

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
**[Judicial Department]**

**Cr.A. No.1073-P/2023**

Rustam son of Gul Nawaz,  
r/o Garhi Qamar Din, Peshawar.

**Cr.A. No.1086-P/2023**

Rooh Ullah s/o Din Akbar,  
r/o Pandu road Chairman Office,  
Peshawar

Appellant (s)

**VERSUS**

The State etc

Respondent (s)

For Appellant (s) :-

Mr. Muhammad Saeed Khan,  
Advocate and Barrister Amir Khan  
Chamkani.

For State :-

Mr. Noman-ul-Haq Kaka Khel,  
AAG.

For Respondent No.1

Malik Nasruminallah, Advocate.

Date of hearing:

08.10.2024

Date of announcement:

**JUDGMENT**

**ISHTIAQ IBRAHIM, CJ.**-Tried by learned Judge  
Anti-Terrorism Court-III, Peshawar, ("Trial Court"), in case  
FIR No.453 dated 08.03.2021, registered under sections  
302, 324, 34 PPC and section 7 Anti-Terrorism Act, 1997, at  
Police Station Faqir Abad/CTD, Peshawar (1) Rustam and  
(2) Roohullah, ("appellants"), having been found guilty of  
committing murder of Mubashar Ahmed ("deceased"), have  
been convicted and sentenced vide judgment dated 14.06.2023  
("impugned judgment") as under:-

**Under Section 302/34 PPC:-** To undergo rigorous  
imprisonment for life each and to pay rupees one

lac each, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. and in default thereof to further undergo six months simple imprisonment.

**Under Section 7(1)(a) Anti-Terrorism Act, 1997:-**

To undergo rigorous imprisonment for life each and to pay rupees one lac each as fine and in default thereof to further undergo six months simple imprisonment each.

**Under Section 324/34 PPC:-**

To undergo ten years rigorous imprisonment on two counts each and to pay rupees one lac each as fine and in default thereof to further undergo six months simple imprisonment each.

**Under Section 7(1)(b) Anti Terrorism Act, 1997:**

To undergo rigorous imprisonment for ten years each and to pay rupees one lac each as fine and in default thereof to further undergo six months simple imprisonment each.

All the sentences shall run concurrently and benefit of Section 382-B Cr.P.C. has been extended to the appellants.

**2.** Through the instant and connected **Cr.A. No.1086-P of 2023**, the appellants have questioned their conviction and sentences, whereas, Zia Ullah, the petitioner-complainant, has filed connected **Cr.R. No.170-P of 2023**, seeking enhancement of sentences of the respondents-convicts from life imprisonment to normal penalty of death as provided for the offence under section 302 PPC.

3. Since all the three matters are stemming out from the impugned judgment of the learned trial Court, therefore, we propose to decide the same through this single judgment.

4. The prosecution's case as per First Information Report ("FIR") Exh.PA, registered on the basis of Murasila is that on 08.03.2021 at 0240 hours, complainant Zia Ullah (PW.12), in company of friend, namely, Mubashir Ahmad (then injured), in casualty of Lady Reading Hospital ("LRH"), Peshawar, reported to Inayat Ullah Khan ASI (not produced) to the effect that on 08.03.2021 he along with his friends, namely, Mubashir Ahmad and Muhammad Haris (PW.13), late night left Supper Market Saddar Peshawar in a Motorcar bearing Registration No.APZ.966, being driven by injured Mubashir Ahmad for refreshment and taking tea; that at 0210 hours, when they reached *Dalazak road City Railway Station*, Mubashir Ahmad stopped the motorcar, debarked from it and went at distance for attending the call of nature and after his return when he boarded the motorcar, they told him to play music/tape-record of the motor car. In the meantime, they heard report of fire shots and Mubashir Ahmad told them that the bullets of the fire shots have hit him; that no sooner he (complainant) debarked from the motorcar and reached driving seat of the motorcar in the meantime two police constables, duly armed, riding on a motorbike arrived at the spot, who on noticing Mubashir Ahmad in injured condition told them to immediately shift him to the hospital; that

Muhammad Haris (PW.13) immediately occupied the driving seat of the motorcar and they shifted their injured friend to hospital; that he has not seen anyone firing at them, but is satisfied from the dubious movements and actions of the two constables that they might have fired at them. Report of the complainant was recorded in the shape of Murasila, on the basis of which, FIR Exh.PA was registered under section 324 PPC against unknown culprit(s).

5. On 08.03.2021 at about 02.25 AM, Dr. Latifullah (PW.16), examined injured Mubashir Ahmad aged about 20 years and found the following injuries on his person vide Medico legal report Exh.PW.16/1:-

- i. One firearm wound about 2x3 cm in size on his right lateral aspect of chest below axilla.
- ii. Firearm wound about 1x1 cm on left anterior aspect of chest above nipple.
- iii. Firearm wound about 3x4 cm on his right hip joint, lateral aspect.
- iv. Firearm wound about 1x1 cm on his pelvic region just above root of penis.
- v. Abrasion on left thigh plus right flank.

The patient was advised X-ray pelvic, chest, left thigh and fast scan. He was referred to CVW, CTW, COW, CSW, urology and radiology.

**Probable duration of injuries:** within 30 minutes approximately.

**Kind of weapon used:** firearm.

6. On the same day i.e. 08.03.2021 injured Mubashir Ahmad deceased succumbed to injuries. At 02.45 AM, Dr. Noor ul Baqi (PW.15), conducted autopsy on the dead body of the deceased and found the following:-

**External Appearance:**

As per record the deceased was hospitalized vide Chit No.KO.2ACF21158115. Time of death of the deceased as per police record 04.09 AM at LRH, Peshawar. No mark of ligature on neck. A young man with average built wearing white shalwar bloodstained with firearm defects and blackening seen vide postmortem report Exh.PM.

**Injures:**

- i. A firearm entry wound on right outer of chest 4x3 cm in size with metallic stapling 5 cm from axilla 9 cm from nipple.
- ii. Firearm exit wound on left front of chest 3x3 cm in size. 5 cm midline. 9cm above nipple.
- iii. A surgically made wound 2x1 cm on right outer of chest 4 cm from nipple, 7 cm from axilla.
- iv. A grazing wound 4x1 cm in size on right outer of chest, 5 cm nipple, 4 cm from axilla, metallic piece was also recovered.
- v. Firearm entry wound right outer of thigh 4x2 cm in size with blackening around and abrasion 7 cm from iliac spine 14 cm from midline.
- vi. Firearm exit wound on left side public area 1x1 cm, 1 cm from midline, 2 cm from root of penis.
- vii. Firearm re-entry inner of thigh 1x2 cm in size, 3 cm from growing, 20 cm above knee.
- viii. Firearm exit left outer of thigh 1x1 cm in size, 13 cm from iliac spine, 12 cm from knee.
- ix. An abrasion on right side thigh 2x3 cm in size, 8 cm below iliac spine.

**Thorax:** Walls, ribs, cartilages, plurae, right and left lungs injured.


**Stomach and its contents:** Partially filled.

**Remarks:-**According to his opinion the deceased died due to injuries to the vessels of lower abdomen and upper thigh, both lungs and associated blood vessels due to firearm.

**Probable time between injury and death:** hospitalized.

**Probable time between death and postmortem:** 3 to 6 hours.

7. On 13.03.2021, complainant Zia Ullah (PW.12), recorded statement under section 164 Cr.P.C. before the learned Judicial Magistrate, Peshawar, wherein he denied report written down in the Murasila. His statement is reproduced below:-



“Stated that on 08.03.2021 at night, I along with my friends, namely, Mubashir Ahmad and Muhammad Haris, was going in a motorcar bearing Registration No.APZ.966, driven by Mubashir Ahmad, for taking tea and when we reached at Dalazak road near City Railway Station, Peshawar, Mubashir Ahmad stopped the motorcar, deboarded from it and went for attending the call of nature. After little time he returned and occupied the driving seat of the motorcar, the police opened fire at us, as a result, Mubashir Ahmad got hit and seriously injured while we luckily remained unscathed. In the meantime, two police constables, duly armed and greatly perturbed came there and aimed their weapons at us. When I opened the door of the motorcar, my friend Mubashir Ahmad, fell on the ground from the driving seat. The two constables told us to shift our injured friend to hospital; that out of the two constables, one having beard, called someone on his cell phone and stated conversation with him. We put the injured in the motorcar and shifted him to hospital. After sometimes, SHO Police Station Faqir Abad Peshawar along with

other police officials reached hospital. I narrated the occurrence to him but he ignored my version and started pressurizing us to hand over him the ICE and arms allegedly in our possession. The SHO also threatened us. We were already frightened due to the incident. The SHO then obtained my signature on a paper written by he himself. After sometime, the injured succumbed to injuries. I charge the two constables, namely, Roohullah and Rustam for committing murder of Mubashir Ahmad deceased and firing at us. This is my statement”.

8. Similarly, on 09.04.2021, Muhammad Haris, recorded statement under section 164 Cr.P.C. before the learned Judicial Magistrate-IV, Peshawar, wherein he too while narrating the same story as advanced by the complainant charged both the appellants-constables for murder of the deceased and ineffective firing at them.

9. Shafi Ullah Khan DSP (PW.18), conducted investigation in the case, who on receipt of copy of FIR, proceeded to the spot and prepared site plan Exh.PB at his own observation. During spot inspection, he secured blood through cotton Exh.P.2 from the place of the deceased and one empty of 7.62 bore Exh.P.3, vide recovery memo Exh.PW.9/1. On 08.03.2021, he took into possession one DVR Exh.P.8 from Taj Mahal Students Hostel, vide recovery memo Exh.PW.9/3. He also took into possession the last worn bloodstained garments of the deceased vide recovery memo Exh.PW.9/2.

Vide recovery memo Exh.PW.6/1 he took into possession motorcar bearing registration No.APZ.966 Exh.P.1 of the deceased. Vide recovery memo Exh.PW.11/2 he took into possession a .30 bore pistol Exh.PX belonging to constable Roohullah (appellant) and one SMG official rifle Exh.PX/1 bearing No.56-29012724 along with loaded magazine containing 23 live round Exh.PX/2 belonging to constable Rustam (appellant), produced by Ameer Dad Khan (PW.7) Moharrir of Police Station. Vide recovery memo Exh.,PW.11/1 he took into possession a motorcycle of the appellants bearing registration No.3760-KPK Exh.PX/3. He draw photographs of the motorcar Exh.PW.18/1 (four in number). The appellants were arrested by the SHO and handed over to Shafi Ullah Khan DSP (PW.18), who obtained their physical remand from the court of learned Judicial Magistrate, interrogated them and recorded their statements under section 161 Cr.P.C. He also obtained CDR of mobile numbers of the deceased as well as the accused Exh.PW.8/1. On 13.03.2021 he applied for identification parade of the appellants which was allowed and their identification parade was conducted. On 10.03.2021 he inserted section 7 ATA in the case, sent the blood and urine obtained from the appellants to KMC Peshawar for the purpose intoxication analysis, reports whereof are Exh.PL and Exh.PL/1. He also sent the bloodstained articles as well as empties, weapons of the appellants and the motorcar to the FSL. On 11.03.2021 he took into possession two spent bullets,



one recovered from the body of the deceased during postmortem examination and another recovered from bonnet of the motorcar, vide recovery memo Exh.PW.9/4. He placed on file FSL reports which are Exh.PZ, Exh.PZ, Exh.PZ/2 and Exh.PZ/3, recorded statements of the PWs under section 161 Cr.P.C. and thereafter handed over case file to Qeemat Gul Khan Inspector (PW.14) Police Station CTD Peshawar. On receipt of investigation, Qeemat Gul Khan Inspector (PW.14), placed on file extract of Register No.19 and 21 of PS Faqir Abad. Vide application Exh.PW.14/1 he applied for obtaining CDR data of mobile numbers of the complainant party, produced PW Muhammad Haris for recording his statement under section 164 Cr.P.C. before the learned Judicial Magistrate. Vide recovery memo Exh.PW.3/1 he took into possession USB regarding video recording of the place of occurrence, recorded statements of the PWs under section 161 Cr.P.C. and after completion of investigation handed over case file to Noorullah Khan SHO (PW.1), who submitted complete challan against the appellants before the learned trial Court.

10. On receipt of challan by the learned Trial Court, the appellants were summoned and formally charge sheeted under sections 302, 324 and 34 PPC, sections 7(1)(a), 7(1)(b) Anti-Terrorism Act, 1997 and section 15 Khyber Pakhtunkhwa Arms Act, 2013. To prove guilt of the appellants, the prosecution examined as many as twenty (20) witnesses. After closure of the prosecution's evidence, statements of the

appellants were recorded under section 342 Cr.P.C. wherein they denied the prosecution's allegation and professed their innocence. They, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides, convicted and sentenced the appellants as mentioned in the initial paragraph of the judgment, hence, these appeals and revision petition.

11. We have heard the exhaustive arguments of learned counsel for the parties and perused the record and evidence with their valuable assistance.

12. We would like to first determine the applicability of the offences of the Anti-Terrorism Act, 1997 keeping in view the facts and circumstances of the case as well as evidence led by the prosecution and legal position of trial of the appellants conducted by the Anti-Terrorism Court which culminated into the conviction of the appellants under the penal provisions of the Special law i.e. the Anti-Terrorism Act 1997 as well as general law under sections 302(b) and 324 PPC as it was the first argument of learned counsel for the appellants that the essential ingredients to bring the occurrence within the ambit of sections 6 and 7 of the Anti-Terrorism Act, 1997, are missing. After going through the record from cover to cover and scrutinizing the evidence of prosecution, we are firm in our view to hold that from the very inception of the case till final conclusion of trial, the prosecution's evidence is

completely silent with regard to motive behind the occurrence. An iota of evidence has not been brought on record by the prosecution to bring the instant case within the meaning of section 6 of the Anti-Terrorism Act, 1997 (**“Act of 1997”**), which for the sake of convenience is reproduced below:-

**“S.6.Terrorism(1)** In this Act, “terrorism” means the use or threat of action where:-

- (a) The action falls within the meaning of sub-section (2) and
- (b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or
- (c) The use of threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property to ransacking, looting, arson or by any other means, government officials, installation security forces or law enforcement agencies.

This court in its authoritative judgment in case titled, **“Jumaraz Vs the State” (2021 YLR Peshawar, 955)**, has held that “the issue of applicability of section 6 of the Act of 1997 to a particular case has remained a debated topic before the august Supreme Court of Pakistan as well as the High Courts of the country and the view which has persistently been taken in this regard is that all the acts mentioned in sub-section (2) of Section 6 of the Act, if committed with design/motive to intimidate the government, public or a segment of the society,

or the evidence collected by prosecution suggests that the aforesaid aim is either achieved or otherwise appears as a by-product of the said terrorist activities, are to be dealt with by the special Courts established under the Act of 1997. The test to determine whether a particular act is terrorism or not is the motivation, object, design and purpose behind the act and not the consequential effect created by such act". In the present case, the allegation against the appellants is that they being police officials during their duty timing fired at the complainant party without any motive and as a result of their firing, the deceased got hit and succumbed to injuries. No doubt a young boy/student of 20 years has been done to death for which the appellants are charged, but it is persistent view of the august Supreme Court of Pakistan that mere gravity or brutal nature of an offence would not provide a valid yardstick for bringing the same within the meaning of terrorism. This view was re-affirmed by the larger Bench of the august Supreme Court of Pakistan in a judgment rendered in case titled **Ghulam Hussain and others Vs. The State and others** reported as **PLD 2020 Supreme Court 61**, and finally it was concluded in the said judgment that:

For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such

action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.

The occurrence in the present case do not qualify the essential ingredients of section 6 punishable u/s 7 of the Act of 1997. This Court, after scanning the entire evidence and material available on record, has come to the conclusion that Section 7 of the Act of 1997 is not applicable to the present case in light of the judgment of the larger bench in *Ghulam Hussain's case supra*.

13. The next legal point for determination is that what would be the fate of the case when otherwise the appellants are found guilty of the offences under sections 302, 324 and 34 PPC and whether their conviction under penal sections of the Pakistan Penal Code can be maintained or not? if this court arrives at the conclusion that the prosecution has proved their

guilt. It may be noted that the Anti-Terrorism Court, after taking cognizance of a non-scheduled offence, is vested with powers u/s 23 of the Act of 1997 to transfer the case to a Court having jurisdiction. For ready reference the said provision is reproduced below:

**23. Power to transfer cases to regular Courts.** Where after taking cognizance of an offence, an Anti Terrorism Court is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

This Court exercises its jurisdiction in the instant case as an Appeal Court u/s 25 of the Act of 1997 read with section 410, Cr.P.C and it is an admitted legal position that appeal is continuation of the trial. The powers of this Court as Appellate Court whether u/s 25 of the Act of 1997 or under section 410, Cr.P.C, are regulated by section 423, Cr.P.C which confers vast powers on the Appeal Court regarding reversal, alteration, reduction or changing the nature of the sentence awarded to a convict by trial Court. The above provisions of law is reproduced below for ready reference.

**423. Powers of Appellate Court in disposing of appeal.--**(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court.

After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under Section 411-A, sub-section (2) or Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may –

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or sent for trial to the Court of Session or the High Court, as the case may be, or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction, (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of Section 106, sub-section (3), not so as to enhance the same;
- (c) in an appeal from any other order, alter or reverse such order;
- (d) make any amendment or any consequential or incidental order that may be just or proper.

*(Emphases supplied)*

Admittedly, the appellants/convicts have been afforded fair and proper opportunity of cross-examination of the PWs. They

have also been examined u/s 342 Cr.P.C. We do not see any illegality or even an irregularity in the entire proceedings conducted by learned trial Court. Similarly, no prejudice would be caused to the appellants if this court decides their appeal to the extent of the provisions of the general law. In this view of the matter, this Court while exercising powers u/s 25 ATA or 410, Cr.P.C read with section 423, Cr.P.C, deem it appropriate to look into the conviction and sentences of the appellants, recorded by trial Court under the general law instead of remanding the case to the Court of Sessions for deciding the case in exercise of its ordinary criminal jurisdiction on the basis of evidence recorded by Special Court. If this court is convinced with regard to conviction of the appellants and no illegality or material irregularity is noticed on the face of record to vitiate the trial, in that eventuality this Court can exercise its jurisdiction to set aside the conviction under one head by maintaining the conviction and sentence under the other head, subject to appraisal of evidence. Reliance in this regard can be placed on the judgment of the august Supreme Court of Pakistan in the case of Waris Ali and 5 others Vs. The State (2017 SCMR 1572) wherein the appellants were initially charged u/s 302/324/452/436 P.P.C read with section 148 & 149, P.P.C whereas sections 6 and 7 (a) of the Act were subsequently inserted in the case. The trial Court in the mentioned case, *inter alia*, awarded death sentences to the appellants u/s 7(a) ATA which was confirmed by the Lahore



High Court in appeals. The august Supreme Court of Pakistan, after hearing appeal of the convicts, set-aside their conviction u/s section 7(a) of the Act of 1997 by converting the same to one under section 302(b), P.P.C and reduced their sentences from death to life imprisonment in view of the facts and circumstances of the case. Relevant portion of the judgment is as under:

31. Accordingly, the conviction of the appellants under section 7(a) of the Special Act, is set aside and the same is converted to one under section 302(b), P.P.C. however, keeping in view the peculiar circumstances of the case, this Court is influenced by caution and for securing the ends of justice in the matter of sentence because all was not well with the complainant and the Prosecution, the possibility that innocent persons amongst the guilty one were also involved, could not be altogether ruled out, thus, the death sentences awarded to all the appellants are reduced to life imprisonment on the counts mentioned in the impugned judgment but under section 302(b), P.P.C. and the conviction and sentences awarded to them under section 6 read with section 7 of the Special Act are set aside.

14. In view of what has been discussed above, conviction and sentences of both the appellants under sections 7(1)(a) and 7(1)(b) of the Act of 1997 are hereby set-aside and the appeals are being decided on merit to the extent of conviction and sentences of the appellants recorded under sections 302, 324 and 34 PPC.

15. Record depicts that Mubashir Ahmad deceased aged about 20 years, was the permanent resident of village *Qamar Kalay District Bannu*. Complainant Zia Ullah (PW.12) aged about 17/18 years is also the resident of the same village and the deceased was his maternal cousin. PW Muhammad Haris aged about 20/21 years is the resident of District Mardan and was the friend and class fellow of Mubashir Ahmad deceased. The deceased and PW Muhammad Haris being students and friends were temporarily residing in Super Market Peshawar, whereas, complainant Zia Ullah had visited Peshawar to meet the deceased (his cousin). The appellants are police constables/officials and on the day of occurrence, they were posted in Police Station Faqir Abad Peshawar. Keeping in view ages of the deceased and eyewitnesses coupled with the fact that their opponents/appellants are police officials, the yardstick for assessing and evaluating the evidence cannot be the same which is to be applied in cases of murder(s) where private accused are charged. We say this because of the lethargic and disinterested conducted of the prosecution in preserving the evidence during investigation. In this regard we will refer to order dated 08.04.2021 of the learned trial court, which is reproduced blow:-

“Learned APP for the State accompanied by Inspector/Investigation Officer Qeemat Gul Khan of CTD PS Peshawar present. The IO submitted application seeking extension in time for submission of challan on the ground that FSL opinion in the case is yet to be obtained.

Perusal of record disclose that material evidence in the case is examination of motorcar through expert to determine the kind of fire shots available on it. There is letter dated 10<sup>th</sup> March, 2021 of worthy SSP investigation Peshawar addressed to DSP (Investigation) Peshawar to carryout examination of the motorcar through expert in FSL formulating four questions for replies of him. Though the investigation officer when questioned as to whether the motorcar has been taken to FSL and examined by the expert, he orally stated that previous investigation officer in the case has carried out the said exercise but nowhere on record case diary is available to this effect. **The material evidence of the case is in danger of spoiling if this attitude is allowed. Neither the investigation officer of police Station Faqir Abad nor after transfer of the case for investigation to CTD, the investigation Officer present in the court bother to secure this important evidence on record.**

In view of the aforesaid, it would be in fitness of the matter to hand over this case file to learned Prosecutor with direction to forward the same to worthy SSP investigation CTD, Peshawar to ensure examination of motorcar through FSL expert as per queries contained in letter of worthy SSP investigation Peshawar referred above and ensure collection of expert opinion in the case soon after examination so that challan for trial in the case is submitted which is held up on this single point. **(Bold and underlines supplied emphasis).**

The conduct of the police/Investigating Agency is quite manifest from the order (*supra*). Yet there is another aspect raising suspicion on the role of police played in the instant case. The Murasila has allegedly been shown to have been written down by Inayat Ullah ASI on the narration of complainant Zia Ullah duly verified by PW Muhammad Haris but both the

above named witnesses in their statements under section 164 Cr.P.C. and court statements, have totally denied the said document. As per their statements, after the occurrence, SHO Police Station Faqir Abad reached the hospital, pressurized them and forcibly obtained their signature on a document written by he himself. The version of complainant and PW Muhammad Haris got support from the fact that Inayat Ullah ASI, the alleged author of the Murasila has not been produced in the witness box during trial so as to prove the scribing of Murasila on the report of the complainant. This aspect strongly suggest that the police had strong apprehension that if Inayat Ullah ASI is produced, he might not disclose the true facts.

16. The ocular account of the unfortunate tragedy of murder of Mubashir Ahmad deceased, a young student of 20 years, has been furnished by complainant Zia Ullah and Muhammad Haris. The former while appearing in the witness box as PW.12, has deposed as below-


“Deceased Mubashir was my maternal cousin while Muhammad Haris is my friend and class fellow of the deceased. On the day of occurrence i.e. 08.03.2021 I along with Mubashir and Muhammad Haris went out of Super Market Saddar at about in between 12.00 and 1.00 AM (night time) for taking Quetta tea in our motorcar bearing registration No.APZ.966 driven by deceased Mubashir and when reached on Dalazak road, the deceased Mubashir stopped the car and deboarded from it for the call of nature and when he came back to the car, in the meanwhile, accused facing trail came and started firing at us, as a result of which the deceased Mubashir got hit and injured. After receiving injury, I opened the door of the car for

deceased Mubashir when in the meanwhile, the accused came near us and aimed their weapons on us. After seeing the deceased Mubashir in injured condition they directed us to take him to hospital for treatment and we are following you to the hospital. PW Haris has occupied the driving seat and accordingly we proceeded to the hospital. When we reached to the hospital, the SHO and other police contingents also reached there and I narrated the whole facts to him to record my report but instead he pressurized us and told us that you were in possession of pistols and ICE and also fired at the police party and directed us to hand over the pistol and ice to the SHO. Then on an already written paper they forcibly obtained my signature as well as signature of PW Haris on the said document. After death of the deceased Mubashir the police took me to the spot in their vehicle while PW Haris was taken to Police Station along with our vehicle. I pointed out the place of occurrence and the articles lying there and at my instance the site plan was prepared. In the morning when the relative and other our co-villagers came, then we came to know that FIR was wrongly registered on facts, hence, we protested but we were assured by the high up of the police that we might take our dead body for burial and thereafter the facts will be corrected accordingly. When we came back after the burial and funeral proceedings of the deceased, I recorded the actual facts to the police in my statement under section 161 Cr.P.C. and before the court under section 164 Cr.P.C. I have also identified the accused facing trial in the central Jail before Magistrate. After transfer of investigation to CTD Police Station, I also handed over to the I.O. the USB containing CCTV recording installed at Taj Mehal Hostel which the I.O. took into possession vide recovery memo Exh.PW.3/1. I charge the accused for murder of the deceased and attempt at our lives".

16. Perusal of statement of the complainant would reveal that he has furnished minute details of each and every aspect of the occurrence. He has well explained the purpose of his presence with the deceased at the time of occurrence. The argument of learned counsel for the appellants to the effect that as per statement of Dr. Latifullah (PW.16), the deceased then injured was well oriented in time and space at the time of examination, but he has not reported the occurrence which create serious doubt in the prosecution's case is not tenable, for the reason that when the signatures of the eyewitnesses were obtained by force by the SHO PS Faqir Abad on a self-written report so as to save the skin of police constables/appellants, then it is quite understandable to a prudent mind that the SHO present in the hospital was not so idiot to record report of the deceased then injured so that it may be used as a dying declaration during trial. The complainant has been subjected to lengthy cross-examination by the defence on each and every aspect of the incident but he remained stuck to his stance as set forth by him in his statement under section 164 Cr.P.C. No doubt, his statement u/s 164 Cr.P.C. has been recorded on 13.03.2021 after five days of the occurrence, but such delay would not damage the prosecution's case for the reason that he and the deceased were the residents of District Bannu. After the occurrence, the dead body of the deceased was shifted to Bannu where the complainant would have remained busy in the *Fatiha* ceremony of the deceased for such period. Besides,

charging the appellants directly in his statement under section 164 Cr.P.C, the complainant has also identified them during identification parade conducted by learned Judicial Magistrate, on 15.03.2021 inside jail premises. The defence in the cross-examination of the complainant itself has admitted presence of the appellants on the spot at the time of occurrence by putting the following suggestions to him *“It is further incorrect to suggest that the accused facing trial Roohullah had accompanied the deceased then injured to the hospital. It is further incorrect to suggest that accused Roohullah has only been charged on bald suspicion for having been on duty at the fateful night in the company of the co-accused.* The deceased was paternal cousin of the complainant and an iota of evidence has not been brought on record by the defence so as to remotely suggest false implication of the appellants by him. We are of the unanimous view that due to close relation of complainant with the deceased, he was in fact not likely to let off the actual perpetrators of the offence by falsely implicating the appellants, against whom he admittedly had no previous malice, ill-will, animosity or grudge. It is by now well settled law that substitution of real culprits especially in cases where the eye witnesses lost their kith and kin before their own eyes is a rare phenomenon. Reliance is placed on the cases of “Asfandiyar vs. The State and other” (2021 SCMR 2009) and “Muhammad Abbas & another vs. The State” (2023 SCMR 487).

18. Another eyewitness of the occurrence is Muhammad Haris. He is resident of District Mardan and not related to the deceased except that the deceased was his friend and they both were temporarily residing in Super Market Peshawar. He while appearing as PW.13 in the witness box has deposed as below:-



“Deceased Mubashir was my friend/class fellow. On the night of occurrence, I along with deceased Mubashir and PW Zia Ullah left Super Market Saddar in motorcar bearing registration No.APZ.966 for taking Quetta Tea and when we reached at Dalazak road. The deceased Mubashir who was driving the car stopped the car and deboarded for the call of nature and thereafter when he came back to the car and sat on driving seat of the car, in the meanwhile, the accused started firing upon us due to which deceased Mubashir got hit and injured, in the meanwhile, the accused reached the car and the complainant Zia Ullah opened the door of the car and found the deceased Mubashir in injured condition. In the meanwhile, one of the accused made a telephonic call to someone and directed us to take the injured to hospital for treatment and they will follow us. After reaching the hospital, the SHO along with other police officials also arrived there and SHO asked us to hand over the ICE and pistols to him and also made dire threats. On this the SHO took us to our car and he reached the car however, nothing was recovered by him. Thereafter the SHO obtained our signatures on a document already written by him. The deceased Musbahsir died later on in the hospital. The complainant Zia Ullah was taken to the spot by police while I was taken along with the car to Police Station. After coming back to the complainant to the Police Station with the police, the police scribed the FIR themselves and got signed it from us in the police Station but we agitated that it was wrong FIR. Then I along with complainant went to the native village of the deceased for attending the funeral



ceremony. I have also identified the accused facing trial before the Magistrate. I have recorded statement to the I.O. as well as before the Magistrate in this regard."

19. PW Muhammad Haris has also been subjected to lengthy cross-examination but nothing favourable to defence or adverse to prosecution could be extracted from his mouth. He also remained stuck to his stance and fully corroborated the complainant on each and every material aspect of the occurrence such as the day, date, time and place of occurrence as well as the mode and manner in which the incident took place. He is also unanimous with the complainant on the events as to how the deceased then injured was shifted from the spot to the hospital. This PW too has identified the appellants during identification parade conducted by the learned Judicial Magistrate, namely, Muhammad Latif Shah (PW.17), who while appearing in the witness box has deposed that during identification parade both the eyewitnesses have correctly identified the appellants.

20. Shafi Ullah Khan DSP, the Investigating Officer, has been examined as PW.18. He has stated that he got verified the site plan Exh.PB from the eyewitnesses. Though it has been brought from him in cross-examination by the defence that Super Market Peshawar consists of many shops, but this would not advance the prosecution's case because the deceased and eyewitnesses were students and young boys living in hostel

and as a general practice students putting up in the hostels go outside late at night for refreshment.

21. In the site plan Exh.PB, the deceased is shown inside the motorcar on driving seat. Appellant Rustam is shown at point No.4 (on right side of the motorcar) while appellant Rooh Ullah is shown at point No.5 (behind the motorcar of the deceased) at the time of occurrence. From point No.C i.e. place behind point No.4 (place of appellant Rustam) one empty of 7.62 bore has been shown recovered by the I.O. during spot inspection, whereas, no empty has been shown recovered from or near the place of appellant Roohullah. From point-D recovery of official motorcycle of the appellants-constables has been shown which as per site plan was being riding by appellant Roohullah. The motorcar Exh.P.1 of the deceased has been shown recovered from the spot vide recovery memo Exh.Pw.6/1 by the I.O. The photographs of the motorcar are available on file having bullet markets on its right side i.e. driver's side. As per medical evidence furnished by Dr. Latifullah and Noor ul Baqi (PW.15), the deceased has sustained all the firearm entrance wounds on his right side, and as per site plan Exh.PB right side of the appellant falls within the firing range of appellant Rustam at point No.4. Ameer Dad Khan Moharrir Police Station Faqir Abad (PW.7) deposed that on 08.03.2021, he produced .30 bore pistol Exh.PZ, belonging to appellant Roohullah and one SMG official rifle bearing No.56-29012724 along with loaded magazine containing 23

live rounds of 7.62 bore Exh.PX/1 and Exh.PX/2 belonging to appellant Rustam to the I.O. which were taken into possession vide recovery memo Exh.PW.11/2. The I.O. has sent the SMG official rifle along with empty of 7.62 recovered from the place of appellant Rustam to the FSL, report whereof Exh.PZ/1 reveals that the empty of 7.62 bore has been fired from 7.62 mm bore (SMG) rifle. The pistol of appellant Rooh ullah was also sent to the FSL and report of the FSL says that **“presence of gun powder residue in the barrel of 30 bore pistol in question revealed that fire has been made through it, however, no opinion can be expressed as to when it was last fired. The pistol is in proper working order in its present condition”**. Motorcar bearing registration No.APZ.966 of the deceased was also sent to the FSL, report whereof Exh.PZ shows that the holes present on its right side, head light and left front door were caused due to firing. The bloodstained last worn garments of the deceased and blood secured from the spot from the place of the deceased were also sent to the FSL and in this regard Serologist report Exh.PZ/3 reveals that it was human blood and of the same group. All these strong circumstantial pieces of evidence fully corroborate the ocular account of the eyewitnesses, but at the same time draw a clear line of distinction between the roles of the two appellants. As stated earlier appellant Rustam is shown at point No.4 which is on right side of the deceased. The bullet marks are also visible on right side of the motorcar in the photographs. The crime

empty recovered from the place of appellant Rustam matches with the SMG rifle, an official weapon allotted to him for his duty. Blood and urine of the appellant Rustam was also obtained by the I.O. and sent to KMC Peshawar, for analysis of intoxication. Report in this regard Exh.P.2 is in positive, meaning thereby that at the time of occurrence appellant Rustam was intoxicated. Report with regard to urine and blood of appellant Rooh ullah for the purpose of intoxication is in negative. In view of the above discussed evidence, we are convinced to hold that appellant Rustam is the actual perpetrator. There is no bullet mark on the motorcar of the deceased from back side where presence of appellant Rooh Ullah is shown in the site plan at the time of occurrence. Similarly, the deceased has also not received any injury from back side.

22. Medical evidence furnished by Dr. Latifullah (PW.16) and Noor ul Baqi (PW.15), also supports the prosecution's case. As per opinion of PW.15 who conducted autopsy on the dead body of the deceased, the deceased met his unnatural death due to firearm injuries to various parts of his body on right side. So far as blackening on the shalwar as noticed by the medical Officer is concerned, on one hand, in the site plan Exh.PB the distance between point No.4 (place of appellant Rustam) and point No.3 (place of deceased) is shown as four feet. Appellant Rustam was in possession of SMG rifle at the time of occurrence. Thus keeping in view length of the SMG

rifle as well as stretching of hands by appellant Rustam at the time of firing, there is strong possibility of blackening over the shirt of the deceased. Even otherwise, in case titled, **“Aman Ullah and another vs the State and others” (2023 SCMR 723)** it has been held by the Hon’ble Apex Court that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused.

Relevant part of the judgment is reproduced below:-

“It is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused. Reliance is placed on **Muhammad Iqbal Vs the State (1996 SCMR 908)**, **Naeem Akhtar Vs the State (PLD 2003 SC 396)**, **Faisal Mehmood Vs the State (2010 SCMR 1025)** and **Muhamamd Ilyas vs the State (2011 SCMR 460)**.”

**23.** On reassessment of the evidence available on record, we have arrived at an irresistible conclusion that prosecution has proved murder of the deceased by appellant Rustam through cogent and confidence inspiring direct evidence corroborated by strong circumstantial evidence and supported by medical evidence.

**24.** As regards case of appellant Rooh Ullah, available evidence proves that he was present with appellant Rustam at

the time of occurrence as is shown in the site plan Exh.PB at back of motorcar of the deceased. However, as medico legal report Exh.PW.16/1 and autopsy report Exh.PM, the deceased has not sustained any injury/entrance wound on his back. No bullet marks have been noticed on back of the motorcar. Similarly, no empty has been shown recovered from the place assigned to appellant Rooh Ullah. The pistol shown recovered from appellant Rooh Ullah has been sent to the FSL, report whereof shows that from the residue powder found in the pistol, no opinion can be given as to when fire was made from it lastly. Besides, one of the eyewitnesses, namely, Muhammad Haris in his cross-examination has stated that appellant Rooh Ullah accompanied them from the spot to the hospital when the deceased then injured was being shifted. By considering the overall facts and circumstances referred above, we are of the considered view that the prosecution has not proved guilt of appellant Rooh Ullah to the extent of commission of murder of the deceased. An iota of evidence has also not been led by the prosecution to prove sharing of common intention of appellant Rooh Ullah with appellant Rustam in committing murder of the deceased. However, the fact of presence of appellant Rooh Ullah with appellant Rustam at the time of occurrence has been established by the prosecution through cogent evidence beyond shadow of reasonable doubt. Appellant Rooh ullah, being police official and on his duty at the relevant time, was legally bound to give

information of the offence to the police but he kept mum, therefore, his role amounts to intentional omission to give information of the offence, thus he has committed an offence punishable under section 202 PPC, which for the sake of convenience and ready reference is reproduced below:-

**“S.202. Intentional omission to give information of offence by person bound to inform:-** Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give **shall be punished with imprisonment of either description for a term which may extend to six months or with fine, or with both”.**

25. Admittedly, no motive has been advanced by the eyewitnesses behind the occurrence. The peculiar facts and circumstances as are manifest from the evidence on record, it is quite possible that there was some sudden provocation between appellant Rustam and the deceased, which resulted into the present unfortunate incident. It is well settled proposition of law that in the absence of premeditation to commit murder where motive is not proved by the prosecution, the same may be considered as the mitigating factor in order to reduce the quantum of sentence in cases involving capital punishment. In the case reported as **Iftikhar Mehmood and another versus Qaiser Iftikhar and others (2011 SCMR 1165)**, it has been ordained:-

“We agree with the prosecution that motive is not sine qua non for the proof of commission of the crime and at time motive is not known to any other person other than the deceased or the accused person which never surfaced on the record. However it cannot be denied that motive is always very relevant to determine the quantum of sentence that might be awarded to a person against whom charge of murder is proved.”

In the case reported as Zeeshan Afzal alias Shani and another versus The State and others (2013 SCMR 1602), this Court has held that:

“If motive is not alleged or is not proved, normally the sentence of death is converted into imprisonment for life.”

This view is also fortified in the case reported as Muhammad Yasin and another versus The State and others (2024 SCMR 128).

**26.** For what has been discussed above, the prosecution has proved murder of Mubashir Ahmad deceased, a young boy of 20 years, as well as attempting at the lives of the eyewitnesses against appellant Rustam. In this view of the matter, the learned trial Court while appreciating the evidence in its true perspective has rightly held appellant Rustam guilty of the offences under sections 302(b) and 324 PPC, to which no exception can be taken. The sentence of rigorous imprisonment



for life awarded to appellant Rustm being just and in accordance with law does not warrant any interference by this court. Accordingly, conviction and sentences of appellant Rustam under sections 302 and 324 PPC, recorded by the learned trial Court through the impugned judgment, are maintained and resultantly, his appeal is hereby dismissed. The sentences of appellant Rustam shall run concurrent and benefit of Section 382-B Cr.P.C. is extended to him.

27. In view of the evidence discussed above, Cr.A. No.1086-P/2023, filed by appellant Rooh Ullah is disposed of in the manner, that his conviction and sentences under sections 302 and 324 PPC, recorded by the learned trial court through the impugned judgment, are hereby set-aside. He, however, having been proved guilty of the offence under section 202 PPC, is convicted and sentenced under the said offence to undergo imprisonment for six months and to pay Rs.50,000/- as fine and in default thereof to further undergo one month simple imprisonment. Benefit of section 382-B Cr.P.C. is extended to him.

28. The learned trial court though has framed charge under section 15 KP Arms Act, 2013 against both the appellants, but in the judgment neither any findings with regard to acquittal or conviction of the appellants has been given by the learned trial court under the said section of law. The learned trial court probably has purposely kept mum in this regard for the reasons that on one hands the arms recovered from the appellants were

officials which amounts to implied acquittal of the appellants. The prosecution having not moved appeal against such implied acquittal of the appellants seems to have abandoned the charge against the appellants under section 15 KP Arms Act, 2013. In this regard case titled, **“Shera and 6 others Vs the Crown” (PLD 1954 Federal Court 141)** can also be referred relevant part of which is reproduced below:-

“The trial judge was careful only to record his findings in respect of the charges on which he found the various accused persons guilty. His omission to record express findings in relation to the other offences charged cannot, however, affect the substantive position namely that **in the absence of express reservation by the trial Judge, in respect of each of these offences, for the purpose of law, he must be deemed to have recorded a finding of not guilty and to have made an operative order of acquittal in consequence of such finding**”.

Similar is the view of this court in case titled, **“Abid Khan vs the State” (2018 YLR Note 180 Peshawar)**, wherein accused was charged under sections 302 and 427 PPC. Charge was framed against accused under both the aforesaid offences by the learned trial court. On conclusion of trial the accused was convicted and sentenced under section 302(b) PPC, however, judgment of the learned trial court was silent with regard to conviction or acquittal of the accused under section 427

Cr.P.C. This court while deciding the appeal of the convict-accused rendered the following observation: -

“Although charge of offence under section 427 PPC was also framed but in the absence of evidence; and, apparently, charge also not pressed by the prosecution against the appellant/accused; the learned trial court did not record judgment/order of either acquittal or conviction, hence, amounting to ‘implied acquittal’ of the appellant/accused. The prosecution, having not moved appeal against such ‘implied acquittal’ seems to have abandoned the charge against the appellant/accused”.

**29.** Placing reliance on the judgments (supra) we hold that the impugned judgment to the extent of section 15 KP Arms Act, 2013, amounts to implied acquittal of the appellants.

**30.** With the above modification in the conviction and sentences of the appellants the connected Cr.R. No.170-P/2023, is also dismissed.

**Announced:**

*M.Siraj Afridi CS*

**CHIEF JUSTICE**

**JUDGE**

**SB of Mr. Justice Ishtiaq Ibrahim Hon'ble the Chief Justice  
And Hon'ble Mr. Justice Wiqar Ahmad**