

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.7/2013
Syed Zameer-ul-Hassan Kazmi
versus
Muhammad Hanif & 03 others

Appellant by: Mr. Muhammad Ilyas Siddiqui and Mr.
Muhammad Asim Tanveer, Advocates.

Respondents by: M/s Adil Aziz Qazi, Jamil Fayyaz Rajput, Haseeb
Hassan and Zopash Khan, Advocates for
Respondents No.1 to 3
Mr. Ishtiaq Ahmad, State Counsel.

Date of Hearing: 12.08.2021.

JUDGMENT

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellant has called in question judgment of the learned Additional Sessions Judge-V (West), Islamabad, dated 21.12.2012, whereby respondents No.1 to 3 have been acquitted of the charges in case FIR No.256, dated 20.12.2007, under Section 302, 201, 109/34 PPC, P.S. Tarnol, Islamabad.

2. Succinctly, Syed Zameer-ul-Hassan Kazmi (*appellant/complainant*) submitted complaint for registration of a criminal case alleging that on 19.12.2007, at about 09:00 p.m., when he was present at his house along with his brother Zaheer ul Hassan alias Poma Shah (*deceased*) as well as his cousin Khawar Shah, respondents Muhammad Hanif, Zaheer Akhtar and Saeed Akhtar (P.O.) came there and asked the appellant's deceased brother to come along with them in order to settle some accounts pertaining to property business. At about, 10:00 p.m., when the appellant was in the house of one Matloob, he heard fire shots, whereafter Khawar Shah informed the appellant that Muhammad Hanif, while armed with 9MM pistol, Zaheer ul Hassan Akhtar, armed with .30 bore pistol and Saeed Akhtar, armed with 9MM pistol, made fire shots on the deceased, as such, when Khawar Shah and appellant went to the place of occurrence they saw Zaheer Akhtar and Saeed Akhtar (P.O.) putting the dead

body of deceased in trunk of the vehicle bearing registration No.RIA-1552, whereas Muhammad Hanif was standing nearby holding 9MM pistol, who also made firing upon the complainant party threatening them of killing, whereafter the accused party fled away from the scene. The appellant alleged in the complaint that his brother has been done to death at the instigation of respondent Abdul Aziz. Pursuant to submission of report under Section 173 Cr.P.C., respondents Muhammad Hanif, Zaheer ul Hassan Akhtar and Abdul Aziz have been charged, to which they pleaded not guilty, whereas Saeed Akhtar was declared proclaimed offender. After recording of pro and contra evidence, the learned trial Court, vide impugned judgment dated 21.12.2012, acquitted the respondents of the charges. Hence, instant criminal appeal.

3. Learned counsel for appellant contended that the prosecution has successfully proved the case against the respondents but the learned trial Court erred in passing the impugned judgment, which is not based on the available record; that the motive stated in the FIR has been supported by the prosecution evidence and is fully proved but, the learned trial Court has not given any weightage to the same in the impugned judgment; that the malafide on the part of acquitted accused persons is apparent from the conduct of accused Zaheer ul Hassan Akhtar, who remained absconder for more than six (06) months and his plea of *alibi* was not even believed by the apex Court while rejecting his bail application; that neither the place of occurrence nor the recovery of dead body from the vehicle mentioned in the FIR has been disbelieved by the learned trial Court but even then the respondents have been acquitted of the charges.

4. Conversely, learned counsel for respondents No.1 to 3 in support of the impugned judgment maintained that respondent Abdul Aziz has not been attributed any role or connected with the alleged motive, as such, the motive is stated to be of a financial dispute but same is not mentioned in the FIR, even otherwise, the prosecution has failed to prove any element of abetment; that the evidence produced by the prosecution witnesses with respect to motive of the

case is totally not reliable; that the prosecution case is fraught with doubts and could not connect the acquitted accused persons with the commission of offence, as such, the learned trial Court has rightly appreciated each and every aspect of the case and acquitted the respondents of the charges.

5. Arguments heard, record perused.

6. Perusal of record reveals that the incident of murder of Zaheer ul Hassan (deceased) was lodged on the complaint of PW-10 Syed Zameer-ul-Hassan Kazmi (appellant) i.e. real brother of deceased, who was present in his house along with his deceased brother and PW-11 Khawar Shah (cousin) on 19.12.2007 in the night time in order to check a cow for sacrifice in the house of Muhammad Matloob situated in Dhoke Malyar. As per appellant's stance, in the meanwhile Saeed Akhtar, Muhammad Zaheer and Muhammad Hanif, who were doing joint land business with his deceased brother Zaheer ul Hassan alias Poma Shah reached there and intended to settle some accounts with his deceased brother. The deceased along with PW-11 Khawar Shah accompanied the aforesaid persons and went to Dhoke Malyar, whereas the appellant had gone to the house of Matloob for checking the cow. At about 10 p.m., when the appellant was present with Matloob, he heard fire shots, whereafter PW-11 Khawar Shah arrived there and informed the appellant that Muhammad Hanif, Saeed Akhtar, both armed with 9mm pistol and Zaheer Akhtar, armed with .30 bore pistol, fired upon Zaheer ul Hassan (deceased), whereupon, he along with Matloob and PW-11 Khawar Shah rushed towards the place of occurrence, as such, when they reached there, Saeed Akhtar and Zaheer Akhtar were putting dead body of deceased in the luggage boot of vehicle bearing registration No.RIA-1552, which was obtained by the deceased on rent, whereas Muhammad Hanif was standing nearby the car, who fired upon the complainant party through 9mm pistol warning them not to come near the place of occurrence, whereafter the accused persons drove the car towards motorway. PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) submitted application Exh.PB/1 to the S.H.O. P.S. Tarnol,

Islamabad for registration of FIR, which has been converted into FIR No.256, dated 20.12.2007, under Section 302/34, 201/109 PPC, P.S. Tarnol, Islamabad Exh.PB.

7. The above referred incident narrated by PW-10 complainant (appellant) clearly spells out that neither he nor was his second witness i.e. PW-9 Matloob an eyewitness of the occurrence, both had allegedly seen the accused persons loading the dead body of deceased in the boot of car bearing registration No.RIA-1552. Both these witnesses have narrated the incident of murder on the information given by PW-11Khawar Shah, who is stated to be an eyewitness of the incident.

MEDICAL EVIDENCE

8. At this stage, it is important to dilate upon the medical evidence recorded by PW-16 Dr. Manzoor Ahmad, who conducted the autopsy of deceased and submitted his report Exh.PB along with pictorial diagrams as well as injury statement Exh.PQ and inquest report Exh.PX. As per the autopsy report, PW-16 Dr. Manzoor Ahmad opined in the following manner:

EXTERNAL EXAMINATION

Body of 33 years old man having beard and moustache strong and stout body wearing yellow tinged, gray shalwar qameeze, gray sweater, black chadar and sleeveless white bonyan.

Five entry wounds and five exit wound of bullets "fire-arm" injuries on different parts of the body with bleeding from nose and left wear.

ABDOMEN

Entry wound of first bullet, back of left wear, skin bone, skin muscle and bone deep and ear detached and hanging measure about 1 ½ inches black area around the wound. Exit wound of first bullet. On forehead skin muscle bone and brain deep 1 inch above right supra arbitral measures about 2 inches.

Brain mininges and frontal bone ruptured bleeding from nose and left ear observed. Entry wound of second bullets.

Right side on back of ribs 3 inches from vestibular column and 11 inches from head region black area around wound found. Exit wound of bullet rights side 3 inches below axilla 9 inches from vertebral column

measures about 1 c.m. all under line structure were found torn by the bullets.

Right pleura torn.

Entry wound of third bullet. Right side chest wound 2 ½ c.m. below right nipple. 4 c.m. from sternum, right lung healthy and right pleurae found hitting by bullet, exit wound of 3rd bullet, right side back all under line structure torn. Left lung healthy, pericardium healthy, blood vessels healthy.

Entry wound of four bullet. Left side back lumbar region. Wound about 1 ½ c.m. from vertebral column. Exit wound right side about iliac crest 5 inches about 7 ½ c.m. from vertebral column. Peritoneum healthy. Mouth healthy, diaphragm healthy, stomach healthy, pancreas healthy, small intestines healthy, large intestine and their contents healthy liver pierced or hitten by bullet and underlying structure also, spleen healthy, kidneys healthy. Bladder normal organs of generation external and internal. Entry wounds of 5th bullet right side buttock at level of coccyx bone 1 ½ c.m. from coccyx bone. Exit wound of 5th bullet 8 c.m. from coccyx bone on right side buttock and 7 c.m. from iliac crest.

OPINION

A case of fire-arm injury about 5 entry wound and 5 exit wound of bullet wounds and bleeding from nose and left ear found because of bullets passing cranium. Time between injury and death 5 to 10 minutes and between death to postmortem 24 hours to 30 hours. Postmortem report Exh.PP and drawing Exh.PP/1-2 are in my hand and dully attested by me. The injury statement Exh.PQ and inquest report Exh.PX are also attested by me.

DELAY IN LODGING OF FIR

9. While going through the above referred medical evidence, the deceased had received fire entry wounds through firearm weapon having five exit wounds, whereas the most fatal shot is near the back of left ear creating a black area, which exits from forehead by rupturing the frontal bone. As per the doctor's stance, the time between death and injury is 5 to 10 minutes and the time between death and postmortem is about 24 hours to 30 hours, hence there is an apparent delay in the postmortem examination as well as in lodging of the FIR, as such, the complainant and the only eyewitness PW-11 Khawar Shah tried to create an impression that they themselves were looking for deceased, who was

taken in injured condition in the car boot of RIA 1552 but, as such, this aspect has not been proved independently, especially when they were just few kilometers away from Police Station. The complainant as well as PW-11 Khawar Shah has not made any serious effort to call the police at that time despite the fact that they were well aware of the procedure as per criminal history provided in this case. It is settled law that promptly made FIR eliminates the possibility of fabrication as held in 1975 SCMR 442 (Khalil Ahmad vs. The State) and if there was any delay in lodging FIR or in commencement of investigation it gives rise to a doubt, which could not be extended to anyone else except to the accused person. Reliance is placed upon PLD 2019 SC 64 (Mst. Asia Bibi vs. The State)., therefore, it is primary duty of the Investigating Officer to give plausible reason about the delay, though PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) and PW-11 Khawar Shah have taken a categorical stance that accused persons had taken the dead body of deceased in a car, whereafter they started searching for the dead body of deceased but, the delay of 2 hours and 35 minutes in lodging of FIR has not been justified, as such, their human conduct is not in line with the required standards as their explanation for delay in reporting the matter to police seems to be an afterthought and, as such, the inordinate delay in setting the machinery of law in motion speaks volume against the veracity of prosecution version as held in case reported as 2019 SCMR 274 (Altaf Hussain vs. The State).

MOTIVE

10. In order to understand the proposition of instant case, it is necessary to dilate upon the motive part at first instance, which has been introduced by PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) in the following manner:

“My brother purchased 5 ½ kanal from village Wanni together with Muhammad Hanif accused. My brother also erected a market known as Madina Market with his own pocket. Six shops along with Waranda are completed whereas five shops are under construction work. Hand pump was also installed by my brother and the market was put on rent by my

brother. All electricity meters were installed in the name of my brother however my brother gifted out of two shop to Hanif accused present in the Court except two. An amount of Rs.14,00,000/- of Haji Naeem resident of G-11 Islamabad was outstanding against Muhammad Hanif. That amount was misappropriated by Hanif accused and Abdul Aziz. Whereupon an application was moved by said Haji Naeem in the police station and my brother compensated Haji Naeem about the above said amount. The cheque was dishonored which was given by my brother. My brother paid an amount of Rs.9 lac in cash to Haji Naeem whereas an amount of Rs.5 lac of my deceased brother was already outstanding against Haji Naeem therefore, said amount was also counted towards payment of Rs.14,00,000/-. Thereafter my brother was consistently demanding return of his money from Muhammad Hanif accused. Abdul Aziz is paternal uncle of Muhammad Saeed and Zaheer accused.

11. The above referred motive could only be proved if the complainant justifies the same by way of an independent evidence comprising of any titled document of the property but, no such documentary evidence has been placed on record, except recording of his oral statement, even otherwise, the FIR is silent qua any motive part, hence there is no cavil to proposition that the motive has been introduced by the complainant with due deliberation and consultation. The learned Trial Court has rightly observed in the impugned judgment while considering the stance of complainant qua the motive that as to why a dispute, if any, qua the accounts and property has to be settled at the odd hours of the winter night, which is not the usual culture of the area to arbitrate upon any matter. Heavy burden lies upon the prosecution to prove that the deceased had purchased 5 ½ kanal of land in village Wannu together with Muhammad Hanif accused and also constructed a market named as Madina Market from his own pocket, whereas two of the shops have been gifted to Muhammad Hanif accused. This stance of PW-10 complainant has not been justified through any sale deed, gift deed, mutation or any other document in terms of Articles 72 and 73 of the Qanun-e-Shahadat Order, 1984 or even through secondary evidence in terms of Article 74 of the Qanun-e-Shahadat Order, 1984, therefore, existence of a fact

narrated in the motive part is not believable as it relates to the contents of document which could not be proved through oral evidence in terms of Article 70 of the Qanun-e-Shahadat Order, 1984. In this backdrop, Articles 21 and 129(g) of the Qanun-e-Shahadat Order, 1984 come into play creating an adverse presumption against the prosecution qua the motive part, as the evidence which was required to prove the motive has been withheld by the complainant and no valid justification has been given for withholding of such evidence, therefore, this Court concurs with the findings of the learned Trial Court qua the motive part that the same has not been proved by the prosecution as referred in Para-80 of the impugned judgment.

12. Similarly, the learned Trial Court has rightly observed that PW-11 Khawar Shah deposed in the cross examination that *when they reached at the place of occurrence from Dhera of Muhammad Hanif, all of them alighted from the car in a friendly move*. This aspect discloses that there was neither any dispute at that point of time nor were the parties in a bad blood.

STATUS OF SOLE EYEWITNESS

13. PW-11 Khawar Shah is the only eyewitness produced by the prosecution in this case, who has also narrated the same stance referred by PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) that on 19.12.2007, he along with Zaheer ul Hassan and the deceased were present in the house and making a plan to see a cow in the house of PW-9 Matloob for sacrifice purpose, when Muhammad Hanif, Zaheer Akhtar and Saeed Akhtar (P.O.) arrived there and asked the deceased to accompany them for rendition of accounts, whereafter he and the deceased left the house with aforesaid accused persons on car bearing registration RIA 1552. As such, PW-11 Khawar Shah narrated the incident occurred between the accused persons and deceased in the following manner:-

"We went to the dera of Hanif where the accused and deceased stated about rendition of accounts. They also mentioned some amount of Haji Abdul Aziz accused. The accused offered the deceased for retaining a plot

against the money of Abdul Aziz at Dhok Malihar near rainy nullah. The deceased replied that we would decide after visiting the plot. Thereupon, I along with deceased and accused person went to the said plot, which is the place of occurrence on the car of the deceased. As we reached at the place of occurrence, Hanif took 9mm pistol from his Nepha, whereas Zaheer also took .30 bore pistol and Saeed took 9mm pistol from his dub. They started firing at Zaheer ul Hassan who fell on the grounds. I was standing beside the car and was at a distance of about 12 paces from the accused and deceased when the deceased was shot at. The headlights of the car were on and the car was in starting position. I run towards left side in a street towards the house of Matloob PW. I informed Zamir ul Hassan and Matloob. We all rushed to the place of occurrence. We saw that the face of the car was towards motorway and the Zaheer and Saeed accused were removing Zaheer ul Hassan in the luggage boot of the car. Muhammad Hanif who was standing beside the car fired in the air when he saw us."

14. The above referred version of PW-11 Khawar Shah has been cross examined at length by the accused side and following facts have been surfaced on record:

- i) PW-11 Khawar Shah got registered FIR No.103/2007 on 22.05.2007, under Section 324, 440, 109/34 PPC, P.S. Tarnol, Islamabad against Shaheen Naqvi, Naeem Kazmi, etc. for making murderous assault on one Gul Khan.
- ii) On 04.05.2007, Zaheer ul Hassan, deceased of this case, got registered FIR No.87/2007 on account of murder of Syed Waseem Kazmi in P.S. Tarnol, Islamabad, whereas Zaheer Akhtar and Muhammad Hanif i.e. accused persons of this case, were PWs and eyewitness in that case. In the said FIR, Israr Shah, brother of Naeem Kazmi, Intezar Hussain, Ishtiaq Shah and Samar Shah were accused persons, whereas Samar Shah is real brother of PW-11 Khawar Shah, while rest of the accused persons are maternal uncles of PW-11 Khawar Shah.

- iii) Zaheer ul Hassan, deceased, was residing with his brother PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) in one joint house.
- iv) PW-11 Khawar Shah came to the house of complainant to see the cow but he had not purchased any share for sacrificial purpose.
- v) PW-11 Khawar Shah does not remember how many fire shots were made by the accused persons at deceased. However, he stated that accused persons might have made 10 fire shots at deceased, which is in contradiction with the medical evidence.
- vi) The accused persons had not made any fire upon PW-11 Khawar Shah and PW-11 Khawar Shah had not made any hue and cry at the time of firing at deceased.
- vii) PW-11 Khawar Shah claims to be witness of drafting of application but he did not remember the name of person, who drafted the complaint.
- viii) As per stance of PW-11 Khawar Shah the car (RIA-1552) was secured on rent by the deceased, however this aspect has been denied by PW-18 Mumtaz Ahmad/S.I. (I.O.) with the claim that the vehicle was secured by PW-11 Khawar Shah on rent from a Rent-a-Car, but no evidence has been brought on record from owner of vehicle.

15. While going through the above mentioned evidence of star eyewitness, it seems that PW-11 Khawar Shah is in good relationship with PW-10 Syed Zameer-ul-Hassan Kazmi (complainant) and on the fateful day PW-11 Khawar Shah visited the complainant in order to see a cow for sacrificial purpose in the house of PW-9 Matloob. In this plan, the deceased has not been mentioned by him, therefore, there is no justified reason of taking PW-11 Khawar Shah by the accused persons to witness the murder of deceased. PW-11 Khawar Shah has given details of firing in his statement but, as per site plan Exh.PH, the accused

Saeed Akhtar and Muhammad Hanif have been referred at Point No.3 i.e. the place from where the said accused persons had allegedly resorted to firing using their 9mm pistols, whereas Zaheer Akhtar has been shown at Point No.4 from where he made firing with his .30 bore pistol at Point No.1 being the place where deceased was present, whereas PW-11 Khawar Shah has been referred at Point No.2 i.e. behind the deceased, as such, if we place the stance of PW-11 Khawar Shah in juxtaposition with the site plan Exh.PK, it is not consumable that five firearm injuries have been caused to deceased to the exclusion of PW-11 Khawar Shah, especially when he was standing about 12 feet behind the deceased as per his own version. Even otherwise, the vehicle RIA-1552 was not shown in the site plan.

16. The status of PW-11 Khawar Shah at the initial stage has been established by the prosecution as a chance witness, but his presence at the relevant time at the place of occurrence could not be plausibly consumed as he has failed to establish or explain that particular event or chance to justify that in ordinary course of business he was not supposed to be present on the spot, in such scenario, the testimony of chance witness could not be given weightage from the principle laid down in 2005 SCMR 1906 (Mst. Dur Naz and another Vs. Yousuf and another), 2017 SCMR 1543 (Zahid Iqbal Vs. The State), 2010 SCMR 1791 (Anwar Shamim Vs. The State), hence the testimony of PW-11 Khawar Shah is highly doubtful.

DELAY IN CONDUCT OF POSTMORTEM EXAMINATION

17. Now we are considering the status of delay in conduct of postmortem examination, whereby the apex Court has settled such questions of unexplained delay in the postmortem examination, which damages the prosecution case as held in 2020 SCMR 192 (Sufyan Nawaz vs. The State), 2019 SCMR 1978 (Safdar Mehmood v. Tanvir Hussain), 2019 SCMR 1068 (Muhammad Rafique alais Feeqa vs. The State), 2018 SCMR 1549 (Muhammad Yaseen v. Muhammad Afzal) and

2011 SCMR 1190 (Irshad Ahmed vs. The State). In the aforesaid judgments, it has also been referred that the unexplained delay in autopsy of deceased alone creates dent in the prosecution case so far as presence of eyewitness at the place of occurrence is concerned, although the prosecution has brought on record the recovery of dead body on the pointation of one of the accused person namely Muhammad Hanif through recovery memo Exh.PJ, dated 20.12.2007, whereby the vehicle was allegedly pointed out by the said accused, which was parked near Shaikhpur under constructed road, situated in Sector I-14, Islamabad but, surprisingly the recovery memo Exh.PJ is silent qua the car keys, as such, the statement of PW-18 Mumtaz Ahmad/I.O. is silent as to how he opened the car boot. PW-18 Mumtaz Ahmad/S.I. acknowledged that he based on spy information arrested Muhammad Hanif accused at about 5 a.m. in the morning on 20.12.2007 from Motorway Chowk and on same day the said accused had allegedly disclosed and got recovered the dead body but, surprisingly the postmortem examination was conducted after midnight on 21.12.2007, for which no valid justification has been given, hence the effect of delay of conduct of postmortem examination creates a serious doubt in the prosecution case, where noticeable delay is available on record, such delay discloses the deliberation, consultation in this case.

RECOVERY OF DEAD BODY

18. The place of recovery of dead body is an open place near an under construction road and the recovery was witnessed by PW-10 Syed Zameer-ul-Hassan Kazmi (complainant), but surprisingly the complainant and PW-18 Mumtaz Ahmad/I.O. have not uttered a single word qua the car keys having been used by the accused Muhammad Hanif, even PW-18 Mumtaz Ahmad/S.I. claimed that he arrested Muhammad Hanif on 20.12.2007 at about 5 a.m. in the morning and at the time of arrest he took RLE-3077, XLI Toyota Corolla, mobile phone P1, original ID card of accused Exh.P2, licensed shot gun P3, Rs.1,700/- P4

in custody through recovery memo Exh.PA but, no car keys of Toyota Corolla (RIA-1552) were recovered from him, whereafter the dead body of deceased was recovered, per se, such lacuna creates a doubt in the chain of evidence. The prosecution has failed to establish the possession of vehicle with the accused persons nor the Investigating Officer has established anything on record qua the car keys of RIA 1552, especially when the vehicle was taken on rent by the deceased himself as per the stance of the only eyewitness i.e. PW-11 Khawar Shah, whereas the Investigating Officer has confirmed that the vehicle was taken on lease by PW-11 Khawar Shah. In such scenario, the justified explanation is required as to how the vehicle was taken on lease by PW-11 Khawar Shah or by the deceased in this case, therefore, effect of Article 129(g) of the Qanun-e-Shahadat Order, 1984 comes on record. The Investigating Officer has produced the owner of vehicle PW-8 Muhammad Naeem on record, but he has taken the stance that he sold out the vehicle RLA-3077 Toyota XLI to Muhammad Shakoore prior to the occurrence, which was not the said vehicle from whom the dead body was allegedly recovered, even RLA-3077 has no nexus with the RIA-1552, hence the chain of evidence is missing. The factum of delivery of vehicle RIA-1552 on lease either to deceased or PW-11 Khawar Shah has not been proved nor established from the record, therefore, adverse presumption comes on record that such evidence if produced might go against the prosecution case as held in 2017 PCr.LJ 25 (Shah Izzat alias Shehzad Vs. Adnan Constable No. 5355), 2016 PCr.LJ 380 (Najaf Khan Vs. The State), 2017 PCr.LJ 605 (Pirzada alias Peer Vs. The State). The vehicle RIA-1552 has not been produced by the Investigating Officer PW-18 nor by the claimant owner Muhammad Naeem PW-8.

19. Bare reading of entire judgment of the case as well as of the record including the evidence is silent qua the fact as to whether the vehicle RIA-1552 Toyota Corolla has ever been produced in the Court nor referred by the I.O in this case neither the same has been exhibited, such aspect further creates dent in

the prosecution case, though the vehicle has been confronted to the accused persons in the statement under Section 342 Cr.P.C., but it lost its significance when the same has not been produced in the evidence.

INCOMPLETE INQUEST REPORT

20. The Investigating Officer has brought the inquest report Exh.PX on record but surprisingly Column No.10 of said report is blank where the injuries have not been explained, though it is settled proposition of law that inquest report is not a substantive piece of evidence. Furthermore, the Investigating Officer has also not mentioned the time when the dead body was recovered nor explained the injuries found on the dead body, hence important piece of evidence is missing, which could have explained the nature of injuries *vis-a-vis* the time to justify the delay in conduct of postmortem examination of the deceased. In such scenario the possibility that time has been consumed by the local police and complainant party in procuring and planting eyewitnesses and cooking up story for prosecution could not be ruled out. Reliance is placed upon 2017 SCMR 54 (Muhammad Ilyas v. Muhammad Abid alias Billa).

RECOVERY OF WEAPON OF OFFENCE AND NEGATIVE FSL REPORT

21. The other important aspect of this case is the recovery of weapon of offence i.e. 9mm pistol Exh.P1, which was recovered on 30.12.2007, on the pointation of Muhammad Hanif accused from the bushes (Jungle) situated on Link Road near Motorway Chowk vide recovery memo Exh.PE, whereby a separate FIR under Sections 13/20/65 of the Arms Ordinance, 1965 has been registered. As per the stance of Investigating Officer PW-18 Mumtaz Ahmad/S.I., he has secured eight 9mm empties from three different places and two empties of .30 bore pistol from the place of occurrence, through Exh.PF, and he transmitted the empties to the Forensic Science Laboratory through PW-5 Dost Muhammad/HC on 27.12.2007, but the laboratory was closed for three official days, therefore, the same were deposited on 31.12.2007, whereas the

weapon of offence i.e. 9mm pistol was deposited on 10.01.2008 in the FSL by the same police official. The firearm empties have been tested with the crime weapon allegedly recovered from Muhammad Hanif accused but, surprisingly the report Exh.PB issued by the FSL Punjab, dated 21.02.2008, reveals the following result:

"The crime empties of 9mm bore marked as C1 to C8 were examined and compared with the test empties prepared from the pistol of 9mm bore body signed and it was found that the crime empties of 9mm bore marked as C1 to C8 HAD NOT BEEN FIRED FROM THE PISTOL of 9mm bore body signed."

22. The above mentioned result of the FSL makes the recovery of 9mm pistol from Muhammad Hanif as inconsequential, especially when crime empties have not been matched with the recovered weapon of offence, even otherwise, the weapon of offence was recovered on 30.12.2007 as per Exh.PE when the crime empties have not been transmitted to the FSL, therefore, the delay in sending the crime empties affects the entire prosecution case. The law is settled by now that sending of empties and weapon to the laboratory after the arrest of accused carries no evidentiary value. Reliance is placed upon 2018 SCMR 1051 (Umer Khursheed v. Syed Tufail Ahmad), 2017 SCMR 709 (Haleem vs. The State), 2008 SCMR 707 (Ali Sher vs. The State) and 2007 SCMR 525 (Israr Ali vs. The State).

23. In view of above guiding principles the learned Trial Court has rightly considered the recovery of weapon of offence as inconsequential, especially keeping in view the negative report of the Forensic Science Laboratory regarding matching of the recovered crime empties from the spot. Reliance is placed upon 2019 SCMR 1068 (Muhammad Rafique alias Feeqa vs. The State) and 2019 SCMR 1156 (Asad Rehmat vs. The State).

STATUS OF CONSPIRACY EVIDENCE AGAINST ABDUL AZIZ ACCUSED

24. In the present criminal case, the complainant has leveled the allegation of abetment and criminal conspiracy against respondent Abdul Aziz son of Habib Ullah (accused), on whose behalf the crime of murder has been committed. In

order to prove this aspect the prosecution has produced PW-17 Muhammad Javed, who stated that on 18.12.2007, at about 8 p.m., when he went to take tea in a hotel known as Sheesha Wala Hotel at Motorway Chowk, he saw Muhammad Hanif, Zaheer Akhtar and Haji Abdul Aziz along with Saeed Akhtar (P.O.), who were sitting at a corner table, whereby Abdul Aziz allegedly addressed to remaining accused persons saying that, *"I am fed up from Poma Shah. Wherever he meets him he demands return of his money. Kill him and I would settle all other affairs."*, whereafter the deceased was murdered at the behest of Abdul Aziz on 19.12.2007. PW-17 Muhammad Javed recorded his statement before the police on 20.12.2007 and during the course of cross-examination, he acknowledged that he was neither acquainted with PW-11 Khawar Shah nor with PW-10 Syed Zameer-ul-Hassan Kazmi, and even he was not aware of the name of Poma Shah, as referred in his examination-in-chief but, he did not disclose about the conspiracy hatched in his presence by Abdul Aziz in front of other accused persons and next day he came to know that Poma Shah has been murdered. Such conduct is not normal, especially when he was not aware of the credentials of the witnesses having any relationship with the complainant. The other important aspect negating the conspiracy theory is the residence of all accused persons, who are of the same area and it is improbable that all four accused persons had allegedly hatched the conspiracy at Sheeshay Wala tea hotel on 18.12.2007, which itself is against the concept of conspiracy, which requires privacy and secrecy, per se, it is not consumable that conspiracy has been hatched in the public view, especially in a public place in the same area and, as such, this aspect has rightly been observed by the learned Trial Court while relying upon 2001 SCMR 424 (Imran Ashraf vs. The State). As per definition provided in Section 120-A PPC, it is an agreement between two or more persons to do any illegal act and it is settled law that evidence as to conspiracy by a chance witness is not reliable as held in 1969 SCMR 620 (Fakku Mian vs. The State), therefore, the testimony of PW-17

Muhammad Javed is considered to be an afterthought. As per evidence of the Investigating Officer PW-18 Mumtaz Ahmad/S.I., it reveals that a supplementary statement of complainant was recorded on the first day of occurrence but he has not given any detail about the role of Abdul Aziz regarding allegation of abetment, as such, this aspect has rightly been noted by the Investigating Officer in Zimni / Police Diary. The accused Abdul Aziz in his statement under Section 342 Cr.P.C. has strongly denied his presence while answering Question No.4 that on 18.02.2007 (*sic*), at around 6 p.m., he was present at Village Java, Khana Dak, Islamabad along with Abdul Ghani, Muhammad Zaheer, Muhammad Maskeen, and Muhammad Afzal in connection with reference to purchase of plot from Muhammad Zaheer. He also took the stance that this fact may also be confirmed from revenue office / record as the plot was transferred vide registered sale deed after the said date. Putting in juxtaposition the evidence of PW-17 Muhammad Javed and defence version, this Court opines that the evidence of conspiracy is highly improbable and the same has rightly been negated by the learned Trial Court.

INVESTIGATION CONDUCTED BY PW-19 MUHAMMAD ASLAM SAHI/S.I.

25. The second Investigating Officer i.e. PW-19 Muhammad Aslam Sahi/S.I. has arrested Zaheer Akhtar accused on 20.06.2008, obtained physical remand of said accused and has taken the stance that the complainant has failed to produce any evidence implicating the accused Zaheer Akhtar in this case. It has been acknowledged by the Investigating Officer that no incriminating articles were recovered from accused Zaheer Akhtar and even he stated in cross examination that the complainant on 28.06.2008 came to Police Station pressurizing him to plant a recovery of pistol on the accused and even he has supplied a pistol to him. The Investigating Officer has taken the stance that during the course of investigation he called the complainant to take oath on Holy Quran qua the involvement of accused persons in the murder, however the complainant did not

accept and refused to take oath on Holy Quran. The Investigating Officer confirmed that Zaheer Akhtar has taken the stance in the investigation that he was present in Mouza Nogazi in connection with some meeting relating to election and said fact has been verified by Ghulam Shabir, Javed Akhtar, Muhammad Younis, Waseem, Malik Abdur Rehman, Mushtaq, Shoukat and many others, who recorded their statements under Section 161 Cr.P.C. during the course of investigation. The Investigating Officer further disclosed that the complainant was sleeping in his house at the time of occurrence and later on came to know about murder of his brother. All these aspects create a serious doubt in the entire prosecution case qua the involvement of accused persons, who have been attributed specific role by complainant as well as by PW-11 Khawar Shah being the alleged eyewitness of the occurrence as the version of complainant as well as of PW-11 Khawar Shah is not based upon truth.

STATEMENT OF ACCUSED PERSONS UNDER SECTION 342 CR.P.C. AND DEFENCE VERSION

26. All the three accused persons denied their presence in the present case, whereby Zaheer Akhtar has taken the stance while answering Question No.8 that he was eyewitness of a murder case in which close relatives of PW-11 Khawar Shah were involved. Similarly, Muhammad Hanif, the alleged partner of deceased, has given a detailed view about the alleged business relationship with the deceased answering Question No.3 in his statement under Section 342 Cr.P.C. in the following manner:

"It is incorrect. In fact 10 Kanals land was purchased in the name of accused Muhammad Hanif and deceased Zaheer ul Hassan jointly in the Mouza Wani Gujran Tehsil Taxila District Rawalpindi, both the parties are in possession of land in question and there was no market constructed on the any portion of the land measuring 5 ½ Kanal owned by deceased. Copy of Reg. Haq zameen is annexed. As far market is concerned, that was constructed on the land situated at Mouza Ghangi Syedan Dhok Malyar, Islamabad from Khasra No.1059, land measuring one Kanal 3 marlas jointly (copy of sale deed is annexed) by the deceased and the accused because accused and deceased were close friend from

long time and they have purchased joint property, there was no dispute regarding any property during the life time of the deceased, there was no litigation between accused and deceased regarding property or any other lane dane. It is pertinent to mention here that the market was constructed by the accused and deceased jointly and it is proved from the very fact that the utility connection has been installed in the name of both the parties. (Copy of Electric bills are annexed). Further accused have no concern with Haji Naeem and nothing was payable against me and I have no connection with the dishonored cheque."

27. Muhammad Hanif accused has also produced a defence witness namely Farrukh Rasheed/SP DPD as DW-1, who narrated that the complainant and the prosecution witnesses have refused to take special oath qua the involvement of Zaheer Akhtar accused, resultantly, he was not found guilty of the offence and his name was placed in Column No.2 of the Challan.

CONCLUSION

28. While going through the above referred statements and defence version as well as the other evidence of the prosecution story, following facts emerge on record qua the previous history of witnesses, accused party and the complainant qua different cases:

- A) FIR No.87/2007, dated 04.05.2007, lodged on the complaint of Zaheer ul Hassan (deceased) qua murder of Waseem Kazmi, which has been witnessed by Zaheer ul Hassan (deceased) himself as well as by present respondents accused Zaheer Akhtar, Muhammad Hanif and Abdul Aziz and the FIR was registered against Samar Ali i.e. real brother of PW-11 Khawar Shah as well as against Ishtiaq Shah, Israr Shah and Intezar Shah i.e. maternal uncles of PW-11 Khawar Shah.
- B) FIR No.103/2007, dated 22.05.2007, was registered on complaint of PW-11 Khawar Shah qua murderous assault on him and on Gul Khan having been allegedly witnessed by PW-17 Muhammad Javed, Syed Zameer-ul-Hassan Kazmi (present complainant) and

PW-11 Khawar Shah himself, lodged against Zaheer ul Hassan (deceased of this case) and Naseem Kazmi alias Ainy Shah.

29. From the above referred background of criminal cases, it appears that Zaheer ul Hassan (deceased) had enmity with Samar Ali i.e. real brother of PW-11 Khawar Shah (sole eye witness) and maternal uncles, where the present accused persons were eyewitnesses. Similarly, PW-11 Khawar Shah is complainant against Zaheer ul Hassan (deceased) in case FIR No.103/2007. This aspect demonstrates that PW-11 Khawar Shah i.e. the only eyewitness in this case is a biased witness having his own issues to settle his score against the accused party, even, the motive highlighted by the complainant in this case has not been proved from any documentary or independent evidence. The recovery of 9mm bore pistol allegedly used by Muhammad Hanif accused has already been disbelieved by the learned Trial Court and concurred by this Court as same has not been found matched with fire empties recovered from spot as highlighted by the Forensic Science Laboratory Report Exh.PV, even empties have been dispatched to the Forensic Science Lab on 31.12.2007 after the arrest of the accused and recovery of weapon of offence, which otherwise made the recovery inconsequential. The recovery of dead body on the pointation of principal accused from the open place lying in a car boot of RIA 1552, which was also taken on rent by PW-11 Khawar Shah but, at the time of alleged recovery of the dead body the Investigating Officer has not referred the Car keys nor has any witness pointed out about the car keys, even no blood spot was seen nor blood was collected from the Car boot, neither any picture was obtained by the I.O, as such, the circumstantial evidence leading to recovery of dead body is not believable. The Investigating Officer has not made any serious effort to produce the owner of the vehicle RIA-1552 or the person who rented out the vehicle to PW-11 Khawar Shah in this case, which itself goes against the prosecution case. At last, the mode and manner in which PW-11 Khawar Shah has referred the

alleged murderous assault upon the deceased is also not consumable to a prudent mind, especially when deceased has received five firearm injuries from behind and one from front side having been made from a close range of about 4 feet, which has been confirmed by evidence of doctor, who has referred that black area was found near the entry wounds of ear. Similarly, one of the Investigating Officer PW-19 Muhammad Aslam Sahi has declared the accused Zaheer Akhtar innocent and even the allegation of conspiracy against Abdul Aziz accused has been disbelieved. PW-11 Khawar Shah acknowledges that accused persons might have made ten (10) fire shots at the deceased, but this aspect is in clear contradiction with the medical evidence. In such scenario, the learned Trial Court has acquitted all the accused persons of the charges by extending benefit of doubt after application of golden rule i.e. benefit of doubt. It is trite law that the principle of appraisal of evidence in appeal against acquittal is different from appeal against conviction as the accused is presumed to be innocent in law and if after regular trial he is acquitted of the charge he earns double presumption of innocence, therefore, heavy onus lies upon the prosecution to rebut such presumption as held in 2008 SCMR 329 (Muhammad Shafi v. Muhammad Raza).

30. This Court is also mindful of the fact that scope of interference in appeal against acquittal is more narrow and limited, even rare, as held in cases reported as PLD 2011 SC 554 (The State v. Abdul Khaliq) and 2013 SCMR 1602 (Zeeshan Afzal alias Shani vs. The State), 2006 SCMR 1550 (Sana ur Rehman, etc. v. Nayyar Ahmed). It is also settled proposition of law that there can be contrary view of re-appraisal of evidence by the Court hearing the acquittal appeal, simpliciter would not be sufficient to justify the interference with the acquittal judgment. The Courts do not interfere unless impugned order of acquittal is based on misreading and non-appraisal of evidence or arbitrary, capricious and fanciful against the record as held in cases reported as PLD 2009 SC 53

(Muhammad Tasaweer v. Hafiz Zulkarnain), 2004 SCMR 425 (The State v. Khuda Dad), 2009 SCMR 985 (Muhammad Aslam v. Sabir Hussain) and PLD 2006 SC 538 (Abdul Mateen Kamal v. Sahib Khan). The appellant has failed to point out any non-appraisal of evidence or misreading of evidence in this case, therefore, the High Court should give due weightage to the opinion of the learned Trial Court as findings of the facts have rightly been concluded by the said Court as held in 1996 SCMR 678 (The State v. Abdul Ghaffar).

31. While going through the entire record, this Court is of the view that motive has not been proved, the recovery of weapon of offence is disbelieved, even declared inconsequential. The firearm empties have not been found matched with the crime weapon recovered by the accused person. The conduct of eyewitness i.e. PW-11 Khawar Shah is highly improbable, who even not fit in this case to be called as a chance witness, especially in the light of previous enmity and blood feud amongst the deceased and witnesses versus the accused persons, who were supporting the deceased in earlier round. The delay in lodging FIR as well as in conduct of postmortem examination of deceased also casts a serious doubt in this case, therefore, this Court is left with no other option but to uphold the verdict of the learned Trial Court.

32. In view of above, the instant criminal appeal is hereby **DISMISSED**.

(BABAR SATTAR)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 20th September, 2021.

JUDGE

JUDGE

Khalid Z.