

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Jail Appeal No.192/2015

Nasir Mehmood vs. The State.

Jail Appeal No.202/2015

Rafaqat Hussain vs. The State.

Murder Reference No.17/2015.

The State vs. Rafaqat Hussain and another.

Appellants by: Raja Muhammad Shafat Khan, Advocate.

Complainant/Respondent No.2 by: Raja Muhammad Mumtaz, Advocate.

Mr. Sadaqat Ali Jahangir, State Counsel.

DATE OF HEARING: 18.04.2018.

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MOHSIN AKHTAR KAYANI J. Through this single judgment, we intend to decide the above mentioned jail appeals and murder reference as the same have arisen out of same case FIR No.271, dated 28.09.2009, U/S 302, 324, 337-F(i), 337-F(v), 337-A(i), 148, 149, 109, PPC, Police Station Koral, Islamabad.

2. Through the captioned jail appeals, appellants Nasir Mehmood and Rafaqat Hussain have assailed the judgment dated 25.11.2015, passed by learned Additional Sessions Judge (East) Islamabad, whereby they have been convicted and sentenced U/S 302(b), PPC to death sentence on three counts for the murder of Babar Nadeem, Mulazim Hussain and Mukhtar Hussain and to pay Rs.1,00,000/- each to the legal heirs of all three deceased persons U/S 544-A, Cr.P.C. In default of payment of compensation, they shall further undergo six months S.I. The appellants were also convicted and sentenced U/S 324 PPC for 10 years R.I with fine of Rs.50,000/-, in default whereof, they shall further undergo six months SI each for an attempt to commit murder of injured Matloob Hussain. The appellants were also convicted and sentenced U/S 337-F(v) for three years imprisonment with Daman of Rs.50,000/- each for causing injuries to Matloob Hussain. The appellants were acquitted from the charge of an attempt to commit murder of injured

Wajid Nadeem and inflicting injuries to him. Benefit of section 382-B, Cr.P.C. was also extended to the appellants.

3. Brief facts are that Muhammad Azam/complainant got recorded his statement to the police with the allegation that on 28.09.2009, he went to Rawalpindi on his car for supply of milk and when he was coming back with Asghar Ali to his village and at about 8:30 a.m, when they reached near Pind Dayan, they suddenly heard firing and saw that Ilyas s/o Aslam armed with Kalashnikov, Arif s/o Aslam armed with 7 mm, Rafaqat s/o Muhammad Hussain armed with 12 bore gun, Nasir Mehmood s/o Muhammad Hussain armed with 30 bore pistol, Faisal s/o Muhammad Hussain armed with Kalashnikov and Zafraan s/o Meherban armed with Kalashnikov resorted firing at car No.RIV/1845 of Babar Nadeem and others, who were sitting in the said car. Behind the car four motorbike riders on two motorcycles were making aerial firing. During the firing, Babar Nadeem, who was present on driving seat of car, fled to save himself in injured condition and he was chased by accused Faisal, who fired upon him with his Kalashnikov and Babar Nadeem fell down on the ground, thereafter accused Rafaqat Hussain fired on him with his 12 bore gun. Due to said firing, people gathered at the site and accused Ilyas alongwith his companions fled away on their white colour Mehran Car from the scene while making aerial firing. The four unknown persons, who were present on motorcycles, also decamped from the place of occurrence, who can be identified by Muhammad Azam/complainant and Asghar Ali, if seen. Thereafter, they went to vehicle of Babar Nadeem and found dead bodies of Mulazim Hussain on front seat, Mukhtar Hussain on back seat, nearby Babar Nadeem, whereas Wajid Hussain and Matloob Hussain were also lying on the back seat of the vehicle in critical injured condition. The injured were taken to hospital by Asghar Ali. Ilyas and his companions have committed murder of three persons and injured two persons in consultation with Muhammad Hussain, whereas the motive of the occurrence is old enmity due to murder. On the complaint of Muhammad Azam, above mentioned FIR has been registered. After completion of the investigation, challan U/S 173, Cr.P.C was submitted before the Trial Court, and learned trial Court convicted and sentenced the appellants through the impugned judgment.

4. Learned counsel for the appellants have contended that the conviction is based upon misreading and non-reading of evidence and the appraisal of circumstances adopted by learned Trial Court is not sustainable as the evidence is insufficient to prove the guilt of the appellants; that the occurrence took place in densely populated area but no independent person/witness was produced in the Trial from the vicinity to substantiate the contention of the complainant; that presence of the complainant at the place of occurrence is doubtful, even no specific injury has been attributed to appellant Nasir Mehmood; that the I.O sent weapon of offence to FSL with delay and the witnesses were inimical, whose statements could not be corroborated without independent source, hence, their evidence has to be discredited; that the witnesses have improved their stance and there are a lot of contradictions and additions in material facts, which shake the credibility of the witnesses qua their bonafide.

5. Conversely, learned counsel for the complainant has contended that the appellants have been nominated with specific role of committing murder of three innocent persons and injuring two witnesses, which has been corroborated through testimony of injured P.W.16; that it was pre-planned murder, which was committed in gruesome and brutal manner and the Trial Court has rightly convicted the appellants and awarded them death sentence; that the contradictions referred by learned counsel for the appellants amongst the statements of the witnesses are minor and the same do not affect material facts of the case and the same have no bearing on merits of the case; that there is no discrepancy in the ocular account and the appellants were identified in proper manner; that the motive is established from the record; that non-matching of empties recovered from the place of occurrence with the weapon of offence recovered from the accused is of little significance as the prosecution case is based upon ocular account furnished by one injured P.W.16, whose presence at the place of occurrence is beyond any shadow of doubt; that car P.1 produced before the Court during the trial, in which two persons lost their lives and two got injured, clearly revealed that it had broken windscreen and blood stained seats, therefore, all the ingredients of conviction are on record and chain of evidence proves that the appellants alongwith others committed gruesome murder of three innocent persons and got injured two persons.

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

7. From perusal of the record, it has been observed that complainant Muhammad Azam, got lodged the complaint to SHO, P.S Koral, Islamabad with the allegations that he is milk seller and resident of Darwala, Islamabad, whereas on 28.09.2009 he went to Rawalpindi early in the morning in his vehicle to sell milk and after selling the milk, when he alongwith Asghar Ali s/o Wali Muhammad was coming back to his village and at about 8:30 a.m, when they reached near Pind Dayan, they suddenly heard firing and saw that accused Muhammad Ilyas armed with Kalashnikov, Arif armed with 7mm, Rafaqat armed with .12 bore gun, Nasir armed with .30 bore pistol, Faisal armed with Kalashnikov and Zafran armed with Kalashnikov were firing on the vehicle RIV/1845 of Babar Nadeem, whereas on the back side of the vehicle four persons on two motorcycles were also making aerial firing, Babar Nadeem, who was present on the driving seat in injured condition fled to save his life but Faisal accused chased him and fired upon him from his Kalashnikov, whereby Babar Nadeem fell down on the ground. Accused Rafaqat, who was armed with 12 bore gun, also resorted to firing upon Babar Nadeem. During the said firing, people gathered at the site and accused Muhammad Ilyas alongwith companions decamped from the site on white Mehran Car while making aerial firing and similarly the four motorcycle riders also fled away from the scene, who can be identified, if seen. After the said incident, the complainant went to the said vehicle and found that on the front seat Mulazim Hussain and on the back seat Mukhtar Hussain were lying dead, whereas dead body of Babar Nadeem was lying at some distance. Wajid Hussain and Matloob Hussain were seriously injured lying on the back seat of the car, who were shifted to the hospital by Asghar Ali. Muhammad Ilyas and his companions have committed murder of three innocent persons and injured two persons in consultation with Muhammad Hussain s/o Khan Muhammad, whereas motive of the occurrence is enmity due to a murder case.

8. The complaint was converted into FIR No.271, dated 28.09.2009, U/S 302/324/148/149/109/337-A(i)/337-F(v)/337-F(i), PPC, P.S Koral, Islamabad/Exh.P.T. After receiving information of the incident by police officials, Ghulam Abbas, S.I/SHO/P.W.2 alongwith Shafaqat Ullah, Sabir Masih, and Muhammad Asif, constables

reached at the spot and observed vehicle RIV-1845 and found on its front seat dead body of Mulazim Hussain and on the rear seat dead body of Mukhtar Hussain, whereas at some distance dead body of Babar Nadeem was lying down on the ground. All the three dead bodies were shifted to the hospital for the purpose of post mortem.

9. Investigation Officer, Muhammad Munir, S.I/P.W.18 completed the investigation and arrested the appellants, submitted different reports U/S 173, Cr.P.C. First Muhammad Ilyas accused was arrested on 01.11.2009 and challan to his extent was submitted before the Court, whereas appellants Nasir Mehmood and Rafaqat Hussain were declared proclaimed offenders, who were later on arrested by Shoukat S.I/P.W.19 on 23.05.2014, where-after separate challan was submitted before the Court to their extent, trial was conducted and after completion of the trial, appellants Nasir Mehmood and Rafaqat Hussain were convicted and sentenced U/S 302(b), PPC to death sentence on three counts for the murder of Babar Nadeem, Mulazim Hussain and Mukhtar Hussain, and to pay Rs.1,00,000/- each to the legal heirs of all three deceased persons U/S 544-A, Cr.P.C. In default of payment of compensation, they shall further undergo six months S.I. The appellants are also convicted and sentenced U/S 324 PPC for 10 years R.I with fine of Rs.50,000/-, in default whereof, they shall further undergo six months S.I. each for attempting to commit murder of injured Matloob Hussain. The appellants are also convicted and sentenced U/S 337-F(v) for three years imprisonment with Daman of Rs.50,000/- each for causing injuries to Matloob Hussain. The appellants were acquitted from the charge of attempting to commit murder of Wajid Nadeem and inflicting injuries to him. Benefit of section 382-B, Cr.P.C was also extended to the appellants.

10. The prosecution produced 19 witnesses in the trial. Dr. Farrukh Kamal appeared as P.W.1, who conducted post mortem of deceased persons Mukhtar, Babar Nadeem and Mulazim Hussain and referred the details in following manner:-

“that on 28.09.2009, I was posted in PIMS Hospital, Islamabad. On the same day at 2 p.m I conducted the post mortem of Mukhtar s/o Peeran Ditta age 40 years male, caste Chatha, r/o Darwala, Islamabad brought by Ghulam Abbas 6517 and Shokat S.I Police Station Koral and identified by Muhammad Shafique s/o Peeran Ditta, Ghulam Abbas s/o Kala Khan.

EXTERNAL APPEARANCE.

A middle age man height 5 ft 4 inches, hairs, moustaches and beard, mouth and one eye closed. Following injuries were found on the dead body.

- i. Entry wound circular inverted margins 1 x 1 cm above left ear 7 cm on skull.*
- ii. Entry wound 3x2 cm below left ear on neck back side.*
- iii. Combine exit of above two entry wounds 12 x 9 cm right eye absent, brain matter outside.*
- iv. Entry wound 1x1 cm circular inverted margins blood stained lateral aspect of chest right side.*
- v. Exit wound irregular inverted margins blood stained 1.5 x 1.5 cm back of chest.*
- vi. Entry wound 1.5 x 1.5 cm Circular inverted margins left front of shoulder, fracture humerus.*
- vii. Exit wound 1.5 x 1.5 cm irregular inverted margins blood stained left back below shoulder.*

INTERNAL EXAMINATION.

Scalp, membrane of brain, brain and walls thorax were ruptured. Skull and humerus fractured.

Opinion.

In my opinion deceased died due to fire arm injury, which caused rupture of brain, fracture of skull and left humerus which caused death. All injuries are ante mortem in nature and sufficient to cause death in ordinary cause of nature.

11. P.W.1 also conducted postmortem of Babar Nadeem and referred the details in following manner:-

“On 28.09.2009 at 12 p.m (noon) I conducted the post mortem of Babar s/o Sabir Nadeem aged 35 years male, caste Chatha, r/o Darwala, Islamabad brought by Shafqat Ullah 4304 of Police Station Koral and identified by Adalat Hussain s/o Muhammad Shafi, Umar Zaman s/o Adalat Hussain.

EXTERNAL APPEARANCE.

A young male height 5 ft 8 inches, hairs, moustaches and beard, bearing cream color Qameez white colour Shalwar and vest. Following injuries were found on the body.

- i. Entry wound 8 x 5 cm multiple entry wounds right mandible region with fracture mandible and lower jaw.*
- ii. Exit wound 1.5 x 1.5 cm irregular inverted margins occipital region on neck.*
- iii. Entry wound circular inverted margins blood stained right side back 1 x 1 cm.*

- iv. Exit wound irregular inverted margins blood stained 19 cm from arm pit right lateral abdomen.
- v. Amputated right middle finger.
- vi. Entry wound 1.5 x 1.5 cm circular inverted margins blood stained on left arm near shoulder.
- vii. Graze wound 2.3 cm below sterna notch.

INTERNAL EXAMINATION.

Scalp, membrane of brain, brain ruptured, skull fractured, walls ruptured, pleurae ruptured. Right lung ruptured left lung ruptured. Heart ruptured. Abdominal walls ruptured, peritoneum ruptured, liver ruptured, fracture mandible. All other viscera were intact.

OPINION.

In my opinion deceased died due to fire arm injury, which caused ruptured of right lung, left lung, heart, liver, brain and fractured mandible and skull and fractured lower jaw. All injuries are ante mortem in nature and sufficient to cause death in ordinary cause of nature”.

12. Dr. Farrukh Kamal/P.W.1 also conducted postmortem of Mulazim Hussain and referred the details as under:-

“On 28.09.2009 at 1 p.m I conducted the postmortem of Molazim s/o Gulzar Khan aged 50 years male, caste Khanial Rajput, r/o Darwala, Islamabad brought by Shafqat Ullah 4304 of Police Station Koral and identified by Ali Ahmed s/o Sardar Khan, Muhammad Hanif s/o Abdul Aziz.

EXTERNAL APPEARANCE.

A middle age man height 5 ft 8 inches, hairs, moustaches beard, wearing white color clothes and Salooka. Eyes and mouth closed. Following injuries were found on the body.

- i. Entry wound 2 x 3 cm palm of left hand circular inverted margins, blood stained blackening present.
- ii. Exit wound dorsum of hand 12 x 8 cm irregular inverted margins, blood stained.
- iii. 3 Entry wounds on forehead 1 x 1 cm circular inverted margins blood stained left side.
- iv. Entry wound 1 x 1 cm circular inverted margins blood stained on forehead left side close to injury No.3.
- v. Entry wound 1 x 1 cm fronto parietal region on forehead.
- vi. Entry wound circular inverted margins blood stained 1 x 1 cm left mandible region. Bullet removed approaching the track.
- vii. Entry wound left side of neck. Bullet removed.
- viii. Entry wound 1 x 1 cm circular inverted margins blood stained right front middle of chest.

ix. *Exit wound irregular inverted margins blood stained right back of chest.*

x. *Exit wound 1.5 x 1.5 cm irregular inverted margins blood stained parieto occipital region.*

INTERNAL EXAMINATION.

Scalp, membrane of brain, brain ruptured, skull fractured. Walls of thorax ruptured, pleurae ruptured. Right lung ruptured. All other organs were intact.

OPINION.

In my opinion deceased died due to fire arm injury, which caused ruptured of brain, right lung, fractured skull caused death. All injuries are ante mortem in nature and sufficient to cause death in ordinary cause of nature.

13. During cross-examination, P.W.1 acknowledged that autopsy of Babar Nadeem deceased was started at 12:00 noon and he opined that shot made from close distance causes blackening approximately of 2 cm of diameter and he further stated that if gunshot be made from remote distance, the size of entry wound is normally less than .5 cm. He further stated that all dead bodies were brought together at the same time at round about 10:30 a.m. and he started autopsy of deceased Mutkhar Hussain at 2 p.m., however, he acknowledged that there was no blackening on all the injuries of deceased Mukhtar Hussain. He further stated that he cannot tell as to what kind of weapon was used as he is not ballistic expert of weapon nor he is able to tell exact distance of fire-arms through which injuries were caused. He further stated that entry wounds were of different size and it depends upon the weapons as well as entry in the tissues of the body. He further stated that no material was found inside entry wounds, however, he conceded that possibility of incident might be between 7 to 9 a.m. He also conceded that the date mentioned in postmortem of Mukhtar is 03.10.2009. The injuries caused to deceased Mukhtar Hussain were from different dimensions. P.W.1 further confirmed that he cannot disclose the exact distance of bullet injuries and no blackening of injuries were found on dead body of Mukhtar except of Injury No.1. He further stated that at the time of postmortem of Mukhtar Hussain no private person was present there and he handed over the clothes of deceased at about 3/3.30 pm to the police and as per his calculation the time mentioned in the post mortem report, if calculated, the occurrence could take place at 7 am. P.W.1 further confirmed that he did not mention the time of the postmortem of Babar Nadeem, however he stated that no blackening of injuries were found on the dead body and he

confirmed that blackening appears if the distance is one meter or less. He further confirmed that no private person was present at the time of post mortem of Babar Nadeem, however he could not tell the exact direction of fire-arm used on the dead body of Babar Nadeem but as per his opinion deceased sustained injuries due to fire from different directions and same is the position with deceased Mukhtar Hussain and Mulazim Hussain.

14. The prosecution produced Dr. Abdul Ghafoor as P.W.11, who was posted in Benazir Bhutto Hospital as CMO on the day of incident and he examined injured Wajid Nadeem at 12:45 p.m on 28.09.2009 and referred the details as under:-

- 1. A lacerated wound over right hypochondrium (RHC), laterally, 1.5 x 1.5 cm with inverted margin, depth not probed (DNP), no blackening, burning present.*
- ii. A lacerated wound over mid of back with everted margin, with no blackening or burning, DNP, 2 x 1 cm.*
- iii. A lacerated wound over right arm laterally at upper one third 1.5 x 1.5 cm, DNP, margins inverted with no blackening or burning.*

Marked sign sealed Qameez was handed over to police. The patient was referred to surgical unit No.1 for management and expert opinion regarding extent of injuries. Injuries were found caused with fire arm within 03 hours and the same were kept under observations. According to surgeon BBH, there was laceration of segment of liver, perirenal hematoma and laceration of upper pole of right kidney. The injuries No.1 & 2, kept under observations were declared as Jurh Jaifa, whereas injury No.3 was declared as Jurh Ghair Jaifah Damia. Ex-PU is true carbon copy of the original, which is in my handwriting and bears my signature. I also signed injury statement Ex-PM..

15. On the same day, P.W.11 also examined the other injured Matloob Hussain and referred the details as under:-

- “1. A lacerated wound over mid of left upper arm, 1 x 1 cm, with inverted margin, with no blackening and burning. depth not probed (DNP).*
- ii. A lacerated wound over back of left shoulder, 2 x 1.5 cm with everted margin, with no blackening or burning, DNP.*

Marked, sign and sealed Qameez handed over to police. The patient was referred to surgical unit No.1 for management and expert opinion regarding extent of injuries.

Injuries were found caused with fire arm within 03 hours and were kept under observation. According to surgeon of BBH, Sr. Registrar SU-I Dr.Zeeshan, there was fracture of left scapula and left humerus,

hence, KU injuries were declared Jurh Ghair Jaifa Hashima. Ex.PV is true carbon copy of the original, which is in my handwriting and bears my signatures. I also signed the injury statement.

16. During cross-examination, Dr. Abdul Ghafoor/P.W.11 acknowledged that the injured was observed by him at 12.45 pm and no blackening or burning was observed on the injuries of both the injured P.Ws, however he confirmed that the fire shot was made from a distance of more than 4 feet. He further confirmed that the size of injuries varies from each other and he could not comment whether the same were caused from same or different weapons. He further stated that injury No.2 is an exit wound. P.W.11 confirmed that injured was conscious and oriented, however he could not tell the time when he handed over MLC to police nor he is able to confirm the date when he received the opinion of the surgeon and he is unable to tell the duration of examination.

17. PW.11 further confirmed that in case of injured Matloob Hussain/P.W.16, he did not use the words entry, exit and the size of injuries were roughly mentioned, however he did not mention the date of receiving of expert opinion and he cannot tell the name of police official to whom *Qameez* of injured P.W was handed over.

18. The prosecution produced Dr. Anees Ahmed as PW.10, who was posted as Sr. Registrar in BBH, Rawalpindi on 28.09.2009 (occurrence day), who examined injured Wajid Nadeem for expert opinion, referred by Dr. Abdul Ghafoor/P.W.11, who observed that:

“Patient was presented in the emergency with firearm injury abdomen. Exploratory laparotomy was done in which there was laceration of segment 6 & 7 of liver and peri-renal hematoma retro and retro peritoneal laceration of upper pole of right kidney. Post-operative recovery was smooth. The opinion was given by me on 6.1.2010 Ex.PT is in my handwriting which bears my signature.”

19. The prosecution produced Adalat Khan as P.W.14, who stated that on 28.09.2009, he heard about occurrence and he alongwith his son Umar Zaman proceeded to the place of occurrence on motorcycle and saw vehicle No.RIV-1845 and found that on the front seat dead body of Mulazim Hussain was lying and on the back seat dead body of Mukhtar Hussain was lying, whereas at distance of 10/15 steps dead body of Babar Nadeem was lying. He further stated that after some time police arrived there and he signed the injury sheet/Exh.PX on which he identified his signatures as Exh.PX/1, where-after the police

officials shifted the dead bodies to PIMS Hospital and there he identified the dead body of Babar Nadeem for the purpose of post mortem. He further stated that he received the dead body of Babar Nadeem from police officials through receipt/Exh.PZ.

20. During the cross-examination, P.W.14 acknowledged that he reached at the place of occurrence at about 9/9:15 a.m., whereas the police officials arrived at the crime scene after his arrival and he remained at the place of occurrence throughout the time when the proceedings were carried out by the I.O. He further stated that he does not remember whether the I.O had collected anything from the place of occurrence and he is not aware as to how police officials came at the spot and he cannot tell the names of drivers and registration number of the vehicles used for the purpose of transportation. He further conceded that he cannot even tell the name of I.O, who was present at the spot and he also cannot tell how many police officials were present there. He also conceded that all the signatures were made at PIMS hospital and he does not know when the post mortem was conducted, however, he signed the receipt of dead body at 1:30 pm.

21. The prosecution produced Muhammad Shafique as P.W.15, who stated that on 28.09.2009 he was present in his house alongwith Ghulam Abbas and after hearing about the occurrence, he alongwith Ghulam Abbas reached at the place of occurrence and saw vehicle No.RIV-1845, wherein on the front seat of the said vehicle dead body of Mulazim Hussain was lying whereas on the rear seat dead body of Mukhtar Hussain was lying and at about 14/15 steps from the vehicle dead body of Babar Nadeem was present. He further stated that the police arrived at the spot and the I.O prepared the injury statement Exh.PAA of Mukhtar Hussain which he signed alongwith Ghulam Abbas, where-after they alongwith dead body went to PIMS hospital and after post mortem, he received the dead body of his deceased brother Mukhtar Hussain vide receipt/Exh.PBB and he had also identified the dead body vide memo of identification/Exh.PCC.

22. During the cross-examination, P.W.15 stated that he heard about the occurrence at 8:30 a.m and the distance between his house and the place of occurrence is 01 Kilometer and it took twenty minutes to reach at the place of occurrence. He conceded that he does not know who was present at the spot from the family of Adalat Khan and that police reached at the spot after 30/45 minutes of his arrival i.e. at about 9/9:30 a.m. He further

stated that he cannot tell the registration number of the police vehicle and even cannot tell the number of the police officials available at the spot, even he cannot tell the name of the I.O. He further stated that he cannot tell as to whether complainant drafted and submitted any application for registration of FIR and the dead bodies were shifted in pickup Suzuki. He further stated that he cannot tell the name of the driver or registration number of vehicle used for transportation of dead bodies and the name of doctor, who conducted the post mortem.

23. The prosecution produced Shaukat S.I, posted at police station Bhara Kahu, Islamabad in the trial of appellants Rafaqat Hussain and Nasir Mehmood as P.W.19, who in addition to his earlier statement in the trial of accused Muhammad Ilyas stated that on 23.05.2014, he was posted as S.I in Police Station Koral and for the arrest of proclaimed offender, he arranged police party consisting of Ghulam Abbas/C and Munir Ahmed/C, whereby they arrested appellants Nasir Mehmood and Rafaqat Hussain and on personal search of appellant Nasir Mehmood, he recovered a mobile phone ZTC-6120/P-32, mobile phone X-202-G5/P-33, four artificial bangles/P-34/1-4, purse of red and black/P-35, original driving licence and original CNIC of appellant Nasir Mehmood/P-36 and the said articles were secured vide recovery memo Exh.PZZ. He further stated that on personal search of appellant Rafaqat Hussain, he recovered an Olympus camera/P-37, original registration book of RNG-4114/P-38, mobile phone set H9 H&H/P-39, mobile set P500 wootel/P-40, phone set Nokia 1110/P-41, mobile set model 2310/P-42, mobile set model 101/P-43, cash Rs.40/P-44, black color purse/P-45, photo copy of CNIC of one Shahzad son of Yousaf Masih/P-46, original CNIC of Rehmat Ayaz Khan/P-47 & colored copy of CNIC of accused Rafaqat/P-48, which were secured vide recovery memo Exh.PAAA. He further stated that he obtained physical remand of the appellants for six days on two different dates and during investigation, appellant Rafaqat Hussain disclosed about the crime weapon and on the said disclosure, he alongwith complainant, Wajid Nadeem, and police constables proceeded to Haran Maira road in official vehicle and when they reached near Chowk Darwala, the appellant asked them to stop the vehicle and while in custody he led them to the bushes near the road and out of those bushes he took out .12 bore repeater wrapped in white colour bag and handed over to him, which was found

empty. He further stated that on the left side of the said repeater the words of made 99-12GA-Bodyguard and on the barrel the words of bodyguard tested 12CA Pak-Made were engraved and he sealed the repeater/P-49 and secured the same vide recovery memo Exh.PBBB. He further stated that he prepared the visual site plan/Exh.PCCC of the place of recovery and prepared the written complaint/Exh.PDDD and sent the same to the police station through constable Tasadaq Hussain, who came with the copy of FIR No.161/2014, dated 29.05.2014, offence U/S 13 AO alongwith original complaint. He further stated that appellant Nasir Mehmood made disclosure about the crime weapon .30 bore and on his disclosure he got recovered .30 bore pistol wrapped in white colour shopping bag from bushes near Haran Maira Chowk and on unloading the pistol, he recovered three live bullets. He further stated that he sealed the recovered pistol/P.50 and three live bullets/P-51/1-3 and secured the same vide recovery memo Exh.PEEE and obtained the signatures of complainant, Wajid Nadeem on the recovery memo. He prepared visual site plan of place of recovery Exh.PFFF and prepared complaint Exh.PGGG for the offence U/S 13 AO and dispatched it to police station through Tasadaq Hussain constable, who returned with the copy of FIR No.162/14 and original complaint. He further stated that on 01.06.2014, he sent up the incomplete report U/S 512, Cr.P.C against the accused. He confirmed that he sent the parcels of pistol and repeater 12 bore to Forensic Science Laboratory, Islamabad through Muhammad Akram/4380/C on 30.06.2014. He further stated that he sent the parcel of Kalashnikov to Forensic Science Laboratory, Islamabad through Muhammad Akram/4380/C on 06.08.2014.

24. During cross-examination, P.W.19 acknowledged that they reached at the place of occurrence at about 09:00 a.m. He further stated that he received information of the occurrence after 08:30 a.m, whereas he recorded 11:15 a.m in the column of time of the receipt of information in the inquest report. He further confirmed that nobody was present on the Daira and there was a shop near the place of occurrence and he had not recorded the statement of any shopkeeper. He had not taken the photographs of the car of complainant party and the said car is not present in Court. He further conceded that he did not provide the exact number of bullet marks on the car of complainant party, even he does not remember that from which direction the accused had fired on the car of the

complainant party. He further conceded that he did not recover broken glasses of the car and that no other person except the complainant party joined the investigation at the scene of occurrence. He further acknowledged that he does not remember that the inter-se distance between point No.6 and point No.1 would also be 46 steps, whereas point No.5 is at the distance of 10 feet from the car of complainant party. He further conceded that the dead bodies were sent to PIMS on Suzuki vehicles under the supervision of Shafaqat Ullah and Ghulam Abbas constables. He also conceded stated that he cannot tell the names of drivers of those vehicles and he had dispatched the complaint to police station at 11:15 a.m. whereas he had dispatched the empties recovered on 28.09.2009 to Forensic Science Laboratory Islamabad in the year 2014. He also conceded that the place of recovery of weapon is an open place having access for anybody and at the time of recovery the weapons were not rusty. He also conceded that he had not recovered the shopping bags, in which the weapons were wrapped and when he was confronted with marks present on the weapon, short gun 12 bore, he could not tell the exact details.

25. The prosecution produced only one eyewitness Matloob Hussain as P.W.16 in this case, who stated before the court that on 28.09.2009 he along with Babar Nadeem, Mulazim Hussain, Mukhtar Hussain, Wajid Nadeem were travelling to district Court, Islamabad in car RIV-1845 of Babar Nadeem to attend the proceedings of the case and when they reached Pind Dayyan at about 8.30 a.m, four persons on two motorcycles, two persons each on one motorcycle, came behind our car and accused Ilyas, armed with Kalashnikov, Arif armed with 7mm, appellant Rafaqat armed with 12 bore, Faisal, again said appellant Nasir armed with .30 bore, Faisal with Kalashnikov, Zafran with Kalashnikov, were standing with their car No.8978.

26. P.W.16 further stated that Muhammad Ilyas accused raised Lalkara and thereafter all of them started indiscriminate firing and Babar Nadeem after sustaining injuries attempted to flee from place of occurrence but Faisal fired at him with Kalashnikov and thereafter Rafaqat also fired upon with 12 bore rifle. He further stated that Babar Nadeem, Mulazim and Mukhtar succumbed to the injuries at sight and Arif accused fired at him which landed on his left shoulder and Muhammad Ilyas Wajid Nadeem, which landed on his right shoulder and right side of abdomen. He further stated that he along with Wajid

Nadeem were shifted Benazir Bhutto Hospital, Rawalpindi in injured condition and the accused present on the motorcycles decamped from the place of occurrence while resorting to aerial firing and the occurrence took place on the consultation of Muhammad Hussain. He further stated that on 29.09.2009 police officer came to him and recorded his statement on the same day.

27. During cross-examination, injured Matloob Hussain/P.W.16 acknowledged that Wajid Nadeem P.W and Muhammad Azam complainant present at the time of occurrence have not come to the Court for their evidence and he is not aware as to why they have not attended the Court for evidence, however, he further confirmed that nephew of accused namely Saqib Hussain was murdered and these PWs were nominated in the said FIR. He further confirmed that in the year 2007 FIR of murder of Mehmood Hussain was registered in which Abid, Babar Nadeem deceased, Wajid Nadeem P.W were nominated as accused in the said murder case.

28. P.W.16 further confirmed that the occurrence took place on Monday and they left home at about 8:15 am and they reached at the scene of occurrence at about 8.30 am. He further confirmed that there is cattle shed, a graveyard and a single shop at the place of occurrence and people were present in and around their houses and shop and some persons were present in the cattle shed but they did not become the witnesses. P.W.16 further confirmed that appellants Rafaqat and Nasir were present on the left side of the P.W's vehicle beside under constructed hut and the remaining accused were present in front of the vehicle. He further stated that appellants Rafaqat and Nasir were present at the distance 4/5 from remaining four accused and there was six accused persons, however, he did not see any other accused besides those 6 accused persons. As per his stance, accused Muhammad Ilyas armed with Kalashnikov was present at the right of the remaining accused, who were present in front of their car, however he could not tell the nature of dress of accused Ilyas and Arif armed with 7mm rifle was also standing adjacent to Ilyas but he could not tell the nature of the dress of accused Arif. He further stated that accused Rafaqat was present in the hut on the left side of the P.W.16's car but he could not tell the number on which he was standing nor he is able to tell the dress of the accused. He further confirmed that on hearing the fire shots the people attracted at sight, however, he

confirmed that he was injured due to fire shot of accused Arif and his statement U/S 161 Cr.P.C. was recorded on 29.09.2009. He further confirmed that he was shifted to hospital in Suzuki pickup and reached to the hospital at 9:15 a.m. and police reached at the hospital. P.W.16 further stated that complainant Azam was the brother of Mulazim Hussain.

29. The prosecution produced Muhammad Ilyas as P.W.17, who stated that he deal in the business of rent a car in the name of Chaudhry Motors situated at Thanda Pani and on 27.09.2009, at about 05:00 p.m Rafaqat accused took on rent Suzuki Mehran No.LRE-8978 and returned the same on 28.09.2009 at 10:30 a.m. He further stated that after about 14/15 days the police officials of Police Station Koral took the car from him vide recovery memo Exh.PDD, which was later on taken by him on Superdari. He further stated that he produced the vehicle in the Court in the trial of co-accused Muhammad Ilyas as P.1.

30. During cross-examination, P.W.17 conceded that he had not brought car No.LRE-8978 today in the Court. He stated that when they give some vehicle on rent to some person, they retain some proof of his identity i.e. CNIC, etc but he did not took CNIC of appellant Rafaqat nor demanded any witness as he was previously known to him. He also conceded that original receipt of the car is given to the person, who takes the vehicle on rent and the carbon copy is kept in the office and he had provided the carbon copy of the receipt to the police. He conceded that receipt/Exh.PS/1 is not the carbon copy and it is original and he had given it to appellant Rafaqat. He further stated that he had not delivered receipt/Exh.PS/1 to the police. He further stated that he himself produced car in the police station and he had received information of the occurrence 14/15 days after 28.09.2009, when the police made a telephonic call to him.

31. The prosecution produced Munir Ahmed S.I/O posted at P.S Sihala, Islamabad as P.W.18, who stated that on 26.10.2009, he was posted at P.S Koral and on the same day investigation of this case was assigned to him, whereas he arrested Ilyas accused on 01.11.2009 and recovered service card, CNIC, driving licence, and cell phone with two SIMs through recovery memo Exh.PEE. He further stated that during the course of investigation accused Ilyas disclosed that he can lead to the place of recovery and on 15.11.2009, he was taken to his house in village Darwala and from residential room he got

recovered Kalashnikov from an iron box alongwith two magazines containing 19 live bullets, which were taken into possession through recovery memo Exh.PFF, where-after on 25.11.2009, he submitted incomplete challan against Ilyas accused in the Court. He further stated that he recovered rental receipt/Exh.PT from Muhammad Ilyas/P.W.17 and also recovered motorcycle through recovery memo/Exh.PL and obtained proclamation U/S 87, Cr.P.C against accused Muhammad Arif, Rafaqat Hussain, Nasir Hussain, Faisal Hussain, Zafran and Muhammad Hussain. However, during the course of cross-examination, Munir Ahmed S.I/I.O/P.W.18 acknowledged that he does not remember the number of the vehicle, which was taken on rent by accused persons on the day of occurrence.

32. The prosecution produced Ghulam Abbas, S.I, posted at Police Line Head Quarter, Islamabad, who stated that on 28.09.2009, he was posted as S.I at Police Station Koral and on the same day, Shaukat Ali/S.I sent a written complaint through Muhammad Asif/constable to police station and he recorded the FIR at 11:15 a.m, copy of which he referred as Exh.PD, which is in his handwriting and bears his signatures.

33. The prosecution produced Shan Muhammad/ASI as PW.3, who stated that on 29.05.2014, he was posted as Moharrar in Police Station Koral, Islamabad and at about 02:00 p.m, Tasadaq Hussain/constable brought a written complaint of Shaukat Ali/S.I for registration of case and on the said complaint he registered FIR No.161, U/S 13 AO, copy of which is referred as Exh.PE. He further stated that on the same day, he received another complaint drafted by Shaukat Ali/S.I and he registered FIR No.162/2014, U/S 13 AO/Exh.PF. He further stated that on the same day Shaukat Ali/I.O. handed over to him two sealed parcels, one said to contain repeater 12 bore and the other said to contain pistol .30 bore, which he kept in the Malkhana and on 30.06.2014, he delivered the said two parcels to constable Muhammad Akram through road certificate and English docket for depositing in the office of the NFSA F-10/3 Islamabad. During the course of cross-examination, P.W.3 conceded that his statement was recorded on 31.05.2014. He further conceded that he had dispatched the parcels on 30.06.2014 on the direction of the I.O. after delay of 32 days. He stated that he do not know whether the raput recorded by him

about the arrival of Tasadaq constable is part of the record or not and that he had not supplied the copies of raput to the I.O.

34. The prosecution produced Malik Amir Shahzad Draftsman as P.W.4, who stated that on 30.09.2009 he prepared scaled site plan/Exh.PG (two pages) on the pointation of Muhammad Azam complainant.

35. The prosecution produced Shafaqat Ullah/constable posted at Security Division, Islamabad as P.W.5, who stated that on 28.09.2009, he was posted in police station Koral and he went to the place of occurrence alongwith Shaukat Ali, S.I, who handed over to him two bodies of Mulazim Hussain and Babar Nadeem for autopsy and two forms of inquest reports. He further stated that he delivered last worn clothes of Mulazim Hussain and Babar Nadeem deceased to Shaukat Ali, S.I, who took the same through recovery memos Exh.PH and Exh.PJ, respectively. He further stated that he received two led bullets in a sealed parcel from CMO, which he handed over to Moharrar Tariq Mehmood ASI and on 16.12.2009, Munir S.I/I.O took into possession the said parcel of led bullets vide recovery memo Exh.PK. He further stated that on 18.10.2009 Tariq Mehmood ASI/Moharrar Mal Khana handed over to him four sealed parcels alongwith road certificate for depositing in the office of Forensic Science Agency, Lahore and office of chemical examiner. He further stated that Munir S.I recovered the said motorcycle vide recovery memo Exh.P.L. During the course of cross-examination, P.W.5 acknowledged that the I.O handed over to him the dead bodies alongwith the documents at about 09:00 a.m. He further stated that he does not remember the exact time of post mortem. He further stated that neither he remembers the exact time of delivering of the clothes and led bullets by the CMO nor knows about the last worn clothes of the deceased, however, he acknowledged that the last worn clothes were not sealed.

36. The prosecution produced Arshad Ali S.I, posted at P.S Bhara Kahu, Islamabad as PW.6, who stated that on 28.09.2009, he was posted at P.S Koral, Islamabad and on the same day, on receiving call from Shaukat Ali, S.I, he rushed to Benazir Bhutto Hospital, Rawalpindi and prepared injury statements Exh.PM & Exh.PN of Wajid Nadeem and Matloob Hussain. He further stated that he submitted an application Exh.PP to the CMO

for recording the statement of the injured but the doctor opined that injured are not fit for statement.

37. The prosecution produced Asif Nadeem/constable posted at Police Station Koral, Islamabad as PW.7, who stated that on 28.09.2009, he was posted at P.S. Koral, Islamabad and on the same day, Shaukat Ali, S.I/I.O & Arshad Ali/S.I sent him to Benazir Bhutto Hospital, Rawalpindi for medical examination of Matloob Hussain and Wajid Nadeem and after examination, the doctor handed over to him MLC & blood stained clothes of the injured, which he produced before the I.O, who secured the same through Exh.PQ & Exh.PR. However, during cross-examination, P.W.7 acknowledged that the clothes were without parcel.

38. The prosecution produced Tariq Mehmood/ASI as PW.8, posted as Reader SDPO Rural Circle, Islamabad, who stated that on 28.09.2009, he was posted at P.S Koral, Islamabad as Moharrar and Shaukat Ali/S.I handed over to him two sealed parcels, one parcel said to contain blood stained soil, one parcel said to contain crime empties and one parcel said to contain led bullet. He further stated that on 18.10.2009, he handed over the parcels of blood stained cotton and blood stained soil to Shafaqat Ali/constable for depositing in the office of Chemical Examiner, Lahore and one parcel of crime empties for depositing in the Forensic Science Agency, Lahore. He further stated that his statement U/S 161, Cr.P.C was recorded by the I.O on 19.10.2009.

39. The prosecution again produced Malik Amir Shahzad/Draftsman as P.W.13, who stated that on 30.09.2009 Shoukat Ali, S.I went to the place of occurrence and on the pointation of complainant Muhammad Azam, he took rough notes and on 05.10.2009, he prepared scaled site plan. During the cross-examination, P.W.13 acknowledged that he had not seen the site plan prepared by the police. He stated that the distance between point No.1 and point No.3 is 38 feet, whereas the distance between point No.1 and point No.5 is 22 feet and the distance between point No.5 and point No.3 is approximately 60 feet, whereas the road/place of occurrence is 12 feet wide, which is used for traffic from both sides. He further stated that the cattle shed/dera is at the distance of 11 feet from the road and the distance between point No.4 and point No.1 is 230 feet.

40. The above referred evidence gives rise to the following facts:-

- i) FIR No.271, dated 28.09.2009, U/s 302, 324, 337-F(i), 337-F(v), 337-A(i), 148, 149, 109, PPC, Police Station Koral, Islamabad was registered on the complaint of Muhammad Azam, who allegedly seen the incident at about 8:30 a.m near Pind Dayan alongwith Asghar Ali.
- ii) As per prosecution, Muhammad Ilyas armed with Kalashnikov, Arif armed with 7 mm, Rafaqat Hussain armed with 12 bore, Nasir Mehmood armed with .30 bore pistol, Faisal armed with Kalashnikov, Zafran armed with Kalashnikov resorted firing at car No.RIV-1845 of Babar Nadeem and others.
- iii) Babar Nadeem was chased by Faisal accused, who made fire on him from his Kalashnikov and Babar Nadeem fell on the ground, where-after appellant Rafaqat Hussain fired on him with his 12 bore gun.
- iv) Babar Nadeem, Mulazim Hussain and Mukhtar Hussain died in the said incident.
- v) Wajid Hussain and Matloob Hussain were lying in injured condition on the back seat of the vehicle, who were taken to the Benazir Bhutto Hospital Rawalpindi by Asghar Ali.
- vi) Mukhtar Hussain deceased aged 40 years received seven injuries on his body, two entry wounds are on back side, which correspond with exit wounds on the front on right eye, which is absent and two entry wounds on front side of lateral aspect of chest right side and on the left shoulder, which correspond with exit wounds.
- vii) Babar Nadeem deceased aged 35 years received eight injuries on front mandible region, lower jaw, left arm near shoulder and amputated right middle finger.
- viii) Mulazim Hussain deceased aged 50 years received ten injuries on his body, seven entry wounds on palm of left hand, four at mandible region, left side of neck and on middle of chest.
- ix) Wajid Nadeem injured was examined in Benazir Bhutto Hospital by Dr. Abdul Ghafoor/P.W.11 at 12:45 p.m on 28.09.2009, who received three injuries over right

hypochondrium, lacerated wound over mid of back and over right arm.

- x) Matloob Hussain injured/P.W.16 was also examined by Dr. Abdul Ghafoor/P.W.11 at Benazir Bhutto Hospital Rawalpindi on same day, who received lacerated wound over mid of left upper arm and second injury over back of left shoulder with no blackening or burning.
- xi) Arshad Ali S.I made a request to the doctor at Benazir Bhutto Hospital Rawalpindi for recording statements of injured but the doctor opined that the injured are not fit for statements.
- xii) The dead bodies were received by Adalat Khan/P.W.14 at 12/12:15 p.m in PIMS Hospital.
- xiii) The I.O recovered 3 empties of 7 mm rifle P.17/1-3, 2 crime empties of .30 bore pistol P.18/1-2, 4 cartridges of 12 bore shot gun P.19/1-4 and 13 crime empties of Kalashnikov P.20/1-13.
- xiv) The I.O recovered Alto Car No.1845-RIV/P.22 with broken windshield.
- xv) Complainant Muhammad Azam and injured eye-witness Wajid Nadeem never appeared before the Court for recording of their testimony and the only eye witness account brought on the record is of Matloob Hussain injured/P.W.16.
- xvi) Vehicle No.8978 of accused party is not mentioned in the complaint/Exh.PZ made by Muhammad Azam.
- xvii) Matloob Hussain injured/eye witness/P.W.16 stated that Babar Nadeem after sustaining injuries attempted to flee from the place of occurrence but Faisal fired on him with Kalashnikov and he fell down and appellant Rafaqat Hussain fired on him with his 12 bore rifle.
- xviii) Matloob Hussain/P.W.16 stated that he sustained injury on his left shoulder with fire of Arif and Wajid Nadeem sustained injury on the right shoulder and on the right side of abdomen by fire of accused Ilyas and they were shifted to Benazir Bhutto Hospital.

- xix) Matloob Hussain/P.W.16 stated that Ilyas, appellant Rafaqat Hussain and Arif were in front of the vehicle while Zafaran and appellant Nasir Mehmood were near outside the cottage.
- xx) Matloob Hussain injured/P.W.16 was sent to Benazir Bhutto Hospital through Asghar Ali but he was never produced before the Court as a witness.
- xxi) Matloob Hussain/P.W.6 stated that he was sitting behind the driving seat of the vehicle while Wajid and Mukhtar were sitting with him on rare seat.
- xxii) Matloob Hussain/P.W.6 remained in the hospital for one day and was discharged and he never recorded his statement to any police official after the day of occurrence.
- xxiii) Wajid Nadeem/P.W.7 acknowledged that on the place of occurrence shops, school and houses were at distance of 8/9 feet.
- xxiv) Muhammad Ilyas/P.W.17 was running business of rent a car in the name of Chaudhry Motors at Thanda Pani , who stated that appellant Rafaqat obtained car on rent from him on 27.09.2009 at about 5:00 p.m and returned the same on 28.09.2009 at 10:30 a.m.
- xxv) Ghulam Abbas/P.W.2 S.I recorded FIR/Exh.P.D on 28.09.2009 on the complaint received at 11:55 a.m.
- xxvi) Shaukat S.I/P.W.19 acknowledged that the empties were dispatched to Forensic Science Agency Lahore for the first time on 19.10.2009 but the same were returned un-examined and again dispatched to the Forensic Science Laboratory Islamabad on 25.06.2014.
- xxvii) As per Exh.P.MM un-scaled site plan prepared by the I.O on the day of incident dated 28.09.2009, the position of complainant/eye witness Muhammad Azam is on the side of the vehicle at distance of 46 feet with reference to point 1 to point 4, whereas he has not appeared as a witness in this case.

41. In view of above background, this Court has gone through the entire evidence brought on record from all angles and it appears that alleged incident of murder of three deceased persons Mukhtar aged 40 years, Babar Nadeem aged 35 years and Mulazim

Hussain aged 50 years, who allegedly received fire arm injuries at the hands of appellants Razaqat Hussain and Nasir Mehmood and their co-accused. In these jail appeals and the murder reference, we have confined ourselves to the role of appellants Razaqat Hussain and Nasir Mehmood.

42. As per complaint/Exh.PZ, complainant Muhammad Azam is milk seller, who after selling milk at Raja Bazar Rawalpindi was coming to his village Darwala on Suzuki Pick up and when he reached near Pind Dayan, he heard sound of firing and saw that accused Muhammad Ilyas armed with Kalashnikov, Arif armed with 7 mm rifle, Razaqat armed with 12 bore gun, Nasir armed with .30 bore pistol, Faisal and Zafran armed with Kalashnikovs were firing on car No.RIV/1845 of Babar Nadeem, in which Mulazim Hussain, Mukhtar Hussain, Matloob Hussain, Wajid Hussain and Babar Nadeem were sitting and two motorcycles with two riders each on rear of the car were also making aerial firing.

43. The above referred complaint was produced in evidence as Exh.PZ but surprisingly ***complainant Muhammad Azam was not produced as a witness in this case***, therefore, version narrated in the complaint/Exh.PZ as well as in the FIR/Exh.PD has not been proved by the prosecution and the same cannot be considered for the decision of the appeals and the murder reference. As per complaint/Exh.PZ, the injured Wajid Hussain and Matloob Hussain, who were sitting on the back seat of the vehicle were shifted to the hospital through Asghar Ali as narrated by the complainant Muhammad Azam in the following manner:-

جن کے جانے کے بعد دیکھا کہ گاڑی میں فرنٹ سیٹ پر ملازم حسین اور پیچلی سیٹ پر مختار حسین اور تھوڑے ہی فاصلے پر
بارندیم مردہ حالت میں اور واجد حسین و مطلوب حسین شدید زخمی حالت میں گاڑی کی پیچلی سیٹ پر پڑے ہوئے تھے۔
زخمیوں کو اصغر علی کے ہمراہ ہسپتال بھجوا دیا۔

44. The above referred portion of the complaint has not been proved as ***Asghar Ali was also not produced by the prosecution as a witness*** during the trial, who shifted the injured to the hospital and as such the prosecution could not prove as to who shifted the injured to the hospital.

45. Another important aspect of this case is ***non-appearance of one of the injured person namely Wajid Nadeem***, who alleged got injured in the incident and was treated by

Dr. Abdul Ghafoor/P.W.11 at Benazir Bhutto Hospital Rawalpindi and the relevant injury statement/Exh.PM and MLR/Exh.PU have also been brought on record but surprisingly the said witness was not produced by the prosecution, which clearly establishes that the best evidence has been withheld and as such the negative presumption comes on record in terms of article 129(g) of Qanun-e-Shahadat Order, 1984, however, MLR/Exh.PU clearly reveals that Wajid Nadeem injured was examined by Dr. Abdul Ghafoor/P.W.11 on 28.09.2009 at 12:45 p.m, whereas the alleged incident took place at 8:30 a.m in the morning, which clearly establishes delay of 4½ hours in the treatment of the injured Wajid Nadeem. The only person, who has taken the responsibility to prove the case of the prosecution is injured Matloob Hussain/P.W.16, who recorded his first statement before the police on 29.09.2009 with delay of one day despite the fact that Dr. Abdul Ghafoor/P.W.11 acknowledged that:-

“The injured was conscious and oriented.”

Even otherwise, Dr. Abdul Ghafoor/P.W.11 stated before the Court that:

“Injured was observed by me at 12:45 pm.”

Such delay on part of the prosecution, which has not been explained, is fatal as the only prosecution witness, who has to share the responsibility to prove the prosecution case reached in the hospital with delay of 4½ hours and his ***first statement was recorded on the second day of the incident*** although he was well oriented and conscious and this fact establishes consultation and deliberation with other persons of the complainant party to involve different persons of accused side in the case. Reliance is placed upon **2010 SCMR 584 (Rahat Ali vs. The State)** and **2017 SCMR 486 (Muhammad Asif vs. The State)**.

46. As per statement of injured Matloob Hussain/P.W.16, the appellants and their co-accused were armed in the following manner:-

- (i) Accused Muhammad Ilyas armed with Kalashnikov.
- (ii) Accused Arif armed with 7mm rifle.
- (iii) Accused Rafaqat armed with 12 bore gun.
- (iv) Accused Nasir armed with .30 bore pistol.
- (v) Accused Faisal and Zafran armed with Kalashnikovs.

47. The above referred details given by injured Matloob Hussain/P.W.16 are with generalized role in the following manner:-

“thereafter all of them started indiscriminate firing. After sustaining injuries Babar Nadeem attempted to flee from the place of occurrence but Faisal fired at him with Kalashnikov and thereafter Rafaqat accused also fired upon him with his rifle 12 bore. Babar Nadeem, Mulazim Hussain & Mukhtar Hussain succumbed to the injuries at the site.”

48. The above referred role gives an impression that all of the accused including appellants resorted to indiscriminate firing, however, one of the accused Rafaqat appellant in present case has been attributed role of single fire shot of 12 bore gun upon the deceased Babar Nadeem, therefore, this Court has gone through the evidence of Dr. Farrukh Kamal/P.W.1, who conducted post mortem of deceased Babar Nadeem and as per his evidence injury No.1 is:-

“entry wound 8 cm x 5 cm multiple entry wounds right mandible region with fracture mandible and lower jaw.”

49. The above referred injury, if seen in the light of description given by injured Matloob Hussain/P.W.16 qua the role of appellant Rafaqat, the same is contrary to the weapon used as Dr. Farrukh Kamal/P.W.1 has not referred any pellet injury rather used the term **“multiple entry wounds”** as the same has to be seen in juxta position with the description given by P.W.1 while referring injury No.2 as **“exit wound 1.5 cm x 1.5 cm irregular inverted margins occipital region on neck.”** The said injury is not in line with the shot gun injury rather gives an impression of other kind of weapon i.e. Kalashnikov AK-47, therefore, statement of injured Matloob Hussain/P.W.16 is not in line with medical evidence, therefore, the same could not be believed.

50. Matloob Hussain/P.W.16 has given particular details of his own injury and attributed the same to Muhammad Ilyas co-accused but could not explain the role of appellant Nasir Mehmood, **which could be considered in generalize manner**, however, to that effect benefit of doubt creates on the record.

51. The above referred preposition has to be seen in the light of judgment reported as **1996 SCMR 1411 (Muhammad Hayat and another vs. The State)**, wherein it was held that:-

“injured eye witnesses---stamp of fire arm injury on the person of prosecution witnesses is not per-se tantamount to A stamp of credence on their testimony”

Similar view was also taken in **2011 SCMR 323 (Amin Ali and another vs. The State)** that:

“presence of injured witnesses cannot be doubted at place of incident merely because they had injuries on their person does not stamp them to truthful witnesses.”

52. The other important factor, which creates serious doubt in the entire case is delay in recording of first statement U/S 161, Cr.P.C of injured Matloob Hussain/P.W.16, on the second day of incident without, which has not been explained in any manner, especially when the injured was well conscious and oriented as per statement of Dr. Abdul Ghafoor/P.W.11. Reliance is placed upon **2010 SCMR 584 (Rahat Ali vs. The State)**, wherein it was held that:

“delayed examination of witnesses could effect delay in recording of statement of witness by police without furnishing plausible reason is fatal to the prosecution case and statement of such witness is not to be relied upon.”

Similar view has also been taken in the recent judgment of Apex Court **2017 SCMR 486 (Muhammad Asif vs. The State)**, wherein it has been held that:-

“even one or two days un-explained delay in recording statements of the eye witnesses would be fatal and testimony of such witnesses could not be safely relied upon.”

53. Learned counsel for the respondent tried to convince this Court with the help of application for recording statement of the injured/Exh.PP, which was produced by Arshad Ali, S.I/P.W.6 in evidence during his testimony and stated that the doctor gave his opinion that the injured is not fit for statement. We have gone through the said application as well as the note written by Dr. Abdul Ghafoor, CMO, Benazir Bhutto Hospital, Rawalpindi/P.W.11 and the said application has been seen in the light of statement of Dr. Abdul Ghafoor/P.W.11, who categorically stated in his cross-examination that **“the injured was conscious and oriented”**, hence, the prosecution has failed to justify the reason of recording of statement of injured Matloob Hussain/P.W.16 **with delay as such they have brought specific reasons, which has been denied by the concerned doctor in his testimony**, therefore, the note written on the application Exh.PP has no legal worth to be considered for any purpose in favour of the prosecution.

54. The statement of injured Matloob Hussain/P.W.16 has to be taken into account with due care and caution as he is related witness to the deceased as well as other injured persons. During cross-examination, Matloob Hussain stated that he got injured due to fire shot of accused Arif Proclaimed Offender. He also stated during cross-examination that appellant Rafaqat, who was present in the hut on the left side of the car came out of the hut and made firing but surprisingly in examination in chief, he stated that appellant Rafaqat fired upon Babar Nadeem, when he attempted to flee from the place of occurrence with his 12 bore rifle but as per statement of Matloob Hussain as well as site plan, Babar Nadeem deceased was sitting on driving seat and fled from the said position on the right side of the vehicle, therefore, it was not possible for the appellant, who was standing on the left side of the vehicle to go around the vehicle and fire upon the deceased Babar Nadeem and in such eventuality the ocular account given by Matloob Hussain/P.W.16 is contrary to the medical evidence. Even otherwise, the inquest report/Exh.PKK prepared by the I.O regarding Babar Nadeem on the alleged day of occurrence reveals injury No.1 in column No.10 as under:-

دائیں سائیڈ منہ پر ٹھوڑی پر ذخم خونچکاں برسٹ نما

This gives clear cut description of an automatic weapon like Kalashnikov and the doctor did not extract any pellet or wad (small plastic cap which holds the pellets inside the .12 bore cartridge) from the said injury as the 12 bore cartridge is comprising of 100s of pellets including wad and it is usually seen in the injury of 12 bore shot gun with close range. The wad has to be recovered from the injury, which is not available in this case, therefore, ocular account given by Matloob Hussain/P.W.16 is contrary to the technical evidence of use of weapon. In such like eventuality, we are fortified with the view taken in **1999 SCMR 172 (Muhammad Aslam Khan vs. The State)**, wherein it was held that:-

“The medical evidence in this case also falsifies the ocular account. The presence of wad in the body of the deceased proves it beyond any shadow of doubt that he was fired from a close range.”

55. In view of above authoritative judgment of Apex Court, it is clear that any injury caused by 12 bore gun with close range must result into recovery of wad from the body of the deceased or the injured but in this case, the role defined by injured Matloob Hussain/P.W.16, in which appellant Rafaqat Hussain fired with his 12 bore gun with close range could not be justified through the medical evidence. Even otherwise, blackening around the wound is found, if a weapon like shot gun is discharged from a distance of not

more than three feet and the revolver or pistol is discharged within about two feet as referred in Modi's Medical Jurisprudence and Toxicology. Reliance is placed upon 1995

SCMR 610 (Mir Muhammad vs. The State), wherein it was held that:-

“Blackening of wound---Blackening around wound is found, if a fire-arm like shot-gun is discharged from a distance of not more than 3 feet and a revolver or pistol is discharged within about 2 feet.”

Similar view was also taken in 2007 SCMR 1812 (Barkat Ali vs. Muhammad Asif and others), wherein it was held that:-

“Blackening on dead body would appear in case deceased received injuries from a distance of four feet.”

56. The above referred details of ocular and medical evidence have persuaded this Court to consider evidence of injured Matloob Hussain/P.W.16 in the light of law laid down by the Apex Court regarding related, inimical and interested witnesses, which requires strong corroboration. Reliance is placed upon 1999 SCMR 1030 (Muhammad Irshad and another vs. The State), wherein it was held that:-

“Where a witness is interested and also inimical and is thus likely to falsely implicate one or other accused, it was essential to seek independent corroboration regarding each one of other accused.”

Similar, view was taken in 1980 SCMR 979 (Hazoor Bakhsh vs. Waddon and 3 others) & PLD 1985 Supreme Court 11 (Ghulam Sikandar and another vs. Mamaraz Khan and others). In view of above circumstances, we are also of the view that PW.16 Matloob Hussain is not truthful witness as his statement is contrary to the medical as well as technical evidence of firearm, even otherwise, he is related, inimical and interested witness whose statement has not been corroborated with any other independent source or witness. Similarly, he could not explain the usage of specific weapon which caused murder of Mulazim Hussain and Mukhtar Hussain deceased sitting on the front and rear seat of the car, especially when both the deceased died due to firearm injuries received on their left side and not from the front.

57. Lastly, we have gone through the evidence of recovery of 12 bore repeater gun, which was recovered from appellant Rafaqat Hussain on 29.05.2014 vide recovery memo Exh.PBBB and as per the said recovery memo, the appellant while on physical remand got

recovered the said weapon from Haren Maira Road near Darwala Chowk, Islamabad in the following manner:-

قریب خود رو گھنٹی جھاڑیوں میں سے پلاسٹک کے تھیلے برنگ سفید میں لپیٹی ہوئی 12 ریپیٹر بندوق از دست خود نکال کر میرے حوالے کی۔

The said recovery memo was prepared by Shoukat S.I/P.W.19, who stated before the Court that he sent the parcels of repeater 12 bore and pistol to Forensic Science Laboratory on 30.06.2014 and he also acknowledged that he dispatched the empties recovered on 28.09.2009 to FSL, Islamabad in the year 2014 for the second time but he could not explain as to why he waited for five years and did not dispatch the crime empties. In such like eventuality the recoveries of weapon of 12 bore repeater gun and 30 bore pistol are in consequential. Reliance is placed upon 2007 SCMR 1812 (Barkat Ali vs. Muhammad Asif and others), wherein it was held that:-

“The learned High Court had also examined the evidence on record qua the recoveries and came to the conclusion that the empties recovered from the spot did not tally with the weapon recovered at the instance of Muhammad Asif respondent whereas according to the report of Forensic Science Laboratory (F.S.L) .12 bore empties recovered from the spot matched with the gun allegedly recovered at the instance of Shabbir respondent on 5-11-2002 yet no relevance can be placed on the report on the ground that according to P.Ws Shabbir was appeared with a rifle and not with a gun and that the empties were received in the F.S.L on 29-11-2002 i.e. after one month and 10 days of the occurrence and after 24 days of the recovery of the weapon. There is no explanation as to why the empties were not sent to the laboratory soon after their recovery.”

58. We have also gone through the report/Exh.PKKK of National Forensic Science Agency produced by the prosecution, through which recovered four empties of 12 bore gun were tested but the same did not match with the tested cartridges, however, the pistol 30 bore recovered from appellant Nasir Mehmood through recovery memo/Exh.PEEE matched with the crime empties but the same has no evidentiary value as there is delay of five years in sending the weapon alongwith fire empties which has not been explained by the prosecution. Even otherwise, .30 bore pistol allegedly recovered from appellant Nasir Mehmood was also recovered in the following manner:-

آگے آگے چل کر ہرن میرا روڈ کے قریب خود رو گھنٹی جھاڑیوں میں سے شاہر برنگ سفید میں لپیٹا ہوا پستل 30 بور از دست خود نکال کر میرے حوالے کیا۔

The said recovery also effected on 29.05.2014 by Shaukat S.I/P.W.19, therefore, in the light of judgment referred above, the recoveries are inconsequential and even otherwise, the recoveries were made from main road, which is an open place and accessible to everyone and it is not possible that weapons of offence could be concealed for 5 years near the main road.

59. We have not seen any element of vicarious liability to the extent of appellants Rafaqat Hussain and Nasir Mehmood in the alleged crime rather the entire case set up by the prosecution through injured Matloob Hussain/P.W16 is result of concoction, fabrication, consultation and the delay in lodging of FIR has not been explained in this case, even the most important witnesses namely, Muhammad Azam complainant, Wajid Nadeem second injured P.W and Asghar Ali eye witness, who allegedly took the injured to the Benazir Bhutto Hospital Rawalpindi was not produced, which give an overall impression that the prosecution has suppressed material facts and if they produced those witnesses, their evidence might comes against the prosecution case and their evidence has been withheld in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984, therefore, adverse inference is drawn.

60. The motive set up in this case, if admitted, could affect both sides as it is considered to be double edge weapon mainly on the ground that the complainant party was heading towards District Courts, Islamabad in connection with murder case of the brother (Makhdoom) of Muhammad Ilyas co-accused, therefore, false implication of innocent persons cannot be ruled out. No independent witness has been produced by the prosecution despite availability of the witnesses on the place of occurrence and the overall evidence of injured Matloob Hussain/P.W.16 is not confidence inspiring to the extent of murder of deceased Babar Nadeem and even he did not utter a single word as to how fire-arm injury was caused to Mulazim Hussain and Mukhtar Hussain deceased, who were sitting on the front seat and rear seat of the same vehicle and received the injuries from different angles.

61. Lastly, the entire evidence is silent as to how and when police was informed and who informed the police and the delay of 4 ½ hours in reaching the hospital is unexplained. Even otherwise, there is no explanation on record as to why the injured PWs

were taken to Benazir Bhutto Hospital, Rawalpindi and three deceased were taken to PIMS Hospital Islamabad and as to who selected the injured P.Ws among the deceased to be taken to the hospital. This entire background creates serious doubt in the mode, manner and description of the accused persons and it is settled principle of law that benefit of slightest doubt must be extended in favour of the accused.

62. In view of above discussion, the instant Jail Appeal No.192/2015 (Nasir Mehmood vs. The State.) as well as Jail Appeal No.202/2015 (Rafaqat Hussain vs. The State) are **allowed** and Murder Reference No.17/2015 (The State vs. Rafaqat Hussain and another) is answered in **negative**. Appellants Nasir Mehmood and Rafaqat Hussain are acquitted from the charges and they be released forthwith, if not required in any other case.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

JUDGE

Approved for Reporting.

Khalid Z.