

IN THE HIGH COURT OF SINDH, KARACHI

**Before:**

**Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Zulfiqar Ali Sangi**

**Criminal Appeal No.113 of 2016  
Confirmation Case No.02 of 2016**

Appellant No.1 : Taj Muhammad S/o BakhtZamir Khan  
Through M/s. Mehmood A. Qureshi &  
Jamshed Iqbal, Advocates

Appellant No.2 : Abdul Baseer S/o Saeed-ur-Rehman  
Through Mr. Inamullah Khan, Advocate

Respondent : The State  
Through Mr. Muhammad Iqbal Awan  
Deputy Prosecutor General, Sindh

Complainant : Deendar Ali S/o Moosa Khan  
Through Mr. Muniruddin Khan, Advocate

Date of Hearing : 31-10-2019

Date of Judgment : 20-11-2019

**J U D G M E N T**

**ZULFIQAR ALI SANGI---J.**, Appellants filed the instant Criminal Appeal on being aggrieved and dissatisfied with the impugned judgment dated 19.03.2016 passed by learned Sessions Judge, Karachi West in Sessions Case No.105/2012 under FIR No.22/2002 for the offence under sections 302/34 PPC registered at PS Peerabad, Karachi; whereby appellants were convicted under section 302(b) PPC and awarded death sentences for the offence of murder of deceased Hafiz Nisar Ali and Rahimullah subject to confirmation by this Court and also to pay Rs.100,000/- **each** as compensation under section 544-A Cr.P.C. to the legal heirs of deceased named above and in case of default in payment of compensation, they shall further suffer S.I. for six months. However, benefit of section 382-B was extended in favour of the appellants.

2. Brief facts of the prosecution case are that on 17.01.2002 at about 1900 hours, complainant Deendar Ali (Advocate) son of Moosa Khan, R/o House No.D-1/52, near Raja Jewelers, Frontier Colony No.1, Karachi came at police station and reported that he is a resident of above given address and lawyer by profession. Two days prior, his younger brother Zainul Abideen quarreled with a boy of his locality namely Abdul Baseer but same was patched up. Today on 17.01.2002 at about 1030 hours, while his younger brother Zainul Abideen was going towards the house of his maternal uncle, the said Abdul Baseer alongwith his brother Vakeel as well as two companions, whose name was not known but could be recognized from their faces, stopped in front of shop of Babak, abused him and also beaten him with kicks, fists and dandaas, as the result whereof, his brother sustained injuries on his nose and other parts of his body. He brought him at police station and after lodging the report, he took him to Jinnah Hospital for his treatment. Subsequently, at about 02:00 PM he returned back from hospital and then his elder brother namely Hafiz Nisar Ali came to the house after receipt of information about the incident and also inquired about the incident. After some time, his maternal brother namely Waris Khan came to the house and informed that Abdul Baseer, Shafiq and Taj Muhammad were coming to his uncle's house, throwing the stones and causing dandaas blows at the door and also abusing them. Upon which, his elder brother Hafiz Nisar Ali in order to pacify the matter with them, at about 04:00 PM reached near Babak Shop, however Abdul Baseer on seeing him, loudly told his accomplices not to leave him alive. All of sudden, Shafiq with firearm weapon started firing, due to which one intervener Rahimullah sustained injury and fell down then Abdul

Baseer duly armed with churri attacked upon Hafiz Nisar Ali and inflicted Churri on left side of abdomen just lower to ribs whereas Taj Muhammad also caused Churri blows on right side, due to which his brother after sustaining injuries also fell down. The incident was witnessed by Naseeruddin, Waris Khan, Anwar Ali and other locality people. Thereafter both the injured succumbed to the injuries. He claimed that accused Abdul Baseer, Shafiq and Taj Muhammad have caused murder of his brother Hafiz Nisar Ali and Rahimullah and requested for taking legal action in the matter. Accordingly, the duty officer SIP Haleem Shah lodged the instant FIR.

3. After registration of the FIR, the investigation was entrusted to SIP Muhammad Ashraf Awan, who as per entry No.37 reported at 1635 hours was already busy inspecting the dead bodies and completing the formalities under section 174 Cr.P.C. at Abbasi Shaheed Hospital. The I.O. on receipt of investigation inspected the place of incident and recorded the statements of witnesses under section 161 Cr.P.C. and on 25.01.2002, he succeeded to arrest one of the accused persons namely Taj Muhammad on the pointation of the complainant. During the investigation and on transfer of SIP Muhammad Ashraf Awan, further investigation was entrusted to SIP Abdul Rauf, who after completion of usual investigation, submitted the challan against accused Taj Muhammad and co-accused Abdul Baseer and his brother Shafiq by showing them as absconder.

4. After receipt of the challan, formalities under section 87/88 Cr.P.C. were completed against both the absconding accused by the trial court and compliance of section 265-C Cr.P.C. was made vide receipt Ex.2, firstly the charge against accused Taj Muhammad was

framed on 28.07.2003 vide Ex.3, to which he pleaded not guilty and claimed his trial. Subsequently, one of the absconding accused namely Abdul Baseer was also arrested by the police on 30.01.2005 and was produced before the Court, as such, after compliance of section 265-C Cr.P.C. vide receipt at Ex.6, the amended charge was framed on 30.08.2006 vide Ex.7, to which he pleaded not guilty and claimed his trial.

5. In order to prove the case, prosecution examined PW-1 Complainant Deendar Ali at Ex.11, who produced the carbon copy of the FIR, memo of inspection of place of incident and memo of arrest of accused Taj Muhammad as Ex.11-A to 11-C. PW-2 Anwar Ali at Ex.12. PW-3 Khalil-ur-Rehman at Ex.13, who produced receipt of receiving the dead body of deceased Rahimullah, memo of inspection of dead body of deceased Rahimullah and inquest report as Ex.13-A to 13-C respectively. PW-4 SIP Muhammad Pervaiz Khan at Ex.14. PW-5 SIP Muhammad Safdar at Ex.15, who produced the memo of arrest of accused Abdul Baseer and entry of daily station diary as Ex.15-A and 15-B respectively. PW-6 Inspector Muhammad Ashraf at Ex.16, who produced 174 Cr.P.C. proceedings of deceased Hafiz Nisar Ali as Ex.16-A. PW-7 SIP Ghulam Mustafa at Ex.17. PW-8 ASI Dost Muhammad at Ex.18, who produced entry No.28 of 11.02.2002 at 1545 hours at Ex.19. PW-9 Adil Zada at Ex.20. PW-10 Naseeruddin at Ex.22. PW-11 Dr. Nisar Ali Shah at Ex.23, who produced two postmortem reports and cause of death endorsed on written request of I.O. in respect of both deceased as Ex.23-A to 23-E respectively. PW-12 Shahensha at Ex.27. PW-13 Dawood Shah at Ex.28, who produced application addressed to the SHO dated 07.02.2002 at Ex.29. PW-14 Fida Hussain at Ex.30, who produced application addressed to the SHO

dated 07.02.2002 at Ex.31. PW-15 Waris Khan at Ex.32. PW-16 Khalid Hussain at Ex.36. PW-17 Abdul Samad at Ex.40. PW Khalil-ur-Rehman was given up vide statement at Ex.33 as well as PWs Nasir Khan, Khursheed, Bacha Khan, Fazal Mannan, ASI Abdul Rauf and PC Fayaz could not be examined being untraceable except Nasir Khan, who has been murdered. Learned DDPP for the state closed the side of prosecution vide statement at Ex.41.

6. Thereafter, statements of both the accused were recorded under section 342 Cr.P.C. vide Ex.42 and Ex.43 respectively, wherein they denied the allegations against them and stated that they are innocent and involved falsely in this case. However, neither they have examined themselves on oath nor led any evidence in their defense.

7. Learned counsel for appellant Taj Muhammad contended that appellant is innocent and has been involved by the complainant party due to enmity which is admitted in the evidence; that the motive as set out by the complainant has not been proved; that important witness Zainul Abideen was not examined by the prosecution before the trial court; that motive was not put before the appellant while recording his statement U/S 342 Cr.P.C; that the case is of two versions and therefore doubtful; that all the witnesses had given contradictory evidence on main points of the case; that nothing was recovered from the possession of appellant which connects him with the crime; that the appellant voluntarily appeared before the police; that most of the witnesses have not supported the case of prosecution to the extent of appellant Taj Muhammad and deposed before the trial court that appellant Taj Mohammad was not present at the spot; that prosecution has not

proved the case against appellant beyond reasonable doubt; lastly he prayed for acquittal of appellant.

8. Learned counsel for appellant Abdul Baseer while adopting the arguments of counsel of Taj Mohammad further contended that although, the charge is not according to law he would prefer that this case not be remanded but decided by this Court on merits; on merits he contended that appellant is innocent and has been booked in this case due to enmity; that the PWs had not supported the case against the appellant Taj Muhammad before the trial court thus, they are not reliable and trustworthy and therefore, their evidence against Abdul Baseer cannot be relied upon; that it is the duty of prosecution to prove the case beyond reasonable doubt but present case is not free from doubts; that entire case of prosecution is doubtful therefore by extending benefit of doubt, appellant may be acquitted.

9. Mr. Muhammad Iqbal Awan, learned DPG contended that it has been established from the evidence that complainant party went towards the accused person for settlement of dispute but appellant party made attack upon them and committed murder of two innocent persons; that the appellants committed an offence which is heinous in nature; that prosecution has proved the case by producing confidence inspiring and trustworthy evidence; that appellants themselves admitted in their statement U/S 342 Cr.P.C that they acted in their self-defense; that the trial court after appreciation of entire evidence available on record passed the impugned judgment which is based on sound reasons and does not require any interference by this Court; lastly he prayed that appeal of both the appellants may be dismissed.

10. Learned counsel for the complainant argued that all the witnesses fully supported the case of the prosecution; that the motive has also been proved by the prosecution; that ocular evidence is supported by medical evidence; that FIR was promptly registered; that no mistake was made in identification of appellants as it was a daytime incident; that no ill-will was suggested against the witnesses who are natural and not chance witnesses; he further contended that charge was framed according to law, though at the time of charge, trial court committed some irregularities which are not illegalities and irregularities and same are curable U/S 537 Cr.P.C and on such bases, the case cannot be remanded; lastly he prayed that conviction and sentence awarded by the trial court may be maintained and appeal may be dismissed.

11. We have heard the arguments of learned counsel for the parties and have gone through the material available on record with their able assistance.

12. At the first instance, we have decided to clear up the issue regarding the legality of the charge despite the appellants not objecting to it by considering the following issues:

- i) *whether the charge framed by the trial court was in accordance with law or was an illegal?*
- ii) *what will be the effect of such charge on the trial if it is found illegal?*
- iii) *whether any rights of the accused was prejudiced due to such charge?*

13. We have examined the charge framed against the appellant Taj Muhammad available at page 193 of the paper book which reads as under:-

**CHARGE**

*I, Mrs. Naseem Mansoor, IVth Additional Session Judge, Karachi do charge you:-*

*Taj Muhammad S/o Bukht Zameen*

As

*That on or about 17.01.2002 at 1600 hours at Bahreen Road, Near Babak Dukandar, Frontier Colony No.2 Karachi you along with absconder co-accused namely (1) Abdul Baseer son of Saeed-ur-Rehman (2) Muhammad Shafiq son of Abdul Rehman in furtherance of your common intention while you were duly armed with churri, while absconding co-accused Muhammad Shafiq was also armed with carbine (pistol). You accused Taj Muhammad along with absconding accused Abdul Baseer knowingly and intentionally caused churi injuries on the abdomen of Nisar Ali son of Moosa Khan due to which he expired. While absconding co-accused Shafiq caused fire arm injuries to Rahimullah son of Nosharwan on his neck due to which he also expired. Thus you all have committed Qatl-e-Amd of both deceased, thus committed offence punishable u/s 302/34 Q and D which is within the cognizance of this Court.*

*AND I hereby direct you that you be tried by this Court on the aforesaid charge.*

*Given under my hand and seal of the Court this July 28, 2003.*

*Sd/-*

*(Mrs. Naseem Mansoor)*

*IVTH ADDITIONAL DISTRICT & SESSION JUDGE  
KARACHI (WEST)*

14. After framing the charge against appellant Taj Mohammad, co-appellant Abdul Baseer was arrested and amended charge was framed which is available at page 213 of the paper book which reads as under:-

**AMENDED CHARGE**

*I, Mrs. Akhtar A. Chaudhry, IV-Additional District & Sessions Judge, Karachi (West), do hereby charge you:-*

*Abdul Baseer S/o Syed Rehman*

*As follows:-*

*That on or about 17.01.2002 at 1600 hours at Bahreen Road, Near Babak Dukandar, Frontier Colony No.2 Karachi, you alongwith absconder accused namely Muhammad Shafiq in furtherance of your common intention duly armed with churri, while absconding accused Muhammad Shafiq was also armed with carbine (pistol), accused Taj Muhammad along with*



*accused Abdul Baseer knowingly and intentionally caused churri injuries on the abdomen of Nisar Ali S/o Moosa Khan due to which he expired, while absconding accused Shafiq caused fire arm injuries to Rahimullah S/o Nosharwan on his neck due to which he also expired, thus you have committed Qatl-e-Amd of both deceased, whereby you have committed an offence punishable u/s 302/34 PPC and is within the cognizance of this Court.*

*AND I hereby further direct you that you be tried by this Court on the aforesaid charge.*

*Given under my hand and seal of this Court, this 30<sup>th</sup> day of August, 2006.*

*Sd/-*

*(Mrs. Akhtar A. Chaudhry)*  
*IV-ADDITIONAL DISTRICT & SESSION JUDGE*  
*KARACHI (WEST)*

15. Thereafter, evidence of the prosecution witnesses as well as statement of the appellants U/S 342 Cr.P.C was recorded. Thereafter, on application some other witnesses were examined before the trial court by the prosecution and again statement U/S 342 Cr.P.C was recorded, Thereafter, application U/S 227 Cr.P.C R/W section 537 Cr.P.C was filed on behalf of complainant and the same was allowed on no objection of counsel for appellants vide order dated:10-12-2013, and again the charge was framed which is available at page 521 which reads as under:-

**AMENDED CHARGE**

*I, Ghulam Mustafa Memon, Sessions Judge, Karachi-West, do hereby charge you:*

- 1. Taj Muhammad son of Bakht Zameen*
- 2. Abdul Baseer son of Saeed ur Rehman*

*as under:-*

*That on 17<sup>th</sup> January, 2002 at about 1600 hours, you the above named accused duly armed with churri, with association to absconding co-accused Muhammad Shafiq, who was armed with carbine at Bahreen Road, Near Babak Shop, situated in Frontier Colony, Karachi in furtherance of of your common intention caused churri blows injuries to Nisar Ali son of Moosa Khan, brother of*

*the complainant Dindar Ali, whereas absconding co-accused Shafiq caused firearm injuries to Rahimullah son of Nosharwan, as the result whereof Rahimullah and Nisar Ali received grievous hurts and succumbed to injuries at the spot, thereby you have committed the offence of Qatl-i-Amd, punishable under section 302/34 PPC within the cognizance of this Court.*

*And I hereby direct that you be tried by this Court on the aforesaid charge.*

Sd/-

*(Ghulam Mustafa Memon)  
Sessions Judge Karachi-West*

*Dated:17.12.2013*

16. We have carefully examined the charge and gone through the relevant provisions of law. In the second charge, only due to some bonafide mistake or an error, name of appellant Taj Mohammad was not mentioned though he was present before the trial court to face the trial and against him, charge was already framed and it was the part of proceedings. Whereas, an application was moved only for amendment of charge/correction in the charge and to rectify the mistake which is also evident from the wording used in application. Learned trial court passed an order dated:10-12-2013 which clears the position and the same is reproduced as under:-

*Heard the learned DDPP for the State, advocate for the complainant, so also taken into consideration no objection endorsed by the learned advocate for the accused. On perusal of the R & Ps manifest that on 28.07.2003 charge was framed against accused Taj Muhammad alone and at that time the culprits Abdul Baseer and Shafiq were at large. Subsequently Abdul Baseer was arrested and on 30.08.2006 the amended charge was framed against accused Abdul Baseer only. Inadvertently in the said amended charge the name of first accused Taj Muhammad has not been mentioned, although he was in attendance and facing trial. The subject amended charge ought to have been framed against both the accused and not against the culprit arrested subsequently. Looking to the subject circumstances, the learned DDPP for the State who has also been assisted by the advocate for the complainant, jointly moved instant application for amendment in charge thereby bringing on the record the name of accused Taj Muhammad alongwith accused Abdul*

*Baseer, same has been consented by the advocate for the accused Taj Muhammad as well as by Mr. Zia Hussain, advocate associate of Mr. Ghulam Mustafa Memon, advocate for the accused Abdul Baseer. By the subject amendment in the charge neither fresh evidence is essential nor the same will change the basic ingredient of the crime, as such just to rectify the bonafide mistake did by the then trial Court, I hereby allow the application in hand and will frame the amended charge. Case is adjourned to 16.12.2013 for amended charge.*

*Announced in open Court this 10<sup>th</sup> day of December, 2013.*

*Sd/-*

*(Ghulam Mustafa Memon)  
District & Sessions Judge Karachi West*

17. We have found that the charge, which was corrected to rectify the error by way of a fresh charge, was framed in accordance with the provision of Sections 221, 222, 223 and 224 Cr.P.C and no illegality has been found by us in that charge which misled the accused or caused them any prejudice and due to such correction, rights of the parties were not affected and no failure of justice has arisen vis.a.vis the appellants. We have also noticed that both the appellants through their counsel raised no objection on application for correction in the charge and they had also not filed any application for re-calling the witnesses already examined. Even we have found no need of re-calling them after such correction and the appellants were not prejudiced from any of their right to a fair trial as they know the charge against them and prepared their defence and cross examined the prosecution witnesses pursuant to such defense. We have also found that after making such correction in the charge in shape of fresh charge, a joint statement was filed by the counsel of complainant and APP for the state wherein they adopted the same evidence earlier recorded and such was taken on record at Ex: 47, whereas both the appellants had also filed their

separate statements through their counsel and adopted their earlier statement U/S 342 Cr P C and such were also taken on record at Ex: 48 and 49 respectively. In our view therefore based on the above discussion the remand of the case is not justified and we will proceed to decide the appeal on merits as desired by the learned counsel for the appellant. Reliance is placed on the case of Nazir Ahmed and others V. The State and others.{ PLD 2005 Karachi 18 }, relevant paragraphs are re-produced as under:-

*"...19. As regards the objection of the learned Advocate for the appellants that the particulars of the role assigned to each appellant are not mentioned in the charge or no separate charge for offence under section 302, P.P.C. against the appellants Nazeer Ahmed and Dilawar was framed or the charge of 149, P.P.C. does not mention its parts, therefore, the charge is defective. No doubt these are errors in the charge but the said errors can be cured under section 225, Cr.P.C., which reads as under:-*

*"225. **Effect or errors.**--No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."*

*20. From the above provision of law, it is clear that even if the particulars required to be stated are not mentioned in the charge then the errors are curable subject to conditions that the accused is not misled or it has not occasioned a failure of justice. Similar is the case with regards to the objection about the charge under section 114, P.P.C. The important point for consideration is whether these defects had misled the appellants or it has occasioned a failure of justice. In this connection illustration, 'D' of section 225 is reproduced which explains the said point more clearly. It reads as under:*

*"(D) A is charged with the murder of Khuda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haider Baksh, and the date of the murder was the 20th January, 1882. A never was charged with any murder but one, and had heard the [trial], before the Magistrate, which referred exclusively to the case of Haider Baksh.*

*The Court may inter from these facts that A was not misled and that the error in the charge was immaterial."*

*21. Furthermore a perusal of sections 225, 232, 535 and 537 of Cr.P.C. shows that every conceivable type of error and irregularity referable to a charge that can possibly arise can be cured. The error or irregularity may range from the cases in which there is a conviction with no charge at all. That may be from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Cr.P.C. is emphatic that whatever the irregularity may be it is not be regarded as a fatal unless there is prejudice. A reference invited to 1980 SCMR 402 (Nadir Shah v. State).*

*22. In the present case, it is pointed out that before the case proceeded the appellants were provided all the required documents under section 265-C, Cr.P.C. The said documents contained all the details of the allegations and the evidence purported to be produced against each of them. Thus, the appellants came to know the entire case of the prosecution and allegations levelled against each of them by the prosecution even before the framing of the charge. While framing the charge the trial Court committed the above errors, as the charge was not happily worded. It- is pointed out that a seasoned and senior counsel represented the appellants. After framing of the charge, he did not raise any objection in framing such a charge. He also did not apply for making any alteration or amendment in the charge at any stage of the trial by invoking the provisions of section 227, Cr.P.C. to make the charge inconformity with the prosecution allegations. However, the case proceeded: The evidence was led in which the witnesses deposed the prosecution allegations against each appellant. The appellants cross-examined each witness at length and put their defence to the witnesses in it. During that period also the Advocate for the appellants did not raise any objection or pointed out to the trial Court that the framing of the charge and evidence had misled them in their defence. Even at that stage, the appellants could have requested the Court for altering or amending the charge but the appellants kept quiet, which clearly shows that they were not prejudiced or misled in their defence. It is pointed out that under Explanation- clause of section 537, Cr.P.C. it is provided that in determining whether any error, omission or irregularity in any proceedings under the Code of Criminal Procedure has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In the present case, the appellants could have raised objection but they did not do so If they felt that an error or irregularity in the*

*charge misled them or the same had occasioned a failure of justice, then they should have raised such objection at that stage but they did not do so the conduct on the part of the appellants clearly indicates that they were satisfied with the charge and they were not being misled by such charge. It has been held in a case of Nadir Shah v. State (1980 SCMR 402) at page 409, as under:--*

*"Before dealing with the questions relating to the merits. it is necessary to refer to the curing provisions in section 225, Cr.P.C. similar to those contained in section 537, Cr.P.C. the Legislature never intended-that the errors committed in stating either the offence or the particulars required to be stated in the charge or omission in that behalf, be regarded as material unless the accused was in fact misled by such errors or omissions and further, it also occasioned a failure of justice. "*

*23. After relying upon the above mentioned authority, the Hon'ble Supreme Court of Pakistan in another case of Shah Nawaz v. 'State reported in 1992 SCMR 1583, took the same view.*

*24. After considering the arguments and case-law, we are of the considered view 'that the errors and defects in the charge had not misled the appellants or occasioned a failure of justice."*

18. Turning to the merits of the case, we have found that the prosecution witnesses have given contradictory evidence on nearly each and every material point hence we have serious doubts about their truthfulness. Besides other material contradictions, they are not in line with each other particularly on the point of presence of accused persons at the time of incident, weapons carried by the accused persons at the time of offence and the role played by accused persons in the commission of offence.

19. On the point of presence of accused at the time of offence at the place of wardat, PW-1 (Complainant), namely, Dindar Ali during his examination-in-chief showed the presence of accused Abdul

Baseer, Shafiq-ur-Rehman and Taj Muhammad, PW-2, namely, Anwar Ali brother of complainant was in line with complainant on the point of presence of accused at spot, whereas PW-9, namely AdilZada showed presence of accused Abdul Baseer and Shafiq-ur-Rehman and for accused Taj Muhammad he deposed in his examination-in-chief that accused Taj Muhammad was not present.

20. On the point of holding the weapons by the accused at the time of offence, PW-1, Complainant, Dindar Ali had not showed any weapon with accused Shafiq-ur-Rehman but he deposed in his examination-in-chief that Shafiq-ur-Rehman was armed with Carbine pistol and accused Abdul Baseer and Taj Muhammad were armed with Knife (churi), however, during cross examination he admitted this fact and stated that "It is correct to suggest that I have not used the term carbine pistol in the FIR but the word "Aatishen" indicates carbine pistol mentioned by me in the FIR." PW-2, Anwar Ali deposed in his examination-in-chief in same line as complainant, whereas PW-9, Adil Zada deposed in his examination-in-chief that Abdul Baseer was holding double barrel gun in his hand and did not show any weapon with Shafiq-ur-Rehman.

21. On the point of role played by the appellants at the time of incident, PW-1 Dindar Ali deposed in his examination-in-chief that accused Shafiq-ur-Rehman who was armed with carbine pistol, tried to fire with intention to murder of Nisar Ali but Rahimullah came in his front and the same bullet hit him and passed through left side on the neck and he fell down facing toward and died, while Taj Muhammad and Abdul Baseer who were already armed attacked with intention to murder deceased Nisar Ali. Abdul Baseer from left side and Taj Muhammad from right side below the rib

caused injury with knives (Churi). He further deposed in his examination-in-chief that deceased Nisar Ali tried to catch knives due to which his hands also got injured. PW-2 Anwar Ali deposed in his examination-in-chief that accused Shafiq fired from his carbine pistol which hit Rahimullah on his neck and he received grievous fire arm injury and he fell down and accused Abdul Baseer and Taj Muhammad caused Churi below to Hafiz Nisar Ali on the right and left side of ribs. He also received severe injury and also fell down but this witness did not depose a single word whether deceased Nasir Ali also received injuries on his hands. PW-9, namely, Adil Zada deposed in his examination-in-chief that Hafiz Nisar came out running towards the house of accused Abdul Baseer, holding double barrel gun in his hand. The deceased Rahimullah went in front of deceased Hafiz Nisar and said that the issue is minor and it should not be gone executed up to the gun. Deceased Hafiz Nisar replied to deceased Rahim to go aside and pushed him and fired shot which hit to deceased Ramimullah and he fell down. He further deposed that deceased Hafiz Nisar moved towards the house of accused Abdul Baseer and Shafiq brother of accused Abdul Baseer, caught hold of him from back side and moved the barrel of the gun upwards. In the meanwhile, accused Abdul Baseer came there running and started beating and causing screw driver blows to deceased Hafiz Nisar.

22. The prosecution witnesses have also given different stories of the incident before the trial court. PW-1 in his examination-in-chief deposed that this incident took place on 17-1-2002 at about 4pm in front of Babak shopkeeper, Behrin road, Frontier colony. Deceased Nisar Ali was going ahead of him to convince the accused person as soon as deceased reached at the place of occurrence, on seeing him,



accused person Abdul Baseer shouted that Nisar Ali should not go scot-free. Shafiq-ur-Rehman, who was armed with carbine pistol tried to fire with intention to commit murder of Nisar Ali. Rahimullah came in his front and the same bullet hit him and passed through left side to right side on the neck and he fell down facing towards and died, while Taj Muhammad and Abdul Baseer who were already armed attacked with intention to murder of Nisar Ali. Accused Abdul Baseer from left side and Taj Muhammad from right side below the rib caused injury with knives (Churi). He got sustained severe injury. Deceased Nisar Ali tried to catch knives due to which his hands also got injured. We rushed to him then accused persons fled away from the scene.

23. (PW-2) Anwar Ali deposed in his examination-in-chief that complainant is his brother, deceased Hafiz Nisar Ali was his brother. This incident took place on 17.01.2002 at about 04 PM at Frontier Colony in front shop of Babak, Bahreen Road. A quarrel between his younger brother Zain-ul-Abideen and Baseer was held and such report was lodged at the concerned police station. His elder brother deceased Hafiz Nisar Ali had come to his home on that day. His maternal uncle's son Waris Khan had also come at our home on that day, Waris Khan had told him that Baseer, Taj and Shafi duly armed with danda and stones were abusing them at their home and his brother Hafiz Nisar Ali asked Waris Khan that he will intervene in order to subside the dispute. Thereafter their brother Hafiz Nisar Ali went towards the Baseer and others in order to pacify to them. He further deposed that after six minutes they went towards the accused Baseer and others and at that time accused Baseer loudly said that Hafiz Nisar Ali should not go alive

from there, accused Shafiq was armed with carbine pistol, Rahimullah and Hafiz Nisar Ali were trying to convince Baseer and others to resolve the dispute. Shafiq who was armed with carbine pistol pointed his pistol towards Hafiz Nisar Ali and Rahimullah who was also there tried to intervene in order to stop them, accused Shafiq fired from his carbine pistol which hit Rahimullah on his neck and he received grievous fire arm injury and he fell down and accused Baseer and Taj caused churri below to Hafiz Nisar Ali and Taj caused churri below to Hafiz Nisar Ali on the right and left side of ribs. He also received severe injury and he also fell down. The muhalla people were gathered there. The accused Baseer, Taj and Shafiq escaped good after committing crime from the place of incident.

24. (PW-9) namely Adil Zada in his examination-in-chief stated that he knows Hafiz Nisar and deceased Rahimullah. He is not related to them but they were his mohalla people. The incident occurred on 17.01.2002. In the morning, he was present in his house and his brother Taj Muhammad came to his house and made call to police through PTCL phone on "15" informing about the quarrel between Abdul Baseer, Shoukat Hussain, Anwar Ali and Zainul Abideen. He and his brother then came out from their house and noticed that Abdul Baseer was lying injured, his two brothers accused Taj Muhammad and Dost Muhammad shifted him to Abbasi Shaheed Hospital by motorcycle. He also proceeded to Abbasi Shaheed Hospital and noticed that Abdul Baseer was sustaining injuries on his head and other body. He further deposed that at about 1100 or 1200 noon, he came back to his house. At about 03:00 or 3:30 PM accused Abdul Baseer came back from hospital and started kicks on the door of house of Verk, whereupon

Mujeeband Shafique, brothers of accused Abdul Baseer took him to their house. Thereafter, one woman wearing veil came out from the house of Verk and went to the house of Moosa Khan. After some time, deceased Hafiz Nisar came out running towards the house of accused Abdul Baseer, holding double barrel gun in his hand. The deceased Rahimullah went in front of deceased Hafiz Nisar and said that the issue is minor and it should not be taken upto the gun. Deceased Hafiz Nisar replied to deceased Rahim to go aside and pushed him and fixed fire shot, which hit deceased Rahimullah and he fell down. Deceased Hafiz Nisar then moved towards the house of accused Abdul Baseer. Further in his examination-in-chief he stated that he called to the neighbourers, who brought their Suzuki Carry, when he alongwith Shahenshah son of deceased Rahimullah and Fida Hussain, were shifting deceased Rahimullah in Suzuki Carry, in the meantime, he noticed that deceased Hafiz Nisar Ali moved towards the house of accused Abdul Baseer and Shafiq brother of accused Abdul Baseer, caught hold him from back side and moved to the barrel of the gun upwards. In the meantime, accused Abdul Baseer came there running and started beating and causing screw driver blows to deceased Hafiz Nisar. The deceased Hafiz Nisar while falling down, again fired with gun, which hit the earth and no body sustained injury.

25. PW-12 namely Shahenshah who is real son of deceased Rahimullah deposed before the trial Court that complainant Dendar is residing in his mohalla, deceased Hafiz Nisar Ali was brother of complainant. Deceased Rahimullah was his father. He also knows both accused persons present in Court, who are residing in the same mohalla and their names are Baseer and Taj PW Dawood is his younger brother. On 17.01.2002, he was available at his house

alongwith other family members comprising of mother, sisters and younger brother namely Atta-ur-Rehman. At about 03:30 or 04:00 pm, he heard fire shot and rushed out of his house and noticed that his father was lying on the earth sustaining bullet injury. He shifted his father to Abbasi Shaheed Hospital. After some time, Hafiz Nisar Ali was also brought at hospital but he was unaware whether he was alive or not. After post mortem, he shifted the dead body of his father to his house.

26. (PW-13) namely Dawood Shah, who is also real son of deceased Rahimullah, deposed that accused present in Court are namely Baseer and Taj. Deceased Rahimullah was his father, deceased Hafiz Nisar Ali was also residing in his mohalla, complainant was also residing in their mohalla. The incident occurred on 17.01.2002 at about 04:30 pm. At the time of incident, his father was working as Chowkidar but he does not know place of his service as he was minor at that time. At the time of incident, he was available at his house. In his house, he himself, his brothers Shahenshah, Aman and mother and other ladies are residing, his father was also available. He came out of the house and noticed that there was rush of public near the shop of Babak. There was quarrel between Shafiq and Nisar Ali, again says the quarrel was held in the morning. He himself and his father both were standing in rush of people at Babak shop. Baseer returned from hospital and knocked at the door of the Virk, who was not present in his house. The mohalla people took Baseer to his house. Thereafter, deceased Nisar Ali was coming from his house, who was having gun in his hand, his father asked him not to quarrel with Baseer and came in front of Nisar Ali. His father caught gun of Nisar Ali but in the meantime there was fire from gun and his father sustained gun

injury. He rushed towards his father. His elder brother Shahenshah also came there. His brother Shahenshah alongwith 2/3 mohalla people shifted his father to hospital in a Suzuki. He was sitting there and weeping and mohalla people took him to house of accused Taj and then Taj came out from side of the house.

27. (PW-14) namely Fida Hussain deposed before the trial Court that he knows deceased Hafiz Nisar Ali, who was residing in his mohalla and was the real brother of complainant Deendar. He knows both accused persons present in Court, their names are Taj and Baseer. He knows deceased Rahimullah, who was also residing in his mohalla. The incident occurred in the year 2002, about eleven years back. It was about 03:00 to 04:00 pm, he was standing near his house, at that time, accused Baseer was brought to hospital by his brothers namely Mujeeb, Shafiq and some mohalla persons. Virk is maternal uncle of deceased Hafiz Nisar Ali. Accused Baseer kicked at the door of the house of said Virk, which is situated near to his house. Accused Baseer was taken to his house by his brothers. He further deposed that he was standing near his house and noticed that deceased Hafiz Nisar Ali brought a gun and deceased Rahimullah tried to intervene him, in the meantime, by chance there was fire from said gun which hit Rahimullah. Thereafter, he, Adil Zada and Dawood Shah rushed towards Rahimullah to shift him to hospital. Thereafter Shahenshah, son of deceased Rahimullah also reached there. He hired a Suzuki to shift Rahimullah to hospital, when they were moving in the Suzuki for hospital and noticed that Nisar Ali was lying on the ground. He in his cross-examination further stated that accused Taj Muhammad was not present at the spot at the time of incident.

28. (PW-15) namely Waris Khan deposed before the trial Court that he does not know both accused persons present in Court. Complainant Deendar is his relative. Deceased Rahimullah was known to him as he was father of his friend. Deceased Hafiz Nisar Ali was also his relative. He is unaware who had lodged the FIR of instant incident. The incident occurred about 12 years back. He is unaware about the time. He was not present at the time of incident. His brother-in-law late Shaukat called him through telephone to reach at his house which is situated at Keekar Ground, Frontier Colony. He reached there at about 04:00 to 05:00 pm. Late Shaukat took his NIC. The police was also available in the drawing room of Shaukat and they obtained his signature on a paper. He was not examined by the police during investigation. After the above evidence, he was declared hostile and was cross-examined by the DDPP.

29. (PW-16) namely Khalid Hussain, who deposed before the trial Court that he knows both the accused present in Court namely Baseer and Taj. He also knows complainant Deendar Ali, who is residing in their mohalla. The deceased Nisar Ali was brother of complainant, so also deceased Rahimullah was also known to him. The incident occurred in the year 2002. At the time of incident, he was available in Muhammadi Masjid, situated in Bazar, which is at the distance of about 10 minutes on walk from his house. One person informed him that his brother Fida Hussain was taken away by the police at PS Peerabad. Thereafter, he went to PS, where one police person obtained his signature on a paper as his brother had already signed it. He was unaware about the detail of the incident nor had witnessed the incident. His statement was not recorded by the police.

30. All the above witnesses were shown by the prosecution as eye-witnesses of the incident and they have given separate stories of the incident and they even all shown as different witnesses who had seen the incident. The conflicting and contradictory evidence which is material in nature of the key prosecution witnesses makes the entire case of the prosecution doubtful. Reliance can be placed on the cases of Muhammad Ashraf alias Acchu Vs. The State 2019 SCMR 6521 and Muhammad Mansha Vs. The State 2018 SCMR 7721.

31. The complainant in his examination-in-chief showed himself as an eye-witness of the incident; whereas, during cross-examination he stated that "It is correct to suggest that in my FIR I have not stated to have seen the alleged incident." This conduct of the witness (complainant) clearly showed that his evidence is not reliable. Likewise the complainant and other (PW-2) Anwar Ali who is also real brother of the complainant and deceased, stated in his cross-examination that "It is correct to suggest that I alongwith Deendar and Waris Khan went afterwards the place of incident, stated in my statement under Section 161 Cr.P.C"(PW-9) who is an independent witness namely Adil Zada in his cross-examination stated that "It is correct to suggest that deceased Hafiz Nisar had fired shot to accused Abdul Baseer but due to its angle towards down, same hit the earth."

32. Presence of complainant Deendar Ali and PW-2 Anwar Ali at the time of incident while taking the deceased persons to the hospital by them is also doubtful as on this point, PW-1 Deendar Ali (Complainant) in his examination-in-chief stated that "I, Dindar Ali, Anwar Ali, Waris and other people of locality carried the deceased persons to hospital. After postmortem of both dead bodies

and legal formalities, we for the purpose of funeral, took them at home at about 06:30 to 07:00 pm.”He stated in his cross-examination that “It is correct to suggest that I did not identify the deceased persons at the time of postmortem.” This witness during cross-examination replied the suggestion of defense counsel as “It is incorrect to suggest that I neither witnessed this occurrence nor present in the hospital alongwith corp.”(PW-2) in this regard stated in his examination-in-chief that “The mohalla people who were gathered there in order to provide first aid to both the injured who were seriously injured taken them to Abbasi Shaheed Hospital (ASH). At that time, eye witnesses Mannan and Naseer were present. Thereafter, we went to ASH where we came to know that both the injured succumbed/expired due to injuries sustained by them”. He further deposed in his cross-examination that “when I reached at the place of incident I saw about 20 to 25 inhabitants available there”. The evidence of this PW showed that he did not witness the incident nor he took the injured from which one was his real brother to the hospital to save his life. In this regard, (PW-3) namely Khalil-ur-Rehman stated during his cross-examination that “I received the dead body. Dindar Ali and Anwar Ali came at hospital after receiving of dead body by me”. It has also come in the evidence of Doctor Nisar Ali Shah that dead bodies were brought by police in the hospital. He in his cross-examination stated that “I see postmortem report of deceased Rahimullah and say that his dead body was identified by Pervaiz Khan and Nasir Khan. It is correct to suggest that the dead body of deceased of Rahimullah was brought by SIP Muhammad Ashraf. I see postmortem of deceased Hafiz Nisar Ali and say his dead body was identified by Khalil-ur-Rehman



and Muhammad Saleem and his dead body was also brought by SIP Muhammad Ashraf.”

33. Apart from the above material contradictions in the evidence of the key prosecution witnesses other most important aspects in the present case is that the empty of the cartridge was **not** recovered from the place of incident though the place of incident was inspected by the police on the same day; that no weapon was recovered from either of the appellants which can connect them with the commission of offence.

34. The record reveals that SI Ashraf visited the place of wardaat in presence of Naseeruddin and Fazal Mannan and recovered bloodstained earth but surprisingly the same was not sent to chemical examiner nor any report is available in this regard.

35. Another important PW was shopkeeper where the incident took place but he was not examined by the investigating officer during investigation nor the complainant produced him before the trial court at the time of recording evidence of other witnesses in support the case of prosecution. Reliance can be placed on case of G.M. Niaz Vs. The State (2018 SCMR 506).

36. It is now settled that medical evidence is an evidence which is always used for ascertaining the cause of death, nature of injury, use of weapons, period in between injury and death etc. but cannot be used to identify the culprit. Hence, death of two innocent persons in the present case is not deniable in this regard as all the witnesses are on same line that both the deceased namely Rahimullah and Hafiz Nisar Ali were murdered and such fact is also supported by the evidence of Doctor Nisar Ali Shah who conducted the postmortem of the deceased.

37. It is well settled principle of law that all the incriminating piece of evidence available on record is required to be put to the accused, if the same is against him while recording his statement under section 342 Cr.P.C as has been held by Hon'ble Supreme Court of Pakistan in case of Muhammad Shah V. The State { 2010 SCMR 1009 }, likewise the case cannot be remanded back to the trial court for recording statement under section 342 Cr.P.C. afresh so that the prosecution can fill in the lacunas in its case as has been held by Hon'ble Supreme Court of Pakistan in case of Nusrat Ali Shar etc. V. The state in Cr. Appeal Nos. 24-K, 25-K and 26-K of 2018. It is also settled by the Apex Court time and again that the piece of evidence which was not put to accused at the time of recording his statement under section 342 Cr.P.C. could not be considered against him. Reliance can be placed in case of Imtiaz @ Taj V. The State 2018 SCMR 344, Qadan and others V. The State 2017 SCMR 148 and Mst. Anwar Begum V. Akhtar Hussain alias Kaka and 2 others 2017 SCMR 1710.

38. In the present case, statement under section 342 Cr.P.C. was twice recorded by the trial court but the medical evidence in shape of postmortem was not put to him on both the occasions. Whereas, trial court while convicting the appellants also considered the medical evidence which is against the scheme of law and is in violation of supra judgments of Hon'ble supreme Court of Pakistan.

39. We cannot go beyond the settled principles of law by the Apex Court that prosecution is duty bound to prove its case beyond reasonable shadow of doubt by producing confidence inspiring and trustworthy evidence and if a single circumstance creates doubt in the prosecution case its benefit must go to accused not as a matter of grace or concession but as a matter of right. We find in the

present case that the prosecution has failed to produce confidence inspiring and trustworthy evidence against the appellants as discussed above in detail. Reliance can be placed on the case of Tariq Pervez V. The State {1995 SCMR 1345}.

40. We, therefore, allow the instant appeal and acquit the appellants namely Taj Mohammad and Abdul Baseer by extending them the benefit of doubt and set aside the impugned judgment of trial Court dated: 19-03-2016 passed by learned Sessions Judge, Karachi West in Sessions Case No.105/2012 under FIR No.22/2002 for the offence under sections 302 & 34 PPC registered at PS Peerabad, Karachi. The appellants are directed to be released forthwith, if not required in any other custody case. As a result thereof, the conformation reference sent by the trial court is answered in negative.

41. The appeal stands disposed of in the above terms.

**JUDGE**

**JUDGE**