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Judgment Sheet

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR.

JUDICIAL DEPARTMENT

Murder Reference No.29 of 2023
(The State Vs. 1.Madiha Zafar
2.Abdul Wali alias Muhammad Bilal)

Criminal Appeal No. 427 of 2023
(Madiha Zafar Vs. The State and another)

Criminal Appeal No. 419-J of 2023
(Abdul Wali alias Muhammad Bilal Vs. The State)

J U D G M E N T

Date of hearing:	07.04.2025.
Appellants by:	Mr. Zeeshan Haider, Advocate.
State by:	Ch. Asghar Ali Gill, Deputy Prosecutor General.

SADIQ MAHMUD KHURRAM, J. –Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat (convicts) were tried alongwith Abid Hussain son of Muihammad Rafique (since acquitted), the co-accused of the convicts by the learned Additional Sessions Judge, Yazman in case F.I.R No. 481 of 2021 dated 26.10.2021 registered in respect of offences under sections 302,201 and 34 P.P.C. at the Police Station

Saddar Yazman District Bahawalpur for committing the *Qatl-i-Amd* of Umar Farooq son of Ghulam Murtaza (deceased) and Maqboolan Bibi widow of Ghulam Murtaza (deceased) . The learned trial court vide judgment dated 27.09.2023, convicted Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat (convicts) and sentenced them as infra:

Madiha Zafar daughter of Zafar Iqbal :-

i) Death on *two counts* under section 302(b) PPC as *Tazir* for committing *Qatl-i-Amd* of Umar Farooq son of Ghulam Murtaza (deceased) and Maqboolan Bibi widow of Ghulam Murtaza (deceased) and directed to pay Rs.200,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased; in case of default thereof, the convict was directed to further undergo six months of simple imprisonment .

ii) Rigorous imprisonment of seven years under section 201 P.P.C. and directed to pay fine of Rs.50,000/-; in case of default thereof, the convict was directed to further undergo six months of simple imprisonment.

The convict was ordered to be hanged by her neck till dead.

Abdul Wali alias Muhammad Bilal son of Muhammad Inayat :

i) Death on *two counts* under section 302(b) PPC as *Tazir* for committing *Qatl-i-Amd* of Umar Farooq son of Ghulam Murtaza (deceased) and Maqboolan Bibi widow of Ghulam Murtaza (deceased) and directed to pay Rs.200,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased; in case of default thereof, the convict was directed to further undergo six months of simple imprisonment .

ii) Rigorous imprisonment of seven years under section 201 P.P.C. and directed to pay fine of Rs.50,000/-; in case of default thereof, the convict was directed to further undergo six months of simple imprisonment.

The convict was ordered to be hanged by his neck till dead.

The benefit provided under section 382-B of the Code of Criminal Procedure, 1898 was extended to both the convicts by the learned trial court. Abid Hussain son of Muhammad Rafique, the co-accused of the convicts, was however acquitted by the learned trial court.

2. Feeling aggrieved, Madiha Zafar daughter of Zafar Iqbal(convict) lodged Criminal Appeal No.427 of 2023 assailing her conviction and sentence. Feeling aggrieved, Abdul Wali alias Muhammad Bilal son of Muhammad Inayat (convict) lodged Criminal Appeal No.419-J of 2023 through Jail assailing his conviction and sentence. The learned trial court submitted Murder Reference No.29 of 2023 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentences of death awarded to the appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat. We intend to decide the Criminal Appeal No.427 of 2023, the Criminal Appeal No. 419-J of 2023 and the Murder Reference No.29 of 2023 through this single judgment.

3. Precisely, the necessary facts of the prosecution case, as stated by Rashid Ali (PW-1), the complainant of the case, are as under:-

> "I am resident of Chak No.110/DB Yazman and running a shoes shop with the name "Munir Shoes" in Yazman. Deceased Umar Farooq was son of my phupho and was working in Al-Sadiq Cotton Factory. On 26.10.2021, I received a call from the Factory that Umar Farooq was not coming on duty. I made call on cell phone number of Umar Farooq but the same was

switched off. In the evening. I went to the house of Umar Farooq. I knocked the door of house of Umar Farooq then his wife Madiha Zafar accused present in the court told that Umar Farooq is out of home. At about 9:00 p.m, I alongwith Shams Hussain Tahir and Naeem Ahmad went to the house of Umar Farooq. The door of house of Umar Farooq was opened and light smoke was coming from the room. 1 alongwith Shams Hussain Tahir and Naeem Ahmad PWs immediately went towards the room and saw in the light of bulb that dead bodies of my phupho Maqboolan Bibi and Umar Farooq were lying and accused persons Madiha Zafar and Abdul Wali alias Bilal accused persons present in the court were setting the dead bodies on fire by putting oil. The fire burnt the dead bodies. We tried to apprehend accused persons but accused Abid pointed pistol and forbade us to come near them and accused persons succeeded to flee away. Motive behind the occurrence is that accused Madiha Zafar and Abdul Wali alias Bilal have illicit relations with each other, deceased Umar Farooq and Maqboolan forbade Abdul Wali alias Bilal to visit their house and, due to this grudge, accused persons Abdul Wali alias Bilal and Madiha Zafar have committed murder of Umar Faooq and Maqboolan Bibi unjustly and set on fire their dead bodies. I informed the police, police came at the place of occurrence. I recorded my statement to the police which is Exh.PA. Exh.PA bears my signature in Englion as Exh.PA/1. Police completed its proceedings at the place of occurrence. After post mortem examination, I received dead bodies of Umar Farooq and Maqboolan Bibi vide receipts Exh.PB and Exh.PC. On 28.10.2021, I alongwith Shamas Hussain went to Ada Tail wala in connection with personal work. We were taking tea at the hotel Siddique where saw that one person on seeing us moved his face to other side and leave his cup of tea and went out. I and Shamas identified him that said person is the person who pointed pistol on us at the time of occurrence. People told that said person is Abid Hussain s/o Muhammad Rafique

resident of Chak No.116/DB. I got recorded my supplementary statement to the police which is Exh.PD and nominated accused Abid Hussain in this case."

4. After the formal investigation of the case report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court and the accused were sent to face trial. The learned trial court framed the charge against the accused on 16.06.2023, to which the accused pleaded not guilty and claimed trial.

5. The prosecution, in order to prove its case, got statements of as many as **thirteen** witnesses recorded. The ocular account of the case was furnished by Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) . Hina Tufail 33/LC (PW-5) stated that on 27.10.2021, she escorted the dead body of the deceased namely Maqboolan Bibi to the hospital and received the last worn clothes of the deceased from the Medical Officer after the post mortem examination of the dead body of the deceased. Muhammad Shahzad, ASI (PW-11) stated that he got recorded the formal F.I.R. (Exh.PW). Muhammad Aleem (PW-13) stated that he identified the dead bodies of the deceased at the time of their post mortem examinations. Qadir Bakhsh, SI (PW-8), the Investigating Officer of the case, investigated the case from 26.10.2021 till 09.11.2021, arrested the appellant namely Madiha Zafar on 31.10.2021, arrested the appellant namely Abdul Wali alias Bilal on 29.10.2021 and detailed the facts of the investigation as conducted by him in his statement before the learned trial court.

6. The prosecution also got Dr. Abdul Mannan (PW-4) examined, who on 27.10.2021 was posted as Medical Officer at THQ hospital Yazman and on the same day conducted the postmortem examination of the dead body of Umar Farooq son of Ghulam Murtaza (deceased). Dr. Abdul Mannan (PW-4) on examining the dead body of Umar Farooq son of Ghulam Murtaza (deceased) observed as under:-

> " **DESCRIPTION OF INJURIES.**
>
> A dead body of male 32 years old lying spine on mortuary table with right and left arm are flexed at wrist and elbow. Hairs were burnt from scalp except some area of occipital region. Body is completely burnt from head to toe including face, neck, chest, abdomen, pelvic, both legs. Anterior abdominal wall were ruptured at left lumber region and abdominal contents were leaking at that point. A mark of violence is noted.
>
> Injury No. 1. A 10 x 3 cm deep incised wound that cutting the skin, muscles, fascias with sharp weapon that extending from right ear to chin.
>
> ……..
>
> **FINAL OPINION**.
>
> After careful external and internal examination, I have collected above mentioned samples to rule out throtlling and poisoning (ante-mortem). Body was with extensive burnt. Final report will be given after receiving reports from PFSA Lahore Govt. of Punjab Lahore.
>
> After Keeping in view of autopsy finding and PFSA reports, I am of the opinion that burning is the cause of death, resulting in thermal injury, neurogenic shock, hypovolemia, asphyxia and cardio respiratory failure. All culminating in death. Such type of injury individually or collectively sufficient to cause death in an ordinary course of life, whereas injury No.1 is only involving skin, subcutaneous tissue and platysma muscle but not involving major vessel and that is not sufficient for cause of death."

The prosecution also got Dr. Maryam Iqbal (PW-12) examined, who on 27.10.2021 was posted as Woman Medical Officer at THQ

hospital Yazman and on the same day conducted the postmortem examination of the dead body of Maqboolan Bibi widow of Ghulam Murtaza (deceased). Dr. Maryam Iqbal (PW-12) on examining the dead body of Maqboolan Bibi widow of Ghulam Murtaza (deceased) observed as under:-

> *"* **DESCRIPTION OF INJURIES.**
>
> A dead body of female lying spine on mortuary table with right arm completely flexed at shoulder joint and elbow joint and extended at wrist joint. Let arm completely extended in pronated form at shoulder, elbow and wrist joint. Skin changed in black and yellow pussy patches and peel off from many parts of body. Scalp was completely burnt from frontal and temporal region with bone exposed. Hairs were present only in occipital and parietal regions. Body was completely burnt from head to toe including scalp as mentioned above, face, neck, chest, abdomen, pelvis and both legs. Anterior abdominal wall was completely burnt with internal organs were partially burnt with evisceration. Both legs were completely burnt and on right side of leg below knee joint only bones were present. No marks of violence could be identified due to complete burn.
>
> ……..
>
> **FINAL OPINION**.
>
> After careful external and internal post mortem examination, I have collected the above mentioned samples to rule out throatlling and poisoning (ante-mortem). Body was with extensive burn and due to condition of body, I cannot rule out any ante-mortem violence. Therefore, final report/opinion will be given after receiving reports from PFSA Lahore Govt. of Punjab Lahore.
>
> After Keeping in view of autopsy finding and PFSA reports, I am of the opinion that burning is the cause of death, resulting in thermal injury, neurogenic shock, hypovolemia, asphyxia and cardio respiratory failure. All culminating in death. Such type of burn individually or collectively sufficient to cause death in an ordinary course of life."

7. On 26.07.2023, the learned Assistant District Public Prosecutor gave up the prosecution witness namely Abdul Aziz, SI as being

unnecessary and closed the prosecution evidence after tendering in evidence the reports of the Punjab Forensic Science Agency, Lahore (Exh. PZ, Exh.PAA and Exh.PBB).

8. After the closure of prosecution evidence, the learned trial court examined the appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat under section 342 Cr.P.C. and in answer to the question *why this case against you and why the PWs have deposed against you*, they replied that they had been involved in the case falsely and were innocent. The appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat opted not to get themselves examined under section 340(2) Cr.P.C. and did not adduce any evidence in their defence.

9. On the conclusion of the trial, the learned Additional Sessions Judge, Yazman convicted and sentenced the appellants as referred to above.

10. The contention of the learned counsel for the appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat, precisely was that the whole case was fabricated and false and the prosecution remained unable to prove the facts in issue and did not produce any unimpeachable, admissible, and relevant evidence. Learned counsel for the appellants further contended that the story of the prosecution mentioned in the statements of the witnesses, on the face of it, was

highly improbable. Learned counsel for the appellants further contended that the statements of the prosecution witnesses were not worthy of any reliance. The learned counsel for the appellants also submitted that the recovery of the Toka (P-7) from the appellant namely Abdul Wali alias Muhammad Bilal son of Muhammad Inayat was full of procedural defects, of no legal worth and value, and was the result of fake proceedings. The learned counsel for the appellants also argued that the appellants had been involved in the occurrence only on suspicion. The learned counsel for the appellants finally submitted that the prosecution had totally failed to prove the case against the accused beyond the shadow of a doubt.

11. On the other hand, the learned Deputy Prosecutor General contended that the prosecution had proved its case beyond the shadow of doubt by producing independent witnesses. The learned Deputy Prosecutor General further argued that the deceased died as a result of injuries suffered at the hands of the appellants. The learned Deputy Prosecutor General further contended that the medical evidence also corroborated the statements of the eye witnesses. The learned Deputy Prosecutor further argued that the recovery of the Toka (P-7) from the appellant namely Abdul Wali alias Muhammad Bilal son of Muhammad Inayat also corroborated the ocular account. The learned Deputy Prosecutor General further contended that there was no occasion for the prosecution witnesses, who were related to the deceased, to substitute the real offenders with the innocent in this case. Lastly, the learned Deputy Prosecutor

General prayed for the rejection of the appeals as lodged by the appellants.

12. We have heard the learned counsel for the appellants, the learned Deputy Prosecutor General and with their assistance carefully perused the record and evidence recorded during the trial.

13. The whole prosecution case circulates around the statements of the prosecution witnesses Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), the eye witnesses of the occurrence. The relationship of the said witnesses with the deceased is on record. Umar Farooq (deceased) was the cousin (پھوپھی زاد) of Rashid Ali (PW-1) whereas the prosecution witness namely Rashid Ali (PW-1) was the nephew of the wife of Shamas Hussain Tahir (PW-2) . The prosecution witness namely Shamas Hussain Tahir (PW-2) explained during cross-examination, as under:-

"Complainant is nephew/bhanja of my wife"

We have noted with serious anxiety that the ocular account of the occurrence as furnished by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) is inconsistent with the medical evidence as available and flawed beyond mending, resulting in disfiguring the complexion of the whole prosecution case beyond reparation and recognition. According to the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), the occurrence took place on **26.10.2021 at about 09.00 p.m** in the

presence of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) when they saw the appellants burning the dead bodies of both the (deceased). We have already reproduced the examination in chief of the prosecution witness namely Rashid Ali (PW-1) and the prosecution witness namely Shamas Hussain Tahir (PW-2) also got recorded in his examination in chief as under :-

> " Deceased Umar Farooq was phuphi-zad of complainant Rashid Ali and was resident of Chak No.110/DB. Deceased Umar Farooq was working in Al-Sadiq Cotton Factory. **On 26.10.2021**, Rashid Ali received a call from the Factory that Umar Farooq was not coming on duty for last four days. Rashid Ali made call on cell phone of Umar Farooq but the same was switched off. **In the evening**, Rashid Ali went to the house of Umar Farooq. Madiha Zafar wife of Umar Farooq met him, who told that Umar Farooq is out of home. Rashid Ali has suspicion and called me and Naeem Ahmad and told whole story. **At about 9:00 p.m, I alongwith Rashid Ali and Naeem Ahmad went to the house of Umar Farooq**. The door of house of Umar Farooq was opened, we went inside the house and saw that bulb was lightening and light smoke was coming from the room. We saw in the light of bulb that accused persons Madiha Zafar and Abdul Wali alias Bilal have committed murder of Maqboolan Bibi and Umar Farooq and their dead bodies were lying. **In our view, accused persons Madiha Zafar and Abdul Wali alias Bilal present in the court set on fire the dead bodies by putting oil**. The fire burnt the dead bodies." (emphasis supplied)

Fatally contradicting the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) with regard to the time of the occurrence and the time of the deaths of the deceased are the statements of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) who on **27.10.2021** had conducted the post mortem examinations of the dead bodies of the deceased namely Maqboolan Bibi and Umar Farooq. According to the opinions of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12), the probable time that had elapsed between the deaths of the deceased and the post mortem examination of the dead bodies of the deceased was as much as **2-3 days** approximately. Dr. Abdul Manan (PW-4) had conducted the post mortem examination of the dead body of the deceased namely Umar Farooq on **27.10.2021 at 11.00 a.m.** and opined as under :-

> "PROBABLE TIME THAT ELAPSED
>
> a) Between injury and death: cannot be commented due to putrefaction.
>
> b**) Between death and postmortem:- within 2 to 3 days** ." (emphasis supplied)

Similarly, Dr. Maryam Iqbal (PW-12), who conducted the post mortem examination of the deceased namely Maqboolan Bibi on **27.10.2021 at 12.00 p.m.** opined with regard to the time which had elapsed between the death of the deceased and the post mortem examination of the dead body as under :-

> "PROBABLE TIME THAT ELAPSED
>
> a) Between injury and death: .---

> b**) Between death and postmortem:- within 2 to 3 days** .” (emphasis supplied)

More importantly, both Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) also opined that the cause of death of both the deceased was not the infliction of any injuries upon them rather the *cause of the death of both the deceased was burning.* Dr. Abdul Manan (PW-4) who conducted the post mortem examination of the dead body of the deceased namely Umar Farooq opined with regard to the cause of the death of the deceased as under :-

> “After Keeping in view of autopsy finding and PFSA reports, I am of the opinion that **burning is the cause of death**. resulting in thermal injury, neurogenic shock, hypovolemia, asphyxia and cardio respiratory failure. All culminating in death. Such type of injury individually or collectively sufficient to cause death in an ordinary course of life, whereas injury No.1 is only involving skin, subcutaneous tissue and platysma muscle but not involving major vessel and that is not sufficient for cause of death.” (emphasis supplied)

Similarly, Maryam Iqbal (PW-12), who conducted the post mortem examination of the deceased namely Maqboolan Bibi on **27.10.2021 at 12.00 p.m.** opined with regard to the cause of the death of the deceased as under :-

> “After Keeping in view of autopsy finding and PFSA reports, I am of the opinion that **burning is the cause of death**. resulting in thermal injury, neurogenic shock, hypovolemia, asphyxia and cardio respiratory failure. All culminating in death. Such type of burn individually or collectively sufficient to cause death in an ordinary course of life.” (emphasis supplied)

In this manner, according to the statements of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12), the incident had taken place **2-3 days** before the post mortem examinations of the dead bodies of the deceased were conducted on **27.10.2021**. There is no explanation of these opinions of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) that the probable time that had elapsed between the deaths of the deceased and the post mortem examinations of the dead bodies of the deceased was as much as **2-3 days** when the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) had claimed that the incident had happened **just fourteen hours** prior to the post mortem examinations of the dead bodies of the deceased . This fact alone is sufficient to discard the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) who did not even know when the incident had taken place. The poor dead persons lay dead for as many as **two to three days** before their bodies were found. The prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) remained totally oblivious to this fact that according to the opinions of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) the probable time that had elapsed between the deaths of the deceased and the post mortem examinations of the dead bodies of the deceased was as much as **2-3 days** and made no effort to explain the same. We have noted that during the course of the trial, the prosecution witnesses failed to explain as to why was there such a huge, gaping and all consuming, inexplicable and baffling error in the statements of the

prosecution witnesses Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) with regard to the very time of the incident itself. In this manner, the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) are in direct contradiction and in conflict with the opinions and observations of Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) who conducted the post mortem examinations of the dead bodies of the deceased. Despite our repeated queries, the learned Deputy Prosecutor General has failed to explain the said discrepancy in the prosecution evidence. In this manner, an irreconcilable and harrowing contradiction has cropped up with regard to the **day of the occurrence** itself between the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and the medical evidence. Between the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12), the **date when the deceased died** stands contradicted by as many as **2-3 days** . The contradiction in the ocular account of the occurrence, as narrated by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and the medical evidence as furnished by Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12) clearly establishes that the prosecution miserably failed to even prove the **date of the occurrence** with any degree of certainty. Reliance is placed on the cases of *"Muhammad Ali Vs. The State"* **(2015 SCMR 137)** "*Muhammad Ashraf Vs. The State"*(**2012 S C M R 419**) ,*USMAN alias KALOO Vs. The State*

(**2017 S C M R 622**) ,*Muhammad Hussain Vs. The State* (**2008 S C M R 345**)*"Muhammad Shafi alias Kuddoo vs. The State and others "* (**2019 S C M R 1045**), *"Muhammad Zaman vs. The State and others "* (**2014 S C M R 749**)and "*Ain Ali and another Vs. The State"*(**2011 SCMR 323**) where the august Supreme Court of Pakistan was pleased to reject the evidence of prosecution witnesses when the same was found to be in contrast with the medical evidence.

14. We have also noted that it was also admitted by both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) that the place of occurrence was at a distance from the houses of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and the prosecution witness namely Rashid Ali (PW-1) was residing at Chak No. 110/DB whereas the house of the prosecution witness namely Shamas Hussain Tahir (PW-2) was situated within the city of Yazman. Rashid Ali (PW-1) stated during cross-examination as under:-

> " Distance between my shop situated in the City Yazman and place of occurrence is about fifteen kilometers. Shamas PW is my maternal uncle (khalu). **Shams Hussain PW is resident of City Yazman and his residence is fifteen kilometers away from the place of occurrence**. Naeem Ahmad PW is my brother in law (behnoi).House of Naeem Ahmad PW is at the distance of 23 kilometers from the place of occurrence. It is correct that none amongst residents of surroundings of place of occurrence is witness in this case." (emphasis supplied).

Shamas Hussain Tahir (PW-2) during cross-examination admitted as under:-

> "Complainant is nephew/bhanja of my wife. My house is 14/15 kilometers away from the place of occurrence. I have landed property in the village of occurrence. I run a dawakhana in City Yazman and said distance of said shop is 14/15 kilometers from the place of occurrence."

In view of the above mentioned facts, it can be validly held that the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) were "*chance witnesses*" and therefore were under a duty to explain and prove their presence at the place of occurrence, at the time of occurrence. A perusal of the statements of prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) reveals that both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) failed to provide any reason, consistent with the attending circumstances, due to which reason they left their houses at night and proceeded to the place of occurrence. According to the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) they had gone to the house of the deceased when on 26.10.2021, the prosecution witness namely Rashid Ali (PW-1) received a call from the workplace of Umar Farooq (deceased) that he had not come to the place of his work for the last few days. We have scrutinized the statements of both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and find that they failed miserably to prove their stated reason for proceeding to the house of the deceased. During cross-

examination the prosecution witness namely Rashid Ali (PW-1) admitted that though the only reason for him to had visited the place of occurrence on the night of occurrence was that he went to inquire about Umar Farooq (deceased) after having received a call from his place of work regarding his absence however, he never produced any evidence in the shape of Call Data Record or any other documentary evidence regarding receiving of such a call or even the fact that Umar Farooq (deceased) was working at any such place. The prosecution witness namely Rashid Ali (PW-1) admitted during cross-examination as under:-

> "Al-Sadiq cotton factory is about nine kilometers away from the place of occurrence. **No employee of the said factory is witness in this case**. **I never produced any proof of absence of Umar Farooq from Al-Sadiq cotton factory throughout investigation of this case. I never mentioned the name of employee of the factory who informed me regarding absence of deceased nor 1.0 inquired about his name.** As I do not know the name of the caller, due to said reason, I cannot tell the name of person who called me. I have also not told the mobile number of the caller to the police. **Neither 1 handed over my mobile phone to the I.O nor 1 shown him my mobile phone to establish the mobile call.** Neither recording of said call nor any call data record was provided by me to the 1.0. I was informed by the caller that deceased is absent from his job for the last four days. I got recorded this fact in FIR. Confronted with Exh.PD where it is not so recorded. I did not provided any proof of absence of Umar Farooq from the said factory to the 1.0. I never visited Al-Sadiq cotton factory to inquire about Umar Farooq deceased. It is incorrect to suggest that neither 1

> received any call from Al-Sadiq cotton factory nor I visited the house of deceased.
>
> ……
>
> The only reason of my visit to the house of occurrence was receiving a phone call from Al-Sadiq cotton factory. **However, I never produced any proof of receiving said phone call to the 1.0 throughout the investigation**. It is correct that even today I have no proof to establish the receiving of said call." (emphasis supplied)

Similarly, Qadir Bakhsh, SI (PW-8), the Investigating Officer of the case, also admitted during cross-examination that the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) did not produce any evidence with regard to the reason for the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to have visited the house of the deceased on the night of occurrence and stated as under:-

> "I have not joined any person in the investigation from Al-Sadiq cotton factory. I have not taken any record from Al-Sadiq cotton factory to ensure whether deceased Umar Farooq was employee or remained absent from his duty. I have also not collected any evidence regarding his employment in Al-Sadiq cotton factory. Complainant has not told me about the name of the person or his mobile number who informed him about absence of deceased from Al-Sadiq cotton factory. I neither took into possession mobile of the complainant nor collected any CDR of mobile number of complainant to confirm that complainant received any call from Al-Sadiq cotton factory. "

In this manner, the claim of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), that they had gone to the place of occurrence just before the occurrence for the purpose of inquiring about Umar Farooq (deceased) after having received a call regarding his absence from his workplace, was not verified either by Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, or through any documentary proof. A perusal of the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) reveals that the reason given by them for their presence at the place of occurrence was a concocted, invented and a false reason. In this manner, the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) failed to prove their stated reason for leaving their residences on the night of occurrence and their subsequent presence at the place of occurrence. Both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) were badly exposed in this regard and the very foundation upon which the whole edifice of the prosecution case had been built was shattered ,resulting in the collapse of the whole prosecution case built upon the said fractured foundation.

15. We have also noted that though it was claimed by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) that they had gone to the place of occurrence on a motorcycle, however, during the course of the investigation as well as before the learned trial court, the said motorcycle, allegedly used by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas

Hussain Tahir (PW-2) , to arrive at the place of occurrence, was not produced. The prosecution witness namely Rashid Ali (PW-1), admitted during cross-examination that the motorcycle used by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to arrive at the place of occurrence was not taken into possession by the Investigating Officer of the case and admitted as under:-

> "We approached the place of occurrence on one motorcycle. Neither I shown said motorcycle to the I.O nor I handed over the same to the police."

Similarly, the prosecution witness namely Shamas Hussain Tahir (PW-2) also admitted during cross-examination, as under:-

> " I visited Chak No.110/DB on motorcycle. I never produced said motorcycle before the police."

Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, also admitted during cross-examination, as under:-

> "Neither the vehicle which was used by the complainant and PWs to reach the place of occurrence was shown to me nor the said vehicle was produced or handed over to me "

The non-production and the non-availability of the motorcycle used by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to arrive at the place of occurrence and the failure of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to produce the same before the

Investigating Officer of the case, leads to only one conclusion and that being that no such vehicle was available. Had such a motorcycle been used by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to arrive at the place of occurrence, then the same must have been available at the place of occurrence, at the time of arrival of Qadir Bakhsh, SI (PW-8), the Investigating Officer of the case and the same would necessarily have been taken into possession by the Investigating Officer of the case but it was not and it proves that a false claim was made by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) that they had arrived at the place of occurrence on a motorcycle. In this manner, the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) failed miserably to prove that they had indeed arrived at the place of occurrence, prior to the incident. Reliance in this regard is placed on the case of *"Muhammad Ali Vs. The State"* **(2015 SCMR 137)** wherein the august Supreme Court of Pakistan has held as under:-

> *"The Investigating Officer during the cross-examination has admitted that the 'Dala' was not present when he visited the spot and he had not taken into possession the said 'Dala' during investigation. So the story introduced by the eye-witnesses that they were travelling on the 'Dala' when the incident took place is not supported by any connecting material."*

16. Another aspect of the case noted by us with some gravity is the fact that both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) admitted that **it was dark** at the

time of occurrence, still none of the witnesses stated in their statements before the learned trial court that any source of light was present and lit at the place of occurrence, at the time of occurrence, which allowed the witnesses to observe the occurrence. During the course of the investigation and even before the learned trial court, no source of light was ever produced in the light of which the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) had witnessed the occurrence. Moreover, though the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) candidly admitted that it was dark at the time of occurrence, however, made no effort to state that they had any source of light with them or that any source of light was available at the place of occurrence in the light of which they had seen the occurrence. Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, also did not observe or take into possession any source of light at the place of occurrence, in the light of which the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) could have witnessed the occurrence. During cross-examination, Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, admitted as under:-

> "The complainant mentioned. the source of light but no such source of light was taken into possession by me. It is correct that, in inspection notes as well as in site plan, no source of light is mentioned by me."

Moreover, it is an admitted part of the prosecution case that no source of any light was produced either before the Investigating Officer of the case or before the learned trial court, in the light of which source

the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) had witnessed the occurrence. The non-production of any light source, available and lit at the place of occurrence, at the time of occurrence and the failure of the complainant of the case as well as the Investigating Officer of the case to produce the same before the learned trial court leads to only one conclusion and that being that no such source of light was available with the witnesses or available at the place of occurrence which could have enabled the eye witnesses to have identified the assailants and also spectate the role of the assailants as acted by them during the occurrence. The prosecution witnesses failed to establish the fact of the availability of any light source at the place of occurrence, at the time of occurrence and in the absence of their ability to do so, we cannot presume the existence of such a light source. The absence of any light source has put the whole prosecution case in the murk. It was admitted by the witnesses themselves that it was a dark night and as the prosecution witnesses failed to prove the availability of any light source, their statements with regard to them identifying the assailants cannot be relied upon. The failure of the prosecution witnesses to prove the presence of any light source at the place of occurrence, at the time of occurrence, has repercussions, entailing the failure of the prosecution case. Reliance is placed on the case of "*Gulfam and another v. The State"* **(2017 SCMR 1189)** wherein the august Supreme Court of Pakistan observed as under:-

> *"The occurrence in this case had taken place at about 11.45 p.m. during the fateful night and the source of light at the spot had never been established by the prosecution. It had been presumed by the courts below that as the occurrence had taken place at a medical store, therefore, some electric light must be available at the spot. The courts below ought to have realized that presumptions have very little scope in a criminal case unless such presumption is allowed by the law to be raised"*

Reliance is also placed on the case of "*Hameed Gul v. Tahir and two others"* **(2006 SCMR 1628)** wherein the august Supreme Court of Pakistan observed as under:-

> *"Next is the identification of the accused on the spot. The torch in the light of which the accused were identified, was produced before the Investigating Officer sixteen days after the occurrence. The one Haid Akbar who produced the same before he Investigating Officer was never produced at the trial and hence there is no satisfactory evidence that the torch produced in the given circumstances was the same, available at the time of occurrence. It was never found on the spot along with other recoveries though there was no occasion for the injured and the deceased to have carried it along."*

Reliance is also placed on the case of "*Basar Vs. Zulfiqar Ali and others"* (**2010 SCMR 1972**) wherein the august Supreme Court of Pakistan observed as under:-

> *"7. It is also alleged by the prosecution that the witnesses had identified the culprits on torch lights. The complainant and P.Ws. did not produce the torches before the police immediately but the same were produced after 10 days of the incident.*
>
> *8. Considering all aspects of the case, we are of the view that the prosecution has failed to prove the case against the respondents beyond any reasonable doubt."*

Reliance is also placed on the case of "*Azhar Mehmood and others v. The State"* **(2017 SCMR 135)** wherein the august Supreme Court of Pakistan observed as under:-

> "*It has straightaway been noticed by us that the occurrence in this case had taken place after dark and in the FIR no source of light at the spot had been mentioned by the complainant. Although in the site-plan of the place of occurrence availability of an electric bulb near the spot had been shown yet no such bulb had been secured by the investigating officer during the investigation of this case."*

Reliance is also placed on the case of "*Arshad Khan v. The State"* **(2017 SCMR 564)** wherein the august Supreme Court of Pakistan observed as under:-

> *"The occurrence in this case had taken place before Fajar prayers at about 05.00 a.m. and according to the FIR the occurrence in issue had been witnessed by the eye-witness in the light of an electric bulb but during the investigation no such electric bulb had been secured by the investigating officer*."

17. We have noted with grave concern and disquiet that the alleged eye witnesses, namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) made no effort either to save the deceased or to apprehend the accused. Both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) were closely related to the deceased. It is unnatural and unbelievable that the alleged eye witnesses, namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), did not even move a limb to protect their near and dear ones. According to the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), they had arrived at the place of occurrence, prior to the putting on fire of the dead bodies of the deceased by the accused. It is strange and rather unbelievable that the accused still succeeded in the presence of the prosecution witnesses, namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2). Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) did not react at all. Rashid Ali (PW-1) during cross-examination admitted as under:-

> " After my arrival in the house of deceased persons, accused persons took half minute/one minute for setting the dead bodies on fire. It is

> correct that I as well as my PWs have not faced any injuries or any sign of burning regarding fire or oil on our clothes. When I saw the accused persons while throwing oil on the dead bodies I did not raise alarm. Even at the time of setting on fire the dead bodies I did not raise alarm. I did not make any phone call to fire brigade at 1122. I did not try to pour water on the fire to extinguish the same. I did not try to save the dead bodies from the fire through any mode"

Even Shamas Hussain Tahir (PW-2) admitted during cross examination as under:-

> " We did not try to extinguish the fire. The fire remained alive for about one hour. We did not make any call to 1122"

During the whole episode wherein the dead bodies of the deceased were put on fire, the prosecution witnesses, namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) kept watching the accused and did not interfere at all. No person with ordinary prudence would believe that such closely related witnesses would remain watching the proceedings as mere spectators for as long as the occurrence continued without doing anything to rescue the deceased or apprehend the assailants. The allowance of prosecution witnesses to the assailants of causing the deaths of their near and dear relatives speaks loudly that if Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) had seen the occurrence, they would have definitely intervened and prevented the assailants from murdering their dear ones. It only proves that the deceased were at the mercy of the assailants and no one was there to save them. Such behaviour, on the part of the witnesses, runs counter

to natural human conduct and behaviour. Article 129 of the Qanun-e-Shahadat, 1984 allows the courts to presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events and human conduct in relation to the facts of the particular case. This Court, thus, trusts the existence of this fact, by virtue of the Article 129 of the Qanun-e-Shahadat, 1984, that the conduct of the witnesses, as deposed by them, was opposed to the common course of natural events, human conduct and that the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) had not witnessed the occurrence. Reliance in this regard is placed on the cases of "*Zulifqar Ali v. The State*" **(2021 S C M R 1373)** , *Pathan v. The State* **(2015 SCMR 315)** ,"*Shahzad Tanveer v. The State"* **(2012 SCMR 172)** and "*Liaquat Ali v. The State"* **(2008 SCMR 95)** .

18. It is also an admitted fact of the prosecution case that the place of occurrence was occupied by other persons including Hadia Farooq and Zain Farooq, the children of the deceased namely Umar Farooq. Rashid Ali (PW-1), admitted during cross-examination, as under:-

> "Elder daughter of Umar Farooq namely Hadia Farooq is about 11-years old, whereas son of deceased namely Zain Farooq is about 8-years old. Both children were produced before DSP during investigation. It is correct that both children are neither witness of this case nor police recorded their statements."

As mentioned above and as admitted by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2), neither during the course of the investigation nor before the learned

trial court, the statements of Hadia Farooq and Zain Farooq, the children of the deceased namely Umar Farooq, who were admittedly the residents of the place of occurrence and were also present there at the time of occurrence, were recorded. This failure of Qadir Bakhsh, SI (PW-8), the Investigating Officer of the case, to include in the investigation the inhabitants of the house where the occurrence had taken place and the failure of the prosecution to produce the said inhabitants of the place of occurrence before the learned trial court, reflects poorly upon the veracity of the prosecution case. Article 129 of the Qanun-e-Shahadat, 1984 provides that if any evidence available with the parties is not produced, then it shall be presumed that had that evidence been produced, the same would have been gone against the party producing the same. Illustration (g) of the said Article 129 of the Qanun-e-Shahadat Order, 1984 reads as under:-

> ***"(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."***

The failure of the prosecution to produce Hadia Farooq and Zain Farooq, the children of the deceased namely Umar Farooq, the residents of the place of occurrence and the most natural witnesses, before the learned trial court, has convinced us that had they been produced before the learned trial court they would not have supported the prosecution case. Reliance in this matter is placed on the case of *SHAMSHAD versus THE STATE* (**1998 SCMR 854 also cited as 1999 SCMR 2844**) wherein the august Supreme Court of Pakistan held as under:-

> *"10. The prosecution has also failed to offer a plausible explanation as* ***to why the children of the appellant, who were, admittedly, present in the house at the time of the incident, were not produced as witnesses in the case.*** *In fact, the children of the appellant were the most natural witnesses of the occurrence, However, the Investigating Officer thought it fit not to examine them as witnesses. When confronted with this situation at the time of his cross--examination he explained that two daughters and the son of the appellant were less than? years of age. However, in the same breath it was admitted by him that Ruhi Bano was about 8 or 9 years of age. The other children were a few years younger. However, at least the older children under normal circumstances could have given evidence in the Court. The explanation given by the Investigating Officer, therefore, was not tenable.*
>
> ……..
>
> *13. Learned State Counsel has however, argued that in case the prosecution had failed to examine any of the appellant's children as a witness, they should have been examined as defence witnesses. It has been further argued that if there are two versions, one given by the prosecution and the other by the defence, then if the latter is not believed, the prosecution version must be believed as true. In our view, both the contentions are untenable. Burden to prove its case beyond a reasonable doubt squarely rests on the prosecution. Such burden cannot be discharged by weaknesses found in the case of the defence. The mere fact that the defence version is not believed by the Court cannot lend credence to the prosecution case if, otherwise, the prosecution has failed to discharge its burden. For the reason enumerated above, we have no hesitation in coming to the conclusion that the prosecution has failed to establish its case against the appellant."(emphasis supplied)*

Reliance is also placed on the case of *Lal Khan versus THE STATE* (**1996 SCMR1846**) wherein the august Supreme Court of Pakistan held as under:-

> *"The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought*

> *into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."*

Reliance is also placed on the case of *USMAN alias KALOO versus THE STATE* (**2017 SCMR 622**) wherein the august Supreme Court of Pakistan held as under:-

> *"A peculiar feature of this case is that the inmates of the house of occurrence, i.e. the mother, wife and children of Noor Muhammad deceased had never been associated with the investigation of this case and no statement of the said natural witnesses had been recorded by the investigating officer nor were they produced before the trial court".*

Reliance is also placed on the cases of *Muhammad Irshad Vs. Allah Ditta and others* (**2017 SCMR 142**) and *G. M. NIAZ Vs. The State*" (**2018 SCMR 506**). In this manner, the prosecution case suffers from inherent defects which are irreconcilable as it is.

19. We have also noted with disquiet that the postmortem examinations of the dead bodies of the deceased were conducted with much delay. As already mentioned, it was determined by Dr. Abdul Manan (PW-4) and Dr. Maryam Iqbal (PW-12), who on **27.10.2021** had conducted the post mortem examinations of the dead bodies of the deceased namely Maqboolan Bibi and Umar Farooq, that the deceased had been burned to death **2-3 days before the post mortem examinations** of the dead bodies of the deceased. No explanation was offered to justify the said delay in conducting the post mortem examination. This clearly establishes that the witnesses claiming to

have seen the occurrence were not present at the time of the occurrence and the delay in the post mortem examinations was used to procure their attendance and formulate a false narrative after consultation and concert. It has been repeatedly held by the august Supreme Court of Pakistan that such delay in the post mortem examination is reflective of the absence of witnesses and the sole purpose of causing such delay is to procure the presence of witnesses and to further advance a false narrative to involve any person. The august Supreme Court of Pakistan in the case of "*Khalid alias Khalidi and two others vs. The State"* **(2012 SCMR 327)** has held as under:

> "*The incident in the instant case took place at 2.00 a.m, FIR was recorded at 4/5 a.m, Doctor Muhammad Pervaiz medically examined the injured person at 4.00 a.m. but conducted the post mortem examination of the deceased at 3.00 p.m i.e. after about ten hours, which fact clearly shows that the FIR was not lodged at the given time".*

The august Supreme Court of Pakistan in the case of "*Mian SOHAIL AHMED and others vs. The State and others"* **(2019 SCMR 956)** has held as under:

> "*According to the Doctor (PW-10), who did the post-mortem examination, the dead-body of the deceased was brought to the mortuary at 11:15 a.m. on 01.9.2006 and the post-mortem examination took place at 12 noon after a delay of 15 hours. This delay in the post-mortem examination, when the occurrence was promptly reported at 8:45 p.m. and formal FIR was registered at 9.00 p.m. on 31.8.2006 gives rise to an inference that the incident was not reported as stated by the prosecution"*

The august Supreme Court of Pakistan in the case of "*MUHAMMAD RAFIQUE alias FEEQA vs. The State"* **(2019 SCMR 1068)** has held as under:

> *"More importantly, the only person who can medically examine the dead body during the said police custody of the dead body is the medical officer, and that too, when the same is handed over to him by the police for its examination. For the purposes of the present case, it is crucial to note that, at the time of handing over a dead body by the police to the medical officer, all reports prepared by the investigating officer are also to be handed over in order to assist in the examination of the dead body.*
>
> *10. Thus, once there is suspicion regarding the death of a person, the following essential steps follow: firstly, there is a complete chain of police custody of the dead body, right from the moment it is taken into custody until it is handed over to the relatives, or in case they are unknown, then till his burial; secondly, post mortem examination of a dead person cannot be carried out without the authorization of competent police officer or the magistrate; thirdly, post mortem of a deceased person can only be carried out by a notified government Medical Officer; and finally, at the time of handing over the dead body by the police to the Medical Officer, all reports prepared by the investigating officer are also to be handed over to the said medical officer to assist his examination of the dead body.*
>
> *11. **It is usually the delay in the preparation of these police reports, which are required to be handed over to the medical officer along with the dead body, that result in the consequential delay of the post mortem examination of the dead person**. To repel any adverse inference for such a delay, the prosecution has to provide justifiable reasons therefor, which in the present case is strikingly wanting."*

20. Another aspect of the case raising our doubt over the presence of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) at the place of occurrence, at the time of occurrence, is the fact that they never reported the matter to the police and Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, himself reached at the place of occurrence and recorded the oral statement (Exh. P.A.) of the prosecution witness namely Rashid Ali (PW-1). Both the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) admitted this fact that neither they attempted to report the matter to the police nor , as mentioned above, made any effort to extinguish the fire. This utter failure of the

prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) to report the matter to the police and their total inaction in this regard evidences the fact that they had not witnessed the occurrence and were informed about the same only subsequently. The august Supreme Court of Pakistan has already enunciated the principle of law that when the F.I.R of the case is not lodged at the Police Station, a conclusion can be drawn that the F.I.R. had been registered after pondering and inquiry at the spot. The august Supreme Court of Pakistan in the case of "*Abdul Jabbar alias Jabbari v. The State"* (**2017 SCMR 1155**) has observed as under:

> *"An F.I.R. in respect of the incident in issue had not been lodged at the local Police Station giving rise to an inference that the F.I.R. had been chalked out after deliberations and preliminary investigation at the spot."*

21. The learned Deputy Prosecutor General has also relied upon the recovery of the *Toka (P-7)* from the appellant namely Abdul Wali alias Muhammad Bilal and has submitted that the said recovery from the appellant offered sufficient corroboration of the ocular account of the occurrence as furnished by the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2). Regarding the recovery of the *Toka (P-7)* from the appellant namely Abdul Wali alias Muhammad Bilal, the same cannot be relied upon as the Investigating Officer of the case, did not join any witness of the locality during the recovery of the said *Toka (P-7)* from the appellant

which was in clear violation of section 103 Code of Criminal Procedure, 1898. Shamas Hussain Tahir (PW-2) admitted during cross-examination, as under:-

> "No resident of the area is cited. as witness of recovery proceeding, however, residents of area were associated into recovery proceedings on 08.11.2021. "

The provisions of section 103 Code of Criminal Procedure, 1898, unfortunately, are honoured more in disuse than compliance. To appreciate it better, this section is being reproduced:-

> "103.--(1) Before making a search under this chapter, the officer or other person about to make it **shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do**."

Therefore, the evidence of the recovery of the *Toka (P-7)* from the appellant namely Abdul Wali alias Muhammad Bilal cannot be used as incriminating evidence against the appellant, being evidence that was obtained through illegal means and hence hit by the exclusionary rule of evidence. The august Supreme Court of Pakistan in the case of *Muhammad Ismail and others Vs. The State* (**2017 SCMR 898)** at page 901 has held as under:-

> *"For the above mentioned recovery of weapons the prosecution had failed to associate any independent witness of the locality and, thus, the mandatory provisions of section 103, Cr.P.C. had flagrantly been violated in that regard."*

Moreover, as mentioned above, the Toka (P-7) was recovered on **08.11.2021** from the **same house** where the occurrence had taken

place on **26.10.2021**. Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, had already visited the said house on **26.10.2021** with regard to the investigation of the case and had conducted a search of the said house on the said date, however, did not observe the presence of the Toka (P-7) on the said date rather went on to claim that the appellant got recovered the Toka (P-7) from the same house on **08.11.2021**. This also lays bare the attempt of Qadir Bakhsh, SI (PW-8) , the Investigating Officer of the case, to pad up the prosecution case with false evidence. Even the learned trial court rejected the evidence of the recovery of the Toka (P-7) for the same reason. In this manner, the recovery of the *Toka (P-7)* from the appellant namely Abdul Wali alias Muhammad Bilal could not be proved and cannot be considered as a relevant fact for proving any fact in issue. .

22. Learned Deputy Prosecutor General has also relied upon the evidence of motive and submitted that it corroborated the ocular account. The motive of the occurrence as stated by Rashid Ali (PW-1) in the oral statement (Exh. PA) was that there was a history of fighting between Umar Farooq (deceased) and the appellant namely Madiha Zafar, however, when the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) appeared before the learned trial court, they stated that the motive of the occurrence was not what was stated in the oral statement (Exh.PA) but was that the appellants namely Mdiha Zafar and Abdul Wali alias Muhammad Bilal had developed illicit relations with each other and

therefore, they committed the occurrence. We have perused the statements of the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) and find that they failed to prove the motive of the occurrence as stated by them. Even the learned trial court came to the conclusion that the motive of the incident could not be proved. We have also noted that Umar Farooq (deceased) was blessed with the birth of two children. This also proves that the husband and wife were having a happy and healthy marital life. Qadir Bakhsh, SI (PW-8), the Investigating Officer of the case also did not collect any evidence with regard to the motive of the incident. The prosecution witnesses failed to provide evidence enabling us to determine the truthfulness of the motive alleged, and the fact that the said motive was so compelling that it could have led the appellant to have committed the *Qatl-i-Amd* of the deceased. There is a poignant hush with regard to the particulars of the motive alleged. No independent witness was produced by the prosecution to prove the motive as alleged. Even otherwise a tainted piece of evidence cannot corroborate another tainted piece of evidence. The august Supreme Court of Pakistan has held in the case of *Muhammad Javed v. The State* **(2016 SCMR 2021)** as under:

> "*The said related and chance witnesses had failed to receive any independent corroboration inasmuch as no independent proof of the motive set up by the prosecution had been brought on the record of the case.*"

23. It has been argued by the learned Deputy Prosecutor General that where any person dies an unnatural death in the house of such

accused then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred and in this case the appellant namely Madiha Zafar daughter of Zafar Iqbal was the resident of the house where the dead bodies were burnt. The prosecution is bound to prove its case against an accused person beyond a reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts the presence of some eye-witnesses and such claim of the prosecution is not established by it, there the accused person could not be convicted merely on the basis of a presumption that since the murder of a person had taken place in her house, therefore, it must be he and none else who would have committed that murder. The learned Deputy Prosecutor General submitted that it was in the knowledge of the appellant namely Madiha Zafar daughter of Zafar Iqbal how the deceased died so it was the appellant namely Madiha Zafar daughter of Zafar Iqbal who was responsible, in the absence of any explanation. The law on the burden of proof, as provided in Article 117 of the Qanun-e-Shahadat, 1984, mandates the prosecution to prove, and that too, beyond any doubt, the guilt of the accused for the commission of the crime for which he is charged. The said provision provides:

> ***"117. Burden of proof**:- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

On a conceptual plain, Article 117 of the Qanun-e-Shahadat, 1984 enshrines the foundational principle of our criminal justice system, whereby the accused is presumed to be innocent unless proved otherwise. Accordingly, the burden is placed on the prosecution to prove beyond doubt the guilt of the accused which burden can never be shifted to the accused, unless the legislature by express terms commands otherwise. It is only when the prosecution is able to discharge the burden of proof by establishing the elements of the offence, which are sufficient to bring home the guilt of the accused then, the burden is shifted upon the accused, inter alia, under Article 122 of the Qanun-e-Shahadat, 1984, to produce evidence of facts, which are especially in his exclusive knowledge, and practically impossible for the prosecution to prove, to avoid conviction. Article 122 reads as under:

> *"122. Burden of proving fact especially within knowledge:- When any fact is especially within the knowledge of any person, the burden to proving that fact is upon him."*

It has to be kept in mind that Article 122 of the Qanun-e-Shahadat, 1984 comes into play only when the prosecution has proved the guilt of the accused by producing sufficient evidence, except the facts referred in Article 122 Qanun-e-Shahadat, 1984, leading to the inescapable conclusion that the offence was committed by the accused. Then, the burden is on the accused not to prove his innocence, but only to produce evidence enough to create doubts in the prosecution's case. It may be noted that this issue was also dilated

upon by the august Supreme Court of Pakistan in the case of "*Rehmat alias Rahman alias Waryam alias Badshah v. The State"* (**PLD 1977 SC 515**), where, while deliberating upon Section 106 of the Evidence Act, which is *para materia* with Article 122 of the Qanun-e-Shahadat, 1984, it held as under:

> *"Needless to emphasis that in spite of section 106 of the Evidence Act in criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the inability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve! the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."*

The *ratio decidendi* of the above decision was further developed by in the case of "*NASRULLAH alias NASRO Versus The STATE* (**2017 S C M R 724**), wherein, it held as under:

> *"It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the case, particularly when the medical evidence contradicted the same. Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder.*

……..

In a case of this nature the appellant could not have been convicted for the alleged murder merely because he happened to be the husband of the deceased."

In a criminal case, the burden of proof is on the prosecution and article 122 of the Qanun-e-Shahadat, 1984 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are " especially " within the knowledge of the accused and which he could prove without difficulty or inconvenience. If the article was to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. Article 122 of the Qanun-e-Shahadat, 1984 cannot be used to undermine the well-established rule of law that, save in a very exceptional class of cases, the burden is on the prosecution and never shifts. Throughout the web of the Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the accused's guilt subject to any statutory exception. No matter what the charge, the principle that the prosecution must prove the guilt of the accused is the law and no attempt to whittle it down can be entertained. As discussed above, the prosecution witnesses namely Rashid Ali (PW-1) and Shamas Hussain Tahir (PW-2) failed miserably to prove their presence at the place of

occurrence, at the time of occurrence. In a case of this nature, the appellant namely Madiha Zafar daughter of Zafar Iqbal could not have been convicted for the alleged murders merely because it was claimed that she was a resident of the place of occurrence. An accused person cannot be convicted merely because she did not explain the circumstances in which the deceased died. The august Supreme Court of Pakistan has held in the case of "*MUHAMMAD JAMSHAID and another vs. The State and others"* (**2016 SCMR 1019**) as under:

> *"only circumstance relied upon by the prosecution was that the deadbody of the deceased had been found inside the house of the appellant and, hence, it was concluded by the courts below that it must be none other than the present appellant who had done the deceased to death. We have found such an approach adopted by the courts below to be nothing but speculative".*

The august Supreme Court of Pakistan has held in the case of "*Arshad Khan vs. The State"* (**2017 SCMR 564**) as under:

> *"It may be true that it has been held by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) that in such cases some part of the onus lies on the accused person to explain as to how and in which circumstances the accused person's wife had died an unnatural death inside the confines of the matrimonial home but at the same time it has also been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that where the prosecution completely fails to discharge its initial onus there no part of the onus shifts to the accused person at all."*

The august Supreme Court of Pakistan has held in the case of *Nazeer Ahmed vs. The State* (**2016 SCMR 1628**) as under:

> *"It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Abdul Majeed v. The State (2011 SCMR 941) and Saeed Ahmed v. The State (2015 SCMR 710)."*

The august Supreme Court of Pakistan has held in the case of *Asad Khan vs. The State* (**PLD 2017 Supreme Court 681**) as under:

> *"It had been held by this Court in the case of Arshad Mehmood v. The State (2005 SCMR 1524) that where a wife of a person dies an unnatural death in the house of such person there some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. In the later case of Saeed Ahmed v. The State (2015 SCMR 710) the said legal position had been elaborated and it had been held that an accused person is under some kind of an obligation to explain the circumstances in which his vulnerable dependent had met an unnatural death within the confines of his house; It had, however, been held in the case of Abdul Majeed v. The State (2011 SCMR 941) that where the entire case of the prosecution stands demolished or is found to be utterly unbelievable there an accused person cannot be convicted merely because he did not explain the circumstances in which his wife or some vulnerable dependent had lost his life. In such a case the entire burden of proof cannot be shifted to him in that regard if the case of the prosecution itself collapses. The present case is a case of the latter category wherein the entire case of the prosecution has been found by us to be utterly unbelievable and the same stands demolished and, thus, we cannot sustain the appellant's conviction and sentence merely on the basis of an inference or a supposition qua his involvement."*

The august Supreme Court of Pakistan has held in the case of *Abdul Majeed vs. The State* (**2011 SCMR 941**) as under:

> *"The basic principle of criminal law is that it is the burden of the prosecution to prove its case against the accused beyond reasonable doubt. This burden remains throughout and does not shift to the accused, who is only burdened to prove a defence plea, if he takes one. The strangulation to death of the appellant's wife in his house may be a circumstance to be taken into account along with the other prosecution evidence. However; this by itself would not be sufficient to establish the appellant's guilt in the absence of any other evidence of the prosecution connecting him to the crime. The prosecution has also not been able to establish that the appellant was present in the house at the time his wife was murdered. This, perhaps, distinguishes this case from that of "Afzal Hussain Shah v. The State" (ibid) where the accused admittedly was present in the house when his wife was killed."*

24. Considering all the above circumstances, we entertain serious doubt in our minds regarding the involvement of the appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat in the present case. It is a settled principle of law that for giving the benefit of the

doubt it is not necessary that there should be so many circumstances rather, if only a single circumstance creating reasonable doubt in the mind of a prudent person is available, then such benefit is to be extended to an accused not as a matter of concession but as of right. The august Supreme Court of Pakistan in the case of "*Muhammad Mansha Vs. The State"* (**2018 SCMR 772**) has enunciated the following principle:

> *"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akramv.The State (2009 SCMR 230) and Muhammad Zamanv.The State (2014 SCMR 749)."*

Reliance is also placed on the judgment of the august Supreme Court of Pakistan "*Najaf Ali Shah Vs. the State"* (**2021 S C M R 736**) in which it has been held as infra:

> *"9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the*

> *cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."*

25. For what has been discussed above, the Criminal Appeal No.427 of 2023 lodged by the appellant namely Madiha Zafar daughter of Zafar Iqbal is **allowed.** For what has been discussed above, the Criminal Appeal No.419-J of 2023 lodged by Abdul Wali alias Muhammad Bilal son of Muhammad Inayat (appellant) is also **allowed**. The convictions and sentences of both the appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat awarded by the learned trial court through the impugned judgment dated 27.09.2023 are hereby **set-aside**.The appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat are ordered to be acquitted by extending them the benefit of doubt. The appellants namely Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat are in custody and they are directed to be released forthwith if not required in any other case.

26. Consequently, the **Murder Reference No. 29 of 2023** is answered in **Negative** and the sentences of death awarded to Madiha Zafar daughter of Zafar Iqbal and Abdul Wali alias Muhammad Bilal son of Muhammad Inayat, are **Not Confirmed**.

(CH.SULTAN MAHMOOD) JUDGE

(SADIQ MAHMUD KHURRAM) JUDGE

Approved for Reporting
Judge

Raheel