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Judgment Sheet
IN THE LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

Criminal Appeal No.596 of 2017
(Zaka Ullah Vs. The State)
and
Murder Reference No.63 of 2017
(The State v. Zaka Ullah)

JUDGMENT

Date of hearing: 05.03.2020

Appellant by:	Sardar Abdul Raziq Khan, Advocate.
Complainant by:	Mr.Khurram Shahzad, Advocate.
State by:	Mr.Shahid Mahmood, Deputy Prosecutor General Punjab along with Afzaal SI with record.

Ch. Abdul Aziz, J. Zaka Ullah (appellant), involved in case F.I.R No.451/2014 dated 23.12.2014 registered under section 302 PPC at Police Station Kallar Syedan, District Rawalpindi, was tried by learned Additional Sessions Judge, Rawalpindi and vide judgment dated 09.06.2017 was convicted and sentenced as under:-

> **Under Section 302(b) PPC** to suffer death sentence. He was also directed to pay Rs.2,00,000/- as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default whereof to undergo six months SI”**.**

Challenging his conviction and sentence, Zaka Ullah (appellant) filed **Criminal Appeal No.596 of 2017**, whereas trial court sent reference under section 374, Cr.P.C. which was numbered as **Murder Reference No.63 of 2017** for confirmation or otherwise of death sentence awarded to him. Both these matters are being disposed of through this single judgment.

2. Succinctly stated the case of prosecution as it unfolded from FIR (Exh.PA) lodged by Naheed Akhtar is to the effect that she was resident of Behai Mehar Ali Tehsil Kallar Sayedan, District Rawalpindi; that she got married with Muhammad Shabbir in the year 1987; that out of the said wedlock the couple was blessed with three sons and three daughters and

all were living in Norway; that on 22.03.2014 she alone came to Pakistan and started constructing a house in Mohallah Boys High School Kallar Sayedan; that she had given the construction work on contract and herself was looking after the whole affair pertaining to construction; that she along with mason and labourers was residing in a house adjacent to the under construction structure; that on 23.12.2014 at about 08:35 p.m. she was present at her place of abode, and attracted to a knock at the outer door; that she found Zaka Ullah (appellant) with red colour box standing there who sprinkled petrol on her and then kindled fire with lighter and ran away; that on hearing her hue and cries, mason and labourer, namely, Muhammad Abid and Shahid Yousaf along with other people of the locality attracted to the spot; that they stifled the fire and took her to THQ Hospital for medical treatment. Motive behind the occurrence was that Zaka Ullah used to demand money from Mst.Naheed Akhtar which she refused to disburse.

3. On 23.12.2014, Altaf Gohar SI (PW.7) on receipt of information of the occurrence reached at THQ, Hospital Kallar Syedan and found Naheed Akhtar lying in injured condition with burn marks; that he after permission from the Doctor got recorded statement (Exh.PH) of Naheed Akhtar and thereafter sent it to the police station, which later on was reduced into formal FIR (Exh.PA) and thereafter prepared injury statement (Exh.PJ). Subsequent thereto he visited the crime scene and prepared rough site plan (Exh.PK). He secured one petrol gallon (P.1) and took into possession through recovery memo (Exh.PL). After medical examination of Naheed Akhtar, he collected her burnt clothes which includes one brazier (P.2), one burnt shoe (P.3), one shirt mustered colour (P.4), one burnt sweater purple colour (P.5) and took them into possession through recovery memo. On 26.12.2014 one Saleem Akhtar alias Mithu appeared along with Zaka Ullah (appellant), whose hands and face was swollen. Asif Gohar SI (PW.7) took Zaka Ullah to THQ Hospital for treatment, wherefrom he was referred to Holy Family Hospital, Rawalpindi.

On 28.12.2014 investigation of the case was entrusted to Insthiaq Masood inspector (PW.4) who arrested Zakah Ullah (appellant) on 07.01.2015, after being discharged from hospital. After receipt of

information about the death of Naheed Akhtar, he submitted application for issuance of docket (Ex.PD). Thereafter, Muhammad Ilyas SI (PW.8) received death certificate (Exh.PL/1-3) of Naheed Akhtar from the Executive Officer of the District Court of Heggen Og Froland Tingrett.

4. Prosecution in order to prove its case against the appellant produced eight PWs including **Muhammad Abid (PW.2)** & **Shahid Yousaf (PW.3)**, who provided some details of the occurrence, **Dr.Ruqayia Bibi (PW.5)** & **Dr.Adnan Tariq (PW.6)** who furnished medical evidence and **Ishtiaq Masood Inspector (PW.4)** & **Altaf Gohar SI (PW.7)** who investigated the case. The remaining witnesses, more or less, were formal in nature.

5. According to Dr. Ruqayia (PW.5), she examined Naheed Akhtar (deceased) in injured condition on 23.12.2014 at about 9:30 p.m. and observed following injuries on her person:-

> 1st injury: Whole face involving both ears; front of neck; hair of head on all sides.
> 2nd injury: Right upper chest.
> 3rd injury: Right shoulder.
> 4th injury: Right arm, forearm, hand alongwith wrist.
> 5th injury: Left upper arm, left hand with wrist.
> 6th injury: Whole back alongwith neck.
> 7th injury: History of physical abuse day before yesterday by the same person. On examination, blackish bruise 2.5x0.5cm on left breast medial size, 2x0.5cm blackish bruise on right chest medial size.
> She was referred to Holy Family Hospital Rawalpindi for further medical treatment after giving first aid.
> Nature of injuries: Burnt.
> Probable duration of injuries: within 6 hours.
> Kind of weapon used: Burn material (petrol).

On 25.12.2014 at about 11:09 P.M. Dr.Adnan Tariq (PW.6) medically examined Zaka Ullah (appellant) and observed following traumas on his body:-

> The patient had superficial skin burn of whole face, head up to lower part of occipital region back and in front up to upper part of neck.
> 1. There was also superficial skin burn of hands, front and back up to wrist. He referred the patient to Holy Family Hospital, Rawalpindi for further management.
>
> The Medical Officer suspected that the burnt might had occurred within 72 hours.

6. After the conclusion of prosecution evidence, the learned trial court examined the appellant under section 342, Cr.P.C. who in response to

question "why this case is against you and why the complainant and PWs have deposed against you", replied as under:-

> "There were some family differences between Mst. Naheed Akhtar and her husband Muhammad Shabbir. Mst. Naheed Akhtar came to Pakistan and remained here for 8/9 months. During the said period her husband Muhammad Shabbir and children never visited Pakistan. Construction work of her house was also underway, which was being supervised by me. My vehicle was also in use of Mst. Naheed Akhtar and we both were having cordial relations like brother and sister. In the absence of her husband and children I was providing all my support and help to her. Muhammad Shabbir was unhappy on our such relations and he started leveling false allegations. On the day of occurrence Muhammad Shabbir leveled false allegation on telephone whereupon Mst. Naheed Akhtar became infuriated and attempted to commit suicide by setting her to fire. I tried to stifle the fire and during the said process I myself got injured having received burn injuries. We both were taken to THQ Hospital, Kallar Syedan and later we were shifted to Holy Family Hospital, Rawalpindi. Mst. Naheed Akhtar neither raised any allegation against me nor made any statement to the police nor I was involved in the occurrence in any manner whatsoever. The police with the connivance of Muhammad Shabbir has concocted a false story and thereby registered the instant case against me through misrepresentation and transgression of authority. The investigation was also carried out in a dishonest, partial and fictitious manner".

The appellant neither opted to make statement under section 340(2) of Cr.P.C. nor produced any evidence in his defence. On the conclusion of trial, the appellant was convicted and sentenced as afore-stated.

7. It is contended by learned counsel for the appellant that apparently the case in hand is arising out of a promptly lodged FIR, however, it was made to look so through tampering of record; that since the complaint does not bear either the signatures or thumb impressions of Naheed Akhtar (deceased), hence the FIR subsequently registered thereupon had no legal sanctity; that victim Naheed Akhtar though initially remained admitted in THQ Hospital Kallar Syedan but later on was shifted to Norway where she died; that admittedly no legally admissible medical record from Norway was produced during trial so as to prove beyond shred of any doubt that deceased died due to burn injuries received during the occurrence; that two witnesses of occurrence, namely, Abid and Shahid Yousaf stated not a single word that the deceased was set to fire by the appellant; that in fact Naheed Akhtar made an attempt to commit suicide and the appellant was falsely implicated in the case; that though the prosecution miserably failed to prove the guilt of appellant, however even

then the appellant was handed down a guilty verdict which is liable to be set-aside.

8. On the other hand, learned law officer assisted by learned counsel for the complainant came forward with the submissions that the case is emerging from a promptly lodged FIR which was registered on the complaint of none other than the deceased herself; that the complaint prepared on the statement of Naheed Akhtar is admissible in evidence being dying declaration; that the guilt of the appellant is further established from the statements of PW.2 Muhammad Abid and PW.3 Shahid Yousaf who went on to hold Zaka Ullah responsible for the occurrence; that the case of prosecution is further corroborated from the medical evidence furnished during trial; that it was reasonably established through letter issued by Interpol Oslo that the deceased died due to burn injuries and that since the prosecution successfully proved its case beyond any doubt, hence the conviction awarded to the appellant needs no interference.

9. Arguments heard. Record perused.

10. The case of prosecution, so to speak, revolves around an occurrence having taken place on 23.12.2014 at about 8:35 p.m. during which Zaka Ullah (appellant) statedly set ablaze Naheed Akhtar (deceased) after pouring gasoline upon her. The tale of occurrence was imparted to police in THQ Hospital, Kallar Syedan by none other than the victim Naheed Akhtar herself at about 10:10 p.m. through her statement (Exh.PH), which shortly thereafter was transcribed into FIR (Exh.PA). The same statement is canvassed by the prosecution as dying declaration. Naheed Akhtar (deceased) remained admitted in hospital with burn injuries on her person and since was a Norwegian national, hence on 18.01.2015 was shifted to Norway through Air-Ambulance. As per letter (Exh.PN) issued by Interpol Oslo, Naheed Akhtar remained admitted in Haukeland University Hospital, Norway with extensive burn traumas and took her last breath on 21.01.2015.

11. While dilating upon the merits, it is observed that information of crime was reported to police without afflux of any delay and as a necessary consequence the FIR was registered within one hour and twenty

minutes and the sole perpetrator nominated therein was Zaka Ullah (appellant). The learned defence counsel drew our attention towards the absence of signature or thumb impression of Naheed Akhtar (deceased/complainant) upon her statement (Exh.PH), thereby, endeavoured to persuade us that the FIR registered thereupon has no legal sanctity. Since the complaint (Exh.PH) was prepared upon the statement of victim of crime, hence we eloquently pondered upon the afore-mentioned objection. It is noticed that Naheed Akhtar (victim/deceased) after being brought to THQ Hospital was provided medical care by Dr. Ruqayia (PW.5). As per deposition of Dr. Ruqayia (PW.5) both hands, wrists and arms of Naheed Akhtar were badly burnt and as a necessary corollary, it can be held without an exaggeration that obtaining of her signature upon the complaint was out of question. In a wrestle with the proposition, we have also peeped through the judicial archives and have come across certain precedents from Indian jurisdiction wherein affixing of foot thumb/toe impression is considered a sufficient substitute to the disability of signing a statement under section 154 Cr.P.C. and some of them can be quoted as *Rishi v. State* [**2008 (15) R.C.R (Criminal) 339]**, *Mahender Kaushik & another v. State of Delhi* [**2015 (29) R.C.R (Criminal) 883],** *State of Gujarat v. Patel Maheshbhai Ranchhodbhai* [**2008 (3) GLR 2566],** *Ramesh s/o Tulshiram Mahajan v. The State of Maharashtra* [**2011 (21) R.C.R (Criminal) 762]**, *C. Suresh v. The State* [**2015 (1) MadWN (Cri) 238]**, *Shri Ganesh Sakharam Kamble v. State of Maharashtra* [**2011 (3) Bomb. C.R (Cri.) 586]** and *Rameshbhai Dahyabhai v. State of Gujarat* [**2008 Cri.L.R 761]**. The frailty of afore-mentioned interpretation of courts from across the border stands exposed when scrutinized on the touchstone of definition of expression "sign" embodied in section 3 (52) of The General Clauses Act, 1897 which does not include toe impression even as a substitute. For the clarity of proposition the foregoing provision is being reproduced hereunder:-

> "**Sign**". "Sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions".

The afore-mentioned definition leaves no room for discussion that use of toe impression by respected courts from Indian jurisdiction as a substitute to "sign" can at the most be treated as suggestive in nature but cannot be taken as rule of thumb. It would be advantageous to set out at this stage that the legislative intent ensued from use of expression "sign" in section 154 Cr.P.C. at the most is to ensure the identity of the informant and the correctness with which such statement/information is recorded. In the instant case, statement of Naheed Akhtar was recorded in the presence of Dr. Ruqayia (PW.5) and a gist of it was even mentioned in MLC (Exh.PE) as well. Last but not the least, neither Dr. Ruqayia (PW.5) nor Altaf Gohar SI (PW.7) had any personal grouse against Zaka Ullah (appellant) so as to incorporate incorrect tale of occurrence in the complaint (Exh.PH). To be precise, if from the attending circumstances court can draw a satisfactory impression that FIR was registered on the statement of person mentioned therein, the absence of his sign and that too on account of some disability cannot be taken as an illegality or irregularity so as to damage the prosecution case. This rule can inflexibly be applied in the instant case wherein the first informant i.e. Naheed Akhtar (deceased) was having burn injuries on both her hands, thus as a necessary consequence, absence of her sign on the complaint is an ignorable omission.

12. The mainstay of prosecution case is the dying declaration (Exh.PH) of deceased Naheed Akhtar, which also formed basis of FIR (Exh.PA). As per record, the dying declaration was made in the presence of Dr. Ruqayia (PW.5) and Altaf Gohar SI (PW.7) in THQ Hospital Kallar Syedan, within one hour and twenty minutes of the occurrence and Zaka Ullah (appellant) is the sole perpetrator nominated therein. The tale of incident, as set out in complaint/dying declaration (Exh.PH), is to the effect that Naheed Akhtar, a Norway based Overseas Pakistani was constructing house in her ancestral town i.e. Kallar Syedan and had hired the services of Zaka Ullah (appellant) as contractor. On the fateful night, Naheed Akhtar came out of her house upon a knock at the door and fell prey to the assault of Zaka Ullah, who after sprinkling gasoline set her to fire. Since Naheed Akhtar

died subsequently, hence her statement (Exh.PH) was used during trial as dying declaration and is projected the bastion of prosecution case.

13. It needs no mention that during trial evidence is to be recorded strictly within the framework of Qanun-e-Shahdat Order, 1984. Whenever there is a doubt during trial about the relevancy and admissibility of certain facts as evidence, its fate is to be decided in accordance with the provisions of Qanun-e-Shahadat Order, 1984. The admissibility of dying declaration is derived from Article 46 of Qanun-e-Shahadat Order, 1984 which is placed in Chapter-III titled as **"OF THE RELEVANCY OF FACTS"**. It is embedded in Article 46 that eight kinds of statements of relevant facts made by persons who are dead or untraceable or have become incapacitated to depose or whose attendance cannot be procured without an amount of delay or expense deemed unreasonable by the court, can be brought on record and dying declaration is one of them. According to Article 46 (1), a statement in order to qualify for acceptance as dying declaration, must be made by a person regarding the causes or circumstances leading to his death. It is not necessary that while making such statement, its maker must be having a looming danger of losing his life. It is also of immense importance to mention here that such statement can only be used in proceedings where the cause of death of its maker is in question. While making a dying declaration, its maker must be in full control over all his/her faculties so as to exclude the possibility that the words so spoken by him were not out of stupor of death. This object, needless to mention, can be achieved by obtaining opinion of doctor regarding fitness of dying person to make a lucid statement. The intrinsic worth of such statement/evidence is to be adjudged in consonance with general principles laid down for appraisal of evidence. If the accused has history of hostility either with the maker of dying declaration or with witnesses before whom such statement was recorded, the put forth tale of incident must be subjected to scrutiny on the touchstone of corroboration. Since the Legislature have used the expression "written or verbal" in Article 46, hence by no implications a dying declaration can be restricted to written statements only. A dying declaration, in order to form basis of conviction, must not be polluted from menace of prompting or tutoring

and be recorded at the earliest. Admittedly, Article 46 (1) does not contemplate the mode, manner or the forum for recording a dying declaration, however, certain guidelines are laid down in Chapter-25 Rule 21 of Police Rules, 1934 which for advantage sake are being reproduced hereunder:-

> **"25.21. Dying declarations.**--- (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.
> (2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.
> (3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.
> (4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.
> (5) A dying declaration made to a police officer should, under section 162, Code of Criminal Procedure, be signed by the person making it."

14. While reverting back to the facts of case it is noticed that dying declaration of Naheed Akhtar (Exh.PH) was recorded in the presence of Dr. Ruqayia (PW.5) in THQ Hospital Kaller Syedan, who also affixed her signatures (Exh.PH/1) upon it as certificate of correctness. Before recording such statement, Dr. Ruqayia gave opinion (Exh.PG/1) on a police query (Exh.PG) that Naheed Akhtar was fit to make statement. The control of Naheed Akhtar over her faculties to narrate lucid detail of this unfortunate saga can further be gathered from the following excerpt of Dr. Ruqayia (PW.5):-

> "When I examined injured Naheed Akhtar she was quite well and there was no indication that injuries of such nature of sudden death. Volunteered that in case of burn injuries, immediate death does not happen."

The doctor unequivocally deposed that the dying declaration (Exh.PH) was recorded in her presence and she also verified its contents. The defence remained abortive to dislodge the afore-mentioned claim of Dr. Ruqayia (PW.5) and the defence failed to bring on record any material from which we may form an opinion that Dr. Ruqayia had any sinister or hideous design to falsely grill Zaka Ullah in the instant case. Similar is the case of Investigating Officer, Altaf Gohar SI (PW.7) who also had no reason to support an incorrect theory of crime arising out of the dying

declaration. Neither of the afore-mentioned two witnesses was either related with deceased or had any affair of abhorrence with the appellant, thus by no stretch they can be treated as mendacious. Likewise, nothing as such is available from which it may even remotely insinuate that Naheed Akhtar (deceased) was pitched in an affair of grouse or grudge with Zaka Ullah so as to substitute him in her dying declaration as the sole perpetrator of crime by letting the actual culprit go scot-free.

15. We are mindful of the fact that according to scheme of things provided in Chapter 25 Rule 21 of the Police Rules, 1934 (referred above), a dying declaration is not ideally to be recorded by a doctor. At the same time, we are not oblivious of the fact that after noticing sky rocketed increase in cases of violent burn or acid injuries, section 174-A was inserted in Code of Criminal Procedure 1898 through Ordinance No.XXXVII of 2001. Through the insertion of afore-mentioned section, it was made incumbent upon a medical officer to record the statement of person brought before him with burn traumas. The legislative intent of using such statement as dying declaration in a subsequent proceeding manifests from sub-section 3 of section 174-A Cr.P.C., which as ready reference is being mentioned hereunder:-

> "If the injured person is unable, for any reason, to make the statement, before the Magistrate, his statement recorded by the Medical Officer on duty under sub-section (1) shall be sent in sealed cover to the Magistrate or the trial court if it is other than the Magistrate and may be accepted in evidence as a dying declaration if the injured person expires".

Admittedly, section 174-A, Cr.P.C. and Rule 25-21 of Police Rules, 1934 are to some extent in conflict with each other so far as the mode and manner of recording the statement of an injured for being used subsequently as dying declaration is concerned. Suffice it to say in this regard that Rules are always subservient to the Statute and in case of a conflict, the latter is to be given effect. Thus, non-adherence to Police Rules while recording dying declaration cannot be used to the detriment of prosecution case. Even otherwise, it is crystalized from the bare reading of section 174-A Cr.P.C. that it is inserted in the statute to advance the purpose for which Article 46 of Qanun-e-Shahadat Order, 1984 was enacted but is restricted only to the extent of cases in which hurt is caused

through corrosive substance. To be precise, we are satisfied that evidence of dying declaration inspires confidence and as per settled principles, if such declaration is found to be free from doubt, conviction can be awarded thereupon. In this regard, we will like to reproduce an observation of Hon'ble Supreme Court of Pakistan expressed in case *Niaz-ud-Din and another v. The State and another* **(2011 SCMR 725)** whereby the conviction awarded on dying declaration was upheld:-

> "As to the contention about the worth or genuineness of dying declaration of Rehman Ali Shah, it is worth noting that the same was made by him in the hospital, which was certified by the Doctor that he was conscious and was capable of making the statement. As held in Mst.Shamim Akhtar v. Fiaz Akhtar and 2 others (PLD 1992 SC 211) there is no special mode for recording such a declaration under Article 46 of Qanun-e-Shahadat Order, 1984. It was further held in the said case that the same could be used against the accused when there was nothing to suggest that deceased had substituted any innocent person in place of the real culprit."

Almost similar observation was given by the Hon'ble Supreme Court of Pakistan in case reported as *Farman Ullah v. Qadeem Khan and another* **(2001 SCMR 1474)** and accordingly conviction awarded on dying declaration was upheld.

16. Though we have formed an opinion that dying declaration inspires confidence but even then, as an abundant caution, further made a careful scrutiny of record so as to exclude all the hypotheses of appellant's innocence. It is noticed that Muhammad Abid and Shahid Yousaf (PW.2 & PW.3), who though were not distinctly related to the deceased but even then appeared in the dock and held appellant solely responsible for this occurrence. Muhammad Abid (PW.2) & Shahid Yousaf (PW.3) while having their abode in the under-construction house of the deceased were rendering services as labourer and mason in the ongoing work. Since Zaka Ullah (appellant) was also working as contractor in the same house, thus was no stranger to them. Nothing as such emerges from record, reflecting that Muhammad Abid and Shahid Yousaf (PWs) were biased, out of enmity or due to any other reason, against Zaka Ullah (appellant). Inevitably, due to foregoing reasons both of them can be treated as natural and independent witnesses and explicit reliance can be placed upon their deposition. The acclaimed presence of Shahid Yousaf is further proved from MLC (Exh.PE) wherein he is shown to have brought Naheed Akhtar

to hospital and that too immediately after the occurrence. The two witnesses attracted to the crime scene after hearing the hue and cry of Naheed Akhtar and saw her engulfed in fire. There is an honest admission by both the witnesses that they had neither seen Zaka Ullah pouring gasoline upon the deceased nor igniting her to fire. This aspect is vociferously projected by the defence for excluding the testimony of these witnesses from consideration but in our view, it positively reflects upon their honesty and credibility. Legally speaking, the deposition of both the afore-mentioned witnesses is in the nature of *res gestae* and is admissible in evidence. The term *res gestae* is Latin and is defined in Black's Law Dictionary in the following manner:-

> "The res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to having a direct casual connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence."

The rule of *res gestae* found its place in section 6 of the Evidence Act, 1872 (since repealed) as well as in Article 19 of the Qanun-e-Shahadat Order, 1984. The latter provision from Qanun-e-Shahadat Order, 1984 along with one of its illustration is being referred hereunder for the clarity of proposition:-

> "**19.Relevancy of facts forming part of same transaction**.—Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different time and places."
>
> *Illustrations*
>
> (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

Bare look of Article 19 and the Illustration annexed therewith leads to the inference that an evidence/circumstance to attain the status of *res gestae* must be connected with the fact in issue in the manner so as to form same transaction. Such facts must be incidental and explanatory to the main occurrence and can even be arising out of acts or from words, performed or uttered by someone immediately after the event in question. The event of *res gestae* must also be closely connected with the fact in issue in term of proximity of time. The afflux of some delay between the

fact in issue and the event canvassed as *res gestae* will separate them from each other giving rise to a possibility so as to be part of some other transaction. The concept of *res gestae* can better be understood from an observation of Hon'ble Supreme Court of Pakistan expressed in case reported as *Shabbir Hussain alias Sukku v. The State* **(PLD 2003 Supreme Court 368)** which for advantage sake is being reproduced hereunder:-

> "In order to attract the application of Article 19 of Qanun-e-Shahadat it is important to bear in mind that the facts, which are connected with the fact in issue as "part of transaction" under investigation are admissible as relevant facts. In order to apply the said rule the point for decision will always be whether the said facts do form part or are too remote to be considered really part of the transaction before the court."

In the aftermath of what is discussed above, we have evaluated the testimony of Muhammad Abid and Shahid Yousaf (PWs) with utmost circumspection. Both the witnesses reached the spot immediately after the occurrence and found Naheed Akhtar engulfed in fire and also heard her crying that Zaka Ullah (appellant) did it. Muhammad Abid (PW.2) further deposed that he also saw Zaka Ullah running from the spot. The deposition of both the witnesses inescapably comes within the purview of Article 19 of Qanun-e-Shahadat Order, 1984. We have also taken note of the fact that the event forming *res gestae* occurred in a manner that it can safely be stated as connected with the main occurrence and cannot be separated therefrom. In the case reported *Krishna Ram Das v. The State* **(AIR 1964 ASSAM 53)**, the evidence of *res gestae* met acceptance for conviction with following observation:-

> "That apart, the statement made by the deceased very shortly after he sustained the injuries, is admissible in evidence under section 6 of the Evidence Act. Under this section, any statement made by a victim or the by-standers, so shortly after the incident as to become part of the same transaction with it is relevant, and accordingly the statement made by the deceased almost immediately after the assault on him by the appellant is perfectly relevant under section 6 of the Evidence Act. In any view of the matter, the learned Sessions Jude was quite justified in accepting the evidence concerned, that is the statement made by the deceased, as relevant and relying on it as a credible piece of evidence."

In another case reported as *Muhammad Aslam Shah v. The State* **(1993 PCrLJ 704)** the Hon'ble Division Bench of Peshawar High Court

while expounding upon Article 19 of Qanun-e-Shahadat Order, 1984 observed as under:-

> "The statement of Phul Hussain Shah (P.W.7) made to Qasim Shah (P.W.8) and the factum of his seeing the convict-appellant going away from the spot immediately after the occurrence holding a gun in his hand were made under immediate influence of a transaction in order to characterise it and explain circumstances connected therewith which are admissible under Article 19 of the Qanun-e-Shahadat, 1984, particularly when there was no further time for thinking and fabrication. The statement made by Phul Hussain Shah to Qasim Shah P.W. was substantially contemporaneous with the act. The interval between the act of firing the deceased to death and the declaration was not such as to allow of fabrication. In consequence, the evidence of Qasim Shah would be admissible under Article 19 of Qanun-e-Shahadat Order, 1984 and no possible exception could be taken thereto."

17. In our considered view, for a just decision, the case of prosecution is to be reviewed by placing it in two different compartments. The first part of prosecution case comprises upon the main incident wherein burn injuries were caused to Naheed Akhtar and the second one relates to her death. So far as, the causing of burn injuries to Naheed Akhtar is concerned, the guilt of appellant is established beyond shred of any suspicion from the dying declaration of deceased as well as from the statements of Muhammad Abid and Shahid Yousaf (PWs). However, the prosecution is found to have failed in proving beyond scintilla of any doubt that the deceased died in Norway due to no other reason but because of burn injuries caused by the appellant. In order to prove the death cause of Naheed Akhtar, the prosecution solely banked upon Letter of Interpol (Exh.PN) and Certificate of Death (Exh.PL/1) issued by District Court of Heggen Og Froland Tingrett. Both the documents were brought on record through the statement of learned Assistant District Public Prosecutor apparently under section 510 Cr.P.C. It needs no mention that through this provision, only the documents purporting to be report of Chemical Examiner, Serologist, Finger Print Expert, Firearm Expert appointed by the Government are admissible in a criminal trial, without calling them as witnesses. In this backdrop, we are swayed to hold that Letter of Interpol (Exh.PN) and Certificate of Death (Exh.PL/1) since were not issued by Experts appointed by Government of Pakistan in terms of section 510 Cr.P.C, thus were not *per se* admissible under the foregoing provision. As

a necessary consequence, it can safely be concluded that not an iota of evidence is available on record to prove with certainty that the deceased died only due to the injuries received during the crime in question, thus the conviction and sentence of Zaka Ullah (appellant) under section 302 (b) PPC is unsustainable. However, the prosecution has proved beyond doubt that the burn injuries were caused to the ill-fated Naheed Akhtar by none other than the appellant. A very complex question of law arises that whether the failure of prosecution to prove the charge under section 302 (b) PPC damages the evidence of dying declaration or not. For the answer of the foregoing query, Article 46 (1) of Qanun-e-Shahadat Order, 1984 is essentially required to be recapitulated hereunder:-

> "**When it relates to cause of death**: When the statement is made by a person as to the cause of his death, **or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question** such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question." (emphasis provided).

It manifests beyond shred of any ambiguity that the use of expression "circumstances resulted in his death" in Article 46 (1) is of higher import and wider in scope. Due to this reason, even if the prosecution has failed to prove the charge of murder, still the dying declaration can be used for awarding conviction to the appellant in some other proved offence. The scope of Article 46 (1) came under discussion before the Hon'ble Federal Shariat Court of Pakistan in case reported as *Irfan v. State* **(PLJ 2010 FSC 203)** and was dilated upon in the manner mentioned hereunder:-

> "The statement, verbal or written, of relevant facts made by a person as to the cause of his death or as to any circumstance which resulted in his death is relevant. The words "resulted in his death" are significant in this provision of law. These words are wider in scope than the term "cause of his death". Such a statement becomes relevant as dying declaration."

18. We have also gone through the defence put forth by the appellant so as to see that whether any circumstance emerges therefrom, the legitimate benefit of which can be extended to him. According to the defence version, Naheed Akhtar got perturbed after the receipt of a phone call from her husband in Norway whereby any allegation of unchastity

was levelled and thereafter committed suicide. The question arises that if such defence version was based on truth then why instead of accompanying the injured Naheed Akhtar to hospital, the appellant preferred for an escape from the crime scene. This is also not understandable that why he was implicated by Naheed Akhtar and two other witnesses in the case as solitary accused, more importantly when there was no previous enmity. Without an exaggeration, the defence of the appellant is found by us to be preposterous in nature, thus is destined to be discarded.

19. The epitome of above discussion is to the effect that prosecution has failed to prove its case against the appellant under section 302 (b) PPC, thus the conviction in this regard is set-aside. However, since the prosecution successfully proved that Zaka Ullah (appellant) caused burn injuries to Naheed Akhtar after pouring petrol upon her, thus he is found guilty of offence under section 336-B PPC and accordingly sentenced to suffer rigorous imprisonment of fourteen years along with fine of rupees one million with the benefit of section 382-B Cr.P.C. In case of default to pay fine, the appellant shall further undergo simple imprisonment of five years. With said modification in the conviction and sentence of Zaka Ullah (appellant), **Criminal Appeal No.596 of 2017** stands dismissed.

20. Resultantly, **Murder Reference No.63 of 2017** is answered in the **NEGATIVE** and death sentence awarded to Zaka Ullah (convict) is **NOT CONFIRMED**.

(RAJA SHAHID MEHMOOD ABBASI)
JUDGE

(CH.ABDUL AZIZ)
JUDGE

APPROVED FOR REPORTING

(CH.ABDUL AZIZ)
JUDGE

Najum*