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JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 170/2019
Habib Akhtar Vs. The State, etc.

Criminal Appeal No. 194/2020
Adnan Tariq Vs. Zahid Hussain, etc.

Criminal Revision No. 68/2019
Adnan Tariq Vs. Habib Akhtar, etc.
and

Murder Reference No. 19/2019
The State Vs. Habib Akhtar

APPELLANT BY: Raja Gul Nawaz, Advocate.

COMPLAINANT BY: Mr. Jan Muhammad Khan, Advocate.

STATE BY: Mr. Ishtiaq Ahmed, State Counsel.

DATE OF HEARING: 28-09-2021.

BABAR SATTAR, J.- Through this judgment we will decide **(i) Criminal Appeal No. 170/2019** filed by Habib Akhtar against the judgment of the learned Additional Sessions Judge dated 23.05.2019, whereby he has been found guilty under section 302(b) PPC and sentenced to death and liable to pay compensation to the legal heirs of Tariq Mehmood (Deceased) in the amount of Rs.500,000/- in terms of section 544-A, Cr.P.C and in default of payment or recovery of compensation undergo further imprisonment for a period of six months (S.I) under section 544-A(2) of Cr.P.C., **(ii) Criminal Appeal No. 194/2020** filed under section 417(2) of Cr.P.C by the complainant Adnan Tariq, challenging

acquittal of Zahid Hussain and Sharafat under sections 302(b)/34 of PPC, **(iii) Criminal Revision No. 68/2019 (Adnan Tariq Vs. Habib Akhtar, etc.)** whereby enhancement of compensation amount payable by Habib Akhtar has been sought and **(vi) Murder Reference No. 19/2019**, whereby the judgment of the learned Additional Sessions Judge, East-Islamabad dated 23.05.2019, through which he has found Habib Akhtar son of Saleem Akhtar guilty for an offence under section 302(b) of Pakistan Penal Code, 1860 ("PPC") and sentenced him to death, has been referred to us under section 374 of the Code of Criminal Procedure, 1898 ("Cr.P.C") for confirmation.

2. Adnan Tariq filed a private complaint on 03.05.2012 which was fixed before the learned Additional Sessions Judge (East), Islamabad, who after recording statements of the complainant and his witnesses admitted the complaint for regular hearing. Adnan Tariq had previously filed a complaint with the police under sections 302/34 and 109 PPC against Zahid Hussain, Sharafat and Habib Akhtar for committing murder of his father Tariq Mehmood on 05.08.2011 around 1.20 p.m., pursuant to which FIR No. 315 dated 05.08.2011 was registered at Police Station Koral, Islamabad. Upon conclusion of the investigation, the police submitted an incomplete report under section 173 of Cr.P.C before the Magistrate on 05.10.2011.

3. Being dissatisfied by the investigation conducted by the police pursuant to the said FIR, Adnan Tariq filed the

aforementioned private complaint, by which time the charge had been framed in the state case against Habib Akhtar under section 302/34 and 109 of PPC on 18.07.2012. In view of the private complaint, proceedings in the state case were stopped and proceedings were continued in the private complaint pursuant to which charge under section 302/34 and 109 of PPC was framed against Habib Akhtar, Sharafat and Zahid Hussain on 24.08.2013. The content of the private complaint was the same as that of the complaint on the basis of which FIR No. 315 dated 05.08.2011 was registered.

4. Adnan Tariq (**"Complainant"**) had alleged that on 05.08.2011 at about 1.20 pm he along with his father Tariq Mehmood (**"Deceased"**) and Muhammad Safeer were walking towards Masjid for offering Jumma prayer close to the complaint's home. When they reached at Japan Road, Habib Akhtar armed with 12-bore single barrel gun approached them from western side and shot the Deceased from behind, which hit his left shoulder and he fell down. Muhammad Safeer and the Complainant tried to help the Deceased. Meanwhile Habib Akhtar fled towards the west from where he had approached the Complainant, Muhammad Safeer and the Deceased. Co-accused Sharafat was also hiding in hemp surrounding the place of incident. He emerged from the hemp with 30-bore gun resorted to aerial firing and fled in the same direction as Sharafat. Samar Mukhtar s/o Muhammad Mukhtar allegedly saw Habib Ahmed and Sharafat fleeing from the place occurrence. Adnan Tariq alleged that Habib Akhtar shot the Deceased and Sharafat aided and abetted

him on the behest of Zahid Hussain who is uncle of Habib Akhtar and a relative of Sharafat, as Zahid Hussain had enmity with the Deceased. He also alleged that at 02.23 in the afternoon after Tariq Mehmood was murdered Zahid Hussain called Muhammad Safeer on his cell phone and informed Muhammad Safeer that he had the Deceased killed and threatened Muhammad Safeer will the same fate. He alleged that Zahid Hussain had plotted the murder of the Deceased in 2009 as well, but such plot could not succeed and it was discovered when Zahid Hussain sent members of his family to Gujrat and engineered their arrest so that when they murdered the Deceased there would be a record of them being in police custody. He asserted that the plan was communicated by Police Station Kunjah, District Gujrat to Police Station Koral through a phone call due to which Zahid Hussain could not succeed back in 2009. He, however, acknowledged that the Deceased did not initiate any proceedings against Zahid Hussain at that time and that Zahid Hussain did not directly attack the Deceased during his lifetime. The Complainant also alleged that Sharafat along with his relatives had broken the arms and legs of the Deceased and FIR No. 233/2007 was registered as a consequence.

5. Upon receipt of information about the occurrence, Abdul Waheed, S.I (CW-6) reached Polyclinic hospital and he was handed over complaint (Exh.PA) by Adnan Tariq pursuant to which FIR No. 315 dated 05.08.2011 (Exh.PB) was registered. After preparing inquest report, receiving the death

certificate and transmitting the dead body of the deceased to PIMS for postmortem, Abdul Waheed S.I. went to the place of occurrence and collected blood through cotton (Exh.PH), recovered one empty cartridge of 12-bore gun (Exh.P4). On 09.08.2011 a site plan prepared by draftsman, Aamir Shehzad, was handed over to Abdul Waheed (CW-6). On 10.08.2011 Habib Akhtar was arrested from the street where he lived, and according to the prosecution upon his revelation, immediately after his arrest, a 12-bore single barrel rifle was recovered hidden in a room under a heap of chaff adjacent to his house. On 15.08.2011 Dr. Farrukh Kamal, MLO (PW-3) handed over postmortem report and a sealed bottle containing six pallets to Constable Muhammad Arshad (CW-2). On 23.08.2011 Zahid Hussain and Sharafat joined the investigation and appeared before Abdul Waheed S.I after getting ad-interim bail. On conclusion of the investigation an incomplete report under section 173 Cr.P.C was submitted. Thereafter the private complaint was filed against the accused pursuant to which their trial commenced.

6. After conclusion of the trial, the learned Additional Sessions Judge passed judgment dated 23.05.2019, pursuant to which it found Habib Akhtar guilty of an offence under section 302(b) of PPC for qatl-e-amd punishable as ta'zir and awarded him the death sentence and acquitted co-accused Sharafat and Zahid Hussain.

7. The learned trial court in its judgment has provided a summarized account of the evidence adduced before it, which

need not be recapitulated here. The relevant parts of the evidence will be discussed in the later part of this judgment where this Court analyzes the evidence and expresses its opinion.

8. In relation to Habib Akhtar the learned trial court found that the eye-witness account provided by the Complainant remained unimpeached and that such account was corroborated through the evidence of Muhammad Safeer as well as the postmortem report, recoveries and other circumstances of the case. As regards Sharafat, the learned trial court concluded that Muhammad Safeer (PW-2) did not see him at the place of occurrence, no firearm injury was attributed to him, no weapon was recovered from him and the Call Record Data (CDR) of his cell phone made his presence at the place of occurrence doubtful and consequently Sharafat was acquitted. The learned trial court concluded in relation to Zahid Hussain that he was admittedly not present at the place of occurrence and the role of abetment attributed to him had not been proved through evidence produced before the Court and consequently Zahid Hussain was also acquitted.

9. The learned counsel for Habib Akhtar, Sharafat and Zahid Hussain (Defence Counsel) submitted that this was a case of unseen occurrence and the eye-witnesses were all planted being interested witnesses and consequently their testimony was not reliable. That there were serious contradictions in the account presented by the prosecution, the recovery of the alleged murder weapon as well as the

empty cartridge allegedly recovered from the place of occurrence was inconsequential, the site plan was disowned by the prosecution and there was no corroborating evidence supporting the testimony of the interested witnesses produced by the prosecution. He submitted that the testimony of the prosecution witnesses and court witnesses regarding the identity of the person who informed the police regarding the incident remained a mystery throughout the trial. That what was evident was that the FIR was registered a few hours after the stated time of occurrence at 1.20 pm on 05.08.2011 and due deliberation took place before it was lodged. That as per the prosecution narrative the Deceased was accompanied by the Complainant (PW-1) and Muhammad Safeer (PW-2) and they were walking together with the Deceased who was shot behind from a distance of 8 to 10 feet. Given that the alleged murder weapon was single barrel shotgun, in the event that the shot was fired from close range the postmortem report would have been reflected that there was blackening around the wounds of the Deceased. And in the event that it was fired from a distance of more than six feet, stray pellets ought to have hit the Complainant as well, who was supposedly walking next to the Deceased at the time of the incident. But the postmortem report neither reflects blackening nor does the Complainant admit to having been hit by any stray pallet. That the logical conclusion is that the Complainant was not present at the place of occurrence. He further submitted that the prosecution's account of the conduct of the Complainant, Muhammad Safeer as well as the

accused Habib Akhtar and co-accused Sharafat was unnatural and did not appeal to a prudent mind. That according to the prosecution, Habib Akhtar, after firing the shot that claimed the life of the Deceased, reloaded his weapon but faced difficulty doing so. During the period in which he was struggling to reload the gun, the Complainant, being the real son of the Deceased, and Muhammad Safeer, his close associate, did not try to confront or apprehend Habib Akhtar. Further, that Sharafat was hiding in hemp fields at the time, but instead of continuing to hide after the Deceased had been shot, he emerged, resorted to aerial firing and then left the scene of the occurrence. His actions seem to be influenced by no apparent reason other than to make his identity known to the eye-witnesses to the murder. That Samar Mukhtar, who allegedly witnessed Habib Akhtar and Sharafat fleeing from the place of occurrence, had a vehicle, according to the account of Abdul Waheed I.O. (CW-6), but he did not come to the aid of the Deceased or help transport his body to the hospital and Muhammad Safeer (PW-2) called one Fida Hussain instead, who brought his vehicle which was used to transport the body of the Deceased to Polyclinic Hospital.

10. The Defence Counsel emphasized that as per Call Data Record (CDR) of the cell phone of Muhammad Safeer (PW-2), he was in Jhang Syedan at 1.27 pm i.e. seven minutes after the stated time of the incident and not in Kirpa where the occurrence took place and consequently could not possibly have been at the place of occurrence at the time of the incident of which he claimed to be an eye-witness. He

submitted that as the Complainant testified that he along with Muhammad Safeer accompanied the Deceased when he was shot, and the CDR established that Muhammad Safeer was not present at the place of occurrence at the relevant time, the testimony of the Complainant (PW-1) could also not be relied upon. He further submitted that according to the Complainant (PW-1) there were other passers-by who witnessed the occurrence but none were produced before the trial court. That Samar Mukhtar who was identified as a witness was given up and consequently there was no evidence to corroborate the presence of Habib Akhtar or Sharafat at the place of occurrence. He submitted that the empty cartridge was allegedly recovered from the place of incident on 05.08.20211, the murder weapon was allegedly recovered upon Habib Akhtar's revelation on the date of his arrest i.e. 10.08.2011. But the empty was sent to Forensic Science Laboratory on 20.09.2011 and the alleged murder weapon was not sent up until 18.02.2012 and consequently the recoveries were inconsequential. In view of these facts and circumstances, he submitted that there was no evidence that Habib Akhtar was present at the place of occurrence or had been involved in the murder of the Deceased except the account of the Complainant (PW-1), whose testimony was also not reliable for being false on the material aspect given that he had claimed that Muhammad Safeer had accompanied him and also witnessed the incident and Muhammad Safeer was in Jhang Syedan at the time of incident, as established by the CDR of his cell phone as opposed to Kirpa and could

not possibly have been an eyewitness to the incident. In relation to Sharafat, he submitted that the learned trial court had acquitted him on the basis that Muhammad Safeer had not corroborated the account of the Complainant (PW-1) identifying him as being at the place of occurrence and the prosecution story that he emerged from hiding while armed with 30-bore pistol and did nothing other than firing 7-8 shots in the air to attract attention did not appeal to an ordinary prudent mind. In relation to Zahid Hussain the learned Defence Counsel stated that the learned trial court had rightly acquitted him as there was no evidence of conspiracy and there was no proof as regards the content of the telephone call he made to Muhammad Safeer after the incident. That in the event that Zahid Hussain secretly plotted to arrange the murder of the Deceased it made no sense that he would subsequently call and confess his crime.

11. The learned counsel for the Complainant submitted that Habib Akhtar's presence at the place of occurrence was proved. The eyewitness account presented by the Complainant (PW-1) was confirmed by the eyewitness account of Muhammad Safeer (PW-2). That the murder weapon had been recovered from Habib Akhtar and his guilt had been established beyond reasonable doubt and he had been rightly found guilty and convicted by the learned trial court. In relation to Sharafat the learned counsel for the Complainant submitted that his presence had also been proved through the testimony of the Complainant (PW-1) and while the same had not been corroborated by Muhammad

Safeer, a single unimpeached eyewitness account was sufficient for the purpose of conviction of Sharafat. He submitted that as the learned trial court held that the testimony of the Complainant (PW-1) was remained unimpeached, Sharafat ought to have been found guilty and punished for the offence that he had been charged for. In relation to Zahid Hussain, he submitted that the said accused and the Deceased had a checkered history of litigation and enmity and that the learned trial court did not take into account the fact that he hatched a plot to have the Deceased killed in 2009 which could not succeed as Police Station Kunjah, Gujrat, had informed Police Station Koral, Islamabad, at the relevant time and a report of such communication was brought to the notice of the police by the Complainant. Further that the Deceased during his lifetime conducted a press conference and claimed that he feared he would be harmed by Zahid Hussain and reports of such press conference were also shared with the police. He further submitted that Habib Akhtar was the nephew of Zahid Hussain and it was Zahid Hussain on whose direction Habib Akhtar murdered the Deceased. That Zahid Hussain subsequently called Muhammad Safeer (PW-2) in the presence of individuals who appeared before the police authorities to confirm that they were present when Zahid Hussain called Muhammad Safeer to admit that he had succeeded in having the Deceased killed and also threatened to Muhammad Safeer with dire consequences. That CDR of Zahid Hussain's cell phone confirmed that he had called

Muhammad Safeer approximately an hour after the incident that claimed the life of the Deceased. He submitted that this was sufficient evidence to establish that that Zahid Hussain had conspired to have killed the Deceased.

12. The learned State Counsel supported the judgment passed by the learned trial court and submitted that Habib Akhtar had been rightly convicted in view of the evidence adduced before the learned trial court.

13. Having heard the learned counsel for the parties, and having reviewed and reappraised the evidence as produced before the learned trial court we do not agree with the conclusion reached by the learned trial court. While appraising the evidence, the learned trial court noted that in view of the CDR of the cell phone of Muhammad Safeer (PW-2) his presence at the place of occurrence seemed doubtful. The CDR of the cell phone of Muhammad Safeer (PW-2) reflects that he was at Ali Medical Centre, F-8 Markaz, Islamabad at 12.13 pm, Bhatti Plaza main Bazar Ali Pur at 12.55 pm, and in Jhang Syedan at 01.27 pm. In view of the CDR it is not possible to place Muhammad Safeer (PW-2) at the place of occurrence at the reported time of incident (i.e. 01.20 pm). The prosecution has provided no explanation as to how the Complainant (PW-1) and Muhammad Safeer (PW-2) could both claim that the latter was present at the place of occurrence when the CDR reflects that he was almost 10 kilometers away in Jhang Syedan at least eight minutes after the time of incident. The Complainant or the State led no

evidence to address the doubt created due to the CDR of the cell phone of Muhammad Safeer (PW-2) that he admitted was in his possession on the fateful day. In the presence of the CDR and lack of explanation as to why it places Muhammad Safeer (PW-2) in Jhang Syedan at the time of incident and lack of explanation by the prosecution for such discrepancy between the scientific data and verbal testimony produced by the Complainant (PW-1) and Muhammad Safeer (PW-2), we find it hard to believe that Muhammad Safeer (PW-2) was an eyewitness of the occurrence. Apart this there are other aspects of eyewitness testimony that do not appeal to the ordinary logical mind. The prosecution story is that after firing the fatal shot from close range Habib Akhtar chose to reload the murder weapon due to which empty cartridge fell out and was recovered by the Investigating Officer (CW-6) from the place of occurrence. However, during such period when he was reloading the murder weapon, he was struggling to do so as the cartridge was stuck. He was thus holding an unloaded gun, but neither the Complainant (PW-1), son of the Deceased, nor Muhammad Safeer (PW-2), a close associate of the Deceased, chose to confront Habib Akhtar or apprehend him even though at the said time Habib Akhtar while holding unloaded gun was only a few feet away from them. The explanation of the Complainant (PW-1) and Muhammad Safeer (PW-2) is that at the relevant time that they were trying to take care of the Deceased who had fallen down. Again, if Habib Akhtar was trying to reload his weapon and was struggling to do so, the Complainant and Muhammad

Safeer could not have known that they would not be the next targets of Habib Akhtar. Thus, the action of allowing Habib Akhtar to reload his weapon at leisure makes no sense. Further, by their own account, the Deceased fell to the ground upon being hit and the Complainant and Muhammad Safeer they changed the location of the body of the Deceased from the point where he was hit to the point from where the Investigating Officer (CW-6) collected blood samples. The distance between these points according to site plan and the Complainant's testimony was approximately 20 feet. However, while moving the body of the deceased by about 20 feet for no valid reason, the blood oozing out of the wounds of the Deceased did not fall down on the road making a trail, as according to the Complainant (PW-1), he and Muhammad Safeer (PW-2) were holding the body of the Deceased and the blood soaked their clothes instead of falling on the road. However, the police did not take into possession the blood-stained clothes of the Complainant (PW-1) and Muhammad Safeer (PW-2) to support the prosecution story. The Complainant (PW-1) and Muhammad Safeer (PW-2) claimed that the body of the Deceased was transported to Polyclinic Hospital in a vehicle brought by one Fida Hussain, who was asked to come to the place of occurrence by Muhammad Safeer but no blood was collected from the vehicle and made part of evidence. Further, the conduct of Habib Akhtar as well as Sharafat as reported by Complainant (PW-1) and Muhammad Safeer (PW-2) seems equally unnatural. There appears no purpose for Habib Akhtar to reload his gun, after

firing a fatal shot that claimed life of the Deceased, if he did not intend to harm the Complainant (PW-1) or Muhammad Safeer (PW-2) who were accompanying the Deceased. That he would leave the place of incident with two eyewitnesses unharmed and able to identify him and send him to the gallows, when he had the ability to shoot at them, is inexplicable. Further, if he only meant to kill the Deceased, why would he reload his shotgun and leave an empty at the place of occurrence to help the police find it and pin it on him.

14. The conduct of Sharafat as stated by the Complainant (PW-1) is even more mindboggling. The accused Sharafat, according to Complainant (PW-1) was hiding in hemp fields towards the west of the place of occurrence. He is stated to have emerged from his hiding place with his 30-bore gun in his hand and resorted to aerial firing before fleeing the place of occurrence along with Habib Akhtar. The natural conduct of someone involved in an offence would be to hide his identity. Crimes committed in the name of honour might be exceptions, but even in such cases the offender chooses to admit the offence committed to bolster his perceived honour as opposed to hiding before the occurrence and denying his role after the occurrence. The purpose of Sharafat's action, as reported, could be nothing other than to reveal himself to the Complainant (PW-1) so as to enable the Complainant to testify against Sharafat. In other words, Sharafat hid himself while the Deceased was being shot and subsequently revealed himself and his 30-bore weapon, fired 7-8 shots to attract attention to himself and then scrambled without hurting the

eyewitnesses to the murder of the Deceased. According to the Complainant (PW-1) and Muhammad Safeer (PW-2), Samar Mukhtar was an eyewitness to Sharafat and Habib Akhtar fleeing the place of occurrence. However, Samar Mukhtar was not produced as a witness. According to the Complainant (PW-1), Samar Mukhtar (who is the father-in-law of the Complainant's brother) was 250 feet from the place of incident. But he couldn't somehow reach the place of incident for the 7-8 minutes that it took Fida Hussain to bring his vehicle that transported the Deceased's body to the hospital, even though according to the Investigating Officer (CW-6), Samar Mukhtar had a vehicle at the time. While, the Complainant (PW-1) does not remember Samar Mukhtar reaching the place of incident before the body of the Deceased was moved to the hospital, Muhammad Safeer (PW-2) believes Samar Mukhtar did arrive before the body was moved. According to the Complainant (PW-1) that there were other passersby who witnessed the occurrence. The prosecution however was unable to present any of them as witnesses. Even Fida Hussain in whose vehicle the body of the Deceased was moved to the hospital was not presented as a witness.

15. The recovery affected by the police is also inconsequential and does not help the prosecution's case. The I.O. (CW-6) claims to have recovered an empty from the place of occurrence on the date of occurrence. However, for some incomprehensible reason, before sending the empty to the laboratory for analysis he held on to it from 05.08.2011 to

20.09.2011. According to the prosecution, Habib Akhtar was arrested from his street on 10.08.2011 and immediately upon being interrogated while standing in the same street, he straightaway volunteered to guide the arresting party to a room adjacent to his house where he had chosen to hide the murder weapon under a heap of chaff. Again, for some inexplicable reason, the I.O. (CW-6) elected not to send the alleged murder weapon for forensic analysis up until 18.02.2012. It is the prosecution story that after postmortem six pallets recovered from the body of the Deceased were handed to Muhammad Arshad Constable. However, the pallets were also not sent for forensic analysis. In other words, the empty cartridge which Habib Akhtar allegedly used while killing the Deceased, the murder weapon recovered on the revelation of Habib Akhtar and the pallets recovered from the body of the Deceased were all held on by the investigators without sending them all to the laboratory for examination. Such recoveries are therefore inconsequential. The blood collected from the place of occurrence by the I.O. (CW-6) was sent to the laboratory but was not matched with the blood of the Deceased. Consequently, such sample serves no purpose other than to verify that it is a human blood. In the event that blood sample collected from the place of occurrence was matched with that of the Deceased, such report would have at least confirmed the place of occurrence. Further, in the event that the empty recovered from the place of occurrence was sent for forensic examination immediately and subsequently the weapon recovered from Habib Akhtar

and the pallets recovered from the body of the Deceased were also sent for examination immediately upon recovery, and all the three items had not been kept in custody simultaneously, forensic reports matching the three items would have been effective corroboratory evidence linking the accused Habib Akhtar to the murder of the Deceased. Due to incompetence or complicity of the investigator the recoveries have become inconsequential and have no evidentiary value. As the recovered empty and the alleged murder weapon were in police custody at the same time, there is no way to establish beyond reasonable doubt that the empty is not from a cartridge fired from the murder weapon after the occurrence in order to concoct evidence and pin it on the accused.

16. The medical evidence is not helpful in the instant case. Nothing turns on the cause of death of the Deceased in this case. The medical evidence is merely supportive evidence which in the facts and circumstances of the case does nothing to help determine the identity of the culprit who claimed the life of the Deceased. And consequently, it cannot be used to corroborate the account of the eyewitnesses to attribute liability upon the accused for the death of the Deceased.

17. In the facts and circumstances as discussed above, this Court finds it hard to believe that Muhammad Safeer (PW-2) was at the place of occurrence and an eyewitness to the murder of the Deceased when the CDR of his cell phone reflects that he was in Jhang Syedan at the time of the

incident. We therefore conclude that his testimony is not reliable. The Complainant (PW-1) is the son of the Deceased who testified that Muhammad Safeer (PW-2) was with him at the time of the incident, helped him take care of the Deceased after he was shot and move the body of the Deceased approximately 20 feet from the place of occurrence where he was shot, and subsequently accompanied him along with the body of the Deceased to Polyclinic Hospital. If Muhammad Safeer (PW-2) was in Jhang Syedan at the relevant time, the testimony of Complainant (PW-1) becomes untruthful in material respect and contradicts the principle that *falsus in uno, falsus in omnibus* in view of the law laid down by the august Supreme Court in **Notice to Police Constable Khizar Hayat Son of Hadait Ullah (PLD 2009 SC 527)** wherein it was held that if an eyewitness resorts to falsehood in a material respect, his testimony cannot be found reliable and taken into consideration for any other purpose either. As we have concluded that there is no real possibility of Muhammad Safeer (PW-2) to be an eyewitness, we believe that the testimony of the Complainant (PW-1) claiming that Muhammad Safeer (PW-2) accompanied him all along and was an eyewitness is false in a material respect and is therefore unreliable. Even if we had come to the conclusion that the testimony of the Complainant (PW-1) was not false in a material respect and had concluded that the parts that are false are divisible and can be distinguished from the parts that are true, the account of the events as presented by Complainant (PW-1) does not appeal to a prudent mind for

not being sync with natural human conduct. Further, the Complainant (PW-1) is also an interested witness. The prosecution's case is founded in the belief that the accused Zahid Hussain was the mastermind who plotted the murder of the Deceased and he used Habib Akhtar, his nephew, and Sharafat, another relative, as tools to carry out his design. The prosecution story as presented by the Complainant (PW-1) and reflected in the content of the FIR as well as in the private complaint is therefore inspired by the enmity between Zahid Hussain and the Deceased as allegedly articulated by the Deceased during his lifetime. According to the Complainant (PW-1) the accused Sharafat was involved in an attack on the Deceased in the year 2009, when he attacked the Deceased and broke his arms and legs. Likewise, Muhammad Safeer (PW-2) and Sharafat also shared acrimony as Sharafat had a case registered against Muhammad Safeer under sections 324 and 34 of PPC at PS Koral, Islamabad. Given this history, the eyewitnesses PW-1 and PW-2 were interested in seeking to have Zahid Hussain and Sharafat punished and the Complainant (PW-1) believed that Zahid Hussain hatched the plan to kill his father on basis of past enmity. In the instant matter the trial court has rightly concluded that there was no evidence of conspiracy implicating Zahid Hussain in the murder of the Deceased. Admittedly the Deceased filed no complaint during his lifetime stating that he feared that Zahid Hussain sought to kill him. Zahid Hussain admittedly called Muhammad Safeer (PW-2) on the date of demise of the Deceased, within a couple of hours

of the incident. Zahid Hussain claimed making a call to enquire about the incident and to assure the Deceased's family that he had nothing to do with the incident. While there is evidence that Zahid Hussain called Muhammad Safeer (PW-2), there is no evidence regarding the content of the call other than the words of Muhammad Safeer (PW-2). For reasons already stated above, we have not found the testimony of Muhammad Safeer (PW-2) to be true and therefore his words cannot be relied upon as evidence of conspiracy for the murder of the Deceased. Other than the account of Muhammad Safeer (PW-2), there is no other evidence connecting Zahid Hussain to the offence he is charged with. We, therefore, conclude that he was rightly acquitted by the learned trial court. Given that the prosecution has been unable to prove motive for the offence committed against the Deceased and the eyewitness accounts of both the Complainant (PW-1) and Muhammad Safeer (PW-2) have been found not to be reliable, there is no other evidence placing Sharafat at the place of occurrence or linking Habib Akhtar to the murder of the Deceased. In the event that even that the testimony of the Complainant (PW-1) was not found to be unreliable in a material respect, he would be treated as an interested witness in relation to the accused persons and his testimony would need to be supported by corroboratory evidence in order to be relied upon to find the accused guilty. In the instant case, as has already been discussed above, there is no corroboratory evidence. The motive has not been proved by the prosecution. The

recoveries have been rendered inconsequential and have no evidentiary value in view of the conduct of the investigators, and likewise the forensic evidence is of no utility to the prosecution. The medical evidence is merely supporting evidence and does not help in any way to identify the culprit or corroborate the testimony of the Complainant (PW-1) or Muhammad Safeer (PW-2). Thus, even if this Court had not come to the conclusion that testimony of the Complainant (PW-1) is not reliable to convict the accused, being an interested witness, his testimony could be of limited value as it is not corroborated with independent evidence possessing intrinsic value.

18. The motive attributed to Zahid Hussain is based on prior FIRs registered against individuals in Gujrat allegedly acting on Zahid Hussain's behest and newspapers reports of a press conference convened by the Deceased. The I.O who lodged or investigated the FIR lodged in Gujrat has not been produced. Similarly, the author of newspaper reports, copies of which were made part of the evidence, were not produced before the learned trial court. It has been held by this Court in **Syed Hamid Saeed Kazmi and others Vs. The State (2017 PCr.L.J 854)** that documents are not admissible in evidence unless their authors are produced to verify the content. Similarly, the august Supreme Court in **State Vs. Ahmed Omar Sheikh (2021 SCMR 873)** held that newspaper reports cannot be relied upon unless the authors of such reports are produced. This was not happened in the present case. It was held by the august Supreme Court in

Muhammad Bux Vs. Abdul Aziz (2010 SCMR 1959) that if motive is not proved, the court should be very careful in accepting the prosecution story and the evidence of such witness who gave evidence on motive should be accepted with great caution. It is also settled law that if motive is disbelieved, death penalty cannot be awarded as lack of proof of motive constitutes a mitigating circumstance. (***Reliance is placed on Qaddan Vs. State (2017 SCMR 148), Hashim Qasim Vs. State (2017 SCMR 986), Ali Bux Vs. State (2018 SCMR 354) and Ghulam Murtaza Vs. State (2021 SCMR 149)***). It was held in **Sabir Hussain Vs. State (2020 MLD 1492)** that where last call was made by the accused to the deceased, the same could have been for reasons not connected to the offence that the accused is charged with, and that the fact of making a call by itself is of no use to the prosecution. In the instant case as well, while placing of the call by Zahid Hussain to Muhammad Safeer (PW-2) is not denied, the fact that such call was made is not useful to the prosecution as there is no proof regarding the content of the call. It was held by full bench of learned Federal Shariat Court in **Shahnawaz Vs. State (2014 YLR 724)** that motive is a double edge sword, which cuts both ways in a sense that the enmity that could prompt a person to commit a crime could also inspire the other party to falsely implicate such perceived enemy.

19. In the cases of Sharafat and Zahid Hussain, who have been acquitted by the learned trial court, double presumption of innocence is attracted. It has been held by the

august Supreme Court that strong and cogent reasons are required to dislodge double presumption of innocence (***Reliance is placed on Muhammad Tasweer Vs. Hafiz Zulkarnain (PLD 2009 SC 53), Zaheer Sadiq Vs. Muhammad Ijaz (2017 SCMR 2007) and Khuda-e-Dad alias Pehlwan Vs. State (2017 SCMR 701)***). It was held in ***Zulfiqar Ali Vs. Imtiaz (2019 SCMR 1315)*** that acquittal once granted is not to be recalled merely on the possibility of contra view. In the instant case, we have been given no strong and cogent reasons to disbelieve the double presumption of innocent that attaches to Sharafat and Zahid Hussain.

20. It was found by the august Supreme Court in ***Shahid Abbas Vs. Shahbaz (2009 SCMR 237)*** that where two sons of the deceased were present when the accused allegedly killed their father in their presence, circumstances suggested that they were not present at the scene of occurrence at the relevant time in the backdrop that prior enmity between the parties was admitted. It was held by the august Supreme Court in ***Muhammad Asif Vs. State (2017 SCMR 486)*** that in face of unnatural conduct of interested witness, which was disbelieved regarding one accused, his testimony could also not be believed in relation to the co-accused without corroboratory evidence. In ***Muhammad Arif Vs. State (2019 PCr.LJ 337)*** the learned Balochistan High Court found that the alleged conduct of the accused was unnatural where the brothers of the deceased were let go unharmed such that they could consequently able to testify

against the accused. Likewise, in **Shahid Amir alias Noor Kamal Vs. State (2018 YLR 1850)** the learned Peshawar High Court inferred that a witness was not present on the spot when he claimed to have been left unharmed despite the ability of the culprit to hurt such witness. It is settled law that once the prosecution witnesses are disbelieved with respect to an accused, they cannot be relied upon with regard to co-accused unless corroborated by independent evidence (***Reliance is placed on Qaddan Vs. State (2018 SCMR 787) and Haroon Shafique Vs. State (2018 SCMR 2118)***).

21. It has been held by the august Supreme Court that inconsequential recovery would not hurt the prosecution case in the presence of reliable ocular evidence (***Reliance is placed on Mukhtar Ahmed State (2004 SCMR 220) and Haroon Rasheed Vs. State (2005 SCMR 1568)***). But we have already expressed our opinion in detail that recovery in the instant case has been inconsequential and further that the ocular evidence is also not confidence-inspiring. It was held by the august Supreme Court in **Muhammad Shah Vs. State (2010 SCMR 1009)** that when two interpretations of evidence were possible, the one favourable to the accused is to be taken into consideration. It was further held in **Yasin alias Ghulam Mustafa Vs. State (2008 SCMR 336)** that suspicion however strong cannot take the place of proof. Substitution of an uninvolved person for actual culprit is a rare phenomenon as explained by the august Supreme Court in **Muhammad Iqbal Vs. State (PLD 2001 SC 222)**. But the tendency of casting a wider net is fairly common in our

socio-legal culture. In the instance case, the prosecution story revolves around Zahid Hussain as the mastermind responsible for the Deceased's murder. Habib Akhtar's actions are then explained as being the nephew through whom Zahid Hussain executed his plot against the Deceased. The learned trial court has found Zahid Hussain not guilty on the basis that motive was not proved. Consequently, the testimony provided by the Complainant (PW-1) cannot be accepted not just in relation to Zahid Hussain, as his evidence regarding motive has been disbelieved, but also in relation to the other co-accused as his testimony has been found to be false in material respects. In the instant case the learned trial court has disbelieved the ocular account of the Complainant (PW-1) in regard to Sharafat. The testimony of the same witness in relation to Habib Akhtar could not therefore be accepted unless corroborated from independent sources or evidence that had intrinsic worth. And in face of the record, there is no independent witness to corroborate the actions of the Complainant (PW-1). The principle of *falsus in uno, falsus in omnibus* was endorsed and upheld by the august Supreme Court in **Notice to Police Constable Khizar Hayat Son of Hadait Ullah (PLD 2019 SC 527)** wherein the following was held:

20...A court of law cannot grant a license to a witness to tell lies or to mix truth with falsehood and then take it upon itself to sift grain from chaff when the law makes perjury or testifying falsely culpable offence. A court also has no jurisdiction to lay down a principle of law when even the Parliament is

expressly forbidden by the Constitution from enacting such a principle as law. The inapplicability of this rule in Pakistan was introduced by Chief Justice Muhammad Munir in the year 1951 at the time when Article 227 of the Constitution was not in the filed but after introduction of the said constitutional prohibition of the enunciation of law by his lordship in this field, like the infamous doctrine of necessity introduced by his lordship in the constitutional field, may not hold its ground now...

21. *We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is foundation of justice and justice is core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule *falsus in uno, falsus in omnibus* shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a deliberate falsehood on a material aspect shall, without any latitude invariably be proceeded against the committing perjury.*

22. We are cognizant that it doubtful that the occurrence was unseen. The incident transpired in broad daylight in the middle of the day, at a time close to Jumma prayers in a place which had houses and shops nearby. In our society and

culture witnesses have an aversion to being embroiled in a criminal matter and often refuse to testify especially when they are witnesses to a horrific crime. The possibility cannot therefore be dismissed that an actual eyewitness might have shared his account with the Deceased's family, while refusing to become a witness himself, and thereafter false witnesses were planted in order to state and affirm the anonymous witness account narrated to them. Even in such circumstance, a court cannot affix guilt on the basis that while the witnesses may not be truthful or eyewitnesses to a crime at all, their account of the events that transpired and claimed the life of the deceased seems plausible. It was held by the august Supreme Court in **State Vs. Ahmed Omar Sheikh (2021 SCMR 873)** that even if a single circumstance created a reasonable doubt in a prudent mind regarding guilt of the accused, benefit of the doubt must be granted to the accused.

"The accused is entitled to the benefit of such doubt not as a matter of grace, but as matter a matter of right," it was held.

It has been emphasized by the august Supreme Court in

Naveed Asghar Vs. State (PLD 2021 SC 600) that no matter how heinousness of the crime in question should not influence the mind of the Judge as the court is under a duty *"to assess the probative value of every piece of evidence in dispassionate, systematic and structured manner without being influenced by the nature of allegations."* In the said case before the august Supreme Court the prosecution story of interrogation of the accused at the place of arrest and the accused leading the police from place of arrest to recovery

was found to be doubtful as it did not fit ordinary human conduct. The august Supreme Court emphasized that conjecture and probability were not substitutes of proof and if courts were to decide criminal matters on high probabilities "*the golden rule of granting benefit of doubt to the accused person, which was a dominant feature of the criminal justice system would be reduced to a naught.*"

23. It is the obligation of the court to punish the guilty once the guilt is proved in accordance with law and not to punish someone suspected of having committed a crime. This definition is essential to ensure the safety of the criminal justice system, as at stake on the one hand is the ability of criminal justice to bring the offender to justice and on the other hand what is at stake is human life and liberty, guaranteed by Article 9 of the Constitution.

24. In view of the reasoning above together with the law as settled by the Supreme Court, we have found the ocular evidence unreliable for being untruthful in material respects, and the recovery inconsequential, and have consequently concluded that the prosecution has failed to prove beyond reasonable doubt that Habib Akhtar is guilty of an offence under section 302(b) of PPC. We therefore **allow** Criminal Appeal No. 170/2019 filed by Habib Akhtar, and answer the Murder Reference in the **negative** and set aside the impugned judgment dated 23.05.2019 to the extent of conviction of Habib Akhtar. The appellant, Habib Akhtar stands acquitted from the charge framed against him by the

learned trial court by order dated 24.08.2013 and shall be released forthwith if not required in any other case. Criminal Revision No. 68/2019 for enhancement of compensation amount awarded to Habib Akhtar is also dismissed. We support the impugned judgment to the extent that it found Sharafat and Zahid Hussain not guilty and acquitted them of the offences that they were charged with and consequently Criminal Appeal No. 194/2020 also stands **dismissed**.

25. We are dismayed by the manner in which the investigation was conducted, recoveries were affected and withheld by the police, including the empty of the cartridge allegedly used in the offence, the murder weapon, the pallets recovered from the body of the Deceased and the failure of the I.O. to send recoveries for forensic analysis in a timely manner in order to transform recoveries into material evidence that could be used against the accused during trial. The conduct of the police could be explained by one of three reasons: due to extreme incompetence of everyone involved in the investigation, especially the I.O.; or their complicity with the offender with the aim of destroying valuable evidence that would otherwise enable the court to bring to justice those responsible for the heinous act of murder; or their complicity with the prosecution to pin false evidence upon accused who had nothing to do with the offense. We therefore direct the Inspector General of Police, ICT, to initiate proceedings under the relevant laws to investigate the matter to determine whether Abdul Waheed, Sub-Inspector, I.O., and other police witnesses in the instant case are liable

for incompetence and determine whether or not they are fit to serve. In the event that the departmental proceedings under the relevant laws find that Abdul Waheed, S.I., and other police witnesses are liable for incompetence, the Inspector General of Police will ensure that appropriate action is taken against them in accordance with law. In the event that the departmental proceedings find that Abdul Waheed S.I. and other police witnesses were not incompetent and were aware of their obligations and capable of preserving the recovered items and sending them for forensic evaluation in order to transform such recoveries into useable evidence, they would be liable for presenting false evidence before the learned trial court and ought to be proceeded against under section 194 PPC for perjury. In such case, the Inspector General of Police shall refer the matter to the learned Sessions Judge for proceedings against Abdul Waheed S.I. and other police witnesses in the instant case in accordance with law.

26. We are also unable to comprehend as to why in the 21st century while conducting investigation the police is unable to cordon off crime scenes, collect evidence in real time and create photographic and video evidence of the crime scene and the recoveries affected, in order to ensure that such evidence can be used by the trial court to bring the guilty to justice and limit the possibility of concoction of evidence or planting of false evidence that embroils the innocent in a criminal trial and enables the guilty to go Scott-free. We expect the Inspector General of Police ICT to put in place Standard Operating Procedures (i) for purposes of

creating photographic and video evidence at the investigation stage, and (ii) for the manner in which evidence is to be subjected to forensic evaluation and timelines within which such evidence is to be dispatched for evaluation while preserving the safety and reliability of such evidence. The Inspector General of Police ICT may also consider creating a mechanism that throws-up red-flags whenever such SOPs are not abided by during investigation and automatically results in disciplinary and penal proceedings against the investigators and police officials found delinquent. In order to ensure that our criminal justice system is able to bring criminals to justice in an efficient manner, without compromising the safety of the system, it is essential to address the problems that afflict investigations and prosecution, which form essential components of our criminal justice system.

27. The office is directed to send a copy of this judgment to the Inspector General of Police, ICT, for compliance.

(MOHSIN AKHTAR KAYANI) (BABAR SATTAR)
JUDGE JUDGE

Announced in the open Court on 14.10.2021.

JUDGE

JUDGE

Saeed*