IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL APPEAL NO.01-P OF 2022

GHAZI GUL SON OF PERVEZ, RESIDENT OF JUDGE BANGLA NOTHIA, PESHAWAR

APPELLANT

VERSUS

1. THE STATE.
2. AMIR ULLAH SON OF ABDUL QAYUM RESIDENT OF HOUSE NO.4, YOUSAF ABAD, DILA ZAK ROAD, PESHAWAR.

RESPONDENTS

CRIMINAL MURDER REFERENCE NO.01-P OF 2022

THE STATE. APPELLANT

VERSUS

GHAZI GUL SON OF PERVEZ, RESIDENT OF JUDGE BANGLA NOTHIA, PESHAWAR

RESPONDENT

Counsel for the Appellant	Mr. Hussain Ali, Advocate
Counsel for the complainant	Mr. Muhammad Usman Khan Turlandi, Advocate
Counsel for the State	Malik Akhtar Hussain Awan, Additional Advocate General, KPK & Mr. Niaz Muhammad, Assistant Advocate General, KPK.
FIR No., Date & P.S	160/2018, 03.03.2018, Daudzai, Peshawar.
Date of impugned judgment	04.01.2022
Date of Institution of Cr.A.No.01-P of 2022, Cr.M.Ref. No.01-P of 2022	08.01.2022 & 13.01.2022
Date of Hearing	22.03.2022
Date of Judgment	14.05.2022

J U D G M E N T

KHADIM HUSSAIN M. SHAIKH –J. Appellant Ghazi Gul has called in question judgment dated 04.01.2022, passed by the learned Additional Sessions Judge/SC, Model Criminal Trial Court Peshawar in Sessions Case No.01/MC-HC of 2021 re-The State Vs. Ghazi Gul, emanating from Crime No.160 of 2018 registered at Police Station Daudzai District Peshawar, for Offences under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, **("The Ordinance"),** Section 412 of The Pakistan Penal Code, 1860 (XLV of 1860) **("The Penal Code")** and Section 15-AA whereby the appellant has been convicted for offences under Section 302 (b) of The Penal Code and sentenced him to death penalty on account of murder of Nizam Ullah with fine of Rs.500,000/- (five lacs), which was ordered to be paid to the legal heirs of the deceased as compensation and in default whereof the appellant is to further undergo six months simple imprisonment; the appellant has also been convicted for offence under Section 392 of The Penal Code on account of the robbery and sentenced to suffer rigorous imprisonment for 10 years as Tazir, extending him benefit of Section 382-B of The Code of Criminal Procedure, (Act V of 1898) **("The Code")**, while the charge for offence under Section 412 of The Penal Code against the appellant was dropped.

2. Briefly, the facts of the prosecution case are that on 03.03.2018, complainant Sub-inspector Tehseen Ullah of police station Daudzai during gasht in the locality receiving information regarding dead body of a person, rushed to the pointed place situated at Charsadda near Tariq Flour Mill and reached there at 0730 hours, where he found a dead body of an unidentified male aged about 30/31 years, murdered by some unknown

assailant(s) with firearm. The dead body was surrounded by the people of the locality, but none among them could identify him (the deceased); the deceased wore dark green clothes and white vest, but with no identifiable data; after preparation of inquest report and injury sheet, the dead body was dispatched to Khyber Medical College hospital under the escort of constable 276 Jahangir for postmortem while a mursaila was prepared and sent to police station Daudzai where it was incorporated in book under Section 154 of The Code; despite efforts of the local police through various channels the dead body of the deceased could not be identified, therefore, on 06.03.2018 it was handed over to Town-II Municipal authority, who buried it in Rahman Baba Graveyard as *amanat* until the legal heirs of the deceased were found. On 22.03.2018 the identity of the deceased was allegedly established for the first time as Nizam Ullah alias Lali son of Abdul Qayyum resident of Yousaf Abad District Council Colony, through his two brothers; on 26.03.2018, PW.11 Amir Ullah, claiming himself to be the brother of the deceased, appeared before the Investigating officer and recorded his statement under Section 161 of The Code informing him that his deceased's brother owned a rickshaw, which is also not traceable and thus he suspected the murder of his brother for that rickshaw; on the following day i.e. on 27.03.2018 he recorded his statement under Section 164 of The Code before the Judicial Magistrate-IX Peshawar having also produced documents of rickshaw and recorded his statement under Section 161 of The Code; on 27.03.2018 PW Ihsan Ullah first time claiming himself to be the solitary eye witness of the occurrence of the alleged murder of Nizam Ullah, appeared before the investigating officer and recorded his statement under Section 161 of The Code and then he recorded his statement under Section 164 of The Code before the learned

Judicial Magistrate-IX Peshawar on 28.03.2018 i.e. after more than 25 days of the incident, charging the appellant Ghazi Gul for robbery of rickshaw with murder of deceased Nizam Ullah. The appellant was arrested on 28.03.2018 and then after usual investigation he was sent up with the challan to face his trial. On completing all the formalities, a formal charge was framed against the appellant, who pleaded not guilty and claimed his trial.

3. In order to prove its case, the prosecution examined in all 11 PWs namely Dr. Farman Ullah MO KMC as PW.1; Sub Inspector Syed Sardar Ali Shah as PW.2, constable No.276 Jahangir as PW.3, constable 217 Maqsood Ali as PW.4, ASI Gulzair Khan as PW.5, Ihsan Ullah as PW.6, Investigating Officer Sub-Inspector Muhammad Jan as PW.7, constable No.16 Faiq Zaman as PW.8, ASI Ihsan Shah as PW.9, Sub-inspector Tehseen as PW.10 and Amir Ullah as PW.11 and produced all the necessary documents including inquest report, postmortem report, memos of recovery, securing clothes of the deceased, arrest card and paper relating to the subject rickshaw etc and then closed its side. Whereafter the statement of the appellant under Section 342 of The Code was recorded, wherein he denying the prosecution allegations and recovery of alleged crime weapon, professed his innocence and further stated therein that he purchased the subject rickshaw from PW.6 Ihsan Ullah some 20/25 days before the occurrence at the cost of Rs.120,000/- out of which he paid Rs.50,000/- to him, while an amount of Rs.20,000/- was payable after one month and the remaining amount of Rs.50,000/- after three months; on 23rd day of the transaction, PW.6 Ihsan Ullah demanded Rs.20,000/- to which the appellant disagreed, which gave rise to the dispute between the appellant and PW.6 Ihsan Ullah, who in order to grab his money has falsely

implicated him in this case. The appellant examined himself on oath under Section 340(2) of The Code, but he did not examine any person as his defence witness. At the conclusion of the trial and after hearing the parties' counsel, the learned trial Court has convicted and sentenced the appellant vide impugned judgment dated 04.01.2022 as discussed in paragraph-I *supra*.

4. Earlier the learned trial Court vide judgment dated 11.07.2020, convicted the appellant under Section 302(c) read with Section 392 of The Penal Code and sentenced him to suffer simple imprisonment for 25 years (twenty five years) as Tazir with fine of Rs.200,000/- (two lac) on account of murder of the deceased and to further suffer rigorous imprisonment for 10 years (ten years) as Tazir with fine of Rs.50,000/- (fifty thousand) on account of committing robbery, the amount of fine was payable to the LRs of the deceased as compensation under Section 544 of The Code. All the sentences were ordered to run concurrently with benefit of Section 382-B of The Code. Both the parties feeling aggrieved by the judgment dated 11.07.2020 filed appeal and revision petition. The appellant filed appeal against his conviction and sentences while the respondent filed revision petition being dissatisfied with the quantum of sentence and sought enhancement of the sentence. After hearing the parties, both the matters were disposed of by a common judgment dated 29.03.2021, whereby the case was remanded to the learned trial Court for re-writing of the judgment. The operative portion of the said judgment dated 29.03.2021 is reproduced here for the sake of convenience:-

> "*It can safely be concluded that the judgment passed by the trial Court suffers from incurable defect as contemplated by the provision of Section 367 Cr.P.C. Therefore, it is a fit case for remand to the trial Court for rewriting of judgment. Hence, we accept the appeal, set aside the conviction recorded vide judgment dated 11.07.2020 passed by the*

learned Additional Sessions Judge-IX, Peshawar and remand the case to the trial Court for rewriting of judgment. Since the impugned judgment has been set aside, therefore, the Revision petition No.2/P of 2020 filed by the complainant has become infructuous. The trial Court shall adhere to the mandatory provisions of Section 367 Cr.P.C. and conclude the proceedings, preferably within two months after the receipt of copy of this judgment. Needless to observe that fair opportunity of addressing arguments shall be awarded to all parties."

5. The learned trial Court instead of passing the judgment, in terms of remand order dated 29.03.2021 discussed supra, had passed an order dated 18.05.2021 for de-novo trial, which was called in question in Criminal Revision No.02-P of 2020 filed by respondent Amir Ullah before this Court. After hearing the parties' counsel the aforesaid Criminal Revision Petition was accepted, setting aside the order dated 13.04.2021 and the subsequent proceedings including the impugned order dated 18.05.2021 vide judgment dated 11.10.2021 with the directions to the Court seized with the matter to decide the case within one month after the receipt of that judgment by strictly adhering to and complying with the remand order dated 29.03.2021. The penultimate paragraphs of the said judgment for the sake of convenience are reproduced here:-

10. Looking with this perspective, legal impact and effect, we do not find any such illegality, impropriety, imperfection, vagueness or defect that may cause prejudice to the accused. Therefore, we are inclined to accept this revision petition, set aside the Order dated 13.04.2021 and the subsequent proceedings including the impugned Order dated 18.05.2021.

11. Since the learned Presiding Officer Mr. Muhammad Tahir Aurangzeb, Additional District and Sessions Judge-IX, Peshawar has made up his mind prior to hearing the parties, so in the larger interest of justice, we direct the learned District & Sessions Judge, Peshawar to hear the matter himself or transfer it to any other Additional District & Sessions Judge within his territorial jurisdiction to decide the case. The Court seized with the matter shall decide the case within one month after the receipt of this judgment by strictly adhering to and complying with the remand Order dated 29.03.2021 referred to at Page 3 Paragraph 5 of this judgment. Needless to observe

that the trial Court shall not be prejudiced by any observation made in this judgment.

Thereafter, the learned trial Court has passed the impugned judgment dated 04.01.2022, convicting and sentencing the appellant as discussed in paragraph-I *supra.* Having felt aggrieved by the impugned judgment dated 04.01.2022, the appellant has preferred the captioned Criminal Appeal, while the learned trial Court has made the captioned Murder Reference for confirmation of the death penalty of appellant.

6. The learned Counsel for the appellant, who also represents him in Murder Reference, has mainly contended that the name of the appellant is not mentioned in the FIR; that the subject occurrence is in an un-witnessed one and it was after more than 25 days, PW Ihsan Ullah nominated the appellant as an accused in his statements under Section 161 and 164 of The Code recorded before the police and Judicial Magistrate-IX Peshawar respectively and there is no plausible explanation for such a long delay in recording his statements, which per learned counsel, is fatal to the prosecution case; that the empty shell secured from the place of incident was sent alongwith 30 bore pistol allegedly secured from the appellant after his arrest, per learned counsel the report of FSL thereof has no evidentiary value, that there are material contradictions in the evidence led by the prosecution; that the appellant is innocent and he has been falsely implicated in this case by PW Ihsan Ullah due to his dispute with the appellant over the sale transaction in respect of the subject rickshaw with him; and, that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Learned counsel for the appellant placing his reliance on the cases of **HASHIM VERSUS THE STATE (2019 YLR 552), ABDUL RASHEED VERSUS FARHAN ALI AND 6 OTHERS (2019 YLR 593), ALLAH RAKHA VERSUS THE STATE AND ANOTHER**

(2020 PCR.LJ 524), MUHAMMAD IMRAN VERSUS THE STATE AND OTHERS (2019 YLR 565), SARFRAZ KHAN VERSUS THE STATE AND 2 OTHERS (1996 SCMR 188), MUHAMMAD ASIF VERSUS THE STATE (2017 SCMR 486), MUHAMMAD SHAFT VERSUS THE STATE (1993 PCR.LJ 142), NAZAKAT ALI VERSUS THE STATE (2019 PCR.LJ 107), GHULAM SHABBIR AND 2 OTHERS VERSUS THE STATE (2018 PCR.LJ 570) AND AMIN ALI AND ANOTHER VERSUS THE STATE (2011 SCMR 323) has prayed that the Criminal Appeal may be allowed, the impugned judgment may be set-aside, and the appellant may be acquitted of the charge.

7. Learned counsel for PW.11 Amir Ullah, who claimed himself to be the brother of the deceased Nizam Ullah has mainly contended that the prosecution by examining 11 witnesses and producing all the necessary documents including post-mortem report, memos of place of vardhat, recovery of empty shell, blood stained material, recovery of robbed rickshaw; recovery of crime weapon, danistnama, blood stained clothes of the deceased and Forensic Expert Reports etc, has proved its case against the appellant beyond a reasonable doubt; and, that the learned trial Court has rightly convicted and sentenced the appellant. The learned Additional Advocate General, KPK supporting the impugned conviction judgment and arguments of the learned counsel for the complainant, prays for dismissal of the captioned Criminal Appeal.

8. We have considered the submissions of learned counsel for the parties and have gone through the evidence brought on the record with their assistance.

9. From a perusal of the record, it would be seen that the name of the appellant does not find place in the FIR and even the name of deceased is

no where mentioned in the FIR; per prosecution on 03.03.2018 complainant sub-Inspector Tehseen Ullah of police station Daudzai while was on gasht duty receiving information regarding availability of the dead body of an unknown person near Tariq Flour Mills on Charsadda road reached at the pointed place at 0730 hours, where he found a dead body of an unidentified male aged about 30/31 years, murdered by some unknown assailant(s) with firearm; the efforts of the local police though media for identity of the deceased yielded no fruit, hence the dead body was buried in Rahman Baba Graveyard as *amanat* on 06.03.2018 until the legal heirs of the deceased were found by Town-II Municipal authority; although the prosecution claimed that on 22.03.2018 the identity of the deceased was established for the first time as Nizam Ullah alias Lali son of Abdul Qayyum resident of Yousaf Abad District Council Colony through his two brothers, but the names of those two brothers, were not surfaced during the investigation and even during the trial. Then on 26.03.2018 i.e. after 23 days of the occurrence PW.11 Amir Ullah, claiming himself to be the brother of the deceased, appeared before the investigating officer and recorded his statement under Section 161 of The Code suspecting the murder of his brother for robbery of his rickshaw. On the following day i.e. 27.03.2018 he recorded his statement under Section 164 of The Code before the learned Judicial Magistrate-IX Peshawar mainly stating therein that he remained in search of his missing brother Nizam Ullah and after strenuous efforts he came to know that his brother Nizam Ullah was murdered by appellant Ghazi Gul and that Ihsan Ullah son of Yaseen had also informed him that appellant Ghazi Gul has committed murder of Nizam Ullah near Tariq Flour Mills on Charsadda road; then PW.6 Ihsan Ullah, first time appeared and introducing himself to be a solitary eye witness of

the occurrence on 27.03.2018 and recorded his statement under Section 161 of The Code before the investigating officer on 27.03.2018 and his statement under Section 164 of The Code before the Judicial Magistrate-IX Peshawar on 28.03.2018 i.e. after more than 24 days of the occurrence, which per prosecution took place on or about 02.03.2018 and there is no plausible explanation for such an inordinate delay of more than 24 days in his surfacing and introducing himself as a solitary eye witness of the occurrence, which itself robs it of its credibility in view of well settled law that the credibility of the witness is looked with serious suspicion if his statement under Section 161 of The Code is recorded with delay without offering plausible explanation and there is plethora of judgments of the Superior Courts wherein it has been held that even one or two days unexplained delay in recording the statements of the eye witnesses would be fatal to the proseuction and testimony of such witnesses cannot be safely relied upon. Reliance in this context is placed on the case of ***MUHAMMAD ASIF VS. THE STATE [2017 SCMR 486]***, wherein the **Hon'ble Supreme Court of Pakistan** has held that:

> ***"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 statements of eye witnesses would be fatal and testimony of such witnesses cannot be safely relied upon.***

10. Furthermore, PW.11 Amir Ullah when appeared in witness box, he purposely did not state about his remaining in search and gaining knowledge of murder of his alleged brother Nizam Ullah by appellant Ghazi Gul for the obvious reason that he had not disclosed the source of his gaining such knowledge and instead he stated that **"it was told in police station by one Ihsan Ullah son of Yaseen** (the accused) **that your brother along with his taxi rickshaw was hired for Sardaryab by one**

Ghazi Gul (accused facing trial) **and on return from Sardaryab he murdered the rickshaw driver namely Nizam Ullah near the Tariq Flour Mills on G.T Road towards Peshawar and snatched the rickshaw from the deceased; the entire story told me by Ihsan Ullah in police Station Daudzai"** which runs counter to the prosecution case as per prosecution PW.6 Ihsan Ullah first time appeared before the investigating officer on 27.03.2018 i.e. one day after the appearance of PW Amir Ullah at police station and did not state about his telling the story regarding the incident to PW.11 Amir Ullah and instead he stated that **"I kept mum for a few days whereafter I told the whole story to my father who searched for LRs of the deceased and informed them";** none among the police official witnesses has stated about meeting of PW.11 Amir Ullah with PW.6 Ihsan Ullah at police station and the latter's telling story of the incident to the former; PW.6 Ihsan Ullah attempting to improve the prosecution case, has stated that **"I did not disclose about the occurrence for so many days as I was ill**, and when he was confronted to his statement under Section 164 of The Code he has stated that **"I did not mention the stated reason for the delay before the magistrate while recording my statement under Section 164 Cr.P.C";** even, otherwise he has not produced any prescription and/or even a laboratory report etc, which could show that he was ill during that relevant period; according to PW.6 Ihsan Ullah the registration Number of the subject rickshaw was 5347 and that they all three including the rickshaw driver (the deceased), accused Ghazi Gul and he himself ate kabab and Fish at fishing hut located in Sardaryab, stating further that **"while we were eating our dinner the deceased had told the accused facing trial that he belong to village Charkha khel; village Charkha khel is at the far end of Nothia; I did not go to village**

Charkha khel in search of LRs of the deceased" and has admitted that **"it is correct that I have not mentioned the name of the deceased in my statement under Section 164 Cr.P.C; I did not mention the features of the deceased before the police as to whether the deceased was bearded or not; it is correct that I have not mentioned the specific time of our departure from Nothia; I have not mentioned the residence of the deceased in my statements; it is correct that I have not mentioned the registration Number and colour** (of rickshaw) **in my statement under Section 164 Cr.P.C; I had not noticed the color or registration of the rickshaw, however after the accused shot the deceased I noticed the registration Number which was 5347",** but according to the prosecution the subject rickshaw was unregistered and its registration Number was applied for, as was deposed by PW investigating officer Sub-Inspector Muhammad Jan and PW constable Maqsood Ali, the alleged marginal witness of the recovery of rickshaw and even PW.11 Amir Ullah in his evidence has stated that **"I do not remember that from whom the rickshaw was purchased by my brother rather it was new and unregistered rickshaw"**. However, photocopy of Authority/Registration Letter produced at Ex.PW.7/10 would reveal that the rickshaw stood in the name of one Ajmal, who was neither cited as witness nor was examined during the investigation or during the trial; PW.11 Amir Ullah has stated that **"we are four brothers including the deceased residing in the same house while two other brothers resided separately; I am residing at Yousaf Abad at Dilazak road while the said PW Ihsan Ullah is residing in Nothia"** PW.6 Ihsan Ullah has stated that **"Ghazi Gul, the accused facing trial was good friend of mine; on 2nd of March 2018, the accused Ghazi Gul called and asked me to accompany him to**

Sardaryab for gathering", but in cross examination he has stated that **"I cannot say whether the accused facing trial is elder or younger than me; I cannot tell the name of the father of the accused",** he claimed himself to be an army personnel as a contract employee with the 102 brigade of the Army as a loader and to be educated person, having cleared Inter examination and is a student of third year from Allama Iqbal Open University, but he taking shelter of his memory has avoided to give proper replies of the several material questions by stating that **"I cannot say as to how long we remained at the fishing hut; I cannot say as to how much fish we had ordered at the fishing hut; I cannot say how much fare was fixed with the rickshaw; I do not remember the exact date when my statement was recorded; I do not remember if the deceased was wearing what type of clothes; I cannot tell the exact time consumed while returning from Nowshera; I cannot say as to how many fires were shot by the accused; I cannot also identify the make type and bore of pistol in question; I cannot say about the distance between Nothia and Sardaryab; I cannot say as to whether the deceased was wearing shoes or chappal";** and he went on to depose that **"I was taken to the spot by the local police, however, site plan was not prepared on my pointation",** while investigating officer sub-Inspector Muhammad Jan and other police official PWs did not state about PW Ihsan Ullah's taking to the spot and his pointing the place of incident to the police; PW.11 Amir Ullah has also made admissions adverse to the prosecution by stating that **"the clothes of the deceased and his photographs were shown to me by the police of police station Daudzai and accordingly we identified that it was my real brother namely Nizam Ullah because we knew his clothes and photographs; it is correct that I have not mentioned in my**

statement under Section 164 Cr.P.C that my real brother was identified from photographs and his clothes; my deceased brother had left the house on 02.03.2018 and we came to know about him after around 22/23 days; **we had lodged the report regarding missing of my deceased brother in police station Paharipura; it is correct that I did not mention this fact regarding lodging report to the police in my statement in chief or in my statement under Section 164 Cr.P.C; it is correct that I charged the accused facing trial on the statement of one Ihsan Ullah; it is correct that nothing has been done in my presence regarding the occurrence on the crime spot; I do not know whether PW Ihsan Ullah had dispute over a rickshaw sale/transaction with the accused Ghazi Gul facing trial and for that very reason Ihsan Ullah deposed as PW against him".** But admittedly the alleged report regarding missing of Nizam Ullah allegedly lodged at police station Paharipura by PW.11 Amir Ullah etc was neither produced during the investigation nor was it produced in evidence.

11. It is pertinent to mention here that one empty of 30 bore pistol shown to have been secured from the place of incident on 04.03.2018 was sent to the ballistic expert on 16.03.2018 i.e. with delay of more than 12 days without proper explanation thereof and as to who had delivered it in the forensic science laboratory is no where mentioned in the FSL report Ex.PW.7/24 even any roznamcha entry in this regard was neither shown kept at the police station nor was produced in evidence, while in cross examination PW.7 investigating officer has stated that **"on the same day i.e. 03.03.2018 I recovered empty and handed over to the moharrar concerned who sent the same onward to the FSL; I do not know that when the moharrar has sent the same parcel to the FSL".** The

appellant was arrested on 28.03.2018 and 30 bore pistol was allegedly secured from the house of appellant on his pointation on 29.03.2018 vide memo Ex.PW.2/3, but the FSL report Ex.PW.7/29 reveals that one 30 bore pistol and one 30 bore crime empty were received together in the office of FSL on 10.05.2018 and there is no explanation for such an inordinate delay of more than 40 days in sending the pistol and crime empty to the ballistic expert and as to who had delivered the alleged weapon and empty shell in the office of FSL is no where either mentioned in the FSL report Ex.PW.7/29 or even disclosed during the trial and it is also not known as to when the empty shell which was allegedly earlier sent to ballistic expert vide FSL report Ex.PW.7/24 was returned to the I.O and by whom, has also not been disclosed anywhere by the prosecution and even roznamcha entry in this regard was neither shown kept at the police station nor was produced in evidence. And thus, the safe custody and safe transmission of the empty shell allegedly secured from the place of incident and the alleged crime weapon namely 30 bore pistol allegedly secured on the pointation of appellant, has not been established by the prosecution by producing any sort of documentary evidence and/or by examining any person in this regard, and as such no reliance can be placed on the FSL reports Ex.PW.7/24 and Ex.PW.7/29; moreover, PW.2 Syed Sardar Ali sub-Inspector SHO PS Daudzai, who allegedly secured 30 bore pistol from the store of the house of appellant on his pointation has admitted that **"it is correct I have not sent the recovered pistol to the FSL rather I have handed over it to the I.O and the same was sent by him to the FSL; it is correct that we entered our arrival and departure in roznamcha; The specific entry regarding departure for the recovery of pistol has not been mentioned";** while PW.7 sub-Inspector Muhammad Jan, who is also

investigating officer, was shown to have acted as a marginal witness to the alleged recovery of pistol from the house of the appellant on 29.03.2018 vide Ex.PW.2/3, has not stated about handing over the pistol by PW.2 SHO Syed Sardar Ali Shah to him and he also did not state about making departure and arrival entries for the purpose of recovery of alleged crime weapon at the police station Daudzai, which needless to say, were essential for the purpose of establishing movements of the police party for the purpose of recovery of the crime weapon from the alleged house of appellant, which is not even stated to be in exclusive possession of the appellant; and to a question **P**W.7 mashir SI Muhammad Jan (I.O) has stated that **"I cannot say how many rooms are exist in the house of the accused";** furthermore, neither any independent person from the locality was associated with the alleged recovery proceedings nor was any effort made to do so by the police party and as such the alleged recovery of the pistol on the pointation of the appellant is also not free from doubt.

12. Record reflects that PW.1 Dr. Farman Ullah, MO KMC, Peshawar, who conducted postmortem of the dead body of the deceased (unknown deceased) on 03.03.2018 at 10:30 a.m. found that stomach & its contents, small intestines & their contents and large intestines & their contents empty, as is revealed from the postmortem report Ex.PM, and whereas according to PW.6 Ihsan Ullah they all three viz, driver of the rickshaw (the deceased) accused Ghazi Gul and he himself had meals i.e. fish, kabab etc in the aforementioned restaurant (fishing hut) and after taking meals while they were returning through Charsadda road and reached at the place of vardhat near Tariq Flour Mills, rickshaw driver receiving firearm injury at the hands of appellant Ghazi Gul died instantaneously. In such view of the matter, the medical evidence is in conflict with the ocular

account of the prosecution rested solely on purported solitary eye witness PW.6 Ihsan Ullah.

13. Record further reveals that the letter relating verification of finger prints Ex.PW.7/26 was written to the Chairman NADRA Islamabad on 24.04.2018 seeking verification of finger prints of the deceaed although the incident was shown to have taken place on 03.03.2018, and challan was already submitted in the Court; it is also strange enough that the finger prints form, containing some finger impressions Ex.PW.7/27 was shown to have been prepared on 03.02.2018 as is evident from the top of that form Ex.PW.7/27, which is not in consonance with the date of the incident rather it shows that it was prepared in haphazard manner in antedate. Paper relating to personal information Ex.PW.7/28 produced by investigating officer is unsigned and is also not printed on letter head, having no NADRA's monogram, which is on simple paper and even its covering letter if any was not produced in evidence. And as such, the said simple paper Ex.PW.7/28 can hardly be termed to be a piece of evidence relating to the identity of the deceased, who was buried unidentified and after his burial his dead body was never exhumed and no valid proof relating to the identity of the deceased to be the brother of complainant Amir Ullah has been produced by the prosecution, and hence, the identity of the deceased to be Nizam Ullah as claimed by PW.11 Amir Ullah, having not been proved, is also doubtful.

14. The aforementioned infirmities, material & glaring contradictions, admissions adverse to the prosecution case, dishonest & deliberate improvements to strengthen the prosecution case made during the trial in the statements by the PWs qua the contents of their statements under Sections 161 and 164 of The Code, rendered the credibility of the

prosecution witnesses doubtful and their evidence unreliable; no explicit reliance can be placed upon their evidence and the entire case of the prosecution is shrouded in mystery. Reliance in this context is placed on the case of ***AKHTAR ALI and others V. The State (2008 SCMR 6)***, wherein the Hon'ble Supreme Court of Pakistan has held that:-

> ***"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness had improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. See Hadi Bakhsh's case PLD 1963 Kar. 805."***

In case of MUHAMMAD MANSHA Vs. The STATE [2018 SCMR 772], the Hon'ble Supreme Court of Pakistan has held that:

> ***Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that when ever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafiqe Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).***

In the case of ***MUHAMMAD ILYAS V. THE STATE (1997 SCMR 25),*** the Hon'ble Supreme Court of Pakistan has held that:-

> ***"It is well-settled principle of law that where evidence creates doubt about the truthfulness of prosecution story, benefit of such a doubt had to be given to the accused without any reservation. In the result, there is no alternative but to acquit the appellant by giving him benefit of doubt".***

15. In view of what has been stated above, it is crystal clear that there is absolutely no evidence worth consideration against the appellant to connect him with the offence alleged against him and the prosecution case is full of doubts. And, thus, the prosecution has miserably failed to prove its case against the appellant beyond a reasonable doubt, but the learned trial Court without appreciating the evidence brought on the record in its true perspective, has passed the impugned judgment dated 04.01.2022, convicting and sentencing the appellant, which suffers from mis-reading and non-reading of the evidence. it needs no reiteration that a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, benefit thereof is to be extended to the accused not as a matter of grace or concession, but as matter of right. Reliance in this context is placed on the case of ***GHULAM QADIR and 2 others V. THE STATE (2008 SCMR 1221)***, wherein the Hon'ble Supreme Court of Pakistan has held that:-

> ***"16. It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge-makers the whole case doubtful. Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt end this duty does not change or vary in the case. A finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. Mere conjectures and probabilities cannot take the place of proof. Muhammad Luqman v. The State PLD 1970 SC 10."***

In the case of ***MUHAMMAD MANSHA*** **supra***, the Hon'ble Supreme Court of Pakistan has observed that:*

> ***"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State***

(1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).

In the case of ***MUHAMMAD AKRAM v. THE STATE*** **(2009 SCMR 230),** the Hon'ble Supreme Court of Pakistan has held that:

> **"*It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."***

16. Under the above circumstances, we are of the considered view that the impugned judgment dated 04.01.2022 and the conviction and sentence awarded to the appellant cannot sustain, therefore, the captioned Criminal Appeal is accepted, the conviction and sentence awarded to appellant Ghazi Gul son of Pervez vide impugned judgment dated 04.01.2022, are set-aside and the appellant is acquitted of the charge, extending him benefit of doubt. The appellant is directed to be released forthwith, if his custody is not required in any other case. Resultantly, the captioned Criminal Murder Reference is answered in negative.

(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE

(JUSTICE MUHAMMAD NOOR MESKANZAI)
CHIEF JUSTICE

(JUSTICE DR. SYED MUHAMMAD ANWER)
JUDGE

khurram