Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Murder Reference No. 01 of 2019

The State
Vs
Zulqarnain Hussain Shah

APPELLANT BY:	Syed Hamid Ali Bukhari, Advocate.
Complainant BY:	Mr. Jan Muhammad Khan, Advocate.
State By:	Mr. Majid Rashid Khan, State Counsel.
DATE OF HEARING:	28-04-2021.

BABAR SATTAR, J.- Through this judgment we will decide ***(i) Murder Reference No. 01/2019,*** whereby the judgment of the learned Sessions Judge, East-Islamabad dated 19.12.2018 through which he has found Zulqarnain Hussain Shah son of Saqlain Hussain Shah guilty for offence under section 302(b)/34 of Pakistan Penal Code, 1860 ***("PPC")*** and sentenced him to death has been referred to us under section 374 of the Code of Criminal Procedure, 1898 ***("Cr.P.C")*** for confirmation, ***(ii) Criminal Appeal No. 224/2018*** filed by Zulqarnain Hussain Shah and Iftikhar Hussain Shah, whereby Zulqarnain Hussain Shah has been found guilty under section 302(b)/34 PPC and sentenced to death and liable to pay compensation to the legal heirs of Jabbar Hussain Shah in the amount of Rs.200,000/- in terms

of section 544-A, Cr.P.C and fine of Rs.100,000/- and in default of payment of fine to undergo rigorous imprisonment for a period of three months, and Iftikhar Hussain Shah has been found guilty for causing injuries to Ghulam Abbas under section 337-F(ii) of PPC and sentenced to two year rigorous imprisonment and payment of Daman as prescribed by law, ***(iii) Criminal Appeal No. 21/2019 (Syed Lal Hussain Shah Vs. Fida Hussain Shah, etc.)*** filed under section 417(2)-A of Cr.P.C by the complainant Syed Lal Hussain Shah, challenging acquittal of Iftikhar Hussain Shah under section 302(b) of PPC, the acquittal of Zulqarnain Hussain Shah under section 324, 337-F(ii), 148 and 149 of PPC and the acquittal of four other co-accused against all charges, and ***(iv) Criminal Revision No. 22/2020 (Syed Lal Hussain Shah Vs. Iftikhar Hussain Shah, etc.)*** whereby enhancement of the sentence of Iftikhar Hussain Shah for offence under section 337-F(ii) of PPC has been sought.

2. On 24.06.2012 Jabbar Hussain **("Deceased")** son of Syed Lal Hussain Shah (PW-8) was shot dead in his house around 10.00 a.m. The complainant, Syed Lal Hussain Shah (PW-8) filed a complaint with the police and consequently a case under FIR No. 302 dated 24.06.2012 for offences under sections 302, 324, 148 and 149 of PPC was registered against Syed Saqlain Hussain Shah, his brother Fida Hussain Shah, Saqlain's sons Zulshahadatain Shah and Zulqarnain Hussain Shah, Fida's sons Zulfiqar Hussain Shah and Iftikhar Hussain Shah and their relative Aftab Hussain Shah son of Nazar

Hussain. According to the complainant's account as recorded in the FIR (EXh.PW-1/1), the accused entered into the complainant's house in Village Ali Pur Farash at 10.00 a.m in the morning. Zulshahadatain Shah, Zulqarnain Hussain Shah and Iftikhar Hussian Shah were armed with 30-bore pistols and Zulfiqar Hussain Shah and Syed Aftab Hussain Shah were armed with 12-bore Rifles. Saqlain Hussain Shah abused the complainant and threatened to kill the complainant and his sons. Zulshahadatain Shah fired his 30-bore pistol and the bullet hit the Deceased near his neck. He attempted to fire a second shot at the complainant but his pistol malfunctioned. Zulqarnain Hussain Shah then fired his 30-bore pistol and the bullet hit the Deceased in his leg. Iftikhar Hussain Shah on the direction of his father Fida Hussain Shah, fired his 30-bore pistol and the bullet hit Ghulam Abbas (PW-9) son of the complainant in his thigh. Aftab Hussain Shah hit the complainant with his 12-bore Rifle and injured him. Zulfiqar Hussain Shah and Aftab Hussain Shah also fired shots at the complainant's sons Sibtain Hussain Shah and Faizan Ali Shah but as both of them were behind a wall they were not hit. Zulshahadatain Shah was declared as a Proclaimed Offender and has not been arrested thus far. The remaining accused were tried.

3. The charge was famed against the six accused who pleaded not guilty and the trial ensued. Syed Lal Hussain Shah, complainant (PW-8) and his injured son Ghulam Abbas (PW-9) were presented by the prosecution as eye-witnesses.

Syed Lal Hussain Shah, complainant (PW-8) reiterated the account of events as reported in the FIR. He testified that while leaving his house the accused indulged in aerial firing. During cross-examination, he acknowledged that the wife of Saqlain Shah was his real sister and so was the mother of Aftab Hussain Shah and that he was married to sister of the accused Saqlain Hussain Shah and Fida Hussain Shah. During cross-examination, he testified that he went to the Police Station Shahzad Town and reported the occurrence and after recording his statement he went to Polyclinic Hospital and took along the Deceased, whose body was subsequently moved to PIMS Hospital. He subsequently stated during cross-examination that he went to the hospital straightaway and not to the Police Station. Regarding the distance of the accused from the Deceased, he stated during cross-examination that Zulshahadatain Shah was around two to three feet from the Deceased when he fired at the Deceased and Zulqarnain Hussain Shah was three to four feet from the Deceased when he fired at the Deceased. He stated that the second shot fired by Zulshahadatain Shah missed the complainant because Zulshahadatain Shah's pistol was stuck and the fire ended up hitting the Shrine of Mazhar Shah adjacent to the complainant's house. He further testified that Iftikhar Hussain Shah shot his son Ghulam Abbas (PW-9) inside the shrine adjacent to his house and that Iftikhar Hussain Shah was at a distance of approximately twenty to twenty two feet from Ghulam Abbas when the shot was fired.

4. Ghulam Abbas (PW-9), the second eye-witness, narrated the same story as presented by the complainant and recorded in the FIR. He described the motive for the attack as the declaration of 'Waqf' for mosque in Khasra No. 223 which was the complainant's inherited property and this action begrudged the accused who assaulted the complainant on 23.06.2012. That the complainant stopped the construction work of mosque after such assault and in presence of respectables of the locality it was decided that a 'Jirga' would be convened on 24.06.20212. On such date the accused attacked the complainant and his sons, killing the Deceased and injuring the said witness. During cross-examination Ghulam Abbas (PW-9) acknowledged that he was facing trial in a case registered under section 9(c) of CNSA, 1997. He further testified that the distance between Iftikhar Hussain Shah who fired the shot at him was approximately twenty two to twenty four feet at the time the shot was fired. He further testified that after receiving the gun shot injury he went inside his house and took out a pistol, but it then transpired that there were not bullets available and after about two minutes he got into a taxi and left for Polyclinic Hospital.

5. Dr. Farrukh Kamal, MLO, PIMS (PW-3) conducted the postmortem of the Deceased and testified that the Deceased had two bullet injuries, one at the neck and the other on his right thigh. He testified that the cause of death was firearm injury caused by the bullet that entered between

his neck and shoulder and exited from right side of his abdomen. He further testified that both fire shot injuries caused blackening around the entry wounds and were fired from a close range of approximately four feet. The postmortem report was exhibited as Exh.PE and was consistent with the testimony of Dr. Farrukh Kamal (PW-3). The postmortem report also noted that fire shot causing an injury between the neck and shoulder fired from close range caused the death of the Deceased and the fire shot that hit the right thigh (also fired from close range) was not the cause of death. Dr. Tanvir Afsar Malik (PW-7) had attended to Ghulam Abbas (PW-9) at Polyclinic Hospital on 24.06.2012 and testified that Ghulam Abbas had an entry wound above iliac crest on the right side and an exit wound lateral to the entry wound above iliac bone posterior that had caused charring but not blackening. He testified that charring is caused around a wound when a gun is fired from a distance of six to nine inches and blackening is caused by a gun fired from a distance of two feet. He testified that charring is not caused when a shot is fired from a 30-bore pistol from a distance of over one foot. He also testified that he had examined Syed Lal Hussain Shah, complainant (PW-8), also on 24.06.2012 at around 11.10 a.m, who was complaining of pain and swelling in right thumb and opined that the complainant's injury was simple. The medical history and prescription issued to the complainant (PW-8) and Ghulam Abbas Shah (PW-9) were exhibited as Ex-PJ and were consistent with the testimony of PW-7.

6. Muhammad Hanif S.I (PW-13), the first Investigating Officer, testified that after receiving information regarding the incident at 10.00 a.m he reached Polyclinic Hospital at 10.25 a.m and the body of the Deceased was lying in the emergency ward and Ghulam Abbas was also present there. He received the complaint from the complainant on the basis of which the FIR was registered. He prepared the inquest report. After the postmortem of the Deceased he visited the venue of the occurrence and prepared un-scaled site plan and collected blood with cotton which was exhibited as Exh.PA. He testified that a scaled site plan was handed to him by the Draftsman on 28.06.2012, whose statement was recorded in the Police Station on the said date. He also testified that the first version of the accused was that they were innocent and had been falsely involved in the matter and that Zulshahadatain Shah was responsible for the incident. Muhammad Nawaz ASI (PW-2) also testified that he along with Muhammad Hanif visited the place of occurrence on 24.06.2012 where Muhammad Hanif (PW-13) secured one empty of 30-bore pistol. Malik Aamer Shahzad, Draftsman (PW-4) testified that he visited the place of occurrence along with Muhammad Hanif (PW-13) on 25.06.2012 and that his statement was recorded by Muhammad Hanif (PW-13) on 28.06.2012. Muhammad Afzal Moharir (PW-5) testified that Muhammad Hanif, S.I (PW-13) handed over parcels of bloodstained cotton and one empty of 30-bore pistol which he handed over to Liaquat Ali on 07.09.2012 to be delivered at Forensic Science Laboratory and Liaquat Ali (PW-6) testified

that he delivered the said parcel to Forensic Science Laboratory, Lahore. A more detailed account of the evidence adduced by the prosecution is recorded in the impugned judgment and need not be recapitulated here.

7. In the statements of accused recorded under section 342 of Cr.P.C, all of them stated that they had been falsely implicated for the murder of the Deceased which was committed by Zulshahadatain Shah, who was a family member but a fugitive from law and that they had no prior criminal record. Fida Hussain Shah and Saqlain Hussain Shah also stated that they were 80-year and 75-year old, respectively. Iftikhar Hussain Shah also stated that he was a government servant with a clean service record and had been falsely implicated to damage his career merely for being a relative of Zulshahadatain Shah.

8. In its judgment, the learned trial Court concluded that the testimony of the witnesses were consistent with the medical evidence furnished by Dr. Farrukh Kamal (PW-3) and Dr. Tanvir Afsar Malik (PW-7). That the accused while claiming to be innocent had not denied the Deceased had been killed by firearm injuries. That in relation to the injury inflicted on Ghulam Abbas (PW-9), the ocular account presented by Syed Lal Hussain Shah (PW-8) was in line with the medical evidence furnished by Dr. Tanvir Afsar Malik (PW-7). That the place of occurrence was also not disputed as a site plan had been prepared by Malik Aamer Shahzad (PW-4) on the pointation of Syed Lal Hussain Shah (PW-8) in

presence of Muhammad Hanif (PW-13), who had also collected one empty of 30-bore pistol from the crime scene. The learned trial court found that eye-witness account was supported by the testimony of the Investigating Officer, Muhammad Hanif (PW-13) and Mansha Hussain (PW-12) who had submitted the challan against the accused. Further on the basis that accused Zulqarnain Hussain Shah and Iftikhar Hussain Shah neither appeared in the witness box nor adduced any evidence to rebut the allegation against them and the evidence produced by the prosecution was trustworthy, it found that Zulqarnain Hussain Shah guilty of murder of the Deceased with common intention of co-accused Zulshahadatain Shah (who was declared Proclaimed Offender and never tried) and the accused Iftikhar Hussain guilty of causing intentional injury to Ghulam Abbas (PW-9). The learned trial Court further held that sufficient evidence had not been produced by the prosecution to connect Syed Saqlain Hussain Shah, Fida Hussain Shah, Aftab Hussain Shah and Zulfiqar Hussain Shah with the commission of the offence. Consequently, the said accused were acquitted being granted the benefit of doubt. The learned trial court further held that no *mala fide* or ulterior motive had been found on part of prosecution witnesses to falsely implicate Zulqarnain Hussain Shah, who was awarded the death sentence.

9. The learned counsel for the accused argued that the incident solely involved Zulshahadatain Shah (P.O.) and nobody else, and as the incident caused the death of the

Deceased, all family members of Zulshahadatain Shah had been falsely implicated by the complainant (PW-8) and his son Ghulam Abbas (PW-9) by casting a wider net. He submitted that the cause of dispute between Zulshahadatain Shah and the complainant was that the complaint's brother-in-law's body was buried at the shrine adjacent to his house for which his son Jabbar Hussain Shah was acting as Mutawali and Zulshahadatain Shah wanted to act as Mutawali instead. The learned Defence counsel contended that the testimony of complainant Syed Lal Hussain Shah (PW-8) suffered from contradictions as he initially stated that he reported the incident by visiting the Police Station and subsequently acknowledged that after the incident he went directly to the hospital. He further contended that the eye-witness account of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) was not backed by evidence as according to the eye-witness account Zulshahadatain Shah was 4/5 feet away from the Deceased who was shown to be ten feet in the site plan. Further that the prosecution case was that multiple shots had been fired and the accused had indulged in aerial firing as well but only one empty of 30-bore pistol had been recovered from the place of occurrence which was not a public place. He contended that no weapons were recovered from any of the accused and consequently the recovery of one empty was inconsequential. He stated that Ghulam Abbas (PW-9) had provided a motive for the attack while claiming that there existed a dispute related to declaration of 'Waqf' but no evidence had been led by the prosecution to prove the

motive. He contended that the medical evidence did not support the ocular evidence as the medical evidence suggested that in the case of the injury suffered by Ghulam Abbas (PW-9), there was charring around the wound which could only have been caused had he been shot from within a distance of one foot. But that the testimony of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) placed Iftikhar Hussain Shah at a distance of at least twenty feet away from Ghulam Abbas. He submitted that in view of the inability of the prosecution to prove its case against the accused beyond reasonable doubt the conviction of the two accused and award of death penalty to Zulqarnain Hussain Shah (who was attributed the role of inflicting non fatal injury on the deceased), the judgment rendered and the sentence awarded suffered from illegality and was liable to be set-aside. He relied on **Tariq Pervez Vs. The State** (***1995 SCMR 1345)***, ***Amin Ali Vs. The State and another (2011 SCMR 323)***, ***Barkat Ali Vs. Muhammad Asif and others (2007 SCMR 1812) and Akhtar Ali and other Vs. The State (2008 SCMR 6).***

10. The learned counsel for the complainant submitted that the place of occurrence, date of occurrence, dispute between the parties and identity of the Deceased were not disputed and that the counsel of the accused had admitted the existence of differences between the parties. He contended that the investigation was conducted in a dishonest manner and that the complainant was not responsible for

failings of the prosecution. He contended that it has been held by the august Supreme Court in ***Muhammad Asghar alias Mannah Vs. State (2010 SCMR 1706)*** that the standard of proof beyond reasonable doubt did mean proof beyond all doubt and that the prosecution has successfully proved its case beyond reasonable doubt against the accused. He relied on ***Shakil and 5 others Vs. The State (PLD 2010 SC 47), Muhammad Yaqoob Sub Inpsector Vs. The State (PLD 2001 SC 378), Ansar Mehmood Vs. Abdul Khaliq and another*** **(2011 SCMR 713), *Muhammad Ismail Vs. The State (2017 SCMR 713)*,** and ***Imran Ashraf and 7 others Vs. The State (2001 SCMR 424).***

11. The learned State Counsel supported the judgment rendered by the learned trial court and submitted that it has been passed after due appreciation of the evidence produced before the learned trial court and was liable to be upheld.

12. We have heard the learned counsel for the parties and perused the record with their able assistance.

13. We are not in agreement with the conclusions drawn by the learned trial court on the basis of the evidence adduced before it. The only evidence on the basis of which a guilty verdict has been delivered against Zulqarnain Hussain Shah and Iftikhar Hussain Shah is the eye-witnesses testimony of Syed Lal Hussain Shah (PW-8) (the Deceased's father) and his son Ghulam Abbas (PW-9). Syed Lal Hussain Shah (PW-8), in his testimony, which matches with the

narrative presented in the FIR, alleged that all seven accused who are related to each other and also form part of extended family of the complainant himself, attacked the complainant and his sons and attributed a specific role to each of the said accused. It is admitted in the testimony of Syed Lal Hussain (PW-8) as well as Ghulam Abbas (PW-9) that the fatal shot that claimed the life of the Deceased (as also backed by the postmortem report and the testimony of Dr. Farrukh Kamal, MLO (PW-3)) was fired by Zulshahadatain Shah, who was declared a Proclaimed Offender and has never been tried. The gun shot attributed to Zulqarnain Hussain Shah (convicted and given the death penalty) admittedly hit the thigh of the Deceased and according to postmortem report (Ex-PE) and the testimony of Dr. Farrukh Kamal (PW-3) was not the cause of death of the Deceased. Further, while Ghulam Abbas (PW-9) testified that there was an altercation between the accused and the complainant one day before the day of occurrence in the presence of respectables from the locality, no motive was mentioned in the FIR or by the complainant Syed Lal Hussain (PW-8) himself in his testimony and no evidence was led by the prosecution to prove motive. It is surprising that Ghulam Abbas (PW-9) eluded to the altercation between the accused and the complaint but the complainant (PW-8) himself neither reported such altercation in the complaint that resulted in the FIR nor mentioned the same in his own testimony before the trial court. It also makes no sense that if such altercation took place in front of respectables from the locality, such person would not be investigated and asked to testify. In any event,

what can be concluded in view of the evidence produced before trial court is that no motive has been provided for the attack that claimed the life of the Deceased and no evidence has been led in relation to any altercation between the accused and the complainant as alleged by Ghulam Abbas (PW-9) or in relation to any dispute between the family of the complainant and the accused. It was held by the august Supreme Court in ***Muhammad Bux Vs. Abdul Aziz (2010 SCMR 1959)*** that if motive is not proved, *"the Court should be very careful in accepting prosecution story and the evidence of such witnesses who gave evidence on motive."*

14. Further, according to Syed Lal Hussain Shah (PW-8), two of the accused fired at Sibtain Hussain Shah and Faizan Ali Shah, the sons of the complainant, who did not testify before the trial court. Giving up two eye-witnesses to the occurrence on part of the prosecution is also surprising.

15. The other fact that stands out when eye-witness testimony is juxtaposed against evidence collected during the investigation and produced by the prosecution is that other than the account of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) there is no evidence regarding the presence of the accused at the place of occurrence on the date of occurrence. According to Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) shots were fired by at least five accused, some of which hit the walls of the shrine adjacent to the complainant's house and that the accused also indulged in aerial firing after killing the Deceased and injuring Ghulam

Abbas (PW-9). However, there was only one empty of a 30-bore pistol recovered from the place of occurrence according to the prosecution. The prosecution produced no evidence of multiple shots having been fired that allegedly also hit the walls of the shrine. This together with the fact that no recovery of weapons was effected from the accused, including the two accused who have been convicted, manifests an absence of reliable independent evidence to corroborate the ocular evidence.

16. In terms of injury inflicted on Ghulam Abbas (PW-9) by Iftikhar Hussain Shah the testimony of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) himself is in conflict with the medical evidence produced by Dr. Tanvir Afsar Malik (PW-7). According to the testimony of PW-7, Ghulam Abbas (PW-9) suffered a fire shot injury which caused charring around the wound and according to his expert testimony charring around the wound could only have been caused if the shot was fired from within a distance of one foot. According to the testimony of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9), Iftikhar Hussain Shah was at least twenty two to twenty four feet away from Ghulam Abbas when he fired the shot attributed to him. The shot allegedly fired by Iftikhar Hussain Shah from the distance of over twenty two feet could not possibly have caused the kind of injury that Dr. Tanvir Afsar Malik (PW-7) described on the body of Ghulam Abbas (PW-9) after examining him on the date of incident within an hour of the injury being inflicted on him. It was held by the

august Supreme Court in ***Barkat Ali Vs. The State (2007 SCMR 1812)*** that oral evidence to the extent of inconsistency with medical evidence could not be accepted. In ***Amin Ali Vs The State (2011 SCMR 323)*** when ocular evidence was found to be in conflict with medical evidence, the conviction was set aside.

17. In a nut-shell, in view of the prosecution evidence no motive has been proved beyond reasonable doubt as to why the accused would attack Syed Lal Hussain Shah (PW-8) and his sons. No recovery of any weapon has been affected from any of the accused. Only one empty of a 30-bore pistol was recovered. Given that no weapon was recovered, the bullet has not been matched to a weapon and such recovery is inconsequential. The fatal injury that caused the death of the Deceased was attributed by the complainant (PW-8) as well as Ghulam Abbas (PW-9) to Zulshahadatain Shah, the Proclaimed Offender. The injury attributed to Zulqarnain Hussain Shah who has been convicted for murder and awarded the death sentence is not the cause of death of the Deceased. It is settled law that where fatal injuries cannot be ascribed to an accused with certainty, the maximum sentence of death cannot be awarded. Reliance is placed on ***Allah Dad Vs. The State (1995 SCMR 142), Naik Muhammad alias Naika Vs. The State (2007 SCMR 1639)*** and ***Muhammad Tashfeen Vs. The State (2006 SCMR 577).*** In view of the above facts i.e. that no motive having been established, in the absence of any recovery from Zulqarnain Hussain Shah,

in the absence of fatal gun shot having been attributed to him and in the absence of any evidence of common intention produced by the prosecution establishing a concert between Zulqarnain Hussain Shah and Zulshahadatain Shah, Zulqarnain Hussain Shah can neither be convicted for an offence under section 302(b) of PPC nor can he be given the death sentence, given that even as per the prosecution role attributed to him is that of inflicting a firearm injury on the Deceased which in of itself would not have claimed the life of the Deceased. In the absence of any evidence of common intention with the person who actually caused the death of the Deceased and was liable for an offence under section 302(b) of PPC, Zulqarnain Hussain Shah could at best be charged under section 337-F for causing hurt. It was held by the august Supreme Court in ***Muhammad Akbar Vs. The State (PLD 1991 SC 923)*** that to attribute common intention, there must exist clear circumstances manifesting common intention as generally common intention was preceded by common motive, preplanned preparation and concert pursuant to such plan. It was held in ***Muhammad Yaqoob Vs. The State (PLD 2001 SC 378)*** that common intention and joint liability pursuant thereto could not be attributed to an accused if there was no evidence to suggest that the alleged offence was committed in furtherance of common intention or a pre-arranged plan. No evidence of common intention has been adduced by the prosecution in the present case, on the basis of which Zulqarnain Hussain Shah can be found guilty and punished on the basis of joint or

vicarious liability. In any event, in the absence of primary liability being affixed, vicarious liability can also not be affixed.

18. Another crucial aspect of the evidence produced before the learned trial court and the manner in which it has been appreciated leading to the impugned judgment is that the learned trial court has disbelieved eye-witness testimony of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) in relation to all of the accused other than Zulqarnain Hussain Shah and Iftikhar Hussain Shah and has consequently acquitted them by giving them the benefit of doubt. The learned trial court has recorded no reasons as to why it would disbelieve the narrative of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas Shah (PW-9) in relation to four accused who according to Syed Lal Hussain Shah (PW-8) and Ghulam Abbas Shah (PW-9) were acting in concert with those convicted and, on whose instigation, Zulqarnain Hussain Shah and Iftikhar Hussain Shah allegedly fired shots causing injuries to the Deceased and Ghulam Abbas. It is not that on the basis of that the evidence produced by the prosecution, Syed Lal Hussain Shah (PW-8) and Ghulam Abbas Shah (PW-9) can be declared as independent witnesses in relation to two accused but motivated witnesses in relation to the remaining accused. Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) have narrated the story and sequence of event that places all the accused within the house of the complainant (PW-8) and close to the adjacent shrine and

claims that in an attack instigated by Saqlain Hussain Shah and Fida Hussian Shah their sons including Zulshahadatain Shah, Zulqarnain Hussain Shah fired shots that killed the Deceased and Iftikhar Hussain Shah fired a shot that injured his other son Ghulam Abbas (PW-9). It is inconceivable that a story and eye-witness account can be disbelieved in relation to the role played by four accused but is found consistent and trustworthy for purposes of determining the guilt of the remaining two accused. In the event that the testimony of the complainant (PW-8) and Ghulam Abbas Shah (PW-9) was found to be trustworthy and motivated for purposes of four of accused, the same testimony cannot form the basis for conviction of the remaining two accused.

19. It has been held by the august Supreme Court in ***Muhammad Iqbal Vs. the State*** ***(1984 SCMR 930)*** regarding ocular testimony that, *"ipsi dixit of such witnesses could not be accepted without independent corroboration in wake of false implication of many others already acquitted."* In ***Syed Saeed Muhammad Shah Vs. The State*** ***(1993 SCMR 550)*** the evidence of the complainant was found not to inspire confidence that he had spoken the whole truth and consequently the accused was given the benefit of the doubt and acquitted. In ***Akhtar Ali Vs. The State*** ***(2008 SCMR 6)*** eyewitnesses were found to have falsely implicated five of the eight accused and it was held that the conviction of the remaining accused could not be based on the same evidence without independent corroboration. It was held that the

credibility of ocular evidence was not divisible. In ***Imran Ashraf Vs. The State*** ***(2001 SCMR 424)*** the apex Court had explained that unreliable evidence could not be used for convicting an accused. But if the evidence was partially reliable and partially unreliable, the principle of sifting the grain from the chaff could be employed to seek independent corroboration of partially reliable evidence from other reliable evidence for purposes of conviction. In the present case however, there exists no other independent and reliable evidence that could be used to corroborate any part of the ocular evidence. In the absence of any recovery having been proved or motive having been established, there is nothing other than the testimony of Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9) to base the conviction of Zulqarnain Hussain Shah and the Iftikhar Hussain Shah on.

20. The contradiction between ocular account and medical evidence can also not be ignored. According to Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9), Iftikhar Hussain Shah was at least twenty two feet away from Ghulam Abbas Shah (PW-9). According to the medical evidence produced, Iftikhar Hussain Shah could not have inflicted the gun shot injury on Ghulam Abbas causing charring around his wound unless he fired the shot from less than one foot distance. In this case, other than the ocular evidence produced by Syed Lal Hussain Shah (PW-8) and Ghulam Abbas (PW-9), there is nothing to pin the blame of the injury suffered by Ghulam Abbas on Iftikhar Hussain Shah.

21. Even in terms of the appeal filed by the complainant against the acquittal of the remaining accused, there is nothing available on record to connect them to the offence alleged against them. According to the Investigating Officer (PW-13) the first statement of all the accused was that Zulshahadatain Shah was solely responsible for the incident that caused the death of the Deceased. In the absence of any evidence implicating the accused, they cannot be embroiled and punished merely for being related to Zulshahadatain Shah who allegedly caused the death of the Deceased.

22. It was held by the august Supreme Court in ***Qurban Hussain alias Ashiq Vs. The State*** ***(2010 SCMR 1592)*** that, *"onus rests upon the prosecution to prove the case beyond a reasonable doubt and it never shifts upon the accused accept in cases falling under Article 121 of the Qaunoon-e-Shahahdat Order, 1984 and during the entire proceedings the accused is presumed to be innocent. Both the expression viz. "proof beyond a reasonable doubt" and "presumption of innocence" are to be read together as a unit."* And that the, *"prosecution cannot take benefit of the defence as the prosecution is duty bound to prove the case on the evidence produced before the court beyond reasonable doubt.".* It was also emphasized in ***Muhammad Asghar Vs. The State*** **(2010 SCMR 1706)** that the principle requiring proof beyond reasonable doubt is of fundamental importance to ensure that the criminal justice system does not sacrifice

safety of convictions to efficacy of the system as a whole and to ensure that no innocent person is convicted. Relying on the US judgment ***State Vs. Velasco (253Conn.2010, 249 (2000)),*** it was held that reasonable doubt is *"not hesitation springing from any feelings of pity or sympathy for the accused or any other person who might be affected by the decision. It is, in-other- words, a real doubt, a doubt that has its foundation in evidence or lack of evidence."* In the present case doubt emerges when the evidence produced by the prosecution is appreciated as a whole, the benefit of which must be granted to the accused.

23. For the aforesaid reasons, we are of the view that in view of the golden rule that benefit of doubt must be given to the accused, the prosecution has failed to establish that the accused, including those convicted by the learned trial court, are liable for the offences they have been charged with. We find that in view of the evidence produced against the accused, their conviction would lack safety. There is no doubt that a terrible crime has been committed here. A life has been lost and the suffering inflicted on the complainant's family cannot be quantified. But the object of the criminal justice system is not just to convict any accused, but to convict those who are found to be guilty for having committed the crimes they are charged with in accordance with law after a fair trial. In the present case, the prosecution has not brought home charges and guilt to the accused beyond reasonable doubt.

24. We answer the Murder Reference in the **negative**. Consequently, we **allow** Criminal Appeal No. 224/2018 and set aside the impugned judgment, dated 19.12.2018 passed by the learned trial court. Criminal Appeal No. 21/2019 and Criminal Revision No. 22/2020 also stand **dismissed**. The appellants Zulqarnain Hussain Shah and Iftikhar Hussain Shah stand acquitted from the charge framed against them by the learned trial Court by order, dated 08.10.2013. The Appellant Zulqarnain Hussain Shah shall be released forthwith if not required to be detained in any other matter. Given that the appellant Iftikhar Hussain Shah is on bail, as his sentence was suspended by order dated 12.06.2019 passed in C.M No. 01/2018 in Criminal Appeal No.224/2018, the surety stands discharged.

(CHIEF JUSTICE) (BABAR SATTAR)
JUDGE

Announced in the open Court on 17.08.2021.

JUDGE (CHIEF JUSTICE)

Saeed*