SUPREME COURT OF AZAD JAMMU AND KASHMIR

[SHARIAT APPELLATE JURISDICTION]

PRESENT:

Kh. Muhammad Nasim, J

Raza Ali Khan, J.

1. Criminal appeal No.01 of 2023

Criminal Misc. No. 01 of 2023

(Filed on 02.01.2023)

Mohammad Shahbaz s/o Mohammad Ashraf caste Jatt r/o Aahi, Tehsil Barnala, District Bhimber presently Confined in Central Jail Mirpur.

….CONVICT-APPELLANT

VERSUS

1. Nasarullah Khan s/o Chaudhary Muhammad Khan,
2. Fakhira Faiza,
3. Aamina,
4. Maimoona,
5. Sana ds/o Sanaullah alias Chaudhary

Mohammad Amin, caste Gujjar r/o Bharowal, Tehsil and District Gujrat.

6. Sabar Hussain s/o Sardar Khan caste Mughal, r/o Awan Shareef District Gujrat.
7. The State through Advocate-General.

….RESPONDENTS

8. Taj bibi widow of Sanaullah alias Ch. Muhammad Amin resident of Karyan wala Do Khooha Tehsil and District Gujrat.
9. Shabir Hussain s/o Noor Hussain r/o Aahi, Barnala District Bhimber.

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 01.12.2022 in criminal appeals No.55 and 56 of 2017)

APPEARANCES:

FOR THE CONVICT-APPELLANT:	Raja Inamullah, Advocate.
FOR THE COMPLAINANT-RESPONDENTS:	Raja Khalid Mehmood Khan, Advocate.
FOR THE STATE:	Ch. Shakeel Zaman, Addl. Advocate-General.

2. Criminal appeal No. 08 of 2023
(Filed on 12.01.2023)

1. Nasarullah Khan s/o Chaudhary Muhammad Khan,
2. Fakhira Faiza,
3. Aamina,
4. Maimoona,
5. Sana ds/o Sanaullah alias Chaudhary Mohammad Amin, caste Gujjar r/o Bharowal, Tehsil and District Gujrat.
6. Umar Shabeer,
7. Qamar Shafiq sons,
8. Faiza Bibi,
9. Mariam bi (minor), through her real mother Naseem Begum widow,
10. Naimat Bibi mother of SHabeer Hussain r/o Aahi Tehsil Barnala, District Bhimber.

…COMPLAINANT-APPELLANTS

VERSUS

1. Muhammad Shahbaz s/o Muhammad Ashraf caste Jaat r/o Aahi Tehsil Barnala District Bhimber.

….CONVICT-RESPONDENT

2. The State through Additional Advocate-General of Azad Jammu and Kashmir, Mirpur, AJK.

….PROFORMA RESPONDENT

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 01.12.2022 in criminal appeals No.55 and 56 of 2017)

APPEARANCES:

FOR THE COMPLAINANT-APPELLANTS:	Raja Khalid Mehmood Khan, Advocate.
FOR THE CONVICT-RESPONDENTS:	Raja. Inamullah Khan, Advocate.
FOR THE STATE:	Ch. Shakeel Zaman, Addl. Advocate-General.

Date of hearing: 23.01.2023

JUDGMENT:

Raza Ali Khan, J.– The common judgment of the Shariat Appellate Bench of the High Court (*hereinafter to be referred as High Court*), dated 01.12.2022, has been called in question in the titled appeals, (supra), whereby the appeals filed by the contesting parties have been dismissed. As the titled appeals are outcome

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

2. After hearing the arguments of the contesting parties of the appeals, the Court on 25.01.2023, decided the appeals through the short order in the following terms.

> "For the reasons to be recorded later on, the appeal filed by the convict-appellant is accepted and the convict-appellant, Muhammad Shahbaz, is acquitted of the charges, He shall be released forthwith if not required in any other case. The counter appeal filed by the complainant is dismissed."

We shall now record our detailed reasons for acquitting of Muhammad Shahbaz, convict-appellant, accepting of his appeal and dismissing the appeal filed by the prosecution.

3. The brief facts forming the background of the captioned appeals are that the complainant-Nasrullah Khan, filed a written application at Police Station Barnala, on 08.09.1993 stating therein, that the complainant along with Sanaullah alias Muhammad Amin, (deceased) Mehndi Khan, resident of Bherwal (Gujrat) and Shabbir Hussain r/o Aahi Bhimber, came to Barnala on the day of occurrence while boarding a hired Hilux pick-up bearing registration No. KE-0391 Karachi, driven by Sabir Hussain resident of Awan Sharif, a village in Gujrat, in connection with some personal engagement. The occurrence took place when they were on their way back to Bherwal. Apart from Sabir Hussain, who was driving the vehicle, Sanaullah alias Muhammad Amin and Shabbir Hussain were seated on the front of the vehicle

while the complainant and Mehndi Khan were seated in the back of the hilux. As the weather was warm, so the tarpaulin from the front side was removed. When they reached the place a bit ahead of Hazari Toll Post, the vehicle was slowed on the speed-breakers, the complainant found two cars parked alongside the road in which one was Mercedes and the other was Toyota Car. Shahbaz, Khawar (sons of Muhammad Ashraf) Nadeem S/o Allah Ditta, Jamshed s/o Muhammad Akbar, all residents of Aahi, Shahid Shah s/o Saghir Shah resident of Ajnala Tehsil Gujrat and javed s/o Noor Alam resident of Awan Sharif, were standing near the said parked vehicles. Shahbaz, khawar, Shahid Shah and Jamshed had the Kalashnikovs with them while Nadeem and Javed were carrying a double barrel 12 bore gun and a 222 bore rifle respectively.

Shahbaz launched the attack by firing a burst from his Kalashnikov which hit Sanaullah alias Muhammad Amin. Due to speed-breakers the vehicle was moving at a slow speed, therefore, the complainant and Mehndi Khan jumped out of the vehicle and took shelter behind a nearby culvert. The other accused persons also started firing indiscriminately. Sanaullah alias Muhammad Amin, Sabir Hussain and Shabbir Hussain received severe injuries. Sanaullah alias Muhammad Amin succumbed to the injuries and expired on the spot. The accused fled away while boarding on the said two cars towards Awan Sharif and also took away 7mm licensed gun of the deceased. The motive behind the occurrence was stated to be a dispute over the land situated near the village Aahi in the

territory of Azad Kashmir, between accused-Shahbaz and the deceased.

4. On this report, an FIR No.76/1993 was registered at Police Station Barnala in the offences under sections 147/148,149,427,307 and 34-APC read with 5 and 15 IPL and 17(3) EHA. The police after completing thorough investigation, presented the challan in the trial Court on 11.12.1993, wherein Muhammad Shahbaz, convict-appellant was entered in the relevant column of the challan as absconder. He presented himself before the Police in 1999 and again absconded in 2001. On his appearance, fresh challan presented in the District Criminal Court Bhimber, on 09.07.2011. The accused pleaded himself as innocent in his statement recorded under section 265-D Cr.Pc.

whereupon the prosecution was directed to lead evidence. Upon completion of prosecution evidence, the statement of accused under section 342 Cr.Pc., was recorded who again pleaded not guilty, and got his statement recorded under section 340(2), Cr.Pc. on oath and produced Shahbaz Ashraf, Muhammad Sharif, Khalid Mehmood and Ansar Mehmood as defence witnesses.

5. At the conclusion of the proceedings, the learned trial Court vide its judgment dated 27.02.2015, convicted the accused, Muhammad Shahbaz by awarding him the sentence in the following manner: -

> **"لہذا مجرم شہباز اشرف ولد محمد اشرف کو جرائم زیر دفعات *APC/149,147/148* کی پاداش میں دو ، دو سال سزائے قید با مشقت اور جرمانہ اور جرم زیر دفعہ *427/APC* کی پاداش**

میں ایک سال قید محض اور جرم زیر دفعہ *307/APC*جو بوقت وقوعہ قتل کی سزا کے طور پر نافذ تھی اس لئے اس دفعہ کے تحت اس وقت متعین سزا کے مطابق ہی صادر کی جاتی ہے۔ لہذا دفعہ *307/APC*کی پاداش میں سات سال قید با مشقت کی سزا دی جاتی ہے اور مجرم قید کی سز ا کے ساتھ پانچ ہزار روپے جرمانہ کی بھی سزادی جاتی ہے عدم ادائیگی جرمانہ کی صورت میں مجرم مزید دو ماہ قید محض برداشت کر ے گا۔

جہاں جرم زیر دفعہ *5/IPL*کا تعلق ہے اس دفعہ کی رو سے بوقت وقوعہ درج سزا نافذ العمل تھی جس کے تحت قتل عمد کی سزا (جو کوئی شخص شبہ عمد کا ارتکاب کرے وہ قصاص کا مستوجب ہو گا الا یہ کہ مقتول کے ورثا اس کو معاف کر دیں یا باہم رضامندی سے مال لے کر صلح کر لیں)

اس دفعہ کی رو سے بنیادی سزا قصاص ہے اور قصاص نافذ ہونے کی صورت میں یا ورثاء کی جانب سے کسی کو معاف کرنے یا دیت پر راضی کرنے کی صورت سزائے دیت ہے۔ مقدمہ ہذا میں ثبوت اس معیاد پر نہ ہے اور گواہان کے بیانات میں تضاد بیانی اور ان کا تزکیہ الشہود پر پورا اترنے کی بناء پر مجرم کو قصاص کی سزا دی جائے مگر اسلامی تعزیراتی ایکٹ کی دفعہ 24 یوں ہے۔

اختیار عدالت مجاز بوجہ عدم فراہمی شرعی نصاب شہادت (اگر عدالت مجاز بعد سماعت مقدمہ اس نتیجہ پر پہنچے کہ ملزم کے خلاف جرم تو ثابت ہے لیکن متعینہ گواہان کے پورا نہ ہونے یا گواہان کی مطلوبہ شرعی میعاد پر نہ اترنے کی وجہ سے ملزم کو حد یا قصاص کی سزا نہیں دی جا سکتی یا یہ کہ مقدمہ کی تفصیلات کی بناء پر حد یا قصاص کی سزا دینا مناسب نہ ہو گا تو عدالت مجاز کو اختیار ہو گا کہ وہ متبادل سزا یا سزائیں مندرجہ دفعہ 13 ایکٹ ہزا صادر کرے) کی روسے ایکٹ ھذا کی

دفعہ 3 میں تعین سزاوں میں سے متبادل سزا تجویز کی جا سکتی ہے جو یوں ہے اگر الزام ثابت ہو اور معیار شہادت پورا نہ ہو تو تعزیری سزا مجرم کو اس بناء پر دی جا سکتی ہے کہ مجموعی طور پر مجرم کے خلاف الزام ثابت ہے مگر شرائط قصاص و دیت پورا نہ ہونے کی بناء پر حتمی سزا دی جانی مناسب نہ ہے اس طرح جرم زیر دفعہ 5/IPL کے تناظر میں دفعہ 24/IPL کو ملا کر پڑھنے سے دفعہ 3/IPL کی ذیلی دفعہ ہفتم کے تحت قید کی تعزیری سزا دی جانی مناسب ہے .لہذا مذکور کو بحالات بالا دفعہ 3/IPL کی ذیلی دفعہ 7 کے تحت دس سال قید با مشقت کی سزا دی جاتی ہے اور مذکور کو دفعہ 544/A ض ف کے تحت مالی تاوان پانچ لاکھ روپے کی سزا بھی دی جاتی ہے۔ مذکور کی جانب سے مالی تاوان ادا ہونے پر ورثاء مقتول کو تحت ضابطہ اداکیا جائے گا۔ عدم ادائیگی مالی تاوان معاوضہ مجرم مزید چھ ماہ قید محض برداشت کرے گا جملہ سزائیں بیک وقت شروع ہو نگی اور مجرم کی مقدمہ ہذا میں مدت حراست سزائے قید میں محسوب ہو گی ."

Against the aforesaid conviction and sentence of the trial Court, both the parties preferred separate appeals before the High Court. The learned High Court after necessary proceedings maintained the conviction passed by the trial Court and dismissed both the appeals

through the impugned judgment dated 01.12.2022.

6. Mr. Inam-Ullah Khan, the learned Advocate appearing for convict-appellant, after narration of the necessary facts submitted that the impugned judgment of the High Court as well as the trial Court is against law, facts and the record of the case. He submitted that while passing the impugned judgments both the Courts below failed to appreciate that the prosecution has miserably failed to prove the guilt of the convict-appellant beyond any shadow of doubt. He further submitted that both the Courts below have not taken into consideration this important factor that the accused was falsely implicated in the case, even the contents of the FIR have also been negated during

the course of evidence. The motive alleged by the prosecution was also not proved but the High Court did not consider this aspect of the case. He argued that the prosecution did not produce the Investigation Officer as witness in support of prosecution case to the extent of convict appellant, herein, and also withheld the prosecution witnesses No.8, 9, 16, 18, 26, 27, 31 and 39. He further submitted that the occurrence took place in the dark night and there was no source of light to identify all the accused along-with their weapons, especially, when the place of occurrence was surrounded by fields of millet crop, the plants of which were taller than the height of a common man, therefore, the identification of the accused just in the light of running vehicle on a curved road was not possible. He added that the recovery of

alleged Kalashnikov is fake, forged and planted one and the investigation officer also declared it as a fake recovery document. It is also to be noted that despite alleged recovery of weapon of offence i.e. Kalashnikov, the FIR was not registered. He contended that the witnesses produced before the trial Court were interested and inimical towards the convict-appellant and were also involved in the criminal litigation with the accused, hence, strong corroborative evidence was required for conviction which is not available in the case in hand. He further contended that the prosecution also failed to produce any witness to prove pre-planning or premeditation. The learned Advocate further submitted that the independent witnesses i.e Sabir Hussain, the driver and Shabir Hussain (injured), who were stated to be seated on the front of the

vehicle, failed to point out that whose fire shot hit the deceased. Shabbir Hussain also admitted in his cross examination that he had a criminal record in which the cases of murder and attempt to murder were registered against him, hence, he cannot be considered as an *Adil* witness and his statement cannot be relied on. Moreover, Sabir Hussain (driver) who is also cited as witness of the occurrence has refused to identify any accused including Shahbaz despite the fact that he was driving the vehicle and must be looking ahead at the front. The Courts below wrongly relied upon the fake recovery of Kalashnikov and interested witnesses of recovery, even the non-appearance of the investigation officer who prepared the recovery memo, before the Court to prove the recovery of Kalashnikov, is also fatal for the prosecution. The

learned Advocate further argued that from the very first day, the convict took the plea of *alibi* and also proved it during the investigation and before the trial Court but the Courts below have not taken into consideration the same. He emphasized on the point that Taj Begum (widow of Sanaullah alias Chaudhary Amin), deceased, got her statement recorded before the High Court that she has forgiven the convict for the sake of Allah Almighty but the Courts below did not rely on her statement despite the fact that the widow herself appeared in the Court and got the said statement recorded with her own free will. He added that in the offences under section 5 IPL, after recording of pardon statement of one of the legal heirs of the deceased, the case securely falls within the ambit of Diyat only as has been observed by the trial Court in its

judgments. The learned Advocate further submitted that recovery memo reveal that the Kalashnikov was recovered on 11.11.1999 and sent for chemical examination to Forensic Science Laboratory (FSL) on 03.10.2001, after a considerable delay of 23 months which was enough for the Court to acquit the convict-of the charge but the learned Courts below arbitrarily convicted the appellant without proving the case by the prosecution. The learned Advocate submitted that the Courts below have not recorded the conviction regarding the injuries sustained by Shabeer Hussain and Sabir Hussain, so the injured persons were not the necessary party in the case, to be impleaded in the line of respondents. He further submitted that both the Courts below declared the witnesses as interested and inimical towards the convict-appellant, hence, those

witnesses cannot be relied on without strong corroboration in shape of recovery of weapon, whereas, the recovery of Kalashnikov has also been declared as inconsequential by the High Court, in this way, the conviction order passed by the trial Court was liable to be set-aside. He finally submitted that while accepting the appeal filed by the convict appellant, herein, he may be acquitted of the charge. In support of his contentions, the learned Advocate placed reliance on the cases reported as *Zulfiqar vs. Additional Sessions Judge/ Ex-Officio Justice of Peace, Lahore and 2 others [2021 PCr.LJ 1779], Muhammad Anwar vs. The State etc. [NLR 1993 Cr. 358], Abdul Ghafoor and others vs. The President National Bank of Pakistan and others [2018 SCMR 157], Iqra Hussain and others vs. The State and another [2014 SCMR 1155],*

State through Advocate-General Sindh, Karachi vs. Farman Hussain and others [PLD 1995 SC 1], Zahid Hussain vs. The State [PLD 2015 SC 77] and Ghulam Ali vs. The State [NLR 1993 Cri (Sukhar) 385].

7. Raja Khalid Mehmood Khan, the learned Advocate appearing for Nasrullah Khan & others, complainant-respondents, herein, submitted that the impugned judgments of the District Criminal Court dated 27.02.2015, as well as learned High Court dated 01.12.2022, are against the celebrated principle of law to the extent of lesser punishment, hence, are not maintainable. He submitted that the convict appellant, herein, was duly nominated in the FIR and the evidence produced by the prosecution alongwith other incriminating material fully implicates the convict-appellant in the alleged

offences. He was liable to be punished with death as Qissas but the learned Courts below fell in error of law while handing down the impugned judgments. He further argued that the learned High Court has also not considered the aspect of animosity of the convict appellant with the deceased which was fully established by producing cogent evidence, therefore, awarding a very meagre sentence to the convict is not justified. The learned Advocate submitted that the learned High Court in the impugned judgment has observed that the appeal filed by the legal heirs of the deceased is not competent, whereas, if the sentence cannot be enhanced while exercising appellate jurisdiction even then it was enjoined upon the first appellate Court to treat the appeal as revision, as the legal position has been declared by Supreme Court of

Pakistan in the case reported as 2017 SCMR 56, wherein the Court observed that the Courts do follow the practice of treating or converting the appeal into revision and evidence vice-versa and constitutional petition into appeal or vice-versa. He further submitted that the learned High Court has also failed to take into consideration this fact that the presence of the convict at the place of occurrence is proved which is also apparent from the act of abscondence of the convict to avoid arrest after the registration of FIR. He further argued that the convict appellant falls within the definition of habitual, desperate and dangerous criminal who had spread fear and panic in the society. He further argued that in view of incriminating material collected and recovery made by police from the accused including the co-

accused, the convict appellant does not deserve any concession but he has illegally been awarded lesser punishment by both the Courts below. He further argued that there are no contradictions in the statement of witnesses regarding the recovery of incriminating material, hence, the impugned judgments are not maintainable to the extent of lesser punishment. The case against the convict appellant was proved by the prosecution beyond any shadow of doubt but this important aspect has been ignored by the Courts below. The learned Advocate in support of his submissions, placed reliance on the case reported as Raja *Sarfraz Azam Khan and others vs. State and others,* [2005 SCR 166]

8. Per Contra, Ch. Shakeel Zaman, the learned Additional Advocate-General, appearing for the State, supported the prosecution case as well as findings recorded by the trial Court and the learned High Court and adopted the arguments advanced on behalf of the complainant by the learned Advocate, Raja Khalid Mehmood Khan, however, in addition, he submitted that occurrence was witnessed by the eye-witnesses who appeared in the Court, got their statements recorded and fully supported the prosecution version. He further submitted that the convict-appellant remained absconder for more than 18 years after incident, hence, adverse inference is liable to be drawn. The Supreme Court of Pakistan in the case reported as *Mst. Mumtaz Begum vs. Ghulam Farid and another* [2003 SCMR 647], has

also observed that it is an established principle of criminal jurisprudence that when an accused remains absconded after commission of an offence, adverse inference has to be drawn against him for the reason that he has committed an offence, therefore, is trying to hamper the process of investigation. He finally submitted that the appeal filed by the convict-appellant is liable to be dismissed. The learned Additional Advocate-General, placed reliance on the cases reported as *M. Bashir and another vs. Sain Khan and others* [2014 SCR 821] and *Badar Shehzad & another vs. The State and another* [2007 SCR 218].

9. We have given our dispassionate thought to the arguments advanced by the learned Advocates representing the parties and Additional Advocate-General and have also gone

through the record of the case, evidence produced by the parties and the impugned judgments of the Courts below with utmost diligence. Admittedly, the case is of ocular evidence but it is evident from the statement of witnesses, that the eye-witnesses, who have allegedly seen the occurrence, are close relatives of the complainant and the deceased. Moreover, they were involved in previous criminal and civil litigation with the convict-appellant, therefore, the statements of these eye-witnesses are required to be corroborated by the other pieces of evidence and the case has to be carefully appraised. Undoubtedly, a witness is normally considered as independent unless he or she springs from sources which are likely to be fainted and that usually means unless the witness has cause, such an

enmity against the accused to wish to implicate him falsely. We are of the view that it would be unreasonable to contend that evidence given by witness should be discarded merely on the ground that it is evidence of a partisan or an interested witness, the mechanical rejection of such evidence on this sole ground that he is related or interested witness would invariably lead to failure of justice. No hard and fast rule can be laid down in this regard but this Court has elucidated the difference between 'interested witness' and 'related witness' in a plethora of cases, that a witness may be called interested only when he or she derives some benefits from result of litigation, which in the context of criminal case, would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity

or any other reason and has a motive by falsely implicating the accused. Although, it is settled practice of law that this court does not go into re-appraisement of the evidence, when it has been settled that the first appellate court and the trial court have properly appraised the same and admitted it for reaching at any plausible conclusion. However, this is not a hard and fast rule and this court does not hesitate to re-examine the evidence, where gross misreading or non-reading of evidence, any error of law and sheer disregard of principles of appraisal of evidence, which resulted into miscarriage of justice, is found to be committed by the Courts below. Our view find support from the case reported as *Shahzad and 8 others vs. Rana Qamar & 4 others* [2019 YLR 2508], wherein, it has been observed that: -

> "This Court normally does not go into the re-appraisement of evidence which has been admitted by the Courts below. But it is well-settled law that if in case the Shariat Court is found to have committed an error of law or has disregarded the well-known principles relating to the appraisal of evidence, resulting into miscarriage of justice, then this Court has no reluctance to reappraise the evidence for doing complete justice. The appraisal of evidence especially in a murder case, has always seemed to be the most difficult undertaking which in the nature of things has come to rest on the shoulders of a Judge."

10. The incident is reported to have taken place on 08.09.1993 and the complainant-Nasrullah Khan, filed a written application at Police Station Barnala, on the same day which is discussed in detail in the preceding paras of this judgment.

11. Before heading towards the appreciation of evidence, it is pertinent to mention here that the challan under section 173, Cr.PC, against the convict-appellant, available at page 89 of the file of the trial Court, was presented in the Court of competent jurisdiction, wherein, the Investigating Officer himself mentioned that he is not sure about the guilt of the convict-appellant. The investigating Officer has endorsed in the challan that the guilt of the accused is doubtful. The said portion is reproduced hereunder: -

"سردار خورشید حسن DSPصاحب نے
اس ملزم کو بےگناہ قرار دیا ہوا ہے۔گو
گنہگاری ملزم شہباز مشکوک ہے تاہم
مقدمہ عدالت مجاز میں سماعت اس مرحلہ
پر ہے کہ اسے گنہگار یابے گناہ قرار دینا
مناسب نہیں مناسب یہی ہے کہ اس معاملہ
کو عدالت کی صوابدید پر چھوڑا جائے۔ "

The aforementioned portion reveals that the Investigating Officer who investigated the

convict-appellant was himself not sure as to whether the convict is guilty or not, and left the matter up to the Court. This fact has neither been attended by the trial Court nor by the High Court.

12. According to the prosecution version, the occurrence was witnessed by the complainant-Nasrullah Khan, Mehndi Khan, Shabbir Hussain and Sabir Hussain. The eye witness, Mehndi Khan, died before recording his statement in the trial Court, hence, only three eye-witnesses got their statements recorded. Sabir Hussain, (pw.4) one of the eye-witnesses is the most important and impartial witness who is reported to be a driver of complainant-Nasrullah. He stated in this statement before the trial Court in the following manner: -

"ملزمان حاضر عدالت کو مظہر نہیں جانتا ان کو آج پہلی دفعہ دیکھا ہے مظہر کے پاس پک اپ نمبری KEO/390 کراچی تھی مظہر کو چوہدری نصر اللہ نے مورخہ 8-9-93 کو بوقت پانچ چھ بجے شام کے قریب بلایا اور کہا کہ برنالہ جانا ہے مظہر کی گاڑی کی فرنٹ سیٹ پر شبیر حسین اور امین عرف ثناء اللہ بیٹھے اور گاڑی کی پچھلی باڈی میں نصر اللہ اور مہدی بیٹھے تھے۔ مظہران کو لے کر برنالہ گیا جو برنالہ اتر کر ایک گھر میں گئے اور مظہر اپنی گاڑی کے پاس رہا پھر متذکرہ اشخاص واپس آئے اور پہلے کی طرح یہ اشخاص گاڑی میں بیٹھے اور ہم واپس اعوان شریف آرہے تھے کہ ٹول پوسٹ ہزاری سے آگئے پہنچے ہم سپیڈ بریکر کے قریب جب پہنچے تو وہاں دو گاڑیاں کھڑی تھیں ایک کا رنگ سفید اور دوسری کا رنگ سرخ تھا ایک مرسیڈیز کار اور دوسری ٹویوٹا کرولا تھی وہاں پانچ مسلح اشخاص کھڑے تھے جنہوں نے فائرنگ کردی۔ یہ فائرنگ مظہر والی گاڑی پر ہوئی تھی فائرنگ کے نتیجہ میں مظہر زخمی ہو گیا دو گولیاں مظہر کی گردن پر بائیں جانب اور ایک گولی باز و پرلگی تھی اور ایک گولی بائیں ہاتھ کے انگوٹھا پر لگی تھی فائرنگ سے چوہدری امین موقع پر ختم ہو گیا تھا شبیر حسین بھی زخمی ہو گیا تھا فائر نگ کرنے والے اشخاص واردات کے بعد بھاگ گئے تھے مظہر کو گھر والےسی ایم ایچ لے گئے تھے اور مظہر کی گاڑی کا نقصان بھی ہوا تھا."

The said pw. No. 4, during his cross examination deposed that: -

"چوہدری نصر اللہ میرے پاس آیا تھا اس وقت چوہدری نصر اللہ کے ساتھ چوہدری مہدی بھی

تھا بعد میں چوہدری امین اور چوہدری شبیر بھی آئے تھے۔ ثناء اللہ اور شبیر آکر اگلی سیٹ پر بیٹھ گئے اور اس کے بعد مظہر نے نصر اللہ اور مہدی کو بلایا تھا۔ چوہدری نصر اللہ چوہدری ثناء اللہ ماموں ہے۔ ملزمان پانچ چھ تھے رات کا وقت تھا۔ مظہر آج بھی ملزمان کو نہیں جانتا مظہر مرسیڈیز اور کرولا گاڑیوں کا فرق پہچانتا ہے۔ دونوں گاڑیوں کے منہ جانب جنوب تھے پہلے مرسیڈیز کھڑی تھی اور اس کے بعد کرولا تھی۔ یہ درست ہے کہ ملزمان اس وقت گاڑیوں سے آگے جانب جنوب کھڑے تھے۔ مظہر نے یہ بیان دیا تھا کہ پتہ نہ ہے کہ فائرنگ کس نے کی ہے چونکہ اندھیرا تھا اس لیے مظہر نہیں بتا سکتا۔ کسی ملزم کے پاس کونسا ہتھیار تھا مظہر نے کسی ہتھیار کا نام نہ لکھوایا تھا۔ مظہر یہ نہیں بتا سکتا کہ ExhDB کا حصہ AtoA پولیس نے خود لکھا یا کسی اور نے لکھوایا ہے پولیس بیان میں بائیں کلائی پر زخم آنے کی بات درست نہ لکھی ہے کیونکہ مظہر کو دائیں کلائی پر زخم آیا تھا۔ ExhDB حصہ BtoB بھی غلط ہے۔"

This pw.4, in his statement recorded before the trial Court, has categorically refused to identify the accused. He even stated that he has seen the accused for the first time in the Court during his cross-examination. He only stated in his statement that the accused were standing on south side in front of the vehicles parked therein

at that time, and could not tell who fired at them as it was a dark night and further that he was also not aware of the fact as to which weapons the accused were carrying. In this scenario, when neither the witness has identified the accused nor he was able to implicate him in the crime, how could his statement be relied on in order to convict the convict-appellant, especially, when he has not nominated the convict-appellant in his statement? Therefore, to this extent, we are of the view that, although he is a credible and impartial witness but his statement failed to relate convict-appellant with the offence and prove that the accused was the one who fired with the Kalashnikov, thus, this statement cannot be relied on for the purpose of conviction of the convict-appellant. Here, one thing is to be noted that this

pw.4 is reported to be driving the vehicle. It is a prudent mind approach that a driver is more vigilant and attentive than the people sitting next to him and has a constant eye on the road. If the driver was unable to see clearly and was incapable to provide a clear picture of the crime scene, how can the other people at back and beside the driver in the same vehicle expected to witness the same incident with such clarity and visibility? This point also somehow makes the prosecution case doubtful on the ground of logic and rationality; thus, the statement of other prosecution witnesses who are interested and inimical witness have become more doubtful.

13. The second eye-witness in the case is Shabir Hussain, pw.3, who firstly narrated the

same story as alleged in the FIR but during his cross-examination, he stated that indiscriminate firing started at the place of occurrence and he does not know who was injured by the firing of all the accused and whose fire had hit the victim. His cross-examination is reproduced hereunder for better appreciation: -

جبکہ دوران جرح کہتا ہے کہ مظہر برنالہ میں ظفر نامی شخص کے پاس گیا تھا ۔ مظہر ان کے پاس 5/4 گھنٹے رہا تھا مظہر کے پاس اس وقت نصر اللہ مہندی خان ، ثناء اللہ بیٹھے ہوئے تھے نصر اللہ اور مہندی مظہر کے ساتھ گئے تھے ۔ ملزمان پارٹی کے درمیان 3/2 ماہ تناز عہ اراضی رہا ہے ملزمان اور مقتول کے درمیان جو مقدمات اراضی عدالت زیر سماعت تھے ان میں مظہر کبھی نہ پیش ہوا مظہر نماز نہ پڑھتا ہے مظہر کو وضو نہ کرنا آتا ہے۔ مظہر کو علم نہ ہے کہ مستغیث اور گواہ مہندی کی آپس میں کیا رشتہ داری ہے ۔ گواہ محمد الیاس نصر اللہ کا رشتہ دار نہ ہے از خود کہا کہ الیاس مقتول ثناء اللہ کا چچازاد بھائی ہے ۔ گواہ محمد افضل مستغیث مقدمہ کا بھتیجا ہے ۔ مقتول اور مستغیث مقدمہ آپس میں ماموں بھانجا تھے۔ یہ درست ہے کہ مظہر کی مقتول کے ساتھ اچھی دوستی تھی ۔ جہاں پر وقوع ہوا تھا جو جگہ بھاگ دین کی ملکیتی تھی۔ اس رقبہ کا نمبر خسرہ یاد نہ ہے ۔ جائے وقوعہ میں فصل

مونگ اور باجرہ دونوں کاشت شدہ ہے۔ بوقت وقوعہ موقع پر پچاس / سو آدمی اکٹھے ہو گئے تھے مگر مظہر زخمی تھا اس لئے نہ جانتا ہے کہ کون کون آیا تھا۔ وقوع کے 20/15 منٹ پولیس موقع پر آگئی تھی مظہر یہ وقت اندازاً بتا رہا ہے ۔ 8/7 پولیس اہلکاران ہوئے ہوں گے۔ مظہر کو اسی رات میر پور ریفر کر دیا گیا تھا۔ مظہر ہفتہ ڈیڑھ میر پور ہسپتال رہا تھا اس کے بعد کھاریاں چلا گیا تھا۔ مظہر کو تاریخ یاد نہ ہے کہ کھاریاں سے کب واپس آیا تھا۔ جمشید اور خاور کے درمیان 6/7 کرم کا فاصلہ تھا۔ خاور سے جمشید دکن جنوب کی جانب کھڑا تھا۔ جمشید، خاور اور ندیم ایک ہی سیدھ میں کھڑے تھے ۔ جاوید سے شاہد شاہ کا فاصلہ نوکرم تھا۔ جاوید سے شاہد شاہ جانب شمال کھڑا تھا۔ جب یہ واقع رونما ہوا تو شریف بھی موقع پر آ گیا تھا۔ شریف کے والد کا نام احمد دین ہے ۔ خاور نے 5/4 منٹ فائرنگ کی ۔ خاور وغیرہ ملزمان نے اندھا دھند فائرنگ شروع کر دی تھی۔ ملزمان خاور وغیرہ دکن کی طرف بھاگ گئے تھے۔ مظہر کو اس بات کا علم نہ ہے کہ جملہ ملزمان کی فائرنگ سے کون کون مضروب ہوا اور مقتول کوکس کا فائر لگا۔شاہدشاہ کا فائر کس کو لگا تھا مظہر کو علم نہ ہے۔ مظہر کو اس بات کا علم نہ ہے کہ مضروب صابر حسین کے عزیز واقارب جائے وقوعہ سے صابر کو کس وقت لے کر گئے مظہر یہ نہ بتا سکتا ہے کہ جو ضربات مظہر کے جسم کے مختلف حصوں پر آئی ہیں وہ کس کے فائر کرنے سے آئی ہیں۔ یہ اندھا دھند فائرنگ سے آئی ہیں ۔ شاہد شاہ فوت ہو چکا ہے یہ درست ہے کہ شاہد شاہ کے مقدمہ میں مظہر نامزد ملزم تھا۔ یہ درست ہے کہ شہباز وغیرہ ملزمان کے ساتھ فوجداری مقدمات چلتے رہے ہیں۔ یہ درست ہے کہ صوفی مشتاق صبح کے وقت اذان دینے کی غرض سے مسجد کی طرف جارہے تھے کہ مظہر اور شریف نامی آدمی

نے اس کو مسجد کے دروازے کے ساتھ پہنچنے پر اس کی ٹانگیں اور باز وتوڑے تھے۔ یہ درست ہے کہ 1996 میں جرال اور گوجر فیملی کے درمیان لڑائی ہوئی تھی ۔ جس میں چار آدمی قتل ہوئے تھے اس میں مظہر اور نصر اللہ نامزد FIR ملزم تھے۔ جائے وقوعہ والی زمین فصل باجرہ موجود تھا۔ یہ درست ہے کہ مظہر اور ملزم شہباز وغیرہ کے درمیان فائرنگ ہوئی تھی جو بعد میں راضی نامہ ہو گیا تھا۔

14. Similarly, pw.3, Shabir Hussain, almost narrated the same story that indiscriminate firing happened at the place of occurrence and he does not know who got injured by the firing of the accused and who fired at the deceased, and he is also unable to tell that who was shot by Shahid Shah. The important deposition made by this witness during his cross-examination is that he had civil and criminal litigation with the convict-appellant which is indicative of the fact that the witness is inimical towards the accused, hence, the testimony of such witness cannot be relied

upon safely. Moreover, the witness also deposed in his cross-examination that he also had criminal cases registered against him, as, he deposed that Sufi Mushtaq was on his way to the masjid to call out to prayer (Adhan) in the morning and he and Sharif had broken his legs and arms when he reached the door of the masjid; and he also deposed that in the year 1996 there had been a clash between Jaral and Gujjar family, and in consequence whereof four men were killed and pw. 3 & Nasrullah were nominated as accused n the FIR. He further deposed that it is true that firing was exchanged between him and the accused Shahbaz, etc. and the issued was later on settled. In such state of affairs, a person with a criminal history, involvement in heinous offences and a nominated accused in various cases, cannot

be relied upon for the testimony safely. Astonishingly, the purgation report of this witness (pw.3) is also available at pages 337 & 338 of the file of the trial Court which reveals that Additional District Qazi, Bhimber, prepared the purgation report, wherein, he stated that pw.3, Shabir Hussain, is a sane adult and has a good reputation in the vicinity, he is not reported to be criminal and also offers prayers regularly. Whereas, in his statement recorded before the trial Court, he admitted that he does not offer prayer nor even he can perform ablution (وضو), and several FIRs were lodged against him. Since the purgation report of the Additional District Qazi runs counter to the statement made by the witness himself, therefore, the said purgation report cannot be relied upon. Muzaakki who inquires about Tazkia-

al-Shuhud is under great responsibility. The inquiry made by Muzakki may not necessarily be open or confidential but should be of sufficient standard to convince the Court about credibility of the witness appearing before it. It is very astonishing that the person who has been declared fit for evidence by Additional District Qazi in purgation report which was prepared after closing of evidence, does not fulfil the basic criteria of Tazkia-ul-Shahud in the light of his own statement.

15. Nasrullah Khan, pw.1, who is also the complainant in this case, is reported as the third eye-witness of the occurrence, and has almost narrated the same story in his Court's statement

as contended in the FIR, however, during his cross examination, he deposed that: -

"بسوال جرح بیان کرتا ہے کہ پک اب صابر کی ذاتی نہ تھی بلکہ کسی دیگر شخص کی تھی۔ مظہر کے ساتھ ثناء اللہ عرف ،آمین، شبیر حسین، صابر حسین ڈرائیور اور مہندی خان تھے۔ موٹر سائیکل شریف نامی آدمی کی تھی بوقت وقوعہ شریف موقع پر موجود نہ تھا بعد میں آیا تھا مظہر یہ نہ بتا سکتا ہے کہ واقعہ سے کتنی دیگر بعد شریف موقع پر آیا تھا۔ مقتول اور ملزمان کے مابین اراضی کا تنازعہ تھا جس کا مقدمہ گجرات عدالت میں چل رہا تھا۔ یہ درست ہے کہ امین مقتول مظہر کا بھانجا ہے اور شبیر مظہر کا ڈرائیور ہے ۔ یہ درست ہے کہ مظہر کے خلاف تھانہ برنالہ میں پرچہ درج ہوا تھا البتہ مظہر اس میں باعزت بری ہو گیا تھا یہ درست ہے کہ مظہر اور شبیر کے خلاف شاہد شاہ کے قتل کا مقدمہ درج ہوا مظہر اس میں بے گناہ تھا اور پولیس نے مظہر کو ابتدائی تفتیش میں فارغ کر دیا ۔ یہ درست ہے کہ 1996 کے الیکشن میں مظہر کو مقدمہ قتل میں ملوث کیا گیا تھا۔ یہ درست ہے کہ گا ؤں اعوان شریف کے ملک اسحٰق کے ساتھ جھگڑا ہوا تھا جس میں اسکا بازو ٹوٹا تھا جس کے باعث مظہر کے خلاف تھانہ کڑیا نوالہ میں مقدمہ درج ہوا تھا۔ یہ غلط ہے کہ بوقت وقوعہ ملزم شہباز موقع پر موجود نہ تھا۔"

This witness admitted during his cross-examination that there had been a dispute over a land between the victim and the convict. It is to

be noted that the deceased, Amin, is the nephew of pw.1, therefore, the argument of the learned Advocate for the convict that the testimony of the witnesses who are hostile, interested and biased, cannot be relied upon in any way without a strong corroboration, is relevant. In the case in hand, both the eye witnesses i.e. pw No. 1 & 3 are admittedly the close relatives of the victim, and have been involved in criminal and civil litigation with the convict-appellant, thus, the possibility of giving false testimony cannot be ruled out. Now the question arises that while appreciating the evidence of the witnesses, who are inimical towards the accused, what measures should be adopted by the Courts? It would be advantageous to mention here that where the witnesses are inimical to the accused, then the Court has to be

more cautious and vigilant in determining the truth. This view finds support from a case reported as *Muhammad Sharif Khan vs. The State* [1991 PCr.LJ 1997], wherein, it has been laid down as under: -

> "Muhammad Aslam gave a chequered history of enmity by reference to numerous instances resulting in litigation between the parties. The parties are found involved in different cases. They were inimical to each other. In presence of the accepted enmity, a heavy duty is cast upon the Court to be on double alert in sifting the truth from the falsehood in the evidence produced before the Court. In such situation, the testimony of a related, inimical and interested witness has to be deeply appreciated to find out the truth. Moreover, as a rule of caution, such evidence cannot be accepted, by itself, to record conviction. It is one of such cases where the Court shall insist on independent corroboration to record conviction of the accused."

The same view has been taken in the case reported as *Liaqat Hussain & another vs. Ulfat Khan and another* [2007 SCR 39], wherein, it has been held as under: -

> "It is well settled principle of appreciation of evidence that mere fact of witnesses being related inter se to deceased sufficient to discard their testimony outrightly if such witnesses otherwise found to be witnesses of truth The witnesses found to be interested and inimical in sense of having a motive to falsely! implicate innocent person from other party must be scrutinized very carefully and cautiously by the Court in order to eliminate the chances of false implication"

This view further finds support from a case reported *as Mehtab Khan The State* (PLD 1979 SC (AJ&K) 231 which reads as under: -

> "After studying these authorities and considering the arguments, we have come to the conclusion that:
>
> (a) The mere fact that the witnesses are related inter-se or related to the deceased is not sufficient to discredit outright their testimony if otherwise such witnesses are found to be witnesses of truth.
>
> (b) But where the witnesses are found to have been interested and inimical in the sense that they have a motive to implicate falsely the innocent persons from other party. The Court should be on guard and cautiously look for some supporting circumstances with a view to eliminating chances of false implication especially in cases where there is a background of blood-feuds between the parties or a chain reaction of retaliatory murders."

16. It is also to be noted that even otherwise, the presence of pw.1 is also doubtful at the scene of occurrence. He claims himself to be the witness of the incident and in his statement

he stated that he and Mehdi Khan were sitting at the back side of the Hilux vehicle when suddenly indiscriminate firing started, but the question in a prudent mind arises that how could a single bullet not hit him during such indiscriminate firing? He also specified in his statement as to whose bullet hit the victim and whose hit the injured but according to his own statement, he was sitting at the rear seat of the vehicle, then how was it possible for him to look straight at the front and visualize the whole incident and even specify that whose bullet has hit whom in such intense scene, that too from the back seat and amazingly without any bullet hitting him? Moreover, Muhammad Bashir, one of the prosecution witnesses, allegedly came to the spot immediately after the incident, but this witness stated nothing regarding

Nasrullah Khan or Mehndi in his statement. The statement of Muhammad Basheer is reproduced hereunder for better appreciation: -

"مورخہ 8-9-1993 کا واقعہ ہے کہ مظہر کوٹ جیمل کی طرف واپس آہی اپنے گاؤں آرہا تھا مظہر موٹر سائیکل پر سوار تھا جب مظہر آہی موٹر پر پہنچا وہاں پر دو سپیڈ بریکر ہیں پہلے سپیڈ بریکر کو کر اس کرنے کے بعد دوسرے سپیڈ بریکر کے قریب پہنچا تو وہاں پر دو کار میں کھڑی تھیں ان میں ایک کار ملزم شہباز حاضر عدالت کی تھی اور دوسری اجنالہ کے شاہ صاحب کی تھی۔ ملزم حاضر عدالت کی گاڑی سرخ رنگ کی تھی جبکہ دوسری سفید رنگ کی تھی وہاں پر ملزم شہباز حاضر عدالت اور خاور اور ایک شاہ اور ندیم کے علاوہ کچھ لوگ دوسرے گاؤں کے موجود تھے۔ مظہر نے مذکورہ ملزمان کو وہاں کھڑے دیکھا مظہر وہاں گھر چلا گیا جب گھر پہنچا تو فائرنگ کی آواز آئی مظہر آہستہ آہستہ موقع پر پہنچا تو موقع پر کافی لوگ آگئے تھے شبیر زخمی تھا جبکہ امین فوت ہو چکا تھا اور ڈرائیور جو اعوان شریف کا تھا اس کی آواز سنی و ہ چیخ وپکار کر رہا تھا جس گاڑی پر امین اور شبیر وغیرہ تھے وہ گاڑی ہمارے گاؤں کے اسلم نامی شخص کی تھی اور اس کا ڈرائیور اعوان شریف کا تھا۔ اس سے قبل بھی مظہر نے شہادت دی تھی یہ واقعہ 21/22سال کا ہے۔"

This witness, Muhammad Basheer, reached the spot soon after the occurrence and

stated that when he reached the spot, he found that Shabbir was injured and Amin was dead but did not mention the names of Nasrullah Khan or Mehdi khan which also makes the presence of pw.1 suspicious at the place of occurrence. Furthermore, the trial Court in the first trial of instant case titled *State through Nasrullah vs. Khawar Mehmood,* dated 23.02.2008, has already formed an opinion regarding this prosecution witness that his presence is doubtful at the place of occurrence. The relevant portion of said judgment is reproduced hereunder for better appreciation: -

"مختصراً یہ کہ مستغیث و مہندی کے بیانات سے ہر سہ ملزمان کے خلاف دفعہ IPL 15 ثابت نہ ہوتا ہے کیونکہ اسکی ملزمان سے مقدمہ بازی ہے۔ شہادت استغاثہ کی جو صورت و نوعیت سامنے آئی ہے کہ گواہ صابر نے ملزمان کو شناخت ہی نہیں

کیا۔ شبیر گواہ کی مقتول اور اس خاندان سے دوستی یاری اور ملزمان سے مقدمہ بازی ہے اور مستغیث نصر اللہ اور مہندی گواہ نے 77 فٹ کی دوری سے بھاگتے ہوئے جس طرح وقوعہ دیکھنا بیان کیا ہے۔ اور اندھا دند فائرنگ کے باوجود گاڑی کے اندر موجود ہوتے ہوئے ان دونونکو خراش تک نہ آئی ہے۔ اس سے یہ احتمال بھی ر د نہ کیا جا سکتا ہے کہ یہ دونوں گواہان موقع پر موجود ہی نہ تھے۔"

The above reproduced portion of the judgment of the trial Court clearly reveals that to the extent of pw. 1 & 2, trial Court has observed that the presence at the time of occurrence is doubtful, however, at the same time, while relying on the statement of pw.1, has passed the conviction order against the convict-appellant. The findings recorded by the trial Court are self-contradictory which have wrongly been affirmed by the High Court.

17. The learned counsel for the convict-appellant, has also taken a plea that the recovery of Kalashnikov is forged and fabricated as the convict-appellant was not available at the relevant time. He submitted that even for the sake of argument, if it is presumed that the recovery of illegal weapon was effected from him, then why FIR under Arms Act was not registered against him or why he was not arrested under the said offence? The record reveals that the Kalashnikov was recovered from the accused on 11.11.1999, but the Investigating Officer who allegedly recovered the Kalashnikov from the convict and prepared the parcel, was not produced before the Court who was the most relevant and important witness to prove the recovery of Kalashnikov. Furthermore, no legally acceptable explanation

for withholding such an important evidence is available on record, thus, in the foregoing circumstances, we have no other option except to draw an inference in term of illustration (g) of Article 129 of Qanoon-e-Shadat 1984. For ready reference, the relevant statutory provision is reproduced hereunder: -

> "129. Court may presume existence of certain facts. – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> The Court may presume –
>
> (a) ……
> (b) ……..
> (c) ……..
> (d) ……..
> (e) ……..
> (f) ……..
> (g) that evidence which could be and is not produced would, if

produced, be unfavorable to the person who withholds it;

(h) ……..

(i) ……..”

The statutory provision (supra) clearly postulates that if the best evidence is withheld, a presumption can be drawn that if the witness would have examined, his evidence would have been unfavourable to the prosecution. Reliance in this regard may be placed on the case reported as *Muhammad Rafique etc vs. State & others* [PLJ 2011 SC 191], wherein, it has been held as under:

> “Thus the best evidence of conspiracy was the statement of PW Amir Ali which has been withheld by the prosecution. It is well settled that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129(g) of Qanun-e-Shahadat Order can fairly be drawn that if PW Ami Ali would

> have been examined, his evidence would have been unfavourable to the prosecution."

Besides this, as per record, the alleged Kalashnikov was recovered on 11.11.1999, which was sent to Forensic Science Laboratory (FSL) on 03.10.2001, i.e. after a considerable delay of 23 months and empties recovered from the place of occurrence and bullets recovered from the body of the victim were also not sent for matching along-with the alleged recovered Kalashnikov, hence, the recovery memo becomes inconsequential. This Court in its authoritative judgment reported as *Malik Zaffar vs. Rashid Hussain & others* [2022 SCR 1489], has already dealt with identical proposition authoritatively as under: -

“27. The contention of the learned Advocate for the convict-appellant, that the crime empties recovered from the spot were not sent to the FSL, immediately after recovery casts a serious doubt on the prosecution story, appears to have substance. From the scrutiny of record, firstly it shows that the recovery of empties was done after almost 8 hours of the incident, the place of occurrence is a busy public road, neither it was cordon of nor the traffic was closed, and soon after its recovery, the same were not sent to FSL rather were kept along-with the weapon of offence and sent to FSL after the arrest of convict-appellant, due to which, intrinsic evidentiary value of such recoveries becomes inconsequential, as has been observed in the case reported as *Khuda-e-Dad alias Pehlwan vs. The State,* [2017 SCMR 701] that:

“The alleged recovery of a firearm from the appellant's custody during the investigation was legally inconsequential because admittedly the crime-empties secured from the place of occurrence had been sent

> to the Forensic Science Laboratory after arrest of the appellant and after recovery of a firearm from his possession. In these circumstances we have found the learned counsel for the appellant to be quite justified in maintaining that the prosecution had failed to prove its case against the appellant beyond reasonable doubt as far as the allegation regarding murder of Miran Jan was concerned."

The Supreme Court of Pakistan has also made the identical observation in the case reported as *Ali Sher & others vs. The State* [2008 SCMR 707], wherein, it has been held that: -

> "10. Three crime-empties of .7 m.m. Rifle and two crime-empties of .12 bore gun had been allegedly found at the place of occurrence which had been taken into possession by Jehangir Khan, S.-I./S.H.O. (P.W.14). Even if it be presumed that the said crime-empties were in fact available at the spot and had been rightly recovered by the Investigating Officer, it is a pity that the said crime-empties had been retained in the police

station for more than three weeks and had been sent to Forensic Science Laboratory only on 14-4-1995 and that also along with a .7 m.m. Rifle and a .12 bore gun which had been allegedly recovered at the instance of Ali Sher and Gohar Ali respectively. No explanation had been offered as to why the crime-empties had not been dispatched immediately to the Forensic Science Laboratory specially when one Muhammad Mushtaq F.C. (P.W.13) and gone to Lahore on 28-3-1995 carrying the blood-stained earth found in this case for transmitting the same to the Officer of the Chemical Examiner.

11. The crime-empties having been allegedly found at the place of occurrence and having been retained for so long the police station and having been sent to the F.S.L. Along with the crime weapons and that also 12 days after the alleged weapons of offence had been allegedly recovered destroys and evidentiary value of the said piece of evidence. These recoveries, therefore, cannot offer any corroboration to the ocular testimony."

In another case reported as *Mst. Saddan Bibi vs. Muhammad Amir & others* [2005 SCMR 1128], the Apex Court of Pakistan has held as under: -

> "6. Muhammad Amir respondent had been arrested on 29-7-1994. The crime-empty allegedly recovered from the spot had been sent to the Forensic Science Laboratory on 1-8-1994. In the circumstances the conclusion reached by the High Court about the doubtful nature of this piece of evidence could not be said to be arbitrary. Likewise the finding of the Honourable High Court that the F.I.R. Had been recorded at the spot after preliminary investigation on account of the delayed postmortem examination of the dead body; the delayed medico-legal examination of Ashraf P.W. And the admission of Shah Nawaz P.W., was also a reasonably justifiable finding. Noticing the material available on record, the High Court was also of the opinion and rightly so that it

> was the accused party who were in possession of the land in dispute."

18. As far as the plea taken by the learned counsel for the convict-appellant that the occurrence took place in the dark night and very close to the field of millet crop, the plants of which were taller than the height of an average man, does not have substance as the occurrence took place on the roadside and tall millet crop nearby do as not in anyway become relevant to be connected to the argument.

17. We feel that the judgments of learned trial Court as well as High Court are the result of mis-reading and non-reading of evidence. The prosecution has failed to prove the case beyond any shadow of doubt. It has already been settled by the Courts time and again that for the purpose

of giving benefit of doubt to an accused, multiple infirmities are not required, rather, a single infirmity can cast a shadow of reasonable doubt in the mind of a prudent person regarding the truth of the charge. The rule of giving benefit of doubt to an accused is essentially a rule of caution and prudence, and is deep rooted in criminal jurisprudence for the safe administration of criminal justice. In common law, a famous maxim, is being quoted that:- *"It is better that ten guilty persons be acquitted rather than one innocent person be convicted".* Moreover, in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (Peace Be Upon Him):

> ***"Avert punishments [hudood] when there are doubts"*; and *"Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way,***

***because the leader's mistake in pardon is better than his mistake in punishment*”.**

19. It is pertinent to mention here that according to the celebrated principle of criminal justice, the burden lies on the prosecution to prove its case through cogent evidence by exclusion of all other doubts. For the better administration of justice in criminal legal system, the accused is always benefited with "reasonable" and not of “imaginary” doubt. What constitutes a reasonable doubt is a basic question of law; essentially a question for human judgment by a prudent person to be found in each case, taking in full account of all the facts and circumstances appearing on the entire record. It is an antithesis of a haphazard approach for reaching a fitful decision in a case. Reliance in this regard may be placed on

the case reported as *Ghulam Rasool Shah vs. State & others* [2009 SCR 390], wherein, it has been observed as under: -

> "… while under law, it was the bounded duty and moral obligation of the prosecution to prove its case beyond any doubt. The prosecution has to stand on its own legs and every benefit of doubt will got to the accused. It is well settled principle of law that surmises and conjectures cannot take the place of proof."

20. In the instant case the prosecution has failed to prove its case against the convict beyond any reasonable doubt which fact of course goes in favour of the convict. This view is fortified from the reported judgment of this Court titled *Tasawar Husain vs. The State & others* [2016 SCR 373], wherein, it has been held as under: -

> "According to the universally settled and accepted principle of law of

> criminal administration of justice, benefit of doubt always goes to the accused."

In another judgment of this Court reported as *Abid Hanif vs. Muhammad Afzal & 4 others* [2014 SCR 983], on the question of slightest doubt it has been held as under:

> "From the perusal of hereinabove reproduced portion, it appears that the doctor negates the version of the prosecution which creates a doubt and it is settled principle of law that even a slightest doubt must go in favour of the accused. In this scenario when the ocular account is disbelieved by the trial Court being contradictory in nature, the other evidence which are only corroborative in nature cannot be given any weight and no preference can be given over the ocular account.

21. As far as the plea taken by the learned counsel for the convict-appellant that Taj Begum,

widow of, Muhammad Amin, deceased, got her statement recorded before the High Court, is concerned, this argument has become irrelevant as the case of the prosecution is otherwise not proved.

In the light of above detailed discussion, the impugned judgments and conviction recorded by the trial Court and affirmed by the High Court is hereby set-aside. Consequently, while accepting the appeal of the convict and extending the benefit of doubt who legally deserves for it, he is acquitted of the charge and is ordered to be released forthwith if not required in any other case. The other appeal filed by Nasrullah & others stands dismissed.

22. Before parting with the judgment, we find it necessary to highlight this important issue

which has been observed generally that the principle of “Tazkiya-ul-Shahood”, is grossly overlooked by the trial Court. “Tazkiya-ul-Shahood”, is the rule for determination of competency of a witness to testify. According to Islamic Dictionary, the concept of “Tazkiya-ul-Shahood”, is defined as the “purgation of witness”, and in order to conduct the same, either an open inquiry is done or a secret inquiry is conducted through one or more Muzzaki’s who is questioned about antecedents, character and otherwise dealings of the witness and it is enjoined upon the Court to satisfy itself about the credibility and truthfulness of a witness. However, it has generally been observed that the due diligence, proper procedure and necessary steps which are required are not followed, while conducting

”Tazkiya-ul-Shahud” and unfortunately, this vital part of the trial is neglected and disregarded.

23. Although, the case in hand is not of Qisas, however, during the perusal of the record, while handing down this judgment, we found that the Muzzaki has not properly followed the principle of “Tazkiya-ul-Shahud”, which has been discussed in detail in para 13 of this judgment. It is also pertinent to mention here that this Court in the case reported as *Abdul Razaq and another vs. The State* [PLD 1988 Supreme Court (AJ&K), 190], has already laid down principles for conducting “Tazkiya-ul-Shahud” but unfortunately the same are not taken into consideration by the Courts below. For better appreciation, we find it advantageous to

reproduce the relevant paras of Abdul Razzaq's case (supra), as under: -

> "8. What is purgation? 'Tazkiya' means purgation of witnesses. (Dictionary of Islam by Thomas Patrick Hughes, page 534). Dictionary of Islam at page 634 Tazkiyah' is defined to mean:-
> "TAZKIYAH Lit. 'purifying' (1) giving the alms, (2) the purgation of witnesses."
>
> "An institution of inquiry into the character of witnesses." The following Ayats of Holy Qur'an may also be said to have some relevancy on the issue:
>
> (i) (a) Al-Maida Ayat No.11 (V.111)
>
> That is most suitable. That they may give the evidence in true nature and shape....."
> (b) Al A'raf Ayat No.105 (VII:105):
> "One for whom it is right. To say nothing but truth about Allah. Now have I come unto you (people), from your Lord with a clear (Sign): So let the Children of Israel Depart alongwith me."
> The above is an order about 'will' but it cannot be said with certainty as to whether the principle can be extended to cover all cases.
> (ii) Al Talaq: 2 (LXV: 2):
> "And take for witness two persons from among you, Endued with justice. And establish the evidence (As) before Allah,"

It is thus obvious that in matters of 'will' and 'Talaq' only those witnesses are endued with justice who are found just after their testimony is tested by a 'Model' or 'Muzakki' secretly or publicly. I may now refer to an Ayat of Holy Qur'an. (S. XLIII 86):-
ھ الا من شھد بالحق و ھم یعلمون .
Maulana Yusuf Ali translates it in the following way: -
"Only he who bears witness to the Truth, And they know (Him)." This Ayat is referred in Ainul Hadaya (Urdu), Vol. 3 (Kitabush Shahadat) page 339. At pages 343 and 344 it is said: -

اما العداله فتقوله تعالی من ترضون من الشهداء والمرضی من الشاهد هو العدل ولقوله تعالی وشهدوا ذی العدل منکم ولان لعد العدة في السيدة للمصدق لان من يشاطي غير الكذب قدهتماشاء یعنی میں گواہوں کو تم پسندیدہ جانو اور پسندیدہ گواہ وہ ہے جو عادل ہو اور اس دلیل سے اللہ تعالیٰ نے فرمایا:
راشید و اذری مدل منظم - معنی مسلمانوں میں سے عادلوں کو گواہ کر لو

It would, thus, appear that 'Tazkiya' of the witnesses is conducted primarily with the object to know their competency and other virtues in order to place implicit faith in their statements to record conviction in cases of 'Hudood' and 'Qissas'. Naturally, the procedure adopted to conduct 'Tazkiya' must satisfy that it is done by persons whose conduct is also above-board. 'Tazkiya' conducted by any person whose conduct is

not shown to be above-board, cannot be considered to be 'Tazkiya' known in the Islamic law.

9. How secret purgation is to be conducted is the next question to be answered.

A secret purgation is made by a Qazi writing a letter, privately. to a 'Muzzaki' or purgator (that is, a person whose business it is to inquire into the character of others), and describing to him the, C abode; and the purgator, in like manner, returning his answer privately to the Qazi, lest if it were known to a party, he might attempt to injure him. (Hedaya by Hamilton, second edition, page 356 owns this view). The secret inquiry is called in legal and technical language 'mestureh'. It is conducted by writing. For such an inquiry the judge is to put in writing the names of the parties and the subject-matter of the action, and the names and generally known names of the witnesses and their trade and conditions, and the places where they live, and the names of their fathers and grandfathers, or if they are well-known, only their names, and generally known names.

10. The judge should place it in an envelope and seal it and then send the same to those who are chosen to ascertain the character of the witnesses. The persons chosen after opening and reading the 'mestureh', if the

witnesses are competent, would write under the names that they are competent as regards the evidence, and, if they are not competent, it would be said that they are not competent. They would sign it, and return it to the judge, putting a seal on the envelope, without making known what is written to the person, I who brings the envelope, or other persons.

11. Who are the persons competent to make purgation is also an important question to be answered. The examination of the credibility of the witnesses is to be made (publicly or privately) from the people with whom they have been connected, that is to say, if they are pupils, from trustworthy inhabitants, the master of the school where they have lived, and, if they are soldiers, from the officers and clerks of their battalion, and if he is a clerk from his superiors and fellow clerks in his office, and if he is a merchant from trustworthy merchants and if he belongs to an incorporated trade from the warden of the trade and the masters in committee, and if he belongs to other trades from trustworthy inhabitants of the quarter of village. (The Mejelle by C.R. Tyser, 1980 edition page 302 provides this guideline.

12. The above would show that ordinarily more than one trustworthy inhabitants of the quarter of village where the witnesses

reside are E. required to come forward to testify that the witnesses are 'Aadil'. No doubt one person is also competent to testify that the witnesses are 'Aadil' but prudence requires the number as two.

13. Let us now look into the issue in view of the above observations. The document, on the basis of which 'Tazkiya' (purgation) has been conducted, shows that the District Qazi entrusted the job of conducting the purgation to Tehsil Qazi who, it appears, reached the relevant village on 1-7-1980 and conducted the purgation on the same day. The 'Muzakki' (Tehsil Qazi), on the oral words of one Muhammad Siddique son of Muhammad Sharif, was satisfied that the witnesses. were 'Aadil'. The witnesses, thus, were declared as such. Muhammad Siddique is stated by the 'Muzakki' to be an independent person residing within the vicinity of the litigant parties. According to 'Muzakki' Muhammad Siddique is a retired Havaldar and now is working as driver. To have the correct view in the matter, let me quote the 'Muzakki' in his own words. He says:--

ده محمد صدیق داد محمد شریعت قال قوم عباسی ساکن سالیان غیر جانب دار فریقین کا قریبی پر روسی سابقی حوالدار پیشتر پیشه ڈرائیور سے ترکیه سرمی نسبت گواہان ہوا ہے

14. We have on the issue only one person, namely, Muhammad Siddique son of

Muhammad Sharif who, according to 'Muzzaki' is Haveldar and independent person residing within the vicinity of the parties. No doubt in secret inquiry one person to inquire into the character of the witnesses may be sufficient yet for consideration of prudence there should be two at least. I am supported in my view in by C.R. Tyser, 1980 edition page 303.

15. It may be observed that the mere fact that Muhammad Siddique is Haveldar and independent person would not, per se, be sufficient to say that he is trustworthy man. There is nothing on the record to hold so. Experience tells us that a person may be independent having no relation whatsoever with any of the parties but still he may not be considered a trustworthy man competent to depose about the conduct of the witnesses. It is, therefore, necessary that person or persons who are noble, notable and of unimpeachable character should inquire into the conduct of the witnesses. Such a person or persons should have the same qualities as are being required of a purgator. Unfortunately there is nothing on the record that Muhammad Siddique had the qualities listed above. How he can be termed to be a person competent to depose about the conduct etc. of the witnesses? Besides, Muhammad Siddique, as said by the Qazi, is only a neighbour of the parties and not of the witnesses as is required

under law. We are supported in our view from the following extracts of expertise.
In 'Fatawa-e-Alamgiree, Vol. 5 page 194, the procedure which the purgator is to follow in conducting the purgation is narrated as under:

خفیہ تعدیل کی یہ ضرورت ہے کہ قاضی ایک رقعہ میں گواہوں کے نام اور نسب اور ان کا حلیہ اور قبیلہ اور محلہ اور بازار اگر بازار ہو تو لکھ کر مزکی کے حوالے کرے اور مز کی ان کے پڑوسیوں میں سے اہل ثقہ و امانت سے ان کا حال دریافت کریں۔ قاضی کو چاہیے کہ اس دریافت حال کے واسطے ایسے لوگوں کو اختیار کریں جو لوگوں میں ثقہ اور امانت میں بڑھ کر ہوں اور ان کو آگاہی لوگوں سے زیادہ ہو اور تمیز دار ہوں اور لوگوں میں اس واسطے مشہور نہ ہوں، کیونکہ اگر لوگ اُن سے واقف ہوں گے تو ان کو ایزا پہنچائیں گے ۔ تعدیل کرنے والے مزکی کو چاہیے کہ گاؤں کا حال اس کے پڑوسیوں اور اہل بازار سے دریافت کرے، پس اگر اس کا عدل ہونا ثابت ہو تو رقعہ میں لکھ دے کہ میرے نزدیک عادل اور اس کی گواہی جائیز ہے ۔ ورنہ لکھ دے کہ میرے نزدیک عادل نہیں ہے اور رقعہ پر مہر کر کے واپس کر دے ۔

In Ainul Hadaya, Vol. 3, page 346 about purgation it is written:-

خفیہ تزکیہ کی صورت یہ کہ ممدل کو خفیہ رقعہ بھیجے ۔ جس میں گواہوں کا نسب اور ان کا حلیہ مصلی مسجد تحریر کرے اور ممدل اسی رقعہ میں ہر چیز کے سامنے اس کا جواب لکھ کر واپس کرے اور یہ سبب خفیہ ہونا چاہیئے تا کہ ظاہر ہو کر مدل کے حق میں ضرر پہنچانے کا مکر نہ کیا جائے یا رشوت دینے کا قصد نہ کیا جائے، یا قریب کے ساتھ یا ظاہری طور پر اس کو ایزا نہ پہنچائی جائے اور محیط اور قاضی خان میں لکھا ہے کہ ممدل

ایسا شخص تلا کرے جولوگوں میں زیادہ معتبر اور پرہیز گار اور بزرگ ہو اور زیادہ امانت دار و آگاہ و زی علم ہو، پھر ممدل کوچاہئے قاضی کے آمین سے یہ مہری رقعہ لے کر گواہ کے اہل محلہ سے یا پڑوسیوں سےیا اس کے پیشہ والوں سے یا اہل بازار سے عقلمندی کے ساتھ اس کا عادل یا فاسق ہونا دریافت کرے"

The above would show that the inquiry with respect to the witnesses is only competent from the persons who are noble, righteous, honest etc. Fatawa-e-Alamgiree published by منتظمیه اشاعت فشاری in its note 26 also owns this view, It (عالمگیری گرجه رود را ولپنڈی maintained in this note:

-ور تزکیه کرنے والے کو چاہیے که وه گواہوں (کی عدالت) کا حال دریافت کرنے کے لئے ایسے شخص کو اپنے جو ایسے اوصاف سے منصف ہو جو اوصاف تزکیه کرنے والے میں شرط ہیں۔

It is further maintained in Note 18 of the same book at page 321:-

اور قاضی کو چاہیے که وه گواہوں کی عدالت) کا حال دریافت کرنے کے لئے ایسے شخص کو چھنے جو لوگوں کے حالات سے باخبر ہو۔)

ب) ۔ اور لالچی نه ہو۔

ج) اور چاہیے که وه فقیه (یعنی ماہر اسلام ہو) جرح اور تعدیل کے اسباب کو پہنچانتا ہو

د)اور یه که وه غنی ہو۔

ر)اور اگر قاضی نے ایسا عالم دین، پایا جو فقیر ہے اور ایسا غنی پایا جو نه ثقه ہے مگر غیر عالم (دین) ہے یا اس نے ایسا عالم (دین) بایا جو ثقه ہے مگر لوگوں سے میل جول نہیں رکھتا اور ایسا ثقه غیر عالم دین پایا جو

لوگوں سے میل ملاپ رکھتا ہے تو وہ (قاضی) عالم (دین) کو چھنے ۔

The book further maintains in note 27 at page 325 as follows:-

ور شمس الائمه الحلوانی رحمته الله علیه کا قول ہے (که تزکیه کنده) اس گواہ کے پڑوسیوں سے اس کی عدالت کا حال تب دریافت کرے ۔ جب که اس گواہ میں اور ان پڑوسیوں میں عداوت ظاہر نه ہو اور وہ گواہ ان پڑوسیوں کا بوجھ اٹھانے والا نه ہو ۔ مثلاً یه که دان کی طرف سے) خراج اور اس کی مانند عطا نه کرتا ہو۔ ابو علی سلفی رحمة الله علیه نے اس حکم کو اختیار کیا ہے اور اُسے امام محمد رحمت الله علیه سے روایت کیا ہے ،

Besides, in 'Fatawa-e-Alamgiree! Vol. 5, page 193, it is written:-

خفیه تعدیل یه ہے که قاضی تعدیل کرنے والے سے خفیه دریافت کرے که فلاں گواہ کیسا ہے اور یا اس کی تعدیل کرے یا اس میں جرح بیان کرے۔ یه جواہر اخلاطی میں لکھا ہے اور تعدیل کرنے والے کو یه کہنا ضروری ہے که یه گواہ مادل اور اس کی گواہی جائز ہے ۔ کیونکه عادل غلام بھی ہوتا ہے اوراس کی گوری جائز نہیں ہے ۔ یه خزانه المفتین میں لکھا ہے "

In Sharah Fateh-ul-Qadeer, 6:13 it is writtén:-

" تزکیه السر کی صورت یه ہے که حاکم ایک کاغذ پر گواہ کا نام، ولدیت، حلیه اور اس کی جائے سکونت سے قریب ترین مسجد کا نام لکھے اور اُسے ایک لفافے میں بند کر کے اس پر اپنی مہر ثبت کر دے، پھر اپنے کسی نہایت قابل اعتماد آدمی کے بدست وہ لفافه مزکی دوہ آدمی جس سے گواہ کے حالات کا پته لگایا جا رہا ہے) کے پاس بھیج دے، ضروری ہے که مزکی نیک، زاہد ، متین اور واقف کار ہو ۔ گوشه نشین قسم کا آدمی نه ہو ، لالچی اور بالکل بے

حیثیت ہو ۔ اگر فقیہ ہو تو انسب ہے۔ معدل کو چاہیے
کہ حاکم کا ملفوف پاتے ہی گواہ کے پڑوسیوں سے اس کے
حالات معلوم کرے اور صرف اس کی عبادت و ریاضت
ہی نہ دیکھے بلکہ یہ بھی پتہ کرنے کہ معاملات کے اعتبار
سے وہ کیسا آدمی ہے۔ اس کے بعد اگر گواہ معیار پر پورا
اترتا ہو تو اس کے نام کے نیچے لکھ دے "

16. The combined reading of the above would show that it is imperative for the purgator to inquire into the conduct, character and antecedents of the witnesses from those persons whose character is unimpeachable. Therefore, the mere say of the purgator that Muhammad Siddique is an independent person, per se, is not sufficient to hold that he was a competent person to apprise the purgator about the conduct of the witnesses. Besides, since Muhammad Siddique, F as per say of the Qazi, is not the neighbour of the witnesses, he is incompetent to conduct purgation of the witnesses. Only such person or persons are competent to conduct the purgation who are neighbours of the witnesses and not of the parties. In these circumstances, I am of the view that the purgation had not been conducted in accordance with the procedure available in Islam. This factor vitiates the judgment and warrants remand."

The said judgment of this Court was later on affirmed by the Supreme Court of Pakistan

while reproducing the same in the case reported as *Daniel Boyd (Muslim Name. Saifullah) and another vs. The State* [1992 SCMR 196].

In view of such affairs, it is directed to all the concerned Courts of competent jurisdiction that in the light of principles of Shariah and procedural law, strict mechanism shall be made in order to ensure that the principles of “Tazkiya-ul-Shahood” shall be conducted properly and diligently and further that such mechanism shall be strictly complied with by all the concerned Courts. The copy of this judgment shall be sent to the Registrar of the High Court to circulate this judgment to all the concerned Courts and to put the same before the learned Chief Justice of High Court AJK to ensure the compliance of the same.

JUDGE **JUDGE**

Muzaffarabad,
10.02.2023.