

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.38 of 2015
 Criminal Jail Appeal No. 80 of 2015
 Conf. Case No. 01 of 2015
 Criminal Appeal No. 39 of 2015
 Criminal Jail Appeal No. 279 of 2015
 Criminal Appeal No. 40 of 2015
 Criminal Jail Appeal No. 280 of 2015
 Criminal Appeal No. 41 of 2015
 Criminal Jail Appeal No. 278 of 2015
 Criminal Appeal No. 42 of 2015
 Criminal Jail Appeal No. 281 of 2015

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants:	1. Hassan Bux son of Muhammad Essa Mari, 2. Pathan son of Attur Mari, and 3. Sain Bux son of Mohabbat Khan Mari, Through Mr. Mehmood A. Qureshi, Advocate
Complainant by:	The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh and Mr. Muhammad Ayaz Khan.
Date of hearing:	04.12.2018 and 06.12.2018.
Date of Judgment:	18.12.2018.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Hussain Bux son of Muhammad Essa Mari, Pathan son of Attur Mari and Sain Bux son of Mohabbat Khan Mari, have preferred these appeals against the impugned judgments dated 28.11.2014 passed by the learned Additional Sessions Judge Moro in Sessions Case No.258 of 2011 for offences under sections 302, 34, PPC, Sessions Case No.256/2011, for offences under sections 324, 353, 34, PPC and Sessions Case No.303, 304 and 305 of 2014, for offences under section 13(d) of the Pakistan Arms Ordinance, 1965. Learned trial court vide separate judgments dated 28.11.2014 convicted and sentenced the appellants as under:-

- (i) Appellants were awarded death sentence under Section 302(b) read with section 34, PPC and directed to be hanged till death. However, such conviction and sentence subject to confirmation of Hon'ble High Court.

- (ii) Appellants were convicted under section 353, PPC and sentenced to suffer imprisonment for two years. For offence under Section 324, PPC to rigorous imprisonment for 05 years and fine of Rs.10,000/- each or in default whereof to further undergo simple imprisonment for 03 months.
- (iii) For offences under section 13(d) of Pakistan Arms Ordinance, 1965 and sentenced to suffer rigorous imprisonment for 03 years and to pay the fine of Rs.5,000/- in default whereof to further undergo simple imprisonment for one month.

2. Brief facts of case as per FIR No.156/2011 are that the complainant Allah Ditto son of Sulleman Mari resident of village Din Muhammad Zardari, Taluka Moro, on 10.05.2011 at 11:30 A.M, alleged that deceased Hakim Ali aged about 30 years is his son and there was enmity of accused Hassan Bux Mari with the relatives of complainant. On the day of incident in the morning, the complainant alongwith his sons, Hakim Ali, Sharafuddin, and Murad Ali were available at the lands and were planting the cotton in their field, when at 08:00 AM, everyone accused Hassan Bux Mari son of Muhammad Essa armed with country made pistol, Pathan son of Attur Mari, Sain Bux son of Mohabbat Khan Mari armed with pistols, all residents of near Qazi Ahmed District Nawabshah came there. On coming they raised (Lalkara) and said that today they will not spare them and they will kill them saying so all the accused made straight firing on his son Hakim Ali, who due to sustaining fire arm injuries fell down on the ground and accused ran away alongwith their weapons towards the east. Thereafter, they saw that Hakim Ali was having firearm injuries on his neck and left arm and blood was oozing. The complainant party brought Hakim Ali at Civil Hospital Moro, where he succumbed to injuries. The complainant left the dead body under supervision of the PWs 2 and 3 and appeared at police station, hence this report.

3. The trial court framed charge against all the accused in the above referred sessions cases, to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution, in order to prove its case examined complainant Allah Ditto S/o. Sulleman at Ex. 08, he produced the FIR at Ex. 08-A, PW Sharafuddin, PW Murad, PW Imamuddin as mashir at Ex. 11 who produced the mashirnama of Lash at Ex. 11-A, the mashirnama of place of

vardat and recovery of empty cartridges and blood stained earth at Ex. 11-B, and mashirnama of recovery of clothes of deceased at Ex. 11-C, PW Muhamamd Yaseen Balal the medical officer at Ex. 12, who produced lash Chakas Form at Ex. 12-A, postmortem report at Ex. 12-B, PW HC Pir Bux Bhatti was examined at Ex.13, who produced the mashirnama of arrest and recovery of weapons from accused at Ex.13-A, PW Police constable Khadim Hussain was examined at Ex.14 who produced receipt of handing over the dead body to complainant at Ex.14-A, PW Asadullah Shahi Tapedar was examined at Ex.15, who produced the letter of Mukhtiarkar at Ex. 15-A and produced site plan at ex.15-B. PW ASI Muhammad Anwar Mallah was examined at Ex.16 who produced the departure entry at Ex. 16-A, PW H.C. Ghulam Rasool Khoso was examined as well conversant of late SIP Arbab Ali Nawal at Ex.17, he identified signatures of SIP Arbab on several documents, the learned DDPP produced letter of police sending empties and weapons to FSL and report of same, so as also chemical examiner's report along with his statement at Ex.18, and then closed the side of prosecution vide his statement at Ex. 19.

5. The statements of accused have been recorded U/s 342 Cr.P.C. at Ex.20 to Ex.22 respectively in which they denied the allegations of prosecution and stated that they have been falsely involved in this case, that the pistols were not recovered from them and the same have been foisted upon them. In the last question the accused have stated that actually the complainant is inimical towards them over the murder of father of accused Sain Bux namely Muhbat Khan. Said Muhbat Khan was murdered about five years prior to this incident for which the near relatives of complainant were booked in the case, registered by the uncle of accused Sain Bux. They do not know about the murder of this case. The deceased Hakim Ali was murdered by some unknown persons and they have falsely been involved due to old murderous enmity. The accused neither examined themselves on oath nor examined any witness in their defence.

6. Learned Additional Sessions Judge, Moro, District Nausharo Feroze after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgments dated

28.11.2014, convicted and sentenced the appellants Hassan Bux, Pathan and Sain Bux as stated above, hence these appeals have been filed. By this single judgment, we intend to dispose of the aforesaid appeals as well as Confirmation Reference No.01/2015 made by the trial court.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgments dated 28.11.2014 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. The prosecution case in a nutshell is that on 10-05-2011 at 8 am the complainant PW 1 Allah Ditto was working with his sons PW 2 Sharafuddin and PW 3 Murad and Hakim Ali (the deceased) on the land of Din Mohammed Zardari when the 3 accused all came armed and shot the deceased in their presence and then escaped from the scene of the crime. The deceased was taken to Moro hospital where he expired on account of injuries caused by firearm as per post mortem report of PW 5 Dr. Muhammed Yaseen. Thereafter on the same day the complainant registered an FIR at PS Moro against the 3 accused for murder u/s 302/34 PPC who he saw shoot and murder the deceased. SIP Arbab Ali Nawal (who died before the trial) was made IO of the case who carried out all the usual investigative and legal formalities. Two days later on 12-05-2011 PW 9 Muhammed Anwar (who had also registered the FIR) whilst on patrol received spy information that the 3 accused were at Gujjan stop where he proceeded to. On seeing him and the police party the accused opened fire and after an encounter the 3 accused were arrested and a country made pistol and 2 TT pistols were recovered from the accused which were unlicensed which lead to separate FIR's being registered against each accused under S.324, 353 and 34 PPC and 13 (d) of the Pakistan Arms Ordinance. PW 6 Head Constable Pir Bux also took part in the encounter and was a mashir of the arrest and recovery. In support of its case the prosecution relied on numerous PW's and documents including the FSL report which had been exhibited at trial.

9. The plea of the accused was that they were all completely innocent; that they had not murdered the deceased; that the police encounter was fake and the recovered pistols had been foisted upon them by the police. The complainant had falsely implicated the accused in this case as there

was an old enmity between the complainant and the accused and by implicating them in this false case the complainant was using this as a tactic to pressurize the accused into withdrawing a murder case which had been registered against relatives of the complainant.

10 Learned counsel for the appellants contended that the 3 eye witnesses could not be relied upon because they were all related to each other and all had an enmity with the accused and therefore wanted to falsely implicate the accused in the case out of revenge; that apart from the eye witness accounts there was no independent corroboration; that in effect this was an unwitnessed crime as the PW's had all concocted the story as they were not eye witnesses; that there was an unexplained delay in lodging the FIR of 3.5 hours which enabled them to fabricate the case against the accused; that there were contradictions in the ocular evidence and the medical evidence. For instance PW 2 Sharafuddin stated that the deceased was alive when they took him from the place of incident to the hospital whereas PW 5 Dr. Muhammed Yaseen stated that the deceased died instantaneously; that the eye witness PW's had dishonestly improved their evidence for instance by mentioning that Buxan had taken the deceased to hospital on his motor bike which had not been mentioned in the FIR or any of the S.161 statements of the PW's; that there was an unexplained delay in carrying out the post mortem of 4.5 hours; that there was no corroborative evidence that who actually brought the deceased to the hospital; that the blood stained clothes of the eye witness PW's had not been sent for examination; that no motive had been proved; that the whole case of the prosecution did not appeal to reason in that if there was enmity between the parties why did the accused not also kill the other PW's who were unarmed; that the recovery of the empties at the scene of the incident was doubtful as the mushir PW 4 Imam Din was also closely related to the accused; that the charring on the body of the deceased meant that the shots fired at the deceased were made at close range and as such it did not appeal to reason that if all three accused fired only 2 bullets hit the deceased from such a close distance; that only pellets were found in the body of the deceased whereas no pellet weapon was used in the crime; that the police encounter was fake and the recovered weapons were foisted upon the accused as only empties from the accused were recovered and no injuries were caused to either side or any property; that the

empties recovered at the scene of incident were deliberately delayed being sent to the FSL so that the police could malafidly match them with the foisted weapons; that the empties were not identified in the court; that the FSL report could not be relied upon as it had not been introduced by the IO and stood unproven and thus for any and all of the above reasons the accused were entitled to the benefit of the doubt and ought to be acquitted in all the impugned judgments against them. In the alternative it was submitted that if this court believed the prosecution case and decided to uphold the impugned judgments then the death sentence should be reduced to life imprisonment in respect of all three accused as the prosecution had failed to prove any motive and there was no direct evidence as to which of the 3 accused had actually fired the fatal shot which led to the death of the deceased. In support of his contentions learned counsel placed reliance on **Allah Bux and others v. The State** (2018 SCMR 354), **Atta-ur-Rehman and another v. The State** (2018 SCMR 372), **Ata Muhammad and another v. The State** (1195 SCMR 599), **Noor Muhammad v. The State and another** (2010 SCMR 97), **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 596), **Ali Sher and others v. The State** (2008 SCMR 707), **Akhtar Ali and others v. The State** (2008 SCMR 6), **Muhammad Fazil v. The State** (NLR 2005 Criminal 469) and **Text Book on "Firearms in Criminal Investigations and Trials"** (Third Edition) by Dr. B.R. Sharma

11. On the other hand Mr. Muhammad Iqbal Awan, Deputy Prosecutor General contended that the impugned judgment in respect of the murder of the deceased did not require interference as it had been decided in accordance with the evidence on record after the trial court had properly appreciated the evidence; he however when questioned on specific details and evidence about the case of the encounter with the police and the cases under S.13(d) of the Pakistan Arms Ordinance stated that he did not support these impugned judgments. Learned counsel for the complainant adopted the arguments of learned DPG

12. In support of the impugned judgment in respect of the murder case learned DPG submitted that there was no delay in registering the FIR; that the 3 eye witnesses corroborated each other in all material respects in connection with the murder of their brother; that related witnesses could

be relied upon if their evidence was found convincing and there was no enmity; that there was no enmity between the parties as the enmity hinted at related to many years ago and as such the complainant and the other PW's had no reason to falsely implicate the accused; that the medical evidence corroborated the eye witness evidence and thus the impugned judgment relating to the murder case should be upheld. Again when questioned by the court whether the case if made out justified the death sentence the learned DPG very fairly conceded that since no motive had been proven for the murder by the prosecution and it was unclear whose shot had caused the death of the accused this was a fit case where the alternate sentence of imprisonment for life would be appropriate. In support of his contentions he placed reliance on **Dr. Javaid Akhtar v. The State** (PLD 2007 Supreme Court 249), **Muhammad Siddique v. The State** (2008 SCMR 71), **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872), **Zulfiqar Ahmad and another v. The State** (2011 SCMR 492), **Nizamuddin v. The State** (2010 SCMR 1752) and **Saeed and 2 others v. The State** (2003 SCMR 747)

13. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants, the impugned judgments with their able assistance and have considered the relevant law.

14. The accused have been convicted and sentenced in 3 separate cases for 3 separate offenses. In essence these offense are (a) murder u/s 302(b) r/w 34 PPC (b) Police encounter u/s 324, 353 and 34 PPC (c) carrying unlicensed weapons u/s 13 (d) of the Pakistan Arms Ordinance 1965. We shall deal with each case in turn. Turning firstly to the murder case under S.302/34 PPC.

15. In our view the **crucial** element in this case are the eye witnesses and whether we find their evidence to be trustworthy, reliable and confidence inspiring and as such believable.

16. In this case there are 3 eye witnesses to the incident. PW 1 Allah Ditto is the complainant and father of the deceased who was an eye witness. PW 2 Sharafuddin and PW 3 Murad are the sons of PW 1 Allah Ditto and Hakim Ali the deceased was their brother and they were also eye witnesses to the murder of the deceased. All 3 eyewitness PW's were

Hari's who were working on the land of Din Mohammed Zardari at the time of the incident which they all stated occurred at 8am on 10-5-2011. Thus they were not chance witnesses. This was a day light incident and all of the aforesaid 3 PW eye witnesses have stated in their evidence that they saw the accused (Sain Bux, Hassan Bux and Pathan) approach the deceased and that accused Sain Bux and Pathan were each armed with a pistol while Hasan was armed with a country made pistol and all of the 3 accused made straight fire on the deceased who fell down and that the deceased was taken on Buxan's motor bike along with eye witness Sharafuddin to Moro hospital where he was found to be dead on arrival at 8.30 am. PW Allah Ditto and PW Murad followed later on a different motor bike and Allah Ditto registered the FIR against the accused u/s 302/34 PPC at PS Moro which was 9KM away from the incident as per FIR at 11.30 am. All the eye witness PW's corroborate each other in all material respects. The question of identification does not arise since it is an admitted position that the PW eye witnesses and the accused are all related and know each other and that it was a day light incident. In this respect reliance is placed on **Dr. Javaid Akhtar's** case (Supra). None of the eye witnesses have been damaged let alone shattered during cross examination

17. As a matter of law we can convict the accused based on the evidence of the eye witnesses which is corroborated by medical evidence if it is found to be trustworthy, reliable and confidence inspiring as was held in the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857) at P.1860 at Para 6 as under:

"6. It is true that there is only ocular testimony of P.W. 4 Mst. Khatun Bibi corroborated by medical evidence, P.W. 6 Dr. Muhammad Sarfraz Sial. The fact that there is only ocular testimony of one P.W. which is unimpeachable and confidence-inspiring corroborated by medical evidence would be sufficient to base conviction. It has been noted that this Court has time and again held that the rule of corroboration is rule of abundant caution and not a mandatory rule to be applied invariably in each case rather this is settled principle that if the Court is satisfied about the truthfulness of direct evidence, the requirement of corroborative evidence would not be of much significance in that, as it may as in the present case eye-witness account which is unimpeachable and confidence-inspiring character and is corroborated by medical evidence". (bold added).

18. Even otherwise corroboration is only a rule of prudence when there is inherent merit in the eyewitness accounts as was held in the case of **Zulfiqar Ahmed** (Supra) as under at P.497 Para 8.

"We have also examined the prime contention of Mr. Ibadur-ur-Rehman Lodhi, learned Advocate Supreme Court on behalf of appellants that no corroboration whatsoever is available on record connecting the assailants with the commission of alleged offence but it cannot be considered for the simple reason that corroboration is not a principle of law but a rule of prudence and while dilating upon the rule of corroboration it was held in case titled Shahzad v. State (2002 SCMR 1009) as follows:-

"We would like to mention here at this juncture that corroboration is not a rule of law but that of prudence. There is no denying the fact that acid test of the veracity of the prosecutrix's statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to award conviction. It is well-settled by now that "the extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but as a rule it is not necessary that there should be corroboration in every particular, all that is necessary is that the corroboration must be such as to effect the accused by connecting or tending to connect him with the crime. The corroborative evidence should tend to show that the witness or witnesses evidence that the accused took part in the crime is true. To say that certain witnesses required corroboration and then to lay clown that the corroborative evidence must show that the accused did not precise act attributed to him by the witnesses is tantamount to doing away with the evidence of those witnesses. And the same would be the result if the corroborative evidence required is such as is incompatible with the innocence of the accused. The true rule governing such situation is that the corroborative evidence should at least tend to show that the evidence of the witnesses when they name the accused as taking part in the crime is true. Corroboration of the interested testimony should be such as would remove the doubt that the accused have been falsely implicated" (Ramzan Ali v. State (PLD 1967 SC 545), Ashraf v. Crown (PLD 1956 FC 56). (bold added)

19. The question which arises is why should we not rely on the evidence of all three eye witness who corroborate each other in this case?

20. The main contention of the appellants is that there was an old enmity between the complainant's side and the appellants and as such the complainant's side had deliberately falsified the case against them. In particular there case was that in Sakrand in 2006 Muhabat Khan the uncle of accused Pathan was murdered by Mir Muhammed, Sikander Ali and Pir Bux all of whom Pathan's father had nominated in the FIR and that such nominated persons were related to the complainant and that by filing this false case against the appellants it was a pressure tactic to

compel accused Pathan's father to withdraw the FIR against the nominated accused who were relatives of the complainant.

21. This alleged enmity has been admitted in the FIR and by all the 3 PW eyewitnesses and thus they have not concealed this fact. It is also observed that this incident occurred in Sakrand 5 years before the murder of the deceased and even at the time of the Sakrand incident the PW eye witnesses had already left that area for Moro. That the concerned relatives with whom the enmity is going on are not particularly close relatives being maternal uncle and cousin and that the 3 PW eye witnesses were also related to the accused. So why would they implicate the accused bearing in mind that the murder of Muhabat Khan took place 5 years ago, in an area where they were not residing, the nominated accused are not particularly close relatives and the accused are equally close relatives? Taking all the above factors into consideration we find that the alleged enmity was not only too remote but also not strong enough to induce the complainant's side to falsely implicate the accused in this case. It is in our view at best an indirect motive

22. It has also been contended that the 3 eye witnesses PW's were all closely related and as such their evidence could not be safely relied upon as they were all bound to support each other. We disagree with such a contention especially as we have already found that the appellants were not falsely implicated in this case on account of old enmity. In this respect reliance is placed on **Zulfiqar Ahmed's case** (Supra) which held as under at P.479;

"It is well-settled by now that merely on the ground of inter se relationship the statement of a witness cannot be brushed aside. The concept of "interested witness" was discussed elaborately in case titled Iqbal alias Bala v. The State (1994 SCMR 1) and it was held that "friendship or relationship with the deceased will not be sufficient to discredit a witness particularly when there is no motive to falsely involve the accused. The principles for accepting the testimony of even an interested witness are set out in Nazir v. The State (PLD 1962 SC 269). In Khalil Ahmed v. The State (1976 SCMR 161) the testimony of deceased's son aged 15 years was accepted as he was not personally involved in any act of enmity and his statement was consistent, corroborated by the presence of injuries on his person, human blood-stained articles recovered from the accused and supported by two other witnesses. In Allah Ditta and others v. The State (1970 SCMR 734) the testimony of four P.Ws. out of which two had sustained injuries was accepted although they were related to the deceased because they were natural

witnesses, injuries sustained by two prosecution witnesses proved their presence and involvement in the occurrence and there was motive on the part of the accused to attack the deceased. Further their evidence found support from the medical evidence".

23. The next contention by the appellants is that the evidence of the 3 PW eye witnesses has been greatly improved from their initial statements under S.161 in order to strengthen their false case and as such it cannot be safely relied upon. In particular he pointed out that in none of the S.161 statements of the eye witness PW's or even the FIR had it been mentioned that Buxan brought his motor bike and took the deceased to hospital along with PW 2 Sharafuddin from the place of the incident. We accept that this is an improvement in the PW's initial statements but the question to our mind is whether such improvement is material to the prosecution case **and whether it has strengthened the prosecution case.** In our view the improvements are neither material in proving the guilt of the accused nor have they strengthened the prosecution case. This is because it is not an improvement in their eye witness account of the killing of their brother rather it concerns only the method by which he was taken to hospital which is not material in proving the prosecution case. In our view even if such improvements had not been made they would not have strengthened the prosecution case. Even in the case of **Akhtar Ali** (Supra) it was indicated that the improvement would only be relevant if it strengthened the prosecution case. The fact remains that all 3 eye witness are all consistent in their evidence as to the shooting of the deceased by all 3 accused. The method of how the accused was transported to the hospital in our view is not of huge significance. PW Muhammed Yaseem who is the Doctor who carried out the post mortem of the deceased gave evidence that the dead body arrived at 8.35 am which is about 30 minutes after the incident which is consistent with the body being brought relatively quickly to the hospital by Sharafuddin. Thus, we do not find the improvements to the eye witness statements to be material enough to discount their evidence. The position may however have been different had the PW's improved their evidence in respect of their eye witness accounts as to the killing of the deceased by the accused.

24. The next contention by the appellants is that the FIR cannot be safely relied upon as there was an undue delay in lodging the same which gave the complainant plenty of time to cook up a false case against the

accused on account of enmity. We note that the FIR was lodged 3.30 hours after the incident. In that time the body was taken to the hospital whilst the complainant initially remained on the spot. The complainant then proceeded to the hospital where he was informed about the death of his son which must have been quite a shock to him. Thereafter he lodged the FIR against named accused giving them specific roles at the PS which was about 9 KM's away. Under these circumstances we find that the delay in lodging the FIR is not inordinate and in any event such delay has been sufficiently explained by the complainant. Even in the case relied upon by the appellants of **Akhtar Ali** (Supra) it is made clear that it was unexplained delay which was relevant and not the delay itself. Indeed, in that case the delay had been 10 to 11 hours in lodging the FIR which went unexplained. Thus, the instant case is distinguishable as the delay was only 3.30 hours which in our view has been adequately explained looking to the facts and circumstances of the case which therefore negates the chances of the complainant making a false case against the appellants

25. The appellants next contended that the PW eye witnesses could not be relied upon because their evidence was not corroborated by the medical evidence. For instance PW 5 Dr. Muhammed Yaseen found that the deceased died instantaneously whereas eye witness PW 2 Sharafuddin gave evidence that the deceased was alive when they were taking him to hospital but died before their arrival according to the Dr. Muhammed Yaseen.

26. We consider the medical evidence as important keeping in view the fact that there were allegations of the accused making a false case on account of enmity, close relationship, improved statements and delay in lodging the FIR as it is supportive evidence as was held in the case of **Ata Muhammed** (Supra) at P.609 Para 16 as under;

"Another question that arises with reference to the corroboration is whether medical evidence can corroborate the ocular evidence qua the appellants. The answer is in the negative. When we talk of corroboration, it is always with regard to the story of the prosecution and with regard to the identity of each accused. The medical evidence may confirm the ocular evidence with regard to the receipt of the injury, kind of weapon used for causing the injury; duration between the injury and the death, presence of the injured P.Ws. or of the accused on the spot, but it would not connect the accused with the commission of the crime." (bold added)

27. We do not find the above referred to contradiction in the medical evidence and ocular evidence to be fatal to the prosecution case as it is quite possible that if the deceased was badly injured where blood was seen oozing PW 2 who took the deceased to hospital may have assumed that he was alive when in fact he was already dead.

28. Importantly the medical evidence shows that the deceased died on account of fire arm injuries and that he received 2 bullet wounds. One through and through and the other without an exit wound. The bullet wounds were on the arm and abdomen which ties in with the evidence of the eye witness PW's. Importantly 2 pellets were also recovered from the dead body which would tie in with the ocular evidence that a country pistol which uses pellets out of a cartridge as well as pistols were used to kill the deceased. The fact that "charring" appears in the medical report in our view is not relevant as this simply indicates that the shots were not fired from long range. Thus in our view the medical evidence supports the ocular evidence given by the PW eye witnesses.

29. In the case of **Noor Mohammed** (Supra) P. 104 it was held that both corroborative and ocular testimony is to be read together and not in isolation in the following terms;

"It was held in the case of Asadullah Muhammad Ali PLD 1971 SC 541, that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In the case of Saifullah v. The State 1958 SCMR 410, it was held that when there is no eye-witness to be relied upon, then there is nothing which can be corroborated by the recovery. In the present case, we have already discarded the ocular testimony as such there is no substantive piece of evidence which requires to be corroborated through the recoveries. Thus, the recoveries in the present circumstances of the case have no weight." (bold added)

30. In the case of **Nizamuddin** (Supra) the eye witness evidence despite being interested parties corroborated by medical evidence, as in this case, was sufficient to bring home a conviction where at P.1755 it was held as under;

"Thus we do not find any conflict in between ocular and medical evidence which, rather is corroborative on date, time of the incident and the seat of injury. Learned counsel took a plea in his arguments that the eye-witnesses were interested witnesses. There is no denial that the complainant is brother of the deceased while two other eye-witnesses, namely, Sakhawat Hussain and Muhammad Sharif are their cousins but, it is well-settled that mere relationship does not hold a witness interested to a party and

we find nothing to hold them so. On the contrary we find their ocular evidence unbiased, consistent in material aspects and more so reliable.

6. Coming to the question of delay in sending crime weapon and crime empties, admittedly, the crime empties were recovered on the day of incident and the crime weapon was recovered on 17-7-1996. It appears that the same were, however, sent to Chemical Examiner on 24-7-1996 with considerable delay but such delay shall not, in the facts and circumstances of this case, outweigh the ocular evidence found in the line with and supported by the medical evidence.

7. As far the question of absence of motive is concerned in case of murder it may be stated that even failure of the prosecution to prove the motive is not fatal to the prosecution. (2005 SCMR 427 referred). (bold added)

31. The next question is whether apart from the eye witnesses and medical evidence in respect of the murder are there any other corroborative pieces of evidence which supports the prosecution case? It appears from the evidence of PW 4 Imam Din who was a mashir at the vardat and not an eye witness that blood stained clay was collected by the police along with one empty cartridge of white colour and three empty pistol bullets. This evidence of such recoveries and the recoveries themselves which were identified in court by PW 4 Imam Din would also tend to support the prosecution case whereby one empty was a cartridge which would contain pellets from the country made pistol. Admittedly the post mortem took 4.5 hours to take place after the dead body reached the hospital. However, we do not consider such delay to be fatal to the prosecutions case as from the ocular evidence of the eye witness PW's it is apparent that the deceased received fire arm injuries and that he died from the same as was later confirmed through the post mortem. It also needs to be considered that a hospital at Moro in the interior of Sindh is unlikely to be so efficiently managed or sufficiently staffed by doctors that a post mortem would be carried out within an hour of the arrival of a dead body. This is the ground reality in the environment where this incident took place and as such we need to take such ground realities into account also keeping in view that any delay in conducting a post mortem cannot be attributed to the complainant. Moreover no benefit was derived by the prosecution by such delay.

32. In the case of Saeed (supra) which was also a murder case based largely on the evidence of interested eye witnesses the conviction was upheld in the circumstances set out as under at P.753;

"The petitioners while armed with deadly weapons attacked at the deceased and the witnesses when they were present in the courtyard of their house at 6 p.m., therefore, there was no possibility of misidentification as the complainant and his companions would not be sitting in the courtyard in dark. The report of the occurrence was lodged within one hour of the occurrence at the police station urban area, Sargodha, which was situated at a distance of 1-1/2 kilometers from the place of occurrence, therefore, there would be no question of deliberation and consultation. Close relationship of the injured witnesses namely, Muhammad Bashir and Zulfiqar with the deceased would not be a ground to discard their testimony. They were natural witnesses of the occurrence and had no motive either to make false deposition against the petitioners or substitute them for the real culprits. It is in the medical evidence that the deceased and eye-witnesses were caused injuries with sharp-edged weapon and the blood stained weapons of offence recovered at the instance of the petitioners were found to have been stained with human blood by the expert in the Forensic Science Laboratory which would provide sufficient corroboration to the ocular account. The motive part of prosecution story was proved by Muhammad Bashir (P.W.-5) who claimed to have witnessed the quarrel between Khurshid deceased and his son Shabbir 2/3 days prior to the occurrence and thus the motive would also be supportive evidence in proof of the guilty of petitioners.

We having gone through the evidence of the injured and natural witnesses, have found them truthful, confidence-inspiring and trustworthy. The evidence of eye-witnesses was not suffering from any material defect or contained any describable contradiction and discrepancy to create a slight doubt regarding the guilt of the petitioners. We find that motive in the present case was not shrouded in mystery as contended by the learned counsel and in any case, the weakness and insufficiency of motive or absence of motive in such-like cases, cannot be considered as a mitigating circumstance for lesser penalty". (bold added)

33. Thus, based on the above discussion we find that there was insufficient enmity for the complainant to falsely implicate the appellants in the case, that based on the particular facts and circumstances of the case that the relationship between the eye witness PW's does not affect the reliability of their evidence, that the improvements in the prosecution evidence are not material and have no bearing on the out come of the case, that any delay in registering the FIR has been explained as such we find no reason to disbelieve the evidence of the prosecution eye witnesses who corroborated each other in all material respects and whose evidence in our view is trustworthy and confidence inspiring and can safely be relied upon.

34. **In addition** the eye witness evidence is also supported by the medical evidence relating to injuries caused and the cause of death and the recoveries of the empties at the scene of the crime and thus when all this evidence is taken together we find that the prosecution has proved its case beyond a reasonable doubt against all 3 appellants for the murder of the deceased and as such the conviction of all the appellants in the impugned judgment in respect of the murder of deceased Hakim Ali is upheld.

35. It should be noted that the above finding has been made without taking into account the recovery of the country pistol and other pistols from the appellants, the empties recovered at the time of the police encounter and FSL report for reasons discussed later in this judgment

36. The next issue is what should the sentence be? The impugned judgment for murder has sentenced each of the appellants to death. In our view the prosecution has neither been able to prove the motive for the murder nor which of the appellants fired the fatal shot that killed Hakim Ali. Thus, under these circumstances we consider it appropriate to reduce the death sentence to that of imprisonment for life in respect of each appellant. In this respect reliance is placed on **Ali Bux** (Supra) and **Atta-Ur-Rehman** (Supra)

Turning to the police encounter case u/s 324, 353/34 PPC and the offenses under S.13 (d) of the Pakistan Arms Ordinance 1965.

37. These two judgments follow on from the main murder case discussed above whereby the appellants were arrested after a police encounter and found in possession of unlicensed weapons.

38. **Turning firstly to the police encounter case.** Learned DPG has already very fairly stated that he does not support this judgment. In our view, we do not consider that the prosecution has proved this case against the appellants beyond a reasonable doubt and that the appellants are entitled to the benefit of the doubt. This is because allegedly the encounter took place for about 30 minutes between the appellants and the police who were using deadly sophisticated weapons however during this period no one from the police party or the appellants received any bullet injury. Likewise no police mobile received any damage or any other property. That despite the long duration of the encounter not a single

empty was recovered from the police side. According to the evidence all such empties fell into the water and could not be recovered yet surprisingly empties were recovered from the appellant's side. That despite the location of the encounter being a busy area no independent mushir was associated with the arrest and recovery. That the police delayed sending the empties to the FSL for an unexplained period of 12 days. That the FSL report was not even introduced into evidence by a police officer. Thus for all the above reasons we extend the benefit of doubt in the police encounter case to the appellants u/s 324, 353 and 34 PPC and set aside the impugned judgment relating to offenses under S.324, 353 and 34 PPC and acquit the appellants of the charge.

39. **Turning to the cases under S.13 (d) of the Pakistan Arms Ordinance 1965.** Having already come to the finding that the case u/s 324, 353 and 34 PPC has not been proved against the appellants beyond a reasonable doubt we by way of continuation of reasoning and logic reach the finding that this case has also not been proved against the appellants beyond a reasonable doubt especially as it appears that there was no safe custody of any of the empties or weapons as well as safe transmission to the expert for analysis. Thus, even a positive report of the ballistic expert would not improve the case of the prosecution. Thus for all the above reasons we extend the benefit of the doubt in the S.13 (d) Pakistan Arms Ordinance cases to the appellants and set aside the impugned judgment relating to S.13 (d) Pakistan Arms Ordinance and acquit the appellants of the charge.

40. Summary

(a). The impugned judgment dated 28-11-2014 in respect of the conviction of all the appellants for the murder u/s 302/34 PPC of Hakim Ali is upheld in respect of each of the appellants however the death sentence in respect of each of the appellants is reduced to that of imprisonment for life for each appellant. The appellants are also directed to pay compensation of RS 200,000 each to the legal heirs of the deceased and in default of payment to undergo S.I for 6 months more. The appellants shall be entitled to the benefit of S.382 (B) Cr.PC. As such the confirmation reference is answered in the negative.

(b). The impugned judgment dated 28-11-2014 in respect of the conviction of all the appellants for offenses under S.324, 353 and 34 PPC is set aside and the appellants stand acquitted of the charge.

(c). The impugned Judgment dated 28-11-2014 in respect of the conviction of all the appellants for an offense u/s 13 (d) of the Pakistan Arms Ordinance 1965 is set aside and the appellants stand acquitted of the charge.

41. The appeals and confirmation reference stand disposed of in the above terms.

Arif