

SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Shariat Appellate Jurisdiction)

PRESENT:

Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Criminal Appeal No.24 of 2018
(Filed on 26.07.2018)

1. Muhammad Idrees son of Sajawal Khan,
2. Muhammad Jameel son of Javid Iqbal,
3. Abbas Hussain son of Muhammad Bashir, caste Jatt, r/o Nomal, Tehsil and District Mirpur, presently in judicial lockup, Mirpur.

.... CONVICT-APPELLANTS

VERSUS

1. State through Advocate-General.
2. Muhammad Bashir son of Fateh Muhammad, caste Jatt, r/o Nomal Dhari Nasar-ullah, Tehsil and District Mirpur.
3. Muhammad Khaliq son of Ghulam Muhammad,

4. Sakina Bibi w/o Abdul Khaliq, caste Jatt, r/o Dhook Meera Khambal, Tehsil and District Mirpur (legal heirs of deceased Muhammad Rasheed).
5. Saqib Amin son of Muhammad Amin,
6. Muhammad Arif son of Muhammad Khadim Hussain, caste Jatt, r/o Nagiyal Mirpur (injured).

....RESPONDENTS

7. Tanveer Hussain son of Muhammad Ayoub,
8. Qurban Hussain son of Muhammad Adalat,
9. Muhammad Sadique son of Muhammad Alam, caste Jatt, r/o Nomal, Tehsil and District Mirpur.
10. Muhammad Jahanzeb son of Qurban Hussain, r/o Nomal Kharik, Tehsil and District Mirpur presently District Jail Mirpur.
11. Muhammad Shoaib son of Sajawal Khan, r/o Nomal, Tehsil and District Mirpur.
12. Abdul Majeed son of Muhammad Ayoub, r/o Nomal, Tehsil and District Mirpur.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat
Appellate Bench of the High Court dated
04.07.2018 in criminal appeals
No.90, 92, 93, 96, 97 and 98 of 2017)

FOR THE CONVICTS: Mr. Abdul Hameed,
Ch. M.Ashraf Ayaz,
and Mr. M.Jamil Ch.,
Advocates.

FOR THE RESPONDENTS: Mr. Khalid Rasheed
Ch., Advocate.

FOR THE STATE: Raja Inamullah
Khan, Advocate-
General.

Criminal Appeal No.25 of 2018
(Filed on 26.07.2018)

1. Muhammad Jahanzeb son of Qurban Hussain,
2. Muhammad Shoaib son of Sajawal Khan, r/o Nomal, Tehsil and District Mirpur.

VERSUS

1. State through Advocate-General.

2. Muhammad Bashir son of Fateh Muhammad, caste Jatt, r/o Nomal Dhari Nasar-ullah, Tehsil and District Mirpur.
3. Muhammad Khaliq son of Ghulam Muhammad,
4. Sakina Bibi w/o Abdul Khaliq, caste Jatt, r/o Dhook Meera Khambal, Tehsil and District Mirpur (legal heirs of deceased Muhammad Rasheed).
5. Saqib Amin son of Muhammad Amin,
6. Muhammad Arif son of Muhammad Khadim Hussain, caste Jatt, r/o Nagiyal Mirpur (injured).

....RESPONDENTS

7. Tanveer Hussain son of Muhammad Ayoub,
8. Qurban Hussain son of Muhammad Adalat,
9. Muhammad Sadique son of Muhammad Alam, caste Jatt, r/o Nomal, Tehsil and District Mirpur.
10. Muhammad Muhammad Idrees son of Sajawal Khan,
11. Muhammad Jameel son of Javil Iqbal,
12. Abbas Hussain son of Muhammad Bashir, caste Jatt, r/o Nomal, Tehsil and

District Mirpur presently judicial lockup,
Mirpur.

13. Abdul Majeed son of Muhammad Ayoub,
r/o Nomal, Tehsil and District Mirpur.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat
Appellate Bench of the High Court dated
04.07.2018 in criminal appeals
No.90, 92, 93, 96, 97 and 98 of 2017)

FOR THE CONVICTS:	Mr. Abdul Majeed Mallick, Mr. Abdul Hameed and Ch. Muhammad Ashraf Ayaz, Advocates.
FOR THE RESPONDENTS:	Mr. Khalid Rasheed Ch., Advocate.
FOR THE STATE:	Raja Inamullah Khan, Advocate- General.

Criminal Appeal No.31 of 2018
(Filed on 27.08.2018)

1. Saqib Amin son of Muhammad Amin,
2. Muhammad Bashir son of Fateh
Muhammad, caste Jatt, r/o Nomal Dhari
Nasarullah, Tehsil and District Mirpur.

.... APPELLANTS

VERSUS

1. Muhammad Jahanzeb son of Qurban Hussain,
2. Muhammad Shoib son of Sajawal Khan, caste Jatt, r/o Nomal, Tehsil and District Mirpur.l
3. Muhammad Idrees son of Sajawal Khan,
4. Abbas Hussain son of Muhammad Bashir,
5. Muhammad Jameel son of Javil Iqbal,
6. Tanveer Hussain son of Muhammad Ayub,
7. Muhammad Siddique son of Muhammad Alam,
8. Qurban son of Adalat,
9. Abdul Majeed son of Muhammad Ayub, caste Jatt, r/o village Nomal, Tehsil and District Mirpur.

....RESPONDENTS

10. State through Advocate-General, Azad Jammu and Kashmir.

....PROFORMA RESPONDENT

(On appeal from the judgment of the Shariat
Appellate Bench of the High Court dated
04.07.2018 in criminal appeals
No.90, 92, 93, 96, 97 and 98 of 2017)

FOR THE APPELLANTS: Mr. Khalid Rasheed
Ch., Advocate.

FOR THE CONVICTS: Mr. Abdul Majeed
Mallick, Mr. Abdul
Hameed, Ch. M.
Ashraf Ayaz, and Mr.
M. Jamil Ch.,
Advocates.

FOR THE STATE: Raja Inamullah
Khan, Advocate-
General.

Criminal Appeal No.33 of 2018
(Filed on 30.08.2018)

1. Sakina Bibi w/o Abdul Khaliq,
2. Abdul Ghafoor,
3. Muhammad Rafique sons of Abdul
Khaliq,
4. Muhammad Arif son of Muhammad
Khadim Hussain, caste Jatt, r/o No.1 to
3 Dhoke Mera Khambal, No.4 Nagyal,
Mirpur, Tehsil and District Mirpur.

....APPELLANTS

VERSUS

1. Muhammad Shoib son of Sajawal Khan,
2. Jahanzeb Akhtar son of Qurban Hussain,
3. Muhammad Jamil son of Javil Iqbal,
4. Abbas Hussain son of Muhammad Bashir,
5. Mohammad Idrees son of Sajawal Khan,
6. Muhammad Saddique son of Muhammad Alam,
7. Tanveer Hussain son of Muhammad Ayub,
8. Qurban Hussain son of Muhammad Adalat,
9. Abdul Majeed son of Muhammad Ayub, caste Jatt, r/o Nomal, Mirpur. (No.1 to 5 are in District Jail Mirpur).

....RESPONDENTS

10. The State through Advocate-General.
11. Muhammad Bashir son of Fateh Muhammad, r/o Nomal Kharik, Tehsil and District Mirpur.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 04.07.2018 in criminal appeals No.90, 92, 93, 96, 97 and 98 of 2017)

FOR THE APPELLANTS: Mr. Khalid Rasheed Ch., Advocate.

FOR THE CONVICTS: Mr. Abdul Majeed Mallick, Mr. Abdul Hameed, Ch. M. Ashraf Ayaz, and Mr. M. Jamil Ch., Advocates.

FOR THE STATE: Raja Inamullah Khan, Advocate-General.

Date of hearing: 30.01.2020

JUDGMENT:

Raja Saeed Akram Khan, J.— Through the appeals (supra), the common judgment of the Shariat Appellate Bench of the High Court (High Court) dated 04.07.2018, has been called in question, whereby the appeals filed by the complainant party have partly been accepted while the appeals filed by the convicts have been dismissed. As all the titled

appeals are outcome of one and the same occurrence and judgment, hence, these are being disposed of through this single judgment.

2. The facts necessary for disposal of the titled appeals are that a case in the offences under sections 147, 148, 149, 302 and 324, APC was registered at Police Station City Mirpur on the complaint lodged by Muhammad Bashir on 30.03.2009. It was alleged that on the fateful day a procession, led by Ch. Allah Ditta, against the upraising project of Mangla Dam, started from Kharak and when the same reached at Khambal Chowk, Jahanzeb and Majeed armed with 30-bore pistols along with other accused, Tanveer son of Ayub, Qurban son of Adalat, Idrees and Shoib sons of Sajawal, Jameel son of Javid, Abbas son of Muhammad Bashir and Muhammad Siddique son of Muhammad Alam,

armed with 30-bore pistols, arrived at the spot and raised controversy regarding the leading of the procession. Majeed, Tanveer and Qurban, accused, were boarding on a Jeep owned by Jahanzeb, accused, whereas, the other accused were riding on motorbikes. All the accused started firing from the front side of the procession with the common intention to kill the opponents. Jahanzeb, accused, started firing shots with 30-bore pistol upon Amin. Muhammad Yousaf, Saqib, Arif alighted from the Jeep to rescue him, but the fire hit Amin at his chest, who fell down on the ground. Thereafter, Majeed, accused fired a straight shot upon Muhammad Yousaf which hit him at his right shoulder and left thigh. Tanveer, accused, fired a straight shot upon Muhammad Rasheed which hit him at right side of his abdomen, whereas, Shoib, accused, also fired a shot which hit Muhammad Rasheed

at his left thigh. Idrees, accused, fired a straight shot, which hit Saqib at his left thigh. Qurban, accused, fired shot which hit Ajaib on right side of his bladder. Jamil, Abbas and Siddique, accused, also fired straight shots upon Arif, which hit him at his right shin, left thigh and right heel. On account of firing, the said persons sustained severe injuries due to which they fell to the ground. The accused fled away from the scene of occurrence and later on, Muhammad Amin, Muhammad Rasheed and Muhammad Yousaf injured, succumbed to the injuries. The occurrence was witnessed by Ch. Allah Ditta, Ch. Maroof son of Raj Muhammad, Qadeer son of Nazir and many other persons present at the place of occurrence. The motive behind the occurrence is stated to be a dispute over land between the accused, Jahanzeb and Muhammad Amin (deceased).

3. On the registration of the case, the police apprehended the accused and on the completion of the investigation presented the *challan* in the District Court of Criminal Jurisdiction, Mirpur which was entrusted to the Additional District Court of Criminal Jurisdiction, Mirpur for hearing and disposal. The trial Court on the conclusion of trial vide its judgment dated 27.05.2017, convicted the accused, Jahanzeb and awarded him the sentence of 10 years' simple imprisonment under section 302(c), APC and he was also ordered to pay Rs.5,00,000/- as compensation under section 544-A, Cr.P.C., to the legal heirs of the deceased, Amin and in default of payment he shall have to further undergo six months' simple imprisonment. The convict was also awarded one year's simple imprisonment along with Rs.5,000/- as fine in the offence under section 13 of the Arms Act, 1965 and in

default of payment of fine, he was ordered to further undergo three months' simple imprisonment. The accused, Shoib was also convicted and sentenced to 10 years' simple imprisonment under section 302 (c), APC, along with compensation of Rs.5,00,000/-, under section 544-A, Cr.P.C., to be paid to the legal heirs of the deceased in default of which it was ordered that he will further undergo for six months' simple imprisonment. The convict was also awarded one year's simple imprisonment along with Rs.5,000/- as fine in the offence under section 15(2) of the Arms Act, 2016, in default of which, he was ordered to further undergo simple imprisonment for three months, whereas, accused, Idrees, Abbas and Jameel were convicted and awarded 1 year's imprisonment each along with Rs.1,00,000/- each as *daman* under section 337-F(iii), APC, in default of which they

were ordered to remain in jail till payment of *daman*. The accused, Jameel was also convicted and awarded sentence of one year's simple imprisonment along with fine of Rs.5,000/-, and it was ordered that in case of default he shall undergo for three months' simple imprisonment under section 13 of the Arms Act, 1965. The accused, Siddique was convicted and awarded two years' simple imprisonment along with Rs.1,00,000/- as *daman* in the offence under section 337-F(iv), APC in default of which he was ordered to remain in jail, one year's simple imprisonment and a fine of Rs.5,000/- under section 13 of the Arms Act, 1965, in default of which, he has to undergo three months simple imprisonment, while the accused, Qurban was convicted and awarded the sentence of 1 year's simple imprisonment and fine of Rs.5,000/- in the offence under section 13 of

the Arms Act, 1965, in default of which he was ordered to undergo 3 months' simple imprisonment. The accused, Tanvir Hussain was also convicted and awarded the sentence of 1 year's simple imprisonment and fine of Rs.5,000/- under section 15(2) of Arms Act, 2016, in default 3 months' simple imprisonment was awarded. Feeling dissatisfied from the judgment of the trial Court, both the parties filed separate appeals before the High Court. The learned High Court vide impugned judgment dated 04.07.2018, partly accepted the appeals filed by the complainant party and dismissed the appeals filed by the convicts in the following manners:-

“Nutshell of the above discussion is that, We partly accept the appeals filed by the legal heirs of deceased, Muhammad Amin and Rasheed and enhance the sentence of ten years imprisonment awarded to convict-

appellants Jahanzaib and Shoaib to fourteen years R.I each under section 302 (c), APC, however, the other sentences shall remain intact. The offence under section 324, APC against convict-appellants, Idrees, Abbas and Jameel has also been proved, therefore, by partly accepting the appeals, the aforesaid accused-persons are also awarded punishment of five years rigorous imprisonment each under section 324, APC. The judgment to the extent of accused-convicts, Tanveer, Qurban and Siddique shall be maintained.

The other appeals filed by the convict-appellants stands dismissed. The convict-appellants, who are on bail and liable to serve the punishment according to this judgment, shall be arrested forthwith.

With the above modification, the appeals stands disposed of accordingly."

Now through the titled appeals, the validity of the judgment of the High Court has been challenged by the parties.

4. M/s Abdul Majeed Mallick and Abdul Hameed, Advocates, the learned counsel for the convict-appellants argued that the impugned judgment is against law and the facts of the case. They submitted that the whole prosecution story is doubtful; the case against the convicts has been made on the political motivation. In the instant case, two different motives have been alleged but the prosecution failed to prove the same and under law once motive has been alleged the same must be proved beyond shadow of doubt. They added that first motive alleged by the prosecution is that there was a dispute over land between the convict, Jahanzeb and Amin, (deceased), whereas, the alleged land had admittedly been acquired for Mangla Dam

Raising Project two years' prior to the occurrence. The other motive established by the prosecution is that during the procession the dispute between the parties arose to the effect that who will lead the procession; whereas, according to the prosecution's own story, one, Allah Ditta, was the organizer of the procession and he was leading the same himself. Thus, in such state of affairs, the alleged motives have not been proved. They contended that the place of occurrence, i.e. Khambal Chowk, is situate in the main city which is a thickly populated area but no independent witness has been cited in the calendar of witnesses. All the prosecution witnesses are closely related to each other and are interesting witnesses. The star witness of the case, Allah Ditta, who led the procession according to the prosecution's story, has not been produced before the Court, similarly, two

other alleged eyewitnesses, Muhammad Maroof and Muhammad Ajaib, have also been abandoned by the prosecution. In this scenario, the prosecution withheld the best evidence and in such a situation the Courts below should have drawn the adverse inference. They forcefully contended that one, Muhammad Yousaf, the brother-in-law of the convict-Jahanzeb, was died on spot by the firing made by the complainant party and firstly a person namely Abdul Rehman approached the police for registration of the case, but due to the political pressure, the FIR on the said application was not registered. On the contrary, Muhammad Amin and Muhammad Rasheed who got injured in the occurrence were succumbed to the injuries in the hospital but initially no one from the legal heirs of the deceased came forwarded to lodge FIR, however later one, Muhammad Bashir

became the complainant of the murder of all the three deceased persons. They submitted that the legal heirs of the deceased, Muhammad Yousaf, protested against the registration of false case by blocking the road and they also approached the High Court by filing writ petition that the case has falsely been registered against the facts. This aspect of the case makes the case highly doubtful. They added that in the instant case, the origin of occurrence has been suppressed, nothing has been pointed out that what had happened in the result of which the occurrence taken place. Moreover, according to the prosecution story, a large number of bullets were fired, whereas, only four empties have been recovered from the place of occurrence and even the same have not been got matched with the weapons allegedly recovered from the convicts. The pistol allegedly recovered on the

pointation of the convict, Shoaib, even has not been sent to the Forensic Science Laboratory. Two site plans of the spot of occurrence were prepared and there is a lot of difference in both of them. They maintained that according to the prosecution version, both the parties were facing each other when the occurrence took place, but the medico legal report shows that the entry wounds of the bullets have been found at the back sides of the deceased persons, thus, it is clear that the said persons were died due to the firing of their own companions. They added that the deceased, Muhammad Yousaf the brother-in-law of the convict, Jahanzeb, who was accompanying him sustained firearm injuries inflicted by the complainant party and died at the spot but FIR has wrongly been registered against the relatives of the deceased. They maintained that the statements of the witnesses under

section 161, Cr.P.C., have been recorded after lapse of a considerable time. The injured Saqib and Ajaib according to the medical report, were discharged from the hospital on 04.04.2009, whereas, their statements under section 161, Cr.P.C., have been recorded on 21.04.2009 and no plausible explanation for such a long delay has been offered. They forcefully contended that the witnesses cited in the incomplete *challan* have been substituted later on while presenting the complete *challan* and the Investigating Officer while recording his statement deposed that the witnesses cited in incomplete *challan* did not support the prosecution version, hence, they were substituted later on. Thus, from the statement of the Investigating Officer, it is clear that the witnesses have been managed later on. They also pointed out that the postmortem report has been tempered with and this fact has been

admitted by the Doctor in his statement. The alleged vehicle in which Muhammad Amin (deceased) was sitting at the time of occurrence has not been recovered. They further added that according to the postmortem report the entry wound of the injury inflicted to the (deceased) Amin is 3cm in length, whereas, such injury cannot be caused with the shot of 30 bore pistol, moreover, in some reports the blackening has been shown around wound, which cannot be caused from the distance shown in the site planes. They submitted that the Investigating Officer himself stated in his statement that no evidence regarding preplanning or premeditation was found during investigation. The story established by the prosecution is concocted and the case is highly doubtful, hence, the convicts are liable to be acquitted of the charge. They referred to and relied upon

the case law reported as *Mushtaq Hussain v. The State* [2011 SCMR 1048], *Mahmood Ahmed and 3 others v. The State* [1995 SCMR 127], *Naseer Ahmed v. The State* [2011 P.Cr.LJ 1040], *Tasawar Hussain v. The State* [2016 SCR 373], *Muhammad Khalid and another v. State and another* [2018 SCR 356], *Waseem Hussain and 2 others v. Muhammad Rafique and another* [2017 SCR 428], *Muhammad Rafique v. Aurangzeb and another* [2015 SCR 974], *Muhammad Shabir v. The State* [2004 P.Cr.LJ 1030]. Ch. Muhammad Ashraf Ayaz and Mr. Muhammad Jamil Chaudhary, Advocates, the learned counsel for some of the convicts adopted the arguments advanced by M/s Abdul Majeed Malick and Abdul Hameed, Advocates.

5. On the other hand, Mr. Khalid Rasheed Chaudhary, Advocate, the learned counsel for the complainant argued that the impugned

judgment is against law and the facts of the case. The learned Courts below failed to appreciate the evidence brought on record in a legal manner. In the instant case, the motive, place of occurrence, presence of the witnesses at the spot and manner of occurrence are admitted and under law admitted facts need not to be proved. In support of this contention, the learned counsel drew the attention of the Court towards the statement of convict, Jahanzeb, recorded under section 242, Cr.P.C. He added that the defence has taken a specific stance that due to the firing of the complainant party the injuries were inflicted to the deceased persons and others; therefore, under law the convicts were bound to prove their version. He contended that the convicts belonged to the ruling political party and due to undue pressure of the sitting Government, the statements of the witnesses under section

161, Cr. P.C. could not be recorded at the relevant time as the police file had been made a shuttlecock. He submitted that initially the situation regarding occurrence was not clear and police mere on the strength of presence of people on sport cited different persons as witnesses in the incomplete *challan*. He pointed out that mostly the witnesses cited in the witness column in the incomplete *challan* were the close relatives of the convict party and during investigation when the police found that these are not impartial witnesses then they replaced the same, therefore, it cannot be said that prosecution withheld the evidence. He added that the eyewitness, Allah Ditta, due to health problem had proceeded to abroad; therefore, he could not be produced before the Court, even otherwise, it is not necessary for the prosecution to produce each and every witness cited in the calendar of

witnesses. He submitted that the contention of the learned counsel for the convicts that according to the medical reports the injuries sustained by the victims were found at their back sides, whereas, according to the prosecution story the convicts hit the injured from the front side, is amazing one as it is a natural phenomenon that when the convicts started firing from the front side the victims changed their positions. He also submitted that 3cm entry wound can be caused by the shot of 30 bore pistol as the dimension can be changed by the movement of the victim. He forcefully submitted that it is a case of direct evidence and the minor discrepancies in the corroboratory evidence have no value in the eye of law. He contended that due to the firing of the convicts three innocent persons lost their lives and many sustained severe injuries but amazingly the Courts below omitted to

make attract section 324, APC, similarly, in respect of application of section 34, APC, the judgments of the Courts below are silent. He submitted that the statements of all the eyewitnesses are in line with each other and defence failed to point out any contradiction in the same, thus, it can be said that the prosecution has proved its case beyond the shadow of doubt. The learned counsel drew the attention of the Court towards the findings recorded by the Courts below and submitted that at one hand the Courts below have observed that the prosecution succeeded to prove the case against the convicts but on the other, instead of normal sentences provided under law, awarded lesser punishment to them; therefore, the impugned judgments are contradictory and liable to be modified. The learned counsel referred to and relied upon the case law reported as *Abdul Ghafoor and*

another v. The State [1999 P.Cr.LJ 1245],
*Muhammad Hanif Khan and another v. State
and another* [PLJ 2001 SC (AJK) 166],
Ghazanfar Ali v. The State another [2015 SCR
1042], *Azhar Aziz v. The State* [1996 SCR
225], *Muhammad Khurshid Khan v.
Muhammad Basharat and another* [2007 SCR
1], *Taswar Hussain v. The State and 9 others*
[2016 SCR 373], *Said Akbar and another v.
Sardar Ghulam Hussain Khan and another*
[2015 SCR 1487], *Javid Azam v. Muhammad
Saleem and 10 others* [1997 P.Cr.L.J. SC (AJK)
1865], *Muhammad Riaz v. Muhammad Zaman*
[PLD 2005 SC 484], *Mst. Mumtaz Begum v.
Ghulam Farid and another* [2003 SCMR 647],
*Muhammad Bakhsh v. Jamadar Rahim Khan
through legal heirs and 2 others* [1996 MLD
1681], *Liaqat Hussain and another v. Ulfat
Khan and another* [2007 SCR 39] and *Sheikh*

Javed Iqbal v. Muhammad Bashir and 5 others
[2010 SCR 208].

6. Raja Inamullah Khan, the learned Advocate-General, while appearing on behalf of State strongly supported the arguments advanced by the learned counsel for the complainant. He submitted that the names of the witnesses are mentioned in the FIR, therefore, delay in recording of their statements under section 161, Cr.P.C is not fatal under law. The convicts with common intention attacked upon the complainant party; recovery of firearm weapons from the custody of the convicts, is sufficient to believe that it is a preplanned occurrence and all the convicts are liable to be awarded the normal penalties provided under law. He referred to and relied upon the case law reported as *Niamat and others v. The State* [PLD 1961 Lah. 1], *Chikkarange Gowda and others v. The*

State of Mysore [PLD 1957 SC (Ind.) 133] and *The State through Muhammad Afzal & others v. Waheed Iqbal* [2005 P.Cr.L.J 1384].

7. We have heard the arguments and gone through the record along with the impugned judgment and also considered the case law, referred to and relied upon pro and contra. In the instant case, the allegation leveled against the convicts is that at the fateful day they armed with 30-bore pistols attacked upon a peaceful procession and killed 3 innocent persons and injured many others. The motive alleged in the FIR is that the convict, Jahanzeb, wanted to get a passage forcibly from the land owned by Muhammad Amin (deceased) but the deceased was not willing to provide the passage to him. The relevant portion of the FIR is reproduced here which reads as under:-

"وجہ عناد یہ ہے کہ ملزم پارٹی یعنی جہانزیب وغیرہ محمد امین سے زبردستی راستہ لینا چاہتے تھے جس پر محمد امین آمادہ نہ تھے۔"

In the *challan*, the police again mentioned that during investigation, it was found that regarding a passage there was a dispute between Muhammad Jahanzeb (convict) and Muhammad Amin (deceased). The Investigating Officer while recording his statement has deposed that during investigation none else was stated that there was any dispute between the parties in respect of the passage and he also did not investigate the matter on this angle; whether there was any dispute about the passage or not. The relevant portion of his statement is reproduced here which reads as under:-

"دوران تفتیش کسی نے ان کے مابین راستہ کا تنازعہ نہ بتایا تھا۔ مظہر نے اس نسبت چھان بین نہ کی کہ راستہ کا کوئی تنازعہ ہے بھی یا نہیں۔"

At one hand, it has been mentioned in the *challan* that during investigation it was found

that there was a dispute between the parties regarding the passage through the land owned by the deceased but on the other hand, Investigating Officer himself appeared and negated the averments of the *challan*. Thus, in such situation it becomes obvious that the prosecution failed to prove the basic motive beyond shadow of doubt. Another version of the prosecution is that during the course of procession, a dispute between the parties in respect of the leading of the procession arose; although, the convicts while recording their statements under section 242, Cr.P.C. have owned this position but neither in the whole prosecution story nor in the statements of the witnesses, it has been explained that what happened at the spot and what actually transpired immediately between the parties in consequence thereof the incident took place. According to the prosecution version one, Allah

Ditta, was organizer of the procession and he himself leading the same; but the clash between the convict, Jahanzeb and Muhammad Amin (deceased) on leading the procession is unexplained. So, it can be said that in the instant case the origin of the occurrence is also shrouded in mystery.

8. We are aware of the fact that under law, the motive plays a vital role in the case of circumstantial evidence and in the case of direct evidence, coming from independent and natural source and the natural witness is one who is not inimical towards the accused to falsely implicate him in the commission of offence, it is not necessary for the prosecution to prove the motive. Reference may be made to a case reported as *Muhammad Yaqoob v. The State & 2 others* [2014 SCR 121], wherein, while relying upon different case law this Court has held as under:-

"11. We have considered the argument of the counsel for the appellant that the prosecution alleged specific motive and it has not been proved, therefore, it is not a case of death sentence. The motive plays an important role in the case of circumstantial evidence. In the case of direct evidence it is not essential to prove the motive. The direct evidence which come from independent and natural source and the natural witness is one who is not inimical and has no motive to implicate the accused in false case, his statement rings true, then it is not necessary to prove the motive."

Thus, keeping in mind the principle of law discussed hereinabove; we have examined the direct evidence brought on record by the prosecution. At first, we deem it proper to observe here that the direct evidence can include what the witnesses saw, what they

heard or anything they observed with their senses; however, ultimately, the Courts, after adjudging the reliability of the direct evidence, have to determine how much the Courts want to believe it. In the instant case, 7 witnesses have been cited as eyewitnesses, out of which, the prosecution produced 4 witnesses and abandoned the others. The eyewitnesses of the case are Muhammad Bashir (complainant), Abdul Qadeer (son of the complainant), Muhammad Nazir (brother of the complainant), Saqib Amin (son of Muhammad Amin deceased) and Muhammad Arif who stated in his statement that he is also the member of the group of Muhammad Amin (deceased). Relevant portion of his statement reads as under:-

"مظہر امین مقتول کے گروپ سے تعلق رکھتا ہے۔"

It appears that the eyewitnesses are related to each other and they have also admitted in their statements the previous resentment between the parties. Though, under law mere on the ground of relationship the testimony of the witnesses cannot be discarded but when some ill-will or animosity of the witnesses against the accused comes on the record, coupled with the withholding of the impartial witnesses by the prosecution, then the testimony of the related witnesses cannot be relied upon without independent corroboration. In this regard, reference may be made to a case reported as *Qadir Bakhsh and others v. The State through Shoukat and others* [2013 SCR 439], wherein while dealing with the proposition it has been held that:-

“9.It is a celebrated principle of the appreciation of evidence that mere relationship of witnesses inter

se or to the deceased is not sufficient to discredit outrightly their testimony if otherwise such witnesses are found to be the witnesses of truth but if the independent and impartial witnesses are available and they are not produced and withheld and only the related witness whose testimony is not confidence-inspiring, are produced, the testimony of such witnesses cannot be relied upon without independent corroboration and the corroboration shall be of such a standard which tends to satisfy the court that the witnesses have spoken the truth.”

In the case in hand, the place of occurrence admittedly is a thickly populated area and it is also an admitted fact that hundreds of people participated in the procession when the occurrence took place, but no independent witness has been cited as eyewitness of the occurrence. The perusal of the record shows

that the witnesses are unanimous on the point that Allah Ditta was leading the rally but he did not appear before the Court and the prosecution abandoned him. In view of the story narrated by the prosecution, Allah Ditta was the star witness of the case but he has not been produced before the Court and the alleged injured eyewitness, Muhammad Ajaib, was also declared hostile by the prosecution. Furthermore, the police while presenting the incomplete *challan* cited 14 persons as eyewitnesses of the case, but surprisingly at the time of presenting the complete *challan* eliminated the names of a number of the eyewitnesses shown in the incomplete *challan*. The Investigating Officer in his statement has admitted that while presenting the complete *challan* a number of witnesses cited in the calendar of witnesses of incomplete *challan* were substituted due to the reason that they

were not supportive to the prosecution's version. The relevant portion of his statement reads as under:-

"یہ درست ہے کہ نامکمل چالان میں جو گواہان فہرست گواہان میں درج تھے ان میں سے بعض گواہان کو مکمل چالان پیش کرتے وقت نکال دیا گیا اور بعض گواہان کا اضافہ کر دیا گیا۔ یہ درست ہے کہ جو نکالے تھے اس لئے نکالے تھے کہ وہ استغاثہ کے موقف کی تائید نہ کر رہے تھے۔ یہ درست ہے کہ جو گواہان نکالے وہ عباس پسر یوسف مقتول کے اس موقف کی تائید کر رہے تھے کہ اصل ملزمان کی بجائے غلط طور پر بے گناہ ملزمان ملوث کئے گئے ہیں اور FIR بھی غلط درج کی گئی ہے۔"

From the juxtapose perusal of the circumstances discussed hereinabove and the statement of the Investigating Officer, we are of the considered view that it is a fit case in which an adverse inference can be drawn, under the provisions of Article 129, of the Qanun-e-Shahadat, 1984, that material witnesses have been withheld by the prosecution being not supportive to the prosecution's version. Our this view finds support from the case law reported as

Muhammad Shabir vs. The State [2003 SCR 486], wherein it has been observed that:-

“5.We agree that it is not mandatory for the prosecution to produce all the witnesses cited by it in the calendar of witnesses. However, if a material witness is withheld then the presumption can be taken against the prosecution that such witness if produced would have not supported the case of the prosecution.”

As in the case in hand despite the fact that a large number of people were present at the spot, no independent witness has been cited, the prosecution has also withheld important witness, Allah Ditta, who being leader of the procession, was a central figure, and only produced the related witnesses, therefore, in the light of settled principle of law and the peculiar facts of the case, we are of the view

that the ocular account requires further corroboration; however, we deem it proper to make it clear that rule of independent corroboration is not an absolute and mandatory rule to be applied in each and every case, rather it is a rule of abundant caution which is applied in the cases in which the direct evidence is not of the standard on the basis of which a definite opinion can be formed. Thus, in the instant case, to find out; whether the ocular account is corroborated by the other material brought on record; we intend to examine the other evidence made available on record.

9. In the case in hand, all the witnesses are unanimous on the point that a large number of bullets were fired by the convicts, however, the record shows that only 4 empties were recovered from the place of occurrence. The learned counsel for the

complainant during the course of arguments submitted that as the place of occurrence is thickly populated area and due to the running of vehicles and the people the empties maybe misplaced; however, this version is not of worth consideration as the incident took place in the city near to the police station and it was the duty of the police to collect the evidence at the relevant time. The record shows that the recovery of the alleged crime weapons on the pointation of the convicts, Jahanzeb and Muhammad Jameel, has been made from an open place situate at a thickly populated area adjacent to a main road but neither any independent witness of the locality has been associated with the recovery proceedings nor there is any explanation from the prosecution side that at the time of recovery no independent person was available. The prosecution produced only the son of the

complainant, the nephew of the complainant and son of Muhammad Amin (deceased) as recovery witnesses and during the course of trial abandoned the other recovery witness, Chaudhary Basharat, while declaring him as hostile. The record also shows that from the recovered empties none else matched with the pistol allegedly recovered on the pointation of the convict, Jahanzeb and the pistol allegedly recovered on the pointation of the convict, Shoib even has not been sent to the Forensic Science Laboratory. In these circumstances, much reliance cannot be placed on such recovery. In this regard, the learned counsel for the convicts has rightly referred to and relied upon the case law reported as *Mahmood Ahmad and 3 others v. The State and another* [1995 SCMR 127], wherein, it has been held that:-

“Such a recovery is a sham and cannot be accepted as no independent respectable witness from the locality was associated with the recovery proceedings nor there is any explanation from the prosecution that the house of the accused was situated at a deserted place and no person from the locality was available. In these circumstances no reliance can be placed upon such recovery and consequently the report of the Ballistic Expert becomes of no importance.”

The statements of the witnesses under section 161, Cr.P.C. have been recorded after a lapse of a considerable time and under law unexplained delay cannot be ignored lightly. The learned Advocate-General during the course of arguments submitted that the names of all the witnesses are mentioned in the F.I.R. therefore, delay in recording the statements

under section 161, Cr.P.C. is not harmful to the case of the prosecution, but the perusal of the F.I.R. shows that only the names of few witnesses have been mentioned in the same. During the course of arguments in this regard when a query was made to the learned counsel for the complainant, who submitted that the convicts were the members of such political party which was in the Government and due to the pressure of the ruling party, the police file had been made a shuttlecock; therefore, the statements could not be recorded at the relevant time. We do not agree with the version of the learned counsel for the complainant as a different aspect of the case is also in our sight that counter application was moved for registration of the case in which the complainant party was nominated as accused for the murder of Muhammad Yousaf, but on that application no

case was registered. The Investigating Officer in his statement has admitted that counter application was moved for registration of the case against the complainant party and the statements of few witnesses had also been recorded under section 161, Cr.P.C., who supported the contents of said application, but neither the said application was made part of the file nor the said witnesses were cited as witnesses while presenting the *challan*. It will be advantageous to reproduce here the relevant portion of the statement of Investigating Officer which reads as under:-

"عباس پسر مقتول محمد یوسف نے جو درخواست تھانہ میں دی وہ مظہر کو موصول ہوئی تھی۔ درست ہے کہ عباس نے اپنی درخواست میں ثاقب امین وغیرہ کو اپنے والد کا قاتل قرار دیا تھا۔ اس درخواست کی رپورٹ افسران بالا کو بھیجی تھی۔ وہ رپورٹ شامل مسل ضمنیات ہے۔ چالانی مسل میں شامل نہ کی ہے۔ یاد نہ ہے کہ 168 ض ف کے تحت رپورٹ میں عباس کی درخواست کی نسبت کوئی رائے قائم کی یا نہیں۔ عبدالرحمن نامی آدمی نے بھی درخواست دی تھی اسکا بیان بھی 161 ض ف کے تحت قلمبند کیا تھا۔ عبدالرحمن نے اپنے بیان میں کہا تھا کہ محمد امین کے ایک

ہاتھ میں پستول اور دوسرے میں ڈنڈا تھا۔ عبدالرحمن نے یہ بھی بتایا تھا کہ محمد امین کے دونوں بیٹے مسلح تھے اور معروف بھی مسلح تھا اور ان کا فائرنگ کرنا بھی بتایا تھا۔ علی اکبر نامی آدمی کا بیان 161 ض ف قلمبند کیا تھا۔ درست ہیکہ اُس نے بتایا تھا کہ محمد امین نے جلوس کی قیادت کے جیپ آگے لگائی۔ یہ درست ہیکہ اس نے یہ بھی بتایا تھا کہ محمد امین نے جھگڑا شروع کیا اس کے ہمراہیاں ثاقب، عامر، معروف نے 30 بور پستولوں سے فائرنگ کی۔ اس نے اللہ دتہ کا فائرنگ کرنا بھی بتایا تھا۔ درست ہیکہ ان دونوں گواہان نے 161 ض ف کے بیان میں بتایا تھا کہ جہاں زریب غیر مسلح تھا اور بوقت فائرنگ ایک شوروم میں چھپ گیا تھا۔ اس نے یہ بھی بیان کیا تھا کہ علم نہ ہے کہ کس کی گولی امین کو لگی تھی۔ درست ہیکہ ان دونوں گواہان نے جہانزیب پارٹی کے کسی شخص کا مسلح ہونا نہ بتایا تھا۔ درست ہیکہ مکمل چالان میں ان دونوں کو گواہ نہ رکھا ہے۔ مقدمہ میں سول کتنے گواہان کے بیانات قلمبند کئے زبانی یاد نہ ہے۔ یہ درست ہیکہ مظہر نے مورخہ 14.04.2009 کے نامکمل چالان کے مطابق کل 19 کس سول گواہان کے بیانات قلمبند کئے۔ ان گواہان کے قابل انحصار یا ناقابل انحصار ہونے کی نسبت کوئی رائے قائم نہ کی تھی۔ افسران بالانے بھی ان گواہان کے قابل انحصار یا ناقابل انحصار ہونے کی نسبت کوئی رائے قائم نہ کی تھی۔ یہ بات درست ہیکہ علی اکبر اور عبدالرحمن کے بیانات کی روشنی میں تحقیق کر کے کوئی رائے قائم نہ کی تھی۔"

After going through the statement of the Investigating Officer, it cannot be said that the delay in recording the statements under section 161, Cr.P.C. was caused due to the

involvement of the ruling party as non-registration of the case on the application filed by the alleged members of the ruling party against the complainant party is sufficient to contradict such version.

10. The record also shows that the heirs of one of the deceased, Muhammad Yousaf, moved different applications in the trial Court that the case has been registered against the facts. The widow and son of Muhammad Yousaf (deceased) have also got recorded their statements in a bail matter and took the stance that the allegation of murder of Muhammad Yousaf (deceased) against the accused, Abdul Majid, is baseless. However, the perusal of the judgments of the Courts below shows that these applications as well as the statements have not been considered. In the case in hand, according to the prosecution story, the convicts armed with firearm

weapons attacked from the front side and made reckless firing upon the complainant party, usually in such a situation, it is difficult to watch the role of every assailant, especially in a crowd, whereas, in the instant case the eyewitnesses narrated the story in the manner that they saw the whole episode minutely which cannot be believed with certainty and does not appeal to a prudent mind. All the eyewitnesses in their statements have stated that the convict, Jahanzeb, fired a shot which hit at the chest of Muhammad Amin (deceased), however, according to the postmortem report the entry wound was found at the back side of the deceased. Although, we agree with the stance taken by the learned counsel for the complainant that it is natural that if firing is made from the front side then the opponent will change the position, but in the instant case when the eyewitnesses stated

that in their presence the convict hit at the chest of the deceased then it can be said that the postmortem report also does not corroborate the version of the eyewitnesses.

11. After examining the record it appears that apart from withholding the best evidence there are many other strong mitigating circumstances available in the case in hand. Although, in view of the peculiar facts of the case, we do not entirely brush aside the direct evidence, but at the same time these sturdy mitigating circumstances also cannot be ignored lightly, hence, as a result we have arrived at the conclusion that it is not a case of acquittal, however, the evidence collected by the prosecution is also not of such standard on the basis of which the major penalties can be awarded to the convicts. In presence of the mitigating factors discussed in the preceding paragraphs, there hardly remains any need to

discuss the point raised by the learned counsel for the complainant regarding the applicability of the provisions of section 324, APC coupled with some other points, as the findings on any of the points, will not change the fate of the case.

Thus, for the forgoing reasons, we partly accept the appeals filed by the convicts and while modifying the impugned judgments convert the sentences awarded to the convict-appellants, into the sentences already undergone. They shall be released from the custody forthwith if not required to be detained in connection with any other case. The cross appeals filed for enhancement of the sentences having no substance stand dismissed.

Mirpur,
19.02.2020

JUDGE

JUDGE