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Judgment Sheet

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR.

JUDICIAL DEPARTMENT

Murder Reference No. 06 of 2022
(The State Vs. Mahnaz Ali)

Criminal Appeal No. 68 of 2022
(Mahnaz Ali Vs. The State and another.)

Date of hearing:	18.01.2023
Appellant by:	Mr. Farooq Haider Malik, Advocate.
State by:	Ch. Asghar Ali Gill, Deputy Prosecutor General.

JUDGMENT.

SADIQ MAHMUD KHURRAM, J.– Mahnaz Ali son of Nazir Ahmad (convict) was tried alongwith Zahoor Ahmad and Mst.Rukhsana Bibi (both since acquitted by the learned trial court) ,the co-accused of the convict , by the learned Additional Sessions Judge, Chishtian, in the case F.I.R. No. 322 of 2019 dated 06.10.2019 registered in respect of offences under sections 302 and 34 P.P.C. at the Police Station Dahranwala, District Bahawalnagar, for committing the *Qatl-i-Amd* of Memona Bibi daughter of Allah Rakha (deceased). The learned trial court, vide judgment dated 27.01.2022, convicted Mahnaz Ali son of Nazir Ahmad (convict) and sentenced him as infra:

Mahnaz Ali son of Nazir Ahmad:

Death under section 302(b) P.P.C. as *Tazir* for committing *Qatl-i-Amd* of Memona Bibi daughter of Allah Rakha(deceased) and directed to pay Rs.500,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of Memona Bibi daughter of Allah Rakha(deceased) and in case of default thereof, the convict was further directed to undergo six months of simple imprisonment.

The convict was ordered to be hanged by his neck till dead.

Zahoor Ahmad and Mst.Rukhsana Bibi, the co-accused of the convict were, both however acquitted by the learned trial court.

2. Feeling aggrieved, Mahnaz Ali son of Nazir Ahmad (convict) lodged Criminal Appeal No.68 of 2022, assailing his conviction and sentence. The learned trial court submitted Murder Reference No.06 of 2022 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentence of death awarded to the appellant namely Mahnaz Ali son of Nazir Ahmad. We intend to dispose of the Criminal Appeal No. 68 of 2022 and Murder Reference No.06 of 2022 through this single judgment.

3. Precisely, the necessary facts of the prosecution case, as narrated by Allah Rakha (PW-1), the complainant of the case are as under:-

> " Stated that my daughter Memona bibi aged 18/19 years was married with accused Mahnaz Ali s/o Nazir Ahmad about 3 years ago in Chak No.178/M. On 06.10.2019 I alongwith Muhammad Irfan son of Muhammad Siddique, Muhammad Yaqoob son of Haji Ghulam Rasool went to see my said daughter Memona Bibi in Chak No.178/M Tehsil Chishtian. We reached near the house of my said daughter at about 12:30 PM (Noon), where we heard the noise of my said daughter, whereupon we instantly entered into the house and

saw in the room where accused persons had lay my daughter on the cot, accused Rukhsana Bibi wife of Zahoor Ahmad and Zahoor Ahmad s/o Dur Muhammad had caught hold from her legs and accused Mahnaz Ali present in court had pressed the throat of my daughter in order to commit her murder. On seeing this we raised hue and cry, upon which PWS Haji Ramzan and Muhammad Iqbal sons of Haji Allah Din came at the spot, witnessed the occurrence and saw the accused while fleeing away from the place of occurrence. We took care of my daughter, but she died at the spot

The accused persons committed the instant occurrence for the reason that accused Mahnaz Ali had illicit relations with accused Mst.Rukhsana Bibi and when my daughter came to know about this fact, she forbade them and due to this reason the present accused Mahnaz Ali with help of accused Zahoor Ahmad and Mst.Rukhsana Bibi committed the murder. Prior to the instant occurrence accused Mahnaz Ali used to torture my daughter due to his illicit relations with the accused Rukhsana Bibi.

After the occurrence local police came at the spot, I submitted an application (Exh.PA) against accused Mahnaz Ali present in court as well as accused Zahoor Ahmad and Mst.Rukhsana Bibi, on the basis of which instant case was registered. Complaint Exh.PA bears my signature as Exh.PA/1. The present accused Mahnaz Ali as well as accused Zahoor Ahmad and Mst.Rukhsana Bibi with common intention committed murder of my daughter, they may kindly be dealt with according to law..”

4. After the formal investigation of the case report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court and the accused were sent to face trial. The learned trial court framed the charge against the accused on 25.02.2020, to which the accused pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case got statements of as many as **ten** witnesses recorded. The ocular account of the case was furnished by Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2). Fazal Ahmad

(PW-3) stated that on 07.10.2019, he identified the dead body of the deceased at the time of post mortem examination and Muhammad Saleem ASI (PW-6) received the last worn clothes of the deceased from the Woman Medical Officer and produced them before Majid Iqbal, SI (PW-7) , the Investigating Officer of the case. Muhammad Nasrullah, ASI (PW-4) stated that on 06.10.2019, he received four sealed envelopes from the Crime Scene Unit, Bahawalpur and on 11.10.2019, he handed over the said sealed parcels to Muhammad Shabbir, SI (PW-10) for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore and further stated that on 19.10.2019, he received the last worn clothes of the deceased as well as three sealed Jars and three sealed envelopes from Majid Iqbal, SI (PW-7) and on 29.10.2019, he handed over the three sealed Jars and three sealed envelopes to Muhammad Shabbir, SI (PW-10) for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore. Shahzad Aslam 1647/C (PW-5) stated that on 06.10.2019, he escorted the dead body of the deceased to the hospital and received the last worn clothes of the deceased from the Medical Officer after the post mortem examination of the dead body of the deceased. Muhammad Jamil, draftsman (PW-9) prepared the scaled site plan of the place of occurrence (Exh.PJ). Muhammad Shabbir, SI (PW-10) stated that on 06.10.2019, he recorded the formal F.I.R (Exh.PA/2) and on 11.10.2019, he received four sealed envelopes from Muhammad Nasrullah, ASI (PW-4) for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore and on 29.10.2019, he received three sealed Jars and three sealed envelopes from Muhammad Nasrullah, ASI (PW-4) for their onward transmission to the office of the Punjab

Forensic Science Agency, Lahore.Majid Iqbal, SI (PW-7) investigated the case from 06.10.2019 till 10.03.2020, arrested the appellant on 15.11.2019, and detailed the facts of the investigation as conducted by him in his statement before the learned trial court.

6. The prosecution also got Dr. Irum Zafar (PW-8) examined who on 07.10.2019 was posted as Woman Medical Officer at the T.H.Q. Hospital, Chishtian and on the same day had conducted the post mortem examination of the dead body of the deceased namely Memona Bibi daughter of Allah Rakha. On conducting the post-mortem examination of the dead body of the deceased namely Memona Bibi daughter of Allah Rakha, Dr. Irum Zafar (PW-8) observed as under:-

> "Examination of Neck
>
> A bruise mark measuring 1 cm starting from below the right ear and anteriorly crossing the right thyroid cartilage running towards left ear posteriorly. On anterior part the bruise was more thick alongwith crescent shape small size bruises, more prominent on the right side of neck.
>
> **Description of Injuries**
>
> Injury No. 1.
>
> On exploration of neck area, muscles underneath the bruise were damaged, hyoid bone was fractured, taken out, sealed and handed over to police.
>
> ……..
>
> Opinion:

After thorough external and internal postmortem of the dead body, all the visceras including hyoid bone taken and sent to PFSA for opinion. Rectal (internal external), vaginal (internal), perineal swabs sent to PFSA.

Probable time that lapsed between death and postmortem within 20/hours.

Final Opinion:

Vide Forensic DNA and Serology analysis report No.PFSA 2019-262607- DNA-39187 dated 15-11-2019, Forensic DNA and Serology analysis report No.PFSA 2019-258665-DNA-38461 dated 29.11.2019, Forensic Toxicology analysis report No.PFSA 2019-262607-TOX-14960 dated 06.01.2020 and Forensic Histopathology analysis report No.PFSA 2019- 262607-PATH-07709 PATH 15463 dated 12.12.2019, received on 31.8.2020. In the light of above mentioned reports, my final opinion is as under:

No seminal material was found on item No.1,2,3 and 4, therefore, no further DNA analysis (short tandem repeat profiling) was conducted on these items.

As no standard reference sample of suspects were submitted therefore no analysis was conducted on items No.1,2,3, 4.1 and 4.2 at this time.

Drugs were not detected in blood in item No.01.

Histological examination of heart section reveals patent coronaries and unremarkable myocardium. The lung section reveals vascular congestion and presence of oedematous fluid inside alveoli. The stomach, small and large intestinal sections reveal that no pathological changes. The renal section, reveals vascular congestion and presence of hemorrhages inside renal tissue. The uterine section reveal attach decidual tissue with endometrial wall. Histological examination of

multiple sections from hyoid bone reveals bone entrapped in those are blood hemorrhages derioting ante-mortem injury to hyoid bone. These features suggest interference at the level of neck causing asphyxias death.

In the light of postmortem examination and expert opinion from PFSA Lahore, I was of the opinion that cause of death in this case was asphyxia/strangulation."

7. On 22.01.2021, the learned Assistant District Public Prosecutor gave up the prosecution witnesses namely Muhammad Irfan, Muhammad Ramzan, Muhammad Iqbal, Haji Atim and Sarfraz Ahmad 513/C as being unnecessary and closed the prosecution evidence after tendering in evidence the reports of Punjab Forensic Science Agency, Lahore (Exh. P.K, Exh.PL, Exh.PM and Exh.PN).

8. After the closure of prosecution evidence, the learned trial court examined the appellant namely Mahnaz Ali son of Nazir Ahmad under section 342 Cr.P.C. and in answer to the question why this case against you and why the P.Ws. have deposed against you, he replied that he had been involved in the case falsely and was innocent. The appellant namely Mahnaz Ali son of Nazir Ahmad opted not to get himself examined under section 340(2) Cr.P.C. and did not adduce any evidence in his defence.

9. On the conclusion of the trial, the learned Additional Sessions Judge, Chishtian convicted and sentenced the appellant as referred to above.

10. The contention of the learned counsel for the appellant precisely is that the whole case is fabricated and false and the prosecution remained

unable to prove the facts in issue and did not produce any unimpeachable, admissible and relevant evidence. Learned counsel for the appellant further contended that the story of the prosecution mentioned in the statements of the witnesses, on the face of it, was highly improbable. Learned counsel for the appellant further contended that the statements of the prosecution witnesses were not worthy of any reliance. The learned counsel for the appellant also argued that the appellant had been involved in the occurrence due to suspicion alone. The learned counsel for the appellant finally submitted that the prosecution had totally failed to prove the case against the accused beyond the shadow of a doubt.

11. On the other hand, the learned Deputy Prosecutor General contended that the prosecution had proved its case beyond the shadow of a doubt by producing independent witnesses. The learned Deputy Prosecutor General further argued that the deceased died as a result of injuries suffered at the hands of the appellant. The learned Deputy Prosecutor General further contended that the medical evidence also corroborated the statements of Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2). The learned Deputy Prosecutor General contended that there was no occasion for the prosecution witnesses, who were related to the deceased, to substitute the real offender with the innocent in this case. Lastly, the learned Deputy Prosecutor General prayed for the rejection of the appeal.

12. We have heard the learned counsel for the appellant, the learned Deputy Prosecutor General and with their able assistance, perused the record and evidence recorded during the trial.

13. The whole prosecution case revolves around the statements of Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2), the eye witnesses of the occurrence. The relationship of the said witnesses with the deceased is on record. Mamoona Bibi (deceased) was the real daughter of Allah Rakha (PW-1) and the paternal cousin of Muhammad Yqoob (PW-2). In his statement before the learned trial court, the prosecution witness namely Muhammad Yaqoob (PW-2) stated as under:-

> "Complainant Allah Rakha is my paternal uncle.. "

The prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were also admittedly not the residents of the place of occurrence. According to the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2), the prosecution witness namely Allah Rakha (PW-1) was the resident of the city of *Lahore* and the prosecution witness namely Muhammad Yaqoob (PW-2) was the resident of *Basti Jhurran-wali*, Mauza Qazi Wala, Tehsil & District Bahawalnagar, whereas the occurrence had taken place at *Chak 178/M*, which place was admittedly at a distance from the places of residences of Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2). The prosecution witness namely Allah Rakha (PW-1), during cross-examination, stated as under:-

> "I work at Lahore as labourer for the last 10/15 years.
>
> ……..
>
> I alongwith said two sons used to work in Muddle Textile Mills Lahore. My sons are having education i.e. 7/8 Classes. I am working as Laboratory Supervisor in the above said Mills.

…….

Muhammad, Yaqoob PW is grandson of my paternal aunt. Muhammad Irfan PW is resident of Tensil FortAbbas and his residence is 70 kilometer away from the place of occurrence. **Muhammad Yaqoob is resident of Basti Raanwan Tehsil Bahawalnagar, which is about 60 kilometers away from the place of occurrence**." (emphasis supplied).

The prosecution witness namely Muhammad Yaqoob (PW-2), during cross-examination, stated as under:-

"Allah Rakha Complainant and his sons work at Lahore separately at different places.

……

My residence is at a distance of about 45 kilometers away from the place of occurrence.

……..

It is correct that none from the sons of the complainant is witness of the case for the reason that they used to work at Lahore in some Factory." (emphasis supplied)

It is an admitted fact that both the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) did not have their residences or their places of employment near or around the place of occurrence. In this manner, both the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) can be validly termed as "*chance witnesses*" and therefore were under a bounden duty to provide a convincing reason for their presence at the place of occurrence, at the time of occurrence and were also under a duty to prove their presence by

producing some physical proof of the same. We have noted with grave concern that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) failed miserably to provide any consistent evidence as to the reason for their arrival at the place of occurrence and their presence at the place of occurrence , when the same was taking place. Both the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) did not even make an effort to explain as to why, on the very day of occurrence, they found it necessary to visit the matrimonial house of the deceased. Moreover, no effort was made by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) to explain as to how and when and where the prosecution witness namely Muhammad Yqoob (PW-2) joined the prosecution witness namely Allah Rakha (PW-1) on their journey towards the place of occurrence, as the prosecution witness namely Allah Rakha (PW-1) was residing at Lahore when the occurrence took place , whereas the prosecution witness namely Muhammad Yqoob (PW-2) was residing at *Basti Jhurran-wali*, Mauza Qazi Wala Tehsil & District Bahawalnagar, both places being substantially away from each other as well as the place of occurrence . We have also noted that though it was admitted by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) that the place of occurrence was at quite a distance from their residences, however, during the course of the investigation as well as before the learned trial court, the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) did not mention as to the vehicle used by them to arrive at the place of occurrence. Necessarily the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad

Yaqoob (PW-2) would have used some vehicle to travel the said distance however, the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) did not give any evidence in this regard and did not state as to how they had travelled to arrive at the place of occurrence . Majid Iqbal, SI (PW-7) , the Investigating Officer of the case, also admitted that the prosecution witness namely Allah Rakha (PW-1) did not produce any documentary evidence to prove that he had taken leave from the place of his work on the day of occurrence. Majid Iqbal, SI (PW-7) , the Investigating Officer of the case , during cross-examination , stated as under:-

> "It is correct that witness Muhammad Irfan is resident of Tehsil FortAbbas, whereas witness Muhammad Yaqoob is resident of Tehsil Bahawalnagar.
>
> ……..
>
> **Complainant did not produce any leave certificate before me during investigation**. " (emphasis supplied)

In this manner, both the eye witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) failed miserably to establish the reason for their presence at the place of occurrence, at the time of occurrence and the mode through which they arrived at the place of occurrence. We have also noted with concern that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were not mentioned as the witnesses who were present at the place of occurrence when the Investigating Officer of the case , prepared the inquest report (Exh.PG/1-

2). Majid Iqbal, SI (PW-7) , the Investigating Officer of the case , admitted during cross-examination as under:-

> "Fazal Ahmad and Haji Atim are not witnesses of the instant FIR, who are mentioned as witnesses of recovery of last worn clothes of deceased as well as identification of body "

The prosecution was under a bounden duty to establish not only that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) had a reason to proceed to the place of occurrence but also to prove the mode through which the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) arrived at the place of occurrence. The very inception of the prosecution case is put in doubt due to the said failure of the prosecution. The failure of the prosecution to prove the said facts has vitiated our trust in Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) as being truthful witnesses. Reliance is placed on the case of "*Muhammad Rafiq v. State"* **(2014 SCMR 1698)** wherein the august Supreme Court of Pakistan rejected the claim of witnesses who lived one kilometer away from the place of occurrence, but on the day of occurrence stated to be present near the spot as they were working as labourers, inasmuch as they failed to give any detail of the projects they were working on. Reliance is also placed on the case of "*Usman alias Kaloo v. State*" **(2017 SCMR 622)** wherein the august Supreme Court of Pakistan held that the ocular account of the incident had been furnished by Zahoor Ahmad, Ghulam Farid and Manzoor Ahmed in the said case ,who were all residents of some other houses and they were not the inmates of the house wherein the occurrence had taken place and therefore the said eye-witnesses were,

thus, chance witnesses and declared not worthy of reliance. Reliance is also placed on the case of "*Nasrullah alias Nasro v. The State"* **(2017 SCMR 724)** wherein the august Supreme Court of Pakistan observed as under:-

> *"In the case in hand the eye-witnesses produced by the prosecution lived eighty kilometers away from the scene of the crime, their stated reason for presence in the house of occurrence at the time of incident in issue had never been established through any independent evidence."*

14. We have also observed that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) claimed that the occurrence took place exactly at the same time when they had arrived at the place of occurrence. This narrative of the prosecution witnesses that the accused kept waiting for the arrival of the witnesses at the place of occurrence and thereafter committed the same is unnatural and cannot be believed. It is opposed to human conduct that an assailant would keep waiting for the arrival of the witnesses prior to the commission of the offence. It is all the more illogical that being perceptive of the fact that by pending the matter the accused ran the risk of the arrival of the witnesses and them deposing against the accused, even then the assailant kept waiting for their arrival. Such behaviour on the part of the accused, as deposed by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2), runs counter to natural human conduct and behaviour. Hence, being perceptive of this strain of human conduct, we are holding that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were not present at the time of occurrence, at the place of occurrence and had not witnessed the occurrence. In this

regard reliance is placed on the case of "*STATE through Advocate-General, Khyber Pakhtunkhwa, Peshawar Vs. HASSAN JALIL and others"* (**2019 S C M R 1154**) wherein the august Supreme Court of Pakistan held as under:-

> *"Arrival of Noor Seema, PW at venue exactly at a point of time when the respondent allegedly did away with the deceased, in itself is a circumstance that reflects on the very genesis of the prosecution case."*

Reliance is also placed on the case of *"Muhammad Imran Vs. The State" **(2020 S C M R 857)*** wherein the august Supreme Court of Pakistan held as under:-

> *"These contradictions, viewed in the retrospect of arrival of the witnesses exactly at a point of time when the petitioner started inflicting blows to the deceased with their inability to apprehend him without there being any weapon to keep them effectively at bay, cast shadows on the hypothesis of their presence during the fateful moments. It was an odd hour of night without any source of light as admitted by no other than Fazal Abbas (PW-4) himself."*

15. We have also noted that the alleged eye witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) alongwith Muhammad Irfan (given up prosecution witness) made no effort either to save the deceased or to apprehend the accused when they were three in number and could have easily restrained the accused. It is unnatural and unbelievable that the alleged eye witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) alongwith Muhammad Irfan (given up prosecution witness), did not even move a limb to protect their near and dear one, despite the fact that the appellant was not even armed with any weapon, rather according to the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) , the appellant was present at the place of occurrence empty handed. The alleged eye witnesses namely

Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) alongwith Muhammad Irfan (given up prosecution witness), also allowed the appellant to escape from the place of occurrence .No person having ordinary prudence would believe that such closely related witnesses would remain watching the proceedings as mere spectators for as long as the occurrence continued without doing anything to rescue the deceased or to apprehend the assailant. It only proves that the deceased was at the mercy of the assailant and no one was there to save her. Such behaviour, on the part of the witnesses, runs counter to natural human conduct and behaviour. Article 129 of the Qanun-e-Shahadat, 1984 allows the courts to presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events and human conduct in relation to the facts of the particular case. We thus trust the existence of this fact, by virtue of the Article 129 of the Qanun-e-Shahadat, 1984, that the conduct of the witnesses, as deposed by them, was opposed to the common course of natural events, human conduct and that the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were not present at the place of occurrence, at the time of occurrence and their presence was procured subsequently. The august Supreme Court of Pakistan has enunciated binding principles for appreciation of evidence in such circumstances. Reliance is placed on the case of "*Zulifqar Ali v. The State*" **(2021 S C M R 1373)** wherein the august Supreme Court of Pakistan observed as under:-

> *"Though the human response/reaction, in a sudden crisis, particularly one striking awe and terror, cannot be gauged or assessed with any degree of empirical certainty as fear impacts differently upon faculties*

> *of the onlookers, nonetheless, despite maximum latitude, in the given scenario, it really appears hard for the appellant who operated with impunity in the face of heavy presence of the witnesses; deceased being herself "a young female with average-built" could not be expected a static target offering no resistance. Razor (P-13), commonly used by the barbers, given its moving handle instead of a fixed grip, is an instrument to be managed with some difficultly against a moving object; it risks the handler more than the intended target and as such unless the victim is stunned as a stone, a possibility beyond contemplation for the witnesses standing nearby to foil the attempt; they included three able-bodied males in their youth; their inaction is mindboggling and explanation far from being plausible, circumstances that in retrospect insinuate their absence at the scene"*

Reliance is placed on the case of "*Pathan v. The State"* **(2015 SCMR 315)** at page 317 wherein the august Supreme Court of Pakistan observed as under:-

> *"The causing of such large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to the pause in between the first injury and the last one but all the three P.Ws. including the son with a strong stature and built remained as silent spectators. They did not react or showed any response when the accused was causing the injuries. No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot."*

Further reliance is placed on the case of "*Shahzad Tanveer v. The State"* **(2012 SCMR 172)** at page-176 wherein the august Supreme Court of Pakistan observed as infra:-

> *"It is also more strange that none of the P.Ws. dared to physically intervene in order to save the victim or apprehend the accused at the spot."*

Reliance is also placed on the case of "*Liaquat Ali v. The State"* **(2008 SCMR 95)** at page 97 wherein the august Supreme Court of Pakistan observed as under:

> *"He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."*

16. We have noted with serious anxiety that the ocular account of the occurrence as furnished by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) is inconsistent with the medical evidence as furnished by Dr. Irum Zafar (PW-8) and flawed beyond mending , resulting in disfiguring the complexion of the whole prosecution case beyond reparation and recognition. According to the statements of the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2), they had seen the appellant namely Mahnaz Ali, pressing the neck of the deceased with his hands and kept pressing the same till the deceased died, however, Dr. Irum Zafar (PW-8), on examining the dead body of Memona Bibi (deceased) observed a bruise mark measuring 1 cm, starting from below the right ear and anteriorly crossing the right thyroid cartilage, running towards the left ear posteriorly and also noted that the anterior part the bruise was more thick, alongwith crescent shaped, small sized bruises, present more prominently on the right side of the neck. Dr. Irum Zafar (PW-8), on examining the dead body of Memona Bibi (deceased), gave her opinion with regard to the manner in which the neck of the deceased was pressed , as under:-

" The neck may be **pressed with rope in this case**."

The prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) made a contrary statement to the opinion of Dr. Irum Zafar (PW-8) and did not state that any rope had been used to press the neck of the deceased or that they had seen the appellant using a rope during the occurrence. In Chapter 20 '*Deaths from Asphyxia* ", from page 515 to page

517 of Rai Bahadur Jaising P. Modi's *A Textbook of Medical Jurisprudence and Toxicology* (26th Edition 2018) Strangulation has been defined as the compression of the neck by a force other than hanging and when constriction is produced by the pressure of the fingers and palms upon the throat, it is called as throttling. It has been further noted that if fingers are used for throttling, **marks of pressure by the thumb and the finger prints are found on the either side of the neck**. In Chapter 20 '*Deaths from Asphyxia*", at page 515 of Rai Bahadur Jaising P. Modi's *A Textbook of Medical Jurisprudence and Toxicology* (26th Edition 2018), the types of strangulation have been mentioned as under:-

> " Types of Strangulation
>
> . Ligature strangulation
>
> . Throttling (manual strangulation-compressing with hand) • Mugging (compressing with forearm or foot or wrist)
>
> • Bansdola (wooden stick is used to compress the neck) • Garrotting (a rope or a loincloth and a wooden stick as a lever to tighten the ligation is used)
>
> • Accidental strangulation (can arise in the course of a person's occupation when a neck tie or scarf is caught in moving machinery or belts as in mill workers or in an epileptic or an intoxicated person who may be helpless in extricating himself from such tight encirclement of the neck or in utero when the movements of the foetus cause the umbilical cord to be wound round into neck."

In the same Chapter 20 '*Deaths from Asphyxia* ", from page 516 to page 517 of Rai Bahadur Jaising P. Modi's *A Textbook of Medical Jurisprudence and Toxicology* (26th Edition 2018) it has been discoursed as under:-

"(2) If fingers are used (throttling), marks of pressure by the thumb and the fingertips are usually found on either side of the windpipe. The thumb mark is ordinarily higher and wider on one side of the front of the neck, and the finger marks are situated on its other side obliquely downwards and outwards, and one below the other. However, the marks are sometimes found clustered together, so that they cannot be distinguished separately. These fingertip bruises, each disc-shaped and 1-2 cm in diameter, look like red bruises (six penny bruises) if examined soon after death, but they look brown, dry and parchment-like sometimes death. One should refrain from drawing inference from the direction of curved abrasion, as to how the hand of the assailant might have been applied to the neck of victim. The inherent quality of the victim's skin, the shape, and length of the fingernails of the assailant render such inferences extremely tenuous. This linear or crescentic marks produced by the fingernails are occasionally present, if the fingertips are pressed deeply into the soft tissues of the neck. A body, which is wet, may not reveal fingernail marks until drying of the skin of the body. When both hands are used to grasp and compress the throat, the thumb mark of one hand and the finger marks of the other hand are usually found on either side of the throat. Sometimes, both thumb marks are found on one side and several finger marks on the opposite side. If the throat is compressed between two hands, one being applied to the front and the other to the back, bruises and abrasions may be found on the front of the neck, as well as on its back.

Besides these marks, there may be abrasions and bruises on the mouth, nose, cheeks, forehead, lower jaw or any other part of the body, if there has been a struggle. Similarly, fractures of the ribs and injuries to the thoracic and abdominal organs may be

present, if the assailant kneels on the chest or abdomen of his victim while pressing his throat"

As narrated above, had the deceased been throttled in the manner as stated by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) then Dr. Irum Zafar (PW-8) must have observed the evidence of marks of pressure by the thumb and the fingertips, fingertip bruises, linear or crescentic marks produced by the fingernails, abrasions and bruises on and around the neck of the dead body of the deceased , however she did not. Therefore, the oral account of the occurrence, as given by prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) , cannot be said to be in accordance with the medical evidence, rather is proved to be contrary to it.

17. It is also a fact of the prosecution case that according to the report of the Punjab Forensic Science Agency, Lahore (Exh.PL) a rope was also sent to it for analysis, however, no DNA Profile of the appellant was obtained from the same. When an individual touches an object, epithelial cells are left behind. Touch DNA is also known as epithelial DNA. The same traditional DNA analysis procedures are used to analyze and examine these remaining epithelial cells as are used to analyze and examine bodily fluids. The amount left behind is often less than 100 picograms and is also called low copy DNA. This is evidence with "no visible staining that would likely contain DNA resulting from the transfer of epithelial cells from the skin to an object. Due to development, lower amounts of human DNA can be detected and, possibly, a full or partial STR profile can be generated. DNA evidence has emerged as a powerful tool to identify perpetrators of

unspeakable crimes and to exonerate innocent individuals accused of similarly heinous actions. The technology has advanced to Polymerase Chain Reaction (PCR) based short tandem repeat (STR) testing. This system multiplies a single copy of a DNA segment to allow for the analysis of the genetic makeup of a small sample. Current analysis makes it possible to determine whether a biological tissue matches a suspect with near certainty. DNA is comprised of "coding" and "non-coding regions. The loci examined are found on "junk DNA," which are segments of the DNA not known to code for any specific trait, but known to be different between individuals. "Junk DNA" are the non-coding regions which contain valuable information about identity, but do not contain information regarding coding for other genetic traits. This allows the development of a DNA profile without an examination into other genetic markers. The report of the Punjab Forensic Science Agency, Lahore (Exh.PL) supports the claim of the appellant that he was innocent for the reason that had the appellant handled the rope then his DNA profile must had been obtained from the said rope because had he touched the said rope, then the epithelial cells from the skin of the appellant must have been left behind on the rope handled by him and subsequently the presence of DNA profile of the appellant would have been identified on the said rope handled by him by the Punjab Forensic Science Agency, Lahore . The absence of any DNA profile of the appellant on the rope sent to the Punjab Forensic Science Agency, Lahore for DNA analysis creates further doubt regarding the involvement of the appellant in the occurrence .

18. Another aspect of the case raising doubt over the presence of the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) at the place of occurrence, at the time of occurrence, is the fact the matter was reported to the police on **06.10.2019 at 09.30 p.m**., when the prosecution witness namely Allah Rakha (PW-1) submitted the written application (Exh.PA) to Majid Iqbal, SI (PW-7) , the Investigating Officer of the case, whereas the occurrence had taken place on **06.10.2019 at 12.30 p.m**. In this manner, the delay in reporting the matter to the police was of about **nine hours,** for which delay no reason, much less plausible, was offered. No justification, much less credible, has been given by the prosecution at any stage for such deferral in reporting the matter to the police and the delay in submitting the written application (Exh. P.A.) by Allah Rakha (PW-1) to Majid Iqbal, SI (PW-7). The reason for this inordinate delay in reporting the matter to the police by the prosecution witness namely Allah Rakha (PW-1) is obvious, being that both the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were not present at the place of occurrence, at the time of occurrence and the delay was used to procure their attendance. The prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) even admitted that the police arrived at the place of occurrence as early as at about 06.00 p.m, however, the written application (Exh.PA) was submitted at 09.30 p.m. The prosecution witness namely Allah Rakha (PW-1) , during cross-examination , stated as under:-

" Police reached at the place of occurrence at about 06:00PM."

The prosecution witness namely Muhammad Yqoob (PW-2) also admitted during cross-examination , stated as under:-

> "Police reached at the place of occurrence at about 06:00 PM "

Majid Iqbal, SI (PW-7) , the Investigating Officer of the case , also admitted that the case was registered after substantial delay. Majid Iqbal, SI (PW-7), the Investigating Officer of the case , during cross-examination, stated as under:-

> " It is correct that **FIR was registered with delay of 10 hours from the time of occurrence**." (emphasis supplied)

In this case, the ocular account furnished is suffering from legal and factual infirmities and does not appeal to a prudent mind, much less a legal one, because the witnesses never reported the matter to the police for as many as nine hours. This inordinate delay in reporting the matter conclusively proves that the written application (Exh. P.A.) submitted by Allah Rakha (PW-1) and the formal F.I.R (Exh.PA/2) were prepared after probe, consultation, planning, investigation and discussion and as the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) were not present at the place of occurrence, at the time of occurrence, the delay was used for procuring their arrival. As many as nine hours were taken to invent a false and dishonest narrative of the written application (Exh. P.A.) of Allah Rakha (PW-1). The scrutiny of the statements of the prosecution witnesses reveals that the written application (Exh. P.A.) of Allah Rakha (PW-1) was neither prompt nor spontaneous nor natural, rather was a contrived, manufactured and a compromised document. Sufficient doubts have arisen and inference against the

prosecution has to be drawn in this regard and the delay in reporting the matter to the police and the failure of the prosecution witnesses to proceed to the Police Station evidences their absence at the time of occurrence, at the place of occurrence. Reliance is placed on the case of "*Ghulam Abbas and another v. The State and another"* **(2021 SCMR 23)** wherein the august Supreme Court of Pakistan observed as under:-

> *"As per contents of F.I.R., the occurrence in this case took place on 19.06.2008 at 01.40 a.m. and the matter was reported to the Police on the same morning at 07.00 a.m. and as such there is a delay of more than five hours in reporting the crime to the Police whereas Police Station was situated at a distance of just six kilometers from the place of occurrence. No explanation whatsoever was furnished by the complainant for this delay in reporting the crime to the Police. Hameed Ullah Khan SI (PW.15) who investigated the case stated during his cross-examination that he reached at the place of occurrence at about 05.00 a.m. and he had completed the police proceedings by 06.30 p.m. In the circumstances, chances of deliberations and consultations before reporting the matter to the Police cannot be ruled out*."

Reliance is also placed on the case of "*MUHAMMAD ASHRAF JAVEED and another vs. MUHAMMAD UMAR and others"* (**2017 SCMR 199**) wherein the august Supreme Court of Pakistan was pleased to hold as under:

> *"The hospital is closely situated to the Police Station but neither the complainant nor P.W.s took a little pain to report the matter, nor the staff of the hospital including the treating doctor took initiative*."

Guidance is also sought from the principle enunciated by the august Supreme Court of Pakistan in the case of "*Zafar vs. The State and others"* (**2018 SCMR 326**) where the august Supreme Court of Pakistan was pleased to hold as under:-

> "*It has been observed by us that the occurrence in this case as per prosecution took place on 03.09.1999 at 3.00 a.m. (later half of night) and the matter was reported to the police on the same day at 8.30 a.m. i.e. after five hours and thirty minutes of the occurrence. The distance between the place of occurrence and the police station is 09 miles. The postmortem on the dead body of deceased was conducted on the same day at 2.00 p.m. i.e. after 11 hours of the occurrence. No explanation*

> *whatsoever has been given by the complainant Shahadat Ali (PW5) and Umer Daraz (PW6) in the F.I.R. or while appearing before the learned trial Court qua the delay in lodging the F.I.R. or for that matter the belated postmortem of the deceased."*

Guidance is sought from the principles enunciated by the august Supreme Court of Pakistan in the cases of "*G. M. NIAZ Vs. The State"* (**2018 SCMR 506**), "*Abdul Jabbar and another Vs. The State"* (**2019 S C M R 129**) and "*Muhammad Shafi alias Kuddoo Vs. The State and others"* (**2019 S C M R 1045**).

19. We have also noted with disquiet that despite the fact that the occurrence took place at about **12.30 p.m on 06.10.2019**, the post-mortem examination of the dead body of the deceased was conducted after much delay. According to Dr. Irum Zafar (PW-8), she conducted the post-mortem examination of the dead body of the deceased namely Memoona Bibi at **07.30 a.m on 07.10.2019** i.e. after **nineteen hours** of the occurrence and after **ten hours** of the submission of the written application (Exh. P.A.) of Allah Rakha (PW-1) to Majid Iqbal, SI (PW-7). Dr. Irum Zafar (PW-8) , who conducted the post-mortem examination of the dead body of Memoona Bibi (deceased) and prepared the post-mortem examination report (Exh. PH/1-7), gave the time between death and post-mortem examination as being **twenty hours**. The reason which is apparent for the delayed conducting of the post-mortem examination of the dead body of Memona Bibi daughter of Allah Rakha(deceased) is that by that time the details of the occurrence were not known and the said time was used not only to procure the attendance of the witnesses but also to fashion a false narrative of the occurrence. No explanation was offered to justify the said delay in receiving the complete documents from the police

and the delay in conducting the post-mortem examination. Furthermore, it was also not explained by the prosecution why the dead body was not sent to the hospital for as many as fifteen hours after the occurrence, as the dead body was received at the hospital on 07.10.2019 at 03.00 a.m. Dr. Irum Zafar (PW-8) explained during cross-examination , as under:-

> " It is correct that I have mentioned the time between death and postmortem as **within 20 hours**.
>
> ……
>
> The dead body was produced at about 03:00 AM, no police papers were submitted alongwith the dead body. **Police papers were provided to me at 06:15 AM.**" (emphasis supplied)

These facts clearly establish that the witnesses claiming to have seen the occurrence were not present at the time of occurrence and the delay in the post-mortem examination was used to procure their attendance and formulate a dishonest account, after consultation and planning. It has been repeatedly held by the august Supreme Court of Pakistan that such delay in the post-mortem examination is reflective of the absence of witnesses and the sole purpose of causing such delay is to procure the presence of witnesses and to further advance a false narrative to involve any person. The august Supreme Court of Pakistan in the case of "*Khalid alias Khalidi and two others vs. The State"* **(2012 SCMR 327)** has held as under:

> "*The incident in the instant case took place at 2.00 a.m, F.I.R. was recorded at 4/5 a.m, Doctor Muhammad Pervaiz medically examined the injured person at 4.00 a.m. but conducted the post mortem examination of the deceased at 3.00 p.m i.e. after about ten hours, which fact clearly shows that the F.I.R. was not lodged at the given time".*

The august Supreme Court of Pakistan in the case of "*Mian SOHAIL AHMED and others vs. The State and others"* **(2019 SCMR 956)** has held as under:

> "*According to the Doctor (PW-10), who did the post-mortem examination, the dead-body of the deceased was brought to the mortuary at 11:15 a.m. on 01.9.2006 and the post-mortem examination took place at 12 noon after a delay of 15 hours. This delay in the post-mortem examination, when the occurrence was promptly reported at 8:45 p.m. and formal F.I.R. was registered at 9.00 p.m. on 31.8.2006 gives rise to an inference that the incident was not reported as stated by the prosecution"*

The august Supreme Court of Pakistan in the case of "*Muhammad Rafique alias Feeqa vs. The State"* **(2019 SCMR 1068)** has held as under:

> *"More importantly, the only person who can medically examine the dead body during the said police custody of the dead body is the medical officer, and that too, when the same is handed over to him by the police for its examination. For the purposes of the present case, it is crucial to note that, at the time of handing over a dead body by the police to the medical officer, all reports prepared by the investigating officer are also to be handed over in order to assist in the examination of the dead body.*
>
> *10. Thus, once there is suspicion regarding the death of a person, the following essential steps follow: firstly, there is a complete chain of police custody of the dead body, right from the moment it is taken into custody until it is handed over to the relatives, or in case they are unknown, then till his burial; secondly, post mortem examination of a dead person cannot be carried out without the authorization of competent police officer or the magistrate; thirdly, post mortem of a deceased person can only be carried out by a notified government Medical Officer; and finally, at the time of handing over the dead body by the police to the Medical Officer, all reports prepared by the investigating officer are also to be handed over to the said medical officer to assist his examination of the dead body.*
>
> *11. **It is usually the delay in the preparation of these police reports, which are required to be handed over to the medical officer along with the dead body, that result in the consequential delay of the post mortem examination of the dead person**. To repel any adverse inference for such a delay, the prosecution has to provide justifiable reasons therefor, which in the present case is strikingly wanting."*

20. The learned Deputy Prosecutor General has also relied upon the evidence of motive and submitted that it corroborated the ocular account.

The motive of the occurrence as stated by Allah Rakha (PW-1) in his written application (Exh. P.A.) was that the deceased came to know about the illicit relations of the appellant with Mst.Rukhsana Bibi(since acquitted by the learned trial court), the co-accused of the appellant and therefore, the appellant not only initially exacted violence upon the deceased but subsequently also murdered her . We have perused the statements of the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) and find that they failed to prove the motive of the occurrence as stated by them. It is even otherwise absurd to believe that Zahoor Ahmad(since acquitted by the learned trial court), the husband of Mst. Rukhsana Bibi, would have joined her during the occurrence to commit the murder of the wife of a person, in this case the appellant , who was having illicit relations with his wife, as has been stated by the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2). Furthermore, the prosecution witness namely Allah Rakha (PW-1) admitted that during the course of the investigation he made a statement in favour of both Zahoor Ahmad and Rukhsana Bibi (both since acquitted), the co-accused of the appellant and during cross-examination stated as under:-

> "It is correct that I exonerated accused Zahoor Ahmad and Mst.Rukhsana Bibi."

The Investigating Officer of the case also did not collect any evidence in support of the allegation that the deceased came to know about the illicit relations of the appellant with Mst.Rukhsana Bibi(since acquitted by the learned trial court), the co-accused of the appellant and therefore, the

appellant not only initially exacted violence upon the deceased but subsequently also murdered her. Majid Iqbal, SI (PW-7) , Investigating Officer of the case , during cross-examination , admitted as under:-

> "It is correct that the motive that there were illicit relations was between accused Mahnaz All and accused Rukhsana Bibi **was found false during my investigation.** It is correct that investigation regarding the innocence of accused Zahoor Ahmad Rukhsana Bibi accused was also verified by high ups of the police department.
>
> ……
>
> It is correct that during investigation illicit relations of accused and Mst.Rukhsana bibi, as alleged by the complainant, were not found. " (emphasis supplied)

There is no evidence on record that Memona Bibi daughter of Allah Rakha (deceased) was facing any threat to her life at the hands of the appellant prior to the occurrence rather, to the contrary, she was living with the appellant till her tragic death. This also proves that the appellant and the deceased were having a happy and a healthy marital life and hence there did not exist any reason for the appellant to have murdered his loving wife. The prosecution witnesses failed to provide evidence enabling us to determine the truthfulness of the motive alleged and the fact that the said motive was so compelling that it could have led the appellant to have committed the *Qatl-i-Amd* of the deceased. There is a poignant hush with regard to the particulars of the motive alleged. No independent witness was produced by the prosecution to prove the motive as alleged. Even otherwise a tainted piece of evidence cannot corroborate another tainted

piece of evidence. The august Supreme Court of Pakistan has held in the case of "*Muhammad Javed v. The State"* **(2016 SCMR 2021)** as under:

> "*The said related and chance witnesses had failed to receive any independent corroboration inasmuch as no independent proof of the motive set up by the prosecution had been brought on the record of the case.*"

21. It has been argued by the learned Deputy Prosecutor General that where any person dies an unnatural death in the house of such accused, then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The prosecution is bound to prove its case against an accused person beyond a reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts the presence of some eye-witnesses and such claim of the prosecution is not established by it, there the accused person could not be convicted merely on the basis of a presumption that since the murder of a person had taken place in his house, therefore, it must be he and none else who would have committed that murder. The learned Deputy Prosecutor General submits that it was in the knowledge of the appellant how the deceased died so it was the appellant who was responsible, in the absence of any explanation. The law on the burden of proof, as provided in Article 117 of the Qanun-e-Shahadat, 1984, mandates the prosecution to prove, and that too, beyond any doubt, the guilt of the accused for the commission of the crime for which he is charged. The said provision provides:

> ***"117. Burden of proof****:- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

On a conceptual plain, Article 117 of the Qanun-e-Shahadat, 1984 enshrines the foundational principle of our criminal justice system, whereby the accused is presumed to be innocent unless proved otherwise. Accordingly, the burden is placed on the prosecution to prove beyond doubt the guilt of the accused, which burden can never be shifted to the accused, unless the legislature by express terms commands otherwise. It is only when the prosecution is able to discharge the burden of proof by establishing the elements of the offence, which are sufficient to bring home the guilt of the accused then, the burden is shifted upon the accused, inter alia, under Article 122 of the Qanun-e-Shahadat, 1984, to produce evidence of facts, which are especially in his exclusive knowledge, and practically impossible for the prosecution to prove, to avoid conviction. Article 122 of Qanun-e-Shahadat,1984 reads as under:

> *"122. Burden of proving fact especially within knowledge:- When any fact is especially within the knowledge of any person, the burden to proving that fact is upon him."*

It has to be kept in mind that Article 122 of the Qanun-e-Shahadat, 1984 comes into play only when the prosecution has proved the guilt of the accused by producing sufficient evidence, except the facts referred in Article 122 Qanun-e-Shahadat, 1984, leading to the inescapable conclusion that the offence was committed by the accused. Then, the burden is on the accused not to prove his innocence, but only to produce evidence enough to create doubts in the prosecution's case. It may be noted that this issue was also dilated upon by the august Supreme Court of Pakistan, in the case of "*Rehmat alias Rahman alias Waryam alias Badshah v. The State"* (**PLD 1977 SC 515**), where, while deliberating

upon Section 106 of the Evidence Act, which is *para materia* with Article 122 of the Qanun-e-Shahadat, 1984, held as under:

> *"Needless to emphasis that in spite of section 106 of the Evidence Act in criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the inability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve! the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."*

The *ratio decidendi* of the above decision was further developed in the case of "*Nasrullah Alias Nasro Versus The STATE"* (**2017 S C M R 724**), wherein, it held as under:

> *"It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the case, particularly when the medical evidence contradicted the same. Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder.*
>
> *……..*
>
> *In a case of this nature the appellant could not have been convicted for the alleged murder merely because he happened to be the husband of the deceased."*

In a criminal case, the burden of proof is on the prosecution and article 122 of the Qanun-e-Shahadat, 1984 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. If the article was to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. Article 122 of the Qanun-e-Shahadat, 1984 cannot be used to undermine the well-established rule of law that, save in a very exceptional class of cases, the burden is on the prosecution and never shifts. Throughout the web of the Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the accused's guilt subject to any statutory exception. No matter what the charge, the principle that the prosecution must prove the guilt of the accused is the law and no attempt to whittle it down can be entertained. As discussed above, the prosecution witnesses namely Allah Rakha (PW-1) and Muhammad Yaqoob (PW-2) failed miserably to prove their presence at the place of occurrence, at the time of occurrence. In a case of this nature, the appellant could not have been convicted for the alleged murder merely because he happened to be the resident of the place of occurrence. An accused person cannot be convicted merely because he did not explain the circumstances in which the deceased had lost her life. The august Supreme Court of Pakistan has held in the case of "*MUHAMMAD JAMSHAID and another vs. The State and others"* (**2016 SCMR 1019**) as under:

> *"only circumstance relied upon by the prosecution was that the deadbody of the deceased had been found inside the house of the appellant and, hence, it was concluded by the courts below that it must be none other than the present appellant who had done the deceased to death. We have found such an approach adopted by the courts below to be nothing but speculative".*

The august Supreme Court of Pakistan has held in the case of "*Arshad Khan vs. The State"* (**2017 SCMR 564**) as under:

> *"It may be true that it has been held by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) that in such cases some part of the onus lies on the accused person to explain as to how and in which circumstances the accused person's wife had died an unnatural death inside the confines of the matrimonial home but at the same time it has also been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that where the prosecution completely fails to discharge its initial onus there no part of the onus shifts to the accused person at all."*

The august Supreme Court of Pakistan has held in the case of "*Nazeer Ahmed vs. The State"* (**2016 SCMR 1628**) as under:

> *"It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Abdul Majeed v. The State (2011 SCMR 941) and Saeed Ahmed v. The State (2015 SCMR 710)."*

The august Supreme Court of Pakistan has held in the case of "*Asad Khan vs. The State"* (**PLD 2017 Supreme Court 681**) as under:

> *"It had been held by this Court in the case of Arshad Mehmood v. The State (2005 SCMR 1524) that where a wife of a person dies an unnatural death in the house of such person there some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. In the later case of Saeed Ahmed v. The State (2015 SCMR 710) the said legal position had been elaborated and it had been held that an accused person is under some kind of an obligation to explain the circumstances in which his vulnerable dependent had met an unnatural death within the confines of his house; It had, however, been held in the case of Abdul Majeed v. The State (2011 SCMR 941) that where the entire case of the prosecution stands demolished or is found to be utterly*

> *unbelievable there an accused person cannot be convicted merely because he did not explain the circumstances in which his wife or some vulnerable dependent had lost his life. In such a case the entire burden of proof cannot be shifted to him in that regard if the case of the prosecution itself collapses. The present case is a case of the latter category wherein the entire case of the prosecution has been found by us to be utterly unbelievable and the same stands demolished and, thus, we cannot sustain the appellant's conviction and sentence merely on the basis of an inference or a supposition qua his involvement."*

The august Supreme Court of Pakistan has held in the case of "*Abdul Majeed vs. The State"* (**2011 SCMR 941**) as under:

> *"The basic principle of criminal law is that it is the burden of the prosecution to prove its case against the accused beyond reasonable doubt. This burden remains throughout and does not shift to the accused, who is only burdened to prove a defence plea, if he takes one. The strangulation to death of the appellant's wife in his house may be a circumstance to be taken into account along with the other prosecution evidence. However; this by itself would not be sufficient to establish the appellant's guilt in the absence of any other evidence of the prosecution connecting him to the crime. The prosecution has also not been able to establish that the appellant was present in the house at the time his wife was murdered. This, perhaps, distinguishes this case from that of "Afzal Hussain Shah v. The State" (ibid) where the accused admittedly was present in the house when his wife was killed."*

22. Considering all the above circumstances, we entertain serious doubt in our minds regarding the involvement of the appellant namely Mahnaz Ali son of Nazir Ahmad, in the present case. It is a settled principle of law that for giving the benefit of the doubt, it is not necessary that there should be so many circumstances rather if only a single circumstance creating reasonable doubt in the mind of a prudent person is available then such benefit is to be extended to an accused not as a matter of concession but as of right. The august Supreme Court of Pakistan in the case of "*Muhammad Mansha Vs. The State"* (**2018 SCMR 772**) has enunciated the following principle:

> *"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which*

> *creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akramv.The State (2009 SCMR 230) and Muhammad Zamanv.The State (2014 SCMR 749)."*

Reliance is also placed on the judgment of the august Supreme Court of Pakistan "*Najaf Ali Shah Vs. the State"* (**2021 S C M R 736**) in which it has been as infra:

> *"9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."*

23. For what has been discussed above, Criminal Appeal No.68 of 2022 lodged by Mahnaz Ali son of Nazir Ahmad (appellant) is **allowed** and the

conviction and sentence of the appellant awarded by the learned trial court through the impugned judgment dated 27.01.2022 are hereby **set-aside**. Mahnaz Ali son of Nazir Ahmad (appellant) is ordered to be acquitted by extending him the benefit of the doubt. Mahnaz Ali son of Nazir Ahmad (appellant) is in custody and is directed to be released forthwith if not required in any other case.

24. **Murder Reference No.06 of 2022** is answered in **Negative** and the sentence of death awarded to Mahnaz Ali son of Nazir Ahmad is **Not Confirmed**.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

(SADIQ MAHMUD KHURRAM)
JUDGE

Raheel

APPROVED FOR REPORTING

JUDGE

JUDGE