JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

JUDGMENT

Cr. Appeal No. 963-P/2019.

Date of hearing: *04-12-2019*
Appellant: *(Suleman) By Mr. Muhammad Riaz Khan, Advocate.*
Respondent: *(State) By Mr. Mujahid Ali Khan, Addl: A.G.*

Complainant: *(Riaz Khan) By Mr. Muhammad Saleem Khan (Mardan) Advocate.*

ISHTIAQ IBRAHIM, J.- This single judgment shall dispose off the present Criminal Appeal No. 963-P/2019 filed by appellant Sulaiman son of Saadat Khan against his conviction and sentence, and Criminal Revision No.182-P/2019 filed by Riaz Khan complainant-petitioner for enhancement of sentence awarded to accused-respondent Sulaiman (Appellant in Cr.Appeal No.963-P/2019), as both are arising from one and the same impugned judgment dated 20.07.2019 rendered by the learned Additional Sessions Judge/Judge Model Criminal Trial Court, Mardan, in case FIR No.235 dated 31.05.2014 under sections-302/34 PPC, registered at Police Station Saddar, District Mardan, whereby the appellant Suleman was convicted and sentenced as under;

i. **Under Section-316 PPC to suffer rigorous imprisonment for 14 years as Tazir and to pay Diyat at the prevailing rate to the legal heirs of deceased in lump sum and shall remain in prison till payment of Diyat amount.**

ii. **Benefit of section-382-B Cr.PC was extended to the appellant.**

2. Facts of the prosecution case are that on 31.05.2014 Riaz Khan son of Zainullah and his relatives brought the dead body of his son Abu Bakar to Casualty Hospital, Mardan, in Rescue-1122 Ambulance; that at 15.20 hours Riaz Khan reported the matter to Ali Zar Shah Khan SI posted at Casualty DHQ, Mardan, to the effect that on the day of occurrence he alongwith his son Abu Bakar and Saeed Khan son of Mir Hassan were present near the chicken shop of his deceased son; that at 14.15 hours Sulaiman and Kamran sons of Saadat came to the shop of his deceased son and sought to purchase chicken on credit/loan basis and on refusal of his son, upon which both the accused became furious, grappled with the deceased and gave kicks and fists blows to the deceased on his head, heart and other parts of the body due to which his son became unconscious; that the persons present on the spot called Ambulance-1122 and while on way to the hospital, his son expired; that besides him the occurrence was also witnessed by Saeed Khan. The dispute was reported to be over purchase of chicken on loan basis. The complainant charged both the accused for the murder of his son. The report of the complainant was reduced into

writing in the shape of murasila and sent to police station for registration of case FIR against the accused through constable Sohail No.3035. The injury sheet and inquest report of the deceased were prepared and the dead body of the deceased was referred to the doctor for conducting autopsy under the escort of constable Ijaz No.2794. Both the accused were arrested on 05.05.2015, vide card of arrest (EX PW 4/1) wherein the age of accused Kamran has been mentioned as 16-17 years, therefore, he was declared Juvenile, and separate challan under the Juvenile Justice System Ordinance, 2000, was submitted against him.

3. After completion of investigation, supplementary challan against the accused Sulaiman was submitted and provisions of section-265-C Cr.PC were complied with. Formal charge against him was framed, to which he did not plead guilty and claimed trial.

4. The prosecution in order to prove its case, examined as many as eight (08) witnesses. The important prosecution witnesses are, **Dr. Zafrullah (PW-1)** deposed that on 31.05.2014 at 3:45 PM, he conducted postmortem examination on the dead body of the deceased Abu Bakar son of Riaz brought by his relatives and found the following:

> "The deceased was brought on 31.5.2014 at 3.20 P.M.
> External appearance:
> Condition of subject stout body. No rigormortis, wearing blue clothes showing no blood stains. No visible injury or marks of violence on his body.
> Remarks. In my opinion death was caused due to cardio respiratory arrest.
> Probable time between injury and death..Instantaneous.
> Probable time between death and PM. Within two hours."

Ali Zar Shah Khan SI (PW-02) reiterated the same facts, which he has recorded in murasila. **Riaz Khan complainant (PW-6)** reiterated the same story, which he has reported in his initial report and that the I.O prepared the site plan at his instance. **Saeed Khan (PW-7)** also supported the version of the complainant. **Taj Muhammad Khan SI (PW-8)**, who conducted investigation of the case, prepared site plan (EX PB) at the instance of complainant and Saeed Khan eyewitness and took into possession the clothes of the deceased vide recovery memo (EX PW 8/1) on the spot. He also recorded statements of the PWs under section-161 Cr.PC.

5. After closure of prosecution evidence, the accused was examined under Section 342 Cr.P.C, wherein he discarded the allegations leveled against him by the prosecution and claimed innocence. He neither wished to be examined on Oath under Section 340 (2) Cr.P.C nor opted to produce defence evidence. After hearing the learned counsel for the parties, the learned trial Court vide impugned judgment dated 20.07.2019 convicted and sentenced the appellant.

6. We have heard arguments of the learned counsel for the parties and gone through the evidence with their valuable assistance.

7. Initially charge was framed under section-302/34 PPC, but subsequently the learned trial Court convicted the appellant under section-

316 PPC for Qatl Shibh-i-amd of the deceased. Five types of Qatals have been defined and their respective punishments have been provided by Chapter-XVI of the Pakistan Penal Code, 1860, which are;

i. Qatl-i-amd. (302 PPC)
ii. Qatl shibh-i-amd, (316 PPC)
iii. Qatl-i-khata, (319 PPC)
iv. Qatl-i-khata by rash or negligent driving, (320 PPC)
v. Qatl-bis-sabab, (322 PPC)

Only for Qatl-i-amd, the intention and mens-rea is required while for the rest of the categories of Qatal provided under this chapter, there is no need of mens-rea for the Qatal of the victim, even the mens rea, is for not committing the Qatal and during that course, the offence is committed under Chapter-XVI of the Pakistan Penal Code, 1860, the offender is liable for the offence not withstanding his intention provided his case comes within the definitions of different types of Qatal mentioned above.

8. Now before adverting to the merits of the case, first we have to see the definition of Qatl-i-Shibh-i-amd as provided under section-315 of the Pakistan Penal Code, 1860, which reads;

> ***"Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit Qatl Shibh-i-amd."***
>
> ***(emphasis provided)***

In case of **"Federation of Pakistan..vs..Gul Hassan Khan"**, **(PLD 1989 SC 663)**, the provisions of Chapter-XVI right from Sections-299 till 338 were held to be repugnant to the injunctions of Islam mainly on the

ground that the same do not provide for Qisas in cases of Qatl-i-Amd and it was also held by the Apex Court that in cases of Qatl-e-Shibh-i.amd, Qatl-i-Khata, no provisions for payment of Diyat and Arsh are in existence and more so, the offence being compoundable under the Islamic Law were not compoundable under the old dispensation of justice provided by Chapter-XVI of PPC **with regard to the offences against human body**.

The definition of Qatl-i-Shibh-i-amd as to our comprehension lays down two categories for the commission of Qatl-i-Shibh-i-amd;

(i) ***With intent to cause harm to the body or***
(ii) ***Mind of any person causes the death of that person or any other person.***

The act which in the ordinary course of nature is not likely to cause death is said to commit Qatl Shibh-i-amd. The first part regarding harm to the body can be further clarified from the illustration to Section-315 of the PPC, which reads as follows;

> ***"A in order to cause hurt strikes Z with a stick or stone which in the ordinary course of nature is not likely to cause death. Z dies as a result of such hurt. A shall be guilty of Qatl Shibh-i-amd."***

The main distinguishing feature between "Qatl-i-Amd and Qatl-i-Shibh-i-Amd" is that in case of Qatl-i-amd the intention of assailant is must to cause death or such bodily injury which in the ordinary course of nature was 'likely to cause death'; whereas in case of Qatl-i-Shibh-i-amd, the

intention should be to cause such harm to the body or mind of the person which in ordinary course of nature was 'not likely to cause death'. In case of 'Qatl-i-shibh-i-amd', intention to cause death or cause such bodily injury is not sine qua non for the proof of the charge.

9. The core point of difference between "Qatl-bis-sabab" and "Qatl Shibh-i-amd" is that in the former case there is no intention to cause death or cause harm to the victim, whereas in the latter case the offender possesses intention to cause harm to the body or mind of the victim but not his death. Here question crop up how to ascertain intention of the offender to cause harm to the body or mind of the victim, which has caused death. The determining factor would be the nature of the weapon, instrument, force with which it is used or the nature of the act and its consequential effect/result.

10. Section-338-F of the Pakistan Penal Code, 1860, by use of the word shall make it mandatory for the Courts that in the interpretation of provisions of Chapter-XVI guidance shall be derived from the injunction of Islam as laid down in the Holy Quran and Sunnah. For convenience section-338-F PPC is reproduced below;

> ***"338-F. Interpretation: In the interpretation and application of the provisions of this Chapter, and in respect of matter ancillary or akin thereto, the Court shall be guided by the injunctions of Islam as laid down in the Holy Quran and Sunnah."***

At times, different Islamic Jurists have interpreted and explained Qatl-Shibh-i-amd in its true perspective and with most particular reference to the harm to the body and have almost consensus on the preposition which is clarified in the illustration of section-315 PPC. In this regard, the view of different scholars/Islamic jurists is as follows;

Fatawa-e-Alamgiri, Vol. IX, Page.294

قتل پانچ طرح پر ہوتا ہے۔

عمد وشبہ، عمد وخطا وقائم مقام خطا وقتل سبب اور ان سے مراد وہ انواع قتل ہے۔ جو بغیر حق ہوں۔ جس سے احکام متعلق ہوتے ہیں۔ پس عمد وہ ہے جو تعمداً ہتھیار کی ضرب سے ہو یا جو چیز اعضاء جسم جدا کر ڈالنے میں ہتھیار کے قائم مقام ہو۔ جیسے دھار دار لکڑی و پتھر و نرکل کی کھپاچ و وآگ بہ کانی میں ہے۔ اور اسکا نتیجہ گناہ ہے اور قصاص ہے۔ آلہ اُس صورت میں قصاص نہیں ہے کہ جب اولیاء مقتول معاف کر دیں یا صلح کر لیں اور ہمارے نزدیک اسمیں کفارہ نہیں ہوتا ہے۔ کذا فی الہدایہ اور اُس کے احکام میں سے یہ ہے کہ قاتل میراث سے محروم ہو جاتا ہے۔ اور باہمی رضامندی کے وقت مال واجب ہوتا ہے۔ یا شبہ کی وجہ سے قصاص متعذر ہونیکی وجہ سے مال واجب ہوتا ہے۔ یہ شرح مبسوط میں ہے۔ اور شبہ عمد یہ ہے کہ عمداً ایسی چیز سے مارے جو ہتھیار نہیں ہے اور نہ قائم مقام ہتھیار کے ہے۔ یہ امام اعظمؒ کے نزدیک ہے اور امام ابو یوسفؒ و امام محمدؒ نے فرمایا کہ اگر بڑے پتھر یا بھاری لکڑی سے مارا تو وہ قتل عمد ہے اور شبہ عمد یہ ہے کہ ایسی چیز سے مارے جس سے غالباً مقتول نہیں ہوتا ہے۔ مگر امام اعظمؒ کا قول صحیح ہے یہ مضمرات میں ہے۔ اور اسکا نتیجہ ہر دو قول کے موافق گناہ اور کفارہ ہے اور اسکا کفارہ یہ ہے کہ مسلمان باندی کو آزاد کرے۔ پس اگر نہ پاوے تو پے در پے دو مہینے کے روزے رکھے اور مددگار برادری پر دیت مغلظ واجب ہوتی ہے۔ کذا فی الکافی اور یہ تغلیظ جبھی ظاہر ہوتی ہے کہ جب اونٹوں سے دیت واجب ہو دوسری چیز میں نہیں ظاہر ہوتی ہے۔

Sunan Ibn-e-Maja Vol.II, Page 127 Baab No. 174

باب ۱۷۴ دِیۃِ شِبہِ العمدِ مغلظۃ

قتل کی تین قسمیں ہیں۔ قتلِ عمد، قتلِ شبہ بالعمد، قتلِ خطاء، قتلِ عمد تو ظاہر ہے کہ قاتل کا مقصود قتل ہو، اور قتل شبہ بالعمد ہے کہ کسی کو کوڑا یا چھڑی ماری اور وہ مر گیا اب اس میں غرض قتل نہ تھی لیکن ارتکاب جرم ضرور تھا۔ تیسرا قتلِ خطاء ہے کہ انسان کسی اور شئے کو مارنا چاہتا تھا لیکن کوئی اور دوسرا انسان زد میں آ گیا تو قتل خطاء میں قصاص نہ ہوگا صرف دیت ہوگی۔ اور قتل عمد میں مقتول کے وارث چاہیں قصاص لیں یا دیت لیں۔ اور قتلِ شبہ بالعمد میں تفصیل ہے اگر کوئی بھاری شئے ہے۔ جس سے ظاہری نظر میں آدمی مر جاتا ہو تو وہ قتلِ عمد میں حکماً داخل ہوگا۔ اور اگر کوئی ایسی چیز ہے جس سے موت واقع نہ ہو سکتی ہو تو وہ قتل خطاء سمجھا جائے گا۔ اور امام ابوحنیفہؒ کے نزدیک اس پر قصاص نہ ہوگا۔

Kitab-ul-Fiqah Vol.5 Page 337

قتل عمد کے مشابہ قتل کا بیان

حنفیہ کہتے ہیں کہ قتل کی پانچ صورتیں ہیں۔ قتلِ عمد، قتلِ مشابہ بہ قتل عمد، قتلِ خطاء، قتلِ مشابہ بہ قتل خطاء، غرض مندانہ قتل۔

قتل عمد یہ ہے کہ ہتھیار سے یا ہتھیار جیسی شے سے، مثلاً لوہا منڈھی لکڑی یا تیز پچھی، یا دھار دار پتھر مار کر یا آگ میں جلا کر ہلاک کیا جائے۔ مشابہ بہ قتل عمد یہ ہے کہ ہتھیار یا ہتھیار جیسی کسی شے سے نہیں بلکہ کسی اور طرح ضرب پہنچائی جائے۔ خواہ عام حالات میں اس سے بھی موت واقع ہو جاتی ہو مثلاً بھاری پتھر یا موٹا سا ڈنڈا یا دھوبی کی موگری سے یا اس سے موت نہ واقع ہوتی ہو مثلاً کوڑا یا چوب دستی۔ چنانچہ رسول ﷺ نے فرمایا ,,الا ان قتیل خطا العمد قتیل السوط، والعصا,, بروایت نعمان بن بشیر رضی اللہ عنہ (یعنی یاد رہے کے کوڑے یا چوب دستی کی ضرب سے خطأ ہلاک کرنا بھی قتلِ عمد ہے)۔ اس روایت سے استدلال کی صورت یہ ہے آنحضرت ﷺ نے کوڑے یا سوٹی کی ضرب سے مقتول ہونے والے کو مطلقاً (یعنی کیسا ہی کوڑا یا سوٹی ہو۔) قتلِ عمد کے مقتول کے مشابہ قرار دیا ہے۔ اب اس کو چھوٹی سی لکڑی کے ساتھ مخصوص کر دینا حکمِ مطلق کو باطل کر دینا ہے۔ جو جائز نہیں ہے۔

پھر یہ بھی ہے کہ سوٹی خواہ چھوٹی ہو یا بڑی اس لحاظ سے یکساں ہیں کہ وہ قتل کرنے کے لیے نہیں ہوتیں اور نہ بالعموم ان کو اس مقصد کے لیے استعمال کیا جاتا ہے اور یہ ممکن نہیں ہے کی اس کے استعمال میں پہل کرنے کی غرض قتل کر دینا ہو اور پہل کرنے میں اکثر قتل ہو جاتا ہو اور در آنحالیکہ اس لحاظ سے (چھوٹی اور بڑی) دونوں قسم کی لاٹھیاں برابر ہیں۔ اور چھوٹی سوٹی سے قتل کرنا بالاتفاق قتل شبہ عمد ہے تو بڑی لاٹھی سے قتل بھی اسی طرح مشابہ بہ قتل عمد ہے۔ غرض عمداً قتل کے تعین کا انحصار آلہ قتل پر ہے اور یہ صورت قتل عمد کے مشابہ متصور ہوگی (قتل عمد متصور نہ ہوگی)۔

اسلام کا فوجداری قانون

حصہ دوم

عقوبات

قتل شبہ عمد

عبدالقادر عودہ شہیدؒ

ترجمہ

ساجد الرحمٰن صدیقی

اسلامک پبلیکیشنز (پرائیویٹ) لمیٹڈ

ہم پہلے ہی ذکر کر چکے ہیں کہ قتل شبہ عمد کے بارے میں فقہاء کرام کے درمیان اختلاف ہے۔ چنانچہ امام مالکؒ کی رائے یہ ہے کہ قتل کی دو قسمیں ہیں۔ عمد اور خطاء۔ اور اس پر اضافہ غیر قرآنی پر اضافہ کرنا ہے۔ اور ان کی دلیل قرآن کریم کی یہ آیات ہیں۔

وَمَنْ يَّقْتُلْ مُؤْمِنًا مُّتَعَمِّدًا۔ (النساء:۹۳)

جو کسی مومن کو جان بوجھ کر قتل کرے۔

وَمَا كَانَ لِمُؤْمِنٍ اَنْ يَّقْتُلَ مُؤْمِنًا اِلَّا خَطَاً۔ (النساء:۹۲)

کسی مومن کا یہ کام نہیں ہے۔ کہ دوسرے مومن کو قتل کرے اِلا یہ کہ اس سے چوک ہو جائے۔

لیکن امام ابوحنیفہؒ امام شافعیؒ اور امام احمد قتل شبہ عمد کے بھی قائل ہیں۔ چنانچہ یہ ائمہ فرماتے ہیں کہ قتل کی تین قسمیں ہیں۔ عمد شبہ عمد، اور خطاء۔ ان فقہا کی دلیل نبی کریم کا یہ فرمان ہے۔

خطا عمد کے مقتول کی دیت یعنی وہ شخص جو کوڑا لکڑی یا پتھر مارنے سے مر گیا ہو۔ سو اونٹ ہیں۔

دوسری دلیل یہ ہے کہ حضرت عمرؓ حضرت علیؓ حضرت عثمانؓ حضرت زید بن ثابتؓ حضرت ابوموسیٰ اشعری اور حضرت مغیرہؓ قتل شبہ عمد کے قائل تھے اور صحابہ کرام میں سے کسی نے ان کی مخالفت نہیں کی۔ اور تیسری دلیل یہ ہے کہ قصد کا تعلق محرم کی نیت سے ہے۔ چونکہ نیت کا علم خدا کے سوا کسی کو نہیں ہو سکتا۔ اس لیے ظاہر پر حکم لگایا جائے گا۔ اور اس نیت کا بہتر اور واضح اظہار آلہ قتل سے ہوتا ہے۔ چنانچہ اگر کسی شخص نے دوسرے کو ایسے آلہ سے جو بالعموم قاتل ہو قصداً ضرب لگائی تو اس کا حکم قصد قتل کا حکم ہوگا اور جس شخص نے قصداً ایسے آلہ سے ضرب لگائی جو بالعموم قاتل نہ ہو تو اس کا حکم عمد اور خطاء کے درمیان متردد کا ہوگا۔ اور اس کا فعل شبہ عمد (مشابہ عمد) ہوگا۔ کیونکہ اس نے قصداً ضرب لگائی جو خطاء سے مشابہ ہے اور ایسے آلہ سے ضرب لگائی جو بالعموم قاتل نہیں ہیں اور ایسے آلہ سے ضرب لگانا اس امر پر دلالت کرتا ہے کہ اس نے قتل کا قصد نہیں کیا۔ اسی لیے اس قسم کو قتل شبہ عمد کہا جاتا ہے۔ کیونکہ یہ ہر طرح قتل عمد کے مشابہ ہے۔ اور صرف محرم کے قصد میں اس سے مختلف ہے۔ مفروض یہ ہے کہ قتل عمد کا مرتکب خُسنی حلیہ پر اس کے قتل کے ارادے سے زیادتی کرتا ہے۔ جب کہ شبہ عمد کا قاتل خُسنی حلیہ پر بغیر قتل کے بارے میں فکر کیے ہوئے محض ابتداء حملہ کرتا ہے۔ غرض دونوں قسموں میں اظہار محرم کی نیت سے ہوتا ہے۔ اور اس نیت کا اظہار جرم میں استعمال ہونے والے آلہ سے ہوتا ہے اور اس طرح دونوں قسم کے قتل کا شدید اقتضاء یہ ہے کہ ان میں سے ایک کو قتل عمد کہا جائے اور دوسرے کو قتل مشابہ عمد کہا جائے۔

11. From the above interpretation of religious scholars, we are of the firm view that the first category of Qatl-Shibh-i-Amd i.e with regard to harm to the body, the religious scholars are of the same view and they are almost unanimous that if the harm intended to be caused is not of such a gravity, which in ordinary course would cause the Qatal of a person then the offender would be liable for Qatl-Shibh-i-Amd, of course that would be subject to legal proof and evidence is to be led in this regard.

12. Now coming to the second category of Qatl-i-amd with regard to the causing of harm to the mind, it is manifest from the language of the section that the second category of Qatl Shibh-i-amd, relates to causing of harm to the mind of the victim or any other person whose death is not intended. The law makers while using the word harm to mind has not specifically mentioned hurt to mind for the reason that harm to mind is something psychological relating to the intellect of a particular individual by putting him in such a position to cause psychological stress in order to cause harm to his mind, causes the death of that particular person without intention of the same is liable for the punishment provided for Qatl Shibh-i-amd under section-316 PPC. According to ***Legal Terms and Phrases*** authored by M.Ilyas Khan, published by B.M. Publishers, that the word harm has not been specifically defined in the Penal Code. In its ordinary dictionary meaning, it denotes hurt, injury, damage, impairment, moral

wrong or evil. The expression has been used in Pakistan Penal Code, in sections-81, 87, 88, 89, 91, 92, 100, 104, and 106. In section-93, it is used in a sense of mental reaction while another it is the physical injury. ***Black's Law Dictionary (9th Edition)***, provides the meaning of word harm injury, loss, damage, material or tangible detriment. According to the ***Mitra's Legal and Commercial Dictionary (sixth Edition)*** harm means the existence of loss or detriment in fact of any kind to a person resulting from any cause; injury, loss , or detriment.

13. From the above dictionary's meaning of the word harm, it is abundantly clear that there must be some act to the detriment of the other side, which results in causes harm to the mind of the person whose death has not been intended, but it results into the Qatal of that victim or any other person, would squarely comes within the definition of Qatl-i-Shibh Amd as defined in section-315 of the PPC and for the proof of charge for causing harm to the mind, prosecution is duty bound to bring on record tangible and lucid evidence.

14. While appraising the merits of the present case in light of the above discussion, the murasila reveals that the complainant and his relatives brought the dead body of his deceased son to Casualty DHQ Hospital, Mardan in Rescue-1122 Ambulance, and at 15.20 hours lodged report. The complainant in his cross examination stated that he and only PW

Saeed had accompanied the deceased in Rescue-1122 Ambulance to DHQ Hospital, that firstly he lodged the report and then the deceased was examined by the doctor while in the postmortem examination report (EX PW 1/1) the doctor has mentioned that the dead body of the deceased was brought by relatives at 3.20 PM. The complainant in his initial report stated that while on way to the Hospital, his son expired. The complainant in his cross examination stated that after the occurrence 15-20 people attracted to the spot and the Rescue-1122 came to the spot after 15-20 minutes of the occurrence, however, as per postmortem examination report probable time that elapsed between injury and death was instantaneous. The occurrence is stated to have taken place at 14.15 hours and the Rescue-1122 Ambulance came to the spot after 15-20 minutes of the occurrence, while Saeed Khan (PW-7) the eyewitness contradicted the complainant by stating that on the spot they remained till 02.15 P.M. The complainant and eyewitness both have stated that both the accused gave kicks and fists blows to the deceased on his head, heart and other parts of the body and the deceased fell to the ground and became unconscious. The dead body of the deceased was examined by the doctor and no visible injury or marks of violence was found on the dead body of the deceased and according to his opinion the death was caused due to cardio respiratory arrest and in his cross examination he further stated that

unnatural causes of death might be due to firearm injury, due to accident, due to stabbed sharp weapon, poisoning, by hitting of heavy object, strangulation, and according to the history of the present case no such causes are the result of the death of the deceased.

15. The complainant is running the business of wood cutting and selling and residing in village Baja Killi while the crime shop is situated in village Zakir Abad and the inter-se distance is about one furlong. Saeed Khan (PW-7) the eyewitness of occurrence is a school teacher and performing his duty as a teacher in Faqir Banr Baghdada, the distance between his village and the said school is 5-6 kilometers while the distance between the house of complainant and PW Saeed Khan is 120 paces as per complainant. Saeed Khan (PW-7) the eyewitness in his cross examination stated that;

> ***"I left the school at 12.35 PM. In the said school there are about 16 teachers. On reaching to my home I took launch and then went for Zuhar prayer at about 01.30 PM and attended congregational prayer. After performing the prayer I came back to the home at about 02.00 PM. The house of complainant is at a distance of 30/40 paces from my house. .... I met the complainant at about 02.05 PM."***

16. The occurrence took place on 31.5.2014 at 14.15 hours and admittedly in a summer season. The complainant is admittedly running the business of wood cutting and selling while eyewitness Saeed Khan is a school teacher. It is not believable to a prudent mind that being a summer season and at 02.15 P.M they met each other near the place of occurrence

per chance. The complainant being father of the deceased while eyewitness Saeed Khan being maternal uncle of the deceased have shown their presence near the spot which is repellent to common course of action, because both of them did not offer any plausible and confidence inspiring reason of their visit/presence at the spot and as such both the witnesses i.e complainant and eyewitnesses are to be considered as chance witnesses. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court rendered in ***Usman alias Kaloo's case*** **(2017 SCMR-622),** wherein it was held that;

> ***"The occurrence in this case had taken place in the dead of a night, i.e. at 11.30 p.m. on 05.03.2005 and the investigating officer had stated before the trial court in black and white that no electric light was available at the spot. The occurrence in issue had taken place outside the house of the deceased and in the absence of any source of light at the spot the question regarding identification of the assailant had assumed pivotal importance but the prosecution had paid no heed to the same. The FIR about the alleged incident had been lodged at the spot whereat the local police had arrived on its own after having statedly been informed of the occurrence by one Afzal who had not been produced before the trial court. The ocular account of the incident had been furnished by Zahoor Ahmad complainant (PW-3), Ghulam Farid (PW6) and Manzoor Ahmed (PW7) who were all residents of some other houses and they were not inmates of the house wherein the occurrence had taken place. The said eye-witnesses were, thus, chance witnesses."***

Furthermore, the complainant in his cross examination stated that near to the shop of his son there are other shops intervened by a house which are being run by different people, again said that there is only one shop, and admitted it correct that there is a shop of one Gul Muhammad and Abuzar grocery shop, and that he was standing at a distance of 78/80 feet from the

shop of his son, but none of the shopkeepers was examined by the Investigating Officer. On the application of the complainant, the prosecution abandoned PWs Haji Shaukat son of Hazrat Gul and Muhammad Ihtiraz Khan son of Zainullah being won over for reasons best known to him. It is also pertinent to mention here that when father and maternal uncle of the deceased were present at the spot and the accused gave him kicks and fists blows, but both of them simply stated that when the accused saw them, they fled away from the spot.

17. The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. Reliance is placed upon the judgment rendered in ***Tariq Pervez's*** **case (1995 SCMR 1345),** wherein it was held that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.

18. As a sequel to what has been discussed above, we accept this appeal, set aside the impugned conviction recorded and sentence imposed by the learned Additional Sessions Judge/Judge Model Criminal Trial

Court, Mardan, dated 20.07.2019 and the appellant is acquitted of the charge leveled against him. He is directed to be released forthwith, if not required in any other cause.

As the Criminal Appeal No.963-P/2019 filed by appellant Suleman, against his conviction and sentence, has been allowed, therefore, Criminal Revision No.182-P/2019 filed by Riaz Khan for enhancement of sentence awarded to the appellant has become infructuous, stands dismissed.

Above are the detailed reasons of our short order of even date.

Announced:
Dated. 04-12-2019.

JUDGE

JUDGE

(D.B.)
Hon'ble Mr. Justice Rooh-ul-Amin Khan,
Hon'ble Mr. Justice Ishtiaq Ibrahim,

(Kausar Ali, PS)