

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

Murder Reference No.28 of 2019

(The State Vs. Muhammad Nadeem)

Criminal Appeal No. 151 of 2019

(Muhammad Zahid alias Billa and another Vs. The State and another)

Criminal Revision No. 148 of 2019 .

(Zia Ahmed Vs. The State and another)

Date of hearing: 13.11.2023.
Appellants by: Mudassir Altaf Qureishi, Advocate.
State by: Mr. Shahid Aleem, District Public Prosecutor.
Complainant by: Mr. Muhammad Malik Khan Langah, Advocate.

SADIO MAHMUD KHURRAM, J. –Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil (convicts) were tried along with their co-accused namely Muhammad Amin son of Naseer (since acquitted) by the learned Additional Sessions Judge, Burewala in case F.I.R No. 120 of 2018 dated 01.03.2018 registered at Police Station Gagoo, District Vehari in respect of offences under sections 302, 392 and 411 P.P.C. for committing the *Qatl-i-Amd* of Ishtiaque Ahmed son of Muhammad Ashraf (deceased) during robbery. The learned trial court vide judgment dated 28.02.2019 convicted Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil (convicts) and sentenced them as infra:

Muhammad Nadeem son of Neghaban:-

i) Death under section 302(b) PPC as Tazir for committing Qatl-i-Amd of Ishtiaque Ahmed son of Muhammad Ashraf (deceased) and directed to pay Rs.2,00,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased; 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.

ii) Rigorous Imprisonment for ten years under section 392 P.P.C. and directed to pay Rs.100,000/- as fine; in case of default thereof, the convict was further directed to undergo six months of simple imprisonment.

iii) Simple Imprisonment for three years under section 411 P.P.C. and directed to pay Rs.50,000/- as fine; in case of default thereof, the convict was further directed to undergo six months of simple imprisonment.

Muhammad Zahid alias Billa son of Muzammil:

i) Rigorous Imprisonment for ten years under section 392 P.P.C. and directed to pay Rs.100,000/- as fine; in case of default thereof, the convict was further directed to undergo six months of simple imprisonment.

ii) Simple Imprisonment for three years under section 411 P.P.C. and directed to pay Rs.50,000/- as fine; in case of default thereof, the convict was further directed to undergo six months of simple imprisonment.

All the sentences awarded to Muhammad Zahid alias Billa son of Muzammil were ordered to run concurrently by the learned trial court.

Muhammad Amin son of Naseer , the co-accused of the appellants, was, however, acquitted of the charges by the learned trial court.

2. Feeling aggrieved, Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil (convicts) lodged the

Criminal Appeal No.151 of 2019 assailing their convictions and sentences. The learned trial court submitted Murder Reference No.28 of 2019 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentence of death awarded to the appellant namely Muhammad Nadeem son of Neghaban. Zia Ahmed the complainant of the case filed Criminal Revision No. 148 of 2019 seeking the enhancement of the sentences awarded to the convict namely Muhammad Zahid alias Billa son of Muzammil. We intend to dispose of the Criminal Appeal No.151 of 2019, the Criminal Revision No. 148 of 2019 and the Murder Reference No.28 of 2019 through this single judgment.

3. Precisely the facts necessary, as stated by Zia Ahmed (PW-6), the complainant of the case, are as under:-

“Stated that on 01.03.2018 at about 05:45 pm I and my brother Ishtiaque were going on our motorcycle Road Prince from Burewala to our house. When we reached near Chak No.291/E.B, the accused persons present in the court Zahid, Amin and Nadeem came on a motorcycle behind us. When they came in line with us accused persons namely Zahid and Nadeem pointed their pistols to us and asked us to stop. We stopped and deboarded from our motorcycle. The accused persons present in the court also deboarded from their motorcycle. They were having handkerchief on their faces which were put off. Zahid accused remained pointed his pistol and said if we moved he would kill us. Accused Amin searched me. I was having mobile phone Nokia of my brother in my hand. He snatched the same. I was having my mobile in my pocket. Amin accused present in the court snatched that mobile phone Nokia, copy of my ID card and Rs.50/- from me. Nadeem accused present in the court snatched gold ring from my brother Ishtiaque Ahmad. He also snatched Rs.4500/- and copy of I.D card from the pocket of my brother Ishtiaque Ahmad. Nadeem accused present in the court asked accused Amin to snatch the key of the motorcycle from my brother Ishtiaque. My brother Ishtiaq did not

hand over the key of Motorcycle to them, upon which accused Nadeem made fire shot of his pistol which hit on the left arm and went to left flank of my brother Ishtiaq. In the meanwhile, PWs Anees Ahmad, Ijaz and Munawar Hussain also reached at the place of occurrence and they witnessed the occurrence. The accused persons ran away towards Chak No. 291 while leaving their motorcycle united, at the spot. My brother fell at the edge of the metaled road and scrummed to the injuries at the spot.

I left Anees Ahmad and Muhammad Ijaz near the dead body of my brother Ishtiaq and myself set out for police station. When I reached in the Chowk of Mana Moor on my way to police station, police party was standing there, I went to the police Thanedar was sitting inside the vehicle. I got recorded my statement Ex. PF which bears my signatures. I alongwith the police party reached again at the place of occurrence.

On next day I was called by the 1.0 at the place of occurrence. I alongwith PWs reached there. On our pointation and direction of the 1.0 Patwari Halqa took the rough note for scaled site plan.

On 03.03.2018 at the day of Rasm-e-Kul of my brother some persons informed us that the persons namely Zahid, Amin and Nadeem were the real culprits who used to commit such like occurrence in the area. I and eye witnesses nominated the accused persons present in the court, in this case in the police station.

On 16.03.2018 I and eye witnesses were summoned in the district jail Vehari for test identification parade. I identified the accused persons namely Zahid, Amin and Nadeem during the identification parade one by one. The accused persons present in the court are the real culprits who have committed the offence ”

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 appellants namely Muhammad Nadeem son of

Neghaban and Muhammad Zahid alias Billa son of Muzammil along with their co-accused namely Muhammad Amin son of Naseer (since acquitted) were sent to face trial. The learned trial court framed the charge against the accused on 10.08.2018, to which the accused pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case got recorded statements of **ten** witnesses. Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) gave evidence regarding the ocular account. Aziz ur Rehman Patwari (PW-1) prepared the scaled site plan of the place of occurrence (Exh.PB). Tanvir Ahmad 1114/C (PW-2) stated that on 01.03.2018 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 Iqbal (PW-4) stated that on 01.03.2018, 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 officer in his presence. Abbas Ali 1330/HC (PW-5) stated that on 01.03.2018, the Investigating Officer of the case handed over to him a sealed parcel said to contain an empty shell of the bullet and on 27.03.2018, the Investigating Officer of the case handed over to him a sealed parcel said to contain a pistol and on 30.03.2018, the Investigating Officer of the case handed over to him another sealed parcel said to contain a pistol and on 02.04.2018, the Investigating Officer of the case handed over to him another sealed parcel said to contain a pistol and he handed

over all the said sealed parcels to the Investigating Officer of the case on 10.04.2018 for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore. Muhammad Amjad (PW-8) stated that on 27.03.2018, the appellant namely Muhammad Nadeem got recovered pistol (P-8) along with seven live bullets (P-9/1-7) and on the same day the appellant namely Muhammad Zahid alias Billa got recovered Rs.4500/- (P-7/1-5) and a copy of the CNIC and on 01.04.2018, the appellant namely Muhammad Nadeem got recovered the ring of the deceased (P-12) and copy of CNIC of Zia Ahmed (PW-6) and on 02.04.2018, the appellant namely Muhammad Zahid alias Billa got recovered pistol (P-13) along with four live bullets and also got recovered two mobile phone devices (P-14 and P-15) on the same day. Muhammad Shafique learned Civil Judge/Magistrate (PW-9) stated that on 16.03.2018, he supervised the test identification parade proceedings held to establish the identities of the appellants and prepared his report (PW/9). Naseer Ahmad 758/HC (PW-10) stated that on 01.03.2018, he got recorded the formal F.I.R (Exh.PF/1). Mahboob Elahi, SI investigated the case, however, remained untraceable during the trial, therefore, statement of Abbas Ali 1330/HC (PW-5) was recorded with regard to the documents prepared by Mahboob Elahi, SI (untraceable) who got exhibited all the documents as prepared by Mahboob Elahi, SI (untraceable) being conversant with his handwriting.

6. The prosecution also got Dr. Muhammad Naeem Tahir (PW-3) examined who on 01.03.2018 was posted as a Medical Officer at RHC

Gaggo and on the same day conducted the postmortem examination of the dead body of Ishtiaque Ahmed (deceased). Dr. Muhammad Naeem Tahir (PW-3) on examining the dead body of the deceased Ishtiaque Ahmed observed as under:-

“ THORAX.

Walls, sternum, cartilages and ribs.

A lacerated wound 1.5 cm x 1.5 cm x going deep with 11th rib (lt.) fracture, sternum, menubrium were healthy tissue.

Pleurae, larynx and trachea, right and left lungs, pericardium and heart and blood vessels were healthy tissues

.....

UPPER LIMB

A lacerated wound 4.0 x 2.0 x muscle deep on left forearm 4 c.m below the elbow joint while lower limb was healthy.

PROBABLE TIME THAT ELAPSED

- A. Between injury and death sudden
- B. Between death and post mortem within six hours.

FINAL OPINION.

After conducting the postmortem of Ishtiaque deceased I was of opinion that death occurred due to the injury to the abdomen and thorax leading to rupture of spleen and large and small intestines that led to hemorrhage and then Hypovolemic that ultimately led to cardio pulmonary arrest and death. The injury was anti mortem and due to firearm. I handed over the dead body of the deceased, last wom clothes PMR and police documents to Tanveer Ahmad 1114/C after conducting the postmortem of the deceased.”

7. On 21.02.2019 the learned Deputy District Public Prosecutor gave up the prosecution witnesses namely Amin, Munawar Hussain and Allah Ditta as being unnecessary and closed the prosecution evidence

after tendering the report of Punjab Forensic Science Agency, Lahore (Exh.PZ) regarding blood stained earth and the report of Punjab Forensic Science Agency, Lahore (Exh.PAA) regarding the comparison of the empty shell of the bullet and the pistols.

8. After the closure of prosecution evidence, the learned trial court examined appellants namely Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil under section 342 Cr.P.C. and in answer to question *why this case against you and why the PWs have deposed against you*, they replied that they were innocent and had been falsely involved in the case. They further stated that they had not committed the occurrence and had been made scapegoats in the case in order to show efficiency by the police. The appellants namely Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil opted not to get themselves examined under section 340(2) Cr.P.C however the appellant namely Muhammad Nadeem son of Neghaban produced the document (Exh.DF) as evidence in his defence.

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

10. The contention of the learned counsel for the appellants is that whole case is fabricated and false. The learned counsel for the appellants argued that the prosecution remained unable to prove the facts in issue

and did not produce any unimpeachable, admissible and relevant evidence to prove the same. The learned counsel for the appellants further contended that the statements of Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were not worthy of any reliance. He further contended that the appellants were neither nominated in the F.I.R nor in the statements of witnesses recorded on the first day and the test identification parade proceedings as conducted were full of procedural defects and of no legal worth and value. The learned counsel for the appellants also argued that the recoveries were full of procedural defects, of no legal worth and value and result of fake proceedings. The learned counsel for the appellants finally submitted that the prosecution had totally failed to prove the case against the appellants beyond the shadow of a doubt.

11. On the other hand, the learned District Public Prosecutor and the learned counsel for the complainant contended that the prosecution had proved its case beyond a shadow of a doubt by producing independent witnesses. The learned District Public Prosecutor and the learned counsel for the complainant further argued that the deceased died as a result of injuries suffered at the hands of the appellants in a joint enterprise. The learned District Public Prosecutor and the learned counsel for the complainant further contended that the medical evidence also corroborated the statements of Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7). The learned District Public Prosecutor and the learned counsel for the complainant further argued that the recoveries made during the

investigation of the case corroborated the ocular account. The learned District Public Prosecutor and 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 offenders with the innocent in this case. Lastly, the learned District Public Prosecutor and the learned counsel for the complainant prayed for the rejection of the appeal.

12. We have heard the learned counsel for the appellants, the learned District Public Prosecutor, the learned counsel for the complainant and with their assistance have perused the record and evidence recorded during the trial.

13. The whole prosecution case revolves around the statements of Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7). These witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were related to each other as well as the deceased. Their relationship with the deceased is also on record. The prosecution witness namely Ijaz Ahmad (PW-7) stated during cross-examination that he was related to the complainant of the case and admitted as under:-

“Complainant Zia Ahmad is my relative”

It is also a fact that the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were not the residents of the place of occurrence. The prosecution witness namely Zia Ahmad (PW-6) gave his residence as that of *Mauza Jhodika* District Bahawalnagar, whereas

the occurrence took place within the area of *Chak No. 291/EB* District Vehari. The other eye witness of the case namely Ijaz Ahmad (PW-7) stated during cross-examination that his residence was at a distance of 12-15 kilometers from the place of occurrence. The prosecution witness namely Ijaz Ahmed (PW-7) during cross-examination admitted as under:-

“The place of occurrence is at a distance of about 12/15 K.M from my house ”

When it is an admitted aspect of the prosecution case that both the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) had their residences or their places of business quite a distance from the place of occurrence, then both the witnesses can be validly termed as “*chance witnesses*”. The prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) claimed that on the day of occurrence they had gone to the city of Burewala and when they were returning from the said city, the occurrence took place on their arrival within the area of *Chak No.291/EB* .The perusal of the statements of the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) recorded during the course of the trial reveals that they could not prove their stated reasons for their visit to the city of Burewala and on return from the said city, their arrival within the area of *Chak No.291/EB* where the occurrence took place. The prosecution witness namely Ijaz Ahmed (PW-7) candidly admitted during cross-examination that he provided no reason to the Investigating Officer of the case for his visit to the city of Burewala and his subsequent return from the said city and his

arrival at the place of occurrence. Ijaz Ahmed (PW-7) during cross-examination stated as under:-

“ On the day of occurrence I came to Burewala. I did not told (sic) the I.O that for what purpose I came to Burewala”

Similarly, the prosecution witness namely Zia Ahmad (PW-6) only stated that he was coming back from the city of Burewala to his own house when the occurrence took place, however, did not explain any reason available with him for having visited the city of Burewala on the day of the incident and that too with the deceased when admittedly Zia Ahmad (PW-6) was the resident of *Mauza Judhika* District Bahawalnagar. Moreover, during the investigation of the case, no statement of any witness was recorded with whom the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) had entered into any transaction on the day of occurrence which would have substantiated the claim of the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) that on the day of occurrence, they had visited and were returning from the city of Burewala when the incident took place. We have also noted that the alleged eye witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were not mentioned in column No.4 or page 4 of the inquest report (Exh.PD) as being the ones who were present at the time of preparation of the said inquest report (Exh. PD) by the investigating officer. These witnesses were also not the ones who had identified the dead body of the deceased at the time of the postmortem examination of the same. The dead body of the deceased

was identified by Muhammad Iqbal (PW-4), who admitted during cross-examination that he was not even related to the deceased. Muhammad Iqbal (PW-4) during cross-examination stated as under:-

“It is correct that I am not relative of deceased Ishtaique and inspite of this fact I identified the dead body ”

Zia Ahmad (PW-6) admitted that he had not identified the dead body of the deceased at the time of post mortem examination rather Muhammad Iqbal (PW-4) did the same with whom he had no relationship. Zia Ahmad (PW-6) during cross-examination admitted as under:-

“ It is correct that neither I, nor Ijaz and Anees PWs identified the dead body before the doctor at the time of autopsy. The person to meet whom we came Burewala namely Iqbal, identified the dead body of my brother at the time of autopsy. **Iqbal is not my relative nor he is from my brother**” (emphasis supplied)

It has not been explained and is also implausible that when prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were ostensibly present at the place of occurrence at the time of arrival of the Investigating Officer of the case and the departure of the dead body to the RHC for the purpose of its post mortem examination then why it was found necessary to get the dead body identified by Muhammad Iqbal (PW-4) who was not even related to the deceased. The prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) also admitted that they did not accompany the dead body of the deceased to

the RHC when the same was taken from the place of incident. Zia Ahmad (PW-6) during cross-examination, admitted as under:-

“It is correct I, Ijaz and Anees PWs did not accompany the dead body to the mortuary. It is incorrect to suggest that we were not present at the spot so we did not accompany the dead body to the mortuary. Munawar Hussain also did not accompany the dead body to the mortuary.”(emphasis supplied)

The august Supreme Court of Pakistan has repeatedly observed that such conduct of the prosecution witnesses where they failed to accompany the dead body of the deceased to the hospital revealed their absence at the place of occurrence. Reliance is placed on the case of Muhammad Sharifan Bibi vs. Muhammad Yasin and others (**2012 SCMR 82**)

wherein the august Supreme Court of Pakistan held as under:-

“Their presence becomes further doubtful as none of them accompanied Abdul Latif deceased to the hospital for postmortem examination.”

The august Supreme Court of Pakistan in the case of “Zaheer Sadiq v. Muhammad Ijaz and others” (**2017 SCMR 2007**) has observed as under:

“The conduct of both these witnesses is also highly improbable as they did not try to shift Muhammad Sadiq (deceased) or Muhammad Sadiq (injured) to the hospital prior to the arrival of the Police.”

It is also an admitted part of the prosecution case that though the occurrence had taken place at about 05.45 p.m, however, according to Dr. Muhammad Naeem Tahir, (PW-3) , the dead body of the deceased

was brought to the hospital at 11.00 p.m. Dr. Muhammad Naeem Tahir, (PW-3) stated during cross-examination , as under:-

“I received dead body of deceased Ishtiaque Ahmad at about 11:00 p.m on 01.03.2018. According to post mortem report Ex. P-E I received the documents from police at about 11:30 p.m and I conducted postmortem examination on 11:40 p.m on the same day ”

Even Zia Ahmad (PW-6) admitted that after the occurrence, the dead body remained at the place of occurrence for *about 2/ 2 ½ hours*. The delay in dispatching the dead body to the RHC is indicative of the fact that the said time was consumed to procure the attendance of prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) from their houses. All these facts are conspicuous and telling of the fact that prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were not present at the place of occurrence at the time of occurrence and their attendance was procured subsequently. In this respect reliance is placed on the cases of Muhammad Rafiq v. State (2014 SCMR 1698), “Usman alias Kaloo v. State” (2017 SCMR 622) and Nasrullah alias Nasro v. The State (2017 SCMR 724) .

14 It was indeed an unfortunate incident wherein, during robbery, Ishtiaque Ahmed (deceased) lost his life however, the fact remains that the names of the assailants were not mentioned in the oral statement (Exh.PF) as got recorded by Zia Ahmed (PW-6) to Mahboob Elahi, SI (untraceable), the Investigating Officer of the case and the formal F.I.R (Exh.PF/1) was lodged against unknown accused persons. The

prosecution, in order to prove the identities of the appellants as being the accused involved in the occurrence, got Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) examined, who both stated that on 16.03.2018 they had identified the appellants during the test identification parade proceedings held to establish the identities of the appellants. Facts which establish the identity of any person whose identity is relevant are, by virtue of Article 22 of the Qanun-e-Shahadat, 1984, always relevant. The term 'identification' means proving that a person before the Court is the very same that he is alleged, charged or reputed to be. Identification is almost always a matter of opinion or belief. With regard to a criminal offence, identification has a two-fold object: first, to satisfy the investigating authorities, before sending a case for trial to court, that the person arrested, but not previously known to the witnesses, was the one of those who committed the crime; second, to satisfy the court that the accused was the real offender concerned with the crime. Identification proceedings are therefore as much in the interest of the prosecution as in the interest of the accused. An identification parade is held in the course of investigation of an offence for the purpose of enabling the witnesses to identify the persons who are concerned with the offence; they are not held merely for the purpose of identifying persons irrespective of their connection with the offence; the witnesses are explained the purpose of holding these parades and are asked to identify the persons who are concerned in the offence. But it is obvious that if before the court a witness pointed to a stranger and stated that he was the offender, there would be no guarantee of the truth of his assertion. Consequently, in

order to have some assurance of truth, a test identification is held , that is to say, the witness at an earlier stage is confronted with the alleged offender, not standing alone but mixed with a number of innocent persons of the same age-group and of similar build and features. That is to say, it is to give credence to the evidence of a witness who does not know the accused from before, subsequent to the commission of the offence, that a test identification is held, since, without it, the evidence of the witness concerned would have little value. Of course, the substantive evidence, i.e., evidence on which alone the court can base its order of conviction or acquittal, is that given by the witness before the court, but the value of deposition of a witness of having identified the accused in the act of the crime is of little consequence. Before the Court can accept such identification as sufficient to establish the identity of the accused, it is very necessary that there be reliable corroborative evidence, and the corroborative evidence which the Court is entitled to accept in such cases is that of a test identification parade conducted with due precautions. In short, a test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the court. But of all evidence of fact, evidence about the identification of a stranger is perhaps the most elusive, and the Courts are generally agreed that the evidence of identification of a stranger based on a personal impression, even if the veracity of the witness is above board, should be approached with considerable caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence. As mentioned above, the

names of the assailants were not mentioned in the oral statement (Exh.PF) of Zia Ahmed (PW-6) and the F.I.R (Exh.PF/1) was lodged against unknown accused persons. Subsequently, both the witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) got recorded their statements under section 161 of the Code of Criminal Procedure, 1898 on **03.03.2018**, wherein they not only named the appellants as accused who had committed the occurrence but also gave all the details with regard to their particulars. Zia Ahmed (PW-6) in his statement recorded by the learned trial court , stated as under:-

“On 03.03.2018 at the day of Rasm-e-Kul of my brother some persons informed us that the persons namely Zahid, Amin and Nadeem were the real culprits who used to commit such like occurrence in the area. I and eye witnesses nominated the accused persons present in the court, in this case in the police station.

.....

I disclosed the names, parentages, castes and addresses of the accused persons to the I.O on 03.03.2018”

The prosecution witness namely Zia Ahmad (PW-6) even claimed that he had named the appellants in his oral statement (Exh.PF) and during cross-examination claimed as under:-

“**I got recorded in my statement Ex. PF** that "my brother Ishtiaq did not hand over the key of motorcycle to them upon which accused **Nadeem** made fire shot of his pistol which hit on the left arm and went to left flank of my brother Ishtiaq ”(emphasis supplied)

The prosecution witness namely Ijaz Ahmed (PW-7) in his statement recorded by the learned trial court , stated as under:-

“On 03.03.2018, we nominated these persons in this case in the police station.

.....

On 03.03.2018 I alongwith complainant Zia Ahmad and Muhammad Anees PW appeared before the I.O. **We nominated the accused persons in this case on 03.03.2018 while mentioning their names, parentages, castes and addresses.**

.....

When I identified accused Nadeem I told his name to learned Magistrate. It is incorrect to suggest that I did not tell the name accused Nadeem to learned Magistrate. **When I identified accused Zahid I told his name to learned Magistrate.”** (emphasis supplied)

The above referred portion of the statements of the prosecution witnesses clearly reflects that the identities and the particulars of the appellants were in the knowledge of Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) , therefore, there did not exist any reason for the said witnesses not to have named the appellants as accused on the day when the F.I.R was being registered. Moreover, when every detail regarding the assailants was disclosed by Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) through their statements recorded under section 161 Cr.P.C. on 03.03.2018 then the holding of the test identification parade proceedings even otherwise was an exercise in futility. The question begs an answer that when Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) both knew about the details and particulars of the accused and when the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) had already got the appellants named as accused on **03.03.2018**, then for

what purpose the test identification parade proceedings were held on **16.03.2018**. We have also noted that the arrest of the appellants was affected after the witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) had got recorded their statements recorded under section 161 Cr.P.C. on 03.03.2018. The description of the appellants was so vivid and detailed that out of the whole province of Punjab, the appellants were identified and arrested by Mahboob Elahi, SI (untraceable), the Investigating Officer of the case . This illustrates the futility of holding of the test identification parade proceedings to establish the identities of the appellants who were so clearly named and already identified by the witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) prior to the said test identification parade proceedings held on 16.03.2018.

15. Another aspect drawing our grave concern is the fact that the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) made blatant improvements to their previous statements in order to bring the ocular account as narrated by them in line with the observations of). Dr. Muhammad Naeem Tahir (PW-3) who had conducted the post mortem examination of the dead body of the deceased namely Ishtiaque Ahmed , and went on to claim that during the occurrence only one accused fired at the deceased and the deceased also suffered from one firearm entry wound on his body though initially the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) had stated that two of the assailants had fired at the deceased , hitting him separately. The prosecution witnesses namely Zia Ahmed (PW-6)

and Ijaz Ahmed (PW-7) made a deliberate and dishonest departure from their earlier narrations of the occurrence while deposing before the learned trial court. The prosecution witness namely Zia Ahmed (PW-6) was cross-examined in this regard and the learned trial court observed as under:-

“I did not get record (sic) in my statement Ex. PF that **one accused made fire short of pistol 30-Bore, which hit at the left arm** of my brother Ishtiaq whereas **the other accused made fire with pistol 30 Bore**, which hit at the left flank of my brother Ishtiaque Ahmad. **Confronted with Ex. PF where it is so recorded**(emphasis supplied)

The prosecution witness namely Ijaz Ahmed (PW-7) was also cross-examined in this regard and the learned trial court observed as under:-

“I did not get record (sic) in my statement before police that **one person made a fire shot** with pistol 30 bore which hit at the arm of Ishtiaque Ahmad deceased **where as the second person made fire shot** with pistol 30 bore which hit at the left flank of Ishtiaque. **Confronted with Ex. D-B where it is so recorded.**”(emphasis supplied)

By improving their previous statements , the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) impeached their own credit. Article 151 of the Qanun-e-Shahadat Order 1984 provides as under: -

“151. Impeaching credit of witness. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;”

As the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) introduced dishonest, blatant and substantial improvements to their previous statements and were duly confronted with their former statements, hence their credit stands impeached and the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) cannot be relied upon, being proved to have deposed with a slight, intended to mislead the court. The august Supreme Court of Pakistan in the case of “Muhammad Ashraf Vs. State” (2012 SCMR 419) took serious notice of the improvements introduced by witnesses and rejected their evidence. We, thus, are satisfied that the evidence of the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) has no intrinsic worth and is to be rejected outrightly. The august Supreme Court of Pakistan in a recent case reported as “Muhammad Mansha Vs. The State” (2018 SCMR 772) has enunciated the following principle:

“Once the Court comes to the conclusion that the eye witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence”.

The august Supreme Court of Pakistan in the case reported as Muhammad Arif Vs. The State (2019 SCMR 631) has enunciated the following principle:

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

Guidance is sought from the principle enunciated by the august Supreme Court of Pakistan in the case of “Amin Ali and another Vs. The State” (2011 SCMR 323) where the august Supreme Court of Pakistan was pleased to reject the evidence of injured witnesses and held as under:-

“11. All the three witnesses deposed that the deceased had received three injuries, but the Medical Officer found six injuries on the person of the deceased. One of them had blackening. None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased. Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence. The Medical Officer did not show as to which of the injury was entry or exit wound on the person of the deceased. The medical officer stated that metallic projectile was recovered from wound No.1/B which was an exit wound. If it was an exit wound then the metallic projectile would have been out of the body. The presence of metallic projectile in the body clearly establishes the fact that it is not an exit wound but an entry wound. The medical officer has not shown that any of the injuries had inverted or averted margins so as to ascertain as to which of the injuries is entry or exit wound. Thus on this count there is a conflict between the medical and oral evidence. Furthermore, according to Medical Officer, the P.W.15 had four injuries out of them two were entry and two were exit wounds but the P.Ws. 13 and 14 deposed that the injured had received three injuries. Thus the P.Ws. have shown one exit wound as entry wound. With regard to the injured Tanveer Hussain, the Medical Officer showed two injuries one entry wound on the chest and one exit wound on the back but all the three eye-witnesses deposed that P.W.14 had received two injuries on his chest. As regards injuries on the person of Mst. Maqbool Bibi. The Medical Officer found one entry wound on her back with blackening, whereas P.Ws. 13, 14 and 15 deposed

that the fire shot was fired from the roof of the shop. Entry wound with blackening marks cannot be caused from such a long distance. From the above position it is manifest that the ocular testimony is in conflict with the medical evidence. Thus, the deceased and injured did not receive the injuries in the manner, as alleged by the prosecution.

.....
13. From the above evidence of the P. Ws., they do not appear to be truthful witnesses; therefore, no implicit reliance can be placed on their evidence.”

16. The learned District Public Prosecutor and the learned counsel for the complainant have laid much stress on the fact that the appellants were identified by the witnesses during test identification parade proceedings. The august Supreme Court of Pakistan in the case of Mian SOHAIL AHMED and others Vs. The State and others (2019 SCMR 956) has enunciated guiding principles for the appreciation of evidence regarding the test identification parade and the statements of the witnesses participating in the same. 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:-

“13. In the late 1960s, the courts around the world¹², began to set the standard for reviewing eyewitness identification evidence.¹³ Reliability and credibility of the witness was termed as the linchpin in determining the admissibility of identification testimony.¹⁴ US Supreme Court in the case of Manson v Brathwaite¹⁵, UK Court of Appeal (Criminal Division) in Regina v. Turnbull and Another,¹⁶ New Jersey Supreme Court in State v. Madison¹⁷ and Oregon Supreme Court in State v. Classen¹⁸ settled the following factors for assessing the reliability of the witness:

- (1) the opportunity of the witness to view the suspect at the time of the crime;*
- (2) the witness's degree of attention;*
- (3) the accuracy of the witness's prior description of the suspect;*

(4) *the level of certainty demonstrated at the confrontation (seeing the accused in court); and*

(5) *the time between the crime and the confrontation (seeing the accused in court).*

It is interesting to note that these factors were drawn from earlier judicial rulings and not from scientific research.¹⁹ The scientific research refutes the notion that memory is like a video recording, and that a witness needs only to replay the tape to remember what happened. Human memory is far more complex. The memory is a constructive, dynamic, and selective process. The process of remembering consists of three stages: acquisition-"the perception of the original event"; retention-"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval-the "stage during which a person recalls stored information".²⁰ The process of memory retention and retrieval may be affected by a number of factors. The scientific literature divides those variables into two categories: system and estimator variables.²¹ System variables are factors like lineup procedures which are within the control of the criminal justice system and in our jurisprudence are referred to as the Test Identification Parade. Whereas Estimator variables are factors related to the witness - like distance, lighting, or stress - over which the legal system has no control.²² Our courts have marginally attended to this aspect of witness reliability before placing reliance on the identification evidence (see above). The scientific research²³ establishes that the following non-exhaustive list of "estimator variables" negatively affect the memory process:-

i. Stress: Even under the best viewing conditions, high levels of stress can diminish an eye-witness' ability to recall and make an accurate identification. It may be noted "while moderate levels of stress improve cognitive processing and might improve accuracy, an eye-witness under high stress is less likely to make a reliable identification of the perpetrator."²⁴

ii. Weapon Focus: When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.²⁵

iii. Duration: The amount of time an eye-witness has to observe an event may affect the reliability of an identification. There is no minimum time required to make an accurate identification, however, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."

iv. Distance and Lighting: A person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

v. *Witness Characteristics: Characteristics like a witness' age and level of intoxication can affect the reliability of an identification. Children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults*⁸

vi. *Characteristics of Perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affects the accuracy of an identification.*

vii. *Memory Decay: Memories fade with time and memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.*³⁰

The scientific research referred to above has not only appeared in the peer reviewed journals but also has been considered "credible" by various courts in different jurisdictions. New Jersey Supreme Court in State v. Henderson³² observed that "virtually all of the scientific evidence" that had emerged in recent decades "reveals that an array of variables can affect and dilute memory and lead to misidentifications." Also see State v. Lawson³³.

14. *The laws of evidence maintain that in order for the court to take judicial notice of scientific facts they must be part of the general knowledge of men or must be agreed upon by reputable men in a particular field of science beyond reasonable dispute.*³⁴ *For judges to determine the degree of consensus on a particular scientific fact they may refer to any reputable and recognized reference sources.*³⁵ *The House of Lords in Regina (Quintavalle) v. Secretary of State for Health³⁶ held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. This Court can take judicial notice of the credible scientific development under Article 112, Qanun-e-Shahadat, 1984. The question is can we shut our eyes to credible scientific research and development, which has already been recognized and acknowledged by the courts in various other jurisdictions. If scientific research can help and assist the court in understanding and appreciating evidence more fully and more meaningfully, the risk of miscarriage of justice stands minimized. Therefore, the courts don't shy away from scientific developments but instead reach out and embrace them. Reliance on scientific research and the factors evolved by science to assess the reliability and credibility of the eye-witness can improve the quality of identification evidence and as a consequence the quality of justice. Our jurisprudence had already travelled in this direction and now credible scientific research by providing us additional factors or "estimator variables" (which are not exhaustive) has provided additional factors to certify the credibility and reliability of the eye-witness and as a result the veracity and probative value of the identification evidence."*

We have scrutinized the statements of the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) who appeared before the learned trial court and had joined the test identification parade proceedings held to establish the identity of the assailants, in light of the said judgment. Judges hearing a case should be aware of the dangers inherent in the identification of strangers by witnesses who have seen them very briefly. A perusal of the statements of both the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) recorded by the learned trial court revealed that both the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) were confronted with their previous statements wherein they had stated that the faces of the assailants were **covered by handkerchiefs** and in that scenario there did not exist any ability with the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) that they could have identified the assailants subsequently, therefore, they improved upon their previous statements and came up with the statements that during the occurrence, the handkerchiefs covering the faces of the assailants were removed however were duly confronted with their previous statements and were found to had made dishonest and blatant improvements in this regard . The prosecution witness namely Zia Ahmed (PW-6) was cross-examined in this regard and the learned trial court observed as under:-

“I got recorded in my examination in chief that the handkerchiefs were put off. I got recorded this fact in my statement Ex. PF. Confronted with Ex. PF where it is not so recorded.

.....

I did not get record (sic) before the Magistrate that the faces of the accused persons were covered with handkerchiefs which later on were put off.”(emphasis supplied)

The prosecution witness namely Ijaz Ahmed (PW-7) was also cross-examined in this regard and the learned trial court observed as under:-

“I did not get record (sic) in my statement that the accused persons had muffled their faces with handkerchief. Confronted with Ex. D-B where it is so recorded.”

We have also considered the fact that the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) obviously must have been under a lot of stress and even under the best viewing conditions, high levels of stress can diminish an eye-witness's ability to recall and make an accurate identification and an eye-witness under high stress is less likely to make a reliable identification of the perpetrator. Then the assailants had used a visible firearm weapon during the occurrence and the “estimator variables” of *Weapon Focus* and *Stress* were there, which distract a witness and draws his attention away from the culprit, impairing his ability to make a reliable identification and describe what the culprit looked like, in the situation, as in this case, that the incident was of short duration. Characteristics of Perpetrators ,as mentioned above ,could also not have been noted by prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) as according to the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7) themselves the assailants had taken measures to hide their identities .

In view of the above discussion, it is proved on record that in the present case, many estimator variables existed which negatively affected the memory process making it impossible for the witnesses to have identified the accused during the test identification parade proceedings.

17. The learned District Public Prosecutor and the learned counsel for the complainant, have submitted that the recovery of the Pistol (P-8) from the appellant namely Muhammad Nadeem and the recovery of the Pistol (P-13) from the appellant namely Muhammad Zahid alias Billa offered sufficient corroboration of the statements of the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7). Regarding the recovery of the Pistol (P-8) from the appellant namely Muhammad Nadeem and the recovery of the Pistol (P-13) from the appellant namely Muhammad Zahid alias Billa, the same cannot be relied upon as the Investigating Officer of the case, did not join any witness of the locality during the recovery of the *Pistol (P-8)* from the appellant namely Muhammad Nadeem and the recovery of the *Pistol (P-13)* from the appellant namely Muhammad Zahid alias Billa which was in clear violation of section 103 Code of Criminal Procedure, 1898. Abbas Ali 1330/HC (PW-5), admitted during cross-examination , as under:-

“it is correct that according to the record no independent private persons join the recovery proceedings in this case.

.....

Similarly, on 01.04.2018 & 02.04.2018 no witness from general public except Allah Ditta and Muhammad Amjad appeared before the I.O.”

The provisions of section 103 Code of Criminal Procedure, 1898, 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 *Pistol (P-8)* from the appellant namely Muhammad Nadeem and the recovery of the *Pistol (P-13)* from the appellant namely Muhammad Zahid alias Billa cannot be used as incriminating evidence against the appellants, being evidence that 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.”

Furthermore, on the perusal of the report of Punjab Forensic Science Agency, Lahore (Exh. PAA) regarding the analysis of the *Pistol (P-8)* recovered from the appellant namely Muhammad Nadeem and the *Pistol (P-13)* recovered from the appellant namely Muhammad Zahid alias

Billa and the empty shell of the bullet collected from the place of occurrence, we have noticed that the empty shell of the bullet recovered from the place of occurrence and the Pistol (P-8) recovered from the appellant namely Muhammad Nadeem and the Pistol (P-13) recovered from the appellant namely Muhammad Zahid alias Billa were received by Punjab Forensic Science Agency, Lahore on the same day i.e. **11.04.2018**. In this manner the said report of Punjab Forensic Science Agency, Lahore. (Exh. PAA) has no evidentiary value as the possibility of fabricating matching empties is apparent. The august Supreme Court of Pakistan has held in the case of Nasrullah alias Nasro v. The State (2017 SCMR 724) as under :-

“The alleged recovery of a pistol from the appellant's possession during the investigation was legally inconsequential because the report of the Forensic Science Laboratory brought on the record shows that the recovered pistol and the secured crime-empties had been received by the Forensic Science Laboratory together on one and the same day.”

The august Supreme Court of Pakistan has held in the case of Nasrullah alias Ali Sher v. The State (2008 SCMR 707) as under :-

“The crime-empties having been allegedly found at the place of occurrence and having been retained for so long the police station and having been sent to the F.S.L. along with the crime weapons and that also 12 days after the alleged weapons of offence had been allegedly recovered destroys and evidentiary value of the said piece of evidence. These recoveries, therefore, cannot offer any corroboration to the ocular testimony.”

Moreover, the appellants namely Muhammad Nadeem and Muhammad Zahid alias Billa were arrested on **06.03.2018**, the Pistol (P-8) from the appellant namely Muhammad Nadeem was recovered on **27.03.2018** and the Pistol (P-13) was recovered from the appellant namely Muhammad Zahid alias Billa on **02.04.2018**, however, the empty shell

of the bullet taken into possession from the place of occurrence, was sent to Punjab Forensic Science Agency, Lahore on **10.04.2018** .There was no reason for keeping the empty shell of the bullet which was taken into possession on **01.03.2018** at the Police Station and not sending them to the office of Punjab Forensic Science Agency, Lahore till **10.04.2018**, till after the arrest of the appellants and the recoveries of the pistols (P-8 and P-13). In this manner also the said report of Punjab Forensic Science Agency, Lahore. (Exh. PAA) has no evidentiary value as the possibility of fabrication is apparent. Reliance is placed on the case of Muhammad Amin Vs. The State and another (**2019 S C M R 2057**) wherein the august Supreme Court of Pakistan has held as under:-

“Interestingly, two empty cartridges (P-4/1-2) were secured from the place of occurrence by the investigating officer Akhtar Ali, SI (PW12) on the night of 11.10.2012, but the same were sent to the office of Punjab Forensic Science Agency on 23.01.2013 i.e. after arrest of the appellant in this case. In these circumstances, the positive report of FSL is of no avail to the prosecution and is inconsequential.”

Therefore, the recovery of the Pistol (P-8) from the appellant namely Muhammad Nadeem and the recovery of the Pistol (P-13) from the appellant namely Muhammad Zahid alias Billa do not further the case of the prosecution in any manner. In view of the above mentioned facts, the recovery of the Pistol (P-8) from the appellant namely Muhammad Nadeem and the recovery of the Pistol (P-13) from the appellant namely Muhammad Zahid alias Billa are not proved and the same cannot be used as a circumstance against the appellants.

18. The learned District Public Prosecutor and the learned counsel for the complainant have also relied upon the recoveries from the appellant namely Muhammad Nadeem of the ring (P-12), a copy of CNIC (P-18) on 01.04.2018 and the recovery of Rs.4500/- (P-7/1-5) and a copy of CNIC of the deceased (P-17) on 27.03.2018 from the appellant namely Muhammad Zahid alias Billa and the recovery of two mobile phone devices (P-14 and P-15) also from the appellant namely Muhammad Zahid alias Billa on 02.04.2018 and have submitted that the said recoveries from the appellants offered sufficient corroboration of the ocular account of the occurrence as furnished by the prosecution witnesses namely Zia Ahmed (PW-6) and Ijaz Ahmed (PW-7). With regard to the recovery of the of two mobile phone devices (P-14 and P-15) also from the appellant namely Muhammad Zahid alias Billa on 02.04.2018 ,it has been noted by us that the prosecution failed to prove as to how the said recovered mobile phone devices were proof of any fact in issue. The mobile phone devices (P-14 and P-15) were never sent to the Punjab Forensic Science Agency, Lahore for their analysis. Only the Forensic Analyst could have determined if the mobile phone devices (P-14 and P-15) having the International Mobile Equipment Identity (IMEI) were registered in the name of either the deceased or any of the witnesses.It is also a fact that Mahboob Elahi, SI (untraceable), Investigating Officer of the case did not hand over the said mobile phone devices (P-14 and P-15) to Abbas Ali 1330/HC (PW-5) and Abbas Ali 1330/HC (PW-5) did not make any statement of having received any such mobile phone devices (P-14 and P-15) from the

Investigating Officer of the case for keeping them in safe custody. Similarly, after the recoveries from the appellant namely Muhammad Nadeem of the ring (P-12) and a copy of CNIC (P-18) on 01.04.2018 and the recovery of Rs.4500/- (P-7/1-5) and a copy of CNIC of the deceased (P-17) on 27.03.2018 from the appellant namely Muhammad Zahid alias Billa, Mahboob Elahi, SI (untraceable), Investigating Officer of the case did not hand over the said articles to Abbas Ali 1330/HC (PW-5) for keeping them in safe custody. It is also a fact of the prosecution case that during the recording of the statement of the prosecution witness namely Abbas Ali 1330/HC (PW-5), he was cross-examined by the learned Assistant District Public Prosecutor , however, even during the said cross-examination it was not even suggested to Abbas Ali 1330/HC (PW-5) that Mahboob Elahi, SI (untraceable), Investigating Officer of the case had handed over to him the ring (P-12) and a copy of CNIC (P-18) on 01.04.2018 and the Rs.4500/- (P-7/1-5) and a copy of CNIC of the deceased (P-17) on 27.03.2018 for keeping them in safe custody. This fact alone is sufficient to reject the evidence of the prosecution with regard to the alleged recoveries of the ring (P-12) and a copy of CNIC (P-18) on 01.04.2018 and the Rs.4500/- (P-7/1-5) and a copy of CNIC of the deceased (P-17) on 27.03.2018 from the appellants. Furthermore, it is admitted part of the prosecution case that Mahboob Elahi, SI (untraceable), Investigating Officer of the case, had visited the house of the appellant namely Muhammad Nadeem on **27.03.2018** and remained there for a substantial period of time and in that scenario, had the ring (P-12) and a copy of

CNIC (P-18) been present in the same house, then their presence must have been noted by Mahboob Elahi, SI (untraceable), Investigating Officer of the case, however it was not. Similarly, it is an admitted part of the prosecution case that Mahboob Elahi, SI (untraceable), Investigating Officer of the case, had visited the house of the appellant namely Muhammad Zahid alias Billa on **27.03.2018** and remained there for a substantial period of time and in that scenario, had the pistol (P-13) and two mobile phone devices (P-14 and P-15) been present in the same house, then their presence must have been noted by Mahboob Elahi, SI (untraceable), Investigating Officer of the case, however, it was not. This also denudes the effort made by Mahboob Elahi, SI (untraceable), Investigating Officer of the case to prop up the failing prosecution case by showing false recoveries. Additionally, the prosecution witness namely Zia Ahmad (PW-6) admitted during cross-examination that he did not identify the ring (P-12) and the mobile phone devices (P-14 and P-15) as belonging to him or the deceased on the days (01.04.2018 and 02.04.2018 respectively) when they were recovered and only identified them after having received them on temporary custody, whereas it was the claim of the prosecution witnesses that the said articles had been identified on the days when they were recovered and memos were also prepared regarding the said identification. Zia Ahmad (PW-6) during cross-examination, stated as under:-

“ I did not identify the ring Ex. P-12 before the I.O. Witness volunteers I identified it when the same was taken by us on superdari.

I do not remember after how many days of recovery, I took the gold

ring Ex. P-12 on superdari. It is incorrect to suggest that I identified the gold ring Ex. P-12 on 01.04.2018 before the I.O. I did not identify the mobile phones Ex. P-14 and Ex. P-15 before the I.O. Witness volunteers identify the same after superdari”

All these facts prove that sham proceedings were held to show recovery of the snatched property.

19. The only other piece of evidence left to be considered by us is the medical evidence but the same is of no assistance in this case as medical evidence by its nature and character, cannot recognize a culprit in case of an unobserved incidence. As all the other pieces of evidence relied upon by the prosecution in this case have been disbelieved and discarded by us, therefore, the appellants’ conviction cannot be upheld on the basis of medical evidence alone. The august Supreme Court of Pakistan in its binding judgment titled “Hashim Qasim and another Vs. The State” (2017 SCMR 986) has enunciated the following principle of law:

“The medical evidence is only confirmatory or of supporting nature and is never held to be corroboratory evidence, to identify the culprit.”

The august Supreme Court of Pakistan in its binding judgment titled “Naveed Asghar and two others Vs. The State” (P L D 2021 Supreme Court 600) has enunciated the following principle of law:

“31. The prosecution has attempted to complete the chain of circumstantial evidence by medical evidence relating to the post mortem examinations of the deceased persons. This evidence proves only the factum that death of the deceased persons was caused by cutting their throats through some sharp edge weapon; it does in no way indicate who had cut their throats and with what particular weapon. Medical evidence is in the nature of

supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person.³² Therefore, the medical evidence is of little help to the prosecution for bringing home the guilt to the petitioners."

20. The plea of the learned District Public Prosecutor and the learned counsel for the complainant that because the complainant party had no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced should be believed, is entirely a misconceived one. It is a cardinal principle of justice and law that only the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of an uninterested witness, not inimical to the accused, may be corrupted deliberately while evidence of an inimical witness, if found consistent with the other evidence corroborating it, may be relied upon. Reliance in this regard may be placed on the case of "Waqar Zaheer vs. The State" (1991 PSC 281). It is a known and settled principle of law that the

prosecution primarily is bound to establish guilt against the accused without a shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling the Court to draw a conclusion whether the prosecution has succeeded in establishing accusation against the accused or otherwise and if it comes to the conclusion that charges, so imputed against the accused, have not been proved beyond a reasonable doubt, then the accused becomes entitled to acquittal. In such a situation the Court has no jurisdiction to abridge such right of the accused. To ascertain as to whether the accused is entitled to the benefit of the doubt the Court can conclude by considering the agglomerated effect of the evidence available on record as held in the cases of “Safdar Ali v. The Crown” (PLD 1953 FC 93) and “Muhammad Luqman v. The State” (PLD 1970 SC 10). In the instant case we have scanned the prosecution evidence in-depth and we are persuaded to hold that the prosecution has failed to produce trustworthy, confidence-inspiring and consistent evidence against the appellants. Conversely, the evidence so brought on record appears to have been fabricated to prove the prosecution case. Even otherwise the prosecution evidence suffers from material discrepancies, contradictions and omissions and for such reasons it has not proved the case against the accused persons intrinsically and if the evidence of such defective quality is accepted it would produce an illusory judgment which apparently would not be sustainable in the eyes of the law in view of the principles laid down by the august Supreme Court of Pakistan. Even otherwise the prosecution evidence is inconsistent and flawed, thus, on

the basis of the same, appellants cannot further be immured because they have every right to claim guarantee of the Constitution of the Islamic Republic of Pakistan, 1973 which provides that every citizen of the country shall be dealt with in accordance with the law.

21. Considering all the above circumstances, we entertain serious doubt in our minds regarding the involvement of the appellants namely Muhammad Nadeem and Muhammad Zahid alias Billa in the present case. It is a settled principle of law that for giving benefit of 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 Zaman 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 in 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.”

22. For what has been discussed above the Criminal Appeal No. 151 of 2019 lodged by Muhammad Zahid alias Billa son of Muzammil and Muhammad Nadeem son of Neghaban is **allowed** and the convictions and sentences of the appellants awarded by the learned trial court through the impugned judgment dated 28.02.2019 are hereby set-aside. Muhammad Nadeem son of Neghaban and Muhammad Zahid alias Billa son of Muzammil (appellants) are ordered to be acquitted by extending

them the benefit of doubt. Muhammad Nadeem son of Neghaban is in custody and is directed to be released forthwith if not required in any other case. The sentence of the appellant namely Muhammad Zahid alias Billa son of Muzammil was suspended by this Court vide order dated 11.04.2022 and the appellant namely Muhammad Zahid alias Billa son of Muzammil is present before the Court on bail. The surety of the appellant shall stand discharged from his liability and the bail bonds submitted by the appellant namely Muhammad Zahid alias Billa son of Muzammil are hereby cancelled.

23. Pursuant to the discussion made and conclusions arrived at above, the Criminal Revision No. 148 of 2019, seeking the enhancement of the sentence of the convict namely Muhammad Zahid alias Billa son of Muzammil, is hereby **dismissed**.

24. **Murder Reference No.28 of 2019** is answered in **Negative** and the death sentence awarded to Muhammad Nadeem son of Neghaban is **Not Confirmed**.

(MUHAMMAD TARIQ NADEEM) (SADIQ MAHMUD KHURRAM)
JUDGE JUDGE

Raheel

Approved for reporting

Judge