

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Murder Reference No. 4 of 2014/BWP
(The State v. Muhammad Anwar)

Criminal Appeal No. 52 of 2014/BWP
(Muhammad Anwar v. The State)

Criminal Appeal No. 80 of 2014/BWP
(Muhammad Sarwar v. Noor Ahmad etc.)

JUDGMENT

DATE OF HEARING	26-04-2018
Appellant by:	Syed Zeeshan Haider, Advocate.
State by:	Ch. Asghar Ali Gill, Deputy Prosecutor General.
Complainant by:	Mr. Sadiq Mehmood Khurram, Advocate

Tariq Saleem Sheikh, J:- By this consolidated judgment we propose to decide Murder Reference No. 4/2014/BWP, CrI. Appeal No. 52/2014/BWP and CrI. Appeal No. 80/2014/BWP arising from case FIR No. 340/2012 dated 20-07-2012 registered at Police Station A-Division, Bahawalnagar, for offences under Sections 302/34/109 PPC.

2. Brief facts of the case are that on 20-07-2012 Muhammad Ahmad (deceased) got recorded his statement Exh.PO to Inamullah/SI (PW-16) to the effect that on the same day at 06:15 a.m. he was returning home after picking up some groceries from his shop situated at Fordwah Canal

Bridge. When he reached near his house, Muhammad Anwar *alias* Anwari (Appellant in Crl. Appeal No. 52/2014) and Akbar Ali (tried separately as juvenile) alongwith an unknown person suddenly came on a motorcycle. Muhammad Anwar shot at him with a .12 bore gun which hit right side of his back. Then Akbar Ali, who was armed with .30 bore pistol, fired two shots one of which hit right side of his abdomen while the second struck his right leg owing to which he fell down. On his hue and cry and report of firing Muhammad Adil (PW-1), Nazir Ahmad (PW-2) and some other people were attracted to the spot who witnessed the occurrence. They tried to apprehend the accused but they managed to escape. Muhammad Ahmad alleged that the accused attacked him at the instance of Maqsood Ahmad *alias* Soodi and Noor Ahmad who were involved in the murder of his paternal uncle Allah Ditta. They were absconders in that case and wanted to eliminate him because he was pursuing it. He was taken to the DHQ Hospital, Bahawalnagar, where he was admitted for treatment.

3. According to '*Karwai Police*' appended to Exh. PO, Rao Inamullah/SI (PW-16) reached the Emergency Room of the DHQ Hospital on receiving information about the incident. He made an application Exh. PO/2 to the Medical Officer to inquire whether he could record the statement of Muhammad Ahmad on which Dr. Habib Khan Shamsi (PW-19) certified that he was fit. Thereupon, at 8:10 a.m., he recorded his statement (Exh. PO) in the presence of Dr. Habib Khan Shamsi and PWs Muhammad Adil and Nazir Ahmad and sent it to the police station through Muhammad Safdar 981/C on the basis of which FIR No. 340/2012 (Exh. PO/1) was chalked out at 9:00 a.m.. It is pertinent to note that the FIR was initially

registered under Sections 324/34/109 PPC. However, on 06-08-2012, Muhammad Ahmad succumbed to his injuries at the Jinnah Hospital, Lahore, whereafter offence under Section 302 PPC was added.

4. The investigation of the case was also entrusted to Rao Inamullah/SI (PW-16). He prepared Injury Statement (Exh.PJ/1) and then proceeded to the place of occurrence. He prepared rough site plan (Exh.PP), collected blood stained earth from the place where Muhammad Ahmad injured fell down and secured it vide Recovery Memo Exh.PA, took into possession two crime empties of .12 bore (P-1/1-2) and two of pistol .30 bore (P-2/1-2) vide Recovery Memo Exh.PB. He raided the house of the accused but did not find them. Thereafter, he went to the DHQ Hospital again where Arbab Jahangir 1369/C (PW-3) handed over to him blood stained Qameez (P-3) which he secured vide Recovery Memo Exh.PC. On 23-07-2012, he went to the Jinnah Hospital, Lahore, where he recorded supplementary statement of Muhammad Ahmad injured as well as the statements of Javed (PW-7) and Habib (PW-8) under Section 161 Cr.P.C. On 6.8.2012, Muhammad Ahmad died and his body was taken to the DHQ Hospital, Bahawalnagar, Rao Inamullah/SI reached the hospital, prepared Injury Statement (Exh.PJ/1), Inquest Report (Exh.PJ) and dispatched the corpse to the mortuary for autopsy under the escort of Safdar 981/C. On 08-08-2012, Muhammad Latif (PW-12) and PW Muhammad Anwar (given up) joined investigation and he recorded their statements under Section 161 Cr.P.C. regarding extra-judicial confession allegedly made by Zubair *alias* Bhalli. On 13-08-2012, Noor Ahmad while on bail joined investigation. He interrogated him and prepared incomplete *challan* against him. Then he was transferred.

5. On 05-10-2012, the investigation was entrusted to Javed Iqbal/SI (PW-15). He obtained proclamation under Section 87 Cr.P.C. against Anwar, Akbar, Maqsood and Zubair alias Bhalli from the Court and handed over the same to Muhammad Aslam 335/C (PW-5) for service and thereafter *challan* under Section 512 Cr.P.C. was prepared. He got prepared scaled site plan (Exh.PD & Exh.PD/1) of the place of occurrence from Patwari Muhammad Aslam (PW-4). On 30-12-2012, he received information that Muhammad Anwar was arrested in case FIR No.382/2011 registered under Sections 395/412 PPC at Police Station McLeod Ganj whereupon he filed an application before the learned Area Magistrate Minchanabad, for his custody which was allowed. On 02-11-2012, he produced Muhammad Anwar before the Area Magistrate and obtained his physical remand. On 2.11.2012, during interrogation Muhammad Anwar led to the recovery of .12 bore gun (P-4) along with four cartridges (P-5/1-4), which he secured vide Recovery Memo Exh.PK. He handed over the file to the SHO for preparation of report under Section 173 Cr.P.C. against him. On 08-12-2012, he arrested Muhammad Zubair *alias* Bhalli and sent him to jail for identification parade. On 12-12-2012, identification parade was conducted in which the PWs identified Zubair *alias* Bhalli. On the same day he obtained his physical remand. On 14.12.2012, Zubair *alias* Bhalli got recovered motorcycle CG-125 from his *Bethak* in presence of Majid Jameel (given up PW) and Muhammad Jaffar 997/C (PW-13) which he secured vide Recovery Memo Exh.PM. On 17-12-2012, he arrested accused Akbar Ali who claimed juvenility and moved an application before the Area Magistrate for his medical examination which was conducted

on 21-12-2012 and his age was declared 17/18 years. Thereafter, he was transferred.

6. On 23-12-2012 the investigation was entrusted to Naseer-ud-Din/SI (PW-17). He interrogated Akbar Ali who led to the recovery of pistol .30 bore (P-6) with fifteen live bullets (P-7/1-15) from the *Bethak* of his house which he secured vide Recovery Memo Exh.PL. He prepared separate *challan* under Section 173 Cr.P.C. against Akbar Ali.

7. The learned Additional Sessions Judge summoned Muhammad Anwar, Muhammad Zubair alias Bhalli and Noor Ahmad for trial and indicted them on 21-01-2013. They denied the charge and claimed trial. In order to prove its case the prosecution examined 20 witnesses in all. Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) proved the statement Exh.PO of Muhammad Ahmad deceased and provided the ocular account. They also witnessed recovery of blood stained earth and crime empties from the place of occurrence. Dr. Atif Mehmood (PW-6) and Dr. Muhammad Tahir (PW-14) furnished medical evidence. Dr. Habib Khan Shamsi (PW-19) proved his endorsement on the statement (Exh.PO) of Muhammad Ahmad deceased. Muhammad Riaz (PW-11) testified about the recovery of .12 bore gun with four cartridges at the instance of Muhammad Anwar while Muhammad Latif (PW-12) deposed about extra-judicial confession of Zubair *alias* Bhalli. Muhammad Jaffar 997/C (PW-13) appeared to prove recovery of motorcycle CG-125 at the instance of Muhammad Zubair. The Investigation Officers, Javed Iqbal/SI (PW-15), Rao Inamullah/SI (PW-16) and Naseer-ud-Din/SI (PW-17), gave details of their investigation and the evidence they collected in this case. Magistrate Muhammad Masroor Anwar Khan

(PW-20) deposed about the proceedings of the identification test parade of Muhammad Zubair. The remaining witnesses were formal in nature. The learned prosecutor gave up PWs Muhammad Asad, Muhammad Sarwar, Muhammad Munir, Muhammad Anwar, and Muhammad Majid Jamil 382/HC being unnecessary. On 09-01-2014 he closed the prosecution evidence after tendering reports of the Punjab Forensic Science Agency Exh.PZ & Exh.PAA.

8. After the close of prosecution evidence the learned trial Court examined the accused under Section 342 Cr.P.C. They all refuted the allegations levelled against them and professed innocence. When Muhammad Anwar was asked as to why he had been implicated in this case he said that the complainant party was a notorious land mafia and they wanted to grab his house. In reply to the same question, Zubair *alias* Bhalli stated that they involved him due to previous enmity and to grab his property situated at Fordwah Canal Bridge, Bahawalnagar. On the other hand, Noor Ahmad maintained that he had been roped in due to previous enmity. The accused neither got their statements recorded on oath under Section 340(2) Cr.P.C. nor examined any witness in their defence. However, they produced copies of various FIRs which were placed on the record.

9. On the conclusion of the trial, vide judgment dated 23-01-2014, the learned Additional Sessions Judge acquitted Noor Ahmad and Muhammad Zubair *alias* Bhalli. However, he convicted Muhammad Anwar under Section 302(b) PPC and sentenced him to death with a direction to pay Rs.3,00,000/- as compensation to the legal heirs of Muhammad Ahmad deceased in terms of Section 544-A

Cr.P.C. and in default thereof to undergo simple imprisonment for a further period of six months.

10. Muhammad Anwar has filed Crl. Appeal No. 52/2014/BWP against his conviction and sentence whereas the learned Additional Sessions Judge has sent Murder Reference No. 4/2014/BWP to this Court under Section 374 Cr.P.C. for confirmation of his death sentence. On the other hand, deceased's father Muhammad Sarwar has filed Criminal Appeal No.80/2014/BWP to assail the acquittal of Noor Ahmad and Muhammad Zubair.

11. In support of Crl. Appeal No. 52/2014/BWP, Syed Zeeshan Haider, Advocate, contended that the prosecution had failed to prove its case against Appellant Muhammad Anwar beyond reasonable doubt. The learned trial Court had failed to appraise the evidence properly which had caused serious miscarriage of justice. He argued that, firstly, the statement (Exh. PO) attributed to Muhammad Ahmad deceased was false and concocted. He was critically injured in the occurrence and was not in a position to make it. Secondly, Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) were not present at the spot at the time of occurrence and the police had planted them to strengthen the prosecution case. Thirdly, the said witnesses were interested and made dishonest improvements over their previous statements which made them untrustworthy. Fourthly, there was conflict in the medical evidence and the ocular account. Fifthly, Javed (PW-7) and Habib (PW-8) had given false evidence that they had heard the Appellant and his co-accused conspiring/abetting to murder Muhammad Ahmad. Their story did not appeal to a prudent mind. Sixthly, .12 bore gun was not recovered from the Appellant and the same had been

foisted on him. Lastly, the motive was also not proved. He prayed that this appeal be accepted and Appellant Muhammad Anwar be acquitted of the charge.

12. On the other hand, the learned Deputy Prosecutor General vehemently opposed the above-mentioned appeal. He argued that the FIR was promptly lodged on the statement of the victim himself who nominated the Appellant in the instant case with a specific role. Although he was badly injured in the incident, Dr. Habib Khan Shamsi (PW-19) had opined that he was fit to make a statement at the time when he got it recorded. There was no chance of substitution or deliberation. He next argued that the prosecution case was based on dying declaration of Muhammad Ahmad deceased as well as the evidence of the eye-witnesses of the occurrence, namely, Muhammad Adil (PW-1) and Nazir Ahmad (PW-2), and was reinforced by the medical evidence, recovery of weapons of offence (gun P-4 and pistol P-6) and the evidence of conspiracy furnished by Javed (PW-7) and Habib (PW-8) and the absconding of the Appellant. He maintained that dying declaration could be made basis of conviction even if the same was not corroborated while in the present case it had been corroborated by independent and trustworthy evidence. The learned Law Officer further argued that the motive was also established. He contended that the learned trial Court had rightly awarded death penalty to Appellant Muhammad Anwar and prayed that the same be maintained, his appeal be dismissed and the Murder Reference be answered in the affirmative.

13. So far as Crl. Appeal No. 80/2014 is concerned, Mr. Sadiq Mehmood Khurram, Advocate, argued that

Muhammad Zubair *alias* Bhalli and Noor Ahmad actively participated in the occurrence. The learned trial Court had misread the prosecution evidence qua them and had erred in acquitting them. He prayed that they be punished in accordance with law.

14. We have heard the learned counsel for the parties and have examined the record with their able assistance.

15. The prosecution case is that the occurrence took place at Fordwah Canal Bridge within the territorial limits of Police Station A-Division, Bahawalnagar, at 6:15 a.m. on 20-07-2017. Muhammad Ahmad was injured and was taken to the DHQ Hospital, Bahawalnagar. Rao Inamullah/SI (PW-16) reached there on receiving information about the incident and after seeking permission from the Medical Officer, Dr. Habib Khan Shamsi (PW-19), recorded his statement Exh. PO whose details have been given in the earlier part of this judgment and in pursuance thereof FIR No. 340/2012 (Exh. PO/1) was registered at 9:00 a.m. On the same day Muhammad Ahmad was shifted to the Jinnah Hospital, Lahore, where he remained under treatment for 16 days and eventually died on 06-08-2012. In order to prove the charge the prosecution relies on Muhammad Ahmad's statement Exh. PO (which is stated to be his dying declaration), the eye-witness account, medical evidence, recovery of crime weapons, evidence of abetment, motive and absconding of Muhammad Anwar and Muhammad Zubair.

16. Rao Inamullah/SI (PW-16) deposed that on 20-07-2012 when he reached the DHQ Hospital he submitted application Exh. PO/2 to the Medical Officer for a certificate as to whether Muhammad Ahmad was able to make a

statement. Dr. Habib Khan Shamsi (PW-19) certified that he was fit whereupon he recorded his statement Exh. PO which was attested by the said Medical Officer and Muhammad Adil (PW-1) and Nazir Ahmad (PW-2). When Dr. Habib Khan Shamsi came to the witness-box he reaffirmed these facts and his endorsement on application Exh. PO/2. PWs Muhammad Adil and Nazir Ahmad corroborated him. As already noted, the occurrence took place at 6:15 a.m. while Muhammad Ahmad was brought to the hospital at 6:30 a.m. and his statement Exh. PO was recorded at 8:10 a.m. Keeping in view the fact he had suffered multiple injuries it can reasonably be presumed that he was expecting his death at that time. As such, his said statement can be regarded as dying declaration which is admissible in evidence under Article 46 of the Qanoon-e-Shahadat Order, 1984 (“QSO”). However, Courts are required to scrutinize it carefully before relying on it. Some of the vital tests for determining its genuineness are:

- (i) Whether the maker had the physical capacity to make the dying statement;
- (ii) Whether the maker had opportunity to recognize the assailants;
- (iii) Whether there were chances for mistake on the part of dying man in identifying and naming his assailants;
- (iv) Whether it was free from prompting from any outside quarter; and
- (v) Whether the witness who heard the deceased making his statement heard him correctly and whether their evidence can be relied on.

17. Courts have always insisted that veracity of dying declaration is to be scrutinized in light of facts and

surrounding circumstances. In “Abdul Razik v. The State” (PLD 1965 SC 151), the Hon’ble Supreme Court observed:

“To accept such statement without considering ‘surrounding circumstances’, ‘totally inconsistent with safe dispensation of justice’ – Accepting such statement on considerations of opinions expressed in precedent cases regarding similar declarations, accompanied by words indicating reliance on ‘some principle of law’, held, to be ‘no less dangerous’ – ‘Careful scrutiny, applied to all physical circumstances’ appearing from evidence, only way of arriving at conclusion that statement is ‘worthy of belief’.”

In “Farman Bi v. Ghulam Farid and others” (1994 SCMR 1852), the Apex Court held:

“For proper evaluation of the dying declaration, the surrounding circumstances in which it was made and the contents thereof have to be kept in view.”

The above principle was reiterated in “Mst. Zahida Bibi v. The State” (PLD 2006 SC 255), “Farman Ahmed v. Muhammad Inayat and others” (2007 SCMR 1825) and “Tahir Khan v. The State” (2011 SCMR 646).

18. In the instant case, Dr. Muhammad Tahir (PW-14) deposed that Muhammad Ahmad was brought to the DHQ Hospital, Bahawalnagar, and was produced before him by the police for medical examination at 6:30 a.m. His clothes were stained with blood, pulse was 110/min and B.P. was nil. He was not oriented to time and place and was referred to the Jinnah Hospital, Lahore, after blood transfusion. He had the following injuries on his person:

1. Four perforated lacerated nearly circular wounds on supero lateral and posterior aspect of right shoulder 8 cm x 8 cm with profuse bleeding at inverted skin margins.
2. A lacerated wound with irregular margins of skin on back of chest measuring 5 cm x 3 cm, muscles were cut and bleeding profusely.

3. A lacerated wound with round margins 1.cm x 1.cm going deep to chest cavity with inverted margins below left breast, bleeding profusely.
4. A round wound 0.8 x 1 cm on right side of abdomen. A lacerated and inverted margins going deep towards abdominal cavity and bleeding.
5. A lacerated wound on supero lateral aspect of right knee heavily bleeding.

19. From the deposition of Dr. Muhammad Tahir (PW-14) it seems unlikely that Muhammad Ahmad was in a position to make statement Exh.PO at 8:10 a.m. We are fortified in our view from the following portion of his cross-examination:

“The injured was produced before me at 6:30 a.m. that day. It is correct that the injured was not conscious at the time of his examination. Volunteered he was not oriented to time and place as I have already stated. It is correct that we used to obtain thumb-impressions in the relevant column of MLC Proforma and used to incorporate name, I.D. Card number etc. after inquiring the same from examinee. It is correct that in this case I had not obtained thumb-impressions, signature or other particulars in the relevant column of the injured. Volunteered that injured was not in a position to sign or thumb-mark the MLC. It is correct that I have incorporated the name, caste parentage and address of the injured as reported by police since injured was not in a position to tell his age and occupation, so I did not fill the relevant columns. It is correct that till the injured Muhammad Ahmad remained under my treatment and I referred him to Jinnah Hospital Lahore at 8:30 a.m., he had not gained senses due to severe injuries.”

20. The testimony of Dr. Habib Khan Shamsi (PW-19) appears to be in conflict with that of Dr. Muhammad Tahir (PW-14). We are of the considered opinion that the evidence of the latter is to be preferred because Muhammad Ahmad was under his treatment. Reference may be made to the following extract from the cross-examination of Dr. Muhammad Tahir:

“It is correct that I was the only doctor on duty at the time when injured was produced in Emergency DHQ Hospital, Bahawalnagar.”

Dr. Habib Khan Shamsi himself admitted in his cross-examination as under:

“It is correct that the then injured Muhammad Ahmad was given treatment and was medically examined by Dr. Muhammad Tahir C.M.O. who was on duty at that time. I had endorsed the referring letter of the injured for treatment from Lahore only and had not given any treatment. Volunteered that I had advised the doctor on duty for first aid treatment of the injured at that time.”

21. The prosecution was well aware of the aforementioned contradiction. It could have easily resolved the controversy by producing the operation notes and other medical record of the Jinnah Hospital but it did not do so. In the circumstances, an adverse inference under Illustration (g) of Article 129 of the QSO is liable to be drawn against it. In “Nawab Ali Biswas and others v. The State” (PLD 1962 Dacca 278), the Court was confronted with difference of opinion between the doctor recording dying declaration and the one holding post-mortem examination with regard to the question whether the deceased was able to talk after receiving fatal injury on neck. The Court left out of consideration dying declaration by way of caution.

22. There are two other aspects of the matter which cannot be ignored. Firstly, perusal of Exh. PO shows that Muhammad Ahmad gave photographic details of the incident. It was not possible for him to make such a narration in his given condition. Secondly, he was surrounded by Muhammad Adil (PW-1) and Nazir Ahmad (PW-2). Record does not indicate that necessary steps were taken to keep him out of their influence at the time of making the declaration. These facts make the dying declaration all the more dubious

and we hold that it cannot be relied upon and in this respect we are guided by the cases reported as “Muhammad Banaras v. Shah Fakhar Zaman and others” (1985 SCMR 505) “Mst. Khurshid Begum and 2 others. v. Tariq and others” (1988 SCMR 1537), “Farman Bi v. Ghulam Farid and others” (1994 SCMR 1852), “Basharat Ali v. Muhammad Safdar and another” (2017 SCMR 1601) and “Muhammad Anwar v. The State” (PLD 1984 Lahore 132).

23. The prosecution next relies on the ocular account furnished by Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) to prove the charge. Both of them reiterated the contents of the FIR (Exh.PO/1). However, their testimony does not inspire confidence. We have noted that both these eye-witnesses were not resident of the place where the incident happened. In order to justify his presence, Muhammad Adil (PW-1) stated in his examination-in-chief that he was brother of Muhammad Ahmad (deceased) and on 20-7-2012 at about 06:15 a.m. he was present in his house and came out on hearing noise and saw the occurrence but in cross-examination he conceded that he was not his brother. The relevant part of his statement in examination-in-chief and the one made during cross-examination is reproduced hereunder:-

Examination-in-chief of Muhammad Adil (PW-1):

“Stated that on 20-7-2012 at about 06:15 a.m. I was present in *my house* and *my brother Muhammad Ahmad* was coming from shop after taking grocery. On hearing the noise, I came out of my house and saw that a Honda motorcycle red colour on which accused Muhammad Anwar alias Anwari armed with .12 bore gun pump-action and Akbar Ali armed with pistol .30 bore and a person with muffled face who was driving the motorcycle. They raised Lalkara to teach a lesson for pursuing the murder case of your uncle. Anwar accused made a fire shot with his pump-action which hit on the right side of the back of Muhammad Ahmad deceased.

Akbar Ali fired with his pistol .30 bore which hit on the right side of abdomen of the deceased Muhammad Ahmad. Akbar made second fire which hit on the right leg of Muhammad Ahmad deceased. I and Nazir Ahmad witnessed the occurrence and tried to apprehend them but the accused persons threatened to kill us and fled away on the motorcycle.” (emphasis added)

Cross-examination:

“It is correct that Muhammad Ahmad deceased was the son of Muhammad Sarwar while my father’s name is Muhammad Younas. ***It is correct that he was not my brother.*** It is incorrect to suggest that with deliberation and consultation I have stated him as my brother in my above statement.” (emphasis added)

24. It is noteworthy that when Muhammad Adil (PW-1) conceded that he was not the brother of Muhammad Ahmad deceased he himself falsified the reason that he had advanced for his presence at the spot. Furthermore, as already noted, the said witness claimed that at the time of occurrence he was in his house and on hearing the noise came out and saw the incident happen but in the site plan (Exh.PD and Exh.PD/1) his house has not been shown. As regards Nazir Ahmad (PW-2), it is observed that during his cross-examination he also conceded that his house was situated in Bhatta Colony which was at a distance of one kilometre from the crime scene. In the circumstances, both the eye-witnesses were chance witnesses and their evidence requires independent corroboration which is very much lacking in this case. The august Supreme Court of Pakistan in the case of “Mst. Anwar Begum v. Akhtar Hussain alias Kaka and 2 others” (2017 SCMR 1710) was pleased to observe that independent corroboration of the testimony of chance witnesses is required to maintain conviction of a convict on capital charge and in absence of such corroboration he was to be acquitted. Similarly, in the cases of “Mst. Sughra Begum and another v. Qaiser Pervez and others” (2015 SCMR

1142), “Khalid Javed and another v. The State” (2003 SCMR 1419) and “Zafar Hayat v. The State” (1995 SCMR 896), it was held that “a chance witness is not worthy of reliance when the reasons given by him for his presence at the crime scene at the relevant time were not convincing.”

25. It is significant that both the above-mentioned eye-witnesses were cited as prosecution witnesses in other criminal cases lodged by the complainant party. Relevant part of the statement of Muhammad Adil (PW-1) in this respect reads as under:

“I am also witness in the previous murder case of abovementioned Allah Ditta. Nazir PW is also a witness of said previous murder case of Allah Ditta. I am as well as Nazir are witnesses of 2/3 other FIR cases lodged by Muhammad Anwar deceased party.”

Similarly, Nazir Ahmad (PW-2) said:

“It is correct that many FIRs have been registered against Muhammad Ahmad deceased which have been got registered by his opponents. It is correct that Muhammad Anwar and Akbar had never got registered any case against Muhammad Ahmad and Allah Ditta etc. ***I used to reside with Muhammad Ahmad deceased family as servant. I became witness of the cases which have been lodged by Muhammad Ahmad deceased etc.***” (emphasis added)

It is, therefore, evident that the above-mentioned eye-witnesses are either professional witnesses or stock witnesses.

26. PWs Muhammad Adil and Nazir Ahmad both admitted that they were witnesses in the previous cases of the complainant party, including the murder case of Allah Ditta (uncle of Muhammad Ahmad deceased), whereas the prosecution case was that only Muhammad Ahmad (deceased) was pursuing that case. There is nothing in the

prosecution evidence that Muhammad Ahmad (deceased) was the complainant or prosecution witness in the said murder case of Allah Ditta or was otherwise pursuing it. If the above-mentioned story of the prosecution is taken as gospel truth, then instead of Muhammad Ahmad (deceased), Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) being prosecution witnesses in Allah Ditta's murder case should have been the prime target of Muhammad Anwar and his co-accused but despite their presence at the crime scene they did not receive even a single scratch on their bodies. Hence, we are of the view that the above-mentioned prosecution story does not appeal to a prudent mind. Reliance in this context may be placed on the cases reported as "Muhammad Zaman Mangat v. Muhammad Akhtar and others" (2004 SCMR 757) and "Rohtas Khan v. The State" (2010 SCMR 566).

27. We have further noted that the evidence of Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) is contradicted by the medical evidence. As per contents of the application (Exh.PO), on the basis of which formal FIR (Exh.PO/1) was lodged, fire shot made by Muhammad Anwar landed on the right side of the waist () of Muhammad Ahmad deceased whereas both the above-mentioned eyewitnesses stated that the fire shot made by Muhammad Anwar landed on the right side of the back of Muhammad Ahmad. According to the evidence of Dr. Muhammad Tahir (PW-14), who initially medically examined Muhammad Ahmad in injured condition, there was one injury on the back of the chest of the deceased (i.e. Injury No.2) and in his cross-examination he stated that he could not specify the nature of the said injury as to whether the same was an entry or exit wound. On the other hand, according to the statement of Dr. Atif Mahmood (PW-6) who

conducted postmortem examination and as per pictorial diagrams (Exh.PI/1), there was no injury on the waist or on the back side of the waist of Muhammad Ahmad and there was only one injury (i.e. Injury No.2) on his right upper back region which was skin deep. Muhammad Akbar (co-accused) was assigned the role of making a fire shot on the right leg of Muhammad Ahmad deceased. Although Dr. Muhammad Tahir (PW-14) noted Injury No.5 on the right knee of Muhammad Ahmad (deceased), in his cross-examination he also stated regarding the said injury that he could not specify whether Injury No.5 was an entry wound or exit wound, though he specifically mentioned that Injuries No. 1,3 and 4 were entry wounds. As per evidence of Dr. Muhammad Tahir (PW-14), there were found perforated wounds on the posterior aspect of the right shoulder of Muhammad Ahmad (deceased) i.e. Injury No.1. There was another entry wound on the chest of the deceased i.e. Injury No.2. The said injuries were also noted in the postmortem examination report of the deceased by Dr. Atif Mahmood (PW-6) as Injuries No. 2 & 3 but the said injuries were not attributed to any of the accused in this case. It is also important to note that, according to the prosecution case, Muhammad Akbar (co-accused) was armed with .30 bore pistol and he made two fire shots out of which one landed on the right leg and the other on the abdomen of Muhammad Ahmad (deceased) but as per postmortem report (Exh.PI), the statement of Dr. Atif Mahmood (PW-6) and pictorial diagrams (Exh.PI/1) there were three lacerated wounds on the lateral aspect of right thigh (Injury No.5), two lacerated wounds on the lateral aspect of right knee joint (Injury No.6) and two lacerated wounds on the lateral aspect of right leg (Injury No.7). As such, there were a total three (or seven injuries) on the right

leg of Muhammad Ahmad deceased whereas according to the evidence of PWs Muhammad Adil and Nazir Ahmad only one fire shot with pistol .30 bore was made by Muhammad Akbar (co-accused) on the right leg of Muhammad Ahmad. The said prosecution eye-witnesses have not mentioned two injuries on the chest and two injuries (or six injuries) on the right leg of Muhammad Ahmad which are noted as Injuries No. 1,3,6 & 7 in the postmortem report of the deceased (Exh.PI) and pictorial diagram (Exh.PI/1). Had PWs Muhammad Adil and Nazir Ahmad been present at the crime scene at the time of occurrence, they would have explained the aforesaid injuries on the body of the deceased. As there is glaring conflict between the number of injuries mentioned by the eye-witnesses of the prosecution and number of injuries mentioned by Dr. Atif Mahmood (PW-6) in postmortem report and pictorial diagram, their testimony is not free from doubt. Reliance in this respect may be placed on the judgments reported as “*Muhammad Ali v. The State*” (2015 SCMR 137), “*Irfan Ali v. The State*” (2015 SCMR 840) and “*Usman alias Kaloo v. The State*” (2017 SCMR 622).

28. In order to fill up the lacunas in the prosecution case, both the eye-witnesses made dishonest improvement in their statements in respect of a material point, i.e. the alleged dying declaration of Muhammad Ahmad deceased. They were confronted with their previous statements and the dishonest improvements made by them in this respect were duly brought on the record. Relevant part of the statement of Muhammad Adil (PW-1) is reproduced hereunder for ready reference:

“I had recorded in my statement under Section 161 Cr.P.C. that we carried Muhammad Ahmad injured to hospital where Rao Inam Ullah SI reached in the hospital he submitted a written application to the doctor

in order to inquire about the condition of the injured for recording his statement. Confronted with Exh.DA where it is not so recorded. I had also stated in my statement that doctor reported that Muhammad Ahmad was fit for making statement. Confronted with Exh.DA where it is not recorded. I had stated before the I.O. that Muhammad Ahmad injured got recorded his statement to the I.O. in presence of doctor. Confronted with Exh.DA where it is not recorded. I had stated before the I.O. that Muhammad Ahmad singed and thumb marked the statement which was signed by the doctor as well as signed by the I.O. Confronted with Exh.DA where it is not recorded. It is incorrect to suggest that in order to prove concocted and fake statement of Muhammad Ahmad, I have deposed falsely. It is incorrect to suggest that Muhammad Ahmad never made any statement as stated by me.”

The statement of Nazir Ahmad (PW-2) in this resepect reads as under:

“I have stated before the I.O. that Rao Inam Ullah SI came at hospital who submitted an application to the doctor for recording the statement of Muhammad Ahmad injured and doctor permitted him to record the statement of Muhammad Ahmad. Confronted with Exh.DB where it is not recorded. I had recorded in my statement under Section 161 Cr.P.C. that I.O. recorded the statement of Muhammad Ahmad in presence of the doctor which was signed and thumb marked by Muhammad Ahamd as well as signed by the doctor and the I.O. in our presence. Confronted with Exh.DB where it is not recorded. I had recorded in my statement Exh.DB that four named persons and one unknown persons had committed the murderous assault upon Muhammad Ahmad then injured (deceased) in order to restrain him from pursuing the case of murder of Allah Ditta. It is incorrect to suggest that with deliberation and consultation I have made certain improvements.”

The Hon’ble Supreme Court of Pakistan has observed in a number of judgments that a witness is not worthy of reliance who makes dishonest improvements in his statement on a material aspect of the case in order to fill the lacunas of the prosecution case or to bring his statement in line with the other prosecution evidence. Reference in this respect may be made to the judgments reported as “Akhtar Ali and others v. The State” (2008 SCMR 6) and “Sardar Bibi and another v. Munir Ahmad and others” (2017 SCMR 344).

29. The Investigation Officer Rao Inamullah/SI (PW-16), recovered two crime empties of .12 bore gun P-1/1-2 and two of .30 bore gun P-2/1-2 from the place of occurrence and secured the same vide Recovery Memo Exh.PB. During the course of investigation, on 02-11-2012, Muhammad Anwar made disclosure and while on physical remand got recovered pump-action gun P-4 alongwith cartridges P-5/1-4 after digging earth near a tubewell situated on the Fordwah Canal which was taken into possession vide Recovery Memo Exh.PK. The crime empties and the weapon of offence were sent to the Punjab Forensic Science Agency (the "PFSA"). According to the Forensic Report Exh.PZ, Parcel No. 3 contained one 12G pump action (Item S1) having serial number obliterated, marked as 20778/12 alongwith its item number, duly signed. The report further states that it was said to be recovered from Babar *alias* Babry son of Bashir Ahmad. It is thus evident that Parcel No. 3 did not contain gun P-4 allegedly recovered from Muhammad Anwar. The same was never sent to the PFSA. The positive report qua 12G pump-action shot gun is, therefore, inconsequential.

30. The prosecution did not allege any direct motive against Muhammad Anwar (the Appellant). As per prosecution case, Maqsood Ahmad *alias* Soodi (P.O.) and Noor Ahmad were involved in the murder of Muhammad Ahmad's paternal uncle Allah Ditta. They absconded and wanted to eliminate Muhammad Ahmad because he was pursuing that case. They hired Muhammad Anwar, Akbar Ali (juvenile co-accused) and Zubair *alias* Bhalli for this purpose. In order to prove the above-mentioned motive, the prosecution produced Javed (PW-7) and Habib (PW-8) who testified that one day prior to the fateful day at *Asar-Wela*

they were taking tea at the hotel of Ismail Deendar when Maqsood Ahmad (since PO), Noor Ahmad along with Muhammad Anwar, Akbar Ali and Muhammad Zubair also came there. The said Maqsood Ahmad and Noor Ahmad in their presence asked Muhammad Anwar and his afore-named co-accused to kill Muhammad Ahmad and they would pay them. In our opinion, this piece of evidence is false and concocted. To start with, it does not appeal to a prudent mind that so many people would assemble at a public place to hatch a conspiracy for a murder. Secondly, PWs Javed and Habib claimed that they informed Muhammad Ahmad about the conspiracy on the same day. If that was so he would have mentioned it in his statement Exh.PO. Thirdly, the above-mentioned witnesses did not state that any money was paid by Maqbool Ahmad alias Sadi etc. to the Appellant or his co-accused in his presence. Even otherwise, there is no evidence to prove that any money was paid to the Appellant and his co-accused for the murder of the deceased and no such money was recovered from their possession during the investigation of this case. Lastly, PWs Javed and Habib got recorded their statements under Section 161 Cr.P.C. three days after the incident for which there is no explanation. It is settled law that such delay impinges on the credibility of the witness. Reliance is placed on "Syed Saeed Muhammad Shah and another v. The State" (1993 SCMR 550), "Abdul Khaliq v. The State" (1996 SCMR 1553), "Muhammad Khan v. Maula Bakhsh and another" (1998 SCMR 570). Resultantly, alleged conspiracy and the motive set forth by the prosecution are not proved.

31. We have also considered the alleged abscondence of Muhammad Anwar. In support thereof, proclamation & report Exh.PE has been brought on record

through Muhammad Aslam 335/C (PW-5). It is by now well settled that abscondence by itself is not a conclusive proof of the guilt of an accused person and in absence of other convincing evidence an accused cannot be convicted and sentenced merely on the basis of his abscondence. In “Liaquat Hussain and others vs. Falak Sher and others” (2003 SCMR 611), the Apex Court held:

“Disappearance of an accused person could have ordinarily offered useful corroboration to the prosecution case. But this is so only in a situation where the prosecution case is reasonably believable to some extent and requires some corroboration for proof of the same.”

32. Having reappraised the evidence we have found that the prosecution case is riddled with doubts. It is a cardinal principle of criminal jurisprudence that it is not necessary that there should be many circumstances which create doubt about the guilt of an accused. Even a single circumstance which creates reasonable doubt in the mind of a prudent person would entitle him to acquittal. Reliance is placed on “Tariq Pervez v. The State” (1995 SCMR 1345), “Muhammad Akram v. The State” (2009 SCMR 230), “Muhammad Zaman v. The State and others” (2014 SCMR 749) and “Muhammad Mansha v. The State” (2018 SCMR 772). Hence, we accept Crl. Appeal No. 52/2014/BWP and set aside the conviction and sentence awarded to Muhammad Anwar. He is in jail. He shall be released forthwith if not required to be detained in any other case.

33. Murder Reference No. 4/2014/BWP is answered in the NEGATIVE and the death sentence awarded to Muhammad Anwar is NOT CONFIRMED.

34. We now take up Crl. Appeal No. 80/2014/BWP which assails the acquittal of Muhammad Zubair *alias* Bhalli

and Noor Ahmad. So far as the former is concerned, it is observed that he was not nominated in the FIR which alleged that Muhammad Anwar and Akbari came on a motorcycle which was driven by their accomplice who had muffled his face. The name of Muhammad Zubair was introduced by the prosecution for the first time on 08-08-2012 when Muhammad Latif (PW-12) in his statement Exh.DE stated that he had confessed his guilt before him and one Muhammad Anwar (given up PW). Subsequently, Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) identified him in the identification test parade held on 12-12-2012.

35. It is settled law that extra-judicial confession should always be received with utmost caution for the reason that it can be procured effortlessly and easily concocted. In "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231), the Hon'ble Supreme Court observed:

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

36. Indubitably the phenomenon of confession is not altogether unknown but in order to determine its

genuineness the Court should look at the circumstances in which it is made and the motivating factors behind it. In *Sajid Mumtaz*'s case, *supra*, Sardar Muhammad Raza Khan, J. noted that an accused may confess (i) to boost off, (ii) to ventilate the suffocating conscience, and (iii) to seek help when actually trapped by investigation or for some other reason. He further wrote:

“Boasting off is very rare in such like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to one's pressure on mind and conscience is another aspect of the same psyche. One gives vent to one's feelings only before a strong and close confident....Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought firstly, when a person is sufficiently trapped and secondly, from one who is authoritative, socially or officially.”

In the instant case, it is observed that the prosecution has not brought any material on the record which may suggest that Muhammad Zubair had any reason to make confession before him. Even otherwise, it is a weak type of evidence and the same cannot be made basis of conviction unless it is corroborated by cogent evidence. Reliance is placed on “*Wazir Muhammad and another v. The State*” (2005 SCMR 277), “*Abdul Mateen v. Sahib Khan and others*” (PLD 2006 SC 538), “*Muhammad Aslam v. Sabir Hussain and others*” (2009 SCMR 985), “*Imran alias Dully and another v. The State and others*” (2015 SCMR 155) and “*Azeem Khan and another v. Mujahid Khan and others*” (2016 SCMR 274).

37. Another piece of evidence brought against Muhammad Zubair is identification test. It is observed that it is the prosecution's own case that the third accused was muffled face. As such, Muhammad Adil (PW-1) and Nazir Ahmad (PW-2) could not recognize him in the identification

test parade. It is also noteworthy that Muhammad Zubair was previously known to the said PWs which fact they categorically admitted at the trial. On this score as well the identification test loses significance.

38. The prosecution also claims that motorcycle CG-125 was recovered from Muhammad Zubair *alias* Bhalli (which was recovered vide Recovery Memo Exh. PM). We have noted that the said motorcycle was not produced during the trial and Muhammad Jaffar 997/C (PW-13) who testified about its recovery got exhibited only the Recovery Memo Exh.PM in evidence. More importantly, even the said document was not put to any of the accused when they were examined under Section 342 Cr.P.C. This piece of evidence has no legal value and is discarded in view of the law laid down by the Hon'ble Supreme Court in the cases cited as "*Sheral alias Sher Muhammad v. The State*" (1999 SCMR 697), "*Muhammad Shah v. The State*" (2010 SCMR 1009), and "*Qaddan and others v. The State*" (2017 SCMR 148).

39. In a nub, the prosecution has not adduced any trustworthy evidence against Muhammad Zubair to prove his involvement in the offence.

40. Noor Ahmad was accused of abetment and the prosecution examined Javed (PW-7) and Habib (PW-8) to prove the charge. We have already discarded their testimony while deciding Crl. Appeal No. 52/2014. Therefore, further discussion in this respect is not required.

41. The learned trial Court has extended benefit of doubt to Muhammad Zubair and Noor Ahmad after thorough appraisal of evidence. The learned counsel has failed to persuade this Court that the conclusions drawn by the learned

trial Court are contrary to record or are otherwise arbitrary, fanciful or perverse. In “*Mst. Saira Bibi v. Muhammad Asif and others*” (2009 SCMR 946), the Hon’ble Supreme Court held:

“It is a settled law that before the order of acquittal is reversed, it must be shown that the judgment of the learned trial Court was not reasonable or wrong. Even if two conclusions were equally possible the order of acquittal should not be reversed.”

42. For what has been discussed above, Crl. Appeal No. 80/2014/BWP is hereby **dismissed**.

(Malik Shahzad Ahmad Khan) (Tariq Saleem Sheikh)
Judge Judge

Approved for reporting.

Judge

Judge