Form No: HCJD/C-121.

# ***JUDGEMENT SHEET***

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Jail Appeal No. 368 of 2022

Shoaib Ishtiaq
***VS***
The State, etc.

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| **APPELLANT BY:** | Mirza Umar Asadullah, Advocate |
| **Complainant BY:** | Syed Muhammad Tayyab Shah, Advocate |
| **State By:** | Makhdoom Syed Fakhar Imam Ali Shah, State Counsel.<br>Mr. Naveed, S.I. |
| **DATE OF HEARING:** | 19-09-2023. |

***BABAR SATTAR, J.-*** Through this judgment we will decide ***(i) Jail Appeal No. 368/2022*** *(Shoaib Ishtiaq Vs. The State)* filed by Shoaib Ishtiaq son of Ishtiaq Ahmed against the judgment dated 20.10.2022, whereby he has been convicted for an offence under section 302(b) of Pakistan Penal Code, 1860 **("PPC")** as Ta'zir and sentenced to death while being required to pay compensation in the amount of Rs.200,000/- under section 544-A of the Code of Criminal Procedure, 1898 (**Cr.PC)**, to the legal heirs of Talib Hussain deceased, and convicted under section 449 of PPC and punished with rigorous imprisonment for five years and also required to pay fine in the amount of Rs.25,000/-, pursuant to FIR No. 220/2017 dated 24.08.2017 at Police

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Station Lohi Bher, Islamabad, and ***(ii) Murder Reference No. 11/2022,*** whereby the judgment of the Additional Sessions Judge, East-Islamabad dated 20.10.2022, through which he has found Shoaib Ishtiaq son of Ishtiaq Ahmed guilty for an offence under section 302(b) of PPC and sentenced him to death, has been referred to us under section 374 of Cr.PC for confirmation of death sentence.

2. The prosecution's story is that Shoaib Ishtiaq entered the house of Talib Hussain on 23.08.2017 at 11.00 pm. Talib Hussian was sitting in his TV lounge in his house in Bahria Town Islamabad along with his brother Khalid Mehmood Mirza (complainant and PW-1), his wife Mukhtar Begum, his daughter Sadaf Ambreen (PW-2) and his cousin Sadia Nisar. The family was chatting away when Shoaib Ishtiaq, nephew of the deceased's wife (i.e. Mukhtar Begum's brother's son) entered the room without knocking. He asked Talib Hussain whether he would allow Shoaib Ishtiaq to marry his daughter, Sadaf Ambreen. The deceased admonished Shoaib Ishtiaq for proposing in such fashion. Shoaib Ishtiaq pulled out a pistol. The deceased attempted to walk towards his room but was shot in the back. He fell down and died. The incident was witnessed by the deceased's brother, his wife, his daughter and his cousin, who could not apprehend Shoaib Ishtiaq, as they were in shock and also because the Shoaib Ishtiaq had a weapon. Shoaib Ishtiaq then fled away. The police was informed by an unidentified third person. Mr. Shaukat Hussain, Inspector (I.O and PW-10) accompanied by

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Nasir Manzoor, ASI, Qaiser Mehmood (PW-4), Muhammad Farooq and Javed Iqbal (PW-8) reached the deceased's house around 11.30 pm. The body of Talib Hussain was dispatched to the hospital in a private vehicle and the deceased was declared dead on arrival at Pakistan Institute of Medical Science **("PIMS")**. The postmortem was conducted the next day around noon. Shaukat Hussain, Inspector (PW-10) along with other police officials collected one empty cartridge case and blood with cotton from the place of occurrence. A sealed parcel containing the empty cartridge case was delivered to National Forensic Science Agency **("NFSA")** on 28.08.2017 and the bloodstained cotton was delivered to Punjab Forensic Science Agency at Lahore on 29.08.2017. Shoaib Ishtiaq was arrested on 29.08.2017, who led to the recovery of a pistol on 07.09.2017, which was delivered to NFSA for forensic examination on 13.09.2017. The forensic report dated 20.10.2017 (Ex-PO) concluded that the empty recovered from the place of occurrence had been fired from the pistol the recovery of which was attributed to Shoaib Ishtiaq. The postmortem report dated 15.08.2017 (Ex-PG) mentioned that there was an entry wound caused by the bullet on the back of the deceased and an exit wound created at the front. The gun shot ruptured multiple organs, which caused excessive bleeding and the death of the deceased.

3. The testimonies by the ten prosecution witnesses have been adequately summarized by the trial court and need not be recapitulated. After appreciating the evidence and

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hearing the learned counsel for parties, the trial court found the ocular account of PW-1, Khalid Mehmood, (brother of the deceased) and PW-2, Sadaf Ambreen, (daughter of the deceased) to be consistent and reliable. It found that Sadaf Ambreen (PW-2) is a natural witness being the resident of the house. And there was nothing exceptional about PW-1, Khalid Mehmood, being at the residence of his brother at 11.00 pm, as he lived 5-6 km away and frequently visited his brother's house after work (who was a retried man and stayed largely at home). The trial court noted that the evidence reflected that tube lights were switched on at the time of the incident. And as Shoaib Ishtiaq, the nephew of the deceased's wife, was a relative of the deceased and first cousin of PW-2, Sadaf Ambreen, the question of misidentification did not arise. The trial court appreciated the medical evidence and concluded that the postmortem report and the cause of death was consistent with the testimonies of PW-1 and PW-2 and also noted the fact that the postmortem was not carried out in the early hours on 24.08.2017 when the body of the deceased was brought to hospital, and was instead carried out around noon on 24.08.2017, was consistent with the practice in vogue in Pakistan where postmortems were not carried out in the night. The trial court found that the manner in which the recovery of empty cartridge and the pistol were affected and the manner in which the recovered items were transmitted to the NFSA did not create any doubt with regard to safe transmission. The trial court took into account the fact that Shoaib Ishtiaq had claimed in his section 342 statement that

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he had been promised the hand of Sadaf Ambreen and was being framed to exclude him from the picture by implicating him in the murder of the deceased, as he suffered from medical condition that was causing blindness. But Sadaf Ambreen (PW-2) testified that she was neither engaged to Shoaib Ishtiaq nor had such proposal been agreed to by her father and she was also unaware of Shoaib Ishtiaq's weak eyesight. The trial court further held that it was for the accused to establish that he suffered from blindness and could not have shot the deceased as he had taken such plea. He, however, had not produced reliable evidence in such regard and failed to prove such plea. In these circumstances, the trial court convicted Shoaib Ishtiaq under sections 302(b) and 449 of PPC.

4. Learned counsel for the appellant, Shoaib Ishtiaq, submitted that the appellant had been framed by the family of the deceased as he was suffering from a disease that caused night blindness and in order to get rid of him, he was implicated in a murder committed by some unknown assailant. He submitted that the prosecution's account of sending the deceased's body to the hospital did not match Ex-DB, which was a ticket issued by PIMS. Further, there were two tickets issued on the night of 23.08.2017. The first ticket (Ex-DC) was issued at 12.15 am and reflected that the body of the deceased was brought in dead. And the second ticket (Ex-DB) was issued at 02.35 am which also stated that the body of the deceased was brought in dead. He submitted that

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there was no logical basis to explain why the postmortem was not carried out immediately and was carried out after a delay of almost 12 hours. He submitted that there was no reason why Khalid Mehmood, PW-10 (brother of the deceased) was present at the place of occurrence (i.e. the house of the deceased) at 11.00 pm in the night. There was no explanation as to whether there was any light in the room to enable the identification of the appellant. In relation to motive, he submitted that the prosecution has failed to prove the same. The idea of the implicating Shoaib Ishtiaq was an afterthought once the deceased was found dead so that Sadaf Ambreen does not have to marry him as he was suffering from a blindness causing disease. He finally stated that Ex-DA and Ex-DB, if considered along with the evidence of Dr. Inayat Ullah Khan (DW-1), established that Shoaib Ishtiaq was suffering from a disease called bilateral advanced retinitis pigmentosa and in view of his blindness he could not have murdered the deceased. The learned counsel for the appellant relied on ***Muhammad Shaban Vs. The State*** ***(2023 YLR 926)*** for the proposition that when there was a delay in conducting postmortem it reflected that the eyewitnesses were not available at the place of occurrence and additional time was consumed to tailor the story, the benefit of which was to be extended to the accused. He relied on ***Muhammad Imran Vs. The State*** ***(2020 SCMR 857)*** for the proposition that where ocular account contained discrepancies, the benefit was to be given to the accused. He relied on ***Ibrar Hussain Vs. The State*** ***(2020 SCMR 1850)*** for the

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proposition that where source of light was suspect, the question arose with regard to proper identification of accused, the benefit of which was to be given to the accused. He relied on ***Muhammad Walayat Vs. The State (2022 YLR Note 185)*** where it was held that in face of mitigating factors death sentence was to be converted into life imprisonment.

5. Learned counsel for the complainant submitted that the accused was known to the complainant, Khalid Mehmood (PW-1) and Sadaf Ambreen (PW-2) given that he was a close relative. The place of occurrence was not disputed and neither was the fact that the deceased was murdered. Khalid Mehmood Mirza (PW-1) was not a resident of the house of the deceased but was his brother and lived 5/6 kilometers away and visited his brother in routine after closing his own real estate business, as was a norm in our society. His presence at the place of occurrence had been sufficiently explained. PW-2, Sadaf Ambreen, was a natural witness being the daughter of the deceased and present at the place of occurrence i.e. her home. Recovery of empty cartridge case and 30-bore pistol was duly recorded by recovery memos and the parcels were safely transmitted to NFSA and the forensic report established that there was a match. There was no enmity between the parties. The slight contradictions being pointed out with regard to the two tickets issued by PIMS was because the body of the deceased was transmitted to the hospital by Nasir Mehmood, ASI, after midnight, which is why the first ticket reflected the time of 12.14 am on 24.08.2017. Subsequently,

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Shaukat Hussain, Inspector (I.O) arrived at the hospital after conducting preliminary investigation at the place of occurrence and as a matter of routine a fresh ticket was issued to him. This explains why a second ticket was issued at 02.35 am and the address reflected on such ticket was that of Shaukat Hussain, P.S. Lohibher, Islamabad. He submitted that the two tickets did not create any doubt the benefit of which could be given to Shoaib Ishtiaq, as both of them reflected that the deceased had been brought in dead. He relied on the testimony of Shaukat Hussain (PW-10) as well as the noting on the complaint Ex-PA which reflected that the body of the deceased had been sent to the hospital earlier and the complaint was subsequently sent for registration of the FIR around 01.15 am on 24.08.2017. Thus the discrepancies being identified in the evidence had been sufficiently explained by Shaukat Hussain Inspector/I.O (PW-10) in his testimony. He highlighted the fact that the motive had been acknowledged by the convict himself by claiming that he was promised the hand of Sadaf Ambreen which claim had been denied by Sadaf Ambreen (PW-2). And Shoaib Ishtiaq led no evidence to prove his claim. The evidence thus reflected that there was difference of opinion between the convict and the family of the deceased with regard to the marriage of Sadaf Ambreen and the convict. Shoaib Ishtiaq had further failed to lead any evidence to establish his plea of partial blindness and his inability to murder someone due to weak eyesight. Learned counsel for the complainant relied on ***Allah Ditta Vs. The State (NLR 2002 Criminal 1)*** for the

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proposition that substitution of real culprit with an accused is a rare phenomenon in our criminal justice system. He relied on *Modi's Text Book of Medical jurisprudence* to argue that the instruction prevalent in Pakistan with regard to postmortem was that it is to be conducted in natural light. He relied on ***Waris Hussain Shah Vs. Abid Hussain Shah (2001 PCr.LJ 268)*** to argue that contradiction in the testimony of eyewitnesses meant negation of the prosecution's version, but mere discrepancies in relation to details of facts did not amount to a contradiction. He relied on ***Sher Muhammad Baloch Vs. The State (2008 SCMR 32)*** for the proposition that evidence was to be weighed with great care in cases of heinous crimes and technicalities were to be ignored. He relied on ***Khair Muhammad and another Vs. The State (PLJ 2007 SC 226)*** for the proposition that family relationship of the witnesses with the deceased was an insufficient basis to hold that the witnesses were interested or that their evidence ought to be discarded.

6. The learned State Counsel adopted the arguments of the learned counsel for the complainant. He submitted that Ex-PA sufficiently explained the sequence of events and the timing of arrival of the police party, the transmission of the body of the deceased to the hospital and the subsequent registration of the FIR. There was no inconsistency in the timeline. He submitted that Dr. Inayat Ullah Khan (DW-1), who testified for Shoaib Ishtiaq, did not attribute blindness to Shoaib Ishtiaq and in fact testified that Shoaib Ishtiaq had the

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"perception of light" (i.e. he was not blind). He submitted that the prosecution had proved its case beyond reasonable doubt.

7. The prosecution's case is based on the testimony of PW-1, Khalid Mehmood Mirza (brother of the deceased) and PW-2, Sadaf Ambreen (daughter of the deceased). PW-1, Khalid Mehmood, stated in his testimony that he arrived at the house of the deceased around 09.00 pm on 23.08.2017 after closing his real estate office. This was his routine as his brother was a retired Lieutenant Commander of Pakistan Navy who stayed largely at home and he frequently visited his brother in the evenings, as he lived 5/6 kilometers away from his brother's house. He has narrated how Shoaib Ishtiaq entered the house of his deceased's brother around 11.00 pm, whose doors were not locked. And after seeking the hand of Sadaf Ambreen in marriage and on being admonished, shot the deceased. A third person informed the police and the police arrived at the place of incidence around 11.30 pm. The body of the deceased was sent along with a police officer to the hospital. Subsequently the complaint (Ex-PA) was sent for registration of the FIR. PW-1, Khalid Mehmood, also arrived at the hospital and he was given back the body of the deceased for funeral on 24.08.2023 after postmortem. Khalid Mehmood (PW-1) was cross-examined at length. But such cross-examination produced no discrepancies or contradictions in his account. There is also nothing remarkable about the presence of Khalid Mehmood at the house of the deceased at 11.00 pm, who had arrived at 09.00 am and stayed on

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chatting with the deceased and other family members. A brother visiting another, having dinner and staying on to shoot the breeze is quite the norm in our society. The second eyewitness was Sadaf Ambreen PW-2 (daughter of the deceased). Her eyewitness account also matches the account reflected in the complaint/FIR as well as the account of Khalid Mehmood, PW-1. She testified that Shoaib Ishtiaq was her maternal cousin and her mother had good terms with her brothers and sisters. She had no knowledge of the weak eyesight of her cousin, Shoaib Ishtiaq. She narrated how Shoaib Ishtiaq sought her hand in marriage and was reproached by her deceased father, after which he became furious and fired at the deceased while he was walking away toward a room. The shot hit the deceased in the back and he then fell down. During cross-examination she explained how Khalid Mehmood (PW-1) frequented their house as he lived close by and visited them almost daily as her father had retired from Pakistan Navy and stayed mostly at home. During lengthy cross-examination, her account remained consistent. She stated that Shoaib Ishtiaq wished to marry her and she did not want to do so as he was not educated. The eyewitnesses account is corroborated by postmortem report (Ex-PG), which also reflects that the deceased was shot in the back and the bullet created an exit wound in the front portion of his body. The shot ruptured his organs and led to excessive bleedings causing death. Dr. Irshad Hussain, Medical Officer, PIMS appeared as PW-9 and testified that the deceased died due to firearm injury. The postmortem report

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mentioned that the entry wound had black marks and PW-9 testified that blackening is observed when a shot is fired from an approximate distance of 3 to 6 feet. Dr. Irshad Hussain (PW-9) was also subjected to cross-examination and he was able to explain his opinion as reflected in the postmortem report as well as in his examination-in-chief. The eyewitnesses account, postmortem report and the testimony of Dr. Irshad Hussain (PW-9) is consistent with the site-plan (Ex-PK) which reflected that the distance between the place where the deceased was shot and the place where Shoaib Ishtiaq stood was approximately around one step. The unscaled site plan which obviously was prepared on the basis of approximation in light of the testimony of eyewitnesses, did not state that Shoaib Ishtiaq shot the deceased from closer range and therefore the suggestion that there ought to have been charring around the wound as suggested by the defence has no basis in view of the eyewitnesses account as corroborated by the postmortem report and the testimony of Dr. Irshad Hussain, Medical Officer (PW-9).

8. Shaukat Hussain, I.O (PW-10) testified that he reached the place of occurrence at 11.30 pm and dispatched the body of the deceased to hospital along with Nasir Manzoor, ASI, on a private vehicle. He stated that he remained at the place of occurrence for about two hours. He also dispatched the complaint for registration of the FIR. He sent the body of the deceased to the hospital around 12.00 am. This timeline matches with the arrival of the body of the

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deceased at PIMS around 12.14 am and the details of the initial examination are also provided therein (Ex-DC). The defence counsel highlighted that the second ticket (Ex-DB) had also been issued by PIMS in relation to the deceased which reflected the time of 2.35 am. This document reflects the name of Shaukat Hussain (PW-10) at the base where address is to be mentioned and the explanation of PW-10 that this ticket was issued in routine as the I.O arrived at the hospital in relation to the postmortem of a deceased. The testimonies of the eyewitnesses as well as police officials reflected that the incident was reported almost immediately after 11.00 pm by someone who heard the gun shot. The police arrived at the place of occurrence around 11.30 pm and the body of the deceased was dispatched to the hospital around 12.00 am and was received at the hospital at 12.14 am. The complaint was dispatched to the police Station at 01.15 am and the FIR was accordingly registered at 1.35 am on 24.08.2017. In the facts and circumstances of the case, there was neither any delay in reporting the occurrence nor any significant delay in recording of the FIR. It is natural for eyewitnesses to be in shock and overcome by grief due to the death of a relative. The police after arriving at the place of occurrence would naturally be involved in procuring evidence to be used for prosecution of the matter. The focus of the defense on minor differences within timeline as reflected in the testimonies of the prosecution witnesses is of no avail to Shoabi Ishtiaq. First of all, there is no delay in reporting of the incident or in the registration of the FIR. And secondly,

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whether the body of the deceased was checked into PIMS at 12.14 am or after two hours could at best reflect on the efficiency of the police authorities investigating the matter but does not change the basic case of the prosecution that the deceased was shot dead by Shoaib Ishtiaq, who was positively identified by eyewitnesses and who fled the scene after shooting the deceased. The minor differences in timeline can therefore not be treated as contradictions. There is nothing contradictory in the eyewitnesses' testimonies about the identity of the culprit. Shoaib Ishtiaq is a first cousin of PW-2, Sadaf Ambreen, and a relative of PW-1, Khalid Mehmood. The site plan (Ex-PK) reflects that there were at least three tube lights that were switched on in the TV lounge at the relevant time. The source of light is thus sufficiently explained. And as Shoaib Ishtiaq was a close relative, the question of misidentification does not arise.

9. Learned counsel for the complainant argued that substitution of an accused, especially where there is a single accused, is an extremely rare phenomenon in our criminal justice paradigm. In ***Arshad Beg Vs The State (2017 SCMR 1727)*** the Supreme Court held that, "*this is a case of single accused and substitution in such cases is a rare phenomenon as normally kith and kin of the deceased (in this case real brothers) would not implicate an innocent person by letting off the real culprits. Therefore, we hold that both the witnesses of ocular account were present at the spot and had witnessed the occurrence."* The same was held in ***Khizar***

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***Hayat Vs. The State*** ***(2011 SCMR 429)***. Likewise, in ***Subedar (Retd.) Abdul Majeed Vs. Mulazim Hussain Shah*** ***(2010 SCMR 641)*** the Supreme held that, *"the ocular account furnished by two eye-witnesses is supported by medical evidence and circumstantial evidence and in absence of blood feud and in a case of single accused substitution would be rare phenomena."* The principle of non-substitution especially in cases of single accused was endorsed by the Supreme Court in ***Dr. Israr-ul-Haq Vs. Muhammad Fayyaz*** (***2007 SCMR 1427).***

10. In terms of recoveries an empty cartridge was recovered from the place of occurrence on 24.08.2017 and was received by NFSA on 28.08.2017. The police witnesses testified with regard to the safe custody of the parcel. Shoaib Ishtiaq was arrested on 29.8.2017 and led to the recovery of pistol on 07.09.2017. Police witnesses testified to the safe custody of the pistol which was received at NFSA on 13.09.2017. Thus, at no point was the empty cartridge case and the pistol being the murder weapon simultaneously in possession of police authorities. The NFSA report (Ex-PO) dated 20-10-2017 opined that the empty cartridge recovered from the place of occurrence had been fired from the pistol the recovery of which was guided by Shoaib Ishtiaq after his arrest. This forensic evidence pins the murder weapon and the bullet fired that caused the death of the deceased on Shoaib Ishtiaq. Nothing was brought on record by the defence to establish that the manner in which the recoveries were

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affected and the forensic report produced created any doubt re safe transmission or suffered from any infirmity.

11. The eyewitness account of Khalid Mehmood (PW-1) and Sadaf Ambreen (PW-2) clearly stated that Shoaib Ishtiaq demanded that Sadaf Ambreen be married to him after entering into the TV lounge of the house of the deceased where they were all sitting. Upon being rebuked he got angry and fired a shot at the deceased, who was attempting to walk away. The motive was stated by PW-2, who also testified that at no point had she agree to marry with Shoiab Ishtiaq, as he was illiterate. PW-1, Khalid Mehmood (brother of the deceased and uncle of Sadaf Ambreen) also denied that the family had agreed to marry Sadaf Ambreen and Shoaib Ishtiaq or that the family wished to wriggle out of such proposal due to Shoaib Ishtiaq's poor eyesight. In his section 342 statement in response to question No.3, Shoaib Ishtiaq claimed that the family of the deceased had accepted his proposal to marry Sadaf Ambreen. In response to question No. 10 as to why he had been implicated in the instant case, he claimed that it was due to his poor eyesight that the deceased's family sought to make him a scapegoat. In other words, Shoaib Ishtiaq claimed that he was already engaged to Sadaf Ambreen, which claim was contradicted by the testimony of PW-1, Khalid Mehmood and more specifically by PW-2 Sadaf Ambreen herself. As Shoaib Ishtiaq took up the plea that he had been falsely implicated in the murder of the deceased to enable the deceased's family to extricate itself

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from its commitment to marry Shoaib Ishtiaq with Sadaf Ambreen, it was for him to discharge the onus of proving this fact in view of Article 121 of Qaunun-e-Shahadat Order, 1984, which he failed to do. (See for example *Muhammad Nadeem alias Nadeem Hussain Vs. State (2017 YLR 2291), Muhammad Javed Vs. State (2015 SCMR 864), The State Vs. Muhammad Abbasi (2015 PCr.LJ 1685)* and *Shaukat Ali Vs. The State (2006 MLD 1642)).*

12. Shoaib Ishtiaq's second defence was that he suffered from low vision and produced Dr. Inayat Ullah Khan (DW-1), who testified that Shoib Ishtiaq suffered from a disease called bilateral advanced retinitis pigmentosa. However, in his section 342 statement Shoaib Ishtiaq did not claim that he was blind but that he was moving toward blindness. Dr. Inayat Ullah Khan (DW-1) also stated in his testimony that Shoaib Ishtiaq had light perception. The defence relied on Ex-DA and Ex-DB, which are slips issued by Free Secondary Eye Hospital and PIMS, respectively. A perusal of Ex-DA and Ex-DB reflects that Shoaib Ishtiaq was diagnosed as being significantly visually impaired but not blind. The medical literature on retinitis pigmentosa **("RP")** reflects that it is an inherited disorder characterized by progressive peripheral vision loss and night vision difficulties that can lead to central vision loss. The literature reflects that a patient suffering from RP deteriorates over time and can go completely blind by the end of the third or fourth decade of his life and therefore requires rehabilitative therapy as there is no cure for the

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disease. As it is a progressive disease where a vision loss progresses over time, a patient diagnosed with RP is not necessarily blind even though he has the disease. Section 342 statement of Shoaib Ishtiaq read together with the opinion of Dr. Inayat Ullah Khan (DW-1) establishes that while the vision of Shoaib Ishtiaq was impaired, he was not blind. Shoaib Ishtiaq was accused of firing a shot at the deceased in his living room which was lit up by tube lights from the distance of approximately three to five feet. The defence led no evidence to establish that Shoaib Ishtiaq was incapable of doing so because he was suffered from RP.

13. It has already been held that minor discrepancies in timelines of when the body of deceased was dispatched to the hospital do not enable Shoaib Ishtiaq to claim that he was never at the place of occurrence. It would have been another thing if the facts of the case were such that the delay in taking the body of the deceased to the hospital or the time of recording the FIR supported the argument that the accused was falsely implicated. In the instant case the defence did not plead that there was any alibi, which could rule out the possibility of Shoaib Ishtiaq being at the place of occurrence at the relevant time. The difference of an hour or two with regard to arrival of the body of the deceased at the hospital thus creates no doubt the benefit of which can be granted to Shoaib Ishtiaq.

14. The prosecution and the complainant's counsel have relied on *Modi's Text-Book of Medical Jurisprudence and*

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*Toxicology* which provides in Chapter IV that a postmortem examination should be conducted in daylight and not in an artificial light as far as possible. *C.K Parikh's Medicolegal Postmortems in India and Pakistan* also states in Section IX (PP 158) that each unit for conducting autopsy should have ample natural light. Whether or not science has made significant advances so as not to require natural light for purpose of postmortem and requiring a review of our postmortem protocols and practice is not a question before this Court. In view of the standard texts guiding the carrying out of postmortems and autopsies, it is evident that the practice entrenched in Pakistan is that postmortems are carried out during sunlight hours of the day. In view of such realty, that postmortem of the deceased was carried out at noon on 24.08.2017 also creates no dent in the prosecution's story that can benefit Shoaib Ishtiaq.

15. Khalid Mehmood Mirza (PW-1) and Sadaf Ambreen (PW-2) are blood relatives of the deceased. But such relationship does not necessarily make them interested witnesses. A relative might be interested in seeking justice for the deceased and his family, but that doesn't mean that such relative is interested in framing or likely to frame an innocent person. Our jurisprudence has defined an interested witness as one with a preference for helping to produce a predetermined outcome rendering the testimony of such witness suspect. (See for example *Anar Gul Vs. The State (1999 SCMR 2303), Khadim Hussain Vs. The State (2010*

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*SCMR 1090), Khizar Hayat Vs. The State (2011 SCMR 429), and Takdir Samsuddin Sheikh Vs. State of Gujrat (2012 SCMR 1869)).* In the instant case, Shoaib Ishtiaq was a relative of the deceased, PW-1 and PW-2. The defence has not led any evidence to reflect enmity between Shoaib Ishtiaq or his family with the family of the deceased. The defence argument that Shoaib Ishtiaq has been framed to enable the family of the deceased and Sadaf Ambreen to wriggle out of her commitment to marry Shoaib Ishtiaq makes no sense. PW-2, Sadaf Ambreen, has stated in her testimony that she did not like Shoaib Ishtiaq. She did not wish to marry him nor was betrothed to him as he was not educated and not an appropriate match. Even if there had been some prior understanding that the family of the deceased might consider marrying their daughter to Shoaib Ishtiaq and they had changed their minds due to the deteriorating eyesight of Shoaib Ishtiaq, they did not need to frame him in a murder that he did not commit and could simply break up the arrangement and say no to the marriage proposal. In these circumstances, the section 342 statement of Shoaib Ishtiaq itself suggests that there was a difference of opinion or understanding between him and the family of the deceased with regard to his interest in marrying Sadaf Ambreen. And this can explain the outrage manifested by Shoaib Ishtiaq.

16. For the aforementioned reasons, this Court finds that the prosecution proved its case beyond reasonable doubt that Shoaib Ishtiaq fired one fatal shot that hit the deceased in his

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back and caused his death. It is, however, on the matter of sentencing where this Court is not in agreement with the Sessions Court. Shoaib Ishtiaq suffered from RP. Patients with such genetic disorder have learning disabilities and have to undergo therapy to learn to lead a normal life as their condition deteriorates and they move towards impaired living. It is quite understandable that those afflicted with the impairment would get left behind their peers. It can also not be ruled out that such genetic disorder and its consequences on everyday life might impact the psychological wellbeing of the person. Shoaib Ishtiaq was around 22 years old when he shot the deceased. He stated in his section 342 statement that he had been promised the hand of Sadaf Ambreen. While prosecution has led no evidence to establish such fact, it cannot be ruled out that in his own imagination Shoaib Ishtiaq believed that he was set to marry Sadaf Ambreen. When the 22-year-old entered the house of the deceased on the fateful night of 23.08.2017, he was armed with a gun. He must have worked himself up to a state of fury and anger on the prospect of not getting married to Sadaf Ambreen. Upon being rebuked his state of mind drove him to fire the fatal shot at the deceased. While his conduct is not justifiable as it claimed the life of an innocent man and caused irreparable loss and grief to his family, Shoaib Ishtiaq had no previous criminal history.

17. In view of the manner in which he invited himself into the house of the deceased and shot him in the presence

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of four other eyewitnesses who were his relatives, no detailed planning appears to have preceded the murder. Given his deteriorating vision due to RP, his consequent psychological make-up and the inability to marry someone he wishes to, it cannot be ruled out that Shoaib Ishtiaq actions were instigated by extreme emotional and mental disturbance. The circumstances that drove him to a state of desperation where he claimed the life of an innocent man, his uncle and the father of the girl he wanted to marry, do not necessarily project Shoaib Ishtiaq as a threat to society-at-large. He fired a single shot at the deceased and left. We find that these are mitigating circumstances in view of age of Shoaib Ishtiaq, his medical condition, his motivation to get married to the daughter of the deceased and the manner in which his actions claimed the life of the deceased. This court cannot close its eyes to the fact that extreme mental and emotional distress can have pervasive effects on a person's behavior, especially in early years on manhood.

18. Mental and emotional distress coupled with younger age can be a relevant factor in considering the grant of death penalty. This is because our penal justice system is simultaneously guided by considerations of deterrence, retribution and reform. The theory of deterrence does not necessarily work in relation to those individuals who have an impaired mental state due to a mental disorder or due to a temporary situation created by emotional or mental distress. This is where the logic of retribution takes over. Whether an

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accused, given his age and mental makeup, is unlikely to be a threat to society-at-large and is a reasonable candidate for reform, the state must treat his mental and emotional state in terms of mitigation as opposed to insisting that he be sent to the gallows. We are also cognizant that by the time the appellant serves out a long jail sentence he might be completely blind due to RP. We, therefore, while maintaining the conviction of the appellant under sections 302(b) of PPC, convert the death sentence awarded to him into life imprisonment. The rest of the sentence, including the compensation under section 302(b) of PPC and the conviction and sentence awarded to the appellant under section 449 of PPC as passed by the Additional Sessions Judge, is upheld. Benefit of section 382-B of Cr.P.C is also extended to the appellant. Consequently, the Jail Appeal is **partly allowed** and the Murder Reference is answered in the **negative.**

(CHIEF JUSTICE) (BABAR SATTAR)
JUDGE

Announced in the open Court on……..2023.

CHIEF JUSTICE JUDGE

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