst. Sadaf Abbas appellant which admittedly belonged to the said appellant and as such the aforementioned recovery of mobile phone is inconsequential for the prosecution; that insofar as the recovery of motorcycle from Muhammad Imran appellant is concerned, it was the case of prosecution that Muhammad Imran appellant took the said motorcycle on rent from one Gull Hameed and used the

same in occurrence in order to transport the deceased to the place of occurrence but the above said Gul Hameed was never produced in the witness box; that there is absolutely no evidence to establish that the mobile phone allegedly recovered from the possession of Muhammad Imran appellant was owned by Muhammad Usman deceased; that Qamiz P-3 of the deceased allegedly recovered from Muhammad Imran appellant was never got identified by Muhammad Sarwar complainant, in order to establish that the said shirt belonged to the deceased; that the alleged recovery of I.D. Card of the deceased was planted against Muhammad Imran appellant and even otherwise it does not appeal to the common sense that as to why Muhammad Imran appellant would keep the I.D. Card of the deceased with him for a period of 15 days after the occurrence because the said I.D. Card was of no use for the above mentioned appellant; that the impugned judgment is result of misreading and non-reading of evidence, therefore, the same may be set aside and the appellants may be acquitted from the charges.

7. On the other hand, this petition has been opposed by learned Deputy District Public Prosecutor on the grounds that the prosecution has proved its case against the appellants beyond the shadow of any doubt; that Muhammad Usman deceased contracted court marriage with Mst. Sadaf Abbas appellant without the consent of his parents, therefore, he left his house and he along with his wife stared to reside at the house of Muhammad Imran appellant but in the meanwhile Mst. Sadaf Abbas appellant and Muhammad Imran appellant developed illicit relations inter-se and due to this reason they committed the murder of Muhammad Usman deceased; that the prosecution has proved its case against the appellants through confidence inspiring and trustworthy evidence of eye-witnesses namely Abdul Aziz (PW7) and Ghulam Muhammad (PW8) who had absolutely no enmity with the appellants to falsely depose against them; that the aforementioned eye-witnesses of the prosecution stood the test of lengthy cross-examination but their evidence could not be shaken; that the prosecution has also proved the motive part of its case through reliable and convincing evidence of Muhammad Sarwar complainant (PW5) and Muhammad Siddiq (PW6); that prosecution case against the appellants is further corroborated by the recovery of mobile phone of the deceased P-2, shirt of the deceased P-3 and I.D. Card of the deceased P-4 on the pointation of Muhammad Imran appellant which were taken into possession vide recovery memo Exh. PD; that post mortem report of the deceased has further

supported the prosecution evidence against the appellants; that there is no substance in these appeals, therefore, the same may be dismissed.

8. Arguments heard and record perused.

9. The detail of the prosecution case has already been given in para No. 3 of this judgment, therefore, there is no need to repeat the same. It is evident from the perusal of record that no eye-witness was mentioned in the FIR Muhammad Sarwar complainant lodged FIR Exh. PF on the basis of suspicion against both the appellants with the allegation that Muhammad Usman deceased eloped with Mst. Sadaf Abbas appellant and they both were staying at the house Muhammad Imran appellant at Piplan, therefore, the complainant expressed his suspicion that both the appellants committed the murder of his son Muhammad Usman deceased because one Iqrar Shah who was neighbor of the complainant was insulted many times by the complainant and as the said Iqrar Shah was brother-in-law of Muhammad Imran appellant, therefore, due to this grudge the appellants committed the occurrence. After registration of the FIR on 15.05.2011, on the same day, prosecution introduced two eye-witnesses in this case, namely Abdul Aziz (PW7) and Ghulam Muhammad (PW8). Both the above mentioned eye-witnesses have stated that on 12.05.2011 at 05.30 p.m. they saw Muhammad Imran appellant and Mst. Sadaf Abbas appellant along with Muhammad Usman deceased who were standing on the stairs of bridge of Thal canal of Tehsil Piplan and within their view both the appellants pushed Muhammad Usman deceased into the canal who did not know how to swim and drowned in the water. According to their evidence, both the said eye-witnesses saw the occurrence regarding commission of a heinous crime of murder of Muhammad Usman (deceased) at the hands of the appellants on 12.05.2011 at 05.30 p.m. but they did not report the matter to the police for a period of three days and later on they appeared before the police on 15.05.2011 to make their statements against the appellants. Although the above mentioned witnesses gave this explanation that parents of the deceased were not known to them, therefore, they did not report the matter to the police but at the same time both the said witnesses claimed that Muhammad Imran appellant was very well known to them prior to the occurrence. In-spite of the fact that Muhammad Imran appellant was known to them prior to the occurrence and they had seen the said appellant while committing the crime of murder, they did not bother to proceed to the police station to inform the police about the occurrence. Abdul Aziz (PW7) stated during his cross-examination that

after the occurrence he straightaway went towards his house as it was very hot season. The explanation given by the above mentioned witness for not proceeding towards the police station to lodge the FIR is highly ridiculous because if it was very hot season on 12.05.2011 then it was the same season after three days, i.e. on 15.05.2011, when he went to the police station and made his statement before the police. The Hon'ble Supreme Court of Pakistan in the case of Muhammad Asif v. The State (2017 SCMR 486) was pleased to observe that even one or two days unexplained delay in recording the statements of eye-witnesses would be fatal and testimony of such witnesses could not be safely relied upon. Similarly in the case of Muhammad Khan v. Maula Bakhsh and another (1998 SCMR 570) the apex court of the country held that belated statement of a witness recorded under section 161, Cr.P.C. without offering any plausible explanation would reflect adversely on the credibility of such witness and his statement shall be looked with serious suspicion.

Moreover, the conduct of both the above mentioned eye-witnesses at the time of occurrence also raises serious questions about their presence at the spot at the relevant time. The appellants were admittedly empty handed and they did not carry any sort of weapon with them at the time of occurrence. Abdul Aziz (PW7) has stated during his cross-examination that he along with Ghulam Muhammad (PW8) saw the appellants while committing the occurrence from a distance of 15/16 Karams. Both the above mentioned eye-witnesses did not try to apprehend the appellants. They could have at least apprehended Mst. Sadaf Abbas appellant who is a female but they did not attempt to do so. The unnatural conduct of the above mentioned eye-witnesses has established that they were not present at the time of occurrence and their evidence is not worthy of reliance. In the cases reported as Liaquat Ali v. The State (2008 SCMR 95), Pathan v. The State (2015 SCMR 315) and Irshad Ahmad v. The State (2011 SCMR 1190), the Hon'ble Supreme Court of Pakistan disbelieved the evidence of eged eye-witnesses of the occurrence on the ground that despite the fact that the accused were not armed with any formidable weapon at the time of occurrence, the said eye-witnesses did not try to over power or apprehend the accused and as such their conduct was highly un-natural, therefore, their evidence was not worthy of reliance.

10. It is also noteworthy that as per post-mortem report Exh. PN and evidence of Dr. Bilal Ayyub Khan Niazi (PW10), there were three injuries on the body of

Muhammad Usman deceased. The detail of the said injuries as given by Dr. Bilal Ayub Khan Niazi (PW.10) is reproduced as under:--

1. An abrasion 0.5 x 0.3 cm x skin deep on left side of forehead, 1 cm above the left eyebrow.

2. An abrasion 1.5 cm x 1 cm on the front of right knee joint.

3. An abrasion 1.3 cm x 0.8 cm on the front of left knee joint.

I have noted that both the above mentioned eye-witnesses have not explained the said injuries in their statements recorded by the police or by the learned trial court which further indicates that they were not present at the spot at the time of occurrence because had they been present at the place of occurrence at the relevant time then they must have explained the said three injuries on the body of the deceased, in their statements recorded by the police or by the learned trial court. Under the circumstances, the evidence of above mentioned eye-witnesses is not trustworthy. In the case of Irfan Ali v. The State (2015 SCMR 840), at Page 844, the apex court of the country was pleased to observe as under:-

> "11…….The most striking feature of the case is that in the FIR complete photographic narration of the entire tragedy has been given so much so, Muhammad Khan acquitted accused and the appellant were attributed causing specific injuries with the fire shots of 30 bore pistols at the deceased. With such degree of accuracy each and every detail of the incident was given, however, it was not due to mental disorientation that the dagger blows inflicted on the deceased found during the autopsy on the dead body, could not be noticed by the complainant. This doubt of reasonable nature and substance would strongly suggest that the complainant and the other eye-witnesses were not present at the spot, otherwise, the lodging the report after more than 3 hours and spending 1-1/2 hour at the spot with the dead body, no room was left for this glaring omission. This omission is very fatal to the prosecution case and it is established that crime was an unwitnessed one"

11. Both the above mentioned witnesses have admitted that Mst. Sadaf Abbas appellant was not known to them prior to the occurrence. No identification parade of the said appellant has ever taken place in this case.

12. It is true that the defence was unable to establish any enmity of the above mentioned witnesses with the appellants but the evidence of said eye-witness cannot be blindly relied upon merely on the ground that they had no enmity with the appellants, when otherwise their evidence is not worthy of reliance. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Haroon alias Harooni v. The State and another (1995 SCMR 1627) and Ghulam Mustafa alias Ziau v. The State (PLD 1991 SC 718).

13. Insofar as the recovery of mobile phone P-2 through recovery memo Exh. PA from the possession of Mst. Sadaf Abbas appellant is concerned, admittedly the said mobile phone is owned by Mst. Sadaf Abbas appellant. No mobile data is available on the record that the above mentioned mobile phone was used by the said appellant for the commission of occurrence of this case. Although a motorcycle has been recovered from the possession of one Gul Hameed vide recovery memo (Ex.PC) and the prosecution case in respect of the said motorcycle is that the same was taken on rent from the said Gul Hameed and it was used by the appellants for transporting Muhammad Usman deceased to the place of occurrence. The abovementioned Gul Hameed was never produced in the witness box in support of the above mentioned claim of the prosecution. A mobile phone bearing Sim No. 0301-3129692 has also been recovered from the possession of Muhammad Imran appellant with the allegation that the said mobile phone belonged to Muhammad Usman deceased but there is absolutely no documentary proof to establish that the above mentioned mobile phone was owned by Muhammad Usman deceased.

Although shirt of the deceased (P3) has allegedly been recovered on the pointation of Muhammad Imran (appellant) but the said shirt was never got identified by the complainant to prove that the same belonged to the deceased. Insofar as the recovery of I.D. Card of the deceased from the possession of Muhammad Imran appellant is concerned, I have noted that the occurrence in this case took place on 12.05.2011. Muhammad Imran appellant was arrested in this case on 27.05.2011, whereas, the alleged recovery of I.D. Card of the deceased was effected from the possession of Muhammad Imran appellant on 30.05.2011. It does not appeal to a prudent mind that as to why the said appellant would keep the I.D. Card of the deceased with him for a period of more than 15 days after the occurrence so that the same may be used as an evidence against him, when the said I.D. Card was of no use for the above mentioned appellant. In the case of

Muhammad Sajjad v. The State (2009 SCMR 1248), at page 1254, the apex court gave the following findings in respect of the prosecution evidence qua the recovery of photo copy of the I.D. card of the complaint from the accused.

> "…..As far as identity card of the complainant is concerned it was of no use to the accused. Anyone with a head on his shoulders would not keep these articles intact till his arrest so as to produce those to the Investigating Officer……"

Under the circumstances the aforementioned alleged recoveries from the possession of the appellants are highly doubtful and unreliable.

14. According to the prosecution story narrated in the FIR Exh.PF the motive behind the occurrence was that one Iqrar Shah was a neighbor of the complainant who was many times insulted by the complainant. Muhammad Imran appellant was brother-in-law of the above mentioned Iqrar Shah. Muhammad Imran appellant provided residence to Muhammad Usman deceased and Mst. Sadaf Abbas appellant at his house and due to the above mentioned grudge (of insult of Iqrar Shah), the appellants committed the murder of Muhammad Usman deceased. In order to prove the above mentioned motive, the prosecution produced Muhammad Sarwar complainant (PW5) and Muhammad Siddique (PW6). Muhammad Sarwar complainant (PW5) while appearing in the witness box made dishonest improvements in his statement in respect of the motive part of the prosecution case by stating that Mst. Sadaf Abbas appellant eloped with Muhammad Usman deceased and they were residing in the house of Muhammad Imran appellant and during the said stay Muhammad Imran appellant and Mst. Sadaf Abbas appellant developed illicit relations inter se and wanted to marry each other and due to this reason and insult of Iqrar Shah, they committed the murder of Muhammad Usman deceased. Muhammad Sarwar complainant (PW5) was confronted with his previous statement and dishonest improvements made by him qua the motive part of the case were duly brought on the record. He frankly conceded during his cross-examination that it is correct that he did not get recorded in FIR Exh. PF about illicit relations between Muhammad Imran and Mst. Sadaf Abbas accused persons. The relevant part of his statement in this respect is reproduced hereunder for ready reference:--

> "It is correct that I did not get record in FIR Exh. PF about illicit relations between Imran Shah and Mst. Sadaf Abbas accused persons"

The said witness also admitted during his cross-examination that it is correct that wife of Iqrar Shah is not sister of Imran Shah accused, however, he volunteered that Iqrar Shah is Behnoi of Muhammad Imran accused in relation. Muhammad Siddique (PW6) has categorically stated in his cross-examination that it is correct that motive part was told to him by his Mamoon, i.e. Muhammad Sarwar complainant (PW5) and he had no personal knowledge of the same. The above mentioned Iqrar Shah who was allegedly insulted by the complainant and due to his insult the appellants allegedly committed the murder of Muhammad Usman deceased, was never made an accused in this case by the police. No private complaint was filed by the complainant against said Iqrar Shah. As the motive alleged in the FIR was directly attributed against the above mentioned Iqrar Shah and because the said Iqrar Shah has not been tried and convicted in this case, therefore, the aforementioned motive to the extent of the present appellants cannot be believed. Insofar as the other motive alleged by the prosecution witnesses regarding development of illicit relations inter-se both the appellants is concerned, admittedly the said motive was not mentioned in the FIR. As the said motive is result of dishonest improvements in the statements of prosecution witnesses, therefore, the prosecution story qua the above mentioned newly introduced motive which was introduced for the first time at the time of recording of the statements of PWs by the learned trial court, cannot be relied upon. Reference in this respect may be made to the case of Akhtar Ali and others v. The State (2008 SCMR 06).

15. Keeping in view all the above mentioned facts, I have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the truthfulness of the prosecution evidence. In Tariq Pervez v. The State (1995 SCMR 1345) the Hon'ble Supreme Court of Pakistan at page 1347 was pleased to observe as under:--

> "5……..The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt it is not necessary that there should be many circumstances creating doubt. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of Muhammad Akram v. The State (2009 SCMR 230) at page 236 observed as under:--

> "13……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. In the light of above discussion, Criminal Appeal No. 257 of 2015 filed by Mst. Sadaf Abbas appellant and Criminal Appeal No. 444 of 2015 filed by Muhammad Imran appellant are allowed, convictions and sentences of both the appellants recorded by the learned Additional Sessions Judge Piplan, District Mianwali vide judgment dated 30.01.2015 are hereby set aside and both the appellants are acquitted of the charges by extending them the benefit of doubt. Mst. Sadaf Abbas and Muhammad Imran appellants are in custody, they be released forthwith if not required in any other case.

16(sic) As Mst. Safdar Abbas and Muhammad Imran appellants have been acquitted by this Court today, therefore, Criminal Revision No.314 of 2015 filed by Muhammad Sarwar complainant seeking enhancement of sentence of the said appellants from imprisonment for life to death penalty has become infructuous, hence, the same is hereby dismissed.

JK/S-45/L **Appeals allowed.**

PLJ 2018 Lahore 474

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

***Mst.* ALIA SEHAR--Petitioner**

versus

STATION HOUSE OFFICER POLICE STATION MUREED WALA DISTRICT FAISALABAD and 4 others--Respondents

W.P. No. 152452 of 2018, decided on 31.1.2018.

Constitution of Pakistan, 1973--

----Arts. 4, 10-A & 199--Criminal Procedure Code, (V of 1898), S 22-A & 22-B & 491--Custody of minors--Illegal & improper custody--Habeas corpus--Right of hizanat--Mental sickness of minors mother--Respondent an advocate exerting influence in proceedings--Petitioner, mother of minors filed petition before ASJ, upon which minors were handed over to her--Non-implementation of orders--Petitioner contended that she is real mother of minors and her petition had been accepted by ASJ, but respondent along with other members of bar did not allow implementation of said order--Respondent contended that petitioner is psycho patient, minors are school going, as such, welfare of minors lie with respondent--Determination--Petitioner is real mother of minors--First right of Hizanat in respect of minors lies with petitioner--Habeas Corpus filed by petitioner was accepted--Respondent along with other members of bar did not allow implementation of order passed by ASJ--Neither fact of mental sickness of petitioner nor any FIR was lodged regarding alleged attack of petitioner on father of respondent--Petition allowed. [Pp. 478 & 479] A & B

Naziha Ghazali vs. The State and another 2011 SCMR 1782 *ref.*

Rana Rashid Akram Khan, Advocate for Petitioner.

Ch. Iftikhar Iqbal Ahmad, Astt.A.G.

M/s. Ch. Amin Javed, Ch. Asif Shahzada, Amir Shahzad Anjum, Afzaal Aslam Khan Lodhi and Dilbar Hameed Ball, Advocates with Respondent No. 2.

Date of hearing: 31.1.2018.

ORDER

Through this single order, I intend to decide the instant Writ Petition No. 152452-H of 2018, as well as, connected Writ Petition No. 155237 of 2018, as both these petitions have arisen out of the same order dated 16.01.2018 passed by the learned Addl. Sessions Judge, Samundari District Faisalabad, whereby the minor children of the petitioner, namely, Basham Fatima aged about 06 years, Yashfa Fatima aged about 05 years and Abdullah aged about 03 years were directed to be handed over to their mother *Mst.* Alia Sahar (petitioner). The petitioner of Writ Petition No. 152452 of 2018, namely, *Mst.* Alia Sahar shall hereinafter be called as the petitioner, whereas, Mushtaq Ahmad, Respondent No. 2 of the said petition, shall hereinafter be called as the respondent. Learned Addl. Sessions Judge, Samundari *vide* the abovementioned order dated 16.01.2018 directed that the abovementioned minors be handed over to their mother (*Mst.* Alia Sahar petitioner) and Writ Petition No. 152452 of 2018 has been filed by *Mst.* Alia Sehar on the ground that inspite of the abovementioned order of learned Addl. Sessions Judge, Samundari, the minors were not handed over to her as the respondent is an Advocate, whereas, Writ Petition No. 155237 of 2018 has been filed by Mushtaq Ahmad respondent (petitioner of the said Writ Petition) to challenge the legality of abovementioned order dated 16.01.2018 of the learned Addl. Sessions Judge, Samundari.

2. As per brief facts of the present case, *Mst.* Alia Sehar petitioner was married with Mushtaq respondent and from the said wedlock, the abovementioned minors were borne. As per claim of the petitioner, she was ousted by the respondent from his house ten days prior to the filing of her habeas petition in the Court of learned Addl. Sessions Judge, Samundari, which was filed on 04.01.2018. On 02.01.2018, the respondent forcibly snatched the minors from her custody, whereupon, she filed the abovementioned habeas petition for the recovery of her minor children which was

accepted *vide* order dated 16.01.2018 passed by the learned Addl. Sessions Judge, Samundari and all the minors were directed to be handed over to the petitioner. Mushtaq Ahmad respondent is a practicing Advocate in the local Bar therefore, the aforementioned order of the learned Addl. Sessions Judge, Samundari could not be implemented. *Mst.* Alia Sehar petitioner has now filed the instant petition before this Court on the ground that despite the abovementioned order of the learned Addl. Sessions Judge, Samundari, the minors were not handed over to her and they are still in illegal/improper custody of Mushtaq Ahmad respondent. On the other hand, Mushtaq Ahmad respondent has also filed the abovementioned connected Writ Petition No. 155237 of 2018 whereby he has challenged the legality of the abovementioned order dated 16.01.2018 passed by the learned Addl. Sessions Judge, Samundari.

3. It is contended by learned counsel for *Mst.* Alia Sehar petitioner that the petitioner is real mother of the minors and her habeas petition has already been accepted by the learned Addl. Sessions Judge, Samundari *vide* order dated 16.01.2018 whereby the minors were directed to be handed over to the petitioner but as Mushtaq Ahmad respondent is a practicing Advocate at Tehsil Courts Samundari therefore, he along with other members of the Bar did not allow the implementation of the aforementioned order; that the respondent thereafter, filed a guardian petition in the Court of learned Guardian Judge, Samundari on 18.01.2018 in order to frustrate the aforementioned order of the learned Addl. Sessions Judge, Samundari; that the respondent concealed the fact in his guardian petition regarding the acceptance of habeas petition filed by the petitioner and he simply stated in his aforementioned petition that the habeas petition filed by the petitioner in the Court of learned Addl. Sessions Judge, Samundari has already been decided; that the respondent has now advanced another claim that the petitioner is mentally sick, whereas, no such allegation was leveled by the respondent in his divorce deed; that the respondent did not challenge the order of the learned Addl. Sessions Judge, Samundari dated 16.01.2018 and when the petitioner filed her Writ Petition before this Court then the respondent has filed the abovementioned connected Writ Petition which speaks

malafide of the respondent; that although an interim stay has been granted by the learned Guardian Judge in favour of the respondent but the said interim stay has *malafide*ly been obtained *ex-parte* by the respondent in order to illegally deprive the petitioner from her minor children; that after the impugned order passed by the learned Addl. Sessions Judge, Samundari, the custody of the minors with the respondent is illegal and improper therefore, this petition may be accepted and the minors may be handed over to the petitioner.

4. On the other hand, it is contended by learned counsel for the respondent that Mushtaq Ahmad respondent is real father of the minors therefore, custody of the minors with the abovementioned respondent is neither illegal nor improper; that the petitioner is a psycho patient and it will not be in the welfare of the minors to hand over their custody to the petitioner; that on 28.11.2017, the petitioner attacked upon the father of the respondent with the help of 'Churri' and caused injury to him and a medical report in this respect is also available on the record; that the petitioner has not approached the Court with clean hands because the petitioner has alleged that the petitioner was ousted by the respondent about ten days prior to the filing of her habeas petition in the Court of learned Addl. Sessions Judge, Samundari which was filed on 04.01.2018 and thereafter, the minors were snatched from her custody on 02.01.2018 but through the school certificates of the minors it is established that the minors were throughout under the custody of Respondent No. 2 and they were also appearing in the school during the days when the petitioner was allegedly ousted by the respondent; that if the minors are handed over to the petitioner then it will not be in their welfare because in that case their studies will be disturbed; that the respondent has already filed a guardian petition before the learned Guardian Judge, Samundari and interim stay in favour of the respondent has also been issued on 18.01.2018; that keeping in view the abovementioned facts, Writ Petition filed by *Mst.* Alia Sehar petitioner may be dismissed and Writ Petition filed by the respondent may be accepted while setting-aside the impugned order dated 16.01.2018 passed by the learned Addl. Sessions Judge, Samundari. In support of his contentions, learned counsel for the respondent has placed reliance on the cases reported as *'Naziha*

Ghazali vs. The State and another' (2001 SCMR 1782), *'Tanvir Hussain vs. Station House Officer, Police Station Safdarabad, District Sheikhupura and 5 others'* (PLD 2011 Lahore 516), *'Mst. Seema vs. Aftab Ahmed and others'* (2013 YLR 583), *'Mst. Zohra Hilal vs. Noor Sakht Shah and others'* (2009 MLD 258), *'Mst. Nadia Perveen vs. Mst. Almas Noreen and others'* (PLD 2012 Supreme Court 758) & *'Mrs. Rania Ibrahim Qureshi vs District & Sessions Judge, Abbotabad and 2 others'* (2011 PCr.L.J. 1594) .

5. Arguments heard. Record perused.

6. The petitioner is real mother of the minors, namely, Basham Fatima aged about 06 years, Yashfa Fatima aged about 05 years and Abdullah aged about 03 years. The first right of 'hazanat' in respect of the abovementioned minors lies with the petitioner. Habeas petition filed by the petitioner in the Court of learned Addl. Sessions Judge, Samundari for the recovery and interim custody of the minors was accepted *vide* order dated 16.01.2018. As Mushtaq Ahmad respondent is a practicing Advocate at Tehsil Courts, Samundari therefore, he along with his other colleagues (members of the Tehsil Bar, Samundari) did not allow the implementation of the abovementioned order of the learned Addl. Sessions Judge, Samundari and he forcibly kept the minors with him. The said respondent instead of challenging the aforementioned order of the learned Addl. Sessions Judge, Samundari before the High Court, initially filed a guardian petition in the Court of learned Guardian Judge, Samundari on 18.01.2018 and through concealment of the facts that the learned Addl. Sessions Judge, Samundari has already passed an order for handing over the custody of the minors to the petitioner and by simply stating that the habeas petition filed by the petitioner has been decided by the learned Addl. Sessions Judge, Samundari, he (respondent) obtained an interim stay order in his favour on 18.01.2018 from the learned Guardian Judge, Samundari. The Writ Petition of the petitioner i.e. Writ Petition No. 152452 of 2018 was filed before this Court on 24.01.2018 and notice in the said petition was issued to the respondent on 25.01.2018 for 26.01.2018. On 26.01.2018, Mushtaq Ahmad respondent appeared before this Court along with his learned counsel but he did not produce the minors before this Court and sought an adjournment in order to

produce the minors before the Court and the case was adjourned for 31.01.2018. In the meanwhile, the respondent filed the abovementioned connected Writ Petition No. 155237 of 2018 in this Court on 29.01.2018. It is therefore, evident that Mushtaq Ahmad respondent has *malafide*ly filed the abovementioned connected Writ Petition in order to frustrate Writ Petition No. 152452 of 2018, filed by *Mst.* Alia Sehar petitioner. Although learned counsel for the respondent alleged that the petitioner is a psycho patient and she earlier attacked upon the father of the respondent on 28.11.2017 and injured him but neither the aforementioned fact of mental sickness of the petitioner has been mentioned by the respondent in divorce deed of the parties nor any FIR was lodged regarding the abovementioned alleged attack of the petitioner on the father of the respondent. As mentioned earlier, the respondent obtained an interim stay from the learned Guardian Judge, Samundari on 18.01.2018 without specifying in his guardian petition that the learned Addl. Sessions Judge, Samundari has already directed that the custody of the minors be handed over to the petitioner *vide* order dated 16.01.2018 and he simply mentioned in his guardian petition that the habeas petition filed by the petitioner has already been decided by the learned Addl. Sessions Judge, Samundari. Respondent has *malafide*ly obtained the aforementioned *ex-parte* interim stay order dated 18.01.2018 from the learned Guardian Judge, Samundari therefore, the said order has no bearing on the merits of the instant constitutional petitions. Reliance in this respect may be placed on the case of *'Shaukat Masih vs. Mst. Farhat Parkash and others'* (2015 SCMR 731). Although it has been claimed by the respondent that the minors were throughout under his custody and the claim of the petitioner that they were forcibly snatched on 02.01.2018 has been falsified by the school certificates of the minors, wherein their attendance has been marked in the relevant record but it is noteworthy that the petitioner claimed in her petition under Section 491 of Cr.P.C, which was filed by the petitioner in the Court of learned Addl. Sessions Judge. Samundari on 04.01.2018, that about ten days prior to the filing of the said petition, she was expelled by the respondent from his house and later on, the minors were forcibly snatched from her custody on 02.01.2018. During the period of expulsion of the petitioner from the house of the respondent, which comes to the last week of December, 2017, there were admittedly winter vacation in the school

therefore, there is no substance in the argument of learned counsel for the respondent that the minors throughout remained under the custody of the respondent and the said fact is established from the attendance of the minors in their schools at the relevant time. It is also noteworthy that the respondent in his Writ Petition No. 155237 of 2018 has filed the school certificates of the minors in order to establish that the minors were under his custody during the period of desertion of the petitioner but the school certificates produced by the respondent have been issued by a private school and as such, the same are easily procurable. Moreover, there is contradiction in the name of school of the minors on different school documents. In the school certificate of the minor Basham Fatima and Yashfa Fatima, the name of school is written as 'New AFAQ School for Boys and Girls', whereas, in fee slips of the said minors, the name of school has been mentioned as 'New AFAQ Higher Secondary School, Samundari'. The genuineness of the said documents is still to be proved by the respondent in a guardian petition. The petitioner cannot be deprived from the interim custody of her minor children on the basis of such documents. In the case of *'Naziha Ghazali vs. The State and another'* (2011 SCMR 1782), cited by learned counsel for the respondent, habeas petition was filed by the mother after 5/6 months of the alleged unlawful removal of the minors from her custody, whereas, in the instant case, habeas petition was filed by the petitioner in the Court of learned Addl. Sessions Judge, Samundari within a period of two days from the date of unlawful removal of the minors from her custody. Similarly facts of the remaining judgments cited by learned counsel for the respondent are distinguishable from the facts of the present case.

7. In the light of above discussion, Writ Petition No. 152452 of 2018, filed by the petitioner, is accepted and the custody of the minors, namely, Basham Fatima aged about 06 years, Yashfa Fatima aged about 05 years and Abdullah aged about 03 years is directed to be handed over to *Mst.* Alia Sehar petitioner, whereas, Writ Petition No. 155237 of 2018 filed by Mushtaq Ahmad respondent against the order dated 16.01.2018 passed by the learned Addl. Sessions Judge, Samundari, is hereby dismissed *in limine*.

8. It is however, clarified that the observations made in this order are tentative in nature and shall not cause prejudice to the case of either party in guardian petition, pending before the learned Guardian Judge, Samundari and the same shall be decided by the concerned guardian Judge on its own merits keeping in view the welfare of the minors.

(Z.I.S.) **Petition accepted.**

2017 C L C Note 138

[Lahore (Rawalpindi Bench)]

Before Malik Shahzad Ahmad Khan, J

Malik LIAQAT ALI----Petitioner

Versus

DISTRICT CO-ORDINATION OFFICER RAWALPINDI and another---Respondents

W.P. No.2131 of 2015, heard on 1st September, 2015.

Parks and Horticulture Authority Act (XLVII of 2012)---

----Ss. 6 & 10 (1) (4)---Use of parks green belts and green areas for commercial activities---Right to life, scope of---Petitioner raised question regarding violation of his fundamental rights by the authorities guaranteed under Arts.9 & 26 of the Constitution; therefore, constitutional petition was maintainable---Park in question was under the control of the Authority and District Coordination Officer had granted permission to the respondent to hold Festival in the park---Respondent under the garb of said permission had started using the park for commercial activities/business of circus, zoo, etc.---Under S.6 of Park and Horticulture Authority Act, 2012 only Board of Directors of Parks and Horticulture Authority could make policy decision and nothing was available on record to show that any decision had been taken by Directors of the Board: therefore, District Coordination Officer had issued the impugned order in violation of said provision of the law---Under S.10(1)(4) of Park and Horticulture Authority Act, 2012, no permission could be granted even by the Authority for a period exceeding fifteen days, if the intended use was likely to bring directly or indirectly, any financial benefit to the applicant; whereas, in the present case, the permission had been granted to the respondent for his financial activities for forty-three days---District Coordination Officer had obtained NOC's from concerned Departments before issuance of impugned order, but nothing was mentioned in said NOC's regarding said commercial activities---Said NOC's specifically provided that the festival will be organized through a well-reputed event management company on no profit no loss basis through press ad, but no press advertisement had been given

before passing impugned order which was also illegality---Playgrounds, parks, green belts and other places of public use belonged to all citizens of the country, whether belonging to urban areas or coming from rural background, more particularly residents of that vicinity and the city, where such places were located---Said places came in the joint ownership and constructive possession of all citizens, which is a Constitutionally guaranteed right---Places like parks and playgrounds were necessary for healthy life and to convert such places to commercial use and residential purpose was infringement of the Fundamental rights as guaranteed under Arts.9 & 26 of the Constitution---Impugned order was, therefore, violative of fundamental rights---Spot inspection report prepared by the Amicus Curiae. Revealed that nearly seventy per cent of the park had been ruined and huge amount would be required to bring the park on its previous position---High Court set aside impugned order and directed the authorities to immediately remove all the illegal constructions/ installation etc. and restore the park to its original position---Constitutional petition was allowed in circumstances. [Paras. 8, 9, 11, 12, 13, 14, 15 & 16 of the judgment]

Mian Fazal Din v. Lahore Improvement Trust, Lahore and another PLD 1969 SC 223; Human Rights Case No. 4668 of 2006; Human Rights case No.1111 of 2007 and Human Rights Case No. 15283-G of 2010 (Action taken on news clippings regarding fast food outlet in F-9 Park Islamabad) PLD 2010 SC 759; Subhash Kumar v. State of Bihar and others AIR 1991 SC 420; Government of Punjab through Minister of Revenue, Board of Revenue, Lahore and others v. Messrs Crescent Textile Mills Limited PLD 2004 SC 108; Ch. Muhammad Siddique and 2 others v. Government of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad and others PLD 2005 SC 1; Ardeshir Cowasjee and 11 others v. Sindh Province and others 2004 CLC 1353; Shehri and others v. Province of Sindh and others 2001 YLR 1139; Ms. Shehla Zia and others v. WAPDA PLD 1994 SC 693; Syed Waqar Hussain Gillani v. Capital Development Authority and others 2013 CLC 1095; Barrister Sajjad Ahmed Satti v. Federation of Pakistan through Ministry of Defence and 9 others 2013 CLC 1804 and Moulvi Iqbal Haider v. Capital Development Authority and others PLD 2006 SC 394 ref.

Suo Motu Case No.10 of 2005 (Re: Environmental Hazard of the proposed New Murree Project) 2010 SCMR 361; Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others 1999 SCMR 2883; Moulvi Iqbal Haider v. Capital Development Authority and others PLD 2006 SC 394 and Syed Waqar Hussain Gillani v. Capital Development Authority and others 2013 CLC 1095 rel.

Petitioner in Person.

Sheikh Muhammad Suleman and Muhammad Faisal Butt Amici Curiae.

Shafqat Munir Malik, Raja Abdul Hameed, AAG along with Sajid Zafar Dhol, DCO, Muhammad Akram Sohan, DG. PHA and Waqar Ahmed, Resident Director, Rawalpindi Arts Council.

Date of hearing: 1st September, 2016.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner through the instant petition has invoked the constitutional jurisdiction of this court on the grounds that the petitioner is a citizen of Pakistan and he uses Nawaz Sharif Park, Muree Road Rawalpindi for evening walk but the District Coordination Officer, Rawalpindi (respondent No.1) vide order No. GHC/2991 dated 16.07.2015, has allowed Sajjad All Bhatti, Chief Executive Media Entertainment Network (Pvt.) Limited Event Management Advertising and IV production, 22-M Saddique Trade Centre, Main Bouleverd Gulbarg Lahore (respondent No. 2), to run his business of circus, zoo and well of death , in the aforementioned park at the rate of Rs.50/- per child and Rs.100/- per adult. It is further averred that the government of Punjab has spent millions of rupees in the construction and maintenance of the aforementioned park but the grass and plants of the park have been destroyed at a large scale due to the illegal business activities of respondent No.2. It is further averred that a huge amount as gratification has been received by respondent No.1 from respondent No.2 for granting him the permission to run his aforementioned business in the Nawaz Sharif Park, Muree Road Rawalpindi, under the garb of Sohana Punjab Festival. It is also stated in the present petition that sufficient public toilets are not available in the aforementioned park and

due to grant of permission to respondent No.2 to run his business of circus etc., there is garbage and filth in whole of the park. It is also stated that respondent No.1, in order to cover the amount, misappropriated in the name of maintenances of the aforementioned park, has passed the impugned order No.GHC/2991 dated 16.07.2015, with regard to grant of permission to respondent No.2 to run his business of circus etc in the said park.

2. The instant petition was filed by the petitioner Malik Liaqat Ali in person. Notices were issued to respondents vide order dated 11.08.2015 and on 19.08.2015, this court appointed Sheikh Zameer Hussain, Sheikh Muhammad Suleman and Muhammad Faisal Butt, Advocates as Amici Curiae, in this case in order to assist this court regarding the issues involved in this petition.

3. The District Coordination Officer, Rawalpindi (respondent No.1), denied the allegations levelled in the present petition and in his parawise comments, he stated that permission to respondent No.2 to hold Sohana Punjab Festival in Nawaz Sharif Park, Muree Road, Rawalpindi was granted in accordance with the law and rules on the subject.

4. It is also note worthy that during the pendency of the instant petition the amicus curiae namely Sheikh Muhammad Suleman, Advocate (President, High Court Bar Association, Rawalpindi), also submitted a report regarding the factual position on the site. The said report has been brought on the record of the instant petition through C.M. No.02 of 2015. Notice on the said Civil Miscellaneous was issued to the respondents vide order dated 27.08.2015, in presence of learned Assistant Advocate General and learned counsel for respondent No.2 but no written objections have been filed by the respondents on the said report.

5. The amici curiae Sheikh Zameer Hussain, Sheikh Muhammad Suleman and Muhammad Faisal Butt, Advocates have contended that playgrounds, parks, green belts and other places of public use belong to all citizens of the country, more particularly residents of that vicinity and the city, where such places are located and the public places cannot be used by the government officials in a way which is detrimental to the interest of the public; that citizens of Rawalpindi/Islamabad use Nawaz Sharif Park for healthy activities like walking, jogging, exercise etc but

respondent No.1, vide the impugned order has permitted respondent No.2 to run his business of circus, zoo etc in the aforementioned park, which has created hurdle for the citizens of Rawalpindi and Islamabad to use the aforementioned park freely; that Rs.50/100 is being charged from the minors and adults for entering in that portion of the park which has been leased out to respondent No.2 and as such a public park is being used for commercial activities of respondent No.2; that no decision from the board of Directors as envisaged under section 6 of the Parks and Horticulture Authority Act, 2012 was obtained in the instant case while passing the impugned order; that respondent No.2 has been allowed to run his commercial activities with effect from 1st day of Eid-ul-Fitr (18th July, 2015) to 30th August 2015, whereas under section 10(4) of the Act ibid, no such permission can be granted for a period exceeding fifteen days if the intended use is likely to bring, directly or indirectly, any financial benefit to the applicant or any other person; that due to circus, zoo and presence of animals, the grass and plants of the park in question have been ruined badly; that the petitioner and other citizens of Rawalpindi and Islamabad have been restrained from using the aforementioned park freely, which is violative of their fundamental rights; that the District Coordination Officer, Rawalpindi (respondent No.1) being in league with the staff/officials of Park and Horticulture Authority, Rawalpindi and other concerned departments, in order to usurp the amount, which was allegedly spent for maintenance of the Nawaz Sharif Park, has granted permission in question to respondent No.2 vide the impugned order dated 16.07.2015, after taking gratification from the said respondent; that respondent No.1 has violated the fundamental rights of the petitioner, guaranteed under Articles 9 and 26 of the Constitution of the Islamic Republic of Pakistan, 1973; that the impugned order No.GHC/2991 dated 16.07.2015, issued by respondent No.1 may be declared illegal and unlawful, same may be cancelled and an order for registration of case against the respondents and their other allies with regard to aforementioned corruption may be ordered to be registered. In support of their contentions, amicus curiae placed reliance on the judgments reported as "Mian Fazal Din v. Lahore Improvement Trust, Lahore and another" (PLD 1969 Supreme Court 223), "Human Rights Case No. 4668 of 2006; Human Rights case No.1111 of 2007 and Human Rights Case No. 15283-G of 2010 (Action taken on news clippings regarding fast food outlet in F-9 Park

Islamabad (PLD 2010 Supreme Court 759), "Subhash Kumar v. State of Bihar and others" (AIR 1991 Supreme Court 420), "Government of Punjab through Minister of Revenue, Board of Revenue, Lahore and others v. Messrs Crescent Textile Mills Limited" (PLD 2004 Supreme Court 108), "Ch. Muhammad Sidduque and 2 others v. Government of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad and others" (PLD 2005 Supreme Court 1), Ardeshir Cowasjee and 11 others v. Sindh Province and others" (2004 CLC 1353), "Shehri and others v. Province of Sindh and others" (2001 YLR 1139) and "Ms. Shehla Zia and others v. Wapda" (PLD 1994 Supreme Court 693).

6. On the other hand, this petition has been opposed by learned AAG and learned counsel for respondent No. 2 on the grounds that the instant petition is not maintainable because the petitioner has no legal right or grievance in respect of Nawaz Sharif Park, Muree Road, Rawalpindi; that respondent No.1 had the legal authority under the capacity of Administrator, District Government, Rawalpindi to issue order in question; that the impugned order was issued after receiving NOC from all the concerned departments; that the impugned order was issued in the light of direction issued by the Government of Punjab for holding Sohana Punjab Festival at all District Headquarters; that no illegal gratification has been obtained by respondent No.1 from respondent No.2 or any other person for the issuance of the impugned order; that no damage has been caused to the plants and grass of the park; that the petitioner has raised disputed questions of facts in this petition, hence the same is liable to be dismissed. During the pendency of the instant petition, learned counsel for respondent No.2 has also placed on the record different photographs in order to demonstrate that the grass and plants of the park in question are still intact and no damage has been caused to the park due to the activities of respondent No.2.

7. Heard.

8. Insofar as the objection of respondents regarding the maintainability of the instant petition is concerned, I have noted that the petitioner has raised the question regarding violation of his fundamental rights by respondents Nos.1 and 2, guaranteed under Articles 9 and 26 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, this petition is maintainable. Reference in this context may be made to the

cases reported as "Syed Waqar Hussain Gillani v. Capital Development Authority and others" (2013 CLC 1095), "Human Rights Case No.4668 of 2006; Human Rights case No.1111 of 2007 and Human Rights Case No.15283-G of 2010 (Action taken on news clippings regarding fast food outlet in F-9 Park Islamabad (PLD 2010 Supreme Court 759), "Barrister Sajjad Ahmed Satti v. Federation of Pakistan through Ministry of Defence and 9 others" (2013 CLC 1804), and "Moulvi Iqbal Haider v. Capital Development Authority and others" (PLD 2006 Supreme Court 394).

9. This is an admitted position that Nawaz Sharif Park, Muree Road, Rawalpindi is under the control of the Park and Horticulture Authority, Rawalpindi (hereinafter referred to as Authority). The District Coordination Officer, Rawalpindi vide the impugned order No.GHC/2991 dated 16.07.2015, granted permission to respondent No.2 to hold a Sohana Punjab Festival in the aforementioned park with effect from 15th day of Eid-ul-Fitr (18th July, 2015) to 30th August, 2015 from 11.00 a.m. to 10.00 p.m. daily. Respondent No. 2 under the garb of aforementioned permission for holding a Sohana Punjab Festival has started running his business of circus, zoo, well of death etc., at the rate of Rs.50/- per child and Rs.100/- per adult and as such the aforementioned public park is being used for commercial activities. I have noted that under section 6 of the Park and Horticulture Authority Act, 2012, only a Board of Directors, comprising of following persons can make a policy decision:-

a) Chief Minister or any other person nominated by the Chief Minister; Chairperson

b) Minister for Housing or any other person nominated by the Minster for housing; Vice Chairperson

c) Two members of the Provincial Assembly of the Punjab nominated by the Speaker of the Assembly; Members

d) the elected head of the local government of the area for which the Authority is established; Member

e) Secretary to the Government, Housing Department or his nominee; Member

f) Secretary to the Government, Finance Department or his nominee; Member

g) Secretary to the Government, Local Government and Community Development Department or his nominee; Member

h) District Coordination Officer of the area for which the Authority is established; Member

i) Director General of the Development Authority of the area for which the Authority is established; Member

j) two environmentalists nominated by the Government Member

k) one horticulture expert nominated by the Government; Member

l) one representative of the concerned Chamber of Commerce and Industry; and Member

m) Director General Member/ Secretary

It is evident from the perusal of the abovementioned provision of law that a board comprising of above directors was competent to make a policy decisions on behalf of the Authority but there is nothing on the record that any decision was taken by the aforementioned directors of the board and as such respondent No.1 has issued the impugned order in blatant and flagrant violation of provisions of law on the subject.

10. Furthermore provisions of section 10(1)(4) of the Act ibid are also relevant for the decision of the present petition, which read as under:

10. Use of Public Parks, green belts and green areas:-- (1) If any person intends to use a public park, green belt or green area for any purpose other than the normal use of the place, he shall make an application to the Authority.

(2)

……

(3)

……

(4) The Authority shall not grant permission for a period exceeding fifteen days if the intended use is likely to bring, directly or indirectly, any financial benefit to the applicant or any other person.

11. It is clear from the bare reading of the aforementioned provision of law that no permission can be granted even by the Authority for a period exceeding fifteen days if the intended use is likely to bring, directly or indirectly, any financial benefit to the applicant but in the instant case the permission has been granted by respondent No.1 to respondent No.2 for his financial activities for a period of about 43 days. It is not understandable that under which provision of law, respondent No. 1 has passed the impugned order in favour of respondent No.2. Respondent No.1 along with his comments has also placed on the record NOC from Rawalpindi Arts Council dated 24th June, 2015 for holding Sohana Punjab Festival, 2015/2016 at Nawaz Sharif Park, Shamasabad Muree Road, Rawalpindi in order to demonstrate that NOC's were obtained from all the concerned departments before issuance of the impugned order. I have noted that there is nowhere stated in the aforementioned NOC regarding holding a circus, zoo, well of death etc in "Nawaz Sharif Park" for Sohana Punjab Festival. I have noticed that in the abovementioned NOC of Rawalpindi Arts Council, it was specifically mentioned that "the festival will be organized through a well-reputed event management company on no profit no loss basis through press ad" (underlining supplied) but admittedly no press ad was given before passing the impugned order in favour of respondent No.2, which is another patent illegality committed by respondent No.1, while passing the impugned order.

12. Playgrounds, parks, green belts and other places of public use belong to all citizens of the country, whether belonging to urban areas or coming from rural background, more particularly residents of that vicinity and the city, where such places are located. These places come in the joint ownership and constructive possession of all citizens, which is a constitutionally guaranteed right. It appears that DCO, Rawalpindi, (respondent No.1) without caring about the park in question and without taking into consideration the park and Horticulture Authority Act, 2012, conspired to pass the impugned order in favour of respondent No.2, which cannot be describe as bona fide Act of the abovementioned respondent. Respondents have

placed on the record the master plan of the Nawaz Sharif Park, wherein a specific place has admittedly been allocated for the swings and other rides of the children but now respondent No.2 has stateldy installed swings and rides of the children around the walking track, constructed in the abovementions park.

13. As mentioned earlier, this petition was filed by the petitioner in person and vide order dated 19.08.2015, this court appointed Sheikh Zameer Hussain, Sheikh Muhammad Suleman and Muhammad Faisal Butt, Advocates as Amici Curiae, in this case in order to assist this court regarding the issues involved in this petition. During the pendency of this petition the amicus curiae namely Sheikh Muhammad Suleman, Advocate (President, High Court Bar Association, Rawalpindi), also submitted a report regarding the factual position on the site. The said report has been brought on the record through Civil Miscellaneous No.02 of 2015, in which notice was issued to the respondents vide order dated 27.08.2015, in presence of learned Assistant Advocate General and learned counsel for respondent No.2 but the respondents thereafter did not file any written objections on the aforementioned report. It is stated in the above-mentioned report that at the time of site inspection, circus and numbers of stalls were installed in the park, very loud and noisy sound speakers were buzzing there, more than 100 stalls of different commodities like cloths, grocery, bottles, shoes, Utensils were installed there. Swings on both sides of the walking track were in progress, shops and khokhas were temporary built with iron sheets in the park and on inquiry, one of the stall holder replied that he was paying Rs.1000/- per day for a stall measuring 10 x 10 feet. It was further stated in the report that grass and plot of the park has been destroyed at a large scale and nearly 70% of the park has been ruined and at least rupees twenty millions are required to bring the park on its previous position.

14. I have also gone through the article written about the park in question, published on the city age of Daily "The News" Islamabad/Rawalpindi Edition" dated 29.08.2015. The aforementioned newspaper has been placed on the record by amicus curiae. The hosting of so called "Mela" in the Nawaz Sharif Park has been deplored by the author of the abovementioned article. The said article also apprises about the destruction of Nawaz Sharif Park, Rawalpindi at the hands of the government

officials. Under Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973, it has clearly been provided that no person shall be deprived of his life or liberty saved in accordance with the law. Right to enjoy pollution free life is also included in the right of life. Similarly under Article 26 of the Constitution of the Islamic Republic of Pakistan, 1973, it is provided that there shall be no discrimination in respect of access to public places but in the instant case, by imposing a ticket of Rs.50/- per child and Rs.100/- per adult, the citizens of Pakistan, more particularly the citizens of Rawalpindi/Islamabad have been restrained from entering in that part of the Nawaz Sharif Park, where the commercial activities are being run by respondent No.2 and as such the impugned order is violative of the fundamental rights guaranteed by the Constitution. The superior courts have also discouraged such type of arbitrary decisions and polluted acts. It has been held in different judgments of the Hon'ble Supreme Court of Pakistan that places like parks and playgrounds were necessary for healthy life and to convert such places to commercial use and residential purpose was an infringement of Fundamental rights as guaranteed under Articles 9 and 26 of the Constitution of the Islamic Republic of Pakistan, 1973. Reliance in this context is placed on the cases of Suo Motu Case No.10 of 2005 (Re: Environmental Hazard of the proposed New Murree Project) (2010 SCMR 361), "Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others" (1999 SCMR 2883) and "Moulvi Iqbal Haider v. Capital Development Authority and others" (PLD 2006 Supreme Court 394). Reference in this respect may also be made to the case reported as "Syed Waqar Hussain Gillani v. Capital Development Authority and others" (2013 CLC 1095).

15. In the light of above discussion, the instant petition is allowed and the impugned order No. GHC/2991 dated 16.07.2015, passed by the District Coordination Officer, Rawalpindi (respondent No.1) in favour of respondent No. 2 is hereby declared illegal, void and the same is hereby set aside. Respondents are further directed to immediately remove all the illegal constructions/installments, khokhas, stalls, present in the Nawaz Sharif Park, Murree Road, Rawalpindi. Respondent No.1 and officials of the Park and Horticulture Authority, Rawalpindi are directed to restore the original position of the park, within a period of three months from today. District Coordination

Officer, Rawalpindi (respondent No.1) shall file a compliance report on or before 01.12.2015, before the Deputy Registrar Judicial of this court. The District Coordination Officer, Rawalpindi (respondent No.1) is permanently restrained from issuing any such order in future, which may destroy the utility of public parks.

16. Insofar as the allegations regarding corruption, levelled against respondents Nos.1 and 2 and other concerned officials, by the petitioner and amici curiae are concerned, it is clarified that the petitioner or any other citizen of Pakistan may avail the alternate remedies, provided under the law in this respect and if any application in this regard is moved, then the same shall be decided on its own merits, without being influenced by any observation made in this judgment. Attested copy of this order be sent to the Park and Horticulture Department, Rawalpindi and respondent No.1 and the same be placed on their record for future guidance.

SL/L-4/L **Petition allowed.**

2017 P Cr. L J 1140

[Lahore]

Before Mazhar Iqbal Sidhu and Malik Shahzad Ahmad Khan, JJ

Mian TOUSEEF---Appellant

Versus

DISTRICT POLICE OFFICER and 2 others---Respondents

I.C.A. No. 1188 of 2014 in W.P. No. 23227 of 2014, heard on 1st March, 2016.

(a) Penal Code (XLV of 1860)---

----S. 302---Criminal Procedure Code (V of 1898), S. 22-A (6)(i)---Law Reforms Ordinance (XII of 1972), S. 3(2)---Qatl-i-amd---Registration of case---Intra court appeal---Maintainability---Complainant filed petition before Ex-officio Justice of Peace for registration of FIR against accused-police officials for murder of her brother in police custody which was dismissed---Constitutional petition under Art.199 of the Constitution of complainant was accepted and direction was issued by the High Court for registration of case against accused-police officials---Accused filed intra court appeal against said order---Maintainability---Word "proceedings" mentioned in proviso to S. 3(2) of Law Reforms Ordinance, 1972 included FIR, therefore, intra-court appeal against order of Single Judge passed in constitutional jurisdiction for registration of FIR was not maintainable---Opportunity of hearing was not a legal requirement to an accused in murder case before the registration of FIR---Time lapsed between injury and death was 24-hours and between death and post mortem was 16-24 hours which meant that injuries to the deceased were caused on the date when deceased was in police custody---Version of accused-police officials that deceased was beaten by local residents was fully negated by post-mortem report---Accused-police officials alleged that deceased committed suicide with help of his "nala" but deceased was wearing shalwar qameez at the time of his post-mortem examination---During pendency of judicial as well as departmental inquiry FIR against the Police Officer could be registered---Intra court appeal was dismissed accordingly.

Nawazul Haq Chowhan v. The State and others 2003 SCMR 1597; Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another PLD 2010 SC 483; Wajid Ali v. Civil Judge and Judicial Magistrate No.1 and 5 others PLD 2014 Sindh 164; Muhammad Hayat v. The Chief Settlement and Rehabilitation

Commissioner and another PLD 1970 Lah. 679 and Mumtaz Hussain v. Deputy Inspector General, Faisalabad and 7 others PLD 2002 Lah. 78 rel.

(b) Law Reforms Ordinance (XII of 1972)---

----S. 3(2)---Criminal Procedure Code (V of 1898), S. 154---Intra-court appeal---Maintainability---Word "proceedings" mentioned in proviso to S. 3(2) of Law Reforms Ordinance, 1972 includes also FIR, therefore, intra-court appeal against order passed by Single Judge of High Court in constitutional jurisdiction for registration of FIR was not maintainable.

Nawazul Haq Chowhan v. The State and others 2003 SCMR 1597 and Ahmad Yar v. Station House Officer, Shah Kot, District Sahiwal and 8 others 2007 PCr.LJ 1352 rel.

(c) Criminal Procedure Code (V of 1898)---

----S. 22-A (6)(i)---Application before Justice of Peace for registration of case---Right of accused for being heard---Cases where no urgency was involved and there were no chances of destruction of evidence, e.g. cheating, fraud, forgery, criminal breach of trust, ineffective firing, criminal trespass, criminal intimidation and other cases of like nature, opportunity of hearing must be provided to the accused before registration of FIR---Cases where delay in registration of FIR might cause destruction of valuable evidence, e.g. murder, hurt, dacoity, terrorism, kidnapping and abduction, rape, possession of counterfeit currency, drugs and other cases of like nature, there was no need to provide opportunity of hearing to accused---If it appeared on record that petition for registration of FIR before Justice of Peace seemed to be based on mala fide then opportunity of hearing might be provided to the accused.

Malik Muhammad Sadiq v. Station House Officer and others 2013 PCr.LJ 1177; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another PLD 2010 SC 483; Wajid Ali v. Civil Judge and Judicial Magistrate No.1 and 5 others PLD 2014 Sindh 164 and Muhammad Hayat v. The Chief Settlement and Rehabilitation Commissioner and another PLD 1970 Lah. 679 rel.

(d) Criminal Procedure Code (V of 1898)---

----S. 154---Registration of case---Registration of case/FIR was independent right of an aggrieved person who could report the matter to the in-charge of concerned police

station, who was bound under the provision of S. 154, Cr.P.C. to record his report and conduct investigation in accordance with law.

(e) Criminal Procedure Code (V of 1898)---

----Ss. 174 & 176---Death of accused in Police custody---Inquiry by Magistrate---Scope of Ss. 174 & 176, Cr.P.C. was limited to ascertainment of cause of death without recording a finding regarding guilt or innocence of accused.

Mumtaz Hussain v. Deputy Inspector General, Faisalabad and 7 others PLD 2002 Lah. 78 rel.

(f) Criminal Procedure Code (V of 1898)---

----S. 174---Inquiry by police---Scope---Officer in-charge of police station or other police officer specially empowered could hold an investigation on receiving information that a person had committed suicide or killed or died under circumstances raising a reasonable suspicion that some other person had committed an offence.

(g) Criminal Procedure Code (V of 1898)---

----Ss. 176 & 174---Death of accused in police custody---Inquiry by Magistrate---Scope--- Magistrate could hold an enquiry into the cause of death of a person if it had taken place, while the deceased was in police custody---Such enquiry could be either instead of or in addition to the investigation held by a police officer under S. 174, Cr.P.C.

Khuda Bakhsh v. Province of West Pakistan PLD 1957 Lah. 662 rel.

Barrister Suleman Safdar for Appellant.

Mrs. Salma Malik, Assistant Advocate-General with Muhammad Ilyas, S.I. and Abdul Ashfaq, ASI for Respondent No.1.

Muhammad Arfan Malik for Respondent No.2.

Nemo for Respondent No.3.

Date of hearing: 1st March, 2016.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This Intra-Court Appeal has been filed against the order dated 10.12.2014 passed by the learned Single Judge in Chamber of this Court, in Writ Petition No.23227 of 2014, whereby the Constitutional Petition filed by Mst. Robina Kausar respondent No.2 was accepted, the order dated

18.04.2014 passed by the learned Ex-officio Justice of Peace, Kharian District Gujrat was set aside and SHO of the concerned Police Station was directed to record the version of Mst. Robina Kausar respondent No.2 and proceed further in accordance with the law.

2. As per brief facts of the present case, Mst. Robina Kausar (respondent No.2) filed a petition under section 22-A/B of Cr.P.C. for registration of case against the appellant Mian Touseef, Inspector/SHO of P.S. Sadar, Kharian District Gujrat and other police officials with the averment that on 28.07.2014, her brother Iftikhar Ahmad Butt (deceased) went out of his house and did not return. She (respondent No.2) started search for her brother and on 01.08.2014 she came to know that her brother Iftikhar Ahmad Butt was confined by the police at Police Station Kakrali (District Gujrat). She (respondent No.2) along with her sister Shamim Ijaz (respondent No.3), her daughter Saima Shafqat and one Tariq Mehmood son of Munawar Hussain, went to the Police Station Kakrali and reached there at about 08:00 p.m., where the police told them that Safdar Qureshi, Inspector and Mushtaq Ahmad, Sub Inspector have shifted the above mentioned Iftikhar Ahmad Butt to Police Station Galyana (District Gujrat). Respondent No.2, along with the above mentioned witnesses, then reached at Police Station Galyana, where they saw that Safdar Qureshi, Inspector and Mushtaq Ahmad, Sub Inspector were strangulating her brother Iftikhar Ahmad Butt with the help of a rope, whereas, Mian Touseef Ahmad (appellant) and Mehr Abbas, Inspector along with two other unknown police officials were extending physical torture to him. Respondent No.2 and other witnesses raised hue and cry, whereupon Mehr Abbas, Inspector, asked the other police officials to confine the above mentioned respondent and other witnesses, so that they may witness the lesson being given to the brother of respondents Nos. 2 and 3, thereafter, the other police officials started pushing them and forcibly made them to sit in the courtyard of the police station. The police officials kept on extending physical torture to Iftikhar Ahmad Butt with the help of 'dandas' iron rods and 'litters' who ultimately succumbed to the torture at the spot. Respondent No.2 thereafter, moved an application before the District Police Officer, Gujrat who did not lodge any FIR against the proposed accused-therefore, respondent No.2 moved an application under section 22-A/B of Cr.P.C. before the learned Ex-officio Justice of Peace, Kharian but the same was dismissed vide order dated 18.08.2014. Above mentioned respondent, thereafter, filed Writ Petition No. 23227 of 2014 which has been accepted in the aforementioned terms vide impugned order dated 10.12.2014 passed by the learned

Single Judge in Chamber of this Court hence, the instant Intra-Court Appeal before this Court.

3. It is contended by learned counsel for the appellant that in the Writ Petition filed by respondent No.2, a notice was issued by this Court to the appellant but on the relevant date of hearing, the cause list was not issued to the counsel for the appellant and, as such, the appellant was not provided an opportunity of hearing before passing the impugned order; that the impugned order was passed against the principle of natural justice because the appellant has been condemned unheard; that the instant Intra-Court Appeal against the impugned order is maintainable under the relevant provisions of law and while keeping in view the principle of "audi alteram partem"; that the deceased was involved in 17 cases of heinous nature and Mst. Robina Kausar (respondent No.2) is also involved in 03 criminal cases therefore, in order to save her skin, the above mentioned respondent moved a frivolous application for registration of case against the police officials, so that the police officials may be pressurized and blackmailed; that Iftikhar Ahmad Butt deceased has committed suicide and the allegation of murder, leveled against the appellant and other proposed accused is baseless; that even according to the post mortem report of the deceased, the cause of death of the deceased was asphyxia due to hanging which further supports the version of the appellant; that Iftikhar Ahmad Butt deceased apart from injury on his neck, received other injuries on his body at the hands of local residents who gave him severe beating when he (Iftikhar Ahmad Butt) was caught red handed while trying to flee away from the spot after committing dacoity and FIR No. 204 of 2014 at Police Station Kakrali, District Gujrat was also registered in this respect; that during the judicial inquiry conducted by concerned Judicial Magistrate Section-30, Gujrat, the appellant and other proposed accused have been found innocent; that even a departmental inquiry was held in this case and the appellant and other proposed accused were also exonerated during the said inquiry; that respondent No.2 has implicated four SHOs of different Police Stations of District Gujrat, in her petition moved under section 22-A/B, of Cr.P.C. and acceptance of said petition would demoralize the police of District Gujrat; that the impugned order is against the law and facts of the present case therefore, the same may be set-aside. In support of his contentions, learned counsel for the appellant has placed reliance on the cases reported as 'Sher Khan v. The State through A.A.-G. and 2 others' (2009 YLR 2407), 'Usman Ali v. Additional Sessions Judge/Ex-officio Justice of Peace, Toba Tek Singh and 4 others' (2016 PCr.LJ 323), 'Muhammad Ali v. The State and others' (2016 YLR

80), 'Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others' (PLD 2011 Supreme Court 671), 'Nisar Ahmed v. The State' (2015 MLD 742), 'Malik Muhammad Sadiq v. Station House Officer and others' (2013 PCr.LJ 1177), 'Mansoor Ali v. Station House Officer and another' (2015 PCr.LJ 480) and 'Haji Muhammad Sadiq v. Ilaqa Magistrate Police Station Factory Area, Faisalabad and others' (2001 PCr.LJ 1571).

4. Learned Assistant Advocate General has also supported the arguments of learned counsel for the appellant.

5. On the other hand, this appeal has been opposed by learned counsel for respondent No.2, on the ground that keeping in view the proviso of section 3(2) of Law Reforms Ordinance, 1972, instant appeal, which has been filed against an order passed in respect of criminal proceedings, is not maintainable; that the appellant and other proposed accused are police employees and they were supposed to maintain the rule of law but they took the law in their own hands and committed the murder of an innocent person by extending severe physical torture to him therefore, the impugned order was rightly passed by the learned Single Judge in Chamber of this Court; that involvement of a person in different criminal cases does not grant a licence to the appellant police official to commit the murder of said person; that the postmortem report of Iftikhar Ahmad Butt deceased has fully established that severe physical torture was extended to him which supports the version of respondent No.2; that section 154 of Cr.P.C. does not require the hearing of an accused in a murder case before the registration of FIR; that according to the police record, Iftikhar Ahmad Butt was arrested on 24.07.2014 and according to the postmortem report dated 02.08.2014, he died 24 hours before the postmortem examination therefore, it is established that he received injuries and died during the police custody; that pendency of a judicial inquiry is not a bar against the registration of FIR; that findings of judicial and departmental inquiries are not based on true facts therefore, the same are not binding on this Court; that during the departmental inquiry, the concerned senior police officials have tried to save the proposed accused who are also police employees; that the Medical Board has not reported that it was a case of suicide; that there is no substance in the present appeal therefore, the same may be dismissed. In order to embellish his arguments, learned counsel for respondent No.2 has placed reliance on the cases reported as 'Ahmad Yar v. Station House Officer, Shah Kot, District Sahiwal and 8 others' (2007 PCr.LJ 1352), 'Mst. Karim Bibi and others v.

Hussain Bakhsh and another' (PLD 1984 Supreme Court 344), 'Nawazul Haq Chowhan v. The State and others' (2003 SCMR 1597), 'Mumtaz Hussain v. Deputy Inspector General, Faisalabad and 7 others' (PLD 2002 Lahore 78) and 'Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another' (PLD 2010 Supreme Court 483).

6. Arguments heard. Record perused.

7. First of all we take up the issue of maintainability of the instant Intra Court Appeal. It is evident from the perusal of record that Mst. Robina Kausar respondent No. 2 moved a petition under section 22-A/B of Cr.P.C., before the learned Ex-officio Justice of Peace, Kharian, for registration of FIR against the appellant and other police officials for the murder of her brother, namely, Iftikhar Ahmad Butt deceased. Said application was dismissed by the learned Ex-officio Justice of Peace, Kharian vide order dated 18.08.2014, however, the Constitutional Petition filed by respondent No.2 against the said order of the learned Ex-officio Justice of Peace, Kharian has been accepted by the learned Single Judge in Chamber of this Court, vide the impugned order dated 10.12.2014. Intra-Court. Appeal against the order of a learned Single Judge in Chamber of this Court cannot be filed in view of proviso of section 3(2) of the Law Reforms Ordinance (XII of 1972). The said provision of the Ordinance ibid reads as under:

"3. Appeal to High Courts in certain cases:

1. An appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a single Judge of that Court in the exercise of its original civil jurisdiction.

2. An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court under [clause (1) of Article 199 of the Constitution of Islamic Republic of Pakistan] not being an Order made under sub-paragraph (i) of paragraph (b) of that clause:

Provided that the appeal referred to in this subsection shall not be available or competent if the application brought before the High Court under Article [199] arises out of any proceedings in which the law applicable provided for at least one appeal [or one revision or one review] to any Court. Tribunal or authority against the original order."

(Underlining and bold supplied)

The word "proceedings" mentioned in the above referred provision of law also includes the FIR, therefore, Intra-Court Appeal against the order of the learned Single Judge in Chamber of this Court passed in Constitutional jurisdiction, whereby the order for registration of FIR was passed, is not maintainable. We may refer here the case reported as 'Nawazul Haq Chowhan v. The State and others' (2003 SCMR 1597), wherein the Hon'ble apex Court of the country at page No. 1610 was pleased to observe as under:

> "31. Civil Appeal No. 5553 of 1994 with the leave of this court arises out of a counter case viz. FIR No. 495 of 1991 registered under sections 324, 148 and 149, P.P.C. at the behest of acquitted accused Manzoorul Haq against Malik Anjum Farooq Paracha and seven others. Appellant Malik Anjum Farooq Paracha and others sought quashment of the said FIR in Writ petition No. 178 of 1993 before the Lahore High Court, Rawalpindi Bench, Rawalpindi under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, which was allowed, against which I.C.A. No. 71 of 1993 was filed by acquitted accused Manzoorul Haq and others which was accepted and the order passed by learned Single Judge of the Lahore High Court' for the quashment in writ petition was set aside. This order, however, was challenged by Malik Anjum Farooq Paracha appellant in Civil Petition No. 129 of 1994 in which leave to appeal was granted, inter alia on the ground as to whether or not ICA lies against the order passed in writ petition by the learned Single Judge and as to whether or not the word 'proceedings' mentioned in the proviso of section 3(1) of Law Reforms Ordinance, 1972, includes the FIR. On this aspect of the matter, we have given our anxious consideration to the contentions raised at bar. The above controversy have been resolved by this Court in the case of Mst. Karim Bibi and others v. Hussain Baksh and another (PLD 1984 SC 344) and Settlement Commissioner (L) and others v. Mauj-Din and others (1989 SCMR 1351) while holding that in view of section 3(2) of the Law Reforms Ordinance. 1972, I.C.A. is not maintainable. Accordingly Civil Appeal No. 553 of 1994 is allowed and order. dated 14.03.1993 passed in I.C.A No. 7 of 1993 by the learned Division Bench of the Lahore High Court, Rawalpindi Bench, is set aside.

Similar view was taken by this Court in the case of 'Ahmad Yar v. Station House Officer, Shah Kot, District Sahiwal and 8 others' (2007 PCr.LJ 1352). We are

therefore, of the view that the instant Intra-Court Appeal against the aforementioned impugned order is not maintainable.

8. It has also been argued by learned counsel for the appellant that as the appellant was condemned unheard while passing the impugned order therefore, the same is liable to be set aside. We are of the considered view that in cases where the allegations of cheating, fraud, forgery, criminal breach of trust, ineffective firing without causing any injury to any person, criminal trespass, criminal intimidation to commit murder, etc are leveled and no urgency is involved and there are no chances of the evidence being destroyed, in all such cases and other cases of the like nature, the concerned Justice of Peace, must provide an opportunity of hearing to the proposed accused before giving a direction for registration of the FIR. Similar view was taken by this Court in the case of 'Malik Muhammad Sadiq v. Station House Officer and others' (2013 PCr.LJ 1177), wherein, it was held that in suitable cases, an aggrieved party may be heard before passing an order for registration of the case. However, in the cases where the allegations of murder, causing such injuries to the aggrieved party attracting cognizable offences, dacoity, offences under Anti-Terrorism Act, kidnapping, abduction, rape, sodomy, possession of counterfeit currency, drugs etc have been levelled, in such cases and in all other cases in which some urgency is involved and there are chances that due to the delay in registration of the FIR, valuable evidence of the case may be destroyed, there is no need to provide opportunity of hearing to the proposed accused before registration of the case and FIR can be lodged without hearing a proposed accused. However, we may clarify here that even in cases falling under this latter category, if the facts and circumstances of a case so warrant or appear to be doubtful or a petition for registration of FIR seems to be based on mala fides, then opportunity of hearing may be provided to the proposed accused. In such like cases, the Justice of Peace is not obliged to blindly pass an order for registration of the FIR. Reference in this context may be made to the case of 'Rai Ashraf and others v. Muhammad Saleem Bhatti and others' (PLD 2010 Supreme Court 691), wherein the apex Court of the country was pleased to observe that as the petition under section 22-A/B of Cr.P.C. was malafidely, filed by the petitioner of said case against Lahore Development Authority (L.D.A) in order to restrain the public functionaries not to take action against him in accordance with the L.D.A Act, 1975, rules and regulations framed thereunder, therefore, the said petition was rightly dismissed by the learned Ex-officio Justice of Peace, Lahore and the order of High Court, whereby, petition under section 22-A/B of Cr.P.C. was accepted merely on the

ground that a cognizable offence was made out from the contents of said petition, was set-aside. We are therefore, of the considered view that even in suitable cases falling under the latter category, the Justice of Peace should provide opportunity of hearing to the proposed accused before giving final decision on the petition under section 22-A/B of Cr.P.C. For example in a case of abduction or rape of a girl, if the police report or the other circumstances suggest that the abductee/victim, being sui juris, with her free will and consent has contracted marriage with the proposed accused and there is some documentary evidence like registered Nikah Nama, etc. in this respect then a mechanical order for registration of FIR should not be passed by the Justice of Peace, merely on the ground that a cognizable offence was made out from the contents of the petition for registration of FIR. Similarly, in a case where the allegation of dacoity has been leveled and the police report so suggests that petition under section 22-A/B of Cr.P.C. has malafidely been moved by a person-who is himself an accused in the murder case of the relative of the proposed accused and the petition under section 22-A/B of Cr.P.C. has been moved in order to save his own skin, in that situation, the Ex-officio/Justice of Peace must provide an opportunity of hearing to the proposed accused before passing any adverse order against him. In such like cases, opportunity of hearing must be provided to the proposed accused, by the Justice of Peace by fixing shortest possible dates of hearing before passing a final verdict on the petition under section 22-A/B of Cr.P.C. However, it is clarified that opportunity of hearing to a proposed accused of cases falling under the category of latter cases, is to be provided by the Ex-officio/Justice of Peace, only in exceptional cases, where the circumstances of a case so warrant and not in all cases of the said category.

9. Now coming to the facts of the present case, the appellant is a proposed accused in a murder case of Iftikhar Ahmad Butt deceased. An FIR in a cognizable case is to be registered while keeping in view the provisions of section 154 of Cr.P.C. There is no legal requirement of providing an opportunity of hearing to an accused in a murder case before the registration of an FIR under section 154 of Cr.P.C. Normally, if an accused of a murder case is given the right of hearing before registration of the FIR, then he will definitely try to linger on the proceedings and in that case, valuable evidence of the case may be destroyed. For example in a case of murder with the help of 'Churri', the accused may wash away the blood from the weapon of offence or the blood may disintegrate due to the lapse of time. The Hon'ble Supreme Court of Pakistan in the case of 'Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another' (PLD 2010 Supreme Court 483), at page Nos. 540 and 541, has

laid down some exceptions to the general principle of "audi alteram partem" (one should not be condemned unheard), which are reproduced hereunder:-

> "A prima facie right to opportunity to be heard may be excluded by implication in the following cases:-
>
> (i) When an authority is vested with wide discretion (H.W.R. Wade and C.F. Forsyth: Administrative Law, 7th Ed., at p.391 H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at p.392
>
> (ii) When the maxim 'expressio unius est exclusio alterius' is involved (Colquhoun v Brooks 21 QBD 52 at p. 62 Humphrey's Executor v. United States, (1935) 295 US 602)
>
> (iii) Where absence of expectation of hearing exists (Y.G. Shivakumar v B.M. Vijaya Shankar (1962) 2 SCC 207, AIR 1992 SC 952)
>
> (iv) When compulsive necessity so demands (Union of India v. W.N. Chadha (supra)
>
> (v) When nothing unfair can be inferred (Union of India v. W.N. Chadha (supra)
>
> (vi) When advantage by protracting a proceeding is tried to be reaped (Ram Krishna Verma v State of U.P. (1992) 2 SCC 620, AIR 1992 SC 1888).
>
> (vii) When an order does not deprive a person of his right or liberty (Indian Explosive Ltd. (Fertiliser Division), Panki, Kanpur v State of Uttar Pardesh (1981) 2 Lab LJ 159)
>
> (viii) In case of arrest, search and seizure in criminal case (Union of India v W.N. Chadha 1993 Cr.LJ 859, 1993 Supp (4) SCC 260, AIR 1993 SC 1082)
>
> (ix) In case of maintaining academic discipline (1992) 2 SCC 207)
>
> (x) In case of provisional selection to an academic course (S.R. Bhupeshkar v Secretary, Selection Committee, Sarbarmathi Hostel Kilpauk, Medical College Hostel Campus, Madras AIR 1995 Mad 383 (FB)
>
> (xi) In case of enormous malpratices in selection process (Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552)
>
> 42. It must not be lost sight of that in the abovementioned "exclusionary cases, the 'audi alteram partem' rule is held inapplicable not by way of an

exception to fair play in action but because nothing unfair can he inferred by not affording an opportunity to present or meet a case "(Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248, vide also Mohinder Singh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405. The doctrine of `audi alteram partem' is further subject of maxim nemo inauditus condemnari debet contumax."

(bold and underlining supplied)

Taking the guidelines from the Hon'ble Supreme Court of Pakistan through the aforementioned judgment, we are of the considered view that there is no legal aforementioned requirement of providing an opportunity of hearing to a proposed accused of a murder case before registration of the FIR and no illegality has been committed by the learned Single Judge in Chamber of this Court while passing the impugned order without providing an opportunity of hearing to the appellant. Similarly, in the cases of `Wajid Ali v. Civil Judge and Judicial Magistrate No. 1 and 5 others' (PLD 2014 Sindh 164) and 'Muhammad Hayat v. The Chief Settlement and Rehabilitation Commissioner and another' (PLD 1970 Lahore 679), it was held that the maxim 'audi alteram partem' (no one should be condemned unheard), is not applicable in the cases of registration of FIR, therefore, the instant Intra-Court Appeal is not maintainable, merely on the ground that the appellant was not provided opportunity of hearing before passing the impugned order.

10. Apart from the above mentioned aspects of this case, insofar as the merits of the case are concerned, we have noted that it was the case of Mst. Robina Kausar, respondent No.2 that on 28.07.2014 her brother Iftikhar Ahmad Butt went out of his house and did not return. She (respondent No.2) started search for her brother and on 01.08.2014 she came to know that her brother Iftikhar Ahmad Butt was confined by the police at Police Station Kakrali District Gujrat. She (respondent No.2) along with her sister Shamim Ijaz, her daughter Saima Shafqat and one Tariq Mehmood son of Munawar Hussain went to the Police Station Kakrali and reached there at about 08:00 p.m., where the police official told them that Safdar Qureshi, Inspector and Mushtaq Ahmad, Sub-Inspector have shifted the above mentioned Iftikhar Ahmad Butt to Police Station Galyana District Gujrat. Respondent No.2 along with the above mentioned witnesses, then reached at Police Station Galyana, where they saw that Safdar Qureshi, Inspector and Mushtaq Ahmad, Sub-Inspector were strangulating the above mentioned Iftikhar Ahmad Butt with the help of a rope, whereas, Mian Touseef

Ahmad (appellant) and Mehr Abbas, Inspector along with two other unknown police officials were extending physical torture to him. Respondent No.2 and other witnesses raised hue and cry, whereupon Mehr Abbas, Inspector, asked the other police officials to confine the above mentioned respondent and other witnesses so that they may witness the lesson being given to the brother of respondent No.2, thereafter, the other police officials started pushing them and made them to sit in the courtyard of the police station. The police officials kept on extending physical torture to Iftikhar Ahmad Butt with the help of 'dandas' iron rods and `litters' who ultimately succumbed to the torture at the spot. According to the police record, FIR No. 204 of 2014 was registered at Police Station Kakrali, District Gujrat regarding the occurrence of dacoity against six unknown accused persons, who after committing dacoity fled away from the place of occurrence. The police report shows that Iftikhar Ahmad Butt received the injuries on his body at the hands of local residents who gave him severe beatings when he was caught red handed while trying to flee away after committing dacoity and he was shifted to Police Station Galyana to save his life, where he committed suicide. It is noteworthy that according to the police record, Iftikhar Ahmad Butt deceased was arrested by the police on 24.07.2014. His postmortem report is also available on the record according to which, the postmortem of the deceased was conducted on 02.08.2014 at 08:20 p.m., and the time that elapsed between the injuries and death was 24 hours, whereas, the time that elapsed between the death and postmortem examination was 16 to 24 hours, which means that the injuries on the body of Iftikhar Ahmad Butt deceased were caused on 31.07.2014 when he was in police custody. The time given by the Medical Board regarding the duration of the injuries has fully negated the version of the appellant and other police officials. that Iftikhar Ahmad Butt deceased was physically tortured by the local residents by giving him severe beatings. The perusal of postmortem report and pictorial diagrams of the deceased further reveals that apart from the injury on the neck, there were multiple ante-mortem injuries on the different parts of the body, of the deceased which supports the version of respondent No.2 that the deceased was subjected to severe physical torture by the appellant and other Police officials before his death.

It was the case of the appellant that Iftikhar Ahmad Butt deceased committed suicide with the help of his 'naala' (string in the shalwar) but as per postmortem report, the deceased was wearing shalwar qameez at the time of his postmortem examination. If the deceased had committed suicide with the help of `naala' (string in his shalwar),

then how his shalwar was present on his body at the time of his postmortem examination.

11. We have gone through the reports of judicial inquiry and departmental inquiry conducted in this case and have noticed that the above mentioned facts were not considered in the aforementioned inquiry reports therefore, the said reports are not helpful for the appellant.

12. The next objection of learned counsel for the appellant is that at the relevant time, the judicial inquiry in the case in hand was pending before the concerned Judicial Magistrate (which has later on, been finalized) therefore, the order for registration of FIR should not have been passed during the pendency of said inquiry. This objection has no substance because there is no legal bar against the registration of a criminal case during the pendency of a judicial inquiry or the departmental inquiry or even after the finalization of the said inquiries in favour of the proposed accused. We may refer here the case reported as 'Mumtaz Hussain v. Deputy Inspector General, Faisalabad and 7 others' (PLD 2012 Lahore 78), wherein at page Nos. 82 and 83, it was observed as under:

> "4. The mere fact that in the enquiry conducted by the Magistrate, the cause of death was held to be septicemia, does not bar registration of the criminal case under section 154 of the Cr.P.C. Sections 174 and 176 of the Cr.P.C. are limited to ascertainment of the cause of death without recording a finding regarding guilt or innocence of an accused. That function is separately assigned to the police under the provisions of Part 5, Chapter XIV of the Cr.P.C. Under section 174 of the Cr.P.C., the police officer Incharge of a police station or some other police officers specially empowered by the Provincial Government in that behalf, can hold an investigation on receiving an information that a person,
>
> (a) has committed suicide, or
>
> (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
>
> (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence.

On the other hand, under section 176 of the Cr.P.C. a Magistrate can hold an enquiry into the cause of death of a person if it has taken place, while the deceased

was in police custody. This enquiry can be either instead of or in addition to the investigation held by a police officer under section 174 of the Cr.P.C. While interpreting the provisions of sections 174 and 176 of the Cr.P.C. a Division Bench of this court held in the case of Khuda Bakhsh v. Province of West Pakistan PLD 1957 Lahore 662:

> "Section 176 of the Code of Criminal Procedure which has been reproduced in an earlier part empowers a Magistrate to hold an inquiry contemplated by clauses (a), (b) and (c) of subsection (1) of section 174 of that Code in place of or in addition to an investigation held by a police officer,....."
>
> So, the investigation referred to in section 176 of the Cr.P.C., is the one held by a police officer under section 174 of the Cr.P.C. So far as the registration of a criminal case is concerned, it is the independent right of an aggrieved person, who can report the matter to the Incharge of the concerned police station, who is bound under the provisions of section 154 of the Cr.P.C., to record his report and conduct investigation in accordance with the law."

It is evident from the above mentioned discussion that there is no bar against the registration of FIR during the pendency or even after the finalization of judicial or departmental inquiries, against or in favour of the accused.

13. It is also true that according to the police record, Iftikhar Ahmad Butt (deceased) was involved in 17 criminal cases, whereas, Mst. Robina Kausar respondent No.2 was involved in 03 criminal cases but involvement of the deceased or respondent No.2, in number of criminal cases does not grant a licence to the appellant police official to take the law in his own hands and commit the murder of the deceased.

14. Nomination of four SHOs of different police stations as proposed accused in the petition moved by respondent No.2 under section 22-A/B of Cr.P.C. does not mean that the said application should be dismissed, outrightly, merely on the basis of said ground. Police officials are not above the law therefore, they cannot be treated differently merely on the basis of their designations or posts.

15. In the case of 'Malik Muhammad Sadiq v. Station House Officer and others' (2013 PCr.LJ 1177), cited by learned counsel for the appellant, this Court only observed that in suitable cases, opportunity of hearing may be provided to an accused by the learned Ex-officio Justice of Peace before passing an order for registration of FIR but it was not held that in all cases, opportunity of hearing must be granted to the

proposed accused by the learned Ex officio Justice of Peace before passing any order on application under sections 22-A/B of Cr.P.C. Likewise in the case of 'Haji Muhammad Sadiq v. Ilaqa Magistrate Police Station Factory Area, Faisalabad and others' (2001 PCr.LJ 1571), although this Court accepted Intra Court Appeal against the order passed by a learned Single Judge in Chamber of this Court, in a case arising out of criminal proceedings but the proviso of section 3(2) of the Law Reforms Ordinance, 1972 and the question of maintainability of Intra Court Appeal against an order of a learned Single Judge of this court, passed in respect of criminal proceedings, did not come under discussion in the said Judgment. Similarly, the facts of the other judgments, cited by learned counsel for the appellant, are distinguishable from the facts of the present case therefore, the aforementioned judgments are of no avail to the appellant.

16. In the light of above discussion, there is no substance in the present appeal therefore, the same is hereby dismissed on account of being not maintainable, as well as, on merits.

WA/T-11/L **Appeal dismissed.**

P L D 2017 Lahore 45

Before Malik Shahzad Ahmad Khan, J

KHAWAR PERVAIZ BUTT---Appellant

Versus

MUHAMMAD TAHIR QASIM AWAN---Respondent

R.F.A. No.555 of 2009, heard on 23rd February, 2016.

(a) Civil Procedure Code (V of 1908)---

----O. XXXVII, Rr. 2 & 3---Qanun-e-Shahadat (10 of 1984), Art.17(2)(a)---Stamp Act (II of 1899), Ss. 12(2) & 36---Institution of summary suit on the basis of promissory note---Promissory note not attested by two witnesses---Words "unless otherwise provided in any other special law" contained in Art. 17 of Qanun-e-Shahadat, 1984---Scope---Adhesive stamps---Cancellation of---Purpose---Contentions of defendant was that his signature and thumb impression on promissory note were obtained through fraud and misrepresentation and promissory note was without consideration and same did not bear signatures of two attesting witnesses---Suit was decreed by the Trial Court---Validity---Defendant had admitted his signature and thumb impression on the promissory note---Promissory note or cheque was not required to be attested by two witnesses---Qanun-e-Shahadat, 1984 was a general law and provisions of special law i.e. Negotiable Instruments Act, 1881 were applicable to the present case---No legal compulsion existed that in all cases adhesive stamps should bear the signature of a party to the said document---Object of cancellation of adhesive stamps was that same might not be used again on any other document---Provisions of Stamp Act, 1899 were not intended to deny the vested rights of the parties and to punish the beneficiary of a promissory note merely on the technical grounds---Promissory note had been admitted in evidence without any objection on the part of defendant---Appeal was dismissed in circumstances.

Munir Ahmad Kahloon v. Rana Muhammad Yousaf PLD 2003 Lah. 173; Muhammad Shafi v. Sheikh Riaz-ud-Din and another 2004 YLR 1669 and Muhammad Hanif v. Kissan Dost (Pvt.) Limited 2003 CLD 224 ref.

Mst. Sajida Abbas Zaidi v. Syed Arshad Ali Jafri 1990 CLC 1018; Mirza Arif Baig v. Mubarik Ali PLD 1992 Lah. 366; K.M. Muneer v. Mirza Rashid Ahmad PLD 1963 (W.P.) Kar. 905; Arjumand Azhar and others v. Salim Akhtar Khan and another

2004 YLR 2368; Asif Ali and 6 others v. Saeed Muhammad 2009 CLD 1301 and Malik Liaqat Ali v. Muhammad Sharif 2009 CLD 1313 distinguished.

Qazi Abdul Ali and others v. Khawaja Aftab Ahmad 2015 SCMR 284; Abdul Rauf v. Farooq Ahmed and another PLD 2007 Lah. 114; Sheikh Muhammad Shakeel v. Sheikh Hafiz Muhammad Aslam 2014 SCMR 1562; Mst. Sajida Abbas Zaidi v. Syed Arshad Ali Jafri' 1990 CLC 1018; Messrs United Bak Limited, Karachi v. Muhammad Ali Haji Kassim Ali 1987 CLC 2321; Hafizullah v. Haji Hussain Bakhksh 1990 CLC 603 and Habib Bank Ltd. v. Raza Sons and another PLD 1978 Kar. 425; Munir Ahmad Kahloon v. Rana Muhammad Yousaf PLD 2003 Lah. 173; Muhammad Ashiq and another v. Niaz Ahmad and another PLD 2004 Lah. 95 and Muhammad Shafi v. Sheikh Riaz-ud-Din and another 2004 YLR 1669 rel.

(b) Stamp Act (II of 1899)---

----Preamble---Stamp Act, 1899 was a revenue collecting law.

Mian Zafar Iqbal Kalanori for Appellant.

Malik Mushtaq Ahmad for Respondent.

Date of hearing: 23th February, 2016.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Instant appeal has been filed against the judgment and decree dated 31.10.2009 passed by the learned Addl. District Judge, Sialkot, whereby the suit filed by Muhammad Tahir Qasim Awan (respondent) under Order XXXVII, Rule 2 of C.P.C., for recovery of Rs.6,50,000/- on the basis of promissory note dated 17.03.2008, was decreed in his favour.

2. As per brief facts of the present case, Muhammad Tahir Qasim respondent/plaintiff filed a suit against Khawar Pervaiz Butt appellant/ defendant on the ground that the appellant/defendant borrowed an amount of Rs.6,50,000/- from him and executed a promissory note dated 17.03.2008. The said promissory note was duly signed and thumb marked by the appellant/defendant. The respondent/plaintiff, later on demanded back the amount of loan from the appellant/defendant but he refused to do so. The respondent/plaintiff therefore, filed the abovementioned suit for recovery of his loan amount. The application filed by the appellant/ defendant for leave to appear and to defend the suit was allowed by the learned trial court. The

appellant/defendant thereafter, filed his written statement, wherein he averred that the respondent/plaintiff had no cause of action and his signature and thumb impression on the promissory note in question, were obtained through fraud and misrepresentation and promissory note was without consideration. The learned trial Court framed the following issues from the divergent pleadings of the parties.

ISSUES:

1). Whether the plaintiff has no cause of action to file the instant suit? OPD

2). Whether the plaintiff obtained promissory note from the defendant with fraud.? OPD

3). Whether the defendant executed promissory note dated 17.03.2009 in favour of the plaintiff having received Rs.6,50,000/-? OPP

3-A). Whether the plaintiff obtained promissory note from the defendant with fraud, misrepresentation, without consideration and with the collusion of his brother Asim/Shaukat? OPD

4. Relief.

In order to prove his case, the respondent/plaintiff produced Syed Irshad Kazmi as PW-1 and he himself appeared in the witness box as PW2. In his documentary evidence, the respondent/plaintiff produced promissory note as Exh.P-1. The appellant/defendant himself appeared in the witness box as DW-1 and stated that he had friendly relationship with the brother of the respondent/plaintiff, namely, Asim. Asim asked him (appellant/defendant) that his brother Tahir Qasim (respondent/plaintiff) was not ready to give him the money and as he (appellant/defendant) had good relationship with the respondent/plaintiff therefore, if he takes money from the respondent/plaintiff, then he (Asim) will return the same to him (appellant/defendant). As a guarantee for the repayment of loan amount, Asim handed over to him (appellant) a cheque-of Rs.6,25,000/- which was Exh.D-1. The appellant/defendant therefore made a request for loan to the respondent/plaintiff who agreed to pay the same and obtained signature and thumb impression of the appellant/defendant on a receipt. After obtaining signature and thumb impression, he (respondent/plaintiff) promised that the payment will be made on the next day but on the following day, the respondent/plaintiff told the appellant/defendant that he had already handed over the loan amount to his brother Asim. It was further stated by the

appellant/defendant that a fraud was committed with him by the respondent/plaintiff and his brother Asim. In his documentary evidence, the appellant/defendant produced cheque Exh.D-1.

3. After recording of evidence of the parties and hearing the arguments of their learned counsel, the learned Addl. District Judge, Sialkot decreed the suit filed by the respondent/plaintiff vide the abovementioned impugned judgment and decree hence, the present appeal before this Court.

4. It is contended by learned counsel for the appellant that the promissory note Exh.P-1 does not bear signatures of two attesting witnesses, whereas, Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 provides for attestation of a document by two witnesses, in the matters pertaining to financial or future obligations therefore, the document Exh.P-I cannot be relied upon; that adhesive stamps on the promissory note Exh.P-1 were not properly cancelled because the said adhesive stamps do not bear the signatures of the respondent/plaintiff and, as such, the aforementioned promissory note was not properly stamped therefore, the same was inadmissible in evidence in the light of provisions of Section 12(2) of the Stamp Act, (II of) 1899; that the appellant/defendant had denied the passing of any consideration to him, under the promissory note Exh.P-1 and had clearly stated that the promissory note was without consideration therefore, the burden shifted upon the respondent/plaintiff to prove that any consideration was paid to the appellant/defendant but he miserably failed to discharge the said burden; that although under Section 118 of the Negotiable Instruments Act, 1881, there is presumption that a negotiable instrument is executed against consideration but the said presumption is rebuttable and keeping in view the evidence produced in the instant case, the aforementioned presumption has successfully been rebutted by the appellant/defendant; that version of the appellant/defendant was fully proved through documentary evidence produced in this case in the shape of cheque Exh.D-1 but the said documentary evidence has not been properly appreciated by the learned trial Court while passing the impugned judgment and decree; that the signature and thumb impression of the appellant were deceitfully obtained by the respondent/plaintiff on a blank receipt and the version of the appellant/defendant that he has been defrauded by the respondent/plaintiff and his brother Asim, has not been duly considered in this case; that it was stance of the appellant/defendant in his written statement that he was immature and mentally weak

but this aspect of the case has completely been overlooked by the learned trial Court; that the impugned judgment and decree is result of misreading and non-reading of evidence, therefore, the same may be set-aside. In support of his contentions, learned counsel for the appellant/defendant has placed reliance on the cases reported as Mst. Sajida Abbas Zaidi v. Syed Arshad Ali Jafri (1990 CLC 1018), 'Mirza Arif Baig v. Mubarik Ali' (PLD 1992 Lahore 366), 'K.M. Muneer v. Mirza Rashid Ahmad' (PLD 1963 (W.P.) Karachi 905), 'Arjumand Azhar and others v. Salim Akhtar Khan and another' (204 YLR 2368), 'Asif Ali and 6 others v. Saeed Muhammad' (2009 CLD 1301) and 'Malik Liaqat Ali v. Muhammad Sharif' (2009 CLD 1313).

5. On the other hand, this appeal has been opposed by learned counsel for the respondent/plaintiff on the grounds that the respondent/plaintiff has proved his case through reliable oral, as well as, documentary evidence therefore, his suit was rightly decreed by the learned trial Court; that the Negotiable Instruments Act, 1881, is a special law and under the provisions of the Act ibid, there was no need of attestation of promissory note Exh.P-1 by two attesting witnesses; that the provisions of above mentioned special law, override the provisions of Article 17 of the Qanun-e-Shahadat Order, 1984, which is a general law; that Syed Irshad Kazmi PW-1 was the scribe of promissory note Exh.P-I and he was an independent witness, who fully supported the case of the respondent/ plaintiff; that the appellant/defendant has admitted his signature and thumb impression on the promissory note Exh.P-1 therefore, the burden shifted upon him to prove that any fraud was committed with him by the respondent/plaintiff but he did not produce any cogent or confidence inspiring evidence in order to discharge the said burden; that all the adhesive stamps, affixed on the promissory note Exh.P-I, have been cancelled/ crossed and there is no legal requirement that in all cases, the said stamps should contain the signatures of the party executing the same; that the promissory note Exh.P-I was properly stamped according to the provisions of the Stamp Act, 1899; that under Section 118 of the Negotiable Instruments Act, 1881, there is presumption that a promissory note was executed against consideration and the appellant/defendant miserably failed to rebut the said presumption, that the appellant/defendant being in league with the brother of the respondent/plaintiff namely Asif took a frivolous plea of fraud, as the said brother had strained relations with the respondent/plaintiff; that no Medical Certificate regarding the weak mental condition of the appellant/defendant was produced in evidence in this case and the above mentioned ground of weak mental condition of

the appellant/ defendant has been taken to usurp the amount of loan, taken from the respondent/plaintiff; that there is no substance in the present appeal therefore, the same may be dismissed. In support of his contentions, learned counsel for the respondent/plaintiff has placed reliance on the cases reported as 'Qazi Abdul Ali and others v. Khawaja Aftab Ahmad' (2015 SCMR 284), 'Munir Ahmad Kahloon v. Rana Muhammad Yousaf' (PLD 2003 Lahore 173) 'Muhammad Shah v. Sheikh Riaz-ud-Din and another' (2004 YLR 1669), 'Muhammad Hanif v. Kissan Dost (Pvt.) Limited' (2003 LLD 224) 'Muhammad Ashiq and another v. Niaz Ahmad and another' (PLD 2004 Lahore 95) and 'Abdul Rauf v. Farooq Ahmed and another' (PLD 2007 Lahore 114).

6. Arguments heard. Record perused.

7. As mentioned earlier, the respondent/plaintiff filed suit for recovery of Rs.6,50,000/- against the appellant/defendant, on the basis of promissory note, Exh.P-1. It was claim of the respondent/plaintiff that the appellant/defendant borrowed an amount of Rs.6,50,000/- from him and for the repayment of said amount, he executed promissory note Exh.P- I. In order to prove his case, respondent/plaintiff produced Syed Irshad Kazmi, as PW-1 and he (respondent/plaintiff) himself appeared in the witness box as PW-2. Syed Irshad Kazmi is the scribe of the promissory note Exh.P-1. He stated in his examination-in-chief that promissory note Exh.P-1 was written by him and the same bears his signature Exh.P-1/1. He further stated that Khawar Pervaiz appellant/defendant also affixed his signature and thumb impression on the promissory note which are Exh.P-1/2. In his cross-examination, he further stated that the amount of Rs.6.50,000/-, mentioned in the promissory note, was paid in his presence and the payment was made at the time of signing the above mentioned document. Syed Irshad Kazmi PW-1 is admittedly not related to the respondent/plaintiff. He is an independent witness. The respondent/plaintiff, namely, Muhammad Tahir Qasim Awan, himself appeared in the witness box as PW-/2. He stated that an amount of Rs.6,50,000/- was obtained as loan by the appellant/defendant and for the repayment of said amount, promissory note Exh.P-1 was executed by the appellant/defendant. Both the above mentioned witnesses were cross-examined at length but nothing favourable to the appellant/defendant could be brought on the record. Their evidence is trustworthy and confidence inspiring. It is pertinent to note that the appellant/defendant has admitted his signature and thumb

impression on the promissory note Exh.P-1. The stance of the appellant/ defendant, however, was that his signature and thumb impression were obtained fraudulently on a blank receipt. The said stance of the appellant/defendant is not believable because promissory note Ex.P-1 has been executed on a printed form, clearly showing that it was a promissory note.

8. It is true that the promissory note Ex.1 is not attested by two witnesses but in my humble view under the Negotiable Instruments Act, 1881, there was no need of attestation of a promissory note or cheque by two witnesses. Although under Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984, it was mandatory that an instrument pertaining to the financial or future obligations should be attested by two men or one man and two women but application of the aforementioned sub-clause (a) is subject to clause (2) of the said Article which reads as under:--

"17. Competence and number of witness.-

(1) ----------

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.}

(underlining and bold supplied)

Article 17(2) of the Order ibid clearly ordains, "unless otherwise provided..... in any other special law." The Qanun-e-Shahadat Order, 1984 is a general law, whereas, the case in hand has been filed on the basis of promissory note Exh.P-1 therefore, the provisions of special law i.e. The Negotiable Instruments Act, 1881, are applicable in the instant case. It is also noteworthy that the Qanun-e-Shahadat Order, 1984 came into force on 26.10,1984 and at that time, the Negotiable Instruments Act, 1881 was already in force therefore, the Act ibid was a special law within the meaning of the aforementioned provisions of the Qanun-e-Shahadat

Order, 1984. Section 4 of the Negotiable Instruments Act, 1881, is reproduced hereunder in order to determine that as to whether promissory note is required to be attested by two witnesses, under the said Act:--

> **"4. "Promissory note:** A "Promissory note" is an instrument in writing (not being a bank-note or a currency-note containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time, a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument."

It is evident from the perusal of above provision of special law that there was absolutely no need of attestation of a promissory note by two witnesses, Remaining conditions to qualify a document to be a promissory note, like the instrument should be in writing, there should be unconditional undertaking to pay on demand or at a fixed or determinable future time, a certain sum of money, to a certain person or bearer of the instrument and that the instrument should contain the signature of the maker, are fully present in the document Ex.1. Similar view was taken by this Court in the case of 'Abdul Rauf v. Farooq Ahmed and another' (PLD 2007 Lahore 114). Likewise, in the case of 'Sheikh Muhammad Shakeel v. Sheikh Hafiz Muhammad Aslam' (2014 SCMR 1562), at page 1565, the apex Court was pleased to observe as under:--

> "The learned High Court has held that the Promissory Note was not attested in terms of Article I7(2)(a) of the Order therefore, it was not a valid instrument. This finding of the learned High Court is contrary to the language of section 4 of the Act, which defines a Negotiable Instrument. In terms of section 4 of the Negotiable Instruments Act, a Promissory Note is required to contain the following ingredients:--
>
> (i). An unconditional undertaking to pay,
>
> (ii) the sum should be the sum of money and should be certain
>
> (iii) the payment should be to or to the order of a person who is certain, or to the bearer, of the instrument,
>
> (iv) and the maker should sign it.
>
> 10. If an instruments fulfills the above four conditions it will be termed as Promissory Note within the meaning of section 4 of the Act. The requirement

> of attestation of a document as contained under Article 17(2)(a) of the Order is contrary to the definition given by section 4 of the Act. Therefore, we are of the considered view that the Promissory Note Exh.P.2 produced by the appellant in evidence contains all the ingredients of a valid Promissory Note as defined in section 4 of the Act.-

In the light of above discussion, there is no legal requirement of attestation of a promissory note or cheque by two witnesses.

9. Learned counsel for the appellant/defendant has also taken this objection that the adhesive stamps, affixed on the promissory note Exh.P-1, were not signed by the respondent/plaintiff and, as such, the same were not properly cancelled therefore, under Section 12(2) of the Stamp Act, 1899, promissory note Exh.P-1 was inadmissible in evidence. I have perused the promissory note Exh.P-1 and noted that all the adhesive stamps, affixed on it, have duly been crossed by drawing two lines on the face of the stamps, crossing each other. There is no legal compulsion that in all cases, the said stamps should bear the signatures of a party to the said document. The same may be cancelled through "any other effectual manner" as provided under Section 12(3) of the Act ibid which reads as under:--

> "The person required by subsection (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

(bold and underlining supplied)

In the cases of of 'Mst. Sajida Abbas Zaidi v. Syed Arshad Ali Jafri' (1990 CLC 1018), 'Messrs United Bank Limited, Karachi v. Muhammad Ali Haji Kassim Ali' (1987 CLC 2321), 'Hafizullah v. Haji Hussain Bakhsh' 1990 CLC 603 and 'Habib Bank Ltd. v. Raza Sons and another PLD 1978 Kar. 425, it was held that drawing of one line or drawing of two lines across the face of an adhesive stamp, is an effectual cancellation.

Even otherwise, The Stamp Act, 1899, was a revenue collecting law and the object of cancellation of stamps was only that the same might not be used again on any other document. Provisions of the Stamp Act, 1899 were not intended to deny the vested rights of the parties and to punish the beneficiary of a promissory note merely

on the technical grounds. Reliance in this respect may be placed on the case reported as "Qazi Abdul Ali and others v. Khawaja Aftab Ahmad' (2015 SCMR 284), wherein at pages Nos. 288, 289, 290 and 291, it was observed as under:--

> "The learned trial Court keeping in view all the attending circumstances had come to a definite conclusion and had decreed the suit. However, the learned High Court took a different stand and has held, that as the adhesive stamps on the pro note were not properly cancelled thus in terms of section 12 of the Stamp Act, 1899, the document was insufficiently stamped and the appellants could not have filed suit under Order XXXVII, C.P.C. before the trial Court. While passing the impugned judgment, the learned High Court did not take into consideration the fact that Stamp Act is a revenue collecting law and the object of cancelling of stamps is only that the same might not be used again on any other document. The provisions of law are not intended to deny vested rights of the parties and to punish the beneficiary of pronote. According to section 12(3) of the Stamp Act "the person required by subsection (1) to cancel an adhesive stamp may cancel it by writing on or cross the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner." We have gone through the pronote and found that out of 20 adhesive stamps only two have not been crossed/cancelled. Section 12(2) of the said Act provides that "any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped".'From the bare perusal of this provision it is clear that the instrument would be deemed to be unstamped only to the extent of stamps which had not been cancelled. As only two stamps were not cancelled, the pronote in question was insufficiently stamped only to the extent of those stamps. In such a case, the same could be admitted in evidence on payment of penalty provided under law but it could not be held that pronote in question which was insufficiently stamped could have formed the basis of rejection of claim of the appellant/plaintiff. Payment of stamp duty is a matter between a citizen and the State and an adversary could not be permitted to capitalize on a technicality, which otherwise was not fatal to the suit. According to section 36 of the Stamp Act, 1899, document once admitted in evidence could not be challenged at any stage of proceedings on the ground for not being duly

stamped except under section 61 thereof. In Ch. Muhammad Saleem v. Muhammad Aram and others (PLD 1991 SC 516) the question as to whether an agreement which was not stamped can be admitted in evidence or not came up for consideration and this Court while relying on an Indian case-law, with approval, has held that "once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial Court itself or to a Court of Appeal or Revision to go behind that order" Similarly in Union Insurance Company of Pakistan (Pvt.) Ltd v. Muhammad Siddique (PLD 1978 SC 279) wherein the issue was relatable to an unstamped arbitration agreement, this Court has specifically held as under:--

"Section 35, Stamp Act, 1899 prescribes that no instrument, which is not properly stamped, "shall be admitted in evidence for any purpose..... or shall be acted upon... " Now merely because an instrument cannot be admitted in evidence for any purpose as because it cannot be acted upon by the persons specified in the section, does not mean that such an instrument is invalid, and it is not irrelevant to observe here that the words have to be construed strictly, because they are to be found in a provision of a penal nature. Therefore, it would be against all canons of construction to enlarge the meaning of these words, so as to render invalid instruments which fall within the mischief of the section. After all, instruments, which are not duly stamped, are executed every day, and most persons, who incur obligations under such instruments, honour their liabilities under such instruments, regardless of the provisions of section 35. In any event, this section is attracted only when an instrument is produced before the persons specified in the section. But, for example, an instrument would be produced in evidence only when there is a dispute about it, therefore, if the intention of the Legislature had been to render invalid all instruments not properly stamped, it would have made express provision in this respect, and it would also have provided some machinery for enforcing its mandate in those cases in which the parties did not have occasion to produce unstamped instruments before the persons specified in the section. Additionally, there is nothing in the section which would support the plea

that an instrument becomes invalid, if it falls within the mischief of the section. After all, if an instrument is invalid, it must be invalid for all purposes, but proviso (d) to the section expressly saves unstamped instruments in most criminal proceedings, whilst the other provisos to the section enable the parties to overcome the disabilities attached to an instrument not property stamped by paying the requisite duty together with a penalty, therefore, this would suggest that the object of the section is to protect public revenue. Again, if an instrument is invalid it should not be admissible in evidence and it is so stated in section 35. But the next section prescribes that if an instrument has been admitted in evidence, howsoever erroneously its admissibility cannot be questioned at any stage thereafter, and even the appellate Court's power to entertain an objection about the admissibility of documents have been removed by section 61, which instead empowers the appellate Court to collect the duty payable on the unstamped instrument together with a penalty." (Emphasis is supplied)

7. In Farid Akhtar Hadi v. Muhammad Latif Ghazi (1993 CLC 2015) one of the issues was with regard to admissibility of a document on which some of the stamps were not cancelled and the learned Court after discussing a number of case-law had come to the conclusion that "an instrument once having been admitted in evidence is immune from challenge on the ground that it was under-stamped or the stamps were not cancelled properly. In Munir Ahmad Kahloon v. Rana Muhammad Yousaf (PLD 2003 Lahore 173) the pro note in question bore 25 adhesive stamps on it and out of those 25, two were not crossed/cancelled. The learned High Court has held that the instrument would be deemed to be unstamped only to the extent of stamps which had not been cancelled; that provisions of section 12 of the Stamp Act have been substantially complied with; pro note could be admitted in evidence on payment of penalty and that "once the instrument was admitted in evidence, same could not be called in question at any stage of suit or proceedings on the ground that it was not duly stamped except under Section 61 of Stamp Act, 1899." In Muhammad Hand v. Kissan Dost (Pvt.) Ltd. (2003 CLD 224), the plea raised by the defendant was that the stamps affixed on the pro note were not cancelled, therefore, the same is inadmissible document in evidence but the Court came to the conclusion that "as the pro

note was admitted in evidence without objection by the defendant at the relevant time the same could not be kept out of consideration at the time of deciding of appeal." Similarly in Manzoor Ahmed v. Qamar ul Zaman (2001 CLC 1756) the suit for recovery of money on the basis of pronote was dismissed by the learned trial Court on the ground that pronote was inadmissible in evidence due to non-cancellaion of one of adhesive stamps but the learned High Court accepted the appeal filed by the plaintiff and has held that "according to section 36 of the Stamp Act, 1899, document once admitted in evidence could not be challenged at any stage of proceedings on ground for not being duly stamped except under section 61 thereof. Defendant in written statement had not raised objection regarding non-cancellation of questioned stamp. Plaintiff could not be non-suited on technical ground."

In the case in hand, the appellant/defendant in his written statement has not raised any objection regarding the non-cancellation of adhesive stamps on the promissory note Exh.P-1 therefore, the respondent/plaintiff cannot be non-suited on the aforementioned technical ground. It is also noteworthy that promissory note Ex.P-1 was admitted in evidence without any objection on the part of the appellant/defendant. According to Section 36 of the Stamp Act, 1899, "if a document is admitted in evidence then the same could not be challenged at any stage of the proceedings on the ground of not being duly stamped, except under Section 61 of the said Act." As the appellant/defendant did not raise any objection at the time of admission of promissory note Ex.P-1 in evidence therefore, under Section 36 of the Act ibid, he cannot raise any objection at this belated stage. Reference in this context may also be made to the cases reported as 'Sheikh Muhammad Shakeel v. Sheikh Hafiz Muhammad Aslam' (2014 SCMR 1562), 'Munir Ahmad Kahloon v. Rana Muhammad Yousaf (PLD 2003 Lahore 173), 'Muhammad Ashiq and another v. Niaz Ahmad and another' (PLD 2004 Lahore 95) and Muhammad Shafi v. Sheikh Riaz-ud-Din and another (2004 YLR 1669).

10. Insofar as the objection of learned counsel for the appellant/ defendant regarding the non-consideration of the ground of weak mental condition and immaturity of the appellant/defendant by the learned trial Court, is concerned, I have noted that although this ground was taken by the appellant/defendant in his written statement

but while appearing in the witness box as DW-1, the appellant/defendant did not utter even a single word in this respect. No Medical Certificate regarding the weak mental condition or immaturity of the appellant/defendant was produced in evidence. Even no oral evidence in this respect was produced by the appellant. I have also noted that the appellant/defendant himself appeared in the witness box as DW-1 and there is nothing in his evidence to demonstrate that he was having weak mental condition or immaturity or he was suffering from any mental disorder/ailment, therefore, there is no force in the abovementioned objection or learned counsel for the appellant.

11. The appellant/defendant also took this stance that he had friendly relations with one Asim who was real brother of the respondent/plaintiff. Asim asked him (appellant/defendant) that his brother Tahir Qasim (respondent/plaintiff) was not ready to give him the money and as he (appellant/defendant) had good relations with the respondent/plaintiff therefore, if he takes money from the respondent/plaintiff, then he (Asim) would return the same to him (appellant/defendant). As a guarantee for the repayment of loan amount, Asim handed over to him (appellant) a cheque of Rs.6,25,000/- which was Exh.D-1. The appellant/defendant therefore, made a request for loan to the respondent/plaintiff who agreed to pay the same and obtained signature and thumb impression of the appellant/defendant on a blank receipt. After obtaining signature/thumb impression, he (respondent/plaintiff) promised that the payment will be made on the next day but on the following day, respondent/plaintiff told the appellant/defendant that he had already handed over the amount to his brother Asim. It was further stated by the appellant/defendant that a fraud was committed with him by the respondent/plaintiff and his brother Asim.

The veracity of the stance of the appellant, in respect of obtaining his signature and thumb impression on a blank receipt, has already been discussed in para. No. 7 above. I have also noted that learned defence counsel has himself put different questions during the cross-examination of respondent/plaintiff and brought on the record that at the time of execution of promissory note Ex.P-1, relations between the respondent/plaintiff and his brother Asim were very strained due to family disputes. It was also brought on the record that the respondent/plaintiff and his brother Asim were not even on speaking terms. It is therefore, established that the question of defrauding the appellant/ defendant by the respondent/plaintiff in connivance with his brother was not probable in the light of aforementioned strained relationship between

them. Above mentioned fact regarding the strained relationship of the respondent with his brother Asim is also established from the written statement filed by the appellant/defendant himself, as well as, from his statement made before the Court, wherein it was specifically stated that brother of the respondent/plaintiff, namely, Asim asked the appellant/ defendant that the respondent/plaintiff was not ready to give him (Asim) the money therefore, he (appellant/defendant) should obtain money from the respondent/plaintiff. Insofar as the cheque Exh.D-1, issued by abovementioned Asim in favour of the appellant, is concerned, the said matter is between the appellant and the said Asim. The appellant may file a suit under Order XXXVII, Rule 2 of C.P.C. against the above mentioned Asim for the recovery of amount mentioned in the said cheque. The respondent has no concern with the said cheque, therefore, the same cannot be used against him.

12. The judgments cited by learned counsel for the appellant/defendant, reported as 'Mst. Sajida Abbas Zaidi v. Syed Arshad Ali Jafri' (1990 CLC 1018), 'Mirza Arif Baig v. Mubarik Ali' (PLD 1992 Lahore 366), 'K.M. Muneer v. Mirza Rashid Ahmad' (PLD 1963 (W.P.) Karachi 905) and 'Arjumand Azhar and others v. Salim Akhtar Khan and others' (2004 YLR 2368), regarding the inadmissibility of promissory note on the ground of non-cancellation of adhesive stamps, affixed on it, are not helpful to the case of the appellant/defendant in the light of discussion in para-9 of this judgment and the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of 'Qazi Abdul Ali and others (2015 SCMR 284) and 'Sheikh Muhammad Shakeel v. Sheikh Hafiz Muhammad Aslam' (2014 SCMR 1562), supra. Similarly, learned counsel for the appellant/defendant has also placed reliance on the cases reported as 'Asif Ali and 6 others v. Saeed Muhammad (2009 CLD 1301) and 'Malik Liaqat Ali v. Muhammad Sharif' (2009 CLD 1313), to embellish his arguments that presumption under section 118 of the Negotiable Instruments Act, 1881, was not conclusive presumption, rather the same was rebuttable in nature, but the facts of the aforementioned cases are distinguishable from the facts of the present case. In the case of 'Malik Liaqat Ali' (2009 CLD 1313) supra, the suit filed by the plaintiff on the basis of promissory note was decreed by the trial Court and inspite of above mentioned observation under section 118 of the Act ibid, the appeal filed against the judgment and decree of the learned trial Court was dismissed by this Court, whereas, in the case of 'Asif Ali and 6 others (2009 CLD 1301) supra, the suit on the basis of cheque was not filed during the life time of the defendant and the concerned Bank

Officer was unable to state, if the signature on the cheque belonged to the defendant or otherwise, whereas, in the instant case the signature and thumb impression of the appellant/defendant, on the promissory note Ex.P-1 are admitted by the appellant himself, therefore, the above mentioned judgments are of no help to the case of appellant.

13. In the light of above discussion, there is no substance in the present appeal therefore, the same is hereby dismissed.

ZC/K-15/L **Appeal dismissed.**

PLJ 2017 Lahore 479

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Malik SHAUKAT ALI--Petitioner

versus

SUPERINTENDENT OF POLICE MODEL TOWN, CIRCLE, LAHORE and 4 others--Respondents

W.P. No. 7489 of 2017, heard on 30.3.2017.

Constitution of Pakistan, 1973--

----Art. 199--Pakistan Penal Code, (XLV of 1860), S. 420--Quashing of FIR--Jurisdiction of police--Agreement to sell--Ingredients of--Alternate remedies--No criminal offence is made out--Civil nature--It was a case of civil nature for specific performance of agreement to sell but complainant instead of filling a civil suit against petitioner has lodged impugned order, in order to use state machinery so that petitioner may be pressurized to execute sale deed in his favour--No criminal offence is made out from contents of FIR, therefore, same is liable to be quashed. [P. 482] A

2014 PCr.LJ 1305, 2009 PCr.LJ 290.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 249--Pakistan Penal Code, (XLV of 1860), S. 420--Constitution of Pakistan, 1973, Art. 199--Quashing of FIR--It is by now well settled that mere submission of challan before trial Court by itself is no ground to refuse quashment of FIR, when no criminal offence is made out from contents of same--No useful purpose shall be served by directing petitioner to first avail alternate remedy of filing a petition under Section 249-A, Cr.P.C. before trial Court.

[P. 482] B

2000 SCMR 122 & 1994 SCMR 798.

Sardar Muhammad Ashraf Khan Sargana, Advocate for Petitioner.

Mr. Adnan Shamim Bhatti, Advocate for Respondent No. 4.

Mr. Sittar Sahil, Assistant Advocate General for State.

Date of hearing: 30.3.2017.

JUDGMENT

The instant constitutional petition has been filed by the petitioner for the quashment of FIR No. 642/2016 dated 14.05.2016, offence under Section 420, PPC registered at Police Station Nishtar Colony, Lahore.

2. As per brief allegations levelled in the FIR, Malik Shaukat Ali (petitioner) was owner of the land bearing Khasra No. 2041, 2046 and 2047, measuring 3½ marlas, situated within the jurisdiction of Police Station Nishtar Colony, Lahore. The complainant executed an agreement to sell with the petitioner in respect of the aforementioned land, in sale consideration of Rs.6,12,500/- and on 01.11.2011, paid an amount of Rs.5,20,000/-, whereas out of the remaining amount of Rs.92,500/-, the complainant paid to the petitioner an amount of Rs.60,000/- on 11.05.2012 and an amount of Rs.32,500/- on 14.03.2014. The petitioner handed over a photo copy of *Fard Malkiyat* to the complainant in June, 2013 but the original *Fard Malkiyat* was not handed over by the petitioner to the complainant. Later on the petitioner told the complainant that, the aforementioned photo copy of *Fard Malkiyat* had expired and demanded an amount of Rs.5000/- for issuance of fresh original *Fard Malkiyat*, which amount was paid to him by the complainant but inspite of that, the original *Fard Malkiyat* was not handed over by the petitioner to the complainant. In July 2014, the petitioner demanded Rs. 15000/- from the complainant, in respect of expense to be incurred on the execution of registered sale deed and the said amount was also paid by the petitioner to the complainant but inspite of that registered sale deed was not executed by the petitioner in favour of the complainant, hence the aforementioned FIR.

3. It is contended by learned counsel for the petitioner that it was a case of civil nature regarding the specific performance of agreement to sell and no criminal offence is made out from the contents of the impugned FIR, therefore, the same may be quashed.

4. On the other hand, this petition has been opposed by learned Assistant Advocate General assisted by learned counsel for the complainant on the grounds that the complainant had paid the entire sale consideration of the land in question to the petitioner and he has also paid an amount of Rs.20,000/- in respect of the expenses for obtaining a fresh attested photo copy of *Fard Malkiyat* and for registration of the sale deed but inspite of the payment of the abovementioned amounts, the petitioner has not executed the sale deed, in favour of the complainant, therefore, the ingredients of offence under Section 420, PPC are fully attracted in this case; that challan in this case

has already been submitted before the learned trial Court, therefore, this petition is not maintainable before this Court because the petitioner may first avail the alternate remedies as provided under the law; that there is no substance in the present petition, therefore, the same may be dismissed. In support of his contentions, learned counsel for the complainant has placed reliance on the judgment reported as *"Director General Anti-Corruption Establishment Lahore and others vs. Muhammad Akram Khan and others"* (PLD 2013 Supreme Court 401).

5. Arguments heard. Record perused.

6. It is evident from the perusal of the contents of the impugned FIR that the same was lodged by the complainant on the ground that he has executed an agreement to sell with the petitioner in respect of land bearing Khasra Nos. 2041, 2046 and 2047, measuring 3½ *marlas*, situated within the jurisdiction of Police Station Nishtar Colony, Lahore and he (complainant) had paid the entire sale consideration, as well as, expenses for obtaining a fresh attested copy of *Fard Malkiyat* and for registration of the sale deed but inspite of that the petitioner has not executed the sale deed in favour of the complainant. It is, therefore, clear that it was a case of civil nature for specific performance of agreement to sell but the complainant instead of filling a civil suit against the petitioner has lodged the impugned order, in order to use the State machinery so that the petitioner may be pressurized to execute the sale deed in his favour. No criminal offence is made out from the contents of the impugned FIR, therefore, the same is liable to be quashed. Reference in this context may be made to the judgments reported as *"Umair Aslant vs. Station House Officer and 7 others"* (2014 PCr.LJ 1305) & *"Zahid Jameel vs. SHO. etc"* (2009 Cr.LJ 290).

7. It is by now well settled that mere submission of challan before the learned trial Court by itself is no ground to refuse the quashment of the FIR, when no criminal offence is made out from the contents of the same. No useful purpose shall be served by directing the petitioner to first avail the alternate remedy of filing a petition under Section 249-A, Cr.P.C. before the learned trial Court. The proceedings in this case before the learned trial Court will amount to abuse of process of the law and the Court. Reliance in this respect may be placed on the judgments reported *"Miraj Khan vs. Gul Ahmad and 03 others"* (2000 SCMR 122) & *"The State vs. Asif Ali Zardari and another"* (1994 SCMR 798).

8. Keeping in view all the aforementioned facts, the instant petition is allowed and the impugned FIR No. 642/2016 dated 14.05.2016, offence under Section 420, PPC registered at Police Station Nishtar Colony, Lahore is hereby quashed.

(R.A.) **Petition allowed.**

PLJ 2017 Cr.C. (Lahore) 751

[Bahawalpur Bench Bahawalpur]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

MUNIR AHMED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2044-B of 2016, decided on 15.10.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code (XLV of 1860), Ss. 337-A, 337-L(II) & 34--Bail before arrest, confirmed--Findings of medical board regarding story narrated in instant FIR had not been challenged any further by complainant--As it is a case of cross versions and petitioner himself sustained injured during occurrence, therefore, it is difficult to determine at that stage that as to who was aggressor and who was aggressed upon, hence a case of grant of pre arrest bail to petitioner is made out in that case--Nothing has recovered from possession of petitioner; therefore, no useful purpose will be served by sending petitioner behind bars.[P.] A & B

2010 SCMR 1219, 2015 5CMR 879, 2011 SCMR 1719, *ref*.

Mr. Muhammad Saleem Faiz, Advocate for Petitioner.

Mr. Gulzar Ahmed Sabir, Addl.P.G. for State.

Mian Muhammad Tayyab Watoo, Advocate for Complainant

Date of hearing: 15.10.2016.

ORDER

Through the instant petition, the petitioner namely Munir Ahmed seeks pre-arrest bail in case FIR No. 200/2016 dated 30.07.2016, offences under Sections 337-A(i)/337-A(ii)/337-L(ii)/34, PPC, registered at Police Station Shaher Fareed, District Bahawalnagar on the complaint of Muhammad Iqbal (complainant).

2. As per brief allegations levelled in the FIR, on 23.07.2016, at about 5.45 p.m, a quarrel took place between the petitioner and the complainant party, whereupon the petitioner inflicted a brick blow on the head of Muhammad Iqbal (complainant), whereas his co-accused namely Amir Shahzad, inflicted a brick blow, which landed above the right ear of the complainant and his co-accused namely *Mst.* Baigan gave fists and slap blows to the complainant.

3. Arguments heard. Record perused.

4. It is a case of two versions. It is claim of the petitioner that infact he was attacked by the complainant party of this case. The medico legal report of the petitioner is also available on the record, according to which the petitioner sustained two injuries and as per his x-ray report, the bone of left arm of the petitioner was found to be fractured and the same was declared as *Jurh Ghayr Jaifah Hashimah* to be punishable under

Section 337-F(v), PPC. Although the initial Medical Officer has mentioned in the relevant column of the medico legal report of the petitioner that possibility of accidental injury of the petitioner cannot be ruled out but the said report was challenged before the Medical Board and according to the final report, furnished by the Medical Board, the abovementioned findings of the initial Medical Officer regarding possibility of receiving of injury by the petitioner during an accident were set aside and it was noted that the aforementioned findings were given by the initial Medical Officer without any solid reason/evidence. Although the duration of the injury was given by the initial Medical Officer to be within four to six days but the Medical Board has opined as under:

> "According to FIR No. 200/2016 lodged by opposite party Mr. Muhammad Muneer was main accused and he seriously injured to opposite which is not possible for a person who have a long bone fracture of forearm.
>
> The police investigate this matter on circumstantial evidence."

Admittedly the abovementioned findings of the Medical Board regarding the story narrated in the instant FIR have not been challenged any further by the complainant. As it is a case of cross-versions and the petitioner himself sustained injuries during the occurrence, therefore, it is difficult to determine at this stage that as to who was aggressor and who was aggressed upon, hence a case for grant of pre-arrest bail to the petitioner is made out in this case. Reference in this context may be made to the cases reported as *"Hamza Ali Hamza and others vs. The State"* (2010 SCMR 1219) & *"Syed Darbar Ali Shah and others vs. The State"* (2015 SCMR 879). Moreover, as per contents of the FIR, the petitioner pelted/threw brick bat upon the complainant and brick bat, if any, must be available at the place of occurrence. Nothing is to be recovered from the possession of the petitioner, therefore, no useful purpose will be served by sending the petitioner behind the bars. Reference in this context may be made to the case of *"Khalid Mehmood and others vs. The State and others"* (2011 SCMR 1719). Possibility of *mala fide* involvement of the petitioner in this case, due to the cross version, cannot be ruled out at this stage.

5. Keeping in view the aforementioned facts, the instant petition is allowed and the ad-interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of-the case before the learned trial Court.

(W.I.B) **Bail allowed.**

PLJ 2017 Cr.C. (Lahore) 826 (DB)

[Bahawalpur Bench Bahawalpur]

***Present*: MALIK SHAHZAD AHMAD KHAN AND KHALID MAHMOOD MALIK, JJ.**

MUHAMMAD AZAM etc.--Petitioners

versus

STATE, etc.--Respondents

Crl. Misc. Nos. 1191-B & 1204-B of 2016, decided on 18.10.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Explosive Substances Act, 1908, S. 4, Anti-Terrorism Act, 1997, Ss. 7 & 11--Bail, grant of--Rule of consistency--Allegation of--Explosive substance was recovered--Explosive substance was recovered from possession of co-accused person--Co-accused of petitioners has already been granted post arrest bail by High Court--As principal accused has already been granted bail by High Court, petitioners are also entitled to relief of bail under rule of consistency--Bail was granted. [Pp. 827 & 833] A & B

M/s. M. Umair Mohsin and Zafar Iqbal Awan, Advocates for Petitioners.

Ch. Asghar Ali Gill, D.P.G. for Respondent.

Date of hearing: 18.10.2016.

ORDER

This order will dispose of aforementioned bail petitions as these emanate from the one and same F.I.R.

2. Through the instant petitions, the petitioners Muhammad Azam and Muhammad Saad Zulqarnain seek post arrest bail in case F.I.R. No.33/2016 dated 07.04.2016, offences under Section 4 of the Explosive Substances Act, 1908, read with Sections 7 & 11-W(2) of the Anti Terrorism Act, 1997, registered at Police Station Counter Terrorism Department, Multan.

3. As per brief allegations levelled in the F.I.R, on 07.01.2016, the complainant Muhammad Tariq Javed, S.I, Counter Terrorism Department (CTD), Bahawalpur received a spy information that four persons being members of a band organization

"Daish", were present near the Khanwa Canal and they were proceeding towards Khanqaa Shareef, situated within the limits of District Bahawalpur. On this information, a raiding party was constituted and thereafter, the petitioners along with their co-accused were apprehended by the police and explosive substance weighing 500 grams was recovered from the possession of the Amir Saeed co-accused whereas, eight electronic resisters and one meter prima cord were recovered from Muhammad Azam petitioner while 74 pamphlets containing hate material, one meter of electric wire, ¼ kg. iron nails, four cells of batteries, one scotch-tape etc were recovered from the Muhammad Saad Zulqarnain petitioner.

4. Arguments heard. Record perused.

5. As per brief allegations levelled in the F.I.R., eight electric resisters and one meter prima cord were allegedly recovered from Muhammad Azam petitioner whereas 74 pamphlets containing hate material, one meter electric wire, ¼ kg iron nails, four cells of batteries, one scotch-tape and an amount of Rs.350/- were allegedly recovered from Muhammad Saad Zulqarnain petitioner. The explosive substance weighing 500 grams was recovered from the possession of Dr. Amir Saeed co-accused whereas explosive substance weighing 514 grams and 1014 grams four electric batteries etc were recovered from Jawad co-accused. Dr. Aamer Saeed co-accused of the petitioners has already been granted post arrest bail by this Court *vide* order dated 13.06.2016, passed in Crl. Misc. No.977-B of 2016 on the following grounds:

> "6. Admittedly the petitioner is an Assistant Professor in the Punjab University, Lahore. He is a highly educated person. He has done his doctorate in the Hospital Management. The petitioner has admittedly been serving in the Punjab University, Lahore since the year-2008. He was appointed as Superintendent/ Caretaker of the Hostel, reserved for male bachelor teachers of the University by the Vice Chancellor of Punjab University *vide* letter dated 27.08.2008. The petitioner has also written and published his thesis on the topic of "Making Sense of Policy Implementation Process in Pakistan: The Case of Hospital Autonomy Reforms". The letter dated 27.08.2008, issued by the Vice Chancellor of Punjab University, Lahore, whereby the petitioner was appointed

as Superintendent/Caretaker of the Hostel, reserved for male bachelor teachers of the University and the publication of the abovementioned thesis have been produced in the Court by learned counsel for the petitioner. It is the case of the petitioner that as the petitioner was Superintendent/Caretaker of the Hostel of the Punjab University, Lahore for male Bachelor teachers and as one Professor Ghalib Atta of the Punjab University, Lahore was illegally apprehended by the officials of Counter Terrorism Department (CTD), Lahore from the abovementioned hostel, therefore, the petitioner being Superintendent of the said hostel launched a protest against the agencies, including the officials of CTD, Lahore, hence he was illegally arrested and confined by the officials of CTD, Lahore, whereupon the father-in-law of the petitioner namely Saeed Iqbal Qureshi, filed Writ Petition No. 1844 of 2016, in the nature of habeas corpus petition before the Lahore High Court, Lahore and during the pendency of the abovementioned writ petition, in order to justify the illegal detention of the petitioner, the petitioner has falsely been implicated in this case. Learned counsel for the petitioner has placed on the record the newspaper daily *"Dawn"* Lahore edition dated 08.12.2015, wherein the news regarding the detention of the abovementioned professor namely Ghalib Atta by the officials of CTD, Lahore has been published. We have noted that the abovementioned Writ Petition No. 1844 of 2016, filed by the father-in-law of the petitioner namely Saeed Iqbal Qureshi regarding the alleged illegal detention of the petitioner by the officials of CTD, Lahore was filed on 20.01.2016 and the learned Division Bench of this Court at the Principal Seat on 21.01.2016, directed the respondents of the said writ petition, including Deputy Inspector General of Counter Terrorism Department (C.T.D.) Punjab, Lahore to submit a reply and para-wise comments to the said petition before the next date of hearing and the case was adjourned for 03.02.2016. On 03.02.2016, parawise comments on behalf of SHO, Police Station CTD, Lahore, CCPO, Lahore and SHO, Police Station Muslim Town, Lahore were submitted before the Court and for submission of parawise comments on behalf of the remaining respondents, the case was adjourned for 17.02.2016. The Court *vide* the abovementioned order

dated 02.03.2016, also directed the respondents to produce the petitioner before the Court, on the next date of hearing, if he was under the custody of the respondents of said petition. On 17.02.2016, learned Deputy Attorney General for Pakistan requested for an adjournment in order to trace out the petitioner namely Dr. Aamer Saeed, therefore, the case was adjourned to 02.03.2016. On the next date of hearing i.e. 02.03.2016, another request for adjournment was made by learned Law Officer in order to trace out the petitioner and the case was again adjourned to 24.03.2016. Eventually, the instant F.I.R. was lodged on 07.04.2016, against the petitioner and his co-accused, therefore, on 26.04.2016, the aforementioned writ petition, filed by the father-in-law of the petitioner was disposed of with the result that a copy of the said petition along with all its annexures was directed to be transmitted to the Deputy Inspector General of Police Punjab, Lahore, who was further directed to treat the same as an application of the petitioner and proceed further in the matter, in accordance with the law. It is evident from the perusal of the abovementioned Writ Petition No. 1844 of 2016, filed by the father-in-law of the petitioner that the claim of the father-in-law of the petitioner was that the petitioner was forcibly abducted and illegal confined by the officials of CTD, Lahore on the intervening night of 14/15.12.2016 and the abovementioned writ petition regarding illegal detention and recovery of the petitioner was filed on 20.01.2016 and the learned Division Bench of this Court also issued a direction for the recovery of the petitioner *vide* order dated 21.01.2016 and later on the instant F.I.R was lodged against the petitioner on 07.04.2016 i.e., after three months and 12 days of the filling of the abovementioned Writ Petition No. 1844 of 2016, by the father-in-law of the petitioner before the Court regarding the alleged illegal detention of the petitioner. We have also noted that in the comments, submitted by some of the respondents of the above-mentioned writ petition, including the SHO, police station CTD, Lahore, the respondents, expressed their ignorance regarding the detention of the petitioner. The SHO, Police Station City CTD, Lahore in his written comments, filed in the above mentioned petition categorically stated that neither the petitioner was arrested

nor he was required by the CTD, Lahore. As mentioned earlier, during the pendency of the above-mentioned writ petition an order for production of the petitioner before the Court was passed and eventually the instant F.I.R was lodged against the petitioner at police station CTD, Multan region. *Prima facie* it appears that as the father-in-law of the petitioner moved a writ petition regarding the illegal detention of the petitioner against the officials of CTD, Lahore and a prayer for registration of F.I.R against the officials of CTD, Lahore for illegal confinement of the petitioner was also made in the said writ petition and as the Court *vide* order dated 03.02.2016 issued a direction for production of the petitioner before the Court, therefore, in order to justify the detention of the petitioner, the instant F.I.R. has *malafidely* been lodged against the petitioner. The contention of learned APG that the petitioner managed to file the abovementioned Writ Petition No. 1844 of 2016, in order to create a defence in this case, does not appeal to the common sense, because it is a common observation that the accused, who are involved in terrorist activities, try their level best to conceal their identity from the public and law enforcing agencies and they secretly execute their plans and try to take their targets by surprise. It is not understandable that if the petitioner was not in the custody of CTD, Lahore, then what benefit has been taken by him due to the filling of the abovementioned writ petition. It is also not understandable that how the petitioner was in the knowledge at the time of filling of abovementioned Writ Petition No. 1844 of 2016 i.e., on 21.01.2016 that after three months and 12 days from the date of filling of abovementioned petition, he (petitioner) will be arrested by the officials of CTD Multan on 07.04.2016 and the present F.I.R. shall be registered against him, therefore, the filling of the abovementioned writ petition shall be used as a defence by the petitioner in the instant case. As mentioned earlier, the petitioner is a highly educated person and he is serving as Assistant Professor in the Punjab University, Lahore, since the year 2008. Learned APG has conceded on instructions that the petitioner never remained involved in any other criminal case. He has further conceded that the name of the petitioner was not even included in the 4th schedule of Anti-Terrorism Act,

1997, with the allegation that he had any link with any banned organization. Keeping in view all the aforementioned facts, we are of the view that the case of the prosecution against the petitioner is one of further inquiry and it will be determined by the learned trial Court after recording of evidence that as to whether or not the case in hand was *malafidely* lodged against the petitioner due to the filling of Writ Petition No. 1844 of 2016, against the officials of CTD, Lahore, in order to justify illegal detention of the petitioner or the case of the prosecution against the petitioner is based on true facts.

7. In the light of above, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000/- (Rupees five hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court."

Now coming to the case of the present petitioners namely Muhammad Saeed Zulqarnain and Muhammad Azam, we have noted that Muhammad Saeed Zulqarnain petitioner through Crl. Misc. No.4571 of 2016/BWP has placed on the record the documents regarding his service in Pakistan Mobile Communications Limited-Mobilink. According to the said documents, the petitioner was holding the post of Customer Care Representative (internal Grade: Associate II) in Floor Department of Commercial of the above mentioned company and remained on the said post till January 04, 2016. Muhammad Azam petitioner through Crl. Misc. No.4575 of 2016/BWP has also placed on the record the documents regarding his service according to which the said petitioner remained the Manager Finance & Taxation, Lub Gas (Pvt) Ltd. and he was serving in the above mentioned company since 27.01.1997. The pay slip of the above mentioned, petitioner has been placed on the record according to which he has been drawing the salary @ Rs. 133535/- per month. He is also an active tax payer and his National Tax Number (NTN) is 1130684-0. He has paid an amount of Rs.96922/- as income tax in the year 2015. It is the case of the petitioners that they alongwith their co-accused Dr. Aamir Saeed have *malafidely* been implicated in this case by the prosecution because their aforementioned co-accused who was an Assistant Professor in the Punjab University, launched a protest against the arrest of his colleague

Professor Ghalib Atta of the Punjab University and as they (petitioners) have also joined the aforementioned co-accused Dr. Aamer Saeed in the protest launched against the agencies, therefore, they were falsely implicated in this case by the Counter Terrorism Department (CTD), Lahore. We have also noted that the mother of Muhammad Saad Zulqarnain petitioner namely *Mst.* Shamshad Begum filed W.P. No.40338/2015 before the Lahore High Court, Lahore regarding the illegal detention of the said petitioner by the agencies. The said petition was filed on 23.12.2015 and a Division Bench of this Court at the principal seat, on the date fixed i.e. 23.12.2015 directed the respondent of the said W.P. including the Incharge CTD, Punjab, Lahore to produce the alleged detenue Muhammad Saad Zulqarnain (petitioner) before the Court on 28.12.2015, thereafter, number of opportunities were granted by the Court on 25.01.2016, 11.02.2016, 01.03.2016 and 29.03.2016 regarding the recovery of the petitioner in the said case and ultimately as per request of learned counsel for the petitioner, the aforementioned petition alongwith all its annexures was directed to be transmitted to Respondent No. 2 of the said case (CCPO, Lahore),with the direction to treat the same as an application of the petitioner and proceed in accordance with the law. It is evident from the perusal of the record that the aforementioned W.P. No.40338/2015 was filed by the mother of Muhammad Saad Zulqarnain petitioner with the claim that the said petitioner was arrested by the agencies on the intervening night of 07/8.12.2015 at about 2:00 a.m. As the above mentioned writ petition regarding illegal detention and recovery of the above petitioner was filed on 23.12.2015 and the learned Division Bench also issued a direction for recovery of the said petitioner but later on the instant F.I.R. was lodged against the aforementioned petitioner on 07.04.2016, after about four months from the filing of aforementioned writ petition by the mother of the petitioner against the illegal detention of the said petitioner. Muhammad Asif, brother of Muhammad Azam petitioner also filed Habeas Petition No.433 of 2016 in the Court of Sessions Judge, Lahore on 17.03.2016, wherein learned Additional Sessions Judge Lahore directed Respondents No.1 to 3 of the said petition to produce the alleged detenue Muhammad Azam (petitioner) on 19.03.2016. The S.H.O. Police Station Counter Terrorism Department, Lahore submitted report that Muhammad Azam was neither arrested nor detained by the CTD, Lahore. The S.H.O. Police Station Baghbanpura,

Lahore also submitted report on the same lines. Prima facie it appears that as the mother of Muhammad Saad Zulqarnain petitioner and brother of Muhammad Azam petitioner moved the aforementioned writ petitions regarding illegal detention of the said petitioners against the officials of CTD, Lahore and a prayer for registration of F.I.R. against the officials of C.T.D. Lahore for illegal confinement was also made in the petition filed by the aforementioned co-accused of the petitioners namely Dr. Aamer Saeed, therefore, in order to justify the arrest of the petitioners and their abovementioned co-accused, the instant F.I.R. has *malafidely* been lodged by the C.T.D. Multan on the behest of C.T.D. Lahore. As the principal accused has already been granted bail by this Court which order is still in the field, therefore, petitioners are also entitled to the relief of bail under the rule of consistency.

6. In the light of above, both the petitions are allowed and petitioners Muhammad Azam and Muhammad Saad Zulqarnain are admitted to post arrest bail subject to their furnishing bail bonds in the sum of Rs.500,000/- (Rupees five hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court.

7. It is however clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned trial Court.

(A.A.K.) **Bail granted.**

PLJ 2017 Cr.C. (Lahore) 849 (DB)

[Multan Bench Multan]

***Present*: MALIK SHAHZAD AHMAD KHAN AND KHALID MAHMOOD MALIK, JJ.**

JAWAD-UR-REHMAN--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 2379-B of 2016, decided on 10.11.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Explosive Substances Act, (VI of 1908), S. 4--Anti-Terrorism Act, (XXVII of 1997), Ss. 7 & 11-W(2)--Bail, grant of--Rule of consistency--Allegation of--Explosive substance was recovered-- Petitioner was a student of M.A. Mass Communication Program in Beaconhouse National University, Lahore--Although, a certificate regarding his rustication from aforementioned program has been issued by university and original certificate in this respect is available on record but aforementioned certificate has established that petitioner was a student in above mentioned program in Beaconhouse National University, Lahore--The instant F.I.R, was lodged whereas mother of petitioner field writ petition in Lahore High Court, Lahore regarding illegal detention of petitioner--The said Habeas petition was filed and Division Bench of High Court, issued a direction to Respondent No. 3/Incharge Counter Terrorism Department, Lahore to produce alleged detenues mentioned in headnote of petition--On next date of hearing, alleged detenue (petitioner) was not produced before Court despite repeated directions--As co-accused of petitioner has already been granted bail by High Court which order is still in field, therefore, petitioner is also entitled to relief of bail on rule of consistency.

[Pp. 856 & 857] A & B

Mr. Zafar Iqbal Awan, Advocate for Petitioner.

Ch. Asghar Ali Gill, Dy.P.G. for State.

Date of hearing: 10.11.2016.

ORDER

Through the instant petition, Jawad-ur-Rehman petitioner seeks post arrest bail in case F.I.R. No. 33/2016 dated 07.04.2016, offences under Section 4 of the Explosive Substances Act, 1908, read with Sections 7 & 11-w(2) of the Anti

Terrorism Act, 1997, registered at Police Station Counter Terrorism Department, Multan.

2. As per brief allegations levelled in the F.I.R, on 07.01.2016, the complainant Muhummad Tariq Javed, S.I, Counter Terrorism Department (CTD), Bahawalpur received a spy information that four persons being members of a band organization "Daish", were present near the Khanwa Canal and they were proceeding towards Khanqaa Shareef, situated within the limits of District Bahawalpur. On this information, a raiding party was constituted and thereafter, the petitioner along with his co-accused was apprehended by the police and explosive substance weighing 514 grams and 1014 grams, four electric resistors, one knife and one scotch-tape etc were recovered from the possession of the petitioner whereas explosive substance weighing 500 grams, eight electronic resisters and one meter prima cord 74 pamphlets containing hate material, one meter of electric wire, ¼ kg iron nails, four cells of batteries, one scotch-tape etc were recovered from the co-accused of the petitioner.

3. Arguments heard. Record perused.

4. As per brief allegations levelled in the F.I.R., explosive substance weighing 514 grams and 1014 grams along with lour electric resisters, one knife and one scotch-tape etc were allegedly recovered from the possession of the petitioner whereas eight electric resisters, one meter prima cord were allegedly recovered from Muhammad Azam co-accused while 74 pamphlets containing hate material, one meter electric wire, ¼ kg iron nails, four cells of batteries, one scotch-tape and an amount of Rs. 350/- were allegedly recovered from Muhammad Saad Zulqarnain co-accused. The explosive substance weighing 500 grams was recovered from the possession of Dr. Amir Saeed co-accused. Dr. Amir Saeed co-accused of the petitioner has already been granted post arrest bail by this Court *vide* order dated 13 06.2016 passed in Crl. Misc. No. 977-B of 2016 on the following grounds:

> "6. Admittedly the petitioner is an Assistant Professor in the Punjab University, Lahore. He is a highly educated person. He has done his doctorate in the Hospital Management. The petitioner has admittedly been serving in the Punjab University, Lahore since the year-2008. He was appointed as Superintendent/Caretaker of the Hostel, reserved for male bachelor teachers of the University by the Vice-Chancellor of Punjab University *vide* letter dated 27.08.2008. The petitioner has also written and published his thesis on the topic of "Making Sense of Policy Implementation Process in Pakistan: The Case of Hospital Autonomy Reforms". The letter dated 27.08.2008, issued by the Vice-

Chancellor of Punjab University, Lahore, whereby the petitioner was appointed as Superintendent/Caretaker of the Hostel, reserved for male bachelor teachers of the University and the publication of the abovementioned thesis have been produced in the Court by learned counsel for the petitioner. It is the case of the petitioner that as the petitioner was Superintendent/ Caretaker of the Hostel of the Punjab University, Lahore for male Bachelor teachers and as one Professor Ghalib Atta of the Punjab University, Lahore was illegally apprehended by the officials of Counter Terrorism Department (CTD), Lahore from the abovementioned hostel, therefore, the petitioner being Superintendent of the said hostel launched a protest against the agencies, including the officials of CTD, Lahore, hence he was illegally arrested and confined by the officials of CTD, Lahore, whereupon the father-in-law of the petitioner namely Saeed Iqbal Qureshi, filed Writ Petition No. 1844 of 2016, in the nature of habeas corpus petition before the Lahore High Court, Lahore and during the pendency of the abovementioned writ petition, in order to justify the illegal detention of the petitioner, the petitioner has falsely been implicated in this case. Learned counsel for the petitioner has placed on the record the newspaper daily "Dawn" Lahore edition dated 08.12.2015, wherein the news regarding the detention of the above-mentioned professor namely Ghalib Atta by the officials of CTD, Lahore has been published. We have noted that the abovementioned Writ Petition No. 1844 of 2016, filed by the father-in-law of the petitioner namely Saeed Iqbal Qureshi regarding the alleged illegal detention of the petitioner by the officials of CTD, Lahore was filed on 20.01.2016 and the learned Division Bench of this Court at the Principal Seat on 21.01.2016, directed the respondents of the said writ petition, including Deputy Inspector General of Counter Terrorism Department (C.T.D.) Punjab, Lahore to submit a reply and para-wise comments to the said petition before the next date of hearing and the case was adjourned for 03.02.2016. On 03.02.2016, para wise comments on behalf of SHO, Police Station CTD, Lahore, CCPO, Lahore and SHO, Police Station Muslim Town, Lahore were submitted before the Court and for submission of parawise comments on behalf of the remaining respondents, the case was adjourned for 17.02.2016. The Court *vide* the abovementioned order dated 02.03.2016, also directed the respondents to produce the petitioner before the Court, on the next date of hearing, if he was under the custody of the respondents of said petition. On 17.02.2016, learned Deputy Attorney General for Pakistan requested for an adjournment in order to trace out the petitioner namely Dr. Aamer Saeed, therefore, the case was adjourned to 02.03.2016. On

the next date of hearing *i.e.* 02.03.2016, another request for adjournment was made by learned Law Officer in order to trace out the petitioner and the case was again adjourned to 24.03.2016. Eventually, the instant FIR was lodged on 07.04.2016, against the petitioner and his co-accused, therefore, on 26.04.2016, the aforementioned writ petition, filed by the father-in-law of the petitioner was disposed of with the result that a copy of the said petition along with all its annexures was directed to be transmitted to the Deputy Inspector General of Police Punjab, Lahore, who was further directed to treat the same as an application of the petitioner and proceed further in the matter, in accordance with the law. It is evident from the perusal of the abovementioned Writ Petition No. 1844 of 2016, filed by the father-in-law of the petitioner that the claim of the father-in-law of the petitioner was that the petitioner was forcibly abducted and illegal confined by the officials of CTD, Lahore on the intervening night of 14/15.12.2016 and the abovementioned writ petition regarding illegal detention and recovery of the petitioner was filed on 20.01.2016 and the learned Division Bench of this Court also issued a direction for the recovery of the petitioner *vide* order dated 21.01.2016 and later on the instant F.I.R was lodged against the petitioner on 07.04.2016 *i.e.*, after three months and 12 days of the filling of the abovementioned Writ Petition No. 1844 of 2016, by the father-in-law of the petitioner before the Court regarding the alleged illegal detention of the petitioner. We have also noted that in the comments, submitted by some of the respondents of the above-mentioned writ petition, including the SHO, Police Station CTD, Lahore, the respondents, expressed their ignorance regarding the detention of the petitioner. The SHO, Police Station City CTD, Lahore in his written comments, filed in the above mentioned petition categorically stated that neither the petitioner was arrested nor he was required by the CTD, Lahore. As mentioned earlier, during the pendency of the above-mentioned writ petition an order for production of the petitioner before the Court was passed and eventually the instant F.I.R was lodged against the petitioner at Police Station CTD, Multan region. *Prima facie* it appears that as the father-in-law of the petitioner moved a writ petition regarding the illegal detention of the petitioner against the officials of CTD, Lahore and a prayer for registration of F.I.R against the officials of CTD, Lahore for illegal confinement of the petitioner was also made in the said writ petition and as the Court *vide* order dated 03.02.2016 issued a direction for production of the petitioner before the Court, therefore, in order to justify the detention of the petitioner, the instant F.I.R. has *mala fidely* been lodged against the petitioner.

The contention of learned APG that the petitioner managed to file the abovementioned Writ Petition No. 1844 of 2016, in order to create a defence in this case, does not appeal to the common sense, because it is a common observation that the accused, who are involved in terrorist activities, try their level best to conceal their identity from the public and law enforcing agencies and they secretly execute their plans and try to take their targets by surprise. It is not understandable that if the petitioner was not in the custody of CTD, Lahore, then what benefit has been taken by him due to the filling of the abovementioned writ petition. It is also not understandable that how the petitioner was in the knowledge at the time of filling of abovementioned Writ Petition No. 1844 of 2016 *i.e.*, on 21.01.2016 that after three months and 12 days from the date of filling of abovementioned petition, he (petitioner) will be arrested by the officials of CTD Multan on 07.04.2016 and the present F.I.R. shall be registered against him, therefore, the filling of the abovementioned writ petition shall be used as a defence by the petitioner in the instant case. As mentioned earlier, the petitioner is a highly educated person and he is serving as Assistant Professor in the Punjab University, Lahore, since the year 2008. Learned APG has conceded on instructions that the petitioner never remained involved in any other criminal case. He has further conceded that the name of the petitioner was not even included in the 4th schedule of Anti-Terrorism Act, 1997, with the allegation that he had any link with any banned organization. Keeping in view all the aforementioned facts, we are of the view that the case of the prosecution against the petitioner is one of further inquiry and it will be determined by the learned trial Court after recording of evidence that as to whether or not the case in hand was *mala fidely* lodged against the petitioner due to the filling of Writ Petition No. 1844 of 2016, against the officials of CTD, Lahore, in order to justify illegal detention of the petitioner or the case of the prosecution against the petitioner is based on true facts.

7. In the light of above, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000/- (Rupees Five hundred Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court."

The co-accused of the petitioner namely Muhammad Saad Zulqarnain and Muhammad Azam have also been granted post arrest bail by this Court *vide* order dated 18.10.2016, passed in Crl.Misc. No. 1191-B of 2016 and Crl. Misc. No. 1204-B of 2016 on the following grounds:

"Now coming to the case of the present petitioners namely Muhammad Saad Zulqarnain and Muhammad Azam, we have noted that Muhammad Saad Zulqarnain petitioner through Crl. Misc. No. 4571 of 2016/BWP has placed on the record the documents regarding his service in Pakistan Mobile Communications Limited Mobilink. According to the said documents, the petitioner was holding the post of Customer Care Representative (internal Grade: Associate II) in Floor Department of Commercial of the above mentioned company and remained on the said post till January 04, 2016. Muhammad Azam petitioner through Crl. Misc. No. 4575 of 2016/BWP has also placed on the record the documents regarding his service according to which the said petitioner remained the Manager Finance & Taxation, Lub Gas (Pvt) Ltd. and he was serving in the above mentioned company since 27.01.1997. The pay slip of the above mentioned petitioner has been placed on the record according to which he has been drawing the salary @ Rs. 133535/- per month. He is also an active tax payer and his National Tax Number (NTN) is 1130684-0. He has paid an amount of Rs. 96922/- as income tax in the year 2015. It is the case of the petitioners that they along with their co-accused Dr. Aamir Saeed have *mala fidely* been implicated in this case by the prosecution because their aforementioned co-accused who was an Assistant Professor in the Punjab University launched a protest against the arrest of his colleague Professor Ghalib Atta of the Punjab University and as they (petitioners) have also joined the aforementioned co-accused Dr. Aamcr Saeed in the protest launched against the agencies, therefore, they were falsely implicated in this case by the Counter Terrorism Department (CTD), Lahore. We have also noted that the mother of Muhammad Saad Zulqarnain petitioner namely *Mst.* Shamshad Begum filed W.P. No. 40338/2015 before the Lahore High Court, Lahore regarding the illegal detention of the said petitioner by the agencies. The said petition was filed on 23.12.2015 and a Division Bench of this Court at the principal seat, on the date fixed *i.e.* 23.12.2015 directed the respondent of the said W.P. including the Incharge CTD, Punjab, Lahore to produce the alleged detenue Muhammad Saad Zulqarnain (petitioner) before the Court on 28.12.2015, thereafter, number of opportunities were granted by the Court on 25.01.2016, 11.02.2015, 01.03.2016 and 29.03.2016 regarding the recovery of the petitioner in the said case and ultimately as per request of learned counsel for the petitioner, the aforementioned petition along with all its annexures was directed to be transmitted to Respondent No. 2 of the said case (CCPO, Lahore) with the direction to treat the same as an application of the petitioner and

proceed in accordance with the law. It is evident from the perusal of the record that the aforementioned W.P. No. 40338/2015 was filed by the mother of Muhammad Saad Zulqarnain petitioner with the claim that the said petitioner was arrested by the agencies on the intervening night of 07/8.12.2015 at about 2:00 a.m. As the above mentioned writ petition regarding illegal detention and recovery of the above petitioner was filed on 23.12.2015 and the learned Division Bench also issued a direction for recovery of the said petitioner but later on the instant F.I.R. was lodged against the aforementioned petitioner on 07.04.2016, after about four months from the filing of aforementioned writ petition by the mother of the petitioner against the illegal detention of the said petitioner. Muhammad Asif, brother of Muhammad Azam petitioner also filed Habeas Petition No. 433 of 2016 in the Court of Sessions Judge, Lahore on 17.03.2016, wherein learned Additional Sessions Judge Lahore directed Respondents No. 1 to 3 of the said petition to produce the alleged detenue Muhammad Azam (petitioner) on 19.03.2016. The S.H.O. Police Station Counter Terrorism Department, Lahore submitted report that Muhammad Azam was neither arrested nor detained by the CTD, Lahore. The S.H.O. Police Station Baghbanpura, Lahore also submitted report on the same lines. *Prima facie* it appears that as the mother of Muhammad Saad Zulqarnain petitioner and brother of Muhammad Azam petitioner moved the aforementioned writ petitions regarding illegal detention of the said petitioners against the officials of CTD, Lahore and a prayer for registration of F.I.R. against the officials of C.T.D. Lahore for illegal confinement was also made in the petition filed by the aforementioned co-accused of the petitioners namely Dr. Aamer Saeed, therefore, in order to justify the arrest of the petitioners and their abovementioned co-accused, the instant F.I.R. has *mala fidely* been lodged by the C.T.D. Multan on the behest of C.T.D. Lahore. As the principal accused has already been granted bail by this Court which order is still in the field, therefore, petitioners are also entitled to the relief of bail under the rule of consistency.

6. In the light of above, both the petitions are allowed and petitioners Muhammad Azam and Muhammad Saad Zulqarnain are admitted to post arrest bail subject to their furnishing bail bonds in the sum of Rs. 500,000/- (Rupees five hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court."

Now coming to the case of the present petitioner namely Jawad-ur-Rehman, we have noted that petitioner was a student of M.A. Mass Communication Program in the Beaconhouse National University, Lahore. Although, a certificate regarding his rustication from the aforementioned program has been issued by the university and the original certificate in this respect is available on the record but the aforementioned certificate has established that the petitioner was a student in the above mentioned program in the Beaconhouse National University, Lahore. The instant F.I.R, was lodged on 07.04.2016 whereas the mother of the petitioner namely *Mst.* Shamshad Begum field Writ Petition No. 40338/2015 titled "*Mst. Shamshad Begum versus S.H.O., etc"* in the Lahore High Court, Lahore regarding the illegal detention of the petitioner. The said Habeas petition was filed on 23.12.2015 and the learned Division Bench of this Court *vide* order dated 23.12.2015, issued a direction to Respondent No. 3/Incharge Counter Terrorism Department, Lahore to produce the alleged detenues mentioned in the headnote of the petition. On the next date of hearing *i.e.* 28.12.2015, the alleged detenue (petitioner) was not produced before the Court despite repeated directions and *vide* order dated 29.03.2016, writ petition was disposed of in the following manner:

> "As per request of the learned counsel for the parties this petition along with all its annexures is transmitted to Respondent No. 2/CCPO, Lahore who shall treat it as an application of the petitioner and shall proceed in accordance with law. Disposed of."

As the co-accused of the petitioner has already been granted bail by this Court which order is still in the field, therefore, petitioner is also entitled to the relief of bail on the rule of consistency.

5. In the light of above, this petition is allowed and petitioner Jawad-ur-Rehman is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 500,000/- (Rupees five hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court."

6. It is however clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned trial Court.

(A.A.K.) **Bail granted.**

PLJ 2017 Cr.C. (Lahore) 157 (DB)

***Present*: SAYYED MAZAHAR ALI AKBAR NAQVI AND MALIK SHAHZAD AHMAD KHAN, JJ.**

SAMBA BANK LTD., LAHORE through Authorized Signatory--Petitioner

versus

ABU SAEED AHSAN ISLAHI and another--Respondents

Crl. Rev. No. 822 of 2011, decided on 27.1.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----Ss. 249-A, 435 & 439--Application u/S. 249-A, Cr.P.C. for acquittal was accepted--Challenge to--Financial facility--Special judge—Cheque was dishonoured with remarks refer to drower--Case was remained pending for period of more than 15 years--No probability of conviction--Evidence was not produced--No documentary evidence--Validity--Despite lapse of more than 16 years, not a single witness was produced by prosecution--Similarly second application under Section 249-A, Cr.P.C. after dismissal of first application was not barred because prosecution after dismissal of first application under Section 249-A, Cr.P.C., did not produce a single witness for a period of more than another six in circumstances, trial Court was left with no option but to acquit--Revision was dismissed. [P. 162] A

2005 SCMR 1544, *ref.*

Mr. Muhammad Asif Ismail, Advocate for Petitioner.

Mr. Muhammad Akhtar Javed, Advocate for Respondent No. 1.

Date of hearing: 27.1.2016.

ORDER

The instant criminal revision has been filed against the impugned order dated 14.12.2010, passed by the Special Judge (Offences in Banks), Lahore, whereby the application under section 249-A, Cr.P.C., moved by Abu Saeed Ahsan Islahi (Respondent No. 1) was accepted and the aforementioned respondent was acquitted from the charge.

2. As per brief facts of the present case, an FIR was lodged against Abu Saeed Ahsan Islahi and others with the allegations that one Ahmad Daud Al-Hussaini (co-accused since P.O), approached the Fidelity Investment Bank Limited, Lahore through an introduction of Respondent No. 1, who was Senior Executive Vice President and Provincial Chief of National Bank of Pakistan, Lahore. On the basis of said, introduction, the aforementioned Ahmad Daud Al-Hussaini (co-accused since P.O) applied for a financial facility of the sum of Rs. 3,800,000/- and 40,000/- shares of ICI Pakistan Limited with transfer deeds were directly delivered to the Fidelity Investment Bank as collateral for the said finance facility through Tasawar Hussain, who was officer of National Bank of Pakistan, Lahore. The said facility was renewed in March, 1994 and once again in June, 1994. On 12.07.1994, Ahmad Daud Al-Hussaini (co-accused since P.O) again approached the Fidelity Investment Bank Limited for further finance facility in the sum of Rs. 15,000,000/- and his request was duly supported by an unconditional undertaking of Bank of Punjab, Lahore along with direct delivery of 76,000/- shares of ICI Pakistan Limited together with duly verified transfer deeds. Further 67,000/- shares of ICI Pakistan Limited with duly verified transfer deeds were also submitted and delivered to the Fidelity Investment Bank Limited by Rashid Shabbir Khawaja, who was officer of the Bank of Punjab, Lahore. The said disbursement was made in two installments and these two facilities were consolidated on 28.9.1994 and were renewed on 28.12.1994 and 28.03.1995. Total finance amounting to Rs. 18.800/- millions was allowed to Ahmad Daud Al-Hussaini (co-accused since P.O) against the security of aforesaid shares. In March, 1995, ICI Pakistan Limited announced a right issue of 220 %. Ahmed Daud Al-Hussaini was called upon to adjust the facility and in the alternative it was informed to lodge the share certificates with ICI Pakistan Limited for obtaining transfer of the said shares. He undertook to adjust the facility and for such purpose Ahmed Daud Al-Hussain (co-accused since P.O) issued a cheque dated 15.06.1995, amounting to Rs. 20,000 millions drawn on the Bank of Punjab but the said cheque was dishonoured with the remarks “Refer to drawer” and that the signatures had not matched. On 28.06.1995, the Fidelity Investment Bank received a letter dated 27.061995 from the ICI Pakistan Limited that the share certificates and transfer deeds for effecting transfer of shares are forged, fake and not genuine. It was further alleged that Ahmad Daud Al-Hussaini in connivance with the concerned bank officials and functionaries knowingly provided forged share certificates and transfer deeds as collateral security to Fidelity Investment Bank Limited and wrongfully

managed to obtain total finance facility of Rs. 18.800 millions for their personal gains and caused wrongful and huge monetary loss to public exchequer.

3. During the proceedings of the aforementioned case, before the learned, trial Court, an application under section 249-A, Cr.P.C. was moved by Respondent No. 1 for his acquittal from the said case, which was accepted by the learned trial Court, *vide* the abovementioned impugned order, hence the present criminal revision before this Court.

4. It is contended by learned, counsel for the petitioner that Respondent No. 1 along with his co-accused was named in the FIR with specific role of fraud, forgery and cheating, therefore, the impugned order of acquittal of the abovementioned respondent is not sustainable in the eyes of law; that the prosecution witnesses in their statements under Section 161, Cr.P.C. have specifically implicated the abovementioned respondent in the instant case; that earlier a similar application under Section 249-A, Cr.P.C., moved by Respondent No. 1 was dismissed by the learned trial Court *vide* order dated 21.04.2004, therefore, a subsequent application under Section 249-A, Cr.P.C., moved by the abovementioned respondent was not maintainable; that it was evident from the contents of the FIR that Respondent No. 1 along with other co-accused in connivance with each other has committed the offence while holding a responsible post and caused huge monetary loss to the complainant bank; that sufficient opportunity was not given to the prosecution to prove its case against Respondent No. 1; that the abovementioned respondent has miserably failed to point out any *mala fide* on the part of the prosecution for his false involvement in the instant case; that Respondent No. 1 was declared guilty during the course of investigation of this case; that the impugned order was passed against the facts and record of the present case, therefore, the same may be set aside. In support of his contentions, learned counsel for the petitioner has placed reliance on the judgment reported as *'The State through Advocate General, Sindh High Court of Karachi Vs. Raja Abdul Rehman"* (2005 SCMR 1544).

5. On the other hand, this petition has been opposed by learned counsel for Respondent No. 1, on the grounds that FIR in the instant case was lodged on 26.07.1995 and the case remained pending before the learned trial Court for a period of more than 15 years and thereafter *vide* the impugned order dated 14.12.2010, the petitioner was acquitted u/S. 249-A of Cr.P.C.; that there is nothing available on the record that the petitioner played any role in the transaction of loan given to

Ahmad Daud Al-Hussaini (co-accused since P.O); that the allegation against the petitioner is that he verbally introduced the aforementioned Ahmed Daud Al-Hussaini to the officials of Fidelity Investment Bank Limited, Lahore and on the direction of Respondent No. 1, the prosecution witnesses extended facility of loan to the abovementioned co-accused but if Respondent No. 1 had issued any such direction and the officials of Fidelity Investment Bank Limited, Lahore acted upon such direction, then the prosecution witnesses should have been made an accused in this case but instead of that they have been made prosecution witnesses; that in fact Respondent No. 1 did not introduce the abovementioned co-accused to the officials of Fidelity Investment Bank Limited, Lahore and he has been made a scapegoat in this case in order to save the real culprits, that the earlier application under Section 249-A, Cr.P.C., filed by Respondent No. 1 was dismissed *vide* order dated 21.4.2004 and thereafter the prosecution did not produce any evidence against the petitioner and the case remained pending before the learned trial Court for another period of six years and then the impugned order dated 04.12.2010, was passed by the learned trial Court; that as there was no probability of conviction of Respondent No. 2, therefore, the impugned order was rightly passed; that there is no substance in the present revision petition, therefore, the same may be dismissed.

6. Arguments heard. Record perused.

7. We have noted that FIR was lodged in this case on 26.07.1995 and the case remained pending before the learned trial Court for a period of more than 15 years but during this period, the prosecution did not produce any evidence, before the learned trial Court. The earlier application under Section 249-A, Cr.P.C., filed by Respondent No. 1 was dismissed *vide* order dated 21.4.2004 and after that the case remained pending before the learned trial Court for another period of more than six years but admittedly not a single witness was produced by the prosecution before the learned trial Court and ultimately the application under Section 249-A, Cr.P.C., filed by the abovementioned respondent was accepted *vide* the impugned order dated 04.12.2010. Admittedly Respondent No. 1 was Senior Executive Vice President/Provincial Chief of National Bank of Pakistan, Lahore, at the relevant time and he was not an officer of the complainant bank i.e. Fidelity Investment Bank Limited, Lahore. It is also an admitted fact that there is no allegation that Respondent No. 1 prepared or processed any document for obtaining loan by the co-accused namely Ahmed Daud Al-Hussaini (since P.O). As per prosecution's case, Shafiq Ahmed Khan, President/Chief 'Executive Fidelity Investment Bank

Limited, Lahore stated that he was verbally asked by Respondent No. 1 to disburse the loan to the principal accused Ahmad Daud Al-Hussaini (since P.O) but the aforementioned Shafiq Ahmed Khan, who was actually responsible for disbursement of the loan to the principal accused has not been made an accused in this case rather he has been made a prosecution witness. There is absolutely no documentary evidence, from which it could be established that Respondent No. 1 played any role in disbursement of the loan amount to the principal accused. Finance facility was extended by the complainant bank to Ahamd Daud Al-Hussaini (co-accused since P.O), on the application of the said co-accused and submission of collateral sureties like ICI Pakistan Limited shares and certificates etc. Respondent No. 1 was not even an officer of ICI Pakistan Limited.

It is also evident from the perusal of the record that finance facility to the principal accused was disbursed in two installments of Rs. 7,000 million and 6,800 million each by the complainant bank on 18.07.1994, which were consolidated on 28.09.1994 and the same were renewed on 28.12.1994 by the complainant bank, without any role of Respondent No. 1. It is also evident from the contents of the FIR that on 12.07.1994 the principal accused namely Ahmad Daud Al-Hussaini again approached the complainant bank for further finance facility of 15 million and his request was duly supported by an unconditional undertaking of the Bank of Punjab, Lahore along with direct delivery of 76,000/- shares of ICI Pakistan Limited together with duly verified transfer deeds. Abu Saeed Ahsan Islahi (Respondent No. 1) was an officer of National Bank of Pakistan and he had nothing to do with the unconditional undertaking of the Bank of Punjab, Lahore. The cheque of an amount of Rs. 20,000/- millions drawn on the bank of Punjab, which was later on dishonoured, was issued by Ahmed Daud Al-Hussaini (co-accused since P.O) and admittedly Respondent No. 1 was neither present at the time of issuance of the aforementioned cheque nor he was a party to the said cheque. It is also note worthy that there is nothing on the record that any money was transferred in the account of Respondent No. 1 or he is a beneficiary in this case.

8. Keeping in view all the aforementioned facts and as the FIR was lodged on 26.07.1995 and the case remained pending before the learned, trial Court for a period of more than 16 years but no evidence was produced by the prosecution before the learned trial Court therefore, the application moved by Respondent No. 1 under Section 249-A, Cr.P.C. was rightly accepted by the learned trial Court and the said respondent was rightly acquitted *vide* the impugned order dated 14.12.2010.

9. The facts of the judgment cited by learned counsel for the petitioner are distinguishable from the facts of the present case as in the case of *"Raja Abdul Rehman"* supra (2005 SCMR 1544), it was held by the August Supreme Court of Pakistan that the Magistrate should have not decided the application of the accused under Section 249-A, Cr.P.C. at such stage, when the case has reached at its final stage, whereas in the present case, despite the lapse of more than 16 years, not a single witness was produced by the prosecution, in this case by the prosecution. Similarly second application under Section 249-A, Cr.P.C. after dismissal of first application on 21.04.2004 was not barred because the prosecution after dismissal of first application under section 249-A, Cr.P.C., *vide* order dated 21.04.2004, did not produce a single witness for a period of more than another six year and in the circumstances, the learned trial Court was left with no option but to acquit Respondent No. 1, *vide* the impugned order dated 04.12.2010.

10. In the light of above discussion, there is no substance in the present criminal revision, hence the same is hereby dismissed.

(R.A.) **Revision dismissed.**

PLJ 2017 Cr.C. (Lahore) 258 (DB)

***Present*: MAZHAR IQBAL SIDHU AND MALIK SHAHZAD AHMAD KHAN, JJ.**

BILAL @ BALI--Petitioner

versus

STATE, etc.--Respondents

Crl.M.No. 2338-B of 2016, decided on 9.3.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 337-F(v)--Bail, grant of--Allegation of Charge of possessing *Charas*--Abberrant behavior of complainant--Police officials working in field usually do not speak truth in whole of matter before Court which is very unfortunate and incommodious but Almighty Allah view and hears each and every person and deeds accountable before Him at end of day, it is relevant and may not be incongruous to describe here that--Courts are bound to function under codified laws of land without any fear of contradiction, it is described that criminal justice system has been packed by incorrigibility's of police officials especially working in field--Extraneous interferences and personal motivations in functions of police have taken such a deep place which has to be required to be eradicated and controlled--Furthermore, rapacity of greed to wealth has broken all limits rather sometimes is thought, are we Muslims living in a country obtained on basis of ideology of Islam--In running epoch duties of Courts have become so difficult to search truth--In some times, truth and falsity have been noticed so entwined, its separation remains impossible--A criminal remains foot ahead of law but standard of investigation is so poor, on account of it prosecution does not succeed in getting culprits punished--Passage of law is very exquisite to seek justice but same does not guarantee administration criminal administration of justice, therefore, need of day is to reform it segmentationly--Bail was granted.

[Pp. 259 & 260] A & B

Mr. Abdul Latif Hanjra, Advocate for Petitioner.

Mr. Muhammad Akram Tahir, DDPP for Respondents.

Date of hearing: 9.3.2016.

ORDER

Bilal @ Bali was sent to prison over the charge of possessing 1750-grams *Charas* and now has prayed for grant of bail.

2. Learned counsel for the petitioner submits that the whole occurrence is tailored one; the petitioner was innocently captured to relentless tortured, then knowing his condition serious has been involved in the false case to cover up the element of repression, in this regard learned counsel has turned to Medico Legal Report carried on 08.09.2015 at 12:10 p.m by the Medical Officer who observed as many as sixteen injuries, out of it, Injuries No. 1, 2, 3, 13 & 16 were kept under observation for X-Ray report; Further submits that the report of Radiologist reveals that Injuries No. 1 & 15 carry fracture of bones and have been declared 337-F(v), PPC. It has further been submitted that male members of the family of the petitioner have also been falsely involved in different cases of identical nature to deter them to prosecute against the police, therefore, in these circumstances, a case for the grant of bail is made out and hence, has requested for the acceptance of instant application.

3. Learned DDPP has opposed the submissions that the petitioner was apprehended at the spot alongwith huge has also been elaborated in the FIR, therefore, he does not deserve the relief sought for.

4. Heard. Record perused.

5. Assuredly, the petitioner was apprehended at the spot along with contraband *charas* but his sustaining of number of injuries as alleged is repellant to the senses. The doctor has given the duration of injuries within eight to twenty hours whereas the incident took place on 08.09.2015 at about 09:00 a.m, in this way, the time reckoning, *prima facie*, proves that he was held in police custody and might have been manhandled, then the contraband might have been planted upon him to deterge its blameworthy aggression done fiendishly and fiercely. The petitioner was medically examined on 08.09.2015 and 16 injuries were found on his body, of its, Injuries No. 1 & 15 have carried fractures of bones. Such number of injuries could not have been received by the petitioner by impinging on rickshaw. *Prima facie*, this version of the prosecution appears to be preposterous, this backdrop reflects upon the whole prosecution's case veracity.

6. **It is a talk of the town that our police treat the persons fiendishly though law does not permit it but some sort of conceit is assimilated in them by wearing the uniform and do not bother that they are accountable before the Almighty Allah.** ***It is noticed that the police officials working in the field usually do not speak truth in whole of the matter before the Courts which is very unfortunate and incommodious but the Almighty Allah view and hears each and every person and deeds accountable before Him at the end of day, it is relevant and may not be incongruous to describe here that,***

In the Holy Qura-en in Surah Jathiyah Allah Almighty has revealed verse No. 29 as

"هذا كتبنا ينطق عليكم بالحق انا كنا نستنسخ ما كنتم تعملون"

یہ ہماری کتاب (جس میں اعمال لکھیں ہیں) تمہارے مقابلہ میں ٹھیک ٹھیک بول رہی ہے۔ جو کچھ بھی تم کرتے تھے ہم لکھواتے جاتے تھے۔

"This Our record speaks of you in all truth: for, verily, We have caused to be recorded all that you ever did!"

The Courts are bound to function under the codified laws of land without any fear of contradiction, it is described that the criminal justice system has been packed by the incorrigibility's of police officials especially working in the field. It has also been noticed that extraneous interferences and personal motivations in the functions of the police have taken such a deep place which has to be required to be eradicated and controlled. Furthermore, rapacity of greed to wealth has broken all limits rather sometimes is thought, are we Muslims living in a country obtained on the basis of ideology of Islam. In the running epoch the duties of the Courts have become so difficult to search the truth. In some times, the truth and falsity have been noticed so entwined, its separation remains impossible. It is also true that a criminal remains foot ahead of the law but the standard of investigation is so poor, on account of it the prosecution does not succeed in getting the culprits punished. It is said that passage of law is very exquisite to seek justice but the same does not guarantee administration criminal administration of justice, therefore, need of the day is to reform it segmentationly. This paragraph has been mentioned having noticed the aberrant behavior of complainant (Jamshed Iqbal, T.ASI).

7. Circumstances deliberated above warranting to persuade the Court to allow this petition, therefore, instant application is accepted and the petitioner is granted bail provided his submission of bail bond in the sum of Rs.2,00,000/- (rupees two lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail allowed.**

2017 CrLJ 212

Before Malik Shahzad Ahmad Khan, J. (Bahawalpur)

W.P. No. 916-2015/BWP dismissed on 21.4.2015.

NASREEN BIBI---Petitioner

versus

STATION HOUSE OFFICER, ETC.---Respondents

Constitution of Pakistan, 1973---

Art. 199. Direction cannot be given to investigating officer under Art. 199 to submit report of a case under S. 173, Cr.P.C. as High Court cannot assume the role of an investigating officer. Similarly, prayer that name of petitioner be mentioned in column 1 of the challan as complainant and name of a person be mentioned in challan as accused cannot be granted because High Court under Art. 199 cannot interfere with matters which fall within the domain of an investigating officer. Writ petition filed under Art. 199 seeking such directions from High Court dismissed. (P. 215,216)

Zafar Iqbal Awan for petitioner.

Muhammad Atif Qureshi for respondent No. 5.

Mehr Muhammad Iqbal, Assistant Advocate General.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The instant petition has been filed by the petitioner with the prayer that a direction be issued to the Investigating Officer of case FIR No. 173, dated 21.3.2014 registered at Police Station City B-Division District Bahawalnagar offences under Sections 364/34 of PPC read with Articles 155(c)/155 (d)/156(c)/156(d) of

Police Order, 2002 to investigate the matter on facts and merits and submit report under Section 173 of, Cr.P.C. against respondent No. 5, It is also prayed that the name of the petitioner may kindly be mentioned in column No. 1 as complainant of the above-mentioned FIR and the name of respondent No. 5 may kindly be mentioned as accused in report under Section 173 of Cr.P.C. It is further prayed that Arif Hussain, Sub-Inspector/SHO P.S. Dunyapur District Lodhran (respondent No. 3) and the District Police Officer, Lodhran (respondent No. 4) may kindly be directed to transmit the FIR No. 226 dated 25.5.2014 offences under Sections 302/148/149 of PPC and FIR No. 80 dated 21.3.2014 offences under Sections 302/148/149 of PPC, both registered at Police Station Sadar Dunyapur District Lodhran to the Police Station City B-Division, District Bahawalnagar.

2. As per brief facts of the present case, three different FIRs (FIR No. 226, dated 25.5.2014 offences under Sections 302/148/149 of PPC, FIR No. 80, dated 21.3.2014 offences under Sectiosn 302/148/149 of PPC both registered at Police Station Sadar Dunyapur District Lodhran and FIR No. 173, dated 21.3.2014 registered at Police Station City B-Division District Bahawalnagar offences under Sections 364/34 of, PPC read with Articles 155(c)/155(d)/156 (c)/156(d) of Police Order, 2002), regarding the murder of the daughter of the petitioner, namely, Mst. Rabia Bibi have been registered at different police stations and the instant petition with the afore-mentioned prayers has been filed by the petitioner.

3. Learned counsel for the petitioner submits that although Jang Sher respondent No. 5, who is the complainant of afore-mentioned FIR No. 173/2014, has claimed that he was the husband of Mst. Rabia Bibi deceased but in fact the said respondent has no relationship with the deceased; that Mst. Rabia Bibi deceased was married with one Altaf Hussain and was living happily with her husband; that the Investigating Officer of FIR No. 173/2014 is not investigating the case on merits; that under Rule 25(3) of the Police Rules, 1934, Chapter XXV, SHO P.S. City B-Division, District Bahawalnagar (respondent No. 1) and the investigating Officer of afore-mentioned case FIR No. 173/2014 are duty bound to find out the truth of the matter under investigation and their object should be to discover the actual facts of the case and to arrest the real offender or offenders; that in fact, respondent No. 5 is the main culprit for the murder of Mst. Rabia Bibi, daughter of the petitioner, but respondent No. 1 is saving the skin of respondent No. 5/complainant of FIR No. 173/2014; that there is documentary and the oral material available against respondent No. 5 which makes him the main accused of above-mentioned FIR but respondent No. 1 and the Investigating Officer are favouring respondent No. 5 due to *mala fide*/unknown reasons; that respondents No. 3 & 4 are duty bound under Rule 25(4), 25(7) and 25(8), Volume III of the Police Rules, 1934 to transmit the two FIRs No. 226/2014 and 80/2014 registered at Police Station Sadar Dunyapur District Lodhran to the Police Station City B-Division, Bahawalnagar. Learned counsel for the petitioner also referred Rule 25(4)(5)(7) & (8) of the Police Rules, 1934 to establish that FIR No. 226/2014 and FIR No. 80/2014 have wrongly

been cancelled by the police and requested that the prayers made in the present petition may kindly be accepted.

4. On the other hand, this petition has been opposed by the learned Assistant Advocate General assisted by learned counsel for respondent No. 5 on the grounds that the afore-mentioned FIRs No. 226/2014 & 80/2014 have already been cancelled, whereas, challan in the afore-mentioned case FIR No. 173/2014 has already been sent to the Court and as such, this petition has become infructuous; that the afore-mentioned FIRs No. 226/2014 & 80/2014 have rightly been cancelled by the police and if the petitioner has any objection on the cancellation reports, prepared by the police, then he can avail alternate remedy by raising objection before the concerned Court; that the Rules referred by learned counsel for the petitioner are not relevant for the decision of instant petition therefore, instant petition may be dismissed.

5. Arguments heard. Record perused.

6. Insofar as the prayer of the petitioner that a direction be issued to the Investigating Officer of afore-mentioned case FIR No. 173/2014 registered at Police Station City B-Division, District Bahawalnagar, to investigate the case on facts and merits and submit report under Section 173 of Cr.P.C. is concerned, the report under Section 173 of Cr.P.C. in the said case has already been sent to the Court, therefore, this petition has borne fruit to the extent of above-mentioned prayer. Insofar as the prayer of the petitioner that the Investigating Officer of the afore-mentioned FIR No. 173/2014 be directed to submit the report under Section 173 of Cr.P.C. against respondent No. 5 is concerned, the said

prayer cannot be granted because this Court cannot assume the role of Investigating Officer and direct the Investigating Officer to submit challan against a particular person. Similarly, the prayer of the petitioner that the name of the petitioner be mentioned in column No. 1 as complainant and the name of respondent No. 5 be mentioned as accused, in report under Section 173 of Cr.P.C, cannot be accepted by this Court because this Court cannot interfere in the matters which fall within the domain of the Investigating Officer. Reference in this context may be made to the case of *'Shahnaz Begum v. The Hon'ble Judge of the High Court of Sindh and Baluchistan and another'* (PLD 1971 Supreme Court 677). Insofar as the last prayer of the petitioner that respondents No. 3 & 4 be directed to transmit the FIRs No. 226/2014 and 80/2011 registered at Police Station Sadar Dunyapur District Lodhran, to the Police Station City B-Division, District Bahawalnagar is concerned, the said FIRs have already been cancelled by the police therefore, no order regarding the transmission of the afore-mentioned FIRs to Police Station City B-Division, Bahawalnagar can be passed by this Court and if the petitioner has any objection on the cancellation of the afore-mentioned FIRs, then he can raise the objection before the learned Judge of the concerned Court, who may disagree with the findings of the police.

7. Keeping in view all the afore-mentioned facts, there is no substance in the instant petition hence, the same is hereby dismissed. *Writ Petition Dismissed.*

2016 Y L R 2312

[Lahore (Rawalpindi Bench)]

Before Sayyed Mazahar Ali Akbar Naqvi and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD RASIB alias BABU---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 351 and Murder Reference No.52/Rwp of 2010, heard on 17th March, 2014.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 364--- Qatl-i-amd, kidnapping or abducting in order to murder---Appreciation of evidence---Circumstantial evidence--- Scope--- No direct evidence was on record and prosecution case hinged on the circumstantial evidence---Utmost care and caution was required for reaching at a just decision of the case---Every circumstance was to be linked with each other, and it should form such a continuous chain that its one end would touch the dead body and other to the neck of accused---If any link in the chain was missing, its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 364--- Qatl-i-amd, kidnapping or abducting in order to murder---Appreciation of evidence---Benefit of doubt--- Dead body of the deceased was recovered after two days of the occurrence and the delay of about six hours in lodging the FIR had created a serious doubt about the prosecution case---Evidence of last seen furnished by the prosecution was not worthy of reliance---Circumstantial evidence produced by the prosecution through prosecution witness, was inconsequential, as said witness did not state that he had seen the accused in the company of the deceased---Prosecution had not produced in evidence the report of Forensic Science Laboratory with regard to one empty recovered from the place of occurrence, and pistol recovered from the possession of accused---Best evidence to connect accused with the crime,

was withheld by the prosecution---In absence of matching report of empty with pistol, alleged recovery of pistol, was of no avail to the prosecution---Incident was a case of unseen occurrence, and was replete with number of circumstances, which had created serious doubt about the prosecution story---Prosecution having failed to prove its case against accused beyond the shadow of doubt, conviction and sentence recorded by the Trial Court against accused, were set aside; accused was acquitted extending him the benefit of doubt and was ordered to be released forthwith.

Akhtar Ali and others v. The State 2008 SCMR 6; Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473; Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127; Abid Javed alias Mithu v. The State 1996 PCr.LJ 1161; Waqar-ul-Islam and another v. The State 1997 PCr.LJ 1107; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMr 230 ref.

(c) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd--- Medical evidence---Scope---Medical evidence, was a type of supporting evidence, which could confirm the ocular account with regard to receipt of injury, nature of injury, kind of weapon used in the occurrence, but it would not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 ref.

(d) Criminal trial---

----Benefit of doubt---If there was a single circumstance, which would create doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Raja Ghaneem Aabir Khan for Appellant.

Ch. Muhammad Sarwar Sidhu, A.P.-G. for the State.

Raja Muhammad Farooq for the Complainant.

Date of hearing: 17th March, 2014.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Muhammad Rasib alias Babu appellant was tried in case FIR No.257 dated 26.07.2008, registered at Police Station Murree, District Rawalpindi in respect of offences under section 302/34, P.P.C. (section 364, P.P.C. added in the charge). After conclusion of the trial, the learned trial Court vide its judgment-dated 28.04.2010 has convicted and sentenced the appellant as under:-

Muhammad Rasib alias Babu

Under section 302(b), P.P.C. to 'Death' sentence for committing Qatl-i-amd of Aqeel Ahmad deceased. He was also ordered to pay Rs.2,00,000/- (rupees two hundred thousand only) as compensation under section 544-A of Cr.P.C., and in default thereof to suffer simple imprisonment for six months.

Under section 364, P.P.C. to undergo rigorous imprisonment for ten years along with fine of Rs.50,000/-, or in default of the payment of fine, to further undergo SI for six months.

2. Feeling aggrieved, the appellant has challenged his convictions and sentences through Criminal Appeal No.351 of 2010, whereas, the learned trial Court has transmitted Murder Reference No.52/Rwp of 2010 for confirmation or otherwise of the Death sentence of Muhammad Rasib alias Babu appellant. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 28.04.2010 passed by the learned Additional Sessions Judge, Rawalpindi.

3. Brief facts of the case as given by the complainant, namely, Mst. Rukhsana Bibi (PW4) in her written application (Exh.PB) on the basis of which the formal FIR (Ex.PB/1) was chalked out, are that on 24.07.2008, at about 4.00 p.m. (evening), the complainant's son Aqeel Ahmad (deceased), who was 16/17 years old along with his younger brother Khurram Shahzad went in the ground of Government High School Ban to play cricket. Aqeel Ahmad (deceased) didn't return in the evening. The complainant Mst. Rukhsana Bibi (P.W.4) inquired from Khurram Shahzad about Aqeel Ahmad (deceased). Khurram Shahzad told the complainant Mst. Rukhsana Bibi (P.W.4) that during the game, the appellant Muhammad Rasib alias Babu along with Muhammad Idrees alias Billa (since PO) came in the ground and took Aqeel

Ahmad (deceased) along with them. Nasir (P.W.3) and Javed (P.W.5) also went behind the appellant and the deceased towards the office of Forest Department. Muhammad Rasib alias Babu (appellant) told to Nasir (P.W.3) and Javed (P.W.5) that they had some personal work with Aqeel Ahmad and that they (PWs) should go back, upon which the said witnesses came back and started playing. The complainant Mst. Rukhsana Bibi (P.W.4) asked from Nasir (P.W.3) and Javed (P.W.5) about her son Aqeel Ahmad (deceased) and they also verified the statement of Khurram Shahzad. The complainant Mst. Rukhsana Bibi (P.W.4) along with the members of her baradree searched for Aqeel Ahmad (deceased) and on 26.07.2008, at about 10.00 a.m., all the persons of baradree of the complainant went in the jungle, situated along the side of the office of Forest Department and during search, the complainant Mst. Rukhsana Bibi (P.W.4) came to know through P.W Khizar Hayat (since given up) and Muhammad Ikhlaq (P.W.1), who were relatives of the complainant that dead body of Aqeel Ahmad (deceased) was lying in the jungle. The complainant further alleged that the appellant and Muhammad Idrees alias Billa co-accused (since PO) had committed the murder of her son in the forest, for the purpose of committing sodomy with him.

4. The appellant namely Muhammad Rasib alias Babu was arrested on 28.07.2008 by Nazeer Ahmad, SI (PW14). According to the prosecution case, on 04.08.2008, the appellant Muhammad Rasib alias Babu after making disclosure, led to the recovery of pistol (P-2), which was taken into possession through memo Exh. PH. After completion of investigation, the challan was prepared and submitted before the court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 05.03.2009 under sections 302, 364, 34, P.P.C., to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced 15 witnesses, during the trial. Mst. Rukhsana Bibi (PW4) is the complainant of the case. Tariq Mehmood (PW2) is the witness through whom the circumstantial evidence has been produced, Javed Iqbal (PW5) is the witness of last seen, whereas, Nasir Mehmood (PW3) who was though the witness of last-seen but he was declared hostile.

The medical evidence was furnished by Dr. Waheed Afsar Bajwa (PW7).

Muhammad Zareef 2286/C (PW9) is the witness of the recovery of pistol P-2, which was recovered on the pointation of the appellant through memo Exh. PH. Nazeer Ahmad, SI (PW14) is the Investigating Officer of the case.

Muhammad Ikhlaq (PW1), Shafiq-ur-Rehman (PW6), Muhammad Zamir C/2016 (PW8), Nasir Mehmood C/7850 (PW10), Saeed Mehmood, ASI/Moharrar (PW11), Tariq Mehmood, SI (PW12), Muhammad Waseem-ul-Haq 7746/C (PW13) and Mukhtar Ali, 335/C (PW15) are the formal witnesses.

The prosecution produced documentary evidence in the shape of receipt of deadbody Exh. PA, application of Mst. Rukhsana Bibi (PW4) to SHO Police Station Murree for registration of FIR Exh. PB, FIR Exh.PB/1, post-mortem report of the deceased Exh.PC and pictorial diagrams Exh.PC/1 and Exh.PC/2, Inquest report of Aqeel Ahmad deceased Exh.PD, application for conducting post-mortem examination on the deadbody of deceased Exh.PE, Medico-legal Report of Muhammad Rasib alias Babu appellant Exh.PF, memo of possession of two live rounds of .30 bore Exh.PG, memo of possession of pistol .30 bore P-2 recovered on the pointation of the appellant Exh.PH, memo of possession of blood stained earth Exh.PJ, memo of possession of empty round of .30 bore Exh.PK, memo of possession of last worn clothes of the deceased Exh.PL, rough site plan of the place of occurrence Exh.PM, rough site plan of the place of recovery of .30 bore pistol Exh.PN, warrant of arrest of Muhammad Idrees co-accused (since PO) and report on over leaf Exh.PO, proclamation under section 87, Cr.P.C. against Muhammad Idrees and report on over leaf Exh.PQ, scaled site plan of the place of occurrence Exh.PR, report of Chemical Examiner in respect of earth Exh.PS, Serologist report Exh.PT, report of Chemical Examiner qua anal swabs Exh.PU and closed its evidence.

6. The statement of the appellant under section 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" the appellant replied as under:-

> "I am innocent. I have had nothing with this occurrence. In fact the complainant party has suspicion that I have illicit relation with the mother of deceased, so due to this suspicion, I am falsely implicated in this case. In fact I had no concern with the mother of deceased Aqeel. It was a blind murder

and I was implicated due to above mentioned grudge in this false case. All the private PWs malafidely deposed falsely against me and with the collusion of complainant party or the police officials all made false statement against me. Moreover, fake recovery of .30 bore pistol was planted upon me. In fact no recovery has been effected from me. I am innocent".

The appellant opted not to make statement on oath as envisaged under section 340(2), Cr.P.C. nor produced any evidence in his defence.

The learned trial Court vide its judgment dated 28.04.2010 convicted and sentenced the appellant as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that it is a case of circumstantial evidence which is always considered to be a weak type of evidence; that the circumstantial evidence produced by the prosecution is not worthy of reliance; that there is delay of two days in reporting the matter to the police and no plausible explanation has been given by the prosecution for the said delay; that the evidence of prosecution witness of last seen is highly doubtful; that there is no motive with the appellant to commit the murder of Aqeel Ahmad deceased and the motive alleged by the prosecution that the deceased was murdered after committing sodomy is not supported by the medical evidence because no injury was noted by the doctor on the anal area of the deceased; that the report of Chemical Examiner, in absence of semen grouping test is also not worthy of reliance; that although it has been alleged that pistol P-2 was recovered from the possession of the appellant but no Forensic Science Laboratory report has been produced in evidence by the prosecution, therefore, no reliance can be placed on the said recovery; that prosecution failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal be accepted and the appellant may be acquitted from the charge.

8. Conversely, learned Additional Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that prosecution has produced a very strong circumstantial evidence against the appellant; that the appellant could not establish any mala fide on the part of the complainant for his false involvement in the instant case; that the delay in reporting the matter to the police in the instant case is not fatal to the prosecution case because the said delay has been explained by the complainant in the FIR wherein she stated that she along

with her other family members was trying to trace out the deceased; that the complainant Mst. Rukhsana Bibi (PW4) while appearing before the Court has also stated that on the following day of occurrence she orally reported the matter at Police Post Ghularan Gali and as such the delay in lodging the FIR has been explained by the prosecution; that the medical evidence has further supported the prosecution case, according to which, the deceased was murdered with the help of firearm; that the motive of sodomy as alleged by the prosecution has also been proved in this case and according to the report of Chemical Examiner Exh.PU, swabs taken from the anal area of the deceased were found to be stained with semens; that the evidence of last-seen furnished by Javed Iqbal (PW5) is confidence inspiring and trustworthy and despite lengthy cross-examination the evidence of said witness could not be shaken; that the pistol was also recovered from the possession of the appellant which further corroborates the prosecution case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), `Sarfraz Khan v. The State' (1996 SCMR 188) and `Asadullah and another v. The State' (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:-

> '...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the

circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

'....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:-

'7....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

11. The prosecution case is based on the following pieces of evidence:-

(i) Last seen evidence.

(ii) Circumstantial evidence produced by Tariq Mehmood (PW2).

(iii) Recovery of pistol from the appellant.

(iv) Motive.

(v) Medical evidence.

(i) Last seen evidence.

12. We have noted that there is delay of two days in reporting the matter to the police. The exact time when Aqeel Ahmad deceased accompanied the appellant and his co-accused Muhammad Idrees alias Billa (since PO) towards the forest has not been mentioned in the FIR. The date of occurrence is mentioned as 24.07.2008, whereas, the matter was reported to the police on 26.07.2008. The witness of last seen

evidence namely Javed Iqbal (PW5) has stated during his cross-examination that he told Mst. Rukhsana Bibi complainant (PW4) on 24.07.2008 after Maghrib prayer that he had lastly seen the deceased alive in the company of the appellant and his co-accused but even then the matter was not reported to the police for two days. Although Mst. Rukhsana Bibi (PW4) has stated in her examination-in-chief that she orally reported the matter of missing of her son Aqeel Ahmad deceased at Police Post Ghularan Gali, New Murree on the following morning but no such report has been brought on the record by the prosecution. It is also noteworthy that according to the statement of Shafiq-ur-Rehman (PW6) the deadbody of Aqeel Ahmad deceased was recovered on 26.07.2008 at 10.00 a.m. Even the complainant Mst. Rukhsana Bibi (PW4) has stated that she reached at the spot/jungle at 10.00/10.30 a.m. on 26.07.2008 but the FIR was lodged in this case on the said day at about 04.10 p.m., i.e. with the delay of about six hours from the recovery of deadbody. The distance between the police station and the place of occurrence is 15 miles. The delay of two days after the occurrence and the delay of about six hours in lodging the FIR after the recovery of deadbody has created a serious doubt about the prosecution case. The Hon'ble Supreme Court of Pakistan while discussing the point of delay in lodging the FIR, in the case of Akhtar Ali and others v. The State (2008 SCMR 06) at page 12 has observed as under:-

> "It is also an admitted fact that the FIR was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The FIR was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of FIR provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the FIR."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Nazeer Ahmad v. Gehne Khan and others (2011 SCMR 1473) wherein the delay of seven hours in lodging the FIR was considered to be a ground which adversely reflected on the credibility of prosecution version.

Similarly in the case of Mehmood Ahmad and 3 others v. The State and another (1995 SCMR 127) the Hon'ble Supreme Court of Pakistan has discarded the prosecution evidence, inter alia, on the ground that there was delay of two hours in

lodging the FIR and it was held that the same could be attributed to consultation, taking instructions and calculatedly preparing the report.

As per contents of the FIR there were three witnesses of the prosecution who had lastly seen Aqeel Ahmad deceased alive in the company of the appellant and his co-accused Muhammad Idrees alias Billa (since PO). One of them, Khurram Shahzad is real brother of the deceased but he has not been produced in the witness box by the prosecution, therefore, adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984 can be drawn against the prosecution that had the said witness been produced in the witness box his evidence would have been unfavourable to the prosecution case. Apart from the above mentioned witness there were two other witnesses of last seen namely Nasir Mehmood (PW3) and Javed Iqbal (PW5). Nasir Mehmood (PW3) while making his statement before the learned trial court did not support the prosecution case and he was declared hostile. Now we are left with the evidence of only one prosecution witness of last seen namely Javed Iqbal (PW5). He claimed that on the day of occurrence, i.e. on 24.07.2008 he went to the playground of Government High School "Bann" for cricket game where the appellant came and took Aqeel Ahmad deceased to the forest rest house. He further stated that Muhammad Idrees alias Billa (since PO) also reached there and from the forest Rest house, both the above mentioned persons took Aqeel Ahmad deceased to the nearby jungle. The above mentioned Javed Iqbal (PW5) gave a specific reason of his presence at the playground of Government High School "Bann" that he went there to play the cricket game but during his cross-examination he admitted that he did not play cricket on the said day. He further admitted that on the day of occurrence no match was being played except daily game. The relevant part of the statement of Javed Iqbal (PW5) during his cross-examination at pages Nos. 30 and 31 of the paper-book reads as under:-

> "it was Thursday on 24.07.2008. I do not remember what kind of work was done by me on 24.07.2008 after dawn, nor I can explain how many people / friends met me on the said day. On the said day, no match was being played except daily game. 50/60 persons were present into the ground on 24.07.2008. I cannot give the name of players as well spectators."
>
> .....

.....

"I went to play ground for cricket as well volley ball being player of both games and on 24.07.2008, both the games were being played. On the said day, I did not play any game.

In the above mentioned circumstances we are of the view that although this witness has given a specific reason for his presence at the time of lastly seen the deceased alive in the company of the appellant but his evidence in this respect is not confidence inspiring. It is not understandable that when on the day of occurrence he went to the playground for cricket game, as well as, volley ball game being player of both the games but at the same time he admitted that he did not play any game on that day. He is related to the deceased but he did not inform the police regarding missing of the deceased for two days. Although he stated that on 24.07.2008 he lastly seen the deceased alive in the company of the appellant and his co-accused who took the deceased to the nearby jungle but Mst. Rukhsana Bibi (PW4) has stated during her cross-examination that she along with her other relative searched for her son Aqeel Ahmad deceased on 25.07.2008 in the said jungle but could not trace him out. The relevant part of the statement of Mst. Rukhsana Bibi (PW4) during her cross-examination at page No. 29 of the paper- book reads as under:-

"We searched my son Aqeel on 25.07.2008 from the said jungle but could not trace out him."

Considering all the aforementioned circumstances we are of the view that the evidence of last seen furnished by the prosecution is not worthy of reliance.

(ii) Circumstantial evidence.

13. The prosecution has also produced circumstantial evidence through Tariq Mehmood (PW2) who simply stated that he was a Taxi driver by profession and on 24.07.2008 he was present at "Bann" bazaar Adda where appellant came and asked him to take him to Rawalpindi because his son was ill who was residing at Rawalpindi. He further stated that he picked the appellant and reached at Karor Arain where public transport was available and the appellant de-boarded from his Taxi on the said point. He further stated that thereafter the complainant of the present case met him and inquired as to whether he dropped the appellant along with Aqeel Ahmad

deceased but the said witness replied that he only took and then dropped the appellant. He further stated during his cross-examination that the complainant met him on 24.07.2008 about 07.00/07.30 p.m., therefore, the circumstantial evidence produced by the prosecution through Tariq Mehmood (PW2) is inconsequential. Even otherwise, he did not state that he had seen the appellant in the company of the deceased.

(iii) Recovery of pistol from the appellant.

14. According to the prosecution case one empty was recovered from the place of occurrence vide memo Exh.PK and pistol P-2 was recovered from the possession of the appellant vide memo Exh.PH but the prosecution has not produced in evidence the report of Forensic Science Laboratory. The best evidence to connect the appellant with the crime was withheld by the prosecution. In absence of matching report of any empty with pistol P-2, the alleged recovery of above mentioned pistol is of no avail to the prosecution.

(iv) Motive.

15. According to the prosecution case the appellant and his co-accused committed the murder of Aqeel Ahmad deceased after committing sodomy with him. We have noted that Dr. Waheed Afsar Bajwa (PW7) conducted post-mortem examination on the deadbody of Aqeel Ahmad deceased. He has not mentioned any injury in his post-mortem report on the anal area of the deceased. Although he stated that according to the report of Chemical Examiner the swabs of the anal area of the deceased were found to be stained with semens, therefore, sodomy was committed with the deceased but it is noteworthy that it is a case of unseen occurrence, thus, the grouping test of the aforementioned semens was essential in this case for safe administration of justice. In absence of grouping test of the above mentioned semens, the positive report of Chemical Examiner is not helpful to the prosecution case. A reference in this respect may be made to the cases of Abid Javed alias Mithu v. The State (1996 PCr.LJ 1161) and Waqar-ul-¬Islam and another v. The State (1997 PCr.LJ 1107).

(v) Medical Evidence.

16. Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well settled law that medical evidence is a type of supporting evidence, which

may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. We may refer here the cases of `Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53). `Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410).

17. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In `Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> '5.....The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of `Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

> '13.....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.351 of 2010 filed by Muhammad Rasib alias Babu appellant, set aside his convictions and sentences recorded by the learned Additional Sessions Judge Rawalpindi vide judgment dated 28.04.2010 and acquit him of the charges by extending him the benefit of doubt. Muhammad Rasib alias Babu appellant is in custody, he be released forthwith if not required in any other case.

19. Murder Reference No. 52/Rwp of 2010 is answered in the NEGATIVE and the sentence of death of Muhammad Rasib alias Babu (convict) is NOT CONFIRMED.

20. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the learned trial Court during the trial of the absconding accused namely, Muhammad Idrees alias Billa and his case shall be decided on its own merits on the basis of the evidence to be adduced during the trial of the said accused.

HBT/M-82/L **Appeal accepted.**

PLJ 2016 Cr.C. (Lahore) 138

[Bahawalpur Bench Bahawlpur]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD AKRAM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1862-B of 2015, decided on 5.10.2015.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(ii) & 337-L(ii)--Bail before arrest, confirmed--Role of inflicting a kassi--Wrong side of *Kassiv* was given below--Medical legal certificate was challenged before medical board--Opinion regarding injury--Validity--Conflict in ocular account and medical evidence of prosecution has established that complainant has not given true account of incident in F.I.R., therefore, truthfulness or otherwise of story narrated in F.I.R. shall be determined by trial Court after recording of evidence--Kassi (Hoe) was still to be recovered from possession of accused but no useful purpose will be served by that recovery because blood, if any, present on Kassi (Hoe) must have disintegrated by now because occurrence took place and a period of about three months has already elapsed--Possibility of *mala fide* involvement of petitioner cannot be ruled out--Pre-arrest bail already granted to petitioner was hereby confirmed.

[Pp. 139] A, B & C

Mr. Muhammad Atif Qureshi, Advocate for Petitioner.

Mr. Gulzar Ahmad Sabir, Addl.P.G. for State.

Mr. Muhammad Ismail Makki, Advocate for Complainant.

Date of hearing: 5.10.2015.

ORDER

Through the instant petition, the petitioner Muhammad Akram seeks pre-arrest bail in case FIR No. 82, dated 08.07.2015, under Section 337-A(ii), 337-L(ii), P.P.C. registered at Police Station Sahja, District Rahimyar Khan.

2. As per brief allegations leveled in the F.I.R. on 7.7.2015 at 4:00 p.m., the petitioner alongwith his co-accused while armed with Kassi, launched an attack on Allah Dewaya and inflicted different injuries on his person.

3. Arguments heard and record perused.

4. The petitioner has been assigned the role of inflicting a Kassi (Hoe) blow on the head of the complainant Allah Dewaya. The complainant has specifically mentioned in the F.I.R. that the co-accused of the petitioner namely Muhammad Khalid inflicted wrong side of the Kassi (Hoe) blow on his right hand but he has not mentioned in the F.I.R. that the petitioner has given the wrong side of Kassi (Hoe) blow which *prima facie* means that the petitioner inflicted the right side of the Kassi (Hoe) blow but according to the MLC, the kind of weapon used in the occurrence was blunt. The petitioner challenged the aforementioned MLC before the Medical Board on the ground that the complainant got the aforementioned MLC being in league with the Medical Officer to strengthen his false and fabricated story. The Medical Board has opined that it was unable to give any opinion regarding the injury (Injury No. 1) attributed to the petitioner at the belated stage. It was further noted that the clothes worn by the complainant at the time of incident were not produced before the Board.

The conflict in the ocular account and medical evidence of the prosecution has established that the complainant has not given the true account of the incident in the F.I.R., therefore, truthfulness or otherwise of the story narrated in the F.I.R. shall be determined by the learned trial Court after recording of the evidence and at present, the case of prosecution against the petitioner is one of further inquiry. Learned counsel for the complainant has argued that the Kassi (Hoe) is still to be recovered from the possession of the petitioner but in my humble view no useful purpose will be served by the said recovery because the blood, if any, present on the Kassi (Hoe) must have disintegrated by now because the occurrence took place on 07.07.2015 and a period of about three months has already elapsed. Reference in this contest may be made to the cases of *"Malik Muhammad Aslam vs. The State and others"* (2014 SCMR 1349) and *"Muhammad Jamil vs. Muhammad Akram and others"* (2009 SCMR 120).

6. In the light of above, possibility of *mala fide* involvement of the petitioner in this case cannot be ruled out at this stage therefore, the instant petition is allowed and interim pre-arrest bail already granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 100,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. It is clarified that observations made hereinabove are tentative in nature and strictly confined to the disposal of instant petition.

(R.A.) **Bail confirmed.**

PLJ 2016 Cr.C. (Lahore) 326

[Bahawalpur Bench Bahwalpur]

***Present*: MALIK SHAHZAD AHMAD KHAN, J.**

MUHAMMAD RAFIQUE--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2038-B of 2015, decided on 18.11.2015.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(5)--Pakistan Penal Code, (XLV of 1860), Ss. 353, 395, 156, 148 & 149--Cancellation of bail--Absconder--Prohibitory clause--Allegation of looting--Nominated in FIR--Allegation of looting different articles, mobile phones and cash amounts was levelled against accused, therefore, ingredients of Section 395, PPC are fully attracted ASJ--Second reason for grant of bail to as given order of ASJ that notice was issued to complainant of instant case but did not turn up to oppose bail petition. [P. 329] A & B

Mian Muhammad Tayyab Wattoo, Advocate for Petitioner.

Mr. Muhammad Rafique, on interm bail and Muhammad Amir Wattoo Respondent No. 2 (in Crl. Misc. No. 1073-CB of 2015).

Mr. Gulzar Ahmed Sabir, Addl.P.G. for State.

Syed Mujahid Ayub Wasti, Advocate for Complainant.

Date of hearing: 18.11.2015.

ORDER

Through this single order, I proceed to decide the instant Criminal Miscellaneous No. 2038-B of 2015/BWP, filed by the petitioner namely Muhammad Rafique, seeking his pre-arrest bail, as well as, Criminal Miscellaneous No. 1073-CB of 2015/BWP, filed by the State for cancellation of post arrest bail, granted to Respondent No. 2, namely Muhammad Amir Wattoo, by learned Additional Sessions Judge, Fort Abbas *vide* order dated 24.03.2015, as both these petitions have arisen out of the same F.I.R. No. 193/2013 dated 04.08.2013 offences under Sections 353/395/156/148/149, PPC, Police Station Maroot, District Bahawalnagar.

2. As per brief facts of the present case, on 03.08.2013, at about 5.30 p.m., the complainant namely Muhammad Younis, Sub-Division Officer (Operation), Sub-

Division Fort Abbas along with other officials of the department of MEPCO (Multan Electric Power Company) was going towards Chak No. 337/HR. Muhammad Rafique, petitioner in Criminal Miscellaneous No. 2038-B of 2015/BWP, while armed with pistol and Muhammad Amir Wattoo, Respondent No. 2, in Criminal Miscellaneous No. 1073-CB of 2015/BWP, while armed with pistol along with their other co-accused, who were also armed with different weapons, intercepted the complainant party and at gun point, looted five safety gloves, ten pliers, five screwdrivers and five testers from the complainant party. They also snatched one mobile phone and cash amount of Rs. 14,000/-, along with identity card from Ansar Hussain, who was driver of the complainant, two mobile phones and cash amount of Rs. 7000/-, official card and a diary was snatched from the complainant, one mobile phone and cash amount of Rs. 5000/- were snatched from Farhat Abbas LM-II. The accused persons also beat the complainant party and extended threats of life to them.

3. Arguments heard. Record perused.

4. First of all I take up the case of Muhammad Rafique, petitioner in Criminal Miscellaneous No. 2038-B of 2015/BWP. The aforementioned petitioner is nominated in the F.I.R. The occurrence in this case took place in the broad-day-light and as such there is no chance of any mistaken identification of the said petitioner. It was alleged in the F.I.R that the petitioner Muhammad Rafique along with his co-accused looted different articles, cash amount and mobile phones from complainant party, at pistol point and recovery of pistol and looted articles/cash is still to be effected from the possession of the petitioner. It is also evident from the perusal of the record that F.I.R was lodged on 04.08.2013 and the petitioner remained absconder in this case for a period of more than two years. The petitioner is unable to establish any *mala fide* on the part of the complainant, who is a government servant, for his false involvement in the instant case. The offence under Section 395, PPC, falls within the ambit of prohibitory clause of Section 497, Cr.P.C. It is held in the case of *"Rana Muhammad Arshad Vs. Muhammad Rafique and another"* (PLD 2009 Supreme Court 427) that grant of pre-arrest bail is an extra ordinary relief to be granted only in extra ordinary circumstances. As no extra ordinary circumstance has been pointed out by learned counsel for the petitioner for grant of pre-arrest bail to the petitioner, therefore, this petition, bearing Criminal Miscellaneous No. 2038-B of 2015/BWP, filed by Muhammad Rafique (petitioner), seeking his pre-arrest bail, is hereby dismissed and the interim pre-arrest bail, granted to the petitioner by this Court *vide* order dated 16.09.2015, is hereby recalled.

5. Now I take up Criminal Miscellaneous No. 1073-CB of 2015/BWP, filed by the State for cancellation of post arrest bail, granted to Muhammad Amir Wattoo (Respondent No. 2) by the learned Additional Sessions Judge, Fort Abbas *vide* order dated 24.03.2015. It is argued by the learned APG that the accused Muhammad Amir Wattoo (Respondent No. 2) is a notorious criminal, who is involved in different criminal cases of heinous nature. The occurrence of the present case, occurred due to the reason that Respondent No. 2 was also involved in commission of theft of electricity and was responsible for causing loss of millions of rupees to the Government Exchequer. Learned APG has also placed on the record a list of criminal cases, registered against the abovementioned respondent, which shows that eleven different criminal cases have so far been registered against the said respondent, which were registered in the years 2010, 2013, 2014 and 2015 but in my humble view, mere involvement of the abovementioned respondent in some criminal cases by itself is not sufficient to cancel his bail, however, other aspects of the case are taken into consideration for decision of the instant petition for cancellation of bail. I have noted that the aforementioned respondent is specifically nominated in the F.I.R with the allegation that he while armed with a pistol along with his co-accused, looted different articles and cash amount from the complainant party. Two safety belts, six safety gloves, two pliers, two screwdrivers and two testers, which were looted during the occurrence have been recovered from the possession of Respondent No. 2, during his physical remand. A pistol, which was used by the abovementioned respondent during the occurrence, has also been recovered from the possession of said respondent (Respondent No. 2), which further corroborates the allegations levelled against the said respondent by the prosecution. The complainant Muhammad Younis and other P.Ws are government officials in the department of MEPCO (Multan Electric Power Company) and they have absolutely no ill will or malice against the accused Muhammad Amir Wattoo (Respondent No. 2) to falsely implicate him in this case. This case was registered on 04.08.2013 and thereafter Respondent No. 2, remained absconder for a period of more than two years. The offence under Section 395, PPC falls within the ambit of prohibitory clause of Section 497, Cr.P.C. Keeping in view all the above facts, the aforementioned respondent was not entitled to the relief of bail.

6. I have also noted that the learned Additional Sessions Judge, Fort Abbas *vide* order dated 24.03.2015, granted bail to Respondent No. 2, on the ground that the offence under Section 395, PPC is not attracted in this case but in my humble view the allegation of looting different articles, mobile phones and cash amounts etc was levelled against Respondent No. 2 and his co-accused, therefore, ingredients of

Section 395, PPC are fully attracted in this case. Second reason for grant of bail to Respondent No. 2, as given in the above-mentioned order of learned Additional Sessions Judge, Fort Abbas is that notice was issued to the complainant of the instant case but the complainant did not turn up to oppose the bail petition but it is note worthy that it was not mentioned in the abovementioned bail granting order that notice was served upon the complainant and it is only mentioned therein that the notice was issued to the complainant. Learned counsel for MEPCO (Multan Electric Power Company) is present in the Court, who has vehemently supported this petition and prayed for cancellation of bail granted to the abovementioned respondent. Another reason given by the learned Additional Sessions Judge, Fort Abbas for grant of bail to Respondent No. 2, was that admittedly the said respondent was not a habitual offender and he did not belong to any group of dacoits but as mentioned earlier, learned APG has placed on the record, a list, prepared by the local police, according to which, Respondent No. 2 is involved in as many as eleven criminal cases, which shows that the abovementioned reasoning of the learned Additional Sessions Judge, Fort Abbas, is against the record.

7. In support of his arguments, learned counsel for Respondent No. 2 has placed reliance on the judgments reported as *"Muhammad Ramzan Vs. Zafar Ullah and another"* (1986 SCMR 1380) and *"Muzaffar Iqbal Vs. Muhammad Imran Aziz and others"* (2004 SCMR 231), wherein it was held that once a bail is granted to an accused by a Court of competent jurisdiction, then very strong and exceptional grounds are required to cancel the bail but the facts of the judgments cited by learned counsel for Respondent No. 2 are distinguishable from the facts of the present case.

8. In the light of above discussion, Criminal Miscellaneous No. 1073-CB of 2015/BWP, filed by the State for cancellation of post arrest bail, granted to Respondent No. 2 namely Muhammad Amir Wattoo is hereby accepted, bail granting order dated 24.03.2015, passed by learned Additional Sessions Judge, Fort Abbas is hereby recalled and bail granted to Respondent No. 2 is hereby cancelled.

10. It is however clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned trial Court.

(R.A.) **Bail accepted.**

PLJ 2016 Cr.C. (Lahore) 918 (DB)

[Bahawalpur Bench Bahawalpur]

***Present*: KHALID MAHMOOD MALIK AND MALIK SHAHZAD AHMAD KHAN, JJ.**

FAROOQ NAWAZ--Appellant

veruss

STATE, etc.--Respondents

Crl. Apepal No. 335-J of 2016, decided on 4.10.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Suspension of sentence--There was no chance of fixation of main appeal of petitioner in near future--Petitioner remained on bail during his trial and there was no allegation that he misused concession of bail during his trial--Sentence awarded to petitioner was short one, therefore, chances' cannot be ruled out that petitioner may serve out his entire sentence before decision of his case on merits which will amount to awarding him punishment in advance and purpose of filing main appeal of petitioner before High Court shall become infructuous--Petition was allowed. [P. 919] A

Mr. Atif Saleem Qureshi, Advocate for Appellant.

Ch. Asghar Ali Gill, D.P.G. for State.

Date of hearing: 4.10.2016.

ORDER

Farooq Nawaz, convict/applicant seeks suspension of his sentence in case/FIR No. 32/2013, dated 05.02.2013, offence under Section 9-C of Control of Narcotic Substances Act 1997, registered at Police Station City B Division, Rahim Yar Khan. *Vide* judgment dated 10.06.2016, delivered by learned Addl: Sessions Judge, Rahim Yar Khan, the petitioner was convicted and sentenced as under.

Under Section 9-C of Control of Narcotic Substances Act 1997

> "Sentenced for 04 years and six months rigorous imprisonment and fine of Rs. 20,000/- and in case of default in payment of fine, he shall further undergo

five months simple imprisonment. The benefit of Section 382-B, Cr.P.C. is given to the convict."

2. After hearing the learned counsel for the petitioner, the learned Deputy Prosecutor General and perusing the record, it is observed that the petitioner/appellant was convicted and sentenced as stated above. There is no chance of fixation of the main appeal of the petitioner in the near future. The petitioner remained on bail during his trial and there is no allegation that he misused the concession of bail during his trial. Since the sentence awarded to petitioner is short one, therefore, chances' cannot be ruled out that the petitioner may serve out his entire sentence before the decision of his case on merits which will amount to awarding him punishment in advance and the purpose of filing the main appeal of the petitioner before this Court shall become infructuous. Resultantly, the instant petition is allowed the sentence awarded to the petitioner/appellant Farooq Nawaz is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Court. Petitioner shall appear before this Court on each and every date of hearing till the final decision of main appeal.

(A.S.) **Petition allowed.**

2016 CrLJ 430

Before Malik Shahzad Ahmad Khan, J. (Bahawalpur)

Cr. Misc. No. 477-B/2015/BWP accepted on 20.3.2015.

SAFDAR MASIH---Petitioner

versus

1. THE STATE

2. LIAQAT ALI, S.I.---Respondents

Criminal Procedure Code (V of 1898)---

S. 497(2). Grant of bail for offences not falling under prohibitory clause of S. 497(1) is the rule and its refusal an exception. Applying this well-settled law, High Court releasing accused facing charge under Art. 3, Prohibition Order, 1979, which did not fall under prohibitory clause of S. 497(1), on bail. (P. 431,432)

Lazar Allah Rakha for petitioner.

Khalid Pervaiz Opal, DPG for State with *Liaqat*, SI.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The petitioner Safdar Masih through instant petition seeks post arrest bail in case FIR No. 68, dated 9.2.2015 registered at Police Station Baghdad-ul-Jadeed, District Bahawalpur offences under Articles 3 & 4, Prohibition (Enforcement of Hadd) Order, 1979.

2. As per brief allegations levelled in the FIR, on 9.2.2015, police conducted raid and apprehended the petitioner while distilling the liquor. Allegedly 21 bottles of illicit liquor alongwith distillery were recovered from the possession of the petitioner.

3. Arguments heard. Record perused.

4. The offence under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979 is a bailable offence, whereas, offence under Article 3 of the Order *ibid* does not fall within the ambit of Prohibitory Clause of Section 497 of

Cr.P.C. and grant of bail in such-like cases is a rule while its refusal is an exception. Although it has been argued on behalf of learned Deputy Prosecutor General that the petitioner is involved in twelve other criminal cases of similar nature but mere involvement of the petitioner in some cases is no ground to refuse bail to him if otherwise he is entitled to the said concession on merits. Reference in this context may be made to the case of *'Muhammad Rafique v. The State'* (1997 SCMR 412). Learned DPG has conceded, on instructions, that the petitioner is not a previous convict. The recovery has already been affected in this case, therefore, no useful purpose will be served by keeping the petitioner behind the bars. As the above-mentioned offences does not fall within the ambit of prohibitory clause of section 497, Cr.P.C., therefore, while relying on the case of *Zafar Iqbal v. Muhammad Anwar and others* (2009 SCMR 1488) ordaining that where a case falls within non-prohibitory clause, the concession of granting bail must be favaurably considered and should only be declined in exceptional cases, I am of the view that the petitioner has a good case for grant of post-arrest bail.

5. In the light of above, this petition is allowed and the petitioner is admitted to post arrest bail subject to his furnishing the bail bonds in the sum of Rs. 100,000/- (Rupees one hundred thousand only) with one surely in the like amount to the satisfaction of the learned Trial Court. *Bail Granted.*

NLR 2016 Criminal 377

Before Malik Shahzad Ahmad and *Arshad Mahmood Tabbasum, JJ.* (Lahore)

Criminal Appeal No. 334-ATA of 2013 allowed on 18.3.2015.

KHAWAR MASIH---Appellant

versus

THE STATE---Respondent

(a) **Penal Code (XLV of 1860)---**

S. 324. In presence of material contradictions between statements of prosecution witnesses and medical evidence, prosecution would fail to prove its case under S. 324 against accused beyond shadow of doubt. Conviction with sentence of ten years' R.I. recorded by Anti-Terrorism Court against accused under S. 324 by ignoring such material contradictions between ocular evidence of prosecution witnesses and medical evidence set aside by High Court by accepting appeal against conviction/sentence. (P. 390,391,392)

(b) **Benefit of Doubt---**

Single circumstance creating doubt in prosecution case would entitle accused to acquittal by having benefit of doubt. (P. 391)

(c) **Conflict between ocular evidence and medical evidence---**

Conflict between ocular evidence and medical evidence would give rise to benefit of doubt in favour of accused. (P. 388,389)

(d) **Recoveries---**

Recovery of motor-cycle from accused would be of no avail to prosecution when recovery witness in his cross-examination stated that he did not know the name of the owner of the house from where the recovery was effected. (P. 389)

(e) **Recoveries---**

Prosecution evidence as to recovery of pistol on pointation of accused and positive report of Punjab Forensic Science Agency would become immaterial when empties and pistols were deposited together with considerable delay.

(P. 389,390)

(f) **Eye-witnesses---**

Injuries on the body of eye-witnesses would not stamp their deposition with truth. (P. 390)

(g) **Eye-witnesses---**

It is by now well-settled that non-existence of enmity between the accused and the eye-witnesses would not mean that evidence of such eye-witnesses should be relied upon blindly. (P. 390)

Lazar Allah Rakha for appellant.
Asghar Ali Gill, DPG for State.
Date of hearing: 18.3.2015.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Khawar Masih appellant was tried in case F.I.R. No. 252/2012, dated 3.5.2012, registered at Police Station Civil Lines, District Bahawalpur in respect of offences under sections 353, 324, 186, 34, PPC and section 7 of the Anti-Terrorism Act, 1997. After conclusion of the trial, the learned Trial Court *vide* its judgment dated 28.8.2013 has convicted and sentenced the appellant as under:---

Under Section 324, PPC, he was sentenced to undergo ten years' rigorous imprisonment with fine of Rs. 1,00,000/-. In default of payment of fine, he was directed to undergo six months' simple imprisonment.

Under section 7(h) of Anti-Terrorism Act, 1997, he was sentenced to undergo ten years' rigorous imprisonment with fine of Rs. 1,00,000/- and in default of payment of fine, he was directed to further undergo six months' simple imprisonment.

Under section 353, PPC he was sentenced to undergo two years' rigorous imprisonment.

Under section 337-F(iii), PPC he was sentenced to undergo two years' rigorous imprisonment on two counts for causing two injuries to Muhammad Younas. He was also directed to pay Rs. 20,000/- as Daman to Muhammad Younas injured on two counts.

Under section 337-F(iii), PPC, he was sentenced to undergo two years' rigorous imprisonment for causing injury to Muhammad Makki. He was also directed to pay Rs. 20,000/- as Daman to Muhammad Makki injured constable.

Under section 337-F(v), PPC, he was sentenced to undergo three years' rigorous imprisonment for causing injury to Muhammad Makki. He was also directed to pay Rs. 20,000/- as Daman to Muhammad Makki injured constable.

All the sentences were ordered to run concurrently. The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

2. Feeling aggrieved, the appellant has challenged his convictions and sentences through Criminal Appeal No. 334-ATA of 2013.

3. Brief facts of the case as given by the complainant, namely, Safdar Hussain 222/HC (PW2) in his complaint (Exh.PB) on the basis of which the formal FIR (Ex. PA) was chalked out, are that on 3.5.2012, he (complainant) alongwith other police officials was present at Railway Chowk in connection with patrolling duty. At about 12.30 p.m, two persons, came there while riding a motorcycle Honda-125. On suspicion, they were signaled to stop but they did not stop and ran away. The complainant (PW2) alongwith other police officials chased them and when they reached near welcome chowk, both the accused persons started firing at the complainant (PW2) and his other companions. Due to the firing, Muhammad Younas Khan 447/C-II (PW3) and Muhammad Makki 960/C (PW4) suffered injuries. The names of both the accused persons were later on disclosed as Nadeem Mehmood accused (since P.O) and Khawar Masih (appellant). Accused Nadeem Mehmood (since P.O) was driving the motorcycle, whereas Khawar Masih (appellant) was sitting on the rear seat. Due to this act of the afore-mentioned accused, fear, panic and harassment in general public was created.

4. The appellant namely Khawar Masih was arrested on 4.5.2012 by Sajjad Hussain, SI (not produced). According to the prosecution case, on 8.5.2012, the appellant Khawar

Masih after making disclosure, led to the recovery of Motorcycle Honda 125 P-10, which was taken into possession through memo. Exh. PF. On 14.5.2012, the appellant Khawar Masih after making disclosure, led to the recovery of pistol 9MM P-5 with seven live bullets P-14/1-5, which were taken into possession through memo. Exh. PD. On the same day, the appellant Khawar Masih after making disclosure, led to the recovery of pistol 30 bore P-1 with one extra magazine P-2 and after unloading the same four live bullets P-3/1-4, which were taken into possession through memo. Exh. PC. After completion of investigation, the challan was prepared and submitted before the Court. The learned Trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant namely Khawar Masih on 3.6.2013, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced 10 witnesses, during the trial. Safdar Hussain 222/HC (PW2) is the complainant of the case, whereas, Muhammad Younas Khan 447-C-II (PW3), Muhammad Makki 960-C (PW4) and Imran Haider 1166/C (PW5) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Akram (PW8).

Allah Bakhsh, SI (PW6) is the witness of recovery of Pistol 30 bore P-1 and pistol 9MM P-5, which was recovered on the pointation of Khawar Masih appellant, whereas, Muhammad Naveed 672/C (PW7) is the witness of the recovery of motorcycle Honda 125 P-10 which was recovered

on the pointation of the appellant. Syed Hamid Shah, Inspector (PW10) is the Investigating Officer of the case.

Muhammad Ishaq 1874/HC (PW1) and Muhammad Aasim Raza 1227/C (PW9) are the formal witnesses.

The prosecution produced documentary evidence in the shape of FIR Exh. PA, complaint, Exh. PB, memo. of recovery of pistol 30 bore P-1 with one extra magazine P-2 and four live bullets P-3/1-4 which were recovered on the pointation of the appellant, Exh. PC, rough site-plan of the place of recovery of pistol 30 bore P1 Exh.PC/1, memo. of possession of pistol 9MM P-5 with seven live bullets P-4/1-5, which were taken into possession through memo. Exh. PD, rough site-plan of the place of recovery Exh. PD/1, memo. of possession of clothes of injured Muhammad Makki 960/C (PW4) Exh. PE, memo. of possession of Honda Motorcycle P-10, which was recovered on the pointation of the appellant Exh. PF, rough site-plan of the place of occurrence without scale Exh. PF/1, Medico-legal Report of Muhammad Younas Khan 447-C-II (PW3) Exh. PG, Medico-legal Report of Muhammad Makki 960-C (PW4) Exh. PH, memo. of possession of blood-stained earth in respect of Muhammad Younis Khan 447-C-II (PW3) Exh. PJ, memo. of possession of blood-stained earth in respect of Muhammad Makki 960/C (PW4) Exh. PK, memo. of recovery of five empties of pistol 30 bore P-1, four empties of 9mm P-12 (1-4) and eight empties of 30 bore P-13 (1-8) Exh. PM, scaled site-plan of the place of occurrence Exh. PN, Punjab Forensic Science Agency report Exh. PQ and closed its evidence.

The statement of the appellant u/s. 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" the appellant has replied as under:---

> *"I belong to a poor family. I have no concern with this case. When this occurrence is shown to have been committed, I was already in the illegal custody of police in some other case in which police arrested me on the basis of suspicion. Police tortured me in that case and I sustained sever injuries. In order to avoid the consequences of inquiry, police involved me in this case falsely and I have no concern with co-accused Nadeem Mahmood Butt."*

Neither the appellant made statement on oath u/s. 340 (2), Cr.P.C. nor he produced any evidence in his defence. The learned Trial Court *vide* its judgment dated 28.8.2013, found the appellant guilty and convicted and sentenced him as mentioned and detailed above.

6. Learned counsel for the appellant, in support of this appeal, contends that it is evident from the perusal of contents of FIR Exh. PA that the names of the assailants who made firing on police party were not known to the complainant or other eye-witnesses and their names came into the knowledge of the complainant later on but no source of information has been disclosed in the FIR or by the eye-witnesses that as to how the names of the appellant and his co-accused came to their knowledge; that no identification parade of the appellant

was ever held in the instant case; that the complaint Exh. PB was written by Sajjad Hussain, SI who also initially investigated the case but he was not produced before the Court; that there is clear contradiction in the prosecution case regarding the date of arrest of the appellant which has created another dent in the prosecution story; that there are material contradictions in the statements of the prosecution witnesses; that according to the prosecution witnesses the distance between the assailants and the injured PWs was ten feet but according to the medical report there was burning and blackening around some injuries of the injured PWs and as such ocular account of the prosecution has been contradicted by the medical evidence; that it is the case of the prosecution that the appellant was also injured during the occurrence but no medico-legal report of the appellant has been brought on the record; that the alleged recovery of motorcycle from the appellant is of no avail to the prosecution because the registration number of motorcycle which was used by the assailants during the occurrence was not mentioned in the FIR; that similarly the evidence of the prosecution *qua* the alleged recovery of pistols from the appellant and positive report of Punjab Forensic Science Agency Exh. PQ is immaterial because the empties and pistol were deposited together in the agency; that the impugned judgment is result of misreading and non-reading of evidence available on the record; that the prosecution miserably failed to prove its case against the appellant, therefore, this appeal may be accepted and the appellant be acquitted from the charges.

7. Learned DPG for the State opposes this appeal on the grounds that the occurrence in this case took place on 3.5.2012 at 12.30 (noon) and the FIR was promptly lodged on the same day at 02.00 p.m.; that the appellant and his co-accused were specifically named in the FIR with their respective roles of causing injuries to Muhammad Younas Khan 447-C-II (PW3) and Muhammad Makki 960/C (PW4); that it was a daylight occurrence and the injured prosecution witnesses in their statements before the Court have fully supported the prosecution story narrated in the FIR; that the case of prosecution is further supported by the medical evidence; that the injuries on the persons of Muhammad Younas Khan 447-C-II (PW3) and Muhammad Makki 960/C (PW4) have established the presence of said witnesses at the spot; that the contradictions in the prosecution evidence, pointed out by learned counsel for the appellant are minor in nature and the same are not worth of consideration; that the appellant could not establish any *mala fide* on the part of the police for his false involvement in this case; that the motorcycle which was used during the occurrence was also recovered from the possession of the appellant; that the recovery of pistols from the possession of the appellant and positive report of Punjab Forensic Science Agency Exh. PQ have further corroborated the prosecution case against the appellant; that the prosecution has proved its case against the appellant beyond the shadow of any doubt, therefore, the instant appeal may be dismissed.

8. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

9. According to the prosecution case the occurrence took place on 3.5.2012 at 12.30 p.m. (noon), whereas, the FIR Exh. PA was lodged on the same day at 02.00 p.m. It is evident from the contents of the FIR that the assailants who made firing on the police party and caused injuries to Muhammad Younas Khan 447-C-II (PW3) and Muhammad Makki 960/C (PW4) were not known to the complainant or other eye-witnesses. It is so mentioned in the FIR that the name of the assailants came into the knowledge of police party later on but no source of information has been disclosed therein that as to how the complainant party came to know about the name of the appellant and his co-accused. During the cross-examination of the complainant Safdar Hussain 222/HC (PW2) he stated that he came to know about the names of the accused persons when they were arrested and according to the statement of Syed Hamid Ali Shah, Inspector (PW10) the appellant was arrested on 4.5.2012. We have also gone through the police record and found that in application for judicial remand of the appellant his date of arrest has been mentioned as 8.5.2012. There is no mention of the arrest of the appellant in the FIR, therefore, the above-mentioned statement of the complainant Safdar Hussain 222/HC (PW2) that he came to know about the names of the accused persons when they were arrested has created dent in the prosecution case because as per above-mentioned statement of Syed Hamid Ali Shah, Inspector (PW10) the appellant was arrested on

4.5.2012, whereas, the name of the appellant was already mentioned in the FIR which was lodged on 3.5.2012 at 02.00 p.m. It is also noteworthy that the features and descriptions of the assailants were also not mentioned in the FIR. Similarly the injured eye-witness of the prosecution namely Muhammad Makki 960/C (PW4) stated that he came to know about the names of the accused persons after their arrest. He further stated during his cross-examination that in his statement under section 161, Cr.P.C. he had not got recorded the names of accused persons. Similarly the other injured eye-witness namely Muhammad Younas Khan 447-C-II (PW3) has stated during his cross-examination that when he regained his senses the name of the accused persons came to his knowledge. He further stated during his cross-examination that he cannot tell the source through which he came to know about the names of the accused persons. Both the above-mentioned prosecution witnesses have stated that the appellant was arrested on the day of occurrence but their evidence is contradicted by Syed Hamid Shah, Inspector (PW10) and the police record (application for physical remand), according to which, the appellant was arrested on 4.5.2012 and 8.5.2013, respectively. Sajjad Hussain who wrote the FIR Exh. PA and arrested the appellant was given up by the prosecution being not available.

10. We have also noted that according to the statement of another eye-witness namely Imran Haider 1166/C (PW5) the motorcycle of the accused persons had fallen on the ground at the time of occurrence, whereas, according to the statement of complainant Safdar Hussain 222/HC (PW2) the accused persons fled away on the motorcycle on the day of occurrence.

As per statement of injured eye-witness namely Muhammad Younas Khan 447/C-II (PW3) the motorcycle of the accused persons did not fall on the ground at the time of occurrence and as such there are contradictions about the manner of occurrence in the statements of prosecution witnesses.

11. Now coming to the medical evidence of the prosecution we have noted that according to the statement of Safdar Hussain 222/HC (PW2) the distance between the appellant and him at the time of occurrence was ten feet. Similarly Imran Haider 1166/C (PW5) has stated in his examination-in-chief that the police party was at a distance of 8/10 feet at the time of occurrence but according to the statement of Dr. Muhammad Akram (PW8) blackening was present around injury No. 1 of Muhammad Makki 960/C (PW4) and blackening and tattooing was also present on injury No. 3 of the above-mentioned injured. He further stated during his cross-examination that the above-mentioned injuries were caused from a distance of less than two feet and as such ocular account of the prosecution has further been contradicted by the medical evidence furnished by Dr. Muhammad Akram (PW8). It is also noteworthy that as per prosecution case one of the assailants whose name was later on disclosed as Khawar Masih (appellant) was also injured during the occurrence due to the firing of his co-accused and Syed Hamid Shah, Inspector (PW10) has stated that the appellant was admitted in the hospital when he initially interrogated him but surprisingly no Medico-legal Report of the appellant regarding sustaining his injury during the occurrence has been brought on the record by the prosecution. As there is conflict between ocular account

C

and positive report of Punjab Forensic Science Agency Exh. PQ has become immaterial. Reference in this respect may be made to the cases of *Barkat Ali versus Muhammad Asif and others* (2007 SCMR 1812), *Ali Khan versus The State* (1999 SCMR 955), *Ali Sher and others versus The State* (2008 SCMR 707).

14. Although it has been argued by learned DPG that the prosecution case has been proved through the evidence of injured eye-witnesses but in our humble view the injuries on the body of an eye-witness does not stamp him with the truth. Reference in this regard may be made to the case of *Khuda Dad versus Ghulam Qasim and six others* (PLJ 2001 Cr.C. (Lahore) 499).

It was also argued by learned DPG that there is no enmity of the prosecution witnesses with the appellant, therefore, their statements may be relied upon but it is by now well-settled that non-existence of enmity between the accused and the prosecution witnesses does not mean that the evidence of such witnesses should be relied upon blindly. Reliance in this context may be placed upon the cases reported as *Ghulam Mustafa alias Ziau versus The State* (PLD 1991 SC 718) and *Haoon alias Harooni versus The State and another* (1995 SCMR 1627).

As mentioned earlier, there are material contradictions in the statements of prosecution witnesses and the ocular account of the prosecution is contradicted by the medical evidence furnished by Dr. Muhammad Akram, therefore, the evidence of above-mentioned eye-witnesses cannot be relied upon

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As mentioned earlier, there are material contradictions in the statements of prosecution witnesses and the ocular account of the prosecution is contradicted by the medical evidence furnished by Dr. Muhammad Akram, therefore, the evidence of above-mentioned eye-witnesses cannot be relied upon

blindly without independent corroboration which is very much lacking in this case.

15. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove as case against the appellant beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In *'Tariq Pervez versus The State'* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:---

> '5.....The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram versus The State'* (2009 SCMR 230), at page 236, observed as under:---

> '13.....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in

favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. In the light of above discussion, we are of the view that as the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we **accept** the **Criminal Appeal No. 334-ATA of 2013** filed by Khawar Masih appellant, set aside his convictions and sentences recorded by the learned Judge, Anti-Terrorism Court, Bahawalpur *vide* judgment dated 28.8.2013 and acquit him of the charges by extending him the benefit of doubt. Khawar Masih appellant is in custody, he be released forthwith if not required in any other case.

A

Conviction/Sentences Set Aside/Acquittal Ordered/Appeal Allowed.

2016 SD 610

Before Malik Shahzad Ahmad Khan and *Mazhar Iqbal Sidhu, JJ.* (Lahore)

Cr. Misc. No. 3061-B of 2016 accepted on 22.3.2016.

ATTA ULLAH KHAN---Petitioner

versus

THE STATE, ETC.---Respondents

Control of Narcotic Substances Act (XXV of 1997)---

S. 9(b)(c). Fact that accused is involved in ten other cases for Narcotic offences would not disentitle him to grant of bail when case against him requires further inquiry whether it falls under S. 9(b) or under S. 9(c). With this finding, High Court accepting bail application of accused and releasing him on bail. (P. 611)

Saif-ul-Haq Ziay for petitioner.

Ch. Muhammad Akram Tahir, DDPP for State with *Muhammad Ayub,* ASI.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Atta Ullah Khan petitioner moved the present petition for grant of post-arrest bail in case FIR No. 280, dated 20.12.2015, offence

under section 9(c) of the Control of Narcotic Substances Act, 1997 registered with Police Station Dawood Khail, District Mianwali.

2. Arguments heard and record perused.

3. As per prosecution case, on 20.12.2015 at 12:40 p.m., on the basis of spy information, the petitioner was apprehended by the police and 1300 grams of Charas was allegedly recovered from his possession. Although the weight of the allegedly recovered narcotic is higher than the maximum weight mentioned in section 9(b) of the Control of Narcotic Substances Act, 1997 but the quantity of narcotic substance which has brought the case of the present petitioner within the mischief of section 9(c) of Control of Narcotic Substances Act, 1997 is only 300 grams. Possibility cannot be ruled out that there may be some variation in the scale used by the complainant to weigh the allegedly recovered narcotic and a proper scale. Variations do occur in different scales. It will be determined after recording of evidence that what was the net weight of allegedly recovered narcotic and as to whether the case of the petitioner falls under section 9(b) or it comes under the ambit of section 9(c) of the Control of Narcotic Substances Act, 1997.

4. Although learned DDPP submits on instructions the petitioner is involved in 10 other criminal cases of similar nature but mere involvement of the petitioner in other cases by itself is no ground to refuse bail to him if otherwise he is entitled to the said concession on merits. Reference in this context may be made to the cases reported as *'Muhammad Rafique v. The State* (1997 SCMR 412) & *'Jamal-ud-Din alias Zubair Khan v. The State'* (2012 SCMR 573). In this view of the matter, we accept this petition and admit the petitioner to bail after arrest subject to his furnishing bail bonds in the sum of Rs. 200,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail Granted.

2016 P Cr. L J Note 35

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

FAROOQ AHMAD and 3 others---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos.1119 of 2008 and 419-J of 2012 and Murder Reference No.348 of 2009, heard on 26th March, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 100, 148 & 149---Qatl-i-amd, rioting, common object---Appreciation of evidence---Private defence, right of---Case being of two versions, court was required to analyse the prosecution version in order to ascertain its truthfulness or otherwise, whereas, the defence version was to be taken thereafter---Motive as alleged by the prosecution was not convincing, same was discarded and repelled---Story as narrated by eye-witnesses was highly improbable and prosecution witnesses had made dishonest omissions/improvements in their statements before the Trial Court on material aspects of the case---Unexplained delay of eighteen hours had occurred in the postmortem examination of the deceased, which was suggestive of the fact that the complainant and other eye-witnesses were not present at the time of occurrence, and said delay was used by the prosecution in concocting a false story and procuring false eye-witnesses of the occurrence---No allegation was levelled to the effect that accused had inflicted butt blows of pistol on the person of the deceased---None of the Sotas allegedly recovered from accused persons was alleged to have been stained with human blood---No report of the Chemical Examiner or Serologist was on record to establish that said sotas were stained with human blood---Alleged recoveries of sotas and pistol, was of no avail to prosecution---Number of circumstances existed which had created serious doubt about the truthfulness of prosecution story---Evidence of eye-witnesses was not worthy of reliance, as they had made dishonest omissions/improvements in their statements---Defence plea had got support from the evidence of court witnesses and defence witnesses---Accused was established to have right of private defence, which extended to cause death of the deceased---Case of accused persons fell within four corners of general Exception as provided under S.100 (thirdly) P.P.C.---Prosecution had failed to prove its case

against accused persons beyond shadow of doubt, in circumstances---Conviction and sentences of accused persons awarded to them by the Trial Court, were set aside and they were acquitted and released, in circumstances.

Ashiq Hussain alias Muhammad Ashraf v. State PLD 1994 SC 879; Amin Ali and another v. The State 2011 SCMR 323; Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. Esab Khan and others 1991 SCMR 61 rel.

(b) Criminal trial---

----Witness---Dishonest improvements in statement of witness---If a witness would make dishonest improvements in his statement, then he could not be relied upon to maintain the conviction of accused on a capital charge.

Muhammad Rafique and others v. The State and others 2010 SCMR 385 rel.

(c) Criminal trial---

----Medical evidence---Scope---Medical evidence could confirm the ocular evidence with regard to the seat of injury, nature of injury, kind of weapon used in the occurrence; but it would not connect accused with the commission of offence.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(d) Criminal trial---

----Evidence---If the prosecution evidence was disbelieved by the court, then the statement of an accused was to be accepted or rejected as a whole---Legally not possible to accept the inculpatory part of the statement of accused and to reject the exculpatory part of the same statement.

Muhammad Asghar v. The State PLD 2008 SC 513 rel.

Ch. Muhammad Inayat Ullah Cheema for Appellants (in Criminal Appeal No.1119 of 2008).

Maqbool Ahmad Qureshi for Appellant (in Criminal Appeal No.419-J of 2012).

Arshad Mahmood, Deputy Prosecutor General for the State.

Waseem Talib Chattha for the Complainant.

Date of hearing: 26th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 1119 of 2008 titled as "Farooq Ahmad etc. v. The State" filed by Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad and Muhammad Saleem, appellants, Criminal Appeal No.419-J of 2012 titled as "Manzoor Ahmad v. The State" filed by Manzoor Ahmad, appellant and Murder Reference No.348 of 2009 titled as "The State v. Farooq Ahmad etc." submitted by the learned trial court for confirmation or otherwise of the sentence of death awarded to Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad, Manzoor Ahmad and Muhammad Saleem, appellants as all these matters have arisen out of the same judgment dated 30.09.2008 passed by the learned Additional Sessions Judge, Faisalabad in case FIR No.733 dated 07.12.2006, offences under sections 302, 148 and 149, P.P.C., registered at Police Station Dijkot District Faisalabad whereby, Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad, Manzoor Ahmad and Muhammad Saleem appellants were convicted under section 148, P.P.C. and all of them were sentenced to rigorous imprisonment for three years with a direction to pay Rs.10,000/- (rupees ten thousand) each as fine and in default thereof to further undergo simple imprisonment for one year. All the appellants were also convicted under section 302(b)/149, P.P.C. and sentenced to death with the direction to pay Rs.3,00,000/- (rupees three lac) each as compensation to the legal heirs of deceased Khalid Mahmood as envisaged under section 544-A of the Code of Criminal Procedure and in default thereof to further undergo simple imprisonment for six months each.

2. Brief facts of the case, as disclosed by Allah Rakha, complainant (PW-7) in his 'Fard Biyan' (Exh-PB), on the basis of which formal FIR (Exh-PB/1) was registered, are that he (complainant) was resident of Chak No.85/J.B. and cultivator by profession. On 07.12.2006 at about 03.30 p.m, his son Khalid Mahmood, Bashir Ahmad (PW-8) and Allah Rakha (given up. PW) were coming back from their fields to their home. When they reached in front of Haveli of Sardar Jatt, Maqbool Ahmad, Farooq Ahmad, Manzoor Ahmad, Maqsood Ahmad (appellants) armed with Sotas and Muhammad Saleem alias Bagga (appellant) armed with pistol came there while raising lalkaras that Khalid Mahmood (deceased) would be taught a lesson for capturing their pigeon. Meanwhile, Maqbool Ahmad, Farooq Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants) took Khalid Mahmood (deceased) in their Jhapha and dragged him inside their residential house whereas, Saleem alias Bagga (appellant), armed with pistol, kept on threatening that if any one would dare to come

close, he will he done to death. The appellants, thereafter, took Khalid Mahmood, while giving him beating and dragging, to the house of their paternal grandfather Barkat Ali Jatt. Bashir Ahmad (PW-8) and Allah Rakha (given up PW) ran to the complainant in his fields and told the above incident to him. Upon which, he (complainant) along with Bashir Ahmad (PW-8) and Allah Rakha (given up PW) rushed towards the house of above said Barkat Ali where they saw that Maqbool Ahmad, Farooq Ahmad, Manzoor Ahmad, Maqsood Ahmad and Saleem alias Bagga gave Sota blows and butt blows of pistol to Khalid Mahmood (deceased), which landed on his forehead, right and left hands, both arms, both knees, left shin, back and different parts of body. Khalid Mahmood (deceased) became unconscious and fell down in the courtyard. The appellants kept on giving beatings to Khalid Mahmood with Sotas. They (complainant party) raised hue and cry, which attracted other inhabitants of Mohallah who entered the courtyard of the house, upon which, the appellants fled away from the spot. They took care of Khalid Mahmood (deceased) who succumbed to the injuries. The motive for the occurrence, as stated by the complainant in the FIR (Exh-PB/1), was that Khalid Mahmood (deceased) and Maqbool Ahmad etc. (appellants) had pigeons and few days prior to the occurrence, during a competition of pigeons, a quarrel took place between Khalid Mahmood (deceased) and the appellants and the matter was patched up by the intervention of the respectables of the locality but Maqbool Ahmad etc. took the incident as their insult and due to this grudge, the appellants have committed the murder of Khalid Mahmood (deceased).

3. Farooq, Maqbool and Muhammad Saleem (appellants) were arrested in this case on 18.12.2006 whereas, Maqsood and Manzoor (appellants) were arrested on 05.01.2007 by Muhammad Ashraf S.I. (CW-1). On 29.12.2006, Muhammad Saleem (appellant), while in police custody, after making disclosure, got recovered .30 bore pistol (P-4) which was taken into possession vide recovery memo Exh-PG. On the same day, Farooq Ahmad (appellant), while in police custody, after making disclosure, got recovered Sota (P-5), which was taken into possession vide recovery memo Exh-PH. On the same day i.e. 29.12.2006, Maqbool Ahmad (appellant), while in police custody, after making disclosure, got recovered Sota (P-6) which was taken into possession vide recovery memo (Exh-PJ). After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal

Procedure, 1898 framed charge against the appellants on 12.04.2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced nine witnesses, during the trial. Allah Rakha, complainant (PW-7) any Bashir Ahmad (PW-8) furnished the ocular account of the case Bashir Ahmad (PW-8) is also the witness of recovery of .30 bore pistol (P-4), Sota (P-5) and Sota (P-6) recovered on the pointations of Muhammad Saleem, Farooq Ahmad and Maqbool Ahmad (appellants), respectively.

The medical evidence was furnished by Dr. Pervaiz Akhtar (PW-5), who conducted the postmortem examination on the dead body of Khalid Mahmood (deceased). Dr Mehmooda Khurshid, who medically examined Mst. Yasmeen Akhtar (DW-1), was also examined as CW-2.

Muhammad Aslam, S.I. (PW-9) and Muhammad Ashraf, S.I (CW-1) are the Investigating Officers of the case. Akbar Ali Nizami, Draftsman (PW-1), Khadim Hussain (PW-2), Nazakat Ali, S.I. (PW-3), Ali Asghar 977/C (PW-4), Muhammad Afzal, ASI (PW-6) are the formal witnesses. The prosecution produced documentary evidence in the shape of scaled site plan, in duplicate, of the place of occurrence (Exh-PA and Exh-PA/1), statement (Fard Biyan) of the complainant (Exh-PB), FIR (Exh-PB/1), recovery memo of last worn clothes of the deceased (Exh-PC), postmortem report along with pictorial diagrams of the deceased (Exh-PD, Exh-PD/1 and Exh-PD/2), injury statement (Exh-PE), inquest report (Exh-PF), recovery memo of .30 bore pistol P-4 (Exh-PG), recovery memo of Sota P-5 (Exh-PH), recovery memo of Sota P-6 (Exh-PJ), rough site plan of the place of occurrence (Exh-PK) and closed its evidence.

The statements of the appellants except Muhammad Saleem alias Bagga (appellant), under Section 342 of the Code of Criminal Procedure, were recorded on 15.09.2008 whereas, statement of Muhammad Saleem alias Bagga (appellant) was recorded on 20.09.2008. All the appellants refuted the allegations levelled against them and professed their innocence. In his statement recorded under section 342 of the Code of Criminal Procedure, Farooq Ahmad (appellant) took a specific plea of right of self defence whereas, Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants) relied on the plea taken by Farooq Ahmad (appellant) in his statement recorded under section 342 of the Code of Criminal Procedure whereas, Muhammad Saleem (appellant) while answering to a question that "Why this case against you and why the PWs have deposed against you?", replied as under:-

"The case is absolutely false against me. The PWs are related inter se and deposed against me falsely at the behest of the complainant to support the prosecution version. I am running a Shop in the village and the complainant used to get commodities from my shop on credit and Rs.3,000/- were due against the complainant. When I demanded the said amount, the complainant became furiated and a quarrel took place between the complainant and me a few days prior to the occurrence. The complainant extended threats to me of dire consequences and in the meantime Khalid Mehmood was murdered and the complainant involved me in this case falsely due to the above said grudge and due to the relationship with Farooq my co-accused."

The appellants did not opt to make statements on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them, however, they produced Mst. Yasmeen Akhtar (DW-1) and Mst. Arifa Parveen (DW-2) in their defence. They also got examined Dr Mehmooda Khurshid as CW-2. They produced copies of statements of Bashir Ahmad PW-8 (Exh-DA and Exh-DB), copy of school leaving certificate of Yasmeen Akhtar DW-1 (Exh-DC), medico legal report of Mst. Yasmeen Akhtar (Exh .CW-2/A) and report of Chemical Examiner (Exh-CW-2/B) in their defence.

5. The learned trial court vide its judgment dated 30.09.2008, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

6. Learned counsel for the appellants, in support of these appeals, contends that the prosecution story as stated in the FIR (Exh -PB/1) and brought before the learned trial court through the statements of Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) is highly doubtful and improbable and does not appeal to common sense; that it is the case of the complainant that he was in the fields when he was informed by Bashir Ahmad (PW-8) and Allah Rakha (given up PW) that his son Khalid Mahmood (deceased) was assaulted upon by the appellants, they dragged and took him to their house and thereafter, the appellants took Khalid Mahmood (deceased) to the house of their grandfather, upon which, they (complainant party) came there and witnessed the occurrence which is highly improbable because the PWs did not try to rescue the deceased; that the dead body of the deceased, even as per scaled site plan, was lying on a cot in the Veranda of the house, whereas, according to the prosecution story, the injuries to the deceased were caused in the courtyard of the house; that the recovery of Sotas (P-5 and P-6), allegedly recovered at the instance of Farooq Ahmad and Maqbool Ahmad (appellants), respectively, is inconsequential as none of the said

Sotas was blood stained; that even the recovery of .30 bore pistol (P-4), allegedly recovered at the instance of Muhammad Saleem (appellant) is inconsequential as no fire shot was made during the occurrence; that motive for the occurrence, as alleged in the FIR (Exh-PB/1) has not been proved as no witness qua the motive was produced by the prosecution before the learned trial court who has stated that in his presence incident of motive took place over pigeons; that even it was concluded by Muhammad Ashraf, S.I. (C.W-1), the Investigating Officer of this case that the motive as alleged by the prosecution was found incorrect during investigation; that the version of Farooq Ahmad (appellant) is more probable than the prosecution story; that as per prosecution's own case, the dead body of the deceased was found lying in the house of paternal grandfather of Farooq Ahmad (appellant) and it was his (Farooq Ahmad appellant's) first version before the police after his arrest that the deceased was committing rape with his cousin Mst. Yasmeen Akhtar, thus, he (Farooq Ahmad appellant) gave beatings to him, which has been admitted by Muhammad Ashraf, S.I. (CW-1) and this version is also supported by the statement of Mst. Yasmeen Akhtar (DW-1) who has stated that Khalid Mahmood (deceased) was committing rape with her and on seeing this, Farooq Ahmad (appellant) killed him; that this version of Farooq Ahmad (appellant) is further corroborated by the statement of Dr Mehmooda Khurshid (CW-2); that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, both these appeals be accepted and the appellants may be acquitted from the charges.

7. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposes both these appeals on the grounds that there was no reason for the complainant and other witness to falsely depose against the appellants especially when real son of the complainant was murdered in this case; that the complainant and Bashir Ahmad (PW-8) are the residents of the same village where this incident took place and the matter was reported to the police within two hours of its happening despite the fact that distance between the police station and the place of occurrence is thirteen kilometers; that the complainant has given natural narration of events by stating that he was informed by Bashir Ahmad (PW-8) and Allah Rakha (given up PW) that his son was captured, dragged and taken to their house by the appellants, upon which, they (complainant party) came at the spot and witnessed the occurrence; that the ocular account furnished by Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) is fully supported by the medical evidence that the deceased received thirteen injuries on his person which is supported

by the postmortem report along with pictorial diagrams of the deceased, which are available on the record as Exh-PD, Exh-PD/1 and Exh-PD/2; that prosecution case is further corroborated by the recovery of .30 bore pistol (P-4) at the instance of Muhammad Saleem (appellant), recovery of Sota (P-5) at the instance of Farooq Ahmad (appellant) and recovery of Sota (P-6) at the instance of Maqbool Ahmad (appellant); that the motive for the occurrence has fully been proved by the prosecution; that the sentence of death was rightly awarded to the appellants by the learned trial court and the same may be maintained, appeals may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the appellants, learned Deputy Prosecutor General and have also gone through the record with their able assistance.

9. It is a case of two versions, one mentioned in the FIR (Exh-PB/1) and brought on the record through the statements of Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) and second version is the plea taken by Farooq Ahmad, appellant in his statement recorded under section 342 of the Code of Criminal Procedure which was relied upon by Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants), evidence produced and suggestions put to the prosecution witnesses on behalf of the defence. In such like situation, firstly, the Court is required to analyze the prosecution version in order to ascertain its truthfulness or otherwise, whereas, the defence version is to be taken thereafter. In this respect, we are guided by the judgment of the Hon ble Supreme Court of Pakistan passed in the case reported as Ashiq Hussain alias Muhammad Ashraf v. State" (PLD 1994 SC 879) wherein, at page 883, the Hon'ble Supreme Court has been pleased to observe as under:-

"9. ...The proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counterversions, if

the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors. the favouring plea in defence and the total effect should be estimated in relation to the questions, viz., is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Reference in this respect may also be made to the case of "Amin Ali and another v. The State" (2011 SCMR 323).

10. The detail of the prosecution story has already been mentioned in paragraph No.2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that Khalid Mahmood (deceased) was captured by the appellants when he was going to his house along with Bashir Ahmad (PW-8) and Allah Rakha (given up PW) and taken to the house of appellants where from, he was taken to the house of grandfather of Farooq Ahmad (appellant) namely, Barkat Ali. Bashir Ahmad (PW-8) and Allah Rakha (given up PW) informed the complainant about the incident who was working in his fields. Upon which, the complainant along with the above said PWs rushed towards the place of occurrence where they saw that the appellants were giving beatings to Khalid Mahmood (deceased) with Sotas and butt blows of pistol, as a result whereof, Khalid Mahmood (deceased) succumbed to the injuries at the spot.

11. The appellants, five in numbers, have been awarded death penalty for the murder of Khalid Mahmood (deceased). The prosecution has given the motive behind the occurrence that the appellants were keeping pigeons whereas, Khalid Mahmood (deceased) was also a "Kabotarbaz" and a few days prior to the occurrence, the appellants quarrelled with Khalid Mahmood (deceased) over pigeons, therefore, the

appellants due to abovementioned grudge committed the murder of Khalid Mahmood (deceased) whereas, the case of defence is that in fact Khalid Mahmood deceased was committing rape with a minor girl namely, Yasmeen Akhtar (DW-1), who was Phophizad' (paternal cousin) of Farooq Ahmad (appellant), therefore, the said appellant (Farooq Ahmad), while using his right of private defence, committed the murder of Khalid Mahmood (deceased) with `Thapi (a stick used for washing clothes). We, therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan, in the cases of Ashiq Hussain alias Muhammad Ashraf v. State and Amin Ali and another v. The State supra, will first examine the case of the prosecution to see as to whether the prosecution has been able to prove its case or not because it is the duty of the prosecution to prove the guilt of the accused.

12. The prosecution evidence qua motive was furnished by Allah Rakha, complainant (PW-7). He has not given any specific time, date or place of the quarrel over pigeons, which allegedly took place between the appellants and Khalid Mahmood (deceased). Although he stated that the people of the locality intervened and effected a compromise between Khalid Mahmood (deceased) and the accused party but none from the persons who intervened and effected the compromise between the parties was produced by the prosecution in the witness box. The complainant has also admitted during his cross-examination that he did not produce any pigeon Khudda' to the Investigating Officer and made an excuse that the Investigating Officer did not come to him for the said purpose. The Investigating Officer Muhammad Ashraf S.I. (CW-1) has also conceded during his cross-examination that motive part of the prosecution was without any evidence and during investigation of the case, the same was found to be incorrect. Even otherwise, it does not appeal to common sense that for the abovementioned petty reason i.e. quarrel over pigeons, the appellants would first drag Khalid Mahmood (deceased) inside their residential house and from there, they will drag him to the residential house of their grandfather namely, Barkat Ali. We are, therefore, of the view that the motive as alleged by the prosecution is not convincing, therefore, the same is hereby discarded and repelled.

13. The prosecution case, as set forth in the FIR (Exh-PB/1) was that on 07.12.2006 at 03.30 p.m, Khalid Mahmood (deceased) was captured by the appellants and was firstly taken to the residential house of the appellants, then he was dragged to the residential house of grandfather of the appellants namely, Barkat Ali where he was given beatings in the courtyard of said house. The story narrated by the eye-witnesses namely, Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) is highly

improbable. It is not understandable as to why the appellants first dragged Khalid Mahmood (deceased) inside their own residential house and thereafter, they dragged him towards the residential house of their paternal grandfather, where he was done to death. We have also noted that according to scaled site plan (Exh-PA), the dead body of Khalid Mahmood (deceased) was found on a cot lying in the Veranda of the house of abovementioned Barkat Ali. As the story set forth in the FIR (Exh-PB/1) regarding inflicting of injuries by the appellants on the person of Khalid Mahmood (deceased) in the courtyard of their grandfather was not in line with the scaled site plan (Exh-PA), therefore, the eye-witnesses of the prosecution namely, Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) while appearing before the learned trial court deliberately did not mention that Khalid Mahmood (deceased) was inflicted injuries in the courtyard of Barkat Ali and they made dishonest omissions/improvements in their statements. Allah Rakha, complainant (PW-7) stated that after the occurrence, they (PWs) placed the dead body of Khalid Mahmood (deceased) on a cot. The complainant was confronted with his previous statement and the omissions in his statement and the improvements made by him were duly brought on the record. The relevant part of the statement of complainant Allah Rakha (PW-7) at pages 36 and 38 of the paper book is reproduced hereunder for ready reference:-

At page 36:

"...I recorded in my statement under section 154, Cr.P.C. Ex.P.B that the accused Maqbool etc. in courtyard of the house of Barkat Ali were giving beating to Khalid Mehmood with sotas and with butt of pistol. (Confronted with Ex.P.B where it is so recorded). Today in the court in my examination-in-chief the injuries to the deceased by the accused persons in the courtyard I deliberately omitted. The word "Courtyard" was omitted in my statement because it creates contradictions recorded during investigation. I do not know if I got recorded in Ex.P.B that the deceased Khalid Mehmood my son after receiving injuries fell in the courtyard of the house of Barkat Ali. (Confronted with Ex.P.B where it is so recorded). The word "courtyard is specifically mentioned..."

At page 38:

"I recorded in my statement Ex.P.B that my son when died his dead body was placed on a cot which was lying there (Confronted with Ex.P.B where it is not recorded)..."

Similarly the relevant part of the statement of Bashir Ahmad (PW-8), at page 44 of the paper book, reeds as under:-

"...I recorded that the victim Khalid Mehmood deceased after receiving injuries with sotas fell down unconsciously. (Confronted with Ex.D.A where the PW omitted the word "Courtyard"). Again confronted with PW he stated that deceased Khalid fell down in the courtyard..."

It is clear from the above mentioned portions of the statements of cross-examination of Allah Rakha, complainant (PW-7) and Bashir Ahmad (PW-8) that they made dishonest omissions/improvements in their statements before the learned trial court on material aspects of the case. It is by now well settled law that if a witness makes dishonest improvements in his statement then he cannot be relied upon to maintain the conviction of an accused on a capital charge. Reference in this context may be made to the case of "Muhammad Rafique and others v. The State and others" (2010 SCMR 385) wherein, at page 396, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:-

"24. ...This Court in the case of Saeed Muhammad Shah v. State 1993 SCMR 550 observed that if a witness improves his statement on material aspects of the case then such improvement is not worthy of reliance and the evidence of such witness requires corroboration. In the case of Khalid Javed v. State 2003 SCMR 1419 while reiterating the above rule, it was further observed that such witness is to be considered to be wholly unreliable and it is not advisable to place explicit reliance upon his evidence."

14. We have also noted that the occurrence in this case took place on 07.12.2006 at 03.30 p.m., whereas, the postmortem examination on the dead body of Khalid Mahmood (deceased) was conducted on 08.12.2006 at 10.00 a.m. There is delay of more than eighteen hours in the postmortem examination of Khalid Mahmood (deceased). There is no plausible explanation for the abovementioned delay in the postmortem examination of the deceased. The said delay in the postmortem examination is suggestive of the fact that the complainant and other eye-witness were not present at the time of occurrence and delay in postmortem examination of the deceased was used by the prosecution in concocting a false story and procuring fake eye-witnesses of the occurrence. We may refer here the case of "Irshad Ahmed v. The State" (2011 SCMR 1190) wherein, it has been held that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the

prosecution before preparing police papers necessary for getting the postmortem examination of the dead body conducted.

15. The prosecution has also produced the evidence qua recovery of .30 bore pistol (P-4) at the instance. of Muhammad Saleem (appellant) and recovery of Sotas (P-5 and P-6) at the instance of Farooq Ahmad and Maqbool Ahmad (appellants), respectively. There was no allegation that any fire shot was made during the occurrence rather it was alleged that Muhammad Saleem (appellant) inflicted butt blows of pistol on the person of the deceased. None of the Sotas (clubs) allegedly recovered from Farooq Ahmad and Maqbool Ahmad (appellants) was alleged to have been stained with human blood. There is no report of the Chemical Examiner or Serologist to establish that the abovementioned Sotas were stained with human blood. Even it was not mentioned in the recovery memos of Sotas (Exh-PH and Exh-PJ) that the same were stained with blood. Similarly, it was not mentioned in the recovery memo of .30 bore pistol (P-4) that there was any blood on the butt of the said pistol. We are, therefore, of the view that the alleged recoveries of Sotas (P-5 and P-6) and pistol (P-4) are inconsequential and of no avail to the prosecution.

16. Insofar as medical evidence is concerned, it is by now well settled law that medical evidence may confirm the ocular evidence with regard to the seat of injury, of the injury, kind of weapon used in the occurrence but it would not connect the accused with the commission of the offence. Reference in this respect may be made to the case of "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "Mursal Kazmi alias Qamar Shah and another v. The State" (2009 SCMR 1410) and 'Altaf Hussain v. Fakhar Hussain and another (2008 SCMR 1103).

17. After considering all the aspects of the case, we have come to the conclusion that there are number of circumstances which have created serious doubt about the truthfulness of the prosecution story. The evidence of eyewitnesses is not worthy of reliance and they have also made dishonest omissions/improvements in their statements. We have already disbelieved the motive as alleged by the prosecution and the alleged recoveries of weapons of offence are also inconsequential due to the reason mentioned hereinabove. We are, therefore, of the view that the prosecution has miserably failed to prove its case against the appellants beyond shadow of doubt.

18. Now coming to the defence version of the appellants. We have noted that Farooq Ahmad (appellant) took the plea of private defence in his statement recorded under

section 342 of the Code of Criminal Procedure. His defence plea was also relied upon Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants) whereas, Muhammad Saleem (appellant) has simply denied his participation in the occurrence, in his statement recorded under the abovementioned provision of law. Farooq Ahmad (appellant) took the following plea in his statement recorded under section 342 of the Code of Criminal Procedure:-

"The case against me has been brought for the reason that I assaulted the deceased Khalid Mehmood when he was assaulting with rape Mst. Yasmeen my (Phuphi zad) a minor girl and acted in defence. The PWs who are closely related has not seen the occurrence and brought this false story with false motive. Involving the whole family. Mst. Yasmeen daughter of Muhammad Yaqoob grand daughter of Rehmat Ali was born on 06.06.1993. She is daughter of Hakim Bibi daughter of Barkat Ali. She was found alone in the house of Barkat Ali my grand father and her grand maternal father by Khalid Mehmood deceased. My house and my grand father's house are adjacent, having contiguous wall. Khalid Mehmood assaulted Yasmeen for rape in the veranda over the cot. I came to know of it there was lying a Thapi (a stick for washing clothes). I gave him injuries as along as he remained committing Zina-bil-Jabar with her. I stopped when he stopped. The eye-witnesses were not been there. There are 13 injuries on the person of the deceased which were given in 13 seconds. The statement of complainant PW7 at page 2 starting from last 3rd line of cross examination dated 01.11.2007 falsifies itself the occurrence having seen by PWs which goes as follows. "It is my case that my son Khalid Mehmood deceased was abducted from the Haveli of Sardar and was taken covering distance of 350 feet and took to the Barkat's house then PW went to the Haveli of Sardar, covering distance of 350 feet and from there went to Killa No.5 and 6 of Square No.46 and then came back to Haveli of Sardar and they again covered a distance of 350 feet and then the PWs saw the occurrence in, the house of Barkat grand father of accused. It is in evidence that Killa Nos.5 and 6 are a distance of 400 feet from the Haveli of Sardar which is at a distance of 350 feet from the house of Barkat Ali. It does not appeal to reasons that the two PWs after entrance of the deceased in the house of Barkat Ali through accused went to Haveli of Sardar, there from, went to Killa No.6 Square No.46, where the complainant was, thereafter covering again a distance of 400 feet and then 350 feet to reach the house of Barkat Ali and there saw the occurrence", which the doctor PW5 at page 4 last 5/6 lines has stated in the circumstances of the case that 13 injuries can be caused by a person in 13 seconds on a person who was committing rape. I have taken this version

before the police at the time of my arrest and this fact was put to the complainant PW7 who admitted at page 3 upper half of cross examination dated 01.11.2007. "Accused Farooq was arrested by police and he recorded his version before the police and he was examined by the police, that Khalid Mehmood deceased was committing rape with daughter of my phuphi named Yasmeen and Farooq inflicted injuries to deceased against assault for rape upon Yasmeen". The CW1 Muhammad Ashraf has admitted the whole version of accused Farooq at page 4 of his evidence upper half and page 5, 2nd and third line from upper. My first cousin Yasmeen was examined by the Medical Women as ordered by the court and DIG Police and her Medical Examination is Ex.CW2/A. I again repeat that the case against me is false due to above said reasons. My other relatives i.e. my three brothers namely Maqsood, Manzoor, Maqbool have been falsely involved due to my relationship with them.

No one from the PWs came at the place of occurrence as it is in evidence of PW9 Muhammad Aslam Awan SI at page 2 in the middle "the eyes of deceased were semi open as mentioned in para No.8 of inquest report when the dead body was dispatched to the hospital" and it is in evidence of PW5 Doctor Pervaiz Akhtar page 3 in cross-examination "when I examined the deceased mouth and eyes were closed. I endorsed the inquest report Ex.P.F in which eyes semi open and mouth closed. I do not know if some relative of the deceased closed the eyes of the deceased after inquest report prior to postmortem examination. In normal course the relative of the deceased usually closed the eyes of the deceased". I will examine Mst. Yasmeen in defence and her birth certificate evidence in defence."

Mst. Yasmeen Akhtar (DW-1) and Mst. Arifa Parveen (DW-2) also appeared in defence of Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants). Similarly, Muhammad Ashraf, S.I. (CW-1) and lady Dr Mehmooda Khurshid (CW-2) also appeared as Court Witness and the defence plea also gets support from their evidence. Mst. Yasmeen Akhtar (DW-1) aged about 15/16 years stated before the learned trial court that on 07.12.2006 at 2/3 p.m, Khalid Mahmood (deceased) started committing rape with her whereupon, she started crying. On her hue and cry, Farooq Ahmad (appellant) attracted to the spot and he inflicted injuries on the person of Khalid Mahmood (deceased) with the help of Thapi (a stick, used for washing clothes). She further stated that her statement was recorded by the police and the police took her to the Magistrate where her statement (Exh-DD) with regard to medical examination was recorded and 'thereafter, she was medically examined. Lady Dr Mahmooda Khurshid (CW-2) stated that on 29.12.2006 she medically

examined Yasmeen Akhtar (DW-1) and found that her hymen was torn and old healed tear was present. She sent four swabs for semens detection and grouping. On receipt of the report of the Chemical Examiner, according to which the abovementioned swabs were stained with semens, she opined that recent intercourse was committed with the victim. She further stated during her cross-examination that dead sperms can remain in orifice from seventeen to twenty-one days even after menstruation period. Muhammad Ashraf, S.I. (CW-1) has also stated that on 18.12.2006, he recorded the first version of Farooq Ahmad (appellant), according to which, at the time of occurrence, Khalid Mahmood (deceased) was committing zina bil jabr with his cousin namely, Yasmeen Akhtar, therefore, he along with Maqbool Ahmad (appellant) gave beatings to him. Although the abovementioned evidence was produced in the defence of Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants) but we are of the view that there is no need to discuss the said evidence because we have already disbelieved the prosecution evidence. Thus, we are left with the statement of Farooq Ahmad (appellant) which was recorded under section 342 of the Code of Criminal Procedure and the same was relied upon by Maqbool Ahmad, Maqsood Ahmad and Manzoor Ahmad (appellants), therefore, while scrutinizing the statement of Farooq Ahmad (appellant), this Court has to accept or reject the said statement in toto. According to Farooq Ahmad (appellant), at the time of occurrence Khalid Mahmood (deceased) was committing rape with his Phophizad' (paternal cousin) Mst. Yasmeen Akhtar (DW-1) and he took `Thapi' (stick used for washing clothes) and gave beatings to him. We are of the view that, in such situation, the said appellant had the right of private defence which also extends to cause death of the assailant as provided under Section 100 of the Pakistan Penal Code, which is reproduced hereunder:-

"100. When the right of private defence of the body extends to causing death.---The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

Firstly: .....;

Secondly: .....;

Thirdly: An assault with the intention of committing rape;

Fourthly: .....;

Fifthly: .....;

Sixthly: .....;

It is evident from the perusal of section 100 (thirdly) P.P.C. that the right of private defence of the body will extend to the voluntary causing the death of the assailant, if the assailant launches an assault with the intention of committing rape, whereas, in the instant case Khalid Mahmood (deceased) was virtually committing rape with Mst. Yasmeen Akhtar (DW-1). The case of the appellants, therefore, squarely falls within the four corners of general exception as provided under section 100 (thirdly) P.P.C.

19. It is by now well settled law that if the prosecution evidence is disbelieved by the court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statement of the appellant and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of "Muhammad Asghar v. The State" (PLD 2008 SC 513). The relevant paragraph of the said, judgment at page 520 is reproduced hereunder for ready reference:-

"8. ...It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of Shabbir Ahmad v. The State PLD 1995 SC 343 and The State v. Muhammad Hanif and 5 others 1992 SCMR 2047. It has been held by this Court in the judgment reported as Waqar Ahmad v. Shaukat Ali and others 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weaknesses of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

20. It is true that Farooq Ahmad (appellant) has admitted in his statement recorded under section 342 of the Code of Criminal Procedure that he inflicted blows on the person of Khalid Mahmood (deceased) with Thapi (stick used for washing clothes) but at the same time, he has also stated that Khalid Mahmood (deceased) was

committing rape with his cousin (Phophizad) namely, Mst. Yasmeen Akhtar (DW-1) and he exercised his right of private defence. In view of the above, as we have already discarded the prosecution evidence, the appellants cannot be awarded punishment on the basis of statement of Farooq Ahmad (appellant) recorded under section 342 of the Code of Criminal Procedure, by accepting the inculpatory part of said statement wherein, he has stated that he (Farooq Ahmad appellant) inflicted injuries on the person of Khalid Mahmood (deceased) with Thapi and by rejecting exculpatory part of the same statement wherein, he has stated that he (appellant) inflicted injuries on the person of Khalid Mahmood (deceased) in the right of private defence of the body of his cousin. We are fortified in our above mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of "Sultan Khan v. Sher Khan and others (PLD 1991 SC 520) and "Ghulam Qadir v. Esab Khan and others" (1991 SCMR 61).

21. In the light of above discussion, we accept the Criminal Appeal No.1119 of 2008 filed by Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad and Muhammad Saleem (appellants) and Criminal Appeal No.419-J of 2012 filed by Manzoor Ahmad (appellant), set aside the impugned judgment dated 30.09.2008 passed by learned Additional Sessions Judge, Faisalabad. Resultantly the convictions and sentences of the appellants awarded by the learned Additional Sessions Judge, Faisalabad, are set aside and they are acquitted from the charges. All the appellants are in custody, they be released forthwith if not required to be detained in any other case.

22. Murder Reference No.348 of 2009 is answered in the NEGATIVE and the sentence of death of Farooq Ahmad, Maqbool Ahmad, Maqsood Ahmad, Manzoor Ahmad and Muhammad Saleem convicts is NOT CONFIRMED.

HBT/F-16/L **Appeal accepted.**

2015 M L D 1473

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. GOHAR FATIMA and others---Petitioners.

versus

FAROOQ AHMED LODHI and 3 others---Respondents

Writ Petition No.2899 of 2013, heard on 12th February, 2014.

Guardians and Wards Act (VIII of 1890)---

----S.25---Constitution of Pakistan, Art. 199---Constitutional petition---Custody of minor---Father of minor had died and mother had contracted second marriage---Minor was in custody of maternal grand parents---Application for custody of minor filed by paternal grand-parents was accepted on the ground that evidence of respondents (paternal grand parents) was not subjected to cross examination---Validity---First application for custody of minor was dismissed on merits and it was held that welfare of the minor was with the mother---Welfare of minor had been held with the paternal grand-parents in the second application for custody of minor while accepting the same---Examination-in-chief of the witnesses of paternal grand-parents was recorded and their affidavits were also exhibited in evidence on the same day but without providing any opportunity to cross examine the said witnesses impugned order was passed---Nothing was on record that any opportunity to cross examine the witnesses of paternal grand-parents was provided to the mother and she refused to cross examine the said witnesses---Right to cross examine the said witnesses had illegally been closed by the Guardian Court---Right to cross examine the witnesses could not be closed on the day when there was neither any examination-in-chief of the witnesses nor their affidavits were exhibited in evidence---Impugned orders/judgments passed by the courts below were set aside---Case was remanded by the High Court with the direction to provide opportunity to the mother to cross examine the witnesses of applicants and also produce evidence in rebuttal---Constitutional petition was accepted in circumstances.

Muhammad Umar Awan for Petitioners.

Basharat Ullah Khan for Respondents.

Date of hearing: 12th February, 2014.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This constitutional petition has been filed against the impugned order dated 21-2-2013, passed by learned Judge Guardian Court, Rawalpindi, whereby the application under section 25 of the Guardians and Wards Act, 1890, filed by respondents Nos.1 and 2 for the custody of the minor Muhammad Hussain was accepted, as well as, against the impugned judgment dated 12-11-2013, passed by learned Additional District Judge, Rawalpindi, whereby the appeal filed against the above mentioned order was dismissed.

2. As per brief facts of the present case, respondents Nos.1 and 2 filed an application under section 25 of the Guardians and Wards Act, 1890 against the petitioner No.1 and Abdul Latif Minhas (since died during the pendency of guardian petition) for the custody of minor Muhammad Hussain by contending therein that they are real paternal grand parents of minor Muhammad Hussain. Mst. Gohar Fatima (petitioner No.1) was married with Captain Farooq Ahmad Lodhi, who died on 10-7-2007. After the death of son of respondents Nos.1 and 2, the petitioner No.1, shifted to her parents house, whereas the minor Muhammad Hussain was born later on. It was further averred in the guardian petition that Mst. Gohar Fatima contracted second marriage with Iftikhar Ali on 14-12-2009 and she was living with her husband, whereas the minor Muhammad Hussain was living at the mercy of the servants at the house of parents of petitioner No.1. It was further contended in the petition that parents of petitioner No.1 were not in a position to look after the minor, therefore, custody of the minor Muhammad Hussain be handed over to respondents Nos.1 and 2, as they were entitled for the same, being real paternal grandparents. Mst. Gohar Fatima (petitioner No.1) and Abdul Latif Minhas (since died during the pendency of guardian petition), resisted the application, filed by respondents Nos.1 and 2. The said application, filed by respondents Nos. 1 and 2 was accepted vide impugned order dated 21-2-2013, passed by learned Judge Guardian Court, Rawalpindi. The appeal

filed by the petitioners was dismissed vide the impugned judgment dated 12-11-2013, passed by learned Additional District Judge, Rawalpindi, hence the present constitutional petition before this court.

3. It is contended by learned counsel for the petitioners that the impugned decisions of the courts below are result of misreading and non-reading of evidence available on the record; that the first application for the custody of the minor Muhammad Hussain, filed by respondents Nos.1 and 2 was dismissed on merits by the learned Judge Guardian Court, Rawalpindi vide the order dated 7-6-2008 and in that order, the learned Judge has specifically mentioned that the welfare of the minor lies with his real mother (petitioner No.1) but subsequently the second application, filed by respondents Nos.1 and 2 has been accepted without any legal justification; that the second application of the above mentioned respondents was accepted mainly on the ground that the petitioner No.1 has contracted second marriage but mere this fact that the petitioner No.1 has contracted second marriage would not disentitle her to the custody of the minor; that the impugned decisions have been passed on the grounds that the witnesses of respondents Nos.1 and 2 were not cross examined and their evidence remained un-rebutted but the statements of the witnesses of respondents Nos.1 and 2 were recorded on 21-2-2013 and without providing any opportunity of cross examination to the petitioner, on the same day, the impugned order dated 21-2-2013 was passed by the learned Judge Guardian Court, Rawalpindi whereby Guardian Petition filed by respondents Nos. 1 and 2 was accepted; that it has wrongly been held in the impugned decisions that the right to cross-examine the witnesses of respondents Nos.1 and 2 was closed on 6-1-2012 because no examination in chief of the above-mentioned witnesses was recorded by the learned Judge Guardian Court, Rawalpindi before 6-1-2012, therefore, the question of cross-examination on the witnesses of abovementioned respondents, does not arise; that even affidavits of witnesses of respondents Nos.1 and 2 were not exhibited on 5-10-2011 and the same were merely filed on the said date before the learned Judge Guardian Court, Rawalpindi; that after recording the examination in chief of the witnesses of respondents Nos.1 and 2 no opportunity was given to the petitioners to cross examine the said witnesses and to

produce evidence in rebuttal, therefore, the impugned decisions of the courts below are not sustainable in the eye of law.

4. This petition has vehemently been opposed by learned counsel for respondents Nos.1 and 2 on the grounds that the affidavits of the witnesses of respondents Nos.1 and 2 were submitted before the learned Judge Guardian Court on 15-10-2011 and if the same were not exhibited in evidence, then it can merely be termed a technicality; that the witnesses of the above mentioned respondents kept on appearing before the learned Judge Guardian Court, Rawalpindi on numerous dates of hearing but they were not cross-examined by learned counsel for the petitioners, therefore, right of cross examination of the petitioners was rightly closed vide order dated 6-1-2012; that as number of opportunities were already granted to the petitioners to cross-examine the witnesses of respondents Nos.1 and 2 therefore, there was absolutely no need for giving any further opportunity or cross-examination to the petitioners; that as the petitioner No.1 has contracted a second marriage, therefore, it is in the welfare of the minor to hand over his custody to respondents Nos.1 and 2; that as there was no evidence in rebuttal to the evidence produced by respondents Nos.1 and 2, therefore, the impugned decisions of the courts below have rightly been passed against the petitioners; that there is no substance in the instant petition, hence the same may be dismissed.

5. Arguments heard and record perused.

6. Petitioner No.1 is real mother of the minor Muhammad Hussain, whereas respondents Nos.1 and 2 are paternal grandparents of the minor. The first application for the custody of the minor, filed by respondents Nos.1 and 2 was dismissed on merits by the learned Judge Guardian Court, Rawalpindi vide order dated 7-6-2008 and it was held that as petitioner No.1 is real mother of the minor Muhammad Hussain. therefore, the welfare of the minor lies with the said petitioner. The second petition for the custody of the minor, moved by respondents Nos.1 and 2 has been accepted by the learned Judge Guardian Court, Rawalpindi mainly on the ground that the evidence of said respondents was not subjected to cross examination and the same remained unchallenged and un-rebutted, therefore, it was held that welfare of the minor lies with the above mentioned respondents. I have noted that examination-in-

chief of the witnesses of abovementioned respondents namely Mst. Musarrat Farooq Lodhi (AW-1) and Farooq Ahmad Lodhi (AW-2) was recorded on 21-2-2013 and their affidavits were also exhibited in evidence as Exh.P and Exh.P2 on the same day i.e.,

21-2-2013 but without providing any opportunity to cross-examine the said witnesses, the impugned order dated 21-2-2013 was passed by the learned Judge Guardian Court, Rawalpindi on the same day i.e. 21-3-2013 whereby application for the custody of minor namely Muhammad Hussain, moved by respondents Nos.1 and 2 was accepted. It is not mentioned under the statements of the above-mentioned witnesses that any opportunity to cross-examine the above-mentioned witnesses was provided to the petitioners and they refused to cross-examine the said witnesses. Although the affidavits of the above mentioned witnesses were submitted before the court on 15-10-2011 but admittedly neither the said affidavits were exhibited in evidence nor examination-in-chief of the above mentioned witnesses were recorded on the said date, therefore, it has been wrongly held in the impugned decisions of the courts below that the right to cross examine the above mentioned witnesses was given to the petitioners but they failed to cross examine he witnesses of respondents Nos.1 and 2. As mentioned earlier, no examination-in-chief of the witnesses of respondents Nos.1 and 2 was recorded on 15-10-2011, therefore, the right to cross examine the said witnesses has illegally been closed by the learned Judge Guardian Court Rawalpindi on 6-1-2013. Furthermore, the examination-in-chief of the witnesses of respondents Nos.1 and 2 was recorded on 21-2-2013 and their affidavits were also exhibited on the same day i.e., 21-2-2013, therefore, the right to cross examine the said witnesses cannot be closed on 6-1-2012, when there was neither any examination-in-chief of the witnesses of the respondents Nos.1 and 2 nor their affidavits were exhibited in evidence.

7. In the light of above discussion, this constitutional petition is hereby accepted and the impugned order dated 21-2-2013, passed by learned Judge Guardian Court, Rawalpindi, as well as, the impugned judgment dated 12-11-2013, passed by learned Additional District Judge, Rawalpindi are hereby set aside. The case is remanded back to the learned Judge Guardian Court, Rawalpindi with the direction that he will

provide opportunity to the petitioners to cross examine the witnesses of respondents Nos.1 and 2 and thereafter he will also provide an opportunity to the petitioners to produce evidence in rebuttal. The petition under section 25 of the Guardians and Wards Act, 1890, filed by respondents Nos. 1 and 2 shall be deemed to be pending before the learned Judge Guardian Court, Rawalpindi. Parties are directed to appear before the learned Judge Guardian Court, Rawalpindi on 7-4-2014.

AG/G-55/L **Case remanded.**

P L D 2015 Lahore 1

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ASHRAF and others---Appellants

Versus

THE STATE and others---Respondents

Criminal Appeal No. 290, Criminal Revision No. 173 of 2008; PSLA No.17 of 2008 and Murder Reference No.34 of 2008, heard on 18th June, 2013.

(a) Criminal Procedure Code (V of 1898)---

----Ss. 422 & 423---Notice of appeal---Notice of hearing had to be given to the appellant or his counsel--- Where the record had been sent for, after hearing the appellant or his counsel, if he appeared; the court could dismiss the appeal, or accept the same, or pass such order as might be necessary---Notice of hearing to the appellant or his counsel and to give him an opportunity of being heard was a legal obligation-- If the appellant or his counsel, did not appear before the Appellate Court, even then the appeal could competently be decided after service of notice for hearing to the appellant, or his counsel, though the Appellate Court would have been deprived of the assistance of the appellant or his counsel.

(b) Criminal Procedure Code (V of 1898)---

----S. 366---Pronouncement of judgment---Mode---Appellant absconding after filing of appeal---Personal attendance of accused was necessary for the pronouncement of the judgment in Criminal Trial, except where his personal attendance during the trial had been dispensed with or where the judgment was of acquittal, or was of fine only, but under subsection (3) of S.366, Cr.P.C., a judgment delivered by a court was not to be deemed to be invalid, merely because of the reason that any party, or his pleader was absent on the date of pronouncement of the judgment, or for any defect in the service of notice on the parties regarding the date and place of pronouncement of the judgment---Application of provisions under S.537, Cr.P.C. had been reaffirmed in S.366(4), Cr.P.C. with the result that the pronouncement of the judgment in a criminal trial in the absence of any party was not at all an illegality; nor same would render any such judgment as invalid---No such provision existed in the Code of Criminal Procedure, such as that contained in S.366, Cr.P.C. for the announcement of judgment in criminal appeal, meaning thereby that the intention of the Legislature was that the judgment in appeal could be pronounced in the absence of the appellant---Presence of party or its

availability or its being within the reach of the court at the time of decision of his appeal was not a legal requirement---Court was supposed to do justice after appraisal of evidence; and appellant could not be punished simply for the reason that he had absconded after filing his appeal before the Appellate Court---Appeal filed by accused who had absconded after filing his appeal, could competently be decided on merits by Appellate Court, even in his absence.

Haq Nawaz and others v. The State and others 2000 SCMR 785; Muhammad Aslam and 5 others v. The State 1972 SCMR 194 and Mushtaq and 3 others v. The State 1989 PCr.LJ 2336 ref.

(c) Criminal Procedure Code (V of 1898)------

----S. 173---Opinion of Police---Admissibility in evidence---Opinion of the Police qua innocence or otherwise of accused, was inadmissible in evidence.

Muhammad Ahmad (Mahmood Ahmed) v. The State 2010 SCMR 660 ref.

(d) Criminal trial--

----Evidence---Inimical eye-witnesses-Reliability---Evidence of inimical eye-witnesses, could be relied upon, provided the same was confidence inspiring, and was corroborated by some independent evidence.

(e) Penal Code (XLV of 1860)-

----S.302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Post-mortem examination was conducted with the delay of eight hours and ten minutes from the occurrence---No plausible explanation had been brought on the record for the delay of more than eight hours in bringing the dead body to the hospital---Said delay was suggestive of the fact that the F.I.R. was not recorded at the time mentioned therein; and the time was consumed in procuring attendance of eye-witnesses and preparation of Police papers, necessary for post-mortem examination---Statement made by prosecution witness qua the role of accused was in conflict with the story narrated in the F.LR.---Mala fide of the complainant had also been established from the fact that co-accused were implicated in the case in place of unknown accused persons---Said co-accused were not named in the F.I.R.---Motive as alleged by the prosecution had not been proved---No weapon of offence was recovered from the possession of accused persons during the investigation---Prosecution could not prove its case against accused persons beyond the shadow of doubt---Case was replete with number of circumstances, which had created doubt about the prosecution story---

Prosecution having failed to prove its case against accused persons, beyond the shadow of doubt, conviction and sentence recorded against accused persons by the Trial Court, were set aside; they were acquitted of the charges by extending them the benefit of doubt and were released, in circumstances.

Mushtaq and 3 others v. The State 1989 PCr.LJ 2336; Irshad Ahmad v. The State 2011 SCMR 1190; Muhammad Ashraf v. The State 2012 SCMR 419; Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327; Akhtar Ali and others v. The State 2008 SCMR 6 and Muhammad Rafique and others v. The State and others 2010 SCMR 385 ref.

Haq Nawaz and others v. The State and others 2000 SCMR 785; Muharnmad Aslam and 5 others v. The State 1972 SCMR 194 and Mushtaq and 3 others v. The State 1989 PCr.LJ 2336 rel.

(f) Criminal trial--

--Benefit of doubt-If there was a single circumstance, which created doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

(g) Criminal Procedure Code (V of 1898)---

417---Penal Code (XLV of 1860), S.302(b)/34---Qatl-i-amd, common intention---Special leave to appeal---Acquitted accused were not named in the F.I.R.---Complainant had admitted during cross-examination that both acquitted co-accused were residents of his village and known to him prior to the occurrence being his relatives---If said acquitted co-accused were known to the complainant being his relatives, why they were not named in the F.I.R.---Petition for special leave to appeal, was dismissed, in circumstances.

Syeda Feroza Rubab for Appellant No.1.

Shahzad Saleem Warraich for Appellant No.2.

Mirza Abid Majeed Deputy Prosecutor General for the State.

Muhammad Arif Gondal for the Complainant.

Date of hearing: 18th June, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.290 of 2008 filed by Muhammad Ashraf and Muhammad Shafqat (appellants) against their convictions and sentences, Petition for Special Leave to Appeal No.17 of 2008 preferred by Ghulam Sarwar complainant against the acquittal of Saif Ullah and Muhammad Zaman, Criminal Revision No. 173 of 2008 submitted by the complainant Ghulam Sarwar for enhancement of sentence of imprisonment for life to death of Muhammad Shafqat convict and Murder Reference No.34 of 2008, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Ashraf appellant, as all these matters have arisen out of the same judgment dated 10-3-2008, passed by the learned Additional Sessions Judge, Mandi Bahauddin.

2. Muhammad Ashraf and Muhammad Shafqat appellants were tried in private complaint under sections 302/148/149 of P.P.C. After conclusion of the trial, vide its judgment dated 10-3-2008, the learned trial court acquitted Saif Ullah and Muhammad Zaman co-accused of the appellants, whereas, has convicted and sentenced the appellants as under:--

Muhammad Ashraf

Under section 302(b)/34 of P. P. C. to death for committing Qatl-i-Amd of Ahmad Khan deceased. He was also ordered to pay Rs. 1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr. P. C. or in default to suffer simple imprisonment for six months.

Muhammad Shafqat

Under section 302/34 of P. P. C. to imprisonment for life as Ta'zir for committing Qatl-i-Amd of Ahmad Khan deceased. He was also ordered to pay Rs. 1,00,000 (Rupees One Hundred Thousand only) as compensation to the legal heirs of the deceased under section 544-A Cr. P. C. or in default to suffer simple imprisonment for six months.

The benefit of section 382-B, Cr.P.C. was also extended to the appellant.

3. Brief facts of the case as given by the complainant, namely, Ghulam Sarwar (P.W.3) in his private complaint Exh. PA are the same which were given by him in the F.I.R. lodged by him. According to the facts as given in the complaint Exh. PA, on 4-2-2006, he (complainant) along with Nisar Ahmad "behnoi" (given up P.W.), Haji Muhammad Asghar (P.W.4) "phophizad" and his father Ahmad Khan (deceased) was coming back from village Charanwala to their own village after inquiring the health of one Chaudhry

Nawaz and at about 3-00 p.m., when they reached at the katcha path at a distance of two acres away from the Dera of Mehdi Khan, the complainant Ghulam Sarwar (P.W.3), Nisar Ahmad (given up P.W.) and Haji Muhammad Asghar (P.W.4) stopped at the cattle-shed of above said Mehdi Khan in order to see his cow, whereas, Ahmad Khan (deceased) (father of the complainant) went ahead at some paces. In the meanwhile, Muhammad Ashraf and Muhammad Shafqat appellants, Abdul Sattar accused (since P.O.), Saif and Muhammad Zaman accused (both since acquitted) armed with Kalashnikoves, came out from the cluster of trees from the western side of katcha path and encircled Ahmad Khan (deceased). Muhammad Ashraf appellant raised lalkara that Ahmad Khan (deceased) be taught a lesson for fracturing his legs and he be not let alive and, thereafter, Muhammad Ashraf appellant made a burst of fires with his Kalashnikov which hit on the chest, belly and lower side of abdomen of Ahmad Khan (deceased), who fell down, facing downwards. Muhammad Shafqat appellant, Abdul Sattar accused (since PO), Saif Ullah and Muhammad Zaman accused (both since acquitted) then made a burst of fires with their respective weapons on the person of Ahmad Khan (deceased) which hit on his waist, left buttock, left flank, left shoulder and on his back. The complainant along with Nisar Ahmad (given up P.W.) and Haji Muhammad Asghar (P.W.4) witnessed the occurrence but due to fear did not go near them. The appellants along with their co-accused after being satisfied that Ahmad Khan had died, decamped from the place of occurrence. After their departure, the complainant along with P.Ws. attended to Ahmad Khan (deceased) who succumbed to the injuries at the spot.

The motive behind the occurrence as set forth in the F.I.R., as well as, in the private complaint was, the previous litigation between the deceased and the accused persons.

4. The matter was reported to the police by the complainant Ghulam Sarwar (P.W.3) through his Fard Bayan Exh. PC, whereupon, the formal F.I.R. was chalked out.

5. The appellants Muhammad Ashraf and Muhammad Shafqat were, arrested on 24-4-2006 by Bahu Khan, SI (CW-1). After completion of investigation, the challan was prepared and submitted before the learned trial court. The appellants and their aforementioned co-accused were declared innocent by the police during investigation. The complainant Ghulam Sarwar (P.W.3) being dissatisfied with the police investigation filed a private complaint in the concerned court in which he alleged that the local police being in league with the above mentioned culprits had illegally declared them innocent.

The learned trial court, after recording preliminary evidence summoned Muhammad Ashraf, Muhammad Shafqat (appellants), Saif Ullah and Muhammad Zaman co-accused (since acquitted). The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 29-11-2006, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced seven witnesses while two witnesses namely Bahu Khan, S.I. and Munawar Hussain, S.I. were recorded as Court Witnesses, during the trial. Ghulam Sarwar complainant (P.W.3) and Muhammad Asghar (P.W.4) are the witnesses of ocular account of the occurrence.

The medical evidence was furnished by Dr. Ghulam Abbas Nasir (P.W.1).

Bahu Khan, S.I. (CW-1) and Munawar Hussain (CW-2) were the Investigating Officers of this case.

Imtiaz Ahmad Patwari (P.W.2), Ghulam Fareed (P.W.5), Zaghum Abbas No. 448/MHC (P.W.6) and Muhammad Mansha No.580/C (P.W.7) are the formal witnesses.

The prosecution produced documentary evidence in the shape of copy of private complaint and post mortem report of the deceased, both exhibited as Exh.PA, pictorial diagram Exh. PA/1, scaled site plan of the place of occurrence in triplicate Exh.PB, Exh. PB/1 and Exh. PB/2, copy of complaint Exh. PC, memo of possession of blood stained earth Exh.PE, memo of possession of last worn clothes of the deceased Exh.PF, rough site plan of the place of occurrence Exh.CW/2 and closed its evidence.

7. The statements of the appellants and their co-accused under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you" the appellants replied as under:-

Muhammad Ashraf

"I am innocent. I have been falsely involved in this case due to previous enmity and on the basis of suspicion. The P. Ws. are inimical towards me and have deposed against me falsely.

The appellant Muhammad Shafqat while answering to the above-mentioned question gave the same answer as given by Muhammad Ashraf appellant.

Neither the appellants opted to make statements under section 340(2), Cr.P.C. nor they produced any evidence in their defence.

The learned trial Court vide its judgment dated 10-3-2008, while acquitting co-accused Saif Ullah and Muhammad Zaman, found Muhammad Ashraf and Muhammad Shafqat appellants guilty and convicted and sentenced them as mentioned and detailed above.

8. Learned counsel for Muhammad Ashraf appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that both the eye-witnesses of ocular account are chance witnesses and they have not been able to give any valid reason for their presence at the spot and moreover the matter was not reported to the police at the time mentioned in the F.I.R., which is clear from the fact that the doctor (P.W.1) who conducted the post-mortem examination on the dead body of the deceased had admitted in his cross-examination that the dead body was brought in the mortuary at 11-00 p.m. which clearly negates the evidence of the witnesses of ocular account because had they been present at the spot, the dead body would have reached to the hospital much earlier than the time mentioned above; that in the F.I.R. and private complaint it was the case of the complainant that firstly fire shots were made by Muhammad Ashraf appellant which hit the deceased at his chest, abdomen and different parts of his body and thereafter Saif and Abdul Sattar accused along with two unknown persons also fired at the deceased which hit him on his back, left flank, left shoulder and back and the same stance was taken in the private complaint which was instituted on 28-7-2006 but while appearing before the court, the complainant changed his version qua the injury caused by the co-accused of the appellant and stated that Muhammad Shafqat appellant fired with his respective weapon which hit Ahmad Khan deceased on his belly, then Sattar accused fired with Kalashnikov which hit on his chest; then Saif accused fired with his respective weapon which hit Ahmad Khan on his chest and then Zaman accused fired with his weapon which hit on the belly of Ahmad Khan deceased and thus, the version was changed/improved by the complainant in order to bring his evidence in line with the medical evidence; that the complainant was duly confronted with his previous statements, i.e. contents of the F.I.R. and his cursory statement recorded after filing of the private complaint and dishonest improvements in his statement were brought on the record; that in the F.I.R. only three accused persons were mentioned by name, i.e. Muhammad Ashraf, Muhammad Shafqat (appellants) and Abdul Sattar (since PO) but the private complaint was filed against five persons namely Muhammad Ashraf, Muhammad Shafqat (appellants), Saif Ullah, Muhammad Zaman accused (since acquitted) and Abdul Sattar (since PO) and in his cross-examination, the

complainant has stated that in his Fard Bayan Exh. DA he mentioned the name of Saif Ullah and Muhammad Zaman, he was confronted with his Fard Bayan where it was not so recorded. He further admitted that the above mentioned accused persons are residents of his village and known to him (complainant) but even then they were not named by him in the F.I.R. which clearly established mala fide of the complainant; that the motive alleged in the F.I.R. and in the private complaint was previous litigation between the appellant and the deceased, however, while appearing before the learned trial court the complainant alleged the motive to the effect that the deceased divorced the sister of Muhammad Ashraf appellant and that Muhammad Ashraf appellant was earlier injured by them but in cross-examination he admitted that sister of Muhammad Ashraf appellant was divorced 20 years back and thereafter the deceased contracted another marriage with Mst. Riaz Bibi who too was dead and in this situation the motive appears to be highly improbable; that the complainant has admitted that his father was not the accused in the earlier hurt case, therefore, there was no reason or occasion for Muhammad Ashraf appellant to kill the deceased; that even otherwise the question regarding the marriage of the sister of the appellant and her divorce by the deceased was not put to the appellant while recording his statement under section 342, Cr.P.C. and as such the evidence which has not been put to the appellant cannot be used against him; that admittedly the complainant and Muhammad Asghar (P.W.4) are interested and inimical witnesses because the complainant has admitted that Muhammad Ashraf appellant filed an application against them because they filled the pond of village and took its possession and the Revenue Authorities declared them as illegal occupants and passed an order of their eviction; that during the course of investigation the appellant was found innocent and nothing was recovered from his possession or at his instance and as such the ocular account furnished by Ghulam Sarwar complainant (P.W.3) and Muhammad Asghar (P.W.4) is doubtful, as they are chance, interested and inimical witnesses, therefore, corroboration of such witnesses is sine qua non which is very much lacking in this case; that this appeal may be accepted and the appellant may be acquitted from the charge.

Insofar as Muhammad Shafqat appellant is concerned, learned counsel contends that he was convicted by the learned trial court, his sentence was suspended by this Court vide order dated 31-3-2009 and he was ordered to be released on bail and thereafter he did not appear despite issuance of notice and warrants. Notices to the sureties were also issued and ultimately they deposited the amount of sureties. It is further submitted that since the appellant has filed his appeal and thereafter he became absent, therefore, this

appeal may be decided on merits. Placed reliance on the case reported as Mushtaq and 3 others v. The State (1989 PCr.LJ 2336). While adopting the arguments of learned counsel for Muhammad Ashraf appellant, learned counsel adds that Muhammad Shafqat appellant has falsely been implicated in this case being real son of Muhammad Ashraf appellant; that nothing was recovered from his possession during the course of investigation and he was declared innocent by the police; that the complainant has changed his version qua the role of this appellant during the occurrence; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charges.

9. Conversely, learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the F.I.R. was promptly lodged, as occurrence in this case took place on 4-2-2006 at 3-00 p.m. and the matter was reported to the police at 4-30 p.m., whereas, the distance between the place of occurrence and the police station is seven and a half miles; that the F.I.R. was also promptly lodged on the same day at 5-20 p.m. which rules out the possibilities of deliberation, consultation and also established the presence of the complainant and other eye-witnesses at the spot; that the delay in conducting the post-mortem examination was not on the part of the complainant as the occurrence took place in a village and sufficient time was required to transport the dead body from the place of occurrence to the mortuary; that both the eye-witnesses are though related to the deceased, but they are residents of the same village where this occurrence took place, therefore, their presence at the spot cannot be considered as unnatural or improbable and they have sufficiently explained their presence at the spot by stating that they accompanied their father in order to see one Ch. Nawaz who was sick and when they were coming back to their village and reached at the spot, the appellants and their co-accused came out from the trees from the western side and all the accused persons encircled Ahmad Khan and committed the occurrence; that opinion of the police is inadmissible in evidence; that the prosecution evidence remained consistent despite lengthy cross-examination; that the ocular account gets full support from the medical evidence and the complainant did not change his version rather clarified the same; that the motive as alleged by the prosecution has been proved in this case; that non-recovery of weapon of offence is not material as the police in connivance with appellants declared them innocent that the sentence of death was rightly awarded to Muhammad Ashraf appellant and the same may be maintained, appeal of the appellant may be

dismissed and Murder Reference be answered in the affirmative. So far as PSLA No. 17 of 2008 is concerned it has been argued by learned counsel for the complainant that Saif Ullah and Muhammad Zaman accused actively participated in the occurrence, specific injuries were attributed to them and as such they have wrongly been acquitted by the learned trial court, therefore, they be punished in accordance with law. Insofar as Criminal Revision No. 173 of 2008 is concerned, it is argued on behalf of the complainant that Muhammad Shafqat appellant also caused injuries to the deceased and the role assigned to him has been proved through oral, as well as, medical evidence, therefore, the appellant Muhammad Shafqat also deserves normal penalty of death; that the reasons assigned by the learned trial court while awarding sentence of life imprisonment against the said appellant are against the record, therefore, Muhammad Shafqat appellant be also awarded the sentence of death.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. The first and foremost question for determination before this Court is that whether the appeal filed by Muhammad Shafqat appellant can be decided by this Court in his absence because the said appellant after suspension of his sentence and release on bail by this Court vide order dated 31-3-2009 passed in Criminal Miscellaneous No.1 of 2008 has absented himself from this Court. The notices to his sureties were issued and his bail bonds were forfeited. Both of his sureties have deposited the amount of bail bonds to the tune of Rs.2,00,000 each. In the present case an appeal was filed by Muhammad Shafqat appellant against his conviction and sentence of imprisonment for life, through his counsel. A notice was issued to Muhammad Shafqat appellant and in response to- said notice Mr. Shahzad Saleem Warraich, Advocate has entered appearance before this Court. We have inquired from the said learned counsel as to whether the authority given by Muhammad Shafqat appellant to him still subsists or the same has been revoked by the appellant. Mr. Shahzad Saleem Warraich, Advocate submits that his association with the case of Muhammad Shafqat appellant as his duly appointed counsel has not been repudiated by the appellant. We have gone through the provisions of sections 422 and 423, Cr.P.C. and have come to this conclusion that a notice of hearing of appeal has to be given to the appellant or his counsel and where the records have been sent for, after hearing the appellant or his learned counsel if he appears, the court may dismiss the appeal or accept it or pass such other order as may be necessary. The only legal obligation is to give a notice of hearing to the appellant or

his learned counsel and to give him an opportunity of being heard. However, if the appellant or learned counsel for the appellant does not appear before the appellate court even then the appeal can competently be decided after service of notice for hearing to the appellant or his learned counsel, though the appellate court would have been regretfully deprived of the assistance of the appellant or his learned counsel. A reference to section 366(2), Cr.P.C. will show that the personal attendance of the accused is necessary for the pronouncement of the judgment in criminal trials except where his personal attendance during the trial has been dispensed with or when the judgment is of acquittal or is of fine only but under subsection (3) of the same section a judgment delivered by a court is not to be deemed invalid merely because of the reason that any party or his pleader was absent on the date of pronouncement of the judgment or for any defect in the service of notice on the parties regarding the date and place of pronouncement of the judgment. In subsection (4) of this section the application of provisions under section 537, Cr.P.C. have been reaffirmed with the result that the pronouncement of the judgment in a criminal trial in the absence of any party is not at all an illegality nor the same will render any such judgment as invalid. We have also noted that there is no such provision in the Code of Criminal Procedure such as that contained in section 366, Cr.P.C. for the announcement of judgment in criminal appeal meaning thereby, that the intention of the legislature was that the judgment in appeal can be pronounced in the absence of the appellant. Similarly there is no legal requirement at all that a party is to be present or is available or is within the reach of the court at the time of decision of his appeal. We are of the considered view that it is duty of the court to do justice after appraisal of evidence and appellant cannot be punished simply for the reason that he had absconded after filing his appeal before the appellate court. A similar proposition came under discussion before the Hon'ble Supreme Court of Pakistan in the case of Haq Nawaz and others v. The State and others (2000 SCMR 785) wherein at page No.811 it was observed as under:--

> "We now take up Criminal Appeal No. 176 of 1999 filed by the
>
> State challenging the acquittal of the respondents. The learned State Counsel very vehemently contended that the acquittal of the respondents in the above case was on wrong premises as sufficient evidence was led by the prosecution to sustain their conviction. The learned State Counsel also very vehemently contended that in so far respondent Zakiullah is concerned, he was fugitive from law and therefore, his appeal should have been dismissed by the High Court at the hearing. Before considering the contention of the learned State

Counsel on merits, we would like to dispose of the contention that the case of the appellant Zakiullah could not be decided by the High Court as he was fugitive from law. This argument was fully considered by the learned Judges of the High Court but repelled. The learned State Counsel does not dispute that the time the appeal .was filed before the High Court, he was in prison. It is subsequent to the filing of the appeal that he was stated to have absconded from the jail custody. In our view, in such a circumstance, it was discretionary with the High Court either to defer consideration of the appeal of Zakiullah or to hear the same and decide on merits. Since Zakiullah was not absconder and fugitive from law at the time he lodged his appeal and his subsequent act of absconding from jail was an independent act punishable under the law separately, no exception could be taken if the High Court, in such circumstances, decided to deal with his case on merits. We, therefore, find no substance in the contention of the learned State Counsel that the case of appellant Zakiullah could not be heard on merits."

In another case titled as Muhammad Aslam and 5 others v. The State. (1972 SCMR 194) the Hon'ble Supreme Court of Pakistan while giving the benefit of doubt to the appellants of said case also acquitted the absconding appellant who after filing his appeal became an absconder and remained fugitive from law till the decision of his appeal. The concluding Paragraph of the said judgment at page No. 201 reads as under:-
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"Having regard to these broad features of the case the appellants were entitled to the benefit of doubt which should have been given to them. We accordingly allow the appeal, set aside the conviction and sentences of all the appellants including the absconding appellant Muhammad Aslam, and acquit them of all the charges, and direct that they shall be set at liberty forthwith if not wanted in connection with any other matter.

We may observe here that although the appellant Muhammad Aslam has absconded during the pendency of the present appeal and has remained absconding up till now, the benefit of our judgment should be given to him also in order to do complete justice in the case. We, therefore, do not find it necessary to postpone the hearing of the case of Muhammad Aslam until his presence before the Court."

We may also refer here the case of Mushtaq and 3 others v. The State (1989 PCr.LJ 2336) wherein at page No. 2341 this Court has observed as under:-

"……He frankly conceded that Noor Hassan had absconded after the close of the trial, but before the announcement of the judgment and so he had no right of hearing. But in any case, as per Hayat Bakhsh's case 1981 SCMR 1 it was the duty of the Court to sift the evidence and to do justice in his case as well, if after perusal and appreciation of the evidence his case called for interference, and simply for the reason that he had absconded he was not to be condemned. We are inclined to agree with him in this respect"

In the light of above discussion, we are of the view that the appeal filed by Muhammad Shafqat appellant who has absconded after filing his appeal can competently be decided on merits by this Court even in his absence.

12. The gist of the prosecution case as set forth in the private complaint has already been given in Para No. 3 above, therefore, there is no need to repeat the same.

13. It is true that the appellants were declared innocent by the Investigating Officer Bahu Khan, S.I. (CW-1) who has conceded during his cross-examination that the stand of the appellants was found to be correct during his investigation and due to that reason he declared them innocent but it is by now well settled law that opinion of the police qua innocence or otherwise of the accused is inadmissible in evidence, I therefore, the above mentioned appellants cannot be acquitted merely on the ground that they were declared innocent by the police. A reference in this respect may be made to the case of Muhammad Ahmad (Mahmood Ahmed) v. The State (2010 SCMR 660) wherein at page 676 the Hon'ble Supreme Court was pleased to observe as under:-

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed them the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt"

14. Now coming to the merits of this case, we have noted that the ocular account of the prosecution has been furnished by Ghulam Sarwar complainant (P.W.3) and

Muhammad Ashgar (P.W.4). The complainant Ghulam Sarwar (P.W.3) has admitted during his cross-examination that he (complainant) and Muhammad Asghar (P.W.4) had filled the pond of their village and took its possession, whereupon, Muhammad Ashraf appellant moved an application against him and Muhammad Asghar (P.W.4) to the revenue authorities. He further conceded that the revenue authorities declared them (P.Ws.) illegal occupants and passed an order of their eviction. It is, therefore, established that the aforementioned eyewitnesses were inimical towards Muhammad Ashraf appellant, whereas, Muhammad Shafqat appellant is son of Muhammad Ashraf appellant. The evidence of inimical eye-witness can be relied upon, provided the same is confidence inspiring and is corroborated by some independent evidence. We will now discuss the evidence of aforementioned eyewitnesses keeping in view the said principle. The occurrence in this case took place on 4-2-2006 at 3-00 p.m. According to the prosecution case the matter was reported to the police by the complainant Ghulam Sarwar (P.W.3) through his Fard Bayan on the same day, i.e. 4-2-2006 at 4-30 p.m. The formal F.I.R. was also recorded on the same day at 5-20 p.m. but we have noted that the post-mortem examination on the deadbody of Ahmad Khan deceased was conducted on 4-2-2006 at 11-10 p.m., i.e. with the delay of eight hours and ten minutes, from the occurrence. The aforementioned delay in conducting the post-mortem examination cannot be attributed to Dr.Ghulam Abbas Nasir (P.W.1) because he has stated during his cross-examination that the deadbody was brought to the hospital at 11-00 p.m. on 4-2-2006. He further stated that he incorporated the aforementioned fact in the relevant register and conducting the post-mortem examination at about 11-10 p.m. No plausible explanation has been brought on the record for the delay of more than eight hours in bringing the dead body to the hospital and in conducting the postmortem examination on the dead body of Ahmad Khan deceased. The said delay is suggestive of the fact that the F.I.R. was not recorded at the time mentioned therein and the time was consumed in procuring attendance of eye-witnesses and preparation of police papers necessary for post-mortem examination. We may refer here the case of Irshad Ahmad v. The State (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a postmortem examination of the deadbody conducted.

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ashraf v. The State (2012 SCMR' 419). Similarly, in the case of Khalid alias Khalidi and 2 others v. The State (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 13 hours from the occurrence in conducting the post mortem examination on the deadbody of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the F.I.R. was not lodged at the given time.

15. According to the story of the prosecution, on the fateful day the complainant Ghulam Sarwar (P.W.3) and Muhammad Asghar (P.W.4) along with Ahmad Khan (deceased) and Nisar Ahmad (given up P.W.) were coming back towards their village after inquiring the health of one Chaudhry Muhammad Nawaz son of Fateh Dad r/o of village Charanwala and when they reached near the Dera of one Mehdi Khan son of Aman Din, the above mentioned eye-witnesses went to the abovesaid Dera in order to see the cow of Mehdi Khan, whereas, Ahmad Khan deceased kept on walking on the katcha path and when he (deceased) reached near the trees on the road, the appellants along with their co-accused emerged on the spot and committed the murder of Ahmad Khan (deceased). Although it was claimed that at the time of occurrence the above mentioned eye-witnesses, when reached near the Dera of one Mehdi Khan, they went to the said Dera in order to see his cow but we have noted that the abovesaid Dera has not been shown in the site plan Exh. PB. Neither the aforementioned Mehdi Khan has been produced by the prosecution in the Witness box nor Ch. Muhammad Nawaz son of Fatal Dad r/o of village Charanwala who had been allegedly visited by the aforementioned eye-witnesses on the day of occurrence, has been produced before the learned trial court, therefore, the reason given by the aforementioned witnesses for their presence at the spot has not been established in this case, and as such, the above mentioned witnesses are chance witnesses.

16. The medical evidence of the prosecution was furnished by Dr. Ghulam Abbas Nasir (P.W.1). He, on 4-2-2006 at about 11.10 p.m., conducted the postmortem examination on the dead body of Ahmad Khan (deceased) and found twelve firearm wounds on his body including three exit wounds. It was the case of the prosecution in the F.I.R. that the fire shot made by Muhammad Ashraf appellant landed on the chest, abdomen and lower part of abdomen of Ahmad Khan (deceased), whereas, the fire shots jointly made by Muhammad Shafqat appellant, Abdul Sattar accused (since PO) and two unknown accused persons (later on nominated as Saif Ullah and Muhammad Zaman accused) landed on the waist, left thigh, left flank, left shoulder and on the back of Ahmad Khan

(deceased). The eye-witnesses namely Ghulam Sarwar (P.W.3) and Muhammad Asghar (P.W.4) while appearing before the learned trial court have changed the prosecution story as set forth in the F.I.R. qua the rode attributed to the appellants. Ghulam Sarwar complainant (P.W.3) has stated in the following terms qua the role of appellants while making his statement before the learned trial court:--

> "First of all, Ashraf accused fired with his respective Kalashnikov which hit on his chest and belly. Then Shafqat accused fired with his respective weapon which hit Ahmad Khan on his belly, then Sattar accused fired with Kalashnikov which hit on his chest. Then Saif accused fired with his respective weapon which hit Ahmad Khan on his chest. Then Zaman accused fired with his weapon which hit on the belay of Ahmad Khan. My father Ahmad fell down. Except Ashraf all the other four accused persons fired at my father Ahmad Khan. My father Ahmad Khan succumbed to the injuries at the spot.

The complainant Ghulam Sarwar (P.W.3) was confronted with his previous statement Exh. DA recorded by the police and the improvements made by him were duly brought on the record:--

> "I stated in my Fard Biyan Exh. DA that Shafqat accused made a fire with the Kalashnikov which landed on the chest and the belly of my father deceased. Confronted with Exh. DA where it is not so recorded. I stated in Exh. PA and in my cursory statement recorded in the court that Shafqat accused made a fire with the Kalashnikov which landed on the belly of my father deceased. Confronted with Exh. PA where belly is not mentioned. I stated in my Fard Biyan Exh DA that Abdul Sattar accused made a fire shot with his respective weapon which landed on the chest of my father deceased. Confronted with Exh. DA where chest is not mentioned. I stated in my Fard Biyan Exh. DA that Muhammad Ashraf made a burst of Kalashnikov which hit on the belly of my father deceased who fell down whereas the remaining accused made indiscriminate firing on the person of my father deceased which hit on different part of his body. I stated in my Fard Biyan Exh. DA that my father after receiving the first fire injury fell down on face down on the ground. I stated in my Fard Biyan Exh. DA that Saif Ullah and Muhammad Zaman made a fire shot on the person of my father deceased which hit him on different parts of body. Confronted with Exh. DA where it is so recorded".

Similarly the statement made by Muhammad Asghar (P.W.4) qua the role of the appellant is in conflict with the story narrated in the F.I.R. In the case of "Akhtar All and others v. The State" (2008 SCMR 6) while discussing the evidence of a witness who made dishonest improvements in his statement the Hon'ble Supreme Court of Pakistan observed as under:-

> "It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Rafique and others v. The State and others" (2010 SCMR 385) wherein it was held that improvements made by a witness on material aspects of the case is not worthy of reliance. It is, therefore, not safe to rely upon the evidence of the above mentioned eye-witnesses who made dishonest improvements in their statements before the court in order to strengthen the prosecution case.

The mala fide of the complainant has also been established from the fact that he implicated Saif Ullah and Muhammad Zaman co-accused in this case in place of unknown accused persons. The said co-accused were not named in the F.I.R. The complainant admitted during his cross-examination that Saif Ullah and Muhammad Zaman, both were residents of his village and were known to him prior to the occurrence being his relatives. It does not appeal to common sense that if the afore mentioned eye-witnesses were present at the time of occurrence then why did they not nominate Saif Ullah and Muhammad Zaman in the F.I.R. who were residents of their village and were known to them prior to the occurrence being their relatives.

17. The motive behind the occurrence as set forth in the F.I.R., as well as, in the private complaint was the previous litigation between the deceased and the accused persons. No detail of said previous litigation was mentioned in the F.I.R., as well as, in the private complaint Exh. PA. The complainant Ghulam Sarwar (P.W.3), however, while appearing before the learned trial court has stated that the motive behind the occurrence was that his father Ahmad Khan (deceased) had divorced the sister of Muhammad Ashraf appellant and also that Muhammad Ashraf appellant was injured by them

(complainant party) and due to this grudge the accused persons committed the murder of Ahmad Khan deceased. We have noted that the story of divorce to the sister of Muhammad Ashraf appellant was not mentioned in the F.I.R. or in the private complaint and the same was introduced for the first time by the complainant at the time of making his statement before the learned trial court. The complainant Ghulam Sarwar (P.W.3) has stated during his cross-examination that his father Ahmad Khan contracted second marriage with the sister of Muhammad Ashraf appellant. He further stated that his second mother/step mother had been divorced by his father Ahmad Khan (deceased) 20 years back. It was also brought on the record during his cross-examination that Ahmad Khan deceased had contracted four marriages in his life time. It does not appeal to common sense that Ahmad Khan deceased would be murdered by the appellants due to the divorce given by the deceased to the sister of Muhammad Ashraf appellant after the lapse of more than 20 years from the said divorce. Insofar as second motive alleged by the prosecution is concerned, we have noted that it was case of the prosecution that Muhammad Ashraf appellant was injured by the complainant party and due to this grudge the accused persons committed the murder of Ahmad Khan deceased. It is noteworthy that Ghulam Sarwar complainant (P.W.3) has admitted during his cross-examination that Ahmad Khan deceased was not the accused of the hurt case of Muhammad Ashraf appellant. He further conceded that Muhammad Asghar (P.W.4) was the accused in the said hurt case. It is not understandable that if Muhammad Asghar (P.W.4) was the accused in the hurt case of Muhammad Ashraf appellant and he was also present at the time of occurrence then why he was spared by the appellants and in his place Ahmad Khan deceased was murdered who was not even the accused in the above said hurt case. We are, therefore, of the view that the motive as alleged by the prosecution has not been proved in this case.

18. Although it was alleged in the F.I.R. that both the appellants were armed with Kalashnikoves at the time of occurrence and they along with their co-accused committed the murder of Ahmad Khan deceased with the help of said weapons but no weapon of offence was recovered from the possession of the appellants during the investigation of instant' case, thus, there is no corroboration of the prosecution story from the recovery of any weapon of offence from the possession of the appellants.

19. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well settled law that if there. is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit

of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble,

Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

> '5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

> '13……..It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to, the benefit of doubt not as a matter of grace and concession but as a matter of right."

20. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept Criminal Appeal No.290 of 2008 filed by Muhammad Ashraf and Muhammad Shafqat appellants, set aside their convictions and sentences recorded by the learned Additional Sessions Judge, Mandi Bahauddin vide judgment dated 10-3-2008 and acquit them of the charges by extending them the benefit of doubt. Muhammad Ashraf appellant is in custody, he be released forthwith if not required in any other case.

> **Murder Reference No. 34 of 2008** is answered in the **NEGATIVE** and the sentence of death of Muhammad Ashraf is **NOT CONFIRMED.**

21. Insofar as **Petition for Special Leave to Appeal No. 17 of 2008** filed against the acquittal of Saif Ullah and Muhammad Zaman is concerned, we have noted that the

aforementioned respondents were not named in the F.I.R. As mentioned earlier, the complainant Ghulam Sarwar (P.W.3) has admitted during his cross-examination that both, Saif Ullah and Muhammad Zaman were residents of his village and known to him prior to the occurrence being his relatives. It does not appeal to common sense that if the said respondents were known to the complainant being his relatives then why they were not named in the F.I.R.. Even otherwise we have already discarded the prosecution evidence while deciding **Criminal Appeal No. 290 of 2008**, therefore, the instant Petition for Special Leave to Appeal is, hereby, dismissed in **limine.**

22. For the foregoing reasons, **Criminal Revision No.173 of 2008** filed by the complainant seeking enhancement in the sentence of Muhammad Shafqat appellant also stands **dismissed.**

HBT/M-213/L **Appeal accepted.**

2015 P Cr. L J 338

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ALI RAZA and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.1321 and Murder Reference No. 558 of 2007, heard on 10th January, 2013.

(a) Criminal trial---

----Defence plea---Duty of prosecution---Prosecution was required to prove its case against accused person beyond any shadow of doubt; and the defence version was to be taken into consideration after evaluating the prosecution evidence to find out whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 324/34, 337-D, 337-F(vi) & 337-L(2)---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, Jaifah, causing Manaqqilah, causing hurt not endangering life---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---Occurrence had taken place at 1.00 a.m. (night) and matter was reported to the Police on the next morning---Injured prosecution witnesses, initially were taken to the Government Hospital, from there they were referred to the other Hospital---Distance between the place of occurrence and Police Station was 9 kms.---Considering said facts, the place and time of occurrence, there was no delay in reporting the matter to the Police---Ocular account of the prosecution regarding the role played by accused during the occurrence, was furnished by the complainant and injured eye-witnesses of the occurrence---All were cross-examined at length, but their testimonies could not be shaken eye-witnesses corroborated each other on all material aspects of the case; their evidence was reliable and trustworthy---Medical evidence had fully supported the ocular account furnished by eye-witnesses---Time of occurrence, seat of injuries, the kind of weapon used by accused, had fully tallied with the medical evidence---Empties secured from the spot having been sent to the Forensic Science Laboratory after the arrest of accused, possibility could not be ruled

out that false empties were prepared from pistol allegedly recovered from the possession of accused; and the recovery of said pistol was fictitiously shown to be effected; it was not safe to rely upon the alleged recovery of pistol from accused; and positive report of Forensic Science Laboratory---Prosecution alleged illicit relations of accused with co-accused, who was sister of the complainant and also commission of illicit intercourse---Neither any charge was framed against accused persons under Offence of Zina (Enforcement of Hudood) Ordinance, 1979; nor they had been convicted for the same by the Trial Court---Motive, as alleged by the prosecution, had not been proved, in circumstances--- Plea of accused was that prosecution witnesses had come to kill him as he contracted marriage with co-accused, who was sister of complainant, against the wishes of the prosecution witnesses and the deceased---Accused could not produce any witness in proof of his said plea---Accused, in circumstances, could not prove the plea taken by him---Sufficient incriminating evidence was available on the record against accused to prove the case of prosecution against him---Prosecution case was fully proved through evidence of eye-witnesses, their evidence was quite natural, straightforward and confidence inspiring---Prosecution having proved its case against accused beyond the shadow of doubt, all the convictions and sentences awarded to accused by the Trial Court were maintained, but sentence of death awarded to him under S.302(b), P.P.C. was altered to imprisonment for life, in view of mitigating circumstances in his favour.

(c) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-i-amd---Sentence, quantum of--- Mitigating circumstances---Accused was awarded death sentence, but in view of mitigating circumstances in favour of accused, sentence of death was quite harsh---Mitigating circumstances in favour of accused were firstly that evidence of recovery of pistol from the possession of accused, could not be believed, for the reason, that possibility could not be ruled out that false empties were prepared from the pistol allegedly recovered from the possession of accused; and recovery of pistol was fictitiously shown to be effected; Secondly that occurrence took place without any premeditation in the house of accused at the spur of the moment and thirdly that the prosecution had failed to prove alleged specific motive---Accused was also entitled for the benefit of doubt as an extenuating circumstance, while deciding question of sentence---As to what had actually happened immediately before the occurrence, which had resulted into the death of deceased was not determinable---Accused, in peculiar circumstances of the case, deserved benefit of doubt to the extent of his sentence, one out of the two

provided under S.302(b), P.P.C.---Sentence of death awarded to accused under S.302(b), P.P.C., was altered to imprisonment for life, in circumstances.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b), 324/34, 337-D, 337-F(vi) & 337-L(2)---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, Jaifah, causing Manaqqilah, causing hurt not endangering life---Appreciation of evidence---Benefit of doubt---Co-accused, a woman, had not been attributed any active role during the occurrence---Joint Lalkara, though was attributed to co-accused and accused, but said joint Lalkara was raised when occurrence was almost completed; and thereafter only one fire shot was made by accused which landed on the chest of prosecution witness---None of the prosecution witnesses, while appearing before the court, had stated that co-accused raised Lalkara during the occurrence---Co-accused had not caused any injury to the deceased or any member of the complainant party---Accused persons had not launched attack on the complainant party with premeditation, but according to the prosecution's own case, it was the complainant party who entered the house of accused at midnight in search of co-accused---Case of prosecution against co-accused, had not been proved beyond the shadow of doubt---Conviction and sentences awarded to co-accused vide impugned judgment passed by the Trial Court, were set aside and she was acquitted from the charges by extending her the benefit of doubt and was released from the jail.

(e) Criminal trial---

----Motive---Proof---If a specific motive had been alleged by the prosecution, then it was duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence---Non-proof of motive could be considered a mitigating circumstance in favour of accused.

Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

Mrs. Bushra Qamar for Appellants.

Ch. Arshad Mahmood, Deputy Prosecutor-General for the State.

Muhammad Asif Ismail for the Complainant.

Date of hearing: 10th January, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1321 of 2007 (Ali Raza and another v. The State) and Murder Reference No.558 of 2007, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Ali Raza appellant, as both these matters have emanated out of the same judgment dated 26-7-2007, passed by the learned Additional Sessions Judge, Faisalabad, in case F.I.R. No. 576/2006 dated 9-10-2006 under sections 302/324/34 of P.P.C. Police Station Garh, Faisalabad, whereby Ali Raza and Mst. Sakina appellants were convicted under sections 302/324/337-D/337-L(2), 337-F(vi)/34 of P.P.C. for committing the murder of Manzoor Ahmad (deceased) and for attempting to commit the murder and causing different injuries to Iftikhar Ahmad (P.W.7), Hamid Ali (P.W.8) and Ghulam Farid (P.W.6) and were awarded the following sentences:--

1. Ali Raza	302(b)/34, P.P.C.	Death Punishment and to pay Rs. 50,000 as compensation under section 544-A of Cr.P.C. to the legal heirs of Manzoor Ahmad deceased and in default of payment thereof, to further undergo six months' S.I.
Mst. Sakina Bibi	Under section 302/34, P.P.C.	Life imprisonment and to pay Rs. 50,000 as compensation to the legal heirs of Manzoor Ahmad deceased under section 544-A, Cr.P.C. and in default of payment thereof to further undergo six months' S.I.
2. Ali Raza	324/34, P.P.C.	Five years' R.I. and to pay a fine of Rs.5,000 and in default thereof to undergo one month's S.I.
Mst. Sakina Bibi	-do-	-do-
3. Ali Raza	337-L(ii)/34, P.P.C.	Two years' R.I. and to pay Rs. 10,000 as Daman to Iftikhar Ahmad injured.

Mst. Sakina Bibi	-do-	-do-
4. Ali Raza	337-F(vi)/34, P.P.C.	Three years' R.I. and to pay Rs.5,000 as Daman to Iftikhar Ahmad injured.
Mst. Sakina Bibi	-do-	-do-
5. Ali Raza	337-D/34, P.P.C.	Five years' R.I. and to pay Arsh equal to 1/3rd of Diyat amount to Hamid Ali injured.
Mst. Sakina Bibi	-do-	-do-
6. Ali Raza	337-D/34, P.P.C.	Five years' R.I. and to pay Arsh equal to 1/3rd of Diyat amount to Ghulam Farid injured.
Mst. Sakina Bibi	-do-	-do-

In case of non-payment of Daman/Arsh, it was directed to be recovered from the convicts and until Daman/Arsh is paid in full to the extent of his/her liability, the convicts were ordered to be kept in jail and dealt with in the same manner as sentenced to simple imprisonment or may be released on bail if he/she furnishes security equal to the amount of Daman/Arsh to the satisfaction of amount of Daman/Arsh to the satisfaction of the Court under section 337-Y, P.P.C. All the sentences were ordered to run concurrently.

2. Brief facts of the case as given by the complainant Ahmad Ali (P.W.9) in his written application (Exh.PJ) on the basis of which formal F.I.R. (Exh.PJ/1) was chalked out are that his sister Mst. Sakina Bibi (appellant) aged 15 years, was illiterate and used to go to the house of Altaf Hussain son of Hafiz Abdul Jabbar, Hanjra by caste, resident of the village, in order to learn tailoring from his daughter. During this period, Ali Raza (appellant) son of Altaf Hussain developed illicit relations with Mst. Sakina Bibi (appellant). On suspicion, the complainant party reprimanded Mst. Sakina Bibi (appellant) and asked her not go to the house of Ali Raza appellant, but she continued meeting with him, secretly. On the intervening night of 8/9-10-2006 at about 1-00 a.m. (night) he (complainant) woke up in order to answer the call of nature and found his sister missing from her cot. The complainant told this fact to his father

(Manzoor Ahmad deceased), as well as, his brothers Hamid Ali (P.W.8) and Ghulam Farid (P.W.6). He also inquired from the house of his paternal uncle about his sister and told the entire facts to him. Having suspicion against Ali Raza (appellant), he along with his father Manzoor Ahmad (deceased), his brother Hamid Ali (P.W.8) and Iftikhar Ahmad (P.W.7) went to the cattle shed of Altaf Hussain to inquire about Mst. Sakina Bibi (appellant). The gate of the cattle shed of Altaf Hussain was opened from inside by his servant namely Murtaza Baloch. They, in the light of moon and bulb, saw Ali Raza and Mst. Sakina Bibi, appellants while committing zina with each other in the courtyard of the cattle shed. The father of the complainant namely Manzoor, Ahmed (deceased) reproached Mst. Sakina Bibi and asked her to go with them, whereas his brother Hamid Ali (P.W.8) and his paternal cousin Iftikhar Ahmad (P.W.7) stepped forward to catch hold of her, on which, Ali Raza appellant took out pistol which was lying underneath his pillow and raised lalkara that if any one would come forward, he will not be spared, then he made a straight fire with his pistol hitting Iftikhar Ahmad (P.W.7) at his right thigh. He again made a straight fire hitting Hamid Ali (P.W.8) on the front of his chest at left side. Having heard the report of firing, his brother Ghulam Farid (P.W.6), along with Noor Muhammad (given up P.W.) and Muhammad Sadiq (P.W.5) came to the place of occurrence. His father Manzoor Ahmad stepped forward to attend the injured persons. Ali Raza appellant then made two straight fire shots with his pistol hitting Manzoor Ahmad on the front of his chest at left side, who succumbed to the injuries at the spot. After a while Ali Raza and Mst. Sakina appellants raised lalkara that if any one would come forward, he will be done to death. Ali Raza appellant again made a straight fire shot hitting the brother of the complainant namely Ghulam Farid (P.W.6) at his chest. He, (complainant) and the other P.Ws. attended his father and the injured persons and in the meanwhile both the accused persons (appellants) made their escape good while scaling over the wall on the back side of the Ihata (cattle shed). On their hue and cry, other persons of the village were also attracted to the spot and with their assistance, the dead body of Manzoor Ahmad (deceased) and injured persons were taken to the Government Hospital, Kanjwani. It was further alleged that both the accused (appellants) committed 'Zina' with consent and also committed the above offences in furtherance of their common intention.

3. The appellant Ali Raza was arrested on 20-10-2006. On 29-10-2006 he led to the recovery of pistol .30-bore P-4, which was taken into possession vide recovery memo Exh.P.H. The appellant Mst. Sakina Bibi was arrested on 12-10-2006. After

completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898, framed charge against the appellants on 2-2-2007 to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced 14 witnesses during the trial. Muhammad Sadiq (P.W.5), Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7), Hamid Ali (P.W.8) and Ahmed Ali, complainant (P.W.9), were the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Afzal (P.W.3) and Dr. Muhammad Yousaf Mughal (P.W.13).

Muhammad Sadiq (P.W.5) and Ghulam Murtaza SI (P.W.14) are the recovery witnesses of pistol .30 bore (P-4), which was taken into possession on the pointation of Ali Raza appellant vide recovery memo. Exh.PH. The investigation of this case was conducted by Ghulam Murtaza SI (P.W.14).

Muhammad Abbas C/145 (P.W.1), Akbar Ali Nizami, Draftsman (P.W.2), Saeed Ahmed (P.W.4), Muhammad Yaqoob (P.W.10), Ghulam Qadir 1300/MHC (P.W.11) and Nazir Ahmad-C/2539 (P.W.12) are formal witnesses. The prosecution has produced documentary evidence in the shape of memo. of possession of blood stained clothes Exh. PA, site plan Exh. PB, post mortem report Exh.PC, pictorial diagram Bxh.PC/1, death report Ex. PE, memo. of possession of blood stained earth Exh.PF, memo of possession of empty bullets Exh.PG, memo. of possession of pistol .30 bore Exh.PH, copy of complaint Exh.PJ, F.I.R. Exh.PJ/1, Medico-legal Report of Hamid Ali (P.W.8) Exh.PL and diagram Exh.PL/1, Medico-legal Report of Iftikhar Ahmad (P.W.7) Exh.PK and diagram Exh.PK/1, Medico-legal Report of Ghulam Farid (P.W.6) Exh.PM and diagram Exh.PM/1, site plan of the place of occurrence without scale Exh.PN, report of Chemical Examiner Exh.PQ, report of serologist Exh. PR, report of Forensic Science Laboratory Exh.PS and closed its evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded by the learned trial Court. While answering to a question "Why this case against you and why the P.Ws. have deposed against you", the appellants replied as under:--

Ali Raza

"All the P.Ws. are not only related to each, but also inimical to me. They had come to kill me as their sister contracted marriage with me against their wishes."

Mst. Sakina Bibi:-

"As my deceased father had promised to give my hand to Iftikhar P.W. and I contracted marriage with my co-accused Ali Raza and that I had refused to get divorce on the asking of the P.Ws. as well as my deceased father, they themselves killed my father and injured each other. They implicated me after fabrication of fake motive, which they could not set up unless I was implicated. So in order to support fake motive, they had deposed against me."

The appellants did not opt to make statements under section 340(2) of Cr.P.C., however, Ali Raza appellant produced evidence in his defence in the shape of Nikhanama as Exh.DC, birth certificate of Shakeela Bibi as Exh.DD, Nikahnama of Altaf Hussain son of Nazir Ahmad as Exh.DE and Nikahnama of Muhammad Iqbal son of Ghaus Muhammad as Exh.DF. The learned trial Court vide its judgment dated 26-7-2007, convicted the appellants and sentenced them as mentioned and detailed above.

5. Learned counsel for the appellants in support of this appeal, contends that story of the prosecution mentioned in the F.I.R., on the face of it is highly improbable and the reason assigned by the complainant and the eye-witnesses for going to the house of the complainant at night time at 1-00 a.m. is without any justification; that in fact Mst. Sakina Bibi (appellant) married with Ali Raza appellant which is clear from the Nikahnama, certified copy whereof is available on the record as Exh.DC, therefore, reason given by the complainant party for going to the house of the appellants at midnight is improbable; that in the F.I.R. it was case of the complainant that he along with eye-witnesses went to the house of appellant Ali Raza and knocked the door which was opened by his servant Murtaza Baloch and they saw in the courtyard Mst. Sakina Bibi appellant was involved in fornication with Ali Raza appellant, but while appearing before the court he did not say so, rather introduced a different story by stating that when he was a few paces away from the Haveli, he heard the report of fire shots; that the complainant did not mention in the written application (Ex.PJ) that he knocked at the gate of Havaili which was opened by Murtaza Baloch but while appearing before the court, he stated so; that the appellants were alleged to have illicit relations with each other but no evidence has been produced in respect thereof; that the appellants have not been convicted or charged under section 10 of Zina (Enforcement of Hudood) Ordinance, 1979; that the appellants have taken a specific plea which appears to be more probable; that recovery of pistol with positive report

of FSL is of no value as empties were allegedly recovered from the spot on 9-10-2006, the appellant Ali Raza was arrested on 20-10-2006 and empties were sent to the Forensic Science Laboratory on 21-10-2006; that so far as Mst. Sakina Bibi appellant is concerned, learned counsel for the appellants contends that no role was assigned to her and there is absolutely no evidence against her which could implicate her in the commission of offence; that the prosecution has miserably failed to prove its case against the appellants beyond shadow of doubt thus, this appeal be accepted and the appellants may be acquitted from the charges.

6. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant contends that both appellants are specifically named in the F.I.R. with specific roles; that in this case one life was lost and three persons were injured; that the injured were taken to the hospital and the matter was reported to the police within three hours, though place of occurrence is situated at a distance of 9 kms. and as such there is no delay in reporting the matter to the police; that the witnesses have no enmity to falsely depose against the appellants; that the plea taken by the appellants is vague in nature and does not fit in the circumstances of this case and the appellants have not produced any witness in support of their plea; that ocular account is fully supported by medical evidence available on record and is further corroborated by the recovery of pistol at the instance of appellant Ali Raza and positive report of FSL; that motive has also been proved in this case; that Nikahnama produced by the appellants is not a reliable document as no such plea was taken by the appellants during the course of investigation and no Nikah Khawan or Nikah Registrar has been examined to prove the same; that there is no mitigating circumstance in this case; that the sentences were rightly awarded to the appellants and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

7. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

8. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Muhammad Sadiq (P.W.5), Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7), Hamad Ali (P.W.8) and Ahmed Ali, complainant (P.W.9), whereas, the other has been brought on the record through the statements of appellants, recorded under section

342 of Cr.P.C. and suggestions put to the eye-witnesses during their cross-examination.

9. It is settled now by the Hon'ble Supreme Court of Pakistan in a number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not? In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342 of Cr.P.C, statement under section 340(2) and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should he convicted far that offence only. In case of contraventions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz. is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably he true, even then the Court must accept his plea and acquit or convict him accordingly."

Therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

10. The occurrence in this case took place on the intervening night of 8/9-10-2006 at 1-00 a.m. (night) in Chak No.543 G.B within the area of Police Station, Garh, District Faisalabad. The matter was reported to the police on the next morning i.e. 9-10-2006 at 3-35 a.m. by the complainant Ahmad Ali (P.W.9) through application Exh.PJ, on the basis whereof formal F.I.R. Exh.PJ/1 was registered at 4-15 a.m. The injured prosecution witnesses namely Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7) and Hamid Ali (P.W.8) were initially taken to the Government Hospital Kanjwani, where, they were referred to the Allied Hospital, Faisalabad. The distance between the place of occurrence and police station is 9 kms. Considering the abovementioned facts, the place and time of occurrence and the distance of place of occurrence from the police station, we are of the view that there is no delay in reporting the matter to the police.

11. First of all we will discuss the case of Mst. Sakina Bibi appellant. We have noted that Mst. Sakina Bibi has not been attributed any active role during the occurrence. Although, a joint lalkara was attributed to Mst. Sakina Bibi appellant and Ali Raza appellant in the F.I.R. (Exh.PJ/1), but said joint lalkara was raised when the occurrence was almost completed and thereafter only one fire shot was made by Ali Raza which landed on the chest of Ghulam Farid (P.W.6), but while appearing before the court none of the prosecution witnesses has stated that Mst. Sakina Bibi raised any lalkara during the occurrence. She has admittedly, not caused any injury to the deceased or any member of the complainant party. It is not the case of the prosecution that the appellants with premeditation launched any attack on the complainant party rather according to the prosecution's own case it was the complainant party who entered the house of Ali Raza appellant at midnight in search of Mst. Sakina Bibi appellant and when the complainant party tried to take Mst. Sakina Bibi appellant with them, the co-accused Ali Raza (appellant) made fire shots on the deceased and other members of the complainant party, therefore, we are of the considered view that case of prosecution against Mst. Sakina Bibi appellant has not been proved beyond the shadow of doubt.

12. Now we will discuss the case of Ali Raza appellant. The ocular account of the prosecution regarding the role played by Ali Raza appellant during the occurrence was furnished by the complainant Ahmad Ali (P.W.9), Muhammad Sadiq (P.W.5),

Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7) and Haamid Ali (P.W.8). Out of the abovementioned eye-witnesses, Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7) and Haamid Ali (P.W.8) are injured eye-witnesses of the occurrence. All the abovementioned eye-witnesses were cross-examined at length, but their testimonies could not he shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is reliable and trust worthy.

13. The medical evidence of prosecution was furnished by Dr. Muhammad Afzal (P.W.3) and Dr. Muhammad Yousaf Mughal (P.W.13). On 9-10-2006 at 2-30 p.m. Dr. Muhammad Afzal, conducted post-mortem examination on the dead body of Manzoor Ahmad deceased and found the following injuries on his person:--

(1) 2 lacerated fire-arm wounds of entry 1.5 cm x 1.5 cm each and about 2 cm apart from each with inverted margins on the front of upper part of left chest, about 4 cm below the outer 1/3 of the left clavicle bone. Wounds were going deep in the chest.

(2) A lacerated fire-arm wound of exit 1.5 cm x 1.5 cm on the back of the middle of the left chest, medial to the left scapula bone. Wound margins were everted and wound was continuous with Injury No.1, and through and through, through the upper part of the left side of chest.

In his opinion, the cause of death was haemorrhage and shock because of injury No.1 which was sufficient to cause death in ordinary course of nature and the probable duration between injury and death was 2 to 5 minutes and the time that elapsed between death and post mortem was 8 to 20 hours. Dr. Muhammad Yousaf Mughal (P.W.13) on 9-10-2006 at 3-40 a.m., medically examined Iftikhar Ahmad (P.W.7) and found following injuries on his person:--

Iftikhar Ahmad

1-A 2 fire-arm wounds of entry lacerated each measuring 1-3/4 cm x 1-3/4 cm, 1/2 cm separated from each other with inverted margins on right front upper thigh.

1-B A fire-arm lacerated wound of exit 3/4 cm x 3/4 cm with everted margins on the right back upper thigh.

(2) A tattooing mark in an area of 25 cm x 12 cm on right front and outer arm. Corresponding holes were present on Shalwar.

According to his opinion, injury No.2 was declared as 337-1,00, while injury No.1 was kept under observation for Radiologist and Surgeon report. The probable duration of injuries was fresh and the same were caused by firearm. On the same

day i.e. 9-10-2006 at 2-30 p.m., he medically examined Haamid Ali (P.W.8) and found the following injuries on his person:-

Haamid Ali

1-A. A fire-arm wound of entry lacerated with inverted margins 1-3/4 cm x 1-3/4 cm on left front chest, (6 cm above and outer to left nipple, with tattoo mark in an area of 16 cm x 15 cm.

1-B. A fire-arm lacerated wound of exit 3/4 cm x 3/4 cm on left back chest middle part. Corresponding holes were present on Qameez and Bunyan.

Injury No.1 was caused by firearm and was kept under observation for report of Radiologist and Surgeon. The probable duration of injury was about 3 to 9 hours.

On the same day (9-10-2006) at 6-10 a.m. he conducted medical examination on the person of Ghulam Farid (P.W.6) and noted following injuries on his person:--

I-A firearm lacerated wound 1-3/4 cm x 1-3/4 cm with inverted margins 5 cm below of nipple.

1-B. A firearm lacerated wound of exit 1-1/2 cm x 1 cm on back of injunction of chest and abdomen, left side 6 cm lateral to midline. Corresponding holes were present on Qameez and Bunyan.

In his opinion, the probable duration of injury was about 3 to 9 hours. The weapon used was firearm.

14. The above mentioned medical evidence has fully supported the ocular account furnished by the above mentioned eye-witnesses namely Ahmad Ali (P.W.9), Muhammad Sadiq (P.W.5), Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7) and Haamid Ali (P.W.8). The time of occurrence, the seat of injuries, the kind of weapon used by the assailant as narrated by the abovementioned eye-witnesses has fully tallied with the aforementioned medical evidence.

15. The prosecution has also produced the evidence of recovery of Pistol (P-4) on the pointation of the appellant Ali Raza, which was taken into possession vide recovery memo. Exh.PH. We have noted that empties were secured from the spot on 9-10-2006, Ali Raza appellant was arrested in this case on 20-10-2006 and empties were sent to the Forensic Science Laboratory on 21-10-2006, meaning thereby that the empties were sent to the Forensic Science Laboratory after the arrest of the appellant Ali Raza, therefore, possibility cannot be ruled out that fake empties were

prepared from the pistol allegedly recovered from the possession of appellant Ali Raza and the recovery of pistol (P-4) was fictitiously shown to be effected on 29-10-2006. We are, therefore, of the considered view that it is not safe to rely upon the alleged recovery of pistol (P-4) from the possession of appellant Ali Raza and positive report of Forensic Science Laboratory (Exh.PS).

16. In so far as the evidence of motive is concerned, it was alleged that Ali Raza (appellant) developed illicit relations with Mst. Sakina Bibi (appellant) and the complainant party stopped Mst. Sakina Bibi (appellant) from visiting the house of Ali Raza (appellant), however, Mst. Sakina Bibi kept on visiting the house of Ali Raza (appellant), secretly. It was added that on the fateful night, the complainant party reached the Haveli of Ali Raza (appellant) where they admonished Mst. Sakina Bibi and tried to take her with them due to which the occurrence took place. We have noted that it was alleged by the complainant Ahmad Ali (P.W.9) in the F.I.R. (Exh.PJ/1) that when he along with Manzoor Ahmad deceased and other eye-witnesses of the occurrence entered the Haveli of Ali Raza (appellant) in search of Mst. Sakina Bibi, they saw that both the appellants were committing illicit intercourse with each other in the courtyard, but while appearing before the court the complainant Ahmad Ali (P.W.9) did not level the allegation of illicit intercourse against the appellants. On the other hand both the appellants took this plea that they had contracted Nikah with each. They also produced in their defence an attested copy of 'Nikahnama' dated 11-8-2006 as Exh.DC. We have also noted that no medical evidence or report of the Chemical Examiner was produced by the prosecution to substantiate the allegation of above mentioned illicit relations between the appellants. Neither any charge was framed against the appellants under any provision of offence of Zina Enforcement of Hudood Ordinance nor they have been convicted for the same by the learned trial Court, therefore, we are of the view that motive as alleged by the prosecution has not been proved in this case.

17. Now coming to the plea of the appellant Ali Raza, we have noted that the appellant Ali Raza has taken a specific stance in his statement under section 342 of Cr.P.C. The appellant while answering to question No.3 has replied as under:--

"The version is not correct. In fact, the P.Ws. had come there to kill me as I had contracted marriage with my co-accused Mst. Sakina Bibi against the wishes of the P.Ws. and the deceased, whereas the deceased and P.Ws. wanted to marry her with Iftikhar P.W., a cousin of the complainant. Having been known about their marriage,

they kept on pressurizing his co-accused Mst. Sakina to get divorce from me, but she refused. The P.Ws. and the deceased stabbed in her back and locked her in a room after hatching a conspiracy to eliminate me. They were armed with fire-arms and Iftikhar was in forefront. He raised lalkara to kill me and the P.Ws. fired at me. As I took shelter of Mangers, so remained unhurt. When he felt that they would kill him, he fired with his .32 bore licensed revolver hitting Iftikhar on his legs to prevent them. Haamid Ali was injured as a result of firing of rest of the P.Ws."

We have noted that the appellant Ali Raza did not bother to produce any witness in support of his above mentioned plea. So much so he himself did not appear in the witness box to make statement on oath in his defence as envisaged under section 340(2) of Cr.P.C. Although the appellant has stated that the complainant party while armed with firearm weapons launched an attack to kill him but surprisingly he or Mst. Sakina Bibi appellant did not receive a single scratch on their bodies during the occurrence. It is not probable that seven persons from complainant party while armed with firearm weapons would launch an attack on the appellants but neither Ali Raza appellant nor Mst. Sakina appellant would receive a single injury during the occurrence. We are, therefore, of the view that the appellant Ali Raza could not prove the plea taken by him.

18. We have disbelieved the evidence of prosecution qua the motive and recovery of pistol P-4 in this case. However, if the evidence of motive and recovery of pistol P-4 is excluded from consideration, even then there is sufficient incriminating evidence available on the record against the appellant Ali Raza to prove the case of prosecution against him. As discussed earlier, the prosecution case was fully proved through the evidence of eye-witnesses namely Ahmad Ali complainant (P.W.9), Muhammad Sadiq (P.W.5), Ghulam Farid (P.W.6), Iftikhar Ahmad (P.W.7) and Haamid Ali (P.W.8). The said eye-witnesses stood the test of lengthy cross-examination, but their evidence could not be shaken. Their evidence is quite natural, straightforward and confidence inspiring. The ocular account of the prosecution as given by the abovementioned eye-witnesses is fully supported by the medical evidence furnished Dr. Muhammad Afzal (P.W.3) and Dr. Muhammad Yousaf Mughal (P.W.13) as well as by the postmortem report of Manzoor Ahmad deceased (Exh.PC), pictorial diagram (Exh. PC/1), medico-legal reports of Ghulam Farid (P.W.6) Exh.PM, Iftikhar Ahmad (P.W.7) Exh.PK and of Haamid Ali (P.W.8) Exh.PL, therefore, we hold that the prosecution has proved its case against the appellant Ali Raza beyond the shadow of any doubt.

19. Now coming to the quantum of sentence we have noted some mitigating circumstances in favour of appellant Ali Raza, firstly, the evidence of recovery of pistol (P-4) from the possession of Ali Raza appellant has been disbelieved by us for the reason mentioned in Para No.15 of this judgment, secondly the occurrence in this case took place without any premeditation. Even according to the prosecution case, the complainant party entered the house of Ali Raza appellant at midnight at 1-00 a.m. and when the complainant party tried to catch hold of Mst. Sakina Bibi (appellant) in order to take her with them, Ali Raza appellant took out his pistol and made fire shots at Manzoor Ahmad deceased and the other prosecution witnesses. It is, therefore; evident that the occurrence took place in the house of Ali Raza appellant at the spur of moment and thirdly the prosecution has alleged a specific motive in this case but has failed to prove the same. It is well recognized principle by now that accused is entitled for the benefit of, doubt as an extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of Mir Muhammad alias Miro v. The State (2009 SCMR 1188) wherein Hon'ble Supreme Court has held as under:--

"It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the parts of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

In another case Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death. We are convinced that Ali Raza appellant in the peculiar circumstance of this case deserve benefit of doubt to the extent of his sentence one out of two provided under section 302(b) of P.P.C.

Moreover, it is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence which had resulted into the death of Manzoor Ahmad deceased, therefore, in our view the death sentence awarded to the appellant is quite harsh. It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating

it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State (2011 SCMR 593), wherein, at page 604, the Hon'ble apex Court of the country has been pleased to lay emphasis as under:--

"10. The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of sections 306 to 308, P.P.C. attracts only in the cases of Qatl-i-amd liable to Qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-i-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-i-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-i-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-i-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-i-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:-) "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life,

if the outlook of a particular case requires that course". (underlining, italic and bold supplied)."

20. In the light of above discussion, this appeal (Criminal Appeal No. 1321 of 2007) to the extent of Mst. Sakina Bibi appellant is accepted, the convictions and sentences awarded to Mst. Sakina Bibi appellant vide the impugned judgment dated 26-7-2007 passed by the learned Additional Sessions Judge, Faisalabad are hereby set aside and Mst. Sakina Bibi appellant is acquitted from the charges, by extending her the benefit of doubt. She be released from the jail forthwith if not required in any other case. Any how, all the convictions and sentences of Ali Raza appellant as awarded by the learned trial Court through the abovementioned judgment are maintained but the sentence of death awarded to Ali Raza appellant under section 302(b), P.P.C. is altered to imprisonment for life. The compensation awarded by the learned trial Court under section 544-A of Cr.P.C. and sentence in default thereof is maintained and upheld. All the sentences of the appellant Ali Raza shall run concurrently. The benefit of section 382(b) of Cr.P.C. is also given to the appellant Ali Raza.

Consequently, with the above said modification in the sentence of Ali Raza appellant, Criminal Appeal No.1321 of 2007 is hereby dismissed to the extent of Ali Raza appellant. Murder Reference No.558 of 2007 is answered in the negative and death sentence of Ali Raza appellant is not confirmed.

HBT/A-22/L **Order accordingly.**

2015 P Cr. L J 820

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

SAIF ULLAH and 2 others---Appellants

versus

The STATE---Respondent

Criminal Appeal No. 30 and Murder Reference No.23 of 2009, heard on 11th April, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Circumstantial evidence---No direct evidence was available in the case and prosecution case hinged on the circumstantial evidence---Utmost care and caution was required for reaching at a just decision in the case---Every circumstance should be linked with each other and it should form such a continuous chain that its one end should touch the dead body and other to the neck of accused---If any link in the chain was missing, then its benefit must go to accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188 and Asadullah and another v. The State 1999 SCMR 1034 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Occurrence was unseen, which took place in the month of December at 5-00 a.m.---Complainant was not an eye-witness of the occurrence and he did not name any accused in his "Fard Biayan" on the basis of which FIR was registered---Complainant got recorded his supplementary statement, wherein he implicated accused persons on the basis of information imparted to him by a prosecution witness who was given up---Both witnesses of Waj-takkar, were not the residents of the village, where occurrence took place, but were residents of other villages and could not give plausible reason for their presence at the spot at the relevant time; it was not safe to rely upon the evidence furnished by said Waj-takkars---No evidence of extra judicial

confession was available against one of the accused persons---Prosecution had, however, produced the evidence of extra judicial confession against other two accused persons, through prosecution witnesses who were residents of different villages---Prosecution witness before whom said accused had allegedly made extra judicial confession, was not holding any authority or office---Evidence of extra judicial confession was a weak type of evidence and in the present case same being not trustworthy, could not be relied upon---Motive as alleged by the prosecution had not been proved---Occurrence being unseen, and no details regarding the manner in which the offence was committed was mentioned by the witnesses of extra judicial confession there was no need to discuss the medical evidence---No report of Forensic Science Laboratory was available on record qua gun pump-action allegedly recovered from the possession of accused---No report was on record in respect of Kalashnikov allegedly recovered from the accused person---Evidence of Waj-takkar, extra judicial confession and motive, having been disbelieved, accused persons could not be convicted merely on the basis of recoveries which were only corroborative piece of evidence---Accused could not be convicted merely on the basis of his abscondence---Present case was replete with number of circumstances, which had created doubt about the prosecution story---Prosecution having failed to prove its case against accused persons beyond the shadow of doubt, their conviction and sentences were set aside, and they were acquitted from the charges and were released, in circumstances.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 and Tahir Javed v. The State 2009 SCMR 166 ref.

Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756; Nek Muhammad and another v. The State PLD 1995 SC 516; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

(c) Criminal trial---

----Medical evidence---Medical evidence was a type of supporting evidence, which could confirm the ocular account with regard to receipt of injury, nature of injury, kind of weapon used in the occurrence, but it would not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 rel.

(d) Criminal trial---

----Benefit of doubt---If there was a single circumstance which created doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Muhammad Irfan Malik for Appellants.

Appellant No.3 present on bail.

Arshad Mehmood, Deputy Prosecutor-General for the State.

Aurangzeb Marl and Miss Najma Parveen for the Complainant.

Date of hearing: 11th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Saif Ullah, Muhammad Alam alias Goga and Hafiz Tanveer Ahmad appellants were tried in case FIR No. 371, dated 11-12-2006, registered at Police Station Kakrali, District Gujrat in respect of offences under section 302, P.P.C. (section 34 of P.P.C. added at the time of framing of the charge). After conclusion of the trial, the learned trial Court vide its judgment dated 6-1-2009 has convicted and sentenced the appellants as under:--

Saif Ullah, Muhammad Alam alias Goga and Hafiz Tanveer

Under section 302(b)/34, P.P.C. to 'Death' sentence to each appellant for committing Qatl-i-amd of Intizar Ahmad deceased. They were also ordered to pay Rs.10,00,000 (rupees ten hundred thousand only) each as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months each.

2. Feeling aggrieved, the appellants have challenged their convictions and sentences through Criminal Appeal No. 30 of 2009, whereas, the learned trial Court has transmitted Murder Reference No.23 of 2009 for confirmation or otherwise of the Death sentences of Saif Ullah, Muhammad Alam alias Goga and Hafiz Tanveer appellants. We propose to dispose of both these matters by this single judgment as

these have arisen out of the same judgment dated 6-1-2009 passed by the learned Additional Sessions Judge, Kharian, District Gujrat.

3. Brief facts of the case as given by the complainant, namely, Riaz Ahmad (P.W.9) in his 'Fard Biayan' (Exh.PH) on the basis of which the formal FIR (Exh.PH/1) was chalked out, are that he (complainant) was resident of 'Bhadhar' and cultivator by profession. He (complainant) and his younger brother Intizar Ahmad were living in one and the same house. On 11-12-2006, at about 5-00 a.m., Intizar Ahmad (deceased) as per his routine was going to the mosque 'Qureshian' to offer his morning prayer. As soon as Intizar Ahmad (deceased) reached at the corner of the house of one Dr. Muhammad Aslam in the street which was a thoroughfare, unknown persons opened fire shots for murderous assault at Intizar Ahmad, which hit on different parts of his body. On hearing the report of firing, he (complainant) reached at the spot along with other relatives and found that Intizar Ahmad had expired. The deadbody of Intizar Ahmad (deceased) was lying in the street and unknown assailants had already decamped from the spot. It was further alleged by the complainant that the cause of murder was not known to him and that as and when he would get the knowledge of the said cause, he would inform the police about the same.

The complainant Riaz Ahmad (PW9) is not an eye-witness of the occurrence and he did not name any person as accused in his 'Fard Biayan' Exh.PH on the basis of which the formal FIR (Exh.PH/1) was registered. However, on the same day, (11-12-2006), at evening time, he got recorded his supplementary statement Exh.PJ wherein he implicated the appellants on the basis of information imparted to him by Bashir Ahmad (given up P.W.) and Liaqat Ali (P.W.8). The complainant stated in the above mentioned supplementary statement Exh.PJ that on 11-12-2006 at 6-00 p.m. he (complainant) was sitting at 'Fateh Khawani' of his deceased brother Intizar Ahmad, where Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.) came to him and told that on that day (11-12-2006) at 5-00 a.m. they had seen Saif Ullah appellant armed with Kalashnikov, Hafiz Tanveer Ahmad appellant armed with .12 bore pump action and Muhammad Alam alias Goga armed with .12 bore pump action, while running in the street. The complainant further stated in his above mentioned supplementary statement Exh.PJ that he was sure that his brother Intizar Ahmad was murdered by the appellants because Muhammad Alam alias Goga and Hafiz Tanveer Ahmad (appellants) used to bring women of bad character to the Dera of Saif Ullah appellant

where they used to commit illicit inter course with them and against this, Intizar Ahmad deceased complained to Saif Ullah appellant and due to this grudge, the appellants committed the murder of Intizar Ahmad deceased.

4. The appellants namely Saif Ullah and Muhammad Alam alias Goga were arrested on 24-1-2007 by Sajjad Anwar, SI (P.W.18), whereas, Hafiz Tanveer Ahmad was arrested in this case on 17-10-2007. According to the prosecution case, on 26-1-2007, the appellant Muhammad Alam alias Goga led to the recovery of gun pump action (P-7) and three live cartridges P-8/1-3, which were taken into possession through memo Exh.PE. Likewise, on 27-1-2007, the appellant Saif Ullah led to the recovery of Kalashnikov (P-9) and ten live cartridges P-10/1-10, which were taken into possession through memo. Exh.PF, whereas, on 1-10-2007, the appellant Hafiz Tanveer Ahmad led to the recovery of gun .12 bore Pump action (P-1), which was taken into possession through memo. Exh.PN. After completion of investigation, the challan was prepared and submitted before the court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants namely Saif Ullah and Muhammad Alam alias Goga on 12-7-2007. After the arrest of Hafiz Tanveer Ahmad appellant amended charge was framed against all the appellants on 12-1-2008, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced 18 witnesses, during the trial. Riaz Ahmad (P.W.9) is the complainant of the case. Liaqat Ali (P.W.8) is the witness of waj-takkar, whereas, Bashir Ahmad (P.W.5) and Muhammad Sarwar (P.W.6) are the witnesses of extra judicial confession. Rafique Ahmad (P.W.4) is the witness of motive incident.

The medical evidence was furnished by Dr. Nasir Mumtaz (P.W.2).

Muhammad Sarwar (P.W.6) is also witness of the recovery of gun pump action P-7 and three live cartridges P-8/1-3 and Kalashnikov P-9 along with ten live bullets P-10/1-10, which were recovered on the pointation of Muhammad Alam alias Goga and Saif Ullah appellants through memo. Exh.PE and Exh.PF, respectively. Khurram Shahzad 945/C (P.W.15) and Faiz Ahmad, ASI (P.W.16) are witnesses of the recovery of gun .12 bore pump action P-11, which was recovered on the pointation of Hafiz Tanveer Ahmad appellant through memo Exh.PN. Muhammad Arif,

Inspector (P.W.14) and Sajjad Anwar, SI (P.W.18) are the Investigating Officers of the case.

Muhammad Iqbal 34/C (P.W.1), Muhammad Iqbal (P.W.3), Muhammad Azeem 926/C (P.W.7), Abdul Rehman 606/MHC (P.W.10), Akhtar Naqash Draftsman (P.W.11), Tasawar Ali, SI (P.W.12), Muhammad Khalid 227/C (P.W.13), Muhammad Arif, SI (P.W.14), Amjad Hussain 1298/C (P.W.17), are the formal witnesses. The prosecution produced documentary evidence in the shape of post mortem report of the deceased Exh.PA, pictorial diagram Exh.PA/1, memo of possession of blood stained earth Exh.PB, memo. of possession of empty bullets Exh.PC, memo. of possession of last worn clothes of the deceased Exh.PD, memo. of possession of gun .12 bore pump action Exh.PE, copy of rough site plan of the place of recovery of gun .12 bore Exh.PE/1, memo. of possession of Kalashnikov from Saif Ullah appellant Exh.PF, copy of rough site plan of the place of recovery of Kalashnikov Exh.PF, memo. of possession of gun .12 bore pump action from appellant Exh.PG, copy of rough site plan of place of recovery of .12 bore gun pump action Exh.PG/1, statement of Riaz Ahmad complainant Exh.PH, FIR Exh.PH/1, copy of supplementary statement given by the complainant Riaz Ahmad complainant Exh.PJ, scaled site plan of the place of occurrence in duplicate Exh.PK and Exh.PK/1, warrant of arrest of Hafiz Tanveer Ahmad appellant Exh.PL and report Exh.PL/1, application by the I.O. to summon the appellant Hafiz Tanveer Ahmad confined in District Jail, Gujrat and order Exh.PM, memo of possession of gun .12 bore pump action from Tanvir Ahmad appellant Exh.PN, injury statement of the deceased Exh.PQ, application for conducting post mortem examination of the deceased Exh.PR, inquest report Exh.PS, rough site plan of the place of occurrence Exh.PT, warrant of arrest of Hafiz Tanveer Exh.PU and report Exh. PU/1, application for issuance of warrant of arrest and order Exh.PV, application for proclamation under section 87 of Cr.P.C. Exh.PX, bailable warrants of arrest of Hafiz Tanveer appellant (Exh.CW-1/A), report on the said warrants (Exh.CW-1/B), proclamation against Hafiz Tanveer appellant (Exh.CW-2/A), report on the said proclamation (Exh.CW-2/B), report of chemical examiner Exh.PY, report of serologist Exh.PZ, reports of Forensic Science Laboratory Exh.PAA and Exh.PBB and closed its evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While

answering to a question that "Why this case against you and why the P.Ws. have deposed against you" the appellants have responded as under:--

Saif Ullah

"This case which has been got registered at the instance of Riaz Ahmad complainant is baseless, false and foisted. The fact of the matter is that Lt. Gen. Mukhtar Ahmad is my staunch enemy and a close relative of the complainant. Similarly Shafqat S.P. is inimically disposed towards me because in various Union Council Elections and for the election of Provincial Assembly, his close relative contested those elections and I vehemently opposed them. Lt. Gen. Mukhtar aforementioned had land dispute with me and he wanted to take forcible possession of some parcel of my land, to which I opposed tooth and nail and so both Shafqat S.P. and Lt. Gen. Mukhtar aforementioned joined hands and head together and wanted to wreak vengeance from me. Both the aforementioned officers imported their various relatives from different villages and they prepared false circumstantial evidence. All the P.Ws. of this are close kith and kin inter se and they after conniving with Riaz Ahmad and the police fabricated a false version and they got this case registered against me which is totally false. This is a case trumpeted up by enemies. I am innocent and I had no reason whatsoever to commit the murder of Intizar deceased. This was totally an un-witnessed occurrence. The names of none of the accused figure in the FIR and late in the day both the officers mentioned above convened together and made Riaz Ahmad complainant as a tool in their hands in order to satisfy the grudge and ill will, which they bore against me. The complainant and most of the other witnesses, they themselves took up themselves to be a panacea for all the ailment of the prosecution and have fabricated a case of circumstantial evidence against me. The complainant of this case contested an election for the Naib Nazim of the U.C. Bhadar and in that elections I opposed him tooth and nail and when he was defeated in that elections. I jubilated and resorted fire works and this fact also rankled in his eye like a thorn and he in order to satisfy his ill will and grudge installed himself as a complainant of this case. The case is completely false and coined by me against my adversaries."

Muhammad Alam alias Goga and Hafiz Tanveer

"The complainant of this case namely Riaz Ahmad contested elections for the seat of Naib Nazim of Union Council of Bhadar and I jubilated resorted to fire works in

front of his house. His rival for that seat was a friend of mine and so I rejoiced at his success and this fact ranked in the eye of complainant like a thorn. He had a fight with me also, in which I picked and slapped him. So he subsequently involved me in this case after due deliberations and consultation with Let. Gen. Mukhtar and S.P. Shafqat."

Neither the appellants made statements under section 340(2), Cr.P.C. nor they produced any evidence in their defence. The learned trial Court vide its judgment dated 6-1-2009, found the appellants guilty and convicted and sentenced them as mentioned and detailed above.

6. Learned counsel for the appellants, in support of this appeal, contends that the appellants have falsely been implicated in this case; that the appellants were not named in the FIR which was registered by the brother of the deceased and the complainant simply stated in the FIR that his brother has been murdered by some unknown accused; that the complainant subsequently got recorded his supplementary statement regarding the incident which carries no value in the eye of law; that the complainant was informed by Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.) that they had seen the appellants after the occurrence running in the street while holding firearm weapons in their hands but the said Bashir Ahmad was not produced in the witness box and statement of Liaqat Ali (P.W.8) carries no value because he stated that at the relevant time, he along with Bashir Ahmad came out of the house of one Tanveer Ahmad in order to proceed to Rawalpindi in connection with an urgent piece of work but he has not been able to give any rational answer in his cross-examination about the nature of their work at Rawalpindi and moreover, he is a chance witness; that so far as the motive is concerned, complainant did not state anything in the FIR and he stated regarding the motive in his supplementary statement which was to the effect that Hafiz Tanvir Ahmad and Muhammad Alam alias Goga (appellants) used to bring women of easy virtue at the Dera of Saif Ullah (appellant) and the appellants used to commit adultery with them and that against this the deceased complained to Saif Ullah appellant but no such motive was mentioned in the FIR, therefore, no reliance can be placed in this respect; that the evidence of extra judicial confession allegedly made by the appellants before the witnesses carries no value, for the reason, there was no reason with the appellants to make such confession before the witnesses; that it is the case of Bashir Ahmad (P.W.5) that he was present

in the house when Saif Ullah appellant had confessed his guilt that he along with Muhammad Alam alias Goga appellant and Tanveer Ahmad appellant had committed the murder of Intizar Ahmad, deceased but had this appellant confessed his guilt in the house of Bashir Ahmad (P.W.5) he could easily have overpowered him as his other family members were also present in his house; that so far as recovery of fire arm weapons at the instance of the appellants and positive reports of FSL are concerned, learned counsel for the appellants contends that it is a corroborative piece of evidence and relevant only if the primary evidence inspires confidence and merely on the basis of recovery and positive reports of Forensic Science Laboratory, conviction of the appellants cannot be sustained; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt, thus, this appeal be accepted and the appellants may be acquitted from the charges.

8. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant, opposes this appeal on the grounds that bona fide of the complainant is clear from the fact that he did not nominate anybody in the FIR and had he any enmity with the appellants he could have easily implicated them in the FIR; that the complainant got recorded his supplementary statement on the same day when he got information from Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.), thus, this evidence clearly connected the appellants with the commission of crime; that the evidence of motive has been produced through Rafiq Ahmad (P.W.4) who had no enmity with the appellants to falsely implicate them in the case; that the prosecution case is further supported by the evidence of extra judicial confession and none of the witnesses has any enmity with any of the appellants; that ocular account gets support from the medical evidence as there are eleven firearm injuries on the person of the deceased; that one of the appellants namely Hafiz Tanveer remained fugitive from law for a considerable period and his abscondence has been proved through the statement of Muhammad Khalid (P.W.13); that the prosecution case is further corroborated by the evidence of recovery of Kalashnikov P-9 which was recovered on the pointation of Saif Ullah appellant, the recovery of gun pump action P7 which was recovered on the pointation of Muhammad Alam alias Goga appellant and recovery of gun .12 bore from the possession of Hafiz Tanveer Ahmad appellant; that the prosecution case is further corroborated by the positive report of Forensic Science Laboratory (Exh.PAA); that there is no mitigating circumstance in this case; that the sentences of death were rightly awarded to the appellants and the same may

be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:--

'...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:--

'7....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:--

'7....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the

neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

11. The prosecution case is based on the following pieces of evidence:--

(i) Wajtakkar; evidence.

(ii) Evidence about extra judicial confession of Saif Ullah and Muhammad Alam alias Goga appellants.

(iii) Motive.

(iv) Medical evidence

(v) Recoveries

12. (i) 'Wajtakkar' evidence.

As mentioned earlier, the occurrence in this case was unseen which took place in the month of December, i.e. 11-12-2006 at 5-00 a.m. in village "Bhadhar". The complainant Riaz Ahmad (P.W.9) is not an eye-witness of the occurrence and he did not name any accused in his 'Fard Biayan' Exh.PH on the basis of which the formal FIR Exh.PH/1 was registered. However, on the evening of 11-12-2006 he got recorded his supplementary statement Exh.PJ wherein he implicated the appellants on the basis of information imparted to him by Bashir Ahmad (given up P.W.) and Liaqat Ali (P.W.8). The complainant stated in the above mentioned supplementary statement Exh.PJ that on 11-12-2006 at 6-00 p.m. he was sitting at 'Fateh Khawani' of his deceased brother Intizar Ahmad, when Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.) came to him and told that on that day (11-12-2006) at 5-00 a.m. they had seen Saif Ullah appellant armed with Kalashnikov, Hafiz Tanveer Ahmad appellant armed with .12 bore pump action and Muhammad Alam alias Goga appellant armed with .12 bore pump action, while running in the street. The complainant further stated in his supplementary statement Exh.PJ that his brother Intizar Ahmad was murdered by the appellants because Muhammad Alam alias Goga and Hafiz Tanveer Ahmad (appellants) used to bring women of bad character to the Dera of Saif Ullah appellant where they used to commit illicit inter course with them

and Intizar Ahmad deceased complained to Saif Ullah appellant and due to this grudge the appellants committed the murder of Intizar Ahmad deceased.

We have noted that both the above mentioned witnesses of Waj-takkar namely Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.) were not the residents of village 'Bhadhar' where this occurrence took place. Liaqat Ali (P.W.8) is resident of a different village, i.e. village Sidh, whereas, Bashir Ahmad (given up P.W.) was resident of village Kotla. In order to establish their presence at the spot, at the time of occurrence which took place in the darkness of night, i.e. on 11-12-2006 at 5-00 a.m., Liaqat Ali (P.W.8) stated that Bashir Ahmad (given up P.W.) was his 'Khalu' and his daughter Mst. Sajida Parveen was married to one Tanveer Ahmad resident of village 'Bhadhar'. He further stated that Bashir Ahmad (given up P.W.) came to the house of his daughter at village 'Bhadhar' and he also summoned him (Liaqat Ali P.W.8) to village 'Bhadhar' as he (Bashir Ahmad given up P.W.) had to go to Rawalpindi due to some piece of work, therefore, he (Liaqat Ali P.W.8) went to 'Bhadhar' and stayed there in the house of Tanveer Ahmad for the night and on 11-12-2006 at 5-00 a.m. he saw the appellants while armed with different weapons running in the street. Liaqat Ali (P.W.8) is 'mamoonzad' (maternal cousin) of the deceased Riaz Ahmad and this fact was brought on the record during the cross-examination of the complainant Riaz Ahmad. He claimed that after the occurrence he saw the appellants near the house of one Sher Ali Butt. It was so mentioned in the FIR that the occurrence took place near the house of one Dr. Muhammad Aslam. Liaqat Ali (P.W.8) has further stated during his cross-examination that the house of above mentioned Dr. Muhammad Aslam and Sher Ali Butt are located in a street and the distance between the said two houses was 60 Karams. The relevant part of the statement of Liaqat Ali (P.W.8) at page No. 61 of the Paper-book reads as under:--

"Dr. Aslam is also known to me. The distance between the house of Sher Ali Butt and Dr. Muhammad Aslam is 60 Karams. The house of Dr. Aslam is towards the west of the house of Sher Ali Butt. All these houses are located in a street. There are about 15/20 houses lying in the street where the house of Sher Ali is located. The house of Saif Ullah accused lies towards north west of the house of Sher Ali Butt at a distance of about 15/20 Karams."

It is evident from the perusal of the above mentioned portion of the statement of Liaqat Ali (P.W.8) that the house of Dr. Muhammad Aslam where the occurrence

took place and the house of Sher Ali Butt where he saw the appellants after the occurrence is situated in a street and the distance between the house was only 60 Karams (330 feet). The conduct of Liaqat Ali (P.W.8), who is 'mamoonzad' (maternal cousin) of the deceased, is highly un-natural because had he been present at the spot he would have heard the report of fire shots. This witness did not bother to go to the spot to see as to what had happened over there rather he stated that he along with Bashir Ahmad (given up P.W.) went to Rawalpindi and they came back in the evening. He has not given any reason of his visit to Rawalpindi and simply stated that Bashir Ahmad (given up P.W.) asked to accompany him as he was going for an urgent piece of work over there. However, during his cross-examination he stated that Bashir Ahmad (given up P.W.) did not inform him the purpose of his visit to Rawalpindi. He further stated that he did not disclose to police any purpose of his visit to Rawalpindi and the name of the persons to whom they visited on that day. As mentioned earlier, Liaqat Ali (P.W.8) is not resident of village 'Bhadhar' and he gave the reason for his presence at the spot at the relevant time that it was Bashir Ahmad (given up P.W.) who called him on the preceding night of occurrence to village 'Bhadhar' but prosecution did not produce the above mentioned Bashir Ahmad in order to establish the reason given by Liaqat Ali (P.W.8) for his presence at the spot on the fateful night. As the above mentioned witness was not the resident of the village of occurrence, he could not give any plausible explanation of his presence at the spot at the time of occurrence (5-00 a.m. in the month of December) and as he also could not reasonably explain his silence from 5-00 a.m. (morning) to 6-00 p.m. (evening) after allegedly witnessing the appellants after the incident, therefore, it is not safe to rely upon the evidence of Waj-takkar furnished by Liaqat Ali (P.W.8).

13. (ii) Evidence of Extrajudicial Confession.

There is no evidence of extra judicial confession against Hafiz Tanveer Ahmad appellant. However, the prosecution has produced the evidence of extra judicial confession against Saif Ullah appellant through Bashir Ahmad (P.W.5) and against Muhammad Alam alias Goga appellant through Muhammad Sarwar (P.W.6). We have noted that Saif Ullah appellant is resident of village 'Bhadhar', whereas, Bashir Ahmad (P.W.5) is resident of Chak Sikandar. Bashir Ahmad (P.W.5) is a 'Zimindar' by profession and he was not enjoying any office of authority. He has stated during his cross-examination that there were two lumberdars of his village Chak Sikandar.

It does not appeal to common sense that as to why the appellant had gone to him (Bashir Ahmad P.W.5) and made an extra judicial confession before him when the said P.W. was neither resident of his village nor holding any office of authority. The other witness produced by the prosecution to prove the extra judicial confession of Muhammad Alam alias Goga is Muhammad Sarwar (P.W.6). Muhammad Alam alias Goga appellant is resident of village Aikya, whereas, Muhammad Sarwar (P.W.6) is resident of village "Ropairy". Muhammad Sarwar (P.W.6) is closely related to the deceased because he has himself stated in his examination-in-chief that the deceased of this case was 'Bhanja' of his wife. He was a retired DEO. Even this witness was not enjoying any office of authority at the time of alleged extra judicial confession of Muhammad Alam alias Goga appellant. As mentioned earlier he is close relative of the deceased and he is also witness of the recovery of .12 bore pump action P-7 which was allegedly recovered on the pointation of the appellant Muhammad Alam alias Goga which shows that he is an interested witness of the prosecution. Even otherwise it is not understandable that as to why Muhammad Alam alias Goga appellant who is resident of village Aikya would go all the way to another village, i.e. "Ropairy" to make extra judicial confession before Muhammad Sarwar (P.W.6). He was not holding any office of authority. It is by now settled law that the evidence of extra judicial confession is a weak type of evidence. The evidentiary value of the extra-judicial-confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as Sajid Mumtaz and others v. Basharat and others (2006 SCMR 231), wherein, at page 238, the apex Court of Pakistan has been pleased to lay emphasis as under:--

"17..... This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra-judicial-confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial-confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial-confession, the Court must inquire into all material points and surrounding circumstances to 'satisfy' itself fully that the confession cannot but be true. As, an extra-judicial-confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

(18) It has been further held that the status of the person before whom the extra-judicial-confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule of prescribed by this Court.

(19) It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

(20) Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial-confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial-confession have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confession. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been

fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness" (emphasis supplied)

The above view has been reiterated in the case reported as Tahir Javed v. The State (2009 SCMR 166), wherein, at page 170, the august Supreme Court of Pakistan, has been pleased to observe as under:--

"It may be noted here that since extrajudicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683 and (4) Sarfraz Khan v. The State and others (1996 SCMR 188)".

Keeping in view the guidelines given by the Hon'ble Supreme Court of Pakistan in the above mentioned judgments we are of the considered view that the evidence of extra judicial confession furnished by Bashir Ahmad (P.W.5) and Muhammad Sarwar (P.W.6) is not trustworthy.

14. (iii) Motive.

No motive was mentioned by the complainant Riaz Ahmad (P.W.9) in his 'Fard Biyan' Exh.PH, on the basis of which the formal FIR (Exh.PH/1) was registered. The complainant, however, introduced the motive part of the prosecution story through his supplementary statement Exh.PJ wherein he stated that Muhammad Alam alias Goga and Hafiz Tanveer Ahmad appellants used to bring the women of bad character to the Dera of Saif Ullah appellant where they all used to commit illicit inter course with them. Intizar Ahmad deceased complained to Saif Ullah appellant and due to

this grudge, the appellants committed the murder of Intizar Ahmad (deceased). The complainant Riaz Ahmad has stated during his cross-examination that he does not know the name of the women who were brought by the accused persons for adultery at the Dera of Saif Ullah appellant. He further stated that the deceased never told him about the said women as he was younger to him at 8th place and he (deceased) felt shy and was afraid of him. The prosecution, however, produced evidence qua motive through Rafiq Ahmad (P.W.4). The name of this witness was neither mentioned in the FIR Exh.PH/1 nor in the supplementary statement of the complainant Exh.PJ which was recorded after more than 13 hours of the occurrence, although the above mentioned story of motive was narrated in the above mentioned supplementary statement of the complainant Exh.PJ. The motive occurrence allegedly took place in village 'Bhadhar' but Rafiq Ahmad (P.W.4) is not resident of the said village and he is resident of village Sidh. In order to show his presence in village 'Bhadhar' to witness the motive incident, he stated that on 10-12-2006 he came to village 'Bhadhar' to see his sister Mst. Bashir Fatima who was married to Umar Hayat (given up P.W.). He further stated that on that day he expressed his desire of purchasing bricks to his brother-in-law Umar Hayat. The said witness instead of going to purchase bricks at the brick kiln went to the Dera of Saif Ullah appellant who was statedly owner of a brick kiln, where he witnessed the altercation between the appellants and Intizar Ahmad deceased on bringing the women of ill repute to the Dera of Saif Ullah appellant. Although this witness made this excuse that the purpose of his visit to village 'Bhadhar' and the Dera of Saif Ullah appellant was to purchase bricks but he did not produce any receipt regarding the purchase of bricks from the brick kiln of Saif Ullah appellant or from any other brick kiln. He has further stated during his cross-examination that his statement was recorded by the police at 6-00 p.m. in village 'Bhadhar' on 11-12-2006 but as mentioned earlier his name did not find mention in the supplementary statement of the complainant Exh.PJ which was also recorded on 11-12-2006 after 6-00 p.m. because the complainant stated in his supplementary statement (Exh.PJ) that he was informed about the appellants by Liaqat Ali (P.W.8) and Bashir Ahmad (given up P.W.) at 6-00 p.m. on 11-12-2006 which means that his above mentioned statement (Exh.PJ) was recorded after 6-00 p.m. on 11-12-2006.

In the light of above discussion, we are of the view that the motive as alleged by the prosecution has not been proved in this case.

15. (iv) Medical Evidence.

Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53), 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410). As the occurrence in the instant case is unseen and no detail regarding the manner in which the occurrence was committed was mentioned by the witnesses of extra judicial confession, therefore, there is no need to discuss the medical evidence of the prosecution.

16. (v) Recoveries of the weapons of offence.

The prosecution has also produced the evidence of recoveries qua Kalashnikov P-9, which was allegedly recovered on the pointation of Saif Ullah appellant, gun .12 bore pump action P-7 at the instance of Muhammad Alam alias Goga appellant and gun pump action P-11 from Hafiz Tanveer Ahmad appellant. So far as recovery of gun pump action P-11 from Hafiz Tanveer Ahmad appellant is concerned, there is no report of Forensic Science Laboratory qua gun pump action P-11 recovered from the possession of Hafiz Tanveer Ahmad appellant. So far as the alleged recoveries of Kalashnikov P-9 and gun .12 bore pump action P-7 from the possession of Saif Ullah and Muhammad Alam alias Goga appellant's respectively and positive report of Forensic Science Laboratory (Ex.PAA) is concerned, there is no need to discuss the said evidence because we have already disbelieved the prosecution evidence of waj-takkar, extra judicial confession and motive, therefore, the said appellants cannot be convicted merely on the basis of above mentioned recoveries which are only corroborative pieces of evidence. Reference in this respect may be made to the case of 'Muhammad Afzal alias Abdullah and others v. The State and others' (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:-
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"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to

bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be."

Similarly in the case of 'Abdul Mateen v. Sahib Khan and others' (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Muhammad Yaqub v. The State' (1971 SCMR 756) and 'Nek Muhammad and another v. The State' (PLD 1995 Supreme Court 516).

16. Similarly Hafiz Tanveer Ahmad appellant cannot be convicted, merely on the basis of evidence about his abscondence, in absence of any reliable direct or circumstantial evidence.

17. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

'5.....The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

'13 .....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.30 of 2009 filed by Saif Ullah, Muhammad Alam alias Goga and Hafiz Tanveer Ahmad appellants, set aside their convictions and sentences recorded by the learned Additional Sessions Judge Kharian vide judgment dated 6-1-2009 and acquit them of the charges by extending them the benefit of doubt. Saif Ullah and Muhammad Alam alias Goga appellants are in custody, they be released forthwith if not required in any other case. Hafiz Tanveer Ahmad is on bail, his bail bonds and sureties shall stand discharged.

Murder Reference No.23 of 2009 is answered in the NEGATIVE and the sentences of death of Saif Ullah, Muhammad Alam alias Goga and Hafiz Tanveer Ahmad (convicts) are NOT CONFIRMED.

HBT/S-61/L **Appeal accepted.**

2015 P Cr. L J 1007

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD SARWAR and others---Appellants

versus

The STATE---Respondent

Criminal Appeals Nos.1386, 1387, 270-J of 2008 and Murder Reference No. 5 of 2009, heard on 25th April, 2013.

Penal Code (XLV of 1860)---

----Ss. 302(b), 396, 148 & 149---Qatl-i-amd, dacoity with murder, rioting, common object---Appreciation of evidence---Benefit of doubt---Accused persons, neither were nominated in the FIR, nor their description was mentioned in the FIR; and no identification parade was conducted---Case of prosecution was that seven unknown accused persons participated in the occurrence and resorted to firing at the deceased, but there was only one firearm injury on the person of deceased as per medical evidence---Three co-accused who were also assigned the role of making fire at the deceased had been acquitted by the Trial Court and their acquittal had attained finality as no appeal was filed against said acquittal---Role attributed to accused persons, was similar to that of acquitted co-accused---Recoveries of .12 bore guns at the instance of two accused persons, were of no avail to the prosecution as no report of Forensic Science Laboratory about wedding of any empty with the said guns was available on record---Nothing was recovered from third accused during investigation---No specific identification mark or denomination of any currency Notes was mentioned in the FIR---No specific identification mark on allegedly recovered currency notes, had been mentioned in the recovery memo.---Recovery of cash amount of Rs.150 only which was easily available with almost every person, at the instance of accused, and was of no avail to the prosecution---No independent corroboration was found against accused persons---Case of accused persons was not distinguishable from the case of acquitted co-accused---Prosecution, in circumstances, had failed to prove its case against accused persons beyond any shadow of doubt---Convictions and sentences awarded to accused persons, by the Trial Court were set aside extending them benefit of doubt---Accused

were acquitted from the charges levelled against them and they were released, in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185 and Akhtar Ali and others v. The State 2008 SCMR 6 rel.

Rao Muhammad Naeem Hashim, Sikandar Zulqarnain Saleem and Rao Javed Khurshid for Appellants.

Ms. Fouzia Sultana Advocate/defence counsel at State expenses for the Appellant (in Criminal Appeal No. 270-J of 2008).

Arshad Mahmood, Deputy Prosecutor-General for the State.

Maqbool Ahmad Bhatti and Muhammad Shoaib Bhatti for the Complainant.

Dates of hearing: 23rd and 25th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1386 of 2008 titled as "Muhammad Sarwar v. The State" filed by Muhammad Sarwar, Criminal Appeal No.1387 of 2008 titled as "Sakhawat Ali alias Sakhoo v. The State" filed by Sakhawat Ali alias Sakhoo, Criminal Appeal No. 270-J of 2008, titled as "Muhammad Irshad v. The State" filed by Muhammad Irshad (appellant) against their convictions and sentences and Murder Reference No.5 of 2009 titled as "The State v. Muhammad Sarwar etc." submitted by the learned trial Court, under section 374 of the Code of Criminal Procedure, for confirmation or otherwise, of the sentences of death awarded to Muhammad Sarwar, Sakahawat Ali alias Sakhoo and Muhammad Irshad appellants, as all these matters have arisen out of the same judgment dated 27-11-2008 passed by the learned Additional Sessions Judge, Chunian, District Kasur in case FIR No. 110 dated 5-3-2004, registered under sections 302 and 396, P.P.C. (section 109, P.P.C. was added subsequently), 148 and 149, P.P.C. (added in charge) Police Station Chunian, District Kasur whereby, Muhammad Sarwar, Sakhawat Ali alias Sakhoo and Muhammad Irshad appellants were convicted under section 302(b), P.P.C. read with section 396, P.P.C. for committing the murder of Fateh Muhammad (deceased) and all of them were sentenced to death with a direction to pay Rs. 50,000 (rupees fifty thousand only) each to the legal heirs of deceased, as envisaged

under section 544-A of the Code of Criminal Procedure and in default thereof to further undergo rigorous imprisonment for six months each.

The learned trial Court, however, through the same judgment, acquitted Muhammad Ismail, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad, co-accused of the appellants while giving them the benefit of doubt.

2. Brief facts of the case, as disclosed by Abid Ali Khan complainant, (P.W.10) in his application (Exh-PG/1), on the basis of which the formal FIR (Exh-PG) was registered, are that he (complainant) was resident of Kora Khooh Mashmoola Sadha Ottar and runs a shop of dry cleaner at Chunian. His (complainant's) father Fateh Muhammad (deceased) had purchased a Mazda Coaster bearing registration No.LPT-1161, which was driven by him (Fateh Muhammad deceased) from Chunian to Lahore. On 5-3-2004 at 9-30 p.m., when, as per routine, he (father of the complainant), being relieved from passengers, was going to Sadha, he (complainant) along with Abdur Rehman (P.W.11) and Muhammad Ashfaq (given up P.W.) also sat with him. Their wagon, when reached at a distance of one kilometer from College Bypass near Abadi Haji Idrees, all of a sudden, seven persons armed with firearm weapons came in front of the wagon and asked to stop the same. As the wagon stopped, the accused persons started firing and the bullets hit father of the complainant (Fateh Muhammad deceased) who succumbed to the injuries at the spot. Thereafter the accused persons came inside the wagon and carried out the personal search of the P.Ws. They took Rs.2,500 from the pocket of the complainant and Rs.150 from the pocket of Ashfaq (given up P.W.). The inner and outer lights of the wagon were lit. The occurrence was witnessed by the complainant, Abdur Rehman (P.W.11) and Muhammad Ashfaq (given up P.W.). It was further stated in the FIR, that he (complainant) can identify the accused persons on confrontation.

3. On 22-4-2002, Muhammad Sarwar (appellant) was arrested in this case by Muhammad Idrees, S.I (he was not produced as he has gone abroad) who on 5-5-2004, while in police custody, after making disclosure, got recovered .12 bore gun (P-7), which was taken into possession vide recovery memo. Exh-PM. Irshad alias Shada (appellant) was arrested on 24-5-2004 by Muhammad Idrees, S.I. Sakhawat Ali alias Sakhoo (appellant) was arrested in this case on 24-8-2004 by Muhammad Ashraf, S.I. (P.W.13), who, on 28-8-2004, while in police custody, after making disclosure, got

recovered .12 bore gun (P-2), which was taken into possession vide recovery memo. Exh-PB. The appellant Sakhawat Ali also got recovered parts of motorcycle i.e. mudguard (P-7), handle (P-8), Chimta Grari chain cover (P-9), filter cover (P-10), both wheels (P-11/1-2), oil tank of the motorcycle (P-12), engine bearing No.CD 70-E/F01909 (P-13) two indicators (P-14/1-2) which were taken into possession vide recovery memo. Exh-PC. After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused (since acquitted) on 4-2-2006, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fifteen witnesses, during the trial whereas, Naveed ur Rehman (C.W.1) appeared as Court Witness. Abid Ali Khan, complainant (P.W.10) and Abdur Rehman (P.W.11) furnished the ocular account of the case.

The medical evidence was furnished by Dr Nawab Din (P.W.9) who, on 6-3-2004 at 11-00 a.m., conducted the postmortem examination on the dead body of Fateh Muhammad (deceased).

Muhammad Ashraf, S.I. (P.W.13) is the Investigating Officer of the case. Nazir Ahmad 565/C (P.W.2) is the witness of recovery of .12 bore gun (P-2) whereas, Mehmood ul Hassan 937/HC (P.W.3) is the witness of recovery of motorcycle (P-1) at the instance of Sakhawat Ali alias Sakhoo (appellant). Shaukat Ali 839/C (P.W.1), Mubarik Ali Shah 802/C (P.W.4), Ghulam Mustafa 926/HC (P.W.5), Riaz Ahmad 421/C (P.W.6), Muhammad Anees, Draftsman (P.W.7), Ali Muhammad (P.W.8), Muhammad Saleem 663/C (P.W.12), Karamat Ali 177/HC (P.W.14) and Abdur Rashid 169/C (P.W.15) are the formal witnesses whereas, Naveed ur Rehman 1040/C2 appeared as C.W.1.

It is pertinent to mention here that Karamat Ali 177/HC again appeared as P.W.14 to give secondary evidence as Muhammad Idrees, S.I, the investigating officer of this case proceeded abroad to Kosovo for duty in Peace Mission of United Nations.

The prosecution also produced documentary evidence in the shape of recovery memo. of motorcycle P-1 (Exh.PA), rough site plan of the place of recovery of

motorcycle P-1 (Exh.PA/1), recovery memo. of .12 bore gun P-2 (Exh.PB), rough site plan of the place of recovery of .12 bore gun P-2 (Exh.PB/1), recovery memo. of parts of motorcycle CD-70 (Exh.PC), recovery memo. of last worn clothes of the deceased (Exh.PD), scaled site plan, in duplicate, of the place of occurrence (Exh.PE and Exh.PE/1), postmortem report of the deceased along with pictorial diagram (Exh.PF and Exh.PF/1), FIR (Exh.PG), application of the complainant for registration of the case (Exh.PG/1), application for postmortem examination (Exh.PH), injury statement of the deceased (Exh.PJ), inquest report of the deceased (Exh.PK), recovery memo. of blood stained mat (Exh.PL), recovery memo. of .12 bore gun (P-7) at the instance of Muhammad Sarwar appellant (Exh.PM), rough site plan of the place of recovery of .12 bore gun P-7 (Exh.PM/1), warrants of arrest of Muhammad Tufail accused (since acquitted) along with report (Exh.PN and Exh.PN/1), warrants of arrest of Mushtaq accused (since acquitted) along with report (Exh.PO and Exh.PO/1), proclamation of Tufail accused (since acquitted) along with report (Exh.PQ and Exh.PQ/1), proclamation of Mushtaq accused (since acquitted) along with reports (Exh.PR and Exh.PR/l), rough site plan of the place of occurrence (Exh.PS), receipt of receiving the dead body of the deceased (Exh.PT), report of the Chemical Examiner (Exh.PU), report of the Serologist (Exh.PV), reports of the Forensic Science Laboratory (Exh.PW and Exh.PX), application for discharge of Niaz Ahmad accused (Exh.PY), copy of letter from DIG (Exh.CW-1/1), list of police officers selected for UNO Peace Mission (Exh.CW-1/2) and closed its evidence.

5. The statements of the appellants and their co-accused (since acquitted) except Muhammad Ismail, under section 342 of the Code of Criminal Procedure, were recorded by the learned trial Court on 4-5-2007. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?", Muhammad Sarwar appellant replied as under:-

"The P.Ws. are related inter se and they have deposed falsely against me. It was an occurrence of blind murder. I and my co-accused Muhammad Ismail etc., have been involved in the case by the Police with mala fide in connivance with this complainant party just to show its efficiency. We all are innocent in this case."

In reply to the above said question, Sakhawat alias Sakhoo appellant replied as under:-

"The P.Ws. are related inter se, so they have deposed against me falsely. I have been falsely involved in this case without any reason. In fact, it was an occurrence of blind murder and the Police party has involved me in the case in connivance with the complainant party by nominating me in supplementary statement got recorded by the complainant. I am innocent and false recovery has been planted upon me. No weapon of offence was recovered from my house. On the fateful night of occurrence, I was present at my house and have no knowledge about any such occurrence."

In reply to the same question, Muhammad Irshad appellant replied as under:-

"The P.Ws. are related inter se and they have falsely deposed against me. In fact, on the fateful night of occurrence, I along with my father Muhammad Hussain were present at the Dera of Shaukat Ali, situated at Qilla Natha Singh, in a punchayat and I along with my father spent the whole night at the said Dera. On the next morning, I went to Lahore and for that reason I have also been declared innocent during investigation."

6. The learned trial court vide its judgment dated 27-11-2008, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants, in support of these appeals, contend that admittedly the appellants are not named in the FIR (Exh.PG) and even no feature or description of any of the appellants or any other accused is mentioned therein; that the claim of the complainant that he made a supplementary statement immediately at the spot is belied by other circumstances of the prosecution's own case; that firstly, in the inquest report (Exh.PK), the story of the prosecution is the same as was in the FIR (Exh.PG) and even in the scaled site plan (Exh.PE), which was prepared on 15-3-2004, name of any of the appellants or any other co-accused is not mentioned and the Draftsman who prepared the scaled site plan appeared before the learned trial Court as P.W.7 and stated that he did not mention the name of any accused in the scaled site plan as the Investigating Officer told him that no accused was traced out by that time; that the complainant has stated that he was disturbed at the time of submitting application (Exh.PG/l) for registration of the case and he could not mention the names of the appellants, therefore, he got recorded his supplementary statement but his version does not appeal to common sense and even no such supplementary statement of the

complainant is available on the record; that it was specifically alleged by the complainant in the FIR (Exh.PG) and while appearing before the learned trial court that seven persons fired at the deceased but the doctor who conducted the postmortem examination on the dead body of Fateh Muhammad (deceased) appeared before the learned trial court as P.W.9 and as per postmortem report (Exh.PF), he noted a group of firearm entry wounds on the person of the deceased which was caused by one fire shot and as such, the medical evidence is in conflict with the ocular account; that along with the appellants five other persons namely, Muhammad Ismail, Niaz Ahmad, Muhammad Tufail, Mushtaq Ahmad and Ashiq were also implicated in this case, out of whom, Ashiq had died whereas, Muhammad Ismail, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad were acquitted by the learned trial court and no appeal against their acquittal was filed either by the State or by the complainant, therefore, the evidence which has been disbelieved qua the acquitted accused persons cannot be believed to the extent of the appellants until and unless, there is strong and independent corroboration which is very much lacking in this case as the recovery of .12 bore guns (P-2 and P-7) at the instance of Sakhawat Ali alias Sakhoo and Muhammad Sarwar (appellants), respectively is of no avail to the prosecution because no crime empty was recovered from the spot and the reports of the Forensic Science Laboratory (Exh.PW and Exh.PX) are simply to the effect that the guns were in working order; that recovery of Rs.150 from Muhammad Sarwar (appellant) is also of no avail to the prosecution as no description of the currency notes allegedly snatched from the complainant and Muhammad Ashfaq (given up P.W.) was mentioned in the FIR; that even Muhammad Ashfaq from whom Rs.150 were snatched did not appear before the learned trial court as witness; that recovery of motorcycle and parts of motorcycle at the instance of Sakhawat Ali alias Sakhoo (appellant) is also not helpful to the prosecution because there is no allegation that any accused was riding on the motorcycle or motorcycle was snatched during the occurrence; that the prosecution case is of doubtful nature from all angles; that prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, these appeals be accepted and the appellants may be acquitted from the charges.

8. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant vehemently opposes these appeals on the grounds that the

appellants cannot get any benefit from the acquittal of other co-accused namely, Muhammad Ismail, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad as they were found innocent during the course of investigation; that this incident took place on 5-3-2004 at 10-00 p.m. whereas, the matter was reported to the police on the same night at 10-30 p.m.; that immediately after the registration of the case, the complainant made a supplementary statement wherein, the appellants were named with specific allegation of causing firearm injury to Fateh Muhammad (deceased) and snatching Rs.2,500 from him and Rs.150 from Muhammad Ashfaq (given up P.W.); that there is absolutely no enmity of the complainant or any other witness with the appellants and other co-accused (since acquitted) for their false implication in this case; that the prosecution witnesses cannot be treated as interested or inimical witnesses; that it is not only a case under section 302, P.P.C. but it is also a case under section 396, P.P.C. and all the accused are conjointly responsible for the murder of Fateh Muhammad (deceased); that .12 bore guns (P-2 and P-7) were recovered at the instance of Sakhawat Ali alias Sakhoo and Muhammad Sarwar (appellants), which were taken into possession vide recovery memos. Exh.PB and Exh.PM, respectively; that the prosecution has proved its case against the appellants beyond the shadow of any doubt; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellants and the same may be maintained, appeals may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the appellants, the learned Deputy Prosecutor General assisted by learned counsel for the complainant and have also gone through the record with their able assistance.

10. The detail of the prosecution story has already been mentioned in paragraph No.2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that on 5-3-2004 at 9-30 p.m., Fateh Muhammad (deceased), Abid Ali Khan complainant (P.W.10), Abdur Rehman (P.W.11) and Muhammad Ashfaq (given up P.W.) were going to village Sadha Ottar on wagon of the deceased and when they reached near Abadi Haji Idrees, one kilometer from College bypass, seven persons armed with firearm weapons came in front of the wagon and asked to stop the same. As the wagon stopped, the accused persons started firing and the bullets hit the deceased

who succumbed to the injuries at the spot. The accused persons also snatched cash amount from the complainant and Ashfaq (given up P.W.).

We have noted that the appellants were not named in the FIR (Exh.PG). No description of the appellants, whatsoever, was mentioned in the FIR. No identification parade of the appellants was conducted. Although it has been claimed by the complainant that the appellants were implicated through his supplementary statement which was recorded on the day of occurrence but no such statement has been brought on the record. The complainant had claimed that the accused persons were known to him prior to the occurrence but it is not understandable that if the accused persons were known to the complainant prior to the occurrence, then what was the obstacle in his way to nominate them in the FIR (Exh.PG). It was the case of the prosecution, as set forth in the FIR (Exh.PG), that seven unknown accused persons participated in the occurrence and resorted to firing at the deceased at the time of occurrence but there was only one firearm injury on the person of Fateh Muhammad (deceased) as per medical evidence furnished by Dr. Nawab Din (P.W.9) and besides abovementioned one fire-arm injury, there were only two abrasions on the person of the deceased. We have also noted that three co-accused namely, Muhammad Tufail, Niaz Ahmad and Mushtaq Ahmad who were also assigned the role of making firing at the deceased, have been acquitted by the learned trial Court and no appeal against their acquittal has been filed either by the State or by the complainant and as such, their acquittal has attained the finality.

11. In the FIR (Exh.PG), the complainant Abid Ali Khan (P.W.10) attributed the joint role of firing to all the seven unknown accused persons who were later on nominated as Muhammad Sarwar, Sakhawat Ali alias Sakhoo, Irshad (the appellants) and Niaz Ahmad, Mushtaq Ahmad and Muhammad Tufail (since acquitted). The complainant Abid Ali Khan, while appearing before the learned trial court as (P.W.10) narrated the same allegation and assigned the role of inflicting fire-arm injury to all the above-mentioned accused persons. The relevant part of his statement is reproduced hereunder:-

"...all of a sudden, 7 persons i.e., accused Muhammad Sarwar duly armed with .12 bore Gun, Irshad armed with 30 bore Pistol, Sakhawat armed with .12 bore Gun, Tufail armed with .44 bore Rifle, Ashiq armed with .12 bore Gun, Mushtaq armed with

Carbine and Niaz armed with .12 bore Gun, came in front of the Coaster and started making fire shots with their respective weapons of offence. All the aforesaid accused are present before this court. Due to firing by the accused, my father Fatteh Muhammad died at the spot..."

The other eye-witness namely, Abdur Rehman (P.W.11), while appearing before the learned trial Court made the following statement:-

"...When we were passing through Bypass and reached at a distance of about one Kilometer ahead of Commercial College, Chunian, we saw tractor trollas on the road and those were being stopped by the accused. We saw accused Irshad duly armed with Pistol, Sarwar, Sakhawat, Niaz duly armed with .12 bore Guns, Ashiq armed with .12 bore Gun (since dead), Tufail armed with .44 bore Rifle and Mushtaq armed with Carbine. All the accused except Ashiq are present before this court. We saw the accused looting tractor trollas. Our driver was intended to overtake the tractor trollas whereupon the accused gave signal to stop the Mazda Wagon, but it was in high-speed. The driver of coaster stopped the same after applying break, but in the meantime accused made fire shots. One of the fire hit Fateh Muhammad at the back side of his body, who died at the spot..."

It is evident from the perusal of evidence of the above-mentioned prosecution witnesses that the role attributed to the appellants Muhammad Sarwar, Sakhawat Ali alias Sakhoo and Irshad was similar to that of acquitted co-accused, namely, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad.

12. Charge under sections 302, 396, 148, 149 of P.P.C. with identical allegations was framed against the appellants Muhammad Sarwar, Sakhawat Ali alias Sakhoo, Muhammad Irshad and the above-mentioned acquitted three co-accused namely, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad. The said three co-accused were also assigned the similar joint role of firing on the person of Fateh Muhammad (deceased) due to which he (Fateh Muhammad deceased) died but they have been acquitted by the learned trial Court while extending them the benefit of doubt and no appeal against their acquittal has been preferred either by the State or by the complainant, as confirmed by the learned Deputy Prosecutor General, for the State, and the learned counsel for the complainant and, as such, the said acquittal has attained finality, therefore, the question

for determination, before this Court, is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellants can be believed against the appellants. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as "Iftikhar Hussain and another v. State" 2004 SCMR 1185, wherein the Hon'ble Supreme Court, at page 562, held as under:-

"17. ...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758), relevant para therefrom is reproduced herein below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v.

The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Zaiaullah v. State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)."

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as "Akhtar Ali and others v. The State" (2008 SCMR 6). We, therefore, following the principles as set forth by the Hon'ble Supreme Court of Pakistan in such like cases, would examine the case of the appellants to see, as to whether there case is distinguishable from the case of acquitted co-accused and whether there is any independent corroboration of the prosecution case against the appellants.

13. Learned Deputy Prosecutor-General assisted by the learned counsel for the complainant has referred to the recovery of .12 bore gun (P-2) and cash amount of Rs.150 allegedly recovered at the instance of Sakhawat Ali alias Sakhoo (appellant) and recovery of .12 bore gun (P-7) allegedly recovered at the instance of Muhammad Sarwar (appellant). In so far as the alleged recovery of .12 bore gun (P-2) at the instance of Sakhawat Ali alias Sakhoo (appellant) and .12 bore gun (P-7) at the instance of Muhammad Sarwar (appellant) is concerned, the same is inconsequential as there is no report of the Forensic Science Laboratory about wedding of any empty with the said guns and the reports of the Forensic Science Laboratory (Exh.PW and Exh.PX) are only to the extent of working condition of the said guns. We are, therefore, of the view that the recoveries of .12 bore guns (P-2 and P-7) allegedly recovered at the instance of Sakhawat Ali alias Sakhoo and Muhammad Sarwar (appellants) respectively, are of no avail to the prosecution whereas, nothing was recovered from Muhammad Irshad (appellant) during the investigation of this case.

In so far as the alleged recovery of Rs.150 at the instance of Muhammad Sarwar (appellant) is concerned, we have noted that no specific identification mark or denomination of any currency note is mentioned in the FIR (Exh.PG). No specific identification mark on allegedly recovered currency notes has been mentioned in the recovery memo Exh.PM. There is no identification memo of the recovered currency notes prepared in this case to show that the said currency notes were got identified by any eye-witness and he verified that recovered currency notes were the same which

were looted during the occurrence, therefore, recovery of cash amount of Rs.150, which is easily available with almost every person, at the instance of Muhammad Sarwar (appellant) is of no avail to the prosecution.

We are, therefore, of the view that there is no corroboration of the prosecution case from the abovementioned alleged recoveries.

14. As far as medical evidence is concerned, Dr. Nawab Din (P.W.9) conducted the postmortem examination on the dead body of Fateh Muhammad (deceased) on 6-3-2004 at 11-00 a.m., who noted the following injuries on the dead body of Fateh Muhammad (deceased):-

"(1) A group of six entry wounds, every one measuring 1/2 x 1/2 cm x chest cavity deep. On back of middle and lower part of right side of chest 2 to 3 cm apart from one another. Margins were inverted.

(2) An exit wound 1/2 x 1/2 cm x chest cavity deep, in mid-line 3 cm above, epigastrium. Margins everted.

(3) An abrasion 3 x 1 cm, present in front of right lower leg.

(4) An abrasion 2 x 1 cm present in front of left knee."

It is obvious from the perusal of above-mentioned medical evidence given by Dr Nawab Din (P.W.9), that there was only one firearm entry wound (injury No.1) on the person of Fateh Muhammad (deceased). The said injury has not been specifically assigned to any of the appellants and the same was jointly attributed to the appellants, as well as, their three acquitted co-accused namely, Niaz Ahmad, Muhammad Tufail and Mushtaq Ahmad.

In the circumstances of the case, we could not find out any independent corroboration against the appellants and we are unable to distinguish the case of the appellants from the case of acquitted co-accused.

15. In view of the above-mentioned circumstances, we are of the considered opinion that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt. We, therefore, accept all the appeals i.e. Criminal Appeal No.1386 of 2008 filed by Muhammad Sarwar (appellant), Criminal Appeal No.1387 of 2008 filed by Sakhawat Ali alias Sakhoo (appellant) and Criminal Appeal No.270-J of 2008 filed

by Muhammad Irshad (appellant) and set aside their convictions and sentences awarded by the learned trial Court vide its judgment dated 27-11-2008 by extending them the benefit of doubt. The appellants are acquitted from all the charges. They are in custody, they be released forthwith if not required in any other case.

16. Murder Reference No.5 of 2009 is answered in the NEGATIVE and the sentence of death of Muhammad Sarwar, Sakhawat Ali alias Sakhoo and Muhammad Irshad (convicts) is NOT CONFIRMED.

HBT/M-177/L **Appeal accepted.**

2015 Y L R 476

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD IQBAL and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos.265-J of 2009, 1235 of 2010 and Murder Reference No.340 of 2009, heard on 22nd October, 2013.

(a) Criminal trial---

----Prosecution was required to prove its case against accused persons beyond any shadow of doubt---Defence version was to be taken into consideration after evaluating the prosecution evidence to find out whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b), 100, 109, 148 & 149---Qatl-i-amd, abetment, rioting---Appreciation of evience---Private defence, right of---Formal F.I.R. which had been registered after one hour and forty five minutes of occurrence---Complainant had admitted that he had not witnessed the occurrence and story regarding the incident was narrated to him by prosecution witnesses---One of the prosecution witnesses, who was son of the complainant, could not justify his presence at the spot at the relevant time, and his evidence was in conflict with medical evidence---Trial Court, in circumstances, had rightly discarded evidence of said witness---Prosecution witness who allegedly was going with the deceased on a motorcycle, did not receive any injury during the occurrence---Highly improbable that when intention of seven persons who were armed with firearm weapons, was to kill both the deceased and said witness, then how was the witness spared---Motorcycle which the deceased and prosecution witness were allegedly riding at the time of occurrence, was not taken into possession by the Police which had created doubt in the prosecution story---Prosecution witness did not attribute any specific injury to accused, but a joint role of making fire shots upon the deceased by co-accused, who had since been acquitted, was assigned by him---

Evidence of co-accused who had since been acquitted was in conflict with the story narrated by the prosecution in the F.I.R., and with the statement of other eye-witness---Prosecution witness implicated as many as 10 accused persons in the occurrence, but the Trial Court had awarded death penalty only to the accused, who was assigned a joint role of inflicting firearm injuries on various parts of body of the deceased along with the acquitted co-accused---Prosecution had failed to prove any motive against accused---Recovery of pistol .30 bore on the pointation of accused was inconsequential because the report of Forensic Science Laboratory was only to the effect same was in working order---In absence of matching report of the empty with said pistol, alleged recovery of said pistol was immaterial---Prosecution in circumstances, could not prove its case against accused beyond the shadow of doubt---If the statement of accused was accepted as a whole, then accused had the right of private defence of his body which also extended to cause death of assailant as provided under S.100 of P.P.C.---Impugned judgment passed by the Trial Court was set aside---Conviction and sentence of accused were also set aside and he was acquitted from the charge and was released, in circumstances.

(c) Criminal Procedure Code (V of 1898)---

----S. 342---Penal Code (XLV of 1860), S.302(b)--- Qatl-i-amd--- Examination of accused---Statement of accused, acceptance or rejection of---Even, if accused had himself admitted in his statement recorded under S.342, Cr.P.C. that he committed the murder of the deceased, but, that had no force, because, if the prosecution evidence was disbelieved by the court, then the statement of an accused was to be accepted or rejected as a whole---Court could not accept the inculpatory part of the statement of accused, and reject the exculpatory part of the same statement---Prosecution evidence having already been discarded by the Trial Court, accused could not be awarded punishment on the basis of his statement recorded under S.342, Cr.P.C. by accepting the inculpatory part of said statement, and by rejecting exculpatory part of the same statement.

Muhammad Asghar v. The State PLD 2008 SC 513; Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. East Khan 1991 SCMR 61 rel.

(d) Criminal Procedure Code (V of 1898)---

----S. 417(2-A)---Penal Code (XLV of 1860), S.302(b)--- Qatl-i-amd--- Appeal against acquittal of co-accused---Main accused was acquitted from the charge---Prosecution evidence having already been disbelieved while discussing the case of

main accused, appeal against acquittal of co-accused, was also dismissed, in circumstances.

Sultan Ali Dogar for Appellants.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Mian Tariq Hussain for the Complainant.

Date of hearing: 22nd October, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.265-J of 2009, filed by the appellant, Muhammad Iqbal, against his conviction and sentence, Criminal Appeal No.1235 of 2010, filed by the complainant Muhammad Nawaz, against acquittal of co-accused Ijaz Ahmad alias Riaz Ahmad, Muhammad Boota, Muhammad Akram, Muhammad Siddique, Muhammad Iqbal and Zafar Iqbal and Murder Reference No. 340 of 2009 (The State v. Muhammad Iqbal), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Iqbal convict, as all these matters have arisen out of the same judgment dated 5-8-2009, passed by the learned Additional Sessions Judge, Sialkot. Muhammad Iqbal appellant along with Ijaz Ahmad alias Riaz (since acquitted), Muhammad Boota (since acquitted), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal (since acquitted), Zafar Iqbal (since acquitted), Muhammad Nazir (since acquitted), Muhammad Sadiq (since acquitted) and Muhammad Khalid Mehmood (since acquitted) was tried in case F.I.R. No. 709, dated 19-12-2007, registered at Police Station, Uggoke, District Sialkot, in respect of offence under sections, 302/109/148/149 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 5-8-2009, has convicted and sentenced the appellant as under:--

Muhammad Iqbal son of Ali Ahmad.

Under section 302(b) of P.P.C. to death for committing the Murder of Asad Iqbal (deceased). He was directed to pay compensation of Rs.2,00,000 under section 544-A of Cr.P.C. to the legal heirs of the deceased Asad Iqbal and in default thereof to further undergo 06 months Imprisonment Benefit of section 382-B of Cr.P.C. was also extended to the appellant.

Learned Trial Court however, vide the same judgment dated 5-8-2009 acquitted co-accused Ijaz Ahmad alias Riaz, Muhammad Boota, Muhammad Akram,

Muhammad Siddique, Muhammad Iqbal, Zafar Iqbal, Muhammad Nazir, Muhammad Sadiq and Muhammad Khalid Mehmood while extending the benefit of doubt in their favour.

2. Brief facts of the case as given by the complainant Muhammad Nawaz (P.W.3) in Fard Bayan (Exh.PB), on the basis of which the formal F.I.R. (Exh.PD) was chalked out, are that he (complainant) was resident of Mundair Khurd, Tehsil Sambariyal, District Sialkot and was holder of Coca Kola Agency. On 19-12-2007 at about 9-00 a.m., the complainant's nephew (Bhatija) Asad Iqbal (deceased) along with his cousin Muhammad Waqar Azam (P.W.1) while boarding on a motorcycle was going to the "Dera" from his home. On the way, accused Ijaz Ahmad alias Riaz Ahmad (since acquitted), Muhammad Boota (since acquitted), Muhammad Iqbal (appellant), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal son of Khushi Muhammad (since acquitted), Zafar Iqbal (since acquitted) and an unknown person were already sitting ambushed in the Bhatick of accused Ijaz Ahmad alias Riaz Ahmad (since acquitted). Asad Iqbal (deceased), when passed from near the Bhatick of Muhammad Siddique (since acquitted). Muhammad Iqbal (appellant) and Zafar Iqbal (since acquitted) raised Lalkara while abusing that Asad Iqbal (deceased) and Muhammad Waqar Azam (P.W.1) be killed and they should be taught a lesson for not compromising the previous litigation. After raising Lalkara, accused Muhammad Ijaz alias Riaz Ahmad (since acquitted) fired at Asad Iqbal (deceased) with his pistol, which hit Asad Iqbal (deceased) on the upper part of his belly. Muhammad Iqbal (appellant), Muhammad Boota (since acquitted) and Muhammad Akram (since acquitted) also fired with their pistols and one fire shot of each (accused) hit Asad Iqbal (deceased) at the different parts of his body and he (deceased) fell down in injured condition. It is further alleged in the F.I.R. (Exh.PD) that Muhammad Waqar Azam (P.W.1) saved his life while running in the adjacent street. At the time of occurrence Rashid Nawaz (P.W.2), who was going from his home Adha Sahowala to his "Tayazad" Asad Iqbal (deceased) also reached at the place of occurrence and witnessed the whole occurrence. All the accused persons fled away from the spot after raising lalkaras, while boarding the Mehran Car bearing No. LEA-4097 silver in colour, owned by Ijaz Ahmad (since acquitted). It is also alleged in the F.I.R. (Exh.PD) that the above mentioned accused persons committed the occurrence on the abetment and instigation of Muhammad Nazeer (since acquitted), Muhammad Sadique (since acquitted) and Khalid Mehmood (since acquitted).

3. The appellant Muhammad Iqbal was arrested by Faryad Ali Inspector (P.W.13) on 24-12-2007. On 10-1-2008, he (appellant) led to the recovery of pistol .30 bore (P-6) which was taken into possession vide recovery memo (Exh.PF). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned Trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant Muhammad Iqbal and his co-accused Ijaz Ahmad alias Riaz (since acquitted), Muhammad Boota (since acquitted), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal (since acquitted), Zafar Iqbal (since acquitted), Muhammad Nazir (since acquitted), Muhammad Sadiq (since acquitted) and Muhammad Khalid Mehmood (since acquitted) under sections 302/109/ 148/149 of P.P.C., on 8-5-2010, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced thirteen witnesses during the trial. Muhammad Nawaz (P.W.3) the complainant of this case Muhammad Waqar (P.W.1) and Rashid Nawaz (P.W.2) are the witnesses of the ocular account. Sharaiz Tahir (P.W.11) is the witness of abetment.

Muhammad Amjad (P.W.8) is the witness of recovery of pistol 30 bore (P-6) which was recovered on the pointation of the appellant Muhammad Iqbal vide recovery memo Exh.PF.

The medical evidence was furnished by Dr. Muhammad Arif Sheikh (P.W.10) and Dr. Gull Nawaz (P.W.12).

Faryad Ali Inspector (P.W.13) was the Investigating Officer of this case. Sarfraz Ahmad 1168-C (P.W.4), Tahir Tasneem Draftsman (P.W.5), Waqar Khan A.S.-I. (P.W.6), Abdul Razzaq 1258/H.C (P.W.7) and Zulfiqar Ali Constable (P.W.9) were the formal witnesses.

The prosecution also produced documentary evidence in the shape of recovery memo of blood stained cotton from the place of occurrence (Exh.PA), Fard Bayan of the complainant Muhammad Nawaz (Exh.PB), scaled site plan of the place of occurrence in duplicate (Exh.PC and Exh.PC/l), F.I.R (Exh.PD), recovery memo of last worn clothes of the deceased (Exh.PE), recovery memo of pistol .30 bore at the instance of the appellant Muhammad Iqbal (Exh.PF), site plan of the place of recovery of pistol (Exh.PF/1), postmortem report (Exh.PG), pictorial diagram (Exh.PG/1), medico-legal report of the deceased (Exh.PH), inquest report (Exh.PJ), application

for conducting postmortem examination of the deceased (Exh.PK), injury statement of the deceased (Exh.PL), rough site plan of the place of occurrence (Exh.PM), report of F.S.L (Exh.PN), report of Chemical Examiner (Exh.PO) and report of Serologist (Exh.PP) and closed its evidence.

5. The statements of the appellant and his co-accused under section 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question that 'why this case against you and why the P.Ws. have deposed against you', the appellant replied as under:--

"In fact, Muhammad Azam P.W who was injured P.W in case F.I.R. No.622/2007 dated 28-7-2007 under sections 324/109/34, P.P.C., registered at Police Station Uggoki on the statement of Muhammad Inayat, paternal grandfather of Waqar Azam P.W. Muhammad Azam injured of said case is real brother of Amjad, Arif P.Ws of the present case. Muhammad Inayat wrongly implicated me in that case. In fact, Muhammad Azam was injured by one Abbas resident of village Ganjianwali, but I was falsely involved in that case with the allegation of abetment under Section 109, P.P.C. Asad Sohail deceased of this case and his father Muhammad Iqbal are record holder in the police station and desparate daring person. Sometimes prior to present occurrence, Waqar Azeem because of abovesaid case F.I.R. No. 622/07 along with Asad Sohail (deceased) resorted firing at me but I was luckily saved and the matter was not reported to the police because I did not want to indulge myself in enmity or criminal litigation being poor man and law abiding citizen. I could not afford that. It is submitted that on 19-12-2007 on the alleged day of occurrence, when I came to Adda Sahowala to go for Samberial when Asad Sohail (deceased) and Waqar Azam P.W came across me at Adda Sahowala at about 9.00 a.m and started abusing me and people present there forbad them to pick quarrel without reason and hurle abuses, meanwhile I had a chance to make an escape to avoid further altercation as both Asad Sohail (deceased) and Waqar P.W. were bent upon to do so. I apprehending imminent danger at their hands, returned to village. When I was way to home in the village, Asad Sohail (deceased) and Waqar P.W came behind me on a motorcycle and came infornt of me to block my way, at that time Waqar Azam who was driving a motorcycle and Asad Sohail (deceased) was got down from the rear of motorcycle on road and tried to fire at me by raising abuses and Lalkara, I apprehending imminent danger to my life and in a right of exercise of myself defence and under the immediate fear of attack, resorted into firing at ,him, who fell down. Waqar Azam P.W picked up pistol and drove the motorcycle. I also ran away. I was all alone when I was

attacked by Asad Sohail (deceased) and Waqar Azam P.W who followed me from Adda Sahowala on motorcycle on the day of occurrence. On the same day, I surrendered myself to the police at my own and narrated the whole occurrence in the manner stated above, but the police kept pending my arrest and formally showed my arrested after many days of the occurrence on 6-1-2008. I am old age man of 50 years having children and law abiding citizen and poor man. Complainant party which is headed by Muhammad Inayat grandfather of Amjad, Waqar and Arif P. Ws, who are rich, influential and strong people in the village and in the area. Police also support and help them. My plea was interrogated by the I.O. and on the application of the complainant party, my plea was investigated by DSP and SP investigation in presence of the complainant. A large number of people in support of my plea appeared before the police, but the police did not cite them as witnesses in list of witnesses and that from Adda Sahowala many persons as well as passerby were Asad Sohail and Waqar Azam who blocked my way at Adda Sahowala and endanger my life".

The appellant did not opt to make statement on oath as envisaged under section 340(2) of Cr.P.C, however, in defence evidence he produced copy of statement of Waqar Azam (P.W.1) recorded under section 161 Cr.P.C. as (Exh.DA), copy of statement of Rashid Nawaz (P.W.2) recorded under section 161, Cr.P.C. as (Exh.DB), copy of statement of Muhammad Amjad (P.W.8) recorded under section 161 Cr.P.C. as (Exh.DC), copy of F.I.R. No. 622/2007 as (Exh.DD), copy of F.I.R No. 355/2007 as (Exh.DE), copy of F.I.R No. 313/2003 as (Exh.DF), copy of F.I.R No. 251/2002 as (Exh.DG), copy of F.I.R No. 175/2002 as (Exh.DH), copy of F.I.R No. 711/2005 as (Exh.DJ) and copy of F.I.R No. 19/2004 as (Exh.DK). The learned Trial Court vide its judgment dated 5-8-2009, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. Learned counsel for the appellant in support of this appeal, contends that the appellant has falsely been implicated in this case; that the complainant Muhammad Nawaz (P.W.3) was admittedly not present at the time of occurrence, and the same fact has been admitted by him (complainant/ P.W.3) in opening sentence of his cross examination; so far as Rashid Nawaz (P.W.2) is concemed, learned counsel for the appellant contends that he was not present at the spot and he was a chance witness and that his evidence was rightly discarded by the learned trial court after assigning valid reasons; that presence of Muhammad Waqar (P.W.1) at the place of occurrence is also doubtful in nature because he is a chance witness as he was going to the "Dera" from his house on a motorcycle along with Asad Iqbal (deceased) but no motorcycle

was taken into possession by the police; that although Muhammad Waqar (P.W.1) stated in his statement (examination-in-chief) that Muhammad Siddique (since acquitted), Muhammad Iqbal son of Khushi Muhammad (since acquitted) and Zafar Iqbal (since acquitted) raised Lalkara that Asad Iqbal (deceased) and Muhammad Waqar (P.W.1) be also killed for not effecting compromise but surprisingly he (Muhammad Waqar P.W.1) did not receive any injury during the occurrence; that the conduct of Muhammad Waqar (P.W.1) at the place of occurrence is highly unnatural because he did not make any attempt to shift Asad Iqbal (deceased) to the hospital and Asad Iqbal (deceased) was shifted to the hospital by Sohail Ahmad (given up P.W); that no specific motive was alleged in the F.I.R (Exh.PD), that although Muhammad Waqar (P.W.1) stated in his statement (examination-in-chief) that Muhammad Siddique (since acquitted), Muhammad Iqbal son of Khushi Muhammad (since acquitted) and Zafar Iqbal (since acquitted) raised Lalkara that Asad Iqbal (deceased) and Muhammad Waqar (P.W.1) be killed as they were not compromising the previous litigation but no detail of litigation was disclosed by him; that recovery of pistol 30 bore (P.6) is immaterial because the report of Forensic Science Laboratory (Exh. PL) is only to the effect that the said pistol was in working order; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charges.

7. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that there is no conscious delay in reporting the matter to the police as the occurrence took place at 9.00 a.m., matter was reported to the police at 10.15 a.m., postmortem examination on the dead body was also conducted on the same day at 6.00 p.m.; that names of both the witnesses of ocular account i.e., Muhammad Waqar (P.W.1) and Rashid Nawaz (P.W.2) were mentioned in the F.I.R (Exh.PD); that Muhammad Waqar (P.W.1) who was going along with Asad Iqbal (deceased) on motorcycle is his cousin whereas the other eye-witness is also resident of the same village; that there was no reason for false implication of Muhammad Iqbal (appellant) and co-accused Ijaz Ahmad alias Riaz (since acquitted), Muhammad Boota (since acquitted), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal (since acquitted), Zafar Iqbal (since acquitted), Muhammad Nazir (since acquitted), Muhammad Sadiq (since acquitted) and Muhammad Khalid Mehmood (since acquitted); that the ocular account of the prosecution is fully supported by the medical

evidence as the deceased in this case received five injuries on his person, as per post mortem report of the deceased; that the prosecution case is also corroborated by the recovery of pistol .30 bore (P.6) at the instance of the appellant; that specific plea was taken by the appellant but he has not been able to prove the same; that appellant has himself admitted in his statement recorded under section 342, Cr.P.C. that he committed the murder of Asad Iqbal (deceased); that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative; so far as the appeal of the complainant against the acquittal of Ijaz Ahmad alias Riaz (since acquitted), Muhammad Boota (since acquitted), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal (since acquitted), Zafar Iqbal (since acquitted), Muhammad Nazir (since acquitted), Muhammad Sadiq (since acquitted) and Muhammad Khalid Mehmood (since acquitted) is concerned, learned counsel for the complainant contends that they fully participated in the occurrence and that they were wrongly acquitted by the learned trial court.

8. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

9. It is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Muhammad Nawaz, complainant (P.W.3), Muhammad Waqar (P.W.1) and Rashid Nawaz (P.W.2), whereas, the other has been brought on the record through the statement of the appellant, recorded under section 342 of Cr.P.C.

10. It is settled now by the Hon'ble Supreme Court of Pakistan in number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as `Ashiq Hussain v. The State' (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the

statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be aquitted. If the statement under section 342, Cr.P.C. believed as a whole constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter-versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is. yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Amin Ali and another v. The State' (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

11. The occurrence in this case took place on 19-12-2007 at 09:00 a.m. whereas the matter was reported to the police at 10:15 a.m and the formal F.I.R. (Exh.PB) was registered on the same day at 10:45 a.m. The complainant Muhammad Nawaz (P.W.3) though has not categorically stated during his statement that he was not present at the place of occurrence but during his cross examination, he (complainant) admitted that story regarding the occurrence was narrated to him by Muhammad Waqar (P.W.1) and Rashid Nawaz (P.W.2). Moreover in the opening sentence of cross examination, Muhammad Nawaz (P.W.3) admitted that he did not witness the

occurrence which clearly proves the fact that complainant Muhammad Nawaz (P.W.3) is not the eye-witness of the occurrence.

12. Insofar as Rashid Nawaz (P.W.2) is ccncerned, we have noted that the evidence of Rashid Nawaz (P.W.2) is in conflict with the medical evidence because he (P.W.2) has assigned the role of inflicting a fire arm injury on the belly of Asad Iqbal (deceased) to accused Ijaz Ahmad alias Riaz (since acquitted) but according to the evidence of Dr. Muhammad Arif Sheikh (P.W.10), who conducted postmortem examination on the deadbody of Asad Iqbal (deceased), there was no injury on the belly of the deceased. He is son of the complainant. He could not justify his presence at the spot at the relevant time as he stated that at the time of occurrence, he was going from his house to the house of Asad Iqbal (deceased) which as per his own statement was situated towards the northern side of his house, whereas the place of occurrence was situated towards the southern side of his house . Even according to the statement of Investigating Officer of the case Faryad Ali Inspector (P.W.13) as per his investigation, Rashid Nawaz (P.W.2) was not present at the time of occurrence. We are, therefore, of the view that the learned trial court has rightly discarded the evidence of Rashid Nawaz (P.W.2) in paragraph No. 36 (c, d, e, f, g, k, l, l-l) of its judgment.

13. Insofar as the evidence of Muhammad Waqar (P.W.1) is concerned, as per prosecution case, on the day of occurrence he was going with Asad Iqbal (deceased) on a motorcycle to the "Dera" from their house, when they were intercepted by the appellant and Ijaz Ahmad alias Riaz (since acquitted), Muhammad Boota (since acquitted), Muhammad Akram (since acquitted), Muhammad Siddique (since acquitted), Muhammad Iqbal (since acquitted), Zafar Iqbal (since acquitted), Muhammad Nazir (since acquitted), Muhammad Sadiq (since acquitted), Muhammad Khalid Mehmood (since acquitted). Muhammad Siddique (since acquitted), Muhammad Iqbal (appellant) and Zafar Iqbal (since acquitted) raised Lalkara that Asad Iqbal (deceased) and he (P. W.1) Muhammad Waqar be killed for not affecting compromise in previous litigation but we have noted that Muhammad Waqar (P.W.1) did not receive any injury during the occurrence. It is highly improbable that when intention of seven persons who were armed with firearm weapons, was to kill both Asad Iqbal (deceased) and Muhammad Waqar (P.W.1) then how he Muhammad Waqar (P.W.1) was spared. Moreover, the motorcycle upon which Asad Iqbal (deceased) and Muhammad Waqar (P.W.1) were allegedly riding at the time of occurrence was not taken into possession by the police to support the version of this

witness which also creates doubt in the prosecution story. Muhammad Waqar (P.W.1) has admitted during his cross examination that application (Ex:PB) "Fard Bayan" was drafted by his relative Mr. Sohail Aamir, Advocate. Mr. Sohail Aamir, Advocate was not cited as an eye-witness of the occurrence in this case. The above mentioned admission on the part of Muhammad Waqar (P.W.1) is suggestive of the fact that F.I.R. (Exh.PD) was lodged after due deliberation and consultations. It is noteworthy that Muhammad Waqar (P.W.1) did not attributed any specific injury to Muhammad Iqbal (appellant) and a joint role of making fire shots upon Asad Iqbal (deceased) by Muhammad Iqbal (appellant) as well as co-accused Muhammad Boota (since acquitted) and Muhammad Akram (since acquitted) was assigned by him. He, however, assigned a specific injury on the chest of Asad Iqbal (deceased) to Ijaz Ahmad alias Riaz co-accused (since acquitted) but his evidence is in conflict with the story narrated by the prosecution in the F.I.R. (Exh.PD) and with the statement of other eye-witness namely Rashid Nawaz (P.W.2) wherein co-accused Ijaz Ahmad alias Riaz was assigned the role of inflicting an injury on the belly of Asad Iqbal (deceased). It is also note worthy that Dr. Muhammad Arif (P.W.10) did not note any injury on the belly of the deceased as alleged in the F.I.R. (Exh.PD). We have noted that Muhammad Waqar (P.W.1) implicated as many as 10 accused persons in this case for the murder of Asad Iqbal (deceased). The learned trial court awarded death penalty only to Muhammad Iqbal (appellant) who was assigned a joint role of inflicting fire arm injuries on various parts of body of Asad Iqbal (deceased) along with co-accused Muhammad Boota and Muhammad Akram but said co-accused namely Muhammad Boota and Muhammad Akram have been acquitted by the learned trial court.

14. Now coming to the motive part of the prosecution, it is relevant to mention here that no specific motive was alleged in the F.I.R. (Exh.PD) by the complainant Muhammad Nawaz, Muhammad Waqar (P.W.1) and Rashid Nawaz (P.W.2) stated during their statements (examination in chief) that motive behind the occurrence was that Asad Iqbal (deceased) and Muhammad Waqar (P.W. 1) were not effecting compromise in the previous litigation. Rashid Nawaz (P.W.2). admitted during his cross examination that neither the deceased Asad Iqbal nor Muhammad Waqar (P.W.1) were the witnesses of the case of motive incident, thus, there was no reason for the appellant Muhammad Iqbal and his co-accused to launch an attack on the complainant party. We are, therefore, of the view that the prosecution in this case, failed to prove any motive against the appellant.

15. Insofar as the recovery of pistol .30 bore (P.6) on the pointation of Muhammad Iqbal (appellant) is concerned, the same is inconsequential because the report of Forensic Science Laboratory (Exh. PN) is only to the effect that the said pistol was in working order. In absence of matching report of any empty with the aforementioned pistol the alleged recovery of said pistol is immaterial.

16. In the light of above discussion, we have come to this conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt.

17. Now coming to the defence plea taken by the appellant and evidence produced by him in his defence, we have noted that Muhammad Iqbal (appellant) took the following plea in his statement recorded under section 342, Cr.P.C.:--

"In fact, Muhammad Azam P.W who was injured P.W in case F.I.R. No. 622/2007 dated 28-7-2007 under sections 324/109/34, P.P.C., registered at Police Station Uggoki on the statement of Muhammad Inayat, paternal grandfather of Waqar Azam P.W. Muhammad Azam injured of said case is real brother of Amjad, Arif P.Ws of the present case. Muhammad Inayat wrongly implicated me in that case. In fact, Muhammad Azam was injured by one Abbas resident of village Ganjranwali, but I was falsely involved in that case with the allegation of abetment under section 109, P.P.C. Asad Sohail deceased of this case and his father Muhammad Iqbal are record holder in the police station and desparate daring person. Sometimes prior to present occurrence, Waqar Azeem because of abovesaid case F.I.R. No. 622/07 along with Asad Sohail (deceased) resorted firing at me but I was luckily saved and the matter was not reported to the police because I did not want to indulge myself in enmity or criminal litigation being a poor man and law abiding citizen. I could not afford that. It is submitted that on 19-12-2007 on the alleged day of occurrence, when I came to Adda Sahowala to go for Samberial when Asad Sohail (deceased) and Waqar Azam P.W came across me at Adda Sahowala at about 9.00 a.m. and started abusing me and people present there forbad them to pick quarrel without reason and hurle abuses, meanwhile I had a chance to make an escape to avoid further altercation as both Asad Sohail (deceased) and Waqar P.W were bent upon to do so. I apprehending imminent danger at their hands, returned to village. When I was way to home in the village, Asad Sohail (deceased) and Waqar P.W came behind me on a motorcycle and came in fornt of me to block my way, at that time Waqar Azam who was driving a motorcycle and Asad Sohail (deceased) was got down from the rear of motorcycle on road and tried to fire at me by raising abuses and

Lalkara, I apprehending imminent danger to my life and in a right of exercise of myself defence and under the immediate fear of attack, resorted into firing at him, who fell down. Waqar Azam P.W picked up pistol and drove the motorcycle. I also ran away. I was all alone when I was attacked by Asad Sohail (deceased) and Waqar Azam P.W who followed me from Adda Sahowala on motorcycle on the day of occurrence. On the same day, I surrendered myself to the police at my own and narrated the whole occurrence in the manner stated above, but the police kept pending my arrest and formally showed my arrested after many days of the occurrence on 6-1-2008. I am old age man of 50 years having children and law abiding citizen and poor man. Complainant party which is headed by Muhammad Inayat grandfather of Amjad, Waqar and Arif P. Ws, who are rich, influential and strong people in the village and in the area. Police also support and help them. My plea was interrogated by the I.O. and on the application of the complainant party, my plea was investigated by DSP and SP investigation in presence of the complainant. A large number of people in support of my plea appeared before the police, but the police did not cite them as witnesses in list of witnesses and that from Adda Sahowala many persons as well as passers by were Asad Sohail and Waqar Azam who blocked my way at Adda Sahowala and endanger my life"

18. Although it has been argued on behalf of the prosecution that the appellant has himself admitted in his statement recorded under section 342, Cr.P.C. that he committed the murder of Muhammad Iqbal (deceased) but this argument has no force because it is by now well settled law that if the prosecution evidence is disbelieved by the court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inclupatory part of the statement of accused persons and to reject the exculpatory part of the same statements. Reference in this context may be made to the case of 'Muhammad Asghar v. The State' (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:--

'It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of `Shabbir Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as `Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its

own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him.'

19. In view of the above, as we have already discarded the prosecution evidence, the appellant cannot be awarded punishment on the basis of his statement recorded under section 342, Cr.P.C. by accepting the inculpotary part of said statement and by rejecting exculpatory part of the same statement. We are fortified in our above mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the case of 'Sultan Khan v. Sher Khan and others, (PLD 1991 SC 520) and Ghulam Qadir v. East Khan (1991 SCMR 61).

20. If the statement of the appellant is accepted as a whole then he (appellant) had the right of private defence of his body which also extends to cause death of the assailant as provided under section 100 of P.P.C. which is reproduced hereunder:--

'100. When the right of private defence of the body extends to causing death.---- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

Firstly. Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. ……

Fourthly. ……

Fifthly. ……

Sixthly. ……

21. In the light of above discussion, we accept the Criminal Appeal No.265-J of 2009 filed by Muhammad Iqbal (appellant), set aside the impugned judgment dated 5-8-2009 passed by learned Additional Sessions Judge, Sialkot. Resultantly the conviction and sentence of the appellant is set aside and he is acquitted from the charge. He is in custody. He be released forthwith, if not required to be detained in any other case.

22. Murder Reference No.340 of 2009 is, therefore, answered in the NEGATIVE and the sentence of death of Muhammad Iqbal (convict) is NOT CONFIRMED.

23. Insofar as the Criminal Appeal No.1235 of 2010, filed by the complainant Muhammad Nawaz against acquittal of co-accused Ijaz Ahmad alias Riaz Ahmad, Muhammad Boota, Muhammad Akram, Muhammad Siddique, Muhammad Iqbal and Zafar Iqbal is concerned, we have already disbelieved the prosecution evidence while discussing the case of Muhammad Iqbal (appellant) in Criminal Appeal No.265-J of 2009, therefore, the instant appeal i.e., Criminal Appeal No.1235 of 2010 filed against the acquittal of aforementioned accused is also dismissed.

HBT/M-283/L **Order accordingly.**

2014 P Cr. L J 139

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ZAFAR ABBAS and others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.186-J and Murder Reference No.393 of 2009, heard on 10th September, 2012.

Penal Code (XLV of 1860)---

----Ss. 302, 324, 392, 411 & 34---Qatl-e-amd, attempt to commit qatl-e-amd, robbery, dishonestly receiving stolen property, common intention---Appreciation of evidence---Benefit of doubt---F.I.R. was lodged with the delay of more than thirteen hours from the occurrence, and no plausible explanation had been mentioned in the F.I.R. for such gross delay, which had created serious doubt regarding the truthfulness of the prosecution case---Postmortem examination on the dead body of the deceased was also conducted with the delay of about thirty-four hours, and no plausible explanation was available for said delay, which delay had further created serious doubt about the truthfulness of the story---Evidence of the complainant was highly contradictory and that of prosecution witness was based on hearsay evidence---No identification parade of accused persons had been held in the case---No denomination of Currency Notes, allegedly snatched by accused persons from the complainant, was either mentioned in the F.I.R. or in the statement of the complainant made before the Trial Court---Neither any specific identification mark on the mobile phone, neither the make, nor on the wrist watch was mentioned in the F.I.R., or in the statement of the complainant---Alleged recovery of mobile phone, wrist watch and cash amount, which was jointly effected from both accused persons, was not helpful to the prosecution---Alleged recovery of motorcycle was not helpful in the prosecution case as the F.I.R. did not mention that accused persons used any motorcycle at the time of occurrence---No crime empty was taken into possession from the spot---No report of Forensic Science

Laboratory regarding carbine and pistol was on record---In the absence of matching report of any crime empty with carbine and .30 bore pistol, alleged recovery of the weapons was inconsequential, and same was of no avail to the prosecution---If there was a single circumstance which created doubt regarding the prosecution case, same was sufficient to give benefit to accused---Present case was replete with number of circumstances which had created serious doubt about the prosecution story---Prosecution having failed to prove its case against accused persons beyond shadow of doubt, conviction and sentence of accused persons, were set aside, they were acquitted from the charges by extending them benefit of doubt, and were released, in circumstances.

Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127; Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473; Irshad Ahmed v. The State 2011 SCMR 1190; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Maqbool Ahmad Qureshi, for Appellant No.1.

Rana Muhammad Arif for Appellant on bail.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Complainant in person.

Date of hearing: 10th September, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.186-J of 2009 titled as "Zafar Abbas and others v. The State" filed by Zafar Abbas and Saeed Ahmad (appellants) against their convictions and sentences and Murder Reference No.393 of 2009 titled as "The State v. Zafar Abbas" submitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Zafar Abbas (appellant), as both these matters have arisen out of the same judgment dated 14-5-2009 passed by the learned Additional Sessions Judge, Faisalabad in case F.I.R. No.411 dated 27-7-2008, offence under sections 302, 392 and 324, P.P.C. (sections 411 and 34, P.P.C. were added in charge sheet), registered

at Police Station Dijkot District Faisalabad whereby, Zafar Abbas and Saeed Ahmad (appellants) were convicted under section 302(b), P.P.C., as a result whereof, Zafar Abbas (appellant) was sentenced to death as Tazir and Saeed Ahmad (appellant) was sentenced to imprisonment for life. Both the appellants were also directed to pay Rs.1,00,000 (rupees one lac) each as compensation to the legal heirs of deceased Kamran, as envisaged under section 544-A of the Code of Criminal Procedure and in default thereof to further undergo simple imprisonment for six months each. Both the appellants were further convicted under section 392, P.P.C. and sentenced to rigorous imprisonment for ten years each with the direction to pay Rs.50,000 (rupees fifty thousand) each as fine and in default thereof to further undergo simple imprisonment for one year. All the sentences were ordered to run concurrently. The appellants were also given the benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case, as disclosed by Mosa Khan, complainant (P.W.1) in his application (Exh.PA), on the basis of which the formal F.I.R. (Exh.PA/1) was registered, are that he (complainant) was resident of Chak No.132/GB and a businessman by profession. On 26-7-2008 at about 11-30 p.m (night), he was going to his village from Panwan on. bicycle and when he reached at the turn of Square No.34 Link Road, suddenly, three persons armed with pistol and carbine came out of sugarcane crop at the road and stopped the complainant. They aimed their weapons towards the complainant and asked him to take out everything he had with him otherwise; they would kill him. He (complainant) identified them as they were residents of the adjacent village and he (complainant) had already seen them while visiting his village. He (complainant) refused to let them search him and started resistance. Upon which, Saeed Ahmad (appellant) made a fire shot with his pistol at him but luckily he escaped. Second fire shot was made by Zafar Abbas (appellant) with Carbine which, due to resistance, hit Kamran (deceased). The accused persons snatched Rs.500, a Nokia mobile and one watch on gun-point from the complainant and fled away towards forest along with Kamran injured. He (complainant), after getting opportunity, ran towards his village and in the morning, he informed the other villagers and they all with the help of footprints from the place of occurrence traced out the dead body of accused (Kamran) in reeds.

3. Zafar Abbas and Saeed Ahmad (appellants) were arrested in this case on 15-8-2008 by Muhammad Saleem, S.I. (P.W.14). On 24-8-2008, Zafar Abbas (appellant), while in police custody, after making disclosure, got recovered Carbine (P-1.) along with two live cartridges (P-2/1-2) and an empty (P-3), which were taken into possession recovery memo Exh.PE. On the same day i.e. 24-8-2008, both the appellants also got recovered motorcycle (P-4), which was taken into possession vide recovery memo Exh-PE. On 28-8-2008, both the appellants, while in police custody, after making disclosure, got recovered mobile phone (P-5), wrist watch (P-6) and five currency notes of the denomination of one hundred each (P-7/1-5), which were taken into possession vide recovery memo. Exh.PF. On the same day i.e. 28-8-2008, Saeed Ahmad (appellant), while in police custody, after making disclosure, got recovered .30 bore pistol (P-8) along with three live bullets (P-9/1-3), which were taken into possession vide recovery memo Exh-PG. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants on 16-12-2008, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fourteen witnesses, during the trial. Mosa Khan, complainant (P.W.1) and Khalid Rashid (P.W.2) furnished the ocular account of the case. Hakoomat Ali 1930/C (P.W.5) is the witness of recovery of Carbine (P-1) along with two live cartridges (P-2/1-2) allegedly recovered at the instance of Zafar Abbas (appellant) and motorcycle (P-4) allegedly recovered at the instance of both the appellants. Anwaar Hussain 5264/C (P.W.8) is the witness of recovery of mobile phone (P-5), wrist watch (P-6) and five notes of the denomination of one hundred (P-7/1-5) allegedly recovered at the instance of both the appellants. He is also the witness of recovery of .30 bore pistol (P-8) along with three live bullets (P-9/1-3) allegedly recovered at the instance of Saeed Ahmad (appellant). Abdul Ghafoor (P.W.13) is the witness of identification of motorcycle (P-4).

The medical evidence was furnished by Dr. Javaid Nabi (P.W.3), who conducted the postmortem examination on the dead body of Kamran (deceased).

Muhammad Saleem, S.I. (P.W.14) is the Investigating Officer of the case. Muhammad Khan, MHC/2333 (P.W.4), Abdul Sattar (P.W.6). Muhammad Sharif HC/2025 (P.W.7), Mahmood Ali, (P.W.9), Akbar Ali Niazami, Draftsman (P.W.10), Zafar Iqbal 5015/C (P.W.11) and Nazakat Ali SI (P.W.12) are the formal witnesses. The prosecution also produced documentary evidence in the shape of application for registration of case (Exh.PA), F.I.R. (Exh.PA/1), recovery memo of blood-stained earth (Exh.PB), postmortem report along with pictorial diagram (Exh.PC and Exh.PC/1), recovery memo of Carbine (P-1) along with two live cartridges (P-2/1-2) allegedly recovered at the instance of Zafar Abbas appellant (Exh.PI)), recovery memo of motorcycle P-4 (Exh.PE), recovery memo of mobile. phone P-5, wrist watch P-6 and Rs.500, five currency notes of the denomination of one hundred each, (Exh-PF), rough site plan of the place of recovery of .30 bore pistol along with three live bullets (Exh.PF/1), recovery memo of .30 bore pistol P-8 along with three live bullets P-9/1-3 (Exh.PG), scaled site plan, in duplicate, of the place of occurrence (Exh.PH and Exh.PH/1) recovery memo of last worn clothes of the deceased (Exh.PJ), identification memo of motorcycle (Exh.PK), inquest report (Exh.PL,), injury statement of the deceased (Exh.PM), rough site plan of the place of occurrence (Exh.PN), rough site plan of the place of recovery of Carbine P-1 along with two live cartridges P-2/1-2 (Exh.PP), report of the Chemical Examiner (Exh.PQ), report of the Serologist (Exh.PR) and closed its evidence.

The statements of the appellants, under section 342 of the Code of Criminal Procedure, were recorded on 27-2-2009. They refuted the allegations levelled against them and professed their innocence. While answering to a question that 'Why this case against you and why the P.Ws. have deposed against you?, both the appellants replied as under:--

"Case is false. I and my co-accused Saeed Ahmad were going on Dijkot Road and there was an altercation between us and the police and the police had brought us to the-police station and locked in the police station. Meanwhile the present occurrence took place between the complainant Musa and Kamran deceased and that fire shot made by Musa complainant hit Kamran deceased and he died. The police in connivance with the complainant Musa falsely involved us in the case in order to

show its Carvai in this case. All the recovery witnesses are police officials and they have deposed falsely being subordinate to the I.O."

Both the appellants neither opted to make statements on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them nor produced any evidence in their defence.

5. The learned trial Court vide its judgment dated 14-5-2009, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

6. Learned counsel for both the appellants, in support of this appeal, contends that there is a delay of more than thirteen hours in reporting the matter to the police without there being any explanation; that the version of the complainant in the F.I.R. (Exh.PA/1) is altogether different from his statement recorded by the learned trial Court as in the F.I.R., the complainant has not only named the appellants and his co-accused with their parentage and their addresses are also mentioned therein but while appearing before the learned trial Court, the complainant has stated that accused persons present in court who are the appellants were not known to him and only Kamran (deceased) of this case was known to him; that in the F.I.R., the complainant stated that after the incident, he went to his village and in the morning, he informed his co-villagers about the occurrence and they went to the place of occurrence and with the help of footprints, they found the dead body of deceased in the reed bushes but while appearing before the learned trial Court he stated that Zafar Abbas (appellant) was arrested by the people and he (Zafar Abbas appellant) led to the recovery of dead body of Kamran (deceased) while in police custody; that the evidence of Khalid Rashid (P.W.2) is not helpful for the prosecution because he, in his examination-in-chief, has stated that he was informed about the story by the complainant i.e. Mosa Khan (P.W.1) and in the circumstances, he is not an eye-witness rather his evidence is hearsay. Further contends that so far as the recovery or Rs.500 is concerned, no denomination of the currency notes was mentioned in the F.I.R. and even it was a joint recovery allegedly made on the pointation of both the appellants which is inadmissible in evidence; that even otherwise, it is highly improbable that the appellants will keep the same currency with them for such a long time; that similarly, no description or model number of Nokia mobile phone and wrist

watch is mentioned in the F.I.R. or in the statement of the complainant before the learned trial Court and that too is a joint recovery having no evidentiary value; that recovery of motorcycle is not connected with the instant case in any manner; that alleged recovery of carbine (P-1) along with two live cartridges (P-2/1-2) and .30 bore pistol (P-8) along with three live bullets (P-9/l-3) from the appellants is of no help to the prosecution as there is no report of the Forensic Science Laboratory; that from all angles, the prosecution case is of doubtful nature; that the prosecution has failed to prove its case against the appellants; that this appeal may be accepted, the appellants may be acquitted and murder reference may be answered in the negative.

7. Mosa Khan, complainant present in person, on the last date of hearing i.e. 25-6-2013, stated that due to financial constraints, he was not in a position to hire the services of a learned counsel and will be satisfied with the arguments of learned DPG. Today, complainant is present in person and learned Deputy Prosecutor-General assisted by the complainant opposes this appeal on the grounds that the complainant has absolutely no enmity with either of the appellants to falsely implicate them in this case; that delay in reporting the matter to the police in such like cases is not material as the incident of robbery took place at night and the complainant thereafter because of fear went to his house and on the next day, he informed the police; that both the appellants have correctly been identified by the complainant before the learned trial Court; that the prosecution case is also corroborated by the recovery of different articles such as, Nokia mobile phone, wrist watch and Rs.500 snatched from the complainant during the occurrence; that the prosecution case is further strengthened by the recovery of carbine (P-1) along with two live cartridges (P-2/1-2) and .30 bore pistol (P-8) along with three live bullets (P-9/1-3) from Zafar Abbas and Saeed Ahmad (appellants) respectively; that the prosecution has proved its case against both the appellants beyond the shadow of any doubt; that this appeal may be dismissed and the sentence of death awarded to Zafar Abbas (appellant) and sentence of imprisonment for life awarded to Saeed Ahmad (appellant) may be maintained and the murder reference be answered in affirmative.

8. We have heard the arguments of learned counsel for both the appellants, learned Deputy Prosecutor-General, assisted by the complainant and have also gone through the record with their able assistance.

9. The detail of the prosecution case, as set forth in the F.I.R. (Exh.PA/1) has already been given in paragraph No.2 of this judgment, therefore, there is no need to repeat the same. The occurrence in this case took place on 26-7-2008 at 11-30 p.m. The matter was reported to the police on the next day i.e. 27-7-2008 at 12-55 p.m. and the F.I.R. (Exh.PA/1) was also lodged on 27-7-2008 at 1-15 p.m. with the delay of more than thirteen hours from the occurrence. No plausible explanation has been mentioned in the F.I.R. (Exh.PA/1) for the aforementioned delay in reporting the matter to the police. The only eye-witness of the occurrence namely, Mosa Khan, complainant (P.W.1) has made contradictory statement regarding informing the police about the occurrence. During his cross-examination, at the First instance, he stated that the police arrived at the spot within about half an hour of the occurrence whereas, in the later part of his cross-examination, he has stated that the police arrived at the spot at about 10-00 a.m. but even then, the matter was reported to the police at 12-55 p.m. There is absolutely no plausible or convincing reason for the aforementioned gross delay of more than thirteen hours in reporting the matter to the police which has created serious doubt regarding the truthfulness of the prosecution story. The Hon'ble Supreme Court of Pakistan, while discussing the issue of delay in lodging the F.I.R., in the case of "Mehmood Ahmad and 3 others v. The State and another" (1995 SCMR 127), at page 131, was pleased to observe as under:--

"5. ...Although in some circumstances a delay of two hours may not be of much importance yet in the facts and circumstances of this particular case as they have happened, the delay has great significance. It can be attributed to consultation, taking instructions and calculatedly preparing report keeping the names of accused open for roping in such persons whom ultimately prosecution may wish to implicate..."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of "Nazeer Ahmad v. Gehne Khan and others" (2011 SCMR 1473) wherein, the delay of seven hours in lodging the F.I.R. was considered to be a ground which adversely reflected on the credibility of prosecution version.

10. We have also noted that the postmortem examination on the dead body of Kamran (deceased) was conducted on 28-7-2008 at 9-20 a.m. whereas, the occurrence in this case took place on 26-7-2008 at 11-30 p.m., which means that the postmortem examination on the dead body of Kamran (deceased) was conducted with the delay of about thirty-four hours. There is no plausible explanation for the above-mentioned delay in the postmortem examination of the deceased. The said delay in the postmortem examination has further created serious doubt about the truthfulness of the story of the prosecution. We may refer here the case of "Irshad Ahmed v. The State" (2011 SCMR 1190), wherein, it has been held that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in cooking up a story for the prosecution before preparing police papers necessary for getting the postmortem examination of the dead body conducted.

11. The ocular account of the prosecution was furnished by Mosa Khan, complainant (P.W.1) whereas, the evidence of Khalid Rashid (P.W.2) is based on hearsay evidence because he has categorically stated in his examination-in-chief that Mosa Khan, complainant (P.W.1) told the story qua the occurrence to him when he (complainant) reached in the village. The evidence of Mosa Khan, complainant (P.W.1) is highly contradictory. In the F.I.R. (Exh.PA/1), he stated that the occurrence took place on 26-7-2008 at 11-30 p.m. and on the next morning, he along with his co-villagers traced out the dead body of Kamran with the help of footprints but while making statement before the learned trial Court, he stated that on the next day of the occurrence, Zafar Abbas, (appellant) was apprehended by the people at a picket and he (Zafar Abbas appellant) during the investigation of the case got recovered the dead body of Kamran (deceased) from the bushes of forest. The complainant Mosa Khan (P.W.1) has mentioned in the F.I.R. (Exh.PA/1) that at the time of occurrence, he identified the accused persons as he already knew them. He has also named all the accused persons in the F.I.R. with their parentage and respective residential address but while appearing before the learned trial Court, the complainant stated that the accused persons present in the court were not known to him and only Kamran (deceased) who was resident of his village was known to him. No identification

parade of the appellants has been held in this case. The prosecution evidence regarding the arrest of Zafar Abbas (appellant) is also self-contradictory because according to the statement of complainant Mosa Khan (P.W.1) recorded by the learned trial Court, Zafar Abbas (appellant) was apprehended by the villagers at a picket on the following day of the occurrence at 7-00 a.m. but according to the statement of Muhammad Saleem, S.I. (P.W.14), Zafar Abbas and Saeed Ahmad (appellants) were arrested on 15-8-2008 whereas, the occurrence took place, on 26-7-2008. Although Mosa Khan, complainant (P.W.1) has stated in his examination-in-chief that Zafar Abbas (appellant) was arrested on the next morning at 7-00 a.m. and he got recovered the dead body of Kamran (deceased) but the fact regarding the arrest of Zafar Abbas (appellant) was not mentioned in the F.I.R. (Exh.PA/1.) which was lodged on the next day i.e. 27-7-2008 at 1-15 p.m. Considering all the aforementioned facts, we are of the view that the ocular account of the prosecution furnished by the complainant Mosa Khan (P.W.1) is not worthy of reliance.

12. The prosecution has also produced the evidence qua recovery of mobile phone (P-5), wrist watch (P-6) and cash amount of Rs.500 (P-7/1-5). We have noted that no denomination of currency notes snatched by the appellants from the complainant was either mentioned in the F.I.R. or in the statement of the complainant Mosa Khan (P.W.1) made before the learned trial Court. Similarly, neither any specific identification mark on the mobile phone neither the make or any identification mark on the wrist watch was mentioned in the F.I.R. or in the statement of Mosa Khan, complainant (P.W.1) recorded by the learned trial Court. Even as per prosecution's own case, the alleged recovery, of mobile phone (P-5), wrist watch (P-6) and cash amount of Rs.500 (P-7/l-5) was jointly effected from both the appellants, thus, the said joint recovery is not helpful to the prosecution in the instant case.

Similarly, the alleged recovery of motorcycle (P-4) is not helpful to the prosecution case because there was nowhere mentioned in the F.I.R. that the accused persons used any motorcycle at the time of occurrence, therefore, the alleged recovery of motorcycle from both the appellants which was effected in some other case is not helpful to the prosecution in the instant case.

13. So far as the recovery of Carbine, (P-1) along with two live cartridges (P-2/1-2) and .30 bore pistol (P-8) along with three live bullets (P-9/1-3) allegedly effected from Zafar Abbas and Saeed Ahmad (appellants), respectively is concerned, suffice to mention that no crime empty was taken into possession from the spot. Even there is no report of the Forensic Science Laboratory regarding Carbine (P-1) and pistol (P-8). In the absence of matching report of any crime empty with Carbine (P-1) and .30 bore pistol (P-8), the alleged recovery of abovementioned Carbine and pistol is inconsequential and the same is of no avail to the prosecution.

14. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

"5. ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:--

"13. ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be

entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept Criminal Appeal No.186-J of 2009 filed by Zafar Abbas and Saeed Ahmad (appellants), set aside their convictions and sentences and acquit them from the charges by extending them the benefit of doubt. Saeed Ahmad (appellant) is on bail, his bail bond is discharged and surety is released whereas, Zafar Abbas (appellant) is in custody, he be released forthwith if not required in any other case.

16. Murder Reference No.393 of 2009 is answered in the NEGATIVE and the sentence of death of Zafar Abbas (convict) is NOT CONFIRMED.

HBT/Z-24/K **Appeal accepted.**

2014 P Cr. L J 669

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ALI alias FAISAL---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.618 and Murder Reference No.160 of 2008, heard on 17th April, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 100---Qatl-e-amd---Appreciation of evidence---Private defence, right of---Scope---Benefit of doubt---Matter was reported to the Police and the formal F.I.R. was lodged with the delay of 4-1/2 hours and no plausible or convincing reason had been given by the prosecution for said delay---Delay had created serious question about the truthfulness of the prosecution story---Story narrated by complainant and prosecution witness was highly improbable---Prosecution witnesses had made dishonest improvements in their statements before the Trial Court in order to strengthen their case---When a witness would improve his version to strengthen the prosecution case, his evidence could not be relied upon---Material contradiction existed in the statements of the eye-witnesses and the evidence of prosecution witnesses was in conflict with the medical evidence---Not safe to rely upon the testimonies of said eye-witnesses---Motive as alleged by prosecution had not been proved in the case---Accused could not be convicted on the basis of mere alleged recovery of weapon of offence in absence of any reliable and convincing direct or circumstantial evidence---Evidence of recovery of weapon of offence, was only of corroborative in nature and conviction of accused could not be sustained on the basis of said piece of evidence---Accused had stated that on the night of occurrence, deceased assaulted his mother and he attempted to commit rape with her, who raised alarm, whereupon accused was attracted to the spot and made fire shots at the deceased in order to save his mother---Accused in such a situation, had the right of private defence, which also extended to cause death of the assailant as provided under S.100, P.P.C.---Case of accused fell within the four corners of general exception---Present case was replete with number of circumstances which had created serious doubts about the prosecution story---Prosecution having failed to prove its case

against accused beyond the shadow of doubt, conviction and sentence awarded to accused by the Trial Court, were set aside and accused was acquitted of the charge by extending him the benefit of doubt and he was released, in circumstances.

Ashiq Hussain alias Muhammad Ashraf v. State PLD 1994 SC 879; Amin Ali and another v. The State 2011 SCMR 323; Akhtar Ali and others v. The State 2008 SCMR 6; Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473; Mehmood ahmad and 3 others v. The State and another 1995 SCMR 127; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756; Nek Muhammad and another v. The State PLD 1995 SC 516; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 ref.

(b) Penal Code (XLV of 1860)---

----S. 100---Right of private defence---Scope---Assault with the intention of committing rape---Right of private defence would extend to the voluntary causing the death of the assailant.

(c) Criminal trial---

----Evidence---If the prosecution evidence was disbelieved by the court, then the statement of accused was to be accepted or rejected as a whole---Legally not possible to accept the inculpatory part of the statement of accused and to reject the exculpatory part of the same statement.

Muhammad Asghar v. The State PLD 2008 SC 513 ref.

(d) Criminal trial---

----Benefit of doubt---If there was a single circumstance which would create doubt regarding the prosecution case, then the same was sufficient to give benefit of doubt to accused.

Ch. Muhammad Afzal Nazir for Appellant.

Arshad Mahmood, Deputy Prosecutor-General for the State.

Ch. Muhammad Ashraf Goraya for the Complainant.

Date of hearing: 17th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Muhammad Ali alias Faisal (appellant) was tried by the learned Additional Sessions Judge, Gujranwala in case F.I.R. No.01/2008, dated 1-1-2008, offence under section 302 read with 34, P.P.C., registered at Police Station Garjakh, Gujranwala for the murder of Muhammad Babar (deceased) brother of the complainant. Vide judgment dated 26-5-2008 passed by the learned Additional Sessions Judge Gujranwala, Muhammad Ali alias Faisal (appellant) has been convicted under section 302(b), P.P.C. and sentenced to death with a further direction to pay Rs.50,000 (rupees fifty thousand only) as compensation to the legal heirs of the deceased and in default whereof to further undergo imprisonment for six months. Assailing the above conviction and sentence, Muhammad Ali alias Faisal (appellant) has filed the appeal in hand, whereas, the learned trial Court has forwarded Murder Reference No.160 of 2008 for confirmation or otherwise of sentence of death awarded to Muhammad Ali alias Faisal (appellant), as required under section 374, Code of Criminal Procedure. As both these matters have arisen out of the same judgment, therefore, shall be decided together through this single judgment.

2. Precisely, facts of the case, as contained in F.I.R. (Exh.PF) recorded on the basis of application (Exh.PF/1) submitted by Muhammad Afzal complainant (P.W.7), are that he was resident of Mohallah Chah Norang, Street No.4 near Naila Chowk Gujranwala. He (complainant) and his real brother Muhammad Babar were running a Welding Press. Muhammad Ali alias Faisal (appellant) son of Rehmat Ali, caste Rehmani, Mohallah Hameed Pura, Garjakh, District Gujranwala was working with them as a technician, who had taken Rs.25,000 (Rupees twenty five thousand only) as advance. He was not coming to the job for the last so many days. On 31-12-2007 at about 7/8-00 p.m. the complainant along with his brother Babar (deceased) and Muhammad Shafique son of Muhammad Siddique, caste Gujjar, resident of Mohallah Muhammad Pura, Street Khaksaran, Gujranwala and Muhammad Naeem son of Feroze Din, Caste Khokhar, Mohallah Muhammad Pura, Street Khaksaran, Gujranwala went to the house of Muhammad Ali (appellant) situated at Mohallah Hameed Pura to inquire about him (Muhammad Ali appellant). Muhammad Ali (appellant) made them sit in the house. One unknown person was already present there. Babar (deceased) asked the reason for not coming to the job but Muhammad Ali (appellant) refused to join the work or return the advance. On compelling again, Muhammad Ali (appellant) and unknown person became infuriated. Unknown person raised lalkara and expressed that Babar be taught a lesson and murdered for

demanding the advance amount. Muhammad Ali (appellant), all of a sudden, brought out the pistol and started firing. The fire shots landed on various parts of Babar (deceased) who fell down on the ground. Muhammad Ali (appellant) and unknown person while brandishing pistol ran away from the spot. Babar (deceased) succumbed to the injuries at the spot. Besides the complainant, Muhammad Shafique (P.W.8) and Muhammad Naeem (given up P.W.) had witnessed the occurrence. Motive behind the occurrence, as per F.I.R., was that Babar (deceased) had demanded the return of advance money amounting to Rs.25,000 (Rupees twenty five thousand only) due to which Muhammad Ali (appellant) committed the murder of Babar (deceased), brother of complainant.

3. Khalid Hussain, S.I. (P.W.10) was posted at Police Station Garjakh, Gujranwala. On 1-1-2008, the investigation of this case was entrusted to him. He reached at the spot, inspected the dead body of Muhammad Babar (deceased), prepared inquest report (Exh.PL), injury statement (Exh.PM) and drafted application for its autopsy (Exh.PN). He took into possession blood through cotton from the spot vide recovery memo (Exh.PG). He collected three empty cartridges from the spot and took into possession vide recovery memo (Exh.PH). He took the cot into possession from the spot vide memo (Exh.PJ). He also took into possession last worn clothes of the deceased viz shalwar (P.1), qameez (P.2), vest (P.3), jersi (P.4), and socks (P.5/1-2) vide recovery memo (Exh.PC). He got prepared scaled site plan of the place of occurrence (Exh.PE and Exh.PE/1) by Masood Ahmad Bhatti Draftsman (P.W.5). On 30-1-2008 he arrested Muhammad Ali alias Faisal appellant. On 3-2-2008 Muhammad Ali alias Faisal (appellant) led to the recovery of pistol .30 bore (P.6) which was taken into possession vide recovery memo (Exh.PK). He got prepared challan and submitted before the learned trial Court.

4. The appellant was summoned by the learned Additional Sessions Judge, Gujranwala to face the trial. Copies of the documents, as required under section 265-C, Code of Criminal Procedure, were provided to him and formal charge was framed against him on 8-5-2008, under section 302 read with 34, P.P.C., to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution examined as many as eleven witnesses, in all. Ocular account was furnished by Muhammad Afzal (P.W.7) and Muhammad Shafique (P.W.8). Medical evidence was furnished by Dr. Muhammad Imran (P.W.4). Abdul Rasheed (P.W.9) witnessed the recovery of pistol .30 bore (P.6) at the instance of appellant which was taken into possession vide recovery memo (Exh.PK). Khalid Hussain S.I (P.W.10) investigated this case and

while appearing in the witness box, narrated the various steps taken by him during the course of investigation. Rest of the witnesses namely Zulfiqar Ali 1996/HC (P.W.1), Qasim Nazir 3137-C (P.W.2), Muhammad Anwar 51-C (P.W.3), Masood Ahmad Bhatti Draftsman (P.W.5), Riasat Ali 1721- HC (P.W.6) and Shahid Mehmood 3/MHC (P.W.1l) are formal in nature. Learned DDPP gave up P.Ws. Haji Muhammad Ramzan, Safdar Ali, Muhammad Naeem, Abdul Ghafoor 2875-C and Muhammad Rasheed being unnecessary on the request of complainant vide statement dated 19-5-2008. He also closed the prosecution case on 23-5-2008 after tendering in evidence the reports of Chemical Examiner (Exh.PR), Serologist (Exh.PS) and F.S.L (Exh.PT). Statement of the appellant was recorded under section 342, Code of Criminal Procedure on 23-5-2008 wherein he refuted all the prosecution allegations. To a question as to why the case against him and why the prosecution witnesses had deposed against him, Muhammad Ali alias Faisal (appellant) replied as under:--

"It is a false case and private P.Ws. deposed against me falsely being close relatives of the deceased as P.W.7 Muhammad Afzal was his brother and P.W.8 Muhammad Shafique was his Khalazad. The real fact has been that Babar deceased victim had assaulted my mother Fatima Bibi and attempted to commit rape with her, who raised alarm. I was attracted to the same and I made fire shots upon the deceased in grave and sudden provocation to save my mother, myself and my property. My case falls in general exception under section 100, P.P.C."

The appellant did not appear as his own witness as provided under section 340(2), Code of Criminal Procedure nor did he produce any evidence in his defence. Hence, this appeal and murder reference.

5. After conclusion of the trial, the learned trial Court convicted and sentenced the appellant as detailed above.

6. Learned counsel for the appellant, in support of this appeal contends that the appellant has falsely been implicated in this case and true facts have been suppressed by the prosecution; that both the witnesses of the ocular account i.e. Muhammad Afzal complainant (P.W.7) and Muhammad Shafqiue (P.W.8) are chance witnesses and they have not been able to assign any plausible reason for their presence at the place of occurrence; that as per F.I.R. the incident took place on 31-12-2007 at around 7/8-00 p.m. but the matter was reported to the police at 12:30 (night) i.e. with a delay of about 4-1/2 hours without there being any satisfactory explanation, whereas the distance between the place of occurrence and the Police Station was only two

furlongs; that presence of both these witnesses is also belied from the fact that the dead-body was removed from the place of occurrence by the police and had the witnesses been present at the spot, they should have taken the deceased to the hospital; that there are contradictions between the statements of witnesses as the complainant (P.W.6) stated in his cross-examination that he (complainant) along with Babar, Naeem and Shafique gathered in his house for going towards Muhammad Ali (appellant) and that Shafique and Naeem were summoned by Muhammad Babar (deceased) through telephone, whereas, Muhammad Shafique (P.W.8) stated in his cross-examination that they had gathered in the Chowk of the street for going towards Muhammad Ali (appellant) and that they had gathered by chance; that in the F.I.R. it is simply stated that appellant made to sit in his house but after realizing that the dead-body was found in room which was situated in the back portion of the house, they improved their version dishonestly by stating that father of the appellant was lying sick in the baithak, therefore, Muhammad Ali appellant made them to sit in a room. Muhammad Shafique (P.W.8) was confronted with his statement recorded under section 161, Code of Criminal Procedure and the said improvement was brought on the record; that complainant has stated in his cross-examination that he and Shafique (P.W.8) were on one motorcycle and Babar and Naeem were on the other motorcycle, whereas Muhammad Shafique (P.W.8) stated in his cross-examination that he and Naeem were on one motorcycle while Babar and Afzal were on the other motorcycle which further creates doubt in the prosecution story; that had they come to the house of appellant on motorcycles then they could easily have informed the police just after the occurrence; that motive has also not been proved as there is no evidence on the record that Rs.25,000 (Rupees twenty five thousand) were given to the appellant as advance; that alleged recovery of pistol (P.6) at the instance of appellant has not been proved in accordance with law and the provisions of section 103, Code of Criminal Procedure have also been violated; that the case of prosecution is of doubtful nature and the appellant is entitled to acquittal.

7. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant, while vehemently opposing this appeal contends that there was no conscious or deliberate delay in reporting the matter to the police; that both the witnesses of ocular account have reasonably explained their presence at the place of occurrence by stating that they had come to the house of the appellant to get back the amount of Rs.25,000 (Rupees twenty five thousand only) which had been taken by the appellant as advance as he was working as technician with the

complainant and Muhammad Babar (deceased); that the ocular account is fully supported by medical evidence, corroborated by recovery of pistol .30 bore (P.6) and positive report of the Forensic Science Laboratory (Exh.PT); that there is no enmity between the appellant and complainant party which could prompt the complainant or other witness to falsely depose against the appellant; that even otherwise substitution in such-like cases is a rare phenomenon as kith and kin of the deceased would not implicate an innocent person by letting off the real culprits; that it was the appellant who committed the cold-blooded murder of Muhammad Babar (deceased), he does not deserve any leniency even in the quantum of sentence.

8. We have heard learned counsel for the appellant as well as the learned Deputy Prosecutor-General, assisted by learned counsel for the complainant at a considerable length and have also gone through the record with their able assistance.

9. It is a case of two versions, one mentioned in the F.I.R. (Exh.PF) and brought on the record through the statements of Muhammad Afzal, complainant (P.W.7) and Muhammad Shafique (P.W.8) and second version is the plea taken by Muhammad Ali alias Faisal (appellant) in his statement recorded under section 342 of the Code of Criminal Procedure. In such-like situation, firstly, the Court is required to analyze the prosecution version in order to ascertain its truthfulness or otherwise, whereas, the defence version is to be taken thereafter. In this respect, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan passed in the case reported, as "Ashiq Hussain alias Muhammad Ashraf v. State" (PLD 1994 SC 879) wherein, at page 883, the Hon'ble Supreme Court has been pleased to observe as under:--

"9. ...The proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/ rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable; under the Code/law, then the accused should be convicted for that offence only. In case of counterversions, if the Court believes prosecution evidence and is not prepared to exclude the same from

consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the questions, viz., is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Reference in this respect may also be made to the case of "Amin Ali and another v. The State" (2011 SCMR 323).

We have noted that the appellant took a specific plea in his statement recorded under section 342, Code of Criminal Procedure which was to the effect that on the night of occurrence Muhammad Babar (deceased) assaulted his mother Fatima Bibi and attempted to commit rape with her, who raised alarm, whereupon he (appellant) was attracted to the spot and made fire shots at the deceased in order to save his mother and his case falls in general exception provided under section 100, P.P.C. However, before discussing the version of the appellant we, while following the principles settled by the Hon'ble Supreme Court of Pakistan, in the aforementioned judgments, will first of all take and discuss the case of the prosecution because it is the first and foremost duty of the prosecution to prove its case against the accused.

10. The detail of the prosecution story has already been given in paragraph No.2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that on 31-12-2007 at about 7/8-00 p.m. complainant along with his brother Muhammad Babar (deceased), Muhammad Shafique (P.W.8) and Muhammad Naeem (given up P.W.) went to the house of Muhammad Ali alias Faisal (appellant). One unknown person was already present there. Muhammad Babar (deceased) asked the reason from the appellant, for not coming to the job but Muhammad Ali (appellant) refused to join the work or return the advance. On

compelling again, Muhammad Ali (appellant) and unknown person became infuriated. Muhammad Ali (appellant), all of a sudden, brought out the pistol and started firing. The fire shots landed on various parts of the body of Muhammad Babar (deceased) who fell down on the ground and succumbed to the injuries at the spot.

11. The occurrence in this case took place inside a room of the house of the appellant on 31-12-2007 at 7/8-00 p.m., situated at Mohallah Hameedpura within the territorial jurisdiction of Police Station Garjakh whereas, the matter was reported to the police and the formal F.I.R. was lodged on 1-1-2008 at 12:30 (night) i.e. with the delay of about 4-1/2 hours, whereas the distance between the place of occurrence and the police Station was only two furlongs. It was so mentioned in the F.I.R. (Exh.PF) that Muhammad Babar (deceased) succumbed to the injuries at the spot. The dead body was also dispatched to the mortuary by the police from the house of the appellant, so it is not the case of the prosecution that any time was consumed while taking the deceased to the hospital. No plausible or convincing reason has been given by the prosecution for the abovementioned delay in reporting the matter to the police. We have noted that the complainant (P.W.7) has stated during his cross-examination that on the night of occurrence he (complainant) along with the deceased and P.Ws. went to the house of the appellant on two different motorcycles. The distance of two furlongs can be covered within a span of five minutes on motorcycles and even, by foot the said distance can be covered within a span of twenty minutes but the matter was reported and the F.I.R. was lodged with a delay of four and half hours from the time of occurrence. The above mentioned delay in reporting the matter to the police has created serious questions about the truthfulness of the prosecution story. The Hon'ble Supreme Court of Pakistan, while discussing the point of delay in lodging the F.I.R., in the case of "Akhtar Ali and others v. The State" (2008 SCMR 6), at page 12, was pleased to observe as under:--

"5. ...It is also an admitted fact that the F.I.R. was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The F.I.R. was also not lodged at police station as mentioned above. 10/11 hours delay in lodging of F.I.R. provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the F.I.R..."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of "Nazeer Ahmad v. Gehne Khan and others" (2011 SCMR 1473) wherein, the delay of seven hours in lodging the F.I.R. was considered to be a ground which adversely

reflected on the credibility of prosecution version. Similarly in the case of "Mehmood Ahmad and 3 others v. The State and another" (1995 SCMR 127), the Hon'ble Supreme Court of Pakistan has discarded the prosecution evidence, inter alia, on the ground that there was delay of two hours in lodging the F.I.R. and it was held that the same could be attributed to consultation, taking instructions and calculatedly preparing the report.

12. The ocular account was furnished by Muhammad Afzal complainant (P.W.7) and Muhammad Shafique (P.W.8). The story narrated by the above mentioned witnesses in their statements before the police was highly improbable. They claimed that on the night of occurrence the complainant (P.W.7) along with Muhammad Babar (deceased) and P.Ws. went to the house of the appellant in order to take back the amount of Rs.25,000 (Rupees twenty five thousand only) but we have noted that the dead-body of Muhammad Babar (deceased) as per site plan (Exh.PE) was lying in a room which was situated in the back portion of the house of the appellant. It does not appeal to common sense that instead of demanding the amount of loan from the appellant while standing in the street or at the most in the baithak of his house which as per site plan (Exh.PE) was adjacent to the street, the deceased and eye-witnesses went to a room which was in the back portion of the house of the appellant. The Investigating Officer Khalid Hussain (P.W.10) has stated that dead-body of Muhammad Babar (deceased) was lying in a room which was adjacent to the Veranda. He further stated that there was a baithak, then deori and then Veranda and dead-body was present in a room behind that Veranda. The relevant portion of his statement at page Nos.29 and 30 of the paper book is reproduced hereunder:--

"Dead body was present in the room adjacent to Veranda. Another cot was present in that room. Some household articles might have been present there but I did not note any other specific thing. There is a Baithak, then Deori and then Veranda of this house. The room where dead body was present was behind that Veranda."

No reason whatsoever was mentioned in the F.I.R. (Exh.PF) for going of the deceased and P.Ws. in the said room which was situated in the back portion of the house of the appellant. The complainant Muhammad Afzal (P.W.7) and Muhammad Shafique (P.W.8) after realizing the above-mentioned weakness in the prosecution case while appearing in the witness box before the learned trial Court have made improvements in their statements by stating that father of the appellant was lying sick in the baithak, therefore, they (P.Ws.) went to the abovementioned room. As mentioned earlier, no

such reason was mentioned in the F.I.R. (Exh.PF) that father of the appellant was lying sick in the baithak, therefore, the deceased along with P.Ws. went to the room of occurrence. Similarly no such reason was given by Muhammad Shafique (P.W.8) in his statement before the police (Exh.DA). He was confronted with his previous statement and the improvement made by him was duly brought on record. Relevant portion of his statement at page No.25 of the parer book is reproduced here under:--

"I had mentioned before the police that father of the accused was lying in Baithak (confronted with Exh.D.A not so recorded)".

It is evident that the abovementioned witnesses made dishonest improvements in their statements before the trial Court in order to strengthen their case. It is by now well-settled law that when a witness improves his version to strengthen the prosecution case, his evidence cannot be relied upon. Reference in this context, inter alia, may be made to the case of Akhtar Ali and others v. The State (2008 SCMR 6) wherein Hon'ble Supreme Court observed as under:--

"5. ...It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness..."

Even otherwise it does not appeal to the mind of a prudent person that a man who is sick would lie in the baithak of his house which is adjacent to the street and meant for guests, instead of lying in his bedroom. Moreover there are material contradictions in the statements of eye-witnesses namely Muhammad Afzal complainant (P.W.7) and Muhammad Shafique (P.W.8). We have noted that Muhammad Afzal (P.W.7) has stated in his cross-examination that he, Babar (deceased) Naeem (given up P.W.) and Shafique (P.W.8) had gathered in his house for going towards Muhammad Ali appellant, whereas Muhammad Shafique (P.W.8) has stated during his cross-examination that they (P.Ws.) had gathered in the Chowk of the street for going towards Muhammad Ali (appellant). Muhammad Afzal (P.W.7) has stated during his cross examination that Muhammad Shafique (P.W.8) and Naeem (given up P.W.) were summoned by Muhammad Babar through telephone whereas Muhammad Shafique (P.W.8) has stated during his cross examination that they (P.Ws.) had gathered by chance when Babar told them to go to the house of Muhammad Ali

(appellant). Muhammad Afzal (P.W.7) has stated that he and Muhammad Shafique (P.W.8) were on one motorcycle whereas Babar (deceased) and Naeem (given up P.W.) were on the other motorcycle when they had set out from their house for going towards the house of the appellant, whereas Muhammad Shafique (P.W.8) had stated that he and Naeem (given up P.W.) were on one motorcycle while Muhammad Babar (deceased) and Muhammad Afzal (P.W.7) were on the other motorcycle. We have also noted that the distance between the appellant and the deceased has been mentioned as five feet in the site plan (Exh.PE). The same distance between the appellant and the deceased at the time of occurrence has been mentioned by Muhammad Afzal (P.W.7) during his cross-examination but Dr Muhammad Imran (P.W.4) has specifically stated in his examination in chief that there was no blackening around the wounds of entries on the person of Muhammad Babar (deceased). We have also noted that there was no burning or tattooing around the wounds of entries, therefore, ocular account of prosecution is not supported by the medical evidence furnished by Dr. Muhammad Imran (P.W.4).

13. As there is delay in reporting the matter to the police, the story narrated by the above-mentioned eye-witnesses about the presence of dead-body in a room which was situated in the back portion of the house of the appellant is not convincing, the prosecution witnesses made dishonest improvements in their statements in order to strengthen their case, there are material contradictions in the statements of the eye-witnesses and the evidence of prosecution witnesses is in conflict with the medical evidence, therefore, it is not safe to rely upon the testimonies of the above-mentioned eye-witnesses.

14. The motive, according to the prosecution case was that Muhammad Ali alias Faisal (appellant) took an amount of Rs.25,000 (twenty five thousand only) from the complainant party which was given to him as advance and Muhammad Babar (deceased) when demanded the said amount from the appellant, hot words were exchanged and thereafter the appellant committed the murder of Muhammad Babar (deceased). We have noted that Muhammad Afzal complainant (P.W.7) while appearing before the learned trial Court has mentioned his occupation as labourer but during his cross-examination he stated that he was running a Welding Press. He did not mention his profession as a businessman and as such his evidence is self-contradictory. No receipt or document about the delivery of above-mentioned amount to the appellant has been brought on the record and the prosecution has not produced any independent witness in presence of whom the said amount was handed over to

the appellant. Even this fact was not brought on the record as to whether Muhammad Afzal complainant (P.W.7) or Muhammad Babar (deceased) handed over the above mentioned amount of Rs.25,000 (Rupees twenty five thousand only) to the appellant. No register or note book of the alleged Welding Press of the complainant and Muhammad Babar (deceased) have been brought on the record by the prosecution to establish any entry in respect of above mentioned amount of loan which was allegedly given to the appellant by the complainant party. It cannot be held merely on the oral assertion of the complainant party that an amount of Rs.25,000 (twenty five thousand only) was in fact paid to the appellant. We are, therefore, of the view that the motive as alleged by prosecution has not been proved in this case.

15. So far as recovery of pistol .30 bore (P.6) at the instance of appellant and positive report of Forensic Science Laboratory (Exh.PT) are concerned, we are of the view that an accused cannot be convicted on the basis of mere alleged recovery of weapon of offence in absence of any reliable and convincing direct or circumstantial evidence. Even otherwise, the evidence of recovery is only of corroborative in nature and conviction of the appellant cannot be sustained merely on the basis of said piece of evidence.

In the case of MUHAMMAD AFZAL alias ABDULLAH and others v. THE STATE and others (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similarly, in the case of ABDUL MATEEN v. SAHIB KHAN and others (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410".

Similar view was taken by the Hon'ble Supreme Court of Pakistan, in the cases of MUHAMMAD YAQUB v. THE STATE (1971 SCMR 756), and NEK MUHAMMAD and another v. THE STATE (PLD 1995 Supreme Court 516).

16. Now coming to the version of the appellant. The statement of appellant has already been reproduced in paragraph No.5 of this judgment. As we have already discarded the prosecution evidence, therefore, while scrutinizing the statement of the appellant this Court has to accept or reject the said statement in toto. According to the appellant, on the night of occurrence Muhammad Babar deceased assaulted his mother Fatima Bibi and attempted to commit rape with her, who raised alarm, whereupon he (appellant) was attracted to the spot and made fire shots at the deceased in order to save his mother, thus in such situation, the appellant had the right of private defence which also extends to cause death of the assailant as provided under section 100 of P.P.C. which is reproduced hereunder:--

'100. When the right of private defence of the body extends to causing death.--- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

Firstly.

Secondly.

Thirdly. An assault with the intention of committing rape;

Fourthly.

Fifthly.

Sixthly.

It is evident from the perusal of section 100 (thirdly) P.P.C. that in the case of an assault with the intention of committing rape, the right of private defence will extend to the voluntary causing the death of the assailant. The case of the appellant, therefore, squarely falls within the four corners of general exception as provided under section 100 (thirdly) P.P.C. It is by now well-settled law that if the prosecution evidence is disbelieved by the court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statement of the appellant and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of "Muhammad Asghar v. The State" (PLD 2008

SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:--

"8. ...It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of Shabbir Ahmad v. The State PLD 1995 SC 343 and The State v. Muhammad Hanif and 5 others 1992 SCMR 2047. It has been held by this Court in the judgment reported as Waqar Ahmad v. Shaukat Ali and others 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weaknesses of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

17. It is also by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, then the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

"5 ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:--

"13. ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that

for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we have come to this irresistible conclusion that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No.618 of 2008 filed by Muhammad Ali alias Faisal (appellant), set aside his conviction and sentence awarded by the learned trial Court vide its judgment dated 26-5-2008 and acquit him of the charge by extending him the benefit of doubt. Muhammad Ali alias Faisal (appellant) is in custody, he be released forthwith if not required in any other case.

19. Murder Reference No.160 of 2008 is answered in the NEGATIVE and the sentence of death of Muhammad Ali alias Faisal (convict) is NOT CONFIRMED.

HBT/M-156/L **Appeal accepted.**

2014 Y L R 15

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD TAHIR---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.867 and Murder Reference No.317 of 2008, heard on 8th March, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by the complainant and prosecution witness, while the other had been brought on the record through the statement of accused recorded under Ss.342, 340(2), Cr.P.C., and suggestions put to the prosecution witnesses during their cross-examination---Prosecution was required to prove its case against accused beyond any shadow of doubt and the defence version was to be taken into consideration after evaluating the prosecution evidence to find out whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---No delay in reporting the matter to the Police---Both the eye-witnesses had plausibly explained their presence at the spot at the relevant time----Presence of complainant and prosecution witness in the house of their sister and sister-in-law, respectively (place of incident), at the time of occurrence, was neither unnatural nor improbable---Complainant being real brother of the deceased, it was highly improbable that he would falsely implicate accused and would let off the real culprit---Substitution in such like cases was a rare phenomenon---Eye-witnesses were cross-examined at length, but their evidence could not be shaken during the process of cross-examination---Said witnesses corroborated each other on all material aspects of the case; their evidence was

straight-forward and confidence-inspiring---Medical evidence had fully supported the ocular account furnished by the complainant and prosecution witness---Ocular account about the seat of injuries, the kind of weapon used during the occurrence and the time of incident as narrated by the eye-witnesses of the occurrence, had fully tallied with the medical evidence---Motive had been proved by the prosecution---Prosecution case against accused had also been corroborated by the recovery of pistol on his pointation and the positive report of Forensic Science Laboratory---Plea taken by accused in his defence that he had committed the murder of the deceased on the pretext of honour was not convincing due to number of reasons---Even if said plea of accused was accepted, even then the offence of qatl-e-amd of deceased had been established and proved against him---Question of grave and sudden provocation had not arisen in the case of accused---Prosecution having proved its case against accused through confidence-inspiring and reliable evidence, accused was rightly convicted and sentenced, in circumstances.

Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others PLD 1994 SC 885 and Haji v. The State 2010 SCMR 650 ref.

(c) Penal Code (XLV of 1860)---

----S. 302(b)(c) [as amended by Criminal Law (Amendment) Act (I of 2005)], Ss.306, 307 & 308---Qatl-e-amd on account of 'Ghairat'---Counsel for accused had argued that at least it was not a case of capital punishment because accused had committed the murder of his deceased wife on account of 'Ghairat', therefore lenient view could be taken in case of accused---No lenient view could be taken in the present case on account of "Ghairat" (honour)---Counsel for accused had also argued that death sentence awarded to accused was not sustainable in view of provisions of Ss.306, 307 & 308, P.P.C., because accused being husband of deceased was also her legal heir---Contention of counsel was also without any substance because accused had been awarded death sentence by way of "Tazir" under S.302(b), P.P.C. and not as Qisas as provided under S.302(a), P.P.C.---Provisions of Ss.306, 307 & 308, P.P.C. were not applicable in the case.

Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others PLD 1994 SC 885 reviewed.

Faqir Ullah v. Khalil-uz-Zaman and others 1999 SCMR 2203; Muhammad Akram v. The State 2003 SCMR 855 and Nasir Mehmood and another v. The State 2006 SCMR 204 ref.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Quantum of punishment---Prosecution had proved its case against accused through confidence inspiring and reliable evidence---Accused had committed the murder of his wife by inflicting repeated firearm injuries on her person---No mitigating circumstance was available in favour of accused, as he had committed a shocking, callous and cold blooded murder of his wife---Accused, therefore, did not deserve any leniency and no extenuating circumstance was available in his favour for extending him any benefit regarding his sentence; his conviction and sentence under S.302(b), P.P.C. were maintained and his appeal was dismissed---Death sentence awarded to accused was confirmed and murder reference was answered in the affirmative.

Dawood Ahmad Khan and Mrs. Bushra Qamar for Appellant.

Arshad Mehmood, Deputy Prosecutor General for the State.

Zia-ur-Rehman Ch. for the Complainant.

Date of hearing: 8th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 867 of 2008 filed by Muhammad Tahir appellant against his conviction and sentence, and Murder Reference No. 317 of 2008, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Tahir appellant, as both these matters have arisen out of the same judgment dated 30-6-2008, rendered by the learned Additional Sessions Judge, Sheikhupura, in case F.I.R. No. 240 dated 24-6-2007, offence under sections 302/34, P.P.C., Police Station City Farooqabad District Sheikhupura, whereby, Muhammad Tahir, appellant was convicted under section 302(b) of P.P.C. for committing the murder of his wife Mst. Aasma Bibi (deceased) and sentenced to death with a direction to pay the compensation amount of Rs.50,000 (Rupees fifty thousand only) to the legal heirs of deceased as envisaged under section 544-A, Cr.P.C. and in

default, thereof, to suffer imprisonment for six months' S.I. However, through the same judgment, Sodagir co-accused of the appellant was acquitted of the charge by the learned trial court while extending benefit of doubt to him.

2. Brief facts of the case, as disclosed by Naeem Abbas, complainant (P.W.7) in his complaint (Exh.PB/l) on the basis whereof, the formal F.I.R. (Exh.PB) was recorded are that he (complainant) was resident of Mohallah Jehangir Abad, Police Station A-Division, Sheikhupura and was a labourer by profession. The marriage of Mst. Aasma Bibi (deceased) aged about 20 years, real sister of complainant was solemnized with Muhammad Tahir (appellant) 9/10 months prior to the occurrence. She was pregnant of five months. The relations between the spouses remained strained and they used to quarrel with each other due to matrimonial disputes. A few days earlier to the occurrence Mst. Aasma Bibi (deceased) after quarrelling with her husband, came to the house of complainant Muhammad Tahir (appellant), husband of Mst. Aasma Bibi (deceased) and his brother Sodagir (acquitted accused) came to the house of complainant and after effecting compromise, they took along Mst. Aasma Bibi (deceased) to their house and Sodagir Ali (acquitted accused) gave assurance that the spouses will not quarrel in future. On 23-6-2007, at evening time, Mst. Aasma Bibi (deceased) told the complainant, on telephone that her husband, Muhammad Tahir (appellant) and Sodagir (acquitted accused) were quarrelling with her since morning, they had beaten her and were also extending threats to kill her. Mst. Aasma Bibi (deceased), therefore, called the complainant to her house at Farooq Abad. The complainant, his brother Jamil (given up P.W.) and Nazir Ahmad (P.W.8), thereupon, reached the house of Mst. Aasma Bibi (deceased) at the time of 'Isha' prayer, for the purpose of effecting compromise between the spouses. It is also mentioned in the F.I.R. (Ex.PB) that whole of the night passed during this process, but the compromise could not be effected. At 4-30 a.m. (night) Sodagir (acquitted accused) raised a lalkara and asked Muhammad Tahir (appellant) to make fire if they (complainant party) don't agree with them, whereupon, Muhammad Tahir (appellant) made a fire shot with his pistol 30 bore which hit Mst. Aasma Bibi (deceased) on the right side of her buttock and then he made second fire shot hitting on her left side of the chest. Then Muhammad Tahir (appellant) made third fire shot hitting on the backside of head near the ear of Mst. Aasma Bibi (deceased). Muhammad Tahir (appellant) extended threats to the complainant and P.Ws. that if anyone would come

forward, he will be done to death. Sodagir (acquitted accused) then took pistol from Muhammad Tahir (appellant) and pointed the same towards the P.Ws. and he asked Muhammad Tahir (appellant) to flee away from the place of occurrence and he will himself cope with the P.Ws. Mst. Aasma Bibi succumbed to the injuries at the spot. It was further alleged that Muhammad Tahir (appellant) in consultation with Sodagir Ali (acquitted accused) has committed the murder of Mst. Aasma Bibi.

3. The appellant was arrested on 20-7-2007 by Nasrullah Khan, Inspector (P.W.10). He (appellant) while in police custody, after making disclosure, got recovered pistol .30 bore (P-5) along with five live bullets (P-6/1-5), which were taken into possession vide recovery memo Ex-PD. After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 25-9-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced ten witnesses, during the trial. Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8) are the witnesses of ocular account while Naeem Abbas complainant (P.W.7) is also the witness of recovery of pistol .30 bore (P.5) from the possession of the appellant.

The medical evidence was furnished by Lady Dr. Marryam Aftab Khan (P.W.9) who on 24-6-2007 at 4-25 p.m. conducted the postmortem examination on the dead body of Mst. Asma Bibi (deceased).

Nasrullah Khan, Inspector/S.H.O. (P.W.10) is the Investigating Officer of the case.

Tanvir Hussain (P.W.1), Zulfiqar Ali (P.W.2), Muhammad Ramzan (P.W.3), Abdul Hameed, S.I. (P.W.4), Muhammad Siddique (P.W.5) and Muhammad Riaz, Draftsman (P.W.6) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of memo of possession of last worn clothes of the deceased, Ex. PA, copy of F.I.R. (Exh.PB), application for registration of case (Ex. PB/l), scaled site plan in duplicate of the place of occurrence, Ex. PC and Ex. PC/1, recovery memo of pistol 30 bore (P.5) along with five live bullets P-6/1-5, (Ex. PD), rough site plan of the place of recovery Ex.

PD/1, memo of possession of blood-stained earth from the place of occurrence, Ex. PE, recovery memo of three crime empties from the spot Ex. PF, copy of postmortem report of Mst. Aasma Bibi, deceased, Ex. PG, pictorial diagram Ex. PG/1, Inquest report of the deceased Ex. PH, application for conducting postmortem examination on the dead body of Mst. Aasma Bibi deceased Ex. PJ, Injury statement of Mst. Aasma Bibi deceased (Ex. PK), rough site plan of the place of occurrence, Ex. PL, report of Chemical Examiner, Ex. PM, report of Serologist Ex. PN, report of Forensic Science Laboratory, Ex. PO and closed its evidence.

5. The statement of the appellant under section 342 Cr.P.C. was recorded by the learned trial court. He refuted the allegations levelled against him and professed his innocence. While answering to question "Why this case against you and why the P.Ws. deposed against you?" the appellant replied as under:--

"I committed this murder on the pretext of honour. P. Ws. deposed falsely. None of them was present at the spot and witnessed the occurrence. I alone committed this murder. None else instigated, abeted or participated with me to accomplish this offence. Name of my brother Sodagir Ali was falsely mentioned in the F.I.R. "

The appellant opted to make statement on oath, under section 340(2), Cr.P.C., however, he did not produce any evidence in his defence. He (appellant) in his statement on oath recorded under section 340 (2), Cr.P.C., took this plea that he committed the murder of his wife Mst. Aasma Bibi (deceased) on account of honour (ghairat). He further deposed that on 23-1-2007, he went to the house of his in-laws where he saw his wife Mst. Aasma Bibi (deceased) in an objectionable condition with her 'Behnoi' Nazir as they both were busy in sexual act at that time. It was further deposed by the appellant that he controlled himself at that time, however, on the night of occurrence, i.e. on 24-6-2007 at about 3-00 a.m. (night), he was present in his room alongwith his wife when he inquired from her about her illicit relations with her 'Behnoi' Nazir, whereupon Mst. Aasma Bibi (deceased) confessed her illicit relationship with Nazeer. The appellant further deposed that when his wife Mst. Aasma Bibi (deceased) confessed about her illicit relations, he could not control himself, thus, he fired at Mst. Aasma Bibi (deceased) who succumbed to the injuries.

6. The learned trial Court vide judgment dated 30-6-2008, found Muhammad Tahir appellant guilty and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that a totally false case has been registered against the appellant; that both the eye-witnesses are admittedly chance witnesses and they have not been able to prove their presence at the place of occurrence, at the relevant time; that Naeem Abbas complainant (P.W.7) is real brother of Mst. Aasma Bibi (deceased) while Nazir Ahmad (P.W.-8) is 'Behnoi' of the complainant and as such both of them are close relatives of the deceased, who are inter se related and are interested witnesses and as such their evidence requires strong and independent corroboration which is very much lacking in this case; that the alleged recovery of pistol .30 bore P-5 has been planted against the appellant in order to strengthen the prosecution case; that the motive as alleged by the prosecution, has not been proved in this case, as no specific reason of the matrimonial disputes has been disclosed by the P.Ws.; that version of the appellant in the circumstance is more probable and convincing which has been rejected by the learned trial court without any valid reason; learned counsel for the appellant has also contended that at least it is not the case of capital punishment because the appellant has committed the murder of Mst. Aasma Bibi (deceased) his wife on account of 'ghairat', therefore, lenient view may be taken in this case; that the death sentence awarded to the appellant is not sustainable while keeping in view the provisions of sections 306, 307 and 308 P.P.C. because the appellant being husband of Mst. Aasma Bibi deceased is also her legal heir; that the prosecution has miserably failed to prove its case against the appellant; thus, this appeal be accepted. In support of his contentions, learned counsel for the appellant has placed reliance on the case of Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others, (PLD 1994 Supreme Court 885).

8. On the other hand, learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that F.I.R. in the present case was promptly lodged as incident took place on 24-6-2007 at 4-30 a.m., whereas, the matter was reported by Naeem Abbas complainant (P.W.7) through complaint (Ex. PB/l), on the basis whereof, formal F.I.R. (Ex. PB) was chalked out by Abdul Hameed, S.I. (P.W.4) on the same day at 5-55 a.m. that specific role of firing at Mst. Aasma Bibi deceased has been attributed to the appellant; that the eye-witnesses have no reason to falsely, implicate the appellant in the present case; that there was no reason for substitution of the appellant by the eye-

witnesses as there was no serious enmity existing between them and the appellant; that medical evidence substantially supports the ocular account furnished by the eye-witnesses of the occurrence; that recovery of pistol .30 bore (P.5) has also been effected from the possession of the appellant which further corroborates the prosecution case; that the motive as alleged by the prosecution has also been proved in this case; that the plea taken by the appellant is an afterthought and he has not produced any witness in support of his plea; that as the appellant has caused three firearm injuries on the person of the deceased, therefore, he does not deserve any leniency in respect of his sentence; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the appellant, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant and have also gone through the record with their able assistance.

10. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8), whereas, the other has been brought on the record through the statements of Muhammad Tahir (appellant), recorded under section 342 and 340(2), Cr.P.C. and suggestions put to the prosecution witnesses during their cross-examination.

11. It has been settled now by the Hon'ble Supreme Court of Pakistan through number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-

witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342 Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/ excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted if the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter-versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

The above mentioned view has been reiterated by the August Supreme Court of Pakistan in the case reported as Amin Ali and another v. The State (2011 SCMR 323). Therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

12. The occurrence in this case took place on 24-6-2007 at 4-30 a.m. in the house of Muhammad Tahir appellant situated in the area of `Mohallah Shamas Abad, Farooqabad falling within the territorial jurisdiction of Police Station City Farooqbaad District Sheikhupura, whereas the matter was reported by the complainant Naeem Abbas (P.W.7) through complaint Ex. PB/1, on the basis

whereof, formal F.I.R. (Ex. PB) was chalked out by Abdul Hameed, S.I. (P.W.4) on the same day at 5-55 a.m. The distance between the place of occurrence and police station is 2 kilometers. Considering the time of incident, the place of occurrence and its distance from the police station, we are of the view that there was no delay in reporting the matter to the police.

13. The ocular account of the prosecution was furnished by the complainant Naeem Abbas (P.W.7) and Nazir Ahmad (P.W.8). The examination-in-chief of Naeem Abbas complainant (P.W.7) recorded by the learned trial Court on 3-11-2007 is reproduced hereunder for ready reference:--

"9-10 months before the present occurrence the marriage of my sister was solemnized with Tahir accused. He used to beat my sister Asma. She had come to our house due to altercation, few days before the occurrence. Tahir and Sodagar came to our house after some days; Sodagar expressed that he was responsible for the peaceful union of the spouses and no beating shall take place in future. He took responsibility of the matter. They thus took my sister with them. On the same day i.e. 23-6-2007 in the evening, my sister Asma rang me up and told that Sodagar and Tahir accused were extending threats to kill her and beating her. I, my brother Jamil and Nazir son of Rehmat Ali reached the house of Asma at Esha Prayer time. We advised Sodagar and Tahir accused throughout the night. At about 4-30 a.m. Sodagar asked Tahir accused to murder Asma. Tahir brought out a pistol from the drawar and hit fire shot to my sister Asma on the right side of buttock, second fire shot hitting on the left of her chest. Tahir hit the third fire shot on the back of left ear of Asma. Asma succumbed to the injuries at the spot. I, Nazir and my brother Jamil had witnessed the occurrence. Sodaghar accused then took pistol from Tahir and pointed the same towards us. He arranged the fleeing away of Tahir accused. I went to police station City Farooqabad and moved written application for registration of case Ex. PB/1 which bears my thumb impression. Lateron I had joined the investigation. Tahir accused in custody made disclosure and led to the recovery of pistol .30 bore P-5 with magazine containing 5 rounds which were taken into possession by I.O. vide recovery memo Exh. PD attested by me and Aslam."

The statement of other eye-witness namely, Nazir Ahmad (P.W.8) is also on the same lines. The occurrence took place in the house of Muhammad Tahir appellant

who is husband of Mst. Aasma Bibi deceased. Naeem Abbas complainant is real brother of Mst. Asma Bibi deceased whereas Nazir Ahmad (P.W.8) is brother-in-law of the deceased. Both the above mentioned eye-witnesses have plausibly explained their presence at the spot at the relevant time by stating that the appellant used to beat his wife Mst. Asma Bibi (deceased) and due to the altercation which took place some days prior to the occurrence, Mst. Asma Bibi (deceased) came back to the house of complainant, however, few days prior to the occurrence, Muhammad Tahir appellant alongwith his brother Sodagar (acquitted accused) came to the house of complainant and took his wife (Mst. Aasma Bibi deceased) back to his house with the assurance that he will not beat the deceased in future. One day prior to the occurrence, i.e. on 23-6-2007 Mst. Aasma Bibi (deceased) rang up her brother Naeem Abbas complainant (P.W.7) and told him that Muhammad Tahir appellant and his brother Sodagar (acquitted accused) have beaten her and had also extended threats to kill her. On this information complainant (Naeem Abbas P.W.7) along with his brother namely Jamil (given up P.W.) and brother-in-law Nazir Ahmad (P.W.8) went to the house of the appellant at the time of 'Esha Prayer'. They tried to pacify the matter throughout the night which proved to be in vain and at about 4-30 a.m. the appellant brought out pistol from the drawar and made three successive fire shots at Mst. Aasma Bibi deceased which landed on her buttock, left side of chest and on her head near left ear.

14. It is a common observation that whenever altercation takes place between spouses, their near relatives try to intervene and patch up the matter. Therefore, in the above circumstances, presence of Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8) in the house of their sister/sister-in-law, at the time of occurrence is neither unnatural nor improbable. The complainant Naeem Abbas (P.W.7) is real brother of Mst. Asma Bibi (deceased) and it is highly improbable that he will falsely implicate the appellant and would let off the real culprit. Substitution in such-like cases is a rare phenomenon. Although the eye-witnesses, namely, Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8) are closely related to the deceased but their evidence cannot be discarded outrightly on account of their relationship with the deceased provided the same is confidence-inspiring and straight forwarding. We may refer here the case of Haji v. The State (2010 SCMR 650), wherein the Hon'ble Supreme Court of Pakistan has observed as under:--

"Both the ocular witnesses undoubtedly are inter se related and to the deceased but their relationship ipso facto would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

The above mentioned eye-witnesses were cross-examined at length but their evidence could not be shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is straightforward and confidence-inspiring.

5. The medical evidence of the prosecution was furnished by Lady Dr. Marryam Aftab Khan, (P.W.9). She, on 24-6-2007 at 4-25 p.m. conducted postmortem examination on the dead body of Mst. Aasma Bibi (deceased) and found the following injuries on her person:--

"(1) Wound of entry, fire arm wound of entry 2 x 2 cm on the right side of the skull (vault) which made an exit wound 3 x 3 cm on the left side of the head 3 inches above the left ear.

(2) Fire arm wound of entry on the front of the left side, chest 0.5 x 0.2 cm, three inches below the left nipple, which made an exit wound on the right side of the back at the right lumber region of size 3 x 3 cm.

(3) Fire arm wound of entry 1.3 x 1.3 cm left side on the left buttock making an exit 2 x 2 cm on the inner aspect of the left thigh."

In her opinion, all the injuries were ante-mortem, caused by fire-arm weapon and death occurred due to severe shock, haemorrhage, injury to the vital organ leading to cardiorespiratory failure. All injuries collectively and Injuries Nos. 1 and 2 individually were sufficient to cause death. The probable duration between injuries and death was immediate whereas, between death and postmortem was within 24 hours. The aforementioned medical evidence has fully supported the ocular account

furnished by Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8). The ocular account about the seat of injuries, the kind of weapon used during the occurrence and the time of incident as narrated by the eye-witnesses of the occurrence, has fully tallied with the afore-referred medical evidence.

16. The motive of the occurrence, as per prosecution case was that the appellant used to quarrel with his wife Mst. Aasma Bibi (deceased) and on the night of occurrence the complainant party tried to pacify the appellant, but he became infuriated and committed the murder of Mst. Aasma Bibi (deceased). The evidence of above mentioned motive was produced by the prosecution through the Naeem Abbas complainant (P.W.7) and Nazir Ahmad (P.W.8). Both the abovementioned eye-witnesses remained consistent regarding the motive part of the prosecution case. They were cross-examined at length but nothing favourable to the appellant could be brought on record. In his statement recorded under section 340(2), Cr.P.C. the appellant has admitted, though in a different manner, about his quarrels and strained relationship with his wife Mst. Aasma Bibi (deceased). We are, therefore, of the view that the motive has been proved by the prosecution in this case.

17. So far as the recovery of pistol .30 bore P-5 from the possession of the appellant is concerned, we have noted that three crime empties were recovered from the place of occurrence on 24-6-2007 by Nasrullah Khan, Inspector (P.W.10), vide memo Ex. PF. The said crime empties were deposited in the office of Forensic Science Laboratory on 14-7-2007. According to the statement of Nasrullah Khan, Inspector (P.W.10), the appellant was arrested in this case on 20-7-2007, who on 22-7-2007, while in police custody, after making disclosure, got recovered pistol .30 bore (P-5) along with five live bullets (P-6/1-5), which were taken into possession vide recovery memo Ex-PD. The parcel of pistol was deposited in the office of Forensic Science Laboratory on 11-8-2007 and according to the report of Forensic Science Laboratory Exh.PO, all the three empties recovered from the place of occurrence were found to have been fired from the pistol P.5 which was recovered from the possession of appellant. Therefore, the prosecution case against the appellant has also been corroborated by the recovery of pistol P.5 on his pointation and the positive report of Forensic Science Laboratory Exh. PO.

18. Now coming to the plea taken by the appellant in his statements recorded under section 342 and 340(2), Cr.P.C. The statement of the appellant recorded under section 342, Cr.P.C. has already been reproduced in para No. 5 of this judgment. We have noted that the appellant took the following plea in his statement on oath recorded under section 340(2), Cr.P.C.

"My marriage with Aasma deceased, who was my Maternal cousin took place 9/10 months prior to this occurrence. I suspected that she (Asma deceased) having some relations with some one, which turned to be true, when on 23-1-2007, I came to the house of my in-laws. My wife already was there. After stayed 15/20 minutes, I went out to Market for purchase of maple leaf, after about half an hour when I came back, I found my wife Aasma (deceased) and her Behnoi Nazir in an objectionable condition. They both were busy in sexual act, at that time, no male member of my in-laws was present in house. I controlled myself, bite my hand and came out side the house of my in-laws. At about 6-00 p.m. my father-in-law came back, I told him about this and asked my wife to accompany me back at home. About this, I felt shamed of that incident and did not tell to my elder brothers, strictly stopped Mst. Asma Bibi to go to her parents house, but in my absence, she used to visit the house of her parents, just to meet Nazir (Behnoi). On 24-6-2007, about 3-30 a.m. at night, I along with my wife were in our room when I enquired my wife that why she indulged in fornication with Nazir, she confessed her illicit relations with Nazir, then I could not control myself and fired at Asma deceased, who fell down and succumbed to the injuries. Then opend the door which was bolted inside of my room and fled away. I committed this murder on the pretext of honour. We have joint family system. My brothers namely, Sodagir Ali, Dilawar, Liaqat Ali with their families were also residing in the same house. This occurrence took place in my room which was bolted from inside and at that time, nobody including my brothers were present in my room and neither any of them instigated, abetted or participated with me in commission of offence. I alone committed this offence under the passion of heat. When I committed this offence, my all three brothers were sleeping in their separate rooms and nobody from my in-laws was present in my home when this occurrence took place and they deposed falsely when they appeared as P.Ws. Name of my brother Sodagir Ali was falsely involved in this case and he neither abetted nor participated with me in this commission of offence. No body arrested me. On 20-7-2007, I produced myself

before the Local Police with Pistol .30 bore which was used by me during occurrence."

The above-mentioned plea taken by the appellant in his defence that he had committed the murder of Mst. Aasma Bibi (deceased) on the pretext of honour is not convincing due to number of reasons. It is manifest from the perusal of his statement that on 23-1-2007, in the house of his in-laws, he had allegedly seen Mst. Aasma Bibi (deceased) and her 'Behnoi' Nazir Ahmad in an objectionable condition, as they both were busy in the sexual act, but it is strange to note that he did not take any action at that time, rather he brought his wife Mst. Aasma Bibi (deceased) back to his house where they lived as husband and wife for more than five months and then on 24-6-2007 at about 3-30 a.m. (at night) he inquired from his wife who admitted her illicit relations with her 'Behnoi' Nazir Ahmad, whereupon, he (appellant) committed the murder of his wife Mst. Aasma Bibi (deceased) on account of 'Ghairat' (honour). It does not appeal to common sense that he did not feel any 'ghairat' (honour) at the time when he had allegedly seen Mst. Aasma Bibi (deceased) and Nazir Ahmad while committing sexual intercourse, but after the lapse of more than five months, on one fine morning he realized that there was some element of 'Ghariat' (honour) also involved in this case. He has admitted during his cross-examination that Mst. Aasma Bibi (deceased) had seven sisters and four brothers. He has further admitted that apart from three married sisters, all the remaining sisters and brothers of Mst. Aasma Bibi deceased were living in the house of his father-in-law. It is not probable that Mst. Aasma Bibi (deceased) would indulge herself in the sexual act with her Behnoi Nazir Ahmad in a house where his four brothers and three sisters were also residing and she will commit the sexual intercourse in a manner where she will also provide a chance to the appellant to witness the said act.

19. We have scrutinized the statement of appellant in detail and we have come to this conclusion that if the plea of the appellant is accepted even then the offence of 'qatl-e-amd' of Mst. Aasma Bibi (deceased) has been established and proved against him. As discussed earlier, even according to his own statement the appellant on 23-1-2007, saw Mst. Aasma Bibi deceased and her 'Behnoi' Nazir Ahmad, while busy in the sexual act but he did not take any action at that time and after the lapse of more than five months, on 24-6-2007 he committed the murder of Mst. Aasma Bibi

(deceased) on the pretext that he had seen her in an objectionable condition, five months prior to the occurrence. As the appellant did not take any action for a period of more than five months, therefore, question of grave and sudden provocation does not arise in this case.

20. Learned counsel for the appellant has argued that at least it is not a case of capital punishment because the appellant has committed the murder of Mst. Aasma Bibi (deceased) on account of ghairat therefore, lenient view may be taken in this case. The said argument of learned counsel for the appellant is misconceived. We have noted that the occurrence in this case took place on 24-6-2007, whereas, amendment/ proviso was introduced in section 302(c) P.P.C. by the Criminal Law (AMdt.) Act, 2004 (I of 2005) dated 10-1-2005, which reads as under:--

"Provided that nothing in this clause shall apply to the offence of qatl-e-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be."

It is evident from the perusal of above mentioned amendment/proviso introduced in section 302(c) P.P.C. in the year, 2004 that no lenient view can be taken in the instant case on account of 'ghairat' (honour).

21. Learned counsel for the appellant lastly argued that the death sentence awarded to the appellant is not sustainable while keeping in view the provisions of sections 306, 307 and 308 P.P.C. because the appellant being husband of Mst. Aasma Bibi deceased is also her legal heir. In support of this contention he has also placed reliance on the case reported as Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others, (PLD 1994 Supreme Court 885). The said contention of learned counsel for the appellant is also without any substance because the appellant has been awarded death sentence by way of Taz'ir under section 302(b) P.P.C. and not as of Qisas, as provided under section 302(a) P.P.C., therefore, provisions of sections 306, 307, and 308 P.P.C. are not applicable in the instant case. Even otherwise, the case of 'Khalil-uz-Zaman', supra, cited by the learned counsel for the appellant has already been reviewed by the Hon'ble Supreme Court of Pakistan, vide the judgment reported as, Faqir Ullah v. Khalil-uz-Zaman and others (1999 SCMR 2203), wherein at page Nos.2214 and 2215, it has been held as under:--

"19. In cases where Qisas is not available, the Shariah has given authority to the State and the Courts to award appropriate punishment to the offender keeping in view the circumstances of the case. Such punishment may reach up to life imprisonment or death by way of Tazir. This kind of death punishment has been termed variously by the Jurists but there is a general agreement that such a punishment is justified under the Shariah in the special circumstances.

20. After hearing the learned counsel for the petitioner, the convict-respondent, the learned D.A.G. and the learned State Counsel, we find that the learned Division Bench of this Court which annulled the death sentence awarded to the convict-respondent did not notice as to how the learned Supreme Appellate Court had converted the conviction of the convict-respondent from Tazir to that of Qisas. A bare perusal of the order of the Supreme Appellate Court would reveal that no reasons for alteration of sentence of death by way of Tazir to that of Qisas were furnished. According to Mr. M. Ismail Qureshi learned Senior Advocate Supreme Court representing the petitioner, it was on account of inadvertence. Another possibility appears to be that the statement of the convict-respondent recorded under section 342, Cr.P.C. by the learned trial Judge confessing his guilt on the ground of 'Ghairat' was taken to be a voluntary and true under section 304(1)(a) of the P.P.C. This possibility is also not strong enough in that the question is if such a statement is at all a 'confession' falling within the ambit of Qanun-e-Shahadat, 1984. Again even if it be so, whether it is not a sine qua non for such a confession to be true and voluntary because it has to be either accepted as a whole or rejected in toto. In this view of the matter, the conversion of death sentence by the learned Supreme Appellate Court awarded by the learned trial Court by way of Tazir into death by way of Qisas' was sheerly an inadvertence. The learned Division Bench of this Court ought to have but had not adverted at all to this question and had, therefore, gone wrong in taking it for granted that the convict-respondent had been legally awarded death sentence by way of Qisas. The death sentence was awarded to him by the learned trial Judge by way of 'Tazir' under section 302(b), P.P.C. It was certainly by inadvertence that it was converted into death sentence by way of Qisas. The question referred to lastly was very vital for the disposal of the Constitutional Petition No. 36 and passing of the impugned order. We are of the considered view

that there was no ground for conversion of the death sentence by way of Qisas. And this conversion being inadvertent is not sustainable in law.

21. The delay in filing the review petition is condoned in the interest of justice as the proposition of law involved is of public importance and is of far-reaching consequences.

22. The error of omitting to take note by the learned Division Bench of this Court of the impugned order of the learned Supreme Appellate Court was apparent on the face of the record and was related to the impugned order passed by the learned Division Bench. The existence of the error or inadvertence was not disputed before us. The order of this Court dated 3-8-1994 based as it is upon the mistaken view that the convict-respondent had been awarded death sentence by way of Qisas thus needs to be reviewed.

23. Accordingly, we accept this review petition, set aside the impugned order of the Court and restore that of the learned Special Judge who awarded sentence of death to the convict-respondent by way of Tazir.

Similarly in another case of Muhammad Akram v. The State (2003 SCAM 855), the Hon'ble Supreme Court of Pakistan, upheld the death sentence awarded to a husband for the murder of his wife by observing that it is not permissible to extend benefit of provisions of sections 307 and 308, P.P.C. in the cases which are punishable under sections 302(b) and 302(c), P.P.C. as Tazir, because it would amount to grant the license of killing of innocent persons by their Walies. The relevant part of the said judgment at pages 859 and 860 reads as follows:--

".....The first contention of the learned counsel relating to the application of section 308, P.P.C. by virtue of sections 306, P.P.C. is without any substance, sections 306, 307 and 308, P.P.C. would only attract in the cases of Qatl-e-Amd which are liable to Qisas under section 302(a), P.P.C. and not in the cases in which, sentence for Qatl-e-Amd has been awarded as Tazir under section 302(b) and (c), P.P.C. For the purpose of removing the confusion and misconception of law on the subject the above provision must be understood in the true spirit. Section 306, P.P.C. provides that Qatl-e-Amd shall not be liable to Qisas in certain cases mentioned therein inoperative but there is no such exception in a case of Qatl-e-Amd punishable

as Tazir. Under section 307, P.P.C. the sentence of Qisas for Qatl-e-Amd cannot be enforced in the cases referred therein and therefore, the excep-tions mentioned in sections 306 and 307, P.P.C. are confined only to the cases liable to Qisas and not Tazir. Under section 308, P.P.C. it is provided that where an offender guilty of Qatl-e-Amd is not liable to Qisas in terms of section 306, P.P.C., the sentence of Qisas will not be enforced against him as provided under section 307, P.P.C., and he shall be liable to Diyat and may also be punished with imprisonment which may extend to a term of 14 years as Tazir. The above provision of law can be made applicable only if the essential conditions contained therein are available in a case which is liable to Qisas, and not in the cases of Qatl-e-Amd punishable as Tazir. The petitioner was tried for the charge of Qatl-e-Amd under section 302(b), P.P.C. and was convicted and sentenced to death as Tazir, therefore, he would not be entitled to the benefit of section 308, P.P.C. and was rightly punished under section 302(b), P.P.C. it is not permissible to extend the benefit of provisions of section 308, P.P.C. in the cases of Qatl-e-Amd which are punishable under section 302(b) and (c), P.P.C. as Tazir and therefore, the extension of such benefit to cases falling under section 302(a) and 302(c), P.P.C. would amount to grant the licence of killing of innocent persons by their Walies.

The abovementioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Nasir Mehmood and another v. The State (2006 SCMR 204) and the death sentence awarded to the appellant who had murdered his wife was upheld by the Hon'ble Supreme Court of Pakistan and it was observed that as the appellant was punished with death penalty by way of Taz'ir under section 302(b)/34, P.P.C., therefore, he cannot take the benefit of section 306, P.P.C. and resultantly the death penalty awarded to the appellant who had committed the murder of his wife was upheld and maintained by the Hon'ble Supreme Court of Pakistan.

22. Having considered all the pros and cons of this case, the irresistible conclusion drawn by this Court is that the prosecution has proved its case against Muhammad Tahir appellant through the aforementioned confidence-inspiring and reliable evidence. The appellant committed the murder of his wife Mst. Aasma Bibi (deceased) by inflicting repeated firearm injuries on her person and according to the evidence of Lady Dr. Marryam Aftab Khan (P.W.9), there were as many as three

firearm entry wounds on the person of Mst. Aasma Bibi (deceased). We are unable to find out any mitigating circumstance in favour of the appellant. He has committed a shocking, callous and cold-blooded murder of his wife namely Mst. Aasma Bibi (deceased), therefore, he does not deserve any leniency. In the circumstances we are of the considered view that there is no extenuating circumstances available in favour of the appellant for extending him any benefit regarding his sentence, hence his conviction and sentence under section 302(b), P.P.C. is maintained and his Criminal Appeal No.867 of 2008 is, dismissed.

Resultantly death sentence awarded to Muhammad Tahir appellant is confirmed and Murder Reference (M.R. No.317 of 2008) is answered in the affirmative.

HBT/M-157/L **Appeal dismissed.**

2014 Y L R 143

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

AZAM---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.19-J and Murder Reference No.39 of 2009, heard on 30th May, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 149, 324, 353, 186 & 148---Qatl-e-amd, common object, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, obstructing public servant in discharge of public function, rioting---Appreciation of evidence---Accused was not named in the F.I.R.---No role having been attributed to accused at the time of his identification parade, it could not be held with certainty that as to whether accused was among those two unknown accused persons who ran away from the spot, or he was among those three accused who made ineffective firing at the Police Party at the time of occurrence; or it was accused who made the fatal fire shot, on the head of deceased---Complainant did not take part in the proceedings of identification parade of accused---Accused being not earlier known to complainant, it was mandatory for him to take part in the proceedings of identification parade in order to identify accused, it was therefore, not safe to rely upon the evidence of complainant---Story of circumstantial evidence and extra-judicial confession furnished by prosecution witness, was not worthy of reliance---Alleged recovery of rifle was of no avail in absence of wedding report of any empty with the rifle---Prosecution having not been able to prove its case against accused, beyond shadow of doubt, impugned judgment passed by the Trial Court was set aside---Conviction and sentence awarded to accused were set aside and he was acquitted from the charge and was released, in circumstances.

Sabir Ali alias Fauji v. The State 2011 SCMR 563 ref.

(b) Criminal trial---

----Medical evidence---Medical evidence could confirm the ocular evidence with regard to the seat of injury, the nature of injury, the kind of weapon used in the occurrence, but it would not identify the accused.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 ref.

Haider Rasool Mirza for Appellant.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 30th May, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.19-J of 2009 titled as "Azam versus The State" filed by Azam, appellant against his conviction and sentence and Murder Reference No.39 of 2009 titled as "The State versus Azam" submitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Azam, appellant as both these matters have arisen out of the same judgment dated 23-12-2008 passed by the learned Addl Sessions Judge, Bhalwal in case F.I.R. No.292 dated 23-12-2003, offences under sections 302, 324, 186, 353, 402, 399, P.P.C. (Sections 148 and 149, P.P.C. were added in charge sheet) read with section 7 of the Anti-Terrorism Act, 1997 (no charge under section 7 of the Anti-Terrorism Act, 1997 was framed), registered at Police Station Midh Ranjha District Sargodha, whereby, Azam, appellant was convicted under section 302(b)/ 149, P.P.C. and sentenced to death with the direction to pay Rs.2,00,000 (rupees two lac), as compensation to the legal heirs of deceased Sher Muhammad constable, as envisaged under section 544-A of the Code of Criminal Procedure and in default thereof, the same was directed to be recovered as arrears of land revenue. The learned trial Court also convicted Azam (appellant) and Jafar (co-convict) under sections 324/149, P.P.C. and sentenced them to imprisonment for five years with fine of Rs.5000 each as fine and in default thereof, to further undergo simple imprisonment for six months each. They were further convicted under section 353/ 186, P.P.C. and were sentenced to imprisonment for two years each. They were also convicted under section 148, P.P.C. and were sentenced

to imprisonment for two years each. They were, however, acquitted from the charges under sections 399/402, P.P.C. The charge under section 302(b), P.P.C. against Jafar, co-convict was dropped because of compromise of Jafar, co-convict with the legal heirs of the deceased. All the sentences of imprisonment were ordered to run concurrently.

The learned trial Court, however, acquitted Mumtaz and Zafar Iqbal, co-accused of the appellant.

It is pertinent to mention here that Jafar, co-convict of the appellant has not filed any appeal against his conviction and sentence.

2. Brief facts of the case, as disclosed by Muhammad Ijaz Ahmad S.I/S.H.O., complainant (P.W.11) in his application (Exh-PBB), on the basis of which the formal F.I.R. (Exh-PEE) was registered, are that on 23-12-2003 at about 6-40 p.m., he (complainant) received a telephonic information from Bakhtiar Ranjha that six persons along with two motorcycles were present at the bridge of canal Naseerpur Kalan for committing dacoity. Upon which, he (complainant) along with Zulfiqar Ali, A.S.-I. (P.W.12), Khizer Hayat A.S.-I. (given up P.W.), Shaukat Hayat, A.S.-I. (P.W.9), Muhammad Nawaz 795/C (P.W.10), Khaliq Dad 458/C (given up P.W.), Sher Muhammad 1779/C (deceased), Hameed Ali 1453/C (P.W.-4). They i.e. Zulfiqar Ali, A.S.-I. (P.W.12), Khizer Hayat A.S.-I. (given up P.W.3) Shaukat Hayat, A.S.-I. (P.W.9), Muhammad Nawaz 795/C (P.W.10), Khaliq Dad 458/C (given up P.W.), Sher Muhammad 1779/C (deceased), Hameed Ali 1453/C (P.W.4) were given rifle Semi-automatic along with fifty cartridges, official revolver, rifle 9 MM along with fifty cartridges, rifle SMG along with eighty cartridges, rifle 3-G along with eighty cartridges, 9 MM rifle along with fifty cartridges, rifle Semi Automatic along with seventy cartridges, respectively from Malkhana and went to the bridge of canal Naseerpur Kalan on official vehicle bearing Registration No.6728/SGH being driven by Jalil Tariq 1660/C. He (complainant) also asked the S.H.O. Police Station Maila through wireless to reach at the spot. At about 7-20 p.m., he (complainant) along with his companions reached near the bridge of canal Naseerpur Kalan and found six persons on two motorcycles, who, on seeing the police vehicle, sat on motorcycles. Four persons, out of whom, one was of young age having average physique, average height and was wearing white Shalwar Qameez, second was a young man of dark complexion having average height with average physique and was wearing white

Shalwar Qameez, third was a young man of average height and average physique wearing white Shalwar Qameez and fourth was a young man of average physique and height wearing grey Shalwar Qameez, sat on a motorcycle bearing Registration No.LOW-3568 Yahama. They (complainant party) saw the above said accused persons in the light of their vehicle. The other two persons armed with firearms sat on motorcycle and fled away towards north to Raheempur. He (complainant) along with his companions chased Motorcycle No.LOW-3568. When they (accused persons) reached at the bank of canal at a distance of one kilometer, they threw the motorcycle and started firing at the police party from a close range. Upon which, he (complainant) along with his companions also retaliated with firing. Sher Muhammad 1779/C (deceased) came in front of the light of vehicle, upon which, the person who was wearing grey clothes made a burst with Kalashnikov which landed on the head of Sher Muhammad 1779/C (deceased) who fell down and succumbed to the injuries. The accused persons while taking advantage of slope of canal bank ran, upon which, he (complainant) deputed Shaukat Hayat, A.S.-I. (P.W.9) and the driver of the vehicle near the dead body and followed the' accused persons along with other police officials. When they (complainant party) reached at a distance of 5/6 acres, the accused persons again started firing at them. They also resorted to firing. The accused persons while taking the advantage of darkness, fled away from the spot. Meanwhile, S.H.O. Police Station Maila also reached there. They took into possession the motorcycle.

3. Azam (appellant) was arrested in some other case i.e. F.I.R. No.95 dated 24-3-2004 registered under section 13 of the Arms Ordinance, 1965 and rifle (P-27) along with two hundred live bullets (P-28/1-200) was recovered from his possession. He was formally arrested in this case on 15-5-2004 by Muhammad Shamoon, S.I. (P.W.16) who, took into possession Kalashnikov (P-27) along with two hundred live bullets (P-28/1-200) on 20-5-2004 vide recovery memo Exh-PZ. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant, his co-convict namely, Jafar and his co-accused namely, Mumtaz and Zafar Iqbal (since acquitted) on 11-12-2006, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eighteen witnesses, during the trial. Shaukat Hayat, A.S.-I. (P.W.9), Muhammad Nawaz, 795/C (P.W.10), Muhammad (Ijaz Ahmad Qureshi, complainant (P.W.11) and Zulfigar Ahmad, A.S.-I. (P.W.12) furnished the ocular account of the case. Muhammad Ijaz Ahmad Qureshi, complainant (P.W.11) is also one of the investigating officers of the case. Muhammad Nawaz 795/C (P.W.10) is also the witness of recovery of Kalashnikov (P-27) along with two hundred live bullets (P-28/1-200) allegedly recovered at the instance of Azam (appellant).

The medical evidence was furnished by Dr. Muhammad Azam (P.W.1), who conducted the post-mortem examination on the dead body of Sher Muhammad, constable (deceased).

Hafiz Ahmad Tariq, Special Judicial Magistrate (P.W.13) supervised the Identification parade of the appellant. Muhammad Shamoon S.-I. (P.W.16) also was an Investigating Officer of this case. Muhammad Yousaf (P.W.6) and Mehra (P.W.7) are the witnesses of circumstantial evidence. Mehra (P.W.7) is also the witness of extra judicial confession allegedly made by Muhammad Azam (appellant). Muhammad Akram, A.S.-I. (P.W.2), Muhammad Arshad A.S.-I. (P.W.3), Abdul Hamid 1453/C (P.W.4), Muhammad Sher (P.W.8), Mukhtar Ahmad 814/C (P.W.14), Muhammad Iqbal Khan Inspector (P.W.15), Muhammad Farooq, A.S.-I. (P.W.17) and Muhammad Hayat, Patwari (P.W.18) are the formal witnesses. The prosecution also produced documentary evidence in the shape of post-mortem report of the deceased along with pictorial diagram (Exh-PA & Exh-PA/1), inquest report of the deceased (Exh-PB), injury statement of the deceased (Exh-PC), recovery memo of .12 bore gun P-1 along with ten live cartridges P-2/1-10 allegedly recovered at the instance of Mumtaz Ahmad accused, since acquitted (Exh-PD), recovery memo of .12 bore gun P-3 along with eight live cartridges P-4/1-8 allegedly recovered at the instance of Zafar accused, since acquitted (Exh-PE), recovery memo of motorcycle bearing Registration No.LOF-3568 (Exh-PF), recovery memo of last worn clothes of the deceased (Exh-PG), recovery memo of blood-stained earth (Exh-PII), recovery memo of crime empties of Kalashnikov (Exh-PI), recovery memo of crime empties of Kalashnikov (Exh-PJ), recovery memo of crime empties, magazine along with thirty live cartridges (Exh-PL), recovery memo of official vehicle bearing Registration No.SGH-6728 (Exh-PM), recovery memo of empties fired by the police

party (Exh-PN), warrants of arrest of Azam (appellant) along with report (Exh-PP), warrants of arrest of Imtiaz alias Balo along with report (Exh-PQ), warrants of arrest of Azhar along with report (Exh-PR), warrants of arrest of Mumtaz accused (since acquitted) along with report (Exh-PS), warrants of arrest of Zafar accused (since acquitted) along with report (Exh-PT), proclamation of Azhar along with report (Exh-PU), proclamation of Imtiaz alias Balo along with report (Exh-PV), proclamation of Azam (appellant) along with report (Exh-PW), proclamation of Jafar (co-convict) along with report (Exh-PX), recovery memo of last worn clothes of the deceased (Exh-PY), recovery memo of Kalashnikov allegedly recovered at the instance of the appellant (Exh-PZ), recovery memo of Kalashnikov allegedly recovered at the instance of Jafar, co-convict (Lxh-PAA), application for registration of the case (Exh-PBB), rough site plan of the place of murder of the deceased (Exh-PCC), rough site plan of the place where the accused were present for committing dacoity (Exh-PCC/1), application for issuance of proclamation of accused persons (Exh.PDD), application for identification parade of the appellant (Exh.PEE), warrants of arrests of Gahna accused along with report (Exh.PEE & Exh-PEE/1), proceedings of identification parade of the appellant (Exh-PFF), proclamation of Gahna accused along with report (Exh.PFF & Exh-PFF/1), application for identification parade of Jafar, co-convict (Exh-PGG), proceedings of identification parade of Jafar co-convict (Exh-PHH), scaled site plan of the place of occurrence (Exh-PFF & Exh-PF/1), report of the Chemical Examiner (Exh-PGG), report of the Serologist (Exh-PHH), report of the Forensic Science Laboratory (Exh-PII) and closed its evidence.

The statements of the appellant, his co-convict and co-accused (since acquitted), under section 342 of the Code of Criminal Procedure, were recorded on 20-12-2008. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?, the appellant replied as under:-

"I have been involved in this case due to previous enmity. All the P.Ws. are police officials and they have falsely deposed on the asking of their superior."

The appellant neither opted to make statement on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against him nor produced any evidence in his defence.

5. The learned trial Court vide its judgment dated 23-12-2008, found the appellant and Jafar (co-convict) guilty, convicted and sentenced them as mentioned and detailed above.

6. Learned counsel for the appellant, in support of this appeal, contends that the appellant is not nominated in the F.I.R. and even his correct description is not mentioned therein; that in the F.I.R., it is the case of the prosecution that four persons rode on a motorcycle and tried to flee away from the spot which is not probable as four persons armed with firearms cannot ride on a motorcycle; that in the F.I.R., it is the case of the prosecution that the person who was wearing grey Shalwar Qameez made a burst with Kalashnikov which landed on the head of the deceased which is belied by the medical evidence as the doctor, who conducted postmortem examination on the dead body of Sher Muhammad (deceased), found only one entry wound on the head of the deceased, which is of the size of 1 1/2 cm x 1 cm and the same clearly suggests that it is not caused with a burst of Kalashnikov; that the identification parade of the appellant carries no value as no description of the appellant was given in the F.I.R. and all the three witnesses have simply identified the appellant without assigning any specific role to him; that the complainant did not participate in the proceedings of identification parade and while appearing before the learned trial Court he stated that the accused persons fired at the deceased; that the recovery of Kalashnikov at the instance of the appellant is immaterial in this case as no empty of Kalashnikov was sent to the Forensic Science Laboratory for comparison; that so far as extra-judicial confession allegedly made by the appellant is concerned, though Mehra (P.W.7), the witness of extra-judicial confession was not cross examined on behalf of the appellant but if his examination-in-chief is taken as it is, even then, the same is not worthy of reliance as he stated that he did not inform the police due to the fear of his life and he has not disclosed as to how his fear was removed; that at the time of making of alleged extra-judicial confession, there was nothing on the record against the appellant, which could have persuaded him to make extra-judicial confession; that Mehra (P.W.7) was not a man of authority or had any influence on the legal heirs of the deceased, therefore, it is highly improbable that the appellant would make an extra-judicial confession before him and even otherwise, the alleged extra-judicial confession was joint in nature; that from all angles, the prosecution case is of doubtful nature; that the prosecution has miserably failed to

prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charge.

7. Notice was issued to the legal heirs of the deceased but none appeared on their behalf. The learned DPG has placed on the record, the notice upon which, the service of the legal heirs of the deceased was effected.

8. On the other hand, learned Deputy Prosecutor-General vehemently opposes this appeal on the grounds that there was no enmity of the complainant with the appellant to falsely involve him in this case; that the appellant was duly identified by the witnesses during the identification parade; that even before the learned trial Court, the witnesses have stated that the appellant was the person who committed the murder of Sher Muhammad, constable (deceased); that the ocular account of the prosecution case is in line with the medical evidence, which is further corroborated by the recovery of Kalashnikov from the appellant; that the appellant remained proclaimed offender for about two months; that the prosecution has proved its case against the appellant beyond shadow of doubt; that the sentence of death was rightly awarded to the appellant by the learned trial Court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. have heard the arguments of learned counsel for the appellant, learned Deputy Prosecutor-General and have also gone through the record with their able assistance.

10. The gist of the prosecution case has already been given in paragraph No.2 of the judgment, therefore, there is no need to repeat the same. It is noteworthy that the appellant was not named in the F.I.R. Although it was alleged in the F.I.R. that six unknown accused persons were present at the time of occurrence but the description of only four unknown accused persons was mentioned therein. We have also noted that the description given in the F.I.R. of all the four unknown accused persons was almost identical. It was stated regarding all the four accused that they were of average height, average physique and they were of young ages. The colour of only one accused was stated to be dark complexion whereas, the colour of remaining accused persons was not mentioned. It was stated in the F.I.R. regarding three accused persons that they were wearing white Shalwar Qameez and qua one accused, it was stated that he was wearing Shalwar Qameez of grey colour. It was stated in the F.I.R. that the person who was wearing Shalwar Qameez of grey colour fired at Sher Muhammad, constable (deceased), which landed on his head. We have noted that at the time of

identification of the appellant, no specific role was attributed to him by the witnesses who identified him and it was simply mentioned in the report regarding proceedings of identification parade (Exh-PFF) that the witnesses have identified the appellant. It was not even mentioned in the said report that it was stated by any witness that it was the appellant who was wearing Shalwar Qameez of grey colour at the time of occurrence or he made fire shot at the deceased. As four accused persons were tried in this case, therefore, it was mandatory to assign the role to the appellant at the time of occurrence. As per story of the prosecution, six accused persons were present at the time of occurrence, out of whom, two unknown accused persons ran away on their motorcycle towards village Raheempur whereas, the police party chased four unknown accused persons. There is no allegation of even ineffective firing to the extent of two unknown accused persons who ran away towards Raheempur at the time of occurrence. No role, whatsoever, in the F.I.R. was assigned to the said two unkhown accused persons. The police party chased only four unknown accused persons and the allegation of ineffective firing was levelled against three accused persons out of said four accused whereas, the role of making effective fire shot was assigned to only one accused. As no role, whatsoever, was attributed to the appellant at the time of his identification parade, therefore, it cannot be held with certainty that as to whether the appellant was amongst those two unknown accused persons who ran away from the spot on their motorcycle towards Raheempur or he was amongst those three accused persons who made ineffective firing at the police party at the time of occurrence or it was the appellant who made the fatal fire shot on the head of Sher Muhammad, constable (deceased). Although the prosecution witnesses namely, Shaukat Ilayat, S.-I. (P.W.9) and Muhammad Nawaz (P.W.10) have assigned the role of making fatal fire shot to the appellant in their statements recorded by the learned trial Court but the abovementioned defect in the proceedings of identification parade regarding non-mentioning the role of the appellant is fatal to the prosecution case. We may refer here the case of "Sabir Ali alias Fauji v. The State" (2011 SCMR 563) wherein, at page 570, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

"6....It is also settled principle of law that role of the accused was not described by the witnesses at the time of identification parade which is always considered inherent defect, therefore, such identification parade lost its value and cannot be relied

upon. See Ghulam Rasul's case (1988 SCMR 557), Mahmood Ahmed's case (1995 SCMR 127) and Khadim Hussain's case (1985 SCMR 721)..."

So far as the evidence of the complainant Muhammad Ijaz Ahmad Qureshi, S.I (P.W.11) is concerned, we have noted that the said witness did not take part in the proceedings of identification parade of the appellant. The appellant was not earlier known to the said witness, therefore, it was mandatory for him to take part in the proceedings of the identification parade in order to identify the appellant in the said proceedings, therefore, it is not safe to rely upon the evidence of the complainant Muhammad Ijaz Ahmad Qureshi, S.-I. (P.W.11).

11. The prosecution has also produced circumstantial evidence against the appellant through Muhammad Yousaf (P.W.6) who stated that on 23-12-2003, he saw Muhammad Azam (appellant) and four other co-accused standing on the bridge of canal of Naseerpur while armed with different weapons. He further stated that after a short distance, he crossed the police vehicle and when he reached near Shahid Petroleum, he heard the report of firing. After this, he went to Lahore for his personal work and on 10-3-2004, he came back and the police recorded his statement. Although the said witness was not cross-examined by the learned defence counsel but even then this Court has to see the evidentiary value of his testimony. We have noted that the evidence of abovementioned witness is not confidence-inspiring. He claimed that he heard the report of firing at the time of occurrence and in that eventuality, his natural conduct would have been to know about the actual occurrence or to report the matter to the police but instead he stated that he went to Lahore. He remained mum for as many as eighteen days and his statement was recorded by the police on 10-3-2004 after the delay of eighteen days from the occurrence.

12. The prosecution has also produced circumstantial evidence and evidence of extra-judicial confession of the appellant through Mehra (P.W.7). He also stated that on 23-12-2003, he saw the appellant and five other co-accused while armed with weapons standing near the bank of canal of Naseerpur. He further stated that when he reached at Midh Ranjha, he heard that a police constable had been killed in a police encounter. He further stated that he remained silent due to the fear of his life and on 17-3-2004, when he was present at Adda Kandiwal, the appellant along with other accused persons came there on a car and confessed before him regarding the murder of a police constable. Although this witness was also not cross examined by the

learned defence counsel but the evidence of this witness is also not worthy of reliance for the reason that according to his own statement, he remained silent for a period of almost three months after the occurrence. He gave this explanation for the said delay that due to the fear of his life, he remained silent but he did not gave any explanation as to how his fear was removed. On one hand, he claimed that due to the fear of his life, he remained silent and on the other hand, he claimed that the appellant confessed before him regarding the occurrence. It is not understandable that as to why the appellant would confess before a person who was admittedly afraid of him. Even otherwise, it does not appeal to common sense that the appellant would make confession before the abovementioned witness when he met him per chance at the Adda of Kandiwal. This witness has not claimed that he was holding any authoritative post. We are, therefore, of the view that the story of circumstantial evidence and extra-judicial confession furnished by Mehra (P.W.7) is not worthy of reliance.

13. The prosecution has also produced the evidence qua recovery of Kalashnikov (P-27) along with two hundred bullets (P28/1-200) recovered on the pointation of the appellant, which was taken into possession vide recovery memo Exh-PZ but the alleged recovery of Kalashnikov along with two hundred live bullets does not corroborate the prosecution case against the appellant because the report of the Forensic Science Laboratory (Exh-PII) is only to the effect that the rifle 7.62 MM was in working order. In absence of wedding report of any empty with the rifle (P-27), the alleged recovery of said rifle is of no avail to the prosecution.

14. Insofar as medical evidence is concerned, it is by now well-settled law that medical evidence may confirm the ocular evidence with regard to the seat of injury, the nature of the injury, the kind of weapon used in the occurrence but it would not identify the accused. Reference in this respect may be made to the case of "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "Mursal Kazmi alias Qamar Shah_ and another v. The State" (2009 SCMR 1410) and "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103).

15. In the light of above discussion, we are of the view that the prosecution has not been able to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.19-J of 2009 filed by Azam (appellant), set aside the impugned judgment dated 23-12-2008 passed by learned Addl Sessions Judge, Bhalwal District Sargodha. Resultantly the convictions and sentences of the

appellant awarded by the learned Addl Sessions Judge, Bhalwal District Sargodha, are set aside and he is acquitted from the charges. Azam (appellant) is in custody, he be released forthwith if not required to be detained in any other case.

16. Murder Reference No.39 of 2009 is answered in the NEGATIVE and the sentence of death of Azam (convict) is NOT CONFIRMED.

HBT/A-82/L **Appeal accepted.**

2014 Y L R 306

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

The STATE---Petitioner

Versus

MUHAMMAD BOOTA---Respondent

Murder Reference No.778 of 2006, heard on 19th January, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---F.I.R. having been lodged promptly, chances of concoction and deliberations, had been ruled out---One of the prosecution witnesses who was real daughter of accused was resident of the house where the occurrence had taken place, her presence at the spot was quite natural---Said witness was cross-examined at length, but her evidence could not be shattered during the process of cross-examination, her evidence was further corroborated by circumstantial evidence---Evidence of other prosecution witnesses, was straightforward and confidence inspiring---Manner in which deceased was done to death and the time of her death was supported by medical evidence---Case of the prosecution was further corroborated by circumstantial evidence---Prosecution witnesses not only were relatives of the deceased, but were also closely related to accused, as well---No reason existed for the complainant to falsely implicate accused in the case---Evidence of prosecution witnesses, could not be discarded on the sole ground of their relationship with the deceased---Delay in recording statement of one prosecution witness under S.161, Cr.P.C. by Investigating Officer was not significant, as name of said witness was mentioned in promptly lodged F.I.R.---Plea of accused was that the deceased had committed suicide, and that he had been falsely implicated in the case---Said plea had not been taken by accused during the investigating of that case before the Investigating Officer, but was an afterthought---Motive, mentioned in the F.I.R., was not stated by the complainant and prosecution witnesses in the court---In absence of any evidence with regard to motive, same could not be believed---Nothing was recovered from the possession of accused during his physical remand---Ocular account and circumstantial evidence of the prosecution witnesses, was fully supported by medical evidence---Prosecution, in circumstances, had proved its case against accused beyond the shadow of any doubt-

--Conviction of accused was maintained, but in view of certain mitigat-ing circumstances, his sentence was altered from death to imprisonment for life, with benefit of S.382-B, Cr.P.C.

(b) Qanun-e-Shahadat (10 of 1984)---

----Art. 3---Statement of child witness---Admissibility---No age limit of a witness had been prescribed under Art.3 of Qanun-e-Shahadat, 1984---Statement of a child witness was admissible in evidence, unless the court considered that a witness was prevented from understanding the question put to him or from giving rational answers---Trial Court was to determine as to whether or not a witness was prevented from understanding question put to him because of his tender age---Child witness was quite competent to give evidence in court provided he or she understood the question put to him and give rational answers to the said questions---No legal compulsion existed to check the intellect of a child witness in a written form---Only requirement was the satisfaction of the court.

Mst. Razia alias Jia v The State 2009 SCMR 1428; Amjad Javed v. The State 2007 SCMR 1247; Muhammad Jamal and others v. The State 1997 SCMR 1595; Abdul Majeed v. The State 2002 PCr.LJ 41 and Qadeer Hussain v. The State through Advocate-General, Azad Jammu and Kashmir Government, Muzaffarabad 1995 PCr.LJ 803 rel.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Prosecution had alleged a specific motive in F.I.R., but same was not proved during the trial---Prosecution witnesses, did not utter a single word regarding the motive part of the prosecution---Co-accused, in the case, had been acquitted by the Trial Court by extending him benefit of doubt---Acquittal of co-accused having not been challenged, either by the complainant or by the State, same had attained finality---As to how the occurrence had started, and what had actually happened between the deceased and accused, immediately before the occurrence, which had resulted into the death of the deceased was not determinable---Sentence of death awarded to accused, in circumstances, was harsh---In view of facts of the case and safe administration of justice, conviction of accused under S.302(b), P.P.C. awarded to accused by the Trial Court, was maintained, but his sentence was altered from death to imprisonment for life.

(d) Criminal trial---

----Motive---Proof---Non-proof of motive, effect---If a specific motive had been alleged by the prosecution then, it was duty of the prosecution to establish motive beyond any shadow of doubt and non-proof of motive could be considered a mitigating circumstance in favour of an accused.

Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

Maqbool Ahmad Qureshi and Ijaz Bajwa for the Convict.

Chaudhary Muhammad Mustafa Deputy Prosecutor-General for the State.

Chaudhary Riaz Ahmad Kataria for the Complainant.

Date of hearing: 19th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Muhammad Boota, convict along with his co-accused Muhammad Sharif was tried by the learned Additional Sessions Judge, Ferozewala, District Sheikhupura, in case F.I.R. No. 140, dated 2-3-2005, registered under sections 302, 34, at Police Station, Factory Area, for the murder of Mst. Abida Parveen (deceased). The learned Trial Court vide judgment dated 29-11-2006 acquitted co-accused Muhammad Sharif of the charge framed against him, whereas the appellant was convicted under section 302(b), P.P.C. as Ta'zir and he was sentenced to death. He was further, directed to pay Rs.1,00,000 as compensation as envisaged under section 544-A of Cr.P.C. to the legal heirs of the deceased, and in default thereof, to further undergo 6 months' S.I.

2. The convict has not filed any appeal against his conviction and sentence, whereas, the learned trial Court has sent Murder Reference No. 778 of 2006 under section 374, Cr.P.C., to this Court for confirmation or otherwise of death sentence of the convict.

3. Succinctly stated facts as propounded in the F.I.R. (Exh.PB/1) which was recorded on the basis of complaint (Exh.PB) made by the complainant namely, Nawab Ali (P.W.4), are that on the fateful day of occurrence, he (the complainant) along with Manzoor Hussain (P.W.5) and Sadiq Ali son of Sardar Muhammad was present at his house. In the meantime, the grand-daughter of the complainant namely, Mst. Gul Bano came in his house and informed that her uncle Muhammad Sharif had put her mother on the bed by holding her from her hands and her father Muhammad Boota (the convict) by putting the scarf around her neck was strangulating her. Upon

this, the complainant and the P.Ws. rushed towards the house of Muhammad Boota, and when they were about two acres away from the house of occurrence, they saw Muhammad Boota (convict) and co-accused Muhammad Sharif, fleeing away from the spot. The complainant along with P.Ws. entered the house of occurrence and witnessed her daughter, taking her last breath. They noticed a scarf around her neck and blood was oozing from her nostrils. There was a cut on her lower lip and she breathed her last, at the spot. The motive for the occurrence was alleged that Mst. Abida Parveen (deceased) was married with the convict, who used to beat her and kicked her out from his house and she was returned back through the intervention of 'Punchayat'.

4. After completion of investigation, the challan was submitted. The convict and his co-accused Muhammad Sharif were charge-sheeted, to which, they pleaded not guilty and claimed trial.

The prosecution in order to prove its case examined as many as 9 P.Ws. and also tendered documentary evidence. The ocular account of occurrence was furnished by Mst. Gul Bano P.W.7 whereas circumstantial evidence was rendered by Nawab Ali P.W.4 and Manzoor Hussain P.W.5.

(P.W.9) Lady Doctor Nuzhat Aziz, on 2-3-2005, at 6-15 p.m., conducted the post-mortem examination on the dead-body of Mst. Abida Parveen (deceased) vide Post-mortem Report Exh.PK and pictorial diagram Exh.PK/2 and found the following injury on her person:---

(1) 22 x 1-1/2 contused swelling on front of neck, left and right side of neck. Pale looking face.

In her opinion, the above-mentioned injury was ante-mortem in nature. The cause of death in this case was by ligature around the neck. Probable time that elapsed between injury and death was not ascertained and between death and post-mortem was 12 hours.

(P.W.8) Umar Saeed, Sub-Inspector is the Investigating Officer of this case, who completed the investigation and submitted the challan.

P.W.1 Abdul Aziz C-712, P.W.2 Muhammad Nawaz, S.I., P.W.3 Rabnawaz Shah, Draftsman, P.W.6 Muhammad Rafique, are the formal witnesses.

5. The statement of the convict was recorded under section 342 of Cr.P.C. He refuted the allegations levelled against him and professed his innocence. In answer to

the question, why this case against you and why the P.Ws. have deposed against you, the convict replied as under:---

"I have been implicated in this case falsely due to mala fide and I have nothing to do with this occurrence. I was not present at the time and place of occurrence. My wife deceased Abida Parveen committed suicide due to harsh attitude of her parents. I am innocent. I am poor man. Police challaned me wrongly with the connivance of complainant party. P.Ws. are related to the deceased so they stated falsely against me".

Neither the convict produced any defence evidence nor opted to make statement on oath as envisaged under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him.

After conclusion of the trial, the learned Trial Court, convicted Muhammad Boota (convict), as detailed above, whereas, co-accused Muhammad Sahrif was acquitted of the charge framed against him.

6. The learned Defence Counsel for the convict contends that there is no evidence available on record, which could connect the convict with the commission of the crime; that the complainant (P.W.4) is not an eye-witness of the incidence; that the statements of the complainant and the other witness Manzoor Hussain (P.W.5) is only to the extent of information provided by Gull Bano (P.W.7) to the effect that her mother is being strangulated; that Manzoor Hussain (P.W.5) had allegedly seen the accused running from the distance of 2 acres; that only material statement is of Gull Bano, who appeared before the Trial Court as P.W.7 and she made a lot of dishonest improvements in her statement and moreover she is so young; that Gull Bano (P.W.7) was a minor girl at the time of occurrence and her statement is not worthy of consideration; that admittedly P.W.7 is under the influence of her maternal grand-father; that the statement of Mst. Gull Bano (P.W.7) under section 161 of Cr.P.C. was recorded by the Investi-gating Officer on 26-7-2005, whereas, the occurrence took place on 2-3-2005, therefore, the delay in recording her statement has made her statement doubtful; that the learned Trial Court has fallen into error by not putting the questions to the witness in writing form; that the complainant (P.W.4) while lodging the F.I.R. stated that her daughter Mst. Abida Parveen (deceased) was married with the convict, who used to beat her and kicked her out from his house and she was returned back through the intervention of 'Punchayat', but in the Court he did not state so; that the motive alleged in the F.I.R. has not been proved; that no recovery has

been effected from the possession of the petitioner to corroborate prosecution case against the convict; that in fact Mst. Abida Parveen (deceased) had committed suicide, therefore, Murder Reference be answered in the negative and the convict be acquitted from the charge.

7. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant has controverted the contentions of the learned Defence Counsel for the convict on the grounds that the witnesses have absolutely no malice to falsely depose against the convict and the facts narrated by the complainant (P.W.4) are true, because had there been any enmity with the convict, he could have claimed himself to be an eye-witness; that Gull Bano (P.W.7) is a natural witness as she is resident of the same house, where this incident took place; that P.W.7 is real daughter of the convict, as such, she cannot be expected to make incorrect statement against her father; that the questions put by the defence side were not relevant to this case and, as such, she could not be expected to answer the same; that the statement of Gull Bano P.W.7 is fully supported by the medical evidence; that "muffler" (P.4) with which the deceased was strangulated was taken into possession vide recovery memo. (Exh.PA) and that convict acted in a brutal manner, therefore, he deserves no leniency, and thus, Murder Reference may be answered in the affirmative.

8. We have heard the arguments of the learned counsel for the parties, and have gone through the evidence available on record.

9. The occurrence in this case took place on 2-3-2005, at 11-00 a.m. The F.I.R. (Exh.PB/1) was lodged on the same day at 1-5 p.m. The Police Station Factory Area was at the distance of 1-km from the place of occurrence, so there was no delay in reporting the matter to the police. It was a prompt F.I.R. which rules out the chances of concoction and deliberation. The complainant Nawab Ali (P.W.4) is real father of Mst. Abida Parveen (deceased). The prosecution in order to prove the ocular account of the occurrence has examined Mst. Gull Bano (P.W.7). In this case, she is the star witness of the prosecution, who is real daughter of the convict Muhammad Boota, as well as, of Mst. Abida Parveen (deceased). According to her statement, on the day of occurrence, at about 10-30 a.m., her father Muhammad Boota (convict) and her paternal uncle Muhammad Sharif (acquitted co-accused) went to the room of her mother Mst. Abida Parveen (deceased). Co-accused Muhammad Sharif caught hold of Mst. Abida Parveen (deceased) by her hands, pushed her on the bed, whereas, her

father Muhammad Boota (convict) put a scarf around her neck and strangulated her. As already observed Gull Bano (P.W.7) is real daughter of the convict Muhammad Boota and resident of the house where the occurrence took place, therefore, her presence at the spot is quite natural. She was cross-examined at length but her evidence could not be shattered during the process of cross-examination. Her evidence is further corroborated by the circumstantial evidence put forth by Nawab Ali (P.W.4) and Manzoor Hussain (P.W.5) who had seen the convict coming out of the house of occurrence immediately after the incident. The said witnesses were also cross-examined at length but the learned defence counsel could not bring on record any material favourable to the convict. The evidence of the above-mentioned prosecution witnesses is straightforward and confidence inspiring.

10. The prosecution has also produced Lady Doctor Nuzhat Aziz (P.W.9), who conducted the post-mortem examination on the dead-body of Mst. Abida Parveen (deceased) through post-mortem report (Exh.PK) and pictorial diagram (Exh.PK/2). The post-mortem of Mst. Abida Parveen (deceased) was conducted on 2-3-2005, at 6-15 p.m., and the following injury was found on her person:--

(1) 22 x 1-1/2 contused swelling on front of neck, left and right side of neck. Pale looking face.

According to the statement of said witness, cause of death was by ligature around the neck. Probable time that elapsed between injury and death was not ascertainable and between death and post-mortem was within 12 hours. The learned defence counsel did not opt to cross-examine Lady Doctor Nuzhat Aziz (P.W.9).

11. The manner in which Mst. Abida Parveen (deceased) was done to death and the time of her death as given by Gull Bano (P.W.7) was supported by the medical evidence furnished by Lady Doctor Nuzhat Aziz (P.W.9). The case of the prosecution was further corroborated by the circumstantial evidence rendered by the complainant Nawab Ali (P.W.4) and Manzoor Hussain (P.W.5). The complainant Nawab Ali (P.W.4) is father of Mst. Abida Parveen (deceased) and maternal grand-father of Gull Bano (P.W.7). He was present at his house, when he was informed about the occurrence by Gull Bano (P.W.7). He along with Manzoor Hussain (P.W.5) and Sadiq (given up P.W.) rushed towards the house of occurrence. They saw the convict Muhammad Boota and co-accused Muhammad Sharif coming out of the house of occurrence and escaping from the spot. When they entered the house of the convict Muhammad Boota, they saw that a scarf was put around the neck of Mst. Abida

Parveen (deceased), and she breathed her last, within their view. Blood was oozing from her nose. The complainant Nawab Ali (P.W.4) and Manzoor Hussain (P.W.5) were also cross-examined at length, but the learned defence counsel could not bring on record any material favourable to the accused.

12. Although the prosecution witnesses namely, Nawab Ali (P.W.4) and Gull Bano (P.W.7) are relatives of Mst. Abida Parveen (deceased), but at the same time, they are also closely related to the convict Muhammad Boota, as well. As discussed earlier, Gull Bano (P.W.7) is real daughter of the convict Muhammad Boota, and it is not possible that she will falsely implicate her real father under the influence of her maternal grandfather (P.W.4). There is no reason for the complainant Nawab Ali (P.W.4) to falsely implicate the convict in this case, therefore, their evidence cannot be discarded on the sole ground of their relationship with Mst. Abida Parveen (deceased).

13. The delay in recording the statement of Gull Bano (P.W.7) under section 161 of Cr.P.C. by the Investigating Officer is not significant in this case. The name of said witness was mentioned in the F.I.R. (Exh.PB/1), which was promptly lodged on the same day within 2 hours 5 minutes, from the occurrence. Gull Bano (P.W.7) is real daughter of Mst. Abida Parveen (deceased) and is resident of the house of occurrence. Her presence at the spot at the time of occurrence is quite natural, therefore, mere delay in recording her statement under section 161 of Cr.P.C. is of no avail to the convict Muhammad Boota.

14. The contention of the learned counsel for the convict that Gull Bano (P.W.7) was minor at the time of occurrence, therefore, her statement may be brushed aside of consideration, is misconceived. The age of Gull Bano (P.W.7) has been recorded as ten years at the time of recording of her statement by the learned Trial Court. Her statement was recorded on 23-11-2006, meaning thereby, she was of the age of more than seven years and three months at the time of occurrence. The learned Trial Court also put certain questions to Gull Bano (P.W.7), and after being satisfied that she was not prevented from understanding the questions or from giving rational answers due to her tender age, recorded her statement. She was cross-examined at length and it is evident from her cross-examination that she has given rational answers to the questions of the learned defence counsel. Her evidence is straightaway, confidence inspiring and trustworthy, therefore, the same can be safely relied upon in order to award punishment to the convict Muhammad Boota.

No age limit of a witness has been prescribed under Article 3 of Qanun-e-Shahadat, 1984. The statement of a child witness is also admissible in evidence, unless the Court considers that a witness is prevented from understanding the questions put to him or from giving rational answers. The above-mentioned Article reads as follows:---

"Art. 3. Who may testify: All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

It is evident from the perusal of above-mentioned provision of law that any particular age of a witness was not mentioned in it. It is for the Trial Court to determine as to whether or not a witness is prevented from understanding questions put to him because of his tender age.

A child witness is quite competent to give evidence in Court provided he or she understands the questions put to him and gives rational answers to the said questions. The Hon'bIe Supreme Court of Pakistan in the case of "Mst. Razia alias JIA v. The State" (2009 SCMR 1428) maintained the conviction of the accused on the basis of statements of the child witnesses. While discussing the evidence of child witnesses, it was observed in the said judgment at page 1433, in the following terms:---

"6. The careful perusal of the material on record leads us to the same conclusion as was reached by the learned High Court. The testimony of Naveed P.W.3. and Naheed Akhtar P.W.4 who made such confidence inspiring statements as to the events and occurrence that took place in the house before their eyes, cannot be brushed aside. As mentioned above, the Trial Court had taken all possible and due steps to judge the level of their intelligence and maturity before proceeding to record their statements. Naveed was 12 years of age whereas Naheed Akhtar was of the age of 10 years. It may be observed that mere fact that a witness was of tender age does not ipso facto make his evidence unreliable. It is true that before acting upon the evidence of child witness, close and careful scrutiny is required which in the instant case was duly adopted by the Trial Court and a note to the effect was also recorded by the Trial Court about his satisfaction. The two witnesses indeed had given a consisting account of the occurrence and the participants who were present at that time taking part in doing away with their father. This was not all, their ocular testimony derived strength and corroboration from the other evidence including the

post-mortem report. The cause of death tallied with their testimony. It cannot be lost sight, that these two eye-witnesses were related to the deceased (their father) and the appellant (their mother). They had no reason whatsoever for implicating their mother falsely. A very lengthy cross-examination was conducted which they faced but on all material aspects they remained consistent and undeterred. The learned Judges of the Division Bench of the High Court, were well-justified in finding no fault with their testimony and reliance of the Trial Court upon their evidence. Some minor discrepancies or even contradictions having no material bearing do not result in vitiating the findings recorded by the two Courts on proper appreciation of the evidence. The contentions of the learned counsel thus, lose its significance."

Similarly in the cases of "Amjad Javed v. The State" (2007 SCMR 1247) "Muhammad Jamal and others v. The State" (1997 SCMR 1595) the judgments of conviction and sentence of the accused which were recorded on the basis of child witnesses of the age of 5-1/2 and 6 years respectively, were upheld by the Hon'bIe Supreme Court of Pakistan.

The learned counsel for the convict has argued that the learned Trial Court did not check the intellect of the child witness Gull Bano (P.W.7) by putting questions and taking answers in written form. The said objection of the learned counsel is misconceived. There is no legal compulsion to check the intellect of a child witness in a written form. The only requirement is the satisfaction of the Court. In this case the Judge of the learned Trial Court after putting certain questions, was satisfied that Mst. Gull Bano P.W.7 was not prevented from understanding the questions or giving rational answers to those questions. A note to this effect was also given by the learned Trial Court before recording her statement. This Court in the case of Abdul Majeed v. The State (2002 PCr.LJ 41), while discussing the above proposition of law at page-49 came to the following conclusion:--

"The Honourable Judges of Azad Jammu and Kashmir Supreme Court in Qadeer Hussain v. State 1995 PCr.LJ 803 have observed that Rule enunciated in Article 3 of Qanun-e-Shahadat, 1984 is not an absolute or inflexible rule. It means that the observing intellect of a child in the shape of writing question and answer is not the requirement of law. The Court was quite competent to give its observation with regard to the intellect of the witness. It would mean that only requirement is the satisfaction of the Court".

A similar view was taken in the case of Qadeer Hussain v. The State through Advocate General, Azad Jammu and Kashmir Government, Muzaffarabad (1995 PCr.LJ 803).

Therefore, the contention of the learned defence counsel for the convict that the Trial Court has erred in law by not taking into writing the questions put to the witness, having no force is repelled.

15. The learned counsel for the convict has contended that Mst. Abida Parveen (deceased) had committed suicide and the convict was falsely implicated in this case. The said argument of the learned counsel for the convict is not convincing. Lady Doctor Nuzhat Aziz (P.W.9) appeared in the Court. The learned defence counsel did not opt to cross-examine the said witness. Even, no suggestion was given to the said witness that the death of Mst. Abida Parveen (deceased) was result of the suicide. The convict Muhammad Boota had not taken the plea of suicide of Mst. Abida Parveen (deceased) during the investigation of this case before the Investigating Officer. A specific question was also put to the Investigating Officer Umar Saeed (P.W.8), who denied that the first version of the convict Muhammad Boota was to the effect that Mst. Abida Parveen had committed suicide, which shows that the plea of suicide was taken by the convict Muhammad Boota as an after-thought during the trial of this case. No evidence was brought on record by the convict Muhammad Boota to establish that there was any sign of suicide on the dead-body of Mst. Abida Parveen (deceased), or at the place of occurrence, therefore, we see no force in the above-mentioned argument of the learned defence counsel.

16. Insofar as the evidence of motive is concerned, it was alleged in the F.I.R. (Exh.PB/1) that the convict Muhammad Boota used to beat Mst. Abida Parveen (deceased) and kicked her out from his house, but the complainant Nawab Ali (P.W.4) used to send his daughter (Mst. Abida Parveen) to the house of the convict as a result of 'Punchayat'. The motive mentioned in the F.I.R. (Exh.PB/1) was not stated by the complainant Nawab Ali (P.W.4), Manzoor Hussain (P.W.5) and Gull Bano (P.W.7) while appearing in the Court. They did not utter even a single word regarding the motive part of the occurrence, therefore, without producing any evidence by the prosecution in this regard, we cannot believe the motive part of the prosecution case.

17. Nothing was recovered from the possession of the convict during his physical remand.

18. However, even if evidence of motive is excluded from consideration, there is sufficient incriminating evidence available on record against the convict Muhammad Boota in the shape of ocular account rendered by Gull Bano (P.W.7) and circumstantial evidence given by Nawab Ali (P.W.4) and Manzoor Hussain (P.W.5). The ocular account and circumstantial evidence of the prosecution witnesses was fully supported by the medical evidence of Lady Doctor Nuzhat Aziz (P.W.9), as well as, by post-mortem report (Exh.PK) and pictorial diagram (Exh.PK/2) of the deceased. The time of occurrence and manner in which the occurrence had taken place, the kind of weapon of offence used, seat of injury as given by Gull Bano (P.W.7) all the material points of ocular account have tallied with the above-mentioned medical evidence, therefore, we hold that the prosecution has proved its case against the convict beyond the shadow of any doubt.

19. Now coming to the quantum of sentence, we may observe that the prosecution has alleged a specific motive in the F.I.R. (Exh.PB/1), but the same was not proved during the trial. The prosecution witnesses did not utter a single word regarding the motive part of the prosecution. The prosecution also implicated in this case another accused namely, Muhammad Sharif son of Shah Muhammad, with the allegation that he had put Mst. Abida Parveen (deceased) on the bed by holding her from her hands and thereafter, the convict Muhammad Boota by putting the scarf around her neck strangulated her. The said co-accused Muhammad Sharif has been acquitted by the learned Trial Court by extending him the benefit of doubt. His acquittal has not been challenged either by the complainant or by the State any further, therefore, the same has attained finality. In view of the above, it is not determinable in this case as to how the occurrence had started and what had actually happened between Mst. Abida Parveen (deceased) and the convict Muhammad Boota, immediately before the occurrence, which had resulted into the unfortunate death of Mst. Abida Parveen, therefore, the sentence of death awarded to the convict is quite harsh. It has been held in a number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State (2011 SCMR 593), wherein, at page 604, the Hon'ble apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of sections 306 to 308, P.P.C. attract only in the cases of Qatl-e-Amd liable to Qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-e-Amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-Amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Murtaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case".

In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:- "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course". (underlining, italic and bold supplied).

20. Keeping in view the above-mentioned facts and the principles of safe administration of justice, the conviction of Muhammad Boota (convict) under section 302(b) of P.P.C. awarded by the learned Trial Court is maintained, but his sentence is altered from death to imprisonment for life. The compensation awarded by the

learned Trial Court or sentence in default thereof is, hereby, maintained and upheld. The benefit of section 382-B of Cr.P.C. is also given to the convict.

21. Consequently, with the above-mentioned modification in the sentence, Murder Reference No. 778 of 2006 is answered in the negative and death sentence of the convict Muhammad Boota is not confirmed.

HBT/S-47/L **Sentence reduced.**

2014 Y L R 514

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ATIF FARID and others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.1358 of 2008 and Murder Reference No.12 of 2009, heard on 30th May, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---F.I.R. was registered more than 2 hours after the occurrence---Post-mortem examination on the dead body of deceased was conducted with a delay of 18-1/2 hours from the occurrence without any plausible explanation for such delay---Occurrence was unseen and said delay was consumed in concocting a false and fabricated story of the prosecution to procure the attendance of eye-witnesses; and the F.I.R. was not lodged at the time mentioned therein---Both, the complainant and other eye-witness were chance witnesses as both of them were residents of area different to area where occurrence had taken place---Story narrated by said eye-witnesses regarding their presence at the spot did not appeal to common sense---Inherent defects existed in the prosecution case---Motive as alleged by the prosecution, had not been proved against accused---Alleged recovery of pistol on the pointation of accused, was of no avail to the prosecution, because the Forensic Science Laboratory report was only to the extent of working order of the said pistol---In absence of matching report of empty with the said pistol, the alleged recovery of pistol on the pointation of accused was immaterial---Present case was replete with number of circumstances, which had created serious doubt about the prosecution story---Prosecution having failed to prove its case against accused persons beyond any shadow of doubt, conviction and sentence recorded by Trial Court against accused were set aside; he was acquitted of the charge extending him benefit of doubt and was released, in circumstances.

Irshad Ahmad v. The State 2011 SCMR 1190; Muhammad Ashraf v. The State 2012 SCMR 419 and Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327 ref.

(b) Criminal trial---

----Medical evidence---Medical evidence was a type of supporting evidence, which could confirm the ocular account with regard to the receipt of injury, nature of injury, kind of weapon used in the occurrence, but it would not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 ref.

(c) Criminal trial---

----Benefit of doubt---If there was a single circumstance which would create doubt regarding the prosecution case same was sufficient to give benefit of doubt to accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 ref.

Shahzad Ahmad Bajwa for Appellant.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Rana Munir Ahmad for the Complainant.

Date of hearing: 30th May, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1358 of 2008, preferred by Kamran alias Bao (appellant) along with Atif Farid and Muhammad Mukarram (appellants since acquitted by this Court on the basis of compromise vide order dated 25-9-2012) and Murder Reference No.12 of 2009, sent by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Kamran alias Bao (appellant), as both these matters have arisen out of the same judgment dated 26-11-2008, passed by the learned Addl. Sessions Judge, Faisalabad in case F.I.R. No.132 dated 14-8-2007, offence under section 302, P.P.C. (section 34, P.P.C. added in charge sections 148 and 149, P.P.C. were

mentioned in F.I.R. but no charge was framed under the said offences), registered at Police Station Sahianwala, District Faisalabad, whereby, Atif Farid, Kamran alias Bao and Muhammad Mukarram were convicted under section 302(b)/34 P.P.C. for committing the murder of Nadeem Ahmad deceased and sentenced to death as Tazir with the direction to pay Rs.50,000 (rupees fifty thousand) each as compensation to the legal heirs of deceased Nadeem Ahmad as required under section 544-A of the Code of Criminal Procedure, and, in default thereof, to undergo simple imprisonment for six months each.

2. Brief facts of the case as disclosed by Abdur Rauf, complainant (P.W.9), in his statement (Exh.PB), on the basis of which, the formal F.I.R. (Exh-PB/1) was registered, are that on 14-8-2007 at about 3-00 p.m., he (complainant) along with Nadeem Ahmad (deceased), Muhammad Boota (given up P.W.) and Muhammad Ajmal (P.W.10) was going to Faisalabad from his house and when they reached near the bridge of the Canal Bangla Salarwala, Muhammad Shoaib (since P.O) armed with .244 bore rifle, Muhammad Mukarram co-accused (since acquitted) armed with .30 bore pistol, Atif Farid co-accused (since acquitted) armed with .30 bore pistol and Kamran alias Bao (appellant) armed with .30 bore pistol along with two unknown accused persons, with muffled faces, armed with firearms came behind them on a 2-D car who made Nadeem Ahmad (deceased) to sit in the car and fled away. Meanwhile, one unknown person came from the village side on a motorcycle. They (complainant party) implored him, took his motorcycle and followed the car and when they reached in Square No.33 in the area of Chak No.145/R.B on the said motorcycle, the accused persons brought down Nadeem Ahmad (deceased) from the car. When they (complainant party) reached near them, Muhammad Shoaib (since P.O.) made a straight fire shot with .244 bore rifle and raised lalkara that if anyone would come closer, he will meet a bad fate. Muhammad Mukarram co-accused (since acquitted), thereafter, made the first fire shot with .30 bore pistol at Nadeem Ahmad (deceased) which landed on his right cheek. Second fire shot was made by Atif Farid co-accused (since acquitted) with his pistol at Nadeem Ahmad (deceased) which landed on the left side of his neck. Muhammad Shoaib (since P.O.) made straight fire shots at Nadeem Ahmad (deceased) which landed on the different parts of his body. Nadeem Ahmad (deceased) fell down on the ground because of said injuries, whereupon, Kamran (appellant) made a straight fire with pistol which landed on the front side of abdomen of Nadeem Ahmad (deceased). Thereafter, unknown accused persons, with

muffled faces, made fire shots with their weapons at Nadeem Ahmad (deceased) which landed on his buttocks. At the end, Atif Farid and Muhammad Mukarram co-accused (since acquitted) made straight fires at Nadeem Ahmad (deceased), in fallen position, which landed on his head and penis. The accused persons fled away from the spot on the car towards Sahianwala. They (complainant party) took care of Nadeem Ahmad (deceased) but he succumbed to the injuries. The motive behind the occurrence, as alleged by the complainant in F.I.R. (Exh-PB/1), was that two days prior to the occurrence Atif Farid and Muhammad Mukarram co-accused (since acquitted) had a quarrel with Nadeem Ahmad (deceased) on some money transaction and due to this grudge, the accused persons committed the murder of Nadeem Ahmad (deceased).

3. Kamran alias Bao (appellant) was arrested in this case on 18-9-2007 by Muhammad Ishaq, S.I. (P.W. 11). On 30-9-2007, Kamran alias Bao (appellant), while in police custody, after making disclosure, got recovered pistol (P-6) along with four live bullets (P-7/1-4), which were taken into possession vide recovery memo Exh-PN. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 14-6-2008 to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Abdur Rauf, complainant (P.W.9) and Muhammad Ajmal (P.W.10) furnished the ocular account of the prosecution. Muhammad Ajmal (P.W.10) is also the witness of recovery of .30 bore pistol (P-4) along with five live bullets (P-5/1-5), .30 bore pistol (P-6) along with four live bullets (P-7/1-4) and .30 bore pistol (P-8) along with three live bullets (P-9/1-3) allegedly recovered at the instance of Atif Farid co-accused (since acquitted), Kamran alias Bao (appellant) and Muhammad Mukarram co-accused (since acquitted), respectively.

The medical evidence was furnished by Dr. Muhammad Javaid Asghar (P.W.8) who conducted the postmortem examination on the dead body of Nadeem Ahmad (deceased).

Muhammad Ishaq, S.I. (P.W.11) is the Investigating Officer of this case. Khalid Mehmood 458/HC (P.W.1), Azhar Iqbal, Patwari (P.W.2), Jameel Arshad 2174/HC

(P.W.3), Naseer Ahmad, A.S.I. (P.W.4), Haji Ihsan Illahi (P.W.5), Rafaqat Ali 4457/C (P.W.6) and Hidayat Ali 3698/C (P.W.7) are the formal witnesses. The prosecution also produced documentary evidence in the shape of scaled site plan, in duplicate, of the place of occurrence (Exh-PA & Exh-PA/1), `Fard Biyan' of the complainant (Exh-PB), F.I.R. (Exh-PB/1), recovery memo of last worn clothes of the deceased (Exh-PC), warrants of arrest of Muhammad Mukarram appellant (Exh-PD), warrants of arrest of Muhammad Shoaib (since P.O) along with report (Exh-PE & Exh-PE/1), proclamation of Muhammad Shoaib (since P.O.) along with report (Exh-PF & Exh-PF/1), proclamation of Muhammad Mukarram (appellant) along with report (Exh-PG & Exh-PG/1), postmortem report of Nadeem Ahmad (deceased) along with pictorial diagrams (Exh-PH, Exh-PH/1 & Exh-PH/2), injury statement of the deceased (Exh-PJ), inquest report of the deceased (ExhPK), recovery memo of blood-stained earth (Exh-PL), recovery memo of .30 bore pistol (P-4) along with five live bullets (P-5/1-5) at the instance of Atif Farid co-accused (since acquitted) (Exh-PM), rough site plan of the place of recovey of .30 bore pistol P-4 along with five live bullets P5/1-5 (Exh-PM/1), recovery memo of .30 bore pistol (P-6) along with four live bullets (P-7/1-4) at the instance of Kamran alias Bao appellant (Exh-PN), rough site plan of the place of recovery of .30 bore pistol P-6 along with four live bullets P-7/1-4 (Exh-PN/1), recovery memo of .30 bore pistol (P-8) along with three live bullets (P-9/1-3) at the instance of Muhammad Mukarram co-accused (since acquitted) (Exh-PQ), rough site plan of the place of occurrence (Exh-PR), report of the Chemical Examiner (Exh-PS), report of the Serologist (Exh-PU) and report of the Forensic Science Laboratory (Exh-PT) and closed its evidence.

The statements of the appellant and his co-accused, under section 342 of the Code of Criminal Procedure, were recorded on 19.11.2008. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?" the appellant replied as under:--

"I have falsely been involved in this case. The deceased had enmity with many people and some of his enemy had committed the murder of deceased. I was nominated in this case due to suspicion."

The appellant did not make statement on oath under section 340 (2) of Cr.P.C., however, produced evidence in his defence, such as copy of original summon in the

civil suit titled Muhammad Rasheed v. Muhammad Siddque, and others issued by the court of Mr. Muhammad Saleem Civil Judge, Faisalabad as Exh. DL and copy of plaint of the said suit as Mark-D. The appellant also relied upon the statement made by his co-accused Atif Farid (since acquitted) who in his statement has tendered the following documents, i.e. F.I.R. No. 809 dated 31-10-2002 as Exh.DA, F.I.R. No. 633 dated 14-8-2003 as Exh.DB, F.I.R. No. 631 dated 13-8-2003 as Exh.DC, F.I.R. No. 332 dated 10-6-1999 as Exh.DD, F.I.R. No. 348 dated 13-6-1999 as Exh. DE, F.I.R. No. 370 dated 22-6-1999 as Exh.DF, F.I.R. No. 814 dated 10-12-1998 as Exh. DG, F.I.R. No.755 dated 22-9-2003, registered at Police Station Chak Jhumra as Exh. DH, F.I.R. No. 17 dated 26-1-2000, Police Station Sadar Chakwal as Exh. DJ, F.I.R. No. 18 dated 26-1-2000 Police Station Sadar Chakwal as Exh. DK. The learned trial Court vide its judgment dated 26-11-2008, convicted Kamran alias Bao appellant and sentenced him as mentioned and detailed above.

5. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that the complainant and the other eye-witness are not residents of the area where this occurrence took place; that Abdur Rauf (P.W.9) and Muhammad Ajmal (P.W.10) are chance witnesses and they have not been able to give any plausible explanation of their presence at the spot; that the story of the prosecution as narrated in the F.I.R. and disclosed before the learned trial Court is highly improbable; that the name of the person from whom motorcycle was borrowed at the time of occurrence to chase the accused persons was neither mentioned in the F.I.R. nor in the statements of the P.Ws.; that there is delay of 18-1/2 hours in conducting the postmortem examination on the deadbody of Nadeem Ahmad deceased which suggests that the F.I.R. was not lodged at the time mentioned therein; that the motive as alleged by the prosecution has not been proved in this case; that the recovery of pistol 30 bore at the instance of the appellant is of no avail to the prosecution because the report of Forensic Science Laboratory is only to the extent of working order of the said pistol; that the case of the prosecution is doubtful from all angles; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charge.

6. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the occurrence in this

case took place on 14-8-2007 at 3-00 p.m., whereas, the matter was promptly reported to the police on the same day, i.e. on 14-8-2007 at 4-25 p.m.; that there is no delay in reporting the matter to the police if all the material available on the record is taken into consideration; that the complainant and other eye-witness are residents of the same area where this occurrence took place; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspires confidence and despite lengthy cross-examination, the defence could not shake the testimony of the prosecution witnesses; that there could not be any reason to falsely implicate the appellant in this case; that the motive has also been proved in this case; that the ocular account of the prosecution gets full support from the medical evidence; that prosecution case is further corroborated by the recovery of 30 bore pistol from the possession of the appellant; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

7. We have heard the arguments, of learned counsel for the appellant, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant and have also gone through the record with their able assistance.

8. It is pertinent to mention here that four accused persons namely Kamran alias Bao (appellant), Muhammad Mukarram and Atif Farid accused and Muhammad Shoaib (PO) along with two unknown accused persons were nominated in the F.I.R. with specific roles of causing firearm injuries on the person of Nadeem Ahmad deceased. Out of the above mentioned four accused persons, Muhammad Shoaib has been declared a Proclaimed Offender. However, Atif Farid and Muhammad Mukarram co-accused were convicted and sentenced to death by the learned trial Court but they have been acquitted by this Court vide judgment dated 25-9-2012 in light of the compromise effected between them and legal heirs of the deceased.

9. The detail of the prosecution story as set forth in the F.I.R. has already been given in Para No. 2 of this judgment, therefore, there is no need to repeat the same. The occurrence in this case took place on 14-8-2007 at 3-00 p.m., whereas, according to the prosecution case the matter was reported to the police on the same day at 4-25 p.m. and the formal F.I.R. was also registered on the same day at about 5-15. p.m. We have noted that the post-mortem examination on the deadbody of Nadeem Ahmad

deceased was conducted on the next day, i.e. 15-8-2007 at 9-30 a.m. with a delay of 18-1/2 hours from the occurrence. Although the doctor has stated during his cross-examination that the facility of post-mortem examination at the night time was not available in the concerned hospital but we have noted that Rafaqat Ali No. 4457/C (P.W.6) has stated during his cross-examination that on the day of occurrence he escorted the deadbody of Nadeem Ahmad deceased to the hospital. He further stated that he reached at the hospital at 5-30 p.m. As the occurrence took place in the month of August (14-8-2007) when the sun sets after 7-00 p.m., therefore, the explanation for the above mentioned delay in conducting the post-mortem examination on the deadbody of Nadeem Ahmad deceased due to non-availability of facilities of the post-mortem examination at the night time in the concerned hospital has been belied from the prosecution's own evidence produced through Rafaqat Ali No. 4457/C (P.W.6). As there is no plausible explanation for the above mentioned delay of 18-1/2 hours in conducting the postmortem examination on the deadbody of Nadeem Ahmad deceased, therefore, it is quite obvious that the occurrence was unseen and the said, delay was consumed in concocting a false and fabricated story of the prosecution, to procure the attendance of eye-witnesses and the F.I.R. was not lodged at the time mentioned therein. We may refer here the base of Irshad Ahmad v. The State (2011 SCMR 1190) wherein it was observed that the post-mortem examination of the deadbody had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted.

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ashraf v. The State (2012 SCMR 419). Similarly, in the case of Khalid alias Khalidi and 2 others v. The State (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 13 hours from the occurrence in conducting the post-mortem examination on the deadbody of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the F.I.R. was not lodged at the given time.

10. The ocular account of the prosecution was furnished by Abdur Rauf complainant (P.W.9) and Muhammad Ajmal (P.W.10). Both the above mentioned eye-witnesses

are chance witnesses because the occurrence in this case took place in the area of Chak No. 145/RB, whereas, the complainant Abdur Rauf (P.W.9) is resident of a different Chak, i.e. Chak No. 146/RB and Muhammad Ajmal (P.W.10) is resident of Mohallah Hassanpura, Street No. 8, Dhudhi Wala, Faisalabad. The story narrated by the above mentioned eye-witnesses regarding their presence at the spot does not appeal to common sense. They have stated that the accused persons, who were total six in number came to the bridge of Canal Bangla Sardarwala on a 2.OD car and forcibly abducted Nadeem Ahmad deceased at gun point and took him in the said car to Chak No. 145/RB where they committed his murder. It is not understandable that as to why the appellant did not commit the murder of the deceased at the place wherefrom he was abducted and what was the reason with him for taking him in the area of Chak No. 145/RB to commit his murder. According to the story of the prosecution, six accused persons were already present in the car while armed with different weapons and they also abducted Nadeem Ahmad deceased while putting him in the same car and as such there were seven persons in one car. The aforementioned exercise of putting the deceased with all the accused persons in one car and taking the deceased from the bridge of Canal Banglow Sardarwala to Chak No. 145/RB has not been convincingly explained by the prosecution. The above mentioned witnesses have also stated that after the abduction of Nadeem Ahmad deceased a motorcyclist came to the spot and they (P.Ws.) borrowed his motorcycle and followed the accused persons on the said motorcycle and when they reached in the area of Chak No.145/RB, they witnessed the occurrence. The name of the person from whom the motorcycle was borrowed and returned after the occurrence was neither mentioned in the F.I.R. nor in the statements of above mentioned eye-witnesses and they have simply stated that the motorcycle was driven by some unknown person. The complainant Abdur Rauf (P.W.9) has further stated during his cross-examination that he does not know the name of the person from whom the motorcycle was borrowed nor the number of the motorcycle. We have also noted that Abdur Rauf complainant (P.W.9) has stated during his cross-examination that Rikshaw and Tonga also ply and available in the village and he further stated that they did not hire any Rikshaw, etc. as Nadeem Ahmad deceased preferred to walk by foot. He further stated that the 'Salarwala Banglow' was at a distance of 1-1/2 kilometers from their chak. The complainant has not claimed that due to financial constraints they did not hire Rikshaw, rather he stated that Nadeem Ahmad deceased

preferred to walk by foot. The story of taking a walk in the scorching heat of August at 3.00 p.m. is also not convincing. No reason was mentioned in the F.I.R. by the complainant for going of the complainant party to Faisalabad on 14-8-2007 as it was a public holiday due to 'Pakistan Day', though the eye-witnesses tried to give explanation in this respect while making their statements before the learned trial Court. We are, therefore, of the view that there are inherent defects in the prosecution case.

11. The motive according to the prosecution case behind the occurrence was that two days prior to the occurrence Atif Farid and Muhammad Mukarram co-accused (since acquitted) quarrelled with Nadeem Ahmad deceased due to some money dispute and because of the said grudge, the accused persons committed the murder of Nadeem Ahmad deceased. It is evident from the perusal of prosecution evidence that no motive was alleged against Kamran alias Bao appellant and the same was attributed to Atif Farid and Muhammad Mukarram accused (since acquitted). As mentioned earlier, the said accused persons have been acquitted by this Court vide judgment dated 25-9-2012 due to the compromise effected between them and the legal heirs of the deceased/ complainant party. We are, therefore, of the view that the motive as alleged by the prosecution has not been proved against the present appellant.

12. Insofar as the alleged recovery of pistol P-6 on the pointation of Kamran alias Bao appellant is concerned, the same is of no avail to the prosecution because the Forensic Science Laboratory report is only to the extent of working order of the said pistol. In absence of matching report of any empty with the said pistol, the alleged recovery of pistol P-6 on the pointation of the appellant is immaterial.

13. Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well-settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to the receipt of injury, nature of injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53). 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410).

14. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against Kamran alias Bao appellant beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In `Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

'5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

'13…...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.1358 of 2008 filed by Kamran alias Bao appellant, set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Faisalabad vide judgment dated 26-11-2008 and acquit him of the charge by extending him the benefit of doubt. Kamran alias Bao appellant is in custody, he be released forthwith if not required in any other case.

16. Murder Reference No. 12 of 2009 is answered in the NEGATIVE and the sentence of death of Kamran alias Bao, (convict) is NOT CONFIRMED.

17. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the learned trial Court during the trial of the absconding accused namely, Muhammad Shoaib and his case shall be decided on its own merits on the basis of the evidence to be adduced during the trial of the said appellant.

HBT/A-83/L **Appeal accepted.**

2014 Y L R 672

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD AMIN and 3 others---Petitioners

Versus

The STATE---Respondent

Criminal Appeals Nos.1195 and 1196 and Murder Reference No.512 of 2007, heard on 24th September, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 324---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Benefit of doubt---Contention of counsel for accused was that as two accused persons were declared innocent during course of investigation by the Police, other accused persons, could be acquitted on that ground---Validity---Contention was misconceived because it was not the duty of Investigating Officer to decide the innocence or guilt of accused---Opinion of the Police Officer was inadmissible in evidence---Accused person could not be acquitted merely on the basis of Police Investigation---Gross delay of about twenty-eight hours in conducting the postmortem examination of the dead-bodies of deceased persons had created serious doubt about the truthfulness of the prosecution story; as said delay was suggestive of the fact that the delay was consumed in concocting prosecution story and procuring the attendance of eye-witnesses---Both the complainant and other eye-witness who furnished ocular account of the prosecution, were not the residents of the place where occurrence took place, they had not given any plausible explanation for their presence at the spot at the relevant time, such persons, in circumstances were chance witnesses---Said witnesses had also made dishonest improvements in their statements as recorded by the Trial Court, such dishonest improvements in statements, was not worthy of reliance---Eye-witness of the occurrence, was not injured due to the firing of any of accused persons, but he received the injuries as the car of the deceased persons collided with a tree at the time of occurrence---Case of prosecution was that accused were armed with .244 bore rifles at the time of occurrence, but nothing was recovered from the possession of accused persons---Crime empties recovered from the spot were not found to have been fired from said rifle---Said recovery was of no avail to the prosecution---Motive for the murder of the deceased was not alleged

against present accused persons, but was alleged against the accused who had died---Evidence of prosecution qua the motive had become irrelevant, in circumstances---Present case was replete with number of circumstances, which had created serious doubts about the prosecution story---Prosecution having failed to prove its case against accused persons beyond the shadow of doubt, their conviction and sentence were set aside, and they were acquitted of the charges by extending them benefit of doubt.

Muhammad Ahmad (Mahmood Ahmed) and another v. The State 2010 SCMR 660; Irshad Ahmed v. The State 2011 SCMR 1190; Muhammad Ashraf v. The State 2012 SCMR 419 and Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327 ref.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

(b) Criminal trial---

----Motive---Scope---Motive was a double edged weapon; and if it could be a reason for commission of crime, then at the same time, it could be a reason for false implication of an accused in the case---Accused could not be convicted merely on the basis of evidence of motive in absence of convincing and reliable direct or circumstantial evidence.

(c) Criminal trial---

----Medical evidence---Scope---Medical evidence could confirm the ocular evidence with regard to the seat of injury, the nature of injury, the kind of weapon used in the occurrence, but it could not identify the accused.

Muhammad Tasawere v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

Muhammad Akram Qureshi for Appellants (in Criminal Appeal No.1195 of 2007).

Syed Ehtesham Qadir Shah for the Appellant (in Criminal Appeal No.1196 of 2007).

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Munir Ahmad Bhatti for the Complainant.

Date of hearing: 24th September, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1195 of 2007 titled as "Muhammad Amin and others v. The State" filed by Muhammad Amin, Yaqoob Ali alias Kaddu, Zulfiqar Ali and Akbar Ali alias Bhola (appellants) against their convictions and sentences, Criminal Appeal No.1196 of 2007 titled as "Liaqat Ali v. The State" filed by Liaqat Ali (appellant) against his conviction and sentence and Murder Reference No.512 of 2007 titled as "The State v. Akbar Ali alias Bhola and others," submitted by the learned trial court for confirmation or otherwise of the sentence of death awarded to Akbar Ali alias Bhola, Zulfiqar Ali, Muhammad Amin, Liaqat Ali and Yaqoob Ali alias Kaddu (appellants), as all these matters have arisen out of the same judgment dated 30-6-2007 passed by the learned Addl. Sessions Judge, Lahore in case F.I.R. No.633 dated 19-11-2003 registered under sections 302, 109, 148 and 149, P.P.C. (section 324, P.P.C. was added in the charge-sheet) at Police Station City Raiwind District Lahore whereby, Akbar Ali alias Bhola, Zulfiqar Ali, Muhammad Amin, Liaqat Ali and Yaqoob Ali alias Kaddu (appellants) were convicted under section 302(b), P.P.C. for committing the murder of Mushtaq and Mumtaz (deceased persons) and sentence to death on two counts each with the direction to pay Rs.50,000 (Rupees fifty thousand) each as compensation to the legal heirs of each deceased namely, Mushtaq and Mumtaz failing which they were directed to suffer simple imprisonment for six months and in default thereof, the same was directed to be the liability against the persons and properties of the convicts. They were further convicted under section 324, P.P.C. and sentenced to rigorous imprisonment for three years each with the direction to pay fine amounting to Rs.5000 each and in default thereof further undergo simple imprisonment for three months each and the amount of fine, if realized, was ordered to be paid to the injured P.W.

The learned trial Court, however, through the same judgment, acquitted Ashraf, Khan Muhammad, Ghulam Ullah, Ghulam Qadir, Muhammad Ameer and Muhammad Anwar, co-accused of the appellants while giving them the benefit of doubt.

It is pertinent to mention here that Muhammad Amin (appellant) died during the pendency of this appeal, therefore, to his extent, this appeal stood abated vide order dated 7-2-2012.

2. Brief facts of the case, as disclosed by Muhammad Iqbal, complainant (P.W.11) in his 'Fard Biyan' (Exh-PE/1) on the basis of which the formal F.I.R. (Exh.PE) was registered, are that on 19-11-2003, the (complainant) along with Muhammad Safdar (given up P.W.) on Vehicle No.LXX-7153, which was being driven by Sawar Khan (given up P.W.) whereas, Mushtaq (deceased), who was driving Suzuki Mehran Car bearing Registration No.LOS-7685, in which Mumtaz alias Bhola (deceased) was sitting on front seat with Mushtaq (deceased) whereas, Shahzad (P.W.10) was sitting on the rear seat, was going to Raiwind in connection with an important piece of work. The vehicle of Mushtaq (deceased) was 30/35 yards ahead of them. At about 8-00 a.m. when the Vehicle of Mushtaq (deceased) reached in front of the gate of Green River Nursery, Vehicle No.LRF-6213, which was being driven by Bhola (Akbar Ali alias Bhola appellant) came from behind, in which, Azam, accused (since P.O.) armed with .244 bore, was sitting on the front seat whereas, Zulfiqar (appellant) and Amin accused (since dead) armed with .244 bore were sitting on the rear seat, started firing at the vehicle of Mushtaq (deceased) while coming parallel to them. One Hyundai Car black colour which was being driven by an unknown person, to whom he (complainant) and his companions can identify if confronted with them, on the front seat of said car, Liaqat (appellant) armed with .244 bore whereas, Yaqoob alias Kaddo appellant, Muhammad Irfan (since P.O), armed with .244 bore were sitting on the rear seat, also started firing from behind at the vehicle of Mushtaq (deceased). They (complainant party) did not to go close due to the fear. All the accused persons after satisfying themselves that Mushtaq and Mumtaz (deceased persons) have died, drove away their vehicles towards Araian. They (complainant party), thereafter, reached near the vehicle of Mushtaq (deceased), Mushtaq and Mumtaz were lying there dead. It is further alleged in the F.I.R. (Exh-PE/1) that when the deceased were fired upon, their vehicle collided with acacia tree (Keeker) and was destroyed and Shahzad (P.W.10) was also injured due to the accident. The occurrence was committed on the abetment of Ashraf, Khan Muhammad; Ghulam Ullah, Ghulam Qadir, Muhammad, Ameer and Muhammad Anwar, accused persons (since acquitted) who, on 5-11-2003 at the Sessions Court, Lahore in the presence of Safdar (given up P.W.) and Arif (P.W.12) asked Azam accused (since P.O) and Zulfiqar (appellant) etc. that they will take care of themselves and all the expenses will be borne by them but Mushtaq etc. be murdered. The motive behind the occurrence, as disclosed by the complainant in the F.I.R. (Exh-PE) was that Mushtaq (deceased) was released from jail about three

months ago after serving his sentence in the murder case of Riasat whereas, Mumtaz (deceased) was released on bail in the murder case of Abbas.

3. Akbar Ali alias Bhola, Muhammad Ameen (since dead), Liaqat Ali and Yaqoob Ali (appellants) were arrested in this case on 15-1-2004 by Muhammad Aslam, S.I. (P.W.14) whereas, Zulfiqar Ali (appellant) was arrested by him on 20-2-2004. On 24-2-2004, Zulfiqar Ali (appellant), while in police custody, after making disclosure, got recovered .44 bore rifle (P-28) along with one magazine containing ten bullets (P-29/1-10) and one magazine containing fifteen bullets (P-30/1-15), which was taken into possession vide recovery memo Exh-P.W.14/Q. After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused (since acquitted) on 10-2-2006, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eighteen witnesses, during the trial. Shahzad (P.W.10) and Muhammad Iqbal, complainant (P.W.11) furnished the ocular account of the case. Muhammad Arif (P.W.12) is the witness of abetment.

The medical evidence was furnished by Dr Khizer Hayat Khan (P.W.3), who medically examined Shahzad (P.W.10), Dr. Muhammad Ubaid Ullah (P.W.4), who conducted the postmortem examination on the dead body of Mumtaz Ahmad (deceased) and Dr. Aman Ullah Khan (P.W.5), who conducted the postmortem examination on the dead body of Muhammad Mushtaq (deceased). Muhammad Zakriya (P.W.18) is the witness of recovery of .44 bore rifle (P-28) along with one magazine containing ten bullets (P-29/1-10) and one magazine containing fifteen bullets (P-30/1-15) allegedly recovered at the instance of Zulfiqar Ali (appellant).

Muhammad Aslam, S.I (P.W.14) was the Investigating Officer of this case. Syed Younas Bokhari, Draftsman (P.W.1), Khalid Maqsood 12180/C (P.W.2), Muhammad Javaid 2671/C (P.W.6), Nazir Ahmad, S.I. (P.W.7), Muhammad Fayyaz 13093/C (P.W.8), Farzand Ali, S.I. (P.W.9), Muhammad Ilyas (P.W.13), Shaukat Ali, A.S.-I. (P.W.15), Badar Munir, S.I. (P.W.16), Abdul Aziz, S.I (P.W.17) are the formal witnesses. The prosecution also produced documentary evidence in the shape of scaled site plan, in duplicate, of the place of occurrence (Exh-PA & Exh-PA/1), Medico-legal Report of Shahzad injured (Exh-PB), postmortem report of Mumtaz Ahmad (deceased) along with pictorial diagrams (Exh-PC, Exh-PC/1 & Exh-PC/2),

postmortem report of Mushtaq Ahmad (deceased) along with pictorial diagrams (Exh-PD, Exh-PD/1 & Exh-PD/2), recovery memo of last worn clothes of the Mushtaq deceased (Exh-PE), F.I.R. (Exh-PE), Fard Biyan of the complainant (Exh-PE/1), recovery memo of last worn clothes of Mumtaz alias Bhola deceased (Exh-PF), recovery memo. of Suzuki Car bearing Registration No.LOS-7685 (Exh-P.W.14/A), injury statement of Muhammad Mushtaq deceased (Exh-P.W.14/B), injury statement of Mumtaz alias Bhola deceased

(Exh-P.W.14/C), application for postmortem examination of Muhammad Mushtaq deceased (Exh-P.W.14/D), application for postmortem examination of Mumtaz alias Bhola deceased (Exh-P.W.14/E), inquest report of Muhammad Mushtaq deceased (Exh-P.W.14/F), inquest report of Mumtaz alias Bhola deceased (Exh-P.W.14/G), injury statement of Shahzad PW (Exh-P.W.14/H), recovery memo of blood-stained earth from the place of murder of Mumtaz alias Bhola deceased (Exh-P.W.14/J), recovery memo of blood-stained earth from the place of murder of Mushtaq deceased (Exh-P.W.14/K), recovery memo of twelve crime empties of .244 bore (Exh-P.W.14/L), rough site plan of the place of occurrence (Exh-P.W.14/M), rough site plan of the place of recovery of car bearing Registration No.LRF-6213 (Exh-P.W.14/N), recovery memo of .44 bore rifle along with twenty-five bullets allegedly recovered at the instance of Zulfiqar Ali appellant (Exh-P.W.14/Q), rough site plan of the place of recovery of .44 bore rifle along with twenty-five bullets allegedly recovered at the instance of Zulfiqar Ali, appellant (Exh-P.W.14/R), recovery memo of Car bearing Registration No. LRF-6213 (Exh-P.W.17/A), warrants of arrest of Muhammad Azam and Muhammad Irfan, accused (since P.O) along with report (Exh-CW-1 & Exh-CW-1/A), proclamation of Muhammad Azam and Muhammad Irfan, accused (since P.O) along with report (Exh-CW-2/A, Exh-CW-2-A/1, Exh-CW-2-B/1), report of the Chemical Examiner (Exh-DDPP/A), report of the Forensic Science Laboratory (Exh-DDPP/B), report of the Serologist (Exh-DI)PP/C) and closed its evidence.

5. The statements of the appellants and their co-accused, under section 342 of the Code of Criminal Procedure, were recorded on 18-6-2007. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?", Akbar Ali alias Bhola, appellant replied as under:--

"The witnesses are interested in the complainant and the deceased and inimical towards me and my co-accused and thus deposed against me and my co-accused due to previous enmity and relationship with Muhammad Abbas and Riasat Ali deceased. On the day of occurrence, I was not present at the spot. I was employed as driver in SN International Company Thokar Niaz Baig Lahore. I used to leave for my duty from my house at 6 a.m. in the morning and become free by 3 p.m. On 19-11-2003 I proceeded for my duty at 6 a.m. At about 7 a.m. reached the residence of Doctor Nasir Sharif Randhawa where the said doctor and three other persons were present. I took them in the car to Sharaqpur Sharif District Sheikhupura. I remained on duty with them for the whole of day and reached Thokar Niaz Baig at about 4 p.m. on the same date. I remained on duty with the above said persons from 7 a.m. till four p.m. on 19/11/03. The allegations of my participation in the alleged occurrence are totally false, incorrect and concocted."

To the same question, Zulfiqar Ali (appellant) replied as under:--

"The witnesses are interested in the complainant and the deceased are inimical towards me and my co-accused and thus deposed against me and my co-accused.

I deal in the sale and purchase of cattle. On 17-11-2003 I along with my co-accused Ghulam Ullah and Muhammad Amin proceeded for Chichawatni cattle market to purchase cattle. I, Ghulamullah and Muhammad Amin co-accused reached. Chak No.54/12-1, Chichawatni District Sahiwal at the residence of Saddi Muhammad son of Ahmad Din Lambardar on the evening of 17-11-2003 and stayed there till the morning of

19-11-2003. On 19-11-2003 I, Muhammad Amin and Ghulamullah co-accused went to Bus Stop Chak No.54/12-I, Police Station Ghaziabad, Chichawatni District Sahiwal to have a public transport to proceed for the cattle market of the area. At about 7/8 a.m. I, Ghulamullah and Muhammad Amin co-accused were standing at the Bus Stop at about 7/8 a.m. when a police van stopped near us and suspecting us started searching us. During this process I slipped away whereas my co-accused Ghulamullah and Amin were apprehended by the police at the Bus Stop of above mentioned chak. A .30 bore pistol was recovered from the fold of shalwar and Rs.65000 from the personal search of my co-accused Ghulamullah. Similarly from the personal search of Muhammad Amin a carbine with one alive cartridge and Rs.50,000 were recovered. Cases under section 13/20/65 Arms Ordinance were registered against them at Police Station Ghaziabad District Sahiwal. On 19-11-2003

Amin and Ghulamullah co-accused were kept in the police lock-up of Police Station Ghaziabad District Sahiwal and produced before the Ld. Illaqa Judicial Magistrate on 20-11-2003 who sent them to judicial lock-up. Muhammad Aslam S.I. visited Police Station Ghaziabad District Sahiwal, Jail at Sahiwal and the court of Ld. Judicial Magistrate and verified the above facts. The record pertaining to this fact has already been exhibited on the record. At the time of the alleged occurrence of this case, I and my above said ca-accused were present in Chichawatni District Sahiwal with the police of Police Station Ghaziabad. Zulfiqar co-accused-escaped the arrest and remained with Saddi Muhammad Lamberdar. I was also not present at the spot at the time of alleged occurrence."

Yaqoob alias Kaddo (appellant), to the said question, replied as under:-

"The complainant party murdered Riasat Ali and Ghulam Abbas, my cousins. Due to my relationship with the said two deceased I have been involved in the present case due to previous enmity. On 19-11-2003 my cousin Muhammad Arif called me in the drawing room of his residence located in Mouza Lakhowal District Lahore. In the said drawing rooms Haji Asghar and Noor Muhammad were also sitting along with Shafique and Siddique. Muhammad Arif aforementioned asked me to bring tea for them. I brought tea for them from the residence of Muhammad Arif, aforementioned. It was about 8 a.m. in the morning. I remained present in the residence of said Muhammad Arif along with above-mentioned Haji Asghar etc for about two hours and thereafter left for my residence in Lakhowal. I was not present at the spot at the time of alleged occurrence. The P.Ws. are interested in the deceased and inimical towards me. Therefore, they falsely involved me in this case."

To the same question, Liaqat Ali (appellant) replied as under:--

"On 10-3-1995 Mushtaq alias Makho, Baqir, Akbar Ali sons of Ghulam Muhammad caste Bhatti resident of Lakhowal murdered my brother Riasat Ali. My father got a case registered against Mushtaq etc. in which they were challaned and and Mushtaq was sentenced to death who was subsequently released by the honourable Lahore High Court, Lahore. Afterwards my cousin Abbas son of Hassan Muhammad, Vice-Chairman District Council Lahore was murdered by Muhammad Akbar, Baqir sons of Ghulam Muhammad, Ansir Ali son of Muhammad Akbar, Riasat Ali son of Muhammad Hussain, Yaqoob son of Noor Muhammad Case F.I.R. No.294/1999 dated 12-8-1999 under sections 302/148/149 P.P.C. was registered against them. Muhammad Hussain and Mumtaz alias Bhola were released on bail in

the said case. Noor Muhammad had died his natural death. I have been involved in this case due to the above mentioned enmity.

On the day of present occurrence, I was present at our residence. I, and my brother Shafaqat Ali proceeded for Mouza Baddoki Police Station Kahna District Lahore at 7.45 a.m. for the residence of my friend Fayyaz son of Sameer Khan to offer condolence and Fateha over the death of is father Sameer Khan. Thereafter we went to Muslim Commercial Bank Kahna and I withdrew Rs.3000 from my bank account. We also went to Nishter Colony Bazar to purchase our shoes as the marriage of my brother Shafaqat and sister Parveen was going to be held shortly. We came back to their residence at about 1 p.m. on the said date. At the time of alleged occurrence I was at the residence of my above mentioned friend Fayyaz in Mouza Baddoki.

On 5-11-2003 I was present at my residence. At about 9-30 a.m. Istikhar son of Hidayat and Zulfiqar son of Sarwar came to see him and stayed with him till

10-30 a.m. After about 10 minutes Hayat Muhammad son of Inayat came to our residence in Mouza Khund and remained with my father till 12 noon. Afterwards he went to Ittafaq Hospital for his usual treatment. The doctor gave him the prescription for medicines. He purchased the medicines from the bazaar and came to his residence with my brother Shafaqat at about 4 p.m. My father is an old man of about 70 years having multiple diseases offered specialist treatment and multiple surgeries during his detention in jail.

He did not visit the Court of Session on 5-11-2003. The allegations of conspiracy at an odd place of canteen of Sessions Court, Lahore are not only baseless, bogus but incorrect."

The appellants neither opted to give evidence on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them nor produced any evidence in their defence.

6. The learned trial court vide its judgment dated 30-6-2007, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants, in support of these appeals, contends that all the appellants have falsely been implicated in this case; that, as per F.I.R. (Exh-PE), this incident took place on 19-11-2003 at 8-00 a.m. and the matter was reported to the police on the same day i.e. 19-11-2003 at 9-15 a.m. but the other circumstances of the prosecution case suggest that the matter was not reported to the police at the time

mentioned in the F.I.R. i.e. 9-15 a.m. on 19-11-2003 because the postmortem examination on the dead body of Mushtaq (deceased) was conducted by Dr Aman Ullah Khan (P.W.5) at 11.45 a.m. on the next day i.e. on 20-11-2003 whereas, the postmortem examination on the dead body of Mumtaz alias Bhola (deceased) was conducted by Dr. Muhammad Ubaid Ullah (P.W.4) at 11-50 a.m on 20-11-2003; that both the doctors in their cross-examination have admitted that there was no delay on their part in conducting the postmortem examination; that they further stated that the postmortem examination on the dead bodies was conducted on the receipt of police papers and not on the receipt of the dead bodies; that in the circumstances, it can safely be presumed that the police papers were not delivered to the said doctors before 11-30 a.m. on 20-11-2003 and as such, this delay of more than twenty-seven hours in conducting the postmortem examination on the dead bodies of the deceased persons clearly suggests that the complainant was not present at the spot at the time of occurrence; that even otherwise, the complainant, from his statement before the learned trial court, can easily be presumed as chance witness as he was resident of Lakhowal whereas, the occurrence in this case took place on the main Raiwind Road and though in the F.I.R. (Exh-PE), the complainant has stated that he along with Muhammad Safdar and Sawar Khan (given up PWs) was present in one car whereas, Mushtaq, Mumtaz (deceased persons) and Shahzad (P.W.10) were present in the other car and they were going to Raiwind in connection with some important work but while appearing before the learned trial court, he has not stated anything as to why he was present at the spot and as such, his statement cannot be believed; that so far as Shahzad (P.W.10) is concerned, he is also not reliable as he stated that he was sitting in the car on the rear seat and received injuries as the car collided with an acacia tree and he was injured but as per his Medico-legal Report (Exh-PB), he was medically examined at 2-30 p.m. i.e. after about six hours of the occurrence and in his cross-examination, he stated twice that he was medically examined at about Maghrib prayer time, which makes his presence at the spot highly doubtful; that the complainant made dishonest improvements in his statement before the learned trial court and he was duly confronted with his previous statement and the improvements made by him were brought on the record as he, in the F.I.R. (Exh-PE), did not mention the locale of injuries on the person of deceased whereas, while appearing before the learned trial Court, he mentioned the details thereof. So far as the recovery of .244 bore rifle allegedly recovered at the instance of Zulfiqar Ali (appellant) is concerned, learned counsel for the appellants contends that the report of the Forensic Science

Laboratory is not positive, therefore, no reliance can be placed on this piece of evidence. So far as remaining appellants are concerned, learned counsel contends that nothing was recovered from them rather it was concluded by the police during the investigation that Liaqat Ali and Yaqoob Ali alias Kaddu (appellants) were not present at the spot. So far as the motive behind the occurrence is concerned, learned counsel for the appellants contends that in the F.I.R. (Exh-PE), the motive behind the occurrence as disclosed by the complainant was that Mushtaq (deceased) was released from Jail three months ago after serving out his sentence in the murder case of Riasat whereas, Mumtaz (deceased) was released on bail in the murder case of Abbas; that so far as the murder of Riasat is concerned, Musthaq (deceased) was convicted in the said murder case and was sentenced to death, which was converted into imprisonment for life by this Court whereas, the motive against Mumtaz (deceased) was attributed to Muhammad Amin, appellant (since dead) because he was brother of Abbas deceased, therefore, there was no reason for the present appellants to commit the murder of Mushtaq and Mumtaz (deceased persons). Learned counsel further contends that the motive is always a double edged weapon and if it could be a reason for commission of crime then at the same time, it could also be a reason for false implication of the accused. Further contends that there is history of criminal record of the complainant and both the deceased persons as they were involved in number of criminal cases and have enmity with many persons; that from all angles, the prosecution case is of doubtful nature; that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt; that these appeals may be accepted, the appellants may be acquitted and the murder reference may be answered in the negative.

8. Learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes these appeals on the grounds that the complainant has stated a specific reason for his presence at the spot in his Fard Biyan (Exh-PE/1), which was made basis for registration of this case, by stating that he along with Muhammad Safdar and Sawar Khan, on one car, whereas, Mushtaq, Mumtaz (deceased persons) and Shahzad (P.W.10), on the other car, were going to Raiwind in connection with an important piece of work; that moreover, in his cross-examination, the complainant has stated that he was present in the other car which has not seriously been contested by the defence; that the road on which this occurrence took place is the main road which is used by the complainant to go to his house and the same is situated in village Lakhowal; that if the presence of the deceased at the place of occurrence is not

disputed, then the presence of the complainant and other witness who was injured in this case, cannot be considered as unnatural or improbable; that the complainant and the police, cannot be held responsible for the delay in conducting the postmortem examination on the dead bodies of the deceased persons as it is on the record that the dead bodies of both the deceased persons reached the hospital before 12-00 noon on 19-11-2003 and no direct question was asked from the doctors as to why the postmortem examination in this particular case was not conducted on 19-11-2003. So far as the delay in conducting the medical examination of injured Shahzad (P.W.10) is concerned, learned counsel for the complainant contends that he was got examined by the police which fact is mentioned in the Medico-legal Report (Exh-PB) and the police firstly recorded his statement and then got his medical examination conducted but the duration of injuries given by the doctor in his Medico-legal Certificate coincide with the time of incident mentioned by this injured witness and there is no suggestion to him that his injuries were self-suffered and his presence at the place of occurrence is proved beyond the shadow of any doubt; that moreover, he is totally an independent witness having no enmity with either of the appellant; that it was a daylight occurrence and no question of mistaken identity can arise as the parties were known to each other prior to the occurrence; that the prosecution case, to the extent of Zulfiqar Ali (appellant), is further corroborated by the recovery of .244 bore rifle recovered on his pointation; that the opinion of the police is not binding on the Court; that the motive is also established as no question regarding the motive was asked on behalf of either of the appellant as it was not denied that Riasat was real brother of Liaqat (appellant) and Mushtaq (deceased) an accused for his murder and similarly, Abbas was real brother of Amin appellant (since dead) and Mumtaz (deceased) was an accused for his murder and as such, the prosecution has proved its case against all the appellants who are responsible for the murder of two innocent persons by firing at them; that the appellants are not even entitled to any leniency so far as the quantum of sentence is concerned; that the prosecution has fully proved its case against the appellants beyond the shadow of any doubt; that these appeals may be dismissed and the sentence of death awarded to the appellants may be confirmed.

9. We have heard the arguments of learned counsel for the appellants, learned Deputy Prosecutor-General assisted by learned counsel for the complainant and have gone through the record with their able assistance.

10. The detail of the prosecution story, as set forth in the F.I.R. (Exh-PE.), has already been mentioned in paragraph No.2 of this judgment, therefore, there is no need to repeat the same.

First of all, we will address the argument of learned counsel for the appellants that Liaqat Ali and Yaqoob Ali alias Kaddu (appellants) were declared innocent during the course of investigation and Muhammad Aslam S.I. (P.W.14) has conceded during his cross-examination that he opined that the presence of above-mentioned appellants was not found at the spot at the time of occurrence which has created serious dent in the prosecution story, thus, the above mentioned appellants may be acquitted on this ground. The said argument of learned counsel for the appellants is misconceived because it is not the duty of the Investigating Officer to decide the innocence or guilt of accused persons. The opinion of the police officer is inadmissible in evidence, therefore, the appellants cannot be acquitted merely on the basis of police investigation. A reference in this respect may be made to the case of "Muhammad Ahmad (Mahmood Ahmed) and another v. The State" (2010 SCMR 660) wherein, at page 676, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

"37....It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officers to creep into the evidence was not curbed then the same could lead to disastrous consequences..."

11. The occurrence in this case took place on 19-11-2003 at 8.00 am. Statedly, the matter was reported to the police by Muhammad Iqbal, complainant (P.W.11) at 09.15 a.m through his Fard Biyan (Exh-PE/1) and the formal F.I.R. (Exh-PE) was recorded on the same day at 9.45 a.m but the other circumstances suggest that the matter was reported to the police at the time mentioned in the F.I.R. because the postmortem examination on the dead body of Mumtaz. Ahmad (deceased) was conducted on 20-11-2003 at 11.50 a.m i.e. with the delay of about twenty-eight hours from the occurrence whereas, the postmortem examination on the dead body of Muhammad Mushtaq (deceased) was also conducted on 20-11-2003 at 11-45 a.m i.e. with the delay of almost twenty-eight hours from the occurrence. Dr Muhammad Ubaid Ullah (P.W.4) has stated during his cross-examination that in routine the

postmortem examination on a dead body is conducted after the receipt of police papers. He further stated that he might have received police papers about thirty minutes prior to the postmortem examination. Similarly, Dr. Aman Ullah Khan (P.W.5) has stated during his cross-examination that as soon as, he received the police papers, he started to conduct the postmortem examination. He further stated that there was absolutely no delay on his part in conducting the postmortem examination. The aforementioned gross delay of about twenty-eight hours in conducting the postmortem examination on the dead bodies of Muhammad Mushtaq and Mumtaz Ahmad (deceased persons) has created serious doubt about the truthfulness of the prosecution story as the said delay is suggestive of the fact that the delay was consumed in concocting the prosecution, story and procuring the attendance of eye-witnesses. We may refer here the case of "Irshad Ahmed v. The State" (2011 SCMR 1190) wherein, it has been held that the postmortem examination on the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a postmortem examination of the dead body conducted. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Ashraf v. The State" (2012 SCMR 419). Similarly, in the case of "Khalid alias Khalidi and 2 others v. The State" (2012, SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of thirteen hours in conducting the post mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the F.I.R. was not lodged at the given time.

12. The ocular account of the prosecution was furnished by Shahzad Ahmad (P.W.10) and Muhammad Iqbal, complainant (P.W.11). Both the above mentioned witnesses are not the residents of the place where this occurrence took place. They are residents of Lakhowal whereas, this occurrence took place on Raiwind Road. They have not given any plausible explanation for their presence at the spot at the relevant time and as such, they are chance witnesses. We have noted that the aforementioned witnesses also made dishonest improvements in their statements recorded by the learned trial court. In the F.I.R. (Exh-PF), Akbar Ali alias Bhola (appellant) was assigned the role of driving the car of his co-accused namely, Muhammad Azam (since P.O.), Muhammad Amin (since dead) and Zulfiqar Ali (appellant). It was not the case of the complainant party before the police that Akbar Ali alias Bhola (appellant) was carrying any weapon at the time of occurrence but

while appearing before the learned trial Court, the aforementioned eye-witnesses have also alleged that all the accused persons (including Akbar Ali alias Bhola appellant) were holding rifles .244 bore and they resorted to firing at Muhammad Mushtaq and Mumtaz Ahmad (deceased persons) at the time of occurrence. The complainant did not mention the locale of injuries in the F.I.R. (Exh.PE) and he assigned a joint role of firing to the accused persons at the persons of the deceased but the complainant Muhammad Iqbal (P.W.11) while appearing before the learned trial court has mentioned specific locale of injuries on the bodies of deceased persons. He was confronted with his previous statement and the improvements made by him were duly brought on the record. Relevant part of the statement of Muhammad Iqbal, complainant (P.W.11) at page Nos.172 & 173 of the paper book reads as under:--

"....I stated before the police in Fard Bian that the accused Bhola was driving the car and he along with accused Azam, Zulfiqar and Ameen were armed with .244 bore (Confronted with Exh.PE/1 wherein the word "all" is not mentioned.). I stated before the police that the aforesaid persons brought their car near us and made the firing (confronted with Exh.PE/1 where the word "in front" is recorded). I stated in Fard Bian that all the accused Liaqat, Yaqoob alias Kudu and Irfan and unknown person were armed with rifle .244 bore (confronted with Exh.PE/1 wherein Yaqoob alias Kudu has not been shown armed and there is no mention of an unknown person therein). I stated in Fard Bian that the aforesaid four persons made the firing on the deceased Mushtaq and Mumtaz on their parts of the bodies head, neck, behind ear, near nose and on left side of chest/behind right Daula (confronted) with Exh.PE/1 where not so recorded). I stated before the police that the deceased persons received the fire arm injuries on right side of the head, behind the head, behind the right ear, on the body of deceased Mushtaq and Mumtaz (confronted with Exh.PE/I) where not so recorded."

It is by now well-settled law that a witness who makes dishonest improvements in his statement is not worthy of reliance.

Learned counsel for the complainant has argued that Shahzad Ahmad (P.W.10) is an injured eye-witness of the occurrence but admittedly, he was not injured due to the firing of any of the accused persons. According to the prosecution's own case, he received injuries on his person as the car of the deceased persons collided with an acacia (Keeker) tree at the time of occurrence. According to the statement of Dr.

Khizer Hayat Khan (P.W.3), all the injuries on the person of Shahzad Ahmad (P.W.10) were caused by blunt means. It is also noteworthy that the occurrence look place at 08.00 a.m. on 19-11-2003 but Shahzad Ahmad (P.W.10) was medically examined by Dr Khizer Hayat Khan (P.W.3) at 2-30 p.m. i.e. with the delay of six and half hours from the time of occurrence. Muhammad Iqbal, complainant (P.W.11) has stated during his cross-examination that he reached the hospital at 10-30 a.m. It is also noteworthy that Shahzad Ahmad (P.W.l0) has stated at two stages of his cross-examination (at pages 156 and 159 of the paper book) that he was medically examined after the "Azan" of "Maghrib". There is no plausible explanation for the delay of six and half hours in getting Shahzad (P.W.10) medically examined by the doctor and if the statement of said injured witness is taken to be correct there was delay of about 9/10 hours in his medical examination. The said delay has casted serious doubt about sustaining injuries in the occurrence of this witness, as well as, his evidence.

13. It is the case of the prosecution that the appellants were armed with .244 bore rifles at the time of occurrence but nothing was recovered from the possession of all the appellants during the investigating of this case expect Zulfiqar Ali (appellant). Insofar as the recovery of .44 bore rifle (Exh-P-28) along with two magazine, one containing ten bullets (P-29/1-10) and the other containing fifteen bullets (P-30/1-15) from the possession of Zulfiqar Ali (appellant) concerned, the same is of no avail to the prosecution because as per the report of the Forensic Science Laboratory (Exh-DDPP/B), the crime empties recovered from the spot were not found to have been fired from the said rifle, therefore, the alleged recovery of rifle (P-28) along with two magazines, one containing ten bullets (P-29/1-10) and second containing fifteen bullets (P-30/1-15) is of no avail to the prosecution.

14. According to the prosecution case, the motive behind the occurrence was that Mushtaq (deceased) was released from jail about three months ago after serving out his sentence in the murder case of one Riasat (brother of Liaqat Ali, appellant) whereas, Mumtaz (deceased) was released on bail in the murder case of one Abbas (brother of Muhammad Ameen, appellant since dead). We have noted that the complainant party had enmity with number of persons. Muhammad Iqbal, complainant (P.W.11) has conceded during his cross-examination that twelve criminal cases with the allegation of murder, murderous assault, dacoity etc. were registered with different police stations against his brother Akbar Ali. It is also brought on the record during the cross-examination of above mentioned eye-witnesses that both the deceased namely, Mumtaz Ahmad and Muhammad Mushtaq

also involved in criminal cases. Insofar as the murder of Riasat Ali, brother of Liaqat Ali (appellant) and murder of Abbas, brother of Muhammad Amin, appellant (since dead) are concerned, we have noted that it was also brought on the record that Muhammad Mushtaq (deceased) was convicted in the above mentioned murder case and sentenced to death which was converted into imprisonment for life by this Court and as such, there was no reason for Liaqat Ali (appellant) to commit the murder of Muhammad Mushtaq and Mumtaz Ahmad (deceased persons). The motive for the murder of Abbas was not alleged against the present appellants and the same was alleged against Muhammad Amin, appellant (since dead). Even otherwise, the motive is a double-edged weapon and if it could be a reason for commission of crime then at the same time, it could be a reason for false implication of an accused in the case. It is by now well-settled law that an accused cannot be convicted merely on the basis of evidence of motive in absence of convincing and reliable direct or circumstantial evidence. As we have already discarded other prosecution evidence, therefore, the evidence of prosecution qua the motive has become irrelevant.

15. So far as the medical evidence is concerned, it is by now well-settled law that medical evidence may confirm the ocular evidence with regard to the seat of injury, the nature of the injury, the kind of weapon used in the occurrence but it would not identify the accused. Reference in this respect may be made to the case of "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "Mursal Kazmi alias Qamar Shah and another v. The State" (2009 SCMR 1410) and "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103).

16. It is by now well-settled law that if there is a single circumstances which creates doubt regarding the prosecution case, then the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In the case of "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

"5 …The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:-

"13. …It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Triq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the light of above discussion, we have come to this irresistible conclusion that the prosecution has failed to prove its case against the Appellants beyond the shadow of doubt, therefore, we accept Criminal Appeal No.1195 of 2007 filed by Akbar Ali alias Bhola, Zulfiqar Ali and Yaqoob Ali alias Kaddu (appellants) and Criminal Appeal No.1196 of 2007 filed by Liaqat Ali (appellant), set aside their convictions and sentences and acquit them of the charges by extending them the benefit of doubt. They are in custody, they be released forthwith if not required in any other case.

18. Murder Reference No.512 of 2007 is answered in the NEGATIVE and the sentences of death of Akbar Ali alias Bhola, Zufliqar Ali, Yaqoob Ali alias Kaddu and Liaqat Ali (convicts) are NOT CONFIRMED.

HBT/M-255/L **Appeal accepted.**

2014 Y L R 933

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ABDUR RAUF and 3 others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No. 1107 of 2008, Criminal Appeal No.637 of 2009, Criminal Revision No.732 of 2008 and Murder Reference No.9 of 2009, heard on 6th June, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(c)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---No injury on the person of the deceased was attributed to accused persons---One of the accused persons was alleged to be armed with .222 bore rifle, while the other was alleged to be armed with Mauser at the time of occurrence; and were resorted to arial firing, but no weapon of offence was recovered from both of them during investigation---Sixteen crime empties were secured from the spot and all said crime empties were of 7.62 MM bore---No crime empty of .222 bore rifle or Mauser was secured from the spot---No motive was alleged against said accused persons---Possibility of false implication of the accused persons by the complainant by using wider net, could not be ruled out---Appeal to the extent of said two accused persons, was allowed, and judgment of the Trial Court to their extent was set aside; they were acquitted of the charge, extending them benefit of doubt, and their bail bonds stood discharged, their sureties, were released, in circumstances.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---No conscious or deliberate delay took place in reporting the matter to the Police and F.I.R. was lodged with promptitude---Ocular account of the prosecution was furnished by complainant and prosecution witnesses, who had plausibly explained their presence at the spot at the time of occurrence---Occurrence took place in the broad-daylight---Both accused persons were assigned the specific role of making firing with Kalashnikov on the person of the deceased---Said witnesses, though were related to the deceased, but their evidence could not be

discarded merely on the basis of their relationship with the deceased or their enmity with accused persons provided the same was confidence-inspiring---Both said eye-witnesses stood the test of lengthy cross-examination, but their evidence could not be shaken to the extent of role played by accused persons---Evidence of said witnesses was trustworthy and reliable qua the role of accused persons---Time of occurrence, nature of injuries, the kind of weapon used by accused persons, as stated by eye-witnesses, had tallied with the medical evidence furnished by the doctor---Objection of counsel for accused with regard to delay of about eleven hours in conducting of post-mortem examination on the dead body of the deceased, was misconceived---Motive as alleged by the prosecution, had fully been proved against accused persons---Nothing was recovered from one of said accused persons, whereas Kalashnikov along with ten live bullets were recovered from other accused, but said recovery was inconsequential, since according to the report of Forensic Science Laboratory, crime empties were not found to have been fired from said Kalashnikov---One of said accused persons, could not prove (as stated) that at the time of occurrence he was either on physical remand or in judicial lock-up in other case---Prosecution case was proved against accused persons through evidence of eye-witnesses, which was fully supported by medical evidence---Prosecution, in circumstances, had proved its case against said accused beyond any shadow of any doubt---Certain mitigating circumstances were present in favour of accused persons, firstly no weapon of offence was recovered from possession of one accused, whereas recovery of Kalashnikov along with ten bullets allegedly recovered from other accused, had been disbelieved; secondly, that a joint role of firing at deceased was attributed to both accused persons and no specific injury was assigned to them in F.I.R., in the private complaint or in statement of eye-witnesses, there were total seven firearm entry wounds on the person of the deceased, and cause of death was three injuries---Said three injuries were not specifically attributed to either of accused persons and thirdly that complainant implicated seven persons in the case, out of whom, three had been acquitted, by the Trial Court, whereas two had been acquitted by High Court---Accused were entitled to the benefit of doubt as an extenuating circumstance, while deciding question of sentence as well--- Convicted accused, in circumstances, deserved the benefit of doubt to the extent of their sentences out of two provided under S.302(b), P.P.C.---While treating the case of mitigation, maintaining conviction of accused persons under S.302(b), P.P.C., their sentence was altered from death to imprisonment for life---Accused were also awarded the benefit of S.382-B, Cr.P.C.

Ellahi Bakhsh v. Rab Nawaz and another 2002 SCMR 1842 and Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

Syed Zahid Hussain Bokhari, Ms. Khalida Parveen and Hussain Qayyum for Appellants.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Abid Saqi for the Complainant.

Date of hearing: 6th June, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1107 of 2008 titled as "Abdur Rauf and others v. The State" filed by Abdur Rauf, Abid Shaheen, Nazir Ahmad and Farooq (appellant) against their convictions and sentences, Criminal Appeal No.673 of 2009 titled as "Raisat Ali v. Nazir Ahmad and others" filed by Riasat Ali (complainant) against the acquittal of Nazir Ahmad and Farooq, appellants (respondents in Criminal Appeal No.673 of 2009) from the charge under section 302(b) P.P.C., Criminal Revision No.732 of 2008 titled as "Riasat Ali v. Abdul Rauf and others" filed by Riasat Ali (complainant) for enhancement of compensation amount imposed upon Abdur Rauf and Abid Shaheen, appellants (respondents in Criminal Revision No.732 of 2008) and Murder Reference No.9 of 2009 titled as "The State v. Abdur Rauf and others" submitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Abdur Rauf and Abid Shaheen, appellants as all these matters have arisen out of the same judgment dated 28-10-2008 passed by the learned Addl. Sessions Judge, Sheikhupura in a private complaint filed by Riasat Ali (complainant) under sections 302, 109, 148 and 149 P.P.C. against Abdur Rauf, Abid Shaheen, Nazir Ahmad and Farooq (appellants) along with Zafar (Jamshaid), Zulfiqar Ali and Liaqat Ali accused persons (since acquitted), whereby, Abdur Rauf and Abid Shaheen (appellants) were convicted under section 302(b), P.P.C., and were sentenced to death with the direction to pay Rs.2,00,000 (rupees two lac) each as compensation to the legal heirs of Liaqat Ali (deceased), as envisaged under section 544-A of the Code of Criminal Procedure, which was ordered to be recovered as arrears of land revenue and in default thereof, to further undergo simple imprisonment for six months' each whereas, Nazir Ahmad and Farooq (appellants) were convicted under section 302(c), P.P.C. and sentenced to rigorous imprisonment for ten years each with the direction to pay Rs.25,000

(rupees twenty-five thousand) each, as compensation to be paid to the legal heirs of Liaqat Ali (deceased), as envisaged under section 544-A of the Code of Criminal Procedure, which was ordered to be recovered as arrears of land revenue and in default thereof, to further undergo simple imprisonment for six months each. The appellants were awarded the benefit of section 382-B of the Code of Criminal Procedure.

The learned trial Court, however, through the same judgment, acquitted Zafar alias Jamshaid, Zulfiqar Ali and Liaqat Ali, co-accused, of the appellants. Riasat Ali (complainant) filed a petition for Special Leave to Appeal i.e. P.S.L.A. No.78 of 2008 against their acquittal, which was dismissed by this Court vide order dated 30-4-2009. Riasat Ali (complainant) also filed a Petition for Special Leave to Appeal (P.S.L.A. No.79 of 2008) for the conviction and sentence of Nazir Ahmad and Farooq under section 302(b), P.P.C. instead of section 302(c), P.P.C., which was admitted by this Court vide order dated 30-4-2009 and the said petition was conver-ted into Criminal Appeal No.673 of 2009.

2. Brief facts of the case, as disclosed by Riasat Ali, complainant (P.W.7), in private complaint (Exh-PJ), are that he (complainant) was resident of Mauza Sahoki Malian and was a cultivator by profession. On 13-7-2005 at about 7-00/ 7-30 a.m., he (complainant) along with Liaqat Ali (deceased) and Zulfiqar Ali (P.W.8) was going to the court of Ch. Abdul Sattar, Addl. Sessions Judge, Sheikhupura to attend the proceedings of case F.I.R. No.275 of 2003, under sections 302, 148 and 149 P.P.C. registered at Police Station Saddar Sheikhupura titled as Muhammad Shafi v. Iftikhar Ahmed and others on bicycles whereas, Shaukat Ali (given up P.W.) was also going on a cycle to deliver milk along with them. Liaqat Ali (deceased) was going ahead of the complainant and his companions and when they all reached at a distance of one acre from the bridge of Saim Nala, Lahore-Sheikhupura Road, a white colour car was standing there Abdur Rauf (appellant) armed with Kalashnikov, Abid Shaheen (appellant) armed with Kalashnikov, Nazir Ahmad (appellant) armed with .222 bore rifle, Farooq (appellant) armed with mouser Zafar (Jamshaid) accused (since acquitted) empty-handed, who were hiding behind the said white colour car, suddenly came in front of them. Zafar accused (since acquitted) raised lalkara that Liaqat Ali (deceased) etc. be taught a lesson for committing the murder of Muhammad Yaqoob. Upon which, Abdur Rauf and Abid Shaheen (appellants) made bursts with their respective Kalashnikovs which landed on the front at the left side of the chest of Liaqat Ali (deceased) who fell down. One fire shot hit Liaqat Ali (deceased) on the

right side of abdomen near umbilicus, one fire shot landed on the chest, below the right armpit and one fire shot landed on the arm of Liaqat Ali (deceased) who succumbed to the injuries at the spot. The complainant and other witnesses saved their lives by running. Nazir Ahmad and Muhammad Farooq (appellants) resorted to aerial firing with their respective weapons. The accused persons fled away from the spot on the white colour car. The complainant and the witnesses tried to shift Liaqat Ali (deceased) to the Civil Hospital, Sheikhupura but he was already dead. The motive for the occurrence, as stated by the complainant in private complaint (Exh-PJ), was that about 2-1/4 years prior to the occurrence, Muhammad Yaqoob, brother of Abdur Rauf (appellant) and father of Abid Shaheen (appellant) was murdered and the case was registered against Liaqat Ali (deceased) etc., which was fixed for hearing on 13-7-2005. Due to this grudge, Abdur Rauf etc. at the abetment of Zulfiqar Ali and Liaqat Ali accused persons (since acquitted) committed the murder of Liaqat Ali (deceased). The complainant after the occurrence, on 13-7-2005 at 08.20 a.m, reported the matter to the police through written application (Exh-PG), on the basis of which, the formal F.I.R. (Exh-PG/1) was lodged. Thereafter, being dissatisfied with the police investigation, the complainant filed a private complaint against the appellants and their co-accused(since acquitted).

3. Abid Shaheen (appellant) was arrested in this case on 21-7-2005 by Naveed Sikandar, S.I. (CW-3), who was already in judicial lock-up in some other case. Abdur Rauf (appellant) was arrested in this case on 9-8-2005 by Haji Qasim Ali, Inspector (CW-2), who on 16-8-2005, while in police custody, after making disclosure, got recovered Kalashnikov (P-6) along with magazine containing ten live bullets (P-7/1-10), which was taken into possession vide recovery memo Exh-PH whereas, nothing was recovered from Abid Shaheen, Nazir Ahmad and Farooq (appellants). Nazir Ahmad and Farooq (appellants) were also declared innocent by the Investigating Officer Haji Qasim Ali, Inspector (CW-2). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused (since acquitted) on 13-2-2006 to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced ten witnesses, during the trial. Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8) furnished the ocular account of the prosecution case. They are also the witnesses of recovery of Kalashnikov allegedly recovered at the instance of Abdur Rauf (appellant).

The medical evidence was furnished by Dr Munir Ahmad Gauri (P.W.2) who conducted the postmortem examination on the dead body of Liaqat Ali (deceased).

During the trial, three Court witnesses were also examined. Haji Qasim Ali, Inspector (CW-2) and Naveed Sikandar, S.I (CW-3) are the Investigating Officers of the case. Sharafat Ali (P.W.9) is the witness of abetment. Imdad Ali, (P.W.1), Muhammad Riaz (P.W.3), Khalid Mehmood, A.S.-I. (P.W.4), Abdul Salam 709/C (P.W.5), Muhammad Younis 38/C (P.W.6), and Muhammad Jahangir, A.S.I. (CW-1) are the formal witnesses. The prosecution also produced documentary evidence in the shape of recovery memo of last worn clothes of the deceased (Exh-PA), postmortem report along with pictorial diagram (Exh-PB and Exh-PB/1), rough site plan of the place of occurrence (Exh-PB), application for postmortem examination (Exh-PC), injury statement of the deceased (Exh-PD), inquest report (Exh-PE), scaled site plan of the place of occurrence, in duplicate (Exh-PF & Exh-PF/1), application for registration of case (Exh-PG), F.I.R. (Exh-PG/1), recovery memo of Kalashnikov (P-6) along with ten live bullets (P-7/1-10) allegedly recovered at the instance of Abdur Rauf appellant (Exh-PH), rough site plan of place of recovery of Kalashnikov (Exh-PH/1), private complaint (Exh-PJ), recovery memo of crime empties of Kalashnikov (Exh-PK), recovery memo of blood-stained earth (Exh-PL), recovery Memo of bicycle of the deceased (Exh-PM), recovery memo of car (Exh-PN), report of the Chemical Examiner (Exh-PK), report of the Forensic Science Laboratory (Exh-PL), report of the Chemical Examiner (Exh.-PM) and closed its evidence.

The statements of the appellants and their co-accused (since acquitted), under section 342 of the Code of Criminal Procedure, were recorded on 20-10-2008. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?" Abid Shaheen (appellant) replied as under:--

"I along with my whole family have been falsely involved in this murder case on account of enmity. Neither 1 was present at the time of occurrence nor did I participate in the same. In fact I was arrested by Police Station Sadar Farooqabad in case F.I.R. No.222/2005, dated 12-7-2005 under section 3/4/4/79 Hadood and was sent to District Jail, Sheikhupura on 13-7-2005 and was released by the orders of learned Magistrate on 27-9-2005 as I was arrested from the jail premises."

Abdur Rauf (appellant) to the same question replied as under:--

"I along with my whole family have been falsely involved in this murder case on account of enmity."

Nazir Ahmad and Farooq (appellants), to the said question, replied on the same lines. Their reply is as under:--

"I have falsely and maliciously been implicated in this murder case due to enmity. I was found innocent during investigation and not challaned, as the prosecution has submitted no solid evidence against me. I was neither present at the spot at the time of occurrences nor I did participate in the same."

The appellants did not opt to make state-ments on oath as provided under section 340(2) of the Code of Criminal Procedue, in disproof of the allegations levelled against them, however, produced copy of Rapt No.24 dated 12-7-2005 (Exh-DB), copy of Rapt No. 6 dated 13-7-2005 (Exh-DC), copy of judicial remand passed by the learned Judicial Magistrate, Sheikhupura in case F.I.R. No.222 dated 12-7-2005 under sections 3/4/4/79, Hadood Ordinance (Exh-DD and Exh-DD/1), certificate issued by the Superintendent, District Jail, Sheikhupura regarding entry and exit of Abid Shaheen (appellant) from jail (Exh-DE), order passed by the learned Judicial Magistrate, Sheikhupura dated 13-7-2005 (Exh-DF and Exh-DF/1), certificate issued by the Superintendent District Jail, Sheikhupura (Exh-DG), F.I.R. No. 275 dated 18-3-2003 registered under sections 302, 148 and 149, P.P.C. (Exh-DH), copy of F.I.R. No. 89/98 (Exh-DI), copy of F.I.R. No.805/2004 (Exh-DJ), copy of F.I.R. No.23/2003

(Exh-DK), copy of F.I.R. No.222 of 2005 (Exh-DL), copy of F.I.R. No.223/2005 (Exh-DM), copy of interim orders passed by the learned Addl. Sessions Judge, Sheikhupura (Exh-DN & Exh-DN/1) in their defence.

5. The learned trial Court vide its judgment dated 28-10-2008, found the appellants guilty, convicted and sentenced them as mentioned and detailed above whereas, acquitted Zafar (Jamshaid), Zulfiqar Ali and Liaqat Ali, co-accused of the appellants.

6. Learned counsel for the appellants, in support of this appeal, contend that all the appellants have falsely been implicated in this case; that the incident was not reported to the police at the time mentioned in the F.I.R. i.e. at 08.20 a.m as the occurrence took place close to the main road within the jurisdiction of Police Station B-Division, District Sheikhupura and the DHQ hospital is at a distance of few kilometers from the said place but surprisingly, the postmortem examination on the dead body of the

deceased was conducted at 7-00 p.m. on 13-7-2005 i.e. after about eleven hours of reporting the matter to the police which clearly suggests the fact that the case was not registered at the time as mentioned, in the F.I.R.; that this incident took place at 7-30 a.m. whereas, written application for registration of the case was presented to the police officer at police station and the complainant admitted that he got the application written from District Courts premises and as such, there are chances of deliberation and consultation on the part of the complainant; that no petition writer was examined in support of the above-mentioned version of the complainant; that the motive alleged in the F.I.R. (Exh-PG/1) was the earlier murder of Muhammad Yaqoob, father of Abid Shaheen (appellant) and brother of Abdur Rauf (appellant) wherein, the deceased and other witnesses were accused and as such, the motive in this case is a double-edged weapon; that if it was the reason for committing the murder of Liaqat Ali (deceased), at the same level and degree, it could be a reason for false implication of the appellants in this case; that the presence of eye-witnesses at the place of occurrence is per chance; that both the witnesses of ocular account were accused in the murder case of motive incident which was registered for the murder of Muhammad Yaqoob, father of Abid Shaheen (appellant) and brother of Abdur Rauf (appellant) and on the day of occurrence, the date of hearing of the said murder case was fixed and it is clear from the interim orders. (Exh-DN) passed by the learned trial Court that on that day the presence of the complainant and Zulfiqar Ali (P.W.8) was marked in the court and qua Liaqat Ali, it was observed that he did not appear and as such, his non-bailable warrants of arrest were issued and notice was also issued to his surety and in the circumstances, it can safely be presumed that the witnesses of ocular account were not present at the spot and had they been present at the place of occurrence, they could have informed the court regarding the incident which took place before their eyes as they were present before the court along with their learned counsel; that the eye-witnesses are inimical, chance and interested and their evidence cannot be accepted until and unless, it is corroborated by same other independent evidence which is very much lacking in this case; that nothing was recovered from Abid Shaheen (appellant). As far as recovery of Kalashnikov from Abdur Rauf (appellant) is concerned, learned counsel contend that the same is not helpful to the prosecution rather it damages the case of the prosecution as empties of Kalashnikov recovered from the place of occurrence did not match with the Kalashnikov allegedly recovered at the instance of Abdur Rauf (appellant); that the learned trial Court has wrongly treated the report of the Forensic Science Laboratory as positive which was

in fact negative; that as per prosecution case, Nazir Ahmad and Farood (appellants) also resorted to firing with .222 bore rifle and mouser, respectively, but except the empties of Kalashnikov, no empty of any other firearm was recovered from the spot; that the doctor who conducted the postmortem examination on the dead body of Liaqat Ali (deceased) has admitted that the injuries on the person of the deceased were result of one burst of Kalashnikov therefore, version of the prosecution that Abdur Rauf and Abid Shaheen (appellants) both caused injuries to the deceased is incorrect; that degree of the enmity with the deceased, complainant and other witness was the same as they all were accused in the murder case of motive incident and even the complainant has stated that he was declared innocent by the police in the said case and had he and other eye-witness been present at the spot, they could not have escaped but they did not receive even a single scratch on their bodies; that the doctor who conducted the postmortem examination on the dead body of the deceased noted blackening and tattooing around entry wounds, which suggests that he was fired at from a very close range whereas, as per scaled site plan (Exh-PF), the appellants were at a distance of twenty feet from the deceased and as such, the ocular account furnished by these two witnesses is contradictory with the medical evidence available on the record. So far as Abid Shaheen (appellant) is concerned, learned counsel for the appellants contend that he was not present at the spot because one day prior to the occurrence i.e. on 12-7-2005, he was arrested, in case F.I.R. No. 222 dated 12-7-2005 registered at Police Station Saddar Farooq Abad under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order IV of 1979; that to support this plea, the F.I.R. of said case along with order of the learned Magistrate by whose order, Abid Shaheen (appellant) was sent to jail on 13-7-2005 was produced by the defence as Exh-DD and Exh-DB/1; that even the report prepared by the Superintendent Jail was also produced on record as Exh-DE; that the Investigating Officer of the case (CW-3) has stated that during his investigation, it was established that Abid Shaheen (appellant) was already under in custody in above said case at the time of occurrence.

As far as Nazir Ahmad and Farooq (appellants) are concerned, learned counsel for the appellants contend that they have been convicted under section 302(c), P.P.C. but there was no allegation against them that they caused any injury to the deceased; that the allegation against them was that they resorted to aerial firing; that no empty of the firearm allegedly used by these appellants was recovered from the spot; that no weapon of offence was recovered from them; that the prosecution miserably failed to prove its case against all the appellants, therefore, their appeal (Criminal Appeal

No.1107 of 2008) may be accepted, Criminal Appeal No.673 of 2009 and Criminal Revision No.732 of 2008 be dismissed and the appellants may be acquitted from the charges.

7. On the other hand, learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that this incident took place on 13-7-2005 at about 7-30 a.m. whereas, the matter was reported to the police on the same day at 8-20 a.m. and the formal F.I.R. was also registered on the same day at 8-20 a.m. that there is nothing on the record to suggest that the postmortem examination was delayed because of non-submission of police papers or non-availability of the dead body as no question in this respect was asked from the doctor; that the presence of the witnesses cannot be treated as chance witnesses because they were going to the court to attend the hearing of the case which fact has not been denied by the defence side; that though the eye-witnesses are related to the deceased but they can be relied upon if their evidence is confidence inspiring and gets support from other evidence; that they have categorically stated that Abid Shaheen and Abdur Rauf (appellants) resorted to firing at the deceased which hit on different parts of his body and the medical evidence supports the ocular account as the deceased received firearm injuries. So far as the distance mentioned in the scaled site plan is concerned, learned counsel for the complainant contends that this is tentative assessment and witnesses have stated during their cross-examination that the deceased was at a distance of six feet from the appellants at the time of occurrence and even otherwise, the eye-witnesses are rustic villagers and not expected to give the exact distance; that the motive has not been disputed rather it was accepted by the defence. So far as the plea of Abid Shaheen (appellant) is concerned, learned counsel contends that it is the case of Abid Shaheen (appellant) that he was arrested in some other case on 12-7-2005 but he did not appear as his own witness in support of his plea; that this plea, in full, was never put to the prosecution witnesses to get their response and moreover, the police officer who arrested the appellant Abid Shaheen was not produced in the witness box and similarly, no body from jail was examined in his defence and the document tendered by the appellant i.e. Exh-DE was inadmissible in evidence and from the order of the learned Magistrate it is not determinable as to when the appellant was arrested in this case and at what time he was produced before the learned Magistrate on 13-7-2005; that even the Investigating Officer in cross-examination has admitted that he did not see the record of said case in which he was arrested, therefore, the plea of Abid Shaheen (appellant) could not

be established; that the appellant has not been able to establish his plea; that Criminal Appeal No.1107 of 2008, filed by all the appellants may kindly be dismissed.

8. So far as Criminal Appeal No.673 of 2009 is concerned, learned counsel for the complainant contends that Nazir Ahmad and Farooq appellants (respondents in this appeal) were present at the spot, resorted to firing and as such, shared common intention with their co-accused and they have been wrongly convicted under section 302(c), P.P.C., therefore, they may also be convicted under section 302(b), P.P.C.; that Criminal Revision No.732 of 2008 he also accepted and compensation amount may kindly be enhanced.

9. We have heard the arguments of learned counsel for the appellants, learned Deputy Prosecutor-General assisted by learned counsel for the complainant and have also gone through the record with their able assistance.

10. The detail of the prosecution case as set forth in the private complaint (Exh-PJ) has already been given in paragraph No.2 of the judgment, therefore, there is no need to repeat the same. The occurrence in this case took place on 13-7-2005 at 07.30 a.m, the matter was reported to the police on the same day at 8-20 a.m and the formal F.I.R. was also recorded on the same day at 08.20 a.m. The distance between the place of occurrence and the police station is two kilometers. Although the complainant has stated that he got the application (Exh-PG) drafted from District Courts premises but at the same time, he has also stated that he did not consult with his lawyer at the time of drafting of the said application. As the F.I.R. (Exh-PG/1) was lodged within a period of fifty minutes from the occurrence, whereas, the place of occurrence was at a distance of two kilometers from the police station. We are, therefore, of the view that there is no conscious or deliberate delay in reporting the matter to the police and the F.I.R. was lodged with promptitude.

11. First of all, we will take up the case of Nazir Ahmad and Farooq (appellants). We have noted that no injury on the person of the deceased was attributed to the said appellants. Although it was alleged in the private complaint that Nazir Ahmad (appellant) was armed with .222 bore rifle and Farooq (appellant) was armed with mouser at the time of occurrence and they resorted to aerial firing but no weapon of offence was recovered from both these appellants during the investigation of this case. It is also noteworthy that sixteen crime empties were secured from the spot and all the said crime empties were of 7.62 MM bore. No crime empty of .222 bore rifle or mouzere was secured from the spot. No motive was alleged against Nazir Ahmad and

Farooq (appellants). We are, therefore, of the view that possibility of false implication of said appellants by the complainant by using wider net cannot be ruled out in this case. We, therefore, partly allow Criminal Appeal No. 1107 of 2008, to the extent of Nazir Ahmad and Farooq (appellants), set aside the judgment of learned Addl. Sessions Judge, Sheikhupura dated 28-10-2008, to their extent and acquit them from the charge while extending them the benefit of doubt. They are on bail, their bail bonds shall stand discharged and sureties be released.

12. Now we will take up the case of Abid Shaheen and Abdur Rauf (appellants). The ocular account of the prosecution was furnished by Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8). The aforementioned witnesses have plausibly explained their presence at the spot at the time of occurrence by stating that on the day of occurrence, at the relevant time, they were proceeding to the District Courts, Sheikhupura in order to appear in the court in connection with their case. It was also stated in the motive part of the prosecution case that about 2-1/4 years prior to the occurrence, Muhammad Yaqoob, brother of Abdur Rauf (appellant) and father of Abid Shaheen (appellant) was murdered for which a case was registered against the complainant party of this case and the date of hearing in the said case was fixed for 13-7-2005 when the present occurrence took place. The complainant Riasat Ali (P.W.7) has stated during his cross-examination that he himself, Zulfiqar Ali (P.W.8) and Liaqat Ali (deceased) were the accused in the abovementioned murder case of Muhammad Yaqoob, father of Abid Shaheen (appellant) and brother of Abdur Rauf (appellant). The defence has not claimed that the aforementioned case was not registered against the eye-witnesses namely, Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8). It was also not denied that in the said murder case, the date of hearing was fixed for 13-7-2005 when the present occurrence took place, therefore, presence of the abovementioned eye-witnesses along with the deceased has fully been established by the prosecution in this case. The occurrence took place in the broad-daylight. Abdur Rauf (appellant) and Abid Shaheen (appellant) both were assigned the specific role of making firing with Kalashnikovs on the person of the deceased. Although, the abovementioned eye-witnesses were related to the deceased and they were also accused in the murder case of Muhammad Yaqoob, father of Abid Shaheen (appellant) and brother of Abdur Rauf (appellant) but their evidence cannot be discarded merely on the basis of their relationship with the deceased or their enmity with the appellants, provided the same is confidence inspiring. Both the abovementioned eye-witnesses stood the test of lengthy cross-examination but their

evidence could not be shaken to the extent of role played by Abdur Rauf and Abid Shaheen (appellants). Their evidence is trustworthy and reliable qua the role of said appellants.

13. The medical evidence of the prosecution was furnished by Dr. Munir Ahmad Ghauri (P.W.2), who on 13-7-2007 at 7-00 p.m, conducted the postmortem examination on the dead body of Liaqat Ali (deceased) and found seven firearm entry wounds on the person of the deceased. According to his opinion, the cause of death were Injuries Nos.1, 2 and 3. The probable time that elapsed between injuries and death was within few minutes and between death and postmortem examination was within twelve hours. The medical evidence furnished by Dr Munir Ahmad Ghauri (P.W.2) fully supported the ocular account furnished by Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8). The time of occurrence, the nature of injuries, the kind of weapon used by the assailant, all these facts as stated by the aforementioned eye-witnesses have tallied with the medical evidence furnished by Dr. Munir Ahmad Ghauri (P.W.2).

The objection of learned counsel for the appellants that there is delay of about eleven hours in conducting the postmortem examination on the dead body of the deceased., which suggests that the case was not registered at the time mentioned in the F.I.R., is misconceived because no question was put to Dr. Munir Ahmad Ghauri (P.W.2) regarding the reasons of delay in conducting the postmortem examination of the deceased.

The contention of learned counsel for the appellants that the doctor who conducted the postmortem examination on the dead body of Liaqat Ali (deceased) has admitted that the injuries on the person of the deceased were result of one burst of Kalashnikov and this has created doubt about the truthfulness of the prosecution story, has no force because the doctor has also stated during his cross-examination that he cannot definitely opine that all the injuries were result of one burst fire of the rifle. The blackening and tattooing were found on the entry wounds of the deceased by the doctor but this fact further supports the ocular account furnished by Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8) because the complainant Riasat Ali (P.W.7) has stated during his cross-examination that the distance between the deceased and the appellants was six feet at the time of occurrence. Even otherwise, the rustic villagers cannot be expected to give the exact distance between the accused persons and the deceased in the state of sensation and panic created at the time of occurrence when the accused persons were

making fire shots at the deceased. In this respect, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case "Ellahi Bakhsh v. Rab Nawaz and another" (2002 SCMR 1842) wherein, at page 1846, the Hon'ble Apex Court of the country, was pleased to observe as under:--

"5. ...The said contention hardly deserves any consideration for the reason that a medical expert cannot be allowed to play the role of Fire-arm Expert and furthermore in the state of sensation and panic it is not justified to expect from a witness that he would mention the distance with exactitude as nobody bothers for any measurement in such a situation..."

14. The motive behind the occurrence, according to the prosecution case was that about 2-1/4 years prior to the occurrence, Muhammad Yaqoob, brother of Abdur Rauf (appellant) and father of Abid Shaheen (appellant) was murdered and the case was registered against Liaqat Ali (deceased) etc., which was fixed for hearing on the day of occurrence i.e. 13-7-2005. Due to this grudge, Abdur Rauf appellant) etc. committed the murder of Liaqat Ali (deceased). The prosecution evidence qua motive was furnished by Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8). Their evidence before the learned trial Court remained consistent regarding the motive part of the occurrence. Even the defence has not disputed the aforementioned motive as alleged by the prosecution. We are, therefore, of the view that the motive, as alleged by the prosecution, has fully been proved in this case against Abdur Rauf and Abid Shaheen (appellants).

15. Nothing was recovered from Abid Shaheen (appellant) whereas, Kalashnikov (P-6) along with ten live bullets (P-7/1-10) was recovered from the possession of Abdur Rauf (appellant) but the alleged recovery of Kalashnikov (P-6) along with ten live bullets (P-7/1-10) on the pointation of Abdur Rauf (appellant) is of no avail to the prosecution because according to the report of the Forensic Science Laboratory (Exh-PL), the crime empties recovered from the place of occurrence were not found to have been fired from the Kalashnikov (P-6) recovered from the possession of Abdur Rauf (appellant), therefore, the alleged recovery of Kalashnikov (P-6) along with ten live bullets (P-7/1-10) from the possession of Abdur Raul (appellant) is inconsequential.

16. So far as the version of Abid Shaheen (appellant) regarding his arrest on the day of occurrence in case F.I.R. No.222 dated 12-7-2005 registered at Police Station Farooq Abad under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order

IV of 1979 is concerned, we have noted that although Abid Shaheen (appellant) has produced the copy of said F.I.R. (Exh-DL) but the police officer who recorded the said F.I.R. was not produced by the defence before the learned trial Court. The appellant Abid Shaheen has also produced the copy of order of the learned Judicial Magistrate dated 13-7-2005 (Exh-DD), whereby, the said appellant was sent to judicial lock-up but the time of said order has not been mentioned therein. It is noteworthy that the present occurrence took place before the court hors at 07-30 a.m, therefore, it has not been established on the record that at the time of present occurrence, Abid Shaheen (appellant) was already in custody. The appellant Abid Shaheen has also produced a certificate issued by the Superintendent District Jail, Sheikhupura (Exh-DE) to show that he was sent to jail on 13-7-2005 at 09.20 a.m. but we are afraid that we cannot look into the said document because the same was not proved in accordance with law as the concerned jail officer who allegedly issued the certificate (Exh-DE) was not produced before the learned trial Court to prove the same. Although the Investigating Officer Naveed Sikandar, S.-I. (CW-3) has stated during his cross-examination on behalf of the appellants that during his investigation, it transpired that at the time of occurrence, Abid Shaheen (appellant) and Zulfiqar accused (since acquitted) were already under arrest in cases F.I.Rs. Nos.222/2005 and 223/2005 dated 12-7-2005 of Police Station Saddar Farooq Abad but during the cross-examination conducted by the learned counsel for the complainant, he conceded that he did not collect the copies of aforementioned F.I.Rs. He further conceded that he did not associate with the investigation of the present case either the complainant or any other witness of the above said cases. He also admitted that he did not see the record of Police Station Saddar Farooq Abad pertaining to the cases of abovementioned F.I.Rs. He further conceded that he did not examine the record of the court of learned Area Magistrate or District Jail, Sheikhupura in connection with the aforementioned criminal cases of Police Station Farooqabad. We are, therefore, of the view that Abid Shaheen (appellant) could not prove that at the time of occurrence, which took place on 13-7-2005 at 07.20 a.m, he (Abid Shaheen appellant) was either on physical remand or in judicial lock-up in the aforementioned case F.I.R. No.222/2005.

17. We have disbelieved the prosecution evidence qua recovery of Kalashnikov (P-6) along with ten live bullets (P-7/1-10) allegedly recovered at the instance of Abdur Raul (appellant) whereas, nothing was recovered from Abid Shaheen (appellant) but even then, there is sufficient incriminating evidence available on the record to prove

the prosecution case against Abid Shaheen and Abdur Rauf (appellants). As discussed earlier, the prosecution case is proved against Abid Shaheen and Abdur Rauf (appellants) through the evidence of eye-witnesses namely, Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8). They were cross-examined at length but their evidence could not be shaken to the extent of role attributed to Abid Shaheen and Abdur Rauf appellants and their evidence is fully supported by the medical evidence furnished by Dr. Munir Ahmad Ghauri (P.W.2) and postmortem report along with pictorial diagram (Exh-P13 and Exh-PB/1). The prosecution case is further corroborated by the evidence of motive produced by the prosecution against the said appellants. We are, therefore, of the view that the prosecution has fully proved its case against Abid Shaheen and Abdur Rauf (appellants) beyond the shadow of any doubt.

18. Now coming to the quantum of sentence of Abid Shaheen and Abdur Rauf (appellants), we have noted certain mitigating circumstances in their favour. Firstly, no weapon of offence was recovered from the possession of Abid Shaheen (appellant) whereas, we have disbelieved the recovery of Kalashnikov (P-6) along with ten live bullets (P-7/1-10) allegedly recovered at the instance of Abdur Rauf (appellant) for the reasons mentioned in Paragraph No. 15 of this judgment. Secondly, a joint role of firing at Liaqat Ali (deceased) was attributed to both Abdur Rauf and Abid Shaheen (appellants) and no specific injury was assigned to them in the F.I.R. (Exh-PG/1), in the private complaint (Exh-P.1) or in the statements of eye-witnesses namely, Riasat Ali, complainant (P.W.7) and Zulfiqar Ali (P.W.8) recorded by the learned trial Court. According to the evidence of Dr. Munir Ahmad Ghauri (P.W.2), there were total seven firearm entry wounds on the person of Liaqat Ali (deceased) and cause of death were Injuries Nos.1, 2 and 3. The said injuries were not specifically attributed to either of the appellants. Thirdly, the complainant implicated seven persons in this case, out of whom, three accused persons namely, Zafar, Zulfiqar Ali and Liaqat Ali were acquitted by the learned trial Court and the P.S.L.A. No.78 of 2008 filed by the complainant against their acquittal has also been dismissed by this Court vide order dated 30-4-2009 whereas, we have acquitted toddy, Nazir Ahmad and Farooq, co-convicts of the appellants.

It is well-recognized principle by now that accused is entitled to the benefit of doubt as an extenuating circumstance while deciding question of his sentence, as well. In this regard, we respectfully refer the case of "Mir Muhammad alias Miro v. The

State" (2009 SCMR 1188) wherein, the Hon'ble Supreme Court of Pakistan at page 1191 was pleased to observe as under:--

"9. It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

We are convinced that Abid Shaheen and Abdur Rauf (appellants), in the peculiar circumstances of this case, deserve the benefit of doubt to the extent of their sentences one out of two provided under section 302(b) of the Pakistan Penal Code. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the ease of "Ahmad Nawaz and another v. The State" (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:-

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another, (PLD 2007 SC 111), it was held that 'This is settled law that provisions of sections 306 to 308, P.P.C. attract only in the cases of Qatl-e-amd liable to qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as qisas and tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of qisas, Court has no discretion in the matter of sentence whereas in case of tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this discretion in the case of sentence of tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4, Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203, Muhammad Akram v. State 2003 SCMR 855 and Abdus Salam v. State 2000 SCMR 338." The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413)

while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case." In Iftikhar Ahmed Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:- "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course..."

19. In the light of above discussion, the conviction of Abid Shaheen and Abdur Rauf (appellants) under section 302(b), P.P.C. awarded to them by the learned trial Court is maintained, however, their sentence is altered from death to imprisonment for life. The amount of compensation and the sentence in default thereof as awarded by the learned trial Court is maintained. They are also awarded the benefit of section 382-B of the Code of Criminal Procedure.

20. Consequently with the above modification in the quantum of sentence of Abid Shaheen and Abdur Rauf (appellants), Criminal Appeal No.1107 of 2008, to their extent, is hereby dismissed.

21. As the appellants Nazir Ahmad and Farooq have been acquitted by this court for the reasons given in paragraph No.11 of this judgment, therefore, Criminal Appeal No.673 of 2009 filed by Riasat Ali, complainant for conviction of Nazir Ahmad and larooq (appellants) under section 302(b) P.P.C. instead of section 302(c) P.P.C. is hereby dismissed.

22. For the foregoing reasons, Criminal Revision No.732 of 2008 filed by Riasat Ali, complainant is also hereby dismissed.

23. Murder Reference No.9 of 2009 is answered in the NEGATIVE and the sentence of death of Abid Shaheen and Abdur Rauf (convicts) is NOT CONFIRMED.

HBT/A-97/L **Order accordingly.**

2014 Y L R 1005

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ALI MUMTAZ---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.657 and Murder Reference No.213 of 2010, heard on 29th October, 2013.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Story of the prosecution as mentioned in the F.I.R. did not appeal to common sense---Accused was not alleged to have used any sharp-edged weapon, but according to medical evidence, two injuries on the person of the deceased caused by sharp-edged weapon were attributed to accused---Both eye-witnesses made dishonest improvements in their statements on material particulars of the case---Witness who would make dishonest improvements on material aspects of the case was not worthy of reliance and it was not safe to rely upon the evidence of said witnesses---Pistol .30 bore, was recovered from the possession of accused after 6 days from his arrest and as per report of Forensic Science Laboratory, crime empties were deposited in the office of Forensic Science Laboratory, after 10 days of recovery of pistol---Pistol and crime weapon were kept together at the Police Station---Chances of fabrication of empties from the said pistol, could not be ruled out---Alleged recovery of pistol from possession of accused and positive report of Forensic Science Laboratory could not be relied upon---Recovery memo did not show that 'sabbal' (iron rod), allegedly recovered was stained with blood---Recovery of "sabbal" was inconsequential, in circumstances---Story narrated by prosecution witnesses about the motive, was altogether different from the one which was mentioned in the F.I.R. and it was not safe, to rely upon the evidence of prosecution witnesses qua the motive part of the occurrence---Prosecution, could not prove its case against accused, beyond shadow of doubt, if there was a single circumstance which would create doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused---Conviction and sentence

recorded by the Trial Court against accused were set aside; he was acquitted of the charge by extending him the benefit of doubt.

Akhtar Ali and others v. The State 2008 SCMR 6; Muhammad Rafique and others v. The State and others 2010 SCMR 385; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Muhammad Yar Khan Daha for Appellant.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Muhammad Akram Qureshi for the Complainant.

Date of hearing: 29th October, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.657 of 2010 filed by Ali Mumtaz appellant and Murder Reference No.213 of 2010, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Ali Mumtaz appellant, as both these matters have emanated out of the same judgment dated 6-3-2010, passed by the learned Sessions Judge, Pakpattan in case F.I.R. No. 931 dated 19-11-2009, offence under section 302 of P.P.C., Police Station Sadar, Pakpattan, whereby, Ali Mumtaz (appellant) was convicted under section 302(b) of P.P.C. for committing the murders of Mst. Zareena Bibi, Mst. Rubina Bibi and Muhammad Akram and was sentenced to death on three counts with a direction to pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand only) for each murder to the legal heirs of three deceased and in default thereof to suffer simple imprisonment for six months.

2. Brief facts of the case as given by the complainant Haji Muhammad Yasin (P.W.8) through his `Fard Biyan' Exh. PD, on the basis of which the formal F.I.R. Exh.PD/1 was chalked out are that he (complainant) was resident of Deedar Singh and was an Imam Masjid in Addah Farid Kot. On the night of 19-11-2009, the complainant and his son Ghazanfar Ali (P.W.9) went to the house of his (complainant's) daughter, Mst. Zareena Bibi (deceased) and slept in front of the room of Mst. Zareena Bibi (deceased). At about 12-30 a.m. (night), they (P.Ws.) woke up after hearing the voice of the foot-steps and saw in the light of electricity that Ali Mumtaz (appellant) armed with .30 bore pistol entered into the room of Mst. Zareena Bibi (deceased), who saw Muhammad

Akram (deceased) in the room of Mst. Zareena Bibi (deceased), whereupon, he (appellant)) made fire shots with his .30 bore pistol, one after the other which landed on the left eye, left side of the neck, on the right side of chest, right side of the abdomen, right arm and left arm of Muhammad Akram (deceased). On the report of firing, Mst. Zareena Bibi (deceased) got up from the cot and then Ali Mumtaz appellant also made fire shots at Mst. Zareena Bibi (deceased) hitting her on the right side of the head. After hearing the noise of firing Shakoor Ahmad (given up P.W) and other people attracted to the spot and in the meanwhile Ali Mumtaz appellant fled away from the place of occurrence. They (P.Ws.) followed Ali Mumtaz appellant who entered in his house where, he also quarreled with his wife Mst. Rubina Bibi (deceased) and the appellant then made fire shots with .30 bore pistol hitting Mst. Rubina Bibi on the left side of face, outer side of left eye, left side of the neck and right side of the head. They (P.Ws.) tried to catch hold of the appellant but he (appellant) while making firing decamped from the spot. Muhammad Akram, Mst. Zareena Bibi and Mst. Rubina Bibi succumbed to the injuries and died at the spot.

The motive behind the occurrence as set forth in the F.I.R. Exh. PD/1 was that the appellant forbade Muhammad Akram deceased from visiting the house of his (appellant's) Saali (sister-in-law), Mst. Zareena Bibi (deceased) but in spite of that Muhammad Akram deceased visited the house of Mst. Zareena Bibi deceased therefore, the appellant committed the occurrence. It was further alleged in the F.I.R. that as wife of the appellant Mst. Rubina Bibi (deceased) reprimanded the appellant, therefore, she was also murdered by the appellant.

3. The appellant Ali Mumtaz was arrested on 1-12-2009 by Muhammad Tufail, SI (P.W.11). On 7-12-2009, Ali Mumtaz appellant led to the recovery of Sabbal P-8, which was taken into possession vide recovery memo Exh. PG/A. On the same day, Ali Mumtaz appellant led to the recovery of .30 bore pistol P-10 with three live bullets P-11/1-3, which were taken into possession vide recovery memo Exh. PH. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 21-1-2010 to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eleven witnesses during the trial. Haji Muhammad Yasin complainant (P.W.8) and Ghazanfar Ali (P.W.9) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Zafar Iqbal (P.W.3) and Lady Dr. Zahida Irshad Khan (P.W.4).

Haji Muhammad Yasin complainant (P.W.9) is also the witness of recovery of Pistol .30 bore P-10 alongwith three bullets P-11/1-3 and Sabbal P-8, which were recovered on the pointation of Ali Mumtaz appellant and taken into possession vide recovery memo Exh. PG/A and Exh. PH, respectively. Muhammad Tufail, SI (P.W.11) is the Investigating Officer of the case.

Muhammad Shabbir 302/C (P.W.1), Qudrut Ullah 262/C (P.W.2), Muhammad Mansha, A.S.-I./Mohrrar (P.W.5), Muhammad Akram son of Muhammad Nawaz Muhammad Akram son of Muhammad Haneef and Ghulam Mustafa draftsman (P.W.10) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of post report of Muhammad Akram deceased Exh.PA and pictorial diagrams Exh. PA/1 and Exh. PA/2, injury statement of Muhammad Akram deceased Exh. PA/3, Inquest report Exh. PA/4, post-mortem report of Mst. Zareena Bibi deceased Exh. PB and pictorial diagrams Exh.PB/1 and Bibi deceased Exh. PB/3, inquest report Exh.PB/4, post-mortem report of Mst. Rubina Bibi deceased Exh. PC and pictorial diagrams Exh. PC/1 and Exh. PC/2, Injury statement of Mst. Rubina Bibi deceased Exh. PC/3, inquest report Exh. PC/4, Fard Bayan of the complainant Haji Muhammad Yasin (P.W.8) for registration of case Exh. PD, F.I.R. Exh. PD/1, memo of possession of last worn clothes of Muhammad Akram deceased Exh. PE, memo of possession of last worn clothes of Mst. Zareena Bibi deceased Exh. PF, memo of possession of last worn clothes of Mst. Rubina Bibi deceased Exh. PG, memo of possession of iron Sabbal P-8 Exh.PG/A, memo of possession of pistol .30 bore P-10 along with three live bullets P-11/1-3 Exh. PH, rough site plan of the place of recovery of iron Sabbal P-8 and

pistol .30 bore P-10 alongwith three live bullets P-11/1-3 Exh. PH/1, memo of possession of blood-stained earth recovered from the place of murder of Mst. Rubina Bibi (deceased) Exh. PJ, memo of possession of blood-stained earth recovered from the place of murder of Mst. Zareena Bibi (deceased) Exh. PK, memo of possession

of blood-stained earth recovered from the place of murder of Muhammad Akram (deceased) Exh. PL, memo of possession of empty cartridges of .30 bore pistol Exh. PM, scaled site plan of the place of occurrence in duplicate Exh. PN and Exh. PN/1, rough site plan of the place of occurrence Exh. PO, report of Chemical Examiner of earth of Muhammad Akram (deceased) Exh. PP, report of Chemical Examiner of earth of Mst. Zareena Bibi (deceased) and report of Chemical Examiner of earth of Mst. Rubina Bibi (deceased) (both exhibited as Exh. PP/2), report of Serologist Exh. PQ, Forensic Science Laboratory report Exh. PR and closed its evidence.

5. The statement of the appellant under section 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you" the appellant made the following statement:--

"It is a false case. I have been roped in this case at the behest of Ali Afzal. In fact Ali Afzal is responsible for the killing of Akram, Rubina and Zareena, with the help of his companions. P.Ws. are related inter se and they have deposed falsely against me. Rubina Bibi was my wife and the step-sister of Ghazanfar. She was not on visiting terms in the house of Yaseen and Ghazanfar. I had not even attended their couple of marriages."

Neither the appellant make statement on oath; under section 340 (2) of Cr.P.C. nor produced any evidence in his defence. The learned trial Court vide its judgment dated 6-3-2010, convicted the appellant under section 302(b), P.P.C. and sentenced him as mentioned and detailed above.

6. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that eye-witnesses namely Haji Muhammad Yasin complainant (P.W.8) and Ghazanfar Ali (P.W.9) have not been able to assign any valid reason for their presence at the spot at the relevant time, thus, the presence of above mentioned eye-witnesses at the spot, at the time of occurrence could not be established; that story of the complainant in the F.I.R. was to the effect that the complainant Haji Muhammad Yasin (P.W.8) and Ghazanfar Ali (P.W.9) went to the house of Mst. Zareena Bibi (deceased) and slept in front of the room of Mst. Zareena Bibi (deceased). At about 12.30 a.m. (night), they (P.Ws.) after hearing some noise saw in the light of electricity that Ali Mumtaz (appellant) armed with .30 bore pistol entered into the room of Mst. Zareena Bibi (deceased) where he saw

Muhammad Akram (deceased) in the room of Mst. Zareena Bibi (deceased), on which, the appellant made fire shots with .30 bore pistol which landed on the left eye, left side of the neck, chest, right side of the abdomen, right arm and left arm of Muhammad Akram (deceased) and on the right side of the head of Mst. Zareena Bibi (deceased) but while appearing before the learned trial Court the complainant changed his version altogether; that the complainant was confronted with his previous statement and the improvements made by him were duly brought on the record; that same was the case of the other eye-witness namely Ghazanfar Ali who also made dishonest improvements in his statement before the court; that there is conflict between the ocular account and medical evidence to the extent of murder of Mst. Rubina Bibi (deceased); that the motive as alleged by the prosecution has also not been proved in this case; that so far as alleged recovery of pistol .30 bore P-10 from the possession of the appellant and positive report of FSL is concerned, it is contended by learned counsel for the appellant that the empties were taken into possession on 19-11-2009, the appellant was arrested on 1-12-2009 the pistol was recovered on 7-12-2009 and the empties were sent to the Forensic Science Laboratory on 17-12-2009, i.e. sixteen days after the arrest of the appellant and ten days after the recovery of pistol, therefore, the alleged recovery of pistol P-10 carries no value in the eye of law; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charges.

7. Learned Deputy Prosecutor-General, for the State assisted by learned counsel for the complainant opposes this appeal on the grounds that the appellant has specifically been named in the F.I.R. with specific role; that there was no reason to falsely implicate the appellant as the appellant was 'Damad' (son-in-law) of the complainant; that presence of the complainant and other eye-witness in the house of their daughter/sister, is quite natural and the complainant has not changed his version before the court rather he explained the prosecution story; that the ocular account is fully supported by the medical evidence, which fact is evident from the post mortem reports of the deceased, that there is no material conflict between the ocular account and medical evidence to the extent of murder of Mst. Rubina Bibi deceased; that it is a case of single accused and substitution in such like cases is a rare phenomenon; that the motive has also been proved against the appellant; that the prosecution case is further corroborated by the evidence of recovery of Pistol P-10 and Sabbal (iron rod) which were recovered on the

pointation of appellant and positive report of Forensic Science Laboratory; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

9. The detail of the prosecution case as set forth in the F.I.R. Exh. PD/1 has already been given in Para No. 2 of this judgment, therefore, there is no need to repeat the same. However, the gist of the prosecution case is that he (complainant) was resident of Deedar Singh and was an Imam Masjid in Addah Farid Kot. On the night of 19-11-2009, the complainant and his son Ghazanfar Ali (P.W.9) went to the house of his (complainant's) daughter, Mst. Zareena Bibi (deceased) and slept in front of the room of Mst. Zareena Bibi (deceased). At about 12.30 a.m. (night), they (P.Ws.) woke up after hearing the voice of foot-steps and saw in the light of electricity that Ali Mumtaz (appellant) armed with .30 bore pistol entered into the room of Mst. Zareena Bibi (deceased), who saw Muhammad Akram (deceased) in the room of Mst. Zareena Bibi (deceased), whereupon, he (appellant) made fire shots with his .30 bore pistol, one after the other which landed on the left eye, left side of the neck, on the right side of chest, right side of the abdomen, right arm and left arm of Muhammad Akram (deceased). On the report of firing, Mst. Zareena Bibi (deceased) got up from the cot and then Ali Mumtaz appellant also made fire shots at Mst. Zareena Bibi (deceased) hitting her on the right side of the head. After hearing the noise of firing Shakoor Ahmad (given up P.W) and other people; attracted to the spot and in the meanwhile Ali Mumtaz appellant fled away from the place of occurrence. They (P.Ws.) followed Ali Mumtaz appellant who entered in his house where, he also quarrelled with his wife Mst. Rubina Bibi (deceased) and the appellant then made fire shots with .30 bore pistol hitting Mst. Rubina Bibi on the left side of face, outer side of left eye, left side of the neck and right side bf the head. They (P.Ws.) tried to catch hold of the appellant but he (appellant) while making firing decamped from the spot. Muhammad Akram, Mst. Zareena Bibi and Mst. Rubina Bibi succumbed to the injuries and died, at the spot.

The motive behind the occurrence as set forth in the F.I.R. Exh. PD/1 was that the appellant forbade Muhammad Akram deceased from visiting the house of his

(appellant's) 'Saali' (sister-in-law), Mst. Zareena Bibi (deceased) but in spite of that Muhammad Akram deceased visited the house of Mst. Zareena Bibi deceased, therefore, the appellant committed the occurrence. It was further alleged in the F.I.R. that as wife of the appellant Mst. Rubina Bibi (deceased) reprimanded the appellant, therefore, she was also murdered by the appellant.

10. The case of prosecution as narrated in the F.I.R. was highly improbable. Haji Muhammad Yasin complainant (P.W.8) has stated in the F.I.R. Exh. PD/1 that on the night of occurrence, i.e. 19-11-2009 he (complainant) alongwith his son namely Ghazanfar Ali (P.W.9) slept outside the room of Mst. Zareena Bibi deceased and at about 12.30 a.m. (night) they woke up on hearing the voice of footsteps of the appellant. He further stated that Muhammad Akram deceased was in the room of Mst. Zareena Bibi deceased and as the appellant had already forbidden Muhammad Akram deceased from visiting the house of his Saali (sister-in-law), Mst. Zareena Bibi deceased and because he saw Muhammad Akram deceased in the room of Mst. Zareena Bibi deceased, therefore, he (appellant) committed the occurrence. It is highly improbable that when the real father and brother of Mst. Zareena Bibi deceased were sleeping out side the room of Mst. Zareena Bibi deceased then her paramour Muhammad Akram would come and enter the room of the deceased. Even otherwise the story of the prosecution as mentioned in the F.I.R. Exh.PD/1 does not appeal to common sense because the occurrence took place in the winter season, i.e. 19-11-2009 at about 12.30 a.m. (night) and it is not probable that the complainant Haji Muhammad Yasin (P.W.8) and his son Ghazanfar Ali (P.W.9) would sleep in the courtyard during the cold night of winter season. We have also perused the site plan of the place of occurrence in which other rooms apart from the room of occurrence, have been shown and no reason for sleeping of the eye-witnesses in the courtyard during the winter season has been mentioned in the F.I.R. It is also noteworthy that the story of cite prosecution mentioned in the F.I.R. was in conflict with the medical evidence because according to the said story the appellant committed the occurrence while giving firearm injuries on the person of his wife Mst. Rubina Bibi deceased. It was not alleged in the F.I.R. that the appellant used any sharp-edged weapon but according to the medical evidence furnished by Lady Dr. Zahida Irshad Khan (P.W.4) two injuries attributed to the appellant, on the person of Mst. Rubina Bibi deceased were caused by sharp-edged weapon. The aforementioned eye-witnesses were aware of all the weaknesses mentioned above, in the prosecution case, therefore, while

`appearing before the learned trial Court they completely changed the prosecution story. Haji Muhammad Yasin complainant (P.W.8) while making his statement before the learned trial Court has stated that on 18-11-2009 he received a phone call from his daughter Mst. Zareena Bibi deceased who complained that Ali Mumtaz appellant was vexing her and had also thrashed his wife Mst. Rubina Bibi deceased and she requested them (P.Ws.) to come for his reformation. He (complainant), thereafter alongwith Ghazanfar Ali (P.W.9) went to the house of Mst. Zareena Bibi deceased where he called Ali Mumtaz appellant and tried to make him understand. He further stated that they (P.Ws.) also called Muhammad Akram deceased and Shakoor (given up P.W), whereupon, a dispute arose between the appellant and Muhammad Akram deceased and Shakoor (given up P.W.). Ali Mumtaz appellant took out a pistol from his Nepha and committed the murder of Muhammad Akram deceased and Mst. Zareena Bibi deceased. He further improved his statement by stating that Ali Mumtaz appellant committed the murder of Mst. Rubina Bibi deceased with the help of firearm, as well as, with the help of Sabbal (iron rod) and caused two injuries on the head of Mst. Rubina Bibi deceased with the help of Sabbal (iron rod). Similarly Ghazanfar Ali (P.W.9) also changed his version while making his statement before the learned trial Court and stated an altogether different story from the one which he narrated before the police in his statement. Exh. DA. Both the above mentioned eye-witnesses were confronted with their previous statements and improvements made by them were duly brought on the record. The relevant parts of the statements of aforementioned eye-witnesses at Pages Nos. 24, 25 and 28 of the paper-book read as under: -

Haji Muhammad Yasin (P.W.8)

I had made statement before the police. Thanedar wrote it. I had stated before the Thanedar that Zarina had phoned me and Ghazanfar (confronted with Exh. PD wherein not so recorded). I had also stated the time of this phone call at 04.00 p.m. (confronted with Exh.PD, wherein not so recorded). I had also told the Thanedar that by phone call Zarina Bibi told us that Ali Mumtaz had thrashed his wife Rubina. (Confronted with Exh PD, wherein not so recorded). Volunteers, I do not know if Thanedar wrote it or not. I told the Thanedar that I and Ghazanfar tried to make Ali Mumtaz understand for reforming himself. Volunteers, I do not know if it was inked or not. (Confronted with Exh.PD, wherein not so recorded). I told the police that there

was exchange of invectives with Mumtaz. Volunteers, I do not know if it was inked or not. (Confronted with Exh.PD, wherein not so found). I mentioned in my statement before Thanedar that Ali Mumtaz brought out pistol from his Nefa. Volunteers, I do not know whether it was written or not. (Confronted with Exh.PD, wherein not so recorded). I had stated before the police that after firing by Ali Mumtaz at Akram, Zareena Bibi rebuked him. (Confronted with Exh.PD, wherein not so recorded). I stated before the police that Ali Mumtaz fired two shots at Rubina Bibi, which hit her head on the left temporal area and right side of the face. (Confronted with Exh.PD, wherein the multiple fires are mentioned, but the locale as the left side of the face on the exterior side of the left eye and on the right side of the head and on the left side of neck in the front are not). I also stated before the police that Ali Mumtaz caused 2/3 sabbal blows on the head of Rubina Bibi. (Confronted with Exh.PD wherein not so recorded). I also stated before the police that the accused decamped by crossing over the wall near the manger. (Confronted with Exh.PD, wherein not so recorded and only the decamping is mentioned). I stated before the police that the accused was liquor addict and a debauch. (Confronted with Exh.PD, wherein not so recorded).

Ghazanfar Ali (P.W.9)

I made statement before the police. I stated before the police that my sister Zarina phoned me that Ali Mumtaz vexing her and upon this, I and my father went to her house. (Confronted with Exh.DA, wherein not so recorded). I had stated before the police that there was a brawl between Akram and Ali Mumtaz and they had exchange of hot words. (Confronted with Exh.DA, wherein not so recorded). I had mentioned in my statement the locale of injuries. (Confronted with Exh.DA, wherein not so recorded). I had mentioned in my statement that Ali Mumtaz quarreled with Rubina and also detailed the locale of injuries and the shots fired by Ali Mumtaz. (Confronted with Exh.DA, wherein not so recorded). I had stated before the police that Zarina Bibi intervened and Ali Mumtaz fired at her. (Confronted with Exh.DA, wherein not so recorded as to quarrel to locale of injuries). I had mentioned before the police the reason behind the occurrence. (Confronts with Exh.DA, wherein not so recorded).

It is evident from the perusal of statements of the above-mentioned witnesses that they made dishonest improvements in their statements on material particulars of the case. It is by now well-settled law that a witness who makes dishonest improvements on material aspects of the case in order to strengthen his case is not worthy of reliance.

In the case of "Akhtar Ali and others v. The State" (2008 SCMR 6) while discussing the evidence of a witness who made dishonest improvements in his statement the Hon'ble Supreme Court of Pakistan observed as under:--

"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Rafique and others v. The State and others (2010 SCMR 385) wherein it was held that if a witness makes improvement on material aspects of the case then he is not worthy of reliance. It is, therefore, not safe to rely upon the evidence of the above mentioned eye-witnesses who made dishonest improvements in their statements before the court in order to overcome the weaknesses in the prosecution case.

11. Insofar as medical evidence is concerned, as mentioned earlier, there was conflict between the prosecution story as set forth in the F.I.R. Exh.PD/1 and the medical evidence of the prosecution. It was mentioned in the F.I.R. that on the night of occurrence Ali Mumtaz appellant made fire shots one after the other which landed on the left side of the face, near left eye, on the left side of neck and on the right side of head of Mst. Rubin Bibi deceased. Lady Dr. Zahida Irshad Khan (P.W.4) conducted post-mortem examination on the deadbody of Mst. Rubina Bibi deceased and found the following injuries on her person:--

(1) A lacerated wound with brunt murled margins, going deep on left cheek, 5 cm away from nose. It could be entrance wound.

(2) A lacerated wound going deep measures 2 x 2 cm with everted margins on back of left ear. It could be exit wound.

(3) A lacerated wound measured 4 x 1.5 cm, on left side of forehead 1.4 cm away left eyebrow. The wound was bone exposed and could be caused by sharp edged weapon.

(4) A lacerated bone exposed wound, measuring 5 x 1.5 cm, on right side of top of head. It could be caused by sharp edged weapon.

It is evident from the perusal of record that injury attributed to the appellant on the left side of neck of Mst. Rubina Bibi deceased i.e. Injury No. 2 was an exit wound, whereas, the firearm injuries attributed to the appellant near the left eye and on the right side of the head, as per medical evidence, were not caused by any firearm and the same were inflicted by sharp-edged weapon. As the prosecution story narrated in the F.I.R. (Exh.PD/1) was in conflict with the medical evidence, therefore; Haji Muhammad Yasin complainant (P.W.8) made dishonest improvements while making his statement before the court by stating that the appellant inflicted two injuries with the help of Sabbal (iron rod) on the person of Mst. Rubina Bibi (deceased). He was confronted with his previous statement and the improvements made by him were duly brought on the record which has already been reproduced in the preceding paragraph. Ghazanfar Ali (P.W.9) has stated that the appellant inflicted two blows with the help of Sabbal (iron rod) on the person of Mst. Rubina Bibi deceased but his evidence was in conflict with the story of the prosecution mentioned in the F.I.R. Exh. PD/1.

12. Insofar as the recovery of pistol .30 bore P-10 is concerned, we have noted that the occurrence in this case took place on 19-11-2009 and six crime-empties were taken into possession from the spot on the said day vide memo Exh. PH. The appellant was arrested in this case on 1-12-2009. Pistol .30 bore P-10 was recovered from the possession of the appellant on 7-12-2009 and as per report of Forensic Science Laboratory Exh.PR the crime empties were deposited in the office of Forensic Science Laboratory on 17-l2-2009, i.e. after ten days of the recovery of pistol P-10. It means that pistol (P-10) and crime empties were kept together at the police station, therefore, chances of fabrication empties from the said pistol cannot be ruled out, therefore, it is not safe to rely upon the alleged recovery of pistol P-10 from the possession of appellant and positive report of Forensic Science Laboratory Exh. PR.

Insofar as the alleged recovery of Sabbal (iron rod) is concerned, we have noted that it is not mentioned in the recovery memo Exh.PG/A that Sabbal (iron rod) P-8 was stained with blood. There is no report of Chemical Examiner or that of Serologist to establish that Sabbal (iron rod) P-8 was stained with human blood, thus, the recovery of Sabbal (iron rod) P-8 from the possession of appellant is also inconsequential.

13. The motive behind the occurrence as set forth in the F.I.R. Exh. PD/1 was that the appellant forbade Muhammad Akram deceased from visiting the house of his (appellant's) Saali (sister-in-law) Mst. Zareena Bibi deceased but in spite of that Muhammad Akram deceased visited the house of Mst. Zareena Bibi deceased, therefore, the appellant committed the occurrence. It was further alleged in the F.I.R. that as wife of the appellant Mst. Rubina Bibi deceased reprimanded the appellant, therefore, she was also murdered by the appellant. The prosecution witnesses while making their statements before the learned trial Court changed their version regarding the motive part of the occurrence by stating that in fact the appellant was keeping lustful eye on Mst. Zareena Bibi deceased. It was also alleged that he (appellant) was a liquor addict and a debauched he also used to quarrel with his wife Mst. Rubina Bibi deceased. The story narrated by the above mentioned witnesses about the motive was altogether different from the one which was mentioned in the F.I.R. Exh. PD/1, therefore, it is not safe to rely upon the evidence of prosecution witnesses qua the motive part of the occurrence.

14. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against Ali Mumtaz appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

'5……The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of `Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

'13……It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was

observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. In the light of above discussion, we are of the view that the prosecution has failed to prove it case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No.657 of 2010 filed by Ali Mumtaz appellant, set aside his conviction and sentence recorded by the learned Sessions Judge, Pakpattan vide judgment dated 6-3-2010 and acquit him of the charge by extending him the benefit of doubt. Ali Mumtaz appellant is in custody, he be released forthwith if not required in any other case.

16. Murder Reference No. 213 of 2010 is answered in the NEGATIVE and the sentence of death of Ali Mumtaz, (convict) is NOT CONFIRMED.

HBT/A-145/L **Appeal accepted.**

2014 Y L R 1060

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ARSHAD and another---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos.1034 and 840 and Murder Reference No.187 of 2008, heard on 4th April, 2013.

(a) Criminal trial---

----Appreciation of evidence---Prosecution was required to prove its case against accused beyond any shadow of doubt and the defence version was to be taken into consideration after evaluating the prose-cution evidence to find out, whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b) & 100---Qatl-e-amd---Right of private defence---Appreciation of evidence---Story of prosecution mentioned in F.I.R., was highly improbable and it did not appeal to common sense that when an altercation had taken place between the deceased and co-accused, few days prior to the occurrence, then why the deceased accompanied accused at night time on summoning of said co-accused---Prosecution eye-witnesses, could not explain as to how deceased entered into the room of the house of accused at the odd hours of night---Case of prosecution was that accused inflicted a hatchet blow near the right eye of deceased, but no hatchet was recovered from accused, or from the possession of any co-accused during the investigation---Conflict existed between the medical evidence and the prosecution case as set forth in the F.I.R.---Prosecution witnesses, while making their statements before the Trial Court, did not attribute any specific injury to accused; and they had simply stated that accused had caused hatchet blow on the deceased---Allegedly, blood-stained 'Kassi' and 'bat' were recovered from accused after 29 days of the occurrence, and same were deposited in the office of Chemical Examiner, after more than one month from the

occurrence---Case of prosecution was not that accused had used three different weapons, 'Kassi', 'bat' and 'gun', but there were positive reports of Forensic Science Laboratory, Chemical Examiner and that of Serologist, in respect of said alleged weapons of offence which had spoken volumes against the truthfulness of prosecution case---Said positive reports, were of no avail to the prosecution---Prosecution could not prove any motive against accused---Case against accused was replete with number of doubts---Accused while exercising his right of self-defence, fired with his gun which hit the deceased who was present near the bed of his niece---Case of accused, in circumstances, fell within the four corners of general exceptions as provided under S.100, P.P.C.---Prosecution having failed to prove the case against accused, conviction and sentence of accused passed by the Trial Court was set aside and , he was acquitted of the charge and was released, in circumstances.

Basharat and another v. The State 1995 SCMR 1735; Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 and Muhammad Akram v. The State 2009 SCMR 230 ref.

(c) Criminal trial---

----Medical evidence---Medical evidence, could only indicate that the deceased had lost his life due to certain injuries, but it would not lead to the culprit.

Mursal Kazmi alias Qamar Shah v. The State 2009 SCMR 1410 ref.

(d) Criminal trial---

----Benefit of doubt---If there was a single circumstance which created doubt, regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

(e) Penal Code (XLV of 1860)---

----S. 100---Right of private defence of the body---Extent of---Right of private defence of the body, would extend to the voluntary causing the death of assailant, if assailant would launch an assault, which could reasonably cause the apprehension that grievous hurt would be the consequence of such assault.

(f) Penal Code (XLV of 1860)---

----S. 302(b)---Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-e-amd---Appeal against acquittal---Appreciation of evidence---One of acquitted co-accused

was attributed the role of causing fire arm injury on the person of the deceased, whereas other acquitted co-accused, was assigned the role of inflicting hatchet blows on the person of the deceased, but neither any fire-arm was recovered from the possession of co-accused nor any hatchet was recovered from the other co-accused during the investigation of the case---Prosecution evidence had already been disbelieved by the Trial Court in the case of main accused---High Court while deciding the appeal filed by main accused held that the prosecution story was replete with number of doubts---Question of awarding any conviction and sentence to said acquitted co-accused, would not arise---Appeal against acquittal, was dismissed, in circumstances.

Rana Ijaz Ahmad Khan and Munir Ahmad Khan for Appellant.

Arshad Mehmood, D.P.G. for the State.

Muhammad Ameer Ali for the Complainant.

Date of hearing: 4th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Muhammad Arshad appellant along with two co-accused was tried in case F.I.R. No.457/2007 dated 28-5-2007 offences under sections 302 & 34, P.P.C., registered at Police Station Satiana, District Faisalabad. After conclusion of the trial, the learned trial Court vide its judgment dated 2-7-2008 has convicted and sentenced the appellant as under:-

Muhammad Arshad.

Under section 302(b), P.P.C. to death for committing the murder of Muhammad Nadeem Iqbal deceased. He was directed to pay compensation amount of Rs.1,00,000 (Rupees One Hundred Thousand only) to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to undergo imprisonment for six months.

Through the same judgment the learned trial Court has, however, acquitted Muhammad Afzal and Abdul Qadir accused, while giving benefit of doubt to them.

2. Feeling aggrieved, the appellant Muhammad Arshad has challenged his conviction and sentence through Criminal Appeal No. 1034 of 2008 and Muhammad Mukhtar complainant has filed Criminal Appeal No.840 of 2008 against the acquittal

of Muhammad Afzal and Ghulam Qadir (Abdul Qadir) co-accused, whereas, the learned trial Court transmitted Murder Reference No. 187 of 2008, for confirmation or otherwise of the death sentence of Muhammad Arshad (appellant). We purpose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 2-7-2008 passed by the learned Additional Sessions Judge, Faisalabad.

3. Brief facts of the case as given by the complainant Muhammad Mukhtar (P.W.4) in his written application Exh PE on the basis of which the formal F.I.R. Exh. PE/1 was chalked out are that he (complainant) was resident of Chak No.32/G.B. On 27-5-2007 at about 09:00 p.m., his (complainant's) son namely Muhammad Nadeem Iqbal (deceased) was present in the house. Muhammad Arshad (appellant) called his (complainant's) son Muhammad Nadeem Iqbal (deceased) and said that his brother Afzal had asked him to come. Muhammad Nadeem Iqbal (deceased) went with the appellant, whereas, the complainant slept as usual. At about 02:00 a.m. (night) he (complainant) got up. and saw that the cot of his son Nadeem Iqbal was vacant and he had not yet returned. He (complainant) took along with him Niaz Ahmad (given up P.W.) and Abdul Khaliq (P.W.5) and went to the house of Muhammad Arshad (appellant) in search of Nadeem Iqbal (deceased). They (P.Ws.) heard the noise of hue and cry from the house of Muhammad Aslam. They (P.Ws.) knocked the door and entered inside where they saw that Muhammad Arshad (appellant) armed with hatchet, Ghulam Qadir (since acquitted) armed with fire-arm weapon and Muhammad Afzal (since acquitted) armed with hatchet were beating Muhammad Nadeem Iqbal (deceased). Muhammad Arshad (appellant) inflicted hatchet blow which hit near the left eye of Muhammad Nadeem Iqbal (deceased). Muhammad Afzal accused (since acquitted) inflicted hatchet blow which hit on the head of Nadeem (deceased) whereas Ghulam Qadir made a fire shot which hit on the left arm of Muhammad Nadeem Iqbal (deceased) who while crying fell on the ground. The accused persons, then inflicted further blows with hatchets. Muhammad Nadeem Iqbal succumbed to the injuries at the spot. The accused persons at gun-point did not allow the complainant party to pick up the dead body of the deceased from the place of occurrence. It was further stated that Muhammad Nadeem Iqbhal deceased had a cash amount of Rs. 10,000 and a mobile phone with him.

The motive behind the occurrence as set forth in the F.I.R. (Exh. PE/1) was that few days prior to the occurrence, hot words were exchanged between Muhammad Nadeem Iqbal (deceased) and Muhamad Afzal accused due to the rendition of accounts.

4. The appellant was arrested on 18-6-2007, by Nazir Hussain, S.I. (P.W.10). As per prosecution case, on 25-6-2007 Muhammad Arshad appellant led to the recovery of gun .12 bore (P-14), which was taken into possession vide recovery memo Exh.PM. On the same day Muhammad Arshad (appellant) also led to the recovery of blood-stained 'kassi' (P15) and bat (P-16) which were taken into possession vide recovery memo Exh. PN. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 3-12-2007, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Muhammad Mukhtar, complainant (P.W.4) and Abdul Khaliq (P.W.5) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Farooq Ahmad Kisana (P.W.1). Nazir Hussain, S.I. (P.W.10) is the Investigating Officer of this Case.

Muhammad Younas 1172/C, (P.W.2), Muhammad Aslam (P.W.3), Aurangzeb, Draftsman (P.W.6), Meraj Din, A.S.-I. (P.W.7), Muhammad Yousaf 4052 MHC, (P.W.8), Atta Muhammad, S.I. (P.W.9) and Behwal Sher 2929 (P.W.11) are the formal witnesses. The prosecution also produced documentary evidence in the shape of post mortem report of Muhammad Nadeem Iqbal (deceased) Exh. PA, its pictorial diagrams Exh.PA/1 and Exh.PA/2, injury statement Exh. PB, inquest report Exh. PC, last worn clothes of Muhammad Nadeem Iqbal (deceased) Exh. PD, written complaint by Muhammad Mukhtar complainant Exh. PE, police proceedings on written complaint Exh. PE/2, F.I.R. Exh. PE/1, memo of possession of blood-stained cotton Exh. PF, memo of possession of empty cartridges Exh. PG, memo of possession of bed sheets, pillows, mattress piece, rings, cotton roll of spinning etc. Exh. PH, scaled site plan of the place of occurrence in duplicate Exh. PJ and Exh. PJ/1, site plan of the place of occurrence without scale Exh. PK, memo of possession of pistol 30 bore along with 4 cartridges Exh.PL, memo of possession of gun 12 bore

Exh. PM, site plan without scale of the place of recovery of gun Exh. PM/1, memo of possession of blood-stained `kassi' & bat Exh. PN, report of Chemical Examiner, Punjab, Lahore qua piece of foam etc., Exh. PQ, report of Serologist qua piece of foam, two shawls and two pillows Exh. PQ/1, report of Chemical Examiner, Punjab, Lahore qua 'kassi' and bat Exh. PR, report of Serologist qua cotton Exh. PR/1, report of Chemical Examiner qua 'kassi' and bat Exh.PS, report of Serologist qua 'kassi' and bat Exh.PS/1 and report of Forensic Science Laboratory, Punjab, Lahore qua crime empties Exh. PT and closed its evidence.

6. The statement of the appellant under section 342 Cr.P.C. was recorded by the learned trial Court. He refuted the allegations levelled against him and professed his innocence. He took the plea of self-defence by stating that on the night of occurrence, the deceased entered into his house by scaling over the wall whereupon, he (appellant) raised lalkara. Muhammad Nadeem Iqbal (deceased) then made a fire shot with his pistol at him (appellant) which was missed, whereupon he (appellant), while exercising his right of self defence fired with his gun at the deceased. The appellant further stated that Muhammad Nadeem Iqbal (deceased) came to his house in order to commit zina with his niece Shamila as he (deceased) had developed illicit relations with her. He further stated that he also inflicted injuries with both side of 'kassi' on the person of the deceased as he lost his control on seeing the rings ear tops and hair catcher etc. on the bed of his niece Shamila.

Neither the appellant opted to make statement under section 340 (2) of Cr.P.C, nor he produced any witness in his defence.

7. The learned trial Court vide judgment dated 2-7-2008, found Muhammad Arshad appellant guilty, convicted and sentenced him as mentioned and detailed above.

8. Learned counsel for the appellant in support of this appeal, contends that the appellant has been implicated in the instant case by the complainant after concocting a false story; that true facts have not been mentioned in the F.I.R. by complainant; that in the F.I.R. the complainant has stated that few days earlier there was altercation between the deceased and Muhammad Afzal accused due to rendition of accounts but while appearing before the learned trial Court he did not say anything about the motive; that as a matter of fact, there was no dispute of accounts between the deceased and the accused party; that the story narrated by the complainant is highly improbable and it does not appeal to common sense that at 02:00 a.m. the complainant called his

brother and nephew who lived at a distance of 4 acres from his house to see the occurrence; that the incident took place in the house of the appellant and the version of the appellant is more probable and gets support from the prosecution evidence; that pistol, rings tops, etc. were recovered from the spot and same have also been shown in the site plan which supports the defence plea of the appellant; that alleged recovery of gun from the appellant is immaterial as there is no allegation of making fire shot against the appellant and that evidence cannot be used against the appellant. So far as the recovery of 'kassi' and bat is concerned, learned counsel for the appellant contends that in the F.I.R. it was the allegation that the appellant was armed with hatchet, therefore, there is no corroboration of the prosecution case from the above mentioned alleged recoveries and in the circumstances the appellant is entitled to acquittal; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

9. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that there is absolutely no enmity of the complainant and other witness of the ocular account with the appellant to falsely depose against him; that no enmity was suggested against the complainant and other witnesses who are residents of the same vicinity where the occurrence took place and they are natural witnesses of the incident; that though the police station was at a distance of 4-miles from the place of occurrence but the matter was reported to the police within three hours which clearly established the presence of the complainant and other witnesses at the relevant time at the spot; that the ocular account furnished by the prosecution witnesses is fully supported by the medical evidence available on the record; that prosecution case is further supported by the recovery of gun, bat and 'kassi' from the possession of appellant and positive report of Forensic Science Laboratory; that the reports of Chemical Examiner and that of Serologist qua bat and 'kassi' are also positive; that the appellant neither produced any witness in his defence before the learned trial Court to prove his plea taken in his statement made under section 342, Cr.P.C. nor he made statement under section 340(2), Cr.P.C. and he has not been able to prove his plea; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

So far as acquittal of Muhammad Afzal and Ghulam Qadir (Abdul Qadir) co-accused is concerned, learned counsel for the complainant contends that both the respondents are named in the F.I.R. and specific allegation was levelled against them; that their role in the occurrence has been established through the trustworthy statements of the prosecution witnesses; that opinion of the police about their innocence is immaterial, therefore, they are liable to be convicted and sentenced under section 302(b), P.P.C.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Muhammad Mukhtar, complainant (P.W.4) and Abdul Khaliq (P.W.5), whereas, the other has been brought on the record through the statement of Muhammad Arshad (appellant), recorded under section 342 of Cr.P.C. and suggestions put to the eye-witnesses during their cross-examination.

12. It is settled now by the Hon'ble Supreme Court of Pakistan in number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then

the accused should be convicted for that offence only. In case of counter-versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Amin Ali and another v. The State' (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

13. The ocular account of the prosecution was furnished by Muhammad Mukhtar complainant (P.W.4) and Abdul Khaliq (P.W.5). The examination in chief of Muhammad Mukhtar complainant (P.W.4) is reproduced hereunder:--

On 27-5-2007, at 9:00 p.m. I was present in my house along with my wife Khurshid Bibi, three daughters, and Nadeem deceased my son. Arshad accused summoned my deceased son that Afzal accused is summoning him. When my deceased son left my house a cell phone and cash money Rs.10,000 were with him. I slept and I woke up at 2:00 a.m. on the same night, and I saw that my deceased son was not present on his cot. I worried about non-presence of my deceased son and I approached Niaz my brother and my Bhanja Abdul Khaliq, thereafter, we all went towards the house of the accused Afzal and Arshad accused, we heard hue and cry from the inner side of the house and then we pushed the gate of the house of the accused person. We saw that Arshad and Afzal were causing hatchet blows to my

deceased son. Thereafter, Qadir accused present in the court made firing which hit at the left arm of my deceased son. My deceased son fell down and Arshad and Afzal accused again caused hatchet blows at my deceased son. We tried to apprehend the accused present in the court, but the accused fled away from the place of occurrence. In our view, my son succumbed to the injuries at the spot. I left Niaz and Khaliq with the dead body and I myself proceeded to lodge the report. On the way, I met police official at 32-Adda and I produced written application Exh.PE and the same was read over to me and police official asked me about the affixation of my thumb-impression over the said application and I verified the same situation. Thereafter, I came to the place of occurrence. The police party came at the place of occurrence after my arrival at the spot.

The evidence of other eye-witness namely Abdul Khaliq (P.W.5) is also on the same lines. The place of occurrence is not disputed in this case by the parties, which took place inside the house of the appellant. The occurrence took place at 02:00 a.m. (at night). We have noted that a motive was alleged in the written application Exh. PE moved by the complainant for registration of case which was to the effect that few days earlier to the occurrence, hot words were exchanged between Muhammad Afzal co-accused and Muhammad Nadeem Iqbal (deceased) due to rendition of accounts. According to the prosecution case on 27-5-2007 at 09:00 p.m. Muhammad Arshad (appellant) went to the house of the complainant and asked Muhammad Nadeem Iqbal (deceased) that Muhammad Afzal co-accused was calling him, whereupon Muhammad Nadeem Iqbal (deceased) accompanied him (the appellant). The above mentioned story of the prosecution as set forth in the F.I.R. Exh. PE/1 does not appeal to common sense that when an altercation took place between the deceased and Muhammad Afzal co-accused, few days prior to the occurrence then why Muhammad Nadeem Iqbal (deceased) accompanied Muhammad Arshad (appellant) at night time (09:00 p.m.) on the summoning of Muhammad Afzal co-accused. It does not appeal to the mind of a prudent person that a father would allow his son to go to the house of a person at night time when an altercation of his son took place with him few days prior to the occurrence. As story of the prosecution mentioned in the F.I.R. was highly improbable, therefore, the above mentioned eye-witnesses did not disclose any motive while making their statements before the learned trial Court. It is also not convincing that the deceased left his house at 9:00 p.m. with the appellant and in spite of the above mentioned strained relationship between the deceased and the accused

party, the complainant did not inquire about his son till 02:00 a.m. (night) and thereafter he proceeded to the house of the accused party.

The occurrence admittedly took place inside the house of the appellant. It is evident from the perusal of the site plan Exh. PJ that the dead body of Muhammad Nadeem Iqbal (deceased) was lying inside the room of the house of the appellant. The Investigating Officer also took into possession from the spot, the blood-stained chadar (bed sheets) (P-10), pillow (P-9) and piece of mattress (P-8) vide memo Exh. PH. The prosecution eye-witnesses could not explain as to how Muhammad Nadeem Iqbal (deceased) entered inside the room of the house of the appellant at the odd hours of night. It was case of the prosecution in the F.I.R. Exh.PE/l that the accused party at gun-point did not allow the complainant to lift the dead body of Muhammad Nadeem Iqbal (deceased) but Muhammad Mukhtar complainant (P.W.4) while appearing in the witness box before the learned trial Court has stated that they (P.Ws.) tried to apprehend the accused persons at the time of occurrence but they (accused persons) fled away from the spot. It was so mentioned in the F.I.R. that when the complainant and P.Ws. reached near the house of the appellant, they heard the noise of shrieks from the house of the appellant, whereupon they knocked the door of the house and thereafter they entered inside the said house and witnessed the occurrence. It is not natural that the complainant who was in search of his son, after hearing the shrieks coming out of the house of the appellant would first knock the door of his house and then he would enter inside it. As the above mentioned story of knocking the door of the appellant was highly unnatural, therefore, the complainant Muhammad Mukhtar (P.W.4) while making his statement before the learned trial Court did not mention that on hearing the shrieks from the house of the appellant he knocked the door of his (appellant's) house, rather he stated that on hearing the hue and cry they, P.Ws. pushed the house of the accused persons. The complainant was confronted with his previous statement Exh. PE and the improvements made by him in this regard and the fact of knocking the door of the appellant was brought on the record. The relevant part of his statement in the cross-examination reads as under:-

'I have stated before the police that we pushed the gate of the house (confronted with Exh. PE where not so recorded.) I have stated before the police that we knocked the door and then entered into the house,'

It is also not understandable that when the accused persons took Muhammad Nadeem Iqbal (deceased) to their house on 27-5-2007 at 09:00 p.m. (night) then whey they kept on waiting till 2:00 a. m. (night) to commit the murder of the deceased. The Investigating Officer Nazir Hussain, S.I. (P.W.-10) has also stated in his examination-in-chief that at the time of spot inspection he took into possession pistol .30 bore (P-12) along with four live bullets (P-13/1-4) vide recovery memo Exh. PL attested by the P.Ws. The said bullets and live bullets were taken into possession from the place of occurrence but the prosecution has not given any explanation regarding the presence of above mentioned weapon and ammunition near the dead body of Muhammad Nadeem Iqbal (deceased). The recovery memo Exh. PL of the above mentioned pistol (P-12) and four live bullets (P-13/1-4) was attested by Abdul Khaliq (P.W.5) but the said witness did not utter a single word about the recovery of pistol (P-12) and four live bullets (P-13/1-4) and recovery memo Exh.PL in his examination-in-chief. The said memo was put to the above mentioned witness but he disowned his attestation on the said memo. However, as mentioned earlier the prosecution other witness Nazir Hussain, S.I. (P.W.10) has stated in his examination-in-chief that pistol (P-12) along with four live bullets (P-13/1-4) were recovered from the place of occurrence vide memo Exh. PL attested by P.Ws. The said witness was not declared hostile by the prosecution.

14. In the F.I.R. Exh.PE/1, it was case of the prosecution that the appellant inflicted a hatchet blow near the right eye of Muhammad Nadeem Iqbal (deceased) but no hatchet was recovered from the appellant or from the possession of any co-accused during the investigation. Although, there is an incised wound on the left fore head of Muhammad Nadeem Iqbal (deceased) but it was not alleged in the F.I.R. Exh. PE/1 that the hatchet blow of the appellant landed on the forehead of the deceased rather it was stated that the hatchet blow inflicted by the appellant landed near the left eye of the deceased. The injury below the left eye of the deceased i.e. Injury No. 5 as per medical evidence furnished by Doctor Farooq Ahmad Kisana (P.W.I) was a lacerated wound which was caused by a blunt weapon and as such there was conflict between the medical evidence and the prosecution case as set forth in the F.I.R. As the eye-witnesses of the prosecution witnesses namely Muhammad Mukhtar (P.W.4) and Abdul Khaliq (P.W.5) were aware of the above mentioned conflict between the prosecution story narrated in the F.I.R. and the medical evidence, therefore, while making their statements before the learned trial Court they did not attribute any

specific injury to the appellant and they simply stated that the appellant caused hatchet blows to the deceased.

15. As mentioned earlier the appellant was assigned the role of inflicting hatchet blows on the person of Muhammad Nadeem Iqbal (deceased) but no hatchet was recovered during his physical remand rather a blood-stained 'kassi' (P-15), blood-stained bat (P-16) and gun .12 bore (P-14) were allegedly recovered from the possession of the appellant. Insofar as the recovery of blood-stained `kassi' (P-15) and blood-stained bat (P-16) is concerned, we have noted that none of the prosecution witnesses levelled this allegation against the appellant that he used `kassi' or bat during the occurrence. The occurrence in this case took place on 27-5-2007. The appellant was arrested by Nazir Hussain, S.I. (P.W.10) on 18-6-2007 whereas blood-stained 'kassi' (P-15) and blood-stained hat (P-16) were allegedly recovered from his possession on 25-6-2007. The said articles were deposited in the office of Chemical Examiner on 3-7-2007 i.e. after about 36 days of the occurrence. As mentioned earlier the appellant was arrested in this case after about 22 days from the occurrence, therefore, it does not appeal to the mind of a prudent person that he would keep the blood-stained weapon intact for such a long period because he had ample opportunity during the above mentioned period to wash away the blood from the above mentioned weapons. The Hon'ble Supreme Court of Pakistan in the case of Basharat and another v. The State' (1995 SCMR 1735) disbelieved the evidence of blood-stained Chhurri which was allegedly recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:-

"11. The occurrence took place on 20-4-1988. Basharat appellant was arrested on 28-4-1988. The blood-stained Chhuri was allegedly recovered from his house on 30-4-1988. It is not believable that he would have kept blood-stained chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it"

As mentioned earlier `kassi' (P-15) and bat (P16) were allegedly recovered from the appellant after about 29 days from the occurrence and these were deposited in the office of Chemical Examiner, after more than one month from the occurrence, therefore, it was unlikely that the blood on the `kassi' (P-15) and bat (P-16) would not disintegrate during the above mentioned period. The Hon'ble Supreme Court of

Pakistan in the case of 'Muhammad Jamil v. Muhammad Akram and others' (2009 SCMR 120) has held that recovery of blood-stained Chhuri has been effected after about one month from the occurrence, it was not likely that the blood would not disintegrate in the meanwhile.

Insofar as recovery of gun 12 bore (P-14) from the possession of the appellant and positive report of Forensic Science Laboratory Exh. PT is concerned, we have noted that it was neither the case of prosecution in the F.I.R. Exh. PE/1 nor it was stated by any eye-witness of the prosecution before the learned trial Court that the appellant used gun .12 bore (P-14) at the time of occurrence rather it was alleged in the F.I.R., as well as, in the statements of the above mentioned prosecution witnesses before the learned trial Court that Ghulam Qadir co-accused made fire shot at the deceased. As it was not the case of prosecution that the appellant used any fire-arm during the occurrence. Even otherwise, it was not the case of prosecution that the appellant used three different weapons, 'kassi' bat and gun at the time of occurrence but in-spite of that, the alleged recoveries of blood-stained `kassi' (P-15) blood-stained bat (P-16) and gun .12 bore (P-14) from the possession of appellant and positive reports of Forensic Science Libratory Exh. PT, Chemical Examiner and that of Serologist Exh. PS and Exh.PS/1, speak volumes against the truthfulness of prosecution case. We are, therefore, of the view that the alleged recoveries of blood-stained 'kassi' (P-15) blood-stained bat (P-16) and gun 12 bore (P-14) from the possession of the appellant and positive reports of Forensic Science Libratory Exh. PT, Chemical Examiner Exh.PS and Serologist Exh.PS/1 are of no avail to the prosecution.

16. In so far as the motive behind the occurrence is concerned, as mentioned earlier the motive as set forth in the F.I.R. Exh. PE/1 was that an altercation took place between the deceased and Muhammad Afzal co-accused due to rendition of accounts. No specific date, time and place of alleged altercation was mentioned in the F.I.R. None of the prosecution witnesses has uttered a single word about the motive before the learned trial Court. No motive was put to the appellant in his statement recorded under section 342, Cr.P.C. We are, therefore, of the view that the prosecution could not prove any motive against the appellant in this case.

17. Insofar as the medical evidence furnished by the prosecution is concerned it is by now well-settled law that medical evidence can only indicate that the deceased had

lost his life due to certain injuries but it does not lead to the culprit. Reference in this respect may be made to the case of `Mursal Kazmi ailas Wamar Shah v. The State' (2009 SCMR 1410).

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused whereas, the instant case is replete with number of doubts. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court Pakistan, at page 1347, was pleased to observe as under:--

'5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

"13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. Now coming to the plea taken by the appellant in his statement recorded under section 342, Cr.P.C. we have noted that while answering to question "Why the present case has been registered against you and why the P.Ws. have deposed against you?" the appellant took the following plea:-

"The P.Ws. are related inter se and deposed against me falsely to strengthen the prosecution case. In fact at the time of occurrence, my brother Afzal was present in

the fields to irrigate the land and my other brother Abdul Qadir was present at his poultry farm. I hade wit yet left the house for irrigating the land and was sleeping in my house and I heard some noise at about 12 night upon which, I woke up and saw that Nadeem Iqbal deceased was present near the bed of my niece Shamila, Student of 7th class. I felt Nadeem Iqbal deceased as thief who had entered into our house by scaling over the wall and I raised lalkara upon which Nadeem Iqbal deceased made a fire shot with his pistol which was missed. I while, exercising my right of self-defence fired with gun which hit the deceased who was present near the bed of Shamil, when I came near the deceased, I found that Nadeem Iqbal deceased came into my house by scaling over the wall with the intention to commit Zina with Shamila as he had developed the illicit relations with Shamila and I found finger rings, hair catchers ear tops etc. on the bed of Shamila on which I enraged and lost my self control and under grave and sudden provocation inflicted injuries with both sides of kassi. The complainant and P.Ws. were not present there at the time and place of occurrence. I am innocent as I had not committed any offence. The prosecution story found false during investigation and my version was found correct during all the investigations carried out by different police officers."

The appellant took the plea that on the night of occurrence, Muhammad Nadeem Iqbal (deceased) entered his house by scaling over the wall and he took him (deceased) as a thief and raised lalkara', whereupon, Muhammad Nadeem Iqbal (deceased) made a fire shot with his pistol but the same did not hit him. He (appellant) while exercising his right of self-defence fired with his gun which hit the deceased who was present near the bed of his niece Shamila. He further stated that he found rings, hair catchers, ear tops etc. on the bed of his niece Shamila due to which he lost his self control and inflicted further injuries on the person of the deceased with both sides of 'kassi'. As mentioned earlier, the Investigating Officer also recovered pistol .30 bore (P-12) and four live bullets (P-13/1-4) Exh.PL. He also secured from the spot four finger rings (P-4/1-4), two nose pins (P-5), two ear tops (P-6/ 1-2), hair catcher (P-7) vide memo Exh.PH.

However, as we have already disbelieved the prosecution evidence, therefore, there is no need to discuss the above mentioned plea of the appellant which he took in his statement recorded under section 342, Cr.P.C. Even otherwise we have already discarded the prosecution evidence, therefore, while scrutinizing the statement of the

appellant this Court has to accept or reject the said statement in toto. According to the appellant, Muhammad Nadeem Iqbal (deceased) entered his house by scaling over the wall and he took him the (deceased) as a thief and raised a lalkara', whereupon, Muhammad Nadeem Iqbal (deceased) made a fire shot with his pistol but the same did not hit him. He (appellant) while exercising his right of self defence fired with his gun which hit the deceased who was present near the bed of his niece Shamila. He further stated that he found rings, hair catchers, ear tops etc. on the bed of Shamila due to which he lost his self control and inflicted further injuries on the person of the deceased with both sides of `kassi', thus in such situation, the appellant had the right of private defence of his body which also extends to cause death of the assailant as provided under section 100 of P.P.C. which is reproduced hereunder:-

`100. When the right of private defence of the body extends to causing death.--- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

Firstly. Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. ……;

Fourthly. ……;

Fifthly. ……;

Sixthly. ……;

It is evident from the perusal of section 100 (secondly) P.P.C. that the right of private defence of the body will extend to the voluntary causing the death of the assailant, if the assailant launches an assault which may reasonably cause the apprehension that grievous hurt will be the consequence of such assault, whereas, in the instant case Muhammad Nadeem Iqbal (deceased) entered in the house of the appellant at midnight (2:00 a.m.) while scaling over the wall and he (appellant) took him (the deceased) as a thief and raised lalkara', whereupon, Muhammad Nadeem Iqbal (deceased) made a fire shot with his pistol but the same did not hit him. He

(appellant) while exercising his right of self defence fired with his gun which hit the deceased who was present near the bed of his niece Shamila. The case of the appellant, therefore, squarely falls within the four corners of general exception as provided under section 100 (secondly). P.P.C.

20. In the light of above discussion, we accept the Criminal Appeal No.1034 of 2008 filed by Muhammad Arshad appellant, set aside the impugned judgment dated 2-7-2008 passed by learned Additional Sessions Judge, Faisalabad. Resultantly the conviction and sentence of the appellant is set aside and he is acquitted from the charge. He is in custody, he be released forthwith if not required in any other case.

21. Murder Reference No. 187 of 2008 is, therefore, answered in the NEGATIVE and the sentence of death of Muhammad Arshad (convict) is NOT CONFIRMED.

Now coming to Criminal Appeal No.840 of 2008 filed by the complainant against the acquittal of Muhammad Afzal and Ghulam Qadir respondents, we have noted that Ghulam Qadir accused/ respondent was attributed the role of causing fire arm injury on the person of Muhammad Nadeem Iqbal (deceased), whereas Muhammad Afzal accused/ respondent was assigned the role of inflicting hatchet blows on the person of the deceased but neither any fire arm was recovered from the possession of Ghulam Qadir nor any hatchet was recovered from the possession of Muhammad Afzal accused/respondent during the investigation of this case. We have already disbelieved the prosecution evidence after detailed scrutiny while discussing the case of co-accused of the appellant namely Muhammad Arshad. We have held while deciding the appeal filed by Muhammad Arshad that the prosecution story is replete with number of doubts, therefore, the question of awarding any conviction and sentence to Ghulam Qadir and Muhammad Afzal accused/ respondents, does not arise.

23. In the light of above discussion we are of the view that Muhammad Afzal and Ghulam Qadir respondents have rightly been acquitted by the learned trial Court, therefore, Criminal Appeal No. 840 of 2008 is hereby dismissed in limine.

HBT/M-176/L **Order accordingly.**

2014 Y L R 1102

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD SHEHZAD alias SAHIBA and another---Appellants

Versus

THE STATE---Respondent

Criminal Appeals Nos.310-J and 311-J of 2007, and Murder Reference No.14 of 2008, heard on 28th May, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 324 & 34---Qatl-e-amd, attempt to commit qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Accused were not named in the F.I.R.---Sufficient description of the unknown accused persons who committed the offence were neither mentioned in the F.I.R. nor in the supplementary statement of the complainant---No role whatsoever during the occurrence was attributed to accused persons by the eye-witnesses which was serious defect in the prosecution case---Eye-witnesses were not residents of the village where occurrence had taken place, but were residents of different village; both were chance witnesses---Star witness of the prosecution, who was injured during the occurrence, did not identify accused persons during identification parades--- Identification parade of accused persons was held 12 days after occurrence---Identification of accused persons through identification parade by witnesses, was not worthy of reliance, in circumstances---Intrinsic value of the evidence of an injured eye-witness was to be seen, and mere injuries on the person of a witness, did not mean that he was telling the whole truth---Witnesses who identified accused persons had brought accused persons to the place of occurrence on a motorcycle---Said witnesses did not nominate accused persons in their statements recorded by the Police and did not take part in the proceedings of identification parade---Accused persons being completely strangers to said witnesses, their identification in the court by said witnesses, was of no avail to prosecution---Evidence of Foot Tracker was a weak type of evidence---Story regarding snatching of cash amount and mobile phones by accused persons was introduced by the complainant through his supplementary statement---No denomination or any specific identification mark on the currency notes, or on the mobile phones which were allegedly looted during the occurrence, were mentioned in the supplementary

statement---Alleged recoveries of mobile phone and cash amount from the possession of accused persons, was of no avail to the prosecution, in circumstances---Empties were sent to the office of Forensic Science Laboratory after about 15 days from the arrest of accused persons---Possibility could not be ruled out that false empties were prepared from pistols and were sent to the Office of Forensic Science Laboratory for their comparison with the said pistols; and Police had fictitiously shown the recoveries of pistols to strengthen the prosecution case---Prosecution evidence qua recoveries of pistol and positive report of Forensic Science Laboratory was not safe to rely, in circumstances and accused could not be convicted merely on the basis of evidence of alleged recoveries---Prosecution having failed to prove its case against accused persons beyond shadow of doubt, convictions and sentences recorded by the Trial Court against accused persons, were set aside---Accused were acquitted of the charge by extending them the benefit of doubt and were released, in circumstances.

State through Advocate-General, Sindh, Karachi v. Farman Hussain and others PLD 1995 SC 1; Sabir Ali alias Fauji v. The State 2011 SCMR 563; Muhammad Pervez and others v. The State and others 2007 SCMR 670; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756; Nek Muhammad and another v. The State PLD 1995 SC 516; Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 ref.

(b) Criminal trial---

----Medical evidence---Medical evidence was a type of supporting evidence, which could confirm the ocular account with regard to the receipt of injuries, nature of injuries, kind of weapons used in the occurrence, but would not identify the assailants.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 ref.

(c) Criminal trial---

----Benefit of doubt---If there was a single circumstance which created doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Tariq Pervez v. The State 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Haider Rasool Mirza for Appellants.

Mirza Abid Majeed, D.P.G. for the State.

Muhammad Afzal Shad for the Complainant.

Date of hearing: 28th May, 2013.

JUDGMENT

MALIK SHAHZAD AHMED KHAN, J.---This judgment shall dispose of Criminal Appeal No. 310-J of 2007 filed by Muhammad Shehzad alias Sahiba appellant, Criminal Appeal No. 311-J of 2007 filed by Imran alias Shani appellant and Murder Reference No. 14 of 2008, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Shehzad alias Sahiba and Imran alias Shani, appellants, as all these matters have arisen out of the same judgment dated 6-12-2007, passed by the learned Additional Sessions Judge, Shorekot District Jhang, in case F.I.R. No.637 dated 26-9-2007 registered at Police Station Shorkot City District Jhang in respect of the offences under sections 302/324/34, P.P.C. (sections 392/ 109/411 P.P.C. were added in the charge) whereby, Muhammad Shehzad alias Sahiba and Imran alias Shani, appellants were convicted under section 302(b)/34 of P.P.C. for committing the murder of Muhammad Akram, deceased and sentenced to death. They were further directed to pay Rs.1,00,000/(Rupees One Hundred Thousand only) each as compensation to the legal heirs of the deceased as required under section 544-A of Cr.P.C., failing which they would further undergo six months' S.I. each. The above-mentioned appellants were also convicted under section 324/34 of P.P.C. for committing the murderous assault upon Muhammad Asghar and sentenced to ten years' rigorous imprisonment each with fine of Rs.50,000/ each and in case of default in payment of fine, both the convicts Muhammad Shehzad alias Sahiba and Imran alias Shani were ordered to further undergo six months' S.I. each. Benefit of section 382-B, Cr.P.C. was awarded to both the appellants/convicts in accordance with law.

2. Brief facts of the case as given by the complainant Muhammad Ashraf (P.W. 16) in his Fard Biyan' Exh.P-A on the basis whereof the formal F.I.R. Exh.P-A/1 was recorded, are that on 26-9-2007 at about 6:30 p.m. his (complainant's) brother namely Muhammad Akram constable (deceased) and Muhammad Ashgar (P.W.14) were

coming on their motorcycle towards their house situated in Chak No. 8 Gagh and when they reached at Link Road near Behari Colony two unknown young accused persons while armed with fire-arm weapons wearing Shalwar Qameez (later on their names were disclosed as Muhammad Shehzad and Imran appellants) emerged from the reed bushes and both of the accused persons started indiscriminate firing at Muhammad Akram (deceased) and Muhammad Asghar (P.W. 14), as a result of which Muhammad Akram received injuries on the right and left side of his neck, shoulder, left side of chest, right thigh, back and right foot. Muhammad Asghar, (P.W.14) also received injuries on the right wrist and both sides of the belly. Both Muhammad Akram deceased and Muhammad Asghar (P.W.14) fell down from the motorcycle. Thereafter the accused managed to escape. The complainant alongwith Muhammad Ramzan (given up P.W.) and Muhammad Ejaz Tahir (P.W.15) who were also coming after their brothers towards Chak No.8 Ghagh on their motorcycle, witnessed the occurrence at some distance. They attended Muhammad Akram but he succumbed to the injuries at the spot while Muhammad Asghar injured P.W. was brought to THQ Hospital Shorkot from where he was referred to Allied Hospital Faisalabad. The complainant left behind Muhammad Ramzan (given up P.W.) and Muhammad Ejaz Tahir (P.W.15) to guard the dead body of Muhammad Akram deceased and went to the police station for registration of the case. On the same day i.e. 26-9-2007, the complainant moved an application (Exh. PS) for recording of his supplementary statement. In his said application/supplementary statement the complainant alleged that he was perturbed at the time of registration of the F.I.R., therefore, he could not state that at the time of occurrence two unknown accused persons also snatched mobile phone SONY ERICSON Sim No. 0302-7501188 and an amount of Rs.3,600 from Muhammad Akram (deceased) and a mobile phone NOKIA Sim No. 0300-6505767 and an amount of Rs.720 from Muhammad Asghar (P.W.14). It was further alleged in the said supplementary statement (Exh. PS) that about two hours prior to the occurrence Muhammad Ashfaq (given up P.W.) and Muhammad Ashraf (P.W.11) witnessed Haider accused (since proclaimed offender) who was bringing two unknown accused persons on his motorcycle towards the place of occurrence and immediately after the occurrence the said two un known accused persons fled away from the spot on the motorcycle of Muhammad Mansha accused (since proclaimed offender) who were seen by Muhammad Mushtaq (given up P.W.) and Inayat Ali (P.W.12) at the Link Road of Chak No.7/Ghagh. It was also alleged that the unknown accused persons stayed at the residence of Haider accused (since

proclaimed offender) and Muhammad Mansha accused (since proclaimed offender) on the night preceding to the occurrence, therefore, Haider and Mansha accused (since proclaimed offenders) had abetted the offence.

3. The appellants were arrested on 30-9-2007 by Muhammad Riaz, Inspector (P.W.17). On 8-10-2007 identification parade of the appellants was got conducted within the premises of District Jail, Jhang, who were identified by Muhammad Ashraf complainant (P.W.16), Muhammad Ijaz Tahir (P.W.15) and Muhammad Ramzan (given up P.W.). On 11-10-2007 statement under section 161 of Cr.P.C. of Asghar injured P.W. was recorded. On 16-10-2007 the appellant Shehzad led to the recovery of pistol (P-6), mobile phone (P-7) and cash amount of Rs.3,600 (P-8), which were taken into possession vide recovery memo Exh.PO. On the same day, the appellant Imran alias Shani led to the recovery of pistol (P-9), which was taken into possession vide recovery memo Exh.PP. On the same day the said appellant also led to the recovery of pistol .30 bore (P-10) which was taken into possession vide recovery memo Exh. PQ. The said appellant also further led to the recovery of mobile phone (P-11) and cash amount of Rs.720 (P-12) which were taken into possession vide recovery memo Exh.PR. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants, on 15-11-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced seventeen witnesses, during the trial. Muhammad Ashraf, complainant (P.W.16), Muhammad Ijaz Tahir (P.W.-15) and Muhammad Asghar (P.W.14) are the witnesses of ocular account. Muhammad Ashraf (P.W.11) is the witness who had seen two unknown accused persons (the appellants) two hours prior to the occurrence while going alongwith Haider accused (proclaimed offender) on a motorcycle towards the place of occurrence. Inayat Ali (P.W.12) is the witness, who had seen two unknown accused persons (the appellants) after the occurrence while fleeing away in the company of Muhammad Mansha (since proclaimed offender).

The medical evidence was furnished by Dr. Muhammad Zafar Iqbal, (P.W.9) and Dr. Muhammad Hashir, (P.W.7). Muhammad Ashraf, (P.W.16) is also the witness of recovery of Motorcycle bearing Registration No.3656/MNY (P-4), mouser pistol .30 bore (P-6) mobile phone (P-7), cash amount (P-8) from the possession of Shehzad

(appellant), pistols .30 bore (P-9 & P-10) cash amount of Rs.3,600 (P-8) and mobile phone NOKIA (P-11) from the possession of Imran alias Shani (appellant). Muhammad Riaz, Inspector (P.W.17) is the Investigating Officer of this case.

Muhammad Riaz Bhatti, Civil Judge/Judicial Magistrate (P.W.13) has supervised the proceedings of identification parade within the premises of District Jail, Jhang.

Muhammad Shakeel Anjum, MHC 424 (P.W.1), Muhammad Arshad Khan, MHC 1022, (P.W.2), Allah Ditta Constable 1539, (P.W.3), Muhammad Arif, A.S.-I. (P.W.4), Jan Muhammad, Draftsman (P.W.5), Akbar Ali Constable 406 (P.W.6), Muhammad Akbar HC 555 (P.W.8) and Amjad Ali (P.W.10) are the formal witnesses. The prosecution also produced documentary evidence in the shape of 'Fard Biyan' of Muhammad Ashraf complainant (P.W.16) Exh. PA, F.I.R. Exh. PA/1, memo of possession of the moulds of foot prints Exh. PB to Exh. PD, scaled site plan of the place of occurrence in duplicate Exh. PE and Exh. PE/1, memo of possession of last worn clothes of the deceased Exh. PF, Medico-legal Report of Muhammad Asghar (P.W.14) Exh. PG, pictorial diagram Exh. PG/1, injury statement of Muhammad Asghar (P.W.14) Exh. PG/2, post mortem report of Muhammad Akram (deceased) Exh. PH, pictorial diagrams Exh. PH/1 and Exh. PH/2, injury statement of the deceased Exh. PJ, inquest report Exh. PK, memo of possession of blood-stained earth Exh. PL, report of Chemical Examiner Exh. PL/1, report of Serologist Exh. PL/2, application for conducting identification parade Exh. PM, memo of possession of 10 crime empties Exh. PMM, proceedings of identification parade Exh. PN to Exh. PN/3, memo of possession of motorcycle (P-4) bearing Registration No. 3656/MNY Exh. PN, memo of possession of pistol .30 bore etc. Exh. PO, memo of possession of mobile phone (SONY ERICSON) and cash amount of Rs. 3,600/Exh. PO, memo of possession of pistol (P-9) from Imran alias Shani appellant Exh. PP, memo of possession of second pistol 30 bore (P-10) from Imran alias Shani appellant Exh. PQ, memo of possession of mobile phone NOKIA and cash amounting to Rs.720/from Imran alias Shani appellant Exh.PR, application for recording supplementary statement of the complainant Exh. PS, memo of possession of clothes of injured Muhammad Asghar (P.W.14) Exh. PT, rough site plan of the place of occurrence Exh. PU, application for summoning of accused persons Exh. PV, rough site plan of the place of recovery of pistol and mobile phone etc. from Muhammad Shahzad appellant Exh.P.W., rough site plan of the place of recovery of pistol etc. from Imran alias Shani appellant Exh. PX, rough site plan of the place of recovery of pistol etc. from Imran alias Shani appellant Exh. PY, report on warrants of arrest of Haider

accused (since proclaimed offender) Exh. PZ, report on warrants of arrest of Muhammad Mansha accused (since proclaimed offender) Exh. PZ/1, application for warrants of arrest Exh. PZ/2, proclamation under sections 87/88 Cr.P.C. against Muhammad Mansha accused (proclaimed offender) Exh. PAA/1, proclamation under sections 87/88 Cr.P.C. against Haider accused (since proclaimed offender) Exh. PAA, application for proclamation under section 87/88 Cr.P.C. against Haider and Mansha (proclaimed offenders) Exh. PAA/2, report of Forensic Science Laboratory, Punjab, Lahore Exh. PBB and closed its evidence.

5. The statements of the appellants under section 342 Cr.P.C. were recorded. While answering to question that "Why this case against you and why the PWs have deposed against you" the appellants replied as under:--

Muhammad Shehzad alias Sahiba.

"I was involved in this case falsely. In fact Muhammad Akram deceased was the employee of Security Branch of Police Station Shorkot City and often report about the activities of the fanatic groups, on which the police took action against them and from those persons some one committed his murder and injured his brother. The case was registered against unknown persons. As Muhammad Akram deceased was the police official, so the police in order to show his efficiency arrested me and my co-accused from Kashmir Sugar Mills where we were working at hotel, police tortured us and challan me and my co-accused mala fidely. P.Ws. are related inter se, so they falsely deposed against me and my co-accused."

Imran alias Shani.

"I was involved in this case falsely. In fact Muhammad Akram deceased was the employee of Security Branch of Police Station Shorkot City and often report about the activities of the fanatic groups, on which the police took action against them and from those persons some one committed his murder and injured his brother. The case was registered against unknown persons. As Muhammad Akram deceased was the police official, so the police in order to show his efficiency arrested me and my co-accused from Kashmir Suger Mills where we were working at hotel, police tortured us and challaned me and my co-accused malafidely. P.Ws. are related inter se, so they falsely deposed against me and my co-accused."

6. The learned trial Court vide judgment dated 6-12-2007, found Muhammad Shehzad alias Sahiba and Imran alias Shani (appellants) guilty and convicted and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants, in support of this appeal, contends that both the appellants have falsely been implicated in this case; that the appellants were not named in the F.I.R. and no exact description of the accused such as colour, tentative ages and height etc. is mentioned therein and identification parade conducted under the supervision of P.W.13 carries no value for the reason that the witnesses i.e. Muhammad Ijaz Tahir (P.W.15) and Muhammad Ashraf (P.W.16) participated in the identification parade but no role whatsoever during the occurrence was attributed to the appellants; that the complainant after registration of the case made his supplementary statement wherein he has stated that both the unknown accused persons were brought at the spot by Haider (proclaimed offender) and they were seen by Muhammad Ashraf (P.W.11) and after the occurrence Muhammad Mansha (proclaimed offender) facilitated the aforesaid unknown accused persons in fleeing away from the place of occurrence which was seen by Inayat Ali (P.W.12) but even in the said supplementary statement the appellants were not named by the complainant; that the injured in this case was Muhammad Asghar (P.W.14) but he did not participate in the identification parade and there is no reason for his non-participation in the identification parade; that the Investigating Officer (P.W.17) went to the Allied Hospital on 28-9-2007 and thereafter on 11-9-2007 he recorded the statement of injured Muhammad Asghar (P.W.14) and the Doctor has not stated that at the time of identification parade, the injured Muhammad Asghar (P.W.14) was not in a position to participate in the identification parade and there is nothing on the record that the injured was not in a position to take part in the identification parade; that it is the case of complainant and other eye-witnesses of the ocular account that they took the injured to the Hospital which is belied by the Medico-legal Report of Muhammad Asghar (P.W.14) Exh. PG as in the column of 'Name of relative or friend' it is mentioned that the injured was brought by the police; that the recovery of pistols and positive report of Forensic Science Laboratory are inconsequential as the empties were recovered on 26-9-2007, appellants were also arrested on 26-9-2007 but their arrest has fictitiously been shown on 30-9-2007 by the Investigating Officer, however, empties were sent to the office of Forensic Science Laboratory on 11-10-2007; that it was not mentioned in the F.I.R. regarding snatching of any article from the deceased and injured and this story was introduced during the supplementary

statement of the complainant; that though charge was framed against the appellants under sections 392 and 411, P.P.C. but they were not convicted and sentenced for the said charge; that even otherwise no specific identification marks on the currency notes and mobile phones were mentioned in the supplementary statement of the complainant; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charges.

8. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that there was absolutely no enmity of the complainant and other eye-witnesses for the false implication of the appellants in this case; that the appellants have correctly been identified by three eye-witnesses namely Muhammad Ashraf complainant (P.W.16), Muhammad Ramzan (given up PW) and Muhammad Ijaz Tahir (P.W.15) during the identification parade which was conducted under the supervision of learned Judicial Magistrate section 30 (P.W.13); that the injured did not participate in the identification parade as he was not in a position to participate in the identification parade as according to the Doctor Muhammad Hashir (P.W.7) the injured was unconscious at the time of his medical examination; that apart from the eye-witnesses the prosecution has also produced two witnesses namely Muhammad Ashraf (P.W.11) and Inayat Ali (P.W.12) who have stated that they saw the appellants on a motorcycle alongwith Haider accused (since proclaimed offender) while going to the place of occurrence and leaving from the place of occurrence in the company of Muhammad Mansha accused (since proclaimed offender); that the prosecution case is corroborated by the recovery of mobile phones and cash amount from the possession of the appellants; that the prosecution case is further corroborated by the recoveries of pistols from the possession of the appellants and positive report of Forensic Science Laboratory; that the prosecution case also gets support from the evidence of Muhammad Akbar, HC No.555 foot tracker (P.W.8); that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellants and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. The detail of the prosecution case as set forth in the F.I.R. (Exh. PA/1) and in the supplementary statement of the complainant (Exh. PS) has already been given in para No. 2 of this judgment, therefore, there is no need to repeat the same.

The occurrence in this case took place on 26-9-2007 at about 06:30 p.m. The matter was reported to the police by Muhammad Ashraf complainant (P.W.16) on the same evening at about 07:45 p.m. and the formal F.I.R. (Exh.PA/1) was also lodged on the same evening at 07:50 p.m. It is noteworthy that the appellants were not named in the F.I.R. The complainant Muhammad Ashraf (P.W.16) got recorded his supplementary statement (Exh. PS) on the day of occurrence i.e. 26-9-2007 but even in his said statement he did not name the appellants, though he nominated two other co-accused namely Haider son of Shamas-ud-Din (since proclaimed offender) and Muhammad Mansha son of Shamas-ud-Din (since proclaimed offender) with the allegation that Haider accused (since proclaimed offender) brought two unknown accused persons on his motorcycle to the place of occurrence and after the occurrence, Muhammad Mansha accused (since proclaimed offender) facilitated the afore mentioned two un known accused persons in fleeing away from the spot on his motorcycle. We have noted that sufficient description of the unknown accused persons who committed the occurrence was neither mentioned in the F.I.R. (Exh. PA/1) nor in the supplementary statement of the complainant (Exh. PS) and it was simply mentioned in the F.I.R. that two unknown accused persons who were of young age and wearing `shalwar qameez' have committed the occurrence. As sufficient description of the appellants was neither mentioned by the complainant Muhammad Ashraf (P.W.16) in the F.I.R. (Exh. PA/1) or in his supplementary statement (Exh. PS) nor by the other eye-witness namely Muhammad Ijaz Tahir (P.W.15) in his statement before the police, therefore, their identification through identification parade by the above mentioned witnesses is not worthy of reliance. We may refer the case of 'State through Advocate-General, Sindh, Karachi v. Farman Hussain and others' (PLD 1995 Supreme Court 1) wherein at page 13 the Hon'ble Supreme Court of Pakistan has held as under:--

'In any case to say that one was in pant and shirt and two were in shalwar-qameez is not the description, which can be helpful at the time of identification parade.'

Similarly in the case of `Sabir Ali alias Fauji v. The State' (2011 SCMR 563) the Hon'ble Supreme Court of Pakistan at page 570 was pleased to observe as under:--

'.....It is also settled principle that identification test is of no value when description/feature of accused is not given in the contents of the F.I.R. It appears from the record that accused persons are complete strangers to the prosecution witnesses, therefore, in the absence of description in the contents of F.I.R., the benefit of doubt be given to the accused persons…."

We have also gone through the report Exh. PM regarding the identification proceedings of the appellants and have noted that no role whatsoever during the occurrence was attributed to the appellants by the eye-witnesses and it is simply mentioned therein that the witnesses have rightly identified the appellants. Non-mentioning of the role of either of the appellant by the eye-witnesses is another serious defect in the prosecution case. We may refer here the case of 'Sabir Ali alias Fauji' supra wherein at page 570 it was observed as under:-

'It is also settled principle of law that role of the accused was not described by the witnesses at the time of identification parade which is always considered inherent defect, therefore, such identification parade lost its value and cannot be relied upon. See Ghulam Rasul's case (1988 SCMR 557), Mahmood Ahmed's case (1995 SCMR 127) and Khadim Hussain's case (1985 SCMR 721).'

11. The occurrence in this case took place in the area of village Rakh Kotla. The eye-witnesses namely Muhammad Ijaz Tahir (P.W.15) and Muhammad Ashraf (P.W.16) are not residents of the said village and they both are residents of Chak No.8/Ghagh and as such they are chance witnesses. Their presence at the spot is also belied from the fact that in the relevant column i.e. 'Name of relative or friend' of the MLR (Exh. PG) of Muhammad Asghar (P.W.14) it is written that the said injured was brought by the police to the Hospital and the names of above mentioned eye-witnesses namely Muhammad Ijaz Tahir (P.W.15) and Muhammad Ashraf complainant (P.W.16) are not mentioned therein. It is also noteworthy that Muhammad Asghar (P.W.14) was the star witness of the prosecution as he was injured during the occurrence but he did not identify the appellants during any identification parade. Although it is argued on behalf of the complainant that Muhammad Asghar (P.W.14) was not medically fit at the time of identification parade of the appellants, therefore, he could not take part in the identification parade but the prosecution has not produced any Medical Officer to prove that the said witness was medically unfit and was not in a position to participate in the identification parade of the appellants. The occurrence in this case took place on 26-9-2007 whereas the identification parade of the

appellants was held on 8-10-2007. No evidence was produced by the prosecution that Muhammad Asghar (P.W.14) was medically unfit on the said date (8-10-2007). Even no application was ever moved by the prosecution for conducting the identification parade of the appellants after the recovery of Muhammad Asghar (P.W.14). Although Muhammad Asghar (P.W.14) is an injured eye-witness of the occurrence but the injuries on his person does not stamp him with the whole truth. It is by now well settled law that the intrinsic value of the evidence of an injured eye-witness is to be seen and mere injuries on the person of a witness does not mean that he was telling the whole truth. We may refer here the case of 'Muhammad Pervez and others v. The State and others' (2007 SCMR 670) wherein the Hon'ble Supreme Court of Pakistan at page 681 has held 1 as under:-

`It is also a settled law that injuries on a P.W. only indication of his presence at the spot but is not informative prove of his credibility and truth. See Said Ahmad's case 1981 SCMR 795'

Insofar as the identification of the appellants by Muhammad Ashraf (P.W.11) and Inayat Ali (P.W.12) is concerned, we have noted that they were the witnesses of circumstantial evidence of bringing the appellants to the place of occurrence on a motorcycle by Haider accused (since proclaimed offender) and taking them away on a motorcycle after the occurrence by Muhammad Mansha accused (since proclaimed offender) but the said witnesses did not nominate the appellants in their statements recorded by the police. Moreover the aforementioned witnesses did not take part in the proceedings of identification parade of the appellants (Exh. PN). As the appellants were completely strangers to the above mentioned witnesses, therefore, their identification in Court by the said witnesses is of no avail to the prosecution.

12. Insofar as the evidence of Foot Tracker Muhammad Akbar/Head-Constable (P.W.8) is concerned, we have noted that Muhammad Akbar/Head-Constable (P.W.8) has stated during his cross-examination that private persons and police were present at the place of occurrence when he reached at the spot. Although he has stated that the police and private persons were present at some distance but the aforementioned part of his statement regarding presence of private persons and police at some distance from the place of occurrence is not convincing because the information regarding the occurrence was given to the police on 26-9-2007 at 07:45 p.m. whereas Muhammad Akbar/Head-Constable (P.W.8) has conceded during his cross-examination that he reached at the place of occurrence at 09:00 p.m. He further

admitted during his cross-examination that foot-prints were not covered at the time when he reached at the spot, therefore, it is not probable that the foot prints of the accused persons would remain intact during the above-mentioned period. Even otherwise it is by now well-settled law that the evidence of Foot Tracker is a weak type of evidence.

13. The prosecution has also produced the recoveries of mobile phone (P-7) and cash amount of Rs.3,600/(P-8) which were taken into possession vide recovery memo Exh. PO from the possession of Muhammad Shehzad alias Sahiba appellant and recovery of mobile phone (P-11) and cash amount of Rs.720/(P-12) which were taken into possession vide recovery memo Exh. PR from the possession of Imran alias Shani appellant. We have noted that it was not mentioned in the F.I.R. (Exh. PA/1) that any cash amount or mobile were looted by the appellants at the time of occurrence. The story regarding snatching of cash amount and mobile phone by the appellants was introduced by the complainant Muhammad Ashraf (P.W.16) through his supplementary statement (Exh. PS). It is noteworthy that no denomination or any specific identification marks on the currency notes or on the mobile phones which were looted during the occurrence were mentioned in the supplementary statement (Exh. PS). Similarly no evidence was brought on the record to establish that the mobile sim numbers mentioned in the supplementary statement (Exh. PS) and recovered from the possession of the appellants were in the ownership of Muhammad Akram (deceased) or Muhammad Asghar (P.W.14). We have also noted that the appellants were not convicted by the learned trial court for the charges under section 392/411 P.P.C. We are, therefore, of the view that the alleged recoveries of mobile phones (P-7) & (P-11) and cash amount (P-8) & (P-12) from the possession of the appellants is of no avail to the prosecution.

Insofar as the recoveries of pistol 30 bore (P-6) on the pointation of Muhammad Shahzad alias Sahiba appellant and pistols .30 bore (P-9) and (P-10) from the possession of Imran alias Shani appellant and positive report of Forensic Science Laboratory (Exh. PBB) is concerned, we have noted that on 26-9-2007, 10 empties were recovered from the spot vide recovery memo Exh. PMM. According to the statement of Muhammad Riaz, Inspector (P.W.17) both the appellants were arrested on 30-9-2007. Although he (Muhammad Riaz, Inspector P.W.17) has stated that he formally arrested the appellants after their identification parade on 10-10-2007 but the complainant Muhammad Ashraf (P.W.16) has categorically stated during his cross-examination that the appellants were arrested on 26-9-2007 and on the same

day the names of the accused persons also came to his knowledge. As per report of Forensic Science Laboratory (Exh. PBB) the empties were sent to the office of Forensic Science Laboratory on 11-10-2007 i.e. after about 15 days from the arrest of the appellants, according to the date of their arrest mentioned by Muhammad Ashraf complainant (P.W.16). The possibilities, therefore, cannot be ruled out that fake empties were prepared from pistols .30 bore (P-6), (P-9) and (P-10) and were sent to the office of Forensic Science Laboratory for their comparison with the said pistols and the police had fictitiously shown the recoveries of pistols (P-6), (P-9) and (P-10) on 16-10-2007 to strengthen the prosecution case, as Muhammad Akram (deceased) was a police constable. It is, thus, not safe to rely on the above-mentioned prosecution evidence qua recoveries of pistols (P-6), (P-9) and (P-10) and positive report of Forensic Science Laboratory (Exh. PBB). Even otherwise we have already discarded the ocular account of the prosecution furnished by the eye-witnesses and the prosecution evidence qua identification of the appellants in the identification parade, therefore, the appellants cannot be convicted merely on the basis of aforementioned prosecution evidence qua alleged recoveries. In the case of Muhammad Afzal alias Abdullah and others v. The State and others (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:-

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similarly, in the case of Abdul Mateen v. Sahib Khan and others (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Muhammad Yaqub v. The State (1971 SCMR 756), and Nek Muhammad and another v. The State (PLD 1995 Supreme Court 516).

14. Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well-settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to the receipt of injuries, nature of the injuries, kind of weapons used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasawaeer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53), 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410). As we have disbelieved the evidence of eye-witnesses and prosecution evidence qua identification of the appellants in the identification parade, therefore, there is no need to discuss the medical evidence of the prosecution.

15. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

'5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

'13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable

doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept Criminal Appeals No. 310-J/2007 and 311-J/2007 filed by Muhammad Shehzad alias Sahiba and Imran alias Shani appellants respectively, set aside their convictions and sentences recorded by the learned trial court vide judgment dated 6-12-2007 and acquit them of the charges by extending them the benefit of doubt. They are in custody, they be released forthwith if not required in any other case.

17. Murder Reference No.14 of 2008 is answered in the NEGATIVE and the sentence of death of Muhammad Shehzad alias Sahiba and Imran alias Shani (convicts) is NOT CONFIRMED.

18. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the learned trial Court during the trial of the absconding accused namely Haider and Muhammad Mansha and their case shall be decided on its own merits on the basis of the evidence to be adduced during the trial of the said accused.

HBT/M-166/L **Appeal accepted.**

2014 Y L R 2120

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

KHAWAR---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 294-J of 2011, Criminal Revision No.317 of 2010 and Murder Reference No.161 of 2010, heard on 5th November, 2011.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Accused was not named in the F.I.R., which was lodged against two unknown accused persons---No description, like, heights, colours, ages etc. of said accused persons were mentioned in the F.I.R.---Accused was implicated in the case by the complainant through his written application filed 20/25 days after the occurrence---No source of information, as to how the complainant came to know about the names and roles of accused and his co-accused during the occurrence was mentioned in the said application---No identification parade of accused, or his co-accused was held in the case---Accused, having not been named by the prosecution witnesses in the F.I.R., holding of identification parade, was necessary---Complainant and other prosecution witness, were residents of other village, which was situated at a distance of 12/13 kilometers from the place of occurrence---Both said witnesses, in circumstances, were chance witnesses---No reason of their presence at the spot, at the relevant time was mentioned in F.I.R.---Presence of said eye-witnesses at the spot at the time of occurrence, was also belied from the evidence of court witness---Case of prosecution was that accused were armed with firearm weapons at the time of occurrence, and they reached at the place of occurrence on a motorcycle, but neither any firearm weapon, nor any motorcycle was recovered from the possession of accused persons during the investigation---Prosecution could not prove any motive---Prosecution having failed to prove its case against accused beyond the shadow of doubt, conviction and sentence recorded by the Trial Court against accused, were set aside and he was acquitted of the charges by extending him benefit of doubt and was released, in circumstances.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103; Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 and Tariq Pervez v. The State 1995 SCMR 1345 ref.

(b) Criminal trial---

----Medical evidence---Scope---Medical evidence was a type of supporting evidence, which could confirm the ocular account with regard to the receipt of injury, nature of injury, kind of weapon used in the occurrence, but would not identify the assailant.

(c) Criminal trial---

----Benefit of doubt---If there was a single circumstance which would create doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Muhammad Akram v. The State 2009 SCMR 230 ref.

Hamad Akbar Wallana for Appellant.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Zahid Iqbal for the Complainant.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.294-J of 2011, (Khawar v. The State), filed by the appellant, Khawar, against his conviction and sentence, Criminal Revision No.317 of 2010 (Mst. Ruqaya Liaqat v. The State and another) filed by the complainant Mst. Ruqayya Liaqat for enhancement of the amount of compensation, and Murder Reference No.161 of 2010 (The State v. Khawar), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Khawar convict, as all these matters have arisen out of the same judgment dated 22-2-2010, passed by the learned Additional Sessions Judge, Depalpur District Okara. Khawar appellant along with Muhammad Ahmad alias Babri was tried in a private complaint lodged under section 302/34 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 22-2-2010, has convicted and sentenced the appellant as under:-

Khawar son of Ashiq.

Under section 302 (b) of P.P.C. to death for committing the murder of Liaqat Ali (deceased). He was directed to pay compensation of Rs. 2,00,000 (rupees two hundred thousand) under section 544-A of Cr.P.C. to the legal heirs of Liaqat Ali (deceased) and in default whereof, he was directed to further undergo 6 months' S.I.

The learned trial Court, vide the same judgment, however, acquitted co-accused, namely, Muhammad Ahmad alias Babri while extending benefit of doubt to him.

2. Brief facts of the case as given by the complainant Muhammad Iqbal (P.W.1) in the F.I.R. (Exh. CW3/A) are that he (complainant) was a shop-keeper. His (complainant's) real brother Liaqat Ali (deceased), aged 40/42 years, used to sell bakery products in different villages on motorcycle Yamaha bearing Registration No 2297/OKE. On 30-10-2007, at about 11:00 a.m., Liaqat Ali (deceased) after selling his bakery products was going from village Dargan towards Qila Sadda Singh on the Canal Link Road, whereas, he (complainant) along with Niamat Ali (P.W.2) and Muhammad Sarwar (given up P.W.) was at some distance behind Liaqat Ali (deceased) and when they reached at Shadiwal Morr in the land of one Sardar Muhammad Jat, two unknown accused persons, who were armed with firearm weapons came there, while riding on a motorcycle. The said accused persons brought their motorcycle parallel to the motorcycle of Liaqat Ali (deceased) and made a fire shot at Liaqat Ali (deceased) who fell down from the motorcycle. They (P.Ws.) attended to Liaqat Ali (deceased) but he had already died. Accused persons fled away from the spot on their motorcycle.

Complainant Muhammad Iqbal (P.W.1) initially lodged F.I.R. No 459 dated 30-10-2007 offence under sections 302/34, P.P.C. at Police Station Mandi Ahmadabad District Okara against two unknown accused persons and thereafter, the appellant along with co-accused Muhammad Ahmad alias Babri was nominated by the complainant through written application (Exh.PC), which as per statement of the complainant was moved 20/25 days after the occurrence. The police declared the appellant and his co-accused as innocent, during investigation of the case and feeling dissatisfied with the police investigation, the complainant filed private complaint (Exh.PB).

3. After completion of the formalities i.e. recording the cursory statements of the P.Ws., the learned trial Court framed the charge against the appellant Khawar and his co-accused Muhammad Ahmad alias Babri (since acquitted) under sections 302/34, P.P.C., on 14-2-2009, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced three witnesses, during the trial, whereas, ten witnesses were examined as Court Witnesses. The complainant Muhammad Iqbal (P.W.1), Niamat Ali (P.W.2) and Ghulam Rasool (C.W.5) have furnished the ocular account of the prosecution.

The medical evidence was furnished by Dr. Muhammad Sharif, (P.W.3).

Muhammad Ashraf, Inspector (CW-6), and Muhammad Aslam Inspector (CW-8) were the Investigating Officers of this case. Muhammad Nawaz Warraich SSP (CW-7) supervised and verified the investigation conducted by Muhammad Ashraf, Inspector (CW-6). Zulfiqar Ali 1643/HC (CW-10) has given the secondary evidence regarding the investigation conducted by Ghulam Shabbir, S.I (since dead). Muhammad Anwar (CW-1), Muhammad Yaqoob 1003/HC (CW-2), Pervez Iqbal, A.S.-I. (CW-3), Bashir Ahmad, S.I (CW-4), and Ghulam Murtaza Patwari Halqa (CW-9) were the formal witnesses.

The prosecution has also produced documentary evidence in the shape of 'Fard Bayan' of the complainant (Exh.PA), police proceedings (Exh.CW-4/A), private complaint (Exh.PB), application of the complainant nominating the accused persons (Exh.PC), memo of possession of blood stained earth from the place of occurrence (Exh.PD), memo of possession of motorcycle bearing Registration No. 2297/OKE (Exh.PE), post mortem report of the deceased (Exh.PF), pictorial diagrams (Exh.PF/1) & (Exh.PF/ 2), report of Chemical Examiner (Exh.PG), report of Serologist (Exh.PH), memo of possession of last worn clothes of the deceased (Exh.CW-2/A), F.I.R. (Exh.CW-3/A), scaled site plan in duplicate of the place of occurrence (Exh.CW-9/A) and (Exh.CW-9/B), application for post mortem examination (Exh.CW-10/A), injury statement (Exh.CW-10/B), inquest report (Exh.CW-10/C), rough site plan of the place of occurrence (Exh.CW-10/D), and closed the prosecution evidence.

5. The statement of appellant under section 342 of Cr.P.C., was recorded. He refuted all the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you", the appellant, replied as under:--

"It is an unseen occurrence committed by unknown dacoits for the purpose of looting the victim/ deceased on the road. None of the P.Ws. had witnessed the occurrence. That is why the F.I.R. No. 459/07 was originally registered against unknown accused. I and my co-accused were roped in this case due to the false motive

a dispute of arrears of sale money with Mst. Ruqayya Bibi widow of deceased, who used to run a grocery shop in the mohallah and I used to purchase some commodities from her shop on credit and being mohalladar, the parties are very well known to each other for the last many years. I and my co-accused have been roped in this case due to the false motive, having a dispute of arrears of sale money owing to Mst. Ruqayya Bibi widow of the deceased, who used to run a Karyyana shop in my mohallah and I used to purchase from her some commodities on credit basis and being mohalladars the parties are very well known to each other, for the last many years. I and the co-accused have been roped through supplementary statement and then in private complaint, for the only purpose of blackmailing and extracting money. At the time of alleged occurrence I was available in the house of my mohallahdar Sakina Bibi. Co-accused Muhammad Ahmad alias Baberi has been roped in the case due to his relationship with me otherwise, I and my co-accused have nothing to do in this case. The P.Ws. have deposed against me at the behest of Mst. Ruqayya Bibi widow of the deceased for the aforesaid purpose. Ghulam Rasool CW-5 is a person of bad character, who has been managed by the complainant party by way of bribery".

Appellant Khawar did not make statement under section 340 (2) of Cr.P.C. in disproof of the allegations levelled against him, however, he produced copy of the statement of Liaqat Ali recorded under section 161, Cr.P.0 (Exh.DA) and copy of statement of Ghulam Rasool (CW5) recorded under section 161, Cr.P.C. (Exh.DA/1) in his defence.

6. The learned trial Court vide its judgment dated 22-2-2010, found the appellant Khawar, guilty and convicted and sentenced him as mentioned and detailed above.

7. The learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that the appellant is admittedly not named in the F.I.R., even no description of any of the assailants is mentioned therein and there is no allegation that any attempt was made by the assailants to snatch anything from the deceased or the witnesses; that the appellant along with co-accused was implicated in this case through an application (Exh.PC) which was submitted by the complainant Muhammad Iqbal about 20/25 days after the occurrence, wherein, he simply stated that now he had come to know that the appellant and his co-accused are involved in the commission of crime but he did not disclose any source of his information as such no reliance can be placed on the evidence of the complainant; that no identification parade of the appellant was conducted in this case; that the

statement of one of the eye-witnesses, namely, Ghulam Rasool (CW-5) is also immaterial because his name is not mentioned in the F.I.R. as a witness. Moreover, his statement was recorded by the police on 7-1-2008 i.e. after about 69 days of the occurrence and he did not state anything as to why he remained mum during this period and even his statement recorded under section 161 of Cr.P.C. was different from the statement which he made before the learned trial Court and he was confronted with his previous statement Exh. DA/1 and the improvements made by him were duly brought on the record; that no identification parade was conducted in this case and the identification of the accused in police station is not permissible under the law; that nothing incriminating was recovered from the possession of appellant during the investigation of this case; that the appellant along with co-accused was declared innocent by the police; that from all angles prosecution case is of doubtful nature; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, the learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant, opposes this appeal on the grounds that there was no enmity between the eye-witnesses and the appellant for his false implication in this case; that besides the complainant Muhammad Iqbal (P.W.1) and Niamat Ali (P.W.2), another person namely, Ghulam Rasool (CW-5) had also witnessed the occurrence who was grazing the cattle just 1-acre away from the place of occurrence and he too had no enmity with the accused side and also, having no relationship with the complainant side or the deceased and this fact was not denied by the defence rather his presence was admitted; that if the statements of the complainant Muhammad Iqbal (P.W.1) and Niamat Ali (P.W.2) are ignored even then there remains sufficient evidence on the record, in the shape of straight forward and confidence-inspiring testimony of Ghulam Rasool (CW-5) who is an independent witness; that the appellant cannot get any benefit from the acquittal of his co-accused as no active role was attributed to Muhammad Ahmad alias Babri (co-accused since acquitted), whereas, specific role of causing fire arm injury to the deceased was attributed to the appellant which is fully supported by the medical evidence; that the police opinion qua innocence of the appellant and his co-accused is inadmissible in evidence and has no value in the eye of law; that the appellant caused death of an innocent person without any justification; that the prosecution has fully proved its case beyond shadow of doubt, the sentence of death was rightly awarded to the appellant and the

same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative. It is further argued by learned counsel for the complainant that the compensation amount awarded by the learned trial court may also be enhanced.

9. We have heard the arguments of the learned counsel for the appellant, the learned Deputy Prosecutor General for the State assisted by the learned counsel for the complainant, and have also gone through the evidence available on the record, with their able assistance.

10. The detail of the prosecution case, as set forth in the F.I.R. (Exh. CW-3/A) has already been given in para No.2 above therefore, there is no need to repeat the same. The appellant was not named in the F.I.R. (Exh.CW-3/A) which was lodged against two unknown accused persons. No description like heights, colours, ages etc of the said accused persons were mentioned in the F.I.R. As mentioned earlier, the appellant was implicated in this case by the complainant through his written application (Exh.PC) wherein it is alleged by the complainant that after probing into the matter, it is established that Khawar (appellant) made fire shot at the deceased and committed his murder, whereas, his Behnoi (brother-in-law) namely Muhammad Ahmad alias Babri was driving the motorcycle of the accused persons. No date is mentioned on the said application (Exh. PC) however, the complainant Muhammad Iqbal (P.W.1) while making his statement before the learned trial Court has stated that he moved the application (Exh.PC), 20/25 days after the occurrence. It is noteworthy that no source of information, as to how the complainant came to know about the names and roles of the appellant and his co-accused during the occurrence was mentioned in application (Exh.PC) No identification parade of the appellant or his co-accused was ever held in this case. As the appellant was not named by the prosecution witnesses in the F.I.R., therefore, holding of identification parade was necessary in this case.

11. The ocular account of the prosecution was furnished by Muhammad Iqbal complainant (P.W.1), Niamat Ali (P.W.2) and Ghulam Rasool (CW-5). The occurrence in this case took place in the area of village Qila Sadda Singh, whereas, Muhammad Iqbal (P.W.1) and Niamat All (P.W.2) are residents of village Hujrah Shah Moqeem which, according to the statement of the complainant Muhammad Iqbal (P.W.1), was situated at a distance of 12/13 kilometers from the place of occurrence. Both the above mentioned witnesses are therefore, chance witnesses. No reason of their presence at the spot at the relevant time was mentioned in the

F.I.R. (Exh.CW-3/A). Although the complainant Muhammad Iqbal (P.W.1) has stated during his cross-examination that on the day of occurrence he went to Qadirabad in order to purchase a buffalo but no receipt or any other proof regarding the purchase of a buffalo has been brought on the record. Presence of the above mentioned eye-witnesses at the spot at the time of occurrence is also belied from the evidence of Ghularn Rasool (CW-5) who stated during his cross-examination that nobody else except him had witnessed the occurrence. Although Ghulam Rasool (CW-5) is resident of the area (village Sadda Singh), where this occurrence took place and he also claimed that he had witnessed the occurrence, but the name of this witness was not mentioned in the F.I.R. (Exh.CW-3/A). It is astonishing to note that this witness claimed that he witnessed the occurrence of a murder case but he did not inform to anybody for a considerable period. He stated during his cross-examination that he got recorded his statement before Ghulam Shabbir, S.I. on 7-1-2008, whereas, the occurrence took place on 30-10-2007. Although this witness has also stated that he appeared before the I.O. on the day of occurrence and narrated the entire facts to him but no such statement has been brought on the record. We have noted that the name of this witness was not mentioned by the complainant Muhammad Iqbal (P.W.1) even in his written application (Exh.PC), which was moved 20/25 days after the occurrence. We are therefore, of the view that the evidence of above mentioned eye-witnesses is not worthy of reliance.

12. It is the case of the prosecution that the appellant and his co-accused were armed with fire arm weapons at he time of occurrence and they reached at the place of occurrence on a a motorcycle but neither any firearm weapon nor any motorcycle was recovered from the possession of the appellant and his co-accused during the investigation of this case.

13. It is also noteworthy that no motive was alleged by the complainant in the F.I.R. (Exh.CW-3/A). We have noted that no motive was alleged even in the application (Exh.PC) of the complainant, which was moved about 20/25 days after the occurrence. Muhammad Iqbal complainant (P.W.1) while appearing before the learned trial court has stated that the accused persons committed the occurrence as they wanted to commit dacoity, whereas, Niamat Ali (P.W.2) has stated that the motive for the occurrence was that previously the accused persons and Liaqat Ali (deceased) had some dispute over money bargain and as such the evidence produced by the complainant about the motive is self-contradictory. Relevant parts of the

examination in chief of the above mentioned witness qua the motive part of the occurrence read as under:--

Muhammad Iqbal (P.W.1).

"The accused fired at Liaqat Ali as they wanted to commit dacoity with him."

Niamat Ali (P.W.2).

"The motive for this occurrence was that previously the accused persons and Liaqat Ali deceased had some dispute over money bargain."

We are therefore, of the view that the prosecution evidence qua the motive is self-contradictory. Moreover, no detail of the previous dispute of money between the accused persons and the deceased was mentioned by Niamat Ali (P.W.2), whereas, nothing was looted during the occurrence to prove the motive of attempt to commit dacoity, as alleged by Muhammad Iqbal complainant (P.W.1). Even motorcycle of the deceased was not snatched during the occurrence and the same was taken into possession from the spot vide memo Exh. PE. We are therefore, of the view that the prosecution could not prove any motive in this case.

14. Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well-settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to the receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53). (Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410). As there is no convincing, direct or circumstantial evidence available against the appellant, therefore, there is no need to discuss the medical evidence of the prosecution.

15. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In `Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page, was pleased to observe as under:--

'5…..The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:--

'13…….. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No.294-J of 2011 filed by Khawar appellant, set aside his conviction and sentence recorded by the learned Additional Sessions Jude, Depalpur District Okara vide judgment dated 22-2-2010 and acquit him of the charges by extending him the benefit of doubt. Khawar appellant is in custody, he be released forthwith if not required in any other case.

17. As we have accepted Criminal Appeal No.294-J of 2011 filed by Khawar (appellant) against his conviction and acquitted him of the charge by extending the benefit of doubt to him therefore, Criminal Revision No.317 of 2010, filed by the complainant for enhancement of the amount of compensation awarded by the learned trial Court against the appellant has become infructuous and the same, is dismissed in limine.

18. Murder Reference No.161 of 2010 is answered in the NEGATIVE and the sentence of death of Khawar (convict) is NOT CONFIRMED.

HBT/K-30/L **Appeal accepted.**

PLJ 2014 Cr.C. (Lahore) 13 (DB)

Present: Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ.

AKBAR ALI and others--Petitioners

versus

STATE and another--Respondents

Crl. Appeal No. 177-J & 190-J of 2008 and M.Ref. No. 186 of 2009, decided on 26.4.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Modification in quantum of sentence--Sentence was altered from death to imprisonment for life--Benefit of doubt--Quantum of sentence of appellant--Mitigating circumstances in his favour--Firstly, the appellant has been attributed a single fire shot on the deceased and there was no allegation of repeating any fire-arm injury against the appellant--Secondly, prosecution evidence qua recovery of .30 bore pistol along with two live bullets on the pointation of appellant--Thirdly, evidence of the prosecution qua motive--It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence which had resulted into the present unfortunate incident, death sentence awarded to the appellant was quite harsh--Conviction of appellant u/S. 302(b), PPC awarded to him by the trial Court is maintained, however, his sentence was altered from death to imprisonment for life--The amount of compensation and the sentence in default thereof as awarded by the trial Court was maintained--Appeal dismissed. [Pp. 22 & 24] A & D

2011 SCMR 593, ref.

Benefit of doubt--

----Principle--Accused is entitled to the benefit of doubt as an extenuating circumstance while deciding question of his sentence, as well. [P. 23] B

2009 SCMR 1188, ref.

Deputy of Prosecution--

----Mitigating circumstance--If a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the same through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. [P. 23] C

1993 SCMR 1660, ref.

Mr. Shahid Ali Shakir, Advocate for Appellant.

Mr. Arshad Mahmood, D.P.G. for State.

Mr. Shahid Shaukat Chaudhry, Advocate for Complainant.

Date of hearing: 26.4.2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--This judgment shall dispose of Criminal Appeal No. 177-J of 2008 titled as "Akbar Ali versus The State" filed by Akbar Ali appellant, Criminal Appeal No. 190-J of 2008 tilled as "Ghulam Ahbas versus The State" filed by Ghulam Abbas appellant against their convictions and sentences and Murder Reference No. 186 of 2009 titled as "The State versus Akhar Ali alias Akka" submitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Akbar alias Akka, appellant as all these matters have arisen out of the same judgment dated 23.07.2008 passed by the learned Addl Sessions Judge, Faisalabad in case FIR No. 1232 dated 13.12.2006, offences under Sections 302 and 34, PPC, registered at Police Station Ghulam Muhammad Abad District Faisalabad whereby, Akbar Ali alias Akka and Ghulam Abbas appellants were convicted under Section 302(b)/34, PPC as a result whereof, Akbar Ali alias Akka appellant was sentenced to death and Ghulam Abbas appellant was sentenced to imprisonment for life. Both the appellants were directed to pay Rs.2,00,000/- (Rupees two lac only) each as compensation to the legal heirs of deceased Muhammad Farooq, as envisaged under Section 544-A of the Code of Criminal Procedure and in default thereof to further undergo simple imprisonment for six months each. Ghulam Abbas, appellant was also awarded the benefit of Section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case, as disclosed by Mansoor Ayub, complainant (PW-9) in his `Ford Biyan' (Exh-PK), on the basis of which the formal FIR (Exh-PK/1) was registered, are that he (complainant) was labourer by profession. On 13.12.2006 at 09.00 a.m, he (complainant) along with Muhammad Farooq (deceased) and Muhammad Rafique (PW-10) went out of their house to earn their livelihood. They when reached in Sobaydar Chowk Mohallah Sana Park, Muhammad Farooq (deceased) was ahead of them and they were a little behind him, suddenly, Akbar alias Akka (appellant) armed with .30 bore pistol, Ghulam Abbas (appellant) and one unknown person empty handed came there. Ghulam Abbas (appellant) raised lalkara that they (complainant party) be taught a lesson for insulting them. Upon which, Akbar alias Akka (appellant) made fire shot with his pistol at Muhammad Farooq (deceased), which landed on the right side of his abdomen and went through and through. Muhammad Farooq fell down. Accused persons fled away from the spot while raising lalkaras. They took care of Muhammad Farooq (deceased) and shifted him to the Emergency Ward, Allied Hospital, Faisalabad where he succumbed to the injury. The motive for the occurrence, as alleged by the complainant in the FIR (Exh-PK/1), was that two days prior to the occurrence, the accused persons, after drinking liquor, were making noise outside their house and they were forbidden from doing so and they took it as their insult. Due to this grudge, they have committed the murder of Muhammad Farooq (deceased).

3. Akbar Ali alias Akka (appellant) was arrested in this case on 18.05.2007 whereas, Ghulam Abbas (appellant) was arrested on 06.06.2007 by Zafar Zaman, S.I. (PW-12). On 22.05.2007, Akbar alias Akka (appellant), while in police custody, after making disclosure got recovered .30 bore pistol (P-6) along with two live bullets (P-7/1-2) which were taken into possession vide recovery memo. Exh-PM. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants on 23.10.2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced twelve witnesses, during the trial. Mansoor Ayub, complainant (PW-9) and Muhammad Rafique (PW-10)

furnished the ocular account of the case. Muhammad Rafique (PW-10) is also the witness of recovery of pistol (P-6) along with two live bullets (P-7/1-2) allegedly recovered from the possession of Akbar Ali alias Akka (appellant).

The medical evidence was furnished by Dr. Arshad Masood (PW-1), who conducted the post-mortem examination on the dead body of Muhammad Farooq (deceased).

Mansoor Sadiq, S.I. (PW-11) and Zafar Zaman, S.I (PW-12) are the Investigating Officers of the case. Aurangzeb, Draftsman (PW-2), Abdul Jabbar 3390/HC (PW-3), Iftikhar Ahmad 289/C (PW-4), Nazir Ahmad 3904/HC (PW-5), Shaukat Ali 1735/HC (PW-6), Muhammad Hanif (PW-7) and Zulfiqar Ali, A.S.I (PW-8) are the formal witnesses. The prosecution produced documentary evidence in the shape of post-mortem report along with pictorial diagrams (Exh-PA, Exh-PA/1 and Exh-PA/2), inquest report (Exh-PB), injury statement (Exh-PC), scaled site-plan, in duplicate, of the place of occurrence (Exh-PD & Exh-PD/1), recovery memo. of last worn clothes of the deceased (Exh-PE), warrants of arrest of Akbar Ali alias Akka along with report (Exh-PF & Exh-PF/1), warrants of arrest of Ghulam Abbas appellant along with report (Exh-PG & Exh-PG/1), proclamation of Akbar Ali alias Akka (appellant) along with report (Exh-PH & Exh-PH/1), proclamation of Ghulam Abbas (appellant) along with report (Exh-PJ & Exh-PJ/1), `Fard Biyan' of the complainant (Exh-PK), FIR (Exh-PK/1), recovery memo. of blood stained earth (Exh-PL), recovery memo. of .30 bore pistol P-6 along with two live bullets P-7/1-2 (Exh-PM), copy of rough site-plan of the place of occurrence (Exh-PN), proclamation of Akbar Ali alias Akka appellant along with report (Exh-PQ and Exh-PQ/1), proclamation of Ghulam Abbas appellant along with report (Exh-PR & Exh-PR/1), rough site-plan of the place of recovery of pistol (P-6) along with two live bullets P-7/1-2 (Exh-PS), report of Chemical Examiner (Exh-PT), report of Serologist (Exh-PU), copy of medical report regarding age of Akbar Ali alias Akka appellant (Exh-PV) and closed its evidence.

The statements of the appellants, under Section 342 of the Code of Criminal Procedure, were recorded on 22.07.2008. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and whey the PWs have deposed against you", both the appellants replied as under:

"The case is absolutely false. The PWs are the relative of the deceased and related to each other and due to their relationship they have deposed falsely against me. It was a blind murder. No body had seen the occurrence. Due to non-distribution of collection of committees the complainant party in connivance with the police got me falsely involved in this unseen occurrence. I have no concern with this case."

The appellants did not opt to make statement on oath as provided under Section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against him. Ghulam Abbas (appellant) did not produce any evidence in his defence, however, Akbar Ali alias Akka (appellant) produced copy of FIR No. 173/2000 dated 25.05.2000, P.S. Shahkot District Sheikhupura as Exh-DC, copy of an application submitted by Muhammad Sarwar (Mark-A) and copy of B-form (Mark-B) in his defence.

5. The learned trial Court vide its judgment dated 23.07.2008, found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

6. Learned counsel for the appellants', in support of these appeals, contends that the appellants have falsely been implicated in this case; that there is delay of about four hours and fifteen minutes in reporting the matter to the police without there being any explanation in this behalf; that it has specifically been alleged by the complainant and other eye-witness that Akbar alias Akka (appellant) was armed with a .30 bore pistol, fired at the deceased which hit him on the right side of his abdomen and went through and through; that the doctor who conducted the post-mortem examination on the dead body of Muhammad Farooq (deceased) noted six exit wounds of Injury No. 1 which clearly suggests that the deceased received a fire shot made by a gun and not a pistol; that even the nature of the injuries suggests that it was caused with pellets and not with bullet; that the eye-witnesses have made dishonest improvements in their statements while appearing before the learned trial Court and they were confronted with their previous statements and the improvements made by them were brought on the record; that the abscondance of appellants has not been proved in accordance with law as the process server admitted that he did not associate any Lumberdar or respectable of the locality in the proceedings and even he was not able to disclose the date and time when he visited the residence of the appellants. So far as the motive is

concerned, learned counsel for the appellants contends that a vague motive has been alleged by the prosecution and no witness in support thereof was examined; that the motive incident was not reported to any authority; that the recovery of pistol is immaterial as there is no report of the Forensic Science Laboratory; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, these appeals be accepted and the appellants may be acquitted from the charge.

7. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposes these appeals on the grounds that this incident took place on 13.12.2006 at 09.00 a.m, the matter was reported to the police on the same day at 01.15 p.m and the FIR was also registered on the same day at 01.40 p.m whereas, the distance between the place of occurrence and the Police Station was about two kilometers; that after the incident, the deceased was taken to the hospital for medical treatment because in such like situation, it is the first priority of the near kith and kin to provide the injured medical treatment instead of rushing towards the Police Station for reporting the matter; that in the post-mortem report (Exh-PA), it is mentioned that the MLC No. 3031/06 dated 13.12.2006 of the deceased was prepared at 09.25 a.m, therefore, there was no delay in reporting the matter to the police; that the witnesses of ocular account are residents of the area where this incident took place; that there is nothing on the record that they had any enmity of the nature which could prompt them to depose falsely against the appellants; that the ocular account, to the extent of Akbar Ali alias Akka appellant, gets full support from the medical evidence; that a layman is not expected to differentiate between a pistol, a carbine and a gun but the fact remains that the deceased received a fire-arm injury; that the motive in this case has also been proved by the prosecution; that the prosecution case is further corroborated by the recovery of .30 bore pistol at the instance of Akbar Ali alias Akka (appellant) and abscondance of the appellants for a period of about five months; that the sentence of death to Akbar Ali alias Akka (appellant) and sentence of imprisonment for life to Ghulam Abbas (appellant) was rightly awarded by the learned trial Court and the same may be

maintained, appeals may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the appellant, learned Deputy Prosecutor General and have also gone through the record with their able assistance.

9. The detail of the prosecution story has already been mentioned in Paragraph No. 2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that on 13.12.2006 at 09.00 a.m, the complainant, Muhammad Farooq (deceased) and Muhammad Rafique (PW-10) went out of their house to earn livelihood. When they reached in Sobaydar Chowk Mohallah Sana Park, Akbar Ali alias Akka (appellant) armed with .30 bore pistol, Ghulam Abbas (appellant) and one unknown person empty handed came there. Ghulam Abbas raised lalkara that complainant party be taught a lesson for insulting them, upon which, Akbar Ali alias Akka (appellant) made a fire shot with his pistol, which landed on the right side of his abdomen and went through and through. He was shifted to the hospital where he succumbed to the injuries. The motive for the occurrence as alleged by the complainant was that two days prior to the occurrence, the appellants, after drinking liquor, were making noise and they were forbidden by the complainant party. Due to this grudge, the appellants have committed this occurrence.

10. The occurrence in this case took place on 13.12.2006 at 09.00 a.m in Sobaydar Chowk Mohallah Sana Park within the territorial jurisdiction of Police Station Ghulam Muhammad Abad, District Faisalabad. The matter was reported to the police at 01.15 p.m. and the FIR was lodged on the same day at 01.40 p.m whereas, the distance between the place of occurrence and the Police Station was about two kilometers. Although, the matter was reported to the police with the delay of four hours and fifteen minutes from the occurrence but the said delay has plausibly been explained by the prosecution. It was so mentioned in the FIR (Exh-PK/1) that after the occurrence, Muhammad Farooq (deceased) was first taken to the Emergency Ward of Allied Hospital, Faisalabad. The complainant Mansoor Ayub (PW-9) while appearing before the learned trial Court has stated that Muhammad Farooq (deceased), in injured condition, was first taken to the Allied Hospital, Faisalabad. The abovementioned fact is also corroborated by the evidence of Dr Arshad Masood

(PW-1) who has stated in his examination-in-chief that the death of Muhammad Farooq (deceased) was a hospital death and the time between injury and death was about three hours. The conduct of the complainant that he first took Muhammad Farooq (deceased), in injured condition, to the hospital in order to provide him medical treatment and try to save his life, instead of rushing towards the Police Station to report the matter, is quite natural. We are, therefore, of the view that the minor delay in reporting the matter to the police has plausibly been explained by the prosecution and there is no conscious or deliberate delay in lodging the FIR by the prosecution.

11. First of all, we will take up the case of Akbar Ali alias Akka (appellant) in Criminal Appeal No. 177-J of 2008, The ocular account of the prosecution was furnished by Mansoor Ayub, complainant (PW-9) and Muhammad Rafique (PW-10). The occurrence in this case took place in Sobaydar Chowk Mohallah Sana Park, Faisalabad. Both the abovementioned eye-witnesses are residents of Faisalabad. Mansoor Ayub, complainant (PW-9) is real brother of the deceased whereas, Muhammad Rafique (PW-10) is the Mamoon (Maternal uncle) of the deceased. They both have plausibly explained their presence at the spot at the relevant time by stating that they were labourer by profession and on the day of occurrence (on 13.12.2006) at 09.00 a.m, they all were going to earn their livelihood and when they reached at Sobaydar Chowk, Mohallah Sana Park, the occurrence took place. We have also noted that both the abovementioned eye-witnesses have mentioned their profession as labourer before the learned trial Court. They were cross examined at length but their evidence could not be shaken. We have gone through the improvements pointed out by the learned counsel for the appellants in the statements of the abovementioned eye-witnesses but we have noticed no material or significant improvement in their statements. They corroborated each other on all material particulars of the case like the place of occurrence, the time of occurrence, the seat of injury on the person of Muhammad Farooq (deceased), the kind of weapon used by the appellant etc. The occurrence took place in broad day light (at 09.00 a.m) and Akbar Ali alias Akka (appellant) was nominated in the FIR with a specific role of making a fatal fire shot on the abdomen of Muhammad Farooq (deceased). The evidence of abovementioned

eye-witnesses namely, Mansoor Ayub, complainant (PW-9) and Muhammad Rafique (PW-10), to the extent of role played by Akbar Ali alias Akka (appellant) during the occurrence is trustworthy and confidence inspiring.

There is another aspect of the case that Mansoor Ayub, complainant (PW-9) is real brother of Muhammad Farooq (deceased) whereas, Muhammad Rafique (PW-10) is real maternal uncle (Mamoon) of the deceased. It is not probable that they will falsely implicate the appellant and would let off the real culprit of the murder of their near kith and kin. Substitution in such like cases is a rare phenomenon.

12. The medical evidence of the prosecution was furnished by Dr. Arshad Masood (PW-1). He, on 13.12.2006 at 03.30 p.m, conducted the post-mortem examination on the dead body of Muhammad Farooq (deceased) and noted the following injuries on his person:--

"1-A. A fire-arm wound of entry 1 x 1 cm on front right sided abdomen at the level of umbilicus and 9 cm outer to the umbilicus.

1-B. Multiple exit wounds (six in numbers) in an area of 8x7 cm on the back of right chest lower part and abdomen measuring 0.5 x 0.5 to 1 x 1 CM.

As per his opinion, the cause of death was due to haemorrhage and shock caused by Injury No. 1 (A and B), which was ante mortem, caused by fire-arm and sufficient to cause death in ordinary course of nature. Probable time that elapsed between injury and death was about three hours whereas between death and post-mortem examination was within six hours. Akbar Ali alias Akka (appellant) was assigned the role of inflicting a fire-arm injury, which hit Muhammad Farooq (deceased) on the right side of his abdomen. According to the medical evidence furnished by Dr Arshad Masood (PW-1), the abovementioned injury was available on the person of Muhammad Farooq (deceased) as Injury No. 1 in the post-mortem report (Exh-PA). Dr Arshad Masood (PW-1) was also cross-examined by the learned defence counsel but nothing favourable to the appellant could be brought on the record. The ocular account of the prosecution which was furnished by Mansoor Ayub, complainant (PW-9) and Muhammad Rafique (PW-10) qua the role of Akbar Ali alias Akka (appellant) has fully been supported by the abovementioned medical evidence. The kind of

weapon used by the accused, the nature of injury, the seat of injury and the time of occurrence as stated by the abovementioned eye-witnesses, all these facts have fully tallied with the medical evidence furnished by Dr Arshad Masood (PW-1). It has been argued by the learned counsel for the appellants that there is conflict between the ocular account and medical evidence as the complainant in the FIR (Exh-PK) has stated that Akbar Ali alias Akka (appellant) was armed with .30 bore pistol and he made a fire shot which landed on the right side of abdomen of Muhammad Farooq (deceased) whereas, the doctor who conducted the post-mortem examination on the dead body of Muhammad Farooq (deceased) noted six wounds of exit of Injury No. 1 which could be caused only with pellets and not bullet. The conflict pointed out by the learned counsel for the appellant between ocular account and medical evidence is not material because it cannot be expected from eye-witnesses of the prosecution who were labourer by profession and were rustic villagers to differentiate between kinds of pistol as cartridges containing pellets are also used in carbine which also looks like a pistol, therefore, the abovementioned conflict in the ocular account and medical evidence is insignificant.

13. The prosecution case against Akbar Ali alias Akka (appellant) is further corroborated by the evidence produced by the prosecution qua his abscondance. The occurrence in this case took place on 13.12.2006 and after the occurrence, the appellant disappeared from the scene. Akbar Ali alias Akka (appellant) was arrested in this case by Zafar Zaman, S.I. (PW-12) on 18.05.2007. The abscondance of Akbar Ali alias Akka (appellant) was proved through the statements of Shaukat Ali 1735/HC (PW-6) and Mansoor Sadiq, S.I (PW-11), Zafar Zaman, S.I. (PW-12), warrants of arrest of the appellant along with report (Exh-PF and Exh-PF/1), proclamation of the appellant along with report (Exh-PQ and Exh-PQ/1). The abovementioned witnesses namely, Shaukat Ali 1735/HC (PW-6), Mansoor Sadiq, S.I (PW-11) and Zafar Zaman, S.I. (PW-12) were also cross-examined by the learned defence counsel but nothing favourable to the appellant could be elicited during the process of their cross-examination. The appellant could not justify his long abscondance after the occurrence.

14. As per prosecution case, the motive behind the occurrence was that two days prior to the occurrence, the appellants after having intoxicant liquor were making noise in front of the house of the complainant. They were forbidden by Muhammad Farooq (deceased), therefore, they felt insulted and due to this grudge, they committed the murder of Muhammad Farooq (deceased). We have noted that Mansoor Ayub, complainant (PW-9) has conceded during his cross-eamination that he did not make any report to any authority regarding the aforementioned incident. He further conceded that nobody from the locality appeared before the Investigating Officer during investigation in support of the abovementioned incident qua motive. We are, therefore, of the view that the motive as alleged by the prosecution has not been proved in this case.

15. The prosecution has also produced the evidence of recovery of .30 bore pistol (P-6) along with two live bullets (P-7/1-2) recovered from the possession of Akbar Ali alias Akka (appellant), which were taken into possession vide recovery memo. Exh-PM. We have noted that there is no matching report of the Forensic Science Laboratory qua pistol (P-6) with any crime empty. In the absence of any such report, the recovery of .30 bore pistol (P-6) at the instance of Akbar Ali alias Akka (appellant) is of no avail to the prosecution and the same is inconsequential.

16. We have disbelieved the prosecution evidence qua alleged recovery of .30 bore pistol (P-6) along with two live bullets (P-7/1-2) at the instance of Akbar Ali alias Akka (appellant) and motive, however, if the evidence of recovery of .30 bore pistol (P-6) along with two live bullets (P-7/1-2) and motive is excluded from consideration, even then there is sufficient incriminating evidence available on the record to prove the case against the appellant. As discussed earlier, the prosecution case is proved through the evidence of eye-witnesses namely, Mansoor Ayub, complainant (PW-9) and Muhammad Rafique (PW-10). Their evidence is quite trustworthy and reliable. They were cross-examined at length but they corroborated each other on all material aspects of the case and their evidence is fully supported by the medical evidence furnished by Dr. Arshad Masood (PW-1). The prosecution case is further corroborated by the abscondance of the appellant. We are, therefore, of the view that

the prosecution has fully proved its case against the appellant Akbar Ali alias Akka (appellant) beyond the shadow of any doubt.

17. Now coming to the case of Ghulam Abbas (appellant) in Criminal Appeal No. 190-J of 2008. We have noted that Ghulam Abbas (appellant) has only been attributed the role of raising proverbial lalkara. Neither he was armed with any weapon of offence nor he has been attributed any sort of injury on the person of Muhammad Farooq (deceased) or on the person of any member of the complainant party. Even according to the prosecution case, he did not take any active part during the occurrence. Considering the abovementioned facts, we are of the view that possibility of false implication of Ghulam Abbas (appellant) in this case by the prosecution by using wider net cannot be ruled out, therefore, while accepting Criminal Appeal No. 190-J of 2008, we acquit Ghulam Abbas (appellant) from the charge while giving him the benefit of doubt. He is present in the Court. His bail bond is discharged and surety is released.

18. Now coming to the quantum of sentence of Akbar Ali alias Akka (appellant), we have noted certain mitigating circumstances in his favour. Firstly, the appellant has been attributed a single fire shot on the person of Muhammad Farooq (deceased) and there is no allegation of repeating any fire-arm injury against the appellant. Secondly, we have disbelieved the prosecution evidence qua recovery of .30 bore pistol (P-6) along with two live bullets (P-7/1-2) on the pointation of Akbar Ali alias Akka (appellant) due to the reasons mentioned in Paragraph No. 15 of this judgment. Thirdly, we have disbelieved the evidence of the prosecution qua motive for the reasons mentioned in Paragraph No. 14 of this judgment. It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence which had resulted into the present unfortunate incident, therefore, in our view the death sentence awarded to the appellant Akbar Ali alias Akka is quite harsh. It is well-recognized principle by now that accused is entitled to the benefit of doubt as an extenuating circumstance while deciding question of his sentence, as well. In this regard, we respectfully refer the case of "Mir Muhammad alias Miro versus The State" (2009 SCMR 1188) wherein, the Hon'ble Supreme Court of Pakistan at page 1191 was pleased to observe as under:

"9. It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

In another case "Ansar Ahmad Khan Barki versus The State and another" (1993 SCMR 1660), the Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home against the accused for the award of normal penalty of death. We are convinced that Akbar Ali alias Akka appellant, in the peculiar circumstances of this case, deserves the benefit of doubt to the extent of his sentence one out of two provided under Section 302(b) of the Pakistan Penal Code.

It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the same through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused.

While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of "Ahmad Nawaz and another versus The State" (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another, (PLD 2007 SC 111), it was held that `This is settled law that provisions of Sections 306 to 308, P.P.C. attract only in the cases of Qatl-e-amd liable to qisas under Section 302(A), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as tazir under Section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as qisas and tazir provided under Sections 302(a) and 302(b), P.P.C. respectively is that in a case of qisas, Court has no discretion in the matter of sentence whereas in case of tazir Court may award either of the sentence provided under Section 302(b), P.P.C. and exercise of this discretion in the case of sentence of tazir would depend upon the facts and circumstances of the case. There is no cavil to the

proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4, Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR, 2203, Muhammad Akram v. State 2003 SCMR 855 and Abdus Salam v. State 2000 SCMR 338." The Court while maintaining the conviction under Section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case." In Iftikhar Ahmed Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:- "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course....."

19. In the light of above discussion, the conviction of Akbar Ali alias Akka (appellant) under Section 302(b), PPC awarded to him by the learned trial Court is maintained, however, his sentence is altered from death to imprisonment for life. The amount of compensation and the sentence in default thereof as awarded by the learned trial Court is maintained. He is also awarded the benefit of Section 382-B of the Code of Criminal Procedure.

20. Consequently with the above modification in the quantum of sentence of Akbar Ali alias Akka (appellant), Criminal Appeal No. 177-J of 2008 is hereby dismissed.

21. Murder Reference No. 186 of 2009 is answered in the **NEGATIVE** and the sentence of death of Akbar Ali alias Akka (convict) is **NOT CONFIRMED.**

(A.S.) **Appeal dismissed.**

PLJ 2014 Cr.C. (Lahore) 25 (DB)

Present: Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, J.

AMIR HAYAT & others--Appellants

versus

STATE and others--Respondents

Crl. Appeals No. 73 & 274 of 2009, M.R. No. 50 of 2009, heard on 21.5.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Offence of murder--Case of mitigation--Modification in sentence--Sentence was altered--Benefit of doubt--Quantum of sentence--Some mitigating circumstances in favour of the appellant firstly, disbelieved the alleged recoveries of cash amount mobile phone, identity card of the deceased etc. and pistol .30 bore from the possession of the appellant due to the reasons secondly, it is a case of single fire shot and there is no allegation of repetition of any fire arm injury against the appellant, thirdly, the prosecution evidence qua motive--It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence, which resulted into present unfortunate incident, the death sentence awarded to the appellant was quite harsh--Prosecution was bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death--Court convinced that appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under Section 302(b) of, PPC with above modification in sentence of appellant, the appeal was dismissed. [Pp. 35 & 36] A & C

2011 SCMR 593, ref.

Benefit of doubt--

----Principle--Accused is entitled to the benefit of doubt as an extenuating circumstance while deciding his question of sentence, as well. [P. 35] B

2009 SCMR 1188, 1993 SCMR 1660, ref.

Sardar Faiz Rasool Khan Jalbani, Advocate of Appellant.

Mirza Abid Majeed, DPG for State.

Mian Muhammad Ilyas and Rana Mushtaq Ahmad, Advocates for Complainant.

Date of hearing: 21.5.2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--Amir Hayat appellant was tried in case FIR No. 228/2008 dated 12.07.2008 offences under Sections 302/392, PPC (Section 411/34, PPC added in the charge) registered at Police Station Kallur Kot, District Bhakkar. After conclusion of the trial, the learned trial Court vide its judgment dated 31.01.2009 has convicted and sentenced the appellant as under:--

Amir Hayat.

Under Section 302-b, PPC for committing the murder of Ihsan Ullah deceased and sentenced to death with a direction to pay the compensation amount of Rs.5,00,000/- (Rupees Five Hundred Thousand only) to the legal heirs of deceased as envisaged under Section 544-A of, Cr.P.C.

2. Feeling aggrieved, the appellant Aamir Hayat has challenged his conviction and sentence through Criminal Appeal No. 73 of 2009, whereas, Aman Ullah, complainant has filed Criminal Appeal No. 274 of 2009 for setting aside of the judgment dated 31.01.2009 to the extent of acquittal of accused respondent from the charges under Section 392 & 411, PPC and the learned trial Court has transmitted Murder Reference No. 50 of 2009, for confirmation or otherwise of the death sentence of Amir Hayat, appellant. We purpose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 31.01.2009 passed by the learned Additional Sessions Judge, Kallur Kot.

3. Brief facts of the case as given by the complainant Aman Ullah (PW-8) in his written application Exh. PC, on the basis of which the formal FIR (Exh. PC/1) was chalked out are that he (complainant) was agriculturalist by profession. On 11.07.2008 at about 02:00 p.m. (day time) his son namely Ehsan Ullah (deceased) alongwith Amir Hayat (appellant) went to see cricket match by his motorcycle bearing Registration No. 1971/MHB. Ehsan Ullah (deceased) who used to deal in cattle, also took Rs.5,000/- with him and did not come back till 08:00 p.m. (night). He (complainant) alongwith Muhammad Yaqoob while taking torches with them went in the search of Ehsan Ullah (deceased) and when at about 09:00 p.m. they reached at a distance of 1« kilometers from their village Sayed Wala towards Northern side, they saw the motorcycle of Ehsan Ullah (deceased) was parked on the

`Katcha' road, and at a distance of 10 `karams' from there Ehsan Ullah (deceased) and Amir Hayat (appellant) were quarreling with each other. Amir Hayat (appellant) was armed with pistol .30 bore. Within their view, Amir Hayat (appellant) made a fire shot with his pistol with intention to commit the murder of Ehsan Ullah (deceased) which hit on the forehead of Ehsan Ullah (deceased). They (complainant party) tried to apprehend Amir Hayat (appellant) who threatened them that if they would come near him, he will murder them. They (PWs) attended Ehsan Ullah (deceased) and found that the amount of Rs.5,000/- and mobile phone NOKIA were missing from his pocket. Ehsan Ullah (deceased) succumbed to the injury at the spot. The occurrence was witnessed besides the complainant by Muhammad Yaqoob (given up PW) and Inayat Ullah (PW-9).

The motive, according to the prosecution case as set forth in the FIR was that Ehsan Ullah (deceased) had Rs.5,000/- and a mobile phone with him, which Amir Hayat appellant wanted to snatch and upon resistance Amir Hayat (appellant) committed the murder of Ehsan Ullah (deceased).

4 & 5. The appellant was, arrested on 16.07.2008 by Muhammad Amin, S.I. (P.W.12). On 19.07.2008, the appellant led to the recovery of purse (P-4) N.I.C. (P-5) Taveez (P-7). The appellant also led to the recovery of Rs.5,000/- (two notes of Rs. 1,000/- each P-8/1-2 and six notes of Rs.500/- each P-9/1-6) and mobile phone NOKIA (P-6). On 20.07.2008, the appellant led to the recovery of pistol .30 bore (P-10) and two live bullets (P-12/1-2), which were taken into possession through memo. Exh. PE. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 20.01.2009, to which he pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced twelve witnesses, during the trial, Aman Ullah (PW-8) and Inayat Ullah (PW-9) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Aslam Malik (PW-10). Muhammad Amin, SI (PW-12) was the Investigating Officer of this case. Muhammad Iqbal 279/C (PW-6) and Muhammad Rafique 537/HC (PW-7) are the witnesses of recoveries of, purse, NIC, mobile cash and pistol .30 bore (P-10) alongwith two live bullets (P-12/1-2) etc. from the possession of Amir Hayat (appellant).

Muhammad Akhtar Patwari (PW-1), Ateeq ur Rehman, 294/C (PW-2), Iftikhar Hussain, 691/C (PW-3), Mati Ullah (PW-4) Muhammad Ishfaq, ASI (PW-5) and Muhammad Bakhsh, 573 (PW-11) are the formal witnesses. The prosecution also produced documentary evidence in the shape of scaled site-plan of the place of occurrence in duplicate Exh. PA and Exh. PA/1, memo. of possession of last worn clothes of the deceased Exh. PB, written complaint of Aman Ullah complainant Exh. PC, FIR Exh. PC/1, memo. of recovery of purse, I.D. Card, Mobile, Taveez and currency notes Exh. PD, memo. of recovery of pistol .30 bore (P-10) Exh. PE, memo. of identification of looted articles Exh. PF, memo. of recovery of crime empty .30 bore Exh. PG, memo. of recovery of motorcycle Exh. PH, memo. of recovery of blood stained earth Exh. P1, post-mortem report Exh. PJ, pictorial diagrams Exh. PJ/1 & Exh. PJ/2, injury statement of the deceased Exh. PK, inquest report Exh. PL, rough site-plan of the place of occurrence Exh. PM, rough site-plan of the place of recovery of purse, mobile etc. Exh. PN, rough site-plan of the place of recovery at the instance of appellant Exh. PQ, report of Chemical Examiner Exh.Pp, report of Serologist Exh. PQ, report of Forensic Science Laboratory Exh. PR, application to the Nazim Union Council Haitu No. 30 Exh. PS and closed its evidence.

7. The statement of the appellant u/S. 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you" the appellant replied as under:--

Amir Hayat.

"The case is false one. I am innocent. Actually Ihsan Ullah deceased was murdered by unknown persons and no body had seen the occurrence and when the dead body was discovered by the complainant party and after deliberation and consultation with Tehsil Nazim and Zia Ullah Abbassi, I was falsely nominated in this case as the police was not ready to lodge the case against unknown persons. Actually there are two political rival groups in our area. One headed by Niwani and Masti Khel. In the recent Provincial and National Assembly Election, the candidates of Niwani and Masti Khel groups were contesting the election. Tehsil Nazim Abdul Jabbar Khan Abbasi asked my family to vote for Niwani group candidate but my father denied to do so; therefore due to this revenge, the complainant party who is tenant of Abbassi family and are under the pressure and influence of Tehsil Nazim, I was falsely implicated in this case on asking and pressure of Tehsil Nazim. The witnesses are interse related and they

deposed falsely against me on the pressure and asking of Niwani and Tehsil Nazim, I am innocent."

The appellant opted not to make statement u/S. 340(2), Cr.P.C. however he produced Mushtaq Ahmed, Secretary Union Council (DW-1) and Abdul Rasheed (DW-2) in his defence. He also produced documentary evidence in the shape of statement of Ateeq-ur-Rehman Exh. DA, statement of Mati Ullah Exh.DB, statement of Muhammad Iqbal Exh.DC and copy of birth certificate Exh.DD.

8. The learned trial Court vide judgment dated 31.01.2009, found Amir Hayat appellant guilty and convicted and sentenced him as mentioned and detailed above.

9. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that both the witnesses are chance witnesses and they have not been able to explain any plausible reason for their presence at the spot at the relevant time; that the prosecution eye-witnesses have stated that they identified the appellant in the light of torches but no torch was taken into possession by the Investigating Officer; that there is delay of three hours in reporting the matter to the police; that the eye-witnesses did not make any attempt to take the deceased to the Hospital or inform the police; that the recovery of pistol .30 bore has rightly been disbelieved by the learned trial Court; that it is the case of the complainant that he noted that a cash amount of Rs.5000/- and mobile phone were missing from the pocket of the deceased but Inayat Ullah (PW-9) has stated in his cross-examination that nothing was snatched, from the deceased in their presence and even there is no description of the mobile and denomination of currency notes given in the FIR; that alleged recovery of identity card of the deceased from the appellant is highly improbable and doubtful because said card was useless for the appellant. So far as, the recovery of pistol .30 bore is concerned, learned counsel for the appellant contends that the appellant was arrested on 16.07.2008 and allegedly pistol .30 bore was recovered on 20.07.2008 and empty was received in the office of Forensic Science Laboratory on 24.07.2008 i.e. after the arrest of the appellant and recovery of pistol, therefore, no reliance can be made on the alleged recovery of pistol and Forensic Science Laboratory report, thus, this appeal be accepted and the appellant may be acquitted from the charges.

10. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the occurrence took place at the night time in a village and there was no conscious delay in reporting the matter to

the police; that there was no enmity of the complainant and other eye-witness with the appellant for his false implication in this case; that it is a case of single accused and substitution in such like cases is a rare phenomena; that recovery of pistol .30 bore has wrongly been disbelieved by the learned trial Court and the prosecution case is further corroborated by the recovery of pistol .30 bore and positive report of Forensic Science Laboratory; that the ocular account gets full support from the medical evidence; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

So far as Criminal Appeal No. 274/2009 is concerned, learned counsel for the appellant/complainant contends that the recovery of snatched articles has wrongly been disbelieved by the learned trial Court and the learned trial Court has not given any finding qua acquittal of the appellant from the charge under Sections 392/411, PPC; that the charge was framed against the appellant under Sections 392/411, PPC, hence respondent may also be convicted and sentenced under Sections 392 & 411, PPC.

11. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

12. The detail of the prosecution case has already been given in Para No. 3 of this judgment, therefore, there is no need to repeat the same, however, gist of the prosecution case is that he (complainant) was agriculturalist by profession. On 11.07.2008 at about 02:00 p.m. (day time) his son namely Ehsan Ullah (deceased) alongwith Amir Hayat (appellant) went to see cricket match by his motorcycle bearing Registration No. 1971/MHB. Ehsan Ullah (deceased) who used to deal in cattle, also took Rs.5,000/- with him and did not come back till 08:00 p.m. (night). He (complainant) alongwith Muhammad Yaqoob while taking torches with them went in the search of Ehsan Ullah (deceased) and when at about 09:00 p.m. they reached at a distance of 1« kilometers from their village Saeed Wala towards Northern side, they saw the motorcycle of Ehsan Ullah (deceased) was parked on the `Katcha' road, and at a distance of 10 `karams' from there Ehsan Ullah (deceased) and Amir Hayat (appellant) were quarreling with each other. Amir Hayat (appellant) was armed with pistol .30 bore. Within their view Amir Hayat (appellant) made a fire, shot with his pistol with intention to commit the murder of Ehsan Ullah (deceased) which hit

on the forehead of Ehsan Ullah (deceased). They (complainant party) tried to apprehend Amir Hayat (appellant) who threatened them that if they would come near him, he will murder them. They (PWs) attended Ehsan Ullah (deceased) and found that the amount of Rs.5,000/- and mobile phone NOKIA were missing from his pocket. Ehsan Ullah (deceased) succumbed to the injury at the spot. The occurrence was witnessed besides the complainant by Muhammad Yaqoob (given up PW) and Inayat Ullah (PW-9).

13. The occurrence in this case took place on 11.07.2008 at 09:00 p.m. (night) at the `Kacha' road of village Syed Wala situated within the territorial limits of Police Station Kalor Kot, District Bhakkar. The matter was reported to the police by the complainant Aman Ullah (PW-8) through his written complaint Exh. PC on the same night at 12:30 a.m., whereas the formal FIR Exh. PC/1 was also chalked out on the same night at 01:30 a.m. The distance between the place of occurrence and Police Station is 7/8 Kilometers. As the occurrence took place at night time (09:00 p.m.) in a village, therefore, considering all the above mentioned facts and social status of the parties, we are of the view that there was no deliberate or conscious delay in reporting the matter to the police.

14. The ocular account of the prosecution was furnished by Aman Ullah (PW-8) and Inayat Ullah (PW-9). They are residents of the same area, where this occurrence took place as their residence is at a distance of 1« kilometers from the place of occurrence. They have also plausibly explained their presence at the spot at the relevant time by stating that on the day of occurrence at about 02:00 p.m. Ehsan Ullah (deceased) alongwith Amir Hayat (appellant) went on YAMAHA motorcycle owned by Aman Ullah (deceased) to see the cricket match at Withiyo Wala and as son of the complainant Aman Ullah (PW-8) namely Ehsan Ullah (deceased) did not return till 08:00 p.m., therefore, he (Aman Ullah complainant PW-8) alongwith Inayat Ullah (PW-9) while having torches with them went in search of Ehsan Ullah (deceased) and when at about 09:00 p.m. they reached at the distance of 1« kilometers from the house of the complainant, they saw the motorcycle of the deceased parked at the `katcha' road and at a distance of 10 `karams' Amir Hayat (appellant) was quarrelling with Ehsan Ullah (deceased). The appellant thereafter made a fire shot which landed on the left side of the forehead of Ehsan Ullah (deceased). The concern of the complainant Aman Ullah (PW-8) was quite natural as his son Ehsan Ullah (deceased) did not come back till 08:00 O' clock at night, therefore, he in the company of Inayat Ullah (PW-9) went in the search of his son. Similarly Inayat Ullah (PW-9) was uncle

of Ehsan Ullah (deceased). The presence of above mentioned eye-witness, at the spot, at the relevant time, therefore, cannot be considered as un-natural or improbable. Both the above mentioned eye-witnesses were cross-examined at length but their evidence could not be shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is trust worthy and straight forward. Both the above mentioned witnesses have stated that they identified the appellant in the light of their torches. Aman Ullah complainant (PW-8) has further stated that there was a pole of electricity installed near the place of occurrence. He has further stated that the `abadi' of Sana Abad exists at a distance of one furlong from the place of occurrence. The relevant part of his statement during his cross-examination at pages 35 & 36 of the paper book reads as under:

"There is no tree near the place of occurrence but there is pole of electricity installed near the said place of occurrence. It is correct that towards east from the said place of occurrence at a distance of about one furlong Sana Abad Abadi exist. I cannot say that Abadi of village Saeed Wala starts at a distance of four furlongs from the said place of occurrence."

In the above mentioned circumstances, the objection of learned counsel for the appellant that the torches of the above mentioned eye-witnesses were not taken into possession by the Investigating Officer is not material which even otherwise appears to be slackness on the part of the Investigating Officer. The appellant was earlier known to the above mentioned eye-witnesses, therefore, his identification in the light of the torches and in the light of electric pole which was installed near the place of occurrence has fully been established in this case.

There is another aspect of the case that the complainant is real father of Ehsan Ullah (deceased). It is a case of single accused. It is highly improbable that he would let of the real culprit and will falsely implicate the appellant for the murder of his real son. Substitution in such like cases is a rare phenomena.

15. The medical evidence of the prosecution was furnished by Dr. Muhammad Aslam Malik (PW-10). He, on 12.07.2008 at 08.30 a.m. conducted the post-mortem examination on the dead body of Ehsan Ullah (deceased) and found the following injuries on his person:--

(1) A fire-arm wound of enterance 1 x 1 cm on the left side of forehead 3 cm above left eye brow with blackening and burning of margin wound.

(2) A fire-arm wound of exit 1.5 x 1.5 cm on the back side of head about 4 cm posterior to right ear. Blood and brain matter were present in the wound.

According to his opinion, all the injuries were ante-mortem caused by fire-arm weapon which caused extensive laceration of brain matter and was sufficient to cause death in ordinary course of nature. Probable time that elapsed between injuries and death was instantenous and between death and post-mortem examination was 3 to 24 hours. It is case of the prosecution that the appellant inflicted fire arm injury on the person of Ehsan Ullah (deceased), which landed on the right side of his forehead. The said injury was available on the person of the deceased as Injury No. 1, in his post-mortem report Exh. PJ. We are, therefore, of the view that the medical evidence furnished by Doctor Muhammad Aslam Malik (PW-10) has fully supported the above mentioned ocular account furnished by Aman Ullah (PW-8) and Inayat Ullah (PW-9).

16. Insofar as the recovery of pistol .30 bore (P-10) and positive report of Forensic Science Laboratory Exh. PR is concerned, we have noted that on 11.07.2008 one crime empty was recovered from the place of occurrence vide recovery memo. Exh. PG. The appellant was arrested in this case on 16.07.2008 and pistol (P-10) was allegedly recovered from his possession on 20.07.2008. The aforementioned crime empty was deposited in the office of Forensic Science Laboratory, Punjab, Lahore on 24.07.2008 i.e. after the arrest of the appellant and after 4 days from the alleged recovery of pistol (P-10) on the pointation of the appellant. As the empty and pistol (P-10) were kept together at the Police Station for a considerable period, therefore, possibility cannot be ruled out that a fake empty was prepared from pistol .30 bore (P-10) and sent to the office of Forensic Science Laboratory for its comparison with the said pistol. We are, therefore, of the view that it is not safe to rely upon the prosecution evidence qua alleged recovery of pistol (P-10) and positive report of Forensic Science Laboratory Exh. PR.

Insofar as the recovery of cash amount of Rs.5,000/-, purse and NOKIA mobile from the possession of the appellant is concerned, it is noteworthy that Inayat Ullah (PW-9) has stated during his cross-examination that Ehsan Ullah (deceased) had not told them (PWs) prior to his death that the appellant had snatched mobile and cash amount from him. He further stated that as the deceased was not having mobile and purse with him, therefore, they (PWs) presumed that these articles were snatched by the

appellant. The relevant portion of the statement of Inayat Ullah (PW-9) at page 42 of the paper book reads as under:-

"Ihsan Ullah had not told us prior to his death that accused had snatched mobile and money from him. As the deceased was not having mobile and purse when we sight him after the occurrence and had having these articles while, he left the house so we presumed that these articles were snatched by the accused."

Moreover, no specific number or model or mark of identification of the snatched mobile of the deceased was mentioned in the FIR or in the statements of the above mentioned eye-witnesses recorded by the learned trial Court. Similarly no denomination of the currency notes, number or any specific identification mark on the snatched currency notes were mentioned in the FIR or in the statements of the above mentioned eye-witnesses, therefore, we are of the view that the alleged recovery of mobile phone and cash amount was rightly disbelieved by the learned trial Court.

Insofar as the recovery of Identity Card of the deceased from the possession of the appellant is concerned, we have noted that it was not stated in the FIR that the Identity Card of the deceased was also missing after the occurrence. Similarly the eye-witnesses namely Aman Ullah (PW-8) and Inayat Ullah (PW-9) did not allege in their statements made before the learned trial Court that the Identity Card of the deceased was also missing, after the occurrence. Even otherwise it does not appeal to common sense that when Identity Card of the deceased was useless for the appellant then why he would keep the same with him for a considerable period in order to create evidence against him. None of the eye-witnesses have stated that cash amount of Rs.5,000/- mobile phone, Identity Card or any other article of the deceased was snatched by the appellant in his presence. Considering all the above mentioned facts, we are, of the view that the evidence qua alleged recovery of Identity Card, cash amount of Rs.5,000/- mobile phone, Taveez, purse of the deceased from the possession of the appellant is of no avail to the prosecution.

17. The motive as alleged in the FIR was to the effect that the appellant snatched cash amount of Rs.5,000/- and mobile phone from the deceased and on resistance of the deceased, he committed his murder. As we have disbelieved the recoveries of cash amount of Rs.5,000/- and mobile phone etc. in the preceding paragraph of this judgment, therefore, we are of the view that the motive as alleged by the prosecution, has not been proved in this case.

18. Now coming to the evidence produced by the appellant in his defence, in the shape of statements of Mushtaq Ahmad (DW-1), Abdul Rasheed (DW-2) and birth certificate of the appellant Exh. DD. We have noted that the above mentioned evidence was produced by the appellant to prove that he was less than 18 years of age, at the time of occurrence. It is noteworthy that after framing of the charge, the appellant claimed that his trial be conducted under the Juvenile Justice System Ordinance, 2000, on the ground that he was less than 18 years of age at the time of occurrence. The appellant also produced at that stage his birth entries in the Union Council, which were not found to be confidence inspiring by the learned trial Court. The appellant was referred by the learned trial Court for his medical examination as envisaged under Section 7 of the Juvenile Justice System Ordinance, 2000. The medical board found the age of the appellant as 20/22 years, therefore, application of the appellant for conducting his trial under the Juvenile Justice System Ordinance, 2000 was turned down by the learned trial Court vide order dated 28.11.2008. (the order dated 28.11.2008 of the learned trial Court is available at Page No. 1 of the paper book.) There is nothing on the record that the order of the learned trial Court dated 28.11.2008 was challenged any further by the appellant. The trial of the appellant was conducted by the ordinary Court. As the order of the learned trial Court dated 28.11.2008 has attained finality, therefore, the appellant cannot take any benefit at this stage from the afore mentioned evidence produced by him in his defense.

19. We have disbelieved the prosecution evidence qua the motive and recoveries of cash amount of Rs.5,000/- mobile phone, identity card, Taveez of the deceased etc. and pistol .30 bore (P-10) but if the prosecution evidence qua motive and aforementioned recoveries is excluded from consideration even then there is sufficient incriminating evidence available on the record to prove the prosecution case against the appellant. As discussed earlier the prosecution case was proved against the appellant through the evidence of eye-witnesses namely Aman Ullah (PW-8) and Inayat Ullah (PW-9). The said eye-witnesses were cross-examined at length but their evidence could not be shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is quite natural, trust worthy and confidence inspiring which has been fully supported by the medical evidence furnished by Doctor Muhammad Aslam Malik (PW-10), as well as, by the post-mortem report of the deceased Ehsan Ullah Exh. PJ and pictorial diagrams Exh.PJ/1 & Exh. PJ/2, therefore, we are of the view that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

20. Now coming to the quantum of sentence, we have noted some mitigating circumstances in favour of the appellant firstly, we have already disbelieved the alleged recoveries of cash amount of Rs.5,000/- mobile phone, identity card of the deceased etc. and pistol .30 bore (P-10) from the possession of the appellant due to the reasons mentioned in Paragraph No. 16 of this judgment, Secondly, it is a case of single fire shot and there is no allegation of repetition of any fire arm injury against the appellant, Thirdly, we have disbelieved the prosecution evidence qua motive due to the reason noted in Paragraphs No. 16 & 17 of this judgment. It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence, which resulted into present unfortunate incident, therefore, in our view the death sentence awarded to the appellant is quite harsh. It is well-recognized principle by now that accused is entitled to the benefit of doubt as an extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of `Mir Muhammad alias Miro v. The State' (2009 SCMR 1188) wherein Hon'ble Supreme Court has held as under:

`It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as suck decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence.'

In another case `Ansar Ahmad Khan Barki versus The State and another' (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death. We are convinced that Amir Hayat appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under Section 302(b) of, PPC.

While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of `Ahmad Nawaz and another v. The State' (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:

"The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of `Iftikhar-ul-Hassan v. Israr Bashir and another' (PLD 2007 SC 111), it was held that:

`this is settled law that provisions of Sections 306 to 308, PPC attracts only in the cases of Qatl-i-Amd liable to Qisas under Section 302(A), PPC and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under Section 302(b), PPC. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under Section 302(a) and 302(b), PPC respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302(b), PPC and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in `Ghulam Muretaza v. State' (2004 SCMR 4), `Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), `Muhammad Akram v. State' (2003 SCMR 855) and `Abdul Salam v. State' (2000 SCMR 338). The Court while maintaining the conviction under Section 302(b), PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B of, Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case.'

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted, that:)

`In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course' (underlining, italic and bold supplied)'."

21. Due to the above mentioned reasons the conviction of Amir Hayat appellant under Section 302(b), PPC awarded by the learned trial Court is maintained but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned trial Court and sentence in default thereof is maintained and upheld. The benefit of Section 382-B of, Cr.P.C. is also given to the appellant.

22. Insofar as Criminal Appeal No. 274/2009 filed by Aman Ullah complainant against the acquittal of Amir Hayat (appellant) from the charge under Sections 392/411, PPC is concerned, as we have already disbelieved the prosecution evidence qua the alleged recoveries of cash amount of Rs. 5,000/-, mobile phone NOKIA, purse etc. due to the reasons mentioned in Paragraph No. 16 of this judgment, therefore, Criminal Appeal No. 274 of 2009 stands dismissed.

23. Consequently with the above said modification in the sentence of Amir Hayat appellant, Criminal Appeal No. 73 of 2009 filed by Amir Hayat appellant is hereby dismissed. Murder Reference (M.R. No. 50 of 2009) is answered in the negative and death sentence of Amir Hayat appellant is not confirmed.

(A.S.) **Appeal dismissed.**

PLJ 2014 Cr.C. (Lahore) 449 (DB)

Present: Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ.

ALLAH YAR & others--Appellants

versus

STATE & others--Respondents

Crl. Appeal Nos. 1260, 1378 and M.R. No. 287 of 2008, heard on 11.4.2013.

Delay in lodging FIR--

----Principle--It is by now well settled law that sanctity of truth cannot be attached to an FIR which has been lodged with an inordinate and un-plausible delay--Possibilities of concoction and deliberations are very much there in case of a delayed FIR. [P. 459] A

Delay in Postmortem Examination--

----Postmortem examination of dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by police in procuring and planting witnesses and in cooking-up a story for prosecution before preparing police papers necessary for getting a post-mortem examination of dead body conducted.

[Pp. 459 & 460] C

2012 SCMR 419 & 2012 SCMR 327, ref.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Eye-witnesses were not present at spot at time of occurrence and delay in post-mortem examination of deceased was used by prosecution in concocting a false story and procuring fake witnesses of prosecution--Appellant has been attributed only one injury with `sota' on head of deceased--Although doctor has given nature of said injury as lacerated wound but in his cross-examination he conceded that he did not open stitches of said injury therefore, statement of doctor regarding nature of injury that it was a lacerated wound is inconsequential because it is not possible to know nature of injury of a stitched wound without opening stitches--Injury on head of deceased was caused by some sharp edged weapon, blunt weapon or fire-arm weapon because doctor who initially medically examined deceased and stitched said wound has not been produced in Court--Doctor

who initially medically examined (deceased) in injured condition and medico legal report of (deceased) were best pieces of evidence to prove exact nature of injury on head of (deceased) which was attributed to appellant but said pieces of evidence were withheld by prosecution for reasons best know to it--As best medical evidence was withheld by prosecution which shows that evidence might not be supporting prosecution case, therefore, same was not produced by prosecution--So a presumption under illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984, can fairly be drawn against prosecutions--There was no report of Chemical Examiner or Serologist to establish that `Sota' was stained with human blood therefore, alleged recovery of `sota' (bamboo stick), is of no avail to prosecution which is even otherwise, of common pattern and is usually available in almost every second house--Motive behind occurrence was that deceased and appellant had joint tubewell and there was turn of deceased to irrigate his land but appellant refused to give turn of water to deceased upon which deceased gave slaps to appellant and disgraced him and due to this grudge, appellant committed murder of deceased--No evidence whatsoever was produced by prosecution to establish joint ownership of tubewell or turn of water of deceased--Relevant part of statement of complainant in his cross-examination--As no evidence was produced to prove alleged motive, therefore, mere verbal assertion of prosecution witnesses qua alleged motive is not sufficient to prove same--Prosecution has failed to prove its case against appellant beyond shadow of doubt--Appeal accepted.[Pp. 459, 460, 461, 462, 463] B, D, E, G, H & K

Incriminating evidence--

----It is by now well settled law that if any incriminating evidence is not put to an accused in his statement recorded under above mentioned provision of law, then same cannot be used against him. [P. 462] F

Incriminating evidence--

----It is by now well settled law that if any incriminating evidence is not put to an accused in his statement recorded under above mentioned provision of law, then same cannot be used against him. [P. 462] I

Benefit of doubt--

----It is by now well settled law that if there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to give benefit of doubt to accused,

whereas, instant case is replete with number of circumstances which have created doubt about prosecution story. [P. 462] J

1995 SCMR 1345 & 2009 SCMR 230, ref.

Malik Muhammad Siddique, and Ch. Muhammad Amin Javed, Advocate for Appellants.

Mr. Arshad Mehmood, D.P.G. for State.

Mehr Allah Yar Sial and Mr. Faryad Ali Choudhry, Advocates for Complainant.

Date of hearing: 11.4.2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--This judgment shall dispose of Criminal Appeal No. 1260 of 2008, filed by the appellant, Allah Yar, against his conviction and sentence, Criminal Appeal No. 1378 of 2008, filed by the complainant Abdul Aziz against the acquittal of Ahmad Yar and others Respondents No. 2 to 8 of the said appeal, and Murder Reference No. 287 of 2008 (The State vs. Allah Yar), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Allah Yar convict, as all these matters have arisen out of the same judgment dated 31.10.2008, passed by the learned Additional Sessions Judge, Sub-Division Tandlianwala, District Faisalabad. Allah Yar appellant along with Ahmad Yar, Bashir Ahmad, Abdul Sattar, Yousaf, Shaukat Ali, Muhammad Yar and Sufi Ameer (since acquitted) was tried in case FIR No. 365, dated 29.09.2007, registered at Police Station, Garh Tandlianwala, District Faisalabad, in respect of offences under Sections 302/148/149/109 of, PPC. After conclusion of the trial, the learned trial Court vide its judgment dated 31.10.2008, has convicted and sentenced the appellant as under:--

Allah Yar son of Ameer:

Under Section 302(b) of, PPC to death for committing the murder of Jafar Ali (deceased). He was directed to pay compensation of Rs. 1,00,000/- under Section 544-A of, Cr.P.C. to the legal heirs of the deceased Basharat Ali and in default whereof, he was directed to further undergo 06 months S.I.

The learned trial Court vide the same judgment, however, acquitted co-accused Ahmad Yar, Bashir Ahmad, Abdul Sattar, Yousaf, Shaukat Ali, Muhammad Yar and Sufi Ameer.

2. Brief facts of the case as given by the complainant Abdul Aziz (PW-10) in his complaint (Ex.PH), on the basis of which formal FIR (Ex.PH/1) was chalked out, are that he (complainant) was resident of Chah Pippalwala Dakhli Kalianwala and cultivator by profession. On 28.09.2007 at about 06:30 p.m, Jafar Ali, real maternal uncle (mamoon) of the complainant, was returning home from Chah Pippalwala and when he reached near the land of Aziz son of Mamand Parbana Kalianwala, suddenly Allah Yar (appellant), Ahmad Yar accused (since acquitted), Shaukat Ali accused (since acquitted), Muhammad Yar accused (since acquitted), Abdul Sattar accused (since acquitted) all armed with sotas and Bashir accused (since acquitted) armed with gun .12 bore emerged there from the maze crop of Allah Yar (appellant). Bashir (since acquitted) raised lalkara that Jafar Ali be not let alive and he be taught a lesson to disgrace Allah Yar (appellant) upon which Allah Yar (appellant) gave sota blow to Jafar Ali (deceased) which hit him on the right side of his head, who fell down. Ahmad Yar (since acquitted), Shaukat Ali (since acquitted), Abdul Sattar (since acquitted), Muhammad Yar (since acquitted), thereafter, gave one sota blow each to Jafar Ali (deceased) hitting him on his back and left hip. On the hue and cry of Jafar (deceased), he (complainant) along with Liaqat Ali (given up PW-), Mazhar Iqbal (given up PW-) and Akhtar Ali (PW-11), who were present nearby, came to the spot and witnessed the occurrence. Allah Yar etc. fled away while raising lalkaras. Jafar Ali (deceased) in injured condition was shifted to the Civil Hospital Kanjwani and the doctor keeping in view the critical condition of the injured referred him to the District Headquarter Hospital, Faisalabad. Jafar Ali (deceased) in injured condition was being shifted to the District Hospital, Faisalabad for treatment who at the bridge of Jhal Khanoo Aana succumbed to the injuries. The dead body of Jafar Ali (deceased) was taken to the Civil Hospital, Kanjwani.

The motive as alleged by the complainant was that Jafar Ali (deceased) and Allah Yar (appellant) had joint tubewell and there was the turn of water of Jafar Ali (deceased) but accused Allah Yar etc. refused to give the turn of water to Jafar Ali (deceased) upon which Jafar Ali (deceased) slapped Allah Yar (appellant) and disgraced him and due to this grudge, accused Allah Yar etc. in consultation with Ameer and Yousaf accused (since acquitted) committed the murder of Jafar Ali (deceased) with sotas.

3. The appellant Allah Yar was arrested in this case on 03.02.2008 by Muhammad Jahangir Khan, Inspector (PW-13) and as per prosecution case, during investigation of the case sota (P-4) was recovered on pointation of the appellant on 02.03.2008 vide recovery memo. (Ex.PJ). After completion of investigation, the challan was prepared

and submitted before the Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed charge against the appellant Allah Yar along with Ahmad Yar (since acquitted), Shaukat Ali (since acquitted), Muhammad Yar (since acquitted), Abdul Sattar (since acquitted) and Bashir (since acquitted) under Sections 302/149/148, PPC, and against Ameer (since acquitted) and Yousaf (since acquitted) under Section 109, PPC on 06.05.2008, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced thirteen witnesses, during the trial whereas Zaka Ullah, Inspector, appeared as CW-1. The complainant Abdul Aziz (PW-10) and Akhtar Ali (PW-11) have furnished the ocular account of the prosecution. Both of them were also the recovery witnesses of `sota' (P-4) which was taken into possession on the pointation of the appellant vide memo. (Ex.PJ). Bashir Ahmad (PW-7) was the recovery witness of `sota' (P-3) which was taken into possession on the pointation of co-accused Ahmad Yar (since acquitted) vide memo. (Ex.PG).

The medical evidence was furnished by Dr. Muhammad Afzal, (PW-1).

Abdul Ghani, S.I (PW-12), Muhammad Jahanghir Khan, Inspector (PW-13) and Zaka Ullah, Inspector (CW-1) were the Investigating Officers of the case. Liaqat Ali, Patwari (PW-2), Muhammad Siddique 3282/HC (PW-3), Abdul Hameed 2526/C (PW-4), Muhammad Ijaz (PW-5), Muhammad Iqbal (PW-6), Muhammad Nawaz 1443/HC (PW-8) and Alamsher, ASI (PW-9), were the formal witnesses.

The prosecution has also produced documentary evidence in the shape of post-mortem report of the deceased Jafar Ali (Ex.PA), pictorial diagram (Ex.PA/1), injury statement of the Jafar Ali deceased (Ex.PB), death report of Jafar Ali deceased (Ex.PC), scaled site plan of the place of occurrence (Ex.PD), memo. of possession of last worn clothes of the deceased i.e. qameez (P-1) and chadar (P-2) (Ex.PE), memo. of possession of blood stained earth (Ex.PF), memo. of possession of sota (P-3) from co-accused Ahmad Yar (since acquitted) (Ex.PG), complaint (Ex.PH), FIR (Ex.PH/1), memo. of possession of sota (P-4) from the appellant Allah Yar (Ex.PJ), site plan without scale of the place of occurrence (Ex.PK), site plan without scale of place of abetment (Ex.PL), site plan without scale of place of recovery of sota (P-3) from co-accused Ahmad Yar (since acquitted) (Ex.PM), site plan without scale of place of recovery of sota (P-4) from Allah Yar appellant (Ex.PN), report of Chemical Examiner (Ex.PP), copy of Entry Register (Ex.PQ), and closed the prosecution evidence.

5. The statement of appellant under Section 342 of, Cr.P.C., was recorded. The appellant refuted all the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you", the appellant, replied as under:--

"I have been involved in this case due to previous enmity. All the PWs are related inter-se as well as to the deceased Jaffar and they have deposed against me due to their relationship and to strengthen the prosecution case."

In answer to another question that "Do you want to say any thing else", the appellant, replied as under:--

"I am innocent. The actual facts are that on 28.09.2008 at 08:00/08:30 p.m., a quarrel took place between Ashraf s/o Ghulam, Jaffar s/o Haitam, Niaz s/o Hanif and Jaffar deceased. After this quarrel, Jaffar deceased went to his home by walking on foot and told his sons Liaqat and Abid who came to Khoh Rehana/Pathana on a bicycle and narrated about this quarrel to Abdul Aziz PW-. Then Abdul Aziz came at Chah Peoplewala and took Akhtar PW- with him and went to the home of Jaffar deceased. They gave self inflicted injury on the head of Jaffar deceased to make a hurt case against Niaz, Asharaf and Jaffar. When they saw the victim has become serious, then they got the injury stitched. They put Jaffar deceased on a cot and took him at the so-called place of occurrence and raised hue & cry. They got stitched the head injury but Jaffar succumbed to that self inflicted injury. This fact has been proved by the prosecution witness (Doctor) PW. When they made hue and cry at the so-called place of occurrence, I came to the so-called place of occurrence. Where is a Pulli on Katch road between Chah Wanwala and Chah Peoplewala and so-called place of occurrence. Many people from Chah Peoplewala and Chah Wanwala along with the PWs were present there at the said Pulli. The persons who were present there told us regarding the quarrel between Jaffar deceased and Ashraf Jaffar and Niaz. Neither I was present at the place of occurrence nor I participated in the occurrence. Further more, I have been declared innocent during the investigation and this fact was verified by the C.P.O, Faisalabad."

Allah Yar appellant neither opted to make statement under Section 340(2) of, Cr.P.C. in disproof of the allegations levelled against him, nor he produced any defence evidence. However, his co-accused Ahmad Yar in his statement has produced attested copy of bail petition of accused persons Ashraf, Sattar and Niaz etc as (Ex.DA), attested copy of its order (Ex.DB), photo copy of petition under Section 22-A/B, Cr.P.C. titled `Bashir Ahmad vs. Addl. DIG Police' before the learned Addl. Sessions Judge Mark-

A, order of the learned Addl. Sessions Judge Mark-B, copy of FIR No. 384/07 at P.S. Garh, Mark-C, copy of FIR No. 06/1981 at P.S. Garh Mark-D, copy of FIR No. 04/1990 at P.S. Garh Mark-E.

6. The learned trial Court vide its judgment dated 31.10.2008, found the appellant Allah Yar, guilty and convicted and sentenced him as mentioned and detailed above.

7. The learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that incident in this case as per FIR (Ex.PH/1) took place on 28.09.2007 at 06:30 p.m and matter was reported to the police on 29.09.2007 at 03:00 a.m, i.e. with the delay of more than 8 hours and there is no explanation in this respect; that in the FIR (Ex.PH/1), it is the case of the complainant that the deceased was taken to the Civil Hospital, Kanjwani and doctor referred him to the District Headquarter Hospital, Faisalabad but there is no evidence that the deceased was examined at RHC, Kanjwani in injured condition as no MLR was tendered in evidence and even no doctor was examined by the prosecution; that document (Ex.PQ) i.e. copy of Entry Register, carries no value as it is not perse admissible in evidence and purportedly attested by Dr. Muhammad Afzal (PW-1), who categorically stated that he did not refer the injured Jafar and the doctor (PW-1) was not declared hostile; that Dr. Muhammad Afzal (PW-1), who conducted the post-mortem, examination on the dead body of deceased, noted a stitched wound on the head of deceased but in cross-examination he admitted that he did not open the wound, as such opinion of the doctor qua the nature of injury is not relevant; that the motive alleged in the FIR (Ex.PH/1) was the joint ownership of tube well and quarrel over the turn of irrigation of water of the deceased but the complainant Abdul Aziz (PW-10) did not produce any document to prove the joint ownership of tube well as well as in respect of turn of irrigation of Jafar deceased and the learned trial Court also has not believed the same; that the case was finally investigated by Zaka Ullah, Inspector (CW-1) who in his cross-examination has admitted that the appellant Allah Yar was found innocent during the course of investigation; that recovery of `sota' (P-4) at the instance of the appellant is not material as it was an ordinary `sota' and was not blood stained. Moreover, no questions qua recovery of `sota' (P-4) and motive were put to the appellant in his statement recorded under Section 342, Cr.P.C. therefore, prosecution evidence qua recovery and motive is of no avail to the prosecution; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant, opposes this appeal on the grounds that there was no conscious delay in reporting the matter to the police as the deceased was seriously injured and firstly he was taken to RHC, Kanjwani from where he was referred to the District Hospital, Faisalabad and in this respect the prosecution has produced copy of Entry Register maintained by RHC, Kanjwani (Ex.PQ) in which it was mentioned that Jafar (deceased) was referred to the District Headquarter Hospital, Faisalabad and statement of Dr. Muhammad Afzal (PW-1) in this respect is not material; that there was no reason for the complainant and the other eye-witnesses, who were the residents of the same village, to depose falsely against the appellant; that prosecution has proved the motive and it is not necessary to produce documents regarding the ownership of tube well and turn of irrigation; that prosecution case to the extent of the appellant is further corroborated by the recovery of `sota' (P-4) at the instance of the appellant; that police opinion about innocence of the appellant is inadmissible and no reliance can be placed on it. Insofar as the Criminal Appeal No. 1378 of 2008 is concerned, learned counsel contends that all the respondents participated in the occurrence with their common object therefore, provisions of Section 149, PPC are fully attracted. They have wrongly been acquitted and while allowing this appeal, they be awarded maximum sentence; that the sentence of death was rightly awarded to the appellant Allah Yar and the same may be maintained, appeal filed by Allah Yar appellant may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the appellant, the learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant, and have also gone through the evidence available on the record, with their able assistance.

10. The prosecution in this case in order to prove the ocular account has produced Abdul Aziz (PW-10) and Akhtar Ali (PW-11). According to the statement of Abdul Aziz (PW-10), on 28.09.2007 at about 06:30 p.m, Jafar son of Sultan deceased was going from Pippalwana to his home. He along with Mazhar, Akhtar, Liaqat were following him and when they reached near the land owned by Aziz son of Mamand, suddenly accused namely Allah Yar, Ahmad Yar, Shaukat Ali all sons of Ameer armed with sotas, Abdul Sattar son of Noor armed with sota, Bashir son of Noor armed with gun .12 bore came out from the maze crop of Allah Yar (appellant). Bashir accused raised lalkara that Jafar Ali deceased should not be let alive because he insulted Allah Yar accused. On this Allah Yar accused gave sota blow which hit Jafar Ali deceased on the left side of his head who fell down, then Ahmad Yar, Shaukat Ali, Abdul Sattar and Muhammad Yar

gave sota blows which hit on Jafar Ali deceased on his back and on his left buttock. Jafar Ali deceased made hue and cry. They witnessed the occurrence. Then accused persons fled away from the spot while raising lalkaras. They (PWs) took Jafar Ali in injured condition to RHC Kanjwani. The doctor referred him to DHQ Hospital, Faisalabad. When they reached at pull Jhal Khanoana, the injured succumbed to his injuries. They came back along with the dead body to RHC Kanjwani.

The motive behind this occurrence was that Allah Yar and Jafar Ali deceased were co-sharers in a Tubewell. The turn of water was of Jafar deceased. Allah Yar (appellant) forbade him but Jafar deceased gave slaps to Allah Yar appellant, due to this grudge, all the accused persons Allah Yar, etc. murdered Jafar Ali deceased.

11. First of all we will take up the argument of the learned counsel for the appellant regarding the result of investigation conducted by Zaka Ullah, Inspector (CW-1). It has been argued by the learned counsel for the appellant that the appellant was declared innocent during the final police investigation and Zaka Ullah, Inspector/Investigating Officer (CW-1) has stated during his cross-examination that according to his investigation, Allah Yar appellant was innocent and he did not take part in the occurrence. He further submitted that final result of police investigation has created serious doubt about the prosecution story qua the appellant. Although Investigating Officer of this case, namely, Zaka Ullah, Inspector (CW-1) who finally investigated this case has found the appellant innocent and has stated during his cross-examination that according to his investigation, Allah Yar appellant did not participate in the occurrence and he was present at his home in village Chahwanwala at the time of occurrence but we are afraid that there is no force in the above argument of learned counsel for the appellant because, opinion of the Investigating Officer is not admissible in evidence and in holding so we are fortified by the judgment of the Hon'ble Supreme Court of Pakistan in the case of `Muhammad Ahmad (Mahmood Ahmed) vs. The State' (2010 SCMR 660) where the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed then

the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be handed to death only because the Investigating Officer had opined about his guilt"

12. According to the prosecution case the occurrence in this case took place on 28.09.2007 at about 06:30 p.m., at the land of one Aziz Purbana situated within the area of Police Station Garh, District Faisalabad. The matter was reported to the police by the complainant Abdul Aziz (FW-10), on 29.09.2007 at 03:00 a.m through his complainant (Ex.PH) i.e. with the delay of 8 1/2 hours. The formal FIR (Ex.PH/1) was registered on 29.09.2007 at 03:30 a.m i.e. with the delay of 9 hours from the occurrence. The distance between the place of occurrence and the Police Station is 5 kilometers. The complainant Abdul Aziz (PW-10) has given this explanation for the above mentioned delay in lodging the FIR, that firstly the deceased was taken to RHC, Kanjwani and the doctor referred him to the DHQ Hospital, Faisalabad and when they reached at Pull Jhal Khanoana, the injured succumbed to the injuries and they came back along with the dead body to RHC, Kanjwani where he (complainant) left the dead body and proceeded to the Police Station to lodge the FIR. Relevant part of the statement of Abdul Aziz complainant (PW-10) regarding the above mentioned delay in reporting the matter to the police reads as under:

"We took Jafar Ali in injured condition to RHC Kanjwani. The doctor referred him to DHQ Hospital, Faisalabad. When we reached pull Jhal Khanoana the injured succumbed to his injuries. We came back along with the dead body to RHC Kanjwani."

We have noticed that Dr. Muhammad Afzal (PW-1) has categorically stated during his cross-examination that he did not refer Jafar Ali (deceased) to the DHQ Hospital, Faisalabad. Relevant part of his statement reads as under:

"It is correct that I did not refer Jafar Ali deceased to DHQ"

The prosecution did not produce the doctor who allegedly referred Jafar Ali (deceased) to the DHQ Hospital, Faisalabad thus, they could not establish the reason of delay in reporting the matter to the police. Prosecution has also not placed on record any medico legal report of Jafar Ali (deceased) regarding his alleged initial medical examination at RHC, Kanjwani. Although prosecution has produced a copy of Entry Register (Ex.PQ) to establish that on 28.09.2007, Jafar Ali (deceased) was medically examined at RHC, Kanjwani and was referred to the DHQ, Hospital Faisalabad but the above mentioned document was not proved by the prosecution in accordance with law because neither

the scribe of said register nor any Record Keeper of RHC, Kanjwani was produced to prove the said document. No medical evidence regarding initial medical treatment of Jafar Ali (deceased) at RHC, Kanjwani nor any doctor who medically examined the deceased at RHC, Kanjwani was produced by the prosecution therefore, the reason given by the prosecution for the delay in reporting the matter to the police cannot be established in this case by the prosecution. The complainant Abdul Aziz (PW-10) in his examination-in-chief has stated that at the time of occurrence, he was accompanied by Mazhar (given up PW-), Akhtar (PW-11) and Liaqat (given up PW-) and they took Jafar Ali (deceased) to Rural Health Centre, Kanjwani. We have also noted that the distance between the place of occurrence and the Police Station as per FIR (Ex.PH/1) was 5-kilometers; but none of the above mentioned four members of the complainant's party went to the Police Station to inform the police about the incident. Thus, no satisfactory explanation has been given by the prosecution about the, above mentioned inordinate delay in lodging the FIR. It is by now well settled law that sanctity of truth cannot be attached to an FIR which has been lodged with an inordinate and un-plausible delay. The possibilities of concoction and deliberations are very much there in the case of a delayed FIR. The Hon'ble Supreme Court of Pakistan while discussing the delay in lodging the FIR in the case of `Akhtar Ali and others v. The State' (2008 SCMR 06) at page 12 has observed as under:--

"It is also an admitted fact that the FIR was lodged by the complainant after considerable delay of 10/11/ hours without explaining the said delay. The FIR was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of FIR provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the FIR."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of `Nazeer Ahmad v. Gehne Khan and others' (2011 SCMR 1473) wherein the delay of seven hours in lodging the FIR was considered to be a ground which adversely reflected on the credibility of prosecution version.

We are therefore, of the view that the FIR was recorded with a considerable delay, therefore, in these circumstances, chances of deliberation and consultation, in twisting the story, on the part of the complainant, cannot be ruled out.

13. There is another aspect of the case. The occurrence in this case took place on 28.09.2007 at 06:30 p.m and the dead body of Jafar Ali deceased remained lying at RHC, Kanjwani and post-mortem examination on the dead body of Jafar Ali deceased

was conducted on 29.09.2007 at 09:45 a.m, i.e. with the delay of more than 15 hours from the occurrence. The above mentioned delay is suggestive of the fact that the eye-witnesses were not present at the spot at the time of occurrence and delay in the post-mortem examination of the deceased was used by the prosecution in concocting a false story and procuring fake witnesses of the prosecution. We may refer here the case of `Irshad Ahmed vs. The State' (2011 SCMR 1190) wherein, it has been held that the post-mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the dead body conducted. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of `Muhammad Ashraf vs. The State' (2012 SCMR 419). Similarly, in the case of `Khalid @ Khalidi and 2 others vs The State' (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 10 hours in conducting the post-mortem examination on the dead body of deceased, to be an adverse fact against the prosecution case and it was held that it shows that the FIR was not lodged at the given time.

14. The medical evidence of the prosecution in this case was furnished by Dr. Muhammad Afzal, (PW-1). He, on 29.09.2007, at 09:45 a.m, conducted the post-mortem examination on the dead body of Jafar Ali (deceased), vide post-mortem report (Ex.PA), pictorial diagram (Ex.PA/1), and found the following injuries on his person:-
-

Injuries.

1. A stitched lacerated wound 3 cm long on left anterior part of top of head.

2. Three contusions 21 x 3 cm, 16 x 3 cm and 13 x 3 cm respectively, with longitudinal abrisons in the contusions on the left posterolateral side of chest in vertical direction.

3. A contusion with abrasion 2.0 x 1.5 cm on area of left ileac crest below the Injury No. 2.

4. A contusion 16 x 2 cm on the posteriolateral side of left buttock.

As per prosecution case, the appellant has been attributed only one injury with `sota' on the head of the deceased. It is evident from the evidence of Dr. Muhammad Afzal (PW-1) that Injury No. 1, which was attributed to the appellant, was a stitched wound.

Although the doctor has given the nature of the said injury as lacerated wound but in his cross-examination he conceded that he did not open the stitches of said injury i.e. Injury No. 1 therefore, statement of the doctor regarding nature of the injury that it was a lacerated wound is inconsequential because it is not possible to know the nature of the injury of a stitched wound without opening the stitches. It cannot be held with certainty in this case that Injury No. 1 on the head of the deceased was caused by some sharp edged weapon, blunt weapon or fire-arm weapon because the doctor who initially medically examined the deceased and stitched the said wound has not been produced in the Court. As mentioned earlier, it has been brought on the record through the statement of the complainant Abdul Aziz (PW-10) that Jafar Ali (deceased) in injured condition was first taken to RHC, Kanjwani where the doctor referred him to the DHQ, Hospital Faisalabad but neither the doctor who initially medically examined Jafar Ali (deceased) in injured condition nor the medical report whereby Jafar Ali (deceased) was referred to the DHQ, Hospital Faisalabad has been produced in evidence by the prosecution. As stated above, Dr. Muhammad Afzal (PW-1) has categorically stated during his cross-examination that he did not refer the deceased to the DHQ, Hospital Faisalabad. The doctor who initially medically examined Jafar Ali (deceased) in injured condition and medico legal report of Jafar Ali (deceased) were the best pieces of evidence to prove the exact nature of injury on the head of Jafar Ali (deceased) i.e. Injury No. 1 which was attributed to the appellant but the said pieces of evidence were withheld by the prosecution for the reasons best know to it. As the best medical evidence was withheld by the prosecution which shows that the above mentioned evidence might not be supporting the prosecution case, therefore, the same was not produced by the prosecution. So a presumption under illustration (g) of Article 129 of the Qanun-e-Shahadat Order, 1984, can fairly be drawn against the prosecutions. We may refer here the case of `Riaz Ahmad v. The State' (2010 SCMR 846) wherein at page 849 the Hon'ble Supreme Court of Pakistan has observed as under:--

"One of the eye-witnesses Manzoor Hussain was available in the Court on 29.07.2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be

drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the cases of `The State and others v Abdul Khaliq and others' (PLD 2011 SC 554) and `Khalid @ Khalidi and two others v The State' [2012 SCMR 327).

15. Insofar as the alleged recovery of `sota' (P-4) on the pointation of the appellant through recovery memo. (Ex.PJ) is concerned, we have noted that there is no where mentioned in the recovery memo. that `sota' (P-4) was stained with blood. There is no report of the Chemical Examiner or the Serologist to establish that `Sota' (P-4) was stained with human blood therefore, alleged recovery of `sota' (bamboo stick) (P-4), is of no avail to the prosecution which is even otherwise, of common pattern and is usually available in almost every second house. Moreover, recovery of `sota' (P-4) was not put to the appellant in his statement recorded under Section 342, Cr.P.C. It is by now well settled law that if any incriminating evidence is not put to an accused in his statement recorded under the above mentioned provision of law, then the same cannot be used against him.

16. Insofar as motive is concerned, as per prosecution case, motive behind the occurrence was that Jafar Ali deceased and Allah Yar appellant had joint tubewell and there was the turn of Jafar Ali deceased to irrigate his land but Allah Yar appellant refused to give the turn of water to the deceased upon which Jafar Ali deceased gave slaps to Allah Yar appellant and disgraced him and due to this grudge, the appellant committed the murder of Jafar Ali deceased. No evidence whatsoever was produced by the prosecution to establish the joint ownership of tubewell or the turn of water of the deceased. Relevant part of the statement of the complainant Abdul Aziz (PW-10) in his cross-examination qua motive is reproduced hereunder:

"I did not produce any record regarding joint ownership of the tubewell of the deceased and accused Allah Yar etc. I did not produce any document about the turn of water regarding irrigation."

As no evidence was produced to prove the alleged motive, therefore, mere verbal assertion of the prosecution witnesses qua the alleged motive is not sufficient to prove the same. Even otherwise, motive was not put to the appellant in his statement recorded under Section 342, Cr.P.C. and as mentioned above it is by now well settled law that if any incriminating evidence is not put to an accused in his statement recorded under the above mentioned provision of law, then the same cannot be used against him.

17. As we have already disbelieved the prosecution evidence therefore, there is no need to discuss the version of the appellant as taken by him in his statement recorded under Section 342 of, Cr.P.C., which is even otherwise exculpatory in nature.

18. We have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In `Tariq Pervez versus The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

`5.....The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of `Muhammad Akram versus The State' (2009 SCMR 230), at page 236, observed as under:--

"13.....It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State' (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No. 1260 of 2008 filed by Allah Yar appellant, set aside his conviction and sentence recorded by the learned trial Court vide judgment dated 31.10.2008 and acquit him of the charge by extending him the benefit of doubt. He is in custody, he be released forthwith if not required in any other case.

Murder Reference No. 287 of 2008 is answered in the NEGATIVE and the sentence of death of Allah Yar (convict) is NOT CONFIRMED.

20. Insofar as Criminal Appeal No. 1378 of 2008 filed by the complainant Abdul Aziz against the acquittal of Ahmad Yar, Muhammad Yousaf, Abdul Sattar, Ameer, Bashir Ahmad, Muhammad Yar and Shaukat Ali is concerned, we have noted that in the FIR (Ex.PH/1) Ahmad Yar, Shaukat Ali, Abdul Sattar and Muhammad Yar accused/respondents were assigned the role of one `sota' blow each on the person of Jafar Ali deceased. Prosecution story regarding the above mentioned accused persons was in conflict with the medical evidence because above mentioned four accused were attributed the role of inflicting one `sota' blow each on the person of Jafar Ali deceased but as per medical evidence there were only three injuries on the person of the deceased apart from one injury attributed to Allah Yar, co-accused. No `sota' was recovered from Ahmad Yar, Shaukat Ali and Abdul Sattar accused/respondents where `sota' (P-3), allegedly recovered on the pointation of Muhammad Yar accused was not stained with blood and there is no report of Chemical Examiner or the Serologist to establish that `sota' (P-3) was stained with human blood. Although Bashir respondent was alleged to be armed with .12 bore gun at the time of occurrence but no gun was recovered from his possession and he has not been assigned any injury on the person of the deceased and was attributed the role of proverbial lalkara whereas the allegation of abetment was levelled against Ameer and Yousaf accused/respondents. The said respondents were admittedly not present at the time of occurrence. All the above mentioned respondents have been acquitted by the Court of competent jurisdiction, therefore, they enjoy double presumption of innocence after their acquittal by the learned trial Court. Very strong and exceptional grounds are required to set-aside the judgment of acquittal passed by a Court of competent jurisdiction. No such ground has been pointed out by the learned counsel for the appellant. Even otherwise, we have already discussed the prosecution case in detail while deciding Criminal Appeal No. 1260 of 2008, filed by Allah Yar, co-accused/convict, and have already held that prosecution case is replete with number of circumstances which have created doubt regarding the truthfulness of the prosecution story. In the light of above discussion, there is no force in this appeal (Criminal Appeal No. 1378 of 2008), which is hereby dismissed in limine.

(A.S.) **Order accordingly.**

2014 UC 214

Before Malik Shehzad Ahmed Khan, J. (Lahore)

W.P. No. 17350 of 2010 dismissed on 29.5.2011.

AMJAD ALI SHAH *ALIAS* SYED AMJAD GHULAM ABBAS SHAH---Petitioner

versus

ADDL. DISTRICT JUDGE, ETC.---Respondents

Family Courts Act (XXXV of 1964)---

S. 14. Appellate order dismissing appeal as hopelessly time-barred by eighteen days would be unexceptionable when appellant's explanation that he could not file appeal within limitation on account of closure of Courts for summer vacation was not satisfactory as he did not file appeal till 24.9.2009 when he was supposed to file appeal on or before 6.9.2009. (P. 216)

Iqbal Mehmood Awan for petitioner.

Shahid Ali Shakir for respondent No. 3.

ORDER

MALIK SHAHZAD AHMED KHAN, J.---Through this Constitutional petition the petitioner has challenged the judgment and decree dated 3.6.2009 passed by the learned Judge Family Court, Shakargarh, as well as, the order dated 28.10.2009 passed by the learned Additional District Judge, Narowal.

2. As per brief facts of the present petition, respondent No. 3 filed a suit for recovery of dowry articles and for recovery of dower, *i.e.* gold ornaments, which was contested by the petitioner/defendant by filing his written statement. The suit pertaining to the recovery of dowry articles was dismissed, whereas, suit for recovery of gold ornaments weighing 8 tola alongwith Rs. 500/- was decreed by the learned Judge Family Court *vide* judgment and decree dated 3.6.2009 in favour of plaintiff/respondent No. 3. The petitioner/defendant filed an appeal against the above-mentioned judgment and decree which was dismissed by the learned Additional District Judge, Narowal on the ground that the appeal filed by the petitioner was time-barred. Hence, the instant writ petition.

3. It is contended by the learned counsel for the petitioner that the appeal filed by the petitioner has illegally been dismissed on the ground of limitation by the learned Appellate Court; that the petitioner could not file the appeal within the prescribed period of limitation because there were

summer holidays in the District Court, Narowal and as such the appeal filed by the petitioner was within the prescribed period of limitation; that the appeal filed by the petitioner was dismissed merely on the technical grounds, therefore, the impugned judgment and decree of the learned Appellate Court is not sustainable in the eyes of law.

4. On the other hand the learned counsel for respondent No. 3 has argued that the appeal filed by the petitioner was hopelessly time-barred, therefore, the same was rightly dismissed by the learned Appellate Court.

5. After hearing the learned counsel for the parties and going through the documents annexed with this petition with their able assistance it has been noted that the impugned judgment and decree was passed by the learned Judge Family Court, Shakargarh on 3.6.2009, whereas, the application for getting certified copy of the said judgment and decree was filed by the petitioner on 5.6.2009 and he got the copy of the above-mentioned judgment and decree on 7.8.2009. So,

excluding the said period, the limitation period would start on 6.8.2009. The petitioner was supposed to file the appeal on or before 6.9.2009 but he filed the appeal before the learned Additional District Judge, Narowal on 24.9.2009 which is hopelessly time-barred by eighteen days. The explanation given by the learned counsel for the petitioner for non-filing of the appeal within the prescribed period of limitation was to the effect that there were summer holidays, therefore, the petitioner could not file his appeal within time. The said explanation is not satisfactory because the petitioner has not established that he was precluded from filing the appeal during the summer holidays. Even otherwise, the District Courts observe summer holidays in the month of August, whereas, the appeal was not filed till 24.9.2009, therefore, the above-mentioned explanation is not convincing. In this view of the matter, this petition is without any substance and the same is, hereby, dismissed.

Writ Petition Dismissed.

2014 UC 527

Before Malik Shahzad Ahmad Khan, J. (Lahore)

Crl. M. No. 2/10 (in Crl. Rev. No. 1275-10) accepted on 27.6.2011.

SAJJAD HUSSAIN---Petitioner

versus

THE STATE, ETC.---Respondents

Criminal Procedure Code (V of 1898)---

Ss. 426, 435/439. Sentence of imprisonment of convict for non-payment of Arsh and Daman when he had already undergone substantive sentence of imprisonment suspended by High Court as revision petition filed by him was not likely to be heard in near future and he could not be detained in jail for indefinite period non-payment of Arsh and Daman. (P. 529)

Mian Shahid Ali Shakir for petitioner.

Arshad Mehmood, DPG for State.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---C.M. No. 2 of 2010. Sajjad Hussain petitioner by way of the instant petition has sought suspension of his sentence and release on bail during the pendency of his revision petition.

2. The above-mentioned petitioner was convicted by learned Trial Court as under:--

Sajjad Hussain:--

"Under section 394, PPC and sentenced him to four years' R.I. and are directed to pay fine in the sum of Rs. 25,000/- each and in case of non-payment of fine, he shall suffer six months' R.I.

Under Section 412, PPC and sentenced him to four years' R.I. and are directed to pay fine in the sum of Rs. 25,000/- each and in case of non-payment of fine, he shall suffer six months' R.I.

Under section 336, PPC and sentenced to pay Arsh to the injured Mujahid Hussain which shall be one-

half of the current amount of Diyat and also awarded four years' R.I. It is ordered by the learned Trial Court that all the sentences shall run concurrently. Benefit of section 382-B, Cr.P.C. was also extended."

On appeal filed by the petitioner, however, learned Additional Sessions Judge, Kamalia dismissed the same without any modification and variation.

3. It is contended by the learned counsel for the petitioner that substantive sentence of the petitioner was completed on 1.8.2010 as per the letter No. 10246, dated 31.8.2010, issued by the Superintendent Jail, Toba Tek Singh and the petitioner is suffering punishment in lieu of fine and Arsh, and that that criminal revision is not likely to be heard and decided in near future.

4. On the other hand learned DPG has opposed the contention of the learned counsel for the petitioner.

5. Heard. Record perused.

6. On 27.1.2011 this Court had called a report from the Superintendent District Jail, Toba Tek Singh, according to which the petitioner has undergone all the substantive sentences of imprisonment on 1.8.2010 and he is only detained in jail on account of non-payment of fine and Arsh. The petitioner has filed a revision petition against the judgment which has been pending adjudication before this Court and has not been fixed so far. There is no likelihood of early hearing of his revision in the near future and the petitioner cannot be detained in jail for indefinite period only for the payment of Arsh and Daman. In these circumstances, I accept this petition and suspend his sentence and admit him to bail pending disposal of his revision subject to his furnishing bail bonds in the sum of Rs. 5,00,000/- (Rupees five hundred thousand only) with two sureties each in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court.

Revision Petition Accepted/Sentence Suspended.

2013 CLC 52

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Syed MUHAMMAD BAQIR SHAH----Petitioner

Versus

FARIDA SAJID----Respondent

Civil Revision No.147 of 2003, decided on 8th September, 2011.

(a) Qanun-e-Shahadat (10 of 1984)---

----Arts. 117 & 118---Transfer of property of pardahnashin lady was challenged on plea of fraud, deception and misrepresentation---Burden of proof---Onus in such case would lie on beneficiary of transaction to establish genuineness and bona fide of document through which such transaction had taken place.

(b) Islamic Law---

----Gift---Gift through mutation in favour of brother was challenged by his sister to be based on fraud, deception and misrepresentation---Proof---Sister in her deposition had categorically denied to have ever appeared before Revenue Officer in connection with suit mutation---Brother, in order to prove genuineness of mutation did not examine Patwari, marginal witnesses of suit mutation and Revenue Officer having attested the same---Brother did not opt to enter into witness box, rather examined his special attorney, who had admitted not to be present at time of attestation of suit mutation---Brother was bound to prove that sister had actually gone to office of Revenue Officer or was present there at time of attestation of suit mutation and was fully aware of suit transaction---Brother had failed to discharge onus to prove genuineness and bona fide of the suit mutation---Sister had established fraud which would vitiate most solemn transaction---Sister's suit was decreed in circumstances.

Mst. Raj Bibi and others v. Province of Punjab through District Collector, Okara and 5 others 2001 SCMR 1591; Abdul Raheem and another v. Mrs. Jannat Bibi and 13 others 2000 SCMR 346 and Jannat Bibi v. Sikandar Ali and others PLD 1990 SC 642 rel.

(c) Pardahnashin lady---

----Educated lady who was in service in the past---Status---Such lady, if did observe strict "Pardah" and was reluctant to go to male dominated departments/offices, could be termed as a "Pardahnashin" lady---Illustration.

(d) Islamic Law---

----Inheritance---Property left by deceased to be in exclusive possession of one legal heir---Effect---Such heir would be considered in constructive possession of property on behalf of all legal heirs.

Khair Din v. Mst. Salaman and others PLD 2002 SC 677 rel.

(e) Specific Relief Act (I of 1877)---

----Ss. 8 & 42---Limitation Act (IX of 1908), Art.120---Suit for declaration and possession---Transfer of plaintiff's land in defendant's name through gift mutation was challenged on ground of fraud and forgery---Suit filed on 2-11-2000 challenging gift mutation attested on 31-1-1987---Maintainability---Evidence on record showed that plaintiff had not come to her village in year 1987, rather at time of attestation of suit mutation, she was staying with her husband in another District, where he was posted---Plaintiff's husband had corroborated such statement of plaintiff by deposing that after marriage, she had never come to her village---Defendant's special attorney had shown complete ignorance about visits of plaintiff to her village---As per plaintiff's statement, she came to know about suit mutation when she checked revenue record---Suit was within time from date of plaintiff's knowledge in circumstances.

(f) Islamic Law---

----Inheritance---Limitation---Question of limitation would not arise in cases of inheritance.

(g) Fraud---

----Limitation---Fraud would vitiate most solemn transaction---Any transaction based on fraud would be void and notwithstanding bar of limitation, matter could be considered on merits so as not to allow fraud to perpetuate.

Jannat Bibi v. Sikandar Ali and others PLD 1990 SC 642 rel.

(h) Civil Procedure Code (V of 1908)---

----O. XIV, R. 1 & O. XX, R. 5---Suit challenging gift mutation on ground of fraud and forgery---Passing of decree by Trial Court without framing issue regarding alleged fraud---Validity---Statement of defendant's special attorney to the effect that no fraud was committed, would show that parties were fully aware of controversy between the parties---Defendant was duly represented through counsel and had not taken objection before Trial Court at relevant time regarding non-framing of such issue---Defendant could not claim to have been prejudiced due to non-framing of such issue---High Court dismissed revision petition.

Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others 1993 SCMR 2018; Mst. Sughran Bibi alias Mehran Bibi v. Asghar Khan and another 1988 SCMR 4 and Muhammad Akram alias Raja v. Muhammad Ishaq 2004 SCMR 1130 rel.

Mujeebur Rehman Kiani for Petitioner.

Muhammad Anwar Khan Luqmani for Respondent.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.--- The instant Civil Revision has been filed against the judgment and decree dated 16-1-2003, passed by the learned Additional District Judge, Chakwal, as well as, against the judgment and decree dated 22-1-2002, passed by the learned Civil Judge, Chakwal.

2. As per brief facts of the present ease, the respondent/plaintiff Mst. Farida Sajid filed a suit for declaraton and possession to the effect that she be declared owner of---

(A) Land measuring 44 kanals, 9 marlas, 100/5589 share out of total 2484 kanals of land, Kata and Khatooni Nos.1/1 to 5 situated in village Kahinpur Tehsil Chakwal on the basis of record of rights for the year 1996-97.

(B) Land measuring 17 marlas, 1/36 Shares out of total 31 kanals, 1 marla in Khasra No.5007 and land measuring 4 kanals, 1/9 share out of total 35 kanals, 5 marlas, Khasra No.5027, Khata and Khatooni No.869/2451 situated in village Chak Baqar Shah on the basis of record of rights for the year 1995-1996.

It was further prayed that Mutation No.2 dated 7-1-1987 of village Kahinpur and Mutation No 3185 dated 31-1-1987 of village Chak Baqar Shah be declared illegal and void as the same have been got attested by the petitioner/defendant in collusion with

the concerned Revenue staff and the same were fictitious, based on fraud and cheating, void and ineffective upon the rights of the respondent/plaintiff and were liable to be cancelled to the extent of share of the respondent/plaintiff. The respondent/plaintiff also prayed for possession of the suit-land. According to the plaintiff/respondent, the above mentioned suit-land had fallen to her share from the inheritance of her father. It was claimed by the plaintiff/respondent that she never appeared before any Revenue Officer and the petitioner/defendant, who is her brother and an influential person, being in league with the concerned Revenue Staff, got the impugned mutations sanctioned in his name. It was also averred that the impugned mutations are result of fraud and forgery, therefore, the same may be set aside. It was also stated in the plaint that the plaintiff/respondent is a Pardahnashin lady and due to transfer/service of her husband in different cities, she had no knowledge of the impugned mutations and three months prior to the institution of the suit, she checked the Revenue Record and came to know that the petitioner/ defendant had got her property transferred in his name by playing fraud.

3. The said suit was contested by the petitioner/defendant, who filed his written statement before the learned trial Court.

4. Out of the divergent pleadings of the parties, following issues were framed by the learned trial Court on 21-6-2001:---

ISSUES.

(1) Whether the suit is time-barred? OPD.

(2) Whether the plaintiff is estopped by her words and conduct to file this suit? OPD.

(3) Whether the plaintiff is owner of the suit-land? OPD.

(4) Whether the plaintiff is entitled to the decree for declaration? OPP.

(5) Relief.

5. In the course of trial, both the parties led oral as well as documentary evidence in support of their respective claims.

The respondent/plaintiff examined herself as P.W.1 and her husband Brigadier (Retired) Syed Sajid Hussain Shah appeared as P.W.2. The plaintiff also produced copy of record or rights 1984-1985 Exh.P.1, copy of record of rights 1988-1989 Exh.P.2, copy of record of rights 1992-1993 Exh.P.3, copy of record of rights 1991-1992

Exh.P.4, copy of record of rights 1987-1988. Exh.P.5, copy of record of rights 1983-1984 Exh.P.6, copy of record of rights 1995-1996 Exh.P.7, copy of record of rights 1996-1997 Exh.P.8, copy of Mutation No.3185 Exh.P.9 and copy of Mutation No.2 Exh.P.10 in support of her claim.

On the other hand, only Javed Zulfi, special attorney of the petitioner/defendant examined himself as DW.1 as well as produced special power-of-attorney Exh.D.1, copy of death entry of Syed Jaffar Shah Exh.D.2, copy of Mutation No.5 Exh.D.3, copy of Mutation No.2 Exh.D.4, copy of record of rights 1995-1996 Exh.D.5 and copy of record of rights 1996-1997 Exh.D.6 in support of his defence.

6. After conclusion of the trial, the learned Civil Judge, Chakwal decreed the suit, filed by the respondent/plaintiff, vide the impugned judgment and decree dated 22-1-2002.

7. The petitioner, being aggrieved, filed an appeal, but the same was also dismissed by the learned Additional District judge, Chakwal vide the impugned judgment and decree dated 16-1-2003, hence, the present revision petition.

8. It is contended by the learned counsel for the petitioner that the impugned judgments and decrees have been passed in clear violation of law on the subject, therefore, the same are not sustainable in the eyes of law; that the impugned gift was made by three sisters and out of them only one sister has challenged the said mutation, which supports the claim of the petitioner that the impugned mutation was not fake and the same was genuine; that although fraud and forgery was alleged by the plaintiff/respondent, but no independent evidence was produced by the plaintiff to prove the alleged fraud/forgery; that the onus was on the plaintiff to establish the alleged fraud/forgery, but the said onus has not been discharged by the respondent; that the impugned Mutation No.2 was attested on 7-1-1987 and impugned Mutation No.3185 was attested on 31-1-1987, whereas, the suit was filed or 2-11-2002, thus, the suit of the respondent/plaintiff was hopelessly time-barred; that the issue of limitation has not been properly adjudicated upon and findings on the said issue were passed by the learned courts below are not sustainable in the eyes of law; that the respondent while appearing in Court as P.W.1 has admitted that she was an educated lady and she was M.A.; that the respondent had also admitted that she had been in service in past, therefore, the respondent/plaintiff cannot be termed as an illiterate or "Pardah" observing lady, therefore, the protection available to an illiterate and "Pardah"

observing lady cannot be extended to the plaintiff/respondent; that no issue was framed in respect of the alleged fraud; that the learned Additional District Judge, Chakwal has also mentioned at Page No.10 of the impugned judgment that proper issues have not been framed in the instant case, therefore, the impugned judgments and decrees are not sustainable in the eyes of law; that the respondent/plaintiff has failed to prove any fraud on the record to justify the cancellation of gift mutation which was made by her in favour of the petitioner/defendant, therefore, this petition may be accepted and the impugned judgments and decrees may kindly be set aside.

9. On the other hand, the learned counsel for the respondent has vehemently opposed this petition on the grounds that the concurrent findings of the courts below have been passed strictly in accordance with law; that the petitioner/defendant, being beneficiary of the impugned mutations, had miserably failed to prove the genuineness of the said mutations; that mere this fact that the plaintiff/respondent is an educated lady or she had been in service, in past, does not mean that the respondent/plaintiff is not a "Pardah" observing lady; that the respondent/plaintiff cannot be deprived of her share in the inheritance of her father without any legal justification; that the plaintiff/respondent never appeared before any Revenue Officer and she never made any gift in favour of the petitioner/defendant; that the impugned mutations are result of fraud and forgery committed by the petitioner/defendant, being in league with the concerned revenue staff; that the question of limitation does not arise in the cases of inheritance; that the petitioner/defendant has miserably failed to establish that he was prejudiced in his defence due to non-framing of any issue as alleged by the petitioner; that the petitioner/defendant was himself a party before the learned trial Court and his counsel was present at the time of framing of issues and it was his duty to raise objection at the relevant time, when the issues were being framed by the learned trial Court; that no objection was raised by the petitioner/defendant at the relevant time therefore, the said objection cannot be taken at this stage; that the impugned judgments and decrees do not suffer from any illegality or material irregularity, therefore, this petition is liable to be dismissed.

10. Arguments heard and record perused.

11. The respondent Mst. Farida Sajid filed a suit for declaration and possession in respect of the property, fully described in para No.2 supra. The plaintiff/respondent claimed that she was owner of the said property as the same was inherited by her out of

the legacy of her father. The respondent/plaintiff and the petitioner/defendant are admittedly real brother and sister inter se. According to the plaintiff/respondent, she never made any gift in favour of the petitioner/defendant and the impugned gift mutations are result of fraud and forgery. She had claimed that she was a 'Pardahnashin' lady. She remained out of the village, because of service of her husband. Her husband was Principal of Boys Scout Cadet College, Mansehra at the time of recording of her statement before the learned trial Court. Syed Muhammad Abdul Latif was her father. On his death, his property was inherited by the sisters and brothers of the respondent/plaintiff. The impugned mutations were attested in the year, 1987, when the plaintiff's/respondent's husband was in service in Sialkot. According to the plaintiff/respondent, she had not come to her village or to Chakwal in January, 1987. The petitioner/ defendant is eldest brother of the respondent/plaintiff. According to the plaintiff/respondent, the petitioner/defendant was an influential person in the local area and he being in league with the concerned revenue staff got her land transferred, in his favour. The respondent/plaintiff had stated that she never appeared before any Revenue Officer in connection with the above mentioned mutations. The plaintiff/respondent has herself appeared as P.W.1 before the learned trial Court in support of her above mentioned contentions. She was also cross-examined at length. The husband of the petitioner Brigadier (Retired) Syed Sajid Hussain Shah also appeared as P.W.2 before the learned trial Court. The said witness has also supported the contentions of the plaintiff/respondent. The above mentioned documentary evidence Exh.P.1 to Exh.P.10 was also produced by the plaintiff/respondent in support of her claim.

12. In rebuttal, Javed Zulfi (special attorney) of the petitioner/ defendant was examined by the defendant/petitioner as DW.1. He deposed that the said mutations in favour of the petitioner/defendant were genuine and correct. According to him, the respondent/plaintiff along with her two sisters appeared at the time of mutation and made the impugned gift in favour of the defendant/petitioner. He has further deposed that it was incorrectly written as sale mutation in the impugned mutations. No other witness except the above mentioned DW.1 was produced by the petitioner/defendant. The defendant/petitioner had also produced the documentary evidence Exh.D.1 to Exh.D.6 in support of his defence.

13. The respondent/plaintiff has categorically denied the execution of gift mutation in favour of the petitioner. The respondent/plaintiff has claimed that she was a

'Pardahnashin' lady and fraud, deception and misrepresentation have been played by the petitioner. It is by now well-settled law that in cases where pleas of fraud, deception and misrepresentation have been taken by a Pardahnashin lady in alleged disposal of her property, the onus in such cases lies on the person, who has taken advantage of the impugned transaction to establish the genuineness and bona fide of the document through which transactions had taken place. As discussed earlier, the plaintiff/respondent had categorically denied that she ever appeared before any Revenue Officer in connection with the impugned mutations. In the given circumstances, it was incumbent upon the petitioner/defendant to produce Circle Patwari, the marginal/attesting witnesses of the mutation (Pattidar/ Councillor etc.) and the Revenue Officer who had attested the suit mutations. In this case, none of the above mentioned persons have been produced by the petitioner/defendant to establish the genuineness of the disputed mutations. So much so, that the petitioner himself did not bother to appear in the witness-box and in his place Javed Zulfi special attorney, had appeared as D.W.1. The said witness has admitted in cross-examination that he was not present at the time of disputed mutations. He has also shown his ignorance regarding the place, where the disputed mutations were executed. He did not know the name of the Revenue Officer, who had attested the said mutations. In view of the above, it is evident that the petitioner/defendant could not discharge the onus to prove the genuineness and bona fides of the suit mutations.

14. A similar proposition came under discussion before the Hon'ble Supreme Court of Pakistan in the case of Mst. Raj Bibi and others v. Province of Punjab through District Collector, Okara and 5 others (2001 SCMR 1591) and it was held as under:--

"(c) Pardahnashin lady---

---Transfer of property of Pardahnashin lady---Plea of fraud---Burden of proof---Where pleas of fraud, deception and misrepresentation had been taken by the illiterate Pardahnashin ladies in alleged disposal of their properties, the onus in such cases lay on the person who had taken advantage of the transaction to prove the genuineness and bona fides of the document, through which transaction had been executed and the contents of such document were fully concerned and understood by the executant independently and freely".

A similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Abdul Raheem and another v. Mrs. Jannat Bibi and 13 others (2000 SCMR 346). Relevant part of the said judgment reads as under:--

"Arts.118 & 119---Gift---Validity---Burden of proof---Alleged donee had failed to discharge burden of proof on him to establish a valid gift by not entering the witness-box---Revenue Officer who allegedly attested the mutation of gift was not produced which was conspicuous to tell a lot about the nature of the alleged transaction of gift---High Court after considering the peculiar circumstances of the case had rightly found the gift to be doubtful."

15. The learned counsel for the petitioner has argued that the petitioner is not a 'Pardah' observing lady, because she has admitted in her cross-examination, while appearing as PW.1 that she has got education uptill M.A and she had been in service in past, therefore, the plaintiff/respondent cannot be termed as a 'Pardahnashin' lady.

I do not agree with this argument of the learned counsel for the petitioner, because even a serving and educated lady can observe 'Pardah'. The nature of service/job of the plaintiff/respondent was not asked in cross-examination. It is a common observation that even serving and highly educated ladies do observe strict 'Pardah' and they are reluctant to go to male dominated departments/offices. The plaintiff/respondent originally belonged to a backward village of District Chakwal. In the given circumstances of the present case, it was foremost duty of the petitioner/defendant to prove the fact that the plaintiff/respondent had actually gone to the office of the Revenue Officer or she was present at the time of impugned mutations and she was fully aware of the disputed transaction. A reference in this respect may be made to the case of Jannat Bibi v. Sikandar Ali and others (PLD 1990 Supreme Court 642). The Hon'ble Supreme Court of Pakistan has held in the said case as under:--

"Question whether a lady is a pardahnashin lady is a question of fact---Burden of proof in respect of a document purported to have been executed by a pardahnashin lady affecting her right or interest in the immovable property is on the person claiming the right or interest under the document and it is for him to establish affirmatively that it was substantially understood by the lady and it was really her free and intelligent act, and if she is illiterate, it must have been read over to her---Rule is also applicable to ignorant and illiterate women.-"

16. The petitioner has claimed that she was in possession of the suit-land and this fact shows that the gift was in fact made by the respondent/plaintiff. In my humble view, the possession of the petitioner over the suit-land was constructive in nature. It is well-settled law that under Islamic Law of inheritance, an heir in possession is to be considered in constructive possession of the property on behalf of all the heirs in spite of its exclusive possession. Reference may be made to the case of Khair Din v. Mst. Salaman and others (PLD 2002 Supreme Court 677).

17. The learned counsel for the petitioner has next contended that the suit filed by the plaintiff/respondent was hopelessly time-barred. In this case, the impugned Mutation No.2 was attested on 7-1-1987 and the impugned Mutation No.3185 was attested on 31-1-1987, whereas, the suit was filed on 2-11-2000.

The plaintiff/respondent while appearing as P.W.1 has categorically stated that at the time of suit mutations her husband was posted at Sialkot in connection with his service and she did not come to her village in District Chakwal in the year, 1987, when the impugned mutations have been alleged to be attested. She has also stated that about one year prior to making of her statement in Court i.e. 28-7-2001, she learnt about the disputed mutations when she checked the relevant Revenue Record. Her husband Brigadier (Retired) Syed Sajid Hussain Shah appeared as P.W.2. This witness has also categorically stated in his cross-examination that in the year, 1987, he was posted at Silakot and the plaintiff/respondent was living with him at Sialkot and she did not come to her village. He has also stated that after marriage, the plaintiff never came to village Chohan, District Chakwal. The witness produced by the petitioner/defendant namely Javed Zulfi (DW.1) has shown his complete ignorance regarding the visits of the respondent/plaintiff to the village Chohan, District Chakwal. In the given circumstances, the suit filed by the plaintiff/respondent cannot be held as barred by limitation. The plaintiff has filed the suit within the period of limitation from the date of her knowledge. Even otherwise the question of limitation does not arise in the cases of inheritance. The fraud was also duly established by the plaintiff. Fraud vitiates even most solemn transaction and as such any transaction based on fraud would be void and notwithstanding the bar of limitation, the matter can be considered on merits so as not to allow fraud to perpetuate in this respect. In my above mentioned humble view, I am fortified by the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Jannat Bibi v. Sikandar Ali and others (PLD 1990 SC 642).

18. The learned counsel for the petitioner has also taken this objection that no issue regarding the alleged fraud was framed by the learned trial Court, therefore, the impugned judgment and decree may be set aside. The learned counsel for the petitioner could not establish any prejudice, in any manner, caused to the petitioner, due to the non-framing of issue of fraud. The defendant/petitioner was fully aware of the allegations levelled by the plaintiff/respondent. It was categorically mentioned in the plaint that the impugned mutations are result of fraud and forgery. The special attorney of the petitioner/defendant while appearing as DW.1 has stated in his examination-in-chief that no fraud was committed. It shows that the parties were fully aware of the controversies between them, therefore, the petitioner cannot claim that was prejudiced in any manner whatsoever due to non-framing of issue of fraud. The defendant/petitioner was duly represented by his learned counsel. It was their duty to get the proper issue framed by the learned trial Court and to raise objection regarding the non-framing of any issue at the time of framing of the same. No such objection was taken by the petitioner or his learned counsel at the relevant time, therefore, this objection is inconsequential in the given circumstances. Reference in this respect may be made to the case of Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others (1993 SCMR 2018). The relevant part of the said judgment reads as below:---

"----O.VI, R. 1 & O.XIV, R.1--Non-framing of specific issue when inconsequential---Pleadings and issues as originally framed, showed that parties were fully aware what was the subject-matter of controversy and what evidence was to be led by each side---Non-framing of specific issue in such circumstances was, thus, inconsequential---Where issues were not framed but allegations made in the plaint were challenged in the written statement and Court had allowed evidence to be led, then decision rendered without framing of issues was not illegal."

I am also fortified in my above mentioned views by the case of Mst. Sughran Bibi alias Mehran Bibi v. Asghar Khan and another (1988 SCMR 4). The relevant part of the said judgment is reproduced as under:--

"---O.XIV, R.1---Constitution of Pakistan (1973), Art. 185(3)---Issues---Framing of---Consequence of framing improper issues---Plea that failure to frame one or other issue at trial stage, in circumstances of case, would have effect of nullifying trial, repelled---Parties having led evidence keeping in view the precise grounds pressed by plaintiffs, no prejudice was caused to parties due to framing of an omnibus issue by trial court---

Held: It was also duty of parties to get proper issues framed, if they had any objection or suggestion regarding framing of issues---No question requiring further examination being involved leave to appeal refused."

In the above mentioned context reliance may also be placed on the case of Muhammad Akram alias Raja v. Muhammad Ishaq (2004 SCMR 1130).

19. The learned counsel for the petitioner could not point out any material illegality or irregularity in the impugned judgments and decrees, passed by the courts-below in the matter.

20. In light of the above discussion, this petition has no force and the same is hereby DISMISSED.

SAK/M-312/L **Revision dismissed.**

2013 C L C 649

[Lahore]

Before Malik Shahzad Ahmad Khan, J

SAEED AHMAD----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, MULTAN and another----Respondents

Writ Petition No.2359 of 2010, heard on 18th September, 2012.

(a) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Landlord and tenant relationship---Proof---Excise and Taxation record---Ejectment application filed by landlord was dismissed by Rent Controller on the ground that relationship of landlord and tenant was not proved---Lower Appellate Court reversed the findings of Rent Controller and passed eviction order against tenant---Plea raised by tenant was that documents of Excise and Taxation Department about payment of property tax were not sufficient to prove relationship of landlord and tenant between parties---Validity---Though documents of Excise and Taxation Department might not be conclusive evidence to establish relationship of landlord and tenant but at the same time those were not totally irrelevant as the documents indicated ownership and payment of property tax---Oral as well as documentary evidence produced by landlord in shape of sale deed, documents of Excise and Taxation Department regarding payment of property tax of house in question and utility bills of house proved that landlord had ownership in respect of the house and petitioner was tenant under him---Tenant could not take advantage of position to frustrate eviction proceedings on the pretext that property owned by landlord was not determinable, particularly when he himself could not prove his title and there was no other claimant of ownership of the property---High Court declined to interfere in eviction order passed by Lower Appellate Court against tenant---Constitutional petition was dismissed in circumstances.

Muhammad Sharif v. Mukhtara Mai and others 2010 YLR 203; Syed Abdul Ghafoor Shah v. Syed Luqman and others 2009 SCMR 45; Haji Feroze Khan and another v. Ameer Hussain through L.Rs and others 2004 SCMR 1719 and Abdul Qayum through Legal Heirs v. Mushk-e-Alam and another 2001 SCMR 798 rel.

(b) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Ejectment of tenant---Landlord and tenant, relationship of---Title of premises---Determination---Jurisdiction of Rent Controller---Scope---Rent Controller is not competent under West Pakistan Urban Rent Restriction Ordinance, 1959, to determine question of title of property, which was job of Civil Court but if tenant fails to produce any title document to support his possession over premises in dispute, Rent Controller or Appellate Court can validly determine relationship of landlord and tenant between parties.

Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another PLD 2009 SC 453 rel.

(c) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Tenancy---Scope---Tenancy may not be necessarily through written document and the same can be oral.

Shajar Islam v. Muhammad Siddique and 2 others PLD 2007 SC 45 and Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another PLD 2009 SC 453 rel.

Syed Athar Hussain Shah Bukhari for Petitioner.

Malik Muhammad Rafiq Rajwana and Malik Muhammad Tariq Rajwana for Respondent No.2.

Date of hearing: 18th September, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--- This writ petition is directed against the impugned judgment and decree dated 1-3-2010 passed by learned Additional District Judge, Multan, whereby, the appeal filed by respondent No.2 was accepted and the petitioner was directed to vacate the house in question within 30 days and to pay tentative rent of Rs.1,50,000/- to respondent No.2.

2. As per brief facts of the present case, Ghulam Mohi-ud-Din (respondent No. 2) filed an ejectment petition against the petitioner before the learned Special Judge (Rent), Multan in respect of House No.X-86- A/40-41 Rajwana Road, Mohallah Ameer Abad, Multan. It was claimed by respondent No.2 that the rented property measuring 10-Marlas was purchased by his father/predecessor-in-interest, namely Muhammad Amin through registered Sale-deed No.1359 dated 21-11-1951 and, thereafter, he constructed a house on it. It was further averred in the ejectment petition that in the year 1984, the said house was rented out to the petitioner through oral

agreement against the rent of Rs.600/- per month. It was also mentioned that the rate of rent was increased from time to time and lastly in the year 2005 rent of the above mentioned house was fixed at the rate of Rs.7000/- per month. It was further mentioned that the petitioner / tenant kept on paying the rent till June, 2005 and thereafter, he stopped the payment of rent. It was also claimed by the landlord respondent No.2 that he required the rented premises for his personal bona fide need and that the petitioner had damaged the rented property, so the eviction petition was filed against the petitioner on the grounds of rent default, personal bona fide need and damage to the rented premises.

3. The petitioner contested the ejectment petition and denied relationship of the landlord and tenant. The learned Special Judge (Rent), Multan, from the divergent pleadings of the parties, framed the following issues:---

(1) Whether relationship of landlord and tenant exists between the parties? OPA

(2) Relief.

4. Respondent No.2, in order to prove his claim, produced in the witness-box, Dr. Maqbool Ahmad Ansari as AW-1, his special attorney namely Muhammad Sagheer as AW-2 and Qadir Bakhsh as AW-3, whereas, in his documentary evidence he produced affidavit of Doctor Maqbool Ahmad Ansari, Exh.A-1, affidavit of Muhammad Sagheer Exh.A-2, special power of attorney in the name of Sagheer Ahmad (AW2) Exh.A-3, affidavit of Qadir Bakhsh Exh.A-4, original receipt of the Excise and Taxation Department Exh.A-5, Original sale-deed Exh.A-6, documents of the Excise and Taxation Department, Multan about payment of the property tax of the house in question (PTI) Exh.A-7 to Exh.A-9, electricity bills of the disputed house Exh.A-10 to Exh.A-11, Gas bill of the said house Exh.A-12 and site plan of the house in question Mark-A.

5. On the other hand, Saeed Ahmad petitioner appeared in the witness box as RW-1. In support of his claim, he produced Mubeen Sarfraz as RW-2 and Ghulam Shabbir as RW-3, whereas, in his documentary evidence he produced his affidavit Exh.R-1, site plan Exh.R-2, affidavit of Ghulam Shabbir (RW-3) Exh.R-3, domicile of the petitioner Exh.R-3, Electricity Bill for the month of July, 2009, Exh.R-4 Electricity Bill for the month of July, 2006 Exh.R-5, Electricity Bill for the month of August, 2006 Exh.R-6, Electricity Bill for the month of August, 2000 Exh.R-7, Electricity Bill for the month of September, 2000 Exh.R-8, Electricity Bill for the month of

September, 2000 Exh.R-9, Electricity Bill for the month of October, 2000 Exh.R-10, Electricity Bill for the month of October, 2000 Exh.R-11, Electricity Bill for the month of November, 2000 Exh.R-12, Electricity Bill for the month of November, 2000 Exh.R-13, Bill Wasa for the month of July, August, 2009 Exh.R-14, Telephone Bill for the month of August, 2009 Exh.R-16, Electricity Bill for the month of April, 2000 Exh.R-17, Electricity Bill for the month of April, 2008 Exh.R-18, Telephone Bill for the month of January, 2008 Exh.R-19, receipt of sui gas Exh.R-20, receipt of sui gas Exh.R-21, Meter, card sui gas Exh.R-22, receipt sui gas Exh.R-23, original T.D. Card Exh. R-24 and attestation by Nazim, Mark-A.

6. After conclusion of the proceedings, the learned Special Judge (Rent), Multan dismissed the ejectment petition filed by respondent No.2 vide its order dated 3-10-2009. The above mentioned respondent filed an appeal against the said order of learned Special Judge (Rent), Multan which was accepted vide the impugned judgment and decree dated 1-3-2010 passed by learned Additional District Judge, Multan. The petitioner has challenged the above mentioned judgment and decree through the instant constitutional petition.

7. It is contended by the learned counsel for the petitioner that respondent No.2 failed to prove the relationship of the landlord and tenant between the parties, therefore, the impugned judgment and decree of learned appellate court is not sustainable in the eye of law; that intricate question about the title of immovable property cannot be decided in proceedings under the Punjab Rent Restriction Ordinance, 1959 and the learned appellate court instead of deciding the said question, should have directed respondent No.2, to file civil suit; that respondent No.2 did not produce any rent agreement executed between the parties; therefore, ejectment petition of the said respondent was rightly dismissed by learned Special Judge (Rent), Multan but the appeal filed by the above mentioned respondent has illegally been accepted; that documentary evidence produced by the petitioner has fully established that the petitioner was in possession of the house in question and in absence of any proof regarding the existence of relationship of the landlord and tenant between the parties, the order/judgment of eviction cannot be passed against the petitioner; that the record and documents of the Excise and Taxation Department are not conclusive evidence to establish relationship of the landlord and tenant; that the property claimed by respondent No. 2 is not determinable because the alleged registered Sale-deed No.1359 dated 21-11-1951 (Exh.A-6) does not contain the house number, i.e. X-86-A/40-41, Rajwana Road, Mohallah Ameer Abad, Multan which is mentioned by the landlord in his ejectment petition that special attorney of

respondent No.2 namely Muhammad Sagheer (AW-2) has admitted during his cross-examination that the above mentioned respondent never received the rent of the house in question, from the petitioner and in view of the said admission, the relationship of the landlord and tenant between the parties, was not established; that the impugned judgment and decree of the learned appellate court is not sustainable in the eye of law, therefore, the same may kindly be set aside and resultantly the order passed by learned Special Judge (Rent), Multan dated 3-10-2009 may kindly be restored.

8. On the other hand this petition has been opposed by the learned counsel appearing on behalf of respondent No.2, on the grounds that the relationship between the parties was fully proved in this case through oral, as well as, documentary evidence; that respondent No.2 has produced original registered Sale-deed No.1359 dated 21-11-1951 (Exh.A-6), in order to prove that he was owner of the rented premises and other documentary evidence produced by respondent No.2, in the shape of property Tax documents (PT1) of the Excise and Taxation Department, Multan, Exh.A-7 to Exh.A-9, Electricity Bills of the house in question Exh.A-10, Exh.A-11 and Sui Gas bill Exh.A-12 has further proved the case of respondent No. 2; that oral evidence produced by respondent No. 2 is also straightforward and confidence-inspiring; that admission of Muhammad Sagheer (AW2) that respondent No. 2 never received rent of the house in question from the petitioner, is not helpful to the case of the petitioner because it was never claimed by the said respondent that he himself used to receive rent from the tenant and the above mentioned witness has categorically stated in his affidavit Exh.AW-2 that the landlord was serving at Islamabad, therefore in his absence Malik Ahmad Baksh (father of the said witness) used to collect rent from the petitioner; that the petitioner could not prove that in which capacity he is in possession of the house in question; that there is no other claimant of the above mentioned house and in absence of any document of title, the petitioner cannot deny relationship of the landlord and tenant; that the documents produced by the petitioner in the shape of utility bills, voter list, etc. does not create any title in favour of the petitioner; that the petitioner while appearing before the learned Special Judge (Rent), Multan has admitted in his cross-examination that he had earlier seen the documents of the property Tax (PT1) regarding the house in question wherein he had been 'recorded as a tenant under the petitioner and he has further admitted that he did not take any action for correction of the above mentioned documents, therefore, he is estopped by his words and conduct to deny relationship of the landlord and tenant between the parties; that this petition is without any substance, therefore, the same may be dismissed.

9. Arguments heard and record perused.

10. The relationship of the landlord and tenant between the parties was denied by the petitioner. Respondent No.2, in support of his claim that he was landlord of the house in question, has produced Dr. Maqbool Ansari as AW-1, Muhammad Sagheer Malik (special attorney of respondent No.2) as AW-2 and Qadir Bakhsh as AW-3. All the above mentioned witnesses have categorically deposed before the learned Special Judge (Rent), Multan that the house in question was rented out to the petitioner by Muhammad Amin, the predecessor-in-interest of respondent No.2, in the year 1984, against monthly rent of, Rs,600/-. They have also stated in unequivocal terms that the petitioner kept on paying rent of the house in, question till June, 2005 and thereafter he stopped the payment of rent and became a rent defaulter. The above mentioned witnesses were cross-examined at length but their evidence could not be shattered by the learned counsel for the petitioner. Their evidence is straightforward and confidence-inspiring. In order to establish his ownership of the house in question, respondent No. 2 has produced in his documentary evidence, the original sale deed Exh.A-6. He has also tendered in evidence the documents of the Excise and Taxation Department, Multan about the payment of property Tax (PT1) for the year 2007-08 Exh.A-7, for the year 2003-04 Exh.A-8 and for the year 2609-10 Exh.A-9. In all the above mentioned documents of the Excise and Taxation Department, Multan respondent No. 2 along with his sisters has been recorded as owner of the House No. X-86-A/40- 41, Rajwana Road, Mohallah Ameer Abad, Multan, whereas, the petitioner Saeed Ahmad has been recorded as occupier of the said house against the rent of Rs.800/- per month. The landlord in order to establish that the electricity and gas meters of the house in question, were in his name has also produced utility bills of the house in question as Exh.A10, Exh.A11 and Exh.Al2.

11. On the other hand, the petitioner claimed that the house in question was purchased by him from one Hafeez Ullah alias Badam. Khan (deceased) but he did not produce any title document to prove the above mentioned claim. The said Hafeez Ullah alias Badam Khan was admittedly relative of the petitioner but neither any legal heir nor any other relative of said Hafeez Ullah was produced in the witness box by the petitioner. The petitioner has also produced different utility bills and receipts of sui gas meter as Exh.R-4 to Exh.R-23 but the petitioner while appearing before the learned Rent Controller as RW-1 has frankly admitted during his cross-examination that Meter No.14391 was in the name of one Muhammad Ameer, whereas, Meter No. l4394 was in the name of one Ghulam Hussain. He has further admitted that in April,

2008 ownership of the meter of electricity has been changed in the name of respondent No.2. It is also evident from perusal of the ID Card of the petitioner (Exh.R-24) that address of the petitioner, of a different house i.e. House No.16388, Mohalla Ameerabad, Rajwana Road, Multan has been mentioned in the said document. None of the documents produced by the petitioner is a document of title, therefore, the documentary evidence produced by the petitioner is of no help to him.

12. It was argued on behalf of the petitioner that documents of the Excise and Taxation Department about the payment of property tax (PT1) Exh.A-7 to Exh.A-9, are not sufficient to prove the relationship of the landlord and tenant between the parties. There is no cavil with the preposition that documents of the Excise and Taxation Department might not be conclusive evidence to establish the relationship of the landlord and tenant but at the same time they were not totally irrelevant as they indicate the ownership and payment of the property tax. Similar view was taken this Court in the case of Muhammad Sharif v. Mukhtara Mai and others (2010 YLR 203).

13. The combined effect of the above mentioned oral, as well as, documentary evidence produced by respondent No.2 in the shape of sale deed Exh.A-6 documents of the Excise and Taxation Department, Multan regarding payment of property tax of the house in question, Exh.A-7 to Exh.A-9 and utility bills of the above mentioned house Exh.A-10 to Exh.A-12, is that the ownership of respondent No.2 in respect of the house in question and that the petitioner is a tenant under the said respondent has fully been proved.

14. The learned counsel for the petitioner has also argued that complicated question about the title of parties in respect of an immovable property was involved in the case and the same has illegally been decided in proceeding, under the Rent Restriction Ordinance, 1959. Although the Rent Controller is not competent to determine the question of title of the property which is the job of Civil Court, but if the tenant fails to produce any title document to support his possession over the premises in dispute, the Rent Controller or the appellate court can validely determine the relationship of landlord and tenant between the parties. I have fortified my views in this respect with the judgment of the Hon'ble Supreme Court of Pakistan in the case of `Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another' (PLD 2009 Supreme Court 453) wherein at page 458 it was held as under:---

> "Though the Rent Controller is not competent to determine the question of title of the property assuming the rule of a Civil Court, but if the tenant fails

to produce the documentary evidence to support his title over the premises in dispute the Rent Controller can determine the relationship of landlord and tenant between the parties. In case the tenant could not establish possession over the property in dispute under the sale, he is not entitled to protect the same and the relationship of landlord and tenant would continue to exist as laid down in 'Mst Azeemun Nisa Begum v. Ali Muhammad' (PLD 1990 SC 382)."

15. The contention of the learned counsel for the petitioner that House No.X-86-A/40-41, Rajwana Road, Mohallah Ameer Abad, Multan mentioned by respondent No.2 in his ejectment petition has not been mentioned in the sale-deed Exh.A-6 and as such the property owned by respondent No.2 is not determinable, therefore, the ejectment petition regarding the house in question was liable to be dismissed is misconceived. I have noted that the land measuring 10-Marlas was purchased by Muhammad Ameen, the predecessor-in-interest of respondent No.2 in the year 1951, through registered sale-deed Exh.A-6. It is evident from perusal of the said document that there was no construction on the plot when the same was purchased. Later on, when the said property became part of a residential area and a house was constructed on it, the same was given a specific number i.e. X-86-A/40-41, in the documents of Excise and Taxation Department, (Exh.A-7 to Exh.A-9). The petitioner cannot take advantage of the position to frustrate the eviction proceedings on the pretext that the property owned by the petitioner is not determinable, particularly when he himself could not prove his title and there is no other claimant of the ownership of the said property. A similar issue came under discussion of the Hon'ble Supreme Court of Pakistan in the case of Syed Abdul Ghafoor Shah v. Syed Luqman and others (2009 SCMR 45). The relevant part of the said judgment at page 50 is reproduced hereunder:---

"Be that as it may, the petitioner cannot take advantage of the position and frustrate the eviction proceedings on the pretext that there is discrepancy regarding Municipal number of the shop in question, because it is quite clear that the property in question is the same property which was let to him on rent by Syed Abdul Qayyum, co-owner of the property particularly when none else has claimed ownership/proprietary rights over the same".

16. The learned counsel for the petitioner has also argued that Muhammad Sagheer (AW-2) has admitted during his cross-examination that respondent No.2 never

received rent from the petitioner, therefore, relationship of the landlord and tenant was not established in this case. The said contention of the learned counsel has no force because it was never the case of afore-mentioned respondent that he himself used to collect the rent from the petitioner. Respondent No.2 in Para No.2 of his eviction petition has categorically mentioned that he was serving at Islamabad therefore, he used to collect rent from the petitioner through his brother-in-law, namely Malik Ahmad Baksh. Even otherwise the above mentioned admission of Muhammad Saeed AW-2 cannot be read in isolation to his remaining evidence. The said witness has specifically stated in his affidavit in evidence Exh.A-2, as well as, during his cross-examination that respondent No.2 was serving at Islamabad and he used to collect rent through Malik Ahmad Bukhsh. So combined effect of the reading of whole statement of the above mentioned witness, clearly was that respondent No.2 had been receiving the rent from the petitioner through the above mentioned Malik Ahmad Bukhsh and there exists a relationship of the landlord and tenant, between the parties. The Hon'ble Supreme Court of Pakistan in the case of 'Haji Feroze Khan and another v. Ameer Hussain through L.Rs and others' (2004 SCMR 1719) has held that raising inferences from the part of the statement of a witness in isolation to the evidence as a whole, was not proper exercise of discretion. The relevant part of the said judgment at page 1722 reads as follows:---

> "The two courts below raised inferences from the part of the statement of the respondent/plaintiff that he came to know about the sale on 10-10-1991 in isolation which was not proper exercise of discretion as to raising of inferences. The learned Judge of the High Court has rightly held that from the evidence if read as a whole, it was made out that the said sentence had either not been correctly recorded in the statement of the plaintiff or there was mistake in mentioning the date as 10-10-1991. We have also gone, through the evidence and find that it was proved through the evidence of the witnesses who were mentioned in the statement of the plaintiff that the plaintiff came to know of the sale on 18-10-1991, three witnesses were sent as Jirga to the petitioners on the same date and notice was issued on the following day i.e. 19-10-1991. The inferences drawn by the two courts below were, therefore, rightly interfered with, the same having been found to have been based on consideration of the evidence as a whole, which are in accordance with law and do not suffer from any legal infirmity."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Abdul Qayum through Legal Heirs versus Mushk-e-Alam and another' (2001SCMR 798).

17. The argument of learned counsel for the petitioner that no rent agreement between the parties has been produced by respondent No.2, therefore, the relationship of the landlord and tenant could not be established in this case, has no force. The argument advanced by the learned counsel for the petitioner in this regard cannot prevail for the simple reason that tenancy may not be necessarily through a written document and the same might be oral. A reference in this context may be made to the case of `Shajar Islam v. Muhammad Siddique and 2 others' (PLD 2007 SC 45) wherein at page 47 it was held as under:---

> "This is settled proposition of law that a landlord may not be essentially an owner of the property and ownership may not always be a determining factor to establish the relationship of the land lord and tenant between the parties. However, in the normal circumstances in absence of any evidence to the contrary, the owner of the property by virtue of his title is presumed to be the landlord and the person in possession of the premises is considered as tenant under the law and the tenancy may not be necessarily created by a written instrument in express terms rather may also be oral and implied."

The above mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of 'Ahmad Ali alias Ali Ahmad versus Nasar-ud-Din and another' (PLD 2009 Supreme Court 453).

18. In light of the above discussion, there is no force in the present petition, thus, the same is hereby dismissed.

MH/S-113/L **Petition dismissed.**

2013 M L D 1404

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

UMAR DRAZ and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.309 and Murder Reference No.61 of 2008, heard on 17th January, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Evidence, qua the motive of occurrence, as stated by the complainant, was based on hearsay evidence---Both prosecution witnesses were not residents of the locality where occurrence had taken place, but were residents of places which were about 2-1/2-3 Kilometers away from the place of occurrence---Eye-witnesses had stated that they identified accused persons at the time of occurrence from the distance of ten Karams (about fifty-five feet) in the light of torch---Said torch was not produced before Police Officer at the time of his spot inspection but was produced before Investigating Officer, four days after occurrence, without any plausible explanation for such delay---Identification of accused persons in the darkness of night with the help of torch light from a distance of about fifty-five feet, was not free from doubt---Conduct of the complainant and other prosecution witnesses, at the time of occurrence was also unnatural---Accused were not carrying any lethal weapons at the time of occurrence---Complainant party saw accused persons strangulating deceased, but instead of rescuing the deceased, or trying to overpower accused persons, they raised noise whereupon, accused fled away from the spot---Was not possible that one of accused persons, who was an old man of the age of sixty-seven years, would succeed to flee away from the spot in presence of prosecution witnesses who were twenty-eight years and forty-nine years of age respectively---Nothing incriminating was recovered from possession of accused persons during their physical remand---Occurrence was un-witnessed, which took place in the darkness of night---Accused were implicated in the case by the complainant party on the basis of suspicion, because the dead-body of the deceased was statedly found near their house---Prosecution having failed to prove its case against accused persons beyond the shadow of doubt, conviction and sentence awarded to

accused, were set aside, they were acquitted of the charges by extending them the benefit of doubt and were released, in circumstances.

(b) Criminal trial---

----Benefit of doubt---If there was a single circumstance which would create doubt regarding the prosecution case, that was sufficient to give benefit of such doubt to accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Ch. Tanveer Ahmad Hanjra and Ch. Muhammad Nawaz Bosal for Appellants.

Arshad Mehmood, Deputy Prosecutor General for the State.

Rehan Faheem Mahl for the Complainant.

Date of hearing: 17th January, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.309 of 2008, preferred by appellants Umar Draz and Muhammad Nawaz against their conviction and Murder Reference No.61 of 2008, sent by the learned trial court for confirmation or otherwise of the sentence of death awarded to Umar Draz and Muhammad Nawaz appellants, as both these matters have arisen out of the same judgment dated 27-3-2008, passed by the learned Sessions Judge, Khushab in case F.I.R. No.192 dated 19-5-2007, offence under sections 302 and 34 P.P.C., registered at Police Station Khushab District Khushab, whereby, Umar Draz and Muhammad Nawaz, appellants were convicted under section 302(b) read with section 34, P.P.C. for committing the murder of Gulbaz and were sentenced to death as Tazir with the direction to pay Rs.1,00,000 (rupees one lac) each as compensation to the legal heirs of deceased Gulbaz as required under section 544-A of the Code of Criminal Procedure and in default, thereof, to undergo simple imprisonment for six months each.

2. Brief facts of the case, as disclosed by Abdul Sattar, complainant (P.W. 6) in F.I.R. (Exh.PF), are that he (complainant) was resident of Khushab and had also constructed a Dera in his land. On 18-5-2007 at about 9-00 p.m, he along with his brothers Muhammad Ramzan (P.W.7), Gulbaz (deceased) and nephew Muhammad Mursaleen (given up PW) was present at his Dera situated in village Badli Wala when Umar Draz (appellant) came at their Dera and asked Gulbaz (deceased) that his father was calling

him. Upon which Gulbaz (deceased) accompanied him to the Dera of Umar Draz (appellant). Gulbaz (deceased) did not return for a long time. Upon which, at about 11-45 p.m., (night), he (complainant) took the torch and went in search of Gulbaz (deceased) along with Muhammad Ramzan (P.W.7) and Mursaleen (given up P.W.) and when they reached near the Dera of Muhammad Nawaz (appellant), they witnessed in the light of torch that Muhammad Nawaz and Umar Draz (appellants) were strangulating brother of the complainant (Gulbaz) by putting a noose around his neck. They raised hue and cry, upon which, the appellants, on seeing them, fled away from the spot towards their Dera. They took care of the deceased who was dead. The motive, as stated by the complainant in the F.I.R. (Exh.PF), was that Umar Draz (appellant) was having a suspicion that Gulbaz (deceased) had illicit relations with his mother and due to this grudge, both the appellants have committed the murder of Gulbaz (deceased).

3. The appellants were arrested in this case on 20-5-2007 by Muhammad Ajmal, S.-I. (P.W.10). After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants on 12-7-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced ten witnesses, during the trial Abdul Sattar, complainant (P.W.6) Muhammad Ramnn (P.W.7) are the witnesses of ocular account.

The medical evidence was furnished by Dr Zafar Iqbal Bhatti (P.W.1) who conducted the postmortem examination on the dead body of Gulbaz (deceased).

Muhammad Ajmal, S.-I. (P.W.10) is the Investigating Officer of the case. Ghulam Yasin, Patwari (P.W.2), Manzoor 521/C (P.W.3), Ahmad Hassan 569/C (P.W.4), Faiz Ahmad H.C. (P.W.5), Abdul Khaliq (P.W.8) and Muhammad Aslam, S.I. (PW-9) are the formal witnesses. The prosecution produced documentary evidence in the shape of postmortem report (Exh.PA), pictorial diagrams (Exh.PA/1 and Exh.PA/2), injury statement (Exh.PB), inquest report (Exh.PC), scaled site plans in duplicate (Exh.PD) & Exh.PD/1), recovery memo of cloth along with noose (Exh.PE), F.I.R. (Exh.PF), recovery memo of torch P-4 (Exh.PG), recovery memo of blood stained earth (Exh-PH), rough site plan of the place of occurrence (Exh.PI), report of Chemical Examiner (Exh.PJ), report of Serologist (Exh.PK) and closed its evidence.

The statements of the appellants under section 342 of the Code of Criminal Procedure were recorded on 5-3-2008. They refuted the allegations levelled against

them and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you? both the appellants replied as under:-

"It is was an unseen occurrence which took place in the dark hours of the night and it was generally known in the locality that Muhammad Gulbaz committed suicide on account of his financial constraints and over a dispute of land with his brothers, Abdul Sattar and Muhammad Ramzan. I have been made scapegoat in this case."

The appellants neither opted to give evidence on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them nor produced any evidence in their defence.

5. Learned counsel for the appellants, in support of this appeal, contend that in fact it was an un-witnessed occurrence, which took place in the dark hours of the night and even the doctor, who conducted the postmortem on the dead body of Gulbaz (deceased), has given the probable time between death and postmortem examination on the basis of police report; that the presence of both the eye-witnesses namely, Abdul Sattar, complainant (P.W.6) and Muhammad Ramzan (P.W.7) at the spot at the time of occurrence is improbable because they are not residents of the locality where the occurrence took place; that the torch (P-4) was handed over to the police by the complainant with the delay of four days on 22-5-2007 whereas, this occurrence allegedly took place on 18-5-2007; that the prosecution has miserably failed to prove the motive as Muhammad Nawaz (appellant) had already divorced his wife about five/six years prior to the occurrence who was living at village Kufri which is at a distance of about fifty/sixty kilometers from the place of occurrence and this fact has been admitted by the witnesses in their cross-examination; that the motive has also not been believed by the learned trial court; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, this appeal be accepted and the appellants may be acquitted from the charges.

6. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that this incident took place on 18-5-2007 at about 11-45 p.m. (night) whereas, the matter was reported to the police on the same night at about 1-30 a.m; that the postmortem examination was also conducted on 19-5-2007 at about 6-10 a.m, which rules out the chances of consultation and false implication; that there is no evidence or circumstance available on the record which could suggest any malice on the part of the complainant or other

eye-witness for false implication of the appellants in this case; that natural account of event has been given by the complainant in the F.I.R. (Exh.PF) and while appearing before the learned trial court; that both the eye-witnesses though related with the deceased but their evidence could not be discarded on this ground as they have no enmity for false implication of the appellants; that the ocular account of this case is fully supported by the medical evidence furnished by Dr. Zafar Iqbal Bhatti (P.W.1). So far as the motive is concerned, the learned counsel for the complainant argued that it was talk of the town that Umar Draz (appellant) had a suspicion of illicit relations of Gulbaz (deceased) with his mother and as such, the motive has wrongly been disbelieved by the learned trial court; that the sentence of death was rightly awarded to the appellants by the learned trial court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

7. We have heard the arguments of learned counsel for the appellants, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant and have also gone through the record with their able assistance.

8. As per prosecution story, the appellants committed the murder of Gulbaz (deceased) because Umar Draz (appellant) had suspicion in his mind that Gulbaz (deceased) had illicit relations with his (Umar Draz's) mother. The evidence qua said motive was furnished by Abdul Sattar, complainant (P.W.6) and Muhammad Ramzan (P.W.7). The complainant Abdul Sattar (P.W.6) was cross-examined regarding the motive part of the prosecution and he, at page 23 of the paper book, has stated as under:-
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"I have seen Muhammad Nawaz accused. He might be 67 years old man and not 70 as suggested. Khadija, his wife might be of his age and that Muhammad Nawaz had divorced his wife 5/6 years before. It is correct that she had been residing in village Kufri after divorce. Kufri is about 50/60 Kilometers from Khushab. Gulbaz, since deceased was 47/48 years old when died. Till the fateful day the relations between Umar Draz and Gulbaz, since deceased had been very cordial and there had been no rumor about the suspicion of illicit relations of Umar Draz's mother with Gulbaz. After the occurrence I learnt about these illicit relations. Someone told me about. He is not a witness cited by us in this case..."

It is evident from the perusal of above mentioned statement of Abdul Sattar, complainant (P.W.6), which was made during his cross-examination that mother of Umar Draz (appellant) was an old woman of the age of about sixty-seven years and she

was already divorced five/six years back by Muhammad Nawaz (appellant) whereas, Gulbaz (deceased) was of the age of forty-seven/forty-eight years. The mother of Umar Draz (appellant) was living in village Kufri, which is at a distance of about fifty/sixty kilometers from Khushab. The above mentioned motive was mentioned in the F.I.R. (Exh.PF) but Abdul Sattar, complainant (P.W.6) stated during his cross-examination that after the occurrence, he learnt about the illicit relations of Gulbaz (deceased) with the mother of Umar Draz (appellant). The evidence qua the above mentioned motive, as stated by the complainant Abdul Sattar (P.W.6), is based on hearsay evidence because the said witness has stated that he was told by someone about illicit relations between Gulbaz (deceased) and mother of Umar Draz (appellant). The name of said person who told about the said illicit relations to the complainant was neither mentioned by him in his statement before the court nor he was cited as a witness in this case.

9. The occurrence, as per prosecution case, took place at 11-45 p.m. (night) near the house of the appellants. The ocular account of the prosecution was furnished by Abdul Sattar, complainant (P.W.6) and Muhammad Ramzan (P.W.7). They are not residents of the locality where the occurrence took place. Abdul Sattar, complainant (P.W.6) is resident of Mohallah Wazirabad, Khushab and Muhammad Ramzan (P.W.7) is resident of Mohallah Malkhani Wala, Khushab whereas, the occurrence took place in-village Badli Wala. The distance between Badli Wala and Wazirabad is 2½/3 kilometers and this fact was brought on the record during the cross-examination of Abdul Sattar (P.W.6). Although Abdul Sattar, complainant (P.W.6) and Muhammad Ramzan (P.W.7) have claimed that they had a Dera in village Badli Wala but they have not given the distance of their Dera from the place of occurrence. Their Dera has not been shown in the site plan (Exh.PD) so, it is quite obvious that they (Abdul Sattar, complainant P.W.6 and Muhammad Ramzan P.W.7) are not residents of the locality where the occurrence took place. According to the statements of the above mentioned eye-witnesses, on the night of occurrence at 9-00 p.m, Umar Draz (appellant) came to the Dera of the complainant and asked Gulbaz (deceased) to accompany him to his father, upon which, Gulbaz (deceased) accompanied Umar Draz (appellant) and thereafter, he was murdered by the appellants because Umar Draz (appellant) had suspicion of illicit relations of his mother with Gulbaz (deceased). The above mentioned story of the prosecution regarding asking of Umar Draz (appellant) to Gulbaz (deceased) to accompany him at night time i.e. 9-00 p.m, does not appeal to common sense because according to prosecution's own case, the appellants suspected Gulbaz (deceased) that he had illicit relations with the mother of Umar Draz (appellant), therefore, it is not

probable that Gulbaz (deceased) will accompany Umar Draz (appellant) to his house at the odd hours of the night. According to the statements of the eye-witnesses, they identified the appellants at the time of occurrence from a distance of ten Karams (about fifty-five feet) in the light of torch. The said torah was not produced before Muhammad Ajmal, S.-I. (P.W.10) at the time of his spot inspection on 19-5-2007. The occurrence in this case took place on 18-5-2007 whereas, the torch was produced before the Investigating Officer on 22-5-2007. No plausible explanation has been given by the prosecution as to why the torch was not taken into possession by Muhammad Ajmal, S.-I. (P.W.10) at the time of his spot inspection on 19-5-2007 although he stated that he took into the possession blood stained earth from the spot, recorded the statements of P.Ws. under section 161 of the Code of Criminal Procedure, prepared rough site plan of the place of occurrence and completed other proceedings of spot inspection on the said date. Even otherwise, the identification of the appellants in the darkness of night with the help of torch light from a distance of ten Karams (about fifty-five feet) is not free from doubt. It also does not appeal to the mind of a prudent person that when Gulbaz (deceased) was taken by Umar Draz (appellant) to his house at 9-00 p.m, then why both the appellants kept on waiting till 11-45 p.m to commit his murder. The conduct of the complainant and other prosecution witnesses, at the time of occurrence, is also unnatural. As per prosecution case, the complainant party comprised of three male persons namely, Abdul Sattar, complainant (P.W.6), Muhammad Ramzan (P.W.7) and Muhammad Mursaleen (given up P.W.) whereas, the accused party consists of two persons namely, Umar Draz and Muhammad Nawaz (appellants). It was brought on the record that Muhammad Nawaz (appellant) was an old man of sixty-seven years of age. The appellants were not carrying any lethal weapon at the time of occurrence. The complainant party saw the appellants while strangulating Gulbaz (deceased) but instead of rescuing the deceased or trying to overpower the appellants, they raised noise, whereupon, the appellants fled away from the spot. It is not probable that Muhammad Nawaz (appellant) who was an old man of the age of sixty-seven years would succeed to flee away from the spot in presence of Muhammad Ramzan (P.W.7) who was twenty-eight years of age and Abdul Sattar, complainant (P.W.6) who was forty-nine years of age. Nothing incriminating was recovered from the possession of the appellants during their physical remand. It appears that the occurrence was un-witnessed which took place in the darkness of night and the appellants were implicated in this case by the complainant party on the basis of suspicion because the dead body of Gulbaz (deceased) was statedly found near their house.

It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case that is sufficient to give benefit of such doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

"5 ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230), at page 236, observed as under:--

"13. ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

10. In the light of the above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.309 of 2008 filed by Umar Draz and Muhammad Nawaz (appellants), set aside their convictions and sentences and acquit them of the charges by extending them the benefit of doubt. They are, in custody, they be released forthwith if not required in any-other case.

11. Murder Reference No.61 of 2008 is answered in the NEGATIVE and the sentence of death of Umar Draz and Muhammad Nawaz (convicts) is NOT CONFIRMED.

HBT/U-1/L **Appeal accepted.**

2013 M L D 1648

[Lahore]

Before Malik Shahzad Ahmed Khan, J

Syed TAFSIR HUSSAIN---Appellant

Versus

MUHAMMAD RASHID JANJUA---Respondent

F.A.O. No.157 of 2010, heard on 21st November, 2011.

Cantonments Rent Restriction Act (XI of 1963)---

----S.17---Specific Relief Act (I of 1877), S.12---Transfer of Property Act (IV of 1882), S.53-A---Ejectment of tenant---Stay of proceedings---Specific performance of agreement to sell---Pendency of suit---Part performance---Tenant resisted ejectment proceedings on the plea that he had filed suit for specific performance of agreement to sell and possession of premises was with him as part performance of the agreement---Validity---Tenant could not be protected from ejectment merely by asserting agreement to sell in his favour or by filing suit for specific performance of agreement to sell, unless sale-deed was executed in his favour and agreement to sell had been enforced---Filing of civil suit could not vitiate title of landlord unless the same was finally decided---Only those cases could be left to be decided by civil court, where intricate and complicated questions regarding title of immovable property were involved---Neither there was any dispute regarding ownership of landlord nor there was any intricate or complicated question involved about title of leased premises---Tenant had himself admitted that landlord was owner of the premises and he agreed to sell the same to him, there was no need to leave the matter to be decided by civil court---Tenant could not protect his possession over leased house by invoking provisions of S.53-A of Transfer of Property Act, 1882---Tenant failed to point out any illegality or material irregularity or legal or factual infirmity in eviction order passed by Rent Controller---Appeal was dismissed in circumstances.

Ashfaque Ahmad and 8 others v. Nadeem Ahmad and 3 others PLD 2006 Lah. 643 and Naseer Ahmed Awan v. Sub-Registrar, Lahore and another 2007 MLD 1606 distinguished.

Muhammad Iqbal Haider and another v. Vth Rent Controller/ Senior Civil Judge, Karachi Central and others 2009 SCMR 1396; Sabir Ali Sheikh v. Haji Nawaj Din 2002 MLD 384; Malik Ameer Bakhsh v. Additional District Judge, Multan and 3 others PLD 2006 Lah. 793; Amjad Mehmood Khokhar v. Farasat Hussain and 2 others 2009 CLC 114; Muhammad Saeed v. Haji Mehmood-ul-Hassan through Special Attorney and 2 others 2010 MLD 45; Abbas Ali Khan v. Mst. Farhat Iqbal and 2 others 2009 SCMR 1077; Wajid Ali Khan v. Sheikh Murtaza Ali and 2 others 2003 SCMR 1416; Mst. Bor Bibi and others v. Abdul Qadir and others 1996 SCMR 877; Muhammad Azam and another v. Muhammad Akram 2008 SCMR 1034; Muhammad Akram v. Haji Ijaz Ahmed and others 2006 SCMR 946; Iqbal and 6 others v. Mst. Rabia Bibi and another PLD 1991 SC 242 and Rabnawaz v. Haji Muhammad Iqbal and 2 others 2003 SCMR 1476 ref.

Noor M. Niazi for Appellant.

Muhammad Bashir Kiani for Respondent.

Date of hearing: 21st November, 2011.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This appeal has been filed to challenge the order dated 25-6-2010, whereby, the ejectment petition, filed by respondent, was accepted by the learned Additional Rent Controller, Rawalpindi Cantonment.

2. Briefly stated facts of the case as gleaned from the present appeal are that the respondent filed an eviction petition against the appellant in respect of House No.7-A, Chur Harpal, Westridge-I, Rawalpindi Cantt. The said ejectment petition was filed on the ground of wilful default in the payment of rent. The appellant contested the said ejectment application and filed his written reply. It was asserted by the appellant that he had purchased the above mentioned house from the respondent (landlord) through agreement to sell dated 10-5-2006, for a total consideration of Rs.30,00,000, out of which, Rs.5,00,000 was paid through cheque, and the remaining amount of Rs.25,00,000 was agreed to be paid at the time of sale transaction in favour of the appellant. The appellant claimed that in light of the above mentioned facts, the relationship of landlord and tenant between the parties did not exist. It was also stated that the appellant (defendant) has filed a suit for specific performance of agreement, and the learned Civil Court has confirmed the

interim stay in favour of the appellant on an application moved under Order XXXIX Rules 1 and 2 of C.P.C., whereby the respondent (landlord) was restrained from interfering in the lawful possession of the appellant. The tenant/appellant lastly contended that the respondent instead of performing his contractual obligations, has filed the ejectment petition against him without any justification.

3. On the basis of divergent pleadings of the parties, the learned trial court framed the following issues in order to resolve the controversy:-

ISSUES

(1) Whether there exists relationship of landlord and tenant between the parties? OPP.

(2) Relief

4. After framing of necessary formal issues, the parties were directed to adduce their respective evidence in support of their claims.

The respondent appeared as P.W.1, and produced documentary evidence in the shape of Exh.P.1 to Exh.P.7, Mark-A and Mark-B.

As against it, the appellant appeared as RW.1 and produced only one document in his defence evidence as Exh.R.1.

5 The proceedings on eviction petition were adjourned sine die by the learned Additional Rent Controller, Rawalpindi Cantt, vide order dated 21-3-2009, on the ground that a civil suit was pending between the parties, therefore, the case was adjourned till decision of the said civil suit. The above mentioned order, was challenged by the respondent through Writ Petition No.731 of 2009, which was accepted by this Court vide order dated 3-5-2010 with the direction to the learned. Additional Rent Controller, Rawalpindi Cantt to decide the eviction application afresh in accordance with law, within a period of twenty days from communication of the said order. The appellant has not challenged this order any further before the Hon'ble Supreme Court of Pakistan and thus the same has attained finality.

6. The learned Additional Rent Controller, after remand of the case, considered oral as well as documentary evidence of the parties and then accepted the ejectment petition, vide order dated 25-6-2010, and directed the appellant to hand over the vacant and peaceful possession of the rented property to the respondent within 90 days.

7. The appellant has filed the instant appeal against the above mentioned order, passed by the learned Additional Rent Controller, Rawalpindi Cantt.

8. It is contented by the learned counsel for the appellant that the appellant has purchased the suit property through an agreement to sell dated 10-5-2006, therefore the relationship of landlord and tenant ceased to exist between the parties, thus, the appellant was not liable to pay rent to the respondent (landlord); that possession of the disputed house was handed over to the appellant as a result of part performance of the above mentioned agreement, therefore, the order of eviction could not be passed against the appellant in view of section 53-A of the Transfer of Property Act (IV of 1882); that the entire evidence, produced by the appellant/tenant, was not discussed by the learned Rent Controller in its true perspective, while passing the impugned order; that the impugned order is a non-speaking order, therefore, the same is liable to be set-aside; that complicated question about title of property was involved in the instant case, which cannot be resolved by the learned Rent Controller, and the matter should have been left for decision by the Civil Court, therefore the impugned order may be set-aside; that if Issue No.1 about relationship of landlord and tenant between the parties was decided in favour of the respondent, even then the learned Rent Controller cannot evict the appellant outrightly and the respondent was bound to establish his plea of wilful rent default. In support of his above mentioned contentions, the learned counsel for the appellant has placed reliance on the case-law reported as Ashfaque Ahmad and 8 others v. Nadeem Ahmad and 3 others (PLD 2006 Lahore 643), and Naseer Ahmed Awan v. Sub-Registrar Lahore and another (2007 MLD 1606).

9. Conversely, the learned counsel for the respondent (landlord) has vehemently opposed this appeal on the grounds that mere agreement to sell does not create any title in an immovable property, and the appellant/respondent was liable to pay rent to the landlord/respondent, in spite of execution of the said agreement; that the appellant has admitted that he has not paid rent to the landlord with effect from 10-5-2006, therefore, ground of rent default was established on record; that in the earlier round of litigation, it was held by this Court vide order dated 3-5-2010 that the present appellant could not be absolved of his liability to pay rent on the basis of agreement to sell; that the said judgment of this Court has attained finality, as the same has not been challenged any further by the appellant; that it was established through cogent evidence that there exists relationship of landlord and tenant between the parties; that the rent default was also proved, therefore, the appellant

was liable to be ejected on this score alone; that the suit of the appellant for specific performance of agreement filed against the respondent (landlord) has already been dismissed by the learned Civil Judge, Rawalpindi, vide judgment and decree dated 30-9-2011, therefore, this appeal is liable to be dismissed. The learned counsel for the respondent, in support of his above mentioned contentions, has placed reliance on the following case-law:--

(i) Muhammad Iqbal Haider and another v. Vth Rent Controller/Senior Civil Judge, Karachi Central and others (2009 SCMR 1396);

(ii) Sabir Ali Sheikh v. Haji Nawaj Din (2002 MlD 384 Lahore);

(iii) Malik Ameer Bakhsh v. Additional District Judge, Multan and 3 others (PLD 2006 Lahore 793);

(iv) Amjad Mehmood Khokhar v. Farasat Hussain and 2 others (2009 CLC 114 Lahore) and

(v) Muhammad Saeed v. Haji Mehmood-ul-Hassan through Special Attorney and 2 others (2010 MLD 45 Lahore).

10. Arguments heard and record perused.

11. A petition under section 17 of the Cantonment Rent Restriction Act, 1963 was filed by the respondent (landlord) on the ground of rent default against the appellant, in respect of House No.7-A, Chur Harpal, Westridge-I, Rawalpindi Cantt. The said eviction petition was contested by the appellant (tenant) on the ground that he had purchased the above mentioned property through an agreement to sell dated 10-5-2006 therefore, the relationship of landlord and tenant between the parties did not exist. It was admitted by the appellant while appearing as RW.1 that he did not pay the rent to the landlord after execution of the above mentioned agreement to sell dated 10-5-2006. In this way, the rent default was admitted by the appellant (tenant).

12. It was first contended by the learned counsel for the appellant that as an agreement to sell was executed between the appellant (tenant) and the respondent (landlord), therefore, the relationship of landlord and tenant ceased to exist between the parties.

The above contention of the learned counsel for the appellant is misconceived. In this regard, section 54 of the Transfer of Property Act, 1882 is the relevant provision of law, which reads as under:--

"Contract for sale. A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

It is evident from the perusal of above mentioned provision of law that mere an agreement/contract for sale does not create any title in respect of an immovable property, therefore, the contention of the learned counsel for the appellant that on the basis of above mentioned agreement to sell, the relationship of landlord and tenant did not exist between the parties, has no force in the eyes of law. Reference in this context may be made to the case of Abbas Ali Khan v. Mst. Farhat Iqbal and 2 others (2009 SCMR 1077). It was held in the said judgment as under:--

"S.13--Ejectment of tenant on grounds of default and bona fide need of landlady---Tenant taking the plea that he was owner of the property on the basis of an agreement to sell executed by the landlady---Validity---Tenant had not filed any copy of the said agreement of sale with the petition and admitted that the original of same had been lost---Tenant had admitted the title of landlady in his pleadings and that he obtained the possession of the premises from her-Agreement to sell, held; did not confer title and Infant on the basis of such agreement was not entitled to deny relationship of landlord and tenant---Plea of tenant being mala fide, he was liable to be straightaway ejected."

Similar view was taken in the cases of Wajid Ali Khan v. Sheikh Murtaza Ali and 2 others (2003 SCMR 1416) and Mst. Bor Bibi and others v. Abdul Qadir and others (1996 SCMR 877).

13. The next contention of the appellant was, that a suit for specific performance of agreement to sell, was pending between the parities in the Court of learned Civil Judge, Rawalpindi, therefore, the learned Rent Controller should have stayed the proceedings on eviction petition filed by the respondent till final decision of his suit by the Civil Court.

The said argument of the learned counsel for the appellant is not convincing. Mere pendency of a civil suit filed by a tenant on the basis of an agreement to sell, is no ground to stay the eviction proceedings pending before the Rent Controller.

In my above mentioned views, I am fortified with the judgment, passed by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Azam and another v. Muhammad Akram (2008 SCMR 1034). The relevant paragraph of the above mentioned judgment is reproduced hereunder:--

"Pendency of tenant's suit against landlord for specific performance of agreement to sell---Plea of tenant was that after such agreement, his possession over premises was no longer as tenant, but as owner thereof, thus, he could not be evicted therefrom till final decision of his suit---Such plea was repelled concurrently by two lower Appellate Courts---Supreme Court upheld ejectment order, dismissed petition and refused leave to appeal."

It is by now a well settled-law that mere filing of a suit by the tenant against the landlord for Specific Performance of agreement to sell, cannot be considered a ground to stay the proceedings in rent cases. Reference in this context may also be made to the case of Muhammad Iqbal Haider and another v. Vth Rent Controller/Senior Civil judge, Karachi Central and others (2009 SCMR 1396), and Malik Ameer Bakhsh v. Additional District Judge, Multan and 3 others (PLD 2006 Lahore 793).

A tenant could not be protected from ejectment merely by asserting agreement to sell in his favour or by filing a suit for specific performance of agreement to sell, unless sale-deed was executed in his favour and agreement to sell had been enforced. Filing of civil suit does not vitiate the title of the landlord unless the same was finally decided. Similar view was taken by this Court in the case of Sabir Ali Sheikh v. Haji Nawab Din (2002 MLD 384 Lahore).

14. The leaned counsel for the appellant has also argued that complicated and intricate question of title was involved in this case, therefore, the learned Rent Controller should have left the matter to be decided by Civil Court.

The said argument of the learned counsel for the appellant is not convincing. It is duty of the Rent Controller to see as to whether or not, there is any genuine and complicated question involved about the title of the leased property. Only those cases can be left to be decided by the Civil Court, where intricate and complicated questions regarding the title of immovable property are involved. In the present case, neither there was any dispute qua the ownership of landlord/respondent nor there was any intricate or complicated question involved about the title of leased

premises. The appellant has himself admitted that the respondent was owner of the leased house and he agreed to sell the said premises to him. Thus, no complicated or intricate question was involved regarding the ownership of the leased house and, as such, there was no need to leave the matter to be decided by the Civil Court. Reference in this respect may be made to the case of Muhammad Akram v. Haji Ijaz Ahmed and others (2006 SCMR 946). The relevant part of the above mentioned judgment is reproduced hereunder:--

"S.13--Denial of relationship of landlord and tenant between parties on basis of agreement to sell in favour of respondent---Prayer for reference of question of title to Civil Court---Validity---Landlord in ejectment petition was required to prove his entitlement to receive rent by proving induction of respondent in premises as tenant---Neither there was any dispute nor same could be raised qua ownership of landlord as respondent's own case was that landlord had agreed to sell premises to him---Question of title, thus, not disputed, which could be referred to Civil Court for resolution".

15. The appellant set up another plea that the ejectment petition could not be allowed against him in view of section 53-A of the Transfer of Property Act (IV of 1882), because he (the appellant) was in possession of the leased premises as a result of part performance of agreement to sell between the parties.

The said plea of the appellant is not effective. A tenant cannot protect his possession over the leased house by invoking the provisions of section 53-A (ibid). The said proposition of law has already been discussed by the Hon'ble Supreme Court of Pakistan in its various judgments and this plea of the tenants was never accepted to be a valid defence in their favour to keep their possession over the leased property. Reference in this context may be made to the case of Iqbal and 6 others v. Mst. Rabia Bibi and another (PLD 1991 Supreme Court 242). In the above mentioned case, the Hon'ble Supreme Court of Pakistan has held as under:--

"(b) West Pakistan Urban Rent Restriction Ordinance (VI of 1959) S.13---Transfer of Property Act (IV of 1882), S.53-A---Specific Relief Act (1 of 1877), S.12---Ejectment application---Plea of agreement to sell of demised premises by tenants in their favour-Effect---Ejectment application could not be stayed or stalled on a plea that tenants in possession were holding agreement to sell---Pendency of a suit for specific performance of agreement would also be no ground to avoid

eviction of tenants by Rent Controller---Where such plea raised in defence by tenants was not effective, next order to be passed would be one for eviction".

It is, therefore, clear that the appellant cannot claim the protection of section 53-A of the Transfer of Property Act, 1882, and the eviction petition of the respondent was rightly accepted by the learned Additional Rent Controller, Rawalpindi Cantt, when wilful default in payment of rent was established against the appellant.

16. It was lastly argued on behalf of the appellant that though the issue regarding the existence of the relationship of landlord and tenant between the parties was decided in favour of the respondent, even then, the learned Rent Controller should have taken into consideration as to whether or not there was any wilful rent default on behalf of the appellant and the appellant could not be evicted straightaway.

This contention of the learned counsel for the appellant is misconceived. The appellant while appearing as RW.1 has admitted that after execution of the rent agreement on 15-9-2002, he did not pay any rent to the respondent (landlord). In view of the above admission of the appellant (tenant), and as the relationship of landlord and tenant was denied by the appellant, therefore, the learned Rent Controller has rightly passed the order of eviction after giving its findings in favour of the respondent (landlord) on the issue of existence of relationship of landlord and tenant between the parties.

I am fortified in my above views with the law laid down by the Hon'ble Supreme Court of Pakistan in the case of Rabnawaz v. Haji Muhammad Iqbal and 2 others (2003 SCMR 1476). The relevant part of the said judgment -- reads as follows:--

"---S.13 (as applicable to Province of N.-W.F.P.)---Relationship of landlord and tenant, existence of Proof---All the facts on record, statement of witness and plaint in a civil suit indicated that relationship of landlord and tenant existed between the parties-Application for ejectment by the landlord having been based on default, and the required relationship of landlord and tenant having been denied by the tenant the tenant was liable to be ejected straightaway when the required relationship was proved in affirmative".

17. The judgments cited by the learned counsel for the appellant are distinguishable from the facts of the present case. In the above referred case of "Ashfaq Ahmad" (PLD 2005 Lahore 643), the judgment was given by this Court in a pre-emption case. Similarly, the case of Naseer Ahmad Awan v. Sub-Registrar,

Lahore and another (2007 MLD 1606) has different facts. The above mentioned judgments were not given in rent matters, therefore, the same are not relevant for the decision of issues, which are involved in the present appeal.

18. The learned counsel for the appellant could not point out any illegality or material irregularity or legal or factual infirmity in the impugned order, passed by the learned Additional Rent Controller, Rawalpindi Cantt., dated 25-6-2010, therefore this appeal has no merits and the same is, hereby, dismissed.

MH/T-39/L **Appeal dismissed.**

2013 M L D 1910

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

AZIZ-UR-REHMAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1355 and Murder Reference No.311 of 2008, heard on 16th May, 2013.

(a) Criminal trial---

----Two versions---Principles---Case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by the complainant and prosecution witness; the other had been brought on the record through the statement of accused, recorded under S.342, Cr.P.C.---Prosecution was required to prove its case against accused beyond any shadow of doubt; and the defence version was to be taken into consideration after evaluating the prosecution evidence to find out, whether the same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Both eye-witnesses, were chance witnesses because they were not residents of the locality where occurrence had taken place, but were residents of a different area---Evidence of said witnesses was in conflict with the medical evidence---Conflict in ocular account and medical evidence, had created serious doubt about the presence of said witnesses on the spot at the relevant time---Recovery of pistol .30 bore on the pointation of accused was inconsequential because there was no report of Forensic Science Laboratory regarding said pistol---In absence of matching report of any empty with pistol, alleged recovery of pistol from possession of accused was of no avail to the prosecution---Motive as set forth by the prosecution had not been proved in the case---Prosecution evidence was not worthy of reliance---If story of prosecution and version of accused was put in juxtaposition, then version of accused, appeared to be more probable---Prosecution could not prove its case against accused

beyond the shadow of doubt---Accused was acquitted of the charge extending him the benefit of doubt and was released, in circumstances.

Amin Ali and another v. The State 2011 SCMR 323; Muhammad Ishaq v. The State 2007 SCMR 108 and Ali Sher and others v. The State 2008 SCMR 707 rel.

(c) Criminal trial---

----Appreciation of evidence---If the prosecution evidence was disbelieved by the court, then the statement of accused was to be accepted or rejected as a whole---To accept the inculpatory part of the statements of accused, and to reject the exculpatory part of the same statements was not legally possible.

Muhammad Asghar v. The State PLD 2008 SC 513; Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. Esab Khan 1991 SCMR 61 rel.

Azam Nazir Tarrar, Malik Matee Ullah and Zafar Hussain Chaudhary for Appellant.

Mirza Abid Majeed, Deputy Prosecutor-General for the State.

Zafar Iqbal Malik for the Complainant.

Date of hearing: 16th May, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Aziz-ur-Rehman appellant was tried in case F.I.R. No.256, dated 10-9-2008, registered at Police Station Sadar, District Mianwali in respect of offence under sections 302/324 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 22-11-2008 has convicted and sentenced the appellant as under:--

Aziz-ur-Rehman

Under section 302(b), P.P.C. to 'Death' for committing Qatl-e-Amd of Sanaullah deceased. He was also directed to pay Rs.1,00,000 (rupees one hundred thousand only) as compensation under section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

2. Feeling aggrieved, the appellant has challenged his conviction and sentence through Criminal Appeal No. 1355 of 2008, whereas the learned trial Court has transmitted Murder Reference No. 311 of 2008 for confirmation or otherwise of the death sentence of Aziz-ur-Rehman appellant. We propose to dispose of both these

matters by this single judgment as these have arisen out of the same judgment dated 22-11-2008 passed by the learned Sessions Judge, Mianwali.

3. Brief facts of the case as given by the complainant, namely, Haji Ata Muhammad (P.W.6) through F.I.R. (Exh.PE) are that he (complainant) was resident of Mohallah Miana Mianwali and he had installed a flour grinding machine in his house, whereas, Sanaullah (deceased) had a Suzuki Van No. LHO 1715, on which, he used to take female students to their schools and colleges. On 10-9-2008 after dropping the female students at their houses, the deceased took Ata Muhammad (complainant) from the house of Ghulam Muhammad (given up P.W.). He (complainant) sat in the back portion of the van and when at about 12-30 p.m. (noon) they reached in the street of Muhammad Khan ex-councillor Watta Khel, the appellant was already present there in front of his house while armed with .30 bore pistol. The appellant forcibly stopped Sanaullah (deceased) and stated that as the deceased had insulted his sister Musarrat Bibi and deserted her so he (appellant) would not leave him alive. The appellant, then made a fire shot with his pistol .30 bore which hit on the right side of cheek and made its exit from the left side of the neck of Sanaullah (deceased). The appellant made a second fire shot which hit on the front of chest and made exit from the back of Sanaullah (deceased). On hue and cry of Musarrat Bibi (CW-1) wife of Sanaullah (deceased), who was residing in the appellant's house because of her family differences, came out of the house, whereupon, the appellant made third fire shot on Mst. Musarrat Bibi which hit on her right thigh. The occurrence was witnessed by Siraj-ud-Din (P.W.7) and Ata-ur-Rehman (given up P.W.) who at that time were going in the street to the house of their mamoon Ghulam Muhammad (given up P.W.) on a bicycle. Sana Ullah was immediately shifted to the Civil Hospital, Mianwali but he succumbed to the injuries on the way.

The motive, according to the prosecution case, behind the occurrence was that daughter of the complainant was married with the elder brother of the appellant Aziz-ur-Rehman whereas sister of the appellant was married with Sana Ullah (deceased). Due to domestic dispute, they both were in the houses of their parents and due to this grudge, Aziz-ur-Rehman appellant committed the murder of Sana Ullah with his pistol .30 bore and injured Mst. Musarrat Bibi (CW-1).

4. Aziz-ur-Rehman appellant was arrested in this case on 16-9-2008 by Abdul Majeed, S.-I. (P.W.8). During the course of investigation, on 18-9-2008, the appellant Aziz-ur-Rehman led to the recovery of pistol

30 bore (P-1) along with four live cartridges (P-2/1-4), which was taken into possession through memo (Exh.PD). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed the charge against the appellant under sections 302/324, P.P.C. on 14-11-2008, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced eleven witnesses while one witness namely Mst. Musarrat Bibi was examined as Court Witness, during the trial. Haji Ata Muhammad complainant (P.W.6) and Siraj Din (P.W.7) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Azmat Ullah Khan (P.W.1) and Lady Dr. Musarrat (P.W.2).

Sher Khan Constable No. 192 (P.W.4) is the witness of recovery of pistol .30 bore (P-1) along with four live bullets, (P-2/1-4) from the appellant, which was taken into possession through memo (Exh.PD). Abdul Majeed, S.-I. (P.W.8) is the Investigating Officer of this case.

Muhammad Shaffiq Khan draftsman (P.W.3), Saif Ullah (P.W.5), Mehr Khan Constable 1014 (P.W.9), Muhammad Amir Constable No. 478 (P.W.10) and Ataullah Head Constable No. 720 (P.W.11) are the formal witnesses. The prosecution produced documentary evidence in the shape of post mortem report of the deceased (Exh.PA), pictorial diagram (Exh.PA/ 1), medico legal report of Mst. Musarrat Bibi (Exh.PB), scaled site plan in duplicate (Exh.PC) (Exh.PC/ 1), memo of possession of pistol 30 bore (P1) along with four live cartridges (P-2/ 1-4) (Exh.PD), rough site plan of the place of recovery of pistol (Exh.PD/ 1), F.I.R. (Exh.PE), memo of possession of blood stained earth (Exh.PF), memo of possession of Suzuki van (P-3) and 12 coloured photographs (P-4/1-12) (Exh.PG), injury statement of the deceased (Exh.PH), death report of the deceased (Exh.PI), rough site plan of the place of occurrence (Exh.PJ), memo of possession of last worn clothes of deceased (Exh.PK), memo of possession of clothes of Mst. Musarrat Bibi injured (CW-1) (Exh.PL), report of Chemical Examiner (Exh.PM), statement of Mst. Musarrat Bibi (Exh.CW1/4), and closed its evidence.

6. The statement of the appellant under section 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While

answering to a question that "Why this case against you and why the P.Ws. have deposed against you" the appellant replied as under:--

"I have been involved falsely in this case by distorting the real story. No witness was present at all at the time of alleged occurrence. In fact the deceased being armed with a pistol had gone to take back forcibly his wife Musarrat Bibi who is also my sister and caused firearm injury to her because of her resistance. At that occasion I was present at my shop situated in my house. On hearing the screams of my sister I rushed towards place of occurrence and I asked the deceased to leave Mst. Musarrat Bibi. I then finding no way, in exercise of right of defence of my sister made two fires on deceased. Thereafter, deceased in injured condition sat inside the Suzuki van and had died after a shot while. I am innocent. We are considered Moeens in the Pathan locality. Watta Khel is a notorious village. I had purchased an automatic pistol for the safety of mine as well as my shop. As I was the younger brother of Musarrat so I had no concern with the family disputes, which were being taken up by elders of both sides. I intentionally did not commit his murder but only to save the life of my sister Musarrat Bibi. Had I not been done so, the deceased could have committed not only the murder of my sister but me too. "

Neither the appellant made statement under section 340(2), Cr.P.C. nor he produced any evidence in his defence, however his sister Mst. Musarrat Bibi was examined by the Court as (CW-1). The learned trial Court vide its judgment dated 22-11-2008, found Aziz-ur-Rehman appellant guilty and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal contends that the appellant has falsely been involved in this case; that both the witnesses of ocular account are chance witnesses and have not been able to establish their presence at the spot; that in the F.I.R. the complainant Haji Ata Muhammad (P.W.6) stated that his son Sana Ullah (deceased) used to pick and drop the female students to school and on the day of occurrence, after dropping the female students, Sana Ullah (deceased) took him (complainant) from the house of one Ghulam Muhammad but while appearing before the learned trial Court, the complainant simply stated that after dropping the girls, Sana Ullah (deceased) accompanied him (complainant) and he has not stated the purpose of his visit to the said house; that the occurrence took place in front of the house of the appellant and the deceased was in fact the aggressor and he wanted to forcibly took along with him Mst. Musarrat Bibi, sister of the appellant and on her

resistance, she was fired at by the deceased and the appellant in exercise of the right of his private defence, made fire shots at the deceased; that there is conflict between the ocular account and medical evidence as the complainant of the case and the other eye-witness stated that first fire shot of the appellant hit the deceased at the right cheek and made its exit from left side of the neck and the second fire shot of the appellant hit at right side of the chest which made its exit from the back of the deceased, whereas Dr. Azmat Ullah Khan (P.W.1), who conducted the post mortem examination on the dead body of the deceased noted that injury on the chest of the deceased was an exit wound; that story narrated in the F.I.R. is highly improbable because Mst. Musarrat Bibi was turned out by the deceased and she was 'ghair abad' and because of that reason the appellant fired at the deceased but at the same time it is mentioned in the F.I.R. that the appellant also fired at Mst. Musarrat Bibi which is not probable and understandable; that the other eye-witness namely Siraj Din (P.W.7) made dishonest improvements in his statement while appearing before the learned trial Court; that most important witness of the prosecution namely Mst. Musarrat Bibi, who was injured at the time of occurrence, was given up being won over who was summoned by the Court and she fully supported the version of the appellant; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the occurrence took place on 10-9-2008 at 12-30 p.m., and the matter was reported to the police at 2-00 p.m. therefore, there is no delay in reporting the matter to the police; that the presence of the complainant with his son Sana Ullah (deceased) cannot be considered as unnatural and the presence of the other eye-witness is also established from the fact that matter was reported to the police within 1-1/2 hour from the occurrence and his name is mentioned in the F.I.R.; that minor conflict between the medical evidence and the ocular account is not material as ocular account gets full support from injury No.1 which is on the cheek of the deceased and it is further corroborated by the recovery of pistol from the appellant. Moreover, version of the appellant is an afterthought; that Mst. Musarrat Bibi (CW-1) fully supported the prosecution case during the course of investigation and she was confronted with her previous statement and her improvement was brought on the record; that the appellant has not been able to prove his plea taken by him in his statement recorded under

section 342, Cr.P.C; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Haji Ata Muhammad complainant (P.W.6) and Siraj Din (P.W.7), whereas, the other has been brought on the record through the statement of Aziz-ur-Rehman (appellant), recorded under section 342 of Cr.P.C. and Mst. Musarrat Bibi (CW-1) and suggestions put to the prosecution witnesses during their cross-examination.

11. It has been settled now by the Hon'ble Supreme Court of Pakistan through number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned apex Court of the country has been pleased to observe as under:-

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counterversions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a

conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

The abovementioned view has been reiterated by the august Supreme Court of Pakistan in the case reported, as Amin Ali and another v. The State (2011 SCMR 323). Therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

12. The ocular account of the prosecution was furnished by Haji Ata Muhammad complainant (P.W.6) and Siraj Din (P.W.7). The occurrence in this case admittedly took place in frount of the house of Aziz-ur-Rehman (appellant) situated in the area of 'Watta Khel' within the territorial jurisdiction of Police Station Sadar Mianwali. Both the above mentioned eye-witnesses are residents of a different area i.e. Mohallah Miana, Mianwali City. The complainant Haji Ata Muhammad (P.W.6) has stated during his cross-examination that his house was at a distance of less than one kilometer from the place of occurrence, in another Mohallah called as Miana Mohallah. Both the above mentioned eye-witnesses are chances witnesses because they are not residents of the locality, where this occurrence took place. Moreover, they have not been able to assign any valid reason for their presence at the spot at the relevant time.

The story narrated by the above mentioned eye-witnesses is highly improbable. According to their version, the motive behind the occurrence was that Mst. Musarrat Bibi, sister of the appellant, was married with Sana Ullah deceased but due to family dispute, she was 'ghair abad'. The above mentioned eye-witnesses stated that at the time of occurrence, the appellant raised lalkara to the deceased, not to leave him alive as he (deceased) had sent back Mst. Musarrat Bibi to his (appellant's) house after

insulting her and thereafter, he made fire shots at the deceased. It was further alleged that after causing injuries to the deceased, the appellant also made fire shots at his sister Mst. Musarrat Bibi (CW-1). It is not understandable that if the appellant caused fire-arm injuries to the deceased due to the desertion and insult of his sister Mst. Musarrat Bibi (CW-1) then why he also made fire shots at his sister Mst. Musarrat Bibi (CW-1). Aforementioned Mst. Musarrat Bibi was not produced by the prosecution in support of their version. She examined as a Court witness by the learned trial Court and she negated the story of the prosecution. She stated that on the day of occurrence, she was present in the house of her parents as she was 'ghair abad' and at about 12-30 p.m. (noon), her husband Sana Ullah (deceased) while armed with pistol came inside the house and forcibly took her with him and brought her in the street. She further stated that on her resistance, Sana Ullah deceased made fire shot which hit on her right thigh. She stated that at the time of occurrence, her husband was also injured however, she was unable to see that who made firing on her husband as she herself was also injured. The story narrated by the above mentioned prosecution eye-witnesses was not supported by Mst. Musarrat Bibi (CW-1).

We have also noted that the evidence of eye-witnesses, namely, Haji Ata Muhammad (P.W.6) and Siraj Din (P.W.7) is in conflict with the medical evidence. They have stated that first fire shot, made by the appellant, landed on the right cheek of Sana Ullah deceased and made its exit from the left side of his neck whereas the second fire shot made by the appellant hit on the right side of chest of the deceased and made its exit from his back. Dr. Azmat Ullah Khan (P.W.1) has furnished the medical evidence of the prosecution and according to his statement, injury attributed to the appellant on the chest of the deceased was an exist wound i.e. injury No.2 in the post mortem report (Exh.PA). There was an entry wound on the back of right side of chest of the deceased (injury No.1) which was not attributed to the appellant and the above mentioned prosecution witnesses have not assigned the said injury to the appellant. It is therefore, established that the ocular account furnished by Haji Ata Muhammad (P.W.6) and Siraj Din (P.W.7) is in conflict with the medical evidence furnished by Dr. Azmat Ullah Khan (P.W.1). The above mentioned conflict in the ocular account and medical evidence has created serious doubt about the presence of above mentioned witnesses at the spot at the relevant time. The Hon'ble Supreme Court of Pakistan extended benefit of doubt to the accused persons in cases reported as 'Amin Ali and another v. The State' (2011 SCMR 323), 'Muhammad Ishaq v. The

State' (2007 SCMR 108), 'Ali Sher and others v. The State' (2008 SCMR 707), on the ground of conflict between ocular account and medical evidence.

13. The recovery of pistol .30 bore (P-1) on the pointation of the appellant is inconsequential because there is no report of Forensic Science Laboratory regarding the above mentioned pistol. In the absence of matching report of any empty with pistol .30 bore (P-1), the alleged recovery of said pistol from the possession of the appellant is of no avail to the prosecution.

14. The motive behind the occurrence as set forth in the F.I.R. (Exh.PE) was that daughter of the complainant, namely, Mst. Hameedan Bibi was married to Fazal-ur-Rehman, elder brother of the appellant, whereas sister of the appellant, namely, Mst. Musarrat Bibi was married with Sana Ullah deceased however, due to family disputes both the above mentioned females were 'ghair abad' and due to this grudge, appellant committed the murder of Sana Ullah deceased and also caused injury to his sister Mst. Musarrat Bibi (CW-1). The story of prosecution qua motive of the occurrence does not appeal to common sense. We have already noted that if the appellant was annoyed with the deceased due to the desertion of his sister Mst. Musarrat Bibi (CW-1) then there was no reason with him to cause firearm injury to his sister Mst. Musarrat Bibi (CW-1). We have also noted that the occurrence took place in front of the house of the appellant. Mst. Musarrat Bibi also appeared before the learned trial Court and denied the allegation levelled by the prosecution qua injury inflicted on her person by the appellant rather she stated that the said injury was inflicted on her person by Sana Ullah deceased. We are therefore, of the view that motive as set forth by the prosecution has not been proved in this case.

15. After considering all the aspects of the case we have come to this conclusion that the prosecution evidence is not worthy of reliance and the prosecution has failed to prove its case against the appellant beyond the shadow of any doubt.

16. Now coming to the version of the appellant which he took in his statement recorded under section 342, Cr.P.C. The version of the appellant has already been reproduced in paragraph No.6 of this judgment. We have disbelieved the prosecution evidence therefore, we have to accept or reject the version of the appellant in toto. It is by now well settled law that if the prosecution evidence is disbelieved by the Court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statements of accused persons and to reject the exculpatory part of the same statements. Reference in this context may

be made to the case of 'Muhammad Asghar v. The State' (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced for ready reference:--

"It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of 'Shahid Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convincing him."

We have been fortified in our above mentioned view by the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of 'Sultan Khan v. Sher Khan and others' (PLD 1991 SC 520) and 'Ghulam Qadir v. Esab Khan' (1991 SCMR 61).

Appellant took this plea in his statement recorded under section 342, Cr.P.C. that on the day of occurrence Sana Ullah deceased came to his house while armed with pistol and tried to forcibly take with him, his wife Mst. Musarrat Bibi who was also sister of the appellant. He further stated that on the resistance of Mst. Musarrat Bibi, Sana Ullah deceased made fire shot with his pistol on her and she was injured. On hearing the screams of Mst. Musarrat Bibi, he (appellant) rushed toward the place of occurrence and while exercising the right of his private defence, he made fire shots on the deceased. Sister of the appellant, namely, Mst. Musarrat Bibi also appeared before the learned trial Court as Court witness (CW-1) and supported the version of the appellant by stating that she received the fire-arm injury on her person at the hands of Sana Ullah deceased where he was trying to take her forcibly with him and she offered resistance The lady doctor Musarrat (PW-2) on 1-9-2008 at 2-00 p.m., medically examined Mst. Musarrat Bibi (CW-1) and found a fire arm injury on her

right thigh. If story of the prosecution and version of the appellant is put in juxtaposition, then version of the appellant appears to be more probable.

The occurrence in this case admittedly took place in front of the house of the appellant. Sister of the appellant, namely, Mst. Musarrat Bibi (CW-1) was admittedly injured during the occurrence and she has not supported the story of the prosecution rather she has supported the version of the appellant. After discarding the prosecution evidence, if version of the appellant is to be accepted in toto then no offence is made out from the contents of his statement recorded under section 342, Cr.P.C. because his act is fully covered under section 100 (secondly) P.P.C. which is reproduced hereunder:--

"100. When the right of private defence of the body extends to causing death.--- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the office which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

First.----------;

Secondly. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. ----------;

Fourthly. ----------;

Fifthly. ----------;

Sixthly. ----------;

17. After considering all the aspects of this case, we have come to this conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. Resultantly, Criminal Appeal No. 1355 of 2008 filed by the appellant Aziz-ur-Rehman is hereby accepted and he is acquitted of the charge while extending him the benefit of doubt. He is in custody, he be released from jail forthwith if not required in any other case. Murder Reference No. 311 of 2008 is answered in the negative and death sentence awarded to the appellant is not confirmed.

HBT/A-86/L **Appeal accepted.**

2013 P Cr. L J 358

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ZULFIQAR ALI and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos.1963, 1988 of 2006 and Murder Reference No.57 of 2007, heard on 7th February, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Four co-accused had been acquitted by Trial Court on benefit of doubt and their acquittal had attained finality---Question was, whether the evidence disbelieved qua the acquitted co-accused could be believed against the accused persons---Motive for the occurrence had been attributed not only to the accused but also to the acquitted co-accused---Reports of the Forensic Science Laboratory in respect of the rifles recovered from the accused were only to the extent that they were in working condition---Injuries on the person of the deceased had not been specifically assigned to any of the accused and the same had been jointly attributed to the accused as well as their acquitted co-accused---No independent corroboration was available on record from any quarter against the accused persons to distinguish their case from that of acquitted co-accused---Accused were also extended benefit of doubt and acquitted in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185; Sarfraz alias Sappi and 2 others v. The State 2000 SCMR 1758; Syed Ali Bepari v. Nibaran Mollah and others PLD 1962 SC 502; Twaib Khan and another v. The State PLD 1970 SC 13; Bakka v. The State 1977 SCMR 150; Khairu and another v. The State 1981 SCMR 1136; Ziaullah v. The State 1993 SCMR 155; Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11; Shahid Raza and another v. The State 1992 SCMR 1647; Irshad Ahmad and others v. The State and others PLD 1996 SC 138; Ahmad Khan v. The State 1990 SCMR 803 and Akhtar Ali and others v. The State 2008 SCMR 6 ref.

(b) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-e-amd--- Appreciation of evidence--- Ocular testimony believed qua some accused and disbelieved qua other accused---Principle---Courts keeping in view the prevailing circumstances and for safe administration of justice follow the principle of appraisal of evidence i.e., sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of accused facing the same trial, then the court must search for independent corroboration on material particulars, in the latter case.

Iftikhar Hussain and another v. State 2004 SCMR 1185 ref.

Shaikh Shahid Waheed for Appellants (in Criminal Appeal No.1963 of 2006).

Ch. Anwar ul Haq Pannun for Appellants (in Criminal Appeal No.1988 of 2006).

Chaudhary Muhammad Mustafa, Deputy Prosecutor-General for the State.

Chaudhary Tariq Mahmood Sulehriya for the Complainant.

Date of hearing: 7th February, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.57 of 2007, sent by the learned trial Court, Criminal Appeal No.1963 of 2006, preferred by appellant Zulfiqar Ali, and Criminal Appeal No.1988 of 2006, filed by Muhammad Saleem appellant, by this single judgment, as all these matters have arisen out of the same judgment dated 7-12-2006, passed by learned Additional Sessions Judge, Shakargarh, District Narowal.

2. Zulfiqar Ali and Muhammad Saleem appellants along with their co-accused namely, Irshad Ahmad, Muhammad Sarwar alias Chhabbu, Hameedan, Farooq Hussain, Muhammad Arshad, Sarfraz Ahmad and Shamsa Bibi, were tried in case F.I.R. No.216, dated 19-9-2004, registered at Police Station, Noor Kot, in respect of offences under sections, 302, 109, 148, and 149 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 7-12-2006, convicted and sentenced the appellants as under:--

Zulfiqar Ali and Muhammad Saleem

Under section 302(b) of P.P.C. to death for committing Qatl-e-amd of Muhammad Lateef deceased. They were also ordered to pay Rs.1,00,000 (Rupees one hundred

thousand only) each as compensation under section 544-A, of Cr.P.C. to the legal heirs of deceased or in default to suffer simple imprisonment for six months each.

whereas, the learned trial Court vide the same judgment acquitted the above-mentioned co-accused of the appellants from the charges.

3. Brief facts of the case as disclosed by Mushtaq Ahmad complainant (P.W.11) in his statement (Exh.PA) on the basis of which F.I.R. (Exh.PA/1) was chalked out are that during the preceding year of the occurrence, his younger brother Ashiq Hussain, was murdered by Muhammad Saleem, Zulfiqar Ali and Muhammad Sarfraz accused and all of them were absconders in the said case. The younger brother of the complainant, namely, Muhammad Lateef, was an army personnel, who had come to his house on leave and on the fateful day, he had to go back to join his duty at Sialkot. It was mentioned by the complainant in the F.I.R. (Exh.PA/1) that he, along with his brother-in-law Nazir Ahmad and Rasheed Ahmad (P.W.12) were going to Bhajpur Bus Stand to see off his brother Muhammad Lateef (deceased). When they reached near the 'Haveli' of one Irshad Ahmad, all of a sudden, Zulfiqar Ahmad, and Muhammad Saleem (the appellants), along with their co-accused namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu (since acquitted), while armed with firearm weapons, came to the place of occurrence on two motorbikes. Co-accused Farooq Ahmad (since acquitted) raised a 'Lalkara' to take the life of Muhammad Lateef (deceased), on which Muhammad Lateef (deceased) ran towards the 'Haveli' of Irshad Ahmad in order to save his life. All the above-mentioned accused followed Muhammad Lateef inside the said 'Haveli' and all of them inflicted firearm injuries on his person, who succumbed to the said injuries at the spot. The accused decamped from the place of occurrence on motorbikes while making aerial firing and raising 'Lalkaras'. It was also alleged that the accused had committed the murder of Muhammad Lateef (deceased) on the abetment of co-accused Hameedan Bibi widow of Hakim Ali (since acquitted), Shamsa Bibi wife of Sarfraz Ahmad (since acquitted) and Irshad Ahmad son of Taj Din (since acquitted).

The motive for the occurrence, as stated by the complainant in F.I.R. Exh.PA/1 was previous enmity of the complainant party with the accused.

4. After completion of investigation, the challan was submitted before the trial Court, the appellants along with acquitted co-accused were charge sheeted on 4-5-2006, to

which they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as twenty P.Ws.

The complainant Mushtaq Ahmad (P.W.11), and Rasheed Ahmed (P.W.12) furnished ocular account of the occurrence.

Dr. Javed Iqbal (P.W.9) on 19-9-2004, at 10-30 p.m., conducted the post-mortem examination on the dead body of Muhammad Lateef (deceased) vide post-mortem report (Exh.PC) and found the following injuries on his person:--

(i) A lacerated wound of 1 cm x 1 cm at the back of right shoulder inward and to the front direction with blackening at the clothes, at the site of injury. (Entry wound).

(2) A lacerated wound of 1 cm x 1.25 cm at the front of right shoulder, everted margins with leaking of blood. (Exit wound).

(3) A lacerated wound of 2 cm x 1 cm at the right cheek near the nose, inward and backward. (Entry wound). Blackening at the site of injury.

(4) A lacerated wound of 1 cm x 1.25 cm at the right cheek in front of ear, everted margins. (Exit wound).

(5) A lacerated wound of 6 cm x 3 cm at back right side of skull, inward and toward the ear, bone fractured, bone matters scattered. (Entry wound).

(6) A lacerated wound of 1-1/2 cm x 1 cm at the right face below the right ear bleeded. (Exit wound).

In his opinion, all the injuries mentioned above were ante-mortem and were caused by fire-arm weapon. The injuries on skull and face were enough to cause death due to neougeranic and haemorrhage shock. Probable time that elapsed between injuries and death was immediate and between death and post mortem was within eight hours.

Rashad Majeed, S.-I. (P.W.2), Faryad Ali, S.-I. (P.W.8), Muhammad Iqbal, S.-I. (P.W.16), Maqbool Ahmad Inspector, SHO (P.W.17), and Muhammad Iqbal Goraya, SI/SHO (P.W.19), were the Investigating Officers of this case.

(P.W.1) Amjad Parvez ASI, (P.W.3) Aftab Ahmad ASI, (P.W.4) Muhammad Ishaque HC-122, (P.W.5) Naseer Ahmad HC-267, (P.W.6) Muhammad Boota C-622, (P.W.7) Muhammad Asif C-378, (P.W.10) Allah Ditta SI, (P.W.13) Muhammad

Farooq, (P.W.14) Rasheed Ahmed, (P.W.15) Tahir Tasleem Draftsman, (P.W.18) Muhammad Sagheer C-17, and (P.W.20) Allah Rakha, are the formal witnesses.

5. After completion of prosecution evidence, the statements of the appellants under section, 342 of Cr.P.C. were recorded on 14-7-2006. They refuted the allegations levelled against them and professed their innocence. In answer to the question, "why this case against you and why the P.Ws. have deposed against you", the appellant Zulfiqar Ali replied as under:--

> "On the basis of previous murder of Ashiq Hussain I have been falsely implicated in this case and the allegations against me in this case are so frivolous that (deceased) namely Muhammad Lateef was done to death in a small room and eight accused according to prosecution version hit him/deceased indiscriminately with deadly weapons like kalashnikovs etc., whereas, only three injuries are on the person of (deceased), so it cannot be ascertained nor there is any evidence with the prosecution that any injury was hit by me to the (deceased). P.Ws. are related inter se and inimical towards me. I am innocent".

The appellant Muhammad Saleem also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded under section 342 of Cr.P.C. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Muhammad Saleem replied as under:--

> "On account of previous enmity and strained relations with the complainant of this case and his relatives, I have been falsely implicated in this case".

The appellants did not make statements under section 340(2), Cr.P.C., nor they intended to adduce their defence evidence.

The learned trial Court vide its judgment dated 7-12-2006, found both the appellants guilty, convicted and sentenced them as mentioned and detailed above.

6. The learned counsel for the appellants, in support of both the appeals, contends that in the F.I.R., there was an allegation against four persons besides the appellants of causing firearm injuries to Muhammad Lateef (deceased), whereas, co-accused namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu have been acquitted by the learned trial Court and their acquittal has not been assailed either

by the State or by the complainant before this Court and the same has attained finality, therefore, on the basis of same evidence, the appellant cannot be convicted unless and until there is strong independent corroboration, which is very much lacking in this case; that the case of the appellants is not distinguishable from the case of acquitted co-accused; that the motive is attributed to the appellants as well as to the above-mentioned acquitted co-accused; that the recovery of rifle (P.5) from the possession of the appellant Zulfiqar Ali and the recovery of rifle (P.7) from the possession of the appellant Muhammad Saleem cannot be considered a corroborative piece of evidence, because the reports of Forensic Science Laboratory are only to the extent of working condition of the said rifles, therefore, this appeal be accepted and the appellants may be acquitted from the charges.

7. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes both the appeals on the grounds that the appellants were named in the F.I.R., which was promptly lodged with the specific allegation against the appellants for causing firearm injuries to Muhammad Lateef (deceased); that the motive was also proved against the appellants; that rifles (P.5) and (P.7) have also been recovered from the possession of the appellants; that the prosecution witnesses of the ocular account remained consistent and straightforward and their evidence could not be shattered by the defence; that the case of the acquitted accused is distinguishable from the case of the present appellants as they were found innocent by the police, therefore, this appeal may be dismissed and Murder Reference may be answered in affirmative.

8. We have heard the arguments of the learned counsel for the appellant and learned DPG assisted by learned counsel for the complainant, and have also gone through the evidence available on record with their able assistance.

9. The occurrence in this case took place on 19-9-2004, at 4-30 p.m., in the 'Haveli' of one Irshad, situated in village Kasraj, Police Station, Noor Kot, District Narowal. The matter was reported to the police on the same day at 6-00 p.m., by the complainant Mushtaq Ahmad (P.W.11), who is real brother of Muhammad Lateef (deceased). The prosecution, in order to prove its ocular account has produced Mushtaq Ahmad (P.W.11) and Rasheed Ahmad (P.W.12). In the F.I.R. (Exh.PA/1); it is the case of the complainant that on 19-9-2004, at 4-30 p.m., he along with his brother-in-law Nazeer

Ahmad son of Din Muhammad and Rasheed Ahmad (P.W.12) were going towards Bhojpur bus stand to see off his brother Muhammad Lateef (deceased), who had to rejoin his duty in his unit of Pakistan Army at Sialkot. According to the complainant Mushtaq Ahmad (P.W.11), when they reached near the 'Haveli' of one Irshad Ahmad, all of a sudden, Zulfiqar Ali, and Muhammad Saleem (the appellants), along with their co-accused namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu (since acquitted), while armed with firearm weapons, came to the place of occurrence on two motorbikes. Co-accused Farooq Ahmad (since acquitted) raised a 'Lalkara' to take the life of Muhammad Lateef (deceased), on which Muhammad Lateef (deceased) ran towards the 'Haveli' of Irshad Ahmad in order to save his life. All the above-mentioned accused followed Muhammad Lateef inside the said 'Haveli' and all of them inflicted firearm injuries on his person, who succumbed to the said injuries at the spot. The accused decamped from the place of occurrence on motorbikes while making aerial firing and raising 'Lalkaras'. It was also alleged that the accused had committed the murder of Muhammad Lateef (deceased) on the abetment of co-accused Hameedan Bibi widow of Hakim Ali (since acquitted); Shamsa Bibi wife of Sarfraz Ahmad (since acquitted) and Irshad Ahmad son of Taj Din (since acquitted).

The motive for the occurrence, as stated by the complainant in the F.I.R. (Exh.PA/1) was previous enmity of the complainant party with the accused.

10. In the F.I.R. (Exh.PA/1), the complainant Mushtaq Ahmad attributed the joint role of firing to all the above-mentioned six accused namely, Zulfiqar Ali Muhammad Saleem (the appellants) and Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu (since acquitted). The complainant Mushtaq Ahmad, while appearing before the learned trial Court as (P.W.11) narrated the same allegation and assigned the role of inflicting fire-arm injuries to all the above-mentioned accused. The relevant part of his evidence is reproduced hereunder:--

"The fires hit Muhammad Lateef (deceased) in my presence. All the accused persons entered in the bethik of Irshad and made firing at the (deceased). The door of bethik was of normal size. I do not know the measurement of bethik. I myself saw the accused persons making firing at the (deceased). I saw the occurrence outside the bethik at a distance of three karms. I cannot tell the number of fires made by each accused at

the time of occurrence. All the accused persons made firing at the (deceased) and the fires hit the (deceased)".

The other eye-witness namely, Rasheed Ahmad (P.W.12), while appearing before the learned trial Court made the following statement:--

"All the accused were armed with fire arms. Farooq Ahmed accused raised lalkara that Muhammad Lateef should be murdered, whereby, Lateef took shelter in the haveli of Irshad and the accused persons made firing at Lateef with their respective fire arms in the bethik. Lateef succumbed to the injuries at the spot. The accused persons while making firing fled-away from the spot on their motor-cycles".

It is evident from the perusal of evidence of the above-mentioned prosecution witnesses that the role attributed to the appellants Zulfiqar Ali and Muhammad Saleem was similar to that of acquitted co-accused, namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu.

11. Charge under sections 302, 109, 148, 149 of P.P.C. with identical allegations was framed against the appellants Zulfiqar Ali and Muhammad Saleem and the above-mentioned acquitted four co-accused namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu. The said four co-accused were also assigned the similar role of causing injuries on the person of Muhammad Lateef (deceased) but they have been acquitted by the learned trial Court while extending them the benefit of doubt and no appeal against their acquittal has been preferred either by the State or by the complainant, as confirmed by the learned Deputy Prosecutor-General, for the State, and the learned counsel for the complainant and, as such, the said acquittal has attained finality, therefore, the question for determination, before this Court, is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellants can be believed against the appellants. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as Iftikhar Hussain and another v. State (2004 SCMR 1185), wherein the Hon'ble Supreme Court at page 1196 and 1197 as under:--

> "17. ...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an

accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others versus The State (2000 SCMR 1758), relevant para there from is reproduced below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Ziaullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)".

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as Akhtar Ali and others v. The State (2008 SCMR 6).

12. The learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant has referred the motive part of the prosecution story with the assertion that it was attributed to the appellants. We have gone through the contents of the F.I.R. (Exh.PA/1), and the statements of the prosecution witnesses namely, Mushtaq Ahmad (P.W.11) and Rasheed Ahmad (P.W.12) made before the Court. The motive as alleged by the said prosecution witnesses was that 1-1/2 years prior to the occurrence the younger brother of the complainant Ashiq Hussain was murdered by Zulfiqar Ali, Muhammad Saleem (the appellants) and their co-accused Sarfraz Ahmad (since acquitted). Similarly, the complainant Mushtaq Ahmad, while appearing before the trial Court as (P.W.11) made the following statement qua the motive:--

"My brother Ashiq Hussain (deceased) was murdered by Sarfraz, Zulfiqar and Saleem accused about 1-1/2 years prior to this occurrence and all the said accused were (Pos) in the murder case of Ashiq Hussain (deceased)".

Similarly, the statement of Rasheed Ahmad (P.W.12) regarding the motive is reproduced hereunder:--

"The motive for occurrence is that Saleem, Zulfiqar and Sarfraz accused committed murder of Ashiq Hussain brother of Mushtaq Ahmed complainant 1-1/2 years prior to this occurrence and the accused said that they would find peace of mind only after committing murder of Muhammad Lateef (deceased)".

The perusal of above-mentioned evidence clearly shows that motive was attributed not only to the appellants, but also to the acquitted co-accused Sarfraz. So, even to the extent of motive, the case of the appellants is not distinguishable from the case of acquitted co-accused Sarfraz.

13. The learned Deputy Prosecutor-General, for the State, and the learned counsel for the complainant have referred to the recovery of rifle (P.5), at the instance of the appellant Zulfiqar, and the recovery of rifle (P.7) at the instance of the appellant Muhammad Saleem to substantiate their arguments that the case of prosecution against the appellants has been corroborated by said recoveries. The reports of Forensic Science Laboratory (Exh.PQ) and (Exh.PR) are only in respect of working condition of the allegedly recovered rifles. In these circumstances, the rifles (P.5) and (P.7), allegedly

recovered from the possession of the appellants cannot be considered as corroborative piece of evidence.

14. As far as medical evidence is concerned, Dr. Javed Iqbal (P.W.9), conducted the post-mortem examination on the dead body of Muhammad Lateef (deceased) on 19-9-2004, at 10-30 p.m., vide postmortem report (Exh.PC), pictorial diagrams (Exh.PC/1) and (Exh.PC/2), and found the following injuries on the dead body of Muhammad Lateef (deceased):--

(1) A lacerated wound of 1 cm x 1 cm at the back of right shoulder inward and to the front direction with blackening at the clothes, at the site of injury. (Entry wound).

(2) A lacerated wound of 1 cm x 1.25 cm at the front of right shoulder, everted margins with leaking of blood. (Exit wound).

(3) A lacerated wound of 2 cm x 1 cm at the right cheek near the nose, inward and backward. (Entry wound). Blackening at the site of injury.

(4) A lacerated wound of 1 cm x 1.25 cm at the right cheek in front of ear, everted margins. (Exit wound).

(5) A lacerated wound of 6 cm x 3 cm at back right side of skull, inward and toward the ear, bone fractured, bone matters scattered. (Entry wound).

(6) A lacerated wound of 1-1/2 cm x 1 cm at the right face below the right ear bleeded. (Exit wound).

It is obvious from the perusal of above-mentioned medical evidence given by Dr. Javed Iqbal (P.W.9), that there were three (3) entry wounds (Injuries Nos.1, 3 and 5) on the person of Muhammad Lateef (deceased). The said injuries have not been specifically assigned to any of the accused, and the same were jointly attributed to the appellants, as well as, their four acquitted co-accused namely, Sarfraz Ahmad, Farooq Ahmad, Muhammad Arshad, and Sarwar alias Chhabbu.

In the circumstances of the case, we could not find out any independent corroboration against the appellants and we are unable to distinguish the case of the appellants from the case of acquitted co-accused.

15. In view of the above-mentioned circumstances, we are of the considered opinion that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt. We, therefore, accept both the appeals, bearing Criminal Appeal No.1963 of 2006, filed by Zulfiqar Ali appellant, and Criminal Appeal Nb.1988 of 2006, filed by Muhammad Saleem appellant, by extending them the benefit of doubt, and set aside the conviction and sentence awarded to the appellants, namely, Zulfiqar Ali and Muhammad Saleem Ali, vide impugned judgment dated 7-12-2006, passed by the Additional Sessions Judge, Shakargarh, District Narowal. The appellants namely, Zulfiqar Ali and Muhammad Saleem, are acquitted from all the charges, and they shall be released from Jail forthwith, if not required in any other case.

Death sentence awarded to the appellants, namely, Zulfiqar Ali and Muhammad Saleem, is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

NHQ/Z-14/L **Appeals accepted.**

2013 P Cr. L J 505

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

NAZIR AHMAD and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.146-J of 2006 and Murder Reference No.508 of 2010, heard on 10th January, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---F.I.R. in the case was lodged with promptitude, which had ruled out the possibilities of concoction and deliberation and carried the sanctity of truth---No delay took place in conducting the post-mortem of the deceased---According to ocular account furnished by the complainant and prosecution witness, accused were ascribed the role of inflicting several blows of 'dagger' and 'daater' which were landed near the nose, under the ear and on right and left flanks of the deceased---Said witnesses were cross-examined at length, but their testimony could not be shattered during the cross-examination---Time of occurrence/death given in the F.I.R. and mentioned by the eye-witnesses had also tallied with the time of death as given by Doctor who conducted the post-mortem of the deceased---Medical evidence had further supported the ocular account regarding the kind of weapon used in the occurrence---Doctor was cross-examined by defence counsel, but no material favourable to accused could be brought on the record in the course of his cross-examination---Complainant and prosecution witness, though were closely related to the deceased, but mere relationship of a witness with the deceased was no ground to discard his evidence outrightly---If the evidence of a related witness was trustworthy and confidence-inspiring, then said evidence could safely be relied upon in order to award punishment to the accused---Prosecution witnesses stood the test of lengthy cross-examination, but their evidence could not be shattered by the defence Counsel---Evidence of said witnesses was quite natural, straightforward and confidence-inspiring---Recovery of offense weapons, "dagger" and "daater", was not helpful to the prosecution case

because prosecution had failed to establish that same were stained with human blood, because there was no report of the serologist to that effect---Motive as alleged was not established by the prosecution through any confidence-inspiring evidence during the course of trial---Defence witness produced by accused, who was sister of accused, was not present at the spot at the time of occurrence---Accused had produced said witness at a belated stage in order to save their skin and same was disbelieved, in circumstances---If the evidence of motive and recoveries of weapon of offence was excluded from consideration, even then sufficient incriminating evidence was available on record against the accused---Prosecution, in circumstances, had proved its case against accused persons beyond the shadow of any doubt.

Sahib Khan v. The State 2008 SCMR 1049; Umar Draz v. The State 1990 SCMR 571 and Bashir Khan v. The State 1995 SCMR 900 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Sentence, reduction in--- Mitigating circumstances---Prosecution could not prove the motive as alleged by the complainant party; it was not determinable as to what had actually happened immediately before the occurrence, which had resulted into the death of deceased---Death sentence awarded to accused, in circumstances, was harsh and his case was of lesser punishment---Co-accused had been awarded lesser punishment of life imprisonment by the Trial Court and prosecution had not filed any criminal revision for enhancement of his sentence---Accused could not be treated differently, when his role was not distinguishable from the role of his co-accused who had been awarded lesser punishment---Recovery of dagger from accused had already been disbelieved because no report of the Serologist was placed on record to establish that the said dagger was stained with blood---Conviction of accused under S.302(b), P.P.C. as awarded by the Trial Court was maintained, but his sentence was altered from death to imprisonment for life---Conviction and sentence awarded to co-accused, were maintained---Benefit of S.382-B, Cr.P.C., was also given to the accused persons.

Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

Rana Muhammad Arshad and Maqbool Ahmad Qureshi (Defence Counsel) for Appellants at State expense.

Chaudhry Ghulam Mustafa, Deputy Prosecutor-General for the State.

Muhammad Shahzad Awan for the Complainant.

Date of hearing: 10th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Nazir Ahmad and Intizar Hussain appellants along with Basara co-accused were tried in case F.I.R. No.296, dated 13-5-2003, registered at Police Station Lundianwala, District Faisalabad in respect of offences under sections 302/109/34, P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 25-2-2006 while acquitting co-accused namely Basara has convicted and sentenced the appellants as under:--

Nazir Ahmad

Under section 302(b), P.P.C. to 'Death' for committing Qatl-e-amd of Zafar Iqbal deceased. He was also ordered to pay Rs.1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

Intizar Hussain

Under section 302(b), P.P.C. to 'Imprisonment for Life' for committing Qatl-e-amd of Zafar Iqbal deceased. He was also directed to pay Rs.1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

2. Feeling aggrieved, the appellants have challenged their convictions and sentences through Criminal Appeal No. 146-J of 2006, whereas the learned trial Court has transmitted Murder Reference No.508 of 2010 for confirmation or otherwise of the Death sentence of Nazir Ahmad appellant. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 25-2-2006 passed by the learned Additional Sessions Judge, Jaranwala.

3. Brief facts of the case as disclosed by Mian Noor complainant (P.W.7) in F.I.R. Exh.PH, are that on 13-5-2003 at about 7-00 p.m. he along with Zahoor Hussain

(P.W.8), Zahid Abbas (given up P.W.) and Zafar Iqbal (deceased) was coming from village Jalika's side. Zafar Iqbal was ahead of them. When he (Zafar Iqbal) reached at the agricultural land of one Santa Khan situated near the graveyard, Nazir Ahmad (appellant) while armed with dagger, Intizar Hussain (appellant) who was equipped with 'daatar' intercepted him and then Nazir Ahmad (appellant) inflicted several dagger blows to Zafar Iqbal on his chest and abdomen. Intizar Hussain also inflicted many 'daatar' blows on the person of Zafar Iqbal which landed near his nose, beneath his ear and on his right and left flanks. Upon receipt of said injuries Zafar Iqbal fell down on the ground and died at the spot, thereafter, both the accused decamped from the spot while raising lalkara.

4. Motive behind this occurrence was alleged that there was "watta" "satta" marriages between the parties. The sister of Zafar Iqbal (deceased) namely Mst. Kaneez Bibi was married to Nazeer Ahmad (appellant) whereas, sister of Nazeer Ahmad (appellant) namely Mst. Musarat Bibi was married to Zafar Iqbal (deceased). Mst. Kaneez Bibi did not live in the house of Nazir Ahmad appellant and due to this grudge Nazir Ahmad and Intizar Hussain appellants committed the murder of Zafar Iqbal (deceased). It was also alleged that the murder of Zafar Iqbal deceased was committed, on the abetment of co-accused Basra (since acquitted).

5. After completion of investigation, the challan was submitted before the court. The appellants and their co-accused, all of them were charge-sheeted, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 9 P.Ws. The complainant Mian Noor (P.W.7) and Zahoor Hussain (P.W.8) furnished ocular account of the occurrence, whereas Muhammad Nawaz, S.-I. had conducted investigation of this case who died during the pendency of trial and Abdul Razzaq Moharrir was called to recognize his signatures on the memos and to lead secondary evidence. Muhammad Nawaz, SI prepared all documents and the memos which were necessary for the collection of evidence. His signatures were identified by Abdul Razzaq Moharrir while appearing as (P.W.9). Abdul Razzaq also drafted the formal F.I.R. Exh.PH on the basis of complaint Exh.PF. Khudah Yar Khan, DSP (P.W.5) also conducted the investigation in this case due to illness of Muhammad Nawaz, SI. Manzoor Ahmad P.W.6 is the recovery witness of dagger P-1 from Nazir Ahmad (appellant) which was taken into possession

vide recovery memo Exh.PD. he is also witness of 'daatar' P-2 from Intizar Hussain (appellant) which was taken into possession vide recovery memo Exh.PE.

6. The statement of appellants and their co-accused under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you" they replied as under:--

Nazir Ahmad

"The case is false and I am innocent. Actually, Kaneez Bibi daughter of complainant wanted to marry with Allah Ditta son of Sadiq and Allah Ditta also wanted to marry with Kaneez Bibi. Deceased Zafar Iqbal admonished Kaneez Bibi and Allah Ditta from having relationship with each other and due to this reason Allah Ditta had murdered Zafar Iqbal. Allah Ditta being closely related to complainant, I have been falsely involved in this case. P.Ws. are closely related to the complainant and Allah Ditta therefore they have falsely deposed against me".

The appellant Intizar Hussain adopted the same plea as taken by Nazir Ahmad appellant.

7. The appellants opted not to make statements under section 340(2) of Cr.P.C. but Nazir Ahmad Appellant produced Mst. Nusrat Bibi as (D.W.1) in his defence. The learned trial Court vide its judgment dated 25-2-2006, while acquitting co-accused Basara, found Nazir Ahmad and Intizar Hussain appellants guilty and convicted and sentenced them as mentioned and detailed above.

8. The learned counsel for the appellants, in support of this appeal, has contended that both the appellants have falsely been implicated in this case; that ocular account was furnished by Mian Noor complainant (P.W.7), who is father of the deceased and Zahoor Hussain (P.W.8) was close relative of the complainant and as such they are interested witnesses; that there is delay in reporting the matter to the police as the occurrence has allegedly taken place on 13-5-2003 at 7-00 p.m. whereas the matter was reported to the police at 9-45 p.m. and postmortem examination was conducted on the next day and in this regard no explanation whatsoever has been given by the prosecution; that recovery of dagger and 'daatar' at the instance of the appellants is of no avail to the prosecution as there is no report of Serologist; that motive alleged by

the prosecution is highly improbable; that the defence evidence produced by the appellants has not been properly appreciated by the learned trial Court; that Mst. Nusrat Bibi (D.W.1) who is widow of Zafar Iqbal (deceased) has categorically stated that the complainant Mian Noor and prosecution witnesses Manzoor and Zahoor were present at their house when they were told about the murder of Zafar Iqbal deceased; that the defence evidence of D.W.1 has fully established, that neither the complainant nor prosecution witnesses were present at the time of occurrence; that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt and that the appellants are entitled to acquittal.

9. On the other hand, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant has vehemently opposed the contentions of the learned counsel for the appellants on the grounds that the delay per se in lodging the F.I.R. is no ground to discard the evidence of the eye-witnesses and even otherwise there is no delay in reporting the matter to the police; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspired confidence and despite cross-examination, the defence could not shake the testimony of the prosecution witnesses; that there could not be any reason to falsely implicate the appellants in this case; that the ocular account is fully supported by the medical evidence as the deceased received as many as 10 injuries on his person, which fact is evident from the post mortem examination report (Exh.P/A); that motive has also been proved and it has not been denied by the appellants that Nazir Ahmad (appellant) was married to the sister of the deceased and similarly sister of the appellant was married to the deceased; that even otherwise in such like cases substitution is a rare phenomenon; that the prosecution has proved its case against the appellants beyond any shadow of doubt and the defence evidence is not reliable; that the appeal filed by the appellants against their convictions and sentences be dismissed.

10. We have heard the arguments of learned counsel for the appellants at length and perused the record minutely with their able assistance.

11. The occurrence in this case took place on 13-5-2003 at 7-00 p.m. the Police Station Lundianwala is at a distance of two miles from the place of occurrence. The matter was reported to the police at 9-45 p.m. and the formal F.I.R. was chalked out at 10-15 p.m. on the same day. So the F.I.R. in this case was lodged with promptitude.

A promptly lodged F.I.R. rules out the possibilities of concoction and deliberations and carries the sanctity of truth. After considering the time, place and its distance from the police station we are of the view that there was no delay in reporting the matter to the police.

The objection of the learned counsel for the petitioner in respect of delay in conducting the postmortem of the deceased is also misconceived. The occurrence, as mentioned earlier, had taken place on 13-5-2003 at 7-00 p.m. (evening) whereas the postmortem was conducted on 14-5-2003 at 2-50 a.m. (night). Dr. Muhammad Hammad (P.W.4) has given the time that elapsed between death and post mortem as 7 to 8 hours, therefore, there was no delay in conducting the postmortem of the deceased Zafar Iqbal.

12. The prosecution in order to prove its ocular account, had produced the complainant Mian Noor as P.W.7 and Zahoor Hussain as P.W.8. The appellant Nazir Ahmad has been ascribed the role of inflicting several blows of dagger, which landed on the front side of chest and belly of Zafar Iqbal deceased whereas the appellant Intizar Hussain has been attributed the role of inflicting several 'daatar' blows, which landed near the nose, under the ear and on right and left flanks of Zafar Iqbal deceased. The above mentioned prosecution witnesses were cross-examined at length but their testimony could not be shattered during the cross-examination. The postmortem of the deceased Zafar Iqbal was conducted on 14-5-2003 at about 2-50 a.m. by Dr. Muhammad Hammad P.W.4. While conducting post mortem, he found the following injuries on the person of deceased:--

(1) An incised wound 11 cm x 5 x bone, cut on the upper lip and the right cheek below the nose.

(2) An incised wound 3 cm x 2 cm x bone, cut in the underneath of left ear.

(3) An incised wound 5 cm x 2 cm x bone, cut on the left chest, 2.5 cm below the right nipple.

(4) An incised wound 6 cm x 2.5 cm x bone, cut along with omentum coming out of the wound in the epigastrium area of the abdomen.

(5) An incised wound 4 cm x 2 cm with intestine coming out from the wound, 2 cm below the injury No. 4 and 6 cm above the umblicus.

(6) An incised wound 5 cm x 2.5 cm in the middle of the abdomen 3 cm below the umblicus. This wound was cavity deep.

(7) An incised wound 3 cm x 2 cm on the lateral side of the left lumber region 7 cm above the left superior iliac spine. This was cavity deep.

(8) An incised wound 4 cm x 2.5 cm on the lateral side of the right lumber region 9 cm above the right superior iliac spine. This was cavity deep.

(9) An incised wound 6 cm x 3 cm of the back of the right lumber region 5 cm back to the injury No.8.

(10) An incised wound 5 cm x 1 cm on the anterior aspect of the right fore-arm near right wrist joint.

In his opinion, `it was difficult to point out which injury was responsible to cause death because all injuries described previously were grievous, causing excessive bleeding, injuries, soft tissue organs, specially, notable injuries Nos.2, 3 and 5 involving soft major blood vessels and nerves in, neck, heart and intestine respectively were enough to cause death in the natural way. The time between injuries and death was immediate and between death and post-mortem was 7 to 8 hours.

The post mortem report of the deceased Zafar Iqbal is Exh.PA and his pictorial sketch is Exh.PA/1. According to Dr. Muhammad Hammad (P.W.4) the time which elapsed between the death and injury was immediate and between the death and post mortem was 7 to 8 hours. The above-mentioned medical evidence has fully supported the ocular account given by the complainant Mian Noor P.W.7 and Zahoor Hussain, P.W.8. According to the post mortem report of the deceased, the seat of injuries on the person of the deceased were the same, which were narrated by the above-mentioned prosecution witnesses. The time of occurrence/death given in the F.I.R. and mentioned by the eye-witnesses has also tallied with the time of death given by Dr. Muhammad Hammad (P.W.4). The medical evidence has further supported the ocular account regarding the kind of weapon used in the occurrence. The above-mentioned medical officer (P.W.4) was also cross-examined by the learned defence counsel but no material favourable to the accused/appellants could be brought on the record in the course of his cross-examination.

13. The learned counsel for the appellants has contended that complainant Mian Noor (P.W.7) and Zahoor Hussain (P.W.8) are closely related to the deceased, therefore, their evidence cannot be relied upon as they are interested witnesses. Mere relationship of a witness with the deceased is no ground to discard his evidence, out rightly. If the evidence of a related witness is trustworthy and confidence-inspiring then the said evidence can safely be relied upon in order to award punishment to an accused. Reference in this respect may be ma o the case of Sahib Khan v. The State (2008 SCMR 1049 at page 1052). The relevant part of the said judgment is reproduced hereunder for ready reference:--

> "The occurrence has taken place on the road at 8-30 a.m. and the F.I.R. was recorded on the same day at 9.45 a.m. promptly without wasting any time in the negotiations and conversation which is proof of the fact that the witnesses of the occurrence were natural. Even otherwise, the mere relationship of the prosecution witnesses with the deceased is no ground to discredit their evidence if it is proved that it is straightforward, fair and confidence inspiring as laid down in the cases of Umarzad versus the State 1990 SCMR 571, Bashir Khan v. The State 1995 SCMR 900 and Nazir Ahmad v. Muhammad Siddique 1995 SCMR 1740. The prosecution witnesses have passed the test of lengthy cross-examination but the defence has not been able to extract any material discrepancies or contradictions from their mouth which could be fatal to the prosecution case."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Umar Draz v. The State (1990 SCMR 571) and Bashir Khan v. The State (1995 SCMR 900).

14. As discussed earlier, the prosecution witnesses stood the test of lengthy cross-examination but their evidence could not be shattered by the learned defence counsel. Their evidence is quite natural straightforward and confidence-inspiring. The above-mentioned ocular evidence of the prosecution has further been supported by the medical evidence. Even otherwise, substitution in such like cases where both the eyewitnesses are close relatives of the deceased, is a rare phenomenon because it is not possible that near kith and kin of the deceased would let off the real culprit and shall substitute some innocent person in a murder case.

The complainant Mian Noor P.W.7 is real father of Zafar Iqbal deceased. It is not believable that he will let the real culprits off and would falsely implicate innocent persons (the appellants) for the murder of his real son.

15. According to the prosecution case on 22-5-2003 the appellant Nazir Ahmad led to the recovery of dagger P-1, which was taken in to possession vide recovery memo Exh.PD. The said recovery was witnessed by Manzoor Ahmad (P.W.6) and Muhammad Fazil (given up P.W.). Similarly, on 22-5-2003 the appellant Intizar Hussain made a disclosure and led to the recovery of 'daatar' P-2, which was taken into possession vide recovery memo Exh.PE. The said recovery was also witnessed by Manzoor Ahmad (P.W.6) and Muhammad Fazil (given up P.W.). The above-mentioned recoveries are not helpful to the prosecution case because the prosecution failed to establish that the dagger P-1 and 'daatar' P-2 were stained with human blood because there is no report of the serologist to this effect, therefore, we disbelieve the prosecution evidence qua the above referred alleged recoveries.

16. Coming to the motive part of the prosecution evidence, we have noted that it was mentioned in the F.I.R. that daughter of the complainant namely Mst. Kaneez Bibi was married to the appellant Nazir Ahmad whereas the sister of Nazir Ahmad appellant namely Mst. Nusrat Bibi was married to Zafar Iqbal deceased. There were marriages of "watta" "satta" between the appellant Nazeer Ahmad and the deceased Zafar Iqbal. According to the complainant his daughter namely Mst. Kaneez Bibi left the house of the appellant Nazir Ahmad and was not living with him, therefore, due to that rancor the appellants committed the murder of Zafar Iqbal deceased. The said motive was not established by the prosecution through any confidence inspiring evidence during the course of trial. The complainant Mian Noor (P.W.7) has stated during his cross examination that his daughter Mst. Kaneez Bibi was not living with her husband (the appellant Nazir Ahmad) because the accused Nazir Ahmad never tried for it. If the appellant Nazir Ahmad never tried to take back Mst. Kaneez Bibi to his house, then there was no motive with him to commit the murder of Zafar Iqbal deceased as alleged by the prosecution. Therefore, we disbelieve, the motive as set forth by the prosecution.

17. The appellants did not opt to make statement on oath under section 340(2) of Cr.P.C. in disproof of allegations levelled against them. Anyhow they have produced

Mst. Nusrat Bibi as D.W.1, in their defence. She has stated that the complainant Mian Noor (P.W.7), Manzoor (P.W.3) and Zahoor Hussain (P.W.8) were present at their house when they were told about the murder of Zafar Iqbal deceased. Mst. Nusrat Bibi is widow of Zafar Iqbal deceased. It was a marriage of "watta satta". The sister of deceased Zafar Iqbal namely Mst. Kaneez Bibi was married to the appellant Nazir Ahmad whereas the above-mentioned witness Mst. Nusrat Bibi (D.W.1) who is sister of Nazir Ahmad appellant was married to the deceased Zafar Iqbal. She never appeared before the Investigating Officer during investigation of the case. She has admitted in her cross-examination that she never made any statement before the police. She has also admitted that she had never appeared before any court prior to recording of her statement on 18-2-2006. The occurrence in this case had taken place on 13-5-2003 but she never agitated the defence version of the appellants before any forum. she remained silent for a period of almost two years and nine months. No plausible explanation has been rendered by this witness for the above-mentioned inordinate delay in making her statement regarding the presence of complainant and prosecution witnesses at their house at the time of occurrence. She was not present at the spot at the time of occurrence. She is real sister of the appellant Nazir Ahmad. It appears that the appellants have produced her at a belated stage in order to save their skin. In view of the above discussion, we disbelieve the defence evidence produced by the appellants.

If the evidence of motive and recoveries of the weapons of offence is excluded from consideration, even then there is sufficient incriminating evidence available on record against the appellants. As discussed earlier, the prosecution case was fully established through evidence of eye-witnesses Mian Noor (P.W.7) and Zahoor Hussain (P.W.8). They stood the test of cross-examination but their evidence could not be shattered by the learned defence counsel. The evidence of said witnesses is quite natural, reliable and confidence-inspiring. The ocular account of the prosecution is fully supported by the medical evidence of Dr. Muhammad Hammad (P.W.4), post mortem report Exh.PA and pictorial sketch of the deceased Exh.PA/1. The injuries attributed to the appellants, seat of injuries, the kind of weapons used in the occurrence and time of death of the deceased, as given by the prosecution eyewitnesses were fully supported by the above-mentioned medical evidence,

therefore, we hold that the prosecution has proved its case against the appellants beyond the shadow of any doubt.

18. Now coming to the quantum of sentence, we hold that the case of the appellant Nazir Ahmad is of lesser punishment due to various reasons. The prosecution in this case, as discussed earlier, could not prove the motive as alleged by the complainant party. It is not determinable in this case as to what had actually happened immediately before the occurrence, which had resulted into the death of deceased Zafar Iqbal, therefore, the death sentence to the appellant Nazir Ahmad is quite harsh. It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence-inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State (2011 SCMR 593), wherein, at page 604, the Hon'ble apex Court of the country, has been pleased to lay emphasis as under:--

> "10. The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of sections 306 to 308, P.P.C. attracts only in the cases of Qatl-e-amd liable to Qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-eamd, keeping in view the circumstances of the case, award the offender the punishment of death or

imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case".

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:) "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course". (underlining, italic and bold supplied)."

Apart from above mentioned law and facts of this case, the prosecution witness, Dr. Muhammad Hammad (P.W.4) has categorically stated in his examination-in-chief that in his view it was difficult to point out as to which injury was responsible to cause death of deceased Zafar Iqbal. Although he has stated in the latter part of his examination-in-chief that all injuries described previously were grievous, causing excessive bleeding injuring soft tissues organs, especially, injuries Nos.2, 3 and 5 involving major blood vessels and nerves in neck, heart and intestine which were respectively enough to cause death in the ordinary course of nature, but the said latter part of his statement is contradictory to the former part of his statement where he has categorically stated that it was difficult for him to pin point the injury which was responsible for the cause of death. Injuries on the person of deceased Zafar Iqbal were attributed to both the appellants Nazir and Intizar Hussain. Even the above-mentioned injuries Nos.2, 3 and 5 have also been attributed to both the appellants. Injury No.2 which is under the left ear of the deceased Zafar Iqbal has

been attributed to Intizar Hussain (appellant) whereas injuries Nos.3 and 5 which are on the chest and abdomen of the deceased Zafar Iqbal have been assigned to Nazir Ahmad, appellant. It is evident from the above-mentioned medical evidence that death of the deceased was the result of cumulative act of dagger and daatar blows caused by both the appellants which is a strong mitigating circumstance in favour of Nazir Ahmad appellant and he was entitled to equal treatment of lesser penalty which has been awarded to his co-accused Intizar Hussain appellant.

Intizar Hussain has already been awarded lesser punishment of life imprisonment by the learned trial Court. The prosecution has not filed any criminal revision for enhancement of his sentence. The appellant Nazir Ahmad cannot be treated differently when his role is not distinguishable from the role of his co-accused who has been awarded lesser punishment. The recovery of dagger from Nazir Ahmad has already been disbelieved because no report of the serologist was placed on record to establish that the said dagger was stained with blood.

19. Due to the above mentioned reasons the conviction of Nazir Ahmad appellant under section 302(b), P.P.C. awarded by the learned trial Court is maintained but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned trial court or sentence in default thereof is maintained and upheld. The conviction and sentence awarded to the appellant Intizar Hussain is, hereby, maintained. The benefit of section 382-B, Cr.P.C. is also given to the appellants.

20. Consequently, with the above said modification in the sentence of Nazir Ahmad appellant, Criminal Appeal No. 146-J of 2006 filed by the appellants is hereby dismissed. Murder Reference (M.R. No.508 of 2010) is answered in the negative and death sentence of the appellant Nazir Ahmad is not confirmed.

HBT/N-15/L **Order accordingly.**

2013 P Cr. L J 1335

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

NAEEM alias DEEMI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.271-J and Murder Reference No.445 of 2007, heard on 17th May, 2012.

Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention--- Appreciation of evidence---Benefit of doubt---Prosecution witness who was son-in-law of the deceased was closely related to the complainant party and could not justify his presence at the spot at the time of occurrence---Said prosecution witness though had no enmity with accused, but absence of enmity of a prosecution witness with accused, would not mean that whatever he had stated, be taken as gospel truth and apostle reality---Court had to see as to whether the statement of prosecution witness was confidence-inspiring and trustworthy to the extent of role assigned to the accused---Accused was not named in the F.I.R., but was implicated in the case later on---Description or any specific identification mark of accused, was also not mentioned in F.I.R.---Role of accused during the occurrence were not described by the witnesses at the time of identification parade, which was always considered an inherent defect in the prosecution evidence---Holding of identification parade of accused was meaningless in circumstances---No empty was recovered from the place of occurrence, and the report of Forensic Science Laboratory was only to the extent that pistol was in working condition---Alleged recovery of pistol from the possession of accused, was of no avail to the prosecution---Evidence of the sole eye-witness was not confidence-inspiring and the prosecution case qua involvement of accused in the case was highly doubtful---Alleged recovery of pistol from the possession of accused, did not connect him with the alleged crime---Prosecution having failed to prove its case against accused beyond shadow of doubt, conviction and sentence recorded against accused by the Trial Court, were set aside extending him benefit of doubt and accused was released, in circumstances.

Zulfiqar Ali v. The State 2008 SCMR 796 distinguished.

Muhammad Pervez and others v. The State and others 2007 SCMR 670 and Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1825 ref.

Shafqat Mehmood and others v. The State 2011 SCMR 537; Bacha Zeb v. The State 2010 SCMR 1189 and Sabir Ali alias Fauji v. The State 2011 SCMR 563 rel.

Haider Rasool Mirza Defence Counsel and Nazim Ali Awan for Appellant.

Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.

Aqeel Afzal Awan for the Complainant.

Date of hearing: 17th May, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.271-J of 2007, filed by Naeem alias Deemi appellant, and Murder Reference No.445 of 2007 (The State v. Naeem alias Deemi), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Naeem alias Deemi appellant, as both these matters have arisen out of the same judgment dated 20-6-2007, passed by the learned Sessions Judge, Sialkot. Naeem alias Deemi along with his co-accused Yasir, was tried in case F.I.R. No.251, dated 14-8-2004, registered at Police Station, Rangpura, District Sialkot, in respect of offences under sections 302 and 34 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 20-6-2007, has convicted and sentenced the appellant and his co-accused Yasir as under:--

NAEEM ALIAS DEEMI AND YASIR.

Under section 302(b)/34 of P.P.C. to death each for committing Qatl-e-amd of Muhammad Saleem (deceased). They were also directed to pay Rs.1,00,000 each as compensation to the legal heirs of deceased as contemplated under section 544-A of Cr.P.C., and in default thereof they shall further undergo six months' SI each.

It is pertinent to mention here that the co-accused of the appellant namely, Yasir, was acquitted by this Court on the basis of compromise, vide judgment dated 29-8-2011, passed in Criminal Appeal No.272-J of 2007.

2. Brief facts of the case as given by the complainant Ijaz Ahmad in his complaint Exh.PF on the basis of which formal F.I.R. Exh.PF/1 was chalked out are that on 14-8-2004, at 4-45 a.m., he along with his father Muhammad Saleem (deceased) and Nazir Ahmad (P.W.12) was going from his village Dallowali towards their hotel located near Aik Bridge, situated in village Naikupura. Muhammad Saleem

(deceased) was on one bicycle, whereas, the complainant Ijaz Ahmad was paddling the other bicycle and Nazir Ahmad P.W.12 was on its rear seat, and when they reached at Jamoo road, near the factory of Mahr Arshad, the appellant Naeem alias Deemi and Yasir co-accused (since acquitted) signalled Muhammad Saleem (deceased) to stop, but he kept on paddling his bicycle, whereupon, the appellant Naeem alias Deemi made a fire shot with his pistol, which landed on the back of the chest of Muhammad Saleem (deceased), who fell down. The complainant Ijaz Ahmad and Nazir Ahmad P.W.12 raised hue and cry. In the meanwhile, a wagon carrying passengers came at the spot, upon which the appellant Naeem alias Deemi while armed with pistol and Yasir co-accused while armed with dagger disappeared in a side lane.

The appellant Naeem alias Deemi and his co-accused Yasir (since acquitted) were not named in the F.I.R. Exh.PF/1. The appellant was arrested in this case by the police and Imdad Hussain ASI P.W.15 on 14-4-2005 moved an application to the Judicial Magistrate for identification parade of the appellant and his co-accused. The identification parade of the appellant and his co-accused Yasir (since acquitted) was held in District Jail, Sialkot on 20-4-2005 under the supervision of Shoaib Anwar Qureshi (P.W.16) the learned Judicial Magistrate, Sialkot during which the appellant and his co-accused were identified by the complainant Ijaz Ahmad and Nazir Ahmad P.W.12.

3. On 15-9-2005, the appellant during investigation of the case made a disclosure and allegedly led to the recovery of pistol P.4 along with cartridges P.5/1-2, which were allegedly taken into possession by Imdad Hussain ASI vide recovery memo Exh.PD.

After completion of investigation, the challan was prepared and submitted before the Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed a charge against the appellant Naeem alias Deemi and his co-accused namely Yasir, on 14-2-2006, under section, 302 read with sections 34 of P.P.C., to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced sixteen prosecution witnesses during the trial.

The complainant Ijaz Ahmad did not appear before the trial Court to substantiate the prosecution version; anyhow, Nazir Ahmad P.W.12 has furnished the ocular account of the occurrence.

The medical evidence was furnished by Dr. Fayyaz Ahmad P.W.5 and Dr. Jahangir Hussain P.W.6.

Muhammad Akram LHC-1440 P.W.7 is a recovery witness of pistol P.4 along with two live bullets P.5/1-2, which were allegedly recovered from the possession of the appellant.

Muhammad Asif Hanif Inspector P.W.13, Liaqat Ali SI P.W.14, and Imdad Hussain ASI P.W.15 were the Investigating Officers of this case, whereas, Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16 conducted the identification parade in this case.

Ulfat Ali HC-1635 P.W.1, Mobashir Ahmad C-1165 P.W.2, Irshad Ahmad C-1322 P.W.3, Muhammad Riaz ASI P.W.4, Mirza Tahir Tasleem Draftsman P.W.8, Ghulam Murtaza HC-1456 P.W.9, Mukhtar Ahmad P.W.10, and Muhammad Khalid SI P.W.11, are the formal witnesses in this case.

The prosecution also produced documentary evidence in the shape of memo of possession of blood-stained clothes Exh.PA, copy of medico-legal report Exh.PB and Exh.PB/ 1, copy of postmortem report etc. Exh.PC and Exh.PC/1, memo of possession of pistol .30 bore etc. Exh.PD, copy of site plan Exh.PE, statement of Ejaz Ahmad Exh.PF, F.I.R. Exh.PF/1, memo of possession of blood-stained cotton Exh.PG, copy of Rapt No.9 Rooznamcha dated 14-8-2004 Exh.PH, copy of death report Exh.PJ, copy of application for post mortem Exh.PK, copy of site plan recovery of blood-stained cotton Exh.PL, copy of application for identification parade Exh.PM, copy of report of identification parade Exh.PN, report of Chemical Examiner Exh.PO, report of Serologist Exh.PP and the report of FSL Ex.PQ.

The statement of appellant Naeem alias Deemi, under section 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you", the appellant, replied as under:--

"I have been falsely implicated in this case. I do not know who had committed the murder of Muhammad Saleem. I was involved in this case falsely with ulterior motive on the part of the complainant only due to suspicion. Otherwise I have no enmity,

grudge or grouse against the deceased nor there was reason any for me to kill the deceased and I have been made an escape goat. All the P.Ws. who have deposed against me are interested witnesses."

The appellants neither opted to make his statement under section 340(2) of Cr.P.C. nor he produced evidence in his defence.

The learned trial Court vide its judgment dated 20-6-2007, found the appellant Naeem alias Deemi guilty, convicted and sentenced him as mentioned and detailed above.

5. The learned counsel for the appellant, in support of this appeal, contends that the appellant is not named in the F.I.R. Exh.PF/1, and the appellant along with his co-accused Yasir (since acquitted) was implicated later on, whereas, the complainant of the case namely, Ijaz Ahmad did not appear before the learned trial Court; that the presence of the complainant and the other witness namely Nazir Ahmad P.W.12, at the time of occurrence, is belied from the fact that they claimed that they took the deceased Muhammad Saleem in an injured condition in a rickshaw to Civil Hospital, whereas, their presence has not been shown in the deceased's MLR Exh.PB/1, and Dr. Fayyaz Ahmad P.W.5 has also admitted in his cross-examination that no relative of the deceased was accompanying him at the time of his examination; that the evidence of Nazir Ahmad P.W.12 is of no help to the prosecution, because he is admittedly resident of village Bharth, whereas, the deceased Muhammad Saleem was resident of village Dallowali and the occurrence took place at Jamoo road near the factory of one Mahr Arshad; that Nazir Ahmad P.W.12, while appearing before the learned trial Court has stated in his cross-examination that during the days of occurrence he was living with his father-in-law Muhammad Saleem (deceased), but while making his statement before the police under section 161 of Cr.P.C., his residence has been shown as 'village Bharth', which is clear from Exh.DA. Further contends that though the identification parade was conducted under the supervision of Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16, but admittedly at the time of the said identification, the witnesses have not mentioned the role allegedly played by the accused during the occurrence; that Imdad Hussain ASI P.W.15, who submitted an application for the identification parade has admitted in his cross-examination that the investigation of the case was entrusted to him on 24-3-2005, and before that the complainant got recorded his supplementary statement in which he

nominated the appellant and his co-accused as an accused of this case, therefore, the identification parade carries no value in the eyes of law; that the identification parade was conducted in violation of the High Court Rules and Orders. Further contends that in the F.I.R. Exh.PF/1, the ages of the appellant and his co-accused have been shown as 23/24 years, whereas, the learned trial Court while framing a charge against the appellant and his acquitted co-accused has mentioned the age of the appellant as 35 years; that the recovery of pistol P4, at the instance of appellant Naeem alias Deemi, is inconsequential, as no empty was recovered from the place of occurrence, and the report of FSL Exh.PQ is only to the effect that pistol P4 was in working order; therefore, this appeal may be accepted, and the appellant may be acquitted from the charges levelled against him.

6. On the other hand, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes this appeal on the grounds that there is nothing on the record, which could even remotely suggest that there was any enmity, ill-will or malice on the part of the complainant or the other witness for false implication of the appellant in this case; that had there been any malice or against the appellant, the complainant could have easily named him in the F.I.R. Exh.PF/1; that the appellant has correctly been identified in the identification parade conducted under the supervision of Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16, and the proceedings were conducted by the learned Judicial Magistrate in accordance with the High Court Rules and Orders; that Imdad Hussain ASI P.W.15 has given undue concession to the appellant and no such application, as stated by this witness in his cross-examination was submitted by the complainant and moreover Nazir Ahmad P.W.12 did not say anything regarding this fact; that the application for conducting identification parade was moved by P.W.15 on 14-4-2005, and soon thereafter the identification parade was conducted on 20-4-2005 under the supervision of Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16; that the ocular account has fully been supported by the medical evidence, as it is the case of Nazir Ahmad P.W.12 that the appellant Naeem alias Deemi was armed with a pistol and fired at the deceased Muhammad Saleem, which hit him on the back of the chest of Muhammad Saleem (deceased), and Dr. Jehangir Hussain P.W.6, who conducted the postmortem examination of the deceased also noted the injury on the back of the chest of Muhammad Saleem (deceased); that the prosecution proved its case against the

appellant beyond the shadow of any doubt, therefore, this appeal be dismissed, and Murder Reference may be answered in the affirmative. The learned counsel for the complainant has placed reliance on ZULFIQAR ALI v. THE STATE (2008 SCMR 796).

7. We have heard the arguments of the learned counsel for the appellant, and the learned counsel for the complainant, as well as, learned Deputy Prosecutor-General, and have also gone through the evidence available on the record, with their able assistance.

8. The occurrence in this case as per 'Fard Biyan' Exh.PF on the basis of which formal F.I.R. Exh.PF/1 was registered took place on 14-8-2004, at 4-45 a.m., near the factory of one Mahr Arshad situated at Jammo road within the area of Police Station, Rangpura, District Sialkot. The matter was reported to the police on the same day by the complainant Ijaz Ahmad, through Fard Biyan Exh.PF, at Civil Hospital, Sialkot, whereas, the formal F.I.R. Exh.PF/1 was also registered on the same day i.e. 14-8-2004, at 6-30 a.m.

Nazir Ahmad P.W.12 has been produced by the prosecution in order to prove the ocular account of the incident. According to his statement, on 14-8-2004, at about 4-40 a.m., he along with his father-in-law Muhammad Saleem (deceased) and brother-in-law Ijaz Ahmad complainant was on the way from village Dallowali towards their hotel (tea stall) located near Aik Bridge. Muhammad Saleem (deceased) was on one bicycle, whereas, the complainant Ijaz Ahmad was paddling the other bicycle and Nazir Ahmad P.W.12 was on the rear seat, and when they reached near the factory of Mahr Arshad, the appellant Naeem alias Deemi and Yasir co-accused (since acquitted) signalled Muhammad Saleem (deceased) to stop, but he kept on paddling his bicycle, whereupon, the appellant Naeem alias Deemi made a fire shot with his pistol, which landed on the back of the chest of Muhammad Saleem (deceased), who fell down. The complainant Ijaz Ahmad and Nazir Ahmad P.W.12 raised hue and cry and a wagon carrying passengers came to the spot, upon which the appellant Naeem alias Deemi while armed with pistol and Yasir co-accused (since acquitted) while armed with dagger disappeared in a side lane.

9. The complainant Ijaz Ahmad did not appear before the learned trial Court, as he had settled abroad and this fact is clear from the statement of the learned DPP for the State dated 27-7-2006 which is available at page No. 38 of the paper-book, according

to which, Ijaz Ahmad complainant was given up having left the country. Nazir Ahmad P.W.12 is the sole eye-witness of the occurrence, who appeared before the learned trial Court in order to prove the ocular account of the prosecution. No doubt, a conviction can be maintained on the basis of evidence of a sole witness, provided the same is confidence-inspiring, reliable and of unimpeachable character. Nazir Ahmad P.W.12 is closely related to the complainant party as he is son-in-law of Muhammad Saleem deceased. He is not resident of the area, where the occurrence took place. Muhammad Saleem (deceased) was done to death near the factory of one Mahr Arshad, situated at Jammu road leading from village Dallowali towards village Naykapura, where the hotel (tea stall) of Mohammad Saleem (deceased) was situated near Aik Bridge, within the area of Police Station, Rangpura, District Sialkot, whereas, Nazir Ahmad P.W.12 is resident of village Bharth, Tehsil and District, Sialkot. He could not justify his presence at the spot, at the time of occurrence. During his cross-examination, he has stated that during the days of occurrence, he had sold out his house at village Bharth to settle a loan and was living with his father-in-law Muhammad Saleem (deceased). Anyhow, he admitted that in his statement under section 161 of Cr.P.C. Exh.DA, he had stated that he was resident of village Bharth. He has further stated that four months after the occurrence, he had shifted back to village Bharth and started residing there. The perusal of the evidence of Nazir Ahmad P.W.12 shows that the said witness is resident of village Bharat, whereas, the deceased and the complainant Ijaz Ahmad were resident of village Dallo-Wali and on the day of occurrence they were going from village Daloo-Wali to village Naiku-Pura and on their way the occurrence took place near the factory of one Mahr Arshad situated at Jamu Road. Nazir Ahmad (P.W.12) is neither resident of village Daloo Wali nor of village Naikhu Pura and he made lame excuses in order to justify his presence at the spot on the day of occurrence. This witness has further stated that he and the complainant Ijaz Ahmad shifted the deceased Muhammad Saleem in an injured condition to the Civil Hospital, but the name of this witness or the complainant Ijaz Ahmad has not been mentioned in the column of "name and relative or friend" of the MLR Exh.PB of the deceased Muhammad Saleem, and the said column was left blank. Dr. Fayyaz Ahmad P.W.5, who medically examined the deceased Muhammad Saleem on the day of occurrence has categorically stated during his cross-examination that the patient was not accompanied by a relative or friend,

therefore, entry to that effect in MLR Exh.PB was left blank. The above-mentioned prosecution witness was not declared hostile by the prosecution. So the presence of the sole eyewitness, namely, Nazir Ahmad P.W.12 at the spot, on the fateful day has not been established, convincingly.

10. It has been argued on behalf of the prosecution that the prosecution witness Nazir Ahmad P.W.12 has no enmity with the appellant to falsely implicate him in this case, therefore, his evidence may be relied upon.

Although Nazir Ahmad P.W.12 has no enmity with the appellant, but absence of enmity of a prosecution witness with the accused does not mean that whatever he has stated, be taken as gospel truth and apostle reality. This Court has to see as to whether the statement of the prosecution witness is confidence-inspiring and trustworthy to the extent of role assigned to the appellant. Though the prosecution witness has no enmity with the appellant, but his presence at the spot at the time of occurrence is not free from doubt and his statement is not confidence-inspiring, therefore, mere absence of his enmity with the accused/appellant does not mean that we should straightaway maintain the death sentence of the appellant, without looking into the veracity of the evidence of such witness. The Hon'ble Supreme Court of Pakistan in its number of judgments has held that mere this fact that a witness is an independent witness does not necessarily prove that he is a witness of truth and intrinsic worth of the statement of any witness is the test of his veracity. Reference in this context may be made to the case of Muhammad Pervez and others v. The State and others (2007 SCMR 670). The above-mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825).

11. It is pertinent to mention here that the accused was not nominated in the F.I.R. Exh.PF/1, and later on, the appellant Naeem alias Deemi and Yasir co-accused (since acquitted) were implicated in this case. The description or any specific identification mark of the accused was also not mentioned in the F.I.R. Exh.PF/1, and it was simply stated that two boys of 23/24 years of ages and of slim body, were the accused who committed the offence. The specific description like, colour of skin, scar marks, mole, colour of eyes etc., was not given in the F.I.R. Exh.PF/1. The prosecution has placed on the record a copy of the report of identification report Exh.PN, which was conducted under the supervision of Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16. It is manifest from the said report that the roles of the accused during the

occurrence were not described by the witness at the time of identification parade, which is always considered an inherent defect in the prosecution evidence. The identification parade of Naeem alias Deemi and Yasir co-accused (since acquitted) was jointly held. Both the accused were made to sit in one and the same lane. The appellant Naeem alias Deemi was sitting at serial No.16, whereas, Yasir co-accused (since acquitted) was also sitting in the same lane at serial No.6. Mr. Shoaib Anwar Qureshi, Judicial Magistrate P.W.16 has admitted during his cross-examination that the witnesses did not mention the role allegedly played by the accused at the time of the commission of the offence, during identification proceedings.

According to the statement of Imdad Hussain ASI P.W.15, on 14-4-2005, he moved an application to the Ilaqa Magistrate for the identification parade of the appellant Naeem alias Deemi and Yasir co-accused (since acquitted). The English version of the statement made by Imdad Hussain P.W.15 during his cross-examination was not clear, therefore, we consulted the Urdu version of the said witness, wherein he has admitted during his cross-examination that the accused were already named by the complainant in his supplementary statement prior to holding of their identification parade. We are of the view that under the circumstances, holding of the identification parade of the said accused was meaningless.

The Hon'ble Supreme Court of Pakistan in the case of Shafqat Mehmood and others v. The State (2011 SCMR 537), at pages 544 and 545, has discussed the value of the identification parade, wherein no role of the accused was described by the witnesses at the time of their identification, in the following terms:--

"It is pertinent to mention here that contents of the F.I.R. reveal that witnesses had seen the accused for the first time. In such situation identification parade becomes essential which is to be conducted strictly in accordance with law after completing legal requirements. It is also settled principle of law that if accused were not named in the F.I.R. identification parade becomes necessary. It is also settled principle of law that role of the accused was not described by the witnesses at the time of identification parade which is always considered inherent defect, therefore, such identification parade lost its value, and cannot be relied upon. As mentioned above, the aforesaid witnesses did not mention name and role of the accused in their statements recorded by the Magistrate after identification parade. It is an admitted fact that appellants had taken objection at the time of identification parade that they

had already been shown to the witnesses but this objection was not taken into consideration by the courts below. In such circumstances identification parade becomes doubtful and cannot be relied upon. It is an admitted fact that in terms of contents of F.I.R. witnesses did not know the appellants before the occurrence. Identification parade was not held in accordance with law, therefore, identification in court by the witnesses is also of no value. Identification parade was held after a delay of 7 days after the arrest of the accused. This delay creates a lot of doubt regarding the identification parade as the witnesses had various opportunities to see the accused persons".

Similarly, the Hon'ble Supreme Court of Pakistan in the cases of Bacha Zeb v. The State (2010 SCMR 1189) and Sabir Ali alias Fauji v. The State (2011 SCMR 563) discarded the prosecution evidence regarding the identification parade, wherein no role of the accused was described by the prosecution witnesses at the time of their identification.

In the light of above stated circumstances, the prosecution evidence regarding the identification of the appellant does not inspire confidence.

12. So far as the alleged recovery of pistol P.4 on the pointation of the appellant Naeem alias Deemi is concerned, we have noted that no empty was recovered from the place of occurrence, and the report of FSL Exh.PQ is only to the extent that the pistol P4 was in working condition, thus, the alleged recovery of pistol P4 from the possession of the appellant Naeem alias Deemi is of no avail to the prosecution.

13. In view of the above discussion, we are of the considered view that evidence of the sole eye-witness is not confidence inspiring and the prosecution case qua involvement of the appellant in the case is highly doubtful. Similarly, the prosecution evidence about identification of the appellant is also riot reliable, whereas, the alleged recovery of pistol P4 from the possession of the appellant does not connect him with the alleged crime and the same is inconsequential; therefore, we hold that the prosecution failed to prove its case against the appellant beyond the shadow of doubt.

14. As we have already disbelieved the evidence of the prosecution against the appellant, therefore, the judgment cited by the learned counsel for the complainant reported as ZULFIQAR ALI v. THE STATE (2008 SCMR 796) on the point that weakness or absence of motive is no ground for lesser punishment, has become irrelevant.

15. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellant Naeem alias Deemi beyond the shadow of doubt, therefore, by extending him the benefit of doubt, we ACCEPT this appeal (Criminal Appeal No.271-J of 2007), filed by appellant Naeem alias Deemi, and set aside his conviction and sentence recorded by the learned trial Court against him. The appellant Naeem alias Deemi is in jail. He shall be released forthwith if not required in any other case.

Death sentence awarded to the appellant Naeem alias Deemi is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

HBT/N-38/L **Appeal accepted.**

2013 P Cr. L J 1346

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ASHRAF alias KALA and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.2085 of 2005 and Murder Reference No.342, heard on 28th February, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---No eye-witness of incident was available and prosecution case was based on circumstantial evidence, which consisted of Wajtakkar; dying declaration; motive; extra-judicial confession; recovery of pistol and positive report of Forensic Science Laboratory---Sole evidence of Wajtakkar, was recorded five days after occurrence and no explanation of said delay had been given---Presence of said witness having not been shown in the site plan, evidence of said witness/Wajtakkar was not worthy of reliance---Alleged dying declaration was not made in presence of the doctor or any staff member of hospital and was not recorded by any Police Officials---Alleged dying declaration before the prosecution witnesses, who were real brothers of the deceased, could hardly be termed as dying declaration---Evidence of prosecution in respect of dying declaration, was not reliable in circumstances---Witness of alleged extra-judicial confession, in his statement had not given the date or time of alleged extra judicial confession---Statement of said witness was recorded by the Police after about 26 days of the occurrence; without any plausible explanation for such inordinate delay---Said prosecution witness, neither was holding any important post/office, nor was a person in authority or had any influence over the complainant party to affect a compromise between accused persons and the complainant---Prosecution evidence of extra-judicial confession, in circumstances, was not worthy of reliance---Motive as alleged by the prosecution, had not been established in the case---Pistol was allegedly recovered from possession of accused after 8 days of his arrest---Empty was also sent to the office of Forensic Science Laboratory with considerable delay---Evidence of recovery, being

only of corroborative in nature, conviction of accused persons could not be sustained merely on the basis of recovery and positive report of Laboratory---Prosecution having failed to prove its case against accused persons beyond any shadow of doubt, conviction and sentence awarded to accused persons by the Trial Court, were set aside extending them benefit of doubt and were released.

Muhammad Sultan v. Muhammad Aslam and another 1988 SCMR 857 and Ghulam Hussain alias Hussain Bakhsh v. The State and another PLD 1994 SC 31 ref.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Tahir Javed v. The State 2009 SCMR 166; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756 and Nek Muhammad and another v. The State PLD 1995 SC 516 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Circumstantial evidence---Where case was based on circumstantial evidence, chain link should be so inter-connected with each other that its one end touched the dead body, while the other end would go around the neck of accused---If any chain link was missing, then its benefit should be given to accused.

The State v. Manzoor Ahmad PLD 1966 SC 664; Asadullah and another v. State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103; Ibrahim and others v. The State 2009 SCMR 407 and Muhammad Hussain v. The State 2011 SCMR 1127 rel.

(c) Qanun-e-Shahadat (10 of 1984)---

----Arts. 46 & 133---Dying declaration---Credibility of evidence---Dying declaration or the statement of a person, without the test of cross-examination, was a weak kind of evidence; and its credibility, would depend upon the authenticity of the witnesses, and the circumstances under which it was alleged to have been made.

Mst. Zahida Bibi v. The State PLD 2006 SC 255 rel.

Shoaib Zafar for Appellants.

Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.

Naseer-ud-Din Khan Nayyar for the Complainant.

Date of hearing: 28th February, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.2085 of 2005 (Muhammad Ashraf alias Kala and another v. The State) and Murder Reference No.342 of 2006, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants, as both these matters have arisen out of the same judgment dated 23-12-2005, passed by the learned Additional Sessions Judge, Sheikhupura, whereby, Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants were convicted under section 302(b) of P.P.C. for committing the murder of Muhammad Ramzan and were sentenced to death each with a direction to pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand) each to the legal heirs of deceased and in default thereof to suffer rigorous imprisonment for six months each.

2. Brief facts of the case as given by Muhammad Awais (P.W.2) in his Fard Biyan (Exh.PA) on the basis of which formal F.I.R. (Exh.PA/1) was chalked out, are that on 16-1-2004, at 21:30 hours (9-30 p.m.), Riaz Cabin Man informed him (Muhammad Awais (P.W.2) that a person named, Muhammad Ramzan, was lying near the West Cabin FRQD in serious injured condition, who had received firearm injury by some one. The injured Muhammad Ramzan was employee of Pakistan Railway. The police was informed, who visited the spot and recorded the statement of Muhammad Awais (P.W.2). The appellants were not named in the F.I.R. (Exh.PA/1), as the same was lodged against unknown accused. They were implicated in this case on the basis of the statements of the brothers of deceased namely, Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3). Sultan Ahmad (P.W.3) in his statement (Exh.DB) has stated that on the day of occurrence i.e. 16-1-2004, at about 8-30 p.m., he and Muhammad Ramzan (deceased), after performing their duties alighted from the train at Farooqabad Railway Station. His bicycle was lying in the railway quarters, whereas, the bicycle of the deceased Muhammad Ramzan was lying in the cabin of Railway Station. He has further

stated that after taking their bicycles, they used to reassemble at 'Phatek' No.47. On the day of occurrence, he was waiting for his brother Muhammad Ramzan at the specified place. After some time, a white coloured car bearing Registration No.706 came from cabin side and went towards the soaling side, after crossing railway 'Phatek' No.47. He has further stated that the said car was being driven by Tariq Mehmood (appellant), who was accompanied by Muhammad Ashraf (appellant). After some time, he (Sultan Ahmad (P.W.3)) went to the cabin to know the situation as to why his brother Muhammad Ramzan (deceased) had not yet come. When he reached near the cabin, he heard the hue and cry of his brother Muhammad Ramzan (deceased). He has further stated that he started weeping, when Riaz came at the spot and consoled him. After a short while, his brother Nazir Ahmad (P.W.1) and one Yousaf reached at the spot. According to the said witness, Muhammad Ramzan (deceased) was shifted to the Civil Hospital, Sheikhupura in a car for his medical treatment. On the way, Muhammad Ramzan (deceased) stated that he was fired upon and injured by Muhammad Ashraf appellant, whereas, Tariq Mehmood co-accused caught hold of him.

Motive for the occurrence, as stated by the prosecution, was that a quarrel took place between Asif, younger brother of the appellant Ashraf alias Kala, and the son of the deceased namely, Adnan, about 2/3 months prior to the occurrence. A compromise was effected between the parties. However, the accused Ashraf and Tariq nourished the said grudge and thereafter they committed the murder of Muhammad Ramzan (deceased).

3. The appellant Muhammad Ashraf alias Kala was arrested in this case on 8-2-2004 by Muhammad Bakhsh, SI (P.W.15). During the course of investigation, on 8-2-2004, a pistol (P4) along with magazine, was taken into possession through recovery memo (Exh.PE) on the pointation of the appellant Muhammad Ashraf alias Kala, whereas, on 12-12-2004, the appellant Tariq Mehmood alias Ghanti was arrested and car bearing Registration No.706/FDB was secured from his possession vide recovery memo (Exh.PN). After completion of investigation, the challan was prepared and submitted before the trial Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed a charge against Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants on 21-6-2004 under sections 302/324/34 of P.P.C., to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fifteen witnesses, during the trial.

The medical evidence was furnished by Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11), as well as, Dr. Muhammad Ashraf Javed (P.W.12). Muhammad Awais Assistant Station-Master (P.W.2) is the complainant of this case, Muhammad Riaz Draftsman (P.W.7), Iqbal Ahmad (P.W.8), Muhammad Kashif (P.W.13), Muhammad Latif (P.W.14), are the formal witnesses. Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) are the witnesses of Wajtakkar, motive and dying declaration of the deceased Muhammad Ramzan, Zulfiqar Ali Head Constable (P.W.4) is a witness of blood-stained earth and empty cartridges. Muhammad Akram (P.W.5) is a witness of conspiracy. Abdul Majeed (P.W.6) is the recovery witness of pistol .30 bore (P.4). Khurshid Ahmad (P.W.9) is the witness of extra-judicial-confession, whereas, Muhammad Bakhsh (P.W.15) is the Investigating Officer of this case. Before closing its case, the prosecution also produced documentary evidence in the shape of complaint (Exh.PA), F.I.R. (Exh.PA/1), blood-stained earth (Exh.PB), empty cartridge (Exh.PC), Chadar/shoes, etc. (Exh.PD), pistol .30 bore (Exh.PE), postmortem report (Exh.PG), death report (Exh.PH), application from police to doctor and report (Exh.PJ), application to M.S. Mayo Hospital and report (Exh.PI&PK), Medico-legal Report (Exh.PL), sealed envelope (Exh.PM), personal search (Exh.PN) and (Exh.PO), possession of car (Exh.PQ), report of Chemical Examiner (Exh.PS), report of Serologist (Exh.PT), and report of FSL (Exh.PU).

The statements of both the appellants under section 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you" the appellant Muhammad Ashraf alias Kala replied as under:--

"I had no motive whatsoever to commit the murder of the deceased. The occurrence is shrouded in mystery. Some unknown persons injured the deceased. Riaz Cabin Man has been withdrawn by the prosecution who could disclose the real circumstances. The injured was taken by the police to the hospital and was unconscious throughout and was not able to utter a single word. Sultan and Nazir Ahmad P.Ws. out of malice and all to all have fabricated the evidence of so-called statement of the deceased, Wajtakkar, the evidence of motive and extra-judicial confession after many days of the occurrence."

The appellant Tariq Mehmod alias Ghanti also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded under section 342 of Cr.P.C. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Muhammad Asghar replied as under:--

"I had no motive whatsoever to commit the murder of the deceased. The occurrence is shrouded in mystery. Some unknown persons injured the deceased. It is night murder case, Riaz Cabin Man has been withdrawn by the prosecution who could disclose the real circumstances. The injured was taken by the police to the hospital and was unconscious throughout and was not able to utter a single word. Sultan and Nazir Ahmad P.Ws. out of malice and all to all have fabricated the evidence of so-called statement of the deceased, Wajtakkar, the evidence of motive and extra-judicial confession after many days of the occurrence."

Neither the appellants made statements under section 340(2) of Cr.P.C. nor they produced any evidence in their defence. The trial culminated into conviction and sentence of the appellant as mentioned earlier.

5. The learned counsel for the appellants, in support of this appeal, contends that in fact it was an unseen occurrence, which took place at around 9-30 p.m., in winter season, and no source of light is mentioned in the F.I.R. (Exh.PA/ 1); that the statement of the complainant is based on the information provided by one Riaz Cabin Man of Railway Station, Farooqabad, but the said Riaz did not appear before the learned trial Court; that the prosecution case is based on circumstantial evidence; that it is the case of Nazir Ahmad (P.W.1) that the information regarding the death of Muhammad Ramzan was provided by one Munir Ahmad to his wife, but neither the said Munir Ahmad nor the wife of Nazir Ahmad (P.W.1) appeared before the learned trial Court; that so far as the dying declaration of Muhammad Ramzan (deceased), allegedly made before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) is concerned, the learned counsel for the appellants contends that Muhammad Ramzan (deceased) was not even in a position to speak, because of the injuries sustained by him were on his neck, and this fact is confirmed by Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11); that the statements of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) are belied from the other circumstances of the case, as their statements were recorded on

17-1-2004 and 21-1-2004, respectively, but the inquest report (Exh.PH), which was prepared on 18-1-2004 contains the same facts as are mentioned in the F.I.R. (Exh.PA/1) in the column of 'Mukhtasir Halat Muqadima' (brief history of the case) and even the site plan (Exh.PF), which was prepared by Muhammad Riaz Draftsman (P.W.7) on 23-1-2004, does not contain the name of any of the appellants; that it is the case of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) that the deceased Muhammad Ramzan informed them that it was Muhammad Ashraf alias Kala appellant, who fired at him and Tariq Mahmood alias Ghanti appellant took him into his 'Japha', but their statements are belied from the documentary evidence, produced by the prosecution itself, as the deceased Muhammad Ramzan was firstly taken in an injured condition to the DHQ Hospital, Sheikhupura, wherefrom he was referred to Mayo Hospital, Lahore, and he was medically examined by Dr. Humayun Siddique (P.W.11), who prepared his operation notes (Exh.PK), but in the said MLR (Exh.PL), all the material columns such as, name of the relative of the injured, time of examination etc., have been left blank. So far as the evidence of Wajtakkar furnished by Sultan Ahmad (P.W.3) is concerned, the learned counsel for the appellants contends that the same is not confidence-inspiring, because at the relevant time of incident, both the appellants were allegedly present in a white coloured car, which was allegedly driven by Tariq Mahmood appellant, but he has not stated anything that any of the appellants was carrying anything in his hand and moreover the place of alleged Wajtakkar is far away from the place of occurrence and even otherwise in the foggy night of winter season, it was not possible to identify the appellants; that so far as the evidence of extra-judicial-confession is concerned, the learned counsel for the appellants contends that there is nothing on the record to show that what prompted the appellants for making confession before Khurshid Ahmad (P.W.9), as he was not having any social status. Moreover, his statement was recorded on 11-1-2005, i.e. after the arrest of the appellants in this case, and he has himself admitted that his statement was recorded by the police after 25/26 days of the occurrence. As far as the recovery of pistol (P.4), allegedly recovered at the instance of the appellant Muhammad Ashraf alias Kala and positive report of FSL (Exh.PU) are concerned, the learned counsel for the appellants contends that the same is not helpful for prosecution, as it has come on the record through the statement of Zulfiqar Ali Head Constable (P.W.4), that he took crime empty and deposited the same in the office of FSL on 9-2-2004, whereas, it is the case of the prosecution that the

appellant Muhammad Ashraf alias Kala was arrested on 8-2-2004 by Muhammad Bakhsh SI-(P.W.15); that there is no evidence that the crime empty was deposited in the 'Malkhana', as the relevant column of register No.19 was blank; that even otherwise, this evidence is only of corroborative in nature, and it is relevant and material if the other prosecution evidence is accepted; that there is no evidence to prove the motive as alleged by the prosecution, therefore, this appeal may be accepted and the appellants may be acquitted from the charges;

6. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant opposes this appeal on the grounds that had there been any enmity or malice on the part of the complainant and the other witnesses, the appellants could have easily been named in the F.I.R. (Exh.PA./1), as they are closely related to the deceased (Muhammad Ramzan), Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) and it has also come on the record that the deceased Muhammad Ramzan was helping the appellant Muhammad Ashraf alias Kala, because he was a pious man; that the prosecution has fully proved its case on the basis of evidence available on the record. So far as the dying declaration of Muhammad Ramzan (deceased) is concerned, the learned counsel for the complainant contends that the injured Muhammad Ramzan, received firearm injury on his neck and as such, was not expected to describe all the details of the incident, however he has categorically stated before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) that it was the appellant Muhammad Ashraf alias Kala, who caused firearm injury, which hit at his neck, whereas, the other appellant Tariq Mahmood alias Ghanti took him in his 'Japha'; that both Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) are truthful witnesses, and they did not exaggerate their statements; that it has also come on the record through the statement of Muhammad Latif, Head Constable (P.W.14) that Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) came at the spot and took the deceased Muhammad Ramzan to DHQ Hospital, Sheikhupura in an injured condition; that the dying declaration of Muhammad Ramzan (deceased) made before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) is also corroborated by the evidence of Wajtakkar furnished by Sultan Ahmad (P.W.3) and evidence of extra-judicial confession provided by Khurshid Ahmad (P.W.9), who is an independent witness; that the recovery of weapon of offence i.e. pistol (P.4) from appellant Muhammad Ashraf alias Kala and positive report of FSL (Exh.PU) fully connect the appellant namely Muhammad Ashraf alias Kala with the

commission of crime. As far as motive is concerned, the learned counsel for the complainant contends that it has duly been proved through the statements of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3), therefore, appeal of the appellants may be dismissed and murder reference be answered in the affirmative.

7. We have heard the arguments of the learned counsel for the appellants, and the learned counsel for the complainant, as well as, learned Deputy Prosecutor-General, and have also gone through the evidence available on the record, with their able assistance.

8. The occurrence in this case as per F.I.R. (Exh.PA/1) took place on 16-1-2004, at 21-30 p.m., at West Cabin Railway Station Farooqabad. The matter was reported to the police through application (Exh.PA) on the same day at 11-00 p.m., whereas, the formal F.I.R. (Exh.PA/1) was chalked out on 17-1-2004, at 8-20 p.m., by Muhammad Latif (P.W.14). The Police Station, Railway Police, Faisalabad, District Sheikhupura, was situated at a distance of 87 kilometers from the place of occurrence. Admittedly, there is no eye-witness of this incident and the prosecution case is based on circumstantial evidence, which consists of (1)-Wajtakkar, (2)-dying declaration, (3)-motive, (4)-extra-judicial confession, and (5)-recovery of pistol (P.4) allegedly from the possession of Muhammad Ashraf alias Kala appellant, and positive report of FSL (Exh.PU).

Since the prosecution case is based on the circumstantial evidence, therefore, utmost care and caution is required for reaching at the just decision of the case. By now, it is settled that in such like cases, the chain link should be so inter-connected with each other that its one end touches the dead body while the other end goes around the neck of the accused and if any chain link is missing then its benefit should be given to the accused. In this regard, guidance has been sought from the judgments of the learned apex Court of the country reported as THE STATE v. MANZOOR AHMAD (PLD 1966 Supreme Court 664), ASADULLAH and another v. STATE and another 1999 SCMR 1034, CH. BARKAT ALI v. MAJOR KARAM ELAHI ZIA AND ANOTHER (1992 SCMR 1047), SARFRAZ KHAN v. THE STATE (1996 SCMR 188), ALTAF HUSSAIN v. FAKHAR HUSSAIN AND ANOTHER (2008 SCMR 1103), IBRAHIM AND OTHERS v. THE STATE (2009 SCMR 407) and MUHAMMAD HUSSAIN v. THE STATE (2011 SCMR 1127).

9. Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

(1)-WAJTAKKAR.

10. The evidence of Wajtakkar has been furnished by Sultan Ahmad (P.W.3). The said witness is real brother of Muhammad Ramzan (deceased). According to his statement, on the day of occurrence i.e. 16-1-2004, at about 8-30 p.m., he and Muhammad Ramzan (deceased), after performing their duties alighted from the train at Farooqabad Railway Station. His bicycle was lying in the railway quarters, whereas, the bicycle of the deceased Muhammad Ramzan was lying in the cabin of Railway Station. He has further stated that after taking their bicycles, they used to reassemble at 'Phatek' No.47. On the day of occurrence, he was waiting for his brother Muhammad Ramzan at the specified place. After some time, a white coloured car bearing Registration No.706 came from cabin side and went towards the soaling side, after crossing railway 'Phatek' No.47. He has next stated that the said car was being driven by Tariq Mehmood appellant, who was accompanied by Muhammad Ashraf appellant. After some time, he (Sultan Ahmad (P.W.3) went to the cabin to know the situation as to why his brother Muhammad Ramzan (deceased) had not yet come. When he reached near the cabin, he heard the hue and cry of his brother Muhammad Ramzan (deceased). He has further stated that he started weeping, when Riaz came at the spot and consoled him. After a short while, his brother Nazir Ahmad (P.W.1) and Yousaf reached at the spot. According to the said witness, Muhammad Ramzan (deceased) was shifted to the Civil Hospital, Sheikhupura in a car for his medical treatment. On the way, Muhammad Ramzan (deceased) stated before them that he was shot by Muhammad Ashraf appellant, whereas, Tariq Mehmood co-accused caught hold of him; Sultan Ahmad (P.W.3), who is real brother of Muhammad Ramzan (deceased), is the sole witness of Wajtakkar. The occurrence in this case took place on 16-1-2004 at 21-30 p.m. (9-30 p.m.), whereas, the matter was reported to the police through application (Exh.PA), at 23-00 (11-00 p.m.), but neither the name of Sultan Ahmad (P.W.3) nor the name of any accused is mentioned in it, rather it is mentioned in application (Exh.PA) that Muhammad Ramzan (deceased) was injured at the hands of some unknown accused. Sultan Ahmad (P.W.3) has claimed that Riaz Cabin Man came at the spot, when he was already present near his brother Muhammad Ramzan (deceased). Had he been present

at the spot, then the application (Exh.PA) should have been moved on his behalf, or at least his name and the name of accused should have been mentioned in it. His statement to the police (Exh.DB) was recorded on 21-1-2004 i.e. five days after the occurrence. No explanation whatsoever for the above-mentioned delay has been given in his statement (Exh.DB). Moreover, the presence of this witness has not been shown in the site plan (Exh.PF), which was prepared by Muhammad Riaz (P.W.7) on 23-1-2004, on the pointation of the complainant and the prosecution witnesses. Similarly, the name of any accused has also not been mentioned in the above-mentioned documentary evidence of the prosecution. All the recovery memos, i.e., recovery memo of blood-stained earth (Exh.PB), recovery memo of empty (Exh.PC), and recovery memo of Chadar/Shoes, etc. (Exh.PD), are attested by Muhammad Ashraf Constable, Police Post, Railway Police, Farooqabad, Riaz Ahmad Cabin Man of Railway Station Farooqabad, and Muhammad Awais, Station Master, Railway Station, Farooqabad. Neither Sultan Ahmad (P.W.3) nor Nazir Ahmad (P.W.1) has been cited as a witness in the above-mentioned recovery memos. The name of Sultan Ahmad (P.W.3) or Nazir Ahmad (P.W.1) has not been mentioned in the relevant column of Medico-legal Report (Exh.PL) of Muhammad Ramzan (deceased). The column of name of the relative or friend, who had brought Muhammad Ramzan (deceased) to the Hospital has been left blank in the above-mentioned document, which indicates that Sultan Ahmad (P.W.3) or Nazir Ahmad (P.W.1) were not present at the time of occurrence, and that's why, their names were not mentioned in the above-mentioned documents. Similarly, in the column of 'Mukhtasir Halat Muqadima' (brief history of the case), of the inquest report (Exh.PH), the name of Sultan Ahmad (P.W.3) and Nazir Ahmad (P.W.1) were not mentioned in any context. Moreover, it is mentioned in the said document (Exh.PH) that Muhammad Ramzan (deceased) was injured by some unknown accused. The Inquest Report (Exh.PH) was prepared on 18-1-2004, and the names of above-mentioned prosecution witnesses have not been mentioned in it. According to the evidence of Sultan Ahmad (P.W.3), he reached at the spot before the arrival of Riaz Cabin Man of Railway Station, Farooqabad, but said Riaz was never produced before the learned trial court to corroborate the said version of Sultan Ahmad (P.W.3). It is the case of the prosecution that said Riaz provided the information of death of Muhammad Ramzan to the complainant Muhammad Awais (P.W.2), who reported the matter to the police thereafter. The said Riaz was a very natural witness as it was he, who informed

the complainant that Muhammad Ramzan was injured by the firing of some unknown, but his evidence was withheld by the prosecution, therefore, presumption as envisaged under Article 129(g) of the Qanun-e-Shahadat Order, 1984, can be drawn against the prosecution, and it is presumed that had he been produced by the prosecution, he would have not supported the prosecution version put-forth by Sultan Ahmad (P.W.3). In the light of above discussion, the prosecution evidence of Wajtakkar is not worthy of reliance.

(2)-DYING DECLARATION AND MEDICAL EVIDENCE.

11. This evidence of dying declaration has been produced through Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3). The evidence of Wajtakkar produced by Sultan Ahmad (P.W.3) has already been discussed earlier. Nazir Ahmad (P.W.1) is also real brother of Muhammad Ramzan (deceased). He has stated before the learned trial Court that on 16-1-2004, he was present at his Dera, where he got the information that Muhammad Ramzan (deceased) has been injured and thereafter, reached at the place of occurrence and took Muhammad Ramzan (deceased) in an injured condition to DHQ, Hospital, Sheikhupura. The Doctor referred Muhammad Ramzan (deceased) to Mayo Hospital, Lahore, and on the way from Sheikhupura to Mayo Hospital, Lahore, Muhammad Ramzan stated that he received injury due to the fire shot of Muhammad Ashraf alias Kala appellant, whereas he was taken into 'Japha' by Tariq co-accused. Admittedly, Muhammad Ramzan (deceased) received firearm injuries on his neck. The prosecution produced medical evidence through three prosecution witnesses namely, Dr. Muhammad Afzal (P.W.10), Dr. Flumayun Siddique (P.W.11), and Dr. Muhammad Ashraf Javed (P.W.12). The statements of the above-mentioned witnesses regarding the condition of injured Muhammad Ramzan (deceased) for making a dying declaration, are contradictory. Dr. Muhammad Ashraf Javed (P.W.12) has stated during his cross-examination that the injured Muhammad Ramzan was in a position to utter each and every word from his mouth. He volunteered that he asked the injured person of his problem, who replied that first of all his pain trouble be removed. This witness has noticed only one injury on the person of Muhammad Ramzan (deceased), whereas, according to the statements of Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11), there were three injuries (two entry and one exit) on the person of Muhammad Ramzap (deceased). In

the MLR (Exh.PL), all the material columns such as name of the relative of the injured, time of examination, have been left blank by the above-mentioned witness (Dr. Muhammad Ashraf Javed P.W.12). Dr. Humayun Siddique (P.W.11) has stated during his cross-examination that when the larynx is injured due to odema of larynx and when the tracheostomy, it is not possible to produce understandable voice with ease. Dr. Muhammad Afzal (P.W.10), who conducted the post-mortem examination on the dead body of Muhammad Ramzan (deceased) has stated, during his cross-examination, that it is not possible to produce any understandable human voice when the left internal juggler vein and trachea and the major blood vessels of the neck were damaged and blood clots were also present in the neck.

In this case, regarding the condition of Muhammad Ramzan (deceased), the most important evidence is that of Muhammad Latif Head Constable (P.W.14). Fard Biyan (Exh.PA) was prepared by this prosecution witness. His name is also mentioned in Column No.2 of the F.I.R. (Exh.PA/1). He has stated that on 14-1-2004, he was posted as Incharge Railway Police Post, Farooqabad. On 16-1-2004, when he received information that Muhammad Ramzan (deceased) received a firearm injury and was lying near the Railway Cabin, he reached at the spot. According to his statement, the Station Master sent the complaint (Exh.PA). He recorded Karvaee police on it. He reached at DHQ, Hospital, Sheikhupura, and wrote an application (Exh.PJ) for recording the statement of injured Muhammad Ramzan, but the Doctor gave his opinion on it that the patient (Muhammad Ramzan deceased) was not fit for statement. The application (Exh.PJ) is also available on the record. Muhammad Latif Head-Constable (P.W.14) has been produced by the prosecution itself. He was not declared hostile by the prosecution.

This is an admitted fact that the statement of the deceased Muhammad Ramzan was not recorded either in DHQ Hospital, Sheikhupura, or in Mayo Hospital, Lahore. The alleged dying declaration was not made in the presence of the Doctor or any staff member of the above-mentioned hospitals. It was not recorded by any police official; therefore, the alleged dying declaration of Muhammad Ramzan (deceased) before the prosecution witnesses Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3), who are real brothers of the deceased could hardly be termed as dying declaration. It is by now a well-settled law that a dying declaration or the statement of a person without the test of

cross-examination is a weak kind of evidence and its credibility depends upon the authenticity of the witnesses and the circumstances under which it was alleged to have been made. Reference in this context may be made to the case of Mst. ZAHIDA BIBI v. THE STATE (PLD 2006 Supreme Court 255), wherein at page 262, the Hon'ble Supreme Court of Pakistan has held as under:--

"This is an admitted fact that the statement of the deceased was not recorded by the Sub-Inspector of police in hospital in presence of the doctor and further neither any member of the hospital staff was associated at the time of recording the statement nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Be that as it may, the status of such a statement would be hardly a statement under section 161, Cr.P.C., and not a dying declaration of the deceased. This may be seen that the dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy, and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts".

According to the above-mentioned prosecution evidence, there are two possibilities about the condition of the deceased Muhammad Ramzan to make dying declaration. It is by now a well-settled law that when a fact is capable of two interpretations/possibilities, then one favourable to the accused is to be accepted. Reference in this context may be made to the case of MUHAMMAD SULTAN v. MUHAMMAD ASLAM and another (1988 SCMR 857) and GHULAM HUSSAIN alias HUSSAIN BAKHSH v. THE STATE and another (PLD 1994 Supreme Court 31). Even otherwise, the presence w of Nazir Ahmad (P.W.1) and Sultan Ahmad

(P.W.3) at the time of occurrence, or soon thereafter has not been established in this case, because as discussed earlier, none of the above-mentioned witnesses are either named in the application (Exh.PA), nor they have been cited as witnesses in any 1 of the recovery memos i.e. (Exh.PB), (Exh.PC), and (Exh.PD). Their names were also not mentioned in the Medico-legal Report (Exh.PL) of Muhammad Ramzan (deceased). The said deceased Muhammad Ramzan was medically examined during his life time by Dr. Humayun Siddique (P.W.11) and Dr. Muhammad Ashraf Javed (P.W.12). None of the above-mentioned witnesses have uttered a single word about the dying declaration of Muhammad Ramzan (deceased). Therefore, we are of the view that the evidence of prosecution in respect of dying declaration is not reliable.

(3)-EXTRA-JUDICIAL-CONFESSION

12. Khurshid Ahmad (P.W.9) is a witness of alleged extra-judicial confession. He has stated before the learned trial Court that after some days of the murder of Muhammad Ramzan (deceased), the appellant Muhammad Ashraf alias Kala came to his Dera and told him that he was much worried, because the police had conducted a raid at his house. The appellant allegedly further told him that he (Muhammad Ashraf appellant) and his co-accused Tariq alias Ghanti had committed the murder of Muhammad Ramzan (deceased) after due consultation. Khurshid Ahmad (P.W.9) in his statement (Exh.DF) has not given the date or time of the alleged extra-judicial-confession. He has simply stated that after some days of the murder of Ramzan (deceased), the extra-judicial - confession was made before him by Muhammad Ashraf alias Kala appellant. The occurrence in this case took place on 16-1-2004, whereas, statement (Exh.DF) of Khurshid Ahmad was recorded by the police on 11-2-2004. This witness has given no plausible explanation for such a long silence. He has not given any reason for the delay in making his statement before the police. Similarly, no date of alleged extra-judicial confession was mentioned in his statement before the Court. He is a cultivator by profession. It has not been established by the prosecution that he was holding any important post/office, or he was a person in authority, or he had any influence over the complainant party to effect a compromise between the appellants and the complainant.

The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as SAJID MUMTAZ AND OTHERS v. BASHARAT AND OTHERS (2006 SCMR

231), wherein, at page 238, the apex Court of Pakistan has been pleased to lay emphasis as under:--

"(17) ..... This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra-judicial confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to 'satisfy' itself fully that the confession cannot but be true'. As, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

(18) It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule of prescribed by this Court.

(19) It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

(20) Why a person guilty of offence, entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off, (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra-judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or

association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial confession have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confession. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relaying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as TAHIR TAVED v. THE STATE (2009 SCMR 166), wherein, at page 170, the learned august Supreme Court of Pakistan, has been pleased to observe as under:--

"It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683 and (4) Sarfraz Khan v. The State and others (1996 SCMR 188)".

In light of the above discussion, we are of the view that the prosecution evidence of extra-judicial confession in the instant case is also not worthy of reliance.

(4) MOTIVE.

13. Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) have given the evidence of motive. It was alleged by the above-mentioned witnesses that motive behind the occurrence was that about 2/3 months prior to the occurrence, a quarrel took place between Asif, the younger brother of appellant Muhammad Ashraf alias Kala and Adnan the son of Muhammad Ramzan (deceased).

There is nothing on the record to establish that the matter was reported to the police or any other authority regarding the alleged quarrel, which took place between the above-mentioned Asif and Adnan. No reason of the alleged quarrel has been given by Nazir Ahmad (P.W.1), or Sultan Ahmad (P.W.3). According to the above-mentioned witnesses, the quarrel allegedly took place 2/3 months prior to the occurrence and a compromise was also effected after the said quarrel. Therefore in the circumstances, we are of the view that the motive, as alleged by the prosecution, has not been established in this case.

(5)-RECOVERY

14. According to the prosecution case, pistol (P.4) was recovered at the instance of Muhammad Ashraf alias Kala appellant during his physical remand. The appellant Muhammad Ashraf alias Kala was arrested in this case on 8-2-2004, and pistol (P.4) was recovered from his possession on 16-2-2004. The report of FSL (Exh.PU) is positive. Although, Muhammad Latif Head-Constable (P.W.14) has stated before the learned trial Court that he handed over the parcel containing empty to Muhammad Kashif Constable (P.W.13) on 8-2-2004, for its onward transmission to the office of FSL, Lahore, but his statement is not helpful to the appellant, because Muhammad Kashif Constable (P.W.13) has stated before the learned trial Court that the parcel of empty cartridge was handed over to him, and he deposited the same in the office of FSL, Lahore, on 1-2-2004. Similarly, it is evident from the report of FSL (Exh.PU) that

the empty was received in the office of FSL on 1-2-2004, whereas, the parcel, of pistol (P.4) was received on 17-2-2004. Therefore, the above objection regarding the delay in sending the empty to the office of FSL, after the arrest of the appellant Muhammad Ashraf alias Kala, is of no avail to the appellant. Anyhow, the evidence of recovery is only of corroborative in nature and conviction of the appellants cannot be sustained merely on the basis of recovery of pistol (P.4) and positive report of FSL (Exh.PU).

In the case of MUHAMMAD AFZAL alias ABDULLAH and others v. THE STATE and others (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similarly, in the case of ABDUL MATEEN v. SAHIB KHAN and others (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of MUHAMMAD YAQUB v. THE STATE (1971 SCMR 756) and NEK MUHAMMAD and another v. THE STATE (PLD 1995 Supreme Court 516).

15. The prosecution also produced another circumstantial evidence against the appellants in the shape of Muhammad Akram (P.W.5), who has stated that five days prior to the murder of Muhammad Ramzan (deceased), he was coming from his 'Dera' and when he reached 'Such Khand', Ashraf and Tariq appellants while armed with 'sotas' were sitting and stated before him that they wanted to murder Muhammad

Ramzan (deceased). He forbade them but they insisted for killing Muhammad Ramzan (deceased). His statement before the police (Exh.DC) is available on the record. He has nowhere mentioned in his statement before the police (Exh.DC) that the appellants told him that they wanted to commit the murder of Muhammad Ramzan (deceased). Although this witness has claimed that five days prior to the occurrence, he came to know about the intention of the appellants, but he never informed the police regarding the plan of the appellants till the of occurrence. The occurrence in this case took place on 16-1-2004, whereas, he appeared before the police for the first time and made his statement (Exh.DC) on 27-1-2004. No reason has been given by this witness as to why the appellants have told him regarding their intention to kill Muhammad Ramzan (deceased). In the light of above discussion, we are of the view that the evidence of Muhammad Akram (P.W.5) is not reliable and trustworthy.

16. We have already disbelieved the circumstantial evidence of the prosecution, which was produced in the shape of Wajtakkar, dying declaration, extra-judicial - confession, and motive, therefore, we are of the view that the prosecution has failed to prove its case against the appellants namely, Muhammad Ashraf alias Kala, and Tariq Mehmood alias Ghanti, beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal, and set aside the conviction and sentence awarded to the appellants, namely, Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti. The appellants Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti are in jail. They shall be released forthwith if not required to be detained in any other case.

Death sentence awarded to the appellants Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

HBT/M-127/L **Appeal accepted.**

2013 P Cr. L J 1650

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

JAFAR and 6 others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.419 and Murder Reference No.121 of 2008, decided on 5th March, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 109--- Qatl-e-amd, abetment--- Appreciation of evidence---Case was of two versions, one putforth by prosecution in the form of ocular account furnished by prosecution witnesses, while other had been brought on record through the statements of accused persons recorded under S. 342, Cr.P.C.---Delay of 4 days in reporting the matter to the Police, having not been explained plausibly, possibility of concoction and deliberation, were very much there---Eye-witnesses were not truthful witnesses, because they had suppressed serious injuries, sustained by accused persons in the occurrence---Evidence of said witnesses was not worthy of reliance---No report of Chemical Examiner or Serologist was available to show that 'Sotas' allegedly used in the occurrence were stained with human blood---Evidence qua alleged recovery of 'Sotas' was of no avail to the prosecution, in circumstances---Prosecution had failed to prove any motive against accused persons---Prosecution, in circumstances, could not prove its case against accused persons beyond shadow of doubt---Impugned judgment of the Trial Court, was set aside and convictions and sentences awarded to accused were set aside; they were acquitted from the charge and were released, in circumstances.

Akhtar Ali and others v. The State 2008 SCMR 6 and Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473 rel.

(b) Criminal trial---

----Appreciation of evidence---Prosecution was required to prove its case against accused persons beyond any shadow of doubt---Defence version, was to be taken into

consideration after evaluating the prosecution evidence to find out, whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 109 & 100---Qatl-e-amd, abetment---Plea of right of private defence---Accused persons in their statements recorded under Ss.340(2) & 342, Cr.P.C. had taken plea of right of self-defence---Putting the prosecution case and defence version in juxtaposition, defence version that it was the complainant party who launched attack on accused party, appeared to be probable which got support from the evidence of prosecution's own witness, who had noted three injuries, including two incised wounds on the head and right cheek of accused and two incised wounds and four injuries on the head to other accused---Accused persons, in circumstances, had the right of private defence of their bodies, which also extended to cause death of the assailants.

(d) Penal Code (XLV of 1860)---

----S. 100---Right of private defence---Extent---Right of private defence of body would extend to the voluntary causing the death of the assailant, if assailant would launch an assault which could reasonably cause the apprehension that grievous hurt would be the consequence of such assault.

(e) Criminal Procedure Code (V of 1898)---

----Ss. 340(2) & 342---Inculpatory and exculpatory statement of accused---If the prosecution evidence was disbelieved by the court, then the statement of an accused was to be accepted or rejected as a whole---Not possible to accept the inculpatory part of the statement of accused, and to reject the exculpatory part of same statement.

Muhammad Asghar v. The State PLD 2008 SC 513 rel.

(f) Criminal Procedure Code (V of 1898)---

----Ss. 340(2) & 342---Inculpatory and exculpatory statement of accused---Accused could not be awarded punishment on the basis of their statements recorded under Ss.340(2) & 342, Cr.P.C., by accepting the inculpatory part of said statements, and by rejecting exculpatory part of the same statement.

Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. Esab Khan 1991 SCMR 61 rel.

Syed Ijaz Qutab for Appellants.

Arshad Mehmood, D.P.-G. for the State.

Sardar Akbar Ali Khan for the Complainant.

Date of hearing: 5th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Jafar, Ali Sher, Riaz, Ozair, Yousaf, Afzal and Safdar appellants along with three others were tried in case F.I.R. No.572 of 2005 dated 9-7-2005 offences under sections 302, 109, 148 and 149, P.P.C. registered at Police Station Tandlianwala, District Faisalabad. After conclusion of the trial, learned trial Court vide its judgment dated 15-4-2008 has convicted and sentenced the appellants as under:--

Jafar, Ali Sher, Riaz and Ozair, appellants.

Convicted under sections 302(b), 149, P.P.C. each for committing the murder of Shahid Iqbal, deceased and sentenced to death each with a direction to pay the compensation amount of Rs.1,00,000 (Rupees One Hundred Thousand only) each to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to suffer simple imprisonment for six months S.I. each. The compensation shall be recoverable as the arrears of land revenue.

Yousaf and Afzal appellants.

Convicted under sections 302(b), 149, P.P.C. each for committing the murder of Shahid Iqbal, deceased and sentenced to imprisonment for life (R.I.) each with a direction to pay the compensation amount of Rs.1,00,000 (Rupees One Hundred Thousand only) each to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to suffer simple imprisonment for six months' S.I. each. The compensation shall be recoverable as arrears of land revenue.

Safdar.

Convicted under sections 302(b), 109, P.P.C. for committing the murder of Shahid Iqbal, deceased and sentenced to imprisonment for life (R.I.) with a direction

to pay the compensation amount of Rs.50,000 (Rupees Fifty Thousand only) to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to suffer simple imprisonment for six months' S.I.

The learned trial Court, however, acquitted Zahoor, Muddai and Abbas, co-accused while giving the benefit of doubt to them.

2. Feeling aggrieved, the appellants have challenged their conviction and sentences through Criminal Appeal No. 419 of 2008, whereas, the learned trial Court has transmitted Murder Reference No.121 of 2008, for confirmation or otherwise of the death sentences of Jafar, Ali Sher, Riaz and Ozair convicts/appellants. We purpose to dispose of both these matters by this single judgment as both have arisen out of the same judgment dated 15-4-2008 passed by the learned Additional Sessions Judge, Tandlianwala, District Faisalabad.

3. Brief facts of the case as given by the complainant Ahmad Yar (P.W.5) in his written application Exh.PA on the basis of which formal F.I.R. Exh.PA/1 was chalked out are that on 5-7-2005 at about 3-00 p.m. he (complainant) along with Muhammad Yaqoob (P.W.6) and Dost Muhammad (given up P.W.) was present at the 'dhari' of Muhammad Yaqoob (P.W.6). At that time Shahid Iqbal (deceased), son of the complainant, aged about 30 years was coming from the village towards the 'dhari' of Muhammad Yaqoob (P.W.6) and when he reached at killa No.15, suddenly Zahoor (since acquitted), Ali Sher (appellant), Jafar (appellant since dead), Yousaf (appellant), Riaz (appellant), Oozair (appellant), and Afzal (appellant) armed with sotas came there from the charri crop cultivated in killa No.6 and attacked on Shahid Iqbal (deceased) while raising lalkaras. They said that they would teach a lesson to Shahid Iqbal and Muhammad Yar for beating Ali Sher. Shahid Iqbal tried to run away but Ali Sher, Riaz, Jafar and Oozair (appellants) chased him and gave sota blows on his head who fell down. In that condition Yousaf, Afzal (appellants) and Zahoor accused (since, acquitted) gave sota blows which hit Shahid Iqbal on his right arm and back of Shahid Iqbal (deceased). Complainant along with P.Ws. rushed towards Shahid Iqbal (deceased). All the accused fled away from the spot, while raising lalkaras that they had taken the revenge of beating to Ali Sher (appellant). Complainant and P.Ws. took Shahid Iqbal (deceased) to civil Hospital, Tandlianwala where he was admitted. The condition of Shahid Iqbal became serious on 9-7-2005, so he was taken to Allied Hospital, Faisalabad where he succumbed to the injuries at

about 4-00-p.m. It was further alleged that occurrence had been committed at the abetment of Muddai, Abbas accused (since acquitted) and Safdar (appellant). The complainant also stated that he remained busy in the medical treatment of Shahid Iqbal till 9-7-2005, hence, he could not inform the police earlier, about the occurrence.

The motive behind the occurrence as set forth in the F.I.R. Exh.PA/1 was, that the accused persons had committed the murder of Shahid Iqbal (deceased) due to a minor reason.

4. The appellants Jafar, Yousaf, Ali Sher, Afzal, Ozair and Riaz were arrested by Shoukat Ali, SI, (P.W.8) and on 31-7-2005 all the above mentioned appellants led the police to Chak No.413/GB where 'sotas' (P-1, P-2, P-3, P-4, P-5 and P-6) were recovered on the pointations of Ali Sher, Riaz Jafar, Ozair, Afzal, Yousaf (appellants), respectively, which were taken into possession vide memos Exh.PB, Exh.PC, Exh.PD, Exh.PE, Exh.PF, Exh.PG, respectively. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 9-12-2005, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution produced nine witnesses, during the trial. Ahmad Yar, complainant (P.W.5) and Muhammad Yaqoob (P.W.6) are the witnesses of ocular account.

Dr. Abdul Satar Randhawa (P.W.4) conducted post mortem examination on the dead body of Shahid Iqbal (deceased), whereas Shoukat Ali, SI (P.W.8) is the Investigating Officer of this case. Muhammad Hanif (P.W.2) is the witness of recovery of 'sotas' (P-1 to P-6).

Farooq Ahmad, SI (P.W.1), Basharat Ali, Patwari (P.W.3), Muhammad Iqbal 1931 (P.W.7) and Zulfiqar Ali, ASI (P.W.9) are the formal witnesses. The prosecution also produced documentary evidence in the shape of complaint filed by Ahmad Yar complainant Exh.PA, F.I.R. Exh.PA/1, memo of possession of recovery of 'sota' (P-1) Exh.PB from the possession of Ali Sher (appellant), memo of possession of recovery of 'sota' (P-2) Exh.PC from the possession of Riaz (appellant), memo of possession of recovery of 'sota' (P-3) Exh.PD from the possession of Jaffar (appellant), memo of possession of recovery of 'sota' (P-4) Exh.PE from the possession of Ozair (appellant) memo of possession of recovery

of 'sota' (P-5) Exh.PF from the possession of Afzal (appellant), memo of possession of recover of 'sota' (P-6) Exh.PG from the possession of Yousaf (appellant), copy of scaled site plan of the place' of occurrence in duplicate Exh.PH and Exh.PH/1, post mortem report of Shahid Iqbal (deceased) Exh.PJ, pictorial diagrams Exh.PJ/1, injury statement Exh.PK, inquest report Exh.PL, memo of possession of last worn clothes of Shahid Iqbal deceased Exh.PM, site plan of place of occurrence without scale Exh.PN, site plan without scale of the place of recovery of 'sotas' Exh.PO, copy of site plan Mark A and closed its evidence.

5. The statements of the appellants and their co-accused (since acquitted) under section 342, Cr.P.C. were recorded by the learned trial Court. They refuted the allegations levelled against them and professed their innocence. While answering to question "Why the prosecution witnesses deposed against you and why this case against you" the appellants replied as under:--

Afzal.

"The case is false and fabricated. Ahmad Yar, alleged complainant, Muhammad Yaqoob deposed falsely being inimical to me and my alleged co-accused and they are closely related with each other and as well as alleged deceased Shahid Iqbal. Complainant party prevailed upon police through Rab Nawaz, MPA. Saee Muhammad is complainant of the private complaint of cross version who filed a private complaint against Ahmad Yar, Muhammad Yaqoob, Dost Muhammad, Hanif Allah Ditta, Murad and one Muhammad Afzal son of Saee Mohammad and Muhammad Ashraf which is pending before learned Judl. Magistrate, Tandlianwala. The actual facts of the case are that on 5-7-2005 at about 3-00 p.m. I along with Muhammad Saee complainant of the private complaint, Muhammad Yousaf injured, Noor Muhammad and Muhammad Ashraf were sitting on the cots in front of my house on the road under the shadow of trees at square No. 20 and we at that time talked with each other. In the meanwhile Shahid Iqbal alleged deceased was armed with hatchet, Dost Muhammad armed with hatchet, Muhammad Hanif armed with hatched, Murad armed with hatchet, Muhammad Afzal son of Saeed armed with pistol Muhammad Ashraf armed with gun 12 bore, Ahmad Yar alleged complainant armed with dang, Muhammad Yaqoob armed with dang, Allah Ditta armed with dang reached the place of occurrence and were raising lalkaras to teach a lesson for beating to Shahid Iqbal alleged deceased and Waris son of Shahadat resident of Chak No.

418/GB for abusing and insulting of them. Muhammad Afzal armed with pistol Muhammad Ashraf armed with gun, they started firing at the spot and created terrorism and panic in the village and raised lalkaras, if someone came to near them and tried to save the lives of myself and the above said other persons otherwise they should be murdered as due to that reason complainant party of the private complaint became afraid and worried at that time. Shahid Iqbal alleged deceased present blow a hatchet to Muhammad Yousaf which hit on his head. Shahid Iqbal also blow hatchet to me which hit on my head, Dost Muhammad inflected hatchet to Muhammad Yousaf which hit on the right side of his head. Murad inflected hatchet blow to Muhammad Yousaf which hit his near left hand at forearm. Muhammad Hanif inflected hatchet blow to me which hit me on my right cheek. Muhammad Yaqoob inflected dang to Muhammad Yousaf which hit on his back of chest. Allah Ditta inflected dang to you Muhammad Afzal which hit on my right arm. In the meantime, I and Muhammad Yousaf picked up sotas near road and inflected some injuries to Shahid Iqbal alleged deceased in the right of private self defence. If I and Muhammad Yousaf did not beat to Shahid Iqbal alleged deceased he and others murdered to myself and Muhammad Yousaf. This occurrence was witnessed by Saee Muhammad complainant of private complaint, Noor Ahmad and Muhammad Ashraf resident of Chak No.417/GB. The above said eye-witnesses namely Saee Ahmad, Noor Muhammad and Muhammad Ashraf beseeched the accused of the complaint and saved our lives. After the occurrence, myself and Muhammad Yousaf in injured condition reached at civil hospital, Tandlianwala for getting MLCs and treatment where the accused party of private complaint also reached there. At that time, the alleged complainant party compromised with us. Due to that reason we did not get our MLCs from the said hospital. We got our treatment from the private clinic. On 9-7-2005 Shahid Iqbal alleged injured had died. A false case under sections 302, 148, 149, 109, P.P.C. had been registered against myself and my alleged co-accused with wrong contents stated in the F.I.R. No.572 dated 9-7-2005, P.S. Tandlianwala. Complainant party stated a wrong motive in this case. The actual fact of the motive was that 10/11 days before the present occurrence the motorcycle, of Safdar Ali my co-accused was stolen by Waris who returned the said motorcycle through punchait and confessed his crime in the punchait so case of stolen motorcycle was not registered against him because matter was patched up in the punchait. Waris is a good friend of Shahid Iqbal deceased. On the day of occurrence at about 11-00 a.m. Shahid

Iqbal and the above said Waris both were passing from our Bazar near our house, at that time Mohammad Yousaf, Jaffar, Ali Sher myself and Ozair Ahmad already were sitting there under the shadow of tree. We asked Shahid Iqbal deceased why he brought Waris on our village who had already stolen our motorcycle and why Shahid Iqbal and Waris deceased were passing from our bazaar. On the asking of the above said fact and a quarrel took place between us and Shahid Iqbal and Waris. We had beaten Shahid Iqbal and Waris and abused them at that time. Due to that grudge the above said persons of the complainant party of the case attacked us while armed with lethal weapons and injured myself and Yousaf. I and Muhammad Yousaf in the right of private-self defence, picked up sotas from the spot and injured Shahid Iqbal to save our lives Rab Nawaz Kharal, MPA who is relative of the complainant party of the case in connivance with the local police registered a false case against us. Police did not record our version correctly. I was medically examined on 10-7-2005. Muhammad Yousaf was also examined on the same day. We produced our MLCs before police and police did not give weight to our MLCs. A false case was registered against myself and my alleged co-accused. Ahmad Yar and Muhammad Yaqoob gave a false statement before this honourable court. I am totally innocent. My father also filed a private complaint against the above said accused persons. They are facing the trial before learned trial Court. The complainant party of the murder was aggressor.

Jafar, Yousaf, Ali Sher, Riaz, Ozair and Safdar.

"The case is false and fabricated. Ahmad Yar, Muhammad Yaqoob deposed falsely being inimical to me and my alleged co-accused and they are closely related with each other. The complainant party prevailed upon the police through Rab Nawaz, MPA registered a false case against myself. I heard the detailed statement of Muhammad Afzal alleged co-accused which is recorded in my presence. I rely upon the statement of Muhammad Afzal the alleged co-accused. I did not take part in the main occurrence.

The appellants produced Muhammad Afzal (appellant) in their defence who made statement on oath as envisaged under section 340(2), Cr.P.C. Muhammad Afzal (appellant) in his statement recorded under section 340(2), Cr.P.C. took this plea that on 5-7-2005 at 3-00 p.m. he, Muhammad Yousaf (appellant) and other members of the accused party namely Noor Muhammad, Muhammad Ashraf and Muhammad Saee were attacked upon by the complainant party. He further claimed that Shahid

Iqbal (deceased) along with Dost Muhammad, Murad, Muhammad Hanif, Muhammad Yaqoob, Allah Ditta inflicted hatchet and 'dang' blows on his person, as well as, on the person of Muhammad Yousaf (appellant) and thereafter he (Muhammad Afzal appellant) and Muhammad Yousaf (appellant) picked up 'sotas' and inflicted some 'danda' blows on the person of Shahid Iqbal (deceased) while using their right of private defence. The appellants also produced documentary evidence in the shape of statement of Muhammad Yaqoob Exh.DA, MLR of Muhammad Afzal (appellant) Exh.DB, pictorial diagrams of injuries Exh.DB/1, MLR of Muhammad Yousaf appellant Exh.DC, pictorial diagram Exh.DC/1 statement under section 161, Cr.P.C. of Muhammad Iqbal Exh.DD, copy of F.I.R. No.465 of 1988 Exh.DE, copy of private complaint under sections 324, 148 and 149 filed by Saee Muhammad Exh.DF and copy of Jamanbandi for the year 2003-04 Exh.DG.

6. The learned trial Court vide judgment dated 15-4-2008, found Jafar, Ali Sher; Riaz, Ozair, Yousaf, Afzal and Safdar appellants guilty, convicted and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants, in support of this appeal, contends that totally a false story was narrated in the F.I.R. Exh.PA/1; that there is un-explained delay of four days in reporting the matter to the police despite the fact that distance between the place of occurrence and police station was just 16 kilometers; that in the F.I.R. it was case of the complainant that he took Shahid Iqbal (deceased) in injured condition to Civil Hospital, Tandlianwala where he remained admitted and became serious and then he was taken to Allied Hospital, Faisalabad but there is no evidence on the record qua the treatment of Shahid Iqbal deceased, either in Allied Hospital, Faisalabad or at Civil Hospital, Tandlianwala; that two appellants namely Yousaf and Afzal appellants were also injured in this incident but the injuries of said appellants were suppressed in the F.I.R. and in the statements made by the prosecution witnesses before the learned trial Court; that the alleged recoveries of 'sotas' are inconsequential, as none of the 'sota' was stained with blood; that no specific motive was alleged in the F.I.R., however, the complainant stated that when the deceased was attacked it was stated by the appellants that they have come to teach a lesson to Shahid Iqbal (deceased) and Muhammad Yar for beating Ali Sher (appellant) and while appearing before the learned trial Court, the complainant has stated in his cross-examination that the altercation took place between Shahid Iqbal (deceased) and Ali Sher

(appellant) in the morning time in front of the house of one Mattal and admittedly said Mattal has not been examined before the police or before the learned trial Court; that Muhammad Yaqoob (P.W.6) during his cross-examination stated that it was Ali Sher appellant who abused Shahid Iqbal (deceased) in the morning time prior to the occurrence and he further stated that Shahid Iqbal was a respectable person and they felt aggrieved due to the said abuses, therefore, the motive was with the complainant party to take revenge of the abuses given by Ali Sher (appellant); that the version of Afzal appellant recorded under sections 340(2), as well as, 342, Cr.P.C. and adopted by the other appellants is more probable and convincing which gets support from the evidence of the prosecution that it was Ali Sher appellant who abused Shahid Iqbal (deceased) and it was Shahid Iqbal (deceased) who had grudge in his mind, therefore, he (deceased) along with his other companions attacked on the accused party; that Muhammad Afzal and Muhammad Yousaf appellants were medically examined by the same Doctor who conducted the post mortem examination on the dead body of Shahid Iqbal (deceased) and their MLRs have also been brought on the record; that it was admitted by the Investigating Officer that houses of the appellants are close to the place of occurrence; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt, thus, this appeal be accepted and the appellants may be acquitted from the charges.

8. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the delay in lodging the F.I.R. per se is no ground to discard the prosecution evidence and even otherwise the said delay has been plausibly explained in the F.I.R. wherein it has been mentioned that the complainant was busy in medical treatment of Shahid Iqbal deceased; that there is no reason for the prosecution witnesses to falsely depose against the appellants; that the ocular account of the prosecution is fully supported by the medical evidence as the deceased in this case received seven injuries on his person, as per post mortem examination report of the deceased; that the prosecution case is also corroborated by the recoveries of 'sotas' at the instance of Jafar, Yousaf, Ali Sher, Afzal, Ozair and Riaz (appellants); that specific plea was taken by the appellants but they have not been able to prove the same; that appellants have themselves admitted in their statements recorded under sections 340(2) and 342, Cr.P.C. that they committed the murder of Shahid Iqbal (deceased); that there is no mitigating circumstance in this case; that the sentences of death were rightly awarded to the

appellants and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. Before proceeding further it would be relevant to mention here that on 10-1-2013 learned counsel for the appellants stated that one of the appellants namely Jafar has died in the Central Jail, Faisalabad. In this regard report was requisitioned from the Superintendent, Central Jail, Faisalabad, who vide his report bearing No.789 dated 23-1-2013 submitted that the condemned prisoner namely Jafar has died on 21-7-2012 at the District Headquarter Hospital, Faisalabad. He has also annexed the death certificate of Jafar (appellant) along with his report. Thus keeping in view the report and death certificate submitted by the Superintendent, Central Jail, Faisalabad, Murder Reference No.121 of 2008 stands abated to the extent of Jafar appellant.

11. Now coming to the merits of this case, it would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Ahmad Yar, complainant (P.W.5) and Muhammad Yaqoob (P.W.6), whereas, the other has been brought on the record through the statements of the appellants, recorded under section 342 of Cr.P.C. and suggestions put to the prosecution eye-witnesses during their cross-examination.

12. It is settled now by the Hon'ble Supreme Court of Pakistan in number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not? In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eyewitnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from

consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing in the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Amin Ali and another v. The State' (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

13. The occurrence in this case took place on 5-7-2005 at 3-00 p.m. whereas the matter was reported to the police on 9-7-2005 at 6-20 p.m. and the formal F.I.R. (Exh.P-A/1) was registered on 9-7-2005 at 6-30 p.m. The distance between the place of occurrence and police station is 16 Kilometers. There is delay of 4 days in reporting the matter to the police. There is no plausible explanation for the above-mentioned gross and inordinate delay in reporting the incident to the police. It was simply stated in the F.I.R. Exh.PA/1, as well as, in the statement of Ahmad Yar complainant (P.W.5) recorded by the learned trial Court that Shahid Iqbal (deceased) in injured condition was first taken to the Tehsil Headquarter Hospital, Tandlianwala, thereafter

he was taken to Allied Hospital, Faisalabad on 9-7-2005 where he was given medical treatment but he succumbed to the injuries over there. Thus, the reason for the above mentioned delay in reporting the matter to the police as given by the prosecution was, that Shahid Iqbal (deceased) was first taken to the Tehsil Headquarter Hospital, Tandlianwala and then he was referred to Allied Hospital, Faisalabad and as the complainant party remained busy in the medical treatment of Shahid Iqbal (deceased), therefore, the matter could not be earlier reported to the police but we have noted that no evidence regarding the admission of Shahid Iqbal (deceased) on 5-7-2005 at Tehsil Headquarter Hospital, Tandlianwala has been brought on the record. Similarly no evidence regarding the medical treatment of Shahid Iqbal (deceased) at Allied Hospital, Faisalabad has been produced by the prosecution, therefore, there is nothing on the record to justify the above-mentioned delay of more than four days in reporting the matter to the police. It is by now well-settled law that sanctity of truth cannot be attached to an F.I.R. which has been lodged with inordinate and un-plausible delay. The possibilities of concoction and deliberations are very much there in the case of a delayed F.I.R. The Hon'ble Supreme Court of Pakistan while discussing the issue of delay in lodging the F.I.R., in the case of "Akhtar Ali and others v. The State" (2008 SCMR 6) at page 12 has observed as under:--

"5. ...It is also an admitted fact that the F.I.R. was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The F.I.R. was also not lodged at police station as mentioned above. 10/11 hours delay in lodging of F.I.R. provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the F.I.R..."

The above-mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of "Nazeer Ahmad v. Gehne Khan and others" (2011 SCMR 1473) wherein, the delay of seven hours in lodging the F.I.R. was considered to be a ground which adversely reflected on the creditability of prosecution version. Similarly in the instant case, the delay of 4 days in lodging the F.I.R. has raised serious questions about the truthfulness of the prosecution story.

14. We have noted that the complainant implicated as many as 10 accused persons in this case for the murder of Shahid Iqbal (deceased). The learned trial Court awarded death penalty to four appellants namely Ali Sher, Riaz, Jafar (since dead) and Ozair who were assigned a joint role of inflicting 'sota' blows on the head of Shahid Iqbal

(deceased), whereas, two appellants namely Muhammad Yousaf and Muhammad Afzal were awarded the punishment of imprisonment for life, as they were assigned a joint role of inflicting 'sota' blows on the right arm and back of Shahid Iqbal (deceased). Safdar (appellant) has also been awarded the sentence of imprisonment for life by the learned trial Court with the allegation that he abetted his co-accused in the commission of offence. In order to prove its case against the appellants the ocular account of the prosecution was furnished by Ahmad Yar complainant (P.W.5) and Muhammad Yaqoob (P.W.6). As mentioned earlier the said eye witnesses did not report the matter to the police for four days and the explanation given by the said witnesses for the above mentioned delay has already been discarded by us in the preceding paragraph of this judgment. We have also noted that the above-mentioned eye-witnesses are not truthful witnesses because they suppressed the injuries sustained by Muhammad Yousaf appellant and Muhammad Afzal appellant in their statements before the police, as well as, in their statements before the learned trial Court. The prosecution's own witness namely Doctor Abdul Sattar Randhawa (P.W.4) who conducted the post-mortem examination on the dead body of Shahid Iqbal (deceased) has stated during his cross-examination that he medically examined Muhammad Afzal (appellant) on 10-7-2005 and found the following injuries on his person:--

(1) An incised wound 5 cm x .4 cm in the middle of anterior part of head wound five days old, not stitched, KUO for X-ray bone is exposed.

(2) An incised wound 4 cm x .2 cm on right cheek front of ear bone is not exposed. Bone is not stitched KUO for X-ray.

(3) A contused swelling 5 cm x .4 cm on right forearm advised x-ray.

According to his opinion injuries on the person of Muhammad Afzal appellant were caused by sharp edged and blunt weapons and duration of the injuries was within five days. He has tendered in evidence MLR of Muhammad Afzal (appellant) as Exh.PB and his pictorial diagram Exh.PB/1.

Doctor Abdul Sattar Randhawa (P.W.4) has further stated during his cross-examination that on 10-7-2005 he also medically examined Muhammad Yousaf Appellant and found following injures on his person:--

(1) (Y) shaped incised wound 8 cm x 0.2 cm, bone is exposed on top of head. Stitched wound opened and examined and re-stitched. ASD and KUO for x-ray.

(2) An incised wound 3 cm x 0.2 cm on left side of head, bone was exposed. The wound was examined after re-opening. The wound was stitched and KUO for x-ray.

(3) A swelling 3 cm x 5. cm on back of right chest. KUO.

(4) An incised wound 4 cm x 0.3 cm on outer side of left forearm.

According to his opinion injuries on the person of Muhammad Yousaf appellant were caused by sharp edged and blunt weapon and duration of the injuries was within five days. He has also tendered in evidence a certified copy of the MLR of Muhammad Yousaf (appellant) as Exh.DC and his pictorial diagram as Exh.DC/1. It is evident from the perusal of medical evidence furnished by Doctor Abdul Sattar Randhawa (P.W.4) that Muhammad Afzal (appellant) and Muhammad Yousaf (appellant) were also seriously injured during the occurrence. There were total three wounds on the person of Muhammad Afzal appellant, out of which two were incised wounds on the head and cheek of said appellant. Similarly out of 4 wounds on the body of Muhammad Yousaf appellant there were two incised wounds on the head of said appellant and the bone of his head under the said wounds was also exposed. The above mentioned prosecution witness namely Doctor Abdul Sattar Randhawa (P.W.4) was not declared hostile by the prosecution. So it was established that Muhammad Afzal and Muhammad Yousaf (appellants) were seriously injured in the occurrence but their injuries were suppressed by the prosecution eye-witnesses. As the injuries on the persons of Muhammad Afzal and Muhammad Yousaf (appellants) have been suppressed by the above mentioned eye-witnesses and as they remained mum for four days after the occurrence, therefore, their evidence is not worthy of reliance.

15. The prosecution has also produced the evidence of recovery of 'sota' (P-1) from Ali Sher appellant, recovery of 'sota' (P-2) from Riaz appellant, recovery of 'sota' (P-3) from Jafar appellant (since died), recovery of 'sota' (P-4) from Ozair appellant, recovery of 'sota' (P-5) from Afzal appellant, recover of 'sota' (P-6) from Yousaf appellant. We have noted that all the above mentioned 'sotas' (P-1 to P-6) were recovered on the same day i.e. 31-7-2005 from the same place i.e. 'baithak', of Ali Sher appellant. We have also noted that it was not mentioned in the recovery memos Exh.PB to Exh.PG of above mentioned 'sotas' (P1 to P-6) that the said 'sotas' were

stained with blood. There is no report of Chemical Examiner or Serologist to show that the 'sotas' (P-1 to P-6) were stained with human blood. In view of the above, the evidence qua alleged recovery of 'sotas' (P-1 to P-6) is of no avail to the prosecution.

16. Now coming to the motive part of the prosecution, the motive of the occurrence as set forth in the F.I.R. Exh.PA/1 was that accused persons committed the murder of Shahid Iqbal (deceased) due to a minor reason. Although it was also alleged in the F.I.R. Exh.PA/1 that the accused persons raised 'lalkara' to teach a lesson to Shahid Iqbal (deceased) and Ahmad Yar (P.W.5) for beating to Ali Sher (appellant) but no reason, time or place of the said beating was mentioned in the F.I.R. The complainant Ahmad Yar (P.W.5) while making his statement before the learned trial Court did not state anything about the motive in his examination-in-chief, however, during his cross-examination he stated that prior to the occurrence an altercation took place between Shahid Iqbal (deceased) and Ali Sher (appellant) in the morning time at about 8-00/9-00 a.m. He did not state that Ali Sher (appellant) was beaten by Shahid Iqbal (deceased), as alleged by him in the F.I.R. Exh.PA/1, rather he stated that Ali Sher (appellant) abused so many to Shahid Iqbal (deceased). Similarly Muhammad Yaqoob (P.W.6) did not state anything about the motive part of the prosecution case in his examination-in-chief, however, during his cross-examination he stated that an altercation took place between Shahid Iqbal (deceased) and accused prior to the occurrence. Even this witness did not state that Ali Sher (appellant) was beaten by Shahid Iqbal (deceased) rather he stated that Ali Sher (appellant) abused Shah Iqbal (deceased). He further stated that Shahid Iqbal was a respectable person and they (complainant party) felt aggrieved that Ali Sher (appellant) had abused Shahid Iqbal (deceased). The relevant statement of Muhammad Yaqoob (P.W.6) (at page 65 of the paper book) reads as under:--

"Ali Sher accused abused Shahid Iqbal deceased. Shahid Iqbal was a respectable person. We felt aggrieved and grudge that accused Ali Sher abused Shahid Iqbal."

It is evident from the perusal of the above mentioned prosecution evidence that infact there was no motive with the appellants to launch an attack on the complainant party rather the complainant party and Shahid Iqbal (deceased) were aggrieved of the abuses given by Ali Sher (appellant) to Shahid Iqbal (deceased) as the complainant party considered Shahid Iqbal a respectable person and they felt aggrieved that Ali Sher appellant had abused him. We have also noted that the occurrence in this case

took place in 'killa' No.15 as mentioned by Ahmad Yar complainant in his examination-in-chief. Moreover, this fact is also established from the site plan of the place of occurrence Exh.PH. Ahmad Yar complainant (P.W.5) has admitted during his cross-examination that houses of accused persons are at a distance of about 35 karams (about 193 feet) from 'killa' No.15. Similarly the Investigating Officer Shoukat Ali SI (P.W.8) has admitted during his cross-examination that houses of the accused persons were nearer to 'killa' No. 15 and the houses of the complainant were far away from said 'killa' (killa No. 15). The above mentioned evidence has established that the occurrence took place near the houses of the appellants. This is suggestive of the fact that it was the complainant party who was aggrieved due to the abuses given by Ali Sher (appellant) to Shahid Iqbal (deceased) and in fact the motive was with the complainant to launch an attack on the accused persons. Thus, the prosecution in this case, failed to prove any motive against the appellants.

17. In the light of above discussion, we have come to this conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt.

18. Now coming to the defence plea taken by the appellants and evidence produced by them in their defence, we have noted that Muhammad Afzal (appellant) took the following plea in his statement on oath recorded under section 340(2), Cr.P.C. which was also relied upon by the other appellants in their statements recorded under section 342, Cr.P.C. The examination-in-chief of Muhammad Afzal appellant reads as under:--

'Stated that on 5-7-2005 at about 3-00 p.m. I along with Muhammad Yousaf, Noor Muhammad, Muhammad Ashraf and Saee Muhammad were sitting in front of our house on the cots under the shadow of kikar trees, We were talking with each other about the motorcycle. Shahid Iqbal deceased armed with hatchet, Muhammad Hanif armed with hatchet, Dost Muhammad armed with hatchet, Murad armed with hatchet, Afzal armed with carbeen/pistol, Muhammad Ashraf armed with gun .12 bore, Muhammad Yaqoob armed with dang, Ahmad Yar armed with dang, Allah Ditto armed with dang came there. Ashraf and Afzal started firing. They raised lalkara that they would teach lesson for beating to Shahid Iqbal. Shahid Iqbal gave a hatchet blow on my head. Muhammad Hanif gave hatchet blow which hit on my right side of the face near the ear. Allah Ditta gave dang blow on my right arm. Shahid Iqbal gave

hatchet blow on the head of Yousaf. Dost Muhammad gave hatchet blow on left side of the head of Muhammad Yousaf. Muhammad Murad gave hatchet blow on the left arm of Muhammad Yousaf Muhammad Yaqoob gave dang blow on the back of Muhammad Yousaf. We also picked up sotas and clangs and gave dangs and sotas blow on the person of Shahid Iqbal deceased in exercise of our self-defence. The occurrence was witnessed by Noor Muhammad, Ashraf and Saee Muhammad. If we did not give sota blows on the person of Shahid deceased, it was apprehension that they would murder us. We became injured and we were taken to hospital. The other respectable persons of the brothery managed compromise between us and Shahid Iqbal, etc. Thereafter Shahid Iqbal, etc. went away from the hospital and he was taken to some private doctor for treatment at canal road Tandlianwala. When we came to know that Shahid Iqbal had expired due to reaction of drip, we reached hospital. We got ourselves medically examined. On 9-7-2002 then said 10-7-2002 I and Yousaf were medically examined. We took the MLCs to the police station and produced the same before the I.O. but police had been making excuses and did not record our statements. The motive behind the occurrence that on 5-7-2005 at about 11-00 a.m. I along with Muhammad Yousaf, Jafar, Ali Sher and Ozair were sitting in front of our door. Shahid Iqbal along with Waris passed through the Waris had stolen motorcycle of Safdar. Regarding the theft of motorcycle and punchait was held about 3/4 days prior to the occurrence and motorcycle was returned through punchait including Abdul Haq Khatchi and Sulla son of Salabat. At that very relevant time, Yousaf said to Shahid Iqbal that why he came there along with Waris who was their thief. Due to that reason an altercation took place between Yousaf and Shahid Iqbal. Yousaf, Ali Sher, Oozair and I gave slaps to Shahid Iqbal accused. Due to that grudge Shahid Iqbal, etc. attacked us while we were sitting in front of our house. Police did not register the case on asking of Rab Nawaz MPA who was reative of the complainant party, therefore, my father filed complaint against Yaqoob, etc. regarding the above said occurrence.'

19. While putting the prosecution case and defence version of the appellants in juxta position, the defence version of the appellants appears to be more probable. Muhammad Afzal (appellant) has stated that infact on the day of occurrence the complainant party along with Shahid Iqbal (deceased) launched an attack and inflicted different injuries on his person, as well as, on the person of Muhammad Yousaf (appellant), with the help of hatchets and 'dang'. It was specifically alleged

that Shahid Iqbal (deceased) inflicted a hatchet blow, which landed on the head of Muhammad Yousaf (appellant). He (Shahid Iqbal deceased) also inflicted a hatchet blow, which hit on the head of Muhammad Afzal (appellant). Dost Muhammad inflicted a hatchet blow to Muhammad Yousaf (appellant) which landed on the left side of his head. Murad, inflicted hatchet blow to Muhammad Yousaf (appellant) which landed on his left arm. Muhammad Hanif inflicted hatchet blow to Muhammad Afzal (appellant) which landed on the right side of his face. Muhammad Yaqoob inflicted 'dang' blow to Muhammad Yousaf (appellant) which hit on his back. Muhammad Afzal (appellant) further stated that apprehending serious threat to their lives, he and Muhammad Yousaf (appellant) picked up 'sotas' and 'dangs' and inflicted some injuries to Shahid Iqbal (deceased) in the right of their private defence and had they not inflicted the said injuries to Shahid Iqbal (deceased), then Shahid Iqbal (deceased) and his companions might have murdered them. The plea taken by the appellants gets support from the evidence of prosecution's own witness namely Doctor Abdul Sattar Randhawa (P.W.4) who has noted three injuries including two incised wounds on the head and right cheek of Muhammad Afzal (appellant) and four injuries including two incised wounds on the head of Muhammad Yousaf (appellant). According to the above mentioned prosecution witnesses the bone of the head of Muhammad Yousaf appellant was exposed. The defence version further gets support from the Medico-legal Report of Muhammad Afzal (appellant) Exh.DB his pictorial diagram Exh.DB/1 and medico-legal report of Muhammad Yousaf (appellant) Exh.DC and his pictorial diagram Exh.DC/1. We have also noted that the prosecution eye-witnesses suppressed the above mentioned injuries on the person of Muhammad Afzal (appellant) and Muhammad Yousaf (appellant), whereas, the appellants have come forward with the true narration of facts and they did not conceal the injuries on the person of Shahid Iqbal (deceased). We have already disbelieved the motive as alleged by the prosecution due to the reasons mentioned in paragraph No.18 of this judgment, rather we have already held in the said paragraph that it was the complainant party and Shahid Iqbal (deceased) who were aggrieved of the abuses given by Ali Sher (appellant) to Shahid Iqbal (deceased). As the complainant party had the grudge due to the abuses given by Ali Sher (appellant) to Shahid Iqbal (deceased) and as we have also noted in the above mentioned paragraph (paragraph No.18 of this judgment) that the occurrence took place near the houses of the accused party (appellants), therefore, the defence version put forth by Muhammad Afzal

appellant in his statement recorded under section 340(2), Cr.P.C. and by the remaining appellants in their statements recorded under section 342, Cr.P.C. appears to be more probable, according to which it was the complainant party who launched an attack on the accused party. Even otherwise we have already discarded the prosecution evidence, therefore, while scrutinizing the statements of the appellants this Court has to accept or reject the said statements in toto. According to the appellants, Shahid Iqbal (deceased) along with other members of the complainant party while armed with hatchets and 'dang' launched an attack on the accused party. Shahid Iqbal (deceased) and other members of the complainant party inflicted injuries with the help of hatchets on the vital parts of Muhammad Afzal and Muhammad Yousaf (appellants) by exposing the bone of the head of Muhammad Yousaf appellant, thus in such situation, the said appellants had the right of private defence of their bodies which also extends to cause death of the assailant as provided under section 100 of P.P.C. which is reproduced hereunder:--

'100. When the right of private defence of the body extends to causing death.--- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

Firstly. Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. .....;

Fourthly. .....;

Fifthly. .....;

Sixthly. .....;

It is evident from the perusal of section 100 (secondly) P.P.C. that the right of private defence of the body will extend to the voluntary causing the death of the assailant, if the assailant launches an assault which may reasonably cause the apprehension that grievous hurt will be the consequence of such assault, whereas, in the instant case Shahid Iqbal (deceased) and other members of the complainant party

had actually inflicted injuries with hatchets on the vital parts of the bodies of Muhammad Afzal (appellant) and Muhammad Yousaf (appellant) including the exposure of the head bone of Muhammad Yousaf (appellant). The case of the appellants, therefore, squarely falls within the four corners of general exception as provided under section 100 (secondly) P.P.C.

20. Although it has been argued on behalf of the prosecution that the appellants have themselves admitted in their, statements recorded under section 340(2) and 342, Cr.P.C. that some of the appellants, committed the murder of Shahid Iqbal (deceased) but this argument has no force because it is by now well settled law that if the prosecution evidence is disbelieved by the court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statements of accused persons and to reject the exculpatory part of the same, statements. Reference on this context may be made to the case of 'Muhammad Asghar v. The State' (PLD 2008 SC 513). The relevant paragraph of said judgment at page 520 is reproduced hereunder for ready reference:--

"It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of 'Shabbir Ahmad v. The State' PLD 1995 SC 343 and 'The State v. Muhammad Hanif and 5 others' 1992 SCMR 2047. It has been held by this Court in the judgment reported as 'Waqar Ahmad v. Shaukat Ali and others' 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused, and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

21. It is true that Muhammad Afzal (appellant) has admitted in his statement recorded under section 340(2), Cr.P.C. which was relied upon by the other appellants that he (Muhammad Afzal appellant) and Muhammad Yousaf (appellant) inflicted

'sota' blows on the head of Shahid Iqbal (deceased) but at the same time he has also stated that he and Muhammad Yousaf (appellant) after receiving serious injuries on the vital parts of their bodies, exercise their right of private defence of body. As mentioned earlier that they further claimed that had they not inflicted injuries to Shahid Iqbal (deceased) then they (Muhammad Afzal appellant and Muhammad Yousaf appellant) might have been murdered at the hands of Shahid Iqbal (deceased) and other members of the complainant party. In view of the above, as we have already discarded the prosecution evidence, the appellants cannot be awarded punishment on the basis of their statements recorded under sections 340(2) and 342, Cr.P.C. by accepting the inculpotary part of said statements wherein they have stated that Shahid Iqbal (deceased) had received 'sota' blows on their hands and by rejecting exculpatory part of the same statements wherein they have stated that they inflicted injuries on the person of Shahid Iqbal (deceased) in the right of their private defence of body. We are fortified in our above mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the case of 'Sultan Khan v. Sher Khan and others' (PLD 1991 SC 520) and 'Ghulam Qadir v. Esab Khan' (1991 SCMR 61).

22. In the light of above discussion, we accept the Criminal Appeal No.419 of 2008 filed by, Yousaf, Ali Sher, Afzal, Riaz, Ozair and Safdar appellants, set aside the impugned judgment dated 15-4-2008 passed by learned Additional Sessions Judge, Tandlianwala, District Faisalabad. Resultantly the convictions and sentences of the appellants are also set aside and they are acquitted from the charges. Ali Sher, Riaz and Ozair are in custody, they be released forthwith if not required in any other case, whereas Muhammad Yousaf, Muhammad Afzal and Safdar (appellants) are present in court, on bail, their sureties stand discharged. As mentioned earlier Jafar appellant has already died, hence relying upon the report submitted by Superintendent, Central Jail, Faisalabad and his death certificate, this murder reference to the extent of Jafar appellant stands abated.

23. Murder Reference No. 121 of 2008 is, therefore, answered in the NEGATIVE and the sentences of death of Ali Sher, Riaz/Jafar and Ozair (convicts) are NOT CONFIRMED.

HBT/J-2/L **Appeal accepted.**

2013 P Cr. L J 1813

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

SALEEM MASIH and another---Appellants

Versus

The STATE---Respondents

Criminal Appeal No.272 of 2008 and Murder Reference No.48 of 2008, heard on 7th February, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Direct evidence being absent in the case, prosecution case hinged on circumstantial evidence---Relations between prosecution witness, who was paternal uncle of the deceased, and accused, were not cordial---Prosecution witness being chance witness, it was not safe to rely upon his evidence---Statement of other prosecution witness was also on the same lines---Conduct of other two prosecution witnesses, was unnatural and material contradictions and improvements were noticed in their statements---Evidence of last seen and wajtakkar furnished by said two prosecution witnesses was not worth reliance---Alleged confession was jointly made by accused persons---Role of accused persons during the occurrence, the manner in which occurrence took place, the kind of weapon used by accused persons, or the reason for committing the murder of the deceased, was not mentioned in said extra-judicial confession---Evidence of extra judicial confession was a weak type of evidence and extra-judicial confession furnished by prosecution witnesses, was not trustworthy---Motive as alleged by prosecution had not been proved in the case---Blood-stained 'churri' was deposited in the office of Chemical Examiner after lapse of more than one month from the occurrence; it was, in circumstances, unlikely that the blood on the churri would not disintegrate during said period---Alleged recovery of churri from accused was not believable, in circumstances---Accused was arrested after 15 days from the occurrence; it did not appeal to the mind of a prudent person that accused would keep the blood-stained weapon intact for such a long period, because he had ample opportunity during that period to wash away the blood-stains from that weapon---No specific identification mark was found on blood-stained shirt of accused to hold that shirt was that of accused---Positive reports of Chemical

Examiner and that of Serologist about presence of human blood on shirt, therefore, were not worthy of reliance---Occurrence was unseen---Prosecution, in circumstances, had failed to prove its case against accused beyond shadow of doubt---Conviction and sentence awarded to accused, were set aside, and they were acquitted extending them benefit of doubt and they were released from the custody, in circumstances.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Tahir Javed v. The State 2009 SCMR 166; Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 and Basharat and another v. The State 1995 SCMR 1735 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Absence of direct evidence where prosecution case hinged on circumstantial evidence---Every circumstance should be linked with each other and it should form such a continuous chain that its one end touched the dead body, and other neck of accused---If chain link was missing, then its benefit must go to accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Asadullah and another v. The State 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(c) Criminal trial---

----Medical evidence---Nature---Medical evidence, was a type of supporting evidence, which could confirm the ocular account with regard to receipt of injury, nature of injury, kind of weapon used in the occurrence, but it would not identify the assailant.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410 rel.

Naseeb Anjum and Mrs. Bushra Qamar for Appellants.

Ch. Arshad Mahmood, Deputy Prosecutor-General for the State.

Waseem Akhtar Choudhary for the Complainant.

Date of hearing: 7th February, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Saleem Masih and Asif Masih alias Sahib alias Sahibi appellants were tried in case F.I.R. No.397/04 dated 25-6-2004, registered at Police Station, Satto Katla, District Lahore in respect of offences under section 302/34 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 13-3-2008 has convicted and sentenced both the appellants under section 302(b)/34 of P.P.C. for committing the murder of Falak Sher alias Fakri Masih to death with a direction to pay the compensation amount of Rs.50,000 (Rupees Fifty Thousand only) each to the legal heirs of deceased. In case of default in payment of compensation, they were directed to further undergo six months' S.I.

2. Feeling aggrieved, the appellants have challenged their convictions and sentences through Criminal Appeal No.272 of 2008, whereas, the learned trial Court has transmitted Murder Reference No.48 of 2008 for confirmation or otherwise of the death sentences of Saleem Masih and Asif Masih alias Sahib alias Sahbi (convicts). We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 13-3-2008 passed by the learned Additional Sessions Judge, Lahore.

3. Brief facts of the case are that initially the matter was reported to the police by Saleem Masih appellant through his Fard Biyan Exh.PD on the basis of which formal F.I.R. (Exh.PD/2) was chalked out. He stated in his Fard Biyan that his 'Saala' (brother-in-law) namely Falak Sher Masih alias Fakri aged about 20/25 years was a labourer by profession. His father was mentally abnormal. They were living in the same house. On the day of occurrence (25-6-2004) at about 1-00/2-00 p.m., he (Saleem Masih) gave Rs. 700 to Falak Sher Masih alias Fakri (deceased) and sent him for payment of the electricity bill in the bank situated at 'Ghazi Chowk'. At about 3-30 p.m., his maternal uncle namely Munawar Masih informed him that he had seen the dead body of Falak Sher Masih alias Fakri, smeared with blood, lying near water tank of Punjab Housing Society, of villas, Satto Katla. Saleem Masih (appellant) along with his maternal uncle Munawar Masih and brother Nazeer Masih went to the spot and found the dead body of Falak Sher Masih alias Fakri lying there and his throat was cut with some sharp edged weapon. He further stated that the deceased was murdered by some unknown persons.

On the same day, Moru Masih (P.W.4), moved application Exh.PD/I to the Incharge Investigation Cell of Police Station Satto Katla, Lahore that on that day, i.e. 25-6-2004 at about 9-00/10-00 a.m., he came to the house of his brother Surjan Masih

situated at Yuhana Colony Green Town, Lahore in order to see him as he was sick. At about 11-00 a.m., in his presence, Saleem Masih, son-in-law of Surjan Masih and Asif Masih alias Sahibi (appellants) took Ashraf alias Falak Sher Masih alias Fakri (deceased) along with them on the pretext of payment of electricity bill. Thereafter, he (Moru Masih P.W.4) went back to his house situated at Mauza Kamas. He, on receiving the information that Ashraf alias Falak Sher Masih alias Fakri had been murdered by some unknown person by cutting his throat, returned to Lahore where Soba Masih (P.W.5) and Anwar Masih (P.W.6) informed him that on that day (25-6-2004) at about 1.45 p.m, they saw Saleem Masih (appellant), Sahib Masih (appellant) and Ashraf alias Falak Sher Masih alias Fakri (deceased), while sitting at 'Rohi Nala' of Satto Katla, opposite to the Punjab Housing Society, Phase-II and after some time at about 2.00 p.m., they again saw Saleem Masih and Sahibi Masih (appellants) while running from 'Rohi Nala' towards Qasim Bridge, WAPDA Town and clothes of Sahibi Masih (appellant) were stained with blood. Moru Masih (P.W.4) alleged that Saleem Masih and Sahibi Masih, with consultation of each other had murdered Ashraf alias Falak Sher Masih alias Fakri.

4. According to Moru Masih, the motive behind the occurrence was that Saleem Masih had developed illicit relations with his niece and Falak Sher Masih alias Fakri (deceased) used to admonish him and due to this grudge the accused persons committed the murder of the deceased.

5. The appellants Saleem Masih and Asif Masih alias Sahib Masih alias Sahibi were arrested on 9-7-2004. On 12-7-2004, Saleem Masih appellant led to the recovery of Chhuri P-6 from 'Rohi Nala' opposite to village Satto Katla, Lahore, which was taken into possession vide recovery memo Exh.PN. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants on 9-3-2005 to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced 15 witnesses during the trial. Moru Masih complainant (P.W.4) is the witness of last-seen evidence, Soba Masih (P.W.5), Anwar Masih (P.W.6) are the witnesses of last seen and 'Wajtakkar' evidence. Jeeta Masih (P.W.10) and Mukhtar Masih (P.W.11) are the witnesses of extra-judicial confession of the appellants.

The medical evidence was furnished by Dr. Aman Ullah Khan (P.W.3). Muhammad Anwar (P.W.9) is the recovery witness of Chhuri (P-6), which was taken into possession on the pointation of Saleem Masih appellant vide recovery memo Exh.PN. The investigation of the case was conducted by Haider S.I (P.W.14).

Muhammad Ashraf, Constable (P.W.1), Syed Younas Ali Bokhari, Draftsman (P.W.2), Ghuman Khan, HC-2300 (P.W.7), Mushtaq Masih (P.W.8), Maqsood Ahmad (P.W.12), Noor Ali, S.I (P.W.13) and Abdul Rauf Inspector (P.W.15) are the formal witnesses. The prosecution also produced documentary evidence in the shape of memo of possession of blood-stained clothes of deceased Exh.PA, scaled site plan in duplicate of the place of recovery of dead body Exh. PB and Exh. PB/1, post mortem report Exh. PC, pictorial diagrams Exh.PC/1 and Exh.PC/2, acknowledgement of receiving of dead body Exh. PC/3, 'Fard Biyan' of Saleem Masih Exh.PD, application of Moru Masih to Investigating Officer Exh.PD/1, copy of F.I.R. Exh.PD/2, memo of possession of shirt of accused Exh.PE, inquest report Exh.PF, memo of possession of blood-stained earth Exh.PG, application for issuance of docket for post mortem examination of the deceased Exh.PH, application for conducting post-mortem examination of the deceased Exh. PJ, injury form Exh.PK, copy of site plan without scale Exh.PL, memo of possession of shoes of the deceased Exh.PM, memo of possession of 'chhuri' Exh.PN, site plan of the place of recovery of 'chhuri' Exh.PN/1, report of Chemical Examiner about earth Exh.PQ, report of Serologist about earth Exh.PQ/1, report of Chemical Examiner about 'chhuri' Exh.PR, report of Serologist about 'chhuri' Exh.PR/1, report of Chemical Examiner about shirt of accused Exh.PS, report of Serologist about shirt of accused Exh. PS/I and closed its evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to question ' Why this case against you and why the P.Ws. have deposed against you", the appellants replied as under:--

Saleem Masih

"Mst. Parveen, sister of the deceased was enticed away by me and later on with the intervention of the Family members/Panchait Mst. Parveen contracted marriage with me in the presence of her family members. Due to this reason her family members were not happy with me and they were looking for chance to get rid of me.

On the fateful day i.e. 25-6-2004 they got chance to satisfy their echo, they planned and booked my and my friend in this case."

Asif Masih

"I have been implicated in this case due to friend of Saleem Masih, otherwise, I have nothing to do with the commission of offence. The I.O. i.e. P.W.13 has admitted in his statement that I have not inflicted any injury at the person of the deceased."

Neither the appellants opted to make statements under section 340(2) of Cr.P.C. nor produced any evidence in their defence. The learned trial Court vide its judgment dated 13-3-2008, convicted the appellants under section 302(b)/34, P.P.C. and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants in support of this appeal, contends that the appellants have falsely been implicated in this case because Saleem Masih (appellant) contracted marriage with the niece of Moru Masih (P.W.4), namely Mst. Parveen Bibi against the wishes of her family; that initially this case was got registered by Saleem Masih appellant as it was an unwitnessed occurrence but subsequently he has falsely been implicated in this case by Moru Masih (P.W.4) in connivance with the police; that there is no direct evidence against the appellants and the circumstantial evidence produced by the prosecution is not worthy of reliance; that the evidence of Soba Masih (P.W.5) and Anwar Masih (P.W.6) who have stated that they saw the appellants in the company of the deceased at the place of occurrence is highly unreliable; that the alleged extra-judicial confession of the appellants also carries no value in the eye of law, as the same has been alleged to be jointly made by the appellants; that alleged recovery of 'chhuri' and reports of Chemical Examiner and Serologist also carries no value due to delayed deposit of 'chhuri' in the office of Chemical Examiner because recovery of 'chhuri' was allegedly effected on 12-7-2004 and it was sent to the office of Chemical Examiner on 27-7-2004, i.e., after the lapse of more than one month from the date of occurrence which took place on 25-6-2004 and there is no explanation of said delay; that alleged recovery of shirt of Saleem Masih appellant is also not helpful to the prosecution because shirt of the deceased was mentioned to have been washed in the recovery memo, therefore, positive reports of Chemical Examiner and that of Serologist about presence of human blood on the shirt P-5 are not reliable; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt. Thus, this appeal be accepted and the appellants may be acquitted from the charge.

8. Conversely, the learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant, opposes this appeal on the grounds that the witnesses have no enmity with the appellants to falsely implicate them in this case; that initially it was Saleem Masih appellant who got registered the case against unknown persons but after that when the real facts were brought into the notice of Moru Masih (P.W.4), he reported the real facts to the police and the police got recorded his statement on the day of occurrence; that the prosecution witnesses of last seen evidence have no enmity to falsely depose against the appellants and they have categorically stated that they saw the appellants in the company of the deceased at the place of occurrence and after some time they again saw the appellants while running from the place of occurrence towards WAPDA Town; that it is in the statement of Moru Masih (P.W.4) that on the day of occurrence the deceased was taken by the appellants along with them on the pretext to deposit the electricity bill; that case of the prosecution is fully corroborated by the extra-judicial confession of the appellants; that the recovery of 'chhuri' was effected from Saleem Masih appellant which further corroborates the prosecution case; that reports of Serologist and that of Chemical Examiner about presence of human blood on chhuri P-5 and shirt P-6 are also positive which have fully proved the prosecution case against the appellants; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellants and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other neck of the accused. But if chain link is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as 'Ch. Barkat Ali v. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan v. The State' (1996 SCMR 188) and 'Asadullah and another v. The State' (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:--

'...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj v. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of Sarfraz Khan (supra), the august Court of Pakistan, at page 192, held as under:-

7....It is well-settled that circumstantial evidence should be inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:--

'7....Needless to emphasise that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

11. The prosecution case is based on the following pieces of evidence:--

(i) Evidence of last seen.

(ii) 'Wajtakkar' evidence.

(iii) Extra-judicial confession of the appellants.

(iv) Motive.

(v) Recovery of 'churri' and shirt of accused (Saleem appellant) from the place of occurrence.

(vi) Medical evidence.

12. The occurrence in this case took place on 25-6-2004 at 2-45 p.m., whereas, the matter was reported to the police on the same day at 3-45 p.m. and the F.I.R. was also lodged on the same day at 4-15 p.m. on the basis of 'Fard Biyan' of Saleem Masih

(appellant). However, Moru Masih (P.W.4) on the same day i.e. 25-6-2004, moved an application to the Incharge Investigation Cell of Police Station Satto Katla through which he implicated the appellants in this case on the ground that the deceased Falak Sher alias Fakri was lastly seen in the company of the appellants by him (Moru Masih P.W.4), as well as, by Soba Masih (P.W.5) and Anwar Masih (P.W.6). It was further alleged that on the day of occurrence Soba Masih (P.W.5) and Anwar Masih (P.W.6), also saw the appellants when they were running away from the spot, after the occurrence, while the shirt of Asif Masih alias Sahibi appellant was stained with blood. Moru Masih (P.W.4) is paternal uncle of Falak Sher alias Fakri deceased, whereas, Saleem Masih (appellant) is brother in law of the deceased. According to the evidence of Moru Masih (P.W.4) on 25-6-2004 at about 10-00 a.m. he went to the house of his real brother Surajan Masih as he was sick. The said house was situated in 'katchi abadi' Yohana Colony, Green Town, Lahore. He further stated that Saleem Masih and Asif Masih alias Sahibi (appellants) took his nephew Fakri Masih (deceased) along with them for payment of electricity bill at about 11-00 a.m. He (Moru Masih P.W.4) thereafter, returned to his town, Kamas. He was later on telephonically informed by Sooba Masih (P.W.5) and Anwar Masih (P.W.6) that his nephew Fakri Masih had been murdered by the appellants.

It has come on the record that Saleem Masih (appellant) contracted marriage with Mst. Parveen who is niece of Moru Masih (P.W.4) and the said marriage was contracted according to their own wishes and this fact was admitted by Anwar Masih (P.W.6) who is brother-in-law of the father of the deceased and of Moru Masih (P.W.4). Anwar Masih (P.W.6) has further admitted during his cross-examination that after convening a 'punchait' it was agreed between the parties that Mst. Parveen be given in the marriage of Saleem Masih (appellant). So it is evident that relationship between Morn Masih (P.W.4) who is paternal uncle of the deceased and Saleem Masih (appellant) was not cordial. We have also noted that Moru Masih (P.W.4) is resident of village Kamas. He stated that he had lastly seen the deceased in the company of the appellants in the house of his brother Surjan Masih situated at Youhana Colony Greeen Town, Lahore. He has further stated during his cross-examination that his village is situated at a distance of 25 miles from the house of Surjan Masih. He is, therefore, a chance witness. He has stated that he came to the house of his brother Surjan Masih as he was sick but neither any medical prescription was produced by him nor any one out of the children or wife of his brother Surjan

Masih appeared in the witness box to corroborate the evidence of this witness, therefore, it is not safe to rely upon the evidence furnished by Moru Masih (P.W.4).

13. The prosecution has also produced evidence that the deceased was lastly seen in the company of the appellants through Soba Masih (P.W.5) and Anwar Masih (P.W.6). The said witnesses have also given the evidence of 'Wajtakar' Soba Masih (P.W.5) has stated that on 25-6-2004 at about 11-00 p.m. he along with Anwar Masih (P.W.6) saw the appellants in the company of Falak Sher alias Fakri deceased near 'Rohi Nala'. They, thereafter went to the Police Station Satto Katla and when they returned from the police station at about 2-00/2-30 p.m. they saw the appellants running near 'Rohi Nala'. He also stated that the shirt of Asif Masih alias Sahibi (appellant) was stained with blood whereas the shirt of Saleem Masih (appellant) present near 'Rohi Nala' which was also stained with blood. He further stated that when he reached back at his house he came to know that Falak Sher alias Fakri had been murdered. The statement of Anwar Masih (P.W.6) is also on the same lines. The conduct of Soba Masih (P.W.5) and Anwar Masih (P.W.6) is un-natural. Anwar Masih (P.W.6) has admitted during his cross-examination that he is brother-in-law (behnoi) of the father of the deceased. The above mentioned witnesses claimed that they had seen the deceased in the company of the appellants on the day of occurrence and after some time they had again seen the appellants while running and their shirts were blood-stained but they did not bother to go to the spot in order to inquire about the deceased who was close relative of Anwar Masih (P.W.6), rather they went back to their respective houses, where they were informed about the murder of Falak Sher alias Fakri. Soba Masih (P.W.5) has stated during his cross-examination that on the day of occurrence Anwar Masih had come to his house at 2-00/2-30 p.m. and when they reached their houses they came to know that Falak Sher alias Fakri had been murdered. It is evident from the perusal of the statement of Soba Masih (P.W.5) that the fact about the murder of Falak Sher alias Fakri came to the knowledge of this witness and Anwar Masih (P.W.6) at 2-00/2-30 p.m. on the day of occurrence but even then they did not report the matter to the police rather the incident about the murder of deceased was reported to the police by Saleem Masih (appellant) on the day of occurrence at 3-45 p.m. and the formal F.I.R. was registered on the same day at 4-15 p.m. Soba Masih (P.W.5) and Anwar Masih (P.W.6) have not given any plausible explanation as to why they did not immediately inform the police regarding the incident. We have also noted material contradictions and improvements in the statements of Soba Masih (P.W.5) and Anwar Masih (P.W.6). Soba Masih (P.W.5)

has stated that on the day of occurrence when he saw the appellants while running near 'Rohi Nala', the shirt of Asif Masih alias Sahbi was stained with blood whereas Anwar Masih (P.W.6) has not stated that the shirt of Anwar Masih alias Sahbi was stained with blood at that time. Soba Masih (P.W.5) also stated that the shirt of Saleem Masih appellant was present near 'Rohi Nala' which was stained with blood but Anwar Masih (P.W.6) did not state that the shirt of Saleem Masih (appellant) was stained with blood and the same was present near 'Rohi Nala'. The improvement made by Soba Masih (P.W.5) in his statement regarding the presence of shirt of Saleem Masih (appellant) near 'Rohi Nala' was duly brought on the record when he was confronted with his statement before police Exh.DA. We are, therefore, of the view that the evidence of last seen and wajtakkar furnished by Soba Masih (P.W.5) and Anwar Masih (P.W.6) is not worthy of reliance.

14. The prosecution has produced the evidence of extra-judicial confession of the appellants through Jeeta Masih (P.W.10) and Mukhtar Masih (P.W.11). The examination in chief of Jeeta Masih (P.W.10) is reproduced hereunder for ready reference:--

'On 8-7-2004 I was sitting along with my maternal nephew Mukhtar when Sahbi Masih and Saleem Masih came and stated that they have committed mistake that they had killed the deceased and they be pardoned. We replied that we will gather and will consider over it. Then we went to the police and made statements.'

The examination-in-chief of Mukhtar Masih (P.W.11) is also on the same lines. It is evident from the perusal of the statements of Jeeta Masih (P.W.10) and Mukhtar Masih (P.W.11) that the alleged confession of the appellants was jointly made by them. The role of the appellants during the occurrence, the manner in which the occurrence took place, the kind of weapon used by the appellants or the reason for committing the murder of Falak Sher alias Fakri (deceased) was not mentioned in the said extra-judicial confession. Jeeta Masih (P.W.10) has admitted during his cross-examination that he was neither lumberdar nor a councilor of the area and was an ordinary labourer. Similarly Mukhtar Masih (P.W.11) has also admitted during his cross-examination that he was neither lumberdar nor a councillor of the area and he used to cultivate land in the village on 'batai', as well as, on lease. He further stated that he was not owner of any land. He has also admitted that he was paternal nephew of the deceased. Jeeta Masih (P.W.10) and Mukhtar Masih (P.W.11) were not the persons in authority and there was no reason with the appellants to confess their guilt

before the said witnesses. It is by now settled law that the evidence of extra-judicial confession is a weak type of evidence. The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as SAJID MUMTAZ AND OTHERS v. BASHARAT AND OTHERS (2006 SCMR 231), wherein, at page 238, the apex Court of Pakistan has been pleased to lay emphasis as under:--

"17..... This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra-judicial-confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial-confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial-confession, the Court must inquire into all material points and surrounding circumstances to 'satisfy' itself fully that the confession cannot but be true'. As, an extra-judicial-confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial-confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule of prescribed by this Court.

19. It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

20. Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra-judicial confession is made

is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial-confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial-confession have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial-confession. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as TAHIR JAVED v. THE STATE (2009 SCMR 166), wherein, at page 170, the learned august Supreme Court of Pakistan, has been pleased to observe as under:--

"It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683, and (4) Sarfraz Khan v. The State and others (1996 SCMR 188)".

Keeping in view the guidelines given by the Hon'ble Supreme Court of Pakistan in the above judgments we are of the considered view that the evidence of extra-judicial confession furnished by Jeeta Masih (P.W.10) and Mukhtar Masih (P.W.11) is not trustworthy.

15. The prosecution has also produced the evidence of motive through Moru Masih (P.W.4). He stated that the motive behind the occurrence was that Saleem Masih (appellant) had illicit relations with his (Moru Masih's) niece and Falak Sher alias Fakri Masih (deceased) used to admonish him and due to this grudge Saleem Masih (appellant) with the help of Asif Masih alias Sahbi (appellant) committed the murder of Falak Sher alias Fakri (deceased). Moru Masih (P.W.4) is the sole witness of the prosecution who has deposed regarding the motive. He has not mentioned the name of his niece with whom Saleem Masih (appellant) had illicit relations. He has admitted during his cross-examination that he did not report to the police about illicit relations of his niece with Saleem Masih (appellant). As mentioned earlier he also admitted during his cross-examination that his village is situated at the distance of 25 miles from the house of his brother Surjan Masih (father of Falak Sher Masih alias Fakri deceased). He further stated during his cross-examination that his deceased nephew had seen the accused but he himself did not see the accused in objectionable condition with his niece, thus, his statement is based on hearsay evidence. Neither mother nor any brother or sister of the deceased was produced by the prosecution to substantiate the motive part of the prosecution case. We are, therefore, of the view that the motive as alleged by the prosecution has not been proved in this case.

16. Now coming to the recovery of 'chhuri' (P-6) from the possession of Saleem Masih (appellant) and recovery of blood-stained shirt P-5 of Saleem Masih (appellant) from the place of occurrence. The occurrence in this case took place on 25-6-2004 whereas 'chhuri' (P-6) was allegedly recovered from the possession of Saleem Masih (appellant) on 12-7-2004. As per report of the Chemical Examiner Exh.PR the parcel of 'chhuri' was deposited in the office of Chemical Examiner, for the Punjab, Lahore on 27-7-2004. As such the blood-stained 'chhuri' (P-6) was deposited in the office of Chemical Examiner, Punjab, Lahore after the lapse of more than one month from the occurrence, therefore, it was unlikely that the blood on

'chhuri' P6 would not disintegrate during the above mentioned period. The Hon'ble Supreme Court of Pakistan in the case of 'Muhammad Jamil v. Muhammad Akram and others' (2009 SCMR 120) has held that recovery of blood-stained Chhuri has been effected after about one month from the occurrence, it was not likely that the blood would not disintegrate in the meanwhile, thus, the alleged recovery of Chhuri from the accused was disbelieved.

The appellant Saleem Masih was arrested on 9-7-2004 i.e. after about 15 days from the occurrence, therefore, it does not appeal to the mind of a prudent person that he would keep the blood-stained weapon intact for such a long period because he had ample opportunity during the above-mentioned period to wash away the blood-stains from his weapon. The Hon'ble Supreme Court of Pakistan in the case of Basharat and another v. The State' (1995 SCMR 1735) disbelieved the evidence of blood-stained Chhuri which was allegedly recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:--

"11. The occurrence took place on 20-4-1988 Basharat appellant was arrested on 28-4-1988. The blood-stained Chhuri was allegedly recovered from his house on 30-4-1988. It is not believable that he would have kept blood-stained chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it"

So far as recovery of blood-stained shirt of Saleem Masih (appellant) from the place of occurrence is concerned, we have noted that Saleem Masih (appellant) has denied the recovery of shirt (P-5) in his statement recorded under section 342, Cr.P.C. The prosecution has not produced any tailor who had sewed the shirt (P-5) to prove that shirt (P-5) belonged to Saleem Masih (appellant). Recovery memo of Shirt P-5 Exh.PE was attested by Soba Masih (P.W.5) and Anwar Masih (P.W.6) but it is not mentioned in the said document that Shirt P-5 was of Saleem Masih and it was simply mentioned as (shirt of accused), meaning thereby that the said witnesses did not allege at that time that shirt P-5 belonged to Saleem Masih appellant and they later on tried to use the said piece of evidence against him. No specific identification mark on the said shirt has been pointed out by any P.W. to hold that the said shirt, was of Saleem Masih appellant. It was mentioned in the recovery memo of shirt (P-5) Exh. PE, as well as, in the site plan Exh.PB that shirt P-5 was already washed. We are, therefore, of the view that despite mentioning of the fact regarding the washing of shirt (P-5) in

recovery memo Exh. PE and site plan Exh.PB the positive reports of the Chemical Examiner Exh. PS and that of Serologist Exh.PS/1 about presence of human blood on shirt P-5 are not worthy of reliance.

l7. Insofar as the medical evidence furnished by the prosecution is concerned, it is by now well-settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53). 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410). As the occurrence in the instant case is unseen and no detail regarding the manner in which the occurrence was committed was mentioned by the witnesses of extra judicial confession, therefore, there is no need to discuss the medical evidence of the prosecution.

18. After considering all the pros and cons of this case, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept Criminal Appeal No.272 of 2008 filed by Saleem Masih and Asif Masih alias Sahib alias Sahibi appellants, set aside their convictions and sentences and acquit them of the charges by extending them the benefit of doubt. They are in custody, they be released forthwith if not required in any other case.

19. Murder Reference No.48 of 2008 is answered in the NEGATIVE and the sentence of death of Saleem Masih and Asif Masih alias Sahib alias Sahibi (convicts) is NOT CONFIRMED.

HBT/S-29/L **Appeal accepted.**

2013 Y L R 76

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

SHAUKAT ALI---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.1432 and Murder Reference No.574 of 2005, heard on 17th January, 2012.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 324---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Four co-accused had been acquitted by Trial Court and their acquittal had not been assailed either by the State or by the complainant before High Court, which had attained finality---Question for determination was, whether the evidence which had been disbelieved qua the acquitted co-accused could be believed against the accused---Counsel for complainant and the State had distinguished the case of accused from his co-accused on the basis of motive, recovery of weapon of offence and medical evidence, which according to them had independently corroborated the prosecution version against the accused---Motive had been attributed not only to the accused, but also to the acquitted co-accused---Hatchet recovered at the instance of accused was found blood-stained by the Chemical Examiner, but there was no report of Serologist regarding origin of the blood-One injury on the person of the deceased and one injury on the person of the injured witness, had been attributed to the accused and to each of the three acquitted co-accused, thus, there was no independent corroboration qua the role assigned to the accused---Role attributed to accused in the occurrence was identical to that of acquitted co-accused and his case was not distinguishable from their case---Accused was acquitted in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185; Sarfraz alias Sappi and 2 others v. The State 2000 SCMR 1758; Syed Ali Bepari v. Nibaran Mollah and others PLD 1962 SC 502; Tawaib Khan and another v. The State PLD 1970 SC 13; Bakka v. The State 1977 SCMR 150; Khairu and another v. The State 1981 SCMR 1136; Zaiaullah v. The State 1993 SCMR 155; Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11; Shahid Raza and another v. The State 1992 SCMR 1647; Irshad Ahmad

and others v. The State and others PLD 1996 SC 138; Ahmad Khan v. The State 1990 SCMR 803 and Akhtar Ali and others v. The State 2008 SCMR 6 ref.

(b) Criminal trial---

----Appreciation of evidence---Principles.

Rai Tanveer Arshad Khan and Muhammad Qaiser Amin Rana for Appellants.

Ch. Muhammad Mustafa, D.P.G. for the State.

Muhammad Iftikhar Ullah Dhillon for the Complainant.

Date of hearing: 17th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Shaukat Ali, the appellant, along with his co-accused namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazeer Khan, and Akram Khan, was tried by the learned Additional Sessions Judge, Shakargarh, District Narowal, in case F.I.R. No.49, dated 6-3-2004, registered under sections 302, 324 of P.P.C., at Police Station, Kot Nainan, for the murder of Ilyas Khan (deceased). The learned trial Court vide judgment dated 23-7-2005, acquitted co-accused Sarfraz alias Sarfi, Bashir Ahmed, Nazeer Khan, and Akram Khan, of the charge framed against them, whereas the appellant was convicted under section 302, P.P.C., for committing Qatl-e-Amd of Ilyas Khan and he was sentenced to death. He was further directed to pay Rs.1,00,000 as compensation to the legal heirs of the deceased under section 544-A of Cr.P.C. The appellant was also convicted under section, 324 of P.P.C., for launching a murderous assault upon Naazer Khan and sentenced to 10 years' R.I with a fine of Rs.30,000 and in default whereof to further undergo one year's S.I.

2. The appellant has filed Criminal Appeal No.1432 of 2005, against his conviction and sentence, whereas, the learned trial Court has sent Murder Reference No.574 of 2005 under section 374 of Cr.P.C., to this Court for confirmation or otherwise of death sentence of the appellant. We propose to dispose of both these matters by this single judgment as both these matters have arisen out of the same judgment.

3. Brief facts of the case as given by the complainant Ismail Khan (P.W.1) in his complaint (Exh.PA) are that, on 6-3-2004, at 2-00 p.m., he alongwith his real brothers namely, Ilyas Khan (deceased) and Naazer Khan (P.W.2) went to the fields for cutting fodder. At about 2-30 p.m., he along with his two above said brothers was coming

back to his village after cutting fodder, and when they reached near defence wall of the rainy drainage, the accused Bashir Ahmed son of Taj Din armed with 'daraat', Shaukat Ali (appellant) armed with hatchet, Sarfraz alias Sarfi son of Bashir armed with 'daraat', Nazeer Khan son of Jan Muhammad armed with hatchet, Akram Khan son of Nazeer armed with hatchet, along with two unknown accused, who were armed with fire arm weapons, who had hidden themselves in the rainy drainage, suddenly launched an attack on them while raising lalkaras. The complainant Ismail Khan (P.W.1) alleged that Shaukat Ali (appellant) inflicted hatchet blow on the left eye of his brother Ilyas Khan (deceased), Bashir Ahmed co-accused (since acquitted) inflicted 'daraat' blow on the upper part of left ear of Ilyas Khan (deceased), Sarfraz alias Sarfi inflicted 'daraat' blow on the forehead of his brother Naazer Khan (P.W.2), Nazeer Khan co-accused (since acquitted) inflicted hatchet blow on the upper part of left ear of Naazer Khan (P.W.2), Akram Khan co-accused (since acquitted) inflicted hatchet blow on the back side of the head of Naazer Khan (P.W.2), Sarfraz alias Sarfi co-accused (since acquitted) inflicted 'daraat' blow on the forehead of Ilyas Khan (deceased), Nazeer Khan co-accused (since acquitted) inflicted hatchet blow on the right side of forehead of Ilyas Khan (deceased), Akram Khan co-accused (since acquitted) inflicted hatchet blow on the left thigh of Ilyas Khan (deceased), Bashir Ahmed inflicted 'daraat' blow on the right side of neck of Naazer Khan (P.W.2) and Shaukat Ali (appellant) inflicted hatchet blow on the left wrist of Naazer Khan (P.W.2). His brothers Ilyas Khan (deceased) and Nazeer Khan (P.W.2) fell on the ground after receiving injuries. The accused kept on inflicting injuries on their persons with their respective weapons. On raising hue and cry by the complainant party, Haji Asghar Khan (P.W.3) and Muhammad Ijaz Khan son of Ilyas Khan, caste Pathan, resident of village Bheeko Chak, who were cutting fodder in the nearby fields were also attracted to the scene of occurrence. In the meanwhile, some persons of the village came towards them on which the accused while resorting to aerial firing fled away from the spot. The complainant and his companions shifted both the injured to Civil Hospital, Shakargarh, where Ilyas Khan succumbed to the injuries.

The motive for the occurrence was that about four year prior to the occurrence, 9-1/2 acres agricultural land was purchased by the complainant party from one Shabbir Ahmed, a relative of the accused and the accused had this grudge against the complainant party.

4. After completion of investigation, the challan was submitted before the Court. The appellant and his co-accused namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazeer Khan, and Akram Khan were charge-sheeted, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 12 P.Ws. and also tendered documentary evidence.

(P.W.7) Dr. Ghulam Safdar, on 6-3-2004, medically examined Naazer Khan (P.W.2), and found the following injuries on his person:--

(1) An incised wound 5 c.m x 1.5 c.m bone exposed on the left side of skull just about the left eye.

(2) An incised wound 5 c.m x 1 c.m. into bone exposed on left side of skull 4 c.m above the left ear.

(3) An incised wound 3 c.m. x half c.m. on the back of skull.

(4) An incised wound 2.5 c.m. x 2.5 c.m into bone exposed on the right side of skull 5 c.m behind the right ear.

(5) An incised wound 2 c.m. x 5 c.m on the right ear bone.

(6) An incised wound 5 c.m x half c.m on the right side of neck.

(7) Surgical emphysema is present on the left chest in its upper part.

(8) An incised wound 3 c.m. x 1.5 c.m into flesh deep on inner side of the left arm just below the elbow joint.

(9) An incised wound 2 c.m. x 5 c.m into muscle deep on the back of left arm at its middle.

(10) An incised wound 3 c.m. x 5 c.m. into bone deep on the back of left thumb.

(11) An incised wound 2 c.m x 5 c.m into muscle deep on top of right thumb.

(12) An incised wound 2 c.m x 5 c.m on the back of right thumb.

(13) An incised wound 5 c.m x 5 c.m on the back of right index finger.

(14) A lacerated wound 1 c.m. x 25 c.m on the front of right leg.

(15) A lacerated wound 1 c.m. x 25 c.m. into skin deep on front of left leg.

On the same day i.e. 6-3-2004, at 8-00 p.m. he conducted the post-mortem examination on the dead body of Ilyas Khan (deceased) vide Post mortem Report

Exh.PH, diagrams Exh.PH/ 1 and Exh.PH/2 and found the following injuries on his person:--

(1) An incised wound 2.5 c.m. x 2.5 c.m. into bone exposed on the frontal part of the skull 7 c.m. above the root of nose.

(2) An incised wound 8 c.m x 1 c.m into bone deep on the right side of the skull 7 c.m. above the right ear.

(3) An incised wound 1 c.m. x 5 c.m. into bone deep on the left side of the skull just above the left eye-brow.

(4) An incised wound 1 c.m. x 1 c.m. on the left side of the skull 5 c.m. behind the injury No.3.

(5) Contused swelling bluish in colour 5 c.m. x 5 c.m. around the left eye.

(6) An abrasion 1 c.m. x 1 c.m. on the outer side of left thigh at its middle.

In his opinion, all the injuries mentioned above were ante-mortem in nature and were caused by sharp-edged weapon. The cause of death in his opinion was due to haemorrhage, shock and brain damage caused by the injuries on the skull, collectively. Probable time that elapsed between injuries and death was within three hours and between death and post mortem was within four hours.

(P.W.11) Muhammad Ashraf Inspector and (P.W.12) Rana Muhammad Saeed S.-I. are the Investigating Officers of this case.

P.W.5 Waris Ali LHC/678, P.W.6 Dilawar Hussain HC/21, P.W.8 Tahir Tasleem Draftsman, P.W.9 Sagheer Ahmed C-17, P.W.10 Farhan Aslam Inspector, are the formal witnesses. P.W.1 Ismail Khan (complainant), P.W.2 Naazer Khan, and P.W.3 Asghar Khan are the witnesses of ocular account. P.W.4 Maqsood Ahmed Khan is the recovery witness of hatchet P.3., from the possession of Shaukat Ali (appellant) which was taken into possession vide recovery memo Exh.P.D.

5. The statement of the appellant under section, 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. In answer to the question, why this case against you and why the P.Ws have deposed against you, the appellant replied as under:-

"It is an unseen occurrence. I and my co-accused had no motive and reasons to commit the offence. Due to party faction, deliberately the complainant and his close

related P.Ws. have roped me and my other co-accused in this case. The case was investigated by the Investigating Authority, Narowal, and the conclusion was that the Investigation Authority exonerated my other four co-accused. Though I was also innocent just to get rid of the headache of the criminal case, they challaned me inadvertently. While I was also innocent like my other four co-accused. The complainant party had enmity of murder with one Muhammad Shakeel son of Muhammad Rafique. The complainant party had other disputes in respect of women of other areas i.e. Karachi and Peshawar, which is admitted by the P.Ws. in cross-examination. For unknown reasons, the complainant party falsely roped me in this case. P.Ws are closely related inter se and they have deposed falsely deliberately. I am innocent".

The appellant had not opted to make statement on oath as envisaged under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him. However, he opted to produce his defence evidence and produced copy of Rapat Roznamcha dated 6-3-2004 of Police Station, Kot Nainan Exh.D.A and closed his defence.

After conclusion of the trial, the learned trial Court, convicted the appellant, as detailed above, whereas, co-accused namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazeer Khan, and Akram Khan were acquitted of the charge framed against them.

6. The learned counsel for the appellant, in support of this appeal, contends that in the F.I.R., there was an allegation against four persons besides the appellant of causing injuries to Ilyas Khan (deceased) and the injured Naazer Khan, and those four persons namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazir Khan and Akram Khan have been acquitted by the learned trial Court and their acquittal has not been assailed either by the State or by the complainant before this Court and the same has attained finality, therefore, on the basis of same evidence, the appellant cannot be convicted unless and until there is strong independent corroboration, which is very much lacking in this case; that the motive is attributed to all the accused nominated in the F.I.R. and recovery of hatchet at the instance of the appellant cannot be considered a corroborative piece of evidence as it is an ordinary hatchet and there is no report of Serologist regarding the blood on the hatchet; that neither the appellant nor the co-accused have been shown in the site plan (Exh.PK), thus, this appeal be accepted and the appellant may be acquitted from the charge.

7. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes this appeal on the grounds that in this case one person namely, Ilyas Khan lost his life, who received six injuries on his person, whereas, the other person namely, Naazer Khan was seriously injured, and he received fifteen injuries; that the appellant was named in the F.I.R., which was promptly lodged with the role of causing injuries to Ilyas Khan (deceased) and the injured as well, and the prosecution witnesses of the ocular account remained consistent and straightforward, and even the motive was also alleged against the appellant as well, and the prosecution has proved its case against him; that the medical evidence has supported the ocular account, because the deceased has received six injuries on his person and the injured Naazar Khan (P.W.2) received 15 injuries and he was medically examined on 6-3-2004 at 3-30 p.m. which is clear from his MLR Exh.PF; that the case of the acquitted accused is distinguishable from the case of the present appellant, as the acquitted accused were declared innocent by the police, whereas, the appellant Shaukat Ali was declared guilty during the course of investigation, therefore, this appeal may be dismissed and Murder Reference may be answered in affirmative.

8. We have heard the arguments of the learned counsel for the parties, and have gone through the evidence available on record.

9. This unfortunate incident, took place on 6-3-2004, at 2-30 p.m., in the fields of Tibba Pakhral, within the jurisdiction of Police Station, Kot Nainan, at a distance of six miles from the spot, wherein one person namely, Ilyas Khan son of Rehamdad Khan lost his life and other Naazer Khan (P.W.2) was seriously injured. The matter was reported to the police at 4-45 p.m., by Ismail Khan (P.W.1), who is real brother of the deceased Ilyas Khan and formal F.I.R. (Exh.PA/ 1) was chalked out at 2-30 p.m. In the F.I.R., it is the case of the complainant that on 6-3-2004, at about 2-00 p.m., he along with his brothers Ilyas Khan and Naazer Khan went to the fields for cutting fodder, and at 2-30 p.m., after cutting fodder, when they were returning to their village and reached near the Defence Band, in the meantime, Bashir Ahmed armed with 'daraat', Shaukat (appellant) armed with hatchet, Sarfi armed with 'daraat', Nazir Khan armed with hatchet and Akram Khan armed with hatchet alongwith two unknown persons duly armed with fire arm weapons launched a murderous attack on them by raising lalakaras. The complainant has also specifically alleged in the F.I.R. that all the accused persons named in the F.I.R. caused injuries to Ilyas Khan

(deceased) and the injured Naazer Khan (P.W.2) as well. Ismail Khan while appearing before the learned trial Court as (P.W.1) qua injuries stated as under:--

"We were coming back to our house after cutting fodder and when we reached near Defence Band, the accused Bashir armed with daraat, Sarfi armed with daraat, Shaukat armed with hatchet, Nazeer Khan armed with hatchet and Akram Khan armed with hatchet who are residents of village Tibba Pakhraal along-with two unknown persons who were armed with fire arms had hidden themselves in a rainy drain. All the accused persons raised lalkaras and thereafter Shaukat accused inflicted hatchet blow on the left-eye of my brother Ilyas Khan (deceased); Bashir inflicted injury with daraat above the left ear of Ilyas Khan (deceased); Sarfi accused inflicted injury with daraat on the forehead of my brother Naazer Khan; Nazeer accused inflicted injury with hatchet above the left ear of Naazer Khan; Akram Khan inflicted hatchet blow on the left temporal region of Naazer Khan on the back side; Sarfi accused inflicted injury with daraat on the forehead of Ilyas Khan (deceased); Naazer Khan accused inflicted injury with hatchet on the right side of forehead of Ilyas Khan (deceased); Akram Khan inflicted injury with hatchet on the left thigh of Ilyas Khan (deceased); Bashir inflicted injury with daraat on the right side of neck of Naazer Khan; Shaukat inflicted injury with hatchet on the left elbow of Naazer Khan; Ilyas Khan and Naazer Khan fell on the ground after receiving the injuries and all the accused persons also tortured both of them when they had fallen on the ground".

Whereas, case of other witness namely, Naazer Khan (P.W.2), who was allegedly injured in this incident, was to the following effect:--

"We were coming back to our house after cutting fodder, when at about 2-30 p.m, we reached near Defence Band, the accused Bashir armed with daraat, Sarfi armed with daraat, Shaukat armed with hatchet, Nazeer armed with hatchet, Akram Khan armed with hatchet, who had hidden themselves in the rainy drain emerged out from the drain and all the accused raised lalkaras. Shaukat Ali accused inflicted hatchet blow on the left-eye of Ilyas Khan (deceased); Bashir Khan inflicted injury with daraat on the upper side of ear of Ilyas Khan; Sarfraz alias Sarfi accused inflicted injury with daraat on the left side of my forehead; Nazeer accused inflicted hatchet blow on the left side of my head; Akram Khan accused inflicted hatchet blow on the back side of my head; Sarfraz alias Sarfi accused inflicted injury with daraat on the forehead of Ilyas Khan (deceased); Nazeer Khan accused inflicted hatchet blow on

the right side of forehead of Ilyas Khan (deceased); Akram Khan inflicted hatchet blow on the right thigh of Ilyas Khan (deceased); thereafter Bashir Khan accused inflicted injury with daraat on the right side of my neck; Shaukat Khan inflicted injury with hatchet on my left arm. I and Ilyas Khan (deceased) fell on the ground and the accused persons also tortured us when we had fallen on the ground".

There is another eye-witness of this occurrence namely, Asghar Khan (P.W.3), who simply stated that all the accused caused injuries to Ilyas Khan (deceased) and injured PW Nazeer Khan.

10. Charge was framed against the appellant Shaukat Ali, and his four co-accused, namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazeer Khan, and Akram Khan, who were named in the F.I.R. However, four co-accused of the appellant namely, Sarfraz alias Sarfi, Bashir Ahmed, Nazir Khan and Akram Khan, who were also assigned specific role of causing injuries on the person of Ilyas Khan (deceased) and injured Nazeer Khan (P.W.2), were acquitted by the learned trial Court while extending them benefit of doubt and no appeal against their acquittal has been preferred either by the State or by the complainant, as confirmed by the learned Deputy Prosecutor-General and the learned counsel for the complainant and as such the said acquittal has attained finality therefore, the question for determination, before us is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellant can be believed against the appellant. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as Iftikhar Hussain and another v. State 2004 SCMR 1185 wherein the Hon'ble Supreme Court at pages 1196 and 1197 held as under:--

"17. ...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior

Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758), relevant para therefrom is reproduced below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Zaiaullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)".

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as Akhtar Ali and others v. The State (2008 SCMR 6).

11. So keeping in view, the principle laid down in the above referred judgments, we asked the learned counsel for the complainant and learned DPG to point out any independent corroboration qua the involvement of the appellant.

The learned D.P.-G. assisted by the learned counsel for the complainant has referred the motive part of the prosecution story with the assertion that it was attributed to the appellant. We have gone through the contents of the F.I.R., and the

statement of the witness made before the Court. The motive alleged in the F.I.R. and stated before the learned trial Court was to the following effect:--

"The motive for occurrence is that about four years before, 9 1/2 acres agricultural land was purchased from Shabbir Ahmed, a relative of accused persons and the accused had grudge for the same".

It clearly shows that motive was attributed not only to the appellant but also to the acquitted co-accused.

12. The learned D.P.-G. and learned counsel for the complainant has referred to the recovery of hatchet at the instance of the appellant, which was taken into possession vide recover memo (Exh.PD), whereas, as per reports of the Chemical Examiner (Exh.PO), it contains blood, but unfortunately, there is no report of Serolo-gist regarding origin of the blood, and in these circumstances, it cannot be considered as corroborative piece of evidence.

13. As far as medical evidence is concerned, it is very much clear that there are six injuries on the person of Ilyas Khan (deceased). Dr. Ghulam Safdar (P.W.7) has stated in his opinion that the death occurred due to haemorrhage, shock and brain damage caused by the injuries on the skull collectively, but it is the case of the prosecution that the appellant caused only one injury to the deceased, whereas, remaining injuries were attributed to other co-accused. According to the statement of Ismail Khan (P.W.1) and Naazer Khan (P.W.2) specific injuries were attributed to Shaukat Ali appellant as well as to acquitted co-accused. According to their statements the appellant Shaukat Ali inflicted one hatchet blow at the head of Ilyas Khan deceased and one blow on the left wrist of Naazer Khan (P.W.2). Bashir Ahmad co-accused (since acquitted) allegedly caused one daraat blow on the left ear of Ilyas Khan deceased and one on the right side of the neck of Naazer Khan P.W. Similarly, Sarfraz alias Sarfi co-accused (since acquitted) allegedly inflicted one daraat blow on the forehead of Ilyas Khan deceased and one blow on the forehead of Naazer Khan (P.W.2). Nazeer Khan co-accused (since acquitted) was given the role of inflicting one hatchet blow on the right forehead of Ilyas Khan deceased and one blow on the left side of the head of Naazer Khan (P.W.2). Akram Khan co-accused (since acquitted) was attributed the role of giving one hatchet blow on the left thigh of Ilyas Khan deceased, and one hatchet blow on the back side of the head of Naazer Khan (P.W.2). So it is evident that the role attributed to the appellant is identical to that of

the role attributed to acquitted co-accused namely Bashir Ahmad, Sarfraz alias Sarfi and Nazir Khan. One injury each on the area of head/forehead of the deceased was attributed to the appellant Shaukat Ali, as well as, to acquitted co-accused Bashir Ahmad, Sarfraz alias Sarfi and Nazir Khan. Similarly, one injury each on the person of Naazer Khan P.W.2 was attributed to the appellant, as well as, to above-mentioned three acquitted co-accused. So the case of the appellant Shaukat Ali is not distinguishable from the case of above-mentioned acquitted co-accused namely Bashir Ahmad, Sarfraz alias Sarfi and Nazir Khan. We are unable to find out any independent corroboration qua the role attributed to the appellant Shaukat Ali.

14. In view of the above-mentioned circumstances, we are of the considered opinion that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. We, therefore, allow this appeal, and the conviction and sentence awarded to the appellant Shaukat Ali vide impugned judgment dated 23-7-2005, passed by the learned trial Court, is set aside. The appellant namely, Shaukat Ali, is acquitted of all the charges, and shall be released from Jail forthwith, if not required in any other case.

Death sentence awarded to the appellant Shaukat Ali is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

NHQ/S-19/L **Appeal accepted.**

2013 Y L R 95

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD RAHTAS KHAN and others---Appellants

Versus

THE STATE---Respondent

Criminal Appeals Nos.133-J, 134-J and Criminal Revision No.82 and Murder Reference No.72 of 2007, heard on 27th March, 2012.

Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Time of occurrence had not been mentioned in the F.I.R.---Matter was reported to the Police on the next day and formal F.I.R. was also registered on the same day---No eye-witness was mentioned in the F.I.R. and the prosecution later on introduced two eye-witnesses---One of such witnesses having been given up, prosecution case hinged only on the statement of second witness---Said two witnesses who were related to the deceased, their conduct was unnatural; they did not make any attempt to take the deceased to the hospital in order to save his life and also did not come to the house of the complainant to inform him regarding the incident---Inordinate delay in lodging the F.I.R. and silence of eye-witness, had created doubt about veracity of the witness---Delay in recording the statement of a prosecution witness by Police without furnishing any plausible explanation was fatal to the prosecution case and the statement of such witness was not reliable---Identification of accused persons in the darkness of night and under the flickering light of the lanterns from the distance of about 50 feet, was not free from doubt---Even otherwise identity of an accused in the darkness of night in the light of lantern, usually was considered a weak type of evidence and it was not safe to rely upon the same---Evidence of sole eye-witness, was not worthy of reliance, in circumstances---When no evidence was available with regard to snatching of wrist-watch and gold ring from the deceased, alleged recovery of said articles from the possession of accused, was of no avail to the prosecution case---Date of arrest of accused person was contradictory---Possibilities could not be ruled out that accused were arrested prior to the date as mentioned by the prosecution witnesses---Empties having been sent to the Forensic Science Laboratory, after arrest of accused, it

was not safe to rely upon alleged recoveries of the weapons of offence on the pointation of accused and report of Forensic Science Laboratory---Even otherwise, the evidence of recovery was only of corroborative in nature and conviction of accused could not be sustained merely on the basis of recovery of Kalashnikov and positive report of Forensic Science Laboratory---Prosecution had failed to prove its case against accused person beyond shadow of doubt---Conviction and sentence awarded to accused persons by the Trial Court were set aside and extending them the benefit of doubt, they were acquitted and released, in circumstances.

Rahat Ali v. The State 2010 SCMR 584; Ghulam Qadir and 2 others v. The State 2008 SCMR 1221; Syed Saeed Muhammad Shah and another v. The State 1993 SCMR 550; Nazir Ahmad v. Muhammad Iqbal and another 2011 SCMR 527; Aurangzeb v. The State through Advocate-General 2008 PSC Crl. 965; Umar Hayat and others v. The State 1997 PCr.LJ 1508; Abdul Hameed alias Hameeda v. The State 1989 PCr.LJ 1041; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756 and Nek Muhammad and another v. The State PLD 1995 SC 516 rel.

Saqib Akram Gondal for Appellants.

Ch. Ghulam Mustafa, D.P.G. for the State.

Zafar Iqbal Chohan for the Complainant.

Date of hearing: 27th March, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.72 of 2007, sent by the learned trial Court, Criminal Appeal No.133-J of 2007, preferred by appellant Muhammad Rahtas Khan, Criminal Appeal No.134-J of 2007, submitted by Ghulam Mustafa appellant, and Criminal Revision No.82 of 2007, filed by Muhammad Anwar Khan complainant, by this single judgment, as all these matters stem out of the judgment dated 18-1-2007, passed by learned Sessions Judge, Mianwali.

2. Ghulam Mustafa and Muhammad Rahtas Khan appellants were tried in case F.I.R. No.294, dated 25-11-2005, registered at Police Station, Sadar Mianwali, in respect of offences under sections, 302, 34 of P.P.C. After conclusion of the trial, vide its

judgment dated 18-1-2007, the learned trial Court has convicted and sentenced the appellants as under:--

Ghulam Mustafa

Under section 302(b) of P.P.C. to death as Ta'zir for committing Qatl-e-Amd of Mati Ullah deceased. He was also ordered to pay Rs.1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

Muhammad Rahtas Khan

Under section 302(b) of P.P.C. to imprisonment for life as Ta'zir for committing Qatl-e-Amd of Mati Ullah deceased. He was also ordered to pay Rs.50,000 (Rupees Fifty Thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months. Benefit of section 382-B of Cr.P.C. was also extended to him.

3. Brief facts of the case as disclosed by Muhammad Anwar Khan complainant (P.W.10) in F.I.R. (Exh.PH) are that on 24-11-2005 at 10.00 p.m. (night) he (The complainant Muhammad Anwar Khan P.W.10) along with his sons Mati Ullah and Aziz Ullah went to his land and started irrigating his fields. After some time the complainant Muhammad Anwar (P.W.10) along with his son Aziz Ullah came back from his fields to his house and went to sleep. The next turn of water was of Ikram Ullah (P.W. 12) which was to start at 3-00 a.m. He (Ikram Ullah Khan (P.W.12)) find that Mati Ullah was not present at his fields. Ikram Ullah (P.W.12) came to the house of the complainant and told the above mentioned fact to him and, thereafter, the complainant along with Aziz Ullah (son) and Ikram Ullah (P.W.12) started search for Mati Ullah. At about 7-00 a.m. (morning) they found deadbody of Mati Ullah Khan lying in the fields of one Muhammad Anwar son of Bahadar Khan. They noticed the foot-prints of two unknown persons near the deadbody. They also noticed a firearm injury on the chest of Mati Ullah Khan (deceased). The complainant Muhammad Anwar Khan (P.W.10), thereafter, lodged the F.I.R. Exh. PH against unknown accused. He did not express his suspicion against any person. The appellant Ghulam Mustafa and Muhammad Rahtas Khan were implicated in this case through supplementary statement of the complainant, as well as, on the basis of statement of Ahmad Khan

(P.W.9) and Gul Sher (given up P.W.). According to the supplementary statement of the complainant Muhammad Anwar Khan (P.W. 10) on 25-11-2005 when he returned from Police Station after lodging the report, Gul Sher (given up P.W.) and' Ahmad Khan, (P.W.11) informed him that on the night of occurrence they had seen Ghulam Mustafa appellant and Muhammad Rahtas Khan appellant committing the murder of Mati Ullah deceased. According to the statement (Exh. DA) of Ahmad Khan (P.W.11) before the police, on the intervening night of 24/25-11-2005 at about 1-30 p.m. he along with Gul Sher (given up P.W.), on the request of Ikram Ullah (PW12) was going towards his lands in order to help him to irrigate his fields. As soon as, he (Ahmad Khan P.W.11) and Gul Sher (given up P.W.) reached the fields of one Muhammad Anwar Khan, they heard the noise of hue and cry. They saw in the light of their lanterns that Ghulam Mustafa appellant armed with Kalashnikov and Muhammad Rahtas Khan appellant also armed with Kalashnikov were demanding money from Mati Ullah deceased and on his refusal Muhammad Rahtas Khan appellant made the first fire shot with his Kalashnikov which did not hit Mati Ullah. The second fire shot was made by the appellant Ghulam Mustafa with Kalashnikov which landed on the person of Mati Ullah who fell down. Both the appellants, thereafter, forbade the above mentioned witnesses from telling the incident to anyone, otherwise, they will also face the same consequences as were faced by Mati Ullah deceased.

4. The appellants were, arrested on 4-12-2005 by Malik Muhammad Amir, Inspector/S.H.O. (P.W.14). On the same day Muhammad Rahtas Khan while in police custody, led the police to a sugarcane field and allegedly got recovered Kalashnikov P-10, 20 live bullets P-12/1-20 magazine P-11. On the same day Ghulam Mustafa appellant allegedly got recovered Kalashnikov P-7 along with magazine containing 40 live bullets P-9/1-40 from inside a sugarcane field which were taken into possession vide memo Exh. PF. Muhammad Akram, S.-I. (P.W.13) interro-gated the appellants and on 5-12-2005 Muhammad Rahtas Khan led the police party to a sugarcane field and allegedly got recovered wrist watch P-5 which was taken into possession vide recovery memo Exh. PD. On the same day Ghulam Mustafa appellant also led the police to a sugarcane field and allegedly got recovered a gold ring P-6 which was taken into possession vide memo Exh. PE. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed a charge against the appellants on 3-5-2006, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced fifteen witnesses, during the trial. Muhammad Anwar Khan (P.W.10) is the complainant of the case. Ahmad Khan (P.W.11) is the witnesses of ocular account.

The medical evidence was furnished by Dr. Azmat Ullah Khan (P.W.6).

Muhammad Maqsood Patwari (P.W.1), Ghulam Muhammad, A.S.-I. (P.W.2), Ghulam Qasim C/724 (P.W.3), Sher Khan C/192 (P.W.4), Liaqat Hayat (P.W.5), Ikram Ullah, (P.W.12) and Zafar Iqbal (P.W.15) are the formal witnesses. Mehr Zaman (P.W.7) and Azmat Ullah, S.-I. (P.W.9) are the recovery witnesses of watch P-5, gold-ring P-6 and Kalashnikovs P-7 and P-10 from the appellants. Muhammad Akram, S.-I. (P.W.13) and Malik Muhammad Amir, Inspector/S.H.O. (PW14) were the Investigating Officers of this case. The prosecution produced documentary evidence in the shape of F.I.R. Exh. PH, memo of possession of blood stained clothes Exh. PB, copy of post-mortem report, etc Exh. PC, memo of possession of wrist watch Exh. PD, memo of possession of gold-ring Exh. PE, memo of possession of Kalashnikovs Exh. PF and Exh. PG, memo of possession of blood-stained earth Exh. PJ, memo of possession of empty cartridges Exh. PK, copy of death report Exh. PM, memo of possession of two blankets Exh. PQ, memo of possession of gold-ring and watch Exh. PR, copy of specimen of signatures Exh. Mark-A, copy of site plan Exh. PA/1,rough site plan of the place of occurrence Exh. PS, site plan without scale Exh. PT, Forensic Science Laboratory Exh. PU, report of Chemical Examiner Exh. PV and that of Serologist Exh. PV/1 and closed its evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you" both the appellants replied as under:--

Ghulam Mustafa

> "Aziz Ullah P.W. son of Muhammad Anwar complainant and brother of the deceased is married to a daughter of Ahmad Khan Malang. Noor Muhammad is the maternal uncle of Ahmad Khan Malang. Ghulam Akbar is son of Noor Muhammad aforesaid. This Ghulam Akbar murdered father of the accused in the year 1998 and had been sentenced to death and is still in the Death Cell and the complainant party in order to pressurize us for compromise has falsely implicated us in this blind murder."

The appellant Muhammad Rahtas Khan adopted the same plea as taken by Ghulam Mustafa appellant.

Both the appellants did not opt to make statement on oath under section 340(2), Cr.P.C. but Muhammad Rahtas Khan appellant tendered in his defence attested copy of F.I.R. No. 226 dated 5-8-1998 under section 302/34, P.P.C. registered at Police Station Mianwali as Exh. DB and attested copy of F.I.R. No. 419 dated 6-11-1998 under section 302/109 of P.P.C. registered at Police Station City, Mianwali as Exh.DC. The learned trial Court vide its judgment dated 18-1-2007, found Ghulam Mustafa and Muhammad Rahtas Khan appellants, guilty and convicted and sentenced them as mentioned and detailed above.

6. It is contended by the learned counsel for the appellants that the appellants are not nominated in the F.I.R. in any manner; that the prosecution has produced only one eye-witness of the occurrence, i.e. Ahmad Khan (P.W.11) whose statement is not reliable for the reason that according to his statement he along with Gul Sher, on the asking of Ikram Ullah (P.W.12) went to his land in order to help him in irrigation of his fields but despite the fact that he saw the appellants committing the murder of Mati Ullah deceased, he did not report the matter to anybody and he informed the comp-lainant on the next morning at 9-30 a.m.; that conduct of this witness is highly improbable as he is related to the deceased and the complainant; that recovery of ring and wrist-watch carries no value because it is not mentioned in the F.I.R. or in the supplementary statement of the complainant that the above mentioned articles were snatched by the appellants; that the alleged recovery of Kalashnikovs P-7 and P-10 at the instance of the appellants also carries no value as there is conflict in the statement of Muhammad Akram, S.-I. (P.W.13) and Malik Muhammad Ameer, Inspector/ S.H.O. (P.W.14) regarding the arrest of the appellants; that even otherwise the recovery is only corroborative piece of evidence and relevant only if the primary evidence has been believed; that the appellants are absolutely innocent and have falsely been implicated in the case; that the prosecution could not prove its case against the appellants beyond the shadow of doubt, thus, this appeal be accepted and the appellants may be acquitted from the charges.

7. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant opposes these appeals on the grounds that the occurrence took place on the intervening night on 24/25-11-2005 and the matter was reported to the police at 8-5 a.m. on the next morning and the bona fide of the

complainant is clear from the fact that he did not name anybody in the F.I.R. Exh.PH, that Ahmad Khan (P.W.11) who has absolutely no enmity with the appellants has stated in unequivocal words that in his view it was Ghulam Mustafa appellant who made a fire shot which landed on the chest of the deceased; that the conduct of this witness is proper if whole scenario is taken into consideration; that the appellants are desperate and hardened criminals and involved in many serious cases; that Ghulam Mustafa appellant is involved in nine other criminal cases, whereas, Muhammad Rahtas Khan appellant is involved in six other criminal cases; that because of the fear, Ahmad Khan (P.W.11) did not disclose this incident to the father of the deceased till next morning at 9-30 a.m.; that the statement of Ahmad Khan (P.W.11) is supported by the medical evidence as the witness stated that the deceased Mati Ullah Khan received one firearm injury on his person and the doctor who conducted the post-mortem examination on the deadbody of the deceased also noted one firearm injury on the person of deceased; that the prosecution case is further corroborated by the recovery of ring P-6, wrist watch P-5, Kalashnikov P-7 and Kalashnikov P-10 on the pointation of the appellants and positive report of Forensic Science Laboratory Exh. PU; that there is no mitigating circumstance in this case; that the sentences of the appellants were rightly awarded to them and the same may be maintained, appeals may be dismissed and Murder Reference be answered in the affirmative. So far as Criminal Revision No. 82 of 2007 is concerned, the learned counsel contends that the sentence of Muhammad Rahtas Khan appellant may kindly be enhanced from imprisonment for life to death and the amount of compensation payable by Muhammad Rahtas Khan appellant and Ghulam Mustafa appellant to the legal heirs of the deceased may also be adequately enhanced.

8. We have heard the arguments of the learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

9. The occurrence in this case took plate on the intervening night of 24/25-11-2005 in the fields of one Muhammad Anwar Khan son of Bahadar Khan situated in the area of village Gulmiri, Police Station Sadar, Mianwali. No time of occurrence has been mentioned in the F.I.R. The matter was reported to the police on the next day at 8-5 a.m. by the complainant Muhammad Anwar Khan (P.W.11) and formal F.I.R. Exh. PH was also registered on the same day at 8-5 a.m. at Police Station Sadar, Mianwali. It was alleged by the complainant Muhammad Anwar Khan (P.W.10) that on 24-11-2005 at 10-00 p.m. (night) it was his turn of water. He (The complainant Muhammad Anwar Khan P.W.10) along with his sons Mati Ullah and Aziz Ullah went to his land and

started irrigating his fields. After some time he (the complainant Muhammad Anwar P.W.10) alongwith his son Aziz Ullah came back home and went to sleep. On the said night the next turn of water was of Ikram Ullah (P.W.12) which was to start at 3-00 a.m. He (Ikram Ullah Khan P.W.12) did not find present Mati Ullah at his fields. Ikram Ullah (P.W.12) came to the house of the complainant and told the above mentioned fact to him and, thereafter, they along with Aziz Ullah (son of the complainant) started search for Mati Ullah. At about 07.00 a.m. (morning) they found the deadbody of Mati Ullah Khan lying in the fields of one Muhammad Anwar son of Bahadar Khan. They noticed the foot-prints of two unknown persons near the deadbody. They also noticed a firearm injury on the chest of Mati Ullah Khan (deceased). The complainant Muhammad Anwar Khan (P.W.10), thereafter, lodged the F.I.R. Exh. PH against unknown accused. He did not express his suspicion against anybody. The appellant Ghulam Mustafa and Muhammad Rahtas Khan were implicated in this case through the supplementary statement of the complainant, as well as, on the basis of statements of Ahmad Khan (P.W.11) and Gul Sher (given up P.W.). According to the supplementary statement of the complainant Muhammad Anwar Khan (P.W. 10) on 25-11-2005 when he returned from Police Station after lodging the report, Gul Sher (given up P.W.) and Ahmad Khan (P.W.11) informed him that on the night of occurrence they had seen Ghulam Mustafa and Muhammad Rahtas Khan appellants committing, the murder of Mati Ullah deceased. According to the statement before the police of Ahmad Khan P.W.11 (Exh. DA), on the intervening night of 24/25-11-2005 at about 1-30 p.m. he along with Gul Sher (given up P.W.) on the request of Ikram Ullah (P.W.12) was going towards his land in order to help him to irrigate his fields. As soon as, he (Ahmad Khan P.W.11) and Gul Sher (given up P.W.) reached the fields of one Muhammad Anwar Khan, they heard the noise of hue and cry. They saw in the light of lantern that Ghulam Mustafa appellant was armed with Kalashnikov and Muhammad Rahtas Khan appellant was also armed with Kalashnikov. They were demanding money from Mati Ullah deceased and on his refusal Muhammad Rahtas Khan appellant made the first fire shot with his Kalashnikov at Mati Ullah Khan which did not hit him. The second fire shot was made by the appellant Ghulam Mustafa with Kalashnikov which landed on the person of Mati Ullah who fell down. Both the appellants, thereafter, forbade the above mentioned witnesses from telling the incident to anyone, otherwise, they will also face the same consequences as were faced by Mati Ullah Khan deceased.

10. As discussed earlier no eye-witness was mentioned in the F.I.R. The prosecution later on introduced two eye-witnesses namely Ahmad Khan (P.W.11) and Gul Sher (given up P.W.) in the case. Gul Sher the alleged eye-witness was not produced by the prosecution before the learned trial Court and the prosecution case hinges only on the statement of Ahmad Khan (P.W.11). According to him he witnessed the occurrence on the intervening night of 24/25-11-2005 at 1-30 a.m. (night). It was brought on the record during cross-examination of the complainant Muhammad Anwar Khan (P.W.10) that Ahmad Khan (P.W.11) was his Chachazad in the second degree, whereas, Gul Sher (given up P.W.) was his Phuphizad. The above mentioned eye-witnesses are related to the deceased but their conduct is unnatural. They did not make any attempt to take the deceased to the hospital in order to save his life. They also did not come to the house of the complainant to inform him regarding the above mentioned incident. They had allegedly seen the murder of their close relative but they did not report the matter to any one or to the police till the next day. According to the statement of the complainant Muhammad Anwar Khan (P.W.10) when he returned from the Police Station after lodging the report Gul Sher (given up P.W.) and Ahmad Khan (P.W.11) informed him that they had seen the appellants causing the death of Mati Ullah (deceased). He has further stated that the above mentioned witnesses met him at the spot at about 9.00/9.30 a.m. when he came back after lodging the report. According to the statement of Ahmad Khan (P.W.11) before the learned trial Court, he made his statement before the police on the following day at 05.30 p.m. He has stated in his examination-in-chief that he informed the complainant Muhammad Anwar on 25-11-2005 at 9-30 a.m. Muhammad Anwar Khan (P.W.10) has stated during his cross-examination that Gul Sher (given up P.W.) and Ahmad Khan (P.W.11) met him at the spot when he came back after lodging the report at about 9-00/9-30 a.m. and they informed him that they had seen the occurrence. Muhammad Akram, S.-I. (P.W.13), the Investigating Officer, has stated in his cross-examination that he reached the place of occurrence at 9-30 a.m. on 25-11-2005. There is no plausible explanation given by the prosecution as to why Ahmad Khan (P.W.11) did not get his statement recorded before Muhammad Akram, S.-I. (P.W.13) when he visited the spot on 25-11-2005 at 9-30 a.m. Muhammad Akram, S.-I. (P.W.13) has also stated that he remained present at the place of occurrence for 03/04 hours. The explanation furnished by Ahmad Khan (P.W.11) regarding his non-reporting the matter to anyone, was, that due to the fear of the appellants he did not inform any one regarding the incident, immediately. The said explanation is not convincing because the appellants were not arrested on the following day of the

occurrence when he made his statement before the police and they were still at large. The appellants were arrested on 4-12-2005. No explanation has been furnished by Ahmad Khan (P.W.11) as to how his fear was removed on the following day. The natural and immediate conduct of Ahmad Khan (P.W.11) and Gul Sher (given up P.W.) would have been to go to their close relative, Muhammad Anwar Khan (P.W.10) in order to inform him about the murder of his son or to inform the police regarding the occurrence. Thus, inordinate delay and silence of Ahmad Khan (P.W.11) creates doubt about his veracity. The delay in recording the statement of a prosecution witness by police without furnishing any plausible explanation is fatal to the prosecution case and the statement of such witness was not reliable. In this regard we respectfully refer the case of Rahat Ali v. The State (2010 SCRM 584) wherein at Page No. 588 the Hon'ble Supreme Court has held as under:--

"The story narrated by P.W.2 that after the abduction he went to sleep in the house also does not seem to be true because in such a situation he could not have gone to sleep when his parents were abducted. His natural and immediate conduct would have been to go to his uncle or to his mother who was first wife of deceased to inform her about the incident. Thus, there is inordinate delay of silence of P.W.2 which creates doubt about his veracity. Delay of 24 hours, 4 days and 15/20 days in reporting the matter to the police or recording the statement of witnesses by the police has been found adersely affecting the veracity of witnesses as held in the cases of Muhammad Sadiq v. The State PLD 1960 SC 23, Sahib Gul v. Ziarat Gul 1976 SCMR 236 and Muhammad Iqbal v. The State 1984 SCMR 930, respectively. It has also been observed by this Court that delay in recording the statement without furnishing any plausible explanation is also fatal to the prosecution case and the statement of such witness was not relied upon in the case of Syed Muhammad Shah v. State 1993 SCMR 550. Therefore, the evidence of P.W.2 is coming within the scope of above rules laid down by this Court. Hence, his statement cannot be safely relied upon in the peculiar facts and circumstances of the present case."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Ghulam Qadir and 2 others v. The State (2008 SCMR 1221) and Syed Saeed Muhammad Shah and another v. The State (1993 SCMR 550).

Although it was claimed by Ahmad Khan (P.W.11) that he informed the complainant Muhammad Anwar Khan (P.W.10) about the incident on 25-11-2005 at 9-30 a.m. but presence of Ahmad Khan (P.W.11) and Gul Sher (given up P.W.) has not

been shown in the Inquest Report Exh. PU prepared by Muhammad Akram, S.-I. (P.W.13) who had stated that he visited the spot on 25-11-2005 at 9-30 a.m. and remained there for 03/04 hours.

The fact of making a request by Ikram Ullah (P.W.12) to Ahmad Khan (P.W.11) and Gul Sher (given up P.W.) to help him to irrigate his fields has not been mentioned in the F.I.R. which shows that the story of prosecution regarding the presence of above mentioned eye-witnesses is a result of an afterthought. As discussed earlier the occurrence in this case took place on the intervening night of 24/25-11-2005. No time of occurrence has been mentioned in the F.I.R. but according to the statement of Ahmad Khan (P.W.11) the occurrence took place at about 1-30 a.m. (night). Ahmad Khan (P.W.11) has also admitted during his cross-examination that the occurrence took place on a dark night. He has not claimed that there was any moon light. As per site plan Exh. PN the deceased Mati Ullah was present at the time of occurrence, at Point No.1, whereas, Ahmad Khan (P.W.11) and Gul Sher (given up P.W.) were present at point No. 2 which was situated on the northern side of Mati Ullah, at a distance of 5-karams from Point No. 1. The appellants Muhammad Rahtas Khan and Ghulam Mustafa have been shown in the site plan, to be present at points Nos. 3 and 4 which were situated on the southern side of Mati Ullah at a distance of 4-Karmas from point No.1. Thus, there was total distance of 9-Karams (49.5 feet) between the eye-witnesses Ahmad Khan (P.W.11), Gul Sher (given up PW) and the appellants. The identification of the appellants in the darkness of night and in the flickering light of the lanterns from the distance of 9-Karams (49.5 feet) is not free from doubt. The identity of an accused in the darkness of night in the light of lantern is usually considered a weak type of evidence and it is not safe to rely upon the same. A reference in this respect may be made to the cases of Nazir Ahmad v. Muhammad Iqbal and another (2011 SCMR 527) and Aurangzeb v. The State through Advocate-General (2008 PSC Crl. 965).

We have noted that Ahmad Khan (P.W.11) has admitted during his cross-examination that he did not produce lantern before the police. No lantern has been taken into possession by the Investigating Officer through any recovery memo. The evidence of identification in the lantern light is insignificant, when the lantern on the basis of which, the appellants were identified was not taken into possession by the Investigating Officer. Reference in this respect may be made to the cases of Umar Hayat, and others v. The State 1997 PCr.LJ 1508 and Abdul Hameed alias Hameeda v. The State (1989 PCr.LJ 1041).

According to the evidence of sole eye-witness, i.e. Ahmad Khan (P.W. 11) the appellants committed the murder of Mati Ullah deceased as they were asking him (the deceased) to pay them the money or he would be abducted for ransom and on his refusal the appellants committed his murder but surprisingly the appellants did not snatch any money or any valuable article from Ahmad Khan (P.W.11) and Gul Sher (given up P.W.).

In the light of above, we are of the considered view that evidence of the sole eye-witness Ahmad Khan (P.W.11) is not worthy of reliance.

11. According to the prosecution case a wrist watch P-5 and ring P-6 of Mati Ullah deceased were recovered on the disclosure of both the appellants and on the pointation of Ghulam Mustafa appellant on 25-12-2005 which were taken into possession vide the recovery memos Exh. PD and Exh. PE attested by Mehr Zaman (P.W.7) and Zia Ullah (given up P.W.). It is interesting to note that the complainant Muhammad Anwar Khan (P.W.10) did not mention in the F.I.R. Exh. PH, as well as, in his statement before the trial Court, that any articles of Mati Ullah Khan deceased were snatched by the appellants or the same was missing from the body of the deceased. So much so, the sole eye-witness of the occurrence namely Ahmad Khan neither mentioned in his statement before the police Exh. DA nor in his statement before the trial Court that any wrist-watch or gold-ring of the deceased Mati Ullah was snatched by the appellants at the time of occurrence. He has simply stated in his both the above mentioned statements that money was demanded by the appellants and on the refusal of Mati Ullah deceased his murder was committed by the appellants. In view of the above, when there is no evidence regarding snatching of wrist-watch and gold-ring from Mati Ullah deceased the alleged recovery of the said articles from the possession of the appellants, is of no avail to the prosecution case.

12. Coming to the recovery of Kalashnikov P-7 on the pointation of Ghulam Mustafa appellant and recovery of Kalashnikov P-10 from the possession of Muhammad Rahtas Khan appellant and positive report of Forensic Science Laboratory Exh. PU, we have noted that there are contradictions in the prosecution evidence regarding the date of arrest of the appellants. The empties were allegedly recovered from the spot on 25-11-2005 and the same were allegedly sent to the Forensic Science Laboratory on 2-12-2005, whereas, according to the report of Forensic Science Laboratory Exh. PU the empties were received at the Laboratory on 3-12-2005, i.e. just one day prior to the alleged date of arrest of the appellants (4-12-2005). As mentioned earlier, the

prosecution evidence regarding the date of arrest of the appellants is contradictory. According to the statement of Malik Muhammad Amir, Inspector/S.H.O. (P.W.14) the appellants were arrested on 4-12-2005 and the Kalashnikov P-7 and Kalashnikov P-10 were recovered on the pointation of Ghulam Mustafa and Muhammad Rahtas Khan appellants, respectively, on the same day, whereas, according to the statement of Muhammad Akram, S.-I. (P.W.13) Ghulam Mustafa appellant and Muhammad Rahtas Khan appellant were arrested on 5-12-2005. As there is conflict in the prosecution case regarding the date of arrest of the appellants, therefore, possibilities cannot be ruled out that the appellants were arrested prior to the date as mentioned by the above mentioned prosecution witnesses and empties were sent to the Forensic Science Laboratory, after their arrest, therefore, it is not safe to rely upon the alleged recoveries of the weapons of offence on the pointation of the appellants and report of Forensic Science Laboratory Exh. PU.

Even otherwise, the evidence of recovery is only of corroborative in nature and conviction of the appellants cannot be sustained merely on the basis of recovery of Kalashnikovs P-7 and P-10 and positive report of FSL (Ex.PU).

In the case of MUHAMMAD AFZAL alias ABDULLAH and others us. THE STATE and others (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similarly, in the case of ABDUL MATEEN V. SAHIB KHAN and others (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled-law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of MUHAMMAD YAQUB v. THE STATE (1971 SCMR 756), and NEK MUHAMMAD and another v. THE STATE (PLD 1995 Supreme Court 516).

13. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants namely, Ghulam Mustafa, and Muhammad Rahtas Khan, beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept the above mentioned appeals, and set aside the convictions and sentences awarded to the, appellants, namely, Ghulam Mustafa, and Muhammad Rahtas Khan. The appellants Ghulam Mustafa, and Muhammad Rahtas Khan are in jail. They shall be released forthwith if not required to be detained in any other case.

For the foregoing reasons Criminal Revision No.82 of 2007 filed by the complainant seeking enhancement of sentence of Muhammad Rahtas Khan and amount of compensation stands dismissed.

Death sentence awarded to the appellant Ghulam Mustafa is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

HBT/M-120/L **Appeals accepted.**

2013 Y L R 406

[Lahore]

Before Malik Shahzad Ahmad Khan, J

GHULAM ABBAS---Petitioner

Versus

ABDUL GHAFOOR and another---Respondents

Criminal Miscellaneous No.8095-CB of 2011, decided on 19th September, 2011.

Criminal Procedure Code (V of 1898)---

----S.497(5)---Penal Code (XLV of 1860), S.376---Rape---Bail, cancellation of---Accused was named in the F.I.R. and was alleged to have committed the heinous offence of committing rape with a twelve years old girl---Allegation against accused was fully supported by the medico-legal report of the victim according to which victim's hymen was freshly torn and blood was coming out of the vagina at the time of examination---Accused could not establish any mala fide on part of complainant for his false involvement in the case---Medical report of accused showed that he was fit to commit sexual intercourse, therefore, amputation of one of his legs did not mean that allegations against him were baseless---Victim had also levelled allegation of rape against accused in her statement, recorded under S.161 Cr.P.C.---Bail granted by court below, being not sustainable in the eyes of law, was recalled and accused's bail stood cancelled.

Rai Muhammad Nawaz Kharal for Petitioner.

Arshad Mehmood Deputy Prosecutor-General for the State with Abid Hussain, A.S.-I.

Syed Faiz-ul-Hassan for Respondent along with Respondent No.1 in person.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This petition has been filed for cancellation of bail after arrest granted to Abdul Ghafoor (respondent No.1), by the learned Additional Sessions Judge, Chiniot, in case F.I.R. No.106, dated 2-4-2011, registered under section, 376 of P.P.C., with Police Station, Langrana, District Chiniot, on the complaint of the petitioner-complainant namely Ghulam Abbas.

2. As per brief allegations levelled in the F.I.R., 4/5 days prior to the registration of the F.I.R. (2-4-2011), respondent No.1 namely Abdul Ghafoor committed rape with Mst. Erum Bibi, aged about 12 years (minor daughter of the petitioner-complainant).

3. The petitioner, after his arrest, moved his bail petition before the learned Additional Sessions Judge, Chiniot, who accepted the same vide impugned order dated 15-6-2011, hence, this petition before this Court.

4. It is contended by the learned counsel for the petitioner-complainant that respondent No.1 has committed a heinous offence; that he has committed rape with 12 years old minor daughter of the petitioner; that the allegations levelled by the petitioner against respondent No.1 are fully supported by the medico-legal report of the victim Mst. Erum Bibi; that respondent No.1 could not establish any mala fide on the part of the petitioner-complainant for his false involvement in the instant case, therefore, this petition may be accepted and the bail granting order dated 15-6-2011, passed by the learned Additional Sessions Judge, Chiniot, may be recalled and withdrawn.

5. On the other hand, this petition has strongly been opposed by the learned counsel for respondent No.1 on the grounds that bleeding from the vaginal area of the alleged victim is not possible after 4/5 days of the occurrence according to the Medical

Jurisprudence; that there are discrepancies/ contradictions in the statements of prosecution witnesses recorded under section 161 of Cr.P.C., because it is mentioned by the complainant in the F.I.R. that the victim came back home at her own, whereas, the prosecution witnesses have stated that co-accused Shaukat has brought the victim to the house of the complainant; that respondent No.1 was implicated in this case due to political rivalry; that bail after arrest was granted by a competent Court of jurisdiction, therefore, very strong and exceptional grounds are required for cancellation of the same; that respondent No.1 is a disabled person and his one leg has already been amputated, therefore, he cannot commit the alleged offence.

6. The learned Deputy Prosecutor-General, for the State has also supported the arguments of the petitioner and prayed for cancellation of bail.

7. Arguments heard and record perused.

8. Respondent No.1 is named in the F.I.R. The allegation of a very heinous offence i.e. rape with a 12 years old girl, has been levelled against him. The said allegation is fully supported by the Medico-legal Report of the victim according to which hymen was freshly torn and blood was coming out of vagina at the time of examination. Respondent No.1 could not establish any mala fide on the part of the complainant for his false involvement in the instant case. The medical report of respondent No.1 shows that he was fit to commit sexual intercourse, therefore, the amputation of one leg does not mean that the allegations against him are baseless. The minor discrepancies in the prosecution evidence cannot be discussed at bail stage. The victim Mst. Erum Bibi has also levelled the allegation of rape against respondent No.1 in her statement recorded under section 161 of Cr.P.C.

9. In view of all the above circumstances, it manifests that the bail granting order is not sustainable in the eyes of law, therefore, this petition is accepted and the impugned order dated 15-6-2011, passed by the learned Additional Sessions Judge, Chiniot, whereby, respondent No.1 was granted bail after arrest, is hereby recalled and bail granted to him stands cancelled.

10. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no pre-judice to the case of either party at the time of decision of other issues involved in the present case or at the time of final adjudication of the case before the learned trial Court.

MWA/G-5/L **Bail cancelled.**

2013 Y L R 788

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ABDUL RAZZAQ and another---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos. 970, 972 and Murder Reference No.550 of 2006, heard on 24th January, 2012.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 460---Qatl-e-amd, lurking house-trespass by night---Appreciation of evidence---F.I.R. was promptly lodged without any delay---No active role was attributed to accused persons in the supplementary statement of the complainant, and prosecution witness had assigned no active role to accused persons---Prosecution witnesses had made material improvements in their statements regarding the presence of accused persons and their role at the time of occurrence and presence of said witnesses was not mentioned in the F.I.R.---Inquest Report of deceased was prepared after sixteen days of the registration of the F.I.R.---Prosecution evidence showed that accused were implicated in the case because of the improvements made by the complainant, and other eye-witnesses also followed the same line and implicated the accused---Dishonest improvements made by the prosecution witnesses regarding the presence of accused persons at the place of occurrence, and the role played by them, had made the prosecution case qua accused persons, highly doubtful---Prosecution witnesses though had no enmity with accused but their statements to the extent of role attributed to accused were not free from doubt and same were not confidence-inspiring---Mere absence of their enmity with accused persons, would not mean that death sentence of accused persons, should straightaway be maintained without looking into the veracity of the evidence of such witnesses---Supplementary statement of the complainant made during Police investigation, would not be equated with F.I.R.---Incident was night occurrence, but no source of light was mentioned in the F.I.R.---No description of accused persons, who allegedly were present at the place of occurrence, was given by the complainant in his supplementary statement and also by other prosecution witness---Prosecution witnesses had not given any specific description like,

age, colour etc. or identification mark of accused persons---Role of accused was not described by the witnesses at the time of identification parade, which was an inherent defect in the prosecution evidence---Such identification parade could not be relied upon to maintain the conviction of accused persons-Identification parade was held with the delay of seven days after the arrest of accused persons, which delay had created a lot of doubt regarding identification parade---Prosecution evidence regarding the identification of accused persons, did not inspire confidence---Prosecution case against accused was replete with material improvements and the story of the prosecution qua involvement of accused in the case was highly doubtful---Prosecution having failed to prove its case against accused persons beyond the shadow of doubt, conviction and sentence recorded by the Trial Court against accused, was set aside and they were released, in circum-stances.

Akhtar Ali and others v. The State 2008 SCMR 6; Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1825; Falak Sher alias Sheru v. The State 1995 SCMR 1350; Shafqat Mehmood and others v. The State 2011 SCMR 537; Bacha Zeb v. The State 2010 SCMR 1189 and Sabir Ali alias Fauji v. The State 2011 SCMR 563 rel.

(b) Penal Code (XLV of 1860)---

----Ss.302(b) & 460---Qatl-e-amd, lurking house trespass by night---Appreciation of evidence---Recovery of weapon of offence---Evidentiary value---Value of the recovery of the weapon of offence was purely corroboratory in nature; and such recovery alone was not capable to bring home charge against accused in absence of direct substantive evidence---Conviction could not be recorded merely on the basis of the evidence of recovery, howsoever convincing it could be and sentence of accused could not sustain merely on the basis of recoveries.

Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Saifullah v. The State 1985 SCMR 410 and Abdul Mateen v. The State and others PLD 2006 SC 538 rel.

(c) Penal Code (XLV of 1860)---

----Ss.302(b) & 460---Qatl-e-amd, lurking house-trespass by night---Appreciation of evidence---Statement of prosecution witnesses---Absence of enmity with accused---Effect---Absence of enmity of prosecution witnesses with accused did not mean that whatever they had stated be taken as gospel truth and apostle reality---Court had to see

as to whether the statements of the prosecution witnesses were confidence-inspiring and trustworthy to the extent of role assigned to accused persons.

(d) Penal Code (XLV of 1860)---

----Ss.302(b) & 460---Qatl-e-amd, lurking house trespass by night---Appreciation of evidence---Mere fact that a witness was an independent, would not necessarily prove that he was a witness of truth; and intrinsic worth of the statement of any witness was the test of his veracity.

Muhammad Pervez and others v. The State and others 2007 SCMR 670 and Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1825 rel.

Rai Usman Ahmad for Appellant (in Criminal Appeal No.970 of 2006).

Muhammad Akram Qureshi for Appellant (in Criminal Appeal Nos.972 of 2006).

Chaudhary Muhammad Mustafa, Deputy Prosecutor-General for the State.

Rana Muhammad Zahid for the Complainant.

Date of hearing: 24th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Abdul Razzaq and Haider Ali alias Babar appellants were tried in case F.I.R. No.353 of 2005, dated 31-8-2005, registered at Police Station Mustafabad, District Kasur, in respect of offences under sections, 302/460 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 30-5-2006 has convicted and sentenced the appellants as under:-

Abdul Razzaq

Under section 302(b), P.P.C. as Ta'zir to `Death' on three counts for committing Qatl-e-amd of Muhammad Ali, Nazir Ahmad and Shafaqat Ali deceased.

Under section 460 of P.P.C. to imprisonment for life on three counts for committing lurking house-trespass into the house of the complainant. He was also directed to pay a fine of Rs.50,000 on three counts or in default to suffer two years' R.I. on three counts.

The sentence awarded under section 460, P.P.C. shall run concurrently and benefit of section 382-B of, Cr.P.C. was also extended.

Haider Ali alias Babar

Under section 302(b), P.P.C. as Ta'zir to `Death' on three counts for committing Qatl-e-Amd of Muhammad Ali, Nazir Ahmad and Shafaqat Ali deceased.

Under section 460 of P.P.C. to imprisonment for life on three counts for committing house lurking trespass into the house of the complainant. He was also directed to pay a fine of Rs.50,000 on three counts or in default to suffer two years' R.I. on three counts.

The sentence awarded under section 460, P.P.C. shall run concurrently and benefit of section 382-B of Cr.P.C. was also extended.

It is pertinent to mention here that co-accused of the appellants namely, Muhammad Raza was murdered in a police encounter, whereas, co-accused Intizar Ahmad and Muhammad Abbas were declared as proclaimed offenders.

2. Feeling aggrieved, Abdul Razzaq appellant has challenged his convictions and sentences through Criminal Appeal No.970 of 2006, and Haider Ali alias Babar has preferred Criminal Appeal No. 972 of 2006 whereas the learned trial Court has transmitted Murder Reference No. 550 of 2006 for confirmation or otherwise of the Death sentences of Abdul Razzaq and Haider Ali alias Babar appellants. We propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 30-5-2006 passed by the learned Additional Sessions Judge, Kasur.

3. Brief facts of the case as disclosed by the complainant Sharafat Ali (P.W.16) in F.I.R. (Exh.PA), are that he along with his father Haji Nazir Ahmad, Muhammad Ali and Shafaqat brothers and his other family members were sleeping in the courtyard of their house. On the intervening night of 30/31-8-2005, at about 1-30 a.m. (night), suddenly they heard the din of firing, upon which they woke up and saw that three persons having muffled their faces were grappling with his father Haji Nazir Ahmad and brothers Muhammad Ali and Shafaqat. Muhammad Ali and Haji Nazir Ahmad caught hold of one of the accused, meanwhile, the other accused started firing, which hit his father and brothers who fell down on the ground after sustaining injuries. His father Haji Nazir Ahmad sustained injuries on his right shoulder and back, and his brother Muhammad Ali sustained injuries on his abdomen, whereas, his brother Shafaqat received injuries on his belly and right side of his chest. In the meantime, womenfolk of the family also woke up. On raising hue and cry the neighbourers were attracted to the spot. Muhammad Ali and Haji Nazir Ahmad succumbed to the injuries at Lahore General Hospital, Lahore, whereas, Shafaqat succumbed to the injuries at

Lahore General Hospital, Lahore after seventeen days. The complainant Sharafat Ali (P.W.16), later on, through his supplementary statement (Exh.DB) recorded on the same day i.e., 31-8-2005, added two more unknown accused (the appellants) in this case. According to his statement, at the time of occurrence apart from the above-mentioned three unknown accused, two unknown accused (the appellants) were also present inside the house of occurrence near the stairs. Mst. Najma Bibi (P.W.15) on 31-8-2005, also got her statement recorded under section 161 of Cr.P.C. (Exh.DA) wherein she stated that apart from three above-mentioned unknown accused, two other unknown accused (the appellants) were also present and standing near the stairs of the house at the time of occurrence. No active role was attributed to the said accused (the appellants) in the supplementary statement of the complainant (Exh.DB). Similarly, Mst. Najma Bibi (P.W.15) assigned no active role to the above-mentioned two unknown accused (the appellants) in her statement (Exh.DA).

(P.W.18) Ghulam Hussain conducted the investigation of this case. He stated that on 31-8-2005, on receipt in formation about the occurrence, he along with police officials reached at Lahore General, Hospital, Lahore. Nazir Hussain Opal, Inspector S.H.O., who was present in the hospital handed over him the charge for conducting the investigation of this case. The said Inspector S.H.O. also handed over to him the death certificates of the deceased Muhammad Ali (Exh.PQ) and of Nazir deceased (Exh.PT/1). He also received the dead bodies of the said deceased persons. He prepared the application for postmortem examination on the dead body of deceased Muhammad Ali (Exh.PU). He also prepared Inquest Report (Exh.PV). He then prepared the application (Exh.P.W.) for autopsy on the dead body of Nazir Ahmad and his Inquest Report (Exh.PX). He collected blood-stained earth from the place, where Muhammad Ali (deceased) had fallen after receiving injury through recovery memo (Exh.PD); whereafter, he collected blood-stained earth from the place, where Nazir (deceased) received injury through recovery memo (Exh.PC). He also secured torn shirt (P.5) of black colour belonging to the accused, a diary, empties of .44 bore six in numbers (P.2/1-6), five empties of .30 bore pistol (P.3/1-5), three live bullets of .44 bore (P.4/1-3), vide recovery memo (Exh.PE). He took 'Dhoti' of deceased Muhammad Ali (P.7) vide recovery memo (Exh.PF). He also took into possession the last worn clothes of deceased Nazir vide recovery memo (Exh.PG). On 1-9-2005, he summoned the draftsman, who prepared the scaled site plan of the place of occurrence (Exh.PH/ 1). He submitted two applications (Exh.PZ) and (Exh.PAA) before the M.O. LGH, Lahore,

regarding the fitness of the injured Shafaqat to make statement, however, in the meanwhile, he received information that Shafaqat injured succumbed to the injuries at LGH, Lahore, therefore, he took the dead body of Shafaqat deceased into possession and drafted application (Exh.PBB) for autopsy. He prepared the Inquest Report (Exh.PCC), and received the death certificate of deceased Shafaqat (Exh. PDD). On 21-9-2005, the accused Abdul Razzaq and Haider Ali, who were allegedly present at Sarhali road for commission of dacoity, were arrested by the police, and a case F.I.R. No.377 of 2005 under sections 399/ 402 of P.P.C., was registered against them at Police Station Mustafabad. During the investigation of said case, the appellants allegedly made disclosure regarding their involvement in the instant case. They were sent to Jail. Identification parade was conducted on 28-9-2005 in the jail premises under the supervision of learned Special Magistrate, Kasur, Tariq Karim Khokhar (P.W.17) and the prosecution witnesses namely, Mst. Najma Bibi (P.W.15), Sharafat Ali (P.W.16), Shaukat Ali and Master Sardar Nusrat (given up P.Ws.) allegedly identified the appellants. After identification parade, both the appellants were formally arrested in this case on 21-9-2005. The appellant Abdul Razzaq, on 4-10-2005, allegedly got recovered pistol (P.9) from his house, which was taken into possession vide recovery memo (Exh.PN). The appellant Haider Ali, on 4-10-2005, allegedly made a disclosure regarding rifle 44 bore, and led the police party to his house and got recovered the rifle (P.10), which was taken into possession vide recovery memo (Exh.PO). He (Ghulam Hussain S.I. P.W.18) prepared rough site plan (Exh.P0/1) of the place of recovery (P.1). On 3-10-2005, he moved an application for obtaining non-bailable warrant of arrest of accused Raza, Intiazar and Abbas (Exh.PHH), which was allowed and he got issued warrants of arrest (Exh.PHH/1), (Exh.PHH/2) and (Exh.PHH/3). On 10-10-2005, he moved an application for obtaining proclamation in respect of the said three accused, which is (Exh.PJJ), whereas, the proclamations are (Exh.PJJ/1), (Ex.PJJ/2), and (Exh.PJJ/3).

4. After completion of investigation, the challan was submitted before the trial Court. The appellants were charge-sheeted on 26-5-2006, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 18 P.Ws. The complainant Sharafat Ali (P.W.16) and Mst. Najma Bibi (P.W.15) furnished ocular account of the occurrence.

The medical evidence in this case has been furnished by Dr. Adnan Hakim (P.W.9) who conducted the post mortem examination on 31-8-2005 at 10-30 a.m. on the dead bodies of Muhammad Ali and Haji Nazir Ahmad deceased. Dr. Zulfiqar Ahmad (P.W.10), on 17-9-2005 at 12:00 noon, also conducted the post mortem examination on the dead body of Shafaqat Ali deceased.

Abdul Sattar (P.W.12) was the recovery witness who stated that on 4-10-2005 Abdul Razzaq got recovered .30 bore pistol P-9 vide recovery memo Exh. PN. Similarly on the said date Haider Ali alias Babar appellant also got recovered rifle 44 bore P-10 vide memo Exh. PO.

5. The statements of the appellants under section, 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you" they replied as under:--

Abdul Razzaq

"The P.Ws. are closely related to each other and to the deceased. They have falsely deposed against me at the instance of police. I have not committed this offence. Raza Saga who had been killed in a police encounter was cousin of Ashfaque lumberdar, who resides at Haveli Malvwayyan Wali, where my residence is also situated. In the previous local bodies elections, Maqsood Bhatti had contested election for the seat of Nazim against Tayyab Shah and we have supported in the said election to Tayyab Shah whereas, Ashfaque lumberdar was supporter of Maqsood Bhatti, who used his car in the elections. I had opened the dera for convincing the campaign for elections with my other friends and family. According to my information, the police had raided at the houses of Ashfaque lumberdar to arrest him, on the next day of the occurrence, Ashfaque lumberdar was not present at home, police took family members of Ashfaque lumberdar and kept them at a secret place for 7/8 days and after about 8 days the police had taken a huge illegal gratification from Ashfaque lumberdar and had released Ashfaque's relatives as they had grudge with us, they had persuaded the police that we should be involved in this case and police had made us as scapegoat. I am innocent."

The appellant Haider Ali alias Babar also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded under section 342 of Cr.P.C. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Haider Ali alias Babar replied as under:--

"The P.Ws. are closely related to each other and to the deceased. They have falsely deposed against me at the instance of police. I have not committed this offence. Raza Saga who had been killed in a police encounter was cousin of Ashfaque lumberdar, who resides at Haveli Malvwayyan Wali, where my residence is also situated. In the previous local bodies elections, Maqsood Bhatti had contested election for the seat of Nazim against Tayyab Shah and we have supported in the said election to Tayyab Shah whereas, Ashfaque lumberdar was supporter of Maqsood Bhatti, who used his car in the elections. I had opened the dera for convincing the campaign for elections with my other friends and family. According to my information, the police had raided at the houses of Ashfaque lumberdar to arrest him, on the next very day of the occurrence, Ashfaque lumberdar was not present at home, police took family members of Ashfaque lumberdar and kept them at a secret place for 7/8 days and after about 8 days the police had taken a huge illegal gratification from Ashfaque lumberdar and had released Ashfaque's relatives as they had grudge with us, they had persuaded the police that we should be involved in this case and police had made us as scapegoat. I am innocent. In fact I was appearing in supplementary matriculation exami-nation under Roll No.48318. I produce my original Roll No. Slip as Mark A. I also produce my result card Mark B".

6. The appellants opted not to make statements under section 340(2) of Cr.P.C., and both the appellants produced Zulfiqar Ali as (DW-1) and Ghulam Nabi as (DW-2) in their defence.

The learned trial Court vide its judgment dated 30-5-2006, found Abdul Razzaq and Haider Ali alias Babar guilty and convicted and sentenced them as mentioned and detailed above.

7. The learned counsel for both the appellants, in support of both these appeals, contends that there is considerable delay in reporting the matter to the police; that as per statement of the complainant Sharafat Ali (P.W.16), this occurrence took place on the intervening night of 30/31-8-2005, at about 1-30 a.m. (night) in his house, when he was present there, whereas, his statement was recorded at 3-15 a.m., while, the distance of Police Station, Mustfabad, from the place of occurrence was hardly two furlongs and this fact shows that the F.I.R. was not promptly lodged; that in the F.I.R., it was the case of the complainant that three persons with muffled faces entered in his house and they grappled with his father Haji Nazir Ahmad and brothers Muhammad Ali and Shafaqat

and due to grappling, their mufflers were removed and he identified them and it has further been stated by the complainant in his statement before the police that those three persons fired at his father and brothers; that neither any description of the assailants nor the kind of weapons used in the incident, was mentioned in the F.I.R.; that no source of the light was mentioned in the F.I.R.; that in his supplementary statement, the complainant has stated that in fact there were five persons, who entered his house and three grappled with the deceased Haji Nazir Ahmad, Muhammad Ali and Shafaqat, whereas, the remaining two were standing near the stairs, but even in the supplementary statement, no role has been assigned to those two persons, who were allegedly standing near the stairs, and it was also not mentioned that they were carrying any weapons with them; that during the trial, the complainant identified the appellants as those two persons, who were standing near the stairs, and also levelled allegation that they too resorted to firing, which resulted into the death of the deceased persons, namely, Haji Nazir Ahmad (father), Muhammad Ali and Shafaqat (brothers); that the complainant was duly confronted with his previous statement recorded under section 154 of the Code of Criminal Procedure and his supplementary statement (Exh.DB), and these material improvements were brought on the record; that the name of other eye-witness, namely, Mst. Najma Bibi (P.W.15) is not mentioned in the F.I.R. (Exh.PA), and had she been present at the spot, her name would have been mentioned by the complainant in the F.I.R.; that the Inquest Report of the deceased Shafaqat was prepared on 17-9-2005, and in the column of "Mukhtasir Halaat Waqiat" (brief history of the case), the fact mentioned in the F.I.R. had been reproduced, wherein it is clearly mentioned that three persons entered the house of the complainant, whereas, it is not mentioned that those were in fact five persons; that although Mst. Najma Bibi (P.W.15) claimed in her statement recorded by the police (Exh.DA), that five persons were present in the house at the time of incident, but she had not stated that two persons, who were standing near the stairs also resorted to firing, however, while appearing before the Court, she stated so and she was duly confronted with her previous statement and this improvement was also brought on the record; that site plan (Exh.PH) of the place of occurrence was prepared on 2-9-2005 by Muhammad Nasrullah (P.W.8), on the pointation eye-witnesses, and in the said site plan, the firing has been shown only from Point-D, that is the place, where three unknown accused were allegedly standing and where the occurrence was shown to have taken place and no firing has been shown from Points-M and N, where both the appellants were allegedly standing and similarly the empties

were also recovered from Point-D and no empty was recovered from Points-M and N; that since no description of the assailants was mentioned in the F.I.R. and similarly the appellants were not identified with any role during the identification parade, therefore, their alleged identification carries no value in the eyes of law. The learned counsel for the appellants further contends that there is conflict between ocular and medical account. As per F.I.R., the complainant has stated that his father Haji Nazir Ahmad (deceased) received injuries on his right shoulder and on the back, whereas, as per post-mortem report, there is only one fire-arm injury on the person of Haji Nazir Ahmad (deceased) i.e. on the buttock and made an exit from the shoulder of the deceased; that in the F.I.R., it is the case of the complainant that Shafaqat (deceased) received injuries on his abdomen, upper part of his chest, whereas, according to the post-mortem report, there is only one fire-arm injury on the person of Shafaqat (deceased), which is on the abdomen. As far as deceased Muhammad Ali is concerned according to the F.I.R., he received injuries on his abdomen, whereas, according to his post-mortem report, he received injuries on his back; that as far as recovery of fire arm weapons i.e. .30 bore pistol (P.9) allegedly from the possession of Abdul Razzaq appellant and Rifle .44 bore (P.10) allegedly on the pointation of Haider Ali alias Babar appellant and positive report of FSL (Ex.POO) is concerned, the learned counsel for the appellants contends that it is a corroborative piece of evidence and relevant only if the primary evidence inspires confidence and merely on the basis of recovery and positive report of FSL, conviction of the appellants and that too on capital charge cannot sustain; that the appellants were arrested on 6-9-2005, the date when the empties were sent to the FSL and in the record, their arrest has wrongly been shown as 21-9-2005; that even otherwise, the alleged recoveries are against the provisions of section 103 of the Code of Criminal Procedure, as no person from the locality was associated in the recovery proceedings, therefore, both the above-mentioned appeals may be accepted and the appellants may be acquitted from this case.

8. On the other hand, learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes these appeals on the grounds that the witnesses of ocular account have absolutely no enmity to falsely depose against the appellants; that there is no delay in reporting the matter to the police; that two persons died at the spot, whereas, one was seriously injured and the complainant had given first priority to provide medical aid to the said injured, and took him to the hospital, where police recorded his statement at 3-15 a.m. (night) and as such there was no delay in

lodging the F.I.R.; that the supplementary statement of the complainant Sharafat Ali (PW.16) was recorded just after one hour of the occurrence and even in the statement of Mst. Najma Bibi (P.W.15). It is clearly mentioned that in fact five persons entered in the house; that the appellants were correctly identified in the identification parade conducted under the supervision of Special Magistrate Tariq Karim Khokhar (P.W.17), by Sharafat Ali (P.W.16) and Mst. Najma Bibi (P.W.15); that there is no conflict between the ocular account and medical evidence as it is the case of both the witnesses that three deceased received fire arm injuries, and the minor contradictions regarding location of injuries is not material in such likes cases; that the empties were recovered from the spot on 2-9-2005, and the same were sent to the FSL on 6-9-2005. whereas, the appellants were arrested on 21-9-2005, and the report of FSL (Exh.POO) is positive; that there is no violation of the provisions of section 103 of the Code of Criminal Procedure; that the eye-witnesses, who have witnessed the occurrence, have no animus against the appellants, to falsely implicate them in the instant case; that both the eye-witnesses are inmate of the house, where this unfortunate incident took place and, as such, are natural witnesses of the occurrence; that the prosecution proved its case against the appellants beyond the shadow of any doubt, therefore, both these appeals be dismissed.

9. We have heard the arguments of the learned counsel for the parties, and have gone through the evidence available on record with their able assistance.

10. The occurrence in this case as per F.I.R. (Exh.PA) took place on the intervening night of 30/31-8-2005, at 1-30 a.m., inside the house of the complainant, situated at Ward No.2, Mustafa Abad, Kasur. The matter was reported to the police by the complainant Sharafat Ali (P.W.16) at 3-15 a.m. (night) at General Hospital, Lahore, and the formal F.I.R. (Exh.PA) was chalked out on 31-8-2005, at 4-00 a.m. (morning). The distance between the place of occurrence and Police Station, Mustafabad, is two furlongs. The complainant Sharafat Ali (P.W.16) took the injured Haji Nazir Ahmad, Muhammad Ali and Shafaqat to the General Hospital, Lahore, therefore, keeping in view the above-mentioned circumstances, we hold that the F.I.R. was promptly lodged and there is no delay in lodging the same.

11. The prosecution in order to prove the ocular account has produced Mst. Najma Bibi (P.W.15) and the complainant Sharafat Ali (P.W.16). We have noted that the above-mentioned prosecution witnesses have made improvements in their statements

to the extent of involvement of the appellants in this case. The complainant Sharafat Ali (P.W.16) has stated in the F.I.R. (Exh.PA) that three persons, with muffled faces, entered his house and they grappled with his father Haji Nazir Ahmad, and brothers Muhammad Ali and Shafaqat. The role of making fire shots were also attributed to the said three accused. It was also the case of the complainant that during the grappling, the mufflers of the accused were removed, and he identified them. It was further stated by the complainant Sharafat Ali (P.W.16) that the fire shot made by the above-mentioned three accused landed on the right shoulder and back of his father Haji Nazir Ahmad (deceased), on the belly and right side of the chest of his brother Shafaqat (deceased) and on the belly of Muhammad Ali (deceased). The complainant, later on, through his supplementary statement (Exh.DB) recorded on 31-8-2005 added two more unknown accused (the appellants) in this case. It was alleged by the complainant Sharafat Ali (P.W.16) in his supplementary statement (Exh.DB) and by Mst. Najma Bibi (P.W.15) in her statement recorded under section 161 of Cr.P.C. (Exh.DA) that apart from three above-mentioned unknown accused, two other unknown accused (the appellants) were also present and standing near the stairs of the house at the time of occurrence. No active role was attributed to the said accused (the appellants) in the supplementary statement of the complainant (Exh.DB). Similarly, Mst. Najma Bibi (P.W.15) assigned no active role to the above-mentioned two unknown accused (the appellants) in her statement (Exh.DA). The complainant Sharafat Ali (P.W.16) and Mst. Najma Bibi (P.W.15) while making their statements before the learned trial Court made further improvements in their statements qua the role of the appellants and they assigned the role of firing to all the five accused. The complainant Sharafat Ali (P.W.16) admitted during his cross-examination that in his statement (Exh.PA/1) he had mentioned only three accused, who participated in the occurrence. He has further admitted that in his statement (Exh.PA/1), he had not mentioned the presence of any accused near the stairs of his house and he did not assign any role to the said accused. He claimed that he had also assigned the role of firing to the accused persons (the appellants) who were present near the stairs, in his supplementary statement (Exh.DB), but this fact was not found to be so mentioned when he was confronted with his previous statement (Exh.DB). The relevant paragraph of his statement is at page-51 of the paper book of Murder Reference, and the same is reproduced hereunder:--

"It is correct that I have numbered three accused who participated in the occurrence in my statement Exh.PA/1. It is correct that I have not assigned any role or mentioned

the presence of any accused near the stairs in my statement Exh.PA/1. Exh.PA/1 was recorded by the police at Lahore General Hospital. My supplementary statement was recorded at the said hospital, after about one an hour. I have stated in my statement Exh.D.B (supplementary statement) that two accused persons who were present near the stairs also made firing (confronted with Exh.D.B where firing is not mentioned). I have in my both the statements that the accused while making firing ran away via stair cases (confronted with Exh.PA/1 and Exh.DB where it is not so recorded). I am matriculate. I have got recorded in Exh.PA/1 that tube-light was on (confronted with Exh.PA/1, where it is not so recorded). However, it is recorded in Exh.D.B".

The other eye-witness of the occurrence, produced by the prosecution, is Mst. Najma Bibi (P.W.15) The name of this witness was not mentioned in the F.I.R. (Exh.PA). Though Mst. Najma Bibi (P.W.15) has mentioned the presence of two unknown accused near the stairs of her house in her statement under section 161 of Cr.P.C. (Exh.DA), but this prosecution witness has also improved her version about the role of the appellant while making her statement before the trial Court. The relevant part of her statement is at page-48 of the paper book of Murder Reference, which reads as follows:-
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"I have stated in Exh.DA that two persons who were unmuffled were standing near the stairs (confronted with Exh.D.A where words "unmuffled" are not mentioned). I have stated in Exh.D.A that the person who had fallen on the ground when his shirt was torn and he became free (confronted with Exh.D.A where word "free" is not mentioned). I also got recorded in Exh.D.A that all the five persons started firing (confronted with Exh.D.A were it is recorded that the accused started firing). I have also got recorded in Exh.DA that the accused persons ran away through the stairs (confronted with Exh.D.A where it is not so recorded)".

It is evident from the perusal of above-mentioned prosecution evidence that the prosecution witnesses have made material improvements in their statements regarding the presence of the appellants and their role at the time of occurrence. Their presence was not mentioned in the F.I.R. (Exh.PA), wherein, only three unknown accused were stated to have entered the house of the complainant, whereas, in the supplementary statement of the complainant Sharafat Ali P.W.16 (Exh.DB), and in the statement before the police of Mst. Najma Bibi (Exh.DA), it was alleged that five accused persons trespassed into the house of the complainant. In the said statements (Exh.DA and

Exh.DB), mere presence of two unknown accused (the appellants) was mentioned near the stairs of the house, and no role whatsoever, was attributed to them, whereas, the prosecution witnesses namely, Sharafat Ali (P.W.16) and Mst. Najma Bibi (P.W.15) at the time of making their statements before the trial Court made yet another improvement in their statements and they assigned the role of firing to all the five accused. It was not mentioned by Mst. Najma Bibi (P.W.15) in her statement (Exh.DA) that two unknown accused, who were standing near the stairs; were armed with any weapon, whereas, while appearing in the Court, she alleged that all the five accused resorted to firing at the deceased persons. The Inquest Report (Exh. PCC) of Shafaqat (deceased) was prepared on 17-9-2005, after sixteen days of the registration of the F.I.R. In the column of "Mukhtasir Halaat Waqiat" (brief history of the case), it was clearly mentioned that three persons entered the house of the complainant, and it is nowhere mentioned in it that five persons have taken part in the occurrence.

The site plan in this case was prepared on 2-9-2005 by Muhammad Nasrullah Draftsman (P.W.8), who has stated that on 1-9-2005, he took rough notes on the ponitation of the complainant, and the prosecution witnesses and thereafter prepared scaled site plan of the place of occurrence (Exh.PH) and (Exh.PH/1). The site plan (Exh.PH) also indicates that the presence of two unknown accused (the appellants) near the stairs of the house of the complainant has been shown at Point-M and N, whereas, presence of three unknown accused has been shown at Point-D. It was mentioned in the site plan (Exh.PH) that the unknown accused, who were standing at Point-D, made firing and empties were also recovered nearby the Point-D. It was not mentioned in the site plan (Exh.PH) that two unknown accused, who were present near the stairs at Point-M and N, were alleged to have made any firing. No empties were recovered from Point-M and N, which clearly shows that even at the time of preparation of site plan (Exh.PH) on 2-9-2005, which was admittedly prepared on the pointation of the complainant and the prosecution witnesses, no active role was assigned to the unknown accused (the appellants), who were allegedly present near the stairs of the house.

As discussed earlier, the complainant Sharafat Ali (P.W.16) has mentioned only three accused in his statement (Exh.PA/ 1), whereas, two more accused (the present appellants) were implicated in this case, through his supplementary statement (Exh.DB). It is evident from the perusal of above prosecution evidence that the appellants were implicated in the present case, because of the improvement made by

the complainant and therefore the other eye-witness Mst. Najma Bibi (P.W.15) also followed the same line and implicated five accused in this case in her statement recorded under section 161 of Cr.P.C. (Exh.DA), The dishonest improvements made by the prosecution witnesses regarding the presence of the appellants at the place of occurrence and about the role played by them, has made the prosecution case qua the appellants highly doubtful.

The Hon'ble Supreme Court of Pakistan in the case of Akhtar Ali and others v. The State (2008 SCMR 6), at page12 has discussed the evidentiary value of the evidence of a witness, who improves his version in his subsequent statement. The relevant part of the above-mentioned judgment is reproduced hereunder:--

"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825).

12. The learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, have insisted that non-mentioning of the presence or role of the appellants in the F.I.R. is not significant because the supplementary statement (Exh.DB) of the complainant Sharafat Ali (P.W.16) and statement under section 161 of Cr.P.C. (Exh.DA) of Mst. Najma Bibi (P.W.15) were recorded on the same day i.e. 31-8-2005, and the said prosecution witnesses disclosed the presence of two unknown accused (the appellants) in their above-mentioned statements. It is added that supplementary statement of the complainant Sharafat Ali (P.W.16), which was recorded on the same day is to be considered as part of the F.I.R. (Exh.PA).

We are afraid, we cannot agree with the above contention of the learned D.P.G., and of the learned counsel for the complainant, because the supplementary statement of the complainant made during police investigation would not be equated with F.I.R. In this respect, we have been fortified by a pronouncement of the Hon'ble Supreme Court of Pakistan in the case of Falak Sher alias Sheru v. The State (1995 SCMR 1350),

wherein, at pages 1355 and 1356, the Hon'ble Supreme Court has been pleased to observe as under:--

"The learned counsel for the State insisted that in supplementary statement recorded by S.-I. Muhammad Ayub on same day the complainant had disclosed name of the appellant. The supplementary statement of the complainant be read as part of the F.I.R. The contention is devoid of force. It may be observed that F.I.R. is the document which is entered into 154, Cr.P.C. Book maintained at the police station at the complaint of informant. It brings the law into motion. The police under section 156, Cr.P.C. starts investigation of the case.

Any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report nor read as part of it.

It is, therefore, established that name of the appellant does not appear in the F.I.R. In respect of the statement of complainant Muhammad Yasin recorded before the Court stating that he had named appellant Falak Sher along with three accused in the F.I.R. It may be observed that it is totally belied by the I.O. Muhammad Ayub. It is an improvement made by the complainant. Statement of the complainant involving of appellant Falak Sher in the case is obviously false and no reliance can be placed thereon. Because of improvement the other eye-witnesses have also named the appellant in the case. Their evidence in respect of the appellant is also not true. This aspect of case was neither attended to either by the trial Court or the Federal Shariat Court.

In view of our observations made hereinabove we are inclined to extend benefit of doubt to the appellant, Falak Sher and accept his appeal, set aside his conviction and sentence recorded against him by the Additional Sessions Judge, Faisalabad, on 10-3-1992. He stands acquitted of the charge. He be set at liberty forthwith if not required in any other case".

13. Insofar as the identification of the appellants in this case is concerned, we have noted that no source of light was mentioned in the F.I.R. (Exh.PA). Similarly, no description of the accused, who were allegedly present near the stairs of the house of occurrence, was given by Sharafat Ali (P.W.16) in his supplementary statement (Exh.DB). Moreover, Mst. Najma Bibi (P.W.15) did not mention any specific description of the assailants, who were present near the stairs of the house. She has given the description of the assailants by saying that one was of nut-brown colour with

bulky physique and was of the age of 30 years. Regarding remaining accused, she stated that one was of the average height with slim body, whereas, the others were of tall heights. She has not given any specific description like age, colour etc. or identification marks like mole, scar marks etc. of the remaining assailants. The prosecution has also placed on record a copy of the report of identification parade (Exh.PS), which was conducted under the supervision of Tariq Karim Khokhar, Special Judicial Magistrate, Kasur (P.W.17). It is manifest from the perusal of said report that role of the accused/appellants was not described by the witnesses at the time of identification parade, which is always considered an inherent defect in the prosecution evidence, therefore, such identification parade is not helpful for the prosecution, and the same cannot be relied upon to maintain the conviction of the appellants. The Special Magistrate Tariq Karim Khokhar (P.W.17), while conducting the identification parade did not bother to ask the appellants as to whether or not they had any objection about the identification parade. The appellants were arrested in this case on 21-9-2005, whereas, the identification parade was held on 28-9-2005, i.e. with the delay of seven days, after the arrest of the appellants. This delay creates a lot of doubt regarding the identification parade, because the prosecution witnesses had number of opportunities to see the accused during this period. The Hon'ble Supreme Court of Pakistan in the case of Shafqat Mehmood and others v. The State (2011 SCMR 537), at pages 544 and 545, has discussed the value of the identification parade, which was held with the delay of seven days, and wherein, no role of the accused was described by the witnesses at the time of their identification, in the following terms:--

"It is pertinent to mention here that contents of the F.I.R. reveal that witnesses had seen the accused for the first time. In such situation identification parade becomes essential which is to be conducted strictly in accordance with law after completing legal requirements. It is also settled principle of law that if accused were not named in the F.I.R. identification parade becomes necessary. It is also settled principle of law that role of the accused was not described by the witnesses at the time of identification parade which is always considered inherent defect, therefore, such identification parade lost its value, and cannot be relied upon. As mentioned above, the aforesaid witnesses did not mention name and role of the accused in their statements recorded by the Magistrate after identification parade. It is an admitted fact that appellants had taken objection at the time of identification parade that they had already been shown to the witnesses but this objection was not taken into consideration by the courts below. In

such circumstances identification parade becomes doubtful and cannot be relied upon. It is an admitted fact that in terms of contents of F.I.R. witnesses did not know the appellants before the occurrence. Identification parade was not held in accordance with law, therefore, identification in court by the witnesses is also of no value. Identification parade was held after a delay of 7 days after the arrest of the accused. This delay creates a lot of doubt regarding the identification parade as the witnesses had various opportunities to see the accused persons".

Similarly, the Hon'ble Supreme Court of Pakistan in the cases of Bacha Zeb v. The State (2010 SCMR 1189) and Sabir Ali alias Fauji v. The State (2011 SCMR 563) discarded the prosecution evidence regarding the identification parade, wherein no role of the accused was described by the prosecution witnesses at the time of their identification.

In the light of above stated circumstances, the prosecution evidence regarding the identification of the appellants does not inspire confidence.

14. In view of the above discussion, we are of the considered view that the prosecution case against the appellants is replete with material improvements and the story of the prosecution qua involvement of the appellants in the case is highly doubtful. Similarly, the prosecution evidence about identification of the appellants is also not believable, therefore, we hold that the prosecution failed to proved its case against the appellants beyond the shadow of doubt.

15. Insofar as the evidence of alleged recovery of pistol (P.9) from Abdul Razzaq appellant and Rifle .44 bore (P.10), from Haider Ali alias Babar appellant, and positive report of FSL (Exh.POO), is concerned, it is by now a well-settled law that evidentiary value of the recovery of the weapon of offence is purely corroboratory in nature and recovery of weapon of offence alone is not capable to bring home the charge against the accused in absence of direct substantive evidence. Conviction cannot be recorded merely on the basis of the evidence of recovery howsoever convincing it may be. After taking out from consideration, the ocular account of the prosecution witnesses and the evidence of identification parade of the accused, we are of the view that the conviction and sentence of the appellants cannot sustain merely on the basis of above-mentioned recoveries. We are guided in this respect by the case of Muhammad Afzal alias Abdullah and others v. The State and others (2009 SCMR 436), wherein, at pages 443 and 444, the Hon'ble Supreme Court of Pakistan has discussed the value of the evidence

of recoveries in absence of confidence inspiring direct evidence, in the following terms:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Saifullah v. The State (1985 SCMR 410) and Abdul Mateen v.The State and others (PLD 2006 Supreme Court 538).

16. Although the prosecution witnesses have no enmity with the appellants, but absence of enmity of prosecution witnesses with the accused does not mean that whatever they have stated be taken as gospel truth and apostle reality. This Court has to see as to whether the statements of the prosecution witnesses are confidence-inspiring and trustworthy to the extent of role assigned to the appellants. Though the prosecution witnesses have no enmity with the appellants, but their statements to the extent of role attributed to the appellants are not free from doubt and the same are not confidence-inspiring, therefore, mere absence of their enmity with the accused/appellants does not mean that we should straightaway maintain the death sentence of the appellants, without looking into the veracity of the evidence of such witnesses. The Hon'ble Supreme Court of Pakistan in its number of judgments has held that mere this fact that a witness is an independent witness does not necessarily prove that he is a witness of truth and intrinsic worth of the statement of any witness is the test of his veracity. Reference in this context may be made to the case of Muhammad Pervez and others v. The State and others (2007 SCMR 670). The above-mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825).

17. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept both the appeals, bearing Criminal Appeal No.970 of 2006, filed by Abdul Razzaq, and Criminal Appeal No.972 of 2006, filed by Haider Ali alias

Babar, and set aside their conviction and sentences recorded by the learned trial Court against the appellants namely, Abdul Razzaq and Haider Ali alias Babar. The appellants, Abdul Razzaq and Haider Ali alias Babar are in jail. They shall be released forthwith if not required in any other case.

Death sentences awarded to the appellants Abdul Razzaq and Haider Ali alias Babar are not CONFIRMED and Murder Reference is answered in the NEGATIVE.

It is clarified that the observations made in this judgment are not relevant for the case of the absconding accused.

HBT/A-63/L **Appeals accepted.**

2013 Y L R 852

[Lahore]

Before Malik Shahzad Ahmad Khan, J

SHAKIL MEHMOOD through Special Attorney---Petitioner

Versus

DISTRICT JUDGE, SIALKOT and 3 others---Respondents

Writ Petition No.22339 of 2010, heard on 15th December, 2011.

West Pakistan Family Courts Act (XXXV of 1964)---

----S.5 &Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Recovery of dower, dowry articles, maintenance allowance and delivery expenses---Concurrent findings of Trial Court and Appellate Court by which decree for maintenance for son, recovery of dower amount and dowry articles was passed in favour of the wife (respondent)---Husband (petitioner) in his petition did not challenge the quantam of maintenance allowance as fixed by courts below but objected to the 20% annual increase in the said allowance---Husband also contented that dowry list was not signed by him or his representative and list of dowry articles exhibited in the court did not mention their prices---Validity---Petitioner had failed to produce his salary slips to establish his contention that 20% annual increase in maintenance allowance was beyond his means---Minor son was a 'special child' because of which wife had to incur a lot of expense on his medical treatment---Such fact was also admitted by one of petitioner's witnesses, in view of which 20% annual increase in maintenance allowance was rightly fixed by courts below---Wife had proved the list of dowry articles, as the same was signed by her and she had also produced different receipts regarding the purchase of said dowry articles---Husband having failed to point out any illegality or irregularity in concurrent findings of Trial Court and Appellate Court below, his petition was dismissed.

Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and 2 others PLD 2009 SC 760 distinguished.

Ch. Muhammad Aslam for Petitioner.

Shahbaz Ali Khan for Respondents Nos.3 and 4.

Date of hearing: 15th December, 2011.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--This petition has been filed to challenge the impugned judgment and decree dated 15-4-2010 passed by the learned Judge Family Court, Sialkot, as well as, against the impugned judgment and decree dated 8-6-2010 passed by the learned District Judge, Sialkot.

2. As per brief facts of the present case, respondents Nos. 3 and 4 filed a suit for recovery of maintenance allowance at the rate of Rs.25,000 per month, per head, dower amount of Rs.60,000, delivery charges of Rs.51,000 and for recovery of dowry articles or in the alternative for recovery of Rs.6,95,920. The said suit was filed in the court of learned Judge Family Court, Sialkot. The suit of dowry articles was decreed to the extent of Rs.3,00,000 whereas the suit for recovery of maintenance allowance of minor was decreed at the rate of Rs.5,000 per month with 20% annual enhancement and delivery charges of Rs.51,000 were also decreed vide judgment and decree dated 15-4-2010.

The petitioner challenged the said judgment and decree through filing an appeal but the same was also dismissed vide impugned judgment and decree dated 8-6-2010 passed by the learned District Judge, Sialkot. The petitioner has challenged the above mentioned judg-ments and decrees through instant writ petition.

3. It is submitted by the learned counsel for the petitioner that he does not challenge the quantum of maintenance allowance as fixed by the courts below but he has objection on the 20% annual increase in the said maintenance allowance. It is contended that in view of the law laid down in the case of "Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and 2 others" (PLD 2009 Supreme Court 760), 20% increase in the maintenance allowance is not sustainable in the eyes of law. It is further contended that the findings of the courts below on issue No. 4 are not sustainable in the eyes of law; that no price was mentioned in the dowry list Exh.P-21, therefore, the decretal amount of Rs.3,00,000 as awarded by the courts below is result of misreading and non-reading of evidence; that the above mentioned dowry list was not signed by the petitioner or his representative, therefore, the suit has wrongly been decreed, thus, this petition may be accepted and the impugned judgments and decrees may be set aside.

4. On the other hand, this petition has been opposed by the learned counsel appearing on behalf respondents Nos. 3 and 4 on the grounds that DW-2 Muhammad Saleem has admitted while appearing in the witness box that respondent No.4 is an abnormal child and respondent No.3 had to incur a lot of expenses on the mental treatment of said minor, therefore, 20% increase in the maintenance allowance has rightly been fixed by

the courts below; that facts in the case of Tauqeer Ahmad Qureshi are distinguishable from the facts of the present case; that there are concurrent findings of facts in favour of respondents Nos.3 and 4, therefore, the impugned judgments and decrees may not be set aside; that dowry articles were fully proved through oral as well as documentary evidence produced by the petitioner; that the petitioner has also placed on record different receipts of said articles; that non-signing of the dowry list by the petitioner is insignificant because said list was fully proved by respondent No. 3 as the said list contains her signature and the same was exhibited in her evidence; that there is no illegality in the impugned judgments and decrees, therefore, this petition may be dismissed.

5. Arguments heard. Record perused.

6. It is an admitted fact that respondent No.3 is ex-wife of the petitioner and respondent No.4 is his son. It is duty of the petitioner to provide maintenance allowance to his minor son. The petitioner has claimed that he is getting salary of Rs.15,000 per month, therefore, 20% increase in the maintenance allowance is beyond his means. The petitioner is admittedly employed in "Kuwait". He has not produced his salary slip to establish his above mentioned contention that he is getting Rs.15,000 per month. The minor respondent No.4 is admittedly a "special child". It was admitted by Muhammad Saleem DW-2 who was a witness of the present petitioner that minor respondent No. 4 is an abnormal child and her mother (respondent No.3) had to incur a lot of expenses on his medical treatment. In view of the above 20% annual increase in the maintenance allowance was rightly fixed by the courts below. The facts of the case of "Tauqeer Ahmad Qureshi" supra are distinguishable from the facts of the present case. So far as suit for recovery of dowry articles is concerned, it is not believable that respondent No.3 was not given any dowry articles at the time of her marriage. She claimed dowry articles of Rs.6,95,920 but the courts below have decreed the suit to the extent of Rs.3,00,000. The petitioner has proved the dowry list as the same is signed by her and contains her signature. The said list was exhibited in evidence as Exh.P-21. The petitioner also produced different receipts regarding the purchase of above mentioned dowry articles. The same are available on record. In view of the above, both the courts below have rightly decreed the suit of respondent No.3 to the extent of recovery of dowry articles of worth Rs.3,00,000. There are concurrent findings of facts of two courts below. The learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned judgments and decrees passed by the courts below.

7. In light of the above discussion, the instant petition is without any substance; hence, the same is, hereby, dismissed.

MWA/S-8/L **Petition dismissed.**

2013 Y L R 965

[Lahore]

Before Malik Shahzad Ahmad Khan, J

NADEEM RAZA---Petitioner

Versus

JUDGE FAMILY COURT and 3 others---Respondents

Writ Petition No.4005 and C.M. No.5471 of 2012, decided on 13th September, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17A---Interim maintenance of minor---Object and purpose---Purpose behind S.17A of the West Pakistan Family Courts Act, 1964 was to ensure that during pendency of proceedings before the Family Court; financial constraints faced by minors were ameliorated.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17A---Constitution of Pakistan, Art. 199---Constitutional petition against interim order---Maintainability---Condi-tions---Interim maintenance, order for---Suit for recovery of maintenance allowance---Husband assailed order of Family Court whereby he was ordered to pay interim maintenance during pendency of proceedings; on the ground that the quantum of maintenance was exorbitant---Validity---Husband had contended that he had recently been sacked from his job---Disputed questions of facts regarding job, source of income and salary of the husband had been raised which could not be resolved in the Constitutional Jurisdiction of High Court and it was not possible to determine the veracity of claims of husband without recording evidence---Such exercise could not be undertaken in the Constitutional Jurisdiction of High Court especially when the finding was only tentative in nature and not final and impugned order was interim in nature---Under Art. 199 of the Constitution, petition against interim order was maintainable if the same was void ab inito, without jurisdiction or had attained status of a final order---Family Court had jurisdiction to fix interim maintenance allowance, therefore, the impugned order did not fall within such categories---Legislature had under S. 14(3) of the West Pakistan Family Courts Act, 1964 had specifically prohibited filing of appeal against interim order and if Constitutional Petition was allowed to be filed against such order, same would tantamount to defeating and diverting intent of the legislature---Petitioner had an alternate remedy available to him by challenging impugned order in appeal which he

may file against ultimate order /judgment if passed against husband---Constitutional petition, being not maintainable, was dismissed in circumstances.

Zafar Hussain v. Begum Farzana Nazli and others PLD 2004 Lah. 349; Makhdoom Ali v. Mst. Razia Sultana and others 2007 MLD 41 and Shahzad Hussain v. Judge Family Court 2011 CLC 820 distinguished.

Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary Forest and Agriculture, Peshawar and others 1993 SCMR 618; Benedict F.D. Souza v. Karachi Building Control Authority and 3 others 1989 SCMR 918; Muhammad Irfan v. Judge Family Court, Sargodha and 2 others 2008 CLC 585; Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S & GAD Karachi and others 1995 SCMR 1165 and Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State 1999 SCMR 1447 rel.

Aamir Aziz Qazi for Petitioner.

Ch. Asif Karim for Respondents Nos. 2 and 4.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This writ petition has been filed against the impugned order dated 16-3-2012 passed by learned Judge Family Court, Multan whereby interim maintenance allowance of respondents Nos.2 to 4 was fixed at the rate of Rs.5,000 per month; per head.

2. It is contended by the learned counsel for the petitioner that the quantum of interim maintenance as fixed vide the impugned order is exorbitant and the same is beyond the means of the petitioner; that petitioner is not in a position to pay the above mentioned maintenance allowance because he has been facing extreme financial crisis as he has been sacked from his job on 5-7-2012 and presently he is jobless, therefore, the impugned order may be set aside and the quantum of maintenance allowance may be reduced. In support of his contention the learned counsel for the petitioner has placed reliance on the cases reported as Zafar Hussain v. Begum Farzana Nazli and others (PLD 2004 Lahore 349), Makhdoom Ali v. Mst. Razia Sultana and others (2007 MLD 41) and Shahzad Hussain v. Judge Family Court, (2011 CLC 820).

3. On the other hand, this petition has been opposed by the learned counsel for respondents Nos.1 to 4 on the grounds that the instant petition has been filed against an interim order, which is not maintainable in the eye of law; that the petitioner is employed in a private firm and has been earning Rs.60,000 per month; that the petitioner has raised disputed questions of facts in this petition regarding his source

or income and the same cannot be resolved in constitutional jurisdiction, therefore, this petition may be dismissed.

4. Arguments heard and record perused.

5. The Family Courts Act, 1964 is a special statute and has been enacted with a specific purpose to ensure expeditious settlement and disposal of disputes relating to marriage and family affairs and also matters connected therewith. It, inter alia, has bestowed upon the Family Court powers under section 17-A of the Act ibid to grant interim maintenance to the concerned parties during the pendency of the proceedings. It also has been mandated that such maintenance shall be paid by the 14th of each calendar month and in case of default the defence of the defendant shall be struck off and the suit decreed. The purpose behind this legislation is to ensure that during pendency of these proceedings with the Family Court financial constraints faced by the minors are ameliorated. In the present case the allowance of maintenance was fixed at the rate of Rs.5,000 per month per head for respondents Nos.2 to 4. It was averred in para 7 of the plaint that the petitioner is employed in a medicine company and has been earning Rs.60,000 per month. The petitioner did not specifically deny in para 9 of his written statement that he was not getting salary of Rs.60,000 per mouth rather he has taken this objection that he has recently been sacked from the said job. The learned Judge Family Court while keeping in view the pleadings of the parties, their status and available record tentatively assessed the interim maintenance allowance at the rate of Rs.5,000 per month per head. The disputed questions of facts regarding the job, source of income and salary of the petitioner have been raised in this petition, which cannot be resolved in the Constitutional jurisdiction of this Court. It is not possible to determine the veracity of the claim of the petitioner without recording of evidence. Such exercise cannot be undertaken in constitutional jurisdiction, especially when the finding was only tentative and not final and order was also interim in nature. I have fortified my views with the cases of Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary Forest and Agriculture, Pehsawar and others (1993 SCMR 618), Benedict F.D. Souza v. Karachi Building Control Authority and 3 others (1989 SCMR 918) at page 920) and Muhammad Irfan v. Judge Family Court, Sargodha and 2 others (2008 CLC 585).

6. There is no cavil with this proposition that a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is maintainable even against an interim order if the same, is void ab initio, without jurisdiction or if the same has attained the status of a final order. As discussed above, under section 17-A of the West Pakistan Family Courts Act, 1964 the learned Judge Family Court has the jurisdiction to fix the interim maintenance allowance, therefore, the impugned order

does not fall within the categories mentioned above. The Legislature under section 14(3) of the Act ibid has specifically prohibited the filing of an appeal against an interim order and if the Constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the Legislature. Reference is made to the cases of Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S & GAD Karachi and others (1995 SCMR 1165) and Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State (1999 SCMR 1447).

7. The petitioner has got an adequate remedy available to him by challenging the impugned order in appeal, which, he may file against the ultimate order/judgment if the same would be passed against the petitioner. This petition is also hit by Article 199 (1) of the Constitution of Islamic Republic of Pakistan, 1973, hence, cannot be entertained.

8. The facts of the judgment cited by the learned counsel for the petitioner are distinguishable- from the facts of the present case.

9. In light of the above discussion, the instant petition is without any substance; hence the same is hereby dismissed. There is no order as to costs.

10. Before parting with this judgment, I may observe here that the findings of the learned Judge Family Court, Lahore, in the impugned order, as well as, the observations made in this order are only tentative in nature and not final. Proper quantum of the maintenance allowance has to be fixed by the learned Judge Family Court, after recording of evidence. The learned Judge family Court may increase or decrease the quantum of maintenance allowance at the time of final adjudication of the case, without being influenced by any observation made in the impugned order, as well as, in this order.

C.M. No.5471 of 2012

As the main writ petition has been finally decided, therefore, this application has become infructuous, therefore, the same is, hereby, dismissed.

KMZ/N-71/L **Petition dismissed.**

2013 Y L R 1091

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

FAROOQ AHMAD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1391 and Murder Reference No.516 of 2007, heard on 4th December, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---No delay in reporting the matter to the Police---Names of witnesses of "Waj Takar", were not mentioned by the Police in the Column 4---Story of Waj Takar was also not mentioned in the report which was prepared by the Police after spot inspection---Names and the points showing the presence of witnesses of 'Waj Takar' were not mentioned in the rough site plan, as well as, in the scale site plan---Prosecution evidence of 'Waj Takar' was the result of an afterthought---Prosecution evidence of extra-judicial-confession in the case, was also not worthy of reliance---No empty was recovered from the place of occurrence, and no report of Forensic Science Laboratory was on record---Evidence of recovery was only of corroborative nature, and conviction of accused could not be sustained merely on the basis of such recovery---Motive was not mentioned in the F.I.R., but was introduced through the supplementary statement of the complainant, which was recorded later on---Prosecution had failed to prove the motive as alleged against accused---Abscondence of accused, per se, was not sufficient to prove the guilt of accused, in absence of any other direct or strong circumstantial evidence against accused---Prosecution having failed to prove its case against accused beyond the shadow of doubt, conviction and sentence awarded to accused vide impugned judgment by the Trial Court, was set aside; accused was acquitted of the charge and was released, in circumstances.

Sajid Mumtaz and others v. Basharat and othes 2006 SCMR 231; Tahir Javed v. The State 2009 SCMR 166; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC

538; Muhammad Yaqub v. The State 1971 SCMR 756 and Nek Muhammad and another v. The State PLD 1995 SC 516 rel.

(b) Penal Code (XLV of 1860)---

----S.302(b)---Qatl-e-amd---Appreciation of evidence---Circumstantial evidence---Where prosecution case was based on circumstantial evidence; utmost care and caution was required for reaching at the just decision of the case---In such like cases, the chain link should be so inter-connected with each other that its one end touches the dead body, while the other end goes around the neck of accused; if any chain link was missing, then its benefit should be given to accused.

The State v. Manzoor Ahmad PLD 1966 SC 664; Asadullah and another v. State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103; Ibrahim and others v. The State 2009 SCMR 407 and Muhammad Hussain v. The State 2011 SCMR 1127 rel.

(c) Penal Code (XLV of 1860)---

----S.302(b)---Qatl-e-amd---Appreciation of evidence---Medical evidence could only establish the kind of weapon used in the occurrence, the seat of the injury, the time elapsed between injury and death; and the time elapsed between death and post-mortem examination---Medical evidence, could never be a primary source of evidence for the crime itself, but it was only a corroborative piece of evidence.

(d) Criminal trial---

----Abscondence of accused---Abscon-dence, per se was not sufficient to prove the guilt of accused, in absence of any other direct or strong circumstantial evidence against accused.

Barkat Ali v. Muhammad Asif and others 2007 SCMR 1812; Rohtas Khan v. The State 2010 SCMR 566 and Tahir Khan v. The State 2011 SCMR 646 rel.

Zafar Iqbal Chohan for Appellant.

Arshad Mehmood, Deputy Prosecutor General for the State.

Javaid-ur-Rehman for the Complainant.

Date of hearing: 4th December, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1391 of 2007 titled as "Farooq Ahmad v. The State" and Murder Reference No.516 of 2007 titled as "The State v. Farooq Ahmad" as both these matters have arisen out of the same case i.e. F.I.R. No.333 dated 15-11-2005, offence under section 302, P.P.C., registered at Police Station Kallur Kot District Bhakkar.

2. Farooq Ahmad, appellant filed Criminal Appeal No.1391 of 2007 against the judgment dated 8-9-2007 whereby, he was convicted by the learned Additional Sessions Judge, Kallur Kot under section 302(b), P.P.C. and sentenced as under:--

"45. I therefore, accordingly convict Farooq Ahmad son of Ahmad Nawaz Awan by caste resident of Awanawala Janubi, Tehsil Kallur Kot District Bhakkar, accused and sentenced him to death under section 302(b), P.P.C. for the murder of Abdul Waheed deceased, subject to confirmation of this sentence by the Hon'ble Lahore High Court, Lahore. He shall be hanged by his neck till his death. I also direct him to pay Rs.One lac as compensation to the legal heirs of deceased under section 544-A, Cr.P.C. and in default of which he will have to undergo one year's S.I. The accused is given the benefit of 382-B, Cr.P.C."

The learned trial Court has sent Murder Reference No.516 of 2007 for confirmation or otherwise of the sentence of death awarded to Farooq Ahmad (convict) as required under section 374 of the Code of Criminal Procedure.

3. Brief facts, of the case are that on the statement of Noor Hussain complainant (P.W.13), F.I.R. (Exh.PC) was registered at Police Station Kallur Kot, District Bhakkar wherein the complainant stated that he is cultivator. His son Ahmad Saeed was in Army who, during the days of occurrence, was posted at Muzaffarabad. On the day of occurrence, at about 2-00 p.m., his son Ahmad Saeed made a phone call at the PCO of Abdul Wahid son of Muhammad Abdullah and left the message that he will talk to his elder brother Abdul Waheed at 9-00 p.m. At about 8-30 p.m., his son Abdul Waheed went to the PCO of Abdul Wahid, his nephew to bring mobile phone so that he may talk (to his brother) at home. The PCO was at a distance of 2/3 furlongs. At about 9-00 p.m. he (complainant) went out of his house to answer the call of nature and in the meanwhile he heard the report of fire shot coming from the southern side. He went towards the side of firing. Meanwhile, Faiz Ahmad son of Muhammad Hassan, his brother-in-law (Sala) and Muhammad Rafique son of Abdul Haleem caste Awan residents of Deh also came there and when they reached at "Kachaa" road at a

distance of about one furlong from the house of the complainant, they saw, in the moonlight Abdul Waheed, smeared with blood, was lying there. They saw that there was a wound of firearm on his forehead and he succumbed to the said injury, at the spot. The complainant further mentioned in the F.I.R. that some unknown person, because of some unknown reasons, had murdered his son Abdul Waheed.

4. On 16-11-2005, the complainant made his supplementary statement (Exh.PC/1) wherein, he stated that he could not mention in the F.I.R., the name of Farooq son of Ahmad Nawaz accused. He further stated that on the day of occurrence when he reached at the spot, Ghulam Abbas, his brother and Muhammad Aslam son of Abdul Latif told him that they were coming from Zamaywala to Awanawala and on the way they had seen Farooq son of Ahmad Nawaz (appellant) after the occurrence. It was also alleged in the said statement that Farooq (appellant) had committed the murder of Abdul Waheed (deceased). The motive, as given by the complainant in his supplementary statement, was that three years prior to the occurrence, Faiz Ahmad (P.W.8), father-in-law of Abdul Waheed (deceased) purchased a piece of land from Rab Nawaz, real paternal uncle of Farooq (appellant) but later wanted to take back that land. A few days prior to the occurrence, a quarrel took place between the parties. Abdul Waheed (deceased) and Faiz Ahmad (P.W.8) gave beatings to Farooq accused who kept this grudge in his mind and committed the murder of Abdul Waheed (deceased).

5. The appellant was arrested on 13-2-2007 by Muhammad Asghar, Inspector/ S.H.O. (P.W.14). On 18-2-2007, Farooq Ahmad appellant while in police custody, led the police to the north corner of his house and allegedly got recovered pistol (P-1) along with six live bullets (P-2/1-6). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 10-5-2007, to which he pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined as many as eighteen witnesses. Noor Hussain, complainant (P.W.13), Faiz Ahmad (P.W.8) found the dead body of Abdul Waheed after hearing the report of fire shot. Muhammad Aslam (P.W.10) and Ghulam Abbas (P.W.11) are the witnesses of Waj Takar. Khadim Hussain (P.W.15) and Rana Khushi Muhammad (P.W.16) are the witnesses of extra

judicial confession made by Farooq Ahmad appellant. Muhammad Yaqoob, 450/HC (P.W.6) is the recovery witness of pistol (P-1) along with six live bullets (P-2/1-6). Dr. Khizer Hayat (P.W.7) conducted the postmortem examination on the dead body of Abdul Waheed deceased.

Muhammad Amin Khan S. I. (P.W.18), Muhammad Ramzan S.I. (P.W.9), Mani Khan S.I. (P.W.17) and Muhammad Asghar, Inspector/S.H.O. (PW-14) conducted the investigation of the case at different stages whereas, the remaining witnesses are formal in nature. The learned Deputy District Public Prosecutor, gave up Mulazim Hussain A.S.-I. and Muhammad Rafique P.W. vide his statement dated 6-7-2007 as being unnecessary. He also gave up Muhammad Yaqoob and Muhammad Rafique as being unnecessary vide his statement dated 20-7-2007. The prosecution produced documentary evidence in the shape of Warrant of arrest and report thereon Exh.PA and Exh.PA/1 respectively, proclamation regarding the appellant and report thereon Exh.PB and Exh.PB/1 respectively, F.I.R. Exh.PC, supple-mentary statement of Noor Hussain complainant (P.W.13) Exh.PC/1, scaled site plan Exh.PD, recovery memo regarding pistol (P-1) along with live bullets (P-2/1-6) Exh.PE, postmortem examination report Exh.PF, Inquest Report Exh.PH, recovery memo regarding blood-stained earth Exh.PJ, recovery memo regarding last worn clothes of the deceased Exh.PK, application for obtaining warrant of arrest and order Exh.PM and Exh.PM/1 respectively. Thereafter, the learned Deputy District Public Prosecutor, vide his statement dated 20-7-2007, after tendering in evidence the report of Chemical Examiner (Exh PO) and that of Serologist (Exh PP), closed the prosecution evidence. After that, on the same day i.e. 20-7-2007, the statement of the appellant was recorded under section 342 of the Code of Criminal Procedure. To a question as to why the case against you and why the prosecution witnesses have deposed against you, the appellant replied as under:--

"The case against me is false. So far as P.Ws are concerned they are relative of the deceased so they are interested in my conviction. All the P.Ws are chance witnesses and are inimical to me."

To another question as to whether he has anything else to say?, the appellant replied as under:--

"I am innocent. I was student of B.A when the F.I.R. of this case was registered against me. My father was suffering from Cancer disease and was admitted in Mayo

Hospital Lahore at that time and any educated and sensible person cannot commit murder when his father is on death bed in the hospital. Nobody witnessed the occurrence. As it was a blind murder. Complainant party tried his best to trace the real culprits but when they failed to do so. They nominated me in this blind murder case later on malafidely."

The appellant did not opt to appear as his own witness, in disproof of the allegations levelled against him, as provided under section 340(2) of the Code of Criminal Procedure, however, he produced Provisional Result Intimation of Secondary School Examination Annual, 2002 as Exh.DG in his defence. He also produced coy of statement of Mushtaq Ahmad Exh.DA, copy of statement of Muhammad Akram Exh.DB, copy of statement of Muhammad Aslam Exh.DC, copy of statement of Ghulam Abbas Exh.DD and copy of statement of Rana Khushi Muhammad Exh.DF.

7. Learned counsel for the appellant, in support of this appeal, contends that in fact, it was a night time unseen occurrence and there is no eye-witness of the same; that in this case, the F.I.R. was got registered by Noor Hussain, father of the deceased but no one was named therein as accused; that the appellant was implicated subsequently through supplementary statement of the complainant, which as per prosecution case, was recorded on the night of occurrence and the complainant based his supplementary statement on the information imparted to him by two persons namely, Muhammad Aslam son of Abdul Latif (P.W.10) and Ghulam Abbas son of Ahmad (P.W.11) and both these persons, in their statements before the learned trial Court, have stated that they were coming from Zamaywala on motorbike and saw the accused having a pistol in his hand who on their asking told that he had killed Abdul Waheed but they have not stated the place where they saw the accused nor they have stated that thereafter, they went to the place where the dead body was lying so their statements are improbable because had there been said incident, the normal course for them was to immediately inform the father of the deceased who was either present there or had gone to the police station; that similarly, the statements of two other persons namely, Faiz Ahmad (P.W.8) and Muhammad Rafique son of Abdul Haleem (given up P.W.) are not material as in the F.I.R., it is simply mentioned that when Noor Hussain complainant (P.W.13), after hearing the report of fire shot reached the place where the dead body was lying, these two persons also came there; that said Muhammad Rafique did not appear before the learned trial Court as a witness and Faiz Ahmad (P.W.8) has stated that shortly after the occurrence, Muhammad Aslam (P.W.10) and

Ghulam Abbas (P.W.11) met him and told him that they had seen the appellant after the occurrence with a pistol in his hand; that the stance of Faiz Ahmad (P.W.8) is not in line with the supplementary statement of the complainant as in the said supplementary statement, the complainant (Noor Hussain) has not stated that the appellant was seen while having pistol in his hand; that in the F.I.R., the complainant has categorically stated that he has no enmity with anybody but in the supplementary statement, he has introduced a motive and in support thereof, he has not produced any evidence before the learned trial Court and the learned trial Court has disbelieved the same; that there was no occasion for the appellant to make extra judicial confession before Khadim Hussain (P.W.15) and Rana Khushi Muhammad (P.W.16) as at that time, he was already named in this case through the supplementary statement of the complainant, (Noor Hussain) and the narrations of the alleged extra judicial confession by above said two witnesses do not appeal to the common sense; that even otherwise, there was no reason or occasion for the appellant to make such confession; that the alleged recovery of pistol (P-1) along with live six bullets (P-2/1-6), at the instance of the appellant, is not helpful to the prosecution as admittedly no empty was recovered from the spot and there is no report of the Forensic Science Laboratory in this behalf; that the appellant cannot be convicted merely because of alleged abscondance as same has not been proved in accordance with law, thus this appeal be accepted and the appellant be acquitted from the charge.

8. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that had there been any enmity of the complainant with the appellant, he (appellant) could have easily been named in the F.I.R. by the complainant but he (complainant) implicated him (appellant) through his supplementary statement recorded on 16-11-2005 when Muhammad Aslam (P.W.10) and Ghulam Abbas (P.W.11) informed him that they had seen the appellant while having a pistol in his hand on the road when they were coming from Zamaywala on motorbike; that the appellant made an extra judicial confession before Khadim Hussain (P.W.15) and Rana Khushi Muhammad (P.W.16) who are totally independent witnesses and one of them namely, Khadim Hussain is even related to the appellant; that the statements of Muhammad Aslam (P.W.10) and Ghulam Abbas (P.W.11) have also been recorded by the learned trial Court and they both have stated that about one year and eight months back when they were coming from Zamaywala on motorbike, they had seen the appellant while

having a pistol in his hand, who on their asking told them that he has murdered Abdul Waheed; that thereafter, the pistol (P-1) along with six live bullets (P-2/1-6) was also recovered on the pointation of the appellant; that Faiz Ahmad (P.W.8), Ghulam Abbas (P.W.11) and Khadim Hussain (P.W.15) are related to the appellant; that the appellant remained a proclaimed offender for about fourteen months and his abscondance is proved through the statements of Muhammad Ishfaq 41/C (P.W.3) and Mani Khan, S.I. (P.W.17); that the motive has also been proved as it has not been seriously contested by the appellant; that there is no mitigation in this case, therefore, the appeal of the appellant be dismissed.

9. We have heard the arguments of learned counsel for the appellant, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant and gone through the record with their able assistance.

10. The occurrence, in this case, took place on 15-11-2005 at about 9-00 p.m. on "Kachaa" road of village Awanawala situated within the area of Police Station Kallur Kot District Bhakkar. The matter was reported to the police by Noor Hussain complainant (P-W-13) on the, same night at about 11-30 p.m. The distance between the place of occurrence and the police station is 12/13 kilometers. Considering the time, place of the occurrence and the distance between the police station and the place of occurrence, we are of the view that there was no delay in reporting the matter to the police.

11. It is evident from the perusal of the record that the occurrence was unseen which took place in the darkness of night. The prosecution case is based on the circumstantial evidence, therefore, utmost care and caution is required for reaching at the just decision of the case. By now, it is well-settled that in such like cases, the chain link should be so inter-connected with each other that its one end touches the dead body while the other end goes around the neck of the accused and if any chain link is missing then its benefit should be given to the accused. In this regard, guidance has been sought from the judgments of the Hon'ble Apex Court of the country reported as "THE STATE v. MANZOOR AHMAD" (PLD 1966 Supreme Court 664), "ASADULLAH and another v. STATE and another" (1999 SCMR 1034), "CH. BARKAT ALI v. MAJOR KARAM ELAHI ZIA and another" (1992 SCMR 1047), "SARFRAZ KHAN v. THE STATE and 2 others" (1996 SCMR 188), "ALTAF HUSSAIN v. FAKHAR HUSSAIN and antoher" (2008 SCMR 1103), "IBRAHIM

and others v. THE STATE" (2009 SCMR 407) and "MUHAMMAD HUSSAIN v. THE STATE" (2011 SCMR 1127).

12. Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

13. The prosecution case is based on the evidence of Wajj Takar, extra judicial confession, recovery of pistol (P-1) along with six live bullets (P-2/1-6) on the pointation of the appellant which were taken into possession vide recovery memo Exh.PE, medical evidence and the evidence of motive.

14. The complainant Noor Hussain (P.W.13) alleged in the F.I.R. that on the night of occurrence i.e. 15-11-2005 at about 9-00 p.m., he went out of his house in order to answer the call of nature. In the meanwhile, he heard the report of fire shot coming from the southern side. On hearing the report of fire shot, he proceeded towards the spot. In the meanwhile, Faiz Ahmad (P.W.8) and Muhammad Rafique (given up P.W.) also joined him and when they all reached at the "Kachaa" road at a distance of one furlong from the house of the complainant, they saw, in the moonlight, that son of the complainant namely, Abdul Waheed was lying on the ground in an injured condition. There was a firearm injury on the forehead of Abdul Waheed who succumbed to the said injury at the spot. The F.I.R. was lodged against unknown accused and no motive for the murder of Abdul Waheed was mentioned in it. The complainant named the appellant in his supplementary statement (Exh-PC/1) recorded on 16-11-2005 wherein, he stated that he forgot to mention in the F.I.R., the name of Farooq son of Ahmad Nawaz and when he reached at the spot, his brother Ghulam Abbas (P.W.11) and Muhammad Aslam (P.W.10) told him that they were coming from village Zamaywala towards village Awanawala and they saw Farooq Ahmad appellant, after the occurrence. It was further stated that Abdul Waheed was murdered by Farooq appellant with his pistol. The motive was also mentioned in the above mentioned supplementary statement (Exh.PC/1) that Abdul Waheed deceased was married with the daughter of Faiz Ahmad (P.W.8). The said Faiz Ahmad purchased some land from paternal uncle of the appellant namely, Rab Nawaz. The appellant wanted to get the above mentioned land back due to which, few days earlier, a quarrel took place between the deceased and the appellant. Farooq (appellant) committed the murder of Abdul Waheed on account of the above mentioned grudge.

We have noted that although the complainant claimed, in his supplementary statement (Exh.PC/1) that when he reached at the spot, he was informed by his brother Ghulam Abbas (P.W.11) and Muhammad Aslam (P.W.10) that they had seen Farooq Ahmad (appellant) after the occurrence but the names of above mentioned witnesses are not mentioned in the F.I.R. It was not mentioned in the supplementary statement of the complainant (Exh.PC/1) that he was informed by the above mentioned witnesses about Farooq Ahmad appellant when he came back to the spot after lodging the F.I.R. but at the time of recording of evidence before the learned trial Court, it was claimed by the prosecution witnesses that the complainant was informed about the name of the appellant when he came back after reporting the matter to the police. Muhammad Aslam (P.W.10) has stated, in his evidence, that he along with Ghulam Abbas (P.W.11) saw the appellant at about 9-00 p.m. while holding a pistol in his hand, who on their asking told that he had killed Abdul Waheed. He further stated during his cross-examination that the police arrived at the place of occurrence at about 12-15/12-30 a.m. (night). The names of the above mentioned witnesses of Waj Takar are also not mentioned by the police in the column of brief history of the case of Inquest Report (Exh.PH). Similarly, the story of Waj Takar was also not mentioned in the above mentioned report which was prepared by the police after spot inspection. Moreover, the names and the points showing the presence of the above mentioned witnesses of Waj Takar were not mentioned in the rough site plan (Exh.PN), as well as, in the scaled site plan (Exh.PD). The evidence of the 'witnesses of Waj Takar namely, Muhammad Aslam (P.W.10) and Ghulam Abbas (P.W.11) does not appeal to our minds because it is not probable that when the accused had taken precautionary measures to conceal his crime and identity and selected the darkness of night to commit the offence, then there was no need for him to show his pistol to the above mentioned witnesses of Waj Takar and to tell them that he had committed the murder of Abdul Waheed deceased. Ghulam Abbas (P.W.11) is real brother of the complainant but in spite of the fact that he was allegedly told by the appellant that he had committed the murder of his nephew, the said witness did not proceed to the police station in order to report the incident to the police or to inform the complainant. We are, of the considered view that the prosecution evidence of Waj Takkar is result of an afterthought.

15. Khadim Hussain (P.W.15) and Rana Khushi Muhammad (P.W.16) are the witnesses of the extra judicial confession of the appellant. Both the above mentioned

witnesses have stated that on 9-2-2007, the appellant came to the Dera of Khadim Hussain (P.W.15) and made an extra-judicial confession before them regarding the murder of Abdul Waheed deceased. Khadim Hussain (P.W.l5) has admitted in his cross-examination that he was not a lumberdar or councillor of the village. He is cultivator by profession. It has not been established by the prosecution that he was holding any important post/office or he was a person in authority to effect compromise between the appellant and the complainant. Rana Khushi Muhammad (P.W.16) is also a cultivator by profession. He is resident of village Rakh Ghulaman whereas, the appellant Farooq Ahmad is resident of village Awanawala Khadim Hussain (P.W.15) has stated, in his examination-in-chief, that Rana Khushi Muhammad (P.W.16) was present at his Dera as he came to purchase a buffalo. It does not appeal to the mind of a prudent person that the appellant will make an extra-judicial confession before Rana Khushi Muhammad (P.W.16) who was an irrelevant person for him.

The evidentiary value of the extra-judicial-confession (joint or otherwise) came up for consideration before the August Supreme Court of Pakistan in the case reported as "SAJID MUMTAZ AND OTHERS V. BASHARAT AND OTHERS" (2006 SCMR 231), wherein, at page 238, the Apex Court of Pakistan has been pleased to lay emphasis as under:--

"17..... This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions starting from Ahmad vs. The Crown PLD 1951 FC 103-107 upto the latest. Extra-judicial confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to satisfy itself fully that the confession cannot but be true'. As, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily

be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court.

19. It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

20. Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witnesses before whom extra-judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

21. Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought firstly, when a person is sufficiently trapped and secondly, from one who is authoritative, socially or officially...

22. As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confession. Such confessions by now, have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the

relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as TAHIR JAVED v. THE STATE (2009 SCMR 166), wherein, at page 170, the August Supreme Court of Pakistan, has been pleased to observe as under:--

"10. ...It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time therefore, normally it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683, (4) Sarfraz Khan v. The State and others 1996 SCMR 188."

In light of the above discussion, we are of the view that the prosecution evidence of extra-judicial-confession in the instant case is also not worthy of reliance.

16. The prosecution has produced the evidence of recovery of pistol (P-1) along with six live bullets (P-2/1-6) on the pointation of the appellant through recovery witnesses namely, Muhammad Yaqoob 450/HC (P.W.6) and Muhammad Asghar Inspector/S.H.O. (P.W.14). In this case, no empty was recovered from the place of occurrence and there is no report of the Forensic Science Laboratory. Therefore, the above mentioned evidence of recovery of pistol (P-1) along with live bullets (P-2/1-6) is of no avail to the prosecution. Even otherwise, the evidence of recovery is only of corroborative in nature and conviction of the appellant cannot be sustained merely on the basis of above mentioned recovery.

In the case of "MUHAMMAD AFZAL alias ABDULLAH and others v. THE STATE and others" (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"12. After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be."

Similarly, in the case of "ABDUL MATEEN v. SAHIB KHAN and others" (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:-

"4....It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "MUHAMMAD YAQUB v. THE STATE" (1971 SCMR 756), and "NEK MUHAMMAD and another v. THE STATE" (PLD 1995 Supreme Court 516).

17. Now coming to the motive part of the prosecution case, it is noted that no motive was mentioned in the F.I.R. and it was simply stated in the F.I.R. (Exh.PC) that Abdul Waheed deceased was murdered by some unknown accused due to some unknown reasons. It was specifically mentioned in the F.I.R. that the complainant had no enmity with anyone. The motive was introduced through the supplementary statement of the complainant (Exh.PC/1) which was recorded on 16-11-2005. According to the prosecution case, about three years prior to the occurrence, Faiz Ahmad (P.W.8), father-in-law of Abdul Waheed deceased purchased land from paternal uncle of the appellant namely, Rab Nawaz. The accused wanted to take back that land for which Faiz Ahmad (P.W.8) was not ready and due to the said reason, few days prior to the present occurrence, a quarrel took place between the appellant and the deceased. In order to prove the above mentioned motive, the prosecution did not produce any mutation, sale deed or any other document to establish that any land was, in fact, purchased by Faiz Ahmad (P.W.8), which was the bone of contention between the parties. According to the prosecution case, it was Faiz Ahmad (P.W.8) who was not ready to return the above mentioned land to the appellant. So as per prosecution's own

case, the appellant had grudge against Faiz Ahmad (P.W.8) and not against Abdul Waheed deceased. The learned trial Court has also disbelieved the motive evidence of the prosecution. We are, therefore, of the view that the prosecution has failed to prove the motive as alleged against the appellant.

18. As far as medical evidence is concerned, by now it is settled law that it can only establish the kind of weapon used in the occurrence, the seat of the injury, the time elapsed between injury and death and the time elapsed between death and postmortem examination and does not tell about the accused. The medical evidence can never be a primary source of evidence for the crime itself but it is only a corroborative piece of evidence.

19. It has been argued on behalf of the prosecution that the appellant remained a proclaimed offender for about fourteen months which has corroborated the prosecution case. The said argument of the prosecution is misconceived. It is, by now, well-settled law that abscondance per se is not sufficient to prove the guilt of an accused, in absence of any other direct or strong circumstantial evidence against the accused. Reference in this context may be made to the case of "BARKAT ALI v. MUHAMMAD ASIF and others" (2007 SCMR 1812) wherein, at page 1816, the august Supreme Court of Pakistan was pleased to observe as under:--

"5...It is also a settled law that mere abscondence does not prove guilty mind. See Amanullah's case PLD 1976 SC 629. It is also a settled law that abscondence alone is not enough for conviction when sufficient evidence connecting the accused is not forthcoming. See Abdus Sattar's case 1974 PCr.LJ 208, Sardaran's case 1974 PCr.LJ Note 95 at p.60 and Hayat Bakhsh's case PLD 1981 SC 265..."

The aforementioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the cases of "ROHTAS KHAN v. THE STATE" (2010 SCMR 566) and "TAHIR KHAN v. STATE" (2011 SCMR 646).

20. For the foregoing reasons, we hold that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt. Therefore, while extending the benefit of doubt to the appellant, the Criminal Appeal No.1391 of 2007 is allowed, conviction and sentence awarded to the appellant vide judgment dated 8-9-2007 passed by the learned trial Court is set aside and the appellant is acquitted from the charge. He is in custody, he be released forthwith if not required to be detained in any other case.

21. Murder Reference No.516 of 2007 is answered in the NEGATIVE and the sentence of death awarded to Farooq Ahmad (convict) is NOT CONFIRMED.

HBT/F-2/L **Appeal allowed.**

2013 Y L R 1257

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD LATIF and others---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos.149-J, 670, Criminal Revision No.634 and Murder Reference No.229 of 2010, heard on 17th January, 2012.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/49---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---F.I.R. was not promptly lodged---Possibilities of concoction and deliberation were always present in the case of a delayed F.I.R.---Eye-witnesses were not only closely related to the deceased, but admittedly complainant party was inimical towards accused party---Statements of said witnesses, therefore, required independent corroboration, which was lacking in the case---Prosecution witnesses had improved their statements at the trial with regard to identification of accused in torch light, besides moon light on the night of occurrence, but torches were never produced before Investigating Officer---Identification of accused in moon-light was quite difficult because of the position of moon on that night---Evidence of identification in torch-light was insignificant, when such torch was not taken into possession by the police---Medical evidence was not in line with ocular testimony---Injury on the person of one eye-witness did not stamp her with truth---Dishonest improvements made by prosecution witnesses on material aspect of the case regarding identification of accused, had made them unreliable---No crime empty having been secured from the spot, gun recovered from the accused was of no avail to prosecution and the report of Forensic Science Laboratory showing the gun being in working condition, was of no consequence---Recovery of two lead bullets after twenty five days of occurrence from the wooden doors of the house, was highly doubtful, particularly when the same were not sent to Forensic Science Laboratory for comparison with the recovered gun---Motive was not proved on record, which as alleged could not be considered against the accused on account of the deep rooted enmity between the

parties---Abscondence of accused, per se, was not a proof of the guilt against him, even if found convincing---Accused were acquitted in circumstances on benefit of doubt.

Ashrar alias Ashroo and another v. The State 2005 PCr.LJ 1489; Amanullah and 4 others v. The State PLD 1978 Kar. 792; Umar Hayat and others v. The State 1997 SCMR 1076; Amin Ali and another v. The State 2011 SCMR 323; Muhammad Ishaq v. The State 2007 SCMR 108; Ali Sher and others v. The State 2008 SCMR 707; Muhammad Pervez and others v. The State and others 2007 SCMR 670; Said Ahmad's case 1981 SCMR 795; Muhammad Rafique and others v. The State and others 2010 SCMR 385 and Barkat Ali v. Muhammad Asif and others 2007 SCMR 1812 ref.

(b) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/149---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Delayed F.I.R.---Possibilities of concoction and deliberation are always present in the case of a delayed F.I.R.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/149---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Identification of accused in torch light---Scope---Identification of accused in torch light is always treated as a weak piece of evidence---Evidence of identification in torch light is insignificant, when the torch on the basis of which the accused were identified, was not taken into possession by the Investigating Officer.

Umar Hayat and others v. The State 1997 SCMR 1076 ref.

(d) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/149---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Injured witness---Credibility---Injuries on a prosecution witness only indicate his presence at the spot, but the same are not an affirmative proof of his credibility and truth.

Muhammad Pervez and others v. The State and others 2007 SCMR 670 and Said Ahmad's case 1981 SCMR 795 ref.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/149---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Improvements made by witnesses---Effect---Witnesses

who make improvements in their statements on material aspects of the case are not worthy of reliance.

(f) Penal Code (XLV of 1860)---

----Ss. 302(b)/149 & 324/149---Qatl-e-amd, attempt to commit qatl-e-amd---Appreciation of evidence---Abscondence of accused---Effect---Abscondence, per se, is not a proof of the guilt of an accused, which however can create a suspicion against him, but suspicion however strong cannot take the place of proof required for punishment of accused---Evidence of abscondence, even if found convincing, would not be sufficient by itself to warrant conviction on a charge of murder.

Barkat Ali v. Muhammad Asif and others 2007 SCMR 1812 ref.

Mrs. Erum Sajjad Gul for Appellants.

Ch. Ghulam Mustaf, D.P.G. for the State.

Zahid Hussain Khan for the Complainant.

Date of hearing: 17th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.229 of 2010, sent by the learned trial Court, Criminal Appeal No.149-J of 2010, preferred by appellant Muhammad Latif, Criminal Appeal No.670 of 2010, submitted by Muhammad Asghar appellant, and Criminal Revision No.634 of 2010, filed by Basharat Ali-complainant, by this single judgment, as all these matters stem out of judgment dated 18-3-2010, passed by learned Additional Sessions Judge, Sarai Alamgir, District Gujrat.

2. Muhammad Latif and Muhammad Asghar appellants along with Muhammad Sarwar, Sabir Hussain, and Muhammad Hanif co-accused were tried in case F.I.R. No.440, dated 26-8-2005, registered at Police Station, Sarai Alamgir, District Gujrat, in respect of offences under sections, 302, 324, 148, 149 of P.P.C. After conclusion of the trial, vide its judgment dated 18-3-2010, while acquitting co-accused namely, Muhammad Sarwar, Sabir Hussain and Muhammad Hanif the learned trial court has convicted and sentenced the appellants as under:--

Muhammad Latif

Under section 302(b)/149 of P.P.C. to death for committing Qatl-e-Amd of Shabina Kausar deceased. He was also ordered to pay Rs.1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

Under sections 324/149, P.P.C. to undergo rigorous imprisonment for 10 years along with fine of Rs.30,000, or in default of the payment of fine, to further undergo S.I. for three months.

Muhammad Asghar

Under sections 302/149 of P.P.C. to imprisonment for life for committing Qatl-e-Amd of Shabina Kausar deceased. He was also ordered to pay Rs.1,00,000 (Rupees One Hundred Thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

Under sections 324/149 of P.P.C. to undergo rigorous imprisonment for 10 years along with fine of Rs.30,000, in default of the payment of said fine amount, to further undergo S.I. for three months. Benefit of section 382-B of Cr.P.C. was also extended to him.

3. Brief facts of the case as disclosed by Basharat Ali complainant (P.W.4) in F.I.R. (Exh.PA/ 1) are that on 25-8-2005, at about 11-00 p.m., the complainant along with his real brother namely Ashiq Ali, Abdul Haq son of Muhammad Hussain, and 35/40 other persons were holding a procession to celebrate the victory of Ch. Manzoor Hussain, for the office of Nazim Union Council and were taking a round of the village and when they reached near the house of Sub. Muhammad Sarwar son of Muhammad Khan, who was their opponent, he (Muhammad Sarwar) started shouting, so, they stopped raising their slogans. The complainant further alleged in the F.I.R. that when the procession reached in front of the houses of Muhammad Ashraf son of Muhammad Khan and Najabat Ali son of Muhammad Walayat, the accused Muhammad Hanif armed with .12 bore double barrel gun, Muhammad Latif armed with rifle, both sons of Muhammad Khan came at the spot from the eastern side, whereas the accused Muhammad Sajjad armed with .12 bore gun pump action, Muhammad Ijaz armed with .244 bore rifle both sons of Muhammad Anwar came towards the main gate of the house of Muhammad Ashraf, and the accused Muhammad Sarwar armed with rifle 7 MM, Sabir Hussain armed with .32 bore revolver both sons of Muhammad Khan, Muhammad Asghar armed with .12 bore gun, Muhammad Akhtar armed with 'danda' both sons of

Muhammad Sarwar, came on the roof top of the house belonging to Shabbir Hussain son of Muhammad Gulzar. The accused Muhammad Sarwar then raised lalkara that Basharat Ali, Ashiq Ali and Abdul Haq be not spared, on which the accused party started firing at the participants of the procession. The complainant further stated that he along with Ashiq Ali and Abdul Haq witnessed the occurrence in the moon-light, Muhammad Latif (appellant) allegedly made successive fire shots with his 12 bore gun, which landed on the chest, left cheek and left arm of Mst. Shabina Kosar, widow of Shaukat Ali, who was present in the courtyard of the house of her father Muhammad Ashraf, who died at the spot. Muhammad Asghar (appellant) allegedly made a fire shot with his .12 bore gun, which hit Mst. Zakiya Bano, daughter of the complainant, on the right side of her belly.

4. The motive for the occurrence, as stated by the complainant, was that the candidate of the accused party for the office of Nazim Union Council, lost his election, due to which, the accused, with their common object, committed the offence.

5. After completion of investigation, the challan was submitted before the Court, the appellants and their co-accused, all of them were charge sheeted, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 15 P.Ws. The complainant Basharat Ali (P.W.4), Abdul Haq (P.W.5) and Mst. Zakia Bano (P.W.13) furnished ocular account of the occurrence.

P.W.7 lady Doctor Fakhra Masaood Syed on 26-8-2005 at 3-00 p.m. conducted the post-mortem examination on the dead body of Mst. Shabina Kausar wife of Shaukat Ali (deceased) vide Post mortem Report Exh.P.W/6-A and Diagram Exh.P.W/6-A-1 and found the following injuries on her person:--

(1-A). A fire arm wound of entry 1 cm x 1 cm present on the upper medial quadrant of left breast. There was no burning blackening or tattooing. There was a colour of abrasion present on the medial side, corresponding whole was present in the clothes.

(1-B). A fire arm wound of exit with everted margin present 3 cm below the lower edge of left scapula.

(2-A). A fire arm wound of entry on antrolateral aspect of left upper arm 9 cm below the left shoulder. Colour of abrasion all around.

(2-B). A fire arm wound of exit present on postrolateral aspect of left upper arm 12 cm below the left shoulder.

(3-A). A fire arm wound of entry 1 cm x 1 cm with inverted margin present on left side of face 4 cm in front of left ear.

In her opinion, all the injuries mentioned above were ante-mortem and were caused by a fire arm weapon, which were sufficient to cause death in ordinary course of nature. Probable time that elapsed between injuries and death was within few minutes and between death and post mortem was 12 to 24 hours.

P.W.8 Dr. Syed Islam Zafar, Director Health Services Punjab, Lahore, on 26-8-2005, medically examined Mst. Zakiya Bibi (P.W.13) daughter of the complainant, and found the following injuries on her body:--

(1) Fire arm wound 1 x 8 cm on right renal area of abdomen, laterally. Burning positive and no bleeding.

(2) Fire arm wound 1 x 4 cm x 1 x 4 cm on front of abdomen on umbilical area 2 cm lateral to umbilicus. No burning. Omentum was coming out of wound. Edges were outward. Corresponding marks of injuries were present on qameez. General condition was not satisfactory.

Both injuries were kept under observation and the injured was immediately referred to THQ Hospital, Kharain, for surgical management. Injuries were inflicted by fire arm weapon and the duration of the injuries was fresh. Final opinion was to be given after the report of Surgical Specialist.

P.W.11 Muhammad Arif Gondal, Inspector was the Investigating Officer of this case who completed the investigation and submitted the challan.

P.W.1 Ansar Ali, Constable, P.W.2 Muhammad Arif, A.S.-I., P.W.3 Abid Hussain, Constable, P.W.6 Muhammad Sharif, P.W.10 Asghar Ali, P.W.12 Muhammad Asghar Ali, A.S.-I. are the formal witnesses. The complainant Basharat Ali (P.W.4), Abdul Haq (P.W.5) and Mst. Zakia Bano (P.W.13) are the witnesses of ocular account.

6. The statements of the appellants and their co-accused under section, 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Muhammad Latif replied as under:-

"I am innocent and has been involved in this case falsely due to the enmity and sister of Basharat Ali complainant eloped with me and Basharat complainant of this case got

registered a case of abduction against me. I filed a suit for restitution of conjugal rights against Mst. Sughran Bibi, who was taken back by Basharat Ali, complainant when I was sent to jail and Sughran Bibi appeared before Family Court Judge and made statement in my favour and rebutted the abduction case and desired to live a family life with me. On this Sughran Bibi, sister of complainant was allowed to live with me from the Family Court, Kharian. P.Ws. have deposed falsely against me and my co-accused, who are my near relatives. It was a dark night occurrence. The procession was taken to celebrate the success of Nazim Ch. Manzoor, to whom the accused party was continuously opposing for the last three terms of elections. The success of Nazim was not controllable for his supporters and to press and humiliate us the procession was arranged, which according to P.Ws. started from shakreela, a place 3/4 k.m away from place of occurrence and only village Shah Ghora was selected for this celebration with pump and show. The members of the procession who were there to show their strength were making aerial firing and the procession remained moving around the whole village abadi. The aerial firing of the members of the procession resulted in injuries to the deceased. Prosecution in collusion with their successful Nazim Manzoor chalked out a false story to involve us in the case falsely. P.Ws. being having longstanding enmity against us thought it a proper chance when of their own firing the deceased was hit and got injuries and to eliminate us and my whole family, this false case has been planted upon us. None from us fired at the procession or anyone else. On account of general firing by the procession, we have hidden ourselves in the safer places to save our skins as we fear that we have opposed Ch. Manzoor Nazim and when had been succeeded there was every apprehension that the procession hosted in his favour may not cause loss to us. If we have fired at the procession, the same must have hit any of the member of the procession but it had not occurred so and the aerial firing by the complainant party holding a procession had hit the deceased causing her death. P.Ws. are closely related inter se and inimical towards us. They have motive to falsely implicate us on account of previous enmity. They are interested witnesses. No independent person has been produced as a witness in this case and no independent corroboration has been produced by the prosecution. A licenced gun has been planted upon me and the same was not recovered at my pointation. My co-accused namely Sarwar, Hanif and Asghar along with Ejaz Anwar P.O. have been declared innocent during the course of investigation by the investigating agency. This also negates the prosecution case. I pray mercy from God and justice from this Honourable court "

The appellant Muhammad Asghar also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded under section 342 of Cr.P.C. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Muhammad Asghar replied as under:--

"For the reasons stated by my co-accused Latif, I have been falsely involved in this case".

The appellants and their co-accused did not make statements under section 340(2) Cr.P.C, however, Muhammad Latif appellant produced in his defence copy of F.I.R. No. 321 dated 12-5-2004 Exh.D-1, copy of F.I.R. No. 421 dated 18-8-2000, Exh.D2, copy of F.I.R. No. 509 of 2001 Exh.D3, copy of F.I.R. No. 312 of 2000 Exh.D-4, copy of F.I.R. No. 503 of 1990 Exh.D-5, copy of F.I.R. No. 290 of 1997 Exh.D-6. The learned trial Court vide its judgment dated 18-3-2010, while acquitting co-accused, namely, Muhammad Sarwar, Sabir Hussain and Muhammad Hanif, found Muhammad Latif and Muhammad Asghar, appellants guilty and convicted and sentenced them as mentioned above.

7. The learned counsel for the appellants, in support of this appeal, contends that there is delay of four hours in reporting the matter to the police without there being any satisfactory explanation on the record and even time of injured Mst. Zakia Bano is not mentioned in the MLR Exh.P.W.8/A; that in the F.I.R. no source of light except moon light is mentioned; that the occurrence allegedly took place in the night of 25-8-2005, which was 20th Rajb and the moon rising time on that date was 10-45 p.m., and as such, there was no light at the relevant time, but while appearing before the Court, the witnesses made dishonest improvements by stating that they had torches with them, whereas, there was no such mentioning in the F.I.R. or the statements recorded under section 161 of Cr.P.C; that it is the case of the complainant in the F.I.R. Exh.PA/1 and in his statement before the Court that he (the complainant) along with other were going in a procession and when they reached near the house of Muhammad Sarwar accused, they heard a noise coming from inside of his house, therefore, they stopped the slogans and that Muhammad Sarwar raised lalakara that Basharat, Ashiq, and Abdul Haq be not spared and thereafter the accused started firing, but surprisingly, none of these persons or any other person present in the procession received even a scratch; that admittedly Mst. Shabina Kausar (deceased) was not participant of the procession and she, as per site plan Exh.PH/1, was inside the house and there was a wall of the height of six and a half feet between the appellant Muhammad Latif and Mst. Shabina Kausar

(deceased), which fact has been confirmed by P.W.4 in his cross-examination and as per site plan the appellant Muhammad Latif, who has allegedly caused injury to Mst. Shabina Kausar, was at Point-2 and from where it is not possible for the appellant Muhammad Latif to cause injury to Mst. Shabina Kausar (deceased), who was inside the house at point-1 having a cover of a wall of the height of six and a half feet.

As far as the appellant Asghar is concerned, learned counsel for the appellant contends that specific allegation against him was that he was armed with rifle and caused injuries on the belly of Mst. Zakia Bano (P.W.13), but the said injury, as per medical report, has burning around it, whereas, the distance of 21 feet between the appellant-Asghar and Mst. Zakia Bano has been shown in the site plan Exh.P-H, because as per site plan Mst. Zakia Bano was at Point-3, whereas, the appellant Muhammad Asghar was at Point-4; that since the said injury has burning around it, therefore, is not possible for the appellant to have caused the said injury from such a long distance; that initially it was the case of the prosecution that the appellant Muhammad Latif was armed with rifle, but subsequently it is mentioned that he fired with .12 bore gun; that allegation against the appellants was that they were armed with a gun and a rifle, but no empty was recovered from the spot, whereas, it is the case of the prosecution that some led bullets were recovered from the wooden door of the house of Muhammad Ashraf, but the same were not sent to the FSL for comparison with the gun (P.1) allegedly recovered from the appellant Muhammad Latif.

As far as motive part is concerned, the learned counsel for the appellants contends that the motive is a double edged weapon that cuts both ways. On the one hand, it could be a cause of commission of offence, simultaneously, it could be a reason for false implication of the accused in a case, and in this case, admittedly there is a deep rooted enmity between the parties, therefore, motive cannot be considered in favour of the prosecution. The learned counsel for the appellants further contends that Muhammad Sarwar, Sabir Hussain and Muhamamd Hanif, co-accused of the appellants, have been acquitted by the learned trial Court against whom Criminal Appeal No.969 of 2010, filed by the complainant has already been dismissed by this Court vide order dated 14-6-2010, therefore, the evidence which has been disbelieved qua the acquitted co-accused of the case, the same could not be believed for the conviction of the appellant.

8. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant opposes this appeal on the grounds that delay of four hours in lodging the F.I.R. in a murder case, which took place at night time in a

village, is not fatal to the prosecution. Further contends that Mst. Zakia Bano was injured in this incident and in the circumstances the first and foremost priority of the complainant and the other witnesses was to provide her medical treatment instead of reporting the matter to the police; that both the appellants are nominated in the F.I.R. with specific role of causing injury to the deceased and injured, respectively, which is fully supported by the medical evidence available on the record and the appellants cannot get the benefit from the acquittal of their co-accused, as no specific injury was attributed to them; that in this case, Mst. Zakia Bano who was aged about 10 years, at the relevant time, was injured, she appeared before the Court as (P.W.13) and fully supported the prosecution case to the extent of Muhammad Asghar appellant; that the ocular account furnished by the prosecution remained consistent, confidence-inspiring, transparent and the defence failed to shake the credibility of the witnesses and their evidence cannot be discarded merely because of previous enmity between the parties; that the motive has been proved and even has not been denied, therefore, this appeal be dismissed.

9. We have heard the arguments of the learned counsel for the parties, and have gone through the evidence available on record.

10. The occurrence in this case as per F.I.R. (Exh.PA/1) took place on 25-8-2005, at 11-00 p.m. (night). The matter was reported to the police by the complainant Basharat Ali (P.W.4) on 26-8-2005, at 3-00 a.m. (night), and the formal F.I.R. (Exh.PA/1) was registered at 3-25 a.m. (night). The Police Station Sarai Alamgir was at a distance of seven miles from the place of occurrence. The incident had taken place in village Shah Ghora, Police Station, Sarai Alamgir, District Gujrat. At the time of occurrence, as per prosecution, 35/40 persons were taking part in the procession, which was taken out to celebrate the victory of Chaudhry Manzoor Hussain, for the office of Nazim Union Council. It has also come on record during the cross-examination of Abdul Haq P.W.5 that facility of mobile phone was available in the village at the time of occurrence, but the matter was reported to the police with the delay of four hours. Although it has been argued on behalf of the complainant that the delay was caused because Mst. Zakia Bano was taken to the hospital by the complainant, but at the same time it is an admitted fact that apart from the complainant, 35/40 persons of the complainant side were present at the time of occurrence but none from them reported the matter at the Police Station, which was at the distance of only 7 miles, despite availability of mobile phone service. The time of arrival of Mst. Zakia Bano (injured) has not been mentioned in her MLR

Exh.P.W.8/A, so that it could be established that the complainant was in fact busy in her medical treatment during the time consumed between the occurrence and registration of the F.I.R., therefore, the F.I.R. in this case was not lodged promptly. The possibilities of concoction and deliberation are always there, in the case of a delayed F.I.R.

The prosecution in order to prove the ocular account has produced Basharat Ali (P.W.4), Abdul Haq (P.W.5), and Mst. Zakiya Bano (P.W.13). The complainant Basharat Ali (P.W.4) is 'Behnoee' (brother-in-law) of Mst. Shabina Kausar (deceased), whereas, he is real father of Mst. Zakiya Bano injured (P.W.13). Similarly, Abdul Haq (P.W.5) is 'behnoee' and 'chachazad' of the complainant. The above-mentioned prosecution witnesses are closely related to the deceased. Their enmity with the accused/appellants is an admitted fact. The complainant Basharat Ali (P.W.4) has admitted the enmity of the complainant party with the accused party. The relevant portion of his statement is reproduced hereunder for ready reference at pages-37 to 39 of the Reference Book:--

"Prior to this case, only one other criminal case from defence side was got registered, in which I was convicted. Muhammad Afzal son of Muhammad Sarzvar was the complainant and Sarwar accused of this case was injured P.W. of the said case. In that case, myself my brother Shafqat, Shaukat and Ashiq and Iqbal my uncle and Javed my cousin were the accused persons. It is correct that the said case was bearing No.290/97 offence under sections 324/148/149, P.P.C. Kaniz Akhtar wife of Iqbal is my chachi. It is correct that said Kaniz Akhtar filed a case under sections 336/148/149, P.P.C. against Sarwar, Hanif, Sabir, Muhammad Latif sons of Muhammad Khan, Afzal, Akthar sons of Sarwar and Shabbir son of Gulzar. I was the P.W. in the said case. Abdul Haq P.W. is my Behnoi. It is correct that he got registered a case against Sarzvar, Hanif, Muhammad Akhtar, Afzal and Amjad Hussain sons of Sarzvar under section 379, P.P.C., in which I along with Noor Hussain are P.Ws. It is correct that Uzma Bibi daughter of Latif accused was murdered and a case against myself and Abdul Haq, Ashiq Hussain, Javed Iqbal, Aurangzeb, Shahid Iqbal, Iqbal Hussain, Naeem Ullah and Sharif was registered. In the said case, Muhammad Hanif and Sabir accused were the P.Ws. It is correct that my sister Ghulam Sughra was abducted by Latif accused, in which I was the complainant. Hanif, Sarwar, and Sabir were also accused in the said case, who are brothers of Latif Akhtar, Afzal, and Amjad son of Sarwar were also accused in the said case. Abdul Haq, Iqbal Hussain were the P.Ws. from my side. It is

correct that a suit for restitution of conjugal rights was filed by Latif accused in which my sister Ghulam Sughra appeared and she gave statement in favour of Latif accused and then she went away along with him by the permission of the Court. It is correct that Sughran Bibi is still living in the house of her husband Latif accused, having one child. It is correct that Kaniz Akthar wife of Iqbal, my chachi also got registered a case under section 354, P.P.C. against Hanif accused, in which I was cited as a P.W. Qurban Hussain son of Dildar is son of my Mamoon and also related to the accused. I do not know whether Qurban Hussain got registered a case under sections 435/148/149 P.P.C. against Sarwar, Anwar, Sabir, Hanif Latif sons of Muhammad, Shabbir, Ansar, Asghar and Liaqat sons of Sarwar, Shaukat and Khadim Hussain, in which Abdul Haq and Ashiq Hussain were the P.Ws. It is correct that we filed a civil suit against Sakina Begum wife of Sarwar accused in which I was a P.W".

From the perusal of above-mentioned portion of the statement of Basharat Ali (P.W.4), enmity of the complainant with the accused party is fully established. Baharat Ali (P.W.4) has admitted that his sister Mst. Ghulam Sughran was abducted by the appellant Muhammad Latif, and he was a complainant in her abduction case. He has further admitted that a suit for restitution of conjugal rights was filed by Muhammad Latif in which his sister Mst. Ghulam Sughran appeared before the Court and gave her statement in favour of Muhammad Latif appellant, and thereafter, she went along with Muhammad Latif appellant with the permission of the Court. He has also admitted in his cross-examination that Mst. Uzma Bibi, daughter of Muhammad Latif appellant, was murdered and he (Basharat Ali/P.W.4) and Abdul Haq (P.W.5) were accused in the said murder case. Similarly, number of other civil and criminal cases of heinous nature were lodged by the complainant and accused party against each other, therefore, it is established that the prosecution witnesses were inimical towards the appellants, thus, their statements are required to be scrutinized with great caution. Similarly, their statements also require independent corroboration.

11. The occurrence in this case took place on 25-8-2005, at 11-00 p.m. (night). It was mentioned in the F.I.R. (Exh.PA/ 1) that the accused were identified by the prosecution witnesses in the moon-light. It was 19th of Rajb on 25-8-2005. The prosecution witnesses while appearing in the Court stated that they identified the accused in the moon light and they were also having torches at the time of occurrence. This fact that the prosecution witnesses were having torches at the time of the occurrence was not mentioned in the F.I.R. (Exh.PA/ 1) and they made this improvement in their statements

before the learned trial Court. Identification of accused in moon light on the day of occurrence, which corresponded to 19th of Rajab would be quite difficult since on that date Moon would be only up to the shoulder level above the Easter horizon. Reference in this context may be made to the case of Ashrar alias Ashroo and another v. The State (2005 PCr.LJ 1489), and Amanullah and 4 others v. The State (PLD 1978 Karachi 792).

The prosecution witnesses namely, Basharat Ali (P.W.4) and Abdul Haq (P.W.5) have also claimed in their improved statements that they identified the accused in the torch-light. The torches were never produced before the police nor the same were taken into possession by the Investigating Officer through any recovery memo. The identification of accused in torch light is always treated a weak piece of evidence. The evidence of identification in the torch light is insignificant, when the torch on the basis of which, the appellants were identified, was not taken into possession by the Investigating Officer. Reliance in this respect may be placed on the case of "Umar Hayat and others v. The State" 1997 SCMR 1076.

12. The prosecution story of the occurrence as narrated by the prosecution witnesses is improbable. The prosecution witnesses Basharat Ali (P.W.4) and Abdul Haq (P.W.5) have claimed that at the time of occurrence they along with 35/40 persons were holding a procession to celebrate the victory of Nazim, Chaudhry Manzoor Hussain and when they reached in front of the houses of Muhammad Ashraf and Najabat Ali at that time co-accused of the appellants namely, Muhammad Sarwar, (since acquitted), raised a lalkara to kill Basharat Ali (P.W.4), Abdul Haq (P.W.5) and Ashiq Ali, who were present in the procession, on which the appellants along with their five other co-accused started firing at the procession, but surprisingly, not a single person from the procession received even a minor scratch on his person. Mst. Shabina Kasuar (deceased) and Mst. Zakiya Bano (P.W.13) were not participants of the above-mentioned procession. They were present inside the house of Muhammad Ashraf (father of Mst. Shabina Kausar deceased). There was no reason with the appellant to kill them, instead of taking life of the complainant P.W.4 and Abdul Haq P.W.5. The appellant Muhammad Latif has been assigned the role of making fire shot, which landed on the chest, cheek and left arm of Mst. Shabina Kausar. According to the prosecution version, the appellant Muhammad Latif was present in the street, whereas, Mst. Shabina Kausar was present inside the house of Muhammad Ashraf. There was a six and half feet high northern intervening wall of the house of Muhammad Ashraf between the appellant Muhammad Latif and Mst. Shabina Kausar (deceased) because as per site plan Ex.P-H the appellant

Muhammad Latif was present at Point No.2 which is an open place outside the house of Muhammad Ashraf, whereas, Mst. Shabina Kausar was at Point No.1 which is inside the house of Muhammad Ashraf and there was 6-1/2 feet high wall between them. So it was not possible for Muhammad Latif appellant to cause injury to Mst. Shabina Kausar who was behind the wall of the height of 6-1/2 feet. Not a single empty was recovered from the place of occurrence, where the appellants and their co-accused were allegedly standing and making firing at the time of occurrence.

13. The medical evidence in this case was furnished by lady Dr. Fakhra Masood Syed (P.W.7), who conducted the post-mortem examination on the dead body of Mst. Shabina Kausar (deceased) vide post mortem report Exh.P.W-6/A and diagram of the injuries Exh.P.W.6/A-1. This witness has stated in her cross-examination that she did not observe any corresponding hole on the last worn clothes of the deceased. Dr. Syed Islam Zafar (P.W.8) medically examined Mst. Zakiya Bano (P.W.13) vide Medico-legal Report (Exh.P.W.8/A) and diagram of injuries (Exh.P.W.8/B). He found the following injuries on the person of Mst. Zakiya Bano (P.W.13):--

(1) Fire arm wound 1 x 8 cm on right renal area of abdomen, laterally. Burning positive and no bleeding.

(2) Fire arm wound 1 x 4 cm x 1 x 4 cm on front of abdomen on umbilical area 2 cm lateral to umbilicus. No burning. Omentum was coming out of wound. Edges were outward. Corresponding marks of injuries were present on qameez. General condition was not satisfactory.

The appellant Muhammad Asghar has been attributed the fire shot on the abdomen of Mst. Zakiya Bano (P.W.13) who was present in the courtyard of her house. According to the prosecution case, the appellant Muhammad Asghar made fire shot, when he was standing on the roof top of the adjoining house of Shabbir Ahmad. As per site plan Exh.P-H the height of the place where the appellant Muhammad Asghar was allegedly standing at the time of occurrence was 19 feet and the distance between the appellant Muhammad Ashghar and Mst. Zakiya Bano (P.W.13) was 21 feet. The pictorial sketch of Mst. Zakiya Bano (P.W.13) does not suggest that the injury was caused to her from a higher level. The level of the entry and exit wound on the person of Mst. Zakiya Bano (P.W.13) does not correspond with the place, where the appellant Muhammad Asghar, was allegedly standing at the time of occurrence. The level of entry and exit wound is the same and it was not from upwards to downwards. Similarly, burning around the entry wound on the person of Mst. Zakia Bano (P.W.13) is not possible from the

distance of 21 feet. It was not the case of prosecution that the injury on the person of Mst. Zakiya Bano (P.W.13) was caused from a close range. From such distance, injury with burning on the person of Mst. Zakiya Bano (P.W.13) could not be caused, and the said injury is possible only from a distance of less than three feet. We hereby refer the case of Amin Ali and another v. The State (2011 SCMR 323), wherein at page 330, the Hon'ble Supreme Court of Pakistan has held as under:--

"All the three witnesses deposed that the deceased had received three injuries, but the Medical Officer found six injuries on the person of the deceased. One of them had blackening. None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased. Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence".

Similarly in another case of "Muhammad Ishaq v. The State" (2007 SCMR 108), the Hon'ble Supreme Court of Pakistan at page 111 discussed the conflict between the ocular and medical evidence in the following terms:--

"Last but not the least, corroboration is sought from the post mortem report but strange it is to observe that it was totally ignored by the two courts that post mortem report has further damaged the already doubtful case of the prosecution. We are surprised to notice that there is burning on all the four inlet wounds of the deceased. Such burning can occur at the most from a distance of 5 to 6 feet from muzzle to the victim. Amazingly the distance from the assailant to the victim is 132 feet."

Regarding contradiction about the direction of entry and exit wound and level of the deceased and the assailant the Hon'ble Supreme Court of Pakistan in the case of "Ali Sher and others v. The State" (2008 SCMR 707) at page 711 has held as under:--

"At the time of the occurrence Irshad deceased and his companions were walking on the service road running along the above mentioned rajbah. The convicts emerged out of the rajbah and had fired at the deceased from the Patrhi on the bank of the said rajbah. According to the two eye-witnesses the sand bank/Patrhi of the rajbah was 2 or 2-1/2 feet higher than the service road. However, according to the two independent witnesses, namely, Muhammad Ashraf Patwari (P.W.7) and Muhammad Sarwar FC (P.W.12) it was six feet higher than the service road. It could therefore be safely presumed that the two assailants were standing at a place which was atleast 4/5 feet

higher than the place where the deceased was available at the time when the shots had been fired at him. In this view of the matter, the direction of the shots entering and leaving the body of the deceased should have been from upward to downwards but according to the description of the injuries as given by Dr. Rehmat Ali Imran (P.W.9) this was not so and in fact in his opinion the direction of the some of these injuries was from downwards to upwards. Consequently, we find it difficult to hold that the medical evidence was in line with the ocular testimony or that the eye-witness account was being corroborated by the medical evidence".

There was no bleeding from injury No.1 of Mst. Zakiya Bano (P.W.13). Dr. Syed Islam Zafar (P.W.8), who medically examined Mst. Zakiya Bano (P.W.13) has admitted that she had not mentioned the time of examination of the above-mentioned injured prosecution witness. The above-mentioned facts have fully established that the ocular evidence is not in line with medical evidence.

14. It is contended by the learned counsel for the complainant that Mst. Zakiya Bano (P.W.13) is an injured eye-witness of the occurrence, therefore, her presence at the time of occurrence could not be doubted.

Although Mst. Zakiya Bano (P.W.13) is an injured eye-witness, but injury on her person does not stamp her with truth. We may refer here the case of Muhammad Pervez and others v. The State and others (2007 SCMR 670). The Hon'ble Supreme Court of Pakistan at page 681 has held as under:-

"It is also a settled law that injuries on a P.W. only indication of his presence at the spot but is not informative prove of his credibility and truth. See Said Ahmad's case 1981 SCMR 795".

In view of the above we hold that the statement of injured eye-witness Mst. Zakiz Bano (P.W.13) requires independent corroboration, which is lacking in this case.

15. The prosecution witnesses made dishonest improvements in their statements. As discussed earlier, it was not mentioned in the F.I.R. or in the statements of the prosecution witnesses recorded under section 161 of Cr.P.C. regarding the availability of torches at the time of occurrence, but at the time of recording of their statements before the Court, the prosecution witnesses namely, Basharat Ali (P.W.4) and Abdul Haq (P.W.5) made dishonest improvements by saying that they identified the accused in moon light as well as in the light of torches. Improvement made by a witness on material aspects of the case is not worthy of reliance. Reference in this context, inter

alia, may be made to the case of Muhammad Rafique and others v. The State and others (2010 SCMR 385).

16. Although it was alleged that that gun P-1 was recovered from the possession of Muhammad Latif appellant vide recovery memo (Exh.P.W.5/C) but said recovery is of no avail to the prosecution, because no empty was recovered from the spot, therefore, report of Forensic Science Laboratory (Exh.PZ) in respect of working condition of the above-mentioned gun is not helpful to the prosecution case. According to prosecution case, on 20-9-2005, two led bullets were allegedly recovered from the wooden doors of the house of occurrence vide recovery memo Exh.P.W.5/B. The said led bullets were not recovered on the day of occurrence, when Investigating Officer inspected the spot. Occurrence in this case had taken place on 25-8-2005, whereas, the led bullets were allegedly recovered on 20-9-2005. There is delay of twenty five days in the recovery of said led bullets, which makes the said recovery highly doubtful. These led bullets were never sent to the Forensic Science Laboratory for their comparison with the gun (P.1) allegedly recovered from the appellant Muhammad Latif.

17. Insofar as motive is concerned, as per F.I.R. (Exh.PA/1), the same is to the effect that the candidate for the office of Nazim Union Council supported by the accused party lost his election and due to that grudge, the accused party in furtherance of their common intention, committed the occurrence. The complainant party also claimed that their candidate Chaudhry Manzoor Hussaain won the election of the office of Nazim Union Council, and they were holding a procession to celebrate his victory. The above-mentioned Chaudhry Manzoor Hussain was not produced either during investigation or before the trial Court to prove the motive alleged by the complainant party. Even otherwise, motive is a double edged weapon, that cuts both ways. It could be a reason for false implication of the accused in a case. There is deep rooted enmity between the parties, therefore, the alleged motive in this case, cannot be considered against the appellants.

18. The learned counsel for the complainant has also contended that the appellant Muhammad Asghar remained fugitive from law and he was declared a proclaimed offender which also corroborates the prosecution case, against the said appellant. It is by now a well settled law that abscondence, per se, is not a proof of the guilt of an accused, which however can create a suspicion against him, but suspicion, however strong, cannot be the substitute of the proof, which is required to award punishment to an accused. The evidence of abscondence, even if found convincing, would not be

sufficient by itself to warrant conviction of accused on a charge of murder. Reference in this context may be made to the cases of Barkat Ali v. Muhammad Asif and others (2007 SCMR 1812).

19. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal, and set-aside the conviction and sentence awarded to the appellants namely, Muhammad Latif and Muhammad Asghar, and dismiss Criminal Revision No.634 of 2010, filed by the complainant. The appellant Muhammad Latif is in jail. He shall be released forthwith if not required in any other case, whereas, appellant Muhammad Asghar is on bail, therefore, his surety bonds stand discharged.

Death sentence awarded to the appellant Muhammad Latif is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

NHQ/M-37/L **Appeals accepted.**

2013 Y L R 1456

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD SALEEM alias CHHEMU---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.875 and Murder Reference No.170 of 2008, heard on 7th March, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Conflict existed in the statement of the complainant and in the statement of other eye-witnesses of prosecution, which they made before the Police qua the injury attributed to accused on the person of deceased---Role attributed to accused and to acquitted co-accused was identical, and case of accused was not distinguishable from the case of said acquitted co-accused---Prosecution case against accused did not get any independent corroboration from the motive part of the prosecution story---Alleged recovery of rifle .222 bore, could not be considered as a corroborative piece of evidence against accused---No independent corroboration qua the role attributed to accused was available---Prosecution evidence, which had been disbelieved qua acquitted co-accused, could not be believed against accused, in circumstances---Prosecution case about the role attributed to accused was highly contradictory and doubtful---Role attributed to accused, was also in conflict with postmortem report of the deceased---Complainant had made dishonest improvements in his statements in order to bring his case in line with medical evidence---Prosecution witnesses appeared to be not present at the spot---Prosecution case was replete with number of circumstances, which had created serious doubts about the prosecution story---Prosecution having failed to prove its case against accused beyond the shadow of doubt, conviction and sentence recorded by the Trial Court against accused, were set aside, he was acquitted of the charge extending him benefit of doubt and was released, in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185 and Akhtar Ali and others v. The State 2008 SCMR 6 rel.

(b) Criminal trial---

----Benefit of doubt---If there was a single circumstance which would create doubt regarding the prosecution case, same was sufficient to give benefit of doubt to accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Mian Muzaffar Ahmad for Appellant.

Arshad Mehmood, Deputy Prosecutor-General for the State.

Syed Zahid Hussain Bokhari and Mrs. Khalida Parveen for the Complainant.

Date of hearing: 7th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 875 of 2008 filed by Muhammad Saleem alias Chhemu appellant against his conviction and sentence and Murder Reference No. 170 of 2008, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Saleem alias Chhemu appellant, as both these matters have stem out of the same judgment dated 22-8-2008, rendered by the learned Additional Sessions Judge, Lahore , in case F.I.R. No. 1/97 dated 1-1-1997, registered under sections 302/324/148/149/109, P.P.C. at Police Station Chung, District Lahore, whereby, Muhammad Saleem alias Chhemu, appellant was convicted under section 302(b) of Pakistan Penal Code for committing the murder of Khalid Mehmood (deceased) and sentenced to death with a direction to pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand only) to the legal heirs of deceased as envisaged under section 544-A, Cr.P.C. and in default, thereof, to suffer imprisonment for six months' S.I. However, through the same judgment, the learned trial Court has acquitted Ameer Ali, Muhammad Mansha alias Budha, Ijaz alias Jajji, Sharafat Ali, Pervaiz Ahmad, Liaqat Ali, Muhammad Anwar son of Ali Muhammad, Muhammad Anwar son of Dil

Muhammad, Farmaish Ali, Asghar Ali and Farman Ali, co-accused, while giving benefit of doubt to them.

2. Brief facts of the case, as disclosed by Muhammad Ayyub complainant (P.W.2) in his 'Fard Bayan' Exh.PB, on the basis whereof, formal F.I.R. (Exh.PB/l) was recorded, are that he (complainant) was resident of Shahpur, Lahore and was agriculturist by profession. On 1-1-1997 at 10-30 a.m., he (complainant) along with his brother Khalid Mehmood (deceased), Muhammad Ashraf (given up P.W.) and Muhammad Hanif (P.W.11) went to Abpara scheme to visit their agricultural land by a 'Tonga' driven by Haji Muhammad Din alias Soni (P.W.9). Adjacent to that land, sugarcane crop of Haji Sultan was present. In the said field, Abdur Rehman was reaping sugarcane crop. Khalid Mehmood (deceased) went to him for taking some sugarcane while the complainant along with Muhammad Ashraf (given up P.W.) and Muhammad Hanif (P.W.11) started moving towards their agricultural land. Meanwhile, the accused, namely Saleem alias Chhemu (appellant) armed with .222 bore rifle, Sharafat armed with .44 bore rifle, Muhammad Mansha armed with .12 bore gun, Liaqat armed with .12 bore gun, Ijaz alias Jajji armed with .12 bore repeater, Ameer Ali armed with Kalashnikov came there by a tractor, whereas, the accused Muhammad Anwar armed with .12 bore gun and Pervaiz Ahmad armed with .12 bore gun came over there by a motorcycle. Sharafat Ali accused (since acquitted) raised lalkara to Pervaiz Ahmad accused (since acquitted) and Saleem alias Chhemu (appellant) that Khalid Mehmood (deceased), had murdered his brother hence, he should not be spared, whereupon, Sharafat, Pervaiz Ahmad and Saleem alias Chhemu, accused persons made straight firing. The fire shot made by Saleem alias Chhemu (appellant) hit Khalid Mehmood (deceased) on the left side of chest who fell down with his face downwards. In that position, Pervaiz Ahmad accused (since acquitted) made a fire a shot which landed on the back of Khalid Mehmood (deceased). The other accused persons namely, Muhammad Mansha, Liaqat Ali, Ijaz alias Jajji, Ameer Ali and Muhammad Anwar, thereafter, made indiscriminate firing. Resultantly, Abdur Rehman also sustained injury due to the firing of accused persons. On raising hue and cry by the P.Ws. the accused persons managed to escape from the spot. Khalid Mehmood (deceased) and Abdur Rehman injured were taken to Jinnah Hospital where Khalid Mehmood succumbed to the injuries.

The motive behind the occurrence, as alleged in the F.I.R. was that the complainant party had already enmity of murders with Sharafat accused (since acquitted). The accused persons in connivance and conspiracy of other accused persons, namely Asghar Ali, Farman Ali, Muhammad Anwar and Farmaish Ali, committed the murder of Khalid Mehmood (deceased) and said conspiracy was hatched in the 'baithak' of Asghar Ali accused.

3. The appellant Muhammad Saleem alias Chhemu along with six other co-accused, namely, Pervaiz, Mansha, Farmaish, Farman, Liaqat and Ameer Ali, was arrested on 22-1-1997 by Waqar Ahmad, Inspector (P.W.16). On 28-1-1997, Muhammad Saleem alias Chhemu (appellant) while in police custody, after making disclosure, got recovered .222 rifle (P-5) from the room of his residential house, which was taken into possession vide recovery memo Exh.PH. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced sixteen witnesses, during the trial. Muhammad Ayyub, complainant (P.W.2), Haji Muhammad Din alias Sohni (P.W.9) and Muhammad Hanif (P.W.11) are the witnesses of ocular account while Haji Afsar Ali (P.W.3) is the witness of abetment.

The medical evidence was furnished by Dr. Muhammad Khalid (P.W.7), who on 2-1-1997 at 10-00 a.m. conducted postmortem examination on the dead body of Khalid Mehmood (deceased), while Dr. Kh. Masood Ahmad (P.W.15), on 1-1-1997 at 11-50 a.m. conducted medico legal examination of Khalid Mehmood (deceased).

Waqar Ahmad, Inspector/S.H.O. (P.W.16) is the Investigating Officer of the case while Hamid Ullah (P.W.12) is the witness of recovery of .222-rifle (P-5) at the instance of Muhammad Saleem alias Chhemu appellant.

Abdul Sattar, A.S.-I. (P.W.1), Muhammad Zafar HC (P.W.4), Manzoor Ahmad HC (P.W.5), Ishtiaq Ahmad Patwari (P.W.6), Sher Ali 1102/C (P.W.8), Abdul Haq 13142/C (P.W.10), Akhtar Maqsood (P.W.13) and Muhammad Aslam, A.S.-I. (P.W.14), are the formal witnesses.

The prosecution also produced documentary evidence in the shape of last worn clothes of the deceased Exh.PA, copy of 'Fard Bayan' Exh.PB, got recorded by Muhammad Ayyub complainant (P.W.2), copy of formal F.I.R. Exh. PB/1, memo of possession of blood-stained shalwar of Khalid Mehmood deceased Exh.PC, copies of scaled site plans of the place of occurrence, Exh.PD and Exh.PD/1, postmortem report of Khalid Mehmood deceased Exh. PE, pictorial diagrams Exh.PE/1 and Exh.PE/2, memo of possession of blood-stained earth from the place of occurrence, Exh.PF, memo of possession of four empties of rifle .222 bore P-8/1-4, 20 empties of Kalashnikov P-9/1-20, 3 empties of .44 bore rifle P-10/1-3, a missed bullet of .44-bore rifle P-11 and 31 empties of .12-bore gun P-12/1-31, Exh. PG, recovery memo of .222 bore rifle (P.5) from the possession of the appellant Exh. PH, copy of site plan without scale of the place of recovery of .222 bore rifle (P.5), Exh. PH/1, recovery memo of .12-bore gun (P.6) from the possession of Mansha (acquitted accused) Exh. PJ, copy of site plan without scale of place of recovery of .12-bore gun (P.6) Exh. PJ/1, recovery memo of .12-bore gun (P.7) from the possession of Pervaiz (acquitted accused) Exh. PK, copy of site plan without scale of place of recovery of .12 bore gun (P.7) Exh. PK/1, medico-legal examination report of Khalid Mehmood deceased Exh. PL, copy of death certificate of Khalid Mehmood deceased Exh. PM, medico-legal examination report of Abdur Rehman injured Exh. PN, inquest report of the deceased Exh. PQ, injury statement of the deceased Exh. PR, copy of application for recording statement of Abdur Rehman injured Exh. PS, copy of site plan of the place of occurrence without scale Exh. PT, report of Forensic Science Laboratory Exh. PU, report of Chemical Examiner Exh.PV, report of Serologist Exh. P.W., and closed its evidence.

5. The statement of the appellant under section 342 of the Code of Criminal Procedure, was recorded on 10-2-2006. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the P.Ws. deposed against you?" Muhammad Saleem alias Chhemu appellant replied as under:--

"I am totally innocent in the present case. All the allegations alleged against me are totally false and baseless. I was not present at the place of occurrence at the time of occurrence. Muhammad Ayyub, the complainant of this case, along with his

companions had murdered Muhammad Arif, cousin (Chachazad Bhai) of my father and my father is the eye-witness of said murder and I and my father have been falsely implicated in this case just to prevent my father from deposition. At the time of this alleged occurrence, I along with my father Ameer Ali had gone to Ramzan Ali Hospital, Temple Road, Lahore to see Zaheer Abbas and I set out in a Bus for Temple Road, Lahore at about 7 a.m. along with my father and reached Ramzan Ali Hospital at about 8-1/2 and when we reached, Sharafat Ali was also present there and we said to him that as he had remained waking for the whole night, therefore, he might have slept for a while and I along with my father and another person Muhammad Ashraf son of Muhammad Shafi remained sitting with Zaheer Abbas since 8-1/2 a.m. to 12.00 noon and thereafter we came back. I have been falsely implicated in the present case and I have nothing to do with the alleged occurrence."

Neither the appellant or his co-accused opted to make statements on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them, nor they produced any evidence in their defence.

6. The learned trial Court vide judgment dated 26-5-2008, while acquitting co-accused Ameer Ali, Muhammad Mansha alias Budha, Ijaz alias Jajji, Sharafat Ali, Pervaiz Ahmad, Liaqat Ali, Muhammad Anwar son of Ali Muhammad, Muhammad Anwar son of Dil Muhammad, Farmaish Ali, Asghar Ali and Farman Ali found Muhammad Saleem alias Chhemu appellant guilty and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that the appellant along with eleven other accused was implicated in this case and all the eleven co-accused of the appellant were acquitted by the learned trial Court but their acquittal has not been challenged any more by the complainant or by the State and as such the evidence which has been disbelieved to the extent of acquitted co-accused cannot be believed to the extent of the appellant unless and until there is strong corroboration which is very much lacking in this case; that the motive was specifically alleged against Sharafat Ali co-accused of the appellant who has already been acquitted; that so far recovery of .222 bore rifle (P.5) from the possession of the appellant and positive report of Forensic Science Laboratory is concerned, learned counsel for the appellant contends that the recovery of .222 rifle P.5 cannot be believed as only witness of recovery,

Hameed Ullah (P.W.12) is admittedly interested and inimical witness as he was an accused in the murder case of Arif brother of Sharafat Ali co-accused; that moreover, there is no evidence on record as to where the gun remained present after its recovery as Manzoor Ahmad Moharrir who appeared as P.W.5 did not state anything about this rifle and even there is no evidence as to who deposited this rifle in the office of Forensic Science Laboratory though the names of Ghulam Shabbir and Abdul Haq have been mentioned in the report of Forensic Science Laboratory Exh. PU; that said Ghulam Shabbir was given up while Abdul Haq appeared as P.W.10, but he did not state anything regarding the deposit of rifle (P.5); that the ocular account is in conflict with the medical evidence as in the F.I.R. it is the case of the complainant that the appellant along with Sharafat and Pervaiz fired at the deceased and fire shot of the appellant hit the deceased on his chest whereas according to Dr. Muhammad Khalid (P.W.7), who conducted post-mortem examination on the dead body of Khalid Mehmood deceased injury on the chest of the deceased was an exit wound but that doctor was not declared hostile; that the complainant when appeared before the learned trial Court changed his version by stating that the fire shot of the appellant hit on the back of the deceased and he was confronted with his previous statement and his improvement was brought on the record; that firstly Khalid Mehmood deceased was medically examined on 1-1-1997 at 11-50 a.m. by Dr. Kh. Masood Ahmad (P.W.15), who in his MLR (Exh. PL) stated that the injury on the chest of the deceased was an entry wound, therefore, the complainant lodged the F.I.R. in line with the medical report (Exh. PL) but later on he changed his version and made statement in court, in order to bring his case in line with the postmortem report, according to which the injury on the chest of the deceased was an exit wound; that F.I.R. was got recorded on 1-1-1997 at 10-30 a.m. after examination of the injured in the hospital and because the doctor declared injury on the chest of deceased as entry wound, therefore, it was shown as entry wound in the F.I.R. but after the postmortem examination of the deceased, the complainant changed his version but none of the doctor was declared hostile; that the eyewitnesses have made dishonest improvements on material points in their statements and the said improvements were duly brought on the record; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that ocular account to the extent of appellant is consistent rather there are two different opinions of the doctors and preference be given to the ocular account and the appellant cannot get any benefit from the acquittal of his co-accused; that so far as acquittal of Pervaiz Ahmad accused is concerned, learned counsel contends that report of the Forensic Science Laboratory to his extent was negative whereas the rifle (P-5) which was recovered from the appellant and FSL report of that rifle was positive which is a very strong corroboration against the appellant; that it is clearly mentioned in the report of Forensic Science Laboratory that the empties were received in the office on 8-1-1997, gun was deposited on 27-2-1997 and name of the depositor in these circumstances was immaterial and it was also immaterial as to who took the gun to the office of FSL and where the gun remained present after its recovery; that it was a day time occurrence and both the parties were previously known to each other and specific role has been attributed to the appellant; that substi-tution in such like cases is a rare phenomenon; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the appellant, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant and have also gone through the record with their able assistance.

10. This unfortunate incident took place on 1-1-1997 at 10-30 a.m. in the fields of one Haji Sultan situated in Abpara Scheme within the area of Police Station Chung District Lahore. The matter was reported to the police by Muhammad Ayyub complainant (P.W.2) through his 'Fard Bayan' (Exh. PB), on the basis whereof, the formal F.I.R. (Exh. PB/1) was chalked out on the same day at 1-00 p.m. The facts of the prosecution case as set forth in the F.I.R. (Exh. PB/l), have already been narrated in detail in para No.2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case as given in the F.I.R. (Exh. PB/1) is that on 1-1-1997 at 10-30 a.m. the complainant Muhammad Ayyub (P.W.2) along with his brother Khalid Mehmood (deceased), Muhammad Ashraf (given up P.W.) Muhammad Hanif (P.W.11) went to his agricultural land situated in Abpara Scheme

Lahore on the 'tonga' of Haji Muhammad Din alias Sohni (P.W.9). At that time Abdur Rehman (given up P.W.) was harvesting the sugarcane crop from the adjacent fields of Haji Sultan. Khalid Mehmood deceased went to the said fields to take a sugarcane from there, whereas the complainant Muhammad Ayyub (P.W.2) along with Muhammad Ashraf (given up P.W.) and Muhammad Hanif (P.W.11) proceeded towards the fields of the complainant. In the meanwhile, Muhammad Saleem alias Chhemu appellant armed with .12 bore rifle, Sharafat armed with .44 bore rifle, Muhammad Mansha armed with .12 bore gun, Liaqat armed with .12 bore gun, Ijaz alias Jajji armed with .12 bore repeater, Ameer Ali armed with Kalashnikov, Muhammad Anwar armed with .12 bore gun and Pervaiz armed with .12 bore gun came at the spot. Sharafat Ali accused (since acquitted) while raising a lalkara asked Muhammad Saleem alias Chhemu (appellant) and Pervaiz Ahmad accused (since acquitted) not to let Khalid Mehmood (deceased) alive as he had committed the murder of his brother, whereupon, Muhammad Saleem alias Chhemu appellant, Pervaiz Ahmad and Sharafat co-accused (both since acquitted) started firing at Khalid Mehmood deceased. The fire shot made by Muhammad Saleem alias Chhemu (appellant) landed on the left side of the chest of Khalid Mehmood deceased who fell on the ground facing downwards. Pervaiz Ahmad accused (since acquitted) made a fire shot which landed on the back of Khalid Mehmood (deceased). Muhammad Mansha accused, Liaqat accused, Ijaz alias Jajji accused, Ameer Ali accused and Muhammad Anwar accused (all since acquitted) also resorted to indiscriminate firing with their respective weapons. Abdur Rehman (given up P.W.) was also injured due to the firing of the accused persons. On raising hue and cry by the complainant party all the accused persons fled away from the spot while raising lalkaras and making aerial firing. Khalid Mehmood deceased and Abdur Rehman (given up P.W.) were taken to Jinnah Hospital in injured condition, where Khalid Mehmood succumbed to the injuries. The motive as alleged in the F.I.R. was that the complainant party had the enmity of murders with Sharafat Ali accused (since acquitted). It was also alleged that the occurrence was committed due to the abetment of Asghar Ali, Muhammad Hussain, Farman Ali, Muhammad Anwar and Farmaish Ali, accused persons (all since acquitted), who hatched the conspiracy of murder while sitting in the baithak of Asghar Ali Bhatti accused (since acquitted).

11. We have noted that according to the prosecution case as set forth in the F.I.R. (Exh. PB/1), the appellant Muhammad Saleem alias Chhemu was assigned the role of inflicting a firearm injury on the left side of chest of Khalid Mehmood deceased, whereas Pervaiz Ahmad accused (since acquitted) was attributed the role of making a fire shot which landed on the back of Khalid Mehmood deceased, but the injury attributed to the appellant was an exit wound according to the postmortem report of Khalid Mehmood deceased (Exh. PE), therefore, the complainant Muhammad Ayyub (P.W.2) while making his statement before the learned trial Court changed his earlier stance and he assigned the role to the appellant, of making a fire shot at the back of Khalid Mehmood deceased. Muhammad Ayyub complainant (P.W.2), while appearing before the learned trial Court qua injuries of Khalid Mehmood deceased stated as under:--

"...Sharafat Ali, accused raised lalkara that Khalid Mahmood was the murderer of his brother and he should not go saved, Saleem alias Chhemu fired his .222 rifle hitting the lower back of Khalid Mahmood and he fell down upon the ground. Pervaiz accused fired with his .12 bore gun hitting the lower back of Khalid Mahmood deceased near to the above said injury."

The case of other eye-witnesses namely, Muhammad Hanif (P.W.11) and Haji Muhammad Din alias Sohni (P.W.9) regarding the injuries on the person of Khalid Mehmood deceased is as under:--

Muhammad Hanif (P.W.11)

"...Sharafat accused alighted from tractor and exhorted Lalkara that Khalid Mehmood had murdered his brother and should not go spare. Salim alias Chhemoon armed with .12 bore fired at the victim Khalid Mehmood which hit him on his lower back, Pervaiz fired with his .12 bore upon which victim Khalid Mehmood fell down on the ground on its bally side."

Haji Muhammad Din alias Sohni (P.W.9)

"...Salim alias Chhemon fired with his .222 rifle upon Khalid who was in going condition to pick up a sugarcane piece and the same landed upon the back just above the buttock of the victim and which came out from the left side of chest in front.

Pervaiz accused fired with his .12 bore gun which landed just below the first injury of an entry wound. ."

12. We have noted that the prosecution case as set forth in the F.I.R. (Exh. PB/1), was changed before the learned trial Court qua the role played by the appellant during the occurrence. Similarly there was conflict in the statement of the complainant and in the statement of other eye-witnesses of the prosecution inter se, which they made before the police qua the injury attributed to the appellant on the person of the deceased. We will discuss the consequences of above mentioned change/conflict of the prosecution case in the later part of this judgment. However, we have noted that in the statements of prosecution witnesses before the learned trial Court the role attributed to the appellant as well as Pervaiz Ahrnad accused (since acquitted) was identical. Muhammad Saleem alias Chhemu appellant, as well as, Pervaiz Ahmad accused (since acquitted), both were assigned the role of making one fire shot each which landed on the back of Khalid Mehmood deceased. Charge was also framed against Muhammad Saleem alias Chhemu appellant and Pervaiz Ahmad accused (since acquitted) that they committed the 'qatl-e-amd' of Khalid Mehmood deceased while armed with .222 bore rifle and .12 bore gun in furtherance of their common intention. Pervaiz Ahmad co-accused and ten other co-accused have been acquitted by the learned trial Court while extending them the benefit of doubt. No appeal against their acquittal has been preferred either by the State or by the complainant as confirmed by the learned Deputy Prosecutor-General for the State and the learned counsel for the complainant. Thus, the decision regarding the acquittal of said co-accused of the appellant has attained finality. Now the question for determination before this Court is that whether the evidence which has been disbelieved qua Pervaiz Ahmad acquitted co-accused of the appellant can be believed against the appellant. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as Iftikhar Hussain and another v. State 2004 SCMR 1185 wherein the Hon'ble Supreme Court at page 562 held as under:--

"17.... It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe

administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758), relevant para therefrom is reproduced below thus:-
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The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Ziaullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others V. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)"

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as Akhtar Ali and others v. The State (2008 SCMR 6).

13. So keeping in view the principle laid down in the above referred judgments, we will discuss the case of the appellant to see, as to whether there is any distinction between the case of appellant and his acquitted co-accused Pervaiz Ahmad. As mentioned earlier, in the statements of eye-witnesses recorded by the learned trial Court, Muhammad Saleem alias Chhemu appellant, as well as, Pervaiz Ahmad accused (since acquitted) both were assigned the role of making one fire shot each with their respective weapons which landed on the back of Khalid Mehmood deceased. According to the medical evidence furnished by Dr. Muhammad Khalid (P.W.7), he conducted postmortem examination on the dead body of Khalid Mehmood deceased and found the following injuries on his person:--

"(1-A) A rounded lacerated wound 0.5 cm x 0.5 cm into going deep with inverted margine and having collar of abrasion situated on the left side of the trunck 3 cm outer to the midline and 4 cm above the natal cleft (entry wound).

(1-B).A , lacerated wound 1 x 0.4 cm with everted edges situated on the front of left upper chest, 5.5 cm outer to midline and 11.5 cm above the left nipple and 2 cm below the left clavical (exit wound).

2. A superficial grace 1 x 1 cm situated on the left side of the trunck, 1 cm below injury No.1-A."

It is clear from the perusal of ocular account as well as medical evidence of the prosecution that the role attributed to Muhammad Saleem alias Chhemu appellant and to Pervaiz Ahmad accused (since acquitted) is identical and the case of Muhammad Saleem alias Chhemu appellant is not distinguishable from the case of Pervaiz accused (since acquitted).

14. Insofar as motive is concerned, we have noted that in the F.I.R. Exh. PB/1, as well as, in the statements of prosecution witnesses recorded by the learned trial Court, the motive behind the occurrence was enmity of the complainant party of murders with Sharafat Ali accused (since acquitted). Although the prosecution witnesses have also mentioned some other cases during their cross-examination which were pending against other accused persons including the appellant but the said cases were not mentioned to be the motive of the occurrence in the F.I.R. Exh. PB/1 or in the examination-in-chief of any prosecution witness. Sharafat Ali accused against whom

the motive was alleged and Pervaiz Ahmad accused against whom the motive was jointly alleged, as well as, all other accused persons against whom motive was jointly alleged and the case was jointly lodged by the complainant party, have already been acquitted by the learned trial Court and as mentioned earlier, no appeal against their acquittal has been filed either by the State or by the complainant. We are, therefore, of the view that prosecution case against the appellant does not get any independent corroboration from the motive part of the prosecution story.

15. The learned, D.P.G. and learned counsel for the complainant have referred to the recovery of rifle .222 bore, P-5, which was taken into possession vide memo Exh. PH and positive report of Forensic Science Laboratory Exh. PU, according to which four crime empties which were recovered from the spot had been fired from the rifle .222 bore P.5 to embellish their argument that prosecution case against the appellant is corroborated by the above pieces of evidence. We have noted that according to the Forensic Science Laboratory report Exh. PU, the parcels of empties and rifle were deposited in the office of Forensic Science Laboratory, Lahore by Ghulam Shabbir No. 2209/C and Abdul Haq No. 13142/C. Ghulam Shabbir No. 2209/C was given up by the prosecution through the statement of learned DDA dated 30-7-2002. However, Abdul Haq No. 13142/C appeared as P.W.10 before the learned trial Court, but the said witness did not utter a single word regarding the delivery of the parcel of rifle .222 bore P-5 in the office of Forensic Science Laboratory, Lahore and he only stated about the delivery of parcel of empties and blood-stained earth to the office of FSL and Chemical Examiner, respectively. There is no evidence regarding the safe custody of .222 bore rifle P.5, and the delivery of parcel of the said rifle, intact to the office of Forensic Science Laboratory, Lahore. We are, therefore, of the view that the alleged recovery of rifle .222 bore P-5 cannot be considered as a corroborative piece of evidence against the appellant.

16. We are unable to find out any independent corroboration qua the role attributed to Muhammad Saleem alias Chhemu appellant, therefore, the case of Muhammad Saleem alias Chhemu appellant is not distinguishable from the case of Pervaiz accused (since acquitted) as there is no independent corroboration of the prosecution story against Muhammad Saleem alias Chhemu appellant. Thus, the prosecution evidence which has been disbelieved qua Pervaiz Ahmad co-accused (since acquitted) cannot be

believed against the appellant as held by the Hon'ble Supreme Court of Pakistan in the cases of "Iftikhar Hussain etc." and "Akhtar Ali etc.", supra.

17. Moreover, the prosecution case qua the role attributed to the appellant is highly contradictory and doubtful. As mentioned earlier, the prosecution case, as set forth in the F.I.R. (Exh. PB/1) was that Muhammad Saleem alias Chhemu appellant made a fire shot with his .222 bore rifle which landed on the left side of chest of Khalid Mehmood deceased, whereas, Pervaiz Ahmad accused (since acquitted) was attributed the role of making a fire shot which landed on the back of Khalid Mehmood deceased. The role attributed to the appellant was in conflict with the postmortem report (Exh. PE) of Khalid Mehmood deceased according to which the injury i.e. injury No. 1-B, on the chest of Khalid Mehmood deceased was an exit wound whereas, the entry wound was on the back of chest of Khalid Mehmood deceased which was attributed to Pervaiz Ahmad accused (since acquitted). Muhammad Ayyub complainant (P.W.2) while making his statement before the learned trial Court changed his earlier version and as there were two firearm wounds on the back of Khalid Mehmood deceased according to the postmortem report, therefore, he (complainant) assigned the role of inflicting one firearm injury each on the back of Khalid Mehmood deceased to Muhammad Saleem alias Chhemu appellant and Pervaiz Ahmad accused (since acquitted). It is evident that he made dishonest improvements in his statements in order to bring his case in line with the medical evidence. He has admitted during his cross-examination that he did not state in the complaint Exh. PB that the fire shot of Muhammad Saleem alias Chhemu (appellant) had hit the lower back of Khalid Mehmood (deceased). He further admitted that he stated in complaint Exh. PB, that the fire shot made by Muhammad Saleem alias Chhemu appellant hit on the left side of chest of Khalid Mehmood deceased. He, however, volunteered that in his supplementary statement he had assigned the role of inflicting a firearm injury on the back of Khalid Mehmood deceased to Muhammad Saleem alias Chhemu appellant, but no such supplementary statement of the complainant was brought on the record. Learned counsel for the complainant has vehemently argued that the role attributed to Muhammad Saleem alias Chhemu appellant in the F.I.R. (Exh. PB) of inflicting a firearm injury on the chest of Khalid Mehmood deceased has fully been supported by the medical evidence furnished by Dr. Kh. Masood Ahmad (P.W.15), who medically examined Khalid Mehmood

deceased on 1-1-1997 and according to his evidence he found a firearm injury with inverted edges on the chest of Khalid Mehmood deceased. The said argument of learned counsel for the appellant has no force because none of the prosecution witnesses while appearing in the witness box before the learned trial Court has stated that the fire shot made by Muhammad Saleem alias Chhemu appellant landed on the chest of Khalid Mehmood deceased. It appears that the prosecution eye-witnesses were not present at the spot and as the medical examination of Khalid Mehmood deceased was conducted on 1-1-1997 at 11-50 a.m. therefore, Muhammad Ayyub complainant (P.W.2) made his statement 'Fard Bayan' Exh. PB at 12-15 p.m. according to the Medico Legal Report Exh. PL, according to which injury No. 1 on the chest of Khalid Mehmood deceased was an entry wound, therefore, the said injury was attributed to Muhammad Saleem alias Chheemu appellant, but later on, when the postmortem examination was conducted on the dead body of Khalid Mehmood deceased by Dr. Muhammad Khalid (P.W.7), who declared that injury on the chest of Khalid Mehmood deceased was an exit wound with everted edges, therefore, the prosecution story regarding the role played by Muhammad Saleem alias Chhemu was changed later on. It is interesting to note that two Medical Officers (Dr. Muhammad Khalid P.W.7 and Dr. Kh. Masood Ahmad P.W.15) were produced by the prosecution. The prosecution evidence produced by said Medical Officers regarding the injury on the chest of Khalid Mehmood deceased is self-contradictory, because according to Dr. Muhammad Khalid (P.W.7), the injury on the chest of Khalid Mehmood deceased was an exit wound, whereas according to Dr. Kh. Masood Ahmad, (P.W.15) the injury on the chest of Khalid Mehmood deceased was an entry wound. Neither of the abovementioned prosecution witnesses, was declared hostile by the prosecution. The complainant never challenged before the Medical Board the findings of the abovementioned Medical Officers nor he ever questioned the MLC (Exh.APL) or the postmortem report (Exh. PE) of Khalid Mehmood deceased. The prosecution ocular account and the medical evidence of the prosecution qua the injury attributed to the appellant on the person of Khalid Mehmood deceased is highly contradictory which has created a serious doubt about the truthfulness of the prosecution case. Prosecution cannot take advantage of said contradiction to its own benefit and the appellant is entitled to the benefit of said doubt, as a matter of right and not as a matter of grace. Although the other eye-witnesses namely Haji

Muhammad Din alias Sohni (P.W.9) and Muhammad Hanif (P.W.11) in their statements before police have assigned the role of inflicting a firearm injury on the back of Khalid Mehmood deceased to Muhammad Saleem alias Chhemu appellant, but their evidence is in conflict with the story of prosecution as set forth in the F.I.R. Exh. PB/1. Moreover, their evidence as mentioned earlier has been disbelieved qua the role attributed to Pervaiz Ahmad accused (since acquitted) who was also assigned the role of inflicting a firearm injury on the back of Khalid Mehmood deceased by the said eye-witnesses, therefore, their evidence which has been disbelieved qua Pervaiz Ahmad accused (since acquitted) cannot be believed against Muhammad Saleem alias Chhemu appellant without independent corroboration which is very much lacking in the instant case.

18. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

'5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SC SCMR 230), at page 236, observed as under:--

'13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable

doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace at concession but as a matter of right."

19. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.875 of 2008 filed by Muhammad Saleem alias Chhemu appellant, set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Lahore vide judgment dated 22-8-2008, and acquit him of the charge by extending him the benefit of doubt. He is in custody, he be released forthwith if not required in any other case.

Murder Reference No. 170 of 2008 is answered in the NEGATIVE and the sentence of death of Muhammad Saleem alias Chhemu-(convict) is NOT CONFIRMED.

20. Before parting with this judgment, we may mention here that the appellant was arrested in this case on 22-1-1997. We have noted with heavy heart and pain that the appellant had been languishing in jail for the last more than 16 years, clamouring for justice, we feel pity for the appellant that his trial remained pending before the learned trial Court for about twelve years and thereafter his appeal and Murder Reference remained pending for more than four years before this Court.

HBT/M-67/L **Appeal accepted.**

2013 Y L R 1562

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD MANSHA and another---Petitioners

Versus

The STATE---Respondent

Criminal Appeals Nos. 740, 187-J and Murder Reference No.150 of 2008, heard on 19th February, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 353, 392, 440 & 34---Qatl-e-amd, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, robbery, mischief, common intention---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---No delay in reporting the matter to the police---Examination-in-chief of complainant was recorded by the Trial Court, and his cross-examination was reserved on the request of defence counsel---Cross-examination on the complainant having not been recorded due to his death---Complainant having not been subjected to cross-examination, his statement could not be relied upon---Star eye-witness of the prosecution had fur-nished ocular account in which he had fully implicated accused---Evidence of other eye-witnesses, was also on the same lines---Said eye-witnesses had no enmity to falsely implicate accused persons---Witnesses were cross-examined at length, but their evidence could not be shaken during the process of cross-examination; they corroborated each other on all material aspects of the case---Evidence of said witnesses was confidence- inspiring---Accused having duly been nominated in the F.I.R., there was no need of holding identification parade---Ocular account of the prosecution about infliction of firearm injury on deceased had fully been supported by medical evidence---Kind of weapon used by accused, nature and seat of injury and the time of occurrence, had fully tallied with the medical evidence---Prosecution having fully proved its case against accused beyond shadow of any doubt, conviction of accused under S.302(b), P.P.C. awarded to him by the Trial

Court was maintained, but in view of certain mitigating circumstances, his sentence was altered from death to imprisonment for life, in circumstances.

(b) Penal Code (XLV of 1860)---

----S. 392---Criminal Procedure Code (V of 1898), S.342---Robbery---Appreciation of evidence---Alleged recovery of motorcycle, mobile phone and currency notes on the pointation of accused persons, were not put to them in their statement recorded under S.342, Cr.P.C.---Said recoveries, could not be used against them---No report of Forensic Science Laboratory was available on record in respect of .30 bore pistol allegedly recovered from accused---Said recovery was of no help to the case of prosecution---Appeal to the extent of the conviction of accused persons under S.392, P.P.C. was accepted; their conviction and sentence to that extent were set aside and they were acquitted from the said charge.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 353, 392, 440 & 34---Criminal Procedure Code (V of 1898), S.410---Qatl-e-amd, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, robbery, mischief, common intention---Failure of convict to file appeal against his conviction and sentence---Effect---One of co-convict, though had not filed any appeal against his conviction and sentence, but statutory right of filing appeal to any convict on a trial by the Sessions Court had been provided under S.410, Cr.P.C. whereby, convict as a right, could demand an adjudication from High Court, either on question of fact or on question of law, or on both, which was a procedural issue.

(d) Constitution of Pakistan---

----Art. 203---Supervisory power of High Court---Scope---Whenever it would come into the notice of the High Court that any procedure or technicality would cause serious injustice and if any illegality was found on the record during the hearing of any connected matter, High Court could reappraise the case of convict on merits, who was being deprived from the relief to which he was entitled to, because High Court could exercise its supervisory power in respect of courts below, where appeal or leave to appeal was not filed.

Amin Ali and another v. The State 2011 SCMR 323 and Shabbir Ahmed v. The State 2011 SCMR 1142 rel.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 324, 353, 392, 440 & 34---Qatl-e-amd, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharging his duty, robbery, mischief, common intention---Appreciation of evidence---Benefit of doubt---Sentence, reduction in---Mitigating circumstances--- Certain mitigating circumstances in the case were noticed firstly, that evidence of alleged recoveries of pistol, motorcycle, mobile phone and currency notes had been disbelieved because same was not put to accused persons in their statements recorded under S.342, Cr.P.C. and secondly that accused had been attributed single fire shot on the person of the deceased, and he did not repeat any injury on the person of the deceased or to any member of the complainant party---Case against accused being not of capital punishment, he was entitled for benefit of doubt as an extenuating circumstance while deciding question of his sentence---His death sentence was altered to imprisonment for life, in circumstances.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188; Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 and Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

Ch. Muhammad Inayat Ullah Cheema for Appellant (in Criminal Appeal No.740 of 2008).

Ms. Najma Rashif for Appellant (in Criminal Appeal No.187-J of 2008).

Arshad Mehmood, Deputy Prosecutor General for the State.

Nemo for the Complainant.

Date of hearing: 19th February, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.740 of 2008, preferred by appellant Muhammad Mansha, Criminal Appeal No.187-J of 2008, preferred by appellant Haider Ali and Murder

Reference No.150 of 2008, sent by the learned trial Court for confirmation of otherwise of the sentence of death awarded to Muhammad Mansha appellant, as all these matters have arisen out of the same judgment dated 27-6-2008, passed by the learned Addl: Sessions Judge, Toba Tek Singh in case F.I.R. No.78 dated 19-2-2007, offence under sections 302, 324, 392, 353, 186, 440, 411 and 34, P.P.C., registered at Police Station Saddar Gojra District Toba Tek Singh, whereby, Muhammad Mansha, appellant was convicted under section 302(b), P.P.C. for committing the murder of Tanveer (deceased) and sentenced to death with the direction to pay Rs.1,00,000 (rupees one lac) as compensation to the legal heirs of deceased Tanveer as required under section 544-A of the Code of Criminal Procedure and in default, thereof, to undergo six months. Muhammad Mansha appellant was further convicted under section 392, P.P.C. read with section 34, P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to undergo simple imprisonment for six months. He was also convicted under section 353, P.P.C. read with section 34, P.P.C. and sentenced to rigorous imprisonment for two years. He was further convicted under section 324, P.P.C. read with section 34, P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months. Muhammad Mansha appellant was also convicted under section 440, P.P.C. read with section 34, P.P.C. and sentenced to rigorous imprisonment for three years with fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months.

Haider Ali (appellant) was convicted under section 392, P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to undergo simple imprisonment for six months. He was also convicted under section 353 P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for two years. He was further convicted under section 324, P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months. Haider Ali (appellant was also convicted under section 440 P.P.C. read.

with section 34 P.P.C. and sentenced to rigorous imprisonment for three years with fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months.

Muhammad Rafique alias Naveed, co-convict of the appellants was convicted under section 392, P.P.C. read with section 34, P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to undergo simple imprisonment for six months. He was also convicted under section 353 P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for two years. He was further convicted under section 324 P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for ten years with a fine of Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months. Muhammad Rafique alias Naveed, co-convict of the appellants was also convicted under section 440 P.P.C. read with section 34 P.P.C. and sentenced to rigorous imprisonment for three years with fine Rs.10,000 (rupees ten thousand) and in default, thereof, to further undergo simple imprisonment for six months.

All the sentences awarded to the appellants and Muhammad Rafique alias Naveed, co-convict of the appellants were ordered to run concurrently. They were also given the benefit of section 382-B of the Code of Criminal Procedure.

It is pertinent to mention here that Muhammad Rafique alias Naveed, co-convict of the appellants did not file any appeal against his convictions and sentences.

2. Brief facts of the case, as disclosed by Muhammad Bashir, complainant (P.W.11) in his 'Fard Biyan' (Exh.PF), on the basis of which formal F.I.R. (Exh.PF/1) was registered, are that he (complainant) was resident of Chak No.326/G.B. He (complainant) along with his son Tanveer Ahmad (deceased) had established a hotel for tea at Adda Mongi on the bank of canal. On 19-2-2007, Maqsood Ahmad (P.W.12) and Muhammad Irfan (given up P.W.) also came there to see them. At about 5-15 p.m, three persons who were riding on a motorcycle which was without registration number passed near their hotel at a high speed and went towards Gavair Canal. Meanwhile, Shah Nawaz (P.W.13) raised hue and cry that his motorcycle, applied for, 'Marka' Ravi, silver coloured, Engine and Chassis No.HKFO3E4909 has been

snatched along with cash amounting to Rs.7000 (rupees seven thousand) and mobile phone Sony Ericsson. Meanwhile, the police of police post Mongi Bangla, Gojra started chasing the accused persons on official Vehicle No.TSC-5364, whereupon, accused persons made a fire shot which landed on front screen of the official vehicle and its major portion was broken. All the three accused persons left their motorcycle on road and concealed themselves in the sugarcane crop. Meanwhile, he (complainant), Tanveer Ahmad (deceased), Muhammad Irfan (given up P.W.), Maqsood Ahmad (P.W.12) also came there. One accused ran towards Chak No.244/G.B. Tanveer Ahmad (deceased) tried to apprehend him, upon which, said accused made a straight fire shot which landed on the left side of neck of Tanveer Ahmad (deceased). They (complainant party) took care of the deceased who succumbed to the injuries. The complainant Muhammad Bashir, in F.I.R. (Exh.PF/1) has further stated that few days prior to the occurrence, Muhammad Rafique, co-convict of the appellants Muhammad Mansha and Haider Ali (appellants) came at his hotel and took tea and amongst them, Muhammad Mansha (appellant) has committed the murder of Tanveer Ahmad (deceased) by making fire shot with his pistol.

3. Muhammad Mansha, Haider Ali (appellants) and Muhammad Rafique alias Naveed, co-convict of the appellants, all were arrested in this case on 26-2-2007 by Muhammad Quresh, S. I. (P.W.14). At the time of their arrest, their physical search was made. On personal search of Muhammad Mansha (appellant), .30 bore pistol (P-6) was recovered from right fold of his shalwar, which was taken into possession vide recovery memo Exh.PL. On personal search of Muhammad Rafique, co-convict of the appellants, .30 bore pistol (P-7) was recovered from right fold of his shalwar, which was taken into possession vide recovery memo Exh.PM whereas, on personal search of Haider Ali (appellant), .30 bore pistol P-8 (inadvertently it has been mentioned in the statement of P.W.14 as P-9) was recovered from right fold of his shalwar, which was taken into possession vide recovery memo Exh.PN. On 2-3-2007, the appellants along with their co-convict Muhammad Rafique alias Naveed got recovered motorcycle (P-5), which was taken into possession vide recovery memo Exh.PE. On 12-3-2007, Muhammad Mansha (appellant), while in police custody, after making disclosure, got recovered mobile phone Sony Ericsson (P-9), which was taken into possession vide recovery memo Exh.PC. On the same day i.e. 12-3-2007,

Muhammad Rafique alias Naveed, co-convict of the appellants, while in police custody, after making disclosure, got recovered one note (P-10) of the denomination of Rs.1000, which was taken into possession vide recovery memo Exh.PB. On the same day i.e. 12-3-2007, Haider Ali (appellant), while in police custody, after making disclosure, got recovered one note (P-11) of the denomination of Rs.1000, which was taken into possession vide recovery memo Exh.PA. (It is noted that Muhammad Quresh S.I (P.W.14) in his statement has inadvertently mentioned the year 2006 in all the above underlined dates, instead of year 2007 whereas, the occurrence took place on 19-2-2007). After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-convict Muhammad Rafique alias Naveed on 11-6-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fifteen witnesses, during the trial. Muhammad Waris 563/C (P.W.10) Muhammad Bashir, complainant (P.W.11), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13) furnished the ocular account of this case. It is pertinent to mention here that Muhammad Bashir, complainant died after the recording of his examination-in-chief and in this respect, the learned trial Court recorded the statement of Muhammad Iqbal 592/C as P.W.15 who produced the death certificate of Muhammad Bashir, complainant as Exh.PR. Shah Nawaz (P.W.13) was also the witness of recovery along with Nadeem Sajid 843/C (P.W.1) regarding mobile phone (P-9) at the instance of Muhammad Mansha (appellant), one currency note (P-10) of the denomination of Rs.1000 at the instance of Muhammad Rafique, co-convict of the appellants, one currency note (P-11) of the denomination of Rs.1000 at the instance of Haider Ali (appellant). Muhammad Boota 205/C (P.W.2) and Farzand Ali 554/C (P.W.5) are the witnesses of recovery of motorcycle (P-5).

The medical evidence was furnished by Dr Waseem Ullah Khan (P.W.7), who conducted the postmortem examination on the dead body of Tanveer Ahmad (deceased).

Muhammad Quresh, S.-I. (P.W.14) is the Investigating Officer of the case. Muhammad Yaqub 385/C (P.W.3), Nazir Ahmad, A.S.-I. (P.W.4), Zafar Iqbal,

Patwari (P.W.6), Abdul Ghafoor 304/C (P.W.8) and Muhammad Akhtar Shah (P.W.9) are the formal witnesses. The prosecution also produced documentary evidence in the shape of recovery memo of one currency note of the denomination of Rs.1000 (P-11) at the instance of Haider Ali appellant (Exh.PA), recovery memo, of one currency note of the denomination of Rs.1000 (P-10) at the instance of Muhammad Rafique alias Naveed, co-convict of the appellants (Exh.PB), recovery memo of mobile phone Sony Ericsson (P-9) at the instance of Muhammad Mansha appellant (Exh.PC), recovery memo of last worn clothes of deceased (Exh.PD), recovery memo of motorcycle P-5 (Exh.PE), rough site plan of the place of recovery of motorcycle (Exh.PE/1), statement of complainant for registration of case (Exh.PF), F.I.R. (Exh.PF/1), scaled site plan, in duplicate, of the place of occurrence (Exh.PG and Exh.PG/1), postmortem report along with pictorial diagram of deceased Tanveer Ahmad (Exh.PH and Exh-PH/1), injury statement (Exh.PI), inquest report (Exh.PJ), recovery memo of blood stained earth (Exh.PK), recovery memo of .30 bore pistol (P-6) at the instance of Muhammad Mansha appellant (Exh.PL), recovery memo of .30 bore pistol (P-7) at the instance of Muhammad Rafique alias Naveed, co-convict of the appellants (Exh.PM), recovery memo of .30 bore pistol (P-8) at the instance of Haider Ali appellant (Exh.PN), identification memo of motorcycle P-5 (Exh.PO), rough site plan of the place of occurrence (Exh.PP), rough site plan of the place of recovery of mobile phone P-9 and currency notes P-10 & P-11 (Exh.PQ), death certificate of Muhammad Bashir, complainant (Exh.PR), report of Chemical Examiner (Exh.PS), report of Serologist (Exh.PT) and closed its evidence.

The statements of Muhammad Mansha and Haider Ali (appellants) along with their co-convict Muhammad Rafique alias Naveed, under section 342 of the Code of Criminal Procedure, were recorded on 8-4-2008. They refuted the allegations levelled against them and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you?" Muhammad Mansha, appellant replied as under:--

"The identity of culprits could not be ascertained. The first part of F.I.R. reveals that the culprits were not acquainted with P.Ws., therefore, in the whole narration of occurrence the accused were not nominated. Even in first part of statement

complainant in court the culprits were not nominated. It means that after recording first part of F.I.R. the second part was deferred till the nomination of the accused by guess. Similarly in first part of statements of the P.Ws. in investigation under section 161, Cr.P.C. and in court the culprits were not nominated. It appears that after recording first part of state-ments of P.Ws. under section 161, Cr.P.C., the remaining statements were deferred. The second part of the statements was recorded by the I.O. himself and not on the statements of P.Ws. after due deliberation and guess work. I did not participate in the occurrence and was falsely roped in this case. The P.Ws. deposed against me on the asking of police."

Haider Ali (appellant) and Muhammad Rafique alias Naveed, co-convict of the appellants in answer to the abovementioned question, also replied on the same lines.

The appellants and their co-convict Muhammad Rafique alias Naveed neither opted to give evidence on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against them nor produced any evidence in their defence.

5. Learned counsel for the appellants, in support of these appeals, contends that this F.I.R. was got registered by Muhammad Bashir, complainant who though appeared before the learned trial Court as P.W.11 but he was not cross-examined on behalf of the appellant as he died on 15-12-2007, therefore, his evidence cannot be used against the appellants. So far as the remaining evidence is concerned, learned counsel for the appellants contends that none of the witnesses while narrating the story stated that it was Muhammad Mansha (appellant) who fired at the deceased though at the end of their statements, they implicated Muhammad Mansha (appellant); that even Muhammad Waris 563/C (P.W.10), in his cross-examination, has stated that now he has come to know that it was Muhammad Mansha who fired at the deceased; that no identification parade was conducted in this case; that in fact, there is no evidence against the appellants. So far as the recoveries are concerned, learned counsel for the appellants contend that it was the case of the prosecution that motorcycle (P-5) was thrown on the bank of canal by the accused persons but later on, same motorcycle, on the joint pointation of the appellants and Muhammad Ralique alias Naveed, co-convict of the appellants, was allegedly recovered from the sugarcane crop, thus, the alleged recovery of

motorcycle (P-5) carries no value; that no description of the mobile phone was given in the F.I.R. or disclosed before the learned trial Court; that even no description of currency notes (P-10 & P-11), allegedly recovered at the instance of Muhammad Rafique alias Naveed, co-convict of the appellants and Haider Ali (appellant) was given in the F.I.R. (Exh.PF/1). Further contends that none of these recoveries was put to either of the appellants while recording their statements under section 342 of the Code of Criminal Procedure, therefore, this evidence cannot be used against the appellants; that the case of the prosecution against the appellants from all angles is of doubtful nature; that the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt; thus, both these appeals be accepted and the appellants may be acquitted from the charges.

6. Notice was issued to the complainant but it was reported on the notice that the complainant has died on 15-12-2007, upon which, notice was issued to his son but none is present on behalf of son of the complainant.

7. Learned Deputy Prosecutor-General vehemently opposes both these appeals on the grounds that the F.I.R. was got registered by Muhammad Bashir (P.W.11) whose real son was done to death and he has no enmity with the appellants or with Muhammad Rafique alias Naveed, co-convict of the appellants for their false implication in the case; that examination-in-chief of Muhammad Bashir, complainant (P.W.11) was recorded on 13-7-2007 but he was not cross-examined by the learned defence counsel and he died on 15-12-2007, therefore, his evidence can be used against the appellants; that apart from the evidence of the complainant, there are statements of other eye-witnesses namely, Muhammad Waris 563/C (P.W.10), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13); that Maqsood Ahmad (P.W.12)and Shah Nawaz (P.W.13), in their statements before the learned trial Court, have stated that it was the appellant Muhammad Mansha who fired at the deceased and the said fact was also mentioned in their statements recorded under section 161 of the Code of Criminal Procedure; that both these witnesses have no enmity with the appellants for their false implication in the case; that the prosecution case got full support from the medical evidence furnished by Dr. Waseem Ullah Khan (P.W.7); that the prosecution case is further corroborated by the recovery of .30 bore pistols and recovery of snatched articles from the

possession of the appellants and from Muhammad Rafique alias Naveed, co-convict of the appellants; that the prosecution has proved its case against the appellants from all angles; that the sentences were rightly awarded to the appellants by the learned trial Court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the appellants, the learned Deputy Prosecutor-General and have also gone through the record with their able assistance.

9. The occurrence in this case took place on 19-2-2007 at 5-15 p.m., in the fields of Chak No.244/G.13 situated within the jurisdiction of Police Station Saddar Gojra, District Toba The Singh. The matter was reported to the police on the same evening (19-2-2007) at 6-45 p.m. by Muhammad Bashir, complainant (P.W.11) through his 'Fard Biyan' (Exh-PF), on the basis of which, formal F.I.R. (Exh.PF/1) was also registered on the same night at 7-45 p.m. The distance between the place of occurrence and the police station is eleven miles. Considering the circumstances of the case, time of occurrence, place of occurrence and the distance between the place of occurrence and the police station, we are of the view that there was no delay in reporting the matter to the police.

10. The ocular account of the prosecution was furnished by Muhammad Waris 563/C (P.W.10), Muhammad Bashir, complainant (PW-11), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13). We have noted that examination-in-chief of Muhammad Bashir complainant (P.W.11) was recorded by the learned trial Court on 13-7-2007 and cross-examination on the said witness was reserved on the request of learned defence counsel. Thereafter, the complainant Muhammad Bashir (P.W.11) did not appear before the learned trial Court on 18-7-2007, 30-7-2007, 11-8-2007 and on 5-9-2007. On 5-9-2007, bailable warrants of arrest of the complainant were issued. On 12-9-2007, learned counsel for the complainant stated that the complainant was ill (The name of Bashir complainant has been inadvertently typed as Shabbir). Thereafter, on two dates (29-9-2007 and 8-10-2007), the learned Presiding Officer was on leave. On 17-10-2007, again complainant did not appear before the learned trial Court, anyhow, he appeared on 29-10-2007. On 12-11-2007, the learned Presiding Officer was on leave. On 21-11-

2007 and 3-12-2007, the complainant was not present and he died on 15-12-2007. Cross-examination on the complainant could not be recorded due to his death on 15-12-2007, therefore, we cannot rely upon the statement of Muhammad Bashir, complainant (P.W.11) who could not be subjected to cross-examination. Anyhow, if the statement of Muhammad Bashir, complainant (P.W.11) is excluded from consideration, even then there remains the evidence of other eye-witnesses of the occurrence namely, Muhammad Waris 563/C (P.W.10), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13). In this case, the star eye-witness of the prosecution is Shah Nawaz (P.W.13) because motorcycle (P-5), mobile phone (P-9) and cash amount of Rs.7000 (rupees seven thousand) were snatched by the accused persons from the said witness. The examination-in-chief of Shah Nawaz (P.W.13) recorded by the learned trial Court on 13-7-2007 is reproduced hereunder for ready reference:--

"I am resident of Chak No.148/GB. At about 5-00 p.m. I on my motorcycle which was applied for "Ravi Marka" silver Engine and Chassis No.HKF03E4909 was going on the bank of Gogera Branch canal and when I had gone a little ahead, in front of my three persons armed with fire arms stopped me and snatched motorcycle from me. All the three persons threatened me to murder. After snatching the motorcycle they ascended on my motorcycle and went on the bank of the said Canal of Moongi Bangla. I was un-armed and was following the culprits and was raising alram because the culprits had snatched Rs.7,000 and mobile Sony Ericsson from me and had fled away. On my alarm Muhammad Bashir son of Asmat Ullah caste Arain resident of Chak No.326/GB Police Station Chutiana presently owner of the hotel at Moongi Bangla, his son Muhammad Irfan P.W., Tanveer deceased and Maqsood son of Ashraf caste Arain resident of Chak No.336/GB Police Station Chutiana on hearing my alarm joined us in pursuing the culprits. In the mean time the service vehicle of Police No.5364/TSC of police post Moongi Bangla was also following the culprits. The culprits were armed with fire arms who resorted to aimed fire at the police vehicle which damaged the vehicle. All the three culprits threw motorcycle at Katcha road and entered the sugarcane crop. We and the police continued the pursuit. Taking advantage of the sugarcane crop the culprits escaped towards Chak No.244/GB. But one of the culprits separated himself from the others

while running, whom Tanveer deceased tried to apprehend. That culprit fired at Tanveer hitting on the left side of his neck with the intention who had injured. We attended Tanveer who had succumbed to the injury at the spot.

Few days prior to the occurrence the accused Muhammad Rafique son of Abdul Hameed caste Faqeer resident of Naimat Abad, Data Colony Faisalabad, Muhammad Mansha son of Muhammad Akram caste Balkhana Jat resident of Chak No.664/5GB Police Station Peermahal and Haider Ali son of Muhammad Hanif caste Malik resident of Mohallah Naimat Abad, Sahianwala, Faisalabad had taken tea at the hotel of Muhammad Bashir complainant whom Muhammad Bashir complainant identified out of which Muhammad Mansha had fired at Tanveer deceased with pistol due to which he died. These three persons had murdered Tanveer Ahmed deceased. My motorcycle, cash Rs.7,000 and mobile phone Sony Ericsson was snatched and the service vehicle was damaged by firing. All the three accused had done excess. I had witnessed the occurrence. I had identified my motorcycle after recovery vide identification memo Exh.PO.

On 12-3-2007 Muhammad Mansha accused while in police custody made disclosure and in support of that disclosure led to the recovery of mobile phone P-9 which was taken into possession by the I.O. vide recovery memo Exh.PC attested by me and Nadeem Sajid constable. On the same day Muhammad Rafique accused while in police custody made disclosure and in support of that disclosure Muhammad Rafique accused led to the recovery of currency note of the denomination of Rs.1000 P-10 which was taken into possession by the I.O. vide recovery memo Exh.PB attested by me and Nadeem Sajid constable. On the same day Haider Ali accused while in police custody made disclosure and in support of that disclosure Haider Ali accused led to the recovery of currency note of the denomination of Rs.1000 P-11 which was taken into possession by the I.O. vide recovery memo Exh.PA attested by me and Nadeem Sajid constable."

The evidence of other eye-witnesses namely, Muhammad Waris 563/C (P.W.10) and Maqsood Ahmad (P.W.12) is also on the same lines. The above mentioned eye-witnesses namely, Muhammad Waris 563/C (P.W.10), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13) have absolutely no enmity to falsely implicate the appellants and their co-convict in this case. They were cross-examined at length but

their evidence could not be shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is confidence inspiring. Muhammad Waris 563/C (P.W.10) is a police employee. He along with other police officials chased the appellants and their co-convict namely, Muhammad Rafique alias Naveed at the time of occurrence when they were trying to flee away from the spot after snatching motorcycle (P-5), mobile phone (P-9) and cash amount of Rs.7,000 (rupees seven thousand) from Shah Nawaz (P.W.13) and when the appellants and their co-convict tired at the police vehicle, as a result of which, its wind screen was broken. The said witness was also cross-examined by the learned defence counsel but nothing favourable to the appellants and their co-convict could be brought on the record. As the appellants and their co-convict Muhammad Rafique alias Naveed were duly nominated in the F.I.R. by Muhammad Bashir, complainant (P.W.11), therefore, there was no need of holding any identification parade of the appellants.

11. The medical evidence of the prosecution was furnished by Dr. Waseem Ullah Khan (P.W.7). He, on 20-2-2007 at 1-00 p.m., conducted the postmortem examination on the dead body of Tanveer Ahmad deceased and found the following injury on his person:--

(1) A lacerated wound of fire arm entrance 5 cm x 1.5 cm into DNP into margins were inverted on left side of lower neck.

According to Dr Waseem Ullah Khan (P.W.7), the cause of death, in this case was haemorrhage and shock resulted from injury No.1. The injury was sufficient to cause death in ordinary course of nature. Injury No.1 was ante-mortem and was caused by firearm weapon. The probable time between injury and death was half an hour whereas, between death and postmortem was about seven hours.

Muhammad Mansha (appellant) was assigned the role of inflicting a firearm injury with .30 bore pistol, which hit Tanveer Ahmad (deceased) on left side of his neck. According to the medical evidence furnished by Dr. Waseem Ullah Khan (P.W.7), the above mentioned injury was available on the person of Tanveer Ahmad (deceased). Dr Waseem Ullah Khan (P.W.7) was also crass-examined by the learned defence counsel but nothing favourable to the appellants could be brought

on the record. The ocular account of the prosecution which was furnished by Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13) about infliction of firearm injury on the left side of the neck of deceased by Muhammad Mansha (appellant) has fully been supported by the above mentioned medical evidence. The kind of weapon used by the appellant, the nature and seat of injury and the time of occurrence as stated by the above mentioned eye-witnesses of the occurrence, all these facts have fully tallied with the medical evidence furnished by Dr. Waseem Ullah Khan (P.W.7).

12. So far as the evidence of alleged recovery of motorcycle (P-5), on the pointation of the appellants and their co-convict Muhammad Rafique alias Naveed, recovery of mobile phone (P-9), one currency note of the denomination of Rs.1000 (P-10) at the instance of Muhammad Rafique alias Naveed, co-convict of the appellant, one currency note of the denomination of Rs.1000 (P-H) at the instance of Haider Ali (appellant) is concerned, we have noted that in the F.I.R. (Exh.PF/1), it was the case of prosecution that the accused persons left the motorcycle on road and entered inside the sugarcane crop. It is amazing that after the arrest of the appellants and their co-convict, the same motorcycle was allegedly recovered on the pointation of the appellants and their co-convict on 2-3-2007 from the fields. Even otherwise, the said recovery of motorcycle (P-5) was effected on the joint pointation of the appellants and their co-convict. Moreover, all the above mentioned alleged recoveries were not put to the appellants and their co-convict in their statements recorded under section 342 of the Code of Criminal Procedure, therefore, the same cannot be used against them. In view of the above, prosecution evidence qua the alleged recovery of motorcycle (P-5), mobile phone (P-9) and two currency notes of the denomination of Rs.1000 each (P-10 and P-11) is inconsequential and of no avail to the prosecution.

13. As far as recoveries of .30 bore pistols P-6, P-7 and P-8 allegedly recovered from the possession of Muhammad Mansha (appellant), Muhammad Rafique alias Naveed, co-convict of the appellants and Haider Ali (appellant), respectively are concerned, there is no report of Forensic Science Laboratory available on the record. We are, therefore, of the view that the recoveries of above mentioned pistols allegedly recovered at the instance of the appellants and their co-convict Muhammad Rafique alias Naveed are also of no help to the case of the prosecution.

14. We have disbelieved the evidence of prosecution qua recovery of motorcycle (P-5), recovery of mobile phone (P-9) and that of two currency notes (P-10 & P-11) of the denomination of Rs.1000 each, therefore, Criminal Appeal No.740 of 2008 and Criminal Appeal No.187-J of 2008, to the extent of the conviction of the appellants under section 392 P.P.C. is accepted, their conviction and sentence under section 392 P.P.C. is set aside and they are acquitted from the said charge.

As far as Muhammad Rafique alias Naveed, co-convict of the appellants is concerned, though the said convict has not filed any appeal against his conviction and sentence but we are of the view that statutory right of appeal to any convict on a trial by the Sessions Court has been provided under section 410 of the Code of Criminal Procedure whereby, the convict as a right can demand an adjudication from High Court either on question of fact or on question of law or on both yet that is a procedural issue. We are of the view that whenever it comes into the notice of the court that any procedure or technicality would cause serious injustice and if any illegality is found on the record during the hearing of any connected matter, High Court can reappraise the case of that convict on merits who is being deprived from the relief to which he was entitled to, because High Court can exercise supervisory power in respect of courts below where the appeal or leave to appeal was not filed. We may refer here the dictum of law laid down by the Hon'ble Supreme Court of Pakistan in the cases of "Amin Ali and another v. The State" (2011 SCMR 323) and "Shabbir Ahmed v. The State" (2011 SCMR 1142) wherein, the Hon'ble Supreme Court of Pakistan while allowing the appeal of accused persons and acquitting them of the charges, directed to give benefit of the judgment to other accused who did not prefer appeal, as their case was at par with they case of acquitted accused. As two co-convicts of Muhammad Rafique alias Naveed namely, Muhammad Mansha ' and wider Ali (appellants) have been acquitted from the charge under section 392, P.P.C. and the case of Muhammad Rafique alias Naveed, co-convict of the appellants, who had not preferred any appeal, was at par with his co-accused to the extent of his conviction and sentence for the charge under section 392 P.P.C., therefore, he could not be deprived off the benefit which was being extended to the appellants, therefore, Muhammad Rafique alias Naveed is also acquitted from the charge under section 392 P.P.C., his conviction and sentence to the extent of charge

under section 392 P.P.C. is set aside, whereas, to the extent of remaining charges, his convictions and sentences shall remain intact.

15. We have disbelieved the prosecution evidence qua recovery of pistols (P-6, P-7 & P-8), motorcycle (P-5), mobile phone (P-9) and two currency notes (P-10 & P-11) allegedly recovered at the instance of the appellants and their co-convict Muhammad Rafique alias Naveed, however, if the evidence of above mentioned recoveries is excluded from consideration, even then there is sufficient incriminating evidence available on the record to prove the case against the appellants discussed earlier, the prosecution case is fully proved through evidence of eye-witnesses namely, Muhammad Waris 563/C (P.W.10), Maqsood Ahmad (P.W.12) and Shah Nawaz (P.W.13). Their evidence is quite trustworthy and reliable. They were cross-examined at length but they corroborated each other on all material aspects of the case and their evidence is fully supported by the medical evidence furnished by Dr. Waseem Ullah Khan (P.W.7). We are, therefore, of the view that the prosecution has fully proved its case against the appellants beyond the shadow of any doubt.

16. Now coming to the quantum of sentence, we have noted certain mitigating circumstances in favour of Muhammad Mansha appellant. Firstly, we have disbelieved the evidence of alleged recoveries of pistols (P-6, P-7 & P-8), motorcycle (P-5), mobile phone (P-9) and currency, notes (P-10 & P-11) due to the reasons mentioned in paragraphs No. 12 & 13 of this judgment, and secondly, Muhammad Mansha appellant has been attributed a single fire shot on the person of Tanveer Ahmad (deceased). He did not repeat any injury on the person of the deceased and he did not cause any injury to any member of the complainant party, therefore, we are of the view that it is not a case of capital punishment. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding question of his sentence as well. In this regard, we respectfully refer the case of "Mir Muhammad alias Miro v. The State" (2009 SCMR 1188) wherein, the Hon'ble Supreme Court of Pakistan at page 1191 was pleased to observe as under:--

"9. It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts,

as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

In another case "Ansar Ahmad Khan Barki v. The State and another" (1993 SCMR 1660), the Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home against the accused for the award of normal penalty of death. We are convinced that Muhammad Mansha appellant, in the peculiar circumstances of this case, deserves the benefit of doubt to the extent of his sentence one out of two provided under section 302(b) of the Pakistan Penal Code., therefore, in our view the death sentence awarded to the appellant Muhammad Mansha is quite harsh. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of "Ahmad Nawaz and another v. The State" (2011 SCMR 593) wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another, (PLD 2007 SC 111), it was held that 'This is settled law that provisions of sections 306 to 308, P.P.C. attract only in the cases of Qatl-e-amd liable to qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as qisas and tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of qisas, Court has no discretion in the matter of sentence whereas in case of tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this discretion in the case of sentence of tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4, Faqir Ullah v. Khalil-uz-Zaman 1999

SCMR, 2203, Muhammad Akram v. State 2003 SCMR 855 and Abdus Salam v. State 2000 SCMR 338." The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr. P. C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case." In Iftikhar Ahmed Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:- "In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course..."

17. In the light of above discussion, the conviction of Muhammad Mansha (appellant) under section 302(b), P.P.C. awarded to him by the learned trial Court is maintained, however, his sentence is altered from death to imprisonment for life. The amount of compensation imposed upon him by the learned trial Court is maintained. We have noted that in the impugned judgment of the learned trial Court, it has only been mentioned that in case of non-payment of compensation, accused Muhammad Mansha shall further undergo six months and the word imprisonment either rigorous or simple has not been mentioned in the impugned judgment. We, therefore, hold that in case of non-payment of compensation amount, the appellant Muhammad Mansha will undergo simple imprisonment for six months.

18. Consequently, Criminal Appeal No.187-J of 2008 is partly dismissed. Similarly with the above modification in the quantum of sentence of Muhammad Mansha (appellant), Criminal Appeal No.740 of 2008 is also partly dismissed. Murder Reference No.150 of 2008 is answered in the NEGATIVE and the sentence of death of Muhammad Mansha (convict) is NOT CONFIRMED. However, all the convictions and sentences of Muhammad Mansha and Haider Ali (appellants) for charges under sections 324, 353, 440 and 34 P.P.C. are upheld and maintained. All

the sentences of the appellants shall run concurrently. Both the appellants are, however, awarded the benefit of section 382-B of the Code of Criminal Procedure.

HBT/M-65/L **Order accordingly.**

2013 Y L R 1763

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ISLAM KHAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1225 and Murder Reference No.264 of 2008, heard on 15th February, 2013.

(a) Criminal trial---

----Proof---Prosecution was required to prove its case against accused persons beyond any shadow of doubt and defence version was to be taken into consideration after evaluating the prosecution evidence to find out whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali and another v. The State 2011 SCMR 323 rel.

(b) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Sentence, reduction in---No delay in reporting the matter to the Police---Complainant and prosecution witness being residents of the same village where occurrence had taken place, their presence along with the deceased, at the spot, at the time of occurrence, was neither unnatural nor improbable---Presence of eye-witnesses at the time of occurrence, had also been admitted by accused, though in a different manner---Eye-witnesses were cross-examined at length, but their evidence could not be shaken---Prosecution witnesses corroborated each other on all material aspects of the case, their testimonies qua the role attributed to accused and injuries inflicted by him on the person of the deceased were confidence-inspiring and trustworthy---Complainant being real paternal uncle of the deceased, it was not probable that he would falsely implicate accused and would let off the real culprit in the murder of his near kith and kin---Substitution in such like cases was a rare phenomenon---Medical evidence, had fully supported the ocular account of prosecution---Motive as alleged by the prosecution, had not been proved---Pistol and empties having been kept in Police Station, possibility could not be ruled out that false empties were prepared from pistol and sent to the office of Forensic Science

Laboratory---Story of prosecution regarding recovery of pistol not appealing to common sense, it was not safe to rely upon the alleged recovery on the pointation of accused and positive report of Forensic Science Laboratory---Accused had pleaded that on the day of occurrence, he was called by his in-laws/complainant party, deceitfully under the garb of compromise and when he reached at the spot he was attacked upon by seven persons of the complainant party---Accused had failed to prove said plea in his statement recorded under S.342, Cr.P.C.---Accused had also received 11 injuries at the time of occurrence, but said injuries were suppressed in the F.I.R. as well as in the statements of eye-witnesses recorded by the Trial Court---Both parties had not approached the court with clean hands and had tried to suppress their own role and had made an attempt to highlight the role of the other side---Real cause of occurrence had been suppressed by the parties, and it appeared that something else had happened immediately before the occurrence, which resulted into the incident---Occurrence appeared to be a sudden fight wherein deceased lost his life at the hands of accused---Sufficient incriminating evidence was available on the record against accused---Prosecution, in circumstances, had proved its case against accused, beyond the shadow of any doubt---Conviction of accused was maintained, but in view of certain mitigating circumstances, in favour of accused, it was not a case of capital punishment---Sentence of death awarded to accused by the Trial Court, was altered to imprisonment for life, with benefit of S.382-B, Cr.P.C.

Syed Ali Beopari v. Nibaran Mollah and others PLD 1962 SC 502 rel.

(c) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-e-amd--- Sentence, reduction of---Mitigating circumstances---Trial Court convicted accused and sentenced him to death---Case against accused was not of capital punishment because of certain mitigating circumstances in favour of accused, firstly that evidence regarding recovery of pistol from possession of accused, could not be believed as said pistol and empties were kept together at Police Station, possibility could not be ruled out that false empties were prepared from the pistol; secondly that accused was also injured during occurrence and he had received 11 injuries on his body, which injuries had been suppressed by the prosecution, and thirdly, that the prosecution had alleged a specific motive, but it had failed to prove the same---Occurrence, had taken place near the house of the deceased, and it appeared that something else had happened between accused and the deceased immediately before

the occurrence, which resulted into the incident and it was not determinable and what was the real cause of occurrence, and what had actually happened immediately before the occurrence---Death sentence awarded to accused, in circumstances was quite harsh---Accused, in the peculiar circumstances of the case deserved benefit of doubt to the extent of his sentence, one out of two provided under S.302(b), P.P.C.---Treating the case of mitigation, sentence of death awarded to accused was altered to imprisonment for life and benefit of S.382-B, Cr.P.C., was also given to accused, in circumstances.

Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660; Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ahmad Nawaz and another v. The State 2011 SCMR 593 rel.

(d) Criminal trial---

----Benefit of doubt---Scope---Accused was entitled for the benefit of doubt as an extenuating circumstance, while deciding question of his sentence, as well.

(e) Criminal trial---

----Motive---Establishment of---Duty of prosecution--- Scope--- Non-proof of motive---Mitigating circumstance---If a specific motive had been alleged by the prosecution, then it was duty of the prosecution to establish said motive through cogent and confidence-inspiring evidence---Non-proof of motive could be considered a mitigating circumstance in favour of accused.

Ch. Anwar-ul-Haq Pannun for Appellants.

Arshad Mehmood, D.P.-G. for the State.

Abdul Rahim for the Complainant.

Date of hearing: 15th February, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Islam Khan appellant along with Allah Ditta co-accused was tried in case F.I.R. No. 68 of 2006 dated 22-4-2006 offences under sections 302 and 34, P.P.C., Police Station Kot Naina, District Narowal. After conclusion of the trial, learned trial Court vide its judgment dated 23-10-2008 has convicted and sentenced the appellant as under:--

Islam Khan

Convicted under section 302(b), P.P.C. for committing the murder of Abdul Shakoor, deceased and sentenced to death with a direction to pay the compensation

amount of Rs.50,000 (Rupees Fifty Thousand only) to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to suffer' simple imprisonment for six months' S.I.

Through the same judgment the learned trial Court has, however, acquitted Allah Ditta accused, while giving benefit of doubt to him.

2. Feeling aggrieved, the appellant Islam Khan has challenged his conviction and sentence through Criminal Appeal No.1225 of 2008 whereas the learned trial Court has transmitted Murder Reference No.264 of 2008, for confirmation or otherwise of the death sentence of Islam Khan. We purpose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 23-10-2008 passed by the learned Additional Sessions Judge, Narowal.

3. Brief facts of the case as given by the complainant Irshad Khan (P.W.8) in his 'Fard Biyan' Exh. PF on the basis of which formal F.I.R. Exh. PK was chalked out are that his niece Abida Bibi was married to Islam Khan (appellant) who was resident of village Ravi Riyan, Dera Irshad Kot Aariyan Tehsil Ferozwala, District Sheikhupura. Their relations became strained and 2/3 months prior to the occurrence Mst. Abida Bibi came back to her parent's house situated at Darya Minhasan, District Narowal and filed a suit for dissolution of marriage at Shakargarh. He (complainant) added that Islam Khan had twice/thrice tried to take her back forcibly and he had also threatened to kill her relatives. He explained that Islam Khan had visiting terms with Allah Ditta son of Faiz Muhammad in village Darya Minhasan. Abdul Shakoor alias Kala, nephew of the complainant was an army personnel who had come to village on leave on 22-4-2006 at about 1-00 p.m. He was standing at the 'Adda' of the village after returning from Shakargarh, when Islam Khan (appellant) while armed with pistol .30 bore along with Allah Ditta emerged from the house of Allah Ditta and came to 'adda'. Allah Ditta, raised 'lalkara' for teaching Abdul Shakoor a lesson for not sending Islam Khan's wife Abida Bibi with him, whereupon Islam Khan started firing at Abdul Shakoor. Abdul Shakoor tried to save his life and ran away towards the fields but he fell down at a distance of 50 karams from the village due to the firearm injury. Islam Khan again made fire shots at Abdul Shakoor who died at the spot.

The motive behind the occurrence was that Islam Khan (appellant) intended to forcibly take back his wife Abida Bibi (sister of the deceased) and due to this reason he used to quarrel with the family members of his wife.

4. The appellant Islam Khan was arrested on 22-4-2006 at the spot in injured condition by Sabir Hussain S.-I. (P.W.10). As per prosecution case, on 27-4-2006 the appellant Islam Khan led to the recovery of pistol .30 bore (P-1) along with two live cartridges (P-3 to P-4) which were taken into possession vide memo Exh. PC. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 7-3-2007, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Irshad Khan, complainant (P.W.8) and Shahid Mahmood (P.W.7) are the witnesses of ocular account. Khalid Khan (P.W.5) is the recovery witness of pistol (P-1) and two live bullets (P/3-4).

The medical evidence was furnished by Dr. Javed Iqbal (P.W.4). Sabir Hussain, S.-I. (P.W.10) was the Investigating Officer of this case.

Mirza Tahir Taslim, Draftsman (P.W.1), Zulfiqar Ali 55/C (P.W.2), Muhammad Sarwar 333/HC (P.W.3), Ajmal Khan (P.W.6), Muhammad Arshad 673/C (P.W.9) and Muhammad Waris, A.S.-I. (P.W.11) are the formal witnesses. The prosecution also produced documentary evidence in the shape of scaled site plan of the place of occurrence in duplicate Exh. PA and Exh. PA/1, copy of post mortem report Exh.PB, pictorial diagrams Exh.PB/1 and Exh. PB/2, memo of possession of pistol .30 bore (P-1) along with two live cartridges (P/3-4) Exh. PC, memo of possession of blood-stained earth Exh. PD, memo of possession of empty cartridges Exh.PE, statement of Irshad Khan complainant Exh. PF, memo of blood-stained clothes of deceased Exh.PG, copy of unscaled site plan of the place of occurrence Exh.PH, copy of inquest report Exh.PJ, F.I.R. Exh. PK, report of Chemical Examiner, Exh. PL, report of Forensic Science Laboratory Exh. PM, report of Serologist Exh.PN and closed its evidence.

6. The statements of the appellant and his co-accused Allah Ditta (since acquitted) under section 342, Cr.P.C. were recorded by the learned trial Court. The appellant

and his co-accused refuted the allegations leveled against them and professed their innocence. While answering to question "Why the prosecution witnesses deposed against you and why this case against you" the appellant replied as under:--

Islam Khan.

"I have committed no offence. I exercised the right of private defence of my person under section 97, P.P.C. The deceased Abdul Shakoor had become prey to his own aggression and assault. Abdul Shakoor and his wife were travelling in the same Dala in which I travelled to reach the place of occurrence. Abdul Shakoor deceased was my brother-in-law but I was not acquainted with him prior to that day because he had not participated in marriage ceremony. Moreover, he had not visited me during the period of my matrimonial life because he throughout remained in his military camp. I had no intention or design to kill anyone.

As a matter of fact, relations between me and my wife Abida Bibi were strained. She had left my house and was residing in her parents house situated in village Darya Minhasan. I was trying for reconciliation so was called by my in-laws deceitfully under the garb of compromise on the day of occurrence. I went to village Darya Minhasan on 22-4-2006 at about 1-00 p.m. When I reached at the bus stop of village Darya Minhasan, I saw that Arshad Khan armed with hatchet, Shabbir Khan armed with drat, Ansar Khan armed with sota, Islam Khan alias Slama son of Bland Khan armed with sota. Jameel Khan armed with hatchet, Shahid Khan armed with hatchet, Babar armed with iron rod were already present there having the common intention to kill me. Jameel Khan, Shabbir Khan and some of others were also armed with mousers and pistols which they had concealed under their garments. Ansar Khan raised lalkara that Islam Khan should not be spared. I started running towards northern fields in order to save myself but slipped down after covering the distance of two acres. All the assailants had encircled me. Abdul Shakoor armed with pistol also reached there. Shabbir Khan gave Drat blow which hit on my head, Jameel Khan and Shabbir Khan gave hatchet blows from rear side which caused injuries on my head and other parts of my body. Arshad Khan also gave hatchet blow on my head. Ansar Khan Islam Khan and Babar also caused different injuries on my person. Abdul Shakoor came forward to use his pistol with intention to kill me then I in order to save my life from their aggression, used my licensed pistol pressing its trigger the bullet hit Abdul Shakoor who died resultantly. Had I not used my licensed pistol, I would

have been killed by the assailants. Police post was near the place of occurrence. Police party reached there and saved me. I exercised the right of self-defence used my licensed weapon which was with me as a routine, being a military person. I was medically examined and treated and luckily saved otherwise the assailants had let no stone unturned to kill me. I also adopt the same first version before the police on the day of occurrence. I was also deprived of cash amounting Rs.8500. The Investigating Officer did not investigate the matter in accordance with law because no one from the assailant was ever arrested or investigated by him, which is absolutely injustice and misuse of authority.'

The appellant did not opt to make statement under section 340(2) of Cr.P.C., however he produced defence evidence in the shape of evidence of Muhammad Iqbal, License Clerk (DW-1) and Doctor Javed Iqbal (DW-2). The appellant also produced Medico-legal report Exh. DA, statement of Shahid Mehmood Khan Exh.DB, copy of arms license Exh. DC and copy of register pertaining to license of pistol (P-1) Exh. DE.

7. The learned trial Court vide judgment dated 23-10-2008, found Islam Khan appellant guilty, convicted and sentenced him as mentioned and detailed above.

8. Learned counsel for the appellant; in support of this appeal, contends that the appellant has falsely been implicated in this case; that the story of the prosecution narrated in the F.I.R. and brought before the court through the statements of P.Ws. is absolutely incorrect; that in fact the appellant was attacked upon by the opposite side comprising of seven persons who inflicted eleven injuries on the person of the appellant and when Abdul Shakoor (deceased) was about to fire at the appellant, he in self-defence fired with his licensed pistol at the deceased; that it is on the record that the appellant was injured at the time of occurrence and when the police officials reached at the place of occurrence, they took the appellant to the hospital; that the same Doctor namely Doctor Javaid Iqbal (P.W.4) medically examined the appellant who later on conducted the post mortem examination on the dead body of the deceased; that the said doctor also appeared as (DW-2) and noted 11 injuries on the person of the appellant and he has stated that the injuries of the appellant were not self-inflicted; that the motive set out by the prosecution has not been proved as Mst. Abida Bibi was not examined in the Court. So far as the recovery of pistol is concerned, it is argued by the learned counsel for the appellant that it has been

admitted by the Investigating Officer that the appellant was arrested at the spot by the police thus it is established that recovery of pistol was planted against the appellant after four days; that even otherwise it was a licensed pistol which was deliberately concealed by the police in order to show the same as unlicensed; that Muhammad Iqbal (DW-1) appeared before the court to prove that the pistol (P-1) was a licensed pistol of the appellant; that the plea taken by the appellant is more probable which fits in the circumstances of the case and as such the appellant is entitled to acquittal; that the report of Forensic Science Laboratory is not helpful because empties were deposited in the office of Forensic Science Laboratory on 15-5-2006 whereas the pistol was allegedly recovered on 27-4-2006; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

9. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds; that the incident took place in the village of the deceased and presence of the appellant in the said village shows his bad intention; that the appellant had strained relations with his wife Mst. Abida Bibi who had filed a suit for dissolution of marriage against the appellant and due to this grudge he committed the murder of the deceased; that both the eye-witnesses of ocular account are residents of the same area where the occurrence took place, therefore, their presence at the spot is natural; that the ocular account of the prosecution is exactly in line with the medical evidence as the deceased received eight fire arm injuries as noted by the Doctor; that the prosecution evidence is further corroborated by the recovery of pistol (P-1). So far as the injuries on the person of the appellant are concerned, it is contended by the learned counsel for the complainant that those were caused by the villagers after the occurrence; that the appellant has inflicted as many as six fire arm injuries on the person of the deceased, therefore, he does not deserve any leniency in respect of his sentence; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Irshad Khan, complainant (P.W.8) and Shahid Mehmood (P.W.7), whereas, the other has been brought on the record through the statement of Islam Khan (appellant), recorded under section 342 of Cr.P.C. and suggestions put to the eye-witnesses during their cross-examination.

12. It is settled now by the Hon'ble Supreme Court of Pakistan in number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as 'Ashiq Hussain v. The State' (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342 Cr.P.C., statement under section 340(2), Cr.P.C. and, the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter-versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused

and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Amin Ali and another v. The State' (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

13. The occurrence in this case took place on 22-4-2006 at 1-00 p.m. in the fields situated within the area of Darya Minhasan, Police Station Kot Nainan District, Narowal, whereas the matter was reported to the police by Irshad Khan complainant (P.W.8) on the same day at 2-00 p.m. through 'Fard Biyan' Exh.PF, on the basis, whereof formal F.I.R. Exh. PK was also registered on the same day at 2-30 p.m. The distance between the place of occurrence and police station is 5-miles. Considering the above-mentioned facts we are of the view that there was no delay in reporting the matter to the police.

14. The ocular account of the prosecution was furnished by Irshad Khan complainant (P.W.8) and Shahid Mehmood (P.W.7). The examination-in-chief of Irshad Khan (P.W.8) is reproduced hereunder:--

'I am agriculturist. Abida Bibi was married to Islam Khan accused present in the Court. The spouses had strained relations some 2/3 months prior to the occurrence. Abida Bibi filed a suit for dissolution of marriage in Family Court, Shakargarh. Islam used to come and threaten us to kill due to the said suit for dissolution of marriage. He also threatened that he would forcibly take away Abida Bibi. Islam Khan used to come in the house of Allah Ditta accused present in the Court. On 22-4-2006 at 1-00 p.m. Shakoor Khan was standing in Adda. Shakoor Khan had come from Shakargarh. He was army man. He had come to his house on leave. Islam Khan and Allah Ditta had come out of the house of Allah Ditta. Islam Khan had a pistol in his hand. Allah Ditta raised lalkara that a lesson be taught because Shakoor Khan was not sending his sister with Islam Khan. Islam Khan started firing at Shakoor Khan with his pistol. Shakoor Khan ran away towards the fields for saving his life. When Shakoor Khan

was 50 karams away from the village on the northern side, a fire hit him and he fell down. Islam Khan accused continued firing at the fallen Shakoor Khan. Shakoor Khan died at the spot. I, Shahid Khan and Shabbir Khan had seen the occurrence. Islam Khan accused intended to forcibly take away Abida, which resulted in the dispute. I had recorded my statement to the police at the spot. The police read over the statement and got my thumb-impression. My statement is Exh.PF. My thumb-impression is Exh. PF/1.'

The evidence of other eye-witness namely Shahid Mehmood (P.W.7) is also on the same lines. The place of occurrence is not disputed in this case by the defence, which took place at the 'Adda' (Bus Stop) of village Darya Minhasan. The complainant Irshad Khan (P.W.8), as well as, Shahid Mehmood (P.W.7) both are residents of the said village (Darya Minhasan). Their presence along with the deceased, at the spot, at the time of occurrence is neither unnatural nor improbable. The presence of eye-witness namely Shahid Khan (P.W.7) at the time of occurrence has also been admitted by the appellant though in a different manner, in his statement recorded under section 342, Cr.P.C. The above mentioned eye-witnesses were cross-examined at length but their evidence could not be shaken during the process of cross-examination. They corroborated each other on all material aspects of the case. Their testimonies qua the role attributed to the appellant and injuries inflicted by him on the person of Abdul Shakoor (deceased) are confidence-inspiring and trustworthy. The complainant Irshad Khan is real paternal uncle of the deceased. It is not probable that he will falsely implicate the appellant and would let off the real culprit in the murder case of his near kith and kin. Substitution in such like cases is a rare phenominon.

15. The medical evidence of the prosecution was furnished by Dr. Javed Iqbal, (P.W.4). He, on 22-4-2006 at 5-00 p.m. conducted the post mortem examination on the dead body of Abdul Shakoor (deceased). He found eight injuries on the person of the deceased out of which six were entry wounds. According to his opinion all the injuries were ante-mortem in nature, caused by fire arm weapon and death was due to haemorrhage and shock due to chest injury. The probable time that elapsed between injuries and death was within 10 to 15 minutes and between death and post mortem was within six hours. The medical evidence furnished by Dr. Javed Iqbal (P.W.4) has fully supported the ocular account of the prosecution produced by Irshad Khan complainant (P.W.8) and Shahid Mehmood (P.W.7). According to the evidence of above mentioned eye-witnesses, the appellant used fire arm weapon (30 bore pistol)

to commit the murder of Abdul Shakoor (deceased). The time of occurrence was mentioned as 1-00 p.m. by the eye-witnesses. According to medical evidence furnished by Dr. Javed Iqbal (P.W.4) the injuries on the person of Abdul Shakoor (deceased) were caused by fire arm weapon and the time of death as given in the post mortem report Exh. PB fully tallied with the ocular account and as such medical evidence is in line with the ocular account of the prosecution.

16. Insofar as the motive behind the occurrence is concerned, according to the prosecution case Mst. Abida Bibi filed a suit for dissolution of marriage in the Family Court, Shakkargarh against the appellant and as the appellant intended to forcibly take back Mst. Abida Bibi, therefore, he committed the murder of Abdul Shakoor (deceased). We have noted that although the appellant had admitted in his statement recorded under section 342, Cr.P.C. that his relations with Mst. Abida Bibi were strained but we have also noted that Irshad Khan complainant has admitted during his cross-examination that Abdul Shakoor (deceased) had not restrained Mst. Abida Bibi from living with Islam Khan (appellant). The complainant Irshad Khan though stated during his cross-examination that a copy of the suit for dissolution of marriage filed by Mst. Abida Bibi was produced to the Investigating Officer but the Investigating Officer, Sabir Hussain, S.-I. (P.W.10) has stated during his cross-examination that he had not included the copy of the plaint and interlocutory orders of the suit filed by Mst. Abida Bibi for dissolution of marriage in the case file. He further stated that no one had produced any such document to him. He further stated that he had not recorded the statement of Mst. Abida Bibi during his investigation. Neither Mst. Abida Bibi was produced before the learned trial Court nor any document was placed on the record by the prosecution to establish the alleged motive of the occurrence. The complainant Irshad Khan (P.W.8) has stated during his cross-examination that the house of Mst. Abida Bibi was at a distance of 20/25 karams from the place of occurrence. As admittedly, Abdul Shakoor (deceased) never restrained Mst. Abida Bibi from living with the appellant, therefore, it appears that something else had happened between the appellant and the deceased which resulted into the present unfortunate incident. We are of the considered view that the motive as alleged by the prosecution has not been proved in this case.

17. The prosecution has also produced the evidence of recovery of pistol .30 bore (P-1) along with two live bullets (P-3 to P-4) which was allegedly taken into possession on the pointation of the appellant vide recovery memo Exh. PC. The

prosecution has also produced the report of Forensic Science Laboratory Exh. PM according to which empties recovered from the place of occurrence were fired from pistol .30 bore (P-1). We have noted that three empties were recovered from the place of occurrence on 22-4-2006. The appellant was also arrested on 22-4-2006. Pistol .30 bore (P-1) was allegedly recovered on the pointation of the appellant on 27-4-2006 whereas the empties were received in the office of Forensic Science Laboratory, Punjab, Lahore on 15-5-2006 which means that the pistol, and empties were kept together at Police Station, therefore, possibilities cannot be ruled out that fake empties were prepared from pistol (P-1) and sent to the office of Forensic Science Laboratory, Punjab, Lahore. Even otherwise according to the prosecution case and statement of Investigating Officer, Sabir Hussain, S.-I. (P.W.10) the appellant was apprehended at the spot on the day of occurrence i.e. 22-4-2006 and was produced by the villagers to the police. It is not understandable that when the appellant was apprehended red-handed at the spot on 22-4-2006 then why recovery of pistol .30 bore (P-1) has not been shown on that day. The story of prosecution regarding the recovery of pistol on 27-4-2006 does not appeal to common sense. In view of the above, it is not safe to rely upon the alleged recovery of pistol (P-1) on the pointation of the appellant and positive report of Forensic Science Laboratory Exh. PM.

18. Now coming to the plea taken by the appellant in his statement recorded under section 342, Cr.P.C. we have noted that while answering to question "Why the present case has been registered against you and why the P.Ws. have deposed against you?" the appellant replied as under:--

"I have committed no offence. I exercised the right of private defence of my person under section 97, P.P.C. The deceased Abdul Shakoor had become prey to his own aggression and assault. Abdul Shakoor and his wife were travelling in the same Dala in which I travelled to reach the place of occurrence. Abdul Shakoor deceased was my brother-in-law but I was not acquainted with him prior to that day because he had not participated in marriage ceremony. Moreover, he had not visited me during the period of my matrimonial life because he throughout remained in his military camp. I had no intention or design to kill anyone.

As a matter of fact, relations between me and my wife Abida Bibi were strained. She had left my house and was residing in her parents house situated in village Darya Minhasan. I was trying for reconciliation so was called by my in-laws deceitfully

under the garb of compromise on the day of occurrence. I went to village Darya Minhasan on 2-4-2006 at about 1:00 p.m. When I reached at the bus stop of village Darya Minhasan, I saw that Arshad Khan armed with hatchet, Shabbir Khan armed with drat, Ansar Khan armed with sota, Islam Khan alias Slama son of Bland Khan armed with sota. Jameel Khan armed with hatchet, Shahid Khan armed with hatchet, Babar armed with iron rod were already present there having the common intention to kill me. Jameel Khan, Shabbir Khan and some of others were also armed with mousers and pistols which they had concealed under their garments. Ansar Khan raised lalkara that Islam Khan should not be spared. I started running towards northern fields in order to save myself but slipped down after covering the distance of two acres. All the assailants had encircled me. Abdul Shakoor armed with pistol also reached there. Shabbir Khan gave Drat blow which hit on my head, Jameel Khan and Shabbir Khan gave hatchet blows from rear side which caused injuries on my head and other parts of my body. Arshad Khan also gave hatchet blow on my head. Ansar Khan Islam Khan and Babar also caused different injuries on my person. Abdul Shakoor came forward to use his pistol with intention to kill me then I in order to save my life from their aggression, used my licensed pistol pressing its trigger the bullet hit Abdul Shakoor who died resultantly. Had I not used my licensed pistol, I would have been killed by the assailants. Police post was near the place of occurrence. Police party reached there and saved me. I exercised the right of self-defence used my licensed weapon which was with me as a routine, being a military person. I was medically examined and treated and luckily saved otherwise the assailants had let no stone unturned to kill me. I also adopt the same first version before the police on the day of occurrence. I was also deprived of cash amounting Rs.8500. The Investigating Officer did not investigate the matter in accordance with law because no one from the assailant was ever arrested or investigated by him, which is absolutely injustice and misuse of authority.'

The appellant also produced Muhammad Iqbal (DW-1) who was a licensed clerk in the office of DCO, Narowal. He produced the copy of license of pistol (P-1) as Exh.DC which was issued in the name of appellant. He has further produced copy of the register pertaining to the issuance/renewal of license as Exh.DE. The appellant has also produced Dr. Javed Iqbal (DW-2) who stated that on 22-4-2006 at 2-40 p.m. he medically examined Islam Khan (appellant) and found 11 injuries on the person of the appellant. According to his opinion injury No.1 was caused by a sharp-edged

weapon, whereas, all other injuries were caused by blunt weapon. Duration of injuries was within 2 hours. The appellant took this plea that on the day of occurrence he was called by his in-laws deceitfully under the garb of compromise and when he reached at the Bus Stop of village Darya Minhasan he was attacked upon by seven persons of the complainant party who were armed with different weapons. He further claimed that out of the said seven persons, Abdul Shakoor (deceased), Jameel Khan, Shabbir Khan and some others were armed with mousers and pistols but we have noted that not a single fire arm injury was received by the appellant. Although he alleged that Abdul Shakoor (deceased) was also armed with pistol at the time of occurrence but no pistol was recovered from the spot by the Investigating Officer at the time of spot inspection and only three empties were recovered by the Investigating Officer vide recovery memo Exh. PE. According to his version Abdul Shakoor (deceased), Jameel Khan, Shabbir Khan and some other persons of the complainant party were armed with mousers and pistols who intended to kill him but amazingly he inflicted all six fire arm injuries on the person of Abdul Shakoor (deceased) and he did not try to defend himself against the above mentioned persons of the complainant party who were armed with fire arm weapons. He while using his alleged right of self-defence did not cause any injury to Shabbir Khan, who allegedly inflicted two blows on his head, to Jamil Khan and Arshad Khan who allegedly inflicted wrong side of the hatchet blows on his head and other parts of the body. He also did not cause any injury to Ansar Khan and Babar Khan who caused different injuries on his person as claimed by him. The appellant took a specific plea of self-defence and burden to prove the said plea was on him, as envisaged under Article 121 of the Qanun-e-Shahadat Order, 1984. He did not produce any witness of the occurrence in his defence to prove the said plea. Even he himself did not bother to make statement on oath as provided under section 340(2) of Cr.P.C., therefore, the appellant could not establish that he was attacked upon by the complainant party and while using his right of self-defence he inflicted injuries on the person of Abdul Shakoor (deceased). We are, therefore, of the view that the appellant has failed to prove the plea taken by him in his statement recorded under section 342 of Cr.P.C.

19. We have disbelieved the defence version of the appellant but the fact remains that the appellant also received 11 injuries at the time of occurrence. It has been argued on behalf of the complainant that the appellant, after the occurrence, was apprehended at the spot by the villagers and he was beaten up by them during which

he sustained above mentioned injuries. Learned counsel for the complainant has also referred to the statement of Sabir Hussain S.-I. (P.W.10) who has stated in his examination-in-chief that the appellant in injured condition was produced by the villagers to the police but we have noted that neither Irshad Khan complainant (P.W.8) nor Shahid Mehmood (P.W.7) has stated that injuries on the person of the appellant were inflicted by the villagers when he was apprehended by them after the occurrence. The injuries on the person of the appellant were suppressed in the F.I.R. Exh.PK, as well as, in the statements of eye-witnesses recorded by the learned trial Court. If both the versions i.e. the prosecution story given in the F.I.R. and narrated by Irshad Khan (P.W.8) and Shahid Mehmood (P.W.7) in their statements made before the learned trial Court and the plea taken by Islam Khan (appellant) in his statement recorded under section 342 of the Code of Criminal Procedure and the statements of the witnesses namely Muhammad Iqbal (DW-1) and Doctor Javaid Iqbal (DW-2), as well as, documents produced by the appellant in his defence during the trial are taken into juxtaposition then the irresistible conclusion is that both the parties have not approached the Court with clean hands and have tried to suppress their own role and have made an attempt to highlight the role of the other side. In such a situation. The court can draw its own inference from the evidence and circumstances of the case. In this regard reliance is placed on 'Syed Ali Beopari v. Nibaran Mollah and others' (PLD 1962 Supreme Court 502), wherein, at page 507, the Hon'ble Supreme Court of Pakistan has been pleased to observe as under:--

'Here we may observe that in a case of this type the parties do not generally come out with the true, story. It is a normal incident of an 'adversary proceeding' to minimize one's own part in the incident. In such a case the Court must not be deterred by the incompleteness of the tale from drawing the inference that properly flow from the evidence and circumstances....'

20. Therefore, from the circumstances available on the record, it appears that the real cause of occurrence has been suppressed by the parties and it appears that something else had happened immediately before the occurrence which had resulted into the present unfortunate incident. It appears to be a sudden fight wherein Abdul Shakoor lost his life at the hands of Islam Khan (appellant) and the appellant also received injuries but there is no evidence on the record to show as to who caused the injuries on the person of the appellant.

21. After taking into consideration the circumstances of the case, we are of the considered view that the prosecution has proved its case to the extent of role played by Islam Khan (appellant) at the time of occurrence. Although we have disbelieved the prosecution evidence qua the motive and recovery of pistol (P-1) from the possession of the appellant, however, if the prosecution evidence qua motive and recovery of pistol (P-1) is excluded from consideration, even then sufficient incriminating evidence is available on the record against the appellant. As mentioned earlier, the prosecution case was proved through the evidence of eye-witnesses namely Irshad Khan complainant (P.W.8) and Shahid Mehmood (P.W.7). The said eye-witnesses were cross-examined at length but their evidence could not be shaken during the process of cross-examination to the extent of role played by the appellant during the occurrence and injuries inflicted by him to the deceased. They corroborated each other on all material aspects of the case. Their evidence to the extent of role of the appellant during the occurrence is trustworthy and confidence-inspiring which has been fully supported by the medical evidence furnished by Doctor Javed Iqbal (P.W.4), post mortem report of the deceased Abdul Shakoor Exh. PB and pictorial diagrams of injuries Exh.PB/1 & Exh.PB/2, therefore, we are of the view that prosecution has proved its case against the appellant beyond the shadow of any doubt.

22. Now coming to the quantum of sentence awarded to the appellant, it has been argued on behalf of the prosecution that as the appellant has inflicted six fire arm entry wounds on the person of Abdul Shakoor deceased, therefore, he does not deserve any leniency in respect of his sentence, but we are afraid that there is no force in the said argument of learned counsel for the complainant because mere this fact that the appellant has inflicted six fire arm entry wounds on the person of the deceased would not ipso facto disentitles him to the lesser punishment. We may refer here the case of 'Ansar Ahmad Khan Barki v. The State and another' (1993 SCMR 1660), wherein the death sentence of Ansar Ahmad Khan Barki appellant of the said case was altered to imprisonment for life by the Hon'ble Supreme Court of Pakistan while considering mitigating circumstances of that case, though the said appellant committed double murder of Wajid Ali Khan deceased and Akhtar Khan deceased and he also caused two fire arm injuries on the face and left flank of Wajid Ali Khan deceased of the said case.

Similarly in the case of 'Mir Muhammad alias Miro v. The State' (2009 SCMR 1188), the death sentence of Mir Muhammad alias Miro appellant was converted into

imprisonment for life while considering his old-age, as a mitigating circumstance though the said' appellant along with three other acquitted accused was tried in a triple murder case for causing death of Muhammad Sadiq, Karim Bakhsh and Muhammad Abbas and causing injuries to the complainant and Muhammad Ishaq P.W. of that case.

We may further refer here the case of 'Ahmad Nawaz and another v. The State' (2011 SCMR 593). In this case, the Hon'ble Supreme Court of Pakistan converted the death sentences of Ahmad Nawaz and Navid Ahmad appellants to imprisonment for life, who were charge sheeted, convicted and sentenced for the commission of 'Qatl-e-Amd of Zakif Ali and Zahid Ali (deceased persons) and for causing injuries to Shahid Ali and Muhammad Amin P.Ws. of that case. Both the appellants of said case inflicted dagger blows to Zakif Ali (deceased) in his abdomen, flank and other parts of the body. Similarly, Navid Ahmad appellant also inflicted dagger blows on the abdomen of Zahid Ali deceased, whereas, Ahmad Nawaz appellant inflicted dagger blows on the chest and left flank of Zahid Ali deceased. The appellants of said case also inflicted injuries to Shahid Ali and Muhammad Amin P.Ws. of the said case.

So it is evident from the perusal of above mentioned judgments of the Hon'ble Supreme Court of Pakistan that mere infliction of more injuries than one on the person of the deceased would not automatically disentitle the accused to lesser punishment as provided under section 302(b), P.P.C.

23. After considering all the pros and cons of this case. We are of the view that it is not a. case of capital punishment because we have noted some mitigating circumstances in favour of the appellant firstly we have disbelieved the prosecution evidence regarding recovery of pistol (P-1) from possession of the appellant due to the reasons mentioned in para No. 17 of this judgment, secondly the appellant was also injured during the occurrence. He received as many as 11 injuries on his body and injuries on the person of appellant were suppressed by the prosecution thirdly the prosecution has alleged a specific motive but has miserably failed to prove the same. The occurrence in this case admittedly took place in the fields near the house of the deceased and his sister Mst. Abida Bibi (wife of the appellant). It appears that something else had happened between the appellant and the deceased immediately before the occurrence which resulted into the present unfortunate incident. It is not determinable in this case as to what was the real cause of occurrence and as to what

had actually happened immediately before the occurrence, therefore, in our view the death sentence awarded to the appellant is quite harsh. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of 'Mir Muhammad alias Miro' supra wherein Hon'ble Supreme Court has held as under:--

'It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence' In another case of 'Ansar Ahmad Khan Rarki' supra Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death. We are convinced that Islam Khan appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under section 302(b) of P.P.C.

It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence-inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating it a case of mitigation, we have fortified our view by the judgment of the Hon'ble Supreme Court of Pakistan reported in the case of 'Ahmad Nawaz and another v. The State' supra wherein at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:--

The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of 'Iftikhar-ul-Hassan v. Israr Bashir and another' (PLD 2007 SC 111), it was held that 'this is settled law that provisions of sections 306 to 308, P.P.C. attracts only in the cases of Qatl-e-Amd liable to Qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under section 302(b) P.P.C. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under section 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under

section 302(b), P.P.C. and exercise of this discretion in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas, is not enforceable, the Court, in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in 'Ghulam Muretaza v. State' (2004 SCMR 4), 'Faqir Ullah v. Khaliquz-Zaman' (1999 SCMR 2203), 'Muhammad Akram v. State' (2003 SCMR 855) and 'Abdul Salam v. State' (2000 SCMR 338). The Court while maintaining the conviction under section 302(b) P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B of Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-eAmd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:-)

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course" (underlining, italic and bold supplied)."

24. In the light of above discussion, the conviction of Islam Khan appellant under section 302(b), P.P.C. awarded by the learned trial Court is maintained but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned trial Court and sentence in default thereof is maintained and upheld. The benefit of section 382-B of Cr.P.C. is also given to the appellant.

25. Consequently with the above said modification in the sentence of Islam Khan appellant Criminal Appeal No. 1225 of 2008 filed by Islam Khan appellant is hereby dismissed. Murder Reference (M.R. No. 264 of 2008) is answered in the negative and death sentence of Islam Khan appellant is not confirmed.

HBT/I-11/L **Sentence reduced.**

2013 Y L R 1805

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

RIAZ and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.1055, Criminal Revision No.747 and Murder Reference No.271 of 2008, heard on 9th April, 2013.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Role attributed to accused was similar to that of acquitted co-accused---Evidence which had been disbelieved qua the acquitted co-accused, could not be believed against accused, without independent corroboration on material particulars of the case---Motive as alleged by the prosecution, did not appeal to the common sense and story of motive as alleged by the prosecution was not reliable---Even to the extent of motive, the case of accused, was not distinguishable from the case of acquitted co-accused---Pistol .30 bore, was allegedly recovered on the pointation of accused, 4 days after his arrest, whereas same was deposited in the office of Forensic Science Laboratory 13 days after arrest of accused; it was not safe, in circumstances, to rely upon the alleged recovery of pistol at the instance of accused and positive report of Forensic Science Laboratory---Alleged recovery of pistol, could not be considered as corroborative piece of evidence against accused---Prosecution story narrated in the F.I.R. was in conflict with the medical evidence---Case of accused, in circumstances, was not distinguishable from the case of his acquitted co-accused--Alleged absondence of accused was not a corroboration of the prosecution case---No independent corroboration was on record against accused---Appeal of accused was accepted by extending him benefit of doubt; his conviction and sentence, were set aside and he was acquitted and released, in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185; Syed Ali Bepari v. Nibaran Mollah and others PLD 1962 SC 502; Tawaib Khan and another v. The State PLD 1970 SC 13; Bakka v. The State 1977 SCMR 150; Khairu and another v. The State 1981 SCMR 1136; Ziaullah v. The State 1993 SCMR 155; Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11; Shahid Raza and another v. The State 1992 SCMR 1647; Irshad Ahmad and others v. The State and others PLD 1996 SC 138 and Ahmad Khan v. The State 1990 SCMR 803 and Akhtar Ali and others v. The State 2008 SCMR 6 rel.

Maaz Allah Khan Sherwani for Appellant.

Arshad Mehmood, D.P.G., for the State.

Saif-ul-Malook for the Complainant.

Date of hearing: 9th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Riaz appellant along with seven co-accused was tried in case F.I.R. No.369/2004 dated 18-6-2004 offences under sections 302, 148, 149 P.P.C. read with section 109 P.P.C., registered at Police Station Saddar, Kasur District Kasur. After conclusion of the trial, the learned trial Court vide its judgment dated 1-9-2008 has convicted and sentenced the appellant as under:-

Riaz.

Under section 302(b), P.P.C. to death for committing the murder of Junaid Qadar deceased. He was directed to pay compensation amount of Rs.5,00,000 (Rupees Five Hundred Thousand only) to the legal heirs of deceased as envisaged under section 544-A of Cr.P.C. and in default, thereof, to undergo imprisonment for six months' S.I.

Through the same judgment the learned trial Court has, however, acquitted Shahid, Faiz Muhammad, Barkat alias Faqir Hussain, Nasroo alias Billa, Jamil, Zubair and Muhammad Akram accused, while giving benefit of doubt to them.

2. Feeling aggrieved, the appellant Riaz has challenged his conviction and sentence through Criminal Appeal No.1055 of 2008 and Seraj Din complainant has filed Criminal Revision No.747 of 2008 for enhancement of compensation amount,

whereas, the learned trial Court has transmitted Murder Reference No. 217 of 2008, for confirmation or otherwise of the death sentence of Riaz (appellant). We propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 1-9-2008 passed by the learned Additional Sessions Judge, Kasur.

3. Brief facts of the case as given by the complainant Seraj Din (P.W.9) in his Fard Biyan Exh PF on the basis of which the formal F.I.R. Exh.PF/1 was chalked out are that he (complainant) was resident of Haveli Padhianwali and agriculturalist by profession. On the intervening night of 17/18-6-2004 he (complainant) was sleeping in his cattle shed. His brother Ghulam Qadir (given up P.W.) and son of Ghulam Qadar namely Junaid Qadar (deceased) aged 14 years were sleeping on the cots at 'thara' outside their 'baithak'. His (complainant's) son Liaquat Ali (P.W.8) who had a shop near his 'baithak' was also sleeping on the cot near them. Electric bulb was illuminating there. At about 12-30 a.m., (night) all of a sudden Riaz (appellant) armed with pistol .30 bore, Shahid accused (since acquitted) armed with pistol .30 bore, Jamil accused (since acquitted) armed with pistol .30 bore, Muhammad Akram accused (since acquitted) armed with pistol .30 bore, Zubair accused (since acquitted) armed with carbine .12 bore, Billa accused (since acquitted) armed with rifle came towards their 'baithak'. His (complainant's) dog was also sleeping in the street in front of the 'baitkak' who on hearing the noise of the feet of accused persons, started barking. His son Liaquat Ali (P.W.8), brother Ghulam Qadir (given up P.W.) and nephew Junaid Qadir (deceased) also woke up. Billa accused (since acquitted) made a fire shot with his rifle which hit on the wall of their 'baitkak' Junaid Qadir (deceased) was still sitting on his cot, upon which Riaz (appellant) made a fire shot with his pistol, which hit on the right flank of Junaid Qadar (deceased). Shahid accused (since acquitted) made a fire shot with his pistol, which hit on the left inguinal area (nal) of Junaid Qadar (deceased). Jamil accused (since acquitted) made a fire shot which landed on the right inguinal area of Junaid Qadar (deceased). Muhammad Akram made a fire shot which hit on the left thigh of Junaid Qadir (deceased) who fell on the cot, facing downwards. Zubair accused (since acquitted) made a fire shot with his rifle at Ghulam Qadir (given up P.W.) who sat down and fire hit on the wall of the

'baithak'. He (complainant), Liaquat Ali (P.W.8) and his brother Ghulam Qadir (given up P.W.) made hue and cry, Zubair accused (since acquitted) made a fire shot with his carbine which hit on the backside of chest between both shoulders of Junaid Qadar (deceased). He (complainant), Ghulam Qadir (given up P.W.), Liaquat Ali (P.W.8) and many people of the village reached at the spot. The accused persons fled away from the spot towards the fields while making aerial firing. The appellant, his brother Ghulam Qadar (given up P.W.), his son Liaquat Ali (P.W.8) came towards Junaid Qadar (deceased) who succumbed to the injuries at the spot.

The motive behind the occurrence as set forth in the F.I.R. (Exh. PF/1) was that three years prior to the occurrence, accused Riaz etc. had injured Nasir and Riasat Ali, nephew and son of the complainant, against whom a case was pending adjudication in the Court and father of the accused persons namely Faiz Muhammad was forcing the complainant party for effecting compromise but they (complainant party) refused to do so.

4. The appellant was arrested on 4-5-2005, by Rana Muhammad Riaz S.-I. (P.W. 16). As per prosecution case, on 8-5-2005 Riaz appellant led to the recovery of pistol .30 bore (P-10), which was taken into possession vide recovery memo Exh.PG. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 15-5-2006, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced seventeen witnesses, during the trial. Seraj Din, complainant (P.W.9) and Liaquat Ali (P.W.8) are the witnesses of ocular account. Nasir Ali (P.W.14) is the witness of recovery of pistol (P-10) from the appellant.

The medical evidence was furnished by Dr. Zulfiqar Ahmad (P.W.2). Ijaz Ahmad, Inspector (P.W.17), Muhammad Rafique Khan, S.-I. (P.W.15) and Rana Muhammad Riaz, S.-I. (P.W.l6) are the Investigating Officers of this case.

Muhammad Nasar Ullah Draftsman (P.W.1), Muhammad Din 7/HC (P.W.3), Mushtaq Ahmad 196/C, (P.W.4), Faqir Hussain 971/C (P.W.5), Allah Ditta 309/C (P.W.6), Asghar Ali 858/C (P.W.7), Shaukat Ali 31/HC (P.W.10), Muhammad Aslam 157/C (P.W.11), Muhammad Iqbal (P.W.12) and Alamdar Abbas, S.-I. (P.W.13) are the formal witnesses. The prosecution also produced documentary evidence in the shape of scaled site plan of the place of occurrence in duplicate Exh. PA and Exh. PA/1, post mortem report of Junaid Qadar (deceased) Exh. PB, pictorial diagrams Exh. PB/1 and Exh. PB/2, memo of possession of three crime empties (P-1/1-3), one plastic stopper of .12 bore cartridge (P-2), crime empty (P-4), two lead bullets (P-3/1 to 2) magazine of 8 mm along with 15 live bullets (P-5/1 to 15) and chaddar blood-stained (P-6) Exh. PC, memo of possession of revolver .32 bore Exh. PD, site plan without scale of the place of recovery of revolver .32 bore Exh. PD/1, memo of possession of last worn clothes of the deceased Exh. PE, written complaint of Seraj Din complainant Exh. PF, F.I.R. Exh. PF/1, Police 'Karwai' (proceedings) on the complaint of Seraj Din complainant Exh.PF/1, memo of possession of pistol .30 bore (P-10) from the possession of Muhammad Riaz (appellant) Exh. PG, rough site plan of the place of recovery of pistol .30 bore (P-10) Exh. PG/1, memo of possession of rifle 8-mm from the possession of Billa (since acquitted) Exh. PH, site plan of the place of recovery of rifle Exh. PH/1, site plan without scale of the place of occurrence Exh. PJ, inquest report Exh. PK, injury form Exh. PL, report of Chemical Examiner, Punjab, Lahore Exh. PM, report of Serologist Exh.PN, report of Forensic Science Libratory Exh. PO, F.I.R. No.93/2001 Exh. P.W.14, warrants of arrest of Riaz (appellant) Exh. PJ, warrants of arrest of Barkat (since acquitted) Exh. PL, warrants of arrest of Billa (since acquitted) Exh. PK and closed its evidence.

6. The statement of the appellant under section 342, Cr.P.C. was recorded by the learned trial Court. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why the prosecution witnesses deposed against you and why this case against you" the appellant replied as under:--

Muhammad Riaz.

"I am innocent. I have been falsely involved in this case due to previous hurt case. In fact, the complainant used to tease us and we in order to avoid any further misshape

sold out our agricultural land as well as our residential house which were purchased by the relatives of the complainant and thereafter, we shifted to Lahore and started to do labour there. My father is patient of hepatitis C and one of my brother is patient of spinal cord disease. We had no grudge against an innocent chap. As alleged, if we had come at the spot having arms where the complainant along with his sons was present, then there was no hurdle and hindrance to murder the complainant or his son instead an innocent child, the nephew of the complainant. The complainant has falsely involved me and my co-accused in this false case due to previous enmity regarding the pendency of hurt case. It is pertinent to mention here that father of the deceased who has been shown witness of the occurrence was given up by the prosecution as he had refused to give false evidence in the Court. Actually, this is a blind murder and complainant having previous enmity and involved in this case falsely, wants to use this blind murder against us."

Neither the appellant opted to make statement under section 340 (2) of Cr.P.C., nor he produced any witness in his defence.

7. The learned trial Court vide judgment dated 1-9-2008, found Riaz appellant guilty, convicted and sentenced him as mentioned and detailed above.

8. Learned counsel for the appellant in support of this appeal, contends that in the F.I.R. besides appellant seven other persons with the same role of firing at the deceased were implicated in the instant case by the complainant but all the remaining accused namely Shahid, Faiz Muhammad, Barkat alias Faqir Hussain, Nasroo alias Billa, Jamil, Zubair and Muhammad Akram have been acquitted by the learned trial Court and appeal filed against their acquittal has also been dismissed by this Court, being time-barred vide order dated 29-4-2009 passed in Criminal Miscellaneous No.2341-M of 2008, which is application for condoning the delay in filing the appeal against acquittal, therefore, the evidence which has been disbelieved qua the acquitted accused can not be believed to the extent of the appellant without any independent corroborative piece of evidence which is very much lacking in this case. So far as the motive is concerned, complainant has stated that three years prior to the occurrence the accused persons had injured his son and nephew and case was registered against the appellant and others and appellant and others were compelling the complainant

party for compromise but the deceased was not inclined for the said compromise but the said motive does not appeal to common sense because a minor boy of 14 years of age cannot be a hurdle in the compromise and there in fact was no reason for the appellant to commit the murder of the deceased because of the above mentioned reason; moreover elder son of the complainant Liaquat Ali (P.W.8) who was witness of that case was present at the spot but he was not touched by the appellant. So far as the abscondance of the appellant is concerned, learned counsel for the appellant contends that no proclamation was obtained by the Investigating Officer and even no question regarding abscondance of the appellant was put by the learned counsel for the complainant. So far as recovery of pistol .30 bore and positive report of Forensic Science Libratory is concerned, there is no evidence that the empties which were allegedly taken from the spot were handed over to the 'moharrar' by the Investigating Officer as Muhammad Din 'Moharrar' (P.W.3) appeared before the learned trial Court and he simply stated that the blood-stained earth was handed over to him. Apart from that there is conflict between ocular account and medical evidence as in the F.I.R. there was specific allegation of causing five firearm injuries to the deceased but only three entry wounds were noted by the Doctor in the post mortem examination. So far as the appellant is concerned, it was alleged that he caused injury on the right flank of the deceased but there was no injury on the right flank of the deceased, therefore, the complainant changed his version before the learned trial Court and he simply stated that fire shot made by the appellant landed on the flank of deceased; that father of the deceased was allegedly present at the spot, he was cited as a witness but given up by the prosecution, therefore, adverse presumption can be drawn against the complainant under Article 129(g) of Qanun-e-Shahadat, 1984; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charges.

9. Learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the instant occurrence took place on the intervening night of 17/18-6-2004 at 12-30 a.m. (night) and the matter was promptly reported to the police on the same night at 3-55 a.m. though the

distance between the place of occurrence and police station was 12 kilo-meters; that there is no reason for the complainant and other witnesses to falsely implicate the appellant in the instant case; that the motive has also been alleged in the F.I.R. that the deceased was creating hurdle in effecting the compromise with the appellant in a hurt case; that the medical evidence to the extent of the appellant is in line with the ocular account; that the appellant cannot get any benefit from the acquittal of co-accused as motive was directly attributed to the appellant; that prosecution case is further corroborated by the recovery of pistol .30 bore (P-10) from the possession of appellant and positive report of Forensic Science Laboratory; that the prosecution case is also corroborated by the abscondance of the appellant as he remained fugitive from law and was arrested on 4-5-2005; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. The occurrence in this case took place on the intervening night of 17/18-6-2004 at 12-30 a.m. outside the house of complainant situated in village Haveli Padianwali within the area of Police Station Saddar Kasur, District Kasur. The matter was reported to the police on the same night at 3-55 a.m. by the complainant Seraj Din (P.W.9) through 'Fard Biyan' Exh. P-F on the basis, whereof the formal F.I.R. Exh.P-F/1 was also registered on the next morning (18-6-2004) at 4-50 a.m. The ocular account of the prosecution was furnished by Seraj Din complainant (P.W.9) and Liaquat Ali (P.W.8). The examination-in-chief of Seraj Din complainant (P.W.9) is reproduced hereunder:-

'About two years and 3-1/2 months ago, I was sleeping near my cattle heads. My brother Ghulam Qadar was sleeping near his baithak along with his son Junaid Qadar where an electric bulb was also litting. Whereas Liaqat my son was sleeping near his shop. It was 12-30 a.m. when my dog started barking I saw accused Nasroo alias Billa, present in the Court, who was armed with a rifle and he fired towards Ghulam Qadar my brother but the fire hit the wall. Then accused Riaz, Shahid and Jamil

present in Court while armed with Mozers came 'near the place where Junaid Qadar was present. Riaz accused fired at Junaid which landed on his flank. Thereafter Shahid accused fired at Junaid which landed on lower part of abdomen (nal). Thereafter Jamil accused also fired at Junaid Qadar which also hit on the lower part of his abdomen (nal.). Bari accused present in Court along with one Faiz were present near the street and they made ariel firing and retrieved back alongwith other accused when the villagers attracted to the spot after hearing firing. Junaid Qadar succumbed to the injuries at the spot.

The motive behind this occurrence is that Riaz accused alongwith his companions had injured Riasat Ali and Nasir some time before the occurrence and the case was got registered which is still pending in the trial Court.

Accused was absconder. They were compelling us to effect the compromise otherwise we will be done to death. Due to this grudge accused committed the murder of Junaid Qadar.

Thereafter, I.O. came at the spot and I got recorded my statement to him which is Exh.PF which was read over and explained to me and I thumb marked the same in token of its correctness. Thereafter, I submitted an application Exh.PF/1 which was also thumb marked by me. I also got recorded my supplementary statement in respect of said application.'

The evidence of other eye-witness namely Liaqat Ali (P.W.8) is also on the same lines. It is evident from the perusal of the statements of above mentioned prosecution eye-witnesses that the role attributed to Riaz (appellant) was similar to that of acquitted co-accused namely Shahid and Jamil.

12. Charge under sections 302, 148, 149 P.P.C. read with section 109, P.P.C. with an identical allegation was framed against the appellant Riaz and his above mentioned acquitted co-accused namely Shahid, Jamil. The said co-accused were also assigned the similar role of causing fire arm injuries on the person of Junaid Qadar (deceased) but they have been acquitted by the learned trial Court while extending them the benefit of doubt and Criminal Appeal filed against their acquittal before this Court, was time barred and Criminal Miscellaneous No.2341-M of 2008, for condoning the

delay in filing the appeal was dismissed vide order dated 29-4-2009 as the delay was not condoned and as such the acquittal of above mentioned co-accused has attained finality, therefore, the question for determination, before this Court, is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellant can be believed against the appellant. In this regard we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as Iftikhar Hussain and another v. State 2004 SCMR 1185 wherein the Hon'ble Supreme Court at page 562 held as under:--

'17....It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be believed against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of 'Sarfraz alias Sappi and 2 others v. The State' (2000 SCMR 1758), relevant para therefrom is reproduced below thus.

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an overworked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence

which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of `Syed Ali Bepari v. Nibaran Mollah and others' (PLD 1962 SC 502), Tawaib Khan and another v. The State' (PLD 1970 SC 13), Bakka v. The State' (1977 SCMR 150), Khairu and another v. The State' (1981 SCMR 1136), `Ziaullah v. The State' (1993 SCMR 155), `Ghulam Sikandar v. Mamaraz Khan' (PLD 1985 SC 11), 'Shahid Raza and another v. The State' (1992 SCMR 1647), 'Irshad Ahmad and others v. The State and others' (PLD 1996 SC 138) and Ahmad Khan v. The State' (1990 SCMR 803).'

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as Akhtar Ali and others v. The State' (2008 SCMR 6).

It is evident from the perusal of above mentioned judgments passed by the Hon'ble Apex Court of the country that if the ocular testimony of the witnesses is disbelieved against a particular set of accused persons then it cannot be believed against another accused/set of accused persons facing the same trial, without independent corroboration on material particulars of the case. We will, therefore, discuss the case of the appellant while following the guidelines given in the above mentioned judgments by the Hon'ble Supreme Court of Pakistan.

13. The learned Deputy Prosecutor-General for the State, assisted by the learned counsel for the complainant has referred the motive part of the prosecution story with the assertion that it was attributed to Riaz appellant. We have gone through the contents of F.I.R. Exh. PF/1 and the statements of the prosecution witnesses namely Liaquat Ali (P.W.8) and Seraj Din (P.W.9). The motive as alleged by the said prosecution witnesses before the learned trial Court was as under:--

Liaquat Ali (P.W.8).

'The motive of the occurrence is that 4/5 years ago Riaz and Shahid accused had caused fire shot injuries to my brothers namely Riasat and Nasir. The case against accused was lodged which is pending in the trial Court and the present accused were pressurizing us to effect compromise. The said Junaid Qadar (deceased) was not

agreed to effect compromise and due to this grudge the accused had committed the murder of Junaid Qadar.'

Seraj Din, complainant (P.W.9).

'The motive behind this occurrence is that Riaz accused along with his companions had injured Riasat Ali and Nasir some time before the occurrence and the case was got registered which is still pending in the trial Court.

Accused was absconder. They were compelling us to effect the compromise otherwise we will be done to death. Due to this grudge accused committed the murder of Junaid Qadar.'

The perusal of above mentioned evidence clearly shows that the motive was attributed not only to Riaz (appellant) but also to the acquitted co-accused Shahid. So even to the extent of motive the case of Riaz (appellant) is not distinguishable from the case of acquitted co-accused. Even otherwise, we have noted that the motive as alleged by the prosecution does not appeal to common sense because Junaid Qadar (deceased) was a young boy of 14 years of age. He was neither complainant nor a witness in the earlier case lodged by the complainant against the appellant and his co-accused. It does not appeal to the mind of a prudent person that as to how a minor boy of 14 years of age would create any hurdle in the compromise efforts of the accused persons with the complainant party. The other adult family members of the complainant, party were also sleeping in the same street but they were not even touched by the accused persons. We are, therefore, of the view that the story of motive as alleged by the prosecution is not reliable. It is noteworthy that the said motive has already been disbelieved against Shahid accused (since acquitted) against whom the same motive was alleged. So even to the extent of motive, the case of the appellant is not distinguishable from the case of acquitted co-accused Shahid.

14. Learned Deputy Prosecutor-General for the State and learned counsel for the complainant has referred to the recovery of pistol .30 bore (P-10) at the instance of Riaz (appellant) and positive report of Forensic Science Libratory Exh. PO, to substantiate their arguments that case of the prosecution against the appellant has been corroborated by the recovery of pistol .30 bore (P-10) and positive report of

Forensic Science Libratory Exh.PO. We have noted that three crime empties were secured from the spot on 18-6-2004 vide memo Exh-PC. According to the statement of Investigating Officer, Rana Muhammad Riaz, S.-I. (P.W.16) the appellant was arrested on 4-5-2005 and pistol .30 bore (P-10) was allegedly recovered on his pointation on 8-5-2005, whereas the crime empties were deposited in the office of Forensic Science Libratory, Punjab, Lahore on 3-9-2004, and the pistol .30 bore (P-10) was deposited in the said office on 17-5-2005. According to the report of Forensic Science Libratory Exh. PO the above mentioned parcels of empties and pistol were brought to the office of Forensic Science Laboratory by Muhammad Ashfaq 196/C and Muhammad Aslam 157/C. Muhammad Ashfaq 196/C did not appear in the witness box whereas Muhammad Aslam 157/C appeared before the learned trial Court as (P.W.11) but he did not utter even a single word regarding the delivery of crime empties to him or their onward transmission to the office of Forensic Science Libratory, Lahore and as such there is no evidence regarding the save transmission of crime empties from the police station to the office of Forensic Science Libratory, therefore, it is not safe to rely upon the alleged recovery of pistol .30 bore (P-10) at the instance of the appellant and positive report of Forensic Science Libratory Exh.PO. In these circumstances, the alleged recovery of pistol .30 bore (P-10) from the possession of the appellant cannot be considered as corroborative piece of evidence against the appellant.

15. So far as the medical evidence is concerned, Doctor Zulfiqar Ahmad (P.W.2) on 18-6-2004 at 3-30 p.m. vide post mortem report Exh.PB and pictorial diagrams Exh. PB/1 to Exh. PB/2 conducted the post mortem examination on the dead body of Junaid Qadar (deceased) and found the following injuries on his person:--

(1) A circular wound of entry with abraded inverted margins, blackening present around the margins on front of abdomen, left upper corner 3 c.m below subcostal margin.

(2) A wound of exit 1-1/2 x 1 c.m with everted margins on back of chest at level of 8th dorsal vertebra, 2 c.m left of mid line. It was exit of injury No.1.

(3) An oblique wound of entry 2-1/2 x 2 c.m with blackening around the margins, left inguinal region. Wound was oval in shape.

(4) An oblique entry wound 1 x 3/4 c.m oval in shape front and outer side of left thigh in middle, blackening present on margins.

(5) A wound of exit 2-1/2 x 1-1/2 c.m upper most part of left thigh in middle, 1 c.m below injury No.3, internally contiguous with injury No.4. It was exit of injury No.4.

We have noted that the prosecution case as set forth in the F.I.R. Exh. PF/1 was in conflict with the above mentioned evidence because five fire arm injuries on the person of the deceased were attributed to Riaz appellant and his co-accused (since acquitted) namely Shahid, Jamil, Muhammad Akram and Zubair but according to the medical evidence furnished by Doctor Zufliqar Ahmad (P.W.2) there were only three entry wounds on the person of the deceased. It was alleged in the F.I.R. Exh.PF/1 that Riaz appellant made a fire shot with his pistol .30 bore (P-10) which landed on the right flank of Junaid Qadar (deceased), Shahid accused (since acquitted) made a fire shot with his pistol which landed on the left inguinal area of the deceased, Jamil accused (since acquitted) made a fire shot which landed on the right inguinal area of the deceased. Muhammad Akram accused (since acquitted) made a fire shot with his pistol .30 bore which landed on the left thigh of the deceased and Zubair accused (since acquitted) made a fire shot with his carbine which landed on the back of chest, between both the shoulders of the deceased. In the F.I.R. Jamil co-accused (since acquitted) was attributed a fire shot injury on the right inguinal area of the deceased but according to the medical evidence furnished by Doctor Zulfiqar Ahmad (P.W.2) there was no such injury on the person of the deceased. Similarly Zubair accused (since acquitted) was attributed the role of making a fire shot with .12 bore carbine which landed on the back of chest between both the shoulders of the deceased but according to the medical evidence the said injury i.e. injury No.2 was an exit wound. Riaz (appellant) was assigned the role of making a fire shot which landed on the right flank of the deceased but there was no entry wound on the right flank of the deceased, whereas, the entry wound was on the left flank of the deceased. As the prosecution story narrated in the F.I.R. was in conflict with the medical evidence, therefore, the prosecution witnesses namely Seraj Din complainant (P.W.9) and Liaquat Ali (P.W.8) while appearing before the learned trial Court assigned only three fire arm injuries on the person of the deceased, one each to three different accused persons

namely Riaz (appellant), Shahid accused (since acquitted) and Jamil accused (since acquitted). As mentioned earlier, there was no entry wound on the right flank of Junaid Qadar (deceased) which was assigned to Riaz (appellant) in the F.I.R. and the entry wound was on the left flank of the deceased, therefore, the above mentioned eye-witnesses of the prosecution while appearing before the learned trial Court have simply stated that the fire shot made by the appellant landed on the flank of the deceased, in order to bring their testimony in line with the medical evidence. If the statements of the above mentioned eye-witnesses made before the learned trial Court are taken to be correct even then the case of the appellant is not distinguishable from the case of acquitted co-accused namely Shahid, Muhammad Akram because injury attributed to Shahid accused (since acquitted) on the left inguinal area of the deceased and injury attributed to Muhammad Akram co-accused (since acquitted) on the left thigh of the deceased were available as injuries Nos.3 and 4 respectively on the person of the deceased according to the medical evidence furnished by Doctor Zulfiqar Ahmad (P.W.2), therefore, to the extent of medical evidence, the case of Riaz (appellant) is not distinguishable from the case of his acquitted co-accused Shahid and Muhammad Akram.

16. Learned Deputy Prosecutor-General assisted by learned counsel for the complainant has lastly argued that the prosecution case against the appellant is corroborated by the abscondence of the appellant. We have noted that although the warrant of arrest of the appellant and report thereof Exh. PJ has been brought on the record but no proclamation or report thereof qua the abscondence of the appellant was produced in evidence by the prosecution. We have also noted that abscondence, if any, of the appellant was not put to him in his statement recorded under section 342 of Cr.P.C. It is by now well-settled law that any incriminating evidence which is not put to an accused in his statement recorded under the above mentioned provision of law, cannot be used against him. We are, therefore, of the view that there is no corroboration of the prosecution case against the appellant through his alleged abscondence.

17. In the circumstances of the case, we could not find out any independent corroboration against the appellant and despite our best efforts, we are unable to distinguish the case of the appellant from the case of acquitted co-accused.

18. In view of the above mentioned circumstances, we are of the considered view that there is no independent corroboration of the prosecution case against the appellant. The prosecution evidence which has been disbelieved against acquitted co-accused namely Shahid, Jamil, Muhammad Akram, Zubair and Billa cannot be believed against the appellant without independent corroboration on material particulars of the case, which is very much lacking in this case.

19. In the light of above discussion, we accept the Criminal Appeal No.1055 of 2008 filed by Riaz appellant by extending him the benefit of doubt and acquit him from the charges. Resultantly the conviction and sentence of the Riaz appellant vide judgment dated 1-9-2008 passed by learned Additional Sessions Judge, Kasur is set aside. The appellant Riaz is in custody, he shall be released forthwith if not required in any other case. Murder Reference No. 217 of 2008 is, therefore, answered in the NEGATIVE and the sentence of death of Riaz (convict) is NOT CONFIRMED.

20. Now coming to Criminal Revision No.747 of 2008 filed by the complainant Seraj Din for enhancement of compensation amount, we have held while deciding the appeal filed by Riaz that the prosecution story is replete with number of doubts, therefore, the question of enhancement of compensation amount, does not arise, therefore, Criminal Revision No. 747 of 2008 is hereby dismissed.

HBT/R-8/L **Appeal accepted.**

2013 Y L R 2054

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

ISHTIAQ alias SHAITI and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.1484 of 2008, Criminal Appeal No.2-J and Murder Reference No.250 of 2009, decided on 16th March, 2013.

Penal Code (XLV of 1860)---

----Ss. 302(b), 393 & 34---Qatl-e-amd, attempt to commit robbery, common intention---Appreciation of evidence---Benefit of doubt---Neither accused were named in the F.I.R., nor their description was mentioned therein---Identification of accused persons in the light of motorcycle, driven by brother of the deceased who was at a considerable distance, was not probable---Accused were known to the complainant and his brother but said fact was not mentioned in the F.I.R.---Prosecution claimed that two prosecution witnesses, were present at the time of occurrence at a distance of 10/20 feet and they had also witnessed the occurrence, but their names or presence, was not mentioned in the F.I.R.---Said prosecution witnesses had neither been mentioned in the rough site plan, nor in the scaled site plan---Prosecution witness, who was brother of the deceased, was a chance witness; he could not justify his presence at the time of occurrence at the spot, at the odd hours of night---Presence of eye-witnesses at the time of occurrence was highly doubtful, in circumstances---Evidence of 'Waj-takkar', produced by prosecution witness was not worthy of reliance---Alleged extra-judicial confession which was jointly made by accused persons, carried no value in the eye of law---No detail about the role of accused persons, or reason of the commission of offence, had been mentioned in the evidence, qua alleged extra-judicial confession of accused persons---Evidence of extra-judicial confession, which was a weak type of evidence, was easily procurable---No independent corroboration of the alleged extra-judicial confession being

available same was not worthy of reliance---No Forensic Science Laboratory report regarding the pistols allegedly recovered from the possession of accused was on record---Forensic Science Laboratory report regarding pistol allegedly recovered from co-accused was about its being in working order---Absence of wedding report of any empty with the pistols, prosecution evidence about said recoveries, was of no avail to the prosecution---No motive whatsoever, was mentioned in the F.I.R.---Prosecution could not prove its case against accused persons beyond the shadow of doubt---Single circumstance creating doubt regarding the prosecution case, was sufficient to give benefit of doubt to accused whereas present case was replete with number of circumstances, which had created doubt about the prosecution case---Prosecution having failed to prove its case against accused persons beyond shadow of doubt, conviction and sentence awarded to them, were set aside by extending them benefit of doubt and were released, in circumstances.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Tahir Javed v. The State 2009 SCMR 166; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Muhammad Arshad Bhatti for Appellant (in Criminal Appeal No.1484 of 2008).

Mrs. Humera Qaiser for Appellant (in Criminal Appeal No.07-J of 2009).

Arshad Mehmood, Deputy Prosecutor-General for the State.

Ghulam Hussain Awan for the Complainant.

Date of hearing: 8th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Ishtiaq alias Shaiti and Irfan alias Sian appellants were tried in case F.I.R. No.359 of 2006, dated 6-8-2006, registered at Police Station Cantt., District Sialkot in respect of offences under sections 302/393/109/34, P.P.C. After conclusion of the trial, learned trial court vide its judgment dated 24-12-2008 has convicted and sentenced both the appellants as under:--

Ishtaiq alias Shaiti and Irfan alias Sian

Under section 302(b)/34, P.P.C. to 'Death' as Ta'zir to each appellant for committing Qatl-e-Amd of Muhammad Tanveer Ahmad deceased. They were also ordered to pay Rs.2,00,000 (rupees two hundred thousand only) each as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months each.

Under section 393 of P.P.C. to 7 years' R.I. each with a fine of Rs.50,000 each or in default of payment of fine to suffer simple imprisonment for one year each.

2. Feeling aggrieved, Ishtaiq alias Shaiti appellant has challenged his conviction and sentence through Criminal Appeal No. 1484 of 2008 and Irfan alias Sian appellant has challenged his conviction and sentence through Criminal Appeal No.7-J of 2009, whereas, the learned trial Court has transmitted Murder Reference No. 25 of 2009 for confirmation or otherwise of the 'Death' sentences of Ishtaiq alias Shaiti and Irfan alias Sian appellants. We propose to dispose of all these matters by this single judgment as these have arisen out of the same judgment dated 24-12-2008 passed by the learned Additional Sessions Judge, Sialkot.

3. Brief facts of the case as given by the complainant, namely, Imran Nazir (P.W.3) through written application Exh. PE/ 1 on the basis of which formal F.I.R. Exh. PF was chalked out are that on 6-8-2006 at about 10-30 p.m. (night) he (complainant) and his brother Muhammad Tanveer Ahmad (deceased) were returning home from their jobs. Muhammad Tanvir Ahmad (deceased) was riding on a motorcycle bearing Registration No.STK/1468, while he (complainant) was on his bicycle. On their way some unknown accused persons were standing near the "Khaal" of the government motor of 'Rakh Murakiwal' who tried to stop Muhammad Tanveer Ahmad (deceased) and when he did not stop, they fired at him. The complainant, when reached near his brother, he had already fallen on the ground and then he died at the spot. He (complainant) raised hue and cry but no one was nearby at that time and he could not do anything as he was alone.

4. The appellants were not named in the F.I.R. However, they along with Usman accused (since P.O.) were implicated on the basis of second written application of the complainant Exh. PC which was statedly moved on the same night, i.e. on 6-8-2006.

The complainant in his said application stated that on the same night he had earlier moved an application but he could not nominate the accused persons as he was perturbed due to the murder of his brother. He further stated that he identified Irfan alias Sian and Ishtaiq alias Shaiti (appellants), in the light of motorcycle who were armed with .30 bore pistols at the time of occurrence. He (complainant) further stated that the accused persons (appellants) tried to stop Muhammad Tanveer Ahmad (deceased) but he did not stop, whereupon, Ishtiaq alias Shaiti (appellant) stepped forward and intercepted the motorcycle of Muhammad Tanveer Ahmad (deceased) who identified the accused persons in the light of his motorcycle. Muhammad Tanveer Ahmad (deceased) asked them (appellants) that they had been committing dacoities, whereupon, Ishtiaq alias Shaiti (appellant) caught hold of Muhammad Tanveer Ahmad (deceased) and Irfan alias Sian (appellant) made a fire shot with his pistol on Muhammad Tanveer Ahmad (deceased) who fell down from his motorcycle. The accused persons (appellants), thereafter, fled away from the spot towards 'rore Khana'. The complainant further stated in his second application Exh. PC that his brother Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.), later on told him that they were going towards Sialkot City and they stopped on seeing the dacoits and had witnessed the occurrence. They further stated that they identified Irfan alias Sian and Ishtiaq alias Shaiti (appellants) in the light of their motorcycle when they were fleeing away towards 'rore Khana' and they also chased the accused persons but they succeeded to flee away due to the darkness of night. The complainant further stated in his second application Exh. PC that Muhammad Yagoob (P.W. not produced) told him that he was taking tea at 'Adda' (bus stop) of Murakiwal where he overheard Muhammad Usman accused (since P.O.) who was talking to someone on his mobile phone and was saying that he had checked the police barricade and there was nothing to worry about, therefore, they should complete their job without any fear. It was further alleged by the complainant that Usman accused (since P.O.) got Muhammad Tanveer Ahmad (deceased) murdered by the above mentioned accused persons for the purpose of dacoity. The complainant further stated in his second application Exh. PC that Muhammad Shabir (P.W.6) also told him that at about 11-00 p.m. he was going towards Gondal road to take a walk after offering a Jinaza prayer and when he reached near the ground of boys High School he noticed that two

persons were coming while running from the side of 'rore Khana' and when they crossed the road he identified them in the light of torch as Irfan alias Sian and Ishtiaq alias Shaiti (appellants) who were armed with .30 bore pistols.

5. The appellants were arrested in this case on 10-11-2006 by Muhammad Javed, S.-I. (P.W.12) and during the course of their physical remand on 24-11-2006, the appellant Ishtiaq Ahmad alias Shaiti led to the recovery of pistol (P-6), which was taken into possession through memo Exh. PR. Likewise, on the same day, appellant Irfan alias Sian also led to the recovery of pistol (P4), which was taken into possession vide recovery memo Exh. PQ. After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided, under the Code of Criminal Procedure, 1898 framed the charge against the appellants on 22-2-2007, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced twelve witnesses, during the trial. Imran Nazir (P.W.3) and Muhammad Sabir (P.W.4) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Abdul Jabar (P.W.2) who on 15-11-2006 medically examined Usman accused (since P.O.) and found no fresh injury on his person and Dr. Muhammad Farooq (P.W.10) who on 7-8-2006 conducted the post mortem examination on the deadbody of Muhammad Tanveer Ahmad (deceased) and found three firearm injuries on his person.

Abdul Qayyum (P.W.7) and Abdul Rasheed (P.W.8) are the witnesses of extra judicial confession of both the appellants and their co-accused Usman (since P.O.).

Muhammad Younis, Inspector (P.W.11) and Muhammad Javed, S.-I. (P.W.12) are the investigating officer of the case. Muhammad Shabir (P.W.6) is the witness of waj-takkar.

Mirza Tahir Tasleem draftsman (P.W.1), Anwar Farooq, Inspector (P.W.5), and Bashir Ahmad 848/C (P.W.9) are the formal witnesses. The prosecution has also produced documentary evidence in the shape of scaled site plan in duplicate of the place of occurrence (Exh.PA) and (Exh.PA/ 1), copy of Medico-legal Report of

Usman Ali accused (since P.O.) (Exh.PB), copy of second application of the complainant to the S.H.O. (Exh.PC), memo of possession of blood-stained earth and motorcycle bearing Registration No. 1468/STK (Exh.PD), copy of first application to the S.H.O. by the complainant (Exh.PE/1), F.I.R. (Exh.PF), memo of possession of last worn clothes of the deceased qameez (P-1), shalwar (P-2) along with one sealed box containing led bullet (Exh.PG), copy of post mortem report (Exh.PH), pictorial diagram (Exh.PH/ 1), copy of injury statement (Exh.PJ), copy of site plan without scale of the place of occurrence (Exh.PK), copy of application for post mortem examination of the deceased (Exh.PL), copy of death report (Exh.PM), copy of application for medical examination of Usman Ali accused (Since P.O.) (Exh.PN), memo of possession of pistol .30 bore along with three cartridges from Usman Ali accused (since P.O.) (Exh.PP), copy of site plan without scale of the place of recovery of pistol .30 bore (Exh.PP/1); memo of possession of pistol .30 bore (P-4) along with four cartridges from Irfan alias Sian (appellant) (Exh.PQ), copy of site plan without scale of the place of recovery of pistol P-4 (Exh.PQ/ 1), memo of possession of pistol .30 bore (P-6) along with two cartridges from Ishtiaq alias Shaiti (appellant) (Exh.PR), copy of site plan without scale of the place of recovery of pistol P-6 (Exh.PR/ 1), memo of possession of motorcycle bearing Registration No.5267/STG (Exh.PS), report of Chemical Examiner (Exh.PT), report of Serologist (Exh.PT/1), report of FSL (Exh.PU) and closed the prosecution evidence.

The statements of the appellants under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you" the appellants replied as under:--

Ishtiaq alias Shaiti

"In fact initially the case in hand was got registered by complainant P.W.3 against unknown assailants through his written application Exh.PE/1 but later on with his due deliberation and legal consultation having in league with local police upon the direction of I.O. has falsely implicated us on the mere suspicion and therefore in support his false assertions he and all the P.Ws. falsely deposed against us"

The appellant Irfan alias Sian adopted the same statement as made by Ishtiaq alias Shaiti appellant.

7. Neither the appellants made statement under section 340(2), Cr.P.C. nor they produced any evidence in their defence. The learned trial Court vide its judgment dated 24-12-2008 found the appellants guilty, convicted and sentenced them as mentioned and detailed above.

8. Learned counsel for the appellants, in support of the above mentioned appeals, contend that the appellants have falsely been implicated in this case; that the complainant did not name any person as accused in the F.I.R. and even has not given any description of the assailants but while appearing before the learned trial court he has admitted in his cross-examination that he knew the appellants previously; that the F.I.R. was lodged in this case on the basis of written application Exh. PE/1 submitted by the complainant in which he stated that he was alone at the time of occurrence and, thereafter, the complainant submitted another application Exh.PC wherein he stated that he was confused at the time of moving his first application Exh.PE/1 and in fact he identified the appellants in the light of motorcycle who were armed with pistols .30 bore and his brother Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.) also witnessed the occurrence, thus, the prosecution story is not reliable; that no reliance can be placed on the witnesses of extra judicial confession namely Abdul Qayyum (P.W.7) and Abdul Rasheed (P.W.8) because there was no occasion for the appellants to make extra-judicial confession before the said witnesses and moreover it is a joint confession, and no details of the confession were disclosed by the above mentioned witnesses; that prosecution evidence of Waj-Takkar is not reliable, as the torch with the help of which the witnesses identified the appellants has not been produced before the I.O.; that version of the complainant that he had made application Exh.PC immediately after his first application Exh.PE/1 is belied from the fact that in the relevant column of Inquest Report, the same facts stood mentioned which were contained in the F.I.R. and that in the site plan the names of the witnesses and the accused persons are not mentioned; that recoveries of pistols at the pointation of the appellants are not material because of the fact that the report of Forensic Science Laboratory is only to the effect that the said pistols are in working order; that so far

as the convictions of the appellants under section 393 of P.P.C. is concerned, there is no allegation against the appellants that they snatched anything from the deceased and even the motorcycle of the deceased was lying at the spot as per prosecution's own case; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt, thus, the above mentioned appeals be accepted and the appellants may be acquitted from the charges.

9. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes these appeals on the grounds that the occurrence in this case took place on 6-8-2006 at 10-30 p.m., whereas, the matter was promptly reported to the police on the same night, i.e. on 6-8-2006 at 10-45 p.m. and even the F.I.R. was also registered on the same night at 11-15 p.m. and there is no delay in reporting the matter to the police if all the material available on the record is taken into consideration; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspires confidence and despite lengthy cross-examination, the defence could not shake the evidence of the prosecution eye-witnesses; that there could not be any reason to falsely implicate the appellants in this case; that the ocular account is fully supported by the medical evidence, which fact is evident from the post mortem report of the deceased Exh. PH; that ocular account has further been corroborated by the evidence of witnesses of extra-judicial confession namely Abdul Qayyum (P.W.7) and Abdul Rashid (P.W.8); that prosecution case is further corroborated by recoveries of pistols (P-4 and P5) on the pointation of the appellants and positive reports of the Forensic Science Laboratory; that there is no mitigating circumstance in this case; that the sentences of death and imprisonments for seven years each were rightly awarded to the appellants and the same may be maintained. Hence, appeals of the appellants may be dismissed and murder reference be answered in the affirmative.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. The occurrence in this case took place on 6-8-2006 at night time (10-30 p.m.). The place of occurrence is situated at a road near 'Rakh Muraki Wal' situated at a distance of six kilometers from Police Station Cantt., District Sialkot. Imran Nazir

complainant (P.W.3) first moved a written application Exh. PE/1 on the basis of which formal F.I.R. Exh. PF was registered, wherein he stated that on the night of occurrence he (complainant) and his brother Muhammad Tanveer Ahmad (deceased) were going back to their house after their duty. Imran Nazir complainant (P.W.3) further stated that Muhammad Tanveer Ahmad (deceased) was on a motorcycle bearing Registration No.STK 1468, whereas, he (complainant) was on his bicycle and when they reached near the Khaal of government motor of Rakh Muraki Wal' there unknown accused persons were present who tried to stop Muhammad Tanveer Ahmad (deceased) but when he did not stop, they fired at him who fell down and when the complainant reached near his brother he found that he (Muhammad Tanveer Ahmad deceased) had already died. Imran Nazir complainant further stated in his first written application Exh.PE/1 that he was alone, therefore, he could not do anything at the time of occurrence. We have noted that neither the appellants were named in the F.I.R. nor any description of the accused persons were mentioned in it. Even the number of assailants was not mentioned in the F.I.R. The appellants along with Muhammad Usman accused (since P.O.) were implicated in this case in the second application Exh. PC of Imran Nazir complainant (P.W.4) which was statedly moved on the night of occurrence (6-8-2006). The detail of the prosecution story which was mentioned in the second application of Imran Nazir complainant Exh. PC has already been given in Paragraph No. 4 of this judgment and there is no need to repeat the same. However, the gist of the prosecution case as set forth in the second application Exh.PC of the complainant is that the complainant could not name the appellants in his first written application Exh.PE/1, because he was perturbed due to the murder of his brother. He further stated that Muhammad Tanveer Ahmad (deceased) was stopped by the appellants on the night of occurrence and as Muhammad Tanveer Ahmad (deceased) identified the appellants in the light of his motorcycle and he told the appellants that they were committing dacoities, therefore, Ishtiaq alias Shaiti caught hold of Muhammad Tanveer Ahmad (deceased) and Irfan alias Sian appellant made a fire shot with his pistol due to which Muhammad Tanveer Ahmad (deceased) fell down from his motorcycle and, thereafter, both the appellants fled away from the spot towards 'rore Khana'. The complainant further mentioned in second application Exh. PC that he was later on, informed by Muhammad Sabir

(P.W.4) and Muhammad Aslam (given up P.W.) that they had also witnessed the occurrence and they identified the 4 appellants in the light of their motorcycle. The said P.Ws., also chased the appellants but the appellants succeeded to flee away due to the darkness of night. Muhammad Yaqoob (P.W. not produced) also told Imran Nazir complainant (P.W.3) that he was taking tea at Adda (bus stop) of 'Rakh Muraki Wal' where he overheard Muhammad Usman accused (since P.O.) who was talking to someone on his mobile phone and was saying that he had already checked the police barricades and there was nothing to worry about, therefore, they should finish their job without any fear. Later on he (Muhammad Yaqoob P.W. not produced) came to know that the dacoits had committed the murder of some person and on this information he reached at the place of occurrence and found that Muhammad Tanveer Ahmad (deceased) was lying dead on the spot, thus, he informed the above mentioned facts to the complainant. It was further stated by Imran Nazir complainant (P.W.3) in his second application Exh. PC that Muhammad Shabir (P.W.6) also told him that at about 11-00 p.m. he was going towards Gondal road to take a walk after offering Jinaza prayer and when he reached near the ground of boys high school, he saw two unknown persons who were coming while running from the side of 'rore Khana' side and he identified them in the torch light, as Irfan alias Sian and Ishtiaq alias Shaiti (appellants). As mentioned earlier, the appellants were not named in the first written application of the complainant Exh.PE/1 and in the F.I.R. Exh.PF. Neither any description nor the number of assailants was mentioned in it. Imran Nazir complainant (P.W.3) did not claim in the F.I.R. Exh.PF that he identified the assailants at the time of occurrence in the light of motorcycle. Even otherwise he himself stated in the F.I.R. that on the night of occurrence Muhammad Tanveer Ahmad (deceased) proceeded on his Motorcycle No. STK 1468, whereas, he (complainant) proceeded on his bicycle, towards their house after performing their duties. The distance between Imran Nazir complainant (P.W.3) and Muhammad Tanveer Ahmad (deceased) has been mentioned as 50 feet in the site plan Exh.PA. As the complainant was on his bicycle, therefore, identification of the appellants in the light of motorcycle which was driven by his brother Muhammad Tanveer Ahmad (deceased) who was at a considerable distance was not probable. We have noted that Imran Nazir complainant (P.W.3) while appearing before the court has admitted

during his cross-examination that both the accused (appellants) were previously known to him, as well as, to his brother Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.). It is strange to note that in spite of the fact that the appellants were known to the complainant and his brother Muhammad Sabir (P.W.4), but even then this fact was not mentioned in the F.I.R. that the accused persons were known to the complainant party either by theire names or by their faces. It has been claimed by the prosecution that the occurrence was also witnessed by Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.). Imran Nazir complainant (P.W.3) has stated during his cross-examination that Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.) were also present at the time of occurrence at a distance of 10/20 feet but their names or their presence was not mentioned in the F.I.R. Imran Nazir complainant (P.W.3) further stated during his cross-examination that he pointed out the positions of P.Ws. Muhammad Sabir P.W.4 and Muhammad Aslam (given up P.W.) at the place of occurrence not only to the I.O. but also to the draftsman and both the P.Ws. were also present while the rough site plan of the place of occurrence Exh.PK was prepared by the I.O. and also at the time of preparation of scaled site plan Exh.PA by the draftsman. He further stated that the above mentioned P.Ws. have also stated and pointed out their positions at the place of occurrence to the I.O. and the draftsman but we have noted that the presence of the above mentioned eye-witnesses namely Muhammad Sabir (P.W.4) and Muhammad Aslam (given up P.W.) has neither been mentioned in the rough site plan Exh. PK nor in the scaled site plan Exh. PA which was prepared on 10-8-2006, i.e. four days after the occurrence. As mentioned earlier, according to the statement of Imran Nazir complainant (P.W.3) both the above mentioned eye-witnesses (Muhammad Sabir P.W.4 and Muhammad Aslam given up P.W.) stated that they were also present at the spot at the time of occurrence and they stated and pointed out their positions at the place of occurrence to the I.O. but we have noted that in the column of 'brief history of the case' of Inquest Report Exh.PM prepared by the I.O. Muhammad Younis, Inspector (P.W.11) neither the names or presence of said witnesses nor the names or descriptions of the appellants has been mentioned rather the same story about the unknown accused persons which was mentioned in the written application of Imran Nazir complainant Exh.PE/1 was mentioned in it. In order to cover the above mentioned lacunae in the

prosecution case, the complainant while appearing before the court has stated that his thumb-impressions were taken on white blank papers by the police but we have noted that he did not mention this fact in his second application Exh.PC that his thumb-impressions were taken by the police on blank papers. Moreover, he admitted that he did not move any application against the police. He did not file any private complaint with the allegation that in fact he did not move application Exh.PE/1. It is evident that the complainant made this excuse before the court that his thumb-impressions was taken by the police on blank papers in order to cover the weaknesses of the prosecution case. Muhammad Sabir (P.W.4) is brother of Muhammad Tanveer Ahmad (deceased). He is a chance witness. He could not justify his presence at the time of occurrence at the spot at the odd hours of night (10-30 p.m.). He simply stated that he at the relevant time was going along with his chachazad Muhammad Aslam (given up P.W.) to Sialkot City but he has given no reason whatsoever for going to Sialkot city at the odd hours of night. As mentioned earlier, his name is neither. mentioned in the F.I.R. nor in the rough site plan Exh.PK or the scaled site plan Exh.PA or in the Inquest Report Exh.PM. We are, therefore, of the view that presence of eye-witnesses at the time of occurrence is highly doubtful.

12. The prosecution has also produced the evidence of waj-takkar through Muhammad Shabir (P.W.6). He claimed that he identified both the appellants on the night of occurrence in the light of his torch when they were coming while running from the side of 'rore Khana', while armed with pistols and after some time he noticed that some people were gathered at the place of occurrence and when he reached at the spot, he saw that Muhammad Tanveer Ahmad (deceased) was lying dead. This witness is 'Tayazad' (paternal cousin) of the deceased. Although he claimed that he identified the appellants in the torch light but no torch has been taken into possession by the I.O., with the help of which, he identified the appellants. He has stated during his cross-examination that police reached after about five minutes of his arrival at the spot. Even the I.O. Muhammad Yonis, Inspector (P.W.11) has stated during his cross-examination that all the P.Ws. including Muhammad Shabir (P.W.6) were also present at the spot when he reached over there but we have noted that name of this witness is also neither given in the F.I.R. nor in the first written application of the

complainant Exh.PE/1 or in the rough site plan of the place of occurrence Exh.PK or in the scaled site plan of the place of occurrence Exh.PA or even in the Inquest Report Exh.PM.

In view of the above, evidence of waj-takkar produced by Muhammad Shabir (P.W.6) is not worthy of reliance.

13. The prosecution has also produced the evidence qua extra-judicial confession of the appellants and their co-accused Muhammad Usman (since P.O.) through the statements of Abdul Qayyum (P.W.7) and Abdul Rasheed (P.W.8). Abdul Qayyum (P.W.7) is closely related to Muhammad Tanveer Ahmad (deceased) as his younger brother Abdul Rauf is father-in-law of Muhammad Tanveer Ahmad (deceased) and this fact was brought on the record during his cross-examination. Similarly Abdul Rasheed (P.W.8) is also from the brotherhood of the deceased as admitted by him during his cross-examination. It is evident from the perusal of their statements that the alleged extra-judicial confession was jointly made by the appellants which carries no value in the eye of law. No detail about the role of the accused persons or reason of the commission of offence has been mentioned in the evidence qua alleged extra-judicial confession of the appellants and it was simply stated by the above mentioned witnesses that on 11-11-2006, all the three accused persons namely Irfan alias Sian and Ishtiaq alias Shaiti (appellants) and Muhammad Usman. accused (since P.O.) along with one Muhammad Riaz went to the house of Abdul Qayyum (P.W.7) and confessed their guilt. We have also noted that Abdul Qayyum (P.W.7) is a farmer by profession. He was not a man in authority. There was no reason with the appellants to go to the house of Abdul Qayyum (P.W.7) and confess their guilt before him and Abdul Rasheed (P.W.8). It is by now well-settled law that evidence of extra-judicial confession is a weak type of evidence which is easily procurable. The evidentiary value of the extra-judicial-confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as SAJID MUMTAZ AND OTHERS v. BASHARAT AND OTHERS (2006 SCMR 231), wherein, at page 238, the Apex Court of Pakistan has been pleased to lay emphasis as under:--

"17..... This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra-judicial-confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial-confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial-confession, the Court must inquire into all material points and surrounding circumstances to 'satisfy' itself fully that the confession cannot but be true'. As, an extra-judicial-confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial-confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court.

19. It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

20. Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra judicial confession is made is such that they are neither, the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial-confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial-confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial-confession. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as TAHIR TAVED V. THE STATE (2009 SCMR 166), wherein; at page 170, the learned August Supreme Court of Pakistan, has been pleased to observe as under:--

"It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683, and (4) Sarfraz Khan v. The State and others (1996 SCMR 188)".

In light of the above discussion, as any independent corroboration of the alleged extra judicial confession of the appellants is very much missing in this case, therefore, we are of the view that the prosecution. evidence qua the alleged extra-judicial-confession of the appellants in the instant case is also not worthy of reliance.

14. The prosecution has also produced the evidence qua recovery of pistol P-4 from Irfan alias Sian appellant and recovery of pistol P-6 from Ishtiaq Ahmad alias Shaiti appellant but we have noted that there is no Forensic Science Laboratory report regarding the pistols allegedly recovered from the possession of Ishtiaq Ahmad alias Shaiti appellant, whereas, the report of Forensic Science Laboratory report regarding pistol P-4 allegedly recovered on the pointation of Irfan alias Sian appellant is only about the working order of said pistol. We are, therefore, of the view that in the absence of wedding report of any empty with the pistols P-4 and P-6, the prosecution evidence qua above mentioned recoveries is of no avail to the prosecution.

15. No motive whatsoever was mentioned in the F.I.R. However, as per second application of the complainant Exh. PC, as well as, according to the statements of prosecution witnesses before the trial court, the motive behind the occurrence was that the appellants commit-ted the murder of Muhammad Tanveer Ahmad (deceased) for the purpose of dacoity. We have noted that no allegation of looting or even attempt to loot any article was either levelled in the first written application of Imran Nazir complainant Exh.PE/1 or in his second written applica-tion Exh.PC or in the statements of prose-cution witnesses before the trial court. Although two mobile phone sets were recovered during the physical remand of Irfan alias Sian appellant and one mobile phone set was recovered from Muhammad Usman accused (since P.O.) but none of the prosecution witnesses have claimed that the said mobile phone sets were looted during the occurrence or the same belonged to the deceased. Even the motorcycle of the deceased was not taken away by the accused persons and the same was recovered from the place of occurrence by the I.O. through recovery memo Exh. PD. According to the statement of Muhammad Shabbir (P.W.6) the

appellants were seen by him as they were coming while running from the side of 'rore khana'. It does not appeal to common sense that if the appellants had committed the murder of Muhammad Tanveer Ahmad (deceased) for the sake of dacoity then what compelled them to flee away from the spot by foot while running, instead of taking away the motorcycle of the deceased and fleeing from the spot on the said motorcycle.

16. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution case. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe 'as under:--

"5…….The concept of benefit of doubt of an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, the accused will be entitled to the benefit not as a matter, of grace and concession but as a matter of right."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

"13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of 'Tariq Pervez v. The State' (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants namely, Irfan alias Sian, and Ishtiaq alias Shaiti, beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept the above mentioned appeals (Criminal Appeals No. 1484 of 2008 and 07-J of 2009), and set aside the convictions and sentences awarded to the appellants, namely, Irfan alias Sian, and Ishtiaq alias Shaitin. The appellants Irfan alias Sian, and Ishtiaq alias Shaiti are in jail. They shall be released forthwith if not required to be detained in any other case.

18. Death sentences awarded to the appellants Irfan alias Sian, and Ishtiaq alias Shaiti are not CONFIRMED and Murder Reference is answered in the NEGATIVE.

19. However, before parting with this judgment, we may observe here that the observations made in this judgment shall not influence the learned trial Court during the trial of the absconding accused namely, Muhammad Usman (since P.O.) and his case shall be decided on its own merits on the basis of the evidence to be adduced during the trial of the said accused.

HBT/I-15/L **Appeal accepted.**

2013 Y L R 2090

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

NAZIR AHMAD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1098 and Murder Reference No.591 of 2006, heard on 7th February, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Case of two versions, i.e. one put forth by prosecution in the form of ocular account furnished by the complainant and prosecution witness, and the other through the statement of accused recorded under S.342, Cr.P.C.---Delay of almost ten hours in lodging the F.I.R. had not been plausibly explained--- Chances of deliberation and consultation, in twisting the story, on the part of the complainant, could not be ruled out, in circumstances---Postmortem in the case was also conducted with the delay of almost 14 hours from the death of deceased---Prosecution story, which did not appeal to a common sense, was not believable---Prosecution witness who was not resident of village where occurrence took place, was a chance witness---Prosecution case, was in conflict with medical evidence and prosecution witnesses had made dishonest improvements in their previous statements in order to bring their case in line with medical evidence---Conflict between ocular and medical evidence had created doubt about the prosecution case---Motive as alleged by the prosecution, was not proved---Alleged recovery of Repeater .12 bore gun, was of no avail to the prosecution case because there was no report of Forensic Science Laboratory on the record to connect accused with alleged offence---Two co-accused had been acquitted by the Trial Court and said acquittal had attained finality as no appeal against said acquittal had been filed, either by the State or by the complainant which had shown that complainant was satisfied with said acquittal---Prosecution having failed to prove its case against accused beyond the shadow of doubt, his conviction and sentence was set aside extending him benefit of doubt and he was released, in circumstances.

Akhtar Ali and others v. The State 2008 SCMR 6; Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473; Allah Bachaya and another v. The State PLD 2008 SC 349; Muhammad Shafique Ahmad v. The State PLD 1981 SC 472; Ali Sher and others v. The State 2008 SCMR 707 and Barkat Ali v. Muhammad Asif and others 2007 SCMR 1812 rel.

(b) Criminal trial---

----Appreciation of evidence---Prosecution was required to prove its case against accused persons beyond any shadow of doubt---Defence versioin was to be taken into consideration after evaluating the prosecution evidence to find out whether same inspired confidence or not.

Ashiq Hussain v. The State PLD 1994 SC 879 and Amin Ali v. The State 2011 SCMR 323 rel.

(c) Criminal Procedure Code (V of 1898)---

----S. 342---Statement of accused recorded under S.342, Cr.P.C.---Awarding punishment on the basis of said statement---If the prosecution evidence was disbelieved by the court, then the statement of accused was to be accepted or rejected as a whole---Acceptance of inculpatory part of the statement of accused and rejection of the exculpatory part of the same statement was not legally possible---When the court had discarded the prosecution evidence, accused could not be awarded punishment on the basis of his statement recorded under S.342, Cr.P.C. by accepting the inculpatory part of it.

Muhammad Asghar v. The State PLD 2008 SC 513; Sultan Khan v. Sher Khan and others PLD 1991 SC 520 and Ghulam Qadir v. Esab Khan 1991 SCMR 61 rel.

Seerat Hussain Naqvi for Appellant.

Maqbool Ahmad Qureshi for Appellant at State expense.

Chaudhry Ghulam Mustafa, Deputy Prosecutor-General for the State.

Rana Habib-ur-Rehman Khan for the Complainant.

Date of hearing: 7th February, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Nazir Ahmad appellant along with Sultan Mehmood and Khalid Mehmood co-accused were tried in case F.I.R. No.1494,

dated 12-12-2005, registered at Police Station Sadar, District Faisalabad in respect of offences under sections 302/34 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 20-6-2006 while acquitting co-accused namely Sultan Mehmood and Khalid Mehmood has convicted and sentenced the appellant as under:-

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Nazir Ahmad

Under section 302(b), P.P.C. to 'Death' for committing Qatl-e-Amd of Nazar Hussain deceased. He was also ordered to pay Rs.1,00,000 (rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr. P.C. or in default to suffer simple imprison-ment for six months.

2. Feeling aggrieved, the appellant has challenged his conviction and sentence through Criminal Appeal No. 1098 of 2006, whereas the learned trial Court has transmitted Murder Reference No. 591 of 2006 for confirmation or otherwise of the Death sentence of Nazir Ahmad appellant. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 26-6-2006 passed by the learned Additional Sessions Judge, Faisalabad.

3. Brief facts of the case as disclosed by Sarwar complainant (P.W.8) in application Exh. PD on the basis of which F.I.R. Exh.PD/1, was registered are that the complainant party sold a buffalo to Nazir Ahmad appellant in consideration of Rs.25,000 out of which Nazir Ahmad appellant paid an amount of Rs.24,700, whereas, an amount of Rs.300 was outstanding against him. The complainant party used to demand the said amount of Rs.300 but Nazir Ahmad appellant kept on lingering the matter. On 11-12-2005 at 11.00 p.m., the complainant Sarwar (P.W.8) along with his brothers Nazar Hussain (deceased), Shaukat Ali and Phuphizad Sarfraz Ahmad (P.W.9) was coming back to the village from their `Dera' and when they reached near the Haveli of Nazir Ahmad appellant, they decided to inquire about their outstanding amount of Rs.300 from Nazeer Ahmad appellant. All of them went inside the 'Haveli' of Nazir Ahmad appellant where Khalid Mehmood and Sultan co-accused (since acquitted) were also present along with Nazir Ahmad appellant in a room of said 'Haveli'. Nazar Hussain (deceased) demanded the outstanding amount from Nazir Ahmad appellant, on which, the appellant Nazir Ahmad, Khalid Mehmood and Sultan Mehmood co-accused (since acquitted) started hurling abuses. Nazar Hussain (deceased) forbade them from abusing, upon which Sultan Mehmood co-accused

(since acquitted) asked Nazir Ahmad appellant that he (Nazar Hussain deceased) was not going to stop making the demand of outstanding amount, so he be shot dead. Khalid Mehmood co-accused (since acquitted) handed over a .12 bore repeater gun to Nazir Ahmad appellant. The complainant party ran out of the room but they were chased by the accused. Khalid Mehmood co-accused (since acquitted) caught hold of the complainant Sarwar, whereas, Sultan Mehmood co-accused (since acquitted) took Shaukat into his clutches. Nazar Hussain when turned back the appellant Nazir Ahmad made a fire shot which hit above the knee of left thigh of Nazar Hussain who fell down. The appellant Nazir Ahmad and his co-accused fled away from the spot while extending threats of dire consequences. The injured Nazar Hussain was shifted to the hospital but he succumbed to the injury.

4. After completion of investigation, the challan was submitted before the trial Court. The appellant Nazir Ahmad and his co-accused namely Sultan Mehmood and Khalid Mehmood were charge-sheeted, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 12 P.Ws. The complainant Sarwar (P.W.8) and Sarfraz Ahmad (P.W.9) furnished ocular account of the occurrence. Medical evidence was given by Dr. Arshad Masood (P.W.3), whereas, Arshad Ali, S.-I. (P.W.12) was the Investigating Officer of this case who completed the investigation and submitted the challan. He on 17-1-2006, upon disclosure of Nazir Ahmad appellant, allegedly got recovered repeater .12 bore P-3 which was taken into possession vide memo Exh.PE. Hafiz Muhammad Nasir (P.W.7) was the recovery witness of repeater .12 bore.

5. After completion of prosecution evidence the statement of the appellant Nazir Ahmad and his co-accused under section 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you" the appellant replied as under:--

Nazir Ahmad

"The case is false one. Actually on the night the occurrence at about midnight I was sleeping in my Haveli along with my servants. On listening some noise, I woke up and found there three unknown persons with muffled faces in the courtyard of my Haveli. I haulted them and asked their antecedents but on non-reply. I made a fire just to frighten them. This fire hit on one of them, rest of two persons fled away from the

spot. I thereafter removed the cloth from the face of persons who received fire shot and fell down in my courtyard and I recognized him as Nazar my co-villager. Upon this, I informed about this incident to the heirs of Nazar Hussain who subsequently came there. Blood was oozing so, I along with heirs of Nazar Hussain shifted him to the Clinic of Dr. Ghulam Rasool where he was provided first aid and his wound was stitched. After that Nazar Hussain was shifted to hospital and during the way to the hospital he succumbed to the injury. Deadbody was brought back and it was kept in my Haveli and it was mutually settled that as it was an incident, so case would not be registered but later on complainant party got registered this case against me in spite of the fact that it was an accidental death. On the day of occurrence, I was having a gun with me just to guard my cattle and property as prior to 1/2 months of this occurrence, a dacoity occurrence was committed with me at my Haveli. I had no dispute whatsoever between me and Nazar Husain deceased in respect of sale of buffalo nor any amount was outstanding against me. Further there was no enmity between me and Nazar Hussain deceased, so there was no question with me to murder him".

6. Neither the appellant made statement under section 340(2), Cr.P.C. nor he produced any evidence in his defence. The learned trial Court vide its judgment dated 26-6-2006, while acquitting co-accused Sultan Mehmood and Khalid Mehmood, found Nazir Ahmad appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. The learned counsel for the appellant, in support of this appeal, has contended that the story of the prosecution is highly improbable because the reason for coming of the complainant party to the Haveli of the appellant in the late hours of night does not appeal to common sense as there is nothing available on the record that the complainant ever sold any buffalo to the appellant; that if the story given in the F.I.R. is accepted as correct to the effect that the complainant had already received an amount of Rs.24,700 out of the total sale consideration of Rs.25,000 then story of going to the Haveli of the complainant Nazir Ahmad at odd hours of night in order to make demand of outstanding amount of Rs.300 does not appeal to one's mind; that as per F.I.R. the occurrence took place on 11-12-2005 at 11-00 p.m. whereas the matter was reported to the police on the next day at 8-40 a.m. which shows that there is delay of about ten hours in lodging the F.I.R. which has not been plausibly explained; that Sarfraz Ahmad (P.W.9) is admittedly not resident of the village where this occurrence

took place, therefore, he is a chance witness and the reason given by him for his presence at the relevant time at the place of incident is highly improbable; that this witness has also admitted that the deceased was taken to the hospital at 12-15/12-30 night and, thereafter, his deadbody was brought back to the village which does not appeal to a prudent mind; that motive as alleged by the prosecution has also not been proved through any cogent piece of evidence; that the recovery of repeater .12 bore P-3 is of no avail to the prosecution because there is no report of Forensic Science Laboratory available on the record; that the co-accused namely Sultan Mehmood and Khalid Mehmood of the appellant, were acquitted on the same evidence and the evidence which has been disbelieved qua the acquitted co-accused of the appellant cannot be believed against the appellant; that the prosecution has failed to prove its case against the appellant beyond the shadow of any doubt and that the appellant is entitled to acquittal.

8. On the other hand, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant has vehemently opposed the contentions of the learned counsel for the appellant on the grounds that the appellant has specifically been nominated in the F.I.R. with the specific role of causing firearm injury on the person of Nazar Hussain which resulted into his death; that no allegation of misidentification arises as the appellant was residing in the same area where this occurrence took place; that the delay per se in lodging the F.I.R. is no ground to discard the evidence of the eye-witnesses and even otherwise there is no delay in reporting the matter to the police; that in order to prove its case, the natural eye-witnesses account has been furnished by the prosecution, which inspired confidence and despite cross-examination, the defence could not shake the testimony of the prosecution witnesses; that the ocular account is fully supported by the medical evidence as the deceased received injury on his person, which fact is evident from the post mortem examination report (Exh. PB); that the motive has also been proved by the prosecution; that even otherwise in such like cases substitution is a rare phenomenon; that the prosecution has proved its case against the appellant beyond the shadow of any doubt and the defence evidence is not reliable; that the appeal filed by the appellant against his conviction be dismissed and the Murder Reference may be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

10. It would not be out of place to mention here that it is a case of two versions, i.e. one put forth by the prosecution in the form of ocular account furnished by Sarwar complainant (P.W.7) and Sarfraz Ahmad (P.W.9), whereas, the other has been brought on the record through the statement of Nazir Ahmad (appellant), recorded under section 342 of Cr.P.C. and put to the prosecution witnesses before the learned trial Court.

11. It is settled now by the Hon'ble Supreme Court of Pakistan in a number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?. In this regard, we have been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as Ashiq Hussain v. The State (PLD 1994 SC 879), wherein, at page 883, the learned Apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342 of Cr.P.C., statement under section 340(2) and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of contraventions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there

is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

The above view of the learned apex Court of the country has been reiterated in the case reported as Amin Ali v. The State (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

12. The occurrence in this case as per F.I.R. Exh. PD/1 took place on 11-12-2005 at 11-00 p.m. (night) and the matter was reported to the police by the complainant Sarwar (P.W.8) on 12-12-2005 at 8-40 a.m. and formal F.I.R. was also chalked out on 12-12-2005 at 9-40 a.m. The Police Station Sadar, District Faisalabad was at a distance of 20 kilometers from the place of occurrence. The incident has taken place in the house of Nazir Ahmad appellant situated in Chak No. 233/R.B. village Hari Singh Wala, Police Station Sadar, District Faisalabad. The first question before us is to determine whether there was any delay in reporting the matter to the police or not. We have noted in this context that it is the case of the complainant that during the incident Nazar Hussain became injured, he and other prosecution witnesses took him to the hospital where he succumbed to the injury. In cross-examination Sarfraz Ahmad (P.W.9) has stated that they reached at the DHQ Hospital at 12-15/12-30 a.m. (night) where Nazar Hussain expired in the Emergency Ward at 1-00/1-15 a.m. (night) and thereafter he took his deadbody back to the village. He has also admitted that neither they nor the officials of DHQ hospital had informed the police about the occurrence. Surprisingly, the statement of the complainant was recorded by the police official namely Arshad Ali, S.-I. at the spot at 8-40 a.m. and there is nothing on the record why in between the above mentioned period, i.e. 11-12-2005 at 11-00 p.m. to 12-12-2005 at 8-40 a.m. the police was not informed about the incident. The complainant Sarwar (P.W.8) has stated during his cross-examination that the incident was reported to the police on the next morning on telephone. The relevant part of his statement is reproduced hereunder:--

"The occurrence was informed to the police at about 8-00 a.m. by me through telephone; again said any of our relative had informed the police on telephone."

The above mentioned part of statement of the complainant Sarwar (P.W.8) has established that the telephone facility was available at the place of occurrence but in spite of that the police was not informed by the complainant or anybody else for almost ten hours. The complainant and prosecution witness could not justify the above mentioned inordinate delay in reporting the matter to the police and this fact has created serious doubts about the presence of the complainant and other eyewitnesses at the place of occurrence. The application Exh. PD was also not lodged at Police Station rather the matter was reported to Arshad Ali, S.-I. (P.W.12) at the spot. The delay of almost ten hours in lodging the F.I.R. provides sufficient time for deliberation and consultation, especially when the prosecution has not given any plausible explanation for delay in lodging the F.I.R. The Hon'ble Supreme Court of Pakistan while discussing the delay in lodging the F.I.R. in the case of Akhtar Ali and others v. The State (2008 SCMR 6) at page 12 has observed as under:--

"It is also an admitted fact that the F.I.R. was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The F.I.R. was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of F.I.R. provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the F.I.R."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Nazeer Ahmad v. Gehne Khan and others (2011 SCMR 1473) wherein the delay of seven hours in lodging the F.I.R. was considered to be a ground which adversely reflected on the credibility of prosecution version.

The complaint Exh.PD was not lodged at Police Station rather it was chalked out at the spot and this fact has been admitted by Sarwar (P.W.8) and Sarfraz Ahmad (P.W.9). The complainant Sarwar (P.W.8) has stated that the complaint Exh.PD was chalked out at the spot. The Hon'ble Supreme Court of Pakistan has held in its number of judgments that when first information report was recorded at the spot, the same would be considered to be recorded after due deliberations. The Hon'ble Supreme Court of Pakistan in the case of Allah Bachaya and another v. The State (PLD 2008 SC 349) at page 354 discussed the said issue in the following terms:--

"In the instant case, the F.I.R. was not recorded at the police station. It has been held time and again that F.I.Rs. which are not recorded at the Police Stations suffer from the inherent doubt that those were recorded at the spot after due deliberations. "

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the lease of Akhtar Ali and others v. The State (2008 SCMR 6).

We are, therefore, of the view that the F.I.R. was recorded with a considerable delay, therefore, in these circumstances chances of deliberation and consultation, in twisting the story, on the part of the complainant, cannot be ruled out.

13. The post-mortem in this case was also conducted with the delay of almost 14 hours from the death of Nazar Hussain. The occurrence in this case took place on 11-12-2005 at 11-00 p.m. (night). The prosecution witnesses, i.e. Sarwar (PW8) and Sarfraz Ahmad (P.W.9) had stated that they had taken Nazar Hussain in an injured condition to DHQ hospital on the night of occurrence where he succumbed to the injury. The prosecution witnesses made an excuse that the deadbody of Nazar Hussain deceased was brought back to the village. Sarfraz Ahmad (P.W.9) during his cross-examination has given the time of death of Nazar Hussain deceased at about 1-00/1-15 a.m. (night) at the hospital but the post-mortem of the deceased Nazar Hussain was conducted on 12-12-2005 at 3-30 p.m. So it is evident from the perusal of the above mentioned evidence that post-mortem of the deceased Nazar Hussain was conducted with an inordinate delay of about 14 hours from his death and more than 16 hours from the alleged occurrence. It also cast doubts about the prosecution story.

14. The prosecution version as furnished by Sarwar (P.W.8) and Sarfraz Ahmad (P.W.9) was that the complainant party sold a buffalo to the appellant in consideration of Rs.25,000. The appellant Nazir Ahmad allegedly paid an amount of Rs.24,700 out of the above mentioned sale consideration and only an amount of Rs.300 was outstanding against the appellant and on the demand of the complainant the appellant was delaying the matter on one pretext or the other and on the fateful night at 11-00 p.m. the complainant Sarwar (P.W.8) along with Nazar Hussain deceased, Shaukat and Sarfraz Ahmad (P.W.9) while coming back to their village from their Dera went inside the Haveli of the appellant Nazir Ahmad and demanded Rs.300, whereupon an altercation took place and the appellant Nazir Ahmad made a fire shot at Nazar Hussain (deceased) which landed on his left thigh. This story does not appeal to a common sense because if the complainant has already received an amount of Rs.24,700 then for the remaining amount of Rs.300, there was no justification for going inside the house of the appellant at odd hours of winter night, i.e. 11.00 p.m.

The complainant Sarwar (P.W.8) has stated that on the day of occurrence he along with the deceased Nazar Hussain and other prosecution witnesses went to the fields to cut 'loosan' crop which was to be supplied in the market on the following day. He has also stated that he kept on cutting the 'loosan' crop till 10-30 p.m. (night). This story of the prosecution witnesses is also not believable because it is not probable that in the winter season, i.e. in the month of December the complainant, the deceased and prosecution witnesses would keep on cutting the 'loosan' crop in the darkness of night till 10-30 p.m. Sarfraz Ahmad (P.W.9) is resident of village Chak No. 213/RB whereas the occurrence took place in Chak No. 233/RB. He is not resident of the village where the occurrence took place. In order to justify his presence at the place of occurrence he has stated that he had come in order to see his maternal uncle, therefore, he is a chance witness.

15. The prosecution case as given in the application Exh.PD by the complainant Sarwar (P.W.8) is in conflict with the medical evidence given by Dr. Arshad Masood (P.W.3). It was case of the complainant in the application Exh. PD, on the basis of which F.I.R. Exh.PD/1 was registered, that the fire shot made by Nazir Ahmad appellant landed above the knee of left leg of Nazar Hussain deceased. The relevant portion of the application Exh. PD is reproduced hereunder:-

The part of the body, i.e. knee ( ) of a human being is located on the front side of the leg but according to the evidence of Dr. Arshad Masood (P.W.3) the wound on front of left thigh above knee of Nazar Hussain deceased was an exit wound whereas the entry wound was on the back part of the left thigh. The relevant part of the statement of Dr. Arshad Masood (P.W.3) regarding injuries on the deadbody of Nazar Hussain is reproduced here-under:--

(1) A firearm wound of entry 4 x 1 cm on the back and middle part of left thigh, 12 cm above left knee, the wound had three stitches.

(1-b) Five firearm wounds of exit in an area of 5 x 4 cm on front of left thigh, 7 cm above left knee, 2 cm outer to mid line. Each one wound measured 1 x 1 cm.

By this injury the posterior leg muscles were damaged, the posterior major blood vessels (poplitial) were damaged, the inner side of left femur was damaged and then anterior muscles and blood vessels were damaged. Large amount of blood was present in muscles.

(2) A surgical exploration wound 17 cm long on front of left thigh, in midline. It had 9 stitches. It was 5 cm above left knee.

Sarwar (P.W.8) while appearing in the Court did not mention the exact seat of injury and he simply stated that the fire shot made by Nazir Ahmad appellant landed on left leg of Nazar Hussain deceased but conflict between the ocular and medical evidence is evident from the perusal of application Exh. PD and the evidence of Dr. Arshad Masood (P.W.3). The statement of Sarfraz Ahmad (P.W.9) recorded before police Exh.DA was also in line with the statement made by the complainant Sarwar (P.W.8) in F.I.R. Exh.PD/1. The relevant part of his statement as recorded in Exh.DA is reproduced hereunder:--

The said witness has also made dishonest improvement in his statement while appearing before the court wherein he has stated that the fire shot made by Nazir Ahmad appellant landed on back side of left thigh of Nazar Hussain. The relevant part of his statement is reproduced hereunder:--

"Nazir accused whereupon made a fire shot on Nazar Hussain which seated on the back side of left thigh of Nazar Hussain"

It is evident from the perusal of above mentioned evidence that there was a conflict between ocular and medical evidence and the prosecution witnesses made dishonest improvements in their previous statements in order to bring their case in line with the medical evidence. The conflict between ocular and medical evidence has created doubt about the prosecution case. In the case of Muhammad Shafique Ahmad v. The State (PLD 1981 SC 472) the Hon'ble Supreme Court of Pakistan extended benefit of doubt to the accused where the eye-witnesses stated that assailants made fire shot at deceased when deceased was in the act of walking towards them but one of entrances wounds was found on back of the deceased. Similarly whenever conflict between ocular and medical evidence was found the Hon'ble Supreme Court of Pakistan acquitted the accused while extending him the benefit of doubt. Reference in this respect may be made to the case of Ali Sher and others v. The State (2008 SCMR 707) and Barkat Ali v. Muhammad Asif and others (2007 SCMR 1812).

16. Now coming to the motive part of the prosecution case, the complainant Sarwar (P.W.8) while appearing before the learned trial Court has stated regarding the motive in the following terms:--

"Prior to the instant occurrence, I sold out my buffalo to Nazir accused present in Court in consideration of Rs. 25,000; Nazir gave me Rs. 24,700 in two instalments and Rs. 300 had yet to be paid. I used to demand said Rs.300 but he kept on lingering on, on one pretext or other"

It is evident from perusal of the above mentioned evidence that it was the complainant Sarwar (P.W.8) who had allegedly sold the buffalo to the appellant Nazir Ahmad and he was the person who used to demand the remaining sale consideration of Rs.300 from the appellant. According to the prosecution case the dispute was allegedly between the appellant and the complainant Sarwar (P.W.8) but surprisingly the appellant did not inflict even a single scratch on the person of Sarwar (P.W.8), who was allegedly present at the time of occurrence. The complainant Sarwar (P.W.8) has admitted during his cross-examination that he did not produce any witness before the police about the transaction of buffalo. We, therefore, hold that the motive as alleged by the prosecution is not proved in this case.

17. Although it was alleged that a repeater .12 bore gun P-3 was recovered on the pointation of the appellant Nazir Ahmad on 17-1-2006 which was taken into possession vide recovery memo Exh.PE but the recovery of the said repeater .12 bore gun P-3 is of no avail to the prosecution case because there is no report of Forensic Science Laboratory on the record to connect the appellant with the alleged offence. Because of the above mentioned reasons the prosecution story is of doubtful nature.

18. We have also noted that, apart from the appellant, two co-accused of the appellant namely Sultan Mehmood and Khalid Mehmood were also arrayed by the complainant as accused person in the F.I.R. but those were acquitted by the learned trial Court and no appeal against their acquittal has been filed either by the State or by the complainant which shows that the complainant stands satisfied with the acquittal of the above mentioned two co-accused.

19. As far as the plea of the appellant is concerned, he has taken the following plea before the learned trial Court in his statement recorded under section 342 of Cr.P.C.:-
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"The case is false one. Actually on the night the occurrence at about midnight I was sleeping in my Haveli along with my servants. On listening some noise, I woke up and found there three unknown persons with muffled faces in the courtyard of my Haveli. I haulted them and asked their antecedents but on non reply. I made a fire just

to frighten them. This fire hit on one of them, rest of two persons fled away from the spot. I thereafter removed the cloth from the face of persons who received fire shot and fell down in my courtyard and I recognized him as Nazar my co-villager. Upon this, I informed about this incident to the heirs of Nazar Hussain who subsequently came there. Blood was oozing so, I along with heirs of Nazar Hussain shifted him to the Clinic of Dr. Ghulam Rasool where he was provided first aid and his wound was stitched. After that Nazar Hussain was shifted to hospital and during the way to the hospital he succumbed to the injury. Dead body was brought back and it was kept in my Haveli and it was mutually settled that as it was an incident, so case would not be registered but later on complainant party got registered this case against me in spite of the fact that it was an accidental death. On the day of occurrence, I was having a gun with me just to guard my cattle and property as prior to 1/2 months of this occurrence, a dacoity occurrence was committed with me at my Haveli. I had no dispute whatsoever between me and Nazar Hussain deceased in respect of sale of buffalo nor any amount was outstanding against me. Further there was no enmity between me and Nazar Hussain deceased, so there was no question with me to murder him."

We have already disbelieved the prosecution evidence, therefore, while scrutinizing the statement of the appellant this Court has to accept or reject the said statement in toto. According to the above mentioned statement, Nazar Hussain deceased entered the Haveli of the appellant at midnight and as such, he committed house breaking by night. The appellant Nazir Ahmad in such a situation had the right of private defence of property, which also extended to cause death as provided under section 103 of P.P.C. which is reproduced hereunder:--

Section. 103 When the right of private defence of property extends to causing death. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:--

First. Robbery;

Secondly. House breaking by night;

Thirdly. Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property.

Fourthly, Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Thus, if plea of the appellant is taken in toto then no offence is made out in this case. It is by now a well-settled law that if the prosecution evidence is disbelieved by the court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statement of an accused and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of Muhammad Asghar v. The State (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:-

"It is settled law by now that a statement of an accused recorded under section 342, Cr.P. C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of Shabbir Ahmad v. The State PLD 1995 SC 343 and The State v. Muhammad Hanif and 5 others 1992 SCMR 2047. It has been held by this Court in the judgment reported as Wagar Ahmad v. Shaukat Ali and others 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted in toto in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

Although the appellant Nazir Ahmad had admitted in his statement recorded under section 342 of Cr.P.C. that he made a fire shot which caused the death of Nazar Hussain but at the same time he has also stated that he was having a gun with him just to guard his cattle and property because 1/2 month prior to the occurrence a

dacoity was committed at his Haveli. He has further claimed that he had no dispute whatsoever with the deceased in respect of sale of buffalo nor any amount was outstanding against him. He has further stated that the death of Nazar Hussain was accidental and he was innocent in this case. In view of the above when we have discarded the prosecution evidence, the appellant cannot be awarded punishment on the basis of his statement recorded under section 342 of Cr.P.C. by accepting the inculpatory part of it wherein he has stated that Nazar Hussain deceased had received firearm injury on his hands and by rejecting the exculpatory part of the same statement wherein he has stated that he made a fire shot at Nazar Hussain deceased because he had committed the offence of house breaking by night. We are fortified in our above mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the case of Sultan Khan v. Sher Khan and others (PLD 1991 SC 520) and Ghulam Qadir v. Esab Khan (1991 SCMR 61).

20. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal (Criminal Appeal No. 1098 of 2006), and set aside the conviction and sentence awarded to the appellant namely, Nazir Ahmad. The appellant Nazir Ahmad is in jail. He shall be released forthwith if not required in any other case.

21. Murder Reference (Murder Reference No. 591 of 2006) is answered in the negative and death sentence of the appellant Nazir Ahmad is not confirmed.

HBT/N-14/L **Appeal accepted.**

2013 Y L R 2237

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ASLAM and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No. 832 and Murder Reference No.589 of 2007, heard on 5th March, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-e-amd--- Appreciation of evidence---Benefit of doubt--- Recovery of weapon, not proved---Effect---Two accused were convicted by Trial Court and sentenced to death, while three were acquitted---Validity---Both the accused (convicted) were armed with pistols at the time of occurrence but no pistol was recovered from their possession, instead a gun .12 bore was alleged to be recovered on the pointation of one of them---No empty was recovered from place of occurrence whereas two metallic foreign bodies which were recovered from body of deceased were never sent to Forensic Science Laboratory for their comparison with gun---In absence of wedding report of empty or metallic bodies recovered from body of deceased, alleged recovery of gun on the pointation of accused was of no avail to prosecution---Prosecution evidence regarding motive had already been disbelieved against co-accused (since acquitted), therefore, the same could not be believed against the accused---Prosecution failed to prove its case against accused persons beyond shadow of doubt---High Court extended benefit of doubt to both the accused and they were acquitted of the charge---Appeal was allowed in circumstances.

The State v. Abdul Khaliq and others PLD 2011 SC 554; Riaz Ahmad v. The State 2010 SCMR 846 and Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327 ref.

(b) Criminal trial---

----Medical evidence--- Scope--- Medical evidence may confirm ocular evidence with regard to seat of injury, nature of injury, kind of weapon used in occurrence but it cannot connect accused with commission of occurrence.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Mursal Kazmi alias Wamar Shah v. The State 2009 SCMR 1410 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 ref.

(c) Criminal trial---

----Benefit of doubt---Scope---If there is single circumstance which creates doubt regarding prosecution case, the same is sufficient to give benefit of doubt to accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Azam Nazir Tarar and Zafar Hussain Chaudhry for Appellants.

Malik Muhammad Awan for the Complainant.

Ch. Arshad Mahmood, Deputy Prosecutor-General for the State.

Date of hearing: 5th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No. 832 of 2007 filed by Asghar Ali and Muhammad Aslam appellants and Murder Reference No. 589 of 2007, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Asghar Ali and Muhammad Aslam, appellants, as both these matters have arisen out of the same judgment dated 29-5-2007, rendered by the learned Additional Sessions Judge, Bhalwal, in case F.I.R. No. 53 dated 14-2-2006, registered at Police Station Midh Ranjha, District Sargodha in respect of offences under sections 302/34/ 109, P.P.C., whereby, Asghar Ali and Muhammad Aslam, appellants were convicted under section, 302(b)/34, of P.P.C. for committing the murder of Ahmad Sher (deceased) and sentenced to death with a direction to pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand only) each to the legal heirs of deceased as envisaged under section 544-A, Cr.P.C. and in default, thereof, to suffer imprisonment for six months' S.I. each. Through the same judgment the learned trial court has, however, acquitted Mst. Rifat Bibi, Bukhsha and Allah Dad, co-accused while giving benefit of doubt to them.

2. Brief facts of the case as given by the complainant Massan (P.W.6) in F.I.R. (Exh.PF) are that he (complainant) was resident of Village Gullapur. He was residing

at his dera and was a cultivator by profession. On 13-2-2006 at 'Sham Waila' (evening) Muhammad Aslam (appellant) from his mobile number 0333-2078827 rang Ahmed Sher (deceased) and asked him to come to him at night as he was having an important piece of work with him. Ahmed Sher (deceased) told the complainant about the call of Muhammad Aslam (appellant) and also told that he was going to meet him. At that time, Moula Bakhsh brother of the complainant was also present there. On suspicion the complainant sent his son Dawood (P.W.7) with Ahmed Sher (deceased). At about 12-30 a.m. (night) he (Dawood P.W.7) came back to the Dera and told the complainant that he (Dawood P.W.7) alongwith Ahmed Sher (deceased) and Noor Muhammad (given up P.W.) were going to the house of Muhammad Aslam (appellant) to meet him but when they reached near the house of Mohri Haral, electric bulbs were illuminating and it was a moonlit night. They saw that Muhammad Aslam, Asghar (appellants) armed with pistols and one unknown person armed with gun were sitting beside the wall of Mohri. Mst. Rifat (acquitted accused) was standing under a Mango tree and on seeing Ahmad Sher (deceased), she raised a 'lalkara' that Ahmed Sher (deceased) had come on which Muhammad Aslam (appellant) made a fire shot with his pistol which hit Ahmed Sher (deceased) on the backside of his head. Unknown person made fire which hit Ahmed Sher (deceased) on the left side of his head above the ear. Asghar (appellant) made a fire shot which hit the deceased on his back whereupon Ahmed Sher (deceased) fell down. All the accused also made straight firing upon Dawood etc., but they saved themselves by taking shelter behind the wall and then they came to the Dera of complainant. On hearing about the occurrence the complainant and Moula Bakhsh, etc. went to the place of occurrence but Ahmed Sher (deceased) had already succumbed to the injuries. It was further alleged that one day before the occurrence Ameer Machhi (P.W.10) and Ahmed (given up P.W.) were passing in front of the 'Baithak' of Muhammad Aslam (appellant) when they heard Bukhsha and Allah Dad (acquitted accused) instigating Asghar and Aslam (appellants) that Ahmed Sher (deceased) had developed illicit relations with Mst. Ambreen so they should murder Ahmed Sher (deceased) by taking him into confidence and they would handle the circumstances. All the accused committed the murder of Ahmed Sher (deceased) after consultation with each other.

3. The appellants were arrested on 1-4-2006 by Khuda Bukhsh, S.-I. (P.W.11). According to the prosecution case, during the course of investigation, on 2-4-2006, the appellant, Asghar Ali, led to the recovery of gun .12 bore (P-4), which was taken

into possession along with two live cartridges (P.5/1-2) through memo Exh. PI. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellants and their co-accused on 3-2-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Massan (P.W.6), Dawood (P.W.7) and Noor Muhammad (P.W.8) are the witnesses of ocular account while Muhammad Ameer appeared as P.W.10 in order to prove the abetment.

The medical evidence was furnished by Dr. Waqar Hameed (P.W.1), whereas, Khuda Bakhsh, S.-I. (P.W.11) is the Investigating Officer of this case.

Noor Muhammad, HC/1137 (P.W.2), Anar Khan C/1412 (P.W.3), Muhammad Riaz C/1788 (P.W.4), Muhammad Mumtaz, Revenue Patwari (P.W.5) and Allah Bakhsh (P.W.9) are the formal witnesses.

The prosecution also produced documentary evidence in the shape of copy of postmortem report of the deceased Exh.PA, pictorial diagram Exh.PA/1, injury statement Exh.PB, inquest report of the deceased Exh.PC, memo of possession of last worn clothes of the deceased, Exh.PD, scaled site plan of the place of occurrence in duplicate Exh.PE and Exh.PE/1, F.I.R. Exh.PF, memo of possession of blood-stained earth Ex. PG, rough site plan of place of occurrence Ex. PH, memo of possession of gun 12 bore P.4 along with two cartridges P5/1-2, Exh. PI, rough site plan of place of recovery of gun P.4, Exh.PI/1.

5. The statements of appellants under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to question "Have you anything else to say? " Asghar Ali appellant replied as under:-

Asghar Ali appellant

"According to the complainant party one unknown person fired at the deceased. The deceased party has many enemies and the occurrence took place during night time and there was no source of light. "

In response to the above-said question, Muhammad Aslam appellant stated as under:-
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Muhammad Aslam appellant

"I am innocent and it was also concluded by all the Police Officers that I did not fire at the deceased".

The appellants did not opt to make statements on oath, under section 340(2), Cr.P.C., however, Asghar appellant produced evidence in his defence in the shape of certified copy of F.I.R. No. 236 of 2001, Police Station Midh Ranjha, Exh. DD, Certified copy of F.I.R. No. 452 dated 25-9-1998 under section 393/427, P.P.C. of Police Station Midh Ranjha Exh. DE, its index Exh.DE/l, certified copy of F.I.R. No. 396 dated 22-10-2006 under sections 324/452, P.P.C., Police Station Midh Ranjha, Exh. DF, certified copy of F.I.R. No. 406 dated 2-11-2000 under sections 324/148/149, P.P.C. Police Station Midh Ranjha Exh. DG, certified copy of F.I.R. No. 202 dated 29-10-1985 under section 307/34 P.P.C. Police Station Midh Ranjha Exh.DH, certified copy of F.I.R. dated 15-6-1989 under sections 307/148/ 149, P.P.C. Police Station Midh Ranjha Exh. DI, certified copy of F.I.R. No. 122 dated 19-6-1989 under section 14-20/65 A.O. Police Station Midh Ranjha Exh. DJ, certified copy of F.I.R. No. 24 dated 4-3-1994 Police Station Midh Ranjha Exh. DK, certified copy of F.I.R. No. 344 dated 1997 under sections 302/148/149, P.P.C. Police Station Midh Ranjha Exh.DM, certified copy of F.I.R. No. 76 dated 2-5-1983 under sections 379/411, P.P.C. Police Station Midh Ranjha Exh. DN, certified copy of F.I.R. No. 222/1985 under section 10/18 Hadood Zina Ordinance Police Station Midh Ranjha Exh. DO, certified copy of F.I.R. No. 53 dated 5-3-2007 Police Station Midh Ranjha Exh.DP and F.I.R. No.305 dated 22-7-1987 under section 302/34, P.P.C. Police Station Midh Ranjha Exh.DQ, showing the criminal history of the complainant and his family members and closed his defence evidence.

6. The learned trial Court vide judgment dated 29-5-2007, while acquitting co-accused Bakhsha, Allah Dad and Mst. Riffat, found Muhammad Aslam and Asghar Ali appellants guilty and convicted and sentenced them as mentioned and detailed above.

7. Learned counsel for the appellants, in support of this appeal, contends that the occurrence took place during the odd hours of night and prosecution has failed to establish any source of light; that F.I.R. in this case also has not been lodged with

promptitude as claimed by the complainant himself; that postmortem examination on the dead body of the deceased was conducted at 2-00 p.m. on the following day whereas Masson complainant (P.W.6) claimed that he lodged the report at Police Station after two hours of the occurrence, i.e. 2-00 a.m. on 14-2-2006; that opening paragraph of F.I.R. (Exh.PF) reads as follows:--

and as the complainant has himself stated in the F.I.R. that on yesterday evening he was told by the deceased about the phone call of the appellant, therefore, all these facts clearly suggest that the occurrence being unseen at a place quite far away from the place of abode of the complainant was not reported by the complainant immediately as the same was unseen and it was in fact reported to the police on the following morning; that on account of suspicion the prosecution story was concocted and, thereafter, the F.I.R. was lodged; that the complainant is not the eye-witness of the occurrence; that both the eye-witnesses, i.e. Dawood (P.W.7) and Noor Muhammad (P.W.8) produced by the prosecution have failed to establish their presence at the place of occurrence; that they can safely be termed as chance witnesses; that the prosecution did not bring any circumstance on record to justify their presence/ accompanying the deceased at the time of occurrence; that the eye-witnesses frankly conceded that their place of abode was situated at a distance of 1-1/2 k.m. from the place of occurrence; that Khuda Bukhsh, S.-I. (P.W.11), Investigating Officer has stated that in fact the witnesses resided at a place situated at about three miles from the place of occurrence; that taking into consideration the facts brought on the record by the prosecution in entirety, it can safely be inferred that the story of joining the deceased by the two witnesses and their presence at the scene of occurrence has later on been concocted by the complainant in order to make out a case against the accused persons; that the prosecution has failed to connect the appellant with the offence by any corroborative piece of evidence; that as far as recovery of weapon of offence from Asghar Ali appellant is concerned, the same does not connect him with the commission of offence as there is no report of Forensic Science Laboratory, besides the same was recovered in violation of section 103, Cr.P.C.; that as far as Aslam appellant is concerned, nothing incriminating was recovered on his pointation; that the motive always has been considered as a double edged weapon and even otherwise after discarding and disbelieving the story of conspiracy by the learned trial Court, the evidence of motive also falls on the ground which cannot be used against the appellants; that it is well-settled proposition of law

that medical evidence is always considered supportive evidence but that too in the present case does not support the prosecution version as according to the Medical Officer, Dr.Waqar Hameed (P.W.1), who conducted the postmortem examination on the dead body of Ahmad Sher deceased, possibility of one gun shot was not ruled out as all the injuries received by the deceased were on his backside; that it was established on record that a single gun shot was fired from a long distance which clearly belies the prosecution stance that three fire shots were made at the deceased; that the complainant's version of receiving phone call by the deceased whereby he was called at the place of occurrence also has not been established on the record as no call data was produced by the prosecution during the course of investigation or even at the stage of trial; that in the absence of any call data or recovery of phone set either from the appellant, or from the deadbody of the deceased, the prosecution story does not inspire confidence; that even otherwise, it is against the normal human conduct that a father would send his two young sons at the odd hours of night at a place where he suspects danger to them; that the prosecution miserably failed to prove its case against the appellants beyond the shadow of doubt, thus, this appeal be accepted and the appellants may be acquitted from the charge.

8. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that the F.I.R. in this case was lodged with promptitude in which specific allegation of making firing by the appellants has been levelled; that the police station is at a distance of 19 k.ms. from the place of occurrence and the F.I.R. has been registered within two hours which clearly suggests the presence of the eye-witnesses at the spot; that place of occurrence is a thoroughfare and the eye-witnesses are residents of the locality and they have no enmity to falsely involve the appellants in this case; that the recovery of gun at the instance of Asghar appellant further strengthens the prosecution case; that motive was not seriously contested by the opposite party and as such the same is to be deemed to have been proved; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellants and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. The occurrence in this case took place on 14-2-2006 at 12-5 p.m. The detail of the prosecution case has already been given in para No. 2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that on the evening of 13-2-2006 Ahmad Sher (deceased) received a phone call on his mobile phone from the mobile of phone number 0333-2078827, of Muhammad Aslam appellant, who asked Ahmad Sher (deceased) to come to him as he had some important piece of work with him. Ahmad Sher deceased told the complainant that he was going to Muhammad Aslam appellant. Masson complainant (P.W.6) felt suspicion about the abovementioned telephone call, therefore, he asked his other son namely Dawood (P.W.7) to accompany Ahmad Sher (deceased) to the house of Muhammad Aslam (appellant). At about 12-30 a.m. (night), Dawood (P.W.7) came back and told the complainant that he and his paternal cousin Noor Muhammad (P.W.8) and Ahmad Sher (deceased) were going towards the house of Muhammad Aslam appellant and when they reached near the house of Mohri Haral, the electric bulb were illuminated and there was also the light of moon and they saw that Muhammad Aslam and Asghar Ali appellants, both armed with pistols along with an unknown companion who was armed with gun were standing on the corner of the house of Mohri Harral near a wall, while Mst. Riffat accused (since acquitted) was standing under a mango tree. Dawood (P.W.7) further told that on seeing them Mst. Riffat accused (since acquitted) shouted that Ahmad Sher (deceased) had come, whereupon, Muhammad Aslam appellant made a fire shot at Ahmad Sher (deceased) which landed on the backside of his head. Second fire shot was made by unknown accused person which landed on the left side of the head, above the left ear of Ahmad Sher (deceased). Then Asghar Ali appellant made a fire shot which landed on the back of the chest of Ahmad Sher (deceased). Muhammad Aslam and Asghar Ali appellants, thereafter, also made ineffective firing at Dawood (P.W.7) and Noor Muhammad (P.W.8), who took shelter behind the wall of the house of one Zafar. It was further alleged that the appellants alongwith their co-accused committed the murder of Ahmad Sher (deceased) as they suspected that Ahmad Sher (deceased) had illicit relations with Mst. Ambreen, daughter of Bakhsha accused (since acquitted).

11. It is evident from the perusal of record that occurrence took place near the house of the appellants and this fact was brought on the record during the cross-examination of Massan complainant (P.W.6) who has stated that the occurrence took place at a distance of some karams from the house of the accused persons, where Mst. Ambreen

used to live. The eye-witnesses namely, Dawood (P.W.7) and Noor Muhammad (P.W.8) are not residents of the locality where this occurrence took place. Dawood (P.W.7) has admitted during his cross-examination that his 'Dera' was at a distance of 1:05 k.ms. from the place of occurrence. Similarly, the Investigating Officer namely, Khuda Bakhsh, S.-I. (P.W.11) has also stated during his cross-examination that the Dera' of complainant was at a distance of 3 miles from the place of occurrence. The presence of abovementioned eye-witnesses at a far off place from their residence at the odd hours of night i.e. 12-5 a.m. is highly improbable. The reason given by the complainant for presence of the abovementioned eye-witnesses at the spot at the relevant time does not appeal to common sense. He (complainant Masson P.W.6) has stated in the F.I.R. that on the evening of 13-2-2006 Ahmad Sher (deceased) received a phone call on his mobile phone from the mobile phone No. 0333-2078827 of Muhammad Aslam appellant, who asked Ahmad Sher (deceased) to come on that night as he had some important piece of work with him. The complainant has himself stated that he felt suspicion about the said call, therefore, it is not understandable that even then why did he allow his son Ahmad Sher (deceased) to go to the house of accused persons at the odd hours of night (11-00 p.m.). He (complainant) did not bother to ask his deceased son as to what was that important piece of work which Muhammad Aslam appellant had to discuss with him at the odd hours of night. No mobile phone data of any mobile number of Muhammad Aslam appellant or of Ahmad Sher deceased has been brought on the record to substantiate the abovementioned prosecution story. We have also noted that no mobile phone set was found in the clothes or near the dead body of Ahmad Sher (deceased) at the time of inspection of the deadbody, by the I.O. as per inquest report Exh.PC. Similarly no mobile phone set was recovered from Muhammad Aslam appellant during his physical remand. The prosecution case as set forth in the F.I.R., as well as, in the statement of Massan complainant (P.W.6) was that Ahmad Sher deceased received telephone call on the evening of 13-2-2006. As it was the month of February, therefore, it means that Ahmad Sher deceased received telephone call from Muhammad Aslam appellant at around 5-00 p.m., whereas, the occurrence took place at 12-5 a.m. (night). It does not appeal to a prudent mind that the accused persons kept on waiting for almost 7 hours for Ahmad Sher (deceased) while standing armed in the village Abadi.

12. According to the statements of prosecution eye-witnesses, Muhammad Aslam and Asghar Ali (appellants) both were armed with pistols at the time of occurrence whereas an unknown accused person was armed with .12 bore gun. Both the appellants were assigned the role of making one fire shot each on the person of Ahmad Sher deceased with the help of their respective pistols, but no pistol was recovered from the possession of both the appellants during their physical remand rather a .12 bore gun P-4 was allegedly recovered from Asghar Ali appellant. As mentioned earlier, it was never the case of prosecution that Asghar Ali appellant was armed with .12 bore gun at the time of occurrence. We have noted that Dr. Waqar Hameed (P.W.1) recovered two metallic bodies, one from the scalp cavity and other from the left lung of Ahmad Sher deceased at the time of his postmortem examination. He has further stated in his examination-in-chief (page 17 of the paper book) that after the postmortem examination he handed over the postmortem report along with a sealed bottle which contained two metallic foreign bodies to Muhammad Riaz Constable. We have noted that the said metallic foreign bodies were neither sent to the Forensic Science Laboratory for their comparison with the gun P-4 nor the same were exhibited in evidence by the prosecution. On perusal of the police record we have further noted that the said metallic bodies were pellets which were taken into possession by the I.O. vide Memo dated 14-2-2006 but the said memo was not exhibited in evidence, apparently for the reason that the recoveries of pellets from the head and lung of Ahmad Sher deceased did not support the prosecution case because as per prosecution case the appellants did not make fire shots with .12 bore gun rather they made fire shot with pistols on the head and on the backside of the chest of Ahmad Sher deceased. As recovery memo of pellets dated 14-2-2006 has not been exhibited in evidence, therefore, we cannot place any reliance on the said memo, however, it was established through the evidence of Dr. Waqar Hameed (P.W.1) that two metallic bodies were handed over to Muhammad Riaz Constable (P.W.4) and as the prosecution did not produce the said metallic bodies in evidence, therefore, an adverse inference within the meaning of Article 129(g) of Qanun-e-Shahadat, 1984 is to be drawn against the prosecution that had the above mentioned two metallic bodies been produced in evidence then the said evidence would have been unfavourable to the prosecution. We may refer here the case of The State v. Abdul Khaliq and others (PLD 2011 SC 554). Relevant part of the said judgment at Pages No. 588 and 589 is reproduced hereunder for ready reference:--

"As regards the other submission of Ch. Aitzaz Ahsan, learned senior Advocate Supreme Court, that the statement under section 164, Cr.P.C. of those witnesses who have not been examined by the prosecution is not a substantive piece of evidence and cannot be used for any purpose in the case, including to support the plea of the defence, suffice it to say that admittedly in this case the Magistrate before whom the statements were recorded has appeared as a witness and has produced in evidence, inter alia, the statements of Ghulam Fareed, father of the complainant and Ghulam Nabi which were duly exhibited. In an answer to a question by the defence counsel, the Magistrate in unequivocal terms stated that Ghulam Nabi appeared before him and stated that on the day of occurrence he was not in the village, rather had gone to meet the relatives at Dera Ismail Khan and returned after two days when he learnt about the incident; these statements have been produced by the prosecution in the evidence itself as aforestated, the contents are also proved by the Magistrate, who recorded it; though ordinarily the opposite side can use such a document to its advantage which has been produced by the other side and the party producing it in evidence is bound by the fall out thereof, however, when the statement is under section 164, Cr.P.C. of a person, who is not produced, it cannot be considered as a substantive piece of evidence, but at the same time the criminal court in order to administer safe justice, in consonance and in letter and spirit of section 162(2), Cr.P.C. may use such statement not as evidence, but to aid it, the said statement thus can be looked into, for drawing the presumption under Article 129(g) of QSO, 1984, because Ghualm Nabi was the star witness of the prosecution, who throughout remained in touch with the alleged events, he was allegedly present at the time of panchayat, the occurrence and even went along with the prosecutrix to register the case in which he is specifically named, as a witness, but was given up by the prosecution not being won over, but as unnecessary. The court, thus, for the propose (s) of drawing a presumption for withholding the best evidence under the said Article could examine the statement and make up its mind in this context. Had Ghulam Nabi been examined by the prosecution, the defence would have validly confronted him with his statement to create a vital dent in the prosecution version, and it seems that in order to avoid the repercussions and consequences thereof, he was given up. Adverse presumption of withholding the father of the prosecutrix could likewise be validly drawn ."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Riaz Ahmad v. The State (2010 SCMR 846) and Khalid alias Khalidi and 2 others v. The State (2012 SCMR 327).

13. There is no corroboration of the prosecution case by the recoveries of weapons of offence from the appellants. As discussed earlier, according to the prosecution case, both the appellants were armed with pistols at the time of occurrence, but no pistol was recovered from the possession of Muhammad Aslam appellant. Similarly, no pistol was recovered from the possession of Asghar Ali appellant and instead a gun .12 bore (P.4) has been alleged to be recovered on the pointation of said appellant. No empty was recovered from the place of occurrence whereas two metallic foreign bodies which were recovered from the body of Ahmad Sher deceased were never sent to the Forensic Science Laboratory for their comparison with gun (P.4). In absence of any wedding report of empty or metallic bodies recovered from the body of Ahmad Sher deceased, the alleged recovery of gun (P.4) on the pointation of Asghar Ali appellant is of no avail to the prosecution.

14. According to the prosecution case the motive behind the occurrence was that the accused suspected that Ahmad Sher deceased had illicit relations with Mst. Ambreen daughter of Bakhsha accused (since acquitted). The prosecution evidence qua motive mainly revolved around the statement of Muhammad Ameer (P.W.10) who has stated that on 12-2-2006, he alongwith Ahmad (given up P.W.), overheard the appellants and their co-accused namely, Allah Dad and Bakhsha (both since acquitted) who were sitting in the baithak' of Muhammad Aslam appellant where Bakhsha accused (since acquitted) asked the appellants to kill Ahmad Sher (deceased) as he had developed illicit relations with Mst. Ambreen (daughter of Bakhsh). The evidence of abovementioned witness of abetment/motive namely Muhammad Ameer (P.W.10) has already been disbelieved by the learned trial Court and resultantly Bakhsha and Allah Dad who were accused of abetment and motive have been acquitted by the learned trial Court. No appeal against their acquittal has either been filed by the State or by the complainant as admitted by the Deputy Prosecutor-General for the State, as well as, by the learned counsel for the complainant and as such the decision qua acquittal of abovementioned co-accused has attained finality. We are, therefore, of the view, that the prosecution evidence

qua motives which has already been disbelieved against co-accused (since acquitted) specially Baksha, cannot be believed against the appellants.

15. Insofar as the medical evidence furnished by the prosecution is concerned it is by now well-settled law that medical evidence may confirm the ocular evidence with regard to the seat of injury, nature of the injury, kind of weapon used in the occurrence but it would not connect the accused with the commission of the occurrence. Reference in this respect may be made to the case of Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others (PLD 2009 Supreme Court 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of Mursal Kazmi ailas Wamar Shah v. The State (2009 SCMR 1410) and Altaf Hussain v. Fakhar Hussain and another (2008 SCMR 1103).

16. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellants beyond the shadow of doubt. It is by now well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In Tariq Pervez v. The State (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

'5…….The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of Muhammad Akram v. The State (2009 SCMR 230), at page 236, observed as under:--

'13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be

entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, we accept the Criminal Appeal No.832 of 2007 filed by Muhammad Aslam and Asghar Ali appellants, set aside their conviction and sentence and acquit them of the charge by extending them the benefit of doubt. They are in custody, they be released forthwith if not required in any other case.

Murder Reference No. 589 of 2007 is answered in the NEGATIVE and the sentence of death of Muhammad Aslam and Asghar Ali (convicts) is NOT CONFIRMED.

MH/M-162/L **Appeal allowed.**

2013 Y L R 2411

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

NAZAKAT ALI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1468 and Murder Reference No.328 of 2008, heard on 9th April, 2013.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---Role attributed to accused was similar to that of co-accused who was acquitted extending him benefit of doubt---No evidence having been produced by the prosecution to prove the alleged motive, it could not be held that motive in the case had been proved, merely on the basis of imagination of prosecution witnesses---Trial Court had rightly disbelieved the motive part of the prosecution---Crime empties and rifle recovered on the pointation of accused, were kept together at the Police Station, and empties secured from the spot, were deposited in the office of Forensic Science Laboratory after 19 days of the alleged recovery of rifle---As crime weapon (rifle) and empties were kept together at the Police Station, chances of preparation of false empties for their comparison with said rifle, could not be ruled out in the case; it was, in circumstances, not safe to rely upon the alleged recovery of rifle and positive report of Forensic Science Laboratory---Prosecution evidence qua the alleged recovery of rifle and positive report of Forensic Science Laboratory, could not be considered as corroborative piece of evidence against accused---Case of accused was not distinguishable from the case of acquitted co-accused on the basis of medical evidence---Prosecution evidence, which had already been disbelieved against acquitted co-accused, could not be believed against accused without independent corroboration which was very much lacking in the case---Conviction and sentence awarded to accused by the Trial Court, were set aside extending him benefit of doubt---Accused was acquitted from the charge and was released, in circumstances.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188 ref.

Iftikhar Hussain and another v. State 2004 SCMR 1185; Akhtar Ali and others v. The State 2008 SCMR 6 and Mir Muhammad alias Miro v. The State 2009 SCMR 1188 rel.

(b) Criminal trial---

----Evidence--- Disbelieving ocular testimony of eye-witnesses against particular set of accused and believing same evidence against another set of accused---Validity--- If the ocular testimony of eye-witnesses was disbelieved against a particular set of accused persons, then it could not be believed against another set of accused persons without independent corroboration on the material particulars of the case.

Rana Muhammad Anwar for Appellant.

Arshad Mehmood, Deputy Prosecutor-General for the State.

Rai Zameer-ul-Hassan Kharal for the Complainant.

Date of hearing: 9th April, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1468 of 2008, filed by the appellant, Nazakat Ali, against his conviction and sentence, and Murder Reference No. 328 of 2008 (The State vs. Nazakat Ali), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Nazakat Ali convict, as both these matters have arisen out of the same judgment dated 20-12-2008, passed by the learned Additional Sessions Judge, Hafizabad. Nazakat Ali appellant was tried in case F.I.R. No. 53, dated 11-3-2007, registered at Police Station, Kassoke, District Hafizabad, in respect of offences under section, 302/34 of P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 20-12-2008, has convicted and sentenced the appellant as under:-

Nazakat Ali son of Muhammad Yar.

Under section 302 (b) of PPC to death for committing the murder of Basharat (deceased). He was directed to pay compensation of Rs.1,00,000 under section 544-A of Cr.P.C. to the legal heirs of the deceased Basharat Ali and in default whereof, to further undergo 6 months' S.I.

However, he was acquitted of the charge of murder of Mst. Robina Bibi.

The learned trial Court vide the same judgment, however, acquitted co-accused Asif Ali from the charge of murder of Basharat Ali (deceased) as well as of Mst. Robina Bibi (deceased).

2. Brief facts of the case as given by the complainant Liaqat Ali (P.W.10) in his complaint (Exh.PG), on the basis of which formal F.I.R. (Exh.PG/1) was chalked out, are that he (complainant) was resident of Mauza Burianwala and cultivator by profession. His (complainant's) son Basharat Ali (deceased) and Naveed (P.W.11) both after obtaining poultry farm on 'thaika' (lease) at the Dera of one Tahir Bhatti, kept chicks there. On Sunday, 11-3-2007 at about 7-00 p.m, Naveed (P.W.11), Zahid (given up P.W.) and he (complainant P.W.10) were providing feed to the chicks, while his (complainant's) son Basharat Ali (deceased) was sitting on a cot. Suddenly Nazakat Ali (appellant) armed with rifle and Asif Ali accused (since acquitted) armed with rifle came inside after forcibly opening the door. Electric bulb was illuminating. Nazakat (appellant) raised lalkara that Basharat be ready to die and made fire with his rifle which hit Basharat Ali (deceased) on the back side of the left shoulder and crossed through the right armpit. Second fire was made by Asif accused (since acquitted) with his rifle which hit his (complainant's) son (Basharat Ali) on the inner side of right thigh near knee who succumbed to the injuries at the spot and the accused persons ran away from the spot after raising 'lalkaras'. It was further alleged in the F.I.R. that after some time of their return, Nazakat accused etc. committed the murder of their sister Mst. Robina with firing. Occurrence was witnessed by him (complainant), Zahid (given up P.W.) and Naveed Abbas (P.W.11).

The motive as alleged by the complainant was that Nazakat accused etc. had suspicion that some time earlier, Basharat Ali deceased had developed illicit relations with their sister (Mst. Robina) but the said suspicion was false, however due to this grudge the accused persons committed the crime.

3. The appellant Nazakat Ali was arrested in this case on 28-3-2007 by Rafi Ullah, S.-I (P.W.13) and as per prosecution case, during investigation rifle .44 bore (P-3) and 10 live bullets (P-4/1-10) were recovered on pointation of the appellant on 31-3-2007 which were taken into possession vide recovery memo (Exh.PB). After completion of investigation, the challan was prepared and submitted before the Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed charge against the appellant Nazakat Ali

and Asif Ali (since acquitted) under sections 302/34, P.P.C., on 18-8-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced thirteen witnesses, during the trial. The complainant Liaqat Ali (P.W.10) and Naveed (P.W.11) have furnished the ocular account of the prosecution. Akhtar (P.W.2) was the recovery witness of rifle (P-3) and 10 live cartridges (P-4/1-10) which were taken into possession on the pointation of the appellant vide memo (Exh.PB).

The medical evidence was furnished by Dr. Cap. Khalid Farooq, (P.W.3) amd Dr. Samina Kausar (P.W.8).

Faiz Ahmad, A.S.-I. (P.W.12) and Rafi Ullah, S.-I., (P.W.13) were the Investigating Officers of the case. Allah Dittah 2 /HC (P.W.1), Inayat Hussain 61/C (P.W.4), Mushtaq Ahmad A.S.-I. (P.W.5), Masood Ahmad Bhatti, Draftsman (P.W.6), Muhammad Nawaz 258/HC (P.W.7) and Muhammad Aslam 409/C (P.W.9), were the formal witnesses.

The prosecution has also produced documentary evidence in the shape of memo of possession of last worn clothes of Basharat Ali deceased i.e. qameez (P-1) and shalwar (P-2) (Exh.PA), memo of possession of rifle 44 bore (P-3) and 10 live cartridges (P-4/ 1-10) (Exh.PB), site plan without scale of the place of recovery of gun .44 bore (Exh.PB/ 1), copy of post mortem examination report of the deceased Basharat Ali (Exh.PC), pictorial diagram (Exh.PC/1), application for post mortem examination of Basharat Ali deceased (Exh.PD), injury statement of the deceased Basharat Ali (Exh.PE), death report of Basharat Ali deceased (Exh.PF), complaint (Exh.PG), formal F.I.R. (Exh.PG/1), memo of possession of last worn clothes of Mst. Robina Bibi (deceased) i.e. qameez (P-5), shalwar (P-6) and bunyan (P-7) (Exh.PH), scaled site plan of the place of murder of Basharat Ali deceased in duplicate (Exh.PH-A) 86 (Exh.PH-A/1), scaled site plan of the place of murder of Mst. Robina Bibi deceased in duplicate (Exh.PJ) and (Exh.PJ/1), copy of post mortem examination report of Mst. Robina Bibi deceased (Exh.PK), pictorial diagram (Exh.PK/1), injury statement of Mst. Robina Bibi deceased (Exh.PL), death report of Mst. Robina Bibi deceased (Exh.PM), memo of possession of blood-stained earth from the place of murder of Basharat Ali deceased and copy of application for post mortem examination of Mst. Robina Bibi deceased both exhibited as (Exh.PN), memo of possession of 10 empty cartridges (P-8/1-10) from the place of murder of Basharat Ali deceased (Exh.PP), memo of possession of cot (P-9) (Exh.PQ), memo of

possession of blood-stained earth from the place of murder of Mst. Robina Bibi deceased (Exh.PR), site plan without scale of the place of murder of Basharat Ali deceased (Exh.PS), site plan without scale of the place of murder of Mst. Robina Bibi deceased (Exh.PT), report of Chemical Examiner regarding blood-stained earth of Basharat Ali deceased (Exh.PU), report of Chemical Examiner regarding blood-stained earth of Mst. Robina Bibi deceased (Exh.PV), report of Chemical Examiner regarding three high vaginal swabs (Exh.P.W.), report of Serologist regarding blood-stained earth of Basharat Ali deceased (Exh.PX), report of Serologist regarding blood-stained earth of Mst. Robina Bibi deceased (Exh.PY), report of Forensic Science Laboratory (Exh.PZ) and closed the prosecution evidence.

5. The statements of appellant under section 342 of Cr.P.C., was recorded. The appellant refuted all the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you", the appellant, replied as under:--

"All the P.Ws. are not residents of village Boeke. They are chance witnesses. The deceased and the P.Ws. had no business in the village Boeke. They belong to one party of village Borianwala. In fact it was blind murder. P.Ws. were not present at the time and place of occurrence. The complainant party involved me and my brother in this case on suspicion because my sister was also murdered on the same night by unknown assailants. I am innocent."

Appellant Nazakat Ali did not opt to make statement under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him, nor, he produced any evidence in his defence.

6. The learned trial Court vide its judgment dated 20-12-2008, found the appellant Nazakat Ali, guilty and convicted and sentenced him as mentioned and detailed above.

7. The learned counsel for the appellant, in support of this appeal, contends that the appellant along with his real brother Asif Ali co-accused (since acquitted) have falsely been implicated in this case; that there was allegation against Asif Ali co-accused that he fired with rifle which hit the deceased inside his right thigh near knee but said Asif Ali co-accused has been acquitted by the learned trial Court and no appeal against his acquittal has been filed either by the State or by the complainant therefore, the evidence which has been disbelieved to the extent of co-accused Asif

Ali (since acquitted) can only be believed against the appellant if the same is corroborated by any independent evidence which is very much lacking in this case; that the motive is alleged not only against the appellant but also against co-accused Asif Ali (since acquitted) but it has not been believed by the learned trial Court. Insofar as the recovery of rifle (P-3) and positive report of Forensic Science Laboratory (Exh.PZ) is concerned, learned counsel contends that the incident took place on 11-3-2007 and empties (P-8/1-10) were allegedly taken into possession by the I.O. on 11-3-2007, appellant was arrested on 28-3-2007 and he allegedly got recovered rifle (P-3) on 31-3-2007 but empties were sent to the office of Forensic Science Laboratory on 19-4-2007 i.e. after 20 days of the alleged recovery of rifle (P-3) therefore, no reliance can be placed on the recovery of rifle (P-3) and positive report of Forensic Science Laboratory (Exh.PZ); that apart from alleged recovery of rifle (P-3), there was no evidence on the record which could corroborate the case of the prosecution against the appellant; that the appellant has been acquitted by the learned trial Court from the charge of murder of his sister Mst. Robina Bibi; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, learned Deputy Prosecutor-General for the State, assisted by learned counsel for the complainant, opposes this appeal on the grounds that it was a promptly lodged F.I.R. as incident in this case took place on 11-3-2007 at 7-00 p.m. and the matter was reported to the police at 7-45 p.m. and F.I.R. was also registered on the same night at 8-5 p.m.; that case of the appellant is distinguishable from his co-accused as fatal fire shot is attributed to the appellant because Dr. Khalid Farooq (P.W.3) in his post mortem report (Exh.PC) has mentioned that injury, which was caused by the appellant, was fatal; that ocular account gets full support from the medical evidence to the extent of the appellant which is further corroborated by the recovery of rifle (P-3) and positive report of Forensic Science Laboratory (Exh.PZ). As far as motive is concerned, learned counsel for the complainant contends that it was wrongly disbelieved by the learned trial Court and the prosecution has fully proved the motive in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative. In support of his arguments, he has placed reliance on the case of 'Mir Muhammad alias Miro v. The State' (2009 SCMR 1188).

9. We have heard the arguments of learned counsel for the appellant, learned Deputy Prosecutor-General for the State assisted by learned counsel for the complainant, and have also gone through the evidence available on the record, with their able assistance.

10. The detail of the prosecution case as set forth in the F.I.R. (Exh.PG/ 1) has already been given in paragraph No.2 of this judgment however, gist of the prosecution case is that on 11-3-2007 at about 7-00 p.m., when complainant along with Naveed (P.W.11) was providing feed to the chicks in the poultry farm of his son Basharat Ali (deceased) and Basharat Ali (deceased) was sitting on a cot. Suddenly Nazakat Ali (appellant) armed with rifle and Asif Ali (since acquitted) armed with rifle came there and Nazakat Ali (appellant) after raising lalkara, made a fire shot with his rifle which hit Basharat Ali (deceased) on the back side of his left shoulder and crossed through his right armpit. Second fire shot made by Asif Ali accused (since acquitted) hit Basharat Ali (deceased) at the inner side of his right thigh near knee who succumbed to the injuries at the spot. Motive, as set forth by the complainant, was that Nazakat Ali etc. accused persons had suspicion that some time earlier to the occurrence, the deceased had developed illicit relations with their sister Mst. Robina.

11. The occurrence in this case took place on 11-3-2007, at 7-00 p.m., at the poultry farm of Basharat Ali deceased at village Boeki situated within the area of Police Station Kassoki, District Hafizabad. The matter was reported to the police on the same evening by real father of the deceased, namely, Liaqat Ali complainant (P.W.10), on the same evening at 7-45 p.m. through his complainant (Exh.PG). The formal F.I.R. (Ex.PG/ 1) was also chalked out on the same night i.e. 11-3-2007, at 8-5 p.m. The prosecution, in order to prove its ocular account has produced Liaqat Ali (P.W.10) and Naveed (P.W.11). In the F.I.R. (Exh.PG/1), the complainant Liaqat Ali (P.W.10) assigned the role of inflicting one fire arm injury each on the person of Bashar Ali (deceased) to both Nazakat Ali (appellant) and Asif Ali accused (since acquitted). The complainant Liaqat Ali (P.W.10) even while appearing before the learned trial Court attributed one injury each on the person of deceased to Nazakat Ali appellant and Asif Ali accused (since acquitted). Relevant part of the evidence of Liaqat Ali (P.W.10) is reproduced hereunder:--

"Asif accused shouted lalkara at the deceased that he should be ready to face his death. Nazakat accused fired his rifle at the shoulder of deceased in the back. Asif accused then fired his rifle at the deceased which hit his right thigh inwardly."

The other eye-witness, namely, Naveed (P.W.11) while appearing before the learned trial Court made the following statement:--

"Nazakat and Asif accused present in the court suddenly appeared at that time when the farm had been lit by the electric bulbs. Each of them was armed with a rifle .44 bore. Nazakat accused shouted a lalkara at Basharat deceased that he should be prepared to face his death. Nazakat also fired at the deceased which hit his left shoulder in the back. Asif too followed and fired his rifle at deceased and the shot hit his right thigh to its inside. Basharat died at the spot."

It is evident from the perusal of the evidence of above mentioned prosecution eye-witnesses that role attributed to Nazakat Ali (appellant) was similar to that of acquitted co-accused, namely, Asif Ali.

12. Charge under section 302/34 of P.P.C. with identical allegation was framed against the appellant Nazakat Ali and above mentioned acquitted co-accused Asif Ali. Said Asif Ali was also assigned the role of causing fire arm injury on the person of Basharat Ali deceased but he has been acquitted by the learned trial Court while extending him the benefit of doubt and no appeal has been filed against his acquittal either by the State or by the complainant as conceded by the learned Deputy Prosecutor General as well as by the learned counsel for the complainant and, as such, the acquittal of Asif Ali, co-accused, has attained finality therefore, question for determination before this Court is that whether the prosecution evidence, which has been disbelieved qua the acquitted co-accused, namely, Asif Ali, can be believed against the appellant. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as Iftikhar Hussain and another v. State (2004 SCMR 1185), wherein the Hon'ble Supreme Court at page 562 held as under:--

"17. .....It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the Superior

Courts. Reference may be made readily to the case of 'Sarfraz alias Sappi and 2 others v. The State' (2000 SCMR 1758), relevant para therefrom is reproduced below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them, facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of 'Syed Ali Bepari v. Nibaran Mollah and others' (PLD 1962 SC 502), `Tawaib Khan and another v. The State' (PLD 1970 SC 13), Bakka v. The State' (1977 SCMR 150), 'Khairu and another v. The State' (1981 SCMR 1136), Ziaullah v. The State' (1993 SCMR 155), `Ghulam Sikandar v. Mumaraz Khan' (PLD 1985 SC 11), 'Shahid Raza and another v. The State' (1992 SCMR 1647), Irshad Ahmad and others v. The State and others' (PLD 1996 SC 138) and `Ahmad Khan v. The State' (1990 SCMR 803)."

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as 'Akhtar Ali and others v. The State' (2008 SCMR 6). It is evident from the perusal of above mentioned judgments passed by the Hon'ble Apex Court of the country that if the ocular testimony of eye-witnesses was disbelieved against a particular set of accused persons, then it cannot be believed against another set of accused persons without independent corroboration on the material particulars of the case. So following the guidelines given by the Hon'ble Supreme Court of Pakistan in the aforementioned-judgments, we will discuss the case of the appellant.

13. The learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant has referred the motive part of the prosecution story with the assertion that motive has fully been established against the appellant. We have gone through the contents of F.I.R. (Exh.PG/1) and the statements of the prosecution witnesses namely Liaqat Ali (P.W.10) and Naveed (P.W.11) made before the learned trial Court. Motive as alleged by the said prosecution witnesses was that the accused persons suspected that Basharat Ali (deceased) had developed illicit relations with their sister Mst. Robina and due to this grudge, they committed the murder of Basharat Ali (deceased). Complainant Liaqat Ali (P.W.10) while appearing before the learned trial Court made the following statement qua motive:--

"The accused suspected that deceased and Robina had an illicit affair but this was an unfounded suspicion. The accused had killed my son without any justification."

Similarly statement of Naveed (P.W.11) regarding motive is as under:--

"The accused had a suspicion against deceased and said Robina that they were having an illicit affair. This suspicion was however without any basis. The deceased had been killed by them out of this suspicion."

No evidence was produced by the prosecution to prove the alleged motive and it cannot be held that the motive in this case has been proved, merely on the basis of the imagination of P.Ws. The learned trial Court rightly disbelieved the motive part of the prosecution case. Moreover, perusal of above mentioned evidence clearly shows that motive was attributed not only to the appellant but also to Asif Ali, acquitted co-accused who is the real brother of Nazakat Ali appellant and also real brother of above mentioned Mst. Robina. So, even to the extent of motive, case of the appellant is not distinguishable from the case of acquitted co-accused Asif Ali.

14. The learned Deputy Prosecutor-General for the State and the learned counsel for the complainant have referred to the recovery of rifle (P-3) at the instance of Nazakat Ali appellant and positive report of Forensic Science Laboratory (Exh.PZ) to establish that there is independent corroboration of the prosecution case, against the appellant, through afore-mentioned pieces of evidence. We have noted that ten crime empties (P-8/1-10) were secured from the spot vide memo (Ex.PP) on 11-3-2007 by Faiz Ahmad, A.S.-I. (P.W.12). Appellant was arrested in this case on 28-3-2007 by Rafi Ullah, S.-I. (P.W.13) and rifle (P-3) was allegedly recovered on the pointation of appellant on 31-3-2007. Empties were deposited in the office of

Forensic Science Laboratory on 19-4-2007. It is evident from the perusal of the record that crime empties (P-8/1-10) and rifle (P-3) were kept together at the police station and empties were deposited in the office of Forensic Science Laboratory after 19 days of the alleged recovery of rifle (P-3). As crime empties (P-8/1-10) and rifle (P-3) were kept together at the police station therefore, chances of preparation of fake empties from rifle (P-3) for their comparison with said rifle cannot be ruled out in this case. It is, therefore, not safe to rely upon the alleged recovery of rifle (P-3) and positive report of Forensic Science Laboratory (Exh.PZ). In these circumstances, prosecution evidence qua the alleged recovery of rifle (P-3) and positive report of Forensic Science Laboratory (Exh.PZ) cannot be considered as corroborative piece of evidence against the appellant.

15. As far as medical evidence is concerned, Dr. Cap. Khalid Farooq, (P.W.13), on 12-3-2007, at 12-00 p.m. (noon), conducted the post-mortem examination on the dead body of Basharat Ali (deceased), vide post-mortem report (Exh.PC), pictorial diagram (Exh.PC/1), and found the following injuries on his person:--

Injuries.

(1) Fire arm wound of entry 3/4 cm x 3/4 cm on the back of left shoulder, edges inverted, and margins were tattooed with exit wound 3 cm x 1 1/2 cm on the outerside of right side of chest 4 cm below exilla, edges were everted.

(2) Fire arm entry wound 3/4 cm x 3/4 cm on the inner side of right thigh just above knee. Edges were inverted and margins were tattooed, with exit wound 2 cm x 1-1/2 cm on the outer part of right thigh in its lower Ordinance Edges were everted. Adjacent to the entry wound, laceration was present.

It is clear from the above mentioned medical evidence furnished by Dr. Cap. Khalid Farooq (P.W.3) that there were two entry wounds on the person of Basharat Ali deceased. Injury No.1 on the left shoulder of the deceased was attributed to the appellant Nazakat Ali whereas injury No.2 on the right thigh of deceased was assigned to Asif Ali (acquitted co-accused) and, as such, case of the appellant is not distinguishable from the case of Asif Ali (acquitted co-accused) on the basis of medical evidence.

In the circumstances of the case, we could not find any independent corroboration against Nazakat Ali appellant. Despite our best efforts we are unable to distinguish the case of the appellant from the case of Asif Ali co-accused (since acquitted). The

facts of the case of 'Mir Muhammad alias Miro v. The State' (2009 SCMR 1188) are dis-tinguishable from the facts of this case, therefore, said judgment is not helpful to the prosecution in this case.

16. In the above mentioned circumstances, we are of the considered view that prosecution evidence which has already been disbelieved against Asif accused (since acquitted) cannot be believed against the appellant without independent corroboration, which is very much lacking in this case. We, therefore, accept this appeal, (Criminal Appeal No.1468 of 2008), filed by Nazakat Ali appellant, by extending him the benefit of doubt, and set-aside the conviction and sentence awarded to the appellant, Nazakat Ali, vide impugned judgment dated 20-12-2008, passed by the learned Additional Sessions Judge, Hafizabad. The appellant, namely, Nazakat Ali, is acquitted from the charge, he is in custody and he shall be released from the Jail forthwith, if not required in any other case.

Death sentence awarded to the appellant, Nazakat Ali, is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

HBT/N-23/L **Appeal accepted.**

2013 Y L R 2748

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

NAZER ABBAS---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1026 and Murder Reference No.404 of 2007, heard on 28th March, 2013.

(a) Criminal trial---

----Circumstantial evidence---Chain of events---Missing link, benefit of---Principle---Every circumstance should be linked with each other and it should form such continuous chain that its one end touches dead body and the other neck of accused---If any link of chain is missing then its benefit must go to accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Asadullah and another v. State and another 1999 SCMR 1034 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

(b) Penal Code (XLV of 1860)---

----S. 302---Qatl-e-amd--- Evidence---Improvements by witness---Effect---If witness makes dishonest improvements in his statement, then he cannot be relied upon to maintain conviction of accused on a capital charge.

Muhammad Rafique and others v. The State and another 2010 SCMR 385 rel.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Blind murder---Identification of dead bodies---Circumstantial evidence---Chain of events---Proof---Incident was blind murder and on the basis of circumstantial evidence, Trial Court

convicted accused and sentenced him to death on two counts---Prosecution did not produce any witness who had identified dead bodies of two unknown persons to be that of deceased in question---Prosecution witness stated during cross-examination that dead bodies were buried by ambulance service people, who told the witness that dead bodies were of deceased in question---None from staff of ambulance service was produced in witness box by prosecution to establish identification of dead bodies---No application for disinterment of dead bodies was brought on record---Prosecution had not been able to prove beyond shadow of doubt that dead bodies were not of unknown persons which were discovered by complainant and were those of deceased in question---High Court set aside conviction and sentence awarded to accused by Trial Court, as prosecution had failed to prove its case against him beyond shadow of doubt and he was acquitted of the charge---Appeal was allowed in circumstances.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53; Mursal Kazmi alias Qamar Shah and another v. The State 2009 SCMR 1410; Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

(d) Penal Code (XLV of 1860)---

----S. 302--- Qatl-e-amd--- Extra-judicial confession---Scope---No date, time or place of extra-judicial confession allegedly made by accused was mentioned by prosecution witness and no reason for committing murder of deceased was mentioned by witness in his statement---Evidence regarding extra-judicial confession allegedly made by co-accused was also produced by prosecution through statement of another prosecution witness but such evidence had been disbelieved by Trial Court and co-accused was acquitted---There was no other witness produced by prosecution regarding extra-judicial confession allegedly made by accused---As the extra-judicial confession was not corroborated by any other evidence, therefore, it was not worthy of reliance.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 rel.

(e) Penal Code (XLV of 1860)---

----S. 302---Qatl-e-amd---Recovery of weapon---Matching of empties---Principle---Empties recovered from the spot and weapon recovered from accused were kept together at police station, therefore, possibility could not be ruled out that fake

empties were prepared from recovered weapon and thereafter the same were sent to the office of Forensic Science Laboratory for their comparison with weapon allegedly recovered from the possession of accused---Recovery of weapon from possession of accused and positive report of Forensic Science Laboratory were of no help to prosecution in circumstances.

Jehangir v. Nazar Farid and another 2002 SCMR 1986; Mushtaq and 3 others v. The State PLD 2008 SC 1 and Ali Sher and others v. The State 2008 SCMR 707 rel.

Faisal Shahzad for Appellant.

Arshad Mehmood, Deputy Prosecutor General for the State.

Ch. Farooq Haider for the Complainant.

Date of hearing: 28th March, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.1026 of 2007 titled as "Nazer Abbas v. The State" preferred by appellant Nazer Abbas against his conviction and sentence and Murder Reference No.404 of 2007 titled as "The State v. Nazer Abbas" submitted by the learned trial court for confirmation or otherwise of the sentence of death awarded to Nazer Abbas appellant, as both these matters have arisen out of the same judgment dated 12-9-2007, passed by the learned Sessions Judge, Gujrat in case F.I.R. No.303 dated 9-6-2005, offence under section 302, P.P.C., registered at Police Station Saddar Khariyan District Gujrat, whereby, Nazer Abbas, appellant was convicted under section 302(b)/34, P.P.C. for committing the murders of Nasir and Arshad (deceased) and sentenced to death on two counts with the direction to pay Rs.3,00,000 (rupees three lac) as compensation to the legal heirs of each deceased namely, Nasir and Arshad as envisaged under section 544-A of the Code of Criminal Procedure and in default, thereof, to undergo simple imprisonment for six months on each count.

The learned trial court, however, through the same judgment acquitted Shafaqat and Aamer, co-accused of the appellant. The complainant filed Criminal Appeal

No.1379 of 2007 against their acquittal which was dismissed in limine by this Court vide order dated 1-4-2008.

2. The machinery of law was set in motion by Muhammad Anwar, Lumberdar (P.W.4) who moved an application (Exh.P.W.9/1-P.W.4/1), on the basis of which formal F.I.R. (Exh.P.W.9/1-1) was registered. Muhammad Anwar, Lumberdar (P.W.4), in the said application, stated that he was Lumberdar of the village Boriyanwala. On 9-6-2005, he was going to village Panjan Kasana in connection with some personal work. When at about 7-00 a.m, he reached near the Dera of one Sikandar situated in the area of Boriyanwali on the road leading from Boriyanwala to Panjan Kasana, he saw the dead bodies of two unknown young persons. There were bullet injuries on their heads and faces. He made announcements in nearby villages for identification of the dead bodies, upon which, many people came there but the said dead bodies could not be identified. It was further stated in the F.I.R. that some unknown accused persons committed the murder of above mentioned two unknown persons with firearms.

3. On 10-6-2005, Nazeer Ahmad (P.W.1) moved an application (Exh.P.W.1/1 = P.W.9/16) wherein, he stated that he was resident of village Panjan and was retired from Army. His (Nazeer Ahmad P.W.1's) maternal nephew Muhammad Arshad (deceased) was in Greece in connection with livelihood for the last five years who had come to Pakistan on five months leave. Muhammad Arshad accused (arrested and tried later), who too was in Greece was given Rs.9,00,000 (rupees nine lac) by Muhammad Arshad (deceased) which was to be given in the house of Muhammad Arshad (deceased) but Muhammad Arshad accused (arrested and tried later) did not give the same amount in the house of Muhammad Arshad (deceased). Muhammad Arshad (deceased), after coming back to Pakistan, demanded said amount from Muhammad Arshad, accused (arrested and tried later) who kept on promising to return the same. On 8-6-2005 at about 4-00 p.m., he (Nazeer Ahmad P.W.1) along with Muhammad Arshad (deceased), Bashir Ahmad (P.W.2), Muhammad Arshad (given up P.W.) was present in the house of his sister. Muhammad Arshad (arrested and tried later), Aamir (since acquitted), Nazer Abbas (appellant), Abu Zar (since P.O.) and Nasir (deceased) came there on a Hi-ace whose names were told to him (Nazeer Ahmad P.W.1) by Muhammad Arshad (deceased). They took dinner with them. He (Nazeer Ahmad P.W.1) also saw weapons in the vehicle. After the dinner,

Muhammad Arshad (arrested and tried later) asked Muhammad Arshad (deceased) to accompany them to Khariyan to receive his amount and they will drop him back. When Muhammad Arshad (deceased) was going with them, he (Nazeer Ahmad P.W.1) asked him as to where he was going who told him that he was going to Khariyan and after receiving the amount, he will come back but when till the next morning Muhammad Arshad (deceased) did not return back, they started his search. They tried to contact with Muhammad Arshad (arrested and tried later) but failed. They read the news in the newspaper of 10-6-2005 that the police had found two dead bodies in the area of Boriyanwali, out of which, on the arm of one, Muhammad Arshad was embossed. He (Nazeer Ahmad P.W.1) along with Muhammad Arshad (given up P.W.) came to the police where they identified the clothes of Muhammad Arshad (deceased) and his friend Nasir (deceased). Muhammad Arshad (arrested and tried later) along with his companions Nazer Abbas (appellant), Aamir (since acquitted) and Abu Zar (since P.O) have committed the murder of Muhammad Arshad and Nasir (deceased) and threw their dead bodies in the area of Boriyanwali. The motive for the occurrence, as alleged by Nazeer Ahmad (P.W.1) in his application (Exh. P.W.1/1 = P.W. 9/16), was that Muhammad Arshad (deceased) used to demand his amount from Muhammad Arshad (arrested and tried later) whereas, Nasir (deceased) used to accompany Muhammad Arshad (deceased) and due to this grudge, the appellant along with his co-accused had committed the murder of Muhammad Arshad and Nasir (deceased).

4. The appellant was arrested in this case on 14-7-2005 by Muhammad Nawaz, Inspector (P.W.9). On 28-7-2005, Nazer Abbas (appellant), while in police custody, after disclosure, got recovered Kalashnikov, which was taken into possession vide recovery memo Exh. P.W. 9/17 = Exh. P.W. 2/1). After completion of investigation, the challan was prepared and submitted before the learned trial court. The learned trial court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused (since acquitted) on 28-6-2006, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced nine witnesses, during the trial. Nazeer Ahmad (P.W.1), Bashir Ahmad (P W.2) and Muhammad Sadiq (P.W.3) are the witnesses of last seen. Bashir Ahmad (P.W.2) and Muhammad Sadiq (P.W.3) are also the witnesses of extra-judicial confession.

The medical evidence was furnished by Dr. Farooq Ahmad (P.W.7) who conducted the postmortem examination on the dead bodies of deceased persons.

Muhammad Nawaz, Inspector (P.W.9) and Muhammad Tanveer, Inspector (CW-1) are the Investigating Officers of the case. Muhammad Anwar (P.W.4) is the complainant of the F.I.R. Sajjad Anwar, S.-I. (P.W. 5), Zafar Iqbal 1378/C (P.W.6) and Azhar Iqbal, Patwari (P.W. 8) are the formal witnesses. The prosecution also produced documentary evidence in the shape of application for registration of case (Exh.P.W.1/1 = Exh.P.W.9/16), recovery memo of last worn clothes of Arshad deceased (Exh.P.W.1/2=Exh.P.W.9/14), recovery memo of Kalashnikov (Exh.P.W.2/1=Exh.P.W.9/17), copy of statement of Muhammad Sadiq P.W.3: (Exh.P.W.3/1), recovery memo of last worn clothes of Nasir deceased (Exh.P.W.3/2=Exh.P.W.9/15), copy of statement of Muhammad Anwar P.W.4 (Exh.P.W.4/1=Exh.P.W.9/1), recovery memo of crime empties (Exh.P.W.5/1 = Exh.P.W.9/3), recovery memo of blood-stained earth (Exh.P.W.5/2 = Exh.P.W.9/2), recovery memo of last worn clothes of deceased persons (Exh.P.W.6/1=Exh.P.W.9/10 and Exh.P.W.6/2=Exh.P.W.9/11), postmortem report along with pictorial diagram (Exh.P.W.7/1 and Exh.P.W.7/2), postmortem report (Exh.P.W.7/3), scaled site plan, in duplicate, of the place of occurrence (Exh. P.W. 8/1 and Exh.P.W.8/2), F.I.R. (Exh.P.W.9/1-1), injury statements of the deceased persons (Exh.P.W.9/4 & Exh.P.W.9/5), inquest reports of the deceased persons (Exh.P.W.9/6 and Exh.P.W.9/7), applications for postmortem examinations of the dead bodies (Exh.P.W.9/8 and Exh.P.W.9/9), rough site plan of the place of occurrence (Exh.P.W.9/9-1), receipts of handing over the dead bodies to Edhi, Gujrat (Exh.P.W.9/12 & Exh.P.W.9/13), copy of Fard Shanakhat Parchaat (Exh.P.W.9/14), copy of Fard Shanakhaat of Nasir deceased (Exh.P.W.9/15), rough site plan of the place of recovery of Kalashnikov (Exh.P.W.9/18), application of one Muhammad Asif (Exh.P.W.9/19), report of the Forensic Science Laboratory (Exh.PP/l) and closed its evidence.

The statements of the appellant and his co-accused (since acquitted) under section 342 of the Code of Criminal Procedure, were recorded on 8-9-2007. They refuted the allegations levelled against them and professed their innocence. While answering to a question that "Why this case against you and why the P.Ws. have deposed against you?", the appellant replied as under:--

"My reply to Questions Nos.2 and 3 may be taken as my reply to this question. There was no direct evidence in this case. Tanveer Ahmed Inspector CW.1 and Muhammad Nawaz P.W.9 both have admitted that they could not collect any evidence from which it could be inferred that deceased persons were seen in the company of any of the accused including myself or they had seen me or my co-accused committing murder or that anybody had seen myself or my co-accused throwing dead-bodies on the places from where these were recovered. When I was under illegal confinement of Wazirabad police, Muhammad Afzal A.S.-I. who was real brother of Nasir deceased was posted at Wazirabad. He was also instrumental to my false involvement in this case. The real assailants remained unknown as could be seen from site plan prepared by P.W.8 Patwari Exh.P.W.8/1. Since the real assailants were not traced out by the police, they showed their undue efficiency and got me falsely involved in this case."

The replies of the appellant to questions Nos.2 and 3 are as under:--

Question No.2

"It is all incorrect. I was taken as suspect by Wazirabad Police in theft of buffaloes. I was kept in illegal confinement and was given merciless beating. My sister Sajida Parveen filed petition under section 491, Cr.P.C. before the learned Sessions Judge, Gujranwala whereupon learned Sessions Judge took drastic action. Wazirabad police in order to cover up their mischief, joined hand with Muhammad Nawaz Inspector (at the relevant time Sub-Inspector), who appeared before the learned Sessions Judge, Gujranwala on 22-6-2005 and brought me to Thana. He also kept me in illegal confinement till 14-7-2005, wherefrom my misfortune started."

Question No.3.

"It is all incorrect. I have already explained in reply to question No.2 that I was taken as suspect by Wazirabad police where I was kept under illegal confinement. My sister had moved application under section 491 Cr.P.C. before the learned Sessions Judge, Gujranwala. I was recovered from the illegal confinement of Wazirabad police. Wazirabad police then to cover up their mischief and to save themselves from the clutches of law, called Muhammad Nawaz S.-I. (I.O. of this case) who then brought me on 22-6-2005 and kept me in illegal confinement till 14-7-2005

when my arrest was shown. On the last date of my remand i.e. 28-7-2005, false recovery of kalashnikov PY was planted upon me. Empties recovered from the spot were sent to the Forensic Science Lab. after I was sent to judicial lock up. I am innocent in this case. My co-accused Muhammad Arshad and Abu Zar are still P.Os. In fact one of them Muhammad Arshad has been arrested in the recent past."

The appellant did not opt to make statement on oath as provided under section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against him, however, he produced copy of petition filed under section 491 of the Code of Criminal Procedure (Exh.D-1) and order dated 22-6-2005 passed by the learned Sessions Judge, Gujranwala (Exh.D-2) in his defence.

6. The learned trial court vide its judgment dated 12-9-2007, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that it is a case of circumstantial evidence and there is no circumstance which could connect the appellant with the commission of crime; that the occurrence was unseen as none is named as accused and witness in the F.I.R. (Exh.P.W.9/1-1) which was got registered by Muhammad Anwar, Lumberdar (P.W.4); that even the postmortem examination was conducted, on 9-6-2005 and as per postmortem reports, the names of the deceased persons were unknown and thereafter, an application was submitted by Nazeer Ahmad (P.W.1) nominating the appellant and others but in his cross-examination, he has admitted that said application was submitted 3/4 days after the murders and his version in the said application (Exh.P.W.1/1=Exh.P.W.9/16) and before the learned trial court is altogether different; that in the statement of the complainant recorded by the learned trial court, certain persons were shown present at the time when Muhammad Arshad (deceased) was allegedly taken by the appellant and his co-accused along with Nasir (deceased) but their names were not mentioned in the application (Exh.P.W.1/1 =Exh.P.W.9/16); that moreover, there was no motive against the appellant as conceded by Nazeer Ahmad (P.W.1) that there was no 'Lain Dain' between Muhammad Arshad (deceased) and the appellant; that the P.Ws. made dishonest improvements in their statements while appearing before the learned trial court and they were duly confronted with their previous statements and the improvements made by them were brought on the record; that there is no evidence in

this case that the dead bodies which were found lying at the road leading to Panjan Kasana from Boriyanwala, noticed by the complainant Muhammad Anwar (P.W.4) were that of Muhammad Arshad (deceased) and Nasir (deceased) as no body identified the same and it is the case of Nazeer Ahmad (P.W.1) and Muhammad Sadiq (P.W.3) that they identified the clothes of Muhammad Arshad (deceased) and Nasir (deceased); that so far as the identification of dead bodies is concerned, Nazeer Ahmad (P.W.1) has stated in his cross-examination that they were told by the Edhi people that those were the dead bodies of Muhammad Arshad (deceased) and Nasir (deceased) but none from the staff of Edhi Foundation appeared in witness box; that there is no evidence that the deceased persons were seen with the appellant and his co-accused at the place from where the dead bodies were found shortly after the occurrence; that Nazeer Ahmad (P.W.1) has admitted that the complainant is resident of the village which is at a distance of hardly one and half or three miles from his village and that the complainant Muhammad Anwar (P.W.4) made announcement in the mosque and many people from his village also went there and in such a situation, it appears highly improbable that Nazeer Ahmad (P.W.1) could not know about this incident; that recovery of Kalashnikov (PY) at the instance of the appellant is not helpful for the prosecution for the reason that the empties were recovered from the spot on 9-6-2005, the appellant was arrested in this case on 14-7-2005 whereas, the Kalashnikov (PY) was allegedly recovered at the instance of the appellant on 28-7-2005 and both the crime empties and Kalashnikov (PY) were received together in the office of the Forensic Science Laboratory on 1-10-2005, therefore, chances of preparation of fake empties cannot be ruled out. So far as the statement of Muhammad Sadiq (P.W.3) is concerned, learned counsel for the appellant contends that the evidence of said witness is also not helpful to the prosecution as even he did not identify the dead body of his son Nasir (deceased); that the statement of Nazeer Ahmad (P.W.1) is also not reliable because in his application (Exh.P.W.1/1=Exh.P.W.9/16), he has stated that he had noted firearm in the vehicle and while appearing before the learned trial court, he stated that even hot words were exchanged between the deceased and appellant and his co-accused and even the accused persons asked Muhammad Arshad (deceased) sarcastically to go with them and for that reason, there was no need for Muhammad Arshad (deceased) to accompany the appellant and his co-accused; that there is no direct or indirect circumstantial evidence which could connect the appellants with the crime; that the

prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charges.

8. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that there is evidence of last seen of the deceased being alive in the company of the appellant and his companions which has been furnished by Nazeer Ahmad (P.W.1), Bashir Ahmad (P.W.2) and Muhammad Sadiq (P.W.3); that all these witnesses have no enmity with the appellant or any of his co-accused for their false implication; that presence of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2) in the house of their own sister is quite natural and probable as both are residents of the same village wherein, sister of the above said P.Ws. and the deceased were residing; that so far as the identification of the dead bodies is concerned, though no identification memo was prepared by the prosecution but it is not a disputed fact rather it was suggested to the P.Ws. on behalf of the defence that those were the dead bodies of Muhammad Arshad (deceased) and Nasir (deceased) and they were murdered by co-accused Abu Zar who is still P.O.; that evidence of Nazeer Ahmad (P.W.1), Bashir Ahmad (P.W.2) and Muhammad Sadiq (P.W.3), if taken into consideration, it clearly establishes the fact that Muhammad Arshad (deceased) and Nasir (deceased) were taken away by the appellant and his co-accused; that to the extent of appellant, the prosecution is further corroborated by the recovery of Kalashnikov (PY) and positive report of the Forensic Science Laboratory (Exh.P13/1); that in the circumstances, chain link of circumstantial evidence is complete and the prosecution has fully proved its case against the appellant; that the sentence of death was rightly awarded to the appellant by the learned trial court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the appellant, the learned Deputy Prosecutor-General assisted by learned counsel for the complainant and have also gone through the record with their able assistance.

10. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every

circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any chain link is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of the Apex Court of the country reported as "Ch. Barkat Ali v. Major Karam Elahi Zia and another" (1992 SCMR 1047), "Sarfraz Khan v. The State and 2 others" (1996 SCMR 188) and "Asadullah and another v. State and another" (1999 SCMR 1034). In the case of Ch. Barkat Ali (supra), the august Supreme Court of Pakistan, at page 1055, observed as under:--

"9. ...Law relating to circumstantial evidence is that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See "Siraj v. The Crown" PLD 1956 FC 123. The prosecution evidence in this case was of the deceased last seen with the accused and from the latter was recovered a handle of the hatchet blood stained and he was absent from the forest after the murder. The learned Federal Court held that the evidence was not sufficient and the accused was acquitted. In the case of "Karamat Hussain v. The State" 1972 SCMR 15 it was laid down that "In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused."

In the case of Sarfraz Khan (supra), the august Supreme Court of Pakistan, at page 192, held as under:-

"7. ...it is well-settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence..."

Further reliance in this context is placed on the case of "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103) wherein, at page 1105 it was held by the Hon'ble Supreme Court as under:--

"7. Needless to emphasise that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

11. The prosecution case is based on the following pieces of evidence:--

(i) The evidence of last seen:

(ii) Extra-judicial confession;

(iii) The evidence of recovery of Kalashnikov (PY);

(iv) Motive; and

(v) Medical evidence.

(i) The Evidence of Last Seen:

12. As mentioned earlier, it was an unseen occurrence. Muhammad Anwar, Lumberdar (P.W.4), on 9-6-2005 at 8-00 a.m., reported to the police that the dead bodies of two unknown persons were lying near the Dera of one Sikandar within the territorial limits of Boriyanwali and there were bullet injuries on the face and head of both these persons. The evidence of last seen the deceased persons alive in the company of the appellant and his co-accused was furnished by Nazeer Ahmad (P.W.1), Bashir Ahmad (P.W.2) and Muhammad Sadiq (P.W.3). Insofar as the evidence of Muhammad Sadiq (P.W.3) is concerned, the same cannot be termed as last seen evidence because according to his statement, on 8-6-2005 at 9-00 a.m., Nazer Abbas (appellant) went to his house and took Nasir (deceased) with him in order to go to village Panjan Kasana whereas, according to the statements of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2), on 8-6-2005 in the evening time, Nasir (deceased) along with the appellant and his co-accused namely, Abu Zar (since P.O), Muhammad Arshad (arrested and tried later), Aamir and Shafaqat Ali (since acquitted) came to the house of Muhammad Arshpd (deceased). As Nasir (deceased) was subsequently see alive by Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2), therefore, the evidence of Muhammad Sadiq (P.W.3) cannot be termed as last seen evidence. We are, therefore, left with the evidence of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2) who had allegedly seen the deceased persons alive in the company of the appellant and his co-accused. We have noted that the story of lastly

seen the deceased persons alive in the company of the appellant and his co-accused, furnished by Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2) is highly improbable. According to their statements, Muhammad Arshad (deceased) and Muhammad Arshad, co-accused of the appellant (arrested and tried later) both remained in Greece. Muhammad Arshad (arrested and tried later) took an amount of Rs.9,00,000 (rupees nine lac) from Muhammad Arshad (deceased) for delivering the same in the house of Muhammad Arshad (deceased) but he did not deliver the said amount. Muhammad Arshad (deceased), five months prior to the occurrence, came to Pakistan, demanded the said amount from Muhammad Arshad, accused (arrested and tried later). On 8-6-2005, at evening time, the appellant along with his co-accused and Nasir (deceased) came to the house of Muhammad Arshad (deceased), where hot words were exchanged between the accused persons and Muhammad Arshad (deceased). It was so stated by Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2) that the accused and Muhammad Arshad (deceased) broke up with each other. It was also mentioned in the application (Exh.P.W.1/1-Exh.P.W.9/16) moved by Nazeer Ahmad (P.W.1) that on 8-6-2005 at the time when the appellant along with his co-accused came to the house of Muhammad Arshad (deceased), he (Nazeer Ahmad P.W.1) saw that there were firearms in the vehicle of the accused persons. Nazeer Ahmad (P.W.1) has also stated that accused persons sarcastically asked Muhammad Arshad (deceased) to accompany them. As mentioned earlier, according to the statements of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2), hot words were exchanged between the accused persons and Muhammad Arshad (deceased) and Nazeer Ahmad (P.W.l) had also seen firearms in the vehicle of the appellant and his co-accused, therefore, it does not appeal to common sense that even then, they (P.Ws.) allowed Muhammad Arshad (deceased), who was their 'Bhanja' to accompany the appellant and his co-accused. It does not appeal to the mind of a prudent person that a 'Mamoon' (maternal uncle) will allow his nephew to accompany the accused persons despite the fact that he had seen firearms in the vehicle of the accused persons at the relevant time and hot words were also exchanged between the accused persons and the deceased before their departure from the house of the deceased.

We have also noted that the above-mentioned witnesses of the prosecution made dishonest improvements in their statements recorded by the learned trial court. The

relevant part of the cross-examination of Nazeer Ahmad (P.W.1) at pages 35 and 36 of the paper book reads as under:--

"Except Exh.P.W.1/1 no other application was moved by me before the police nor was my statement recorded by the police otherwise. As per the aforesaid application presence of Nasir, Bashir Begum and Rashad was not shown although their presence was stated by me in my examination-in-chief in this case. It is correct that in the above application it was not stated by me that when we were sitting Nasir deceased had also come. Name of Shafaqat accused was not mentioned in the application Exh.P.W.1/1. It is correct that it was not stated in the application that on account of Lain Dain a quarrel had taken place between the deceased persons and the accused persons although I had so stated in my examination-in-chief. It was also not stated in the application that the deceased persons were taken away in Toyota Hiace. It was not stated in the application Exh.P.W.1/1 that at 9-00 p.m. the deceased persons were taken away and when they did not return till 10-00 a.m. the next day then we had tried to contact them on telephone although it was so stated in my examination-in-chief. It is correct that it was not stated in the application that Tariq Bhanja of Shafaqat had come to our house the next morning and had asked the mother of the deceased that he should send Rashad the brother of the first deceased as he was called by him. It was also not stated in the application Exh.P.W.1/1 that Rashad had not gone. It was also not stated in the application that on 10-6-2005 Shafaqat accused himself had come at 8-00 a.m. and asked us that he should search for the deceased from the office of Eidi Welfare although I have so stated in my page 2 of examination-in-chief. It was also not stated in the application that Shafaqat further told that the deceased Arshad had been murdered and he, should be forgiven, although I have so stated in my examination-in-chief..."

Similarly, Bashir Ahmad (P.W.2) also made dishonest improvements in his statement recorded by the learned trial court. The relevant part of the cross-examination of Bashir Ahmad (P.W.2) at Page Nos.40 and 41 of the paper book reads as under:--

"...Police had recorded my statement at Kharian at Thana. I had put my thumb-impression before the police. My statement was read over to me. Nazir complainant had also got recorded his statement. At that time I had not named Shafaqat. We had

required Niaan from him but he did not give it. Then his name was given... Shafaqat was neither named by me nor complainant. His name was included after 15/20 days..."

It is evident from the perusal of abovementioned portions of the statements of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2) that they made dishonest improvements in their statements recorded by the learned trial court and the said improvements were duly brought on the record. It is by now well-settled law that if a witness makes dishonest improvements in his statement then he cannot be relied upon to maintain the conviction of an accused on a capital charge. Reference in this context may be made to the case of "Muhammad Rafique and others v. The State and others" (2010 SCMR 385) wherein, at page 396, the Hon'ble Supreme Court of Pakistan was pleased to observe as under:--

"24. ...This Court in the case of Saeed Muhammad Shah v. State 1993 SCMR 550 observed that if a witness improves his statement on material aspects of the case then such improvement is not worthy of reliance and the evidence of such witness requires corroboration. In the case of Khalid Javed v. State 2003 SCMR 1419 while reiterating the above rule, it was further observed that such witness is to be considered to be wholly unreliable and it is not advisable to place explicit reliance upon his evidence."

We have also noted that Nazeer Ahmad (P.W.1) has stated during his cross-examination that he moved his application (Exh.P.W.1/1) after 3/4 days of the occurrence. He has further stated that the dead bodies of the deceased persons were found within the territorial limits of Burhiawala, Tehsil Kharian. Bashir Ahmad (P.W.2) has stated that the place from where the dead bodies were recovered was at a distance of three or three and half miles from their (P.Ws.') village. It was also brought on the record through the statement of Muhammad Anwar (P.W.4) that announcement through loudspeaker was made regarding the discovery of two dead bodies. According to the statements of Nazeer Ahmad (P.W.1) and Bashir Ahmad (P.W.2), the deceased persons departured in the company of the appellant and his co-accused on 8-6-2005 at 9-00 p.m. and when they did not return after 10-00 p.m., Nazeer Ahmad (P.W.1) tried to establish a telephonic contact with Muhammad Arshad (deceased) but the said effort proved to be in vain. It does not appeal to common sense that when Muhammad Arshad (deceased) who had strained relations with the appellant and his co-accused left his house in the company of the appellant

and his co-accused and was not traceable, the abovementioned witnesses of last seen would remain silent for 3/4 days. We have also noted that the identification of the dead bodies to be that of Muhammad Arshad (deceased) and Nasir (deceased) has also not been established in this case. Dr. Farooq Ahmad (P.W.7) conducted the postmortem examination on the dead bodies and according to his statement, he, on 9-6-2005 at 9-30 a.m. and 10-00 a.m., conducted the postmortem examination on the dead bodies of two unknown persons and their parentage was also not known. The prosecution has not produced any witness who had identified the dead bodies of said two unknown persons to be that of Muhammad Arshad (deceased) and Nasir (deceased). Nazeer Ahmad (P.W.1) has stated during his cross-examination that the dead bodies were buried by Edhi people and they (P.Ws.) were told by Edhi people that the dead bodies were of Muhammad Arshad (deceased) and Nasir (deceased). Relevant part of the statement of Nazeer Ahmad (P.W.1) at pages 37 and 38 of the paper book reads as under:--

"It is incorrect that I had identified the deadbodies only from the clothes. Explained that the deadbodies were buried by Eidi people and that we were told by them that the persons buried were Arshad and Nasir..."

It is evident from the perusal of the statement of Nazeer Ahmad (P.W.1) that the prosecution witnesses were told by the staff of Edhi Foundation that the dead bodies were that of Muhammad Arshad (deceased) and Nasir (deceased) but none from the staff of Edhi Foundation was produced in the witness box by the prose-cution to establish the identification of the dead bodies. No application for disinter-ment of the dead bodies has been brought on the record. We are, therefore, of the view that it has not been proved by the prosecution beyond shadow of doubt that the dead bodies of unknown persons which were discovered by Muhammad Anwar, complainant (P.W.4) near the Dera of one Sikandar within the territorial limits of village Boriyanwali were that of Muhammad Arshad (deceased) and Nasir (deceased).

(ii) The evidence of extra-judicial confession:

13. The prosecution evidence regarding extra-judicial confession allegedly made by the appellant was furnished by Muhammad Sadiq (P.W.3). The relevant part of the statement of Muhammad Sadiq (P.W.3) about extrajudicial confession of the

appellant at pages 45 and 46 of the paper book is repro-duced hereunder for ready reference:--

"...Nazer Abbas accused was taken into custody by us and we had handed him over to the police at Wazirabad. The accused Nazer Abbas had made confession before me that he had murdered my son Nasir deceased..."

It is noteworthy that no date, time or place of the extra-judicial confession allegedly made by the appellant is mentioned by Muhammad Sadiq (P.W.3). No reason, whatsoever, for committing the murder of Nasir (deceased) was mentioned in the abovementioned statement of Muhammad Sadiq (P.W.3). We have also noted that evidence regarding extra-judicial confession allegedly made by Shafaqat accused (since acquitted) was also produced by the prosecution through the statements of Nazeer Ahmad (P.W.1) but said evidence has been disbelieved by the learned trial court and Shafaqat, co-accused of the appellant has been acquitted by the learned trial court. The appeal filed by the complainant (Criminal Appeal No.1379 of 2007) against the acquittal of said accused was dismissed in limine by this Court vide order dated 1-4-2008. It appears that the evidence about extra judicial confession of the appellant and Shafaqat co-accused was procured in order to overcome the weakness of prosecution case. The question of placing reliance on extra-judicial confession of the accused persons, came up for consideration before the august Supreme Court of Pakistan in the case of "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231), wherein, at page 238, the Apex Court of Pakistan observed as under:--

"17. …..This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions staring from Ahmed v. The Crown PLD 1951 FC 103-107 up to the latest. Extra-judicial confession has always been taken with a pinch of salt. In Ahmed v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to "satisfy itself fully that confession cannot but be true". As, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be sued against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court.

19. It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

20. Why a person guilty of offence entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off, (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in suchlike heinous offences where fear dominates and is .always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witnesses before whom extra-judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

21. Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought firstly, when a person is sufficiently trapped and secondly, from one who is authoritative, socially or officially…..

22. As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confessions. Such confessions by now, have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence,

capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all is the position or authority held by the witness".

It was not established by the prosecution that Muhammad Sadiq (P.W.3) was in authority, socially or officially. Further-more, except Muhammad Sadiq (P.W.3), there is no other witness produced regarding extra judicial confession allegedly made by Nazer Abbas appellant and this extra judicial confession is not corroborated by any other evidence. Keeping in view all the abovementioned facts, the evidence of extra judicial confession of the appellant is not worthy of reliance.

(iii) Evidence of recovery of Kalashnikov (PY):

14. The prosecution has also produced the evidence of recovery of Kalashnikov (PY) allegedly recovered from the possession of Nazer Abbas (appellant), which was taken into possession vide recovery memo. Exh.P.W.2/1= Exh.P.W.9/17. We have noted that five crime empties were taken into possession from the spot on 9-6-2005. The appellant was arrested in this case on 14-7-2005 and Kalashnikov (PY) was allegedly recovered from his possession on 28-7-2005 but the Kalashnikov (PY) and crime empties were sent together to the Forensic Science Laboratory. Although the report of the Forensic Science Laboratory is positive according to which five empties recovered from the spot had been fired from the Kalashnikov (PY) but as the empties and Kalashnikov were kept together at the police station, therefore, possibility cannot be ruled out that fake empties were prepared from the Kalashnikov (PY) and thereafter, same were sent to the office of the Forensic Science Laboratory for their comparison with Kalashnikov (PY) allegedly recovered from the possession of the appellant. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "Jehangir v. Nazar Farid and another" (2002 SCMR 1986), "Mushtaq and 3 others v. The State" (PLD 2008 SC 1) and "Ali Sher and others v. The State" (2008 SCMR 707). We are, therefore, of the view that the recovery of Kalashnikov, (PY) from the possession of the appellant and positive report of the Forensic Science Laboratory (Exh.PP/1) are of no help to the prosecution case.

(iv) Motive:

15. We have noted that no motive, whatsoever, was alleged against the appellant and the same was attributed to Muhammad Arshad, co-accused of the appellant (arrested and tried later). Nazeer Ahmad (P.W.1), Bashir Ahmad (P.W.2) and Muhammad Sadiq (P.W.3), all have admitted that there was no money dispute between Nazer Abbas (appellant) and Muhammad Arshad (deceased). Relevant part of cross-examination of Nazeer Ahmad (P.W.1) at page 34 and 35 of the paper book reads as under:--

"….There was no Lian Dain between the two deceased and Nazer Abbas accused…"

Whereas, relevant part of cross-examination of Bashir Ahmad (P.W.2), at page No.42 of the paper book reads as under:--

"Nazer Abbas accused had no Lain Dain with Arshad deceased my Bhanja..."

Similarly, relevant part, of cross-examination of Muhammad; Sadiq (P.W.3), at page 47 of the paper book is reproduced hereunder:--

"...Nazer Abbas accused had no dispute over Lain Dain with my son Nasir deceased..."

We are, therefore, of the view that there was no motive with the appellant to commit the murder of Muhammad Arshad (deceased) and Nasir (deceased).

(v) Medical evidence:

16. Insofar as medical evidence is concerned, it is by now well settled law that medical evidence may confirm the ocular evidence with regard to the seat of injury, nature of the injury, kind of weapon used in the occurrence but it would not connect the accused with the commission of the offence. Reference in this respect may be made to the case of "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53). Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of "Mursal Kazmi alias Qamar Shah and another v. The State" (2009 SCMR 1410) and "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103).

17. We have considered all the pros and cons of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. In "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:--

"5. ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of "Muhammad Akram v. The State" (2009 - SCMR 230), at page 236, observed as under:--

"13. ...It is an axiomatic principle of, law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, we accept Criminal Appeal No.1026 of 2007 filed by Nazer Abbas appellant, set aside his conviction and sentence and acquit him from the charge by extending him the benefit of doubt. He is in custody, he be released forthwith if not required in any other case. However, it is made clear that the observations made in this judgment are not relevant to the case of Abu Zar, co-accused of the appellant (since P.O).

19. Murder Reference No.404 of 2007 is answered in the NEGATIVE and the sentence of death of Nazer Abbas (convict) is NOT CONFIRMED.

MH/N-37/L **Appeal allowed.**

2013 Y L R 2789

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

AMANAT ALI alias MANOO---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.1192 of 2008 and Murder Reference No.1 of 2009, heard on 14th May, 2013.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 404---Qatl-e-amd, dishonest misappropriation of property possessed by deceased---Appreciation of evidence---Benefit of doubt---Role attributed to accused in the F.I.R., was in conflict with the medical evidence, to the extent of injury on the back of deceased---Evidence of other eye-witness who was brother of deceased, was in conflict with the evidence of the complainant---Prosecution witness had deliberately made dishonest improvement in his statement and complainant had also concealed the injury on the forehead of the deceased, which he attributed to accused---Witness who made dishonest improvement/ concealment in his statement was not worthy of reliance---Was not safe to rely upon the evidence of eye-witnesses, who made dishonest concealment/improvements in their statements before the Trial Court in order to overcome the weaknesses in the prosecution case, and to bring their evidence in line with the medial evidence---Eye-witnesses were chance witnesses as the place of occurrence was at a distance of 12/13 Kilometers from their residences, and they had not given any plausible or convincing reason for their presence at the spot at the relevant time---Post-mortem of dead body of deceased was conducted with the delay of eight hours, without any plausible explanation for said delay---Delay in post-mortem examination was suggestive of the fact that the eye-witnesses were not present at the spot, at the time of occurrence; and delay was consumed in procuring the attendance of the eye-witnesses and preparation of Police papers, necessary for the post-mortem examination---Prosecution evidence qua recovery of Pump action .12 bore gun, on the pointation of accused was inconsequential, because report of Forensic Science Laboratory was only about its being in working order---In absence of matching report of any empty or pellet with Pump action .12 bore gun, alleged recovery of gun on the

pointation of accused was of no avail to the prosecution---Motorcycle allegedly took away by accused, was not recovered from the possession of accused during the investigation---No number of pistol or number of its licence was mentioned in the F.I.R., or in supplementary statement of the complainant---Neither any warrant of arrest nor any proclamation to prove alleged abscondence of accused was brought on record by the prosecution---Abscondence of accused had not been proved by the prosecution---Prosecution having failed to prove its case against accused beyond the shadow of doubt, accused was acquitted of the charge while extending him the benefit of doubt and was released from jail, in circumstances.

Akhtar Ali and others v. State 2008 SCMR 6 and Muhammad Rafique and others v. The State and others 2010 SCMR 385 rel.

Irshad Ahmad v. The State 2011 SCMR 1190; Muhammad Ashraf v. The State 2012 SCMR 419 and Khalid alias Khalidi and 2 others v. The State 2012 SCMR 327 ref.

(b) Criminal trial---

----Motive---Motive was a double edged weapon---If motive could be a weapon for commission of the offence, same could be a good ground for false implication of accused in the case---In absence of other convincing and reliable evidence, accused could not be convicted merely on the basis of motive evidence furnished by prosecution.

Shoaib Zafar for Appellant.

Syed Zahid Hussain Bukhari for the Complainant.

Ch. Arshad Mahmood, Deputy Prosecutor-General for the State.

Date of hearing: 14th May, 2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall, dispose of Criminal Appeal No. 1192 of 2008 filed by Amanat Ali alias Manoo appellant against his conviction and sentence and Murder Reference No. 1 of 2009, sent by the learned trial Court under section 374, Cr.P.C., for confirmation or otherwise, of the sentence of death awarded to Amanat Ali alias Manoo appellant, as both these matters have arisen out of the same judgment dated 16-10-2008, handed down by the learned Additional Sessions Judge, Nankana Sahib, in case F.I.R. No. 20 dated 31-1-2005, registered under

sections 302/34, P.P.C., Police Station Syedwala Tehsil and District Nankana Sahib, whereby, Amanat Ali alias Manoo appellant was convicted and sentenced as under:--

Under Section 302 (b) P.P.C., Death Sentence as Taz'ir for committing the murder of Muhammad Sharif deceased with a direction to pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand only) to the legal heirs of the deceased as envisaged under section 544-A, Cr.P.C. and in default, thereof, he was directed to suffer imprisonment for six months' S.I.

Under Section 404 P.P.C., Three years' R.I. for dishonestly mis-appropriating the-pistol belonging to Muhammad Sharif deceased with a direction to pay Rs.10,000 (Rupees ten thousand only) as fine and in default, thereof to further undergo S.I. for a term of one month.

Through the same judgment the learned trial Court has, however, acquitted Ramzan alias Janoo and Khalil Ahmed, co-accused while giving benefit of doubt to them.

It is relevant to mention here that no charge under section 404 P.P.C. was framed but the learned trial Court, convicted and sentenced the appellant under section 404, P.P.C.

2. Brief facts of the case as given by the complainant Muhammad Hussain (P.W.3) in the 'Fard Bayan' Exh.PB, on the basis whereof the formal F.I.R. Exh.PB/1 was chalked out, are that on 30-1-2005 at about 12-00 p.m. (noon), Muhammad Hussain complainant (P.W.2) along with his brother Muhammad Sharif (deceased), who was posted as Excise Inspector at Nankana Sahib, was proceeding back to his village Guddan from Syedwala while riding on their Motorcycle bearing Registration No. 8915/LRX. Muhammad Hussain complainant (P.W.2) was driving the motorcycle, whereas, Muhammad Sharif (deceased) was sitting on the rear seat of motorcycle. They, when reached near the Bridge Pipplan, four persons while riding on two motorcycles, Amanat Ali (appellant) armed with pump action gun, Yar Muhammad accused (since murdered) armed with rifle, two unknown persons, out of them one accused person was armed with pistol .30 bore and the other accused person was armed with rifle who can be identified on confrontation, emerged there. Suddenly, Amanat Ali (appellant) and Yar Muhammad, accused (since murdered in police encounter) started firing with their respective weapons, which landed on the backside of neck and shoulders of Muhammad Sharif (deceased). The complainant Muhammad Hussain (P.W.2) stopped the motorcycle, whereas, Muhammad Sharif (deceased) fell down on

the ground. The complainant Muhammad Hussain (P.W.2) while concealing himself in the nearby standing crop of sugarcane, made firing with his pump action gun in exercise of his right of self-defence. The accused persons entered in a Rajbah, and started indiscriminate firing. Yar Muhammad accused also fired with his weapon which landed near the left ear of Muhammad Sharif (deceased). Amanat Ali (appellant) also fired with his weapon which hit on the right side of forehead of Muhammad Sharif (deceased). The complainant Muhammad Hussain (P.W.2) took shelter in the nearby sugarcane crop. In the meanwhile, Muhammad Amin (P.W.3) and Abdul Jabbar (given up P.W.) brothers of the complainant, who were coming to Syedwala from Bridge Piplan, also reached there and witnessed the occurrence. Muhammad Sharif (deceased) succumbed to the injuries at the spot. Muhammad Amin (P.W.3) informed the police through telephone whereupon the police as well as the residents of the nearby area came at the spot.

The motive behind the occurrence as set forth in the F.I.R. was that Shaukat Ali, brother of Amanat Ali (appellant) and Yar Muhammad co-accused (since murdered), was murdered, whereupon F.I.R. No.174 of 2003, under sections 302/ 324/148/149/109, P.P.C. was registered at Police Station Syedwala against the brothers of the complainant and in order to get revenge of said murder, the accused persons committed the murder of Muhammad Sharif (deceased). The accused persons while leaving the spot also took with them, the motorcycle of the complainant and licensed pistol .30 bore of the deceased which was tied around the waist of the deceased.

3. The appellant Amanat Ali alias Manoo was arrested in this case on 27-8-2005 by Mohabbat Ali, S.-I (P.W.12). On 2-9-2005, the appellant led to the recovery of pump action .12 bore gun (P-5) along with live cartridges (P-6/1-5), which was taken into possession vide recovery memo Exh. PF. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed charge against the appellant Amanat Ali alias Manoo and co-accused Ramzan alias Janoo (since acquitted) and Khalil Ahmed (since acquitted) under sections 302/34 P.P.C. on 21-6-2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced twelve witnesses, during the trial. Muhammad Hussain complainant (P.W.2) and Muhammad Amin (P.W.3) are the witnesses of ocular account while Muhammad Amin (P.W.3) is also the witness of

recovery of pump action .12 bore gun (P-5) from the possession of Amanat Ali alias Manoo appellant.

The medical evidence was furnished by Dr. Khalid Mehmood (P.W.4), who on 30-1-2005 at 8-00 p.m. conducted the postmortem examination on the dead body of Muhammad Sharif deceased while Ishtiaq Khan, Inspector (P.W.9), Riaz-ud-Din, Inspector (P.W.10), Mohabbat Ali, S.-I (P.W.12) and Muhammad Akram, Inspector (CW1) are the Investigating Officers of this case.

Abid Hussain Shah, Patwari (P.W.1), Mansab Ali 242/HC (P.W.5), Muhammad Aslam 117/C (P.W.6), Muhammad Ashraf 537/C (P.W.7), Muhammad Anwar 617/C (P.W.8) and Syed Imdad Hussain S.-I. (P.W.11) were the formal witnesses.

The prosecution has also produced documentary evidence in the shape of scaled site plan of the place of occurrence in duplicate (Exh. PA) & (Exh.PA/1), Fard Bayan of Muhammad Hussain complainant (P.W.2) (Exh.PB), copy of F.I.R. (Exh. PB/1), recovery memo of pistol .30 bore (P.1) of the deceased from the possession of Amanat Ali alias Manoo appellant (Exh.PC), rough site plan of the place of recovery of pistol .30 bore (P.1) (Exh.PC/1), memo of possession of blood-stained earth (Exh.PD), memo of possession of empty bullets etc. (Exh.PE), memo of possession of pump action12 bore gun along with five cartridges (Exh.PF), copy of rough site plan of the place of recovery of .12 bore pump action gun (Exh.PF/l), copy of postmortem report of the deceased (Exh.PG), pictorial diagram (Exh.PG/1), inquest report of the deceased (Exh.PH), injury statement of the deceased, memo of possession of rifle 7-MM from the possession of Khalil Ahmad (acquitted accused), memo of possession of last worn clothes of the deceased, all were exhibited as (Exh.PJ), copy of rough site plan of the place of recovery of rifle along with five cartridges from the possession of Khalil Ahmad (acquitted accused) (Exh.PJ/1), copy of application for conducting postmortem examination on the dead body of Muhammad Sharif deceased (Exh.PK), injury statement of Muhammad Sharif (deceased) exhibited as (Exh.PL), copy of site plan of the place of occurrence without scale (Exh.PM), report of Serologist (Exh.PN), report of Chemical Examiner (Exh.PO), report of Forensic Science Laboratory (Exh.PQ), and closed its evidence.

5. The statement of the appellant under section 342, Cr.P.C. and his co-accused were recorded by the learned trial Court on 18-7-2008. The appellant refuted all the allegations levelled against him and professed his innocence. While answering to a

question that "Why this case registered against you and why the P.Ws. have deposed against you?" Amanat Ali alias Manoo appellant replied as under:--

"Due to enmity and only pressurizing me for compromising the case F.I.R. bearing No. 174 of 2003 dated 30-6-2003 as I am complainant of that case in which my brother was murdered by the complainant party of this case."

The appellant did not opt to make his statement on oath, under section 340(2), Cr.P.C, nor he produced any evidence in his defence. However, the learned trial Court in order to reach at a just conclusion of the case examined Muhammad Akram, Inspector as (CW-1).

6. The learned trial Court vide judgment dated 16-10-2008, while acquitting co-accused Ramzan alias Janoo and Khalil Ahmed found Amanat Ali alias Manoo appellant guilty and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that presence of the complainant and the other eye-witness at the spot is highly improbable; that the complainant in the F.I.R. stated that when he was going on the motorbike along with his brother Muhammad Sharif (deceased), who was sitting on the rear seat, they were fired at from the backside by the appellant and his co-accused Yar Muhammad and the fire shots hit Muhammad Sharif at the backside of his neck and shoulders whereas the complainant in cross-examination has admitted that he identified the accused when they crossed them after firing hence, in that situation when he was driving motorcycle, it was not possible to see as to who was behind him and fired at his brother; that in the F.I.R. the complainant stated that the appellant Amanat Ali who was armed with pump action gun and Yar Muhammad (co-accused since murdered) who was armed with rifle fired which hit on the back of the neck and shoulder of his brother and thereafter his brother fell down and then Yar Muhammad fired which hit him on the left side of his ear and then Amanat Ali appellant fired which hit at the right side of forehead of deceased but while appearing before the learned trial Court, he did not describe injury which was allegedly caused by the appellant on the forehead of the deceased because of the simple reason that it was an exit wound; that in the F.I.R. it was the case of the complainant that the appellant was armed with a pump action gun whereas before the learned trial Court he categorically stated that the appellant was armed with rifle; that motive alleged in the F.I.R. was to the effect that brother of the appellant Amanat Ali and his co-accused Yar Muhammad, namely, Shaukat Ali was murdered and an F.I.R. No.174/03

under sections 302/324/148/149/ 109, P.P.C. at, Police Station Syedwala was registered against the brothers of the complainant and in order to take revenge of that murder, accused persons have committed the murder of Muhammad Sharif but while recording his statement before the Court, complainant did not state anything regarding motive; that recovery of pump action at the instance of the appellant is inconsequential as there was no report of the Forensic Science Laboratory despite the fact that as per police investigation 40 empties were recovered from the spot; that motive is always a double edged weapon and if it is the reason for crime, at the same time it could be the reason for false implication of the accused; that in the F.I.R. it was the case of the complainant that after the incident, the appellant and his co-accused took along with them licensed pistol of the deceased and motorcycle of the complainant on which the complainant and the deceased were riding but no motorcycle was recovered and number of the pistol was not mentioned in the F.I.R.; that the complainant stated in the F.I.R. that pistol of the deceased was licensed one but no licence was produced by the prosecution; that it was the case of the complainant that he too resorted to firing with his licensed pump action gun but no pump action gun was produced by the complainant during the course of investigation; that abscondence of the appellant has not been proved in accordance with law as no warrants of arrest or proclamation against the appellant is available on record and no witness deposed that any warrant or proclamation in respect of the appellant was obtained; that recovery of pistol of Muhammad Sharif deceased (P-1) from the appellant is not material as the licence of the said pistol was never produced either before the police or before the learned trial Court to establish that the same belonged to the deceased; that prosecution case from all angles is of highly doubtful in nature; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; Thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by learned counsel for the complainant opposes this appeal on the grounds that this incident took place on 30-1-2005 at 12-00 p.m. and the matter was reported to the police at 1-00 p.m. wherein all the necessary details of the incident such like the time and place of occurrence, the role played by the appellant and his co-accused, were clearly mentioned. Moreover, witnesses of ocular account has assigned very plausible reasons for their presence at the spot; that during his cross-examination, the complainant stated that he accompanied his brother who had gone home to spend his week end and was

checking rice shellers being Excise Inspector and he also told the names of the owners of the rice shellers checked by the deceased. Similarly the other eye-witness, namely, Muhammad Amin (P.W.3) stated that his land is close to the place of occurrence; that statements of the witnesses of ocular account were recorded immediately after the occurrence, after recording the statement of the complainant. So far as motive is concerned, learned counsel for the complainant contends that the complainant stated motive behind the occurrence in the F.I.R. and although it is true that it was not mentioned in the examination-in-chief but in cross-examination, motive was put to the witness that Muhammad Sharif (deceased of this case) Muhammad Tufail, Ahmad Ali, Amin, brothers of the complainant and others were accused for the murder of brother of the appellant which clearly established the motive and even it has not been denied by the defence and it has been admitted in the statement of the appellant recorded under section 342 Cr.P.C. So far as the medical evidenced is concerned, learned counsel for the complainant contends that there is specific allegation against the appellant that he along with his co-accused fired which hit on the backside of neck and shoulder of the deceased and injury No.3 is on the back of neck of deceased and a pellet was also recovered from the dead body of the deceased which strengthened the prosecution case to the extent of the appellant as he was armed with a pump action gun; that it was a broad-daylight occurrence therefore, no question of mistaken identity arises; that there is no conflict between the ocular account and the medical evidence; that prosecution case is further corroborated by the recovery of pump action gun at the instance of the appellant and recovery of pistol of the deceased from him which was snatched after the incident and taken into possession through recovery memo (Exh.PC); that the appellant remained fugitive from law for a period of about 8 months; that investigation in this case was conducted with mala fide and for that reason Muhammad Akram, Inspector was given up by the prosecution as being won over and thereafter he was summoned as CW-1; that there is nothing on the record to suggest that the complainant and the deceased had enmity with anybody else; that substitution in such like cases is a rare phenomenon; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

10. The detail of the prosecution case has already been given in paragraph No.2 of this judgment therefore, there is no need to repeat the same however, gist of the prosecution case is that on 30-1-2005 at about 12-00 p.m. (noon), Muhammad Hussain complainant (P.W.2) along with his brother Muhammad Sharif (deceased), who was posted as Excise Inspector at Nankana Sahib, was proceeding back to his village Guddan from Syedwala while riding on their Motorcycle bearing Registration No. 8915/LRX. Muhammad Hussain complainant (P.W.2) was driving the motorcycle, whereas, Muhammad Sharif (deceased) was sitting on the rear seat of motorcycle. They, when reached near the Bridge Pipplan, four persons while riding on two motorcycles, Amanat Ali (appellant) armed with pump action gun, Yar Muhammad accused (since murdered) armed with rifle, two unknown persons, out of them one accused person was armed with pistol .30 bore and the other accused person was armed with rifle who can be identified on confrontation, emerged there. Suddenly, Amanat Ali (appellant) and Yar Muhammad, accused (since murdered in police encounter) started firing with their respective weapons, which landed on the backside of neck and shoulders of Muhammad Sharif (deceased). The complainant Muhammad Hussain (P.W.2) stopped the motorcycle, whereas, Muhammad Sharif (deceased) fell down on the ground. The complainant Muhammad Hussain (P.W.2) while concealing himself in the nearby standing crop of sugarcane, made firing with his pump action gun in exercise of his right of self-defence. The accused persons entered in a Rajbah, and started indiscriminate firing. Yar Muhammad accused also fired with his weapon which landed near the left ear of Muhammad Sharif (deceased). Amanat Ali (appellant) also fired with his weapon which hit on the right side of forehead of Muhammad Sharif (deceased). The complainant Muhammad Hussain (P.W.2) took shelter in the nearby sugarcane crop. In the meanwhile Muhammad Amin (P.W.3) and Abdul Jabbar (given up P.W.) brothers of the complainant, who were coming to Syedwala from Bridge Piplan, also reached there and witnessed the occurrence. Muhammad Sharif (deceased) succumbed to the injuries at the spot. Muhammad Amin (P.W.3) informed the police through telephone whereupon the police as well as the residents of the nearby area came at the spot. The motive behind the occurrence was alleged that Shaukat Ali, brother of Amanat Ali (appellant) and Yar Muhammad, was murdered, whereupon case F.I.R. No.174/2003, under sections 302/324/148/149/109, P.P.C. was registered at Police Station Syedwala against the brothers of the complainant and according to the complainant, in order to get revenge of said murder, the accused persons murdered

Muhammad Sharif (deceased), brother of the complainant, in the daylight. The accused persons while going took motorcycle of the complainant and pistol .30 bore of the deceased which was tied around the waist of the deceased, along with them.

11. The role assigned to the appellant Amanat Ali and Yar Muhammad co-accused (since murdered) in the F.I.R. (Exh.PB/1) was to the effect that on the day of occurrence when the complainant Muhammad Hussain (P.W.2) along with his brother Muhammad Sharif (deceased) was going towards his village on motorcycle, Amanat Ali appellant and Yar Muhammad co-accused (since murdered), both made firing at Muhammad Sharif deceased with their respective weapons which landed on the back side of his neck and shoulders. Apart from the above mentioned joint role, Amanat Ali appellant was also assigned the role of making a fire shot which landed on the right side of forehead of Muhammad Sharif deceased whereas Yar Muhammad co-accused (since murdered) was attributed the role of making a fire shot which landed on the left ear of Muhammad Sharif (deceased). The role attributed to Amanat Ali appellant in the F.I.R. (Exh.PB/1) was in conflict with the medical evidence because apart from one injury on the back of the neck of Muhammad Sharif deceased (injury No.3), which was jointly attributed to the appellant Amanat Ali and Yar Muhammad co-accused (since murdered), other two injuries attributed to the appellant were not available on the person of the deceased as there was no injury on the back of shoulders of Muhammad Sharif deceased, which was jointly attributed to the appellant Amanat Ali and Yar Muhammad co-accused (since acquitted) whereas the other injury which was specifically attributed to the appellant on the right side of forehead of Muhammad Sharif deceased was an exit wound according to the medical evidence furnished by Dr. Khalid Mehmood (P.W.4). As the injury on the right side of forehead of Muhammad Sharif deceased was an exit wound therefore, Muhammad Hussain complainant (P.W.2) while making his statement before the learned trial Court did not state anything about the said injury. However, the joint role attributed to the appellant Amanat Ali and Yar Muhammad co-accused (since murdered) of inflicting fire arm injuries on the back side of neck and back of the deceased was assigned by Muhammad Hussain complainant (P.W.2) during his statement recorded by the learned trial Court. The said role was in conflict with the medical evidence to the extent of injury on the back of Muhammad Sharif deceased. Insofar as injury on the back of neck of Muhammad Sharif deceased, which is jointly attributed to the appellant and Yar Muhammad co-accused (since murdered) is concerned, we have noted that in the F.I.R. (Exh.PB/1), the complainant has stated that

he was driving the motorcycle whereas Muhammad Sharif deceased was sitting behind him and the appellant Amanat Ali and Yar Muhammad co-accused (since murdered) jointly started firing from the backside which landed on the back of neck and shoulders of Muhammad Sharif (deceased). Muhammad Hussain complainant (P.W.2) has also conceded during his cross-examination that he saw the accused persons when they over-took him after making fire shots at Muhammad Sharif deceased. Relevant part of the statement of Muhammad Hussain (P.W.2) at page Nos. 32 & 33 of the paper book reads as under:--

"I sighted the accused persons when they overtook me after resorting fire to Muhammad Sharif (since deceased)."

In the given circumstances, it was not possible for the complainant to attribute the above mentioned injuries on the back side of the neck and shoulders of Muhammad Sharif deceased to the appellant because he (complainant) was driving the motorcycle whereas, accused persons were present on his backside. The evidence of other eye-witness namely Muhammad Amin (P.W.3), brother of Muhammad-Sharif deceased, is in contradiction with the evidence of the complainant Muhammad Hussain (P.W.2). As mentioned earlier the complainant in the F.I.R. (Exh.PB/1), as well as, in his statement before the learned trial Court has jointly attributed injuries on the backside of the neck and shoulders of the deceased to the appellant Amanat Ali and Yar Muhammad co-accused (since murdered) but Muhammad Amin (P.W.3) has attributed the above mentioned injuries only to the appellant while making his statement before the learned trial Court. We have noted that Muhammad Amin (P.W.3) while making his statement before the learned trial Court has not attributed any injury on the right side of forehead of Muhammad Sharif deceased to the appellant and he concealed the said injury in his statement recorded by the learned trial Court because the said injury was an exit wound. He was duly confronted with his previous statement (Exh.DA) and his dishonest concealment was brought on the record. Relevant part of his statement at page No. 43 of the paper book reads as under:--

"I had not recorded before the police that Amanat Ali accused resorted a fire which landed upon the forehead of Muhammad Sharif on his right side. (Confronted with Exh.DA) where it is so recorded but not in its minute detail."

It is evident from the perusal of statement of Muhammad Amin (P.W.3) that he deliberately made dishonest improvement in his statement by stating that he did not

record in his statement before the police that a fire shot made by the appellant landed on the right side of the forehead of the deceased in order to bring his evidence in line with the medical evidence. As mentioned earlier, in his statement before the learned trial Court, the complainant Muhammad Hussain (P.W.2) has also concealed the above mentioned injury on the forehead of the deceased which he attributed to the appellant in F.I.R. Exh. PB/1. It is by now well-settled law that a witness who makes dishonest improvements/concealments in his statement is not worthy of reliance. In the case of 'Akhtar Ali and others v. The State' (2008 SCMR 6) while discussing the evidence of a witness who made dishonest improvements in his statement the Hon'ble Supreme Court of Pakistan observed as under:--

"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar.805."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Muhammad Rafique and others v. The State and others' (2010 SCMR 385) wherein it was held that a witness who makes improvements on material aspects of the case is not worthy of reliance. It is, therefore, not safe to rely upon the evidence of the above mentioned eye-witnesses who made dishonest concealment/ improvements in their statements before the learned trial Court in order to overcome the weaknesses in the prosecution case and in order to bring their evidence in line with the medical evidence.

We have also noted that the above mentioned eye-witnesses namely Muhammad Hussain (P.W.2) and his brother Muhammad Amin (P.W.3) were chance witnesses. The occurrence in this case took place near Bridge Pipplanwala. Both the above mentioned witnesses admitted during their cross-examination that the place of occurrence (bridge Pipplanwala) was at a distance of 12/13 kilometers from their residences. They have not given any plausible or convincing reason for their presence at the spot at the relevant time. It is noteworthy that post mortem on the dead body of Muhammad Sharif deceased was conducted on 30-1-2005 at 8-00 p.m. whereas the occurrence took place on the said day at 12-00 p.m. (noon) and as such there is delay of eight hours in conducting the post mortem examination without there being any

plausible explanation for the said delay. The above mentioned delay in post mortem examination is suggestive of the fact that the eye-witnesses were not present at the spot, at the time of occurrence and the said delay was consumed in procuring the attendance of the eye-witnesses and preparation of police papers, necessary for the post mortem examination. We may refer here the case of 'Irshad Ahmad v. The State' (2011 SCMR 1190) wherein it was observed that the post mortem examination of the dead body had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post mortem examination of the dead body conducted. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of 'Muhammad Ashraf v. The State' (2012 SCMR 419). Similarly in the case of 'Khalid alias Khalidi and 2 others v. The State' (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 13 hours in conducting the post mortem examination on the dead body of deceased, to be an adverse effect against the prosecution case and it was held that it shows that the F.I.R. was not lodged at the given time.

12. Prosecution evidence qua recovery of pump action .12 bore gun (P-5) on the pointation of the appellant is inconsequen-tial because report of Forensic Science Laboratory (Exh.PQ) is only about the working order of said gun. We have also noted that a pellet was recovered from the dead body of Muhammad Sharif deceased at the time of his post mortem examination which was handed over by the doctor to Muhammad Anwar 617/C after post mortem examination but said pellet was not sent to the Forensic Science Laboratory for its comparison and matching with the pump action .12 bore gun (P-5) thus, in absence of matching report of any empty or pellet with pump action .12 bore gun (P-5), the alleged recovery of gun (P-5) on the pointation of the appellant is of no avail to the prosecution.

13. We have also noted that it was alleged in the F.I.R. as well as in the statements of the prosecution witnesses that accused persons took away the motorcycle and licensed pistol of Muhammad Sharif deceased after committing his murder. No motorcycle was recovered from the possession of the appellant during the investigation of this case. Although it has been alleged that the licensed pistol of the deceased (P-1) was recovered from the possession of the appellant vide memo (Exh.PC) but licence of the deceased was never produced in evidence by the prosecution to establish that the said pistol was licensed pistol of Muhammad Sharif deceased. No number of pistol or the number of

licence was mentioned in the F.I.R. (Exh.PB/1) or in any supplementary statement of the complainant or in the statements of the complainant Muhammad Hussain (P.W.2) and his brother Muhammad Amin (P.W.3), recorded by the learned trial Court. We are, therefore, of the view that alleged recovery of pistol (P-1) from the possession of appellant is inconsequential.

14. Insofar as alleged abscondence of the appellant is concerned, we have noted that neither any warrant of arrest nor any proclamation to prove the alleged abscondence of the appellant was brought on the record by the prosecution. We are therefore, of the view that the alleged abscondence of the appellant has not been proved by the prosecution in this case.

15. Insofar as prosecution evidence qua motive is concerned, it is by now well-settled law that motive is a double edged weapon. If it could be a reason for commission of the offence, at the same time it may be a ground for false implication of the accused in the case. Even otherwise, in absence of other convincing and reliable evidence, the appellant cannot be convicted merely on the basis of motive evidence furnished by the prosecution. Therefore, there is no need to discuss the prosecution evidence qua motive because there is no other reliable and trustworthy evidence to maintain the conviction and sentence of the appellant.

16. After considering all the aspects of this case, we have come to this conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. Resultantly, Criminal Appeal No. 1192 of 2008 filed by the appellant Amanat Ali alias Manoo is hereby accepted and he is acquitted of the charge while extending him the benefit of doubt. He is in custody, he be released from jail forthwith if not required in any other case. Murder Reference No.1 of 2009 is answered in negative and death sentence awarded to the appellant is not confirmed.

HBT/M-85/L **Appeal accepted.**

PLJ 2013 Cr.C. (Lahore) 10

Present: Malik Shahzad Ahmad Khan, J.

Mst. NUSRAT PARVEEN--Petitioner

versus

MUHAMMAD RAFIQUE and 4 others--Respondents

Crl. Misc. No. 692-H of 2012, decided on 27.4.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 491--Habeas Petition--Petitioner was real mother of the minor and she had first right of `Hizanat' of her minor daughter--In these circumstances, as the custody of the detenue was removed illegally, therefore, petition was accepted and the custody of minor was handed over to the petitioner, who was real mother of the detenue. [P. 11] A

Haji Khalid Rehman, Advocate alongwith Petitioner.

Mr. Muhammad Iftikhar Shakir Advocate for Respondents No. 1 to 3.

Date of hearing: 27.4.2012.

ORDER

This petition has been filed with the prayer that the custody of minor namely Iqra (aged about 12 years) may be handed over to the petitioner.

2. As per brief facts of the present case, the above mentioned minor was in the custody of the petitioner. The petitioner and the detenue filed a suit for the recovery of maintenance allowance against Respondent No. 1, which was decreed in their favour on 21.02.2007 by the learned Judge Family Court, Faisalabad. The decree passed in favour of the petitioner and the above mentioned detenue has not been satisfied so far. The judgment debtor Muhammad Rafique Respondent No. 1, thereafter illegally removed the custody of the alleged detenue on 03.05.2010. The petitioner, thereafter, filed a habeas petition under Section 491 of, Cr.P.C. in the Court of learned Sessions Judge, Faisalabad. Despite repeated efforts made by the learned Sessions Judge, Faisalabad, Respondent No. 1, Muhammad Rafique did not produce the detenue before the above mentioned Court and on the direction of the learned Sessions. Judge, Faisalabad an FIR No. 822/2010 dated 25.06.2010 under Section 363 of PPC was registered against the petitioner at Police Station Ghulam Muhammad Abad, District Faisalabad. Respondent No. 1, later on filed a petition under Section 25 of the Guardians & Wards Act, 1890. The said petition was dismissed vide order dated 13.10.2011 passed by the learned Civil Judge/Guardian Judge, Faisalabad.

3. It is contended by the learned counsel for the petitioner that the petitioner being real mother of the minor/detenue, is entitled to retain her custody; that custody of the minor was illegally removed by Respondent No. 1, therefore, he is not entitled to

retain the custody of the minor. It is added that life and health of the minor will be in danger, if the custody is not handed over to the petitioner/mother.

4. On the other hand this petition has been opposed by the learned counsel appearing on behalf of Respondents No. 1 to 3 on the grounds that Respondent No. 1 being father of the minor is her natural guardian and he is entitled to her custody; that the petitioner has contracted second marriage whereas Respondent No. 1 has devoted his life for bringing up the minor; that the daughter of the petitioner has attained the age of puberty and first right of Hizanat does not lie with the petitioner; that the minor has developed profound attachment with Respondents No. 1 to 3 and it will not be in the welfare of the minor to disturb her custody, therefore, this petition may be dismissed.

5. Arguments heard and record perused.

6. It is evident from the perusal of the record that the minor Iqra was illegally removed by Respondent No. 1 from the custody of the petitioner in order to avoid the decree of maintenance allowance, which was passed in favour of the petitioner and the alleged detenue on 21.03.2007 by the learned Judge Family Court, Faisalabad. The petitioner, thereafter, filed a habeas petition against the above mentioned illegal removal of the minor and ultimately an FIR No. 822/2010 offence under Section 363, PPC was registered against Respondent No. 1, at Police Station Ghulam Muhammad Abad, District Faisalabad on the direction of the learned Sessions Judge, Faisalabad. The petitioner is real mother of the minor and she has first right of `Hizanat' of her minor daughter. It has been laid down in number of judgments passed by the Hon'ble Supreme Court of Pakistan that "Mother's lap is God's own Cradle". In these circumstances, as the custody of the detenue was removed illegally, therefore, this petition is accepted and the custody of minor Iqra is handed over to the petitioner, who is real mother of the detenue. Anyhow, Muhammad Rafique (Respondent No. 1) may file a petition under the Guardians and Wards Act, 1890 for the custody of minor, before the concerned Guardian Court, and he may raise his objection regarding disentitlement of the petitioner to the custody of minor on the ground of her second marriage, if he so desires. The learned Guardian Judge will decide the question of custody, keeping in view the welfare of minor and relevant law on the subject, without being influenced by any observation made in this order, provided a petition is filed in this respect before him.

7. With these observations this petition stands disposed of.

(A.S.) **Petition disposed of.**

PLJ 2013 Cr.C. (Lahore) 100

[Bahawalpur Bench Bahawalpur]

Present: Malik Shahzad Ahmed Khan, J.

MUHAMMAD ATTIQUE BASIT--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 741-B of 2012, decided on 10.7.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 409, 467, 468, 471 r/w PCA of 5(2) 47--Bail, grant of--Allegation of--Got job on bogus degrees and certificates--Petitioner served in the Education Department for as many as 15 years and he has been made victim of the departmental rivalry--Complainant nominated as many as 10 accused in the above mentioned FIR but during the inquiry held by Anti Corruption Establishment, no criminal action was proposed against 7 co-accused of the petitioner and only departmental inquiry/action was recommended against them, whereas, during departmental inquiry, all co-accused of the petitioner have been declared innocent--There was no allegation, of entrustment of any property to the petitioner and similarly no allegation of preparation of any valuable security was levelled against the petitioner in the FIR, therefore, attraction of ingredients of the offences punishable u/Ss. 409 and 467, PPC in the instant case calls for further inquiry--Held: Grant of bail in such like cases is a rule, while refusal is an exception--Petitioner was not involved in any other criminal case--Prosecution case entirely rests upon the documentary evidence which was already in possession of the prosecution and there were no chances of tampering with the same and as such the petitioner was entitled to the post arrest bail--Bail allowed. [P. 101] A

1996 SCMR 1132, ref.

Mr. Muhammad Amir Niaz Khan Bhadera, Advocate for Petitioner.

Malik Latif D.P.G. for State.

Date of hearing: 10.7.2012.

ORDER

The petitioner seeks, bail after arrest in case of FIR No. 27/2011 dated 06.07.2011 offence under Sections 409, 467, 468, 471, PPC read with Section 5(2)47 of PCA, registered at Police Station Anti Corruption Establishment, Bahawalnagar.

2. As per brief allegations levelled in the FIR, the petitioner got the job of Drawing Master in Education Department on account of bogus degrees and certificates. Hence, the above mentioned FIR.

3. It is contended by the learned counsel for the petitioner that the petitioner has falsely been implicated in the above mentioned case due to departmental rivalry; that from the bare reading of the contents of FIR the offences under Sections 409 and 467, PPC are not made out in the instant case whereas all the remaining offences do not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. that the petitioner was not associated at the time of verification of his documents, therefore, he could not establish his innocence and genuineness of the documents in question; that the complainant nominated as many as 10 accused in the above mentioned FIR but all the co-accused of the petitioner were exonerated during the departmental inquiry; that similarly during the inquiry held by Anti-Corruption Establishment 7 co-accused of the petitioner were declared innocent and as such the case of the petitioner is of further inquiry; that the prosecution case rests on the documentary evidence which is already in possession of the prosecution and there are no chances of tampering with the same, therefore, the petitioner may be granted post arrest bail.

4. The learned DPG has opposed this bail petition on the grounds that the petitioner is named in the FIR; that the petitioner got his appointment on the basis of bogus documents and he has drawn salary to the tune of Rs. 1,25,150/- from the department; that the petitioner does not deserve the concession of post arrest bail. Any how, the

learned DPG has frankly conceded that offences under Sections 467 and 409, PPC are not attracted in this case.

5. Arguments heard. Record perused.

6. It was argued on behalf of the petitioner that the petitioner served in the Education Department for as many as 15 years and he has been made victim of the departmental rivalry. Any how without commenting on the said contention of the learned counsel for the petitioner, I have noted that the complainant nominated as many as 10 accused in the above mentioned FIR but during the inquiry held by Anti-Corruption Establishment Bahawalnagar, no criminal action was proposed against 7 co-accused of the petitioner and only departmental inquiry/action was recommended against them, whereas, during departmental inquiry, all co-accused of the petitioner have been declared innocent. It is evident from the contents of the FIR that there was no allegation of entrustment of any property to the petitioner and similarly no allegation of preparation of any valuable security was levelled against the petitioner in the FIR, therefore, attraction of ingredients of the offences punishable under Sections 409 and 467, PPC in the instant case calls for further inquiry. The learned DPG has frankly conceded that offences under Sections 467 and 409, PPC are not made out in this case from bare reading of the FIR. All the remaining offences mentioned in the FIR do not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. The grant of bail in such like cases is a rule, while refusal is an exception. The learned DPG has further conceded on instructions that the petitioner is not involved in any other criminal case and as such no exceptional ground has been pointed by the learned DPG to refuse bail to the petitioner. The prosecution case entirely rests upon the documentary evidence which is already in possession of the prosecution and there are no chances of tampering with the same and as such the petitioner is entitled to the post arrest bail. Reliance is placed on the case of Saeed Ahmed vs. The State (1996 SCMR 1132).

7. In view of the above discussion, this petition is allowed and the petitioner is admitted to bail after arrest subject to furnishing his bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court. It is, however, clarified that the observations made in this order are tentative in nature and shall cause

no prejudice to the case of either party at the time of decision of other issues involved in the present case or at the time of final adjudication of the case before the learned trial Court.

(A.S.) **Bail allowed.**

PLJ 2013 Cr.C. (Lahore) 344 (DB)

Present: Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ.

MAMOON-UR-RASHID alias ABDUL RASHID--Appellant

versus

STATE--Respondents

Crl. Appeal No. 294-J of 2008 and M.R. No. 547 of 2007, decided on 18.12.2012.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Modification in sentence--Sentence altered--Quantum of sentence--Prosecution evidence of motive and recovery of pistol abscondance of the appellant however, if the evidence of motive, abscondance and recovery of pistol was excluded from consideration even then there was sufficient incriminating evidence available; on the record against the appellant--Prosecution case was fully proved through the evidence of eye-witnesses--They stood the test of lengthy cross examination but their evidence could not be shattered, Their evidence was quite natural, straightforward and confidence inspiring--Ocular account of the prosecution was supported by the evidence of Dr. as well as post-mortem report of deceased--Time of occurrence, the seat of injury and the kind of weapon used, as mentioned by the eye-witnesses were supported by medical evidence--Prosecution had proved its case against the appellant beyond the shadow of any doubt--Quantum of sentence and some mitigating circumstances in favour of the appellant firstly, co-accused of the appellant had been acquitted by trial Court while extending them the benefit of doubt and no appeal against their acquittal has been filed by the State, secondly, the alleged recovery of pistol P-4 alongwith bullets P-5/1-2 from the possession of the appellant was of no avail to the prosecution in absence of the Forensic Science Laboratory report and thirdly the prosecution had alleged a specific motive but had miserably failed to prove the same--It was not determinable as to what was the real cause of occurrence and as to what had actually happened which had resulted into the death of deceased--Death sentence awarded to the appellant was quite harsh--Held: If a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused--Conviction of appellant u/S. 302(b), PPC

awarded by trial Court was maintained but his sentence was altered from the death to imprisonment for life--Appeal dismissed. [Pp. 351 & 353] A, B & C

2011 SCMR 593, ref.

Mian Shahid Ali Shakir, Advocate for Appellant.

Mr. Arshad Mehmood, DPG for State.

Nemo for Complainant.

Date of hearing: 18.12.2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--This judgment shall dispose of Criminal Appeal No. 294-J of 2008 filed by Mamoon-ur-Rashid alias Abdul Rashid appellant and Murder Reference No. 547 of 2007, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Mamoon-ur-Rashid alias Abdul Rashid, appellant, as both these matters have arisen out of the same judgment dated 30.07.2007, passed by the learned Additional Sessions Judge, Faisalabad, whereby, Mamoon-ur-Reshid alias Abdul Rashid, appellant was convicted under Section 302(b) of, PPC for committing the murder of Ishtiaq Ahmad, deceased and sentenced to death with a direction to pay the compensation amount of Rs. 1,00,000/- (Rupees One Hundred Thousand only) to the legal heirs of deceased as envisaged under Section 544-A of, Cr.P.C. and in default, thereof, to suffer simple imprisonment for six months S.I.

2. Brief facts of the case as given by the complainant Muhammad Ismail (PW-9) in his `Fard Biyan' Exh. P-C on the basis whereof the formal FIR Exh.P-C/1 was recorded, are that his brother Mushtaq Ahmad was murdered and in order to make arrangements for his `chaleeswaan' ceremony which was scheduled to be held on 14.03.2002 he (complainant) alongwith his brother Zulfiqar Ali (PW-10), Abdul Qayyum (given up PW) and Ishtiaq Ahmad (deceased) on 13.03.2002 at about 9:45 p.m. came out of his house in order to go to the house of Mushtaq Ahmad. As they came out of the house they saw accused Abdul Hafeez (since acquitted), Abdul Rashid (appellant), Muhammad Sharief (since acquitted), Muhammad Akmal (since proclaimed offender), Muhammad Afzal (since acquitted) and two unknown co-accused all armed with fire-arm weapons were standing at a `pulli' in front of the house, who were identified in the light of electric bulb. Muhammad Sharief (accused since acquitted) raised lalkara that they will teach them a lesson for successive police

raids at them, whereupon Abdul Rashid (appellant) made a fire shot, which landed on the left side of the chest of Ishtiaq Ahmad (deceased). All the accused fled away from the place of occurrence while brandishing their fire-arm weapons. The injured Ishtiaq Ahmad succumbed to the said injury at the spot.

3. The appellant and Muhammad Akmal accused were declared as proclaimed offenders and challan under Section 512, Cr.P.C. was submitted before the Court. The case of co-accused namely Abdul Hafeez, Muhammad Sharif and Muhammad Afzal was separated, they were tried and ultimately acquitted by the learned trial Court. The appellant was arrested in another case FIR No. 72/2002 dated 06.02.2002 registered at Police Station Jaranwala. On 12.03.2006 Abdul Ghafoor, SI/Investigating Officer (PW-12) caused his formal arrest in this case and on 19.03.2006 he led to the recovery of .30 bore pistol (P-4) alongwith two live bullets P-5/1-2 through memo. Exh. P-K. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 08.05.2006, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced twelve witnesses, during the trial. Muhammad Ismail (PW-9) and Zulfiqar Ali (PW-10) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Muhammad Ashfaq (PW-6). Muhammad Akram 2356/C (PW-8) was the witness of recovery of pistol .30 bore P-4 alongwith two live bullets, P-5/1-2 on the disclosure of Abdul Rashid (appellant). Abdul Ghafoor, SI (PW-12) was the Investigating Officer of this case.

Muhammad Anwar (PW-1), Aurangzaib, Draftsman (PW-2), Muhammad Javaid, Moharrar (PW-3), Muhammad Arshad 3171/C (PW-4), Ashiq Hussain (PW-5), Sadiq Ali Shah, (Rtd) Inspector (PW-7), Muhammad Akram 2356/C (PW-8) and Mukhtar Ahmad ASI (PW-11) are the formal witnesses.

5. The statement of the appellant u/S. 342, Cr.P.C. was recorded by the learned trial Court, He refuted the allegations levelled against him and professed his innocence. While answering to question that "Why the prosecution witnesses deposed against you and why this case against you" the appellant replied as under:--

Mamoon-ur-Rashid alias Abdul Rashid.

"It is a false case. I am falsely involved in this case due to previous enmity with the complainant party. All the story of complaint Ex.PC is not only incorrect but also disproved during the trial of co-accused Muhammad Sharief Muhammad Afzal and Abdul Hafeez. All the PWs are related inter-se and they are also inimical towards me. They have deposed totally false against me. I am innocent in the murder of Ishtiaque Ahmad. The police proceedings are totally baseless and partial."

6. The learned trial Court vide judgment dated 30.07.2007, found Mamoon-ur-Rashid alias Abdul Rashid appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case because of previous enmity; that it was a night time occurrence, which was un-witnessed and the appellant has been implicated in the case on the basis of suspicion; that the evidence of the prosecution has been disbelieved qua other co-accused who have admittedly been acquitted and their acquittal has not been challenged either by the State or by the complainant and that the appellant cannot be convicted on the basis of same evidence; that the abscondance of the appellant has not been proved in accordance with law; that Muhammad Anwar (PW-1) in his statement has admitted that he prepared his report Exh.P-A/1 under the direction of Investigating Officer; that recovery of pistol P-4 is inconsequential as no empty was recovered from the place of occurrence and that there is no report of Forensic Science Laboratory qua the above mentioned pistol; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt, thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. Notice was issued to the complainant. On the last date of hearing i.e. 13.12.2012, learned DPG stated that the complainant was duly informed about the fixation of this appeal through his son. However, in the interest of justice, fresh notice was ordered to be issued to the complainant. Today, again no body has entered appearance on his behalf, therefore, we proceed to decide this case after hearing the arguments of learned counsel for the appellant, learned DPG and going through the available record.

9. Learned Deputy Prosecutor-General, for the State, opposes this appeal on the grounds that there is no delay in reporting the matter to the police; that the occurrence took place on 13.03.2012 at about 09:45 p.m. and statement of the complainant was

made to the police on the same night at 11:50 p.m.; that there is a specific allegation against the appellant of making a fire shot, which hit on the chest of the deceased and the role attributed to the appellant is fully supported by the medical evidence; that prosecution case is further corroborated by the recovery of pistol P-4 from possession of the appellant vide recovery memo. Exh.P-K; that case of the appellant is distinguishable from the case of co-accused, who have been acquitted; that the appellant remained absconder for a considerable period which further corroborates the prosecution version; that there is no mitigating circumstance in this case; that the sentence of death was rightly awarded to the appellant and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

10. We have heard the arguments of learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.

11. The occurrence in this case took place on the intervening night of 13/14.03.2002 at 09:45 p.m., outside the house of complainant situated in Chak No. 70/`Gaaf Bay' within the area of Police Station Jaranwala, District Faisalabad. The matter was reported to the police on the same night at 11:50 p.m. by the complainant Muhammad Ismail (PW-9) through `Fard Biyan' Exh. P-C, on the basis, . whereof, formal FIR Ex.P-C/1 was also registered on the same night at 12:25 a.m. The distance between the place of occurrence and police station is 12 Miles (20 Kilometers). Considering all the above mentioned facts, time and place of occurrence and its distance from the Police Station, we are of the view that there is no delay in reporting the matter to the police.

12. The ocular account of the prosecution was furnished by the complainant Muhammad Ismail (PW-9), and Zulfiqar Ali (PW-10). The examination-in-chief of Muhammad Ismail (PW-9) recorded by the learned trial Court is reproduced hereunder for ready reference:--

"On 06.02.2002 my brother Mushtaq Ahmad was murdered by Abdul Rashid alias Mamoon-ur-Rashid present in the Court Abdul Hafeez, Amjid Ali and Muhammad Akmal and for the arrest of aforementioned accused we were helping the police to conduct the raid and my son Ishtiaq deceased was on forefront. On 14.03.2002 there was `chaleeswan' ceremony of my deceased brother Mushtaq. For the arrangement of said ceremony on the night of 13.03.2002 myself Zulfiqar Ali, Abdul Qayyum and my deceased son were going towards the house of Mushtaq from our house in the

night. I saw Abdul Rashid alias Mamoon-ur-Rashid armed with .30 bore pistol present in the Court, Abdul Hafeez armed with .12 bore gun Muhammad Sharif armed with .12 bore gun (both since acquitted) and Muhammad Akmal (since PO) armed with .12 bore double barrel gun alongwith two unknown persons were standing on `Saim Nala Pulli', Muhammad Sharif accused raised Lalkara that they should be taught lesson for having the raid of police conducted every day. All the above named accused started firing straight on us. The fire shot made by Abdul Rashid alias Mamoon-ur-Rashid hit on the chest of my son Ishtiaq deceased on left side. He fell down on the ground. The accused persons left the place of occurrence by making firing. I myself Zulfiqar Ali and Abdul Qayyum PWs tried to approach Ishtiaq but he succumbed to the injuries on the spot immediately. I left Abdul Qayyum and Zulfiqar Ali near the dead body and myself left for the police station to make report. At about 11:45 p.m. when I reached near `Bungala Jassoana, I met the police there. I made the statement before the police which was reduced into writing by the SI and read over to me and I signed the same in token of its correctness which is Ex.PC. The police accompanied me to the village and reached the place of occurrence. The police inspected the place of occurrence and collected the blood-stained earth and dispatched the dead body to the hospital for the purpose of post-mortem examination.

On 09.03.2004 I alongwith Ajmaile joined the investigation and Abdul Hafeez accused got recovered gun .12 bore.

On 19.03.2006 I alongwith Muhammad Ilyas were present in the police station in connection with the investigation of this case where the accused Mamnoon-ur-Rasheid now present in Court made a disclosure that he can get recovered the weapon of offence. Then he led to the place of recovery near Gogara Branch Canal bank and dig out from the reed bushes the pistol .30 bore P-4 alongwith two alive bullets P-5/1-2 which were taken into possession by the police vide recovery memo. Ex.PK attested by me and Muhammad Ilyas PW."

The statement of the other eye-witness namely Zulfiqar Ali (PW-10) is also on the same lines.

The above mentioned eye-witnesses namely Muhammad Ismail (PW-9) and Zulfiqar Ali (PW-10) were cross-examined at length but their evidence could not be shattered during the process of cross-examination. They corroborated each other on all material aspects of the case. Their evidence is straight forward and confidence inspiring. Muhammad Ismail (PW-9) is real father whereas Zulfiqar Ali (PW-10) is real uncle

of Ishtiaq Ahmad (deceased). It is highly improbable that they will falsely implicate the appellant and would let of the real culprit. Substitution in such like cases is a rare phenomena.

13. The medical evidence of the prosecution was furnished by Dr. Muhammad Ashfaq (PW-6). The injury attributed to the accused by the above mentioned eye-witnesses of the occurrence was fully supported by the above mentioned medical evidence because according to the story narrated by the complainant Muhammad Ismail (PW-9) in his `Fard Biyan' Exh.P-C in the FIR Exh.P-C/1, as well as, in his statement before the learned trial Court, the fire shot made by Mamoon-ur-Rashid alias Abdul Rashid appellant landed on the Chest of Ishtiaq Ahmad (deceased), and according to the medical evidence the injury on the chest of the deceased was a fire-arm lacerated entrance wound. As per evidence of Dr. Muhammad Ashfiaq (PW-6) the said injury was the cause of death of the deceased.

14. The prosecution has also produced the evidence about the recovery of pistol .30 bore P-4 alongwith two live bullets P-5/1-2 allegedly recovered from the possession of Mamoon-ur-Rashid alias Abdul Rashid appellant. No empty was recovered from the place of occurrence. There is no report of Forensic Science Laboratory regarding the said pistol, therefore, the above mentioned evidence of recovery is of no avail to the prosecution.

15. So far as the motive is concerned, according to the prosecution case brother of the complainant was murdered and the police was conducting raids at the accused party and due to the said grudge the accused persons committed the murder of Ishtiaq Ahmad, deceased. We have noted that the complainant Muhammad Ismail made material improvements in his statement before the Court in respect of the motive part of the prosecution. It was not mentioned in the FIR Exh.P-C/1 that his brother Mushtaq Ahmad was murdered by Mamoon-ur-Rasheed alias Abdul Rashid appellant, whereas while appearing before the Court he stated that his brother Mushtaq Ahmad was murdered by the appellant. We have also noted that in the FIR, as well as, in the statement before the Court the prosecution witnesses have stated that it was Muhammad Sharief accused (since acquitted), who raised `lalkara' that the deceased be taught a lesson for arranging the repeated raids of police at the houses of accused persons. The motive was jointly attributed to the appellant, as well as other co-accused namely Abdul Hafeez, Muhammad Sharief and Muhammad Afzal but all the remaining co-accused have already been acquitted by the learned trial Court. We

are, therefore, of the view that the motive as alleged by the prosecution against the appellant is not proved in this case. No convincing evidence has been produced by the prosecution to prove the alleged motive, therefore, we are of the view that motive as alleged by the prosecution has not been proved in this case.

16. The prosecution has also produced evidence qua the abscondance of the appellant through Muhammad Anwar (PW-1) and the copy of warrant of arrest Exh.P-A and report Exh.P-A/1 were also placed on the record. Muhammad Anwar (PW-1) has admitted during his cross-examination that he did not associate any respectable of the locality, like Lumberdar or School Teacher during the proceedings under Section 87 of, Cr.P.C. It is further admitted that neither statement of any respectable person of the area nor his signatures were obtained during the above mentioned proceedings. He has further conceded that the report Exh.P-A/1 was written by him in the Police Station according to the direction of the Investigating Officer. We are, therefore, of the considered view that the proceedings regarding the abscondance of the appellant have not been carried out in accordance with law, therefore, the above mentioned evidence whereby the appellant was declared as a proclaimed offender is not helpful to the prosecution case.

17. We have disbelieved the prosecution evidence of motive and recovery of pistol P-4, abscondance of the appellant however, if the evidence of motive, abscondance and recovery of pistol P-4 is excluded from consideration even then there is sufficient incriminating evidence available on the record against the appellant. As discussed earlier, the prosecution case was fully proved through the evidence of eye-witnesses namely Muhammad Ismail (PW-9) and Zulfiqar Ali (PW-10). They stood the test of lengthy cross-examination but their evidence could not be shattered, Their evidence is quite natural, straightforward and confidence inspiring. The ocular account of the prosecution as given by Muhammad Ismail (PW-9) and Zulfiqar Ali (PW-10) is supported by the evidence of Dr. Muhammad Ashfaq (PW-6), as well as, post-mortem report of deceased Ex.P-D & Ex.P-D/1, The time of occurrence, the seat of injury and the kind of weapon used, as mentioned by the eye-witnesses were supported by the aforementioned medical evidence, therefore, we hold that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

18. Now coming to the quantum of sentence we have noted some mitigating circumstances in favour of the appellant firstly, co-accused of the appellant namely Abdul Hafeez, Muhammad Sharief and Muhammad Afzal have been acquitted by the

learned trial Court while extending them the benefit of doubt and no appeal against their acquittal has been filed by the State or the complainant as stated by the learned DPG, secondly, we have already held that the alleged recovery of pistol P-4 alongwith bullets P-5/1-2 from the possession of the appellant is of no avail to the prosecution in absence of the Forensic Science Laboratory report and thirdly the prosecution has alleged a specific motive but has miserably failed to prove the same. It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened which had resulted into the death of Ishtiaq Ahmad deceased, therefore, in our view the death sentence awarded to the appellant is quite harsh. It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State (2011 SCMR 593) wherein at Page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:--

The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of `Iftikhar-ul-Hassan v. Israr Bashir and another' (PLD 2007 SC 111), it was held that:--

`this is settled law that provisions of Sections 306 to 308, PPC attracts only in the cases of Qatl-i-Amd liable to Qisas under Section 302(A), PPC and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under Section 302(b), PPC. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under Section 302(a) and 302(b), PPC respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302(b), PPC and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir, The proposition has also been discussed in `Ghulam Muretaza v. State' (2004 SCMR 4), `Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), `Muhammad Akram v. State' (2003 SCMR 855) and `Abdul Salam v.

State' (2000 SCMR 338). The Court while maintaining the conviction under Section 302(b), PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B of, Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that)--

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course" (underlining, italic and bold supplied)."

19. Due to the above mentioned reasons the conviction of Mamoon-ur-Rashid alias Abdul Rashid appellant under Section 302 (b), PPC awarded by the learned trial Court is maintained but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned trial Court and sentence in default thereof is maintained and upheld. The benefit of Section 382-B of Cr.P.C. is also given to the appellant.

20. Consequently with the above said modification, in the sentence, of Mamoon-ur-Rashid alias Abdul Rashid appellant Criminal Appeal No. 294-J of 2008 filed by Mamoon-ur-Rashid alias Abdul Rashid appellant is hereby dismissed. Murder Reference (M.R. No. 547 of 2007) is answered in the negative and death sentence of Mamoon-ur-Rashid alias Abdul Rashid appellant is not confirmed.

(A.S.) **Appeal dismissed.**

PLJ 2013 Cr.C. (Lahore) 575 (DB)

Present: Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ.

MUHAMMAD ASLAM & others--Appellants

versus

STATE & others--Respondents

Crl. Appeals No. 352-J, 353-J & M.R. No. 622 of 2006, heard on 15.3.2012.

Benefit of Doubt--

----Principle--Accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence as well. [P. 585] C

2009 SCMR 1188, ref.

Extenuating circumstances--

----Prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for award of normal penalty of death. [P. 585] D

1993 SCMR 1660, ref.

Duty of prosecution--

----If a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused. [P. 586] E

2011 SCMR 593, ref.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b)/34--Conviction and sentence--Challenge to--Modification in sentence--Evidence of recovery of gun 12 bore pump action (P.1) and the motive part of the prosecution case, however, if the evidence of motive and recovery of gun 12 bore pump action (P.1) is excluded from consideration, even then there is sufficient incriminating evidence available on the record against the appellant--Prosecution case was duly established through the evidence of the complainant--They stood the test of cross-examination--Their evidence is quite natural, reliable and confidence-inspiring--Ocular account of the prosecution is fully supported by

the medical evidence of Dr.--Injury attributed to the appellant seat of injury, kind of weapon used in the occurrence and time of death of the deceased as given by the eye-witnesses, also get support from the above-mentioned medical evidence--Prosecution has proved its case against the appellant beyond the shadow of any, doubt so far as Qatl-e-Amd of deceased is concerned--Question of quantum of sentence of the appellant is concerned, some mitigating circumstances in his favour--Firstly, prosecution has alleged a specific motive, but has miserably been failed to prove the same, and secondly, prosecution has failed to prove the recovery of gun 12 bore pump action (P. 1) beyond the shadow of doubt against the appellant--Conviction of appellant u/S. 302(b), PPC awarded by the trial Court is maintained, but his sentence is altered from the death to imprisonment for life--Conviction and sentence awarded to appellant u/S. 324 of, PPC is concerned, we are of the view that the case of prosecution was not established under the said charge beyond the shadow of doubt--Although it was alleged that appellant made a fire shot at the complainant but admittedly, no injury was sustained either by the complainant or by any other prosecution witness--No empty was recovered from the place of occurrence--Complainant party was empty-handed, whereas, appellant was armed with gun 12 bore and there was nothing to stop him if he had any intention to kill the complainant or any other prosecution witness, set-aside the conviction and sentence awarded to appellant under the charge of Section 324 of, PPC and acquit him from the said charge--Modification in the sentence of appellant--Criminal appeal dismissed. [Pp. 585, 587 & 588] A, B, F, G & H

Chaudhary Zaheer Abbas, Advocate for Appellants.

Chaudhry Muhammad Mustafa, D.P.G. for State.

Malik Asif Ahmad Nissoana, Advocate for Complainant.

Date of hearing: 15.3.2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--This judgment shall dispose of Criminal Appeal No. 352-J of 2006, filed by Muhammad Aslam appellant, Criminal Appeal No. 353-J of 2006, filed by Ghulam Hussain appellant, and Murder Reference No. 622 of 2006 (The State vs. Muhammad Aslam), sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Aslam appellant, as all these matters have arisen out of the same

judgment dated 15.09.2006, passed by the learned Additional Sessions Judge, Bhalwal, District Sargodha. Muhammad Aslam and Ghulam Hussain, appellants, were tried in case F.I.R. No. 282, dated 08.07.2005, registered at Police Station, Kot Momin, District Sargodha, in respect of offences under Sections 302, 324, 449, 34 of, PPC. After conclusion of the trial, learned trial Court vide its judgment-dated 15.09.2006, has convicted and sentenced the appellants as under:--

MUHAMMAD ASLAM

Under Section 302(b) of, PPC to death for committing Qatl-i-Amd of Mst. Rabia Bibi (deceased). He was also directed to pay Rs. 1,00,000/- as compensation to the legal heirs of deceased as contemplated under Section 544-A of, Cr.P.C., and in default thereof he shall further undergo six months SI.

Under Section 324 of, PPC to 10 years R.I for attempting to commit the murder of the complainant Allah Yar (PW.8) and a fine of Rs.50,000/-, and in default thereof he shall further undergo six months SI.

GHULAM HUSSAIN

Under Section 302(b) read with Section 34 of, PPC to life imprisonment as he shared the common intention of Muhammad Aslam (appellant) for Qatl-e-Amd of Mst. Rabia Bibi. He was also directed to pay Rs. 1,00,000/- as compensation to the legal heirs of deceased as envisaged under Section 544-A of, Cr.P.C., and in default thereof he shall further undergo six months SI.

Under Section 324 of, PPC to 10 years R.I for sharing the common intention with Muhammad Aslam (appellant) to commit the murder of the complainant Allah Yar (PW.8) and a fine of Rs.50,000/-, and in default thereof he shall further undergo six months SI.

The substantive sentences were ordered to run concurrently of both the appellants. Benefit of Section 382-B of, Cr.P.C. was also given to both the appellants. The learned trial Court also observed that offence under Section 449/34 of, PPC was not made out.

2. Brief facts of the case as given by the complainant Allah Yar (PW.8) in the FIR (Ex.PG) are that Muhammad Aslam appellant was his son-in-law, whereas, Ghulam Hussain appellant was nephew of his wife Mst. Rabia Bibi (deceased). On 08.07.2005, at 07:00 p.m., the complainant Allah Yar (PW.8) alongwith his son Zulfiqar (PW.9), Iqbal (given up PW) was present in his house. The wife of the

complainant, namely, Mst. Rabia Bibi was present in the Courtyard and was busy in the household work. In the meanwhile, Muhammad Aslam appellant while armed with gun and Ghulam Hussain appellant, empty-handed, entered the house of the complainant. Muhammad Aslam appellant raised `Lalkara' that he had come to teach a lesson as his wife Mst. Nazia Bibi was not sent with him one day prior to the occurrence. Ghulam Hussain appellant also raised `Lalkara'. Muhammad Aslam appellant made a fire shot with his gun, which landed below the right hip of Mst. Rabia Bibi (deceased), who fell down and succumbed to the said injury at the spot Muhammad Aslam appellant again made a fire shot at the complainant Allah Yar (PW.8), but the said fire shot missed. Both the appellants, thereafter, fled away from the place of occurrence.

The motive behind the occurrence as alleged was that the daughter of the complainant namely, Mst. Nazia Bibi was married to Muhammad Aslam appellant.

The relationship between the appellant Muhammad Aslam and Mst. Nazia Bibi became strained and she came to the house of the complainant. Muhammad Aslam appellant came to take his wife back, but it was refused by the complainant party, and due to the said grudge, the appellants committed the murder of the wife of the complainant namely, Mst. Rabia Bibi.

3. The appellants Muhammad Aslam and were arrested in this case on 18.07.2005, by Muhammad Amir SI (PW.6). During the course of investigation, on 22.07.2005, according to Muhammad Amir SI (PW.6), appellant Muhammad Aslam led to the recovery of gun .12 bore pump action (P.I) alongwith bag of cartridges (P.2/1-8), which was taken into possession vide recovery memo. (Ex.PB).

After completion of investigation, the challan was prepared and submitted before the Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed the charge against the appellants Muhammad Aslam and Ghulam Hussain on 23.12.2005, under Sections 302, 324, 449 read with Section 34 of, PPC, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced ten witnesses, during the trial. Muhammad Amir SI (PW.6) was the Investigating Officer of this case.

The medical evidence was furnished by Dr. Saira Ishtiaq (PW.3).

Shaukat Ali C-1722 (PW.1), Ali Hussain MHC-728 (PW.4), Muhammad Hafeez Khan Draftsman (PW.5), Muhammad Aslam C-1767 (PW.7) are the formal witnesses, Ghulam Abbas C-1328 (PW.2) is the recovery witness of gun 12 (P. 1) alongwith 8 live cartridges (P.2/1-8), whereas, Bashir Ahmad (PW.10) is the witness of identifying the dead body of Mst. Rabia Bibi (deceased).

The complainant Allah Yar (PW.8), and Zulfiqar (PW.9) have furnished the ocular account of the occurrence. The prosecution also produced documentary evidence in the shape of recovery memo. of clothes (Ex.PA), recovery memo. of gun .12 bore pump action (Ex.PB), post-mortem report etc. (Ex.PC), site-plan (Ex.PF), FIR (Ex.PG), blood stained earth (Ex.PI), report of Chemical Examiner (Ex.PK), report of Serologist (Ex.PL), and death report (Ex.PM).

The statement of appellant Muhammad Aslam, under Section 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question "Why this case against you and why the PWs have deposed against you", Muhammad Aslam, appellant, replied as under:

"The instant case was falsely registered against me due to the reason that I divorced to the daughter of the complainant and PWs have falsely deposed me due to relationship of PWs with the complainant".

The appellant Ghulam Hussain also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded under Section 342 of, Cr.P.C. In answer to the question, "why this case against you and why the PWs have deposed against you", the appellant Ghulam Hussain replied as under:

"The complainant falsely involved me in this case only due to the reason that accused Muhammad Aslam is my close friend and PWs falsely deposed against me due to relationship with the complainant".

Both the appellants neither made their statements under Section 340(2), Cr.P.C., nor they produced any evidence in their defence. After conclusion of the trial, the learned trial Court convicted and sentenced the appellants, as detailed above.

5. The learned counsel for the appellants, in support of both these appeals, contends that the appellants have been falsely implicated in this case by the complainant Allah Yar (PW.8); that actually the occurrence took place much prior to the time mentioned in the FIR (Ex.PG), which is clear from the statement of Shaukat Ali C-

1722 (PW.1), who has stated that he took the dead body of Mst. Rabia Bibi (deceased) to RHC, Kot Momin at 08:00 p.m., whereas, the case was registered at 09:15 p.m., and thereafter, as per Investigating Officer namely, Muhammad Amir SI (PW.6), he reached at the spot at 10:15 p.m., and sent the dead body to the mortuary within 30/40 minutes; that there is conflict between the ocular account and medical evidence, as it is the case of the complainant Allah Yar (PW.8) in the FIR (Ex.PG) that the fire shot made by Muhammad Aslam appellant hit on the right buttock of Mst. Rabia Bibi (deceased), whereas, while appearing before the Court, he stated that the fire hit on the thigh of the deceased Mst. Rabia Bibi; that the recovery of gun .12 bore Pump Action (P.I), allegedly recovered from Muhammad Aslam appellant is of no avail to the prosecution, as no empty was recovered from the spot, and there is no report of the Forensic Science Laboratory; that the motive alleged in the FIR (Ex.PG) by the complainant Allah Yar (PW.8) was to the effect that the daughter of the complainant namely, Mst. Nazia Bibi was married to the appellant Muhammad Aslam, and she came to the house of the complainant Allah Yar (PW.8) due to strained relations. Muhammad Aslam appellant came in the house of the complainant to take back his wife Mst. Nazia Bibi, but the complainant refused to send his daughter with him, and because of that reason, appellant Muhammad Aslam committed the murder of Mst. Rabia Bibi, whereas, while appearing before the Court, he stated that he (the complainant) and his wife wanted to send their daughter Mst. Nazia Bibi alongwith Muhammad Aslam appellant, and even the most important witness in this case regarding the motive was Mst. Nazia Bibi, who has not been produced either before the police or before the learned trial Court to establish the motive; that so far as appellant Ghulam Hussain is concerned, the learned counsel for the appellants contends that admittedly he was empty-handed, and it is the case of the prosecution that appellant Ghulam Hussain raised `Lalkara' and no overt-act has been attributed to him; that the motive, as alleged by the prosecution, has not been proved against the appellants, therefore, both these appeals be accepted and the appellants may be acquitted from the charges.

6. On the other hand, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes both these appeals on the grounds that there is no delay in reporting the matter to the police, if the distance between the Police Station, Kot Momin and the place of occurrence is taken into consideration; that both the eye-witnesses namely, Allah Yar (PW.8) and Zulfiqar (PW.9) are the residents of the house, where this occurrence took place, therefore,

their presence at the time of occurrence, at the spot is quite natural; that both the appellants are nominated in the FIR (Ex.PG) with their respective roles; that there is no reason for their false implication in this case; that the prosecution witnesses of the ocular account remained consistent and straightforward and their evidence could not be shattered by the defence; that the ocular account is in line with the medical evidence; that the motive has also been proved by the prosecution against the appellants, rather the appellant Muhammad Aslam stated in his statement under Section 342 of, Cr.P.C. that he had divorced Mst. Nazia Bibi, but he has not produced any document in this respect; that the appellants are responsible for causing the death of an innocent woman; that substitution in such like cases is a rare phenomena, therefore, both these appeals may be dismissed and Murder Reference may be answered in the affirmative.

7. We have heard the arguments of the learned counsel for the appellants, and the learned counsel for the complainant, as well as, learned Deputy Prosecutor-General, and have also gone through the evidence available on the record, with their able assistance.

8. The occurrence in this case as per FIR (Ex.PG) took place on 08.07.2005, at 07:00 p.m., in the house of the complainant Allah Yar (PW.8). The matter was reported to the police by the complainant at 09:15 p.m., at Police Station, and the formal FIR (Ex.PG) was also chalked out on the same day i.e. 08.07.2005, at 09:15 p.m., at the said Police Station, which is situated at a distance of 12 kilometres from the place of occurrence. Considering the time and place of occurrence and its distance from the Police Station, we are of the view that there was no delay in reporting the matter to the police.

9. The prosecution, in order to prove ocular account has produced the complainant Allah Yar (PW.8) and Zulfiqar (PW.9). According to the statements of the complainant Allah Yar (PW.8), Muhammad Aslam appellant was his son-in-law, whereas, Ghulam Hussain appellant was nephew of his wife Mst. Rabia Bibi (deceased). On the day of occurrence, at evening time, he (the complainant) alongwith his son Zulfiqar (PW.9), Iqbal (given up PW) was present in his house. The wife of the complainant, namely, Mst. Rabia Bibi was present in the Courtyard and was busy in the household work. In the meanwhile, Muhammad Aslam appellant while armed with gun and Ghulam Hussain appellant, empty-handed, entered the house of the complainant Allah Yar (PW.8). Muhammad Aslam

appellant raised `Lalkara' that he had come to teach a lesson as his wife Mst. Nazia Bibi was not sent with him on the previous day. Ghulam Hussain appellant also raised `Lalkara'. Muhammad Aslam appellant made a fire shot with his gun, which landed on the right thigh of Mst. Rabia Bibi (deceased), who fell down and succumbed to the said injury at the spot. Muhammad Aslam appellant again made a fire shot at the complainant Allah Yar (PW.8), but the said fire shot missed. Both the appellants, thereafter, fled away from the place of occurrence.

The statement of Zulfiqar (PW.9) is also in line with the statement of the complainant Allah Yar (PW.8). He is son of the complainant. The eye-witnesses namely, Allah Yar (PW.8) and Zulfiqar (PW.9) are natural witnesses, as the occurrence took place in their house, therefore, their presence at the time of occurrence at the spot could not be doubted. The place of occurrence has not been disputed by the appellants. The complainant Allah Yar (PW.8) and Zulfiqar (PW.9) are respectively husband and son of Mst. Rabia (deceased). They have no ulterior motive to falsely implicate the appellant Muhammad Aslam in this case, who was their son-in-law. As the above-mentioned eye-witnesses are close relatives of the deceased Mst. Rabia Bibi, therefore, it is not probable that they will falsely implicate the appellants and would let off the real culprits. Substitution in such like cases is a rare phenomena. The complainant Allah Yar (PW.8) and Zulfiqar (PW.9) were cross-examined at length by the learned defence counsel, but their evidence could not be shattered. They have corroborated each other on all material aspects of the case. Their evidence is straightforward and confidence-inspiring.

10. The medical evidence of the prosecution was produced by Dr. Saira Ishtiaq (PW.3), who conducted the post-mortem examination on the dead-body of Mst. Rabia Bibi on 09.07.2005, at 12:00 (noon), and found the following injuries on her person:-

External Injuries.

Injury No. 1 Five small lacerated wound of entry were seen on right buttock each (.5x..5 cms) in size, seen.

Margins were irregular and there was no blacking.

First wound of entry was 14 cm from right iliac crest. 2nd 20 cm away from right iliac crest.

3rd 28 cm away from right iliac crest.

4th and 5th wounds of entry was 25 cm away from right iliac crest.

Injury No. 2 wounds of Exit

09 small oval shape wounds of exit each 1x1 cm in size were seen on right upper 1/3 of anterior of thigh. Margins not blackened.

First wound of exit was 12 cm away from umbilicus.

2nd wound was 16 cm away form umbilicus on right side of first wound.

3rd and 4th wounds were 16 cm away from umbilicus.

5th, 6th and 7th wounds were 21 cm. away from umbilicus.

8th and 9th wounds were 24th cm away from umbilicus.

In her opinion, all the injuries were ante-mortem and were caused by fire-arm weapon, which were sufficient enough to cause death. Probable time that elapsed between injuries and death was within about 10 to 15 minutes, and between death and post-mortem was 16 to 18 hours.

The said medical evidence has fully supported the ocular account furnished by the complainant Allah Yar (PW.8) and Zulfiqar (PW.9). According to the medical evidence, the seats of injuries on the person of Mst. Rabia Bibi (deceased), kind of weapon used and the time of occurrence/death, were the same, which were narrated by the above-mentioned eye-witnesses. Dr. Saira Ishtiaq (PW.3) was also cross-examined at length by the learned defence counsel, but nothing favourable could be elicited during the process of her cross-examination.

11. It is argued by the learned counsel for the appellants that there is conflict between the ocular account and medical evidence, as it is the case of the complainant Allah Yar (PW.8) in the FIR (Ex.PG) that the fire shot made by Muhammad Aslam appellant hit on the right buttock of Mst. Rabia Bibi (deceased), whereas, while appearing before the Court, he stated that the fire shot made by Muhammad Aslam appellant landed on the right thigh of the deceased. So far as the above-mentioned conflict between the ocular account and medical evidence is concerned, it is observed that the buttock and thigh are such part of human body, which are located in close proximity to each other, therefore, said conflict of the ocular account and medical evidence is insignificant. Mst. Rabia Bibi (deceased) was a human being and not a static object. In the state of sensation and panic, when the fire shots are being made by the accused, it is not fair to expect from an ordinary

witness that he would mention the seat of injury with exactitude. It is by now a well-settled law that minor discrepancies in the ocular and medical evidence about the seat of injuries are insignificant. Reference in this context may be made to the case of Abdur Rauf vs. The State and another (2003 SCMR 522), wherein at page-526, the Hon'ble Supreme Court of Pakistan has held as under:--

"We may observe that the minor discrepancies in the medical evidence relating to the seat of injuries would also not negate the direct evidence as the witnesses are not supposed to give photo picture of each detail of injuries in such situation, therefore, the conflict of nature of ocular account with medical as pointed out being not material would have no adverse effect on the prosecution case".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Ellahi Bakhsh vs. Rab Nawaz and another (2002 SCMR 1842).

12. Now coming to the motive part of this case, it was alleged by the complainant Allah Yar (PW.8) that the motive behind the occurrence was that his daughter Mst. Nazia Bibi was married to Muhammad Aslam appellant, but their relationship became strained. His daughter Mst. Nazia Bibi came back to his house and she did not like to go with Muhammad Aslam appellant. The complainant Allah Yar (PW.8) has farther stated that he and his wife Mst. Rabia Bibi (deceased) wanted to send their daughter, but Muhammad Aslam appellant committed the murder of his wife Mst. Rabia Bibi due to the above-mentioned grudge. It was not stated by the complainant Allah Yar (PW.8) in the FIR (Ex.PG) that he (the complainant) and his wife Mst. Rabia Bibi (deceased) wanted to send their daughter Mst. Nazia Bibi with Muhammad Aslam appellant, rather it was stated in the FIR (Ex.PG) that when Muhammad Aslam appellant came to take Mst. Nazia Bibi with him, they (the complainant and his wife Mst. Rabia Bibi deceased) refused to send their daughter with Muhammad Aslam appellant. The complainant Allah Yar (PW.8) was duly confronted with his previous statement (Ex.PG) and his material improvement regarding the motive part of the prosecution case was brought on the record. Mst. Nazia Bibi, daughter of the complainant, has not been cited as a witness in the FIR (Ex.PG). The complainant Allah Yar (PW.8) has not mentioned in the FIR (Ex.PG) that she (Mst. Nazia Bibi) was present in his house, when the occurrence took place. Mst. Nazia Bibi was never produced during the investigation of this case, or before the learned trial Court to substantiate the motive part of the prosecution case. The nature of alleged dispute between Muhammad Aslam appellant and his wife Mst.

Nazia Bibi has neither been disclosed in the FIR (Ex.PG), nor during the statements of above-mentioned eye-witnesses before the learned trial Court, therefore, in our view, the motive, as alleged by the prosecution, was not proved in this case.

13. So far as the recovery of gun .12 bore pump action (P.1) on the pointation of the appellant Muhammad Aslam is concerned, we have noted that no empty was recovered from the place of occurrence, and there is no report of Forensic Science Laboratory, thus, the alleged recovery of gun .12 bore pump action (P.1) from the possession of the appellant Muhammad Aslam is of no avail to the prosecution.

14. We have disbelieved the evidence of recovery of gun .12 bore pump action (P.1) and the motive part of the prosecution case, however, if the evidence of motive and recovery of gun .12 bore pump action (P.1) is excluded from consideration, even then there is sufficient incriminating evidence available on the record against the appellant Muhammad Aslam. As discussed earlier, prosecution case was duly established through the evidence of the complainant Allah Yar (PW.8) and Zulfiqar (PW.9). They stood the test of cross-examination. Their evidence is quite natural, reliable and confidence-inspiring. The ocular account of the prosecution is fully supported by the medical evidence of Dr. Saira Ishtiaq (PW.3). The injury attributed to the appellant Muhammad Aslam, seat of injury, kind of weapon used in the occurrence and time of death of the deceased Mst. Rabia Bibi, as given by the eye-witnesses, also get support from the above-mentioned medical evidence, therefore, we hold that the prosecution has proved its case against the appellant Muhammad Aslam beyond the shadow of any doubt so far as Qatl-e-Amd of Mst. Rabia Bibi (deceased) is concerned.

15. Insofar the question of quantum of sentence of the appellant Muhammad Aslam is concerned, we have noted some mitigating circumstances in his favour. Firstly, prosecution has alleged a specific motive, but has miserably been failed to prove the same, and secondly, prosecution has failed to prove the recovery of gun .12 bore pump action (P. 1) beyond the shadow of doubt against the appellant. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence as well. We very respectfully refer the case of Mir Muhammad alias Miro versus The State (2009 SCMR 1188), wherein the Hon'ble Supreme Court of Pakistan has emphasized as under:--

"It will not be out of-place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence. In the case of Mst. Bevi v. Ghulam Shabbir and another 1980 SCMR 859, it was ruled by this Court "that the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, be pressed also in matter of sentence".

In another case of Ansar Ahmad Khan Barki versus The State and another (1993 SCMR 1660), the Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for award of normal penalty of death.

As discussed earlier, the motive, as alleged by the complainant party, is not proved in this case. It is not determinable in this case as to what had actually happened immediately before the occurrence, which had resulted into the death of Mst. Rabia Bibi (deceased), therefore, the death sentence of the appellant Muhammad Aslam is quite harsh. We are convinced that Muhammad Aslam appellant, in the peculiar circumstances, of this case deserves benefit of doubt to the extent of his sentence one out of two provided under Section 302(b), PPC. It has been held in a number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused. Moreover, while treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another vs. The State (2011 SCMR 593), wherein, at page 604, the learned Apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of Sections 306 to 308, PPC attracts only in the cases of Qatl-i-amd liable to Qisas under Section 302 (A), PPC and not in the cases in which sentence for Qatl-i-amd has been awarded as Tazir under Section 302(b), PPC. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under Sections 302(a) and 302(b), PPC

respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302(b), PPC and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-Amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under Section 302(b), PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B, Cr.P.C. In Muhammad Riaz and another vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-Amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case". In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:-

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course", (underlining, italic and bold supplied)."

16. Due to the above mentioned reasons, the conviction of Muhammad Aslam appellant under Section 302 (b), PPC awarded by the learned trial Court is maintained, but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned trial Court and sentence in default thereof is maintained and upheld. However, benefit of Section 382-B of, Cr.P.C. is given to the appellant Muhammad Aslam.

17. Insofar the conviction and sentence awarded to Muhammad Aslam appellant under Section 324 of, PPC is concerned, we are of the view that the case of prosecution was not established under the said charge beyond the shadow of doubt.

Although it was alleged that Muhammad Aslam appellant made a fire shot at the complainant Allah Yar (PW.8), but admittedly, no injury was sustained either by the complainant or by any other prosecution witness. No empty was recovered from the place of occurrence. The complainant party was empty-handed, whereas, appellant Muhammad Aslam was armed with gun .12 bore and there was nothing to stop him if he had any intention to kill the complainant or any other prosecution witness, therefore, we set-aside the conviction and sentence awarded to Muhammad Aslam appellant under the charge of Section 324 of, PPC and acquit him from the said charge.

18. So far as the case of appellant Ghulam Hussain in Criminal Appeal No. 353-J of 2006 is concerned, he has not been attributed any injury either on the person of the deceased Mst. Rabia Bibi, or to any prosecution witness. He was empty-handed at the time of occurrence. Even, the initial `Lalkara' was attributed to Muhammad Aslam appellant, and thereafter a second proverbial `Lalkara' has been attributed to Ghulam Hussain appellant. No motive has been attributed to him. The motive was alleged against Muhammad Aslam appellant. He had no reason to commit the alleged offence or to take part in the occurrence. He is admittedly nephew of Mst. Rabia Bibi (deceased), and if his presence at the time of occurrence is believed, even then mere his presence at the time of alleged occurrence is not sufficient to maintain his conviction. The prosecution case to the extent of involvement of Ghulam Hussain appellant is not free from doubt. Possibilities of his false involvement in this case while using wider net by the complainant Allah Yar (PW.8) cannot be ruled out. Thus, we hold that the prosecution has failed to prove its case against Ghulam Hussain appellant beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept his appeal (Criminal Appeal No. 353-J of 2006), set-aside the convictions and sentences awarded to him by the learned trial Court vide its judgment dated 15.09.2006. The appellant Ghulam Hussain is in Jail, therefore, he shall be released forthwith, if not required in any other case.

19. Consequently, with the above-mentioned modification in the sentence of Muhammad Aslam appellant, Criminal Appeal No. 352-J of 2006, filed by the appellant Muhammad Aslam, is hereby dismissed and Murder Reference No. 622 of 2006 is answered in the NEGATIVE and death sentence of the appellant Muhammad Aslam is NOT CONFIRMED.

(A.S.) **Appeal dismissed.**

PLJ 2013 Cr.C. (Lahore) 487 (DB)

Present: Manzoor Ahmed Malik and Malik Shahzad Ahmad Khan, JJ.

SAKHI MUHAMMAD and anothers--Appellants

versus

STATE and anothers--Respondents

Crl. Appeal No. 266-J of 2009 and M.R. No. 376 of 2009, heard on 28.5.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b) & 34--Conviction and sentence recorded against accused by trial Court--Challenge to--Place of occurrence, time of occurrence and distance between place of occurrence and police station--Minor delay in reporting matter to police was no material--Ocular account--No enmity with accused and had no relation with complainant--Presence of complainant at place of occurrence was neither unnatural nor improbable because her house was situated at distance of only 9/9 acres from place of occurrence which was situated on the way which leads to her house--Accused were earlier known to eye witnesses as he was employed with complainant for last about one year prior to occurrence, therefore, no chance of any mistaken identity of accused. [P. 493] A & B

Related witness--

----Evidence cannot be discarded out rightly merely on basis of relationship with deceased--It is by now well settled law that evidence of a witness related to deceased can be relied upon if same was confidence inspiring and trustworthy. [P. 494] C

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b) & 34--Conviction and sentence recorded against accused by trial Court--Challenge to--Cause of death was due to injuries--All injuries were ante-mortem and homicidal in nature--Validity--Medical evidence furnished by Dr. had fully supported ocular account furnished by PWs--Time of occurrence, kind of weapon used by accused and nature of injuries, all facts as stated by eye witnesses had fully tallied with medical evidence--Accused committed brutal and merciless murder of a young boy by inflicting as many as nine incised wounds on his person with help of chhuri, therefore, he and not deserve any leniency in respect to quantum of sentence--Prosecution had proved its case beyond any shadow of doubt. [Pp. 495 & 496] D & G

Recovery of Churri--

----Corroborated--Recovery memo--Churri was recovered after digging out earth from a place situated outside wall of brick kiln--Place of recovery of chhurri was in exclusive knowledge of appellant--Evidence qua recovery of chhurri and report of chemical examiner was further corroborated prosecution case against accused. [P. 496] E

Criminal Procedure Code, 1898 (V of 1898)--

----S. 340(2)--Accused was unable to explain as to why third eye witness had deposed against him--Accused did not bother to appear in witness box in order to make statement on oath--Court discard version taken by him in his statement recorded u/S. 342, Cr.P.C. [P. 496] F

Ms. Humaira Kaiser, Advocate for Appellant.

Mirza Abid Majeed, D.P.G. for State.

Mr. Irfan Nasir Cheema, Advocate for Complainant.

Date of hearing: 28.5.2013.

Judgment

Malik Shahzad Ahmed Khan, J.--This judgment shall dispose of Criminal Appeal No. 266-J of 2009 titled as "Sakhi Muhammad versus The State" filed by Sakhi Muhammad, appellant against his conviction and sentence and Murder Reference No. 376 of 2000 titled as "The State versus Sakhi Muhammad" submitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Sakhi Muhammad, appellant as both these matters have arisen out of the same judgment dated 31.07.2009 passed by the learned Addl. Sessions Judge, Daska, District Sialkot in case FIR No. 489 dated 10.10.2008, offences under Sections 302 and 34, PPC, registered at Police Station Mautra District Sialkot whereby, Sakhi Muhammad, appellant was convicted under Section 302(b), PPC and sentenced to death with the direction to pay Rs. 1,00,000/- (rupees one lac) as compensation to the legal heirs of deceased Faiz Ahmad, as envisaged under Section 544-A of the Code of Criminal Procedure, which shall be recovered as arrears of land revenue and in default thereof to further undergo simple imprisonment for six months.

2. Brief facts of the case, as disclosed by Mst. Rahila Bibi, complainant (PW-2) in her `Fard Biyan' (Exh-PA), on the basis of which the formal FIR (Exh-PF) was registered, are that she (complainant) was resident of Mauza Sansera Goraya and was a cultivator by profession. Her husband had gone abroad to earn livelihood. She had 8/9 buffaloes at her Dera and used to sell their milk. She had a servant namely Sakhi Muhammad alias Ali Raza (appellant) to look after the buffaloes and for the sale of milk, for the last one year. On 09.10.2008 at about 06.00 p.m., Sakhi Muhammad

(appellant) along with Faiz Ahmad (deceased) aged about 12/13 years went to the brick kiln of one Muhammad Iqbal Cheema to fetch the sale price of milk from the labour who used to work at the said brick kiln and when they did not return for about one or one and half hours, the complainant became worried. Meanwhile, she (complainant) along with Zafar Iqbal (PW-6) and Muhammad Boota (PW-5) went out to search Faiz Ahmad (deceased) and when they reached near the Dera of one Ijaz Ahmad, they heard a shrick from inside the sugarcane crop situated on the eastern side. They ran towards the sound and when they entered in the sugarcane crop of one Muhammad Yousaf, they saw that Sakhi Muhammad (appellant) along with one unknown person was causing injuries with Chhuri to the son of the complainant Faiz Ahmad (deceased). The appellant and the unknown person fled away from the spot on seeing the complainant party. They went near the deceased and saw that there were injuries on the neck and abdomen of the deceased, who succumbed to the injuries at the spot.

3. Sakhi Muhammad (appellant) was arrested in this case on 29.10.2008 by Muhammad Ilyas, S.I. (PW-11). On 07.11.2008, Sakhi Muhammad (appellant), while in police custody, after making disclosure, got recovered Chhuri (P-3), which was taken into possession vide recovery memo. Exh-PG. After completion of investigation, the challan was prepared and submitted before the learned trial Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 16.04.2009, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Mst. Rahila Bibi, complainant (PW-2), Muhammad Boota (PW-5) and Zafar Iqbal (PW-6) furnished the ocular account of the case. Aman Ullah 751/C (PW-10) is the witness of recovery of Chhuri (P-3), allegedly recovered at the instance of Sakhi Muhammad (appellant).

The medical evidence was furnished by Dr. Abid Ali (PW-3), who conducted the post-mortem examination on the dead body of Faiz Ahmad (deceased).

Muhammad Ilyas, S.I. (PW-11) is the Investigating Officer of the case. Shakir Hussain 532/C (PW-1), Zulfiqar Ahmad, Moharrer (PW-4) Suhail Murad Goraya (PW-7), Mirza Tahir Tasleem, Draftsman (PW-8) and Muhammad Siddique (PW-9) are the formal witnesses. The prosecution also produced documentary evidence in the shape of `Fard Biyan' of the complainant (Exh-PA), post-mortem report of the deceased along with pictorial diagrams (Exh-PB, Exh-PB/1 & Exh-PB/2), recovery memo. of blood stained earth (Exh-PC), recovery memo. of last

worn clothes of the deceased (Exh-PD), scaled site-plan of the place of occurrence in duplicate (Exh-PE & Exh-PE/1), FIR (Exh-PF) recovery memo. of Chhuri (P-3) from the appellant (Exh-PG), injury statement of the deceased (Exh-PH), rough site-plan of the place of occurrence (Exh-PJ), inquest report of the deceased (Exh-PK), rough site-plan of the place of recovery of Chhuri P-3 (Exh-PL), reports of the Chemical Examiner (Exh-PM & Exh-PN), report of the Serologist (Exh-PP) and closed its evidence.

The statement of the appellant, under Section 342 of the Code of Criminal Procedure, was recorded on 29.07.2009. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you?, the appellant replied as under:

"Complainant and PWs have suppressed the true facts of occurrence and maneuvered a false story after due deliberation and consultation with each other. Infact, complainant Mst. Rahila Bibi had illicit relations with Muhammad Boota PW and one day deceased Faiz Ahmad had seen them in an objectionable condition and deceased asked them that he will tell the whole story to his father. At this, Mst. Rahila Bibi complainant and Muhammad Boota PW threatened with dire consequences to the deceased that if he tells about the illicit relations of complainant, and Boota PW to his father. It was the planed murder prepared by complainant and Muhammad Boota PW and deceased was murder with the connivance of Muhammad Boots PW, I have falsely been involved in this case according to the plan prepared by complainant and Boota PW. I am innocent."

The appellant neither opted to make statement on oath as provided under Section 340 (2) of the Code of Criminal Procedure, in disproof of the allegations levelled against him nor produced any evidence in his defence.

5. The learned trial Court vide its judgment dated 31.07.2009, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case; that the eyewitnesses are chance witnesses and they have not been able to establish their presence at the spot; that the complainant is related to the deceased and as such, is interested witness; that there is delay in reporting the matter to the police as the occurrence took place on 09.10.2008 at 06.00 p.m whereas, the matter was reported to the police on 10.10.2008 at 12.50 a.m (night) and even the post-mortem examination was conducted on 10.10.2008 at 07.30 a.m, which clearly suggests that the matter was reported to the police after due deliberations and consultations; that the other eye-witness namely, Zafar Iqbal (PW-

6) is also an interested witness being related to the deceased; that no motive for the occurrence has been alleged in the FIR or disclosed before the learned trial Court; that there was no reason for the appellant to commit the murder of Faiz Ahmad (deceased); that recovery of Chhuri (P-3) is inconsequential and it was recovered from an open place easily accessible to every one; that the place from where recovery of Chhuri (P-3) was effected was neither owned nor possessed by the appellant; that the complainant and other eye-witnesses have not described the total injuries on the person of the deceased; that along with the appellant, one unknown person was also implicated in this case but said unknown person was not traceable; that from all angles, the prosecution case is of doubtful nature; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charge.

7. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposes this appeal on the grounds that there was no conscious or deliberate delay in reporting the matter to the police; that at 06.00 p.m, the deceased left the house along with the appellant and thereafter, the complainant along with eye-witnesses started search of the deceased and it took considerable time; that if all the circumstances and distance of the place of occurrence and the police station is taken into consideration then there was no delay in reporting the matter to the police; that there was no reason for the complainant for false implication of the appellant in this case; that Muhammad Boota (PW-5) is totally an independent witness and he is a school teacher; that said Muhammad Boota (PW-5) has no enmity with the appellant and has no relation with the complainant rather he was from other caste; that the appellant caused nine injuries to the minor son of the complainant who was just twelve/thirteen years of age; that the ocular account of the prosecution gets full support from the medical evidence and is further corroborated by the recovery of Chhuri (P-3) and positive report of the Chemical Examiner (Exh-PN); that it is not necessary to allege a motive because it is the state of mind of an accused to commit an offence; that the prosecution has fully proved its case against the appellant beyond shadow of doubt; that the sentence of death was rightly awarded to the appellant by the learned trial Court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the appellant, learned Deputy Prosecutor General and have also gone through the record with their able assistance.

9. The detail of the prosecution case, as set forth in the FIR (Exh-PF) has already been given in Paragraph No. 2 of this judgment, therefore, there is no need to repeat

the same. On 09.10.2008 at 06.00 p.m, the son of the complainant namely, Faiz Ahmad (deceased) aged about 12/13 years along with his servant Sakhi Muhammad (appellant) went to the brick kiln of one Muhammad Iqbal Cheema to collect the money of milk sold to the labourers of said brick kiln but they did not return for a period of one or one and half hours. The complainant Mst. Rahila Bibi PW-2 (mother of the deceased) along with her cousin Zafar Iqbal (PW-6) and tutor of the deceased namely, Muhammad Boota (PW-5) went to search her son Faiz Ahmad (deceased) and it has been brought on the record that when at about 07.30 p.m, the abovementioned eye-witnesses reached near the Dera of one Ijaz Ahmad son of Qadir, they heard a shriek from the nearby sugarcane crop, so they rushed towards the field of sugarcane where they witnessed the appellant while committing the murder of Faiz Ahmad (deceased) with Chhuri. Although the matter was reported to the police on 10.10.2008 at 12.50 a.m (night) with the delay of five hours and twenty minutes whereas, the distance between the place of occurrence, and the police station is six kilometers but the said delay has plausibly been explained by the complainant Mst. Rahila Bibi (PW-2) by stating that on seeing the murder of her son, she became unconscious. She has further stated during her cross-examination that she regained her senses at the spot. She has also stated in her cross-examination that the police reached at the spot and then she got recorded her statement to the police. The explanation given by the complainant for the abovementioned minor delay in reporting the matter to the place is convincing because it was quite natural that the complainant who was real mother of Faiz Ahmad (deceased), on seeing his brutal murder, became unconscious. Even otherwise, the occurrence took place after the sunset, in the fields of sugarcane of village Kot Ghuman whereas, the police station was at a distance of six kilometers, therefore, minor delay in reporting the matter to the police is not material. Considering all the abovementioned facts, the place of occurrence, the time of occurrence and the distance between the place of occurrence and the police station, we are of the view that there was no delay in reporting the matter to the police.

10. The ocular account of the prosecution was furnished by Mst. Rahila Bibi, complainant (PW-2), Muhammad Boota (PW-5) and Zafar Iqbal (PW-6). The occurrence in this case took place in village Kot Ghuman. The abovementioned eye-witnesses namely, Muhammad Boota (PW-5) and Zafar Iqbal (PW-6) both are residents of village Kot Ghuman. Although Mst. Rahila Bibi, complainant (PW-2) is resident of village Sehnsara Goraya but her house is at a distance of only 8/9 acres from the place of occurrence and this fact was brought on the record during her cross-examination. The complainant Mst. Rahila Bibi (PW-2) has stated that on the day of

occurrence her son Faiz Ahmad (deceased) in the company of Sakhi Muhammad (appellant) went to the brick kiln of one Muhammad Iqbal Cheema and he did not return for about one hour, therefore, she got worried and she took along with her Muhammad Boota (PW-5) and Zafar Iqbal (PW-6) and went for the search of Faiz Ahmad (deceased). It has also been brought on the record that the place of occurrence was situated on the way which leads to the house of the complainant. The presence of eye-witnesses namely, Muhammad Boota (PW-5) and Zafar Iqbal (PW-6) at the place of occurrence is quite natural because they are residents of the same village where this occurrence took place. Similarly, the presence of Mst. Rahila Bibi, complainant (PW-2) at the place of occurrence is neither unnatural nor improbable because her house is situated at a distance of only 8/9 acres from the place of occurrence and the place of occurrence is situated on the way which leads to her house. The eye-witnesses have further explained that they had identified the appellant in the torch light. The appellant was earlier known to the eye-witnesses as he was employed with the complainant for the last about one year prior to the occurrence, therefore, there was no chance of any mistaken identity of the appellant. Muhammad Boota (PW-5) is an independent witness. He is a teacher by profession. He was also the tutor of the deceased. It has been brought on the record during his cross-examination that he was B.A, M.Ed. Although the abovementioned eye-witnesses except Muhammad Boota (PW-5) are related to the deceased but their evidence cannot be discarded out rightly merely on the basis of their relationship with the deceased. It is by now well settled law that the evidence of a witness related to the deceased can be relied upon if the same is confidence inspiring and trustworthy. All the abovementioned eye-witnesses were cross-examined at length but their evidence could not be shaken. They corroborated each other on all material aspects of the case. Their evidence is confidence and worthy or reliance.

There is another aspect of the case that the complainant Mst. Rahila Bibi (PW-2) is the real mother of Faiz Ahmad (deceased), it is highly improbable that she will falsely implicate the appellant for the murder of her son and will let off the real culprit. Substitution in such like cases is a rare phenomenon.

11. It was the case of the prosecution that the appellant committed the murder of Faiz Ahmad (deceased) by causing injuries on his person with the help of Chhuri. On Abid Ali (PW-3) on 10.10.2008 at 07.30 a.m, conducted the post-mortem examination on the dead body of Faiz Ahmad (deceased) and noted the following injuries on his person:--

(i) An incised wound 5 x 1/2 cm x bone deep extending from chin towards left side of check indirection 4 cm away from left ear. Under the dissection of this injury, skin, muscle alongwith their collateral blood supply, facias were badly crushed and under line borne was exposed.

(ii) An incised wound 14x8 cm x DNP transverse in direction on front of neck in lower part extending from right side of nock to left side of neck. This 14 x 8 cm injury crushed under line structures badly. Under the dissection of this injury, skin, soft tissue, under line muscle, blood vessels minor and major (carotid blood vessels and jugular blood vessels) upper part of trachea, upper part of esophagus thyroid glands. All these structures in this neck area were badly cut down and damaged.

(iii) An incised wound 1.5 x 6 cm x DNP vertical in direction extending from epigastrium to middle of abdomen on front, Omentum and intestine were coming out from wound. Under the dissection of this injury, skin, facias under line abdominal muscle alongwith peritoneum and minor and major blood vessels of this area with lower part of stomach, small intestine were perforated and damaged under line this injury.

(iv) An incised wound 2 x 1 cm x muscle deep on palmer aspect of right hand/in direction 3 cm closed to base of right thumb. Under the dissection of this injury, the following structures were cut down under line skin, palmer muscle of this area alongwith facias and their collateral blood supply.

(v) An incised wound 3 x 1 cm x muscle deep on paler aspect of left hand in middle extending to dorsum of hand/in direction. Under the dissection of this injury, following structures, skin, soft tissue, under line muscle alongwith their collateral blood supply damaged.

(vi) An incised wound 2 x 1/2 cm x muscle deep in inter digital space of left thumb extending to palmer aspect of left hand. Under the dissection of this injury, skin, super facial facias muscle alongwith minor and major blood supply badly crushed.

(vii) An incised wound 1/2 x 1/2 cm x muscle deep on palmer aspect of left thumb in distal part. Under the dissection of this injury, skin, super facial facias under line muscle alongwith collateral blood supply was cut down.

(viii) An incised wound 2 x 1 cm x chest cavity deep on outer aspect and back of left chest in upper part 5 cm closed to left axilla. Under the dissection of this injury, skin, inter costal muscles with soft tissues, minor and major blood supply both layers of pleura and upper lob of left lung perforated.

(ix) An incised wound 1/2 x 1/2 cm x muscle deep on right side of lumber region 2 cm closed to mid line. Under the dissection of this injury, skin, soft tissues with blood supply and under line muscles were cut down.

In his opinion, the cause of death was due to injuries No. 2, 3 and 8. All the injuries were ante-mortem and homicidal in nature and were sufficient to cause death in ordinary course of nature. The time between the injuries and death was within few minutes and between death and post-mortem examination was eight to fourteen hours. We are, therefore, of the view that the medical evidence furnished by Dr. Abid Ali (PW-3) has fully supported the ocular account furnished by Mst. Rahila Bibi, complainant (PW-2), Muhammad Boota (PW-5) and Zafar Iqbal (PW-6). The time of occurrence, the kind of weapon used by the appellant and the nature of injuries, all these facts as stated by the aforementioned eye-witnesses, have fully tallied with the medical evidence furnished by Dr Abid Ali (PW-3).

12. The prosecution ease against the appellant is further corroborated by the recovery of Chhuri (P-3) from the appellant, which was taken into possession vide recovery memo. Exh-PG. The said Chhuri was recovered after digging out the earth from a place situated out side the wall of a brick kiln. The place of recovery of Churri was in exclusive knowledge of the appellant. According to the report of the Chemical Examiner (Exh-PM), the Chhurri (PW-3) was stained with blood. Thus, the evidence qua recovery of Chhuri (P-3) and the report of the Chemical Examiner (Exh-PN) have further corroborated the prosecution case against the appellant.

13. No motive for the occurrence was alleged in the FIR by the complainant. It is by now well settled law that it is not necessary for the complainant to allege any motive for the occurrence in the FIR rather it is a state of mind of an accused who commit any offence.

14. The defence version of the appellant has already been reproduced in Paragraph No. 4 of this judgment. The appellant claimed that in fact, Mst. Rahila Bibi, complainant (PW-2) had illicit relations with Muhammad Boota (PW-5) and Faiz Ahmad (deceased) had seen them in an objectionable condition and he told the abovementioned witnesses that he will tell the whole story to his father and due to this grudge, the complainant and Muhammad Boota (PW-5) committed the murder of Faiz Ahmad (deceased).

The abovementioned version of the appellant is not convincing because he is unable to explain as to why the third eye-witness Zafar Iqbal (PW-6) has deposed against him. The appellant did not produce any evidence in support of his abovementioned version. Even he himself did not bother to appear in the witness box in order to make

statement on oath as envisaged under Section 340(2) of the Code of Criminal Procedure. It appears that he had taken the abovementioned version in order to save his skin. We, therefore, discard the aforementioned version of the appellant taken by him in his statement recorded under Section 342 of the Code of Criminal Procedure.

15. After considering all the aspects of the case, we have come to this irresistible conclusion that the prosecution has proved its case against the appellant beyond the shadow of any doubt. Despite our best efforts, we are unable to find any mitigating circumstance in favour of the appellant. He committed a brutal and merciless murder of a voting boy (Faiz Ahmad deceased) of the age of 12/13 years by inflicting us many as nine incised wounds on his person with the help of a Chhuri, therefore, he does not deserve any leniency in respect of the quantum of sentence. In this backdrop of the situation, we hold that the prosecution has fully proved its case against Sakhi Muhammad (appellant) beyond the shadow of any doubt, therefore, there is no merit in Criminal Appeal No. 266-J of 2009, which is hereby dismissed and the conviction and sentence awarded to the appellant by the learned trial Court vide its judgment dated 31.07.2009 is maintained and upheld.

16. Murder Reference No. 376 of 2009 is answered in the AFFIRMATIVE and the sentence of death of Sakhi Muhammad (convict) is CONFIRMED.

(R.A.) **Appeal dismissed**

PLJ 2013 Cr.C. (Lahore) 194

Present: Malik Shahzad Ahmad Khan, J.

Mst. NAHEED AKHTAR--Petitioner

versus

STATION HOUSE OFFICER, P.S.A. DIVISION, SHEIKHUPURA and another--Respondents

Crl. Misc. No. 677-H of 2012, decided on 26.4.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 491--Habeaus Corpus--Alleged illegal custody of minor children--Custody of minor detenus--Detenus daughter aged about 7 years and son aged about 5« years were minor children of the petitioner--First right of Hizanat of the detenus lies with the petitioner, being mother of the said detenus--Custody of the detenus was handed over to the petitioner. [P. 195] A & C

Custody of Minor--

----Principle--It is settled law that mother's lap is God's own cradle. [P. 195] B

Mian Shahid Ali Shakir, Advocate for Petitioner.

Chaudhry Muhammad Jehangir, Chief Public Prosecutor for State.

Date of hearing: 26.4.2012.

Order

This is petition under Section 491, Cr.P.C. has been filed for recovery of minor children of the petitioner namely Kaynait (daughter aged about 7 years) and Rehan (son aged about 5« years), from the alleged illegal custody of Respondent No. 2 (their father).

2. In compliance of this Court's order dated 20.04.2012 Respondent No. 1 has produced the above mentioned detenus before this Court.

3. It is contended by the learned counsel for the petitioner that Respondent No. 2 forcibly snatched the above mentioned detenus from the lawful custody of the petitioner and custody of detenus with Respondent No. 2 is illegal and unlawful; that the life and health of the detenus is in danger in the custody of Respondent No. 2.

4. No one appeared on behalf of Respondent No. 2. Safdar, SI present in Court states that Respondent No. 2 had the information about the fixation of this case as the detenus were recovered from his house.

5. Heard.

6. The detenus namely Kaynait (daughter aged about 7 years) and Rehan (son aged about 5« years) are minor children of the petitioner. The first right of Hizanat of the detenus lies with the petitioner, being mother of the said detenus. It is settled law that mother's lap is God's own cradle. In the view of above discussion, custody of the detenus is handed over to the petitioner. Any how, Respondent No. 2 may file a petition under the Guardian and Wards Act, 1890 for the custody of minors, before the concerned Guardian Court, if he so desires. The learned Guardian Judge will decide the question of custody of minors, keeping in view the welfare of minors and relevant law on the subject, without being influenced by any observation made in this order, provided a petition is filed in this respect before him. With the above observations this petition stands disposed of.

(A.S.) **Petition disposed of.**

NLR 2013 Criminal 465

Before *Manzoor Ahmad Malik* and *Malik Shahzad Ahmad Khan, JJ.* (Lahore)

Criminal Appeal No. 661 of 2008 and M.R. No. 127 of 2008 decided on 12.3.2013.

MUHAMMAD MUMTAZ---Appellant

versus

THE STATE---Respondent

(a) **Penal Code (XLV of 1860)---**

S. 302. In a case of two versions of murder occurrence, the Court is required to analyze first the prosecution version in order to ascertain its truthfulness or otherwise and defence version is to be taken thereafter. Following this rule of prudence, High Court first analyzing prosecution version of murder case against accused and rejecting it as it did not appeal to common sense. High Court accepting defence version of murder occurrence based on exercise of right of private defence by accused under S. 100 extending to causing death of deceased as more probable. In this view, High Court accepting appeal and setting aside conviction with death sentence recorded by Trial Court against appellant.

(P. 476,480,485,488,493,494)

(b) **Eye-witnesses---**

Eye-witnesses who have suppressed serious injuries suffered by accused during murder occurrence and who have not given plausible explanation for their presence at scene of murder occurrence would not be worthy of reliance.

(P. 480,482)

(c) **Recoveries---**

Recovery of blood-stained churri produced by accused at the time of his arrest seventeen days after murder occurrence, positive reports of Chemical Examiner and Serologist cannot be safely relied upon in support of prosecution case. Held: It does not appeal to the mind of a prudent person that accused would keep the blood-stained churri for a long period of seventeen days when he had ample opportunity during the said period to wash the blood from churri. (P. 482,483,484)

(d) **Motive---**

Motive for murder would have no evidentiary value when it did not appeal to common sense. (P. 485)

(e) **Criminal Procedure Code (V of 1898)---**

S. 342. Statement of accused made under S. 342 has to be accepted or rejected as a whole when prosecution evidence is disbelieved. It is legally not permissible to accept the inculpatory part and reject the exculpatory part of accused's statement under S. 342. (P. 485,486,491,492)

(f) **Penal Code (XLV of 1860)---**

S. 302. Accused would have right of private defence under S. 302 extending to causing death of deceased when deceased inflicted injuries with churri on his person. High Court accepting defence version of exercise of private defence by accused in such case and setting aside conviction with death sentence recorded against him by Trial Court. Held: Case of accused squarely fell within four corners of general exceptions as provided under S. 100 (secondly). (P. 490)

(g) **Ibid---**

S. 302. Accused cannot be awarded punishment under S. 302 on basis of his own statement recorded under S. 342, CrPC by accepting inculpatory part and rejecting exculpatory part of his statement when prosecution evidence is discarded.

(P. 493)

Asghar Ali Gill for appellant.

Arshad Mahmood, Deputy Prosecutor General alongwith *Zia*, ASI for State.

Nemo for complainant.

Date of hearing: 12.3.2013.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.—This judgment shall dispose of Criminal Appeal No. 661 of 2008 titled as "*Muhammad Mumtaz versus The State*" filed by Muhammad Mumtaz, appellant against his conviction and sentence and Murder Reference No. 127 of 2008 titled as "*The Slate versus Muhammad Mumtaz*" submitted by the learned Trial Court for confirmation or otherwise of the sentence of death awarded to Muhammad Mumtaz, appellant as both these matters have arisen out of the same judgment dated 10.06.2008 passed by the learned Addl. Sessions Judge, Toba Tek Singh in case FIR No. 506, dated 12.12.2006, offences under Sections 302, 337-L(ii), 337-A(i), 148 and 149, PPC, registered at Police Station Saddar Gojra District Toba Tek Singh whereby, Muhammad Mumtaz, appellant was convicted under Section 302(b), PPC and sentenced to death with the direction to pay Rs. 1,00,000/- (rupees one lac) as

compensation to the legal heirs of deceased Muhammad Irshad as provided under Section 544-A of the Code of Criminal Procedure and in default thereof to further undergo simple imprisonment for six months and the said amount will be recovered as arrears of land revenue. The learned Trial Court, through the same judgment, also convicted Manzoor, co-accused of the appellant under Section 337-A(i), PPC and sentenced him to rigorous imprisonment for one year with the direction to pay Rs. 10,000/- (rupees ten thousand) as Daman to Khalid Hussain injured. He was ordered to be kept in jail till the full payment of Daman and his detention in jail for non-payment of Daman will be treated as simple imprisonment. The learned Trial Court acquitted them from the charges under Sections 148 and 149, PPC.

The learned Trial Court, however, acquitted Noor Muhammad and Muhammad Irshad *alias* Muhammad Iqbal, co-accused of the appellant.

2. Brief facts of the case, as disclosed by Muhammad Mushtaq, complainant (PW-6) in his application (Exh-PH), on the basis of which formal FIR (Exh-PH/1) was registered, are that he (complainant) was resident of Chak No. 353/J.B. Tehsil Gojra. On 9.12.2006, his paternal niece Mst. Asma Bibi, who was student of B.A. in the Government Girls College, Gojra, was abducted by Muhammad Iqbal accused (since P.O.) and his sister Mst. Anwar Bibi. The abductee was not traceable since 9.12.2006, On 11.12.2006, a relative of Muhammad Iqbal also searched Muhammad Iqbal and Mst. Asma Bibi. On 12.12.2006, there was also a plan to search Muhammad Iqbal and Mst. Asma Bibi. On 12.12.2006 at

about 9:30 a.m., as per plan, he (complainant) alongwith Muhammad Irshad (deceased), Khalid Hussain (PW-8) and Muhammad Nawaz (PW-9) went to the house of Muhammad Mumtaz (appellant). They knocked at the door. On opening the door, suddenly, Muhammad Mumtaz (appellant) armed with Chhuri, Noor Muhammad (since acquitted) armed with pump action gun, Manzoor (co-convict) armed with Sota, Muhammad Iqbal son of Muhammad Yar (since P.O) and Muhammad Iqbal son of Machhia (since acquitted) armed with Chhuri came out, who were sitting there in furtherance of their common intention. Muhammad Iqbal raised lalkara that they (complainant party) be killed. Upon which, Mumtaz (appellant) made a Chhuri blow which landed on the left side of neck of Muhammad Irshad (deceased), second blow of Chhuri was made by him which landed on the right side of Chest and third blow landed on the left side of chest of Muhammad Irshad (deceased). He again made a Chhuri blow which landed on the left side of chest of Muhammad Irshad (deceased). He (Muhammad Mumtaz appellant) again made a Chhuri blow which landed on the right side of abdomen of Muhammad Irshad (deceased). Muhammad Iqbal son of Machhia made a Chhuri blow at Khalid Hussain (PW-8) which landed on the right side of his forehead. Manzoor gave a sota blow which landed on the head of Khalid Hussain (PW-8). Manzoor made a sota below which landed on the cheek of Khalid Hussain (PW-8). He again made a sota blow which landed on his (Khalid Hussain's) left shoulder. Meanwhile, Noor Muhammad (since acquitted) made a straight fire at the complainant party with the intention to kill them which was missed. Muhammad Nawaz (PW-9) snatched his gun before he

could have made a second fire shot. Many people gathered there, who rescued them from the accused persons. The injured persons were shifted to Civil Hospital, Gojra for medical treatment. Muhammad Irshad (deceased) was referred to Allied Hospital, Faisalabad by the doctor in view of his precarious condition but he died on the way.

3. Muhammad Mumtaz (appellant) was arrested in this case on 29.12.2006 by Atta Ullah, S.I. (PW-14). On the same day *i.e.* 29.12.2006, Muhammad Mumtaz (appellant) himself produced Chhuri (P-4) before Atta Ullah, S.I. (PW-14), which was taken into possession *vide* recovery memo. Exh-PL. After completion of investigation, the challan was prepared and submitted before the learned Trial Court. The learned Trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 12.9.2007, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fourteen witnesses, during the trial. Muhammad Mushtaq, complainant (PW-6), Khalid Hussain (PW-8) and Muhammad Nawaz (PW-9) furnished the ocular account of the case. Muhammad Nawaz (PW-9) is also the witness of recovery of Chhuri (P-4), allegedly produced by Muhammad Mumtaz (appellant).

The medical evidence was furnished by Dr. Muhammad Asghar (PW-1), who medically examined Muhammad Irshad (deceased) and Khalid Hussain (PW-8) and Dr. Muhammad Zahid (PW-2), who conducted the post-mortem examination on the dead-body of Muhammad Irshad (deceased).

Atta Ullah, S.I. (PW-14) and Ghulam Qadir, S.I. (PW-10) are the Investigating Officers of the case. Syed Kazim Hussain Gillani, Draftsman (PW-3), Muhammad Fayyaz, (PW-4), Muhammad Yaqoob 385/C (PW-5), Ikram-ul-Haq 356-C (PW-7), Khizer Hayat, A.S.I. (PW-11), Abdul Ghafoor 304/HC (PW-12) and Muhammad Shafique (PW-13) are the formal witnesses. The prosecution produced documentary evidence in the shape of medico-legal report of Muhammad Irshad deceased (Exh-PA), medico-legal report of Khalid Hussain PW-8 (Exh-PB), post-mortem report of Muhammad Irshad deceased alongwith pictorial diagram (Exh-PC & Exh-PC/1), injury statement (Exh-PD), inquest report (Exh-PE), scaled site plan, in duplicate, of the place of occurrence (Exh-PF & Exh-PF/1), proclamation of Muhammad Iqbal son of Yar Muhammad accused alongwith report (Exh-PG & Exh-PG/1), application of complainant for registration of case (Exh-PH), FIR (Exh-PH/1), recovery memo. of blood-stained earth (Exh-PJ), recovery memo. of last worn clothes of the deceased (Exh-PK), recovery memo. of Chhuri P-4 (Exh-PL), recovery memo. of Sota P-5 allegedly produced by Manzoor accused (Exh-PM), recovery memo. of .12 bore shot gun (P-6) allegedly produced by Muhammad Irshad accused (Exh-PN), recovery memo. of .12 bore pump action P-7 produced by Muhammad Nawaz (PW-9) allegedly snatched from Noor Muhammad accused (since acquitted) during the occurrence (Exh-PO), application for issuance of warrants of Muhammad Iqbal accused (Exh-PQ), application for issuance of proclamation of Muhammad Iqbal accused (Exh-PR), warrants of arrest of Muhammad Iqbal accused alongwith report (Exh-PS and Exh-PS/1), rough site

plan of the place of occurrence (Exh-PT), rough site plan of place of recovery of gun P-6 (Exh-PU), rough site plan of place of recovery of .12 bore pump action P-7 (Exh-PV), reports of Chemical Examiner (Exh-PW and Exh-PY), reports of Serologist (Exh-PX and Exh-PZ) and closed its evidence.

The statements of the appellant and his co-accused (since acquitted), under Section 342 of the Code of Criminal Procedure, were recorded on 28.5.2008. They refuted the allegations levelled against them and professed their innocence. In his statement recorded under Section 342 of the Code of Criminal Procedure, the appellant has stated that in fact the complainant party was aggressor and they came to his house to abduct his daughters in lieu of Mst. Asma Bibi and he acted in his self-defence. The appellant did not opt to give evidence on oath as provided under Section 340(2) of the Code of Criminal Procedure, in disproof of the allegations levelled against him, however, he produced his medico-legal report (Exh-DA), copy of statement of Khalid Hussain PW-8 (Exh-DB), copy of Nikah Nama of Mst. Asma Bibi with Muhammad Iqbal accused (Exh-DC), copy of harassment petition filed by Mst. Asma Riaz (Exh-DD), copy of order of learned Addl. Sessions Judge, Jhang passed in said petition (Exh-DE) and copy of report submitted by the police (Exh-DF) in his defence.

5. Notice was given to the complainant on 11.1.2013 but none appeared on his behalf. Notice was again issued on 12.2.2013 but once again, no one appeared on his behalf. Zia, ASI, present in Court, states that he has duly informed the complainant about the date fixed for hearing of this appeal. As

this case pertains to the year 2008, therefore, we proceed to decide the same after hearing learned counsel for the appellant and learned Deputy Prosecutor General for the State.

6. Learned counsel for the appellant, in support of this appeal, contends that a false story was concocted by the complainant and even the matter was reported to the police with a delay of about two hours; that admittedly, the complainant and the deceased were not residents of the village where this incident took place; that they came from village 353/J.B, Tehsil Gojra District Toba Tek Singh on cars to the village of the appellant which fact has been admitted by Khalid Hussain (PW-8) in his cross-examination; that the complainant improved his version before the learned Trial Court by stating that the relative of Muhammad Iqbal accused (since P.O.), on 11.12.2006, asked them (the complainant party) to come on 12.12.2006 and they will again search Mst. Asma Bibi; that the complainant was confronted with his previous statement *i.e.* application (Exh-PH) where this was not so recorded which clearly suggests that there was no reason or occasion for the complainant or the deceased to come to the house of the appellant; that it is mentioned in the FIR (Exh-PH/1) that Mst. Asma Bibi was abducted by Muhammad Iqbal son of Muhammad Yar (since P.O.) but in no way it was even alleged that the appellant has any role in the alleged abduction and even no case regarding the abduction of Mst. Asma Bibi was ever got registered by the complainant or any other relative; that in fact Mst. Asma Bibi contracted marriage with Muhammad Iqbal son of Muhammad Yar accused (since P.O.) with her free consent which fact is evident from her Nikah

Nama (Exh-DC); that it is the case of the prosecution that during the incident, Noor Muhammad (since acquitted) resorted to firing whereas, Atta Ullah, S.I. (PW-14), the Investigating Officer has admitted, in his cross-examination, that he did not notice any mark of firing at the place of occurrence; that even the gun (P-7) allegedly snatched from the appellant was produced before the police on 29.12.2006 whereas, this incident took place on 12.12.2006; that apart from the appellant, four other persons namely, Noor Muhammad, Manzoor, Muhammad Iqbal son of Muhammad Yar and Muhammad Iqbal son of Machhia were also implicated in this case; that two persons, out of said four persons, namely, Moor Muhammad and Muhammad Iqbal son of Machhia have been acquitted by the learned Trial Court and no appeal against their acquittal has been filed either by the State or the complainant; that the appellant himself was injured in this incident and he received eight injuries on his person which are incised, abrasion and swelling in nature; that the appellant was medically examined on the same day when the deceased and injured witness Khalid Hussain (PW-8) were medically examined and Khalid Hussain (PW-8), in his cross-examination, has admitted this fact; that the medico-legal report of the appellant was brought on the record as Exh-DA; that the doctor, under the influence of the complainant side, in the medico-legal report, has given note to the effect that *"the possibilities of injuries 1, 3, 4, 8 with friendly/technical hands shall be decided by the police investigating officer according to circumstantial evidence"*; that even the police never concluded in the investigation that the injuries sustained by the appellant were self-suffered or manoeuvred; that it has been brought on

the record during the cross-examination of Atta Ullah, S.I. (PW-14) that the first version of the appellant was the same which he stated before the learned Trial Court; that the version of the appellant is more probable, convincing, reliable which gets full support from the prosecution's own case; that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of doubt; thus, this appeal be accepted and the appellant may be acquitted from the charge.

7. On the other hand, learned Deputy Prosecutor General vehemently opposes this appeal on the grounds that there was no conscious or deliberate delay in reporting the matter to the police; that the incident took place on 12.12.2006 al 9:30 a.m., whereas, the matter was reported to the police on the same day *i.e.* 12.12.2006 at 11.15 a.m; that in this incident, initially Muhammad Irshad deceased and Khalid Hussain (PW-8) were injured and they were taken to the hospital which is clear from their medico-legal reports (Exh-PA and Exh-PB respectively) wherein, time of arrival of Muhammad Irshad (deceased) in the hospital is mentioned as 10:45 a.m. on 12.12.2006; that moreover, all the necessary details of incident such as place of occurrence, name of witnesses, name of the deceased, names of the accused persons, the role played by the accused persons and the manner in which the occurrence took place are mentioned in the FIR (Exh-PH/1); that the injuries sustained by the appellant were self-suffered; that the prosecution case gets full support from the medical evidence furnished by Dr. Muhammad Asghar (PW-1) and Dr. Muhammad Zahid (PW-2); that the prosecution case is further corroborated by the evidence of recovery of Chhuri (P-4) from the possession

of the appellant; that the appellant cannot get any benefit from the acquittal of his co-accused as no active role was assigned to them; that the prosecution case is also supported by the statement of Khalid Hussain injured witness; that the appellant has himself admitted in his statement recorded under Section 342 of the Code of Criminal Procedure that he inflicted Chhuri blows on the person of Muhammad Irshad (deceased) and as such, the case of the prosecution has been proved against the appellant beyond the shadow of doubt; that the appellant has taken a specific plea and in the circumstances, burden was on him to prove the same which he has not been able to prove as no witness in support thereof was produced either before the police or before the learned Trial Court; that the sentence of death was rightly awarded to the appellant by the learned Trial Court and the same may be maintained, appeal may be dismissed and Murder Reference be answered in the affirmative.

8. We have heard the arguments of learned counsel for the appellant, learned Deputy Prosecutor General and have also gone through the record with their able assistance.

A 9. It is a case of two versions, one mentioned in the FIR (Exh-PH/1) and brought on the record through the statements of Muhammad Mushtaq, complainant (PW-6), Khalid Hussain (PW-8) and Muhammad Nawaz (PW-9) and second version is the plea taken by the appellant in his statement recorded under Section 342 of the Code of Criminal Procedure and suggestions put to the prosecution witnesses on behalf of the defence. In such-like situation, firstly, the Court

is required to analyze the prosecution version in order to ascertain its truthfulness or otherwise, whereas, the defence version is to be taken thereafter. In this respect, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan passed in the case reported as *"Ashiq Hussain alias Muhammad Ashraf versus State"* (PLD 1994 SC 879) wherein, at page 883, the Hon'ble Supreme Court has been pleased to observe as under:--

> "9. ...The proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter-versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not

straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the questions, *viz.*, is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing i the case? If the answer be in the affirmative, hen the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Reference in this respect may also be made to the case of "*Amin Ali and another versus The State*" (2011 SCMR 323). Therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan, in such like situation, we will first examine the case of the prosecution to see as to whether the prosecution has been able to prove its case or not because

it is the duty of the prosecution to prove the guilt of the accused.

10. The detail of the prosecution story has already been mentioned in paragraph No. 2 of this judgment, therefore, there is no need to repeat the same, however, the gist of the prosecution case is that Mst. Asma Bibi, niece of the complainant was abducted by Muhammad Iqbal son of Muhammad Yar, co-accused (since P.O) and they (complainant party) were searching for them. In this respect, they (complainant party) came to the house of the accused on the day of occurrence *i.e.* 12.12.2006 at about 09.30 a.m. and when they knocked at the door of the appellant, the appellant alongwith his co-accused came out of the house while armed with different weapons and attacked the complainant party. Muhammad Mumtaz (appellant) gave Chhuri blows to the deceased Muhammad Irshad whereas, his co-accused Manzoor gave sota blows to Khalid Hussain (PW-8). As a result whereof, Muhammad Irshad died while he was being shifted to Allied Hospital, Faisalabad from Civil Hospital, Gojra and Khalid Hussain (PW-8) received injuries. In order to prove its case, the prosecution produced Muhammad Mushlaq, complainant (PW-6), Khalid Hussain (PW-8) and Muhammad Nawaz (PW-9). We have noted that the occurrence, in this case, took place on 12.12.2006 at about 09.30 a.m. in front of the house of Muhammad Mumtaz (appellant) in Chak No. 352/J.B Tehsil Gojra District Toba Tek Singh whereas, all the above-mentioned eye-witnesses are resident of another village *i.e.* Chak No. 353/J.B, Tehsil Gojra District Toba Tek Singh. The above-mentioned witnesses have given no plausible

explanation for their going to the house of the appellant on the day of occurrence because niece of the complainant namely, Mst. Asma Bibi was allegedly abducted by Muhammad Iqbal, co-accused of the appellant (since P.O). It was not alleged in the FIR (Exh-PH/1) that the appellant was also involved in any manner in the abduction of Mst. Asma Bibi. Muhammad Mushtaq, complainant (PW-6) has admitted during his cross-examination that no case of abduction of Mst. Asma Bibi was registered by the police. He has further admitted during his cross-examination that the street where the house of the appellant is situated is six feet wide. The prosecution story does not appeal to common sense that when the complainant party knocked at the door of Muhammad Mumtaz, appellant, he alongwith his co-accused immediately launched an attack on the complainant party. There was no reason with the appellant to take the life of Muhammad Irshad (deceased) and to attack the complainant party, rather it appears that the complainant party was infuriated due to the abduction of the niece of the complainant. We have also noted that the above-mentioned eye-witnesses have suppressed the injuries on the person of Muhammad Mumtaz appellant in their statements before the police, as well as, in their statements before the learned Trial Court. Although Muhammad Mushtaq, complainant (PW-6) has admitted, during his cross-examination, that Muhammad Mumtaz appellant was also medically examined by the same doctor who medically examined Muhammad Irshad deceased but he denied that the appellant also sustained injuries during the occurrence. The prosecution's own witness namely, Dr. Muhammad Asghar (PW-1), who medically examined Muhammad Irshad

A

B

deceased, on the day of occurrence (12.12.2006) has stated, during his cross-examination, that on the same day *i.e.* 12.12.2006 at 12.45 p.m., he medically examined Muhammad Mumtaz (appellant) and found the following injuries on his person:--

(1) An incised wound 2 cm x 3 cm x bone deep (visible) 11 cm above the tragess of left ear.

(2) A swelling 3 cm x 5 cm on the left of head, 5 cm above left mastoid process.

(3) An incised wound 1 cm x 0.1 cm and scalp deep on left eye brow.

(4) Multiple small incised wounds in an area of 1 cm x 0.5 cm on left eye brow, 0.5 cm above injury No. 3 which were partial skin deep.

(5) A superficial cut 0.7 cm x 0.8 cm on back of metacarpo phalyngeal joint of little bone.

(6) Multiple abrasion with radish contusion in an area of 8 cm x 3.5 cm on back of left wrist and lower part of left forearm.

(7) An abrasion 0.5 cm x 0.2 cm on front and proximal part of left index finger.

(8) An incised wound 1.5 cm x 0.3 cm x buckle cavity (through and through) on outer part of left lower lip.

According to the opinion of Dr. Muh mmad Asghar (PW-1), injuries Nos. 2, 6 and 7 were caused with blunt weapon whereas, rest of the injuries were caused with sharp-edged

weapon. The probable duration of the injuries was within four hours. He also tendered in evidence MLC No. 1907, dated 12.12.2006 (Exh-DA) regarding the medical examination of Muhammad Mumtaz appellant. It is evident from the perusal of medical evidence furnished by Dr. Muhammad Asghar (PW-1) that Muhammad Mumtaz (appellant) was also seriously injured during the occurrence. There were total eight injuries on his person, out of which, injuries Nos. 1 & 3 were in the area of head of Muhammad Mumtaz (appellant) and the said injuries were scalp/bone deep which were caused by a sharp-edged weapon. The above-mentioned prosecution witness namely, Dr. Muhammad Asghar (PW-1) was not declared hostile by the prosecution. The medico-legal report (Exh-DA) of Muhammad Mumtaz (appellant) was also not challenged by the prosecution before any medical board. So it was established on the record that Muhammad Mumtaz (appellant) was also seriously injured in the occurrence but his injuries were suppressed by the prosecution eye-witnesses. As the injuries on the person of Muhammad Mumtaz (appellant) have been suppressed by Muhammad Mushtaq, complainant (PW-6), Khalid Hussain (PW-8) and Muhammad Nawaz (PW-9) coupled with the fact that the said eye-witnesses could not give any plausible explanation for their going to the house of the appellant, which was situated in a different village, therefore, we are of the view that the evidence of above-mentioned eye-witnesses is not worthy of reliance.

11. The prosecution has also produced the evidence of recovery of Chhuri (P-4) which was allegedly produced by the appellant at the time of his arrest, positive reports of Chemical

Examiner (Exh-PY) and that of Serologist (Exh-PZ). We have noted that the occurrence in this case took place on 12.12.2006 whereas, the appellant was arrested on 29.12.2006 and Chhuri (P-4) was produced by him on the same day *i.e.* on 29.12.2006. The Chhuri (P-4) was received in the office of Chemical Examiner on 8.3.2007, *i.e.* after about two months and twenty-seven days from the occurrence. As mentioned earlier, the appellant was arrested after about seventeen days from the occurrence, therefore, it does not appeal to the mind of a prudent person that the appellant would keep the blood-stained Chhuri for such a long period because he had ample opportunity during the said period to wash away the blood from the Chhuri. The Hon'ble Supreme Court of Pakistan in the case of "*Basharat and another versus The State*" (1995 SCMR 1735) disbelieved the evidence of blood-stained Chhuri which was allegedly recovered from the accused after ten days from the occurrence. Relevant part of the said judgment at page No. 1739 is reproduced hereunder for ready reference:--

> "11. The occurrence took place on 20.4.1988. Basharat appellant was arrested on 28.4.1988. The blood-stained Chhuri was allegedly recovered from his house on 30.4.1988. It is not believable that he would have kept blood-stained Chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it..."

As mentioned earlier, the blood-stained Chhuri (P. 4) was deposited in the office of the Chemical Examiner after about two months and twenty-seven days of the occurrence,

therefore, it was unlikely that blood on the Chhuri would not disintegrate during the above-mentioned period. The Hon'ble Supreme Court of Pakistan in the case of "*Muhammad Jamil versus Muhammad Akram and others*" (2009 SCMR 120) has held as under:--

> "6. ...It is borne out from the record that the alleged recovery of blood-stained Chhuri has effected after about one month of the occurrence from an open plot which was not in exclusive possession of the respondent and was accessible to all. It was also not likely that the blood would not disintegrate meanwhile. So the reasons advanced by the learned Judge in Chambers are not arbitrary or fanciful for not believing the recovery..."

In view of the above, it is not safe to rely on the prosecution evidence *qua* alleged recovery of Chhuri (P-4), positive reports of Chemical Examiner (Ex.PY) and that of Serologist (Ex.PZ).

12. Insofar as the motive for the occurrence is concerned, we have noted that no specific motive against the appellant was mentioned in the FIR (Exh-PH/1), as well as, in the statements of the prosecution witnesses before the learned Trial Court and it was simply stated that niece of the complainant namely, Mst. Asma Bibi was abducted by Muhammad Iqbal, co-accused (since P.O) and on the day of occurrence, the complainant party went to the house of Muhammad Mumtaz (appellant) and when they (complainant party) knocked at the door of the house of the appellant, they were attacked upon by Muhammad Mumtaz (appellant) and his

co-accused. As mentioned earlier, Muhammad Mushtaq, complainant (PW-6) has admitted during his cross-examination, that no case regarding the abduction of Mst. Asma Bibi was registered by the police. We have also noted that no specific motive was alleged against Muhammad Mumtaz, appellant rather the same was alleged against Muhammad Iqbal, co-accused (since P.O). The motive as alleged by the prosecution does not appeal to common sense because the niece of the complainant was abducted by Muhammad Iqbal, co-accused (since P.O.) and there was no reason with Muhammad Mumtaz (appellant) to launch an attack on the complainant party rather it was the complainant party who was aggrieved due to the above-mentioned abduction of Mst. Asma Bibi, niece of the complainant. As the occurrence admittedly took place in front of the house of the appellant, so this is suggestive of the fact that it was the complainant party who was aggrieved due to the abduction of Mst. Asma Bibi and in fact the motive was with the complainant party to launch an attack on the appellant being relative of Muhammad Iqbal co-accused (since P.O) who abducted the niece of the complainant. Thus, the prosecution in this case failed to prove any motive against the appellant.

13. In view of the above discussion, we have come to this conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt.

14. Now coming to the defence plea taken by the appellant in his statement recorded under Section 342 of the Code of Criminal Procedure. We have noted that Muhammad Mumtaz (appellant) took the plea of self-defence in his

E statement recorded under Section 342 of the Code of Criminal Procedure. While answering to question "Why this case against you and why the PWs have deposed against you?", the appellant replied as under:--

"Mst. Asma Bibi a girl of the complainant party of her own volition left the house of her parents much earlier to the present occurrence with my co-accused Muhammad Iqbal s/o Muhammad Yar (Since P.O) a man of my brothery with whom we already were not on speaking terms. The complainant party suspected that we knew the whereabouts of Mst. Asma Bibi and above-said co-accused Muhammad Iqbal s/o Muhammad Yar (Since P.O). After the elopement of Mst. Asma Bibi the parents of my co-accused Muhammad Iqbal s/o Muhammad Yar (Since P.O) who also reside in our village had disappeared. The complainant party then started pressurizing us to inform them about the place where said Mst. Asma and my co-accused Muhammad Iqbal (Since P.O) were living. The factum of their abode was not known to us. One Kukoo Shah a landlord of the village of the complainant party came to our house prior to the occurrence who threatened us to manage for the return of Mst. Asma Bibi failing which we were threatened to face very odd music. At the instigation of said Kukoo Shah the complainant party brought to our village two cars in order to abduct our daughters in lieu of Mst. Asma Bibi.

Muhammad Irshad, the deceased by scaling the outer wall of my Havelli tried to jump down inside the Havelli in order to open the gate of Havelli from inside for the rest of his contingent to enter into the Havelli, so, that they might abduct our daughters but I pushed him back who fell down in the narrow street of my house but the deceased Muhammad Irshad second time succeeded in jumping down inside my Havelli and he opened the gate from inside whereupon rest of his companions entered inside the Havelli. The deceased after exchange of hot words took out a Churree and attacked me whereupon I sustained injuries at the hand of the deceased Muhammad Irshad and at that time I had no alternative and I picked up a Churree lying near our kitchen place and acted then in my self-defence and the self-defence of my property and the self-defence of my relative girls. Manzoor Hussain was not present but instead Muhammad Abid one party men of the complainant side was present who also sustained injuries. Had Kukoo Shah not instigated the complainant party to launch the attack at our house and to abduct our girls, the occurrence would not have taken place and if Muhammad Irshad deceased would not have died in that case, a case might had been registered against the complainant party, in the circumstances as narrated by me above. I raised the same contention at the time of my arrest before the investigating officer. I will produce in my defence the copy of

the marriage certificate of Mst. Asma Bibi and my co-accused Muhammad Iqbal s/o Muhammad Yar (Since P.O) and a copy of the statement of Mst. Asma Bibi recorded by a competent Court for contracting such marriage. I rely upon case-law titled *The State versus Khair-ur-Rehman* reported as PLD-1960-Peshawar-50. On the day of occurrence I was also shifted to Eye-*cum*-General Hospital, Gojra and PW-1 Dr. Muhammad Asghar had also medically examined me alongwith the deceased. I sustained more than eight injuries including incised wound at the hands of complainant party and such injuries were suppressed by the complainant party and so-called his eye-witnesses during investigation as well as during trial. I had produced my MLC dated 12.12.2006 in this regard to the investigating officer but he neither received such MLC nor he probed into the injuries and the persons responsible for such injuries and nor he registered the case against the complainant party. Although the investigating officer met me in the hospital on the first day of the occurrence. The PWs are party men of the complainant party and related to the deceased Muhammad Irshad and Mst. Asma Bibi."

15. While putting the prosecution case and defence version of the appellant in juxta postion, the defence version of the appellant appears to be more probable. Muhammad Mumtaz (appellant) has stated that in fact, on the day of occurrence, the complainant party alongwith Muhammad

Irshad deceased came to his house. Muhammad Irshad (deceased) by scaling over the outer wall of his Haveli jumped inside the Haveli and opened the gate of said Haveli from inside for rest of his companions whereupon, rest of his companions entered inside the Haveli of the appellant in order to abduct the daughters of the appellant in order to take revenge of the abduction of Mst. Asma Bibi. Muhammad Irshad (deceased) after exchange of hot words took out a Chhuri and inflicted different injuries on the person of the appellant. The appellant further stated that at that time, he had no other option but to exercise the right of his self-defence of body and property in order to save his relative girls, therefore, he picked up a Chhuri lying near his kitchen and inflicted injuries on the person of Muhammad Irshad (deceased). The plea taken by the appellant gets support from the evidence of prosecution's own witness namely; Dr Muhammad Asghar (PW-1) who has noted eight injuries on the person of Muhammad Mumtaz (appellant) including two incised wounds in the area of his head which were scalp/bone deep. The defence version further gets support from the medico-legal report (Exh.DA) of the appellant. We have also noted that the prosecutions eye-witnesses suppressed the above-mentioned injuries on the person of the appellant whereas, the appellant has come forward with the true narration of facts and he did not conceal the injuries on the person of Muhammad Irshad (deceased).

16. We have disbelieved the motive as alleged by the prosecution due to the reasons mentioned in paragraph No. 12 of this judgment rather we have already held in the said

paragraph that it was the complainant party and Muhammad Irshad (deceased) who were aggrieved due to the abduction of Mst. Asma Bibi (niece of the complainant) by Muhammad Iqbal co-accused (since P.O.). As the complainant party was aggrieved due to the above-mentioned abduction and as the occurrence admittedly took place in the village and in front of the house of the appellant, therefore, the defence version put forth by Muhammad Mumtaz (appellant), in his statement recorded under Section 342 of the Code of Criminal Procedure appears to be more probable, according to which it was the complainant party who launched an attack on the appellant, on the day of occurrence. Even otherwise we have already discarded the prosecution evidence, therefore, while scrutinizing the statement of the appellant, this Court has to accept or reject the said statement *in toto*. According to the appellant, Muhammad Irshad (deceased) alongwith other members of the complainant party launched an attack on the accused party. Muhammad Irshad (deceased) inflicted injuries on the person of Muhammad Mumtaz (appellant) with Chhuri, thus in such situation, the said appellant had the right of
F private defence of his body which also extends to cause death of the assailant is provided under Section 100 of the Pakistan Penal Code, which is reproduced hereunder:--

> "100. *When the right of private defence of the body extends to causing death.*---The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the

exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

Firstly: Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly: Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly: .....;

Fourthly: .....;

Fifthly: .....;

Sixthly: .....

It is evident from the perusal of Section 100 (secondly), PPC that the right of private defence of the body will extend to the voluntary causing the death of the assailant, if the assailant launches an assault which may reasonably cause the apprehension that grievous hurt will be the consequence of such assault, whereas, in the instant case Muhammad Irshad (deceased) had actually inflicted injuries with Chhuri on the vital parts of Muhammad Mumtaz (appellant) including the exposure of the head bone. The case of the appellant, therefore, squarely falls within the four corners of general exception as provided under section 100 (secondly), PPC.

17. It is by now well-settled law that if the prosecution evidence is disbelieved by the Court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inculpatory part of the statement of

E the appellant and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of "*Muhammad Asghar versus The State*" (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:-

> "8. ...It is settled law by now that a statement of an accused recorded under section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of *Shabbir Ahmad v. The State* PLD 1995 SC 343 and *The State v. Muhammad Hanif and 5 others* 1992 SCMR 2047. It has been held by this Court in the judgment reported as *Waqar Ahmad v. Shaukat Ali and others* 2006 SCMR 1139, that prosecution is bound to establish its own case independently instead of depending upon the weaknesses of the defence, and the assertion of the accused in his statement under section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted *in toto* in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

18. It is true that Muhammad Mumtaz (Appellant) has admitted in his statement recorded under Section 342 of the Code of Criminal Procedure that he inflicted Chhuri blows on the person of Muhammad Irshad (deceased) but at the same time, he has also stated that he (appellant) after receiving serious injuries on the vital part of his body, exercised his right of private defence of body and property. In view of the above, as we have already discarded the prosecution evidence, the appellant cannot be awarded punishment on the basis of his own statement recorded under Section 342 of the Code of Criminal Procedure, by accepting the inculpatory part of said statement wherein, he has stated that *i.e.* (appellant) inflicted Chhuri blows on the person of Muhammad Irshad (deceased) and by rejecting exculpatory part of the same statement wherein, he has stated that he (appellant) inflicted injuries on the person of Muhammad Irshad (deceased) in the right of private defence of his body and property. We are fortified in our above-mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of "*Sultan Khan versus Sher Khan and others* (PLD 1991 SC 520) and "*Ghulam Qadir versus Esab Khan and others*" (1991 SCMR 61).

19. In the light of above discussion, we accept the Criminal Appeal No. 661 of 2008 filed by Muhammad Mumtaz (appellant), set aside the impugned judgment dated 10.6.2008 passed by learned Addl. Sessions Judge, Toba Tek Singh. Resultantly the conviction and sentence of the appellant awarded by the learned Addl. Sessions Judge, Toba Tek Singh

vide judgment dated 10.06.2008, is set aside and he is acquitted from the charge. Muhammad Mumtaz (appellant) is in custody, he be released forthwith if not required to be detained in any other case. However, it is made clear that the observations made in this judgment are not relevant to the case of Muhammad Iqbal son of Muhammad Yar, co-accused of the appellant (since P.O.).

20. Murder Reference No. 127 of 2008 is answered in the NEGATIVE and the sentence of death of Muhammad Mumtaz (convict) is NOT CONFIRMED.

Conviction/Death Sentence Set Aside/Acquittal Ordered.

2012 C L C 105

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. RAZIA BEGUM----Petitioner

Versus

JANG BAZ and 3 others----Respondents

Writ Petition No.315 of 2009, heard on 7th September, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Suit for possession of house given to wife in lieu of dower by her husband and father-in-law or in alternative for recovery of Rs.3,00,000/- as its present market value---Suit decreed by Family Court for possession of house or in alternative for recovery of Rs.10,000/- as its price mentioned in Nikahnama was modified by Appellate Court granting same only for recovery of Rs.10,000/----Husband's plea that such house was not owned by him, thus, no decree against his father could be passed---Validity---Nikahnama did not find mention any condition to the effect that in case of failure to give such house to wife, husband would pay her Rs.10,000/----Value of such house mentioned in Nikahnama was its market value at time of marriage---Wife was entitled to decree for possession of such house or in the alternative, for recovery of amount equivalent to its present market value---Duty of Family Court was to pass decree after determining prevalent market value of such house, but its omission to do so would not render its decree ineffective or illegal as such value would be determined by Executing Court during execution proceedings---Wife could validly file suit for recovery of dower against her father-in-law, if he either stood surety or guaranteed its payment, thus, he would be liable to pay dower as bridegroom himself---Father-in-law of petitioner was party to Nikahnama containing his thumb-impression as "Wakeel" of bridegroom, thus, Family Court had validly passed decree against him---High Court modified impugned judgments/decrees by declaring that wife was entitled to recovery of possession of such house or in the alternative to its price equivalent to its present market value to be determined by Executing Court during execution proceedings.

Amjad Hussain and another v. Mst. Shagufta and 2 others PLD 1996 Pesh. 64; Liaquat Ali v. Additional District Judge, Narowal and 2 others 1997 SCMR 1122 and Mst. Hussana and others v. Mst. Ghufrana and others 2003 YLR 250 **ref**.

Anjum Firdous v. Additional District Judge and others 2007 CLC 1433 and Mst. Shahenaz Akhtar v. Fida Hussain and 2 others 2007 CLC 1517 **rel.**

Export Promotion Bureau and others v. Qaiser Saifullah 1994 SCMR 859 and Javed Masih and others v. Additional District Judge, Lahore and others 2010 SCMR 795 **distinguished.**

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched. Items Nos.2 & 9---Suit for recovery of possession of immovable property given to wife in lieu of dower---Jurisdiction of Family Court to entertain such suit ---Scope---Such suit could be validly filed before Family Court as Items Nos.2 & 9 of Sched. of West Pakistan Family Courts Act, 1964 clearly brought such suit within ambit of its jurisdiction---Illustration.

Liaquat Ali v. Additional District Judge, Narowal and 2 others 1997 SCMR 1122 **rel.**

(c) West Pakistan Rules under the Muslim Family Laws Ordinance, 1961---

----Rr. 8, 9 & 10---Qanun-e-Shahadat (10 of 1984), Arts.85 & 87---Nikahnama, certified copy of---Admissibility in evidence---Scope---Duty of Nikah Registrar and system of remuneration payable to him would make him a 'public officer'---Nikahnama being a public document could safely be relied upon---Such certified copy could be produced in evidence and would hold field in absence of rebuttal thereof.

Mst. Zubaida Bibi and others v. Mst. Majidan and another 1994 SCMR 1978 and Amjad Hussain and another v. Mst. Shagufta and 2 others PLD 1996 Pesh. 64 **rel.**

(d) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Suit for possession of immovable property given to wife in lieu of dower by her father-in-law---Maintainability---Wife could validly file suit for recovery of dower against her father-in-law, if he either stood surety or guaranteed its payment, thus, he would be liable to pay dower as bridegroom himself---Illustration.

Mst. Shahenaz Akhtar v. Fida Hussain and 2 others 20O7 CLC 1517 **rel.**

Malik Muhammad Saeed for Petitioner.

Agha Muhammad Ali Khan for Respondents Nos.1 and 2.

Date of hearing: 7th September, 2011.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.--- This petition has been filed against the impugned judgment and decree dated 27-11-2008, passed by the learned Additional District Judge, Attock, camp at Jand, as well as against the consolidated judgment and decree dated 22-7-2008, passed by the learned Judge Family Court, Jand with the prayer that the above mentioned judgments and decrees may kindly be declared as illegal, null, and void and the same may be modified with the result that the suit of the petitioner for recovery of possession of house in lieu of petitioner for recovery of possession of house in dower may be decreed, as prayed for, in the original plaint.

2. Brief facts of the present case are that Mst. Razia Begum (the petitioner/plaintiff) contracted marriage with Jang Baz (respondent/ defendant No.1) on 9-12-1987. At the time of marriage, gold jewellery weighing two tolas and land measuring 5 marlas in Mohallah Gohri village Jand was given to the petitioner in lieu of dower and entries in this respect were also incorporated in the relevant columns of Nikahnama Exh.P.2. No issue was born, out of the said wedlock and ultimately on 28-11-2007 the petitioner was divorced by defendant/respondent No.1. The petitioner, thereafter, filed two separate suits bearing No.154/06.12.2007 and 269/06.12.2007 against the respondents for the recovery of maintenance allowance for the period of Iddat, recovery of gold ornaments Rs.30,000/- recovery of dowry articles Rs.1,58,100/-, recovery of Rs.20,000/- and for recovery of house or in the alternative recovery of Rs.3,00,000/- (present market value of the house) in lieu of dower. The said suits were filed in the court of learned Judge Family Court, Jand, District Attock.

3. The above mentioned suits were contested by the defendants/ respondents Nos.1 and 2 by filing their written statement. The defendant/respondent No.1 (Jang Baz) is ex-husband of the plaintiff/petitioner, whereas, the defendant/respondent No.2 (Ghulam Adalat) is her ex-father-in-law.

4. The learned trial court framed the following issues out of divergent pleadings of the parties:---

ISSUES.

(1) Whether the plaintiff is entitled to recover maintenance allowance for iddat period from the defendant? If so, at what rate? OPP.

(2) Whether the plaintiff is entitled to recover Rs.30,000/- as price of gold jewellery of dower? OPP.

(3) Whether the plaintiff is entitled to recover Rs.1,58,100/- as price of dowry articles as per list annexed with the plaint? OPP.

(4) Whether the plaintiff is entitled to recover Rs.20,000/-as per column No.18 of Nikahnama? OPP.

(5) Whether the plaintiff is entitled to recover possession of suit house or in alternative its price of Rs.3,00,000/? OPP.

(6) Whether the plaintiff has no cause of action? OPD.

(7) Whether this Court has no jurisdiction to entertain and try the suit for possession of house? OPD.

(8) Relief.

5. The parties were directed to produce their evidence. The petitioner Mst. Razia Begum appeared as PW.1. whereas, Dilawar Khan was examined as PW.2. The petitioner/plaintiff also produced the list of dowry articles Exh.P 1 and copy of Nikahnama Exh.P.2.

The defendants/respondents Nos.1 and 2 failed to produce any oral or documentary evidence in support of their defence.

6. After conclusion of the trial, the suit of the petitioner/plaintiff was decreed to the extent maintenance allowance for Iddat period at the rate of Rs.2000/- per month, whereas, suit to the extent of recovery of Rs.30,000/ price of jewellery and for recovery of Rs.1,58,100/- price for dowry articles and Rs.20,000/- as per condition of column No.18 of Nikahnama was dismissed with costs. The suit of the plaintiff/petitioner for possession of the house was decreed and it was held that the plaintiff/petitioner was entitled to get possession of the house or in the alternative to receive its price Rs.10,000/ vide consolidated judgment and decree dated 22-7-2008, passed by the learned Judge Family Court Jand.

7. The petitioner being aggrieved of the above mentioned judgment and decree, filed two separate appeals before the learned Additional District Judge, Attock camp at Jand who accepted the appeal of the petitioner to the extent of recovery of dowry articles. He also modified the judgment and decree of the learned trial court and it was held that the decree for possession of the house could not be granted because the amount of dower was determined in cash in Nikahnama Exh.P.2, therefore, the plaintiff/petitioner was, entitled to recover Rs.10,000/- instead of possession of the land/house vide impugned judgment and decree dated 27-11-2008.

8. The petitioner/plaintiff being dissatisfied with the above mentioned impugned judgments and decrees has filed the present writ petition in this Court.

9. It is contended by the learned counsel for the petitioner that a plot measuring 5 marlas was given to petitioner in lieu of dower and enry to this effect was also incorporated in Column No.16 of Nikahnama Exh.P.2, therefore, the impugned judgments and decrees, whereby the petitioner was held entitled to recover Rs.10,000 as value of the said plot are not sustainable in the eyes of law; that the present market value of the said plot is more than Rs.10,00,000 (1 million), therefore, there was no justification with the courts below to award a meagre amount of Rs.10,000 to the petitioner; that the respondents/defendants could not produce any documentary evidence in rebuttal, therefore, the suit of the petitioner was liable to be decreed, as prayed for; that case of the petitioner was fully established through production of Nikahnama Exh.P.2, that Nikahnama Exh.P.2 is public document and in absence of rebuttal, the same can safely be relied upon; that if possession of the suit-land cannot be handed over to the petitioner, then, the present market value of the said land may be determined and the petitioner/plaintiff may be awarded the said value. In support of his contentions, the learned counsel for the petitioner has placed reliance on the case of Amjad Hussain and another v. Mst. Shagufta and 2 others (**PLD 1996 Peshawar 64** (DB)), Liaquat Ali v. Additional District Judge, Narowal and 2 others (**1997 SCMR 1122**) and Mst. Hussana and others v. Mst. Ghufrana and others (**2003 YLR 250**).

10. On the other hand, the learned counsel appearing on behalf of respondents Nos.1 and 2 had vehemently opposed this petition on the grounds that the Family Court has no jurisdiction to grant the relief as prayed for by the

petitioner/plaintiff; that the petitioner is seeking possession of an immovable property, therefore, the case of the petitioner does not fall within the jurisdiction of the Judge Family Court; that an imovable property of the value of more than Rs.100/- can only be transferred through a registered deed; that the findings of courts below cannot be disturbed in writ jurisdiction because reappraisal of evidence is not permissible while exercising constitutional jurisdiction. In support of his contentions, he has placed reliance on the case of Export Promotion Bureau and others v. Qaiser Saifullah (**1994 SCMR 859**), Javed Masih and others v. Additional District Judge, Lahore and others (**2010 SCMR 795**) and Gul Muhammad Tabassam v. Ghulam Ara and 2 others (**2003 CLC 1062**).

11. Arguments heard and record perused.

12. The petitioner Mst. Razia Begum was married with Jang Baz (respondent No.1) on 9-12-1987. Ghulam Adalat (respondent/defendant No.2) is real father of respondent/defendant No.1. The respondents Nos.1 and 2 undertook to pay dower to the petitioner, detail of the same is mentioned in Columns Nos.13 to 17 of Nikahnama. The above mentioned columns of Nikahnama Exh.P.2 reads as under:---

13. No issue out of the above mentioned wedlock was born and due to this reason on 28-11-2007 the petitioner was divorced by respondent No.l. The petitioner, thereafter, filed the above mentioned two separate suits. The suit of the plaintiff/petitioner for possession of 5 marlas of land was decreed and it was held by the learned trial court that the petitioner was entitled to the possession of 5 marlas of suit-land or in the alternative Rs.10,000/- as price of the said land, which was mentioned in Nikahnama Exh.P.2. The said judgment of the learned trial court was modified in appeal and suit for recovery of dower of the plaintiff/ petitioner was decreed, only to the extent of recovery of Rs.9000/- and decree to the extent of possession of 5 marlas land was refused vide the impugned judgment and decree dated 27-11-2008, passed by the learned Additional District Judge, Attock.

14. 1 have gone through the Nikahnama Exh.P.2. Column No.16 makes it clear that respondent No.1 would give 5 marlas of land situated in Mohallah Gohri Village Jand, District Attock to the petitioner. There is no condition that in case of failure to give the above mentioned 5 marlas of land to the petitioner, the respondent No.1 would pay Rs.10,000/- to the petitioner. I find that both the courts below have grossly misapplied the law on the subject by granting decree

worth Rs.10,000/- instead of granting decree for possession of the suit-land or in the alternative granting decree for the amount equivalent to the present market value of the suit-land. As the petitioner/plaintiff was given 5 marlas of land at the time of wedding and the amount of Rs.10,000/- was written in the Nikahnama, just to mention the market value of the said land at that time, therefore, the petitioner is entitled to the decree for possession of the suit-land or in the alternative for recovery of the amount equivalent to the present market value of the said land. I am also fortified in my above mentioned views by the case-law reported as Muhammad Sana Ullah v. Mst, Shamim Naz Kausar and 2 others (1995 SCMR 1208). Similar question was raised before the Hon'ble Supreme Court of Pakistan. The facts of the said case are almost identical with the facts of the present case. Para No.1 of the said judgment is reproduced as under:---

> "Petitioner, Muhammad Sana Ullah, married with respondent Mst. Shamim Naz Kausar on 6-10-1977. The petitioner undertook to pay dower to the respondent, which is mentioned in paragraph No.13 of the Nikahnama as under:---

The Hon'ble Supreme Court of Pakistan had held in the above mentioned judgment as under:---

> "Dower, payment of---Husband agreed to give 1/2 portion of house and six Kanals of land to his wife as dower and such fact was entered in Nikahnama---Trial Court decreed wife's suit but granted her specified amount instead of portion of house and land as specified in Nikahnama---Trial Court's decision, was although maintained by Appellate Court, yet High Court modified decree and instead of specified amount decreed plaintiff's suit in respect of 1/2 portion of house and land in question---Validity---Specified para of Nikahnama had made it clear that husband had agreed to pay dower to his wife in terms of 1/2 portion of house and specified land---No condition was specified that husband would pay specified amount instead of said portion of house and the land---High Court was thus, justified in awarding decree for 1/2 portion of house and land in question, as mentioned in Nikahnama---Leave to appeal was refused in circumstances"

15. The learned counsel for the respondents Nos.1 and 2 has argued that the petitioner has filed a suit for possession of immovable property and the learned Judge Family Court, Jand has no jurisdiction to entertain the said suit.

The said argument of the learned counsel for the respondents Nos.1 and 2 is not convincing. Plea of want of jurisdiction of Family Court to entertain suit for possession of land given to wife in lieu of dower was not warranted because Family Court was empowered in terms of section 5, West Pakistan Family Courts Act, 1964, to entertain and decide such suits. Section 5 of the Act ibid is reproduced as under:---

> "5 Jurisdiction.---. (1) Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, entertain, hear and adjudicate upon matters specified in [Part I of the Schedule]:
>
> (2) …….
>
> (3) …….
>
> **SCHEDULE**
>
> (1) Dissolution of marriage [including Khula].
>
> (2) Dower
>
> (3) Maintenance.
>
> (4) Restitution of conjugal rights.
>
> (5) Custody of children [and the visitation rights of parents to meet them]
>
> (6) Guardianship.
>
> (7) [Jactitation of marriage]
>
> (8) Dowry.
>
> (9) Personal property and belongings of a wife.

It is evident from the perusal of above mentioned provisions of law that suit for possession of immovable property given to wife in lieu of dower can validly be filed before the Judge of Family Court. Items Nos.2 and 9 the above mentioned schedule clearly brings the above mentioned case within the jurisdiction of Family Court. Family Court was not restrained to entertain suit for recovery of immovable property given as dower to wife. Reference in this respect may be made to the case of Liaquat Ali v. Additional District Judge, Narowal and 2 others (**1997**

SCMR 1122). The Hon'ble Supreme Court of Pakistan has held in the said judgment as below:---

> **"West Pakistan Family Courts Act (XXXV of 1964)---**
>
> ----S. 5---Constitution of Pakistan (1973), Art.185(3)---Wife's suit for possession of land (given to her as dower vide "Kabinnama" and "Nikahnama" at the time of marriage) was decreed against her husband---Decree in wife's favour was maintained up to the High Court---Validity---Plea of want of jurisdiction of Family Court to decree suit for possession of land given to wife in dower was not warranted for Family Court was empowered in terms of S.5, West Pakistan Family Courts Act, 1964, to entertain and decide such suit---Family Court was not restrained to entertain suit for recovery of immovable property given as dower to wife---Three Courts below had believed oral evidence as well as Kabinnama and Nikahnama---Petitioner had failed to point out any misreading or non-reading of evidence by three Courts below---Leave to appeal was refused in circumstances."

16. The learned counsel for the respondents Nos.1 and 2 has further argued that the suit of the petitioner could not be decreed because immovable property of the value more than Rs.100 cannot be transferred on the basis of Nikahnama and the same could only be transferred through a registered deed. The said objection of the learned counsel for the respondents Nos.1 and 2 is not valid. It is, by now, well-settled law that Nikah Registrar's duty and system of remuneration make him a "public officer" and "Nikahnama" is a public document. Certified copy of "Nikahnama" can be produced in evidence and in absence of rebuttal would hold the ground. In the instant case, no oral or documentary evidence was produced by the respondents Nos.1 and 2, whereas, the petitioner/plaintiff has produced oral evidence in the shape of P.W.1 and P.W.2 and documentary evidence in the shape of list of dowry articles Exh.P.1 and Nikahnama Exh.P.2. As no evidence was produced by the respondents Nos.1 and 2 in rebuttal of the above mentioned evidence of the plaintiff/petitioner, therefore, Nikahnama Exh.P.2, which is a public document can safely be relied upon. Reference in this respect may be made to the case-law reported as Mst. Zubaida Bibi and others v. Mst. Majidan and another **(1994 SCMR 1978)** and Amjad Hussain and another v. Mst. Shagufta and 2 others **(PLD 1996 Peshawar 64** (DB)).

17. So far as the alternative prayer of the petitioner/plaintiff and the question of determination of present market value of the suit property is concerned, it is noted that it was duty of the learned trial court to determine the said value and decree the suit of the petitioner/plaintiff in light of the prevailing market value of the said property. Omission on part of the learned trial court/Appellate Court by not determining the price of the suit-land equivalent to its present market value, could not render the impugned judgments redundant or ineffective. Illegality/ irregularity so committed by the courts below is cured/rectified by holding that the said value will be determined by the executing court during execution proceedings. Reference in this respect may be made to the case of Anjum Firdous v. Additional District Judge and others (**2007 CLC 1433**). In a similar case, it was held in the said judgment as under:---

> ----S. 5 Sched. & S.14-Constitution of Pakistan (1973), Art.199---Constitutional petition---Suit for recovery of dower---Suit was dismissed, but Appellate Court partly allowed appeal against judgment of the Family Court holding that though the respondent was not owner of the house which was given in dower to the petitioner at the time of marriage, which earlier stood transferred in favour of mother of respondent, but respondent was bound to pay its price and that contention of respondent that he had already paid cash amount to petitioner in lieu of price of said house as owner, was not established---Respondent having not challenged findings of Appellate Court qua the house in dispute, said finding which had attained finality was binding on respondent---Omission on part of Appellate Court by not determining the price of house equivalent to its value could be termed as an accidental slip and same did not render judgment of Appellate Court, either redundant or ineffective---Illegality/irregularity so committed by Appellate Court was cured/rectified by the High Court in constitutional jurisdiction, holding that, in view of admission by respondent regarding transfer of house in dispute to the petitioner in lieu of dower at the time of marriage, respondent could not be relieved of his liability to pay the price of disputed house, equivalent to its value---Constitutional petition was allowed and by modifying the impugned judgment of Appellate Court, it was declared that petitioner would be entitled to recover the price of house

in dispute equivalent to its value from respondent to be determined by Executing Court during executing proceedings."

18. The learned counsel for the respondents Nos.1 and 2 has argued that as the husband of the petitioner was not owner of the land in question against therefore, the suit filed by father-in-law (defendant/ respondent No.2) could not be decreed to that extent. In this respect it is held that the suit for recovery of dower can validly be filed against father-in-law, if the father-in-law had stood surety or had guaranteed the payment of dowers. He could lawfully be impleaded in the suit and was, as such, liable to pay the dower as the bridegroom himself. The father of the respondent No.1 namely Ghulam Adalat (respondent No.2) has been arrayed as defendant No.2 by the petitioner in her above mentioned suit. Ghulam Adalat (respondent/defendant No.2) was party to Nikahnama Exh.P.2. His name is clearly mentioned in Column No.11 of Nikahnama. He was appointed as `Wakeel' of the bridegroom. The Nikahnama also contains thumb-impression of Ghulam Adalat (defendant/respondent No.2), therefore, the judgment and decree can validly be passed under the Family Laws against the defendant/respondent No 2. Reference may be made to the case of Mst. Shahenaz Akhtar v. Fida Hussain and 2 others (**20O7 CLC 1517**). This court, in the said case, decided the above issue in the following terms:---

> ----S. 5 & Sched.---Constitution of Pakistan (1973), Art.199---Constitutional petition---Suit by wife for recovery of dower, dowry articles and for grant of maintenance allowance against husband and her father---Jurisdiction of Family Court---Scope and extent---Necessary parties to suit---Dower amount fixed was prompt and settled as Rs.60,000 out of which plaintiff was permitted to obtain the plot of five Marlas with one constructed room, transferred in her favour from father of husband on basis of an agreement, in lieu of dower amount of Rs.40,000, which for the remaining amount of Rs.20,000 four Tolas gold ornaments were to be delivered, which were handed over to her---Question arose as to whether plaintiff could file suit against father of bridegroom for completion of contract executed by him for the payment of dower---Held, there was no bar or prohibition in the way of plaintiff in that regard, so as to impede the way of plaintiff from claiming the implementation and completion of the agreement---Family Court under S.5, West Pakistan Family Courts Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon

matters specified in Part I of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband only bridegroom/husband could be impleaded in the suit for recovery of dower and none else---If another person had stood surety or had guaranteed the payment of dower, he/she could lawfully be impleaded in the suit---Surety and guarantor to the dower were as much party and liable to pay dower as the bridegroom himself---Principles.

The judgments referred by the learned counsel for respondents Nos.1 and 2 are distinguishable from the facts of the present case and the same are not relevant for decision of issues involved in case.

19. The pith of all the discussion made above is that this petition is allowed by modifying the impugned judgment and decree of the learned Judge Family Court, Jand dated 22-7-2008 and by also modifying the impugned judgment and decree dated 27-11-2008 of the learned Additional District Judge, Attock Camp at Jand and it is declared that the petitioner would be entitled to the recovery of possession of 5 marlas of land, fully described in Column No.16 of the Nikahnama Exh.P.2 or in the alternative, the petitioner is entitled to recover price of the said land equivalent to its present market value from respondent No.1 to be determined by the executing court during execution proceedings. No order as to costs.

S.A.K./R-51/L **Petition accepted.**

2012 C L C 679

[Lahore]

Before Malik Shahzad Ahmad Khan, J

AMANULLAH KHAN----Petitioner

versus

DISTRICT JUDGE and 3 others----Respondents

Writ Petition No.25494 of 2011, decided on 8th December, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched., Ss.13 & 14---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance---Execution of decree---Suit for recovery of maintenance allowance filed by the plaintiff having finally been decreed, plaintiffs filed execution petition, which was allowed---Execution proceedings remained pending for a considerable period due to delaying tactics of the judgment-debtor---Petitioner, who was father of the judgment-debtor stood surety for payment of decretal amount---Petitioner paid Rs.10,000 and undertook to pay the remaining decretal amount in case of non-payment by the judgment-debtor---Later on decretal amount having not been paid by the judgment-debtor or the petitioner/surety, judgment-debtor was finally arrested---Application filed by the petitioner/surety for discharge of his surety, had been dismissed by the Family Court and Appellate Court---Validity---Petitioner's contention was that as he himself was not judgment-debtor and was merely a surety of judgment-debtor, on arrest of judgment-debtor, no further action could be taken against him, when he had performed his duty by producing the judgment-debtor before the court---Contention of the petitioner was misconceived as petitioner did not stand surety for appearance of judgment-debtor, but he stood surety for the payment of decretal amount---Petitioner, could not be absolved of his liability on account of arrest of judgment-debtor---Action for recovery of decretal amount could validly be taken against petitioner/surety---No interference was required by High Court in impugned orders passed by the Family Court and Appellate Court below---Petition was dismissed.

Nawazo v. The State 2004 SCMR 563; Ghulam Qadir Siyal v. The State 1997 PCr.LJ 554 and Mst. Maqsooda Mai v. Bukhat Ali and another 2007 MLD 1264 distinguished.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 14(3)---Constitution of Pakistan, Art.199---Constitutional petition---Appeal against interim order---Petitioner in his constitutional petition had challenged an interim order of Executing Court---When the legislation had specifically prohibited the filing of appeal or revision against an interim order, filing of constitutional petition against such order would amount to defeating and diverting the intent of the legislature---Constitutional petition was dismissed.

Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others 1996 SCMR 1165; Muhammad Sabir v. Mst. Azra Bibi and 2 others 2011 CLC 417 and Muhammad Irfan v. Judge, Family Court, Sargodha and 2 others 2008 CLC 582 **rel.**

Kh. Muhammad Saeed for Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.--- This writ petition has been filed against order dated 10-6-2011 passed by learned Judge Family Court, Sheikhupura, as well as, against the order dated 11-10-2011 passed by learned Additional District Judge, Sheikhupura whereby, application and appeal of the petitioner, with the prayer to discharge his surety given in execution proceedings for recovery of maintenance allowance, have concurrently been dismissed.

2. As per brief facts of the present case Mst. Hajran Bibi (respondent No. 4) along with her minor children filed a suit for recovery of maintenance allowance against respondent No.3 (Asmat Ullah). The said Asmat Ullah is real son of the petitioner. The above mentioned suit was contested by respondent No.3 who filed his written statement before the learned trial court. Evidence of both the parties was recorded. It is pertinent to mention here that the suit for recovery of maintenance allowance was filed on 17-4-2008 by respondent No.4 along with her two daughters namely Zunera Bibi alias Zara and Aman alias Mano, which was finally decreed after completion of trial vide judgment and decree dated 9-4-2009. Respondent No.4, along with her minor children, on 2-3-2010 filed an execution petition in the court of learned Civil Judge/Judge Family Court, Sheikhupura. The said execution proceedings remained pending for a considerable period of time. Respondent No.3 (the judgment-debtor) kept on, delaying, the execution proceedings, on one pretext or the other. He initially filed an objection petition which was dismissed by the executing court. He, then,

assailed the said order through revision petition. During pendency of the said revision the petitioner, who is father of the judgment-debtor stood his surety. He paid an amount of Rs.10,000/- before the learned Revisional Court and undertook to pay the remaining decretal amount in case of non-payment by the judgment-debtor. Later on the remaining decretal amount was neither paid by the judgment-debtor nor by the petitioner. The judgment-debtor was ultimately arrested. The petitioner, thereafter, moved an application for discharge of his surety, which was dismissed by the learned Judge Family Court, Sheikhupura vide impugned order dated 10-6-2011. The petitioner challenged the said order by filing an appeal which was also dismissed by the learned Additional District Judge, Sheikhupura vide the impugned order dated 11-10-2011. The petitioner has now challenged the above mentioned orders through present constitutional petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

3. It is contended by the learned counsel for the petitioner that the petitioner is himself not the judgment-debtor and he was merely a surety of the judgment-debtor, therefore, on the arrest of judgment-debtor no further action can be taken against him; that the petitioner has performed his duty by producing the judgment-debtor before the court and by effecting his arrest, therefore, the impugned orders have illegally been passed against the petitioner whereby he has been directed to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue; that the impugned orders have illegally been passed against the petitioner and the same are not sustainable in the eyes of law. In support of his contentions the learned counsel for the petitioner has placed reliance on the cases of **Nawazo v. The State (2004 SCMR 563**) and **Ghulam Qadir Siyal v. The State (1997 PCr.LJ 554)** and **Mst. Maqsooda Mai v. Bukhat Ali and another (2007 MLD 1264).**

4. I have heard the learned counsel for the petitioner and have also gone through relevant documents annexed with the present petition.

5. A suit for recovery of maintenance allowance was filed by Mst. Hajran Bibi (respondent No. 4) and her two minor daughters against Asmat Ullah (respondent No. 3), which was decreed on 9-4-2009. The decree holders, on 2-3-2010 filed an execution petition in the court of learned Judge Family Court, Sheikhupura. The

judgment-debtor (respondent No.3) filed an objection petition which was dismissed. The said order was assailed by the judgment-debtor through filing a revision petition which was marked to the court of learned Additional District Judge, Sheikhupura. During the pendency of said revision petition, on 19-6-2010, the petitioner who is father of the above mentioned judgment-debtor appeared before the court and made a statement to the effect that he stands surety of the judgment-debtor and in case the judgment-debtor does not pay the amount of decree, he (the petitioner) will be bound to pay the decretal amount. The said statement was reduced into writing which contains his thumb-impression. The petitioner also produced an affidavit mark-A. According to the contents of said affidavit, he paid in the court, an amount of Rs.10,000/- to the decree-holder on 19-6-2010 and to the extent of remaining decretal amount he undertook to pay the said amount in instalments, as per direction of the court. The petitioner, later on, did not honour his above mentioned undertaking. The judgment-debtor was resultantly arrested. The petition moved an application for discharge of his surety, which was dismissed and the learned executing Court, vide impugned order dated 10-6-2011, directed the petitioner (surety) to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue. The learned counsel for the petitioner has argued that, as the judgment-debtor has been produced by the petitioner who has also been arrested, therefore, no further action can be taken against the petitioner/surety. The said argument of the learned counsel for the petitioner is misconceived. It is evident from the perusal of order dated 19-6-2010 that the petitioner stood surety for the payment of the decretal amount and not for the appearance of the judgment-debtor. The petitioner undertook to pay the decretal amount in case of default by the judgment-debtor. It is manifest from record that the petitioner did not stand surety for appearance of the judgment-debtor rather he stood surety for the payment of the decretal amount, therefore, he cannot be absolved of his liability on account of arrest of the judgment-debtor. Under section 13(3) of the Muslim Family Courts Act, 1964, a decree is enforced which is passed by the learned Family Court and sub-clauses (3) and (4) of the said section are reproduced below:--

(3) Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, [not exceeding thirty days] the same shall, if the Court so directs be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder.

(4) The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order, direct.

When the arrears under a decree are assessed as land revenue then the provisions of section 80 to onward, of the Land Revenue Act, 1967 are made applicable. Section 80 of the Land Revenue Act, 1967 reads as under:---

"Process for recovery of arrears.--- Subject to the other provisions of this Act, an arrear of land revenue may be recovered by anyone or more of the following processes, namely:---

(a) by service of a notice of demand on the **defaulter** under section 81;

(b) by arrest and detention of his person under section 82;

(c) by distress and sale of his movable property and uncut or un-gathered crops under section 83;

(d) by transfer, under section 84 of the holding in respect of which the arrear is due;

(e) by attachment, under section 85, of the holding in respect of which the arrears is due;

(f) by annulment, under section 86, of the assessment of that holding;

(g) by sale of that holding under section 88"

A "**defaulter**" under section 80 of the Land Revenue Act, 1967 is defined in section 4(7) of the said Act as meaning a person liable for an arrears of land revenue and also including a person who is responsible as "**surety**" for payment of the arrears".

Section 4(7) of the Act ibid is reproduced hereunder for ready reference:---

"**Defaulter**, means a person liable for an arrear of land-revenue, and includes a person who is responsible as surety for payment of the arrear"

It is manifest from the perusal of above mentioned provisions of law that action for recovery of decretal amount can validly be taken against a **surety** of a defaulter. The petitioner stood as a surety. He was under no obligation to bind himself but he did bind himself to pay the decretal amount, therefore, no interference is required by this

court in the impugned order passed by the leaned Civil Judge/Judge Family Court, as well as, in order dated 11-10-2011 passed by learned Additional District Judge, Sheikhupura.

6. The learned counsel for the petitioner has cited the cases mentioned above in order to establish that on arrest of the judgment-debtor no further proceedings can be taken against the surety. The above mentioned judgments cited by the learned counsel for the petitioner are not applicable to the facts of the present case. The said judgments have been passed with regard to criminal cases, wherein the liabilities of sureties of accused persons were discussed. In the case of **Ghulam Qadir Siyal vs. The State** (**1997 PCr.LJ 554**), the proceedings against the surety were droped on the ground that he produced the accused in compliance of the orders of the court. In the said case, the surety undertook to produce the accused in court and on production of the accused the proceedings of forfeiture of his bond were dropped against the said surety, whereas, in the instant case, as discussed earlier, the petitioner stood surety for the payment of the decretal amount and not for the production of the judgment-debtor, therefore, the above mentioned judgment is not helpful to the petitioner's case. Similarly judgments in the cases of **Nawazo v. The State (2004 SCMR 563)** and **Mst. Maqsooda Mai v. Bukhat Ali and another (2007 MLD 1264)** were given in criminal cases where the sureties took the responsibility for appearance of the accused and not for payment of decretal amount. The facts of the present case are entirely different and distinguishable from the facts of the above mentioned cases.

7. The petitioner had challenged an interim order of the learned executing court through filing an appeal before the learned Additional District Judge, Sheikhupura. He was directed vide said order of the executing court, to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue. As interim order cannot be challenged through an appeal or revision, in view of the provisions of section 14(3) of the West Pakistan Family Courts Act, 1964, therefore, the said appeal was rightly dismissed being not maintainable vide the impugned order dated 11-10-2011 passed by the learned Additional District Judge, Sheikhupura. Impugned order was an interlocutory order, which had no effect of being a final order. Interlocutory order, unless bears characteristics and effect of a final order, could not

be subjected to judicial scrutiny in proceedings under Article 199 of the Constitution. Notwithstanding the contentions raised by the learned counsel, to my mind, the present petition is incompetent and not maintainable on legal plane. Admittedly, the execution proceedings are still pending and during its pendency the learned Executing Court has passed the impugned order. Undoubtedly, order passed by the executing court, for all intents and purposes is an interlocutory order, as the lis is pending before the executing court and it has still to render its final verdict. The Legislature has made such order, as non-appealable by specifically making a provision in that respect by virtue of subsection (3) of section 14 of the West Pakistan Family Courts Act, 1964 which for facility of reference is reproduced below:--

"14. Appeal.--- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable:-

(a) .....
(b) .....
(2) .....
(a) .....
(b) .....
(c) .....

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) ....."

In these circumstances, when the Legislature has specifically prohibited the filing of an appeal or revision against an interim order and if the constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the Legislature. Reference in this context is made to the case of Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others (1996 SCMR 1165), in which the Hon'ble Supreme Court was pleased to hold as under:---

"Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders"

The petitioner has got an adequate remedy available to him by challenging the impugned order in appeal, which, he may file against the ultimate order/judgment if the same would be passed against the petitioner. This petition is also hit by Article 199(1) of the Constitution, hence cannot be entertained. For ready reference, I respectfully refer esteemed judgments of this Court in the cases of Muhammad Sabir v. Mst. Azra Bibi and 2 others (2011 CLC 417) and Muhammad Irfan v. Judge, Family Court, Sargodha and 2 others (2008 CLC 582). The petitioner has alternate remedy by filing an appeal after final decision of the matter by learned executing court.

The learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned orders passed by the learned two courts below, calling for interference in the constitutional jurisdiction, therefore, this petition is, hereby, dismissed.

H.B.T./A-6/L **Petition dismissed.**

2012 C L C 784

[Lahore]

Before Malik Shahzad Ahmad Khan, J

Mst. RASHEEDAN BIBI----Petitioner

versus

ADDITIONAL DISTRICT JUDGE and 2 others----Respondents

Writ Petition No.26532 of 2010, decided on 9th December, 2011.

(a) Guardians and Wards Act (VIII of 1890)---

----Ss. 17 & 25---Custody of minors---Important factors requiring consideration by court---Scope---Mere entitlement of father as natural guardian of minors would not be sufficient to decide such question---Prime consideration while deciding custody of minors would be their welfare keeping in view character and capacity of their proposed guardian.

(b) Guardians and Wards Act (VIII of 1890)----

----Ss. 12, 17 & 25---Custody of minor son and daughter---Contest between minors' maternal grandmother and their father serving in Pakistan Rangers having second wife---Validity---While deciding question of custody of minors, prime consideration would be their welfare while keeping in view character and capacity of proposed guardian---Mere entitlement of father as natural guardian of minors would not be sufficient to decide such question---Minors had developed profound attachment with their grandmother as they were born in her house and had been living with her since death of their mother---Father for serving in Pakistan Rangers had admitted to be visiting house with interval of 1-1/2 months---Minors in absence of father would be at mercy of step-mother, from whom good treatment towards them could not be expected---Lap of maternal grandmother for minors would be better than lap of step mother---Grandmother being of middle age was neither suffering from any ailment nor unable to look after minors properly---Father had filed guardian petition after coming to know about decree passed against him for recovery of maintenance of minors---Father had paid maintenance to minors after a considerable period and that

too after issuance of warrants of his arrest in execution of such decree---Evidence on record showed that when one foot of minor son was to be operated, then father refused to pay his medical expenses on ground that there was no need for the same---Such earlier conduct of father would be a relevant factor for deciding question of custody and welfare of minors---Non-payment of maintenance to minors would be one of the factors requiring consideration while deciding question of welfare of minors---Father had not given reasonable justification for non-payment of maintenance to minors for a considerable long period---Non-payment of maintenance without any justification would be considered a valid ground to disentitle father from custody of minor children---Grandmother, if not having source of income, would not become disentitled to have custody of minor grand children as father was bound to maintain them wherever they might be living---Character and capacity of father in circumstances had disentitled him to have custody of minors---Maternal grandmother would be preferred over real father as interest of minors would be well saved in her custody---Father was refused custody of minors, but was allowed to have meeting with minors within court's premises on Ist Saturday of each month subject to furnishing surety bond and payment of Rs.500/- as traveling expenses for each meeting.

Bashir Ahmad v. Mst. Rehana 1978 SCMR 192; Mst. Saddan v. Muhammad Nawaz and another 1991 CLC 1238; Karim Bakhsh v. Muhammad Bakhsh 1997 CLC 316; Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108; Sharifan Bibi v. Judge, Guardian Court, Daska and 3 others 2005 CLC 529; Mst. Jamila Bibi v. Shabbir Ahmad and 2 others 2006 CLC 207 and Mst. Rashida Bibi v. Muhammad Ismail 1981 SCMR 744 ref.

Bashir Ahmad v. Mst. Rehana 1978 SCMR 192; Karim Bakhsh v. Muhammad Bakhsh 1997 CLC 316; Zahoor Ahmad v. Mst. Rukhsana Kausar(?) and 4 others 2000 SCMR 707; Muhammad Iqbal v. Additional District Judge and 2 others 2000 CLC 1264; Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108 and Mst. Saddan v. Muhammad Nawaz and another 1991 CLC 1238 rel.

(c) Guardians and Wards Act (VIII of 1890)---

----Ss. 17 & 25---Custody of minor children---Non-payment of maintenance to minors by father without reasonable justification---Effect---Such non-payment would be a valid ground to disentitle father from custody of minor children---Illustration.

Mst. Rashida Bibi v. Muhammad Ismail 1981 SCMR 744 ref.

Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others 2000 CLC 108 rel.

Mehr Khalid Meraj for Petitioner.

Chaudhry Masood Ahmad Zafar for Respondent No.3.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.--- This writ petition has been filed against the order dated 19-4-2010, passed by learned Guardian Judge, Kasur, and against the judgment and decree dated 13-11-2010, passed by learned Additional District Judge, Kasur. Muhammad Ijaz (respondent No.3) moved an application under section 25 of the Guardians and Wards Act, 1890 for the custody of his minor children namely, Komal Bibi and Muhammad Zain Raza, before the learned Guardian Judge, Kasur. The said petition was accepted vide the above-mentioned order of the learned Guardian Judge, Kasur, whereas, appeal filed by the petitioner against the said order was dismissed by the learned Additional District Judge, Kasur, vide impugned judgment and decree dated 13-11-2010.

2. As per brief facts emanated from the instant petition, the daughter of the petitioner namely, Mst. Kausar Bibi was married to Muhammad Ijaz (respondent No.3) on 23-8-2001 and from this wedlock, two children namely, Komal Bibi and Muhammad Zain Raza were born. Mst. Kausar Bibi unfortunately died on 15-1-2008. The above mentioned minors have been living with the petitioner, who is their maternal-grandmother. As per stance of the petitioner, after her daughter's death, respondent No.3 did not bother to maintain his children nor he paid even a single penny for their education and eventually the petitioner on 4-2-2008, filed a suit for recovery of maintenance allowance for the above mentioned minors. On coming to know regarding the filing of above mentioned suit, respondent No.3 also filed a Guardian

Petition under section 25 of the Guardians and Wards Act, 1890 on 14-2-2008, which was contested by the petitioner by filing her written reply thereof.

3. In order to resolve the controversy between the parties, the learned Guardian Judge framed the following issues:---

ISSUES.

(1) Whether the welfare of the minors Mst. Komal Bibi and Zain lies in custody of petitioner, father Muhammad Ijaz? OPD.

(2) Whether the petitioner has got no cause of action and locus standi to file this petition? OPR.

(3.) Relief.

After framing formal issues, the parties were directed by the learned trial court to produce their evidence in support of their respective claims.

Muhammad Ijaz (respondent No.3) himself appeared as A.W..1, and examined Muhammad Ali as A.W.2. He also produced documentary evidence in the shape of "Parchi" Pakistan Rangers Hospital, Lahore as Exh.A.1, entitlement certificate as Exh.A.2, school certificate of minors as Exh.A.3, photocopy of death of Kasur Bibi issued by Anmoul Hospital as Mark-A, report of Laboratory as Mark-B, photocopy of certificate Pakistan Rangers Lahore Mark-C, photocopy of Muslim Lab. test report as Mark-D, photocopy of Nikahnama as mark-E, photocopy of birth certificates of Komal Bibi as Mark-F, photocopy of birth certificates of Muhammad Zain as Mark-G.

In rebuttal thereto, the petitioner Rashidan Bibi appeared as R.W.1 and submitted documentary evidence i.e. school certificate of Komal Bibi as Exh.D.1, and school certificate of Muhammad Zain Raza as Exh.D.2.

The learned Guardian Judge, Kasur, after recording evidence and considering all the documents, accepted the Guardian Petition, filed by respondent No.3, vide impugned order dated 19-4-2010. The petitioner, being dissatisfied, filed an appeal against the said order but the same was also dismissed by the learned Additional District Judge, Kasur, vide impugned judgment and decree dated 13-11-2010.

4. The impugned order, as well as, impugned judgment and decree of the courts below have been impeached by the petitioner through the instant writ petition.

5. It is contended by the learned counsel for the petitioner that the minors have been living with the petitioner (maternal-grandmother) since their birth; that respondent No.3 (father of the minors) was a `Ghardamad', who was also living in the house of the petitioner and because the minors have been living with the petitioner since their birth, therefore, they have developed profound attachment with their maternal-grandmother (the petitioner); that respondent No.3 has contracted a second marriage, and if custody of the minors is handed over to respondent No.3, then the minors will be left at the mercy of their step-mother; that it was admitted by respondent No.3 while appearing as AW.1 that he was posted in Pakistan Rangers Headquarters, Lahore, and used to visit his home with the interval of about one and a half month; that in his absence, the minors will be forced to live in the company of their step-mother, therefore, it will not be in the welfare of the minors to hand over their custody to respondent No.3; that it was established through evidence that neither respondent No.3 paid the expenses of the operation of his wife (deceased mother of the minors), nor he paid the maintenance allowance of the minors and warrants of arrest were issued against him in execution proceedings of decree for maintenance allowance, which shows that he has no interest in the minors and his conduct disentitles him to the custody of minors; that the impugned order, as well as, impugned judgment and decree may be set-aside and guardian petition filed by respondent No.3 may kindly be dismissed. In support of his above contentions, the learned counsel for the petitioner has placed reliance on the following case-law:---

(i) Bashir Ahmad v. Mst. Rehana (1978 SCMR 192);

(ii) Mst. Saddan v. Muhammad Nawaz and another (1991 CLC 1238 Lahore);

(iii) Karim Bakhsh v. Muhammad Bakhsh (1997 CLC 316 Lahore);

(iv) Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 Lahore);

(v) Sharifan Bibi v. Judge, Guardian Court, Daska and 3 others (2005 CLC 529 Lahore) and

(vi) Mst. Jamila Bibi v. Shabbir Ahmad and 2 others (2006 CLC 207 Lahore).

6. On the other hand, this petition has vehemently been opposed by the learned counsel appearing on behalf of respondent No.3, on the grounds that the petitioner is mother of five children, who are also living in the same house where the minors have been living; that it was established through evidence that the petitioner did not get the mother of the minors medically examined and this conduct disentitles her to the custody of minors; that there are concurrent findings of facts of the two courts-below in favour of respondent No.3, which may not be disturbed in Constitutional jurisdiction; that the petitioner has no source of income and this fact is relevant for decision of the custody of minors; that mere non-payment of maintenance allowance for some period would not disentitle respondent No.3 from custody of the minors; that later on, maintenance allowance of the minors has been paid by respondent No.3. In support of his above contentions, the learned counsel for respondent No.3 has placed reliance on Mst. Rashida Bibi v. Muhammad Ismail (1981 SCMR 744).

7. Arguments heard and record perused.

8. The petitioner is real maternal-grandmother of minors namely, Komal Bibi and Muhammad Zain Raza, whereas, Muhammad Ijaz (respondent No.3) is their real father. The mother of minors Mst. Kausar Bibi had unfortunately died on 15-1-2008. Respondent No.3 claims that he is father and natural guardian of the minors, therefore, he is entitled to their custody. Mere this ground that respondent No.3 is real father of the minors, is not sufficient to decide the question of custody in his favour. Section 17 and 25 of the Guardians and Wards Act, 1890 provides that while deciding the issue of custody of minors, prime consideration is their welfare. Section 25 of the Act `ibid' is reproduced hereunder:---

"25. Title of guardian to custody of ward.--- (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Similarly, the other relevant provision to decide the question of custody of a minor is section 17 of the Act (supra), which reads as under:---

"17. Matters to be considered by the Court in appointing guardian.---(1) In appointing or declaring the guardian of the minor, the Court shall, subject to the

provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2). In considering what will be for the welfare of the minor the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

3. If the minor is old enough to form an intelligent preference, the Court may consider that preference."

It is, therefore, evident from the perusal of above mentioned provisions of law that prime consideration to decide the question of custody of a minor is his welfare. Welfare of the minor would overweigh against all other considerations. It is also manifest from bare reading of section 17(2) of the Act (ibid) that character and capacity of the proposed guardian is also an important factor to be considered while determining the welfare of a minor. As mentioned earlier, minors have been living with their maternal-grandmother since the death of their mother Mst. Kausar Bibi on 15-1-2008. Father of the minors namely, Muhammad Ijaz (respondent No.3) while appearing in the witness-box as AW.1 has admitted during his cross-examination that minor Muhammad Zain Raza had taken birth in the house of the petitioner. He has further admitted that after the death of their mother, both of the minors have been living with the petitioner. In the above circumstances, it is quite obvious that minors have developed profound attachment with the petitioner, because they are admittedly being brought up by her.

The father of minors, Muhammad Ijaz (respondent No.3) has admittedly contracted a second marriage. He has deposed during his cross-examination that he is posted at Pakistan Rangers Headquarters, Lahore. He has further admitted that at times he visits his house with the interval of one and a half month. It is evident from perusal of the said evidence that most of the time he is not available at his house and in his absences, minors will be at the mercy of their step-mother. Good treatment towards minors cannot be expected from a step-mother. Lap of maternal-grandmother is better than the lap of step-mother.

The petitioner is a lady of middle age. Her age has been recorded as 45 years, when she appeared before the learned trial court as RW.1, on 29-1-2010. There is nothing on record that she has been suffering from any ailment or is unable to properly look after the minors. In view of the above stated facts, minor's welfare was not to live with their father, but their interest is well saved while in custody of their maternal-grandmother, who was there to look after them. Similar view was taken in number of other judgments passed by the Hon'ble Supreme Court of Pakistan, as well as, by different High Courts of the country, where maternal- grandmother was given preference over real father. Reference in this context is made to the cases of Bashir Ahmad v. Mst. Rehana (1978 SCMR 192), Karim Bakhsh v. Muhammad Bakhsh (1997 CLC 316 Lahore), Zahoor Ahmad v. Mst. Rukhsana Kausar and 4 others (2000 SCMR 707), and Muhammad Iqbal v. Additional District Judge and 2 others (2000 CLC 1264).

9. Another important factor for the decision of present petition is that admittedly minors were living with the petitioner after the death of their mother Mst. Kausar Bibi. Respondent No.3 himself mentioned in para-4 of his petition under section 25 of the Guardians and Wards Act, 1890 that minors had been living with the petitioner since 20-12-2007. The father of minors (respondent No.3) did not bother to provide maintenance allowance to his minor children and he did not pay a single penny for their education or livelihood and eventually the petitioner filed a suit for recovery of maintenance allowance of the minors on 4-2-2008. On coming to know about filing of the above mentioned suit, respondent No.3 filed a Guardian Petition for custody of minors on 14-2-2008. It appears that in order to avoid the payment of maintenance allowance of the minors, he had filed the said petition. The above mentioned suit for recovery of maintenance, allowance was decreed in favour of the minors but in spite of that respondent No.3 did not pay the maintenance allowance for a considerable long period and in this respect his warrants of arrest were also issued. Although respondent No.3, later on, had statedly paid the maintenance allowance, when his warrants of arrest were issued by the learned executing Court, but his earlier conduct is a relevant factor to decide the issue of custody of minors and their welfare. It has also come on record in the statement of the petitioner while appearing as PW.1 that minor Zain Raza remained ill and she (the petitioner) had provided him the medical treatment. It has also come on record in her statement that one foot of the said minor was to be operated upon and when the petitioner demanded expenses of the operation

from respondent No.3, he refused to pay the same on the ground that there was no need of it.

As discussed earlier, respondent No.3 has contracted a second marriage, he did not pay the maintenance allowance to his minor children for a considerable period, he even refused to pay the expenses of medical treatment/operation of his minor son Muhammad Zain Raza, thus, keeping in view his Character and Capacity, it will not be in the welfare of minors to hand them over in the custody of said respondent.

The learned counsel for respondent No.3 has argued that mere non-payment of maintenance allowance for some period would not disentitle respondent No.3 from custody of the minors. He has placed reliance on the case of Mst. Rashida Bibi v. Muhammad Ismail (1981 SCMR 744).

The facts of the case of "Mst. Rashida Bibi" (supra) are distinguishable from the facts of the present case. In the said case, it was held that mere non-payment of maintenance cannot be made a sole ground to disentitle the father from custody of his children, whereas, in the instant case, non-payment of maintenance allowance is not the sole ground, whereby respondent No.3 (father) has been held to be disentitled to the custody of minors. Non-payment of maintenance allowance is one of the factors, which has been considered while deciding the question of welfare of the minors. Respondent No.3 has not given any reasonable justification for non-payment of maintenance allowance to the minors for a considerable long period of time. In number of cases, non-payment of maintenance allowance without any justification was considered a valid ground to disentitle the father from the custody of his minor children. Reference in this respect may be made to the case of Muhammad Iqbal v. Additional District Judge, Bhalwal and 2 others (2000 CLC 108 Lahore).

10. The argument of the learned counsel for respondent No.3 that the petitioner has no source of income, therefore, she is not entitled to the custody of minors, is misconceived. The said ground by, itself, was not sufficient to deprive the maternal-grandmother (the petitioner) of her right of custody of her minor grand children. It is duty of the father to maintain his minor children, wherever they may be living. If maternal- grandmother of the minors has no source of income then it was for the father to provide maintenance for them. Similar view was taken by this Court in the case of Mst. Saddan v. Muhammad Nawaz and another (1991 CLC 1238 Lahore).

11. In view of the above discourse, the 'character' and 'capacity' of respondent No.3 disentitles him to the custody of minors. It will not be in the welfare of minors to hand over their custody to respondent No.3, therefore, this petition is allowed. Resultantly, the order dated 19-4-2010, passed by learned Guardian Judge, Kasur, and the judgment and decree dated 13-11-2010, passed by learned Additional District Judge, Kasur, are, hereby, set aside, and consequently the application filed by respondent No.3 under section 25 of the Guardians and Wards Act, 1890 for the custody of minors namely, Komal Bibi and Muhammad Zain Raza, is, hereby, dismissed. There will be no order as to costs.

12. However, before parting with this judgment, this Court feels expedient to make it clear that respondent No.3, father of minors, is entitled to have meeting with his minor children, therefore, it is directed that the petitioner will produce the above said minors on 1st Saturday of every month in the court of learned Guardian Judge, Kasur, and respondent No.3 will be entitled to meet the minors for two hours within the premises of said Court. Apart from this, respondent No.3 will execute a surety bond to the satisfaction of the learned Guardian Judge, Kasur and will also pay an amount of Rs.500/- for expenses of travelling for each meeting. It is further made clear that if respondent No.3 fails to pay the said amount or to meet with minors for three consecutive dates, he will loose his right of visitation.

S.A.K./R-61/L **Order accordingly.**

P L D 2012 Lahore 279

Before Malik Shahzad Ahmad Khan, J

ALAM DIN---Petitioner

versus

MUHAMMAD HUSSAIN and 2 others---Respondents

Civil Revision No.536 of 2009, decided on 16th November, 2011.

(a) Malicious prosecution---

----Damages for---Plaintiff was mentioned as one of the accused in the F.I.R.---Plaintiff after his arrest in the case remained in judicial lock-up for some period, but acquitted after trial by extending him benefit of doubt---Plaintiff's claim for recovery of damages for malicious prosecution---Proof---Police after holding detailed investigation had declared plaintiff guilty of charges and placed his name in Column No.3 of Challan submitted in Trial Court---Trial Court as well as High Court had dismissed plaintiff's application for his acquittal moved under S.249-A, Cr.P.C., during trial---Prosecution of plaintiff could not be declared to be malicious merely on ground of his acquittal in such case---Trial Court had acquitted plaintiff not on ground of registration of false case, but on ground of failure of prosecution to prove its case beyond reasonable doubt---Acquittal of plaintiff by extending him benefit of doubt would establish that defendant had not lodged such case without reasonable and probable cause and for having malice against plaintiff---Suit was dismissed in circumstances.

Hicks v. Faulkner (1881) 8 QBD 167; Denning L.J. in Tempest v. Snowden (1952) 1 KB 130; Sher Muhammad v. Maula Bux 1995 CLC 1134; Sadaruz Zaman v. The State 1990 SCMR 1277; Feroze Khan v. Fateh Khan and 2 others 1991 SCMR 2220; Mahmood Akhtar v. The Muslim Commercial Bank Ltd. and another PLD 1992 SC 240; Subedar (Retd.) Fazale Rahim v. Rab Nawaz 1999 SCMR 700; Abdul Rauf v. Abdul Razzak and another PLD 1994 SC 476 and United Bank Ltmited and 5 others v. Raja Ghulam Hussain and 4 others 1999 SCMR 734 **rel.**

(b) Malicious prosecution---

----Damages for---Factors essential to be proved by plaintiff stated.

The basic elements, on the basis of which a suit for recovery of an amount as damages for malicious prosecution can be accepted or rejected, are that: (a) the prosecution of the plaintiff by the defendant; (b) there must be a want of reasonable and probable cause for that prosecution; (c) the defendant must have acted maliciously i.e. with improbable motive and not to further the ends of justice; (d) the prosecution must have ended in favour of the person proceeded against; and (e) it must have caused damage to the party proceeded against.

Prosecutor may be wrong, but if he honestly believed that accused had committed a criminal offence, he cannot be initiator of malicious prosecution. Even otherwise, malice alone would not be enough, there must also be shown to be absence of reasonable and probable cause.

The maxim "the reasonable and probable cause" means that it is an honest belief in the guilt of the accused based upon full conviction, based on reasonable grounds of the existence of a state of circumstances, which assuming them to be true would reasonably lead any ordinary prudent man to the conclusion that the person charged was probably guilty of crime imputed.

If reasonable and probable cause is established, then question of malice becomes irrelevant.

Mere fact that prosecution instituted by the defendant against the plaintiff ultimately failed cannot expose the former to the charge of malicious prosecution, unless it is proved by the plaintiff that the prosecution was instituted without any justifiable reason and it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect.

Acquittal on extension of benefit of doubt does not mean that accused was falsely implicated and possibility would be excluded that accused might also have been involved in the matter.

Hicks v. Faulkner (1881) 8 QBD 167; Denning L.J. in Tempest v. Snowden (1952) 1 KB 130; Sher Muhammad v. Maula Bux 1995 CLC 1134; Sadaruz Zaman v. The State 1990 SCMR 1277; Feroze Khan v. Fateh Khan and 2 others 1991 SCMR 2220; Mahmood Akhtar v. The Muslim Commercial Bank Ltd. and another PLD 1992 SC 240; Subedar (Retd.) Fazale Rahim v. Rab Nawaz 1999 SCMR 700; Abdul Rauf v.

Abdul Razzak and another PLD 1994 SC 476 and United Bank Ltmited and 5 others v. Raja Ghulam Hussain and 4 others 1999 SCMR 734 **rel.**

Atif Farzauq Raja for Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN.---The petitioner has filed this Civil Revision against the impugned judgment and decree dated 2-4-2009 passed by the learned Additional District Judge, Talagang, whereby the appeal of the petitioner was dismissed and the judgment and decree dated 6-12-2006 passed by the learned Civil Judge, Talagang was maintained. The suit filed by the petitioner for recovery of Rs.15,00,000 as damages for malicious prosecution was dismissed by the learned Civil Judge, Talagang and the said judgment and decree was maintained by the learned Appellate Court vide the above mentioned judgment and decree dated 6-12-2006.

2. As per brief facts of the present case, the petitioner instituted a suit for recovery of Rs.15,00,000 as damages for malicious prosecution against the respondents with the averments that respondents got registered an F.I.R. No. 69 of 1997 dated 29-7-2011 offences under sections 506, 427, 148 and 149 of P.P.C. at Police Station Tamman, Tehsil Talagang, District Chakwal. The petitioner/plaintiff was nominated as one of the accused in the said F.I.R. He was arrested and he remained in judicial lock-up for many days. The petitioner/plaintiff, thereafter, was released on post arrest bail. At that time the petitioner/plaintiff was serving in Abu Dhabi and during his trial, he had to move to Abu Dhabi due to which his bail bonds were forfeited in favour of the State and he was declared a proclaimed offender. In this way, he was statedly humiliated. According to the plaintiff/petitioner, he suffered mental torture, injury to his reputation and suffered financial loss. After attending a number of dates of hearing he was acquitted on 30-5-2000 and through the suit under revision the petitioner claimed the recovery of Rs.15,00,000 as damages for malicious prosecution.

3. On the other hand, the respondents filed their written statement and contested the suit, on different grounds including that the prosecution against the plaintiff was

with reasonable and probable cause and also that the plaintiff was acquitted only by extending him the benefit of doubt.

4. Out of the divergent pleadings of the parties, following issues were framed by the learned trial court:--

ISSUES

(1) Whether the plaintiff is entitled to decree for recovery of Rs.15,00,000 as damages for malicious prosecution as prayed for? OPP.

(2) Whether the plaintiff has got no cause of action or locus standi to institute the suit? OPD.

(3) Whether the suit is defective hence is not maintainable in its present form? OPD

(4) Whether the suit is based on mala fide hence the defendants are entitled to special costs? OPD

(5) Relief

The parties led their evidence. The petitioner/plaintiff, Alam Din himself appeared as P.W.1 and reiterated the contents of the plaint. The petitioner/plaintiff also submitted attested copies of criminal case Exh.P-1, passport Mark-A, Ticket PIA Mark-B, photo copy of petition Mark-C, another photo copy of petition Mark-D, Photo copy of judgment dated 29-7-1997 Exh.P-2. Muhammad Hussain, respondent No. 1 appeared as DW-1 and reiterated the contents of the written statement. He had also submitted photocopy of report under section 173 of Cr.P.C, photocopy of judgment dated 11-11-1998 and photo copy of acknowledgement, as documentary evidence. The learned Civil Judge, Talagang, after conclusion of the trial, dismissed the suit filed by the petitioner/plaintiff and his appeal was also dismissed by the appellate court vide the above mentioned judgments and decrees respectively, hence, the instant Civil Revision.

5. It is contended by the learned counsel for the petitioner that the impugned judgments and decrees passed by both the courts below are against the law and facts of the present case; that the learned courts below have not considered the evidence of the plaintiff/petitioner in its true perspective; that the findings given by both the courts below are result of misreading and non-reading of evidence; that the

petitioner remained in judicial lock-up for many days and, as such, he was subjected to humiliation; that at the time of registration of above mentioned criminal case, the petitioner was serving in Abu Dabi, therefore, he had to leave Pakistan and in his absence, he was declared a proclaimed offender and his bail bonds were forfeited, therefore, he suffered mental torture and injury to his reputation; that the petitioner was ultimately acquitted from the above mentioned case, which has established that the prosecution initiated against the petitioner was malicious and baseless; that the petitioner suffered financial loss in order to pursue the above mentioned criminal case lodged by the defendant/respondent; that the case of the petitioner for recovery of Rs.15,00,000 as damages for malicious prosecution was fully established through oral, as well as, documentary evidence, but the learned Civil Judge, Talagang has illegally dismissed the suit of the petitioner and the said judgment has wrongly been upheld by the learned Additional District Judge, Talagang; that all the proceedings were launched against the petitioner with mala fide intention and ulterior motives; that all the ingredients of malicious prosecution are present in the petitioner's case, hence both the judgments and decrees passed by the courts below may be set aside and the suit of the petitioner/plaintiff may be decreed in his favour.

6. I have heard the arguments of the learned counsel for the petitioner and have also gone through the documents annexed with the present petition.

7. As per brief facts of the present case, the respondent/defendant lodged an F.I.R. No.69 of 1997, dated 29-7-1997, offences under sections, 506, 427, 148, 149 of P.P.C., Police Station, Tamman Tehsil Talagang, District Chakwal. The petitioner was named as one of the accused in the said case. The petitioner was arrested in this case. He remained in judicial lock-up for some period. He was ultimately acquitted by the learned Magistrate section 30, Talagang vide judgment dated 11-11-1998. The petitioner, after his acquittal, filed a suit for recovery of Rs.15,00,000 for malicious prosecution.

8. The above referred suit of the petitioner/plaintiff was dismissed and his appeal also failed. The claim of the plaintiff/petitioner is that his case for recovery damages was fully established and he was entitled to the recovery of claimed amount. It is better and appropriate to reproduce the basic elements on the basis of which a suit

for recovery of an amount as damages for malicious prosecution could be accepted or rejected. The said ingredients are as follows:--

(a) The prosecution of the plaintiff by the defendant.

(b) There must be a want of reasonable and probable cause for that prosecution.

(c) The defendant must have acted maliciously i.e. with improbable motive and not to further the ends of justice.

(d) The prosecution must have ended in favour of the person proceeded against.

(e) It must have caused damage to the party proceeded against.

9. Now keeping in view the above principles, it is important to discuss certain relevant facts of the present case. In the above mentioned criminal case i.e. F.I.R. No.69 of 1997, lodged by the defendant/ respondent, the police declared the petitioner/plaintiff guilty of the charges, after holding a detailed investigation. The Investigating Officer submitted the challan/report under section 173 of Cr.P.C. before the learned trial court, wherein the petitioner was placed in Column No. 3 of the said report as he was found guilty, as per police finding. In the instant case, the petitioner/plaintiff (P.W.1) has admitted during his cross-examination that he moved an application under section 249-A of Cr.P.C. in the above mentioned criminal case, which was dismissed by the learned trial Court. He has further admitted that he moved an application for his acquittal before High Court, against the above mentioned order on application under section 249-A of Cr.P.C, but the said application was also dismissed by the High Court. It is also evident from the judgment of acquittal of the petitioner in the above mentioned criminal case (Mark.D-2), that the petitioner was acquitted by extending him the benefit of doubt. In the above-mentioned circumstances, it cannot be said that the respondent/defendant lodged the above mentioned case against the petitioner without reasonable and probable cause and having malice, against the petitioner/plaintiff. Prosecution of the petitioner could not be declared to be malicious merely because he was acquitted in the above mentioned case.

10. Prosecutor may be wrong, but if he honestly believed that accused had committed a criminal offence, he could not be initiator of malicious prosecution.

Even otherwise, malice alone, would not be enough, there must also be shown to be absence of reasonable and probable cause.

The maxim "The reasonable and probable cause" means that it is an honest belief in the guilt of the accused based upon full conviction, based on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinary prudent man to the conclusion that the person charged was probably guilty of crime imputed. See (1881) 8 QBD 167 Hicks v. Faulkner. It is also a settled principle of law that if reasonable and probable cause is established, then question of malice becomes irrelevant as observed by Denning L.J. in Tempest v. Snowden (1952) 1 K.B. 130.

As discussed earlier, the petitioner/plaintiff was declared guilty during police investigation, his application for acquittal moved under section 249-A of Cr.P.C. was dismissed by the learned trial court and his application whereby he challenged the above mentioned order of trial court, was also dismissed by High Court, therefore, it cannot be said that the prosecution against the petitioner was launched by the respondent "without any reasonable and probable cause".

11. It is pertinent to mention here that judgments of both the courts below are in consonance with the law laid down by the Hon'ble Supreme Court of Pakistan. It is by now, a well settled law that mere fact that prosecution instituted by the defendant against the plaintiff ultimately failed, cannot expose the former to the charge of malicious prosecution unless it is proved by the plaintiff that the prosecution was instituted without any justifiable reason and it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect. In the case reported as Sher Muhammad v. Maula Bux (**1995 CLC 1134**), the learned Single Judge of Sindh High Court at Karachi, observed as under:--

"Suit for damages against malicious prosecution---Essentials---Plaintiff in an action for malicious prosecution must prove, that prosecution was malicious; and that defendant had acted without reasonable and probable cause in launching such malicious prosecution---Prosecution could not be malicious merely because it was inspired by anger---Prosecutor, however, wrong headed may be, if he honestly thought that accused had been guilty of a criminal offence, he could not be initiator

of malicious prosecution. Malice alone, would not be enough, there must also be shown to be absence of reasonable and probable cause."

The suit for recovery of damages on the basis of malicious prosecution was dismissed by the learned trial court in the above mentioned case of "Sher Muhammad" because the plaintiff failed to establish that the defendant had acted without reasonable or probable cause and the said decision was maintained by the Sindh High Court at Karachi.

12. As discussed earlier, the petitioner/plaintiff was acquitted in the above mentioned case, lodged by the defendant/respondent, not because of registration of a false case, but because prosecution had failed to prove its case beyond any reasonable doubt. Acquittal on extension of benefit of doubt does not mean that accused were falsely implicated and possibility would not be excluded that accused might also have been involved in the matter. Reference in this context may be made to the cases reported as Sadaruz Zaman v. The State (**1990 SCMR 1277**), and Feroze Khan v. Fateh Khan and 2 others (**1991 SCMR 2220**).

13. In another case of Mahmood Akhtar v. The Muslim Commercial Bank Ltd. and another (PLD 1992 Supreme Court 240), the Hon'ble Supreme Court of Pakistan maintained the judgment of the High Court resulting in failure of case of malicious prosecution, where the plaintiff was acquitted by extension of benefit of doubt. Relevant paragraph of the said judgment reads as under:--

"Acquitted accused whose acquittal was by extension of benefit of doubt, failed in his subsequent case for malicious prosecution against the respondent---Prosecution witnesses in the case who had no malice against the said acquitted accused could not be said to have perjured themselves simply because the acquitted accused had been extended benefit of doubt---Petition for leave to appeal against order of High Court resulting in failure of case of malicious prosecution was dismissed."

14. In the case reported as Subedar (Retd.) Fazale Rahim v. Rab Nawaz (**1999 SCMR 700**), the Hon'ble Supreme Court of Pakistan maintained the Judgment of the High Court, whereby, the revision petition, filed by the defendant of a malicious prosecution case, was accepted on the ground that the plaintiff failed to establish that the defendant acted without reasonable and probable cause. In the above

mentioned case, the plaintiff was discharged under section 169 of Cr.P.C. in criminal case, lodged by the defendant, and subsequently, the defendant was prosecuted by the police under section 182 of P.P.C., but the Hon'ble Supreme Court of Pakistan has held that even the discharge of the plaintiff from the criminal case, and prosecution of the defendant under section 182 of P.P.C. was not sufficient by itself to establish a case of malicious prosecution. The relevant paragraph of the above mentioned judgment is re-produced hereunder for ready reference:--

"Petitioner (plaintiff) failed to establish that the respondent (defendant) had invented such prosecution against him or that he had acted with malice or without reasonable or probable cause---Mere fact that petitioner was discharged in an earlier case under section 169, Cr.P.C. or that respondent was, subsequently, prosecuted by the police under section 182 P.P.C. was not sufficient to establish a case of malicious prosecution against the respondent---Entire onus in such case would be on the plaintiff which he failed to, discharge".

In another case reported as Abdul Rauf v. Abdu1 Razzak and another (**PLD 1994 Supreme Court 476**), the Hon'ble Supreme Court of Pakistan set aside the judgment of High Court of Sindh, whereby, the suit of plaintiff for recovery of damages on the basis of malicious prosecution, was decreed. In the said case, an F.I.R. was registered on the telegram sent by the defendant. The plaintiff was discharged by the trial court in the said criminal case, which led him to file a suit for recovery of damages on the basis of malicious prosecution. Although, the plaintiff was discharged from the criminal case, lodged by the defendant, but even then the Hon'ble Supreme Court of Pakistan restored the decision of trial court whereby the suit of the plaintiff was dismissed, on the ground that as the police, after investigation, had submitted challan against the petitioner, therefore, it could not be said that the defendant acted without any reasonable or probable cause. The relevant para of the said judgment reads as follows:--

"Appellant had only sent a telegram and the police, after investigation, had submitted challan which showed that the Police, prima facie, was of the view that an offence had been committed by the accused person, respondent being one of them---Appellant, in circumstances, held, could not be said to have acted without reasonable or probable cause or with malice".

Similar view was taken by the Hon'ble, Supreme Court of Pakistan, in the case of United Bank Ltd. and 5 others v. Raja Ghulam Hussain and 4 others (**1999 SCMR 734**).

15. It is evident from the perusal of above mentioned judgments, passed by the Hon'ble Supreme Court of Pakistan that suit of the plaintiffs for recovery of damages on the basis of malicious prosecution was not decreed even in those cases where the accused/plaintiffs were discharged and even where the proceedings under section 182 of P.P.C. were initiated against the defendants/complainants, whereas, in the instant case, as discussed earlier, the petitioner was found guilty by the Investigating Officer. He was placed in Column No.3 of challan, his applications under section 249-A of Cr.P.C. and 561-A of Cr.P.C, for his acquittal, were initially dismissed by the learned trial court as well as, by the High Court respectively, therefore, it cannot be declared that the defendants/respondents had acted without reasonable or probable cause. In view of the above discussion, it is evident that basic ingredients to establish and prove a case for recovery of an amount as damages for malicious prosecution, are not established in the instant case, and in absence of said ingredients, the suit of the petitioner/plaintiff cannot be decreed in his favour.

16. The learned counsel for the petitioner could not point out any illegality or material irregularity in the concurrent findings of the courts below, therefore, this petition is without any substance and the same is, hereby, dismissed in limine.

S.A.K./A-228/L **Revision dismissed.**

2012 M L D 78

[Lahore]

Before Malik Shahzad Ahmed Khan, J

Malik YARAN KHAN---Petitioner

Versus

CHIEF LAND COMMISSIONER, PUNJAB, LAHORE---Respondent

Writ Petition No.3102 of 2006, decided on 9th September, 2011.

(a) Land Reforms Regulation, 1972 (M.L.R. 115)---

----Paras 7 & 13---Constitution of Pakistan, Art. 199---Constitutional petition---Order of resumption of excess land in year 1984 confirmed in year 1986 by Land Commissioner---Dismissal of revision before Chief Land Commissioner filed after sixteen (16) years of passing of resumption order---Petitioner's plea that provisions of Land Reforms Regulations, 1972 about resumption of land had been declared as un-Islamic by Supreme Court vide judgment reported as PLD 1990 SC 99, thus, question of limitation would not arise against resumption order and resumed land was available till target date i.e. 23-3-1990 fixed in such judgment, thus, same was liable to be returned to him---Validity---Petitioner had complete knowledge about resumption order and had not been condemned unheard---Petitioner had not given any plausible explanation for such delay, which could not be condoned merely on ground that resumption order was void---Decisive steps regarding resumption of petitioner's land had been taken much prior to such target date fixed in the Supreme Court judgment---Petitioner could not be returned such land as the Supreme Court judgment had no retrospective effect---High Court dismissed constitutional petition in circumstances.

Sardar Muhammad Jafar Khan Leghari v. Balochistan Land Commissioner, Quetta through its Secretary and others 1997 MLD 1934; Qazalbash Waqf and others v. Chief Land Commissioner, Punjab Lahore and others PLD 1990 SC 99; Aacher and 5 others v. Dur Muhammad Usto and 8 others 2002 SCMR 958; Chief Land Commissioner Punjab and others v. Chief Administration of Auqaf, Punjab PLD 1998 SC 132; Mst. Ulfat Jan and 3 others v. Deputy Land Commissioner Bahawalpur 2001 YLR 1539 and Begum Syeda Azra Masood v. Begum Noshaba Moeen and others 2007 SCMR 914 **ref**.

Qazalbash Waqf and others v. Chief Land Commissioner, Punjab, Lahore and others PLD 1990 SC 99; Sardar Muhammad Jaffar Khan Leghari and others v. Balochistan Land Commissioner, Quetta through Secretary and others 1997 MLD 1934; Shah Jehan Khan Abbasi v. Deputy Land Commissioner, Bahawalpur and another 2006 SCMR 771 and Mst. Ulfat Jan and 3 others v. Deputy Land Commissioner Bahawalpur and 9 others 2001 YLR 1539 **rel**.

(b) Void order---

----Void order, if created certain consequences, must be challenged within shortest possible time by aggrieved person---Principles.

Void order is only a type of an illegal order, and if it has created certain consequences, an aggrieved person must get rid of it within the shortest possible time. If it is accepted that no limitation runs against void order, then there may not be any limitation at all to challenge an illegal order by describing it as a void order.

Begum Syeda Azra Masood v. Begum Noshaba Moeen and others 2007 SCMR 914 **ref**.

Mujeeb-ur-Rehman Kiani for Petitioner.

Rashif Hafeez, A.A.-G. for the State.

ORDER

MALIK SHAHZAD AHMED KHAN, J.---This writ petition has been filed to challenge the order dated 19-8-2006 passed by the learned Senior Member Board of Revenue/Chief Land Commissioner Punjab, Lahore.

2. As per brief facts of the present case the petitioner was owner of land in village Lawa Tehsil Talagang, District Chakwat. The holding of the petitioner was determined by the learned Deputy Land Commissioner, Attock on 9-7-1977 and an area equal to 2366 produce index units was resumed under the Land Reforms Regulations 1972 (MLR 115 of 1972). The holding of the petitioner was scrutinized by inspection team of the Federal Land Commission and it was held that more area of the petitioner equivalent to 748 produce index units was liable to resumption. Therefore more land of the petitioner equivalent to 748 produce index units, was resumed vide order dated 6-8-1984 passed by the learned DLC, Attock. The choice of the petitioner/declarant was also considered at the time of passing the said order. The said resumption order was further confirmed by the Land Commissioner,

Rawalpindi vide order dated 18-9-1986. The petitioner, after the lapse of almost Eighteen years, filed a Writ Petition No.826 of 2002 before this Court which was disposed of vide order dated 20-5-2002. It was observed in the said order that the writ petition was filed with the delay of about eighteen years so the same was hit by the principle of laches. Any how, it was also observed that the petitioner may approach the appropriate forum for redressal of his grievance because the order impugned was appealable under the relevant law. The petitioner, thereafter, filed a revision petition before the learned Chief Land Commissioner, Punjab Lahore which has been dismissed vide the impugned order dated 19-8-2006; hence, the present writ petition.

3. It is contended by the learned counsel for the petitioner that the relevant provisions/sections of the Land Reforms Regulation 1972 (MLR 115 of 1972), about Resumption of Land, have been declared as un-Islamic by the Hon'ble Supreme Court of Pakistan in the case of **Qazalbash Waqf and others v. Chief Land Commissioner and others** (PLD 1990 SC 99); that the respondents cannot be allowed to allot resumed land of the petitioner to any one else and the said land is liable to be returned to the petitioner in the light of the above mentioned judgment of the Hon'ble Supreme Court of Pakistan. He has further placed reliance on the case of **Sardar Muhammad Jafar Khan Leghari v. Balochistan Land Commission, Quetta** through its Secretary and others (1997 MLD 1934). He argued that possession of the resumed land is still with the petitioner and he is still shown in possession of the land in question, in relevant Khasara Girdawaries; that the petitioner has been condemned unheard as he was not associated at the time of proceedings initiated for resumption of land in dispute; that as the impugned resumption order is illegal and void, therefore, the question of limitation would not arise against such an order; that the said order has wrongly been passed against the petitioner on the ground that his revision petition was barred by time, therefore, this petition may be accepted and resumed land of the petitioner may be returned to him and impugned resumption orders may be declared null and void.

4. On the other hand the learned A.A.-G. has vehemently opposed this petition on the grounds that revision petition filed by the petitioner before respondent No. I was rightly dismissed as the same was hopelessly time barred; that the order of resumption was passed keeping in view the choice of the petitioner, therefore, the petitioner could not challenge the said order; that the Attorney of the petitioner had been appearing during the impugned resumption proceedings and the petitioner was properly represented by his Attorney, therefore, he cannot claim that he was condemned

unheard; that the impugned proceedings of resumption of the land of the petitioner were finalized, far earlier than the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of **Qazalbash Waqf and others v. Chief Land Commissioner Punjab Lahore and others** (PLD 1990 SC 99); that the said judgment has no retrospective effects, therefore, this petition may be dismissed. He has supported his above contentions with the case law reported as "Aacher and 5 others v. Dur Muhammad Usto and 8 others" **2002 SCMR 958** "Chief Land Commissioner, Punjab and others v. Chief Administrator of Auqaf Punjab" **PLD 1998 Supreme Court 132** and "Mst. Ulfat Jan and 3 others v. Deputy Land, Commissioner Bahawalpur" **2001 YLR 1539**.

5. Arguments heard and record perused.

6. The land of the petitioner was initially determined by Deputy Land Commissioner, Attock under the Land Reforms Regulation, 1972 (MLR 115 of 1972) and it was held that an area equal to 2366 produce index units of the land of the petitioner was liable to be resumed. This was held vide order dated 9-7-1977. The holding of the petitioner/declarant was later on scrutinized by the inspection team of Federal Land Commission and it was held that more land of the petitioner equivalent to 748 produce index units was liable to resumption. Therefore, more land of the petitioner equivalent to 748 produce index units was resumed vide order dated 6-8-1984 passed by the learned DLC, Attock. The said order was further confirmed by the learned Land Commissioner, Rawalpindi, vide order dated 18-9-1986. The petitioner, thereafter, remained silent for, as long as sixteen years. The petitioner, then, filed Writ Petition No. 826 of 2002 before this Court which was disposed of vide order dated 20-5-2002. It was observed in the said order that the writ petition was filed with the delay of about eighteen years so the same was hit by the principle of laches. It was further observed that the impugned order was appealable under Land Reforms Regulation, 1972 (MLR 115 of 1972) and the petitioner may seek his alternate remedy. The petitioner, then, filed a revision petition before the Chief Land Commissioner, Punjab, Lahore in the year 2002. The said revision has been dismissed vide the impugned order dated 19-8-2006 as the same was filed with the delay of sixteen years and the same was hopelessly barred by time.

The petitioner could not explain such a gross and inordinate delay in challenging the impugned orders. Although it is claimed by the petitioner that he was condemned unheard but it is evident from the record that the petitioner had authorized Malik

Mahar Dad son of Ahmad Khan who appeared on his behalf before the DLC, Attock in connection with the proceedings regarding determination of his holding. It is also evident from the record that the petitioner/declarant had given a choice in respect of the land surrendered by him. The said choice was given by the petitioner as per Annexure-A with the order dated 6-8-1984 passed by the learned DLC, Attock.

7. The learned counsel for the petitioner has contended that as the impugned order of resumption of the land of the petitioner is illegal and void, therefore, the question of limitation would not arise against such order. This contention of the learned counsel for the petitioner is not convincing on two counts. Firstly, as discussed above, the petitioner had complete knowledge of the impugned orders and he was not condemned unheard and secondly the petitioner has given no plausible explanation in challenging the impugned order after the lapse of almost 16 years. The above mentioned gross delay in challenging the impugned order cannot be condoned merely on the ground that the impugned order was alleged to be void. Presuming without conceding that the impugned order was void even then it cannot be accepted that no limitation would run against such order. Void order is only a type of an illega1 order and if it has created certain consequences, an aggrieved person must get rid of it, within the shortest possible time. If it is accepted that no limitation runs against void order then there may not be any limitation at all to challenge an illegal order by describing it as a void order. The land of the petitioner which was resumed vide the impugned orders has been allotted to different persons under Land Reforms Regulation, 1972 (MLR 115 of 1972) and if the impugned order is disturbed then a third party will be prejudiced. I am fortified in my above mentioned views by the judgment of the Hon'ble Supreme Court of Pakistan given in the case of "Begum Syeda Azra Masood v. Begum Noshaba Moeen and others" **2007 SCMR 914**. It was held by the Hon'ble Supreme Court of Pakistan as under:--

> "---Section. 3---Void order---Limitation---Applicability---Void order is only a type of an illegal order and if it has created certain consequences, an aggrieved person must get rid of it---If it is accepted that no limitation runs against void order, then there may not be any limitation at all to challenge an illegal order by describing it as a void order, after any period say 5 years, 10 years, 20 years and so on---One of the objects of legal system, particularly to prescribe limitation, is to settle rights of parties and provide certainty in human affairs---If it is accepted that no limitation runs against void order, then it will have the effect of unsettling the rights and may affect transactions

which may have taken place in the meanwhile and thus prejudice a third party."

The learned counsel for the petitioner has next contended that the land of the petitioner cannot be resumed and the same is liable to be returned as per law laid down by the Hon'ble Supreme Court of Pakistan in the case of **Qazalbash Waqf and others v. Chief Land Commissioner, Punjab Lahore and others (PLD 1990 SC 99)**. He submits that paras 2(7) 7, 8, 9, 10, 13, 15, 16, 17, 19, 20 and 25 of Land Reforms Regulation 1972 (MLR 115 of 1972) and sections 3, 4, 5, 6, 7(5), 8, 9, 10, 12, 13, 14, 15, 16 and 17 of Land Reforms Act, 1972 have been declared against the injunctions of Islam in the above said judgment. He has further argued that as the land of the petitioner was resumed under the above mentioned provisions of MLR 115 of 1972 which have been declared against the injunctions of Islam and as the Land of the petitioner was not allotted to any one before the target date fixed in the above mentioned judgment, i.e. 23-3-1990, therefore, the same may be returned to the petitioner. In support of his above contention, the learned counsel for the petitioner has also placed reliance on "Sardar Muhammad Jaffar Khan Leghari and others v. Balochistan Land Commission, Quetta through its Secretary and others" **(1997 MLD 1934)**.

The said argument of the learned counsel for the petitioner is not convincing. The land of the petitioner was finally resumed vide order dated 6-8-1984 passed by the learned Deputy Land Commissioner, Attock. The said order was further confirmed by the learned Land Commissioner, Rawalpindi vide order dated 18-9-1986. The decisive step by the Land Reforms Authorities regarding resumption of the land of the petitioner had already been taken, far earlier than the above mentioned target date fixed in Qazalbash Waqf case, i.e. 23-3-1990. The above judgment of the Hon'ble Supreme Court of Pakistan has no retrospective effect, therefore, the land of the petitioner which was already resumed far earlier than the above mentioned target date, cannot be retuned to him.

A similar proposition came under discussion before the Hon'ble Supreme Court of Pakistan in the case "Shah Jehan Khan Abbasi v. Deputy Land Commissioner, Bahawalpur and another" **2006 SCMR 771**. It was held in the said case as under:--

> "Para 13---Land Reforms Act (II of 1977), Ss. 7 & 9---Constitution of Pakistan (1973), Art. 185 (3)---Resumption of excess land---Litigation concerning gift concluded on 10-7-1988---Authority thereafter resumed

excess land---High Court dismissed Constitutional petition of petitioner alleging such resumption to be illegal for no material action having been taken by authorities before 23-3-1990---Validity---Declaration had been filed in year 1972---Land Commissioner had rejected petitioner's appeal on 7-5-1972---Deputy Land Commissioner in order dated 6.4.1981 had observed that petitioner had accepted surrender of marked area---Resumption, thus, stood finalized on such acceptance on 6-4-1981---Any dispute or litigation, if existed about such land, would not be material in view of provision of S.9 of Land Reforms Act, 1977---Factum of litigation would not negate or counter the vesting of property in Government---Material proceedings qua resumption had already been taken much prior to crucial date (23-3-1990) given in Qazalbash Waqf case PLD 1990 SC 99---Supreme Court dismissed petition and refused leave to appeal."

Same view was taken by the Hon'ble Division Bench of this court in the case of "Mst. Ulfat Jan and 3 others v. Deputy Land Commissioner Bahawalpur and 9 others" **2001 YLR 1539.**

The learned counsel for the petitioner has further argued that the above mentioned judgment of the Hon'ble Supreme Court of Pakistan has declared the relevant paras of the Land Reforms Regulation, 1972 (MLR 115 of 1972) regarding the resumption of excess land of land owners, to be repugnant to the injunctions of Islam and as the petitioner is a Muslim, therefore, the above mentioned judgment in Qazalbash Waqf case is to be given a retrospective effect. I am afraid I could not agree with this contention of the learned counsel for the petitioner. Law declared by the courts was never retrospectively effective and it only takes effect after the announcement of the judgment or the date notified by the court. As the Hon'ble Supreme Court of Pakistan has itself fixed a target date i.e. 23-3-1990 in the above-mentioned judgment, therefore, the said judgment has clearly no retrospective effect and the same cannot be implemented retrospectively. In my above mentioned views I am fortified by the law laid down by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Younis and others v. Essa Jan and others" **2009 SCMR 1169**, wherein it was held as below:--

"Land Reforms Regulation, 1972 [MLR 115]

---Preamble---Provisions of Land Reforms Regulation, 1972 had been declared against the injunctions of Quran and Sunnah by the Shariat

Appellate Bench of the Supreme Court---Decision in said case would be effective from 23-3-1990---Law declared by courts was never retrospectively effective and it only takes effect after the announcement of the judgment or the date notified by the court.

The learned counsel for the petitioner has lastly argued that as the resumed land of the petitioner was not allotted to any other person till the above mentioned target date fixed in the **Qazalbash Waqf** case i.e. 23-3-1990, therefore, the said land after the above mentioned target date cannot be allotted to any one and the same is liable to be returned to the petitioner in view of the law laid down in the case reported as **Sardar Muhammad Jefar Khan Leghari v. Balochistan Land Commission, Quetta through its Secretary and others** (1997 MLD 1934). The judgment referred by the learned counsel for the petitioner is distinguishable from the facts of the present case. In the said case the land of the petitioners was not resumed till the crucial date (23-3-1990) fixed by the Hon'ble Supreme Court of Pakistan in **Qazalbash Waqf case** and no action taken under para 13 of the Land Reforms Regulation, 1972 in respect of the land in question till the above mentioned date. As the land of the petitioners in the above said case was resumed after the crucial date i.e. 23-3-1990, by the Land Reforms authorities, when relevant provisions, of the land reforms Regulation, 1972, ceased to have effect, therefore, the land of the petitioners of the above mentioned writ petition, was directed to be returned to them. The said judgment is not applicable to the case of the petitioner because, as discussed earlier the land of the petitioner was resumed far earlier than the target date fixed by the Hon'ble Supreme Court of Pakistan in the above-mentioned **Qazaibash Waqf** case. The learned counsel for the petitioner could not point out any material illegality or irregularity in the impugned orders

8. In the light of above discussion, this petition being devoid of any force is hereby dismissed.

S.A.K./Y-11/L **Petition dismissed.**

2012 M L D 216

[Lahore]

Before Malik Shahzad Ahmed Khan, J

Mst. TALAT SHAHEEN and others---Petitioners

Versus

MUHAMMAD IBRAR and others---Respondents

Writ Petition No.432 of 2011, decided on 9th September, 2011.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched. & S.7---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance, dowry articles, etc.---Production of documents as additional evidence---Scope---Plaintiffs moved an application for submission of documents as additional evidence, in order to prove the monthly income and financial status of the defendant, during the trial of the suit---Said application was dismissed vide impugned order on the ground that documents intended to be produced, were neither appended with the plaint nor were relied upon by the plaintiffs in the list of reliance---Family Court under first proviso to S.7(ii) of West Pakistan Family Courts Act, 1964 was possessed with the powers to allow any document to be produced, which was expedient and just for the fair administration of justice---Additional evidence which was necessary for just and fair decision of the case, could be allowed at any stage of the case---Documents intended to be produced by the plaintiffs were expedient and important for the just decision of the case---Judge Family Court had not exercised his jurisdiction properly while passing the impugned order and dismissed the application by the plaintiffs on the ground that they did not append said documents with the plaint at the time of filing the suit---Impugned judgment of the Judge Family Court, being illegal and void was set aside and the plaintiffs were permitted to produce additional evidence, in circumstances.

Mst. Faiza Firdous v. Ghulam Sabir 2002 CLC 1801 and Zar Wali Shah v. Yousaf Ali Shah and others 1992 SCMR 1778 rel.

Nemo for Petitioner

Khawaja Hassan Riaz for Respondent No.1

ORDER

MALIK SHAHZAD AHMED KHAN, J.---This petition has been filed against the order dated 2-2-2011, passed by the learned Judge Family Court, Rawalpindi, whereby the application for production of additional document/evidence filed by the petitioners was dismissed.

2. As per brief facts of this petition, a suit for recovery of maintenance allowance, dowry articles, car and gold ornaments was filed by the petitioners against respondent No. 1. The said suit was filed in the court of learned Judge Family Court, Rawalpindi. During the trial, the petitioners moved an application for submission of documents as additional evidence, in order to prove the monthly Income and Financial Status of the defendant/respondent No.1. The said petition was contested by respondent No.1. The learned Judge Family Court has dismissed the above mentioned application moved by the petitioners vide the impugned order dated 2-2-2011, hence, the present constitutional petition, before this Court.

3. No one entered appearance on behalf of the petitioners.

4. It is contended by the learned counsel for respondent No.1 that the impugned order has been passed strictly in accordance with law; that the documents intended to be produced by the petitioners were not relied upon by the petitioners in the list annexed with the plaint and the same were not appended with the plaint at the time of filing the suit; that the plaintiffs cannot be permitted to produce the said documents at a belated stage; that under section 7 of the West Pakistan Family Courts Act, 1964, the petitioners can only be allowed to produce such documents in evidence, which were either appended with the plaint or the same were relied upon, in the list annexed with the plaint, therefore, this writ petition may be dismissed.

5. I have heard the learned counsel for respondent No.1 and have also gone through the grounds taken in the instant writ petition and the documents annexed with it.

6. The petitioner No.1 Mst. Talat Shaheen along with her minor children (petitioners Nos.2 to 5) had filed a suit for the recovery of maintenance allowance, dowry articles, car and gold ornaments against respondent No. 1. During pendency of the said suit, the petitioners moved an application to produce different documents in additional evidence, to show monthly income and financial status of the defendant/ respondent No.1. The petitioners intended to produce inter alia the pay slip, rent agreement executed by the defendant/respondent No.1, proof of lectures delivered by respondent No.1 in NUST Institute Rawalpindi and receipt of pick and drop of the minor plaintiffs in order to establish the monthly income and status of the defendant/respondent No.1 and expenditures of the plaintiffs. The above said application of the petitioner has been dismissed vide the impugned order, on the ground that the documents intended to be produced were neither appended with the plaint nor relied upon by the plaintiffs/petitioners in the list of reliance. Under section 7(3) of the West Pakistan Family Courts Act, 1964, the petitioners were liable to produce those documents at the time of filing of suit, which were under their power or possession. Section 7(3) of the West Pakistan Family Courts Act, 1964 is reproduced hereunder:--

"Section 7(1)----------

(2)----------

(3) Where a plaintiff sues or relies upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time, deliver the document or a copy thereof to be filed with the plaint"

Similarly under section 7(3)(ii) of the Act, ibid, the petitioners were obliged to rely on other documents not in their possession or power, in the list to be appended with the plaint. Section 7(3)(ii) is reads as under:--

"Section 7(3)(ii) Where he relies on any other document, not in his possession or power, as evidence in support of his claim, he shall enter such documents in a list to

be appended to the plaint [giving reasons of relevancy of these documents to the claim in the plaint"].

The learned Judge Family Court, Rawalpindi while passing the impugned order has completely overlooked first proviso of section 7(ii) of the West Pakistan Family Courts Act, 1964 which is relevant for the decision of controversy involved in the instant petition. The said proviso is reproduced hereunder:--

"7-(ii) Provided [further] that the parties may, with the permission of the court, call any witness at any later stage; if the court considers such evidence expedient in the interest of justice."

The above mentioned proviso in section 7 of the West Pakistan Family Courts Act, 1964 was inserted by Ordinance LV of 2002 dated 1-10-2002. The learned Judge Family Court, under the above mentioned provision of law was possessed with the powers to allow any document to be produced, which was expedient and just for the fair administration of justice. The above-mentioned documents like pay slip of the defendant/respondent No.1, rent agreement executed by the defendant/ respondent No.1, etc., could not be under the power or possession of the petitioners/plaintiffs. It was duty of the defendant/respondent No.1 to produce the said documents before the court, but it appears that he deliberately withheld those documents. The petitioners might not be in the knowledge of the above-mentioned documents at the time of filing her suit, therefore, the same could not be relied upon in the list appended with the plaint. The petitioners anyhow managed to obtain the above-mentioned documents and they intended to produce the same before the learned trial court in order to establish the income/status of the defendant/respondent No.1, so that the court may give a proper decision about the issue of maintenance and may reach at a just and fair decision of the case. The documents intended to be produced by the petitioners are expedient and important for the just decision of the case, in hand. The learned Judge Family Court has not exercised his jurisdiction properly while passing the impugned order. A similar proposition came under discussion of this court in the case of Mst. Faiza Firdous v. Ghulam Sabir (2002 CLC 1801) and it was held in the said judgment as under:--

"S.5 Sched. & S.7---Suit for recovery of dowry articles---Provision of S.7, West Pakistan Family Courts Act, 1964 makes it mandatory upon the parties to give schedule of witnesses giving summary of evidence and also production of all the documents in possession of the parties---Family Court, under S.7 is possessed with power to allow any witness to produce any document on record and pass order as the Court thinks expedient and just for the fair administration of justice"

It is by now a well settled law that the additional evidence, which is necessary for just and fair decision of the case, could be allowed at any stage of the case. Reference in this respect may be matter to the case of Zar Wali Shah v. Yousaf Ali Shah and others 1992 Law Notes 718 SC = 1992 SCMR 1778. In the said case, the Hon'ble Supreme Court of Pakistan has held as under:--

"Additional Evidence---Courts duty to allow suo motu under present Pakistan Jurisprudence - Even if one or the other party had failed to produce all the material documents and/or failed to request for proper examination of the disputed document/ signatures, the Court had ample power to do the needful so as to advance justice rather than injustice---The concept of bar against filling the gaps is no more available in the present Pakistan jurisprudence and the law, including the precedent law on Islamic principles, which are being made applicable progressively to the proceedings before the Courts and other forums which are required to record/admit evidence."

7. The learned Judge Family Court, Rawalpindi has wrongly dismissed the application, moved by the petitioners, vide its impugned order on the ground that the plaintiffs did not append the above referred documents with her plaint at the time of filing her suit. As discussed earlier, the documents intended to be produced by the petitioners were not under their possession or power at the time of filing, the suit, therefore, the petition for production of the said documents could not be dismissed on the above mentioned grounds.

8. In the light of above discussion, this petition is allowed. The impugned order dated 2-2-2011, passed by the learned Judge Family Court, Rawalpindi is hereby declared illegal and void and the same is set-aside. The application of the petitioners/plaintiffs

for production of additional evidence is, therefore, accepted and they are permitted to produce additional evidence. Similarly, the defendant/respondent No.1 will also be permitted by the learned trial court to file documents, if any, in rebuttal of the additional evidence produced by the petitioners/plaintiffs.

H.B.T./T-35/L **Petition allowed.**

2012 M L D 232

[Lahore]

Before Malik Shahzad Ahmad Khan, J

RIAZ JAFAR NATIQ---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 8167-B of 2011, decided on 21st July, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, refusal of---Disputed cheque which was dishonoured on presentation, was issued by accused who was named in the F.I.R.---Sufficient material was available on record to connect accused with the alleged offence---Accused had issued four cheques and out of those four cheques, two had been dishonoured on presentation which had shown that accused was in the habit of repeating the same offence---Accused remained fugitive from law---Grant of bail in offence, which did not fall within the ambit of prohibitory clause of S.497, Cr.P.C., was a rule and refusal was an exception, but, in view of facts of the case, case of accused fell under the exception of said general rule---Accused was not entitled to concession of bail, in circumstances.

Shameel Ahmed v. The State 2009 SCMR 174; Awal Gul v. Zawar Khan and others PLD 1985 SC 402 and Muhammad Siddique v. Imtiaz Begum and 2 others 2002 SCMR 442 rel.

Sarwar Khilji for Petitioner.

Arshad Mehmood, Deputy Prosecutor-General for the State with Khalid Mahmood, A.S.-I

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Riaz Jafar Natiq, petitioner, moved the present petition under section 497 of Cr.P.C. for grant of bail after arrest in case F.I.R. No.895 of 2010, dated 27-8-2010, registered under section 489-F of P.P.C. with Police Station, Islampura, Lahore.

As per allegation levelled in the F.I.R., the petitioner handed over the disputed cheque for an amount of Rs.2,00,00,000 to the complainant, which was dishonoured on presentation, hence, the above-mentioned F.I.R.

It is contended by the learned counsel for the petitioner that the petitioner was roped in this case in the name of investment and the petitioner has been made a scapegoat by his own sons; that the sons of the petitioner convinced him to issue the cheque, whereas, the same shall not be presented for encashment; that the petitioner had not taken any loan from the complainant so there was no question of any repayment of loan; that the petitioner issued four different cheques out of which two have already been dishonoured; that the petitioner has already been granted bail by the Hon'ble Supreme Court of Pakistan vide order dated 8-6-2011, passed in Criminal Petition No.347-L of 2011 in another F.I.R. No.1107, dated 23-8-2010, offence under section, 489-F of P.P.C., Police Station, Qila Gujjar Singh, Lahore; that the offence with which the petitioner is charged does not fall within the ambit of prohibitory clause of section 497 of Cr.P.C. and that the case against the petitioner is one of further inquiry, hence, the petitioner may be admitted to post-arrest bail.

4. On the other hand, the learned Deputy Prosecutor-General, for the State has vehemently opposed this bail petition on the grounds that the petitioner is habitual offender; that the petitioner is in a habit of repeating the same offence; that the petitioner has admittedly issued four cheques and two separate F.I.Rs. have already been registered against the petitioner in respect of above mentioned cheques; that the petitioner remained absconder in this case; that no one can claim bail as a matter of right, if offence does not fall within the ambit of prohibitory clause of section 497 of Cr.P.C, therefore, this petition may be dismissed.

5. Arguments heard and record perused.

6. The petitioner is named in the F.I.R. with specific role. He issued the disputed cheque of an amount of Rs.2,00,00,000 to the complainant. The said cheque was dishonoured on presentation by the concerned Bank, therefore, sufficient material is available on record to connect the petitioner with the alleged offence. In the grounds of bail petition, the petitioner has admitted the issuance of disputed cheque, though he has made an excuse that he was made a scapegoat by his own sons. It is also mentioned in para No.5 of his bail petition that the petitioner has already issued four cheques and out of these four cheques, two have already been

dishonoured on presentation by the concerned Banks. Two separate F.I.Rs. at two different Police Stations, have already been registered against the petitioner. The petitioner has placed on record the copy of order dated 8-6-2011, passed by the Hon'ble Supreme Court of Pakistan, wherein the present petitioner was granted bail in another case F.I.R. No.1107 of 2010, dated 23-8-2010, offence under section, 489-F of P.P.C., Police Station, Qila Gujjar Singh, Lahore. The above mentioned fact shows that the petitioner is in a habit of repeating the same offence. It is admitted by the petitioner that he has already issued four different cheques of huge amounts, therefore, the petitioner is not entitled to the concession of bail after arrest as per law laid down by the Hon'ble Supreme Court of Pakistan in case reported as Shameel Ahmed v. The State (2009 SCMR 174)

7. It is evident from perusal of police file that the petitioner remained fugitive from law. The investigation of police dated 8-9-2010, 21-9-2010 and 7-10-2010, transpires that the police was making hectic efforts to arrest the petitioner and warrants of arrest of the petitioner were also obtained in this regard, but all that proved to be in vain. Finally, on 8-10-2010, the petitioner was arrested in another case F.I.R. No.1107 of 2010. In the judgment reported as Awal Gul v. Zawar Khan and others (PLD 1985 Supreme Court 402), the Hon'ble Supreme Court of Pakistan has laid down that a fugitive from law and Courts loses some of the normal rights granted by the procedural as also substantive law. The relevant para is very important and the same is reproduced as under:--

"It is now well established law that a fugitive from law and Courts loses some of the normal rights granted by the procedural as also substantive law. It is also a well-established proposition that unexplained noticeable abscondence disentitles a person to the concession of bail notwithstanding the merits of the case".

8. There is no cavil with this proposition that grant of bail in offences, which do not fall within the ambit of prohibitory clause of section 497 of Cr.P.C, is a rule and refusal is an exception, but keeping in view the above mentioned facts of the present case, the case of the petitioner fall under the exception to the above mentioned general rule. As discussed earlier, the petitioner has issued different cheques and prima-facie it appears that he is in a habit of repeating the same offence and as the petitioner remained fugitive from law for a considerable period of time, without any plausible explanation, therefore, the above mentioned general rule is not applicable in the instant case. Although the offence under section 489-

F of P.P.C. does not fall within the ambit of prohibitory clause of section 497 of Cr.P.C, but an accused of such offence cannot claim bail as a matter of right as held in the judgment reported as Muhammad Siddique v. Imtiaz Begum and 2 others (2002 SCMR 442).

9. In the light of above discussion, this petition is without any force and the same is hereby DISMISSED.

10. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of decision of other issues involved in the above mentioned case/F.I.R. or at the time of final adjudication of the case before the learned trial court.

H.B.T./R-49/L **Bail refused.**

2012 M L D 737

[Lahore]

Before Malik Shahzad Ahmad Khan, J.

MUHAMMAD SHAFIQ and 2 others---Petitioners

Versus

SECRETARY TO GOVERNMENT OF PUNJAB and 2 others---Respondents

Writ Petition No.13831 of 2010, decided on 27th July, 2011.

(a) Punjab Local Government (Auctioning of Collection Rights) Rules, 2003---

----Rr. 3, 27-A & Second Sched., Part-III, Item No. 2---West Pakistan Municipal Committees (Cattle Market) Rules, 1969, R. 6---Constitution of Pakistan, Art. 199---Constitutional petition---Auction of lease of collection of fee of Cattle Market---Order of authority directing petitioner to hand over charge of such market on expiry of one year---Plea of petitioner (highest bidder) was that such lease was given for three years as approved by Tehsil Nazim, Town Municipal Council and Provincial Government---Validity---Period of such lease as advertised and mentioned in contract document was one year---Petitioner had knowingly participated in auction proceedings that period of such collection rights was one year and not three years---Such auction was held under Punjab Local Government (Auctioning of Collection Rights) Rules, 2003 and not under West Pakistan Municipal Committee (Cattle Market) Rules, 1969---Record showed that such lease had been approved by the Town Municipal Council for a period of one year---Under R. 3 of West Pakistan Municipal Committee (Cattle Market) Rules, 2003, such lease could not be awarded beyond period of one year---Under R. 27-A of said Rules no extension in such contract could be granted beyond period of one year---Lease would be illegal and void, if executed for a period of three years in violation of law/rules---Local Government itself had no authority to extend such contract beyond period of one year, thus, Provincial Government had no power to approve its extension for three years---High Court dismissed constitutional petition in circumstances.

Writ Petition No.24544 of 2009 ref.

Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others PLD 2001 SC 169 and Tanveer Hussein v. Divisional Superintendent, Pak Railways PLD 2006 SC 249 rel.

Ahmad Khan Niazi v. Town Municipal Administration, Lahore through Town Municipal Officer and 2 others PLD 2009 Lah. 657 distinguished.

(b) Administration of Justice---

----Anything required to be done in a particular manner must be done in such manner and not otherwise.

(c) Punjab Local Government (Auctioning of Collection Rights) Rules, 2003---

----Rr. 3, 27-A & Second Sched., Part-III, Item No. 2---Constitution of Pakistan, Art. 199---Constitutional petition---Contract for collection of fee of Cattle Market, cancellation of---Contractor's plea that he shifted market to another village due to reason that area acquired by Town Municipal Administration was not enough for holding such market---Validity---Contractor had no lawful authority to take on lease any other land for holding of a cattle market and shift market from place acquired by authority to such other place---High Court dismissed constitutional petition in circumstances.

(d) General Clauses Act (X of 1897)---

----S. 23---West Pakistan General Clauses Act (VI of 1956), S.22---Publication of new Rules under a statute---Effect---Previous Rules would be deemed to be expressly repealed, if same were obviously and vividly inconsistent with such new Rules.

(e) Interpretation of statutes---

----Special Law would prevail over general law.

Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/ Sargent Traffic through S.P., Traffic, Lahore and others 1996 SCMR 826 and Dur Muhammad v. Abdul Sattar PLD 2003 SC 828 ref.

(f) Estoppel---

----No estoppel against law/statute.

(g) Civil Procedure Code (V of 1908)---

----S.11---Res judicata, applicability of---Scope---Decision on a question of law without proper adjudication would not operate as res judicata.

Muhammad Saleemullah and others v. Additional District Judge, Gujranwala and others PLD 2005 SC 511 and Noor Muhammad v. Muhammad Iqbal Khan and 7 others 1985 CLC 1280 rel.

Ali Sibtain Fazli for Petitioners.

Mahmood A. Sheikh for Respondents Nos. 2 and 3.

Ch. Muhammad Maqsood-ul-Hassan, A.A.-G. for Respondent No.1

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This petition has been filed with the prayer that the impugned order dated 13-4-2010, passed by the Tehsil Officer (Finance), Tehsil Municipal Administration, Sheikhupura (respondent No.3) and the letter dated 7-12-2009, issued by the Secretary to the Government of Punjab, Local Government and Community Development Department Punjab, Lahore (respondent No.1), may be declared to be illegal, without lawful authority and of no legal effect.

2. Brief facts of the instant case as given in the present petition are, that the respondents decided to establish a new cattle market at village Kadlathi, District Sheikhupura. Accordingly, TMA Sheikhupura gave advertisement dated 12-8-2009 in the daily newspapers 'Pakistan' and 'Nawa-i-Waqt', for auction of collection rights of cattle market at Kadlathi, for a period of one year. The petitioners along with other bidders, allegedly gave application on 13-8-2009 to TMA (respondent No.2) requesting therein that the above mentioned period may be increased from one year to three years with 10% annual increase as provided in Rule 6 of West Pakistan Municipal Committees (Cattle Market) Rules, 1969. It is also claimed by the petitioners that the area acquired by the TMA was just 18 kanals 4 marlas, which was

not enough for holding and operating a proper cattle market, therefore, the petitioners requested respondent No.2 that at least 25/30 acres of more land at some proper place be allowed to be taken on lease to hold cattle market at the said place. Anyhow, the auction was held on 21-8-2009 and the petitioners along with other bidders participated in the said auction in which the bid of Rs.3,48,00,000 of the petitioners was accepted being the highest one. The said bid was approved by the Nazim as well as by the House and a contract dated 7-9-2009 was also executed between the parties. As per terms and conditions of the said contract, the same was for a period of three years with annual increase of 10%. It is also claimed by the petitioners that they obtained on lease another area measuring 18 acres situated in village Jewan Pura adjacent to village Kadlathi, Teshsil and District, Sheikhupura vide lease deed dated 22-3-2010 and shifted the market to the said place. The Secretary to the Government of Punjab, Local Government and Community Development, Punjab, Lahore (respondent No.1) vide impugned letter dated 7-12-2009 intimated all the Town Municipal Administrators, that West Pakistan Cattle Market Rules, 1969 stood repealed on the promulgation of Punjab Local Government Ordinance, 2001. The Tehsil Officer (Finance), Tehsil Municipal Administration Sheikhupura (respondent No. 2), thereafter, vide impugned work order dated 13-4-2010 informed the petitioners that the period of contract has been curtailed to one year. The petitioners were directed to hand over the charge of the above mentioned cattle market on the expiry of period of one year; hence, the present petition.

3. It is contended by the learned counsel for the petitioners that under proviso to Rule 6 of West Pakistan Municipal Committees (Cattle Market) Rules, 1969, in case of a new cattle market, the contract for collection of fee for cattle market could be awarded for a period of three years with 10% annual increase; that agreement between the petitioners and respondent No.2 was executed for a period of three years in terms of proviso to Rule 6 ibid; that it has been wrongly held in the impugned letter that West Pakistan Municipal Committees (Cattle Market) Rules, 1969 stood repealed after the promulgation of Punjab Local Government Ordinance, 2001; that under section 23 of the West Pakistan General Clauses Act, 1897, it has been provided that if a law is

repealed and then re-enacted with or without modification then all rules and notifications etc. issued under the previous law shall continue to be in force unless repealed under the new law; that as under section 196 of Punjab Local Government Ordinance, 2001, the above mentioned rules had not been expressly repealed, therefore, the same continued to be in force; that the Government of Punjab also approved the grant of contract to the petitioners for three years vide its letter dated 7-9-2009, hence, the respondents after the execution of the agreement, cannot change their stance to adversely effect the rights already created in favour of the petitioners; that the judgment passed by this Court in another case reported as Ahmad Khan Niazi v. Town Municipal Administration, Lahore through Town Municipal Officer and 2 others (PLD 2009 Lahore 657) may kindly be distinguished because certain legal points were not taken note of by this court while passing the above mentioned judgment and the same is distinguishable from the facts of the present case; that the West Pakistan Market Committees (Cattle Market) Rules, 1969 have not been expressly repealed under the Punjab Local Government Ordinance, 2001, therefore, the same are still in force; that the above mentioned rules of 1969 are not inconsistent with the Punjab Local Government Ordinance, 2001, therefore, said Rules of 1969 have survived; that above mentioned Rules of 1969 are special rules, whereas, Punjab Local Government (Auctioning of Collection Rights) Rules, 2003 are general in nature, therefore, the above mentioned rules of 1969, being special law, will prevail over general rules of 2003; that in view of the above, the contract was rightly awarded to the petitioners for a period of three years; that the grant of contract to the petitioners was challenged by other bidders, but the same was upheld by this Court vide its judgment dated 22-1-2010, passed in Writ Petition No.24544 of 2009; that this Court has already held in the above judgment dated 22-1-2010 that under Rule 6 of the Cattle Market Rules, 1969, a contract can be given for a period of three years in case of a New Cattle Market; that an identical Writ Petition No.14031 of 2011 has been disposed of by another Bench of this Court vide order dated 21-6-2011 and the case has been referred to respondent No. 1 for decision on merits, therefore, the impugned order dated 13-4-2010 and the impugned letter dated 7-12-2009, may kindly be set-aside. He learned counsel for the petitioners in support of his contentions has relied

upon the judgments reported as Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/Sargent Traffic through S.P., Traffic, Lahore and others (1996 SCMR 826), Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others (PLD 2001 Supreme Court 169), Tanveer Hussain v. Divisional Superintendent, Pak Railways (PLD 2006 SC 249) and Dur Muhammad v. Abdul Satter (PLD 2003 SC 828).

4. On the other hand, the learned counsel for respondents Nos.2 and 3 has vehemently opposed this petition on the grounds that the petitioners are guilty of concealment of facts inasmuch as the petitioners earlier filed Writ Petition No.12171 of 2010, which was dismissed as having been withdrawn vide order dated 23-6-2010 and this fact has been concealed by the petitioners; that on the basis of same facts and same prayer, the instant petition is not maintainable in the eyes of law; that the instant writ petition has been filed with malicious intent of protecting the gain received though fraud and forgery in connivance with the then Tehsil Nazim and T.M.O., etc.; that it was specifically mentioned in the advertisement dated 12-8-2009, published in the daily newspapers 'Pakistan' and 'Nawa-i-Waqt' for auction of rights to collect fee of cattle market, that the same was for a period of one year; that the petitioners knowingly, that the period of said auction was only for one year, had participated in the above mentioned auction proceeding; that before the start of auction proceedings, all the intending participants were shown the terms and conditions of the auction; that as per said terms and conditions of the auction, which contains the signatures of the petitioners as well, the auction was meant for one year only; that under clause 32 of the above mentioned terms and conditions, the Punjab Local Government Rules, 2003, were applicable on the said auction proceedings and not above mentioned Rules of 1969; that the House of Tehsil Council on 25-8-2009 approved the auction for 'one year' through resolution No.10, dated 26-8-2009 (Annexure/R-5); that it is absolutely incorrect that the auction was held for a period of three years; that a contractor had no authority under the law to shift the market from the proposed place to another place and he has no lawful authority to retain on lease or otherwise any other land for holding of cattle market; that West Pakistan Municipal Committees (Cattle Market)

Rules, 1969 stood repealed on the promulgation of Punjab Local Government Ordinance, 2001 and particularly under the Punjab Local Government (Auctioning of Collection Rights) Rules, 2003; that the auction was held under above mentioned Rules of 2003 and there was no provision authorizing the Tehsil Municipal Administration to grant lease of collection rights beyond the period of one year; that the provisions of section 23 of the General Clauses Act, 1897 are not attracted in this case as the cattle market rules of 1969 have been replaced by Punjab Local Government (Auctioning of Collection Rights) Rules, 2003; that the impugned revised work order dated 13-4-2010, passed by respondent No. 3 and the impugned letter dated 7-12-2009, passed by respondent No. 1, have been passed strictly in accordance with law; that the earlier order of this Court dated 22-1-2010 passed in Writ Petition No.24544 of 2009 was passed at limine stage and the respondents were not heard, therefore, the petitioners cannot take benefit of the said order, thus, the instant writ petition may kindly be dismissed.

5. The learned A.A.-G. appearing for respondent No. 1 has also supported respondents Nos. 2 and 3 on the above mentioned propositions.

6. Arguments heard and record perused.

7. After arguing the case at some length, learned counsel for the parties have agreed that order dated 21-6-2011, in Writ Petition No.14031 of 2011, passed by this Court, is not applicable in respect of the issues involved in the instant writ petition, because this Court has referred the case vide the above mentioned order to the Secretary to Government of Punjab, Local Government and Community Development, Punjab, Lahore (respondent No.1), whereas the question of repeal of West Pakistan Municipal Committees (Cattle Market) Rules, 1969 is involved in this case, therefore, the said question, being purely a question of law, cannot be resolved by respondent No. 1 and the same can only be decided by this Court. In view of the above, the order of this court dated 21-6-2011 in Writ Petition No. 14031 of 2011 is not relevant for the decision of issues involved in the instant petition.

8. As per facts of the present case, TMA, Sheikhupura (respondent No.2) intended to establish a new cattle market at village Kadlathi. The said respondent, on 12-8-2009

advertised in the daily newspapers "Pakistan" and "Nawa-i-Waqt" for holding an auction of collection rights of the said cattle market. The said advertisement has been placed on record of present petition as (R/1). The petitioners in the light of said advertisement participated in the auction proceedings. The period of above mentioned rights is specifically mentioned as, one year in the said advertisement. The petitioners knowingly parcipated in the said auction, that the period of collection rights of the above said cattle market was only for one year and not three years. The document containing terms and conditions of the above mentioned auction has also been placed on record as (R/2). The period of 'one year' has been specifically mentioned in the said document as well. The said document (R/2) is signed-by the petitioners and other bidders. Under clause (32) of the said document (R/2); it was clearly mentioned that the contract would be governed by the Punjab Local Government Rules, 2003. It is evident from the said document (R/2), that the above said auction was held under the rules 2003 of Punjab Local Government Ordinance, 2001 and the same was not held under the West Pakistan Municipal Committees (Cattle Market) Rules, 1969. There is force in the arguments of the learned counsel for respondents Nos.2 and 3 that later on the petitioners in connivance with the then Tehsil Nazim, had got executed an agreement for a period of three years. It is also evident from the document (R/5) dated 26-8-2009 that the agreement was approved in the house of Tehsil Municipal Council, Sheikhupura, for a period of one year w.e.f. 1-9-2009 to 31-8-2010. Under Rule 3 of Auctioning of Collection Rights Rules, 2003, the collection rights cannot be handed over to a contractor for a period exceeding one financial year. Similarly, under Rule 27-A of the said rules, no extension in a contract can be granted beyond the period of one year, therefore, a contract for three years, which has been executed in violation of the law/rules on the subject, is an illegal and void contract. It is settled law that when anything is required to be done in a specific manner, it must be done in that way and not otherwise. The learned counsel for the petitioners has contended that grant of contract in favour of the petitioners, for a period of three years was later on approved in the meeting of Tehsil Municipal Council and the same was also approved by the Government of Punjab through letter dated 7-9-2009. There is no force in the said arguments of the learned counsel for the petitioners, because according to the

provisions of Rules 3 and 27-A of Punjab Local Government (Auctioning of Collection Rights) Rules, 2003, Local Government, under no circumstances, shall have any power to grant the extension of contract beyond the period of one year. The Local Government itself having no authority to extend the contract beyond the period of one year, therefore, Government of the Punjab had no power to approve the same. The learned counsel for the petitioners has also argued that the area acquired by the TMA was just 18-kanals 4-marlas which was not enough for holding and operating a proper Cattle Market, therefore, the petitioners obtained on lease, another area measuring 18 acres situated in village Jewanpura adjacent to village Kadlathi and as the petitioners have invested a huge amount for the establishment of the Cattle Market in question, therefore, their lease agreement for three years may not be cancelled. The instant petition cannot be accepted on the above mentioned ground. The contractors had no authority under the law to shift the market from the place acquired by the respondents to another place and they have no lawful authority to take on lease or otherwise any other land for holding of a Cattle Market.

9. So far as the question as to whether the West Pakistan Municipal Committees (Cattle Market) Rules, 1969 are still in force or not and as to whether the extension of time beyond the period of one year in respect of the contract for Rights to Collect Fee in a cattle market, is permissible or not, is concerned, I find that the West Pakistan Municipal Committees (Cattle Market) Rules, 1969 were framed under section 121 read with Item No.35(f) of the Fourth-Schedule of the Municipal Administration Ordinance, 1960. The above mentioned Ordinance was firstly repealed under the provisions of section 229 of the Punjab Local Government Ordinance, 1975 (Ordinance VI of 1975) and finally by virtue of section 233 of the Punjab Local Government Act, 1975 (XXXIV of 1975) ("the Act, 1975"). The Ordinance VI of 1975 along with some other enactments was also repealed vide section 237 of "the Act 1975". Section 235 of "the Act 1975" is the validation clause whereas section 4 of the said act is the saving clause. Section 4 of "the Act, 1975" provides as under:--

"Where an enactment, stands repealed under section 233, any appointment, rules, regulations or bye-laws made or saved, notification, order or notice issued, tax

imposed or assessed, scheme prepared or executed, contract entered into, suit instituted, rights acquired, claims made, legal or administrative proceedings or action taken under such enactments, shall so far as it is not inconsistent with the provisions of this Act, be deemed to have been respectively made, saved, issued, imposed or assessed, prepared or executed, entered into, instituted, acquired, made or taken under this Act."

The protection/validation has been given under above mentioned sections 4 and 235 of "the Act 1975" to the orders, proceedings, actions taken or done under the repealed enactments, the rules, by laws etc, framed thereunder. It is evident from the reading of above mentioned sections that rules framed under the Municipal Administration Ordinance, 1960, so far as the same were not inconsistent with the provisions of above mentioned act were deemed to have been respectively made and saved under the said Act. The above mentioned Act of 1975 was also repealed under section 182 of the Punjab Local Government Ordinance 1979 (the Ordinance, 1979). Finally the above mentioned Ordinance, 1979 has also been repealed under section 196 of the Punjab Local Government Ordinance, 2001. Section 182 of the Punjab Local Government Ordinance, 1979 is hereby reproduced as under:-

"Repeal of the Punjab Local Government Act, 1975.---(1) The Punjab Local Government Act, 1975 (XXXIV of 1975) is hereby repealed.

(2) Notwithstanding the repeal of the Punjab Local Government Act, 1975, any appointments, rules, regulations or bye-laws made or saved, notifications, order or notice issued, tax imposed or assessed, scheme prepared or executed, contract entered into, suit instituted, rights acquired, claims made, legal or administrative proceedings or action taken under the said Act, or under such enactments as were repealed by the said Act, shall so far as it or they are not inconsistent with the provisions of the Ordinance, be deemed to have been respectively made, saved, issued, imposed or assessed, prepared or executed, entered into, instituted, acquired, made or taken under the Ordinance."

Section 196 of the Punjab Local Government Ordinance, 2001 reads as follows:--

"**Repeal and Savings**.---(1) On commencement of this Ordinance,--

(i) the Punjab local Government Ordinance, 1979 (VI of 1979), shall be repealed;

(ii) the Punjab Local Government Elections Ordinance, 2000 (V of 2000) shall be repealed; and

(iii) all Metropolitan Corporations, Municipal Corporations, District Councils, Municipal Committees, Town Committees and Union Councils created under the Punjab Local Government Ordinance, 1979 (VI of 1979) shall stand dissolved.

(2) Save as otherwise specifically provided, nothing in this Ordinance, or any repeal effected thereby, shall affect or be deemed to affect anything done, action taken investigation or proceedings commenced, order, rule, regulation, appointment, conveyance, mortgage deed, document or agreement made, fee levied, resolution passed, direction given, proceedings taken or instrument executed or issued, under or in pursuance of any law repealed or amended by this Ordinance and any such thing, action, investigation, proceedings, order, rule, regulation, appointment, conveyance, mortgage deed, document, agreement, fee, resolution, direction, proceedings or instrument shall, if in force at the commencement of this Ordinance and not inconsistent with any of the provisions of this Ordinance, continue to be in force, and have-effect as if it were respectively done, taken commenced, made, directed, passed, given, executed or issued under this Ordinance."

It is evident from reading of section 182 of "the Ordinance, 1979" that notwithstanding the repeal of Punjab Local Government Act, 1975, the rules made under the said enactment, so far as the same were not inconsistent with the provisions of the Ordinance, 1979 were deemed to have been respectively made under the said Ordinance. The learned counsel for respondents could not show from any provision of the Act of 1975 or of the Ordinance of 1979 that the rules of 1969 were inconsistent thereto thus stood repealed and were not accordingly saved. Similarly the learned counsel for the respondents could not point out that any rules contrary to the rules of 1969 were framed under the above mentioned laws. The Punjab Local Government Ordinance, 2001 (the Ordinance, 2001) is the final legislation on the subject so far.

The Government can frame rules as provided in section 191 of the Ordinance, 2001, subsection (2) of section 196 of the Ordinance, 2001 is however, differently worded as compared to the relevant provisions of two earlier enactments. The said provision of the Ordinance, 2001 provides two different modes of saving or repeal. It is evident from the perusal of said provision that firstly, earlier rules can be done away by virtue of some specific provision of the Ordinance, 2001 and secondly the earlier rules shall stand repealed if the same are inconsistent with the rules made by the Government under section 191 of the Ordinance, 2001. The Governor on 3-5-2003,in the light of power as available under section 191 of the Ordinance, 2001 enforced the Punjab Local Government (Auctioning of Collection Rights) Rules 2003. Prior to the enforcement of the 2003 Rules the 1969 rules in my humble view were kept intact because no rules inconsistent to the 1969 Rules were framed under the above mentioned enactments. 1969 Rules, therefore, in light of the above mentioned provisions of law were not repealed and the same were kept intact on the touchstone of consistency. Anyhow, after the enforcement of the Punjab Local Government (Auctioning of Collection Rights) Rules 2003, the Rules of 1969 in my humble view stood repealed, as the said rules were inconsistent with "the 2003 Rules". The learned counsel for the petitioners has argued that the 1969 Rules are not in consistent with "the 2003 Rules". The said argument of the learned counsel for the petitioners is not convincing because it is evident from the perusal of above mentioned rules that both are inconsistent with each other.

The Punjab Local Government (Auctioning of Collection Rights) Rules, 2003 are comprehensive, conclusive, vast in nature, which covers the entire field of the collection of the TMA income regarding the items mentioned in the second schedule to the Ordinance and admittedly cattle market is (item No.2) of Part III thereof. A complete mechanism has been provided for the award of the contracts for such purpose. Rule 3 provides:--

"Auction of collection rights.---A Local Government may prefer to collect any of its income as specified in the Second Schedule of the Ordinance and duly approved and

notified in the official Gazette, through contractor by awarding collection rights to him for period not exceeding one financial year."

Similarly Rule 4 of 2003 Rules provides that no contract of Collection Rights of an income of Local Government shall be awarded to the contractor except in the manner provided under the said rules. Rules 5 to 8 of the Rules, 2003 provides a detailed and comprehensive procedure about the collection of the income of Local Government. The only concept and legal permission thus available in the 2003 Rules about the collection of the income of a local government on the items mentioned in the second schedule is through a public auction; after a public notice in the prescribed manner; the award of the contract only to a highest bidder; the contract should not exceed the period of one financial year. This all is not prescribed by the 1969 Rules rather alien thereto, therefore, such rules are vitally, fundamentally and manifestly inconsistent to the 2003 Rules, thus are repealed on account of the enforcement of these Rules by the express mandate of the law. To attribute this kind of the repeal governed by the concept/doctrine of implied repeal shall be a misnomer, rather shall fall within the domain of the rule of "express repeal", obviously on the criteria of inconsistency; where the inconsistency is obvious and evident, the repeal shall be deemed to be express by all means.

15. The 2003 Rules do not permit any extension in the period of one year as given in section 3 of the said rules, even on the ground of establishment of a new Cattle Market as provided under the proviso of Rule 6 of 1969 Rules. Under Rule 27-A of the 2003 Rules no extension in a contract can be granted beyond one year on any ground whatsoever. It is in exercise of such power that the impugned order and letter have been issued, suffice it to say that this new rule has been subsequently added on 20-10-2003 and forms part of Chapter-IV of the 2003 Rules, which chapter primarily deals with the terms and conditions of the contract, the eligibility of the contractor, the liability of the contractor to abide by the procedure and the bye-laws, the restraint about the overcharging etc., the rights and responsibilities of the contractor, the cancellation of the contract, and the prohibition about Rebates; etc. Rule 27-A constructed in the context of its placement at the end of this Chapter, when unlike

proviso to Rule 6 of 1969 has not been added as proviso to Rule 3 of the 2003 Rules, would mean that it shall not be considered or operated as an exception to the period prescribed by this rule, rather by adding it just after Rule 27, disallowing the contractor the Rebates, it is reiteration that the contract cannot go beyond one year even by virtue of an extension. It may be pointed out that if the extension was intended by the legislature, the rule should have been a proviso, like the one under Rule 6 of 1969 Rules. Otherwise, if the extension is taken to be permissible, then Rules 3 to 5 shall all be rendered redundant, which can never be the intention and the spirit of the law. In fact, Rule 27-A has been introduced subsequently with an object to remove any ambiguity, about the extension and it is not a permissive, rather a restrictive provision, placing a complete circumvention upon the grant of any extension, in the period of the contract beyond one year of whatever grounds it may be sought. Therefore, the local government under no circumstances shall have any power to grant the extension. As there is no permission about the extension of period under the 2003 Rules, therefore, I am not convinced if on account of the establishment of a new market, the extension can be granted either as per the Rules of 1969 or on the basis of Rule 27-A of 2003 Rules. The learned counsel for the petitioners could not point out any legal preposition which was not taken care of in the above mentioned case of Ahmad Khan Niazi v. Town Municipal Administration, Lahore through Town Municipal Officer and 2 others (PLD 2009 Lahore 657).

16. The judgments cited by the learned counsel for the petitioners are distinguishable on their own facts. The learned counsel for the petitioners in support of his contentions that as the West Pakistan Municipal Committees (Cattle Market) Rules, 1969 are not in conflict with Rules, 2003, therefore, the same are still in force, has cited judgments reported as "Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others" (PLD 2001 Supreme Court 169) and "Tanveer Hussain v. Divisional Superintendent, Pakistan Railways and 2 others" (PLD 2006 Supreme Court 249).

It was held in the above mentioned judgment of "Tanveer Hussain v. Divisional Superintendent, Pakistan Railways and 2 others" as under:--

"When provision of former statue is inconsistent and in conflict with a provision of a later statute and the two, cannot be reconciled or harmonized so as to stand together, then the provision of the earlier statute will give way to similar provision in the later statute on the doctrine of implied repeal."

Similar view was taken in the above mentioned case of "Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others" (PLD 2001 Supreme Court 169).

The judgments referred by the learned counsel for the petitioners are not helpful to the petitioners, because as observed earlier, Rules 1969 are in conflict with 2003 Rules, therefore, it cannot be held that "the 1969 Rules" are still in force.

17. The learned counsel for the petitioners has also contended that West Pakistan Municipal Committees (Cattle Market) Rules, 1969 is a special law, therefore, the same will prevail over general provisions of "the 2003 Rules". In support of his contentions he has relied upon cases reported as "Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/Sargeant Traffic" (1994 SCMR 6826) and "Dur Muhammad and others v. Abdul Sattar" (PLD 2003 Supreme Court 828).

It was held in the said judgments that special provision of statute is to prevail upon general provisions. There is no cavil with this preposition that special law will prevail over general law but, as held earlier the West Pakistan Municipal Committees (Cattle Market) Rules, 1969 stood repealed after promulgation of the Punjab Local Government (Auctioning of Collection Rights) Rules, 2003 thus "the 1969 Rules", which are not in existence; cannot be given preference over "the 2003 Rules", on account of special law, therefore, the above mentioned judgments referred by the learned counsel for the petitioners are not applicable in present case.

17. In so far as the earlier order of this court dated 22-1-2010, passed in Writ Petition No.24544 of 2009 is concerned, though it was observed in the said order that under Rule 6 of West Pakistan Municipal Committees (Cattle Market) Rules 1969, a new Cattle Market can be leased out for a period of three years, but I find that the said writ petition was filed by the other bidders. The above mentioned order was passed at limine stage without providing an opportunity of being heard to the respondents,

therefore, the present petitioners cannot take advantage of the said order. Above all as mentioned in Para No. 7 of the present judgment that the learned counsel for the parties have agreed that pure question of law is involved in the instant case, therefore, the above mentioned order cannot operate as res judicata or estoppel against the respondents. Needless to say that there can be no estoppel against statutes/law. Similarly a decision on question of law, without proper adjudication would not operate as res judicata. I am also fortified in my views by cases reported as "Muhammad Saleemullah and others v. Additional District Judge, Gujranwala and others" (PLD 2005 Supreme Court 511) and "Noor Muhammad v. Muhammad Iqbal Khan and 7 others" (1985 CLC 1280).

18. In the light of above discussion, this petition is without any substance and the same is hereby DISMISSED.

S.A.K./M-309/L **Petition dismissed.**

2012 P Cr. L J 1274

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

QAMAR EJAZ---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.208 and Murder Reference No.653 of 2006, heard on 12th January, 2012.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b) & 337-F(iii)---Qatl-e-amd, causing hurt---Appreciation of evidence---Solitary witness---Value---Quality and not the quantity of evidence has to be considered while deciding a case---Confidence inspiring and trustworthy evidence of a sole witness can safely be relied upon for conviction.

Dildar Hussain v. Muhammad Afzaal alias Chala and 3 others PLD 2004 SC 663; Farooq Khan v. The State 2008 SCMR 917 and Mst. Amina Bibi v. Noor Ahmad and 10 others 2007 AC 764 SC ref.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Relationship of prosecution witness with deceased---Effect---Mere relationship of a prosecution witness with the deceased is not sufficient to discard his evidence outrightly---Where presence of a related witness at the time and place of occurrence is natural and his evidence is straightforward, confidence inspiring and trustworthy, then the same can be safely relied upon to award punishment to an accused.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b) & 337-F(iii)---Qatl-e-amd, causing hurt---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---Shop of complainant being adjacent to the shop of deceased, presence of complainant at the time and place of occurrence was natural---Testimony of complainant was supported by medical evidence and the same could not be rejected simply on the ground of his relationship with the deceased---Complainant being the real brother of the deceased, he could not possibly implicate the accused falsely and let off the real culprit---Substitution in such

cases was a rare phenomenon---Defence evidence was not helpful to accused---Conviction of accused under S.302(b), P.P.C. was consequently maintained---Alleged motive was not proved by any cogent evidence--- Prosecution evidence had already been disbelieved by Trial Court qua the acquitted co-accused--- Immediate cause of occurrence resulting in the death of deceased was not determinable---Non-proof of specific motive by the prosecution might be considered a mitigating circumstance in favour of accused---Death sentence of accused was reduced to imprisonment for life in circumstances---Charge under S.337-F(iii), P.P.C. having not been proved against the accused, he was acquitted of the said charge---Appeal was disposed of accordingly.

Dildar Hussain v. Muhammad Afzaal alias Chala and 3 others PLD 2004 SC 663; Farooq Khan v. The State 2008 SCMR 917; Mst. Amina Bibi v. Noor Ahmad and 10 others 2007 AC 764 SC; Ahmad Nawaz and another v. The State 2011 SCMR 593; Iftikhar-ul-Hassan v. Israr Bashir and another PLD 2007 SC 111; Ghulam Muretaza v. State 2004 SCMR 4; Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203; Muhammad Akram v. State 2003 SCMR 855; Abdus Salam v. State 2000 SCMR 338; Muhammad Riaz and another v. The State 2007 SCMR 1413 and Iftikhar Ahmad Khan v. Asghar Khan and another 2009 SCMR 502 ref.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Sentence---Discretion of court---Law has conferred discretion upon the court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course.

Iftikhar Ahmad Khan v. Asghar Khan and another 2009 SCMR 502 ref.

Azam Nazeer Tarar for Appellant.

Ch. Ghulam Mustafa, D.P.-G. for the State.

Zafar Iqbal Chaudhry for the Complainant.

Date of hearing: 12th January, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---Qamar Ejaz, the appellant along with his co-accused Master Ejaz Ahmad was tried by the learned Additional Sessions Judge, Gujranwala, in case F.I.R. No.647, dated 6-10-2004, registered under sections

302, 324, 337-F(v), 34 of P.P.C., at Police Station, Satellite Town, Gujranwala, for the murder of Muhammad Azam (deceased). The learned trial Court vide judgment dated 6-2-2006 acquitted co-accused Master Ejaz Ahmad of the charge framed against him, whereas the appellant was convicted under section 302(b), P.P.C. as Ta'zir and he was sentenced to death. He was further directed to pay Rs.2,00,000 as compensation to the legal heirs of the deceased, and in default thereof, to further undergo 6 months' S.I. The appellant was also convicted under section, 337-F(iii) of P.P.C., and was awarded punishment of Daman amounting to Rs.2,000, for having inflicted injury to Mst. Iqbal Bibi (P.W.11), and in case of default thereof to undergo two months' S.I.

2. The appellant has filed Criminal Appeal No.208 of 2006 against his conviction and sentence, whereas, the learned trial Court has sent Murder Reference No.653 of 2006 under section 374, Cr.P.C., to this Court for confirmation or otherwise of death sentence of the appellant. We propose to dispose of both these matters by this single judgment as all these matters have arisen out of the same judgment/case.

3. Brief facts of the case as given by the complainant Muhammad Ashiq (P.W.10) in his complaint (Exh.PA) are that he (the complainant) had a video shop at Tehsil Road, Gujranwala, whereas, his brother Muhammad Azam had also established a vegetable shop, next to his shop. On 5-10-2004, at 9-30 p.m., he along with his mother Mst. Iqbal Bibi, brother Muhammad Azam and one Muhammad Tariq alias Ali, were sitting on a plank, outside the shop of Muhammad Azam. All of a sudden, the appellant Qamar Ejaz while armed with .30 bore pistol, along with his co-accused Master Ejaz Ahmad, who was empty-handed, emerged at the place of occurrence. Master Ejaz Ahmad raised 'lalkara' that Muhammad Azam be taught a lesson for demanding money and disgracing them, upon which, Qamar Ali accused made 4/5 fire shots with his pistol hitting Muhammad Azam on his chest, left side of his belly and left arm, who fell down on the ground. The appellant Qamar Ejaz again made a fire shot hitting Mst. Iqbal Bibi, (P.W.11) on the index finger of her right hand. The complainant party raised hue and cry, on which, the accused fled away, towards their house. The complainant has further stated that both the above-mentioned injured were taken to Civil Hospital, Gujranwala, from where, Muhammad Azam was referred to Mayo Hospital, Lahore, due to his precarious condition, whereas, his mother Mst. Iqbal Bibi (P.W.11) was discharged from the hospital after providing her medical treatment. Muhammad Azam, later on died on 8-10-2004.

The motive for the occurrence was that 8/10 days prior to the occurrence a "Punchayat" was convened regarding a money dispute and on 10-10-2004, it was to be convened for the second time, but the accused had taken it as their insult and due to that grudge they committed qatl-e-amd of Muhammad Azam and injured Mst. Iqbal Bibi, in furtherance of their common intention.

4. After completion of investigation, the challan was submitted. The appellant and his co-accused master Ejaz Ahmad were charge-sheeted, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 16 P.Ws. and also tendered documentary evidence. Initially, Dr. Iftikhar Hussain, (P.W.6) medically examined Muhammad Azam (deceased) and noted following injuries on his person but referred Muhammad Azam to Mayo Hospital, Lahore due to his critical condition:--

(1) Fire arm wound 1.5 x 1 c.m. with inverted margins on left mid axillary line , 7 c.m. below the axilla, going deep.

(2) Fire arm wound 1.5 x 2 c.m. of entry on the front of left fore arm middle part.

(3) Fire arm wound 1 x 1 c.m exit of injury No.2 on outer side of left fore arm lower part.

(4) Fire arm entry wound 1.5 x 1 c.m on front of left abdomen, 9 c.m above umbilical line and vertical in nipple line.

(5) Fire arm wound 2.5 x 2 c.m on left front of abdomen, 6 c.m above injury No.4.

(6) 3 x 2 c.m glancing wound on inner side of left arm upper part.

(P.W.9) Dr. Mansoor Abbas on 9-10-2004 at 12-15 p.m. conducted the post-mortem examination on the dead body of Muhammad Azam (deceased) vide Post mortem Report Exh.P-J and Diagram Exh.P-J/1 and found the following injuries on his person:--

(1) A midline surgically made incisional wound extending from xiphoid process to below umbilicus containing thirteen stitches of silk thread;

(2) A wound of entry 2 x 1-1/4 c.m x going deep covered with pus on left mid axillary line 7 c.m below axilla (surgically modified wound mentioned in MLR as injury No.1).

(3) A fire arm lacerated wound of entry debrided surgically measuring 3 x 4 c.m x going deep circular in shape containing 2 silk stitches on front of left side of abdomen

upper part 6-1/2 c.m from anterior midline 8 c.m above from umbilicus (surgically modified wound mentioned in MLR as injury No.4).

(4) A fire arm lacerated wound of entry debrided surgically measuring 3-1/2 x 2-1/2 c.m x going deep circular in shape 7 c.m below the left nipple and 3-1/4 c.m above injury No.3 on front of left side of abdomen (surgically modified wound as mentioned in MLR as injury No.5).

(5) A fire arm lacerated wound of entry measuring 1.5 c.m x 2 c.m x going deep covered with pus on front of left fore arm middle part (mentioned in MLR as injury No.2).

(6) A fire arm lacerated wound of exit 1 c.m x 1 c.m with everted margins covered with pussy fluid on outer side of left fore arm lower part (mentioned in MLR as injury No.3).

(7) A fire arm lacerated wound through and through glancing in nature measuring 3-1/2 x 2-1/2 c.m muscle deep covered with pus on inner side of left upper arm middle part (surgically modified wound mentioned in MLR as injury No.6).

(8) A lacerated wound 3 x 1-1/2 c.m x bone exposed covered with pus on middle part of middle finger of right hand (not mentioned in MLR).

(9) A surgical wound for drain tube measuring 1-1/2 x 1 c.m on left side of chest upper part and on lateral side.

(10) A surgical wound for drain tube measuring 1-1/2 x 1 c.m on front of abdomen middle part, 9-1/2 c.m from umbilicus on right hypochondrial area.

(11) A surgical made wound for drain tube measuring 1-1/2 x 1 c.m in hypogastrik area 5 c.m from anterior midline.

(12) A surgical made wound for drain tube measuring 1-1/2 x 1 c.m on right side of chest upper part on lateral side.

In his opinion, all the injuries mentioned-above were ante-mortem in nature. The cause of death in this case was due to septicemia shock due to the complication of injuries Nos.2, 3 and 4 and their sequelae, which were caused by some fire-arm weapon and were sufficient to cause death in ordinary course of nature. Probable time that elapsed between injuries and death was 72 to 76 hours and between death and post mortem was 12 to 16 hours. Dr. Shazia Bhutta (P.W.2) on 16-10-2004 at 1-15 p.m. medically examined Mst. Iqbal Bibi P.W.11 vide MLR Exh.P-B.

(P.W.14) Fazal-ur-Rehman SI and (P.W.15) Munir Ahmad SI are the Investigating Officers of this case who completed the investigation and submitted the challan.

P.W.1 Ahmad Ali ASI, P.W.4 Muhammad Ashfaq C-736, P.W.8 Masood Ahmad Bhatti, Draftsman, P.W.12 Akhlaq Ahmad HC-1727, P.W.13 Munir Ahmad C-338, and P.W.16 Ibrar Hussain C-2669 are the formal witnesses. P.W.10 Muhammad Ashiq and P.W.11 Mst. Iqbal Bibi are the witnesses of ocular account. P.W.5 Manzoor Hussain is the recovery witness of empties P-2/1-4 vide recovery memo Exh.PE, whereas, Muhammad Yousaf constable P.W.7 is the recovery witness of pistol .30 bore P-3 through recovery memo Exh.P-G.

5. The statement of the appellant under section, 342 of Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant replied as under:--

"I have been falsely involved in this case due to civil litigation and enmity between the parties."

The appellant did not opt to make statement on oath as envisaged under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him. Anyhow, he produced documentary evidence in his defence in the shape of copy of F.I.R. No.301 of 2001 (Exh.DA), appeal titled as "Shahab Din v. Master Sher Muhammad Khan" (Exh.DB), order dated 10-10-1984 (Exh.DC), decree sheet dated 28-1-1971 (Exh.DD), decree sheet dated 15-4-1971 (Exh.DE), application titled as Master Muhammad Sher Khan v. Shahhab Din (Exh.DF), appeal titled as "Shahab Din v. Sakina Bibi etc." (Exh.DG), application for compromise (Exh.DH), order dated 10-12-1995 (Exh.DJ), compromise (Exh.DK), order passed in W.P. No.5563 of 1984 (Exh.DL) and order dated 2-9-1991 of Hon'ble Supreme Court of Pakistan (Exh.DM) and closed his evidence.

After conclusion of the trial, the learned trial Court, convicted the appellant, as detailed above, whereas co-accused Master Ejaz Ahmad was acquitted of the charge framed against him.

6. The learned counsel for the appellant, in support of this appeal, contends that the ocular account was furnished by the related and interested witnesses; that it is the case of the complainant in the F.I.R. that the fire shot made by Qamar Ejaz-appellant hit

Mst. Iqbal Bibi (P.W.11) on her index finger of right hand, and the same was his case before the learned trial court; that Mst. Iqbal Bibi, while appearing as (P.W.11) also stated so, but that assertion of the complainant and the witnesses is belied by the medical evidence produced by prosecution itself as Dr. Shazia Bhutta (P.W.2), who medically examined Mst. Iqbal Bibi has categorically stated that the injury was caused to Iqbal Bibi with blunt weapon; that this witness was not declared hostile and moreover the said Mst. Iqbal Bibi was medically examined on 16-10-2004, i.e. after eleven days of the registration of the F.I.R.; that P.W.11 had been taking different positions regarding her admission in the hospital; that according to the prosecution case she was taken care of, on the day of occurrence, and later on, she was discharged from the hospital, but there was no such record available with the prosecution; that the motive in this case was regarding the money dispute, but no detail of money dispute has been provided before the trial court as admitted by Mst. Iqbal Bibi P.W.11; that P.W.11 and the Investigating Officer have categorically stated that no such evidence regarding motive was produced during investigation; that the pistol allegedly taken into possession at the instance of the appellant and empties recovered from the spot were sent together to the FSL on 7-12-2004, therefore alleged recovery of pistol P-3 is inconsequential, thus this appeal be accepted and the appellant may be acquitted from the charge.

7. Conversely, the learned Deputy Prosecutor-General, for the State assisted by the learned counsel for the complainant, has vehemently opposed this appeal and has contended that it's a brutal murder and the appellant is named in the F.I.R. with specific role of causing fire arm injuries to Muhammad Azam (deceased) and Mst. Iqbal Bibi P.W.11; that the said injuries are supported by the statement of Dr. Iftikhar Hussain (P.W.6), who medically examined the deceased and prepared the MLR of the deceased as (Exh.P.F), as well as by the statement of Dr. Mansoor Abbas (P.W.9), who conducted the post-mortem examination on the person of the deceased and prepared post-mortem report (Exh.PJ); that the prosecution case is further supported by the recovery of pistol P-3 on the pointation of the appellant and positive report of FSL; that even the motive part has wrongly been disbelieved by the learned trial court, as the complainant was not cross-examined at this point; that the appellant is responsible for causing the death of an innocent person and substitution in such like cases is a rear phenomenon, therefore, this appeal may be dismissed.

8. We have heard the arguments of the learned counsel for the parties, and have gone through the evidence available on record.

9. The occurrence in this case had taken place on 5-10-2004, at about 9-30 p.m. (night) in front of the shop of Muhammad Azam (deceased). The complainant Muhammad Ashiq is real brother of Muhammad Azam (deceased). He had a video shop adjacent to the vegetable shop of Muhammad Azam (deceased). The prosecution in order to prove the ocular account of the occurrence has examined two eye-witnesses namely, Muhammad Ashiq (P.W.10) and Mst. Iqbal Bibi (P.W.11), whereas, the third eye-witness namely Muhammad Tariq alias Ali was given up by the prosecution being unnecessary. Although it was alleged by the prosecution that Mst. Iqbal Bibi (P.W.11) was also injured during the occurrence, and she was medically examined on the same day, but no medical report of the said injured P.W. was produced in evidence through which she was medically examined on the day of occurrence. She has stated during her cross-examination that she was not medically examined at Gujranwala and she was medically examined at Lahore but no evidence regarding her medical examination at Lahore has been brought on the record. Her only medical examination, which has been placed on record, was conducted by Dr. Shazia Bhutta, (P.W.2) W.M.O., DHQ Hospital Gujranwala on 16-10-2004 i.e. with the delay of eleven days. According to the statement of Dr. Shazia Bhutta (P.W.2), as well as, according to the MLR (Exh.PB) of the above-mentioned witness, injury on the index finger of Mst. Iqbal Bibi was caused by a blunt weapon. The above-mentioned P.W. has not stated that the injury on the person of Mst. Iqbal Bibi (P.W.11) was caused by a fire arm weapon. The story regarding injury sustained by Mst. Iqbal Bibi (P.W.11) through fire-arm weapon at the hands of the appellant, has not been supported by the medical evidence. Moreover, Mst. Iqbal Bibi (P.W.11) is a female and the prosecution has not given any cogent and convincing reason of her presence at the vegetable shop of Muhammad Azam (deceased) at night time i.e. 9-30 p.m. She did not make any statement before police at the day of occurrence i.e. 5-10-2004. She has admitted in her cross-examination that her statement was recorded by the police on 9-10-2004. There is no plausible and convincing explanation regarding the above-mentioned delay of 4-days in getting her statement recorded before the police. In view of the above, we hold that, the case of prosecution to the extent of presence of Mst. Iqbal Bibi at the time of occurrence and sustaining injury at the index finger of her right hand at the hands of the appellant, has not been established beyond the shadow of doubt, therefore, the conviction and sentence of Daman amount of Rs.2,000 and imprisonment of one year under section, 337-F(iii)

of P.P.C. awarded to the appellant, is, hereby, set aside, and the appellant Qamar Ejaz is acquitted from the charge under section 337-F(iii) of P.P.C.

10. As we have disbelieved the evidence of Mst. Iqbal Bibi (P.W.11), therefore, the ocular evidence of the prosecution only hinges upon the statement of Muhammad Ashiq (P.W.10), who had a video shop adjacent to the vegetable shop of Muhammad Azam (deceased). His presence at the spot is quite natural. According to his statement, the fire shots made by the appellant landed on the left side of chest, belly and on left arm of Muhammad Azam (deceased). The complainant (P.W.10) was cross-examined at length, but his evidence to the extent of role attributed to the appellant and injuries sustained by the deceased, could not be shattered during cross-examination. The prosecution has also produced Dr. Iftikhar Hussain as (P.W.6), who had medically examined Muhammad Azam (deceased) through MLR (Exh.PF) and diagram (Exh.PF/1). The medical examination of Muhammad Azam (deceased) was conducted by P.W.6 on 5-10-2004, at 9-15 p.m., and he found the following injuries on the person of Muhammad Azam (deceased):--

(1) Fire arm wound 1.5 x 1 c.m with inverted margins on left mid axillary line , 7 c.m below the axilla, going deep.

(2) Fire arm wound 1.5 x 2 c.m of entry on the front of left fore arm middle part.

(3) Fire arm wound 1 x 1 c.m exit of injury No.2 on outer side of left fore arm lower part.

(4) Fire arm entry wound 1.5 x 1 c.m on front of left abdomen, 9 c.m above umbilical line and vertical in nipple line.

(5) Fire arm wound 2.5 x 2 c.m on left front of abdomen, 6 c.m above injury No.4.

(6) 3 x 2 c.m glancing wound on inner side of left arm upper part.

According to the statement of said witness, all the injuries were caused by fire arm weapon, and were fresh in duration. He referred the deceased to Mayo Hospital, Lahore, due to his serious condition.

Dr. Mansoor Abbas (P.W.9) conducted the post-mortem examination on the dead body of Muhammad Azam (deceased) on 9-10-2004 through post-mortem report (Exh.P.J), and pictorial sketch (Exh.PJ/1). He noted the injuries on the dead body of Muhammad Azam (deceased) as per detail given in para No.4 supra. His evidence is also in line with the evidence of Dr. Iftikhar Hussain (P.W.6).

Both the above-mentioned witnesses were also cross-examined at length by the learned defence counsel, but nothing favourable to the accused/ appellant could be brought on record. Thus, the ocular account furnished by Muhammad Ashiq (P.W.10) is fully supported by the above-mentioned medical evidence.

11. By now it is settled proposition of law that in criminal cases, it is the quality and not quantity of evidence, which is to be considered while deciding a case, and if the evidence of a sole witness is confidence inspiring and trustworthy, then the same can safely be relied upon for conviction. Reference in this context may be made to the cases of Dildar Hussain v. Muhammad Afzaal alias Chala and 3 others (PLD 2004 Supreme Court 663), Farooq Khan v. The State (2008 SCMR 917), and Mst. Amina Bibi v. Noor Ahmad and 10 others (2007 A.C. 764 SC).

12. The learned counsel for the appellant has contended that Muhammad Ashiq (P.W.10) is real brother of the deceased, and because he is a related witness, therefore, his testimony cannot be relied upon. We are afraid; we cannot agree with the above argument of the learned counsel for the appellant because mere relationship of a prosecution witness with deceased is not sufficient to discard his evidence out-rightly. If the presence of a related witness at the time of occurrence is natural, and his evidence is straightforward, confidence-inspiring and trustworthy, then the same can be safely relied upon to award punishment to an accused. In this case, Muhammad Ashiq (P.W.10) was running a video shop, which was adjacent to the vegetable shop of Muhammad Azam (deceased), therefore, his presence at the time of occurrence, at the spot, was quite natural. His testimony has also been supported by medical evidence. He stood the test of lengthy cross-examination, but, his evidence could not be shattered, therefore, his testimony cannot be rejected merely on the ground of his relationship with the deceased.

There is another aspect of the case. The complainant Muhammad Ashiq (P.W.10) is real brother of Muhammad Azam (deceased). It is not possible that he will falsely implicate the appellant and would let off the real culprit. Substitution in such-like cases is a rare phenomenon.

13. The prosecution has also produced the evidence of recoveries of empties and pistol in this case. According to the prosecution case, four empties were recovered from the place of occurrence on 6-10-2004. Manzoor Hussain (P.W.5) is the witness of the said crime empties P.2/1-4, which were taken into possession vide recovery memo Exh.PE. The appellant was arrested in this case on 9-10-2004, and according

to the prosecution case, he got the pistol (P.3) recovered on 24-10-2004. According to the report of FSL, pistol and four crime empties were delivered together at FSL on 7-12-2004, therefore, it is not safe to rely on the recovery of pistol and report of FSL.

14. Insofar as the evidence of motive against the appellant is concerned, it was alleged in the F.I.R. (Exh.PA/1) that there was a money dispute and 8/10 days prior to the occurrence, a 'Punchayat' was also convened to resolve the above-mentioned dispute. The nature and details of money dispute between the deceased and the appellant, have not been mentioned in the F.I.R. It was candidly conceded by Mst. Iqbal Bibi (P.W.11) during her cross-examination that no proof regarding the money dispute between the deceased and the appellant was produced by the prosecution side during the investigation. She has also admitted that she had no knowledge regarding the exact amount, which was involved in the above-mentioned dispute. Similarly, Munir Ahmad SI (P.W.15), who was the Investigating Officer of this case, has also conceded that no evidence was produced during investigation by the complainant party about the motive part of prosecution story, to demonstrate that what was the nature of the dispute between the appellant and the deceased. He has also admitted that no evidence was produced by the complainant as to who was present at the time of motive occurrence. No member of 'Punchayat' was produced during investigation or during the trial, therefore motive part as set-forth by the prosecution is, hereby, disbelieved.

15. The appellant produced defence evidence in the shape of documents Exh.DA to Exh.DM. Exh.DA is the copy of F.I.R. No.301 of 2001 in a murder case in which the deceased Muhammad Azam was nominated as an accused. He was attributed the role of abetment in the said case, whereas, the remaining documents are regarding the civil litigation, which allegedly remained pending between the predecessors of the appellant and the deceased. The said documentary evidence was produced by the appellant in order to establish that the deceased Muhamamd Azam was earlier involved in a criminal case and he (Muhammad Azam) was murdered by some unknown accused, whereas, the appellant was falsely implicated in the instant case due to above-mentioned civil litigation. The appellant was himself not a party in the above-mentioned civil or criminal litigation. We have already discussed that substitution is a rare phenomenon, therefore, we hold that the above-mentioned defence evidence is not helpful to the appellant.

16. However, if the evidence of motive and recovery is excluded from consideration, even then there is sufficient incriminating evidence available on record against the appellant. As discussed earlier, the prosecution case was fully established through evidence of eye-witness Muhammad Ashiq (P.W.10). He stood the test of lengthy cross-examination, but his evidence could not be shattered by the learned defence counsel. The evidence of said witness is quite natural, straightforward and confidence-inspiring. The ocular account of the prosecution as given by Muhammad Ashiq (P.W.10), is fully supported by the evidence of Dr. Iftikhar Hussain (P.W.6) and Dr. Mansoor Abbas (P.W.9), as well as, by Medico-legal Report of Muhammad Azam (deceased) Exh.P.F, diagram Exh.P.F/1, his post-mortem report Exh.PJ, and pictorial sketch Exh.PJ/1. The time of occurrence, the kind of weapon of offence used, the number and seat of injuries as given by the above-mentioned prosecution witness were fully supported by the above-mentioned medical evidence, therefore, we hold that the prosecution has proved its case against the appellant beyond the shadow of any doubt.

17. Now coming to the quantum of sentence, we may observe that the prosecution has alleged a specific motive, but as discussed earlier the said motive was not proved through any cogent evidence. The story of prosecution regarding raising 'lalkara' by co-accused Master Ejaz Ahmad has already been disbelieved by the learned trial court. He was found innocent by police and thereafter he was acquitted by the learned trial court vide the above-mentioned impugned judgment. It is not determinable in this case as to what had actually happened immediately before the occurrence, which had resulted into the death of deceased Muhammad Azam, therefore, the death sentence awarded to the appellant Qamar Ejaz is quite harsh. It has been held in a number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of Ahmad Nawaz and another v. The State (2011 SCMR 593), wherein, at page 604, the Hon'ble apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of

sections 306 to 308, P.P.C. attracts only in the cases of Qatl-e-amd liable to Qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under section 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case".

In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:---"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course". (underlining, italic and bold supplied)".

18. Keeping in view the above-mentioned facts and the principles of safe administration of justice, the conviction of the appellant under section 302(b), of P.P.C. awarded by the learned trial Court is maintained, but his sentence is altered from death to imprisonment for life. The compensation awarded by the learned trial Court or sentence in default thereof is, hereby, maintained and upheld. The benefit of section 382-B, of Cr.P.C. is also given to the appellant.

19. Consequently, with the above-mentioned modification in the sentence, Criminal Appeal No.208 of 2006, filed by the appellant, is, hereby, dismissed. Murder Reference No.653 of 2006 is answered in the negative and death sentence of the appellant Qamar Ejaz is not confirmed.

N.H.Q./Q-2/L **Order accordingly.**

2012 P L C (C.S.) 1437

[Lahore High Court]

Before Malik Shahzad Ahmad Khan, J

ASIA RIAZ

versus

E.D.O. (EDUCATIONAL), CHAKWAL and 2 others

Writ Petitions Nos.1960, 1961, 1983 and 2006 of 2011, decided on 10th August, 2011.

Punjab Civil Servants Act (VIII of 1974)---

----S. 9---Punjab Service Tribunals Act (IX of 1974), S.4---Constitution of Pakistan, Arts.199 & 212(2)---Constitutional petition---Maintainability---Petitioners had challenged their transfer from one place of working to another---Validity---Constitutional jurisdiction of High Court could only be invoked, if no other adequate remedy was provided by law, whereas in the present case, the petitioners being civil servants, were governed by the Punjab Civil Servants Act, 1974---Question of posting/transfer of a government servant, squarely fell within the jurisdictional domain of the competent Authority---Petitioners had alternate remedy available under S.4 of the Punjab Service Tribunals Act, 1974---Constitutional jurisdiction, therefore, could not be invoked to get said controversies resolved---Article 212(2) of the Constitution, had ousted the jurisdiction of all other courts---Orders of the Departmental Authority, even though without jurisdiction, illegal or mala fide, could be challenged only before the Service Tribunal---Under provisions of S.9 of Punjab Civil Servants Act, 1974, a civil servant of a Province was liable to serve anywhere within or outside the Province, in any post under the Provincial or Federal Government---Petitioners could not place on record any document to show that impugned transfer orders of the petitioners, were passed under political influence---No fundamental right was involved with regard to the postings, transfer or promotion of civil servants---Question of infringement of any constitutional right therefore did not arise, in circumstances.

Abdul Razaq v. Government of Balochistan, Communication Works Physical Planning and Housing Department, Quetta through Secretary 2010 PLC (C.S.) 1046; Bashir Ahmed Solangi v. Chief Secretary, Government of Sindh, Karachi and 2 others 2007 PLC (C.S.) 824; Muslimabad Cooperative Housing Society Ltd.

through Secretary v. Mrs. Sidiqa Faiz and others PLD 2008 SC 135 and Muhammad Shafiq v. Secretary to the Government of the Punjab Agricultural Department, Lahore and another 2008 PLC (C.S.) 273 distinguished.

Secretary to Government of the Punjab Health Department, Lahore and others v. Dr. Abida Iqbal and another 2009 SCMR 61; Dr. Younis Asad Shaikh v. Province of Sindh through Secretary, Health Department, Government of Sindh 2009 PLC (C.S.) 735; Agricultural Development Bank of Pakistan v. Imtiaz Ahmed Gill 1999 SCMR 650; Peer Muhammad v. Government of Balochistan through Chief Secretary and others 2007 SCMR 54; Asadullah Rashid v. Haji Muhammad Muneer and others 1998 SCMR 2129 and Superintending Engineer, Highways Circle, Multan and others v. Muhammad Khurshid and others 2003 SCMR 1241 rel.

Haroon Irshad Janjua for Petitioner (in W.P.No.1960 of 2011).

Mir Muhammad Ghufran Imtiazi for Petitioner (in W.P.No.1961 of 2011).

Raja Amjad Iqbal for Petitioner (in W.P.No.1983 of 2011).

Sardar Sohail Asmat for Petitioner (in W.P.No. 2006 of 2011).

Raja Muhammad Hameed, Asstt. A-G. with Dr. Moin, Litigation Officer, Office of District Officer (Health).

ORDER

MALIK SHAHZAD AHMAD KHAN, J.--- The instant petition i.e. W.P.No.1960 of 2011 as also W.P.No.1961 of 2011, W.P.No.1983 of 2011 and W.P.No.2006 of 2011 are being disposed of together through this single judgment as all these petitions involve common questions of law and facts.

2. In W.P.No.1960 of 2011, the petitioner has assailed the impugned order dated 18-7-2011, whereby, her transfer order dated 14-7-2011 has been withdrawn by E.D.O. (Education), Chakwal.

3. It is the case of the petitioner in W.P.No.1961 of 2011, that she has been illegally transferred from Government Girls Elementary School Odharwal to Government Primary School Dab vide the impugned order dated 18-7-2011.

4. In W.P.No.1983 of 2011, the petitioner has challenged the order dated 25-7-2011, passed by the District Officer (Health), Rawalpindi, whereby, she has been transferred back from THQ Hospital, Gujar Khan to Basic Health Unit Jhungal Tehsil Gujar Khan.

5. Similarly, in W.P. No.2006 of 2011, the transfer order dated 6-7-2011 of the petitioner has been withdrawn by the E.D.O (Education) from GPS Dhok Bhatti through the impugned order dated 30-7-2011.

6. Brief facts as given in the above mentioned writ petitions, are that all the petitioners are civil servants and they have been transferred from their present place of postings vide the above mentioned impugned orders. The petitioners have invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 in order to challenge their above mentioned transfer orders.

7. In all these petitions, it has been contended by the learned counsel for the petitioners that the impugned orders of the transfers of the petitioners have been parsed with mala fide and without proper application of independent mind and the same have been passed by the respondents due to political pressure and in order to please their favourists, which have created great inconvenience to the petitioners; that vide the impugned orders, the petitioners have been transferred to a far of place; that the petitioners were transferred frequently in the recent past; that the impugned transfer orders of the petitioners have been passed in violation of the policy/rules on the subject, whereby, the government servants could not be transferred before the expiry of three years; that the respondents have passed the impugned orders without any legal justification; that mala fide acts of the respondents can be corrected in writ jurisdiction; that the bar of jurisdiction provided under Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973 is not attracted in the cases, where mala fides on the part of the government functionaries are evident on the face of record; that the impugned orders are not in conformity with the declared policy of the government nor the same are in conformity with the provisions of Rule 21(2) read with Schedule-V of the Rules of Business, 1974; that under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, it is constitutional right of the petitioners to be dealt with in accordance with law, but the impugned orders have been passed in blatant violation of the law/policy on the subject. In support of their contentions, the learned counsel for the petitioners have placed reliance on the cases reported as Abdul Razaq v. Government of Balochistan, Communication Works Physical Planning and Housing Department, Quetta through Secretary (2010 PLC (C.S.) 1046), Bashir Ahmed Solangi v. Chief Secretary, Government of Sindh, Karachi and 2 others (2007 PLC (C.S.) 824), Muslimabad Cooperative Housing Society Ltd. through Secretary v. Mrs. Sidiqa Faiz and others

(PLD 2008 Supreme Court 135) and Muhammad Shafiq v. Secretary to the Government of the Punjab Agricultural Department, Lahore and another (2008 PLC (C.S.) 273).

8. On the other hand, the learned Assistant Advocate-General has vehemently opposed these petitions on the grounds that under section 9 of the Punjab Civil Servants Act, 1974, a public servant is liable to serve anywhere within or outside the Province in any post under the Government of the Punjab, the Federal Government, or any provincial government; that the instant petitions are not maintainable in view of the bar provided under Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973; that the petitioners have alternate remedy of filing a departmental appeal or appeal before the Punjab Service Tribunal, Lahore; that these petitions are not competent against the impugned transfer orders, because the same are in respect of the terms and conditions of the services of the petitioners; that the petitioners could not establish any political influence in respect of their transfers orders, therefore, the present petitions are without any merits; that a civil servant cannot claim, as a matter of right, to be remained posted at a particular place of his own choice, therefore, all the above mentioned petitions may be dismissed. In support of his contentions, the learned Assistant Advocate-General has placed reliance on the cases reported as Secretary to Government of the Punjab Health Department, Lahore and others v. Dr. Abida Iqbal and another (2009 SCMR 61), Dr. Younis Asad Shaikh v. Province of Sindh through Secretary, Health Department, Government of Sindh (2009 PLC (C.S.) 735) and Agricultural Development Bank of Pakistan v. Imtiaz Ahmed Gill (1999 SCMR 650).

9. Arguments heard and record perused.

10. All the petitioners are admittedly civil servants. They have invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The petitioners have challenged their transfer from the present place of postings through the instant writ petitions. In order to resolve the controversy involved in the present petitions, it is important to decide the issue of jurisdiction and maintainability of the instant writ petitions, at the first instance. In this respect, the provisions of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 are important. Article 199(1) of the Constitution of Islamic Republic of Pakistan, 1973 is reproduced hereunder:---

"199. Jurisdiction of High Court.-- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law."

It is evident from the perusal of above mentioned Article that the constitutional jurisdiction of the High Court could only be invoked, if no other adequate remedy is provided by law. In the instant cases, as mentioned earlier the petitioners, are admittedly civil servants, as such, they are governed by the Punjab Civil Servants Act, 1974. The question of posting/transfer of a government servant squarely falls within the jurisdictional domain of the competent authority subject to law and rules made thereunder. The question of posting/transfer relates to terms and conditions of a civil servant and, as such, Service Tribunal would have the exclusive jurisdiction to dilate upon and decide such matters. The petitioners, who are civil servants, can file a departmental appeal before the next higher authority against the impugned transfer orders. They have alternate remedy availably under section 4 of the Punjab Service Tribunals Act, 1974. Section 4 ibid is reproduced hereunder:---

"4. Appeal to Tribunals.--- (1) Any civil servant aggrieved by any final order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him or within six months of the establishment of the appropriate Tribunal, whichever is later prefer an appeal to the Tribunal".

The constitutional jurisdiction cannot be invoked to get such controversies resolved. The provisions as contained in Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 oust the jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction, illegal or mala fide can be challenged only before the Service Tribunal. Article 212(2) of the Constitution reads as under:---

"212 Administrative Courts and Tribunals.---

(1) .....

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative

Court or Tribunal extends [and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal] [, other than an appeal pending before the Supreme Court,] shall abate on such establishment]."

In light of the above mentioned provisions of law, the constitutional jurisdiction of this Court cannot be invoked by the petitioners because other adequate remedy is provided by law and because of the bar of jurisdiction. The plea of mala fide or political influence does not confer upon the High Court the jurisdiction to interfere in the matter in view of the ouster as contained in Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973 and only the Service Tribunal has full jurisdiction to interfere in such like matters. The orders even if mala fide, ultra vires or coram-non-judice fell within the ambit of Service Tribunal.

11. The learned counsel for the petitioners have cited the case of Abdul Razaq v. Government of Balochistan, Communication Works, Physical Planning and Housing Department, Quetta through Secretary (2010 PLC (C.S.) 1046), in which the Hon'ble Division Bench of Quetta High Court has, inter-alia, held as under:---

> -----Ss. 4 & 10-Constitution of Pakistan (1973), Art.199---Constitutional petition---Transfer---Petitioner was transferred and assumed charge of the post where he was transferred, but within three months he was again transferred---Petitioner had impugned order of his transfer and contended that two illegalities were committed by the authorities while transferring him; firstly, he was not allowed to remain on the post at least for two years, while a junior officer of low grade was posted on the post, secondly action was taken in violation of policy laid down by the Government---Maintainability of constitutional petition was disputed by the authorities on the ground that dispute in respect of posting and transfer of a civil servant fell within the terms and conditions of service, which could not be challenged by invoking constitutional jurisdiction of High Court; further that the petitioner was not an aggrieved person within the meaning of Art. 199 of the Constitution---Petitioner being a civil servant was liable to serve within the Province or outside, while competent authority had the power to make transfer and posting of its employees as per provisions of S.10 of Balochistan Civil Servants Act, 1974 to that extent no illegality was

committed in the impugned notification-Act of transfer however was in violation of policy laid down by the Government---Transfer and posting of the petitioner was made only on wish of some Minister, which was neither legal nor proper---Though concerned authorities had the power to make transfer and posting of their employees, but that power must be exercised with due care and caution and without mala fide intention--- Posting of an officer of lower grade on the post of higher grade in the presence of officer of similar grade was bad in eyes of law---As the posting and transfer of a civil servant was not included in the terms and conditions of his service, it would not come within the jurisdiction of Service Tribunal having exclusive jurisdiction in respect of matters relating to terms and conditions of service of civil servant---There being violation of law in respect of transfer, Service Tribunal had no jurisdiction to entertain the matter---In absence of any other adequate remedy available in the matter, the constitutional jurisdiction of High Court could be invoked by an aggrieved person and High Court had the jurisdiction to entertain constitutional petition--Impugned order was set aside, in circumstances."

In my humble view, the above mentioned judgment passed by the Hon'ble Division Bench of Quetta High Court is distinguishable on its own facts and in view of the law laid down by the Hon'ble Supreme Court of Pakistan on the subject. The transfer of a civil servant is included in the terms and conditions of his service and the same would come within the jurisdiction of Service Tribunal having its exclusive jurisdiction in respect of matters relating to terms and conditions of service of civil servant. As discussed earlier, Article 212(2) of the Constitution has imposed a bar regarding the matters, which are exclusively triable by the Special Tribunals.

12. The Hon'ble Supreme Court of Pakistan has held in a number of judgments than the matter of transfer of a civil servant exclusively falls within the domain of Service Tribunal and constitutional jurisdiction under Article 199 of the Constitution cannot be invoked in such matters. In the case reported as Peer Muhammad v. Government of Balochistan through Chief Secretary and others (2007 SCMR 54), the Hon'ble Supreme Court has held as under:---

> ----S. 10---Constitution of Pakistan (1973), Arts.199 & 212---Constitutional jurisdiction of High Court under Art.199 of the Constitution-

--Scope----Posting and transfers---Terms and conditions of service---Jurisdiction of High Court---Scope---Question of posting of a government servant squarely falls within the jurisdictional domain of competent authority, subject to law and rules made therefore---Question of posting/transfer relates to terms and conditions of a government servant, Service Tribunal, therefore, has the exclusive jurisdiction to dilate upon and decide such matters---Constitutional jurisdiction of High Court cannot be invoked to get such controversies resolved".

Similar view was also taken by the Hon'ble Supreme Court of Pakistan in another case of Asadullah Rashid v. Haji Muhammad Muneer and others (1998 SCMR 2129).

13. In the case of Superintending Engineer, Highways Circle, Multan and others v. Muhammad Khurshid and others (2003 SCMR 1241), the Hon'ble Supreme Court of Pakistan has expressed regrets when the High Court exercised its constitutional jurisdiction in respect of the matters, which relate to the terms and conditions of a civil servant in spite of the ouster clause provided under Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973. In para No.6 of the said judgment, the Hon'ble Supreme Court of Pakistan has recorded the following findings:---

"6. It is regretted to note that learned Single Judge in Chambers has not kept in view the principles of ouster(?) as mentioned hereinabove while passing the judgment impugned. Be as it may, the question of grant of B-16 with retrospective effect does not fall within the jurisdictional domain of learned High Court and Service Tribunal has the exclusive jurisdiction to dilate upon the controversy and decide the same and it squarely falls within its jurisdictional domain."

14. The judgment reported as Zahid Akhtar v. Government of Punjab through Secretary, Local Government and Rural Development, Lahore and 2 others (PLD 1995 Supreme Court 530) also does not support the case of the petitioners. In the said case, writ petition filed by a civil servant against his transfer order was dismissed by the High Court and the said judgment was maintained by the Hon'ble Supreme Court of Pakistan. Similarly, the case reported as Bashir Ahmed Solangi v. Chief Secretary, Government of Sindh, Karachi and 2 others (2007 PLC (C.S.) 824), referred by the learned counsel for the petitioners, is also distinguishable from

the facts of the present petitions, because in the said case, the judgment passed by the Sindh Service Tribunal was challenged before the Hon'ble Supreme Court of Pakistan. It was not a case where a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 was directly filed in the High Court. Similarly the Hon'ble Supreme Court of Pakistan has not held in the said judgment that constitutional jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 can be invoked in the cases of transfers/postings of civil servants.

15. The learned Assistant Advocate-General has rightly argued that under section 9 of the Punjab Civil Servants Act, 1974, the petitioners are liable to serve anywhere in the Province of Punjab or even outside the Province. Section 9 supra is reproduced hereunder:---

> "9. Posting and transfer.--- Every civil servant shall be liable to serve anywhere within or outside the Province in any post under the Government of the Punjab or the Federal Government or any Provincial Government or a local authority or a corporation or a body set up or established by any such Government:

Provided that where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favourable than those to which he would have been entitled if he had not been so required to serve."

It is evident from perusal of the above mentioned provision that a civil servant of a province is liable to serve anywhere within or outside the Province, in any post under the Provincial or Federal Government as provided in the above referred provision of law. It is by now well-settled that there is no fundamental right with regard to the postings, transfers or promotions, therefore, the question of infringement of any constitutional right does not arise. Reference in this regard may be made to Secretary to Government of the Punjab Health Department, Lahore and others v. Dr. Abida Iqbal and another (2009 SCMR 61).

16. The learned counsel for the petitioners could not place on record any document to show that the impugned transfer orders of the petitioners are passed under political influence. Even otherwise, the impugned orders, even if, the same are based on mala fide, ulterior motives, ultra vires or coram non judice, fell within the ambit of Service Tribunal and jurisdiction of other Courts including the High Court

is ipso facto ousted as a result of barring provision of Article 212(2) of the Constitution. Similarly the other judgment referred on behalf of the petitioners in the case of Muslimabad Cooperative Housing Society Ltd., through Secretary v. Mrs. Sidiqa Faiz and others (PLD 2008 Supreme Court 135), is also not applicable in the present case, because the same was not passed in a service matter, therefore, the same is not relevant for the decision of the issues involved in the present writ petitions.

17. In the view of the above, all these petitions are without any force and the same are hereby DISMISSED.

HBT/A-197/L **Petitions dismissed.**

P L D 2012 Lahore 420

Before Malik Shahzad Ahmad Khan, J

ABRAR HUSSAIN---Petitioner

Versus

MEHWISH RANA and 3 others---Respondents

Writ Petition No.3276 of 2011, decided on 20th March, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17-A---Interim maintenance---Object, purpose and scope---Purpose behind provisions for interim maintenance is to ensure that during pendency of such proceedings with Family Court, financial constraints faced by minors are ameliorated.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S.17-A---Interim maintenance---Quantum---Determining factors---Family Court should broadly look into the social status of parties; earning of husband; his capacity to pay; requirements of minor; and on this touchstone fix interim maintenance.

(c) West Pakistan Family Courts Act (XXXV of 1964)---

----S.17-A---Interim maintenance---Powers of court---Family Court has uninhibited powers to enhance or decrease quantum of maintenance after appraising, deciphering and examining evidence produced during trial---Findings regarding interim maintenance normally cannot be interfered with, if the same were fixed upon the parameters in such regard.

(d) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Scope---Interim order---Petition under Art. 199 of the Constitution is maintainable even against an interim order, if the same is void ab-initio, without jurisdiction or if the same has attained the status of a final order.

Suleman and 4 others v. ASJ Nankana Sahib and 3 others PLJ 2007 Lah. 1173 and Muhammad Hassan v. Judge Family Court, Bhalwal and another 2008 YLR 1826 rel.

(e) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Scope---Appeal against interim order, absence of---Effect---When Legislature has specifically prohibited filing of appeal against an interim order and if constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of Legislature.

Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others 1996 SCMR 1165; Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State 1999 SCMR 1447 and Mushtaq Hussain Bukhari v. The State 1991 SCMR 2136 rel.

(f) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17-A---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Interim maintenance---Interim maintenance fixed by Family Court was assailed by husband on the plea of its being exorbitant and beyond his means---Validity---Order passed by Family Court could neither be termed as void ab initio nor without jurisdiction and the order had also not attained status of final order---Order for interim maintenance was passed by Family Court, who had jurisdiction to pass such order under S.17-A of West Pakistan Family Courts Act, 1964---Husband did not challenge jurisdiction of Family Court in his written statement, he was not condemned unheard and was provided opportunity of hearing before passing the interim order---Quantum of interim maintenance allowance was prima facie rightly fixed by Family Court, while keeping in view the status of parties and expenses of minors---Husband was unable to point out any patent illegality or material irregularity in the order of interim maintenance, therefore, petition which had been filed against interim order passed by court of competent jurisdiction, after providing an opportunity of hearing to parties was not maintainable in the eyes of law---High Court declined to interfere in interim maintenance fixed by Family Court---Petition was dismissed in circumstances.

Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others 1993 SCMR 618; Benedict F.D. Souza v. Karachi Building Control Authority and 3 others 1989 SCMR 918 and Muhammad Irfan v. Judge Family Court, Sargodha and 2 others 2008 CLC 585 rel.

Mian Altaf-ur-Rehman for Petitioner.

Mian Sohail Anwar for Respondents Nos.1 to 3.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Through the instant petition, the petitioner has challenged the impugned order dated 28-1-2011, passed by the learned Judge Family Court/Guardian Judge-III, Lahore, whereby, interim maintenance allowance of minor respondents Nos.2 and 3 was fixed at the rate of Rs.10,000 per month, per head.

2. As per brief facts of the present case on 22-12-1996 Mst.Mehwish Rana (respondent No.1) was married to Ibrar Hussain (petitioner) according to the injunctions of Islam. During the subsistence of said marriage, Zoha Ibrar (respondent No.2) and Muhammad Abdullah (respondent No.3) were born on 20-11-1998 and 5-11-1999, respectively. In the year 2007, the relationship between the spouses became strained. According to the version of Mehwish Rana (respondent No.1) she along with her minor children (respondents Nos.2 and 3) was expelled by the petitioner from his house, on 6-11-2007 and no maintenance allowance of the above mentioned respondents Nos.1 to 3 was paid by the petitioner since then. Ultimately, on 22-1-2010 respondents Nos.1 to 3 filed a suit for the recovery of dowry articles, as well as, for the recovery of maintenance allowance at the rate of Rs.1,25,000 per month with effect from September, 2007 till the filing of the suit and at the same rate for recovery of future maintenance allowance with 20% annual increase. An application for the recovery of interim maintenance allowance at the rate of Rs.1,25,000 was also filed by the above mentioned respondents along with their suit.

The petitioner contested the above mentioned suit, as well as, the application for grant of interim maintenance allowance and filed his written statement along with written reply to the application for recovery of interim maintenance allowance. In the meanwhile, on 22-4-2010, the petitioner divorced respondent No. 1.

The learned Judge Family Court/Guardian Judge-III, Lahore vide impugned order dated 28-1-2011 fixed the interim maintenance allowance of minor respondents Nos. 2 and 3 at the rate of Rs.10,000 per month, per head.

The petitioner being aggrieved of the above mentioned interim order of the learned Judge Family Court/Guardian Judge-III, Lahore, has filed the instant writ petition.

3. It is contended by the learned counsel for the petitioner that the quantum of interim maintenance allowance as fixed by the learned Judge Family Court, Lahore, is exorbitant and the same is beyond the means of the petitioner; that the petitioner has already resigned from his job in the year 2010 and presently he is jobless, therefore, he is not in a position to pay the interim maintenance allowance as fixed by the learned Judge Family Court, Lahore; that the quantum of maintenance allowance has been fixed at an excessive rate of Rs.10,000 per month, per head, for respondents Nos.2 and 3 without any proof of the source of income of the petitioner; that under the law, the learned Judge Family Court was obliged to fix the interim maintenance allowance according to the status of the parties and the petitioner cannot be burdened to pay the interim maintenance allowance at the above mentioned rate; that writ jurisdiction can be invoked against an interim order because there is no other alternate or efficacious remedy available to challenge the same; that this Court has ample power to interfere in the interlocutory order even if they are tentative in nature, therefore, the impugned order may kindly be declared illegal and void and the same may kindly be set side.

4. On the other hand, the learned counsel for respondents Nos.1 to 3 opposes this petition on the grounds that the petitioner is admittedly a retired Major from Pakistan Army and his monthly pension is more than Rs.30,000; that apart from his pension, he is working in a multinational company and has been drawing a very handsome salary from his job; that the petitioner is owner of a lot of commercial, as well as, residential properties, he receives rent of the said properties and his monthly income from his pension, job and rent of properties is more than Rs.3,00,000 per month; that minor respondents Nos.2 and 3 were got admitted in Beacon House School System, Lahore by the petitioner himself and their monthly school fee is more than Rs.12,000; that the quantum of maintenance allowance as fixed by the learned Judge Family Court, Lahore, is already too meager to meet the expenses of the maintenance of the minor respondents; that the petitioner has filed this writ petition against an interim order, which is not maintainable in the eyes of law; that the petitioner has raised disputed questions of facts in this petition regarding his status and source of income

and the said questions cannot be decided without recording of evidence, therefore, this petition may be dismissed.

5. Arguments heard. Record perused.

6. The Family Court Act, 1964 is a special statute and has been enacted with a specific purpose to ensure expeditious settlement and disposal of disputes relating to marriage and family affairs and also matters connected therewith. It, inter alia, has bestowed upon the Family Court powers under section 17-A of the Act ibid to grant interim maintenance to the concerned parties during the pendency of the proceedings. It also has been mandated that such maintenance shall be paid by the 14th day of each calendar month and in case of default the defence of the defendant shall be struck off and the suit decreed. The purpose behind this legislation is to ensure that during pendency of these proceedings with the Family Court financial constraints faced by the minors are ameliorated. The question now arises that does the Family Court have un-fettered and un-bridled powers to fix interim maintenance at its discretion or is it required to proceed on pragmatic, rational and judicial basis? The answer, of course, is that it should proceed on the latter. It should broadly look into the social status of the parties, the earning of the defendant, his capacity to pay, the requirements of the minor and on this touchstone fix interim maintenance. It also is noteworthy that no right of appeal etc. has been provided against this fixation, because the order is tentative and interim in nature, therefore, the Family Court should be even more careful and precise in this context to ward off any injustice. However, this order is subject to final review after recording evidence of both parties, thus the quantum of maintenance can thereafter be easily determined and fixed accurately. The Court has uninhibited powers to enhance or decrease the quantum of maintenance after appraising deciphering and examining the evidence produced during trial. Therefore, findings qua interim maintenance normally cannot be interfered with, if the same are fixed upon the parameters stated above.

In the present matter, the demand for the maintenance allowance was made at the rate of Rs.1,25,000 per month. Similarly in the application for grant of interim maintenance allowance it was prayed by respondents Nos.1 to 3 that an order for payment of interim maintenance allowance at the rate of Rs.1,25,000 may be passed. The petitioner is admittedly a retired Major from Pakistan Army and he has been

drawing pension from his previous job. In Para No. 6 of the plaint, it was asserted by the plaintiffs/ respondents Nos.1 to 3 that the petitioner/defendant is employed in a multinational company and he is owner of different rented properties. In Para No. 8 of the plaint, it was specifically averred by the plaintiffs/respondents Nos 1 to 3 that income of the petitioner/defendant from his job and rented properties was more than Rs.3,00,000 (Rupee Three Lac) per month. On the other hand, in Para No.6 of the written statement filed by the petitioner/defendant he did not deny that he has no source of income from his rented properties. Regarding the source of income from his job in a multinational company, he has stated that he was earlier working in Haseen Habib Trading Company, Lahore but he has resigned on 30-4-2010. It is pertinent to mention here that the suit for recovery of maintenance allowance and dowry articles was filed by respondents Nos.1 to 3 on 22-1-2010 and prima facie it appears that document regarding the resignation of the petitioner from his job has been prepared by the petitioner during the pendnency of the above mentioned suit in order to avoid the payment of maintenance allowance. The petitioner has only placed on the record his alleged resignation, which has been prepared by the petitioner himself. No document has been placed on the record to show that the said resignation has been accepted by the company. Anyhow, the petitioner did not deny that at the time of filing of the suit, he was employed in a company. Moreover, there is no specific denial in Paras Nos.6 and 8 of the written-statement regarding the claim of respondents Nos.1 to 3 that the petitioner has been receiving rent from the properties owned by him and his monthly income from his job and properties was more than Rs.300,000. He has made a general and vague denial in paragraphs Nos.6 and 8 of his written-statement.

The status of the petitioner can also be tentatively determined from the facts mentioned by the petitioner/defendant in his written statement. The relevant extracts from para No.7 of the written statement filed by the petitioner/ defendant are re-produced here under for ready reference:--

Para No.7…….

……

……

It is pertinent to mention here that at that time the plaintiff No.1 and the said Shuaib Afzal Malik, while committing theft have also taken away the personal belongings LCD TV 32 inch, two beds, UPS with batteries, computer with computer table, carpets 4 in number, etc. purchased by the plaintiff after marriage. Prize Bond amounting to Rs.5,00,000 the plaintiff's personal belongs i.e. NIC Card, passport, property documents, personal military documents, Toyota Corolla Model 2004 (bearing registration No.AHA-412) and its original documents.

……

……

It is also pertinent to mention here that the plaintiff No.1 had access to the answering defendant's ATM Cards. On 20-2-2010, the plaintiff No.1 without the permission of the defendant transferred Rs.1,58,000 from the defendant's account in Askari Bank while using ATM into her own account of Allied Bank at Lalazar Rawalpindi and cash withdrawal of Rs.45,00,000. The plaintiff No.1 also withdraw (sic) Rs.30,000 from defendant's Al-Falah Bank Account. This fact came into the knowledge of the defendant when he checked his account after shifting of the plaintiff No.1".

The perusal of above-mentioned extracts of the written statement, filed by the petitioner/defendant, has prima facie established that the petitioner is a rich person and a man of means. He has mentioned different precious articles like LCD TV 32 inches, Toyota Corolla Car Model 2004 etc., which were available in his house. Similarly, he has mentioned huge amounts like Rs.45,00,000 (Rupees Forty Five Lac), etc. in the said paragraph, which were allegedly transferred from his account to the account of respondent No. 1. It shows that the petitioner has been maintaining accounts worth millions of rupees. His financial status can be assessed from the perusal of above-mentioned paragraphs of his written-statement.

7. Now coming to another aspect of the case i.e. status of the parties and expenses of the minors, it is noted that the petitioner/defendant has also admitted that he himself got the minors admitted in one of the best school systems of the country i.e. Beacon House School System. In this respect Para No.11 of the written statement filed by the petitioner is reproduced hereunder:--

"11. Denied in the light of reply to the foregoing paras. It is further submitted that the defendant in order to provide best, pleasant and healthy atmosphere to his family, kept them at the said address at DHA, he got admitted the minors in the best school system i.e. Beacon House School System. All the expenses had been borne by the defendant".

It is manifest from the perusal of above paragraph of the written-statement that the minors were got admitted by the petitioner himself in a very expensive school of the country i.e. Beacon House School System. He was naturally in a position to pay the fee of the minors and that is why they were got admitted in the said school. The above-mentioned paragraphs of the written statement, filed by the petitioner/defendant, have prima facie established that the petitioner is a man of means and he is a person of sound financial status. Zoha Ibrar (minor respondent No.2) and Muhammad Abdullah (minor respondent No.3) are admittedly studying in Beacon House School System. Their monthly fee is Rs.12,000 per month.

So keeping in view all the above-mentioned factors, it cannot be declared that the interim maintenance allowance as fixed by the learned Judge Family Court vide the impugned order dated 28-1-2011 is exorbitant and beyond the means of the petitioner, thus the impugned order cannot be declared void ab initio or have been passed without jurisdiction.

8. There is no cavil with this preposition that a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is maintainable even against an interim order if the same, is void ab-initio, without jurisdiction or if the same has attained the status of a final order. Reference in this context may be made to the case of Suleman and 4 others v. ASJ Nankana Sahib and 3 others (PLJ 2007 Lahore 1173), and Muhammad Hassan v. Judge Family Court, Bhalwal and another (2008 YLR 1826).

9. Anyhow, every interim order cannot be challenged in writ Jurisdiction, specially if the same does not fall within the above-mentioned categories of interim orders. Notwithstanding the contentions raised by the learned counsel, to my mind the present petition is incompetent and not maintainable on legal plane. Admittedly, the suit is still pending and during its pendency, the learned Judge Family Court has passed the impugned order. Undoubtedly, order passed by the learned Judge Family Court, for

all intents and purposes, is an interlocutory order, as the lis is pending before the learned Judge Family Court, and it has still to render its final verdict. The impugned order has not attained the status of a final order. The Legislature has made such order, passed by the Judge, Family Court as non-appealable by specifically making a provision in that respect by virtue of subsection (3) of Section 14 of the West Pakistan Family Courts Act, 1964, which for facility of reference is reproduced below.

"14 Appeal.---(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable:-

(a) ----------

(b) ----------

(2) ----------

(a) ----------

(b) ----------

(c) ----------

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) ----------

In these circumstances, when the Legislature has specifically prohibited the filing of an appeal against an interim order and if the Constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the Legislature. Reference is made to Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S & G A D, Karachi and others (1996 SCMR 1165), in which the Hon'ble Supreme Court was pleased to hold as under:--

"Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such order."

The above-mentioned view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Mohtarma Benazir Bhutto, MNA and Leader of the Opposition, Bilawal House, Karachi v. The State (1999 SCMR 1447), wherein, at page 1452, it was held as under:--

"It is well settled that orders at the interlocutory stages should not be brought to the higher Courts to obtain fragmentary decision, as it tends to harm the advancement of fair play and justice, curtailing remedies available under the law, even reducing the right of appeal. Refer the case of "Mushtaq Hussain Bukhari v. The State" 1991 SCMR 2136, Muhammad Afzal Zullah, the then Hon'ble Chief Justice, at page 168 of the report observed as follows:--

"It is a wrong or at least misstatement in our state of law, practice, procedures and proceedings in the Courts of law, that wrong orders should be corrected at the time they are passed because it would take less time for the case to conclude. This might have been true half a century to quarter century ago. Thereafter, the challenge to the interlocutory orders has brought about a deluge in the administration of criminal justice. Cases started piling up with the result that the concept of speedy justice came to a grinding halt and powers that may be, started thinking of curtailing remedies even reducing the right of appeals. Cases like the present one do justify such an angry re-action but with a little change of practice in the technical field (for example amendment, vis-a-vis, the subject in section 197, Cr.P.C. it is hoped there would no (sic) be need to curtail the remedies as that too in the stage where we are passing, might be counter-productive"

The petitioner has got an adequate remedy available to him by challenging the impugned order in appeal, which, he may file against the ultimate order/judgment if the same would be passed against the petitioner. This petition is also hit by Article 199 (1) of the Constitution of Islamic Republic of Pakistan, 1973, hence, cannot be entertained.

As discussed earlier, the impugned order can neither be termed as void, ab initio nor without jurisdiction. Similarly, the impugned order has not attained the status of a final order. The impugned order was passed by the learned Judge Family Court, Lahore, who has the jurisdiction to pass the said order under section 17-A of the West Pakistan Family Courts, Act, 1964. The petitioner has not challenged the jurisdiction

of the learned Judge Family Court, Lahore in his written statement filed before the learned trial court. He was not condemned unheard and was provided an opportunity of hearing before passing the impugned order. The quantum of interim maintenance allowance was prima-facie rightly fixed by the learned Judge Family Court, Lahore, while keeping in view the status of the parties and expenses of the minors. The learned counsel for the petitioner is unable to point out any patent illegality or material irregularity in the impugned order, therefore, the instant petition, which has been filed against an interim order passed by a Court of competent jurisdiction, after providing an opportunity of hearing to the parties, is not maintainable in the eyes of law.

10. The petitioner has raised disputed questions of facts in this petition regarding his resignation from the job, source of income and status. It is not possible to determine the veracity of the claim of the petitioner without recording of evidence. Such exercise cannot be undertaken in constitutional jurisdiction, especially when the finding was only tentative and not final and order was also interim in nature. I have fortified my views with the case of Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others (1993 SCMR 618), wherein at page 632 the Hon'ble Supreme Court of Pakistan has held as under:--

"It is a consistent view of this Court that in cases where factual controversies are involved, Constitution petition in the High Court is not the proper remedy, Reference can be made to PLD 1980 SC 139, 1980 SCMR 933, 1981 SCMR 291, 1989 SCMR 918 and PLD 1991 SC 476.

Similarly in another case of Benedict F.D. Souza v. Karachi Building Control Authority and 3 others (1989 SCMR 918) at page 920, the Hon'ble Supreme Court of Pakistan has observed as under:--

"Factual controversies involved in the case, could not be solved without a full-fledged trial. Accordingly we find that the approach of the High Court in its discretionary writ jurisdiction to decline relief to the petitioner, was unexceptionable. No justification has been made out for grant of leave to appeal. The same is refused."

Reference in this context may also be made to the case of Muhammad Irfan v. Judge Family Court, Sargodha and 2 others (2008 CLC 585).

11. In light of the above discussion, the instant petition is without any substance; hence, the same is, hereby, dismissed. There is no order as to costs.

12. Before parting with this judgment, I may observe here that the findings of the learned Judge Family Court, Lahore, in the impugned order, as well as, the observations made in this order are only tentative in nature and not final. Proper quantum of the maintenance allowance has to be fixed by the learned Judge Family Court, after recording of evidence. The learned Judge Family Court may increase or decrease the quantum of maintenance allowance at the time of final adjudication of the case, without being influenced by any observation made in the impugned order, as well as, in this order.

M.H./A-68/L **Petition dismissed.**

2012 Y L R 899

[Lahore]

Before Malik Shahzad Ahmad Khan, J

ABDUL RAUF---Petitioner

Versus

S.H.O. and 3 others---Respondents

Criminal Miscellaneous No.1977-H of 2011, decided on 4th November, 2011.

Criminal Procedure Code (V of 1898)---

----S. 491---Habeas corpus petition---Detention of accused while on bail---Recovery of accused---Detenu (accused) and co-accused were charged for a case under section 376, PPC but were granted bail by court below---Complainant of the case filed a petition before High court for cancellation of bail to the extent of the co-accused only, which was accepted---Complainant did not move any petition for cancellation of bail of the detenu but still detenu was arrested by police officials---Bail granted to detenu had not been cancelled by any court, therefore, his detention was improper---Habeas corpus petition was accepted and detenu was directed to be released.

Syed Faiz-ul-Hassan for Petitioner.

Arshad Mehmood, D.P.G. with Amir, A.S.-I. for Respondents.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This petition has been filed with the prayer that detenu namely Shoukat Ali son of Muhammad Bakhsh has illegally been confined by Abid Ali, respondent No.3 and respondents Nos. 1 to 3 be directed to produce the detenu before this Court so that he may be set at liberty:

2. As per brief facts of the present case the above mentioned detenu is an accused in case F.I.R. No.106 of 2011 dated 2-4-2011 Police Station Langrana, District Chiniot. The said detenu and his co-accused Abdul Ghafoor were granted bail vide order dated 15-6-2011 by the learned Additional Sessions Judge, Chiniot. The complainant of the above mentioned case filed a petition under section 497(5) of Cr.P.C. for cancellation of bail of the above mentioned co-accused Abdul Ghafoor in this court, which was allowed vide order dated 19-9-2011. According to the petitioner the bail of the above mentioned co-accused Abdul Ghafoor was cancelled by this Court whereas respondent No.3 has also arrested the above mentioned detenu namely Shoukat Ali, though his bail was not cancelled by this Court. The petitioner has filed this habeas petition on the ground that the detenu has illegally been detained in the above mentioned case whereas he has already been granted bail by the learned Additional Sessions Judge, Chiniot.

3. It is contended by the learned counsel for the petitioner that the above mentioned detenu is an accused in the above mentioned case and he was granted bail by the learned Additional Sessions Judge, Chiniot on 15-6-2011 and the said bail granting

order still holds the fields; that as the bail of detenu Shoukat Ali has not been cancelled by any court, therefore, his detention is improper and illegal; that the detenu may be directed to be set at liberty.

4. On the other hand, the learned D.P.-G. after going through the relevant record and on instructions has informed that bail of above mentioned co-accused Abdul Ghafoor was cancelled whereas the bail of Shoukat Ali (detenu) was not cancelled by this Court vide order dated 19-9-2011. He has further contended that the above mentioned detenu was arrested due to mis-understanding by Abid Hussain, A.S.-I., (respondent No.3) vide Zimni No.24 dated 20-9-2011.

5. Arguments heard. Record perused.

6. The above mentioned detenu Shoukat Ali is an accused in case F.I.R. No.106 of 2011 dated 2-4-2011 offence under section 376 of P.P.C. registered at Police Station Langrana District Chiniot. The said detenu and co-accused were granted bail after arrest by the learned Additional Sessions Judge, Chiniot vide order dated 15-6-2011. The complainant of the above mentioned F.I.R. filed a petition for cancellation of bail to the extent of above mentioned co-accused Abdul Ghafoor vide Criminal Miscellaneous No.8095-CB of 2011. The said bail cancellation was accepted by this Court vide order dated 19-9-2011. The complainant did not move any petition for cancellation of bail of the above mentioned detenu Shoukat Ali. Anyhow he was also arrested by Abid Hussain A.S.-I. in the above mentioned case vide order dated 19-9-2011. The bail allowed to the above mentioned detenu by the learned Additional Sessions Judge, Chiniot vide the above mentioned order has not been cancelled so far, by any court, therefore, detention of the said detenu in the above mentioned case is improper. The learned counsel for the petitioner has argued that Abid Hussain, A.S.-I. may be proceeded against for illegal and improper detention of the above mentioned detenu. This argument of the learned counsel for the petitioner has been controverted by the learned D.P.-G. He states that there was no ill-will on the part of Abid Hussain, A.S.-I. respondent No.3 and the detenu was arrested due to misunderstanding. He has further argued that the detenu had himself invited the above mentioned misunder-standing because he was present in this court along with his co-accused at the time of decision of bail cancellation of his co-accused on 19-9-2011.

The disputed questions of facts are involved to resolve the above mentioned issue, which exercise cannot be undertaken at this stage. The parties may seek alternate remedies provided under the law for decision of the above mentioned issue. This petition is, therefore, allowed and the detenu Shoukat Ali son of Muhammad Bukhsh caste "Kumhar" resident of Hanjra Chak No.241/J.B. Tehsil Bhawana District Chiniot is directed to be released from jail, forthwith in case F.I.R. No.106 of 2011 dated 2-4-2011 offence under section 376 of P.P.C. registered at Police Station Langrana, District Chiniot, if he is not required in any other case. Copy "Dasti".

M.W.A./A-25/L **Petition accepted.**

2012 Y L R 1296

[Lahore]

Before Malik Shahzad Ahmad Khan, J

UMAR HAYAT---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.12129-B of 2011, decided on 27th September, 2011.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 380/411/457--- Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979), S. 14---Theft in dwelling house, dishonestly receiving stolen property, lurking house-trespass or house-breaking by night, theft liable to Tazir---Ad interim pre-arrest bail, recalling of---Accused was named in FIR and allegation of commission of theft of different articles from the house of complainant had been levelled against the accused---Statements of two prosecution witnesses had been recorded under section 161, Cr.P.C., according to which accused had confessed his guilt regarding commission of theft in the house of the complainant---Articles stolen were yet to be recovered from the accused and he could not establish any mala fide on the part of the complainant for his false involvement in the case, which was a condition precedent for the grant of bail before arrest---Bail petition of accused was dismissed and ad interim pre arrest-bail granted to him was recalled.

Malik Muhammad Imtiaz Mahl for Petitioner.

Arshad Mahmood, Deputy Prosecutor-General for the State with Fida Hussain A.S.-I.

Muhammad Tariq (complainant) present in person.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---Umar Hayat (the petitioner) has moved the instant petition under section 498 of Cr.P.C. for grant of bail before arrest in case F.I.R. No.739, dated 19-8-2011, registered under sections 457, 380, 411 of P.P.C., read with section 14 of the Offences Against Property (Enforce-ment of Hadood) Ordinance, 1979, with Police Station, Satellite Town, District Sargodha.

2. As per brief allegations levelled in the F.I.R., the petitioner along with his co-accused committed theft of different articles of the complainant from his house. The allegations of receiving stolen property dishonestly have also been levelled against the petitioner by the prosecution; hence, the above mentioned F.I.R.

3. The petitioner filed his petition for bail before arrest, before the learned

Additional Sessions Judge, Sargodha, but the same was dismissed vide order dated 13-9-2011, hence, the present petition before this Court.

4. It is contended by the learned counsel for the petitioner that the petitioner has, falsely been implicated in this case with mala fide intention of the complainant; that in fact, the petitioner is shopkeeper of scrap articles and he purchased the articles belonging to the complainant with bona fides and at the most the provisions of section 411 of P.P.C. are attracted, which offence does not fall within the ambit of prohibitory clause of section 497 of Cr.P.C; that the co-accused of the petitioner namely Muhammad Yasin has been granted bail after arrest by the learned Additional Sessions Judge, Sargodha, vide his order dated 8-5-2011, therefore, applying the rule of consistency the petitioner is also entitled to the same concession, therefore, the petitioner may be granted bail before arrest.

5. On the other hand, the learned Deputy Prosecutor-General, for the State assisted by the complainant, in person, has seriously opposed this bail application on the grounds that the petitioner is named in the F.I.R.; that the petitioner knowingly purchased the articles belonging to the complainant; that the petitioner could not establish any mala fide on the part of the complainant, which is a condition precedent for grant of bail before arrest; that the prosecution witnesses have fully supported the prosecution version in their statements recorded under section 161 of Cr.P.C, therefore, this petition may be dismissed.

6. Arguments heard and record perused.

7. The petitioner is named in the F.I.R. The allegation of commission of theft of different articles from the house of the complainant has been levelled against the petitioner. The statements of two prosecution witnesses namely Muhammad Asad and Faheem Khan have been recorded under section 161 of Cr.P.C., according to which, the petitioner has confessed his guilt regarding the commission of theft in the house of the complainant. The stolen articles are yet to be recovered from the possession of the petitioner. The petitioner could not establish any mala fide on the part of the complainant for his false involvement in the instant case, which is a condition precedent for the grant of bail before arrest.

8. In the light of above discussion, this petition having no merits is dismissed and ad interim pre-arrest bail already granted to the petitioners by this Court on 20-9-2011 is hereby recalled and withdrawn.

9. It is, however, clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of decision of other issues involved in the present case or at the time of final adjudication of the case before the learned trial court.

M.W.A./U-2/L **Bail refused.**

2012 Y L R 1441

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ILYAS alias BHOLA---Appellant

versus

THE STATE---Respondent

Criminal Appeals Nos.590, 756 and Murder Reference No.182 of 2007, heard on 5th April, 2012.

(a) Penal Code (XLV of 1860)---

----S. 302(b)/34---Qatl-e-amd---Common intention---Appreciation of evidence---No delay in reporting the matter to the Police---Incident took place near the house of eye-witnesses, who being inmates of the house, were natural witnesses of the occurrence---Their presence at the spot at the relevant time was quite natural---Their evidence qua accused was straightforward and confidence-inspiring--- Medical evidence had substantially supported the ocular account furnished by the complainant and prosecution witness---Doctor concerned was cross-examined by the defence counsel, but nothing favourable to the accused could be brought on the record during the process of his cross-examination---Prosecution case against accused was further corroborated by the recovery of pistol, which was recovered on his pointation---Empties of said pistol were sent to the Forensic Science Laboratory and report of said Laboratory was positive---Evidence of recovery of pistol and positive report of the Forensic Science Laboratory, had further corroborated the prosecution case against accused---Motive in the case which was not proved, could not be used against accused---Statements of defence witnesses were not reliable as they were resident of place which was away from place of occurrence---One of the defence witnesses was a chance witness who had not explained any plausible reason for his presence at the place of occurrence---Defence evidence produced by accused, being not worthy of reliance, same was not helpful to accused---Even if the evidence of motive was excluded from consideration, there was sufficient incriminating evidence available on the record against accused---Prosecution case was fully established to the extent

of accused through evidence of the complainant and prosecution witness---Prosecution, in circumstances, had fully proved its case against accused beyond the shadow of doubt---Conviction of accused under S.302(b), P.P.C. awarded by the Trial Court was maintained, but there were mitigating circumstances in his favour---Firstly, the prosecution had alleged a specific motive, but it had failed to prove the same---Secondly, his co-accused had been acquitted---Accused was also entitled for the benefit of doubt on extenuating circumstances while deciding his question of sentence---Sentence of death awarded to accused, was altered to imprisonment for life, in circumstances.

Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 and Ahmad Nawaz and another v. The State 2011 SCMR 593 **rel**.

(b) Penal Code (XLV of 1860)---

----S.302(b)/34---Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-e-amd---Common intention---Appeal against acquittal---Accused though was declared innocent in two successive investigations, but High Court was not bound by the opinion given by the Investigating Officer, because it was always the evidence available on the record which weighed with the court and not the Police opinion while passing the judgment---Accused had been assigned the role of making fire shots with his pistol at the deceased---Trial Court had acquitted accused---After perusal of available record and considering findings arrived at by the Trial Court, it appeared that the reasons advanced by the Trial Court for recording acquittal of accused, were not either arbitrary or perverse; and the conclusion arrived at in the impugned judgment appeared to be in accordance with law---No legitimate exception could be taken to the conclusion arrived at by the Trial Court---Even otherwise accused after his acquittal by the Trial Court, enjoyed double presumption of innocence in his favour, and courts seized with appeal against acquittal under S.417, Cr.P.C., were obliged to be very careful in dislodging such presumption---In view of said circumstances coupled with guidelines given by the Supreme Court in its judgment (2009 SCMR 803), nothing arbitrary, capricious, fanciful or against the record was to warrant interference with the acquittal of accused---Appeal against acquittal was dismissed, in circumstances.

Iftikhar Hussain and others v. The State 2004 SCMR 1185 and Haji Paio Khan v. Sher Biaz and others 2009 SCMR 803 **rel**.

Chaudhry Riasat Ali for Appellant and for Respondent No.1 (in Criminal Appeal No.756 of 2007).

Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.

Qamar Zaman Qureshi for the Complainant. (in Criminal Appeal Nos.590 of 2007) and for Appellant (in Criminal Appeal No.756 of 2007). .

Date of hearing: 5th April, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.182 of 2007, sent by the learned trial Court, Criminal Appeal No.590 of 2007, preferred by appellant Muhammad Ilyas alias Bhola and Criminal Appeal No.756 of 2007, filed by Akbar Ali-complainant against the acquittal of Muhammad Abbas accused, by this single judgment, as all these matters stem out of the judgment dated 18-4-2007, passed by learned Additional Sessions Judge, Lahore.

2. Muhammad Ilyas alias Bhola appellant alongwith Muhammad Abbas and Muhammad Ashfaq accused was tried in case F.I.R. No.462, dated 19-7-2004, registered at Police Station, Kahna, Lahore in respect of offences under sections, 302, 34 of P.P.C. After conclusion of the trial, vide its judgment dated 18-4-2007, the learned trial court has acquitted Muhammad Abbas and Muhammad Ashfaq co-accused, whereas, Muhammad Ilyas appellant has been convicted and sentenced as under:--

Muhammad Ilyas alias Bhola

> Under section 302(b) of P.P.C. to death as Ta'zir for committing Qatl-e-Amd of Ahmad Ali deceased. He was also ordered to pay Rs.4,00,000 (Rupees four hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprison-ment for six months.

It is pertinent to mention here that Criminal Appeal No. 756 of 2007 was filed against the acquittal of Muhammad Ashfaq and Muhammad Abbas which was

dismissed on merits vide order dated 18-3-2008 to the extent of Muhammad Ashfaq, whereas, to the extent of Muhammad Abbas accused the above mentioned appeal was admitted and notice was issued to the above mentioned Muhammad Abbas son of Sarfraz Alam (respondent No. 1) in the said appeal.

3. Brief facts of the case as given by the complainant, namely, Akbar Ali (P.W.1.) in his Fard Bian' Exh.PA on the basis of which formal F.I.R. (Exh.PA/1) was chalked out, are that on 19-7-2004 at about 6-45 p.m., his brother Ahmad Ali went to the Haveli from his house to milk the buffalo. The said Haveli was situated in the same street. After doing his job, when he was coming from the Haveli towards his house. At that time, Muhammad Abbas accused, Muhammad Ilyas alias Bhola appellant and Muhammad Ishfaq (co-accused since acquitted) were present in the street while armed with pistols. Muhammad Ilyas alias Bhola appellant and Muhammad Abbas accused were present on their Motorcycle No. LOZ 7029 near the turn of the street, whereas, Muhammad Ishfaq (co-accused since acquitted) was also present in the same street at some distance. Muhammad Ishfaq (co-accused since acquitted) raised lalkara on seeing Ahmad Ali (deceased) that he should not be let alive, whereupon, the appellant Muhammad Ilyas alias Bhola and the accused Muhammad Abbas, both started firing with their respective weapons at Ahmad Ali (deceased). First fire shot was made by Muhammad Abbas accused which landed on the chest of Ahmad Ali, whereas, second fire shot was made by Muhammad Ilyas alias Bhola appellant which landed on the abdomen of Ahmad Ali (deceased) who fell down. Muhammad Ilyas alias Bhola appellant and Muhammad Abbas accused, thereafter, started indiscriminate firing at Ahmad Ali (deceased). The accused, thereafter, fled away from the spot while brandishing their respective weapons. Ahmad Ali was taken to the General Hospital, Lahore in an injured condition, where he succumbed to the injuries.

The motive behind the occurrence as alleged was that Ahmad Ali deceased contracted a love marriage with Mst. Yasmeen Bibi, who was sister of all the accused.

4. Muhammad Abbas accused and Muhammad Ishfaq co-accused were not arrested by the police as they were declared innocent, whereas, the appellant Muhammad Ilyas alias Bhola was formally arrested on 30-8-2004. On the same day Muhammad Ilyas alias Bhola appellant got recovered pistol .30 bore P-5 alongwith licence from his

residential house situated at Ward No. 8, Kahna Nau, Lahore, which was taken into possession vide recovery memo Exh.PF. After completion of investigation, the challan was prepared and submitted before the learned trial court declaring Muhammad Ilyas alias Bhola appellant as guilty. The learned trial court, after recording cursory statement of the complainant Akbar Ali (P.W.1.) also summoned Muhammad Abbas and Muhammad Ishfaq accused to face the trial and after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed the charge against all the accused on 3-4-2006, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced 10 witnesses, during the trial. Akbar Ali complainant (P.W.1.) and Barkat Ali (P.W.2.) are the witnesses of ocular account.

The medical evidence was furnished by Dr. Shahid Mehmood Nasir (P.W.11.).

Allah Wasaya (P.W.3.), Jamshed Ali (P.W.4.), Syed Younas Bukhari draftsman (P.W.6.), Muhammad Ilyas HC/7020 (P.W.7.), Muhammad Boota, S.-I. (P.W.8.) and Muhammad Yasin, A.S.-I. (P.W.10.) are the formal witnesses. Manzoor Ahmad C/2634 (P.W.5.) is the witness of recovery of pistol P5, which was allegedly recovered on the pointation of Muhammad Ilyas alias Bhola appellant. Muhammad Anwar, Inspector/S.H.O. (P.W.9.) was the Investigating Officer of this case. The prosecution produced documentary evidence in the shape of F.I.R. Exh. PA/1, copy of complaint Exh. PA, memo of possession of post-mortem report Exh.PB, memo of possession of empty bullets Exh. PC, memo of possession of blood stained cotton Exh. PD, memo of possession of motorcycle Exh. PE, memo of possession of pistol .30 bore Exh. PF, copy of death report Exh.PH, copy of post-mortem report, etc. Exh.PK, copy of site plan Exh. PG, report of Chemical Examiner Exh. PM, Serologist report Exh. PN, report of Forensic Science Laboratory Exh. PL and Exh. PL/ 1 and closed its evidence.

The statements of the appellant Muhammad Ilyas alias Bhola, Muhammad Abbas and Muhammad Ishfaq accused under section 342, Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you" Muhammad Ilyas alias Bhola appellant replied as under:--

"I have been falsely implicated in this case by the complainant and his brothers. I have no motive to commit the offence alleged against me. The alleged murder took place outside the house of Ahmed Ali deceased in the lane. The occurrence has been concocted in connivance with the police to have taken place near the Haveli More. All the P.Ws. are closely related and they have not seen the occurrence. Complainant Akber Ali is a wagon driver and was away driving his wagon. Barket Ali P.W. resided at Ichhra with his in-laws at the time of occurrence. Both P.Ws. have not seen the occurrence and they have implicated me in this case merely on the basis of suspicion.

Similarly Muhammad Abbas accused (respondent No. 1 in Criminal Appeal No. 756 of 2007) While answering to question "Why this case against you and why the P.Ws. have deposed against you" replied as under:--

"I have been falsely implicated in this case by the complainant and his brothers. I have no motive to commit the offence alleged against me. The alleged murder took place outside the house of Ahmad Ali deceased in the lane. The occurrence has been concocted in connivance with the police to have taken place near the Haveli More. All the P.Ws. are closely related and they have not seen the occurrence. Complainant Akber Ali is a wagon driver and was away driving his wagon. Barket Ali P.W. resided at Ichhra with his in-laws at the time of occurrence. Both P.Ws. have not seen the occurrence and they have implicated me in this case merely on the basis of suspicion. I was found innocent during investigation. No recovery has been effected from me. I was never arrested by the police. I am innocent.

All the accused opted not to make statement under section 340(2) of Cr.P.C. but they produced Zulfiqar Ali as (DW-I) and Muhammad Iqbal as (DW-2) in their defence. The learned trial Court vide its judgment dated 18-4-2007, while acquitting co-accused Muhammad Abbas and Muhammad Ishfaq, found Muhammad Ilyas alias Bhola appellant guilty and convicted and sentenced him as mentioned and detailed above.

6. The learned counsel for the appellant Muhammad Ilyas alias Bhola and accused Muhammad Abbas (respondent No.1 in Criminal Appeal No. 756 of 2007), contends that the accused were falsely implicated in this case; that there is delay of more than

two hours in lodging the F.I.R., whereas, the police station was only at the distance of 1/2 kilometer from the place of occurrence; that it is a case of the prosecution that the deceased had gone to milk the buffalo but no buffalo was seen by the police when the police inspected the site; that the eye-witnesses produced by the prosecution are chance witnesses and they have not been able to explain their presence at the spot at the relevant time; that the complainant is a wagon driver and he has not stated that he was not performing his normal duties at the time of occurrence; that both the witnesses are interested witnesses as well; that the motive alleged by the prosecution is highly improbable and the same was not proved by the prosecution; that the recovery of pistol P-5 has been planted upon the appellant, therefore, the report of Forensic Science Laboratory is not helpful to the prosecution case ; that the prosecution has failed to prove its case against the appellant Muhammad Ilyas alias Bhola beyond any shadow of doubt and that the appellant is entitled to acquittal.

7. On the other hand, the learned Deputy-Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the contentions of the learned counsel for the accused on the grounds that the delay per se in lodging the F.I.R. is no ground to discard the evidence of the eye-witnesses and even otherwise there is no delay in reporting the matter to the police; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspired confidence and despite cross-examination, the defence could not shake the testimony of the prosecution witnesses; that there could not be any reason to falsely implicate the appellant in this case; that the ocular account is fully supported by the medical evidence as the deceased received as many as eight injuries on his person, which fact is evident from the post mortem examination report (Exh. PK); that motive has also been proved and it has not been denied by the appellant; that even otherwise in such like cases substitution is a rare phenomenon; that pistol. 30 bore (P.3) was recovered on the pointation of the appellant and according to the report of FSL (Ex.P.L), nine out of ten empties recovered from the place of occurrence were fired from the above-mentioned pistol, which has further corroborated the prosecution case against the appellant Muhammad Ilyas alias Bhola; that the prosecution has proved its case against the appellant beyond any shadow of doubt and the defence evidence is not

reliable; that the appeal filed by the appellant against his conviction and sentence be dismissed and Murder Reference be answered in the affirmative.

So far Muhammad Abbas (respondent No. 1 in Criminal Appeal No.756 of 2007) is concerned he was named in the F.I.R.; that there is allegation that he also resorted to firing and his fire shot hit at the chest of the deceased, which is supported by medical evidence and that the opinion of the police regarding guilt or innocence of an accused is inadmissible in evidence and he is also liable to be convicted and sentenced.

The learned counsel for respondent No.1 in Appeal No.756 of 2007 contends that an accused, after his acquittal by the trial court enjoys double presumption of innocence; that he was found innocent by the police and even he was not arrested; that no recovery has been effected from Muhammad Abbas accused to corroborate the version of the prosecution and he has rightly been acquitted by the learned trial court.

8. **We have heard the arguments of the learned counsel for the parties and have also gone through the evidence available on the record with their able assistance.**

9. We would first like to discuss the case of Muhammad Ilyas alias Bhola appellant.

10. The occurrence in this case took place on 19-7-2004 at 6-45 p.m., (evening) at Ward No. 6 Kahna situated in the area of Police Station Kahna, District Lahore. The matter was reported to the police through 'Fard Bian' Exh. PA by the complainant Akbar Ali (P.W.1.) at 8-30 p.m. at Emergency Ward General Hospital, Lahore. The formal F.I.R. was registered on the same day at 9-05 p.m. The place of occurrence is situated at the distance of half kilometer from the Police Station. Immediately after the occurrence Ahmad Ali (deceased) was taken to the General Hospital, Lahore in an injured condition by the complainant. Considering the place of occurrence, its distance from the Police Station and the time of registration of the F.I.R. Exh.PA/1 and other circumstances, we are of the view that there was no delay in reporting the matter to the police.

11. The prosecution in order to prove the ocular account has produced the complainant Akbar Ali (P.W.1.) and Barkat Ali (P.W.2.). According to the statement of the complainant Akbar Ali (P.W.1.) on 19-7-2001 at about 6-45 p.m. his brother

Ahmad Ali went to the Haveli from his house in order to milk the buffalo. Haveli and the house of the complainant were situated in the same street. After milking buffalo, when Ahmad Ali was coming back to his house, at that time Muhammad Ilyas alias Bhola and Muhammad Abbas respondent No. 1 in connected Criminal Appeal No. 756 of 2007, both sons of Sarfraz were already present while armed with pistols on their Motorcycle bearing Registration No. LOZ 7029 near the turn of the street, whereas, Ishfaq alias Shakan son of Sarfraz accused while armed with pistol was also present in the same street. He (Ishfaq alias Shakan) accused on seeing Ahmad Ali (deceased) raised a lalkara that Ahmad Ali be not let alive, upon which first fire shot was made by Muhammad Abbas accused which landed on the chest of Ali Ahmad, whereas, second fire shot was made by Muhammad Ilyas alias Bhola appellant which landed on the abdomen of Ahmad Ali who fell down. The appellant Muhammad Ilyas alias Bhola and Muhammad Abbas accused, thereafter, started indiscriminate firing. Ahmad Ali was socked with blood. Accused, thereafter, fled away from the spot. The statement of Barkat Ali (P.W.2.) before the learned trial court is also in line with the statement of Akbar Ali (P.W.1.). The above-mentioned eye-witnesses namely Akbar Ali (P.W.1.) and Barkat Ali (P.W.2.) are natural witnesses of the occurrence. The place of occurrence is not disputed in this case. The incident took place near the house of the above-mentioned eye-witnesses. They being inmates of the house are natural witnesses of the occurrence. Their presence at the spot at the relevant time is quite natural. Their evidence qua Muhammad Ilyas alias Bhola appellant is straightforward and confidence-inspiring.

12. The prosecution had produced medical evidence through Dr. Shahid Mehmood Nasir (P. W. 11). He on 20-7-2004 at 1-30 p.m. conducted the Post-mortem Examination on the deadbody of Ahmad Ali through Post-mortem Report Exh. PK, diagrams Exh. PK/1 and Exh. PK/2. He found the following injuries on the person of Ahmad Ali deceased:--

(1-A) 0.5 x 0.5 cm on front of left side of chest, 3 cm below left nipple.

(1-B) A firearm lacerated wound 0.5 x 0.5 cm with everted margins present on back of chest, 21 cm from occipital protuberance in middle.

(2-A) 1 x 0.5 cm below and lateral to umbilicus with inverted margins 6 cm from anterior superior iliac spine on right.

(2-B) A firearm lacerated wound with everted margins 0.5 x 0.5 cm on the right side of abdomen 6 cm right of umbilicus.

(3) A firearm lacerated wound with inverted margins on the left side of abdomen.

(4) Grazed wound on right abdominal wall below lateral to umbilicus on right side.

(5-A) A firearm lacerated wound 0.5 x 0.5 (in right thigh, 3 inches from anterior iliac spine on front of thigh.

(5-B) A fire arm everted wound 0.5 x 0.5 on right buttock, 9 cm from natal cleft.

(6-A) A firearm injury with inverted margins on front of thigh 8 cm from injury No. 5-A

(6-B) 0.5 x 0.5 cm on left buttock with everted margins, 2 cm from natal cleft.

(7-A) A firearm injury with inverted margins 1 x 0.5 cm on front of thigh below and medial 140 cm from injury No. 6-A.

(7-B) A firearm injury with everted margins 0.5 x 0.5 cm on right buttock. 7 cm from injury No. 6-B.

(8-A) A firearm injury with inverted margins 0.5 x 0.5 cm on left thigh about middle 15 cm from anterior superior iliac spine.

(8-B) A firearm injury with everted margins 0.5 x 0.5 cm on left thigh 6 cm from injury No. 8-A.

According to his opinion the above-mentioned injuries were caused by a firearm weapon. The time that elapsed between injury and death was within few minutes and between death and post mortem was 18 to 24 hours. The above referred medical evidence has substantially supported the ocular account furnished by Akbar Ali (P.W.1.) and Barkat Ali (P.W.2.). According to the medical evidence the nature of injuries on the person of Ahmad Ali deceased, the kind of weapon used during the

occurrence and the time of occurrence/death has tallied with the evidence of eye-witnesses Akbar Ali (P.W.1.) and Barkat Ali (P.W.2.). Dr. Shahid Mehmood Nasir (P.W.11.) was cross-examined by the learned defence counsel but nothing favourable to the accused/appellant could be brought on the record during the process of his cross-examination.

13. The prosecution case against Muhammad Ilyas alias Bhola appellant was further corroborated by the recovery of pistol P-5 which was recovered on his pointation vide recovery memo Exh.PF. We have noted that ten empties of .30 bore pistol were recovered on 19-7-2004 from the place of occurrence. The said empties were sent to the Forensic Science Laboratory on 24-8-2004. The appellant Muhammad Ilyas alias Bhola was formally arrested in this case on 30-8-2004 and pistol P-5 was recovered on his pointation on the same day vide recovery memo Exh.PF. The said pistol was received at Forensic Science Laboratory, Punjab, Lahore on 30-9-2004 and according to the report of the Forensic Science Laboratory Exh.PL, nine empties recovered from the place of occurrence were fired from .30 bore pistol recovered on the pointation of Muhammad Ilyas alias Bhola appellant, therefore, the evidence of recovery of pistol P-5 and positive report of the Forensic Science Laboratory Exh.PL have further corroborated the prosecution case against Muhammad Ilyas alias Bhola appellant.

14. Insofar as the evidence of motive is concerned the complainant Akbar Ali (P.W.1.) while appearing in the court has stated that Ahmad Ali deceased and Mst. Yasmeen sister of the accused persons had contracted love marriage and the matter was compromised. He did not state that the accused kept the said grudge in their minds and due to the above-mentioned motive they committed the murder of Ahmad Ali. Although Barkat Ali (P.W.2.) while appearing before the court has stated that the accused kept the grudge in their hearts and due to the above mentioned reason they committed the murder of Ahmad Ali (deceased) but at the same time he has also stated that the matter was patched up. So according to the statement of the above mentioned prosecution witnesses the matter regarding the alleged love marriage of the deceased with the sister of the appellant was already patched up between the parties. The above mentioned motive was not put to the appellant Muhammad Ilyas alias Bhola in his statement under section 342 of Cr.P.C., therefore, the alleged motive cannot be used against Muhammad Ilyas alias Bhola appellant. Keeping in view the above-

mentioned facts, we are of the considered opinion that the motive in this case was not proved.

15. The accused also produced Zulfiqar Ali (DW-1) and Muhammad Iqbal (DW-2) in their defence. According to the statement of Zulfiqar Ali (DW-1) on 19-7-2004 he was present in the house of his brother-in-law (Bahnoi) Haji Shaukat situated in Ward No.8. He further stated that on hearing the report of firing he came out of the house of his brother-in-law and saw Ahmad Ali in an injured condition lying on the ground and except Shah Muhammad no other relative of Ahmad Ali was seen by him at that time. Similarly Muhammad Iqbal (DW-2) is also resident of Ward No. 8. He has also stated that on 19-7-2004 at evening time on hearing noise of fire shots he came out of his house and saw Mohallahdar gathered on the street outside the house of Ahmad Ali who was lying in an injured condition on the ground. At that time, nobody named Muhammad Ilyas alias Bhola and Muhammad Abbas, as accused. The statements of above-mentioned defence witnesses are not reliable, because they are resident of Ward No.8, whereas, the occurrence took place in Ward No.6. All the accused are resident of Ward No.8, therefore, it appears that being Mohallahdar of the accused, they appeared in their defence. Zulfiqar Ali DW-1 is a chance witness and he has not explained any plausible reason for his presence in the house of his brother-in-law. He has admitted during his cross-examination that he never appeared before any police officer during the investigation of this case in defence of the accused. Muhammad Iqbal (DW-2) has admitted that he remained in jail in narcotic case at Peshawar jail. He has also stated that he was arrested in the murder case of his brother by the police of Police Station Kahna. Although he claimed that he appeared before the Investigating Officer Muhammad Anwar, Inspector/ S.H.O. (P.W.9.) in defence of the accused persons but this fact was never brought on the record by the learned defence counsel during cross-examination of Muhammad Anwar, Inspector/S.H.O. (P.W.9.). Both the above mentioned witnesses have admitted during their cross-examination that they had not seen anybody firing at Ahmad Ali deceased meaning thereby they were not eye-witnesses of the occurrence. In view of the above discussion the defence evidence produced by the appellant is not worthy of reliance and the same is not helpful to the appellant Muhammad Ilyas alias Bhola.

16. We have disbelieved the evidence of motive, however, if the evidence of motive is excluded from consideration even then there is sufficient incriminating evidence available on the record against Muhammad Ilyas alias Bhola appellant. As discussed earlier the prosecution case was fully established to the extent of Muhammad Ilyas alias Bhola appellant through the evidence of Akbar Ali (P.W.1.) and Barkat Ali (P.W.2.). Their evidence is straight-forward and confidence inspiring. The ocular account of the prosecution is supported by the evidence of Dr. Shahid Mehmood Nasir (P.W.11.), as well as, by the post-mortem report Exh. PK, pictorial diagrams Exh.PK/1 and Exh.PK/2. It is further corroborated by the recovery of pistol P-5 from the possession of the appellant Muhammad Ilyas alias Bhola and positive report of Forensic Science Laboratory Exh.PL. Keeping in view the above mentioned evidence, we are of the considered view that the prosecution has fully proved its case against Muhammad Ilyas alias Bhola appellant, beyond the shadow of any doubt.

17. Now we would like to discuss the case of Muhammad Abbas, respondent No.1 in Criminal Appeal No.756 of 2007. Muhammad Abbas and Muhammad Ishfaq accused both were declared innocent during police investigation. They were found not involved in the commission of offence so they were not arrested by the police. Anyhow, both of them were summoned to face the trial by the learned trial court after recording of cursory evidence of the complainant Akbar Ali (P.W.1.). Muhammad Abbas and Muhammad Ishfaq accused were acquitted by the learned trial court but on the appeal filed by the complainant Muhammad Abbas was summoned, whereas, to the extent of Muhammad Ishfaq accused the appeal was dismissed by this Court vide order dated 18-3-2008. Although Muhammad Abbas accused was declared innocent in two successive investigations but this Court is not bound by the opinion given by the Investigating Officer because it is always the evidence available on the record, which weigh with the Court and not the police opinion while passing the judgment.

18. Muhammad Abbas accused has been assigned the role of making fire shots with his pistol at the person of Ahmad Ali deceased. According to the above mentioned eye-witnesses, first fire shot was made by Muhammad Abbas accused which landed on the chest of Ahmad Ali deceased, whereas, second fire shot was made by Muhammad Ilyas alias Bhola accused on the abdomen of Ahmad Ali and, thereafter,

both the accused made indiscriminate firing. We have noted that 10 empties were recovered from the spot on the day of occurrence and according to the report of Forensic Science Laboratory Exh. PL nine out of the above mentioned ten empties were fired from the pistol recovered from the possession of Muhammad Ilyas alias Bhola co-accused, whereas, 10th empty was without percussion cap, therefore, no opinion could be expressed in respect of the said empty. The Forensic Science Laboratory report has fully established that the empties recovered from the place of occurrence were fired with one pistol which was recovered by Muhammad Ilyas alias Bhola co-accused and the allegation that Muhammad Abbas appellant fired with his pistol at Ahmad Ali has not been corroborated by the Forensic Science Laboratory Report Exh.PL. Furthermore, no weapon of offence was recovered from the possession of Muhammad Abbas respondent No. 1 during police investigation, rather he was found innocent by the police. The motive as alleged in the F.I.R. was that the accused had the grudge of love marriage of the deceased Ahmad Ali with their sister namely Mst. Yasmin Bibi. As discussed earlier the said motive was not established in this case because the prosecution witnesses have themselves admitted that the matter was patched up between the parties. The said motive was not put to Muhammad Abbas accused in his statement recorded under section 342 of Cr.P.C.

After perusal of the available record and considering the findings arrived at by the learned trial Court, we are of the view that the reasons advanced by the learned trial court for recording acquittal of the respondent No.1 have not been either arbitrary or perverse and the conclusion arrived at in the impugned judgment appears to us to be in accordance with law. This Court has not been able to take any legitimate exception to the conclusion arrived at by the learned trial Court. Even otherwise, it is settled principle of law that the accused, after his acquittal by trial Court enjoys double presumption of innocence in his favour and Courts seized with the appeal against acquittal, under section 417 of Cr.P.C. are obliged to be very careful in dislodging such presumption. Reliance can advantageously be made to the case of Iftikhar Hussain and others v. The State (2004 SCMR 1185) wherein at page 1194, the Hon'ble Apex Court was pleased to observe as under:--

> "It is well-settled principle of criminal administration of justice that when an accused is acquitted of the charge, he enjoys double presumption of

innocence in his favour and Courts seized with acquittal appeals under section 417, Cr.P.C. are obliged to be very careful in dislodging such presumption. Undoubtedly, two views are always possible while appreciating the evidence available on record, therefore, for such reason and in order to avoid the multiplicity of litigation, it is always insisted that the Court should follow the recognized principles for interference in the acquittal judgment as held in the case of Ghulam Sikandar and another versus Mamaraz Khan and others PLD 1985 SC 11 that the Appellate Court seized with the acquittal appeal under section 417, Cr.P.C. is competent to interfere in the order challenged before it provided it has been established that the trial Court has disregarded the material evidence or misread such evidence or received such evidence illegally.

In this regard further reliance can be placed on the case of Haji Paio Khan v. Sher Biaz and others **2009 SCMR 803** wherein the afore-referred view was further reiterated by the Hon'ble Apex Court.

19. Keeping in view the above circumstances coupled with guidelines given by the Hon'ble Apex Court in the above quoted precedent cases, this Court is of the firm view that there is nothing arbitrary, capricious, fanciful, or against the record, to warrant interference with the acquittal of the respondent No.2.

Resultantly, there being no merit in Criminal Appeal No. 756 of 2007, therefore, the same is, hereby, dismissed.

20. Now coming to the quantum of sentence of Muhammad Ilyas alias Bhola appellant, we have noted some mitigating circumstances in favour of the appellant, firstly, the prosecution has alleged a specific motive but has failed to prove the same and secondly, the co-accused of the appellant namely Muhammad Ishfaq and Muhammad Abbas were acquitted by the learned trial court, whereas, this Court has also dismissed the appeal filed against their acquittal. In our view, the acquittal of Muhammad Abbas co-accused who was also assigned the role of making fire shots at Ahmad Ali deceased and non-proof of motive has created an extenuating circumstance in favour of the appellant Muhammad Ilyas alias Bhola. It is well-settled principle of law by now that accused is entitled for the benefit of doubt as an

extenuating circumstance while deciding his question of sentence, as well. In this regard we respectfully refer the case of Mir Muhammad alias Miro v. The Sate (**2009 SCMR 1188**) wherein Hon'ble Supreme Court has held as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence"

In another case **Ansar Ahmad Khan Barki v. The State and another** (**1993 SCMR 1660**), the Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death. We are convinced that Muhammad Ilyas alias Bhola appellant in the peculiar circum-stances of this case deserve benefit of doubt to the extent of his sentence one out of two provided under section 302(b) of P.P.C.

As discussed earlier, the motive, as alleged by the complainant party, is not proved in this case. It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence which had resulted into the death of Ahmad Ali deceased, therefore, in our view the death sentence awarded to Muhammad Ilyas alias Bhola appellant is quite harsh. It has been held in number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence-inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating it a case of mitigation, we have fortified our view by a judgment of the Hon'ble, Supreme Court of Pakistan reported in the case of **Ahmad Nawaz and another v. The State** (**2011 SCMR 593**), wherein, at page 604, the Hon'ble Apex Court of the country, has been pleased to lay emphasis as under:--

> "(10). The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of **Iftikhar-ul-Hassan v. Israr**

Bashir and another (**PLD 2007 SC 111**), it was held that "This is settled law that provisions of sections 306 to 308, P.P.C. attract only in the cases of Qatl-e-amd liable to Qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-e-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)". The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-e-amd it was observed that "No doubt, normal penalty for an act of commission of Qatl-e-amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case".

(In Iftikhar Ahmad Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:---"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course". (underlining, italic and bold supplied). "

21. Due to the above mentioned reasons the conviction of Muhammad Ilyas alias Bhola appellant under section 302(b), P.P.C. awarded by the learned trial court is maintained but his sentence is altered from the **death to imprisonment for life**. The compensation awarded by the learned trial court and sentence in default thereof are maintained and upheld. The benefit of section 382-B of Cr.P.C. is also given to the appellant.

22. Consequently, with the above said modification in the sentence of Muhammad Ilyas alias Bhola appellant, Criminal Appeal No. 590 of 2007 filed by Muhammad Ilyas alias Bhola appellant is, hereby, dismissed. Murder Reference (**M.R. No.182 of 2007**) is answered in the **negative** and death sentence awarded to Muhammad Ilyas alias Bhola appellant by the learned trial court is **not confirmed**.

H.B.T./M-135/L **Order accordingly.**

2012 Y L R 1616

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

RAZZAQ AHMAD---Appellant

versus

THE STATE---Respondent

Criminal Appeals Nos.1321, 1318, 1319 Criminal Revision No. 869 and Murder Reference No.638 of 2006, heard on 6th March, 2012.

(a) Criminal trial---

----Benefit of doubt---Scope---If prosecu-tion cannot prove its case beyond reasonable doubt, accused in such like cases is entitled to benefit of the same not as a matter of grace but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 **rel**.

(b) Penal Code (XLV of 1860)---

----S. 302 (b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---Prosecution case against accused persons was fully established through evidence of two eye-witnesses, who stood test of lengthy cross-examination but their evidence could not be shattered as far as role of accused was concerned---Evidence of eye-witnesses was supported by medical evidence furnished by doctors, as well as by medico legal report, post mortem report and pictorial diagrams---Prosecution case against both accused was further corroborated by recoveries of hatchets from possession of accused, reports of Chemical Examiner and Serologist---Prosecution proved its case against both the accused beyond shadow of any doubt---Some mitigating circumstances however were found in favour of accused as cause of death of deceased was cumulative effect of injuries attributed to accused as well as to their co-accused, since acquitted---Prosecution alleged specific motive but failed to prove the same, which had created doubt to the extent of reasons due to which occurrence took place---Accused were entitled to benefit of doubt as an extenuating circumstances while deciding their question of sentence as well---High Court maintained conviction of accused under section 302(b), P.P.C. but altered death sentence to imprisonment for life---Appeal was allowed accordingly.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1160 **rel**.

Mian Aftab Farrukh for Appellants (in Criminal Appeal No.1318 of 2006).

Rai Bashir Ahmad for Appellants (in Criminal Appeal No. 1319 of 2006) and Razzaq Ahmad (in Criminal Appeal No.1321 of 2006).

M. M. Iqbal, for Appellants (in Criminal Appeal No.1319 of 2006).

Appellants Nos. 2 to 5 are present in person (in Criminal Appeal No.1319 of 2006).

Ch. Ghulam Mustafa, D.P.-G. for the State.

Allah Bakhsh Gondal, Chaudhry Ghulam Murtaza and Mrs. Nasreen Kausar for the Complainant.

Date of hearing: 6th March, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.638 of 2006, sent by the learned trial Court, Criminal Appeal No.1321 of 2006, preferred by appellant Razzaq Ahmad, Criminal Appeal No.1318 of 2006, submitted by Zafar Iqbal appellant, Criminal Appeal No. 1319 of 2006 filed by Sher Muhammad, Muhammad Akbar, Fayyaz Ahmad, Khizar Hayat and Umar Hayat and Criminal Revision No.869 of 2006, filed by Muhammad Arshad-complainant, by this single judgment, as all these matters stem out of judgment dated 19-7-2006, passed by learned Additional Sessions Judge, Mandi Bahauddin.

It is pertinent to mention here that the sentence of the appellant Mazhar Iqbal was suspended on 23-12-2008 and he was released on bail. The appellant Mazhar Iqbal, thereafter, absented himself from this Court and proceedings under section 514 of Cr.P.C. were initiated against him. Notice to the surety namely Muhammad Afzal was issued and bail granting order was re-called on 8-6-2010. In compliance of this Court's order dated 7-7-2010 the surety Muhammad Afzal had already deposited an amount of Rs.1,00,000 to the Deputy Registrar (Judicial) of this Court. The learned counsel for the complainant has contended that the appeal filed by Mazhar Iqbal (Criminal Appeal No. 1320 of 2006) cannot be decided until and unless he surrenders before this Court. The learned counsel for the appellant Mazhar Iqbal does not contest the said objection of the learned counsel for the complainant. In this view of the

matter, the appeal filed by Mazhar Iqbal appellant cannot proceed any further. The file of his appeal be consigned to the record room and the same will be decided on his arrest.

2. Zafar Iqbal, Fayyaz Ahmad, Umer Hayat, Razzaq Ahmed, Khyzar Hayat, Sher Muhammad and Muhammad Akbar appellants alongwith their co-accused Asif Mehmood, Tassawar Iqbal, Kamran Saif, Irfan, Mazhar Iqbal, Ehsan Ullah, Muhammad Mehndi, Nazir Ahmed, Amjid Iqbal, Iftikhar Ahmed alias Pomi, Niaz Ali, Muhammad Yousaf and Muhammad Younas were tried in case F.I.R. No.312 of 2004, dated 13-8-2004, registered at Police Station, Pahrianwali, District Mandi Bahauddin, in respect of offences under sections, 302, 324, 148, 149 of P.P.C. After conclusion of the trial, vide its judgment dated 19-7-2006, while acquitting co-accused namely, Muhammad Asif, Tassawar, Irfan, Ehsanullah, Amjid, Kamran, Mehdi, Rana Niaz, Iftikhar Ahmed, Nazir Ahmed, Muhammad Yousaf and Muhammad Younas, the learned trial court has convicted and sentenced the appellants as under:--

Zafar Iqbal

Under sections 302(b)/149 of P.P.C. to death for committing Qatl-e-Amd of Liaqat Ali deceased. He was also ordered to pay Rs.50,000 (Rupees fifty thousand only) as compensation, if recovered, to the legal heirs of the deceased or in default of payment to suffer rigorous imprisonment for six months.

Razzaq Ahmad

Under sections 302(b)/149 of P.P.C. to death for committing Qatl-e-Amd of Liaqat Ali deceased. He was also ordered to pay Rs.50,000 (Rupees fifty thousand only) as compensation, if recovered, to the legal heirs of the deceased or in default of payment to suffer rigorous imprisonment for six months.

Sher Muhammad alias Shera, Akbar, Fayyaz, Khyzar Hayat and Umar Hayat

Under sections 302(b)/149 of P.P.C. to imprisonment for life for committing Qatl-e-Amd of Liaqat Ali deceased. They were also ordered to pay Rs.50,000 (Rupees Fifty Thousand only) each as compensation to the

legal heirs of the deceased or in default to suffer simple imprisonment for six months each. Benefit of section 382-B of Cr.P.C. was also extended to them.

3. Brief facts of the case as disclosed by Muhammad Arshad complainant (P.W.12) in F.I.R. (Exh.PC/1) are that on the intervening night, i.e. 12/13-8-2004 at 11-00 p.m. (night) the complainant Muhammad Arshad (P.W.12) along with Mushtaq Ahmad, Muhammad Tufail (P.W.13), Muhammad Sharif (P.W.14) and Liaqat Ali deceased was coming back home after offering funeral prayer of one Mst. Sardaran Bibi wife of Muhammad Hussain. Liaqat Ali deceased was 5/6 karams ahead of them and when he (Liaqat Ali) reached near the gate of one Safdar son of Karam Elahi, the appellant Zafar Iqbal, Mazhar Iqbal (since proclaimed offender) Sher Muhammad appellant, Razzaq Ahmad appellant, Muhammad Fayyaz appellant, Muhammad Akbar appellant, Khizar Hayat appellant and Umar Hayat appellant, all armed with hatchets, Muhammad Asif, Tasawar, Irfan, Ehsan Ullah, Amjad, Kamran, Rana Niaz, all armed with 'sota' (clubs), Muhammad Mehndi empty-handed (co-accused since acquitted) who were already present inside the 'Dara' of above mentioned Safdar came out in the street. Mehndi raised lalkara that Liaqat Ali should not be let off and he should be taught a lesson for getting the turn of water changed, on which Zafar Iqbal appellant inflicted a hatchet blow which landed on the left side of the head of Liaqat Ali, second hatchet blow was inflicted by Razzaq Ahmad appellant which hit Liaqat Ali on the back side of his head who fell down on the ground. Shera accused, thereafter, gave a hatchet blow which landed behind the left ear of Liaqat Ali. Mazhar Iqbal (since P.O.), Fayyaz Ahmad, Muhammad Akbar and Khizar Hayat appellants also inflicted hatchet blows on Liaqat Ali which landed on his left shoulder. Umar Hayat appellant gave successive hatchet blows on the back of Liaqat Ali. Tassawar, Asif, Irfan, Rana Niaz Ahmad, Ehsan Ullah, Amjad and Kamran (co-accused since acquitted) also inflicted sota blows on the person of Liaqat Ali which landed on his left upper arm, on his back, on the left and backside of his shoulder, left cheek, on the back of his left hand and on his right shoulder. The occurrence was witnessed by the complainant Muhammad Arshad (P.W.12), his brother Mushtaq, Muhammad Tufail (P.W.13) and Muhammad Sharif (P.W.14), in the light of electricity. They did not intervene due to fear to their own lives. On the hue and cry raised by Liaqat Ali the people of the locality attracted to the spot on which the accused fled away from the place of occurrence.

4. The motive behind the occurrence was the change of the turn of water of agricultural land.

The matter was reported to the police at Bus Stand Pahrianwali on the same night, i.e. 13-8-2004 at 12-1/4 p.m. (night) through 'Fard Bian' Exh. PC on the basis of which formal F.I.R. Exh. PC/1 was registered at Police Station, Pahrianwali, Iftikhar Ahmad, Nazir Ahmad, Muhammad Yousaf and Muhammad Younas were implicated through supplementary statement of the complainant. It was alleged by the complainant that the above mentioned accused Iftikhar Ahmad, etc. gave beating to Muhammad Sharif (P.W.14) when he tried to rescue Liaqat at the time of occurrence, whereas, Nazir Ahmad co-accused allegedly gave a fist blow under the left eye of Muhammad Sharif (P.W.14).

5. After completion of investigation, the challan was submitted before the Court, the appellants and their co-accused, were charge sheeted, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 16 P.Ws.

The complainant Muhammad Arshad (P.W.12), Muhammad Tufail (P.W.13) and Muhammad Sharif (P.W.14) furnished ocular account of the occurrence.

P.W.1 Dr. Shahid Naseem Iqbal, SMO, RHC, Pahrianwali, on 13-8-2004, medically examined Liaqat Ali (deceased), and found the following injuries on his body:--

(1) Tentative incised wound (3 small skin deep wounds at margin of this wound) about 13 cm x 3 cm on left side of neck starting just behind the labule or ear. It was muscle deep and tendons beneath was also cut and it was going backward. Advised X-Ray.

(2) Incised wound about 9 cm x 2 cm x bone was exposed and also cut on left side of head in temporal region about 3 cm above ear. X-Ray was advised.

(3) Incised wound about 7 cm x 2 cm x bone exposed on back of head in between ears in occipital region. Profuse bleeding was there from wound. X-ray was advised.

(4) 4 incised wounds measuring each 7 cm x 2-1/2 cm x muscle deep on left side at junction of arm and shoulder joint. All the four wounds are about 1 cm apart.

(5) Incised wound 8 cm x 1-1/4 cm x skin deep on left upper arm in middle.

(6) Incised wound 7 cm x 2 cm x muscle deep on back in lumber region on Rt. Side of back bone.

(7) Incised wound about 7 cm x 1-1/2 cm x muscle deep on Lt. Lumbar region near spinal column X-Ray was advised.

(8) Bruise 4 cm round red blackish in colour on left back of lower chest. X-Ray was advised.

(9) Blackish bruise 4 cm round on back of Lft. Shoulder joint.

(10) An abrasion 2 cm x 1-1/4 cm on left side of face lateral to nose.

(11) 2 incised wound measuring each 2 cm x 1-1/4 cm on back of Lt. hand and these were skin deep.

(12) Incised wound 6 cm x 1/2 cm x muscle deep on Rt. shoulder joint.

On the same day (13-8-2004) Dr. Shahid Naseem Iqbal, SMO, RHC, Pahrianwali (P.W.1) also examined Muhammad Sharif son of Muhammad Hayat aged 60 years and found the following injuries:--

(1) Bluish black bruise 4 cm x 3 cm on lower side of left eye. There was sub-conjuntival haemorrhage in left eye and whole eye was red.

(2) He was complaining of pain of whole body.

Liaqat Ali, later on, succumbed to the above-mentioned injuries in the hospital on 28-8-2004, at 9-45 p.m.

Dr. Ghulam Abbas Nasir (P.W.6) on 29-8-2004 at 8-00 a.m. conducted the post-mortem examination on the dead body of Liaqat Ali (deceased) vide Post mortem Report Exh.PF, Diagrams Exh.PF/-1 and Exh. PF/2 and found the following injuries on his person:--

(1) An injury mark about 13 cm on left side of neck starting just behind the lobule of ear going backwards with 3 small injuries marks at margins of this wound.

(2) An injury mark 9 cm on temporal region about 3 cm above left ear.

(3) Injury mark 7 cm on back of head in between ears on occipieal region.

(4) 4 injuries marks 7 cm long and in an are of 2-1/2 cm on left side of junction of arm and shoulder joint about 1 cm apart from each other.

(5) An injury mark 8 cm on left upper arm in middle.

(6) An injury mark 7 cm on back of lumber region on right side.

(7) An injury mark 7 cm on left lumber region near spinal column.

(8) 2 injury marks measuring 2 cm each on back of left hand.

(9) An injury mark 6 cm on right shoulder joint.

In his opinion, the death occurred due to haemorrhage, shock and injury to vital organ brain caused by injuries Nos.1 and 2, which were caused by sharp-edged weapon. Injuries Nos.3 to 9 were contributory to injuries Nos.1 and 2 to cause death which were also caused by sharp-edged weapon. All the injuries were ante mortem in nature. Injuries Nos.1 and 2 were sufficient in ordinary course of nature to cause death. Time between injury and death was within 15 to 17 days and between death and post-mortem within 7 to 15 hours.

Munawar Hussain, S.-I./S.H.O. (P.W.16) and Nazeer, S.-I. (P.W.15) were the Investigating Officers of this case, who completed the investigation and submitted the challan.

Sikandar Hayat, A.S.-I. (P.W.2), Muhammad Azam, MHC (P.W.3), Gulzar Ahmad, draftsman (P.W.4), Muhammad Mehndi (P.W.5), Liaqat Ali, Constable/565 (P.W.7), Muhammad Ashraf, 177/C (P.W.8), and Sikandar, A.S.-I. (P.W.10), are the formal witnesses.

The evidence of recoveries was furnished by Taj Muhammad (P.W.9), Nazir Ahmad, S.-I. (P.W.15) and Munawar Hussain Shah, S.-I. (P.W.16). Muhammad Javed Baryar, DSP (CW-1) appeared as court witness. The prosecution produced documentary evidence in the shape of F.I.R. Exh.PC/1, statement of Muhammad Arshad Exh. PC, copy of site plan Exh. PD, memo of possession of clothes Exh.PE, post-mortem report, etc. Exh.PF, copy of death report Exh.PF/3, memo of possession of blood-stained hatchet Exh.PG, 85 PH, memo of possession of sota Exh.PJ, memo of possession of blood-stained Shalwar Exh.PK, memo of possession of blood-stained hatchets Exhs.PL, and P.M., copy of Rapat No.22 dated 28.08.2004 Ex.PN, copies of warrant of arrest and reports Exh.PO to PR/1, copies of Proclamation and reports

Exh.PS to P.W.1, memo of possession of blood-stained earth Exh.PW, copy of application to doctor and report Exh.PY, reports of Chemical Examiner Exh.PBB, Exh. PCC and Serologist Exh.PDD, Exh.PEE.

6. The statements of the appellants and their co-accused under section, 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellants replied as under:--

Zafar Iqbal

> "The occurrence is unseen one. In fact, deceased was having bad character and womanizer. During the night of occurrence, he went to the house of one Bhadar and was caught red-handed in the house of Bhadar while committing zina with Mst. Moqaddas. At the same time, Bhadar, Mubasher, Tassawar, Yasir and Sajid (who are not facing trial) had given him thrashing in the house of said Bhadar Khan and threw him in the lane. After the announcement made in the Loud-speaker of the mosque, the complainant and P.Ws. reached there and after premeditation and pre-consultation due to previous enmity with Tufail P.W.1 have been involved in this case falsely. P.Ws. are closely related with complainant party".

The appellants namely **Razzaq Ahmad, Fayyaz Ahmad, Muhammad Akbar, Sher Muhammad, Khizar Hayat and Umar Hayat** adopted the same plea as taken by Zafar Iqbal appellant.

Neither the appellants made statement under section 340(2), Cr.P.C. nor they produced any evidence in their defence. The learned trial Court vide its judgment dated 19-7-2006, while acquitting co-accused, namely, Muhammad Asif, Tassawar, Irfan, Ehsan Ullah, Amjid, Kamran, Mehdi, Rana Niaz, Iftikhar Ahmed, Nazir Ahmed, Muhammad Yousaf and Muhammad Younas, found Zafar Iqbal, Fayyaz Ahmad, Umer Hayat, Razzaq Ahmed, Khyzar Hayat, Sher Muhammad and Muhammad Akbar appellants, guilty and convicted and sentenced them as mentioned and detailed above.

7. The learned counsel for Zafar Iqbal appellant, in support of this appeal, contends that Zafar Iqbal appellant has no motive to take part in the occurrence and no motive was alleged against him by the prosecution; that even the motive brought on the

record through the statements of prosecution witnesses is vague as the same is only to the extent that there was a dispute of the change of water but no detail of such dispute was disclosed in the F.I.R. or brought before the learned trial court and no document in this respect was placed on the record; that the eye-witnesses of the prosecution were not present at the spot at the relevant time which is clear from the fact that they all have admitted that there was an announcement on the loudspeaker regarding the death of Liaqat Ali, therefore, had the eye-witnesses been present at the spot then there was no such occasion for the said announcement; that Muhammad Arshad complainant claims that he took the injured Liaqat Ali (subsequently dead) to the hospital but the MLR Exh. PA shows that the deceased was brought to the hospital by one Mushtaq (given up P.W.); that as far as Muhammad Tufail (P.W.13) and Muhammad Sharif (P.W.14) are concerned their evidence cannot be accepted because Muhammad Tufail (P.W.13) has admitted in cross-examination that he had enmity with the accused party; that so far as the other eye-witness, i.e. Muhammad Sharif (P.W.14) is concerned, he is not a reliable witness because he stated in the court that he was caught hold of by Iftikhar, Nazir, Yousaf and Younis accused and Nazir accused gave him a fist blow under his left eye but he was not believed by the learned trial court regarding his own alleged injuries and all the persons named by him qua the injuries allegedly sustained by him were acquitted by the learned trial court and their acquittal was maintained by this Court in appeal filed against them; that moreover in the F.I.R. it was not the case of the complainant that Muhammad Sharif was injured in this incident and even in the relevant column of Mukhtasar Halat of Inquest Report, there is no mention of this fact; that in this case 20 persons were implicated as accused out of whom eight accused were alleged to have caused injuries on the person of deceased Liaqat Ali with hatchets, whereas, the seven others were alleged to have caused injuries with sotas and role of raising a lalkara was attributed to Muhammad Mehndi co-accused, whereas, Iftikhar Ahmad, Nazir Ahmad, Muhammad Yousaf and Muhammad Younas were implicated through supplementary statement with the allegation that they caught hold of Muhammad Sharif (P.W.14) and gave him fist and kick blows. The appellant Nazir Ahmad was assigned a specific role of giving fist blow, which landed on the left cheek below left eye of Mohammad Sharif (P.W.14), but the learned trial court acquitted 12 accused persons, including those who were accused of causing injuries on the person of the deceased with Dandas and their acquittal was challenged by the complainant through Criminal Appeal

No.1475 of 2006 which was dismissed by this Court and the matter was not agitated any further, thus, the same attained finality, therefore, evidence which has been disbelieved qua acquitted co-accused, especially those who allegedly caused injuries on the person of the deceased, cannot be believed to the extent of the appellant, unless and until it is corroborated/supported by any other independent piece of evidence which corroboration is very much lacking in this case; that recovery of hatchet at the instance of the appellant is of no avail to the prosecution case because the same has not been proved as per law; that the version of the appellant that the deceased was a womanizer and he was found in an objectionable condition with one Mst. Muqadas and was killed by his relative is probable in the circumstances of this case; that after the post-mortem examination, the doctor did not hand over Shalwar to the police and the same was handed over to the police on 7-9-2004, i.e. 25 days after the occurrence which supports the version of the appellants.

The learned counsel for Razzaq, Fayyaz and Sher Muhammad appellants, while adopting the arguments of the learned counsel for Zafar Iqbal appellant, further contends that recovery at the instance of Razaq has not been proved in accordance with the law and even it was affected after one and a half months of the occurrence, therefore, no importance can be attached on this piece of evidence; that it is the case of prosecution that hatchet was recovered at the instance of Razzaq appellant on 30-9-2004 and it was dispatched to the Office of Chemical Examiner on 5-10-2004 and was received in the said office on 7-10-2004, therefore, the recovery and positive report of the Chemical Examiner is of no avail to the prosecution case.

The learned counsel for Muhammad Akbar, Khizar Hayat and Umar Hayat appellants, in support of this appeal, contends that no recovery was effected, as far as, Akbar is concerned, whereas, the recoveries of hatchets allegedly affected at the instance of Khizar Hayat and Umar Hayat appellants were not proved because the I.O. has stated that the same were recovered from the same house; that it is the case of the prosecution that Khizar Hayat was armed with hatchet, and caused injury on the left shoulder of Liaqat Ali deceased but according to the relevant record, same injury was attributed to Akbar, Fayyaz and Mazhar accused as well, which shows that the prosecution case is doubtful in nature; that as far as Umar Hayat appellant is concerned it was the case of the complainant in the F.I.R. that he caused injury one after the other on the back of Liaqat Ali deceased whereas the complainant

while appearing before the learned trial court has attributed only one injury to him and same was the case of other eye-witnesses of the prosecution, whereas, as a matter of fact there are two injuries on the person of the deceased, therefore, the above mentioned appeals be accepted and the appellants be acquitted from the charges.

8. On the other hand, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, opposes this appeal on the grounds that the incident took place in the village and it has not been denied or disputed that the eye-witnesses are not resident of the same village rather it is on the record that their residences are situated hardly at a distance of few acres from the place of occurrence; that all the eye-witnesses have reasonably explained their presence at the spot; that all the appellants are specifically named in the F.I.R. with specific allegations of causing injuries on the person of the deceased which resulted into his death; that there is nothing on the record which could even suggest that there was any enmity of the appellants with the complainant party due to which, the appellants have been implicated in this case falsely; that matter was reported to the police promptly at 12-15 a.m. (night), whereas, the occurrence took place at 11-00 p.m. (night); that version of the appellant was vague and even otherwise no evidence in support of that was produced by any of the appellants; that hatchets were recovered from Zafar Iqbal, Razzaq Ahmad, Khizar Hayat and Umar Hayat appellants and the reports of Chemical Examiner and that of Serologist are positive; that non-recovery of hatchets from the appellants Fayyaz, Muhammad Akbar and Sher Muhammad is not damaging to the prosecution case because they have been assigned specific roles by the eye-witnesses and their evidence is natural, confidence-inspiring and straightforward; that the prosecution has also proved the motive through the statements of eye-witnesses; that the motive, as alleged by the prosecution, is further established through documentary evidence (Exh. PDF/1-4) (wrongly men-tioned as Exh.DF), which shows that the turn of water was changed in favour of Liaqat Ali (deceased) and he also moved an application for the implementation of the order regarding the turn of water; that the eye-witness, i.e. Muhammad Arshad, (P.W.12), Muhammad Tufail (P.W.13) and Muhammad Sharif (P.W.14) are consistent on all material aspects of the incident like time, place, mode and the role played by the appellants; that the medical evidence furnished by Dr. Shahid Naseem Iqbal (P.W.1) and Dr. Ghulam Abbas Nasir (P.W.6) fully supported the ocular account; that there was no change in the version of the

prosecution before the court and it remained the same as it was on the first day of occurrence when the matter was reported to the police, therefore, the appeals filed by the appellants against their convictions and sentences be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

10. The occurrence in this case took place on the intervening night of 12/13-8-2004 at 11-00 p.m. in front of the gate of the house of one Safdar son of Karam Elahi at village Haigarwala, Police Station Pahrianwali, District Mandi Bahauddin. The matter was reported to the police by Muhammad Arshad (P.W.12) at 12-1/4 a.m. (night) on 13-8-2004 through Exh.PC on the basis of which formal F.I.R. Exh.PC/1 was recorded on 13-8-2004 at 12-30 a.m. (night) at Police Station Pahrianwali, District Mandi Bahauddin. The prosecution in order to prove the ocular account of the occurrence has examined three eye-witnesses namely Muhammad Arshad (P.W.12), Muhammad Tufail (P.W.13) and Muhammad Sharif (P.W.14). Although it was alleged by the prosecution that Muhammad Sharif (P.W.14) was also injured at the time of occurrence at the hands of Iftikhar Ahmad, Nazir Ahmad, Muhammad Yousaf and Muhammad Younis co-accused of the appellants (since acquitted) but the fact of receiving any injury by Muhammad Sharif (P.W.14) was neither mention in 'Fard Bian' Exh. PC or in F.I.R. Exh.PC/1. Moreover, the learned trial court vide the impugned judgment dated 19-7-2006 has acquitted all the above mentioned accused while extending them the benefit of doubt. The appeal filed by the complainant against the acquittal of above mentioned accused Iftikhar Ahmad, etc. i.e. Criminal Appeal No. 1475 of 2006 has already been dismissed by this Court vide judgment dated 4-4-2007. The complainant or the State has admittedly not challenged the above mentioned order of this Court before the Hon'ble Supreme Court of Pakistan, thus, the judgment of acquittal of the above mentioned accused Iftikhar Ahmad, etc. has attained finality, therefore, we are of the view that the presence of Muhammad Sharif (P.W.14) and receiving injury at the time of occurrence in this case has not been established beyond the shadow of doubt, thus, the evidence of this eye-witness of the prosecution is not reliable.

11. We have excluded the evidence of Muhammad Sharif (P.W.14) from consideration, therefore, the ocular evidence of the prosecution only hinges upon the

statement of Muhammad Arshad (P.W.12) and Muhammad Tufail (P.W.13). We have noted that as many as 20 accused namely Zafar Iqbal, Asif Mehmood, Tassawar Iqbal, Kamran Saif, Irfan, Mazhar Iqbal, Fayyaz Ahmad, Ehsan Ullah, Umar Hayat, Razzaq Ahmed, Khyzar Hayat, Sher Muhammad, Muhammad Akbar, Muhammad Mehndi, Nazir Ahmed, Amjid Iqbal, Iftikhar Ahmad alias Pomi, Niaz Ali, Muhammad Yousaf and Muhammad Younas were implicated in this case by the prosecution. 12 out of the above mentioned 20 accused have already been acquitted by the learned trial court. The appeal against their acquittal bearing Criminal Appeal No. 1475 of 2006 already stands dismissed by this Court vide judgment dated 4-4-2007. The learned counsel for the complainant, as well as, the learned Deputy Prosecutor-General has conceded that no petition against the above mentioned judgment of this Court was filed before the Hon'ble Supreme Court of Pakistan by the complainant or by the State and as such the judgment of acquittal of the above mentioned accused has attained finality. We have also noted that seven acquitted co-accused namely Tassawar, Asif, Irfan, Ehsan Ullah, Amjid, Kamran and Rana Niaz were allegedly armed with sotas (clubs) at the time of occurrence and they were attributed the role of inflicting sota (clubs) blows on the left arm, back, the back of left shoulder, left cheek, back of left hand and right shoulder of Liaqat Ali deceased. According to the Medico-legal Report of Liaqat Ali deceased there were injuries on the left arm, back, on the back of left shoulder, left side of the face, on the back of left hand and right shoulder of Liaqat Ali deceased. As the above mentioned co-accused, Tassawar, etc. have already been acquitted by the learned trial court by extending them the benefit of doubt, therefore, a very strong and independent corroboration is required to the extent of the present appellants to maintain their convictions and sentences. As per story of the prosecution the appellants Fayyaz, Muhammad Akbar and Khizar Hayat along with Mazhar Iqbal (since P.O.) have been attributed a joint role of inflicting hatchet blows on the left shoulder of Liaqat Ali deceased. No specific injury has been attributed to the said appellants and a joint role has been assigned to them. No hatchet was recovered from Fayyaz and Muhammad Akbar appellants to corroborate the allegation against them of inflicting hatchet blows to the deceased. Similarly no recovery was effected from Sher Muhammad appellant to corroborate the prosecution version that he inflicted a hatchet blow on the person of Liaqat Ali deceased. Although it has been alleged that hatchet P4 was recovered from the possession of Khizar Hayat appellant but Nazir, S.-I. (P.W.15) has admitted in his cross-examination that place of recovery of Khizar

Hayat appellant and Umar Hayat appellant was the same house. He has further admitted that the room of recovery was open wherefrom the alleged recovery of hatchet P4 was affected. Taj Muhammad (P.W.9) is the other recovery witness of hatchet P4 allegedly recovered on the pointation of Khizar Hayat appellant and hatchet P5 alleged to have been recovered from the possession of Umar Hayat appellant. He has also admitted during cross-examination that at the time of effecting alleged recovery from the house of Khizar Hayat and Umar Hayat, their house was open. He has further admitted that the places were common and were visible for all persons. It is evident from the perusal of above mentioned evidence that the prosecution has failed to establish that the places of alleged recoveries of hatchets P4 and P5 were in exclusive possession of either Khizar Hayat appellant or Umar Hayat appellant. The places of alleged recoveries were accessible and it was not in exclusive possession of either of the appellants, therefore, the alleged recovery of hatchet P4 from the possession of Khizar Hayat appellant and hatchet P5 from the possession of Umar Hayat appellant has not been proved by the prosecution. The story of prosecution in respect of role attributed to Umar Hayat appellant is also contradictory. It was alleged in 'Fard Bian' Exh. PC that Umar Hayat inflicted repeated hatchet blows on the back of Liaqat Ali deceased, whereas, while appearing before the court Muhammad Arshad (P.W.12) has stated that Umar Hayat gave 'a blow' with his hatchet which hit Liaqat Ali deceased on the back side of his chest. This witness has not stated that Umar Hayat appellant gave repeated hatchet blows on the back of Liaqat Ali deceased. Similarly Muhammad Tufail (P.W.13) has stated that Umar Hayat appellant inflicted hatchet blow which hit on the back of the chest of Liaqat Ali deceased. This eye-witness has also not stated that Umar Hayat appellant inflicted repeated blows on the back of Liaqat Ali deceased and as such there is a contradiction in the prosecution story mentioned in the F.I.R. and put before the learned trial court regarding the role played by Umar Hayat appellant. We have already disbelieved the alleged recovery of hatchet from Umar Hayat appellant and Khizar Hayat appellant.

12. Now coming to the motive part of the prosecution it was alleged in 'Fard Bian' Exh. PC that the motive behind the occurrence was the change of the turn of water of agricultural land between the appellants and the deceased Liaqat Ali, Muhammad Arshad (P.W.12) has admitted during his cross-examination that there is no land of Zafar, Mazhar and Nazir accused near the 'Mogga' which is alleged bone of contention between the parties. He has also admitted during his cross-examination

that he never produced any document relating to the motive of occurrence 'Warbandi' before the police during the course of investigation. Similarly Muhammad Tufail (P.W.13) has also admitted in his cross-examination that in his presence the complainant Arshad had never produced any document relating to 'Warbandi' (change of water) during investigation. He has further admitted that he himself had not seen any document relating to the dispute of 'Warbandi'. Although prosecution has produced a copy of application moved by Liaqat Ali deceased about implementation of the order of Warbandi Exh.PDF/1-4 (wrongly exhibited as Exh.DF) but even the said document does not establish the motive as alleged by the prosecution as no person was named in the above mentioned application Exh.PDF/1-4 moved by Liaqat Ali deceased and it was simply stated that 3/4 miscreants have refused to implement the order of 'Warbandi' (change of water). It was not established by the prosecution that the present appellants had any grudge against Liaqat Ali deceased due to change of water, therefore, we are of the view that motive in this case as alleged by the prosecution has not been proved in this case.

13. Having considered all the pros and cons of the case the irresistible conclusion drawn by this Court is that the prosecution has failed to prove its case against Sher Muhammad, Fayyaz Ahmad, Muhammad Akbar, Khizar Hayat and Umar Hayat appellants beyond shadow of doubt. It is cardinal principle of law that if prosecution cannot prove its case beyond a reasonable doubt, the accused in such like cases is entitled to the benefit of the same not as a matter of grace but as a matter of right. Hon'ble Supreme Court of Pakistan in the case of **Muhammad Akram v. The State** (**2009 SCMR 230 relevant page 236 para. 13**) has observed as under:--

> "It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is a single circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right"

14. Therefore, **Criminal Appeal No. 1319 of 2006** is allowed, convictions and sentences recorded by the learned trial court against Sher Muhammad, Fayyaz

Ahmad, Muhammad Akbar, Khizar Hayat and Umar Hayat appellants are set aside, appellants are acquitted from the charge. Sher Muhammad appellant be released from the jail forthwith if not required to be detained in any other case. Fayyaz Ahmad, Muhammad Akbar, Khizar Hayat and Umar Hayat appellants are on bail. Their bail bonds and sureties shall stand discharged.

15. Now coming to the role attributed to Zafar Iqbal and Razzaq Ahmad appellants. According to the prosecution case, Zafar Iqbal appellant has been attributed the role of inflicting hatchet blow which landed on the left side of the head of Liaqat Ali deceased. Similarly, Razzaq Ahmad appellant has been assigned the role of inflicting hatchet blow which landed on the back side of the head of Liaqat Ali deceased. According to the statement of Dr. Shahid Naseem Iqbal (P.W.1), on 13-8-2004, he medically examined Liaqat Ali deceased and found as many as 12 injuries on his person. Injury No. 2 was an incised wound on the left side of the head of Liaqat Ali deceased. Similarly injury No. 3 was an incised wound on the back of the head of Liaqat Ali deceased. The Post-mortem examination on the deadbody of Liaqat Ali deceased was conducted by Dr. Ghulam Abbas Nasir (P.W. 6) on 29-8-2004 at 8-00 a.m. According to his statement injury No. 2 was on temporal region 3 cm of left ear of Liaqat Ali deceased whereas injury No. 3 was on back of the head of Liaqat Ali deceased. The role attributed to Zafar Iqbal appellant and Razzaq Ahmad appellant has been supported by medical evidence of Dr. Shahid Naseem Iqbal (P.W.1) and his Medico-legal Report (Exh.PB), as well as, by medical evidence of Dr. Ghulam Abbas Nasir (P.W.6), post-mortem report Exh.PF, pictorial diagrams Exhs.PF/1 and PF/2. The prosecution case qua Zafar Iqbal appellant and Razzaq Ahmad appellant is further corroborated by recoveries of hatchet P9 on the pointation of Zafar Iqbal appellant and recovery of hatchet P8 from the possession of Razzaq Ahmad appellant. Taj Muhammad (P.W.9) is the recovery witness of above mentioned hatchets. This witness was cross-examined at length but his evidence could not be shattered and nothing favourable to the appellants Zafar Iqbal and Razzaq Ahmad could be brought on the record. The above mentioned evidence of recoveries of hatchets from Zafar Iqbal appellant and Razzaq Ahmad appellant is further corroborated by positive reports of Chemical Examiner Exh.PBB, Exh.PCC, Serologist reports Exh.PDD and Exh.PEE.

16. We have disbelieved the motive part of the prosecution case. However, if the evidence of motive is excluded from consideration even then there is sufficient incriminating evidence available on the record against Zafar Iqbal and Razzaq Ahmad appellants. As discussed earlier, the prosecution case against the said appellants was fully established through the evidence of Muhammad Arshad (P.W.12) and Muhammad Tufail (P.W.13). The said witnesses stood the test of lengthy cross-examination but their evidence could not be shattered as far as the role of those appellants are concerned. The evidence of the said witnesses qua the role played by Zafar Iqbal and Razzaq Ahmad appellants is supported by the medical evidence furnished by Dr. Shahid Naseem Iqbal (P.W.1) and Dr. Ghulam Abbas Nasir (P.W.6), as well as, by Medico-legal Report of Liaqat Ali Exh. PC, post-mortem report Exh. PF, pictorial diagrams Exh.PF/1 and Exh.PF/2. The prosecution case against Zafar Iqbal and Razzaq Ahmad appellants is further corroborated by the recoveries of hatchets P9 and P8 from the possession of the said appellants and reports of Chemical Examiner Exh.PBB, Exh.PCC and positive reports of Serologist Exh.PDD and Exh. PEE respectively, therefore, we hold that the prosecution has proved its case against Zafar Iqbal and Razzaq Ahmad appellants beyond the shadow of any doubt.

17. So far as the question of quantum of sentence of the appellants Zafar Iqbal and Razzaq Ahmad is concerned, we have noted some mitigating circumstances in their favour, **firstly**, the cause of death of Liaqat Ali deceased was cumulative effect of the injuries attributed to the appellants, as well as, to their co-accused, who have been acquitted either by trial court or this Court and **secondly**, the prosecution has alleged a specific motive but has miserably failed to prove the same which has created doubt to the extent of the reasons due to which the occurrence took place. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence as well. In this regard we respectfully refer the case of **Mir Muhammad alias Miro v. The Sate** (2009 SCMR 1188) wherein Hon'ble Supreme Court has held as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence"

In another case **Ansar Ahmad Khan Barki v. The State and another** (**1993 SCMR 1660**), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death. We are convinced that Zafar Iqbal and Razzaq Ahmad appellants in the peculiar circumstances of this case deserve benefit of doubt to the extent of their sentences one out of two provided under section 302(b) of P.P.C.

19. Due to the above mentioned reasons the conviction of Zafar Iqbal and Razzaq Ahmad appellants under section 302(b), P.P.C. awarded by the learned trial court is maintained but their sentences is altered from the **death to imprisonment for life**. The compensation awarded by the learned trial court and sentences in default thereof are maintained and upheld. The benefit of section 382-B, Cr.P.C. is also given to the appellants.

20. For the foregoing reasons Criminal Revision No.869 of 2006 filed by the complainant seeking enhancement of sentences stands dismissed.

21. Consequently, with the above said modification in the sentence of Zafar Iqbal and Razzaq Ahmad appellants, **Criminal Appeal No. 1321 of 2006** filed by Razzaq Ahmad appellant and **Criminal Appeal No. 1318 of 2006** filed by Zafar Iqbal appellant are, hereby, dismissed. Murder Reference (**Murder Reference No. 638 of 2006**) is answered in the **negative** and death sentences of Zafar Iqbal and Razzaq Ahmad appellants are **not confirmed**.

22. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the case of the absconding accused namely, Mazhar Iqbal (since P.O.) and his case shall be decided on its own merits.

M.H./R-11/L **Order accordingly.**

2012 Y L R 1703

[Lahore]

Before Malik Shahzad Ahmad Khan, J

IBRAR HUSSAIN BUKHARI---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE LAHORE and 3 others---Respondents

Writ Petition No.18373 of 2008, decided on 8th February, 2012.

West Pakistan Family Courts Act (XXXV of 1964)---

----S.5 & Sched.---Constitution of Pakistan Art.199---Constitutional Petition---Suit for recovery of maintenance allowance for minor---Suit was decreed concurrently by courts below---Contention of the husband was that the quantum of the maintenance allowance was excessive, and that the annual increase in the same at the rate of 25% was exorbitant---Validity---Documents submitted before the Trial Court showed that the husband was a wealthy man and keeping in view the status of the parties as well as the fact that the minor was a special child, there was no illegality in the judgment of the courts below to the extent of the quantum of the maintenance allowance---Annual increase in the said maintenance allowance at the rate of 25% was excessive, and no solid grounds for the same were mentioned in the impugned judgment---High Court modified the annual increase in the maintenance allowance to the extent of 10%---Constitutional petition was disposed of accordingly.

PLD 2009 SC 760 rel.

Malik Muhammad Ashhab for Petitioner.

Shahid Bilal Hassan for Respondents Nos.3 and 4.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This petition has been filed to challenge the judgment and decree dated 8-3-2008, passed by learned Judge Family Court, Lahore, as well as, against the judgment and decree dated 15-10-2008, passed by learned Additional District Judge, Lahore.

2. Briefly facts of the case necessitating for the disposal of this petition are that

the petitioner was married to Mst. Syeda Zahra Jaffery (respondent No.3 on 29-2-1980, and from this wedlock, three offspring, namely, Syed Salman Hussain (son), Mst. Amna Hussain (daughter), and Syed Muhammad Saad (son) were born. Syed Salman Hussain and Mst. Amna Hussain are major, whereas, Syed Muhammad Saad is minor and is suffering from Ortisom disease. The petitioner/ defendant deals in automobiles spare parts and is owner of a Company with the name of Dai-Ichi Trading Co Ltd., having its offices in Japan, Canada, Dubai, Chile, Peru and South America. The petitioner failed to provide maintenance allowance to the plaintiffs/respondents Nos.3 and 4 since February, 2006, therefore, they filed a suit for the recovery of maintenance allowance against the petitioner.

3. On the other hand, the petitioner/ defendant appeared in the Court, and controverted the averments made in the suit by submitting his written-statement.

4 In order to resolve the controversy between the parties, the learned trial Court framed the following issues:--

ISSUES

(1) Whether the plaintiff is entitled to get a decree for recovery of maintenance allowance, if so, from what period and at what rate? OPP.

(2) Whether the defendant has paid maintenance allowance to the plaintiff till December, 2006 beyond his means? OPD.

(3) Whether the plaintiff has no cause of action to file this suit? OPD.

(4) Relief.

5. After framing of necessary issues, both the parties were directed to produce their evidence in support of their respective claims.

The plaintiff Syeda Zahra Jaffery (respondent No.3) herself appeared as (P.W.1). She also tendered documentary evidence i.e. Electricity, Gas and Telephone Bills (Exh.PB) to (Exh.PF) and Mark-A. She also examined one Ashraf Ali as (P.W.2) and submitted his affidavit (Exh.PG). Shahid appeared as (P.W.3) and submitted his affidavit (Exh.PH).

In rebuttal thereto, the petitioner/ defendant examined Maqbool Ahmad as (DW-1), who filed his affidavit (Exh.DA), and Riaz Ahmad as (DW-2), who

produced his affidavit (Exh.DB).

The learned Judge Family Court, vide judgment and decree dated 8-3-2008, decreed the suit of the plaintiffs/ respondents Nos.3 and 4 in the following manner:--

"The suit of plaintiff No.1 for maintenance allowance from January, 2007 till effectiveness of her divorce and till the majority and recovery from disease of plaintiff No.2, is hereby, decreed at the rate of Rs.15,000 each per-month. The interim maintenance allowance which the defendant has paid to the plaintiff shall be deducted from the decretal amount".

Both the parties, being dissatisfied with the above-mentioned judgment and decree of the learned Judge Family Court, filed two separate family appeals. The learned Additional District Judge, Lahore, vide impugned judgment and decree dated 15-10-2008, dismissed the appeal, filed by the petitioner, and accepted the appeal, filed by respondents Nos.3 and 4. Resultantly the maintenance allowance of respondent No.3 was enhanced from Rs.15,000 to Rs.40,000 per month whereas maintenance allowance of respondent No.4 was enhanced from Rs.15,000 to Rs.1,00,000 per month with 25% annual increase.

The petitioner has impeached both the above-mentioned judgments and decrees of the courts-below through this petition.

6. It is contended by the learned counsel for the petitioner that the impugned judgments and decrees passed by the courts below are against law and facts; that both the courts below have passed the impugned judgments and decrees without appreciating the evidence available on record; that the learned Additional District Judge fixed the quantum of maintenance without determining the income and sources of the petitioner; that no proof of expenses of the minor respondent No.4 has been placed on the record; that both the witnesses, produced by the petitioner/defendant, categorically stated that business of the petitioner is suffering from heavy loss; that the maintenance allowance granted to respondent No.4 at the rate of Rs.1,00,000 (rupees one lac only) per month, with 25% increase every year is exorbitant, therefore, this petition may be accepted and the impugned judgments and decrees may be set aside.

7. Conversely, the learned counsel appearing on behalf of the plaintiffs/respondents Nos.3 and 4 has vehemently opposed this petition on the

grounds that there are concurrent findings of fact recorded by the two courts below against the petitioner, which may not be disturbed in Constitutional jurisdiction; that both the courts below have rightly passed the impugned judgments and decrees in favour of the plaintiffs/respondents Nos.3 and 4 by appreciating the evidence and the documents available on the record, therefore, this petition being merit less is liable to be dismissed.

8. Arguments heard and record perused.

9. From the perusal of the record, it manifests that respondent No.3 is ex-wife of the petitioner, who had been divorced during pendency of the trial on 8-3-2007, and the said divorce has become effective. During the course of trial, receipts of deposit of the maintenance allowance till December, 2006, in the account of respondent No. 3 were brought on the record, and there is no denial of the said receipts by the above said respondent, therefore, the plaintiff/respondent No.3 was rightly held entitled to get maintenance allowance since January, 2007, till her 'Iddat' period.

As far as minor respondent No.4 namely Syed Muhammad Saad is concerned, admittedly, he is suffering from mental disease and is a special child. His paternity is admitted, therefore, he was held entitled to get maintenance allowance from his father/petitioner since January, 2007 by the two courts below, anyhow, the learned appellate court enhanced the maintenance allowance from Rs.15,000 per-month per head for respondents Nos.3 and 4 to Rs.40,000 per month for respondent No.3 from January, 2007 till her Iddaf period and to Rs.1,00,000 per month, for minor respondent No.4 from January, 2007 till his majority and recovery from disease with 25% annual increase.

11. As regards the status of the petitioner/defendant and quantum of maintenance allowance is concerned, it has very much come on the record that the petitioner deals in the business of automobile spare parts with the name and style of Dai-Ichi Trading Company Ltd. having its offices in different countries of the world including Peru, Chili, South America etc., and this fact has been duly admitted by the petitioner in his written-statement in paragraph No.3 on merits. The witnesses of the petitioner have also admitted that the petitioner/defendant deals in automobile business with the name and style of Dai-Ichi Company Limited. Maqbool Ahmad Malik (DW-1) has also deposed about property/house owned by the defendant in Defence and Dubai. He has also admitted that the petitioner is owner of a boat. He has claimed that business of

the petitioner/defendant is in loss and it is impossible for him to provide maintenance due to loss in his business, but no document was placed on the record by the appellant/defendant to substantiate his claim of loss in the business. During the cross-examination, Riaz Ahmad, DW-2 has stated that the plaintiff/defendant visited Pakistan for eight times in the year, 2007, and on each trip he met the petitioner/defendant in Pearl Continental Hotel. He stated that whenever defendant visits Pakistan, he stays in Pearl Continental Hotel. If business of the petitioner/defendant is in loss then how he can afford to visit Pakistan for eight times in a year and how he can afford to stay in a Five Star Hotel in Pakistan. If the petitioner/defendant can visit Pakistan for eight times in a year and he can afford to live in a Five Star Hotel, then why the petitioner/defendant cannot pay the maintenance allowance to his son who is abnormal and needs more care and attention of parents. The receipts of different amounts deposited by the petitioner/ defendant in the account of respondent No.3/plaintiff No.1, were also attached with the written-statement by the petitioner/ defendant, which were although not exhibited but these receipts were taken into consideration by the learned appellate Court to analyze the financial status of the petitioner/defendant. Photo-copies of bank statements, which bears signatures of the Presiding Officer of the trial Court dated 30-5-2007, were also placed on the record and as per this statement a huge amount of US Dollars 1,129,766 worth about 35-crores rupees was sent in the account of respondent No.3/plaintiff in Citibank, Alfalah Building, Lahore through Dai-Ichi-Motors. Another copy of bank statement, having signatures of the Presiding Officer dated 30-5-2007 from September, 2005 till December, 2005 for an amount of US Dollars $340,984 worth Rs.20,351,245 sent by Dai-Ichi-Motors in the name of Amna Hassan daughter of the parties was also placed on the record of the learned trial Court. The said documents show that the petitioner/ defendant is a wealthy man.

12. Keeping in view the status of the parties and as the minor respondent No.4 is a special child, therefore, I see no illegality in the judgment and decree of the learned appellate Court to the extent of fixation of the quantum of maintenance allowance. Anyhow, the annual increase in the maintenance allowance at the rate of 25% per-annum is excessive. No solid grounds have been mentioned in the impugned judgment of the learned appellate Court for fixation of the said increase, therefore, judgment of the learned appellate court to the extent of annual increase in the maintenance allowance, is modified and it is held that there will be 10% annual

increase in the maintenance allowance of respondent No.3. Reference in this context may be made to the case of PLD 2009 Supreme Court 760).

13. With the above modification in the impugned judgment dated 15-10-2008, passed by the learned Additional District Judge, Lahore, this petition stands disposed of with no order as to costs.

K.M.Z./I-15/L **Order accordingly.**

2012 Y L R 2196

[Lahore]

Before Manzoor Ahmed Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ANWAR---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.1332 and Murder Reference No.675 of 2006, heard on 15th May, 2012.

Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149---Qatl-e-amd, rioting---Appreciation of evidence---Benefit of doubt---Role of making fire-shot, which landed on the left side of the chest near the armpit of deceased, was assigned to acquitted co-accused---Role assigned to accused was similar to that attributed to two acquitted co-accused---Motive was attributed to accused and to all acquitted co-accused---Case of accused was not distinguishable from the case of acquitted co-accused insofar as motive was concerned---Report of Forensic Science Laboratory was only in respect of working condition of the allegedly recovered rifle---Rifle allegedly recovered from the possession of accused, could not be considered as corroborative piece of evidence, in circumstances---No independent corroboration was found against accused and his case could not be distinguished from the case of acquitted co-accused in that regard---Prosecution had failed to prove its case against accused beyond any shadow of doubt---Conviction and sentence awarded to accused by the Trial Court, were set aside extending him benefit of doubt---Accused was acquitted from all charges and was released from jail, in circumstances.

Iftikhar Hussain and another v. State 2004 SCMR 1185 and Akhtar Ali and others v. The State 2008 SCMR 6 ref.

Miss Kausar Jabeen Misha for Appellant.

Chaudhary Muhammad Mustafa, Deputy Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 15th May, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---We propose to dispose of Murder Reference No.675 of 2006, sent by the learned trial Court, and Criminal Appeal No.1332 of 2006, preferred by the appellant Muhammad Anwar, by this single judgment, as both these matters have arisen out of the same judgment dated 20-7-2006, passed by the learned Additional Sessions Judge, Faisalabad.

2. Muhammad Anwar appellant along with his co-accused, namely, Muhammad Shafi, Muhammad Sarwar, Monda, Allah Ditta, Abbas, Asghar Ali and Muhammad Yaqoob, was tried in case F.I.R. No.40, dated 5-2-2000, registered at Police Station, Bahlak, in respect of offences under sections, 302, 148, and 149 of P.P.C. After conclusion of the trial, the learned trial Court vide its judgment dated 20-7-2006, convicted and sentenced the appellant as under:--

MUHAMMAD ANWAR

Under section 302(b) of P.P.C. to death for committing the murder of Shahbaz (deceased). He was also ordered to pay Rs.50,000 (Rupees fifty thousand only) as com-pensation under section 544-A of Cr.P.C. to the legal heirs of deceased or in default to suffer simple imprisonment for one year's R.I. whereas, the learned trial Court vide the same judgment acquitted the above-mentioned co-accused of the appellant from the charges.

3. Brief facts of the case as disclosed by the complainant Muhammad Nawaz P.W.3 in his statement Exh.PB on the basis of which F.I.R. Exh.PB/1 was chalked out are that on 5-2-2000, he (the complainant) along with his brothers namely, Murad Khan, Mumtaz Khan and Shahbaz (deceased) were going towards their fields, situated in Square No.83, Killa No.12, village Thatha Dhadhera, within the area of Police Station, Bahlak, in order to cut fodder for their cattle. At about 11-30 a.m., the

appellant Muhammad Anwar, along with Shafi and Sarwar armed with rifles, Abbas armed with gun .12 bore, Allah Ditta armed with rifle, Asghar Ali armed with rifle, Muhammad Yaqoob armed with gun .12 bore, and Monda armed with rifle, came to the spot. The appellant Muhammad Anwar raised a lalkara that he would not let Shahbaz alive, and thereafter, he made a fire shot, which landed on the right side of the chest of Shahbaz (deceased). Second fire shot was made by Abbas (since acquitted), which landed on the left arm of Shahbaz (deceased). Third fire shot was made by Sarwar (since acquitted), which landed on the right side of the chest of Shahbaz (deceased). The next fire shot was made by Asghar (since acquitted), which landed on the left side of the chest near the armpit of Shahbaz (deceased). Another fire shot was made by the appellant Muhammad Anwar, which hit on the right flank of Shahbaz (deceased), who fell down. Muhammad Yaqoob and Monda (since acquitted), thereafter, inflicted kick blows on the person of Shahbaz (deceased). All the accused kept on making aerial firing during the occurrence.

The motive for the occurrence, as stated by the complainant in the F.I.R. Exh.PB/ 1 was that Yousaf Sahi party of the area snatched two mares from the accused Anwar party, and the appellant Muhammad Anwar and his co-accused suspected that on the information given by Shahbaz (deceased), the mares were snatched from them. It was alleged by the complainant in his Fard Bian Exh.PB that the appellant Muhammad Anwar and his co-accused nourished the above-mentioned grudge in their minds due to which they committed the murder of Shahbaz (deceased).

4. After completion of investigation, the challan was submitted before the trial Court, the appellant along with acquitted co-accused were charge sheeted on 25-3-2006, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as thirteen witnesses.

The complainant Muhammad Nawaz P.W.3, and Murad Khan P.W.5 furnished ocular account of the occurrence.

The medical evidence was furnished by Dr. Naseer Ahmad P.W.6.

Murad Khan P.W.5 is a recovery witness of Rifle .303 Bore, P.S.

Mushtaq Hussain A.S.-I. P.W.11, Muhammad Ishaq S.-I. P.W.12, and Muhammad Riaz S.-I. P.W.13 were the Investigating Officers of this case.

Ghazanfar Ali C-3336 P.W.1, Ghulam Rasul C-3450 P.W.2, Muhammad Naseem C-1183 P.W.4, Abdul Ghafoor Patwari P.W.7, Muhammad Javed MHC-73 P.W.8, and Safdar P.W.10, are the formal witnesses in this case.

The prosecution also produced documentary evidence in the shape of memo of possession of blood-stained clothes Exh.PA, complaint Exh.PB, F.I.R. Exh.PB/ 1, memo of possession of rifle .303 bore etc. Exh.PC, copy of postmortem report etc. Exh.PD, copy of death report Exh.PF, copy of site plan Exh.PG, memo of possession of blood-stained earth Exh. PH, report of Chemical Examiner Exh. PK, report of Serologist Ex. PL and report of FSL Exh.PM.

The statement of appellant Muhammad Anwar under section 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you", Muhammad Anwar appellant, replied as under:--

"Due to party faction and enmity of murder in the village. Due to relations with deceased and due to enmity with us, I was involved in this case".

The appellant did not make statement under section 340(2), Cr.P.C; however, he produced defence evidence in the shape of the statement of the complainant etc., and the persons of the accused party before the Investigating Officer regarding decision of the case on special oath Exh.DA and decision about innocence of Monda, Asghar and Muhammad Yaqoob on the basis of special oath Exh.DB.

The learned trial Court vide the above-mentioned judgment, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

6. The learned counsel for the appellant, in support of this appeal, contends that in the F.I.R., there were allegations against three other persons besides the appellant of causing firearm injuries to Shahbaz (deceased), whereas, all the co-accused have been acquitted by the learned trial Court and their acquittal has not been assailed either by

the State or by the complainant before this Court and the same has attained finality, therefore, on the basis of same evidence, the appellant cannot be convicted unless and until there is strong independent corroboration, which is very much lacking in this case; that the case of the appellant is not distinguishable from the case of acquitted co-accused; that the motive is attributed to the appellant as well as to the above-mentioned acquitted co-accused; that the recovery of rifle .303 bore P.5 from the possession of the appellant Muhammad Anwar cannot be considered a corroborative piece of evidence, because the report of Forensic Science Laboratory Exh.PM is only to the extent of working condition of the said rifle, therefore, this appeal be accepted and the appellant may be acquitted from the charges.

7. Conversely, the learned Deputy Prosecutor-General submits that the brother of the complainant has been properly informed about the fixation of the present case, today. He has also referred to the police report in this respect, but no one is present on behalf of the complainant to pursue this case. The learned Law Officer opposes this appeal on the grounds that the appellant was named in the F.I.R., which was promptly lodged with the specific allegation for causing firearm injuries to Shahbaz (deceased); that the motive was also proved against the appellant; that rifle .303 bore P.5 has also been recovered from the possession of the appellant; that the prosecution witnesses of the ocular account remained consistent and straightforward and their evidence could not be shattered by the defence; that the case of the acquitted accused is distinguishable from the case of the present appellant, as they were found innocent by the police, therefore, this appeal may be dismissed and Murder Reference may be answered in the affirmative.

8. We have heard the arguments of the learned counsel for the appellant, as well as, the learned DPG, and have also gone through the evidence available on record with their able assistance.

9. The occurrence in this case took place on 5-2-2000, at 11-30 a.m., within the area of Thatha Dhadhera, Police Station, Bahlak, District Faisalabad. The matter was reported to the police on the same day at 3-30 p.m., by the complainant Muhammad

Nawaz P.W.3), who is real brother of Shahbaz (deceased) through `Fard Baiyan' Exh.PB on the basis of which formal F.I.R. Exh.PB/1 was registered.

10. The prosecution, in order to prove its ocular account has produced the complainant Muhammad Nawaz P.W.3 and Murad Khan P.W.5. In the F.I.R. Exh.PB/1, it is the case of the complainant that on 5-2-2000, he (the complainant) along with his brothers namely, Murad Khan, Mumtaz Khan and Shahbaz (deceased) was going towards their fields, situated in Square No.83, Killa No.12, village Thatha Dhadhera, within the area of Police Station, Bahlak, in order to cut fodder for their cattle. At about 11-30 a.m., the appellant Muhammad Anwar, along with Shafi and Sarwar armed with rifles, Abbas armed with gun .12 bore, Allah Ditta armed with rifle, Asghar Ali armed with rifle, Muhammad Yaqoob armed with gun .12 bore, and Monda armed with rifle, came to the spot. The appellant Muhammad Anwar raised a lalkara that he would not let Shahbaz alive, and thereafter, he made a fire shot, which landed on the right side of the chest of Shahbaz (deceased). Second fire shot was made by Abbas (since acquitted), which landed on the left arm of Shahbaz (deceased). Third fire shot was made by Sarwar (since acquitted), which landed on the right side of the chest of Shahbaz (deceased). The next fire shot was made by Asghar accused (since acquitted), which landed on the left side of the chest near the armpit of Shahbaz (deceased). Another fire shot was made by the appellant Muhammad Anwar, which hit on the right flank of Shahbaz (deceased), who fell down. Muhammad Yaqoob and Monda (since acquitted), thereafter, inflicted kick blows on the person of Shahbaz (deceased). All the accused kept on making aerial firing during the occurrence.

The statement of the complainant Muhammad Nawaz P.W.3 before the learned trial Court was in line with the story mentioned in the F.I.R. Exh.PB/1, except the role assigned to Asghar accused (since acquitted). The role of making fire shot, which landed on the left side of the chest near the armpit of Shahbaz (deceased) was assigned to Asghar accused (since acquitted) in the F.I.R. Exh.PB/ 1, whereas, in his statement before the learned trial Court, the complainant Muhammad Nawaz P.W.3 has stated that the fire shot made by Asghar accused hit the deceased Shahbaz on his left arm.

The evidence of other eye-witness Murad Khan is also in line with the evidence of the complainant Muhammad Nawaz P.W.3, except the role assigned to Asghar accused since acquitted, because the said witness has given almost the same role, which was assigned to Asghar accused in the F.I.R. Exh.PB/ 1, according to which, the fire shot made by Asghar accused (since acquitted) landed on the left flank of Shahbaz (deceased).

It is evident from the perusal of evidence of the above-mentioned eye-witnesses that the role attributed to the appellant Muhammad Anwar was similar to that of acquitted co-accused, namely, Muhammad Sarwar, and Asghar Ali.

11. Charge under sections 302, 148, and 149 of P.P.C. with identical allegations was framed against the appellant Muhammad Anwar and the above-mentioned acquitted seven co-accused, namely, Muhammad Shafi, Muhammad Sarwar, Monda, Allah Ditta, Abbas, Asghar Ali and Muhammad Yaqoob. Out of the above-mentioned seven co-accused, the role attributed to Sarwar and Asghar Ali (since acquitted) is similar with the role of the appellant Muhammad Anwar, but they have been acquitted by the learned trial Court while extending them the benefit of doubt and no appeal against their acquittal has been preferred either by the State or by the complainant, as confirmed by the learned Deputy Prosecutor-General, for the State and, as such, the said acquittal has attained finality, therefore, the question for determination, before this Court, is that whether the evidence, which has been disbelieved qua the acquitted co-accused of the appellant can be believed against the appellant. In this regard, we are guided by the judgment of the Hon'ble Supreme Court of Pakistan reported as, Iftikhar Hussain and another v. State 2004 SCMR 1185, wherein the Hon'ble Supreme Court at page 1196-1197 held as under:--

"17. ...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused

and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others versus The State (2000 SCMR 1758), relevant Para therefrom is reproduced below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i..e sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Zaiaullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)".

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as Akhtar Ali and others v. The State (2008 SCMR 6).

12. It has been argued by the learned Deputy Prosecutor-General, for the State, that the appellant Muhammad Anwar has been attributed the fatal shot at the person of the deceased, therefore, his case was distinguishable from the case of his acquitted co-accused. We have noted that Dr. Naseer Ahmad P.W.6, conducted the post-mortem examination on the dead body of Shahbaz (deceased) on 6-2-2000, vide post-mortem report Exh.PD, and pictorial diagram Exh.PD/1, and found the following injuries on the dead body of Shahbaz (deceased):--

(1) A firearm lacerated wound of entrance with blackening present on the outer part of left elbow joints. The joint was fractured. The muscles were ruptured.

(2) Exit wound of firearm wound injury No.1 on the medial side of left elbow joint. The muscles and joint were fracture.

(3) Firearm wound of entrance 2 cm x 1-1/2 cm with slight blackening present on the left side of upper part of chest near the nipple. The wound was DNP.

(4) Firearm wound of entrance 2 cm x 1-1/2 cm on the left side of chest adjacent to injury No.3. This was only muscle deep.

(5) Firearm wound of exit 2 cm x 2 cm on the right side of chest on the front part of near the Axilla.

(6) Firearm grazing wound 3 cm x 1 1/2 cm on the lower part of outer side of chest.

(7) Firearm wound of entrance 2 cm x 2 cm with blackening on the outer side of lower part of right side of chest. Below the injury No.6.

(8) Firearm exit wound 2 cm x 1 1/2 cm on the outer side of lower part of chest on the left side. Course of injury No.3. The fire injured the skin and muscle fractured the 5th and 6th ribs on the outer side of frontal part of chest entered in the chest cavity and damaged the heart, both lungs, plum and comes out through injury No.5. The chest cavity was full with stained blood. 5 and 6 ribs on the right side were also fractured. Course of injury No.4. This injured only muscle and skin and not go in the chest cavity. Course of injury No.7. The firearm injury the lateral outer side of lower part of chest and injured the liver duodenum and injured the right kidney and entered

in the abdominal cavity which was also full with stained blood. The (sic) caused the injury on 4th an 5th vertebra and injured the left kidney and come out through injury No.8. Skull not opened.

According to the opinion of Dr. Naseer Ahmad, the cause of death was Injury No.3 and Injury No.7. Injury No.3 was on left side of chest of Shahbaz (deceased), which was attributed to Asghar Ali co-accused (since acquitted), whereas, Injury No.7 was on the right side of the chest of Shahbaz (deceased). According to the prosecution case, the role of inflicting firearm injury on the right side of the chest of Shahbaz (deceased) was attributed to the appellant Muhammad Anwar, as well as, co-accused Sarwar (since acquitted). Although, the complainant Muhammad Nawaz P.W.3, while appearing in the Court has stated that the fire shot made by Asghar co-accused (since acquitted) landed on the left arm of Shahbaz (deceased), but in the F.I.R. Exh.PB/1, he assigned the role of inflicting firearm injury on left side of the chest near the armpit of Shahbaz (deceased). The other eye-witness namely, Murad Khan P.W.5 also assigned the role of inflicting firearm injury on the left flank of Shahbaz (deceased) to Asghar co-accused (since acquitted). The role of causing fatal injuries on the person of Shahbaz (deceased) has been assigned to the appellant, as well as, to acquitted co-accused namely, Asghar Ali and Sarwar, therefore, the role attributed to the appellant Muhammad Anwar is not distinguishable from the role attributed to co-accused Sarwar and Asghar (since acquitted).

13. The learned Deputy Prosecutor-General, for the State, has referred the motive part of the prosecution story with the assertion that it was attributed to the appellant. We have gone through the contents of the F.I.R. Exh.PB/1, and the statements of the prosecution witnesses namely, Muhammad Nawaz P.W.3 and Murad Khan P.W.5 made before the Court. The motive as alleged by the complainant in the F.I.R. Exh.PB/1 was that Yousaf Sahi party of the area snatched two mares from the accused Anwar party, and the appellant Muhammad Anwar and his co-accused suspected that on the information given by Shahbaz (deceased), the mares were snatched from them. It was further alleged in the F.I.R. Exh.PB/1 that the appellant Muhammad Anwar

and his co-accused nourished the above-mentioned grudge in their minds due to which they committed the murder of Shahbaz (deceased).

Similarly, the complainant Muhammad Nawaz, while appearing before the trial Court as P.W.3 made the following statement qua the motive:--

"Yousaf Sahi party of the said area, opponent of the accused in the present case snatched mares from Anwar Sahi party, it was suspected by Anwar accused party that Shahbaz deceased has stood informer regarding the above said fact, feeling grudge in their mind, the accused with common intention and by forming unlawful assembly committed the murder of my brother Muhammad Shahbaz".

The perusal of above-mentioned evidence clearly shows that motive was attributed not only to the appellant, but also to the acquitted co-accused, namely, Muhammad Shafi, Muhammad Sarwar, Monda, Allah Ditta, Abbas, Asghar Ali and Muhammad Yaqoob. So, even to the extent of motive, the case of the appellant is not distinguishable from the case of acquitted co-accused, namely, Muhammad Shafi, Muhammad Sarwar, Monda, Allah Ditta, Abbas, Asghar Ali and Muhammad Yaqoob.

14. The learned Deputy Prosecutor-General, for the State, has referred to the recovery of rifle 303 bore (P.5), at the instance of the appellant Muhammad Anwar, to substantiate his argument that the case of prosecution against the appellant has been corroborated by said recovery. The report of Forensic Science Laboratory Exh.PM is only in respect of working condition of the allegedly recovered rifle. In these circumstances, the rifle P.5, allegedly recovered from the possession of the appellant cannot be considered as corroborative piece of evidence.

In the circumstances of the case, we could not find out any independent corroboration against the appellant and we are unable to distinguish the case of the appellant from the case of his acquitted co-accused.

15. In view of the above-mentioned circumstances, we are of the considered opinion that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. We, therefore, accept this appeal, (Criminal Appeal No.1332 of

2006), filed by Muhammad Anwar appellant, by extending him the benefit of doubt, and set-aside the conviction and sentence awarded to the appellant, Muhammad Anwar, vide impugned judgment dated 20-7-2006, passed by the Additional Sessions Judge, Faisalabad. The appellant, namely, Muhammad Anwar, is acquitted from all the charges, and he shall be released from Jail forthwith, if not required in any other case.

Death sentence awarded to the appellant, Muhammad Anwar, is not Confirmed and Murder Reference is answered in the Negative.

H.B.T./M-208/L **Appeal accepted.**

2012 Y L R 2693

[Lahore]

Before Malik Shahzad Ahmad Khan, J

HAMID ALI---Petitioner

versus

Mst. NABILA RIAZ and 2 others---Respondents

Writ Petition No.22327 of 2011, decided on 17th January, 2012.

West Pakistan Family Courts Act (XXXV of 1964)---

----S.5 & Sched.---Constitution of Pakistan Art.199---Constitutional petition---Suit for recovery of maintenance allowance and dowry articles---Petitioner (husband) assailed order of Appellate Court whereby suit of respondent for recovery of maintenance allowance and dowry articles was decreed---Contention of petitioner was that neither the list of dowry articles was prepared at the time of marriage nor receipts of said articles had been produced by the respondent (wife) before the Trial Court---Validity---Non-preparation of list of dowry articles and non-production of receipts of said dowry articles were not fatal to the case of the respondent---Record revealed that ordinary items were mentioned in the said list---Said list was prepared by the respondent who had appeared in the Trial Court as a witness, and her evidence had been corroborated by other witnesses who were cross-examined at length and nothing favourable to the petitioner had been brought on the record---Contradictions in such evidence pointed out by the petitioner were insignificant---Minor variations in the statement of witnesses did occur when their statements were recorded after a considerable period of time---Respondent could not be non-suited on ground of such minor contradictions in the statement of her witnesses when such statements were recorded after about five years from when the marriage between the parties was solemnized---No illegality, material irregularity or infirmity having been pointed out in the order of the Appellate Court warranting interference by the High Court in its constitutional jurisdiction---Constitutional Petition was dismissed, in circumstances.

Muhammad Habib v. Mst. Safia Bibi and others 2008 SCMR 1584; Saheb Khan through Legal Heirs v. Muhammad Pannah PLD 1994 SC 162 and Abdul Qayyum through Legal Heirs v. Mushk-e-Alam and another 2001 SCMR 798 ref.

Muhammad Akhtar Rana for Petitioner.

Raja Tassawar Iqbal for Respondent No.1.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---This writ petition has been filed against the judgment and decree dated 20-9-2011, passed by the learned Addl. District Judge, Ferozewala, District Sheikhupura.

2. As per brief facts of the present case, respondent No.1 filed a suit for recovery of maintenance allowance and for recovery of dowry articles. The suit for maintenance allowance was decreed in favour of the minor plaintiff namely Laiba whereas the suit for recovery of dowry articles was dismissed by the learned Judge Family Court, Ferozewala, District Sheikhupura vide the judgment and decree dated 11-5-2011. Respondent No.1 filed an appeal which was accepted by the learned Additional District Judge, Ferozewala vide the impugned judgment and decree dated 20-9-2011 and suit of the plaintiff/respon-dent No.1 was decreed excluding articles mentioned at Serial Nos. 39, 40, 43, 45 or in the alternative their approximate price of Rs.2,50,000. The findings of the learned Judge Family Court, Ferozewala were not challenged any further on the issue of recovery of maintenance allowance, therefore, the said findings had attained finality, hence, the present writ petition.

3. It is contended by the learned counsel for the petitioner that the plaintiff/ respondent No.1 could not establish her claim regarding the recovery of dowry articles; that neither the list of the dowry articles was prepared at the time of marriage nor receipts of said articles were produced by the plaintiff/respondent No.1 during the trial; that there are material contradictions in the statement of the plaintiff/respondent No.1; that the plaintiff/respondent No.1 while appearing in the Court (as P.W.1) has stated that receipts of the dowry articles were received at the time of purchase whereas P.W.2, Riaz Ahmad has stated that no such receipts were collected; that P.W.3 Muhammad Ashfaq has stated that he was not present at the time of purchase of dowry articles,

therefore, the petitioner/defendant could not establish her claim regarding the recovery of dowry articles, hence the impugned judgment and decree is liable to be set aside.

4. On the other hand, this writ petition has been opposed by the learned counsel appearing on behalf of respondent No.1/plaintiff on the grounds that the non-preparation of list of dowry articles at the time of marriage or non-production of receipts of the said articles is not fatal to the case of the plaintiff/respondent No.1; that contradictions pointed out by the learned counsel for the petitioner/defendant are immaterial, therefore, this petition may be dismissed.

5. Arguments heard and record perused.

6. The plaintiff/respondent No.1 filed a suit for recovery of maintenance allowance and dowry articles, which was dismissed to the extent of dowry articles by the learned Judge Family Court, Feroze-wala whereas in appeal the said suit was decreed vide the impugned judgment and decree dated 20-9-2011. The non-preparation of list of dowry articles at the time of marriage and non-production of receipts of the said dowry articles is not fatal to the case of the plaintiff/respondent No.1. In this respect reference may be made to the case reported as Muhammad Habib v. Mst. Safia Bibi and others (2008 SCMR 1584). A perusal of list Exh. P-2 shows that ordinary items are mentioned in the said list. The above-mentioned list was prepared by the plaintiff has appeared in the Court as P.W.1. She has been corroborated by the evidence of P.W.2 and P.W.3 namely Riaz Ahmad and Muhammad Ashfaq. The above-mentioned witnesses were cross-examined at length but nothing favourable to the defendant/petitioner could be brought on the record. The contradictions pointed out by the learned counsel for the petitioner are insignificant. The minor variations in the statement of the witnesses do occur when their statements are recorded after considerable period of time. In this case marriage between the petitioner and respondent No.1 was solemnized on 29-1-2006 whereas the statements of the plaintiff's witnesses were recorded on 6-12-2010. The plaintiff can not be non-suited on the ground of minor contradictions in the statement of her witnesses when such statements were recorded after about five years from the marriage of parties. Reference in this context may be made to the cases of Saheb Khan thorugh Legal Heirs v. Muhammad Pannah (PLD 1994 Supreme Court 162) and Abdul Qayyum through Legal Heirs v. Mushk-e-Alam and another 2001 SCMR 798.

7. The learned counsel for the petitioner is unable to point out any illegality or material irregularity or infirmity in the impugned judgment and decree of the learned Additional District Judge, Ferozewala, District Sheikhupura, warranting interference by this court in its constitutional jurisdiction, therefore, this writ petition is, hereby, dismissed. There is no order as to costs.

KMZ/H-4/L **Petition dismissed.**

2012 C.L.R. 1400

[Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Sarfraz

Versus

Additional District Judge, Kamalia and 2 others

Writ Petition No. 5938 of 2010, decided on 7th December, 2011.

CONCLUSION

(1) Mother's lap is God's own Cradle".

CUSTODY OF MINOR---(Entitlement of mother)

Constitution of Pakistan (1973)---

---Art. 199---Guardian and Wards Act, 1890, S. 25---Appointment of guardian---Issue of custody of minor female---Entitlement of mother---Right of Hizanat---Appellate Court below while upsetting determination of Guardian Judge dismissed guardianship application of petitioner/father---Impugned judgment---Validity---Said minor had been living with mother/respondent since time of birth and naturally she was deeply attached with her real mother---Objection of petitioner to the effect that respondent/mother had contracted a second marriage was no more available because her second husband already died---Moreover, petitioner had not paid maintenance allowance of said minor which showed that he had no attachment with her---Respondent was real mother of minor and there is no substitute to the lap of real mother---Writ petition dismissed. (Paras 6,7)

نابالغہ بچی پیدائش کے وقت سے رسپانڈنٹ/والدہ کے ہمراہ رہ رہی تھی۔سائل/والد نے کوئی نان نفقہ ادا نہ کیا تھا۔اپیلٹ کورٹ ماتحت نے درست طور پر مذکورہ نابالغہ کو رسپانڈنٹ/والدہ کی تحویل میں دیا تھا۔مذکورہ فیصلہ کے خلاف ہائیکورٹ میں رٹ پٹیشن خارج ہوئی۔

Key Terms:- Custody of minor.

[Minor female was living with the mother/respondent since birth. Petitioner/father had failed to pay maintenance allowance even. Appellate Court below had correctly ordered the custody to be left with respondent/mother. High Court dismissed writ petition against impugned judgment].

For the Petitioner: Mian Muhammad Siddique, Advocate.

For the Respondent No. 3: Shoukat Ali Tanveer, Advocate.

Date of hearing: 7th December, 2011.

ORDER

MALIK SHAHZAD AHMAD KHAN, J. --- This writ petition has been filed against judgment dated 8.2.2010 passed by the learned Additional District Judge, Kamalia whereby appeal filed by respondent No. 3 was accepted and issue of the custody of minor *Mst.* Sadia Bibi aged five years was decided in favour of the above-mentioned respondent.

2. Brief facts of the present case are that the petitioner filed a petition under Section 25 of the Guardian and Wards Act, 1890 for appointment of Guardian of *Mst.* Sadia Bibi. The said petition was filed in the Court of learned Guardian Judge, Kamalia, which was accepted *vide* judgment and decree dated 17.9.2009. Feeling aggrieved, respondent No. 3 filed an appeal before the Court of learned Additional District Judge, Kamalia, which was accepted *vide* judgment and decree dated 8.2.2010, hence this petition.

3. It is contended by the learned counsel for the petitioner that respondent No. 3 was married to the petitioner and out of the said wedlock three children namely Babar Ali, *Mst.* Nadia Bibi and *Mst.* Sadia Bibi were born; that remaining two children namely Babar Ali and *Mst.* Nadia Bibi are in the custody of petitioner and if custody of third minor namely *Mst.* Sadia Bibi is not handed over to the petitioner, it will leave negative effects on the health of the minor Sadia Bibi; that minor Sadia Bibi will miss the company of here other brother and sister, therefore, it will not be in the welfare of the said minor to allow her custody to remain with respondent No.

3; that the learned Judge Family Court, Kamalia had rightly decided the question of custody in favour of the petitioner; but the said findings have illegally been set aside *vide* the impugned judgment dated 8.2.2010 passed by learned Additional District Judge, Kamalia; that respondent No. 3 had contracted a second marriage, therefore, custody of minor daughter of the petitioner may be handed over to the petitioner by setting aside the impugned judgment dated 8.2.2010.

4. On the other hand, this petition has been opposed by the learned counsel appearing on behalf of respondent No. 3 on the grounds that second husband of respondent No. 3 had already died, therefore, the objection of the learned counsel for the petitioner to the above-mentioned fact has become infructuous; that respondent No. 3 was divorced by the petitioner at the time when she was pregnant and minor Sadia Bibi has been living with respondent No. 3 since the time of her birth and she is deeply attached with the said respondent; that minor never remained in the company of her brother and sister, therefore, question of missing their company does not arise; that the petitioner has filed the present petition in order to avoid the payment of maintenance allowance; that there is no substitute of mother's lap, therefore, this petition may be dismissed.

5. Arguments heard. Record perused.

6. From the perusal of record, it is evident that respondent No. 3 was divorced by the petitioner when she was pregnant. Minor Sadia Bibi has taken birth during the period of desertion. The minor has been living with respondent No. 3 since the time of her birth and naturally, she is deeply attached with her real mother. The objection of the learned counsel for the petitioner to the effect that respondent No. 3 had contracted a second marriage, is no more available because the second husband of respondent No. 3 has already died. The death of second husband of the petitioner has not been denied by the learned counsel for respondent No. 3. It is also an admitted fact that the petitioner has not paid the maintenance allowance of the above-mentioned minor *Mst.* Sadia Bibi, which shows that he has no attachment with her. Respondent No. 3 is real mother of the minor and there is no substitute to the lap of

real mother. It has been laid down in number of judgments passed by Hon'ble Supreme Court of Pakistan that "*Mother's lap is God's own Cradle*".

7. In light of the above discussion, the instant petition is without any substance. Hence, the same is, hereby, dismissed.

Petition dismissed.

2012 P.Cr.R. 490

[Lahore]

Present: **MANZOOR AHMAD MALIK and MALIK SHAHZAD AHMAD KHAN, JJ.**

Abid Hussain

Versus

The State

Criminal Appeal No. 1960 of 2006 and Murder Reference No. 85 of 2007, decided on 16th February, 2012.

CONCLUSION

(1) It is by now a well-settled law that injury on the person of PW does not stamp him/her with the truth.

(a) Criminal Trial---

---Injured eye-witness---Validity of statement---Injury on the person of prosecution witness does not stamp him/her with the truth---The statement of an injured eye-witness cannot be relied upon blindly---The injury on the person of a prosecution witness does not mean that he/she is telling the whole truth---The Court has to assess the intrinsic nature of the evidence of said witness. (Para 18)

(b) Criminal Trial---

---Dishonest improvements by PW---Effect---A prosecution witness, who dishonestly improves his statement is not worthy of credence and due to his dishonest improvements, his evidence becomes doubtful.

(Para 13)

MURDER --- (Acquittal of co-accused)

(c) Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/324/34---Committing Qatl-i-Amd of three deceased persons---Criminal trial---Impugned conviction/sentence of death---Acquittal of co-accused---Dishonest improvements of PWs---Appreciation of evidence---Validity---PWs made dishonest improvements in their previous

statements and they changed role attributed to each accused---Motive part of prosecution case was also changed---A prosecution witness, who dishonestly improves his statement is not worthy of credence and due to his dishonest improvements, his evidence becomes doubtful---Complainant party changed its earlier version after lapse of considerable time---Empties were sent to FSL after three days of arrest of appellant, therefore, positive report of FSL in such circumstances was of no avail to prosecution in instant case---Co-accused against whom motive was alleged, had already been acquitted by Trial Court---Statement of injured PW *qua* acquitted accused had already been disbelieved, therefore, her evidence to extent of appellant could not be believed without any independent corroboration---Prosecution evidence *qua* acquitted co-accused with identical role had already been disbelieved by Trial Court whereas same evidence had been believed against appellant without any independent corroboration---Prosecution had failed to prove its case beyond any shadow of doubt---Criminal appeal accepted.

(Paras 13,14,15,16,17,18,19,21)

Ref. 2008 PSC Crl. (SC Pak.) 213 = 2008 SCMR 6, PLJ 1994 SC 552.

[On the identical evidence co-accused had been acquitted by Trial Court. Evidence against appellant had got no independent corroboration. Impugned conviction/sentence of death was set aside].

For the Appellant: Chaudhry Muhammad Riaz Ahmad, Advocate.

For the State: Chaudhry Muhammad Mustafa, Deputy Prosecutor-General.

For the Complainant: Ustad Muhammad Iqbal, Advocate.

Date of hearing: 16th February, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J. --- Abid Hussain, appellant alongwith Muhammad Ashiq, Muhammad Asif and Qammer *alias* Lal Din, was tried in complaint case No. 69/ASJ of 2004 titled as *"Maqsood Ahmed v. Abid Hussain, etc.*", under Sections 302, 324, 34 of P.P.C., and in State case F.I.R. No. 172, dated 20.05.2004, offences under Sections 302, 324 of P.P.C., registered at Police Station, City Depalpur, District Okara. The learned Trial Court *vide*

judgment dated 20.12.2006, while acquitting Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din had convicted Abid Hussain appellant under Section 302(b), P.P.C. and sentenced him to "DEATH" on three counts for Qatl-e-Amd of three persons namely, Muhammad Amin, *Mst.* Hajran Bibi and *Mst*. Ghulam Fatima. He was also directed to pay Rs. 1,00,000/- (rupees one lac only) on three counts as compensation to the legal heirs of above-mentioned deceased persons under Section 544-A, Cr.P.C., recoverable as arrears of land revenue and in default thereof to undergo six months' S.I. The appellant was acquitted from the charge under Section 324 of P.P.C. of attempt to commit Qatl-e-Amd of *Mst*. Abida Parveen.

2. Feeling aggrieved, the appellant Abid Hussain has challenged his conviction and sentence through Criminal Appeal No. 1960 of 2006, whereas learned Trial Court has transmitted Murder Reference No. 85 of 2007 for confirmation or otherwise of the "DEATH" sentence of the appellant. Both these matters being unified are disposed of through this single judgment.

3. Brief facts of the case as stated by the complainant Maqsood Ahmad (PW1) in his application Exh.PA on the basis of which formal F.I.R. Ex.PA/1 was registered, are that on 20.05.2004, he was sleeping at his house alongwith his family members. At about 03.45 a.m. the outer door of the house was knocked. Father of the complainant namely, Muhammad Amin and other family members of the house woke up. Muhammad Amin opened the door and found Abid Hussain appellant armed with 7MM rifle, Muhammad Ashiq, Muhammad Asif both sons of Qamer Hussain and Qamer Hussain *alias* Lal Din co-accused (since acquitted), standing outside the house. Abid Hussain appellant entered the house, whereas, rest of three above-mentioned co-accused persons remained present outside the house. Abid Hussain appellant made a fire shot with his rifle on Muhammad Amin, which hit him on his right flank. The mother of the complainant namely *Mst*. Hajra Bibi came forward on which Abid Hussain appellant made a fire shot, which landed on the left side of her neck, then Abid Hussain appellant made another fire shot on maternal grand-mother of the complainant namely, *Mst*. Ghulam Fatima, which hit her on her chest. The complainant's sister namely, *Mst*. Abida Parveen stood up, whereupon, Abid Hussain appellant made a fire shot, which hit her on the right side of her chest. Abid Hussain, thereafter, made indiscriminate firing on Muhammad

Amin, *Mst*. Ghulam Fatima and *Mst*. Hajran Bibi and *Mst*. Abida Parveen. *Mst*. Ghulam Fatima succumbed to the injuries at the spot. On raising hue and cry of the complainant party, residents of the vicinity attracted to the scene of occurrence, on which the appellant Abid Hussain and his co-accused decamped from the spot while raising 'lalkaras'. Muhammad Amin, *Mst*. Hajran Bibi and *Mst*. Abida Parveen were shifted to the Civil Hospital, Depalpur in an injured condition. Muhammad Amin succumbed to the injuries at Civil Hospital, Depalpur, whereas, *Mst*. Hajran Bibi and *Mst*. Abida Parveen were referred to the Civil Hospital, Okara. *Mst*. Hajran Bibi died at the Civil Hospital, Okara, whereas, *Mst*. Abida Parveen was admitted in the hospital.

The motive for the occurrence as narrated in the application Ex.PA was that Muhammad Amin deceased had close ties with Qamer Hussain *alias* Lal Din co-accused (since acquitted) and Abid Hussain appellant, who had sold 4¾ acres of agricultural land of Muhammad Amin deceased against a sale consideration of Rs. 10,00,000/-, but they had misappropriated the said amount. Muhammad Amin deceased used to demand the said amount from the accused due to which the accused and Muhammad Amin deceased several times quarreled with each other prior to the occurrence. For the said grudge, the accused with their common intention committed the above offences.

4. After registration of the F.I.R. Ex.PA/1, the complainant moved an application Exh.PB, which was marked by the DSP, Depalpur, to the S.H.O., Police Station, City Depalpur, on 29.05.2004. The complainant Maqsood Ahmad PW.1 stated therein that at the time of registration of the F.I.R., he was perturbed and he forgot to give correct facts and actually at the time of occurrence, the appellant Abid Hussain and his three co-accused (since acquitted) namely, Muhammad Ashiq, Muhammad Asif sons of Qammer Hussain and Qammer Hussain *alias* Lal Din, all armed with rifles entered his house at the time of occurrence. It was further mentioned in Ex.PB that Muhammad Amin was murdered due to the fire shot of Abid Hussain appellant, *Mst*. Hajran Bibi was murdered due to the fire shot of Muhammad Ashiq co-accused (since acquitted), and *Mst*. Ghulam Fatima was murdered due to the fire shot of Qamer Hussain *alias* Lal Din co-accused (since acquitted). It was further alleged in Ex.PB that *Mst*. Abida Parveen PW.3 received

fire-arm injuries on her person at the hands of Muhammad Asif co-accused (since acquitted).

5. During the investigation of this case, the police found the appellant Abid Hussain guilty and challaned him, whereas, all the remaining co-accused namely Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din were declared innocent and they were not challaned by the police. Being dissatisfied with the police investigation the complainant Maqsood Ahmad (PW1) lodged a private complaint (Exh.PC), narrating the same facts as mentioned in application (Exh.PB). After report under Section 202 of Cr.P.C. Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din co-accused (since acquitted) were summoned by the learned Trial Court to face the trial in this case. The appellant Abid Hussain alongwith Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din co-accused (since acquitted) was charge-sheeted under Sections 302, 324, and 34 of P.P.C., to which he and his above-mentioned co-accused pleaded not guilty and claimed trial.

Both, the challan case and the private complaint were tried together by the learned Trial Court.

6. In order to substantiate the charge against the appellant, prosecution had examined 7 witnesses. Dr. Muhammad Sharif (PW5), Dr. Qaisar Tariq (PW6) and Dr. Shagufta Yasmeen (PW7) produced medical evidence and Maqsood Ahmad complainant (PW1), Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3) appeared as eye-witnesses, whereas, statement of Muhammad Aslam (PW4) is formal in nature.

The witnesses of the State case were summoned as Court Witnesses. Muhammad Ashraf Sajjad, Draftsman appeared as CW1, Muhammad Ashraf, C/352 (CW2) escorted the dead-body of Muhammad Amin deceased to the mortuary, Muhammad Aslam, C-901 (CW3) stated that on 20.05.2004 the dead-body of *Mst*. Hajran Bibi deceased was given to him at D.H.Q. Hospital, Okara for post-mortem examination, Muhammad Ashiq (CW4) is the recovery witness of rifle 7 MM (C-8), Muhammad Abbas, C/279 (CW5) stated that on 20.05.2004 the dead-body of *Mst*. Ghulam Fatima deceased was handed over to him for post-mortem examination and Tajamal Hussain, S.I. (CW.6) conducted the investigation of this case. On 26.05.2004 he arrested Abid Hussain appellant and on his pointation allegedly got recovered 7

MM rifle (C-8) *vide* recovery memo. (Ex.CW4/A). The prosecution has tendered in evidence the reports of Chemical Examiner Exh.PZ, Exh.PA.A. and Exh.P.B.B, reports of Serologist Ex.P.C.C, Exh.PD.D. and Exh.P.E.E and report of Forensic Science Laboratory as Exh.P.F.F.

7. After the closure of the prosecution case the appellant and his co-accused were examined under Section 342 of Cr.P.C.; they denied the allegations and professed their innocence. Abid Hussain, appellant while answering to question "*Why this case against you and why the PWs have deposed against you*" replied as under:---

"*The PWs are inter se closely related. Muhammad Ashiq is the first cousin of Muhammad Amin deceased and Taya of the complainant. Said Muhammad Ashiq is inimical toward me and my co-accused prior to this occurrence, on account of civil and criminal litigation pending between my father and other co-accused and said Muhammad Ashiq. It was an unseen occurrence. Complainant Maqsood Ahmed and Nawaz PWs were not present at the time of occurrence. The said PWs involved me and my co-accused in this case at the instance of Muhammad Ashiq aforesaid. I myself and my co-accused Muhammad Ashiq, Muhammad Asif are the sons of my co-accused Qamer Hussain alias Lal Din and we all being the members of one family have been involved in this case on account of the previous enmity with said Muhammad Ashiq. In fact it was a dacoity committed in the house of complainant by some unknown persons, which could not be identified due to darkness of night. During investigation my co-accused namely Muhammad Ashiq, Asif and Qammer Hussain were found innocent by the police. We all are not involved in the aforesaid occurrence. I am innocent.*"

8. The learned Trial Court *vide* judgment dated 20.12.2006, found Abid Hussain guilty and convicted and sentenced him as mentioned above and acquitted his co-accused Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din from the charge while extending them the benefit of doubt. Anyhow, the appellant Abid Hussain was also acquitted from the charge under Section 324 of P.P.C.

9. The learned counsel for the appellant, in support of this appeal, contends that the prosecution witnesses are closely related *inter se* and inimical towards the appellant and they are at variance with each other on the material aspects of this case; that in the F.I.R. it was the case of the complainant Maqsood Ahmad (PW1) that on the day of occurrence, there was a knock at the outer door of the house and

father of the complainant opened the door and Abid Hussain appellant while armed with rifle 7 MM entered the house and made first fire with his rifle on Muhammad Amin which hit him on the right flank and then his mother namely *Mst*. Hajran Bibi step forward and, thereafter, he too was fired at by the appellant Abid Hussain, which hit her on the left side of her neck and then *Mst*. Ghulam Fatima woke up and he was also fired at by the appellant Abid Hussain, which hit her on her chest and lastly it was stated by the complainant that the appellant also injured *Mst*. Abida Parveen (his sister) by firing on her chest, but surprisingly the complainant while appearing before the learned Trial Court as (PW.1) gave altogether a different version, which is to the effect that his father Muhammad Amin deceased woke up and switched on the electric light and he asked as to who was there, on which, Qamar Hussain *alias* Lal Din accused asked Muhammad Amin to open the door and when he opened the door, Abid Hussain appellant, Muhammad Ashiq co-accused, Muhammad Asif co-accused and Qamer Hussain *alias* Lal Din co-accused, all armed with rifles, entered his house. Abid Hussain accused fired with his rifle at his father and two fire shots hit his father Muhammad Amin, on his right arm and right flank. Muhammad Ashiq accused fired two shots with his rifle, which hit his mother *Mst*. Hajran Bibi. Qamar Hussain accused fired with his rifle which hit on the chest of *Mst*. Ghulam Fatima deceased. Muhammad Asif accused fired one shot with his rifle which hit *Mst*. Abida Parveen on her chest; that the complainant has also stated before the Trial Court that he made a supplementary statement (Ex.PB) on the day of occurrence *i.e.* on 20.05.2004, but he made this improvement in order to bring his statement in line with the statement, which he made before the Court, because in fact, the supplementary statement (Ex.PB) of the complainant reveals that this was made on 29.05.2004, because it contains the seal of the DSP dated 29.05.2004, who referred the matter to the concerned S.H.O. on the said date; that this fact is supported from the other circumstances of the case such as site plan (Ex.CW1/A), which was prepared on 21.05.2004, wherein presence of only Abid Hussain appellant was shown inside the house of the complainant; that same story was mentioned in the relevant column of *"Mukhtasar Halat Muqadama"* of Inquest Report of Muhammad Amin deceased (Ex.PT); that thereafter the complainant instituted a private complaint, wherein his version was in line with his supplementary statement (Ex.PB); that while instituting a private complaint, it was not the case of the complainant that his statement was not correctly recorded by the

police, rather he stated that at the time of lodging Ex.PA (statement made before the police), he was confused; that statements of other eye-witnesses, *i.e*. Muhammad Nawaz (PW.2) and *Mst*. Abida Parveen (PW.3) before the police were in line with the version of the complainant in Ex.PA and F.I.R. Ex.PA/1, but while appearing before the Court, they have changed their statements because while lodging the F.I.R., the complainant assigned the role of firing only to Abid Hussain appellant, but while appearing before the Court, the role of firing was also assigned to co-accused, namely, Muhammad Ashiq, Muhammad Asif, and Qammer Hussain *alias* Lal Din; that the above-mentioned co-accused of the appellant against whom there was an allegation that they caused fatal injuries to *Mst*. Ghulam Fatima and *Mst*. Hajran Bibi deceased and caused serious injury to *Mst*. Abida Parveen (injured) have been acquitted by the learned Trial Court and their acquittal has not been assailed either by the complainant or the State, therefore, the same has attained finality; that Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din were tried alongwith the appellant Abid Hussain and they were acquitted by the learned Trial Court, therefore, the evidence, which has been disbelieved *qua* these three acquitted co-accused of the appellant cannot be believed to the extent of the appellant; that there is no independent corroboration, as far as, the case of the appellant Abid Hussain is concerned, because the motive was mainly attributed to Qammer Hussain *alias* Lal Din father of the appellant and since Qammer Hussain *alias* Lal Din has been acquitted, therefore, the motive part of prosecution evidence cannot be used as corroborative evidence against the appellant; that, as far as recovery of rifle 7MM, which was allegedly recovered at the instance of the appellant and positive report of Forensic Science Laboratory is concerned, the learned counsel for the appellant has contended that as per Tajammal Hussain (CW6) the appellant Abid Hussain was arrested on 26.05.2005, whereas, as per statement of Muhammad Abbas (CW4) he was arrested on the day of occurrence and on the same day he led to the recovery of rifle (C.8); that the empties allegedly recovered from the place of occurrence were sent to the Forensic Science Laboratory on 29.05.2005 and it is clear from the statement of Muhammad Ashraf (CW2) that at that time the appellant was in the custody of the police, therefore, no reliance can be placed on the positive report of the Forensic Science Laboratory; that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt and that the appellant is entitled to acquittal.

10. On the other hand, the learned Deputy Prosecutor General, for the State, assisted by the learned counsel for the complainant, has vehemently opposed the contentions of the learned counsel for the appellant on the grounds that so far as the appellant is concerned the case of the prosecution is consistent as it is mentioned in the F.I.R., private complaint and the statements of the other witnesses, that he was the person, who entered inside the house of the complainant and caused injuries to Muhammad Amin; that the prosecution has fully proved its case against Abid Hussain appellant to the extent of murder of Muhammad Amin deceased; that *Mst*. Abida Parveen was inmate of the house, who was injured in the incident, therefore, her presence at the spot cannot be doubted; that there is no reason to falsely implicate the appellant in this case; that the case of the prosecution to the extent of Abid Hussain appellant is fully supported by medical evidence available on the record and it is further corroborated by the recovery of rifle 7MM (C.8), which was recovered on the pointation of the appellant and by the positive report of the Forensic Science Laboratory (Ex.PFF); that the delay *per se* in lodging the F.I.R. is no ground to discard the evidence of the eye-witnesses and even otherwise there is no delay in reporting the matter to the police because the occurrence took place on 20.05.2004, at 03.45 a.m., whereas, the matter was reported to the police at 05.30 a.m. on the same night and in such a situation, where three persons lost their lives and one received serious injuries then the most important thing for the complainant was to provide first medical aid to the injured, instead of reporting the matter to the police; that in order to prove its case, the natural eye-witnesses account has been furnished by the prosecution, which inspired confidence and despite lengthy cross-examination, the defence could not shake the testimony of the prosecution witnesses' that the prosecution has proved its case against the appellant beyond any shadow of doubt; that the appeal filed by the appellant against his conviction and sentence be dismissed and Murder Reference be answered in the affirmative.

11. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

12. The occurrence in this case took place on 20.05.2004, at 03.45 a.m. (night) in the house of the complainant Maqsood Ahmad (PW1). The matter was reported to the police at 05.30 a.m. by the complainant Maqsood Ahmad (PW1) whereas formal F.I.R. was registered at 06.00 a.m. on the same day. The place of occurrence was at

the distance of one kilometer from the Police Station. The matter was reported to the police at Civil Hospital, Depalpur.

The prosecution has itself given two different versions in this case. In complaint (Exh.PA) on the basis whereof the F.I.R. (Exh.PA/1) was registered, the case of the complainant Maqsood Ahmad (PW1) was that at the time of occurrence when Muhammad Amin deceased opened the door of his house, the appellant Abid Hussain while armed with rifle 7MM, Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din co-accused (since acquitted) were present outside the house and it was Abid Hussain appellant, who entered the house of the complainant and made a fire shot, which landed on the right flank of Muhammad Amin deceased. The second fire shot made by him hit on the left side of the neck of *Mst*. Hajran Bibi deceased, whereas, the third fire shot made by him landed on the chest of *Mst*. Ghulam Fatima deceased. It was further alleged in the said complaint/F.I.R. that 4th fire shot made by Abid Hussain appellant landed on the right side of the chest of *Mst*. Abida Parveen (PW3). Same was the case of other prosecution witnesses, *i.e*. Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3) in their statements made before police under Section 161, Code of Criminal Procedure *vide* Exh.DA and DB respectively, whereas, in the application Exh.PB the complainant Maqsood Ahmed (PW.1) has given an altogether different story. In his application (Ex.PB), he has alleged that all the accused, namely, Abid Hussain appellant, Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din co-accused (since acquitted), while armed with rifles entered his house. According to the changed version of the prosecution (in application Exh.PB), the appellant Abid Hussain was attributed the role of making a fire shot at Muhammad Amin deceased only, whereas, Muhammad Ashiq co-accused (since acquitted) has been assigned the role of making a fatal fire shot at *Mst*. Hajran Bibi. Qammer Hussain *alias* Lal Din co-accused (since acquitted) was given the role of inflicting a fatal fire-arm injury at the person of *Mst*. Ghulam Fatima deceased, whereas, Muhammad Asif co-accused (since acquitted) was attributed the role of causing a fire-arm injury on the person of *Mst*. Abida Parveen (PW.3). It was stated by the complainant Maqsood Ahmad (PW1) in Exh.PB that he could not describe the above-mentioned facts in his application Exh.PA as he was perturbed at the time of making said statement. The complainant, later on, filed a private complaint, in which he narrated the same changed version, which he introduced in his application Exh.PB. In

application Exh.PA, the injuries to all the deceased, namely, Muhammad Amin, *Mst*. Ghulam Fatima, *Mst*. Hajran Bibi, as well as, to injured witness, namely, *Mst*. Abida Parveen (PW.3), were attributed to only Abid Hussain appellant, whereas, in the application (Ex.PB), and in private complaint (Ex.PC), and in the statements of prosecution witnesses namely, Maqsood Ahmad (PW.1), Muhammad Nawaz (PW.2) and *Mst*. Abida Parveen (PW.3) before the learned Trial Court, the appellant Abid Hussain, as well as, Muhammad Ashiq, and Qammer Hussain *alias* Lal Din co-accused (since acquitted) have been attributed one fatal injury each at the person of Muhammad Amin deceased, *Mst*. Hajran Bibi deceased, and *Mst*. Ghulam Fatima deceased, respectively. The injury to *Mst*. Abida Parveen (PW.3) was assigned to Muhammad Asif, co-accused (since acquitted), in place of Abid Hussain appellant. It was not alleged in the application (Ex.PA) and in the F.I.R. (Ex.PA/1) that co-accused Muhammad Ashiq, Muhammad Asif and Qammer Hussain *alias* Lal Din, were armed with any weapon at the time of occurrence, but in the above-mentioned subsequent statements, it was alleged that all the accused were armed with rifles. In application Exh.PA, the allegation of criminal house trespass was levelled only against Abid Hussain appellant, whereas, in the above-mentioned subsequent statements, the allegation of criminal house trespass was levelled against all accused. There are glaring contradictions in the prosecution evidence on material aspects of the case, because the story narrated in application (Ex.PA), lodged by Maqsood Ahmad (PW.1) and in the statements of Muhammad Nawaz (PW.2) and *Mst*. Abida Parveen (PW.3) Ex.DA and Ex.DB, respectively is altogether different from the story narrated in the application (Ex.PB), private complaint Exh.PC, and in the statements of the above prosecution witnesses made before the learned Trial Court. It was not the case of Maqsood Ahmad (PW1), Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3) that they did not make their statements before the police *vide* Exh.PA, Exh.DA and Exh.DB, respectively. The said prosecution witnesses made material improvements in their previous statements, while making their statements before the learned Trial Court. The said witnesses were duly confronted with their previous statements, and dishonest improvements made in their previous statements were brought on the record. The relevant part of the statement of Maqsood Ahmad (PW1) is reproduced hereunder:---

"*I stated before the police in my statement Exh.PA that at the knock of the door, my father Muhammad Amin let the electric light and he asked who he was, Qammer*

Hussain alias Lal Din accused asked my father to open the door and then my father opened the door. Confronted with Ex.PA, Ex.PB and Ex.PC, where, it is not so recorded. It is correct that I did not mention in Ex.PA, Ex.PB, and Ex.PC that at the knock at the door all the inmates of the house woke up, and my father opened the door, confronted with Ex.PA, E, PC, where in portion A to A, it is so recorded. It is incorrect that I have improve my statement to the extent of litting an electric light and specific name of Qammer Hussain accused, dishonestly to make the identification possible and to involve the accused in this case. I stated before the police as well as in my private complaint that Ashiq, Asif, Qammer Hussain alias Lal Din, accused armed with rifles, entered in the house, confronted with Ex.PA, wherein it is not so recorded. It is incorrect that I stated before the police in Ex.PA that Muhammad Ashiq, Muhammad Asif and Qammer Hussain alias Lal Din accused remained outside of the house and were not armed, confronted, so recorded in Ex.PA. I stated before the I.O. as well as in private complaint that Abid Hussain made two fires at my father, which hit him on right arm and flank. Confronted with Ex.PA and Ex.PC not so recorded. I did not state before the police that Abid Hussain accused made fire straight at my father Muhammad Amin which hit on his right flank, confronted with Exh.PA where it is so recorded. It is incorrect that I have improved my statement dishonestly to take my evidence in line with medical evidence. I stated before the police in Ex.PA that Muhammad Ashiq accused made two fires which hit my mother Mst. Hajran Bibi, confronted with Ex.PA not so recorded. I did not state before the police in my statement Ex.PA that when my father received fire-arm injury my mother Mst. Hajran Bibi stepped forward upon which Abid Hussain accused made straight fire with his rifle which hit on the left side of her neck, confronted, so recorded in portion B to B. In Ex.PA. It is incorrect that I have deposed falsely and improved my statement to connect Muhammad Ashiq accused in this case. I stated before the police that Qammer Hussain accused fire with his rifle at the chest of Mst. Ghulam Fatima, confronted with Ex.PA, not so recorded. I did not state in my statement Ex.PA that my maternal grandmother Ghulam Fatima woke up and upon her Abid Hussain accused made straight fire which hit on front of her chest, confronted, so recorded in portion C to C in Ex.PA. It is incorrect that I have improved my statement and deposed falsely against Qammer Hussain accused to create evidence against him to involve him in this case. I stated before the police that Muhammad Asif made fire with his rifle which hit

Mst. Abida Parveen) confronted with Ex.PA not so recorded. I did not state in Ex.PA that my sister Abida Parveen woke up, upon her Abid Hussain accused made straight fire with his rifle, which hit on the right side of her chest, confronted with Ex.PA, where is so recorded in portion D to D. I did not state before the police that Abid Hussain accused made indiscriminate firing with his rifle at my father, mother, grand-mother, and at my sister and we escaped ourselves by running. Confronted with Ex.PA where is so recorded. It is incorrect that I have deposed falsely and suppressed dishonestly portion D to D to involve the accused Muhammad Ashiq) Muhammad Asif and Qammer Hussain alias Lal Din. It is incorrect that I have attributed the overt act to Muhammad Ashiq, Muhammad Asif, Qammer Hussain accused to involve them in this case dishonestly and that after deliberation, consultation on account of my dishonest intention to involve the said accused at this stage. I stated before the police as well as in my private complaint that my father sell 4 acres land and gave 10-lac rupees to Qammer Hussain accused. Confronted with Ex.PA and Ex.PC, where it is not so recorded. I stated before the police as well as in the private complaint that Qammer Hussain accused had asked my father that he would get purchase land for him measuring 42 acres but Qamer Hussain did not get purchased the land for my father. Confronted with Ex.PA and Ex.PC, where it is not so recorded. I stated before the police that Qammer Hussain got land on lease which was jointly cultivated by my father and Qammer Hussain, confronted with Ex.PA where it is not so recorded. It is incorrect that I have concocted the story of sale of land, giving Rs. 10,00,000/- (ten lac) to Qammer Hussain on the pretext of purchasing 42 acres of land) and then taking the land on lease and being cultivated jointly, dishonestly to create motive evidence against the accused persons and that to strengthen the motive already given in Ex.PA and Ex.PH".

Similarly dishonest improvements of other prosecution witnesses, namely, Muhammad Nawaz (PW2) and *Mst.* Abida Parveen (PW3) were also brought on the record during their cross-examination when they were confronted with their previous statements. The relevant part of the statement of Muhammad Nawaz (PW.2) is reproduced hereunder:---

"I had made statement before the police. I had also made cursory statement in this complaint. I had stated in my statement before the police that all the accused armed with rifles had entered into the house of Muhammad Amin deceased, confronted

with Ex.DA where it is not so recorded. I did not state in Ex.DA that Muhammad Ashiq, Muhammad Asif and Qammer Hussain alias Lal Din stood outside, while Abid Hussain entered the house, confronted, so recorded in Ex.DA. I had stated in Ex.DA that an electric bulb was on at that time, confronted not so recorded in Ex.DA. It is incorrect that I have made dishonest improvement of electric bulb to make possible of the accused, dishonestly. It is incorrect that improved my statement to all the accused in the house of Muhammad Amin, dishonestly to connect them with the offence. I had stated in Ex.DA that Muhammad Ashiq accused fired at Hajran Bibi deceased, Asif accused fired at Abida Bibi and Lal Din accused had fired at Ghulam Fatima deceased, confronted with Ex.DA where it is not so recorded. I did not state in Ex.DA that Abid Hussain accused fired at Hajran Bibi, when she stepped forward, which hit on her left side of neck, my mother Ghulam Fatima woke up, upon which Abid Hussain accused made fire which hit on her chest on front of my Bhanji Abida Parveen woke up and Abid Hussain accused made fire with his rifle which hit on right side of her chest, and accused Abid Hussain made indiscriminate firing at Muhammad Amin. Ghulam Fatima, Hajran Bibi and my niece Abida Parveen, confronted with Ex.DA, where in portion A to A. It is so recorded. It is incorrect that I dishonestly improved my statement and charged the accused namely Muhammad Ashiq, Asif and Lal Din for making fires at the deceased, to connect them with the offence."

Same was the case of *Mst*. Abida Parveen who also made number of dishonest improvements in her previous statement. She was also confronted with her previous statement Ex.DB, which she made before the police. The relevant portion of her statement reads as under:---

"*I had made statement before the police, at about 07.00/08.00 a.m. on the day of occurrence. Thereafter I had made statement in this Court in my examination-in-chief and then today. I had statement in my statement Ex.DB that Abid Hussain, Ashiq, Muhammad Asif and Qammer Hussain alias Lal Din accused armed with rifles entered our house confronted, not so recorded in Ex.DB. I had stated in Ex.DB that Ashiq accused fired at my mother Hajran Bibi deceased, Qamer Hussain alias Lal Din accused fired at Ghulam Fatima deceased, while Asif accused fired at me, confronted, not so recorded in Ex.DB. I did not state in Ex.DB that my mother Hajran Bibi stepped forward, on which Abid Hussain fired with his rifle which hit*

her on the left of her neck, my Nani Ghulam Fatima got up, Abid Hussain fired at her, which hit on her chest, and Abid Hussain accused fired with his rifle at me which hit on my right chest, confront with Ex.DB where it is so recorded, in Ex.DB I had stated in Ex.DB that light of bulb was on in our house, confront, not so recorded in Ex.DB. It is incorrect that I have improved my statement by attributing the specific roles to all the accused persons dishonestly to connect them with the offence and improve my statement to the extent of light to make the identification of the accused possible, dishonestly".

13. It is evident from the perusal of prosecution evidence that the prosecution witnesses made dishonest improvements in their previous statements. They changed the role attributed to each accused. The motive part of the prosecution case was also changed. It is interesting to note that all the prosecution witnesses, namely, Maqsood Ahmad (PW1), Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3) did not claim that the police has *mala fidely* changed their statements or the same were not properly recorded by the police. They have admitted that the statements Ex.PA, Ex.DA and Ex.DB, were made by them before the police. It is by now a well-settled law that a prosecution witness, who dishonestly improves his statement is not worthy of credence and due to his dishonest improvements, his evidence becomes doubtful.

14. Although it is claimed by the complainant that he moved his application Exh.PB, on the day of occurrence *i.e.*, 20.05.2004, but this fact could not be established by him. The application Exh.PB (treated as supplementary statement) contains the signatures and seal of DSP, Depalpur dated 29.05.2004, so it is quite obvious that application Ex.PB was, in fact, moved by the complainant on 29.05.2004. This fact is also established through the scaled site plan Exh.CW1/A, which was prepared on 21.05.2004, and in the said document Muhammad Ashiq, Muhammad Asif and Qammer Hussain co-accused (since acquitted) have been shown at point-H, which is outside the house of the complainant and only Abid Hussain appellant has been shown at point-E, which is inside the said house. Similarly in the site plan Exh.CW1/A, the role of making fire shots at the persons of all three deceased and injured PW has been attributed to the appellant Abid Hussain, whereas, Muhammad Ashiq, Muhammad Asif and Qammer Hussain co--accused (since acquitted) have been shown to be simply present outside the house

of the complainant Maqsood Ahmed (PW.1) at point-H and no role whatsoever has been attributed to them. Muhammad Ashraf Sajjad, Draftsman (CW1) has stated that on 21.05.2004, he took rough notes of the place of occurrence on the pointation of the PWs. So the story of the complainant Maqsood Ahmed (PW.1) that he told the actual facts on the same day and moved his application Ex.PB on the day of occurrence *i.e.* 20.05.2004, has been belied by the above-mentioned evidence of CW.1, because had he changed his earlier version on 20.05.2004 then he should have pointed out to Muhammad Ashraf Sajjad, Draftsman (CW1) that all the accused entered the house of the complainant and took active part in the occurrence by making fire shots at all the three deceased and injured PW.3. It is quite obvious from the perusal of prosecution evidence that the complainant party changed its earlier version after the lapse of considerable time.

15. It is evident from the perusal of the statements made in the Court by the above-mentioned prosecution witnesses, namely, Maqsood Ahmad (PW1), Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3) that role attributed to the appellant Abid Hussain was similar to that of acquitted co-accused, namely, Muhammad Ashiq and Qammer Hussain. Charge under Sections 302, 324, 34 of P.P.C. with identical allegations was framed against the appellant Abid Hussain, as well as, against Muhammad Ashiq and Qammer Hussain co-accused (since acquitted). The said two co-accused were also assigned the similar role of causing fatal injuries to *Mst*. Hajran Bibi and *Mst*. Ghulam Fatima deceased but they have been acquitted by the learned Trial Court by extending the benefit of doubt and no appeal against their acquittal has been preferred either by the State or by the complainant as confirmed by the learned Deputy Prosecutor-General and the learned counsel for the complainant and as such the said acquittal has attained finality, therefore, the question for determination before this Court is that whether the evidence which has been disbelieved *qua* the acquitted co-accused of the appellant can be believed against the appellant. In this regard, we are guided by the judgment of the Hon'bIe Supreme Court of Pakistan reported as *Iftikhar Hussain and another v. State* (PLJ 2004 SC 552), wherein the Hon'ble Supreme Court at page 562 held as under:---

"*17. ... It is true that principle of falsus in uno falsus in omnibus is no more applicable, as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused*

person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts. Reference may be made readily to the case of Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758), relevant para therefrom is reproduced below thus:

The proposition of law in criminal administration of justice namely whether a common set of ocular account can be used for recording acquittal and conviction against the accused persons who were charged for the same commission of offence is an over-worked proposition. Originally the opinion of the Court was that if a witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case. This proposition is enshrined in the maxim falsus in uno falsus in omnibus but subsequently this view was changed and it was held that principle enshrined in this maxim would not be applicable and testimony of a witness will be acceptable against one set of accused though same has been rejected against another set of accused facing same trial. However, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502), Tawaib Khan and another v. The State (PLD 1970 SC 13), Bakka v. The State (1977 SCMR 150), Khairu and another v. The State (1981 SCMR 1136), Ziaullah v. The State (1993 SCMR 155), Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. The State (1992 SCMR 1647), Irshad Ahmad and others v. The State and others (PLD 1996 SC 138) and Ahmad Khan v. The State (1990 SCMR 803)".

Similar view was reiterated in the subsequent judgment of the Hon'bIe Supreme Court of Pakistan reported as *Akhtar Ali and others v. The State* (2008 SCMR 6).

16. The learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, has referred to the recovery of rifle 7MM (C.8) at the instance of the appellant Abid Hussain and positive report of Forensic Science Laboratory Ex.PFF to substantiate his arguments that the case of the prosecution against the appellant Abid Hussain has been corroborated by said recovery and report of Forensic Science Laboratory Ex.PFF. We have noted that five empties P-5/1-5 were recovered from the place of occurrence on 20.05.2004. According to the statement of Tajammal Hussain (CW6) the appellant Abid Hussain was arrested on 26.05.2004 whereas according to the statement of Muhammad Ashraf (CW2) the parcel of empties was handed over to him by *Moharrir* on 29.05.2004 and he deposited the said parcel in the office of Forensic Science Laboratory, Lahore. It is evident from the perusal of said evidence that the empties were kept in Police Station till the arrest of appellant Abid Hussain on 26.05.2004, and the same were sent to the Forensic Science Laboratory after three days of his arrest on 29.05.2004, therefore, the positive report of Forensic Science Laboratory in such circumstances, is of no avail to the prosecution in this case, thus, the alleged recovery of gun C8 on the pointation of the appellant Abid Hussain does not corroborate the prosecution version.

17. The learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant, has next referred the motive part of the prosecution story with the assertion that it was attributed to the appellant Abid Hussain.

We have gone through the contents of application Ex.PA, and the statements of prosecution witnesses, namely, Maqsood Ahmad (PW1), Muhammad Nawaz (PW2) and *Mst*. Abida Parveen (PW3). It was alleged in the application Exh.PA that Qammer Hussain co-accused (since acquitted) and Abid Hussain appellant had sold the land of the complainant party and, thereafter, they misappropriated the sale consideration of the said land and as the complainant party demanded the said sale consideration from the accused, therefore, due to said grudge the above-mentioned offence was committed by the accused party. The complainant Maqsood Ahmad, while appearing as PW1 before the learned Trial Court has not attributed the said motive against the appellant Abid Hussain. He attributed the motive against Qamer Hussain co-accused (since acquitted). The relevant part of his statement is reproduced hereunder:---

"*The motive for this occurrence was that my father Muhammad Amin deceased owerred 4¾ acres of land and my father sold the land and gave Rs. 10,00,000/- (ten lac) to Qammer Hussain accused who had asked my father that he would get purchase land for him measuring 42 acres, but Qamer Hussain accused did not get purchased the land for my father. Qammer Hussain got land on lease, which was jointly cultivated by my father and Qamer Hussain. My father asked. My father demanded the money back but the same were not paid by Qamer Hussain accused to my father, on account of these circumstances, the present occurrence, took place."*

The other prosecution witnesses did not make any statement about motive.

It is quite obvious from the above-referred statement of' the complainant Maqsood Ahmad (PW.1) that no motive was alleged against the appellant. Even otherwise, no documentary evidence was produced by the complainant party to establish that any land owned by Muhammad Amin deceased was in fact sold either by Qammer Hussain or by appellant Abid Hussain. The co-accused Qammer Hussain, against whom the motive was alleged, has already been acquitted by the learned Trial Court, so, even to the extent of motive, there is no independent corroboration of the prosecution case against the appellant.

18. It is argued by the learned Deputy Prosecutor General, for the State, assisted by the learned counsel for the complainant that the prosecution case has been established through injured eye-witness, namely, *Mst*. Abida Parveen. It is further argued that the injury on the person of *Mst*. Abida Parveen indicates that she was present at the time of occurrence. It is by now a well-settled law that injury on the person of prosecution witness does not stamp him/her with the truth. The statement of an injured eye-witness cannot be relied upon blindly. The injury on the person of a prosecution witness does not mean that he/she is telling the whole truth. The Court has to assess the intrinsic value of the evidence of said witness. *Mst*. Abida Parveen (PW3) has made dishonest improvements in her previous statement. The said improvements were brought on the record when she was confronted with her previous statement (Ex.DB) during her cross-examination while making her statement before the Court. She has not assigned any injury on her person to the appellant. Her evidence *qua* three acquitted co-accused has already been

disbelieved, therefore, her evidence to the extent of the appellant Abid Hussain, cannot be believed without any independent corroboration.

19. As far as the ocular account and medical evidence is concerned, it is obvious from the perusal of prosecution evidence that Abid Hussain appellant has been attributed a fire shot, which hit Muhammad Amin deceased, whereas, Muhammad Ashiq co-accused (since acquitted) was attributed two fatal fire shots, which landed on the person of *Mst*. Hajran Bibi deceased. Similarly, Qammer Hussain co-accused (since acquitted) was also assigned the role of making a fatal fire shot on the chest of *Mst*. Ghulam Fatima deceased. The prosecution evidence *qua* Muhammad Ashiq and Qammer Hussain co-accused (since acquitted) with identical role has already been disbelieved by the learned Trial Court whereas the same evidence has been believed against the appellant without any independent corroboration.

20. We are unable to distinguish the case of the appellant Abid Hussain from the case of acquitted co-accused Qammer Hussain and Muhammad Ashiq. We could not find out any independent corroboration against the appellant Abid Hussain.

21. In view of the above-mentioned circumstances, we are of the considered opinion that the prosecution has failed to prove its case against the appellant Abid beyond any shadow of doubt. We, therefore, *accept* this appeal, bearing Criminal Appeal No. 1960 of 2006, filed by Abid Hussain appellant, by extending him the benefit of doubt, and set aside the conviction and sentence awarded to the appellant Abid Hussain, *vide* impugned judgment dated 20.12.2006, passed by the Additional Sessions Judge, Depalpur, District Okara. The appellant Abid Hussain, is acquitted, from the charges. He shall be released from Jail forthwith, if not required in any other case.

Death sentence awarded to the appellant Abid Hussain, is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

Criminal appeal accepted.

2012 P.Cr.R. 804

[Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Muhammad Rizwan

Versus

The State and another

Criminal Misc. No. 11997-B of 2011, decided on 11th October, 2011.

BAIL (DACOITY/MURDER) --- (Supplementary statement)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/392/411---Four unknown accused persons allegedly committed murder of son of complainant during an occurrence of dacoity---Supplementary statement---Further inquiry---Bail concession---Validity---Petitioner and said co-accused were implicated through supplementary statement of complainant which was recorded later on---Petitioner and co-accused were stated to be present in the mentioned car on day of occurrence---Co-accused had been granted bail by apex Court---Case of petitioner was that of co-accused even at better footing---Nothing incriminating material was recovered from possession of petitioner---Mere alleged recovery of mobile phone in absence of EMI number was not sufficient to refuse bail to petitioner---Nature of said recovery and supplementary statement of complainant would be determined by Trial Court after recording evidence---Case was of further inquiry---Bail after arrest granted.

(Paras 8, 9)

[Petitioner was implicated in offence of dacoity/murder through supplementary statement. Nothing incriminating was recovered from possession of petitioner. Bail was allowed].

For the Petitioner: **Muhammad Kabeer Khan, Advocate.**

For the Petitioner (in Crl. Misc. No. 11997-B/2011): **Shoaib Zafar, Advocate.**

For the Respondent No. 2: **Muhammad Yousuf Javaid Phiphra, Advocate.**

Arshad Mehmood, DPG with Muhammad Siddique, S.I.

Date of hearing: **11th October, 2011.**

ORDER

MALIK SHAHZAD AHMAD KHAN, J. --- I propose to dispose of criminal miscellaneous No. 10530-B/2011 as well as criminal miscellaneous No. 11997-B/2011 through this single order as both these cases have arisen out of the same F.I.R.

2. Through instant petitions, the petitioners seek post arrest bails in case F.I.R. No. 382/2010, dated 06.06.2010 offences under Sections 302, 392 & 411, PPC registered at Police Station Khurianwala, District Faisalabad on the complaint of Manzoor Ahmad, complainant.

3. As per brief allegations levelled in the FIR, on 06.06.2010 at about 03:30 a.m. four unknown accused persons/dacoits while armed with pistols .30 bore entered the hotel and shop of the complainant and started looting cash and different articles. The son of the complainant namely Munir Ahmad *alias* Imtiaz resisted, upon which the accused started firing as a result of which, the son of the complainant was injured whereas the accused fled away from the spot. The injured was shifted to hospital, where he succumbed to the injuries hence, the instant F.I.R.

4. The petitioners Muhammad Nawaz and Muhammad Rizwan were implicated in this case through supplementary statements of the complainant which were recorded later on. The petitioners were arrested in this case and then they applied for their post arrest bail in the Court of learned Additional Sessions Judge, Jaranwala, which was dismissed *vide* order dated 09.08.2011. Hence, the instant bail petition.

5. It is contended by the learned counsels for the petitioners that the petitioners are not nominated in the FIR; that the petitioners were implicated through supplementary statement which carries no evidentiary value in the eyes of law; that co-accused with identical role namely Muhammad Pervaiz has been granted bail by the Hon'ble Supreme Court of Pakistan *vide* order dated 21.07.2011; that co-accused namely Ghulam Ali and Shabbir Hussain have also been granted bail by the learned Trial Court; that there is no specific role attributed to the present petitioners; that case of the petitioners is one of further inquiry. Hence, the instant bail petition may be accepted

6. On the other hand learned DPG assisted by the learned counsel for the complainant has vehemently opposed this bail petition on the grounds that pistol .30 bore, mobile and cash were recovered from the possession of the petitioners; that the petitioners were identified through identification parade; that the petitioners are involved in chain of cases; that the petitioners have committed a heinous offence, therefore, the petitioners are not entitled to the concession of bail.

7. Arguments heard. Record perused.

8. The above-mentioned F.I.R. was registered against four un-known accused with the allegation that they committed dacoity in the house of complainant and during the occurrence Munir Ahmad was murdered at the hands of above-mentioned un-known accused. The petitioners and co-accused namely Muhammad Pervaiz were implicated through supplementary statement of the complainant which were recorded later on. The said statement was made on the basis of evidence of one Tariq Masood who told the complainant that the above-mentioned petitioners and co-accused namely Muhammad Pervaiz were seen by him in a black car No. 2776/LEC on the day of occurrence. The said witness also stated that the above-mentioned black car was used by the petitioner and above-mentioned co-accused Muhammad Pervaiz in the occurrence. The above-said car was allegedly recovered from co-accused Muhammad Pervaiz. The pistols from the possession of the petitioner Muhammad Rizwan and his co-accused Pervaiz were allegedly recovered during their physical remand. The above-mentioned co-accused namely Muhammad Pervaiz has been granted bail by the Hon'ble Supreme Court of Pakistan *vide* order dated 21.07.2011. The case of the present petitioner Muhammad Rizwan is at par with the above-mentioned co-accused Muhammad Pervaiz whereas the case of the petitioner Muhammad Nawaz is even at better footing. Nothing incriminating material was recovered from the possession of Muhammad Nawaz petitioner. It was observed in the above-mentioned order of the Hon'ble Supreme Court of Pakistan that the car which has been shown to be recovered from the above-mentioned co-accused namely Muhammad Pervaiz was given on "superdari" much before the said co-accused was apprehended in this case. Mere alleged recovery of mobile phone from the possession of the petitioner Muhammad Rizwan is not sufficient to refuse bail to him. No EMI number of the mobile phone was mentioned in the F.I.R. Value of the said recovery and supplementary statement of the complainant will be determined by the learned Trial Court after recording of evidence. The case of the petitioners is one of further

inquiry. The petitioners are also entitled to the concession of bail after arrest on the ground of consistency.

9. In view of the above discussion, both the above-mentioned bail petitions are accepted and the petitioners are admitted to post arrest bail subject to their furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees One Hundred Thousand Only) with one surety in the like amount to the satisfaction of the learned Trial Court.

10. It is however clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of either party at the time of final adjudication of the case before the learned Trial Court.

Bail after arrest granted.

2012 P.Cr.R. 809

[Lahore]

Present: **MALIK SHAHZAD AHMAD KHAN, J.**

Gulzar Hussain

Versus

Tehseen Khan etc.

Criminal Revision No. 579 of 2011, decided on 2nd June, 2011.

CONCLUSION

(1) Under Section 408(b), Cr.P.C. as amended, if the term of sentence, awarded by Judicial/ Special Magistrate or Magistrate S. 30, exceeds four years appeal shall lie to the Court of Session.

(a) Criminal Procedure Code (V of 1898)---

---S. 408(b) (as amended by Law Reforms Ordinance (XII of 1972))---Provision of---Mandate---In a case where sentence of imprisonment exceeding 4 years is passed by a Magistrate Section 30, the appeal would lie before the Court of Session.

(Para 4)

SENTENCE OF IMPRISONMENT EXCEEDING 4 YEARS BY MAGISTRATE S. 30 --- (Remedy)

(b) Criminal Procedure Code (V of 1898)---

---Ss. 439, 408(b) as amended by Law Reforms Ordinance (XII of 1972)---Pakistan Penal Code, 1860, Ss. 420/406/467/468/471---Impugned sentence of imprisonment exceeding 4 years---Contention was that appeal against impugned judgment would lie to High Court and appeal filed by respondent-convict before Court of Session was liable to be dismissed as not maintainable---Amended provisions---Effect---The words "or a Magistrate specially empowered under Section 30" were omitted by Law Reforms Ordinance (XII of 1972)---After said amendment under Section 408, Cr.P.C. in a case where sentence of imprisonment exceeding 4 years passed by a Magistrate Section 30, the appeal would lie before the Court of Session---Criminal review petition was dismissed by High Court .

(Paras 4, 5)

Ref: **2005 P.Cr.LJ. 1435, 2006 YLR 1718.**

Key Terms:- Sentence exceeding 4 years and remedy.

[In instant case, respondent/accused was convicted by Magistrate S. 30 and sentence to imprisonment exceeding 4 years, therefore, appeal before Court of Sessions was competent. High Court dismissed criminal revision].

For the Petitioner: **Syed Muhammad Nawaz, Advocate.**

Date of hearing: **2nd June, 2011.**

ORDER

MALIK SHAHZAD AHMAD KHAN, J. --- Through the instant revision petition, the petitioner has challenged the order dated 21.05.2011 whereby the learned Additional Sessions Judge, Nankana Sahib has admitted for hearing the criminal appeal filed by respondent No. 1 in case F.I.R. No. 137/2009 23.05.2009 offences under Sections 420, 406, 467, 468 & 471, PPC registered at Police Station Sangla Hill, District Nankana Sahib. Respondent No. 1 was convicted and sentenced in the above case *vide* judgment dated 25.04.2011 passed by learned Magistrate Section 30, Nankana Sahib as under:---

I. Under Sections 406, PPC sentenced to 3 years' RI with fine of Rs. 5,00,000/- or in default thereof to further undergo 9 months' SI.

II. Under Section 420, PPC sentenced to 7 years' RI with fine of Rs. 5,00,000/- or in default thereof to further undergo 1½ year's SI.

III. Under Section 467, PPC sentenced to 7 years' RI with fine of Rs. 5,00,000/- or in default thereof to further undergo 1 ½ year's SI.

IV. Under Section 468, PPC sentenced to 7 years' Rl with fine of Rs. 5,00,000/- or in default thereof to further undergo 1½ year's SI.

V. Under Section 471, PPC sentenced to 7 years' RI with fine of Rs. 5,00,000/- or in default thereof to further undergo 1½ year's SI.

Respondent No. 1, thereafter filed an appeal which was admitted for hearing by the learned Additional Sessions Judge, Nankana Sahib *vide* his impugned order dated 21.05.2011.

2. It is contended by the learned counsel for the petitioner that respondent No. 1 was awarded sentence of imprisonment exceeding four years, therefore, the appeal

would lie before High Court . It is added that in light of provisions of Section 408(b), Cr.P.C., the appeal in such-like cases would lie before this Court and impugned order whereby appeal has been admitted for regular hearing is liable to be set aside. He has lastly argued that as judgment of conviction against respondent No. 1 was passed by Magistrate Section 30, therefore, appeal against said judgment is not maintainable in Sessions Court. In support of the above contentions, learned counsel for the petitioner has placed reliance on cases reported as *"Khadim Hussain v. The State"* (2006 YLR 1718) and *"Muhammad Yaqoob v. The State"* (1991 MLD 2203).

3. Arguments heard. Record perused.

4. Respondent No. 1 was convicted by Magistrate Section 30, Nankana Sahib and was sentenced as per detail given above. The relevant provision of law which deals with the instant case is Section 408 of Criminal Procedure Code, 1898. The said provision is reproduced hereunder:---

"Appeal from sentence of Assistant Sessions Judge or [Judicial Magistrate]. Any person convicted on a trial held by an Assistant Sessions Judge, or any [Judicial Magistrate] [Special Magistrate] or any person sentenced under Section 349 [....] may appeal to the Court of Session:

Provided as follows:

(a) Clause (a) Rep. by Act 12 of 1923, S 23.]

(b) When in any case an Assistant Sessions Judge [...] passes any sentence of imprisonment for a term exceeding four years, [...] the appeal of all or any of the accused convicted at such trial shall lie to the High Court :

(c) When any person is convicted by a Magistrate of an offence under Section 124-A of the Pakistan Penal Code, 1860 the appeal shall lie to the High Court .

It is evident from bare reading of Section 408, Cr.P.C. that any person who is convicted on a trial held by Judicial Magistrate, Special Magistrate or sentenced under Section 349, Cr.P.C. may appeal to the Court of Sessions. So far as sub-section (b) of Section 408, Cr.P.C. is concerned it is clearly mentioned in the said provision that in any case if Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal of accused convicted at such trial shall lie to the High Court. The said Section deals with the sentences passed by an Assistant Sessions Judge whereas the judgment of conviction of respondent No. 1 has not been passed by an Assistant Sessions Judge, the same has been passed by Magistrate Section 30,

Nankana Sahib. In the above-referred case of *"Muhammad Yaqoob v. The State"* (1991 MLD 2203), the judgment was passed in light of un-amended provisions of Section 408(b), Cr.P.C. Section 408(b) of Cr.P.C. as it is stood before amendment is reproduced here-under:---

"When in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years the appeal of all or any of the accused convicted at such trial shall lie to the High Court ."

The appeal, under the said un-amended provision of Criminal Procedure Code, 1898 was competent before High Court against the judgment passed by a Magistrate Section 30, wherein sentence of imprisonment for a term exceeding four years was awarded to the accused. The words "or a Magistrate specially empowered under Section 30", were omitted by Law Reforms Ordinance (XII of 1972), therefore, after the above-said amendment under Section 408, Cr.P.C. in a case where sentence of imprisonment exceeding 4 years is passed by a Magistrate Section 30, the appeal would lie before the Court of Sessions. The same view was taken by this Court in above-referred case of *"Khadim Hussain v. The State"* (2006 YLR 1718). I am also fortified on the above-mentioned point of law by a judgment of Hon'ble Division Bench of this Court in case of *"Amanullah v. The State"* (2005 P.Cr.L.J. 1435).

5. In the light of above discussion, it is clear that under Section 408(b), Cr.P.C. as amended by Law Reforms Ordinance (XII of 1972), if the term of sentence, awarded by Judicial/Special Magistrate or Magistrate Section 30, exceeds four years, appeal shall lie to the Court of Sessions, therefore, this petition is without any force and the same is hereby dismissed *in limine*.

Criminal revision petition dismissed.

2012 P.Cr.R. 1246

[Lahore]

Present: **MANZOOR AHMAD MALIK and MALIK SHAHZAD AHMAD KHAN, JJ.**

Noor Ahmad *alias* Noor Muhammad

Versus

The State

Crl. Appeal No. 88-J of 2007 and Murder Reference No. 157 of 2007, decided on 3rd May, 2012.

CONCLUSION

(1) In all circumstances it is the duty of the prosecution to prove its case against the accused beyond any shadow of doubt. The said burden does not shift to accused even if he takes a specific plea and facts to establish the same.

(a) Benefit of doubt---

---If there is a single circumstance which created doubt in a prudent mind about the guilt of the accused, then benefit of said doubt would be extended in favour of the accused---Principle of law.

(Para 14)

Ref. **2009 SCMR 230, PLD 2002 SC 1048.**

(b) Criminal trial---

---Charge---Defence plea---Duty of prosecution---Law settled---In all circumstances it is the duty of the prosecution to prove its case against the accused beyond any shadow of doubt---The said burden does not shift to accused even if he takes a specific defence plea and fails to establish the same---If any doubt arises from the circumstances of the case its benefit has to go to the accused not as a matter of grace that as a matter of right.

(Para 13)

CRIMINAL TRIAL (MURDER)---(Benefit of doubt)

(c) Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, S. 302(b)---Charge for committing murder---PWs peeped through the window and saw that appellant was allegedly cutting into

pieces the body of deceased with a 'Toka'---Criminal trial---Impugned conviction/sentence of death---Benefit of doubt---Appreciation of evidence---Validity---Chance witnesses---None of PWs had deposed that deceased was forcibly taken inside house by appellant---There was conflict between ocular account and medical evidence---Presence of PWs/eye-witnesses at spot at time of occurrence was not natural---Both the said PWs were closely related to deceased---Evidence of closely related PWs to the deceased required independent corroboration and the same should be trustworthy and confidence inspiring---Manner of witnessing instant occurrence as stated by said PWs did not appeal to common sense---It was not probable that appellant who was allegedly committing murder of deceased and was cutting him into pieces would leave window of his house so that PWs might witness occurrence---Prosecution had changed its story regarding motive part which had further created doubt about truthfulness of said PWs and story narrated by them---'Toka' was allegedly recovered from the same house where the dead-body of deceased was found---There was no explanation as to why said 'Toka' was not recovered on same day when dead-body of deceased was taken into possession---Even otherwise, mere recovery of Toka was a corroborative piece of evidence and relevant only if other evidence was believed---Prosecution story was replete with doubts and contradictions---Prosecution failed to prove its case against appellant beyond shadow of doubt---Benefit of doubt extended---Criminal appeal allowed.

(Paras 14,15)

Ref. 2002 SCMR 1048, PLD 1995 SC 516, 1971 SCMR 756, PLD 2006 SC 538, 2009 SCMR 436, 2011 SCMR 323, 2008 SCMR 707, 2007 SCMR 1812, 2009 PSC (Crl.) SC (Pak) 133, 2011 PSC (Crl.) SC (Pak) 65.

[According to prosecution story, PW/alleged eye-witness was peeping into the window of the house and saw appellant cutting body of the deceased into pieces with a Toka. Such story did not inspire confidence and was contradicted by medical evidence. Impugned conviction/sentence of death was set aside].

For the Appellant: Miss Kausar Jabeen Misha, Advocate (Defence Counsel) at State expense.

For the State: Chaudhry Muhammad Mustafa, Deputy Prosecutor-General.

For the Complainant: Allah Ditta in person.

Date of hearing: 3rd May, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J. --- This judgment shall dispose of Criminal Appeal No. 88-J of 2007 filed by Noor Ahmad *alias* Noor Muhammad appellant and Murder Reference No. 157 of 2007, sent by the learned Trial Court, for confirmation or otherwise, of the sentence of death awarded to Noor Ahmad *alias* Noor Muhammad appellant, as both these matters have arisen out of the same judgment dated 17.2.2007, passed by the learned Sessions Judge, Sargodha, whereby, Noor Ahmad *alias* Noor Muhammad appellant was convicted under Section 302(b) of PPC for committing the murder of Manzoor *alias* Baboo deceased and sentenced to death as Ta'zir with a direction to pay the compensation amount of Rs. 50,000/- (Rupees fifty thousand) to the legal heirs of deceased as envisaged under Section 544-A of Cr.P.C. and in default thereof to suffer simple imprisonment for six months.

2. Brief facts of the case as given by the complainant, namely, Allah Ditta (PW.9) in F.I.R. Exh.PH are that he is labourer by profession and had three sons and three daughters, the youngest of them was Manzoor *alias* Baboo (deceased) who was found of playing cricket. On 15.3.2006 the son of the complainant Manzoor *alias* Baboo did not return home till late night. The complainant Allah Ditta went in search of his son but could not find him. On 16.3.2006 at about 12.40 p.m. Amjad Ali (PW.7) told him that on 15.3.2006, after 'Esha' prayer, he went to Sharif Colony in connection with a piece of work, where he saw Manzoor *alias* Baboo (deceased) having a conversation with Noor Ahmad *alias* Noor Muhammad appellant in front of the house of the appellant. Upon receiving this information the complainant alongwith Muhammad Ashraf (PW.10) and Ghulam Abbas (given up PW) went to the house of Noor Ahmad *alias* Noor Muhammad appellant and when they reached near the 'Baithak' of the appellant, they found that the door of the 'Baithak' was closed. They heard noise coming out of the 'Baithak' and they peeped through the window and saw that Noor Muhammad was cutting into pieces, the body of Manzoor *alias* Baboo with 'Toka'. The naked body of the deceased was soaked with blood and was lying on the floor. The complainant and his companions tried to break open the door of the 'Baithak' and in the meanwhile the appellant made good his escape through the roof of his house.

The motive behind the occurrence, according to the story narrated in the F.I.R. Exh.PH, was that Manzoor *alias* Baboo (deceased) was a vagabond and the appellant Noor Muhammad used to forbade him from coming to his colony. He also made a complaint to Allah Ditta (complainant) in this regard. Due to the above-mentioned grudge, the appellant committed the murder of Manzoor *alias* Baboo.

3. The appellant was arrested on 20.3.2006 by Nazar Muhammad, S.I. (PW.11). During the course of investigation, on 20.3.2006, the appellant Noor Ahmad *alias* Noor Muhammad allegedly led to the recovery of 'Toka' (P-18), which was taken into possession through memo. Exh.PG/1. After completion of investigation, the challan was prepared and submitted before the learned Trial Court. The learned Trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed a charge against the appellant on 13.7.2006, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eleven witnesses, during the trial. Allah Ditta complainant (PW.9) and Muhammad Ashraf (PW.10) are the witnesses of ocular account. Amjad Ali (PW.7) is the witness of circumstantial evidence.

The medical evidence was furnished by Dr. Munawar Ali (PW.4).

Muhammad Salim (PW.1), Aman Ullah C-I No. 151 (PW.2), Muhammad Waris (PW.3), Muhammad Hasnain MHC No. 1260 (PW.5), Arshad (PW.6) are the formal witnesses. Muhammad Nawaz HC No. 371 (PW.8) is witness of the recovery of 'Toka' P-18, which was allegedly recovered on the pointation of Noor Ahmad *alias* Noor Muhammad appellant. Nazar Muhammad, S.I. (PW.11) was the Investigating Officer of this case. The prosecution produced documentary evidence in the shape of F.I.R. Exh.PH, memo. of possession of blood-stained clothes Exh.PB, copy of post-mortem report Exh.PC, copy of death report Exh.PE, memo. of possession of photographs Exh.PF, copies of photographs Exh.P4 to P10, memo. of possession of blood-stained Toka Exh.PG, memo. of possession blood-stained cotton Exh.PJ, memo. of possession of blood-stained quilt, etc. Exh.PK, injury statement Exh.PD, site-plan of the place of occurrence without scale Exh.PL, copy of site-plan Exh.PA, report of Chemical Examiner in respect of blood-stained cotton Exh.PM, the report of Chemical Examiner in respect of blood-stained 'Toka' Exh.PN, the report of Serologist in respect of 'Toka' Exh.PP, the report of Serologist in respect of blood-stained cotton Exh.PQ and closed its evidence.

The statement of the appellant u/S. 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to question "*Why this case against you and why the PWs have deposed against you*" Noor Ahmad *alias* Noor Muhammad appellant replied as under:--

Noor Ahmas *alias* Noor Muhammad

"The PWs have made false statements by twisting the real facts of the case."

In answer to question "Have you anything else to say", he replied as under:--

"I am innocent. I acted in self-defence and to save the honour of my daughter."

The appellant opted not to make statement under Section 340(2) of Cr.P.C. but he produced copy of F.I.R. No. 91 as Ex.DD, F.I.R. Ex.DE, certified copy of F.I.R. Exh.DF, certified copy of F.I.R. Exh.DG, certified copy of F.I.R. Exh.DG, certified copy of F.I.R. Exh.DJ, cerfified copy of F.I.R. Exh.DJ and copy of F.I.R. No. 235 of 2002 Exh.DK in his defence. The learned Trial Court *vide* its judgment dated 17.2.2007 found Noor Ahmad *alias* Noor Muhammad appellant guilty and convicted and sentenced him as mentioned and detailed above.

5. The learned counsel for the appellant, in support of this appeal, contends that story of the prosecution, as mentioned in the F.I.R. is highly improbable as it is the case of the complainant in the F.I.R. his son Manzoor *alias* Baboo did not return home on 15.3.2006 and on the next day at 12.40 p.m. he was informed by Amjad Ali (PW.7) that his son was seen in front of the house of the appellant while talking to him (the appellant) but the said Amjad Ali did not accompany the complainant and other witnesses to the house of the appellant; that it was nowhere mentioned in the F.I.R. by the complainant that he knew the address of the appellant; that the ocular account furnished by Allah Ditta complainant (PW.9) and Muhammad Ashraf (PW.10) is belied by medical evidence as the doctor who conducted the post-mortem examination on the dead-body of the deceased has stated that the time that elapsed between injuries and death was within five minutes and between death and post-mortem was within 6 to 24 hours and in his cross-examination he has categorically stated that the deceased was done to death on the night between 15.3.2006 and 16.3.2006, whereas, the post-mortem examination was conducted on 16.3.2006 at about 3.45 p.m. and the time of occurrence given by the prosecution witnesses was around 12.40 p.m. on 16.3.2006 which does not tally with the medical evidence; that in the F.I.R. the complainant has stated that his son was a vagabond and he was restrained by the appellant from visiting the colony but while appearing before the learned Trial Court he has stated that his son used to go to play cricket while passing through the street situated in front of the house of appellant and he was forbidden by the appellant from passing through the said street but as the deceased kept on passing through the said street, therefore, he was murdered by the appellant; that both the eye-witnesses of ocular account are not resident of the area where the occurrence took place and they are chance witnesses; that the evidence of recovery of 'Toka' P-18 which was allegedly recovered on the pointaiton of Noor Ahmad *alias* Noor Muhammad appellant is doubtful because it is stated by the complainant and other

eye-witness that the appellant ran away from the place of occurrence and it was not alleged that he took 'Toka' with him but the 'Toka' P-18 has been shown to have been recovered at the instance of the appellant on 20.3.2006 from the house where the occurrence took place; that no explanation was given by the prosecution as to why the deceased entered to the house of the appellant and why his dead-body was found in a naked condition, therefore, the plea of the appellant that he acted in self-defence and to save the honour of his daughter, in the circumstances mentioned above is more probable and convincing; that the prosecution has failed to prove its case against the appellant beyond the shadow of any doubt and that the appellant is entitled to acquittal.

6. Allah Ditta complainant present in Court states that he is not in a position to engage a counsel and he relies upon the arguments of the learned Deputy Prosecutor-General appearing for the State.

The learned Deputy Prosecutor-General opposes this appeal on the grounds that the appellant has specifically been nominated in the F.I.R. with specific role of causing 'Toka' blows on the person of the deceased and he has acted in a brutal manner; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspired confidence and despite cross-examination, the defence could not shake the testimony of the prosecution witnesses; that the ocular account is fully supported by the medical evidence as the deceased received injuries with sharp-edged weapon on his person, which fact is evident from the post-mortem report Exh.PC; that no reason was given by the appellant for his false implication in this case; that 'Toka' P-18 was recovered on the pointation of the appellant which further corroborates the prosecution case; that the appellant has taken a specific plea that he acted in his self-defence but he has miserably failed to substantiate the same; that the appellant neither made any statement as required under Section 340(2) of Cr.P.C. nor produced his daughter *Mst.* Nargas regarding whom he had taken the plea of self-defence; that the prosecution has proved its case against the appellant beyond the shadow of any doubt and the plea of the appellant is not reliable; that, even otherwise, if the appellant has taken a specific plea in his statement recorded under Section 342 of Cr.P.C. then under Article 121 of the Qanun-e-Shahadat Order, 1984 he was bound to prove the same but he failed to do so; that the appeal filed by the appellant against his conviction be dismissed and the Murder Reference may be answered in the affirmative.

7. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

8. It would not be out of place to mention here that it is a case of two versions, *i.e.* one put forth by the prosecution in the form of ocular account furnished by Allah Ditta complainant (PW.9) and Muhammad Ashraf (PW.10), whereas, the other has been brought on the record through the statement of Noor Ahmad *alias* Noor Muhammad (appellant), recorded under Section 342 of Cr.P.C. and suggestions put to the eye-witnesses during their cross-examination.

9. It is settled now by the Hon'ble Supreme Court of Pakistan in a number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not? In this regard, we have been fortified by an illustratious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as *Ashiq Hussain v. The State* (PLD 1994 SC 879), wherein, at page 883, the learned apex Court of the country has been pleased to observe as under:--

"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them and then examine the statement of the accused under Section 342 of Cr.P.C., statement under Section 340(2) and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under Section 342, Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of contraventions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring the plea in defence and the total effect should be estimated in relation to the question, *viz*. is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of

the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

Therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such-like situation, we will, first, examine the case of the prosecution.

10. The occurrence in this case as per F.I.R. Exh.PH took place on 16.3.2006 at about 12.40 p.m. (day time). The matter was reported to the police by the complainant Allah Ditta (PW.9) on the same day at 1.30 p.m. and formal F.I.R. was also chalked out on 16.3.2006 at 1.30 p.m. The incident took place in the house of Noor Ahmad *alias* Noor Muhammad appellant. The complainant Allah Ditta (PW.9) has stated in the F.I.R. that on 15.3.2006 his son Manzoor *alias* Baboo (deceased) did not return home till late night and he went out in search of his son but could not find him. On 16.3.2006 he was informed by Amjad Ali (PW.7) that on the previous day, *i.e.* 15.3.2006 after Esha prayer time he (Amjad Ali PW.7) went to Sharif Colony in connection with some piece of work where he saw Manzoor *alias* Baboo deceased while having a conversation with Noor Ahmad *alias* Noor Muhammad appellant in the street in front of the house of the appellant. On the above-mentioned information given by Amjad Ali (PW.7) the complainant Allah Ditta (PW.9) alongwith Muhammad Ashraf (PW.10) and Ghulam Abbas (given up PW) went to the house of Noor Ahmad *alias* Noor Muhammad appellant situated at Sharif Colony Village Sillanwali and when they reached outside the 'Baithak' of the appellant they heard Din coming out of the 'Baithak' of the appellant. The complainant and above-mentioned witnesses peeped through the window and saw that the appellant was cutting the body of Manzoor *alias* Baboo into pieces with a 'Toka'. The dead-body of Manzoor *alias* Baboo was lying naked on the floor of the 'Baithak' and the same was soaked with blood. The complainant and his companions tried to break open the door of the 'Baithak' and in the meanwhile Noor Ahmad *alias* Noor Muhammad appellant fled away from the spot through the roof of his house. Almost same was the statement of the complainant and other eye-witness Muhammad Ashraf (PW.10) before the learned Trial Court.

11. The prosecution story does not appear to be probable and is of doubtful nature due to variety of reasons. (a) According to the story of the prosecution Amjad Ali (PW.7) on 15.3.2006 after Esha prayer time went to Sharif Colony village Sillanwali in connection with some piece of work and allegedly saw Manzoor *alias* Baboo deceased while having conversation with Noor Ahmad *alias* Noor Muhammad appellant in the street in front of the house of the appellant. Amjad Ali (PW.7) is not resident of Sharif Colony where the occurrence took place. He is resident of Aziz

Park Village Sillanwali. He has admitted during his cross-examination that he was challaned in a murder case alongwith Allah Bakhsh, son of the complainant. So it was established that he has close ties with the complainant party and he is not an independent witness. He did not disclose the nature of his work for which he went to Sharif Colony, therefore, he is a chance witness. His presence has not been shown in the site-plan Exh.PA. He has himself admitted during his cross-examination that he did not point out any place to the police about his meeting with the deceased and the accused. Even otherwise, he is not an eye-witness of the occurrence; (b) It has not been explained by the prosecution that if son of the complainant namely Manzoor *alias* Baboo deceased was talking with the appellant in the street situated in front of his (appellant's) house at night time then how did he (Manzoor *alias* Baboo deceased) entered inside the house of the appellant. None of the prosecution witnesses has deposed that Manzoor *alias* Baboo deceased was forcibly taken inside the house by the appellant. The prosecution case in this respect is absolutely silent and there is no explanation whatsoever in this regard. Moreover, it is the case of the prosecution that the deceased was lying naked in the 'Baithak' of the appellant. No explanation in this regard has been furnished by the prosecution witnesses as to why the dead-body of Manzoor *alias* Baboo was found in naked condition; (c) there is conflict between ocular account and medical evidence. As per F.I.R. Exh.PH the occurrence took place on 16.3.2006 at about 12.40 p.m. According to the story narrated in the F.I.R. on 16.3.2006 at about 12.40 p.m. the complainant Allah Ditta (PW.9) alongwith other prosecution witnesses went to the house of the appellant and saw that the appellant was cutting Manzoor *alias* Baboo into pieces with the help of a 'Toka'. Muhammad Ashraf (PW.10) in his statement before the learned Trial Court has narrated the same date and time of occurrence which was mentioned in the F.I.R. but the complainant Allah Ditta (PW.9) did not mention the date or time of occurrence while making his statement before the learned Trial Court. It appears that the complainant Allah Ditta (PW.9) deliberately did not mention the date and time of occurrence in his statement before the learned Trial Court in order to cover the conflict between the ocular and medical evidence because according to the statement of Dr. Munawar Ali (PW.4) who conducted the post-mortem examination on the dead-body of Manzoor *alias* Baboo on 16.3.2006 at about 3.45 p.m., the time that elapsed between death and post-mortem was within 6 to 24 hours. During his cross-examination he has categorically stated that the death took place during night time between 15.3.2006 and 16.3.2006. The above-mentioned witness was not declared hostile by the prosecution. The time given by the Dr. Munawar Ali (PW.4) does not tally with the time of occurrence as given in the F.I.R. Exh.PH and Muhammad Ashraf (PW.10) because according to the

prosecution case the occurrence took place on 15.3.2006 at about 12.40 p.m., whereas, according to the statement of Dr. Munawar Ali (PW.4) death took place during the night time between 15.3.2006 and 16.3.2006. Thus, the ocular account furnished by the prosecution witnesses has been contradicted by the medical evidence produced by the prosecution itself. The Hon'ble Supreme Court of Pakistan extended the benefit of doubt to the accused on the ground of conflict between ocular and medical evidence in the cases of *Amin Ali v. The State* (2011 SCMR 323), *Ali Sher and others v. The State* (2008 SCMR 707) and *Barkat Ali v. Muhammad Asif and others* (2007 SCMR 1812). (d) The eye-witnesses of the prosecution namely Allah Ditta (PW.9) and Muhammad Ashraf (PW.10) are not resident of the locality (Sharif Colony) where the occurrence took place. The complainant Allah Ditta (PW.9) is resident of Mohallah Nishat Abad Sillanwali, District Sargodha, whereas, Muhammad Ashraf (PW.10) is resident of Ganja Bhatian situated within the area of Police Station Barana, Tehsil Chiniot, District Jhang. They are not natural witnesses of the occurrence. Their presence at the spot at the time of occurrence is not natural. They are chance witnesses. Both the above-mentioned eye-witnesses are closely related to the deceased. Allah Ditta (PW.9) is father of the deceased, whereas, Muhammad Ashraf (PW.10) is maternal uncle of the deceased. Although mere relationship of the prosecution witnesses with the deceased is no ground to discard their evidence outrightly but the evidence of the closely related witnesses to the deceased requires independent corroboration and the same should be trustworthy and confidence inspiring. As discussed earlier the evidence of the above-mentioned closely related witnesses is not natural and the same is in conflict with the medical evidence, therefore, it is not safe to rely upon the said evidence. The manner of witnessing this occurrence as stated by the above-mentioned eye-witnesses does not appeal to common sense because they have stated that they were outside the house of the appellant when they heard Din and then they peeped through the window and saw that the appellant was cutting the deceased Manzoor *alias* Baboo into pieces. It is not probable that the appellant who was committing the murder of Manzoor *alias* Baboo deceased and was cutting him into pieces would leave the window of his house, open so that the prosecution witnesses may witness the occurrence. (e) The prosecution has changed the motive part of its story. It was mentioned by the complainant in the F.I.R. Exh.PH that his son Manzoor *alias* Baboo (deceased) was a vagabond and he was forbidden by the appellant many a time due to his frequent visits to his colony and the appellant also complained against him to the complainant Allah Ditta (PW.9) but while making his statement before the Court the complainant Allah Ditta (PW.9) has stated that his son Manzoor *alias* Baboo (deceased) used to go to play cricket while

passing through the street situated in front of the house of the appellant and he was dissuaded by the appellant from passing through the said street but he kept on passing through the same, due to which the appellant committed the murder of his son Manzoor *alias* Baboo. It is evident from the perusal of F.I.R. Exh.PH and the above-mentioned statement of the complainant Allah Ditta (PW.9) that the prosecution has changed its story regarding the motive part which has further created doubt about the truthfulness of the prosecution witnesses and the story narrated by them.

12. So far as the recovery of 'Toka' P.18 is concerned, it is the case of the prosecution that the appellant ran away from the place of occurrence when Allah Ditta (PW.9) alongwith Muhammad Ashraf (PW.10) and Ghulam Abbas (given up PW) entered the 'Baithak' of the appellant. It has not been stated by the above-mentioned witnesses that the appellant took 'Toka' with him but surprisingly 'Toka' P-18 was allegedly recovered from the same house on 20.3.2006 where the dead-body of Manzoor *alias* Baboo was found and there is no explanation as to why 'Toka' P-18 was not recovered on the same day, *i.e.* 16.3.2006 when the dead-body of the deceased was taken into possession. Even otherwise, mere recovery of a 'Toka' is a corroborative piece of evidence and relevant only if the other evidence is believed. In this respect, we may refer the case of *Muhammad Afzal alias Abdullah and others v. The State and others* (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence however, convincing it may be."

Similarly, in the case of *Abdul Mateen v. Sahib Khan and others* (PLD 2006 SC 538) at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in *Saifullah's* case 1984 SCMR 410."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of *Muhammad Yaqub v. The State* (1971 SCMR 756) and *Nek Muhammad and another v. The State* (PLD 1995 SC 516).

13. Now coming to the plea of the appellant, we have noted that the appellant has not taken any specific stand in his statement recorded under Section 342 of Cr.P.C. and he has simply stated that he is innocent and he acted in self-defence in order to save the honour of his daughter *Mst.* Nargas. Anyhow, suggestions were put to both the eye-witnesses namely Allah Ditta (PW.9) and Muhammad Ashraf (PW.10) which were to the following effect:--

Allah Ditta (PW.9)

"It is incorrect to suggest that the deceased scaled over the wall of the house of accused and went to the 'Baithak' of the accused, there unmarried daughter of accused Nargas was sleeping on the bed, present in the Court and he took off his clothes and attempted to commit rape with her who raised alarm which attracted accused. It is further incorrect to suggest that the deceased Manzoor *alias* Baboo attempted to make a fire on the accused with 30 bore pistol but the accused picked up a Toka from his house to save the honour of his daughter and himself and he gave injuries with Toka to the deceased."

Muhammad Ashraf (PW.10)

"It is incorrect to suggest that Manzoor deceased scaled over the wall of the house of the accused and went to his Baithak where his daughter Nargas was sleeping on a cot. It is further incorrect that when he tried to rape *Mst.* Nargas forcibly, she had raised hue and cry upon which the accused was attracted in the Baithak."

The appellant has not produced any evidence in support of his plea nor produced his daughter *Mst.* Nargas in his defence. Moreover, the appellant has not made any statement as required under Section 340(2) of Cr.P.C.

It is settled by now that in all circumstances it is the duty of the prosecution to prove its case against the accused beyond any shadow of doubt. The said burden does not shift to accused even if he takes a specific defence plea and fails to establish the same. If any doubt arises from the circumstances of the case its benefit has to go to the accused not as a matter of grace but as a matter of right.

14. As discussed earlier, the prosecution story is replete with doubts and contradictions and the prosecution failed to prove its case against the appellant beyond the shadow of doubt. It is by now a well-settled principle of law that if there

is a single circumstance which created doubt in a prudent mind about the guilt of the accused, then benefit of said doubt would be extended in favour of the accused, whereas, there are number of doubts in the instant prosecution case. We may refer here the case of *Muhammad Akram Vs. The State* (2009 SCMR 230) wherein at page No. 236 the Hon'ble Supreme Court of Pakistan has emphasized as under:--

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In another case *Ayub Masih v. The State* (PLD 2002 SC 1048), wherein at page No. 1056 the Hon'ble Supreme Court of Pakistan has observed as under:--

"It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, 'it is better that ten guilty persons be acquitted rather than one innocent person be convicted'. In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in *The State v. Mushtaq Ahmad* (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (PBUH) that the 'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent'."

15. Having considered all the pros and cons of the case the irresistible conclusion drawn by this Court is that the prosecution has failed to prove its case against the appellant Noor Ahmad *alias* Noor Muhammad beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal (Criminal Appeal No. 88-J of 2007), and set aside the conviction and sentence awarded to the appellant namely, Noor Ahmad *alias* Noor Muhammad and acquit him from the charge of

committing murder of Manzoor *alias* Baboo. The appellant Noor Ahmad *alias* Noor Muhammad is in jail. He shall be released forthwith if not required in any other case.

16. Murder Reference (M.R. No. 157 of 2007) is answered in the negative and death sentence of the appellant Noor Ahmad *alias* Noor Muhammad is not confirmed.

Criminal appeal dismissed.

2012 P.Cr.R. 1265

[Lahore]

Present: **MANZOOR AHMED MALIK and MALIK SHAHZAD AHMAD KHAN, JJ.**

Riasat Ali and others

Versus

The State

Crl. Appeals Nos. 67-J of 2007, 931 of 2006, 98-J of 2012, Crl. Revision No. 1053 of 2006 and Murder Reference No. 323 of 2006, decided on 8th May, 2012.

CONCLUSIONS

(1) Non-proving of motive once set up by the prosecution in the case, furnishes a ground for mitigation of sentence.

(2) Opinion of police *qua* innocence of accused is inconsequential.

(a) Criminal trial---

---Non-proving of motive---Case of mitigation---If a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused.

(Para 19)

(b) Appreciation of evidence---

---Minor discrepancies in the ocular and medical evidence about the seat of injuries are insignificant---Rule.

(Para 12)

Ref. **2002 SCMR 1842, 2003 SCMR 522.**

MURDER TRIAL---(Mitigating of sentence)

(c) Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302(b)/324---Charge of murder---Non-proving of motive---Question of sentence---Factors---As many as thirteen persons were implicated in instant case by complainant party and out of them six co-accused

of appellant had since been acquitted---It was a case of sudden fight---Prosecution had failed to prove recovery of carbine beyond shadow of doubt---Prosecution had alleged a specific motive had miserably failed to prove same---It was not determinable in instant case as to what had actually happened immediately before occurrence---**Held:** Impugned sentence of death was quite harsh---Impugned sentence was altered from death to imprisonment for life---Sentence reduced.

(Paras 19,20)

Ref. 2011 SCMR 593.

Key Terms:- Reduction of sentence.

[Instant occurrence of murder was result of sudden fight. Motive could not be established. Impugned death sentence was converted into life imprisonment].

For the Appellants (in Crl. Appeals Nos. 67-J of 2007 and 98-J of 2012): Syed Karamat Ali Naqvi, Advocate.

For the Appellants (in Crl. Appeal No. 931 of 2006): Rao Javaid Khurshid, Advocate.

For the Appellants: Abdul Majid Chishti, Advocate/Defence Counsel.

For the State: Chaudhry Muhammad Mustafa, Deputy Prosecutor-General.

For the Complainant: Chaudhary Muhammad Jahangir Wahlah, Advocate.

Date of hearing: 8th May, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J. --- This judgment shall dispose of Criminal Appeal No. 67-J of 2007, filed by Riasat Ali appellant, Criminal Appeal No. 931 of 2006, filed by Shakir Hussain and Akbar Ali appellants, Criminal Appeal No. 98-J of 2012, filed by Arshad *alias* Achoo appellant, Criminal Revision No. 1053 of 2006, filed by the complainant and Murder Reference No. 323 of 2006 (*The State Vs. Riasat Ali*), sent by the learned Trial Court, for confirmation or otherwise, of the sentence of death awarded to Riasat Ali appellant, as all these matters have arisen out of the same judgment dated 27.4.2006, passed by the learned Additional Sessions Judge, Okara. After conclusion of the trial, learned Trial Court *vide* its judgment dated 27.4.2006, has convicted and sentenced the appellants as under:--

RIASAT ALI

Under Section 302(b) of PPC to death for committing *Qatl-i-Amd* of Ghaffar Ahmad (deceased). He was also directed to pay Rs. 50,000/- as compensation to the legal heirs of deceased as contemplated under Section 544-A of Cr.P.C., and in default thereof the same shall be recovered from the appellant as arrears of land revenue and in further default whereof, he shall undergo six months' S.I.

SHAKIR HUSSAIN

Under Section 324 of PPC to 10 years' R.I. for attempting to commit the murder of Khadim Hussain (PW.3) and a fine of Rs. 50,000/-, and in default thereof he shall further undergo six months' S.I.

AKBAR ALI & ARSHAD *ALIAS* ACHOO

Under Section 324 of PPC to 10 years' R.I. each for attempting to commit the murder of the complainant Nisar Ahmad (PW.1) and a fine of Rs. 50,000/- each, and in default thereof he shall further undergo six months' S.I. each.

Benefit of Section 382-B of Cr.P.C. was also extended to all the convicts.

It is pertinent to mention here that the appellants were charged by the learned Trial Court for committing *Qatl-i-Amd* to Ghaffar Ahmad deceased, as well as, for committing *Qatl-i-Amd* of Sattar Ahmad deceased punishable under Sections 302/149 of PPC but the learned Trial Court has held in its above-mentioned judgment that the prosecution failed to prove the vicarious liability of all accused as provided under Section 149 of PPC therefore appellants have been convicted for their individual acts. The appellant Riasat Ali has not been convicted for the murder of Sattar Ahmad deceased. Similarly the remaining appellants have also neither been convicted for the murder of Ghaffar Ahmad deceased nor for the murder of Sattar Ahmad deceased. No appeal has been filed by the State or by the complainant against the acquittal of the appellants from the charge of the murder of Sattar Ahmad deceased or against the acquittal of Shakir Hussain, Akbar Ali and Arshad *alias* Achoo, appellants from the charge of murder of Ghaffar Ahmad deceased, therefore, their acquittal from the above-mentioned charges has attained finality.

The learned Trial Court *vide* the same judgment dated 27.4.2006 acquitted co-accused of the appellants, namely, Abdul Majeed, Zafar Ali, Iqbal Zakir Hussain, *Mst.* Salma Bibi and *Mst.* Raysham Bibi.

The Petition for Special Leave to Appeal bearing No. 57 of 2006 against the acquittal of above-mentioned accused has been dismissed by this Court *vide* order dated 2.10.2006.

2. Brief facts of the case as given by the complainant Nisar Ahmad (PW.1) in the F.I.R. (Ex.PA) are that on 15.6.2005, at about 6.30 p.m., he alongwith his paternal uncle Khadim Hussain (PW.3), brothers namely, Ghaffar Ahmad (deceased), Mukhtar Ahmad (PW.2) and Israr Ahmad, was present in his house. His brother Sattar Ahmad (deceased) was coming back home from the fields and when he reached in the street in front of his house, he was intercepted by Zakir and Iqbal accused, who raised *lalkara* that Sattar etc. should be taught a lesson for the spy information. On hearing *lalkara*, the complainant Nisar Ahmad (PW.1) alongwith Khadim Hussain (PW.3), Ghaffar Ahmad (deceased), Israr Ahmad and Mukhtar Ahmad (PW.2) came out in the street and saw that Muhammad Asghar accused (since P.O.) made a fire shot with his gun, which landed on the abdomen of Sattar Ahmad (deceased). Riasat Ali appellant made a fire shot with his carbine, which landed on the chest of Ghaffar Ahmad (deceased). Liaqat Ali (since P.O.) made a fire shot with his carbine, which hit on the right arm of Ghaffar Ahmad (deceased). Abdullah accused (since P.O.) made a fire shot with his carbine, which hit Ghaffar Ahmad (deceased) on the wrist of his left arm. Shakir Hussain made a fire shot with his fire-arm weapon, which landed on the left leg of Khadim Hussain (PW.3). Akbar Ali and Achoo (Arshad) accused fired with their respective fire-arm weapon and the fire shots made by the said accused landed on his (complainant's) right leg and left leg, respectively. Abdul Majeed and Zafar also resorted to indiscriminate firing with their respective fire-arm weapons. The accused, thereafter, fled away from the spot.

3. During police investigation, nothing was recovered from the possession of the appellants, namely, Shakir Hussain, Akbar Ali, and Arshad *alias* Achoo and they alongwith Abdul Majeed, Zafar Ali, Iqbal, Zakir Hussain, *Mst.* Salma Bibi and *Mst.* Raysham Bibi were declared innocent by the police. However, the appellant Riasat Ali while he was in police custody on 15.8.2005 led to the recovery of Carbine (P.5), which was taken into possession *vide* recovery memo. (Ex.PQ) by Muhammad Ishaq, Inspector (CW.5). He was declared guilty during police investigation.

After completion of investigation, the challan was prepared and submitted before the Court. The complainant being dissatisfied with police investigation filed a private complaint and the learned Trial Court summoned all the accused named in the private complaint to face the trial. The learned Trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed a charge against the appellants Riasat Ali, Shakir Hussain, Akbar Ali, and

Arshad *alias* Achoo, and their above-mentioned acquitted co-accused on 29.9.2004, under Sections 302, 114, 148, 149 of PPC read with Section 109 of PPC, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced six witnesses, whereas, eight Court witnesses were also examined during the trial.

The complainant Nisar Ahmad (PW.1), Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3) have furnished the ocular account of the occurrence.

The medical evidence was furnished by Dr. Iqbal Hussain (PW.7) and Dr. Ishtiaq Ahmad (PW.8).

Irshad Ahmad (PW.4) is a recovery witness of Carbine (P.5).

Falak Sher (PW.5) and Saeed Ahmad (PW.6) are the witnesses of abetment.

Muhammad Ishaq, Inspector (CW.5) and Altaf Hussain, S.I. (CW.8) were the Investigating Officers of this case.

Muhammad Akbar, S.I. (CW.1), Zafar Iqbal C-447 (CW.2), Muhammad Abbas, HC-1024 (CW.3), Saeed Nasir Hussain, Draftsman (CW.4), Said Munir, HC-1040 (CW.6), and Muhammad Aslam C-195 (CW.7) are the formal witnesses in this case.

The prosecution also produced documentary evidence in the shape of complaint and F.I.R. (Ex.PA), copy of private complaint (Ex.PB), copies of F.I.Rs. (Ex.PC) to (Ex.PK), memo. of possession of blood-stained clothes (Ex.PL) and (Ex.PM), memo. of possession of blood-stained earth (Ex.PN) and (Ex.PP), memo. of possession of Carbine 12 bore (Ex.PQ), copies of post-mortem reports (Ex.PR) and (Ex.PS), copy of application for warrant of arrest and order (Ex.PU/1), copies of warrant of arrest and reports (Ex.PV to CW.2/A), copy of application for proclamation and order (Ex.PY), copies of proclamation (Ex.PZ) to (Ex.PBB), copy of site-plan (Ex.CW.4/A), copy of site-plan without scale (Ex.CW.5/A), copy of F.I.R. (Ex.CW.6/A), copy of application for post-mortem (Ex.CW.8/A), copy of death report (Ex.CW.8/B), copy of application for post-mortem (Ex.CW.8/C), copy of death report (Ex.CW.8/D), copies of injury statement (Ex.DW/8/E&F) and copy of site-plan of the place of occurrence (Ex.CW.8/G).

The statement of appellant Riasat Ali, under Section 342, Cr.P.C. was recorded. He refuted the allegations levelled against him and professed his innocence. While answering to a question "*Why this case against you and why the PWs have deposed against you*", Riasat Ali, appellant, replied as under:--

"The PWs are related *inter se* and with the deceased persons. Khadim Hussain PW is real uncle of the complainant and deceased while complainant Nisar Ahmad, Mukhtar Ahmad are real brothers *inter se* and of the deceased persons. Sattar deceased was committing zina with *Mst.* Mina Bibi, my Bhanji, in the house of Liaqat P.O. I and Liaqat saw Satter committing zina with our Bhanji. We reprimanded Sattar, Ghaffar Ahmad, Nisar Ahmad also came there. There was a fight in which Ghaffar and Sattar died, while Nisar Ahmad was injured. It was all done in a sudden provocation. There was exchange of firing between the parties and the occurrence took place in darkness."

The appellants Shakir Hussain and Arshad *alias* Achoo also denied the allegations of the prosecution levelled against them and claimed their innocence, in their statements recorded under Section 342 of Cr.P.C. In answer to the question, "why this case against you and why the PWs have deposed gainst you", both the appellants gave a similar answer, which is reproduced as under:--

"All the PWs are related and with the deceased. I was away from my house at the time of occurrence and I was present in the fields of Mumtaz Khan Lashari, alongwith Zafar co-accused to take fodder for our animals. I have been falsely involved in this case. I am innocent."

Similarly, the appellant Akbar Ali also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statements recorded under Section 342 of Cr.P.C. In answer to the question, why this case against you and why the PWs have deposed against you, the appellant replied as under:--

"All the PWs are related and with the deceased persons. Khadim Hussain PW is uncle of deceased persons as well as other PWs Nisar Ahmad, Israr Ahmad and Mukhtar Ahmad, while Falak Sher and Saeed Ahmad PWs are also related and are close friends of Nisar Ahmad complainant. I have been falsely involved in this case. I am quite innocent. The motive set up by the prosecution is fabricated one."

All the appellants did not opt to make their statements under Section 340(2), Cr.P.C.; anyhow, they examined Mina Bibi as (DW.1) in their defence. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants, as detailed above.

5. Syed Karamat Ali Naqvi, Advocate for the appellants in Criminal Appeal No. 67-J of 2007 and Criminal Appeal No. 98-J of 2012, in support of both these appeals, contends that wider net was thrown by the complainant and all the family

members/close relatives of the appellants were falsely implicated in this case; that the case was investigated by the local police and Shakir, Akbar Ali, Abdul Majeed, Arshad *alias* Achhoo, Zafar, Iqbal, Zakir Ali, *Mst.* Salma Bibi and *Mst.* Raysham Bibi were found innocent; that the appellants were also charged for the murder of Sattar (deceased), but they were not convicted for that charge and no appeal regarding the acquittal from the said charge was preferred either by the complainant or by the State; that co-accused of the appellants namely, Abdul Majeed, Zafar Ali, Iqbal, Zakir Hussain, *Mst.* Salma Bibi and *Mst.* Raysham Bibi were also charge-sheeted alongwith the appellants, but they have been acquitted by the learned Trial Court; that their acquittal was challenged through PSLA No. 57 of 2006, but the same was also dismissed by this Court *vide* order dated 2.10.2006, and their acquittal was not further agitated by the complainant or the State; that the prosecution has miserably failed to prove the motive as alleged by the complainant; that even otherwise in the F.I.R., the complainant simply stated that the accused Riasat Ali, etc. had a suspicion that Ghaffar and Sattar were providing spy information without making any detail of such information, whereas, while filing the private complaint, he improved his case by stating that the accused, namely, Abdullah, Asghar *alias* Khundda, Riasat Ali and Akbar were involved in many cases of theft, and the police used to raid their houses and they had a suspicion that the deceased were providing spy information, but no evidence of that spy information was produced before the Court; that the alleged recovery of Carbine (P.5) at the instance of the appellant Riasat Ali is of no avail as the report of FSL is only about the working condition of the said Carbine as no empty was taken into possession from the spot. The learned counsel further contends that in the F.I.R., the complainant alleged that the appellant Arshad *alias* Achoo made a fire shot, which landed on his left leg, whereas, according to the medical evidence, there is no injury on his left leg and in the complaint, he changed his version by stating that the fire shot made by Arshad *alias* Achoo landed on his right leg; that the plea of the appellant Riasat Ali regarding the commission of zina by Sattar (deceased) with his niece *Mst.* Mina Bibi is more probable in the circumstances of the case; that the appellants were not convicted under Sections 148 and 149 of PPC, because the story of the prosecution has not been believed by the learned Trial Court; therefore, these appeals be accepted and the appellants may be acquitted from the charge.

Rao Javed Khurshid, Advocate for the appellants Shakir Hussain and Akbar Ali in Criminal Appeal No. 931 of 2006, in support of this appeal, contends that both the appellants were found innocent during the occurrence, whereas, they have

falsely been implicated in this case; that they have no motive for the commission of this crime; that they have been acquitted from the charges under Sections 302, 148, 149 of PPC and that the prosecution case against the appellants is of doubtful nature.

6. On the other hand, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant opposes all these appeals on the grounds that the appellants were named in the F.I.R., which was promptly lodged with the specific allegation against the appellant Riasat Ali for causing fire-arm injury to Ghaffar (deceased), whereas, the appellant Shakir has caused fire-arm injury, which landed on the left leg of Khadim Hussain (PW.3), the appellant Akbar has caused fire-arm injury, which hit the complainant on his right leg, whereas, the appellant Arshad *alias* Achhoo has caused fire-arm injury, which landed on the left leg of the complainant; that the prosecution witnesses of the ocular account remained consistent and straightforward and their evidence could not be shattered by the defence; that the ocular account is in line with the medical evidence; that the motive part of the prosecution has been proved by the prosecution; that the appellants are responsible for causing the death of two innocent persons; that the case of the appellants is quite distinguishable from their acquitted co-accused, as no active role had been ascribed to them; that the prosecution case is further corroborated by the recovery of Carbine (P.5), at the instance of the appellant Riasat Ali; that opinion of the police about innocence or guilt of an accused is inadmissible in evidence. So far as the plea of the appellant Riasat Ali is concerned, the learned Law Officer, as well as, the learned counsel for the complainant states that the appellant has taken a vague defence, therefore, the evidence of *Mst.* Mina Bibi is not helpful to him and it is an afterthought; therefore, this appeal may be dismissed and Murder Reference may be answered in the affirmative.

7. We have heard the arguments of the learned counsel for the appellants, as well, as the learned Deputy Prosecutor-General, and have also gone through the evidence available on the record, with their able assistance.

8. The occurrence in this case as per F.I.R. (Ex.PA) and private complaint (Ex.PB) took place on 15.6.2005, at 6.30 p.m. in front of the house of the complainant, situated in the village Baman Zairin, District Okara. The matter was reported to the police by the complainant Nisar Ahmad (PW.1) on the same day, at 9.30 p.m. (night), when he was present at District Hospital, Okara, and the formal F.I.R. (Ex.PA) was also chalked out on the same day at 10.30 p.m. (night), at the Police Station, Choochak, District Okara, which is situated at a distance of 12 k.ms. from the place of occurrence. Considering the time and place of occurrence and its

distance from the Police Station, we are of the view that there was no delay in reporting the matter to the police.

9. The police during investigation found Abdul Majeed, Zafar Ali, Iqbal, Zakir Hussain, *Mst.* Salma Bibi and *Mst.* Raysham Bibi as innocent. The complainant, being dissatisfied with the above-mentioned findings of the police filed a private complaint (Ex.PB). The same facts were narrated by the complainant in his private complaint (Ex.PB) as were mentioned by him in the F.I.R. (Ex.PA).

10. The prosecution/complainant, in order to prove ocular account has produced the complainant Nisar Ahmad (PW.1), Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3). According to the statements of the complainant Nisar Ahmad (PW.1), on 15.6.2005, at about 6.30 p.m., he alongwith Khadim Hussain (PW.3), Ghaffar Ahmad, Mukhtar Ahmad (PW.2) and Israr Ahmad, his brothers, was present in his house. His brother Sattar Ahmad (deceased) was coming back from the fields and when he reached in the street in front of the house of the complainant, he was intercepted by Zakir and Iqbal co-accused (since acquitted) and they raised *lalkara*. On hearing *lalkara*, he (the complainant) alongwith Ghaffar Ahmad (deceased), Khadim Hussain (PW.3), Israr Ahmad and Mukhtar Ahmad (PW.2) came out in the street and saw that Muhammad Asghar accused (since P.O.) made a fire shot with his gun, which landed on the abdomen of Sattar Ahmad (deceased). Riasat Ali appellant made a fire shot with his carbine, which landed on the chest of Ghaffar Ahmad (deceased). Liaqat Ali (since P.O.) made a fire shot with his carbine, which hit on the right arm of Ghaffar Ahmad (deceased). Abdullah accused (since P.O.) made a fire shot with his carbine, which hit Ghaffar Ahmad (deceased) on the wrist of his left arm. Akbar Ali and Ashraf *alias* Achoo accused fired with their respective guns and the fire shots landed on his (complainant's) right leg. Shakir Hussain appellant made a fire shot with his gun, which hit Khadim Hussain (PW.3) on his left leg. Abdul Majeed and Zafar fired with their respective guns, but the same did not hit anybody. The accused, thereafter, fled away from the spot.

The statements of other eye-witnesses, namely, Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3) are also in line with the statement of the complainant Nisar Ahmad (PW.1). The complainant Nisar Ahmad (PW.1) and Mukhtar Ahmad (PW.2) are real brothers, whereas, Khadim Hussain (PW.3) in their paternal uncle. The above-mentioned eye-witnesses are natural witnesses of the occurrence, because the occurrence took place in front of their house. The place of occurrence has not been disputed by the appellants. The complainant Nisar Ahmad (PW.1) and

Khadim Hussain (PW.3) are injured eye-witnesses of the occurrence. Therefore, their presence at the time of occurrence cannot be doubted. The above-mentioned witnesses have no ulterior motive to falsely implicate the appellants in this case. Khadim Hussain (PW.3) is paternal uncle, whereas, Nisar Ahmad (PW.1) and Mukhtar Ahmad (PW.2) are real brothers of Ghaffar Ahmad (deceased) and Sattar Ahmad (deceased), therefore, it is not probable that they will falsely implicate the appellants and would let off the real culprits. Substitution in such-like cases in a rare phenomena. The above-mentioned eye-witnesses were cross-examined at length by the learned defence counsel, but their evidence could not be shattered. They have corroborated each other on all material aspects of the case. Their evidence is straightforward and confidence inspiring.

11. The medical evidence of the prosecution was produced by Dr. Iqbal Hussain (PW.7), who conducted the post-mortem examination on the dead-body of Sattar Ahmad (deceased) on 16.6.2005, at 11.00 a.m., and found the following injuries on his person:--

External Injuries.

(1) A lacerated wound ½ c.m. x ½ ingoing with inverted margins, on right side of abdomen, 6 c.m. from the umbilicus (entry wound).

(2) A lacerated wound ½ c.m. x ½ c.m. margins inverted, deep going on right side of abdomen, 6 c.m. below the injury No. 1 and 7 c.m. form midline (entry wound).

In his opinion, both the injuries were ante-mortem and were caused by fire-arm weapon, which were sufficient enough to cause death. Probable time that elapsed between injuries and death was within one hour, and between death and post-mortem was 16 hours.

On the same day, Dr. Iqbal Hussain (PW.7) conducted the post-mortem examination on the dead-body of Ghaffar Ahmad (deceased) at 11.30 a.m., and found the following injuries on his person:--

External Injuries.

(1) A lacerated wound 1 c.m. x 1 c.m. ingoing with inverted margins on front and upper part of left chest. 6 c.m. above from left nipple (wound of entry).

(2) A lacerated wound ½ c.m. x 1 c.m. deep going with everted margins, on front and outer part of right chest, 4 c.m. from nipple (wound of exit).

(3) A slippery wound 2 c.m. x 2 c.m. on front of right chest, 4 c.m. from right nipple and 3 c.m. from midline.

(4) A lacerated wound each measuring 1 c.m. x 1 c.m., deep going with inverted margins, in an area of 10 c.m. into 6 c.m., on back middle left fore-arm, underneath bone fractured (wound of entry).

(5) 4 lacerated wounds each measuring 1½ x 1½ c.m., deep going with everted margins in an area of 11 c.m. x 5 c.m. On inner and front left fore-arm (wound of exit).

(6) 6 lacerated wounds each measuring 1 c.m. x 1 c.m., deep going with inverted margins in an area of 16 c.m. into 11 c.m., on front middle right upper arm. (underlying bone was fractured, entry wound).

(7) 3 lacerated wounds each measuring 1½ c.m. x 1½ c.m., deep going with everted margins in an area of 7 c.m. x 3 c.m., on back of right upper arm (exit wound).

Dr. Ishtiaq Ahmad (PW.8), on 15.6.2005, at 8.50 p.m., medically examined the complainant Nisar Ahmad (PW.1), and found the following injuries on his person:--

(1) A lacerated wound ½ x ½ c.m. deep going on back upper right thigh (exit wound).

(2) A lacerated wound ½ x ½ c.m., into deep going outer upper right thigh (entry wound).

(3) A lacerated wound ½ x ½ c.m., x outer middle right thigh deep going (entry wound).

(4) A lacerated wound 1 x 1 c.m., inner back middle thigh. It was deep going and it was exit wound.

(5) A lacerated wound ½ x ½ c.m. x deep going, on outer lower right thigh (entry wound).

(6) A lacerated wound 1½ c.m. x deep going on back middle right thigh. It was exit wound.

On the same day, Dr. Ishtiaq Ahmad (PW.8), medically examined Khadim Hussain (PW.3), and found the following injuries on his person:--

(1) A lacerated wound ½ x ½ c.m. x deep going, on the front upper left leg, 7 c.m. belong knee joint (entry wound).

(2) A lacerated wound ½ x ½ c.m., deep going, outer upper left leg (exit wound).

(3) A lacerated wound ½ x ½ c.m., x inner middle left leg, deep going, 16 c.m. below left knee (entry wound).

(4) A lacerated wound 1½ x ½ c.m., deep going middle inner lower left leg, 3 c.m. from injury No. 3, on the front side.

The above-mentioned medical evidence has fully supported the ocular account furnished by the complainant Nisar Ahmad (PW.1), Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3). According to the medical evidence, the seats of injuries on the persons of Sattar Ahmad (deceased), Ghaffar Ahmad (deceased), Nisar Ahmad (PW.1) and Khadim Hussain (PW.3), kind of weapons used and the time of occurrence/death, were the same, which were narrated by the above-mentioned eye-witnesses. Dr. Iqbal Hussain (PW.7) and Doctor Ishtiaq Ahmad (PW.8) were also cross-examined by the learned defence counsel, but nothing favourable to the accused could be elicited during the process of their cross-examination.

12. The learned counsel for the appellant Arshad *alias* Achoo contends that there is conflict between the ocular account and medical evidence to the extent of role attributed to this appellant, as it is the case of the complainant Nisar Ahmad (PW.1) in the F.I.R. (Ex.PA) that the fire shot made by Arshad *alias* Achoo appellant hit on the left leg of the complainant Nisar Ahmad (PW.1), whereas, according to the medico-legal report, there was no injury on the left leg of the complainant and entry wounds were on his right leg.

The said argument of the learned counsel for the appellant Arshad *alias* Achoo is not convincing because the complainant Nisar Ahmad (PW.1) was not confronted with his previous statement wherein he has stated that the fire shot made by Arshad *alias* Achoo appellant landed on his left leg. The learned defence counsel did not cross-examine the complainant regarding his statement about the seat of injury inflicted by the appellant Arshad *alias* Achoo. According to the medical evidence furnished by Dr. Ishtiaq Ahmad (PW.8), there are three fire-arm entry wounds on the right leg of the complainant Nisar Ahmad (PW.1). The complainant Nisar Ahmad (PW.1) and other eye-witnesses while appearing before the Court has stated that the fire shot made by Arshad *alias* Achoo appellant landed on the right leg of the complainant. The above-mentioned minor variation in the medical and ocular

account about the seat of injury is inconsequential. In the state of sensation and panic, when the fire shots are being made by the accused, it is not fair to expect from an ordinary witness that he would mention the seat of injury with exactitude. It is by now a well-settled law that minor discrepancies in the ocular and medical evidence about the seat of injuries are insignificant. Reference in this context may be made to the case of *Abdur Rauf Vs. The State and another* (2003 SCMR 522), wherein at page 526, the Hon'ble Supreme Court of Pakistan has held as under:--

"We may observe that the minor discrepancies in the medical evidence relating to the seat of injuries would also not negate the direct evidence as the witnesses are not supposed to give photo picture of each detail of injuries in such situation, therefore, the conflict of nature of ocular account with medical as pointed out being not material would have no adverse effect on the prosecution case."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of *Ellahi Bakhsh Vs. Rab Nawaz and another* (2002 SCMR 1842).

13. It was next contended by the learned counsel for the appellants that co-accused of the appellants were also charge sheeted alongwith the appellants, but they have been acquitted by the learned Trial Court, whereas, the appellants have been convicted on the basis of same evidence.

The said argument of the learned counsel for the appellants is misconceived. The co-accused of the appellants namely, Abdul Majeed, Zafar Ali, Iqbal, Zakir Hussain, *Mst.* Salma Bibi and *Mst.* Raysham Bibi, no doubt were acquitted by the learned Trial Court and the petition for special leave to appeal bearing No. 57 of 2006 against their acquittal has also been dismissed by this Court *vide* order dated 2.10.2006 but the case of the appellants is quite distinguishable from their above-mentioned acquitted co-accused, as no active role has been ascribed to them, therefore, the acquittal of the above-mentioned co-accused is of no avail to the appellants.

14. Now coming to the motive part of this case, it was alleged by the complainant Nisar Ahmad (PW.1) in the F.I.R. (Ex.PA) that the accused Riasat Ali, etc. had the suspicion that Sattar Ahmad (deceased) and Ghaffar Ahmad (deceased) used to give spy information against them and due to the said grudge, their murder was committed by the accused. It was not mentioned in the F.I.R. (Ex.PA) as to whom the spy information was given by the deceased persons against the accused party. The nature of spy information was also not mentioned in the F.I.R. (Ex.PA). The complainant Nisar Ahmad (PW.1), later on, improved the prosecution story

regarding the motive part while filing the private complaint (Ex.PA). At para No. 3 of the private complaint, he had stated that the accused Abdullah, Asghar *alias* Khundda, Riasat Ali, and Akbar, were involved in number of theft case and they had suspicion that the deceased persons had provided spy information to the police against them. No evidence in respect of the improved story of the prosecution about the alleged motive was produced in this case. No police official was produced by the prosecution to establish that any spy information was given by the deceased persons, against the accused. Similarly, the prosecution has not produced any witness, who had stated that the accused had complained regarding the alleged spy information given by the deceased persons against them or any altercation took place in his presence between the deceased persons and the accused, therefore, we are of the view that the alleged motive has not been proved in this case.

15. Nothing was recovered from the possession of the appellants Shakir Hussain, Akbar Ali and Arshad *alias* Achoo during their physical remand.

So far as the alleged recovery of carbine (P.5) on the pointation of the appellant Riasat Ali is concerned, we have noted that no empty was recovered from the place of occurrence, and the report of FSL (Ex.PGG) is only to the extent that the carbine (P.5) was in working condition, thus, the alleged recovery of carbine (P.5) from the possession of the appellant Riasat Ali is of no avail to the prosecution.

16. Now, we will discuss the defence plea taken by Riasat Ali appellant and defence evidence produced by him. Riasat Ali appellant took a plea in his statement recorded under Section 342 of Cr.P.C. that Sattar (deceased) was committing zina with his niece, namely, *Mst.* Mina Bibi, in the house of Liaqat Ali (P.O.). He and Liaqat Ali saw Sattar (deceased) while committing zina with their niece. They reprimanded Sattar and Ghaffar and in the meanwhile, Nisar Ahmad also came there. There was a fight in which Sattar and Ghaffar died, while Nisar Ahmad was injured. It was further claimed by Riasat Ali appellant that it was all done in a sudden provocation and there was an exchange of firing between the parties and the occurrence took place in the darkness. He has also produced *Mst.* Mina Bibi in his defence evidence as DW.1. No application was ever moved by Riasat Ali appellant for recording his cross version. *Mst.* Mina Bibi while appearing before the learned Trial Court as DW.1 has admitted that she never got registered any criminal case, or filed any private complaint regarding the above-mentioned defence plea. She has also admitted that she never went to the DHQ Hospital, Okara, for her medical examination. We have noted that Riasat Ali appellant has taken a vague defence plea. It appears that the defence plea was taken as an after-thought, therefore, we

are of the view that the appellant Riasat Ali failed to substantiate the defence plea taken by him.

17. It was argued on behalf of Shakir Hussain and Akbar Ali appellants that both the appellants were found innocent during police investigation, therefore, they may be acquitted from the charge. The said contention of the learned counsel for the appellants is misconceived. Mere opinion of the police *qua* innocence of the above-mentioned appellants is inadmissible in evidence, therefore, the above-mentioned appellants cannot be acquitted merely on the ground that they were declared innocent by the police. A reference in this respect may be made to the case of *Muhammad Ahmad (Mahmood Ahmed) Vs. The State* (2010 SCMR 660) wherein at page 676 the Hon'ble Supreme Court was pleased to observe as under:--

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to crep into the evidence was not curbed them the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent them why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt."

As discussed earlier, the case against the above-mentioned appellants was proved through reliable and confidence inspiring evidence of the eye-witnesses namely Nisar Ahmad complainant (PW.1), Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3). The said evidence is also supported by the medical evidence rendered by Dr. Iqbal Hussain (PW.7) and Dr. Ishtiaq Ahmad (PW.8).

18. We have disbelieved the evidence of recovery of carbine (P.5) and the motive part of the prosecution case, however, if the evidence of motive and recovery of carbine (P.5) is excluded from consideration, even then there is sufficient incriminating evidence available on the record against the appellants. As discussed earlier, prosecution case was duly established through the evidence of the complainant Nisar Ahmad (PW.1), Mukhtar Ahmad (PW.2) and Khadim Hussain (PW.3). They stood the test of cross-examination, but the defence could not create any dent in their evidence. Their evidence is quite natural, reliable and confidence inspiring. The ocular account of the prosecution is fully supported by the medical

evidence of Dr. Iqbal Hussain (PW.7) and Dr. Ishtiaq Ahmad (PW.8). The injuries attributed to the appellants, seats of injuries, kind of weapons used in the occurrence, as stated by the eye-witnesses, also get support from the above-mentioned medical evidence, therefore, we hold that the prosecution has proved its case against the appellant Riasat Ali for committing *Qatl-i-Amd* of Ghaffar Ahmad (deceased), as well as, against the appellant namely, Shakir Hussain, for attempting to commit the murder of Khadim Hussain (PW.3) and against the appellants Akbar Ali and Arshad *alias* Achoo for attempting to commit the murder of Nisar Ahmad (PW.1).

19. Insofar the question of quantum of sentence of the appellants is concerned, we have noted some mitigating circumstances in their favour. *Firstly*, as many as thirteen persons were implicated in this case by the complainant party and out of them six co-accused of the appellants, namely Abdul Majeed, Zafar Ali, Iqbal, Zakir Hussain, *Mst.* Salma Bibi, and *Mst.* Raysham Bibi, have been acquitted by the learned Trial Court and PSLA No. 57 of 2006, filed by the complainant, against their acquittal has already been dismissed by a learned Single Judge of this Court *vide* order dated 2.10.2006. Similarly, criminal appeal, filed by the complainant, for the complainant, for the enhancement of sentence of the appellants, Shakir Hussain, Akbar Ali and Arshad *alias* Achoo has already been dismissed by a learned Division Bench of this Court *vide* order dated 28.9.2011, as the application of the complainant for condonation of delay bearing Criminal Miscellaneous No. 1822-M of 2006 was not allowed. *Secondly*, it was a case of sudden fight. It was admitted by the complainant Nisar Ahmad (PW.1) that his house and the house of the accused party are adjacent to each other, even the learned Trial Court has held in its impugned judgment that possibility cannot be ruled out that when the firing started and there was hue and cry, all the participants rushed from their houses and reached the place of occurrence, because, their houses are adjacent and contiguous to each other, as well as, to the place of occurrence and resultantly it was held that the prosecution failed to prove the vicarious liability of all the accused as provided under Section 149 of PPC. *Thirdly*, the prosecution has failed to prove the recovery of carbine (P.5) beyond the shadow of doubt against the appellant Riasat Ali, whereas, nothing was recovered from the possession of other appellants and *fourthly* the prosecution has alleged a specific motive, but has miserably been failed to prove the same. It is not determinable in this case as to what had actually happened immediately before the occurrence, which had resulted into the occurrence, therefore, the death sentence of the appellant Riasat Ali is quite harsh.

It has been held in a number of judgments of the Hon'ble Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive beyond any shadow of doubt and non-proof of motive may be considered a mitigating circumstance in favour of an accused. Moreover, while treating it a case of mitigation, we have fortified out view by a judgment of the Hon'ble Supreme Court of Pakistan reported in the case of *Ahmad Nawaz and another Vs. The State* (2011 SCMR 593), wherein, at page 604, the learned apex Court of the country, has been pleased to lay emphasis as under:--

"10. The recent trend of the Courts with regard to the awarding of penalty is evident from several precedents. In the case of *Iftikhar-ul-Hassan v. Israf Bashir and another* (PLD 2007 SC 111), it was held that "This is settled law that provisions of Sections 306 to 308, PPC attracts only in the cases of *Qatl-i-Amd* liable to Qisas under Section 302(a), PPC and not in the cases in which sentence for above-mentioned has been awarded as Tazir under Section 302(b), PPC. The difference of punishment for *Qatl-i-Amd* as Qisas and Tazir provided under Section 302(a) and 302(b), PPC respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under Section 302(b), PPC and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of Qisas if he is minor at the time of occurrence but in a case in which Qisas is not enforceable, the Court in a case of *Qatl-i-Amd*, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in *Ghulam Murtaza v. State* (2004 SCMR 4), *Faqir Ullah v. Khalil-uz-Zaman* (1999 SCMR 2203), *Muhammad Akram v. State* (2003 SCMR 855) and *Abdus Salam v. State* (2000 SCMR 338)." The Court while maintaining the conviction under Section 302(b), PPC awarded him sentence of life imprisonment under the same provision and also granted him the benefit of Section 382-B, Cr.P.C. In *Muhammad Riaz and another Vs. The State* (2007 SCMR 1413) while considering the penalty for an act of commission of *Qatl-i-Amd* it was observed that "No doubt, normal penalty for an act of commission of *Qatl-i-Amd* provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case". In *Iftikhar Ahmad Khan v. Asghar Khan and another* (2009 SCMR 502) it has been noted that:

"In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course". (underlining, italic and bold supplied)."

20. Due to the above-mentioned reasons, the conviction of Riasat Ali appellant under Section 302(b), PPC awarded by the learned Trial Court is maintained, but his sentence is altered from the death to imprisonment for life. The compensation awarded by the learned Trial Court and sentence in default thereof is maintained and upheld. However, benefit of Section 382-B of Cr.P.C. is given to the appellant Riasat Ali.

21. Similarly, keeping in view the above-mentioned factors, while maintaining the sentences of Shakir Hussain, Akbar Ali and Arshad *alias* Achoo, under Section 324 of PPC, their sentences are reduced from 10 years' R.I. to 6 years' R.I. each. However, the amount of compensation and the sentence of imprisonment in default thereof as ordered by the learned Trial Court is maintained against all the appellants namely Shakir Hussain, Akbar Ali and Arshad *alias* Achoo.

22. In light of the above discussion, Criminal Revision No. 1053 of 2006, filed by the complainant Nisar Ahmad (PW.1) has no merits and the same is, hereby, dismissed.

23. Consequently with the above-mentioned modification in the sentences of the appellants, Criminal Appeal No. 67-J of 2007, filed by the appellant Riasat Ali, Criminal Appeal No. 931 of 2006, filed by the appellants Shakir Hussain and Akbar Ali and Criminal Appeal No. 98-J of 2012, filed by the appellant Arshad *alias* Achoo, are hereby, dismissed and Murder Reference No. 323 of 2006 is answered in the NEGATIVE and death sentence of the appellant Riasat Ali is NOT CONFIRMED.

24. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the learned Trial Court during the trial of the absconding accused namely, Abdullah, Liaqat Ali and Muhammad Asghar *alias* Khundda and their case shall be decided on its own merit on the basis of the evidence to be adduced during the trial of the said appellants.

Sentence reduced.

2012 LAW NOTES 418

[Lahore]

Present: **MANZOOR AHMAD MALIK and MALIK SHAHZAD AHMAD KHAN, JJ.**

Nazir Ahmad

Versus

The State

Crl. Appeal No. 1098 of 2006 and Murder Reference No. 591 of 2006, decided on 7th February, 2012.

CONCLUSIONS

(1) Un-explained delay in lodging of F.I.R. provides sufficient time for deliberation and consultation.

(2) F.I.R. recorded at spot would be considered to be recorded after due deliberation.

(a) Criminal Trial---

---It is the prosecution which is required to prove its case against the accused person beyond any shadow of doubt and the defence version is to be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not?

(Para 11)

Ref. PLD 1994 SC 879, 2011 SCMR 323 and 2011 PSC Crl. (SC Pak) 65.

(b) Appreciation of evidence---

---If the prosecution evidence is disbelieved by the Court, then the statement of an accused is to be accepted or rejected as a whole---It is legally not possible to accept the inculpatory part of the statement of an accused and to reject the exculpatory part of the same statement.

(Para 19)

Ref. PLD 2008 SC 513.

MURDER CHARGE---(Improbabilities)

(c) Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/34---Charge of murder---Impugned conviction/sentence of death---Improbabilities---Benefit of doubt---Appreciation of evidence---Validity---Telephonic facility was available at place of occurrence but inspite of that police was not informed by complainant or anybody else for almost ten hours---Delay of almost ten hours in lodging F.I.R. provided sufficient time for deliberation and consultation especially when prosecution had not given any plausible explanation for delay in lodging F.I.R.---Complaint (Exh.) was not lodged at Police Station rather it was chalked out at spot---When F.I.R. was recorded at spot, the same would be considered to be recorded after due deliberation---Post-mortem of said deceased was conducted with an inordinate delay of about 14 hours from

his death and more than 16 hours from alleged occurrence---It also cast doubts about prosecution story---Alleged story did not appear to a common sense because if complainant had already received an amount of Rs. 24,700/-, then for remaining amount of Rs. 300/- there was no justification for going inside house of appellant at odd hours of winter night *i.e.* 11.00 p.m.---It was not probable that in winter season *i.e.* in month of December, complainant, deceased and PWs would keep on cutting "*Loosan*" crop in darkness of night till 10.30 p.m.---There was conflict between ocular and medical evidence---PWs made dishonest improvements in their previous statements in order to bring their case in line with medical evidence---Motive as alleged by prosecution was not proved in instant case---No appeal against acquittal of co-accused had been filed either by State or complainant---If plea of appellant was taken *in toto*, then no offence was made out in instant case---Prosecution had failed to prove its case against appellant beyond shadow of doubt---Criminal appeal accepted. (Paras 12,13,14,16,18,19,20)

Ref. 1991 SCMR 61, PLD 1991 SC 520, PLD 2008 SC 513, 2007 SCMR 1812, 2008 SCMR 707, PLD 1981 SC 472, 2008 SCMR 6, PLD 2008 SC 349, 2011 SCMR 1473 and 2007 PSC Crl. (SC Pak) 834.

اندراج ایف آئی آر میں تاخیر تھی پوسٹ مارٹم بھی تاخیر سے کرایا گیا۔ استغاثہ کہانی بعید از قیاس تھی۔ بصری اور طبی شہادت میں تضاد تھا۔ سزایابی کے خلاف اپیل منظور ہوئی۔

[There was delay in lodging of F.I.R. Also post-mortem of the deceased was conducted with delay. Prosecution story was improbable. There was conflict between ocular and medical evidence. Impugned conviction/sentence of death was set aside].

For the Appellant: **Seerat Hussain Naqvi, Advocate.**

For the Appellant: **Maqbool Ahmad Qureshi, Advocate (Defence Counsel) at State expense.**

For the Complainant: **Rana Habib-ur-Rehman Khan, Advocate.**

For the State: **Chaudhry Ghulam Mustafa, Deputy Prosecutor-General.**

Date of hearing: **7th February, 2012.**

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J. --- Nazir Ahmad appellant alongwith Sultan Mehmood and Khalid Mehmood co-accused were tried in case F.I.R. No. 1494, dated 12.12.2005, registered at Police Station, Sadar, District Faisalabad in respect of offences under Sections 302/34 of PPC. After conclusion of the trial, learned Trial Court *vide* its judgment dated 20.6.2006 while acquitting co-accused namely Sultan Mehmood and Khalid Mehmood has convicted and sentenced the appellant as under:--

Nazir Ahmad

Under Section 302(b), PPC to 'Death' for committing *Qatl-i-Amd* of Nazar Hussain deceased. He was also ordered to pay Rs. 1,00,000/- (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under Section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months.

2. Feeling aggrieved, the appellant has challenged his conviction and sentence through Criminal Appeal No. 1098 of 2006, whereas the learned Trial Court has transmitted Murder Reference No. 591 of 2006 for confirmation or otherwise of the death sentence of Nazir Ahmad appellant. We propose to dispose of both these matters by this single judgment as these have arisen out of the same judgment dated 26.6.2006 passed by the learned Additional District Judge, Faisalabad.

3. Brief facts of the case as disclosed by Sarwar complainant (PW.8) in application Exh.PD on the basis of which F.I.R. Ex.PD/1, was registered are that the complainant party sold a buffalo to Nazir Ahmad appellant in consideration of Rs. 25,000/- out of which Nazir Ahmad appellant paid an amount of Rs. 24,700/-, whereas, an amount of Rs. 300/- was outstanding against him. The complainant party used to demand the said amount of Rs. 300/- but Nazir Ahmad appellant kept on lingering the matter. On 11.12.2005 at 11.00 p.m., the complainant Sarwar (PW.8) alongwith his brothers Nazar Hussain (deceased), Shaukat Ali and *Phuphizad* Sarfraz Ahmad (PW.9) was coming back to the village from their '*Dera*' and when they reached near the *Haveli* of Nazir Ahmad appellant, they decided to inquire about their outstanding amount of Rs. 300/- from Nazeer Ahmad appellant. All of them went inside the '*Haveli*' of Nazir Ahmad appellant where Khalid Mehmood and Sultan co-accused (since acquitted) were also present alongwith Nazir Ahmad appellant in a room of said '*Haveli*'. Nazar Hussain (deceased) demanded the outstanding amount from Nazir Ahmad appellant, on which, the appellant Nazir Ahmad, Khalid Mehmood and Sultan Mehmood co-accused (since acquitted) started hurling abuses. Nazar Hussain (deceased) forbade them from abusing, upon which Sultan Mehmood co-accused (since acquitted) asked Nazir Ahmad appellant that he (Nazar Hussain deceased) was not going to stop making the demand of outstanding amount, so he be shot dead. Khalid Mehmood co-accused (since acquitted) handed over a 12 bore repeater gun to Nazir Ahmad appellant. The complainant party ran out of the room but they were chased by the accused. Khalid Mehmood co-accused (since acquitted) caught hold of the complainant Sarwar, whereas, Sultan Mehmood co-accused (since acquitted) took Shaukat into his clutches. Nazar Hussain when turned back the appellant Nazir Ahmad made a fire shot which hit above the knee of left thigh of Nazar Hussain who fell down. The

appellant Nazir Ahmad and his co-accused fled away from the spot while extending threats of dire consequences. The injured Nazar Hussain was shifted to the hospital but he succumbed to the injury.

4. After completion of investigation, the challan was submitted before the Trial Court. The appellant Nazir Ahmad and his co-accused namely Sultan Mehmood and Khalid Mehmood were charge-sheeted, to which, they pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as 12 PWs. The complainant Sarwar (PW.8) and Sarfraz Ahmad (PW.9) furnished ocular account of the occurrence. Medical evidence was given by Dr. Arshad Masood (PW.3), whereas, Arshad Ali, S.I. (PW.12) was the Investigating Officer of this case who completed the investigation and submitted the challan. He on 17.1.2006, upon disclosure of Nazir Ahmad appellant, allegedly got recovered repeater 12 bore P-3 which was taken into possession *vide* memo. Ex.PE. Hafiz Muhammad Nasir (PW.7) was the recovery witness of repeater 12 bore.

5. After completion of prosecution evidence the statement of the appellant Nazir Ahmad and his co-accused u/S. 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question "Why this case against you and why the PWs have deposed against you" the appellant replied as under:--

Nazir Ahmad

"The case is false one. Actually on the night the occurrence at about midnight I was sleeping in my *Haveli* alongwith my servants. On listening some noise, I woke up and found there three unknown persons with muffled faces in the courtyard of my *Haveli*. I haulted them and asked their antecedents but on non-reply. I made a fire just to frighten them. This fire hit on one of them, rest of two persons fled away from the spot. I thereafter removed the cloth from the

face of persons who received fire shot and fell down in my courtyard and I recognized him as Nazar my co-villager. Upon this, I informed about this incident to the heirs of Nazar Hussain who subsequently came there. Blood was oozing so, I alongwith heirs of Nazar Hussain shifted him to the Clinic of Dr. Ghulam Rasool where he was provided first aid and his wound was stitched. After that Nazar Hussain was shifted to hospital and during the way to the hospital he succumbed to the injury. Dead-body was brought back and it was kept in my *Haveli* and it was mutually settled that as it was an incident, so case would not be registered but later on complainant party got registered this case against me inspite of the fact that it was an accidental death. On the day of occurrence, I was having a gun with me just to guard my cattle and property as prior to ½ months of this occurrence, a dacoity occurrence was committed with me at my *Haveli*. I had no dispute whatsoever, between me and Nazar Hussain deceased in respect of sale of buffalo nor any amount was outstanding against me. Further there was no enmity between me and Nazar Hussain deceased, so there was no question with me to murder him."

6. Neither the appellant made statement u/S. 340(2), Cr.P.C. nor he produced any evidence in his defence. The learned Trial Court *vide* its judgment dated 26.6.2006, while acquitting co-accused Sultan Mehmood and Khalid Mehmood, found Nazir Ahmad appellant guilty, convicted and sentenced him as mentioned and detailed above.

7. The learned counsel for the appellant, in support of this appeal, has contended that the story of the prosecution is highly improbable because the reason for coming of the complainant party to the *Haveli* of the appellant in the late hours of night does not appeal to common sense as there is nothing available on the record that the complainant ever sold any buffalo to the appellant; that if the story given in the F.I.R. is accepted as correct to the effect that the complainant had already received an

amount of Rs. 24,700/- out of the total sale consideration of Rs. 25,000/- then story of going to that *Haveli* of the complainant Nazir Ahmad at odd hours of night in order to make demand of outstanding amount of Rs. 300/- does not appeal to one's mind; that as per F.I.R. the occurrence took place on 11.12.2005 at 11.00 p.m. whereas the matter was reported to the police on the next day at 8.40 a.m. which shows that there is delay of about ten hours in lodging the F.I.R. which has not been plausibly explained; that Sarfraz Ahmad (PW.9) is admittedly not resident of the village where this occurrence took place, therefore, he is a chance witness and the reason given by him for his presence at the relevant time at the place of incident is highly improbable; that this witness has also admitted that the deceased was taken to the hospital at 12.15/12.30 night and, thereafter, his dead-body was brought back to the village which does not appeal to a prudent mind; that motive as alleged by the prosecution has also not been proved through any cogent piece of evidence; that the recovery of repeater 12 bore P-3 is of no avail to the prosecution because there is no report of Forensic Science Laboratory available on the record; that the co-accused namely Sultan Mehmood and Khalid Mehmood of the appellant, were acquitted on the same evidence and the evidence which has been disbelieved *qua* the acquitted co-accused of the appellant cannot be believed against the appellant; that the prosecution has failed to prove its case against the appellant beyond the shadow of any doubt and that the appellant is entitled to acquittal.

8. On the other hand, the learned Deputy Prosecutor-General assisted by the learned counsel for the complainant has vehemently opposed the contentions of the learned counsel for the appellant on the grounds that the appellant has specifically been nominated in the F.I.R. with the specific role of causing fire-arm injury on the person of Nazir Hussain which resulted into his death; that no allegation of misidentification arises as the appellant was residing in the same area where this occurrence took place;

that the delay *per se* in lodging the F.I.R. is no ground to discard the evidence of the eye-witnesses and even otherwise there is no delay in reporting the matter to the police; that in order to prove its case, the natural eye-witnesses' account has been furnished by the prosecution, which inspired confidence and despite cross-examination, the defence could not shake the testimony of the prosecution witnesses; that the ocular account is fully supported by the medical evidence as the deceased received injury on his person, which fact is evident from the post-mortem examination report (Exh.PB); that the motive has also been proved by the prosecution; that even otherwise in such-like cases substitution is a rare phenomena; that the prosecution has proved its case against the appellant beyond the shadow of any doubt and the defence evidence is not reliable; that the appeal filed by the appellant against his conviction be dismissed and the Murder Reference may be answered in the affirmative.

9. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

10. It would not be out of place to mention here that it is a case of two versions, *i.e.* one put forth by the prosecution in the form of ocular account furnished by Sarwar complainant (PW.7) and Sarfraz Ahmad (PW.9), whereas, the other has been brought on the record through the statement of Nazir Ahmad (appellant), recorded under Section 342 of Cr.P.C. and put to the prosecution witnesses before the learned Trial Court.

11. It is settled now by the Hon'ble Supreme Court of Pakistan in a number of judgments that it is the prosecution which is required to prove its case against the accused persons beyond any shadow of doubt and the defence version is be taken into consideration after evaluating the prosecution evidence to find out whether the same inspires confidence or not? In this regard, we have

been fortified by an illustrious pronouncement of the Hon'ble Supreme Court of Pakistan in the case reported as *Ashiq Hussain v. The State* (PLD 1994 SC 879), wherein at page 883, the learned apex Court of the country has been pleased to observe as under:--

> "The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by accused under Section 342 of Cr.P.C., statement under Section 340(2) and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under Section 342, Cr.P.C. believed as a whole, constitutes some offence, punishable under the Code/law, then the accused should be convicted for that offence only. In case of contraventions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring the plea in defence and the total effect should be estimated in relation to the question, *viz.* is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a

reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

The above view of the learned apex Court of the country has been reiterated in the case reported as *Amin Ali v. The State* (2011 SCMR 323), therefore, following the principles settled by the Hon'ble Supreme Court of Pakistan in such like situation, we will, first, examine the case of the prosecution.

12. The occurrence in this case as per F.I.R. Exh..PD/1 took place on 11.12.2005 at 11.00 p.m. (night) and the matter was reported to the police by the complainant Sarwar (PW.8) on 12.12.2005 at 8.40 a.m. and formal F.I.R. was also chalked out on 12.12.2005 at 9.40 a.m. The Police Station, Sadar, District Faisalabad was at a distance of 20 kilometers from the place of occurrence. The incident has taken place in the house of Nazir Ahmad appellant situated in Chak No. 233/R.B. village Hari Singh Wala, Police Station, Sadar, District Faisalabad. The first question before us is to determine whether there was any delay in reporting the matter to the police or not. We have noted in this context that it is the case of the complainant that during the incident Nazar Hussain became injured, he and other prosecution witnesses took him to the hospital where he succumbed to the injury. In cross-examination Sarfraz Ahmad (PW.9) has stated that reached at the DHQ Hospital at 12.15/12.30 a.m. (night) where Nazar Hussain expired in the Emergency Ward at 1.00/1.15 a.m. (night) and thereafter he took his dead-body back to the village. He has also admitted that neither they nor the officials of DHQ Hospital had informed the police about the occurrence. Surprisingly, the statement of the complainant was recorded by the police official namely Arshad Ali, S.I. at the spot at 8.40 a.m. and there is nothing on the record why in-between the above-mentioned period, *i.e.* 11.12.2005 at 11.00 p.m. to 12.12.2005 at 8.40 a.m. the

police was not informed about the incident. The complainant Sarwar (PW.8) has stated during his cross-examination that the incident was reported to the police on the next morning on telephone. The relevant part of his statement is reproduced hereunder:--

> "The occurrence was informed to the police at about 8.00 a.m. by me through telephone; again said any of our relative had informed the police on telephone."

The above-mentioned part of statement of the complainant Sarwar (PW.8) has established that the telephone facility was available at the place of occurrence but inspite of that the police was not informed by the complainant or anybody else for almost ten hours. The complainant and prosecution witness could not justify the above-mentioned inordinate delay in reporting the matter to the police and this fact has created serious doubts about the presence of the complainant and other eye-witnesses at the place of occurrence. The application Exh.PD was also not lodged at Police Station rather the matter was reported to Arshad Ali, S.I. (PW.12) at the spot. The delay of almost ten hours in lodging the F.I.R. provides sufficient time for deliberation and consultation, especially when the prosecution has not given any plausible explanation for delay in lodging the F.I.R. The Hon'ble Supreme Court of Pakistan while discussing the delay in lodging the F.I.R. in the case of *Akhtar Ali and others v. The State* (2008 SCMR 6) at page 12 has observed as under:--

> "It is also an admitted fact that the F.I.R. was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The F.I.R. was also not lodged at Police Station as mentioned above. 10/11 hours delay in lodging of F.I.R. provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the F.I.R."

Similar view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of *Nazeer Ahmad v. Gehne Khan and others* (2011 SCMR 1473) wherein the delay of seven hours in lodging the F.I.R. was considered to be a ground which adversely reflected on the credibility of prosecution version.

The complainant Exh.PD was not lodged at Police Station rather it was chalked out at the spot and this fact has been admitted by Sarwar (PW.8) and Sarfraz Ahmad (PW.9). The complainant Sarwar (PW.8) has stated that the complainant Exh.PD was chalked out at the spot. The Hon'ble Supreme Court of Pakistan has held in its number of judgments that when first information report was recorded at the spot, the same would be considered to be recorded after due deliberations. The Hon'ble Supreme Court of Pakistan in the case of *Allah Bachaya and another v. The State* (PLD 2008 SC 349) at page 354 discussed the said issue in the following terms:--

> "In the instant case, the F.I.R. was not recorded at the Police Station. It has been held time and again that F.I.Rs. which are not recorded at the Police Station suffer from the inherent doubt that those were recorded at the spot after due deliberations."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of *Akhtar Ali and others v. The State* (2008 SCMR 6).

We are, therefore, of the view that the F.I.R. was recorded with a considerable delay, therefore, in these circumstances chances of deliberation and consultation, in twisting the story, on the part of the complainant, cannot be ruled out.

13. The post-mortem in this case was also conducted with the delay of almost 14 hours from the death of Nazar Hussain. The occurrence in this case took place on 11.12.2005 at 11.00 p.m. (night). The prosecution witnesses,

i.e. Sarwar (PW.8) and Sarfraz Ahmad (PW.9) had stated that they had taken Nazar Hussain in an injured condition to DHQ Hospital on the night of occurrence where he succumbed to the injury. The prosecution witnesses made an excuse that the dead-body of Nazar Hussain deceased was brought back to the village. Sarfraz Ahmad (PW.9) during his cross-examination has given the time of death of Nazar Hussain deceased at about 1.00/1.15 a.m. (night) at the hospital but the post-mortem of the deceased Nazar Hussain was conducted on 12.12.2005 at 3.30 p.m. So it is evident from the perusal of the above-mentioned evidence that post-mortem of the deceased Nazar Hussain was conducted with an inordinate delay of about 14 hours from his death and more than 16 hours from the alleged occurrence. It also cast doubts about the prosecution story.

14. The prosecution version as furnished by Sarwar (PW.8) and Sarfraz Ahmad (PW.9) was that the complainant party sold a buffalo to the appellant in consideration of Rs. 25,000/-. The appellant Nazir Ahmad allegedly paid an amount of Rs. 24,700/- out of the above-mentioned sale consideration and only an amount of Rs. 300/- was outstanding against the appellant and on the demand of the complainant the appellant was delaying the matter on one pretext or the other and on the fateful night at 11.00 p.m. the complainant Sarwar (PW.8) alongwith Nazar Hussain deceased, Shaukat and Sarfraz Ahmad (PW.9) while coming back to their village from their *Dera* went inside the *Haveli* of the appellant Nazir Ahmad and demanded Rs. 300/-, whereupon an alteraction took place and the appellant Nazir Ahmad made a fire shot at Nazar Hussain (deceased) which landed on his left thigh. This story does not appeal to a common sense because if the complainant has already received an amount of Rs. 24,700/- then for the remaining amount of Rs. 300/-, there was no justification for going inside the house of the appellant at odd hours of winter night, *i.e.* 11.00 p.m.

The complainant Sarwar (PW.8) has stated that on the day of occurrence he alongwith the deceased Nazar Hussain and other prosecution witnesses went to the fields to cut '*loosan*' crop which was to be supplied in the market on the following day. He has also stated that he kept on cutting the '*loosan*' crop till 10.30 p.m. (night). This story of the prosecution witnesses is also not believable because it is not probable that in the winter season, *i.e.* in the month of December the complainant, the deceased and prosecution witnesses would keep on cutting the '*loosan*' crop in the darkness of night till 10.30 p.m. Sarfraz Ahmad (PW.9) is resident of village Chak No. 213/RB whereas the occurrence took place in Chak No. 233/RB. He is not resident of the village where the occurrence took place. In order to justify his presence at the place of occurrence he has stated that he had come in order to see his maternal uncle, therefore, he is a chance witness.

15. The prosecution case as given in the application Exh.PD by the complainant Sarwar (PW.8) is in conflict with the medical evidence given by Dr. Arshad Masood (PW.3). It was case of the complainant in the application Exh.PD, on the basis of which F.I.R. Exh.PD/1 was registered, that the fire shot made by Nazir Ahmad appellant landed above the knee of left leg of Nazar Hussain deceased. The relevant portion of the application Exh.PD is reproduced hereunder:--

سلطان محمود نے نذیر احمد کو کہا کہ یہ اس طرح باز نہ آئیں گے اسکو فائر مارو۔ نذیر احمد کو خالد محمود نے بندوق 12 بور و پیٹر پکڑائی اتنے میں ناظر حسین اور ہم کمرہ سے بھاگ کر باہر نکل آئے تو خالد نے پیچھے بھاگ کر مجھے چھا مار لیا جبکہ سلطان نے شوکت کو پکڑ مار لیا اور میرا بھائی ناظر جب پیچھے کو مڑا تو نذیر نے ناظر پر فائر بندوق 12 بور و پیٹر جو کہ ملکیتی خالد محمود تھی سے کیا جو "ناظر حسین کے بائیں ٹانگ کے گھٹنے کے اوپر پٹ پر لگا" جو کہ موقعہ پر گر گیا۔

The part of the body, *i.e.* knee ـــ of a human being is located on the front side of the leg but according to the

evidence of Dr. Arshad Masood (PW.3) the wound on front of left thigh above knee of Nazar Hussain deceased was an exit wound whereas the entry wound was on the back part of the left thigh. The relevant part of the statement of Dr. Arshad Masood (PW.3) regarding injuries on the dead-body of Nazar Hussain is reproduced hereunder:--

(1) A fire-arm wound of entry 4 x 1 c.m. on the back and middle part of left thigh, 12 c.m. above left knee, the wound had three stiches.

(1-b) Five fire-arm wounds of exit in an area of 5 x 4 c.m. on front of left thigh, 7 c.m. above left knee, 2 c.m. outer to mid line. Each one wound measured 1 x 1 c.m.

By this injury the posterior leg muscles were damaged, the posterior major blood vessels (poplitial) were damaged, the inner side of left femur was damaged and then anterior muscles and blood vessels were damaged. Large amount of blood was present in muscles.

(2) A surgical exploration wound 17 c.m. long on front of left thigh, in midline. It had 9 stitches. It was 5 c.m. above left knee.

Sarwar (PW.8) while appearing in the Court did not mention the exact seat of injury and he simply stated that the fire shot made by Nazir Ahmad appellant landed on left leg of Nazar Hussain deceased but conflict between the ocular and medical evidence is evident from the perusal of application Exh.PD and the evidence of Dr. Arshad Masood (PW.3). The statement of Sarfraz Ahmad (PW.9) recorded before police Exh.DA was also in line with the statement made by the complainant Sarwar (PW.8) in F.I.R. Exh.PD/1 The relevant part of his statement as recorded in Ex.DA is reproduced hereunder:--

سلطان محمود نے نذیر احمد کو کہا کہ یہ اس طرح باز نہ آئیں گے اسکو فائر مارو۔ نذیر احمد کو خالد محمود نے بندوق 12 بور رپیٹر پکڑائی اتنے میں ناظر حسین اور ہم کمرہ سے بھاگ کر باہر نکل آئے تو خالد نے پیچھے بھاگ کر مجھے چھما مار لیا جبکہ سلطان نے شوکت کو چھما مار لیا اور میرا بھائی ناظر جب پیچھے کو مڑا تو نذیر نے ناظر پر فائر بندوق 12 بور رپیٹر جو کہ ملکیتی خالد محمود تھی سے کیا جو "ناظر حسین کے بائیں ٹانگ کے گھٹنے کے اوپر پٹ پر لگا" جو کہ موقعہ پر گر گیا۔

The said witness has also made dishonest improvement in his statement while appearing before the Court wherein he has stated that the fire shot made by Nazir Ahmad appellant landed on back side of left thigh of Nazar Hussain. The relevant part of his statement is reproduced hereunder:--

> "Nazir accused whereupon made a fire shot on Nazar Hussain which seated on the back side of left thigh on Nazar Hussain."

It is evident from the perusal of above-mentioned evidence that there was a conflict between ocular and medical evidence and the prosecution witnesses made dishonest improvements in their previous statements in order to bring their case in like with the medical evidence. The conflict between ocular and medical evidence has created doubt about the prosecution case. In the case of *Muhammad Shafique Ahmad v. The State* (PLD 1981 SC 472) the Hon'ble Supreme Court of Pakistan extended benefit of doubt to the accused where the eye-witnesses stated that assailants made fire shot at deceased when deceased was in the act of walking towards them but one of entrances wounds was found on back of the deceased. Similarly whenever conflict between ocular and medical evidence was found the Hon'ble Supreme Court of Pakistan acquitted the accused while extending him he benefit of doubt. Reference in this respect may be made to the case of *Ali Sher and others v. The State* (2008 SCMR 707) and *Barkat Ali v. Muhammad Asif and others* (2008 SCMR 707) and *Barkat Ali v. Muhammad Asif and others* (2007 SCMR 1812).

16. Now coming to the motive part of the prosecution case, the complainant Sarwar (PW.8) while appearing before the learned Trial Court has stated regarding the motive in the following terms:--

> "Prior to the instant occurrence, I sold out my buffalo to Nazir accused present in Court in consideration of Rs. 25,000/-; Nazir gave me Rs. 24,700/- in two instalments and Rs. 300/- had yet to be paid. I used to demand said Rs. 300/- but he kept on lingering on, on one pretext or other."

It is evident from perusal of the above-mentioned evidence that it was the complainant Sarwar (PW.8) who had allegedly sold the buffalo to the appellant Nazir Ahmad and he was the person who used to demand the remaining sale consideration of Rs. 300/- from the appellant. According to the prosecution case the dispute was allegedly between the appellant and the complainant Sarwar (PW.8) but surprisingly the appellant did not inflict even a single scratch on the person of Sarwar (PW.8), who was allegedly present at the time of occurrence. The complainant Sarwar (PW.8) has admitted during his cross-examination that he did not produce any witness before the police about the transaction of buffalo. We, therefore, hold that the motive as alleged by the prosecution is not proved in this case.

17. Although it was alleged that a repeater 12 bore gun P-3 was recovered on the pointation of the appellant Nazir Ahmad on 17.1.2006 which was taken into possession vide recovery memo. Exh.PE but the recovery of the said repeater 12 bore gun P-3 is of no avail to the prosecution case because there is no report of Forensic Science Laboratory on the record to connect the appellant with the alleged offence. Because of the above-mentioned reasons the prosecution story in doubtful nature.

18. We have also noted that, apart from the appellant, two co-accused of the appellant namely Sultan Mehmood and Khalid Mehmood were also arrayed by the

complainant as accused person in the F.I.R. but those were acquitted by the learned Trial Court and no appeal against their acquittal has been filed either by the State or by the complainant which shows that the complainant stands satisfied with the acquittal of the above-mentioned two co-accused.

19. As far as the plea of the appellant is concerned, he has taken the following plea before the learned Trial Court in his statement recorded under Section 342 of Cr.P.C.:--

> "The case is false one. Actually on the night the occurrence at about midnight I was sleeping in my *Haveli* alongwith my servants. On listening some noise, I woke up and found there three unknown persons with muffled faces in the courtyard of my *Haveli*. I haulted them and asked their antecedents but on non-reply. I made a fire just to frighten them. This fire hit on one of them, rest of two persons fled away from the spot. I thereafter removed the cloth from the face of persons who received fire shot and fell down in my courtyard and I recognized him as Nazar my co-villager. Upon this, I informed about this incident to the heirs of Nazar Hussain who subsequently came there. Blood was oozing so, I alongwith heirs of Nazar Hussain shifted him to the Clinic of Dr. Ghulam Rasool where he was provided first did and his wound was stiched. After that Nazar Hussain was shifted to hospital and during the way to the hospital he succumbed to the injury. Dead-body was brought back and it was kept in my *Haveli* and it was mutually settled that as it was an incident, so case would not be registered but later on complainant party got registered this case against me inspite of the fact that it was an accidental death. On the day of occurrence, I was having a gun with me just to guard my cattle and property as prior to ½ month of this occurrence, a dacoity occurrence was committed with

me at my *Haveli*. I had no dispute whatsoever between me and Nazar Hussain deceased in respect of sale of buffalo nor any amount was outstanding against me. Further there was no enmity between me and Nazar Hussain deceased, so there was no question with me to murder him."

We have already disbelieved the prosecution evidence, therefore, while scrutinizing the statement of the appellant this Court has to accept or reject the said statement *in toto*. According to the above-mentioned statement, Nazar Hussain deceased entered the *Haveli* of the appellant at midnight and as such he committed house breaking by night. The appellant Nazir Ahmad in such a situation had the right of private defence of property, which also extended to cause death as provided under Section 103 of PPC which is reproduced hereunder:--

Section 103. *When the right of private defence of property extends to causing death.* – The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:--

First.	Robbery;
Secondly.	House breaking by night;
Thirdly.	Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property.
Fourthly.	Theft, mischief or house-trespass, under such circumstances as may as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised."

Thus, if plea of the appellant is taken *in toto* then no offence is made out in this case. It is by now a well-settled law that if the prosecution evidence is disbelieved by the Court, then the statement of an accused is to be accepted or rejected as a whole. It is legally not possible to accept the inclupatory part of the statement of an accused and to reject the exculpatory part of the same statement. Reference in this context may be made to the case of *Muhammad Asghar v. The State* (PLD 2008 SC 513). The relevant paragraph of the said judgment at page 520 is reproduced hereunder for ready reference:--

> "It is settled law by now that a statement of an accused recorded under Section 342, Cr.P.C. is to be read in its entirety, is to be accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference can be made to the case of *Shabbir Ahmad v. The State* (PLD 1995 SC 343) and *The State v. Muhammad Hanif and 5 others* (1992 SCMR 2047). It has been held by this Court in the judgment reported as *Waqar Ahmad v. Shaukat Ali and others* (2006 SCMR 1139), that prosecution is bound to establish its own case independently instead of depending upon the weakness of the defence, and the assertion of the accused in his statement under Section 342, Cr.P.C. was not sufficient to establish the prosecution case regarding guilt of the accused and such statement of the accused could be accepted *in toto* in the absence of any other prosecution evidence. In the case in hand, the High Court should have either accepted appellant's statement in its entirety or rejected it altogether, but it had misdirected itself while choosing a portion of the statement, which went against the appellant, and convicting him."

Although the appellant Nazir Ahmad had admitted in his statement recorded under Section 342 of Cr.P.C. that he made a fire shot which caused the death of Nazar Hussain

but at the same time he has also stated that he was having a gun with him just to guard his cattle and property because ½ month prior to the occurrence a dacoity was committed at his *Haveli*. He has further claimed that he had no dispute whatsoever with the deceased in respect of sale of buffalo nor any amount was outstanding against him. He has further stated that the death of Nazar Hussain was accidental and he was innocent in this case. In view of the above when we have discarded the prosecution evidence, the appellant cannot be awarded punishment on the basis of his statement recorded under Section 342 of Cr.P.C. by accepting the inculpatory part of it wherein he has stated that Nazar Hussain deceased had received fire-arm injury on his hands and by rejecting the exculpatory part of the same statement wherein he has stated that he made a fire shot at Nazar Hussain deceased because he had committed the offence of *house breaking by night*. We are fortified in our above-mentioned views by the judgments passed by the Hon'ble Supreme Court of Pakistan in the case of *Sultan Khan v. Sher Khan and others* (PLD 1991 SC 520) and *Ghulam Qadir v. Esab Khan* (1991 SCMR 61).

20. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal (Criminal Appeal No. 1098 of 2006), and set aside the conviction and sentence awarded to the appellant namely, Nazir Ahmad. The appellant Nazir Ahmad is in jail. He shall be released forthwith if not required in any other case.

21. Murder Reference (M.R. No. 591 of 2006) is answered in the negative and death sentence of the appellant Nazir Ahmad is not confirmed.

Criminal appeal allowed.

PLJ 2012 Lahore 519

Present: Malik Shahzad Ahmad Khan, J.

MAHMOOD RAZA--Petitioner

versus

Mst. NAHEED LIAQAT & 2 others--Respondents

W.P. No. 25258 of 2011, decided on 27.1.2012.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Suit for recovery of dowry articles was decreed and price of decreed dowry articles was fixed--Findings of trial Court were modified by First Appellate Court--Challenge to--Stance was self contradictory--Evidence was not produced to establish that dowry articles were destroyed due to flood--Claim of plaintiff inspired confidence because she had frankly admitted in plaint that gold ornaments of dowry had already been returned to her by petitioner--Held: Appellate Court after appreciating the evidence of plaintiff and in light of dowry articles and their respective price mentioned by plaintiff during cross examination had rightly determined the price of the articles--Petitioner could not point out any illegality or material irregularity in the judgment passed by appellate Court--Petition was dismissed. [P. 521] A & B

Mr. Sajid Hussain Qureshi, Advocate for Petitioner.

Mr. Tipu Salman Makhdoom, Advocate for Respondent No. 1.

Date of hearing: 27.1.2012.

ORDER

This petition has been filed against the judgment and decree dated 17.01.2011 passed by the learned Judge Family Court, Jhang as well as, against the judgment and decree dated 28.09.2011 passed by the learned Additional District Judge, Jhang, whereby the findings of the learned trial Court on the issue for recovery of dowry articles were modified and the price of the dowry articles was increased from Rs.65,000/- to Rs. 1,00,000/-.

2. It is contended by the learned counsel for the petitioner that admittedly the list of dowry articles was not prepared at the time of marriage; that due to flood in the year 2010 all the dowry articles were destroyed; that the Plaintiff/Respondent No. 1 failed to establish her case in respect of dowry articles, therefore, the petitioner was not liable to return the said dowry articles, hence, both the judgments and decrees passed by the Courts below are liable to be set aside.

3. On the other hand, this petition has been opposed by the learned counsel for Respondent No. 1 on the grounds that non-preparation of dowry list at the time of marriage and non-production of receipts of the said articles is not fatal to the case of the Plaintiff/Respondent No. 1; that the Plaintiff/Respondent No. 1 filed her suit for

recovery of dowry articles or in the alternative for recovery of Rs.2,69,600/- as price of the said articles, whereas the same has been decreed only to the extent of Rs. 1,00,000/-; that the learned appellate Court while appreciating the evidence of the Plaintiff/Respondent No. 1 has rightly enhanced the price of the dowry articles from Rs.65,000/- to Rs.1,00,000/-; that the petitioner/plaintiff could not produce any evidence to establish that the dowry articles were damaged due to the flood; that there are concurrent findings of facts of two Courts below, recorded in favour of the Plaintiff/Respondent No. 1, therefore, this petition may be dismissed.

4. Arguments record and record perused.

5. Plaintiff/Respondent No. 1 filed a suit for recovery of dowry articles or in the alternative for recovery of Rs.2,69,600/-, as price of the said articles. Her suit for recovery of dowry articles was decreed by the learned Judge Family Court, Jhang and price of the decreed dowry articles was fixed at Rs,65,000/-. Anyhow, the said findings of the trial Court were modified by the learned Additional District Judge, Jhang, and Respondent No. 1 was held entitled to recover Rs.1,00,000/- as price of dowry articles from the petitioner. The Plaintiff/Respondent No. 1 has given the detail of dowry articles during her cross-examination. She has mentioned different articles and has also given value of the said articles. Similarly Muhammad Iqbal, PW-2 has also mentioned some of the dowry articles in his cross-examination. The father of the petitioner was admittedly employed as Warden in Jail, therefore, it cannot be said that the Plaintiff/Respondent No. 1 was not given any dowry articles at the time of her marriage. Ordinary articles were mentioned by the Plaintiff/ Respondent No. 1 during her cross-examination. On one hand, the petitioner/defendant has totally denied that the Plaintiff/Respondent No. 1 was given any articles of dowry, whereas on the other hand, he has taken this plea that the dowry articles were destroyed due to flood. The stance of the petitioner/defendant is self contradictory. Even otherwise, the petitioner/defendant did not produce any evidence to establish that the dowry articles were destroyed due to flood. The claim of the plaintiff/ Respondent No. 1 also inspires confidence because she has frankly admitted in her plaint that gold ornaments of the dowry has already been returned to her by the petitioner/defendant. This fact shows that claim of the Plaintiff/Respondent No. 1 is genuine. The evidence of the Plaintiff/Respondent No. 1 and Muhammad Iqbal (PW.2) has been proved to be reliable and confidence inspiring. The learned appellate Court after appreciating the evidence of the Plaintiff/Respondent No. 1 and in light of the dowry articles and their respective price mentioned by the Plaintiff/Respondent No. 1 during her cross-examination has rightly determined the price of said articles. The learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned judgment passed by the learned appellate Court.

6. In light of the above discussion, the instant petition is without any substance; hence, the same is hereby, dismissed.

(R.A.) **Petition dismissed.**

PLJ 2012 Lahore 593

Present: Malik Shahzad Ahmad Khan, J.

ANOSH QAINAN--Petitioner

versus

Mst. FARHAT NAZ and 2 others--Respondents

W.P. No. 24272 of 2009 and C.M. Nos. 4031 & 4664 of 2011,
decided on 20.12.2011.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Application for restoration of main writ petition--Writ petition was dismissed due to non prosecution on fourth time--Validity--If petitioner was indisposed then it was duty of petitioner to appear in person before High Court, counsel for petitioner did not bother to appear in High Court on any of dates of hearing--Petitioner had already been provided sufficient opportunities to pursue the case but he had miserably failed to avail the opportunities--There is no force in arguments for the petitioner--Petitioner had been deliberately lingering on the case in order to avoid the decree for recovery of dowry articles which was passed in favor of respondent--Applications for restoration of petition were dismissed. [Pp. 594 & 595] A

Mr.Shahid Aziz Anjum, Advocate for Petitioner.

Ch. Abdul Salam, Advocate for Respondents.

Date of hearing: 20.12.2011.

ORDER

C.M. Nos. 4031 and 4664 of 2011.

C.M. 4031 is an application for restoration of the main writ petition which was dismissed on 18.12.2009, whereas C.M. No. 4664/2011 is for interim stay of execution proceedings.

2. It has been contended on behalf of the petitioner that the learned counsel for the petitioner could not appear before this Court due to his illness, therefore, main writ petition may be restored.

3. On the other hand, learned counsel appearing on behalf of Respondent No. 2 has vehemently opposed the applications moved for restoration of the main writ petition and stay of execution proceedings on the grounds that this writ petition has earlier been dismissed on four different dates of hearing, that the petitioner has deliberately been lingering on this case in order to avoid the decree for recovery of dowry articles which was passed in favour of the Respondent No. 2 on 25.01.2009, therefore, this petition may be dismissed.

4. Arguments heard and record perused.

5 It is evident from the perusal of order of this Court that the main writ petition first time was dismissed due to non-prosecution on 18.12.2009 and later on it was restored on 18.01.2010. The main writ petition was again dismissed due to non-prosecution on 01.03.2010 but it was again restored vide order dated 04.10.2010. Later on this petition was dismissed due to non-prosecution for the third time on 9.05.2010 and it was restored on 16.06.2011. This writ petition was dismissed due to non-prosecution on fourth time on 09.05.2011 and now the petitioner has again moved the instant applications for restoration of the main writ petition. If the learned counsel for the petitioner was indisposed then it was duty of the petitioner to appeal in person before this Court. He did not bother to appear in this Court, on any of the above mentioned dates of hearing. The petitioner has already been provided sufficient opportunities to pursue the case but he has miserably failed to avail the said opportunities. There is no force in the arguments of the learned counsel for the petitioner. It is evident that the petitioner has been deliberately lingering on the case in order to avoid the decree for recovery of dowry articles which was passed in favour of Mst. Fakhra Begum, Respondent No. 2.

6. In view of the above, there is no force in these applications, which are, hereby, dismissed.

(R.A.) **Applications dismissed.**

PLJ 2012 Lahore 640

Present: Malik Shahzad Ahmad Khan, J.

MUHAMMAD SHAFIQUE--Petitioner

versus

Mst. SAKINA BIBI & 3 others--Respondents

W.P. No. 3053 of 2011, heard on 25.1.2012.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional Petition--Custody of daughters (minor)--Welfare of minor--Mere second marriage of mother was no ground to disentitle from custody of minors and welfare of minors--Validity--If mother had contracted second marriage with a stranger, even then right to custody of minor was not lost absolutely--Court has to see environment, circumstances, position of the parties, while determining the welfare of minors. [P. 642] A

2000 SCMR 838, 2000 MLD 1967 & 2000 YLR 641 ref.

Mian Farrukh Mumtaz Khan Manika, Advocate for Petitioner.

Mr. Aamir Sohail Sheikh, Advocate for Respondent Nos. 1 to 3.

Date of hearing: 25.1.2012.

JUDGMENT

This writ petition has been filed against the judgment dated 24.01.2011, passed by learned Additional District Judge, Pattoki, District Kasur, whereby, he accepted the appeal, filed by Respondent No. 1, and set-aside the judgment dated 04.11.2010, passed by learned Guardian Judge, Pattoki.

2. As per brief facts emanated from the instant petition, the petitioner was married to Respondent No. 1 on 10.04.1999, and from this wedlock, four offspring were born and out of them Aysha Saddiqa and Kalsoom are alive, but thereafter, the said marriage culminated into divorce. The petitioner filed a petition for the custody of his daughters. The said petition was filed in the Court of Guardian Judge.

3. On the other hand, Respondent No. 1 resisted the said petition by submitting a written-statement and controverted the averments made in the petition.

4. In order to resolve the controversy between the parties, the learned Guardian Judge framed the following issues:--

ISSUES

1. Whether petitioner is entitled to custody of minors? OPA.

2. Relief.

After framing formal issues, the parties were directed by the learned trial Court to produce their evidence in support of their respective claims.

The petitioner himself appeared as PW. 1, and examined Ghulam Nabi as PW.2.

In rebuttal thereto, Mst. Sakina Bibi appeared herself as DW.1, and examined Ghulam Rasool as DW.2, and submitted documentary evidence in the shape of certificate Mark-D.A.

The learned Guardian Judge, Pattoki, District Kasur, after recording evidence and considering all the documents, accepted the Guardian Petition, filed by the petitioner, vide judgment dated 04.11.2011. Respondent No. 1, being dissatisfied, filed an appeal against the said judgment, which appeal was accepted by the learned Additional District Judge, Pattoki, vide impugned judgment dated 24.01.2011.

This judgment dated 24.01.2011 of the learned appellate Court has been impeached by the petitioner through the instant writ petition.

5. It is contended by the learned counsel for the petitioner that the petitioner, being father of minors Aysha Saddiqa and Kalsoom Bibi, is entitled to their custody; that the mother of minors namely, Mst. Sakina Bibi (Respondent No. 1) has contracted a second marriage, therefore, she has lost her right of `Hizanat' of minors, whereas, the petitioner has not contracted second marriage and it will be in the interest of minors to grant their custody to the petitioner/father, therefore, this petition may be accepted and the impugned judgment, passed by the learned Additional District Judge, Pattoki, may be set-aside.

6. On the other hand this petition has been opposed by the learned counsel appearing on behalf of Respondents No. 1 to 3 on the grounds that Respondent No. 1, being real mother of minors, is entitled to their custody till the age of their puberty; that minors have been living in the company of their mother (Respondent No. 1) since their birth and they have developed profound attachment with the said respondent; that Respondent No. 1 has contracted second marriage with her `Mamonzad'; that mere second marriage of the mother/Respondent No. 1 is no ground to disentitle her from the custody of minors and welfare of the minors is the prime consideration to decide the question of their custody; that the learned Additional District Judge, Pattoki, has rightly granted the custody of minors to Respondent No. 1, therefore, this petition may be dismissed.

7. Arguments heard and record perused.

8. Mst. Sakina Bibi (Respondent No. 1) is real mother of the minors namely, Aysha Saddiqa and Kalsoom Bibi. The petitioner has admitted at the time of recording of his statement before the learned trial Court that he was a tutor at Madrissa Jamia Usmania, where 50/60 children were under his tutelage. The said Institution is 18/19 miles away from his house. He has further admitted that he used to come to his house on Thursday. The other witness produced by the petitioner namely, Ghulam Nabi (PW.2) has stated that Muhammad Shafique (the petitioner) used to come to his house after one month on Thursday. It has also come on the record that when the minors were produced before the learned trial Court, they were in good clothes. It has not been brought on record that Mst. Sakina Bibi (Respondent No. 1) does not enjoy good reputation, therefore, the learned Additional District Judge, Pattoki has rightly held that welfare of minors lies in keeping them under the custody of their mother. The said respondent could not be refused custody of minors merely on the ground that she has contracted a second marriage. If Respondent No. 1 has contracted marriage with a stranger, even then the right to the custody of minor is not lost absolutely. The Court has to see the environment, circumstances, position of parties, while determining the welfare of minors. Reference in this context may be made to the cases of Mst. Firdous Iqbal vs. Shiffat Ali and others (2000 SCMR 838), Mst. Rani vs. Bilal Ahmad and 2 others (2000 MLD 1967 Lahore), and Mst. Yasmin Bibi vs. Mehmood Akhter and 2 others (2000 YLR 641 Lahore).

9. The learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned judgment, passed by the learned Additional District Judge, Pattoki, District Kasur, warranting interference by this Court through its Constitutional jurisdiction. This petition has no merits and the same is, hereby, dismissed. There is no order as to costs.

(R.A.) **Petition dismissed.**

PLJ 2012 Cr.C. (Lahore) 695

Present: Malik Shahzad Ahmad Khan, J.

MUHAMMAD NAWAZ--Petitioner

versus

STATE and another--Respondents

Crl. Misc. 12976-B of 2011, decided on 19.10.2011.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 420, 468 & 471--Bail, grant of--Prima facie--Agreement was executed between complainant and accused regarding sale of agricultural land--Provincial Govt. was owner of land which was subject matter of agreement--Complainant knowingly executed the agreement that accused was not owner of land--Held: Provincial Government had been shown as owner of land and the accused was shown in possession of same, therefore, prima facie it appears that no forgery was committed at time of execution of agreement to sell as such attraction of S. 468 of, PPC in instant case require further probe--Offences u/Ss. 420 & 471, PPC are bailable--Even offence u/S. 468, PPC does not fall within ambit of prohibitory clause of S. 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception--Bail was granted. [P. 697] A

Mian Shahid Ali Shakir, Advocate for Petitioner.

Mr. Arshad Mehmood, DPG for State.

Mr. Mazhar Ali Ghallu, Advocate for Complainant/Respondent No. 2.

Date of hearing: 19.10.2011.

ORDER

Through instant petition, the petitioner seeks post arrest bail in case FIR No. 133/2010 dated 24.02.2010 offences under Sections 420, 468 & 471 of, PPC registered at Police Station Kotwali, District Jhang on the complaint of Mulazim Hussain, complainant.

2. As per brief allegations levelled in the FIR, the petitioner executed an agreement to sell in respect of agricultural land measuring 111-Kanals situated in Chak No. 441/"Jeem Bay" Tehsil & District Jhang. It is also alleged by the complainant in the above FIR that the petitioner was not in-fact owner of the land

in question and he committed fraud and forgery with the complainant, hence the above mentioned FIR was registered against the petitioner.

3. The petitioner was arrested in this case. The petitioner applied for grant of post arrest bail in the Court of learned Judicial Magistrate 1st Class, Jhang but the same was dismissed vide order dated 28.04.2011. He, thereafter, moved a petition for grant of bail after arrest, in the Court of learned Additional Sessions Judge, Jhang but the same was also dismissed vide order dated 25.08.2011. The petitioner has now filed the instant petition for post arrest bail in this Court.

4. It is contended by the learned counsel for the petitioner that no forged document was prepared by the petitioner; that it was clearly mentioned in the agreement to sell that the land in dispute is owned by the Provincial Government and at the time of execution of said agreement, the petitioner was not owner of the said land and further that the petitioner will get the process completed regarding the allotment of proprietary rights in respect of the above mentioned property; that no forged document was prepared by the petitioner, therefore, the offences mentioned in the FIR are not attracted against the petitioner; that it was a case of civil nature, which has been given the colour of a criminal offence; that civil suit between the parties is pending adjudication before the civil Court Jhang; that co-accused of the petitioner namely Abid Hussain and Sher Muhammad have already been granted bail; that a subsequent agreement to sell was also executed between the petitioner and the complainant, according to which, on 26.11.2009 an agreement was executed between the parties and it was settled that the land in question will be sold by one Abid Hussain and Sher Muhammad and the amount of the complainant will be paid after sale of land in question; that case of the petitioner is one of further inquiry; that the offences mentioned in the FIR, do not fall within the ambit of prohibitory clause of Section 497 of, Cr.P.C. Hence this petition may be accepted.

5. On the other hand, the learned DPG assisted by the learned counsel for the complainant has vehemently opposed this bail petition on the grounds that the petitioner is specifically nominated in the FIR; that the petitioner has defrauded the complainant; that the prosecution witnesses have fully supported the case of prosecution in their statements recorded under Section 161 of, Cr.P.C. that the petitioner was found guilty during investigation; that the petitioner has later on appointed his wife as a special attorney in respect of the land in question which

shows mala fide on the part of the petitioner; that the petitioner also lodged an FIR against the complainant under Section 379 of, PPC. He has placed reliance on cases reported as "Mushtaq Ahmad Solangi and another versus The State" (2009 P.Cr.L.J. 732), "Muhammad Aslam versus Muhammad Feroze and others" (2008 SCMR 807) and "Riaz Ahmad versus The State and another" (2009 P.Cr.L.J.142). He, therefore, prayed that this petition may be dismissed.

5. Arguments heard. Record perused.

6. According to the contents of the FIR, an agreement was executed between the complainant and the petitioner regarding sale of 111-kanals of agricultural land situated in Chak No. 441/"Jeem Bay" Tehsil & District Jhang. It is claimed by the complainant that the petitioner had shown himself as owner of the suit land whereas the land in question was owned by the Provincial Government and there by he has defrauded the complainant. The agreement to sell executed between the petitioner and the complainant has been placed on record by the petitioner. It is clearly mentioned in the said agreement that the petitioner was not owner of the land in question. It was also described in the said agreement that Provincial Government is owner of the land which was subject matter of the agreement. The complainant knowingly executed the above mentioned agreement that the petitioner was not owner of the land in question. Copy of register "Haqdaran" Zameen has also been placed on record, in which the Provincial Government has been shown as owner of the land in question and the petitioner is shown in possession of the same, therefore, prima facie it appears that no forgery was committed at the time of execution of agreement to sell, as such attraction of Section 468 of, PPC in this case requires further probe. The offences under Sections 420 & 471, PPC are bailable. Even otherwise offence under Section 468, PPC does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule while refusal is an exception. The second agreement was also executed between the petitioner and the complainant, according to which the disputed land was to be sold by Abid Hussain etc., and thereafter the sale consideration paid by the complainant was to be handed over to him. A civil suit in respect of land in question has also been filed which is statedly pending in the Court of learned Civil Judge, Jhang. It will be seen after recording of evidence as to whether any fraud was committed or not. The judgments cited by the learned counsel for the complainant are distinguishable from the facts of the present case.

7. In view of the above discussion, the instant bail petition is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs.3,00,000/- (Rupees Three Hundred Thousand Only) with one surety in the like amount to the satisfaction of the learned trial Court.

8. It is however clarified that the observations made in this order are tentative in nature and shall cause no prejudice to the case of cither party at the time of final adjudication of the case before the learned trial Court.

(R.A.) **Bail accepted.**

PLJ 2012 Cr.C. (Lahore) 761 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Manzoor Ahmed Malik and Malik Shahzad Ahmad Khan, JJ.

MATLOOB HUSSAIN etc.--Appellants

versus

STATE etc.--Respondent

Crl. Appeal No. 99 of 2008 and Crl. Rev. No. 53/2008, heard on 3.7.2012.

Appreciation of evidence--

----PWs made dishonest improvements in their statement--Held: It is by now a well settled law that improvements made by a witness on material aspects of the case was not worthy of reliance. [P. 770] A

2010 SCMR 385, ref.

Motive--

----No motive was mentioned in FIR--Although PWs later on introduced story of motive that there was litigation between parties but prosecution had admitted during cross-examination that compromise was effected--Prosecution did not produce any documentary evidence to establish that any litigation was still pending--Trial Court disbelieved the motive part of prosecution--Prosecution was unable to prove alleged motive in the instant case. [Pp. 770 & 771] B

Recovery--

----Evidence of recovery--Nothing was recovered--Validity--Alleged recovery of pistol from possession of the accused was in consequential because report of FSL is only to effect that weapon was in working order, therefore, no independent corroboration of prosecution case against the accused. [P. 771] C

Injured eye-witnesses--

----Statements of injured eye-witnesses required independent corroboration, which was much lacking in instant case. [P. 771] D

Abscondence--

----Fugitive from law--Accused was declared proclaimed offender--It is by now a well settled law that abscondence per-se is not a proof of guilt of an accused, which can create a suspicion against him but suspicion, however strong, cannot be substitute of proof, which was required to award punishment to an accused--Evidence of abscondence, even if found convincing would not be sufficient by itself to warrant conviction of accused on a charge of murder. [P. 771] E

2007 SCMR 1812, ref.

Malik Sadiq Mehmood Khurram and Zafar Iqbal Awan, Advocates for Appellants.

Malik Abdul Latif, DPG for State.

Hafiz Shahid Nadeem Kahloon, Advocate for Complainant.

Date of hearing: 3.7.2012.

JUDGMENT

MALIK SHAHZAD AHMED KHAN, J.--This judgment shall dispose of Criminal Appeal No. 99 of 2008, preferred by appellants Matloob Hussain and Riaz Hussain, as well as, Criminal Revision No. 53 of 2008, filed by Jameel Hussain complainant, as both these matters have arisen out of the same judgment dated 08.05.2008, passed by learned Additional Sessions Judge, Haroon Abad, Camp at Fort Abbas, District Bahawalnagar, whereby the appellants Matloob Hussain and Riaz Hussain were convicted and sentenced as under:--

Matloob Hussain.

Under Section 337-F(i) of PPC to one year rigorous imprisonment as Tazir and to pay Daman Rs. 5,000/- for causing injuries to Jameel Hussain. He was also convicted under Section 337-F(ii) of PPC and sentenced to two years rigorous imprisonment as Tazir and to pay Daman Rs. 5,000/- for causing injuries to Jameel Hussain. He was further convicted under Section 337-F(i) PPC for causing injury to Mst. Nabeela Bibi

and sentenced to one year rigorous imprisonment as Tazir and to pay Daman Rs. 5,000/-. The amounts of Daman was directed to be paid to the injured persons. All the afore-mentioned sentences were ordered to run concurrently. He was also given the benefit of Section 382-B of Cr.P.C. However, the appellant Matloob Hussain was also acquitted of the charge under Section 302 of PPC.

Riaz Hussain.

Under Section 302-B of PPC to imprisonment for life as `Tazir' for committing Qatl-i-Amd of Munir Hussain (deceased). He was also ordered to pay Rs. 50,000/- (Rupees Fifty Thousand only) as compensation to the legal heirs of the deceased under Section 544-A Cr.P.C. or in default to suffer simple imprisonment for six months. He was given the benefit of Section 382-B of Cr.P.C.

The learned trial Court vide the same judgment has acquitted both the appellants under Section 324, 459/460 of PPC, whereas the co-accused Muhammad Ajmal has been acquitted of the charges.

2. Brief facts of the case as disclosed by Jameel Hussain complainant (PW-2) in his written application Exh. PB on the basis whereof formal FIR Exh.PB/1 was chalked out are that on the intervening night of 25/26.05.2006, the complainant Jameel Hussain alongwith his real brother namely Munir Hussain and other family members was sleeping in the Courtyard of his house situated at Chak No. 168/7-R within the area of Police Station Khichiwala, District Bahawalnagar, whereas Muhammad Arshad (given up PW) and Muhammad Iqbal PW-4 were also sleeping in the `baithak' of the said house. At about 2:00 a.m. (night), Jameel Hussain complainant woke up after hearing the noise of foot steps and saw that an unknown person armed with pistol was standing near the cot of his brother Munir Hussain, another person armed with pistol was standing near his cot, whereas a third person armed with pistol was standing at some distance. The accused persons raised `lalkara' that no body should move, otherwise they would kill him. The complainant and his brother Munir Hussain offered resistance, whereupon all the three accused started firing at the complainant party, as a result of which the complainant Jameel Hussain PW-2, his wife Mst. Nabeela Parveen PW-3 and his brother Munir Hussain (deceased) received injuries and fell down. On the report of the firing and on raising hue and cry of the

complainant party, Muhammad Arshad (given up PW) and Muhammad Iqbal PW-4 attracted to the spot and witnessed the occurrence in the light of the electric bulb. The accused fled away from the spot while resorting to aerial firing. One of the accused also took alongwith him the registration book of the motorcycle and identity card of Munir Hussain (deceased). The complainant alleged in the FIR that the accused were seen by him and the above mentioned witnesses in the light of electric bulb and they can identify the accused. Munir Hussain succumbed to the injuries at the spot, hence, the above mentioned FIR.

3. After registration of the case, Jameel Hussain complainant on the same night i.e. 26.05.2006 got recorded his supplementary statement, wherein, he nominated Riaz Hussain (appellant), Matloob Hussain (appellant) Ali Sher, Arshad Ali (since dead) and Muhammad Ajmal co-accused (since acquitted) alongwith three un-known persons in the instant case.

4. The motive for the occurrence was not mentioned in the FIR and was introduced later on. According to the prosecution case the motive for the occurrence was that there was previous litigation between the complainant and the accused party and due to the said grudge the accused committed the above mentioned offence.

5. The appellant Riaz Hussain was arrested on 25.06.2006 by Muhammad Ashfaq, SI (PW-11). During the course of investigation, on 29.06.2006 the appellant Riaz Hussain allegedly led to the recovery of pistol .30 bore, P-5 and P-6 a magazine containing 05 live bullets which were taken into possession vide recovery memo Exh. PE.

On 27.07.2006 Muhammad Ashfaq, SI (PW-11) got issued warrant of arrest of Matloob Hussain (appellant), Muhammad Amjal, Ali Sher and Muhammad Arshad accused persons. On 30.07.2006 he got issued proclamations against the above named accused persons under Section 87/88 of Cr.P.C.

6. Initially incomplete challan was submitted against Riaz Hussain appellant and Muhammad Ajmal (since acquitted) whereas accused Matloob Hussain and Ali Sher were proceeded against under Section 512 of Cr.P.C., while, Muhammad Arshad was murdered in a police encounter.

The appellant Matloob Hussain was subsequently granted pre-arrest bail by this Court which was confirmed vide order dated 20.08.2007, whereas, Ali Sher co-accused was not arrested and was declared a proclaimed offender.

The police submitted challan against the present appellants and their co-accused namely Muhammad Ajmal in the Court.

7. The appellants Riaz Hussain and Matloob Hussain alongwith their co-accused Muhammad Ajmal (since acquitted) were charge sheeted under Sections 459, 460, 302, 324 & 34 of PPC on 25.10.2007, to which they pleaded not guilty and claimed trial.

8. The prosecution in order to prove its case examined as many as 14 PWs. The complainant Jameel Hussain (PW.2), Mst. Nabila Parveen (PW.3) and Muhammad Iqbal (PW.4) furnished ocular account of the occurrence.

Doctor Muhammad Anwar PW-5 on 26.05.2006 conducted the post-mortem examination on the dead body of Munir Hussain (deceased) vide Post-mortem Report Exh.PH and medically examined Jameel Hussain and Mst. Nabila Parveen injured PWs, vide MLR Exh.PF and MLR Exh.PG, respectively.

Manzoor Ahmad, (PW-1), Muhammad Anwar 764/C (PW-7), Muhammad Amin, (PW-9), Muhammad Zafarullah 45/C (PW-10), Muhammad Hanif 466/C (PW-12) and Muhammad Jamil 757/HC (PW-13) are the formal witnesses. Muhammad Iqbal (PW-4) is the eye witness of the occurrence, as well as, the witness of recovery of pistol .30 bore P-5 and magazine containing 05 live cartridges from Riaz Hussain appellant which were taken into possession vide recovery memo Exh. PE. Basharat Ali, SI, PW-6, Irshad Ali, SI, PW-8, Muhammad Ashfaq, SI, PW-11 and Muhammad Aslam, SI, PW-14 are the Investigating Officers of this case.

9. The prosecution produced documentary evidence in the shape of memo of possession of clothes of the deceased Exh.PA, application to SHO Exh. PB, FIR Exh.PB/1, memo of possession of opticals and two ball points Exh.PC, memo of possession of blood stained earth Exh.PD, recovery memo of pistol ..30 bore Exh.PE, medical report of Jameel Hussain (PW-2) Exh.PF, injury statement of Jameel Hussain Exh.PF/1, medical report of Mst. Nabila Parveen Exh. PG, injury statement of Mst.

Nabila Parveen Exh. PG/1, post-mortem report Exh.PH, Pictorial sketch Exh.PH/1, Inquest report Exh.PH/2, Injury statement of Munir Hussain deceased Exh. PH/3, recovery memo of pistol ..30 bore from Ajmal Hussain accused (since acquitted) Exh. PI, rough site-plan Exh.PJ, site-plan Exh. PK, report of chemical examiner Exh. PL, Report of Serologist Exh. PL/1, report of Forensic Science Laboratory, regarding pistol of Muhammad Ajmal accused Exh.PM, report of Forensic Science Laboratory about pistol of Riaz Hussain appellant Exh. PN and report of DPO, Bahawalpur regarding the illegal investigation conducted by Investigating Officer, dated 19.08.2007 Exh. PO.

10. The statements of the appellants Riaz Hussain, Matloob Hussain and their co-accused Muhammad Ajmal (since acquitted) were recorded under Section 342 of Cr.P.C. They refuted the allegations levelled against them and professed their innocence. In answer to the question, why this case against you and why the PWs have deposed against you, the appellants replied as under:--

Riaz Hussain

"All the PWs are related interse and are inimical towards me and my co-accused. Complainant party resides in front of my house and very well known to me and my co-accused but they did not nominate us in the FIR. Despite the fact that the case was registered on the written application of the complainant. In-fact unknown dacoits trespassed into the house of the complainant and tried to commit dacoity. Complainant party tried to apprehend the culprits whereupon they made firing upon the complainant party. I and my co-accused had not participated in the occurrence in any manner and had no motive to commit the murder of deceased and to injure the PW. I have been falsely implicated by the complainant and the PWs."

Matloob Hussain.

"I rely upon the statement of my co-accused Riaz Hussain made in response to the same question. Further more, I have been declared innocent during the police investigation."

11. The appellants did not make statements under Section 340 (2) Cr.P.C. nor they opted to adduce any evidence in their defence.

12. The learned trial Court vide its impugned judgment dated 08.05.2008 found both the appellants guilty, convicted and sentenced them as mentioned and detailed above, whereas co-accused Muhammad Ajmal was acquitted from the charges.

13. The learned counsel for the appellants, in support of this appeal, has contended that the case was registered on the written application Exh.PB of Jameel Hussain (PW-2) who is a retired police constable and none was named as accused in the FIR Exh.PB/1; that even number of accused persons mentioned in the FIR were three but subsequently while appearing before the learned trial Court the complainant and other eye-witnesses of the prosecution implicated the appellants and number of accused persons was enhanced from 3 to 4; that no specific role was attributed to any accused in the FIR but while appearing in the Court the prosecution witnesses assigned specific roles to the appellants and their co-accused; that it is on the record that the house of the appellants is situated in front of the house of the accused and in that situation there was no occasion for the complainant for not mentioning the name of the appellants and their co-accused in his written application Exh. PB, which became basis of registration of the case; that stance of the complainant Jameel Hussain, that the written application Exh.PB was drafted by the Duty Police Officer available on the police station at the relevant time is also belied from the statement of Irshad Ali, SI (PW-8) who appeared before the learned trial Court and stated that he received the written application Exh. PB from Jameel Hussain and drafted the formal FIR Exh.PB/1 without any addition or omission; that the complainant never moved any application before higher police authorities in respect of omission of the names of accused in his written application by the duty police officer; that in the inquest report the same story was narrated as mentioned in the FIR; that Mst. Nabila Parveen PW-3 was also not a reliable witness because she has also made material improvements in her statement, she was duly confronted with her previous statement and her improvements were brought on the record, therefore, no importance can be given to this witness; that no crime-empty was recovered from the place of occurrence and nothing was recovered from the possession of the appellants; that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt and that the appellants are entitled to clean acquittal.

14. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the contentions of the learned counsel for the appellants on the grounds that the prosecution case was fully established through the evidence of injured eye-witnesses of the occurrence namely Jameel Hussain PW-2 and Mst. Nabila Parveen PW-3; that after registration of the FIR the complainant came to know that his true version was not recorded and then he made supplementary statement and he has not been confronted with his supplementary statement by the learned defence counsel; that statement of Mst. Nabila Parveen (PW-3) who was an injured eye-witness of the occurrence is fully supported by medical evidence; that in her statement Exh. DA she has specifically named the appellants, as well as, their other co-accused and her evidence could not be shattered during the process of cross-examination; that the prosecution case has further been supported by the evidence of Muhammad Iqbal PW-4; that motive was also established against the appellants in this case; that the prosecution proved its case against the appellants beyond the shadow of any doubt, therefore, their appeal may be dismissed. So far as Criminal Revision No. 53 of 2008 is concerned, the learned counsel contends that the sentence of Respondents No. 1 and 2 may kindly be enhanced from imprisonment for life to death penalty because there is no mitigating circumstance in their favour.

15. We have heard the arguments of learned counsel for the parties at length and perused the record minutely with their able assistance.

16. The occurrence in this case took place on the intervening night of 25/26.05.2006, at 02:00 a.m. (night) in the house of the complainant situated at Chak No. 168/7-R Western, within the area of police station Khichiwala, District Bahawalnagar. The matter was reported to the police on the same night at 2:45 a.m. by the complainant Jameel Hussain (PW-2) who is real brother of Munir Hussain deceased. The prosecution in order to prove its ocular account has produced the complainant Jameel Hussain PW-2, Mst. Nabila Parveen PW-3 and Muhammad Iqbal PW-4. In the written application Exh.PB moved by the complainant Jameel Hussain PW-2, as well as, in the FIR Ex.PB/1, it is the case of the complainant that on the intervening night of occurrence three unknown accused persons who were armed with pistols inflicted

fire-arm injuries on his person, as well as, on the person of his brother Munir Hussain (deceased) and his wife Mst. Nabila Parveen PW-3. It was further claimed by the complainant Jameel Hussain PW-2 that he and the other eye-witnesses of the occurrence had seen the unknown accused in the light of electric bulb and they can identify them. The complainant named the appellants and two other co-accused, as well as, three unknown accused in his supplementary statement, which was statedly recorded on the night of occurrence i.e. 26.05.2006. The complainant Munir Hussain PW-2 while appearing before the learned trial Court has admitted during his cross-examination that houses of Maqbool Hussain and Riaz Hussain appellants are situated in front of his house. He has further stated that his son got registered a criminal case against Matloob Hussain and Riaz Hussain appellants in the year 2002. He has also stated that one Shazia Bibi also got registered a Hadood case against Mudassar Hussain son of Maqbool Hussain appellant in which he (the complainant) supported Mst. Shazia Bibi. He further conceded that a dispute of `Lumberdari' remained pending before the concerned forum and a compromise was effected between the parties in the year 2004.

The perusal of above mentioned part of the statement of the complainant has established that the appellants were living in front of the house of the complainant and they were well known to him but even then their names were not mentioned in the FIR. The complainant has claimed in his written complaint Exh.PB that he and other witnesses of the occurrence had seen the assailants in the light of electric bulb. Had the appellants committed the above mentioned offence, the complainant must have nominated them in his written application Exh.PB because they were very well known to him. The complainant Jameel Hussain PW-2 in order to cover the above mentioned lacuna in his case made an excuse that the police official on duty did not record the application Exh.PB as narrated by him and when he asked the SHO in this respect, he promised that he would correct the FIR later on but the same was not done. The said excuse of the complainant does not appeal to the mind of a prudent person because the complainant Jameel Hussain PW-2 is admittedly a retired head constable of the police department. The FIR Exh. PB/1 was lodged on the written application Exh.PB moved by him which contains his signature. He has admitted during his cross-

examination that he did not move any application before the high ups of the police department that his case has been spoiled by the concerned police official. Irshad Ali, SI (PW-8) appeared before the Court and he stated in his examination-in-chief that on 25.05.2006, the complainant Jameel Hussain produced the application Exh.PB for registration of case on the basis, whereof, he drafted the formal FIR Exh. PB/ 1 without any "omission or deletion". The said witness was produced by the prosecution itself and he was not declared hostile by the prosecution, therefore, the excuse made by the complainant regarding the non-mentioning of the names of the appellants in his written application Exh.PB, as well as in the FIR Exh.PB/1 is hereby discarded and repelled.

17. The prosecution eye-witnesses made dishonest improvements in their previous statements and their statements are also full of contradictions. As mentioned earlier only three unknown accused persons were mentioned in the written application Exh.PB, as well as, in the FIR Exh. PB/1 who participated in the occurrence, whereas the prosecution witnesses while appearing before the learned trial Court, named four accused persons in their statements namely Riaz Hussain appellant, Maqbool Hussain appellant, Ali Sher (since proclaimed offender) and Arshad Ali co-accused (since dead). In the FIR, no specific role was assigned to any of the accused and a general allegation of firing was leveled against three unknown accused, whereas, while appearing before the learned trial Court, the eye-witnesses attributed specific role of making two fire shots to Riaz Hussain appellant, which hit Munir Hussain (deceased) on the back side of his right shoulder, whereas the third fire shot made by Riaz Hussain appellant landed on the back side of the head of Munir Hussain deceased. The eye-witnesses while appearing before the Court have assigned a specific role of making a fire shot to Matloob Hussain appellant, which landed on the right ankle of the complainant Jameel Hussain, whereas, the second fire shot made by him landed on the left calf of the complainant. A joint role of making indiscriminate firing was also leveled against all the above mentioned four accused, which landed on different parts of the body of Munir Hussain deceased. The role of making a fire shot at the left hand of Mst. Nabila Parveen PW-3 was also attributed to Matloob Hussain appellant. The prosecution eye-witnesses were confronted with their previous statement and

their dishonest improvements were duly brought on the record. The relevant part of the cross-examination of the complainant Jameel Hussain PW-2 is reproduced here under:--

"I also had not got recorded that we identified them in the light of electric bulb. Confronted with Exh.PB where it is so recorded. Similarly I had not got recorded in Exh. PB that one of the accused persons took out registration book lying under the pillow, confronted Ex.PB where it is so recorded. I have got recorded in application Exh.PB that accused Matloob Hussain present in Court fired upon me which hit my right ankle, confronted with Ex.PB where it is not so recorded and I also got recorded in this Exh.PB that second fire fired by Matloob Hussain hit my left calf, confronted with Exh. PB where it is not so recorded. I also got recorded in my application Exh. PB that Riaz Hussain accused fired two successive shots which hit my brother Munir Hussain on his right back side of shoulder, confronted with Exh. PB where it is not so recorded. I also got recorded in application Exh. PB that Riaz Hussain accused present in Court fired upon Munir Ahmad which hit on his back side of head, confronted with Exh. PB where it is not so recorded. I also got recorded in Exh. PB that Riaz Hussain, Matloob Hussain alongwith their co-accused Arshad and Ali Sher fired indiscriminately upon Munir Ahmad which hit on different parts of his body, confronted with Exh, PB where it is not so recorded. I also got recorded in Exh.PB that Matloob Hussain took registration book of motorcycle and key, confronted with Exh.PB where it is not so recorded. I also got recorded in Exh. PB that Matloob Hussain accused fired upon my wife which hit on her left flank, confronted with Exh. PB where it is not so recorded. It is incorrect that I have made dishonest improvements in my afore mentioned statement in order to strengthen the prosecution case."

Although Mst. Nabila Parveen PW-3 nominated the appellants in her statement recorded before the police but her evidence is also not trustworthy because she also made dishonest improvements in her previous statement. She was confronted with her statement before the police Exh. DE and her dishonest improvements were also brought on the record, which are reproduced here under:

"I got recorded in my statement before police that Matloob Hussain accused present in Court fired upon my husband which hit on his right ankle, confronted with Exh.

DA where it is not so recorded. I also got recorded in my statement that Matloob Hussain fired second shot which hit my husband on his left leg, confronted with Exh.DA where it is not so recorded. I also got recorded in my statement that Riaz Hussain accused fired which hit on the back of right shoulder of Munir Hussain deceased, confronted with Exh.DA where it is not so recorded. I also made statement before police that Riaz Hussain accused fired third shot which hit on his back of head, confronted with Exh. DA, where it is not so recorded. I also got recorded in my statement before police that Matloob Hussain made another fire which hit on my left flank, confronted with Exh. DA where it is only recorded that I received fire-arm injury on my left flank, name of the accused is not mentioned therein."

Similarly the statement of other eye-witness namely Muhammad Iqbal (PW-4) is also replete with dishonest improvements. The prosecution witnesses made dishonest improvements in their statements. It is by now a well settled law that the Improvements made by a witness on material aspects of the case is not worthy of reliance. Reference in this context, inter-alia, may be made to the case of Muhammad Rafique and others vs. The State and others (2010 SCMR 385).

18. So far as the motive part of the prosecution case is concerned, we have noted that no motive was mentioned in the FIR. Although the prosecution witnesses later on introduced the story of motive that there was litigation between the complainant and accused party but the complainant Jameel Hussain (PW-2) has admitted during his cross-examination that a compromise was effected between the parties in the year 2004. The prosecution did not produce any documentary evidence to establish that any litigation was still pending between the parties. Even the learned trial Court disbelieved the motive part of the prosecution case. In view of the above, we are of the view that the prosecution was unable to prove the alleged motive in this case.

19. So far as the evidence of recovery in this case is concerned, it is noted that nothing was recovered from the possession of Matloob Hussain appellant whereas pistol P-5 was allegedly recovered from the possession of Riaz Hussain appellant. The alleged recovery of pistol from the possession of Riaz Hussain appellant is in consequential because the report of Forensic Science Laboratory (Exh.PM) is only to the effect that

pistol P-5 is in working order, therefore, there is no independent corroboration of the prosecution case against the appellants.

20. It is argued by the learned counsel for the complainant that the complainant Jameel Hussain PW-2 and Mst. Nabila Parveen (PW.3) sustained injuries during the occurrence and their presence at the time of occurrence can not be doubted, hence, the prosecution case was fully proved through the evidence of injured eye-witnesses. The said contention of the learned counsel for the complainant is misconceived.

Although Jameel Hussain PW-2 and Mst. Nabila Parveen (PW.3) are injured eye-witnesses, but injuries on their persons do not stamp their evidence with truth. We may refer here the case of Muhammad Pervez and others vs. The State and others (2007 SCMR 670). The Hon'ble Supreme Court of Pakistan at page 681 has held as under:

"It is also a settled law that injuries on a P.W. only indication of his presence at the spot but is not informative prove of his credibility and truth. See Said Ahmad's case 1981 SCMR 795".

In view of the above we hold that the statements of injured eye-witnesses Jameel Hussain (PW-2) and Mst. Nabila Parveen (PW.3) requires independent corroboration, which is very much lacking in this case.

21. The learned counsel for the complainant has lastly contended that the appellant Matloob Hussain remained fugitive from law and he was declared a proclaimed offender which also corroborates the prosecution case, against the said appellant, It is by now a well settled law that abscondence, per se, is not a proof of the guilt of an accused, which however can create a suspicion against him, but suspicion, however strong, cannot be the substitute of the proof, which is required to award punishment to an accused. The evidence of abscondence, even if found convincing, would not be sufficient by itself to warrant conviction of accused on a charge of murder. Reference in this context may be made to the cases of Barkat Ali vs. Muhammad Asif and others (2007 SCMR 1812).

22. In the light of above discussion, we hold that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, by extending

the benefit of doubt, we accept this appeal, and set-aside the conviction and sentence awarded to the appellants namely, Riaz Hussain and Matloob Hussain, and dismiss Criminal Revision No. 53 of 2008, filed by the complainant for enhancement of sentence of the accused. The appellant Riaz Hussain is in jail. He shall be released forthwith if not required in any other case. Matloob Hussain appellant is on bail, his bail bonds and surety shall stand discharged.

23. However, before parting with the judgment, we may observe here that the observations made in this judgment shall not influence the learned trial Court during the trial of the absconding accused namely Ali Sher and his case shall be decided on its own merits on the basis of the evidence to be adduced during the trial of the said accused.

(R.A.) **Appeal accepted.**

PLJ 2012 Cr.C. (Lahore) 717 (DB)

Present: Rauf Ahmad Sheikh and Malik Shahzad Ahmad Khan, JJ.

MUHAMMAD ARIF--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5956-B of 2012, decided on 17.7.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Control of Narcotic Substances Act, 1997, Ss. 2(T)(iii) & 9(c)--Bail, grant of--Percentage of morphine--Chemical Examiner Report--Accused was apprehended while carrying polythene bag containing 5 K.g papaver husk--Held: Report of Chemical Examiner does not show percentage of morphine in material allegedly recovered from the accused--U/s. 2(T)(iii) of Act, 1997, unless material contains as percentage morphine, it could not be deemed to be narcotic substance--Case against accused needs further probe and inquiry--Even otherwise one of I.O. has come to conclusion that accused was not connected with commission of the offence--Accused was behind bars and his person was no more required for further investigation--Bail was allowed. [P. 719] A

2008 YLR 1784 Lah, rel.

Mr. Abdul Samad Khan Bisriya, Advocate for Petitioner.

Mr. Khurram Khan, DPG, for State.

Date of hearing: 17.7.2012.

Order

The petitioner seeks post-arrest bail in case FIR No. 191/12 dated 13.04.2012 P.S. Alla Abad, District Kasur, under Section 9-C of the Control of Narcotic Substances Act, 1997.

2. Briefly stated the prosecution version as set-forth in the FIR recorded on the complaint of Shah Wali, S.I. of the above-mentioned Police Station, is that on spy information, the petitioner was apprehended while carrying a polythene bag containing 5 Kilograms papaver-husk, whereas his co-accused fled away.

3. Learned counsel for the petitioner has contended that the petitioner was declared innocent after thorough investigation; that the report of the Chemical Examiner does not show the percentage of morphine in the material allegedly recovered from the petitioner; that the petitioner does not bear history of involvement in such cases in the past and that he is behind the bars w.e.f. 13.04.2012. In support of the contentions raised, reliance is placed on Masud Ahmad v. The State (2008 YLR 1784) (Lahore).

4. Learned DPG has vehemently opposed the petition. It is contended that the petitioner and his co-accused were carrying huge quantity of Poppy husk. It is, however, admitted that according to the I.O., he was innocent.

5. The report of the Chemical Examiner does not show the percentage of morphine in the material allegedly recovered from the petitioner. Under Section 2(t) (iii) of the Control of Narcotic Substances Act, 1997, unless the material contains 0.2 per cent morphine, it cannot be deemed to be narcotic substance. From this angle, the case against the petitioner needs further probe and inquiry. Even otherwise one of the I.Os. has come to the conclusion that he is not connected with the commission of the offence. The petitioner is behind the bars w.e.f. 13.04.2012 and his person is no more required for further investigation.

6. For the reasons supra, the petition is accepted and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of the learned trail Court.

(R.A.) **Bail allowed.**

2011 P Cr. L J 1729

[Lahore]

Before Malik Shahzad Ahmad Khan, J

ZULFIQAR ALI---Petitioner

Versus

THE STATE and 4 others---Respondents

Writ Petition No. 10473 of 2011, decided on 16th May, 2011.

(a) Criminal Procedure Code (V of 1898)---

----S. 516-A---Penal Code (XLV of 1860), Ss.395/342---Constitution of Pakistan, Art. 199---Constitutional petition---Dacoity, wrongful confinement---Superdari of vehicle---Superdari of the tractor trolley given to the respondent by Sessions Court had been assailed by the accused petitioner, who had allegedly forcibly snatched the same from the complainant-respondent---Petitioner had failed to produce any documentary evidence regarding purchase of the said tractor trolley---F.I.R. about the said dacoity having been registered against the accused petitioner, ground of his last possession of the disputed vehicle was of no help to him---If the ground of last possession, as taken by the petitioner, was considered to be the sole basis for granting interim custody of the vehicle, then all the accused involved in theft, robbery and dacoity cases, would claim "Superdari" of the recovered vehicles as a matter of right and would amount to vitiate the criminal proceedings initiated against such type of accused and would give a licence to them to commit such offences and frustrate the law---Superdari of a vehicle could not be given to a person against whom allegation of theft had been made---Respondent had established his ownership of the tractor trolley through documentary evidence, which stood transferred in his name---Stay order granted to petitioner by civil court by itself had made it clear that it would not affect any judicial proceedings pending between the parties---Impugned order giving the vehicle on "Superdari" to the respondent had no legal or factual infirmity---Constitutional petition was dismissed in limine in circumstances.

(b) Criminal Procedure Code (V of 1898)---

----S. 516-A---Penal Code (XLV of 1860), Ss.395/342---Dacoity, wrongful confinement---Superdari of vehicle---Superdari of a vehicle cannot be given to a person against whom allegation of theft has been levelled.

Qaiser Shafeeq Vohra v. The State and others 1991 MLD 2590 **rel.**

Ch. Zulfiqar Ali for the Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.---The instant petition has been filed against order dated 10-3-2011 passed by learned Judicial Magistrate Section 30, Jaranwala, whereby application for "superdari" of "tractor trolley" bearing Registration No.2082/BRB Ford, was dismissed and against the order dated 4-5-2011 passed by learned Additional Sessions Judge, Jaranwala, whereby through consolidated judgment, learned Additional Sessions Judge, Jaranwala dismissed the revision petition filed by the petitioner, whereas criminal revision filed by respondent No. 2 was accepted and "superdari" of the above mentioned "tractor trolley" was ordered to be given to said respondent.

2. According to the facts of the present case Muhammad Zahid respondent No. 3, got a case registered vide F.I.R. No.128 of 2011 dated 10-2-2011 offences under sections 395/342, P.P.C. at Police Station Khurrianwala, District Faisalabad. It was alleged in the said F.I.R. that on 16-1-2011, he along with Inamullah son of Muhammad Hussain and Muhammad Abdullah son of Muhammad Suleman, was coming back from "Mureedkay" to Chak No.415 Toba Tek Singh, on the above mentioned "tractor trolley". When they reached "Makuwana" Chowk near By-Pass Khurrianwala, the petitioner (Zulfiqar Ali) along with seven unknown persons while armed with firearm weapons, reached in front of the "tractor trolley" and stopped their cars right in front of the same. It is further alleged that the petitioner and his co-accused, forcibly snatched the above mentioned "tractor trolley" and took the same along with petitioner and above mentioned two persons towards their "dera", where the complainant and the above mentioned persons were locked in a room. It is added in the above mentioned F.I.R. that the complainant and his above mentioned companions were released by the petitioner and his co-accused on the next day and the complainant was also given threats of dire consequences by the petitioner. Ultimately, the complainant Muhammad Zahid lodged the above-mentioned F.I.R. at Police Station Khurrianwala, District Faisalabad. Thereafter the petitioner as well as respondent No. 2 filed their petitions for "superdari" of the above mentioned "tractor trolly" which were dismissed by the learned Judicial Magistrate Section 30, Jaranwala vide order

dated 10-3-2011. Then two separate criminal revisions were filed by the petitioner as well as respondent No. 2 before the Additional Sessions Judge, Jaranwala. The criminal revision filed by the petitioner was dismissed whereas the criminal revision filed by Hassan Ali respondent No. 2 was allowed vide the impugned order dated 4-5-2011 passed by the learned Additional Sessions Judge, Jaranwala.

3. It is contended by the learned counsel for the petitioner that the petitioner has also filed a civil suit for specific performance of agreement which is pending adjudication before the learned Civil Judge, Jaranwala and the injunctive order has also been passed in the said civil suit. It is further argued that as the above mentioned "tractor trolley" was recovered from the possession of the petitioner therefore the petitioner is entitled under the law to the "superdari" of the above mentioned "tractor trolley".

4. Arguments heard. Record perused.

5. According to the petitioner he had purchased the "tractor trolley" through an agreement but the petitioner has failed to produce any receipt to show that any payment was made by the petitioner, as a sale consideration of the above mentioned "tractor trolley". Moreover the petitioner could not produce any transfer letter from his possession, to establish that the above mentioned "tractor trolley" was sold to him. F.I.R. has also been registered against the petitioner, wherein the allegations of forcible snatching of above mentioned tractor trolley have been levelled against the petitioner, therefore, the ground of last possession is of no help to the petitioner. If the ground of last possession, as taken by the petitioner, is considered to be the sole basis for granting interim custody of the vehicle, then all the accused involved in theft, robbery and "dacoity", cases will claim "superdari" of the recovered vehicles as a matter of right. It will amount to vitiate the criminal proceedings initiated against such type of accused and shall give them a licence to commit offences of alike nature and get the superdari of the stolen/snatched vehicles on the ground of last possession. This shall frustrate the law of the land and shall deprive the actual owners of their valuable property, which is not the intention of law. While observing this, I am fortified by the case-law reported as Qaiser Shafeeq Vohra. v. The State, and others (1991 MLD 2590) wherein it has been held that superdari of a vehicle cannot be given to a person against whom allegations of theft have been levelled. The ownership of respondent No. 2 is established through documentary evidence as the above

mentioned vehicle stands transferred in the name of said respondent. So far as the stay order granted by Civil Court in favour of the petitioner is concerned, it was categorically mentioned in the said stay order that the said order will not affect any judicial proceedings pending between the parties. In the above circumstances, the impugned judgment passed by the learned Additional Sessions Judge, Jaranwala is strictly in accordance with law.

6. In the light of above, I do not find any legal or factual infirmity in the impugned order, calling for interference in the constitutional jurisdiction. This petition thus has no merits and the same is hereby dismissed. However, any observation made in the impugned judgment or in the present order will not prejudice the claim of either party, at the time of final adjudication of the cases pending between them.

7. In view of the above discussion, the instant petition is **dismissed in limine**.

N.H.Q./Z-22/L **Petition dismissed.**

2011 YLR 3034

[Lahore]

Before Malik Shahzad Ahmed Khan, J

AWAIS KHALID---Petitioner

Versus

JUDGE FAMILY COURT and others---Respondents

Writ Petition No.1991 of 2011, decided on 5th August, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched., Ss.10(3) & 18---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for dissolution of marriage---Defendant's application for summoning of plaintiff in person---Defendant's plea was that plaintiff had not filed suit with her free consent; that she was not a pardahnashin lady and that her personal attendance in court was essential for reconciliation and to resolve question of authenticity of her signatures on plaint---Dismissal of such application by Family Court---Validity---Plaintiff living abroad had been pursuing suit through her attorney/father---Plaintiff had appeared before Family Court and made statement after putting her signatures on its order-sheet that she had to go to America and could not live with the defendant---Plaintiff was identified before Family Court by her counsel---Order of Additional Sessions Judge disposing of habeas corpus petition on plaintiffs statement was still holding field for not having been challenged any further by the defendant---Plaintiff was duly represented by her attorney, thus, there was no need of her personal appearance before Family Court---Plaintiff having appeared before Family Court, once or twice, would not be disentitled her to avail legal right provided under S. 18 of West Pakistan Family Courts Act, 1964 for all times to come---Personal appearance of plaintiff in conciliation proceedings was not mandatory---Question as to whether plaintiff was a pardahnashin lady or not, being factual one could not be decided in constitutional jurisdiction of High Court---Defendant could raise such question before Family Court during trial or at time of final decision of case---Impugned interim order was neither illegal nor mala fide or without jurisdiction, thus, could not be challenged in constitutional jurisdiction---High Court dismissed constitutional petition in circumstances.

Muhammad Javed Iqbal v. Mst. Tahira Naheed and others 2002 CLC 1396 and Shahida Perveen and another v. Sher Afzal and 2 others 2006 MLD 1752 ref.

Khalid Mehmood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore PLD 1979 Lah. 217; Mst. Saeeda v. Lal Badshah 1981 SCMR 395 and Saad Amanullah Khan v. Ayesha Tahir Shafique and another 1999 CLC 1544 rel.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 10(3) & 18---Pre-trial conciliation proceedings---Personal appearance of wife in such proceedings---Scope---Provision of S.10(3) of West Pakistan Family Courts Act, 1964 for being directory neither required personal appearance of wife nor such appearance was mandatory---Court under S. 18 of the Act could dispense with legal requirement of personal appearance of Pardahnashin lady and allow her to be represented in such proceedings through her authorized agent---Wife having appeared before Family Court, once or twice, would not be disentitled to avail legal right provided under S. 18 of West Pakistan Family Courts Act, 1964 for all times to come---Principles.

Khalid Menunood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore PLD 1979 Lah. 217 and Mst. Saeeda v. Lal Badshah 1981 SCMR 395 rel.

(c) West Pakistan Family Courts Act (XXXV of 1964)---

----Ss. 5 & 14---Constitution of Pakistan, Art.199--- Constitutional jurisdiction of High Court---Scope---Interim order of Family Court---Such order, if neither illegal nor mala fide nor without jurisdiction, could not be challenged in such jurisdiction.

Saad Amanullah Khan v. Ayesha Tahir Shafique and another 1999 CLC 1544 rel.

Umer Ali Khan for Petitioner.

ORDER

MALIK SHAHZAD AHMED KHAN, J.---This petition has been filed to challenge the order dated 14-7-2011, passed by learned Judge Family Court, Murree, whereby, the application filed by the petitioner for summoning the plaintiff in person, has been dismissed.

2. As per brief facts of the present case, Mst. Ummara Naeem (respondent No.3) filed, a suit for dissolution of marriage against the petitioner in the court of learned Judge Family Court, Murree. During the pendency of the said suit, the petitioner filed an application for summoning of plaintiff in person. The said application has

been dismissed vide the impugned order dated 14-7-2011, passed by the learned Judge Family Court, Murree; hence, the present petition.

3. It is contended by the learned counsel for the petitioner that the petitioner and the plaintiff/respondent No.3 had contracted marriage with each other, without the consent of the parents of the plaintiff/respondent No.3; that the suit for dissolution of marriage filed by respondent No.3 was not filed with free consent of the said respondent, therefore, the appearance of respondent No.3, in person, was mandatory for the ends of justice; that the object of reconciliation will not be fulfilled if respondent No. 3 is not summoned; that the petitioner has challenged the authenticity and genuineness of the signatures of the plaintiff/respondent No.3 on her plaint, therefore, the personal attendance of the plaintiff was essential; that the plaintiff is not a Pardahnashin lady, therefore, she may be summoned in order to resolve the above mentioned dispute; that this petition may be accepted and the impugned order dated 14-7-2011, passed by the learned Judge Family Court, Murree may kindly be set aside.

4. I have heard the learned counsel for the petitioner and have also gone through the documents annexed with the present petition.

5. A suit for dissolution of marriage has been filed by Mst. Ummara Naeem (respondent No.3), against the petitioner. The petitioner during the pendency of said suit filed a petition for summoning of plaintiff (respondent No.3) in person, which application has been dismissed vide the above mentioned impugned order, passed by the learned Judge Family Court, Muree. The learned counsel for the petitioner has argued that personal attendance of the plaintiff was mandatory in view of his above mentioned contentions. The plaintiff/respondent No.3 has been pursuing her suit through her attorney/ respondent No.2 (her real father). It is also evident from record that the plaintiff/respondent No.3, appeared before the learned trial court on 9-5-2011, and got her statement recorded wherein she had categorically stated that she had to go to America and she could not live with the defendant/petitioner. She also put her thumb impression on the order-sheet of the learned trial court. Respondent No.3/plaintiff was duly identified by her counsel. It is also mentioned in para No. 4 of the grounds of present writ petition that a habeas corpus petition was filed by the petitioner before the learned Additional Sessions Judge, Lahore. The said petition was disposed of on the statement of respondent No.3. The said respondent appeared before the court of learned

Sessions Judge, Lahore and made a statement which was not in favour of the petitioner and as such the habeas corpus petition filed by the petitioner was disposed of. Though it is alleged by the petitioner that statement of respondent No.3 was made under threats extended by her father (respondent No.2) but the fact remains that the above mentioned order of the learned Additional Sessions Judge Lahore, still holds the field and the same was not challenged any further by the petitioner on the above said alleged grounds. The plaintiff/respondent No.3 has been living l abroad (USA). She was duly represented by her attorney, therefore, there was no need of her personal appearance before the learned trial court. Under section 18 of the West Pakistan Family Courts Act, 1964, the plaintiff/respondent No.3 can validly pursue her case through her attorney. 'Section 18 of the West Pakistan Family Courts Act, 1964 is reproduced as under:

> "Section 18. **Appearance by agent**.---If a person required under this Act to appear before a Family Court, otherwise than as a witness, is a pardahnashin lady, the Family Court may permit her to be represented by a duly authorized agent."

In view of the above-mentioned section, respondent No.3 can validly pursue her case through her attorney. Appearance through agent was legally permissible under the said provision of law, therefore, the learned Judge Family Court, Murree has rightly declined to summon the plaintiff/ respondent No.3, in person. Similar proposition has already been discussed by this Court in the case of Muhammad Javed Ipbal v. Mst. Tahira Naheed and others (2002 CLC 1396) and it was held in the said case as under:--

> "--S.18---Appearance through agent---Non-appearance of plaintiff in witness-box---Defendant raised an objection that the plaintiff' did not appear herself in the suit but had produced her father as special attorney in the Family Court--Validity--Appearance through agent was legally permissible under S.18 of West Pakistan Family Courts Act, 1964---Family Court had rightly not drawn adverse inference due to non-appearance of the plaintiff in the witness-box in support of her Claim."

I am also fortified in my above mentioned views by another judgment of this Court in the case of Shahida Perveen and another v. Sher Afzal and 2 others (2006 MLD 1752).

6. The learned counsel for the petitioner has contended that respondent No. 3/plaintiff has already appeared before the Judge Family Court, Murree, therefore, she cannot be termed as Pardahnashin lady. This argument of the learned counsel for the petitioner is not convincing. One or two time appearance of the plaintiff/ respondent No. 3 before a court does not disentitle her for all times to cone to avail her legal right, provided under section 18 of the West Pakistan Family Courts Act, 1964 Even otherwise the question as to whether the plaintiff (respondent No. 3) is a Pardahnashin lady or not, is a question of fact which requires recording of evidence. The said question cannot be decided in writ jurisdiction. The petitioner ' can raise his above mentioned objection during the trial or at the time of final decision of the case before the learned trial court.

7. It was also argued on behalf of the petitioner that the object of reconciliation will not be fulfilled if respondent No.3 is not summoned. In this context relevant provisions of the law are section 10(3) and above referred section 18 of the West Pakistan Family Courts Act, 1964. Section 10(3) reads as under:--

"Section 10(1)?

??????????? (2) ??????..????

> (3) At 'the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible."

The above mentioned provision i.e. 10(3) of the West Pakistan Family Courts Act, 1964 is directory in nature and the same cannot be regarded as mandatory but the directory provision cannot be regarded as mere surplusage, worthy of no notice. The said provisions cannot be lightly ignored. Anyhow, the real question for p determination is, as to whether, the provisions of section 10(3) of the West Pakistan Family Courts Act, 1964, require the personal appearance of the parties. In this respect reference may again be made to section 18 of the above mentioned Act. As discussed earlier, the said section has empowered the court to permit a Pardahnashin lady, required under the Act to appear before the Family Court, to be represented by an authorized agent. This provision enables the court to dispense with the legal requirement of personal appearance of a Pardahnashin lady and allow the said lady to be represented through an authorized agent. Section 10(3) of the said Act does not require the plaintiff to appear in person. An identical question was discussed by this Court in the case of Khalil Mehmood Syed v. Razi Abbas

Bokhari, Judge, Family Court, Lahore (PLO 1979 Lahore 217) and it was observed as under:--

> "Section 10(3)---Provision of section 10(3) directory---Compro?mise or reconciliation between parties---Personal attendance of parties in Court---Held. Not indispensable ".

A similar proposition was also discussed by the Hon'ble Supreme Court of Pakistan in the case of Mst. Saeeda v. Lal Badshah (1981 SCMR 395) and in the above mentioned judgment the Hon'ble Supreme Court has held as under:-

> "Defendant appearing before Family Court at outset submitting his 'written statement and also remaining present when date fixed for reconciliation. Held. Fulfilled his obligations under provisions of Act. Insistence on personal attendance of defendant necessarily leading to delay in conclusion of suit and such conclusion already considerably delayed. Petition pray for forcing personal attendance of defendant dismissed."

In the light of above discussion, in my humble view, the personal appearance of the plaintiff is not mandatory, for It reconciliation proceedings.

8. No final judgment has been passed by the learned Judge Family Court, Murree. The petitioner in the instant petition has challenged an interim order of the learned Judge Family Court, Murree. The said order in light of the above discussion, cannot be termed as illegal, mala fide or without jurisdiction, therefore, the same could not be challenged in writ jurisdiction. Reference in this respect may be made to the case reported as Saad Amanullah Khan v. Ayesha Tahir Shafique and another (1999 CLC 1544).

9. In the light of above discussion, this petition is without any forte and the same is hereby DISMISSED in limine.

S.A.K./A-202/L **Petition dismissed.**

2024 LHC 2590

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE JUDICIAL DEPARTMENT

Criminal Appeal No.57920 of 2019

(Khizer Hayat vs. The State etc) &

Criminal Revision No.50268 of 2019

(Mushtaq Ahmed vs. Khizer Hayat etc)

J U D G M E N T

Date of hearing.	**27.05.2024**
Appellant by:	**Mr. Ijaz Ahmad Janjua, Advocate**
State by	**Mr. Nisar Ahmad Virk, Deputy Prosecutor General**
Complainant by	**Ch. Hammad Najib, Advocate**

Malik Shahzad Ahmad Khan, C.J:- This judgment shall dispose of ***Criminal Appeal No.57920 of 2019***, filed by Khizer Hayat (appellant) against his conviction and sentence, as well as ***Criminal Revision No.50268 of 2019***, filed by Mushtaq Ahmed petitioner/complainant for enhancement of sentence awarded to Khizer Hayat (respondent No.1 in the said revision petition), as both these matters have arisen out of the same judgment dated 07.08.2019, passed by the learned Additional Sessions Judge, Gujrat.

2. The appellant along with Muhammad Ikram (accused/co-convict since absconded), was tried in private complaint titled *Ch. Mushtaq Ahmad Vs. Munawar Hussain etc* under sections 302/449/148/149 PPC, in connection with case F.I.R. No.366/2013 dated 11.08.2013, registered at police station Dinga, District Gujrat. After conclusion of the trial, the learned trial Court *vide* its judgment dated 07.08.2019, has convicted and sentenced the appellant as under: -

> ***Under sections 302(b) PPC read with section 149 PPC*** *to imprisonment for life for committing Qatl-e-Amd of Muhammad Asghar alias Saddam (deceased). The appellant was also directed to pay an amount of Rs.3,00,000/- (Rupees three hundred thousand only) as compensation under section 544-A of Cr.P.C to the legal heirs of deceased and in case of default to further undergo six months simple imprisonment.*
> *Benefit of section 382-B Cr.P.C was also extended to the appellant.*

It is pertinent to mention here that Muhammad Ikram co-accused was also convicted and sentenced by the learned trial Court but he absented himself at time of pronouncement of the impugned judgment and absconded.

3. Initially on the complaint of Mushtaq Ahmad complainant (PW-4) case F.I.R. No.366/2013 dated 11.08.2013, under sections 302/449/148/149 PPC, was registered at police station Dinga, District Gujrat but later on being dissatisfied with the police investigation, Mushtaq Ahmad complainant (PW-4) filed private complaint (Exh.PK) against the appellant and five others. The learned trial Court, after observing all the pre-trial codal formalities, framed

charge under sections 302/449/148/149 PPC against the appellant and his co-accused on 25.02.2014, to which they pleaded not guilty and claimed trial.

4. Brief facts of the case as given by the complainant Ch. Mushtaq Ahmad (PW-4) in his private complaint (Ex.PK), are that he (complainant) was resident of Dhakranwali and was a cultivator by profession. On 11.08.2013, at 2.00 a.m, the complainant along with Qaiser Mehmood (PW since given up), Babar Asjad (PW-3) and Muhammad Asghar alias Saddam (deceased), was sitting inside a room at the *Dera* of the deceased and were talking to each other. In the meanwhile, Munawar Hussain (co-accused since P.O), Habib Nawaz (co-accused since P.O), Usman alias Mani (co- accused since P.O), Ikram (co-accused since absented himself after trial), Khizer Hayat (appellant) and Shamraiz Iqbal (co-accused since P.O), all armed with Kalashnikoves along with three unknown co-accused (who can be identified), while riding on four motorcycles came there. Munawar Hussain (co-accused since P.O), made a fire shot from his Kalashnikov, which landed on the front of chest of Muhammad Asghar alias Saddam (deceased). Khizer Hayat (appellant), made a fire shot from his Kalashnikov, which also landed on the front of chest of the deceased. Shamraiz Iqbal (co-accused since P.O), made a fire shot from his Kalashnikov, which landed on the left side of belly of the deceased. Usman alias Mani (co-accused since P.O), made a fires shot from Kalashnikov, which landed on the bicep of left arm of the deceased. Ikram (co-accused since absented after the trial), made a fire shot from his Kalashnikov, which landed on the left side of belly of the deceased. Habib Nawaz (co-accused since P.O), made a fire shot, which landed on the left leg of the deceased. All the accused persons made fire shots from their respective weapons, which landed on different parts of the body of Muhammad Asghar alias Saddam (deceased), who succumbed to the injuries at the spot. The accused persons fled away from the spot while making aerial firing and boarding their motorcycles towards Chak Jani. The prosecution eye-witnesses, witnessed the occurrence.

Motive behind the occurrence was previous murder enmity and litigation. The nephew of Khizer Hayat (appellant) and brother of Munawar Hussain (co-accused since P.O) namely Mazhar Iqbal was murdered in a police encounter and FIR No.362, dated 04.08.2010, was lodged at police station Saddar Kharian regarding the said occurrence. The appellant and his co-accused had a suspicion that the abovementioned occurrence took place on the basis of spy information imparted by Muhammad Asghar alias Saddam (deceased) to the police. The complainant also alleged that brother of Khizar Hayat (appellant) namely Shan Ali was also murdered and case FIR No.102, dated 04.03.2008, at police station Dinga, District Gujrat was lodged and the appellant and his co-accused had a suspicion that Muhammad Asghar alias Saddam (deceased), was also involved in the said occurrence.

5. In order to prove its case the prosecution produced four witnesses during the trial, whereas statements of nine Court witnesses (CWs) were also got recorded. The prosecution also produced documentary evidence in shape of Ex.PA to Ex.PK, as well as, Ex.CW.2/A to Ex.CW.9/F. The statement of the appellant under section 342, Cr.P.C was recorded, wherein he refuted the allegations levelled against him and professed his innocence. Statements of two defence witnesses (DWs) were also recorded, whereas documentary evidence in the shape of Ex.DA to Ex.DR, was also tendered in defence evidence. The learned trial Court *vide* its judgment dated 07.08.2019, found the appellant guilty, convicted and sentenced him

as mentioned and detailed above.

6. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has been falsely implicated in this case; that the appellant has fully proved his plea of alibi through cogent and convincing evidence but the same has wrongly been disbelieved by the learned trial Court; that the prosecution eye-witnesses were not resident of the place, where the occurrence took place and they have not given any cogent reason regarding their presence at the spot at the time of occurrence, therefore, they are chance witnesses and their evidence is not worthy of reliance; that no weapon was recovered at the pointing out of the appellant; that the motive was also not proved by the prosecution; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, the appeal filed by the appellant may be accepted and he (appellant) may be acquitted from the charge.

7. On the other hand, it is contended by learned Deputy Prosecutor General assisted by learned counsel for the complainant that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the FIR was promptly lodged and the evidence of the prosecution could not be shaken, despite lengthy cross-examination; that the appellant has failed to prove his plea of alibi; that merely opinion of the Investigating Officer about innocence of the appellant is not binding on the Court; that the motive was also proved through reliable evidence of PWs and as such there is no substance in the appeal filed by the appellant, therefore, the same may be dismissed and the criminal revision filed by the complainant for enhancement of sentence of the appellant may be accepted because there is no mitigating circumstance in this case.

8. Arguments heard and record perused.

9. I have noted that Khizar Hayat (appellant), was found innocent during the course of police investigation and his plea of *alibi* was verified by the Investigating Officer. Although the Hon'ble Supreme Court of Pakistan in the case of "***Muhammad Ahmad (Mahmood Ahmed and another Vs the State***"**(2010 SCMR 660)**, has observed that police opinion after recording of prosecution evidence by the learned trial Court becomes irrelevant, however, at the same time, I have noted that the Hon'ble Supreme Court of Pakistan in the cases reported as ***"Khalid Mehmood and others Vs The State"*** **(2011 SCMR 664) &** ***"Sajjad Hussain Vs. The State and others"*** **(2022 SCMR 1540),** has considered the police opinion regarding the innocence of the accused persons as an additional fact for the acquittal of the said accused, coupled with other peculiar facts of the said cases. It is, therefore, evident that if otherwise, there is some doubt in the prosecution case then the findings of the Investigating Officer qua the innocence of an accused can also be considered for the acquittal of the accused provided the said finding is based on some tangible evidence or reasoning. Keeping in view the guide lines given in the abovementioned dictums of the Hon'ble Supreme Court, I proceed to decide the instant case.

10. According to the plea of alibi taken by the appellant, he (appellant), was not present at the village of occurrence i.e. village Dhakranwali, Tehsil Kharian, District Gujrat at the time of occurrence rather he was present at a hotel situated at Liberty Market, Lahore. I have noted that the Investigating Officer of this case namely Muhammad Riaz SI (CW-9), appeared before the learned trial Court as Court witness and during cross-examination by the accused, he stated about the plea of alibi taken by the appellant as under:-

"……It is correct that accused Khizer Hayat present before the Court had pleaded his version that he was present at his hotel stated at Liberty Market, Lahore at the time of occurrence of this case. It is correct that he had pleaded his innocence and further deposed that mobile phone No.0321-4000649 and 0341- 4000649, were in his use at the time of occurrence of this case. It is correct that I had received call data Ex.CW.4/A and Ex.CW.4/D on 01.10.2013. I had gone through the call data as to mobile phone No.03241-4000649 and 0341-4000649. It is correct that the location of both the mobile phone Nos. 03241-4000649 and 0341- 4000649 was found in the area of Liberty Market, Lahore from 9.57

a.m (morning) to 11.45 p.m (night) on 11.08.2013. It is correct that on 02.10.2013, accused Khizer Hayat had withdrawn his pre-arrest bail. It is correct that I deferred arrest of accused Khizer Hayat U/S 169 of Cr.P.C. It is correct that I visited Lahore to verify the plea of accused Khizer Hayat as to his presence at Liberty Market, Lahore on the date and time of occurrence of this case. It is correct that on 04.10.2013, Munir Ahmad son of Muhammad Arif, R/O Pattoki, District Kasoor Ameer Abbas son of Hassan Abbas, Jamshaid Younas son of Muhammad Younas and Sadaqat Ali son of Muhammad Zaman all residents of Lahore had appeared before me in support of version of accused Khizer Hayat. It is correct that all the said persons tendered their affidavits and made their statements in support of version of accused Khizer Hayat. It is correct that all the said persons tendered their affidavits and made their statements in support of the version of accused Khizer Hayat before me. It is correct that Muhammad Mansah son of Dilawar, R/O Mughlianwali, Tehsil Kharian had also appeared in support of version of accused Khizer Hayat. It is correct that accused Khizer Hayat remained affirmed to his version during the course of my entire investigation. It is correct that I had verified the version of accused Khizer Hayat. It is correct that place of occurrence is at the distance of about 170 KM from Liberty Market, Lahore"

I have also noted that the Investigating Officer of this case namely Muhammad Riaz SI (CW-9), clearly deposed that during his investigation, Khizer Hayat (appellant), was found not to be involved in the occurrence of this case and the complainant did not move any application regarding change of investigation. Relevant part of his statement made in this respect reads as under:-

"……It is correct that I have mentioned in the report U/S 173 of Cr.P.C that accused Khizer Hayat present before the Court was not found involved at the place of occurrence during my investigation. It is correct that the complainant had not moved any application against my investigation…"

It is also noteworthy that in the instant case, the police finding qua the appellant is not merely based on the opinion of the Investigating Officer rather the same is based on *Call-Data* record of the mobile phone numbers of the appellant, which was collected by the Investigating

Officer during the course of investigation of this case and statements of the defence witnesses namely Sadaqat Ali and Munir Ahmed recorded in favour of the appellant during the course of investigation. The said witnesses also appeared before the Court during the trial of this case as DW-1 and DW-2. Both the abovementioned defence witnesses categorically stated that the appellant was present at his hotel at Lahore on the day and time of occurrence. They were cross-examined at length by learned counsel for the complainant but their evidence could not be shaken. They remained consistent to the extent of plea of alibi of the appellant. I have further noted that Call-Data recorded of the SIMs (0341-4000649 & 0321-4000649), which Sims were in the use of Khizer Hayat (appellant), was also tendered in evidence as (Ex.CW- 4/B/1-7 and Ex.CW.4/D//1-18, respectively. The said Call-Data record also showed that the appellant was at Lahore at the date and time of occurrence.

Although learned Deputy Prosecutor General assisted by learned counsel for the complainant has argued that no evidence is available on the record to show that the above-mentioned SIMs were owned by the appellant but I have noted that Khizer Hayat (appellant), produced copy of certificate of collection of tax as to mobile No.0321-4000649 as (Ex.DR), which shows that the said SIM number was owned by the appellant. Moreover, the complainant never moved any application for summoning of the ownership record of the above-referred Sims from the concerned companies. He never challenged the findings of the I.O. by moving an application for change of investigation which shows that he was satisfied with the findings of I.O. qua the appellant, therefore, there is no substance in the abovementioned argument of learned Deputy Prosecutor General assisted by learned counsel for the complainant.

11. Furthermore, it is an admitted fact that there is a single deceased in this case namely Muhammad Asghar alias Saddam and the complainant has implicated as many as six named and three unknown accused total nine accused persons in this case for the said single deceased. I have also noted that Muhammad Asghar alias Saddam (appellant), was involved in number of criminal cases and sixteen (16) FIRs registered against him were tendered by Khizer Hayat (appellant), in his defence evidence as (Ex.DB to Ex.DQ). I have further noted that even Mushtaq Ahmad complainant (PW- 4), admitted during his cross-examination that the correct name of deceased was Muhammad Asghar and his nickname Saddam was due to the reason that he (deceased) was a brave man of the locality and had scattered enmities. The relevant part of statement of the complainant made in this respect is reproduced hereunder for ready reference:-

> *" It is correct that correct name of deceased was Muhammad Asghar. It is correct that his nick name Saddam was due to the reason that he was a brave man of the locality and had scattered enmities"*

Babar Asjad (PW-3), also admitted during his cross-examination that so many criminal cases were registered against Asghar alias Saddam (deceased). Relevant part of his statement reads as under:-

> *"It is correct that so many criminal cases were registered against Asghar alias Saddam (deceased) "*

As the complainant party and the deceased were involved in number of criminal cases, which shows that they are habitual criminals, and as nine accused have been

implicated in this case for the single deceased, therefore, there is every possibility that the appellant was falsely implicated in this case by the complainant party while using the wider net, hence the findings of I.O. cannot be lightly brushed aside, specially while keeping in view the oral and documentary evidence produced by the appellant in his defence.

12. It is further noteworthy that the occurrence in this case took place at the *Daira* of Muhamad Asghar alias Saddam (deceased). Babar Asjad (PW-3) and Mushtaq Ahmad complainant (PW-4), were residents of village Dhakranwali, which was at a distance of 1 to 1½ kilometers from the place of occurrence. Mushtaq Ahmad complainant (PW-4), admitted during his cross- examination that the alleged place of occurrence is at a distance of about one mile from village Dhakranwali. Relevant part of his statement made in this respect is reproduced hereunder for ready reference:-

> "*……..Alleged place of occurrence is at a distance of about one mile from village Dhakranwali*"

Muhammad Anwar SI (CW-8), who also Investigated this case, admitted during his cross-examination that village Dhakranwali is at a distance of 1.5/2 KM from the place of occurrence and during his investigation, the complainant and the eye-witnesses had not disclosed the reason of their presence at the place of occurrence. Relevant parts of his statements made in this respect are reproduced hereunder:-

> *"……Village Dhakranwali is at a distance of 1.5/2 Km from the place of occurrence……*
> *……The complainant and eye witnesses had not disclosed the reason of their presence at the place of occurrence during my investigation"*

In the light of above, both the prosecution eye-witnesses namely Babar Asjad (PW-3) and Mushtaq Ahmad (PW-4), were chance witnesses and they were bound to prove the reason of their presence at the spot at the relevant time. They have not given any cogent reason of their presence at the spot at the time of occurrence, therefore, they are chance witnesses and as such their evidence is not free from doubt. The Hon'ble Supreme Court of Pakistan in the case of ***"Mst. Sughra Begum and another Vs. Qaiser Pervez and others"*** **(2015 SCMR 1142)** at Para No.14, observed regarding the chance witnesses as under:-

> *"14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his*

testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt."

Similar view was taken in the case of ***"Muhammad Irshad Vs. Allah Ditta and others"*** **(2017 SCMR 142)**. Relevant part of the said judgment at Para No.2 reads as under:-

"……Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence "

As the above-mentioned prosecution eye-witnesses are chance witnesses and they could not prove the reason of their presence at the spot at the time of occurrence, therefore, their very presence at the spot at the relevant time becomes doubtful.

13. As per prosecution's case, the motive behind the occurrence was previous murder enmity and litigation. The nephew of Khizer Hayat (appellant) and brother of Munawar Hussain (co-accused since P.O) namely Mazhar Iqbal was murdered in police encounter and FIR No.362, dated 04.08.2010, was lodged at police station Saddar Kharian regarding the said occurrence. The appellant and his co-accused had a suspicion that the abovementioned occurrence took place on the basis of spy information imparted by Muhammad Asghar alias Saddam (deceased) to the police. The complainant also alleged that brother of Khizar Hayat (appellant) namely Shan Ali was also murdered and case FIR No.102, dated 04.03.2008, at police station Dinga, District Gujrat was lodged and the appellant and his co-accused had a suspicion that Muhammad Asghar alias Saddam (deceased), was also involved in the said occurrence. I have noted that Mushtaq Ahmad complainant (PW-4), while lodging the FIR only alleged that motive behind the occurrence was previous murder enmity and litigation between the parties, however, when he (complainant), lodged private complaint Ex.PA, he improved his version while mentioning the abovementioned facts. I have also noted that the prosecution eye-witnesses namely Babar Asjad (PW-3) and Mushtaq Ahmad (PW-4), during their statements recorded before the learned trial Court made dishonest improvements qua the motive part of the prosecution story. Both the abovementioned PWs were confronted with their previous statements during cross-examination and the dishonest improvements made by them regarding the motive part of the prosecution case were duly brought on the record. The relevant part of their statements are reproduced hereunder for ready reference:-

Asjad Mehmood (PW-3)

"I had got recorded in my statement before the police that Zafraan nephew of acucsed Khizar Hayat and brother of accused Munawar Hussain namely Mazhar Iqbal were proclaimed offenders and were murdered in police encounter of Police Station Kharian for which case FIR No.362/2010, dated 04.08.2010, was registered at PS Sadar Kharian, Gujrat. (Confronted with Ex.DA where no so recorded). I had got recorded in my statement before the police that accused persons had suspicion that Muhammad Asghar alias Saddam (deceased) had

supplied spy information to the local police about Zafraan and Mazhar Iqbal and they were murdered in police encounter. (Confronted with Ex.DA where not so recorded). I had got recorded in my statement before the police that Shan Ali alias Shana, the real brother of accused Khizer Hayat was murdered for which case FIR No.102, dated 04.03.2008, was registered at PS Dinga, Gujrat and the accused persons had suspicion that there was hidden hand of Muhammad Ashgar alias Saddam (deceased) in the murder of Shan alias Shana. (Confronted with Ex.DA where not so recorded)"

Mushtaq Ahmed (PW-4)

"I had got recorded in my application for registration of case Ex.PJ that Zafraaan nephew of accused Khizer Hayat and brother of accused Munawar Hussain namely Mazhar Iqbal were proclaimed offenders and were murdered in police encounter of PS Kharian for which case FIR No.362/2010, dated 04.08.2010, was registered at PS Sadar Kharian, Gujrat. (Confronted with Ex.PJ where not so recorded). I had got recorded in my application for registration of case Ex.PJ that accused persons had suspicion that Muhammad Asghar alias Saddam (deceased) had supplied spy information to the local police about Zafraan and Mazhar Iqbal and they were murdered in police encounter. (Confronted with Ex.PJ where not so recorded). I had got recorded in my statement Ex.PJ that Shan Ali alias Shana, the real brother of accused Khizar Hayat was murdered for which case FIR No.102, dated 04.03.2008, was registered at Police Station Dinga, Gujrat and the accused persons had suspicion that there was hidden hand of Muhammad Asghar alias Saddam (deceased) in the murder of Shan alias Shana. (Confronted with Ex.PJ where not so recorded). It is incorrect to suggest that I have made dishonest improvements in my private complaint Ex.PK as well as in my statement before the Court with regard to motive part of the occurrence in order to strengthen my false private complaint. It is correct that I had not produced any document as to previous murder enmity and litigation with the present accused Khizer Hayat and Ikraam to the police during the course of investigation. It is correct that the deceased Muhammad Asghar alias Saddam was not accused in the case FIR No.102, dated 04.03.2008, Ex.PH as to murder of Shan alias Shana. It is correct that deceased Muhammad Asghar alias Saddam was not a witness in the said case FIR No.102, dated 04.03.2008 Ex.PH. It is correct that Muhammad Asghar alias Saddam (deceased) was neither accused nor witness in case FIR No.362,d ated 04.08.2010 Ex.PG. "

I have further noted that even the Investigating Officer of this case namely Muhammad Riaz SI (CW-9), admitted during his cross examination that the complainant did not produce any document with regard to motive part of the

occurrence of this case. Relevant part of his statement reads as under:-

> *"It is correct that the complainant had not produced any document with regard to motive of the occurrence of this case. It is correct that during the course of my investigation, the complainant and the eye-witnesses had not deposed before me as to case FIR No.102/2008 and case FIR No.362/2010 as motive of the occurrence of this case……"*

It is further noteworthy that the learned trial Court in paragraph No.46, of the impugned judgment has also disbelieved the abovementioned motive. I am, therefore, of the view that the prosecution has failed to prove the motive part of its case.

14. No weapon was recovered at the pointing out of the appellant during the course of investigation.

15. Insofar as the medical evidence of the prosecution is concerned, it is by now well settled that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of ***"Muhammad Tasaweer Vs. Hafiz Zulkarnain and 2 others"*** (**PLD 2009 SC 53),** ***"Altaf Hussain Vs. Fakhar Hussain and another"*** (**2008 SCMR 1103)** and ***"Mursal Kazmi alias Qamar Shah and another Vs. The State"*** **(2009 SCMR 1410).**

16. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution evidence is full of doubts. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the truthfulness of the prosecution story. In ***'Tariq Pervez Vs. The State'*** **(1995 SCMR 1345)**, the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

> *"5… The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."*

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of ***"Muhammad Akram Vs. The State"*** **(2009 SCMR 230)**, at page 236, observed as under:-

> "*13…….It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the*

guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the light of above discussion, I **accept** **Criminal Appeal No.57920 of 2019** filed by Khizer Hayat (appellant), set aside his conviction and sentence recorded by the learned Additional Sessions Judge, Gujrat *vide* impugned judgment dated 07.08.2019 and acquit him of the charge under Sections 302(b)/149 PPC by extending him the benefit of doubt. The appellant is in custody, he be released forthwith, if not required to be detained in any other case.

18. Insofar as **Criminal Revision No.50268 of 2019**, filed by Mushtaq Ahmed (complainant) for enhancement of sentence, awarded by the learned trial Court against Khizer Hayat (appellant) from imprisonment for life to death is concerned, I have already disbelieved the prosecution evidence due to the reasons mentioned in paragraph Nos.10 to 15 of this judgment and Khizer Hayat (appellant) has been acquitted due to the reasons, mentioned therein, therefore, this criminal revision being devoid of any force is hereby dismissed.

19. It is pertinent to mention here that Munawar Hussain, Usman alias Mani, Habib Nawaz and Shamraiz Iqbal (co-accused), are still proclaimed offenders in this case, whereas Muhammad Ikram (accused/co-convict), absented himself from the Court at the time of pronouncement of the impugned judgment, therefore, it is directed that the case property be kept intact till arrest of the abovementioned co-accused since proclaimed offenders and till the decision of the case to their extent. The findings recorded in this case are only to the extent of Khizer Hayat (appellant) and the case of the above-mentioned co-accused since P.Os shall be decided on its own merits and on the basis of evidence recorded after the arrest of Munawar Hussain, Usman alias Mani, Habib Nawaz and Shamraiz Iqbal (co-accused since P.Os) whereas the appeal of Muhammad Ikram, co- accused since absconded shall also be decided on its own merits.

This judgment has been dictated & pronounced on 27.05.2024, whereas prepared and signed on 29.05.2024.

Aitazaz

(***MALIK SHAHZAD AHMAD KHAN***)
Chief Justice

Approved for reporting.

2024 LHC 2606

Criminal Appeal No.29448-J of 2022

(Haq Nawaz vs. The State)

J U D G M E N T

Date of hearing.	**22.05.2024**
Appellant by:	**Mr. A.G. Tariq Chaudhry, Advocate**
State by	**Mr. Nisar Ahmad Virk, Deputy Prosecutor General with Jafar SI**
Complainant by	**Mr. Ali Raza Khokhar, Advocate**

Malik Shahzad Ahmad Khan, C.J:- This judgment shall dispose of ***Criminal Appeal No.29448-J of 2022***, filed by Haq Nawaz (appellant) against his conviction and sentence. Haq Nawaz (appellant) along with Shafique alias Rembo (co-accused since acquitted) and Shafaqat alias Basharat (co-accused since acquitted), was tried in case F.I.R. No.460, dated 24.12.2019, registered at police station Satiana, District Faisalabad, in respect of offences under sections 302/34 PPC and vide impugned judgment dated 09.03.2022, passed by learned Additional Sessions Judge, Jaranwala, he (appellant) has been convicted and sentenced as under:-

> ***Under section 302(b) PPC*** *to imprisonment for life and to pay an amount of Rs.1000,000/- to the legal heirs of the deceased, namely Muhammad Faryad, as compensation under section 544-A of Cr.P.C. The compensation shall be recoverable as arrears of land revenue and in default thereof to further undergo six months simple imprisonment.*

2. Brief facts of the case as given by Muhammad Mumtaz, complainant (PW-1) in his complaint (Ex.PA), on the basis of which the formal FIR (Ex.PM) was chalked out, are that he (complainant) was resident of Chak No.35/GB and a labourer by profession. On 23.12.2019, at 3.30 a.m, the complainant along with Farman (PW-2) and Iqbal (PW since given up), was sitting in his Haveli of cattle and were chatting with each other, whereas the son of the complainant namely Muhammad Faryad deceased was constructing *Khuda* for hens. Suddenly on hearing hue and cry from the chowk, the complainant along with Farman Ali (PW-2) and Muhammad Faryad (deceased), went towards the chowk and saw

that Haq Nawaz (appellant) and his co-accused were giving beating to nephew of the complainant namely Muhammad Shahban. Muhammad Faryad (deceased) tried to intervene but Haq Nawaz (appellant), raised a lalkara that Muhammad Faryad (deceased), be taught a lesson as he (deceased) had stolen the cow of one Munawar. In view of the complainant party, Liaqat Ali (co-accused since P.O), made a fire shot, which landed on the right thigh of Muhammad Faryad (deceased). The deceased fell on the ground, whereafter Haq Nawaz (appellant), made a fire shot with his pistol 30-bore, while putting his pistol on the right thigh of Muhammad Faryad (deceased). The remaining accused persons namely Shafique alias Rambo and Shafaqat alias Basharat (co-accused since acquitted), made aerial firing. On raising hue and cry by the complainant party, many people of the locality gathered at the spot, whereas the appellant and his co-accused fled away from the spot while making fire shots.

The motive behind the occurrence was that on the previous night of occurrence a cow of one Munawar was stolen and the foot trackers led the footprints of the accused towards Chak No.34/GB. In Chak No.34/GB, one Irfan was residing, who was having enmity of murders with the complainant party. The said Irfan told the abovementioned Munawar that his cow was stolen by Muhammad Faryad (deceased). The abovementioned Munawar and Haq Nawaz appellant etc. had close friendship with each other and due to the above-mentioned grudge, the occurrence was committed by the appellant and his co-accused.

3. After completion of investigation, the *challan* was prepared and submitted before the learned trial Court. In order to prove its case, the prosecution produced eleven witnesses during the trial. The prosecution also produced documentary evidence in the shape of (Ex.PA) to (Ex.PX). In defence evidence Ex.DA, was produced. The statement of the appellant under section 342 Cr.P.C, was recorded, wherein he denied the allegations leveled against him. The learned trial Court *vide* its judgment dated 09.03.2022, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

4. It is contended by learned counsel for the appellant that the appellant is absolutely innocent and he has falsely been implicated in this case being in league with the complainant party; that there is over-writing in complaint (Ex.PA), regarding the role attributed to the appellant as interpolation was made by the complainant while changing the words

from left to right thigh and words by putting the pistol on the thigh of the deceased were also added; that there is conflict between the ocular account and the medical evidence as Dr. Kashif Jameel (PW-9), did not note any blackening, burning or tattooing on injury No.2, therefore, the stance of the complainant in Ex.PA that appellant made a fire shot while putting his pistol on the thigh of the deceased is contradicted by the medical evidence; that the prosecution miserably failed to prove its case to the extent of the appellant beyond the shadow of doubt; that pistol (P-6) was planted against the appellant to strengthen the weak prosecution case and no motive was proved against the appellant, therefore, the appeal filed by the appellant may be accepted and the appellant may be acquitted from the charge.

5. On the other hand, learned Deputy Prosecutor General for the State assisted by learned counsel for the complainant has supported the impugned judgment while controverting the arguments of learned counsel for the appellant and argued that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the prosecution eye- witnesses remained consistent on all material aspects of the case; that the prosecution case is fully supported by the medical evidence and corroborated by the recovery of 30-bore pistol (P-6), at the pointing out of the appellant; that the motive was also proved against the appellant through reliable evidence of the prosecution witnesses;, that there is no substance in this appeal therefore, the same may be dismissed.

6. Arguments heard and record perused.

7. According to the prosecution case, the motive behind the occurrence was that on the previous night of occurrence, a cow of one Munawar was stolen and the foot trackers led the footprints of the accused towards Chak No.34/GB. In Chak No.34/GB, one Irfan was residing, who was having enmity of murders with the complainant party. The said Irfan told the abovementioned Munawar that his cow was stolen by Muhammad Faryad (deceased). The abovementioned Munawar and Haq Nawaz appellant etc. had close friendship with each other and due to the above- mentioned grudge, the occurrence was committed by the appellant and his co-accused. It is, therefore, evident that cow of the appellant was not stolen in this case rather the cow of one Munawar was stolen. Learned counsel for the complainant has conceded that Haq Nawaz (appellant), has no relationship with the abovementioned Munawar. It is claim of learned

counsel for the appellant that as the appellant was a foot-tacker, who tried to trace out the accused responsible for the theft of the cow of the abovementioned Munawar, therefore, he has falsely been implicated in this case. I have noted that Naseer-ud-Tariq SI (PW-8), who was first Investigating Officer of this case has conceded that Haq Nawaz (appellant) and Liaqat (co-accused since P.O), started foot-detection being foot- detectors and the same reached to Shahbaz Phulawar at Chak No.34-G.B. Relevant part of his statement made in this respect reads as under:-

> *"……it is correct that accused persons Haq Nawaz and Liaqat started foot detection being foot detector and the same reached to Shahbaz Phulawar at chak No.34/GB…"*

As Haq Nawaz (appellant) was having no personal grudge or enmity against Muhammad Faryad (deceased), therefore, he had no reason to commit the occurrence. Even the learned trial Court in paragraph No.20, of the impugned judgment has disbelieved the motive part of the prosecution case, therefore, I am of the view that the prosecution has failed to prove any motive against the appellant.

8. Insofar as the ocular account of the prosecution case regarding the role attributed to the appellant is concerned, in this respect, I have noted that in the complaint Ex.PA, there is over-writing with regard to role attributed to the appellant. It is evident from the perusal of the complaint Ex.PA that initially it was alleged that Haq Nawaz (appellant), made a fire shot with his pistol, which landed on the left thigh of Muhammad Faryad (deceased) but after interpolation and overwriting the abovementioned words were changed from left thigh to right thigh and the words by putting the pistol on the thigh were also added and as such the role attributed to the appellant has been changed through interpolation and over-writing. It is further noteworthy that in the contents of the FIR (Ex.PM) and in the complaint (Ex.PA), it was alleged that Haq Nawaz (appellant), made a fire shot with his pistol after putting the same on his right thigh but Dr. Kashif Jameel (PW-9), who first medically examined Muhammad Faryad (deceased) in injured condition, did not note any blackening, burning or tattooing on injury No.2, which was on the right thigh of the deceased. He further conceded that in case of a contact fire shot, there is possibility of blackening, burning and tattooing. He also added that as there was no blackening, burning or tattooing on the injuries of the deceased, therefore, the said injuries were not contact

wounds and the said injuries were caused from the range of more than three feet. Relevant parts of his statement in this respect reads as under:-

> *"……..There is possibility of blackening, burning and tattooing if fire shot is made by putting firearm weapon on the person (contact fire)……..*
>
> *...As per my MLC there is no blackening, burning and tattooing on the injuries. Both are not contact fires. PW volunteer that injured might sustained firearm injuries out of the range of more than 03-feet..."*

I am, therefore, of the view that there is conflict in the ocular account and the medical evidence of the prosecution to the extent of role attributed to Haq Nawaz (appellant), of making a fire shot on the right thigh of the deceased by putting his pistol on his right thigh.

Learned Deputy Prosecutor General assisted by learned counsel for the complainant has next argued that there was a dying declaration of Muhammad Faryad (deceased), wherein he fully implicated Haq Nawaz (appellant), in this case but it is noteworthy that Dr. Kashif Jameel (PW-9), who initially medically examined Muhammad Faryad (deceased) in injured condition was not the medical officer, who allowed the Investigating Officer to record the dying declaration of the deceased. He did not utter a single word in this respect and the Medical Officer, who allowed to record the alleged dying declaration of the deceased was not produced in the witness box. Moreover, Dr. Kashif Jameel (PW-9), has further stated during his cross examination that the condition of the injured was critical and in the column of history, he has mentioned that the victim did not name the assailant. Relevant part of his statement made in this respect reads as under:-

> *"I did not mention in my MLC due to critical condition the patient was unable to speak. PW volunteer that I mentioned the pulse 110 per minute and blood pressure 90/60 that shows the critical condition. There is no scale mentioned in Medico-legal Certificate as at what limit of blood pressure or pulse makes the person unspeakable. It is mentioned in history that victim did not state the name of any assailant... "*

In order to prove the dying declaration of the deceased, the prosecution has only produced Muhammad Mansha retired SI (PW-11). He stated that he recorded dying declaration of the deceased (Ex.PF) and he also

produced the abovementioned document to establish that the deceased was fit to make statement but as mentioned earlier, the relevant Medical Officer, who gave the abovementioned opinion that the deceased was fit to make statement has not been produced in the witness box. It is further noteworthy that in the examination-in-chief, Muhammad Mansha retired SI (PW-11), has stated that at the time of joining Muhammad Faryad (deceased), the then injured into the investigation of this case the father of the deceased namely Muhammad Mumtaz, Mst. Mumtaz Bibi (mother) and Muhammad Tariq (brother), were present, who joined the investigation but the abovementioned witness namely Muhammad Mumtaz (PW-1), did not utter a single word in his examination-in-chief that dying declaration of Muhammad Faryad deceased was recorded in his presence and he only denied a suggestion during his cross-examination that it was incorrect that no such statement was recorded by the police. Remaining above-mentioned witnesses of dying declaration were also not produced by the prosecution in the witness box. Neither any member of the concerned hospital staff was associated at the time of recording of statement of the deceased nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Under the circumstances, the status of abovementioned statement of the deceased was a statement under section 161 Cr.P.C and not the dying declaration of the deceased. If the abovementioned statement is considered to be statement of the deceased under section 161 Cr.P.C, then the said statement without the test of cross- examination is not worthy of reliance. In the case of ***"Mst. Zahida Bibi Vs. The State"*** **(PLD 2006 Supreme Court 255)**, the Hon'ble Supreme Court of Pakistan was pleased to held as under:-

> *"……This is an admitted fact that the statement of the deceased was not recorded by the Sub-Inspector of police in hospital in presence of the doctor and further neither any member of the hospital staff was associated at the time of recording the statement nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Be that as it may, the status of such a statement would be hardly a statement under section 161, Cr.P.C. and not a dying declaration of the deceased. This may be seen that the dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying*

declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its „truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts. In the present case, in the manner in which the statement of deceased was recorded by the Sub-Inspector, would seriously reflect upon its correctness and consequently, could not be considered worthy of any credit to be relied upon as dying declaration "

Similarly in the case of ***"Farman Ahmed Vs. Muhammad Inayaat and others"*** **(2007 SCMR 1825),** the Hon'ble Supreme Court of Pakistan has held that dying declaration of the deceased requires independent corroboration but as mentioned earlier, in the instant case, none from the concerned hospital appeared to corroborate the abovementioned alleged dying declaration of the deceased. I am, therefore, of the view that dying declaration of the deceased has not been proved in this case in accordance with the law.

9. Insofar as the recovery of pistol (P-6), at the pointing out of Haq Nawaz (appellant), is concerned, I have noted that the report of PFSA (Ex.PV), is only regarding mechanical operating condition of the abovementioned pistol and the empties recovered from the spot (C1 to C8), did not match with the said pistol, therefore, I am of the view that the recovery of pistol (P-6), at the pointing out of the appellant is of no avail to the prosecution.

10. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution miserably failed to prove its case to the extent of Haq Nawaz (appellant) beyond the shadow of doubt. It is by now well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. Reliance in this respect is placed on the judgments reported as *'Tariq Pervez versus The State'* **(1995 SCMR 1345)** and

'Muhammad Akram versus The State' **(2009 SCMR 230).**

11. In the light of above discussion, I am of the view that the prosecution has failed to prove its case to the extent of Haq Nawaz (appellant) beyond the shadow of doubt, therefore, I accept **Criminal Appeal No.29448-J of 2022** filed by Haq Nawaz (appellant), set aside his conviction and sentence recorded by the learned trial Court vide impugned judgment dated 09.03.2022 and acquit him of the charge by extending him the benefit of doubt. He is in custody, he be released forthwith if not required to be detained in any other case.

12. It is pertinent to mention here that Liaqat Ali (co-accused), is still a proclaimed offender in this case, therefore, case property be kept intact till his arrest and till decision of the case to his extent. The findings recorded in this case are only to the extent of Haq Nawaz (appellant) and the case of the above-mentioned Liaqat Ali, co-accused (since P.O) shall be decided on its own merits and on the basis of evidence recorded after his arrest.

(***MALIK SHAHZAD AHMAD KHAN***)
Chief Justice

This judgment has been dictated And pronounced on 22.05.2024 whereas Prepared and signed on 29.05.2024.. ****Aitazaz****

Approved for reporting.