

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI**

Date	Order with signature of the Judge
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**Spl. Cr. A.T. Appeal No.189 of 2019  
Spl. Cr. A.T Jail Appeal No.220 of 2019**

Array Masih @ Eric..... Vs.....The State & others  
**Spl. Cr. A.T. Jail Appeal No.322 of 2019**

Waqas Masih ..... Vs. ....The State

**29. 01.2021.**

Mr. Iftikhar Ahmed shah a/w Shahzad Leghari, advocate for  
appellants.

Mr. Khadim Hussain, Addl. P.G.

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**MUHAMMAD IQBAL KALHORO J:** Having been convicted and sentenced to suffer imprisonment for life and to pay Rs.25000/- each to the legal heirs of deceased, in default to suffer imprisonment for six months in Spl. Case No.A-03 of 2014 bearing Crime N.358/2013 U/s 302, 34 PPC r/w section 7 ATA of P.S. Zaman Town, Karachi vide a judgment dated 02.07.2019, appellants preferred Spl. Cr. A. T. Appeal No.189/2019, Spl. Cr. A.T. Jail Appeals No.220 and 322 of 2019 against the same, which were decided by a Division Bench of this Court comprising my brothers Mr. Justice Nazar Akber J. and Mr. Justice Zulfiqar Ahmed Khan J. vide a judgment dated 04.01.2021. My lord Mr. Justice Nazar Akber J. was pleased to acquit the appellants, whereas my lord Mr. Justice Zulfiqar Ahmed Khan J. disagreed and upheld conviction and sentence awarded to the appellants. In the light of spilted views with regard to acquittal of the appellants, the matter was placed before Honourable Chief Justice and he was pleased to nominate the undersigned as a referee judge on office note vide order dated 11.01.2021. In compliance thereof, the matters have come on the file of the undersigned and today have been heard with assistance of learned defence counsel and Additional Prosecutor General, Sindh.

2. As per brief facts, a crime report of the incident occurring on 23.09.2013 in between 1730 to 1745 hours was registered on 24.09.2013 at 1830 hours, by a brother of deceased namely Nazar Iqbal. He has stated that he was informed on phone that accused namely Waqas Masih, Yasir and Eri @ Eric Masih while holding a protest at gate Khulfa-e-Rashdeen Masjid, against

Peshawar incident in which few Christian people had lost their lives as a result of a Bomb blast, pulled his brother Nazar Iqbal present there and dragged him to a nearby lane and caused him injuries with stick, bat, iron rod and knife on various parts of his body including his head. He died at the spot, and subsequently was taken to Hospital for postmortem, which was conducted after 20 hours of the incident. He has mentioned in the report that three eyewitnesses had seen the incident but has not introduced their names therein.

3. Eyewitnesses namely Muhammad Saeed, Muhammad Jibrán and Muhammad Mushtaque were introduced in the case after five days of the incident on 28 and 29<sup>th</sup> September, 2013 respectively when their 161 Cr.P.C statements were recorded. In their statements, they have not assigned any active role to any of the appellants or accused namely Yasir Masih and Eri Masih, who have since absconded except their presence. However, meanwhile appellant Arrey @ Eric was arrested on 30.09.2013, although his name does not appear in the FIR nor in 161 Cr.P.C statements of the eyewitnesses and thus it is unclear what evidence led the police to arrest him. After about one month of the incident, 164 Cr.P.C statements of said eyewitnesses were recorded on 22.10.2013 and 24.10.2013 respectively. In those statements, the eyewitnesses among others have taken name of the appellant Arrey @ Eric Masih but without assigning any active role to him. After usual investigation, the case was challaned and in the trial prosecution examined as many as 11 witnesses, who have produced all the necessary documents including FIR, different memos, postmortem etc.

4. After closure of the prosecution side, the statements of appellants u/s 342 Cr.P.C were recorded in which they have denied prosecution story and pleaded their innocence. However, they did not prefer to examine themselves on oath u/s 340(2) Cr.P.C. On conclusion of trial, they were convicted and sentenced as stated above and their challenge to the same has resulted in spilling judgments regarding their acquittal as stated above.

5. I have read evidence of the witnesses with assistance of learned counsel appearing for the respective parties. It is clear that in the FIR lodged after 25 hours of the incident, none of the witness's name transpires. Complainant himself is not the eyewitness but was informed on phone of the incident by some one else, even that person has not been made a witness in the case nor his identity is disclosed. P.W. Muhammad Saeed in his evidence has stated that appellant Waqas was arrested with a pistol and had fired at the

deceased. However, while conducting the postmortem, the MLO did not find any such injury and in his cross examination has revealed that there were four injuries on the body of deceased which were minor in nature, skin deep merely and were not sufficient for causing death of deceased. He has further clarified that he was not able to ascertain cause of death of the deceased.

6. P.W. Muhammad Jibrán has simply produced his 164 Cr.P.C statement in his evidence, a perusal of which does not show any active role assigned to any of the appellants. He has simply given narration of the incident and presence of 10/11 Christians armed with certain articles/weapons. P.W. Muhammad Mushtaq, third eyewitness has also not assigned any role to any of the appellants except that they were present at the spot. He also says that appellant Waqas was armed with a pistol but has said that he had made aerial firing. Conspicuously he has contradicted with P.W. Muhammad Saeed as his assertion about this accused causing a direct fire on the deceased. However, it is interesting to note that neither any empty was recovered from the spot nor during investigation after arrest of appellant Waqas any crime weapon was recovered from him. P.W. Muhammad Mushtaq has disclosed in his evidence that accused had pulled the deceased to a lane inside lane No.5 where they had jointly beaten him, whereas P.W. Muhammad Saeed in his evidence says that accused had beaten the deceased first and thereafter appellant Arrey and Waqas dragged him by holding his legs inside lane No.5 and when deceased tried to stand up, appellant Arrey had attacked him with knife. The medical evidence in regard to injury by knife has not been found on person of deceased and the version narrated by both the witnesses is contradictory to each other. A holistic view of the evidence of the eyewitnesses brought on record would reveal that although presence of appellants has been established but without any specific role and without causing any injury to the deceased. In such circumstances their sharing common intention with the main accused does not appear to have been established by the prosecution nor settled conclusively in the evidence recorded during the trial. Further it is strange to note that although three eyewitnesses have asserted their presence at the spot but in their evidence none of them have supported presence of each other and appear to be totally unaware of presence of each other. This factor coupled with the fact that they were chance witnesses and in ordinary course were not supposed to be available at the spot have rendered their evidence unworthy of reliance.

7. The evidence of MLO appears to have caused a final blow to the prosecution qua guilt of the appellants in the incident of death of deceased.

He says that although there were four injuries but those were minor in nature, skin deep and were not sufficient for causing death of deceased. He admits that he could not ascertain cause of death of the deceased. And, although eyewitnesses have stated that deceased was pulled and dragged by the accused to the lane from his legs, but the doctor says that there were no marks of pulling or dragging on the person of the deceased. The medical evidence, therefore, has completely belied the version of the eyewitnesses forwarded before the Court. In these circumstances, I am of the view that the prosecution cannot be said to have brought home guilt of the appellants beyond a reasonable doubt. It is a golden principle of law, that when there is even a single circumstance causing a reasonable doubt in the mind, benefit of which shall be extended to the accused not as a matter of grace or concession but as a matter of right. Mere presence of the accused that too established by shaky evidence would not connect them with death of the deceased particularly when even cause of death is not known and could not be ascertained by the MLO. In the circumstances, I concur with the reasons recorded by my brother Mr. Justice Nazar Akber J. in acquitting the appellants and allow this appeal. As a result, I acquit both the appellants, they shall be released forthwith if not required in any other custody case.

The appellants stand disposed of in the above terms.

JUDGE

A.K