

## **JUDGMENT SHEET**

### **IN THE ISLAMABAD HIGH COURT, ISLAMABAD.** **JUDICIAL DEPARTMENT.**

**Criminal Appeal No.154/2015**  
(*Muhammad Saeed vs. The State*)

**Jail Appeal No.153/2015**  
(*Muhammad Saeed vs. The State*)

**Criminal Revision No.23/2016**  
(*Waqar Ali vs. Muhammad Saeed Khan and another*)

**Murder Reference No.14/2015**  
(*The State vs. Muhammad Saeed*)

Appellant By: Mr. Sabah Mohy-ud-Din Khan, Advocate

Complainant By: Mr. Talat Mahmood Zaidi, Advocate

State By: Mr. Yasir Barkat Ch., State Counsel

Date of Hearing: 16.05.2017

**MOHSIN AKHTAR KAYANI, J:-** This common judgment will dispose of Criminal Appeal No.154/2015 (Muhammad Saeed vs. The State), Jail Appeal No.153/2015 (Muhammad Saeed vs. The State), Murder Reference No.14/2015 (The State vs. Muhammad Saeed) and Criminal Revision No.23/2016 (Waqar Ali vs. Muhammad Saeed Khan, etc.)

2. The appellant through Criminal Appeal No.154/2015 and Jail Appeal No.153/2015, has assailed the judgment dated 05.09.2015 passed by learned Additional Sessions Judge-VII (West), Islamabad, whereby the learned Trial Court convicted the appellant under section 302 PPC in FIR No.175, dated 23.10.2013, P.S. Secretariat, Islamabad and awarded death penalty with Rs.100,000 as compensation under section 544 Cr.P.C., failing which the appellant is to undergo 6 months simple imprisonment, whereas complainant, Waqar Ali, also filed Criminal Revision No.23/2016 against the judgment dated 05.09.2015 passed by learned Additional Sessions Judge-VII (West), Islamabad, for the enhancement of compensation up to Rs.1 million only, while Murder

Reference No.14/2015 sent by learned Trial Court and seeking confirmation of death penalty awarded to the appellant or otherwise.

3. Brief facts of the case as referred by complainant Waqar Ali in his complaint (Exh.D2), are as under:-

"آج مورخہ 23-10-13 کو تقریباً 3/30 بجے رات اپنے گھر خیل میں سویا ہوا تھا کہ اچانک گھر کے صحن میں چبھنوں و پکار کی آواز آئی میں نے جلدی میں اپنے کمرے کے دروازے کو کھولا جو نہ کھلا زیادہ شور کی آواز سنی تو زور سے دھکادیکر دروازے کو کھولا جو کھل گیا صحن میں پڑی میری بہن نگینہ بی بی جو خون میں لت پت تھی جسکے چار چھوٹے چھوٹے بچے ہیں زور زور سے چیخیں مار مار کر بتا رہی تھی کہ مجھے سعید نے چھری پیٹ میں مار کر زخمی کر دیا ہے جس پر میں نے نگینہ بی بی سے پوچھا تو اتنی دیر میں میری بہن روہینہ بی بی اور میری ماں دوسرے کمرے سے نکل آئی نگینہ بی بی نے آواز دے کر کہا کہ سعید مجھے چھریاں مار کر گیٹ کی طرف بھاگ گیا ہے یہ بات سن کر میں اسکے پیچھے بھاگ گیا جو گلی کے اندر سے قائد اعظم یونیورسٹی کی جانب بھاگ کر کامیاب ہو گیا۔ میں نے واپس آکر اپنی بہن کو خون میں لت پت دیکھا اپنے ہاتھوں میں اٹھایا اور زور زور سے محلے والوں کو آوازیں دی اور بہن کو اٹھا کر گھر سے باہر گلی میں آگیا جہاں پر محمد اکرم نے اپنی ٹیکسی میں ڈال کر مجھے میری والدہ اور میرے بہن نگینہ بی بی کو زخمی حالت میں پولی کلینک ہسپتال لے آیا ہسپتال میں میری بہن زخموں کی تاب نہ لا کر جان بحق ہوئی ہے۔"

4. After the submission of abovementioned complaint, the police registered FIR No.175 dated 23.10.2013, under section 302 PPC, P.S. Secretariat, Islamabad, referred as Exh.PD. Subsequently, the Investigation Officer arrested the nominated accused, Muhammad Saeed Khan and recovered the weapon of offence, *Churri*, whereafter the Investigation Officer completed the investigation and submitted *Challan* under section 173 Cr.P.C against the appellant before the competent Court. The learned Trial Court after completion of evidence and on the basis of statement recorded under section 342 Cr.P.C., convicted appellant U/S 302-B PPC and awarded him death sentence along with compensation of Rs.100,000/- under section 544 Cr.P.C., failing which appellant has to further undergo 06 months SI. Hence, this criminal appeal and murder reference.

5. Learned counsel for appellant contended that, appellant was not arrested on spot, even the prosecution has not alleged any motive and the complainant Waqar Ali is not the eyewitness of the alleged incident; that there are material contradictions in the testimonies of the eyewitnesses and charge of murder has not been proved; that the recovery upon the appellant is fake and planted one while the statement of PW-8 Shujat Bibi has not been corroborated through her

other family members i.e. Mst. Rubina Bibi and Mst. Rozina Bibi, who were not examined by the Trial Court as they were not produced by the prosecution in the trial; that PW-13 Waqar Ali Khan stated during his statement that when he came out of his room, he saw Nagina Bibi in injured condition who was telling her mother and sister that Saeed (appellant), injured her, although this fact has not been proved independently; that record shows, deceased was taken to hospital and the injury statement is silent qua the appellant; that the inquest report and application (Exh.PB) shows that FIR got lodged after the postmortem; that there is no eyewitness of the case and the recovery of weapon of offence is doubtful as the *Churri* was not found stained with blood and the presence of deceased in courtyard with her mobile at odd hours of the night, makes the case suspicious. Finally, learned counsel for appellant argued that the impugned judgment has been passed without observing the mandatory provisions of Sec.367 Cr.P.C.

6. Conversely, learned counsel for the complainant contended that, instant murder case has been fully corroborated by the prosecution, even the eyewitnesses have completely corroborated the conduct of the appellant by all means and the deceased had plainly described the role of appellant in her dying declaration, which was confirmed by the complainant, mother Shujat Bibi, as well as neighbor/taxi driver, PW-10 Muhammad Akram, who carried the deceased in injured condition to the hospital. Learned counsel for the complainant as well as State, have opposed the instant Criminal Appeal mainly on the ground that there is no delay in lodging of the instant FIR and appellant is directly nominated in the same at the first instance, therefore, the punishment of death sentence has rightly been awarded to Muhammad Saeed Khan, accused/appellant. Lastly, learned counsel for the complainant further contended that the learned Trial Court while passing the order of compensation in terms of Sec.544 Cr.P.C., has taken a lenient view, therefore, amount of compensation may be enhanced.

7. We have heard the arguments and gone through the record with valuable assistance of learned counsel for the parties.

8. It has been observed from the perusal of record, that complainant PW-13 Waqar Ali Khan lodged the complaint Exh.D2 and alleged therein that, on 23.10.2013 at 3:30 am, when he was sleeping at his home situated in Naryal, all of a sudden he heard hue and cry of her sister, Nagina Bibi (deceased), when he tried to open the door of the room, it was not opened, thereafter, he forcefully pushed the door on which it got opened and saw his sister Nagina Bibi in an injured condition who time and again was referring that she got injured by the Churri blows caused by Muhammad Saeed Khan and meanwhile other sister Rubina and mother Shujat Bibi, came out of room. The complainant PW-13 Waqar Ali Khan further alleged in the complaint that, he ran after Muhammad Saeed but he succeeded in escape towards Quaid-e-Azam University, where after complainant took her sister out of his house and boarded her in taxi brought by PW-10 Muhammad Akram/Taxi Driver, in which they reached to Polyclinic Hospital, where Nagina Bibi succumbed to injuries.

9. PW-5, Doctor Tanveer Afsar Malik, C.M.O., on 23.10.2013 at 04:15am, conducted initial examination of deceased Nagina Bibi w/o Sabir Khan, caste Pathan, resident of Nareel Dhakhi, Malpur, Islamabad, aged about 33 years, who was brought by her family members, in pursuance thereof, MLC (Exh.PE) was prepared, wherein it was opined that:

*"History of stab wound semi-pubic region about 6 cm in length more than one finger deep i.e. more than 10 cm deep.*

*Patient presented in state of shock. She was pulse less, BP less, two white cannulas are passed and hemotel infusion was started immediate blood grouping and cross match was done and patient was immediately shifted to operation theater, thread pulsation in the operation theater. Patient gone critical condition cross match blood was attached and middle lue abdominal exploration was done. Pesop, there was a deep stab wound, massive, pelure hemdone and right vessels injured and bladder injured.*

*CPR was started.*

*Injection atropae of adrenal was gone. Antra cardiac adrenal was given and CPR contended for bomuule. Patient did not recovered and there was no cardial actual seen Pupils were belatedly dilated. ECG was*

*done which shows straight line and death was declared at 05 am on 23.10.2013.*

*Date of admission 23.10.2013 at 04:15 am death 23.10.2013 at 05:50 am in operation theater."*

However, during the course of cross-examination, PW-5 admitted that injury sheet of Nagina Bibi, prepared by PW-2 Shahid Zaman, ASI, was produced before him after the medical examination and he did not sign it at that time. He further admitted that, it was mentioned in the injury sheet that, the then injured Nagina Bibi was stabbed by an unknown person.

10. The prosecution produced Dr. Sabina Akhtar as PW-6 who, along with PW-5 Dr. Tanvir Afsar Malik, CMO, conducted the autopsy of deceased Nagina Sabir, and prepared postmortem report (Exh.PG/1-6), and formed opinion that:

**"External Appearance**

*A young lady of good physique wearing phuldar brown color qameez, shalwar red color bra black color soaked with blood, eyes and mouth closed. Body is in initial state of rigor mortis. There is slight postmortem lividity underneath arm and on the back of the chest on external postmortem examination there is sharp edge stab wound on the supra pubic region area already stitched by the surgical department unit one wound is about 18-20 cm long tidally already stitched, post abdominal exploration. On dissection of abdomen injury of right iliac vessel and bladder see.*

- Thorax External ---- Health,
- Abdomen External --- Bladder, right iliac vessel. Other organs healthy ruptured.

**Opinion**

*In my opinion deceased sustained stabs wound on the abdomen which resulted in primary internal hemorrhagic which leads to hemorrhagic shock and later on death. All injuries are ante-mortem in nature and sufficient to cause death in ordinary course of life.*

**Time elapsed between injury and death** *variable 1 hour and 35 minutes approximately, whereas time elapsed between death and postmortem about 4 hours and 10 minutes approximately."*

11. PW-4 Maqsood Ahmad, SI, lodged FIR No.175/2013, dated 23.10.2013 under section 302 PPC, P.S. Secretariat, Islamabad (Exh.PD) on the complaint (ExhD2). The said criminal case was investigated by PW-12 Abdul Ghafoor, S.I. and PW-11 Yasin Ali Khan, S.I., who had submitted the final Challan under

section 173 Cr.P.C. to the concerned Court and declared the appellant as accused in the case.

12. The learned Trial Court has framed the charge under section 302 PPC on 24.04.2014, where after prosecution has produced PW-5 Dr. Tanveer Afsar Malik, CMO, PW-6 Dr. Sabina Akhtar, MLO, who had examined the deceased during her treatment and conducted postmortem. The prosecution further produced two recovery witnesses, PW-1 Muhammad Adil, Constable, and PW-9 Sabir Ullah, private witness, and also produced PW-8 Mst. Shujaat Bibi, mother of deceased, PW-10 Muhammad Akram/Taxi Driver and PW-13 Waqar Ali Khan/complainant in order to prove the case against the appellant.

13. The Investigation Officers, during the course of investigation, have prepared/produced the recovery memo of *Churri* (Exh.PA), medical report of Nagina Bibi (Exh.PE), inquest report (Exh.PF), Postmortem Report (Exh.PG), Memo of possession of Parchajaat of deceased (Exh.PH), Memo of identification of death body (Exh.PI), Memo of possession of photographs of deceased at place of occurrence (Exh.PN), Memo of possession of bloodstained earth (Exh.PN), Photographs (Exh.P7-14), Scaled site plan (Exh.PC), and unscaled site plan (Exh.PP/2), Forensic Science Lab Reports (Exh.PU) and (Exh.PV).

14. From the read-through of the statement got recorded by PW-13 Waqar Ali Khan, it has been observed that he, on 23.10.2013 at about 3:30 am, was sleeping in his room when he heard the noise of her deceased sister, whereupon when he tried to open the door of his room, it did not open on the first attempt while on the second attempt, the door got opened and noticed her sister Nagina Bibi lying on a floor in injured condition, who was shrieking to his mother and sister that accused Muhammad Saeed Khan (facing trial) caused a knife blow to her. Nagina Bibi narrated the same incident to complainant with addition to that, accused ran away in the street, on which PW-13 Waqar Ali Khan with unsuccessful attempt chased the accused but he fled away towards Quaid-e-Azam University. Afterward, PW-13 raised hue and cry, whereupon PW-10

Muhammad Akram/Taxi Driver brought his taxi and took the injured and complainant along with his mother and sister to Polyclinic Hospital.

15. PW-13 further stated before the Court that, the injured was reciting "*Kalma*" and stating again and again that she has been stabbed by accused Saeed Khan facing trial and the same stance has also been taken by his mother PW-8 Shujat Bibi and younger sister Rubina Bibi. He further stated before the Court that when they reached the emergency ward of the hospital, they met with one police official, who prepared a document, whereafter her treatment was started. PW-13 stated before the Court that a person had written an application which was handed over to the police for lodging of an FIR, whereby he identified his signature as (Exh.D/3) on the application (Exh.D/2). He also identified the dead body of his sister through identification memo (Exh.PI), signed the receipt for receiving dead body (Exh.PJ) and also received the last worn clothes, i.e. (Shalwar Red Color (Exh.P2), Printed Shirt (Exh.P3), Brazier (Exh.P4), One Mobile (Exh.P5) along with SIMs (Exh.P6/1-2)), whereby the Investigation Officer prepared the recovery memo (Exh.PH). He further stated that, Investigation Officer took the bloodstained earth and prepared a sealed parcel in his presence through recovery memo (Exh.PN).

16. During the course of cross-examination, PW-13 admitted that, he has not written the complaint by himself, rather he narrated the incident to a person who had written the complaint (Exh.D2). He further confirmed that his mother Shujat Bibi and Rubina Bibi told him that they have seen the accused while stabbing the deceased, however, he had not mentioned this fact in the complaint due to his illiteracy. He further admitted that there was no police official available in the hospital and that he was asked by an elder person in the hospital to write an application for registration of case. PW-13 also admitted that after receiving of his application, police examined his sister whereafter she was taken into Operation Theater.

19/20

17. PW-13 admitted the fact that his mother and younger sister came out of their room prior to him at the time of incident. However this fact could not be mentioned in the complaint as the application was not read before him, even the application was not read over to him by the police. He further confirmed during the cross-examination that, the total time consumed in the incident, coming out from the room and chasing the accused as well as coming back to the house, was about 4 to 5 minutes, however it took 45 minutes to reach the hospital, though it was Fajar time when they reached to the hospital. PW-13 admitted during the course of cross-examination that when he came out from his room, he found his sister sitting alongside the wall in injured condition and at that time, two light bulbs were switched on but these facts have never been mentioned in the complaint. The most important thing, which he admitted before the Court that:

*"I had not seen the accused facing trial in my house, however I have seen him in the street while he was running."*

18. The next important witness in the trial is PW-8 Mst. Shujat Bibi, mother of deceased, who stated before the Court that, first husband of deceased Nagina Bibi, died in a road accident and as a result whereof Nagina Bibi had received a plot measuring 03 Marlas as compensation, whereupon Nagina constructed a house and they all started living there along with her. She further stated before the Court that, on 23.10.2013, she along with her daughter Rubina, were sleeping in separate room while Nagina deceased, along with her 4 kids and Rozina with her 1 kid, were sleeping in another room, and Waqar Ali Khan/complainant, was sleeping in third room. She further stated that she heard a sound of a door and voice of Nagina, whereupon she and her daughter Rubina, woke up and immediately open the door, where they observed that:

*"Our neighbor, Muhammad Saeed s/o Muhammad Rafique R/o Laryal, Islamabad was hitting my daughter Nagina with a knife. Saeed on seeing us ran away."*

19. PW-8 Shujat Bibi further stated before the Court that after the incident, Waqar Ali Khan/complainant opened door of his room door and came out. She



21/22

further stated that Nagina deceased kept saying that Saeed stabbed her and ran away, thereafter, they took Nagina to hospital with Muhammad Akram/taxi driver and that on her way to hospital, Nagina time and again said that "Saeed has killed her and she was reciting Kalma". PW-8 further stated in her evidence that she, Rubina and Rozina, have seen the occurrence with their own eyes, as Saeed wanted to marry Nagina deceased while she got married to PW-9 Sabir Ullah.

20. From the perusal of evidence of PW-8 Shujat Bibi, two factors have been referred on record that,

*"We saw that our neighbor Muhammad Saeed s/o Muhammad Rafique R/o Laryal, Islamabad was hitting my daughter Nagina with knife."*

and that,

*"Nagina was saying again and again that Saeed has hit her. On her way, Nagina was reciting "Kalma" and was saying that Saeed has killed her."*

Whereas PW-8 has defined the motive of the said incident as,

*"Saeed wanted to marry her while she got married with Sabir Ullah."*

However, during the course of cross-examination, learned counsel for accused Saeed Khan asked a particular question regarding the alleged incident of stabbing, whereby PW-8 categorically stated that,

*"I have seen the accused facing trial while committing the stabbing of my daughter and my son, the complainant has also seen him, therefore, we charged him. Two light bulbs were on in the courtyard of our house when I came out."*

It has further been referred on record that:

*"When I came out, my daughter was standing in injured condition who was given support by me and was laid down on the floor."*

The above referred specific questions and answers, give rise to a situation that PW-8 Shujat Bibi is an eyewitness of the entire incident as alleged in the FIR. The only reference of contradiction is whether the other witness, PW-13 Waqar Ali Khan/complainant, came out and seen the occurrence with his own eyes or not? However, it is evident from record that PW-8 seen the incident with her own eyes, even she in her own words stated before the Court that the actual stabbing

has been seen by her, which was done by accused Saeed and in this regard, she has also disclosed the reason of motive in her testimony, hence eyewitness account is based upon true facts and believable. The defence side has cross-examined PW-8 but could not get support in their favour and in our view, the testimony of PW-8 remained unrebutted. However, certain corroboration is required from the testimonies of other witnesses, especially, the taxi driver, who has also recorded his statement as PW-10 Muhammad Akram, regarding the statement of deceased (dying declaration) as to whether Muhammad Saeed Khan stabbed her or not?

21. PW-10 Muhammad Akram put his appearance and stated before the Court that, he belongs to Harnoli, District Mianwali but he is temporally living in Naryal along with his family, whereas he stated before the Court that PW-13 Waqar Ali is his neighbor and on 23.10.2013, he was sleeping in his home and about 03:25 am, Rubina bibi knocked at his gate with force and she cried that:-

*"Uncle please come out and bring your car, my sister Nagina has been injured by Muhammad Saeed s/o Muhammad Rafique with a knife."*

Muhammad Akram, on her request, brought out his car and in the meanwhile, Waqar holding her sister Nagina, who was seriously injured, boarded her in taxi and was brought to the hospital. However, the said witness in his testimony stated that:

*"After boarding the taxi Nagina was telling her brother that Muhammad Saeed has stabbed her. She was also reciting 'kalma'."*

This very fact regarding dying declaration of Nagina was even corroborated from the testimony of PW-8 Shujat Bibi, PW-13 Waqar Ali Khan/complainant as well as by PW-10 Muhammad Akram, who has nothing to do with the entire case, except that he provided help to the deceased and PWs to take the injured lady to the hospital in his vehicle. However, during the course of cross-examination, specific objection was raised that, statement of Muhammad Akram was not recorded U/S 161 of Cr.P.C. by police after the occurrence and he

admitted before the Court that he has never been summoned by the police station in this regard, therefore, no further cross-examination was conducted.

22. We have gone through the above admitted position available on record and it has to be seen in the light of law that as to whether the statement under section 161 Cr.P.C. is necessary or not? However, it is admitted position on record that defence has never raised any objection while recording of testimony/evidence of PW-10 Muhammad Akram and if there was no statement under section 161 Cr.P.C. on record, then why the defence has not raised any objection and not recorded their contention at that time? However, the fact is clear that Nagina Bibi was shifted to hospital in injured condition with the help of PW-10 Muhammad Akram. Status of witness whose statement was not recorded U/S 161 Cr.P.C. can be seen in the light of judgment reported as 2016 PCr.LJ 1124 [Pesh] (Wasiullah vs. Ali Mohseen and 2 others) wherein it is held that:

*"The non-availability of statement of a witness who had not recorded its statement could not be considered to be a violation of the provision of section 265(C), Cr.P.C. and likewise the law does not place any embargo on examination of a person during course of trial, either in favour of prosecution or accused, who had not recorded his statement under section 161, Cr.P.C.*

8. *A person though well cited a witness in the FIR and the report under section 173, Cr.P.C. but his statement was not recorded there under section 161, Cr.P.C. could not be equated with a person who was neither cited as a witness nor his statement was recorded during course of investigation.*

9. *Witnesses whose names appear in the list of witnesses, annexed with the report under section 173, Cr.P.C. submitted before the trial court and once the prosecution is allowed to lead its evidence, no special permission is required, for producing each and every witness, thereafter, from the trial court. However, if the prosecution or the court in view of section 265(F)(2), Cr.P.C., desires to produce a person, not already cited as a witness, in calendar of witnesses, then the permission, in this regard from the trial court become necessary.*

10. *The provision contained in sections 265(F)(2) and 540, Cr.P.C., is not applicable to the attending facts and circumstances of the case. The provision contained in section 26(F)(2), Cr.P.C. is in addition to section 265(C)(1), Cr.P.C. which reads as:*

"265(F)(1) If the accuses does not plead guilty or the court in its discretion does not convict him on his plea, the Court shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution."

11. Subsection (1) of section 265-(F), Cr.P.C., as mentioned hereinabove, has made it mandatory upon the court to take all such evidence as may be produced in support of the prosecution and as such, there is no any restriction on the prosecution to produce evidence of its choice or to apply for permission of the court while subsection (2) of section 265(F), Cr.P.C. would be invoked if a person remained acquainted with the facts of the case is desired to be summoned through Courts, who was not produced in the first instance, by the prosecution, under subsection (1) of section 265(F), Cr.P.C., which shall be subject to grant of permission by the Court. In view of subsection (3) of section 265(F), Cr.P.C., the witness mentioned in subsection (2) *ibid* may be refused by the court to summon any such witness, if it is of opinion that such witness is being called for purpose of vexation of delay or defeating the ends of justice. But the court has given no choice to refuse to examine any witness produced by prosecution, in view of subsection (1) of section 265(F), Cr.P.C.

12. The provision contained in section 540, Cr.P.C. is more exhaustive and conferred vast jurisdiction upon the court, even to examine a witness not summoned as a witness in the case or examine any person in attendance if his evidence appears to the court, essential to the just decision of the case, which reads as:

"540.- Power to summon material witness or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it essential to the just decision of the case"

13. In strive of and to arrive at just and fair decision, the trial court has conferred with ample power to examine any person as a witness in the case, irrespective of the fact whether, his statement under section 161, Cr.P.C. was recorded during course of investigation or not."

Similar view has also been taken in 2017 PCr.LJ 294 [Peshawar] "Zeeshan versus Manzoor Aman and another" and PLD 2017 Lahore 228 "Ali Raza versus Additional Sessions Judge, Sheikhpura and 2 others" whereas contrary view was given by Hon'ble Lahore High Court in case reported as 2011 PCr.LJ 552 [Lahore] "Muhammad Idrees versus The State" which categorically refers that any statement of the witness before the Court, whose statement was not recorded

during the investigation is not worth reliance. Similarly, Hon'ble Supreme Court of Pakistan in 2007 SCMR 1631 "Shahbaz Masih versus The State" has not appreciated the evidence of the witness whose statement U/S 161 Cr.P.C. has not been recorded and whose name was not mentioned in the calendar of witnesses, however, the above referred legal proposition give rise to another aspect of the case that as to whether it is mandatory to supply the statement of the witnesses to the accused before framing of the charge wherein the answer is "yes" as referred in section 265-C of Cr.P.C. However at the same time the Criminal Procedure Code, 1890 empowers the Court to summon any person in terms of section 540 Cr.P.C to appear and record his statement in the trial although the said person has not joined any investigation. The powers U/S 540 Cr.P.C. are very wide to recall, re-examine or examine any person if his evidence appears essential for the just decision of the case. With profound respect, having expressed on the point by the Apex Court in Shahbaz Masih's case, the facts and circumstances of the said case are different from instant matter especially witness PW-10 Muhammad Akram who appeared before the Court as witness, the defence has not raised any objection. Even otherwise the name of PW-10 Muhammad Akram was very much reflected in the list of calendar of witnesses referred in report U/S 173 Cr.P.C. which shows that the investigation officer was conscious of the fact that PW-10 is a witness who had helped deceased Nagina Bibi on the request of her family members other PWs i.e. PW-8 Mst. Shujat Bibi (mother), PW-13 Waqar Ali Khan and he transferred the injured Nagina Bibi to hospital, therefore, it can safely be concluded that the defence is very much aware regarding the statement and role of PW-10 from the very inception of the trial. It is settled proposition of law that a witness, whose statement has not been recorded by the investigation officer will not be considered as worthy of credence but similarly at the same time the Court is empowered to record the testimony of any person, whether his statement U/S 161 Cr.P.C. or 164 Cr.P.C was recorded or not.

23. Besides the above referred legal and factual position of statement of PW-10, it has further been observed from the report U/S 173 Cr.P.C. that the statement U/S 161 Cr.P.C. of PW-10 was duly recorded by the I.O and we have requisitioned the police file wherein statement of PW-10 is available, therefore, no contrary view could be made as claimed by the appellant side. However the only question, which is of any importance is regarding the statement given by the witness in Court, especially when PW-10 stated that his statement was never been recorded by I.O. which shows his ignorance of certain Court procedures, even otherwise, the statement was available from first date, i.e. date of incident and part of report U/S 173 Cr.P.C, therefore, the same cannot be discarded, we are of the considered view that case titled 2007 SCMR 1631 "Shahbaz Masih versus The State" is not applicable in this case and the statement of PW-10 is to be considered in totality as admissible in this case.

24. Yasin Ali Khan, Investigation Officer got recorded his statement as PW-11 and stated that he arrested Muhammad Saeed s/o Muhammad Rafique on 06.11.2013 and obtained physical remand on 07.11.2013, whereby during the course of physical remand, Muhammad Saeed (accused), on 08.11.2013, led to the place of recovery i.e. a nursery near Quaid-e-Azam University and the knife (Exh.P1) was recovered in presence of witnesses and recovery memo (Exh.PA) was signed by PW-1 Muhammad Adil (Constable) and PW-9 Sabir Ullah, husband of deceased. The Investigation Officer, on the same day, also arranged PW-3 Muhammad Aamir Shahzad (Draftsman) and visited the place of occurrence where PW-3 drafted the site plan of occurrence (Exh.PC). He also sent the recovered weapon of offence to the Forensic Science Laboratory, Lahore for its chemical analysis and submitted an incomplete report under section 173 Cr.P.C. to the Court on 21.11.2013. He also received the Nikahnama of deceased submitted by Sabir Ullah (husband of deceased) vide memo of possession (Exh.PM) on 03.12.2013 and received eight (08) photographs of deceased (Exh.P7-14) on 05.12.2013 vide recovery memo (Exh.PN). During the course of cross-

examination, PW-11 while answering a question put by defence, he admitted before the Court that:

*"At the time of recovery, I have noticed some spots of blood upon the said knife. I have not mentioned regarding spots on the knife in the recovery memo Exh.PA. I have mentioned the knife "Churri" in recovery memo Exh.PA. It is correct that knife means "Chako" and "Churri" means dagger. In my and presence of other marginal witnesses, a dagger "Churri" was recovered at the instance of accused."*

25. PW-1 Muhammad Adil/Head Constable, P.S. Secretariat, Islamabad put his appearance and stated before the Court that accused disclosed that he had dropped the knife in a garden located near Quaid-e-Azam University, therefore, they had taken the accused to the said place, from where crime weapon, knife, was recovered vide recovery memo (Exh.PA) which was duly signed by him, wherein the description of the weapon read as follows:

*"The handle of which was of black color and made of plastic which was 5 inch long."*

However, during the course of cross-examination, PW-1 stated before the Court that, place of recovery is not a garden as mentioned in the recovery memo and no one is the owner of the same as it is a government property. That place of recovery is an open place and hundreds of people including the students, usually pass through the same on daily basis. However, he admitted before the Court that, weapon of offence is not mentioned as bloodstained in the memo of recovery and even the Investigation Officer had not asked anyone to be a witness in the recovery proceedings. He also admitted before the Court that, he has not mentioned the alleged *Churri* as bloodstained in his statement under section 161 Cr.P.C. hence status of recovery is disbelieved.

26. The prosecution further produced PW-9 Sabir Ullah, the husband of deceased Nagina Bibi, who married with her on 21.09.2013 and he along with his first wife, Rozina, started living with Nagina Bibi deceased at Naryal. He stated before the Court that, he works as a cook with colonel Zafar Iqbal in Jinnah Sports Complex and on the night of occurrence i.e. 23.10.2013, he received a phone call from his first wife Rozina at about 4 am, who narrated the incident to

him that Saeed has injured Nagina with knife, however, after reaching his home, he received a call from Robina Bibi, sister of Waqar Ali (Complainant), who asked him to reach Federal Government Services Hospital (Polyclinic) as Nagina required blood. On arriving to the hospital, he was told by Waqar Ali (complainant) that Saeed (accused) stabbed Nagina who is in Operation Theater and after some time, doctors came out and informed them of her demise. He also stated before the Court that Abdul Ghafoor, Sub-Inspector/Investigation Officer along with other police officials were also present in the hospital and that, after postmortem, doctor handed over him last worn clothes of deceased, i.e. Shalwar colored red (Ex.P2), printed shirt (Ex.P3), black color bra (Ex.P4), one mobile phone (Ex.P5) along with SIM (Ex.P6) and recovery memo (Exh.PH) was prepared and signed by Investigation Officer. PW-9 also identified the dead body of deceased vide identification memo (Exh.P1) and received the dead body while putting his signature on the receipt regarding delivery of dead body. He further stated before the Court that Nagina had once told him that Saeed (accused) was interested to marry her but her parents refused the proposal as he was drug addict and unemployed.

27. PW-9 further stated before the Court that in his presence Muhammad Saeed (accused) on 08.11.2013 disclosed before I.O. that the knife is lying in a tent fixed in a garden of the Quaid-e-Azam University and he can lead the police to the place of recovery. On his disclosure, the knife (Ex.P1) was recovered and recovery memo (Exh.PA) was signed by the witnesses. However, during course of cross-examination, he admitted before the Court that Investigation Officer at the time of recovery, did not ask anybody regarding ownership of the said tent and that the recovered knife can easily be purchased from open market. No material question has been asked from the said witness, however the testimony of Investigation Officer as well as two recovery witnesses, clearly demonstrates:



- (i) that, the recovery was made from an open place where Investigation Officer has not associated anybody from the university or the locality to join the recovery proceedings as required under Sec.103 Cr.P.C.
- (ii) that, it is an admitted position on record that the recovered *Churri* is of common pattern and was lying in an open space, therefore, the recovery has no significance in this case as the place where accused allegedly put the knife is a common thoroughfare.

Keeping in view the aforesaid position, reliance regarding recovery of crime weapon can be placed upon 2017 PCr.LJ 280 [Lah] (Safraz Masih vs. The State) wherein it is held that:

*"According to prosecution version the occurrence had taken place on 20.09.2011 whereas the alleged recovery was effected on 06.10.2011 from open fields of paddy crops, which was accessible to general public, therefore, it straightway hits the authenticity of the reports of offices of Chemical Examiner and Serologist (Exh.PM and Exh.PN). Even otherwise it is cardinal principle of law that the recovery is deemed to be corroborative in nature and it is used for support of direct evidence."*

Hence, the entire recovery is not believable.

28. Lastly, the prosecution has produced PW-12 Abdul Ghafoor, S.I./Investigation Officer, P.S. Secretariat, who stated before the Court that, he was present in P.S. Secretariat on 23.10.2013 and after receiving information about the occurrence, he along with other constables, reached the Federal Government Services Hospital, where in the emergency ward, dead body of Nagina Bibi was lying. He also stated before the Court that Shahid Zaman/ASI and Munir Ahmad/Constable were already present there who handed over to him 'نقشہ معرودہ' and other documents, i.e., application for recording of statement of deceased/injured. He further stated that lady constable inspected the dead body of deceased and prepared the 'فرد صورتحال' (Ex.PF) and he has given an application for postmortem (Ex.PM) to C.M.O. and prepared the identification memo of the dead body (Ex.PI). After the postmortem, he was handed over the last worn clothes of deceased which were taken into possession through recovery memo

(Exh.PH). He also stated before the Court that he received an application for registration of an FIR, whereupon he prepared a complaint and sent it through Munir Ahmad/Constable to police station for lodging of an FIR. He further stated before the Court that he inspected the place of occurrence and taken into possession the bloodstained earth through recovery memo (Exh.PN) and also prepared the scaled site plan (Exh.PP/1-2) consisting of two pages. He has also recorded the supplementary statement of complainant and other witnesses under section 161 Cr.P.C.

29. During the course of cross-examination, he admitted before the Court that he has prepared the injury sheet of deceased Nagina Bibi, however, he changed his stance and admitted that he prepared the site plan only while the injury sheet was prepared by Shahid Zaman/ASI as he reached the hospital at 6:15 am. He further stated that he inspected the crime spot on the same day at 08:30 am and admitted that the courtyard of the house is muddy/kaccha.

30. We have gone through the photographs of place of occurrence as well as of deceased (Exh.P7-14), which clearly shows that it is a small house and the murder of Nagina Bibi was committed in the courtyard as the pictures evidently demonstrate the pool of blood at the place of occurrence. We have also gone through the testimony of PW-3 Aamir Shahzad/Draftsman, who prepared the site plan and stated before the Court that he prepared the scaled site plan (Exh.PC) by using the scale of 16 feet into 1 inch. He admitted before the Court that, the crime spot was situated in a thickly populated area surrounded by residential area, and the same was prepared at the instance of complainant as well as Investigation Officer. However he has not given any indication regarding the courtyard whether the same was cemented or muddy. The (Exh.PC) clearly depicts that the place of occurrence is a small house and the lighting arrangement has properly been mentioned, especially at Point No.5 and No.6, where a light/bulb was referred, however at Point No.7 as well as No.9, where

PW-13 has confirmed that he has seen the accused Saeed while running from the backside and towards the end of the street, refers the lighting bulb.

31. After completion of the prosecution evidence, the accused got recorded his statement under section 342 Cr.P.C. who admitted before the Court that PW-13 Waqar Ali/Complainant is residing in his Mohalla at Village Naryal near Quaid-e-Azam University. However, Question No.6 in his statement was referred to the motive of the entire case as to whether he wanted to marry Nagina deceased or not, but in reply to the said question, he answered that, he never asked for the marriage of Mst. Nagina deceased from his brother or mother. Lastly, he was asked as to why this case was registered against you, whereby in reply to the said question, he stated that the entire case is false, concocted and the FIR has been registered against him after long deliberation and he has been implicated in this case merely on the basis of suspicion, because no motive has been mentioned by the complainant against him in the FIR and the PWs produced against him, are interested witnesses as being brother and mother of the accused.

32. After scrutinizing the entire evidence, we have gone through the judgment rendered by the learned Trial Court and observed that learned Trial Court after considering the entire evidence, believed the recovery, the motive and the eye witness account, resultantly, convicted the appellant and sentenced him to death.

33. From the entire evidence of the prosecution, certain discrepancies have been noted in the instant murder case, which are as under:

- i. The FIR is silent qua the motive part.
- ii. As per the contents of the FIR (Exh.PD), the Waqar Ali/Complainant, has not seen the actual occurrence with his own eyes as his door did not open and the same got opened on second attempt, whereby he has seen his sister Nagina bibi in an injured condition.

- iii. The recovery of *Churri* is from an open place near Quaid-e-Azam University.
- iv. Investigation Officer has never asked any independent person to join the recovery proceedings as required under section 103 Cr.P.C.
- v. The Investigation Officer has not collected any ownership document of the place of recovery.
- vi. The *Churri* is of common pattern and easily available in market and recovery is disbelieved.
- vii. The original complaint (Exh.D/2) provides the police proceedings at 7 am in the morning at Polyclinic hospital dated 23.10.2013 by Abdul Ghafoor SI, PS Secretariat, Islamabad.
- viii. PW-13 has only seen the accused from behind in the street while running.
- ix. The recovered mobile of deceased was not interrogated by the Investigation Officer as to why the same was carried by the deceased at the time of alleged occurrence in the courtyard and in the odd hours of the night.
- x. The Investigation Officer as well as the Doctor Tanvir Afsar Malik, PW-5 neither referred the corresponding cut in the *kameez* of the deceased nor the same was noted by the Trial Court during the course of evidence.
- xi. The inquest report was prepared after the postmortem.
- xii. The alleged crime weapon *Churri* was not recovered in a condition, as referred bloodstained.
- xiii. There is contradiction in the FIR and statements of the complainant made before the Trial Court.

34. The entire evidence and discrepancies referred above clearly demonstrate that the motive referred by PW-8 Mst. Shujaat Bibi (mother) has not been proved independently, although husband of deceased, PW-9 Sabir Ullah stated in his evidence that deceased told him that Muhammad Saeed wanted to marry her but her brother and mother refused the said proposal, however this fact does not

constitute a valid motive in such a manner, especially when it could not be corroborated through independent source that Muhammad Saeed approached Nagina Bibi for the purpose of marriage. The only statement in this regard is of Shujat Bibi, which requires an independent corroboration, failing which, same cannot be of any help to the prosecution case, therefore, the motive has not been proved by the prosecution.

35. The other important element referred in the prosecution evidence is the ocular account, which has been brought on record through statements of PW-8 Shujat Bibi and PW-13 Waqar Ali Khan/Complainant, but fact remains the same that there is inconsistency between the FIR and statement of Waqar Ali Khan/Complainant, as complaint discloses that the mother and sister Robina Bibi, came out after Waqar Ali Khan/Complainant, but as per statement of PW-8 Shujat Bibi, Waqar Ali Khan/Complainant emerged on the scene after the mother, therefore, the inconsistency gives rise to a situation, that the witness Waqar Ali Khan has improved his statement from initial FIR, whereas he has only seen Muhammad Saeed/accused in the street from his back, therefore, his statement to the extent of being *Wajtakar* can be given consideration at this stage. Some minor descriptions have been observed from the statement of PW-13/complainant, even otherwise all PWs (mother, complainant and taxi driver) are admittedly uneducated, who are not aware of technical details of the case and minor contradictions are natural in their evidence, therefore, the same stand ignored. Reliance in this regard is placed upon 2017 SCMR 807 (Ghulam Sabir vs. The State) wherein it is held that:

"دونوں چشم دید گواہان استغاثہ ان پڑھ اور سادہ لوح دیہاتی آدمی تھے لہذا ہدراہ جرح دونوں میں معمولی نوعیت کی اختلاف یا تضاد ہماری نظر میں مقدمہ استغاثہ کو رد کرنے کے لیے کافی نہیں ہے کیونکہ کافی وقت گزرنے کے بعد اس نوع کے گواہان سے معمولی نوعیت کی غلطیاں سرزد ہوتی ہیں جو کہ قدرتی امر ہے۔"

36. The other ocular account given by the mother, PW-8 Mst. Shujaat Bibi has gone un-rebutted when accused himself asked her a question regarding the

alleged occurrence, in response to the said question, she categorically stated in her testimony that:

*"I have seen the accused facing trial while committing the stabbing of my daughter and my son, the complainant, also seen, therefore, we charged him."*

However, the said specific statement in reply to a question is believable to the extent of Shujat Bibi.

37. In view of above evidence, the statement of PW-8 Shujat Bibi is believable, but fact remains the same that learned counsel for accused himself asked a specific question and in response to said question, Shujat Bibi narrated the actual event. From the perusal of record, it appears that Muhammad Saeed/accused was nominated at the very first instance, even the FIR was promptly lodged and it is not believable that someone else has committed the said crime, especially if we see the statement of mother, PW-8 Shujat Bibi and PW-13 Waqar Ali Khan/Complainant, regarding the alleged dying declaration of Nagina Bibi, both witnesses proved to be consistent in this regard that Nagina Bibi time and again stated that Muhammad Saeed stabbed her. However, statement of mother PW-8 Shujat Bibi, PW-13 Waqar Ali Khan/Complainant was further confirmed through independent third witness PW-10 Muhammad Akram/taxi driver, who had brought the injured lady in his taxi to Federal Government Services Hospital (Polyclinic Hospital), the statements of all three above mentioned witnesses with reference to the dying declaration of deceased Nagina Bibi, have to be seen in the light of principles laid down in judgment reported as PLD 2006 SC 255 (Mst. Zahida Bibi vs. The State) wherein it is held that:

*".....that the dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that*

*dying person is not expected to tell 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."*

Similarly, the same conception can also be seen in 2016 SCMR 1233 (Muhammad Ameer and another vs. Riyat Khan and others) wherein it is held that:

*"A dying declaration is an exception to the hearsay rule and, thus, the same is to be scrutinized with due care and caution, particularly in the backdrop of the observations made by different Courts about veracity of a dying declaration in the Province of the Punjab and a reference in this respect may be made to the cases of Bakhshish Singh alias Bakhshi and others v. Emperor (AIR 1925 Lahore 549), Tawaib Khan and another v. The State (PLD 1970 SC 13) and Usman Shah and others v. The State (1969 PCr.LJ 317)."*

Likewise, the status of dying declaration can be observed in PLD 2015 Peshawar 143 (Sher Umar Khan vs. Khan Pur alias Khaney and 2 others) wherein it is held that:

*"7. To meet the argument of the learned counsel for the appellant, the moot point for determination before us would be as to whether the report of the deceased then injured can be termed as a dying declaration? And if so, how much weight can be attached to it because a dying declaration is a question of fact and has to be determined on the facts of each case. To find out truth or falsity of a dying declaration, a case is generally considered in all its physical environments and circumstances. It is necessary to find out how far the evidence or its different parts fit in with the circumstances and possibility that can safely be deduced in a particular case. Therefore, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that such statements are made in the absence of an accused who has no opportunity of testing the veracity of the statement by cross-examination. In examining the intrinsic worth of dying declaration the inherent consistency, genuineness and truth of the statement in the context of surrounding circumstances, the fact that the deceased was not tortured or motivated by hate or other mercenary motives to give an untrue account or substitute or falsely implicate persons in the crime, its credibility according to normal human standards and the absence of any inherent infirmity or weakness therein, all have to be appraised. Similarly, in examining its extrinsic value, an appraisal of surrounding circumstances i.e. that the deceased was in a fit condition to make the statement would also have to be carefully examined.*

*8. Article 46 of the Qanun-e-Shahadat Order, 1984, postulates a mechanism for recording the dying declaration, according to which, dying declaration, whenever possible, preferably be recorded by a Magistrate and if Magistrate is not available or if there is no time to call the Magistrate*

*due to deteriorating condition of the victim, it can be any body e.g. public servant like a Medical Officer or any other person. Likewise, in case of absence of the Magistrate and the Police Officer, such statement should be recorded in presence of two or more reliable disinterested witnesses to the case. If availability of two independent witnesses is not possible then it should be recorded in presence of two or more police officials. No doubt, conviction can be based on dying declaration alone, provided it is true and free from prompting from outside. To accept such statement, without considering the surrounding circumstances of the case, would not be safe administration of justice to convict accused merely on the basis of so called dying declaration."*

38. The above referred discussion clearly proves that the dying declaration of Nagina Bibi with regards to details of injury, name and description of the accused has not been denied rather the entire cumulative fact clearly demonstrates that the last words of deceased are based upon truth and nothing was concealed thereon, whereas the statement which is helpful to the prosecution case is of PW-8 Shujat Bibi, who has seen the actual occurrence with her own eyes. Therefore, the same could only be corroborated through medical evidence of PW-5 Dr. Tanvir Afsar Malik, C.M.O., who at first instance medically examined the Nagina Bibi/deceased as she was brought to hospital while she was alive but in a state of shock and when she was brought before the doctor, who after seeing the injuries, referred that:

*"History of stab wound semipublic region about 6 cm in length more than one finger deep i.e. more than 10 cm deep."*

PW-5 further stated in his statement that patient presented was in state of shock. She was pulse-less and BP-less, this shows that, the patient was alive at that time but she was not in a condition where she could state anything to the doctor, however PW-5 Dr. Tanvir Afsar Malik, CMO, stated in his evidence that the time of death is 5:15 am which occurred in Operation Theater during her treatment. This fact proves that she was brought to the hospital alive and it can safely be concluded that, approximately 2 hours of time was passed from incident till death, therefore, it can firmly be concluded that Nagina Bibi must have stated some facts about the alleged occurrence to her mother and brother in presence of PW-10 Muhammad Akram/Taxi Driver, who are natural witnesses of the alleged



crime, however, mother and brother as having blood relation with deceased, they are termed as interested witnesses, but fact remains the same that they have not given any inimical statement against the accused nor referred any enmity come to pass between them, therefore, their status of being interested witnesses or inimical witnesses has not been proved and for this reason, their statements can be taken as credible as the same were duly corroborated through independent witness PW-10 Muhammad Akram whose testimony has not been cross-examined by the appellant side although he stated before the Court that:

*"....I permanently belongs to Harnoli, District Mianwali but I temporary lives in Naryal alongwith my family. Waqar Ali was my neighbor. On 23.10.2013, I was sleeping in my home when at about 03.35 am, Robina Bibi knocked my gate with force. She cried that uncle please come out and bring your car, my sister Nagina has been injured by Muhammad Saeed s/o Muhammad Rafique with a knife. She cried to take her to hospital. I brought my car out of my home meanwhile Waqar Ali was holding his sister Nagina who was seriously injured. Waqar Ali, his mother Shujat bib and sister Robina bibi boarded in my taxi. Waqar Ali was holding Nagina in his lap on the back seat and his mother and sister were also sitting in the taxi. Nagina's abdomen was bleeding. After boarding the taxi, Nagina was telling her brother that Muhammad Saeed has stabbed her. She was also reciting "kalma". I took them to Poly clinic hospital emergency. Doctor took her to Operation Theater and informed us that blood is required. Other relatives of Waqar had also reached hospital. I offered Fajar prayer and after short while doctor informed us that Nagina had died. I knew Nagina, as she was my neighbor and very noble lady. She used to come to our home. She had told my wife that she offers "Tahajad: prayers regularly. Accused Saeed has killed Nagina brutally, therefore, severe punishment may be awarded to him."*

Similarly, investigation officer Abdul Ghafoor, SI, PW-12 as well as first investigation officer PW-11 Yasin Ali Khan, SI, have not been confronted with any question by the defence regarding the presence or non-presence of PW-10 Muhammad Akram at the relevant time of the incident. Even otherwise, the defense has not cross-examined PW-10 except a single question that the said PW has never recorded his statement before the police after the occurrence, therefore, the above referred statement is un-rebutted and same has been acknowledged in totality. It is settled principles of law that, the facts which have not been cross-examined, shall be considered to have been admitted.

39. Lastly, the recovery of crime weapon effected by the police during the course of interrogation, is not believable, as the *Churri* was recovered from an open place near Quaid-e-Azam University and the same is of common pattern and it is not conceivable to a prudent mind that *Churri* remained intact there from the date of occurrence till the date of recovery, even otherwise, the Investigation Officer has not called any independent witness in terms of Sec.103 Cr.P.C. to join the recovery proceedings, therefore, the entire recovery is disbelieved as having no faith in it.

40. Besides the abovementioned testimony, it has been observed from the record that, prosecution has not put any effort to confront the last worn clothes of deceased Nagina Bibi to the accused, especially when the Doctor and the I.O. have not stated even a single word regarding the corresponding cut on the front side of the shirt of Nagina Bibi, therefore, this Court while re-hearing the case summoned the I.O. as well as SHO to produce the last worn clothes of deceased Nagina Bibi, whereby on 14.06.2017, the I.O. alongwith the SHO produced the last worn clothes of deceased Nagina Bibi in a sealed parcel received from the chemical examination laboratory. The same was opened in presence of counsel for the parties and with their able assistance it has been seen that the shirt of Nagina Bibi, which was blood soaked, clearly gives a cut mark on the lower front region, the same was already encircled, the said cut is similar to the corresponding cut available on the body of the deceased as referred by the Doctors, i.e. PW-5 & PW-6 and it can safely be concluded that the deceased was injured in the said shirt. Learned counsel for appellant, Mr. Sabah Mohy-ud-Din Khan, Advocate has also drawn the attention of this Court, that Shalwar of the deceased contains four holes but these holes are not cut marks as like available in shirt, therefore, we are convinced that four different holes in Shalwar in lower region have no nexus with the corresponding injury rather the same cannot be considered of any help to the defence. The last worn clothes have been returned to the investigating agency after examination on the same date.

41. In view of above, we have minutely considered the statement of Dr. Tanvir Afsar Malik, CMO, PW-5 where he stated that *"there was a deep stab wound, massive, pelure hemdone and right vessels injured and bladder injured"* and the report provided in external appearance where Dr. Sabina Akhter PW-6 has provided the description of injuries with the following words:-

*"there is sharp edge stab wound on the supra pubic region area"*

Such medical evidence has rightly been corroborated with last worn shirt of the deceased and there is no discrepancy in the said part of evidence as the shirt has played a role of corroborative evidence.

42. The above referred proposition gives rise to a situation that the best available evidence in this case is the statement of PW-8 Mst. Shujat Bibi mother of deceased whose testimony remained un-rebutted as she was specifically asked a question by the defence side, whereby she stated before the Court that, *"our neighbor Muhammad Saeed s/o Muhammad Rafique, resident of Laryal, Islamabad was hitting my daughter Nagina with a knife."* which confirms that the statement of the said witness remain un-rebutted. Even otherwise, the fact of dying declaration further strengthen the prosecution case as Nagina Bibi remained alive for a considerable period till reaching the hospital although her statement could not be recorded by the Doctor. It is settled proposition of law that substitution of single accused is a rare phenomena when the FIR has promptly been lodged and the statement of PW-13 Waqar Ali Khan has been considered to the extent that he had seen the accused from back while running from the place of scene in the street light, therefore, it can safely be concluded that accused/appellant is the one who committed the alleged crime.

43. The prosecution has successfully proved the case beyond any shadow of doubt and in order to achieve the same, the testimony of PW-8 Mst. Shujat Bibi, PW-13 Waqar Ali Khan and PW-10 Muhammad Akram remained un-rebutted.

44. As a natural corollary of above findings, we are of the considered view that, accused has rightly been convicted vide impugned judgment dated

59860

05.09.2015 passed by learned Additional Sessions Judge-VII (West) Islamabad, however, the recovery of *Churri*, which has been disbelieved by this Court and due to absence of motive as well as the single blow attributed to accused/appellant, question of mitigation comes on record, whereas it is settled principles of law that where motive is not alleged or is not proved, normally the death sentence is converted into imprisonment for life. In this regard reliance is placed upon PLJ 2014 SC 174 (Zeeshan alias Shani vs. The State and another), 2012 SCMR 419 (Muhammad Ashraf vs. The State), 2012 SCMR 1936 (Hasil Khan vs. The State), 2003 SCMR 98 (Jehanzeb vs. The State), 1996 SCMR 1747 (Muhammad Ashraf Khan Tareen vs. The State) and PLD 1990 SC 820 (Iftikhar Ahmad vs. The State). Therefore, Murder Reference No.14/2015 (The State vs. Muhammad Saeed) is answered in NEGATIVE and death sentence is NOT CONFIRMED. This Court converts the death sentence awarded to the accused/appellant into life imprisonment under section 302(b)PPC, with the benefit of section 382-B Cr.P.C., whereas Criminal Appeal No.154/2015 (Muhammad Saeed vs. The State) and Jail Appeal No.153/2015 (Muhammad Saeed vs. The State) are partly allowed, while Criminal Revision No.23/2016 (Waqar Ali vs. Muhammad Saeed Khan and another) is allowed, and the amount of compensation is enhanced to the tune of Rs.10,00,000/- from Rs.100,000/-, failing which the appellant/accused shall further undergo six (06) months simple imprisonment.

(ATHAR MINALLAH)  
JUDGE

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on 19<sup>th</sup> June 2017

JUDGE

JUDGE

Approved for reporting.