

Murder of PTI - Death to life - Some minor doubts 01

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 249 & 250 of 2018

a/w Conf. Case 11/2018

M. Rashid & The State
another

HIGH COURT OF SINDH

Composition of Bench: S.B./D. B.

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Khadim Hussain Tirmizi

Date(s) of Hearing: 6th, 7th & 8th of Aug. 2018

Decide on: 20-08-2019

(a) Judgment approved for reporting:

Yes

KHJL

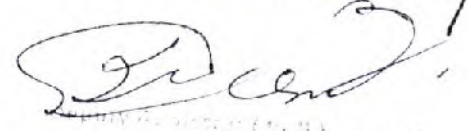
CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- NOTE:
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
 - (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

14-09-2018



3209

BEFORE THE HON'BLE HIGH COURT OF SINDH AT KARACHI
(CRIMINAL APPELLANT JURISDICTION)

Special Anti-Terrorism Appeal # D- *248* of 2018

1. MUHAMMAD RASHID SON OF ABDUL HAMEED

Muslim, Adult, Resident of House No.27/7, B-1 Area,
Liaquatabad at Karachi Presently Confined at Central Prison,
KARACHI .

2. ZAHID ABBAS SON OF GHULAM ABBAS

Muslim, Adult, Resident of Plot No. C-12/C,
Flat No.03, Street-01, Badar Commercial, Phase-5,
DHA at Karachi, Presently Confined at Central Prison,
KARACHI

APPELLANTS / ACCUSED

VERSUS

THE STATE

RESPONDENT

FIR NO. 198/2013

U/S. 302/109/34 PPC R/W Section 7 ATA

POLICE STATION. Gizri, Karachi

APPEAL AGAINST CONVICTION U/S. 25 OF THE ANTI-TERRORISM
ACT, 1997, R/W SECTION 410 CRIMINAL PROCEDURE CODE.

Being aggrieved with dissatisfied by the consolidated judgment dated 31/08/2018 passed by the learned judge, Anti-Terrorism Court No.XVII, Inside Central Prison at Karachi, In Special Case No.325 of 2015 (old special case no.341(III)/2014) whereby the appellant has been convicted under section 265-H(2) and sentenced them to death as (Tazir) both be hanged with the neck till their death with directions to pay Rs.2,00,000/- each to the legal heirs of the deceased by way of compensation under section 544-A Cr.P.C and in default of payment

14-09-2018

03

Pend 1

BEFORE THE HON'BLE HIGH COURT OF SINDH AT KARACHI
(CRIMINAL APPELLANT JURISDICTION)

Special Anti-Terrorism Appeal # D-250 of 2018

ZAHID ABBAS SON OF GHULAM ABBAS

Muslim, Adult, Resident of Plot No. C-12/C,

Flat No.03, Street-01, Badar Commercial, Phase-5,

DHA at Karachi, Presently Confined at Central Prison,

KARACHI

APPELLANT / ACCUSED

VERSUS

THE STATE

RESPONDENT

FIR NO. 555/2014

U/S. 23(i)-A of Sindh Arms Act 2013

POLICE STATION. Boat Basin, Karachi

**APPEAL AGAINST CONVICTION U/S. 25 OF THE ANTI-TERRORISM
ACT, 1997, R/W SECTION 410 CRIMINAL PROCEDURE CODE.**

Being aggrieved with dissatisfied by the consolidated judgment dated 31/08/2018 passed by the learned judge, Anti-Terrorism Court No.XVII, Inside Central Prison at Karachi, In Special Case No.326 of 2015 (old special case no.352(III)/2014) whereby the appellant has been convicted under section 265-H(2) and sentenced him to R.I for Seven years with directions to pay fine Rs.50,000/- and in default of payment of fine thereof, further undergo S.I for six months, the benefit of section 382-B Cr.P.C is also extended to him, Therefore appellant most respectfully prefers this appeal, on the consideration of the following, inter-alia, facts, ground and prays that This Hon'ble Court may be pleased to admit this appeal and after calling for the record and proceeding of above said

(609)

**OFFICE OF THE JUDGE ANTI - TERRORISM COURT
NO. XVII, AT KARACHI.**

No. ATC-XVII/K.DIV/258 /2018, dated. 04-09-2018

To,

The Registrar,
Honourable High Court of Sindh,
Karachi

SUBJECT: REFERENCE U/S 374 OF CR.P.C IN SPECIAL CASE NO. 325/2015, OLD SPECIAL CASE NO. 341(III)/2014, FIR 198/2013 U/S 302/324/109/34 PPC R/W SECTION 7 OF ATA 1997. P/S. GIZRI, KARACHI, THE STATE VERSUS MUHAMMAD RASHID @ MASTER & OTHERS U/S 25(2) OF ATA. 1997.

I have the honour to submit that the below mentioned case has been decided on 31-08-2018 and the accused persons namely Muhammad Rashid @ Master s/o Abdul Hameed & Zahid Abbas @ Zaidi s/o Ghulam Abbas have been awarded death sentence subject to confirmation by the Honourable High Court of Sindh, Karachi U/S 374 of Cr.P.C.

Sr. No.	Case No.	Accused Names	FIR No.	Police Station	U/S
01.	Special Case No. 325/2015 Old Special Case No. 341(III)/2014	1. Muhammad Rashid @ Master s/o Abdul Hameed 2. Zahid Abbas @ Zaidi s/o Ghulam Abbas	198 /2013	Gizri, KARACHI	302/324/109/34 PPC R/W Section 7 of ATA. 1997.



The R&Ps of the above case is sent in view of section 25(2) of for confirmation of death sentence of the above accused or

otherwise.

Judge
Anti-Terrorism Court No. XVII
Karachi
JUDGE
ANTI-TERRORISM COURT NO: XVII KARACHI

THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Appeal No.249 of 2018.
Spl. Crl. Anti-Terrorism Appeal No.250 of 2018.
Confirmation Case No.11 of 2018.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.

Appellants: 1. Muhammad Rashid S/o. Abdul Hameed
2. Zahid Abbas S/o. Ghulam Abbas,
through M/s. Abdul Razzak and Mamoon
A.K. Sherwani, Advocates.

Respondent: The State through Mr. Muhammad Iqbal
Awan, Deputy Prosecutor General Sindh and
Mr. Mushtaq Ahmed Jehangiri, Special
Prosecutor for Rangers.

Date of hearing: 06.08.2019, 07.08.2019 and 08.08.2019

Date of Judgment: 20.08.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Appellants Muhammad Rashid @ Master and Zahid Abbas @ Zaidi were tried by learned Judge, Anti-Terrorism Court No.XVII, Karachi in Special Cases No.325 and 326 of 2015 arising out of Crime No.198/2013 U/s. 302/324/109/34 PPC R/w Section 7 of ATA, 1997 at P.S. Gizri, Karachi and in respect of appellant Zahid Abbas Crime No.555 of 2014 U/s. 23(i)(A) of Sindh Arms Act at P.S. Boat Basin, Karachi. After trial vide judgment dated 31.08.2018 (the impugned judgment), the appellants were convicted and sentenced as under:-

- 1) Under Section 302(B)/34 PPC each and sentenced to death as (Tazir) with directions to pay Rs.2,00,000/- each to the legal heirs of the deceased by way of compensation u/s. 544-A Cr.P.C. and in default of payment thereof further undergo S.I. for six months.
- 2) Under Section 7(1) of Anti-Terrorism Act, 1997 each and sentenced to death with fine of Rs.2,00,000/- each and in default of payment thereof, further undergo S.I. for six months.

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- 3) Zahid Abbas @ Zaidi S/o. Ghulam Abbas for the offence under section 23(1)(a) of Sindh Arms Act, 2013 to undergo R.I. for seven years and to pay fine of Rs.50,000/- in default of fine to undergo S.I. for six months more.

Forfeiture of movable and immovable properties of accused persons was also ordered to the extent of Rs.5,00,000/- each.

All the sentences were ordered to run concurrently. The appellants were extended the benefit of section 382 (B) Cr.P.C. The case against absconding accused persons was kept on dormant file.

2. The brief facts of the prosecution case as per FIR No.198/2014 are that SHO Sohail Ahmed Khan of PS Gizri lodged FIR on behalf of the State on 22.05.2013 at about 1245 hours stating therein that on 18.05.2013, he was on surveillance in the area on an official police mobile-1 Gizri. At about 2215 hours he received information via emergency 15 and immediately reached at behind the Jam Sadiq Bungalow at Main Gizri Avenue 09th Street Phase-IV, in the bungalow No.16.J/1 and came to know that at the main gate inside the car porch two unknown armed persons have fired upon Mst. Zuhra Shahid (the deceased) with fire arm at about 2205 hours and also came to know that she had been taken by her daughter to National Medical Center (NMC) Kala Pull through ambulance. On receiving such information being SHO he gave directions to the duty officer ASI Muhammad Muslim to reach NMC. During that time investigation staff also reached at the scene of the crime. ASI Muslim after reaching the hospital informed him that 70 years old victim namely Mst. Zuhra Shahid has died due to injuries and shifted her dead body to JPMC and after getting permission in writing conducted proceedings u/s 174 Cr.P.C. and got postmortem of deceased through WMLO Dr. Nasreen Qamar and received postmortem report No.488/13 and cause of death certificate from WMLO. After process, the dead body was handed over to the family of the deceased who have stated that after her funeral and burial the case shall be lodged but they did not come to lodge the FIR despite being contacted by him several times and they did not turn up to record their statement u/s 154 Cr.P.C. When the whole facts and circumstances based on the information collected from the spot it transpires that the deceased reached at the main gate of her above mentioned bungalow at about 2205 hours from Defence Club Phase-II along with her driver in Suzuki Cultus white colour having registration Number AEH-212. The driver after stopping the car opened the gate when

the deceased herself got down from the car when she was entering inside from the main gate, in the meantime two youngsters aged about 20/22 years appeared there, who were wearing black Qameez one of whom remained sitting on the motorcycle unknown number while another youngster who was small, grown up, un-shaved with a slight beard hurriedly entered the court yard of the bungalow and towards the deceased Zuhra Shahid, who was in the car porch of the bungalow who intended to hand over her purse to the accused as he appeared to be a robber but the accused threw it with his hand by pushing the purse and fired upon her from his pistol. One bullet hit below the chin and another bullet hit her on right shoulder and she fell down due to injuries. Both the culprits by making aerial firing created terror in the area and ran away on said motor bike. Since none has come forward to lodge the FIR from the family of the deceased therefore, he being SHO of P.S. Gizri lodged the FIR No.198/2014 for the offence u/s 302/34 PPC r/w Section 7 ATA, 1997 on behalf of the State against two unknown persons, whose names and addresses are not known for making firing and committing murder of Ms. Zuhra Shahid and creating terror and panic in the area.

3. On the same day Inspector Ali Ahmed of Investigation Branch reached alongwith his staff at the place of incident and inspected the place of incident and secured the blood from the spot through cotton swab and so also recovered one iron sikka of pistol from the car port and so also one empty bullet of 30 bore pistol from outside the gate and sealed the same and prepared such memo and so also took the photographs of the place of incident. During investigation he has recorded 161 Cr.P.C. statements of the witnesses and so also he got prepared naqsha nazri/site plan of the incident through Tapedar and so also sent the 30 bore empty to FSL for report and so also sent blood stained swabs and last wearing cloths of the deceased to the chemical examiner. Since the culprits were not traced out therefore, the FIR was disposed of in "A" Class and such report was submitted before ATC-iii on 01.07.2013. On the transfer of IO/Inspector Ali Ahmed the Investigation was entrusted to SIO/Inspector Rafique Ahmad Awan. On 25.09.2014 during investigation he received information that accused Rashid @ Master S/o. Abdul Hameed was arrested by Gizri police in FIR No.518/2014 u/s. 23(i)(A) of Sindh Arms Act, 2013 and accused has made disclosure before the police of his

involvement in the murder of Mst. Zuhra Shahid. On such information I.O. Rafique Awan interrogated the accused, who disclosed that he was affiliated with the MQM and on the instructions of their high command they have made a plan along with co-accused Zahid Abbas Zaidi, Junaid Bukhari @ Phora, Tariq Nawab, Asif Ganja, Irfan @ Lamba and Kaleem for killing of Mst. Zuhra Shahid, worker of Pakistan Taherrk-e-Insaaf Party for winning the Election of 2013 and also disclosed that on the day of incident he alongwith accused Zahid @ Zaidi were on motorcycle went to the bungalow of Mst. Zuhra Shahid and other accused persons backing them on motorcycle in order to face untoward situation and also disclosed that he remained sitting on the motorcycle in front of bungalow whereas co-accused Zahid Abbas @ Zaidi fired upon Mst. Zuhra Shahid and then they ran away from the spot. The accused has also pointed out that the place of incident and then he was arrested in this case under the memo dated 25.09.2014 at about 0745 hours.

4. On 02.10.2014 police of Boat Basin has arrested accused Zahid Abbas Zaidi in case Crime No.555/2014 u/s 23(i)(A) of Sindh Arms Act 2013 and during interrogation the accused has made disclosure of his involvement in the murder of Mst. Zuhra Shahid and on such disclosure the Boat Basin police informed the I.O. Rafique Ahmed Awan, who has went there and after interrogation arrested the accused under the memo dated 02.10.2014 and on 03.10.2014 accused pointed out the place of incident. Both the accused persons were also produced before the Joint Interrogation Team (JIT) and were found Black.

5. On 13.10.2014 both the accused were produced before Judicial Magistrate Court No.V, South Karachi and during the identification parade the eye witness Ghulam Rasool identified both the accused persons.

6. The I.O. had also sent the pistol recovered from the accused Zahid alias Zaidi for matching with empty from the spot and after completing the usual investigation he produced the challan before the Court of ATC-III on 24.10.2014. In the challan the accused persons Muhammad Rashid @ Master and Zahid Abbas Zaidi were shown as arrested whereas the others co-accused persons were shown as absconders.

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7. At trial the prosecution examined 16 prosecution witnesses and exhibited numerous documents in order to prove its case before closing its side. The statements of the accused Rashid @ Master and Zahid Abbas @ Zaidi were recorded u/s 342 Cr.P.C. who claimed false implication in the present cases. They did not give evidence under oath but called two and one DW respectively in support of there defense. After assessing the evidence the learned trial judge vide the impugned judgment convicted and sentenced the accused as set out earlier in this judgment hence these appeals against conviction have been filed by the accused.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 31-08-2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned advocate for appellant Zahid Abbas has contended that there was a unexplained delay of 4 days in filing the FIR which lead to its concoction; that the purported eye witness was not present at the scene and that he is a put up witness; that there is no evidence of safe recovery of the Sikka and the empty from the time they were recovered on 18-5-2013 until they were sent to the FSL and there was a long unexplained delay of 18 months in sending the empty and Sikka to the FSL which was deliberately done in order to tie in with the later foisted pistol on accused Zahid Abbas and the same could not be relied upon; that no microscopic photo of the empty was produced at trial which rendered the FSL report unreliable; that the identification parade was not carried out in accordance with the law and there was an unexplained delay of 11 days in holding the same; that the medical report showed that the trajectory of the bullet could not support the eye witness evidence and that for all the above reasons the appellant Zahid Abbas was entitled to be acquitted based on the benefit of the doubt being extended to him. In support of his contentions he placed reliance on **The State of Gujrat v. Adam Fateh Mohmed Umatiya and Ors** (1971 SC 208), **Faheem Ali V. The State** (2019 MLD 468, **Abdul Qayoom and another v. The State** (2018 P Cr. L J Note 229), **Tahir Mehmood @ Achoo v. The State** (2018 SCMR 169), **Muhammad Aslam v. Sabir Hussain and others** (2009 SCMR 985), **Muhammad Nadeem alias Banka v. The Sate** (2011 SCMR 1517), **Ghulam Akbar and others v. The State** (2007 YLR 1506), **Ali Sher and**

others v. The State (2008 SCMR 707), Umer Khursheed and another v. Syed Tufail Ahmad (2018 SCMR 1051), Hayatullah v. The State (2018 SCMR 2092), Muhammad Shah v. The State, (2010 SCMR 1009), Sabir Ali v. The State (2011 SCMR 629), Wahab Ali and another v. The State (2010 P Cr.L J 157), Mst. Sughra Begum and another v. Qaiser Pervez and others (2015 SCMR 1142), Rahat Ali v. The State (2010 SCMR 584), Muhammad Asif v. The State (2017 SCMR 486), Shoukat Ali v. The State (PLD 2007 SC 93) and Ahmad Nawaz and others v. The State (2016 P Cr. LJ 1267),

10. Learned counsel for Muhammad Rashid adopted the arguments of Zahid Abbas and in addition contended that the identification parade was not held in accordance with law and that there was a delay of 19 days in holding the identification parade; that the medical evidence contradicted the eye witness account and that in such situations the medical evidence took preference over the ocular evidence; that there were major contradictions in the evidence of the PW's and that for all the above reasons the appellant Muhammed Rashid was entitled to be acquitted based on the benefit of the doubt being extended to him. In support of his contentions he placed reliance on **Budho v. The State** (PLD 1965 (W.P) Karachi 76), **Muhammad Asif v. The State** (2017 SCMR 486), **Jalal v. The State** (PLJ 1974 Cr.C. (Kar.)244), **Syed Saeed Muhammad Shah and another v. The State** (1993 SCMR 550), **Rahat Ali v. The State** (2010 SCMR 584), **Javed Khan alias Bacha and another v. The State** (2017 SCMR 524), **Tariq Pervez v. The State** (1995 SCMR 1345), **Mian Sohail Ahmed and others v. The State** (2019 SCMR 956), **Nazir and 2 others v. The State** (2018 P Cr. L J Note 14), **Majeed alias Majeedi and others v. The State** (2019 SCMR 301), **State through Advocate General Sindh v. Farman Hussain and others** (PLD 1995 SC 1), **Asghar Ali alias Sabah and others v. The State** (1992 SCMR 2088), **Kamal Din alias Kamala v. The State** (2018 SCMR 577), **Gulfam and another v. The State** (2017 SCMR 1189), **Syed Zaki Kazmi v. The State** (2018 P Cr. L J 976), **Tahir Javed v. The State** (2009 SCMR 166), **Muhammad Shafi alias Kuddoo v. The State** (2019 SCMR 1045), **Muhammad Sharifan Bibi v. Muhammad Yasin and others** (2012 SCMR 82), **Abdul Jabbar and another v. The State** (2019 SCMR 129) and **Muhammad Arif v. The State** (2019 SCMR 631).

11. On the other hand, Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General and Mr. Mushtaq Ahmed Jehangiri, Special Prosecutor for Rangers have fully supported the impugned judgment. They have contended that the presence of the eye witness at the scene of the incident has been accepted by the accused; that the eye witness was with the police since the time of the incident and had shown the police the place of the incident; that the delay in registering the FIR had been explained and that there was no delay in recording the S.161 statement of the eye witness; that the motive of the accused to murder the deceased had been established since the accused were hard core MQM(A) activists who had been sent by their high ups in order to murder the deceased due to the cut throat rivalry between the MQM(A) and the PTI over the election to NA 250; that the medical evidence corroborated the ocular evidence; that the recovered empty matched with the recovered pistol and that there was no undue delay in sending the empty to the FSL; that the identification parade had been carried out in accordance with the law and as such the impugned judgment be upheld, the appeals dismissed and the death penalty handed down to the appellants be maintained. In support of their contentions, they placed reliance on **Muhammad Ali v. The State** ((PLJ 2000 SC 309), **Sikandar v. The State** (2006 SCMR 1786), **Muhammad Ehsan v. The State** (2006 SCMR 1857), **Muhammad Sohail Naveed v. The State** (1992 P Cr. L J 1339), **Noor Zaman v. The State** (2005 P Cr. L J 2016), **Rafaqat Ali v. The State** (2016 SCMR 1766), **Syed Hamid Mukhtar Shah v. Muhammad Azam and 2 others** (2005 SCMR 427), **Arif Masih and another v. The State** (PLD 2001 SC 398), **Abdul Rauf v. The State** (2003 SCMR 522) and **Ghazanfar Ali @ Pappu and another v. The State** (2012 SCMR 215).

12. 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 judgment with their able assistance and have considered the relevant law including that cited at the bar.

13. It does not appear to be disputed by either party that according to the evidence on record the deceased was murdered on 18-05-2013 at about 2200 hours outside the porch of her house on account of firearm injuries.

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The issue before us is the identity of the person (s) who murdered the deceased.

14. At the outset we note that there has been a 4 day delay in lodging the FIR. Such delay can be fatal to the prosecution case unless it is adequately explained. In our view the background to the case adequately explains the delay in filing the FIR. Firstly, that as per the evidence the complainant had asked and was awaiting for the relatives of the deceased who were present with her when she died at hospital to register the FIR however when they failed to do so he registered the FIR on behalf of the State without nominating the appellants in the FIR. Secondly, this was allegedly a politically motivated execution by members of MQM (A) against a rival PTI candidate who was seen as a threat and a hurdle to the MQM (A) winning the disputed NA 250 seat in Karachi. Hira the wife of accused Zahid Abbas even in her cross examination whilst giving evidence for Zahid Abbas admitted that accused Zahid Abbas was unit in charge of Defense/Clifton of MQM at the time of the murder. Thus it would be unlikely in the background of this case where a highly charged atmosphere had been created between the MQM and PTI over the election of NA 250 that any one would like to voluntarily come forward and register an FIR for murder fearing reprisals and hence it was left to the State to register the FIR which it did after 4 days since it could wait no longer for the relatives to come forward. Thus, under these circumstances we do not find the delay in lodging the FIR fatal to the prosecution case and that the delay has been explained on account of the particular facts and circumstances which make up the background to this case.

15. The FIR is quite specific as to how the deceased was murdered and assigns specific roles to both the accused. Namely, that they both came on a motor bike and whilst one remained on the motor bike the other dismounted and shot the deceased from close range. Admittedly the FIR is based on hearsay evidence which all stems from the evidence of eye witness PW 15 Ghulam Rasool who was the driver of the deceased but the contents of the FIR have been corroborated through his evidence at trial. Being a driver and the alleged accused being assassins it would not be expected that he could name the accused in the FIR who he had never come across before and as such we do not find the fact that the accused

are not named in the FIR as being particularly relevant but rather adding to the credibility of the eye witness and strongly pointing to the fact that this was not a cooked up case. If the accused were already in police custody and the police wanted to falsely implicate them in this offence they could simply have named them in the FIR which they did not.

16. With regard to the delay in recording of the eye witness' S.161 statement based on the facts and circumstances of the case as discussed above we find that there has been no unreasonable delay in recording of eye witness PW 15 Ghulam Rasool's S.161 statement. This is because the incident took place on 18-05-2013 at nighttime, the FIR was lodged 4 days later (as explained above) on 22-05-2013 (before which time it is not possible to record any S.161 statements as there was no FIR) and the S.161 statement of the eye witness PW 15 Ghulam Rasool was recorded on 23-05-2013 which was a day after the FIR was lodged

17. It appears that both the accused made extrajudicial confessions to the police whilst in police custody in other matters and led the police to the place of the incident. We do not consider these confessions made by the accused to the police to be of any relevance since it is well settled law that such confessions before the police are inadmissible in the eyes of the law. We also do not consider the accused taking the police to the scene of the crime to be of any relevance as the police already knew where the scene of the crime was. With regards to the recoveries of the Sikka and the empty it appears that there was no delay in sending these to the FSL for their report as they were sent to the FSL on 22-05-13 after 4 days and later married with the pistol recovered from accused Zahid Abbas and as such can be used as corroborative evidence against the accused. The issue of there being no microscopic photo of the empty we find of no relevance as this aspect was not raised at the trial and is not even a part of the paper book or R&P's and it is settled law that we can only decide the appeal based on the evidence on record and not on new evidence which was not adduced at trial. We have also considered the evidence of the PW's and find no material contradictions in the same as would lead to the PW's being disbelieved. In fact a number of PW's have given hearsay evidence

with respect to the actual murder of the deceased upon which we have not placed any reliance.

18. In our view the case turns primarily on three key issues along with any corroborative or supporting material. Namely (a) whether we find the evidence of the sole eye witness, trustworthy, reliable and confidence inspiring and (b) in particular whether both the accused have been correctly picked out at the identification parade by the eye witness as being the culprits and (c) whether the identification parade has been carried out in accordance with the law.

Turning to the eyewitness.

19. The sole eye witness is PW 15 Ghulam Rasool who was the driver of the deceased on the fateful night. It is settled law that we can convict on the evidence of a sole eye witness if we find him to be trustworthy, reliable and confidence inspiring. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857) which was recently affirmed by the Supreme court in the unreported case of **Saleem Zada V State** dated 10-06-2019 in Criminal Petitions No.67P and 68P of 2014. Ghulam Rasool is not a chance witness and had been working with the deceased for a number of years and was even living in the servant quarters with his family at the deceased's bungalow. He was regarded as a member of the family and his presence at the scene of the crime was not disputed by the defense at trial during cross examination and indeed his presence at the scene was natural based on the particular facts and circumstances of the case as he was the driver of the deceased and he was bringing the deceased home from dinner at the defense club when the incident took place when they arrived at her house from the club. His evidence was precise and to the point. He had no enmity with the accused, he was not an interested witness or related to the deceased in any way. He had no reason to not tell the truth. His evidence was not shaken during cross examination. We totally reject the defense suggestion that he killed the deceased because he was not given a pay rise. With regard to source of light the evidence shows that this was from the street lights and headlights. He was also very close to the accused when the incident took place so would have had no problem identifying the accused who he

observed for at least a minute during the incident. He did not try to intervene because he was unarmed and would probably have been killed as well by the accused if he had tried to intervene and as he admitted in his cross examination he was afraid. The fact that his S.161 statement was not recorded immediately after the incident based on the particular facts and circumstances of this case where the FIR was not filed after a four day delay coupled to the background of the case as discussed earlier we do not find particularly significant. He was even honest enough in his evidence to admit that he could only identify the two convicted accused and not acquitted accused Irfan. Thus, we find his evidence to be reliable, trust worthy and confidence inspiring and are of the view that we can convict the accused on his evidence which is also supported/corroborated by the medical evidence to a large extent.

20. According to eye witness Ghulam Rasool the deceased received 2 bullet wounds; one in the neck and one in the right shoulder whereas as per the post mortem report the deceased only received one bullet wound in the neck. It is settled law that oral evidence will take preference over medical evidence when in conflict. In this case the conflict is that the deceased according to the eye witness received 2 bullet wounds whereas per post mortem report the deceased only received one bullet wound.

21. However we are of the view that this discrepancy is not in and of itself sufficient to extend the benefit of the doubt to the accused as in **such cases ocular evidence provided it is trust worthy, reliable and confidence inspiring shall take precedence over corroborative and support evidence such as medical evidence** as in this case if the two are to a certain extent contradictory. In this respect reliance is placed on the case of **Muhammed Riaz V Muhammed Zaman** (PLD 2005 SC 484) where it was held that even if the eye witness evidence slightly differed from the medical evidence this was no ground to disbelieve the eye witness evidence in the following terms at P.491

"We having examined the evidence in detail find that the reasons given by the High Court for disbelieving the presence of witnesses at the spot were highly speculative, flimsy and artificial. The conclusion that the injuries on the person of deceased were the result of one shot which was probably not fired from front and medical evidence was inconsistent to the ocular account of eye-witnesses was also not based on sound reasons. The statement of doctor to the

effect that the injuries were the result of single shot, being only an opinion which may or may not be correct and would not be sufficient to discard the direct evidence and suggest the non presence of eye-witnesses at the spot. The conflict of medical evidence with ocular account in respect of number and nature of injuries may be relevant to ascertain the role of an individual accused in the occurrence but this is not a valid ground to disbelieve the eye-witnesses and exclude their evidence from consideration. We may observe that even if it would be assumed that injuries were result of single shot, still in the facts of the present case, it would be difficult to suggest that witnesses were not truthful or the respondents were not responsible for the crime." (bold added)

22. Like wise in the case of **Muhammed Hanif v. The State** (PLD 1993 SC 895) it was held as under at P.899;

"The expert's evidence may it be, medical or that of Ballistic Expert, is entirely in the nature of confirmatory or explanatory of direct or other circumstantial evidence, but if there is direct evidence as in the instant case, which is definite, trustworthy, the confirmatory evidence is not of much significance. In any case, it cannot outweigh the direct evidence." (bold added)

23. Again in the case of **Amir Khan v. The State** (2000 SCMR 1885), in terms of ocular evidence outweighing corroborative/supportive evidence such as medical evidence it was held as under at P.1888;

"It has time and again been held by the superior courts that if a bald statement of a medical expert is opposed to the proved and admitted confidence inspiring and reliable account of the eye-witnesses or other material and trustworthy evidence on record, then the latter are to be preferred against the former."

24. An identical view was also taken in the recent Indian supreme court case of **Balvir V State of Madhya Pradesh** dated 19-02-2019 when there was a slight difference between the ocular evidence and the medical evidence at Para's 26 and 27 in the following terms;

"26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In Ramnand Yadav v. Prabhu Nath Jha and others (2003) 12 SCC 606, the Supreme Court held as under:-

"17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference".(bold added)

The same principle was reiterated in State of U.P. v. Krishna Gopal and another (1988) 4 SCC 302, where the Supreme Court held "that eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility".

*27. The inconsistencies pointed out in the evidence of eye-witnesses inter se and the alleged inconsistencies between the evidence of eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case. **The evidence of eye witnesses are the eyes and ears of justice. The consistent version of PWs 2, 3 and 13 cannot be decided on the touchstone of medical evidence".** (bold added)*

25. What we find of significance however, which in our view overrides this discrepancy in the ocular account and the medical evidence **and supports the evidence of the eye witness** is that the eye witness not only states that the deceased was shot in the neck but it is apparent from his evidence that the shot was fired at the deceased from close range as revealed by this extract of his evidence set out below;

*"On seeing the person in the bungalow Mst. Zuhra Shahid immediately by thinking that he is robber she has tried to hand over the purse to him but he took the purse thrown it and **pointed the loaded pistol on the neck of Zuhra Shahid and she tried with her hand to push the weapon away but that person has made one fire of pistol on her neck.**"*

26. In this respect the evidence of PW 6 Dr.Nasreen Qamar who was the MLO in describing the surface wounds and injuries of the deceased in her evidence is significant which is set out below;

*"01. firearm wound of **entry on chin** slightly sub-mental region to the left on the midline, circular in shape with swelling around, measuring 0.5 cm in diameter, margins **inverted blackening charring and tattooing** around the wound present"*

27. According to Modi's "Medical Jurisprudence and Toxicology" 23rd ED at P.721 with regard to distance of the firearm from the wound it is opined as under;

"Distance of the Firearm

If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder." (bold added)

28. Thus, this medical evidence concerning the distance from where the deceased was shot being from close range fully corroborates the evidence of the eye witness who clearly indicates in his evidence that the deceased was shot in the neck from close range which in our view is near enough to the chin which covers the front of the neck. We are of the view that it is not possible to accurately trace the trajectory of a bullet once it enters the body unless the wound is "through and through" as it is well known in medical jurisprudence that once the bullet enters the body it can potentially exit from any part of the body because its natural trajectory can be changed by it hitting bone or any other hard part of the body so this argument of the appellant is rejected. In the assassination of former USA President JF Kennedy you even had the concept of the so called "magic bullet" which took all sorts of twists and turns once it entered President JF Kennedy's body when he was assassinated by firearm.

Turning to whether both the accused have been correctly picked out at the identification parade by the eye witness as being the culprits.

29. According to the evidence of PW 3 Rana Asghar there was light at the scene of the incident who during his cross examination states that:

"SIO prepared memo of place of occurrence and Naksh-e-Nazri at spot/main gate under the electricity light of the said bungalow and also in the street lights"

30. Thus, although it was a night time incident we are satisfied that there was sufficient light for the eye witness to identify the accused. Even otherwise it cannot simply be presumed that there was no light available for identification purposes where there is positive evidence of the availability of light. In this respect reliance is placed on **Nasrullah Khan V**

State (2010 SCMR 881). This is more so since the incident took place right in front of the eye witness and he was able to observe the two accused for at least one minute from close range. Sufficient hulia is also given of Zahid Abbas in the FIR to whom the specific role of shooting the deceased is given and to a lesser extent to Muhammed Rashid who is given the specific role of remaining on the motor bike during the murder.

31. Thus, we have no doubt that the eye witness Ghulam Rasool was able to correctly identify the accused and pick them out of the identification parade.

Turning to the question of whether the identification parade was carried out in accordance with the law.

32. We have examined the evidence on record relating to the identification parade and in particular the evidence of PW 12 Mumtaz Ali Solangi who was the IInd senior civil judge who carried out the identification parade, the memorandum of the identification parade and the evidence of PW 15 eye witness Ghulam Rasool who identified the accused from the identification parade.

33. We have taken into account the guidelines for carrying out identification parades as laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488) and we find no legal defects in the identification parade as would warrant holding it to be unreliable or inadmissible and as such we find that the identification parade has been carried out in accordance with law and can be safely relied upon. Any delay in holding the identification parade has been explained by PW 12 Mumtaz Ali Solangi who held the identification parade on account of him earlier being on leave and the eye witness had no opportunity to see the accused after the incident before identifying them at the identification parade as he had already moved to the Punjab prior to that time and before the accused were arrested. We also consider that since the incident only occurred only 18 months before the identification parade and the eye witness had a clear unobstructed view of the murder this time lapse did not affect his ability to correctly identify the accused at the identification parade.

34. Although it is for the prosecution to prove its case against the accused beyond a reasonable doubt we have also considered the defense

case of false implication which we do not find very convincing at all. The fact that at least one of the accused may have filed a constitutional petition in connection with his prior abduction before the murder does not on its own create a dent in the prosecution case especially as in Karachi it is not unknown for criminals to go under ground and file such petitions before committing their crimes in order to set up a false defense. As for the DW's we consider that they have been exposed during cross examination and we do not find them believable or truthful at all and as such we have given no weight to their evidence in chief.

35. Thus, keeping in view that we have found the eye witness to be reliable, trustworthy and confidence inspiring, that he has been in large part corroborated by the medical evidence especially with regard to location of the wound on the deceased's body and the distance from which the shot was fired, that he was in a position to correctly identify the accused from the identification parade which he did and that such identification parade was carried out in accordance with the law and that there was sufficient evidence to prove through the PW's that the pistol used to murder the deceased was recovered from accused Zahid Abbas without a license and that the empty recovered at the scene married with the pistol recovered from Zahid Abbas at the time of his arrest we hereby uphold the convictions of both the accused in the impugned judgment.

36. The next issue is one of sentencing. In our view accused Zahid Abbas being unit in charge of MQM (A) for NA 250 bearing in mind the intense political rivalry and bitterness over the fate of NA 250 of which the deceased was an active PTI canvasser had the motive to kill the deceased in order to scare PTI voters in that constituency from not voting for the PTI which he did cold bloodedly despite the deceased being an old lady of about 70 years of age. That accused Muhammed Rashid has a similar motive although he did not fire the fatal shot which would ordinarily lead to the upholding of the death penalty in both cases.

37. However we find that the murder was not carried out in a brutal manner by accused Zahid Abbas and that accused Muhammed Rashid did not personally murder the deceased and his hulia was less well described in the FIR. There are also some elements of the prosecution case which expose some minor doubt but not enough to hold that the prosecution has

not proved its case against both accused for the offenses charged beyond a reasonable doubt.

38. Thus, we take guidance from the recent Supreme Court case of **Ghual Mohy-Ud-Din V State** (2014 SCMR 1034) where it was held that where the judges entertain some doubt albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment at P.1043 Para 20 and 21 in the following terms;

"20. Albeit, in a chain of case-law the view held is that normal penalty is death sentence for murder, however, once the Legislature has provided for awarding alternative sentence of life imprisonment, it would be difficult to hold that in all the cases of murder, the death penalty is a normal one and shall ordinarily be awarded. If the intent of the Legislature was to take away the discretion of the Court, then it would have omitted from clause (b) of section 302, P.P.C. the alternative sentence of life imprisonment. In this view of the matter, we have no hesitation to hold that the two sentences are alternative to one another, however, awarding one or the other sentence shall essentially depend upon the facts and circumstances of each case. There may be multiple factors to award the death sentence for the offence of murder and equal number of factors would be there not to award the same but instead a life imprisonment. It is a fundamental principle of Islamic Jurisprudence on criminal law to do justice with mercy, being the attribute of Allah Almighty but on the earth the same has been delegated and bestowed upon the Judges, administering justice in criminal cases, therefore, extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular case/cases.

*21. A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. **If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.** (Bold added)*

39. Thus, taking guidance from the above mentioned supreme court authority and based on the particular facts and circumstances of this case whilst exercising our judicial discretion we hereby modify the sentences in the impugned judgment to each of the accused whereby they have been sentenced to death on two counts of murder to sentences of two counts of life imprisonment each and in all other respects the sentences handed down to each of the accused in the impugned judgment shall remain in tact.

40. The upshot therefore is that the appeals are dismissed, the sentences of each of the accused handed down in the impugned judgment are modified only to the extent as mentioned above to that of life imprisonment with the benefit of S.382 (B) Cr.PC which sentences shall run concurrently and the confirmation reference is answered in the negative.

Arif