

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

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

SPL. CR. A.T. JAIL APPEAL NO.244 OF 2019

Appellant: Zahoor Khan son of Khan
Badshah through Mr. Khalid
Ahmed Khan, advocate

Respondent: The State through Mr. Abrar Ali
Khichi Addl. Prosecutor General,
Sindh

Complainant: Through M/s. Shaukat Hayat
and Abdul Hafeez, advocates

SPL. CR. A.T. JAIL APPEAL NO.245 OF 2019

Appellant: Zaheer Mirza son of Mawara
Khan, through Mr. Iftikhar
Ahmed Shah, advocate

Respondent: The State through Mr. Abrar Ali
Khichi Addl. Prosecutor General,
Sindh

Complainant: Through M/s. Shaukat Hayat
and Abdul Hafeez, advocates

SPL. CR. A.T. ACQUITTAL APPEAL NO.251 OF 2019

Appellant: Lala Khan son of Haji Masho
Khan, through M/s. Shaukat
Hayat and Abdul Hafeez,
advocates

Respondents: 1) Noor Muhammad Shah s/o
Muhammad Hussain through
Khawaja Muhammad Azeem,
advocate
2) Zafar Ali son of Adil Shah
through Mr. Ajab Khan Khatak,
advocate.

CRIMINAL REVISION APPLICATION NO.155 OF 2019

Applicant: Lala Khan son of Haji Masho Khan, through M/s. Shaukat Hayat and Abdul Hafeez, advocates

Respondents /State: 1)Zaheer Mirza son of Mawara Khan through Mr. Iftikhar Ahmed Shah, advocate
2) Zahoor Khan son of Khan Badshah through Mr. Khalid Ahmed Khan, advocate.

Date of Hearing: 24.02.2022

Date of Announcement: 07.03.2022

J U D G M E N T

Mohammad Karim Khan Agha, J. Appellants/respondents Noor Mohammad Shah son of Mohammad Hussain, Zaheer Mirza son of Mawara Khan, Zahoor Khan son of Khan Badshah and Zafar Ali son of Adil Shah were charge sheeted to face their trial in Special Case No.07 of 2009 arising out of FIR No.32 of 2009 under section 302/34 PPC, r/w section 7 of ATA 1997 registered at PS Ferozabad, Karachi. Appellants were convicted vide impugned order dated 03.08.2019 passed by the learned Judge, Anti-Terrorism Court No.III, Karachi whereby the accused Zaheer Mirza and Zahoor Khan were convicted u/s.265-II(2) Cr.PC in crime No.32 of 2009 for offence u/s.302 PPC and sentenced to undergo R.I. for life for causing the death of Zaiduddin, Mohammad Tahir, Ubedullah (Waheedullah) and Mohammad Ibrahim and were also directed to pay compensation u/s. 544-A Cr.PC to the heirs of the deceased. The accused were also directed to pay Rs.1,00,000/- each as compensation to the heirs of the deceased. Accused Zaheer Mirza and Zahoor Khan were also convicted u/s.265-II(2) Cr.PC for offence u/s.7 of ATA and sentenced to undergo R.I. for life and to pay fine of Rs.100,000/- each and in default of payment to undergo S.I. for one year more. Benefit of Section 382-B were also extended to the accused persons. However, Accused Noor Mohammad Shah and Zafar Ali were acquitted from the

charge of u/s.265-H(2) Cr.PC as prosecution could not proof its case against them.

2. At this point by way of background it is worth mentioning vide an earlier Judgment of the ATC both the appellants and respondents in these appeals were tried and all of them including the respondents were tried for murder under S.302 PPC RW ATA and all of them were convicted and sentenced to death. This court however on their earlier appeal set aside that judgment and remanded the case back to the concerned ATC for the limited purpose of recording all the S.342 Cr..PC statements of the accused afresh and thereafter after hearing arguments of the parties render a fresh judgment on merits. The fresh judgment as indicated above, which is now the subject of these appeals and revision application, convicted and sentenced the appeals for Life imprisonment whilst acquitting the respondents.

3. The brief facts of the prosecution case are that complainant Haji Lal Khan in the FIR 32/2009 stated that his son Zainuddin and 3 others namely Mohammad Tahir, Ubaidullah and Mohammad Ibrahim left from Quetta on 27.12.2008 in the vehicle of Zainuddin which was driven by Zainuddin, and reached Karachi in the evening time where those in the vehicle had stayed on the backside of showroom of Haji Essa situated at Khalid Bin Waleed Road, known as Tawakal Motors. Haji Abdul Baseer was working as Chowkidar of residence of Haji Essa and Nazar Jan was working as cook. He further stated that his son Zainuddin left the residence of Haji Essa at 8.00 p.m on 30.12.2008 and told Abdul Baseer and Nazar Jan that they are going to Quetta the following day and will return to Tawakal motors after having dinner. As per Majeed and Nida Mohammad, who were also staying there as guests, Zainuddin and others returned in their vehicle after dinner and gave horn at the gate of Tawakal motors at about 0030 hours and as per the chowkidar when he got up to open the gate all of a sudden firing started, when at that time lights of the car and indicators were on and a police mobile was seen behind that car. They further disclosed that they went upstairs and saw endless firing, on the car and then police personnel alighting from the police mobile told Zainuddin, Mohammad Tahir and Mohammad Ibrahim to get down from

their car. Zainuddin alighted from the car with his hands up. Ubaidullah sitting behind Zainuddin also alighted from the car and then there was firing as a result of which Zainuddin fell down and Ubaidullah hid himself by taking shelter behind two cars but the police came and fired straight and killed them; mostly firing hit the car. The police then registered false and fabricated FIR's 1351, 1352, 1353 all of 2008 in respect of the same incident in order to cover up the crime (essentially they claimed that the deceased had fired on them during a car chase and the police were compelled to fire on the deceased in self defence which led to their death) which after an inquiry by the police were found to be false and FIR 24/2009 was registered against the police u/s 319 PPC with S.302 (b) later being added. He further stated that thereafter he remained busy with funeral rituals for 10 days and after 10 days he reached Karachi he came to know that he was called by Honourable Supreme Court at Islamabad. He then went to Honourable Supreme Court Islamabad which had taken suo moto notice of this incident which initially according to the police version was the result of an encounter whereby the deceased were killed by the police in self defense, where he was told that his case would be proceeded in the ATC against the police for murder of the deceased. He then lodged his FIR 32/2009 on 10.01.2009 at P.S. Ferozabad which was contrary to the original FIR lodged by the police on the day of the incident which in essence stated that the police had fired upon and killed the deceased in self defense after an encounter.

4. After completing the investigation, the Investigation Officer submitted challan against the accused for trial according to law. The charge was read out to the accused to which they pleaded not guilty and claimed for trial.

5. To prove its case, the prosecution examined 21 witnesses and exhibited various documents and other recoveries. The statements of the accused u/s. 342 Cr.P.C. were recorded wherein they have denied the allegations of the prosecution and professed their innocence. None of the accused gave evidence under Oath except for deceased co-accused Malik Irshad who also called 3 DW's in support of his defence case.

6. After assessing the available evidence on record the learned trial judge convicted and sentenced two of the accused (Zaheer Mirza and Zahoor Khan) whilst acquitting two other accused (Noor Mohammad Shah and Zafar Ali) as per the impugned judgment as set out earlier in this judgment hence these appeals and revision application for enhancement of sentence have been filed against conviction, for enhancement of sentence and against the acquittal of two accused/respondents.

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

8. Learned counsel for the appellants in the appeal against conviction contended that the case concerned a genuine police encounter with the deceased after the deceased had fired at the police who were compelled to fire at the deceased in self defence which lead to the death of the deceased; that the police mobile was hit during the encounter as was proven by a positive FSL report; that after the encounter with the deceased numerous items were recovered from them including two pistols which when compared with empties at the scene were found to have been fired from the recovered pistols which supported the appellants case of a genuine encounter between the parties and the police exercising their right of self defence; that the FIR had been lodged after a delay of 10 days during which time the eye witnesses and the complainant who were all from chaman cooked up a false case against the accused; that the eye witnesses were planted witnesses and at best could be regarded as chance witnesses and as such their evidence cannot be safely relied upon; that even if the eye witnesses evidence was believed at the best it could only confirm an encounter with unknown police officers which did not include the accused who had been made scape goats due to the public out cry following the incident; that the so called eye witnesses gave no hulia of the accused who they could not identify any way as it was too dark and that the eye witnesses avoided attending an identification parade and as such the identity of the police who were involved in the encounter with

the deceased had not been proven; that the two alleged eye witnesses gave their S.161 Cr.PC statements 6 weeks after the incident and as such their evidence was of no legal value; that the co-accused had been acquitted on the same set of evidence and as such the accused were entitled to be acquitted especially as the State had not filed any appeal against their acquittal; that the other two alleged eye witnesses Majeed and Zazar Jan had been given up by the prosecution and as such an adverse inference could be drawn against them under Article 129(g) Quanoon-e-Shahdat Ordinance 1984 that they would not have supported the prosecution case and based on any or all of the above reasons the accused should be acquitted by extending them the benefit of the doubt. The appellants waived notice to the enhancement application and replied that in the alternative if this court was to uphold the convictions of the appellants it was not a case which merited an enhancement of sentence from life imprisonment to death as rightly found by the trial court for the reasons set out in the impugned judgment. In support of their contentions they placed reliance on the cases of *Allah Wadhayo v The State* (2013 YLR 54), *Syeda Afshan v Syed Farukh Ali* (PLD 2013 Sindh 423), *Muhammad Asif v The State* (2017 SCMR 486), *Noor Muhammad v The State* (2020 SCMR 1049), *Muhammad Khan v Maula Bakhsh* (1998 SCMR 570), *Muhammad Iqbal v The State* (1984 SCMR 930), *Abdul Khaliq v The State* (1996 SCMR 1553), *Majeed alias Majeedi v the State* (2019 SCMR 301), *Asghar Ali alias Sabah v The State* (1992 SCMR 2088), *Ashiq Hussain alias Muhammad Ashraf v The State* (PLD 1994 SC 879), *Shahbaz v The State* (2016 SCMR 1763), *Mst. Sughra Begum v Qasier Pervez* (2015 SCMR 1142), *Mst. Rukhsana Begum v Sajjad and others* (2017 SCMR 596), *Ashiq Hussain v The State* (1993 SCMR 417), *Mohammad Shafqat v The State* (1970 SCMR 713) *Waqar Ahmed v The State* (2006 SCMR 1139), *Akhtar Ali v The State* (2008 SCMR 6), *Abdul Khaliq v The State* (1996 SCMR 1553), *Asfandyar v Kamran and others* (2016 SCMR 2084), *Muhammad Asif v The State* (2017 SCMR 486), *Muhammad Pervez v The State* (PLD 2019 SC 592), *Altaf Hussain v The State* (PLJ 2019 SC (Cr.C.) 458), *Soba Khan v The State* (NLR 2017 Criminal -7) and *Niaz Muhammad alias Niazi v The State* (1996 P Cr. L J 394).

9. On the other hand, learned Additional Prosecutor General Sindh and learned counsel for the complainant have fully supported the impugned judgment with the complainant contending that the brutality of the crime justified the enhancement of the sentence of the appellants from life imprisonment to the death penalty. In particular they have contended that based on the particular facts and circumstances of the case the delay in lodging the FIR has been fully explained and as such this delay is not fatal to the prosecution case; that the eye witnesses were present at the time of the incident and that their evidence is trust worthy and confidence inspiring and can be safely relied upon; that 1 hour and 20 minutes after the incident the police party in order to hide their guilt on account of the cold blooded murder of the deceased lodged a false FIR bearing No. 1351/2008 at PS Firozabad against the deceased u/s 353/324/34 PPC whereby the appellants are named as part of the police party which FIR in effect admitted their presence at the scene and they claimed to have killed the deceased in self defence during an encounter which FIR was subsequently disposed of in "C" class since there was no evidence to support the police version of events; that the evidence under Oath at trial of accused Malik Irshad (now deceased) admitted to the presence of the appellants at the time of the encounter with the deceased which was not challenged by any of the appellants; that in cross examination the appellants never denied their presence at the scene of the murders; that both the appellants withdrew SMG's prior to the raid and empties recovered at the scene matched the SMG's which were allotted to them; that a CD produced at trial showed the appellant Zaheer Mirza giving an interview after the so called encounter which confirmed his presence at the time of the incident; that the police mobile had been fired upon after the incident by the police to support their case that it was a genuine encounter; that the recovered pistols had been foisted on the deceased and as such the appeals against conviction should be dismissed. In support of their contentions they have relied on the cases of **Anwar Shamim and another v. The State** (2010 SCMR 1791), **Muhammad Mushtaq v. the State** (PLD 2001 Supreme Court 107), **Ghulam Hussain v The State** (PLD 2020 SC 61), **Mirza Shaukat Baid v Shahid Jamil** (2005 PLD (SC) 530), **Mehram Ali v Federation of Pakistan** (PLD 1998 SC 1445), **Abdul Khalid v The State** (2006 SCMR 1886), **Shahid Zafar v The State** (2015 P Cr.L.J

628), *Sharukh Jatoi v The State* (2019 SBLR Sindh 1538), *Muhammad Rafiq v Inayat Ali* (2013 P Cr. L J 835) and *Ghulam Farid v The State* (2009 SCMR 929).

10. The State did not file any appeal against the acquittal of the respondents. The complainant however moved an appeal against the acquittal of the respondents who according to him had played the exact same role as the convicted appellants in the murder and based upon such evidence they their acquittal should be over turned and they should be convicted and sentenced for the same offences as the appellants and also sentenced to death. On the other hand learned counsel for the respondents have contended that the case of the respondents is on a different footing to that of the appellants who were convicted as their presence could not be established at the time of the incident and even otherwise having been acquitted by the trial court the respondents enjoyed a double presumption of innocence and as such the appeal against the acquittal of the respondents should be dismissed.

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by learned counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

12. Based on our reassessment of the evidence of the PW's, especially PW eye witnesses, the other witnesses including medical reports, recovery of human blood and empties at the scene of the incident we find that the prosecution has proved beyond a reasonable doubt that Zainuddin, Muhammed Tahir, Ubaidullah (Waheedullah) and Muhammed Ibrahim (the deceased), on 31.12.2008 at 0040 hours at Khalid Bin Walid Road near Tawakal Motors were murdered by fire arm by police officials. This position does not seem to be disputed by the appellants.

Turning to the appeal against conviction by the appellants.

13. The questions left before us are therefore (a) Were the deceased murdered in a police encounter as a result of the police retaliating in self defence after being fired upon by the deceased as alleged by the accused,

or in cold blood by the police as alleged by the prosecution and if the latter (b) who were the police officers involved in the murder of the deceased by firearm at the said time, date and location?

14. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons;

(a) Admittedly there was a 10 day delay in lodging FIR No.32/2009 by the complainant against the police for the murder of the deceased however we find that based on the particular facts and circumstances of this case the delay has been explained and as such the delay is not fatal to the prosecution case. This was because this was not an ordinary case. Four people had been killed by the police. The police immediately registered an FIR claiming that the police had been fired upon and that they killed the deceased in self defence. Hence the police in order to cover their tracks lodged an FIR to this effect within one hour and 20 minutes of the incident which set the ball rolling for an investigation by their brother police officers. The eye witness was a chowkidar who could have hardly been expected to come forward to contradict the police version of events having seen the more influential deceased being gunned down by the police before his eyes. It was only when a hue and cry was raised in the province of Baluchistan where the deceased hailed from in the coming days and the intervention by senior political figures and the Supreme Court which enabled the complainant who was away in Balochistan at the time of the incident to lodge his own FIR by which time the police FIR under such public scrutiny had been found to be doubtful if not false which in effect it was later declared as there was no evidence to support it following a high level police inquiry into the incident. The complainant did not name the eye witnesses in his FIR which he would have done if it was a cooked up case as he knew already who they were. Thus under these **exceptional circumstances** we find that the delay in the complainant lodging the FIR has been fully explained. With respect to an explained delay in lodging the FIR not being fatal to the prosecution case reliance is placed on the cases of **Muhammad Nadeem alias Deemi v The State** (2011 SCMR 872) and **Mustaq Ahmed** (Supra).

(b) That the case of the appellants that the deceased were killed in a genuine encounter with the police after the police were fired on by the deceased and retaliated in self defence has already been completely disbelieved. As mentioned earlier in this judgment straight after the incident the police party headed by accused SI Malik Irshad (now deceased) lodged FIR No. 1351/2008 within one hour and 20 minutes of the incident u/s 353/324/34 PPC.

This FIR was cancelled in "C" class as there was no evidence to support the same. Rather another FIR was lodged against the police party under S.319 PPC which later on based on the orders of the

Supreme Court whilst exercising its suo moto powers directed that an FIR be lodged u/s 302 PPC against the police party for the murder of the deceased. None of the accused ever challenged the cancellation of the FIR in "C" class. Notably a high powered inquiry committee had found this FIR to be false. The findings of the inquiry committee was never challenged by any of the accused in any fora and at the time none of the appellants ever complained that the instant FIR being investigated against them had not been based on a fair investigation. In fact on occasion when the police investigate themselves or others in so called encounter cases the investigation is often less than fair as was held in the case of **Zeeshan@ Shani V State** (2012 SCMR 428 at P.433) in the following terms;

"The Standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case".

Perhaps the original FIR against the deceased as lodged by the police through SI Malik Irshad would have remained in the field had not the Supreme Court intervened to ensure a fair investigation in order to determine the actual and factual circumstances surrounding the incident.

However based on the evidence before us we shall consider whether the prosecution has proved its version of the incident. Namely, whether the police party fired on the deceased in cold blood and murdered them without provocation.

(c) In our view the prosecution's case regarding whether the police murdered the deceased in cold blood or whether the police only fired on the deceased once they were fired upon by way of self defence largely rests on the evidence of the eye witnesses to the murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 4 Bashir.** He was the night time chowkidar of the car show room where the deceased were staying at the time of the incident. According to his evidence on 27.12.2008 the deceased had arrived from Quetta and stayed at the residential quarters of the show room. On the

night between 30.12.2008 and 31.12.2008 and in between 0030 and 0045 hours he was in the balcony of the residential part of the showroom when he heard the horn of a car at the gate. He leaned down and saw the deceased vehicle in front of the gate and one police mobile parked behind it from which the police started firing on the deceased vehicle. He confirmed the presence of PW 5 Nida Muhammed on the balcony at the same time. After the police stopped firing he saw the police get out of the police mobile and ordered Zain to get out of his vehicle. Zain got out of the car with his hands raised. He saw Ubaidullah who was sitting behind the driving seat also get out of the car. He saw the police then fire on Zain who fell down injured. He saw Ubaidullah try to hide behind some vehicles in the show room. Ubaidullah was injured and he saw one police man fire at him. Muhammed Ibrahim and Muhammed Tahir did not come out of the vehicle. He along with PW Muhammed Nida then went down stairs and saw that Zain and his companions did not have any weapons with them. Zain was already dead and he saw two injured being taken to hospital. He narrated the incident to the complainant in person on 09.01.2009 when he came to Karachi. He identified the accused in court and pointed out appellant Muhammed Zaheer as giving an interview to TV people who reached the scene of the incident.

He was a natural witness and not a chance witness as he was employed as night chowkidar and saw the deceased leave in their vehicle for dinner and then on hearing the honk of their horn (prior to the shooting) looked over the balcony to see who was at the gate when he saw the firing of the police on the deceased. His presence cannot be doubted as his presence was also confirmed by PW 5 Nida Muhammed the other eye witness. PW 3 Muhammed Issa who was the owner of the show room also confirmed that quite naturally his chowkidar being this eye witness called him on the night of the incident and gave him the full details of the incident. PW 2 Haji Muhammed Sabir who reached the scene shortly after the incident also saw this eye witness present at the scene of the incident. This eye witness was not related to any of the deceased and no material has come on record to show that he had any reason to falsely implicate the accused. Admittedly it was a night time incident however it has come on record that there was light from the street and also from the vehicles including the police mobile and he was only a short distance away from the incident which he was looking down upon from the balcony so he would have been easily been able to see the incident unfold in its entirety from his elevated view. He gave his evidence in a straight forward manner and was not dented during a lengthy cross examination. Ordinarily we might have placed no reliance on his evidence as he gave his S.161 Cr.PC eye witness statement 6 weeks after the incident however based on the exceptional and particular facts and circumstances of this

case as already discussed above he could hardly have been expected being a lowly chowkidar to have come forward against the police when the police had already registered a different version of the events. Namely, that the deceased fired on the police and the police killed them in self defence. Had he come forward his life might have been in grave danger from the police who carried out the attack on the deceased and as such under these exceptional circumstances we do not find the late recording of his S.161 Cr.PC statement to be of any significance in so far as it concerns the truth of the events which he narrated. As such we find the evidence of this eye witness to be reliable, trust worthy and confidence inspiring and we believe the same with respect to the events which unfolded.

With regard to identification of the accused as being the particular policemen present at the scene with the **exception** of appellant Muhammed Zaheer who remained on the scene after the incident and gave an interview to GEO news at the scene of the incident just after it had happened and admitted firing at the scene we give little if any weight to his evidence in this regard as no identification parade was held and he gave no hulia in his S.161 Cr.PC statement and it was late at night and difficult to correctly identify the accused policemen individually who had left the scene and although he identified all the accused in court the Supreme Court has depreciated in court identification as a means to convict an accused in a capital case.

Thus, for the reasons mentioned above we find the evidence of the eyewitness to be reliable, trustworthy and confidence inspiring and we believe the same with regard to the incident unfolding as per the prosecution case. Namely, the police without provocation firing on and murdering the deceased. **However we find that he has only correctly identified appellant Muhammed Zaheer as taking part in the incident who remained behind after the incident and gave an interview to GEO news at the scene which news interview was also exhibited at trial wherein he admitted firing during the so called encounter and we can convict on the evidence of this eye witness alone provided in respect of appellant Muhammed Zaheer there is some corroborative/ supportive evidence.** In this respect reliance is placed on the cases of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917) and **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eyewitness to be of good quality.

(ii) **Eye witness PW 5 Nida Muhammed.** He was a business man who was also staying in the residential part of the show room having come from Balochistan with Majeed on 26.12.2008. According to his evidence on 27.12.2008 the

deceased arrived in a Toyota car from Quetta and stayed at the residential part of the show room. That on the night of 30.12.2008 and 31.12.2008 he was staying in the residential part of the showroom when at about 12.30 midnight between 0030 and 0045 hours he heard a horn from outside the road and then heard severe sound of firing. He came out of his room and saw that Zainuddin's car was lying parked in front of the gate and police were firing on that car. He and Majeed then went up to the balcony and saw the police severely firing on Zain's car. That the firing was so severe that it hit different cars in the show room and broke the glass of some of those cars. He saw 5 police men alight from their mobile 4 of whom were in uniform and duly armed with weapons and reaching near the car of Zain who told Zain to get out of the car. Zain came out of the car with his hands raised and one police man fired on him and Zain then fell down. Ubaidullah in order to save himself went towards the gate of the show room who the police fired upon and he fell down. Thereafter many police personnel and members of the public arrived and he also went down stairs where he saw that Zain had died and Ubaidullah was injured. He saw the police take two injured persons to hospital. Media people also arrived and they took the interview of appellant Muhammed Zaheer who he pointed out in court.

He has corroborated PW 4 eye witness Bashir in all material respects. The same considerations apply to him as for PW Bashir in that we believe his evidence in respect of the incident and his correct identification of appellant Muhammed Zaheer at the scene of the incident.

That the appellant's/police produced no evidence whatsoever that they acted in self defence which was initially there case in the FIR which they lodged one hour and twenty minutes after the incident.

We have little doubt that the recovered pistols were foisted on the deceased and were most likely used by the police in firing at the deceased hence the recovery of their empties at the scene especially as the eye witnesses have specifically stated that no fire came from the deceased side and no weapon was with them. This however is more of an inference on our part rather than being based on hard evidence whilst taking the particular facts and circumstances of the case into account.

Thus, we find that a police party fired on and murdered the deceased in cold blood.

Turning to the next issue of whether the appellants were at the scene and fired on the deceased without provocation.

(d) Our starting point is the defence case raised by the appellants as revealed by their cross examination of PW's and in their S.342 Cr.PC statements which in effect is **not** that the incident did not take place between the police and the deceased by way of encounter/self defence but rather they played no part in the encounter between the police and the deceased as they were not present at the time. So it appears that their defence case moved from one of self defense to one of not being present at the time of the incident.

(e) As mentioned earlier immediately after the incident the head of the police party the now deceased Malik Irshad gave a S.154 Cr.PC statement which formed the basis of the now disposed of FIR 1351/2008. Its content which is set out below states who was present at the time of the shoot out with the deceased;

STATEMENT U/S.154 Cr.P.C. OF S.I. MALIK IRSHAD HUSSAIN.

Today, I SHO/SIP Malik Irshad Hussain posted at ACLC, Karachi accompanied with staff namely : HC /8977 Noor Muhammad Shah, PC/10396 Zahoor Khan, 17608 Zaheer Mirza, boarded in official vehicle NO.JP-7021, as per control message, for searching of car No.ALJ -696, Maker Toyota Corolla, black color, being busy at 0040 hrs., reached at Tariq Chowrangi that we were standing due to traffic jam that abruptly from Bahadurabad Chowrangi. Car No.RUP - 009, Maker T.C. black colored was signaled to stop, upon which, four persons boarded in car started firing upon the police with intention to commit murder and accelerated the vehicle towards Jail Chowrangi, which was pursued through official mobile, so, the said car was stopped by chasing at Khalid Bin Waleed Road opposite to Mayfair Motors, Block-2, PECHS, Karachi, then, the accused persons again made firing at police party, upon which, in the self defence, made firing accompanied with staff, upon which, the persons boarded in the car became injured, witnessed by going near that two accused persons died on the spot while two accused persons were arrested in injured condition, in the hands of died accused persons, one/one pistol, out of which, one was without numbered 30 bore and another pistol of 9mm No.G-72221 were recovered, injured accused on inquiry disclosed his name as Ubedullah while he disclosed the names of died accomplices as 1) Tahir, 2) Zain ul Aabideen and disclosed the names of injured accomplices as Ibrahim, from the spot, further two mobile phones i.e. 1) Nokia R-6500, Nokia 2311, one black colored wallet, in which, cash amount of Rs.11460/-, two NICs in the names of 1) Tahir Jan and Zain ul Aabideen were recovered, I, SHO/SIP sent the injured accused persons to Jinnah Hospital through official mobile along with staff while other died away accused persons were sent to Jinnah Hospital through called ambulance, car bearing registration No.RUP-009, Maker Toyota Corolla, XLI, black colored being considered as suspected theft property was taken into police possession u/s.550 Cr.PC, this act of accused persons falls u/s. 353/324/34 PPC, and 13-D Arms Ordinance, so, it is hereby sent to duty officer, PS Ferozabad for registration of cases, it is hereby sent through called PC/19682 Zafar Ali, after registration the cases, investigation may be initiated.

Sd/-SIP/SHO Malik Irshad."

This S.154 Cr.PC statement although false in terms of what transpired at the time of the shooting of the deceased clearly shows that the appellants and respondent HC /8977 Noor Muhammad Shah were present at the time of the incident and made fire on the deceased which lead to their death. Admittedly an FIR is not a piece of substantive evidence and can only be relied upon as corroborative/circumstantial evidence. In this respect reliance is placed on the case of **Muhammed Akram V State** (2006 SCMR 1567)

(f) The next piece of evidence to prove the presence of the appellants at the scene at the time of the shooting is the evidence under oath of the now deceased Malik Irshad who was the leader of the police party before the trial court which is set out as under;

EXAMINATION IN CHIEF OF S.I. MALIK IRSHAD HUSSAIN.

On 30.12.2008, I was performing my duty as Station House Officer at ACLC (Artillery Maidan). At about 1100 pm I had received information from wireless operator in respect of an incident of car registration No.ALG-696, Toyota, IST, snatching on gun point from the area of Boat Basin. Meanwhile I had also received a call on my mobile phone from police control whereby intimated me that a tracker is installed in the subject car. I had contacted with Vin tracker company and sought location of the subject car. They informed me its present location near Moti Mahall, Gulshan-e-Iqbal. I had received telephone from SSP, ACLC and DSP Admin, they directed me to arrive at the pointed out location of the car. I had entered entire information in roznamcha register. Thereafter I constituted a raiding party comprises upon me, PCs Zahoor Khan, Zaheer Mirza and HC Noor Shah, thenceforth in Government mobile registration No.SP-7020, proceeded towards Gulshan-e-Iqbal. In the way, I remained with contact to tracker company, they gave us different direction of the said car, when we reached at Sohrab Goth, then we received information that, the subject car is travelling towards Liaquatabad. We followed the car with the help of Tracker Company and when reached at Khudadad Colony, received information that the subject car is going towards Bahadurabad, we went there and when reached at the junction of Tariq road and Shaheed Millat road received information that subject car is coming towards the above location, meanwhile, a another car Toyota Corolla came from Bahadurabad side, whom we had given signal to stop, the person sitting in that car started firing upon us. While noticing suspicious status of the said car, we chased that car. The rider of the said car could not stop the car rather fired rounds upon our mobile. When the said car reached near Tawakal Motors at Khalid-Bin-Waleed Road. They again fired rounds upon us in retaliation two police men PCs Zahoor and Zaheer fired rounds upon the inhabitant of the said car, in self defence. The car stopped there, four persons were sitting in it, two amongst them died at the spot on sustaining fire arm injuries, whereas, two were grievously injured. The rounds fired by the occupants of the said car hit to our mobile. Two pistols were recovered from the possession of injured persons, whom we taken to Jinnah Hospital for treatment, dropped them there, then came back at the place of the incident. Meanwhile, mobile of PS Ferozabad arrived there, dead bodies were dispatched to Jinnah Hospital in the said mobile. I had indited my 154 Cr.PC statement and sent the same to

Ferozabad Police Station for registration of the crime the FIR Nos.1351/2008, 1352/2008 and 1353/2008 were registered on the basis of my above statement. Thereafter, I came back at my office. On 31.12.2008, Inspectors Sajjid and Nasiruddin Shah of PS Ferozabad arrived at ACLC Police Station, they seized official weapons carried by my police party at the time of incident and mobile van. I had narrated entire happenings to them. On the evening of the said day I was put under suspension. After about 10 days i.e. 10.1.2009, another FIR of the subject incident was registered against us by the father of deceased Zainuddin. On 11.01.2009, I had surrendered myself in the said crime before the police. I was not called during the investigation of crime No.1351/2008 to 1353/2008. Fair and impartial investigation was not conducted in the crimes registered by me rather we have been entangled in this crime. The said three FIRs, indicated above were closed without collecting any material / evidence. We are innocent, whatever happened was in performance of our duties and we have not taken in our hands."

(g) The evidence under oath of Malik Irshad clearly reveals that the raiding party as mentioned in his earlier FIR registered one hour and twenty minutes after the incident **consisted of the appellants and respondent HC Noor Shah**. It also clearly states that the appellants fired upon the deceased. Once again this evidence under oath clearly shows the presence of the appellants at the scene of the crime and making fire on the deceased. This evidence was never challenged by any of the appellants before the trial court. Admittedly it is evidence of one co-accused against the other and needs strong corroboration for any reliance to be placed upon it from an unimpeachable source. The first piece of corroborative/supportive circumstantial evidence is the FIR which has already been reproduced above which showed the presence of the appellants at the scene and firing on the deceased.

So what other corroborative/supportive evidence is there against the appellants apart from the FIR?

(h) That SMG's and ammunition was issued to the appellants prior to the incident and the empties recovered from the scene matched the SMG's which had been seized from the appellants as proven by a positive FSL report which ties the appellants to the crime scene and them firing at the crime scene on the deceased.

(i) That PW 8 Rao Zulfiquar who was a police officer gave evidence that on 31.12.2008 he was duty officer at PS Ferozabad and was on night duty when at 1.15 am both the appellants came to his PS and disclosed that they were on patrol with their SHO Malik Irshad at Wahed Road when they had an encounter and some dacoits were killed and some were injured. Neither of the appellants challenged this evidence of the independent police witness who had no enmity with the appellants which undeniably confirms that they were present and took part in the shooting of the deceased and totally belies their claim in their S.342 Cr.PC statements that they were absent at the time of the incident.

(j) That appellant Muhammed Zaheer was shown on GEO TV at the scene of the incident shortly after the incident whereby he admitted

firing during the so called encounter which completely belies his defence that he was not present at the scene of the incident. The appellant did not challenge this CD evidence at trial. He was identified by both the eye witnesses as the police officer giving an interview to the media just after the incident and at the scene of the incident.

(k) That during cross examination the appellants never denied their presence at the scene. Only belatedly in their S.342 Cr.PC statements did they claim that they were not present which we regard as a clear after thought.

(l) That the medical evidence fully corroborates the ocular account of the eye witnesses which indicates that the all the deceased were hit numerous times on vital parts of the body by firearm shots which is a clear indication of the intent to kill the deceased.

(m) Although the prosecution has to prove its case beyond a reasonable doubt we have also considered the defence case. With regard to the defence case this switched from self defense to one of not being present at the time of the incident. However the appellants produced no evidence that they acted in self defence as they later took the view in their S.342 statements that they were not present. With regard to the story of self defence as narrated in the FIR lodged immediately after the incident by SI Malik Irshad this is completely unbelievable. He claims to be chasing a car with a tracker and was in touch with the company who installed the tracker during the chase but this begs the question as to why he simply did not order the tracking company to immobilize the car rather than chase it and let another police officer whose jurisdiction the car was in to take over. He does not mention this aspect of the case in his FIR and did not call as a DW the person from the tracker company who he was in touch with to support his case. Furthermore, it does not appeal to logic, commonsense or reason that in the middle of a high speed chase where he was tracking a car he would let that car get away and turn his attention to another car because the driver looked suspicious who then fires without provocation whilst still in the car at the police mobile. In addition the extent of the fire power used in order to subdue the deceased does not seem to stack up with an encounter. The police discharged many rounds, 4 deceased were each hit several times on vital parts of their body, the vehicle in which the deceased were travelling in received about 20 fire shots as evidenced by duly exhibited FSI report and the direction on which the bullets hit the car do not seem to support the defence case of encounter. Bullets hit cars in the show room and also hit a wall and an electricity pole as evidenced by a duly exhibited site inspection report by a judicial officer. The deceased were hemmed in and could simply have been made to surrender. The bullet marks on the mobile were most likely inflicted by the police themselves in order to conceal the crime and support their fake FIR as interestingly the hit mobile was not inspected at the scene and it was not mentioned in the FIR lodged one hour and twenty minutes after the incident that the mobile was hit by any bullet and even the Geo news reporter at the

scene who gave evidence as a PW did not notice any bullet mark on any police mobile. The duly exhibited FSL report on the police mobile does also in terms of direction of bullet marks does not support the police case of an encounter. No police officer even received the slightest scratch. The whole defence case does not ring true and reeks of a fake encounter. None of the appellants gave evidence on oath and none of them produced a single witness to prove that they were else where at the time of the incident.

Thus, for the reasons mentioned above we find that the prosecution has proved beyond a reasonable doubt the presence of the appellants at the scene of the incident and that they made fire shots by firearm on the deceased with intention to kill which lead to the premeditated murder of the deceased and as such their appeals are dismissed and their convictions are maintained.

Enhancement of Sentence handed down to the appellants from Life Imprisonment to the death penalty.

(n) The complainant has vigorously contended that the sentence of the appellants be enhanced from Life imprisonment to the death penalty on account of the brutal cold blooded murder of four young men who had no previous criminal history by the police. Such enhancement has been vehemently opposed by learned counsel for the appellants who have contended that the trial court has rightly reduced their sentences to one of life imprisonment based on the commonly accepted ground that it was not possible to tell who fired the fatal shots which lead to the death of the deceased and that no motive had been asserted or proven by the prosecution for the murders.

(o) It is true that it might not be possible to ascertain which of the appellants fired the fatal shots which lead to the murder of the deceased and in such circumstances this might lead in a capital case to a reduction in sentence from death to life imprisonment. Like wise if no motive is proved as in this case. Sentencing however is within the **discretion** of the court and there is no universal principle governing the same as each case must be judged on its own particular facts and circumstances. In the case of **Muhammed Juman V State** (2018 SCMR 318) it was held as under at P.322;

"Sentencing is one of the most important and intricate task, which a criminal Court has to perform while handing down a conviction after conclusion of a criminal trial. Inflicting conviction and imposing sentence is not a mechanical exercise but it is onerous responsibility to inflict, fair reasonable and adequate sentence, commensurate with gravity and or severity of crime, looking at the motive, attending and or mitigating circumstances that provoked or instigated commission of crime and it involves conscious application of mind. No mathematical formula, standard or yard stick could be prescribed or set out to inflict conviction and sentence, such factors vary

from case to case and while undertaking such exercise Court must keep in sight provisions contained in Chapters-III and IV of the P.P.C. Unfortunately, no sentencing guideline is laid down in Pakistan, though Courts have set out certain parameters in many cases as to what is mitigating and or aggravating circumstances that may warrant alteration and or varying in conviction and or sentence within the parameters of provided under the charging or penal provision (bold added).

Whilst dilating upon whether a death sentence should be reduced to life imprisonment on account of a lack of motive and the late sending of empties for FSL the Supreme Court in the recent brutal murder case in Criminal Appeal No.46 of 2017 **Noor Zaman V State** dated 22.02.2020 (unreported) held as under in material part at para 3;

"Thus, it is not open to the defence that the petitioner did not know as to why he was in the dock. It is high time to get out of the quagmire of hyper technical past so as to adopt a more realistic and dynamic approach to ensure an effective administration of criminal justice, a sine qua non to maintain peaceful equilibrium in the society; an inconsequential lapse or failure to observe a procedural formality without causing prejudice or handicap to an accused in his defence cannot be allowed to deny justice to the victim of crime. Similarly, presumption of genuineness is attached to the official acts both under article 129 (e) of the Qanun-i-Shahadat Order, 1984 as well as under Article 150 of the Constitution of the Islamic Republic of Pakistan, 1973, supreme law of the land and, thus, in the absence of a positive proof to the contrary, pleaded specifically, a delayed dispatch by itself cannot be viewed with suspicion. Three innocent persons including two women in their prime youth have been done to death with repeated fire shots, two in the safety of their home, in a manner most callous and brute, thus, the wage settled is conscionable in circumstances; scales are in balance. No interference is called for. Petition fails. Leave declined." (bold added)

With regard to the enhancement of a sentence in the case of **Abdul Malik v State** (PLD 2006 SC 365) it was held as under at P.367;

"The question of sentence is primarily a matter of judicial discretion to be exercised in the first instance by the Trial Court. The Court of appeal can enhance the sentence if the same is found to be inadequate or not in accord with judicial principles laid down by superior Courts in this regard. But it will depend on circumstances of that case and it would be undesirable to lay a principle of general application.

There are four broad principles/guidelines in this regard where the Court could interfere and enhance the sentence. Those are as under:-

- i) Where the sentence was not justified by law.
- ii) Where a person was sentenced upon a wrong factual basis.
- iii) Matters improperly taken into consideration or fresh matters to be taken into account.
- iv) The sentence manifestly is excessive or wrong in principle.

These are mere guidelines and their application would depend on each case. The cases entailing capital charge are to be decided with utmost care. When law vests a discretion in Courts to award sentence of death or life imprisonment, it casts a heavy duty to balance the various considerations which underlie these sentencing provisions.

The circumstances surrounding the offence, the question of mens rea, the principle of proportionality of sentence, of the gravity of the offence charged, the considerations of prevention or of deterrence and of rehabilitation may also be kept in view if the circumstances of the cases and the law applicable so warrant"

(p) Ordinarily the lesser alternative punishment of life imprisonment **might** have been appropriate however based on the particular facts and circumstances of this case and our findings we are of the view that this case is such a case which justifies enhancement in sentence. This is because the appellants were **not** ordinary citizens but were instead police officers upon whom a **higher standard** of conduct is expected by exercising their official duties since they are entrusted by the State to uphold the law and protect the citizens from harm rather than to murder them in dubious/fake encounters. Citizens must have the confidence and trust to have reliance on the police to protect and serve them. In this case the appellants completely abused that trust. From the evidence they chased a car with 4 young men inside in the prime of their life; they subjected them to a premeditated hail of gun fire; no attempt was made to arrest them; each of the 4 deceased received numerous bullet wounds on vital parts of their bodies; the vehicle that they were travelling in received up to 20 bullet holes; the car show room which they were parked in front of and the cars there in were damaged by bullets; even the walls and an electric pole was hit in this ferocious use of force which even the eye witnesses gave evidence was severe. This incident was more akin to a premeditated target killing of innocent citizens with excessive use of force to ensure that there were no survivors. Two of the deceased (Zain and Ubaidullah) were ordered to get out of their car and were then mercilessly executed by the police whilst being **unarmed and posing no threat to any one**. None of the 4 deceased had any previous criminal record and they were murdered in the most brutal and barbarous manner; the police version as per their original FIR we have already found to be completely untrue and was a deliberate attempt to cover up their illegal act. The Supreme Court has time and again emphasized that in brutal murders of one person let alone 4 persons the death penalty is the appropriate sentence. In this respect reliance is placed on the cases of **Khalid Mehmood v State** (2017 SCMR 201), **Zahid Iqbal v State** (2017 SCMR 1543) and **Tariq Iqbal alias Tariq V State** (2017 SCMR 594).

(q) Regrettably there are numerous allegations of so called dubious/fake police encounters in Karachi and as such when one is proven, and that one being a most brutal and merciless one as in this case, the court is obligated in the public interest to hand down a **deterrent sentence** to deter such conduct by the police in the future and give a loud and clear message to the public that when such cases are proven in court the courts will not shy away from their responsibility of handing down deterrent sentences in order to protect the public and deter such actions by any one whether they are persons in authority or otherwise as this country is governed by the rule of law and not the rule of man. The public must have full faith and confidence in the criminal justice system which should also consider the victims and their families who have been needlessly and mindlessly in most cases deprived of their loved ones. **As such the sentence of life imprisonment in respect of each of the appellants is enhanced to a single death sentence for the murder of the deceased. The compensation, fines etc set out in the impugned judgment shall remain in tact.**

With regard to the appeal against acquittal of the respondents Noor Muhammed and Zafar Iqbal.

(r) With regard to the appeal against acquittal of the respondents who were alleged to have also been present and fired at the deceased and murdering them as mentioned earlier in this judgment an appeal against acquittal **as a matter of law** has a very narrow scope and the accused acquires a double presumption of innocence. In this respect in the recent Supreme Court case of **Muhammed Shafi V State** (2019 SCMR 1045) it was held as under at P.1047;

"It is by now well settled that acquittal carries with it double presumption of innocence; it is reversed only when found blatantly perverse, resting upon fringes of impossibility and resulting into miscarriage of justice. It cannot be set aside merely on the possibility of a contra view. The High Court has derogated from settled principles of law and thus departure does not commend itself with approval." (bold added)

(s) We have already found that it was a fake police encounter and that the appellants took part in the premeditated murder of the deceased. The question before us therefore is whether there is sufficient evidence against either respondent to meet the legal appeal against acquittal standard to prove the presence of either respondent at the scene of the incident and that they took part in the killing of the deceased by direct firing or by way of common intention.

(t) In our view the case against the respondents is weaker than against the convicted appellants for the reasons set out in turn against each respondent;

Respondents Noor Mohammed and Zafar Iqbal.

(u) Although **respondent Noor Muhammed** is named in Malik Irshad's FIR and in his evidence under oath before the trial court as being part of the raiding party in neither the FIR or evidence is he given the role of making any firing which seem to be the only evidence against him. There is no evidence that he was issued any official weapon and as such no empties could be traced back to him; no weapon was recovered from him on his arrest; no other PW, unlike PW 8 Rao Zulfiquar, who directly implicated the appellants being present at the scene stated that the respondent was at the scene and had taken part in the encounter; he was not shown on any CD footage at the scene; that the IO PW Sajjid admitted in his evidence that on the day of the incident the respondent was performing guard duty at the PS and the said duty is performed at the PS only which was the fence raised by the respondent in his S.342 CR.PC statement; that one of the recovered pistols **might** have been used by him but this has not been proven and as such based on the law governing appeals against acquittal as discussed above we hereby dismiss his appeal against acquittal.

(v) The case of **respondent Zafar Iqbal** is even on a better footing than that of respondent Noor Muhammed in that the same considerations apply to him as for Noor Muhammed but **in addition** he is not named in Malik Irshad's FIR as being part of the raiding party and in Malik Irshad's evidence under oath; that the IO in his evidence stated that he was unable to collect any evidence against this respondent. He also voluntarily surrendered before the police. It appears that his sole role was to deliver Malik Irshad's S.154 Cr.PC statement to the concerned PS for registration of FIR and as such based on the law governing appeals against acquittal as discussed above we hereby dismiss his appeal against acquittal.

Summary.

1. The appeals against convictions are dismissed.
2. The sentences handed down to the appellants are enhanced from life imprisonment to the death penalty with all other fines and compensation remaining in place.
3. The appeal against acquittal is dismissed.