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Judgment Sheet

**IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR.
JUDICIAL DEPARTMENT**

Murder Reference No. 08 of 2021
(The State Vs. Khuda Bakhsh)

Criminal Appeal No. 244 of 2021
(Khuda Bakhsh and another Vs. The State and another.)

Criminal Revision No. 166 of 2021
(The State Vs. Muhammad Zafar Iqbal.)

JUDGMENT

Date of hearing:	24.01.2023.
Appellants by:	Syed Zeeshan Haider, Advocate
State by:	Ch. Asghar Ali Gill, Deputy Prosecutor General.
Complainant by:	Mr. Muhammad Sharif Bhatti, Advocate.

SADIO MAHMUD KHURRAM, J.—Khuda Bakhsh son of Ghafoor Ahmed, and Muhammad Zafar Iqbal son of Ghafoor Ahmed (convicts) were tried by the learned Additional Sessions Judge/Model Criminal Trial Court Bahawalpur in the case FIR No. 421 of 2019, dated 10.11.2019, registered in respect of offences under sections 302 and 34 PPC at the police station Khairpur Tamewali, District Bahawalpur for committing the *Qatl-i-Amd* of Abdul Majeed son of Ghulam Qadir (deceased). The learned trial court vide judgment dated 03.06.2021, convicted Khuda Bakhsh son of Ghafoor Ahmed and Muhammad Zafar Iqbal son of Ghafoor Ahmed (convicts) and sentenced them as infra:

Khuda Bakhsh son of Ghafoor Ahmed:-

Death under section 302(b) P.P.C. as *Tazir* for committing *Qatl-i-Amd* of Abdul Majeed son of Ghulam Qadir (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 remain in jail till the payment of the compensation.

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

Muhammad Zafar Iqbal son of Ghafoor Ahmed :-

Rigorous Imprisonment of one year and six months under section 34 P.P.C. and directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased and in default thereof the convict was directed to remain in jail till the payment of the compensation

The convict namely Muhammad Zafar Iqbal son of Ghafoor Ahmed was extended the benefit available under Section 382-B of the Code of Criminal Procedure, 1898 by the learned trial court.

2. Feeling aggrieved, Khuda Bakhsh son of Ghafoor Ahmed and Muhammad Zafar Iqbal son of Ghafoor Ahmed (convicts) lodged Criminal Appeal No. 244 of 2021, assailing their convictions and sentences. The learned trial court submitted Murder Reference No.08 of 2021 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentence of death awarded to the appellant namely Khuda Bakhsh son of Ghafoor Ahmed. The State filed Criminal Revision No. 166 of 2021 seeking the enhancement of the sentence of the convict namely Muhammad Zafar Iqbal son of Ghafoor Ahmed . We intend to dispose of the Criminal Appeal No. 244 of 2021, Criminal Revision No.166 of 2021 and the Murder Reference No.08 of 2021 through this single judgment.

3. Precisely, the necessary facts of the prosecution case, as narrated by Habib-ur-Rehman (PW-5) , the complainant of the case are as under:-

“Stated that on 07.11.2019, at about 08.30 am, my brother Abdul Majeed deceased was injured by Khuda Bakhsh, Mohammad Zafar and two unknown persons, at this, my brother got lodged ruppat No.8, dated 07.11.2019. At about 11.10 am on the same day, then injured Abdul Majeed was brought to Police Khidmat Center, THQ Khairpur and lodged ruppat by stating that he was resident of Mouza Ghanipur and labourer by profession. On that day, at about 08.30 am. he was standing in front of his house, meanwhile, Khuda Bakhsh s/o Abdul Ghafoor, caste Pawli r/o Basti Sultan Arain came there and started to abuse him, when he/deceased forbade him. Khuda Bakhsh accused flared up and started to give slaps and fists to the deceased Abdul Majeed (then injured). The accused gave fist blow on his left cheek and in the meanwhile, Mohammad Zafar accused came to help Khuda Bakhsh accused alongwith two unknown accused persons. Mohammad Zafar accused having a Soti in his hand, inflicted Soti blow on the Dola of left arm of Abdul Majeed, Khuda Bakhsh accused inflicted Soti blow to Abdul Majeed (deceased) on his right knee joint, Mohammad Zafar accused again caused Soti blow on left knee of Abdul Majeed. Khuda Bakhsh accused again gave Soti blow on left ankle of the deceased. Unknown accused persons also made kicks and fist blows to Abdul Majeed deceased. On hue and cry of Abdul Majeed, PWs Mohammad Bashir s/o Allah Bakhsh, Mohammad Sajjad s/o Noor Mohammad arrived there who witnessed the occurrence and rescued Abdul Majeed (since deceased) from the clutches of accused persons

Motive behind the occurrence was that accused persons have dispute with close relatives of Abdul Majeed since deceased because Abdul Majeed deceased divorced his wife Mst Haseena Mai sister of accused Khuda Bakhsh and Muhammad Zafar about 08 days prior to the occurrence, the reason behind that the accused with intention to commit Qatal-i-Amd of Abdul Majeed deceased, caused severe injuries on his person and done him to death (The then injured Abdul Majeed went to THQ Hospital Khairpur Tamewali alongwith me and got recorded his statement which was verified by the Incharge Police Khidmat Counter, THQ Hospital, Khairpur Tamewali. The injured (since deceased) was medically examined by the Hospital of THQ KPT and then, he was referred to B.V.H. Bahawalpur. On 10.11.2019. the then injured Abdul Majeed succumbed to the injuries at B.V.H. Bahawalpur. The Police of P.S. Khairpur Tamewali came B.V.H. Bahawalpur, where, I submitted written

application Ex.PE which bear my signature and thumb-impression and on the said written application, FIR was registered I also stated before the Police according to my application Ex.PE that Khuda Bakhsh accused, at the time of causing injuries to Abdul Majeed deceased, also caused injury to the deceased with the leg of cot (Paya) on the backside of his head and he also caused injury to Abdul Majeed deceased on his right shoulder, but these two injuries were not written by the Police in ruppat got recorded on the statement of the deceased

After that, the police of P.S. Khairpur Tamewali escorted the dead body of Abdul Majeed deceased to THQ Hospital, Khairpur Tamewali and handed over the dead body of the deceased to the Doctor for autopsy examination. I alongwith Bashir Ahmad and Mohammad Sajjad were alongwith the dead body of the deceased Abdul Majeed. After handing over the dead body to the Doctor for autopsy, the 1.0. came at the spot alongwith me as well as Mohammad Sajjad and Bashir Ahmad, where, the 1.O. inspected the place of occurrence. At the place of occurrence, I produced leg of cot P-1 which was burnt from one side i.e. weapon of offence before the IO. who took the same into possession vide recovery memo Ex.PF, attested by me, Mohammad Bashir and Mohammad Sajjad PWS. The 1.0. also recorded my statement and the statements of PWs in this regard. After post-mortem examination, I received the dead body of my deceased brother Abdul Majeed and I affixed my thumb-impression on the receipt Ex.PG, as a token of its correctness.”

4. After the formal investigation of the case report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court and the accused were sent to face trial. The learned trial court framed the charge against the accused on 30.01.2020, to which the accused pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case got statements of as many as **ten** witnesses recorded. The ocular account of the case was furnished by Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6). Muhammad Nawaz, ASI (PW-3) stated that on 10.11.2019, he got recorded the formal F.I.R (Exh.PD). Shafqat Mahmood 1023/HC (PW-4) stated that on 10.11.2019, he received a stump of cot from the Investigating Officer of the case and on 17.11.2019, the Investigating

Officer of the case handed over to him the last worn clothes of deceased and on 24.11.2019, the Investigating Officer of the case handed over to him two *Sotis* recovered from the appellants. Abdul Rasheed (PW-7) stated that on 10.11.2019, he identified the dead body of the deceased at the time of its post mortem examination and on 17.11.2019, Nabi Ahmad 983/C handed over the last worn clothes of the deceased to the Investigating Officer of the case. Ghulam Qadir, Patwari (PW-10) prepared the scaled site plan of the place of occurrence (Exh.PP). Muhammad Siddique , SI (PW-8) investigated the case from 10.11.2019 till 25.11.2019, arrested the appellants namely Khuda Bakhsh and Muhammad Zafar Iqbal on 17.11.2019 and detailed the facts of the investigation as conducted by him in his statement before the learned trial court.

6. The prosecution also got Dr. Qasim Hussain (PW-1) examined, who on 07.11.2019 was posted as Medical Officer at THQ hospital ,Khairpur Tamewali and on the same day, examined Abdul Majeed son of Ghulam Qadir (the then injured later deceased). Dr. Qasim Hussain (PW-1), on examining Abdul Majeed son of Ghulam Qadir (the then injured later deceased) observed as under:-

“Description of Injuries.

Injury No.1: Lacerated wound of (0.5 x 0.25 cm) on left check near lips which is skin deep. Advised X-ray PNS.

Injury No.2; Subjective complain of pain, upper side of left arm near to elbow joint, on examination an abrasion of (1.5 x 0.5 cm) mild to moderate swelling slightly restricted movement of elbow joint, advised X-ray upper arm with elbow joint.

Injury No.3: Subjective complain of pain on right knee joint, mild swelling present and small abrasion advised right X-ray AP/lateral knee joint.

Injury No.4: Subjective complain of pain in left knee joint abrasion-swelling present on left knee joint. Advised X-ray left knee joint AP/lateral view.

Injury No.5 Subjective complain of pain in left foot ankle joint on examination abrasion measuring (1x0.25cm) and mild to moderate swelling

present on left foot ankle joint. Advised X-ray left foot with ankle joint AP/lateral view.

Patient referred to BVH Bahawalpur dated 07.11.2019 for further management and detail surgical notes, if any, because progressively deteriorating conscious level. It is mentioned in original MLC record.

.....

Receiving surgical notes from neuro surgery departments Bahawalpur on CT brain there was diffused axonal injury patient managed conservatively, he was not improved.”

The prosecution also got Dr. Amin Ullah Khan (PW-2) examined, who on 08.11.2019 was posted as Medical Officer at Neurosurgery Ward ,BV hospital, Bahawalpur and on the same day, examined Abdul Majeed son of Ghulam Qadir (then injured later deceased). Dr. Amin Ullah Khan (PW-2), on examining Abdul Majeed son of Ghulam Qadir (then injured later deceased) observed as under:-

“Neurosurgical Findings/Intervention/Remarks (If any).

On CT scan brain, patient was diagnosed as diffuse axonal injury of brain. Patient managed conservatively but he could not improve. His condition was deteriorated and expired in Ward on 10.11.2019.”

The prosecution also got Dr. Ahmad Faraz (PW-9) examined, who on 10.11.2019, was posted as Medical Officer at THQ, hospital Khairpur Tamewali and on the same day conducted the postmortem examination of the dead body of Abdul Majeed son of Ghulam Qadir (deceased). Dr. Ahmad Faraz (PW-9), on examining the dead body of Abdul Majeed son of Ghulam Qadir (deceased) observed as under:-

“Injury No.1

There was healing laceration of 0.25 x 0.25 cm in sized present on left cheek just lateral to corner of the mouth.

Injury No.2

There was a healing abrasion of 1 x 0.5 cm in size present on left arm near back of the elbow joint.

Injury No.3

There was a healing abrasion on medical aspect of right knee joint.

Injury No.4

A small healing abrasion in front of left knee joint.

Injury No.5

NAD.

Injury No.6

There is no swelling, no abrasion or no mark of injury.

Injury No.7

There was a healing a abrasion 6 x 3 cm in size present on upper aspect of right shoulder.

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VII. REMARKS BY M.O.

After thorough external and internal post mortem examination of the dead body lying on the mortuary table, I am of the opinion not a single injury can caused death will be determined after detail surgical notes from BVH and expert report from PFSA, Lahore (receiving surgical from neurosurgery department BVH. Bahawalpur #138170-3318-88, on CT. Scan brain there was diffused axonal injury, patient manage conservatively he was not improved his condition was detoriorating and expired in ward.

VIII. ACCORDING TO PFSA

1. Forensic Toxicology analysis Report:

- a. Diazepam was detected in liver in item No.1.
- b. Liver in item No.1 contain 0.26 mg/kg nor diazepam.
- c. Poisons were not detected in stomach contents in item No.1

2. Forensic Histopathology Report:

- a. Histological examination of the lungs sections reveals lungs tissues congestions, the alveoli are clear. The brain sections reveal bone, no anti-mortem injury seen.

FINAL OPINION:

So, I am of the opinion that diffused axonal injury of brain may leads him to death.

In this case it is highly suggestive that injury of face may cause diffuse axonal injury.”

7. On 01.03.2021, the learned Deputy District Public Prosecutor gave up the prosecution witnesses namely Muhammad Sajjad and Muhammad Asif as being unnecessary and closed the prosecution evidence after tendering in evidence the reports of Punjab Forensic Science Agency, Lahore (Exh. P.Q. and Exh. P.R).

8. After the closure of prosecution evidence, the learned trial court examined the appellants namely Khuda Bakhsh son of Ghafoor Ahmed and Muhammad Zafar Iqbal son of Ghafoor Ahmed 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, they replied that they had been involved in the case falsely and were innocent. The appellants namely Khuda Bakhsh son of Ghafoor Ahmed and Muhammad Zafar Iqbal son of Ghafoor Ahmed , opted not to get themselves examined under section 340(2) Cr.P.C. and did not adduce any evidence in their defence.

9. At the conclusion of the trial, the learned Additional Sessions Judge/Model Criminal Trial Court Bahawalpur convicted and sentenced the appellants as referred to above.

10. The contention of the learned counsel for the appellants precisely is that the whole case is fabricated and false and the prosecution remained unable to prove the facts in issue and did not produce any unimpeachable, admissible, and relevant evidence. Learned counsel for the appellant further contended that the story of the prosecution mentioned in the statements of the witnesses, on the face of it, was highly improbable. Learned counsel for the appellant further contended that the statements of the prosecution witnesses were not worthy of any reliance. The learned counsel for the appellant also submitted that the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed were full of procedural defects, of no legal worth and value, and were result of fake proceedings. The learned counsel for the appellants also argued that the appellants had been involved in the occurrence only on suspicion. The learned counsels for the appellants 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 appellants namely Khuda Bakhsh son of Ghafoor Ahmed and Muhammad Zafar son of Ghafoor Ahmad. The learned Deputy Prosecutor General along with the learned counsel for the complainant, further contended that the medical evidence also corroborated the statements of the eye witnesses. The learned Deputy Prosecutor General along with the learned counsel for the complainant, further argued that the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed 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 offenders 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 appeals.

12. We have heard the learned counsels for the appellant, the learned counsel for the complainant, the learned Deputy Prosecutor General and perused the record with their able assistance.

13. At the very outset, we have noticed a bludgeoning flaw in the statement of the prosecution witness namely Habib-ur-Rehman (PW-5). We have reproduced the examination in-chief of the prosecution witness namely Habib-ur-Rehman (PW-5) as recorded by the learned trial court in paragraph 3 of the judgment and a bare perusal of the same reveals that the prosecution witness namely Habib-ur-Rehman (PW-5) never claimed to be an eye witness of the occurrence and while getting the examination in-chief before the learned trial court , which has been reproduced by us in paragraph 3 of the judgment, the prosecution witness namely Habib-ur-Rehman

(PW-5) only narrated the account of the occurrence as recorded in the *Rapt No.8* dated 07.11.2019, which *Rapt No.8* was recorded allegedly on the basis of the statement made by Abdul Majeed (deceased) himself. The learned counsel for the complainant has candidly conceded that a perusal of the examination in-chief of the prosecution witness namely Habib-ur-Rehman , as recorded by the learned trial court, made it apparent that the prosecution witness namely Habib-ur-Rehman (PW-5) never gave any evidence that he himself was present at the place of occurrence and had witnessed the same. The prosecution witness namely Habib-ur-Rehman (PW-5) also admitted himself that according to the narrative of the *Rapt No.8*, which was recorded allegedly on the basis of the statement made by Abdul Majeed (deceased) himself, the prosecution witness namely Habib-ur-Rehman (PW-5) had not been mentioned as a witness who was present at the place of occurrence or had indeed witnessed the same. During cross-examination Habib-ur-Rehman (PW-5), admitted as under:-

"I was not cited as witness in ruppat incorporated on the statement of Abdul Majeed. Volunteered that at the time of recording above said ruppat, I was present there

I did not inform the police about the occurrence. Volunteered that the said information was laid down before the Police by Imran and Rashid. Said Imran is my Mulair and Rashid is my nephew.” (emphasis supplied)

Similarly, Muhammad Siddique, SI (PW-8), Investigating Officer of the case , also admitted that according to the written application (Exh.PE) submitted by the prosecution witness namely Habib-ur-Rehman (PW-5) for the registration of the F.I.R on 10.11.2019, Habib-ur-Rehman (PW-5) had not claimed himself to be an eye witness of the occurrence . Muhammad Siddique, SI (PW-8) during cross-examination , stated as under:-

“According to complaint Ex.PE, complainant did not himself claim to be eye-witness of the occurrence.”

Even the prosecution witness namely Muhammad Bashir (PW-6) did not state that at the time of occurrence, the prosecution witness namely Habib-ur-Rehman (PW-5) was present at the place of occurrence or had been attracted to the place of occurrence , rather stated that only he and Muhammad Sajjad (given up prosecution witness) were attracted to the place of occurrence. In view of the above discussion of the prosecution evidence, it is more than apparent that the prosecution witness namely Habib-ur-Rehman (PW-5) had not witnessed the occurrence and was not present at the place of occurrence, at the time of occurrence. It is also proved on record that whatever was stated by the prosecution witness namely Habib-ur-Rehman (PW-5) in his statement before the learned trial court ,regarding the facts of the occurrence, was based on the information he had recovered from the perusal of *Rapt No.8* (Exh.PE/1) and he himself was not a witness of whatever was narrated in the *Rapt No.8* (Exh.PE/1). Therefore, the evidence of the prosecution witness namely Habib-ur-Rehman (PW-5) does not prove any fact in issue relevant in the case.

14. The prosecution also got recorded the statement of Muhammad Bashir (PW-6) who claimed to had witnessed the occurrence. The deceased namely Abdul Majeed was closely related to the prosecution witness namely Muhammad Bashir (PW-6) and the said relationship has been brought on record. According to the prosecution witness namely Muhammad Bashir (PW-6) himself, the deceased as well as Habib-ur-Rehman (PW-5) were his maternal cousins. Muhammad Bashir (PW-6) during cross-examination also claimed that his house was at a distance of only 2-3 houses from the house of the deceased , in front of which house the

occurrence had taken place. Muhammad Bashir (PW-6) during cross-examination , stated as under:-

“Complainant Habib ur Rehman is my maternal cousin (Phophu-Zad). My house is at a distance of 02/03 houses from the house of Abdul Majeed.”

A perusal of the prosecution evidence itself reveals that this claim of the prosecution witness namely Muhammad Bashir (PW-6) that his house was at a distance of only 2-3 houses from the house of the deceased , in front of which house the occurrence had taken place, was not correct. We have perused the rough site plan of the place of occurrence (Exh.PM) as prepared by the Muhammad Siddique, SI (PW-8) , the Investigating Officer of the case , as well as the scaled site plan of the place of occurrence (Exh.PP) as prepared by the Ghulam Qadir, Patwari (PW-10) and find that though in both the site plans of the place of occurrence (Exh.PM and Exh.PP), one house of one Muhammad Arshad Maitla has been shown to be present towards the southern side of the house of the deceased, whereas it has been mentioned that on the eastern side of the house of the deceased , a cattle shed had been made by one Muhammad Arshad Maitla , whereas on the northern and western sides of the house of the deceased there was vacant land, however, the house of Muhammad Bashir (PW-6) has not been shown in the same. Then the prosecution witness namely Muhammad Bashir (PW-6) also did not give any reason for his presence at the place of occurrence. In this manner, the prosecution witness namely Muhammad Bashir (PW-6) can be validly termed as a “*chance witness*” and therefore was under a bounden duty to provide a convincing reason for his presence at the place of occurrence, at the time of occurrence and was also under a duty to prove his presence by producing some physical proof of the same. We have noted with grave concern that the prosecution witness namely Muhammad Bashir (PW-6) failed miserably to provide any consistent evidence as to the reason for his arrival at the place of

occurrence and his presence at the place of occurrence , when the same was taking place, denuding the fact that Muhammad Bashir (PW-6) had indeed not witnessed the occurrence.

15. We have also noted that both the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) admitted that though the occurrence had taken place on **07.11.2019** at about **08.30 a.m.**, however, they neither themselves reported the matter to the police nor got recorded their statements till **10.11.2019**, i.e after as many as three days of the occurrence. The prosecution witness namely Habib-ur-Rehman (PW-5) stated that he submitted the written application (Exh.PE) to Muhammad Siddique, SI (PW-8) at BV hospital on **10.11.2019**, whereas the prosecution witness namely Muhammad Bashir (PW-6) stated that he got recorded his statement to the police only on **10.11.2019**. The prosecution witness namely Habib-ur-Rehman (PW-5) also admitted that prior to submitting the written application (Exh.PE) on 10.11.2019, he had also visited the Police Station , however, still did not make any statement with regard to the occurrence. Habib-ur-Rehman (PW-5) , during cross-examination , stated as under:-

“I had obtained the copy of ruppat incorporated on the complaint of Abdul Majeed one day prior to submission of complaint Ex.PE. I did not make any statement prior to submission of complaint Ex.PE. **After the occurrence, I firstly visited the police station, one day prior to submission complaint Ex.PE**, however, I cannot tell the time of my visit to the police station on that day.

.....

No statement of any PW as well as that of mine was reduced into writing by the Police prior to submission of complaint ExPE” (emphasis supplied)

As mentioned above, Habib-ur-Rehman (PW-5) also admitted during cross-examination that he did not inform the police about the occurrence rather the said information was given to the police authorities by Imran and Rashid, Imran being the cousin of Habib-ur-Rehman (PW-5) and Rashid being his nephew. Similarly, the prosecution witness namely Muhammad Bashir (PW-6) also admitted to not having visited the Police Station after the occurrence nor reporting the matter to the police till **10.11.2019**, the date upon which the statement under section 161 of the Code of Criminal Procedure, 1898 of Muhammad Bashir (PW-6) was recorded, three days after the occurrence. Muhammad Bashir (PW-6), during cross-examination, stated as under:-

“ I did not visit police station prior to death of Abdul Majeed. I did not inform the police about the occurrence. Volunteered that occurrence was informed by the persons standing there. Imran and Rashid conveyed the information to police.

.....

My statement was recorded by the police **on 10.11.2019** and **my no statement was recorded by the police prior to that.**”(emphasis supplied)

Muhammad Siddique, SI (PW-8), the Investigating Officer of the case, also admitted that before 10.11.2019 i.e three days after the occurrence, no information was given to the police regarding the occurrence. Muhammad Siddique, SI (PW-8) during cross-examination, stated as under:-

“ **Prior to 10.11.2019, I did not receive any information about the instant occurrence**”

Both the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) admittedly did not provide any reason for not getting their statements recorded with promptitude and why the matter was delayed by them. This delay in

getting their statements recorded to the police clearly proves the fact that both the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) were not present at the place of occurrence, at the time of occurrence. It is trite that the delayed recording of the statement of a prosecution witness under section 161 of the Code of Criminal Procedure, 1898 reduces its value to nothing unless there is plausible explanation for such delay. No explanation, much less plausible, has been given by the prosecution witness namely Habib-ur-Rehman (PW-5) for not submitting the written application (Exh.PE) earlier or by the prosecution witness namely Muhammad Bashir (PW-6) for him not getting his statement under section 161 of the Code of Criminal Procedure, 1898 recorded immediately or not reporting the matter to the police for three days and therefore no value can be attached to the statements of the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6). The august Supreme Court of Pakistan in the case of "Abdul Khaliq Vs. The State" (**1996 SCMR 1553**) has held as under:

"It is a settled position of law that late recording of 161, Cr.P.C. statement of a prosecution witness reduces its value to nill unless there is plausible explanation for such delay".

The august Supreme Court of Pakistan in the case of "Muhammad Khan Vs. Maula Bakhsh" (**1998 SCMR 570**) has held as under:

"It is a settled law that credibility of a witness is looked with serious suspicion if his statement under section 161, Cr.P.C is recorded with delay without offering any plausible explanation".

The august Supreme Court of Pakistan in the case of "Syed Saeed Muhammad Shah and another Vs. The State" (**1993 SCMR 550**) at page 571 has held as under:

"In the absence of satisfactory nature of explanation normally rule is that statements recorded by police after delay and without explanation are to be ruled out of consideration. In this case unsatisfactory explanation which is not substantiated can be equated with no explanation".

16. We have also noted that the alleged eye witnesses namely Muhammad Bashir (PW-6) and Muhammad Sajjad (given up prosecution witness) made no effort either to save the deceased or to apprehend the accused when they were two in number and could have easily restrained the accused. It is unnatural and unbelievable that the alleged eye witnesses namely Muhammad Bashir (PW-6) and Muhammad Sajjad (given up prosecution witness), did not even move a limb to protect their near and dear one. The alleged eye witnesses namely Muhammad Bashir (PW-6) and Muhammad Sajjad (given up prosecution witness), also allowed the appellants to escape from the place of occurrence . No person having ordinary prudence would believe that such closely related witnesses would remain watching the proceedings as mere spectators for as long as the occurrence continued without doing anything to rescue the deceased or to apprehend the assailant. It only proves that the deceased was at the mercy of the assailant and no one was there to save him. Such behaviour, on the part of the witnesses, runs counter to natural human conduct and behaviour. Article 129 of the Qanun-e-Shahadat, 1984 allows the courts to presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events and human conduct in relation to the facts of the particular case. We thus trust the existence of this fact, by virtue of the Article 129 of the Qanun-e-Shahadat, 1984, that the conduct of the witnesses, as deposed by them, was opposed to the common course of natural events, human conduct and that the prosecution witness namely Muhammad Bashir (PW-6) was not present at

the place of occurrence, at the time of occurrence. The august Supreme Court of Pakistan has enunciated binding principles for appreciation of evidence in such circumstances. Reliance is placed on the case of "Zulifqar Ali v. The State" (2021 S C M R 1373) wherein the august Supreme Court of Pakistan observed as under:-

"Though the human response/reaction, in a sudden crisis, particularly one striking awe and terror, cannot be gauged or assessed with any degree of empirical certainty as fear impacts differently upon faculties of the onlookers, nonetheless, despite maximum latitude, in the given scenario, it really appears hard for the appellant who operated with impunity in the face of heavy presence of the witnesses; deceased being herself "a young female with average-built" could not be expected a static target offering no resistance. Razor (P-13), commonly used by the barbers, given its moving handle instead of a fixed grip, is an instrument to be managed with some difficulty against a moving object; it risks the handler more than the intended target and as such unless the victim is stunned as a stone, a possibility beyond contemplation for the witnesses standing nearby to foil the attempt; they included three able-bodied males in their youth; their inaction is mindboggling and explanation far from being plausible, circumstances that in retrospect insinuate their absence at the scene"

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

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

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

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

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

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

17. Another aspect of the case raising doubt over prosecution case, is the fact the matter was reported to the police on **10.11.2019 at 09.00 p.m.**, when the prosecution witness namely Habib-ur-Rehman (PW-5) submitted the written application (Exh.PE) to Muhammad Siddique, SI (PW-8), the Investigating Officer of the case, whereas the occurrence had taken place on **07.11.2019 at 08.30 a.m.** In this manner, the delay in reporting the matter to the police was of about **three days and twelve hours**, for which delay no reason, much less plausible, was offered. Habib-ur-Rehman (PW-5) admitted during cross-examination that the Police Station was situated just seven kilometres from the place of occurrence and was accessible through the same road, which road also linked the hospital where Abdul Majeed (deceased) was taken, however, still no effort was made to report the matter to the police. Habib-ur-Rehman (PW-5), during cross-examination, stated as under:-

"We shifted Abdul Majeed to Hospital after 01-½ to 02 hours of decamping of accused from the place of occurrence, on a car of someone.

.....

Police Station falls on the way to the Hospital from the place of occurrence The Police Station is situated at a distance of 07/08 K.M. from our house. "

No justification, much less credible, has been given by the prosecution at any stage for such deferral in reporting the matter to the police and the delay in submitting the written application (Exh. P.E.) by Habib-ur-Rehman (PW-5) to Muhammad Siddique, SI (PW-8). As mentioned above, the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) both candidly admitted that they never reported the matter to the police for as many as three days. It has also been

claimed by the prosecution witness namely Habib-ur-Rehman (PW-5) that a *Rapt No.8* was recorded on the statement of Abdul Majeed (deceased) on 07.11.2019, however, Muhammad Siddique, SI (PW-8), the Investigating Officer of the case , admitted that he did not procure any record of the said *Rapt* during the investigation of the case nor any information was received by him regarding the occurrence prior to 10.11.2019 nor he recorded the statement of any police official who had recorded the said Rapt No.8. Muhammad Siddique, SI (PW-8) , the Investigating Officer of the case , admitted during cross-examination , as under:-

“ Complainant did not produce ruppat Roznamcha before me did not take into possession said ruppat in my whole proceedings. **Prior to 10.11.2019, I did not receive any information about the instant occurrence.** The name of official is not mentioned who incorporated the said ruppat.” (emphasis supplied)

In this case, the ocular account furnished is suffering from legal and factual infirmities and does not appeal to a prudent mind, much less a legal one, because the witnesses never reported the matter to the police for as many as three days and twelve hours. This inordinate delay in reporting the matter conclusively proves that the written application (Exh. P.E.) submitted by Habib-ur-Rehman (PW-5) and the formal F.I.R (Exh.PD) were prepared after probe, consultation, planning, investigation and discussion . As many as three days and twelve hours were taken to invent a false and dishonest narrative of the written application (Exh. P.E.) of Habib-ur-Rehman (PW-5). The scrutiny of the statements of the prosecution witnesses reveals that the written application (Exh. P.E.) of Habib-ur-Rehman (PW-5) was neither prompt nor spontaneous nor natural, rather was a contrived, manufactured and a compromised document. Sufficient doubts have arisen and inference against the prosecution has to be drawn in this regard and the delay in reporting the matter to the police and the failure of the prosecution witnesses to proceed to the Police

Station evidences their absence at the time of occurrence, at the place of occurrence.

Reliance is placed on the case of “Ghulam Abbas and another v. The State and another” (**2021 SCMR 23**) wherein the august Supreme Court of Pakistan observed as under:-

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

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

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

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

“It has been observed by us that the occurrence in this case as per prosecution took place on 03.09.1999 at 3.00 a.m. (later half of night) and the matter was reported to the police on the same day at 8.30 a.m. i.e. after five hours and thirty minutes of the occurrence. The distance between the place of occurrence and the police station is 09 miles. The postmortem on the dead body of deceased was conducted on the same day at 2.00 p.m. i.e. after 11 hours of the occurrence. No explanation whatsoever has been given by the complainant Shahadat Ali (PW5) and Umer Daraz (PW6) in the F.I.R. or while appearing before the learned trial Court qua the delay in lodging the F.I.R. or for that matter the belated postmortem of the deceased.”

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

18. The learned counsel for the complainant and the learned Deputy Prosecutor General have also relied upon the statement made by Abdul Majeed (then injured later deceased) at the THQ hospital Khairpur Tamewali upon the basis of which a *Rapt No. 08* (Exh.PE/1) was recorded. Before giving a conclusive finding regarding the legal worth of such statement of the deceased, we deem it appropriate to have a look on the law relevant on the subject. Such a statement is relevant under the provision of Article 46 of Qanun-e-Shahadat Order, 1984. Dying declaration, generally, stands for the statement of a person who is in expectation of his death and relates to the causes of his death. Such a statement is admissible in evidence though its maker does not appear in the witness box so as to provide an opportunity of cross-examination to an accused facing the charge of his murder. The admissibility of the dying declaration is an exception to the general rule which makes inadmissible the hearsay evidence. Dying declaration can be made basis for awarding conviction provided it is free from the menace of prompting and tutoring and is proved to have been made by none other than the deceased himself. The paramount reason of attaching importance and credibility to such a statement is the presumption that a dying person seldom lies. For recording of dying declaration no hard and fast rules are laid down, however, a wade through the provisions of the Police Rules, 1934 reveals that a procedure and brief guidelines are provided in chapter-25, Rule 21 which are being reproduced below for advantage sake:-

"25.21. Dying declarations.- (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.

(2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the

parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police officer should, under section 162, Code of Criminal Procedure, be signed by the person making it."

From above, it can be gathered that preferably such a statement is to be recorded either by a Magistrate or in the presence of a gazetted police officer and in absence thereof in front of two or more unconcerned reliable witnesses. However, if neither of the above mentioned persons are available, only then such a statement can be recorded in the presence of two or more police officers. In the present case, though Abdul Majeed (deceased) remained alive for as many as three days after the occurrence , and admitted in the hospital for a considerable time ,however, his purported statement (Exh.PE/1) was not attested by any official working at the hospital. Furthermore, while appearing as a prosecution witnesses, none of the Medical Officers who had examined the deceased in an injured condition stated that any statement of Abdul Majeed (deceased) was recorded in their presence. The deceased remained in hospital for a considerable time, during which there was sufficient time for the investigating officer to record the dying declaration through a Magistrate which exercise was not done. Likewise, we have not been able to trace any explanation from the perusal of the record that as to why the statement of the deceased (Exh.PE/1) was not recorded in the presence of the doctor as it does not bear his signatures. It needs no mention that for a dying person, a doctor is like nothing less than an angel and the last ray of hope for him in his capacity as a savior of his life. In this backdrop, a doctor can be the best person to endorse the dying declaration as it is expected from a dying person to tell the whole truth to the doctor. In somewhat similar circumstances, the Hon'ble Supreme Court of Pakistan

expressed in the case of *Mst. Zahida Bibi v. The State (PLD 2006 Supreme Court 255)* to the following effect:-

"The rule of criminal administration of justice is that the dying declaration like an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell a lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts."

Furthermore, Muhammad Siddique, SI (PW-8) admitted during cross-examination that he did not record the statement of any police official or any other person who had recorded the alleged statement of Abdul Majeed (deceased) on which the *Rapt No.08* (Exh.PE/1) was recorded. Muhammad Siddique, SI (PW-8), Investigating Officer of the case , also admitted during cross-examination that even the complainant of the case did not produce the said document during the investigation of the case. Muhammad Siddique, SI (PW-8) , admitted during cross-examination , as under:-

“ When I received the information about the death of Abdul Majeed at that time, I have no knowledge about ruppat No.8 dated 07.11.2019. I did not join in investigation the said official who incorporated said ruppat.” (emphasis supplied)

These aspects of the prosecution evidence are sufficient on their own to reject the evidence with regard to the alleged statement of Abdul Majeed (deceased) on which the *Rapt No.08* (Exh.PE/1) was recorded.The document (Exh.PE/1) , the alleged dying declaration of Abdul Majeed (deceased) , is proved to be a fabricated document.

19. We have noted with serious anxiety that the ocular account of the occurrence as furnished by the prosecution witnesses is inconsistent with the medical evidence as furnished by Dr. Qasim Hussain (PW-1) , Dr. Amin Ullah Khan (PW-2) and Dr.

Ahmad Faraz (PW-9) and flawed beyond mending , resulting in disfiguring the complexion of the whole prosecution case beyond reparation and recognition. According to the statements of the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) , during the occurrence the appellant namely Khuda Bakhsh gave a blow with the stump of a cot, hitting on the back of head of Abdul Majeed (deceased). Habib-ur-Rehman (PW-5) in his statement before the learned trial court stated as under:-

“I also stated before the Police according to my application Ex.PE that **Khuda Bakhsh accused, at the time of causing injuries to Abdul Majeed deceased, also injury to the deceased with the leg of cot (Paya) on the backside of his head**” (emphasis supplied)

Muhammad Bashir (PW-6) in his statement before the learned trial court stated as under:-

“Khuda Bakhsh also inflicted **leg of cot (Paya) which hit on the backside of head of Abdul Majeed** and caused serious injuries to him.”. (emphasis supplied)

Contrary to the statements of Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) , Dr. Qasim Hussain (PW-1) who, on 07.11.2019, had examined Abdul Majeed (deceased) in an injured condition , did not observe presence of any such injury caused by the **stump of a cot** present on the back of head of Abdul Majeed (deceased). Dr. Qasim Hussain (PW-1) stated during cross-examination , as under:-

“ When I medically examined injured Abdul Majeed, **I did not observe any injury on his head.** It is also correct that according to Ex.PA there is not mentioned any injury upon the head of Injured Abdul Majeed. It is correct that there is no abrasion and laceration was found by me on the head of the victim Abdul Majeed when I examined him.”(emphasis supplied)

Similarly, Dr. Ahmad Faraz (PW-9), who on 10.11.2019, conducted the postmortem examination of the dead body of Abdul Majeed son of Ghulam Qadir (deceased) did not observe presence of any injury on the back of head of the dead body of the deceased which could have been caused by use of a stump of a cot. Contrary to the statements of prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) that the appellant namely Khuda Bakhsh gave a blow with the stump of a cot hitting him on the back of head of Abdul Majeed (deceased), Dr. Ahmad Faraz (PW-9) opined that there was presence of only diffused axonal injury of the brain which had been caused by the blow suffered by the deceased on his face and there was no injury suffered by the deceased on the back of his head. Dr. Ahmad Faraz (PW-9) opined as under:-

“ FINAL OPINION:

So, I am of the opinion that diffused axonal injury of brain may leads him to death. In this case it is highly suggestive that injury of face may cause diffuse axonal injury.”

Similarly, Dr.Amin Ullah Khan (PW-2) also stated that diffused axonal injury of the brain of Abdul Majeed (then injured later deceased) was detected, however, there was no fracture of the skull. Diffuse axonal injury (DAI) describes a type of traumatic brain injury (TBI). Specifically, it refers to the shearing of the brain's long connecting nerve fibers, or axons. This can occur when the brain shifts and rotates inside the skull. Specifically, Diffuse axonal injury (DAI) describes the shearing, or tearing, of nerve fibers known as axons. This trauma usually results from the brain quickly shifting within the skull. Following a sudden impact, mechanical forces cause nerve fibers to stretch and tear. Axons are the long, thread-like portion of neurons that conduct electrical impulses. They are responsible for communication between nerve cells. The grey and white matter of the axons are of distinct specific

gravities, therefore the axons present at the grey-white matter junction are particularly susceptible to injury. Axonal disconnection and mechanical disruption to axonal cytoskeletal structure results in immediate severe brain injury. Destroyed axon microtubules will align incorrectly, with Tau and amyloid precursor protein (APP) are aberrantly deposited. As such, damage to axons may impair their ability to communicate and help coordinate bodily functions, which can lead to severe disabilities. Diffuse axonal injury (DAI) is more common in high energy traumatic accidents in which the brain rotates or moves forward or backward inside the skull. Typically, this type of trauma involves accelerating and decelerating motions. If these forces are sufficiently strong, they can damage axons, causing these neuronal interconnections to malfunction or disconnect and affecting many brain areas. Diffuse axonal injury (DAI) is an example of closed brain injuries. These injuries occur when there is a non-penetrating injury to the brain with no break in the skull. A closed brain injury is caused by a rapid forward or backward movement and shaking of the brain inside the bony skull that results in bruising and tearing of brain tissue and blood vessels. Closed brain injuries are usually caused by car accidents and falls. Shaking a baby can also result in this type of injury (called shaken baby syndrome). Without realizing this fact that Dr. Qasim Hussain (PW-1) , Dr. Amin Ullah Khan (PW-2) and Dr. Ahmad Faraz (PW-9) **had not observed** any injury on the back of the head of the deceased ,and the Diffuse axonal injury (DAI) , according to the opinion of Dr. Ahmad Faraz (PW-9), was due to the blow on the face of the deceased, the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) , went on to state that during the occurrence the appellant namely Khuda Bakhsh gave a blow *with the stump of a cot, hitting on the back of head of Abdul Majeed* (deceased). Furthermore, the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) both claimed that

the deceased had also suffered an injury on his right shoulder , however, the said injury was not mentioned in the Rapt No.08 (Exh.PE/1) as the witnesses were in shock. Habib-ur-Rehman (PW-5) during cross-examination , stated as under:-

“ It is correct that head injury and injury on the shoulder of Abdul Majeed is not mentioned in ruppat No.02/08. dated 07.11.2019.”

Muhammad Bashir (PW-6) during cross-examination , stated as under:-

“It is correct that on the first day at THQ, Khairpur Tamewall the Rappat which was reduced into writing by the police, the same was read over to me, in which, the injuries upon the head as well as right shoulder of Abdul Majeed were not mentioned in that Rappat. Volunteered that due to worry, we did not mention the above said injuries in the above said Rappat. ”

Muhammad Siddique, SI (PW-8) , the Investigating Officer of the case ,also admitted during cross-examination , as under:-

“ It is correct that as the injuries upon head and shoulder of Abdul Majeed were not mentioned in ruppat, so, due to this reason, the same was not converted in FIR and after submission of Ex.PE by the complainant, FIR was lodged.”

In this manner, the statements of the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) are in direct contradiction and in conflict with the opinion and observations of Dr. Qasim Hussain (PW-1) , Dr. Amin Ullah Khan (PW-2) and Dr. Ahmad Faraz (PW-9) . In this manner, irreconcilable and harrowing contradictions have cropped up in the ocular account of the occurrence as narrated by the prosecution witnesses namely Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) and the medical evidence as furnished by Dr. Qasim Hussain (PW-1) , Dr. Amin Ullah Khan (PW-2) and Dr. Ahmad Faraz (PW-9) . The contradictions in the ocular account of the occurrence, as narrated by

Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) and the medical evidence as furnished by Dr. Qasim Hussain (PW-1), Dr. Amin Ullah Khan (PW-2) and Dr. Ahmad Faraz (PW-9), clearly establish that the prosecution miserably failed to prove the charge against the appellants. The contradictions in the ocular account of the occurrence, as narrated by Habib-ur-Rehman (PW-5) and Muhammad Bashir (PW-6) and the medical evidence, as furnished by Dr. Qasim Hussain (PW-1), Dr. Amin Ullah Khan (PW-2) and Dr. Ahmad Faraz (PW-9), sound the death knell for the prosecution case and prove to be the cause of its sad demise. Had the witnesses seen the occurrence then there did not exist any possibility that they would fall into error. The august Supreme Court of Pakistan in the case of "Muhammad Shafi alias Kuddoo vs. The State and others" (**2019 S C M R 1045**) has held as under:-

"Ocular account is in conflict with medical evidence inasmuch as according to the crime report both the appellant, as well as, Abdul Razzaq, co-accused, are assigned one blow each to the deceased, whereas according to the initial medical examination, Medical Officer noted solitary injury on the head, its impact on the eye has been utilized by the witnesses to array the latter in the crime."

Reliance is also placed on the case of "Muhammad Zaman vs. The State and others" (**2014 S C M R 749**) wherein it has been held as under:-

"The more so, when the total number of injuries found on the deceased as well as the injured could be caused by one or two L.G. Cartridges. The number of assailants in the circumstances of the case appears to have been exaggerated"

Reliance is placed on the cases of "Muhammad Ali Vs. The State" (**2015 SCMR 137**) "*Muhammad Ashraf Vs. The State*" (**2012 S C M R 419**), *USMAN alias KALOO Vs. The State* (**2017 S C M R 622**), *Muhammad Hussain Vs. The State* (**2008 S C M R 345**) and "*Ain Ali and another Vs. The State*" (**2011 SCMR 323**) where the august Supreme Court of Pakistan was pleased to reject the evidence of prosecution witnesses when the same was found to be in contrast with the medical evidence.

20. The learned Deputy Prosecutor General along with the learned counsel for the complainant, have relied upon the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed and have submitted that they offered sufficient corroboration of the ocular account of the occurrence as furnished by the prosecution witnesses . The recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed cannot be relied upon as the Investigating Officer of the case did not join any witness of the locality during the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed which action of his was in clear violation of the provisions of the section 103 Code of Criminal Procedure, 1898 and therefore the evidence of the recovery of the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed cannot be used as incriminating evidence against the appellants, being evidence which was obtained through illegal means and hence hit by the exclusionary rule of evidence. 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.

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.”

Moreover, none of the prosecution witnesses namely Muhammad Bashir (PW-6) and Muhammad Siddique, SI (PW-8), the Investigating Officer of the case ,who gave evidence that the *Soti* (P-2) recovered from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the *Soti* (P-3) recovered from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed stated that the said articles were stained with blood. Muhammad Bashir (PW-6), admitted during cross-examination , as under:-

“It is correct that above said Sotis are not bloodstained.”

With regard to the production of the stump of cot (P-1) produced by Habib-ur-Rehman (PW-5) , it is observed that according to the statements of the Medical officers , the deceased had not suffered any injury caused by the use of such a stump of cot (P-1). In this manner, the recovery of the *Soti* (P-2) from the appellant namely Khuda Bakhsh son of Ghafoor Ahmed and the recovery of the *Soti* (P-3) from the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmed could not be proved and cannot be considered as a relevant fact for proving any fact in issue.

21. 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 behind the occurrence of this case, as stated by the prosecution witness namely Habib-ur-Rehman (PW-5) was that the deceased had divorced Haseena Mai, sister of the appellants , eight days prior to the

occurrence and therefore, the appellants committed the occurrence. The statement of the prosecution witness namely Habib-ur-Rehman (PW-5) with regard to the motive of the occurrence as narrated by him was not supported or given evidence of by any other prosecution witness . Furthermore, the prosecution witness namely Habib-ur-Rehman (PW-5) was exposed as to had made blatant dishonest and substantial improvements in his previous statement with regard to the motive of the occurrence as narrative by him and during the statement of Habib-ur-Rehman (PW-5) , the learned trial court observed as under:-

“I got recorded in my complaint Ex PE that Abdul Majeed deceased divorced his wife Mst. Haseena Mai sister of accused Khuda Bakhsh and Mohammad Zafar about eight days prior to the occurrence, the reason was that behind the occurrence. (**Confronted with Ex.PE, wherein, it is not recorded**). I got recorded in my complaint Ex.PE that after receiving the injuries, Abdul Majeed deceased went to THQ Hospital alongwith me and got recorded his statement before Khidmat Counter. (**Confronted with Ex.PE, wherein, it is not recorded**). ”

Muhammad Siddique, SI (PW-8), the Investigating Officer of the case, also candidly admitted that he did not collect any evidence with regard to the motive of the occurrence and stated as under:-

“ During my investigation, complainant and witnesses did not depose about the motive of the occurrence.”

The perusal of the statements of the prosecution witnesses clearly proves that 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 appellants to have committed the *Qatl-i-Amd* of the deceased .There are haunting contradictions with regard to the minutiae of motive alleged. No independent witness was produced by the prosecution to prove

the motive as alleged. Moreover, it is an admitted rule of appreciation of evidence that motive is only a corroborative piece of evidence and if the ocular account is found to be unreliable, then motive alone cannot be made the basis of conviction. Even otherwise, a tainted piece of evidence cannot corroborate another tainted piece of evidence. Reliance in this regard is placed on the case of *Muhammad Javed v. The State (2016 SCMR 2021)*.

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

“Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervaiz 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 We have categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

23. For what has been discussed above, the Criminal Appeal No.244 of 2021 lodged by the appellants namely Khuda Bakhsh son of Ghafoor Ahmad and Muhammad Zafar Iqbal son of Ghafoor Ahmad is **allowed**. The convictions and sentences of the appellants namely Khuda Bakhsh son of Ghafoor Ahmad and Muhammad Zafar Iqbal son of Ghafoor Ahmad awarded by the learned trial court through the impugned judgment dated 03.06.2021 are hereby set-aside. The appellants namely Khuda Bakhsh son of Ghafoor Ahmad and Muhammad Zafar Iqbal son of Ghafoor Ahmad are ordered to be acquitted by extending them the benefit of the doubt. The appellant namely Khuda Bakhsh son of Ghafoor Ahmad is in custody and is directed to be released forthwith if not required in any other case. The sentence of the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmad was suspended by this Court vide order dated 10.06.2021 and the appellant namely Muhammad Zafar Iqbal son of Ghafoor Ahmad is present before the Court

on bail. The sureties of the appellant shall stand discharged from their liability and the bail bonds submitted by the appellant namely Muhammad Zafar son of Ghafoor Ahmad are hereby cancelled.

24. Pursuant to the discussion made and conclusions arrived at above, the Criminal Revision No. 166 of 2021, seeking the enhancement of the sentence of the convict namely Muhammad Zafar Iqbal son of Ghafoor Ahmad , is hereby **dismissed.**

25. **Murder Reference No.08 of 2021** is answered in **Negative** and the sentence of death awarded to Khuda Bakhsh son of Ghafoor Ahmad is **Not Confirmed.**

(MUHAMMAD AMJAD RAFIQ) (SADIQ MAHMUD KHURRAM)
JUDGE JUDGE

Raheel

APPROVED FOR REPORTING

JUDGE

JUDGE