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Judgment Sheet

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN.

JUDICIAL DEPARTMENT

Murder Reference No.86 of 2017
(The State Vs. Haq Nawaz)

Criminal Appeal No. 520-J of 2018
(Haq Nawaz Vs. The State)

Date of hearing:	30.03.2021.
Appellant by:	Mr. Muhammad Usman Sharif Khosa, Advocate.
State by:	Mr. Muhammad Ali Shahab, Deputy Prosecutor General.

SADIQ MAHMUD KHURRAM, J. –Haq Nawaz son of Ghulam Haider (convict) was tried by the learned Sessions Judge, Dera Ghazi Khan in case FIR No. 82 of 2015 dated 26.04.2015 registered at Police Station Shah Sadar Din, District Dera Ghazi Khan, in respect of an offence under section 302 PPC for committing the *Qatl-i-Amd* of Ghulam Sarwar son of Allah Baksh (deceased). The learned trial court vide judgment dated 11.05.2017, convicted Haq Nawaz son of Ghulam Haider (convict) and sentenced him as infra:

Haq Nawaz son of Ghulam Haider:

Death under section 302(b) PPC as Tazir for committing *Qatl-i-Amd* of Ghulam Sarwar son of Allah Baksh (deceased) and directed to pay Rs.500,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased, in case of default thereof, the convict was directed to undergo further six months of simple imprisonment for the default of payment of fine. The convict was ordered to be hanged by his neck till dead.

2. Feeling aggrieved, Haq Nawaz son of Ghulam Haider (convict) lodged Criminal appeal No.520-J of 2018 through jail assailing his conviction and sentence. The learned trial court submitted Murder Reference No.86 of

2017 under section 374 Cr.P.C. seeking the confirmation or otherwise of the sentence of death awarded to the appellant namely Haq Nawaz son of Ghulam Haider . We intend to dispose of the Criminal appeal No.520-J of 2018 and the Murder Reference No.86 of 2017 through this single judgment.

3. Precisely, the facts necessary, as divulged through the statement of Mahboob Hussain (PW-7) , the complainant of the case, are as under:-

> *"*On 26.04.2015 at about 2.30 P.M I alongwith my brothers Ghulam Sarwar, Ghulam Asghar and Riaz Hussain was present and working on wheat thresher near the house of Ghulam Sarwar. In the meantime Haq Nawaz accused (present in court), my Bahnoi came there on motor bike while armed with pistol 30-bore. Accused Haq Nawaz stopped the motor cycle. Accused Haq Nawaz took out pistol and made straight fire upon Ghulam Sarwar by saying that he would teach lesson to Ghulam Sarwar for forbading him from his house. The fire made by accused Haq Nawaz (present in court) hit on the chest near the doula. After making fire shot, accused Haq Nawaz fled away towards west leaving his motor cycle at the place of occurrence. We attempted to step forward upon which accused extended threats that if anyone would come near him will be dealt with in the same manner. After receiving the fire shot Ghulam Sarwar fell on the ground. We made call to Rescue Service 1122 which reached Shah Sadar Din and we took Ghulam Sarwar to Trauma Center, D.H.Q Hospital, D.G. Khan. Ghulam Sarwar Succumbed to the injuries in Trauma Center, D.G Khan. The police reached Trauma Center, DHQ Hospital, D.G.Khan and recorded my statement Ex.P.G which was read over to me and I affixed my thumb impression in token of its correctness.
>
> The motive behind the occurrence was that Ghulam Sarwar forbade accused Haq Nawaz from his home and due to this grudge accused Haq Nawaz (present in the court) committed the murder of my brother Ghulam Sarwar deceased.
>
> On 3.5.2015, I alongwith Asghar joined the investigation. During investigation accused Haq Nawaz made disclosure in our presence that he could get recovered the weapon of offence. So accused Haq Nawaz while in custody got recovered pistol 30- bore P-4 from a residential room lying in an iron box situated at Chah Nai Wala Mouza Sheru Dasti which was made into a sealed parcel and taken

into possession vide recovery memo Ex.P.H, attested by me and Ghulam Asghar PW. I.O recorded my statement..*"*

4. After the formal investigation of the case, the report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court, wherein the appellant namely Haq Nawaz son of Ghulam Haider was sent to face trial. The learned trial court framed the charge against the accused on 25.07.2015, to which the accused pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case, got statements of as many as **ten** witnesses recorded. The ocular account of the incident was furnished by Mahboob Hussain (PW-7) and Riaz Hussain (PW-8). Khuda Bakhsh, ASI (PW-2) stated that on 26.04.2015 he recorded the formal FIR (Exh.PD).Muhammad Umar (PW-3) stated that on 26.04.2015 he had identified the dead body of the deceased at the time of its postmortem examination and in his presence the Medical Officer also handed over the last worn clothes of the deceased to the police official. Muhammad Nawaz, 362/HC (PW-4) stated that on 03.05.2015 Ghulam Akbar, SI (PW-10), the Investigating Officer of the case, handed over to him a sealed parcel said to contain a pistol for its safe custody which on 04.05.2015 he handed over the said sealed parcel to Shahid Iqbal 604/HC (PW-5) for its onward transmission to the office of Punjab Forensic Science Agency, Lahore. Muhammad Akhtar, Patwari (PW-6) prepared the scaled site plan of the place of occurrence (Exh.PF). Mushtaq Ahmad 328/HC (PW-9) stated that on 26.04.2015 Ghulam Akbar, SI (PW-10) handed over to him two sealed parcels said to contain blood stained earth and an empty which on 04.05.2015 he handed over the said parcel to Shahid Iqbal 604/HC (PW-5) for their onward transmission to

the office of Punjab Forensic Science Agency, Lahore. Ghulam Akbar, SI (PW-10) investigated the case from 26.04.2015 till 14.05.2015, arrested the appellant on 30.04.2015 and detailed the facts of the investigation as conducted by him in his statement before the learned trial court.

6. The prosecution also got Dr. Muhammad Junaid Asghar (PW-1) examined, who on 26.04.2015 was posted as Medical Officer at RHC Shah Sadar Din, District Dera Ghazi Khan and on the same day conducted the postmortem examination of the dead body of Ghulam Sarwar son of Allah Baksh (deceased). Dr. Muhammad Junaid Asghar (PW-1) ,on examining the dead body of Ghulam Sarwar son of Allah Baksh (deceased) observed as under:

> **"**Entry Wound.1. A lacerated wound of about 0.5 x 0.5 cm, circular, inverted margins, carbon soot round the wound, going very deep associated with frank bleeding on left anterior axillary fold of armpit, lateral aspect of left upper chest.
>
> Exit Wound. 2. A lacerated wound of about 1.5 x 0.75 cm everted margins, bleed profusely on left side of back, approximately 14-16 cm above scaral bone. Corresponding holes present on clothes.
>
> …….
>
> As this was a case of fire arm injury and it damaged the vital organ i.e. left lung and its associated blood vessels, due to hammorhage, blood loss, hypovolemia (sic) death occurred.
>
> The probable time between the injuries and death was 5 to 10 minutes while between death and postmortem was 4 to 5 hours."

7. On 22.11.2016, the learned DPP gave up the prosecution witness namely Ghulam Akbar son of Muhammad Bakhsh as being unnecessary and on 13.02.2017 the learned DPP gave up the prosecution witnesses namely Ghulam Asghar and Ghulam Akbar as being unnecessary. On 21.03.2017 the learned DPP closed the prosecution evidence after tendering in evidence the report of Punjab Forensic Science Agency, Lahore regarding the blood

stained earth (Exh.PO) and the report of Punjab Forensic Science Agency, Lahore regarding the comparison of empty and the recovered Pistol (Exh.PP).

8. After the closure of prosecution evidence, the learned trial court examined the appellant namely Haq Nawaz son of Ghulam Haider under section 342 Cr.P.C. and in answer to the question why this case against you and why the PWs have deposed against you, he replied that he was innocent and had been falsely involved in the case on the basis of suspicion . The appellant namely Haq Nawaz son of Ghulam Haider opted not to get himself examined under section 340(2) Cr.P.C. and did not adduce any evidence in his defence.

9. On the conclusion of the trial, the learned Sessions Judge, Dera Ghazi Khan, convicted and sentenced the appellant as referred to above.

10. The contention of the learned counsel for the appellant precisely is that whole case is fabricated and false and that the prosecution remained unable to prove the facts in issue and did not produce any unimpeachable, admissible and relevant evidence. Learned counsel for the appellant in support of this appeal, further contended that the story of the prosecution mentioned in the F.I.R., on the face of it, was highly improbable and the reason assigned by the complainant and the eye-witnesses for being present at the place of occurrence was without any justification. He further contended that the statements of Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were not worthy of reliance. The learned counsel for the appellant further argued that the recovery was full of procedural defects, of no legal worth and value and result of fake proceedings. The learned counsel

for the appellant finally submitted that the prosecution has totally failed to prove the case against the accused beyond the shadow of doubt.

11. On the other hand, the learned Deputy Prosecutor General contended that the prosecution proved its case beyond the shadow of doubt by producing independent witnesses. The learned Deputy Prosecutor General further argued that the deceased died as a result of injuries suffered at the hands of the appellant. The learned Deputy Prosecutor General further contended that the medical evidence also corroborated the statements of Mahboob Hussain (PW-7) and Riaz Hussain (PW-8). The learned Deputy Prosecutor General further argued that the recovery of the pistol (P-4) from the appellant also corroborated the ocular account. The learned Deputy Prosecutor General contended that there was no occasion for the prosecution witnesses to substitute the real offender with the innocent in this case. Lastly, he prayed for the rejection of the appeal.

12. We have heard the learned counsel for the appellant, the learned Deputy Prosecutor General and with their assistance perused the record and evidence recorded during the trial.

13. The whole prosecution case orbits around the statements of Mahboob Hussain (PW-7) and Riaz Hussain (PW-8). These witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were related to each other and the deceased. Their relationship with the deceased is on record. The deceased namely Ghulam Sarwar son of Allah Bakhsh was the brother of Mahboob Hussain (PW-7) and the paternal cousin of Riaz Hussain (PW-8). Admittedly, the appellant namely Haq Nawaz was married to the sister of

the deceased since the last 8/9 years prior to the occurrence. Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) both explained their presence at the place of occurrence categorically. We have noted that the prosecution witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8), in a very natural and forthright manner, narrated the incidence and gave each and every detail of the same. More importantly, the occurrence took place inside the agricultural land belonging to Mahboob Hussain (PW-7) and the deceased at about 02.30 p.m and the presence of Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) at that time, inside their own agricultural land, just in front of their houses, cannot be doubted and was, but natural. Both the witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) explained their arrival at the place of occurrence and also the reason for their presence there. Mahboob Hussain (PW-7) further explained during cross-examination as under:-

> " There is distance of about ¾ karams between my house and the house of these witnesses
>
> …….
>
> I and Ghulam Sarwar deceased were living in the same house.
>
> ……..
>
> Our 5/6 bighas land is situated near out house which was in the name of our father. Some land is situated at a distance of 10/15 karams from our house whereas other part of land is situated at one K.M. One bigha is situated near our house.
>
> ……

> Ghulam Sarwar called Asghar and Riaz from their houses at about 12-30 after noon. The wheat crop was of 5/6 bighas which had been gathered in one place."

Similarly, Riaz Hussain (PW-8) also explained that his house was adjacent to the house of complainant and he along with the witnesses and the deceased were working at the place of occurrence before the arrival of the appellant. We have also perused the scaled site plan of the place of occurrence (Exh.PF) as prepared by Muhammad Akhtar, Patwari (PW-6) and the rough site plan of the place of occurrence (Exh. PN) as prepared by Ghulam Akbar, SI (PW-10), the Investigating Officer of the case. The perusal of the said site plans of the place of occurrence (Exh.PF and Exh.PN) reveals that the presence of the witnesses has been clearly marked in the same and it has been mentioned in the same that the occurrence took place in the land belonging to Ghulam Sarwar (deceased). The perusal of the said site plans of the place of occurrence (Exh.PF and Exh PN) further reveals that the land cultivated by Riaz Hussain (PW-8) has also been marked in the same, whereas the house of the complainant namely Mahboob Hussain (PW-7) and the deceased has also been clearly identified . This evidence proves that not only both the witnesses Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were present at the place of occurrence, at the time of occurrence but that they had also witnessed the occurrence which had taken place inside their own cultivated land. The perusal of the statements of the prosecution witnesses also reveals that no barrier existed between the appellant and the witnesses which could have caused any hurdle in enabling the witnesses to view the occurrence. There existed no hindrance between the appellant and the line sight of the witnesses.

The defence could not prove that the said witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were not present at the place of occurrence at the time of occurrence. The defence even did not challenge the place of occurrence as being not the same as stated by the witnesses. The appellant was previously known to both the witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) and his identification by the witnesses in the circumstances cannot be doubted or even put to question with any success. Admittedly, as mentioned above, the appellant namely Haq Nawaz was married to the sister of the deceased since the last 8/9 years prior to the occurrence. In this manner, the identity of the appellant by the witnesses is a question not even worth consideration as the same is proved beyond any doubt. We have scrutinized the evidence of Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) and find that they were proved to be truthful witnesses and implicit reliance can be placed upon their statements as against the appellant. There is no evidence on record that Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were motivated by any enmity to depose against the appellant. As mentioned above, no friction between the appellant and the witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) existed prior to the occurrence which could have interested Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) to get the appellant, their own brother in-law, involved in this occurrence falsely. Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) were subjected to lengthy cross-examination but the defence had failed to make cracks in their deposition with regard to the appellant and the veracity of their statements has been proved. The august Supreme Court of

Pakistan in the case of "*GHULAM ALI and another versus THE STATE*" (**2002 SCMR 1205**) held as under:-

> *"As reflected from the ocular account the occurrence had taken place in front of main gate of the house of the complainant. They are natural witnesses and their presence at the place of incident cannot be doubted in any manner."*

Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) by no stretch of the imagination can be declared as chance witnesses, as pressed time and again by the learned counsel appearing on behalf of the appellant, because they have rendered a plausible justification for their presence at the place of occurrence. During the course of the investigation, Ghulam Akbar, SI (PW-10), the Investigating Officer of the case, also collected the blood-stained earth from the place of occurrence and took the same into possession through recovery memo (Exh.PJ). The report of the Punjab Forensic Science Agency, Lahore (Exh.PO) establishes that the said blood taken from the place of occurrence was of human origin. As the occurrence in question had inside the land of the witness namely Mahboob Hussain (PW-7) and the deceased and the same, therefore, could not have gone un-witnessed nor could have the culprit escaped unnoticed. The appellant was proved to be present near the witnesses, thus, it would not have been difficult for the complainant party to identify the present appellant. Mahboob Hussain (PW-7) and Riaz Hussain (PW-8), being the real brother and the paternal cousin of the deceased respectively, had no reason to falsely implicate the appellant in the commission of the offence by substituting him and letting off the real culprits more so when the appellant was also related to the witnesses. There is no such material available on record which would indicate substitution of the appellant in the case with the real culprit. Substitution is a phenomenon

of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let off by involving innocent persons. In this context, reference can usefully be made to the case of "*Irshad Ahmad and others v. The State and others"* (**PLD 1996 SC 138)**. Mere relationship of the prosecution witnesses with the deceased and *inter-se* is not sufficient to discredit their testimony. In this regard, reference is made to the judgment in the case titled as "*Ijaz Ahmad v. The State"* (**2009 SCMR 99**) wherein the august Supreme Court of Pakistan was pleased to observe as under:--

> *"In the wake therefore, it proceeds that merely because the witnesses are kith and kin, their evidence cannot be rejected, if otherwise it is trustworthy. It would also be pertinent to mention here that related witnesses some time, particularly in murder cases, may be found more reliable, because they, on account of their relation-ship with the deceased, would not let go the real culprit or substitute an innocent person for him."*

14. As mentioned above, the occurrence in question had admittedly taken place in broad daylight and the same, therefore, could not have gone un-witnessed nor could have the culprit escaped unobserved. As it was a broad daylight occurrence and because of the previous acquaintance and relationship of the parties, the question of misidentification does not arise. It is also a fact that from the place of occurrence the motorcycle (P-7) of the appellant was recovered and taken into possession by the Investigating Officer of the case on the day of occurrence. Similarly, a pair of slippers (P-6/1-2) , which the appellant had left behind as he was fleeing from the place of occurrence , was also recovered from the place of occurrence by Ghulam Akbar , SI (PW-10) , the Investigating Officer of the case. The recovery of the said articles belonging to the appellant from the place of occurrence further establishes the case of the prosecution.

15. We have also noted that the occurrence, in this case, took place in the daytime at about 02.30 p.m which was reported by the complainant of the case namely Mahboob Hussain (PW-7) at 4.30 p.m., when the oral statement (Exh. P.G) of Mahboob Hussain (PW-7) was recorded by Ghulam Akbar , SI (PW-10), the Investigating Officer of the case, on the day of occurrence, inside the Trauma Center of DHQ Hospital Dera Ghazi Khan. On the basis of the oral statement (Exh.PG) of the complainant of the case namely Mahboob Hussain (PW-7), the formal F.I.R (Exh.PD) was registered at 5.45 p.m by Khuda Bakhsh, ASI (PW-2) when the distance between the place of occurrence was 9 kilometres and the complainant had suffered the traumatic and tragic loss of life of his brother. Both the witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8) explained during cross-examination that after the occurrence they immediately shifted the deceased to the hospital. Mahboob Hussain (PW-7) during cross-examination stated as under:-

> "We firstly go to RHC Shah Sadar Din.
>
> ……
>
> I was accompanied by Asghar and Riaz to RHC Shah Saddar Din. We furnished intimation to Rescue Service 1122. The ambulance of rescue service 1122 shifted deceased in injured condition from Shah Sadar Din to D.G.Khan. We shifted the injured from the place of occurrence on a private Dala to RHC Shah Sadar Din."

Riaz Hussain (PW-8) during cross-examination explained as under:-

> "The injured was shifted on a private dala by us from the place of occurrence to RHC Shah Sadar Din.
>
> ……
>
> I accompanied the injured at Trauma Center. The statement of complainant was recorded by the I.O in Trauma Center in my presence."

Thus, it is apparent that the oral statement (Exh.P.G) of Mahboob Hussain (PW-7) and the formal FIR (Exh.PD) were got lodged within a short duration and the complainant not only named the appellant but also mentioned each and every minor as well as material fact of the incident therein, which of course excludes the possibility of pondering or planning regarding the false implication of the appellant in the instant case. The details of the occurrence have been elaborately explained in the F.I.R. (Exh.PD) and the oral statement (Exh. P.G) of Mahboob Hussain (PW-7). The promptitude in reporting the matter to the police also establishes that the eyewitnesses could not have developed a false narrative regarding the occurrence, in which the brother of the complainant had died, in such a short time. In this regard, reference is made to the judgment in the case titled as "*Muhammad Waris v. The State"* (**2008 SCMR 784**) wherein the august Supreme Court of Pakistan was pleased to observe as under:--

> *"The names of the said two eye-witnesses could not have been mentioned in such a promptly lodged F.I.R. if they had not been with the deceased persons at the time of their death."*

We have also noted that as per column No.11 of the inquest report (Exh. PB), relating to Ghulam Sarwar son of Allah Bakhsh (deceased), at the time of preparation of the same, the blood of the deceased had not coagulated at that time. This also proves that the matter was reported to the police with promptitude by the witnesses.

16. The medical evidence produced by the prosecution in the case also proved that the deceased had received the fatal injury with a firearm weapon on the vital part of the body and he succumbed to the said injury. The medical evidence fully supports the ocular account. The probable time

between the death of Ghulam Sarwar (deceased) and the conducting of the postmortem examination as noted by Dr. Muhammad Junaid Asghar (PW-1) was about four to five hours, which estimation coincides with the time of occurrence as mentioned by the witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8). The post-mortem examination of the dead body of Ghulam Sarwar (deceased) had been conducted quite promptly leaving no room for deliberations or fabrication of a story. All the necessary documents were also provided to Dr. Muhammad Junaid Asghar (PW-1) prior to conducting of post mortem examination of the dead body of Ghulam Sarwar (deceased). This promptitude in conducting the post mortem examination of the dead body of the deceased namely Ghulam Sarwar establishes that the matter was reported to the police immediately and spontaneously with regard to the appellant. Furthermore, Dr. Muhammad Junaid Asghar (PW-1), on examining the dead body of Ghulam Sarwar son of Allah Baksh (deceased) observed an entry wound of the dimension of about 0.5 cm x 0.5 cm present on left anterior axillary fold of armpit towards the lateral aspect of left upper chest with circular, inverted margins, going very deep associated with fresh bleeding and an exit wound of the said injury was observed on the back of the dead body of the deceased. Dr. Muhammad Junaid Asghar (PW-1) also noted that corresponding holes were present on clothes on the dead body of the deceased. Dr. Muhammad Junaid Asghar (PW-1) opined that the said entry wound had been caused by the use of a firearm weapon. Dr. Muhammad Junaid Asghar (PW-1) also stated that the said entry wound observed on the dead body of the deceased was sufficient to cause the death in the ordinary course of nature as the same had caused

substantial damage to the vital organs of the deceased. The appellant has been saddled with the responsibility of causing the said fatal injuries. In this manner, the ocular account is fully corroborated by the medical evidence available on record. In view of the above discussion, it is ascertained that the intent of the appellant was to cause death and that he is guilty of *Qatl-i-Amd* of Ghulam Sarwar son of Allah Bakhsh (deceased).

17. Regarding the recovery of the pistol (P-4) from the appellant namely Haq Nawaz, the same cannot be relied upon as the Investigating Officer of the case did not join any witness of the locality during the recovery of the said Pistol (P-4) from the appellant which was in clear violation of section 103 Code of Criminal Procedure, 1898 and therefore cannot be used as incriminating evidence against the appellant, being evidence which was obtained through illegal means and is hence hit by the exclusionary rule of evidence. Mahboob Hussain (PW-7) during cross-examination admitted as under:-

> "No person from that vicinity or neighbor was called by the I.O to become witness of recovery.
>
> ……."

Similarly, Ghulam Akbar , SI (PW-10) the Investigating Officer of the case, also admitted during cross-examination as under:-

> "The place of recovery of pistol is the house of accused which was earlier visited by me. Private persons gathered at the time of recovery but none of them was ready to become masher. I did not force any of private person of that vicinity to become witness. I did not record the factum of unwillingness of private persons of the locality to become witness in my case diary."

The august Supreme Court of Pakistan in the case of <u>*Muhammad Ismail and others Vs. The State*</u> (**2017 SCMR 898**) at page 901 has held as under:-

> *"For the above mentioned recovery of weapons the prosecution had failed to associate any independent witness of the locality and, thus, the mandatory provisions of section 103, Cr.P.C. had flagrantly been violated in that regard."*

We have also noted with grave concern that Mahboob Hussain (PW-7), the witness of the recovery of the pistol (P-4) candidly admitted that the whole recovery proceedings were conducted at the police station. Mahboob Hussain (PW-7) during cross-examination stated as under:-

> " The I.O recorded recovery proceedings at the police station."

This admission of Mahboob Hussain (PW-7) alone is sufficient to reject the evidence of recovery of the pistol (P-4) from the appellant. Moreover, the perusal of the report of Punjab Forensic Science Agency, Lahore(Exh.PP) regarding the comparison of empty and the recovered Pistol reveals that the empty recovered from the place of occurrence was deposited in the office of Punjab Forensic Science Agency, Lahore on 05.05.2015, whereas the appellant was arrested on 30.04.2015 by Ghulam Akbar , SI (PW-10) , the Investigating Officer of the case. There was no reason for keeping the empty recovered from the place of occurrence at the police station till the arrest of the appellant. In this scenario possibility of fabrication on part of the Investigating Officer of the case cannot be ruled out. Reliance is placed on the case of "*Muhammad Amin Vs. The State and another"* (**2019 S C M R 2057**) wherein the august Supreme Court of Pakistan has held as under:-

> *"Interestingly, two empty cartridges (P-4/1-2) were secured from the place of occurrence by the investigating officer Akhtar Ali, SI (PW12) on the night of 11.10.2012, but the same were sent to the office of Punjab Forensic Science Agency on 23.01.2013 i.e. after arrest of the appellant in this case. In these circumstances, the positive report of FSL is of no avail to the prosecution and is inconsequential."*

The perusal of the report of Punjab Forensic Science Agency, Lahore(Exh.PP) regarding the comparison of empty and the recovered Pistol further reveals that the empty and the pistol were submitted at the office of Punjab Forensic Science Agency, Lahore on the same day i.e 05.05.2015. In this manner the said report of Punjab Forensic Science Agency, Lahore. (Exh. PP) has no evidentiary value. The august Supreme Court of Pakistan has held in the case of "*Nasrullah alias Nasro v. The State"* (**2017 SCMR 724**) as under :-

> *"The alleged recovery of a pistol from the appellant's possession during the investigation was legally inconsequential because the report of the Forensic Science Laboratory brought on the record shows that the recovered pistol and the secured crime-empties had been received by the Forensic Science Laboratory together on one and the same day."*

The august Supreme Court of Pakistan has held in the case of Nasrullah alias *Ali Sher v. The State* (**2008 SCMR 707**) as under :-

> *"The crime-empties having been allegedly found at the place of occurrence and having been retained for so long the police station and having been sent to the F.S.L. along with the crime weapons and that also 12 days after the alleged weapons of offence had been allegedly recovered destroys and evidentiary value of the said piece of evidence. These recoveries, therefore, cannot offer any corroboration to the ocular testimony."*

Therefore, the recovery of the pistol (P-4) from the appellant does not further the case of prosecution in any manner. In view of the above mentioned facts, the alleged recovery of the pistol (P-4) is not proved and the same cannot be used as a circumstance against the appellant.

18. The motive of the occurrence, as mentioned in the oral statement (Exh.PG) of Mahboob Hussain (PW-7) was that there was a dispute between the appellant namely Haq Nawaz and the deceased namely Ghulam Sarwar

as the deceased had stopped the appellant from visiting their house due to strange relations between the appellant and his wife, the sister of the deceased and Mahboob Hussain (PW-7). No further details of the said motive were provided in the FIR itself. Mahboob Hussain (PW-7) during cross-examination stated that the appellant used to visit their house after an interval of 5/6 days, however their sister, who was married to the appellant, was residing in the house of Mahboob Hussain (PW-7) and the deceased. Riaz Hussain (PW-8) also stated during cross-examination that prior to the occurrence no altercation or quarrel had taken place between the appellant and the deceased. Mahboob Hussain (PW-7) during cross-examination stated as under:-

> " The accused used to visit our house after 5/6 days of interval, for the last 10/11 years.
>
> .....
>
> Before this occurrence there was no physical assault between us and the accused ."

Riaz Hussain (PW-8) during cross-examination stated as under:-

> "Previously there was no altercation or physical quarrel between them before the occurrence."

Moreover, even the wife of the appellant with whom the appellant was allegedly having strained relations did not appear either before the Investigating Officer of the case or before the learned trial court in support of the alleged motive. Even so much so that the name of the wife of the appellant was not even mentioned during the course of the investigation and the trial. Furthermore, it was not brought on record as to since when the wife of the appellant had been living at the house of her brothers, the deceased and Mahboob Hussain (PW-7). The prosecution witnesses failed to provide

evidence enabling us to determine the truthfulness of the motive alleged, and the fact that the said motive was so compelling that it could have led the appellant to have committed the *Qatl-i-Amd* of the deceased. There is a haunting silence with regard to the minutiae of motive alleged. No independent witness was produced by the prosecution to prove the motive as alleged. The august Supreme Court of Pakistan has held in the case of "*Muhammad Asif v. The State"* **(2008 SCMR 1001)** as under:

> *"Coming to motive, no independent witness was produced in whose presence the altercation had taken place between Shafi and appellant at one side and Mazhar Hussain deceased on the other side."*

So, this leads us to the conclusion that prosecution remained unable to prove the motive as alleged.

19. The learned counsel for the appellant has also argued that in this case there was lack of premeditation, the incident was one of a sudden fight which was a result of heat of passion developed upon a sudden quarrel and no undue advantage had been taken by the appellant nor had he acted in a brutal or unusual manner and in these circumstances Exception 4 contained in the erstwhile section 300, P.P.C. squarely stood attracted to the case in hand and, thus, the case against the appellant fell within the purview of the provisions of section 302(c), P.P.C. therefore the conviction of the appellant for an offence under section 302(b) P.P.C. be converted into that for an offence under section 302(c) P.P.C. We have scrutinized the prosecution evidence with regard to this argument of the learned counsel for the appellant and have rendered our very anxious consideration to this plea laboriously raised by the learned counsel for appellant. The burden, it is trite, is on the accused to show before the court that the offence allegedly

committed by him would fall within the sweep of Exception 4 contained in the erstwhile section 300, P.P.C. He does not of course have the burden to adduce any evidence in support of such plea. The accused can certainly rely on the materials relied on by the prosecution and which have been brought out in the course of cross examination and the defence evidence if any to contend that he must be granted the benefit. The crucial question is whether the appellant can claim the advantage of Exception 4 contained in the erstwhile section 300, P.P.C.. According to the prosecution witnesses the appellant came armed at the place of occurrence on a motorcycle (P-7) and then fired at the most vital part of the deceased causing his death. Apart from that ,the pistol (P-4) was pre-loaded with bullets. The appellant was aware that if the pistol (P-4) is fired from, that would cause a fatal injury and if the injury was caused that shall be fatal and in ordinary course cause death . It is not necessary that the injury must be such as would make it impossible for the injured to escape death. All that is required to be proved by the prosecution is that the injury intended must be such as would in the ordinary course of nature be sufficient to cause death. According to the prosection witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8), the appellant used the pistol to aim and land the fire at the chest of the deceased and hence was fully aware of the consequences of the said act. The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused and the weapon used in causing such injury which are the indicators of the fact whether the accused caused the death of the deceased with an intention of causing death or not. In the instant case it is true that the

appellant fired at the deceased and the bullet hit anterior axillary fold of armpit, towards the lateral aspect of left upper chest and entered the body of the deceased . This act of the appellant , though solitary in number had injured pleuras, left lung diaphragm and their associated blood vessels leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a firearm weapon would cause death. Such an injury in our opinion not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The nature of weapon used and the part of the body where the fire was struck, which was a vital part of the body helps in proving beyond reasonable doubt, the intention of the appellant to cause the death of the deceased. Intention is a matter of inference and when death is as a result of intentional firing, intention to cause death is patent. Exception 4 of the erstwhile section 300 of the PPC covered those cases where an offender causes death '*without premeditation in a sudden flight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner'*. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. All the circumstances indicated in Exception 4 must simultaneously co-exist to justify the invocation of Exception 4.It is to be noted that the word 'fight' occurring in Exception 4 contained in the

erstwhile section 300, P.P.C. is not defined in PPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down. 'Sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There must be no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. Exception 4 jurisprudentially must be reckoned as a humane provision accepting the fact that even the most rational of men may under the heat of passion do acts which they may not have done or would not do if saner faculties were to prevail. To such persons, law in a humane manner, permits mitigation if and only if it is proved that the passion happened to run in a sudden fight upon a sudden quarrel. We have not a semblance of doubt in our mind that the occurrence in this case was a result of any sudden fight. It was an anticipated death. Nay, the appellant bargained for it. The manner in which the incident is said to have taken place, it is clear that the appellant had fired a pistol shot

with an intention to cause death and the injury sustained by the deceased was sufficient to cause death in ordinary course of nature. In the present case, the action and the consequences must have been anticipated by the appellant. When the appellant came at the spot armed with a pistol loaded with bullets and without any provocation on part of the deceased, he fired at him fatally,it was a death which the appellant bargained for . There is no such evidence available in this case entitling the appellant to the benefit of the Exception 4 contained in the erstwhile section 300, P.P.C .

20. We have disbelieved the evidence of prosecution qua the motive and recovery of the Pistol (P-4) in this case. However, if the evidence of motive and recovery of the Pistol (P-4) is excluded from consideration, even then there is sufficient incriminating evidence available on the record against the appellant namely Haq Nawaz son of Ghulam Haider to prove the case of the prosecution against him. As discussed earlier, the prosecution case was fully proved against the appellant namely Haq Nawaz son of Ghulam Haider through the evidence of the eye-witnesses namely Mahboob Hussain (PW-7) and Riaz Hussain (PW-8). The said eye-witnesses stood the test of lengthy cross-examination, but their evidence could not be stunned. Their evidence is quite natural, straightforward and confidence inspiring. The ocular account of the prosecution as given by the abovementioned eye-witnesses is fully supported by the medical evidence furnished by Dr. Muhammad Junaid Asghar (PW-1), therefore, we hold that the prosecution has proved its case against the appellant namely Haq Nawaz son of Ghulam Haider beyond the shadow of any doubt.

21. Now coming to the quantum of the sentence we have noted some mitigating circumstances in favour of the appellant namely Haq Nawaz son of Ghulam Haider; firstly the evidence of recovery of the Pistol (P-4) from the possession of the appellant namely Haq Nawaz son of Ghulam Haider has been disbelieved by us for the reason mentioned in Para No.17 of this judgment; secondly, the prosecution had alleged a specific motive in this case but failed to prove the same. It is well recognized principle by now that the question of quantum of the sentence requires utmost attention and thoughtfulness on the parts of the Courts. In this regard, we respectfully refer the case of "*Mir Muhammad alias Miro v. The State"* (**2009 SCMR 1188**) wherein august Supreme Court has held as under:-

> "*It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the parts of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."*

The august Supreme Court of Pakistan has held in the case of "*Ansar Ahmad Khan Barki v. The State and another"* (**1993 SCMR 1660**), that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of the normal penalty of death. We are convinced that the appellant namely Haq Nawaz son of Ghulam Haider, in the peculiar circumstance of this case deserves consideration to the extent of his sentence; one out of two provided under section 302(b) of P.P.C. It is not determinable in this case as to what was the real cause of occurrence and as to what had actually happened immediately before the occurrence which had resulted into the death of Ghulam Sarwar (deceased) therefore, in our view the death sentence

awarded to the appellant is quite harsh. It has been held in a number of judgments of the august Supreme Court of Pakistan that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence and non-proof of motive may be considered a mitigating circumstance in favour of the accused. While treating it a case of mitigation, we have fortified our view by a judgment of the august Supreme Court of Pakistan in the case of *Ahmad Nawaz and another v. The State* (**2011 SCMR 593**), wherein, at page 604, the Hon'ble apex Court of the country has been pleased to lay emphasis as under:-

> *"10. The recent trend of the courts with regard to the awarding of penalty is evident from several precedents. In the case of Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111), it was held that "This is settled law that provisions of sections 306 to 308, P.P.C. attracts only in the cases of Qatl-i-amd liable to Qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-i-amd has been awarded as Tazir under section 302(b), P.P.C. The difference of punishment for Qatl-i-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of Qisas, Court has no discretion in the matter of sentence whereas in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-i-amd, keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Muretaza v. State (2004 SCMR 4), Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203), Muhammad Akram v. State (2003 SCMR 855) and Abdus Salam v. State (2000 SCMR 338)".*

The august Supreme Court of Pakistan has held in the case of "*Mst. NAZIA ANWAR v. The State and others"* (**2018 SCMR 911**), while considering the penalty for an act of commission of *Qatl-i-Amd*, as under :-

> *"In these circumstances it is quite obvious to me that the motive asserted by the prosecution had remained utterly unproved. The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder."*

We are also fortified in our view in this regard by the cases of "*Nawab Ali v. The State"* (**2019 SCMR 2009**), "*Muhammad Akram alias Akrai v. The State"* (**2019 SCMR 610**), "*Iftikhar Mehmood and another v. Qaiser Iftikhar and others"* (**2011 SCMR 1165**), "*Muhammad Mumtaz v. The State and another"* (**2012 SCMR 267**), "*Muhammad Imran alias Asif v. The State"* (**2013 SCMR 782**), "*Sabir Hussain alias Sabri v. The State"* (**2013 SCMR 1554**), "*Zeeshan Afzal alias Shani and another v. The State and another"* (**2013 SCMR 1602**), "*Naveed alias Needu and others v. The State and others"* (**2014 SCMR 1464**), "*Muhammad Nadeem Waqas and another v. The State"* (**2014 SCMR 1658**), "*Muhammad Asif v. Muhammad Akhtar and others"* (**2016 SCMR 2035**) and "*Qaddan and others v. The State"* (**2017 SCMR 148**).

22. In the light of above discussion, the conviction of the appellant namely Haq Nawaz son of Ghulam Haider as awarded by the learned trial court through the abovementioned judgment is maintained but the sentence of death awarded to the appellant namely Haq Nawaz son of Ghulam Haider under section 302(b), P.P.C. is altered to **imprisonment for life**. The compensation awarded by the learned trial court under section 544-A of Cr.P.C. and sentence in default of payment thereof is maintained and upheld. The benefit provided under section 382-B of the Code of Criminal Procedure, 1898, is also extended to the appellant namely Haq Nawaz son of

Ghulam Haider. Consequently, with the above said modification in the sentence of the appellant namely Haq Nawaz son of Ghulam Haider, the Criminal Appeal No.520-J of 2018 is hereby *dismissed*.

23. The **Murder Reference No.86 of 2017** is answered in **Negative** and the death sentence awarded to Haq Nawaz son of Ghulam Haider is **Not Confirmed**.

(RAJA SHAHID MEHMOOD ABBASI) ***(SADIQ MAHMUD KHURRAM)***
JUDGE ***JUDGE***

Raheel

Approved for reporting

JUDGE ***JUDGE***