

SHARIAT APPELLATE BENCH OF HIGH COURT OF AZAD
JAMMU AND KASHMIR

Crim. Reference No.07/2008-08/2018;

Date of inst. 24.05.2008-04.07.2018;

Date of hearing. 04.07.2022;

Date of decision. 03.08.2022.

The State through Rashid Hussain Shah S/o Shah Pir Shah,
caste Syed R/o Phagwari Tehsil & District Kotli.

...Complainant

VERSUS

Zaffar Iqbal S/o Ghulam Sarwar R/o Kotla.

.....Convict-Respondent

Crim. Appeal No. 09/2008-09/2018;

Date of Inst. 07.07.2008-04.07.2018.

1. Zaffar Iqbal S/o Ghulam Sarwar, caste Malik R/o Phagwari.
2. Imran S/o Mansha, caste Malik R/o Kotli Tehsil & District Kotli.

.....Appellants

VERSUS

1. The State through Additional Advocate General Kotli.
2. Rashid Hussain Shah S/o Shah Pir Shah, caste Syed R/o Phagwari Tehsil & District Kotli.

....Respondents -Complainant

Appeal No.33/2008-10/2018;

Date of Inst. 16.06.2008-04.07.2018 .

1. Mehfooz Fatima, widow.
2. Rashad Husain Shah.
3. Arshad Hussain.
4. Asjad Shah S/o Shah Pir Shah.
5. Mst. Ishrat Naz W/o Aftab Hussain Shah.
6. Uzma Batool W/o Rashad Hussain Shah R/o village Phagwari Tehsil Kotli.
7. Mst. Kosar Parveen W/o Tanveer Hussain Shah R/o village Hill Kalan Tehsil Kotli.
8. Musarrat Bibi W/o Ibrar Hussain Shah R/o village Dabsi Tehsil Nakial District Kotli.

..... Appellants

VERSUS

1. Malik Zaffar Iqbal S/o Ghulam Sarwar.
2. Muhammad Yousaf.
3. Muhammad Taj S/o Sher Dil.
4. Muhammad Aziz S/o Shan.
5. Qamar Bashir S/o Muhammad Bashir.
6. Sajid Mehmood S/o Mehmood Ahmed.
7. Imran S/o Mansha Khan, caste Malik R/o village Phagwari Tehsil Kotli.
8. Hafiz Aurangzeb S/o Muhammad Khan, caste Malik R/o Kekani.
9. Imtiaz S/o Muhammad Iqbal, caste Malik.
10. Muhammad Itefaq S/o Muhammad Khan R/o Kekani.
11. Muhammad Yaqub S/o Muhammad Khan caste Malik R/o Phagwari.
12. Rizwan S/o Muhammad Yousaf caste Malik R/o Kotla Phagwari Tehsil & District Kotli.
13. The State.

....Accused/respondents

MURDER APPEALS AND REFERENCE

***Before:— Justice Muhammad Ejaz Khan, J.
Justice Chaudhary Khalid Rasheed, J.***

PRESENT:

M/s Mirza Muhammad Saeed, Malik Muhammad Zarrat and Raja M. Shafat Khan, Advocates, for the accused/respondents.
M/s Chaudhary Muhammad Illyas and Raja Waseem Tabassum, Advocates for the complainant.
Mr. Abdul Qayyum Sabri, AAG for the State.

JUDGMENT:

(Chaudhary Khalid Rasheed, J.) The captioned appeals have been presented against the judgment dated 19.05.2008 passed by the learned District Court of Criminal Jurisdiction, Kotli and the reference has been sent by the learned Court below for confirmation of the death sentence awarded to accused Zaffar Iqbal by District Qazi, a member of District Criminal Court.

Facts giving rise to the instant appeals as well as reference are, Rashid Hussain Shah, complainant filed a written application Exh.PD at Police Station Kotli on 23.09.2003, wherein it was stated that he is resident of village Phagwari and running a PCO in Riyan Gala. It was further stated that few days ago a minor altercation took place with Nisar brother of Malik Mansha. Today, again a mild dispute repeated and he alongwith with his brother Amir Asif Shah when sitting on said PCO, accused persons namely Mansha Khan, Muhammad Yousuf, Muhammad Taj, Zaffar Malik, Aziz,

Imran, Amjad, Rizwan, Imtiaz, Qammar Malik, Javaid, Niaz, Hafiz Aurangzeb along with 8/9 unknown persons having common criminal intention while riding on a Jeep No.4682 and on Suzuki Jeeps came at Riyan Gala at 9:30 A.M. All accused persons were armed in the manner that accused Zaffar Malik, Imran and Hafiz Aurangzeb were armed with Kalashnikovs and other accused were holding sticks, hatchets and small weapons. Accused persons who were armed with Kalashnikovs started firing soon after reaching at the said spot. It is further stated that brother of the complainant Amir Asif Shah run towards the roof of a nearby school, meanwhile accused Zaffar Malik with an intention of murder fired direct shot by targeting his brother which hit him at the left side of his forehead who fell down but all the accused persons kept firing. It was also contended that occurrence has been committed with preplanning and on the instigation of Mansha Khan. The occurrence was mentioned to be witnessed by Munir Hussain Shah and Iftikhar Shah and motive behind the occurrence was illuminated as a previous vendetta between the parties.

On this report, F.I.R. No.257/2003, Exh.PE was registered at Police Station Kotli in offences under sections

324,147, 148, 149 and 337-A1-APC on 23.09.2003. The injured person namely Amir Asif Shah succumbed to his injuries and expired in hospital, whereupon offence under section 302-APC was inserted by the investigating agency. On the failure of the accused persons to provide license of recovered weapons an offence under section 13/20/65 Arms Act was also added.

On completion of investigation, police sent the accused persons to face the trial before the learned District Criminal Court Kotli on 22.11.2003, statements of the accused persons under section 265-D Cr.P.C. were recorded on 16.12.2003 qua they claimed innocence, hence, prosecution was directed to lead evidence in order to prove their accusation and guilt of the accused persons. At the completion of prosecution evidence, statements of the accused persons were recorded under section 342 Cr.P.C. on 05.01.2007, but again claimed innocence, however, refused to record their statements under section 340(2) Cr.P.C. and also denied to adduce evidence in their defence. At the conclusion of the trial arguments were heard pro and contra and the learned Sessions Judge, a member of District Criminal Court Kotli, acquitted accused persons from all the charges by extending benefit of doubt, however, the other member of trial Court

learned District Qazi convicted accused Zaffar Iqbal under section 302(B) APC and awarded him death sentence as Tazir coupled with five years imprisonment under section 13/20/65 Arms Act whereas accused Imran was awarded five years imprisonment in offence under section 13/20/65 Arms Act and concurred with the acquittal order of rest of accused persons vide its impugned judgment dated 19.05.2008, hence the captioned appeals as well as reference sent by District Qazi, Kotli for confirmation of death sentence awarded to accused Zaffar Iqbal.

The learned advocates for the accused persons vehemently argued that prosecution has miserably failed to prove the allegation leveled in F.I.R. but the learned District Qazi, Member of the trial Court failed to appreciate the relevant evidence in its true spirit and perspective and anomalously convicted accused Zaffar Iqbal under section 302-APC by awarding him death sentence. The learned Advocates while referring to Court statement of the complainant contended that complainant in his Court statement improved the stance taken in F.I.R. by stating that accused persons besides other vehicles reached at the spot on motorcycle. The learned counsel solicited that it is an admitted

fact that the alleged place of occurrence is a thickly populated area of bazaar, more than thirty five shops, Masjid and school are situated but no independent witness has been cited in the challan as prosecution witness. The learned Advocates further argued that motive behind the occurrence is alleged to be a previous vendetta in F.I.R. but complainant as well as other prosecution witnesses have stated in their Court statements that there was no previous enmity between the parties, thus, after alleging the motive behind the occurrence it was sine qua non to prove it but prosecution has miserably failed to accomplish this liability. The learned Advocates also held zealously that as per medical report, the bullet of 30 bore pistol was recovered from the skull of deceased which resulted his death whereas, according to prosecution's case, accused Zaffar Iqbal was armed with Kalashnikov thus, medical evidence also failed to keep up the prosecution version rather negated the whole story narrated in F.I.R. as well as in the statements of prosecution witnesses recorded under section 161 Cr.P.C. The learned counsel also submitted that site plan reveals that Zaffar Iqbal has been shown at point No.9, whereas, deceased was present at point No.1 which was invisible from point No.9, thus, it is not worthy of acceptance for a prudent mind to

believe that a fire shot was aimed at by targeting a person who was out of sight, hence, the whole prosecution story fell on the ground like a sand wall. The learned counsel also claimed with vehemence that the distance between point No.1 and 9 is shown as 235 feet from which a fire of pistol is not possible to be targeted or reached, they also pressed into service that accused Zaffar Iqbal is a political figure who has been involved in criminal case with malicious intention and in fact, he has got no concern with the incident. The learned Advocates defended the impugned judgment to the extent of acquitted accused persons and stated that the fact of previous clash between the parties as alleged in F.I.R. is also failed to be proved by producing independent witnesses, the recoveries are also claimed as doubtful. Finally, the learned Advocates prayed that as the prosecution has failed to prove the guilt of the accused persons to the hilt sine shadow of reasonable doubt and all the accused persons are entitled to get the benefit of slightest doubt in their favour, thus are liable to be acquitted of all the charges. The reliance has been placed on the following case laws:

1. 2005 SCR 1.
2. 1985 P.Cr.L.J 1987.
3. 1986 P.Cr.L.J 2007.

4. 1992 P.Cr.L.J 2092.
5. PLD 1999 Lahore 285.
6. 1992 SCMR 372.
7. 2009 SCR 470.
8. 1985 P.Cr.L.J 1992.
9. 1992 pcr lj 703.
10. 1990 P. Cr. LJ 1018.
11. PLD 1999 Lahore 56.
12. PLD 1994 Peshawar 68.
13. 1993 SCMR 417.
14. 2006 SCMR 1846.
15. 2004 P. Cr. LJ 1403.
16. 2006 SCR 49.
17. 1985 P. Cr. LJ 1987.
18. 1986 P. Cr. LJ 102.
19. 2019 P. Cr. LJ 1378.

The learned counsel for the complainant zealously refuted the claim of the defence and held that prosecution has proved its case by producing direct, convincing, concrete and tangible evidence and the version of the prosecution has been fully supported and corroborated by eye-witnesses which is further confirmed by the other convincing evidence available on the record. It has been further contended that recoveries of crime empties from the place of occurrence and weapons of offence recovered from accused persons further reinforced and affirmed the prosecution stance. The learned Advocate also claimed that the place of occurrence, presence of accused persons on spot and manner of occurrence as alleged in F.I.R. have been amply proved from the evidence adduced by the

prosecution sine even an iota shadow of doubt. The learned Advocate proceeded that minor discrepancies spotted on by the learned counsel for the accused/respondents as well as relied upon by the learned Sessions Judge are natural which were liable to be ignored as being a normal human conduct. The learned Advocate further stated that from the record, it is proved that the parcel of bullet prepared by the doctor recovered from the skull of deceased was managed to be changed, hence, mere fact that as per report, the bullet recovered from the skull of deceased was fired from 30 bore pistol while according to prosecution story, the accused Zafar Iqbal was armed with Kalashnikov could not consider to be a solid reason to disbelieve the statements of credible and trustworthy eye witnesses of the occurrence. The learned Advocate submitted that prosecution also proved the pre-meditation and commission of offence by the accused to complete the desired target of murder, thus, all the accused persons were equally liable to be convicted in equal manner and are responsible for the murder of the deceased. He has placed reliance on the following case laws:

1. 2001 SCR 240;
2. 1990 SCMR 1272;
3. NLR 1981 Criminal Peshawar .23;

4. NLR 1980 Criminal Lahore 659;
5. PLJ 2005 Sh.C (AJ&K) 36;
6. 1981 SCMR 559;
7. NLR 1982 Criminal 517;
8. PLJ 1980 SC Pak.244;
9. PLD 1959 (W.P.) Karachi 137.

The learned counsel for the parties also filed written arguments which are made part of the file.

The learned AAG supported the arguments advanced by the learned counsel for the complainant and also submitted to uphold the judgment of the learned District Qazi.

We have heard the learned counsel for the parties, gone through the written arguments presented on behalf of both the parties and perused the record of the case with utmost care and caution.

The case of the prosecution, as set up in F.I.R. is that a day light occurrence took place on 23.09.2003, which was witnessed by two eye-witnesses besides the complainant. To examine whether prosecution has proved its case beyond shadow of any reasonable doubt we have to inspect the statements of the eye-witnesses of the occurrence. In support of the story narrated in F.I.R. the complainant appeared before the Court and got recorded his statement on 07.12.2004, wherein he reiterated the story which culminated into F.I.R.

and deposed that on the day of occurrence i.e. 23.09.2003 at 9:30 A.M. he and his brother Amir Asif Shah, Munir Hussain Shah, Iftikhar Hussain Shah, Mukhtar Hussain Shah, Muhammad Younus were sitting in PCO at Riyan Gala and heard the noise of firing from a near road curve where a rest-house is located. They came out from PCO and saw a jeep No.AJKD/8246, Suzuki No.AJKC 1846 and Motorcycle No.AJKF 5715, through which, accused Malik Zaffar Iqbal, Hafiz Aurangzeb, Malik Ashfaq, Imran, Malik Mansha Khan, Muhammad Yousuf, Muhammad Taj, Muhammad Aziz, Amjad, Rizwan, Qammar, Tanvir Sarfraz, Naveed Arshad, Sajid, Imtiaz, Farooq, Majid, Hafiz Sajid, Niaz, Javaid, Qaiser, Ameen and Muhammad Yaqoob were transported to reach there. He further deposed that Malik Zaffar Iqbal, Hafiz Aurangzeb and Ashfaq Imran were armed with Kalashnikov type rifles and other accused persons were equipped with sticks, hatchets and small weapons. Accused persons started firing by targeting the complainant, his brother Asif Shah and other companions. They run away from the back side of PCO and went to the roof of the adjacent school which is also courtyard of Masjid. Accused Malik Zaffar Iqbal, Hafiz Aurangzeb and Ashfaq Imran made indiscriminate firing upon them and when

they stopped firing, complainant along with his companion came out. Accused Malik Zaffar Iqbal by targeting his brother Amir Asif Shah with an intention of murder, fired direct shot with Kalashnikov type rifle which hit him at the left side of his forehead. He also deposed that accused persons continued their firing even after the said episode and despite lengthy cross-examination defence failed to shake his credibility and also remained unsuccessful to assail the substantial part of his statement.

The other eye witness of the occurrence Iftikhar Shah P.W.3 also appeared in the witness box before the trial Court and got recorded his statement on 03.01.2005. He propped up the prosecution version and his testimony is also in complete nexus and harmony with the statement of the complainant and remained completely stable during cross-examination.

Munir Hussain Shah, P.W.2 who is another eye witness of the occurrence also became visible before the trial Court, got recorded his statement on 26.01.2006, fully braced the description of prosecution as formulated in F.I.R., statement of other prosecution witnesses who were claimed to

be present at the time of occurrence and remained credible during itemized cross-examination by defence.

After going through the statements of eye witnesses of the occurrence, we are of the considered view that prosecution has proved the guilt of accused Malik Zaffar Iqbal sine any considerable or substantial shadow of doubt.

As far the other corroboratory evidence is concerned, as per recovery memo Exh.PJ seven crime empties of Kalashnikov were recovered from point No.9 of the site plan which was the place of standing of accused Mailk Zaffar Iqbal. The recovery witnesses Rashid Hussain Shah and Iftikhar Hussain Shah verified the recoveries of crime empties in their Court statements. The record further reveals that the weapon of offence Kalashnikov was also recovered on the pointation of accused Zaffar Iqbal from a steel box of his house on 01.10.2003. The recovery witness Syed Abrar Hussain Shah appeared in the witness box on 24.03.2006 and supported the recovery of weapon of offence on the pointation of accused Malik Zaffar Iqbal. Syed Amir Arshad Ali, the other recovery witness of Exh.PO also appeared in the witness box and got recorded his statement on 14.04.2006 and completely corroborated and reinforced the recovery memo. All supra

mentioned witnesses remained trustworthy, firm and steady during cross examination as defence failed to shudder their evidence, thus, the recovery of Kalashnikov and crime empties of Kalashnikov from the place where the accused was standing and was firing completely corroborated the version taken by the prosecution.

As for as the medical evidence and report of FSL are concerned, it is not disputed that deceased expired due to a fire arm injury which resulted in fracture of skull and damaged to brain metal. Defence tried to establish a case that the recovered bullet from the skull of the deceased was a bullet of 30 bore pistol, whereas, according to prosecution story, accused Malik Zaffar Iqbal was armed with Kalashnikov, thus, medical evidence does not support the prosecution story has no substance. Firstly, for the reason that where ocular evidence is found trustworthy the same cannot be discarded merely for the reason that it is not supported by the medical evidence rather the direct evidence has to be believed until impeached by the defence during cross-examination. Moreover, the doctor has no authority in law to express his opinion as to which weapon was used, as held by the Supreme Court of Pakistan in PLD 2001 S.C. 107. Secondly, as per record,

the bullet recovered from the skull of deceased was handed over to the police party as written in the autopsy report of the deceased but police act negligently or mala fidely, did not prepare the parcel of the said bullet as required by law. As per police diaries the recovered bullet was handed over in a glass bottle, but record is silent about said glass bottle. No doubt, police diaries cannot be considered as evidence but can be perused by Court in aid to the evidence brought on record for moral satisfaction, as has been observed in 2018 SCR 661. For our own satisfaction we have also gone through the police diaries and found that the parcel of recovered bullet was handed over to the police in a glass bottle but as per record the same was not sent to expert in a glass bottle and the statement of Muhammad Hanif, Constable, in whose custody parcels were kept stated that said parcel was neither sealed nor bore with any number and was open, thus, could not confront direct evidence, as it was not properly sealed before sending the same to the expert. It is also pertinent to mention that recovery memo of said bullet was prepared on 02.10.2003 whereas post-mortem was conducted on 23.09.2003 which also remained unexplained. Such conduct of Investigating Officer is highly regrettable and said dishonesty could not spoil the

intrinsic worth of direct evidence. Even from autopsy report it reveals that entry wound was measuring 3 cm which is more than one inch thus could not be caused by a fire of 30 bore pistol as 2.54 cm is equal to one inch and furthermore, as per site plan accused Malik Zaffar Iqbal was standing about 235 feet far from the deceased which clearly suggests that deceased sustained the injury of Kalashnikov fire with no exit wound which further confirms said distance and a 30 bore pistol could not hit a target from such a distance. Furthermore, doctor is not expected to give exact distance between the assailant and victim at the time of firing, as has been laid down in 1992 SCR 155. It is also relevant to refer that even otherwise where witnesses have seen the occurrence by implicating accused and their statements have been considered by the Court as being trustworthy and credible, then any conflict with expert evidence could not detract the intrinsic value of the eye-witnesses because it is a trite law settled by the superior Courts that statements of the eye witnesses have to be given preference by ignoring the conflict with the expert evidence. The inefficiency, carelessness or malicious omission of I.O. which has now become a routine matter should not hamper the course of justice as Courts are not only to decide cases on

the basis of record prepared by such dishonesty but are always expected to administer justice by protecting the weak elements of society from the shackles of highhandedness of its influential organs. Even otherwise, the report of Forensic Science Laboratory is merely a corroborative piece of evidence and in presence of strong ocular account duly corroborated by other convincing evidence, any weakness in this regard does not take away its integral worth. Our this view found support from 2012 MLD 1274 (Lahore). In presence of credible direct evidence other corroboratory evidence has got a secondary value and immaterial as corroboration is only necessitated for partially or halfly reliable evidence as held in 2001 SCMR 1422. Further reliance may be placed on 2011 SCMR 872, 2013 YLR 1418 and 2002 P.Cr.L.J 1856.

The discrepancies pointed out by the learned counsel for the accused persons in the statements of prosecution witnesses are merely minor flaws, in the details of facts which could not falsify the prosecution story as none of these discrepancies could be termed as fatal for prosecution, statements of eye witnesses of the occurrence completely affirmed the prosecution version and further elaborated the guilt of accused, thus, such type of minor deviations are not

considerable particularly in a situation where significant and prominent portion of the statements of the prosecution witnesses have not been challenged by the defence during cross-examination. Reliance in this regard can be placed on 2014 SCR 421.

The learned counsel for the accused also attacked the impugned judgment recorded by District Qazi on the ground that when evidence of prosecution was disbelieved to the extent of rest of the accused, hence, the same should not be relied upon to the extent of accused Zaffar Iqbal. In this regard guidance may be taken from the dictum laid down by the Supreme Court of Azad Jammu and Kashmir in 2014 SCR 821, wherein the learned apex Court has discarded the Latin maxim “*falsus in uno falsus in omnibus*” and observed that according to the century old settled precepts of administration of criminal justice, the Courts have to sift the grains from the chaff. It is not necessary that if a piece of evidence is disbelieved to the extent of one accused according to his assigned conduct in the prosecution story, the same cannot be believed to the extent of other accused person where cogent, confidence inspiring evidence is available on record. So, in light of the clear edict of the Hon’ble apex Court it could not be

held that as the prosecution evidence was not accepted for conviction of rest of the accused persons, then accused Zaffar Iqbal was also liable to be acquitted because the evidence produced by the prosecution to prove the guilt of accused Zaffar Iqbal is cogent, tangible, trustworthy and confidence inspiring, hence, has rightly pondered and mused by the learned District Qazi.

Another contention vehemently advanced by the learned counsel for the accused that from point No.9 of the site plan where accused was standing could not be targeted to point No.1 as it was out of sight from point No.9, has no substance because as per site plan point No.1 and point No.9 are in front of each other and this fact is clarified from the observations made by the District Qazi who did spot inspection to satisfy his conscious which is further confirmed by this Court thus, the contention of the learned counsel is against the ground reality, hence repelled.

The next assertion of the learned counsel for the accused that no independent person from the vicinity was cited as eye witness of occurrence and maneuvered a story to drag the accused Malik Zaffar in criminal litigation by citing

kinsmen as eye witnesses is also devoid of any essence because evidence of related witnesses is as reliable and credible as independent witnesses and the same cannot be discarded on the ground of relationship, except when there is a strong motive of false implication which could be determined by the record. It is also worth mentioned that suggestions put to prosecution witnesses Iftikhar Hussain Shah and S.H.O. during cross examination on back sides of pages No. 187 and 221 of the file of the trial Court defence has accepted the occurrence and other alleged allegations. Reliance can be placed on PLJ 2007 S.C. (AJ&K) 43 and NLR 1980 Criminal Lahore 659.

So far the motive behind the occurrence is concerned, it has been claimed that prosecution alleged a specific motive, thus, it was enjoined to prove it and as the motive alleged by the prosecution is not proved in this case, hence, all the accused were liable to be acquitted. It is a well-established precept and celebrated law that in case of direct evidence, absence of motive or failure on the part of the prosecution to prove it does not adversely affect the testimony of eye-witnesses if they are otherwise reliable as motive normally plays an important role only in the case of

circumstantial evidence. Our this view finds support from 2014 SCR 121. As stated above, the instant case has been proved through direct evidence and in presence of direct evidence, motive behind the occurrence was not sine-qua-non. Though, motive as alleged in F.I.R. that some altercation took place between the complainant and deceased party was also proved because the complainant specifically illuminated in his court statement that the motive behind the occurrence was previous vendetta and the other eye witnesses have also taken the same stance and this material portion of their statements has not been assailed in cross-examined, hence, under law the same shall be deemed to have been admitted and admitted facts need not to be proved. After admission of motive by the accused party it has become an independent piece of evidence to connect the guilt of accused persons. Reliance can be placed on 1999 P.Cr.LJ 1245 (Lahore).

In the instant case, the guilt of accused has been proved to the hilt by the prosecution through cogent and tangible evidence regarding the place of occurrence, manner of occurrence and motive behind the occurrence without even an iota of doubt.

The argument advanced by the learned counsel for the petitioner that the complainant has improved his version during court statement, hence, the same created a considerable doubt regarding the manner of occurrence, has also got no essence because F.I.R. always considered just an initial tool to set the state hierarchy into motion and complainant in his Court statement has only elaborated the facts mentioned in F.I.R. and has not travelled beyond in the manner which could be claimed as a step to create doubt.

It is also pertinent to indicate and mark that the learned Sessions Judge also acquitted accused Imran, however, the other member of the bench i.e. District Qazi convicted the accused under section 13/20/65 Arms Act and awarded him 5 years imprisonment, however, a perusal of the record reveals that allegation against accused Imran was that he was armed with Kalashnikov and fired at the prosecution party. As per site plan accused Imran was standing at point No.7 from where 11 empties of 30 bore pistols were recovered. As per recovery Memo Exh.PN Kalashnikov was recovered on the pointation of the accused Imran on 01.10.2003, however, no empty of Kalashnikov was found from point No.7, where the accused was standing, thus, this fact creates some doubt in a prudent

mind that if he had Kalashnikov in his hands and was firing with Kalashnikov then obviously the empties of the Kalashnikov were required to be found. Thus, to the extent of accused Imran, the prosecution has failed to prove its case without reasonable shadow of doubt, hence, the learned Sessions Judge has rightly acquitted him of the charge.

In our considered view, the prosecution by cropping direct evidence proved the guilt of the accused leveled in F.I.R. hence, accused Zaffar Iqbal was liable to be convicted under section 302-APC but the learned Sessions Judge anomalously acquitted him merely by relying on medical evidence and for the reason that from the point No.9 where the accused was standing and point No.1 where deceased was targeted was not visible, and illegally discarded the evidence of eye-witnesses.

So far the case of acquitted accused persons is concerned the prosecution has failed to prove by adducing convincing and material evidence that incident has been committed with pre-meditation because there is no evidence on the record to prove the place of preplanning or manners of premeditation thus, in absence of concrete evidence regarding pre-meditation an accused cannot be declared as member of

unlawful assembly, thus, the acquittal of accused respondents recorded by both the members of trial Court is justified and hardly requires any interference by this Court.

Another legal aspect of the instant matter is that the legal heirs of deceased, Muhammad Younis and others, have also filed an appeal for enhancement of the sentence awarded to convict Usman and Inzamam-ul-haq under section 25 IPL. No doubt, as compared to Pakistan for trial and disposal of criminal cases, a special law known as Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 has been enacted and section 25 of the said Act provided a remedy to assail the judgment of District Criminal Court which includes Additional District Criminal Court, appeal shall lie to the Shariat Appellate Bench of High Court which included the powers to entertain a revision petition against said order. In Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 the powers of appellate Court have not been defined, thus, in the light of direction contained in section 32 of the said Act, all the matters which are not specifically explained in this Act, Tazirat-e-Pakistan and Criminal Procedure Code shall

apply, we have to go through the provisions of Criminal Procedural Code. As per powers of the Appellate Court alluded in section 423 Cr.P.C., the Appellate Court in disposing of appeal, may reverse the finding and sentence, acquit or discharge the accused, order him to be retried or send for trial, alter the finding maintain the sentence, with or without altering finding reduce the sentence, alter the nature of sentence but not so as to enhance the sentence. When it has blatantly illuminated in section 423 Cr.P.C that appellate Court is not empowered under this section to enhance the sentence thus, the provisions of section 439 Cr.P.C. shall come into force, which determined the powers of the High Court to exercise revisional jurisdiction, thus, it can safely be held that appellate Court cannot enhance the sentence of convict but it can be enhanced while exercising revisional jurisdiction of this Court, hence, for enhancement of sentence a revision petition shall lie under Section 25 of Azad Jammu and Kashmir Islami (Tazirati) Qwanin Nafaz Act, 1974 to this Court, so appeal filed for enhancement of sentence entails dismissal as not sustainable. Reliance is placed by a judgment of Honorable

Supreme Court of Pakistan reported as PLD 2007 SC 405. It is also relevant to indicate that as per various verdicts of the learned apex Court, this Court can convert or modify an appeal into revision or revision into an appeal but such powers are subject to limitation and in this case appeal was filed on 27.03.2018 which is more than 14 years ago, hence, at this stage the same could not be treated or converted into a revision petition and as discussed above, even on merits we do not find any justification to allow the same. Reliance may be placed on 1995 CLC S.C. (AJK) 1947, 2015 SCR 1190 and 2019 SCR 654.

It is also pertinent to note here that though the prosecution has proved its case by producing reliable evidence which is confidence inspiring, however, there are sufficient mitigating circumstances which require lesser punishment to the accused.

The crux and epitome of the above discussion is, the impugned judgment to the extent of accused Zafar Iqbal recorded by Sessions Judge is differed and set at naught whereas judgment recorded by District Qazi is modified in the manner that accused Zaffar Iqbal is hereby convicted under

section 302(c)-APC by awarding 14 years rigorous imprisonment and also sentenced to 3 years simple imprisonment under section 13/20/65 Arms Act. Convict Zaffar Iqbal shall also pay Rs.10,00,000/- as compensation to the legal heirs of deceased under section 544-A Cr.P.C., in case of failure same shall be recovered in accordance with the provisions of Land Revenue Act. Benefit of section 382 Cr.P.C. shall be extended in favour of convict. Accused Imran S/o Mansha is hereby acquitted of the charges by extending benefit of doubt. The impugned verdict to the extent of rest of the accused persons is hereby sustained. The reference sent by the District Qazi is denied to affirm. The police is directed to take Zaffar Iqbal convict into their custody and send him to Judicial Lockup Kotli to serve his sentence in accordance with law.

Muzaffarabad;
03.08.2022.

-Sd-
JUDGE

-Sd-
JUDGE

Approved for reporting.

-Sd-
JUDGE

SHARIAT APPELLATE BENCH OF HIGH COURT OF AJ&K

The State	v	Zaffar Iqbal
Zaffar Iqbal etc.	v	The State etc.
Mehfooz Fatima etc.	v	Malik Zaqqfar Iqbal etc.

CORRIGENDUM:

This Court announced the judgment in the captioned cases today, however, it came to our notice during proofreading that at page 25 para 2 line 2 of the judgment inadvertently words ‘Muhammad Younis and others’ have been mentioned instead of “Mehfooz Fatima and others” and in line 4 at page 25 words “Usman and Inzamam-ul-Haq” have been written instead of Malik Zaffar Iqbal and others, therefore, words ‘Muhammad Younis and others’ are substituted with words “Mehfooz Fatima and others” at page 25 para 2 line 2 and words Usman and Inzamam-ul-Haq are substituted with “Malik Zaffar Iqbal and others”. This order shall be the part of judgment dated 03.08.2022.

**-Sd-
JUDGE**

**-Sd-
JUDGE**

Note: The judgment including this corrigendum contains 29 pages which have been read over and signed by us.

**Muzaffarabad,
03.08.2022.**

**-Sd-
JUDGE**

**-Sd-
JUDGE**