SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat APPELLATE JURISDICTION]

PRESENT:

Raja Saeed Akram Khan, C.J.

Raza Ali Khan, J.

1. Crim. Appeal No. 26 of 2018

(Filed on 30.10.2018)

Syed Kamran Hussain Shah s/o Shabbir Hussain Shah caste Syed r/o Mitha Nawan Seri Baral Tehsil and District Sadhnoti (Pallandri).

……APPELLANT

VERSUS

1. State through Advocate General of Azad cJammu & Kashmir, Muzaffarabad.
2. Syed Ashiq Hussain Shah s/o Imdad Hussain Shah caste Syed r/o Mitha Nawan Baral Tehsil and District Sadhnoti (Pallandri).

…..RESPONDENTS

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 06.10.2018 in criminal appeal No. 116 & 117 of 2017]

APPEARANCES:

FOR THE APPELLANT: Mr. M. Noorullah Qureshi, Advocate.

FOR THE STATE: Mr. Sajid Malik, Assistant Advocate-General.

2. Crim. Appeal No. 12 of 2019
(PLA Filed on 26.11.2019)

Syed Ashiq Hussain Shah s/o Imdad Hussain Shah caste Syed, r/o Mitha Nawan Baral Tehsil & District Pallandri/Sudhnoti A.K.

……APPELLANT

VERSUS

1. Syed Kamran Hussain Shah s/o Shabbir Hussain Shah caste Syed r/o Mitha Nawan Baral Tehsil

& District Pallandri/Sudhnoti A.K (presently imprisoned in judicial lockup Pallandri).

.....RESPONDENT

2. State through Advocate-General.

.....PROFORMA-RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 06.10.2018 in criminal appeal No. 116 & 117 of 2017]

APPEARANCES:

FOR THE APPELLANT: Sardar M. Habib Zia, Advocate.

FOR THE STATE: Mr. Sajid Malik, Assistant Advocate-General.

Date of hearing: 01.12.2021.

JUDGMENT:

Raza Ali Khan, J.– Both the titled appeals have been directed against the common judgment of the Shariat Appellate Bench of the

High Court *(hereinafter to be referred as High Court)* dated 06.10.2018, whereby the death sentence awarded to the convict-appellant, Syed Kamran Hussain Shah, by the District Criminal Court, Sadhnoti, Pallandri, has been converted into rigorous life imprisonment along-with compensation of three hundred thousand Rupees.

2. The precise fact forming the background of both the captioned appeals are that on report of Syed Ashiq Hussain Shah, complainant (appellant in appeal No. 12 of 2019), an FIR No. 33/10, was registered, wherein, it was stated that, on 13.03.2010, at 4 pm, Kamran Shah, son of Shabir Hussain Shah, resident of Matha Nawan, planted a tree near the complainant's house, on

which his son, Najam-ul-Hassan forbade him from doing so. Kamran Shah furiously started abusing; harsh words were exchanged and consequently, Kamran Shah left threatening Najamul Hassan with death. Najam-ul-Hassan and his father, the complainant went to the mosque to offer Maghrib prayer in the evening, where they offered prayer along-with Kamran Shah, Adeel, Talat Abbas, and others. After offering the prayer, Kamran Shah took Najam-ul-Hassan along-with him on pretext of doing some task, Adeel, Talat Abbas, Ali Jawad and Mohsin Naqvi were also accompanying. When Najam-ul-Hassan reached behind the house of Nisar Hussain Shah, Kamran Shah attacked Najam-ul-Hasan and upon hearing the noise, complainant and his brother Jabar

Hussain Shah reached at the spot and saw that Kamran Shah had stabbed Najam-ul-Hassan in his neck with a knife, due to which he was injured and fell to the ground. Jabar Hussain Shah also witnessed this incident along-with the complainant, Kamran Shah waved the knife and fled from the spot. Apart from complainant and Jabar, Nisar Hussain Shah also witnessed this incident. The injured, Najam-ul-Hassan was picked up and brought to Nisar Hussain Shah's house. The reason for the animosity was that Shabbir Hussain Shah, who is Kamran's father, was involved in a land dispute for a long time with the complainant. It was stated that Shabbir Hussain Shah many a times persuaded Kamran Shah and they were attacked by him but they avoided

quarreling. Before the incident, Shabbir Hussain Shah loudly asked Kamran Shah to kill Najam-ul-Hassan. Besides Kamran Shah, Nazir Hussain Shah and Haider Shah are also involved in this murder. On application of the complainant the FIR was registered under section 302/ 109 APC.

3. After lodging of the FIR, the police conducted investigation. During the investigation, the accused Shabir Hussain Shah, Nazir Hussain Shah and Haider Hussain Shah were found innocent by the Police under section 169, Cr.PC. The challan against Kamran Hussain Shah was filed on 07.05.2010. During proceedings of the case, the prosecution abandoned the witness, Syed Talat Hussain Shah while the testimony of witness No. 4, Syed Ali Abbas was closed by the

Court vide order dated 10.09.2013. The testimony of Sardar Muhammad Bashir Khan DSP Witness No. 10, was also closed by the order of the Court.

4. The statement under section 342 of Cr.PC of the appellant / accused Kamran Hussain was recorded whereby, while negating the allegation and testimony of the prosecution, he stated that he wants to record his statement and also wants to produce evidence. But the convict-appellant neither recorded his statement under section 340 Cr.PC, nor produced any evidence, however, he requested to summon prosecution witnesses 1, 3 and 4 as Court witnesses under section 540 Cr.PC, which was rejected.

5. On completion of the trial, the learned trial Court vide judgment dated 13.03.2014,

convicted the convict-appellant and sentenced him to death as qisas under section 302(A), APC and he was also ordered to pay Rs. 300,000/- as compensation to the legal heirs of the deceased under section 544-A, Cr.PC, in default to payment of compensation he was required to undergo simple imprisonment for six months. The aforesaid judgment was assailed by the convict-appellant, herein, before the Shariat Appellate Bench of the High Court by filing an appeal. The District Criminal Court also sent the Reference to the same Court for confirmation of the awarded death sentence or otherwise. The learned High Court after necessary proceedings, vide judgment dated 06.10.2018, accepted the appeal of the convict-appellant and converted the death

sentence into rigorous imprisonment for 25 years under section 302(C) APC, however, judgment to the extent of compensation of three hundred thousand rupees (300,000) under section 544-A, Cr.PC, was upheld. The murder reference was answered in negative, subject to terms noted above.

6. Mr. Noorullah Qureshi, the learned counsel for the convict-appellant, Syed Kamran Hussain Shah, submitted that as per evidence produced by the prosecution, death sentence cannot be awarded to the convict-appellant. He argued that the prosecution could not prove his case beyond the shadow of doubt as there are a lot of variations in the statements of prosecution witnesses which led to acquittal of the appellant

but instead of acquitting the appellant, the learned trial Court awarded him death sentence. The learned Shariat Appellate Bench of the High Court has also failed to appreciate the matter and instead of acquitting the appellant only converted the punishment into rigorous imprisonment of 25 years which is against law, the facts and the record of the case. He further argued that the trial Court as well as the High Court did not discuss the impact of improvements made in the case by the prosecution as three eye witnesses were mentioned in the FIR, however, later four other witnesses were included which makes the whole story doubtful. He further argued that the learned Court below misinterpreted law envisaged in section 103 Cr.PC and observed that

the recovery is proved whereas the prosecution has abandoned one of the recovery witness Malik Abdul Rasheed without any reason. He added that the learned trial Court in its judgment, has observed that there is doubt in prosecution story and benefit of doubt will be given to the accused but no such benefit has been extended to the accused. He contended that the High Court despite accepting the huge variations in the statement of prosecution witnesses, observed that the appellant is involved in the murder and instead of acquitting him, converted the death sentence into imprisonment of 25 years by mentioning the other part of judgment of the trial Court. He finally submitted that by accepting this appeal, the judgment of the High Court as well as

that of the District Criminal Court may be set-aside and the appellant may be acquitted of the charges. The learned Advocate in support of his submissions, placed reliance on the cases reported as *Maqsood Ahmed & others vs. Muhammad Razzaque & others* [2009 SCR 38], *Muhammad Asif vs. The State* [PLJ 2008 SC 390], *Noor Muhammad and another vs. State* [PLJ 2007 Cr.C. (Lahore) 897 (DB) and *Ghulam Hussain and others vs. The State* [PLJ 1981 Cr.C (Lahore), 429.

(1) In a case reported as *Maqsood Ahmed & others vs. Muhammad Razzaque & others* [2009 SCR 38], the respondent after obtaining power of attorney executed the sale-deed in favour of his son who transferred the same land through a sale-deed in favour of Fazal Hussain. The Court held that the actual

beneficiary of the power of attorney was Muhammad Razzaq who transferred the land in favour of his son, thus, in the light of Article 79 of of Qanun-e-Shahdat Order, 1984, it was necessary for proving execution of document to produce at least two attesting witnesses of the deed in whose presence the document was executed.

(2) In the case reported as *Muhammad Asif vs. The State* [PLJ 2008 SC 390], the apex Court of Pakistan observed that no independent witness was produced in whose presence the altercation had taken place between Shafi and appellant at one side and Mazhar Hussain deceased on the other side; furthermore, Shafi was never sent-up to face trial and no compliant was filed against him and it appears that motive was created after the occurrence. It was

further observed that a 30 bore pistol and 3 live cartridges were shown to have been recovered from the possession of the accused at the time of his arrest on 20.05.1996, but the evidence of recovery of pistol is of no consequence and cannot be used against the appellant.

(3) In *Noor Muhammad and another vs. State* [PLJ 2007 Cr.C. (Lahore) 897 (DB), the Court observed that recovery evidence was weak inasmuch as recovery witness was himself a very close relative of deceased and as such was an interested witness whose testimony required corroboration; even otherwise, the mandatory requirement of section 103 Cr.P.C. is that that witness of recovery should be respectable inhabitants of the locality.

(4) In the case reported as *Ghulam Hussain and others vs. The State* [PLJ 1981 Cr.C (Lahore), 429, the Court observed that the witness in his statement before the Court of Session tried to improve his earlier statement by volunteering that he wanted to know about the health of Waryam maternal uncle of Manzoor deceased because he was ill. This improvement had been purposely made by this witness in order to inquire about the health of Waryam, had not been stated by him in the FIR, in the circumstances, no implicit reliance can be placed on the statement of this witness.

7. Sardar Muhammad Habib Zia, the learned Advocate appearing on behalf of the complainant, Syed Ashiq Husain Shah (appellant in appeal No. 12/19), submitted that the convict,

Syed Kamran Hussain Shah, inflicted a blow to the deceased with knife on the vital part of the body with a clear intention to murder which is evident on the face of record. He argued that the prosecution proved its case with material, eminent and primary evidence beyond any shadow of doubt. The learned trial Court after recording of the evidence and completion of trial, rightly convicted the accused under section 302 (A) PPC and sentenced him to death as Qisas and Rs. 300,000/- compensation under section 544(A), Cr.PC, whereas, the leniency given by the High Court is the result of mis-reading and non-reading of evidence and facts of the case. He further argued that the observation of the High Court with regard to the non-production of two

prosecution witnesses is a legal mistake as the prosecution is at liberty to produce all witnesses or to withdraw any of them. He further argued that the convict, being the main accused is liable to face death sentence and there were no extraordinary circumstances in which he was entitled to any kind of concession and such relief and concession discouraged the complainant party which has adversely effected the society. The learned Advocate further argued that in the impugned judgment, the learned High Court rightly admitted the murder of deceased by the convict but without pointing out any defect in Tazkia-tu-Shahood, modified the death sentence as Qisas into rigorous imprisonment of 25 years. The learned Advocate finally submitted that the

judgment of the High Court being against law and facts of the case may be set-aside and that of District Criminal Court Palandri, dated 13.03.2014, may be restored. The learned Advocate in support of his contentions, placed reliance on the case reported as *Zabir Maqsood alias Kashif Maqsood vs. The State through Advocate-General, AJ&K Muzaffarabad and another* [2013 SCR 642], *Abdul Rashid & others vs. Abdul Ghaffar & others* [2001 SCR 240] and *Muhammad Khurshid Khan vs. Muhammad Basharat & another* [2007 SCR 1].

(1) In a case reported as *Zabir Maqsood alias Kashif Maqsood vs. The State through Advocate-General, AJ&K Muzaffarabad and another* [2013 SCR 642], the Court held that the criterion

for conviction of an accused for the offence of Qisas is two male eye-witness and if the witnesses are found Adil, their testimony is confidence inspiring, then the accused is liable to be sentenced to Qisas under section 302 (a) APC.

(2) In the case reported as *Abdul Rashid & others vs. Abdul Ghaffar & others* [2001 SCR 240], this Court observed that if ocular evidence is found trustworthy, the same cannot be rejected merely because there was some variation between the prosecution witness and the medical evidence on the point of distance between the assailant and the victim at the time of inflicting the injury.

(3) In *Muhammad Khurshid Khan vs. Muhammad Basharat & another* [2007 SCR 1], this Court has taken a view that where death of a deceased has been admitted by a person but he has claimed

that the death did not take place in the manner as stated by the prosecution but it took place in some other manner, then the onus lies upon him to prove as such.

8. Mr. Sajid Malik, the learned Assistant Advocate-General representing the State, argued that the impugned judgment passed by the learned High Court dated 06.10.2018 is well-reasoned, comprehensive and passed in accordance with law and the facts of the case, hence, deserves to be upheld. He further argued that the convict-appellant has failed to point out any legal ground for interference by this Court in the impugned judgments. He further argued that the appellant is connected with the commission of murder and the prosecution has successfully

proved its case beyond any shadow of doubt against the convict-appellant by production of ocular, circumstantial and corroborative evidence, whereas, the defense has failed to make any dent in the prosecution story. The learned Advocate finally argued that the appellant failed to point out any illegality or irregularity in the judgment passed by the learned High Court therefore, the appeal filed by the convict-appellant, is liable to be dismissed.

9. We have carefully gone through the entire record of the case made available, the evidence produced by the prosecution, impugned judgments and considered the submissions made at the bar before us.

10. Scanning of the available record manifests that the incident is reported to have taken place on 13.03.2010, soon after Maghrib prayer, as reported by the father of deceased-complainant, namely Syed Ashiq Hussain Shah, with Police Station Pallandri. After submission of the report, an FIR No. 33/10, was lodged against the convict and others which is as under: -

"مستغیث مقدمہ نے بحاضری تھانہ رپورٹ دی کہ آج مورخہ 13.03.2010سہ پہر 4بجے دن کامران شاہ ولد شبیر حسین شاہ ساکن مٹھا ناون نے میرے گھر کے نزدیک راستے میں پودا لگایا جس پر میرے بیٹے نجم الحسن نے اسے ایسا کرنے سے منع کیا جس پر کامران شاہ مشتعل ہو گیا اور گال گلوچ کرنے لگا۔ باہم تلخ کلامی ہوئی اور کامران شاہ نجم الحسن کو قتل کی دھمکیاں دیتا ہوا چلا گیا۔ شام نماز مغرب پڑھنے کے لیے میں اور میرا بیٹا نجم الحسن مسجد میں گئے وہاں پر ہم نے باجماعت نماز ادا کی جس میں کامران شاہ، نجم الحسن، عدیل، طلعت اور دیگر آدمی تھے نماز سے فارغ ہونے

کے بعد کامران شاہ نجم الحسن کو اپنے ساتھ کچھ بات کرنے کے بہانے لے گیا اس کے ساتھ عدیل، طلعت عباس، علی جواد اور محسن نقوی تھے۔ جب نجم الحسن نثار حسین شاہ کے گھر کے پیچھے پہنچے تو کامران شاہ نے نجم الحسن پر حملہ کر دیا شو ر کی آواز سن کر میں او ر میرا بھائی جابر حسین شاہ موقع پر پہنچے تو دیکھا کہ کامران شاہ نے چھری سے وار کیا جو نجم الحسن کی گردن پر لگا جس سے وہ زخمی ہو کر زمین پر گر پڑا۔ میرے ساتھ جابر حسین نے بھی یہ واقعہ بچشم خود دیکھا۔ کامران شاہ چھری لہراتا ہوا وہاں سے فرار ہو گیا اس وقوع کو میرے اور جابر کے علاوہ نثار حسین شاہ نے بھی دیکھا۔ زخمی حالت میں نجم الحسن کو اٹھا کر نثار حسین شاہ کے گھر لایا اور چند منٹ بعد پلندری لے جانے کے لیے راستے میں ہی تھے کہ نجم الحسن جان بحق ہو گیا۔ وجہ دشمنی یہ تھی کہ شبیر حسین شاہ جو کامران کا والد ہے سے کافی عرصہ زمین پر تنازعہ چلا آرہا ہے۔ اس دوران شبیر حسین شاہ نے کئی مرتبہ کامران کو جھگڑا کرنے پر آمادہ کیا اورہم پر حملہ آور بھی ہوئے مگر ہم نے جھگڑا سے اجتناب کیا۔ وقوع سے پہلے بھی شبیر حسین شاہ نے بلند آواز سے کامران کو نجم الحسن کو قتل کرنے کے لیے کہا۔ اس کے علاوہ اس قتل میں نذیر حسین شاہ

اور حیدار شاہ بھی شامل ہیں۔ استدعا
ہے کہ دادرسی کی جائے۔"

11. During the course of investigation, the accused Shabir Hussain Shah, Nazir Hussain Shah and Haider Hussain Shah were found innocent by the Police and discharged under section 169, Cr.PC, howevever, a challan was filed against convict-appellant, Kamran Hussain Shah, on 07.05.2010. The statement of the accused under section 242, Cr.PC was recorded, wherein, on 08.06.2010, he pleaded not guilty and claimed his trial. The prosecution produced 14 witnesses out of 19 witnesses listed in the Challan, who appeared before the Court and got their statements recorded while witnesses No. 3 & 11, were discarded by the prosecution being unnecessary, however, the evidence of witness

No. 4, Syed Ali Abbas was closed by the Court order dated 10.09.2013. The evidence of Sardar Muhammad Bashir Khan, DSP, Witness No. 10, was also closed by order of the Court.

12. Under section 342 of Cr.PC, the statement of the accused-appellant, Kamran Hussain Shah was recorded whereby, while declaring the allegation and testimony of prosecution witnesses as false, he stated that he wants to record his statement and also wants to produce evidence, but neither did he record his statement under section 340 Cr.PC nor produced any evidence. However, Kamran Hussain requested to summon prosecution witnesses 1, 3 and 4 as Court witnesses under section 540 Cr.PC which was rejected.

13. The learned District Criminal Court, Sudhnoti, Pallandri, at the conclusion of the entire proceedings, convicted and sentenced Kamran Hussain Shah to death as Qisas under Section 302 (a), APC, for the crime of premediated murder (Qatl-e-amad), and under section 544-A, Cr.PC, he was ordered to pay Rs. 300,000/- as compensation to legal heirs of the deceased vide judgment dated 13.03.2014. Feeling aggrieved from this judgment the convict-appellant, herein, filed an appeal before the High Court. The trial Court also filed the reference for confirmation of the death sentence before the High Court. The High Court partly accepted the appeal while maintaining the conviction awarded by the trial Court, the death sentence was converted into

rigorous life imprisonment, however, judgment to the extent of compensation of rupees three hundred thousand Rupees (300,000) under section 544-A, Cr.PC was upheld.

14. The record reveals that according to the prosecution's story, the incident took place near the house of Syed Nisar Hussain Shah; according to the FIR and the statement of the complainant, prosecution witness Nisar Hussain Shah witnessed the incident who is the brother-in-law of the complainant. The complainant and his brother Jabar Hussain stated in their Court statements that Nisar Hussain Shah was present at the time of the incident however, Nisar Hussain Shah stated in his Court statement that he has not witnessed the occurrence, and only narrated the

event what he saw when he approached the victim Najam-ul-Hassan, the victim said, "Stop the bleeding, I feel dizzy. (خون بند کرو چکر آ رہے ہیں)" and he tried to stop the bleeding by a cloth which he placed on the wound (on neck) of the victim. He further stated that he was told that the victim had been killed by the accused and the victim died on the way when he was being brought to Pallandri. During the cross-examination, the witness said that when victim was brought near his house, there was no one with him except Talat and Adeel, Ali Jawad and Mohsin Naqvi were not seen by him with victim at that time. The witnesses Ashiq Hussain Shah and Jabar Hussain Shah have stated in their statements that they were going to fetch milk

from Nisar Hussain Shah's house after Maghrib prayer when the occurrence took place but Nisar Hussain Shah did not conform to this statement. It is notable that Talat Hussain and Adeel Abbas witnesses were discarded and not presented by the prosecution.

15. Another eye-witness to the occurrence, is PW Mohsin Naqvi, whose age is recorded as 11 years. The statement of this witness was recorded on 19.03.2012. An examination of the record shows that the Court, keeping in view, the low profile of the witness, asked various questions to test his intelligence and found him capable of giving evidence as regard to the occurrence. Article 3 of the Qanun-e-Shahadat Order, 1984, deals with as to “who may testify”. This article

clearly lays down that all persons are competent to testify excepting those, whom the Court considers that they are prevented from understanding the question put to them or from giving rational answers to them by tender years. It speaks of extreme caution regarding the testimony of witnesses of this age and it is generally believed that boys of this age will either give 100% accurate testimony or testify based on their own ideas. According to the prosecution, there are several eyewitnesses of the occurrence in the case in hand, which corroborate the testimony of PW Mohsin Naqvi. In our estimation, the testimony of this witness may be considered as the same is corroborated by testimonies of other witnesses. This view is fortified from the

judgment of the Supreme Court of Pakistan reported as Raja Khuram Ali Khan and 2 others vs. Tayyaba Bibi another, [PLD 2020 Supreme Court 146], wherein, it has been held that: -

> *"45. A close reading of the above provisions reveals that the essential conditions for a child, or for that matter any person, to appear and testify as a witness, is that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto. This threshold has been referred to as passing the "rationality test", and the practice that has developed with time in our jurisdiction is for the same to be carried out by the presiding Judge prior to recording the evidence of the child witness. Moreover, we have noted that in our jurisdiction, the judicial acceptance of a child witness, as a safe piece of evidence, has been rather hesitant and*

cautious. This Court in the case of The State through Advocate General, Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1), *by a majority decision, while dilating upon the competence and evidential value of a child witness, opined that:*

"Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved ... In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record."

46. In other common law jurisdictions, the Courts are more inter-active with the child witnesses during the recording of their entire evidence. Justice McLachlin, speaking for the Canadian Supreme Court in the case of R. v. Marquard [1993] 4 S.C.R. 223*, has explained with precision the competency of the child witness, by stipulating the*

following criteria for testing the same in terms:
"... (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate.... The judge must satisfy him or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable…… *Generally speaking, the best gauge of capacity is the witness's performance at the time of trial. [T]he test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. [once] This established, deficiencies of perception, recollection of the events at issue may be dealt*

with as matters going to the weight of the evidence."

The said witness Mohsin Naqvi, stated that: -

"کامران شاہ نے چھری سے وار کر کے نجم الحسن کی گردن دائیں جانب مارا (عدالت نے نوٹ کیا کہ گواہ نے ہاتھ کے اشارہ سے اپنی گردن کی بائیں طرف بتایا) ۔چھری لگنے سے نجم الحسن گر گیا اور خود جاری ہو گیا پھر انکل عاشق پہنچ گئے۔انکل عاشق ،طلعت،عدیل عباس ،نجم الحسن کو پکر کر پھوپھی کے گھر لے گئے ۔جواد علی ،کامران موقع سے ڈر کر بھاگ گئے۔"

There is conformity between the statement of this witness and the statement of Nisar Hussain Shah. The witness Mohsin Naqvi stated that Jawad Ali and Kamran Hussain Shah fled from the scene while Nisar Hussain Shah also stated that he did not see them on the spot. It is also notable that according to the statement of the witness Mohsin Naqvi, after Najam-ul-Hassan

was stabbed, the complainant Ashiq Hussain reached the scene. The prosecution witness Jabar Hussain Shah heard the noise and saw his elder brother Ashiq Hussain Shah running toward the spot, this witness also rushed to the spot and saw that Kamran Hussain Shah was holding Najam-ul-Hassan and then the convict hit him on the neck with a knife. Thus, there are minor contradictions in the statements of the prosecution witnesses as to the presence and absence of witness.

16. The criterion (نصاب) for conviction on the basis of Qisas is two male eye-witnesses. If the witnesses are found Adil (عادل), their testimony is confidence inspiring, then the accused is liable to be sentenced to Qisas under section 302 (a) APC. In a case where independent

witnesses are present on the place of occurrence but instead of producing them only related witnesses are produced, the investigation appears to have been conducted in an unfair manner. The fact remains that the cumulative effect after analysis of all the evidence leads to inference that direct evidence coupled with other circumstances is not of such standard on the basis of which the sentence of Qisas can be awarded to the appellant. In these circumstances the awarding of sentence of Qisas by the trial Court was not justified and the High Court lawfully converted the sentence.

17. There is no cavil with the proposition that the prosecution is not obliged to produce all the witnesses, however, if there are

impartial/independent witnesses and they are not produced and only related witnesses are produced then the evidence has to be examined with due care. A perusal of Article 129 of Qanon-Shahdat Order, 1984, shows that the Court can draw an inference against the party who did not produce the evidence which could be and is not produced, if produced, would be unfavourable to the person who withheld, it. It is the bounden duty of the prosecution to examine à material witness, particularly when no allegation has been made that if produced, he would not speak the truth. Where material witnesses are not called by the prosecution without giving sufficient reason, the Court may draw an inference adverse to the prosecution. Not only does an adverse inference

arise against the prosecution case from the non-production of a material witness in view of Art. 129, but the circumstance of his being withheld from the Court casts a serious reflection on the fairness of the trial. Where the prosecution withholds a witness under its control which is essential to prove that necessary facts, a presumption that such witness, if produced, would be unfavourable to the prosecution, may be raised. Where an eyewitness who has seen the entire incident is not produced, his non-production would obviously, give rise to an adverse presumption against the prosecution. Therefore, the conviction awarded by the trial Court on the basis of Qisas is not justified

18. The learned counsel for the convict-appellant has urged for acquittal of the accused contending that the penalty of imprisonment of 25 years by the High Court in the circumstances of the case was not justified as the motive alleged by the prosecution was not proved. We do not find merit in the contention of the learned counsel for the convict-appellant as all the witnesses from lodging of the FIR to the Courts statement have confirmed that Kamran Shah, convict, planted a mulberry tree in front of the house of the victim in the afternoon of the day of occurrence due to which altercation was started between the deceased and the convict-appellant and this altercation later led to the murder of Najam-ul-Hassan. The act of planting a tree in

front of victim's house indicates that there was already a land dispute between the parties. Mere fact that the motive as alleged was weak when there has been reliable, satisfactory and unimpeachable ocular evidence connecting the appellant with the commission of the crime, corroborated by the strong evidence, the case of prosecution does not fail as a whole. It may also be observed that the allegations and proof of motive are not legal requirements for awarding maximum penalty of death or life imprisonment in a murder case when the prosecution has proved the guilt of the appellant accused beyond reasonable doubt as in the instant case, we would like to observe here that in the dispensation of criminal justice, decision of the case must not be

taken in relation to accused's case but "must rest on the examination of entire evidence" in view of principle laid down in the case titled *Talib Hussain vs. State* [1995 SCMR 1776], so even in case of weak motive when there has been otherwise strong and reliable evidence, motive would not come in the way of the case of prosecution. Over and all it has to be remembered that this is not a case resting on circumstantial evidence but a case where murder has taken place in presence of eye-witnesses, so it becomes needless to say that when there is acceptable evidence of eye witnesses to the commission of an offence, question of motive can loom large. In *Talib Hussain's* case (supra), it has been observed by the apex Court of Pakistan that:

> *"We may point out that there is no legal requirement that in order to award maximum penalty of death in a murder case, the motive should be alleged and proved. If the prosecution proves the case against an accused in a murder case beyond reasonable doubt, the normal sentence is death. If above normal sentence is not to be awarded the Court is to make out a case for reduction of sentence on the basis of mitigating circumstances."*

In the other case reported as *Saeed and others vs. The State* [2003 SCMR 747], it has been observed that: -

> *"We having gone through the evidence of the inured and natural witnesses, have found them truthful, confidence-inspiring and trustworthy. The evidence of eye-witness was not suffering from any material defect or contained any describable contradiction and discrepancy to create a slight*

> *doubt regarding the guilt of the petitioners. We find that motive in the present case was not shrouded in mystery as contended by the learned counsel and in any case, the weakness and insufficiency of motive or absence of motive in such-like cases, cannot be considered as a mitigating circumstance for lesser penalty."*
>
> (Underlining is ours)

19. We also not agree with the contention of the learned Advocate for the convict-appellant that the complainant named three other co-accused besides the main accused-appellant, herein, in the FIR and they were charged with aiding and abetting the main accused but that part of the FIR has not been proved which has made the rest of the FIR as unreliable even to the extent of the convict and causes serious dent to the prosecution story. There is no doubt that an

FIR is not a detailed document wherein, each and every information is to be mentioned rather it's a tool to put the law in action. It is the investigating officer who has to investigate the matter, bring out the real facts and collect the material relating to the commission of alleged offence. Although, in the instant case the investigating officer has exonerated the co-accused under section 169 Cr.PC, but on the basis of discharge of the other accused the rest of the FIR cannot be declared as false and baseless and also does not affect the prosecution's case.

20. Now we come to the plea of non-examination of the other eye-witnesses namely; Talat Hussain and Adeel Abbas. It would be suffice to say that it is the prerogative of prosecution to

produce evidence as may be necessary to prove the charge and may give up the witness after sufficient evidence is brought on record because it is a settled rule of Criminal jurisprudence that prosecution's evidence is not tested on the basis of the quantity but quality of evidence. It is always within the wisdom of either party to produce evidence of as many witnesses as are found necessary, to prove a certain charge or fact. We are guided on this point from the case *of Karamat Hussain vs. State & another* [2015 SCR 1007], wherein, it has been held by this Court that: -

> *"…It is not necessary for the prosecution to examine each and every witness cited in the calendar of witnesses. It is sweet-will of the prosecution to examine the witnesses of his own choice."*

This view also finds support from the case titled *Said Akhtar & another vs. Sardar Ghulam Hussain* [2015 SCR 1487], wherein, it has been held by this Court that: -

> *"It may be stated here that it is settled principle of law that the discretion lies with the prosecution to examine the witnesses of its own choice and the prosecution cannot be compelled to examine each and every witness cited in the calendar of witnesses."*

This view further finds support from the judgment of this Court in case titled *Ishtiaq Ahmed & others vs. State & others* [PLJ 2013 SC (AJ&K), 231], wherein, it has been observed that: -

> *"12. So far as the argument of the learned counsel for the convict-appellant that all the prosecution witness mentioned in the calendar of witnesses have not been produced and*

examined by the prosecution is concerned, it may be stated that it is prerogative of the prosecution to examine the witnesses which it deems necessary. The prosecution cannot be enforced to examine all the witnesses whose names are mentioned in the list of calendar. No adverse presumption is to be drawn in the absence of any positive evidence."

In the case reported as Saeed Khan and 5 others vs. The State [2008 SCMR 849], it has been held by the Supreme Court of Pakistan that:

-

"It is prerogative of prosecution to produce evidence as may be necessary, to prove the charge and may give up the witness after sufficient evidence is brought on record. No inference can be drawn about the testimony of the remaining witnesses. In case the defense relies on the fact that they do not support

> *the case of prosecution, they can always be examined in defense. No adverse presumption is to be drawn in the absence of any positive evidence."*

This point also came under the consideration of this Court in the case reported as *Abdul Aziz vs. Muhammad Lal & others* [2000 SCR 375], wherein, it was observed that: -

> "After hearing the respective contentions of the learned counsel for the parties and perusing the record, it may be stated that at the very outset that it is not the duty of the prosecution to produce each and every witness cited in the calendar of challan. It depends on the will of the prosecution to produce such witnesses whom it deems necessary for proving the guilt of the accused."

21. At this juncture, we are also of the view that the prosecution has proved its case from the other eye-witness beyond reasonable doubt and we do not find substance in the plea of the defense that giving-up of prosecution witnesses namely, Talat Hussain and Adeel Abbas should result in drawing an adverse inference against the prosecution who, within its wisdom considered it sufficient to produce the other eye-witnesses.

22. As regards to the plea of producing the witnesses being inter-se related instead of independent witnesses, it would be material to make it clear that it is not the relationship which makes one a witness of truth or otherwise. It is now a well settled principle of law that evidence of witness cannot be disturbed merely on his

relationship with the parties. The evidence of a witness could not be disbelieved or discarded merely on the basis of relationship, unless and until it is proved that the witness was inimical towards the accused. This Court in its authoritative judgment titled *Ghazanfar Ali vs. The State & another* [2015 SCR 1042], wherein, it has been observed that: -

> *"13. The argument of the learned counsel for the convict-appellant that the statement of thew witness, namely, Tallat Zahoor is also not reliable as his father has enmity with the convict-appellant, is also not convincing in nature. If for the sake of argument, it is assumed that his father had any ill-will or animosity against the convict-appellant, even then that cannot be made basis to discard the statement of the said witness. The defense also failed to bring*

anything on record that the said witness was inimical towards the convict-appellant, whereas, he categorically stated in his statement that he has no enmity against the accused party. After scrutinizing the evidence of the eye-witnesses, we are of the view that all the eyewitness are independent and trustworthy and the trial Court as well as the learned Shariat Court has appreciated their evidence according to the settled norms of justice. The argument of the learned counsel for the convict-appellant that all the witnesses are closely related to each other, therefore, their statements cannot be believed, has also no substance. It is settled principle of law that mere relationship is no ground for discarding the evidence of a witness."

This view is also fortified from the judgment of this Court in the case titled *Qadir*

Baksh and others vs. The State [2013 SCR (SC AJ&K), 439], has held that: -

> *"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 witnesses of truth".*

Similarly, in the case titled *Muhammad Khurshid Khan vs. Muhammad Basharat & another* [2007 SCR 1], it has been held by this Court that: -

> *"In the instant case both Muhammad Najeeb and Tauseef Ahmed appeared as witnesses and no enmity with the appellant was suggested to them during the cross-examination. Even the accused in his statement under section 342 Cr.PC did not attribute any enmity with them. From the entire evidence it did not transpire that they had any*

> *enmity with the accused persons. It is well settled principle of law that evidence of a witness could not be disbelieved or discarded merely on the basis of relationship, unless and until it is proved that the witness was inimical towards the accused."*

In a case reported as *Ishaq vs. The State* [PLD 1985 Karachi 595], at page 600, it was held by the learned Karachi High Court that: -

> *"…However, it is a settled law that mere relationship of witness with the victim of the crime is no ground to discredit his testimony".*

23. Here another aspect is worth-understanding that the term 'related' should not be confused with the term 'interested' because both are entirely distinct concepts. There is considerable distinction between the terms

‘related and ‘interested’, because the interested witness need not necessarily, be a related but it is the person who has such a motive on account of enmity or any other consideration that due to such enmity or consideration, he has prepared himself to depose falsely. The term ‘related’ is positive in its meaning while the term ‘interested’ is negative in its meaning because the term ‘interested’ has a concept to gain favour for whom or what he/she is interested with. Although the burden is always upon the prosecution to prove truthfulness of a related witness but where the defense claims the witness as ‘interested’, burden shifts upon defense to establish that such witness had a motive on account of enmity or any other consideration which compelled him to

depose falsely against the accused. In the case titled *Khizer Hayat vs. The State,* [2011 SCMR 429], wherein, the Supreme Court of Pakistan Court has formed the same view and held that: -

> *"The statement of the witness on account of being interested witness can only be discarded if it is proved that an interested witness has ulterior motive on account of enmity or any other consideration."*

In the case reported as *Abdul Rashid and others vs. Abdul Ghazanfar & other* [2001 SCR 240], the same view has been taken, wherein, it has been held that: -

> *It may be observed that, except Abdur Rashid, complainant, it has not been shown that the other witnesses, namely, Muhammad Siddique and Walayat Khan were related to the deceased, irrespective of the fact that the mere*

relationship is no ground for discarding the evidence of a witness. The suggestions made to Muhammad Siddique and Walayat Khan in cross-examination regarding their relationship show that according to the defence, they were related to the complainant party remotely; according to the suggestion the aforesaid two witnesses suppressed the names of their grand-fathers in the cross-examination so as to conceal their relationship. Even if it is assumed that there was any such remote relationship, how the said witnesses would become 'interested' witnesses. An 'interested' witness is one who falsely implicates an innocent person with the commission of offence with ulterior motive. Thus, a related witness would be interested to secure the punishment of the actual culprit and not falsely implicate a person in place of the real perpetrator of a crime. It may be observed that a party may rope innocent persons in a

crime along with a real culprit but it is not natural that a party would leave the real culprit and instead falsely implicate innocent persons."

24. Now we would like to consider the plea of the defense that the provisions of section 103 of Cr.PC, have not been complied with at the time of recovery. The learned counsel for the appellant contended that the provisions of section are mandatory in nature and it was enjoined upon the investigating Officer to call for two independent, respectable witnesses of locality to effect the recovery from the accused convict-appellant. He further contended that there are two witnesses of recovery namely, Ahsan-ul-Haq and Malik Abdul Rasheed, but the testimony of Malik Abdul Rashid has been discarded and the other witness

Ahsan-ul-Haq who is from the other village has been produced, therefore, the recovery is in violation of section 103 Cr.PC and cannot be relied upon for convicting the appellant. We have dispassionately considered the argument of the learned Advocate for the appellant. The record reveals that the recovery witnesses namely, Ahsan-ul-Haq is although from the other village but he is respectable in his locality. Even otherwise, it is not necessary in every case to cite the witnesses from the same locality. The provisions of section 103, Cr.PC are applicable in cases of search, but where the recoveries are made at the instance of the accused person there is no strict rule that such a recovery must be made according to the provisions contained in

section 103, Cr.PC and the said provisions are strictly applicable. We are fortified in our view by the case reported as *Qamar Shehzad & others vs. The State* [2010 SCR 113], wherein, it is held by this Court that: -

> *"The record reveals that the recovery witnesses are local and respectable of the locality. Normally general public hesitates to become witness in criminal cases, particularly in cases of dacoity against those persons who are involved in a number of criminal cases. Even otherwise the provision of section 103 is applicable under chapter VII or Cr.PC in cases of search. But where the accused person leads the investigating officer to the place where he has concealed the stolen articles and himself produces the same, the provisions of section 103 are not strictly applicable.*

In the case reported as *Abdul Rashid & others vs. Abdul Ghaffar & other* [2001 SCR 240], it has been held that: -

> *"11. The reasoning given by the Shariat Court that the recoveries of empties and gun were not witnessed by independent witnesses of the locality and as such the same cannot be considered against the accused-respondent is also not correct. It has been held in a number of cases that strict compliance of section 103, Cr.PC is not necessary in case of recoveries or seizure memos made by the police. Similarly mere relations of the witnesses of the recovery memos is not a ground to reject their testimony dubbing the same as doubtful. A reference may be made to the case titled Abrar Hussain Shah [PLJ 1990 Cr.C. (AJK Shariat Cout) 494], wherein, it was held that if recoveries are made at the instance of accused person there is no rule that such a*

recovery must be made according to the provisions contained in section 103, Cr.PC."

This view is also fortified from the case titled *Noor Ahmed and others vs. The State* [1992 SCR 1], wherein, it is held by this Court that: -

"The learned counsel for the appellants has contended that the recovery of blood-stained hatchet, the weapon of offence is doubtful. He has argued that the witnesses to the recovery i.e. Abdul Rashid and Abdul Aziz P.Ws. do not hail from the village Chanjal from where the hatchet was recovered. He has contended that there is no respectable witness of vicinity to the recovery as envisaged in section 103 Cr.PC and thus the recovery is not reliable. It may be stated that the argument is not tenable, because section 103 Cr.PC does not strictly apply to a case where an accused person leads the investigating officer to the

> *place where he conceals the incriminating articles and produces the same himself."*

This view is further fortified from the case reported as *Abrar Hussain Shah vs. The State* [PLD 1992 SC (AJ&K), 20], this Court held that: -

> *"We are of the view that the recovery of weapon of offence at the instance of accused person is not strictly governed by the provisions contained in section 103 Cr.PC as has also been held by the Shariat Court. The said provision pertains to search by a police officer under Chapter VII of the Criminal Procedure Code and not to the case where a weapon of offence is produced or recovered by the police at the instance of an accused person."*

In the other case reported as *Qillandar Shah vs. Azad J&K Government* [PLD 1957 Azad J&K 1], it has also been held that the word

'locality' cannot be strictly construed and the person of other village can be produced as witness. The said observation is as under: -

> *"the word 'locality' used in section 103 Cr.PC is not to be strictly construed and a person residing few miles away from the place of recovery would be deemed to be a person of locality within a meaning of section 103, Cr.PC."*

25. The contention of the learned counsel for the convict-appellant that there are material contradictions in the statements of the witnesses and the complainant in his Court's statement has also made improvements, is without any substance. As there is overwhelming evidence on record to show that the incident had taken place and when once the genesis of the occurrence is proved, it is now well settled that contradictions

which are minor in nature would not be sufficient to dispel the entire prosecution case. It is true that there are minor contradictions in the statement of the witnesses but it cannot be held fatal for the prosecution; and all the witnesses are natural witnesses. Moreover, parrot like statements are also disfavored by the Courts. It is worth adding that the incident is reported to have occurred on 13.03.2010, and the witnesses recorded statements in the Court after more than two and half years, therefore, minor contradictions are pretty much natural to be expected in the statements. The discrepancies in the evidence of the eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. The

learned counsel for the appellant has endeavored hard to highlight certain discrepancies among testimony of the witnesses, in our considered opinion, which are absolutely, minor in nature which do not discredit the cumulative evidence. The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution; giving undue importance to them would amount to adopting a hyper-technical approach. The Court while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies do not shake the basic version of the prosecution case and same are to be ignored. We are fortified in our view from the case reported as *Yasmin Ashraf & 7 others vs.*

Abdul Rasheed Garesta & 5 others [2018 SCR 661], wherein, it has been held that: -

> *"In the instant case, all the witnesses remained consistent on the material points, however, some minor discrepancies are found in their statements which can lightly be ignored and it is settled principle of law that the minor discrepancies do not affect the case of the prosecution as a whole, however, these may make some mitigation to some extent which may be taken into the consideration towards the quantum of the sentence."*

In a case reported as *Muhammad Naseem vs. State & another* [2018 SCR 417], this Court has taken a view that: -

> *"so far as the contention of the learned counsel for the convict-appellant that there are discrepancies in the statements of prosecution witnesses, thus, the conviction cannot be*

> *recorded on such evidence is concerned, it may be observed that the minor discrepancies in the prosecution evidence does not thresh out the whole case of the prosecution as the minor discrepancies can be ignored lightly. However, as stated hereinabove that all the prosecution witnesses remained consistent on the material part of the prosecution version, thus, the convict-appellant failed to point out any major contradiction in the prosecution evidence."*

This view is further fortified from the case titled *Abdul Rashid & 3 others vs. Abdul Ghaffar and 5 others* [2001 SCR 240], wherein, it has been held that: -

> *"9. The finding of the Shariat Court that there are contradictions between the medical evidence and the eye-witnesses is also not correct.*

According to the finding of the trial Court, the fire which caused death of Fazal-ur-Rehman was fired from a close range. The site plan shows that at the time of fire, the distance between the assailant and the deceased was eleven feet. According to medical jurisprudence, the burning of the clothes and blackening may be present if the gun is fired from a distance of about three feet or less. After subtracting the length of barrel of the gun and its butt, which may be about 5/6 feet, the remaining distance between the muzzle of the gun is more or less remains only about 5/6 feet; the difference of 2/3 feet is negligible as the same may be due to wrong perception of the witnesses. Thus, there is no material contradiction in the statements of eye-witnesses and medical evidence. It may be observed that it is not possible for the witnesses in such a case to give the precise distance; there is always a possibility of error of few feet

or yards. The observation of the Shariat Court that according to the statement of eye-witnesses, the distance between the assailant and deceased was about five to six yards is concerned, it may be observed that the witnesses gave statements in the Court after more than three years of the incident. Therefore, the aforesaid statements at the trial would not nullify the distance between the assailant and victim of offence at the time of firing which is mentioned in the site plan. Even otherwise, if ocular evidence is found trustworthy, the same cannot be rejected merely because there was some variation between the prosecution witnesses and the medical evidence on the point of distance between the assailant and the victim at the time of inflicting the injury."

26. As per abovesaid analysis, we are unable to accept the submission of the learned counsel

for the convict-appellant that the evidence of the eye-witnesses should be rejected solely on the ground that there are several contradictions in the testimonies and they are the related witnesses. We may also refer here the judgment of the Indian Supreme Court in the case titled *State of Punjab vs. Jagir Singh, Baljit Singh and Karam Singh* [AIR 1973 (SC) 2407] (https://www.casemine.com/judgement/in/5609ab96e4b014971140cd79, accessed on 08.12.2021), wherein, it has been held that: -

> *"23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay*

of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

27. As far as the contention in appeal filed by the prosecution is concerned, we have already discussed and considered all the facts of the case minutely. However, in the appeal filed by the prosecution it contends that the trial Court rightly convicted the accused under section 302(a) PPC

death as Qisas and 300,000, compensation under section 544(A), Cr.PC, whereas, the mitigating circumstances cannot be a hurdle in awarding the death penalty especially when the prosecution has proved its case beyond any reasonable doubt. We have already dealt with this point in the preceding paragraphs and we are fully agreed with the findings of the learned High Court given in the last para of the impugned judgment which is as follows: -

"ان جملہ حالات و واقعات کی روشنی میں ہماری رائے میں اپیلانٹ کا مران حسین شاہ پر نجم الحسن کے قتل کا جرم عینی اور قرائین کی شہادت سے ثابت ہے ۔لہذا کامران حسین شاہ کو قتل عمد میں قصاص کے طور پر سزا ئے موت دینا مناسب نہیں ہے۔ پس اپیل کامران حسین شاہ بنام سراکار بدیں طور منظور کی جاتی ہے کہ اپیلانٹ/مجرم کامران حسین شاہ قصاص کے طور پر سزا کا مستوجب نہیں ہے۔فیصلہ زیر اپیل منسوخ کیا جاتا ہے اور اپیلانٹ/مجرم کامران

حسین شاہ کو نجم الحسن کے قتل کے الزا م میں زیر دفعہ 25,APC,302(C) سال قید با مشقت کی سزا ئ دی جاتی ہے۔ زیر دفعہ 544-Aض ف عدالت ماتحت کا فیصلہ بحال رکھا جاتا ہے ۔اپیلانٹ /مجرم کامران حسین شاہ مقتول کے ورثائ کو تین لاکھ روپے معاوضہ ادا کرنے کا پابند ہو گا ۔عدم ادائیگی معاوضہ مجرم مزید چھے ماہ قید محض برداشت کرے گا ۔"

It is pertinent to mention that the absence of premeditation is regarded as a strong mitigating factor because it indicates that the alleged offence does not fall into the category of 'worst of the worst'. It is almost settled across the south Asian jurisdiction that even if the absence of premeditation is the only mitigating factor that can be found in a case, should be considered strong enough to bar the application of death penalty.

28. In view of above discussion, we are of the firm view that the prosecution successfully established the guilt against the appellant but we find the quantum of sentence, awarded by the trial Court, as harsh. The Court is satisfied that there are certain reasons due to which death sentence is not warranted; the High Court has rightly imposed sentence of imprisonment for 25 years while extending benefit of the mitigating circumstances to the convict in a just and fair manner. In this view of the matter, we are of the considered view that such extenuating circumstances do exist in the instant case for giving the benefit thereof to the appellant in quantum of sentence. Reference can be made on

the case of *Dilawar Hussain vs. The State* [2013 SCMR 1582], wherein, it has been held that: -

> *"It has neither been the mandate of law nor the dictates of this Court as to what quantum of mitigation is required for awarding imprisonment for life rather even an iota towards the mitigation is sufficient to justify the lesser sentence."*

29. We have also observed that both the lower Courts below have not extended the benefit of section 382-B, Cr.PC to the convict-appellant, herein and the counsel for the convict-appellant has not objected to it. As per the dictum laid down by this Court in the judgment titled *Sain Muhammad vs. The State* [2015 SCR 339], it is mandatory for the Court to extend the benefit of section 382-B, Cr.PC, to the convict for the reason

that if a person who remains under custody before his date of conviction, by not giving benefit of deduction of such period will amount to cross the limit of actual punishment, therefore, the convict-appellant is also given the benefit of section 382-B.

30. Accordingly, while modifying the impugned judgment to the extent of extending benefit of Section 382-B, Cr.PC, rest of the judgment of the High Court is maintained and both the appeals are hereby dismissed.

JUDGE CHIEF JUSTICE

Muzaffarabad,
11.01.2022.