

HCJD/C-21

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.358 of 2011
(Arshad etc. versus Zia Ullah Raja etc.)

and

Murder Reference No.129 of 2011
(The State Versus Arshad etc.)

JUDGMENT

Date of Hearing	27.01.2015
Appellants by	Mr. Naveed Ahmad Khawaja, Advocate along with Amjad (appellant) on bail
State by	Mian Muhammad Awais Mazhar, Deputy Prosecutor General
Complainant by	Mr. Mushtaq Ahmad Mohal and Ms. Fatima Malik, Advocates

Syed Shahbaz Ali Rizvi, J. - This judgment shall dispose of Criminal Appeal No.358 of 2011 titled as **Arshad etc. v. Zia Ullah Raja etc.** filed by Arshad, Asghar Ali and Amjad Hussain (appellants) against their convictions and sentences as well as Murder Reference No.129 of 2011 titled as **The State v. Arshad etc.** transmitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to Arshad and Asghar Ali (appellants), being originated from the same judgment dated 23.02.2011 passed by the learned Addl. Sessions Judge, Sarai Alamgir District Gujrat in a private complaint emanated from FIR No.146 dated 16.05.2008, offence under Sections 302 & 34 PPC, registered at Police Station City Sarai Alamgir, District Gujrat, whereby the appellants were convicted under Section 302 (b) PPC read with Section 34 PPC, as a result whereof, Arshad and Asghar Ali (appellants) were sentenced to death whereas, Amjad Hussain

(appellant) was sentenced to imprisonment for life with the direction to pay Rs.200,000/- each as compensation to the legal heirs of the deceased as envisaged under Section 544-A of the Code of Criminal Procedure, 1898 and in default thereof to undergo simple imprisonment for six months each.

2. Initially, the aforesaid FIR (Exh-PW-4/C) was lodged by Raja Zia Ullah, complainant (PW-4) but being dissatisfied with the investigation of the case, he filed the private complaint (Exh-PW-4/A) under Sections 302 and 34 PPC wherein, he disclosed that he is resident of Raja Bazaar Sarai Alamgir and has a market and haveli across railway lines in Mohallah Shaikhan. A tower of Warid Telecommunication is installed in the haveli where, Sairus Khan, his real brother is an employee. On 16.05.2008 at about 06.00 p.m, he along with his brother Sairus Khan (deceased), Raja Sana Ullah (PW-5) and Raja Asghar (CW-9) was going towards the haveli. When they crossed railway line, Arshad, Asghar (appellants) armed with .30 bore pistols and Amjad (appellant) were sitting ambushed near the railway lines. On seeing them, Amjad (appellant) raised lalkara that they (complainant party) had come, be murdered, upon which, Asghar (appellant) made a fire with his .30 bore pistol which landed on the front side of mouth of Sairus (deceased) and went through and through from head. Arshad (appellant) also made fire with .30 bore pistol which hit Sairus (deceased) on front of left side of abdomen who fell down after sustaining injuries. He along with his companions, in order to save their lives, ran towards their haveli. On hearing the firing and their hue and cry, the people of the locality gathered there. The accused persons while making aerial firing fled away from the spot. He along with his companions was taking his brother (deceased) to Civil Hospital, Jhelum but he succumbed to the injuries before reaching the hospital. The occurrence was witnessed by the complainant and his companions.

The motive behind the occurrence, as disclosed by the complainant in private complaint (Exh-PW-4/A), was that about two years ago, a fight took place between them and the accused party in which brother of the accused was injured and brother of the complainant was in jail and due to this grudge, the accused persons have committed the murder of Sairus Khan (deceased).

3. Asghar alias Dana (appellant) was arrested in this case on 27.05.2008 by Muhammad Gulzar Baig, SI (CW-3) who, on 05.06.2008, while in police custody, after making disclosure, got recovered .30 bore pistol (P-4) along with three live bullets (P-5/1-3) which was taken into possession vide recovery memo Exh-PF.

4. After recording the cursory statement, the appellants were summoned by the learned trial Court to face the trial. Charge was framed against them to which they pleaded not guilty and claimed to be tried.

5. In order to prove its case, the prosecution produced as many as five PWs during the trial whereas, Aamar Shahzad, Awais Ahmad 1635/C, Muhammad Gulzar Baig SI, Khalid Iqbal, Khalid Mehmood, Zafar Iqbal ASI, Ahmad Nawaz ASI, Mazhar ul Haq and Raja Ali Asghar were examined as Court witnesses. The ocular account was furnished by Zia Ullah Raja, complainant (PW-4) and Sana Ullah Raja (PW-5). Awais Ahmad 1635/C (CW-2) is the witness of alleged recovery of .30 bore pistol (P-4) along with three live bullets (P-5/1-3) at the instance of Asghar Ali (appellant).

The medical evidence was furnished by Dr. Usman Ali (PW-1) who, on 16.05.2008 at 10:30 p.m, conducted the post mortem examination on the dead body of Sairus Khan (deceased) and observed the following injuries:-

- “1. Fire arm wound on which burning and missel was present on both lower lip.
2. Fire-arm wound 2 x 1 cm on upper lip. Pellet burning and blackening present. Margins inverted entry wound.
3. Fire-arm wound 3 x 2 cm on left temporal region, margins everted Exit wound.
4. Fire-arm wound 1 x 1 cm in left ilac fossa, blackening and burning was present. Margins inverted (Entry wound).
5. Fire-arm wound 2 x 1 cm on left flank, margins everted.”

In his opinion, death in this case occurred due to shock and excessive bleeding due to above mentioned injuries which were fatal in ordinary course of nature to cause death. The injuries were ante mortem and caused by firearm. The probable duration between injuries and death was immediate whereas, between death and post mortem examination four to five hours.

Muhammad Gulzar Baig, SI (CW-3) is the Investigating Officer of this case and Akhtar Naqash, Draftsman (PW-2) prepared scaled site plan of the place of occurrence whereas, rest of the witnesses are formal in nature.

6. The prosecution gave up Mazhar ul Haq and Raja Asghar PWs being unnecessary. Later on, said PWs were examined as Court Witnesses No.8 & 9. The complainant, after tendering in evidence attested copy of report of Chemical Examiner (Exh-PH), attested copy of report of Serologist (Exh-PG) and that of Forensic Science Laboratory (Exh-PJ), closed his case.

7. The statements of the appellants, under Section 342 of the Code of Criminal Procedure, 1898, were recorded. They refuted the allegations levelled against them and professed their innocence. In answer to the question that as to “*Why this case against you and why*

the prosecution witnesses deposed against you? Arshad (appellant)

replied as under:-

"The PWs of this case are closely related to each other and they have got a criminal history and are inimical towards us. Hence, they have falsely involved us in this case."

In reply to same question, Amjad Hussain and Asghar Ali (appellants) answered, almost, on the same lines. In reply to another question that *Do you want to say anything else?*, Arshad (appellant) replied as under: -

"I am innocent in this case and, in fact, have been made scapegoat. I alongwith my real brother Safdar Hussain were running a goldsmith shop in Raja bazaar under the name and style of Amjad Jewellers. We are law abiding citizen and our only is to run our business properly and honestly. The complainant party of this case is in habit of blackmailing the people and hence extorting money from them as 'Jaga Taz'. They had also been previously blackmailing me like other goldsmith. I refused to satisfy their demands. On 30.9.2006, I alongwith my brother Safdar Hussain, etc. were present in our shop, Raja Imran alias Mani armed with 30 bore pistol alongwith Raja Zia (complainant of this case) and Raja Sana (PW of this case) and Raja Nadeem son of Raja Khuda Dad trespassed into my shop and launched a murderous assault by making fire shots upon my brother Safdar Hussain which after hitting on the right shoulder and then traveled into the body and after damaging certain vital organs finally touched spinal card, hence, my brother Safdar Hussain became paralyzed and could not even move for his personal daily necessities. A case through FIR No.687 dated 30.9.2006 under section 324/34 PPC, P.S. City, Sarai Alamgir was registered against Raja Imran alias Mani, Raja Zia, Raja Sana and Raja Nadeem above mentioned. Raja Imran alias Mani accused was sentenced to punishment for 6 years R.I. alongwith 'Diyat' compensation amounting to Rs.3,50,000/- from the court of Mr. Gul Abbas, Magistrate Section 30, Sarai Alamgir. He preferred an appeal which was heard and decided by Mr. Muhammad Yousaf Aujla, learned ASJ, Kharian and according to the judgment of said appeal the amount of 'Diyat' compensation was enhanced from 3,50,000/- to Rs.8,50,000/- while the appeal against imprisonment was dismissed. The accused persons then preferred an appeal which was afterwards dismissed as withdrawn. During the pendency of this murderous assault case, the accused persons

Raja Imran alias Mani, etc. had been exhorting threats to us in order to effect a compromise. Then on 10.01.2007, Raja Imran alias Mani again launched murderous assault upon me and my brother. Hence, the second case through FIR No.14 dated 10.01.2007, under section 334 PPC was registered against Raja Imran alias Mani in police station City, Sarai Alamgir. We being members of Mughal family were considered to be MOENS (village workers) belonged to poor family and being uninfluential persons could not do anything but to take assistance of law for redressal of our grievances. The complainant party of this case, who are influential Rajput family and have their valuable properties and big brottery, considering that we are denying to effect a compromise finally made up their minds to teach us a lesson in order to bow down to effect a compromise as Raja Imran alias Mani is still behind the bars and serving the imprisonment. The complainant party of this case have a large number of criminal history and they are involved in so many criminal cases. They have their enmity with so many people of the Ilaqa. They remained involved in a large number of criminal cases. It was unseen occurrence. Raja Sairus deceased of this case had received injuries in very suspicious manner and reference was made by the complainant party initially to suppress the truth and give a cover to the actual story. The matter even was not reported to the police. The complainant of this case received the information of this incident at late stage and instead of taking Sairus in injured condition to THQ Sarai Alamgir, THQ or CMH, Kharian or any other hospital in Sarai Alamgir, shifted him to DHQ Jhelum which is another district which speaks volumes about the suspicious manner and suspicious event. The complainant and witnesses are also involved in a large number of criminal cases. They have falsely involved me and my brother in order to pressurize us to effect a compromise. On 16.5.2008, it was Friday and, hence, being off day of my shop. One Qaisar Masih son of Sadiq Masih, R/O Press Colony, Jhelum who was introduced to me by Muhammad Younas had purchased certain jewellery but the full price of jewellery had not been paid. So, on 16.5.2008, at about 4.00 P.M., I in the company of said Muhammad Younas and Muhammad Yaseen son of Khushi Khan of Sarai Alamgir went to the house of Qaisar Masih in West Colony, Jhelum, for recovery of outstanding amount. Qaisar Masih alongwith Pervaiz Masih was present in the house who demanded some time to make the payment. Qaisar Masih had been delaying the payment through lame excuses, so we told him that we would not go back without receiving the amount. Qaisar Masih went away to bring money while leaving us in his house and after about 3/3 ½ hours, he made the payment of Rs.5000/- to me in the

presence of PWs out of the outstanding amount. I was not present in Sarai Alamgir at the time of alleged occurrence. Qaisar Masih, Pervaiz Masih, Muhammad Younas, Muhammad Yaseen supported my version before the police and produced their sworn affidavits. A large number of persons also appeared in my defence. A large number of persons also appeared in my defence. We made an open offer to the complainant in the presence of elders to prove our innocence on oath even but the complainant party did not agree to it. I was declared innocent during investigation conducted by the I.O. which was verified by the SHO and ASP. I and my brother have been involved in this case due to enmity. My whole business has been ruined. I have three kids who have left schooling due to our bad financial condition. I beg mercy from Allah Almighty and request this hon'ble court to do justice with me. I hereby produced photo stat copies of FIR No.687/06, under section 324/34 PPC Mark-A and FIR No.14/07 under section 324 PPC, P.S City, Sarai Alamgir Mark-B in which I was complainant. I also produce copies of FIR No.60/93 under section 506, 186, 337.A(i) PPC Mark-C, FIR No.228/93 under section 337.F(ii) PPC Mark-D, FIR No.168/94 under article 11/4/79 PHO Mark-E, FIR No.335/99 under section 13/20/65 AO Mark-F, FIR No.149/98 under section 324, 337.A(ii), 337.F(ii), 148 and 149 PPC Mark-G, FIR No.306/99 under section 324, 148 and 149 Mark-H, FIR No.425/99 under section 337.A(ii), 337.L(2), 427, 148 and 149 PPC Mark-J, FIR No.635/99, offence under section 506, 342 PPC Mark-K, FIR No.513/01, under section 337.A(i), 148 and 149 PPC Mark-L, etc. to prove the criminal activities and involvement of the deceased, complainant and his brothers. I also produce copies of the FIR No.131/32, under section 18/7/79 Zina Haddood Ordinance Mark-M, copy of the FIR No.355/92, under section 7/21/91 SIIA Mark-N, FIR No.42/97, under section 13/20/65 A.O. Mark-Q registered against Asghar, CW of this case."

Asghar Ali (appellants), in reply to same question, relied on the answer made by Arshad (appellant) whereas, Amjad Ali (appellant) replied as under: -

"I am innocent in this case. My father Muhammad Din is an old man. He had met an accident when the train was passing in year 2000 and since after that he was suffering from different diseases including stomach, kidneys problems and joint pains. On 16.5.2008, on the alleged day of occurrence, the medical problems of my father had increased and was badly suffering. After offering Jumma prayer, I remained busy

in my house Sarai Alamgir attending my father. On the same day, at about 5.30 P.M., Muhammad Farooq, Yousaf and Sajjad Hussain came to inquire about the health of my father being our family friends they stayed for about 2 hours with me in my house. During this period some other male and female relatives have also been visiting our house in my presence to inquire about the health of my father. I was present in my house at the time of alleged occurrence. Muhammad Farooq, Sajjad Hussain and a large number of other persons appeared in my defence and corroborated my version. They proved my innocence through cogent evidence and also gave 'Qasam Niayan'. I was declared innocent during investigation by the I.O., SHO and my innocence was further verified by ASP, Kharian. I also adopt the version of my brother Muhammad Arshad. The complainant has falsely involved all the able bodied persons of our house in this case to pressurize us to come for compromise. I beg mercy from Allah and justice from this Hon'ble court."

8. The appellants did not opt to appear as their own witness as provided under Section 340(2) of the Code of Criminal Procedure, 1898 in disproof of the allegations levelled against them nor did they produce evidence in their defence.
9. The learned trial Court vide its judgment dated 23.02.2011, found the appellants guilty, convicted and sentenced them as mentioned above.
10. Learned counsel for the appellants contends that the appellants have falsely been implicated in this case; that the occurrence was not seen by any of the prosecution witnesses; that there are material contradictions in the statements of the eyewitnesses Zia Ullah (PW-4), Sana Ullah (PW-5) and Raja Ali Asghar (CW-9); that the story narrated in the FIR and the private complaint is highly improbable and unnatural; that the medical evidence is not in line with the stance taken by the complainant; that the medical evidence is also in conflict with the scaled site plan of occurrence; that the alleged recovery of .30 bore pistol at the instance of Asghar Ali appellant is doubtful; that the motive has not been proved by the prosecution;

that the prosecution remained fail to prove its case against the appellants; that this appeal may be accepted, convictions and sentences of the appellants may be set aside and Murder Reference be answered in the negative.

11. Conversely, learned Deputy Prosecutor General assisted by learned counsel for the complainant vehemently opposes the contentions raised by the learned counsel for the appellants and maintains that the appellants have been nominated in the promptly lodged FIR with specific roles; that there are no material contradictions in the statements of the witnesses; that the ocular account produced by the prosecution is fully corroborated by the medical evidence that is further corroborated by the evidence of recovery of crime weapon at the instance of the appellant Asghar Ali; that the motive has also been proved by the prosecution; that no reason for false implication of the appellant has been pointed out by the defence; that the prosecution has proved its case against the appellants beyond any reasonable doubt; that this appeal may be dismissed and Murder Reference be answered in the affirmative.

12. We have heard the arguments of learned counsel for the appellants, learned Deputy Prosecutor General assisted by learned counsel for the complainant and also scanned the record with their able assistance.

13. The prosecution has produced Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5), brothers of the deceased, to furnish the ocular account of the occurrence. During the cross examination at page 41 of the paper book of this case, Zia Ullah, complainant (PW-4) has clearly stated as under: -

“...Only Raja Mazhar Ul Haq and Asghar are the eye witnesses of this case...”

But Raja Mazhar ul Haq when appeared as CW-8 did not utter even a single word regarding his being an eyewitness of this occurrence and furnished the evidence only to the extent of alleged recovery and possession of blood stained earth and crime empty from the scene of occurrence and he also maintained during the cross examination that he reached the place of occurrence at about 08.00/08.15 p.m. i.e. the time even after the registration of crime report while Raja Ali Asghar (given up PW being unnecessary by the complainant vide statement dated 21.07.2010) was also examined by the learned trial court as CW-9 who during his cross examination has maintained as under: -

“...It is correct that before our arrival at the place of occurrence many persons were present there. It is incorrect that police also reached at the spot before our arrival. Police reached at the place of occurrence after about 2/3 minutes of our reaching at the place of occurrence. It is correct that I and Zia Ullah complainant reached the place of occurrence together. Police inquired about the occurrence from the shopkeepers. I do not know that the shopkeepers told the police that unknown assailant had muffled his face. I do not know who informed the police about the occurrence before our reaching at the place of occurrence. When we reached the place of occurrence, 5/7 persons were already present around the dead body of Sairus deceased...” (underlining is ours)

Keeping in mind the admission made by both the said prosecution witnesses that Raja Ali Asghar (CW-9) witnessed the occurrence, the reproduced part of the statement of Raja Ali Asghar (CW-9) is sufficient to rebut the ocular account furnished by Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5). He was never declared won over by the accused party and similar remained the position when he appeared as CW-9 as the prosecution did not bother to cross examine him despite the opportunity given by the learned trial court which amounts to admission of his statement. Another important aspect of this case has been noticed by us that the column No.8 of the inquest report (Exh-CW-3/B) carries the observation of the police officer as under:-

”۸۔ وضع اعضا و چشم و دامن۔
منہ کھولا آنکھیں کھولی“

Which reveals that till the arrival of the police, none of the relatives of the deceased i.e. Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) was available near the dead body who could close the eyes and mouth of the deceased as per the practice prevailing in our society. The behaviour of Zia Ullah, complainant (PW-4) also reflects against the veracity of his testimony. It would be advantageous to reproduce relevant parts of his cross examination, which reflects his mentality and the character: -

“...Nighat Sultan is my real sister. I do not know if Saeed is my Bhanja from the wound of Night Sultana. It is incorrect that Firdos and Sajida are two daughters of my sister namely Nighat Sultana. I do not know if Sajida Bibi is married with one Raja Nisar a very influential person in the town. It is incorrect that we all brothers are involved in number of criminal cases. I do not know if a case FIR No.425/1999 was registered on the complaint of Mohammed Iqbal Mughal u/ss 427/337-A-2 PPC against Imran alias Mani, Nadeem, Adnan, Sana Ullah and Sairus my brothers and myself at P-S Sarai Alamgir. It is not in my knowledge that if in the above said cases my brothers remained in jail. There might be a criminal case FIR No.335/99 u/s 13/20/65 Arms Ordinance, registered at P-S S.A.Gir against my brother Nadeem. Volunteers at that time, we were young enough and number of false cases were registered against us.

C.Q. My age is 32 years and in the year 1999 I was aged about 18 years.

I do not know if case FIR No.635/99 u/s 506/342 PPC P-S S.A.Gir was registered on the complaint of Mohammed Idris against my brother Imran alias Kukri. It is correct that case FIR No.686/2006 was registered at P-S Sarai Alamgir under sections: against me on the complaint of one Azhar...It is correct that FIR No.513 was registered u/s 337-A-21/F-ii/148/149 PPC was registered on the complaint of Zubair Ahmad against me, Zubair, Sairas, Irfan, etc...”

The above narrated portions of cross examination of Zia Ullah, complainant (PW-4) reveals that he tried to conceal the facts

intentionally and that he and his brothers are having antecedents of criminal record. We have also observed that according to the FIR, the ocular account is also discrepant with the medical evidence qua the duration between the injuries and death as according to the opinion of the Medical Officer Dr. Usman Ali (PW-1), the duration was immediate but according to the prosecution witnesses, they took the deceased, in injured condition, to DHQ Hospital, Jhelum and according to Zia Ullah, complainant (PW-4), he succumbed to the injuries on the way but Sana Ullah (PW-5) as discussed above has admitted that it remained the stance of the prosecution during the investigation that the death took place in the DHQ Hospital, Jhelum which reflects adverse to the opinion of the Medical Officer and renders the probity of eyewitnesses further doubtful. Furthermore, the prosecution story narrated in the FIR as well as by the prosecution witnesses Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) before the learned trial court was also found incorrect during the course of investigation and both Arshad and Amjad Hussain (appellants) were found innocent during the course of investigation.

The perusal of column No.4 of the FIR reveals that the distance between the police station and the place of occurrence is only two furlongs and the place of occurrence is Mohallah Raja Bazaar No.1, Sarai Alamgir where the occurrence took place at 06.00 p.m. on 16.05.2008 but surprisingly, the matter was reported to the police at 07.40 p.m. and at 08.00 p.m, the crime report was recorded i.e. after the delay of two hours with the explanation that the deceased, in injured condition, was taken to DHQ Hospital, Jhelum which is not convincing at all as the Rural Health Center, Sarai Alamgir was situated at a distance of only more than one kilometers as is maintained by Muhammad Gulzar Baig, SI (CW-3) in his cross examination. The existence of private hospitals at Sarai Alamgir has also been admitted by the prosecution witnesses while

Muhammad Gulzar Baig SI (CW-3) has also admitted that THQ Hospital, Kharian is at a distance of fifteen minutes from Sarai Alamgir. The story extended by Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) regarding taking Sairus Khan (deceased), in injured condition, towards DHQ Hospital Jhelum for medical treatment is not convincing and plausible which has led us to infer that it has been narrated to justify delay that took place in reporting the matter to the police. The same stance is also pregnant with material discrepancy as well, as according to the FIR, the deceased succumbed to the injuries on the way to Civil Hospital, Jhelum but Sana Ullah (PW-5), during cross examination has admitted as under:-

“...It is correct that we took the plea during investigation that the deceased succumbed to the injuries in DHQ Hospital, Jhelum...”

Which reflects that the prosecution witnesses are not consistent in this regard. No record of DHQ Hospital, Jhelum is available to verify the stance of prosecution. Moreover, it has also been observed by this Court that admittedly, driver of the ambulance was never produced during the investigation as well as the trial. Even no particulars of the driver or the vehicle (ambulance) could be given by the complainant party that renders the veracity of prosecution story available in the FIR and reiterated by Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) before the learned trial court, doubtful as normally the intervening time is consumed in fabrication of prosecution story after deliberation and consultation.

14. Even if we evaluate the presence of Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) at the scene of incident, keeping in view the alleged motive of the occurrence, it transpires that according to Sana Ullah (PW-5), during his cross examination, case FIR No.687/06 under Sections 324/34 PPC was registered at Police Station Sarai Alamgir against himself, complainant Zia Ullah and

Raja Imran for causing assault with intention to murder Safdar Hussain, brother of the accused persons which according to the prosecution case is a motive to the appellants for commission of this fateful occurrence but despite the alleged presence of both Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5) at the spot, none received even a scratch at the hands of the appellants while Sairus who was not the party directly to the motive FIR was done to death further makes the prosecution version doubtful. We have also noticed another important aspect of this case that at the place of occurrence, on eastern side, there are ten shops belonging to the complainant party in the market but surprisingly, no shopkeeper of the said shops is the eyewitness of this case as is admitted by Sana Ullah (PW-5) and Muhammad Gulzar Baig, SI (CW-3), the Investigating Officer of this case.

All the supra discussed facts of the case lead us to hold that no judicial certainty can be attached to the presence of the witnesses at the relevant time and the ocular account furnished by Zia Ullah, complainant (PW-4) and Sana Ullah (PW-5), that renders their testimony untrustworthy, hence is not to be relied upon. Reliance in this respect is placed on the case of Basharat and another. v. The State (1996 SCJ 265) wherein, the Hon'ble Supreme Court was pleased to observe as under: -

"9. ...There is no judicial certainty or circumstantial guarantee about the presence of the eye-witnesses on the spot. On the other hand, there are cogent reasons to doubt that the eye-witnesses were present on the spot and seen the occurrence. So, there is no option but to exclude the ocular evidence from consideration."

15. Though, having guidance from the esteemed judgment passed by the august Supreme Court of Pakistan in the case of Muhammad Jamil versus Muhammad Akram and others (2009 SCMR 120) that when the direct evidence has been disbelieved by us, the conviction cannot be based on the basis of mere corroboratory pieces of

evidence like motive, recovery etc. yet even the perusal of evidence qua the alleged recovery of crime weapon at the instance of Asghar Ali (appellant) produced by the prosecution reveals that the empty was taken into possession on 16.05.2008 and Asghar Ali (appellant) was arrested on 27.05.2008 while the crime empty was sent to the Forensic Science Laboratory on 28.05.2008 i.e. after the formal arrest of the appellant, which renders the veracity of positive report of the Forensic Science Laboratory (Exh-PJ) doubtful and consequently, makes the evidence of recovery inconsequential to the prosecution. Reliance in this respect is placed on the case of Jehangir v. Nazar Farid and another (2002 SCMR 1986) wherein, the Hon'ble Supreme Court of Pakistan was pleased to observe as under: -

"5. ...The occurrence had taken place on 21-1-1996. Nazar Farid was arrested on 1-2-1996. The rifle in question had been allegedly recovered from him on 12-2-1996 and it was at least seven days thereafter i.e on 19-2-1996 that the crime empties in question had been received in the Forensic Science Laboratory. In the circumstances this piece of evidence is not credible and is of no assistance to the prosecution as against Nazar Farid accused..."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of Israr Ali v. The State (2007 SCMR 525) and Ali Sher and others v. The State (2008 SCMR 707). In Israr Ali's case, the Hon'ble Supreme Court has observed that when the crime empties are sent to Forensic Science Laboratory with delay, the recovery of the same does not provide strong corroboration qua the prosecution version.

16. It is, by now, well established principle of law that it is the prosecution, which has to prove its case against the accused by standing on its own legs and it cannot take any benefit from the weaknesses of the case of the defence. In the instant case, the prosecution remained fail to discharge its responsibility of proving

the case against the appellants. It is also a settled law that if there is a single circumstance which creates reasonable doubt regarding the prosecution case, the same is sufficient to give benefit of the same to the accused, whereas, the instant case is replete with circumstances which have created serious doubts about the prosecution story. In the case of Tariq Pervez v. The State (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

“5. ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.”

In Ayub Masih v. The State (PLD 2002 SC 1048), at page 1056 the Hon'ble Apex Court has been pleased to observe as under:-

“....It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, “it is better that ten guilty persons be acquitted rather than one innocent person be convicted”. In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmad (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the “mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent.”

17. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellants beyond the shadow of any reasonable doubt, therefore, we accept **Criminal Appeal No.358 of 2011** filed by Arshad, Asghar Ali and Amjad Hussain (appellants), set aside their convictions and sentences recorded by the learned trial court and acquit them from the charges levelled against them by extending them the benefit of doubt. Arshad and Asghar Ali (appellants) are in custody, be released forthwith if not required in any other case whereas, Amjad Hussain (appellant) is on bail, his bail bond is discharged and surety is released.

18. **Murder Reference No.129 of 2011** is answered in the **NEGATIVE** and the sentence of death of Arshad and Asghar Ali (convicts) is **NOT CONFIRMED**.

(Sayyed Mazahar Ali Akbar Naqvi) (Syed Shahbaz Ali Rizvi)
Judge Judge

APPROVED FOR REPORTING:

Judge /

Judge

'Javaid'