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Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.50-J of 2013

(Akbar etc. v. The State)

and

Murder Reference No.109 of 2013

(The State v. Akbar etc.)

JUDGMENT

Date of hearing: 07.12.2017

Appellant by: Mr. Sikandar Zulqarnain, Advocate.
Complainant by: Mr. Azam Nazeer Tarar, Advocate.
State by: Rana Sultan Ahmed, Additional Prosecutor
General.

Ch. Abul Aziz, J. This judgment shall dispose of **Criminal Appeal No.50-J of 2013** (filed by appellants namely Akbar son of Sarwar and Faisal son of Abbas against their conviction) and Reference sent by trial court under section 374 of Criminal Procedure Code, 1898 which is numbered as **Murder Reference No.109 of 2013**, for confirmation or otherwise of sentence of death awarded to the afore-mentioned appellants. The appeal and the murder reference are originating from the judgment dated 26.01.2013 passed by learned Additional Sessions Judge, Chiniot, on a trial held in private complaint titled as **“Muhammad Nawaz versus Akbar and 5 others”** for the offence under sections 302,324,148,149 & 109 PPC with regard to an occurrence which took place within the territorial jurisdiction of Police Station Saddar Chiniot. The learned trial court vide the impugned judgment while acquitting co-accused namely Sardara, Allah Yar, Falak Sher and Allah Ditta proceeded to convict and sentence both the appellants in the following terms:-

Under section 302 (b) read with section 34 PPC were awarded death sentence on three counts for committing qatl-i-amd of Lal Khan, Mst.Ferozan Bibi and Tahir Abbas. Both the appellants were also ordered to pay compensation of Rs.200,000/- to the legal heirs of each of the deceased under section 544-A Cr.P.C. and in default whereof to further undergo SI for six months on each count.

Under section 324 read with section 34 PPC to undergo RI for seven years for attempt to commit qatl-i-amd of Ahmed Yar and to pay a fine of Rs.10,000/- each and in default whereof to further undergo six months SI each.

Under section 337-F (iii) read with section 34 PPC to undergo RI for three years each and to pay daman of Rs.10,000/- each to Ahmed Yar (injured).

The sentences of rigorous imprisonment were ordered to run concurrently and benefit of section 382-B Cr.P.C. was also extended in favour of the appellants.

2. Succinctly stated the case of the prosecution as unfolded by Muhammad Nawaz (PW.1) in application for the registration of F.I.R (Exh.PA/Mark-A) is to the effect that he was residing in a Dera which he constructed over his agricultural land; that his son Lal Khan (deceased) was married with Mst. Irshad Bibi who on account of some domestic dispute got annoyed and proceeded to the house of her parents; that on 16.06.2010, as per plan, he along with his three sons, wife and two other relatives namely Tahir, Lal Khan, Muhammad Iqbal, Mst.Ferozan Bibi, Zulfiqar and Ahmed Yar came to the house of Allah Yar to cajole Mst. Irshad Bibi; that while present in the house of Allah Yar they received information that Allah Yar etc. while armed with firearms were sitting on their return passage to take revenge of previous enmity; that at 1:00 p.m., when they were going towards their house, after changing their route, and reached near the land of Inayat son of Nadir, they were intercepted by the appellants and their co-accused namely Maqsood, Falak Sher, Sardar and Mujahid; that the assailants challenged them by exhorting to the effect that they would teach them a lesson for injuring Yaqoob and committing the murder of Shahid Iqbal; that Maqsood fired a shot which hit Lal Khan on the front of his neck; that Akbar (appellant) fired at Mst. Ferozan Bibi hitting her on the chest and the

fire made by Falak Sher hit on the right side of her belly, who after the receipt of these injuries fell down; that Faisal (appellant) fired at the left side of the forehead of Tahir Abbas who too fell on the ground; that Mujahid then fired at Tahir Abbas causing injuries on his nose, right side of the forehead and right cheek; that Sardara also fired at Tahir Abbas hitting him at his forehead, left and right side of the lip and left cheek; that when Ahmad Yar tried to flee away from the spot, Mujahid and Sardara fired at him causing injuries on his right leg; that the aforesaid accused persons also made firing at the complainant and others but they remained unhurt; that accused persons chased Muhammad Iqbal with the intent to commit his murder but he saved his life by stealthily decamping from the crime scene.

The motive behind the occurrence was canvassed as previous incidents in which Muhammad Yaqoob, brother of Maqsood (accused) received firearm injury and Shahid Iqbal, brother in law (Behnoee) of Falak Sher (accused) was murdered and cases were registered against the complainant party.

3. On 16.06.2010 at about 3:30/3:45 p.m., when Muhammad Arshad SI (CW.3) was present in village Aasian in connection with patrolling duty, complainant Muhammad Nawaz (PW.1) along with one Nasir approached him and apprised about the occurrence through a written application (Exh.PA). The application, after proper endorsement was forwarded to Police Station through Ahmed Khan 404/C (not produced as a witness) for the registration of F.I.R. Subsequent thereto, Arshad SI (CW.3) along with Muhammad Nawaz proceeded to the crime scene and found the two deceased persons namely Lal Khan and Mst. Ferozan Bibi along with two injured namely Ahmad Yar and Tahir lying there. He forwarded Ahmad Yar and Tahir injured persons to DHQ Hospital under the escort of a police constable. He prepared the injury statement and

inquest report of deceased Lal Khan (Exh.PR & Exh.PS) as well as of deceased Mst. Ferozan Bibi (Exh.PK & Exh.PL) and dispatched their dead bodies to DHQ Hospital through Zafar Iqbal 38/C for the purposes of postmortem examination. During spot inspection, he secured the blood stained earth from the places where Lal Khan and Mst. Ferozan Bibi (deceased persons) were done to death through memos (Exh.PC & Exh.PD). Likewise, he also took into possession blood stained earth pertaining to Tahir Abbas (then injured) vide memo (Exh.PE). He also secured seven crime empties (P.7/1-7) from the spot vide memo (Exh.CW.3/B). According to record, Tahir died in the hospital on 18.06.2010 whereupon Muhammad Arshad SI proceeded to hospital and after drafting his injury statement and inquest report (Exh.PG & Exh.PH), he got the autopsy conducted. On 25.06.2010 he arrested Akbar, Faisal (appellants), Falak Sher and Sardara. On 06.07.2010 Akbar and Faisal (appellants) made separate disclosures and led to the recoveries of rifles (P.9 & P.11) along with some live bullets which were were taken into possession vide recovery memos (Exh.CW.3/G & Exh.CW.3/H) respectively.

Being dissatisfied from the investigation of the case, the complainant opted to file the private complaint on 10.02.2011 on which the trial was held.

4. The prosecution, in order to prove its case against the appellants and their co-accused produced eight PWs which include **Muhammad Nawaz (PW.1)**, **Ahmed Yar (PW.2)** and **Zulfiqar (PW.3)** who are the eyewitnesses of the occurrence, **Dr. Akhlaq Ahmad (PW.4)**, **Dr.Shazia Abdul Sattar (PW.5)** and **Dr. Asif Nawaz (PW.7)**, who furnished the medical evidence. The learned trial court also examined four persons as court witnesses i.e. **Liaqat (CW.1)**, **Muhammad Nawaz (CW.2)**, **Muhammad Arshad SI/ Investigating Officer (CW.3)** and **Zafar Iqbal (CW.4)**.

5. Dr. Akhlaq Ahmad (PW.4) on 18.06.2010 at 11:55 p.m. conducted the post-mortem examination of the dead body of Tahir Abbas (deceased) and observed the following injuries:-

1. A lacerated wound of 1 cm x 1 cm on the left side of forehead with inverted margins.
2. Lacerated wound of 0.2 x 0.2 cm in the bridge of nose. Wound is skin deep.
3. Lacerated wound 0.2 x 0.2 cm on the left lid. Wound is skin deep.
4. Lacerated wound 0.5 x 0.5 cm on right cheek. Wound is skin deep.
5. Lacerated wound 0.4 x 0.4 cm on the right side of forehead. Wound is skin deep.
6. Lacerated wound 0.3 x 0.3 cm on the right cheek close to nose. Wound is skin deep.
7. Lacerated wound 0.4 x 0.4 cm on the right upper leg. Wound is skin deep.
8. Lacerated wound 0.4 x 0.4 cm on left cheek.
9. Lacerated wound 0.2 x 0.2 cm on the right cheek close to lip. Wound is skin deep.
10. Surgical wound 2 x 1.5 cm on the front of leg. (Trachiotomy were done).

According to the doctor, the death in this case occurred due to cardiopulmonary arrest caused by haemorrhage shock and injury to vital organ (brain). He termed injury No.1 as fatal and described it as sufficient to cause death in an ordinary course of nature. The probable time between injury and death was stated to be 53-55 hours and between death and post-mortem was described as approximately 4/5 hours.

Dr. Shazia Abdul Sattar WMO (PW.5) on 16.06.2010 at 11:50 p.m. conducted the postmortem examination on the dead body of Mst. Ferozan and noted the following injuries:-

1. A firearm wound 1 cm x 1 cm with collar of abrasion and bruised margins present on front and upper part of right side of chest. Just below right clavicle. In first intercostals spaces margins inverted wound of entry. No corresponding hole seen on clothes.
2. A firearm wound 1 cm x 1 cm into skin deep. With collar of abrasion and bruised margins inverted present on right side of upper part of abdomen. Wound of entry. No corresponding hole seen on clothes. Projectile of firearm recovered from this wound sealed signed and handed over to constable who had brought the dead body.

According to the doctor, the death in this case occurred due to haemorrhage external and internal shock, injury to the vital organs (lungs, blood vessels of chest). She described injury No.1 as fatal and declared it sufficient to cause death in an ordinary course of nature. The probable time between injury and death was stated to be immediate and between death and post-mortem was described as approximately 7-10 hours.

Dr. Asif Nawaz (PW.7) on 16.06.2010 at 4:05 p.m. conducted the medico legal examination of Ahmed Yar (injured) and observed the following injuries:-

1. A lacerated wound 1 x 0.5 cm on front of right ankle joint. Advise x-ray.
2. A lacerated wound 0.2 x 0.2 cm on back of right ankle joint.

He also conducted the medico legal examination of Tahir at 3:35 p.m. and observed the following injuries:-

1. A lacerated wound 1 x 1 cm on left side of forehead. Advise x-ray. Margins inverted.
2. A lacerated wound 0.2 x 0.2 cm on bridge of nose. Advise x-ray.
3. A lacerated wound 0.2 x 0.2 cm on left eye lid. Advise x-ray.
4. A lacerated wound 0.5 x 0.5 cm on right cheek. Advise x-ray.
5. A lacerated wound 0.4 x 0.4 cm on right side forehead. Advise x-ray.
6. A lacerated wound 0.3 x 0.3 cm on right cheek. Close to nose. Advise x-ray.
7. A lacerated wound 0.4 x 0.4 cm on left upper lip. Advise x-ray.
8. A lacerated wound 0.4 x 0.4 cm on left cheek. Advise x-ray.
9. A lacerated wound 0.2 x 0.2 cm on right cheek close to lip. Advise x-ray.

On the same day, Dr. Asif Nawaz (PW.7) at about 11:00 a.m., conducted the postmortem examination on the dead body of Lal Khan (deceased) and noted the following injuries:-

1. Lacerated wound 1 cm x 1 cm on right side of front of neck. Margins were inverted wound of entry and blackening present. Chest cavity full of blood.

According to the doctor, the death in this case occurred due to haemorrhage external and internal shock, injury to the vital organs

(lungs, aorta diaphragm, liver small intestine). He opined that injury No.1 was sufficient to cause death in an ordinary course of nature. The doctor further opined that the afore-mentioned injury was ante mortem in nature and caused through firearm weapon. The probable time between injury and death was stated to be immediate and between death and post-mortem was described as approximately 7-9 hours.

6. After the closure of prosecution evidence, the learned trial court examined the appellants and their co-accused under section 342 Cr.P.C. In response to the question “why this case against you and why the PWs deposed against you”, both the appellants placed reliance on the reply of Allah Yar (co-accused) which he made in response to the similar question. Thus, it is relevant here to reproduce the said reply of Allah Yar co-accused which is as under:-

“PWs are related inter se and there is previous litigation and enmity between me and complainant party, so due to this very grudge complainant party has falsely implicated me and my co-accused in this case

Likewise in response to the question “have you anything else to say”, the appellants again opted to place explicit reliance on the answer of Allah Yar (co-accused) which he offered in response to this question, hence is being reproduced below:-

“I am innocent. An encounter took place between complainant party of this case and Mallah family in which one Mansha Mallah was also murdered by the complainant party and on the same day the complainant party in connivance with the Mallah family got registered another case against us. When the Mallah family came to know about the true facts they made their true statements before the court of District & Sessions Judge, Chiniot in which we were acquitted. That is why, the complainant party has concealed the factum of murder of one Mansha Mallah deliberately. The postmortem of Mansha Mallah was conducted on the same day and same time and all these facts regarding that murder were deliberately concealed by the complainant party just to save their skin from the legal punishment. My whole family was entangled in this case with mala fide intention. It is very strange that the I.O of this case was the Incharge of the same police post; but he also concealed this fact deliberately on the behest of complainant party.”

The appellants neither opted to appear as witnesses in their own defence under section 340 (2) of Cr.P.C. nor produced any evidence in their defence.

7. On the conclusion of trial, the appellants were convicted and sentenced as afore-stated. Hence, the instant appeal and Murder Reference.

8. It has been contended by learned counsel for the appellants that though apparently the F.I.R was registered within 2-1/2 hours, yet the circumstances of the case strongly suggest that the case was not registered at the time mentioned in the relevant column of the crime report; that none of the eyewitnesses is the resident of the place around the crime scene and even otherwise they miserably failed to justify their presence at the place of occurrence, hence, are chance witnesses; that the statements of these eyewitnesses were not considered of any legal worth, hence, the co-accused of the appellants attributed active participation in the commission of crime were acquitted by the learned trial court; that there are glaring contradictions between the medical and ocular evidence which have further rendered the testimony of the eyewitnesses not worthy of any credence; that admittedly, the eyewitnesses are inimical against the appellants, hence, without there being some strong corroboration, conviction cannot be awarded on their statements alone; that there is unexplained and mysterious delay in the postmortem examination of the deceased persons which adversely affect the prosecution case; that bare recital of the prosecution evidence gives rise to many doubts and suspicions, the benefit of which was not extended to the appellants.

9. On the other hand, learned Additional Prosecutor General assisted by learned counsel for the complainant strongly controverted the arguments advanced by learned counsel for the appellants and contended that the instant case is arising out of promptly lodged

F.I.R; that in such prompt first information report, both the appellants are specifically nominated that too in reference to the roles performed by them in the commission of crime; that it spells out from the testimony of the eyewitnesses that both the appellants are saddled with the responsibility of having fired fatal shots which resulted into the death of deceased persons; that the medical evidence is providing due support to the statements of all the three eyewitnesses; that the recoveries of weapons affected on the disclosure and pointation of both the appellants coupled with the positive report of FSL provide strength to the case of the prosecution; that as per admitted facts, the parties are locked in criminal litigation with each other, hence, motive of previous enmity also stands established; that the prosecution successfully established the guilt of the appellants through confidence inspiring evidence, hence, they deserve no leniency.

10. Arguments heard. Record perused.

11. The case of the prosecution, so to speak, primarily hinges upon the ocular account brought on record by three eyewitnesses namely Muhammad Nawaz, Ahmad Yar and Zulfiqar (PW.1 to PW.3), the medical evidence furnished by Dr. Akhlaq Ahmad (PW.4), Dr. Shazia Abdul Sattar (PW.5) and Dr. Asif Nawaz (PW.7). The prosecution sought corroboration from the motive in support of which Muhammad Nawaz (PW.1) appeared in the dock. The recovery of rifles 303 (P.9 & P.11), statedly affected on the disclosure and pointation of Akbar and Faisal (appellants) is canvassed as further corroboratory material.

12. The occurrence which formed basis of the instant case took place on 16.06.2010 at about 1:00 p.m. within the territorial jurisdiction of Police Station Saddar, Chiniot. It evinces from the record that the wheel of law was set in motion through an application (Exh.PA) moved on behalf of Muhammad Nawaz (PW.1) and

presented before Muhammad Arshad SI (CW.3) at 3:40 p.m. while he was present in the area of Police Station Saddar Chiniot in connection with patrolling duty. According to record, Muhammad Arshad SI after the receipt of application (Exh.PA) forwarded it to Police Station through Ahmed Khan 404/C for the purposes of registration of F.I.R. However, it is noticed that Ahmed Khan 404/C was not produced before the trial court by the prosecution. In our considered view, non-appearance of Ahmed Khan as a witness has caused a dent in the case of the prosecution, so far it relates to the prompt registration of F.I.R. Likewise, it further spells out from the record that Muhammad Nawaz (PW.1) is a rusty and illiterate villager and even according to him, the application (Exh.PA) was drafted by one Nasir son of Allah Yar who was not produced as a witness.

13. As per the detail of the occurrence incorporated in the crime report (Exh.PA), six assailants participated in the bloodbath, which resulted into the death of three persons namely Feroza Bibi, Tahir and Lal Khan (wife and sons of complainant) and firearm injuries to Ahmed Yar (PW.2). It is important to mention here that these six assailants, who actively participated in the incident, can best be divided in three categories. The first category comprises upon Akbar and Faisal (appellants), whereas the second class consists upon Falak Sher and Sardara (acquitted by the trial court). As far as the third set of accused is concerned, it is comprising upon Maqsood and Mujahid, who were initially declared as proclaimed offenders but subsequently became victims of extrajudicial killing. It would be appropriate to mention here that in addition to above named six assailants, three other persons namely Allah Yar, Mansab and Allah Ditta (acquitted by the trial court) were also implicated in the case on the charge of abetment.

14. It evinces from the record that in order to bring home the guilt of the accused nominated in the crime report, three eyewitnesses namely Muhammad Nawaz, Ahmed Yar and Zulfiqar (PW.1 to PW.3) appeared in the witness box. It would be in fitness of things to have a glance over the roles ascribed by them to respective accused persons including the appellants, in the commission of crime. Before embarking upon the case of the appellants, we deem it appropriate to peep through the roles ascribed to Falak Sher and Sardara (since acquitted by the trial court). It is unveiled from the record that Falak Sher was saddled with the responsibility of having caused a firearm injury on the abdomen of Feroza Bibi, whereas Sardara was burdened with the blame of having inflicted a firearm injury on the forehead of Tahir (deceased). So far as Akbar and Faisal (appellants) are concerned, the former is attributed the role of causing a firearm injury on the chest of Feroza (deceased) whereas the later is burdened with the blame of having caused a firearm injury on the left side of the forehead of Tahir (deceased). From above, it can safely be gathered that both of them i.e. Falak Sher and Sardara (since acquitted) were alleged to have actively participated in the commission of crime and the nature of accusation against them was almost similar as ascribed to the appellants and that too arising from the testimony of same set of witnesses. However, the statements of the three eyewitnesses were not considered worth reliance and both the accused (Falak Sher and Sardara) were acquitted from the case. In this state of affairs, strong corroboration is required to uphold the conviction of the appellants. Needless to mention here such corroboration must originate from independent source. While holding so, we are enlightened by the observation of the Hon'ble Supreme Court of Pakistan expressed in the case of Mst. Sughra Begum and another v. Qaiser Pervez and others (2015 SCMR 1142) which is as under:-

“After the acquittal of Muhammad Ilyas, co-accused, to whom same and similar role was attributed like the appellant and because some of the crime empties did not match with the pistol attributed to the appellant but he was given benefit of doubt along with Babu Muhammad Javed, the latter being a moving spirit behind the whole tragedy then how, in the absence of strong corroboratory evidence, the appellant could be convicted on the same quality of evidence, which was disbelieved qua the co-accused. In this regard this court in the case of Ghulam Sikandar v. Mamraz Khan (PLD 1995 SC 11), has laid down a guiding principle to the effect that when case of the convict is not distinguishable from that of the acquitted accused and the evidence is indivisible in nature then in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made basis for conviction qua the convict. This rule of law has been followed since long without any exception.”

In the above backdrop, we have made an in-depth analysis of the deposition of the three eyewitnesses. It spells out from the record that the assailants and the complainant party were in worst of terms with each other on account of enmity arising out of blood feud and multiple cases of criminal as well as civil nature. However, it is noted that in none of the cases, which gave rise to this enmity, the appellants were accused or complainant. Almost in all the previous incidents, on one hand, Maqsood (PO), Falak Sher and Sardara (since acquitted) and on other hand the complainant and his family were party to them.

It is unveiled from the statements of eyewitnesses that the crime scene is situated at a place away from the houses of both the parties. Likewise, none of the witnesses is the resident of the place of occurrence and instead their houses are situated 4/5 squares away therefrom. Similarly, neither the witnesses nor the assailants were having any agricultural land around the eventful place. The witnesses, while offering explanation for their presence at the crime scene stated that Lal Khan (deceased), was married with Irshad Bibi, daughter of Allah Yar. She, due to some family dispute left the house of Lal Khan and proceeded to the house of her parents. According to the PWs, they were present in the house of Allah Yar (father of

Irshad Bibi) in pursuance of an effort for compromise between the couple and acquired knowledge about the presence of the assailants on the path leading to their house and more importantly about their design to launch an assault on them. Due to this reason, while on way back to their house, the PWs opted for a different passage. In this regard, firstly it is observed that none out of the three eyewitnesses disclosed the source of their information regarding aforementioned presence of the appellants and their co-accused. It would be appropriate to reproduce the relevant extract from the statement of Muhammad Nawaz (PW.1) which is as under:-

“In the meantime we received information that Maqsood and Allah Yar etc had made programme to assault on us on our return to our Dera. After receiving this information we changed our route.....”

It needs no mention that since the PWs opted not disclose the source of their information, hence, the aforementioned portion can best be termed as hearsay and is of no legal significance. Secondly, it is noticed that the reason or cause of the presence of the PWs at the crime scene was arising out of compromise effort between Lal Khan and his wife Irshad Bibi. However, in order to provide some legal credibility to this aspect of the prosecution case, neither Irshad Bibi nor her father Allah Yar appeared in the witness box. It goes without saying that the prosecution is legally obliged to prove every bit of its case through legally admissible evidence. Likewise, by not producing Irshad Bibi and Allah Yar, the best evidence to provide credence to the presence of PWs at the crime scene was withheld. Even the record is suggestive of the fact that by the time the occurrence took place, the family of the complainant and Allah Yar were in good terms with each other as Nasir son of Allah Yar even went on to write the application (Exh.PA) for the registration of F.I.R. Such feature of the case has left this Court with no other option but to draw an inference in accordance with the provisions of

Article 129, Illustration (g) of Qanun-e-Shahadat Order, 1984, which is as under:-

129. Court may presume existence of certain facts.

The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and the public and private business, in their relation to the facts of the particular case.

Illustrations

The court may presume:

- (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The Hon'ble Supreme Court of Pakistan in the case of Muhammad Rafique, etc. v. State & others (PLJ 2011 SC 191) held as under:-

“that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129 (g) of Qanun-e-Shahadat Order can fairly be drawn that if PW would have been examined, his evidence would have been unfavourable to the prosecution”.

The features of the case mentioned above and the omission to produce any member from the family of Allah Yar have rendered the eyewitnesses as chance witnesses. Hence, in order to attain credibility, their statements are required to be corroborated from independent sources.

A wade through the testimony of the eyewitnesses of the occurrence reveals that all of them, in their statements before the court, narrated each and every shot fired by the assailants and even the locale of injuries caused therefrom. Keeping in view the fact that according to the theory of the prosecution case, the PWs were under a massive assault, it does not appeal to logic that instead of running for their lives they were focusing on the roles being performed by respective accused as the same is in conflict with natural human response in such an event. Similarly, we have not been able to digest

that all the PWs were having so sharp an eye-sight so as to catch even the velocity of the bullets being fired during the occurrence. As we have discussed earlier that on account of multiple reasons, the eyewitness account is required to be corroborated or supported from independent factors, hence, we have further made a detailed analysis of the record.

So far as Akbar (appellant) is concerned, he is burdened with the blame of having caused firearm injury on the chest of Feroza Bibi (deceased). According to record, the dead body of Feroza Bibi was subjected to autopsy by Dr. Shazia Abdul Sattar (PW.5). During her examination, she noticed two firearm injuries on her person, one of which apparently coincides with the role ascribed to Muhammad Akbar (appellant), whereas the other one concurs with the role assigned to Falak Sher (since acquitted). We have noted it with concern that during examination, Dr. Shazia noticed no corresponding hole on her clothes. Needless to mention here that Feroza Bibi (deceased) was a lady and this is not the case of the prosecution that any time during the occurrence she was deprived from her shirt. Likewise, though a projectile of firearm was recovered from her body yet, it was not forwarded to any expert in order to ascertain its origin or bore. The absence of corresponding holes on the shirt of Feroza Bibi (deceased) is suggestive of the fact that the occurrence had not taken place in the manner narrated by the PWs.

As regards the case of Faisal (appellant), it is found from the record that he stands convicted with the allegation of having caused a firearm injury on the forehead of Tahir (deceased). However, it is important to mention here that besides Faisal (appellant), his co-accused Sardara and Mujahid are also alleged to have caused injuries on the forehead and face of Tahir (deceased). For reference sake, an

extract from the examination-in-chief of Muhammad Nawaz (PW.1) is reproduced below:-

“Then Faisal accused present in the court fired with his rifle hitting Tahir my son on the left side of his forehead who fell down. Then Mujahid accused (since PO) fired with his gun hitting Tahir my son on his face. Then Sardara accused present in the court fired at Tahir hitting him on the left side of his forehead and on his face.”

We have not been able to compromise with the proposition that as to how this is possible that even after getting his face bullet ridden through multiple shots, Tahir (deceased) remained standing on his feet like an oak. Likewise, it is further observed that during postmortem examination, Dr. Akhlaq Ahmed (PW.4) noted no exit wound on the skull of Tahir (deceased). In such an eventuality, some foreign metallic object should have been recovered from the body of Muhammad Tahir (deceased) during postmortem examination. Likewise, the timing of arrival of Muhammad Tahir in hospital (as injured) further casts doubt about the presence of the PWs and the arrival of the police at the crime scene. It evinces from the complaint (Exh.PA) that Muhammad Arshad SI (CW.3) along with Muhammad Nawaz (PW.1) proceeded to the crime scene subsequent to 3:40 p.m. and even 30 minutes thereafter shifted the injured to hospital. However, according to Dr. Asif Nawaz (PW.7), Tahir (deceased) was received in the hospital in injured condition at 3:35 p.m. From such feature of the case, it can safely be gathered that much before the arrival of police and Muhammad Nawaz (PW.1), someone had shifted Tahir from the crime scene to the hospital. Since the fatal injury on the person of Lal Khan (deceased) is attributed to Maqsood (PO), hence, we do not see any necessity of embarking upon the issue as this will be an exercise in futility.

15. The presence of a prosecution witnesses at the crime scene and their claim of having witnessed the occurrence can be ascertained either from the detail of the incident or of post

occurrence events provided by them. According to the prosecution case, all the three deceased were closely related with the complainant and were his wife and sons. All of them received firearm injuries and that too within his eye-sight. Though Feroza Bibi and Lal Khan succumbed to the injuries there and then, however, Tahir Khan (deceased) as well as Ahmad Yar (PW.2) were in injured condition till that time. As per normal and natural human reflexes, before doing anything else the complainant should have made best of his efforts to shift them from the crime scene for medical treatment. However, surprisingly, instead of shifting them to the hospital, the complainant proceeded to inform the police after about 15-minutes of the occurrence while leaving them behind at the crime scene and that too in precarious condition. Both the injured namely Tahir and Ahmad Yar (PW.2) remained lying at the spot till the arrival of police. It is important to mention here that as per complaint (Exh.PA) the police arrived at the crime scene subsequent to 3:40 p.m. and the injured were forwarded to the hospital even after half an hour of the arrival of the police. This feature of the case casts further doubt about the presence of the PWs at the crime scene.

16. We have also given a considered thought to the testimony of Ahmed Yar (PW.2), who also received a firearm injury during the occurrence. During his statement, he held Mujahid (PO) and Sardara (since acquitted) responsible for having caused two firearm injuries on his right leg. Before proceeding further, it is appropriate to observe here that his evidence was not considered favourable for awarding conviction to Sardara and he was acquitted from the case. There are multiple factors pertaining to the admissibility of a witness and receipt of injuries during occurrence is one of them. Though, it is said that injury on the person of a witness is stamp of his presence at the crime scene yet the acceptability of his testimony is dependent upon his credibility and other attending circumstances. In the instant

case when Ahmed Yar (PW.2) is disbelieved even to the extent of the accused who caused him one of the firearm injuries, his testimony for upholding the conviction of the appellants can only be accepted if strongly corroborated and supported from other circumstances. It evinces from the statement of Dr. Asif Nawaz (PW.7) who examined Ahmad Yar (PW.2) that though there were two injuries on his right ankle joint, however, both of them were simple in nature and even caused no fracture. Last but not the least, it is observed that Ahmad Yar (PW.2) was one of the accused in the murder case of Shahid Iqbal, which is canvassed as the motive or immediate cause of the instant occurrence. In this regard, a portion from the cross-examination of Ahmad Yar (PW.2) is being reproduced below:-

“It is correct that in the murder case of Shahid Iqbal who was brother in law of present accused Falak Sher I, my brothers Muhammad Khan, Sikandar and Tahir Abbas were accused and present accused Falak Sher and his brother Mazhar were PWs.”

In above circumstances, Ahmad Yar (PW.2) should have been one of the prime targets, however, he received simple injuries and that too on non-vital part of his person, whereas Lal Khan and Feroza Bibi (deceased persons) were done to death. This aspect gains more importance when seen in the context of the claim of Ahmed Yar (PW.2) according to which he after the receipt of injuries fell on the ground. From this aspect, it follows that at the eventful time he was completely at the mercy of the assailants and that too in the background of an extreme hostility. In such a situation, survival of Ahmed Yar (PW.2) appears to be contrary to the theory of the prosecution case.

This is settled proposition arising out of principles laid down for the appraisal of evidence that the legal worth of the testimony of a witness depends upon his credibility which is indivisible in nature. If he was found not worthy of any credence to the extent of one set

of accused who actively participated in the crime it appears to be wholly unjust to place explicit reliance on his testimony for awarding conviction to a similarly placed set of accused. An acquittal of likely positioned accused makes his honesty as a witness open to questions. Such rule dates back to a case reported as *Mohamed Fiaz Bakhsh v. The Queen* (PLD 1959 Privy Council 24) wherein the Hon'ble Apex Court observed as under:-

“.....Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question it cannot be right to accept their verdict against one and re-open it in the case of the other.”

Likewise, while dealing with similar proposition, the Hon'ble Supreme Court of Pakistan observed in the case reported as *Ata Muhammad and another v. The State* (1995 SCMR 599) as under:-

“The maxim “falsus in uno, falsus in omnibus”, no doubt has no universal application and that grain is to be sifted from chaff but it may not be possible in the case where the very P.W. on whose testimony conviction of an accused is maintained has earlier been held not to be worthy of credence so far as other accused charged with effective participation in the same occurrence was concerned.“

The aforementioned features cumulatively, are giving rise to many questions, which throughout remained unanswered.

17. There is another aspect which has persuaded us to draw a view adverse to the case of the prosecution and it pertains to delayed postmortem examination of Feroza Bibi and Lal Khan (deceased persons). The occurrence took place at about 1:00 p.m., whereas Tahir (deceased) and Ahmed Yar (PW.2) arrived in the hospital at about 3:30 p.m., and 4:05 p.m. respectively in injured condition. It is of immense importance to mention here that the postmortem examination of Feroza Bibi (deceased) was conducted by Dr. Shazia (PW.5) on 16.06.2010 at about 11:50 p.m. i.e. after about 10 hours and 50 minutes of the occurrence. So far as the autopsy of Lal Khan (deceased) is concerned, it was performed by Dr. Asif Nawaz (PW.7) at about 11:00 a.m. in the day. If correctly calculated, it

evinces that the dead body of Lal Khan was examined by the doctor after about 18-hours of the occurrence. In order to trace some justifiable explanation for such inordinate and mysterious delay in the postmortem examination, we have carefully scrutinized the record of the case but have not been able to come across any reason in this regard. In this backdrop, we are constrained to hold that possibility cannot be ruled out that such delay was consumed to knit a story so as to grill the appellants and their co-accused in the instant case. Such unexplained delay in holding autopsy is always looked with doubts and suspicions and adversely reflects the case of the prosecution, more importantly, when the ocular account is furnished by partisan witnesses who are also disbelieved to the extent of acquitted accused persons. The Hon'ble Supreme Court of Pakistan in the case of *Muhammad Ilyas v. Muhammad Abid alias Billa* (2017 SCMR 54) while dealing with the delayed postmortem observed as under:-

“Post-mortem examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that the time had been consumed by the local police and complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution.”

18. Though the circumstances mentioned above are giving rise to a reasonable doubt regarding the involvement of the appellants in the participation of the crime yet for doing complete justice we consider it appropriate to have a glance over the motive part of the case as well as the recoveries of weapons affected from the appellants and the positive report of FSL (Exh.PU).

So far as the motive is concerned, it was canvassed as an enmity arising out of previous criminal cases during which, Shahid Iqbal (the brother in law of Falak Sher) lost his life and Muhammad Yaqoob (brother of Maqsood PO) received firearm injuries. Though it evinces from the record that the parties are at daggers drawn with

each other on account of manifold cases, however, the prosecution claims that the instant occurrence is an outcome of aforementioned cases. As observed above, in the said case Ahmed Yar was one of the accused along with his two brothers who were sentenced to death. In this situation, the assailants should not have let Ahmed Yar alive. Likewise, the acquittal of Falak Sher (co-accused) who was brother in law of the deceased of that case, has left a big dent regarding the motive of the prosecution case. We deem it appropriate to mention here that though the acquittal of Falak Sher in the instant case was challenged before this Court through PSLA No.63 of 2013 and remained pending till 22.10.2015 when it was dismissed. In these circumstances, the projected motive appears to be too remote so as to fascinate this Court to take it as a corroborative piece of evidence against the appellants.

Now coming to the recoveries of 303 rifles (P.9 & P.11) statedly affected on the disclosure and pointation of the appellants. Though according to the report of FSL (Exh.PU), the rifles matched with the crime empties which were secured from the crime scene, however, it is noticed that these articles were forwarded to the office of FSL together, hence, are of no legal significance. Moreover, it spells out from the record that the witness, who took the weapons and empties to FSL was never produced as witness. Even otherwise, the positive report of FSL is only a corroborative piece of evidence and on this score alone, conviction cannot be awarded or upheld and more importantly in cases when the ocular account is found not worthy of any legal credence. The reference in this regard can be placed to the case of Riaz Ahmed v. State (PLJ 2010 SC 877) wherein the Hon'ble Supreme Court of Pakistan gave the following observation:-

“The prosecution also produced the positive FSL, report, meaning thereby, the crime empty secured from place of incident, matched with the gun recovered from the possession of the appellant. This being a corroborative piece of evidence, which by

itself is insufficient to convict the appellant in absence of substantive piece of evidence. Reference is invited to “Ijaz Ahmed v. State (PLJ 1998 SC 510”. It was held in the case of “Asadullah v. Muhammad Ali” (PLD 1971 SC 541)”, that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In the case of “Saifullah v. The State (PLJ 1985 SC 154)”, it was held that when there is no eye-witness to be relied upon then there is nothing, which can be corroborated by the recovery.”

19. In the light of afore-discussion, while giving benefit of doubt in favour of Akbar and Faisal (appellants), we allow **Criminal Appeal No.50-J of 2013**, set aside their conviction and sentence and acquit them of the charge. Both the appellants shall be released forthwith if not required to be detained in any other criminal case. Resultantly, **Murder Reference No.109 of 2013** is answered in the negative and death sentence awarded to Akbar and Faisal (convicts) on three counts **IS NOT CONFIRMED**.

(Qazi Muhammad Amin Ahmed)
Judge

(Ch. Abdul Aziz)
Judge

APPROVED FOR REPORTING

(Ch. Abdul Aziz)
Judge