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Judgment Sheet

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR.

JUDICIAL DEPARTMENT

Murder Reference No. 01 of 2024
(The State Vs. Muhammad Arsalan)

Criminal Appeal No. 383-J of 2023
(Muhammad Arsalan Vs. The State.)

Criminal Appeal No. 384-J of 2023
(Mst. Misbah Bibi Vs. The State.)

Date of hearing:	09.04.2025
Appellants by:	Mr. Zeeshan Haider, Advocate.
State by:	Mr. Muhammad Riaz Khan, Deputy Prosecutor General.
Complainant of the case by:	Mr. Noor Hassan, Advocate.

JUDGMENT.

SADIQ MAHMUD KHURRAM, J.– Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob (convicts) were tried by the learned Additional Sessions Judge, Minchinabad in the case F.I.R. No. 670 of 2022 dated 08.10.2022 registered in respect of offences under sections 302 and 34 P.P.C. at the Police Station Minchinabad, District Bahawalnagar, for committing the *Qatl-i-Amd* of Muhammad Mazhar son of Muhammad Rafique (deceased). The learned trial court, vide judgment dated 08.09.2023, convicted Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob (convicts) and sentenced them as infra:-

Muhammad Arsalan son of Muhammad Ahmad:

Death under section 302(b) read with section 34 P.P.C. as *Tazir* for committing *Qatl-i-Amd* of Muhammad Mazhar son of Muhammad Rafique (deceased) and directed to pay Rs.200,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of Muhammad Mazhar son of Muhammad Rafique (deceased) and to pay fine of Rs.2,00,000/- and in case of default thereof, the convict was directed to undergo further one year of simple imprisonment.

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

Mst. Misbah Bibi daughter of Muhammad Mehboob :-

Imprisonment for life under section 302(b) read with section 34 P.P.C. as *Tazir* for committing *Qatl-i-Amd* of Muhammad Mazhar son of Muhammad Rafique (deceased) and directed to pay Rs.200,000/- as fine and in case of default thereof, the convict was directed to undergo further one year of simple imprisonment.

Both the convicts were extended the benefit provided under section 382-B of the Code of Criminal Procedure, 1898 by the learned trial court.

2. Feeling aggrieved, Muhammad Arsalan son of Muhammad Ahmad (convict) lodged Criminal Appeal No.383-J of 2023 through jail assailing his conviction and sentence. Feeling aggrieved, Mst. Misbah Bibi daughter of Muhammad Mehboob (convict) lodged Criminal Appeal No.384-J of 2023 through jail assailing her conviction and sentence. The learned trial court submitted Murder Reference No.01 of 2024 under section 374 Cr.P.C. seeking confirmation or otherwise of the sentence of death awarded to the appellant namely Muhammad Arsalan son of Muhammad Ahmad. We intend to dispose of the Criminal Appeal No. 383-J of 2023, the Criminal Appeal No. 384-J of 2023 and Murder Reference No.01 of 2024 through this single judgment.

3. Precisely, the necessary facts of the prosecution case, as narrated by Zafar Iqbal (PW-1), the complainant of the case, are as under:-

> "Stated that marriage of deceaed brother namely Muhammad Mazhar was solemnized with Misbah Bibi accused about 10 years ago. During this wedlock, two sons were begotten. Misbah Bibi accused developed illicit relations with Muhammad Arslan accused, who is real maternal nephew of

deceaed Mazhar. When Mazhar deceaed (sic) got the knowledge of said illicit relations, he stopped Arslan accused to visit his house, by which Arslan accused developed grudge in his mind against Mazhar deceased. On 07.10.2022 at night, it was "Mehndi" function of my brother Shah Zeel, however my deceased borther (sic) Mazhar and his children did not come to attend the Mehndi function. I alongwith Azhar and Abdul Majeed went to the house of Mazhar deceaed enquirng him that why he did not come at the Mehndi function. It was 2.00/3.00 a.m (midnight). When we reached in the house of Mazhar, door of room was opened. A bulb in the courtyard as well as one bulb in the room were litting (sic) . We saw that Misbah accused had caught Mazhar deceased from his chest while Arslan was armed with "Suya" (ice broker). In our presence, Arslan accused infielted (sic) Suya blows at the chest of the deceased. Then Arslan acused (sic) inficited Suya blos (sic) at both sides of neck of deceased as well as at upper left arm of the deceased. He again inflicted back side of Suya blow at back side of head of the decased. We tried to capture the accused Arslan but he succeded (sic) in escaping from the spot, while Misbah Bibi accused was captured at the spot by us. We also saw that hands and legs had already tied of the deceased by the accused. We also observed that my deceased brother and his both children were in intoxicated condition. We un-tied Mazhar deceased the then injured. I handed over Misbah accused to witnesses namely Abdul Majeed and Azhar. I took Mazhar, the then injured, to THQ Hospital, Minchinabad. My cousin namely Shahid made telephonic call to local police regarding above said incident, on which police came at THQ Hospital, Minchinabad, where police recorded my statement. My statement was written by police which is Exh.P-A on which I endorsed my thumb-impression as Exh.P-A/1.

Police prepared injury statement at THQ Hospital, Minchinabad in my presence. Mazhar, the then injured, succumbed to the injuries in the way to reach THQ Hospital, Minchinabad. Postmortem of Mazhar deceaed was conducted by Medical Officer. Thereafter, dead body of Mazhar deceased was handed over to us for burial (sic).”

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 14.12.2022, 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 **twelve** witnesses recorded. Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) furnished the ocular account of the incident. Muhammad Ijaz (PW-3) stated that on 08.10.2022, the last worn clothes of the deceased were taken into possession by the Investigating Officer of the case. Muhammad Mohsin 492/HC (PW-5) stated that on 08.10.2022, Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case, handed over to him four sealed parcels and other articles and also printed photographs (P-9/1-7) as taken by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case of the place of occurrence and on 14.10.2022, he handed over the sealed parcels to Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore and on 28.10.2022, Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case handed over to him an icepick. Haji Muhammad 1374/C (PW-7) stated that on 08.10.2022, he escorted the dead body of the deceased 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 and on the same day Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case also printed photographs (P-9/1-7) and took them into possession. Shaukat Ali (PW-8) stated that on 08.10.2022, he identified the dead body of the deceased and the police took into possession the last worn clothes of the deceased after post mortem examination. Shaukat Ali Shah, ASI (PW-10) stated that on 08.10.2022, he got recorded the formal F.I.R. (Exh.PO). Muhammad Din Abid Draftsman (PW-12) prepared the scaled site plan of the occurrence

(Exh.PK). Muhammad Shahbaz T/SI (PW-9), investigated the case from 08.10.2022 till 03.11.2022, arrested the appellant namely Mst. Misbah Bibi on 08.10.2022, arrested the appellant namely Muhammad Arsalan on 21.10.2022 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. Muhammad Akash (PW-11) examined who, on 08.10.2022, was posted as Medical Officer at the T.H.Q. Hospital Minchinabad and on the same day had conducted the post mortem examination of the dead body of the deceased namely Muhammad Mazhar son of Muhammad Rafique. On conducting the post mortem examination of the dead body of the deceased namely Muhammad Mazhar son of Muhammad Rafique, Dr. Muhammad Akash (PW-11) observed as under:-

> "INJURIES.
>
> 1-A lacerated wound measuring 6 x 2 cm into bone expose on right side of head 6 cm from right Pinna.
>
> 2-A stab wound measuring 1 x 0.75 cm into Depth Not Probe on right side of neck.
>
> 3-A stab wound measuring 1 x 0.75 cm into Depth Not Probe on right side of neck4 cm from right Pinna.
>
> 4-Two stab wounds measuring 1 x 0.75 cm into Depth Not Probe posterior to left Pinna. Bleeding also coming from left ear.
>
> 5-A lacerated wound on posterior side of left Pinna measuring 3 x 0.5 cm.
>
> 6-A stab wound measuring 1 x 0.75 cm into Depth Not Probe on right side of chest interiorly 4 cm lateral to sternum in 7 (th) inter coastal space.

7- An abrasion on right wrist dorso laterally measuring 5 x 0.5 cm.

8- An abrasion on left wrist dorso laterally measuring 6 x 0.5 cm.

9- Two stab wounds on lateral surface of left arm measuring 1 x 0.75 into muscle deep.

…….

FINAL OPINION:

After complete external and internal postmortem examination, I am of the opinion that death occurred due to injury No.1, that caused damage to brain and this leads to pith of vital centers of brain and injury No.1 caused by blunt weapon. Injury No.2 to 6 and 9 caused by blunt pointed object and these are helping injuries to cause death. Injury No.7 and 8 caused by a rope that was used for tying his hands. Various samples were taken and sent to chemical examination for detection any sedative material."

7. On 31.05.2023, the learned Assistant District Public Prosecutor gave up the prosecution witnesses namely Muhammad Khizar, Muhammad Umar and Muhammad Azhar as being unnecessary and tendered in evidence the report of the Punjab Forensic Science Agency, Lahore (Exh.PQ). On 06.07.2023, the learned Deputy District Public Prosecutor closed the prosecution evidence after tendering in evidence the report of the Punjab Forensic Science Agency, Lahore (Exh.PR).

8. After the closure of prosecution evidence, the learned trial court examined the appellants namely Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob under section 342 Cr.P.C. and in answer to the question *why this case against you and why the P.W.s have deposed*

against you, they replied that they had been involved in the case falsely and were innocent. The appellants namely Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob 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, Minchinabad convicted and sentenced the appellants as referred to above.

10. The contention of the learned counsel for the appellants 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 argued that the appellants had been involved in the occurrence due to suspicion alone. 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 and the learned counsel for the complainant contended that the prosecution had proved its case beyond the shadow of a doubt by producing independent witnesses. The learned Deputy Prosecutor General and the learned counsel for the complainant further argued that the deceased died as a result of injuries suffered at the hands of the appellants. The learned Deputy Prosecutor General and the learned counsel for the

complainant further contended that the medical evidence also corroborated the statements of Zafar Iqbal (PW-1) and Abdul Majeed (PW-2). The learned Deputy Prosecutor General and the learned counsel for the complainant further argued that the recovery of the *Icepick (P-7)* from the appellant namely Muhammad Arsalan also corroborated the ocular account. The learned Deputy Prosecutor General and the learned counsel for the complainant 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 and 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, the learned counsel for the complainant and with their able assistance, perused the record and evidence recorded during the trial.

13. A perusal of the prosecution evidence reveals that the ocular account of the incident was narrated by the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2). The relationship of the said witnesses with the deceased is on record. Muhammad Mazhar (deceased) was the brother of the prosecution witness namely Zafar Iqbal (PW-1), whereas brother of the wife of the prosecution witness namely Abdul Majeed (PW-2). During cross-examination, the prosecution witness namely Abdul Majeed (PW-2) stated as under:-

> "Deceased Mazhar as well as complainant Zafar are my brother-in-laws"

The prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were also admittedly not the residents of the place of occurrence. It was admitted by the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) that they were not the residents of the place of occurrence and that the

occurrence had taken place at a time which was not usual for the visit and arrival of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) at the place of occurrence. According to the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) , both of them had their residences at a distance from the place of occurrence. In this manner, both the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) can be validly termed as "*chance witnesses*" and therefore were under a bounden duty to provide a convincing reason for their presence at the place of occurrence, at the time of occurrence and were also under a duty to prove their presence by producing some physical proof of the same. We have noted with grave concern that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) failed miserably to provide any consistent evidence as to the reason for their arrival at the place of occurrence and their presence at the place of occurrence when the same was taking place. During the course of cross-examination, it was brought on record that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) did not provide any evidence for the reason of their arrival at the place of the occurrence, at the very time when the same was happening, during the investigation of the case. The prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) claimed that on the night of the occurrence, a "*Mehndi*" function of Shahzeel, one of the brothers of the prosecution witness namely Zafar Iqbal (PW-1) had been arranged, however, as neither the deceased nor any of his family members attended the said "*Mehndi*" function of Shahzeel, therefore, the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2), at about **02.00/03.00 a.m. (night)** proceeded to inquire from the deceased the reason for his failure to attend the said function. A perusal of the prosecution evidence

reveals that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) miserably failed to establish the fact that any "*Mehndi*" function of Shahzeel, one of the brothers of the prosecution witness namely Zafar Iqbal (PW-1) had been arranged on the night of the occurrence which function was not attended by the deceased or any of his family members. Even Shahzeel, one of the brothers of the prosecution witness namely Zafar Iqbal (PW-1) never joined the investigation of the case to support this fact that any "*Mehndi*" function had been arranged on the night which was not attended by the deceased. Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case, did not record the statement of said Shahzeel during the investigation of the case. Moreover, this claim of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) that at about **02.00/03.00 a.m. (night) they** proceeded to inquire from the deceased the reason for his failure to attend the said function even otherwise is implausible and contrary to normal conduct. During the cross-examination, prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were badly exposed with regard to that there did not exist any reason for their arrival at the place of occurrence, at the time of occurrence. The admitted failure of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) to provide a valid reason for their arrival at the place of occurrence in the dead of the night, at the very moment when the incident was happening, has repercussions, proving that there was no reason actually for the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) to be visiting the place of occurrence. The very inception of the prosecution case is thus put in doubt due to the said abject failure of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2). Both the eye witnesses namely Zafar Iqbal (PW-1) and

Abdul Majeed (PW-2) failed miserably to establish the reason for their presence at the place of occurrence, at the time of occurrence and the mode through which they arrived at the place of occurrence. The prosecution was under a bounden duty to establish not only that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) had a reason to proceed to the place of occurrence but also to prove the mode through which the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) arrived at the place of occurrence. The failure of the prosecution to prove the said facts has vitiated our trust in Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) as being truthful witnesses. In this respect, reliance is placed on the case of "*Muhammad Rafiq v. State"* **(2014 SCMR 1698)** wherein the august Supreme Court of Pakistan rejected the claim of witnesses who lived one kilometer away from the place of occurrence, but on the day of occurrence stated to be present near the spot as they were working as labourers, inasmuch as they failed to give any detail of the projects they were working on. Reliance is also placed on the case of "*Usman alias Kaloo v. State*" **(2017 SCMR 622)** wherein the august Supreme Court of Pakistan held that the ocular account of the incident had been furnished by Zahoor Ahmad, Ghulam Farid and Manzoor Ahmed in the said case who were all residents of some other houses and they were not the inmates of the house wherein the occurrence had taken place and therefore the said eye-witnesses were, thus, chance witnesses and declared not worthy of reliance. Reliance is also placed on the case of "*Nasrullah alias Nasro v. The State"* **(2017 SCMR 724)**.

14. We have also observed that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) claimed that the occurrence took place exactly at the same time when they had arrived at the place of occurrence. This narrative of

the prosecution witnesses that the accused kept waiting for the arrival of the witnesses at the place of occurrence, **with the doors of the house open**,who both were visiting the said place in the **dead of the night** and thereafter committed the same is unnatural and cannot be believed. It is opposed to human conduct that an assailant would keep waiting for the arrival of the witnesses prior to the commission of the offence. It is all the more illogical that being perceptive of the fact that by pending the matter the accused ran the risk of the arrival of the witnesses and their deposing against the accused, even then the assailant kept waiting for their arrival. Such behaviour, on the part of the accused, as deposed by the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2), runs counter to natural human conduct and behaviour. Hence, being perceptive of this strain of human conduct, we are holding that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were not present at the time of occurrence, at the place of occurrence and had not witnessed the occurrence. In this regard, reliance is placed on the case of "*STATE through Advocate-General, Khyber Pakhtunkhwa, Peshawar Vs. HASSAN JALIL and others"* (**2019 S C M R 1154**) wherein the august Supreme Court of Pakistan held as under:-

> *"Arrival of Noor Seema, PW at venue exactly at a point of time when the respondent allegedly did away with the deceased, in itself is a circumstance that reflects on the very genesis of the prosecution case."*

Reliance is also placed on the case of *Muhammad Imran Vs. The State* ***(2020 S C M R 857)*** wherein the august Supreme Court of Pakistan held as under:-

> *"These contradictions, viewed in the retrospect of arrival of the witnesses exactly at a point of time when the petitioner started inflicting blows to the deceased with their inability to apprehend him without there being any weapon to keep them effectively at bay, cast shadows on the hypothesis of their presence during the fateful moments. It was an odd hour of night without any source of light as admitted by no other than Fazal Abbas (PW-4) himself."*

15. We have also noted that the alleged eye witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) and Muhammad Azhar (given up PW) made no effort either to save the deceased or to apprehend the accused when they were three in number and could have easily restrained the accused. It is unnatural and unbelievable that the alleged eye witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) and Muhammad Azhar (given up PW) did not even move a limb to protect their near and dear one. No person having 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 to apprehend the assailant. It only proves that the deceased was at the mercy of the assailant and no one was there to save him. Such behaviour, on the part of the witnesses, runs counter to natural human conduct and behaviour. We thus trust 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 Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were not present at the place of occurrence, at the time of occurrence and their presence was procured subsequently. The august Supreme Court of Pakistan has enunciated binding principles for appreciation of evidence in such circumstances. Reliance is placed on the case of *Pathan v. The State* **(2015 SCMR 315)** at page 317 wherein the august Supreme Court of Pakistan observed as under:-

> *"No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot."*

Further reliance is placed on the case of *Shahzad Tanveer v. The State* **(2012 SCMR 172)** at page-176 wherein the august Supreme Court of Pakistan observed as infra:-

> *"It is also more strange that none of the P.Ws. dared to physically intervene in order to save the victim or apprehend the accused at the spot."*

Reliance is also placed on the case of *Liaquat Ali v. The State* **(2008 SCMR 95)** at page 97 wherein the august Supreme Court of Pakistan observed as under:

> *"He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."*

16. The most important part of the prosecution evidence is the statement of the prosecution witness namely Shaukat Ali (PW-8) who candidly admitted that the prosecution witness namely Zafar Iqbal (PW-1) arrived at the THQ Hospital Minchinabad only at 07/08.00 a.m. in the morning whereas the occurrence was told to him by Muhammad Khan and he alongwith Ijaz and his sons namely Sohail Shaukat and Shoaib Shaukat arrived first at the THQ Hospital at about 03/04.00 a.m. in the night. During cross-examination, Shaukat Ali (PW-8) explained as under:-

> " **Muhammad Khan/my brother-in-law disclsoed me about the occurrence** then I reached at THQ Hospital, Minchinabad. Muhammad Khan disclosed me about the occurrence at about 3.00 a.m (night) on 08.10.2022. After getting information of the occurrence, I alongwith Ejaz PW, my son Sohail Shaukat and Shoaib Shaukat (son) reached at THQ Hospsital, Minchinabad. Police was already available at THQ Hospital, Minchinabad before our arrival. I do not remember the names of police party present at THQ Hospital, Minchinabad except Haji Muhammad 1374/C. Four police officers/officials were available at THQ Hospital, Minchinabad. We identified dead body of Mazhar decased. We stayed there and nobody touched dead body during said time. **We identified dead body of Mazhar deceased at about 3/4.00 a.m (night). Zafar complainant came at**

> **THQ Hospital, Minchinabad at about 7/8.00 am.** No other police officer/official came at THQ Hospital, Minchinabad after arrival of complainant. Complainant remained present at THQ Hospital, Minchinabad till postmortem of deceaed. Azhar and Abdul Majeed PWs also remained present at THQ Hospital, Minchinabad alongwith complainant till postmortem of the deceased. Azhar and Majeed PWs came at THQ Hospital, Minchinabad at about 8/9.00 a.m ” (emphasis supplied)

The above reproduced portion of the cross-examination of prosecution witness namely Shaukat Ali (PW-8), conclusively proves that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) had not witnessed the occurrence and that the prosecution witness namely Zafar Iqbal (PW-1) wrongly claimed that it was him who had taken the deceased in an injured condition to the hospital.

17. Another fact which proves the absence of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) at the place of occurrence, at the time of occurrence is that though it was admitted by the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) that Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased) were sleeping in the same room where the incident had taken place and were also found in a state of intoxication, however, according to Zafar Iqbal (PW-1), both Muhammad Umar and Muhammad Khizar (both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased) remained at the place of occurrence while he took the deceased in an injured condition to the hospital and when his oral statement (Exh.PA) was recorded by Muhammad Shahbaz T/SI (PW-9), the

Investigating Officer of the case at the THQ Hospital Minchinabad at about **06.55 a.m**., till then Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased), had not been brought to the hospital and were present at the place of occurrence. During cross-examination Zafar Iqbal (PW-1) claimed as under:-

> " I had mentioned the presence of my two nephews namely Khizar and Muhammad Umar in the house of deceased. Khizar and Muhamad Umar shifted to TH Hospital, Minchiabad through Rescue 1122. I informed at counter of the THQ Hospital on which Rescue 1122 was sent. **Muhammad Umar and Khizar shifted to THQ Hospital after half an hour of recording of my statement**. " (emphasis supplied)

This claim of Zafar Iqbal (PW-1), that both Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased) remained at the place of occurrence while he took the deceased in an injured condition to the hospital and when his oral statement (Exh.PA) was recorded by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case at the THQ Hospital Minchinabad at about 06.55 a.m., till then Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased), had not been brought to the hospital and were present at the place of occurrence was contradicted not only by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case but also by the documentary evidence available on record. During cross-examination, Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case admitted that both Muhammad Umar and Muhammad Khizar (both given up as prosecution witnesses being unnecessary), the sons of

Muhammad Mazhar (deceased) were brought to the THQ Hospital at **05.00 a.m on 08.10.2022.** i.e. prior to the recording of the oral statement (Exh.PA) of Zafar Iqbal (PW-1) by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case, which oral statement (Exh.PA) was recorded at **06.55 a.m. at the THQ Hospital Minchinabad.** During cross-examination, Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case admitted as under:-

> "It is correct that statement of complainant Exh.PA was recorded at **6.55 a.m.** No other statement of complainant was recorded prior to Exh.P-A. It is correct that in Exh.P-A complainant got recorded that his minor nephews were present in the house of occurrence in unconscious condition at 6.55 a.m. According to mark "A" and mark "B" minors namely Muhammad Khizar and Muhammad Umar were brought by the person having I.D card No.311059822080-7 Cell No.0306-0048582 **at 5.00 a.m on 08.10.2022 at THQ Khidmat Counter.** " (emphasis supplied)

The above mentioned facts conclusively prove that Zafar Iqbal (PW-1) did not even know as to who had brought both Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased) to the THQ Hospital or even that both Muhammad Umar and Muhammad Khizar had been brought to the THQ Hospital Minchinabad **at 5.00 a.m on 08.10.2022,** much prior to the recording of the oral statement (Exh.PA) of Zafar Iqbal (PW-1) by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case.

18. As mentioned above, according to the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) themselves, both Muhammad Umar and Muhammad Khizar(both given up as prosecution witnesses being unnecessary),

the sons of Muhammad Mazhar (deceased) were present inside the same room where the occurrence took place, however, both Muhammad Umar and Muhammad Khizar were given up as prosecution witnesses and not produced before the learned trial court. This failure of the prosecution to produce the said Muhammad Umar and Muhammad Khizar (both given up as prosecution witnesses being unnecessary), the sons of Muhammad Mazhar (deceased) before the learned trial court, reflects poorly upon the veracity of the prosecution's 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, the children of the deceased, who were admittedly 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's 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.

19. Another grave flaw of the prosecution case brought on record through the statements of the prosecution witnesses themselves is that according to the injury statements of both Muhammad Umar and Muhammad Khizar, the sons of Muhammad Mazhar (deceased), the incident had been committed by **three unknown persons**. The said injury statements of both Muhammad Umar and Muhammad Khizar were brought on record during the statement of Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case and read as under:-

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Anjum Mumtaz Malik
Addl. District & Judge
Minchinabad

فارم نمبر BWN-3291534

نقشہ معروضی

(بروئے پولیس رول 25.39 میڈیکولیگل آفیسر)

نام	محمد خضر	جنس	مرد
شناختی کارڈ نمبر	31105-9822080-7	فون نمبر	0306-0048582
مورخہ	08/10/2022 06:01:00	تھانہ	منچن آباد
بنام	3 کس نامعلوم	رپٹ نمبر	
میڈیکل نمبر	0	عمر	7
جائے وقوع	موضع کدار پور منچن آباد ضلع بہاولنگر بوقت 5 بجے صبح مورخہ 08/10/2022		
پتہ مضروب	موضع کدار پور منچن آباد ضلع بہاولنگر		

بخدمت جناب میڈیکل آفیسر RHC/THQ/MS

بکار سرکار تحریر ہے کہ مسمی/مسمات محمد خضر ولد/زوجہ مظہر قوم بلوچ سکنہ موضع کدار پور منچن آباد ضلع بہاولنگر جو بحالت مضروبی خدمت کاوشنر THQ ہذا حاضر آیا/ آئی ہے جس کو ذیل ضربات لگنی پائی گئی ہیں۔ جسے بغرض علاج معالجہ و حصول نتیجہ میڈیکل زیر نگرانی کانسٹیبل رشیانہ جمیل L:C/51 متینہ پولیس خدمت کاوشنر THQ بہاولنگر بھجوایا جا رہا ہے۔بعد علاج معالجہ و ملاحظہ ڈاکٹری نتیجہ ڈاکٹری سے آگاہ فرمایا جاوے تاکہ قانونی کاروائی عمل میں لائی جاسکے۔

تفصیل ضربات ذیل ہیں۔

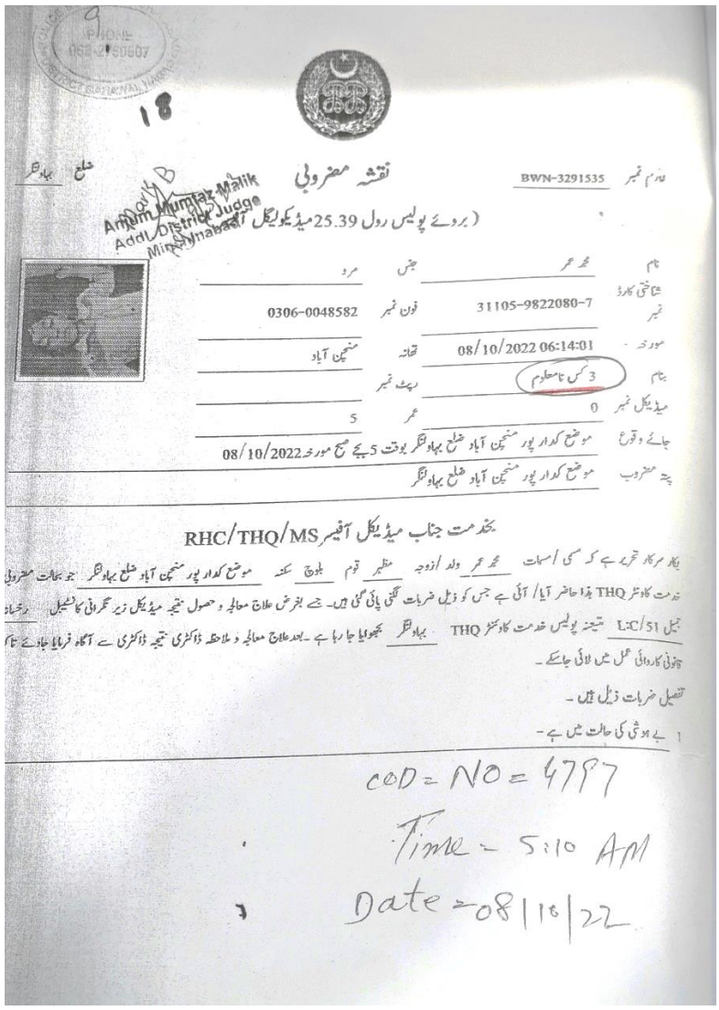
پیٹ میں درد بیان کرتا ہے۔

CoD No = 4798

Time - 5:10 A.M

Date - 08/10/22

DR. ASAD LAGHARI
Medical Officer
THQ Hospital Minchinabad



نقشہ معروبی

BWN-3291535 ملازم نمبر

ضلع بہاولنگر

(بروئے پولیس رول 25.39 میڈیکو لیگل کیس)

نام محمد عمر — جنس مرد

شناختی کارڈ نمبر 31105-9822080-7 — فون نمبر 0306-0048582

موقعہ 08/10/2022 06:14:01 — تھانہ صنیچن آباد

بیان 3 کس نامعلوم — رپٹ نمبر

میڈیکل نمبر 0 — عمر 5

جائے وقوع موضع کدار پور صنیچن آباد ضلع بہاولنگر بوقت 5 بجے صبح مورخہ 08/10/2022

پتہ مضروب موضع کدار پور صنیچن آباد ضلع بہاولنگر

بخدمت جناب میڈیکل آفیسر RHC/THQ/MS

یکار سرکار تحریر ہے کہ کسی اسباب محمد عمر ولد ازوجہ مظہر قوم بلوچ سکنہ موضع کدار پور صنیچن آباد ضلع بہاولنگر جو بحالت معروبی خدمت کلاسٹر THQ ہذا حاضر آیا/ آئی ہے جس کو ذیل ضربات لگی پائی گئی ہیں۔ جسے بغرض علاج معالجہ و حصول نتیجہ میڈیکل زیر نگرانی کانسٹیبل برخیاہ نمبر 1.C/51 تعینہ پولیس خدمت کلاسٹر THQ بہاولنگر بھجوایا جا رہا ہے۔ بعد علاج معالجہ و ملاحظہ ڈاکٹری نتیجہ ڈاکٹری سے آگاہ فرمایا جاوے تاکہ چنانچی کاروائی عمل میں لائی جاسکے۔

تفصیل ضربات ذیل ہیں۔

1 بے ہوشی کی حالت میں ہے۔

COD = NO = 4787

Time = 5:10 AM

Date = 08/10/22

Arsalan Mumtaz Malik
Addl. District & Sessions Judge
Minchinabad

”

A well-known dictum has been laid down by the apex Court of our country that a man may lie but a document will never lie.These documents also prove not only that the assailants were not identified at the time of the occurrence but also that the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) had not witnessed the incident at all.

20. We have also noted with concern that despite the assertion of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) that they had witnessed the occurrence on **08.10.2022 at about 02.00 a.m.,** the matter was reported to the police on **08.10.2022 at about 06.55 a.m.**, when the prosecution witness Zafar Iqbal (PW-1) got recorded oral statement (Exh.PA) for the

registration of the F.I.R at the THQ hospital Minchinabad to Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case. In this manner, the delay in reporting the matter to the police was of about **five hours,** for which delay no reason, much less plausible, was offered. The prosecution witness namely Zafar Iqbal (PW-1) also claimed that Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case had arrived at the spot at 04.00 a.m. still the oral statement (Exh.PA) was recorded at 06.55 a.m. at the THQ hospital Minchinabad and no statement of Zafar Iqbal (PW-1) was recorded at the spot. During cross-examination Zafar Iqbal (PW-1) stated as under:-

> " My cousin firtly informed the police regarding occurrence on 08.10.2022 at 3.30 a.m (night). **After receiving information, police came at the spot** at about 4.00 a.m. Police remained there for ten minutes." (emphasis supplied)

No justification, much less credible, has been given by the prosecution at any stage for such deferral in the recording of the oral statement (Exh.PA) of Zafar Iqbal (PW-1) by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case.The reason for this inordinate delay in reporting the matter to the police by the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) is obvious, being that both the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were not present at the place of occurrence, at the time of occurrence and the delay was used to procure their attendance. In this case, the ocular account furnished is suffering from legal and factual infirmities and does not appeal to a prudent mind, much less a legal one. This inordinate delay in reporting the matter conclusively proves that the oral statement (Exh.PA) of Zafar Iqbal (PW-1) and the formal F.I.R (Exh.PO) were prepared after probe,

consultation, planning, investigation and discussion and as the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) were not present at the place of occurrence, at the time of occurrence, the delay was used for procuring their arrival. Many hours were taken to invent a false and dishonest narrative of the oral statement (Exh.PA) of Zafar Iqbal (PW-1). The scrutiny of the statements of the prosecution witnesses reveals that the oral statement (Exh.PA) of Zafar Iqbal (PW-1) was neither prompt nor spontaneous nor natural, rather was a contrived, manufactured and a compromised document. Sufficient doubts have arisen and inference against the prosecution has to be drawn in this regard and the delay in reporting the matter to the police and the failure of the prosecution witnesses to proceed to the Police Station evidences their absence at the time of occurrence, at the place of occurrence. Reliance is placed on the case of "*Ghulam Abbas and another v. The State and another"* **(2021 SCMR 23)** wherein the august Supreme Court of Pakistan observed as under:-

> *"As per contents of FIR, the occurrence in this case took place on 19.06.2008 at 01.40 a.m. and the matter was reported to the Police on the same morning at 07.00 a.m. and as such there is a delay of more than five hours in reporting the crime to the Police whereas Police Station was situated at a distance of just six kilometers from the place of occurrence. No explanation whatsoever was furnished by the complainant for this delay in reporting the crime to the Police. Hameed Ullah Khan SI (PW.15) who investigated the case stated during his cross-examination that he reached at the place of occurrence at about 05.00 a.m. and he had completed the police proceedings by 06.30 p.m. In the circumstances, chances of deliberations and consultations before reporting the matter to the Police cannot be ruled out*."

Reliance is also placed on the case of *MUHAMMAD ASHRAF JAVEED and another vs. MUHAMMAD UMAR and others* (**2017 SCMR 199**) wherein the august Supreme Court of Pakistan was pleased to hold as under:

> *"The hospital is closely situated to the Police Station but neither the complainant nor PWs took a little pain to report the matter, nor the staff of the hospital including the treating doctor took initiative*."

Guidance is also sought from the principle enunciated by the august Supreme Court of Pakistan in the case of *Zafar vs. The State and others* (**2018 SCMR 326**) where the august Supreme Court of Pakistan was pleased to hold as under:-

> "*It has been observed by us that the occurrence in this case as per prosecution took place on 03.09.1999 at 3.00 a.m. (later half of night) and the matter was reported to the police on the same day at 8.30 a.m. i.e. after five hours and thirty minutes of the occurrence. The distance between the place of occurrence and the police station is 09 miles. The postmortem on the dead body of deceased was conducted on the same day at 2.00 p.m. i.e. after 11 hours of the occurrence. No explanation whatsoever has been given by the complainant Shahadat Ali (PW5) and Umer Daraz (PW6) in the FIR or while appearing before the learned trial Court qua the delay in lodging the FIR or for that matter the belated postmortem of the deceased."*

Guidance is sought from the principles enunciated by the august Supreme Court of Pakistan in the cases of "*G. M. NIAZ Vs. The State"* (**2018 SCMR 506**), *Abdul Jabbar and another Vs. The State* (**2019 S C M R 129**) and *Muhammad Shafi alias Kuddoo Vs. The State and others* (**2019 S C M R 1045**).

21. We have also noted with disquiet that despite the fact that the occurrence took place at about **02.00 a.m. on 08.10.2022**, however, the post-mortem

examination of the dead body of the deceased was conducted after much delay. According to Dr. Muhammad Akash (PW-11), he conducted the post-mortem examination of the dead body of the deceased namely Muhammad Mazhar at **10.00 a.m on 08.10.2022,** i.e. after about **eight hours** of the occurrence and after nearly **three hours** after the oral statement (Exh.PA) of Zafar Iqbal (PW-1) was recorded by Muhammad Shahbaz T/SI (PW-9) for the registration of the F.I.R. Dr. Muhammad Akash (PW-11), who conducted the post-mortem examination of the dead body of Muhammad Mazhar (deceased) and prepared the post-mortem examination report (Exh. P.P.), gave the time between death and post-mortem examination as being **six-twelve hours**. The reason which is apparent for the delayed conducting of the post-mortem examination of the dead body of Muhammad Mazhar (deceased) is that by that time, the details of the occurrence were not known and the said time was used not only to procure the attendance of the witnesses but also to fashion a false narrative of the occurrence. No explanation was offered to justify the said delay in receiving the complete documents from the police and the delay in conducting the post-mortem examination. These facts clearly establish that the witnesses claiming to have seen the occurrence were not present at the time of occurrence and the delay in the post-mortem examination was used to procure their attendance and formulate a dishonest account, after consultation and planning. 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, F.I.R. 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 F.I.R. 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 F.I.R. 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."*

22. The learned Deputy Prosecutor General has submitted that the recovery of the *Icepick (P-7)* and the report of Punjab Forensic Science Agency, Lahore (Exh.PR) offered sufficient corroboration of the statements of the eye-witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2). Regarding the recovery of the Icepick (P-7) from the appellant namely Muhammad Arsalan, 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 Icepick (P-7) from the appellant namely Muhammad Arsalan which was in clear violation of section 103 Code of Criminal Procedure, 1898. 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 Icepick (P-7) from the appellant namely Muhammad Arsalan 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, with regard to the recovery of the Icepick (P-7), we have noted that according to the report of the Punjab Forensic Science Agency, Lahore (Exh.PR), none of the items submitted to the Punjab Forensic Science Agency, Lahore for DNA analysis generated the DNA profile of the appellant namely Muhammad Arsalan. Had the appellant namely Muhammad Arsalan handled the Icepick (P-7) then his DNA profile must have been obtained from the items sent for analysis to Punjab Forensic Science Agency, Lahore but it was not which also proves that the appellant namely Muhammad Arsalan had not handled the Icepick (P-7).All these facts denude the effort made by Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case to prop up the failing prosecution case by showing a sham recovery of the Icepick (P-7). Even otherwise, as we have disbelieved the ocular account in this case, hence, the evidence of recovery of the *Icepick (P-7)* from the appellant namely Muhammad Arsalan would have no consequence. It is an admitted rule of appreciation of evidence that recovery is only a corroborative piece of evidence and if the ocular account is found to be unreliable, then the recovery has no evidentiary value.

23. The learned Deputy Prosecutor General and the learned counsel for the complainant have also relied upon the evidence of motive and submitted that it corroborated the ocular account. The motive of the occurrence as stated by the prosecution witness namely Zafar Iqbal (PW-1), in his oral statement (Exh.PA) was that the appellants had developed illicit relations with each other and therefore committed the *Qatl-i-amd* of the deceased. We have perused the statements of the prosecution witnesses namely Zafar Iqbal (PW-1) and Abdul Majeed (PW-2) and find that they failed to prove the motive of the occurrence as stated by them.

Muhammad Shahbaz T/SI (PW-9), the Investigating Officer of the case, admitted during cross-examination as under:-

> " I did not investigate regarding alleged illicit relations of accused persons calimed by the complainant"

A perusal of the statements of the prosecution witnesses amply proves that there is no evidence on record that Muhammad Mazhar son of Muhammad Rafique (deceased) was facing any threat to his life at the hands of the appellants prior to the occurrence rather, to the contrary, he was living with the appellant namely Mst. Misbah Bibi till his tragic death and had been blessed with the birth of two children. This also proves that the appellant namely Mst. Misbah Bibi and the deceased were having a happy and healthy marital life and hence there did not exist any reason for the appellant namely Mst. Misbah Bibi to have murdered her loving husband. 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 appellants 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.*"

24. It has been argued by the learned Deputy Prosecutor General and the learned counsel for the complainant 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 as the appellant namely Mst. Misbah Bibi daughter of Muhammad Mehboob (the appellant in *Criminal Appeal No. 384-J of 2023*) was the resident of the house where the occurrence took place, so she was also guilty of the commission of the offences. 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 his house, therefore, it must be he and none else who would have committed that murder. The learned Deputy Prosecutor General submits that it was in the knowledge of the appellant how the deceased died so it was the appellant 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 of Qanun-e-Shahadat,1984 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 to 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, 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 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 were 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 Zafar Iqbal (PW-1) and Abdul Majeed (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 Mst. Misbah Bibi daughter of Muhammad Mehboob (the appellant in *Criminal Appeal No. 384-J of 2023*) could not have been convicted for the alleged murder merely because she happened to be the resident of the place of occurrence. An accused person cannot be convicted merely because she did not explain the circumstances in which the deceased had lost his life. 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."*

25. The only other piece of evidence left to be considered by us is the medical evidence with regard to the injuries observed on the dead body of the deceased by Dr. Muhammad Akash (PW-11) but the same is of no assistance in this case as medical evidence by its nature and character, cannot recognize a culprit in case of an unobserved occurrence. As all the other pieces of evidence relied upon by the prosecution, in this case, have been disbelieved and discarded by us, therefore, the appellant's conviction cannot be upheld on the basis of medical evidence alone. The august Supreme Court of Pakistan in its binding judgment titled "*Hashim Qasim and another Vs. The State*" **(2017 SCMR 986)** has enunciated the following principle of law:

> *"The medical evidence is only confirmatory or of supporting nature and is never held to be corroboratory evidence, to identify the culprit."*

The august Supreme Court of Pakistan in its binding judgment titled "*Naveed Asghar and two others Vs. The State*" **(P L D 2021 Supreme Court 600)** has enunciated the following principle of law:

> *"31. The prosecution has attempted to complete the chain of circumstantial evidence by medical evidence relating to the post mortem examinations of the*

> *deceased persons. This evidence proves only the factum that death of the deceased persons was caused by cutting their throats through some sharp edge weapon; it does in no way indicate who had cut their throats and with what particular weapon. Medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person.*[32] *Therefore, the medical evidence is of little help to the prosecution for bringing home the guilt to the petitioners."*

26. Considering all the above circumstances, we entertain serious doubt in our minds regarding the involvement of the appellants namely Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob, 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 observed 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."*

27. For what has been discussed above, Criminal Appeal No.383-J of 2023 lodged by Muhammad Arsalan son of Muhammad Ahmad (appellant) is **allowed.** For what has been discussed above, Criminal Appeal No.384-J of 2023 lodged by the appellant namely Mst. Misbah Bibi daughter of Muhammad Mehboob is also **allowed.** The convictions and sentences of the appellants namely Muhammad Arsalan son of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob awarded by the learned trial court through the impugned judgment dated 08.09.2023 are hereby **set-aside**. The appellants namely Muhammad Arsalan son

of Muhammad Ahmad and Mst. Misbah Bibi daughter of Muhammad Mehboob are ordered to be acquitted by extending them the benefit of the doubt. Muhammad Arsalan son of Muhammad Ahmad (appellant) is in custody and is directed to be released forthwith if not required in any other case. The sentence of the appellant namely Mst. Misbah Bibi daughter of Muhammad Mehboob (the appellant in *Criminal Appeal No.384-J of 2023*) was suspended by this Court vide order dated 13.11.2024 and she is present before the Court on bail. The surety of the appellant namely Mst. Misbah Bibi daughter of Muhammad Mehboob (the appellant in *Criminal Appeal No.384-J of 2023*) shall stand discharged from his liability and the bail bonds submitted by the appellant namely Mst. Misbah Bibi daughter of Muhammad Mehboob (the appellant in *Criminal Appeal No.384-J of 2023*) are hereby cancelled.

28. **Murder Reference No.01 of 2024** is answered in **Negative** and the sentence of death awarded to Muhammad Arsalan son of Muhammad Ahmad is **Not Confirmed**.

(CH. SULTAN MAHMOOD)
JUDGE

(SADIQ MAHMUD KHURRAM)
JUDGE

Raheel

Approved for Reporting

JUDGE