

Stereo. H.C. JD A 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH,MULTAN.
JUDICIAL DEPARTMENT

Murder Reference No.13 of 2021
(The State Vs. Riaz Hussain)

Criminal Appeal No. 312-J of 2021
(Riaz Hussain Vs. The State.)

JUDGMENT

Date of hearing:	05.12.2024.
Appellant by:	Mr. Saddar ud Din Alvi, Advocate.
State by:	Mr. Muhammad Ali Shahab, Deputy Prosecutor General.
Complainant by:	Mr. Sikandar Javed, Advocate.

SADIO MAHMUD KHURRAM, J.—Riaz Hussain son of Muhammad Bakhsh (convict) was tried by the learned Additional Sessions Judge, Rajanpur in the case F.I.R. No. 676 of 2014 dated 25.11.2014 registered at Police Station Fazilpur, District Rajanpur in respect of offences under sections 302, 148 and 149 P.P.C. for committing the *Qatl-i-Amd* of Sajjad Hussain alias Pannu son of Allan Khan (deceased). The learned trial court vide judgment dated 13.04.2021, convicted Riaz Hussain son of Muhammad Bakhsh (convict) and sentenced him as infra:

Riaz Hussain son of Muhammad Bakhsh :

Death under section 302(b) P.P.C. as *Tazir* for committing *Qatl-i-Amd* of Sajjad Hussain alias Pannu son of Allan Khan (deceased) and directed to pay Rs.200,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased and in case of

default thereof, the convict was directed to further undergo six months of simple imprisonment.

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

2. Feeling aggrieved, Riaz Hussain son of Muhammad Bakhsh (convict) lodged Criminal Appeal No.312-J of 2021 through jail assailing his conviction and sentence. The learned trial court submitted Murder Reference No.13 of 2021 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentence of death awarded to the appellant namely Riaz Hussain son of Muhammad Bakhsh. We intend to dispose of the Criminal Appeal No.312-J of 2021 and Murder Reference No.13 of 2021 through this single judgment.

3. Precisely, the necessary facts of the prosecution case, as narrated by Ghulam Qadir (PW-13), the eye witness of the case, are as under:-

“States that on 25.11.2014, I alongwith my father Taj Muhammad complainant (since dead) and Haji Muhammad were sitting at the brokerage (Arhat) of Sajid Hussain son of Sadiq Muhammad, in front of that brokerage (Arhat) there was brokerage (Arhat) of Sajjad Hussain alias Punnu. At about 1.45 p.m, Riaz accused armed with Kalashnikov present in court, Zaffar alias Allah Ditta (already tried) armed with Kalashnikov by one motorcycle, while Sultan, Ameen (already tried) both armed with Kalashnikovs by second motorcycle, Talib Hussain and Ameer Bakhsh (already tried) both armed with Kalashnikov by third motorcycle came on brokerage (Arhat) of Punnu Khan. They alighted from their respective motorcycles and Ameer Bakhsh went on back of brokerage (Arhat). In our view, Riaz Hussain accused made a fire with his Kalashnikov which hit Sajjad Hussain alias Punnu khan on right side of his /chest. Sajjad Hussain alias Punnu khan tried to stand up from the cot but Talib Hussain made fire from his Kalashnikov which hit Sajjad Hussain alias Punnu Khan on his ribs under left arm pit. Zaffar alias Allah Ditta made fire shot with Kalashnikov which hit him on right side of his belly. Sultan made a fire from his Kalashnikov which hit on his right bicep. Riaz accused made second fire with his Kalashnikov which hit him on his right thigh. Ameen made fire shot from his Kalashnikov which hit on outer side of right thigh. Talib Hussain made a fire from his

Kalashnikov which hit on little above of right knee. Ameer Bakhsh accused who was behind the brokerage (Arhat) kept on making aerial firing continuously. When I, my father and Haji Muhammad tried to go to the place of occurrence, all the accused persons threatened us of dire consequences. Sajjad Hussain alias Punnu Khan fell down on the ground while all the accused persons while making aerial firing fled away from the place of occurrence by their motorcycles towards northern side. On hearing the firing neighbors, shop keepers and passersby attracted to the place of occurrence. We got boarded Sajjad Hussain alias Punnu khan on a private Dalla and brought him to hospital Fazilpur where he succumbed to the injuries. Motive behind the occurrence is that there was an FIR of murder of brother of Riaz Hussain accused present in court against persons of 5/6 tribes including our relatives and due to that grudge all the accused persons committed the murder of Sajjad Hussain alias Punnu Khan due to suspicion that Sajjad Hussain alias Punnu was involved in the said murder case. Police came at the place of occurrence and collected blood stained soil vide recovery memo Ex.P-G after making into sealed parcel. I.O also collected 11 crime empties (P-6/1-11) vide recovery memo Ex.P-H and blood stained cot P-7 vide recovery memo Ex.P.J. I and Haji Muhammad attested the above mentioned recovery memos by signing the same. I.O recorded my statement under section 161 Cr.P.C in this regard.”

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 was sent to face trial. The learned trial court framed the charge against the accused on 05.11.2020, 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 **fourteen** witnesses recorded. The ocular account of the case was furnished by Ghulam Qadir (PW-13) and Haji Muhammad (PW-14). Akhtar Abbas 509/HC (PW-2) stated that on 25.11.2014, 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. Wahid Bakhsh, ASI (PW-3) stated that on 25.11.2014, he recorded the formal F.I.R. (Exh.PB). Tariq Raheem 1040/C (PW-4) stated that on 26.03.2015, he made his report (Exh.PC/1) upon the non-bailable warrants of arrest (Exh.PC) issued of the appellant and on 29.03.2015, he pasted the copy of the proclamation (Exh.PD) at the relevant places. Javed Iqbal 121/C (PW-5) stated that on 26.07.2020, the appellant got recovered Kalashnikov rifle (P-4) and five live bullets (P-5/1-5). Ghulam Qasim, Patwari (PW-9) prepared the scaled site plan of the place of occurrence (Exh.PL). Mahmood Ahmad 1142/HC (PW-11) stated that on 26.07.2020, Ashiq Hussain, SI (PW-10) handed over to him a sealed parcel said to contain the recovered Kalashnikov rifle and empties and on 14.08.2020, he handed over the said sealed parcel to Ashiq Hussain, SI (PW-10) for its onward transmission to the office of the Punjab Forensic Science Agency, Lahore . Muhammad Usman (PW-12) stated that on 25.11.2014, he identified the dead body of the deceased at the time of its post mortem examination and the Medical Officer handed over the last worn clothes of the deceased to the police official after post mortem examination. Kazim Hussain, SI (PW-6) investigated the case from 25.11.2014 till 12.12.2014 and detailed the facts of the investigation as conducted by him in his statement before the learned trial court. Ashiq Hussain, SI (PW-10) investigated the case from 12.07.2020 till 15.09.2020, arrested the appellant on 12.07.2020, 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. Abdul Ghafoor (PW-7) examined, who on 25.11.2014 was posted as Medical Officer at RHC, Fazilpur and on the same day conducted the postmortem examination of the dead body of Sajjad

Hussain alias Pannu son of Allan Khan (deceased). Dr. Abdul Ghafoor (PW-7), on examining the dead body of Sajjad Hussain alias Pannu son of Allan Khan (deceased) observed as under:-

“ EXTERNAL EXAMINATION.”

Mouth and eyes were closed, no rigor mortis and post mortem staining was present. There were present seven fire arm entries wound on the front of chest, arm and abdomen, and thighs present. Blackening and burning were also present. There were five fire arm wound of exist present on the back of the body.

INTERNAL EXAMINATION.

Ribs, the pleurae, right lung, left lung, pericardium, blood vessels, abdominal wall, peritoneum, diaphragm, stomach, small intestines, large intestine, liver, spleen and right kidney were damaged. There was also fracture of the right humerus and femur.

CONCLUSION.

The death occurred due to the damage of heart, lungs, liver, spleen, and major blood vessels.”

7. On 09.04.2021, the learned Deputy District Public Prosecutor gave up the prosecution witnesses as being unnecessary and closed the prosecution evidence after tendering in evidence the reports of Punjab Forensic Science Agency, Lahore (Exh. PM, Exh.PN), copy of F.I.R. 21 of 2011 (Exh.PO) and copy of F.I.R. No. 146 of 2021 (Mark-A) .

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

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

10. The contention of the learned counsel for the appellant precisely was that the whole case was 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 submitted that the recovery of the *Kalashnikov rifle (P-4)* was full of procedural defects, of no legal worth and value, and was the result of fake proceedings. The learned counsel for the appellant also argued that the appellant had been involved in the occurrence only on suspicion. 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 along with the learned counsel for the complainant contended that the prosecution has proved its case beyond the shadow of doubt by producing independent witnesses. The learned Deputy Prosecutor General along with the learned counsel for the complainant, further argued that the deceased died as a result of injuries suffered at the hands of the appellant namely Riaz Hussain. The learned Deputy Prosecutor General along with the learned counsel for the complainant, further contended that the medical evidence also corroborated

the statements of Ghulam Qadir (PW-13) and Haji Muhammad (PW-14). The learned Deputy Prosecutor General along with the learned counsel for the complainant, further argued that the recovery of the *Kalashnikov rifle* (P-4) from the appellant namely Riaz Hussain also corroborated the ocular account. The learned Deputy Prosecutor General along with the learned counsel for the complainant further 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 along with the learned counsel for the complainant prayed for the rejection of the appeal.

12. We have heard the learned counsel for the appellant, the learned counsel for the complainant, 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 the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), the eyewitnesses of the occurrence. The relationship of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), with the deceased is on record. It is also an admitted aspect of the prosecution case that the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), were not the residents of the place of occurrence or any place near the same. According to the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), the occurrence took place at the shop of the deceased which was at a distance from the houses of the prosecution witnesses namely Ghulam Qadir

(PW-13) and Haji Muhammad (PW-14). The prosecution witness namely Ghulam Qadir (PW-13) during cross-examination explained as under:-

“My house is at a **distance of 4/5 kms away from place of occurrence.**

House of Haji Muhammad is at a distance of 1-km from place of occurrence whereas same house is at a distance of 5/6 kms from my house.” (emphasis supplied).

The prosecution witness namely Haji Muhammad (PW-14) during cross-examination admitted as under:-

“My house is **one kilometer away from the place of occurrence.** It takes half an hour to reach from my house to place of occurrence by foot.”(emphasis supplied)

The above-referred portions of the cross-examination of the prosecution witnesses reflect that the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), 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 Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), 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 Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) did not even offer any explanation for their presence at the place of occurrence, at the time of occurrence. Moreover, according to the statements of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad

(PW-14), they were sitting at the shop of one Sajid Hussain when the occurrence took place and witnessed the same from the said place, however, according to the statement of Kazim Hussain, (PW-6), the Investigating Officer of the case , the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) were not present at the shop of one Sajid Hussain when the occurrence took place. The prosecution witness namely Ghulam Qadir (PW-13) in his statement before the learned trial court, stated as under:-

“States that on 25.11.2014, I alongwith my father Taj Muhammad complainant (since dead) and Haji Muhammad **were sitting at the brokerage (Arhat) of Sajid Hussain son of Sadiq Muhammad**, in front of that brokerage (Arhat) there was brokerage (Arhat) of Sajjad Hussain alias Punnu.” (emphasis supplied)

The prosecution witness namely Haji Muhammad (PW-14), in his statement before the learned trial court claimed as under:-

“States that on 25.11.2014, I alongwith Taj Muhammad complainant (since dead), and Ghulam Qadir **were sitting at the brokerage (Arhat) of Sajid Hussain** son of Sadiq Muhammad and in front of that brokerage (Arhat) there was brokerage (Arhat) of Sajjad Hussain alias Punnu. ” (emphasis supplied)

Contradicting the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), Kazim Hussain, (PW-6), the Investigating Officer of the case , stated during cross-examination as under:-

“PWs were present in the premises of brokerage (ARHAT) of Sajjad deceased at the time of occurrence. **At the time of occurrence, PWs were not present at the brokerage (ARHAT) of Sajid Chandia.**”(emphasis supplied)

In this manner, the claim of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) with regard to the place of their presence at the time of occurrence was exposed to be false by the statement of Kazim Hussain, SI (PW-6), the Investigating Officer of the case. It is also a fact that the prosecution witness namely Ghulam Qadir (PW-13) was exposed to have made an improvement in his statement with regard to the presence of Haji Muhammad (PW-14) and was confronted with the said improvement during cross-examination and the learned trial court observed as under:-

“It is incorrect to suggest that I did not get record the name of Haji Muhammad son of Maula Dad PW in my said previous statement as PW-2. (It is confronted with the same **where presence of Haji Muhammad at brokerage (ARHAT) of Sajid Hussain is not mentioned** in his said statement whereas his presence at the place of occurrence has been mentioned in the same.). ”(emphasis supplied)

Moreover, Kazim Hussain, SI (PW-6), the Investigating Officer of the case, at the time of his visit to the place of occurrence, after the occurrence, did not observe any furniture which was being used by the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) while sitting at the shop of one Sajid Hussain and neither the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) pointed out any such furniture which they were using for sitting at the shop of the said one Sajid Hussain. It is also a fact that both the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) did not state at all as to why on the day of occurrence they were present at the shop of one Sajid Hussain, with whom neither they had any relationship nor any business. The prosecution witnesses namely Ghulam Qadir (PW-13) and

Haji Muhammad (PW-14) also did not explain as to why they were not sitting at the shop of the deceased and had chosen to sit at the shop of one Sajid Hussain. It is also an admitted fact that during the course of the investigation, the said Sajid Hussain, at whose shop the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) claimed to had been present at the time of the occurrence, never appeared before the Investigating Officer of the case, to verify the said claim of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14). The prosecution witness namely Haji Muhammad (PW-14) during cross-examination admitted as under:-

“Ashiq Thathal, his son, Sajid Chandia and two or three labourers of other casts were present at that time and near to the place of occurrence.”

We have also noted with grave concern that neither in column No.4 of the inquest report (Exh. P.K/4.) nor at page 4 of the inquest report (Exh. P.K/4.), the names of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), were mentioned as being the persons present at the place of occurrence. In column No.4 of the inquest report (Exh. P.K/4.) names of Sadiq Muhammad and Muhammad Usman have been mentioned, whereas at page 4 of the inquest report (Exh. P.K/4.), the names of Ihtsham and Abdul Hae Khan have been mentioned. This fact also fully denudes the fact that at the time of the preparation of the inquest report (Exh. P.K/4.), the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), were not present at the RHC, Fazilpur and therefore, their names were also not mentioned in the same. We have thus reached an irresistible conclusion that the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), failed to prove the reason for their leaving

their houses on the day of occurrence and their arrival at the place of occurrence and the same remained claims unproved, entailing failure of the prosecution witnesses to prove the reasons for their departure from their residences and their subsequent arrival at the place of occurrence. The prosecution was under a bounden duty to establish that the occurrence had indeed taken place when the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), had arrived at the place of occurrence and the failure to prove any reason for the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) , to have proceeded from their houses to the place of occurrence and their presence at the place of occurrence has vitiated our trust in the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) . In this respect, 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 kilometre away from the occurrence, but on the day of occurrence stated to be present near the spot as they 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 witnesses in the said case, who were all residents of some other houses and were not the inmates of the house wherein the occurrence had taken place and therefore the said eyewitnesses being, chance witnesses, were declared not worthy of reliance. Reliance is also placed on the case of "Nasrullah alias Nasro v. The State" (**2017 SCMR 724**).

14. Another grave flaw of the prosecution case is that none of the persons who had their shops near or around the place of occurrence appeared either during the investigation of the case or before the learned trial court in support of the prosecution case. It was admitted by the prosecution witness namely Ghulam Qadir (PW-13) that their cousin namely Shakeel used to work at the shop of the deceased but he was not produced as a witness in the case. The prosecution witness namely Ghulam Qadir (PW-13), during cross-examination, admitted as under:-

“ My cousin Shakeel used to remain at brokerage (Arhat). Shakeel was present on day of occurrence.”

As mentioned above, the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) admitted that there were shops of other persons at the place of occurrence and the said persons were also present at their shops, however, none of those who had their shops at and around the place of occurrence either appeared before the Investigating Officer of the case or before the learned trial court. The failure of the prosecution to produce the said persons has convinced us that had they been produced before the learned trial court, they would not have supported the prosecution case. Article 129 of the Qanun-e-Shahadat, 1984 provides that if any evidence available with the parties is not produced then it shall be presumed that had that evidence been produced, the same would have been gone against the party producing the same. Illustration (g) of the said Article 129 of the Qanun-e-Shahadat Order, 1984 reads as under:-

“(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

The Investigating Officer was under a binding duty to collect evidence and his failure has to be taken as a circumstance belying the prosecution case. The purpose of the trial is the discovery of truth. As long as men keep lying, the only causality would be the reality. The prosecution case suffers from inherent defects which are irreconcilable as they are. The guidance is sought from the binding decisions of the august Supreme Court of Pakistan in case titled Nadeem alias Nanha alias Billa Sher Vs. The State (2010 SCMR 949)

wherein it has been observed as under:-

“....further that no independent witness of the locality where the incident took place, a ‘Bazar’ joined, made case of the prosecution doubtful. It is cardinal principle of Criminal Jurisprudence that any genuine doubt arising out of the circumstances of the case should be extended to the accused as of the right and not as concession. It is difficult to say that prosecution has proved its case beyond shadow of doubt.”

15. Another aspect of the case raising our doubt over the presence the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), at the place of occurrence, at the time of occurrence is the fact that they never reported the matter to the police and Kazim Hussain, SI (PW-6) the Investigating Officer of the case, himself reached at the RHC, Fazilpur and recorded the oral statement (Exh.P.B/1.) of Taj Muhammad(since dead), the complainant of the case. The august Supreme Court of Pakistan has already enunciated the principle of law that when the F.I.R of the case is not lodged at the Police Station, a conclusion can be drawn that the F.I.R. had been registered after pondering and inquiry at the spot. The august Supreme Court of Pakistan in the case of “Abdul Jabbar alias Jabbari v. The State” (2017 SCMR 1155) has observed as under:

"An F.I.R. in respect of the incident in issue had not been lodged at the local Police Station giving rise to an inference that the F.I.R. had been chalked out after deliberations and preliminary investigation at the spot."

16. We have also noted that it was the prosecution claim that the oral statement (Exh. P.B/1.) of Taj Muhammad, complainant of the case (since dead) was recorded at the RHC, Fazilpur by Kazim Hussain, SI (PW-6) at **02.30 p.m.**, after the dead body of the deceased had been brought at the RHC, Fazilpur, however, according to the Post Mortem Examination report (Exh.PK) , the dead body of the deceased was brought to the hospital at **06.00 p.m.** In this manner, it is quite evident that false entry with regard to the time of recording of the oral statement (Exh. P.B/1.) of Taj Muhammad(since dead), complainant of the case,at the RHC, Fazilpur by Kazim Hussain, SI (PW-6) , was made and actually even the dead body of the deceased had not been brought to the RHC, Fazilpur till 06.00 p.m and therefore, the oral statement (Exh. P.B/1.) of Taj Muhammad(since dead), the complainant of the case in no way could have been recorded at 02.30 p.m.. The scrutiny of the prosecution evidence reveals that the oral statement (Exh. P.B/1.) of Taj Muhammad(since dead),the complainant of the case was neither promptly recorded nor was spontaneous nor natural, rather was a contrived, manufactured and compromised document.

17. We have also noted with disquiet that despite the fact that the occurrence took place at about **01.45 p.m. on 25.11.2014**, the postmortem examination of the dead body of the deceased was conducted after much delay. According to Dr. Abdul Ghafoor (PW-7), he conducted the post mortem examination of the dead body of the deceased on **25.11.2014 at 06.00 p.m.** i.e. after as many as **four hours and fifteen minutes** after the

death of Sajjad Hussain alias Pannu (deceased). Moreover, according to the entries made in the post mortem examination report (Exh. P.K.), the complete police papers were received by Dr. Abdul Ghafoor (PW-7) at **6.00 p.m. on 25.11.2014.** The reason which is apparent for the delayed conducting of the post mortem examination of the dead body of Sajjad alias Pannu 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 out a false narrative of the occurrence. No explanation was offered to justify the said delay in conducting the post mortem examination and the delay in submitting the complete papers. This clearly establishes 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.”

18. We have also noticed that according to the opinion of Dr. Abdul Ghafoor (PW-7), who had conducted the post mortem examination of the dead body of the deceased, the time which had lapsed between the *death of the deceased and the post mortem examination* was only **1 ½ hours**, when the post mortem examination was conducted at **06.00 p.m on 25.11.2014**. The prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) claimed that the occurrence had taken place at about **01.45 p.m on 25.11.2014**, the deceased had died prior to the recording of

the oral statement (Exh. P.B/1.) of Taj Muhammad, complainant of the case (since dead), recorded at the RHC, Fazilpur by Kazim Hussain, SI (PW-6) at **02.30 p.m on 25.11.2014**, however, as is apparent from the entries of the Post Mortem Examination report (Exh.PK), in the opinion of Dr. Abdul Ghafoor (PW-7) , the time of occurrence as determined by him was different from what was stated by the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) and that too not by a small margin but by a huge one. According to the entries of the Post Mortem Examination report (Exh.PK), in the opinion of Dr. Abdul Ghafoor (PW-7), the deceased had died at around **04.30 p.m on 25.11.2014**, whereas according to prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) the deceased died before **02.30 p.m. on 25.11.2014**. Moreover, according to the statement of Dr. Abdul Ghafoor (PW-7), the time which had lapsed between the injuries suffered by the deceased and his death was immediate. Dr. Abdul Ghafoor (PW-7) in his statement before the learned trial court, stated as under:-

“Approximately duration between **injury and death was immediate** ”

In this manner, the estimation of Dr. Abdul Ghafoor (PW-7) with regard to the time of death of the deceased also contradicts the statements of prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) and the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) stand directly contradicted by the opinion of Dr. Abdul Ghafoor (PW-7) regarding the time of occurrence itself.

19. We have also noted with grave concern that Dr. Abdul Ghafoor (PW-7), while describing the injuries observed by him on the dead body of the deceased, neither mentioned their locale nor their dimensions nor their kinds

and only recorded that there were seven entry wounds caused by firearm found present by him on the front of the dead body of the deceased and five exit wounds caused by firearm found present by him on the back of the dead body of the deceased. In this manner, the statement of Dr. Abdul Ghafoor (PW-7) offers no support to the statement of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14).

20. We have also noted that according to the statements of prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), the assailants had used **Kalashnikov rifles** to inflict injuries upon the deceased , whereas according to the entries of the Post Mortem Examination report (Exh.PK), after the post mortem examination of the dead body, Dr. Abdul Ghafoor (PW-7) handed over **pellets** recovered from the dead body of the deceased to the police. The prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), were confronted with this fact that the deceased had not suffered any injuries caused by bullets, however, both the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) remained adamant that the deceased had suffered injuries caused to him by *Kalashnikov rifles*. The prosecution witness namely Ghulam Qadir (PW-13), during cross-examination, claimed as under:-

“Volunteers both the injuries were result of **fires of Kalashnikov**. Being witness, I say that deceased did not receive fire arm injuries by two kinds of weapons of offence rather received single type of weapon of offence. Kalashnikov.”(emphasis supplied)

Similarly, the prosecution witness namely Haji Muhammad (PW-14) claimed during cross-examination, as under:-

“ It is incorrect to suggest that Sajjad Hussain received fires of two different kinds of weapons. Volunteers that he received all the fires from single type or (sic) kind of weapons ie. **Kalashnikov.** ” (emphasis supplied)

Dr. Abdul Ghafoor (PW-7), during cross-examination , stated as under:-

“Pellets were recovered from the body while observing injuries no.1 and 2”

Dr. Abdul Ghafoor (PW-7) was also cross-examined by the learned counsel appearing on behalf of the prosecution witness namely Ghulam Qadir (PW-13) and replied as under:-

“It is correct that I have stated in my examination of instant trial **that pellets were handed over to police but same** has been stated by me mistakenly.”(emphasis supplied)

Dr. Abdul Ghafoor (PW-7), however, never explained that what was the mistake in his statement that he had handed over pellets recovered from the dead body of the deceased to the police. It is also a fact that according to the entries of the Post Mortem Examination report (Exh.PK), pellets were handed over to Akhtar Abbas 509/C (PW-2). Kazim Hussain, SI (PW-6) also admitted during cross-examination that he had received pellets and stated as under:-

“I received PMR alongwith parcels and other relevant documents. I had perused the same and in the column of "articles handed over to police", four articles ie. deadbody, documents, clothes and **pellets were mentioned.** ”(emphasis supplied)

In this manner, the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) were also confronted with regard to their

claim that the assailants had used Kalashnikov rifles to inflict their injuries upon the deceased and Dr. Abdul Ghafoor (PW-7), by not mentioning the dimensions of the injuries observed by him on the dead body of the deceased, also made a failed attempt to hide the error in the statements of the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) regarding the weapons used during the incident.

21. The learned Deputy Prosecutor General and the learned counsel for the complainant have also relied upon the recovery of the *Kalashnikov rifle* (P-4), made from the appellant and have submitted that it offered sufficient corroboration of the ocular account of the occurrence as furnished by the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14). The recovery of the *Kalashnikov rifle* (P-4) from the appellant namely Riaz Hussain cannot be relied upon as the Investigating Officer of the case did not join any witness of the locality during the recovery of the *Kalashnikov rifle* (P-4) from the appellant namely Riaz Hussain which was in clear violation of the provisions of the section 103 Code of Criminal Procedure, 1898. The provisions of this section, unfortunately, are honoured more in disuse than compliance. To appreciate it better, this section is being reproduced:-

"103.--(1) Before making a search. under this chapter, the officer or other person about to make it **shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.**

Therefore the evidence of the recovery of the *Kalashnikov rifle* (P-4) from the appellant cannot be used as incriminating evidence against the appellant, being evidence which was obtained through illegal means and hence hit by

the exclusionary rule of evidence. The august Supreme Court of Pakistan in the case of *Muhammad Ismail and others Vs. The State (2017 SCMR 898)* at page 901 has held as under:-

"For the above mentioned recovery of weapons the prosecution had failed to associate any independent witness of the locality and, thus, the mandatory provisions of section 103, Cr.P.C. had flagrantly been violated in that regard."

We have also noted that according to the report of Punjab Forensic Science Agency, Lahore (Exh.PN/1), none of the empty shells of the bullets taken into possession from the place of occurrence were found to had been fired in the Kalashnikov rifle (P-4). The relevant portion of the report of Punjab Forensic Science Agency, Lahore (Exh.PN/1) reads as under:-

*"Because of differences in individual characteristics the items C1 to C11 cartridge cases **could not have been fired in the item R5 rifle** "*

The report of Punjab Forensic Science Agency, Lahore (Exh.PN/1) that none of the empty shells of the bullets taken into possession from the place of occurrence were found to had been fired in the Kalashnikov rifle (P-4) allegedly recovered from the possession of the appellant also supports the claim of the appellant that he had been involved in the case falsely.

22. The learned Deputy Prosecutor General and the learned counsel for the complainant have also relied upon the evidence of motive and submitted that it corroborated the ocular account. The motive of the occurrence as stated by the prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14), was that before the occurrence, a brother of the appellant had been murdered and it was believed by the appellant that the deceased was involved in the said murder of the brother of the appellant. We have scrutinized the statements of the prosecution

witnesses and find that the motive as alleged could not be proved. The prosecution witnesses namely Ghulam Qadir (PW-13) and Haji Muhammad (PW-14) admitted that they had for the first time stated that the deceased was also suspected of being involved in the murder of the brother of the deceased while making their statements before the learned trial court . The prosecution witness namely Ghulam Qadir (PW-13) during cross-examination admitted as under:-

“It is correct that today in my examination in chief, **I have introduced first time** that accused persons were having suspicion that Sajjad Hussain alias Punnu was involved in murder case mentioned in motive part.”
(emphasis supplied)

Kazim Hussain, SI (PW-6), the Investigating Officer of the case, also admitted no evidence was brought on record with regard to the alleged motive of the occurrence . During cross-examination, Kasim Hussain, SI (PW-6) , the Investigating Officer of the case, stated as under:-

“I did not give any opinion about the motive part and regarding involvement of accused Riaz. ”

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 namely Riaz Hussain to have committed the *Qatl-i-Am*d of the deceased. There is an evocative muteness in the prosecution case with regard to the minutiae of motive alleged. No independent witness was produced by the prosecution to prove the motive as alleged. 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."

Even otherwise it is an admitted rule of appreciation of evidence that motive and recovery are only corroborative pieces of evidence and if the ocular account is found to be unreliable, then motive and recovery have no evidentiary value and lost their significance.

23. The learned Deputy Prosecutor General and the learned counsel for the complainant have also laid much premium on the absconcence of the appellant namely Riaz Hussain son of Muhammad Bakhsh as proof of his guilt. The fact of absconcence of an accused can be used as a corroborative piece of evidence, which cannot be read in isolation but it has to be read along with the substantive piece of evidence. The august Supreme Court of Pakistan has held in the case of Asadullah v. Muhammad Ali (PLD 1971 SC 541) that both corroborative and ocular evidence are to be read together and not in isolation. As regards absconcence, the august Supreme Court of Pakistan has held in the case of Rasool Muhammad v. Asal Muhammad (1995 SCMR 1373) that absconcence is only a suspicious circumstance. In the case of Muhammad Sadiq v. Najeeb Ali (1995 SCMR 1632) the august Supreme Court of Pakistan observed that absconcence itself has no value in the absence of any other evidence. It was also held in the case of Muhammad Khan v. State (1999 SCMR 1220) that absconcence of the accused can never remedy the defects in the prosecution case. In the case of Gul Khan v. State (1999 SCMR 304) it was observed by the august Supreme Court of Pakistan that absconcence per se is not sufficient to prove the guilt but can be taken as a corroborative piece of evidence. In the cases of Muhammad

Arshad v. Qasim Ali (1992 SCMR 814), Pir Badshah v. State (1985 SCMR 2070) and Amir Gul v. State (1981 SCMR 182) it was observed that conviction on absconcence alone cannot be sustained. In the present case, the substantive piece of evidence in the shape of the ocular account has been disbelieved, therefore, no conviction can be based on absconcence alone. Reliance is also placed on the cases of “Muhammad Farooq and another Vs. The State” (2006 SCMR 1707) and “Nizam Khan and 2 others Vs. the State” (1984 SCMR 1092) and Rohtas Khan vs. The State (2010 SCMR 566).

24. Considering all the above circumstances, we entertain serious doubt in our minds regarding the involvement of appellant namely Riaz Hussain son of Muhammad Bakhsh 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 Akram v. The State (2009 SCMR 230) and Muhammad Zamani v. 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 observed 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 go to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on 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 eyewitnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

25. For what has been discussed above Criminal Appeal No.312-J of 2021 lodged by Riaz Hussain son of Muhammad Bakhsh (appellant) is **allowed** and the conviction and sentence of the appellant awarded by the learned trial court through the impugned judgment dated 13.04.2021 are hereby set-aside. Riaz Hussain son of Muhammad Bakhsh (appellant) is ordered to be acquitted by extending him the benefit of the doubt. Riaz Hussain son of Muhammad Bakhsh (appellant) is in custody and is directed to be released forthwith if not required in any other case.

26. **Murder Reference No.13 of 2021** is answered in **Negative** and the death sentence awarded to Riaz Hussain son of Muhammad Bakhsh is **Not Confirmed.**

(CH. ABDUL AZIZ)
JUDGE

(SADIQ MAHMUD KHURRAM)
JUDGE

Raheel