JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.48 of 2019

(Yasir Ali Shah Vs. The State and another)

AND

Murder Reference No. 02 of 2019

(The State Vs. Nasir Shabbir, etc.)

AND

Criminal Appeal No.44 of 2019

(Nasir Shabbir Vs. The State and another)

AND

Jail Appeal No.47 of 2019

(Nasir Shabbir Vs. The State)

AND

Criminal Revision 48/2019

(Javed Ul Hassan Vs. Nasir Shabbir, etc.)

AND

Jail Appeal No.54 of 2019

(Shahbaz Haider Shah Vs. Syed Asghar Hussain Shah)

AND

Criminal Appeal No.64 of 2019

(Shahbaz Haider Shah Vs. The State and another)

Crl. Appeal No. 91/2019

(Javed Ul Hassan Vs. Ahsan Mehboob)

JUDGMENT

Appellants by	:	Mr. Zahid Riaz Ch., Ms. Sehrish Rizwan & Sikandar Javed, Advocates
Complainant by	:	Malik Jawad Khalid, Advocate
State by	:	Mr. Jameel Fayyaz Rajput, State Counsel along with Qasim Zia, S.I.
Dates of Hearing	:	13.10.2022

ARBAB MUHAMMAD TAHIR, J. Nasir Shabbir, Shahbaz Haider Shah, Yasir Ali Shah and Ahsan Mehboob (hereinafter collectively referred to as **"the appellants"**) involved in case

FIR No.160/2015 dated 10.06.2015 registered under Sections 302, 109 and 34 of Pakistan Penal Code, 1860 ("hereinafter referred to as **"P.P.C."**) at Police Station Sihala, Islamabad, were tried by the Court of the learned Additional Sessions Judge (East), Islamabad. Whereby the learned trial Court through judgment dated 22.02.2019 (hereinafter referred to as **"the impugned judgment")** while acquitting Ahsan, found rest of the appellants guilty of the offences mentioned in the said F.I.R. and proceeded to convict and sentence them in the following terms:-

i. *Accused Nasir Shabbir had made repeated fire on the deceased Wajih ul Hassan Shah on his vita (sic) part of the body of deceased Wajid ul Hassan Shah, therefore, he has committed qatle amad of deceased Wajih ul Hassan and therefore he is convicted under section 302(b) P.P.C. and awarded major penalty of death sentence, he will be hang (sic) till death he is also liable to pay compensation of Rs, 10 lack (sic) under Section 544-A Cr.P.C. to the legal heirs of deceased and in case of failure to undergo simple imprisonment of 4 months.*

ii. *Accused Yasir Shah had made fire shot at the right lumber region of the deceased Wajih ul Hassan, which is on vital part of the body therefore, he is also convicted under section 302(b) P.P.C. for committing qalt-e-ammad of deceased Wajih ul Hassan Shah and awarded death penalty he will be hang (sic) till death he is also liable to pay compensation of Rs, 10 lack (sic) under Section 544-A Cr.P.C. to the legal heirs of deceased and in case of failure to undergo simple imprisonment of 4 months.*

iii. *Accused Shahbaz Shah is convicted under section 302(b) PPC for committing qalte Amad of deceased Wajih Ul Hassan Shah, however due to existence of mitigating circumstances that the fire shot made by him was not on vital part of body of deceased therefore, he is convicted to undergo imprisonment for life as Taazir, in order to meet*

the ends of Justice. He is also burdened with compensation of Rs, 10 lack (sic) under Section 544-A Cr.P.C. to the legal heirs of deceased and in case of failure to undergo simple imprisonment of 4 months.

02. As regards the appellant, namely Ahsan, the learned trial Court went on to hold as follows:-

"While to the extent of accuse Ahsan, he was nominated with the role of simple lalkara at the place of occurrence, since his lalkara was not commanding in nature as his position was not to influence the rest of accused persons, and nothing was recovered at his instance and he himself surrender himself for investigation and investigation officer in his finding declared him innocent, while complainant during cross examination had not mentioned name o accused Ahsan along with the rest of accused persons, when he was answering question in cross examination with regard to direction of arrival of accused person on place of occurrence, therefore, a doubt is created to the extent of involvement of accused Ahsan in the offence. Therefore he is acquitted from the charge and his bail bonds are discharged"

03. Challenging the convictions and sentences, Nasir Shabbir and Shahbaz Haider Shah have filed Criminal Appeals Nos.44 of 2019 and 48 of 2019 plus Jail Appeals Nos.47 of 2019 and 54 of 2019, respectively, whereas Yasir Ali Shah has filed Criminal Appeal No.64 of 2019. The learned trial Court has sent Reference in terms of Section 374 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "Cr.P.C."), which has been numbered as Murder Reference No.02 of 2019 for confirmation or otherwise of the death sentences awarded to the appellants namely Nasir Shabbir and Yasir Ali Shah (appellants/convicts). Since all these matters emanate from and relate to the impugned judgment,

and since they are interconnected in nature, hence they are being disposed of through this single judgment.

FACTUAL BACKGROUND:-

04. The facts in brief, necessary for the disposal of the above mentioned appeals are that on the basis of the complaint (Exh.PB) submitted by the complainant, namely Syed Javed ul Hassan Shah (PW-8), F.I.R. No.160/15 dated 10.06.2015 (Exh.PB/1) was registered in respect of offences under Sections 302, 109 and 34 of P.P.C. at Police Station Sihala, Islamabad. PW-8, Syed Javed ul Hassan Shah got recorded his statement to the effect that on 09.06.2015 at about 10:16 p.m. he along with his paternal nephew Syed Wajih ul Hassan Shah (hereafter referred to as the "deceased"), Syed Ashjar Hussain Shah s/o Gulzar Hussain Shah, and Syed Naeem Hussain Shah s/o Syed Akhtar Hussain Shah went to the DHA Phase-II, Islamabad which is adjacent to their village for a routine walk; that when they reached at street No.06, Sector-A of DHA Phase-II, the street light was alighting and in the meanwhile Shahbaz Shah and Yasir Shah both sons of Asghar Hussain Shah, who are maternal cousins of the complainant and Nasir Shabbir and Ahsan son of Khalid Lahori resident of their village emerged there; that Ahsan raised a *lalkara* that today kill the deceased and teach a lesson to Masood Shah for his advocacy; that Shahbaz Shah fired a pistol shot which hit the deceased's right arm elbow; Yasir Shah fired upon the deceased which landed at the right lumber region of the deceased's body; that Nasir Shabbir made repeated fire shots which landed at the deceased's head at the right side; that the deceased on sustaining fatal injuries, fell down and succumbed to the injuries while shifting him to the hospital; that after the occurrence, the accused made their escape good. The motive as alleged is that the complainant's elder brother namely

Syed Masood ul Hassan, who is an advocate by profession, was providing legal assistance to his in laws i.e. sons of Syed Gulzar Hussain Shah (late) (maternal uncle of the complainant) regarding a dispute pertaining to land, hence the F.I.R.

05. The criminal law was set into motion on the written application (Exh.PB) presented by PW-8 before Gulfaraz, S.I. (PW-10), upon which formal FIR (Exh.PB) was chalked out by Tanveer Hussain Kiyani, PW-03. PW-10 conducted the investigation and after inspecting the dead body of the deceased prepared the inquest report (Exh.P.A/2). The said PW also moved an application for postmortem (Exh.PQ) and handed over the same to the Duty Officer Doctor of Polyclinic Hospital, Islamabad. He also made an application for placement of the dead body of the deceased in the mortuary (Exh.PR). The said PW visited the place of occurrence with other PWs and prepared un-scaled site plan (Exh.PS). He collected blood stained soil from the place of occurrence through cotton and prepared sealed parcel thereof and took the same into possession through recovery memo (Exh.P15/1-4). The said PW conducted the entire investigation.

06. The prosecution in order to bring home the guilt of the appellants produced 10 witnesses in entirety including the complainant, Syed Wajid ul Hassan Shah (PW-8) and Syed Naeem ul Hassan (PW-9), who are the eye witnesses of the occurrence. Gulfaraz SI (PW-10) is the Investigating officer, who investigated the case and Dr. Tanveer Afsar (PW-2) is the Medico Legal Officer, who on 10.06.2015 conducted the post mortem of the deceased and issued post mortem report along with pictorial diagram (Ex.PA). The said PW also signed the inquest report. Syed Ashjar Hussain Shah, who also

witnessed the occurrence, was given up by the prosecution on 06.10.2018 being unnecessary. Rest of the prosecution witnesses are, more or less formal in nature. After exhibiting the Forensic DNA and Reports of the Serologist and National Forensic Science Agency, the prosecution decided to close its evidence. On 04.01.2016, a charge under Sections 302, 109, and 34 P.P.C. was framed against the appellants to which they pleaded not guilty and claimed trial. After conclusion of the investigation, report under Section 173 Cr.P.C. was submitted and compliance with the provisions of Section 265-C Cr.P.C. was shown. On conclusion of the prosecution evidence, the learned trial Court examined the appellants under Section 342 Cr.P.C., whereby the entire prosecution evidence was put to them to which they denied the charges leveled against them and claimed trial. However, the appellants neither opted to appear under Section 340(2) Cr.P.C. in their own defence nor produced any witness to disprove the charges leveled against them. In reply to a question *"why the case has been registered against you and why the prosecution witness has deposed against you?* the appellants, replied in the following manner:-

Nasir Shabbir

"All the PWs are close relatives of the deceased Wajih ul Hassan / and have strong blood relationship with deceased as they are interested witness and have falsely deposed against me in connivance with police / I.O. of the case."

Shahbaz Haider Shah

"All the PWs are close relatives of the deceased Wajih ul Hassan / interested witnesses and had been falsely deposed against me in connivance with police / I.O. of the case"

Yasir Ali Shah

"All the PWs are close relatives of the deceased Wajih ul Hassan / interested witnesses and had been falsely deposed against me in connivance with police / I.O. of the case"

07. On conclusion of the trial, the appellants stood convicted and sentenced as detailed in paragraph-1 above of this judgment. Hence, these criminal appeals as well as Murder Reference.

08. Learned counsel appearing on behalf of the appellant, namely Nasir Shabbir, has contended that the learned trial Court erred while convicting the appellant on the basis of the evidence, which was not sufficient to inspire confidence; that despite the failure of the prosecution to prove its case against the appellant, the learned trial Court proceeded to convict the appellant without applying its judicial mind; that the sentence awarded by the leaned trial Court to the appellant is harsh; that the impugned judgment was passed by the learned trial Court against the facts as well as the law; that the impugned judgment is not sustainable in the eye of law; that the impugned judgment is the result of mis-reading and non-reading of the evidence; that the motive as alleged by the prosecution has not been proved; that the learned trial Court erred in not appreciating that the prosecution's witnesses were interested witnesses; that the learned trial Court also failed to appreciate that which of the vehicle was used in transportation of the deceased to the hospital; that the prosecution has also not proved the fact as to who took the deceased to the hospital; that the so-called recovery witnesses were chance witnesses and the benefit of the doubt must be extended to the appellant; the prosecution witnesses are interested witnesses; that the statements of the PWs are replete with material contradictions; that the learned trial Court also not appreciated the fact that the place of recovery of alleged weapon is two different places as per the PWs' own stance; that the learned trial Court failed to appreciate that the IO admitted during cross-examination that he had started

the investigation before the registration of the FIR; that the learned trial Court further failed to take into account the fact that the particulars of the vehicle in which the deceased was shifted to hospital were not given by the prosecution. that there exists discrepancies between the ocular account and the medical evidence; that the learned trial Court did not take into consideration the principle regarding the admissibility of the confession in police custody, concluded the learned counsel for the appellant. Learned counsel prayed for the impugned judgment to be set aside.

09. Learned counsel appearing on behalf of the appellants, Yasir Ali Shah and Shahbaz Haider Shah, while adopting the arguments of the learned counsel for Nasir Shabbir, has contended that the appellant is innocent and has not committed the offence with which he has been charged; that the learned trial Court has erroneously convicted the appellants; that the impugned judgment is against the material available on the record as well as the applicable law; that the impugned judgment is the result of mis-reading and non-reading of the available record; that the appellant has falsely been roped in this case; that the impugned judgment is against the canons of safe administration of justice; that the prosecution has failed to bring home the guilt of the appellants by producing evidence inspiring confidence; that the learned trial Court has not applied its mind judiciously; that there are glaring contradictions in the PWs statements; that the medical evidence and the site plan do not support the prosecution's version; that the impugned judgment is not sustainable in the eye of law; that the impugned judgment suffers from gross illegality warranting for interference by this Court.

10. It was further contended that the appellants are innocent and have not committed the offence with which they have been charged; that the learned trial Court has erroneously convicted the appellants; that the medical evidence is in conflict with the ocular account; that the impugned judgment suffers from gross illegality warranting for interference by this Court, concluded the learned counsel for the appellants. Learned counsel prayed for the impugned judgment to be set aside.

11. On the other hand, learned counsel appearing for the complainant assisted by the learned State counsel while whole heartedly supporting the impugned judgment has vehemently controverted the contentions of the learned counsel for the appellants by contending that the appellants have nominated in the crime report with specific roles; that the PWs' testimonies remained unshaken during the cross-examination; that the defense had failed to extract something beneficial from them during the cross-examination; that the learned trial Court has appreciated the evidence in its true perspective; that the medical evidence produced by the prosecution fully supports the ocular account; that despite a lengthy cross-examination, the depositions of the PWs remained steadfast; that the motive as set forth by the prosecution has been proved beyond any shadow of the doubt; that the appellants jointly and severally committed the murder of the deceased; that the impugned judgment is based on sound reasons and thus does not call for any interference by this Court; that the sentences awarded to the appellants by the learned trial Court commensurate with the gravity of the offence; that the learned trial Court applied its judicial mind while convicting the appellants; that the impugned judgment does not suffer from any material illegality warranting interference, concluded the learned counsel for

the complainant. Learned counsel for the complainant as well as learned State counsel prayed for the appeals to be dismissed.

12. We have heard the arguments advanced at the bar and have perused the available record with the valuable assistance of the learned counsel for the parties.

13. As mentioned above, the complainant, Shaukat Ali (PW-8) is the eye witness, who furnished the ocular account in this case to the effect that on the fateful day i.e. 09.05.2015 at about 10:15 p.m. he along with the deceased as well as Syed Ashjar Hussain Shah s/o Gulzar Hussain Shah and Syed Naeem Hussain Shah s/o Syed Akhtar Hussain Shah were on routine walk within the precincts of DHA Phase-II and when reached at Street No.06, Sector-A of DHA Phase-II at about 10:45 p.m. one of the appellants namely Ahsan (since acquitted) raised a *lalkara* to teach a lesson to Masood Shah for his advocacy by killing his son (the deceased). The appellant Shahbaz Shah fired a shot from his pistol which hit the deceased at his right arm elbow. Likewise, it is alleged that Yasir Shah also opened fire at the deceased which hit the deceased at his lumber region of the body. Similarly, the deceased was also fired upon repeatedly by the appellant, namely Nasir Shabbir, which hit the right side of the deceased's head. It's the prosecution stance that the appellant Nasir Shabbir had made repeated fires. Now a question arises that it was only the deceased, who had sustained injuries in the incident and not a single PW/referred persons, despite them being in close proximity with the deceased, had sustained a single injury. It does not appeal to a prudent mind that in the course of consecutive/indiscriminate firing as alleged by the prosecution on the deceased who was being accompanied by

the PWs, it was only the deceased, who sustained fatal injuries and not a single scratch/ minor injury was witnessed on the persons of the accompanying persons.

14. Likewise, the complainant PW-8 had mentioned in his cross-examination that prior to the incident in question, an altercation had taken place on 06.06.2015 between the appellants, Shahbaz Shah and Nasir Shabbir and the deceased and that he had not informed the police. The relevant portion of his deposition reads as follows:-

> *"…it is correct that* ***I have mentioned in my complaint that three days earlier on 06.06.2015 at about 06:00 p.m. outside our house during the Urs Mela Shahbaz Shah and Nasir had a quarrel with Wajih ul Hassan Shah in front of me.*** *On 06.06.2015, Wajih ul Hassan Shah had not informed me the reason of his quarrel with Shahbaz Shah accused and Nasir Shabbir……****when quarrel took place between Shahbaz Shah and Nasir Shabbir and Wajih ul Hassan deceased I had just intervened and settled the matter and therefore no application was filed in the Police Station against Nasir, Shahbaz Shah and Yasir Shah."***
> ***(Emphasis supplied)***

15. He further goes on to say that ***"Zubair Shah had informed me about the abetments of accused persons that they will commit murder of deceased after the occurrence, therefore, I had not informed the police about their abetment before the occurrence".*** Now, the deposition of the said PW is not free from doubt since on the one hand he himself admits that he knew the fact that the deceased will be done to death by the appellants but despite him knowing well the said fact regarding abetment, he chose not to report the matter to the local police. Had he (PW-8) reported the matter to the local police well in time i.e. on 06.06.2015, the appellants could not have been able to have taken an extreme step and could not have been able to be

successful in achieving their extraneous and ulterior motive of killing the deceased, to say the least.

(Emphasis supplied)

16. Undeniably the substratum of the prosecution's entire case is based on the statement of the complainant and it is the complainant on whose statement the law is pressed into service. And if there appears to be improvements and/or discrepancies in the statement of the complainant then the entire edifice of the prosecution's case disappears. The complainant in this case has deposed that *"the occurrence was registered on my complaint. I have not reported the occurrence on the time mentioned as 02.15 a.m. in the FIR dated 10.06.2015, but I have lodged my complaint at about 01:00/01:30 a.m. I had not informed the police but I do not know any other relative had informed them at the day of occurrence at the place of occurrence. I along with Ashjar Hussain Shah, Naeem ul Hassan Shah had not made any call to the Police Station from our mobile to inform about the occurrence from 10:45 p.m. till 02:15 a.m. dated 10.06.2015. Since I was in trouble having the dead body of my young nephew in my hand I was not in position to contact the police on the mobile for the occurrence from the place of occurrence."*

17. Now the question that arises is that who had informed the police as to the occurrence. There is nothing on the record to show as to who had in fact informed the police qua the occurrence. Likewise, PW-9 had also admitted that *"I do not know who had informed the police about the occurrence"*. He further goes on to say that ***"we shifted the deceased instantly after the occurrence in the vehicle. The vehicle was brought by my cousin Hassan Shah. The vehicle has a registration No.RLD55".*** He further admits that ***"I had not mentioned in my statement before the court in examination in chief that the vehicle No.RLD55 was***

brought by Hassan Shah and the deceased was shifted on it". Moreover, the complainant admits that the occurrence took place with 4 to 5 seconds and immediately after the occurrence, the deceased was shifted to hospital in the vehicle brought by Hassan Shah.

18. He further deposed that *"we had not called anyone when we were shifting Wajih Shah in the vehicle".* Now the question which begs an answer is that who had informed Hassan Shah to bring vehicle so that the deceased could be shifted to hospital. The said vehicle which was used in the transportation of the deceased to the hospital had not been taken into possession by the I.O. The I.O. during the course of cross-examination admitted that ***"I had not recorded the statement of Hassan Shah driver of vehicle u/s 161 Cr.P.C. I had also not taken the vehicle on which the deceased was shifted to the hospital in possession.*** *I had not taken the blood stained seat of the vehicle into possession since it is not related to my investigation".*

(Emphasis supplied)

19. It may not be out of context to mention that the said vehicle must have some signs of blood since the blood was oozing. The complainant/PW-8 admitted during the course of cross-examination that *"I was in trouble having the dead body of my young nephew in my hand"* and that *"the last worn clothes of the deceased were stained with blood. I had not handed over my clothes which I was wearing at the day of occurrence to the I.O."* Admittedly, the clothes of the deceased were blood stained but simultaneously clothes of the complainant having been stained with blood too cannot be ruled out since he was holding the deceased, but the I.O. did not take into possession the clothes of the complainant, which too was blood stained. This fact may well be ascertained from the following admission of PW-8:-

> *"We had not called any one when we were shifting Wajih Shah to the hospital.* ***We had left DHA along the deceased Wajih Shah within five minutes after the occurrence.*** *It is correct that within two minutes from the village Hassan Shah driver of the vehicle brought the vehicle at the place of occurrence to the hospital.* ***We had taken Wajih ul Hassan to DHQ Rawalpindi where police official was standing there and asked us about our blood stained clothes and we informed him about the occurrence."***
> ***(Emphasis supplied)***

20. Perusal of the record further reflects that Street No.6, Sector-A of DHA Phase-II is the place of occurrence where the occurrence is alleged to have taken place since according to PW-8/complainant own stance that *"at about 10:45 p.m. when we reached at street No.06 Sector-A of DHA Phase-II street light was alighted. In the meanwhile Shahbaz shah accused and Yasir Shah accused both sons of Asghar Shah and they were my maternal cousin, Nasir Shabbir accused son of Shabbir and Ahsan accused son of Khalid Lahori resident of our village came there Ahsan raised a lalkara that today kill Wajih Shah and teach the lesson to Masood shah for his advocacy".* Now the improvements that were made by the complainant with respect to the distance between the place of occurrence and his house/village may well be gauged from his following depositions:-

> *"**The distance between my house and DHA Phase-II is about 500 to 600 meters. There is a boundary wall around DHA Phase-II**....the distance between DHA boundary wall and the place of occurrence is about 100 meters..... The distance between my village and place of occurrence is 100 to 120 meters."*
> ***(Emphasis supplied)***

21. The said PW also improved his statement by deposing during the cross-examination that *"the occurrence was taken within 04 to 05 seconds, therefore at that time we were holding*

the deceased and could not get engaged to capture the pictures of the accused persons". PW-9 in his cross-examination has also admitted that *"we could not get hold of the accused persons since the occurrence was instantly occurred and it has finished within 04/05 seconds"* Now a doubt is created in that how does it appeal to a prudent mind that how it is possible that when an occurrence takes place within **04 to 05 seconds** and the witnesses in spur of the moment recognize and attribute specific roles to the assailants. It is the complainant's version that within two minutes, Hassan Shah brought the vehicle. According to the complainant's own stance, the place of occurrence is at a distance of around 500 to 600 meters and Hassan Shah had brought the vehicle within two minutes. PW-8 admits that he along with the other eye witnesses had not informed any of his relatives about the occurrence and that Hassan Shah had brought the vehicle within two minutes. Now the question that arises is that what necessitated Hassan Shah to bring along with himself the vehicle within two minutes when he did not know that it was indeed the deceased who had been fired upon given the fact that no one had informed him since within a short span of time i.e. within 05 minutes the deceased was removed to hospital from the place of occurrence. All these aspects of the matter are candid enough to cast a shadow of doubt but have escaped notice of the learned trial Court.

WITHHOLDING OF BEST EVIDENCE.

22. Similarly, the marginal witness namely, Hassan Shah had played a vital role by bringing the vehicle and shifting the deceased to the hospital, but the said Hassan Shah has not been produced at the trial as a witness so as to strengthen the prosecution's case. Neither did the prosecution take the vehicle which was used during the transportation of the deceased to hospital into possession nor did it produce its

driver i.e. Hassan Shah for the reasons best known to it. Moreover, the Moharar who had informed the I.O. as to the occurrence was also one of the marginal witnesses of the prosecution, but the said witness was also not produced at the trial. The statement of the said Moharar was important inasmuch as it was in fact he was who had informed the I.O. *qua* the occurrence. The record is completely silent as to the informer of the incident. It is astonishing to observe that the I.O. had categorically admitted that although he had been informed by the Moharar as to the occurrence, but he did not know the name of the Moharar. The prosecution withheld the best evidence i.e. in the shape of Hassan Shah and Moharar as well as the vehicle used in the transportation of the deceased to the hospital and thus it miserably failed to prove the chain of the ocular account. All these factors cast a serious doubt on the prosecution's story. The learned trial Court erred by not appreciating these loopholes and discrepancies in the prosecution's version.

23. It is apparent from the record that the occurrence took place at about 10:45 pm. on 09.06.2015 and the deceased was first taken to DHQ Hospital Rawalpindi and the complainant party remained present in the said hospital till 11:35 p.m. and after 11:35 p.m. the complainant took the deceased to Polyclinic Hospital. The record is absolutely silent as to how the I.O. came to know that the deceased had been shifted to Polyclinic Hospital from DHQ Hospital Rawalpindi. Moreso, it is also not known as to what had prompted the complainant to shift the deceased from DHQ Hospital to Policlinic Hospital Islamabad.

24. Apart from the above, Hassan Shah and Moharar were the best evidence of the prosecution but the prosecution deliberately chose not to examine the said persons for the

reasons best known to it. It is settled law that when the best evidence is intentionally withheld, an adverse presumption/inference ensues that if it was produced it would be against the person withholding it in terms of Article 129(g) of the Qanoon-e-Shahadat Order 1984. The sake of brevity, the said Article is reproduced herein below:-

> *"129. Court may presume existence of certain facts: The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
> ***(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it"***
> ***(Emphasis supplied)***

25. In the wake of the given scenario, abandoning of the aforementioned persons obviously leads to an adverse inference in terms of Article 129(g) of the Qanun-e-Shahadat 1984 Order that had they been produced in the witness box, they might have not supported the prosecution case. We may observe here that if any party withholds the best evidence, then it can safely be inferred that such a party has some sinister motive behind such withholding. Reliance may be placed on the law laid down in the case titled **"Lal Khan v. The State" (2006 SCMR 1846), wherein it has been held as follows:-**

> ***"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"***
> ***(Emphasis supplied)***

26. Similarly, in the case tilted "**Muhammad Rafiq and others v. The State**" **(2010 SCMR 385), it was held as follows:-**

> ***"It is well-settled that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it"***
> ***(Emphasis supplied)***

INFORMATION OF OCCURRENCE:-

27. PW-10 who is the investigating officer deposed during the cross-examination that *"I had carried out the whole investigation of the case. …when I received the information I was present at the Police Station. Moharar had informed me about the occurrence. I had not recorded the statement of the Moharar u/s 161 Cr.P.C. regarding the information of occurrence. Moharar had informed me that he received an information that a murder of one person has been committed and to reach at the place of occurrence I had not inquired about the person who had given the information to the Moharar about the occurrence." It is correct that whenever an information is received regarding any commission of any offence / occurrence through any person or 15 or an application we reduce into writing the particulars of that person who had given the information. I do not remember the name of the Moharar who had given me the information. I had not recorded the statement of the first informer who informed the Moharar.* At this juncture, it goes without saying that the Investigating Officers are under a legal obligation to investigate the case from every angle so that the authenticity of the information could be ascertained. If the Investigating Officers do not adhere to the law laid down by the superior courts by conducting a proper investigation in cases, then the partial/improper investigation conducted by them is nothing but deserves to be discarded.

TIME OF THE INFORMATION:-

28. The I.O. further improved his statement that *"the Moharar had informed me that a murder was committed at Shahan Gurha Islamabad again said DHA".* PW-10 during the course of cross-examination had deposed at the first instance that ***"Moharar had informed me about the occurrence at about 12:00/12:15 am (nigh)"*** *but while improving his position, he deposed that* ***"I do not remember, when I received the information regarding the occurrence263.*** *It is correct that when any information of occurrence is received it has to be entered into roznamcha.* ***I had not annexed copy of roznamcha along with the challan.*** *I along with constable Tahir 5519/C, Naveed Hussain 7672/L.H.C. Asad Enayat 3509/C went to the hospital.* ***I had mentioned in the roznamcha that I along with the above referred police official were proceeding to the hospital. I had also not annexed copy of roznamcha of our departure along with the challan"***

(Emphasis supplied)

PRESENCE OF SECURITY GUARD:-

29. PW-08/complainant during the course of cross-examination had deposed that ***"there is security guard appointed at every gate of DHA Housing Society".*** Likewise the I.O., PW-10 admitted that *"....there is security system at the gates of DHA during the days of occurrence.* ***No security guard appointed at the gates of DHA recorded any statement with regard to the occurrence*** *or involvement of the accused persons in the occurrence."* The stance of the said PWs stood negated by PW-9, who is also the eye witness of the occurrence in terms that:-

"There is no security guard appointed at the gate of DHA Society from where we entered to it"
(Emphasis supplied)

30. Furthermore, PW-9 falsified himself by deposing that:-

"There are 04/05 gates of DHA Society which are facing towards GT Road. ***We left DHA Society along with the deceased Wajih ul Hassan from gate No.01. It is correct that gate No.1 is meant for the vehicle and there guards were also deputed. The guards deputed at the gate had not stopped us when we were taking Wajih ul Hassan with us since we are residents of the village and they recognize our vehicle. We after having our dinner went for walk"***
(Emphasis supplied)

31. Another discrepancy which occurs in the statements of PW-08 and PW-09 is that PW-8 deposed that he along with the deceased and PW-9 had went to DHA Phase-I for walk and that the said place is near to their house at a distance of around 500/600 meters but from the statement of PW-9, it appears that the complainant and the deceased were in the vehicle as is evident from PW-9's own stance that "***the guards deputed at the gate had not stopped us when we were taking Wajih ul Hassan with us since we are residents of the village and they recognize our vehicle".***
(Emphasis supplied)

32. From the perusal of PW-9's statement, it is also evident that the complainant party had already vehicle in which they proceeded for walk since PW-9 admits that ***"the guards deputed at the gate had not stopped us when we were taking Wajih ul Hassan with us since we are residents of the village and they recognize our vehicle. We after having our dinner went for walk"***
(Emphasis supplied)

33. The said PW further went on to depose that *"the deceased Wajih ul Hassan was laying on the footpath"*

however, he was confronted with his statement recorded under Section 161 Cr.P.C., wherein he had categorically stated that *"I had not mentioned in my statement that Wajih ul Hassan deceased had fell on the foothpath".* There are numerous discrepancies and improvements in the statements of the prosecution witnesses, which cast reasonable doubt on the story of the prosecution the benefit whereof must be extended in favour of the appellants. PW-9 furher admitted that his clothes were also blood stained, but the I.O./PW-10 had not taken the clothes of the said PW as well as of PW-8 for the reasons best known to the I.O.

34. Since the prosecution evidence is doubtful in nature, therefore, there is no need to discuss the same which are exculpatory in nature. In the instant case, the prosecution remained failed to discharge its responsibility of proving the guilt of the appellants. It is also well settled that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of the doubt to the accused, whereas, the instant case is replete with a number of circumstances which have created serious doubt about the prosecution story. Reliance in this regard may be placed on the case law titled as "**Muhammad Akram v. The State" (2009 SCMR 230)**, wherein it was held as follows:-

> ***"The nutshell of the whole discussion is that the prosecution case is not free from doubt. 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.”
(Emphasis supplied)

35. Reliance in this regard may be placed on the law laid down in the case titled **Muhammad Akram v. The State" (2009 SCMR 230),** wherein it was held as follows:-

> *“The nutshell of the whole discussion is that **the prosecution case is not free from doubt. 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**”*
> ***(Emphasis supplied)***

36. Law with respect to the said fact has also been laid down in the case titled **Tariq Pervez v. The State 1995 SCMR 1345**, wherein it was held has follows:-

> *“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**”*
> **(Emphasis Supplied).**

37. It has been held time and again by the superior Courts that a slightest doubt if occurs in the prosecution case is sufficient enough to grant acquittal to an accused person. For giving the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused makes him/her entitled to its benefit, not as a matter of grace or concession, but as a matter of right. Law to this effect has also be laid down in the judgments reported as **2009 SCMR 230, 2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 PCr.LJ 376, 1994 PLD Peshawar**

114, 2012 PLD Peshawar 01, 1999 PCr.LJ 1087, 1997 SCMR 449, 2011 SCMR 820 and 2006 PCr.LJ SC 1002.

38. Moreover, it is well settled by the Hon'ble Apex Court that in case of doubt, its benefit must go to the accused not as a matter of grace, but of right. Reliance is placed upon case titled as **"Tariq Pervez v. The State" (1995 SCMR 1345), "Ayub Masih v. The State" (PLD 2002 SC 1048), "Muhammad Akram v. The State" (2009 SCMR 230), "Khalid Mehmood and others v. The State" (2011 SCMR 664), "Arshad Khan v. The State" (2017 SCMR 564), "Muhammad Mansha v. The State" (2018 SCMR 772), "Asia Bibi v. The State and others" (PLD 2019 SC 64), "Muhammad Ashraf alias Acchu v. The State" (2019 SCMR 652), "Najaf Ali Shah v. The State" (2021 SCMR 736).**

39. It is a well settled principle of law that the prosecution is obliged to prove its case against the accused person beyond any shadow of the doubt and in the event, the prosecution fails to discharge its responsibility by proving the case against the accused persons then the accused persons are entitled to get benefit of the doubt. 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. Moreover, it is also one of the golden principles of law that the Court should let off hundred guilty persons but should not convict one innocent person. Guidance in this respect may be sought from the case titled **"Ayub Masih v. The State" (PLD 2002 SC 1048),** whereby the Hon'ble Apex Court has held as follows:-

> *"----**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 Ahmed" (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 (P.B.U.H) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".
(Emphasis supplied)

40. After considering all the pros and cons of this case, this Court comes to an irresistible conclusion that the prosecution could not prove its case against the appellant beyond any shadow of the doubt. It is by now well established principle of the law that it is the prosecution, which has to prove its case against the accused by standing on its own legs and it cannot take any benefit from the weaknesses of the case of the defence.

41. For what has been discussed above, we **ALLOW** the appeals filed by the appellants and consequently modify the impugned judgment dated 22.02.2019 passed by the Court of the learned Additional Sessions Judge-East, Islamabad in terms that the death sentences awarded to the appellants namely Nasir Shabbir and Yasir Ali Shah are controverted into life imprisonment. Rest of the sentences awarded to the said appellants shall remain intact, whereas Crl. Appeal No. 91/2019 & Crl. Revision 48/2019 are **dismissed**. Since the record reflects that the appellant namely Shahbaz Haider

Shah is handicapped as PW-9 during cross-examination deposed that ***"it is correct that in the year 2007 accused shahbaz Haider Shah had received electric shock"*** *and since* the prosecution also remained un-successful to bring evidence inspiring confidence with respect to the guilt of the said appellant, therefore, to his extent, the impugned judgment is **SET-ASIDE** and he be released forthwith if not required to be detained in connection with some other case. With this modification, all the appeals filed by the appellants are allowed. Resultantly, Murder Reference No.02/2019 sent by the leaned trial Court is answered in the **NEGATIVE.** Appeals succeed.

(CHIEF JUSTICE) **(ARBAB MUHAMMAD TAHIR)**
JUDGE

Announced in an open Court on _____.11.2022

JUDGE **JUDGE**

//Kamran//