2018 P Cr. L J 698

[Lahore]

Before Qazi Muhammad Amin Ahmed and Ch. Abdul Aziz, JJ

IJAZ AHMED and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 663 of 2012, 508 of 2015 and Murder Reference No. 167 of 2012, heard on 29th November, 2017.

(a) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Delay of about one hour and forty five minutes in lodging of FIR---Effect---Occurrence took place on 15.10.2008 at about 6.30 p.m.---Police Station was situated at a distance of 9-kilometers from the crime scene and was connected through a metalled road---Matter was brought to the notice of police through the oral statement of complainant recorded in the hospital at about 8.15 p.m.---Eyewitness had stated that police was informed about the incident within 10/15 minutes after the occurrence and then reached the hospital---Facts remained that statement of eyewitness was not recorded at the time of his first visit to the Police Station---Investigating Officer had denied his interaction with the said eyewitness and stated that he received information of the occurrence from Moharer---Investigating Officer had stated that statement of complainant was recorded in hospital and forwarded the complaint through a constable but said police official was not produced as a witness, during the trial---Non-production of said police official had left a big question mark on the claim of the prosecution regarding prompt reporting of the matter to the police.

(b) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Prosecution case was that the accused persons duly armed with deadly weapons, emerged on the spot and started firing at his son, which hit on his knee and back---Victim was shifted to hospital and after getting first aid, injured got recorded his dying declaration---Victim succumbed to the injuries---Motive behind the occurrence was stated to be previous litigation---Ocular account of the occurrence had been furnished by the witnesses including complainant---Record revealed that the occurrence took place in front of a Dera---None of the eye-witnesses was resident of crime scene and their houses were situated at a distance of 10-15 acres from the said Dera---First

Information Report as well as the examination of eyewitnesses revealed that they tried to justify their presence at the crime scene by deposing that they were sitting there in connection with a personal matter---Detail of personal matter was neither given in the crime report nor in the examination-in-chief of the witnesses---Said witnesses deposed during cross-examination that they were getting prepared sickles from a ironsmith---Neither the owner of the Dera nor ironsmith appeared in the witness box in order to provide some credibility to the claim of both the eye-witnesses regarding their presence at the crime scene---Presence of said witnesses at the crime scene could be an outcome of a sheer coincidence, which rendered them as chance witnesses---If a witness was found to be a chance witness, his testimony was not to be discarded out-rightly if supported and corroborated from other evidence, which was lacking in the present case---Record transpired that the testimony of eye-witnesses, who not only were inimical to the accused persons but were found to be chance witnesses, got no support or corroboration from any other material---Circumstances established that prosecution failed to prove its case against the accused persons beyond any shadow of doubt, benefit of which would resolve in favour of accused---Appeal was allowed and accused were acquitted in circumstances by setting aside conviction and sentences recorded by the Trial Court.

Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1141 rel.

(c) Penal Code (XLV of 1860)---

---Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence--- Interested witnesses---Scope--- Record showed that eyewitnesses including complainant were closely related to the deceased and were also inimically placed against the accused persons---Eyewitness got registered a criminal case and implicated accused persons along with acquitted accused---All the said accused persons during investigation, were found innocent and were placed in Column No. 2 of report under S. 173, Cr.P.C.---Said aspect of the matter unfolded that the eye-witnesses were not in best of terms with the accused persons and made them as partisan and interested witnesses.

Umar Hayat and 3 others v. The State 1997 SCMR 1076 rel.

(d) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Medical evidence---Record transpired that deceased was fired at by the accused persons, while he was riding a motorcycle---Deceased after receiving the first fire shot, fell on the road and such fall of the deceased was likely to cause him certain additional injuries on his person---Statements of Medical Officers revealed that no such injury was noted by either of them---Medical evidence made obvious that the statements of both the Medical Officers did not fit into the theory advanced by the prosecution.

(e) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qanun-e-Shahadat (10 of 1984), Art. 46---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Dying declaration---Scope---Such statement was to be recorded either by a Magistrate or in the presence of a Gazetted Police Officer and in absence thereof, in front of two or more unconcerned reliable witnesses---However, if neither of the said persons were available, only then such a statement could be recorded in the presence of two or more Police Officers---Record revealed that Investigating Officer made no effort to procure the attendance of any unconnected witness, though it could easily be done from the hospital---Deceased, then injured was brought to the hospital at about 7.50 p.m., where he died at 10.45 p.m.---During said period, victim was provided extensive medical treatment---Complainant remained present in the hospital but he uttered not a single word regarding dying declaration of deceased---Eyewitness deposed that deceased died ten minutes after making statement to the police---Investigating Officer deposed that he recorded the statement of deceased after about twenty minutes of his arrival in the hospital---Statements of said witnesses regarding time of recording the statement of deceased were in conflict with each other---Circumstances and facts of the case showed that since the statement of deceased was made just before the death of the deceased, hence, there was every possibility that victim was not in full control of all his faculties giving rise to a possibility of the statement not being lucid, which created doubt regarding the legal worth of dying declaration---Record showed that the thumb impression of the deceased were marked/affixed twice at the same place, which reflected that at the time of making statement, deceased had lost control over his senses---Said feature of the case raised doubt about the veracity and correctness of the dying declaration as well as opinion of the Medical Officer, according to which the deceased was fit to make statement at the relevant time---Inquest report, which was prepared subsequent to the death of deceased found no mention regarding dying declaration of the deceased---Record was silent as to why the statement of the deceased was not recorded in the presence of the Medical Officer as it did not bear his signatures---Dying declaration of the deceased, in circumstances, had no effect on the case of prosecution.

Mst. Zahida Bibi v. The State PLD 2006 SC 255 rel.

(f) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Motive not proved---Effect---Previous litigation was portrayed as cause of the occurrence, but neither in the crime report nor in the examination-in-chief of the witnesses, the details of enmity was brought on record---Eye-witness, during cross-examination stated that prior to the occurrence, a criminal case was registered against the accused party on his complaint---Report under S. 173, Cr.P.C. of the said case evinced that deceased was not even a witness of the said occurrence---If the registration of FIR was the cause of annoyance then eyewitness should have been the primary target of the aggression of the accused

persons---Despite being present at the crime scene, even thirty minutes before the occurrence, eye-witness/complainant of the previous FIR escaped unhurt---Circumstances established that motive remained unproved.

(g) Penal Code (XLV of 1860)---

----Ss. 302, 404, 148 & 149---Qatl-i-amd, dishonest misappropriation of property possessed by deceased person at the time of his death, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Recovery of crime empties and weapon---Scope---Crime empties of .44-bore alleged to have been recovered from the crime scene, matched with rifle recovered from the accused---Said recoveries were inconsequential in nature as the recovered articles were sent to Forensic Science Laboratory on the same date.

(h) Criminal Procedure Code (V of 1898)---

----Ss. 374 & 376---Reference under S. 374, Cr.P.C.---Principles.

A read through the provisions of sections 374 and 376, Cr.P.C. reveals that while deciding a reference under section 374, Cr.P.C. High Court has abundant powers to confirm the sentence or to pass any other appropriate sentence or to annul the conviction or even to order a new trial on the same or on an amended charge and lastly even to acquit an accused. It further spells out from the above two sections that in order to decide a reference under section 374, Cr.P.C. the personal presence of the convict is not made mandatory by the legislature. A reference under section 374, Cr.P.C., even in the absence of the convict is to be decided, keeping in view the merits of the case.

Syed Zahid Hussain Bokhari, Khalida Perveen and Ali Muhammad Zahid Bokhari for Appellants.

Abid Saqi for the Complainant.

Muhammad Zubair Farooq, Additional Prosecutor-General for the State.

Date of hearing: 29th November, 2017.

JUDGMENT

CH. ABDUL AZIZ, J.---This judgment shall dispose of **Criminal Appeal No.663 of 2012** (filed by appellant Ijaz Ahmed against his conviction), **Criminal Appeal No.508 of 2015** (filed by complainant Sarang Khan against the acquittal of respondents namely Noor Muhammad, Ghulam Abbas and Shamraiz Iqbal) and Reference sent by trial court under section 374 of Criminal Procedure Code, 1898 which is numbered as **Murder Reference No.167 of 2012**, for confirmation or otherwise of sentence of death awarded to Ijaz Ahmad and Pervaiz Iqbal (convicts). The appeals as well as the murder reference are originating from the judgment dated 31.03.2012 passed by the learned Additional Sessions Judge, Mandi Bahuddin, on a trial held in case FIR No.423/2008 dated 15.10.2008 registered under sections 302, 404, 148, 149, P.P.C. at

Police Station Kuthiala Sheikhan, District Mandi Bahauddin. Learned trial court through the impugned judgment while acquitting co-accused namely Noor Muhammad, Ghulam Abbas and Shamraiz Iqbal convicted and sentenced the appellant as well as Pervaiz Iqbal in the following terms:-

> **Under section 302(b), P.P.C.** and awarded death sentence. They were also directed to pay Rs.200,000/- each as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default of payment of the said amount, they were ordered to further undergo SI for six months each.

2. Briefly stated the case of the prosecution as unveiled by complainant Sarang Khan (PW.12) in FIR (Exh.PR) is to the effect that he is resident of village Jaiya and cultivator by profession; that on 15.10.2008 at about 6:30 p.m. when he along with Baati Khan was present at the Dera of Muhammad Walayat, his son namely Zaheer Abbas while boarding a motorcycle and having rifle .44 bore arrived there; that when Zaheer Abbas reached near the Dera of Muhammad Walayat, Pervaiz Iqbal and Ijaz Ahmed who were armed with rifles .44 bore and .8 mm emerged from Bamboo plants; that Pervez Iqbal fired a shot from his .44 bore rifle which hit on right knee of Zaheer Abbas who fell down from the motorcycle; that accused Ijaz Ahmad also fired from his .8 mm rifle which hit on the back of Zaheer Abbas; that in the meanwhile three unknown assailants appeared from bamboo plants and started firing from their weapons. The occurrence was witnessed by the complainant, Baati Khan and one Muhammad Riaz who was proceeding to his Dera; that the accused persons while waiving their weapons and resorting to aerial firing, made good their escape towards East and also took away .44 bore rifle of Zaheer Abbas. The motive behind the occurrence was stated to be previous litigation which led into attack upon the above said Zaheer Abbas.

Zaheer Abbas (injured) was shifted to DHQ Hospital, Mandi Bahuddin where he was provided first aid. During this period, Zaheer Abbas also got recorded his dying declaration (Exh.PZ) which is in accordance with the story incorporated in the crime report. Zaheer Abbas succumbed to the injuries caused by the accused persons on the same night.

3. After the receipt of the information regarding the occurrence, Muhammad Aslam SI (PW.16) reached DHQ, Hospital, Mandi Bahauddin where Sarang Khan complainant got recorded his statement (Exh.PV) which was sent to Police Station through Fazal Ahmad 536/C for the registration of FIR. He prepared injury statement of Zaheer Abbas injured (Exh.PC) and submitted application (Exh.PQ) for recording his statement. He also obtained the opinion of the doctor regarding the fitness of Zaheer Abbas for making statement. On the basis of the opinion of the doctor, he proceeded to record the statement of deceased/dying declaration (Exh.PZ) in the presence of Muhammad Nawaz 469/C and Naeem Aslam 830/C. Subsequent to the death of Zaheer Abbas (deceased), Muhammad Aslam SI prepared inquest report (Exh.PAA), application for postmortem examination (Exh.PB) and dispatched the dead body to the mortuary under the escort of Muhammad Nawaz and Naeem Aslam constables. He then proceeded to the crime scene and conducted the spot inspection, during which, he collected blood stained earth vide recovery memo (Exh.PW). He also secured two

empties each of .44 bore (P.9/1-2) and of .8 mm rifle (P.10/1-2) by taking them into possession vide recovery memo (Exh.PX). He arrested Ijaz (appellant) on 11.12.2008, who on 16.12.2008 made a disclosure and in pursuance thereof led to the recovery of rifle .44 bore (P.4) belonging to the deceased which was taken into possession vide recovery memo (Exh.PS). On 21.12.2008 Ijaz Ahmed (appellant) led to the recovery of rifle .8 mm (P.6) which was taken into possession by the Investigating Officer vide recovery memo (Exh.PT). Since the appellant could not produce any valid arm licence of the recovered rifle, hence, a separate case under section 13 of Arms Ordinance XX of 1965 was registered against him. Muhammad Aslam SI got prepared incomplete report under section 173 Cr.P.C. on 24.01.2009 and forwarded it to the learned trial court.

Later on, the investigation of this case was entrusted to Moula Bakhsh SI (PW.15), who on 11.02.2011 arrested Pervez Iqbal (convict) in this case. On 19.02.2011, Pervez Iqbal (convict) in pursuance of his disclosure led to the recovery of rifle .44 bore which was taken into possession vide recovery memo (Exh.PY). The convict could not produce any valid arm licence of the recovered rifle, therefore, a separate case under section 13 of Arms Ordinance XX of 1965 was registered against him.

4. The prosecution, in order to prove its case against the appellant produced sixteen PWs which includes Sarang Khan complainant (PW.12) and Baati Khan (PW.13) who are the eye-witnesses of the occurrence, Dr. Muhammad Ashraf (PW.1) and Dr. Iftikhar Hashmi (PW.5) who furnished the medical evidence and Moula Bakhash SI (PW.15) and Muhammad Aslam SI (PW.16) who conducted the investigation of this case. The remaining prosecution witnesses more or less were formal in nature. The learned trial court also examined Azhar Hussain SI as CW.1.

5. Dr. Mohammad Ashraf (PW.1) on 16.10.2008 conducted the post-mortem examination of the dead body of Zaheer Abbas (deceased) and observed the following injuries:-

1. Lacerated wound of entry on right side back of chest 0.5 x 0.5 cm going deep on right posterior axillary line with inverted margins, burning blackening nil.

2. Lacerated wound of exit on right parasternal line 1.5 x 1.5 cm on front of chest.

3. Lacerated wound of entry with inverted margins 0.5 x 0.5 cm going deep on right side of right leg just 3 cm above knee joint.

4. Lacerated wound of exit 2 cm x 2 cm on the inner side of right leg just 2 cm above the knee joint. Burning blackening nil. Corresponding cut/holes present on clothes.

According to Dr. Muhammad Ashraf, all the injuries were ante mortem and were caused by firearms. According to him, injuries Nos.1 and 2 were individually fatal. He opined that the death in this case occurred due to excessive haemorrhage and shock

leading to cardio respiratory failure and death. The probable time between injury and death was stated to be four hours and between death and post-mortem was described as within 06-hours.

On 15.10.2008 at 7:50 p.m., Dr. Iftikhar Hussain Hashmi (PW.5) conducted the medico legal examination of Zaheer Abbas, when he was alive, and observed the following:-

> "The patient general condition was serious. Pulse 100 by minutes. Blood pressure 80/60 ml hg. He was in semiconscious and in severe agony.

Injuries

> 1-a. Lacerated wound of entry on right side of back of chest 0.5 x 0.5 cm going deep round shape on right posterior auxiliary line wound with inverted margins.
>
> 1-b. Lacerated wound of exit on right parasternal line 1 x 1 cm in front of chest.
>
> 2-a. Lacerated wound of entry with inverted margin 0.5 x 0.5 cm into going deep on right side of right leg just 3 cm above the knee joint.
>
> 2-b. Lacerated wound of exit 2 cm x 2 cm on inner side of right leg just 2 cm above the knee joint.

6. After the closure of prosecution evidence, the learned trial court examined the appellant and his co-accused under section 342, Cr.P.C. Ijaz Ahmad (appellant) and his co-convict Pervez Iqbal in response to question "why this case against you and why the PWs deposed against you", replied identically, reproduced below:-

> "As there was previous enmity between and revenge between me and my family members and present complainant party on the basis of which the complainant party as lodged a false FIR No.272/08 dated: 5.7.2008 under section 395, P.P.C. Police Station Kuthiala Sheikhan in order to further revenge from me and my family. The complainant party has lodged the FIR against me. Furthermore, my relatives are opposite group in Election. The PWs and deceased are closed relatives themselves. The PWs are not only inter se closed relative but they also lend support to each other as the present complainant was witness of the FIR lodged by present witnesses Bati Khan under section 395, P.P.C. above mentioned due to these reasons falsely implicate me in this case and recorded the evidence against me due to dishonesty."

The appellant and his co-accused neither opted to appear as witnesses under section 340(2) of Cr.P.C. nor produced any evidence in their defence. However, Noor Muhammad (co-accused) tendered in evidence FIR No.272/2008 under section 395, P.P.C. registered at Police Station Kathiala Sheikhan (Exh.DC), report under section 173, Cr.P.C. (Exh.DD) and FIR (Exh.DE).

7. On the conclusion of trial, the appellant and Pervez Iqbal (co-convict) were convicted and sentenced as afore-stated. Hence, the instant appeals and Murder Reference.

8. It is contended by the learned counsel for the appellant/convicts that though apparently the instant case is of promptly lodged FIR yet the perusal of the record suggests otherwise; that the ocular account in the instant case was furnished by the inimical and interested witnesses; that both the eye-witnesses miserably failed to prove their presence at the crime scene, hence can best be declared as chance witnesses; that the detail of the occurrence provided by the eyewitnesses got no support from the medical evidence; that the dying declaration of the deceased remained unproved as it was neither attested by the doctor nor by any Magistrate and even otherwise is proved to be a fabricated piece of evidence from other attending circumstances; that though at the time of the registration of FIR, a specific motive was taken up but it remained unproved during the trial; that the recoveries of weapons affected from both the convicts are inconsequential in nature as the weapons and empties recovered from the spot were forwarded to PFSA on the same date and that the bare perusal of the record gives rise to many contradictions and discrepancies, the benefit of which was withheld from the convicts.

9. On the other hand, learned Additional Prosecutor General assisted by learned counsel for the complainant strongly controverted the arguments advanced on behalf of the convicts and argued that the instant case is arising out of promptly lodged FIR; that the eyewitness account in the instant case is furnished by the witnesses who are residents of the same vicinity, hence are reliable; that the guilt of both the convicts is further established from the dying declaration of the deceased; that the ocular account provided by the two eyewitnesses is getting due support from the medical evidence; that the noticeable abscondment of the appellants provides sufficient corroboration to the case of the prosecution; that the motive which was successfully proved by the prosecution is an additional corroboratory piece of evidence and that since both the convicts have committed the murder of deceased who was a young person, hence, deserve no leniency.

10. Arguments heard. Record perused.

11. The case of the prosecution, so to speak primarily hinges upon the ocular account furnished by Sarang Khan (PW.12) and Baati Khan (PW.13), the evidence of coming across (Waj Takar) narrated by Riaz Ahmed (PW.14), the medical evidence brought on record through Dr. Muhammad Ashraf (PW.1) and Dr. Iftikhar Hussain Hashmi (PW.5), the dying declaration (Exh.PZ) heard by Naeem Aslam (PW.2). The prosecution sought corroboration from the recovery of weapons effected on the disclosure and pointation of the convicts as well as from the motive and their abscondment.

12. It divulges from the record that the occurrence, which formed basis of the instant case took place on 15.10.2008 at about 6:30 p.m., in the area of a vicinity known as Jia, situated within the territorial jurisdiction of Police Station Khutiala Sheikhan, District Mandi Bahauddin. According to the crime report (Exh.PR), the police station is situated at a distance of 9-kilometers from the crime scene and is connected through a metalled road. The matter was brought to the notice of police through the oral statement of Sarang Khan (PW.12) recorded in civil hospital at about 8:15 p.m. Though, from above, it follows that the matter was promptly reported to police, yet the

perusal of the record suggests otherwise. It is of immense importance to mention here that Muhammad Aslam SI (PW.16), even after getting information of the occurrence from Baati Khan (PW.13) recorded his statement much thereafter. It will be of great advantage to reproduce an extract from the statement of Baati Khan (PW.13) which is as under:-

> "The Police Station is at 2-1/2 or 3 miles from village Jayyia. We reached at Police Station within 10/15 minutes after the occurrence. I told story of occurrence to Aslam S.I. Aslam told something to Moharar and left for DHQ, Hospital. My statement was not recorded there. Within 5/10 minutes I along with Police reached at DHQ Hospital, Mandi Bahauddin."

We have not been able to come across any justification for not recording the statement of Baati Khan (PW.13) at the time of his first visit to the police station more importantly when he was the eyewitness of the occurrence as well. It is noticed that Muhammad Aslam SI (PW.16), denied his interaction with Baati Khan and instead stated that he received information of the occurrence from Moharar. Likewise, it is further observed that as per Muhammad Aslam SI, he recorded the statement of Sarang Khan complainant (PW.12) in Civil Hospital Mandi Bahauddin and forwarded the complaint to the police station through Fazal Ahmad 536/C. Surprisingly, Fazal Ahmad constable was not produced as a witness, during the trial. It needs no mention that Fazal Ahmed was a necessary link to prove the case of the prosecution, so far as it relates to the prompt registration of FIR. Non-production of Fazal Ahmed Constable has left a big question mark on the claim of the prosecution regarding prompt reporting of the matter to the police.

13. The detail of the occurrence was brought on record through the statements of Sarang Khan and Baati Khan (PW.12 & PW.13). The meticulous examination of the record reveals that the occurrence took place in front of the Dera of Muhammad Walayat. None of the eyewitnesses is resident of crime scene and instead their houses are situated at a distance of 10-15 acres from the house/Dera of Muhammad Walayat. In this respect, reference can be made to an extract from the statement of Baati Khan (PW.13) which is as under:-

> "My Dera is towards east and is at a distance of 10/15 acres from the Dera of Walayat. Dera of Sarang is adjacent to my Dera. It is incorrect to suggest that my as well as the Dera of Sarang are at a distance of 28/30 acres from the said Dera of Walayat."

The perusal of FIR (Exh.PR) as well as the examination-in-chief of both the witnesses reveals that they tried to justify their presence at the crime scene by deposing that they were sitting there in connection with a personal work. Though the detail of this personal work was neither given in the crime report nor in the examination in chief of both the witnesses, however, during cross-examination, they tried to explain their presence at the crime scene by saying that they were getting prepared sickles from Ghulam Muhammad, an ironsmith. It is further observed that neither Muhammad Walayat nor Ghulam Muhammad ironsmith appeared in the witness box in order to provide some credibility to the claim of both the eyewitnesses regarding their presence

at the crime scene. From above feature of the case, it can safely be gathered that the presence of the two eye-witnesses at the crime scene was an outcome of a sheer coincidence. Such aspect of the matter has rendered them as chance witnesses. Before proceeding further, we deem it appropriate to mention here that in legal parlance the chance witness is one who as per his routine and normal course of events should not have been present at the place of occurrence and further fails to satisfactorily explain his presence at the crime scene. The Hon'ble Supreme Court of Pakistan while embarking upon the proposition of chance witness observed as under in the case of Mst. Sughra Begum and another v. Qaiser Pervez and others (2015 SCMR 1141):-

> "A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt".

Once a person is found to be a chance witness, his testimony is not to be discarded out-rightly and instead the Court has to see that whether it is getting some support or corroboration from other evidence.

From the perusal of the record, we have also come across another factor, which directly relates to the credibility of the eyewitnesses. It spells out from the record that Sarang Khan (PW.12) as well as Baati Khan (PW.13) besides being closely related to the deceased were also inimically placed against the convicts. Baati Khan (PW.13) got registered a criminal case vide FIR No.272 dated 15.07.2008 under section 395, P.P.C. at Police Station Khutiala Sheikhan, initially against unknown persons. However, during the course of investigation, both the convicts along with Ghulam Abbas (acquitted co-accused) were implicated in the case. During the course of investigation of FIR No.272, all the above named persons were found innocent and were placed in column No.2 of report under section 173, Cr.P.C. Such aspect of the matter unfolds that the eye-witnesses were not in best of terms with the convicts. This aspect of the matter further makes Baati Khan and Sarang as partisan and interested witnesses. As per principles laid down for the appraisal of evidence of an interested witness, in order to place explicit reliance on his testimony, the Court has to look for independent corroboration. While holding so, we are enlightened from the observation of the Hon'ble Supreme Court of Pakistan expressed in the case titled as Umar Hayat and 3 others v. The State (1997 SCMR 1076) which is as under:-

> "It is a settled position of law that evidence of a partisan witness requires corroboration before the same is relied on for conviction. In the case of

> Muhammad Nawaz v. Abdul Khaliq and others (1971 SCMR 500) the prosecution witnesses were not only related inter se but they were also related with the deceased and it was held that such evidence required some corroboration to ensure the witnesses were speaking the truth."

14. From above, it can safely be gathered that in order to place categorical reliance on the statement of a chance and interested witness independent corroboration is required. In our considered view, corroboration or support can be offered through other circumstances of the case, which tend sufficiently to reflect that the witnesses had spoken the truth. In this regard, we have also gone through the medical evidence as well from which it evinces that attribution of injuries to the convicts apparently is being duly supported therefrom. However, it is intriguing to note here that as per ocular account furnished by the witnesses, Zaheer Abbas (deceased) was fired at by the convicts, while he was riding a motorcycle. According to next string of the ocular account, the deceased after receiving the first fire shot, fell on the road. It needs no elaboration that such fall of the deceased was likely to cause him certain additional injuries on his person. However, the perusal of the statement of Dr. Muhammad Ashraf (PW.1) as well as Dr. Iftikhar Hashmi (PW.5) reveals that no such injury was noted by either of them. It would be in fitness of things to reproduce relevant portions from the cross-examination of both the doctors which are as under:-

Dr. Muhammad Ashraf (PW.1)

> "I have not observed any marks of mud on the last worn clothes of deceased. No marks of abrasion contusion were observed on the body of deceased."

Dr. Iftikhar Hussain Hashmi (PW.5)

> "I have not observed any injury caused on falling from motorcycle. Except the injuries in my examination, I have not observed any other injury of laceration or abrasion."

The two extracts referred above, make obvious that the statements of both the doctors do not fit into the theory advanced by the prosecution. Had the occurrence taken place in the manner narrated by the eye-witnesses, then the deceased in all circumstances should have received some injuries caused through fall from his motorbike as well.

15. There is another aspect of the case which invited our attention for the just decision of the case and pertains to the dying declaration of Zaheer Abbas (deceased). According to the case of the prosecution, the deceased received firearm injuries at about 6:30 p.m. and thereafter was shifted to DHQ Hospital, Mandi Bahauddin where he expired at 10:45 p.m. As per record, during this period, the deceased made a statement (Exh.PZ) before Muhammad Aslam SI (PW.16) and saddled Ijaz Ahmed and Pervaiz Iqbal (convicts) with the responsibility of having caused firearm injuries to him. In support of the dying declaration of the deceased, Naeem Aslam (PW.2) and Muhammad Aslam (PW.16) appeared in the dock.

Before giving a conclusive finding regarding the legal worth of such statement of the deceased, we deem it appropriate to have a look on the law relevant on the subject. Such a statement is relevant under the provision of Article 46 of Qanun-e-Shahadat Order, 1984. Dying declaration, generally, stands for the statement of a person who is in expectation of his death and relates to the causes of his death. Such a statement is admissible in evidence though its maker does not appear in the witness box so as to provide an opportunity of cross-examination to an accused facing the charge of his murder. The admissibility of the dying declaration is an exception to the general rule which makes inadmissible the hearsay evidence. Dying declaration can be made basis for awarding conviction provided it is free from the menace of prompting and tutoring and is proved to have been made by none other than the deceased himself. The paramount reason of attaching importance and credibility to such a statement is the presumption that dying person seldom tells lie. For recording of dying declaration no hard and fast rules are laid down, however, a wade through the provisions of the Police Rules, 1934 reveals that a procedure and brief guidelines are provided in chapter-25, Rule 21 which are being reproduced below for advantage sake:-

> 25.21. Dying declarations.-(1) A dying declaration shall, whenever possible, be recorded by a Magistrate.
>
> (2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.
>
> (3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.
>
> (4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.
>
> (5) A dying declaration made to a police officer should, under section 162, Code of Criminal Procedure, be signed by the person making it."

From above, it can be gathered that preferably such a statement is to be recorded either by a Magistrate or in the presence of a gazetted police officer and in absence thereof in front of two or more unconcerned reliable witnesses. However, if neither of the above mentioned persons are available, only then such a statement can be recorded in the presence of two or more police officers. The perusal of the record reveals that the Investigating Officer made no effort to procure the attendance of any unconnected witness, though it could easily be done from the concerned hospital.

In the instant case, it is noticed that Zaheer Abbas (deceased) was brought to hospital in injured condition at about 7:50 p.m., where he died at 10:45 p.m. During this period, he was provided extensive medical treatment. It is observed that though Sarang Khan (PW.12) remained present in the hospital yet he uttered not a single word regarding

dying declaration of Zaheer Abbas (deceased) while appearing in the Court. It is further noticed that according to Baati Khan (PW.13), the deceased died 10-minutes after making statement to the police. For reference sake, the relevant lines are being reproduced below:-

> "We were still in hospital when Zaheer succumbed to injuries 10 minutes after recording his statement by the IO."

Conversely, Muhammad Aslam SI (PW.16) deposed that he recorded the statement of Zaheer Abbas (deceased) after about 20-minutes of his arrival in the hospital. Admittedly, the statements of the two witnesses regarding the recording the time of recording of the statement of Zaheer Abbas (deceased) are in conflict with each other. Likewise, if explicit reliance is placed on the statement of Baati Khan, it leads this Court to draw an inference that since it was made just before the death of the deceased, hence, there is every possibility that he was not in full control of all his faculties giving rise to a possibility of the statement not being lucid. This aspect of the case gives rise to a doubt regarding the legal worth of dying declaration. It is further observed that the thumb impression of the deceased on Exh.PZ appears to have been marked/affixed twice at the same place. The Investigating Officer namely Muhammad Aslam SI (PW.16) when cross-examined admitted this aspect though he tried to offer following explanation:-

> "The thumb impression of the deceased on his statement recorded by me could not be marked firstly as he was seriously injured and with some help then he managed to put his thumb mark that is why it looks like marked twicely."

The above extract further reflects that at the time of making statement, Zaheer Abbas had lost control over his senses. Such feature of the case raises further questions over the veracity and correctness of the dying declaration as well as the opinion of the doctor, according to which the deceased was fit to make statement at the relevant time. It is further noticed that the inquest report (Exh.PAA) which was prepared subsequent to the death of deceased finds no mention regarding his dying declaration.

According to well settled principles laid down for the appraisal of dying declaration, such a statement is to be appraised like the testimony of any other witness. Since, Zaheer Abbas like other two eyewitnesses was having history of hostility with the appellants, hence, is to be accepted only if duly supported and corroborated from other circumstances. Likewise, we have not been able to trace any explanation from the perusal of the record that as to why the statement of the deceased (Exh.PZ) was not recorded in the presence of the doctor as it does not bear his signatures. It needs no mention that for a dying person, a doctor is like nothing less than an angel and the last ray of hope for him in his capacity as a savior of his life. In this backdrop, a doctor can be the best person to endorse the dying declaration as it is expected from a dying person to tell the whole truth to the doctor. In somewhat similar circumstances, the Hon'ble Supreme Court of Pakistan expressed in the case of Mst. Zahida Bibi v. The State (PLD 2006 Supreme Court 255) to the following effect:-

> "The rule of criminal administration of justice is that the dying declaration like an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell a lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts."

Last but not the least, it is noted with concern that the dying declaration of Zaheer Abbas (Exh.PZ) was witnessed by Naeem Aslam 830-C (PW.2) and Muhammad Nawaz 469/C (given up PW). It is unveiled from the statement of Naeem Aslam (PW.2) that while appearing in the witness box, he uttered not a single word to provide some credence to the dying declaration. This aspect of the matter is like the final nail in the coffin of the prosecution so far as it covers the dying declaration.

16. We have also attended to the motive part of the prosecution case and have found that at the time of the registration of FIR, previous litigation was portrayed as cause of the occurrence. It is noted with concern that neither in the crime report nor in the examination in chief of the witnesses, the detail of this enmity was brought on record. So much so, that Baati Khan (PW.13) uttered not a single word regarding the motive in his examination in chief. However, during cross-examination it was unearthed that prior to the instant occurrence, a criminal case vide FIR No.272 dated 15.07.2008 under section 395, P.P.C. was registered at Police Station Kuthiala Sheikhan on the complaint of Baati Khan. In the said case, both the appellants along with their co-accused (since acquitted) namely Ghulam Abbas were arrayed as accused. Likewise, it evinces from the report under section 173, Cr.P.C. (Exh.DD) of the said case that Zaheer Abbas (deceased) was not even a witness of the said occurrence. This aspect was not left unattended by the defence and both the eye-witnesses were duly cross-examined in this regard. This feature of the case gives rise to the situation that if at all the registration of FIR No.272/2008 (mentioned above) was the cause of annoyance then Baati Khan should have been the primary target of the aggression of the appellants. However, despite being present at the crime scene, even 30-minutes before the occurrence, he escaped unhurt. In this backdrop, it can safely be concluded that the motive canvassed by the prosecution besides being not plausible also remained unproved.

17. While persuading this Court to maintain conviction of the appellants, the learned law officer as well as the counsel for the complainant portrayed the report of PFSA (Exh.PFF/1-3) as sufficient corroboratory material. An in-depth analysis of the above report reveals that though the crime empties of .44 bore alleged to have been recovered from the crime scene, matched with rifle (P.4) recovered from Ijaz Ahmed (appellant) yet the same is inconsequential in nature as the recovered articles were sent to PFSA on the same date.

18. It is also important to mention here that though Pervaiz Iqbal (convict) has not challenged his conviction through an appeal but still a reference has been forwarded by the learned trial court under section 374, Cr.P.C. which is numbered as Murder Reference No.167 of 2012. Now the question arises that if from the facts and

circumstances of the case, Ijaz Ahmed (appellant) is found entitled to acquittal, whether its benefit can be extended to Pervaiz Iqbal or not. In this regard, it is observed that section 374, Cr.P.C. (under which the Reference is forwarded to this Court) falls within the Chapter XXVII of the Criminal Procedure Code which is titled as **"OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION".** In an endeavour to have a look upon the powers blessed upon this Court, while dealing with a reference, we have gone through the provisions of sections 374 and 376, Cr.P.C. For reference sake, it appears to be in fitness of things to reproduce the foregoing provisions which are as under:-

> **374. Sentence of death to be submitted by Court of Session**. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.
>
> **376.Power of High Court to confirm sentences or annul conviction**. In any case submitted under section 374, [ ] the High Court:

(a) may confirm the sentence or pass any other sentence warranted by law or

> (b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge, or

(c) may acquit the accused person.

> Provided that no order for confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of."

A read through the foregoing provisions reveals that while deciding a reference under section 374, Cr.P.C. this Court has abundant powers to confirm the sentence or to pass any other appropriate sentence or to annul the conviction or even to order a new trial on the same or on an amended charge and lastly even to acquit an accused. It further spells out from the above two sections that in order to decide a reference under section 374, Cr.P.C. the personal presence of the convict is not made mandatory by the legislatures. A reference under section 374, Cr.P.C., even in the absence of the convict is to be decided, keeping in view the merits of the case. Hence, we are of the considered view that the fate of Pervaiz Iqbal (convict) can also be decided through a decision of the murder reference. In this regard, we are further enlightened from the precedents arising out of cases reported as Hayat Bakhsh and others v. The State (PLD 1981 SC 265), Mushtaq and 3 others v. The State (1989 PCr.LJ 2336), Master Muhammad Younas and others v. The State (2006 MLD 378) and Mst. Amiran and others v. The State and others (2017 PCr.LJ 1591).

19. The upshot of the discussion leads this Court to draw a conclusion that the testimony of the eye-witnesses, who not only were inimical to the appellants but also were found to be chance witnesses, got no support or corroboration from any other

circumstance. Likewise, the dying declaration, due to its inherent defects and dubious credential is not worthy of any legal credence. These features cumulatively give rise to reasonable doubt, entitling both the convicts to a verdict of acquittal. Consequently, we set aside the conviction and sentence of both the convicts namely Ijaz Ahmad and Pervaiz Iqbal and acquit them of the charge. Both these convicts shall be released forthwith if not required to be detained in any other criminal case. Accordingly Criminal Appeal No.1663 of 2012 is accepted. **Murder Reference No.167 of 2012** is answered in the **NEGATIVE** and death sentence awarded to Ijaz Ahmad and Pervaiz Iqbal (convicts) is **NOT CONFIRMED.**

20. For the foregoing reasons, Criminal Appeal No.663 of 2012 (against the acquittal of respondents namely Noor Muhammad, Ghulam Abbas and Shamraiz Iqbal) is dismissed.

JK/I-2/L Appeal dismissed.

;