JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 183 of 2017

(Muhammad Arshad Vs. The State & another)

AND

Criminal Appeal No.24 of 2019

(Syed Afzal Hussain Shah Vs. Adeel Ayub etc.)

AND

Murder Reference No. 01 of 2018

(The State Vs. Muhammad Arshad)

JUDGMENT

Date of Hearing	:	28.04.2022
Appellant by	:	Muhammad Amir Nadeem Khan, Muhammad Naveed Sultan & Ch. Muhammad Akhtar, Advocates
Respondent by	:	Sardar Ghulam Yasin, Malik Muhammad Rizwan Siddique, Faisal Malik & Syed Muhammad Ali Bukhari, Advocates
State by	:	Saeed Khan Sadozai, State Counsel Nasir Manzoor and Iftikhar, S.I.

ARBAB MUHAMMAD TAHIR, J. Muhammad Arshad (hereinafter referred to as **"the appellant"**) along with other co-accused, namely, Ahsan Mushtaq and Adeel Ayub (hereinafter referred to as **"the acquitted respondents"**) involved in case FIR No.73/2016 dated 08.03.2016 registered under Sections 302 and 34 of Pakistan Penal Code, 1860 ("hereinafter referred to as the **"P.P.C."**) at Police Station Sabzi Mandi, Islamabad, were tried by the Court of the learned Additional Sessions Judge-I (West), Islamabad, whereby the learned trial Court vide impugned

judgment dated 21.11.2017 while acquitting the respondents, proceeded to convict and sentence the appellant in the following terms:-

> *Under Section 302 (b) PPC to suffer death sentence as Taazir for committing qatl-i-amd of Syed Ali Raza. He was also directed to pay compensation in the sum of Rs.4,00,000/- to the legal heirs of the deceased as required under Section 544-A of the Code of Criminal Procedure, 1898 and in default whereof to undergo six months simple imprisonment. Benefit of Section 382-B Cr.P.C. was also extended to him.*

2. Challenging his conviction and sentence, the appellant has filed Criminal Appeal No.183 of 2017, whereas Syed Afzal Hussain Shah (hereinafter referred to as **"the complainant"**) filed Criminal Appeal No.24 of 2019 against the acquittal of the respondents. The learned trial Court sent Reference under Section 374 of the Code of Criminal Procedure 1898 (hereinafter referred to as **"Cr.P.C."**) which has been numbered as Murder Reference No. 01 of 2018 for confirmation or otherwise of the death sentence awarded to the appellant. Since all these matters emanate from the aforesaid judgment dated 21.11.2017 and since they are interconnected, hence they are being disposed of through this single judgment.

FACTUAL BACKGROUND:-

3. Tersely stated facts of the prosecution case as unveiled by the complainant (PW-8) in F.I.R. (Exh.PAA) is to the effect that he is working as Operation Manager in Access Security Company at G-11 Markaz, Islamabad for the last almost ten years; that on 07.03.2016 at about 9:35 p.m. he was present in his office when his Deployment Supervisor namely Muhammad Fayyaz informed him through cell phone that his nephew namely Ali Raza Shah S/o Iftikhar Khan ("hereinafter referred to as **"the deceased"**),

who had been working as Security Guard in Biscuit Company, Street No.1, I-10/3 Islamabad had altercation with someone and he has been shifted to PIMS Hospital through Rescue 1122; that on this information, he (the complainant) reached Emergency Ward of PIMS Hospital and found the deceased in severe injured condition, who latter on succumbed to the injuries; that some unknown persons had inflicted serious injuries on the back of the deceased's head due to which he could not survive. Hence, the prosecution proceedings ensued.

4. The learned trial Court after framing of charge, to which the accused/appellant pleaded not guilty and claimed to be tried. The prosecution in order to bring home the guilt of the appellant and acquitted respondents produced as many as 14 PWs including the complainant (PW.8) and Syed Mujtaba Haider (PW.1), who provided some details of the occurrence. Dr. Muhammad Naseer (Retired Principal/Head of Forensic Department (PW.10) and Dr. Asim Shahzad, M.S Neuron Surgery (PW.12), who furnished medical evidence and Muhammad Afzal S.I./I.O. (PW.13) and Muhammad Athar Khan Inspector/SHO (PW.14) who investigated the case. The remaining prosecution witnesses, more or less, were formal in nature.

5. Dr. Muhammad Naseer (PW.10) conducted the postmortem examination of the deceased on 08.03.2016 at 10 a.m. and gave his opinion in the following terms:-

> *"Deceased sustained trauma over the middle of the skull which resulted fracture of both frontal and both parietal bones leading to extra dural sub dural and sub-arachnoids hemorrhage massively leading to brain oedema and death."*
>
> *All these injuries were ante-mortem in nature and were sufficient to cause death in ordinary course of life. Probable time between injury and death was 5 ½ hour whereas probable time between death and post mortem 12 to 13 hours.*

6. After the conclusion of the prosecution evidence, the learned trial Court examined the appellant as well as the acquitted respondents under Section 342 Cr.P.C., who in response to a question *"why this case against you and why the PWs deposed against you",* replied as under:-

> "*There is no evidence that when, where, before whom deceased was done to death, all these facts shrouded withy mystery. It is admittedly a blind murder. I was falsely involved in this case merely on account of suspicion."*

7. The appellant's statement under Section 342 Cr.P.C. was recorded on 10.07.2017, whereas the acquitted respondents' statements under Section 342 Cr.P.C. were recorded on 03.07.2017 and 06.07.2017 respectively. However, the appellant as well as the acquitted respondents neither opted to become their own witnesses as envisaged under Section 340 (2) Cr.P.C. nor produced any evidence in their defence. On the conclusion of the trial, the appellant stood convicted and sentenced whereas the respondents stood acquitted as afore-stated. Hence, the appeal in hand and the appeal against acquittal so also Murder Reference.

8. Amir Nadeem Khan, Advocate, learned counsel appearing on behalf of the appellant contended that the learned trial Court did not appreciate the evidence in totality, available on the record in its true perspective; that the impugned judgment dated 21.11.2017 is based on mis-reading and non-reading of the evidence present on the record; that the learned trial Court did not apply its judicial mind while convicting the appellant; that the learned trial Court erred by not appreciating the defense version; that from the evidence available on the record, the prosecution has miserably failed to prove the charge against the appellant beyond any shadow of the doubt; that the impugned

judgment passed by the learned trial Court is not based on confidence inspiring evidence; that the learned trial Court did not appreciate the arguments advanced on behalf of the appellant; that the defense version of the appellant was not discussed rather it was discarded in the impugned judgment; that the matter was required to be adjudicated upon its merits rather than technicalities; that the prosecution as well as defense pleas were required to be put in juxtaposition so as to reach at a just conclusion, but the learned trial Court has failed to \do so; that the learned trial Court stretched and strained evidence in favour of the prosecution; that the impugned judgment resulted in grave miscarriage of justice; that the prosecution had remained unable to bring home the guilt of the appellant however, even then the appellant was handed down a guilty verdict which is liable to be set-aside; that the conviction so recorded by the learned trial Court is not warranted by law; that the acquitted respondents have been set at large on the same piece of evidence; that the sentence awarded to the appellant is harsh and uncalled for, concluded, the learned counsel for the appellant. Learned counsel for the appellant prayed for acceptance of the appeal i.e. Crl. Appeal No.183 of 2017 to be allowed and for the impugned judgment dated 21.11.2017 to be set aside resulting in the acquittal of the appellant.

9. On the other hand, Sardar Ghulam Yasin, Advocate, learned counsel appearing on behalf of the complainant while supporting the impugned judgment to the extent of the appellant namely Muhammad Arshad, came forward with the submissions that the impugned judgment is based on sound reasons; that the learned trial Court has appreciated all the material available on the record while convicting the appellant; that the learned trial Court has fully applied its judicial mind while delivering the

impugned judgment against the appellant; that the case is emerging from a promptly lodged FIR which was registered on the complaint of none other than the deceased's real uncle; that all the PWs have through their testimonies proved the guilt of the appellant; that the case of the prosecution is further corroborated from the medical evidence furnished during the trial; that the prosecution has successfully proved its case against the appellant beyond any shadow of the doubt, hence the conviction awarded to the appellant needs no interference; that the impugned judgment to the extent of the appellant does not suffer from any material irregularity or illegality calling for any interference by this Court; that the prosecution through confidence inspiring evidence has proved the charge against the appellant; that the appellant was nominated in the F.I.R. through the complainant's supplementary statement; that there is no enmity between the appellant and the complainant which could be termed as a reason for falsely roping the appellant in this case; that the appellant does not deserve any leniency; that the appeal filed by the appellant merits outright dismissal. Learned counsel for the complainant prayed for the appeal filed by the appellant (Muhammad Arshad) to be dismissed. The learned law officer while supporting the impugned judgment wholeheartedly and faithfully prayed for the appeal filed by the appellant (Muhammad Arshad) to be dismissed.

10. Additionally, Malik Muhammad Rizwan Siddique, Advocate, learned counsel appearing on behalf of the complainant, Afzal Hussain Shah, while questioning the acquittal of the respondents, contended that the impugned judgment to the extent of acquitting the respondents suffers from mis-reading and non-reading of evidence; that the respondents had also actively participated in the murder of Ali Raza Shah (deceased);

that the impugned judgment dated 21.11.2017 is against the facts as well as the law to the extent of the acquitted respondents; that the learned trial Court has committed illegality and irregularity while acquitting the co-accused; that the learned trial Court has misread the evidence and mis-interpreted the law on the subject while acquitting the said co-accused; that the learned trial Court on the basis of the same set of evidence convicted and sentenced the accomplice of the co-accused namely, Muhammad Arshad, whereas the co-accused were acquitted of the charges without any justifiable reasons; that the impugned judgment passed by the learned trial Court to the extent of the co-accused is inconsistent inasmuch as on the one hand, it convicts the appellant, whereas on the other, it acquits the co-accused, who were sailing in the same board; that although earlier in the F.I.R., the said co-accused were not nominated by the complainant, but in the complainant's supplementary statement, they were nominated; that the role of the co-accused were similar as that of the appellant, who has already been convicted; that the judgment passed by the learned trial Court to the extent of the acquitted co-accused is not sustainable. He prayed for the impugned judgment dated 21.11.2017 to be set aside only to the extent of the acquittal of co-accused and the acquittal recorded by the trial Court be recalled and the respondents be punished in accordance with law.

11. We have heard the submissions of the learned counsel for the parties and have perused the record with their able assistance. The facts leading to the filing of the present appeal as well as Crl. Appeal No.24 of 2019 are detailed above and need not be reiterated.

12. The substratum of the prosecution's entire case is built upon the statement of the complainant (PW-8). Perusal of the record reveals that initially the FIR (Exh.PAA) in the instant matter was lodged on 08.03.2016 at about 3.00 a.m. (night) and till recording of the supplementary statement by the complainant on 28.03.2016 (i.e. after a period of 20 days), this was a case of blind murder. The prosecution case is replete with numerous glaring improvements, contradictions, discrepancies, inconsistencies and inherent defects, exposing complete falsity of the prosecution's story which is sufficient to tilt the scale of justice in favour of the appellant. It is an established principle of law that testimony of a solitary eye-witness is sufficient to sustain conviction of an accused, if the same rings true and inspires confidence and it is the quality of the testimony of a witness that has to be weighed and not the quantity of the witnesses. As discussed above, the prosecution produced 14 witnesses, but could not be able to prove its case against the appellant. The contradictions and discrepancies in the statements of the prosecution's witnesses are being discussed *infra* in detail.

MAKING OF THE APPLICATION FOR REGISTRATION OF THE F.I.R.

13. PW-8/the complainant during his examination in chief deposed that ***"I made application Ex.PF bearing my signatures Ex.PF/1 to the I.O. of the instant case Muhammad Afzal S.I.,*** *who was present in the hospital at that moment,* ***for registration of FIR against unknown culprits. In the application, I have not mentioned about the weapon of offence"*** Furthermore, in his cross-examination, the said PW admitted that *"I submitted three applications to the police during the investigation* ***including the application for registration of***

FIR. My first application was moved for registration of F.I.R.", but very strangely, the complainant/PW-8 stood contradicted on this point by the I.O. Muhammad Afzal, S.I./PW-13 inasmuch as in his examination in chief, the said PW/I.O. deposed in the following manner:-

> *"**The complaint (Exh.PF) was drafted by me on the oral statement of complainant and thereafter, I sent it as Istighasa to police station for registration of FIR through constable.**"*

14. Hence, such inconsistencies in the said PWs' statements created reasonable doubt on the story of the prosecution.

INFORMATION REGARDING THE DECEASED'S COMPANY.

15. In the examination in chief, the complainant/PW-8 has deposed that when he was present in his office situated at G-11 Markaz, his Deployment Supervisor informed him as to the quarrel of the deceased with someone and he had been shifted to PIMS hospital through Rescue 1122. Furthermore, the complainant while recording his supplementary statement on 28.03.2016, had shown his suspicion that one Ahsan Mushtaq s/o Muhammad Mushatq (co-accused) and his friend Muhammad Arshad (the appellant) were lastly seen with the deceased Ali Raza Shah and they had food together and if arrested, **would have some clue with regard to the incident.** During the examination in chief he deposed that *"on 28.03.2016, I again joined the investigation with the I.O. of the case and made a supplementary statement before the I.O. that* ***"as per my own investigation on the evening of the occurrence the accused Ahsan Mushtaq and Muhammad Arshad were together at dinner. Again said were together with the deceased at dinner at a Chappar Hotel situated at I-10/3 in St. No.1****, therefore,* ***they may be involved*** *in the case*

and true facts can be ascertained/unearthed if investigation is made from them". The complainant/PW-8 himself admits that the ***appellant Muhammad Arshad and Ahsan Mushtaq were together at dinner with the deceased*** and he expressed his suspicion that ***"if investigation is made from them, true facts can be unearthed***, meaning thereby, he had no clue whatsoever about the appellant's involvement and he just suspected his involvement.

16. The question that begs an answer is that who had lastly seen the appellant and the acquitted respondents, Ahsan Mushtaq in the company of the deceased and who had informed the complainant that the deceased had food together with the said persons. The record and the impugned judgment are completely silent on this fact of the matter. Likewise, PW-14, M. Athar Khan SHO/ second I.O of the case deposed in his cross-examination that ***"it is incorrect that accused Arshad is not involved in this case and he has been booked in this case merely on account of suspicion.***" The said supplementary statement was recorded after 20 days' of the incident. Moreover, on the one hand, PW-8 during his cross-examination had deposed that ***"I have not mentioned the source of my information in my statement due to which I had suspicion of involvement of the accused persons."*** But on the other hand, during his cross-examination, the said PW negated the suggestion put forth to him in terms that ***"it is also incorrect to suggest that no source has been mentioned in supplementary statement"*** meaning thereby that the source of information had been mentioned by him as per his own version, which is not so. It is quite astonishing to note that the complainant took the role of the investigating agency and during his own investigation, he came to know about the deceased being

in the company of the acquitted respondent namely Ahsan Mushtaq and the appellant, who took dinner together at Chappar Hotel.

17. The complainant even did not bother to disclose the source of his own investigation/information to the I.O. as to who had informed him about the said fact, to say the least. Similarly, the I.O. of the case i.e. PW-13, for the reasons best known to him, also seemed least bothered to ascertain the veracity of the complainant's assertion with regard to the source of the information. Had the I.O. of the case gleaned out the said source of information and associated the informer in the proceedings, the prosecution could have been in a good possible position to have proved the case against the appellant.

TRANSMISSION OF BLOOD STAINED EARTH TO FSL.

18. One of the important piece of the prosecution evidence is the blood stained soil. During the examination in chief, PW-5/Khalid Hussain deposed that ***"on 20.03.2016 a parcel said to contain blood stained earth was handed over to me by Muharrar Malkhana Qaiser Bashir 3888/C which was onward transmitted by me to the Forensic Science Agency, Lahore on 21.03.2016 through road certificate No.141/2016".*** The said PW further states that ***"on the same date I came back and handed over the road certificate to Muharrar Malkhana.*** During the cross-examination, the said PW admitted by deposing that ***"I left police station at about 11:30/12 during the night between 20.03.2016 and 21.03.2016. I reached Lahore at about 7 a.m..... I boarded in vehicle from Pir Wadhai after 12 midnight it may be 1 a.m."*** The said PW stood falsified by the I.O./PW-13 as well as PW-2/Qaiser Bashir inasmuch as the I.O./PW-13 in his

examination in chief deposed that ***"on 21.03.2016, I sent one parcel of blood stained soil to PFSL Lahore through constable."***, whereas PW-2 in his examination in chief deposed that *"on 08.03.2016 Muhammad Afzal SI handed over to me a sealed parcel bearing seal AK, said to contain blood stained earth which I placed in Malkhana in safe custody.* ***On 21.03.2016 through road certificate No.141 I handed over the said sealed parcel to Khalid 7234/C for onward transmission to PFSL Lahore."*** During the cross-examination, PW-2 admitted that *"the parcel was handed over to Khalid 7234/C by me* ***at the time of early morning***. From the deposition of PW-2, it is apparent that on 21.03.2016 it was early in the morning, when he handed over parcel to Khalid/PW-5 for onwards transmission to FSL but PW-5/Khalid contradicted PW-2 by deposing that "***I left police station at about 11:30/12 during the night between 20.03.2016 and 21.03.2016. I reached Lahore at about 7 a.m.... I boarded in vehicle from Pir Wadhai after 12 midnight it may be 1 a.m.*** meaning thereby Khalid Hussain/PW-5 reached Lahore at 7:00 a.m. on 21.03.2016, then how PW-2 can assert that it was early in the morning on 21.03.2016 when he handed over the said sealed parcel to Khalid Hussain/PW-5 for onwards transmission to FSL.

PW-5'S ASSOCIATION IN THE INVESTIGATION PROCEEDINGS.

19. Another discrepant feature which casted further doubt in the case of the prosecution is that PW-5/Khalid Hussain during the course of cross-examination deposed that *...I boarded in vehicle from Pir Wadhai after 12 midnight it may be 1 a.m. It takes about 4 hours to reach Lahore from Islamabad.* ***I never remained part of investigation of the instant case other than my above mentioned duty and statement."***. This portion

of the said PW's statement is a good enough reason to disbelieve the prosecution's version since the other PWs in their depositions have altogether took a different stance. PW-3 in his cross-examination deposed that *"I went to Pims Hospital with Afzal ASI/IO at about 1.30 am,* ***constable Khalid also accompanied us."*** Furthermore, he deposed in the cross-examination that *"I reached to place of occurrence with complaint Exh.PF at about 3:40 am. At place of occurrence* ***only Afzal Kalyar ASI, Khalid Constable and Muhammad Afzal complainant were present there***". Whereas, PW-13/I.O. in his cross-examination deposed that ***"I went to hospital along with Khalid constable and Imran constable".*** He further admitted during the cross-examination that *"I also recorded the statements of four PWs namely Muhammad Asghar Supervisor, Adeel driver of Security Company, Israr Khan Hotel/Khokha owner* ***and Khalid 7234/C"***

TIME CONSUMED IN REACHING TO HOSPITAL

20. PW-13, Muhammad Afzal, S.I./I.O. during the course of his cross-examination admitted that ***"I reached in hospital at 09:45 p.m. on the date of occurrence.*** *I went to hospital* ***along with Khalid constable and Imran constable"****. The complainant reached PIMS prior to my arrival.* Whereas, PW-3, Muhammad Imran during his cross-examination has deposed that ***"I went to Pims hospital with Afzal ASI/I.O. at about 1.30 am, constable Khalid also accompanied us.***" Similarly, PW-8, the complainant has deposed in his examination in chief in the following manner:-

> *"****On 07.03.2016 at about 9:35 p.m. I was present in my office at G-11 Markaz*** *when my deployment Supervisor Muhammad Fayyaz informed me through mobile phone that your nephew Ali Raza Shah deceased has quarreled with some and he has been transported to PIMS hospital through Rescue 1122".*

21. Furthermore, in his cross-examination, he took the following stance:-

> *"...**it takes 20 to 25 minutes approximately to reach PIMS Hospital from G-11 Markaz**. I was having a vehicle with me on the day of occurrence. On receiving information about the occurrence I immediately rushed to the hospital. **I reached hospital at about 10 p.m**..... the police also reached hospital.*

22. The point of reaching to hospital is quite contentious. It is quite strange to observe major discrepancies in the testimonies of the two main prosecution witnesses (1) the Investigating Officer of the case whose testimony is of worth consideration in the prosecution case. *Suffice* it to observe that the investigating officer is an important character, who is under legal obligation to investigate the matter, honestly, fairly and justly, so as to bring on surface the truth. It is the bounden duty of the Investigation Officer not only to build-up the case with such evidence enabling the Court to record conviction by all means, but also to dig out the truth, to reach at a just and fair conclusion/decision. Meaning thereby that the purpose of investigation is to collect all relevant evidence pertaining to allegation of crime and to dig out the truth enabling and facilitating the Court to administer justice and to bring the real culprits to book, however, in the case at hand, it appears that Investigating Officer has failed to discharge his statutory duties in the manner as provided under the law. It is noteworthy that PW-13/Investigation Officer had remained inconsistent in his testimony and stood contradicted on material aspect of the matter by other PWs; and (2) the complainant/PW-8, on whose testimony, the entire edifice of the prosecution's case is built. The star witnesses are inconsistent and their testimonies

are fraught with contradictions since PW-13/I.O. deposes that ***"he reached to hospital at 9.45 p.m. and prior to his arrival in hospital, the complainant had already reached to the hospital."*** Whereas, the complainant/PW-8 in his deposition has stated that ***"he reached to hospital at 10:00 p.m.***" Now, the question that arises here is that when the complainant reached hospital at **10:00 p.m.** then how the I.O. can say that he reached to hospital at **9:45 p.m.** and that prior to his arrival in hospital, **the complainant was already there**. Furthermore, according to the complainant at about 9:35 p.m. he was present in his office when his Deployment Supervisor informed him about the occurrence and he reached to hospital at about 10:00 p.m. and that it approximately took him about 20 to 25 minutes to reach PIMS hospital from G-11 Markaz, Islamabad, then reaching of the I.O./PW-13 from police station which is located at a considerable distance i.e. Sector I-10/Mandi Morr and approximately takes a half an hour to reach to PIMS hospital, then how he can be expected to reach hospital within a short span of time and that too prior to the complainant. This important aspect of the matter escaped notice of the learned trial Court.

OWNERSHIP OF THE MOTORCYCLE ALLEGEDLY USED IN THE COMMISSION OF THE OFFENCE.

23. Now, coming to the question of ownership in respect of motorcycle Exh.P-7 allegedly used in the commission of the offence. PW8/the complainant in his examination in chief has deposed that *"....on the same day i.e. 17.06.2016, accused Muhammad Arshad subsequent to his disclosure also led to the recovery of Motorcycle AKK-5845 Exh.P-7 from parking of a factory situated at St. No.6 Sector I-10/3 Islamabad.* ***The said motorcycle is the ownership of accused Arshad.*** *The I.O. took*

the same into possession through Exh.PE which was duly signed by me and Arif ASI". Likewise, PW-14, Muhammad Athar Khan, Inspector/second I.O., to whom the investigation of this case was entrusted on 22.05.2016, deposed in his examination in chief that ***"on the same date (i.e. 17.06.2016), accused Muhammad Arshad also disclosed about motorcycle No. AKK-5845 (Hero) used in the commission of the offence".*** The PW during his cross-examination has deposed that *"it is incorrect that fake and fictitious recovery of motorcycle was foisted upon the accused Arshad* ***as motorcycle was belonged to brother of accused Arshad***. He further goes on to say that "*it is further incorrect that motorcycle was planted upon the accused Arshad after calling the same from his house".* In the same manner, PW-6 has deposed that *"accused Muhammad Arshad led to the recovery of Motorcycle bearing registration number (so far I remember) AAK-5845 Ex.P-7 make Hero color black from parking of a factory situated at St. No.6 Sector I-10/3, Islamabad.* ***Motorcycle Ex.P-7 is ownership of accused Arshad. I.O. took the same into possession through recovery memo Ex.PE."*** During the cross-examination, PW-6 categorically stated as follows:-

> ***"The I.O. asked about the ownership of motorcycle in my presence however did not take into possession the documents of ownership in my presence".***

24. The major contradictions and discrepancies noticed by us in the testimonies of PWs-06, 08 and 14 regarding the alleged recovery of the motorcycle Exh.P7 are that PWs-6 and 8 had categorically stated that ***"the said motorcycle is the ownership of accused Arshad"***, whereas PW-13/ I.O. admitted in the cross-examination that *"it is incorrect that fake and fictitious recovery of motorcycle was foisted upon the accused Arshad* ***as motorcycle was belonged to brother of accused Arshad"***.

These contradictions are enough to cast doubt on the prosecution's story. So much so, the learned trial Court turned a blind eye to examine this important aspect of the matter. It is an admitted fact that there is no independent witness of the ocular account. The testimonies recorded by the prosecution witnesses are only with respect to the circumstantial evidence and that too not worthy of reliance, the prosecution was duty bound to establish the chain of circumstantial evidence, which is lacking in the case at hand.

RECEIVING OF THE DEAD BODY OF THE DECEASED

25. The complainant/PW-8 during his cross-examination deposed that *"the Namaz-e-Janaza of deceased was performed at about 2:30 p.m. on 08.03.2016.* ***I have not received the dead body****"*. However, the I.O./PW-13 during his examination in chief has deposed that *"the dead body of deceased was identified by complainant, upon which I prepared memo of identification of dead body available on the record as Exh.PQ.* ***after postmortem, the dead body was handed over to the complainant for funeral purposes vide receipt Exh.PR*** *which was signed by the PWs*. Exh.PR is a receipt regarding handing over of the dead body of the deceased. In the said document, it has been mentioned as under:-

> ***"I correctly recognized the dead body of my nephew Syed Ali Raza and received the corpse for funeral purposes".***

26. Perusal of the said receipt/document shows that the signature of the recipient of the dead body is affixed so also witnessed by Syed Mujtaba Haider/PW-1, one of the cousins of the deceased. At this stage, this Court has noticed that the signatures of the complainant affixed on the said receipt/Exh.PR

as well as on Exh.PF (i.e. the complainant's application for registration of the F.I.R.) are all totally different and there is a huge difference in between the two. More so, PW-1 deposed that the *"deceased Ali Raza is my cousin I identified his dead body on 08.03.2016 in PIMS Hospital in presence of Doctors."* In the cross-examination he admitted that ***"I reached the hospital on said day at about 7:30 a.m.*** *I received a telephone call from my uncle/complainant Syed Afzal Hussain about the occurrence.* ***When I reached the hospital, my uncle Syed Afzal Hussain Shah, my cousin Syed Qasim Raza Shah, Afzal Kaliar SI/IO and some other police officials were already present there"***. He further goes on to say that ***"I cannot tell the exact time of handing over the above mentioned last worn cloths of the deceased by CMO to the I.O. approximately it would 9:30/10:00 a.m. All the above mentioned person were present at the said time"***. Now at this juncture, the PW stood falsified/contradicted by the complainant/PW-8 inasmuch as he deposed that on 08.03.2016 he reached at the place of occurrence at about **7:30 a.m**. The relevant portion of his deposition reads thus:-

> ***"the Namaz-e-Janaza of deceased was performed at about 2:30 p.m. on 08.03.2016....we would have reached at the place of occurrence at about 7:30 a.m."***

27. On one hand, PW-1 deposes that when he reached hospital, **it was around 7:30 a.m.** and the last worn cloths of the deceased were handed over to the I.O. **at about 9:30/10:00 a.m.** and at the time of handing over of the last worn attires of the deceased, **the complainant/PW-8 was also present at the relevant time** apart from other persons/police officials, but the

complainant on the other hand, deposes in his cross-examination that *"he reached at the place of occurrence at* ***about 7:30 a.m."*** All these contradictions, which created reasonable doubt in the case of prosecution, escaped notice of the learned trial Court. The learned trial Court was not expected to be so apathetic, that it even did not bother to peruse the evidence in its true perspective and make sure fair dispensation of justice, but the learned trial Court did not perform his statutory obligation by applying his judicial mind in the *lis* before it.

MEDICAL EVIDENCE

28. The medical evidence furnished by PW-10 is also not in line with the circumstantial evidence since there exists many instances on which, the PW-10 stood contradicted and disbelieved inasmuch as according to Dr. Asim PW-12, the deceased was brought to the hospital in injured condition and he was unconscious at that time, whereas in the post mortem report (Exh.PH), it has been mentioned by PW-10 that the deceased was brought to hospital as dead on 07.03.2016. The contradictions in the testimonies of these two PWs have rendered the prosecution's story to be false and concocted one. It is well settled law that medical evidence may confirm the ocular account provided such an evidence is worthy of credence. Reference in this regard may be made to the law laid down in the case titled ***Haji Paio Khan v. Sherbaz & others (2009 SCMR 803)*** *wherein,* it has been inter alia held that ***"the medical evidence may confirm the ocular evidence with regard to the seat of injury, kind of weapon used in the occurrence and nature of injury, but it would not connect the accused with the commission of crime."*** Law to the said effect has also been laid down in the case titled ***Altaf Hussain v. Fakhar Hussain & others (2008 SCMR 1103)***

APPLICATION UNDER SECTION 516-A CR.P.C

29. Another important aspect of the matter is that during the proceedings before the learned trial Court, one Muhammad Rashid s/o Muhammad Razik r/o Dhoke Lalu Tehsil Fateh Jhang District Attock, had filed an application for *superdari* of the motorcycle bearing registration No.AKK-5845, detail whereof has been discussed in para 23 above. (The said motorcycle has been alleged by the prosecution to have been used in the commission of the offence). The learned trial Court after receiving the application for Superdari of Motorcycle, issued notices to the State/prosecution for submission of the report on or before 21.03.2017. The requisite report was submitted on 20.03.2017, whereby it was averred that the motorcycle is parked in P.S Sabzi Mandi and is case property in FIR No. 73/2016 (i.e. the FIR in question). There is nothing on the record to show as to what happened to the application. The record is completely silent on the question as to whether the said application was allowed or dismissed. The impugned judgment does not say much about this fact. Apart from issuing notice on the said application and requisitioning a report, the record as well as the impugned judgment impugned is silent with regard to the disposal of the said application filed by the owner of the motorcycle.

30. Furthermore, perusal of the copies of the registration book reveals that the said motorcycle was registered in the name of one Muhammad Rashid S/o Muhammad Razik, who had filed the application for *superdari* while no statement of the owner is on record to establish as to whether or not the motorcycle was ever handed over to the appellant Muhammad Arshad, or sold out to anyone else or ever even used in the commission of the alleged offence by the appellant and/or the acquitted

respondents. It was a golden opportunity for the prosecution to have associated Muhammad Rashid, the motorcycle's owner as a witness for the purposes of ascertaining the true fact as to the alleged use of the motorcycle in the commission of the offence. Had the statement of the owner had been recorded by the Investigating Officer and had the Investigating Officer requisitioned the ownership documents i.e. the registration book from him, it could have easily been ascertained as to who was the actual owner of the said motorcycle and why was it allegedly used in the commission of the offence. The recording of statement of such an important witness was a must in a case like murder, but for the reasons best known to the Investigating Officer, the statement of motorcycle's owner was not recorded. Moreover, the filing of the application was well within the knowledge of the Investigating Officer as well as the prosecution. The Investigating Officer was under a bounden duty to have associated the applicant i.e. Muhammad Rashid, who had filed the application for *superdari* of the motorcycle, as a prosecution witness and recorded his statement under Section 161 Cr.P.C. The recording of the statement of the said person was thus essential for the reasons as he claimed the ownership of the motorcycle. Neither did the I.O./prosecution bother to record the statement of the said person nor did the learned trial Court take this fact into account.

MOTIVE OF THE OCCURRENCE.

31. Motive of the occurrence is shrouded in mystery. Bare perusal of the entire prosecution evidence and the available record shows that no motive has been alleged against the appellant or the acquitted respondents. The learned trial Judge erred by not appreciating this fact of the matter while recording the conviction of the appellant. It has been held by the Hon'ble Supreme Court in

plethora of judgments that there must be a strong reason or motive for taking life of an individual. Reference in this regard may be made to the law laid down in the case of **Manzoor Ahmed Shah and others Vs. The State and others (2019 SCMR 2000),** wherein it has *inter alia* been held as follows:-

> ***"In the absence of proof of the alleged motive sharing of common intention by the present appellants with their co-convict namely Mubarik Ali for the purposes of killing two persons and injuring two others in the present incident has been found by us to be quite suspect"***
>
> **(underline is ours for emphasis)**

32. It has been held in the case titled **Hakim Ali Vs. the State (1971 SCMR 432),** that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defense. The above view has been reiterated in the case of **Amin Ullah Vs. The State (PLD 1976 SC 629),** wherein, it has been observed by their lordships, **that motive is an important constituent** and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story.

33. In the case titled **Atta Mohammad Vs. The State (1968 SCMR 502),** the Hon'ble Supreme Court has observed that **motive is after all a matter of speculation for what moves a person to take the life of another is within his special knowledge and does not constitute a necessary ingredient of the offence of murder**. Similarly, in the case titled **Habibullah and others Vs. The State (PLD 1969 SC 127)**, it was observed by the Hon'ble Supreme Court that in ordinary human conduct where killing takes place by design **it is not without a motive strong or weak**. This is not to say that murders are not

committed wantonly without any motive whatsoever and the motiveless murders do occur owing to mad or reckless acts of inhuman nature. Sometimes, a motive lies mysteriously hidden in the mind of the killer with no means to dig it out on the surface. At the same time the Court significantly went on to add that it may be stated as a rule of prudence in judging human conduct that ***"where a motive is alleged by the prosecution which is found to be false, it becomes all the more necessary to scrutinize the credentials of the witnesses, who by their evidence direct or indirect speak about the guilt of an accused person on the premises of a false motive. Where, therefore, the alleged motive was found to be absent being untrue it was held that the Court should have been very much on their guard to accept the story of the prosecution of which the motive was an important constituent".*** These observations are aptly applicable to the case of the appellant as well as the acquitted respondents.

34. It was again re-enforced by the Hon'ble Supreme Court in the case of **Muhammad Sadiq Vs. Muhammad Sarwar (1997 SCMR 214).** Again on the same principle, reference can be made to the law laid down in the cases of "**Noor Muhammad Vs. The State and another" (2010 SCMR 997) and "Amin Ali and another Vs. The State" (2011 SCMR 323).**

NON-ASSOCIATION OF THE RESCUE WORKERS

35. As discussed above, the complainant/PW-8 has deposed that when he was present in his office situated at G-11 Markaz, his Deployment Supervisor informed him at about 09:45 p.m. as to the quarrel of the deceased with someone and he had been shifted to PIMS hospital through Rescue **1122**. Now the question arises that who had informed Rescue 1122 and when the

deceased was being shifted to hospital, who was accompanying him. PW-9 during his cross-examination admitted that ***"I had not seen any police official other the official of 1122, at the spot when decease Ali Raza was shifted to the hospital in injured condition***. He further deposes that ***"I have not called 1122/ambulance service for the purposes of shifting the deceased Ali Raza in injured condition to the hospital".*** The said PW further falsified all the police officials including the I.O./PW-13 by deposing that ***"police would have arrived after 15 to 20 minutes after the arrival of 1122. I have seen the police officials however I was not at the place of occurrence at that time*** *rather I was in my hotel.*" However, PW-13 negated the said fact by deposing that he reached to hospital along with Khalid constable and Imran constable at 9:45 p.m. and after sending *Istighasa to police station for registration of FIR,* ***he on the pointation of the complainant inspected the spot/place of occurrence and prepared un-scaled site plan Exh.PP.*** Meaning thereby that the I.O. and/or the police officials visited the place of occurrence only when they were taken by the complainant/I.O./PW-8. Both the said PWs i.e. PW-13/I.O. and PW-9 are inconsistent on an important piece of evidence *qua* the presence of the police officials at the place of occurrence. Another defect in the said PWs' statements, which surfaced during the reappraisal of the evidence, is that PW-9/Israr Khan deposed that ***"my statement was recorded by the police at the police station. Afzal Shah SI/I.O. recorded my statement under Section 161 Cr.P.C.",*** whereas Muhammad Afzal/PW-13 during his cross-examination admitted that "*it is incorrect to suggest that statement of Israr Khan (i.e. PW-9) was recorded at the place of occurrence.* ***The statement of Israr Khan was recorded at his Khokha/hotel".***

36. It is pertinent to mention that the statement of PW-9 was recorded as late as 19.04.2016 i.e. after almost one and a half month of the occurrence. PW-9 stated that he had seen the ambulance carrying the deceased in injured condition and more importantly, the said PW was not present at the place of occurrence rather he was present at his khokha/hotel. Now a question arises as to how he saw the ambulance carrying the deceased, who had informed the said PW that the injured, who was being shifted by the ambulance, was in fact Ali Raza, the deceased and more so he admitted that the ambulance passed through his hotel/khokha. How he was in a position to see the injured in the ambulance which was plying/passing in front of his hotel, is a question mark? It is a matter of fact that mostly, the ambulances carrying injured/ill ply fast since they try to save the public life. The question that remains unanswered is that was the deceased alone in the ambulance or there were Rescue workers. Furthermore, it cannot be said that the Rescue workers left the deceased at the mercy of unknown persons. The complainant although admitted that he reached to hospital at about 10:00 p.m. and stated that after his arrival, the police also reached to hospital. But unfortunately, he did not bother to say much about the presence of the Rescue Workers in the hospital since they were said to have shifted the deceased (since injured) to the hospital. Even otherwise, it appears that no one except PW-9 saw these Rescue Workers either at the time of shifting of the deceased from the place of occurrence or at PIMS Hospital or at the time of the incident. None of the PWs other than PW-9 have uttered a single word in their statements as to the Rescuers, so to speak. It may not be out of context to mention that the Rescue workers were lastly seen with the deceased since he was being shifted to hospital by them. Thus their testimonies were of pivotal importance for the prosecution's case. No blood stained

clothes were recovered from them to show that they took the injured to the hospital. If at all it is considered that the deceased was shifted by the Rescue workers even then it does not appeal to reason that their cloths did not stain blood and no blood stained clothes were recovered from them to show that in fact they took the injured to the hospital.

37. Instead they just slipped away from the hospital without telling anyone about the incident, which raises doubts that they ever transported the injured from the scene of the occurrence to the hospital and were even actually present at the scene of the incident. Again such conduct does not appeal to logic, reason or common sense. In this respect reliance is placed on the law laid down in the case titled **Fayyaz Ahmed Vs. The State (2017 SCMR 2026)**, the Hon'ble Supreme Court while discussing the scope of the last scene evidence, has graciously held as follows:-

> *"7. The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under-legal obligation to fulfill the same, some of which may be cited below:-*
>
> *(i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.*
>
> *(ii) The proximity of the crime scene plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.*
>
> *(iii) The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.*

(iv) There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.

(v) Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.

(vi) The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person. Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

(vii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.

(viii) The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."

WITHHOLDING OF BEST EVIDENCE:

38. As discussed earlier, the complainant/PW-8 has deposed that he was present in his office, when his Deployment Supervisor namely, Muhammad Fayyaz informed him through mobile phone that the deceased had altercation with someone and that he (the deceased) had been transported to PIMS hospital through rescue 1122. Likewise, PW-13/I.O. during his cross-examination admitted in the following words:-

"As per Ex.PF (i.e. complainant), the information about the occurrence was given by Fiaz deployment supervisor. I did not investigate said Muhammad Fiaz".

39. It goes without saying that Muhammad Fiaz, Deployment Supervisor, who had informed the complainant as to the occurrence was the best evidence of the prosecution. Apparently, he was the one who had witnessed the deceased to be quarrelling with someone. It would not be out of context to mention that the testimony of the said Muhammad Fayyaz was of pivotal importance for the prosecution since the entire ocular account of the incident was furnished by the said Deployment Supervisor.

40. The learned trial Court did commit an illegality by not appreciating that the withholding of this witness tells nothing but his absence on the spot. Had he been produced he would not have supported the case of the prosecution. The logic behind Article **129 (g)** of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as **"the 1984 Order"**), was to cater for such like situation.

41. In case titled **Tahir Khan Vs. The State (2011 SCMR 646)**, it was held by Hon'ble Supreme Court that:-

> *"In the present case as observed above, the clouds over the veracity of the prosecution version began hovering with the substitution of the initially nominated persons in the FIR and also that complainant did not appear as a witness. It assumes relevance as he (Ghulam Hussain), Sultan Mehmood and Ghulam Abbas were given up by the prosecution and not produced.* ***The only possible conclusion is that the prosecution sensed the risk of producing them that they might not support the said version. Their production thus was withheld leaving doubts spreading all around****".*
>
> **(underline is ours for emphasis)**

42. Additionally, since it was a case of circumstantial evidence, the prosecution was under an obligation to have established the whole chain of circumstances in their evidence in a way that it got netted together as a chain starting from the dead body at the one end and touching the neck of the accused on the other. Any missing link in the chain would destroy the prosecution's case in its entirety and would render the same unreliable for recording a conviction in respect of capital charges/punishment. The entire prosecution case is based on circumstantial evidence. There is no direct evidence of the murder. Law relating to the circumstantial evidence is that ***"proved circumstances"*** must be incompatible with any reasonable hypothesis of the innocence of the accused.

43. It is our view that in cases pertaining to the circumstantial evidence, there are umpteen chances of procuring and fabricating evidence, therefore, the Courts, which are custodian of the law, are under a statutory obligation to take extra care and caution to narrowly examine such evidence in the absence of direct evidence with pure judicial approach to satisfy themselves as to the intrinsic worth and reliability of the circumstantial evidence produced by the prosecution and also to ensure that no dishonesty was committed during the course of collecting the circumstantial evidence by the Investigating Officer/prosecution. The Court should not shut its eyes over the apparent indications of designs on the part of the investigating agency in the preparation of a case resting on circumstantial evidence. The Court must be on its guard against the trap of being deliberately misled into a false inference. In our view, if the Court fails to observe such care and caution and in a hastily manner relies on such circumstantial evidence, and then there would not just be a failure of justice but also a mockery of the

law. In holding so, we are fortified by the law laid down by the Hon'ble Supreme Court in the titled **Hashim Qasim and another Vs. The State (2017 SCMR 986)**, wherein it was held as follows:-

> *"Keeping in view the above, the case of the prosecution appears to have been based entirely on circumstantial evidence.* ***Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge"***

44. Law to the said effect has also been laid down in the cases of **Fazal Elahi Vs. Crown (PLD 1953 FC 214) Lejzor Vs. The Queen (PLD 1952 PC 109)**, wherein it has *inter alia* been held with significant emphasis that *"circumstantial evidence may sometimes appears to be conclusive, but it must always be narrowly examined, if only because this count of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference,* ***if the accused's guilt from circumstantial evidence to be sure and that there are no other co-existing circumstances, which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all".***

45. Similarly, in the case titled **Karamat Hussain Vs. The State (1972 SCMR 15)**, it was held as follows:-

> *"**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*".*
(Underline is ours for emphasis)

46. Law to the said effect has also been laid down in the cases titled **Ch. Barkat Ali Vs. Major Karam Elahi Zia (1992 SCMR 1047), and Siraj Vs. The Crown" (PLD 1956 FC 123, *2021 SCMR 684, 2021 SCMR 542, 2021 SCMR 873, 2021 SCMR 16.***

47. As discussed above, Muhammad Fayyaz [who informed the complainant about the entire episode] and Muhammad Rashid s/o Muhammad Razik, [who filed application for *superdari* of the motorcycle allegedly been used in the commission of the offence] were the best evidences of the prosecution, who were withheld for unknown reasons and not arrayed in the calendar of the witnesses and examined at the trial so as to strengthen the prosecution case. The said independent witnesses 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 best evidence is intentionally withheld, an adverse presumption ensues, that if it was produced, it would be against the person withholding it, in terms of Article 129 (g) of the 1984 Order. For the purposes of clarity, Article 129(g) of the 1984 Order 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"***

48. In the given scenario, abandoning of the aforementioned persons obviously leads to an adverse inference in terms of Article 129(g) of the 1984 Order that had they been produced in the witness box, they might have not supported the prosecution's 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"***

49. Similarly, in the case of **"Muhammad Rafiq and others Vs. 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"***

50. Now turning to the arrest of the appellant and the acquitted respondents as well as the submission of the challan. It was only until the complainant's supplementary statement that the acquitted respondent namely, Ahsan Mushtaq was arrested on 15.04.2016, who did not disclose about any incriminating material, but only pointed towards the place of occurrence, which was already known to the police officials and the complainant. No incriminating materials whatsoever were recovered from his possession and on completion of the physical remand, he was shifted to judicial custody on 26.04.2016. It is significant to note that the remand of said respondent had been till 21.04.2016, but

there is no plausible explanation of keeping him in custody from 22.04.2016 to 26.04.2016 both days inclusive. The incomplete report/interim challan under Section 173 Cr.P.C, to the extent of the acquitted respondent namely Ahsan Mushtaq was submitted in the Court on 21.06.2016. On 22.05.2016, the investigation of the case was entrusted to Muhammad Athar Khan S.I./PW-14, who arrested the appellant Muhammad Arshad on 07.06.2016.

51. During the investigation, on 16.06.2016, the appellant, Muhammad Arshad made a disclosure before the police authorities and subsequent thereto on the same day, he led the police party to the place of occurrence and got identified the place of occurrence to the police, again on 17.06.2016. He made another disclosure with regard to throwing of the weapon allegedly used in the commission of the offence i.e. *"Danda"* and got recovered the same from near the place of occurrence, which was taken into possession vide recovery memo Exh. PD. On the same day, the appellant, Muhammad Arshad made another disclosure about the motorcycle, used in the commission of the offence and led the police party to street No. 6 Sector I-10/3, Islamabad and got recovered motorcycle No. AKK-5845 which was taken into possession by the I.O vide recovery memo Exh.PE. The appellant was sent to judicial lockup on 18.06.2016. At this juncture, a question arises as to why the appellant and the acquitted respondents were made to disclose regarding the place of occurrence (which was admittedly already in the knowledge of the police) in piece meal by leading the police party on 16.06.2016 and on 17.06.2016 the appellant made a disclosure with regard to the throwing of the weapon allegedly used in the commission of the offence.

52. On 19.06.2016, the acquitted respondent Adeel Ayub was arrested, who during investigation on 22.06.2016 pointed towards the place of occurrence, whereupon identification memo Exh.PF was prepared. The acquitted respondent namely, Adeel Ayub was sent to the judicial lockup on 23.06.2016. After submissions of the challans, the appellant as well as the acquitted respondents namely Ahsan Mushtaq and Adeel Ayub were provided with copies of the documents as required under Section 265-C Cr.P.C. and Charge against the appellant Muhammad Arshad and the acquitted respondents Ahsan Mushtaq & Adeel Ayub was framed on 06.10.2016, to which they pleaded not guilty and claimed trial.

DEFENSE PLEA

53. As discussed above, the appellant in his statement recorded under Section 342 Cr.P.C opted not to produce any evidence in defence or to make statement on oath as envisaged under Section 340(2) Cr.P.C. Question No.2 of the appellant's statement recorded under Section 342 Cr.P.C. is such that requires discussion. The said question is reproduced for ready reference:-

> *Q2. It is in prosecution evidence that on 07.03.2016 at about 09:35 p.m. co-accused Ahsan Mushtaq brought the deceased Ali Raza to green area near Sector I-10/3 Islamabad, and your co-accused Adeel Ayub caught hold on the deceased and thereafter, you accused along with co-accused in furtherance of common intention committed murder of decease Ali Raza in the area of Sector I-10/3, Islamabad. What do you say about it?*

54. From bare scanning of the available record, we found that there is nothing in the prosecution's entire evidence which would show that any of its witnesses had made such assertions regarding exact time and date of the occurrence ***viz*** **09:35 p.m.** and date i.e. **07.03.2016.** It is also quite surprising to observe

that wherefrom and how the learned trial Court gleaned out this fact since none of the prosecution's witnesses asserted in their respective statements regarding this fact. Furthermore, Question No.4 of the appellant's said statement also needs discussion and the same reads thus:-

> *Q4.it is in prosecution evidence that you accused, Arshad, Ahsan Mushtaq and deceased used to have your dinner together from the Chapper Hotel of PW-9. What do you say about it?*

55. Now to deal with this question, it is again a question of mark and a matter of concern for this Court since none of the prosecution's witnesses in their testimonies deposed in this behalf. Furthermore, we are amazed at the conduct of the learned trial Court as to how and from where he gauged this fact since PW-9 in his statement did not say that the appellant and his co-accused used to have dinner together from his Chapper Hotel.

56. Insofar as the defense plea taken by the present appellant in his statement under Section 342 Cr.P.C. is concerned, the said plea of the appellant has not been taken into account by the learned trial Court inasmuch as the appellant in his statement recorded under Section 342 Cr.P.C. pleaded as under:-

> *"**There is no evidence that when, where before whom deceased was done to death**, all these facts shrouded with mystery. It is admittedly a blind murder. I was falsely involved in this case mere on account of suspicion"*

57. It is a matter of practice that in most of the criminal cases, the plea of an accused person raised in his / her statement recorded under Section 342 Cr.P.C. is not being given due consideration as it is a statement not on oath and is not put to the test of cross-examination since the same is made under the

protection of immunity. Although an accused's statement under Section 342 Cr.P.C. cannot be placed on the same footings as the statements recorded before the Court on oath, but even otherwise, if the plea of an accused person taken in his / her statement under Section 342 *ibid* is worthy of shaking confidence and the Court is convinced that the said plea is reliable and inspiring confidence, the same may be accepted by the Court provided it is in accordance with the probabilities of the established facts and circumstances of the case. Law to this effect has been laid down by the Hon'ble Supreme Court of Pakistan in the case titled **Raza and another Vs. The State and 2 others (PLD 2020 SC 523)** whereby the Hon'ble Supreme Court in paragraph 39 of the said judgment has inter alia held as follows:-

> *39. It is important to underline that the statement of the accused under section 342, Cr.P.C. is not evidence, it is only the stand or version of the accused by way of an explanation when incriminating material against him is brought to his notice. The statement is not made on oath, and cannot be tested by cross-examination, and is made under the protection of immunity of the maker of the statement from punishment for making false statement. Such statement cannot be placed on the same footing as statements made by witness in court on oath, which are tested by cross-examination. Such statement thus does not strictly constitute evidence**, but in view of the presumption of innocence in favour of the accused, the statement may provide valuable material to the courts for appraising the prosecution evidence in arriving at its findings. The version given in such statement if found by the court to be reasonable and in accord with the probabilities of the established facts and circumstances, the same may be accepted by the court even without requiring defence evidence,** unless the version is falsified by the prosecution evidence."*

NON-SUBMISSION OF THE CHALLAN IN TERMS OF SECTION 173 (B) Cr.P.C.

SUBMISSION OF 1st INCOMPLETE CHALLAN

58. Incomplete challan to the extent of acquitted respondent namely, Ahsan Mushtaq was prepared on 01.05.2016 and forwarded to the Assistant Superintendent of Police/SDPO Industrial Area Circle Islamabad, who on receipt of the same, forwarded it on 18.05.2016, which was then received in the office of District Attorney on 08.06.2016. However, as per the impugned judgment, the challan to the extent of said acquitted respondent was submitted in the Court of Area Magistrate on 21.06.2016.

SUBMISSION OF SECOND INCOMPLETE CHALLAN

59. Second incomplete challan in the *lis* in hand, was prepared on 24.06.2016, forwarded to Assistant Superintendent of Police/SDPO Industrial Area Circle Islamabad, who forwarded the same on 01.07.2016, which was received in the office of District Attorney Islamabad on 18.07.2016. The complete Challan on the receipt of forensic report was submitted on 23.05.2017.

60. The Prosecution was under a statutory obligation to submit the Challan whether interim or final within a period of 14 days after the arrest of an accused person as contemplated under the *proviso* to Section 173 (b) Cr.P.C. For the sake of ready reference, Section 173 (a) and (b) is reproduced herein below:-

> *"173. Report of police officer: (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer incharge of the police-station shall [through the Public Prosecutor]*

"(a) forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given ***: [provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under Section 154, the officer incharge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report****, unless, for reasons to be recorded, the Court decides that the trial should not so commence"*

61. This Court is mindful of the fact rather shocked to observe here that belated challans were submitted in the case in hand. In such a view of the matter, it can safely be held that the provisions of Section 173 Cr.P.C. were not complied with in letter and spirit. The prosecution has not been able to come up with any plausible explanation/reason for not submitting the challans before the Court through Public Prosecutor in accordance with the provisions of Section 173, Cr.P.C. It is the duty of every Investigating Officer to complete the interrogation of the accused within a stipulated period of time and an unnecessary delay is not tolerable in this regard since after completion of investigation, challan is to be submitted before the Court of competent jurisdiction. Section 344 Cr.P.C. provides that it is the duty of the Police Officer to furnish justification for detention

of an accused in custody, in the event, the challan under Section 173, Cr.P.C. has not been submitted before the Court of competent jurisdiction and trial has not been commenced, otherwise in absence of report of a police officer regarding the non-submission of the challan within the stipulated period, the detention of the accused can be termed as unjustified and against the provisions of the law. Such adherence to the mandatory provision of the law *viz* the detention of the accused and submission of the challan is lacking in the present case. Law in respect of the non-observance of the statutory provision of the law has been discussed elaborately by the Hon'ble Supreme Court in the case of **"Hakim Mumtaz Ahmed Vs. The State (PLD 2002 SC 590)**, whereby the Hon'ble Supreme Court while taking a serious view of the delay generally caused in the submission of the challan before the Court in terms of Section 173, Cr.P.C. observed as under:-

> *"On completion of maximum period of police remand the accused becomes entitled for trial and every Investigating Officer is duty bound to complete interrogation of the accused within stipulated period and no unnecessary delay is tolerable in this behalf because after completion of investigation, challan is to be submitted before the Court of competent jurisdiction through the Public Prosecutor.* ***As per section 344, Cr.P.C. it is the duty of the Police Officer to furnish justification for detention of accused in custody if challan under section 173, Cr.P.C. has not been filed*** *and trial has not commenced, otherwise in absence of report of a police officer of challan, detention of the accused would be unjustified and against the provision of law.".*

62. A view similar to the case of **(Hakim Mumtaz Ahmad)** (supra) was taken in the case titled **"Tariq Aziz Vs. the State and another (2018 YLR 747)**, wherein it has been held as under:-

> *Delay in submission of challan/ police report under section 173, Cr.P.C. has been noticed invariably in the criminal cases, despite the fact that section 173 of the Code of Criminal Procedure has been amended by Act XXV of 1992 whereby a facility has been extended to the Investigating Agency for submitting interim report the period of 3 days from the completion of period of 14 days of the police remand* ***but instead of deriving benefit from this provision of law, the Police Authorities including S.H.Os. and high-ups up to the rank of Senior Superintendent of Police never bothered to comply with this mandatory provision of law****.*
>
> *10. Undoubtedly section 173, Cr.P.C. was amended vide Act XXV of 1992 with a view to improve performance of the Police Department and simultaneously to stop the police from adopting protracted investigation process for one of the other pretext but the police authorities had in fact rendered the provisions of section 173, Cr.P.C. ineffective by not following its spirit.* ***In this behalf it is to be noted that unconvincing delaying tactics are adopted by the concerned investigating officers*** *as it has exactly happened in the instant case because the then Superintendent of Police Mandi Bahauddin who is supposed to be incharge of criminal cases as per rule 5.1, Chapter 5 of the Punjab Law Department Manual, 1938 failed* ***to furnish reasons for not submitting the challan before the Court through Public Prosecutor as per the provisions of section 173, Cr.P.C.***

63. In the case titled **Mazhar Hussain Vs. lshtiaq Hussain and another (PLD 1990 Lahore 249)** it has been held that primarily it will be the function of the District Prosecution Agency to finally scrutinize the charge-sheet or report under section 173 Cr.P.C. of a case and on receipt of report from the police submit the same before the Court concerned. On having seen the conduct of the Investigating Agency and District Prosecution Agency, we are of the opinion that in absence of good working relations between both the agencies, it is not possible to strictly adhere to the provisions of Section 173 Cr.P.C. **but on account of non-cooperation between both the agencies no one has suffered**

except the accused/petitioner who remained in detention without trial for a considerable period as it has been noted hereinabove. **In this regard, the Court which had been granting judicial remand of the petitioner in terms of section 344, Cr.P.C. would also be equally responsible for the delay in commencement of trial, because if it had insisted hard upon police to comply with the provisions of section 173, Cr.P.C. or to face consequence for keeping the accused in custody there was no reason that concerned S.H.O/Investigating Officer had not put up challan against the accused**. It is a general practice that we do point out weaknesses in the system but don't bother to discharge the duty cast upon the functionaries seized with the matter."

APPLICATION UNDER SECTION 540 CR.P.C

64. On 25.04.2017, the prosecution moved an application under Section 540 Cr.P.C for summoning of Dr. Asim Shahzad/PW12, who was posted at Surgical Ward-III, PIMS hospital on 07.03.2016 i.e. date of incident, and he opined through Exh.PK/1 that the deceased Ali Raza was not in a condition to get record his statement under Section 161 Cr.P.C. The name of said witness was not included in the calendar of witnesses. The application was allowed vide order dated 04.05.2017 and the Doctor was examined as PW-12. The order sheet dated 16.11.2017 shows that opportunity was granted to the learned counsel for the appellant Muhammad Arshad to cross examine PW-2 (Qaiser Bashir, Constable) PW-7 (Muhammad Asghar), PW-11 (Amir Shahzad, Drafts Man). However, applications were received by the learned counsel for the defense that they do not want to cross examine PW-12 and PW-11 and opted the cross examination conducted by the other defense counsel on the said PWs.

POINTATION OF PLACE OF OCCURRENCE

65. The appellant was arrested on 07.06.2016, whereas acquitted respondents namely Ahsan Mushtaq was arrested on 15.04.2016 and Adeel Ayub on 19.06.2016. The place of occurrence was firstly identified on 08.03.2016 when the complainant along with the police officials visited the place of occurrence. Then on 20.04.2016 the acquitted respondent namely Ahsan Muhstaq made a disclosure to this effect and memo of identification of place of occurrence was prepared as Exh. PU. Again on 16.06.2016 on the pointation of the appellant, the police party was led to the place of occurrence. Yet again on 22.06.2016, the place of occurrence was inspected by the I.O. Now the question arises when the complainant on 08.03.2016 led the police officials to the place of occurrence and it was well within the knowledge of the police, then what useful purpose did it serve to inspect the place of occurrence again and again. Such kind of exercise carried out by the police during the investigation was of no help in any manner except that the police officials were making mockery of their system and investigation carried by them.

66. It is beyond understanding and bespeaks volumes towards the occasional approach of the police officials while conducting the investigation. Such kind of practice should be reprimanded by the high-ups of the police department. The energy and resources that were wasted in such kind of exercise conducted by the investigating officers leaves no room but to hold that the police officials were acting in grave violation of the Police Rules and are lacking the basic knowledge of investigation, as such, it would be appropriate that such kind of exercise should not be carried out by the investigating officers and it is

un-understandable that what the police officials gained while investigating a case of murder like the manner discussed herein above. It goes without saying that the energies and resources of the police if utilized for the intended purposes would help the Court to reach at a just and proper decision in every case, but this kind of conduct of the police during investigation are stumbling blocks in the administration of justice.

67. The learned trial Court while discussing the role of the acquitted accused Ahsan Mushtaq has made some observations which are important to be discussed. The observations are reproduced herein below:-

> *So it can be said that the recovery place of P-5 is an open place. Now the question arises that the said security card remained present in the grass at the place of recovery for about 44 days, and none of the passer-by saw P-5 there. As per I.O and PW-4, the place of recovery of P-5 is close to the place of occurrence, so another questions arises that I.O of the case visited the place of occurrence many time before this recovery, but during inspection of the spot, he could not get recovered the security card of deceased from the said place. Further perusal of security card (P5) reveals that neither there is any mark of scratches, nor any mark of soil or dirt on it. It is not acceptable that the card (P5) remained for 44 days in an open place, and remained intact there, without any damage. In such circumstances, the recovery of security card (P5) after 44 days of the occurrence near the place of occurrence creates doubt.*

68. The learned trial Court while discussing the veracity of the statement of PW-9 (Israr Khan) had also observed that the statement of the said PW was recorded on 19.04.2016 almost after 43 days of the occurrence and has extended the benefit of the doubt to the acquitted respondent Ahsan Mushtaq. The observations of the learned trial Court towards the role of each and every accused are at variance, while the prosecution has produced same set of evidence against all the persons nominated

in the FIR. The learned trial Court while disbelieving the said recovery effected on the pointation of the acquitted respondent (i.e. Ahsan Mushtaq) has extended the benefit of the doubt to the acquitted respondent, but surprisingly while believing mere recovery of *Sarru/Danda* and that too not blood stained (P6) and a motorcycle (which in fact did not belong to the appellant rather belonged to one Rashid (detail whereof has been discussed in preceding paragraphs) has convicted the appellant in the manner discussed in para-1 of this judgment. On such findings of the learned trial Court, which are not just inconsistent but also are at variance on material aspects of the matter and thus the appellant's conviction based on such unreliable evidence cannot be allowed to be sustained.

69. The examination of the prosecution case and of the evidence produced during the trial would reveal that the same set of evidence was disbelieved *qua* majority of the accused i.e. the acquitted respondents, who were assigned almost a similar role as the one assigned to the appellant in the commission of the perpetrated offence. In the absence of independent corroboration, hopelessly lacking in the instant matter, on recovery and motive, since the very origin of the incident is far from being clear, it would be critically unsafe to single out the appellant from the array of the accused persons. It is not less surprising that the accused despite the fact could have planned the murder of the deceased through a conventional weapon rather than using a non-conventional weapon, such as, a Saru/Danda Exh.P6. Admittedly, the weapon of the incident i.e. Saru/Danda Exh.P6 was not blood stained. It does not appeal to a prudent mind that Exh.P6/danda which allegedly caused the death of the deceased, did not stain blood particularly when the prosecution took the stance that the blood was oozing from the deceased's head and

his attire stained blood then why was Exh.P6/danda not stained blood, All these aspects of the matter were ignored by the learned trial Court.

70. From careful appraisal of the entire prosecution evidence, it came to light that initially the subject FIR was registered against unknown persons and after a delay of almost 21 days, the appellant and the acquitted respondents were nominated by the complainant through supplementary statement. As mentioned above, the complainant in his statement did not disclose as to how he came to know that the appellant and the acquitted respondents were the real culprits. The arrest of the appellant and the acquitted respondents and their extra judicial confession before the police, pointation of the place of occurrence, already known to the police from the day first, are inconsequential and rendered no help to the case of the prosecution for bringing home the guilt of the appellant and the acquitted respondents. The subsequent arrest of the appellant and his pointation of the place of occurrence, recovery of the *Danda* on pointation of the appellant, having not bloodstained, never sealed in a parcel, and the admission on the part of the PWs that such like *Saru/Danda* are commonly available in the market as well in open places, leave no room to conclude that the case of the prosecution that hinges upon circumstantial evidence, is highly discrepant, not worthy of credence and cannot be relied upon to hold the appellant guilty for the offence charged with.

71. Reference in this regard may be made to the law laid down in the judgment reported as **2018 SCMR 2092**, wherein it has been held that ***"conviction based on confession before police and other in admissible evidence****.... **No direct evidence is available against the accused**... **mere evidence relied upon***

by the court below was confession of accused before the investigation officer, which was inadmissible evidence in terms of article 38 & 39 of QSO, 1984*.... Pointing out of the place where dead body of the deceased was thrown and the place of recovery of motorcycle by the accused could not be termed as discovery as a consequence of information received from the accused within the meaning of Article 14 of the QSO, 1984, as the said places were also in the knowledge of the police."*

72. Needless to mention here that the defence is not required to create a series of dents and doubts in the prosecution case but for giving the benefit of the doubt if a single doubt is created even then the defence is entitled to the benefit of the same not as a matter of grace and concession but as a matter of right. Reliance can be placed on the judgment of the Hon'ble Supreme Court titled **Muhammad Akram Vs. The State (2009 SCMR 230)**, whereby, 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 occur in favour of the accused as matter of right and not of grace****. It was observed by this court in the case of Tariq Pervaiz 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 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".***
>
> **(Underline is ours for emphasis)**

73. Reliance can also be placed on a reported judgment titled as **Sher Umer Khan v. Khan Pur alias Khaney and 2 others (PLD 2015 Peshawar 143)** wherein it was held as under:-

> *"It is settled law that the prosecution primarily is bound to establish guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling* ***the court to draw conclusion: whether the prosecution has succeeded in establishing accusation against the accused or otherwise: and if it comes to the conclusion that the charges so imputed against the accused have not been proved beyond reasonable doubt, then accused would become entitled for his release on getting benefit of doubt in the prosecution case. The requirement of the criminal case is that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused and it would be sufficient to discredit to the prosecution story and entitle the accused for acquittal.*** *Moreover, accused is always consider as the most favorite child of law and every benefit of doubt goes to him regardless of fact whether he has taken any such plea or not. Reliance can be placed on case titled, "Fariad Ali v. State" 2008 SCMR 1086".*
>
> **(Underline is ours for emphasis)**

74. It is settled principle of law that rule of safe administration of criminal justice is **"the harsher the sentence the stricter the standard of proof"** therefore, for the purposes of the safe administration of criminal justice, some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence in order to obviate chances of miscarriage of justice on account of exaggeration by the Investigating Agency. Such minimum standards of safety are even otherwise necessary for safeguarding the fundamental rights of the citizens regarding life and liberty, which cannot be left at the mercy of the investigating agency without the production of cogent and confidence inspiring and reliable evidence. We would like to quote famous arguments of Sir Geoffrey Lawrence, the then King's Counsel, remembered in legal

memory as a fine judge appointed on the King's Bench Division, to be later elevated as Lord Justice of Appeal in 1944 and who later was destined to Preside over the Tribunal set up to try war crimes at the Nuremberg Trials in 1946-1947, and who remarkably and relatively stranger to the criminal Court but was engaged as a defence counsel in his first murder trial to defend Dr. John Bodkin Admas, a notorious serial killer of his age and accused of murder of a patient in "one of the greatest murder trials of all times" in his concluding address to the jury explained with startling simplicity and clarity how reasonable doubt operates in a criminal case:-

> *"Justice is of paramount consideration here, and the only way in which this can be done is for you to judge the matter on what you have heard in this court and in this court only. What you read in the papers, what you hear in the train, what you hear in the cafes and restaurants, what your friends and relations come and tell you; rumor, gossip, all the rest of it, may be so wrong. The possibility of guilt is not enough, suspicion is not enough, probability is not enough, likelihood is not. A criminal matter is not a question of balancing probabilities and deciding in favour of a probability. If the accusation is not proved beyond reasonable doubt against the man accused in the dock, then by law he is entitled to be acquitted, because that is the way our rules work. It is no concession to give him the benefit of the doubt. He is entitled by law to a verdict of not guilty."*

75. As discussed above, material contradictions, dishonest improvements and inconsistencies have been noted in the statements of the prosecution witnesses, which in our perception, are sufficient to make the very case of the prosecution highly doubtful. The requirement of the criminal case is that the prosecution is duty bound to prove its case beyond any reasonable doubt and if any single or a slightest doubt is created in the prosecution’s case, benefit thereof must

go to the accused and it would be sufficient to disbelieve the prosecution story and acquit the accused. But benefit of such doubt was withheld by the learned trial Court in favour of the appellant, hence, rendered the impugned judgment illegal being suffering from mis-reading and non-reading of evidence.

76. The final and eventual outcome of the above discussion leads us to an irresistible conclusion that the prosecution has failed to prove its case against the appellant beyond reasonable doubt for which he is entitled to be benefited.

In result whereof, the appeal **(i.e. Crl. Appeal No.183/2017)** filed by the appellant Muhammad Arsahd is **ALLOWED,** whereas the appeal **(i.e. Crl. Appeal No.24/2019)** filed by the complainant challenging the acquittal of the acquitted respondents is **DISMISSED** and in consequent thereof, Murder Reference No.01/2018 sent by the learned trial Court is answered in the **NEGATIVE.** Consequently, the appellant namely Muhammad Arhsad is acquitted of the charges under Sections 302 and 34, P.P.C, in case FIR No.73/2016, Police Station Sabzi Mandi, Islamabad by extending him the benefit of the doubt in his favour. The appellant, Muhammad Arshad is ordered to be released forthwith, if not required to be detained in connection with some other criminal case.

(MIANGUL HASSAN AURANGZEB) JUDGE

(ARBAB MUHAMMAD TAHIR) JUDGE

Announced in an open Court on ___07.2022.

JUDGE **JUDGE**

ISLAMABAD | .07.2022
APPROVED FOR REPROTING

//Kamran//