

JUDGMENT

Date of hearing:	<u>06.03.2023</u>
Appellant by:	Mrs. Bushra Qamar, Advocate with Ch. Hamood-ur-Rehman Waseem Zafar, Advocate.
State by:	Ms. Nuzhat Bashir, Deputy Prosecutor General along with Mr. Haroon Rasheed, Deputy Prosecutor General.
Complainant by:	Mr. Muhammad Muzaffar Samore, Advocate.

Farooq Haider, J:- This single judgment will dispose of **Crl. Appeal No.64331-J/2019** filed by Muhammad Afzal (appellant/convict) against his “conviction & sentence” and **Criminal Revision No.43121/2019** filed by Waseem Nazir (complainant) for enhancement of sentence of Muhammad Afzal, as both the matters have arisen out of one and the same impugned judgment dated: 21.05.2019 passed by learned Additional Sessions Judge, Sargodha/trial court.

2. Muhammad Afzal (appellant) along with his co-accused persons namely Sajid Ali and Khalid was tried in case arising out of F.I.R. No.613/2009 dated: 07.07.2009 registered under Sections: 302, 34 PPC at Police Station: Satellite Town, District: Sargodha and trial court after conclusion of trial, while acquitting aforementioned co-accused persons namely Sajid Ali and Khalid, has convicted and sentenced the appellant *vide* impugned judgment dated: 21.05.2019 as under: -

<u>Conviction</u>	<u>Sentence</u>
<u>Under Section:</u> 302 (b) PPC	<p><i>“Imprisonment for Life”</i> with payment of compensation of Rs.3,00,000/- to the legal heirs of the deceased under Section: 544-A Cr.P.C., in case of non-payment of compensation amount to further undergo S.I. for six months and in further default, amount of compensation will be recoverable as arrears of land revenue.</p> <p>Benefit of Section: 382-B Cr.P.C. has been extended.</p>

3. Brief facts, as per statement/فرد بیان (Ex.PA) got recorded by Waseem Nazir (complainant of the case/PW-2) to Muhammad Ramzan S.I. (PW-13) at the place of occurrence on 07.07.2009 at about 04:00 p.m., are that complainant is a labourer; marriage of Mst. Nabila Nazir (sister of complainant) was solemnized about five years prior to the occurrence with Muhammad Anwar and out of said wedlock, a baby boy was born who was alive; about two years prior to the occurrence, his sister got divorced from Muhammad Anwar due to domestic affairs (گھریلو ناچاکی); about one year prior to the occurrence, Mst. Nabila Nazir (sister of complainant) contracted marriage with Muhammad Afzal; after resentment with Muhammad Afzal, sister of complainant was living with the complainant for about four months and she had also instituted suit for recovery of maintenance allowance against Muhammad Afzal which was decreed; on 07.07.2009 at 03:00 p.m., complainant along with Mst. Nabila Nazir (his sister), Muhammad Jameel and Masood Ahmed Saleemi was sitting at the upper portion of his house; sister of the complainant was taking meal while sitting on the cot; in the meantime, Muhammad Afzal armed with pistol .30 bore, Sajid armed with pistol, Khalid (empty handed) came at upper storey through stairs; Muhammad Afzal while raising lalkara asked Mst. Nabila Nazir that how she got decreed suit for recovery of maintenance allowance, today he had come there to give maintenance allowance and he fired consecutive shots with pistol upon his sister, which hit her on the bicep (بڑ) of left arm, front side of abdomen, left rib and right bicep (بڑ) whereas Sajid and Khalid while raising lalkara asked that no one should come near; sister of the complainant fell and all accused persons while raising lalkara that they had paid maintenance allowance, fled away; complainant along with his companions managed his sister, who in their view, succumbed to the injuries at the spot.

Motive behind the occurrence was institution of suit for recovery of maintenance allowance by Mst. Nabila Nazir against Muhammad Afzal, which was decreed in her favour and due to said grudge, Muhammad Afzal in connivance of and consultation with his co-accused persons committed her murder.

4. On the basis of aforementioned statement/فرد بیان (Ex.PA), case *vide* F.I.R. No.613/2009 (Ex.PA/1), dated: 07.07.2009 under Sections: 302, 34 PPC was registered at Police Station: Satellite Town, District: Sargodha.

During post-mortem examination, Dr. Misbah Abu-Bakar (PW-4) found following injuries on the dead body of the deceased: -

- “i. A wound of entry in right renal angle inverted blackened margins 1 cm x 1 cm.
- ii. A wound of exit right hypochondrium everted margins 1 cm.
- iii. A wound of entry on right breast outer quadrant 1 cm x 1 cm blackened inverted margin.
- iv. A wound of exit 1 cm x 1.5 cm everted margin in left armpit.
- v. A wound of entry in right arm 1 cm x 1 cm with inverted blackened margin swollen right arm.
- vi. A wound of exit on medial side of right arm 1.5 cm x 1 cm everted margin.
- vii. A wound of entry on left arm upper part 1 cm x 1 cm blackened margin inverted.
- viii. A wound of exit left arm 1.5 cm x 1 cm medial side of left arm everted margin.”

In the opinion of doctor (PW-4), cause of death in this case was due to damage of vital organs (liver and lungs) leading to internal haemorrhage, shock and death; all injuries were ante-mortem in nature; probable time between injuries and death was immediate whereas between death and post-mortem was five to six hours.

After completion of investigation, challan report under Section: 173 Cr.P.C. was submitted in the Court; appellant and his co-accused (since acquitted) were formally charge sheeted, however, they pleaded not guilty and claimed trial whereupon prosecution evidence was summoned; after recording of prosecution evidence, accused persons were examined under Section: 342 Cr.P.C. but they refuted the allegations levelled against them; they did not opt to appear as their own witnesses under Section: 340(2) Cr.P.C.; Sajid Ali and Khalid did not produce any evidence in their defence, however, Muhammad Afzal (appellant) produced some documents in his defence; in reply to

Question No.21, “Why this case is against you and why the PWs have deposed against you?”, he stated as under: -

“I am innocent. It was a blind murder. No one witnessed the occurrence as father of deceased was un-happy with this marriage. Wasim complainant was entrusted to grab the property of Nabila Nazir deceased so, he falsely involved me in this case because above said property was even given by me to deceased at the time Nikah as dower. For this purpose after the murder of Nabila Nazir complainant illegally sold out the above said property to one Shahzad Khan. PWs are related to the complainant so they falsely deposed against me and they are interested upon my conviction.”

Trial court after conclusion of trial while **acquitting co-accused namely Sajid Ali and Khalid**, has convicted and sentenced the appellant as mentioned above through the impugned judgment dated: 21.05.2019.

5. Learned counsel for the appellant has submitted that conviction recorded and sentence awarded to the appellant through impugned judgment is against the ‘law and facts’ of the case; ocular account is neither trustworthy nor corroborated/supported by any other independent evidence. Learned counsel for the appellant finally prayed for acquittal of the appellant.

6. Learned Deputy Prosecutor General has supported the impugned judgment to the extent of conviction and sentence recorded against Muhammad Afzal (appellant) and prayed for dismissal of his appeal.

7. Learned counsel for the complainant while supporting impugned judgment to the extent of conviction recorded against the appellant prays for enhancement of the sentence. On Court’s query, learned counsel apprised that Crl. Appeal No.43120/2019 filed against acquittal of Sajid Ali and Khalid was not pressed after full length arguments and same was disposed of as such *vide* order dated: 18.04.2022 passed by this Court.

8. **Arguments heard. Record perused.**

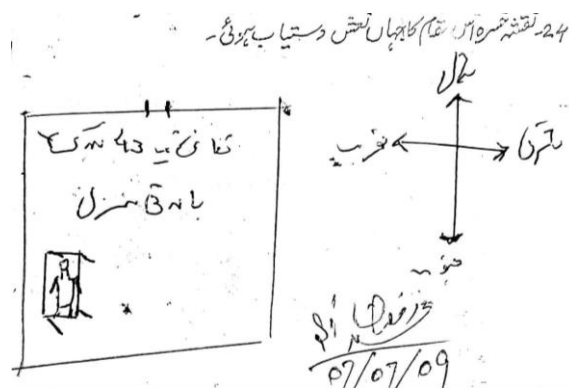
9. As per case of prosecution, occurrence took place at 03:00 p.m. on 07.07.2009 in the house of Waseem Nazir (complainant/PW-2), which is at a distance of ½ k.m. from the police station; police reached at the place of occurrence and complainant (PW-2) got recorded his statement (Ex.PA) regarding the occurrence at 04:00 p.m. to Muhammad Ramzan S.I. (PW-13) there, which was sent to the police station and First Information Report (F.I.R./Ex.PA/1) was recorded by Muhammad Nawaz S.I. (PW-8), however, Muhammad Ramzan S.I. (PW-13) while recording his statement in the Court

clearly stated that he recorded statement of the complainant (Ex.PA) when he was on patrol duty and thereafter reached at the place of occurrence; in this regard, relevant portions of his statement are reproduced: -

“On 07.07.2009 I was posted as S.I at P.S Satellite Town, Sargodha. On the same day, I alongwith other police officials were present at Y-Block New Satellite Town for patrol duty where Wasim Nazir complainant appeared before me who got recorded his statement/Fard Biyan Exh.PA which I read over to him and he in token of its correctness made his signature. I sent complaint through Muhammad Arshad 288/C for registration crime report and I alongwith other police party went to place of occurrence.”

“Before my first visit to the place of occurrence the crime report was already been registered on the statement of complainant. I recorded the statement of complainant at Y-Block.”

so, place of recording statement of complainant for registration of case is “under a cloud”. In the statement/فرد بیان (Ex.PA) and F.I.R. (Ex.PA/1), it was mentioned that Nabila Nazir (deceased of the case) received firearm shots when she was taking meal/food while sitting on the cot in upper portion of the house and it was not mentioned with exactness that either she was available in the room, veranda or courtyard of said portion of the house; similarly, it was mentioned in statement/فرد بیان (Ex.PA) that after receiving firearm shots, she “fell” but not mentioned that she “fell on ground” and even in Column No.24 of the Inquest Report (Ex.PE), it is clearly shown that dead body was found on cot, which is hereby scanned below: -



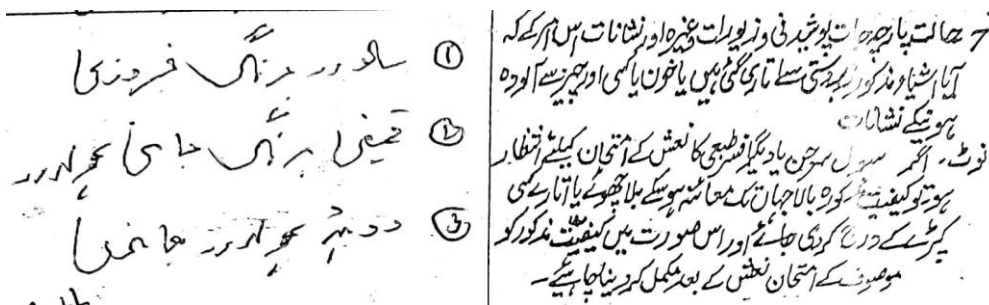
but neither said cot nor any blood of the deceased from said cot was taken into possession during investigation of the case rather blood was statedly secured from the floor. It was case of prosecution that she was taking meal/food but neither any residue of food nor any utensil was secured during investigation of the case and even same was not mentioned as available there, near or around the dead body of the deceased at the place of

occurrence in Columns No.22 and 23 of the Inquest Report (Ex.PE). Though it was also alleged that deceased lady received various firearm shots and as per Post-mortem Examination Report (Ex.PC), there were entry and exit wounds yet any empty shell or foreign metallic body fired from any bullet was not found from the spot; any marks of hitting or striking of any such foreign metallic body at abovementioned cot, floor, wall or roof of the house, were not found and in this regard, site plans of the place of occurrence i.e. Ex.PG, Ex.PB and Columns No.22 & 23 of the Inquest Report (Ex.PE) can be advantageously referred; therefore, exact place of occurrence, is also “under a cloud” in the case.

It is important to mention here that alleged last worn clothes of the deceased were neither blood stained nor having holes of firearm shots and in this regard, relevant portion of statement of Dr. Misbah Abu-Bakar (PW-4) is hereby reproduced: -

“It is correct that I recorded the correct condition of the last worn clothes of the deceased. It is correct that I have not mentioned the staining of blood or holes on the clothes of the deceased in Ex.P.C. Had I found the holes on the last worn clothes of deceased and staining of blood on the clothes. I would have recorded so.”

Even in Column No.7 of the Inquest Report (Ex.PE), clothes of the deceased have not been mentioned as blood stained or having holes/marks and same is hereby scanned below: -



Said state of affairs raises question mark regarding “condition of the deceased and circumstances” at the time of receipt of injuries by her. “Date & Time” of receiving dead body in the hospital and “Date & Hour” of death and examination of body are not mentioned in the Post-mortem Examination Report (Ex.PC) and in this regard, relevant portions of statement of Women Medical Officer (PW-4) are also reproduced: -

“I do not remember the time when the dead body was received in the hospital. I do not remember the time when the post-mortem

examination was conducted. It is correct that the column of death and the column of examination of body are left blank on post-mortem report Ex.PC. ”

“I do not remember when I received the papers for conducting post-mortem examination.”

However, perusal of Injury Statement (Ex.PD) of the deceased reflects that it was referred to Women Medical Officer at 07:10 p.m. on 07.07.2009. Lady Dr. Misbah Abu-Bakar (PW-4) observed in Post-mortem Examination Report (Ex.PC) that probable time between injuries and death was immediate and the time between the death and post-mortem was 5 to 6 hours; relevant portion of statement of PW-4 in this regard is as under: -

“The probable time between injuries and death was immediate and the time between the death and post-mortem was five to six hours.”

but “Rigor Mortis” on the dead body of the deceased was fully developed; relevant portion of statement of PW-4 in this regard is reproduced: -

“Rigor mortis on the dead body of deceased were fully developed when I conducted post-mortem examination.”

As far as “opinion of expert” is concerned, it must be based upon the settled principles on the subject and relevant treatises but if it is otherwise then same has to be examined carefully on touchstone of relevant principles on the subject and treatises and if it has been found contrary to those, then it shall be treated and considered as *ipse dixit* and Court shall make its opinion while preferring settled principles on the subject found in relevant treatises; in this case, on the one hand Dr. Misbah Abu-Bakar (PW-4), who conducted post-mortem examination of deceased lady, opined that probable time between death and post-mortem is five to six hours but on the other hand, she has categorically found that rigor mortis on the dead body was “fully developed”. Since said opinion regarding duration of time between death and post-mortem is not tallying with the time usually consumed for reaching rigor mortis to “developed stage”, therefore, it has been examined on the touchstone of the established principles on the subject; as a matter of fact, rigor mortis means rigidity of death, it is a condition characterised by stiffening, shortening and opacity of the muscles which follow the period of primary relaxation. It is due to chemical changes involving the proteins of

the muscle fibres and it marks the end of the muscle's cellular or molecular life. The contractile element of the muscle consists of protein filaments of two types, viz, myosin and actin. They lie in interdigitating manner. In the relaxed state, the actin filaments interdigitate with the myosin filaments only to a small extent but when the muscle contracts, they interdigitate to a great extent. The principal factor concerned in the process of contraction and relaxation of the muscle is the presence of the enzyme ATP which is in high concentration in a resting muscle. Its production and utilisation are constantly balanced in life. After death, ATP is resynthesised for a short time depending upon the glycogen available locally, but after this glycogen is used up, ATP cannot be resynthesised. This leads to the **fusion of myosin and actin filaments into a dehydrated stiff gel resulting in the condition known as rigor mortis**. During rigor mortis, the reaction of the muscle changes from slightly alkaline to distinctly acid owing probably to the formation of lactic acid. Rigor mortis persists until *autolysis of myosin and actin filaments occurs as a part of putrefaction*. Every muscle in the body, voluntary and involuntary, takes part in the process, including the musculature of the heart and blood vessels, the iris of the eye, the platysma of the skin, and the dartos of the scrotum. According to Parikh's Textbook of Medical Jurisprudence and Toxicology, rigor mortis first appears in involuntary muscles and then in voluntary muscles. It is not dependent on the nerve supply as it develops in paralysed limbs also. It is tested by gently bending the various joints of the body. In the involuntary muscles, rigor mortis appears in the heart within a hour after death. In the voluntary muscles, the sequence is as follows: Rigor mortis first appears as a rule in the muscles of the eyelids (3-4 hours), and then in the muscles of the face (4-5 hours), neck and trunk (5-7 hours), followed by muscles of the upper extremities (7-9 hours) and then the legs (9-11 hours). The last to be affected are the small muscles of the fingers and toes (11-12 hours). When rigor mortis is thus established, the jaw, neck, and extremities become fixed in position with the arms bent at the elbows and the legs at the knees and hips, and movements at the joint are possible only within a very limited range. The rigidity generally passes off, in the same order in which it occurred, due to autolysis of muscle proteins. In Sub-continent (Indo-Pak),

rigor mortis commences in 2-3 hours after death, takes about 12 hours to develop from head to foot, persists for another 12 hour, and takes about 12 hours to pass off. Thus, the presence and extent, or absence of rigor mortis helps to provide a rough estimate of the time since death. As for example, if rigor mortis has not set in, the time since death would be within 2 hours and if it has developed, the time since death would be within about 12-24 hours. The factors which influence rigor mortis include age, health and mode of the death also and according to Parikh's Textbook of Medical Jurisprudence and Toxicology, the onset of rigor is later and the duration longer in the strong muscular person and similarly in cases of sudden death, in healthy adults, a late onset and a long duration is usual. In Modi's Medical Jurisprudence & Toxicology, it has been categorically mentioned that in general, rigor mortis sets in one to two hours after death, is developed in about twelve hours.

Perusal of columns No.16 and 17 of the Inquest Report (Ex.PE) of Nabeela Nazeer reflects that it was dead body of powerful (طاقتور) and strong (مضبوط) person; post-mortem report of the deceased and statement of doctor (PW-4) clearly shows that death of the deceased was immediate after receipt of injuries hence it was sudden death, therefore, according to established principles of Medical Jurisprudence, onset of rigor mortis was later and its duration was longer. Thus, the opinion given by the doctor (PW-4) regarding time between death and post-mortem as five to six hours is mere ipse dixit and not according to settled principles of Medical Jurisprudence on the subject, therefore, when doctor has himself observed that rigor mortis was "fully developed"; as per inquest report, dead body was of powerful and strong person, assailants came and shots were fired at deceased and death was "just after receipt of the injuries i.e. sudden", then, by no stretch of imagination, time between death and post-mortem of the deceased person can be considered as less than twelve hours. Therefore, medical evidence has negated that occurrence took place at the stated/alleged time and when exact time of occurrence has not been proved by the prosecution, then entire superstructure of the case of prosecution has been smashed and fallen like house of cards.

It is also relevant to mention that cutting/overwriting was found in the Inquest Report (Ex.PE) by the doctor (PW-4) and relevant portion of his statement in this regard is as under: -

“It is correct that in inquest report Ex.PE the date has been changed from 06.07.2009 to 07.07.2009 by making overwriting on the digit of 06. It is correct that in column No.3 of inquest report Ex.PE the time has been changed from 2-1/2 to 3-1/2 by making overwriting on the digit of 02. It is correct that no initial signatures are present on the overwriting.”

Though Waseem Nazir (complainant/PW-2) claimed himself as resident of house of occurrence as well as eyewitness yet close scrutiny of the record reveals that he in the statement/فرد بیان (Ex.PA) and also during statement before the Court stated that Muhammad Afzal fired consecutive shots with pistol upon his sister, which hit her on the bicep (ڈول) of left arm, front side of abdomen, left rib and right bicep (ڈول) but as per Post-mortem Examination Report (Ex.PC) during autopsy of the deceased, any entry wound on front of abdomen as well as any entry wound on left rib of the deceased was not found. It goes without saying that if eyewitnesses have themselves opted to narrate exact locale of the entry wounds in their statements and same is not confirmed by medical evidence, then none-else but prosecution has to suffer.

Waseem Nazir (complainant/PW-2) stated during statement before the Court that deceased received only those injuries which he has described; relevant portion of his statement is as under: -

“It is correct that except my described locale of injuries being received on the person of my deceased sister no other injury was received by her.”

but Post-mortem Examination Report (Ex.PC) and statement of the doctor (PW-4) reflect that the deceased also received entry wounds at right renal angle area and at right breast outer quadrant; relevant portions of statement of the doctor (PW-4) are as under: -

“i. A wound of entry in right renal angle inverted blackened margins 1 cm x 1 cm.”

“iii. A wound of entry on right breast outer quadrant 1 cm x 1 cm blackened inverted margin.”

So, ocular version deposed by complainant has not been supported/ confirmed in *stricto sensu* by medical evidence.

When cot was neither taken into possession during investigation nor produced before the Court then to justify securing of blood from the floor, Waseem Nazir (complainant/PW-2) introduced dishonest improvements in his statement and same is as under: -

“I have recorded in my statement Exh.PA that after receiving the fire shots my deceased sister fell on ground confronted with Exh.PA where the word ground is not mentioned.”

By now it is well settled that witness who introduces dishonest improvement for strengthening the case, cannot be relied; in this regard, case of **“MUHAMMAD ARIF versus The STATE”** (2019 SCMR 631) and **“KHALID MEHMOOD and another versus The STATE and others”** (2021 SCMR 810) can be advantageously referred. Complainant (PW-2) also expressed his ignorance about certain admitted facts *qua* execution of agreement (اقرار نامہ) between deceased of the case and Muhammad Afzal (appellant); relevant portion of his statement in this regard is as under: -

“It is not in my knowledge that before marriage with my deceased sister there was an agreement between Muhammad Afzal accused and my deceased sister. At this stage the attested copy of Iqrar Nama Exh.DA was being confronted to the witness and he endorsed his signature upon said Iqrar Nama being made by him as witness.”

It is trite law that witness who denies admitted facts cannot be termed as reliable witness and in this regard, case of **“ARSHAD MASIH versus The STATE”** (2006 MLD 1078), **“MUHAMMAD RIAZ versus THE STATE”** (2007 P Cr. L J 446) and **“MUHAMMAD RAMZAN and another versus THE STATE”** (2008 YLR 1859) can be advantageously referred.

So far as Masood Ahmad Saleemi (PW-3) is concerned, he was admittedly not resident of the place of occurrence rather 5/6 k.m. away from the place of occurrence; in this regard, relevant portion of statement of complainant (PW-2) is as under: -

“Masood Ahmad PW-3 is my Behnoi. Jamil PW is my Khaloo. House of Jamil is at a distance of about 2 K.M. away from the place of occurrence. House of PW-3 Masood Ahmad is at a distance of about 4/5 K.M. away from the place of occurrence. Masood Saleemi is resident of Istiqlalabad.”

On the same point, relevant portion of statement of Masood Ahmad Saleemi (PW-3) is hereby reproduced: -

“Waseem is my Khalazad and ‘Sala’. I was resident of Istiqlabad during the days of occurrence which is 4/5 IK.M. away from the place of occurrence. I was not having any business or office in New Satellite Town during the days of occurrence.”

So, he is a chance witness and no explanation/plausible reason regarding his presence at the “time and place” of occurrence is mentioned in the statement/بیان فرد (Ex.PA) and F.I.R. (Ex.PA/1). Furthermore, Masood Ahmad Saleemi (PW-3) tried to introduce reason of his presence at the spot in following words: -

“I was present at the place of occurrence for settling the family dispute between Nabila and Afzal accused. Jameel, Waseem and neighbour Furrakh Aslam were present there. ”

“emphasis added”

whereas Farrukh Aslam (PW-9) did not state so and relevant portion of his statement is as under: -

“My friend Abdul Qayyum informed me telephonically about the murder and I rushed to the hospital. It is correct that neither Waseem complainant nor uncle/Mamoon of the deceased informed me.”

Furthermore, any said reason was neither mentioned by Waseem Nazir (complainant/PW-2) in the statement/بیان فرد (Ex.PA) nor deposed so in his statement before the Court and importantly not corroborated by Farrukh Aslam (PW-9), hence, said reason was an afterthought and not acceptable; therefore, testimony of PW-3, who was a chance witness, is “suspect” evidence and cannot be accepted without pinch of salt; guidance in this regard has been sought from the case of **“Mst. Sughra Begum and another Vs. Qaiser Pervez and others.”** (2015 SCMR 1142) and relevant portion from paragraph No.14 of said case law is hereby reproduced: -

“14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing

explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt.”

Guidance on the subject has been sought from the case of “**G. M. Niaz versus The State**” (2018 SCMR 506), “**Muhammad Ashraf alias Acchu versus The State**” (2019 SCMR 652), “**Sufyan Nawaz and another versus The State and others**” (2020 SCMR 192) and “**Mst. Mir Zalai versus Ghazi Khan and others**” (2020 SCMR 319).

Furthermore, locale of receipt of firearm shots by deceased i.e. in front of abdomen and left rib narrated by Masood Ahmad Saleemi (PW-3), was not confirmed by medical evidence and entry wounds at right renal area and on breast of the deceased were not deposed by him, hence his version was also not supported/confirmed by medical evidence in *stricto sensu*. So, prosecution’s ocular account is neither trustworthy nor confidence inspiring, hence not reliable.

So far as recovery of pistol (P5) from Muhammad Afzal (appellant) is concerned, as per report of Punjab Forensic Science Agency, Lahore (Ex.PR), said recovered pistol was not functional and in absence of recovery of any empty from the place of occurrence, said recovery is inconsequential and cannot provide any corroboration to the case of prosecution.

As far as motive is concerned, it is notable that in case of murder of a person by his trusted/closely related person, if any cause of murder is alleged/claimed by the prosecution, same attains vital importance. In this case, complainant categorically claimed that due to institution of suit for recovery of maintenance allowance in Family Court by the deceased lady, which was decreed in her favour, Muhammad Afzal (appellant) bore grudge and committed murder; relevant portion of statement of complainant (PW-2) in this regard is as under: -

“She had instituted a suit for recovery of maintenance allowance in Family Court which was decreed in her favour. The accused Muhammad Afzal had bore grudge due to that accused Muhammad Afzal alongwith accused Sajid and accused Khalid accused committed the murder of my sister.”

however, during cross-examination it came out from mouth of the complainant that suit for recovery of maintenance allowance was decreed on

condition of rehabilitation of his sister (now deceased of the case) with Muhammad Afzal (appellant); relevant portions of statement of complainant (PW-2) are reproduced: -

“It is correct that my deceased sister instituted a suit for maintenance allowance against Muhammad Afzal accused which was subsequently withdrawn from the court. It is not in my knowledge that again on dated 20.01.2009 my deceased sister instituted the suit for maintenance against Muhammad Afzal accused. The suit for maintenance being instituted by my deceased sister was decreed with condition to rehabilitate with Muhammad Afzal accused.”

“It is not in my knowledge that for compliance of decree my deceased sister ever file any execution petition before the Court.”

So, when suit for recovery of maintenance allowance was decreed on the condition of rehabilitation of deceased lady with the appellant and it was not mentioned in the statement/فرد بیان (Ex.PA) and F.I.R. (Ex.PA/1) that after decree of the suit, she went to the house of the appellant or was residing with him but he did not pay the maintenance allowance and she filed petition for execution of the decree, then there was no cause of annoyance/grudge with the appellant to commit murder of the deceased lady. Therefore, motive has rightly not been believed by the trial court through paragraph No.15 of the impugned judgment. Even otherwise, when substantive piece of evidence in the form of ocular account has been disbelieved, then motive is of no help to the case of prosecution as the same loses its efficacy.

So far as abscondance of the appellant is concerned, suffice it to say that it has to be proved like any other fact, however, in this case, warrant of arrest (Ex.PH) reveals that it was not issued to any police officer or public servant for execution rather through this warrant Muhammad Afzal was asked to arrest Muhammad Afzal; similarly, it has not been mentioned in the proclamation (Ex.PK) that in how much **period** or till which date, accused had to surrender; therefore, both warrant and proclamation are defective, mandatory requirements in the same have not been fulfilled and prosecution could not prove this limb of its case. It is important to mention here that abscondance is not proof of the charge; in this regard, guidance has been sought from the cases of “**Wajeeh-ul-Hassan versus The State**” (2019 SCMR 1994) and “**KHALID MEHMOOD alias KHALOO versus The STATE**”

(2022 S C M R 1148); furthermore, when ocular account has been disbelieved, then abscondance is of no help to the case of prosecution. Reliance is placed on the case of “**Rohtas Khan versus The State**” (2010 SCMR 566).

10. Nutshell of the above discussion is that prosecution has been failed to prove its case against the appellant, therefore, there is no need to discuss defence version.

11. In view of what has been discussed above, **Criminal Appeal No.64331-J/2019**, filed by Muhammad Afzal (appellant) is allowed; conviction recorded and sentence awarded to the appellant through impugned judgment dated: 21.05.2019 is hereby set-aside. Appellant is acquitted of the charge, he be released from jail forthwith, if not required in any other case.

12. Consequent upon aforementioned reasons, **Criminal Revision No.43121/2019** filed by Waseem Nazir (complainant) for enhancement of sentence of Muhammad Afzal, has lost its relevance; therefore, same also stands **dismissed**.

(Farooq Haider)
Judge

“Approved for reporting.”

(Farooq Haider)
Judge