

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, **JUDICIAL DEPARTMENT**

Crl. Appeal No.68/2016

(Muhammad Irfan vs. The State & another)

&

Murder Reference No.3/2016

(The State vs. Muhammad Irfan)

Appellant by: Syed Khawar Ameer Bukhari, Advocate.

State by: Mr. Sadaqat Ali Jahangir, State Counsel.
G.M. Naqvi, S.I., P.S. Shahzad Town,
Islamabad.

Date of Hearing: 18.10.2018.

MOHSIN AKHTAR KAYANI, J: Through this common judgment, we

intend to decide the captioned criminal appeal as well as the murder reference.

2. Through the captioned criminal appeal the appellant has assailed the judgment dated 07.03.2016, passed by learned Additional Sessions Judge (East) Islamabad, whereby he was convicted in case FIR No.272/2011, dated 19.05.2011, U/S 302/324/336/337-F(ii) PPC, P.S. Shahzad Town, Islamabad and sentenced to death and directed to pay Rs.500,000/- as compensation to the legal heirs of the deceased U/S 544-A, Cr.P.C.

3. On the other hand, the learned Trial Court sent the captioned murder reference under Section 374 Cr.P.C. for the confirmation or otherwise of death sentence awarded to the appellant.

4. Brief facts referred in the complaint Exh.PD are that Nagina Bibi, complainant of this case, lodged the complaint in the following manner:

"بیان کیا کہ میری شادی عرصہ قریب ایک سال قبل مسمی عرفان ولد محمد اجمل بٹ سکھ مرضی پورہ، فیصل آباد، حال کچی آبادی PIA چوک چک شہزاد، اسلام آباد سے ہوئی۔ عرفان پہلے محنت مزدوری کرتا تھا لیکن اجکل فارغ اور بیکار ہونے کے ساتھ ساتھ نشہ کا بھی عادی ہے۔ جس وجہ سے مجھے اکثر مار پیٹ کرتا رہتا۔ جسکی مار پیٹ سے بچ آکر میں نے مذکورہ سے طلاق لینے کی خاطر لہذا الٹ

میں خلع کا دعویٰ دائر کر رکھا ہے۔ عرفان مجھے دعویٰ واپس لینے کیلئے دھمکیاں دیتا رہتا تھا۔ میں اکرم صاحب کے گھر پر کام کرتی اور رشتی بھی ادھر ہی ہوں۔ آج مورخہ 19/5/11 بوقت قریب 10/30 بجے دن میں اپنے کام کیلئے اکرم صاحب کے گھر سے دوسرے گھروں میں کام کے عرض سے جارہے تھی مسماۃ شہین زوجہ خالد بھی میرے ساتھ تھی جب میں گلی نمبر 15، شہزاد ٹاؤن میں پہنچی تو عرفان وہاں پہلے سے موجود تھا اس نے مجھے بازو سے پکڑ کر جان سے مارنے کی خاطر تیزاب کی بوتل جو اسکے پاس تھی میرے سر پر تیزاب انڈیل دیا۔ جس سے میرا جسم تقریباً جل گیا اور کپڑے بھی جھلس گئے۔ میرے شور وادب پر عرفان وہاں سے بھاگ گیا مجھے سارہ اور اکرم صاحب کی بیوی اسپتال لیکر آئے۔ عرفان نے مجھے جان سے مارنے کی خاطر میرے سر پر تیزاب ڈال کر سخت زیادتی کی ہے۔ مذکورہ کے خلاف دعویٰ ارحوں قانونی کارروائی کی جائے۔"

The above referred complaint was converted into FIR No.272/2011, dated 19.05.2011, U/S 302/324/336/337-F(ii) PPC, P.S. Shahzad Town, Islamabad, referred as Exh.PF. After the alleged incident, the complainant was initially treated in hospital for almost a month and the appellant was arrested during the investigation, however the complainant died after a month of the alleged incident in Nishtar Hospital, Multan, and resultantly, offence U/S 302 PPC was added in the said case and challan U/S 173 Cr.P.C. was submitted in the Court. Learned Trial Court conducted trial, passed impugned judgment, whereby the appellant has been awarded death sentence, hence, criminal appeal and murder reference.

5. Learned counsel for appellant contended that the appellant is innocent and there is no direct evidence to connect the appellant with commission of the offence; that there are number of contradictions amongst the statements of witnesses regarding the time of alleged incident as well as shifting of the deceased to Polyclinic Hospital and PIMS Hospital, even police did not reach to the hospital and as such the statement (Exh.PD) allegedly got recorded by the complainant has no substantial value; that opinion of doctor regarding fitness of complainant was not recorded in order to justify the fact that the complainant was able to get record her statement and fully conscious of the facts recorded by her; that the Magistrate, who recorded statement of the

complainant/Exh.P.F in hospital was not produced in the trial and even he was declared proclaimed offender by the Court, therefore, the statement of complainant has no legal worth for the purpose of conviction and the alleged witness of occurrence PW-1 Muhammad Tanveer, brother-in-law of the victim did not see the occurrence with his own eyes and the motive has not been proved, whereas the Investigation Officer did not record statements of the witnesses directly U/S 161 Cr.P.C. rather the same were taken with delay, have no legal value to be considered for the purpose of capital punishment.

6. Conversely, learned State Counsel contended that the complainant/deceased directly nominated the appellant in the complaint and remained consistent till her death i.e. after one month of the alleged occurrence; that the Magistrate recorded statement of victim/complainant in hospital and the doctors have verified the stance of the prosecution; that the Investigation Officer has also confirmed stance of the prosecution that complainant herself got recorded her statement against the appellant attributing him specific role that he had thrown acid upon her in order to take revenge; that the witnesses of last seen evidence have fully corroborated the entire incident and even the two persons i.e. PW-8/Farzana Yasmin and PW-9/Muhammad Akram, who had taken the deceased to hospital, fully corroborated each and every portion of the prosecution evidence, who have no ill will or animosity against the appellant, therefore, their evidence could not be discarded; that statement U/S 164 Cr.P.C. recorded by the Magistrate has been identified through the colleague of Magistrate i.e. Ms. Lubna Riaz, Director (AES), who appeared before the Court as PW-14 and confirmed the statement for the reason that Magistrate, Imran Ali Sultan was out of country on a study leave and as such the requirement to prove his statement through secondary mode has been fulfilled.

7. We have heard the arguments and gone through the record.

8. From perusal of the record, it has been observed that the complainant Nagina Bibi, got lodged complaint/Exh.PD with the allegations that on 19.05.2011, at about 10:30 a.m., after finishing her routine work at the residence of one Akram, she was on her way to other residence along with one Mst. Shaheen, wife of Khalid and when she reached in Street No.15, Shahzad Town, Islamabad, she found the appellant already present there, who caught hold of the complainant from her arm and pour the bottle of acid on her head, as a result whereof, her entire body and clothes burnt and on hue and cry of the complainant, the appellant fled away from the scene. The complainant Mst. Nagina Bibi was taken to hospital by Sarah and wife of Akram. On 19.05.2011, at about 1 p.m., PW-7/ Abdul Sattar Shah, S.I., Police Station Shahzad Town, Islamabad recorded oral statement of complainant in the Burn Centre, PIMS Hospital and secured thumb mark of the complainant on it as token of its correctness. The Investigation Officer also requested the Magistrate for recording statement of Mst. Nagina Bibi, whereupon the then Assistant Commissioner/Magistrate Imran Ali Sultan recorded statement (Exh.PF) of complainant on 20.05.2011. However, Mst. Nagina Bibi/complainant was taken by her brother from the PIMS Hospital to Nishtar Hospital, Multan on 23.06.2011, where she succumbed to injuries.

9. The prosecution in order to prove the case against the appellant produced 14 witnesses including three doctors, who had treated Mst. Nagina Bibi/deceased during the period starting from alleged date of occurrence till her death.

10. The prosecution produced Dr. Tanveer Afsar Malik as PW-5, who treated the deceased at first instance in the Polyclinic Hospital. P.W.5 recorded his examination in chief in the following manner:-

“ Stated that on 19.5.2011 at about 1p.m I examined Mst. Nagina w/o Irfan aged 35 brought by Sohaib constable, PS Shahzad Town. The patient with history of chemical burns (drain opening solution) alleged to be thrown

by the husband according to patient, two hours back. Complains of intensive burn/unable to turn her head.

On Examination

Extensive chemical burns involving face, both arms, all of back, upper chest and part of extending upto the buttocks and natal cleft.

Both ears were involved also the scalp was involved. Approx more than 29% of the body surface area involved.

Advice.

Referred to specialize burns carrier immediately PIMS Hospital. Medico Legal department given by Dr. Farrukh Kamal Dy: Director PIMS.

Extensive burns about 40% involving face, both arms, aprt of abdomen, part of both legs, posteriorly upto buttocks. Patient was still admitted in Burn Centre PIMS and was in critical condition in ICU.

Kind of weapon used. Chemical Burn.

Nature of Injury. 336,337F(ii). MLR Ex-PA was verified and signed by me."

During the course of cross-examination, PW-5/Dr. Tanveer Afsar Malik confirmed that the patient was brought by Shoaib/Constable and on examination of the patient, she was referred to PIMS Hospital after half an hour and no further proceedings except MLR was conducted by him.

11. The prosecution produced Dr. Salman Zaib as PW-11, who stated that on 21.05.2011, he was posted at Burn Centre PIMS Hospital, Islamabad and on the same day Mst. Nagina Bibi/deceased was brought at about 11:25 a.m., who was 40% acid burn on face, scalp, neck, front of chest, back and both upper limbs and she was in a critical condition, however on request of her brother/Muhammad Arif, she was discharged on 20.06.2011 at about 09:57 a.m. vide discharge report referred as Exh.DM.

12. During the course of cross-examination, PW-11 Dr. Salman Zaib acknowledged that the treatment provided at the Burn Centre PIMS Hospital, Islamabad is the best in Pakistan and Mst. Nagina Bibi/deceased was discharged on the personal request of patient's brother Muhammad Arif who took the responsibility for any consequence.

13. The prosecution produced Dr. Shahzad Abdullah Muhammad Khuzaemah, Medical Officer, Children Hospital, Multan as PW-12, who stated that on 23.06.2011, he was posted as Medical Officer in Ward-5 in Nishtar Hospital, Multan, where Mst. Nagina Bibi/deceased, aged about 30 years was admitted on 21.06.2011 due to acid burn, which was assessed to be more than 29% of the total body surface area. He further stated that patient was in septicemia and critical condition, and undergone sudden cardio pulmonary arrest due to Multiple Organ System Failure (MOSF), for which she was resuscitated but she could not recover and died. After death of the patient, PW-12/Dr. Shahzad Abdullah Muhammad Khuzaemah handed over the dead body to attendant and issued death certificate/Exh.PG to them, where-after the dead body was handed over to the legal heirs vide receipt/Exh.PH.

14. During the course of cross-examination, PW-12 acknowledged that special facilities for burn patients were not available in our ward and Burn Centre of PIMS Hospital, Islamabad has the latest facilities.

15. The prosecution story is based upon the ocular account given by PW-1/Muhammad Tanveer, brother-in-law of Mst. Nagina Bibi/deceased, who stated that on 19.05.2011, he was going to Shahzad Town market, when he heard hue and cry in Street No.15, where he saw that Muhammad Irfan/appellant was running after throwing acid on Mst. Nagina Bibi/deceased, whom he tried to chase but the accused fled away from the scene, where-after he returned to Mst. Nagina Bibi/deceased, who was crying and he asked her that where she would want to go and on the reply of Mst. Nagina Bibi/deceased, he took her to the house of Sheikh Muhammad Akram and accompanied her to the hospital along with Sheikh Muhammad

Akram. He also confirmed that Mst. Nagina Bibi/deceased died in Nishtar Hospital, Multan on 23.06.2011 due to those injuries.

16. During the course of cross-examination, he acknowledged that:

"When I reached at the alleged place of occurrence nobody was present there except victim. No other person came at the spot. I remained at alleged place of occurrence for about 4/5 minutes with alleged victim. I did not chase the alleged accused but after shifting Nagina to house of Akram tried to chase the accused."

17. The prosecution produced Muhammad Arif/brother of Mst. Nagina Bibi/deceased as PW-2, who made request vide Exh.DA for discharge of Mst. Nagina Bibi/deceased from Burn Centre PIMS Hospital, Islamabad at his own risk and cost, and admitted her in Nishtar Hospital, Multan.

18. The prosecution produced Farzana Yasmin as PW-8, who stated that on 19.05.2011 at about 11 a.m., she was present in her house and Mst. Nagina Bibi/deceased went out from her house to another house for doing work. She stated that Mst. Nagina Bibi/deceased was her servant and when Mst. Nagina Bibi/deceased reached at Street No.15, her husband threw acid on her, where-after she was taken back to the house of PW-8/Farzana Yasmin in a critical condition and her dress was burnt due to acid. PW-8/Farzana Yasmin further stated that she changed clothes of Mst. Nagina Bibi/deceased and led her to PIMS Hospital and during this period she informed her husband/Muhammad Akram PW-9 on mobile. She further stated that the doctors referred Mst. Nagina Bibi/deceased to PIMS Hospital and she along with her husband took her to PIMS Hospital, where she remained admitted and doctors told them that the victim is in critical condition and there are less chances of her survival. She further stated that Mst. Nagina Bibi/deceased was taken to Nishtar Hospital, Multan by her legal heirs due to huge expenses and then she heard the news of her death.

19. During the course of cross-examination, PW-8/Farzana Yasmin acknowledged that on the day of alleged occurrence only she and her other maid Saabran were present at home and when she opened the main gate, the alleged victim and Saabran were boarded in taxi and the victim was brought by Saabran. After changing the clothes of Mst. Nagina Bibi/deceased, they reached to the hospital at 11 a.m. and they remained in the Polyclinic Hospital for about 20 minutes, where-after victim was referred to PIMS Hospital and they reached there at 11:30 a.m. approximately. She further acknowledged that the police did not arrive in her presence and she along with her husband remained in the PIMS Hospital till 5:00 p.m., whereas the legal heirs of Mst. Nagina Bibi/deceased i.e. mother, brother, and sister arrived the next day. PW-8/Farzana Yasmin further acknowledged that she neither visited the police station nor the police recorded her statement.

20. The prosecution produced Muhammad Akram as PW-9, who stated that on 19.05.2011, at about 11 a.m., he was on his duty in the National Bank of Pakistan, Melody Branch, when he received a call from his wife that Irfan, who is the husband of their maid Mst. Nagina Bibi/deceased has thrown acid on Mst. Nagina Bibi/deceased in Street No.15, Shahzad Town and she is in critical condition and on his advice, his wife took Mst. Nagina Bibi/deceased to Polyclinic Hospital, where-after he also reached there and saw Mst. Nagina Bibi/deceased in a critical condition. After the first aid, the Polyclinic Hospital staff referred the victim to PIMS Hospital, whereupon they took Mst. Nagina Bibi/deceased to PIMS Hospital, where she remained for few days and doctors of PIMS Hospital also told that victim is in critical condition and there are lesser chances of her survival. He further stated that Mst. Nagina Bibi/deceased was taken to Nishtar Hospital, Multan by her relatives, where-after he heard the news of her death.

21. During the course of cross-examination, PW-9/Muhammad Akram acknowledged that he reached the hospital at about 11/11:30 a.m. and victim was brought to the hospital by his wife along with their servant in a taxi and at about 11:30 a.m. victim was referred to Burn Centre PIMS Hospital and the police came to PIMS Hospital at about 4/4:30 p.m. He also acknowledged that he and his wife along with their maid Saabran for the first time got recorded their statements U/S 161 Cr.P.C. vide Exh.DC, Exh.DE and Exh.DF, and the same were recorded by the Investigation Officer, when he visited his home. He further acknowledged that his statement (Exh.DC) bears date as 24.05.2011, statement (Exh.DE) bears the dates as 25.05.2011 and 25.11.2011, Exh.DF bears the dates as 25.05.2011 and 25.11.2011. PW-9 Muhammad Akram further confirmed that Abdul Ghaffar/ASI along with constable reached at the PIMS Hospital at about 4:30 p.m., who recorded the statement of victim.

22. The prosecution produced Ms. Lubna Riaz, Director (AES), the then Additional Commissioner Sub-Division Police Station, Shalimar, Islamabad as PW-14, who verified dying declaration of Mst. Nagina Bibi/deceased Exh.PF, which was recorded by Imran Ali Sultan, the then Sub-Divisional Magistrate, Industrial Area, Islamabad in this case. She stated that she is acquainted with the signature of Imran Ali Sultan, who has proceeded to Japan in connection with a post graduate 18 months degree course.

23. During the course of cross-examination, she acknowledged that original dying declaration recorded by Imran Ali Sultan/Magistrate has not been produced before the Court today, however she explained that due to shifting of District Administration from Sector F-8 to Sector G-11/4, Islamabad, the original statement is not available. She further acknowledged that she remained associated with Imran Ali Sultan/ Assistant Commissioner during her posting from 2011 to 2014, however she has not brought any

document to prove this fact. She further acknowledged that she also recorded various statements U/S 164 Cr.P.C. and whenever Assistant Commissioner or Magistrate records any such statement, the original in sealed manner is sent to Sessions Court concerned. She also acknowledged that signature Exh.PF/1 on Exh.PF and other signatures are different.

24. The prosecution produced Abdul Sattar Shah/Inspector as PW-7, who stated that on 19.05.2011, he was posted as Sub Inspector in P.S. Shahzad Town and at about 1.30 p.m., he received a wireless information regarding throwing of acid on a woman, whereupon he reached to Polyclinic Hospital and prepared injury statement (Exh.PC) of the victim, who was in critical condition and shifted to PIMS Hospital on the recommendations of the doctors. He recorded oral statement of Mst. Nagina Bibi/deceased (Exh.PD), which bears his signature and thumb impression of the victim, which was sent to Police Station through Ahmad/constable. He further stated that he went to the place of occurrence and recorded statements U/S 161 Cr.P.C. of the witnesses and prepared rough site plan Exh.PE. He further stated that he had given an application to Assistant Commissioner for recording statement of

Mst. Nagina Bibi/deceased, which was got recorded by the victim and he handed over the investigation to the next Investigation Officer after the transfer of the investigation.

25. During the course of cross-examination, PW-7 Abdul Sattar Shah/Inspector acknowledged that he along with Abdul Ghaffar/Constable, Najiba/Lady Constable, and Ahmad/Constable went to Polyclinic Hospital at about 1 p.m. and prepared the injury statement of deceased. He acknowledged that Exh.DB is outdoor ticket issued by PIMS Hospital prior to admission of deceased in which name of patient is mentioned as Muhammad Irfan s/o Muhammad Ali, the date of admission of patient is mentioned as

22.05.2011 and the time is mentioned as at about 7:21 pm. He further acknowledged that he recorded statements of PWs Muhammad Akram, Farzana Yasmin, Sabraan Bibi and Tanvir U/S 161 Cr.P.C. on 19/20.05.2011 and these statements were given to him in written form, referred as Exh.DC, Exh.DE, Exh.DF and Exh.DG and the dates mentioned thereon are 24.05.2011, 25.11.2011, 25.11.2011, 22.05.2011, respectively. PW-7 Abdul Sattar Shah/Inspector further acknowledged that he did not submit any application to doctor for recording statement of deceased for the reason that she was in senses and she got recorded her statement. He also acknowledged that doctor did not issue any written permission/fitness certificate for her statement and at the time of recording of statement of victim, Abdul Ghaffar/ASI, Najiba/constable, Sohail Ahmad/constable and medical staff were present there. He also stated that he did not remember the date and name of the Magistrate, to whom he submitted application for recording statement of deceased. He also acknowledged that he did not mention that on whose pointation site plan has been prepared and even no witness of the alleged occurrence has been shown in the site plan.

26. The prosecution produced Muhammad Ashraf/Head Constable as PW-3, who stated that on 31.05.2011, he was posted in P.S. Shahzad Town, Islamabad and he joined the investigation of this case with Munir Hussain/SI and during the course of investigation, Muhammad Irfan/appellant disclosed that he can get recovered the acid bottle, through which he poured acid on Mst. Nagina Bibi/deceased. After such disclosure, the accused Irfan took him and Munir Hussain/SI to the place of recovery near jungle area adjacent to Shahzad Town, from where the appellant Irfan got recovered a white colour can/Exh.P1 from nearby a bush, which was 50/60 yards from the road and handed over the same to Munir Hussain/S.I, which was taken into possession vide recovery memo/Exh.PW3/A.

27

27. During the course of cross-examination, PW-3 Muhammad Ashraf acknowledged that place of recovery is adjacent to Kachi Abadi and it was day time and residents of the locality were passing by, but no private witness was associated in the recovery proceedings.

28. The prosecution produced Najiba Khanum/Head Constable as PW-4, who stated that on 19.05.2011, she was posted in P.S. Shahzad Town, Islamabad and she went to Polyclinic Hospital along with Abdul Ghaffar/ASI and constable and after knowing that deceased was shifted to PIMS Hospital, she visited PIMS Hospital, where the Investigation Officer took information from doctor and one Akram/Bank Manager and recorded the statement of victim.

29. During the course of cross-examination, PW-4 Najiba Khanum/HC acknowledged that she reached at PIMS Hospital at about 12:15 p.m. and victim's statement was recorded around 12:30 p.m. and I.O neither recorded statement of any person in her presence nor her statement was recorded U/S 161 Cr.P.C.

30. The prosecution produced Malik Amir Shahzad/Draftsman as PW-6, who prepared the scaled site plan/Exh.PB under the instructions of Munir Hussain/SI on 29.06.2011.

31. The prosecution produced Investigation Officer of this case, Munir Jafri/SI as PW-13, who stated that on 21.05.2011, he was posted in P.S. Shahzad Town and investigation of this case was entrusted to him and he formally arrested appellant on 22.05.2011 and on his disclosure on 31.05.2011, a white color drum/can was recovered vide recovery memo Exh.PW3/A, which was used for bringing the acid. He prepared rough site plan of place of recovery and recorded statements of the PWs. He further stated that he obtained medical report/Exh.PA from Polyclinic Hospital of Mst. Nagina Bibi/deceased, recorded statement of Dr. Tanvir Ahmad U/S 161 Cr.P.C.,

who also handed over the clothes of Mst. Nagina Bibi/deceased to him i.e. Shalwar P-2, Kameez P-3, and Dopata P-4, which were taken into possession vide recovery memo/Exh.PW13/B. He further stated that he added offences U/S 336 and 337-F(ii), recorded statements of the witnesses and submitted his final report U/S 173 Cr.P.C. on 20.06.2011. He further stated that he visited the place of occurrence along with a draftsman, who prepared the site plan/Exh.PB dated 29.06.2011 and he recorded the statement of Dr. Shahzad Abdullah U/S 161 Cr.P.C., who presented receipt/Exh.PG and report/Exh.PH of Nishtar Hospital, Multan to prove that Mst. Nagina Bibi/deceased remained admitted in Nishtar Hospital, Multan in serious condition and who died subsequently on 23.06.2011, where-after he added Section 302 PPC and prepared the supplementary challan against the accused.

32. During the course of cross-examination, PW-13 Munir Jafri/S.I. acknowledged that he went to place of recovery along with the accused on a private vehicle and acknowledged that the alleged place of recovery was surrounded by Kachi Abadi and people used to pass by the same, however he did not associate any private person in recovery proceedings. He also acknowledged that he did not record statement of Moharrar Malkhana, who did not seal the recovered drum/can, which was allegedly used for commission of offence and the same was neither sent to chemical examination as it was empty nor he handed over the last worn clothes of deceased to Moharrar Malkhana.

33. It is pertinent to mention here that during trial, learned Additional Sessions Judge inadvertently exhibited two documents i.e. statement of deceased Mst. Nagina Bibi and the FIR as Exh.P.F.

34. From the above referred evidence following facts have been noted:-

- i. Complaint (Exh.PD) and FIR No. 272 dated 19.05.2011, U/S 302/324/336/337-F(II) PPC, P.S. Shahzad Town, Islamabad

(Exh.PF) was lodged on the statement of Mst. Nagina Bibi/deceased.

- ii. On 19.05.2011, at about 1.30 a.m., Muhammad Irfan/appellant allegedly injured Mst. Nagina Bibi/deceased in Street No.15 by pouring acid on her, whereby she received acid burn injuries.
- iii. PW-8/Farzana Yasmin took Mst. Nagina Bibi/deceased to Polyclinic Hospital and later on to PIMS Hospital.
- iv. At the time of incident Mst. Nagina Bibi/deceased was in the company of one Shaheen, wife of Khalid but she was not produced in the Court.
- v. Mst. Nagina Bibi/deceased remained in PIMS Hospital from 21.05.2011 to 20.06.2011 as is confirmed by the discharge report Exh.DA.
- vi. Mst. Nagina Bibi/deceased received acid burn injuries on face, scalp, neck, front of chest, bac, and both upper limbs, which is about 40% of body surface area.
- vii. On 20.06.2011, Mst. Nagina Bibi/deceased was taken to Nishtar Hospital, Multan by her brother/PW-2 Muhammad Arif at his own risk and cost, where she died on 23.06.2011 as per death certificate Exh.PG.
- viii. PW-5/Dr. Tanvir Afsar Malik of Polyclinic Hospital treated Mst. Nagina Bibi/deceased on 19.05.2011, at about 1 p.m., who stated that victim has suffered extensive chemical burns involving face, both arms, entire back, upper chest, and part of extending up to buttocks, which is more than 29% of total body surface area.
- ix. PW-11 Dr. Salman Zaib treated Mst. Nagina Bibi/deceased in PIMS Hospital on 21.05.2011 till her discharge on 20.06.2011.

- x. Imran Ali Sultan, Assistant Commissioner/Magistrate recorded statement of Mst. Nagina Bibi/deceased considered to be dying declaration Exh.PF on 20.05.2011 but he has not appeared before the learned Trial Court to confirm that he recorded statement of Mst. Nagina Bibi/deceased.
- xi. PW-14/Ms. Lubna Riaz, Director (AES) verified the handwriting and signature of Ali Imran/Magistrate being her colleague for three years from 2011 to 2014.
- xii. The original statement (dying declaration) of Mst. Nagina Bibi/deceased recorded by Imran Ali Sultan/Magistrate has not been produced in the Court and only a photocopy has been exhibited in the statement of PW-14/Ms. Lubna Riaz.
- xiii. Abdul Sattar Shah/Inspector PW-7 initially recorded the complaint Exh.PD on the oral statement of Mst. Nagina Bibi/deceased in Burn Centre PIMS Hospital without any fitness certificate from the concerned doctor.
- xiv. PW-1/Muhammad Tanvir, brother-in-law of Mst. Nagina Bibi/deceased was produced in the Court as witness of last seen evidence but during the course of cross-examination, he acknowledged that he did not see Muhammad Irfan/appellant pouring acid on Mst. Nagina Bibi/deceased.
- xv. PW-1/Muhammad Tanvir did not accompany Mst. Nagina Bibi/deceased to the hospital despite his relationship and his presence was not confirmed through statement of PW-8 Farzana Yasmin.
- xvi. The prosecution has not produced evidence of motive, although Mst. Nagina Bibi/deceased claimed that she was in litigation with her husband (Muhammad Irfan/appellant) but Talaq/Khullah proceedings have neither been referred in any other evidence nor collected by the Investigation Officer.

- xvii. Statements of witnesses i.e. Muhammad Akram dated 24.05.2011 (Exh.DC), Farzana Yasmin dated 25.11.2011 (Exh.DG), Sabraan Bibi dated 25.11.2011 (Exh.DF), and Muhammad Tanvir dated 22.11.2011 (Exh.DG) were taken by the Investigation Officer in written form, who converted the same into statement U/S 161 Cr.P.C.
- xviii. Statements of witnesses U/S 161, Cr.P.C were not recorded by the Investigation Officer on the day of occurrence but the same were received in a written form in Police Station.
- xix. PW-7 Investigation Office never made any request to the doctor for recording of statement of Mst. Nagina Bibi/deceased.
- xx. The Investigation Officer PW-13 Munir Jaferi/S.I. arrested Muhammad Irfan/appellant on 22.05.2011 and on disclosure of Muhammad Irfan/appellant, he recovered an empty can/drum (Exh.P1) said to containing acid and the same was sent to chemical examiner for the purpose of examination.
- xxi. The recovery of can/drum was effected from an open place near Kachi Abadi but the same has not been justified through witnesses of the locality in terms of Section 103 Cr.P.C.
- xxii. The last worn clothes of Mst. Nagina Bibi/deceased, which got burn in the incident were neither taken into possession nor sent to the examiner for chemical examination.
- xxiii. The learned Trial Court called four different officials of ICT Administration i.e. Nouman Yousaf, Waqas Bashir, Malik Farrukh Nadeem, and Kamran Cheema, the then Assistant Commissioners, but they did not confirm statement recorded by the Imran Ali Sultan/Magistrate, who was declared proclaimed offender in this case.
- xxiv. The original dying declaration was misplaced, lost as claimed by PW-14 during the shifting of offices of district administration

from F-8 Markaz to G-11/4 but neither any such report was placed on record nor any inquiry was conducted.

xxv. There is a difference of time amongst the statements of witnesses about the day of incident and recording of the statement of Mst. Nagina Bibi/deceased.

xxvi. Dr. Salman Zaib/MO PW-11 confirmed that Mst. Nagina Bibi/deceased was admitted to PIMS Hospital Burn Centre on 21.05.2011 and the statements recorded by Imran Ali Sultan/Magistrate as well as PW-7 Abdul Sattar Shah/I.O. on 19.05.2011 and 20.05.2011 at PIMS Hospital are in contradiction with the date and time of the statement of PW-11 Dr. Salman Zaib.

xxvii. The alleged photocopy of statement (dying declaration) is inadmissible in terms of the Qanun-e-Shahadat Order, 1984 as neither the author has been produced nor the original document has been produced in the Court.

xxviii. The best available evidence of eyewitness Shaheen has not been produced before the Trial Court and in this regard no explanation has been given by the prosecution.

35. The above referred factors and discrepancies noted by this Court demonstrate that the Investigation Officer as well as the Magistrate willfully neglected their lawful duties as both of them neither took any written permission from doctors regarding fitness of Mst. Nagina Bibi/deceased as to whether she is able to record her statement U/S 164 Cr.P.C. On the other, the learned Trial Court declared Imran Ali Sultan/Magistrate as absconder and the prosecution did not tender any valid reasons or justification in writing for his non-appearance, although PW-14 Ms. Lubna Riaz/Director (AES), the then Magistrate/Assistant Commissioner confirmed the photocopy of the statement of Mst. Nagina Bibi/deceased (Exh.PF) to the extent of signature

and handwriting of Imran Ali Sultan/Magistrate but in our humble view, the reasons for non-production of original document are not justified and the secondary mode of evidence can only be applied in terms of Article 74 of the Qanun-e-Shahadat Order, 1984 and in such eventuality, it was incumbent upon the prosecution to justify the reasons for non-production of the original record as to whether the same has been lost or destroyed, and to that extent secondary evidence has to be brought on record. Reliance is placed upon PLD 1998 Karachi 86 (The State vs. Nisar Ahmad Khoro and others.) & 1995 SCMR 1237 (Khurshid Begum and 6 others vs. Chiragh Muhammad).

36. Furthermore, it is settled proposition of law that when primary evidence of any document is not produced in terms of Article 75 of the Qanun-e-Shahadat Order, 1984, then the photocopy should not be considered as a valid proof of such document, whereas in this case, the prosecution has not clarified the fact of loss or destruction of the original statement/dying declaration nor adopted the recourse of Articles 75 and 76 of the Qanun-e-Shahadat Order, 1984. Hence, the genuineness of authenticity of the statement of victim has been lost in this case and the evidentiary value of the photocopy is to be considered as negative.

37. To further strengthened the opinion, it is necessary to observe the concept of dying declaration in terms of Article 46 of the Qanun-e-Shahadat Order, 1984, which his reproduced as under:

46. *Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant: Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot, be found, or, who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:*

(1) *When it relates to cause of death: When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when*

they were made, under expectation of death, and whatever may be the nature of the proceeding in which cause of his death comes into question.

38. While considering the above provisions of law, we have also gone through certain judgments of the superior Courts reported as NLR 1993 Criminal 203 (Ghulam Hussain and other. vs. The State), NLR 1987 UC 148 Mst. Zarina vs. The State, 2011 SCMR 725 (Niazuddin and another vs. The State and another), PLD 2006 SC 255 (Mst. Zahida Bibi vs. The State), 1972 SCMR 574 (Khan Zaman vs. Kachkol and another), PLD 1970 SC 13 (Tawaib Khan and another vs. The State) and 1971 SCMR 516 (Ejaz Hussain & 2 others vs. The State), whereby the minimum standards for recording of statement (dying declaration) of victim have been given in the following manner:

- i. Dying declaration could be recorded by police official in case of extreme emergency which could be utilized for registration of a formal FIR depending upon the nature of each case.
- ii. The dying declaration should be recorded by a Magistrate or a doctor present in a hospital.
- iii. Dying declaration of deceased has a degree of sanctity under the law, but no rigid rule can be laid down that a person under immediate apprehension of death would utter nothing but truth and it requires close scrutiny similar to case of interested witnesses.
- iv. Dying declaration of deceased in presence of deceased's relation thereby not ruling out probability of prompting and such statement could not be considered safe to base conviction.
- v. Statement of deceased, if recorded by any police officer in hospital not in presence of doctor, without permission or association of hospital staff, not verified by doctor or staff could not be considered dying declaration of deceased.

- vi. Dying declaration is a weak type of evidence and it could not be treated as an admissible evidence, which requires corroboration.
- vii. No special mode for recording of dying declaration is provided under the law.
- viii. Dying declaration could be used against the accused, when there is nothing to suggest that deceased has substituted any innocent person in place of real culprit.
- ix. Uncorroborated dying declaration could not be relied upon for recording of conviction on the charge of murder.

In view of above, we are of the opinion that PW-7 Abdul Sattar Shah/I.O. and Imran Ali Sultan/Magistrate (P.O.) have neither followed the law in letter and spirit nor they have requested the concerned doctor i.e. PW-11 Dr. Salman Zaib for any permission or fitness of Mst. Nagina Bibi/deceased for recording of her statement as well as other minimum standards for recording of dying declaration have been observed, therefore, this piece of evidence regarding dying declaration lost its scope.

39. Besides the above referred defect in this case, the evidence of last seen is based upon testimony of Muhammad Tanvir PW-1, who claims to be the eyewitness and taken Mst. Nagina Bibi/deceased from Street No.15 of Shahzad Town to the house of PW-8 Farzana Yasmin for onward transmission to hospital but PW-8 Farzana Yasmin has not confirmed his presence at the relevant time, even PW-1 Muhammad Tanvir, who also claims to be the brother-in-law of Mst. Nagina Bibi/deceased, had not accompanied her to the hospital, which is unnatural act on his part and he himself stated during the course of cross-examination that when he reached in Street No.15, nobody was present there, which otherwise confirms that he neither seen the incident nor Muhammad Irfan/appellant at the place of occurrence, therefore, his evidence bears no effect.

40. The statement of Mst. Nagina Bibi/deceased Exh.PD refers an eyewitness i.e. Mst. Shaheen, wife of Khalid, who was not produced in the Court despite the fact she was the best witness in this case and it is trite law that when best evidence is not produced and withheld by the prosecution, an adverse inference is drawn in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984. Reliance is placed upon 2017 SCMR 486 (Muhammad Asif vs. The State).

41. PW-7 Abdul Sattar Shah/I.O, who took the statements of witnesses i.e. PW-9 Muhammad Akram dated 24.05.2011 (Exh.DC), PW-8 Mst. Farzana Yasmin dated 25.11.2011 (Exh.DE), Mst. Sabraan Bibi dated 25.11.2011 (Exh.DF), and PW-1 Muhammad Tanvir dated 22.11.2011 (Exh.DG) in written form but he did not record the same on the day of occurrence, rather all these statements were received in Police Station with delay and converted into statements U/S 161 Cr.P.C. Even otherwise, PW-8 Farzana Yasmin, confirmed that Mst. Nagina Bibi/deceased stated that she received acid burn injuries by Muhammad Irfan/appellant, but this fact has not been corroborated through any independent piece of evidence, and even otherwise, statement U/S 161 Cr.P.C. recorded with delay has no value in the eyes of law and same could not be believed unless the delay is validly explained. Reliance is placed upon 2017 SCMR 486 (Muhammad Asif vs. The State) & 2017 YLR 724 Lahore (Shaukat Ali and 2 others vs. The State).

42. The recovery of can/drum from Muhammad Irfan/appellant on his pointation from an open place also bears no significance as the Investigation Officer has not transmitted the same for chemical examination and similarly, the Investigation Officer has neither taken the burnt/last worn clothes of Mst. Nagina Bibi/deceased nor the same was used in any chemical examination test and the cumulative effect of non-performance of these functions affects the very foundation of this case.

43. Keeping in view the above background as well as the statements available on record, we have gone through the impugned judgment wherein the learned Trial Court convicted Muhammad Irfan/appellant on different counts U/S 336, 337F(II), 324 PPC and 302 PPC and awarded him death sentence U/S 302(b) PPC, and also held that the punishment U/S 324, 336, 337f(ii) PPC has been merged into a major offence. The learned Trial Court has not appreciated the discrepancies qua the timeline of statements of witnesses regarding the alleged day of occurrence as the statements have not been recorded on the same day, which is the misconduct on the part of Investigation Officer and as such, benefit accrues in favour of Muhammad Irfan/appellant, who has pointed out all these discrepancies in his statement U/S 342 Cr.P.C.

44. The entire case has been demolished due to misconduct of Investigation Officer, who is not vigilant enough and trained to conduct investigation of such type of cases and as a result of failure on the part of prosecution, the benefit of doubt goes to Muhammad Irfan/appellant. It is trite law that if a single doubt emerges on record, the same would entitle accused to acquittal. Reliance is placed upon PLJ 2017 SC 505 (Hashim Qasim & others vs. State & others).

45. In view of above discussion, the prosecution has failed to prove its case beyond any shadow of doubt, therefore, Criminal Appeal No.68/2016 (Muhammad Irfan vs. The State & another) is ALLOWED, appellant/Muhammad Irfan is ACQUITTED from the charge and he be released forthwith, if not required in any other criminal case and Murder Reference No.3/2016 (The State vs. Muhammad Irfan) is answered in NEGATIVE.

46. Before parting with the judgment, we have observed that PW-7 Abdul Sattar Shah/Inspector, Investigation Officer of the case, was negligent in

performance of his professional duties as he did not obtain any written permission from concerned doctor regarding fitness of Mst. Nagina Bibi/deceased to record her statement (Dying Declaration) and even Imran Ali Sultan/Magistrate did not consider it appropriate to verify the statement/dying declaration of Mst. Nagina Bibi/deceased from doctor. Similarly, PW-7 Abdul Sattar Shah/Inspector did not record statements U/S 161 Cr.P.C. of the witnesses on the day of occurrence, rather he received the statements (Exh.DC, Exh.DE, Exh.DF, and Exh.DG) in written form after 4/5 days of the alleged incident, which clearly demonstrates that PW-7 Abdul Sattar Shah/Inspector took the entire matter haphazardly. Both the Investigation Officers i.e. PW-7 Abdul Sattar Shah/Inspector and PW-10 Munir Jaferi/S.I. neither took into possession the last worn clothes of Mst. Nagina Bibi/deceased nor sent the same for chemical examination, even PW-13 Munir Jafri/S.I. did not send the acid can/drum to the chemical examiner for verification of acid. All these factors are considered to be as criminal negligence on the part of Investigation Officers and as such, this case is the worst example of negligence on part of the prosecution agency, even the District Attorney, who has cleared the final report U/S 173 Cr.P.C. and sent up the matter to the Court did not see these aspects, which have ultimately devastated the prosecution case, therefore, copy of this judgment be sent to the Inspector General of Police as well as to the S.S.P. Islamabad for holding a regular inquiry against the delinquent officials for their professional negligence and shall take action in accordance with law.

47. Another sad state of affairs observed by this Court is the conduct of Imran Ali Sultan/Magistrate, who recorded the statement of Mst. Nagina Bibi/deceased in the hospital but did not request the doctor to verify the same by paying no heed to the fact that it is essential to verify the statement and fitness of victim before recording of his/her statement and such lapse on

part of Imran Ali Sultan/Magistrate makes obvious lack of training on part of District Administration/Chief Commissioner Office, Islamabad. Although, dying declaration of Mst. Nagina Bibi/deceased recorded by Imran Ali Sultan/Magistrate was further substantiated through statement of PW-14/Ms. Lubna Riaz, Director (AES), who remained Assistant Commissioner in ICT from 2011 to 2014, but surprisingly, the original statement of victim being a primary evidence has neither been produced on record nor any effort has been made to furnish valid reason for non-production of the original statement in the Court, whereas it was incumbent upon the Magistrate to send statement (Dying Declaration) of victim in a sealed manner to the I.O. Even otherwise, Imran Ali Sultan/Magistrate was declared proclaimed offender by the learned Additional Sessions Judge (Trial Court) and four Magistrates namely Nouman Yousaf, Waqas Bashir, Malik Farrukh Nadeem, and Kamran Cheema were called by the learned Trial Court but they did not verify the signature and handwriting of their colleague and even they did not give any specific reason as to why the said Magistrate is not present before the Court. This shows lack of interest on the part of Chief Commissioner Office, who has not taken any serious note of the negligent behavior of their Magistrates/Assistant Commissioners and even the Chief Commissioner Office, Islamabad has failed to submit any valid reason or record, through which, it could be demonstrated that Imran Ali Sultan/Assistant Commissioner was transferred, removed/dismissed from service or went abroad and the learned Trial Court after hectic efforts on 19 different dates of hearing, declared Imran Ali Sultan/Assistant Commissioner as proclaimed offender after recording statement of Process Server vide order dated 16.03.2015 and non-bailable warrants of his arrest were issued, however, the state of affairs on part of Executive Magistrates/Assistant Commissioners

seems to be criminal and they do not deserve to be on these positions as their conduct is highly objectionable, therefore, we hereby recommend an action against the then officials of ICT Administration, who could not enforce/execute orders of the learned Trial Court for presence of Imran Ali Sultan the then Assistant Commissioner/Magistrate and direct the Secretary Interior to inquire into the matter and to proceed in accordance with law after holding a proper inquiry within the period of three (03) months positively, under intimation to this Court.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

ANNOUNCED IN OPEN COURT ON 29.11.2018.

JUDGE

JUDGE

APPROVED FOR REPORTING.

Khalid Z.