SUPREME COURT OF AZAD JAMMU AND KASHMIR

[SHARIAT APPELLATE JURISDICTION]

PRESENT:

Raja Saeed Akram Khan, CJ.
Kh. Muhammad Nasim, J
Raza Ali Khan, J.

1. Criminal appeal No.25 of 2022
(Filed on 10.08.2022)

Malik Zaffar son of Ghulam Sarwar, r/o Kotla, Phagwari, Tehsil and District Kotli, presently in judicial lock-up, District Jail Kotli.

....APPELLANT

VERSUS

1. Rashid Hussain Shah son of Shah Pir Shah, caste Syed, r/o Phagwari, Tehsil and District Kotli.
2. State through Advocate General Azad Government of the State of Jammu and Kashmir, having his office at Supreme Court Building, Muzaffarabad.

3. Mehfooz Fatima, widow,
4. Arshad Hussain,
5. Asjad Shah son of Shah Pir Shah,
6. Mst. Ishrat Naz w/o Aftab Hussain Shah,
7. Uzma Batool w/o Rashad Hussain Shah, r/o village Phagwari, Tehsil Kotli.
8. Mst. Kosar Parveen w/o Tanveer Hussain Shah, r/o village Hill Kalan, Tehsil Kotli.
9. Musarrat Bibi w/o Ibrar Hussain Shah, r/o village Dabsi, Tehsil Nakial, District Kot.

….RESPONDENTS

10. Imran Mansha,
11. Muhammad Yousaf,
12. Muhammad Taj son of Sher Dil,
13. Muhammad Aziz son of Shan,
14. Qamar Bashir son of Muhammad Bashir,
15. Sajid Mehmood son of Mehmood Ahmed, caste Malik, r/o Kotli, Tehsil and District Kotli.
16. Hafiz Aurangzeb son of Muhammad Khan, caste Malik, r/o Kekani.
17. Imtiaz son of Muhammad Iqbal, caste Malik.
18. Muhammad Itefaq son of Muhammad Khan, r/o Kekani.
19. Muhammad Yaqub son of Muhammad Khan, caste Malik, r/o Phagwari.
20. Rizwan son of Muhammad Yousaf, caste Malik, r/o Kotla Phagwari, Tehsil and District Kotli.

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 03.08.2022 in criminal appeals No.09 and 33 of 2008 and criminal reference No.07 of 2008)

APPEARANCES:

FOR THE APPELLANT:	Raja Muhammad Shafat Khan, Raja Inamullah Khan, Ch. Shoukat Aziz, Kh. Attaullah Chak, Kh. Juanid Pandit and Ch. Mehboob Ellahi, Advocates.
FOR THE RESPONDENTS:	Kh. Maqbool War, Advocate-General, Raja Sajjad Ahmed Khan, Mr. Babar Ali Khan, and Syed Zulqarnain Raza Naqvi, Advocates.

2. Criminal appeal No.31 of 2022
(Filed on 10.08.2022)

1. Mehfooz Fatima, widow,
2. Rashid Ali Shah,
3. Arshad Ali Shah,

4. Uzma Batool w/o Rashad Hussain Shah, r/o village Phagwari, Tehsil Kotli.
5. Musarrat Bibi w/o Ibrar Hussain Shah, r/o village Dabsi, Tehsil Nakial, District Kot.

....APPELLANTS

VERSUS

1. Malik Zaffar son of Ghulam Sarwr, r/o Kotla, Phagwari, Tehsil and District Kotli, presently in judicial lock-up, District Jail Kotli.
2. Muhammad Yousaf,
3. Muhammad Taj sons of Sher Dil,
4. Muhammad Aziz son of Shan,
5. Qamar Bashir son of Muhammad Bashir,
6. Sajid Mehmood son of Mehmood Ahmed,
7. Imran son of Mansha Khan, caste Malik, r/o village Phagwari, Tehsil and District Kotli.
8. Hafiz Aurangzeb son of Muhammad Khan, caste Malik, r/o Kekani.
9. Imtiaz son of Muhammad Iqbal, caste Malik.
10. Muhammad Itefaq son of Muhammad Khan, r/o Kekani.
11. Muhammad Yaqub son of Muhammad Khan, caste Malik, r/o Phagwari.
12. Rizwan son of Muhammad Yousaf, caste Malik, r/o Kotla Phagwari, Tehsil and District Kotli.

....RESPONDENTS

13. State through Advocate General Azad Government of the State of Jammu and Kashmir, having his office at Supreme Court Building, Muzaffarabad.
14. Asjad Shah son of Shah Pir Shah,
15. Mst. Ishrat Naz w/o Aftab Hussain Shah,
16. Mst. Kosar Parveen w/o Tanveer Hussain Shah, r/o village Hill Kalan, Tehsil Kotli.

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 03.08.2022 in criminal appeals No.09 and 33 of 2008 and criminal reference No.07 of 2008)

APPEARANCES:

FOR THE APPELLANTS:	Raja Sajjad Ahmed Khan, Mr. Babar Ali Khan, and Syed Zulqarnain Raza Naqvi, Advocates.
FOR THE RESPONDENTS:	Raja Muhammad Shafat Khan, Ch. Mehboob Ellahi, Raja Inamullah Khan, Ch. Shoukat Aziz, Kh. Attaullah Chak and Kh. Junaid Pandit, Advocates.
FOR THE STATE:	Kh. Maqbool War, Advocate-General.

Date of hearing: 10.10.2022

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 03.08.2022, has been called in question in the appeals, supra, whereby the appeals filed by the contesting parties as well as the reference sent by the trial Court have been decided in the following manner:-

> "The crux and epitome of the above discussion is, the impugned judgment to the extent of accused Zafar Iqbal recorded by Sessions Judge is differed and set at naught whereas judgment recorded by District Qazi is modified in the manner that accused Zaffar Iqbal is hereby convicted under section 302(c) APC by awarding 14 years rigorous imprisonment and also sentenced to 3 years simple

> imprisonment under section 13/20/65 Arms Act. Convict Zaffar Iqbal shall also pay Rs.10,00,000/- as compensation to the legal heirs of deceased under section 544-A, Cr.P.C., in case of failure same shall be recovered in accordance with the provisions of Land Revenue Act. Benefit of section 382, Cr.P.C. shall be extended in favour of convict. Accused Imran son of Mansha is hereby acquitted of the charges by extending benefit of doubt. The impugned verdict to the extent of rest of the accused persons is hereby sustained. The reference sent by the District Qazi is denied to affirm..”

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

2. The concise facts involved in the case are that the complainant, Rashid Hussain Shah, moved an application to the Police Station Kotli on

23.09.2003, that he is a resident of village *Phagwari* and running a PCO in *Riyan Gala*. Few days ago a minor altercation took place between the complainant and Nisar, brother of Malik Mansha, and today, again a quarrel took place and thereafter, when he along with his brother Amir Asif Shah were sitting at the PCO, the accused persons namely Mansha Khan, Muhammad Yousaf, Muhammad Taj, Zaffar Malik, Aziz, Imran, Amjad, Rizwan, Imtiaz, Qammar Malik, Javed Niaz, Hafiz Aurangzeb came with 8/9 unknown persons on a Jeep No.4682 and another Suzuki Jeep at 9:30 AM. The accused Zaffar Malik, Imran and Hafiz Aurangzeb were armed with Kalashnikovs and other accused persons were armed with sticks, hatchets and small weapons. The accused who were armed with Kalashnikovs started firing as

soon as their arrival at the spot. The brother of the complainant Amir Asif Shah ran towards the roof of a nearby school, meanwhile the accused, Zaffar Malik, with an intention to kill him fired a direct shot by targeting his brother (deceased) which hit him at the left side of his forehead and fell down, whereas, the other accused kept firing. It was contended that the occurrence has been committed with preplanning and on the instigation of Mansha Khan.

3. On the report of the complainant, initially, the case was registered under sections 147, 148, 149, 337-A1 and 324, APC, but later, on the injured succumbed to the injuries, whereupon, section 302, APC and section 13 of the Arms Act, 1965, were added. On completion of the

investigation, the police sent the accused persons for facing trial before the learned District Criminal Court Kotli, on 22.11.2003. The statement of the accused under section 265-D, Cr.PC was recorded on 16.12.2003, whereupon they pleaded not guilty, hence, the prosecution was directed to lead evidence in order to prove its accusation and guilt of the accused persons. After recording of the prosecution evidence, the statements of the accused under section 342, Cr.PC were also recorded on 05.01.2007, however, they refused to record their statements under section 340(2), Cr.PC and also denied to adduce evidence in their defence.

4. At the conclusion of the trial, one of the learned Member of the District Court of Criminal

Jurisdiction Kotli, i.e. Sessions Judge, acquitted all the accused persons of the charge while extending them the benefit of doubt, whereas, the other learned Member of the Court, i.e. District Qazi, awarded death sentence under section 302(B), APC, to the convict-appellant and 5 years' imprisonment to the co-accused Imran. On the difference of opinion, a reference was sent to the High Court and parties also challenged the said judgment by filing separate appeals which have been decided by the High Court in the terms mentioned in the preceding paragraph.

5. Raja Muhammad Shafat Khan, Advocate, one of the counsel for the convict-appellant, argued the case while submitting that that the impugned judgment of the High Court is against

law, the facts and the record of the case. He contended that in the instant case the prosecution badly failed to prove the case against the convict-appellant but despite of this fact, the learned High Court convicted him. In support of this version, he submitted that 23 persons were nominated as accused in the case, however, during investigation the police discharged 11 persons under section 169, Cr.P.C. and the complainant did not challenge this discharge at any forum which shows that the story narrated by the complainant was false, doubtful, and he concealed the real facts. He added that in the FIR the complainant showed 8/9 persons as unknown and later on, during investigation nominated them, whereas, all the persons are the residents of the same vicinity and well known to each other, thus, in such state of

affairs, the nomination of unknown accused after a considerable time creates serious doubts in the story. He added that the distance between the convict-appellant and the deceased has been narrated/shown in the site plan as 80 meter and according to the prosecution story the convict was armed with Kalashnikov and the affective range of the shot of Kalashnikov is 580 meter, so if the convict hit the deceased from such a short distance then the bullet must have crossed the body of the deceased, but the situation is otherwise as the bullet was recovered from the skull of the deceased during postmortem. In continuation of the argument, he further stated that amazingly the shot of Kalashnikov is attributed to the convict-appellant and the same weapon has allegedly been recovered from him during the

investigation, whereas, the bullet recovered from the body of the deceased was sent to the Forensic Science Laboratory (FSL) and according to the report of FSL, the same was of 30 Bore Pistol. He stressed that such a glaring contradiction in the prosecution story create serious doubts, but the learned High Court failed to consider the same. He maintained that in the FIR as well as in the statements under sections 161, Cr.P.C., the alleged eyewitness specifically stated that the convict-appellant was armed with Kalashnikov but later on, tried to fix the flaw of the prosecution sotry in the light of FSL report by improvements in their statements recorded in the Court that the convict was armed with a Kalashnikov-like weapon/rifle. Such improvement has been made in the case which cannot be ignored lightly. He stated that

statement of one of the alleged eyewitnesses, namely, Munir Shah, under section 161, Cr.P.C., has been recorded after 5 days of the occurrence and no explanation for such a long delay has been explained, whereas, the superior Courts in number of cases have disbelieved the credibility of the statement recorded under section 161, Cr.P.C., even after a delay of 24 hours without any plausible explanation. The learned counsel further drew the Court's attention towards the inquest report and submitted that the same has been prepared at 3:00 PM and in the column of history of the case the names of the accused have not been incorporated which indicates that FIR has been registered after the preparation of the inquest report after due deliberation and time of registration of FIR shown as 10:00 am is not true.

He forcefully submitted that medical report contradicts the ocular account as according to the prosecution story the convict-appellant was armed with Kalashnikov and he fired the shot of Kalashnikov which hit the forehead of the deceased, whereas, during the postmortem, the bullet recovered from the only injury inflicted in the forehead of the deceased was sent to the FSL and as per report of FSL the same was fired from 30 Bore Pistol. He also laid much stress on the point that the presence of the eyewitnesses at the scene of occurrence is highly doubtful and in support of this argument he submitted that there was a lot of confusion in this regard due to which the learned Members of the trial Court visited the spot and came to a unanimous view after inspecting the site, that the convict is not even

visible from the points where eyewitnesses are allegedly shown according to the site plans prepared by the police and the Patwari. Thus, in existence of such a patent doubt in respect of the presence of the eyewitnesses at the scene of occurrence their statements have no evidentiary value in the eye of law. He further submitted that it is a settled principle of law that a single doubt is sufficient to acquit the accused, whereas, in the instant case each and every part of the prosecution story is full of doubts and the learned High Court instead of giving the benefit of doubt to the accused has extended the same to the prosecution which is a unique example. He added that a specific motive has been alleged in the case that an altercation took place between the complainant and the brother of Malik Mansha but

the prosecution failed to prove the motive as none of the witnesses was produced before the Court in order to prove the same. He added that it is settled principle of law that once a motive is alleged, the same must be proved beyond any shadow of doubt. He further stated that father of the deceased, who stated to be the eyewitness has also not been produced, and the father of a deceased could not implicate the innocent by letting go the real culprit so easily, which means that the prosecution deliberately did not produce him and in suchlike situation an inference can be drawn that had he been produced he might have recorded the statement against the prosecution. The learned counsel also drew the attention of the Court towards the record and submitted that diagram, MLC etc. is not available in the record,

the witness, Zafar Iqbal ASI who prepared the Injury Form and sought opinion from the Doctor has not been cited as a witness, moreover, according to the prosecution story indiscriminate firing hit the buildings of mosque and school but the record is silent about any sign of firing on the said buildings and recovery of bullets from the spot and the investigating officer also did not find any mark there. He also submitted that one of the learned Member of the trial Court has discussed a letter allegedly written by the convict-appellant to the Court from Jail and on the strength of that letter has recorded the findings that the convict-appellant has himself confessed the offence, whereas, neither such letter was put to the convict at the time of recording statement under section 342, Cr.P.C. nor the same is the part of record. He

contended that the piece of evidence which was not put to the accused at the time of recording statement under section 342, Cr.P.C. cannot be read against him under law. He finally made a request for acquittal of the convict-appellant while submitting that no case is made out against him in the light of the material available on record. He referred to and relied upon the case laws reported as *Allah Nawaz vs. The State [2009 SCMR 736], Noor Muhammad vs. The State [2020 SCMR 1049], Mst. Yasmeen vs. Javed and another [2020 SCMR 505], Aurangzeb vs. The State [2020 SCMR 612], Muhammad Arif vs. The State [2019 SCMR 631], State through Advocate-General vs. Muhammad Rafique and others [2019 SCMR 1150], Tafsir and others vs. The State [PLD 1960 Dacca 1019], Mst. Farzand Begum and others vs. Dil Muhammad and*

others [2020 SCR 367], Ghulam Qadir and others vs. The State [2008 SCMR 1221], Arshad Mehmood vs. Raja Muhammad Asghar [2008 SCR 345], Waseem Hussain and others vs. Muhammad Rafique and another [2017 SCR 428], Muhammad Akram vs. State [2009 SCMR 230], Nuzhat Bibi vs. Shabir Hussain and others [2006 SCR 58], Abdul Jabbar and others vs. The State [2019 SCR 129], Muhammad Zaman vs. State [2014 SCMR 749], Bashir Muhammad Khan vs. State [PLJ 2022 SC (CRC) 161], Muhammad Sadiq and others vs. The State [PLD 1960 SC, 223], Bashir Muhammad Khan vs. State [2022 SCMR 986], Tajamal Hussain Shah vs. State [2022 SCMR 1567], Haji Nisar Ahmed vs. Muhammad Murad and another [2003 SCMR 1588], Taj Muhammad and another vs. The State [2003 SCMR 1711], Haider Ali and others vs. The

State [2016 SCMR 1554], Ghulam Farid and others vs. The State [PLD 1964 W.P, Peshawar 12], Muhammad Idress and others vs. The State [2021 SCMR 612], Muhammad Aslam Khan vs. The State [1994 SCMR 172], Mst. Rukhsana Begum and others vs. Sajjad & others [2017 SCMR 596], Khud-e-Dad alias Pehlwan vs. The State [2017 SCMR 701], Mst. Sadan Bibi vs. Muhammad Amir and others [2005 SCMR 1128], Barkat Ali vs. M. Asif and another [2007 SCMR 1812], Pathan vs. The State [2015 SCMR 315], Najaf Ali Shah vs. The State [2021 SCMR 736], Khalid Mehmood and others vs. The State [2021 SCMR 810], Yousaf and others vs. The State [1971 Pcr.LJ 257], Muhammad Mansha vs. The State [2018 SCMR 772], Sardar Bibi vs. Munir Ahmed [2017 SCMR 344], Ramzan alias Jani vs. The State [1997 SCMR 590] and Ali

Muhammad and others vs. The State [2022 YLR Note 8].

6. Ch. Shoukat Aziz and Raja Inamullah, Khan, Advocates representing the convict-appellant, Malik Zaffar, adopted the arguments of the learned Advocate, Raja Muhammad Shafat Khan.

7. Conversely, Raja Sajjad Ahmed Khan, the learned Advocate appearing for the respondents raised a preliminary objection that the titled appeal has been filed under section 8 of the Shariat Appellate Bench of the High Court, Act, 2017 which is not maintainable. He added that when a difference of opinion arises between the members of District Criminal Court, the appeal under section 23(7) of IPL, 1974, is already

provided which is a special law and it is a settled principle of law that special law would displace general law, hence, this is not the matter of mere wrong quotation of a section rather a matter of wrong quotation of law, therefore, the appeal merits dismissal. While arguing on the merits of the case, he submitted that the FIR was promptly lodged at 10:15 am, wherein, name and specific roles of the convict-appellant and the other accused along-with the detail of weapon of offence and names of the witnesses have been mentioned. The time of registration of the FIR has also been proved through statements of complainant and SHO in cross examination and according to Article 129(e) of the Qanun-e-Shahadat Order, 1984, the official acts have a presumption of truth unless otherwise proved. The

stance of the defense is totally incorrect that the FIR was recorded after 03:00 pm, moreover, non-mentioning of FIR No. or each and every detail in the inquest report is neither fatal to the case nor the mandatory requirement of law. He further argued that non-production of the witnesses who prepared inquest report and injury sheet would not mean that there is doubt in prosecution story because the cause of death is not doubtful in the light of record. The learned Advocate further argued that the delayed recording of statement under section 161 Cr.PC would not help convict-appellant and other accused. Further, the witnesses have not been cross examined on their material statements and in cross-examination defense clarified the ambiguities and no improvement has been made by the witnesses

neither they changed their stance regarding the place of occurrence or weapon used in occurrence rather, they remained consistent on their version stated in the FIR. Mere mentioning "کلاشنکوف نما رائفل" instead of 'Kalashnikov' is not an improvement (as alleged by the defence) and cannot destroy the whole prosecution story. He further clarified that mentioning the place of convict-appellant as '*Parrat*' instead of 'road side' is also not an improvement but just a clarification. The prosecution witnesses narrated same story before the Court which was setup in their initial statements or in the FIR. He contended that there is no ambiguity in the site plan which is very much clear from the perusal of the statements of the witnesses and spot inspection reports of the

learned Members of the trial Court. He added that even otherwise, when direct evidence is available on record, spot inspection is not warranted by law, and the defense tried to create a confusion by filing the application for spot inspection. It is also settled principle of law that site plan is never considered to be a substantive piece of evidence and the same cannot be given preference over the direct evidence. The learned Advocate further contended that no firearm of 30 bore, has been recovered so the recovery of bullet of 30 bore, has no value. Furthermore, the motive setup by the prosecution has also been proved. While referring to the case reported as *Yasmeen Ashraf vs. Abdul Rasheed,* [2018 SCR 661], the learned Advocate stated that police diaries cannot be considered as evidence but can be perused by the Court in aid to

the evidence brought on record for moral satisfaction. He submitted that the prosecution is not bound to produce all the witnesses and according to Article 17 of Qanun-e-Shahadat Order, the conviction can be based on the statement of solitary witness. He further submitted that where the eye witnesses have witnessed the occurrence and supported the prosecution story, the opinion of expert becomes irrelevant. In support of his version, the learned Advocate placed reliance on the cases reported as *Abdul Rasheed and others vs. Abdul Ghaffar [PLJ 2001 SC AJK 129], Syed Ali Raza Asad Abidi vs. Station House Officer Police Station Model Town Gujranwala and others [PLD 1991 Lahore 306], Brig. Retd. Imtiaz Ahmed vs. Government of Pakistan through Secretary Division Islamabad and*

others [1994 SCMR 2142], Bakhat Jamal and another vs. Hakeem Khan and others [PLD 2014 Peshawar 84], Securities and Exchange Commission of Pakistan through Authorized Officer vs. Adnan Faisal and others [PLD 2019 Sindh 235], Muhammad Khurshid Khan vs. M. Besharat & others [2007 SCR 1], Muhammad Bashir and others vs. Sain Khan and others [2014 SCR 821], Muhammad Taaleem and others vs. The State & others [2014 SCR 893], Muhammad Babar vs. The State through Advocate-General [2014 SCR 1585], Arshad Mehmood vs. Raja M. Asghar [2008 SCR 345], State vs. Habib-ur-Rehman, [PLD 1983 SC 286], Walayat Khan and others vs. M. Yousaf and others [PLD 1995 SC AJK 41], Muhammad Ramzan vs. The State [1996 Pcr.LJ 1076], Mir Afzal vs. The State [2008 Pcr.LJ 881], Muhammad Aslam vs. The

State [1993 PCr.LJ 914], Mauloo and others vs. The State [1983 PCr.LJ 1847], Abdul Rehman vs. The State [1983 PCr.LJ 2462], Muhammad Amin vs. The State [1987 Pcr.LJ 643], Javed Azam and others vs. M. Saleem [PLJ 1997 SC AJK 226], Niaz Muhammad alias JaJa and others vs. The State [PLD 1983 SC AJK 211], Muhammad Arshad vs. Muhammad Mushtaq & others [2003 SCR 204], Farrukh Ahmed Chughtai vs. M. Imtiaz [PLJ 1995 SC AJK 1], Muhammad Abbasi vs. The State [2011 SCMR 1606], Mudassar Altaf vs. The State [2010 SCMR 1861], Shafqat Hussain vs. The State through Advocate-General, AJK Muzaffarabad [2012 PCr.LJ 718], Arif vs. The State [PLD 2006 Peshawar 5], Ch. Muhammad Riasat and others vs. Muhammad Asghar and others [2010 SCR 1] and Arshad

Mehmood and others vs. The State and others [2010 SCR 75].

8. Kh. Maqbool War, the learned Advocate-General while adopting the arguments advanced on behalf of Raja Sajjad Ahmed Khan, Advocate, submitted that impugned judgment passed by the learned High Court dated 03.08.2022, is well-reasoned, speaking one and passed in accordance with law and the facts of the case, hence, deserves to be upheld. He further submitted that the convict-appellant failed to point any legal ground for interference by this Court in the impugned judgment, hence, the appeal is a futile exercise, merely to prolong the litigation and put the complainant party into agony. He stated that the convict-appellant is fully connected with the

commission of the murder and the prosecution has successfully proved its case beyond any shadow of doubt by production of ocular and corroborative evidence, whereas, the defense has failed to point out any dent in the prosecution story.

9. Mr. Babar Ali Khan, the learned Advocate representing the appellants (*in appeal No. 31/2022*), submitted that the learned High Court in the impugned judgment accepted that the direct evidence of the eye witness is not only convincing but also confidence inspiring, but despite this, without any justification acquitted respondents No. 2 to 12, and declined to confirm the death sentence awarded by the District Qazi to convict-Malik Zaffar. He submitted that the weapon of offence was recovered on the pointation of convict

and the recovery witnesses remained trustworthy, firm and steady during cross examination, but the learned High Court took a lenient view while awarding sentence to the convict-appellant without recording any cogent reasons. He further submitted that all the accused persons have been nominated with specific role in promptly lodged FIR and there is no doubt regarding the identity of the respondents. The evidence fully supports the prosecution version and the direct evidence has been admitted correct and confidence inspiring by one of the members of the District Criminal Court, but the learned Court below illegally upheld the judgment of the trial Court to the extent of acquittal of other accused. Moreover, the prosecution has proved through cogent evidence the constitution of unlawful assembly and all the

accused acted in pursuance of common object which resulted into death of deceased, hence, all the accused persons are liable to be punished. He further argued that the motive of the incident was not only proved but has also been accepted by the High Court and the defense has also accepted the motive of the incident that on the basis of vendetta of previous incident, the accused-respondents, herein, formed an unlawful assembly and brutally murdered the deceased. He stressed on the point that the High Court has illegally dismissed the appeal of the appellants for being incompetent against the principle laid down in the case reported as *Abdul Khaliq Awan vs. Muhammad Afsar Khan & others* [1995 SCR 144], wherein, it has been held that the complainant and legal heirs of the deceased can competently file

appeal against the acquittal order and for enhancement of the sentence, therefore, the High Court wrongly dismissed the appeal of the appellants. He further contended that when the prosecution has proved its case through direct and confidence inspiring evidence and the same has been believed by the High Court then it was enjoined upon it to award capital punishment under law, but the High Court instead awarded lesser punishment and has also not recorded any reasons for that. The prosecution successfully proved through cogent evidence of eye witnesses the role of the accused in commission of heinous offence but the Courts below did not appreciate the same against the accused-respondents No. 2 to 6 and 8 to 12. He stated that the impugned judgment has been passed in violation of the

settled principles of law and justice and dictum of this apex Court, therefore, the appeal filed by appellants *Mst. Mehfooz Fatima and others* may be accepted.

10. Conversely, Raja Inamullah Khan, the learned Advocate representing the respondents (*in appeal No. 31/2022*), stated that the prosecution has failed to prove its case beyond any shadow of doubt. He stated that the complainant and the alleged eye witnesses not only made improvements in the statements rather almost changed their statements when they appeared before the Court. He further stated that the occurrence happened in daylight when 30/35 shops were opened but no independent witnesses came forward to support the case of the

prospection, only interested, inimical and related witnesses have been produced in support of their story, in such like situation, very strong and independent corroboration is required for conviction which is lacking in the case. He contended that it is the settled principle of law that history of the crime is to be incorporated in a specific column of the inquest report and the same is supposed to be prepared after the registration of FIR and at the time of post mortem examination. In this case, post-mortem examination was conducted at 03:00 p.m. whereas FIR was reported to have been lodged at 10:15 a.m., astonishingly, none of the names of accused and witnesses is mentioned in the FIR, except the complainant mentioned therein which is suggestive of the fact that FIR was lodged after due

deliberation and consultation at belated stage after conducting the post mortem examination. Furthermore, the conduct of the complainant, the alleged eye witnesses, facts and circumstances of the instant case, speak that either they were not present at the time and place of occurrence or they did not see the occurrence, the presence of the complainant and the alleged eye-witnesses at the time and place of occurrence is highly doubtful, in this state of affairs, the conviction on the basis of such evidence cannot be made. The learned Advocate also drew the attention of the Court towards the site plan and submitted that except the three accused, none of the other accused have been shown nor their place of standing have been mentioned which also create doubts on the prosecution story. He also

submitted that the prosecution witness namely Shoukat Hayat, I.O. deposed during his cross-examination that they reached out to independent witnesses present on the spot but owning to the fact that they were not supporting the prosecution story, were not cited as witnesses, which depicts the weak story of prosecution. He further submitted that it also creates doubt in the prosecution story that Munir Hussain Shah stated in his Court's statement that '*from point No. 3 the firing place is almost visible'* which is also indicative of the fact that he was not sure about his statement. While referring to the impugned judgment of the High Court, the learned Advocate stated that in the impugned judgment, the learned High Court has observed that bullet recovered from the skull of the deceased was handed over to

the police party but the police negligently or mala-fidely did not prepare the parcel of the said bullet; this observation of the High Court is based on misconception as according to record the post-mortem of the deceased was conducted on 23.09.2003 and the recovery memo of the said bullet was prepared on 02.10.2003, hence, the same was kept with the Doctor and on 02.10.2003, the parcel was prepared and was sent in a sealed bottle to FSL which is also evident from the Court's statement of the P.W. Sagheer, Sub-Inspector. He finally submitted that in the light of above dents and doubts in the prosecution story, the sentence awarded by the High Court cannot be sustained. He finally prayed for dismissal of the instant appeal.

11. We have given our dispassionate thought to the arguments of the learned Advocates representing the parties, the Advocate-General and have gone through the record of the case, evidence produced by the parties and the impugned judgments of the Courts below with utmost diligence.

12. The incident took place on 23.09.2003, which was reported to the Police Station Kotli, by the complainant, Rashid Hussain Shah, on the same day. On his report, FIR No. 257/2003, Ex-PE was registered at Police Station Kotli, in the offences under sections 147, 148, 149, 337-A(i) and 324, APC, however, the injured person namely Amir Asif Shah, succumbed to his injuries and expired later on, whereupon, offence under

section 302-APC, was added by the investigating agency. On the failure of the accused persons to provide license of recovered weapons, an offence under sections 13/20/65, Arms Act was also added. After investigation, the challan against the accused persons was submitted before the Court of Competent Jurisdiction on 22.11.2003. On 16.12.2003, the statements of the accused under section 265-D were recorded wherein, they pleaded not guilty and claimed trial, as a result of which, the prosecution was ordered to produce evidence. The prosecution produced the witnesses namely Arshad Hussain Shah, Ibrar Hussain Shah, Ameer Arshad Shah, Sardar Zahid Nawaz, Tufail Hussain, Patwari Halqa, Dr. Faisal Hameed, Muhammad Anwar, Constable, Muhammad S.G, Muhammad Sagheer, Sub Inspector, Mirza Shoukat

Hayat Inspector, Sardar Muhammad Nisar Khan DSP and Muhammad Yaseen Baig, Inspector/SHO, in support of their version. During the trial, the prosecution witness namely Shah Pir Shah died, to whose extent, the proceedings were dropped. The prosecution did not produce the witnesses Tasadaq Hussain Shah, Mukhtar Hussain Shah, Waqar Ali Bukhari, and their evidence was closed. The report of Chemical Examiner Ex-PFF and the report of Forensic Science Laboratory (FSL), Ex-PGG, were also presented as evidence. Besides complainant, there are two eye-witnesses to the occurrence namely Munir Hussain Shah and Iftikhar Hussain Shah.

13. As per recovery memo Ex-PJ, seven crime empties of Kalashnikov were recovered from point

No. 9 of the site plan which was the place of standing of accused, Zaffar Malik. As per site plan prepared by Halqa Patwari, the police seized 11 empties of 30-bore pistols from point No. 7. Likewise, the Police also took possession of 4 empties of 222 bore, from point No. 8. The deceased's clothes, (vest stained with blood) were seized and compiled as parcel No. 1. During the spot inspection, soil and blood-stained earth weighing 1/2 250 grams was found and compiled as Parcel No. 2, Kalashnikov was seized on the identification of the accused Zafar Iqbal as Parcel No. 8, Kalashnikov was seized on the identification of the accused Imran son of Mansha as Parcel No. 7, and on the disclosure of the accused Aurangzeb, parcel No. 9 was prepared by seizing the

Kalashnikov from the boxes in the house of the accused, Itefaq.

14. Now, if we scrutinize different aspects of the case in the light of the record, arguments and our observation, there appear to be different points which need to be discussed. The FIR was lodged by Rashid Hussain Shah, in which the accused have been nominated in the manner that accused No. 3, 5, 12, Zafar Malik, Imran and Hafiz Aurangzeb were carrying Kalashnikovs. The rest of the accused were carrying sticks, axes and small arms; the complainant reported that accused 3, 5, 12, who were carrying Kalashnikovs started firing as soon as they arrived. The complainant's brother Amir Asif Shah ran away from the PCO and went to the roof of the nearby *Muktab* School. Accused No.

3, Zafar Malik tied the target and fired straight which hit the left side of victim's forehead and he fell on the spot, the armed-accused even after that, continued to fire. Besides him, the complainant mentioned Munir Hussain Shah and Iftikhar Hussain Shah as eyewitnesses in the initial report. The complainant also got his statement recorded in the Court in support of his initial report while stating that "Malik Zafar Iqbal, Hafiz Aurangzeb, Itefaq and Imran had Kalashnikov-like rifles with them, while the rest of the accused had machetes, axes and small arms, who, as soon as they arrived, started firing at him. The deceased and other people present along-with him, ran behind the PCO and went to the roof of the school which is the courtyard of the mosque. Malik Zafar, Hafiz Aurangzeb, Itefaq, Imran started firing

indiscriminately with Kalashnikov-like rifles. When the firing stopped for a while, they came forward. Malik Zafar was standing on the *Parat,* 3/4 yards above the roadside, who fired with a Kalashnikov-like rifle with the intend to kill, resultatntly, the bullet hit Amir Asif Ali Shah on the left side of his forehead and he fell on the spot, even after that there was continuous firing".

15. Munir Hussain Shah, another witness of the occurrence almost narrated the same story in his Court's statement, wherein, he stated that

"سال 03-09-23 کا واقعہ ہے تقریبا آٹھ ساڑھے آٹھ بجے صبح مظہر اپنے گھر تھا۔ اطلاع ملی کہ راشد شاہ اور ملک برادری کے افراد کا کوئی جھگڑا ہوا ہے۔ مظہر رہیاں گالہ پی سی او پر آیا۔ وہاں شاہ پیر شاہ، آصف شاہ، چوہدری یونس اور تھوڑی دیر میں راشدہ شاہ، افتخار شاہ، مختار شاہ آ گئے۔ راشد شاہ نے بتایا کہ وہ سویرے رہیاں گالہ سے بس میں بیٹھ کر کوٹلی جارہا تھا کہ کوٹلہ موڑ میں بس رکی وہاں سے تین لڑکے بس پر چڑھے جو رضوان قمر، عمران تھے۔ ان تینوں نے اسے مارنا شروع کر دیا۔

PCOبس میں موجو دسواریوں نے اسے چھڑایا۔ وہ راستہ سے واپس پر آ گیا ہے۔ تھوڑی دیر بعد تقریباساڑھے نو بجے کا وقت تھا فائرنگ کی کے PCO آواز آئی۔ مظہر، شاہ پیر شاہ، آصف شاہ مختار شاہ، افتخار شاہ پچھلی جانب سے باہر نکلے۔ فائرنگ جنگلات ریسٹ ہاؤس کے موڑ سے ہوئی تھی۔ ملزمان گاڑیوں پر (ایک جیپ، ایک سوزوکی اور ایک موٹر سائیکل)24/25 افراد آئے۔ ملک منشاء، عمران، امجد، رضوان، یوسف، تاج، عزیز، قمر، تنویر، ظفر، نوید ساجد نیاز، جاوید قیصر امین، یعقوب، حافظ اورنگزیب، اتفاق، امتیاز، فاروق، ماجد، حافظ ساجد تھے۔ ظفر کے پاس کلاشنکوف نمارائفل تھی۔ عمران کے پاس بھی کلاشنکوف نمارائفل تھی۔ حافظ اورنگزیب اور اتفاق کے پاس بھی کلاشنکوف نما رائفل تھی۔ باقی ملزمان کے پاس لاٹھیاں، کلہاڑیاں تھیں۔ان ملزمان نے آتے ہی ہمارے اوپر اندھا دھند فائرنگ شروع کر دی۔ ہم، مظہر کی پچھلی PCO، شاہ پیر شاہ، آصف شاہ، افتخار شاہ، مختار شاہ، راشد شاہ کی چھت پر چلے گئے PCO جانب سے بھاگ کر مسجد کے صحن اور ۔ملزمان نے لگا تار فائرنگ شروع رکھی۔ تھوڑی دیر فائرنگ بند ہوئی۔ آصف شاہ سامنے ہوا۔ ہم سب سامنے ہوئے۔ ظفر سڑک کی نالی سے 2/3 گز اوپر پڑاٹ پر کھڑا تھا۔ وہاں سے نشانہ باندھ کر فائر کیا جو آصف شاہ کی پیشانی پر لگی۔ آصف شاہ گر گیا۔ ملزمان نے فائرنگ شروع رکھی۔ یہ واقعہ ملک منشاء نے کرایا جو خود بھی موقع پر موجود تھا۔ اس واقعہ سے دو چار دن قبل راشد شاہ کی ملک منشا کے بھائی نثار سے کوٹلی بول چال ہوتی تھی۔ وہ معاملہ رفع دفع ہو گیا تھا۔ اس واقعہ کی بناء پر جملہ ملزمان نے باہم مشورہ ہو کر آصف شاہ کو آکر قتل کیا۔ مظہر کے علاوہ شاہ پیر شاہ، افتخار شاہ، مختار شاہ، راشد شاہ نے بھی واقعہ دیکھا۔ ملزمان واقعہ کر کے کوٹلہ موڑ کی جانب بھاگ گئے۔ آصف شاہ کو اٹھا کر نیچے کار میں لے

کر کوٹلی ہسپتال لائے ۔ مظہر وہاں سے گھر چلا گیا تھا۔ ایک ڈیڑھ بجے
اطلاع ملی کہ آصف شاہ اسی گولی لگنے سے فوت ہو گیا ہے۔"

16. Similarly, Iftikhar Hussain Shah, who is also alleged to have been the eye-witness of the occurrence, in his Court's statement, stated that: -

"مورخہ 03-09-23 کا واقعہ ہے مظہر اور مختار حسین شاہ گواہ، نزاکت حسین شاہ، زاہد حسین شاہ، قاضی عبدالواحد، قاضی زاہد صبح 7:20 بجے امتیاز عرف بھٹی کی جیپ پر لنٹر ڈالنے کوٹلی آرہے تھے۔ کوٹلہ موڑ سے جس کو جیپ نے کراس کیا۔ تھوڑے آگے گئے بس رکی۔ شہزاد حسین شاہ جو اس کے گیٹ پر کھڑا تھا اس نے جیپ کو رکنے کا اشارہ کیا۔ جیپ رکی اور ہم لوگ اتر کر آئے اور دیکھا کہ بس میں راشد حسین شاہ کو عمران، رضوان اور قمر مار رہے تھے ۔ مظہر اور شہزاد حسین شاہ بس کے اندر گئے اور چھڑایا۔ راشد حسین شاہ اور شہزاد حسین کو ہم لوگ جیپ میں لے گئے۔ جب جیپ ساردہ پہنچی تو مظہر نے راشد حسین شاہ کو کہا کہ آگے ملک برادری زیادہ ہے وہ ہمیں ماردیں گے۔ اس لیے اس جگہ اتر جاتے ہیں ۔ مظہر اور راشد شاہ ، مختار شاہ ، شہزاد شاہ ، نزاکت شاہ ، قاضی واحد اور قاضی زاہد اتر گئے - اور پیدل مختصر راستہ سے رہیاں کی جانب چل پڑے ۔ جب دریا کے پاس پہنچے تو نزاکت حسین شاہ شہزاد حسین شاہ، قاضی عبدالواحد، قاضی زاہد اپنے اپنے گھروں کو چلے گئے۔ مظہر اور راشد حسین شاہ اور مختار حسین شاہ رہیاں گلی آصف علی شاہ کے پی سی او پر چلے گئے۔ پی سی او پر آمیر آصف علی شاہ، شاہ پیر حسین شاہ، منیر حسین شاہ اور چوہدری یونس موجود تھے۔ ہم نے انہیں

جا کر واقعہ سنایا۔ تھوڑی دیر بعد فائرنگ کی آواز آئی۔ تقریبا9:30 بجے صبح کا وقت تھا۔ ہم لوگ پی سی او کی پچھلی جانب سے باہر نکلے اور دیکھا کہ جیپ نمبری AJKD 8246، ایک سوزوکی نمبری AJKC 1846 ،ایک موٹر سائیکل نمبری AJKF 5715 پر ملک ظفر، ملک عمران، حافظ اورنگزیب، اتفاق، ملک منشاء ملک تاج، ملک یوسف، ملک عزیز، ملک امجد، ملک قمر، ملک نوید، ملک ساجد، حافظ ساجد، ماجد، فاروق، امتیاز ان گاڑیوں پر بیٹھ کر پی سی او سے دس گز کے فاصلہ پر آ گئے۔ ہم لوگ بھاگ کر یعنی مظہر، آصف شاہ، راشد شاہ مختار حسین شاہ منیر حسین شاہ اور شاہ پیر حسین شاہ بھاگ کر مسجد کے صحن اور سکول کی چھت پر چلے گئے۔ ملک ظفر، عمران، حافظ اورنگزیب اور اتفاق کے پاس کلاشنکوف نمارائفلیں تھیں بقیہ ملزمان کے پاس سوٹیاں، کلہاڑیاں اور چھوٹا اسلحہ تھا۔ ملزمان نے ہم پر اندھا دھند فائرنگ شروع کر دی تھوڑی دیر کے لیے فائرنگ بند ہوئی۔ آمیر آصف شاہ نے کہا کہ انہیں بتاتے ہیں کہ فائرنگ بند کریں۔ بیٹھ کر بات کرتے ہیں۔ آصف شاہ اور ہم جو نہی سامنے ہوئے تو تقریبا سڑک سے 3/4 گز کے فاصلہ پر ملک ظفر جو پڑاٹ پر کھڑ تھانے نشانہ باندھ کر کلاشنکوف نمارائفل سے فائر کیا۔ یہ فائر آمیر آصف شاہ کی پیشانی پر بائیں جانب لگا جس سے آمیر آصف شاہ گر گیا۔ ہم جب آصف شاہ کو اٹھانے لگے تو حافظ اورنگزیب عمران اور اتفاق نے ہم پر فائرنگ شروع کر دی۔ دیگر ملزمان نے بھی فائرنگ شروع کر دی۔ ہمارے شور شرابہ ووایلہ کرنے پر ملزمان گاڑیوں پر کوٹلہ موڑ کی جانب چلے گئے۔ یہ سارا واقعہ ملک منشاء کی منصوبہ بندی سے ہوا جو خود بھی موقع پر موجود تھا۔"

17. The police seized the crime empties from the spot and during preparation of the recovery

memo, produced them as evidence. The site plan with annotations was obtained from Patwari Halqa and also presented in evidence according to which, the police seized 11 empties of 30 bore pistols from point No. 7. From point No. 8, the police seized four empties of 222 bore pistol. It was stated that firing was done by the accused Imran from point No. 7, while from point No. 8, Hafiz Aurangzeb and Itefaq were said to have fired. From point No. 9, seven empties of Kalashnikovs were seized by the police and the said point is attributed to the accused, Zafar Iqbal. Points 7, 8 & 9 are roadsides according to the police map and these locations are on the road inside the road drain, while the prosecution witnesses who recorded their statements in the Court did not mention Malik Zafar to be at Point No. 9 rather, his

presence is shown as standing on '*Parrat*' which is above the road channel. Accused, Zafar Iqbal's standing on the *Parrat* was not mentioned by the complainant even in the FIR. The map Ex-PCC prepared by the police was presented in evidence and at the end of its annotations it is stated that *'the map with annotations has been prepared as indicated by the complainant and the eye-witnesses'*, which means that on 23.09.2003, the same day when the incident took place, the police along-with the accused and the witnesses of the incident went to the place alleged to be the point where accused, Malik Zaffar had opened fire, but this point has not been shown as '*Parrat*', rather, on the side of the road has been mentioned. The presence of the accused Zafar is also mentioned in the site plan prepared by Patwari Halqa and the

map prepared by the police Exh.PCC corresponds to a clearer picture of the spot. It is to be noted that in the site plan prepared by the Patwari Halqa, except the three accused, none of the others is shown to have been present nor found the empties anywhere except from the three places, which is also fatal to the case of the prosecution, especially when they nominated 23 accused in the FIR and in the statement under section 161 Cr.PC. Moreover, both the learned members of the District Criminal Court, themselves, visited the spot for further clarification of the place where it is alleged that the accused fired from Kalashnikov-like rifles, the place where the victim and the eyewitnesses of the incident have been shown, in order to draw a clear connection and picture of the alleged stance with clarity. The report of one of the

members of District Criminal Court, *Syed Khalid Hussain Gillani*, District and Sessions Judge, is reproduced hereunder for better appreciation: -

"رپورٹ موقع ملاحظہ

مقدمہ عنوان بالا میں بحث سماعت ہو چکی ہے۔ آج وکلا فریقین کے ہمراہ جائے وقوع کا ملاحظہ کیا گیا۔ وکیل استغاثہ ملک سلیم صاحب اور وکیل ملزمان مرزا شاہد صاحب دو اراکین عدالت کے ہمراہ تھے۔ ریکارڈ مسل مقدمہ بھی ہمراہ رکھی گئی اور پولیس و پٹواری کے مرتب شدہ نقشہ جات موقعہ و تشریحات کی روشنی میں جائے وقوع کا ملاحظہ کیا گیا۔ مقتول مقام نمبر 1 پر بیان کیا گیا ہے اور مقتول کی جگہ سے مقامات 7,8,9 بالکل واضح نظر آتے ہیں۔ مقام نمبر 2 جہاں راشد شاہ مستغیث کی موجودگی بیان کی گئی ہے سے مقامات 7,8,9 واضح نظر نہیں آتے۔ مقام نمبر 3 سے مقامات 7,8,9 واضح نظر آتے ہیں لیکن مقام نمبر 4 جہاں شاہ پیر شاہ گواہ کی موجودگی بیان کی گئی ہے سے اور مقام نمبر 5 جہاں افتخار حسین شاہ گواہ کی موجودگی بیان کی گئی ہے سے مقامات 7,8,9 نظر نہیں آتے۔ راقم کے فاضل پیشرو اور جناب ضلع قاضی نے قبل از میں موقع ملاحظہ کر کے مقام نمبر 1 سے مقامات 7, 9,8 کا فاصلہ ناپا جانا بیان کیا اور ضلع قاضی صاحب کا اظہار ہے کہ یہ فاصلہ 198 فٹ ہے۔ راقم نے دوبارہ سے اس فاصلہ کو ناپنے کی ضرورت محسوس نہیں کی۔ جہاں پر گواہان کی موجودگی نقشہ میں بیان کی گی ہے وہاں سے پڑاٹ جہاں ملزم ظفر کی موجودگی بیانات میں ظاہر کی گئی ہے واضح نظر آپ چونکہ پڑاٹ اونچی جگہ ہے۔ بیان کی گئی جائے وقوع پر کافی تعداد میں دوکانیں بشکل بازار موجود ہیں جو موقع ملاحظہ کے وقت کھلا تھا۔

لہذا پورٹ موقع ملاحظہ مرتب کی جا کر شامل مسل کی جاتی ہے۔

(سید خالد حسین گیلانی)
سیشن جج کوٹلی رکن ضلعی فوجداری عدالت"

Likewise, the other learned member of District Criminal Court after spot inspection reported that: -

"1۔ مقام نمبر 1 سے وہ جگہ جہاں سے فائر ہوا وہ صاف نظر آتی ہے۔
2۔ مقام نمبر 2 جہاں گواہ کھڑا تھا سے فائرنگ کرنے کی جگہ صاف نظر آتی ہے۔
3۔ مقام نمبر 3 جہاں گواہ کھڑا ہونا بیان کیا گیا ہے سے تقریباً فائرنگ کی جگہ نظر آتی ہے
4۔ مقام نمبر 4 مقام ہذا سے فائرنگ والی جگہ نظر آتی ہے۔
5۔ مقام نمبر 5، مقام ہذا سے فائرنگ کرنے والی جگہ پورے طور پر نظر نہ آتی ہے چونکہ سامنے جھاڑی دار درخت ہے۔"

The perusal of the above reports reveals that points No. 7,8 & 9, are not visible from point No. 5, where the presence of Iftikhar Hussain Shah witness is alleged. From the place where the deceased is shown at point No. 1, points No. 7,8,9 are visible. The points No. 7, 8 & 9 are also visible from point No. 3, but points No. 7, 8, and 9 are not

visible from point No. 2, where Rashid Hussain Shah, complainant, is allegedly shown to be present, however, the spot *'Parrat',* where the witnesses described the presence of the accused-Malik Zaffar during their Court statements, is visible. One thing in both the reports of the learned member of the District Criminal Court, is notable that they are unanimous on the view that from point No. 5, where, the presence of Iftikhar Hussain Shah is described, points No. 7, 8, 9 are not visible, hence, if this is the case, the witnesses could not possibly witness anything and their testimony cannot be relied upon.

The post-mortem of the deceased was conducted on the same day and the same was exhibited in evidence as Exh-PT. The doctor while

conducting the post-mortem, reported that the deceased died due to firearm injury. The doctor recovered a bullet from the skull of the deceased and handed it over to police on 02.10.2002. The bullet along-with other seized arms and recovered shells were sent to the Arms expert, the report of which was exhibited in evidence as Ex-PGG. The Arms Expert has mentioned the bullet in Article 7 of his report which the doctor recovered from the body of the deceased during the post-mortem and it has been stated that the death of the deceased was caused by the bullet of 30 bore pistol. We have also observed that the learned High Court based his judgment on the point that the bullet recovered from the skull of the deceased was handed over to the police but the police negligently or mala-fidely did not prepare the

parcel of the said bullet. We are not agreed with this observation of the learned High Court being based on misconception of facts and the record, because according to the record, the post-mortem of the deceased was conducted on 23.09.2003 and the recovery memo of the said bullet was prepared on 02.10.2003, hence, the same was kept by the Doctor himself and on 02.10.2003, the parcel was prepared and was sent in a sealed bottle for FSL. The fact is also evident from the Court statement of prosecution witness, Sagheer, Sub-Inspector who deposed during his cross-examination that: -

"پارسل سر بمہر کھولا گیا یہ وہی ہے جو مظہر نے ضبط کیا تھا گولی سکہ بوتل میں موجود ہے"

The above reproduced statement of the witness is quite clear and supports the record that the bullet recovered from the skull of the victim

was sealed in a bottle and sent for FSL examination which was also presented to him at the time of recording of his statement. The prosecution has tried to build its story that the accused Zafar Iqbal had a Kalashnikov with which he aimed and fired at deceased which hit him on the left side of his forehead and the said Kalashnikov was also recovered by police on the pointation of the accused, Zaffar Iqbal, and seized but it is a fact to be amazed at that the bullet found by the Doctor from the skull of the deceased was of 30-bore pistol. The eyewitnesses also stated in their Court statement that Zafar Iqbal killed the deceased Amir Asif Shah by firing with a Kalashnikov and the police revealed that the Kalashnikov was recovered from the possession of the accused Zafar Iqbal, but the doctor has confirmed that the bullet that

caused the death of the victim recovered from the victim's body and handed over to the police, which was sent to an Arms expert who inveterate that this bullet is of a 30-bore pistol and did not match with the Arms i.e. Kalashnikovs sent to him, hence, was returned back by Arms Expert. Thus, it is established that the death of deceased, Amir Asif Ali was not caused by a Kalashnikov bullet, but by a 30-bore pistol. It is a settled principle that witnesses can lie but the circumstances cannot. The recovery of a 30-bore pistol bullet from the body of the deceased, which caused the death of the deceased, is not attributed to any accused including Zafar Iqbal, even the police has not confiscated any pistol from any accused during the investigation. Although the accused had reported in the FIR that some of the accused were holding

small arms and the witnesses of the incident also made the same statements in the Court, but in the FIR and in their Court's statements, the prosecution witnesses failed to specify which of the accused was holding small arms, none of them were attributed 30-bore pistol specifically. According to Ex-PCC, point No.7 is the location from where 11 empties of 30-bore pistols were seized by the police and the distance from this location to point No. 1, where the deceased Amir Asif Ali Shah was present, is recorded as 165 feet, from where, it is not possible for a bullet of a 30-bore pistol to hit the deceased particularly, when fired from such a far distance. The doctor has also not mentioned the distance from which the bullet could have hit the victim, whereupon, the Police through letter, Ex-PV sought opinion from the Civil

Medical Officer, who had conducted the post-mortem of the deceased. The doctor mentioned the distance of the bullet on this letter as more than 5 meters, and a distance of more than five meters is far from 165 feet in any case. A distance of more than five meters as opined by doctor may mean six or seven meters, but at least not 165 feet which is equal to 50.2 meters. The prosecution story also narrated that the accused were present on the side of the road while the deceased and the witnesses went to the roof of the school and the courtyard of the mosque but the same has not been proved through any evidence. Thus, when none of the accused went towards the Muktab school or courtyard of Mosque and are allegedly shown to have been standing 50 meters far from the deceased, then the question arises as to who

has actually fired at the victim with the 30-bore pistol, bullet of which was recovered from the skull of the deceased? The entire record is silent and nothing is available on the record through which it could be ascertained about the person who actually fired at the deceased.

18. After comparative study of the ocular and corroborative evidence, we found plenty of contradictions between both. It would be vital to mention here that the most important aspect of the case appears to be controversial, as the weapon alleged to be the weapon of offence is Kalashnikov in the light of ocular evidence of eye-witnesses, recoveries made, empties seized from the place of occurrence and the FIR but to our surprise, the bullet which caused the death of the

deceased and found from the skull of the deceased, later sent to Fire Arms Expert, was proved to be of 30-bore pistol as per FSL report.

19. The learned counsel for the accused, Zafar Malik, stated that the complainant and the witnesses have made crude improvements in the prosecution story in order to bring it in line with the medical evidence. The argument of the learned Advocate for the accused, has substance as from the perusal of site plan Ex-PCC, it transpires that the same was made on the pointation of the complainant and the eye-witnesses. In the said site plan the convict-appellant is stated to have been present at point No. 9, the complainant and the eye-witnesses are stated to have present at points No. 2 and 5 respectively but during their Court's

statements all the three eye-witnesses changed the place of standing of respondent No. 1. In site plan Ex-PCC, the point No. 9 is on road, whereas, from the points No. 2 and 5, the point No. 9 is not visible. The spot inspection made by the learned members of the trial Court falsified the whole story narrated by the complainant and the other eye witnesses as the place of standing of convict-appellant (*Parrat*) as narrated by the witnesses in their Court's statements is 3/4 yards higher from point No. 9 (*the place where convict-appellant is stated to have been present in scaled site plan, Ex-PCC*), moreover, no crime empty was recovered from the said location '*Parrat*' where the convict-appellant is shown to have been present, therefore, this is actually a crude improvement on the part of the prosecution to bring the

prosecution's case in line with the other pieces of evidence.

20. The next plea taken by the learned Advocates for convict-appellant, that at the time of registration of FIR the complainant stated that the convict-appellant was armed with Kalashnikov and the other witnesses support the version of the complainant but when the post-mortem of the deceased was conducted and the bullet removed from the skull of the deceased was found to be of 30-bore pistol, the complainant and the eye-witnesses changed their statements when they appeared before the Court and stated that 'the convict-appellant was armed with Kalashnikov-like rifles, which was an attempt to bring the prosecution's case in line with the medical

evidence. It is a settled principle of law that once the Court comes to the conclusion that the eye-witnesses had made improvements in their statements then it is not safe to place reliance on their statements and in that eventuality, conviction is not sustainable. Reliance can be placed to the case reported as *Muhammad Arif vs. The State* [2019 SCMR 631], wherein, it has been held as under: -

> "It is well established by now that when a witness improves his statement and moment it is observed that the said improvement was made dishonestly to strengthen the prosecution, such portion of his statement is to be discarded out of consideration. Having observed the improvements in the statements of both the witnesses of ocular account, we hold that it is not safe to rely on their testimony to maintain conviction and sentence of Muhammad Arif (appellant) on a capital charge.

> Moreover, Muhammad Javaid co-accused of the appellant who was attributed a firearm injury on the person of Aamer Javaid injured (PW.10) was acquitted by the learned appellate court. Criminal Petition filed by the complainant challenging his acquittal was dismissed, therefore, if testimony of Aamer Javaid was not believed to the extent of the injuries on his person, the same deserves to be discarded out of consideration to the extent of the role assigned to Muhammad Arif (appellant)."

The same point came under the consideration of Supreme Court of Pakistan in the case reported as *Sardar Bibi and another vs. Munir Ahmed & others* [2017 SCMR 344], wherein, it has been held as under: -

> "Both the witnesses for the first time during trial specified the weapons and alleged that such and such specific weapon was in the hand of such and such accused. Both the witnesses had been duly confronted with their previous statements where such

specification of weapons was not mentioned. As doctor, while conducting postmortem examination, declared that the deceased persons received bullet injuries hence for the first time during trial, Falak Sher and. Sikandar were shown to be armed with .30 bore pistol and Munir being armed with 7mm rifle. This willful and dishonest improvement was made by both the witnesses in order to bring the prosecution case in line with the medical evidence. In the FIR the complainant alleged that fire shot of Falak Sher hit Zafar Iqbal deceased on his chest and the fire shot of Sultan Ahmed accused also hit on the chest of deceased Zafar Iqbal. According to doctor, there was only one fire-arm entry wound on the chest of the deceased Zafar Iqbal. In order to meet this situation, witnesses for the first time, during trial made omission and did not allege that the fire shot of Sultan hit at the chest of Zafar Iqbal, deceased. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they are not trustworthy witnesses. It is held in

> the case of Amir Zaman v. Mahboob and others (1985 SCMR 685) that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. In Khalid Javed's case (2003 SCMR 149) such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of Mohammad Shafique Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).”

21. It is also notable that the complainant, Rashid Hussain Shah, initially nominated 12 persons in the FIR along-with 8/9 unknown

persons but subsequently, in his statement, he nominated 11 more persons as accused who were exonerated by the police under section 169, Cr.pC after investigation. The nomination of the 8/9 unknown persons in the FIR is beyond our comprehension especially, when, it was a day light occurrence and all the discharged accused persons were of same vicinity and related to the accused, hence, there was no question of any unidentified accused let alone 8/9 persons. In this state of affairs, it can be presumed that the complainant intentionally involved 8/9 unknown persons so that he may later falsely implicate them, in this way, the testimony of such witness cannot be called as trust worthy and credible.

22. The learned counsel for the convict-appellant also forcefully argued that during the course of evidence, the complainant and the eye-witnesses stated in their Court's statements that the accused continued indiscriminate firing which hit the wall of *Masjid*, Minar of the *Masjid* and Shade of the School but during the spot inspection, the investigating Officer and the Patwari Halqa who prepared the scaled site plan, has not confirmed any mark of firing. Mirza Shoukat Hayat, the investigating Officer deposed in cross-examination that he has not seen any of the bullet marks on the wall of *Masjid* nor on the school. Similarly, the patwari Halqa while preparing the site plan also didn't find any of the bullet marks, thus, according to the statements of the witnesses, if the accused made indiscriminate firing, why

there would not be bullet marks on the walls or pillars of the Masjid. The circumstances highlighted above make the presence of the complainant and the other eye-witnesses highly doubtful, therefore, no explicit reliance can be placed on their testimony. Reliance in this regard may be placed to the case reported as *Ishtiaq Masih vs. The State* [2010 SCMR 1039], wherein, it has been held as under: -

> "7. After considering the material available on record, we are of the considered view that the prosecution has failed to establish the presence of both the witnesses at the time and place of incident beyond any reasonable doubt, therefore, it is very unsafe to rely upon such witnesses on capital charge. After excluding the evidence of ocular testimony, we are left with the corroborative piece of evidence of alleged recovery of blood-stained Chhuri on the pointation of the appellant. This is a corroborative

> piece of evidence which by itself is insufficient to convict the appellant in the absence of substantive piece of evidence. Reference is invited to Noor Muhammad v. State 2010 SCMR 97."

In another case reported as *State through Advocate-General, Khyber Pakhtunkhwa, vs. Muhammad Rafique & others* [2019 SCMR 1150], the same view has been taken and it has been observed as under: -

> "3. Magnitude of calamity and concomitant trauma for the family, notwithstanding what weighed with the learned High Court nonetheless is improbability of complainant's presence at the crime scene during the fateful hours. Emotional attachments apart it is rather unusual for a woman more so in a *pashtoon* rural neighborhood to accompany her sons at a public thorough fare who had already spent preceding day in her company. Prosecution's dilemma has been further compounded by deviation of Inzar Gul from his previous

> statement; conflict between ocular account and medical evidence noticed by learned High Court is not unrealistic. Once presence of Mst. Poshan, PW is found suspect, the testimony of Inzar Gul is also cast away. In this backdrop, impugned acquittal is premised on a prudently possible view which cannot be reversed merely on contra contemplation. Appeal is dismissed."

This view is further fortified from the case reported as *Pathan vs. The State* [2015 SCMR 315], it was observed that: -

> "5. Keeping in view the provision of Article 129 of the Qanun-eShahadat Order, which is to the following effect:-
>
> 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 presence of witnesses on the crime spot due to their unnatural

> conduct has become highly doubtful, therefore, no explicit reliance can be placed on their testimony. They had only given photogenic/photographic narration of the occurrence but did nothing nor took a single step to rescue the deceased. The causing of that much of stab wounds on the deceased loudly speaks that if these three witnesses were present on the spot, being close blood relatives including the son they would have definitely intervened, preventing the accused from causing further damage to the deceased rather strong presumption operates that the deceased was done to death in a merciless manner by the culprit when he was at the mercy of the latter and no one was there for his rescue. In similar circumstances, the evidence of such eyewitnesses was disbelieved by this Court in the case of Masood Ahmed and Muhammad Ashraf v. The State (1994 SCMR 6)."

23. Raja Inamullah, Khan, the learned Advocate appearing for convict-appellant also stated that the occurrence, happened in the day light and 30/35 shops were opened at that time is

indicative of the fact that there were several possible independent witnesses who were not presented before the Court by the prosecution to support its case, rather, only interested, inimical and related witnesses appeared, in such like situation, evidence of such witnesses has to be taken with care and caution and very strong and independent corroboration is required. The perusal of the record shows that there were certain independent witnesses available at the place of occurrence but despite that, they were not produced before the Court. During the cross-examination, P.W. No. 20, Mirza Shoukat, Inspector/SHO, also admitted that there were independent witnesses available at the place of occurrence but due to the fact that they were not supporting the version of the prosecution, were not

produced before the Court. The relevant portion of his statement is reproduced hereunder for better appreciation: -

"یہ بات درست ہے کہ DSP نثار صاحب بھی شعبہ انوسٹی کیشن کے تھے ۔ڈسپنسر اشفاق متعینہ رہیاں گالہ سے بھی دریافت کی تھی۔ ان کے ضمنی میں اظہارات درج ہیں۔ انہوں نے وقوع کی نسبت کچھ بتایا تھا چونکہ ان کے بیانات استغاثہ کے موقف کی مکمل تائید نہ کرتے تھے اس لئے ان کے بیانات زیر دفعہ 161 ض ف تحریر نہ کیے تھے"۔

24. The above statement clearly shows the mala-fide on the part of the prosecution that despite the availability of the independent witnesses, only related and interested witnesses were produced before the Court. It is a settled principle of law that where a witness is inimical to accused and there is no independent corroboration of such a witness, then it makes the prosecution case doubtful. Reliance may be placed on a case

reported as *Muhammad Yaqoob v. The State & 2 others* [2014 SCR 121], wherein it has been held that:

> "8. Of course, if the witness is interested, partisan or inimical towards the accused, his deposition cannot be accepted unless corroborated by such unimpeachable independent evidence which by itself may be sufficient to record conviction."

Similarly in a case reported as *Nazir Ahmed and others v. The State* [PLD 1962 SC 269], it has been held that:

> "But we had no intention of laying down an inflexible rule that the statement of an interested witness who has (by which expression is meant a witness who has a motive for falsely implicating an accused person), can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But

> he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty the Court will in the case of an ordinary interested witness look for some circumstances that gives sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. This is what is meant by saying that the statement of an interested witness ordinarily needs corroboration. For corroboration it is not necessary that there should be the word of an independent witness supporting the story put forward by an interested witness. Corroboration may be afforded by anything in the circumstances of a case which tends sufficiently to satisfy the mind of the Court that the witness has spoken the truth."

This view is further fortified from the reported judgment of Supreme Court of Pakistan,

titled *Haji M. Illahi & others vs. Muhammad Altaf alias Tedi & others* [2011 SCMR 513], wherein, it has been observed as under: -

> "The statements of all the five eye-witnesses are consistent even though subject to the cross-examination at length and their veracity was not shaken during cross-examination. Admittedly all the witnesses are interested and inimical witnesses. It is a settled law that the evidence of such witnesses has to be taken with caution and unless it is corroborated by an independent circumstances, it cannot be credited with truth as law laid down by this Court in Misry Khan's case (PLD 1977 SC 462). In the case in, hand, their statement are duly corroborated with following pieces of evidence as held by both the courts below:
>
> (i) Recovery
>
> (ii) Medical evidence
>
> (iii) Motive."
>
> "It would be useful to mention here that where the witnesses are inimical to accused persons, then the Court has to be more cautious and on

double alert while sifting the truth from the falsehood. Testimony of inimical and interested witness has to be deeply appreciated to find out the truth. Such evidence as a rule of caution could not be accepted by itself to record conviction. This view finds support from a case reported as Muhammad Sharif Khan vs. The State [1991 P.Cr.L.J. 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 aforesaid report clearly contains that

where a witness is inimical to the accused, then his evidence should be appreciated more cautiously and the Court should insist upon independent corroboration for recording conviction. It is well established principle of law that the testimony of a witness cannot be discarded merely on the basis of relationship with a party, unless he is so inimical that he has a motive for falsely implicating the accused persons, however where a witness is inimical, even then his evidence should be appreciated with due care and diligence and the Court should also insist upon independent corroboration of such evidence. This view finds support from a case reported as Muhammad Boota and others vs. The State [1992 PSC (Cr.)687]. It is pertinent to note that where a witness is inimical to accused and there is no independent corroboration of such a witness, then it makes the prosecution case doubtful. This view finds support from a case reported as Abdul Rahim vs. Muhammad Latif [1994 SCR 25]"

25. It is the settled principle of law that brief history of the crime is to be incorporated in a

specific column of the inquest report *"Mukhtasar Halat-e-Muqaddama*" and the same is supposed to be prepared after the registration of the FIR and at the time of post-mortem examination. The FIR was lodged on the same day of occurrence i.e. at 10:15 am, and the post-mortem examination was conducted at 03:00 pm, but amazingly, nothing has been mentioned in the inquest report nor any name of the accused and the witnesses except the complainant has been mentioned despite the claim of the prosecution that the matter was reported to police within three hours of the occurrence. Even the FIR number is not mentioned which is indicative of the fact that the FIR may have been lodged after due deliberation and at belated stage, might be after conducting the post mortem examination. Such circumstances alone

cast serious doubts about the veracity of prosecution case against the accused and the claim of the eye-witnesses to have witnessed the occurrence. This view is fortified from the case reported as *Haji Nisar Ahmed vs. Muhammad Murad and another*, [2003 SCMR 1588], wherein it has been observed as under: -

> "15. By now it is established law that conviction on capital charge may be passed only on unimpeachable ocular account, which is lacking in this case. Perusal of the recovery memos. And inquest report clearly shows that they were prepared after deliberation and consultation wherein the names of the respondents were not mentioned. It is not the case of the prosecution that during occurrence Muhammad Murad respondent received injuries and his clothes were blood-stained, its case is that he fired at some distance at the complainant party, so the recovery of blood-stained clothes of Murad in any case is not supporting the case of the prosecution rather it damages its case.

> Learned counsel for the respondents has rightly pointed out that report of the Serologist was not tendered according to Qanun-e-Shahadat Order."

A similar view has been taken by the Supreme Court of Pakistan in the case reported as *Mst. Yasmeen vs. Javed & another* [2020 SCMR 505], wherein, it has been held as under: -

> "3. It has been observed by us that the learned appellate court, after proper reappraisal of evidence available on record, has rendered findings of acquittal in favour of respondent. In addition to the said findings, it has been observed by us that the occurrence in this case, as per prosecution, took place on 19.02.2005 at 10.00 p.m. The matter was reported to police in the intervening night of 19/20.02.2005 at 1.00 a.m (night). The postmortem examination on the dead body of Mst. Naheeda (deceased) was conducted by Dr. Faiqa Elahi (PW7) on 20.02.2005 at 8.50 a.m. Even if delay in conducting the postmortem examination on A the

> dead body of deceased, in the circumstances of the case, is ignored, the fact remains that in the relevant column of inquest report "brief history of crime", nothing is mentioned regarding facts of the case despite the claim of prosecution that matter was reported to police within three hours of the occurrence i.e. in the intervening night of 19/20.02.2005 at 1.00 a.m (night). This circumstance alone casts serious doubts about the veracity of prosecution case against the respondent and the claim of the eye-witnesses Mst. Yasmeen (PW5) and Mst. Kabalo (PW6) to have witnessed the occurrence."

26. It is also pertinent to mention here that the weapon recovered i.e. Kalashnikov is clearly mentioned in the FIR, but in column No. 12 of inquest report, only 'Fire Arm weapon', is mentioned which is the violation of mandatory provisions of section 174, Cr.PC. Mere mentioning of 'Fire Arm weapon" instead of specifically mentioning 'Kalashnikov' in the inquest report is

indicative of the fact that at the time of preparing the inquest report, this fact was not known to the eye-witnesses that which weapon was used during the occurrence, it also falsifies the story of alleged eye witness and supports the version of the defense that the FIR has been registered after due deliberation at belated stage. In the case reported as *Yusuf and others vs. The State* [1971 PCr.LJ 257], a similar proposition came under the consideration of Lahore High Court, wherein, the learned Lahore High Court observed as under: -

> "We are afraid we cannot place reliance on his statement especially when he has violated the mandatory provisions of section 174, Cr.PC in not mentioning the weapons of offence in column No. 12 of the inquest report although he knew that different weapon like Chhuri (knife), hatchet and sword had been used by the assailants. Mere mentioning of

> sharp-edged weapon in the column would not be enough."

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."

Same observation has been made 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 the other case reported as *Mst. Saddan Bibi vs. Muhammad Amir & others* [2005 SCMR 1128], it has been 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."

28. It is also contended by the learned Advocate for the convict-appellant that motive as alleged by the prosecution is not proved. It is a well settled principle that the motive plays a vital role in a murder case and the same is not necessary for the prosecution to allege, but for proving a case where the motive is alleged; it becomes the duty of the prosecution to prove the same, otherwise, it may create doubt in the prosecution story. In the case in hand, the motive as alleged was that 3/4 days ago a quarrel between the complainant and younger brother of Malik Mansha who was ultimately exonerated by the police under section 169 Cr.PC took place. The witnesses in their

Court's statements also alleged the motive that the complainant along-with Shahzad Hussain were sitting in a bus where Imran s/o Mansha Khan, Rizwan, Muhammad Yousaf and Qamar s/o Muhammad Bashir started quarrelling with the complainant but in this whole scenario, there was no role of the convict-appellant, nor his name was mentioned which also makes the prosecution story doubtful. In a case reported as *Mst. Farzand Begum and others vs. Dil Muhammad and others* [2020 SCR 367], this Court observed that it is not necessary for the prosecution to allege motive for proving the case but once it is alleged, it is the duty of the prosecution to prove the same otherwise it may create doubt in the prosecution story.

29. The statement under section 161, Cr.PC of Munir Hussain Shah, was recorded after a considerable delay of five days despite the fact that he is the family member of the deceased and in this regard no explanation whatsoever, has been furnished by the prosecution. It is an established principle of law that delayed recording of statement of the prosecution witness under section 161, Cr.PC reduces its value unless and until it is explained rendering justifiable reasoning. Reliance in this regard can be placed to the case reported as *Noor Muhammad vs. The State and another* [2020 SCMR 1049], wherein it has been held that: -

> "Similarly, Mst. Amina Bibi and Mst. Imtiaz Fatima introduced eye-witnesses of the occurrence also made their statements under section

> n161, Cr.PC on 31.12.2018, with the dealy of more than one and half year. It is established principle of law that delayed recoding of statement of the PW under section 161, Cr.PC reduces its value to nil."

The same view has been taken in the case reported as *Abdul Khaliq vs. The State* [1996 SCMR 155], wherein, it has been held that: -

> "Late recording of statement of a prosecution witness under section 161, Cr.PC reduces its value to nil unless delay is plausibly explained."

In a latest Judgment of Supreme Court of Pakistan, *titled Bashir Muhammad Khan vs. The State* [2020 SCMR 986], it has been held that: -

> "Delayed recording of statement of PW under section 161, Cr.pC reduces its value to nil unless and until it is explained rendering justiciable reasoning."

30. We feel that there were no compelling and substantial reasons for the High Court to interfere with the findings of the learned Sessions Judge, when the prosecution miserably failed to establish the guilt of the accused. It is already settled by the Courts time and again that for the purpose of giving benefit of doubt to an accused, more than one infirmity is not required, rather, single infirmity creating reasonable doubt in the mind of a prudent person regarding the truth of the charge, makes the whole case doubtful. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for the safe administration of criminal justice. In common law, it is based on the maxim, *"It is better that ten guilty persons be acquitted rather than one innocent person be convicted".* While 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*".

31. It is also notable that the learned High Court while modifying the judgment rendered by District Qazi *(one of the member of the District Criminal Court)*, reduced the sentence to three years simple imprisonment awarded to the convict-appellant under sections 13/20/65, of Arms Act without assigning any reason which also indicates that the High Court has not scrutinized the record in its true perspective. As per record, the alleged recoveries of the Kalashnikovs were seized from the

convict-appellant and other accused vide recovery memo Ex-PS, Ex-PO and Ex-PM. The recovery witnesses mentioned in the recovery memo are *Ibrar Hussain Shah and Ameer Arshad Shah* who categorically stated in their Court's statements that next to Malik Zaffar's house, are houses of Chaudhary family, who did not come at the time of recovery, thus, from the statements of both the witnesses, it is evident that the Kalashnikovs, which are shown to have been recovered from the possession of accused *Imran* and *Zafar Iqbal*, were recovered from their houses and inspite of availability of independent witnesses proved from statements of the recovery witnesses, the police has not fulfilled the requirements of Section 103, Cr.PC, hence, by relying on the statements of these two witnesses, one of whom is the brother and the other

is the brother-in-law of the accused, as is discussed in the preceding paragraphs that if prosecution intentionally not produce the independent witnesses despite availability, the statements of close relatives cannot be blindly relied upon. Moreover, the recoveries have also been affected on 01.10.2003, i.e. after considerable delay of 7/8 days which make the recovery of weapon doubtful. Reliance in this regard may be placed to the judgment of apex Court of Pakistan reported as *Arif Ali vs. Muhammad Ramzan alias Janan & others* [1991 SCMR 331], wherein, it has been held as under: -

> "The recoveries which were made after such a long delay and particularly when the articles were accessible to everyone in the house, were not believed in view of the close relationship of Muhammad Javaid

> with the deceased. The recoveries could not be used as a corroborative piece of evidence."

32. Before dealing with the points of issues involved in the case, it is pertinent to mention here that according to the celebrated principle of administration of criminal justice, the burden lies on the prosecution to prove its case through cogent evidence by exclusion of all the doubts. For the better administration of justice in criminal legal system, the accused person is always extended with the benefit of "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 account fully 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 to 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."

33. In the instant case the prosecution has failed to prove its case against the accused beyond any reasonable doubt which of course goes in favour of the accused. 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.

34. Criminal Jurisprudence is very clear in this regard whenever any reasonable doubt arises in the

prosecution case, the benefit thereof, would be extended to the accused as a matter of right. Wherever a person is accused of serious charges like the case in hand, all kinds of hate and disgust are naturally attached to the accused, but the Courts must abide by the principles of criminal jurisprudence and crucial aspect of appreciation of evidence by keeping the emotions and sentiments aside. The evidence in a criminal case must be scrutinized with due caution and care so that no probability of doubt is left behind but in a case where the prosecution story itself is full of visible doubts and loop-holes, then it would be against the principles of criminal jurisprudence and natural justice to rely on the same.

35. The rule which forms the backbone of criminal jurisprudence is that the guilt of the

accused, in order to justify conviction, must be proved beyond the shadow of reasonable doubt. When there exist contradictions in a criminal case, the story must be broken down into elements; more precisely; criminal elements and each element must be proved beyond reasonable doubt by the prosecution in order to form an unbroken chain which connects the accused with the guilt. The burden of proof always lies on the prosecution to prove the guilt of the accused which is a settled principle of law and requires no debate. In the case in hand, the learned High Court overlooked the above discussed golden rules of criminal jurisprudence which led to the impugned judgment. Finding of guilt against an accused cannot be based merely on high probabilities that may be inferred, but solely and firmly on the deep perusal of each

and every aspect of the case. Rule of benefit of doubt occupies a pivotal position in the Islamic law and is enforced rigorously. If the prosecution fails to prove the case beyond reasonable doubt, benefit of doubt no matter how slight it may be, must go in favour of the accused.

36. There is no denial and doubt of the fact that an innocent young man has lost his precious life and we have sympathy with the family of deceased but looking at the record and scenario of the whole case, we with a very heavy heart and disappointment, observe that, the investigation was carried out in lackluster manner and the prosecution story contradicts with the evidence on record while investigation speaks another story. Investigating officers dealing with the murder case are expected to be fair and diligent in their approach, and their

conduct should always be in conformity with law, procedure and rules and default violation or breach of duty is fatal to the case of prosecution. No serious and sincere effort was made during the process of investigation which demonstrates serious carelessness, negligence and incompetency on behalf of investigating agency.

37. In the light of principles of criminal jurisprudence, settled principles of law, interpretation and perusal of the record, we found many infirmities and contradictions in the prosecution case which have already been discussed in detail before and for better expression are summarized as following: -

i. Contradictions between statements of eye-witnesses and the medical evidence (Post

Mortem & FSL report), relating to the weapon of offence.

ii. Nomination of 12 accused persons with specific roles in the FIR, 8/9 of them being unknown persons but the sit-plan showed only three accused persons.

iii. Production of related, inimical and interested witnesses despite the fact that there was a clear possibility of production of independent witnesses because of the fact that the occurrence took place in the daylight and in a public place.

iv. Both the investigating Officers admitted in their Court statements that independent witnesses were inquired and ultimately dropped by the prosecution because of the reason that they did not support the prosecution version.

v. Site-inspections of both the members of the District Criminal Court (trial Court) revealed that the eye-witnesses could not witness the point where the convict-appellant was alleged to be standing and committing the alleged offence.

vi. The improvements made by the witnesses regarding weapon of offence in order to conform with the prosecution story.

vii. Post-mortem report & FSL report proves the fact that the cause of death of deceased was the bullet of 30-bore pistol, but neither any recovery or attribution of the same was found anywhere on the record.

viii. Delayed recoveries of alleged weapons (Kalashnikovs) from the accused persons

allegedly in the presence of witnesses who were interested, related and inimical.

ix. Delayed and incompetent preparation of inquest report (no names of accused and witnesses, description of weapon used and no FIR number).

x. Alleged story of indiscriminate firing to have occurred at the time of incident but nothing on record as such supporting this point.

38. With the above understanding of law relating to discussion on the infirmities in the prosecution evidence, we have come to the conclusion that the prosecution has failed to prove its case beyond any shadow of doubt. The learned High Court has overlooked serious pitfalls and grave infirmities in the prosecution evidence by adopting a superficial and cursory approach, not befitting the

seriousness of the crime charged in the present case. Therefore, while accepting the appeal filed by the convict-appellant, the impugned judgment of the High Court to his extent is set-aside and the appellant, Malik Zaffar Iqbal, is acquitted of the charges by extending him benefit of doubt in the best interest of justice. The judgment of the High Court to the extent of remaining accused is hereby maintained. The appellant, Malik Zaffar Iqbal, shall be released forthwith if not required in any other case.

39. So far as the other appeal filed by the *Mst. Mehfooz Fatima*, is concerned, the learned counsel for the appellants (in appeal No. 31/2022), raised a legal point that the appeal to the extent of acquitted accused was competent as to their extent both the learned members of the District Criminal Court

passed the unanimous judgment. Be that as it may, it makes no difference, as it has already been held in the preceding paragraphs that the prosecution has failed to prove its case beyond reasonable doubt, therefore, even if for the sake of argument, the appeal filed before the High Court is deemed to be competent, even then the same is not maintainable on merit.

JUDGE CHIEF JUSTICE JUDGE

Muzaffarabad,
03.11.2022.