JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 209-M/2016

Fazal Zada s/o Wazir r/o Mohallah Khana Abad, Koza Bandai, Tehsil Kabal, District Swat.

(Appellant)

Versus

1) The State through A.A.G.
2) Bacha late/deceased through legal heirs.

(Respondents)

Present: ***Mr. Rashid Ali Khan, Advocate for appellant.***

Mr. Suleman Khan, Advocate for State.

Mr. Sardar Zulfiqar, Advocate for complainant.

Cr.R. No. 54-M/2016

Musa Khan s/o Bacha (deceased) r/o Nehar Abad, Koza Bandai, Tehsil Kabal, District Swat.

(Petitioner)

Versus

3) Fazal Zada s/o Wazir r/o Mohallah Nehar Abad, Koza Bandai, Tehsil Kabal, District Swat.
4) State through A.A.G.

(Respondents)

Present: ***Mr. Sardar Zulfiqar, Advocate for petitioner.***

Mr. Suleman Khan, Advocate for State.

Mr. Rashid Ali Khan, Advocate for complainant.

Date of hearing: **06.02.2018**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellant Fazal Zada through this appeal has assailed the judgment dated 06.10.2016 of the learned Additional Sessions Judge/Izafi Zilla Qazi, Swat at Kabal, delivered in case F.I.R No. 71 dated 11.02.2015 registered at

Police Station Kanju, District Swat whereby he was convicted under Section 302 (b) P.P.C and sentenced to rigorous imprisonment for life with payment of Rs.200,000/- as compensation to legal heirs of the deceased within the meaning of Section 544-A, Cr.P.C or in case of default, the said amount was directed to be recovered as arrears of land revenue. Benefit under Section 382-B, Cr.P.C was extended to him.

2. The report in this case has been lodged by deceased then injured namely Bacah son of Abdul Karim in Casualty, Saidu Sharif Hospital at 19:50 hours which was recorded vide *Madd No.*35 dated 08.02.2015 according to which his grandsons and children of the appellant, while playing, fought with each other near his house, he disentangled the fighting children by scolding them and let them go to their houses. In the meanwhile appellant Fazal Zada came over there and started talking with him during which he enraged, took out his knife and caused continuous stabs to him due to which he got seriously injured on his abdomen. The deceased then injured further reported that someone might have

have seen the occurrence which occurred due to fight amongst the children.

3. After recording the above report, injury sheet Ex.PW-2/2 of the injured was prepared. He was examined by Dr. Fazal Karam M.O (PW-5) on the same day at 07:55 P.M. The description of wounds he recorded in his report Ex.PW-5/2 on the body of injured is as under:-

1) **2 x ½ cm incisional wound in the midline below the xiphisternum.**
2) **1 x ½ cm wound over left flank anteriorly.**
3) **2 x 1 cm wound over left costal margin.**

First aid given. Referred to SAW.

Adv: X-Rays Erect abdomen, chest.

Surgical ward notes:

- **Laparotomy done.**
- **Three penetrating wounds on anterior abdominal wall.**
- **Simple serosal tear at proximal jejunum repaired with catgut 2/O.**

PW-5 also issued consciousness certificate which is available on record as Ex.PW-5/3.

4. Opinion of the Prosecution Branch in the light of doctor's report was sought vide application Ex.PW-3/1 made on 11.02.2015 on the basis of which *Murasila* Ex.PW-3/2 was drafted

wherein the appellant was charged under Sections 324/337-D, P.P.C.

5. The appellant was arrested on 11.02.2015. During the course of investigation, the crime weapon i.e knife was recovered on his pointation which was taken into possession vide recovery Memo Ex.PW-10/2. He was produced before the Court of Judicial Magistrate-I, Kabal (PW-12) who recorded his judicial confession Ex.PW-12/2 on 13.02.2015. After completion of investigation, complete challan was submitted in Court for his trial under Sections 324/337-D, P.P.C. Later on, the injured died on 02.03.2015 in his house and the dead body was brought to casualty Saidu Sharif for the purpose of post-mortem. The Investigating Officer prepared inquest report of the deceased whose post-mortem was conducted by Dr. Ghulam Rehmani (PW-3) on 02.03.2015 at 7:40 A.M. The detail of his report Ex.PW-3/2 is as under:- hand over

External Appearance:

No marks of ligature or any other injury seen on neck.

Stout sky colour *qamees shalwar* (not blood stained).

1) **21 stitch wound on midline of abdomen from pelvic region to xipisternum (Healed and from previous surgery).**
2) **1 cm healed wound on left side of abdomen.**
3) **Healed wound 2 x 1 cm on left costal margin.**
4) **Post-mortem lividity developed.**
5) **Rigor mortis partially developed.**

Cranium and spinal cord:

No abnormality detected.

Thorax: **1to 5----- normal**

No abnormality detected.

Blood vessels normal

Abdomen:

1) **21 stitch wound on midline abdomen from pelvic region to xiphisternum healed and from previous surgery.**
2) **1 cm healed wound on left side of the abdomen.**
3) **Healed wound 2 x 1 cm on left costal margin. These already mentioned before on page-1.**
4) **Normal peritoneum, no free fluid. Pus, blood and faecal matter in peritoneum cavity. 3, 4, 6, 9 to 11, 13 ------ Normal.**
5) **Stomach was normal and food particles are seen majority are digested seen in liquid form.**
6) **Serosal stitch at proximal jejunum below duodenum distal to duodena jejunum junction (healed)**
7) **Normal structure but colour is abnormal black.**
8) **Bladder is full of urine (normal)**

v) Muscles, bones, joints:

No abnormality detected.

Remarks by M.O:

1. **Post mortem lividity developed.**
2. **Rigor mortis partially developed.**
3. **Specimens taken from lungs, lever, spleen, stomach, blood, intestine, hear and urine taken for toxicological, hesto pathological**

and chemical examination and handed over to police.

4. **Cause of death after receipt of above report. 2.03.2015.**

The final conclusion regarding the cause of death of Mr. Bacha s/o Abdul Karim after receiving the reports of department of forensic and toxicology KMC, KPK, Punjab Forensic Science Agency Punjab and final concluding decisions of Dr. Mir Alam Afridi Forensic Department, Saidu Medical College, Swat. In most likely chronic pulmonary embolism resulting in respiratory failure, a common and most likely post-operative complication. Reports of all forensic labs and opinion of forensic department are attached on separate pages, Page-7 (department of Forensic Medicine and Toxicology KMS). Page-8 (Punjab Forensic Science Agency). Page 9 (Forensic Department SMC, Swat). These are total nine pages. Post mortem report handed over to Rasool Khan ASI P.S Kanju. 28.04.2015.

Probable time that elapsed between death and post mortem: 6 to 8 hours.

On the written application of Dr. Ghulam Rehman (PW-3), the medical documents of deceased were examined by Dr. Mir Alam Afridi (PW-4) who gave his opinion Ex.PW-4/1 which is as under:-

Date: 23.04.2015

Time: 10:20 A.M

Thursday

From the history and documentary evidence on record of Mr. Bacha s/o Abdul karim r/o Koza Bandai, Tehsil Kabal, Swat, the cause of death is most likely chronic pulmonary embolism resulting in respiratory failure, a common and most likely post-operative complication.

6. On the death of the deceased then injured, prosecution inserted Section 302 P.P.C in the case and submitted fresh challan in Court on 03.05.2015. The appellant was formally indicted for the murder of deceased to which he pleaded not guilty and opted to face the trial. Prosecution examined 16 witnesses in all whereafter statement of the appellant under Section 342, Cr.P.C was recorded on 04.08.2016 wherein he pleaded innocence and denied the allegations of prosecution. At last stage of the trial, the arguments were heard and finally the appellant was convicted and sentenced vide judgment dated 06.10.2016, the detail has already been given earlier, hence, this appeal.

7. Learned counsel for the appellant, *inter alia*, contended that the trial Court has mainly relied upon the alleged confession of the appellant recorded on oath which is inadmissible under the law. He further argued that the appellant has retracted from his confession during his examination under Section 342, Cr.P.C and such confession cannot be used against him most particularly when there is no convincing corroborative evidence

available on record. Learned counsel added that the alleged occurrence took place at 19:20 hours in the month of February when there was pitch dark but no source of light has been shown by prosecution which fact has made the identification of the accused doubtful. He argued that the alleged eye witnesses are interested being related to the deceased and their testimony cannot be relied upon for conviction of the appellant. Learned counsel was of the view that death of the deceased was not the result of the injuries sustained by him in the alleged occurrence as reports of the doctors do not support that version of the prosecution with clarity besides, the statement of deceased then injured in shape of his report cannot be considered as dying declaration in view of the remoteness of death from the date of occurrence. He submitted that the impugned judgment being against the law and evidence on record, be set at naught and the appellant be acquitted of the charge on accepting this appeal.

8. Learned counsel appearing for State and learned counsel for the complainant submitted that there is not only judicial confession of the appellant but also the statement of the deceased then injured

supported by circumstantial evidence on the record which duly proves the guilt of appellant beyond reasonable shadow of doubt. They were of the view that recording judicial confession of the appellant was mere a procedural irregularity not capable of rendering the confession inadmissible as the statement of appellant contains true narrations of facts and it cannot be discarded merely on the ground that a prohibited procedure was adopted by Magistrate while recording his confession. They maintained that when there is nothing on the record showing that the appellant was misled and injustice was caused to him by adopting such procedure for recording his confession, the evidentiary value thereof is still intact. They further submitted that conviction of the appellant is the result of overwhelming evidence brought by prosecution against him which has properly been appreciated by learned trial Court, therefore, this appeal be dismissed and capital punishment be awarded to the appellant by allowing the criminal revision.

9. We have gone through the record in light of the valuable assistance of learned counsel

for the parties and learned counsel appearing on behalf of State.

10. The report in this case has been lodged by deceased then injured soon after the occurrence in Casualty Saidu Sharif wherein he directly charged the appellant for causing him stab injuries. The narrations in the initial report are natural and straightforward duly supported by ocular account and circumstantial evidence. We agree with the submission of learned counsel for the appellant that statement of the deceased then injured was not a dying declaration as he died after 19/20 days of lodging the report without bringing on record cause of death with clarity but the report could not be brushed aside at all rather it should be considered in association with the remaining prosecution evidence for safe administration of justice. Contents of the initial report recorded vide Madd No. 35 dated 08.02.2015 suggest that the injured had narrated the incident in a simple and straightforward manner who was not sure at that moment that he would remain alive. The report is fully corroborated by medical evidence, surrounding circumstances and confidence inspiring ocular account. The record is mute that the

report was the result of consultation or tutoring, which had been made by the deceased voluntarily without any probability of promptitude as to the cause of his death and the same had been reduced into writing by police officer, an independent witness. Prosecution has also examined son of the deceased namely Parwaish Khan as PW-6; according to his statement, he was inside his house when informed by children regarding the occurrence; thereafter he came to the spot where he found his father in injured condition who told him at that time that he (deceased) was stabbed by appellant. The deceased has lodged the report in presence of his son PW-6 who has duly signed the same as seconder. Had the deceased any mala fide against the appellant for dragging him in a false case he would have cited the name of his son as eye witness of the occurrence. Though PW-6 was at a short distance from the spot where his father was subjected to stabs by the appellant but he made no endeavor for supporting his father's version in a dishonest manner rather he recorded his statement in a natural and usual way. He denied the suggestion of defence counsel by stating that:

یہ غلط ہے کہ ہمارے والد نے ہمیں یہ نہیں کہا تھا کہ مجھے فضل زادہ نے چاقو سے وار کر کے زخمی کیا ہے۔ از خود کہا کہ ہمیں اُسی وقت کہا تھا۔

The mode in which the injured and his son described the event; presence of the PW inside his house at the time of occurrence and thereafter his arrival to the spot are the circumstances making a series of events brought on the record in a forthright and undoubted manner which can duly be considered under the rule of ***res gestae*** for reaching at a just conclusion in this case. Essence of the said rule is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction becomes relevant by itself under Article 19 of the Qanun-e-Shahdat Order, 1984. When we look into the statement of the deceased then injured, the same appears to be spontaneous and free of any exaggeration. Admittedly the occurrence took place before Isha prayers; this fact emerges not only from the report lodged at 19:20 hours but also from the cross-examination of PW-6 who stated that:

میرا والد عشا کی نماز سے پہلے زخمی ہوا تھا تاہم میں گھڑی کے حساب سے مخصوص وقت نہیں بتا سکتا۔

Leaving of the houses by the deceased then injured as well as the eye witnesses at the relevant time is not unusual as it was *Isha vela* and people normally go outside their houses for performing the *Isha* prayers; similar is the arrival of PW-6 to the spot soon after the occurrence and shifting of the injured to the hospital. All the above events being the facts, circumstances and declarations growing out of the main fact i.e the occurrence and they are closely connected with each other excluding all doubts of fabrication.

11. Prosecution has examined PW-7 Muhammad Iqbal and PW-8 Amir Zeb as eye witnesses of the occurrence. Although PW-7 is resident of Katlang, a far off area, but his presence stands established in view of cross-examination of PW-6 who stated that:

وقوعہ سے ایک روز قبل محمد اقبال دیہہ بانڈئی سے آیا تھا جو کہ میرا چچا سید عبداللہ بیمار تھا اور اُس کی بیمار پرسی کے لیے آیا تھا۔

However, to be on safe side, we do not consider his statement for resolving the present controversy. Next is the statement of PW-8 Amir Zeb who has also recorded statements confirming all the important aspects of the case mentioned by the

deceased then injured in his report. Admittedly, he is the resident of the said vicinity and lives close to the house of complainant which fact is clear from his cross-examination by stating that:

میرے مکان اور باچا کے مکان کے مابین چھ فٹ چوڑا گلی ہے۔ میرے گھر کا دروازہ گلی مذکور میں کھلتا ہے۔

In view of the facts that houses of the complainant and this PW are closely situated and he also came out of his house for performing the Isha prayers, his presence on the spot at the relevant time could not be termed as fabricated or procured by prosecution. The detail of timings and events appearing in his cross-examination is truthful and there is nothing convincing in the remaining direct and circumstantial evidence in the light of which his testimony could be disbelieved. We would not subscribe to the contention of learned counsel for the appellant that he has not been named in the F.I.R. It would be against the norms of justice most particularly in view of the attending circumstances of this case, to disbelieve the testimony of a witness solely on the ground that his name was not cited in the F.I.R. There is no universal rule that evidence of

a witness not named in the F.I.R will be disbelieved in all circumstances because each and every case is to be adjudged in light of its own facts in the light whereof the credibility of a witness is to be determined. In this regard we would seek guidance from the judgment in the case titled *"Siraj Din Vs. Kala and another" (PLD 1964 Supreme Court 26)* wherein it has been held that:

> **"The F. I. R. given by Siraj Din at the Police Post could however have been used only to contradict its maker, if he gave evidence at the trial. It could not be used as substantive evidence to belie the claim of the other PWs, to be eye-witnesses, by the mere fact of the omission of any reference to them therein. Siraj Din may have had his own reasons for not naming the shopkeepers or Aslam P. W. as witnesses of the crime. This was a case of a blood feud and he may have entertained the notion that businessmen of the locality would be chary of involving themselves in this quarrel between two families and may not be willing to depose as witnesses in this case. The suspicion may well be entertained as seems to have been done in the High Court that Gulzar Hasan and Ghulam Mohyuddin had been named by Siraj Din in the F.I.R. as eye-witnesses, on the strength of his confidence that they would be willing to support the prosecution story on account of intimate relations with him. The story put forward that they were not known to Siraj**

Din previously, appears to be open to grave doubt. But even in the first report it was clearly specified that the incident had happened in front of Bashir green-grocer's shop. It was, therefore, natural for the shopkeepers round about the spot to have seen what happened before their very eyes".

12. No doubt, the occurrence took place at the time when dark had prevailed but PW-8 Amir Zeb has mentioned the source of light in his statement. Moreover it is a case of stabbing which can only be caused from a close distance, therefore, identification of the appellant by the deceased and eye witness in the circumstances was not so improbable to make the prosecution version doubtful. Although slight contradictions do occur in statements of eye witness but the same are negligible by giving cumulative effect to their statements. It is well settled that each and every variation in the evidence could not affect or impair the intrinsic value of the evidence and all those variations which did not have any substantial bearing on the salient features of the prosecution case could be safely ignored as they would not affect the credibility of the witnesses. Another contention of learned counsel for the appellant that the eye witness is interested

being related to the deceased, has no force in view of the attending circumstances of the occurrence. It is well settled that evidence of an interested witness can be relied upon for conviction of an accused provided his statement is corroborated by independent evidence. In the present case the statements of the mentioned eye witness is in line with the version mentioned in the F.I.R which was registered at the behest of deceased then injured. Similarly, there are statements of the remaining PWs coupled with circumstantial evidence, especially the recovery of crime weapon on pointation of the appellant, collected during the course of investigation which duly corroborates the ocular account. Thus, in the considered view of this Court, statement of the eye witness could not be discarded merely on the ground that is relative of the deceased when otherwise he is honest and frank in his deposition.

13. Reverting to judicial confession of the appellant, no doubt his statement shows that it was recorded on oath; however, it was a procedural irregularity which has caused no prejudice to the appellant. Record shows that no question was put to

Judicial Magistrate (PW-12) whether he actually administered oath to appellant or it was mentioned as routine in the beginning of his statement that he was recording statement on oath. In absence of any such question, it cannot be gathered with absolute certainty from the words "حلفاًبیان کیا" that oath was actually administered to appellant before recording his judicial confession, thus, the mentioned words would not vitiate the confession in view of the provisions of Section 533, Cr.P.C. Recording confession of an accused in a manner which is prohibited under the law may be an illegality but when the confessional statement contains true description of facts, it may not lose the status of evidence merely because of adopting of a procedure prohibited under the law, unless it is shown that accused was misled or injustice was caused to him by adopting such procedure. Such procedural illegality would assume the character of irregularity which may not render the confession inadmissible. Reliance in this regard is placed on the judgment in the case titled ***"Nazeer alias Wazeer Vs. The State" (PLD 2007 Supreme Court 202)***.

Far more important aspect of the judicial confession is that it is not the sole evidence which is available on record against the appellant but there is also the statement of the deceased's son and above all the statement of the eye witness PW-8 coupled with circumstantial evidence on record. By giving cumulative effect to all the above mentioned pieces of evidence, it appears that prosecution has established the case against the appellant to the extent that he caused stab blows to the complainant then and there as mentioned in the initial report.

14. The most important aspect of this case which invites our consideration and is needed to be dealt with care and caution is the quantum of sentence awarded to the appellant by learned trial Court convicting him under Section 302 (b) P.P.C. The occurrence took place on 11.02.2015 while the deceased then injured died in his house on 02.03.2015 i.e after 19/20 days of the occurrence. Post-mortem on the dead body was conducted by (PW-3) Dr. Ghulam Rehmani. His observations regarding the stab wounds are as under:-

1) **21 stitch wound on midline abdomen from pelvic region to xiphisternum. (*healed from previous surgery*).**

2) **1 cm *healed wound* on left side of the abdomen.**

3) ***Healed wound* 2 x 1 cm on left costal margin. These already mentioned before on page-1.**

4) ***Normal peritoneum, no free fluid. Pus, blood and faecal matter in peritoneum***

5) **Serosal stitch at proximal jejunum below duodenum distal to duodena jejunum junction *(healed).***

The cause of death mentioned by this PW in his report is "**most likely** chronic pulmonary embolism resulting in respiratory failure, a common and **most likely** "post-operative complication". He based his finding on the reports of Department of Forensic and Toxicology KMC, Punjab Forensic Science Agency and final conclusion of PW-4 Dr. Mir Alam Afridi, head of the Forensic Department, Saidu Medical College, Swat which has already been reproduced herein above. The term **most likely** used in the medical evidence is of utmost importance and needs discussion. The word 'likely' according to Cambridge Dictionary means that if something is likely, it will probably happen or expected and the word "most" increases the degree of the probability of that happening. In our view probability after all is probability whether less or more which cannot be considered as equivalent to certainty, an antonym of that term. In view of the

above definition of the word **"most likely"** the cause of death according to medical evidence appears to be "most probably chronic pulmonary embolism" which means a blockage of an artery in the lungs by a substance that has moved from elsewhere in the body through the bloodstream (embolism) which is commonly caused due to blood clot in the veins. Admittedly, the doctors in their reports have not mentioned the stab wounds as the direct result of death but described the cause thereof as "most likely chronic pulmonary embolism" but the doctors who were examined as PWs in this case have not specifically stated that the pulmonary embolism occurred to the injured due to stab injuries though they mentioned the cause as post-operative complications but once again the word 'most likely' has been used. In other words no connexion between the stab injuries and pulmonary embolism has been established by prosecution meaning thereby that there was ***novus actus interveniens*** (new act intervening). In light of the principle embodied in the maxim it can be concluded that there was not such a direct relationship between the death and the injuries that the one could be treated as flowing

directly from the other. In the case of *"Talib Ali alias Talib Hussain Vs. State" (P.L.J 1974 Cr.C (B.J) 434)* a similar issue was discussed which is reproduced herein below:

> **"It is, thus, clear that some operation was conducted upon Ghulam Qadir on the day when he was admitted in the hospital for removal of some pellets. Despite the fact that the said operation was performed, there is no clear evidence that any anti-tetanus serum was given to him. It has already been observed that the injuries received by Ghulam Qadir were not sufficient in themselves in the ordinary course of nature to cause death. Thus, the tetanus, which developed during the stay of the deceased in the hospital and which was the direct cause of his death, appears to have developed on account of careless medical treatment. In these circumstances, it is not possible to hold that the injuries received by the deceased were the direct cause of his death. In Said Amin Vs. The State" (PLD 1959 Lah.451) it has been laid down as follows.**
>
> ***"The language of S. 299 Penal Code indicates that the offence of culpable homicide can be committed only if death is caused by the doing of an act with the requisite intention or knowledge. If death is not caused by such an act, but something else intervenes between the doing of the act and the death of the person concerned, the offender would not be guilty of the offence of culpable homicide but he might be guilty of some other offence. Such case, for its decision, depends upon its own facts. If***

death of a person is the direct result of an act committed by another person, with the requisite intention or knowledge or if as a result of that act some thin else intervenes such as gangrene, tetanus, peritonitis etc, which is the direct result of that injury, the offender would be guilty of the offence of culpable homicide. If, however, something intervenes and the death of the injured man is not the direct result of the injury, it cannot be said that death had resulted from the doing of the act which caused the injury and, therefore, S.299 of the Pakistan Penal Code will have no application".

In this case, the death of the injured man was not the direct result of the injures but on account of the careless and unskillful treatment of the medical authorities who operated upon him for extracting the pellets and appear to have failed to administer the ant-tetanus serum and to observe the other necessary precautions and, in these circumstances, it cannot be said that the death of Ghulam Qadir was the direct result of the injury caused by Talib Ali. Hence, the appellant cannot be held guilty of having committed the offence of culpable homicide and convicted under S. 302 P.P.C."

15. The doctors have been cross-examined by defence counsel. PW-3 Dr. Ghulam Rehmani stated in his cross-examination that all the wounds were healed and he found his lungs normal at the time of his post-mortem examination:-

میری رپورٹ کے مطابق نعش مقتول کے پھیپھڑے نارمل تحریر کیے گئے ہیں۔
میں نے شک و شبہ دور کرنے کی غرض سے نعش مقتول سے نمونہ جات لیے
تھے۔

Similar is the statement of PW-4 Dr. Mir Alam Afridi who also stated in his cross-examination that:-

سابقہ میڈیکل دستاویزات کے مطابق مقتول تین دن ہسپتال میں داخل ہونے
/رہنے کے بعد صحتمند ہونے پر ڈسچارج کیا گیا تھا۔ ریکارڈ کے مطابق مقتول کے
زخمات Healed تحریر کیے گئے ہیں۔ ۔۔۔۔۔ ریکارڈ کے مطابق مقتول
کے Lungs نارمل تحریر کیے گئے ہیں۔ ازخود کہا کہ میری رپورٹ کے
مطابق pulmonary سے مراد یہ ہے کہ دل سے جو خون کی رگ
پھیپھڑوں کو خون لے جاتی ہے وہ رگ بند ہوئی ہے۔۔۔۔۔ یہ درست ہے کہ
مقتول کو جن ڈاکٹرز سرجن، چسٹ سپشلسٹ نے معائنہ کیا ہے اُنکے رپورٹ
میں دل کی رگ جو خون دل سے پھیپھڑوں تک لے جاتی ہے اسمیں کوئی رکاوٹ
کا ذکر نہ ہے۔

The above abstracts from statements of the doctors clearly show that the deceased then injured was discharged from hospital after his recovery from the injuries. The medical evidence also transpires that no defect in the lungs of the deceased was detected at the time when he was examined soon after the occurrence. The medical term ***embolism*** has been defined in **Dorland's Pocket Medical Dictionary (28th Edition)** as *"the sudden blocking of an artery by a clot or foreign material which has been brought to its sight of*

lodgment by the blood current" while ***pulmonary embolism*** has been defined as *"obstruction of the pulmonary artery or one of its branches by an **embolus**, the term next defined in the dictionary according to which it is a mass of clotted blood or other material brought by the blood from one vessel and forced into a smaller one, obstructing the circulation"*. Another term ***air embolism*** has also been defined in the said dictionary according to which it is caused *"due to air bubbles entering the veins from trauma, surgical procedures, or severe decompression sickness"*. On comparison of both the definitions given for the terms 'pulmonary embolism' and 'air embolism' reproduced herein above, there appears a difference of the words *"surgical procedure"* which have not been used while explaining the medical term *'pulmonary embolism'* from which it can be inferred that surgery may cause *'air embolism'* but not the *'pulmonary embolism'* which is the point under consideration in the present case. From the statements of doctors (PW-3 & PW-4) and the above mentioned dictionary meanings of 'pulmonary embolism' we reach to the conclusion that **may be** the death have occurred due

to chronic pulmonary embolism but there is nothing on the record from which it could finally be concluded that the 'pulmonary embolism' was caused either by the injuries sustained by deceased or due to his surgery soon after the occurrence. The reports of the doctors who were examined as PWs in this case, clearly show that they are not certain in their conclusion that the cause of death was pulmonary embolism even they are not sure that the deceased was suffering from the said disorder. In such situation, how can we consider the ambiguous opinion of doctors for awarding capital punishment to the appellant. Keeping in view the age and physique of the deceased and his death after 19/20 days of the occurrence on his recovery from the previous injuries, it will be highly unsafe to hold that death of the deceased was the result of stab injuries he sustained in the occurrence, as such, Section 302 P.P.C cannot be attracted in this case rather it would be fairer and safer to convict the appellant under Sections 324/337-D, P.P.C keeping in view the prevailing circumstances of the case. Wisdom is derived from the judgment in the case titled *"Muhammad Rahim Vs. Kajeerullah and another"*

(1969 PCr.LJ 18 Supreme Court) wherein it has been held that:-

> **"In this state of evidence it could not be safely found that peritonitis was caused by the abdominal injury inflicted on the deceased by the respondent. The learned Judges in the High Court were, therefore, justified in altering the conviction of the respondent to section 326, P.P.C and no valid ground is made to appear for interference by this Court. The appeal is dismissed".**

16. As a backdrop of the above discussion, this appeal is partially allowed, conviction of the appellant is maintained, however, the sentence is altered from 302 (b) P.P.C to 324 P.P.C and sentenced to 10 years rigorous imprisonment. He is also convicted under Section 337-D P.P.C and sentenced to 5 years rigorous imprisonment with payment of *arsh* i.e one-third of *diyat* payable to the legal heirs of complainant or in default he is to be kept in prison as a person undergoing simple imprisonment or he may approach the trial Court as provided under Section 337-x P.P.C. The substantive sentences shall run concurrently with each other. Benefit of 382-B, has already been extended by the trial Court. Since we have already

altered the life imprisonment to the above mentioned sentence, the criminal revision .. filed by the legal heirs of the deceased has become infructuous, hence, dismissed.

Announced.
Dt: 06.02.2018

JUDGE

JUDGE

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