SUPREME COURT OF AZAD JAMMU & KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:
Raja Saeed Akram Khan, CJ.
Kh. Muhammad Naseem, J.
Raza Ali Khan, J.
Muhammad Younas Tahir, J.

1. Cri. Appeal No.30 of 2019
(Instituted on 29.4.2019)

Tanveer Ahmed Bhatti s/o Muhammad Rashid r/o Ghausia Street, Ban Khurman, Tehsil and District Mirpur.

…. APPELLANT

v e r s u s

1. State through Advocate-General of Azad Jammu and Kashmir.

2. Dr. Moheed Pirzada,

3. Hadi Peerzada, sons,

4. Aneela Peerzada d/o Dr. Ghulam Mohiuddin Peerzada, caste Syed r/o House No.60, Sector F/2, Mirpur (legal heirs).

…. RESPONDENTS

2. Cri. Appeal No.39 of 2019
(Instituted on 31.5.2019)

Dr. Moheed Pirzada s/o Ghulam Mohiuddin Pirzada, caste Syed, r/o House No.60, Sector F/2, Mirpur.

…. APPELLANT

v e r s u s

1. Tanveer Ahmed Bhatti s/o Muhammad Rasheed r/o Ghausia Street, Ban Khurman, Tehsil and District Mirpur, presently confined in judicial lockup Mirpur.

…. RESPONDENT

2. State through Advocate-General of Azad Jammu and Kashmir.

… PROFORMA RESPONDENT

[On appeal from the judgment of the learned Shariat Appellate Bench of High Court, dated 27.3.2019, passed in Cri. Appeals No.100 & 101 of 2017]

FOR THE COMPLAINANT: Raja Inamullah Khan, advocate.

FOR THE CONVICT: Mr. Abdul Hameed, advocate.

FOR THE STATE: Ch. Shakeel Zaman, Additional Advocate-General.

Date of hearing: 26.01.2023

JUDGMENT:

Muhammad Younas Tahir, J.—Through both the captioned appeals, the consolidated judgment passed by the learned Shariat Appellate Bench of the High Court dated 27.3.2019, has been called in question, through which, while dismissing both the appeals filed by the parties, the sentence of life imprisonment awarded to the convict-appellant, Tanveer Ahmed Bhatti, by the District Criminal Court Mirpur, on 26.5.2017, has been maintained. As both the appeals are interlinked, arising out of the single occurrence, therefore, these have been heard together and being disposed of through the proposed judgment.

2. Dr. Moheed Pirzada, complainant, appellant in Cri. Appeal No.30/2019, herein, lodged a written report at the Police Station Mirpur, on 9.3.2013, stating therein, that he is the resident of Sector F-2, Mirpur, and works as a journalist. His parents were aged and weak and he had employed three servants for their look after. It was further submitted that Tanveer Ahmad Bhatti worked at their home for the past several years. He initially

joined as a driver but later also worked as a medical attendant to their father doing many basic tasks of a nurse. It was reported that since the stroke of their father in October last year, Tanveer became the most trusted person in that family set up and their mother relied upon him for almost every important task including her bank transactions. The complainant has two brothers and one sister. Baseer Pirzada is in US, Hadi is in Dubai and Dr. Aneela Kamil works as a consultant doctor in Abu Dhabi. It was reported by the complainant that on 2nd of March 2013, at around 11.00 am, while he was at Lahore, his sister called him from Abu Dhabi and informed that she had just spoken for about 30-40 minutes with their mother in Mirpur. She narrated that their mother complains of extreme weakness, vertigo, churning of head and cold and that according to Tanveer, her blood pressure and blood glucose levels have gone down. According to the complainant, the sister advised him to go to Mirpur to check and sort out whatever problem exists. On this, the complainant was surprised because their mother was not a diagnosed patient of any serious

illness, nor she was diabetic. He called his mother on her cell phone and landline number but no one attended the call. Ultimately, he called Tanveer Ahmed Bhatti, who informed him that his mother is not feeling well. She is sleeping and has instructed him that no one should disturb her. Tanveer also informed him that both the other servants, Yaser and Bashir, are on leave and he alone is taking care of the spouses. Tanveer Ahmed Bhatti asked him to call at around 3:00 PM, when his mother will wake up for her tea. As per the contents of FIR, he also informed the complainant that he had checked again and his mother's blood glucose and blood pressure were not normal. On this, the complainant informed his brother Hadi and sister Aneela that he will be leaving for Mirpur shortly. After this, the complainant again tried calling his mother through Tanveer around 3:00 PM, but he informed me that she was still sleeping and he should call later. The complainant kept on calling but could not get to speak with his mother. Meanwhile his younger brother Hadi Pirzada also tried to call the mother on her cell phone but she did not answer. He also called Tanveer and learnt that

the mother is taking rest and cannot talk. Finally, at around 4:30 PM, when the complainant had already left Lahore for Mirpur by GT Road, Tanveer agreed to let him talk to his mother, who spoke with him very briefly. According to the complainant, his mother sounded very drowsy and sleepy and had a slurred speech like someone who is drugged. He could not understand what she was saying, so he told Tanveer that he is going to call Dr. Zubair and his wife and he should wait for them. The complainant immediately called Doctor Zubair's cell number and informed his wife Qaisra Zubair of his mother's strange conditions and requested her to visit his ailing mother. Thereafter, he called Tanveer and told that Dr. Zubair and his wife are on their way. Tanveer confirmed that they have already called him about their arrival. According to the complainant, after 20-25 minutes he received a telephonic call made from Tanveer's phone by Mrs. Zubair, who was crying and told the complainant that when she approached his mother, she had already died. This was around 5.30 PM, so his mother must have died around 5:00 PM or so. The complainant reached

home in the evening. A lot of his relatives and people were already there. His brother Hadi arrived from Dubai. Their mother was buried at around 3:00 PM on the next day i.e., 3rd March, 2013. The complainant further narrated in the FIR that his other brother-Baseer Pirzada arrived from USA the next morning and they started probing into the circumstances of death of their mother and briefly discussed with family members and members of the medical community. The complainant narrated in the FIR that many things about her death surprised them; firstly, that she was a very active person in good health and apparently did not suffer from any major life threatening disease. Moreover, she did not discuss about any serious disease with her children or relatives. Furthermore, on the day of her death her dead-body was found in a very arranged position and during her ablution (*ghusal*), foul smelling dark brownish fluid emitted from her mouth. If she was indeed seriously ill on that day (2nd March) then why Tanveer neither called any doctor nor informed any relative or family friend at Mirpur and why did he not allow the complainant and his brother to speak with

her, despite his later claims that she was very sick. Lastly, it was found that Tanveer kept on refusing close family friends like Mrs. Raza to see their mother, who visited their home between 12:00 and 1:00 pm, the same day. According to the complainant, they soon found that their mother's gold jewellery (bangles, necklaces and tops etc.) was missing. Over the next 3-4 days, as they looked into her bank accounts, they found that cheques from her cheques No.27374559, 27374560 and 27374561 of the Habib Bank (Account No. 01900024493701) and cheques No.9098666 and 9098667 of UBL (Account No. 0010180175) were missing. They checked from the banks and found that on some of these cheques, the signatures were forged. They also found that Tanveer drew cheque No.9098666 of Rs.5,00,000/- from UBL on 2nd March, 2013, i.e. the day of the death of their mother and apparently someone gave approval to the bank on Tanveer's own cell phone, while their mother was dying. According to the complainant, they checked all these facts and collected the bank record and phone calls records over the last few days

and reached the conclusion that their mother did not embrace natural death. The complainant narrated that Tanveer Ahmad Bhatti has exploited the relationship of extreme trust he had with their mother and has murdered her for monetary gains either by poisoning her or using some medicines or by doing something to stop her breathing. It was prayed in the report that investigation should be started against Tanveer Ahmad Bhatti to punish him for all what he has done and to recover the stolen jewellery and cash from him and exhumation of their mother's grave and post-mortem of her body be conducted to determine the exact cause and circumstances of her death.

3. On this report, a case under sections 302, 381 and 406, APC, was registered against the convict, Tanveer Bhatti, at the Police Station Mirpur. The statements of witnesses under section 161, Cr.P.C. were recorded and site plan with illustrations was prepared. The accused was apprehended by the Police. During the investigation, he admitted the commission of offence while stating that he

administered two tablets of Xanax (sleeping pills) to the deceased on the intervening night of 1st and 2nd of March 2013 and next morning he gave three pills in the breakfast, injected insulin to her and killed her by asphyxiation while using a pillow. He also confessed drawing and taking away Rs.500,000/- from the bank account of the deceased and stealing her cell phone and jewellery. On his pointation, recoveries of the stolen money and jewellery were made from his residence situate at Ban Khurman. The pillow used for asphyxiation, the medicine used in the offence, insulin gun and empty pin, cell phone (Nokia 6700), sim and other incriminating material was recovered, and recovery memos were prepared. The DVD movie of extrajudicial confessional statement of the accused, the call record of his cell phone, that of the complainant, the landline number installed on the residence of deceased, were also seized while preparing the recovery memos. Similarly, the relevant bank record from UBL and HBL; cheques, cheque books of joint account of the deceased and her husband were taken into possession by the investigating officer. Three

cheques allegedly signed by the convict along with the cheques signed by the deceased were sent to the handwriting expert at FIA headquarter, Islamabad, for verification of the signatures affixed, which reportedly did not match. The statements of bank officials were recorded under section 161, Cr.P.C. A, footage of CCTV recording of the convict during withdrawal of the cheque was also obtained through the bank in the presence of witnesses. On the other hand, on the request of the complainant, exhumation of the dead body of the deceased was conducted for autopsy under the supervision of the medical board, consisting of four doctors, teaching at the MBBS Medical College Mirpur. The medical board accordingly submitted the final report showing the cause of death as asphyxia. The statement of the accused under section 164, Cr.P.C., was recorded on 21.3.2013, before the Additional Deputy Commissioner (General). During investigation, offences under section 419 and 468, APC, were added in the FIR. The crux of the police investigation is that the accused was employed by the complainant to look-after his ailing parents. Initially,

he was serving as a Driver, but later on, when Dr. Mohiyuddin Pirzada, father of the complainant, got seriously ill, the accused was assigned the duty of medical attendant and for that purpose, his salary was enhanced up to Rs.15,000/- per month. Besides him, two other servants were also available for household work. It was found that son of the accused was not well, due to which, he was in need of extra money. Allegedly, in the year 2011, he started stealing the ornaments from the house and resultantly a case under FIR No.243/2011 was also registered on 19.9.2011 in the offences under section 381, APC. Being the most trustworthy servant of the family, the accused had access to every household, therefore, he used to steal the cheques and draw the same from the Bank. On 18.12.2012, he drew a cheque of Rs.30,000/- from HBL. On 27.2.2013, he further drew Rs.20,000/- by affixing fake signatures of the deceased. The accused became a habitual offender and was in search of opportunity to draw larger amount and ornaments of the deceased. Meanwhile, on 1st March 2013, the other two servants of the family proceeded

on leave. The accused removed a leaf from the chequebook and gave two tablets of Xanax to the deceased, who used to take a half tablet daily. The heavy dose effected the deceased, who fell down in the washroom while brushing the teeth. The accused took her to her bed and served breakfast, through which he administered more three pills of Xanax. In the meanwhile, on 9:57 AM, the deceased tried to contact her daughter Dr. Anila, who is living at Abu Dhabi and a blank text message was delivered. Dr. Anila was alerted, who called back and the call was attended by the accused. She asked the accused to let her talk to the mother, who earlier refused on the pretext that she is taking rest but she insisted to speak to her mother. The deceased told her about poor health condition of her mother. Dr. Anila contacted the complainant and informed about the mother. The complainant started calling his mother. Meanwhile, the accused injected 60 cc insulin to the deceased, which was used for treatment of the husband of the deceased. At noon, PW-7, Suriyya Raza, came to see the deceased but the accused did not allow her and told that she is taking rest. The complainant again

tried to call his mother, but the accused did not allow to talk him and told that his mother is sleeping. Thereafter, the accused left for the Bank and got the cheque drawn. When he returned back, the deceased asked her for milk. The accused mixed three other tablets of Xanax in the milk and after taking the same, she became unconscious. The complainant asked PW-6 Dr. Qaisra Zubair on telephone to visit his mother on which the said witness called on their landline number and tried to talk to the deceased but the accused refused to forward the call and told that the deceased is well and taking rest. On this, Dr. Qaisra Zubair said that she is coming along with her husband to see the ailing lady. Foreseeing the coming scenario, the accused became troubled and strangulated the deceased with a pillow and sent her to death. When Mr. and Mrs. Zubair reached there, they found the lady dead.

4. The police presented the challan before the District Criminal Court Mirpur, on 18.5.2013. The charge was framed against the accused and read over to him, who negated the same and pleaded

innocence. The prosecution produced 35 witnesses in support of its case and exhibited the FIR, post-mortem report, site-plan, recovery memos, expert opinion, cheques and other incriminating material, to prove its case. After completion of the prosecution evidence, the accused was examined under section 342, Cr.P.C., who again denied the charge and pleaded not guilty. He got his statement recorded on oath, under section 340(2) Cr.P.C., however, did not produce any evidence in support of his alleged innocence. After completion of the trial, the learned trial Court convicted the accused, Tanveer Ahmed Bhatti and sentenced him to life imprisonment under section 302(b), APC. He was ordered to pay compensation of Rs.10,00,000/- to the legal heirs of the deceased under section 544-A, Cr.P.C. He was further awarded 5 years' rigorous imprisonment along with fine of Rs.10,000/- in the offence under section 381-A, APC, 5 years' rigorous imprisonment in the offence under section 406, APC, 5 years' rigorous imprisonment under section 419, APC and 5 years' rigorous imprisonment along with the fine of Rs.10,000/- in the offence under section 468, APC.

All the sentences were ordered to run concurrently. The convict was extended the benefit of section 382-B, Cr.P.C. The legal heirs of the deceased filed an appeal before the learned Shariat Appellate Bench of the High Court for enhancement of the sentence and award of the death penalty while the accused challenged his conviction with the prayer of acquittal, while filing the counter appeal. The learned Shariat Appellate Bench of the High Court, after necessary proceedings, through the impugned judgment dated 27.3.2019, dismissed both the appeals. The judgment passed by the learned Shariat Appellate Bench of the High Court on 27.3.2019, is the subject of instant appeals, by right.

5. At the very outset, the learned counsel for the complainant-respondent raised two preliminary objections; firstly that the appeal filed by the convict-appellant is not maintainable as one of the legal heirs of the deceased has not been impleaded as respondent; and secondly that the convict-appellant has incompetently filed appeal before the High Court, whereas, under section 9 of the Azad

Jammu and Kashmir Constitution of Shariat Appellate Bench of the High Court Act, 2017, jurisdiction of any Court including the Supreme Court and High Court is barred in the matters in which the Shariat Appellate Bench has the power to adjudicate and determine.

6. In reply to the preliminary objections, the learned counsel for the convict-appellant, stated that in view of the latest verdict of this Court laid down in the case reported as *Tasawar Hussain vs. The State & others* [2016 SCR 373], the objection pertaining to not arraying one of the legal heirs of the deceased is not tenable. According to the learned counsel, the appeal was filed before the Shariat Appellate Bench of the High Court, however, due to human error the words "High Court" have been mentioned in the title of appeal and the appeal filed by complainant-party before the lower forum is also liable to be dismissed on the same ground, if the objection prevails.

7. Before hearing the case on merits, it was deemed proper to firstly deal with the preliminary objections raised by the learned counsel for the

complainant. His first and the foremost objection is that the appeal filed on behalf of the convict-appellant is not competent for the reason that he failed to array Dr. Basir Peerzada, one of the legal heirs of the deceased, as respondent, whereas, in view of the principle of law laid down by this Court in the case reported as *Muhammad Riaz & others vs. State* [PLJ 2006 SC(AJK) 120], he is the necessary party. Perhaps, the learned counsel has not gone through the latest opinion of this Court as laid down in the case reported as *Tasawar Hussain vs. The State & others* [2016 SCR 373], wherein, it has been held that:

> "We would like firstly to deal with the preliminary objection raised by the complainant and the heirs of the deceased. According to the learned counsel, the convict-appellant has not arrayed the heirs of the deceased as party in appeal before the Shariat Court, thus, in the light of the principle of law laid down by this Court in the case reported as *Muhammad Riaz & 2 others vs. The State* [2006 SCR 170] appeal before the Shariat Court was not competent meaning thereby it will be deemed that no appeal against the conviction order of the trial Court has been filed before the Shariat Court. Consequently, the instant appeal of

the convict before this Court is also not maintainable. We have considered this argument in the light of the facts of the case. As in the trial Court the conviction order has been passed in the case filed by the State. Neither, the legal heirs were party before the trial Court nor there was any private complaint of the legal heirs upon which conviction order has been passed. Whereas the accused in their appeals have arrayed apart from the State, Saghir Ahmed, complainant, as respondent. Although, the arraying of complainant, Saghir Ahmed in presence of State is superfluous, however, be that as it may, as mentioned hereinabove, the legal heirs were neither party before the trial Court nor on their behalf there was any complaint on which conviction order was passed, therefore, they were not necessary and due to their absence the appeal before Shariat Court could not be deemed as incompetent. As the legal heirs filed separate appeals before the Shariat Court and through the impugned consolidated judgment their appeals have also been disposed off and the convict-appellant in appeal before this Court has arrayed them as party, thus, the objection being baseless, has no substance. So far as the principle of law laid down in the judgment reported as *Muhammad Riaz & 2 others vs. The State* [2006 SCR 170] is concerned, according to the peculiar facts of the case, has no application as in that case, the conviction order was passed on appeal filed by the complainant/legal heirs of the victim and they were party before the lower Court whereas

> no such situation exists in this appeal hence, the argument stands repelled."

In the instant case also, the conviction order against the convict-appellant was passed by the learned trial Court on the case filed by the state, whereas, the learned Shariat Appellate Bench of the High Court has only maintained the conviction recorded by the trial Court. In this situation, the objection raised by the learned counsel for the complainant-respondents is not tenable, especially when the appeal on behalf of the complainant-party has also been filed.

8. The second objection of the learned counsel for the complainant-respondents is that under section 9 of the Azad Jammu and Kashmir Constitution of the Shariat Appellate Bench of the High Court Act, 2017, jurisdiction of any Court, including the Supreme Court and High Court is barred in the matters in which the Shariat Appellate Bench has the power to adjudicate and determine. In this context, he submitted that the convict-appellant has filed the appeal before the High Court and not before the Shariat Appellate Bench of the High Court,

hence, his appeal was incompetent. When this situation was confronted to the learned counsel for the complainant, he very graciously admitted that both the appeals have been filed incompetently and both are not maintainable and liable to be dismissed. To resolve the objection, we have carefully examined the file of Shariat Appellate Bench of the High Court. It transpires from perusal of the original file that the proceedings in both the appeals have been conducted by the learned Shariat Appellate Bench of the High Court. So, we are constrained to hold that due to human error, while drafting the appeals, inadvertently the words “before the High Court” instead of “before the Shariat Appellate Bench of the High Court” were written, whereas it is evident from the record that the appeal was presented to, entertained by and entered in the register of the Shariat Appellate Bench, and not the High Court. Furthermore, the impugned judgment is also passed by the Shariat Appellate Bench. Thus, in our considered opinion, it makes no difference and in the interest of justice, while rejecting the objection raised by the learned counsel for the complainant,

the Court proceeded to hear the arguments on merits.

9. Mr. Abdul Hameed, the learned advocate, while arguing the case on behalf of the convict (appellant in Appeal No.30/2019), submitted that the conviction passed by the learned trial Court and maintained by the learned Shariat Appellate Bench of the High Court is not just, appropriate and plausible, therefore, the same is liable to be recalled. According to the learned counsel it is a case of circumstantial evidence and no direct evidence is available in the case and conviction could not be recorded in such like cases. The FIR has been lodged with due deliberation, with a considerable delay of eight days, much after burial of the deceased, which is an afterthought just to enrope the convict in a baseless allegation. According to the learned counsel, death of the deceased is suspected. She was an old suffering lady of 70 years, who died in natural circumstances. The cause of death is unclear and ambiguous. The prosecution case is full of doubts; under law the benefit of even slightest doubt has to be extended in

favour of the convict, but the learned Courts below have misinterpreted this golden principle of law, while awarding the sentence. The learned counsel next submitted that the complainant has taken two positions about cause of death of the deceased, i.e. asphyxia and use of drugs, therefore, the manner of occurrence is uncertain. He added that the complainant requested for conducting of exhumation and post-mortem of the dead-body but the proceedings were conducted in violation of Section 174, Cr.P.C. According to the learned counsel, 20 jars containing samples from the dead body were sent for chemical examination but no memo was prepared, therefore, the report is not reliable. The learned counsel further submitted the constable Pervaiz Akhtar, who was deputed for obtaining FSL report, has not been entered in the list of witnesses and the prosecution has abandoned him for the reasons best known to them. Similarly, PW-34, Muhammad Riaz, was cited as witness of the parcel but he was not produced before the Court for getting his statement recorded. There is also no explanation as to who prepared the parcel and sent the same for

forensic. The learned counsel referred to the statement of PW, Nabeela Shah, ASI, who deposed that no parcel was prepared. Even otherwise, the report suggests that no drug was found in the blood. Moreover, sample of the lungs was not sent for chemical examination, to prove the allegation of Asphyxia. The learned counsel submitted that according to the prosecution story, tranquiliser and insulin were administered to the deceased but from the evidence, administration of drug has not been proved, which makes the prosecution story further doubtful. The learned counsel submitted that the real cause of death of the deceased has been described in the post-mortem report as injury No.1 which is suggestive of something leading to asphyxia and death but at the same time it was opined that final opinion will be concluded after receipt of the FSL report, meaning thereby that real cause of death was not established. The learned counsel zealously submitted that the challan was presented on 8.5.2013 and FSL report was received on 5.6.2013, thus, the final post-mortem report was not presented and the interim report was not based on the opinion

of FSL. The learned counsel added that the pillow, insulin gun and insulin pin were also not sent for forensic. In the FSL report no insulin was found in the blood and only found in the skin. Even if the same was injected, the quantity is such that it cannot cause harm. The report is otherwise not relevant for the reason that the parcels were not safely prepared and memos are also not available, therefore, the real cause of death is not clear. The learned counsel further argued that the deceased belonged to a family of doctors. She herself was surviving on medicine. The medicine was present in their home. Tablet Xanax was ordinarily used by her, which is not dangerous and incriminating. The quantity of insulin is also not established from the record/evidence; therefore, no final opinion can be formed about the real cause of death and the case does not fall within the ambit of culpable homicide as provided in section 299, APC. The learned counsel maintained that the post-mortem was conducted by the visiting professors of MBBS college, which is not legally authentic for the reason that the college was not notified as such. Only a Civil Medical Officer is

authorised to conduct the post-mortem, therefore, the report is not reliable and the same is self-contradictory also for the reason that Dr. Pervaiz, one of the members of the board, was not cited as witness to testify the findings of the board. He contended that the deceased herself drew the cheque of Rs.500,000/. The signatures on the referred cheque match with those made on the cheque of Rs.20,000/-. While referring to the handwriting expert report, the learned counsel submitted that the expert was not cited as witness, whereas under section 510, Cr.P.C., the handwriting expert is not exempted from appearing before the Court to testify his expert opinion, so that he may be cross-examined. According to the learned counsel the recovery of jewellery is also doubtful. The jewellery was not used one and was new whereas, the prosecution case is that convict put off the ornaments from the deceased. The prosecution version is not supported from the record or evidence. He added that the prosecution witnesses are closely related with each other, and no impartial or independent witness was cited by the prosecution.

The learned counsel forcefully submitted that the recoveries allegedly made from the place of occurrence are doubtful for the reason that the convict being most reliable servant, was in the knowledge of each and everything, thus, his knowledge about ornaments and cell phone of the deceased was not incriminating or unnatural. The learned counsel further attacked the recovery while submitting that it was categorically deposed by Ahtesham Shahid, PW-17, that the recovery memos were prepared in the police station whereas, the other witness; PW-16, Rashid Iqbal, contradicts the same while stating that the items were recovered from the house of the convict. While referring to the statement of bank official, the learned counsel submitted that the said witness deposed that the cheque of Rs.500,000/- was drawn on 2.3.2013. The cheque was genuine. The Bank Manager verified the same after calling the account holder. The call data was obtained, therefore, the allegation that the convict changed his voice and called the bank manager as account holder, was not proved from cogent and reliable evidence. The learned counsel

next submitted that the statement of the convict under section 164, Cr.P.C. was recorded on 21.3.2013, after considerable delay as the FIR was registered on 9.3.2013. The convict was arrested prior to the registration of FIR. Hadi Pirzada, PW-2, has deposed in his statement that the convict was apprehended on 6th/7th March. The confessional statement, which was later on, retracted, carries no legal credibility for the reason that the same was recorded in police custody under police pressure. The statement was recorded by Ch. Muhammad Tariq, ADM, as the Magistrate, who constituted the medical board, gave remand of the convict and recorded his statement under section 164, Cr.P.C.. The learned counsel pointed out that the confessional statement of the convict is not certified, as required by section 364, Cr.P.C. The magistrate deposed in his statement that he did not record the statement, rather the same was written by his clerk, i.e. Reader. PW-28, Haq Nawaz, Reader of the office of ADM negated the stance in his cross examination. Thus, the confessional statement is not worth consideration and was wrongly based as one of the grounds for

convicting the convict. The learned counsel also questioned the constitution of medical board while submitting that the board was not constituted by the District Magistrate or the Additional District Magistrate but the same was constituted by the DG Health, who was not legally competent to do so. According to the learned counsel, Dr. Riffat Sultana, PW-25, deposed in her statement that she has reported, what the Board has told her. Dr. Nadeem, one of the member of medical board was not cited as witness. The report was interim in nature and not final. On the basis of such findings, conviction could not be recorded. The learned counsel further argued that the prosecution has failed to prove the motive. The deceased was an old lady and ailment of the parents was not in the knowledge of the complainant and his brothers and sister. The learned counsel submitted that the deceased wanted to visit Shifa International Hospital Islamabad, so she asked the convict to bring money from the bank. The alleged recovery of the amount, insulin and pillow was not made from the convict. It oozes from the prosecution case that Dr. Pirzada had disinherited his children

while executing a will-deed, the contents of which are admitted by the complainant party. The convict was one of the attesting witnesses of the deed, therefore, the complainant party was inimical to him and was of the impression that the convict persuaded their parents to disinherit them. Due to this reason, a manipulated and afterthought attempt has been made to falsely implicate the appellant in a baseless case, submitted the learned counsel. The deceased died in natural circumstances. It cannot be ruled out that the deceased might have asked the convict to inject the medicine for her treatment. The spouse of the deceased never complained about unnatural death of the deceased. The learned counsel concluded that the prosecution case is highly doubtful and under law, the convict is entitled to get the benefit of every single doubt. The learned counsel prayed for acquittal of the convict-appellant Tanveer Ahmed Bhatti and in the alternate, for award of lesser sentence.

10. While controverting the arguments of the learned counsel for the convict-appellant and arguing

the appeal filed by the complainant, for enhancement of the sentence awarded to the convict, Raja Inamullah Khan, the learned advocate, submitted that both the Courts below, after appraisal and reappraisal of the evidence, found the convict-appellant fully involved in commission of the heinous crime of murder, so, it was enjoined upon the Courts below to award the death sentence to the convict in the circumstances of the case. The learned counsel submitted that the convict was the most reliable person of the family so that the deceased had built a house for his family's residence. No other person was available for looking after the old couple. He was in-charge of the servants. On the day of occurrence, he intentionally sent both the other employees Yasir and Muhammad Bashir (PWs 9 and 10) on leave whereas, earlier both the servants never availed leave jointly. The learned counsel refuted the argument regarding delay in filing of the FIR while submitting that the contents of the FIR are self-explanatory in this regard. According to the learned counsel, if the complainant party wanted to falsely drag the convict into the offence on account of so-

called enmity, they would have nominated him on the day first, but they did so after entire satisfaction regarding the conduct and behaviour of the convict and during primary investigation, he was found suspected. The prosecution has fully proved all the links of the chain of circumstantial evidence. No enmity has been alleged or proved to falsely enrope the convict in the case. According to the learned counsel, the defence has not suggested in the cross examination as to why and how the convict was implicated. The learned counsel added that it is a rare phenomenon that leaving all other persons, relatives, employees, etc., only the convict would have been implicated. The deceased was never ill to such extent; therefore, her unexpected death attracted the attention of the complainant party, which resulted into the conviction of the convict. The learned counsel submitted that the convict did not allow Suriyya Raza, PW-7, to meet the deceased on the fateful day, as is evident from her statement and that of PW-8, her driver, who also affirmed the allegation. It is also on the record that Bushra Iqbal, PW-10, called the deceased but the convict did not

forward the call. All the family members were out of the country, except the complainant, who was at Lahore. Only one blank text SMS from the cell phone of the deceased was sent, meaning thereby that she was unable to write something, due to which the attention of the family members was attracted. They called Dr. Zubair, who along with his wife, Dr. Qaisra Zubair approached there and found the deceased dead. The complainant informed the convict about their arrival. Mr. and Mrs. Dr. Zubair also called the convict and informed that they are visiting the deceased and the complainant is also coming to Mirpur. On this, the convict was alarmed, and he killed the deceased while strangling her with pillow. The learned counsel submitted that the conduct of the convict may be appreciated from the circumstances of the case that neither he allowed anybody to visit the deceased nor let anybody to call her. The learned counsel submitted that the conduct of the guilt is further proved from the fact that the family members of the deceased firstly found the jewellery missing and during further investigation, it was found that he also got the bogus cheque drawn

from the bank without authority. According to the learned counsel, the recoveries have been made on the pointatioin of the convict, in the presence of impartial and independent witnesses, from his exclusive possession. The learned counsel submitted that under section 510, Cr.P.C., every expert is exempted from personal appearance before the Court as witness, hence, the handwriting expert report is conclusive proof. Even otherwise, the same was put to the convict in his examination under sections 242 and 342, Cr.P.C., who admitted the same. The only objection is that the expert was not cited as witness, which is not compulsory and mandatory under law. The convict could cite the said witness when his statement under section 342, Cr.P.C. was recorded, but he did not do the same. The learned counsel submitted that the stance taken by the convict that the deceased was not able to attend the call is contradictory with the second version that she herself visited the bank to get the cheque cashed. The prosecution has fully proved the case beyond any shadow of doubt. The learned counsel further elaborated that from the evidence it

is established that the convict left the bank, attended the confirmation call of the bank official and soon after the call was finished, he returned to the bank, which itself is an ample proof of the offence. The learned counsel submitted that the cash and jewellery were recovered on the same day and the recovery witnesses testified the same in their statements. The learned counsel next submitted that it has rightly been deposed by the Magistrate in his statement that the statement of the convict under section 164, Cr.P.C., was not written by him, rather his clerk wrote the same. According to the learned counsel, Haq Nawaz, Reader of the office of the District Magistrate, has also not negated the prosecution version rather he deposed that he dispatched the letter along with the statement. He has actually not recorded the statement and the same was written by the clerk of the office. The learned counsel submitted it is nowhere the case of defence that the statement was not written by the clerk. The Magistrate has certified the statement in his court statement and there is no flaw in the evidence. The evidence cannot be discarded mere

due to minor irregularity or discrepancy. The prosecution has otherwise proved its case through the complete chain of circumstances and corroboratory evidence, therefore, the objections raised by the other side are not worth consideration. The learned counsel next argued that although the law has been adopted in Azad Jammu and Kashmir as it is, however, notifying of the Civil Medical Officer is not the practice in Azad Jammu and Kashmir. Any Medical Officer of the vicinity may be authorised to prepare the post-mortem report. The medical board, which conducted the post-mortem and prepared report, consisted upon senior doctors, visiting faculty of MBBS College Mirpur. The board was constituted in the result of correspondence between the District Magistrate and the Director General Health. At the relevant time, the Additional District Magistrate was functioning as the District Magistrate, in the absence of the District Magistrate. The said witness has testified the evidence regarding constitution of medical board etc. The learned counsel submitted that the post-mortem report has been based on the FSL report, and not the chemical examination. Three

members of the board have testified the same in their statements before the Court. The parcels of the samples were prepared by the doctor and not by the police, therefore, recovery memo was not required. The doctors have affirmed preparation of the parcels and the Investigating Officer has testified sending of the same to FSL. The sending and bringing back of the parcels has not been challenged by the convict during the trial proceedings. The objection remains to the extent of transportation, which was not taken by the convict in his statement under section 342, Cr.P.C. The guilt is otherwise proved and the evidence cannot be discarded due to some defective investigation, if any. The learned counsel continued that the defence version that insulin was not found in the blood nor was of such a dangerous quantity, cannot be considered also for the reason that insulin is not shown as the sole cause of death in the report, rather a series of acts has been mentioned, including tranquiliser, asphyxia etc., therefore, the guilt is established. The learned counsel further argued that the confessional statement of the convict under section 164, Cr.P.C., was recorded on the last day of

remand, after which he was never taken to the police, therefore, the same carries evidentiary value. The case is also supported from the DVD prepared in the office of SSP, in the presence of four notable persons. The said witnesses have no relation with the complainant family, nor they are inimical towards the convict. The DVD has been testified by the witnesses in the statements recorded before the trial Court. The learned counsel submitted that the defence version that the pillow was not sent for forensic also carries no value for the reason that it has been opined in the medical report that due to pressing the pillow, the lip of the deceased was injured/torn. Finally, the learned counsel submitted that both the Courts below have concurrently come to the conclusion that the convict is fully involved in a case punishable with death sentence and the principle of expectancy of life is not attracted. In these circumstances, the convict was liable to be awarded the death sentence. The learned counsel added that the convict is involved in an offence, which has affected the whole civil society, thus, he does not deserve any concession or leniency by the

Court. The learned counsel prayed that while ignoring the minor natural discrepancies, keeping in view the scale of crime, the sentence awarded to the convict may be enhanced while awarding the death sentence. In support of his arguments, the learned counsel referred to and relied upon the below-mentioned case-law:

i. *Khurshid vs. The State* [PLD 1996 SC 305],

ii. *Athar Aziz vs. The State* [1996 SCR 225],

iii. *Abdul Khaliq vs. Jehangir & another* [1999 SCR 330],

iv. [2001 P.Cr.L.J. 827],

v. *Farmanullah vs. Qadeem Khan & another* [2001 SCMR 1474],

vi. *Abdul Rashid & 3 others vs. Abdul Ghaffar & 5 others* [2001 P.Cr.L.J. 524],

vii. *Zar Gul vs. The State* [PLJ 2004 Cr. C (Peshawar) 79],

viii. *Qasim alias Naeem vs. The State* [2004 P.Cr. L.J. 345],

ix. *Muhammad Khurshid Khan vs. Muhammad Basharat & another* [2007 SCR 1],

x. *Liaqat Hussain & another vs. Ulfat Kahn & another* [2007 SCR 39],

xi. *Ghulam Qadir & others vs. The State* [2007 SCMR 782],

xii. *Fazal Wadood vs. State & another* [PLJ 2007 SC 97],

xiii. *Arshad Mehmood vs. Raja Muhammad Asghar & another* [2008 SCR 345],

xiv. *Muhammad Tahir Aziz vs. The State & another* [2009 SCR 71],

xv. *Muhammad Latif Butt vs. Shehtab & others* [2009 SCR 432],

xvi. *Munawar Hussain & 2 others vs. Imran Waseem & another* [2013 SCR 374],

xvii. *Muhammad Tasleem & another vs. The State & another* [2014 SCR 893],

xviii. *Muhammad Babar vs. State through Advocate-General* [2014 SCR 1585],

xix. an unreported judgment of this Court delivered in the case titled *Nani Sultana vs. Tanveer Ahmed* (Cr. Appeal No.70/2019), decided on 06.6.2022), and

xx. another unreported case titled *Muhammad Riaz alias Kodu vs. State & others* (Cri. Appeal No.26/2018, decided on 26.7.2022).

11. Ch. Shakeel Zaman, the learned Additional Advocate-General, adopted the arguments of the learned counsel for the complainant and additionally submitted that the prosecution has proved the case through reliable circumstantial evidence corroborated by the other evidence. There is no break in the link of chain of circumstances. The incriminating material was recovered on the pointation of the convict. The

learned Additional Advocate-General asserted that Nabeela Shah, ASI, is the witness of exhumation and the parcels have been prepared by the doctors, therefore, the evidence is as good as it may be.

12. We have heard the learned counsels for the parties and the learned Additional Advocate-General at extensive length and gone through the record made available with utmost care.

13. On the written report of the complainant, a case under sections 302, 391 and 406, APC, was registered against the convict at the Police Station Mirpur on 9.3.2013, briefly on the allegation that in order to procure undue monetary benefits, the convict, Tanveer Ahmed Bhatti, contaminated the meal while adding drugs and administrated the same to the deceased more than once. The deceased got physically down. The convict stole cheque from her cheque book and by making fake signatures, drew Rs.500,000/- from the bank. In the meanwhile, complainant, his sister and brothers tried to contact their mother repeatedly, but the convict-appellant did not let them talk to her on the pretext that she is

taking rest and is unable to attend the call. On the insistence of Dr. Anila Kamil, daughter of the deceased, the convict let her talk to her mother, who informed her about her poor health condition. After being informed by Dr. Anila, the complainant left Lahore for Mirpur and called Dr. Zubair and Dr. Qaisra Zubair to see his mother. The convict was alarmed about the coming situation, hence, he asphyxiated the deceased with a pillow, due to which the old lady expired. The prosecution produced 35 out of the 40 witnesses cited in the calendar and exhibited the record and the incriminating material, to prove its case. After completion of the trial, the learned District Criminal Court Mirpur sentenced the convict in the terms indicated in the earlier part of the judgment and on filing of the appeals from both sides, the learned Shariat Appellate Bench of the High Court maintained the conviction and dismissed both the appeals filed by the convict as well as the complainant party.

14. Undoubtedly, this is case of unseen occurrence and the whole prosecution story is based

upon circumstantial evidence. In such like cases, the evidence must be inter-linked to make out a single unbroken chain and every chain of evidence of prosecution must be linked with the other chain of evidence and corroborated by the other available corroboratory evidence. It may also be observed here that in the cases of circumstantial evidence, the required standard of proof is quite different as compared to the cases of direct evidence. Although, in the case, in hand, the learned trial Court has very ably dealt with and appreciated the evidence and the learned Shariat Appellate Bench of the High Court has also briefly reappraised the same and both the Courts below have uniformly recorded their opinions, however, for safe administration of criminal justice and being a case of circumstantial evidence, we have carefully gone through and analysed the evidence, though reproduction of the extract of statements of the witnesses is avoided for the sake of brevity, because in the judgments passed by the trial Court and learned Shariat Appellate Bench of the High Court, the statements have been discussed in detail. The record of the learned trial Court reveals that

each of the prosecution witnesses was examined in detail and was taken to lengthy cross-examination. Despite such lengthy cross-examination and suggestions, their testimony remained in consistence with each other, and the defence failed to obtain anything beneficial for the convict-appellant. Although the defence has taken plea of enmity to falsely enrope the convict in the case, however, the defence has itself taken the version that the convict was the most reliable servant of the family, who was highly paid as compared to the other servants to take care of the old spouses. Even if for the sake of augments, it is presumed that the complainant party was inimical towards him for certain reason, the convict could have been maligned and nominated on the day first but the contents of FIR are self-explanatory that after primary investigation, the complainant party satisfied itself on all counts that the convict has committed the offence just to score and cover his ill-gotten gains. The story narrated in the FIR has been supported by the complainant, his brothers and sister, i.e. PW-1 to PW-4, and nobody contradicts each other. Similarly, Mr. and Mrs. Dr.

Zubair, PWs-5 and 6, have also supported the prosecution story. The statements of PW-7, Suriyya Raza and her driver, Saleem, PW-8, are also interlinked and interwoven. Similarly, PW-9, Muhammad Bashir and PW-10, Yasir, other two servants of the family deposed that on the fateful day they were on leave and the convict also did not deny their non-presence. Even PW-11, Bushra Iqbal d/o Dr. Muhammad Iqbal, who was already familiar with the convict and employed him with the family of the deceased, deposed that she repeatedly insisted to forward the call to the deceased but the convict refused to do so and told that the deceased is feeling headache and will ring you back in the evening. The recovery witness of the cash and jewellery, PW-16 and 17, the recovery witness of cheques and bank record, i.e. the Bank Officer, PW-18, the members of the medical board, PW 23 to 25, PW-26 SDM, PW-27, ADM, PW-28, Haq Nawaz, PW-29 Anila Shah, PW-30, Mazharul-Haque, the recovery witness i.e. PW-31, Abdul Basit, Overseer, PW-32, Imtiaz Ahmed Constable/Computer Operator SP Office, PW-33, Irfan Saleem, SSP Mirpur and PW-34, the

cameraman who recorded DVD movie, fully supported the prosecution story. The effect of minor and natural unexplained discrepancies in the statements of witnesses shall be considered in the later part of the judgment. Keeping in view the given chain of circumstances, there is ample likelihood of the convict having committed the murder of the deceased. On the other hand, the convict-appellant failed to challenge the veracity of the witnesses to discard their testimony.

15. The contention of the learned counsel for the convict-appellant on merits is that the FIR has been lodged by the complainant with pre-consultation after a delay of eight days, as an afterthought just to implicate the convict in a case of baseless allegation. It is an admitted position that FIR has been registered in the case on 9.3.2013, whereas the occurrence is of 2.3.2013, however, the contents of the FIR are self-explanatory about the delay caused in its registration. It appears that soon after burial of the dead-body of deceased, the first question emerged regarding the cause of her death

and all the circumstances were taken into account by the complainant party. The unbecoming and unexpected behaviour of the convict on the day of occurrence with the complainant and other witnesses, the normal health condition of the deceased prior to the day of occurrence, an arranged condition of the dead-body, missing of jewellery and thereafter findings regarding withdrawal from bank accounts, etc. led the complainant party to reasonable suspicion and the FIR was registered. When the complainant party formed the opinion that death of the deceased is unnatural, they approached the police for investigation. In absence of any enmity towards the convict, it cannot be presumed that the FIR was registered with *mala fide* intention, because there is no possibility of substituting the real culprit for false implication of an innocent person, who had served the family since years, especially, when the complainant-party is real daughter and sons of the deceased. In this background, the argument of the learned counsel for the convict-appellant is misconceived, as we have analysed the allegation

regarding registration of FIR as an afterthought and false implication of the convict-appellant in the alleged offence. In the given circumstances and in the light of observations made hereinabove, we do not agree with the contention raised by the learned counsel for the convict-appellant that the FIR was registered after due deliberation as an afterthought. The allegation of false implication also having no weight, is hereby repelled.

16. The next argument of the learned counsel for the convict-appellant is that the witnesses are closely related to the deceased and also to each other, whose testimony is not worth believing. No doubt, some of the witnesses are closely related to the deceased but being natural witnesses, their testimony cannot be discarded, especially in the circumstances that the convict-appellant failed to substantiate the allegation of animosity. In absence of any previous enmity, it cannot be held that the witnesses are interested ones and relationship cannot be made ground to discard their evidence, as

is the view of this Court, expressed in umpteen cases.

17. It is also the case of the defence that cause of death is not clear, therefore, the conviction was not justified. It may be observed that the convict, being the only available person to look after the deceased at the place of occurrence, was expected to sufficiently explain about the real cause of death, failing which the report submitted by the medical board is the only source, which can ascertain the cause of death. The board has opined as under:

> "Injury No.1 along with positive findings in brain and eyeballs are suggestive of smoothing, leading to asphyxia and death. Report Radiologist are awaited, specimens to FSL are being sent to establish/rule out role of poison/drugs, final opinion will be concluded after receipt of above reports."

After receipt of the FSL report, the medical board, formed the following final opinion:

> "In continuation to provisional report dated 11.03.2013, and keeping in view the findings in autopsy, reports from Punjab Forensic Science Agency Lahore and repot of radiologist, the exhumation board concludes, that:

1. Injury No.1 along with positive findings in brain and eye-ball is suggestive of smoothing, leading to asphyxia and death.

2. The raise level of insulin (in comparison to control sample) in skin patch. (sample No.14) from dorsum of left hand (injury No.2) bearing multiple prick marks is suggestive of insulin injection on this site."

The objection of the learned counsel for the convict that the prosecution has alleged two versions, therefore, the cause of death is not clear, has also no force for the reason that from the final report, which is based upon and further explanatory of the preliminary report there appears a series of things culminating into the death of the deceased. The prosecution version is that the convict administered tranquiliser to the deceased and when she lost conscious, he injected insulin. Ultimately, he strangulated her by pressing the pillow against her mouth, which resulted into her death, due to asphyxia. So, it cannot be held that more than one causes of death have been alleged but the real cause appears to be a series of circumstances, which resulted into the unfortunate incident. Even

otherwise, the medical evidence is to be deemed and adjudged in the light of peculiar circumstances of the case, therefore, the stance taken by the learned counsel for the convict-appellant, having no substance, is repelled.

18. So far as the argument of the learned counsel for the convict-appellant that the medical board has not legally been notified for conducting the post-mortem and it was for the Civil Medical Officer to conduct the post-mortem, is concerned, in this regard, the learned counsel for the complainant has explained the actual position in detail. A perusal of the record transpires that on the application moved by the complainant, the District Magistrate initiated for constitution of the medical board and in result of correspondence between the Medical Superintendent and the Director General Health, the board was constituted. Ordinarily, post-mortem is conducted by the Civil Medical Officer of the vicinity by virtue of his office, however, the members of the medical board are senior doctors, visiting faculty of MBBS Medical College Mirpur, who are public functionaries serving

with the Government institution. Moreover, the post-mortem has been conducted by four senior members of medical fraternity, giving opinion with more accuracy as compared to the opinion of only one expert, i.e. the Civil Medical Officer. Three out of four members appeared as witnesses before the trial Court and testified the report. It is a settled law that prosecution is not bound to produce each and every witness cited in the calendar of witnesses and if any of the witnesses is not available for any reason, the whole evidence corroborated by the co-witnesses cannot be thrashed away. We are fortified in our view from the case reported as *Abdul Aziz vs. Muhammad Lal & others* [2000 SCR 375], wherein following observation was made:

> "7. After hearing the respective contentions of the learned counsel for the parties and perusing the record, it may be stated at the very outset that it is not the duty of the prosecution to produce each and every witness cited in the calendar of challan. It depends on the will of the prosecution to produce such witnesses whom it deems necessary for proving the guilt of the accused. However, if the evidence of any of the witnesses is so material that in absence of it no just decision could be pronounced by the

> Court, the Court is competent to summon such witness and record his statement. Therefore, the argument advanced by the learned counsel for the complainant-appellant that for proving the prosecution case the evidence of p.ws.5 and 9 was not material is not without substance. The prosecution was not bound to produce each and every witness cited int eh calendar of challan…."

Thus, no irregularity or illegality is found in the whole proceedings. It is also on the record that at the relevant time, the Additional District Magistrate was performing duty as the Magistrate, in the absence of the District Magistrate, who also appeared before the Court as witness and testified evidence. The argument is, therefore, repelled.

19. The argument of the learned counsel for the convict-appellant regarding unsafe transportation of jars, appears to be of technical nature and the defence has failed to attribute any illegality or irregularity in this behalf. The prosecution has proved from the evidence that Constable Pervaiz Akhtar, took the samples to FSL and brought the report. The defence remained failed to obtain any favourable result despite cross examining the said

witness, therefore, the argument has no effect over the case, which also stands repelled.

20. Another argument of the learned counsel for the convict-appellant is that the Handwriting expert was not cited as witness by the prosecution, therefore, the report is not worth consideration. We have perused the relevant provision of law, i.e., section 510, Cr.P.C. and deem it necessary to reproduce the same in verbatim, which reads as under:

> "510. Report of Chemical Examiner, Serologist: Any document purporting to be a report, under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or of the Chief Chemist of the Pakistan Security Printing Corporation Limited or any Serologist, fingerprint expert or fire-arm expert appointed by Government upon any matter or thing duty submitted to him for examination or analysts and report in the course of any proceeding under this Code, may, without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code:
>
> Provided that the Court may, if it considers necessary in the interest of justice, summon and examine the person by whom such report has been made."

A perusal of the above-reproduced provision shows that besides reports of the other experts, the report of handwriting expert may be used as evidence in any proceedings, like inquiry, trial, etc. without calling the said expert as witness, however, the Court may summon and examine the expert, if it is deemed necessary. The report was put to the convict appellant in his examination under section 342, Cr.P.C. which he admitted but did not make a request for summoning of the witness to cross-examine him, thus, the objection cannot be entertained at this stage, however, at the stage of trial, the defence was very much eligible to raise such like objection or file any application under section 510, Cr.P.C., for summoning the expert and cross-examining the same but no effort was made by the defence in this regard.

21. It is worth mentioning here that motive plays an important role where the case rests solely on circumstantial evidence. In the case in hand the motive alleged is that the convict was the most reliable servant of the family, who was in need of

money. He abused the trust of the family and started drawing money from the bank account of the deceased. He was in search of golden opportunity to withdraw bulky amount and for that reason, he earlier administered sleeping tablets i.e Xanax, to the deceased, stole the cheque and by affixing fake signatures of the deceased drew an amount of Rs.500,000/-. When the health condition of the deceased became worsen and the convict apprehended unfolding of the real story on arrival of Qaisra Zubair, P.W-6, he strangulated the old lady with a pillow. The prosecution has proved the case by producing confidence inspiring evidence to corroborate the whole story. On the other hand, the convict could not justify his position nor could prove his innocence, hence, the prosecution has succeeded to establish and prove the motive. Even otherwise, it is time-tested principle of law that where the prosecution has proved its case beyond reasonable doubt, it is not the legal requirement to prove motive. This Court in the case reported as *Syed Kamran Hussain Shah vs. State & another* [2022 SCR 365], has laid down as under:

"….Mere fact that the motive as alleged was weak when there has been reliable, satisfactory and unimpeachable ocular evidence connecting the appellant with the commission of the crime, corroborated by the strong evidence, the case of prosecution does not fail as a whole. It may also be observed that the allegations and proof of motive are not legal requirements for awarding maximum penalty of death or life imprisonment in a murder case when the prosecution has proved the guilt of the appellant accused beyond reasonable doubt as in the instant case, we would like to observe here that in the dispensation of criminal justice, decision of the case must not be taken in relation to accused's case but "must rest on the examination of entire evidence" in view of principle laid down in the case titled Talib Hussain vs. State [1995 SCMR 1776], so even in case of weak motive when there has been otherwise strong and reliable evidence, motive would not come in the way of the case of prosecution. Over and all it has to be remembered that this is not a case resting on circumstantial evidence but a case where murder has taken place in presence of eye-witnesses, so it becomes needless to say that when there is acceptable evidence of eye witnesses to the commission of an offence, question of motive can loom large. In Talib Hussain's case (supra), it has been observed by the apex Court of Pakistan that:

> 'We may point out that there is no legal requirement that in order to award maximum penalty of death in a murder

> case, the motive should be alleged and proved. If the prosecution proves the case against an accused in a murder case beyond reasonable doubt, the normal sentence is death. If above normal sentence is not to be awarded the Court is to make out a case for reduction of sentence on the basis of mitigating circumstances.'

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

> 'We having gone through the evidence of the inured and natural witnesses, have found them truthful, confidence-inspiring and trustworthy. The evidence of eye-witness was not suffering from any material defect or contained any describable contradiction and discrepancy to create a slight doubt regarding the guilt of the petitioners. We find that motive in the present case was not shrouded in mystery as contended by the learned counsel and in any case, the weakness and insufficiency of motive or absence of motive in such-like cases, cannot be considered as a mitigating circumstance for lesser penalty.'"

22. Besides above, there are two other surprising aspects of the case. At one hand, the convict-appellant, Tanveer Ahmed Bhatti remained

reluctant to forward the telephonic calls made by the family members to the deceased and also did not allow PW-7, Suriyya Raza, to meet her while saying that she is unstable, taking rest and not in a position to talk to anyone. Despite this and the fact that deceased lady was healthy and active previously, he did not inform anyone or arranged medical treatment about her poor physical condition. It is also his case that deceased herself drew money from the bank on 2.3.2013, which is inconsistent with the other version. Moreover, the dead body of the deceased was found in such an arranged order, which attracts further suspicion. Similarly, the objection regarding extra judicial confession of the convict is also not tenable for the reason that the same was recorded in the presence of four impartial notable persons, to whom no enmity or interest has been attributed. In the circumstances, this piece of evidence cannot be ignored. All these circumstances corroborated by the prosecution evidence, lead to the definite conclusion that the convict in order to steal the money, committed such like heinous offence, therefore, he has rightly been convicted by the Courts below.

Hence, it can safely be concluded that the prosecution has succeeded to bring the convict to guilt beyond any shadow of doubt. The Courts below have dealt with the case in detail and no lacuna has been left. The prosecution has failed to make out a case for acquittal or award of lesser punishment. After contemplate perusal of the evidence, we are unanimous on the point that the convict-appellant failed to establish any counter version regarding the death of the deceased while he was examined under section 342, Cr.P.C. and at the time of recording his statement under section 340(2), Cr.P.C.

23. The next contention of the learned counsel for the convict-appellant that the capital punishment cannot be awarded in a case of unseen occurrence and based on circumstantial evidence, has also no force for the reason that under law, conviction can be recorded on the basis of circumstantial evidence in absence of direct evidence because a man can tell lie but the circumstances do not. The conviction can be based on circumstantial evidence when it excludes all hypothesis of

innocence of the accused and guilt of the accused is obvious. Even death penalty can also be awarded in a murder case founded on circumstantial evidence but it should be beyond any shadow of doubt. We are fortified in our view from the judgment of this Court, reported as *Muhammad Tasleem and another vs. The State and another* [2014 SCR 893], wherein, it was observed as under:

> "…As the case is based on the circumstantial evidence, which is a weakest type of the evidence. Although, law does not bar to convict an accused on the basis of circumstantial evidence and even a capital punishment can also be awarded, provided that in a case resting on a circumstantial evidence, no link in the chain should be missing and all the circumstances must lead to the guilt of the accused. However, the circumstantial evidence can only form basis for conviction when it is incompatible with the innocence of accused or the guilt of any other person and in no manner be incapable of explaining upon any reasonable hypotheses except that of the guilt of accused and if no link in the chain found missing, the circumstantial evidence can be safely relied and conviction could be recorded on the basis of that. Reliance A can be placed on a case reported as *Muhammad Latif Butt v. Shehtab & 4 others* [2009 SCR 432] wherein it was observed as under:-

> ‘No doubt the conviction can be recorded on the basis of circumstantial evidence in the absence of direct evidence because a man can tell lie but circumstance never tell lie. The conviction can only be based on circumstantial evidence, if it excludes, all hypotheses of innocence of the accused. The circumstantial evidence must be incompatible of any other hypotheses than that of guilt of the accused.’”

Similarly, in another case reported as *Muhammad Farooq Khan vs. Muhammad Arif & 2 others* [2015 SCR 872], wherein, it was observed as under:

> “6…….A bare reading of the above reproduced statutory provision clearly speaks that in cases of Qatl-i-Amd, in absence of proof as specified in section 304, APC, the Court is vested with the powers to award punishment of death as —*Ta“zir*‖ or imprisonment for life having regard of the facts and circumstances of the case. Thus, it is clear that according to the statutory provisions, in such like cases, the A punishment either the punishment of death or life imprisonment as a —*Ta“zir*‖, both are normal punishments depending upon the expressed wisdom of Court having regard to the facts and

> circumstances of the relevant case. Thus, it can be safely held that in such like cases, it is not mandatory under the statute that the death sentence as —*Ta"zir*‖ has to be necessarily awarded rather it is conditional with the facts and circumstances of each case."

24. So far as the minor discrepancies pointed out by the learned counsel for the convict-appellant i.e., irregularity in recording the statement of convict under section 164, Cr.P.C., non-preparation of memos of the parcels, not sending the pillow for forensic etc.; are concerned, it is now well settled law that the contradictions which are minor in nature would not be sufficient to dispel the entire prosecution case. In this regard, reliance may be placed on the latest judgment of this Court reported as *Syed Kamran Hussain Shah vs. State* [2022 SCR 365], wherein, it has been held that:-

> "… The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution; giving undue importance to them would amount to adopting a hyper-technical approach. The Court while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies

do not shake the basic version of the prosecution case and same are to be ignored. We are fortified in our view from the case reported as Yasmin Ashraf & 7 others vs. Abdul Rasheed Garesta & 5 others [2018 SCR 661], wherein, it has been held that: -

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

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

> 'So far as the contention of the learned counsel for the convict-appellant that there are discrepancies in the statements of prosecution witnesses, thus, the conviction cannot be recorded on such evidence is concerned, it may be observed that the minor discrepancies in the prosecution evidence does not thrash out the whole case of the prosecution as the minor discrepancies can be ignored lightly. However, as stated hereinabove that all the prosecution witnesses remained consistent on the material part

> of the prosecution version, thus, the convict-appellant failed to point out any major contradiction in the prosecution evidence."

25. Now, adverting to the appeal filed by the complainant for enhancement of sentence, it is worth mentioning here that the question of sentence requires utmost care. The same must be weighed in the golden scale and should be properly balanced to save rest of the society from the commission of crimes without being unnecessary harsh. In the instant case, though the prosecution has established a case through unbroken chain of circumstances but some irregularities, procedural defects and flaws on the part of investigating agency, like minor irregularity in recording the statement of convict under section 164, Cr.P.C., non-preparation of memos of the parcels, not sending of the pillow for forensic etc., are also there. It may be observed here that two sentences are provided in section 302(b) i.e., death or imprisonment for life. Both the sentences are alternatives to one another and award of one or the other sentence depends upon the facts and circumstances of each case. It would be

advantageous to reproduce the relevant provision, which reads as under:

> **"302. Punishment of *qatl-i-amd*:** Whoever commits *qatl-e-amd* shall, subject to the provisions of this Chapter be:
>
> a) punished with death as *qisas*;
>
> b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
>
> (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of *qisas* is not applicable."

Keeping in view the command of the law enunciated in section 302 (b), A.P.C., (supra) and the settled principle of law that if a single mitigating circumstance is available in a case, it would be sufficient to put on guard the judge not to award the penalty of death but life imprisonment. It would be beneficial to reproduce here the case of *Ghulam Mohyd-ud-Din alias Haji Babu and others vs. The State* [2014 SCMR 1034], wherein, the Supreme Court of Pakistan, held that:

> "… A single mitigating circumstance, available in a particular case, would

be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of particular case. If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.

Albeit, there are multiple factors and redeeming circumstances, which may be quoted, where awarding of death penalty would be unwarranted and instead life imprisonment would be appropriate sentence but we would avoid to lay down specific guidelines because facts and circumstances of each case differ from one another and also the redeeming features, benefiting an accused person in the matter of reduced sentence would also differ from one another, therefore, we would deal with this matter in any other appropriate case, where, it proper assistance is given and extensive research is made.

In any case, if a single doubt or ground is available, creating reasonable doubt in the mind of Court/Judge to award death penalty

> or life imprisonment, it would be sufficient circumstances to adopt alternative course by awarding life imprisonment instead of death sentence."

In the case reported as *Ansar Mehmood & others vs. Manzir Hussain & another* [2014 SCR 770], this Court held that:

> "13. We have heard the learned counsel for the parties and also paid our utmost attention to the points raised in the arguments. Both the Courts below have awarded punishment of death as "Ta'zir" to the convict-appellant under the provision of section 302 (b) of Azad Penal Code. Before proceeding further, we deem it proper to reproduce here the statutory provision of section 302 (b), A.P.C. which reads as follows:-
>
> > "302. Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be-
> >
> > (a) .....
> >
> > (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available.
> >
> > (c) ……."
>
> A bare reading of this section connotes that in case of Ta'zir, punishment for qatl-i-amd, under clause (b) of section 302, A.P.C., is death or life imprisonment. This statutory provision further speaks

that the quantum of punishment shall be determined having regard to the facts and circumstances of the case. Thus, it hardly requires any further deliberation that according to enforced statutory provisions, both the punishments, i.e. death and imprisonment for life are normal punishments. It cannot be said that only the death sentence is a normal punishment.

14. The perusal of the judgment of learned Shariat Court reveals that in the opinion of Shariat Court, only the death sentence is a normal penalty. But in our opinion, in view of clear statutory provision the punishment of death or life imprisonment as "Ta'zir' are alternate sentences, hence, both can be treated as normal sentences. Our this view finds support from the latest judgment of the apex Court of Pakistan handed down in the case reported as Hassan and others vs. The State and others [PLD 2013 SC 793]. It will be useful to reproduce here the relevant portion of the judgment which speaks as under:-

> "23. Upon the strength of the provisions of subsection (5) of section 367, Cr.P.C., it has been maintained before us that the normal sentence for an offence of murder is death and while considering a prayer for reduction of a sentence of death passed against a convict this Court may remain mindful of that statutory stipulation. We have found such a submission to be suffering from multiple misconceptions. Subsection (5) of section 367,Cr.P.C. provides as follows:

> '(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, then the Court shall in its judgment state the reason why sentence of death was not passed.'

We have not been able to find anything in the said provision of law even hinting at the sentence of death being the normal sentence in such a case. Section 302 (b), P.P.C. clearly provides for two alternative sentences, i.e. sentence of death or sentence of imprisonment for life for the offence of murder and it does not state that any one of those sentences is to be treated as the normal sentence. As a matter of fact section 302 (b), P.P.C., itself mentions that any one of the two alternative sentences provided for therein is to be passed "having regard to the facts and circumstances of the case". There are cases wherein "the facts and circumstances of the case" do not warrant a sentence of death and what is required by subsection (5) of section 367, Cr.P.C. is that such facts and circumstances of the case ought to be mentioned by the trial Court in its judgment so that the higher Courts may straightaway become aware of the same while entertaining or deciding a challenge thrown against the trial Court's judgment. We believe that the general

misunderstanding or misconception about the true import of the provisions of subsection (5) of section 367, Cr.P.C. entertained by the legal community, including the courts, in this regard needs to be removed and rectified. The other misconception about subsection (5) of section 367, Cr.P.C. is that it is considered to be applicable to the entire hierarchy of criminal Courts whereas that is not the case. Sub section (5) of section 367, Cr.P.C. is placed in Chapter XXVI of Part VI of the Code of Criminal Procedure, 1898 and Part VI of the Code pertains only to 'Proceedings in Prosecutions' before a trial court. The matters pertaining to the appellate and revisional courts are provided for in Part VII of the Code and that Part of the Code does not contain any provision akin or similar to that of subsection (5) of section 367, Cr.P.C. It is, thus, evident that the requirements of subsection (5) of section 367, Cr.P.C. are relevant only to trial Court and they have no application to an appellate or revisional Court. The provisions of section 423 (i) (b), Cr.P.C unambiguously show that it is well within the powers of an appellate court seized of an appeal against conviction to reduce the sentence of a convict and the requirement relevant to a trial court, as contained in subsection (5) of section 367, Cr.P.C., is not to be found in section 423 (I) (b), Cr.P.C. The powers conferred upon a

> revisional court under sections 435 and 439, Cr.P.C. also clearly demonstrate that while exercising revisional jurisdiction a sentence can be reduced and, again the requirement relevant to a trial court, as contained in subsection (5) of section 367, Cr.P.C., is not to be found in section 435 and 439, Cr.P.C. it, therefore, goes without saying that when an appellate or revisional court is considering a question of propriety or otherwise of a sentence passed against a convict the provisions of subsection (5) of section 367, Cr.P.C. cannot be pressed into service before it and any question of the sentence of death being the normal sentence is hardly relevant before the appellate and revisional courts."

Thus, in the light of the statutory provisions as well as principle of law enunciated by the apex Court of Pakistan, it can safely be concluded that in the punishment as "Ta'zir" for qatl-i-amd, the sentences of death and life imprisonment are alternative and both are normal sentences"

In the case reported as *Muhammad Bashir & another vs. Sain Khan & 2 others* [2014 SCR 821], this Court refused to interfere with the sentence awarded by the Court below, while observing as under:

> "Thus it is not necessary that in all the circumstances, if the case of murder against accused is proved, he will be

> awarded death sentence, rather life imprisonment is also a normal and legal sentence. Keeping in view all the facts and material of the case, we concur with the findings recorded by the Shariat Court. The case of the convict-appellant falls under section 302 (B), A.P.C., hence, the provided punishment of life imprisonment has been rightly awarded."

In the case reported as *Muhammad Farooq vs. Muhammad Arif* [2015 SCR 872], it was held by this Court that:-

> "… A bare reading of the above reproduced statutory provision clearly speaks that in cases of Qatl-i-Amd, in absence of proof as specified in section 304, APC, the Court is vested with the powers to award punishment of death as Ta'zir or imprisonment for life having regard of the facts and circumstances of the case. Thus, it is clear that according to the statutory provisions, in such like cases, the punishment either the punishment of death or life imprisonment as a Ta'zir, both are normal punishments depending upon the expressed wisdom of Court having regard to the facts and circumstances of the relevant case. Thus, it can be safely held that in such like cases, it is not mandatory under the statute that the death sentence as Ta'zir has to be necessarily awarded rather it is conditional with the facts and circumstances of each case."

Similarly, in the case reported as *Yasmin Ashraf & others vs. Abdul Rasheed Gresta & others* [2018 SCR 661], it has been observed by this Court

that *"in the cases of 'Hudood' and 'Qisas', while awarding the punishment of 'Qisas' or 'Hudood' the Courts have to weigh the case/evidence of either party in the golden scale and the principles of proof of charge beyond any shadow of doubt and extension of reasonable doubt will be strictly applied as per spirit of the Shariah, however, in the case of penal offences the discretion of Qazi will prevail as settled under the Shariah as well as the statutory law."*

26. Thus, keeping in view the circumstances of the case in the light of legal proposition, we are of the view that the learned trial Court, having regard of the facts and circumstances of this case, has rightly awarded the sentence of life imprisonment to the convict, which is one of the normal sentences provided by section 302(b) APC. Consequently, we reiterate the findings recorded by the learned Shariat Appellate Bench of the High Court that both the sentences provided under section 302(b), APC, i.e., the death sentence and the life imprisonment can be treated as normal punishments in a murder case. In

this state of affairs, no interference is required in the sentence awarded by the Courts below.

The result of the above discussion is that finding no force in both the appeals, the same stand dismissed.

JUDGE CHIEF JUSTICE JUDGE JUDGE

Muzaffarabad
20.02.2023.

Tanveer Ahmed Bhatti	vs.	State through Advocate-General & Others
Dr. Moheed Pirzada	vs.	Tanveer Ahmed Bhatti & another

ORDER

The judgment has been signed. The same shall be announced by the Assistant Registrar, branch registry, Mirpur, after notifying the learned counsel for the parties.

CHIEF JUSTICE JUDGE JUDGE JUDGE

Muzaffarabad
20.02.2023.