JUDGMENT

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Appeal No.159/2016
Rashid Mukhtar
Versus
The State, etc.

Appellant by:	Syed Mohammad Tayyab, Advocate
Respondent No.2 by:	Mr. Sabah Mohy-ud-Din Khan, Advocate
State by:	Ms. Hadiya Aziz, State Counsel
Date of Hearing:	21.04.2017

MOHSIN AKHTAR KAYANI, J:- Through this criminal appeal the appellant has assailed the judgment dated 27.07.2016 passed by learned Additional Sessions Judge-IV (West), Islamabad, whereby the appellant has been convicted and sentenced U/S 302(B) PPC to undergo imprisonment for life as Tazir with direction to pay an amount of Rs.200,000/- as compensation to the legal heirs of deceased U/S 544-A Cr.P.C. The appellant has also been convicted and sentenced U/S 324 PPC to five years (RI) with fine of Rs.30,000/- in case FIR No.212/2014 dated 03.08.2014, U/S 302/337-A(i) PPC, Police Station Golra Sharif, Islamabad. Benefit of Section 382-B Cr.P.C. is given to the accused/appellant. All the sentences shall run concurrently.

2. Brief facts of the instant case are that the complainant, Najam Iqbal/respondent No.2, got lodged a criminal complaint on 03.08.2014 against the appellant, Rashid Mukhtar, with the following allegations:-

"آج مورخہ تقریبا-/8بجیرات میں اور میرا بیٹا بلال نجم، میری بیٹی ثانیہ نجم اور میری بیوی نسرین اختر گھر میں موجود تھے کہ میرا داماد مسمی راشد مختیار احمد قوم گجر ساکن خانیوال تحصیل شکر گڑھ ضلع نارووال (حال) مکان نمبر214/B سیکٹر G-6/1-4اسلام آباد جو کہ آج ہی اپنے گھر والوں سے جھگڑا کر کے میری بیٹی اور نواسی عذا راشد بعمر5ماہ کو ہمراہ لیکر ہمارے گھر آیا تھااور کمرے میں میری بیٹی ثانیہ سے جھگڑا کرنے لگا۔اور کہہ رہا تھا کہ آپ کی وجہ سے میرا میرے گھر والوں سے جھگڑا ہوا ہے میں آپکو اور بیٹی عذا کو زندہ نہیں چھوڑں گا۔اس نے کمرے میں پڑی ہوئی چھری اٹھا کر میری بیٹی کو مارنے لگا تو ثانیہ نے جان بچانے کیلئے زور زور سے شور کیا اور ہمیں بلایا میں اور میری بیوی اور بیٹا بلال نجم بھاگ کر اس کمرے میں آئے تو میری بیٹی کے بایاں ہاتھ پر راشد نے چھری ماری جس

سے اسکا ہاتھ زخمی ہو گیا اور اس نے فوراً دیکھتے ہی دیکھتے میری نواسی عذا کو دونوں ٹانگوں سے پکڑ کر اس کا سر فرش پر مارا اور زور زور سے کہنے لگا کہ میں ماں بیٹی دونوں کو مار دوں گا۔ میری نواسی بیہوش ہو گئی میں نے اور میرے بیٹے بلال نجم نے فوراً بچی کو زبردستی اس سے لیا اور بچی کو لیکر ہم لوگ فوراً ہسپتال لے کر چلے گئے۔ جب ہسپتال پہنچے تو بچی عذا فوت ہو چکی تھی۔ مسمی راشد مختار نے میری بیٹی ثانیہ پر چھری سے قتل کی نیت سے حملہ کیا اور میری نواسی عذا کو جان سے مارنے کی نیت سے فرش پر اسکا سر پٹخ کر زخمی کیا جو زخموں کی تاب نہ لاتے ہوئے فوت ہو گئی۔ مسمی راشد کے خلاف دعویدار ہوں قانونی کاروائی کی جائے۔"

After submission of the aforementioned complaint, FIR No.212/2014 dated 03.08.2014, U/S 302/337-A(i) PPC, Police Station Golra Sharif, Islamabad (Exh.PA) was registered. The Investigation Officer after completion of investigation submitted report U/S 173 Cr.P.C. against the appellant, whereupon the learned Trial Court framed the charge and after completion of entire evidence the appellant Rashid Mukhtar got recorded his statement U/S 342 Cr.P.C. and has also appeared as witness in his own defence U/S 340(2) Cr.P.C. whereafter the learned Trial Court convicted the appellant and awarded life imprisonment U/S 302(B) PPC and also awarded five years (RI) imprisonment with fine of Rs.30,000/- U/S 324 PPC for causing injuries to Sania Najam. Hence, instant criminal appeal.

3. Learned counsel for appellant contends that the impugned judgment is absolutely illegal, unlawful, unjust, improper and against the law; that the learned Trial Court has not applied its judicial mind while passing the impugned judgment and the defence evidence has not been appreciated in its true perspective; that there is no motive on the part of appellant is available on record to murder the deceased and there are serious contradictions in this case; that it is a case of two versions where the motive referred by the prosecution has not been established; that even the recovery is not credible, therefore, the sentence awarded to appellant is contrary to law.

4. Conversely, learned counsel for the complainant as well as the learned Standing Counsel argued that the prosecution has proved the case against the appellant as he has admitted his presence at the scene of

occurrence and all the witnesses are natural witnesses, who have given ocular account, which is in line with medical evidence and there is not an iota of discrepancy among the statement of PWs and learned Trial Court has rightly convicted the appellant in accordance with law.

5. Arguments heard, record perused.

6. From the perusal of record it has been observed that FIR No.212/2014 dated 03.08.2014, U/S 302/337-A(i) PPC, Police Station Golra Sharif, Islamabad was registered on the complaint (Exh.PB) of Najam Iqbal, PW-2, whereas the complaint reveals that appellant, son-in-law of complainant, came to the house of complainant along with his wife and daughter Izza Rashid, aged 5 months, and both husband and wife were quarreling with each other and the accused allegedly referred the reasons of coming to the complainant's house that he had a clash with his family due to Sania Najam, the daughter of complainant, and on this score he extended threats of killing both, Sania and minor daughter Izza, and all of a sudden he picked a knife "*Churri*" and attacked Sania, on which Sania made hue and cry and called her family members, whereupon complainant along with his wife and son Bilal Najam, immediately came to the room and witnessed that appellant was attacking Sania on her chest, but she has only received injury on her left hand while defending herself, whereafter appellant immediately got hold of minor Izza from her legs and banged her head against a carpeted floor, resultantly the minor became unconscious, whereafter complainant and his son grabbed the minor Izza from accused and took her to a nearby private hospital and thereafter went to PIMS Hospital for a medical treatment though the minor Izza Rashid in the meantime succumbed to injuries, hence the criminal case has been lodged.

7. The prosecution has produced nine witnesses in the trial of appellant. As per statement of PW-1, Ghulam Abbas (ASI), on the date of occurrence i.e. 03.08.2014, he was serving as Moharrar in PS Golra Sharif and he chalked out the FIR Exh.PA., however it has been observed from the

cross-examination that statement of said witness U/S 161 Cr.P.C. has not been recorded by the Investigation Officer and he has not joined the investigation in the instant case.

8. PW-2, complainant, Najam Iqbal s/o Abdul Karim, aged 65 years, is a retired civil servant, resident of House No.47, Street No.786, Sector G-13/4, Islamabad, who narrated the entire incident on the basis of his own complaint (Exh.PB), whereby he specifically alleged the role of appellant of killing Izza Rashid by way of banging her head on a carpeted floor and also referred the *Churri* attack by the appellant upon Sania Najam.

9. The prosecution has produced Bilal Najam as PW-3, son of complainant in the trial, whereby he alleged that his sister Sania Najam and minor Izza were present in a room of our house on 03.08.2014 at around 8:00pm, when the appellant started shouting and threatened Sania Najam that he would not spare her and minor Izza, because of them he has left his parents. PW-3 along with his father and mother, rushed to the said room and upon entrance they witnessed that appellant while holding *Churri* in his hand tried to attack Sania Najam, whereupon, she in defence, received injury on her left hand. Thereafter appellant lifted the minor Izza deceased from her legs and banged her head against a carpeted floor, Izza got unconscious, whereafter PW-3 snatched minor Izza from the appellant and took her to a nearby hospital, where doctors declared the minor as dead.

10. PW-4, Sania Najam, wife of appellant, stated that appellant on 03.08.2014 quarreled with his parents and left his own house along with her and minor Izza and came to complainant's house. She further stated in her evidence that appellant started quarreling with her on the ground that due to her, he has left his house and quarreled with his parents. PW-4 stated in her evidence that the appellant while picking up a fruit cutting *Churri* from a dressing table aimed at her chest and attacked her and she in her defence got injury on her left hand, whereafter, her father and brother

entered in the room, whereupon appellant dropped the *Churri* and picked up minor Izza, who was lying on the bed and banged her head with force against a carpeted floor, whereafter her father and brother snatched minor Izza from appellant's hand, minor Izza was unconscious, so they took her to a nearby hospital, where doctors declared the minor Izza dead.

11. Besides the above PWs, Ahsan Ullah (Police constable) appeared as PW-5 and got recorded his statement before the Court that he has witnessed the arrest of appellant and during the physical search, got recovered photocopy of NIC (Ex.P1-2), original and photocopy of driving license (Exh.P3 & P4), wallet (Exh.P5), one currency note of denomination of Rs.1000/- (Exh.P6) and one currency note of denomination of Rs.500/- (Exh.P7) and recovery memo was prepared with his signature (Exh.PW-5/A), however he stated that the accused while in police custody on 07.08.2014 led to his house, i.e., House No.42, Street No.85, Sector G-13/1, Islamabad, where he got recovered *Churri* (Exh.P8) from a kitchen and the same was taken into possession vide recovery memo (Exh.PW-5/B) and signed the recovery memo. He further stated that consequent to postmortem of deceased, the doctor handed over Kurta (Exh.P9) and Nikkar (Exh.P10) as the last worn clothes of the deceased and the same were taken into possession vide recovery memo (Exh.PW-5/C).

12. The prosecution further produced Aamir Shahzad (Draftsman) as PW-7, who has prepared the site plan (Exh.PW-7/1) which is produced on the record.

13. Finally, Muhammad Idrees, Sub-Inspector of P.S. Golra Sharif appeared as PW-9 and narrated all the facts of the previous statements recorded by PWs and after completion of investigation, he submitted a final report U/S 173 Cr.P.C. wherein the appellant has been declared as accused. During the course of cross-examination, he has admitted before the Court that at the time of recovery of Exh.P8 (*Churri*) he along with the appellant visited the house whereupon the appellant got recovered the *Churri* from

kitchen, PW-9 answered a specific question regarding the incident in the following manner:-

> *"It is correct that, as per statement of the accused baby Izza had fallen down during scuffle between him, Najam Iqbal and Bilal Najam PWs. As per statement of the accused, Mst. Sania Najam and her mother had tried to snatch baby Izza from him. After the statement of the accused, no other eyewitness had appeared before me to make statement. It is correct that there is no rebuttal of the statement of the accused except the statements of the eye witnesses."*

The Investigation Officer has also witnessed the recovery of the *Churri* on 07.08.2014 and the *Churri* is of common pattern which is easily available in the market.

14. The appellant has got recorded his statement U/S 342 Cr.P.C. whereas the prosecution/complainant asked particular questions in order to prove the reasons of motive. Question No.3 has been asked by the prosecution from appellant, regarding quarrel with his parents and shifting to his in-laws house along with his wife and minor daughter, which has properly been answered. It appears that it is a case of two versions, in order to confirm the said fact, the appellant got recorded his statement U/S 340(2) Cr.P.C., while stating therein that:-

> *"On 03.08.2014, I was present in the house of the complainant Mst. Sania Najam PW, who was then my wife, started quarreling with me. Baby Izza deceased, at that time, was with Mst. Sania Najam, PW. The parents of Mst. Sania Najam PW started scuffled with me, and as a result, baby Izza deceased fell down from the hands of Mst. Sania Najam, PW. Baby Izza died later on. I did not kill her. I am innocent. I had great love for baby Izza deceased. It is a false case against me just to save their own skin."*

The appellant has also been cross-examined but he never agitated the matter before the local police as well as before any authorities, therefore, at this stage appreciation of oral evidence has to be seen in the light of judgment passed by the learned Trial Court.

15. In order to prove the charge of murder it is necessary to peruse the evidence and to prove certain factors, however in order to understand the

proposition, it is necessary to first discuss the ocular account, medical evidence for motive and recovery and finally the law. I have gone through the evidence and it is very much evident that PW-4 Sania Najam along with appellant and minor Izza Rashid, aged 5 months, came to the house of PW-2 Najam Iqbal (father), as per the contents of the FIR (Exh.PA) it has specifically been referred that:-

"آج ہی اپنے گھر والوں سے جھگڑا کر کے میری بیٹی اور نواسی عذارا شد بعمر 5 ماہ کو ہمراہ لیکر ہمارے گھر آیا تھا اور کمرے میں میری بیٹی ثانیہ سے جھگڑا کرنے لگا۔اور کہہ رہا تھا کہ آپ کی وجہ سے میرا میرے گھر والوں سے جھگڑا ہوا ہے۔"

This statement referred in Exh.PB and Exh.PA clearly demonstrates the motive part of the entire prosecution case, however I have meticulously perused every statement of the nine witnesses, but I could not find any evidence available on record through which the factor referred above has been proved independently. I have considered the above mentioned statement as a motive part for this case, however complainant (PW-2), Bilal Najam (PW-3) and Sania Najam (PW-4) have not proved the said motive through an independent source, although all three witnesses have categorically stated that this is the reason and notice of the entire case. All three witnesses are related and interested witnesses in this matter as Najam Iqbal/complainant is the father of Bilal Najam and Sania Najam, where Bilal Najam claimed to be an eye witness and Sania Najam allegedly claimed that she is an injured witness of the attack by appellant (husband), received injury on her left hand palm. All three witnesses narrated the entire incident of (Exh.PA) and (Exh.PB) in their evidence, but they have not referred any reason as to why Sania Najam PW-4 had frequent fight with accused/appellant. Najam Iqbal PW-2 has stated before the Court that he saw the accused "*holding in his right hand a Churri for cutting fruits*" tried assaulting my daughter with the said Churri, the *Churri* blow was aimed at her chest, however she with her right hand held the *Churri* blow,

the accused could not succeed in inflicting injuries on her chest and she received injury on her left hand.

16. However, during the course of cross-examination of the said witness, it has been observed from record that Exh.PB has been confronted to the witness regarding non-availability of the word/object fruit cutter *Churri*, and "fruit cutter" has not been mentioned and only word "*Churri*" is available. However, during the cross-examination the defence counsel has put a question which is a part of defence, the same is reproduced as under:-

> *"It is incorrect to suggest that I and my son Bilal Najam who had assaulted the accused with a Churri. It is incorrect to suggest that it was during the scuffle that baby Izza had fallen down when she was being hold by my daughter."*

The abovementioned suggestion has been referred as defence of the appellant on record.

17. PW-3 Bilal Najam is also an eye-witness and claims that he witnessed appellant assaulting his sister with *Churri* and eventually her left hand got injured. However, he stated that the appellant while holding baby Izza deceased from her legs, lifted her from bed and banged her head against a carpeted floor, thereafter he and his father snatched baby Izza from accused and rushed to a nearby hospital, where doctors categorically stated that minor Izza has succumbed to injuries. Bilal Najam has not been cross-examined with particular reference to question, however Sania Najam herself put appearance as PW-4 and during the course of cross-examination she admitted that:-

> *"It is correct that the accused loved baby Izza."*

This shows the nature and affection of father/appellant with minor daughter.

18. PW-5 Ahsan Ullah (Constable) was performing his duties in Islamabad Police and he categorically stated before the Court that he witnessed the arrest of the appellant as well as the witness of recovery and

his name has also been referred in the recovery memo. But during the course of cross-examination he stated that:-

> *"We arrived at the house of the accused at about 12:30p.m. Nobody was present in the house. The main gate was open."*

The above referred statement clearly demonstrates that the family of accused was not available and they left their house open, especially if the said factor is seen while keeping the conduct of different law enforcement agencies in mind, it appears that it is not possible rather it is humanly impossible that any person who owns a house leave it open especially when the owner/resident intends to go out, therefore, such conduct is not believable and does not seem to be true. During the course of cross-examination, PW-5 also admitted that such kind of *Churri* is easily available in market and Investigation Officer has not associated any person from the locality, at the time of recovery of *Churri,* by the accused.

19. Dr. Muhammad Naseer, Principal and Head of Department Forensic Medicines, PIMS, Islamabad appeared as PW-6, who examined the dead body of Izza Rashid, aged 5 months, and stated the reason of the injury:-

> *"On palpation, right temporal, right prital and both occipital bones were fractured. There was no other visible injury noted."*

However, during the course of cross-examination, PW-6 admitted the fact that:-

> *"I cannot say if the deceased had fallen on the ground or her head was banged down on the floor."*

Though, such kind of evidence has been discarded. PW-6 has further been asked a specific question regarding using of word "forceful" on which he stated that:-

> *"It is correct to suggest that word "forcefully" mentioned in my medical post-mortem report is mentioned by me on the basis of information given by police and except that I had no other basis or reasons to mention such word in the report."*

Dr. Muhammad Naseer PW-6 while answering the question replied the following as of final opinion:-

> *"It is correct to suggest that the injury received by the deceased may be caused by falling on the floor herself."*

20. Aamir Shahzad (Draftsman) appeared as PW-7, who has no formal contract with Islamabad Police Department to render his services being a Draftsman, he is not approved or authorized by government, he is not a Forensic Expert and has no qualification to work as Draftsman specially in murder cases or in police investigation and he is not an eye-witness, therefore, there is no need to discuss the testimony of PW-7.

21. Dr. Niaz Ali, on the application of complainant, has been summoned through Court, got recorded his statement as PW-8 and stated that he medically examined Sania Najam for her wound on her left hand palm and referred her for Plastic Surgery Consultation (Exh.PW-8/A), however during the course of cross-examination he admitted that:-

> *"It is correct to suggest that I did not form any opinion regarding the nature of the injury."*

22. Lastly, Investigation Officer tendered his evidence, whereby he has confirmed the entire stance of prosecution at the initial level and submitted his final report U/S 173 Cr.P.C. However, in order to verify the contents, it is necessary to corroborate the testimony of Investigation Officer with the eye-witnesses' account. The Investigation Officer PW-9 has stated that he arrested the appellant and also got recovered the knife (Exh.P8) on 07.08.2014 from the kitchen of appellant's house. The knife was placed in shelf of the kitchen and it was taken in possession vide recovery memo Exh.PW5/B. The Investigation Officer was cross-examined at length, whereupon he admitted that he has not cleared the contradiction between PWs in his entire investigation nor he made any further investigation for the clarity of contradictions. He has not interrogated Sania Najam in the hospital as she was not in her state of mind. He also admits that he had not collected any incriminating articles from the place of occurrence. He further

admitted that during the recovery of the crime weapon (Exh.P8), house of the accused was already opened, therefore, police entered into the house and searched the same; Police had not met any of the family members in the said premises as it was all vacant. However, during the course of cross-examination, the Investigation Officer has admitted that the *Churri* is of a common pattern and easily available in market.

23. The above referred PWs, in order to achieve the conviction of the appellant, have recorded their statements, however it has been observed that:-

(i) Najam Iqbal is the father of Sania Najam and father-in-law of the appellant and has given the stance of the entire incident in Exh.PB.

(ii) Najam Iqbal, Bilal Najam and Sania Najam are allegedly witnesses of the incident, however all three are interested witnesses.

(iii) House No.47, Street No.786, Sector G-13/4, Islamabad is the place of incident and admitted by both the parties.

(iv) All three eye-witnesses have denied the suggestion that during the scuffle baby Izza deceased fell down from the hands of Sania Najam PW and due to the said fall, she died.

(v) Churri (Exh.P8) is a fruit cutting knife, which was allegedly used by the appellant, however the recovery memo (Exh.PW5/B) reveals otherwise as the size of the *Churri* (Exh.P8) is much bigger than of a normal fruit cutting knife.

(vi) The *Churri* (Exh.P8), on the pointation of appellant was recovered on 07.08.2014 from the kitchen of House No.42, Street No.85, Sector G-13/1, Islamabad, however, the said house and its gate was opened and no one was available at the time of recovery of the said *Churri*.

(vii) It is admitted that the *Churri* recovered from the House No.42, Street No.85, Sector G-13/1, Islamabad is of common pattern and usually available in every house.

(viii) It has also been referred in the testimony of PW-4 Sania Najam that appellant threw down the *Churri* and picked up baby Izza, which means that the Churri was thrown and there is no evidence of any of the witness nor it is the case of the prosecution that appellant grabbed the *Churri* again and left the place.

(ix) All three PWs, i.e., PW-2, PW-3 and PW-4 stated in their evidence that appellant picked up baby Izza from her legs and banged her head with force on a carpeted floor, whereafter PW-2 and PW-3 snatched baby Izza from the appellant. The said portion of the evidence seems to be unreasonable as if the appellant banged the head of the baby Izza on floor, then he has to leave baby Izza on the floor and there is no need to snatch Izza from the hands of appellant by PW-2 and PW-3.

(x) It has been observed from the evidence of Dr. Muhammad Naseer PW-6 that injuries received by the deceased may be caused by falling on the floor herself and nature of injury does not suggest that it was inflicted upon the deceased or Izza deceased has received injury due to falling on the ground.

(xi) Whereas, Dr. Niaz Ali, PW-8 has not form any opinion regarding nature of injury of Sania Najam PW-4 even there is no MLR available on record and the document referred as Exh.PW8/A (outdoor ticket) bears no details regarding the size of the injury or treatment.

(xii) The Investigation Officer PW-9 Muhammad Idrees (Sub-Inspector) and recovery witness PW-5 Ahsan Ullah (Constable), who have arrested the appellant and witnessed the recovery, stated that the house from where the recovery has been made was vacant and no one was living in the said house and *Churri* (Exh.P8) on the pointation of appellant has been recovered from kitchen.

All the above referred evidence is to be seen in *juxtaposition* with the testimony of the appellant who himself recorded his statement U/S 342 Cr.P.C.

and has also appeared as defence witness in his own defence and got recorded his statement U/S 340(2) Cr.P.C, the same is hereby reproduced as under:-

> *"On 03.08.2014, I was present in the house of the complainant Mst. Sania Najam PW, who was then my wife, started quarreling with me. Baby Izza deceased, at that time, was with Mst. Sania Najam, PW. The parents of Mst. Sania Najam PW started scuffled with me, and as a result, baby Izza deceased fell down from the hands of Mst. Sania Najam, PW. Baby Izza died later on. I did not kill her. I am innocent. I had great love for baby Izza deceased. It is a false case against me just to save their own skin."*

However, his statement if seen in context of other eye-witnesses' account, i.e. PW-2, PW-3 and PW-4, it seems that at the place of occurrence, presence of the witnesses and accused/appellant as well as the baby Izza is admitted; the scuffle between parents and Sania Najam is admitted and the only disputed point is as to whether baby Izza died due to fall on the floor or her head was banged against a carpeted floor. Moreover, the prosecution in the entire evidence has never produced the carpet to justify their stance, even the star witness Sania Najam PW-4 who claims that she had received a *Churri* blow on her left hand explained the incident with the following words:-

> *"He while picking up fruit cutting Churri from dressing table aimed Churri blow at my chest, I saved myself by holding the Churri by my right hand. I was slightly injured on my left hand."*

The above referred portion of the testimony seems to be unnatural as if Sania Najam holds the *Churri* with her right hand, how she got injured or received injury on her left hand? That portion of the statement is silent and even Sania Najam has not explained the injury as it seems irrational that if one holds the *Churri* with right hand and receives injury on the left hand. Even if this statement is seen in the light of testimony of PW-8 and the document (Exh.PW8), where the only injury referred by the doctor is "*linear laceration*", however there is no treatment in shape of stitches nor

even the dimensions have been referred by the doctor except he has referred the patient to Surgery Consultation and there is no document available which confirms as to whether the surgery department has ever given consultation to the patient/Sania Najam. Therefore, it is not believable that she has ever received any injury on the left hand. Even I have gone through the record, which clearly reveals that PW-8 Dr. Niaz Ali at the initial stage was not referred as witness in calendar of witnesses, however, the learned Additional Sessions Judge-IV (West) Islamabad on the application of complainant, summoned PW-8 vide order dated 15.10.2015, though the said PW has not produced any MLR and even there is no MLR available on record.

24. The Investigation Officer, in order to verify the versions, has been cross-examined by the defence, but the only thing which came on record is the testimony of PW-9 that he has not prepared any injury statement of Sania Najam and he has not even recorded or interrogated Sania Najam in the hospital on the ground that she was not in fit state of mind. Though, he stated that statement of injury was prepared and it is referred in Para-20 of the Case Diary No.1 that Sania Najam PW's presence in the hospital is not recorded. The Investigation Officer has also not confirmed that who is the owner of the house from where *Churri* (Exh.P8) was recovered and not made any inquiry about the ownership of the said house, even he did not see any male/female or child in the said house and main gate of the house was open.

25. All these factors lead to an irresistible conclusion especially when the said *Churri* has not been sent for chemical examination for determination of human blood, which positively confirms the stance that no *Churri* has been used in the alleged incident as the same has not been corroborated from any independent source, therefore, the circumstances referred by the Investigation Officer and the recovery witness in their testimony, clearly demonstrate that recovery is not believable and has been managed

subsequently especially when the PW-4 Sania Najam in her testimony stated before the Court that the appellant threw down the *Churri* and picked up the minor from her legs. This statement, if seen and placed in *juxtaposition* with the statement of the recovery witnesses, it is clear that, it is not the case of prosecution that appellant has taken the *Churri* again and left the place, therefore, the entire recovery proceedings are not plausible. Even, there is no medical report available on record which proves that Sania Najam has received any injury and, the laceration if, acknowledged as per the statement of PW-8 referred in Exh.PW8, is considered to be simple in nature and the same does not cover the requirement of Sec.324 PPC and hence the punishment awarded U/S 324 PPC is not justified.

26. I have gone through the defence version taken by the appellant, in which he stated that he and his wife Sania Najam were quarrelling and baby Izza deceased at that time was with Sania Najam PW-4, her parents started scuffle with him, resultantly baby Izza fell down from the hands of Sania Najam. This part of the statement if put in *juxtaposition* with the opinion given by PW-6 Dr. Muhammad Naseer, where he stated that it is not affirmed that deceased had fallen on the ground or her head banged on the floor, however he acknowledged that injuries received by the deceased may be caused by falling on the floor herself. Even he has admitted that the word "forcefully" mentioned in the post-mortem prepared by him was on the basis of information given to him by the police and the final opinion referred by him is as under:-

> *"It is correct to suggest that the nature of injury does not suggest that it was inflicted upon or the deceased herself fallen on the ground."*

The above referred opinion given by the doctor during the postmortem, gives rise to a situation where the technical expert like, Dr. Muhammad Naseer, PW-6, could not confirm the real cause of death. It is settled principle of law that, the medical evidence is supportive evidence through which the prosecution can confirm the ocular account with regard to receipt

of injury, but it did not give the identification of accused. Reliance is placed on ***2015 PCr.LJ 820 [Lah] (Saif Ullah and 2 others vs. The State)***, wherein it is held that:-

> *"....it is by now well settled law that medical evidence is a type of supporting evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not identify the assailant. Reference in this context may be made to the cases of 'Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others' (PLD 2009 SC 53), 'Altaf Hussain v. Fakhar Hussain and another' (2008 SCMR 1103) and 'Mursal Kazmi alias Qamar Shah and another v. The State' (2009 SCMR 1410)"*

It is also held in ***2015 PCr.LJ 838 [Peshawar](Azmat Ullah alias Daddi vs. Pir Badshah and another)***, that:-

> *"13. As regards medical evidence, the same can only confirm the ocular evidence with regard to the seat of injury, nature of the injury, kind of weapon used in the incident, but in absence of substantive evidence, the same would not be enough to connect the accused with commission of offence."*

Similarly, when the medical evidence suggests other view, which creates a contradiction between ocular evidence, then benefit of doubt comes on record and it is also settled proposition of law that, when two versions come on record while interpreting the medical and ocular account, the version supported with medical evidence can be appreciated, but where it is not certain, then benefit goes to accused. Reliance in this regard is placed upon ***2015 PCr.LJ 1800 [Lah] (Muhammad Mushtaq vs. The State)***, wherein it is held that:-

> *"15. ....In view of the statement of the Medical Officer wherein a definite opinion has been given, the ocular account is belied by medical evidence. Such contradiction makes the prosecution case doubtful. Reliance in this regard is placed upon the dictum of law laid down by the august Supreme Court of Pakistan in the case of 'Abdul Majid alias Jaidu, etc. v. The State' (1996 SCMR 333)", wherein it has been held as under:-*
>
> > *"Ocular evidence that injuries to deceased were inflicted by three convicts, would be reliable when it stands corroborated by medical evidence."*

Similar view was affirmed by the august Supreme Court of Pakistan in the case of 'Mst. Jallan v. Muhammad Riaz and others' (PLD 2003 SC 644), wherein it was observed:-

"Contradiction between ocular evidence and medical evidence would create doubt prosecution case benefit of which would go to no one except the accused."

19. The nutshell of the above discussion is that the prosecution has badly failed to substantiate its case against the appellant to the hilt and the learned trial Court was not justified in convicting him while basin upon such untrustworthy/uncorroborated evidence, which even otherwise is full of material contradictions and conviction passed by the learned trial court in the circumstances is against all canons of law recognized for the dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused."

The aforementioned scenario clearly demonstrates that it is a case of two versions and while assuming this fact to decide the instant matter, reliance is placed upon *2013 PCr.LJ 345 (Lal Bux vs. Dhani Bux, etc.), 2012 PCr.LJ 1139 (Iqbal Khan, etc. vs. Inayat Ullah, etc.)* and ***2010 PCr.LJ 1850 (Ghulam Rasool Shah vs. State through SHO PS Garhi Doputta, etc.)*** whereas in the latter, it is held that:-

"It is well settled principle of law that where two interpretations of evidence are possible, then the one favourable to accused should be adopted. This view finds support from the cases reported as Khushal and another v. The State [1971 SCMR 357], State through Advocate-General v. Farman Hussain and others [PLD 1995 SC 1], Karim Dad v. Zahir and others [2004 SC 36] and Tufail Hussain Shah v. The State [1994 SCR 275].

In Khushal and another v. The State [1971 SCMR 357] it was held as under:--

"….. Where there are two possibilities open upon the evidence, the possibility which is more favourable to the accused must be accepted, if it otherwise fits in with the facts and circumstances of the case.".

In State through Advocate-General v. Farman Hussain and others [PLD 1995 SC 1] it was held that as under:--

"If any legal provision, which is to be relied upon in the appraisement of evidence and is open to two interpretations, one beneficial to the accused is to be adopted."

In Karim Dad v. Zahir and others [2004 SCR 36] it was held as under:-

> *"…. When there be two possibilities open upon the evidence of the prosecution, the possibility which goes in favour of the accused should be accepted.""*

27. It is the duty of the prosecution to prove the motive if the motive has been suggested in the alleged complaint, however from the bare reading of the Exh.PB, the motive referred is:-

"آپ کی وجہ سے میرا میرے گھر والوں سے جھگڑا ہوا ہے۔"

However, the said portion which reflects the motive part has never been corroborated by the prosecution through any independent source even no witness has been called to prove this factor that appellant had ever quarreled with his parents. Even the Inspector/Investigation Officer has not taken this portion very seriously nor suggested any independent corroboration, therefore, if the motive suggested by the prosecution has not been proved or onus has not been discharged by the prosecution, the same is not to be taken into account while convicting any accused. Reliance is placed upon *2015 Cr.LJ 424 (Zafar vs. The State), 2017 YLR 469 (Tanvir Ahmad vs. The State)* and ***2013 Cr.LJ 1560 (Muhammad Ramzan vs. The State)*** wherein it is held that:-

> *"The prosecution failed to prove the motive against the appellant beyond shadow of doubt and as such the motive remained shrouded in mystery. No doubt the prosecution is not obliged to suggest motive in each and every case which admittedly involves the element of assessment but once it is alleged, it has to be proved by the prosecution by producing convincing and corroborative evidence which admittedly could not be produced by the prosecution as discussed earlier. Even otherwise, the motive alleged does not correspond with the mode and manner of occurrence, number of injuries sustained by the deceased which clearly suggests that there were some other circumstances resulting in occurrence but not disclosed"*

28. In order to reach at a just and fair conclusion, it has to be seen that whether minor Izza was fallen on the floor or her head was banged against carpeted floor. The only testimony available from the independent source is the evidence of the doctor, who has not suggested that injury has been caused due to forceful bang of the head on a floor and neither rule out the

other view, therefore, a serious doubt emerges from such situation, even otherwise all the three witnesses, Najam Iqbal PW-2, Bilal Najam PW-3 and Sania Najam PW-4, are against the appellant to prove the incident and are interested witnesses, hence, the medical evidence give rise to another view wherein the value of medical evidence has been explained in judgments passed by different Courts in *2015 PCr.LJ 838 (Azmat Ullah alias Daddi vs. Pir Badshah and another), 2015 PCr.LJ 820 (Saif Ullah and 2 others vs. The State)* and ***2015 PCr.LJ 1800 (Muhammad Mushtaq vs. The State)*** wherein as per dictum laid down by the High Court in the latter judgment, it is held that:-

> *"15. Though as per contents of the crime report, the stance of the prosecution is that the deceased was done to death by the appellant along with his co-accused (since acquitted) while causing hatchets/chhuras blows, but it is worth mentioning here that Lady Dr. Farzana Shaheen (P.W.6) who conducted postmortem on the dead body of the deseased has opined in categorical terms that the injuries were result of blunt weapon. In view of the statement of the Medical Officer wherein a definite opinion has been given, the ocular account is belied by medical evidence. Such contradiction makes the prosecution case doubtful. Reliance in this regard is placed upon the dictum of law laid down by the august Supreme Court of Pakistan in the case of 'Abdul Majid alias Jaidu, etc. v. The State' (1996 SCMR 333)."*

29. This Court, while considering the entire aspect of the case, is of the view that, it is a case of two versions, motive has not been proved and recovery has been disbelieved, especially in the circumstance when the star witness PW-4, who claims to be a recipient of injury, her injury has not been clearly proved from the record, rather the same was suppressed as the attack of *Churri,* has not been clearly demonstrated from her statement especially when she defended the attack by her right hand and received the injury on the left hand, therefore, the entire alleged incident comes under doubt.

30. At last, I have gone through the statement of appellant recorded U/S 340(2) Cr.P.C. and the cross-examination by the prosecution, the

appellant has denied all the suggestions put forward by the prosecution especially picking up of a fruit cutting *Churri* from a dressing table, the attack and picking up of baby Izza who was lying on the bed and the act of banging of her head against a carpeted floor. I have also gone through the statement of appellant got recorded U/S 342 Cr.P.C. where question No.10 has specifically been asked by the prosecution as to "*why this case has been registered against you and why these PWs have deposed against you?*" In reply to these questions the appellant stated that he was not arrested from the house shown by the police nor any recovery was effected on his pointation, the recovery is fabricated and planted one to make a false case against him in the police proceeding shown to have been made in this behalf are allegedly incorrect and bogus. However, when question No.13 has been asked as to "*whether you want to say anything else*", he has repeated his version which was got recorded by him U/S 340(2) Cr.P.C. that minor had fallen on the ground from the hands of Sania Najam during a scuffle, which took place because he wanted to go to his parents' house with his family but Sania Najam and her family refused to agree to it. For the aforesaid rationale, it has been observed from record that appellant has raised his defence plea on record by way of his statement U/S 342 Cr.P.C. r/w 340(2) Cr.P.C., such statement which falls under defence plea give rise to a reasonable possibility of appellant's innocence, however the concept of appreciation of defence plea has been referred in *2013 PCr.LJ 1858 (Taj Muhammad vs. Bacha Muhammad and another)* and ***2013 SCMR 106 (Mehboob-ur-Rehman vs. The State)***, wherein in the latter judgment, it has been held that:-

> "*…..it is well settled that the accused while raising a defence plea is only required to show that there is a reasonable possibility of his innocence and the standard of proof is not similar to that as expected of the prosecution which must prove its case beyond any reasonable doubt.*"

31. The entire evidence referred above clearly demonstrates that it is a case of serious doubt and a matter of two versions, where a substantial doubt emerges on record, in such like situation when there is a serious doubt, the benefit of doubt ultimately goes to accused. Reliance in this regard is placed upon *2014 PCr.LJ 928 (Muhammad Hanif alias Pocho vs. The State), 2014 PCr.LJ 783 (Ali Haider, etc. vs. The State), 2014 PCr.LJ 885 (Nawab Ali vs. The State), 2014 PCr.LJ 669 (Muhammad Ali alias Faisal vs. The State), 2014 PCr.LJ 1123 (Hajan, etc. vs. The State), 2014 PCr.LJ 1707 (Muhammad Bux alias Papoo Shar vs. The State), 2015 PCr.LJ 369 (Ayub vs. Munsif, etc.), 2015 PCr.LJ 735 (Iqbal vs. The State, etc.), 2015 PCr.LJ 416 (Sami Ullah, etc. vs. The State, etc.), 2014 PCr.LJ 1727 (Mir Muhammad vs. The State, etc.), 2014 PCr.LJ 354 (Siyar Muhammad vs. The State, etc.)* and *2014 PCr.LJ 69 (Nawaz alias Najee vs. The State, etc.).*

Similarly, it has been observed from record that learned Trial Court has not appreciated the evidence in its true perspective, rather reproduced the testimony of PW-2, Najam Iqbal, PW-3, Bilal Najam and PW-4, Mst. Sania Najam, even the learned Trial Court failed to appreciate the evidence as no discussion has been made by the learned Trial Court to corroborate the testimonies from any independent source. It has further been observed from judgment of the learned Trial Court that learned Additional Sessions Judge, has not considered the relationship of all the three witnesses, rather excluded the concept of interested witnesses, although there is a serious contradiction available in the evidence of PW-4, Sania Najam, regarding her injury, which creates doubt upon the entire prosecution case. The learned Trial Court while relying upon the testimony of PW-9, Muhammad Idrees, Sub-Inspector, PW-5 Ahsan Ullah, Constable, regarding recovery of *Churri Exh.P8*, from the kitchen of ground floor of House No.42, Street 85, G-13/1 Islamabad, as well as while considering the evidence of Sania Najam PW-4, Bilal Najam PW-3 an Najam Iqbal PW-2, convicted the appellant, wherein the corroboration is absent in the entire prosecution evidence, even

otherwise the recovery is not believable, especially, when the place of recovery was not locked, rather the *Churri* was taken up from kitchen, being a common fruit cutting *Churri*, which is easily available in the market. These factors clearly demonstrate that the learned Trial Court has not appreciated the evidence in accordance with the principles laid down by different authoritative judgments of the High Courts as well as Supreme Court, the main principle of appreciation of evidence has been referred in ***2013 PCr.LJ 1650 (Jafar and 6 others vs. The State)*** wherein it is held that:-

> *"The proper and legal way of dealing with a criminal case is that the Court should first discuss the prosecution case evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eyewitnesses and the probability of the story told by them, and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342, Cr.P.C. is exculpatory, then he must be acquitted. If the statement under section 342 Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter versions, if the Court believes prosecution evidence and is not prepared to exclude the same from consideration, it will not straightaway convict the accused but will review the entire evidence including the circumstances appearing in the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused has failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit*

or convict him accordingly. [PLD 1994 SC 879 (Ashiq Hussain vs. The State)]"

32. In view of above background and reasons noted above, I am of the view that the entire murder case is of two versions, which was brought on record by the prosecution as well as by the defence side, recovery is disbelieved on the ground that the place of recovery was open and no person was in occupation of the said house from where the *Churri* was recovered, although the recovered *Churri* has been taken into custody from a kitchen of the said house, even without the presence of the residents of the said house. The entire case brought on record by the prosecution give rise to a different view in the light of evidence got recorded by Dr. Muhammad Naseer, PW-6, wherein he has not ruled out the possibility of the injury caused to deceased Izza due to fall on the floor and even not confirmed that the injury was caused by banging the head of deceased Izza on the carpeted floor, hence, I am of the view that the instant matter created a doubt in the mind of a prudent man, where a possibility of falling on floor could not be excluded but all these factors have not been appreciated by the learned Trial Court. In last, the motive which has been specifically framed in the instant matter has not been confirmed from any independent source, even the Investigation Agency has not investigated the same, therefore, the minimum threshold of doubt emerges from record gives possibility of defence plea, therefore, capital punishment could not be awarded.

33. It is a settled law that if the prosecution has failed to prove the entire case without any minor contradiction and the chain of evidence is complete in entire manner then the conviction sustains, whereas I am of the clear view that prosecution has failed to prove the case against the appellant with entire clarity and benefit of doubt goes to the appellant. Therefore, the conviction awarded under section 302(b) PPC read with 324 PPC along with fine to the appellant vide judgment dated 27.07.2016

passed by learned Additional Sessions Judge-IV (West), Islamabad, is hereby set-aside on the basis of benefit of doubt and the appeal is allowed. The appellant is acquitted and be released forthwith if not required in any other case. Record of the learned Trial Court as well as judgment passed by this Court, be sent to the learned Trial Court for further necessary action.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 23rd May, 2017.

JUDGE

Approved for reporting.

Khalid Z.