

Stereo. H C J D A 38.

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Crl. Appeal No.6732-J of 2019
(Muhammad Asif *versus* The State)

JUDGMENT

Date of hearing: 15.03.2024.

Appellant by: Ch. Khalid Rasheed, Advocate.

State by: Mr. Muhammad Akhlaq, Deputy Prosecutor General.

Complainant by: In person.

Aalia Neelum, J.- Muhammad Asif, son of Muhammad Ashfaq, caste Arai, resident of Jamshed Town Bhaini Road, Sharif Pura Baghbanpura, District Lahore, was involved in case F.I.R. No.1086 of 2014, dated 09.12.2014, registered under Sections 302, 34 PPC, at Police Station, Shafiqabad, District Lahore and was tried by the learned Additional Sessions Judge, Lahore. The trial court seized with the matter in terms of the judgment dated 27.11.2018 convicted the appellant Muhammad Asif under section 302(b) PPC, and sentenced him to undergo **imprisonment for life as Tazir** with the direction to pay Rs.4,00,000/- as compensation to the legal heirs of the deceased and in case of default in payment thereof, to undergo six months S.I further. The benefit of section 382-B Cr.P.C. was also extended in favour of the appellant.

2. Feeling aggrieved by the trial court's judgment, Muhammad Asif, the appellant, has assailed his conviction by filing instant **Crl. Appeal No.6732-J of 2019.**

3. The prosecution story as alleged in the F.I.R (Ex.PA/2) lodged on the written application (Ex.PA) of Zeeshan Khalid (PW-5)-the complainant is that he

(the complainant) was married to the daughter of Mst. Robina Shoaib (the deceased) three years back, and he was residing with his in-laws for two years; on 08.12.2014 at 10:00 p.m., the complainant (PW-5) alongwith other family members was sleeping at home, when the door was knocked; the complainant (PW-5) and his mother in law, came at the door, opened the door and saw that accused Asif Ashfaq (the appellant) and Hamza Ashfaq (co-accused since acquitted) were standing there; the mother in law of the complainant, asked them, as to why they had come there; after that, they asked her to transfer her share of land situated in Mehmood Booti, in their names; the mother in law of the complainant refused to do so, after that hot words were exchanged; on hearing the voice of noise, his brother in law (سالہ), Sameer Gul Sher (PW-6) and neighbor Waseem Zafar (PW-7), reached the spot, while accused were speaking loudly. Meanwhile, the father of the accused, Mian Muhammad Ashfaq (co-accused since acquitted) also came there and raised lalkara to teach a lesson to her for not giving the land to them; both Muhammad Asif Ashfaq (the appellant) and Hamza Ashfaq (co-accused since acquitted) pulled out their pistols; Muhammad Asif Ashfaq (the appellant) made fire with his pistol, which hit on the abdomen of Robina Shoaib (the deceased), after touching her right wrist, who fell on the ground after sustaining injury. While Muhammad Asif Ashfaq (the appellant), Hamza Ashfaq (co-accused since acquitted), Mian Muhammad Ashfaq (co-accused since acquitted), alongwith one unknown accused, succeeded in fleeing away while boarding on motorcycles. The complainant, alongwith PWs, shifted Mst. Robina Shoaib (the deceased) to Mayo Hospital, Lahore, for treatment by a rickshaw, where the doctor declared her dead.

4. Upon receiving the information of the occurrence, Rashad Ahmad S.I. (PW-1) reached Mayo Hospital, Lahore, where the complainant (PW-5) presented written application (Ex. PA) before him, who on completion of police karawai sent the same to the Police Station through Iftikhar 12469/C (not cited as a witness) after that formal F.I.R. (Exh.PA/2) was chalked out by Ghulam Murtaza S.I (PW-3).

5. After registration of the case, the investigation of this case was conducted by Gulzar Ahmd S.I (PW-8) and Ghulam Muhammad S.I (PW-17), who, having found the appellant guilty, prepared a challan under section 173 Cr.P.C. and sent the same to the court of competent jurisdiction while placing the names of all accused persons in Column No.3 of the challan. On 19.11.2018, the trial court formally charge-sheeted the appellant, to which he pleaded not guilty and claimed trial. In support of its version, the prosecution produced as many as eighteen (18) witnesses.

6. After the closure of prosecution evidence, the appellant was examined under Section 342 of Cr.P.C., wherein he neither opted to appear as his own witnesses in terms of Section 340 (2) Cr.P.C. nor opted to produce any evidence in his defence. In response to a particular question of why this case was against him and why the PWs had deposed against him, the appellant-Muhammad Asif, made the following depositions: -

“The witnesses are inimical and close relative of each other. Although I was not present at scene of occurrence, my name was given due to malice.”

7. After recording evidence and evaluating the evidence available on record in the light of the arguments advanced by both sides, the trial court found the prosecution version proved beyond any shadow of reasonable doubt, which resulted in the appellant’s conviction in the afore-stated terms.

8. I have heard the arguments advanced by the learned counsel for the parties and have minutely perused the record on the file.

9. In the instant case, the incident occurred at 10:00 p.m. on 08.12.2014 in the house of Mst. Robina Shoaib (the deceased), mother-in-law of Zeeshan Khalid (PW-5)-the complainant, situated at Kausar Pura, falling within the jurisdiction of Police Station Shafiqueabad, District Lahore, which is at a distance of two (02) Kilometers from the place of occurrence. Allegedly, the occurrence was witnessed by Zeeshan Khalid (PW-5)-the complainant, Sameer Gul Sher

(PW-6), and Waseem Zafar (PW-7). As per the prosecution case, accused Asif Ashfaq (the appellant) and Hamza Ashfaq (co-accused since acquitted) arrived at the house of Mst. Robina Shoaib (the deceased) and asked her to transfer her share of land situated in Mehmood Booti, in their names; on refusal of Mst. Robina Shoaib (then injured), hot words were exchanged; on hearing the voice of noise, Sameer Gul Sher (PW-6), son of the deceased and neighbor Waseem Zafar (PW-7), attracted at the place of occurrence; during the foregoing incident, Mian Muhammad Ashfaq (co-accused since acquitted) also came there and raised lalkara to teach her lesson for not giving the land to them; upon which Muhammad Asif Ashfaq (the appellant) and Hamza Ashfaq (co-accused since acquitted) took out their pistols and Muhammad Asif Ashfaq (the appellant) made fire with his pistol, which hit on the abdomen of Mst. Robina Shoaib (the deceased), after touching her right wrist, who fell on the ground after sustaining an injury; the accused persons Muhammad Asif Ashfaq (the appellant), Hamza Ashfaq (co-accused since acquitted), Mian Muhammad Ashfaq (co-accused since acquitted) alongwith one unknown accused while boarding on their motorcycles, waving weapons, fled away from the place of occurrence. Zeeshan Khalid (PW-5)-the complainant, alongwith Sameer Gul Sher (PW-6) and Waseem Zafar (PW-7), put Mst. Robina Shoaib (then injured) in the rickshaw and shifted her for treatment at Mayo Hospital, Lahore. On reaching the hospital, the doctor, after checking Mst. Robina Shoaib informed them that she succumbed to the injuries. After that, the matter was reported to the police by Zeeshan Khalid (PW-5)-the complainant. Zeeshan Khalid (PW-5)-the complainant deposed during examination-in-chief that: -

“Doctor issued documents regarding incident and we took them to the police station. Police came at the place of occurrence and hospital as well. Then we reached at police station for registration of FIR. He (PW-5) also deposed during cross-examination that, “I do not remember when we reached at police station whether blood stained clothes were observed by the police officer on duty. When we (Waseem Zafar, Sameer Shoaib and Zeshan) went to P.S. for registration of case

we did not offer police officer to take our clothes as they were blood stained nor I.O. had taken the same into his possession. The statements of other two witnesses were also recorded by the police officer. It is incorrect to suggest that we did not go to P.S. for registration of the case."

Similarly, Sameer Gul Sher (PW-6) deposed during cross-examination that: -

"I alongwith Zeshan, Waseem went to police station and Zeshan got registered FIR where police officials recorded the statement of Zeshan. At that time my statement and statement of Waseem were not recorded by the police."

Waseem Zafar (PW-7) deposed in his examination in chief that -

"Doctor handed over us concerned documents then we went to police station for lodging FIR."

Whereas, on perusal of the written complaint (Ex. PA), it reveals that at the bottom of the written complaint (Ex. PA), Rashid Ahmad S.I. (PW-1) incorporated police proceedings (Ex. PA/1) by mentioning that the incident was reported by Zeeshan Khalid (PW-5)-the complainant at Emergency Ward of Mayo Hospital, Lahore on 08.12.2014. The scanned copy of the police proceedings (Ex.PA/1) is as follows:

سما روٹنگ پولیس اسٹیشن میں صبح 12:49 بجے 12/12/14ء کو 22198 نمبر پر
 گشت پولیس سرکاری گاڑی میں 12/12/14ء کو 22198 نمبر پر
 قصبہ سوہروردہ میں واقعہ پیش آیا جو
 شہریت ذیشان خالد کے ایک گھر پر واقعہ تھا جس میں
 ایک خواتین نے قتل کیا تھا۔ حالات دیکھ کر پولیس اسٹیشن پر
 302/34 کی باقی جاکر درخواست نمٹا دی گئی اور 12/12/14ء کو
 اسل قتل ہے۔ مقدمہ رجسٹرڈ کر کے تفتیش کے لئے پیش کیا گیا ہے۔
 کی جا رہی ہے۔ تفتیش کے لئے درخواستیں جاری کر دی گئی ہیں۔

رشتہ دار - ڈاکٹر شفیق احمد
 12/12/14

CH. CHULAN MUJAZA
 Add. 2 of 200
 LAHORE

بوقت 14:45
 8-12-14
 نمبر 51 کے ساتھ 12/12/14 بوقت 14:45
 نمبر 1086 کے ساتھ 302/34 کی تفتیش کے لئے
 نمبر 1086 کے ساتھ 302/34 کی تفتیش کے لئے

The police proceeding (Ex.PA/1) incorporated at the bottom of the written complaint (Ex.PA) created doubt in the version of the prosecution that the incident was reported at the police station. Besides, contrary to the depositions of Zeeshan Khalid (PW-5)-the complainant, Sameer Gul Sher (PW-6) and Waseem Zafar (PW-7), Rashid Ahmad S.I. (PW-1) deposed during the examination in chief that:-

“On 08.12.2014 I was posted at P.S. Shafiqueabad, Lahore. On the same day I alongwith Iftikhar Ahmad and Kashif Ali constables was present Kasurpura for patrolling. On receiving information from City Control I reached at Mayo Hospital, Lahore where the complainant Zeshan Khalid presented before me an application Ex.PA for registration of FIR upon which I wrote police proceedings Ex.PA/1 the same is in my handwriting and bears my signatures.”

As per the prosecution case, the incident took place on 08.12.2014 at 10:00 p.m., and as per the police proceedings, the incident was reported by Zeeshan Khalid (PW-5)-the complainant at Emergency Ward Mayo Hospital, Lahore, at 11:45 p.m. on 08.12.2014 and police proceedings were incorporated by Rashid Ahmad (PW-1) at the bottom of the written complaint (Ex. PA), who referred the written complaint (Ex. PA) through Iftikhar Ali 12469/C (PW-11) to the police station for chalking out formal FIR (Ex.PA/2). Iftikhar Ali 12469/C (PW-11) deposed during his court statement that on 09.12.2014, he, alongwith Kashif/C (given up PW) and Rashid Ahmad S.I. (PW-1), was on patrolling, when Rashid Ahmad (PW-1) received information of the occurrence. Iftikhar Ali 12469/C (PW-11), alongwith Kashif/C (given up PW) and Rashid S.I. (PW-1), went to Mayo Hospital and took into possession the dead body of the deceased Robina Bibi. During cross-examination, Iftikhar Ali 12469/C (PW-11) deposed that:-

“Rashid SI handed over dead body of deceased Robina to me at emergency ward of Mayo hospital in the presence of Kashif/C. No other person known to me was present at that time. Rashid SI handed over dead body to me after

completing proceedings of filling the relevant form etc. regarding the handing over dead body.”

Ghulam Murtaza S.I. (PW-3) deposed during examination-in-chief that on 09.12.2014, the written complaint (Ex. PA) was received by him through constable Iftikhar (not mentioned belt number of constable), on which the police proceedings (Ex.PA/1) were recorded by Rashid Ahmad S.I. (PW-1) for registration of FIR. He (PW-3) lodged a formal FIR (Ex.PA/2) without any omission or deletion. During examination-in-chief, Rashid Ahmad S.I. (PW-1) deposed that Iftikhar Ahmad and Kashif Ali Constables were with him on 08.12.2014 when he (PW-1) received information from City Control. The investigation of the case was entrusted to Gulzar Ahmad S.I. (PW-8)-the investigating officer, who deposed during examination in chief that: -

“Stated that on 08.12.2014, I was posted at police station Shafiqueabad, Lahore. I received the information of incident and reached at the place of occurrence. There I came to know that injured has been escorted by Rashid Ahmad SI alongwith legal heirs of the deceased to Mayo Hospital. On 09.12.2014 investigation of this case was entrusted to me. I alongwith my officials reached Mayo hospital, inspected the dead body at dead house and sent the dead body to mortuary for Postmortem examination and came at the place of occurrence alongwith PWs.”

During cross-examination, Gulzar Ahmad S.I. (PW-8)-the investigating officer, deposed as under: -

“We proceeded from the police station at about 12.20 a.m. On receiving information we proceeded to the place of occurrence but in the way we were informed that the dead body was shifted to the dead house. It is correct that it is written in my examination in chief: I proceeded to the place of occurrence first: then I went to the hospital. The factum of going to their hospital is correct and the factum of going to the place of occurrence is incorrect.”

Gulzar Ahmad S.I. (PW-8)-the investigating officer deposed that he reached the dead house and sent the dead body to the mortuary for postmortem examination after preparing all the necessary documents. It is worth noticing in this context that there is a statement in column No.3 of the inquest report (Ex. PR) that the "date and time of the discovery of information of death" was on "08.12.2014 at 10:08 p.m". As per the first column of the inquest report (Ex. PR), relating to the place where death took place or from where dead body was recovered, it was mentioned as "Mayo Hospital Emergency Ward Dead House". On the last page of the inquest report (Ex. PR), the place and the time, when the inquest report was prepared and the witnesses put their signatures were left blank. It is mentioned in column No.8 of the inquest report (Exh. PR) that the mouth was semi-opened. Muhammad Nadeem 8057/C (PW-10) deposed during examination-in-chief that:-

"Stated that on 09.12.2014, I was posted at P.S Shafiquabad Investigation wing. On the same day Ghulzar Ahmad SI handed over to me and Khan Muhammad 10927/C the body of deceased Robina Shoaib for conducting the postmortem examination."

The facts mentioned above reveal that FIR was recorded later on after due deliberations and consultation and was ante-timed. The postmortem report (Ex. PJ) reveals that complete documents were received on 09.12.2014 at 12:45 pm. Dr. Mansoor Mirza, (PW-9) deposed in her examination-in-chief that:-

"On 9.12.2014 when the dead body of Mst. Robina Bibi aged 48 years female w/o Muhammad Shoib r/o House No.1 Street No.7 Ravi road, Lahore was brought by Khan Muhammad No.10927/C and Muhammad Nadeem No.8057/HC P.S. Shafiqueabad, Lahore at 11.20 p.m. It was identified by Sameer Ahmad, s/o Muhammad Shoib (s/o deceased), and Mian Shaukat Ali, s/o Muhammad Shafi (relative of the deceased). According to police paper the time of death was 10.08 p.m. dated 08.12.2014. Complete police papers were received on 09.12.2014 at

12.45 p.m. and the autopsy was conducted at 1.00 p.m. on the same date.”

During cross-examination, Dr. Mansoor Mirza (PW-9) deposed as under: -

“There is standing instruction that P.M examination of a dead body is to be conducted as soon as the complete police papers were received. The police papers means that all the documents prepared by the police should be present at the time of conducting of postmortem. The time of death is mentioned in PMR is 08.12.2014 at 10.08 p.m. The dead body was received in the department on 9.12.2014 at 11.20 p.m. The time which was written in the concerned documents was 11.20 p.m. dated 09.12.2014 while it was 11.20 a.m. It is correct that the time which I stated today at 11.20 a.m. The delay of 12 to 24 hours was occurred due to not receiving police papers. Again said that delay in conducting the P.M. examination was non-availability of complete police papers.”

The circumstances discussed above throw a cloud of doubt about whether the FIR was recorded when it was alleged to have been lodged by the police. The duration given by the doctor between death and postmortem was 12 to 24 hours. It suggests that the death took place between 01:00 a.m. on 09.12.2014 and 01:00 p.m. on 08.12.2014. The matter can also be examined from another angle: Zeeshan Khalid (PW-5)-the complainant deposed during cross-examination that: -

“We reached at hospital after the occurrence within 15/30 minutes. I reached at hospital at about 10.30 p.m. After reaching the hospital we remained in hospital for about 1-1/2 hour. From hospital we came to our house and then we reached police station with out eldest members. We reached police station at about 12.00 midnight/12.15 a.m. Then we returned back to our house and met police on next day. Next day they handed over us a copy of FIR then we went to hospital. We remained in contact with police during this period.”

This fact creates doubt in the prosecution case as well as on the credibility and truthfulness of the statements of Zeeshan Khalid (PW-5)-the complainant, Sameer Gul Sher (PW-6), and Waseem Zafar (PW-7). Therefore, I do not think it safe to rely on the testimonies of these witnesses. This also creates doubt about the genuineness of the version given by prosecution witnesses, i.e., Zeeshan Khalid (PW-5)-the complainant, Sameer Gul Sher (PW-6), and Waseem Zafar (PW-7). Admittedly, all the witnesses are interested. Waseem Zafar (PW-7)-the eye witness deposed during examination-in-chief that: -

“Stated that on 08.12.2014 at about 10.00 p.m. I was eating meal in my room after finishing my work. I heard noise from outside in the street and saw that Asif and Hamza exchanging hot words with mother of Sameer.”

Whereas, during cross-examination, the defence has brought improvements made by Waseem Zafar (PW-7)-the eye witness in his earlier statement on the record, which is as under: -

“It is incorrect to suggest that I got recorded before the police that I was sleeping at the time of occurrence. Confronted with Ex.DA where so recorded.”

Zeeshan Khalid (PW-5)-the complainant in the application for registration of case (Ex. PA), has mentioned that Waseem Zafar is the neighbor, who had also attracted to the place of occurrence. Whereas, during cross-examination, he (PW-5)-the complainant, deposed about the relationship of the witnesses, which reads as under: -

“Sameer is my brother-in-law. Waseem is my relative from my paternal father-in-law (Phopha).”

Zeeshan Khalid (PW-5)-the complainant in his examination-in-chief, deposed that he was present at his house on 08.12.2014; at about 10:00 p.m., the door was knocked, and he opened the door and saw Hamza and Asif standing outside the door. Later, his mother-in-law came there, and they started

negotiations regarding land. During this episode, hot words were exchanged, and Sameer Shoaib (PW-6), son of the deceased, and Waseem Zafar (PW-7) also came there. Whereas, Sameer Gul Sher (PW-6) deposed in his examination-in-chief that on 08.12.2014 at about 10:00 p.m., a noise came from the street; he (PW-6) came down and saw that hot words were being exchanged in between his mother and Hamza (co-accused since acquitted) and Asif Ashfaq (the appellant) regarding land and on the refusal of his mother, the accused flared up and Asif (the appellant) made a fire shot upon his mother and she fell; Waseem his neighbor and Zeshan his brother in law also came there and attended his mother. The mode and manner of initiating the incident and who reached the place of occurrence also create doubt from the depositions mentioned above of the prosecution witnesses, i.e., Zeeshan Khalid (PW-5)-the complainant, Sameer Gul Sher (PW-6) and Waseem Zafar (PW-7). All the above facts, coupled with the fact that the prosecution has not provided evidence to establish the motive for the commission of a crime, create doubt about the prosecution case. It is admitted that the prosecution has not brought any proof on the record that Mst. Robina Shoaib, the deceased, is a shareholder in the land situated in Mehmood Booti, which also throws a cloud of doubt on the prosecution case.

10. As regards the recovery of the 30-bore pistol P-5 and three live bullets (P-6/1-3), the only incriminating evidence on the disclosure and pointing of the appellant-Muhammad Asif and positive report of Punjab Forensic Science Agency, Lahore (Exh.P2) is concerned, it is a prosecution case that on 08.12.2014, Gulzar Ahmad S.I. (PW-8)-the investigating officer, collected one crime empty from the place of occurrence through recovery memo (Ex. PC). The same was handed over to the Moharrar malkhana on the same day. Atta ur Rehman 13916/HC (PW-13)-Moharrar malkhana deposed during examination-in-chief that Gulzar Ahmad S.I. (PW-8) handed him two sealed parcels stamped with the logo of AS for safe custody. On 17.12.2014, he handed over the two sealed parcels to Khan Muhammad 10927/C (PW-4) for onward transmission to the office of Punjab Forensic Science Agency, Lahore. Khan Muhammad 10927/C (PW-4) deposed in his examination-in-chief that: -

“On 17.12.2014 two parcels one of blood stain and other of empties were handed over to me by moharrar operation P.S. Shafiqueabad which I took to the office of FSL. The parcel could not be deposited on the said date as objected by the office. I brought back the said parcel and handed it over to moharrar P.S. Shafiqueabad who again handed over to me the said parcel on 22.12.2014 which I delivered in the FSL intact.”

Atta ur Rehman 13916/H.C. (PW-13) deposed in his examination-in-chief that on 17.12.2014, he handed over two parcels to Khan Muhammad 10927/C (PW-4), which has been received back due to objection raised by the office of PFSA and on 22.12.2014, again said parcels were handed over to Khan Muhammad 10927/C (PW-4) for onward transmission and he (PW-4) deposited the same in the office of PFSA. Atta ur Rehman 13916/HC (PW-13) brought notes while recording his examination-in-chief. This fact has come on the record in his cross-examination, which reads as follows: -

“It is correct that there are some notes on my left hand to refresh my knowledge. Volunteered that those are pertaining to some other case. Then said that these are pertaining to refresh memories of this case.”

Atta ur Rehman 13916/HC (PW-13) gave his deposition during his examination-in-chief, with the help of notes he prepared for the purpose. Now, the question is whether his testimony can be treated as testimony by the provisions contained in Article 71 of the Qanun-e-Shahadat Order, 1984. The tenor of the language used in the first proviso to Article 71 of the Qanun-e-Shahadat Order, 1984 leads this court to the conclusion that evidence contemplated under Article 71 of the Qanun-e-Shahadat Order, 1984 envisages personal testimony based on the memory of the person who has seen, heard, or perceived a fact. The statement given on oath with the help of notes prepared by Atta ur Rehman 13916/HC (PW-13) appears to be against the law on the subject. In this background, I, after going through the nature of the deposition, conclude that Atta ur Rehman 13916/HC (PW-13) is a witness to the fact that he handed over two parcels on 17.12.2014 to

Khan Muhammad 10927/C (PW-4) one of the blood stains and another of crime empties for onward transmission to PFSA but he (PW-4) could not deposit it with PFSA on the same day. He returned the same to Atta ur Rehman 13916/HC (PW-13) Moharrar Malkhana, and later on 22.12.2014, Khan Muhammad 10927/C (PW-4) received parcels from Khan Muhammad 10927/C (PW-4) and deposited the same with the office of PFSA. To consider whether a witness is entitled to refresh his memory before or during his examination. Provisions contained in Article 155 of the Qanun-e-Shahadat Order, 1984 are quoted below:

155. Refreshing memory.

(1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

(3) Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document.

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treatises."

In the instant case, no evidence has been given that this witness made entries in the Register No.19 kept for the purpose of the malkhana. Atta ur Rehman 13916/HC (PW-13) deposed that his statement under section 161 of Cr.P.C. was recorded by the investigating officer. Gulzar Ahmad S.I. (PW-8)-the investigating officer deposed during examination-in-chief that: -

“On 17.12.2014, I recorded the statement of Khan Muhammad/C u/s 161 Cr.P.C. On 18.01.2015 I arrested the accused Iftikhar alias Veera and sent to the judicial lock up by the Area Magistrate. I got challaned the accused on 29.01.2015 by SHO concerned.”

So, from the above deposition of Gulzar Ahmad S.I. (PW-8)-the investigating officer, it reveals he did not depose a single word that he recorded statement under section 161 of Cr.P.C. of Atta ur Rehman 13916/HC (PW-13) on 17.12.2014 to the effect that Khan Muhammad 10927/C (PW-4) returned from PFSA and handed over the parcels to Atta ur Rehman 13916/HC (PW-13), who kept the same in safe custody, nor he deposed that on 22.12.2014 he recorded statements of Khan Muhammad 10927/C (PW-4) and Atta ur Rehman 13916/HC (PW-13) revealing that Atta ur Rehman 13916/HC (PW-13) handed over parcels to Khan Muhammad 10927/C (PW-4) and Khan Muhammad 10927/C (PW-4) deposited the same with PFSA. It is also necessary that when case property is re-deposited in the Malkhana, entry in the Malkhana Register is required to be made, and a dire necessity has been cast upon the prosecution to produce in Court the abstract of the Malkhana Register for ensuring, dispelling of, any aura of skepticism seeping into the prosecution case, especially vis-a-vis safe custody of the case property (P-7), "being," re-deposited in the Malkhana. Therefore, in the present case, provisions of Article 155 of the Qanun-e-Shahadat Order, 1984 would have no application. Pointing out the above deposition of prosecution witnesses it reveals that the prosecution did not prove that the parcel of the crime empty (P-7) was kept in safe custody. Due to the lack of this evidence, it cannot be held that the alleged parcel of crime empty (P-7) was re-deposited in Malkhana, and its benefit will go to the accused. This creates doubt about the genuineness and safe custody of the crime empty (P-7) recovered from the place of occurrence. It is also the prosecution case that the appellant-Muhammad Asif, was arrested by Abbas S.I., Incharge Investigation P.S. Lower Mall, on 14.05.2016, and he informed Ghulam Muhammad S.I. (PW-17)-investigating officer, about the arrest of the appellant and he (PW-17) took custody of Muhammad Asif-the appellant from P.S. Lower Mall, Lahore and after that

Ghulam Muhammad S.I. (PW-17)-the investigating officer produced Muhammad Asif-the appellant before the Magistrate and took his physical remand. Ghulam Muhammad S.I. (PW-17)-the investigating officer deposed during examination-in-chief that: -

“On 27.05.2016 accused made a disclosure during investigation that he could get recovered the pistol P5 which used in the occurrence. I reached at graveyard Gao Shala on lead of accused upon reaching there I opened one hand-cuff of the accused and accused with his free hand got recovered pistol P-5 from the western side wall of the graveyard by digging the earth which was wrapped in a polythene envelope. Upon unload three live bullets P-6/1-3 were recovered. ----- After reaching police station I handed over parcel to moharrar for keeping it in safe custody. ----- On 08.06.2016 I recorded statement of moharrar regarding safe custody of case property. The parcels of case property of this case was submitted in the office of PFSA by me.”

It is the case of the prosecution that pistol P-5, alongwith three live bullets P-6/1-3, were recovered from the possession of the appellant. Ghulam Muhammad S.I. (PW-17)-the investigating officer prepared sealed parcels and took them into possession through a recovery memo (Ex. PM). After that, on reaching the police station, he (PW-17) handed it over to moharrar malkhana. Atta ur Rehman 13916/HC (PW-13) deposed during examination-in-chief that on 09.12.2016 (Urdu version of this witness reveals that he was posted on 09.12.2016) he was posted at the police station Shafiqabad as moharrar. He (PW-13) deposed about the sealed parcels handed over to him by Gulzar Ahmad S.I. on 09.12.2016 and handed over the parcels to Khan Muhammad 10927/C (PW-4) on 17.12.2014 and 22.12.2014. However, Atta ur Rehman 13916/HC (PW-13) did not state a single word that sealed parcels of pistol P-5, alongwith three live bullets P-6/1-3 were handed over to him (PW-13) by Ghulam Muhammad S.I. (PW-17)-the investigating officer. Ghulam Muhammad S.I. (PW-17)-the investigating officer also did not state a single word that when he received a sealed parcel of pistol P-5 and submitted the same with the office of PFSA. The

prosecution has to establish by convincing evidence that the alleged parcels of pistol (P-5), alongwith three live bullets (P-6/1-3) and crime empty (P-7), were kept in safe custody. There is no explanation for this failure to establish safe custody of the parcels pistol (P-5), alongwith three live bullets (P-6/1-3) from the time of seizer on 27-05-2016 till its deposit with the Moharrar and after that its production before court. It is not clear where the parcels of pistol (P-5), alongwith three live bullets (P-6/1-3), were kept. The prosecution has to establish by convincing evidence that the alleged parcels of pistol (P-5), alongwith three live bullets (P-6/1-3), were the same, recovered at the pointing of the appellant and were kept in safe custody. There is no explanation for this failure to establish safe custody of the pistol (P-5), alongwith three live bullets (P-6/1-3) from the time of the seizer on 27-05-2016 till its production in the court. Mere oral evidence of the prosecution witnesses, i.e., Ghulam Muhammad S.I. (PW-17)-the investigating officer, Khurram Shahzad 12228/C (PW-14), and Amir Sarwar 14166/C (PW-15) as to the recovery of pistol (P-5), alongwith three live bullets (P-6/1-3) does not discharge the heavy burden of responsibility, which lies on the prosecution. It is the considered opinion of the court that the inconsistencies described above and contradictions considered cumulatively do lead to irresistible influence that the prosecution has not been able to prove safe custody of the parcels of pistol (P-5), alongwith three live bullets (P-6/1-3) recovered from the possession of the accused-appellant through material and cogent evidence. This contradiction went to the root of the case. Thus, there is no evidence to connect the Firearms & Toolmarks Examination Report (Ex. PZ) with the substance seized from the possession of the appellant. I am, therefore, of the view that the recovery of 30-bore pistol P-5 and three live bullets (P6/1-3) and the positive report of Punjab Forensic Science Agency, Lahore (Exh. P2) are of no avail to the prosecution.

11. The learned Deputy Prosecutor General emphasized that after the occurrence, the appellant absconded himself. However, in the light of the statement of Ghulam Muhammad S.I. (PW-17)-the investigating officer, and Shaukat Ali 7206/C (PW-18), it could not be said that the requirements of declaring a person-proclaimed offender were met. Ghulam Muhammad S.I. (PW-

17)-the investigating officer deposed during examination-in-chief that, **"On 28.04.2015 I was posted at P.S. Shafiqueabad, Lahore. On the same day investigation of this case was entrusted to me. After examining the record I found that the previous I.O had obtained proclamations of accused persons namely Muhammad Asif, Muhammad Ashfaq and Hamza Ashfaq. On 29.04.2015 I recorded statements of constable Shaukat Ali regarding proclamation. On 05.02.2015 I submitted report u/s 512 Cr.P.C to the court through proper channel."** He (PW-17) also deposed during cross-examination that, **"I recorded the statement of Shaukat constable u/s 161 Cr.P.C. on 29.04.2016. He got recorded his statement pertaining to arrest warrant and proclamation of the accused. He did not get recorded his statement about beat of drum and announcement in the mosque of the vicinity. Shaukat constable did not record statement of any private person from the locality."**

Contrary to the deposition of Ghulam Muhammad S.I. (PW-17)-the investigating officer, Gulzar Ahmad S.I. (PW-8) did not depose a single word that he got issued non-bailable warrant of arrest and proclamation against the appellant. It is also admitted that Shaukat Ali 7206/C (PW-18) had not stated that when non-bailable warrant of arrest and proclamation was issued and handed over to him. Shaukat Ali 7206/C (PW-18) deposed during cross-examination that **"I do not remember the dates when I was entrusted proclamations. In order to trace out the accused I went to Jamshaid town, Bhaini road near Mahmood Booti Baghbanpura, Lahore. The proclamations were fixed on different places at their houses. I did not record statement of any person on the back of proclamation. I did not meet any councilor or Numberdar etc. I did not cause announcement in the mosque. I did not make any announcement through drum beat."** However, the factum of absconding, even if established, could only be used as corroborative evidence and was not a substantive piece of evidence. It is an established principle of law that mere absconsion is not proof of the guilt of an accused. Reliance is placed on **"Rasool Muhammad v. Asal Muhammad and another"** (PLJ 1995 SC 477). From the above, it can be ascertained that the

prosecution failed to bring the appellant's guilt through straightforward, confidence-inspiring, and corroborative evidence.

12. From the facts and circumstances narrated above, I am persuaded that the prosecution could not prove its case against the accused beyond the shadow of a doubt, as there were many dents in the prosecution story. The accused persons are not expected to prove their innocence to the hilt. If the prosecution story is doubtful, the benefit of the doubt must go to the accused-appellant. Against this backdrop, it can safely be held that the prosecution has badly failed to bring home the guilt of the accused/appellant, and the conviction passed by the trial court in the circumstances is against all canons of law recognized for the dispensation of criminal justice. Per the dictates of the law, the benefit of every doubt will be extended in favor of the accused/appellant. The conviction and sentence the trial court recorded cannot be sustained. Reliance has been placed on the case reported as **Muhammad Akram** v. **The State** (2009 SCMR 230), wherein the Hon'ble Supreme Court of Pakistan had held that even a single circumstance creating reasonable doubts in a prudent mind about the guilt of the accused makes him entitled to its benefit, not as a matter of grace and concession, but as a matter of right.

13. As a result, Criminal Appeal No.6732-J of 2019 is accepted into **toto**. **Conviction and sentence** recorded by the trial court vide judgment dated 27.11.2018 is **set aside** as a consequence of which, **Muhammad Asif, son of Muhammad Ashfaq-the appellant, is ordered to be acquitted of the charge** in case FIR No.1086/2014 dated 09.12.2014 registered under sections 302, 34 PPC at P.S. Shafiqabad, District Lahore. The appellant, Muhammad Asif, son of Muhammad Ashfaq, is in jail. He (the appellant) is directed **to be released forthwith** if not required in any other case.

(AALIA NEELUM)
JUDGE

Approved for reporting

*This judgment was dictated,
pronounced on 15.03.2024, and
signed after completion on
28.03.2024.*

*Ikram**