

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No. 317 of 2019
Special Criminal Anti-Terrorism Appeal No. 318 of 2019
Confirmation Case No. 16 of 2019

Present:

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellants : Anwar Faheem and Khurram Mustafa
through Mr. Muhammad Imran Meo,
Advocate.

State : Through Ms. Rahat Ahsan,
Additional Prosecutor General, Sindh.

Date of Hearing : 23.12.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellants Anwar Faheem @ Anoo @ Zeeshan son of Faheemullah and Khurram Mustafa son of Muhammad Ajaib were tried by learned Judge, Anti-Terrorism Court-VI, Karachi in Special Case No. 163 of 2011 [Crime No. 544 of 2011, under section 302/34 PPC read with Section 7 of ATA 1997] at P.S Gulshan-e-Iqbal, Karachi and in Special Case No. 167 of 2011 [Crime No. 463 of 2011, under section 13(d) of Arms Ordinance, 1965], registered at P.S. Quaidabad, Karachi. On conclusion of the trial, vide judgment dated 28.10.2019, the appellants were convicted and sentenced as under:-

- 1) Accused Anwar Faheem is convicted in bearing Crime No.544/2011, u/s 302(b) PPC and he is awarded death sentence as hanged till to his death with compensation of Rs.200,000/- to be paid to the legal heirs of the victim.
- 2) Accused Khurram Mustafa is convicted in bearing Crime No.544/2011, u/s 302(b) PPC and he is awarded death sentence as

hanged till to his death with compensation of Rs.200,000/- to be paid to the legal heirs of the victim.

- 3) Accused Anwar Faheem is convicted in bearing Crime No.544/2011, u/s 7(1)(a) ATA, 1997 and he is awarded death sentence, to be hanged till his death.
- 4) Accused Khurram Mustafa is convicted in bearing Crime No.544/2011, u/s 7(1)(a) ATA, 1997 and he is awarded death sentence, to be hanged till his death.
- 5) Accused Anwar Faheem is also convicted in bearing Crime No.463/2011 u/s 13-D Arms Ordinance, 1965 and he is sentenced to undergo for R.I. 07 Years with fine of Rs.10,000/- and in case of default in payment of the fine then he shall suffer a simple imprisonment of another six months.

Benefit of Section 382-B, Cr. P.C. was also extended to accused.

2. Brief facts as per the Crime Report No.544 of 2013 [Exh.18/J] are that on 25.07.2011 at about 2345 hours, informant Syed Anwar Shah reported the matter to police alleging that his brother Sabir Shah on 24.07.2011 with his friend Muhammad Shareef in his car bearing No.ARH-363, Make Mira, silver colour, proceeded to meet his friends. At about 1200 hours at midnight by telephone, the complainant received information that his brother and his friend had been killed near Gulshan Degree College, Block-07, Gulshan-e-Iqbal, at about 11:15 p.m. by some **unknown persons**, riding a motorcycle. The complainant instantly went to Jinnah Hospital and found dead bodies of his brother Sabir Shah and his friend Muhammad Sharif, who had sustained fire arm injuries at different parts of their bodies. Hence, the FIR was lodged against the unknown persons.

3. After usual investigation, challan was submitted against the above accused under the aforementioned sections and trial court framed charge against the accused at Exh.06, to which the accused pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined as many as twenty witnesses in order to prove its case. Thereafter, prosecution side was closed.

5. Statements of accused Anwar Faheem and Khurram Mustafa under Section 342 Cr. P.C. were recorded at Exh.47 and 48, wherein the accused denied all the incriminating pieces of prosecution evidence brought against them on record and claimed false implication in these cases and stated that crime weapons have been foisted upon them, all the witnesses are untruthful, interested and inimical to them and declined to give statement on oath. In a question what else you have to say, they replied that they were innocent and had done no offence, prayed for justice.

6. Trial Court after hearing the learned counsel for the parties and assessment of the evidence, vide judgment dated 28.10.2019 convicted and sentenced the appellants as stated above. Hence these appeals.

7. Before dealing with the instant case and assessing the evidence before us it is relevant to mention that initially co-accused Noman Azeem, Rashid @ Chamber and Asif Qasmani were acquitted by extending them benefit of doubt under section 265-H(i) Cr. P.C.

8. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. He further contended that there is no strong evidence against the appellants/ accused and they cannot be convicted on the basis of prosecution evidence. He further argued that no such incident took place and police has managed a flimsy story in the said FIR. He further contended that learned trial court did not consider the discrepancies and contradictions in the statements of PWs while deciding the case against the present accused and the learned trial Court has failed to appreciate that no alleged weapon has been recovered from the possession of the appellants and the alleged recovery totally foisted upon them. He also contended that the learned trial court has erred in holding that the prosecution has proved the case against the appellants while there was contradictory evidence, which is not trustworthy due to material contradictions and conviction handed down to the appellants is illegal and the same is result of mis-reading of facts and evidence on the record. Learned counsel further contended that the appellants are innocent and have falsely been implicated in

these fake and managed cases. He further contended that the learned trial court has miserably failed to appreciate the evidentiary value of evidence and also failed to prove the case beyond any shadow of doubt, so also, there is no FSL report till date available. Learned counsel for the appellants contended that the prosecution has failed to cite any private witness in this case. Lastly, learned counsel has prayed for acquittal of the appellant. In support of his contentions, learned counsel has relied upon the cases of **Muhammad Asif v. The State [2017 SCMR 486]**, **Muhammad Pervaiz v. The State [PLD 2019 SC 592]**, **Notice to Police Constable Khizar Hayat (PLD 2019 SC 527)**, and unreported judgment passed by this Court in **Criminal Appeal No.150 of 2016 [Khurram Mustafa v. State]**.

9. Learned Additional Prosecutor General while supporting the impugned judgment contended that sufficient incriminating evidence is available on record connecting the appellants with the commission of crime and prosecution has examined 20 PWs and they have fully implicated the accused in the present crime. She further argued that police officials had no enmity to falsely implicate the present accused in this case and trial court has rightly convicted the accused. She prayed for dismissal of the present appeals.

10. We have carefully heard the learned Counsel for the parties and scanned the entire evidence available on record.

11. At the trial, prosecution examined PW-01, Javed Iqbal Malik, Civil Judge, [Exh.14], who has conducted identification parade in the case and produced the Memo as Exh. 14/A and CNIC of witness Masroor Hussain as Exh.14/B. He has not been cross examined though chance was given.

12. PW-2, SIP Shahnawaz Khan, [Exh.18] deposed that he was posted as SIP at PS Gulshan-e-Iqbal, Karachi, in the Investigation Branch. On the same day, at about 2320 hours, **one Babar** called through cell phone at PS Gulshan-e-Iqbal that **two unknown persons on motorcycle** fired upon the car bearing registration number ARK-363 Meera, silver coloured at Gulshan Degree College,

main gate, and as a result thereof two persons sustained bullet injuries and died and dead bodies were lying there. He further stated that he inspected the dead body of Ghulam Sabir Shah s/o Ghulam Shah in presence of ASI Asif and Zubair and prepared such Memo in their presence, which he produced as Exh.18/E. He has further stated that on 25.07.2011 at 2300 hours, he went to the house of Anwar Shah, the brother of the deceased for recording his statement u/s 154 Cr. P.C. which he produced as Exh.18/1 and subsequently he registered the FIR No.544/2011 u/s 302/34 PPC, which he produced as Exh.18/J. During his cross-examination he admitted that he reached within five minutes at the place of incident and Babar did not meet with him at the place of incident, he did not inquire from the people of the locality on arrival at the place of incident and he had not mentioned the source of light for preparation of the memo at the place of incident in memo of seizure, he had not mentioned the engine and chasis number of the Meera Car in Memo of Seizure, further admitted that he had not mentioned the facts of any damage to the Meera Car in the Memo of Seizure and he did not make entry while leaving the PS for house of complainant as to record his statement and complainant did not nominate any accused in FIR and I.O. did not take any photograph at the place of incident and no sketch of the place of incident was prepared by I.O. in his presence, no private witness was accompanying I.O. at the time of inspection of the place of incident and the place of incident was surrounded with residential houses and I.O. did not inquire from the chowkidar of the College, further admitted that there was no signature of the mushirs on the sealed parcels and he had not mentioned the numbers of the empties in memo of seizure and neither he had mentioned the date upon the sealed parcel nor particular place of sealing upon the parcel and he had not mentioned the registration number of the ambulance in memo.

13. PW-03 Shaikh Anwar Shah [Exh.20] deposed that on 24.07.2011 at about 2315 hours, he was present at his house, he received information that his younger brother Sabir Shah along with his friend Shareef s/o Zareef had been murdered by some unknown persons behind Gulshan Degree College. The

culprits were on two motorbikes. Upon which he along with his other brother rushed towards JPMC where he had seen the dead body of his brother and his friend. He had also seen the fire arm injuries appearing on the body of his brother viz. **at the head, neck and stomach.** Police recorded his statement u/s 154 Cr. P.C and on the next day I.O had recorded his statement u/s 161 Cr. P.C.

14. PW-04 Masroor Hussain [Exh.22] deposed that on 24.7.2011 at about 11:00, he along with his friend **Faiz Muhammad** went to Block-7 at Al-Jannat Restaurant, Gulshan-e-Iqbal to have dinner by car. When they reached and parked the car, they got out and saw a friend of him namely Sabir Shah and his companion were being manhandled and dragged by some unknown persons who then forcibly put them in a silver coloured Mira Car and drove away. They were shocked and returned to their home. He also stated that on the next morning, he read in daily Janbaz and also saw their photos that the two persons who were murdered at night were actually Sabir Shah and his companion. **He then collected address of Sabir Shah from his show room** and then went over but found that his family had gone to their native village for funeral. He produced true copy of his statement recorded u/s 164 Cr. P.C. as Exh.22/A before the Magistrate. During his cross-examination he admitted that the place of incident was a populated area and a busy commercial one, he did not ask contact number of the family members of the deceased from anyone in the neighborhood when they had gone for funeral and he had not mentioned the specific distance from where he witnessed the incident and in his statement under section 161 Cr. P.C. neither the license plate number of his car nor of the silver car has been mentioned and in his statement under section 161 Cr. P.C. **it was not mentioned that whether the accused persons were armed with weapon so also their description has also not been mentioned** and further admitted that ammunition recovered by the police was shown to him at PS and they disclosed that the weapons viz. KK was recovered from accused Khurram Mustafa and TT Pistol from accused Anwar Faheem.

15. PW-05 Inspector Tariq Ali [Exh.23] deposed that on 04.08.2011, he was posted as SIP at PS Gulshan-e-Iqbal, Karachi, in Investigation Branch. On the same day, he was entrusted with the investigation of Crime No. 544/2011 of PS Gulshan-e-Iqbal through letter dated 04.08.2011, which he produced the same as Exh.23/A. He has also produced site sketch as Exh.23/B, bears his signature. On return to the PS, he recorded statement under section 161 Cr. P.C. of the complainant and eye witness Mansoor Hussain. On 06.09.2011 he sent crime empties and recovered weapon to the FSL through letter which he produced as Ex.23/E. He also produced FSL report dated 08.09.2011 as Exh.23/F. During his cross-examination he admitted that **he had not produced any entry showing that he had left the PS for visiting the place of incident where he verified the sketch so prepared by PI Sultan Nawaz and Exh.23/B did not bear round stamp of PS Gulshan-e-Iqbal and on information he had proceeded to Crime Branch Landhi-2 and he did not ask any private person to accompany him and be a mashir, further admitted that he did not associate any official of the Crime Branch Landhi-02, to be mushir of formal arrest and in Exh.23/J, accused Anwar Faheem has not given any description of his accomplices, and he had exhibited carbon copy of the entries in Exh.23/I and in Exh.23/I, there was no signature of any official on the round seal of Crime Branch, Landhi-02 and he had proceeded to PS Sachal, he did not ask any private person to accompany him and be mushir and he did not associate any official of PS Sachal, to be mushir of formal arrest and after making entry of serial No.105 in the daily diary, entries bearing Nos.106,107 and so on, were also incorporated. Exh.23/K, was a carbon copy which only shows the entries related to him, whereas the daily roznamcha diary has all the entries written fairly, in serial wise sequence and in Exh.23/K, there was no signature of any official on the round seal of PS Sachal, and in Exh.23/M, the entry number was not mentioned, and the mode of conveyance so used was not mentioned in Exh.23/M, and no official of PS Sachal has been associated as mushir in Exh.23/M and in Exh.23/N, the entry number was not mentioned.**

16. PW-06 SIP Muhammad Aslam [Exh.27] deposed that on 07.10.2011 he was posted as SIP at PS Gulshan-e-Iqbal in Investigation Branch. On the same day, he received the investigation of FIR No.544/2011 along with police papers. Accused Khurram Mustafa and Anwar Faheem were locked up at the PS. On 13.10.2011, he interrogated both the accused. During interrogation, accused Khurram Mustafa disclosed that the weapon he used in commission of the offence had been recovered by PS Sachal. Whereas accused Anwar Faheem disclosed that the weapon he used in the commission of the offence had been recovered by the crime branch Quaid Abad, Karachi. He made interrogation [entry No.38], which he produced as Exh.27/A. During his cross-examination he admitted that **Exh. 27/A did not mention the number of police mobile nor the personnel who went along.** They had reached PS Sachal on 13.10.2011 at 1920 hours and as per Exh.23/M, **no witness of PS Sachal has been associated and no personnel of Crime Branch Landhi was associated as mushir.**

17. PW-07 HC Muhammad Rafiq [Exh.28] deposed that on 24.07.2011, he was posted as HC at PS Gulshan-e-Iqbal, Investigation Branch. On the same day, duty officer received information that an **abandoned car** with a couple of dead bodies in it was available at the back side of Gulshan College, Block-7, Gulshan-e-Iqbal. They reached the spot at 2300/2315 hours, under command of SIP Shahnawaz with personnel namely PC Zubair on motorcycles. They found a grey coloured Mira Car bearing license Plate No.ARK-363, the driver side window pane of which was shattered and 05 empties of KK and 02 empties of 30 bore were found near the car. The empties were collected and sealed by SIP Shahnawaz who prepared its mushirnama in his presence and PC Zubair. During his cross-examination he admitted that **Ex.18/B did not tell the source of lights available at the place of incident and shattering of car window was not mentioned in Ex.18/B and neither engine nor chasis number were mentioned in Exh.18/B and Exh.18/B did not tell that how far the empties lay scattered away from the car, and serial numbers of empties were also not mentioned in Exh.18/B, and article "A" did not mention the date of its**

sealing, further admitted that he had not exhibited any document showing impounding of the car in the PS.

18. PW-08 PC Faqir Muhammad [Exh.31] deposed that on 06.10.2011, he was posted at PS Gulshan-e-Iqbal as PC. At about 1900 hours, he in subordination of SIP Tariq along with HC Tufail Ahmed left PS for crime branch Landhi No.2. When they reached, SIP Tariq took out the custody from the lock up of the arrested accused namely, Anwar Faheem and he was interrogated in instant case. During which, he disclosed the names of his accomplices as Khurram, Asif, Mani, Rashid and Furqan. Further disclosed that he along with them, ascorted the deceased persons into the car from Al-Jannat Restaurant and took them to Block-07, Degree College and killed them by firing because of their Pathan Community. He further stated that SIP Tariq formally arrested the above named accused, prepared mushirnama in his presence and HC Tufail Ahmed. He stated that his statement u/s 161 Cr.P.C. was recorded by SIP Tariq. During his cross-examination he admitted that **no private person has been associated as mushir** and Exh.23/J did not describe the accomplices and no mushir had been attributed from crime branch.

19. PW-09 PC Anjum Khursheed [Exh.32] reiterated the prosecution story in his evidence. During his cross-examination he admitted that when they proceeded to apprehend the accused, neither, they had any photograph of the accused nor had he seen him before and no private person has been attributed.

20. PW-10 Sr. MLO Dr. Dileep Khatri [Exh.33], who produced postmortem No.577/11 as Exh.33/B and 33/C and stated that it bear the signature of Dr. Abdul Razzak. He also produced the postmortem No.578/11 and medical certificate of cause of death of deceased Muhammad Sharif and produced the same as Exh.33/D and Exh.33/C. He had not been cross examined though chance given.

21. PW-11 SIP Muhammad Asif also repeated the whole prosecution story and then he had not been cross-examined.

22. PW-12 HC Dosoza, [Exh.35] deposed that on 07.10.2011, he was posted as PC at PS Gulshan-e-Iqbal. On the same day, he in subordination of ASI Tariq Ali along with HC Huzoor Bux and driver went to PS Sachal in police vehicle. At PS Sachal, ASIP Tariq Ali took out of the custody of the arrested accused Khurram and took him to interrogation room for investigation. During interrogation he disclosed that he along with his accomplices Anwar, Furqan, Rashid and other companions committed murder at Block-7, Gulshan-e-Iqbal, near Degree College. On such disclosure ASIP Tariq Ali formally arrested the accused in instant case and prepared the mushirnama of arrest and took his signature and Huzoor Bux and his 161 Cr. P.C. statement was also recorded. During his cross-examination he admitted that he did not remember the exact timing of departure from PS Gulshan-e-Iqbal. He does not remember the exact timing of arrival at PS Sachal and accused did not describe any of his accomplices as well as disclosed their parentage during investigation, and ASI Tariq Ali did not associate any private witness nor any police official from PS Sachal to act as mushir.

23. PW-13 Retd. Inspector Hameedullah Khan, [Exh.36] deposed that on 03.06.2012, he was posted as SIO at PS Darakhshan. There was an accused namely Rashid @ Chamber who was already arrested in Crime Nos.212/12 and 214/12 of PS Darakhshan, whom he interrogated on the same day. During interrogation, he disclosed about his involvement in the instant crime. Afterwards, he made call at PS Gulshan-e-Iqbal who informed him that the instant case was transferred in CID Garden. On 04.06.2012, PI Malik Adil along with his subordinates came to PS Darakhshan. He took out the custody of the accused and interrogated him in interrogation room in his presence. During interrogation, he admitted to his guilt in the instant crime. PI Malik Adil formally arrested the accused and prepared mushirnama of formal arrest in his presence as well as in presence of PC Maqbool. He produced such mushirnama as Exh.36/A. Thereafter, he locked up the accused and recorded his statement under section 161 Cr. P.C. During his cross-examination he admitted that it was not mentioned in his statement under section 161 Cr. P.C that in whose

presence, when and where he interrogated accused Rashid @ Chamber, and he had not produced any entry regarding the interrogation of the accused, and he had not disclosed the time of making call at PS Gulshan-e-Iqbal in his statement under section 161 Cr. P.C.

24. PW-14 Mehboob Illahi, [Exh.37] was declared hostile by the learned APG and he was cross-examined by the learned APG.

25. PW-15 ASI Arshad Iqbal [Exh.39] who has deposed in his examination that on 05.10.2011, he was posted as ASI as Crime Branch-II, Karachi. Under the subordination of PI Azam Masood, HC Syed, HC Ayub and PC Nawaz were busy in the area patrolling for prevention of crime in official police mobile. When PI Azam Masood received **spy information on which they stopped two persons riding on one motorcycle bearing registration number KBT-3320 make Pak Hero** at Star Ground Main Gate, Mollah Madad Graveyard. On enquiry, the suspect person riding the motorcycle, disclosed his name as Muhammad Ali and on his search, **one TT Pistol 30 bore without number in back pocket of his pant was recovered along with 04 live rounds in its magazine**. While the pillion rider disclosed his name as **Anwar Faheem**, on his search, **one TT pistol 30 bore without number along with 03 live rounds in its magazine in back packet of his pant was recovered**. PI Azam Masood asked for the license of the recovered pistols, which they failed to produce. Thereafter, PI Azam Masood sealed both the pistols, separately, and prepared memo of arrest, and recovery on which he obtained his signature and that of HC Saeed Khan which he produced as Exh.39/A. Investigation of instant FIR bearing No.463/2011 u/s 13(d) was assigned to him by PI Azam Masood. He interrogated the accused, **during which accused Anwar Faheem disclosed his involvement in killing of one person in P.S Gulshan-e-Iqbal**. On such disclosure, he informed PS Gulshan-e-Iqbal. I.O of PS Gulshan-e-Iqbal namely SIP Tariq came and interrogated the accused in the FIR 544/2011 and arrested him. He produced the arrival entry and handing over of the accused as Exh.39/D. On 13.13.2011, new I.O/PI Aslam Baloch of PS Gulshan-e-Iqbal in

the instant FIR collected the recovered pistol from the accused. He handed over the pistol to PI Aslam Baloch, vide memo of handing over the pistol. He produced the memo of handing over the pistol to PI Aslam Baloch as Exh.39/E. During his cross-examination he admitted that the mode of communication of the spy information, the place and time of receiving it, have not been explained in his examination-in-chief, FIR, Memo of arrest and his statement under section 161 Cr. P.C. and during patrolling the police lights remain switched on and Exh.39/A did not disclose that which of the accused rode the motorcycle and which one sat pillion and Exh.39/A did not bear description of the pistol nor its sketch and Exh.39/A also did not specify the number of rounds found loaded in the pistol and no private person could be associated as no one was found and it was not mentioned in Exh.39/A that under what source of light it was prepared, further admitted that he had not exhibited any entry showing the custody of the pistol and Exh.39/A, did not bear the bullets' number written at their base.

26. PW-16 ADJ Zahida Parveen [Exh.40], who recorded statements of witnesses under section 164 Cr. P.C. on the application moved by IO/PI Malik Muhammad Adil. During her cross-examination she admitted that **accused Anwar Faheem was not brought before her for IDP** and It was not in her knowledge whether any IDP was held prior to recording statements under section 164 Cr. P.C. of the witnesses and **It was a fact that she did not note down if the accused and the witnesses had come together before her or separately and during confessional statement, accused Noman did not name any co-accused and Exh.40/I, speaks that accused Noman was made hostage in his company car and taken by the other persons to the place of incident and every answer to the questions does not bear signature / thumb impression of the accused, further admitted that the certificate did not mention that the accused was read over his statement in his native language.**

27. PW-17 PI Meer Mehdi Raza, [Exh.41] reiterated the prosecution story and he has not been cross-examined though chance was given.

28. PW-18 DSP Malik Muhammad Adil [Exh.42] deposed that through letter dated 17.10.2011, he received investigation, case property and the arrested accused from the previous I.O. of the instant case, which he produced as Exh.42/A. During his investigation and interrogation from such accused persons, he realized that more accused persons were involved and required to be arrested for the sake of further investigation. Resultantly, by virtue of investigation and interrogation, he received spy information that accused Noman Azeem was involved in the instant case and as such he would disclose more information and so also the whereabouts of Suzuki Mehran Car used in commission of the offence. Therefore, on 25.10.2011, he along with his police party reached at Al-Jannat Restaurant, Muskan Chowrangi, Gulshan-e-Iqbal, where his spy informer pointed him out upon which he was tactfully arrested. On enquiry, he disclosed that his name as Noman Azeem, his Memo of arrest was prepared on the spot in presence of mashirs namely PC Anjum Khursheed and PC Maqbool Ahmed. He endorsed his signature on Exh.32/A. On 26.10.2011, statement under section 164 Cr. P.C. of accused Noman Azeem was recorded before learned J.M. The previous I.O. had informed him that two witnesses namely Masroor and Faiz were important witnesses as they would depose crucial evidence and as such their statements under section 164 Cr. P.C. were necessary to be recorded. He had got statement under section 164 Cr. P.C. of Masroor and Mehboob Elahi upon proper application. He stated that he arrested accused Rashid @ Chamber who was under custody with PS Darakhshan in presence of mashirs namely PI Hameed Niazi and PC Maqbool Ahmed through Memo Exh. 36/A. On 13.7.2012, one Asif got pre-arrest bail and joined him for investigation, who was placed in Column No. II of a separate challan apart from the challan submitted for the remaining accused persons by him. During his cross-examination he admitted that when he received the investigation there were no sketches of absconding accused persons, and in first challan no accused was named and it was a fact that first challan was reported as A-Class and neither in challan nor in his examination-in-chief, it was mentioned that how he received the spy information, he did not remember the time of departure from PS nor that of arrival at the place

where the accused was arrested, further admitted that in his examination-in-chief the time of arrest was not mentioned and no private person had been associated as a mashir of arrest, and place of arrest was a populated area, and even from there no private person was made a mashir. It was a fact that he did not serve notice under section 160 Cr. P.C. to any of the refusing public and no ID parade was held for the accused persons namely Khurram, Rashid, Anwar and Noman, and no statement under section 164 Cr. P.C. of accused was recorded by him, and witness Masroor did not identify accused Asif in his statement under section 164 Cr. P.C. and the witness namely Faiz did not implicate the accused Asif in his statement under section 161 Cr. P.C.

29. PW-19 SIP Zakirullah and PW-20 PI Syed Sadaqat Ali have also been examined by the prosecution and the said witnesses were not cross-examined, though opportunity was given.

30. Record reflects that earlier despite hectic efforts, SIP Tariq Ali could not find out the culprits of FIR No.544 of 2011, which was disposed of in A-Class on 10.08.2011 and on 06.10.2011, permission was granted to re-investigate the matter by the trial Court (Exh.23/G). Crime empties recovered from the place of incident were received by Ballistics Expert on 06.09.2011, whereas, FIR was registered on 25.07.2011. Sending the crime empties to the forensic division with the considerable delay has also not been explained properly, as such no sobriety can be attached to the positive report, with regard to the safe custody of the crime empties at police station and its safe transit, the Honorable apex court in the case of *Kamaluddin alias Kamala V. The State (2018 SCMR 577)* has held as under:

“As regards the alleged recovery of Kalashnikov from the appellant’s custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice to it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the investigating officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody

of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial court through production of any witness concerned with such custody and transmission”

31. It is the case of the prosecution that SIP Shahnawaz Khan (PW-02) was informed by one **Babar** through cell phone at PS Gulshan-e-Iqbal that **two unknown persons on motorcycle** fired upon the car bearing registration number ARK-363 Meera, silver coloured at Gulshan Degree College, main gate, and as a result thereof two persons sustained bullet injuries and died but neither in the prosecution story, the details/address and cell number of said Babar have been given nor said Babar has been cited or produced before the trial Court for recording of his evidence. Therefore, the best evidence withheld by prosecution itself makes the highly doubtful with regard to the identity of the accused persons/culprits and factum indicates that the evidence is an unseen incident.

32. It can be seen that statement of eyewitness Masroor Hussain (PW-04) under section 161 Cr. P.C. was allegedly recorded on 04.08.2011, whereas, incident took place on 24.07.2011, after the lapse of more than 10/11 days, for which, no plausible explanation has been furnished by the prosecution, likewise Investigating Officer also failed to establish his presence at the place of incident in a memo of place of incident and so also other document i.e. inquest report under section 174 Cr. P.C. (Exh. 18/E to 18/H) and the present PW was not the person who had taken the dead bodies to the hospital for further process. The most important thing is that there is no Huliya/description and features are mentioned in the statement of this PW, and according to his testimony, he went to restaurant (place of incident) along with his friend **Faiz Muhammad** to have dinner but the said Faiz Muhammad has not been produced by the prosecution for his evidence, therefore, the evidence of this PW is not inspiring confidence and as such his evidence is not credible. Another crucial point is that the statement under section 164 Cr. P.C. of said eyewitness Masroor Hussain (PW-04) was recorded on 25.10.2011 after a lapse of three months and after the arrest of the accused persons which itself indicates that

prosecution has no tangible evidence and the present PW was introduced by police in order to dispose of the case in hand on flimsy ground. In the case of **IMRAN ASHRAF and 7 others v. THE STATE (2001 SCMR 424)**, the Hon'ble Supreme Court of Pakistan has held as follows:-

“We are conscious of the fact that as far as site plan is concerned it has no evidentiary value but its importance can also not be denied to determine the location of the incident as well as the position of the witnesses particularly in those matters where presence or otherwise of the witnesses has been challenged. Reference may be made to 1997 SCMR 89. On the question of non-preparation of a site plan at the pointation of a witness this Court has held in the case of Gul Mir v. The State (PLD 1980 SC 185) that if it was not prepared on the pointation of a witness it will loose its evidentiary value.”

It has further been held in para. 30 of the afore-cited judgment that “This Court has already held in 1993 SCMR 550 and 1995 SCMR 127 that if no plausible explanation is offered by prosecution to record the statement of eye-witness immediately after the registration of the case then the evidence of such witness becomes incredible.”

33. It is further case of the prosecution that accused Anwar Faheem was arrested on 06.10.2011 in FIR No.463/2011, registered at P.S. Quaidabad, under section 13-D of Arms Ordinance, 1965 and accused Khurram Mustafa was arrested on 07.10.2011 in FIR No. 580/2011, registered at P.S. Sachal, under sections 365/302/34 PPC and during investigation, they allegedly disclosed that they committed murder of Sabir Shah and Muhammad Sharif along with their other accomplices and then police implicated them in the present case. It is very important to note here that after the admission of the accused before the police officials, the concerned police officials did not produce them before the concerned/nearest Judicial Magistrate/Civil Judge for recording their statements under section 164 Cr. P.C. in respect of the offence in hand. It is also an admitted position that admission of the accused before police official has got no evidentiary value under Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984. Even otherwise, such admission was also not supported from the other independent source of circumstantial evidence. It seems that the case in hand is of no evidence against the accused. In the case of **SAJID MUMTAZ and**

others V. BASHARAT and others reported as 2006 SCMR 231, wherein it was observed as follows:-

“22. As observed by the Federal Court, we could reiterate especially referring to this part of the country, that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confessions. Such confessions by now, have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship of the witness with the maker of confession and what, above all is the position or authority held by the witness.”

34. It is also very important to note here that the so-called eye-witness PW-14 Mehboob Illahi, during the trial, was declared hostile by the APG, no doubt the hostile witness can be taken into consideration when the other circumstances are supporting the case of prosecution. It is surprising that the learned trial Court has relied only on the evidence of one PW when the other circumstances and corroborative evidence has come on the record, therefore, in absence of other strong circumstantial evidence, the evidence of PW Masroor Hussain cannot be relied on as there is delay in his 161 Cr. P.C. statement and, so also, after the arrest of accused persons, his 164 Cr. P.C. statement was also recorded on 25.10.2011 before the Judicial Magistrate, in which, he stated that the present accused were in possession of Kilashinkov and TT Pistol but there is no specific allegation of firing leveled by him in his statement. It is not possible for an eye-witness to remain silent till 04.08.2011, more particularly, when one of the deceased persons was his close friend. Therefore, the evidence of this PW is highly doubtful and cannot be reliable. In view of the matter, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner. Accordingly, the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same, in all fairness.

35. Even for the satisfaction of the Court departure entry of police not produced before the trial Court. Non-production of such entry would be fatal to prosecution case. Crime weapon(s) have also not been sent for FSL. It is therefore held that it would be unsafe to rely upon the evidence of police officials without independent corroboration which is lacking in this case. Hence, no sobriety can be attached to the prosecution case as well as the deposition of prosecution witnesses.

36. Admittedly, arrival and departure entries have not been produced by the prosecution. We are unable to rely upon the evidence of the prosecution witnesses without independent corroboration which is lacking in this case. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case.

37. In view of the above stated reasons, we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about the guilt of accused. 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 the case of **Muhammad Mansha vs. The State (2018 SCMR 772)**, the Hon'ble Supreme Court has observed as follows:-

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

The above principle was also recently reiterated by the Hon'ble Supreme Court in the case of *Abdul Jabbar v. State* (2019 SCMR 129).

38. For the above stated reasons, we reached to an irresistible conclusion that prosecution has utterly failed to prove its case against the appellants and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellants could not be ruled out. Therefore, these appeals were allowed and conviction and sentence recorded by the trial Court vide judgment dated 28.10.2019 were set aside and appellants were acquitted of the charges. They were ordered to be released forthwith if not required to be detained in any other criminal case. Resultantly, Confirmation Case No. 16 of 2019 was answered in the NEGATIVE and death sentence awarded to the appellants was not confirmed.

39. These are the reasons for our short order dated 23.12.2020.

UDGE

JUDGE

Karachi,
Dated: 11.06.2021

Hanif