

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No.189 of 2019
Special Criminal Anti-Terrorism Appeal No.220 of 2019
Special Criminal Anti-Terrorism Appeal No.322 of 2019

Present: Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellants : ARREY MASIH alias Eric son of Babu Masih (*in Spl. Cr. ATAs 189 and 220 of 2019*) and WAQAS MASIH son of Younus Charles (*in Spl. Cr. ATA 322/2019*) through Mr. Iftikhar Ahmed Shah, Advocate.

Respondent : The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh.

Date of hearing : 03.12.2020

Date of Announcement: 04.01.2021

J U D G M E N T

NAZAR AKBAR, J.--- Appellants Waqas Masih and Arrey Masih alias Eric were tried by learned Judge, Anti-Terrorism Court-II, Karachi in Special Case No.A-03 of 2014, arising out of FIR **No.358/2013**, registered at P.S. Zaman Town, Karachi for offence under Section 302, 34, PPC read with Section 7 of the Anti-Terrorism Act, 1997 and by judgment dated **02.07.2019**, both were convicted under sections 302, PPC as *Tazir* read with Section 2(a) and 7(a) of the Anti-Terrorism Act, 1997, and sentenced to **imprisonment for life** and to pay fine of Rs.25,000/- each to the legal heirs of deceased as compensation, in case of non-payment to suffer imprisonment for six months more. Benefit of section 382-B, Cr.PC was also extended to them.

2. Brief facts of the prosecution case as disclosed in FIR No.358/2013 register at 1813 hours dated **24.09.2013**, on the verbatim statement of complainant Muzzafar Iqbal are that on **23.09.2013** he was informed on telephone that his younger brother Nazar Iqbal had gone to offer Asar Prayers at Khulfa-e-Rashideen Masjid, and at about 05:30 or 05:45 p.m when

he came out of the Masjid after his Asar Prayers, few persons belonging to Christian Community were protesting on the incident of Peshawar (bomb blast on a church) started raising slogans and attacked on my brother and other *Namazies*. His brother was dragged from the gate of Masjid to *Gali* No.5 where (i) Waqas Masih, (2) Yasir Masih and (3) Arrey Masih tortured my brother with sticks, bats and *Churry* (dragger) as disclosed by eye-witnesses. My brother had received injuries under his right armpit and at various parts of his body caused by stick blows and due to such torture my brother had fallen and succumbed to his injuries. The eyewitnesses told him that accused persons Waqas Masih, Yasir Masih and Arrey Masih have killed my brother Nazar Iqbal due to their animosity with Muslims. After his burial I have come to lodge FIR.

3. The prosecution after usual investigation on **24.09.2013** submitted challan against the present appellants Waqas Masih and Arrey Masih @ Erric as accused in custody and two other accused persons namely Yasir Masih and Aery Masih with 10/11 unknown persons who were shown absconders before learned Judge, Anti-Terrorism Court for their trial under the above referred sections. The trial court on **25.5.2015**, framed charge against the appellants at Ex.6. Both the accused pleaded not guilty and claimed to be tried. Prosecution examined in all 15 witnesses, in which 05 witnesses were private including three claiming to be eyewitnesses and the complainant and ten officials. On **01.10.2016** prosecution side for evidence was closed at Ex.62.

4. Statements of accused were recorded under Section 342 Cr.PC at Ex.69 and 70. Both the accused denied all the incriminating pieces of prosecution evidence brought against them. Accused Arrey Masih alias Eric

stated that nobody had deposed against him, he had given his original CNIC to IO and also certificate issued by his employer but the same was not considered and that he has been falsely implicated at the instance of complainant and interested witnesses. Accused Waqas Masih did not led any evidence in his defence whereas accused Arrey @ Erric examined DW-1 Sohail Masih in his defence. Both the accused did not examine themselves on oath.

5. The trial Court after hearing the learned counsel for the parties, assessment of evidence and perusal of record by judgment dated **02.07.2019**, convicted and sentenced the appellant as stated above, hence these appeals were filed.

6. Learned counsel for the appellant mainly contended that the FIR of the incident has been lodged with a delay of about 25 hours, after consultation and deliberation and no explanation has been offered for the delay in lodging of FIR. The complainant claimed in the FIR that eye-witnesses have disclosed names of the accused persons who allegedly killed his brother but names of eyewitnesses were not mentioned in the FIR. Learned counsel contended that likewise there is unexplained delay of 16 hours in conducting postmortem examination of the dead body, therefore, such report cannot be used against the appellants as corroborative evidence to the alleged confession before the police. He contended that even statement of eye-witnesses under **Section 161** of the Cr.P.C were recorded after delay of 05 days and therefore, consultations and deliberations even prior to recording the statements of witnesses cannot be ruled out and therefore, their evidence have lost its evidentiary value. Learned counsel has vehemently contended that each witness has contradicted the other and the

so-called eye-witnesses while contradicting each other have tried to dishonestly improve the story of prosecution. The dishonest improvements in statements of complainant and the witnesses has discredited them. The prosecution claimed that incident took place in front of Masjid Khulafah-e-Rasideen at the time when Namazies were coming out of the mosque after Asar Prayer time but none of the Namazies came forward to support the case of prosecution. The prosecution has not produced any Namazee who offered prayer with the victim as eye-witness or otherwise. Learned counsel for the appellant has also contended that despite unreliable and contradictory evidence against appellants the trial Court shifted the burden of proof on the appellant and after their statements under **Section 342 Cr.P.C** convicted them on the ground that the appellants have not denied the allegations against them on oath. Lastly, he argued that learned trial court has not properly appreciated and evaluated the evidence of prosecution witnesses, which is full of discrepancies and contradictions, as such, the impugned judgment passed by the learned trial court is not sustainable in law and prayed for acquittal of the appellants of the charges. In support of his contentions, learned counsel for the appellant has relied upon the following cases:

1. 2019 SCMR 1978 (*Safdar Mehmood & Ors. Vs. Tanvir Hussain & Ors.*)
2. 2019 SCMR 1068 (*Muhammad Rafiq alias Feeqa versus The State*)
3. 2019 SCMR 1170 (*Tariq Mehmood vs. The State and others*)
4. 2020 SCMR 192 (*Sufyan Nawaz and another vs. the State and others*)
5. 2011 SCMR 1190 (*Irshad Ahmed vs. The State*)
6. 2012 SCMR 419 (*Muhammad Ashraf versus the State*)
7. 2017 SCMR 344 (*Sardar Bibi and another v. Munir Ahmed and others*)
8. PLD 2019 Supreme Court 64 (*Mst. Asia Bibi versus the State & Ors*)
9. 2017 SCMR 596 (*Mst. Rukhsana Begum and others vs. Sajjad & Others*)
10. 2020 SCMR 1049 (*Noor Muhammad versus The State and another*)

11. 2017 SCMR 486 (*Muhamamd Asif vs. the State*)
12. 1995 SCMR 599 (*Atta Muhammad versus the State*)
13. PLD 2019 Supreme Court 527 (*Notice to police constable Khizar Hayat son of Hidaitullah on account of his false statement*)
14. 1984 SCMR 930 (*Muhammad Iqbal vs. the State*)
15. PLD 1994 SC 679 (*Javaid vs. the State*)
16. PLD 1991 SC 787 (*Mst. Ameer Khatun vs. Faiz Ahmed & Others*)
17. PLD 1993 SC 251 (*Munawar Ali alias Munawar Hussain vs. the State*).

7. Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General Sindh, argued that in the instant case, an innocent person has been done to death, who left his home to offer his Prayers. The accused persons while torturing the deceased were seen and identified by the eyewitnesses and conveyed such information to the complainant. As far as the delay in lodging of FIR is concerned he argued that after funeral of the deceased, complainant visited the Police Station and lodged such report, mentioning the names of the accused persons, who in retaliation of Peshawar incident have caused murder of the deceased as no other enmity has been alleged between the complainant and the accused party. Leaned Deputy Prosecutor General has further contended that the present appellants has confessed their guilt regarding their involvement in the instant case before the police and on their pointation crime weapons were also recovered. He also argued that act of the appellants and the absconding accused, created sense of fear, insecurity and terror in the minds of people available at the spot, family of the deceased and the general public as well. He finally argued that all the prosecution witnesses have fully implicated the appellants in the instant case and prayed for dismissal of their appeals.

8. We have carefully heard the learned counsel for the appellants, learned Deputy Prosecutor General Sindh for the State and minutely scanned the entire evidence available on record.

9. The points for determination in these appeals are that, (1) what is the effect of delay at every stage from postmortem to registration of FIR and even in recording of statement of eye-witnesses under Section 161 Cr.P.C? (2) whether the eye witnesses have contradicted each other and therefore, their evidence was not confidence inspiring to convict the appellant? (3) whether the trial court has failed to extend the benefit of doubt to the appellant?

10. The case of the appellant is that the story initially recorded in the FIR has not been supported by anyone of the witnesses. The complainant has lodged FIR after 25 hours and completion of the funeral. The complainant was also witness of Inquest Report dated **24.3.2013** prior to lodging of the FIR and even in the said Inquest Report the brief facts given by the complainant but he has not nominated any accused by name nor he has disclosed names of the eyewitnesses. Though in the FIR he has not disclosed what was happening between the time of incident to the time of burial, however, he has nominated only three accused by name on the basis of information received from unidentified persons. The police has challaned four accused instead of three named by complainant in the FIR. In his examination in chief the complainant made several improvement probably in search of motive to attribute to the accused. He stated the eyewitnesses have also disclosed to him that women of the Christian community have also thrown stones on the Muslims who wanted to rescue his brother but due to stoning they could not save him from the violent Christians.

However, no other witness has stated about the stoning by women on the Muslims trying to save the deceased. All of the statements of the complainant at different times indicate that every statement made by him was after consultation and deliberation to falsely implicate the appellants. In these circumstances the delay in lodging of FIR can only be explained as time consumed by the complainant to develop an story against the accused named by him though he was admittedly not an eyewitness to the incident. This delay has adverse effect on the case of prosecution. It is settled law that unexplained delay in lodging FIR would create a doubt and its benefit has to go to the accused. Reliance is placed on the case of *Mst. ASIA BIBI ..Vs..The STATE and others* (P L D 2019 Supreme Court 64), the relevant observation of the Hon'ble Supreme Court in the said judgment is reproduced below:-

29.....There is no cavil to the proposition, however, it is to be noted that in absence of any plausible explanation, this Court has always considered the delay in lodging of FIR to be fatal and casts a suspicion on the prosecution story, extending the benefit of doubt to the accused. It has been held by this Court that a FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime; thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Furthermore, FIR lodged after conducting an inquiry loses its evidentiary value. [see: *Iftikhar Hussain and others v. The State* (2004 SCMR 1185)]. Reliance in this behalf may also be made to the case titled as *Zeeshan @ Shani v. The State* (2012 SCMR 428) wherein it was held that delay of more than one hour in lodging the FIR give rise to the inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful. Such a delay is even more fatal when the police station, besides being connected with the scene of occurrence through a metaled road,

was at a distance of 11 kilometers from the latter. In the case titled as Noor Muhammad v. The State (2010 SCMR 97) it was held that when the prosecution could not furnish any plausible explanation for the delay of twelve hours in lodging the FIR, which time appeared to have been spent in consultation and preparation of the case, the same was fatal to the prosecution case. In the case titled as Muhammad Fiaz Khan v. Ajmer Khan (2010 SCMR 105) it was held that when complaint is filed after a considerable delay, which was not explained by complainant then in such situation it raises suspicion as to its truthfulness. Thus, we are of the view that in the facts and circumstances of the case, the explanation given by the prosecution is not plausible.

11. Learned counsel for the Prosecution has not been able to explain from the evidence the cause of delay in lodging of the FIR. In a similar manner the contention of the learned counsel for the appellant that there has been an unexplained delay even in postmortem instead of getting it immediately done after the death was in fact on account of police trying to procure and plant eyewitnesses, who otherwise have failed to record trustworthy evidence against the appellants. The very fact that even the postmortem was conducted after the dead body has already given death bath (غسل میت) also indicates that the complainant party was busy in deliberation to develop the story against the accused persons. The complainant himself has stated in his examination-in-chief that on **24.9.2013** at about **10:00 a.m** some official of law enforcement agency came to him and asked him not to agitate further and shift the body to Jinnah Hospital for postmortem and in the cross-examination he admitted that on **24.9.2013** before taking dead body to Jinnah Hospital for postmortem we have already given last bath and it was wrapped in coffin. PW-12 Muhammad Yasin contradicted the complainant on the proposition of advice of law enforcing agencies to take the dead body to JPMC when in his examination in chief he stated that "*On my advice postmortem was conducted and in the day time the body was taken to*

JPMC". The Superior Court in several cases has given importance to the handling of dead body in murder case to preserve evidence with particular reference to the facts that how, when and in whose custody the dead body should be prior to the postmortem. In the case of Muhammad Rafiq @ Feeqa..Vs..The State (2019 SCMR 1068), the Hon'ble Supreme court in para 8 has reproduced relevant provision of law as follows:-

8.....The mode and manner in which the dead body is to be taken into custody, retained and then forwarded for the said examination of the medical officer has been prescribed under **Rule 25.37** of the Rules. The relevant provisions of the aforementioned laws read as under:

"174. Police to inquire and report on suicide, etc.---(1)

The officer in charge of a police-station or some other police-officer specially empowered by the Provincial Government in that behalf, on receiving information that a person-

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Provincial Government, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighborhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the [concerned] Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such

rules as the Provincial Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Provincial Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

[(5) The Magistrates of the first class are empowered to hold inquests.]"

"25.37. Post-mortem examination - action to be taken by police: When corpses are sent for medical examination the following rules shall be observed:

(1) The result of the investigating officer's examination of the body shall be carefully recorded in form 25.39(1). Clothing found on the body, foreign matter adhering to it and any instrument likely to have caused death remaining in a wound or on the body shall be secured in the position in which found, if possible, or, otherwise, shall be carefully packed separately, according to the instructions contained in rule 25.41.

(2) To counteract decomposition as far as possible the body shall be sprinkled with Formalin diluted to 10 per cent and shall also be so used with strong solution of chloride of lime in water. Bodies which have to be carried long distances should be sprinkled with the dry powder of chloride of lime or with carbolic powder sold commercially in tin boxes with a perforated lid specially constructed for sprinkling purposes. The use of powdered charcoal is prohibited, as the stains caused thereby may complicate the task of post-mortem examination.

(3) The body shall be placed on a charpoy or other light litter and protected from the sun, flies and exposure to the weather. The litter shall be transported to the place appointed for the holding of postmortem examinations by such means as the investigating officer may consider most expedient in the circumstances of weather, distance to be covered and conditions of the body. If necessary and expedient conveyance, including a motor vehicle, may be hired to carry the corpse and those who are required to accompany it as escort or witnesses.

(4) All police officers along the route are required to give immediate assistance to expedite the transportation of dead bodies for medical examination.

(5) Two police officers who have seen the dead body in the position in which it was first found, and are competent to detect any attempt at substitution or

tampering with the body or its coverings, shall accompany the body to the mortuary, and remain in charge of it until the examination is complete. If necessary, an additional guard shall be supplied by the Lines Officer to place a sentry on the mortuary, but the officers who have accompanied the body from the spot shall hand it over personally to the medical officer conducting that post-mortem examination together with all reports and articles sent by the investigating officer to assist the examination and shall receive and convey to the investigating officer the postmortem report.

(6) As soon as the Civil Surgeon has intimated that his examination is complete, the police shall, unless they have received orders from a competent authority to the contrary, make over the body to the deceased's relatives or friends or, if there are no relatives or friends, or they decline to receive it, the police shall cause the body to be buried or burnt according to the rules framed in this behalf by the District Magistrate."

and after reproducing provision of law the Hon'ble Supreme Court held as under:-

10. Thus, once there is suspicion regarding the death of a person, the following essential steps follow: **firstly**, there is a complete chain of police custody of the dead body, right from the moment it is taken into custody until it is handed over to the relatives, or in case they are unknown, then till his burial; **secondly**, post mortem examination of a dead person cannot be carried out without the authorization of competent police officer or the magistrate; **thirdly**, post mortem of a deceased person can only be carried out by a notified government Medical Officer; and **finally**, at the time of handing over the dead body by the police to the Medical Officer, all reports prepared by the investigating officer are also to be handed over to the said medical officer to assist his examination of the dead body.

12. In the case in hand the record does not show adherence to the required law for immediate action and particularly about custody of the dead body. Admittedly the dead body was not in police custody throughout from the place of incident till the postmortem of the deceased. To the contrary the dead body was in the hands of the complainant party, who have given it even death bath and were ready to go for burial but under the

influence of strangers took a decision to take the dead body to JPMC for the postmortem. It is pertinent to re-emphasis here that even at the time of preparing Inquest Report under **Section 174 Cr.P.C** the complainant was unable to name the appellant or anyone involved in the murder of his brother. In the case of Muhammad Rafique @ Feeqa (supra) the Hon'ble Supreme Court on the question of delay in postmortem has held as under:-

7.....To add to this crucial legal lapse, there is a marked delay in carrying out the post mortem of the deceased Muhammad Azam. According to the complainant's own version, which has been toed by other prosecution witnesses, the crime was committed at 05.30 p.m. at the Dera of Ilam Din, a locality in District Lahore, while the post mortem was carried out after a delay of nearly 22 hours on the next day at 03.00 p.m. at a public hospital in Lahore. One must be mindful of the fact that the incident took place in District Lahore, where there is no dearth of medical officers in public hospitals who are available round the clock to carry out post mortem of deceased persons. When the Additional Prosecutor General and learned counsel for the complainant were confronted to explain the marked delay in carrying out the post mortem of Muhammad Azam, they were unable to point out any justifiable reason for the same in the entire record. **Such unexplained delay in the post mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution's evidence. In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eye-witnesses of the crime.** In similar circumstances, this Court, in the case of Irshad Ahmad v. The State (2011 SCMR 1190), observed that the noticeable delay in post mortem examination of the dead body is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses before preparing police papers necessary for the same. This view has been followed by this court in Ulfat Husain v. The State (2018 SCMR 313), Muhammad Yaseen v. Muhammad Afzal and another (2018 SCMR 1549), Muhammad Rafique v. The State (2014 SCMR 1698), Muhammad Ashraf v. The State (2012 SCMR 419) and Khalid alias Khalidi and 2 others v. The State (2012 SCMR 327).

The Hon'ble Supreme Court in the case of IRSHAD AHMED ..Vs.. THE STATE (2011 S C M R 1190) has observed as follows:-

3.We have further observed that the post-mortem examination of the deadbody of Shehzad Ahmed deceased had been conducted with a **noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted.....**

13. In the light of the contents of FIR and inquest report the prosecution was obliged to find out eyewitnesses and ultimately planted four persons as eyewitness namely PW-4 Muhammad Mushtaq, PW-5 Muhammad Jibrán, PW-6 Muhammad Saeed and one Muhammad Ali were shown eyewitnesses in the application of I.O. dated **05.10.2013** for recording their statements **under section 164, Cr.P.C.** to the Magistrate (**Ex.10/C**). However, witness Mohammad Ali did not record his statement under **sections 164, Cr.P.C.** before the Magistrate. Additionally despite their claim to be eyewitnesses the Investigating Officer PW-14 SIP Rafiquddin has failed to record their statements under **Section 161 Cr.P.C** on the day of incident or next day and even immediately after burial and lodging of the FIR. He has not been able to explain his failure to record statement of eyewitnesses without delay of several days despite the fact that all witnesses were available in the area. In his cross-examination the I.O. has stated as under:-

“It is correct to suggest that after site inspection, I had recorded statement of complainant under section 161, Cr.PC even then he had not given the names of eyewitnesses. ...It is correct to suggest that he had recorded statement of witnesses u/s 161, Cr.PC none of them stated that other witness whose statement I had recorded u/s 161 Cr.PC was present along with them. I see inquest report, Ex.9/B and say that neither the name of witnesses nor the accused persons are given. It is correct to suggest that I had recorded statements of Jibrán, Muhammad Ali, and Mushtaq on 28.09.2013 u/s 161, Cr.PC when all the witnesses and the complainant were sitting together. It is correct to suggest that at the Masjid where dispute took place, there were also shops of Masjid but I had not taken any person from those shopkeepers as a witnesses. It is correct

to suggest that I had not made any Namazi or Pesh Imam as a witness to prove that deceased had offered his prayers”.

The date of incident is **23.09.2013** and statements of witnesses **under section 161 Cr.P.C** were recorded after five days on **28.09.2013**. Likewise statements of the witnesses under **Section 164 Cr.P.C** were recorded after further delay of 26 days on **24.10.2013**. The prosecution witness PW-2 Muqtader Ali, Judicial Magistrate deposed that on **05.10.2013**, SIP Rafiquddin of P.S. Zaman Town preferred application for recording statements of eyewitnesses under **Section 164, Cr.P.C**. However, recording of statements of eyewitnesses was adjourned on **09.10.2013**, to **14.10.2013**, and then to **21.10.2013**. Ultimately on **22.10.2013** statement of only one witness Mohammad Saeed under section 164, Cr.PC was recorded (**Ex.10/G**) and on **24.10.2013** statements of two witnesses namely Muhammad Jibrán and Muhammad Mushtaq under section 164, Cr.PC were recorded (**Ex.10/I and 10/J**). In the case of Muhammad Asif Vs. the State (**2017 SCMR 486**), the Hon’ble Supreme Court has held as under:-

15.....There is a long line of authorities/precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses cannot be safely relied upon.

In the case of NOOR MUHAMMAD ..Vs..The STATE and another (**2020 SCMR 1049**), the Hon’ble Supreme Court again held as under:-

We have also noticed from the record that Khawaja Din Muhammad (PW) has made three successive statements before investigating officers. In all three statements, he has taken somersault while negating each statement whereas last statement was made at a belated stage. The third statement made by said witness before DSP, Investigating Branch was recorded on 10.12.2018 with the delay of one and half year. Similarly, Mst. Amina Bibi and Mst. Imtiaz Fatima introduced eye-witnesses of the occurrence also made their statements under section 161, Cr.P.C. on 31.12.2018 with the delay of more than

one and half year. **It is established principle of law that delayed recording of statement of the PW under section 161, Cr.P.C. reduces its value to nil.** Reliance in this regard is placed upon case titled as "Abdul Khaliq v. The State" (1996 SCMR 155) wherein it has been held as under:-

"---S. 161---Penal Code (XLV of 1860), S. 302/34--- Late recording of statement under S. 161, Cr.P.C.--- Value----Late recording of a statement of a prosecution witness under S. 161, Cr.P.C. reduces its value to nil unless delay is plausibly explained".

14. Besides the above lacunas in the inquiry and investigation with reference to the reasonable time for taking steps in collecting evidence against the accused, the evidence of the so called eyewitnesses who surfaced in the prosecution story after five days of the incident, even they have contradicted each other and their testimony has even been contradicted by the medical evidence on record. In the medical evidence **PW 07** Dr. Afzal Ahmed, Medico Legal Officer, JPMC deposed that on **24.09.2013**, when he was on duty at JPMC, a dead body of Nazar Iqbal son of Chao Khan, aged about 26 years, wrapped in coffin was brought for postmortem examination at about 01:00 p.m. He started postmortem at 01:25 pm. He examined the dead body and found following injuries on his person:

1. Abrasion size 0.7cm x 0.2cm over nose.
2. Lacerated wound size 1cm x 0.5cm over right midaxillary line skin deep.
3. Contusion size 3cm x 1cm over left iliac region
4. Contusion size 1cm x 1cm over right lumber region.

General Particulars

HEAD : No any remarkable mark of injury seen over welt of skull. All correspondence structures intact.

NECK: No any remarkable mark of injury seen.

THORAX: No any remarkable mark of injury seen. All correspondence structure found intact. Right and left lung and heart congested.

ABDOMEN: No any remarkable mark of injury seen corresponding structures found intact.

Time between death and postmortem was approximately 16 to 18 hours.

Cause of death was reserved vide Ex.P/17.

On **22.03.2018** Dr. Afzal Ahmed was again examined in Court as Ex. P/13, when he produced the cause of death at Ex.P/22, which reads as under:

“Final cause of death : Keeping in view the above reports and postmortem findings the exact cause of death could not ascertain, however, inquest report submitted by IO is self-explanatory for further legal proceedings.”

In cross-examination, to the counsel for accused Waqas, Dr. Afzal stated as under :-

“I see Ex. P/16 postmortem report and I see the injury No. 1, 3 and 4 and say that injuries are deep skin and not muscles. I see injury No. 2 and say it is deep skin but not deep cartilage. I had not seen any marks that the body was dragged on his back. It is correct to suggest that there was no bullet injury. It is correct to suggest that I could not ascertain the cause of death.”

In cross-examination to the counsel for accused Aric, Dr. Afzal further stated as under :-

“It is correct to suggest that the injuries sustained by the deceased was not enough to cause death.”

15. In juxtaposition to the evidence of PW Dr. Afzal the evidence of eyewitnesses was entirely contradictory. PW-4 Muhammad Mushtaq in his examination-in-chief has deposed as under :

“..... I alongwith other persons was also present at the scene when 11/12 Christian persons who were standing at the corner of street having wooden sticks, Bats, knives, stones each. The present accused Waqas was also among those 11/ persons, he was holding pistol in his hand covered with handkerchief and was making aerial firing. I saw that above stated 11/12 persons dragged Nazar Iqbal and taken him inside Lane No. 05, where they jointly beaten him.....”

PW-5 Muhammad Jibran deposed that he is eyewitness of this incident, and in his examination-in-chief stated as under :-

“..... I saw that some person namely **Aery, Aeric, Yasir and Waqas started dragging Nazar and took him in Street No. 5, where they gave him danda blow. Aery stabbed a knife on right side of rib box of Nazar. Yasir gave Bat blow on forehead of Nazar. Waqas was carrying a pistol wrapped up in a piece of cloth. Eric was holding a danda.** No body from public could help Nazar because of firing and stoning by Christian community.....”

PW-6 Muhammad Saeed has stated in his examination-in-chief as follows:-

“I saw that few persons out of that Christians were holding wooden sticks and **I also saw steel rod in the hand of one Christian namely ARIE, I further saw a wooden stick in the hands of one Christian namely ARIC.** During that riot I saw that one Christian namely **Waqas was holding T.T. Pistol in his hand, wrapped in cloth but within my side he took it out from that cloth and made direct fire upon one Muslim namely Nazar Iqbal.** Before this I saw that one Christian namely **Yasir who was holding bat in his hands hit that bat on the head of said Nazar Iqbal from back side,** in result of which he became unconscious and fell down. Thereafter **I saw that ARIE and Waqas dragged the said Nazar Iqbal by holding his legs in their hands and took him in lane No.05.** During dragging, the said Nazar Iqbal tried to stand but Arie had again made attack/cut on his face through knife.”

16. The Doctor has confirmed in his examination-in-chief that there was no **Head injury** or on the backside of deceased's head nor there was any injury on the **Neck** of the deceased. In cross-examination he admitted that he has not seen any marks that the body was dragged on his back. There was no bullet injury on the body of deceased. Doctor has categorically stated that the injuries sustained by the deceased were not enough to cause death. None of the injury was caused by hard and blunt substance. Thus the evidence of eye-witnesses was proved to be false.

17. In addition to the contradictory evidence regarding causing injuries to the deceased by the appellants, the prosecution has also failed to

substantiate the allegation of complainant in the FIR that **“the enraged people of the Christian community while chanting slogan attacked upon my brother and other Namazees”** while coming out of Masjid-e-Khulfa-e-Rashideen. The complainant in his examination-in-chief tried to improve the case of the prosecution by alleging that **“the other eye-witnesses have also disclosed to me that the women (foe) of the Christian community has thrown stones on the Muslims who wanted to rescue my brother but due to stoning they could not save him with the violent Christians.”** None of the eye-witnesses as well as complainant have offered Namaz-e-Asr at the Masjid Khulfa-e-Rashideen on the fateful day of incident. This was again another unfortunate false allegation on the Christian community as well as on the appellants that they had been stoning on the Muslims coming out of the mosque after Namaz-e-Asr or they have pelted stones on the mosque. This allegation has been found false and blatant lie. There was no evidence of stoning by the christen people on the mosque or namazees. The Investigating Officer has admitted in his cross-examination that **“It is correct to suggest that there is the Masjid in the area where dispute had taken place but there are also shops of Masjid but I had not taken any person from those shopkeepers as a witness. It is correct to suggest that I have not made any namazi or Pesh Imam as a witness to prove that the deceased had said his prayers and had come out of the Masjid.”** Eye-Witness PW-6 Muhammad Saeed has admitted in his cross-examination that **“It is correct to suggest that on both sides of Masjid there are shops, in result of stoning on the Masjid no damages was caused either to the Masjid or to the shops”**. PW-5 Muhammad Jibrán in his cross-examination also confirmed that **“It is correct to suggest that in my presence when accused persons were stoning on the persons who were coming out of the mosque after offering prayers, no one has sustained any injury in result of that stoning.**

18. In view of the above discussion of facts and evidence the prosecution at every step has failed to prove any of the allegations against the appellants. The complaint registered by the brother of deceased on the basis of hearsay statements after 25 hours was a half cooked story against the appellants which turned out to be a pack of lies. None of the allegations of torture to the deceased and cause of his death against the appellant was substantiated at the trial. Even the statement of complainant and eye-witnesses to the effect that the people belonging to the Christian Community pelted stones on the Masjid Khulafa Rashideen and that the deceased has offered Namaze Asr in the said mosque could not withstand the test of cross-examination. In the given facts and evidence on record the trial Court ought to have dismissed the prosecution story and acquitted the appellants. The trial Court acknowledged the above cited discrepancies and did form the opinion that there are “**discrepancies about what they** (eye witnesses) **saw**” and yet instead of acquitting the appellants, the trial Court violated the universally accepted principle of criminal jurisprudence that benefit of doubt must always go to the accused and convicted them merely on the ground that accused have not examined themselves on oath to deny that they have not beaten Nazar Iqbal. It appears from the reading of impugned judgment that the conviction is based only on the sole ground given by the learned trial Court in Para 107 & 108 of the impugned judgment which are reproduced below:-

107. The prosecution eyewitness on oath had stated that they had seen the two accused beating Nazar Iqbal therefore, it had become encumbent upon both the accused to examine themselves on oath to rebut the same or adverse inference will be drawn against them. Reliance is placed upon 1996 MLD 782, 2009 PLD SUC(A) & K. page 60.

108. I do agree with the Defence Counsel that eyewitnesses have made discrepancies about what they saw the accused persons beating Nazar Iqbal but these accused person did not examined themselves on oath to deny that they had not lay hand on Nazar Iqbal.

It is very unfortunate when I checked the case law cited in para 107 of the impugned judgment I was surprised that citation **1996 MLD 782** is totally out of context and the other case law **PLD SUC(A) & K page 60** is not even proper citation. The judges are supposed to cite case law with clarity and after reading it. Even parties name should have been mentioned to facilitate the appellate Court to verify its usage by the trial Court. In a case of serious nature while awarding life sentence to the appellant the trial Court was not supposed to be so much casual. Be that as it may, neither the citations were correct not the conclusion drawn by the trial Court was in accordance with the principles of writing judgment in criminal case. The trial Court in awarding life sentence to the appellants even after having noticed discrepancies in the evidence of eye-witnesses has acted illegally and violated the basic principle of criminal jurisprudence that the prosecution has failed to prove the case against the appellant beyond shadow of doubts irrespective of weaknesses in the defence plea. The conviction on the ground that appellants have not rebutted allegation by not opting for recording their statement on oath is contrary to law and the principle laid down by the Hon'ble Supreme Court in several cases. Learned counsel for the appellants has relied on the following cases (1) Mst. AMEER KHATUN...Vs..FAIZ AHMED and others (**PLD 1991 SC 787**); (2) MUNAWAR ALI alias MUNAWAR HUSSAIN..Vs..THE STATE (**P L D 1993 SC 251**); and (3) JAVAID vs. THE STATE (**PLD 1994 SC 679**). The relevant observations of the Hon'ble Supreme Court from these citations are reproduced below:-

- (1) Mst. AMEER KHATUN...Vs..FAIZ AHMED and others
(PLD 1991 Supreme Court 787)

23. Finally, the Constitution provides that an accused shall not be compelled to make a statement on oath and this is guaranteed to him by way of a Fundamental Right. Any law providing otherwise would be ultra vires, any interpretation of the law contravening it cannot be allowed to stand. Consistency with the paramount law, therefore, demands that subsection (2) of section 340 should be interpreted as only conferring a duty or a power on the Court to inform the accused that he has a right under the law to make a statement on oath and it is his option with no risk attaching it to either make that statement or not to make that statement.

- (2) MUNAWAR ALI alias MUNAWAR HUSSAIN..Vs..THE STATE (P L D 1993 Supreme Court 251)

13. Lastly High Court has observed* that appellant did not pick up courage to Make statement on oath under section 340(2), Cr.P.C. Be that as it may, it is not open to draw adverse inference if accused declines to make statement in his defence on oath. Appellant Munawar produced defence witness Raja Muhammad Nawaz, who stated that appellant was working with him in Chakwal and was produced by him before police after the incident. But High Court held that his evidence did not inspire confidence and it was not believable that appellant would go as far as Chakwal to do labour work for a petty amount of Rs.600 p.m. when he could easily earn much more money by labouring in city. In this context we would like to say that **it is the duty of the prosecution to. prove case against accused beyond shadow of reasonable doubt and prosecution cannot take benefit from weakness of defence plea.** In this I case, we are of the view that against Appellant prosecution has not proved case its beyond doubt hence we give him benefit of doubt and set aside his conviction and sentence. Appeal is allowed and in the result appellant is acquitted. He may be released at once, if not wanted in any other case.

- (3) JAVAID vs. THE STATE (PLD 1994 SC 679)

17. Other reasons assigned by the High Court for nor believing the defence version are that appellant and other co-accused did not volunteer to be examined on oath as their own defence witnesses. If they declined to be examined on oath, this does not leave it open to presume that they are guilty because it is the duty of prosecution to prove the case against accused beyond doubt and that

burden is not reduced by amendment brought in section 340, Cr.P.C. which gives option to the accused to appear for himself as witness and give statement on oath or not.

19. In view of the above discussion, in my humble view the prosecution has failed to prove its case against the appellants beyond any shadow of doubt, therefore, I extend benefit of doubt to the appellants, this appeal is allowed. Resultantly, conviction and sentences awarded to the appellants by the trial Court vide judgment dated **02.07.2019** are set aside and appellants Arrey Masih alias Eric son of Babu Masih and Waqas Masih son of Younus Charles are acquitted of the charge. The Appellants shall be released forthwith if they are not required in any other custody case.

J U D G E

Zulfiqar Ahmad Khan, J.-- I have gone through the judgment penned down by my learned brother Nazar Akbar, J. and am not in agreement with the view taken in the said judgment, therefore, I have given my dissenting view based on the following reasons:

2. Having carefully heard learned counsel for parties and having gone through the entire evidence available on record, I have come to the conclusion that the accused were rightly convicted by the trial Court which arrived at the conclusion that they committed murder of the deceased Zafar Iqbal on the fateful day.

3. The prosecution story unfolded in the FIR was that on 23.09.2013 complainant Muzafar Iqbal was informed on telephone that his younger brother Nazar Iqbal had gone to offer *Asar* prayers at Khulfa-e-Rashideen Masjid, and between 05:30 to 05:45 p.m. when his brother came out of the

Masjid, few persons belonging to Christian community protesting on the incident of Peshawar (bomb blast on a church) started raising slogans and attacked his brother alongwith the other *Namazies*. His brother was dragged from the gate of the Masjid to Gali No.5, where eyewitness disclosed that (i) Waqas Masih, (2) Yasir Masih and (3) Arrey Masih had *Dandas* (sticks), bats, iron rods and *Churry* (dagger). They injured his brother with sticks, bats and *Churry*. His brother received injuries under his right armpit and at various parts of his body and due to that torture his brother succumbed to his injuries. The eyewitnesses told him that accused persons Waqas Masih, Yasir Masih and Arrey Masih have killed his brother Nazar Iqbal by using *Danda*, Bat and *Churry* and after burial he has come to P.S to lodge the FIR on 24.09.2013.

4. With regard to unnatural death of the deceased, Dr. Afzal Ahmed, Medico Legal Officer, JPMC deposed on 24.09.2013 deposed that he was on duty at JPMC, when dead body of Nazar Iqbal s/o Chao Khan, aged about 26 years, was brought for postmortem. He examined the dead body and found following injuries on his the deceased person:

1. Abrasion size 0.7cm x 0.2cm over nose.
2. Lacerated wound size 1cm x 0.5cm over right midaxillary line skin deep.
3. Contusion size 3cm x 1cm over left iliac region
4. Contusion size 1cm x 1cm over right lumber region.

General Particulars

HEAD : No any remarkable mark of injury seen over welt of skull. All correspondence structures intact.

NECK: No any remarkable mark of injury seen.

THORAX: No any remarkable mark of injury seen. All correspondence structure found intact. Right and left lung and heart congested.

ABDOMEN: No any remarkable mark of injury seen corresponding structures found intact.

Time between death and postmortem was approximately 16 to 18 hours.

5. PW-1 complainant Muzafar Iqbal deposed that on 23.09.2013 at about 05:30-05:45 p.m. he received a call through which he was informed that some people belonging to Christian community due to incident of Peshawar, attacked *Namazis* of Khulafa-e-Rashideen Masjid, in result thereof his brother Nazar Iqbal sustained serious injuries at the hands of those people namely Yasir Masih, Waqas Masih and Arrey Masih @ Arric Masih and others, who dragged Nazar Iqbal towards Lane No.5, where they beaten him with iron rod, churry, bat and wooden stick as disclosed by the eyewitnesses. Eyewitnesses also disclosed that some women of the same community had also thrown stones on the people who wanted to rescue his brother, but due to stoning they could not save him from these violent individuals. After sometime, some persons succeeded to reach to his brother, took him in Rickshaw and shifted him to a hospital. After receipt of such information he rushed to Government Hospital in Korangi No.5, but his brother was not there, then he went to Jinnah Hospital, where he saw that several people had gathered, who informed that dead body of his brother had been taken away towards home. Upon his return, he saw that several people agitating on this incident by keeping the dead body of his brother in the open space of Khulafa-e-Rashideen Masjid. Personnel of Law enforcement/Agencies were also present there. People kept dead body of his brother for whole night at the same place and continued their agitation. On 24.09.2013 at about 10:00 a.m. personnel of Law Enforcement/Agencies advised them not to agitate any further and to shift the dead body to JPMC for postmortem. At about 11:30-11:45 a.m. on 24.09.2013 he took the dead body to JPMC where at about 01:00 p.m. postmortem of the deceased was conducted. Before postmortem at about 12:45 p.m. SIP Aziz called him in

mortuary where dead body of his brother was lying, **he saw several wounds on his body**. In his presence, SIP Aziz prepared memo of inspection of dead body as well as inquest report, obtained his signatures on both the documents. After postmortem, he brought dead body to home. On 24.09.2013 after burial of the dead body of his brother he visited P.S. Zaman Town and lodged FIR at about 06:30 p.m. against Waqas Masih, Yasir Masih, Arrey Masih @ Arric Masih. On 25.09.2013 at 11:00-11:30 a.m. SIP Rafiquddin called him for the site inspection at Lane No.5, SIP took bloodstained earth and sealed the same. He prepared such memo and obtained his signatures and also recorded his statement. On 02.10.2013, upon a call from P.S. Zaman Town he reached at Madina Colony, adjacent wall of Coastguard where one police mobile came there in which SIP Rafiquddin and three other police officials and accused Arrey@Arric Masih were present. Thereafter accused Arric Masih voluntarily led them towards bushes and took out one wooden stick, one bat and handed over the same to SIP Rafiquddin. SIP sealed the same in his presence. In his cross-examination he stated that *"It is correct to suggest that after this incident Deputy Commissioner East has called a meeting of the representatives of both communities of Korangi 3½ and I attended that meeting. It is correct to suggest that in the result of the peace conversation of that meeting the people of Christian community returned back to their respective houses who left their houses after this incident. It is correct to suggest that name of accused Arric Masih is not mentioned in the FIR. Voluntarily says that I disclosed the name of Arric Masih at the time of lodging of FIR before the police officials but may be due to mistake he did not mention his name in the FIR, although several eyewitnesses repeatedly disclosed his name before me as one of the accused, who had beaten my brother at the time of incident.*

6. PW-2 Muqtader Ali, Judicial Magistrate at Ex.10, deposed that on 05.10.2013, he was posted as Civil Judge & Judicial Magistrate-X, Karachi East. On that day SIP Rafiquddin of P.S. Zaman Town moved an application for recording 164 Cr.PC statements of eyewitnesses in Crime No.358/2013 under sections 302/34, PPC of P.S. Zaman Town, namely, Muhammad Saeed son of Riaz Ahmed, Muhammad Ali son of Muhammad Sharif, Muhammad Jibran son of Muhammad Ilyas and Muhammad Mushtaq son of Muhammad Sahib, such application was allowed. On 22.10.2013 statement under section 164 Cr.PC of one witness namely Mohammad Saeed was recorded in verbatim in the presence of accused persons and their counsel at Ex.10/G, while three witnesses were called absent. On 24.10.2013 he recorded statements of two witnesses namely Muhammad Jibran and Muhammad Mushtaq under section 164 Cr.PC at Ex.10/I and 10/J.

7. PW-3 SIO/SIP Aziz Muhammad deposed that on 23.09.2013 upon instructions of SHO P.S. Zaman Town he left P.S. for JPMC for initiation of formalities due to tension amongst Christian community owing to Peshawar bomb blast in case of emergency. On 24.09.2013 at about 11:00 a.m. one dead body of Nazar Iqbal was brought to JPMC. Muzafar Iqbal, brother of deceased informed him that in retaliation of Peshawar blast his brother has been done to death by the Christian community in the incident happened on 23.09.2013, he kept the dead body of his deceased brother in Edhi mortuary and today he brought the same at JPMC. After having obtained necessary permission from MLO he inspected the dead body, prepared inquest report under section 174 Cr.PC at 13:00 hours Ex.9/A in the presence of complainant and his uncle Muhammad Yaseen. After conducting postmortem, cause of death was reserved by MLO who handed over two jars pertaining to organs of deceased for chemical examination and report.

Thereafter, dead body was handed over to Muzafar Iqbal. He asked brother of deceased for recording his statement under section 154 Cr.PC, but at that time he sought time for recording his statement owing to the reasons that **first he wanted to perform religious rites of his brother then he would record his statement.** He brought all such facts on record through Roznamcha Entry No.22, Ex.11/C. On 24.09.2013 at 18:30 hours, complainant Muzafar Iqbal came to Police Station Zaman Town and lodged FIR of the incident, which was recorded in verbatim, contents of FIR were read over by him to the complainant and obtained his signatures. IO/SIO Rafiquddin recorded his statement under section 161, Cr.PC. In his cross-examination, he stated that *"It is correct to suggest that after funeral of the deceased when the complainant came for lodging of FIR at the first time he disclosed the names of accused persons."*

8. PW-4 Muhammad Mushtaq deposed that on 23.09.2013 in Korangi 3½ HT-1850-A in front of Khulafa-e-Rashideen Masjid, Christian community was protesting against the blast incident occurred one day before in a Church at Peshawar. At about 05:45 p.m. when after performing *Asar* prayers one *Namazi* Nazar Iqbal (deceased) along with other persons came out from the Masjid, at that time, he along with other persons was also present at the crime scene when 11/12 Christian community persons were standing at the corner of the street having wooden sticks, bats, knives, stones each. Accused Waqas Masih was also among those 11/12 persons, he was holding pistol in his hand covered with handkerchief and was making aerial firing. He saw that above stated 11/12 persons dragged Nazar Iqbal towards Lane 5, where they jointly beaten him. Said 11/12 persons were equipped with sticks, bats, knives, stones as accused Waqas was holding pistol in his hand therefore none could move forward to save Nazar Iqbal

from the clutches of those enraged persons. After mercilessly beating, they left Nazar Iqbal in an injured condition and left the crime scene. Thereafter, brother of injured Nazar Iqbal, namely, Ghazanfar and his brother-in-law namely Muhammad Islam came at the place of occurrence and they with his help and other persons took him in a Rickshaw and shifted him to Jinnah Hospital. Subsequently, they received news that Nazar Iqbal had expired. On 28.09.2013, P.I Rafiq had recorded his statement under section 161 Cr.PC in the area. On 24.10.2013 his statement under section 164 Cr.PC was recorded in the Court of Judicial Magistrate and obtained his signatures, thumb impressions as well as his photograph. In his cross-examination he stated that, *"when brother and brother-in-law of deceased Nazar Iqbal came at the place of incident in rickshaw I disclosed before them that who killed him. I know the present accused Waqas prior to this incident as he is also resident of the same area. It is incorrect to suggest that I am not an eye witness of this incident and I am deposing falsely due to my relationship and friendship with deceased Nazar Iqbal. Voluntarily says that I am deposing before this Court without any pressure of anyone. It is correct to suggest that I disclosed in my statement under section 164 Cr.P.C the name of accused Arric as one of the accused of this crime. I know him prior to this incident being resident of same vicinity."*

9. PW-5 Muhammad Jibrán deposed that he was an eyewitness of this incident too and after 5 days of this incident SIP Rafiq of P.S. Zaman Town recorded his statement u/s 161, Cr.PC and after few days Judicial Magistrate has also recorded his statement u/s 164, Cr.PC, (Ex.10/I). In his examination-in-chief, he adopted his earlier 164 Cr.P.C statement and pleaded to treat his 164 Cr.P.C. statement as recorded by the learned trial court. In his 164 Cr.P.C statement he deposed that *"it was the time about 5:45 p.m. in the evening I was present outside Masjid Khulfa-e-Rashdeen, Korangi No.3,*

Karachi. At that time one Nazar was coming out of Masjid after offering Namaz-e-Asr. I saw that some persons namely Arrey Aeric, Yasir and Waqas started dragging Nazar and took him in Street No.5 where they gave him Danda blow. Arrey stabbed a knife on right side of rib box of Nazar. Yasir gave Bat blow on forehead of Nazar. Waqas was carrying a pistol wrapped up in a piece of cloth. Eric was holding a danda. Nobody from public could help Nazar because of firing and stoning by Christian community. After 10 to 15 minutes we became close to Nazar who was lying on the road. At the same time sister and brother in law of Nazar also arrived at the spot and immediately took Nazar to the hospital. Accused person Waqas and Eric present before the Court are same. In his cross-examination he stated that, "It is correct to suggest that in my statement under section 161 Cr.P.C I disclosed that on 23rd September 2013 at the time of incident, I was present in front of the gate of Mosque Khulfa-e-Rashideen alongwith other Muhammah fellows."

10. PW-6 Muhammad Saeed deposed that he was eyewitness of this incident too, which happened on 23.09.2013. At the time of incident he was present at the main gate of the Jamia Masjid Khulafa-e-Rashideen, it was *Asar* Prayers time. He and other people of vicinity were waiting for Pesh Imam of that Masjid as they wanted to discuss the matter regarding incident having taken place one day prior to the present incident between Muslim community and Christian community after the bomb blast at a Church in Peshawar. In the meanwhile, he saw a mob of persons belonging to Christian community coming towards Masjid, when the mob reached there they started stoning the persons standing out of the gate of Masjid as well as on the Masjid, they were holding wooden sticks, he saw steel rod in the hand of one such person and knife in the hand of Arric, who was also holding a wooden stick in his hand. He saw T.T. pistol in the hand of Waqas,

wrapped in cloth, he took it out and made fire upon Nazar Iqbal. **Before this, he saw bat in hands of Yasir, who hit the bat on the head of Nazar Iqbal from backside, in result of which he became unconscious and fell down.** Thereafter, he saw that Arric and Waqas dragged said Nazar Iqbal by holding his legs in their hands and took him towards Lane No.5. **During dragging Nazar Iqbal tried to stand but Arrie had again made attack/cut on his face through knife.** Thereafter, the persons belonging to both communities were dispersed but few persons from Muslim Community moved forward and took injured Nazar Iqbal from Gali No.5 and brought him to Rickshaw stand situated at Qabrustan Road and at that time he was alive, meanwhile relatives of Nazar Iqbal, namely, Ghazanfar (brother of Nazar Iqbal) and Akhtar reached there and they took him in Rickshaw and shifted him to the hospital and thereafter that they received news about death of Nazar Iqbal. On 26.09.2013 one police official recorded his statement in front of the said Masjid. On 22.10.2013 Judicial Magistrate also recorded his statement u/s 164. He said that he see Cr.PC Ex-10/H) (statement u/w 164 C.P.C. recorded by the Judicial Magistrate consisting 3 pages, each page pertained his signature and thumb impressions) and said that this was my same statement recorded by the Judicial Magistrate in the presence of the accused persons namely Waqas and Arric. The said Waqas and Arric present before the court are same and at the time of recording my statement u/s 164 Cr.P.C said same accused Waqas and Arric were present there. In his cross-examination he stated that *"It is incorrect to suggest that I am deposing falsely before the Court or that Waqas made direct fire upon the deceased Nazar Iqbal. It is incorrect to suggest that I deposed falsely before this Court that the Christian persons dragged the deceased Nazar Iqbal on the road upto 20/25 steps. It is incorrect to suggest that I am not an eyewitness of the alleged*

incident of this case. It is incorrect to suggest that I am deposing false evidence before this Court at the behest of the Complainant."

11. PW-8 ASI Asad Ali Chitta deposed that on 29.09.2013 he was posted at P.S. Zaman Town and was on duty from 08:00 a.m. to 08:00 p.m. He left P.S. for patrolling in the area in Mobile No.III along with HC Ijaz Ahmed and P.Cs. Waseem, Muhammad Jameel and Arif. On the pointation of spy informer he arrested Waqas Masih involved in Crime No.358/2013 from corner of Raheemabad, in the presence of Mushirs, prepared such memo, nothing was recovered from the accused at the time of his arrest. PW-9 PC Waseem Ahmed was Mashir of arrest of accused Waqas and supported the statement of PW-8 with regard to arrest of accused Waqas.

12. PW-10 ASI Muhammad Khan had deposed that on 30.09.2013 he was posted at P.S. Zaman Town and was on duty from 08:00 a.m. to 08:00 p.m. He left P.S. for patrolling in the area in Mobile No.II along with ASI Asghar, HC Shahid, PCs Rafiq and Khalid. On the pointation of spy informer he arrested Arrey son of Babu Masih involved in Crime No.358/2013 in presence of Mushirs from Bus Stop 48-F, prepared such memo, nothing was recovered from the accused at the time of his arrest. PW-11 HC Muhammad Shahid was Mashir of arrest of accused Areey Masih, he supported statement of PW-10 with regard to arrest of accused Areey Masih from Bus Stop 48-F.

13. PW-12 Muhammad Yaseem Meo deposed that on 23.09.2013 his nephew informed him that dispute has taken place over Masjid Khulfa-e-Rashideen in ST-18, Korangi Town and Christian boys taken his brother from Masjid and had beaten him, who sustained serious injuries and was taken to JPMC, where he succumbed to injuries. He reached at JPMC where

he was informed that dead body has been shifted to home, he reached at residence of Muzafar where there was rush of people, police was also there, there were also vehicle of Rangers. He is head of Meo community, he advised Muslim community not to cause any further loss. On his advice, postmortem was conducted and dead body was shifted to JMPC. Though the firing had also taken place, but **doctor disclosed that deceased died due to sever torture.**

14. PW-13 Dr. Afzal Ahmed was again examined at P 381 with regard to final cause of death of deceased, who opined that after examining the chemical reports the cause of death was uncertainable.

15. PW-14 SIP/IO Rafiquddin deposed that on 24.09.2013 he was posted at P.S. Zaman Town, he received copy of FIR No.358/2013, under section 302, 34, PPC along with proceedings under section 174, Cr.PC, memo of inspection of dead body, MLO letter and handing over of dead body. Case property from JPMC containing 2 sealed glass jars and one bottle containing sample of viscera. He left P.S at 1235 hours, visited the place for site inspection viz. ST-18, Korangi 3 ½ near Khulafa-e-Rashideen Masjid where complainant and relatives of deceased were having *Fateha Khawani*. On 25.09.2013, on the pointation of complainant he inspected the place of incident, collected bloodstained soil, sealed the same at Ex.9/E, prepared sketch of place of incident at Ex.P/43, recorded further statement of complainant as well as 161, Cr.PC statement of witnesses. On 28.09.2013 he wrote letter to DSP Korangi for chemical examination of case property and to send one glass jar from JPMC to Dow Medical Laboratory for histopathology. On 29.09.2013 ASI Asad Chattah arrested one accused Waqas Masaih. On 30.09.2013 he took remand of accused till 05.10.2013 and

interrogated the accused, **who confessed that during agitation he had pelted stones and had used sticks in beating people.** On 30.09.2013 another accused Arrey Masih alias Arric was arrested by ASI Muhammad Khan Niazi. On 01.10.2013 he obtained remand of accused Arric till 05.10.2013. On 02.10.2013 accused Arric Masih led the police and on his pointation recovered stick and bat from bushes at Sector 50/A, Korangi, which he used in beating, complainant was also called there by the I.O, such memo of recovery was prepared by the I.O in presence of Mushirs. On 04.10.2013 he sent bloodstained soil, one glass jar containing viscera and one bottle containing fluid of deceased for chemical examination. On 05.10.2013 both accused were produced before the Court for taking permission for recording their 164, Cr.PC statements, the accused were remanded to judicial custody. On 22.10.2013 and 24.10.2013 I.O got recorded statements of eyewitnesses Muhammad Saeed, Muhammad Mushtaq and Jibran under section 164, Cr.PC before the Judicial Magistrate. He obtained chemical examiner reports on 07.10.2013. On 30.10.2013 he completed the investigation, submitted interim challan but DPP refused to take the same by saying that this is a case of ATA, then he deposited complete file with SSP Investigation.

16. PW-15 Inspector Waheed Ahmed deposed that on 18.11.2013 he was posted as SIO, he received order dated 18.11.2013, whereby he was allowed to submit challan, he received a case file and case property in sealed condition, he had not recorded any further statement u/s 161, Cr.PC. he has submitted challan only. In his cross-examination he stated that since section 7 of the Anti-Terrorism Act, 1997 was added as such investigation was transferred to him.

17. From perusal of the evidence, it has come on surface that PW-5 Muhammad Jibran in his cross examination to Mr. Intikhab Ahmed, Advocate has categorically stated that he himself saw accused Arric beating deceased Nazar Iqbal. While PW-6 Muhammad Saeed stated that accused Arric was having wooden stick, Waqas was holding pistol, which he took out from cloth and made fires, Yasir was holding bat and hit Nazar from the back. Arrey/Arric dragged him to Street No.5, when Nazar Iqbal (deceased) tried to stand, Arrey again made attack/cut on his face through knife. In his cross examination he had stated that he had disclosed the name of the accused who had caused injuries to the deceased Nazar Iqbal on 23.09.2013 when latter was dragged 20 to 25 steps in Street No.5 on Katcha road and his blood was oozing from his injuries. He further stated that he come back home at 5:40 from his shop and that he had seen the injuries on the body of deceased Nazar Iqbal. He denied the suggestion that he has not seen the blood, meaning thereby he did see the blood on the body of the Nazar Iqbal. PW-4 Muhammad Mushtaq is an eye witness and his cross examination defence counsel failed to prove that he was not present at the place of incident. PW-7 Dr. Afzal had stated that three injuries were deep skin. He had sent the pieces viscera's of the deceased for chemical examination and had produced the photocopy of the report of histopathology, which says no remarkable pathology seen which means the viscera's did not show that he was poisoned. The complainant had produced the memo of inspection of dead body recorded on 24.09.2013 at 1300 hours in the hospital by SIP Aziz, which shows that the dead body had marks of torture blue in colour. It showed that the dead body had also marks on the left side on the stomach and on high have blue marks due to torture. In the same way the inquest report (Ex.9/B) also shows in column No.10 that on different parts of the

body there are blue marks of torture and there is one injury on the nose with sharp and solid thing over his nose. The column No.11 of the inquest report shows that the blood was frozen and column No.14 shows **the cause of death is because of torture and by injury with sharp and solid thing**. The inquest report and memo of dead body shows that the **deceased was tortured**. I.O had produced pictures given by the complainant of deceased which shows that **he had received injuries on his nose leading towards his left eyebrow**.

18. Accused Waqas in his statement dated 17.11.2018 recorded u/s 342 had stated that he knew there was a clash between two communities and claimed that he had surrendered himself on 27.09.2013 alongwith his family. He did not say in his 342 statement that he was not present at the spot when incident took place, and neither he examined himself on oath to deny the same nor produced any witnesses. It was stated on 4.10.2013 that a meeting was held for resettlement at the office of the Commissioner where complainant also appeared and the matter was settled, he also produced minutes of the meeting held in the office of Deputy Commissioner where cheque of Rs.5 lac was given to the legal heirs of deceased Nazar Iqbal and resultantly Christian families came back to their respective places.

19. Accused Arrey/ Arric Masih claimed that he on the day of incident he was on duty and was not present at the place of incident and there is no evidence against him. For this plea, he wanted to examine Supervisor Jawaid as defence witness, but instead he had produced Sohail Masih as DW-1. Moreover, he did not examine himself on oath. He stated that on 23.09.2013 he and Arric had worked at the Factory from 7:00 a.m. to 8:00 p.m. and that the mother of Arric had went in the Denim Artistic Company

on 30.09.2013 to get the certificate that his son was present in the Factory on 23.09.2013, but neither his mother nor the supervisor was produced as defence witness to prove that Arric had attended the factory/company on 23.09.2013, nor Arric produced his CNIC to prove his identity that he is Eric and not Areey alias Arric.

20. The prosecution witness on oath had stated that they had seen the two accused beating Nazar Iqbal (deceased), therefore, it had become incumbent upon both the accused to examine themselves on oath to rebut the same or adverse inference will be drawn against them. All the eyewitnesses have supported each other's version independently. The case thus is not hit by the test laid down by *Altaf Hussain verses The State* (2019 SCMR 274) which requires that *when a set of witnesses was disbelieved to the extent of some accused the same could not be believed to the extent of remaining accused facing the same trial without there being any independent and strong corroboration.*

21. A great deal in this case depended upon the evidence of the eyewitnesses and the memo of inspection of dead body and inquest report. I have carefully examined these pieces of evidence in the light of circumstances available on record to satisfy myself whether they have honestly told the story in its material particulars and whether the version of the incident that the accused person had given could be rendered doubtful or improbable by the existence of any circumstances or having regard to the natural course of event, but the latter pursuit wasn't successful on the basis of irrefutable evidence.

22. It has been held in the case of *The State versus Haider Zaidi* (2001 SCMR 1919) that *while deciding criminal case the basic duty of a Court is to*

scrutinize the evidence on record in accordance with the established judicial norms without being influenced by the facts which tend to push in the background the substantiate evidence which is pivotal in reaching the correct conclusion. The pivotal point before the trial Court was whether the deceased Nazar Iqbal was tortured to death, which answer came in affirmative and the following questions was that whether evidence beyond reasonable doubt has come against the accused persons (the appellants) connecting them with the crime. That question from the evidence of the eyewitnesses having found corroboration with the medical evidence also came in affirmation. Positive legal evidence can only be thrown aside for the reason that any witness was untrustworthy. There is no reason for the eyewitness to falsely implicate the accused persons in the instant crime.

23. The case law cited by the appellants' counsel could not deter the evidence brought against the appellants. Mere on the basis of technicalities, conviction in the case of death cannot be set aside. No textual interference would bring a dead back to life.

24. For the above reasons, I come to the forementioned conclusion that the accused committed the subject crime. They beaten Nazar Iqbal who had sustained injuries enough to cause his death as the chemical report viscera's has proved he was not poisoned.

25. In view of the above discussion, I do not find any reason to interfere with the impugned judgments and as such the instant appeals are dismissed.

J U D G E

In view of the above, since dissenting note is recorded by one of us (Zulfiqar Ahmad Khan, J.), the matter be placed before Hon'ble Chief Justice for appropriate orders as his lordship may deems fit.

J U D G E

J U D G E

Karachi

Dated: 04.01.2020

Ayaz Gul