

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

Hon: Mr. Justice Dr. Agha Rafiq Ahmed Khan, Chief Justice
 Hon: Mr. Justice Allama Dr. Fida Muhammad Khan
 Hon: Mrs. Justice Ashraf Jahan.

JAIL CRIMINAL APPEAL NO.26/K of 2010

1. Muhammad Hassan alias Sharif	
2. Makhan	Appellants

Versus.

The State	Respondent.
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CRIMINAL APPEAL NO.27/K OF 2010

Fida Hussain	Appellant.
	Versus.	

The State	Respondent.
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MURDER REFERENCE NO.1/K OF 2011

The State	Appellant
	Versus.	
Fida Hussain	Respondent

Counsel for the appellants (in Jail Cr.A.No.26/K/2010)	... Mr. Muhammad Zeeshan Adhi, Advocate
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Counsel for the appellant (in Cr.A.No.27/K/2010)	... Mr. Muhammad Ghulamullah Chang, Advocate
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For the State	... Mr. Abrar Ali Khichi Assistant Prosecutor General Sindh
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Complainant	... In person
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FIR. Date & P.S.	... No.86/06 dated. 22.07.2006 P.S A Section Latifabad, Hyderabad.
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27.2.2014

Date of hearing	... 29.01.2014
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Date of decision	... 04.2.2014
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JUDGMENT

ASHRAF JAHAN, J:- By way of present appeals, the appellants have impugned the judgment dated 27.11.2010 delivered by the learned IIInd Additional Sessions Judge, Hyderabad, in Sessions Case No.368 of 2006 arising out of the crime No.86 of 2006 of Police Station A-Section, Latifabad Hyderabad, under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance 1979, (hereinafter referred to as the “Ordinance”), whereby they have been convicted and sentenced under section 396 PPC. The accused Fida Hussain was awarded death penalty, whereas co-accused Makhan and Muhammad Hassan were awarded sentence for imprisonment for life, they were also made liable to pay fine of Rs.100,000/-each and in case of failure to pay the fine, to remain in jail for further period of six months. The accused Muhammad Ali was awarded rigorous imprisonment for the period he had already remained in jail alongwith fine of Rs.10,000/-, and in case of failure to undergo simple imprisonment for three months more.

2. Simultaneously Criminal Murder Reference No.1/K of 2011 was also received for confirmation of death sentence as provided under section 374 Cr.P.C.

3. As both the appeals alongwith reference have arisen out of one judgment, therefore, the same have been disposed of vide common short order dated 4.2.2014, which reads as:-

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"For reasons to be recorded later on, both the Cr. Appeals i.e. Jail Cr. Appeal No.26/K/2010 and Cr. Appeal No.27/K/2010 are allowed. The conviction and sentence of appellants Fida Hussain, Makhan and Muhammad Hassan are set aside and they are acquitted of the charges. Consequently Criminal Murder Reference No.01-K/2011 under Section 374 Cr.P.C. in Sessions Case No.368/2006, State Vs. Muhammad Hassan and others is answered in negative. The appellants be released forthwith if not required in any other custody case. The Case property is not claimed by any other person. Let the same be returned to complainant. Applications accordingly disposed of."

4. Following are the reasons for the above order.
 5. The relevant facts as per FIR lodged on 22.7.2006 by the complainant Abdul Sajid Siddiqui are that, on 17.07.2006 he alongwith other family members was asleep in the house, when in between 03:30 to 04:00 a.m., he and his wife were awakened by the presence of four armed persons in his room. The culprits snatched a Seiko-5 wristwatch from him and two gold Karas/bangles from his wife. They also took out Rs.3,000/- from his pocket and one mobile phone Nokia 2600, thereafter, they tied both hands of the complainant on his back with dupatta and put a blanket over him. They demanded keys of the cupboard from his wife, which were accordingly given to them. They also enquired about other inmates of the house. One culprit guarded them, while the remaining went towards the other room. After 15 to 20 minutes, they heard cries of the complainant's younger son's wife and
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later on heard two firearm shots. Meanwhile, the culprit standing as guard also went away. The wife of the complainant opened the door lock and untied his hands. The complainant alongwith his wife went out and saw that his son Abdul Wahid alias Rizwan was standing there alongwith his other son and their wives, who while crying disclosed that his brother had been murdered. Meanwhile the neighbours, Munawar and others also reached there. However as the culprits took away the keys of the house, the lock of the house had to be broken and the injured Abdul Basit alias Imran was taken to Bhitai Hospital, Latifabad wherefrom he was referred to LMCH, Hyderabad. The complainant disclosed that one bullet hit his son's left hand's armpit and the other bullet hit on the left side of his chest. When they reached Civil Hospital, the doctor confirmed his death, thereafter they again brought the dead body to Bhitai Hospital and after postmortem, the dead body was brought to the house. After the funeral ceremony, the complainant appeared at the Police Station and lodged the report that four unknown culprits with muffled faces, during the robbery caused bullet injuries to his son, who subsequently died. It is further alleged that the culprits had robbed away two gold sets, one gold chain, one gold ear-ring, two wrist watches, one watch, two gold ladies' rings, one prize bond of Rs.15,000/- further prize bonds of Rs.200/- worth Rs.10,000/-and cash of Rs.8000/- to Rs.10,000/-

6. After the FIR, police started the investigation and arrested accused Fida Hussain, Makhan and Muhammad Hassan alias Sharif on 31.08.2006 during an encounter, whereas accused Muhammad Ali was

arrested on 10.09.2006. Recoveries of robbed articles were also made from the possession of accused persons. After completing the codal/usual formalities challan was submitted before the Court of law against all the four accused, whereas accused Jalal, Bashir and Shaukat Ali were shown as absconders in the challan sheet, who were declared as proclaimed offenders on 18.06.2007.

7. The charge under section 17 (4) of the Ordinance was framed against the accused persons on 07.07.2007 to which they pleaded not guilty and claimed for trial.

8. The prosecution in order to prove its case has examined 11 PWs, a gist of their evidence is hereby reproduced as under:-

- (i) Abdul Sajid Siddiqui, complainant of the instant case has been examined as Ex.17, he has endorsed the facts narrated in the FIR and has produced receipt dated 18.7.2006 regarding receiving the dead body of his deceased son Abdul Basit alias Imran as Ex.18, FIR as Ex.19 and memos of identification parade in respect of all accused as Ex.20 to 23 respectively.
- (ii) Mst. Birjees Jahan who is wife of complainant Abdul Sajid Siddiqui has been examined as Ex.24, in her examination-in-chief, she has supported the facts as stated in the FIR and further disclosed that she identified the accused persons during identification parade held on 12.09.2006.
- (iii) The third witness examined by the prosecution is PW Abdul Wahid son of complainant Abdul Sajid Siddiqui, he has supported the contents of F.I.R.
- (iv) The fourth witness examined by the prosecution is Liaquat Khan, who is mashir of place of wardat as well as arrest of accused

Muhammad Ali, he has produced the *mashirnama of sarzameen* as Ex.27, as well as *mashirnama* of arrest of accused Muhammad Ali and recovery of two gold bangles from him as Ex.28.

(v) Dr. Waseem Khan has been examined by the prosecution as Ex.29, he had conducted the postmortem of deceased Abdul Basit on 18.07.2006 and had issued such report, which has been produced on record as Ex.30. As per above report following injuries were found on his person:-

"1 (A) Punctured lacerated wound size 0.5 cm in diameter with inverted margins and scrotching on the right upper 1/3rd of Antero-lateral part of arm i.e. wound of entry.

1 (B) Punctured lacerated wound size 1 cm in diameter with averted margins on the posterior medial of upper 1/3rd of right arm (i.e. wound of exit).

2 (A) Punctured lacerated wound of firearm size 0.75 cm in diameter with inverted margins and scrotching on the right upper lateral part of chest (armpit) i.e. wound of entry.

2(B) Punctured lacerated wound of firearm size 01 cm in diameter with averted margins over the left Anterior lateral side of chest i.e. wound of exit.

According to the medical report, the cause of death was injury No.2 which involved the vital organs like lungs and heart causing severe hemorrhage, shock and was sufficient to cause death in ordinary course of nature resulting from discharge of fire arm.

(vi) The next witness is SIP Muhammad Sharif, who is the investigation officer of this case. As per his evidence, accused Muhammad Hassan alias Sharif, Fida Hussain son of Rustam Ali and Makhan son of Sharif were arrested after an encounter with police party headed by SIP Nazim Rao and robbed property was also recovered from their possession. He has deposed that on 05.09.2006, during interrogation accused Muhammad Hassan alias Sharif had volunteered to produce the robbed gold necklace, one gold ear-ring and gold rings, whereas accused Fida Hussain had volunteered to produce gold set with one gold ring and one

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gold ear-ring. Such articles were recovered from the outer wall of the house of accused Muhammad Hassan, likewise from the same place accused Fida Hussain produced the robbed articles in presence of *mashirs* PC Anwer Jamil and ASI Ali Nawaz. According to Investigation Officer he had received some information about the presence of accused Muhammad Ali near his house and he went alongwith the police party and arrested him on 10.09.2006, upon his personal search two gold karas were recovered from the side pocket of his shirt. He also got identification parade of the accused persons from the Court of concerned Magistrate on 12.09.2006 wherein the accused persons were duly identified by the witnesses. He has produced inquest report of deceased Abdul Basit as Ex.33, *mashirnama* of arrest and recovery from Muhammad Hassan and Fida Hussain as Ex.34.

- vii PW-Ali Nawaz, *mashir* of recovery is examined as Ex.36.
- viii Miss Shagufta A.Kaka, Senior Civil Judge, who had conducted the identification parade of accused persons has been examined as Ex.38.
- ix PW-Muhammad Nazim Rao, SHO, P.S A-Section, Latifabad is examined as Ex.39, he has deposed that on spy information he reached at the shrine of Currentwala Baba and arrested all the accused persons except accused Muhammad Ali after an encounter with police party. The accused had also surrendered their weapons. FIRs in respect of police encounter and possession of arms without licences were lodged. He has produced the *mashirnama* of arrest and recovery from all the three accused except accused Muhammad Ali as Ex.40, FIR in Crime No.110/2006 under section 353, 402, and 324 PPC as Ex.41, three FIRs under section 13-D. of the Arms Ordinance as Crime No.113/2006, Ex.42, F.I.R. in Crime No.112/2006 under section 13-D of the Arms Ordinance as Ex.43, FIR in Crime
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No.111/2006 under section 13-D of the Arms Ordinance as Ex.44, and daily dairy entry as Ex.45 on record.

- x SIP Muhammad Salman Farooqui is examined Ex.46.
- xi Last witness Tapedar Fakir Hussain Bux Jarwar has been examined as Ex.47, who has produced the map of place of wardat as Ex.48.

9. The side of the prosecution was closed vide statement dated 7.10.2010 as Ex.49 on record.

10. The statements of accused under Section 342 Cr.P.C. were recorded as Ex.50 to 54 on record, wherein they had denied the case of prosecution and taken the plea that they were falsely implicated in this case. In fact the incident had taken place due to fight between the two brothers, and recovery of property had been falsely foisted upon them in order to connect them with the commission of crime.

11. The appellants/accused did not make any statement on oath as provided under Section 340 (2) Cr.P.C. nor did they produce any evidence in their defence. After conclusion of the trial, the learned IIInd Additional Sessions Judge, Hyderabad, convicted and sentenced the appellants, vide judgment dated 27.11.2010 which is impugned before this court.

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12. We have heard the learned counsel appearing for the appellants, as well as learned State counsel and have perused the case record.

13. The learned counsel Mr. Ghulamullah Chang for the accused Fida Hussain has submitted that there is delay of 5 days in lodging FIR for which no plausible explanation has been given by the prosecution side. The prosecution has not examined the only eyewitness of the incident who is the wife of deceased, which is fatal to the case of the prosecution. Further, as per FIR the accused were with muffled faces, therefore, it is not understandable as to how they were identified during the identification parade by the prosecution witnesses. Reliance in this regard is placed upon the case of Ahmed Sher v. State (PLD 1995 FSC 20), Muhammad Fayyaz v. State (2012 S C M R 522) and Sabir Ali v. State (2011 S C M R 563). He has further contended that no independent witnesses have been examined by the prosecution side and even the neighbour whose name was given in the F.I.R. has not been examined. There is no recovery of crime weapon from the present accused. The accused as per alleged encounter were arrested on 31.8.2006 but their identification parade was held on 12.9.2006 for which no explanation has been given as to why identification parade was delayed. There are material contradictions in evidence brought on record and the prosecution has miserably failed to prove the charge against the present accused.

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14. Mr. Muhammad Zeshan Adhi Advocate for appellants Muhammad Hassan and Makhan has submitted that the complainant and his wife alongwith PW-Abdul Wahid are not the eyewitnesses of the incident as they have not witnessed the murder. The only witness who had seen the murder/incident was Mst. Saba, daughter-in-law of

the complainant but prosecution has not examined her. Besides, there are material discrepancies in the evidence brought on the record, the complainant has disclosed that the accused persons were talking in Seriki type Language whereas Pw-Birjees Jahan has disclosed that they were talking in Urdu. Further, the colour of *dupatta* with which the hands of complainant were tied as disclosed by complainant was pink whereas his wife has disclosed colour of *dupatta* as blue. Similarly, there is contradiction about the colour of blanket which was put upon the complainant by the accused persons as according to complainant it was of brown colour, whereas PW. Birjees Jahan has disclosed its colour as green. He has also vehemently urged that FIR was lodged after delay of 5 days, in consultation with the family, which makes the whole prosecution story doubtful. In support of his contentions he has relied upon the following case law:-

- i) *Bashir v. State (1995 S C M R 276)*
- ii) *Shafqat Mehmood v. State (2011 SCMR 537)*
- iii) *Jamal Khan v. State (2011 S C M R 546)*
- iv) *Ghulam Akbar v. State (2008 SCMR 1064)*

15. Mr. Ibrar Ali Khichi, Assistant Prosecution General, Sindh supported the impugned judgment and has submitted that the accused were arrested after police encounter, not only this but there is recovery of robbed articles from them. Therefore, the trial court has rightly convicted them in this case. He has relied upon the following case law in support of his contentions:

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- i) *Muhammad Nadeem v. State (2011 S C M R 872)*
- ii) *Mazhar Ali v. State (2005 S C M R 523)*
- iii) *Khadim Hussain v. State (2010 S C M R 1090)*

16. We have also heard the complainant, who has submitted that the present accused are the real culprits, therefore, their appeals may be dismissed.

17. We have considered the arguments advanced before us and have perused the impugned Judgment and the record of trial court minutely. The first and utmost crucial aspect of the present case is the inordinate delay in lodging the FIR. In the present day judicial system the purpose of lodging FIR, is to set criminal law in motion and to bring on record first hand spontaneous information about the occurrence of a crime. Thus the main object of recording FIR promptly is to provide a sound basis for carrying out investigation in the right direction excluding the possibility of fabrication of any false story. Whereas in the case in hand as per the case of prosecution the incident had taken place in the intervening night of 17 & 18 of July, 2006 in a thickly populated area of the city of Hyderabad but strangely FIR of the incident is lodged by the father of the deceased on 22.07.2006, i.e the fifth day of the incident. In view of the circumstances of present case, delay in lodging FIR cannot be taken lightly and it casts serious doubts on the case of the prosecution. It is a settled principle of law that delay in lodging the FIR can only be condoned when such delay has been adequately explained but such factor is also missing in this case.

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18. Additionally, it is important to note that during the evidence it has come on record that though the police had reached the place of occurrence on the very first day but despite that FIR was not lodged. In this regard the explanation given by the complainant is that since he was in great shock and tension, therefore, the FIR could not be lodged promptly. This explanation in our humble view carries no weight in the circumstances that a valuable human life had been lost during the incident, therefore, in the ordinary course of events no family can preclude itself from lodging the FIR. Besides, the complainant has also admitted in his cross-examination that he had lodged the FIR after consultation with his son and daughter-in-laws. Thus this casual attitude and inordinate delay in lodging FIR without any plausible explanation creates serious doubts about the truthfulness of the prosecution story.

19. An other important aspect of the case which cannot be ignored is that as per prosecution story itself the complainant, his wife and son Abdul Wahid had rushed towards the place of occurrence after hearing the cries of Mst. Saba wife, of PW Abdul Wahid, and fire arm shot, but surprisingly the prosecution has not examined Mst. Saba, the only eyewitness regarding causing firearm injuries to deceased Abdul Basit. In this regard,in reply to a query made by the Court, it is submitted by the learned prosecutor that it is the prerogative of prosecution to examine the witnesses as per its choice. No doubt, that it is the prerogative of the prosecution to examine the witnesses of its choice but omission to examine the only eyewitness, that too, in a case where murder of an innocent person (son) had taken place, weakens the whole

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prosecution case. It is also important to note in above sequel, that in FIR it has been disclosed that neighbour Munwar along with other neighbours had entered the house of complainant just after the incident, and also broken the locks of the house but again the prosecution has chosen not to examine him or any other neighbour. Thus it can be said that only family members (blood relations) have come forward to depose about the incident and no independent witness has been examined to support the alleged incident. This omission on the part of prosecution is fatal to the case of prosecution.

20. The next element of the case which we found relevant is that there are material contradictions in the ocular evidence of complainant and his wife, for example as per complainant the accused persons had tied both of his hands with pink *dupatta* whereas his wife negates this version and deposes that the colour of the said *dupatta* was light blue. Further the complainant had deposed that the colour of blanket put on him by the culprits was brown, while his wife said it was green. Likewise, both have given contradictory statements in respect of language which was spoken by the culprits at the time of occurrence. The complainant has replied to a question put by the defence counsel that they were talking in *Seriki* type language, while his wife deposed that they were talking in *Urdu* language. Such contradictory and inconsistent versions of both PWs create serious doubts about their veracity and truthfulness.

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21. The other important issue which needs in-depth probe is the identification of accused persons. The accused as per record were

arrested on 31.08.2006 and the identification parade was held on 12.09.2006. It is the case of prosecution that accused were with muffled faces at the time of incident. In this regard, complainant had deposed as under:

"At the time of offence, the accused persons were though muffled faces but I had seen their nose, eyes and foreheads clearly. After the arrest of accused persons, I identified them on 12.09.2006 before Civil Judge and Judicial Magistrate Hyderabad."

22. It is important to note that no description of accused persons is given in the FIR nor it is mentioned that the accused will be identified upon seeing. All the three witnesses *i.e.* the complainant, his wife and son had identified the accused persons during identification parade held before the Magistrate. It is strange to notice that when the accused were with muffled faces at the time of occurrence and no description of them was given in the FIR then how were they identified by these witnesses. In such circumstances, the possibility of accused persons being shown to the P.Ws during the period of their detention in police custody cannot be ruled out.

23. Further as per *mashirnama* of arrest and recovery dated 31.08.2006, accused were arrested during an encounter with police. It has also come on record that during interrogation on 05.09.2006 accused Muhammad Hassan and Fida Hussain volunteered to produce gold ornaments in presence of police *mashirs* but the identification parade had been held on 12.09.2006 for which no explanation has been

given by the prosecution as to why the identification parade was delayed for 12 days. This unexplained delay in the circumstances of present case makes the identification parade doubtful and valueless. Reliance in this regard is placed upon the case of Shafqat Memhood v. State (2011 S C M R 537), *supra* wherein it has been held that delay of seven days in holding the identification parade after the arrest of accused had made the case doubtful, whereas in the present case there is delay of 12 days.

24. In the present case the evidence of Magistrate in whose presence identification parade was held is of prime importance. She in her evidence Ex.38 has categorically deposed that PWs have not assigned any role to any of the accused during identification parade except accused Muhammad Hassan by the complainant. It is a settled principle of law that if the role of the accused was not described by the witnesses at the time of identification parade, it is always considered as an inherent defect, therefore, such identification parade loses its value and cannot be relied upon. See Ghulam Rasul's case (1988 SCMR 557), Mahmood Ahmed's case (1995 SCMR 127) and Khadim Hussain's case (1985 SCMR 721) and lastly case of Sabir Ali alias Fauji (2011 SCMR 563). It will not be out of place to mention that not only the identification parade in the case in hand suffers from above inherent defects but is coupled with the fact that the accused were with muffled faces and no description of them was disclosed in the FIR as to their physical appearances. In such circumstances no reliance on such identification parade can be placed.

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25. Insofar as recovery of robbed articles is concerned, some articles were allegedly recovered from accused persons at the time of police encounter, thereafter during interrogation accused Muhammad Hassan and Fida Hussain further led the police party and after digging the outer wall of the house of accused Muhammad Hassan produced gold necklace, earrings and ring, whereas from the same place accused Fida Hussain produced gold set with gold ring and earring in presence of police *mashirs*. The case is silent as to why private *mashirs* were not taken by the police. Thus, there is clear violation of section 103 Cr.P.C. On the other hand, it is the case of accused persons that above alleged recovery is foisted upon them to connect them with the commission of crime. Similarly, recovery from accused Muhammad Ali is shown to have been made on 10.09.2006 by the police when he was arrested and two gold *karas* / bangles were recovered from his pocket. This version also seems to be vague and concocted for the reason that how and why he was carrying in his pocket the robbed bangles even after one and a half month of the alleged incident.

26. Besides above lacunas and discrepancies, it is also important to note that the place of incident was visited by the police on the fifth day of incident. Nothing was recovered by the police but it was complainant who had produced two empty bullets and two missed bullets before the police. It is relevant to note that there is no recovery of crime weapon in the present case. The two empty cartridges produced by the complainant cannot by itself connect the appellants with commission of offence in absence of recovery of any crime weapon.

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27. It is settled law that an accused can be convicted on the basis of circumstantial evidence if the chain has not been broken and each and every circumstance connects with the other, while in the present case from the very beginning such connection or link is totally missing.

28. No doubt, so far as the death of the deceased is concerned there is ocular as well as medical evidence, but evidence as to who caused the death, is missing in the instant case. The only evidence relied by the prosecution is the identification of accused persons and recovery of robbed articles. But the whole evidence in this regard suffers from inherent deficiencies as discussed above and therefore not sufficient to connect the present accused with the commission of crime. However, strangely the learned trial court has ignored these material aspects of the case.

29. It will not be out of place to mention here that the accused in the present case have taken the stand that murder of deceased Abdul Basit had been caused by his own brother and in order to save him, the complainant party has fabricated this story. This version does not appeal to a prudent mind, as when no enmity is alleged between the parties then why would the complainant party involve them in this crime and how accused who are totally disassociating them with the crime can have such knowledge. Be that as it may, the accused persons cannot be convicted on the basis of their vague or false defence as it is the prosecution who has to prove its case beyond the shadow of reasonable doubt to get their conviction, which factor is lacking in this case. The

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case law cited by the learned prosecutor is also distinguishable and not applicable to the facts and circumstances of the present case.

30. In the light of above factual and legal position, we are of the considered view that prosecution has failed to discharge its burden satisfactorily. Therefore, the accused persons are entitled for the benefit of doubt, which is accordingly extended in their favour.

31. For the aforementioned reasons, both the criminal appeals have been allowed and Criminal Murder Reference answered in negative vide our short order dated 04.02.2014.

21. 2. 2014.

JUSTICE ASHRAF JAHAN

JUSTICE DR. AGHA RAFIQ AHMED KHAN
CHIEF JUSTICE

JUSTICE DR. FIDA MUHAMMAD KHAN.

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Approved for reporting.