

**IN THE FEDERAL SHARIAT COURT**  
(APPELLATE JURISDICTION)

**PRESENT**

**MR. JUSTICE SH. NAJAM UL HASAN, CHIEF JUSTICE**  
**MR. JUSTICE DR. FIDA MUHAMMAD KHAN**  
**MR. JUSTICE MEHMOOD MAQBOOL BAJWA**

**CRIMINAL APPEAL NO.32-I OF 2017**

MEHBOOB AHMED MALIK SON OF MUHAMMAD SHARIF, RESIDENT  
OF HOUSE NO.294, STREET NO.56, SECTOR F-11/4, ISLAMABAD.

APPELLANT

VERSUS

1. NADIR KHAN SON OF FARHAT-ULLAH KHAN, RESIDENT OF HOUSE  
NO.13, STREET NO.79, SECTOR G-6/4, ISLAMABAD.

2. THE STATE

RESPONDENTS

COUNSEL FOR THE APPELLANT	...	MR. AFTAB AHMED KHAN, ADVOCATE
COUNSEL FOR THE RESPONDENT NO.1.		MR. TANVEER IQBAL KHAN, ADVOCATE.
COUNSEL FOR THE STATE		MR. MUHAMMAD ATIF KHOKHAR, ADVOCATE ON BEHALF OF ADVOCATE GENERAL, ISLAMABAD.
FIR NO. AND POLICE STATION	...	72 OF 2004 AABPARA, ISLAMABAD.
DATE OF JUDGMENT OF TRIAL COURT	...	05.07.2006
DATE OF PREFERENCE OF APPEAL IN LAHORE HIGH COURT	...	24.07.2006
DATE OF RECEIPT OF APPEAL IN FEDERAL SHARIAT COURT	...	27.11.2017
DATE OF HEARING	...	20.02.2019
DATE OF DECISION	...	20.02.2019
DATE OF JUDGMENT	...	20.03.2019

**JUDGMENT:**

**Mehmood Maqbool Bajwa, J:** Conclusion arrived at by the learned Sessions Judge, Islamabad, in the judgment dated 5<sup>th</sup> July, 2006, opining about the failure of prosecution to prove its case against the respondent No.1, nominated accused (Hereinafter called the respondent), resulting in his acquittal after completion of trial in Crime-Report No.72 of 2004, (copy of which is Ex.PE-1) at police station Aabpara, Islamabad, prompted the appellant being complainant of F.I.R. to prefer an appeal, seeking its reversal on multiple grounds with further prayer to record conviction, awarding sentence to the respondent.

2. Appeal was preferred before the learned Lahore High Court, Rawalpindi Bench, which later on was transferred to the learned Islamabad High Court, Islamabad. Learned Division Bench of Islamabad High Court was pleased to dismiss the appeal for want of jurisdiction through judgment dated 30<sup>th</sup> May, 2016, assailed by appellant before the Hon'ble Supreme Court of Pakistan. Though, no exception was taken to the judgment questioned but the Apex Court in para (2) of order dated 9<sup>th</sup> November, 2017, issued direction to the office of Islamabad High Court for transmission of memorandum of appeal alongwith the record to this Court for decision of appeal in accordance with law.

Resultantly, the record was transmitted to this Court.

3. The appellant filed Criminal Miscellaneous No.4-I of 2018 seeking condonation of delay. After hearing the parties and for the reasons mentioned, particularly in paras (4) and (8), we are inclined to condone the delay.

4. The appellant, who is father of Shafaq Mehboob (deceased) reported the occurrence to local police through his statement (Ex.PE), stating therein that on 13<sup>th</sup> May, 2004, he dropped the deceased to Muhammad Ali Jinnah University and went to his office. Later on, deceased informed him about her late arrival. As per narration, the appellant after arrival at his residence at about 5:00 p.m., made attempts to contact deceased through her mobile phone but without any success.

As per allegations, at about 7:54 p.m., his another daughter Madia Niyar (P.W.7) communicated occurrence by calling appellant, information of which was given to her by Nadir (respondent) regarding receipt of bullet injury on abdomen by Shafaq Mehboob. On this information, the appellant rushed to Capital Hospital and then Pakistan Institute of Medical Sciences (PIMS), where she was referred, who ultimately succumbed to the injury.

The appellant nominated the respondent, his mother and one un-known person as culprit.

Suggesting motive, it was maintained that the respondent promised to marry with deceased but got himself engaged with some other girl, due to which, the respondent in collusion with his mother and un-known person committed her murder.

Incorporating the accusation, Muhammad Azam, S.I. (P.W.4) recorded the F.I.R., copy of which is Ex.PE-1.

5. Admitting association and company of the deceased in last hours, the respondent while denying allegation took the plea of suicidal attack by the deceased herself, resulting in death as is evident from trend of cross-examination and his statement under Section 342 of The Code of Criminal Procedure, 1898. (Act V of 1898) (Hereinafter called the Code).

6. Dr. Shahid Iqbal (P.W.10) conducted autopsy on the dead body on 14<sup>th</sup> May, 2004 and found following injuries on her person:

- “1. 27 cm long surgical wound with stitches on the mid line of the abdomen
2. 0.5 cm right circular, inverted above the 4 cm Umbilicus and three cm lateral junction. This was an entry wound with blackening and charring around entry.
3. On the back upper margin of the right iliac crest about 1.5 cm lateral to the back mid line, 1 cm irregular, margin everted this was exit wound.
4. On the left interior forearm old multiple linear superficial parallel wound were present which seemed to be self inflicted as shown in diagram at page 6 of the post mortem report.
5. An abrasion was found on the right elbow.”

The deceased as per opinion died due to firearm injury which caused rupture of third part of duodenum, causing massive bleeding in the abdomen.

All the injuries were found anti-mortem.

Probable time between the injury and death was 2 to 3 hours and that lapsed between death and post-mortem was 12 to 16 hours. Ex.PJ/1-4 is the copy of post-mortem report, while pictorial diagram is Ex.PK/1-2.

Vaginal swabs taken at the time of post-mortem examination were handed over to Shohaib Ali Shah, LHC.

7. On the request of police keeping in view the defence version, Medical Board was constituted headed by Dr. Anwar-ul-Haq (P.W.14-A) with its members, Dr. Muhammad Abdul Zahid (P.W.12), Lady Doctor Robina Kamran (P.W.13).

Opinion of the Board reflected in the Report (Ex.PL) concluded as follow:

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1. There was no mentioning of suicidal attempt in Inquest form.
2. from the description of the sites of the entry and exist wounds the direction of the bullet which it traversed and the efforts required to press the trigger in such a position is not possible by self.”

8. As many as twenty witnesses were produced by the prosecution including Madia Niyar (P.W.7), real sister of deceased,

Sheeraz Ahmad Abbasi (P.W.8), Muhammad Latif (P.W.9), Parveen Akhtar Malik, paternal aunt of deceased (P.W.16), Mehboob Ahmed Malik (appellant as well as complainant (P.W.17) and Muhammad Siddique, Inspector-Investigating Officer (P.W.18).

9. Stance of the respondent, being accused in his statement under Section 342 of The Code has already been referred, who neither appeared as his own witness nor led evidence in defence.

10. Heard adversaries at length and perused the record for re-appraisal.

The arguments canvassed though are not incorporated but reference will be made at appropriate stages during the discussion.

11. There is little cavil with the proposition that parameter for re-appraisal of evidence in judgment of acquittal is entirely different from the yardstick to be applied in an appeal recording conviction. The appellate court would be slow in interfering with the judgment in view of earning double presumption of innocence unless and until, the reasons advanced by trial court are found artificial, shocking and ridicule. Perversity of judgment cannot be presumed if conclusion is based on evidence. Possibility of formulating another view keeping in view the evidence by itself would not be sufficient to set at naught the judgment. Double presumption of innocence earned in pursuance of judgment of

acquittal cannot be interfered in the absence of strong and cogent reasons<sup>1</sup>.

**12.** It is not a case of direct evidence. Circumstantial evidence was produced by prosecution to prove the charge under Section 10(3) of The Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 (Shall be called The Ordinance as and when required), Sections 201, 302 read with Section 34 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called Act XLV of 1860).

**13.** Since it is a case of circumstantial evidence, therefore, in order to bank upon such type of evidence, particularly in cases involving capital punishment, stringent principles for accepting the same have been formulated. Consistent view is that such evidence must be so inter-linked, making out an un-broken chain in one unit, touching one to the dead body and other to the neck of the accused. If any link is missed, the chain would be incomplete rendering such evidence unreliable for recording conviction. In case of circumstantial evidence, sensing non-availability of requisite evidence, element of procuring and fabricating evidence cannot be ruled out and as such Courts are obliged to take extra care to scan such evidence about its intrinsic value and reliability.

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<sup>1</sup> “Sheo Swarup and others v. King Emperor” (AIR 1934 PC 227(2))  
“GHULAM SIKANDAR AND ANOTHER v. MAMARAZ KHAN AND OTHER” (PLD 1985 SC 11).  
“BASHIR AHMAD v. FIDA HUSSAIN and 3 others”(2010 SCMR 495)  
“THE STATE and others v. ABDUL KHALIQ and others”(PLD 2011 SC 554)  
“MUHAMMAD ZAFAR and another v. RUSTAM ALI and others” (2017 SCMR 1639)  
“Mst. ANWAR BEGUM v. AKHTAR HUSSAIN alias KAKA and 2 others” (2017 SCMR 1710)

If there is patent element of design on the part of the investigating agency in the fabrication of evidence, the court must be conscious against the said trap. The court while appraising-re-appraising the evidence must observe such care and caution and reliance upon such evidence with haste would result in failure of justice. Better course in such eventuality would be not to act upon such evidence.<sup>1</sup>

**14.** Re-appraisal of evidence further suggests that it is a case of two versions. Version of the prosecution-appellant is that respondent made fire upon Shafaq, resulting in her death while according to respondent, it was suicidal act of deceased.

Yardstick for appraisal, re-appraisal of evidence in such eventuality was highlighted by Apex Court in the case of "ASHIQ HUSSAIN"<sup>2</sup>

"For the guidance of all the Courts in the country we propose to lay down rules/principles for the appreciation of evidence in criminal cases of one version or of two versions. The proper and the legal way of dealing with a criminal case is that the court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under Section 342 Cr.P.C., statement under

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<sup>1</sup> "HASHIM QASIM and another v. The STATE"(2017 SCMR 986)

"IMRAN alias DULLY and another v. The STATE and others" (2015 SCMR 155)

"AZEEM KHAN and another v. MUJAHID KHAN and others"(2016 SCMR 274)

"Sharad Birdhichand Sarda v. State of Maharashtra"(AIR 1984 SC 1622)

<sup>2</sup> "ASHIQ HUSSAIN alias MUHAMMAD ASHRAF v. STATE"(PLJ 1994 SC 560)

Section 340 (2) Cr.P.C. and the defence evidence. If the Court disbelieves/rejects/excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under Section 342 Cr.P.C. is exculpatory, then he must be acquitted. If the statement under Section 342 Cr.P.C. believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only. In case of counter versions, if the court believes prosecution evidence and is not prepared to exclude the same from consideration it will not straight-away convict the accused but will review the entire evidence including the circumstances appearing in the case at close before reaching at a conclusion regarding the truth or falsity of the defence plea/version. All the factors favouring belief in the accusation must be placed in juxta-position to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the questions, viz., is the plea/version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case? If the answer be in the affirmative, then the court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the court will not reject the defence plea as being false but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true. If the Court finds that although the accused failed to establish his plea/version to the satisfaction of the Court but his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly."

15. Scanning of evidence reveals that adversaries are not in agreement about the place of occurrence. According to the prosecution, it is the house of respondent, situated in Street No.79, Sector G-6/4, Islamabad. Controverting the stance, the respondent took the plea that deceased committed suicide in CDA Park, Sector G-6/4, Islamabad.

Determination of place of occurrence in our view is one of the decisive factor.

Occurrence took place on 13<sup>th</sup> May, 2004.

First site plan without scale (Ex.PP) was prepared on 22<sup>nd</sup> May, 2004 by Muhammad Siddique, Inspector-I.O. (P.W.18) on the pointation of respondent, also securing empty of 30 bore pistol as is evident from memo of pointation place of occurrence (Ex.PC). According to his direct statement, the respondent after grant of ad-interim anticipatory bail joined the investigation and pointed out place of occurrence (CDA Park).

There is another site plan (Ex.PQ) drafted by the same I.O. on 21<sup>st</sup> June, 2004, suggesting the house of respondent as place of occurrence. Perusal of Marginal Note (1) reveals that deceased suffered bullet injury in the wash room of bed room of respondent. It is not known why the said plan was prepared with such inordinate delay, clearly demonstrating inefficiency and that too for extraneous consideration, making difficult to controvert contention of learned counsel for the appellant suggesting malice on the part of the I.O. due to relationship of respondent with Senior Police Officers, reference of which was made by the appellant (P.W.17) in his direct statement.

**16.** Site plan with scale in duplicate (Ex.PA-Ex.A-1) is also available on record, prepared by Muhammad Akram, Draftsman (P.W.1). He took rough notes on 20<sup>th</sup> July, 2004, after more than two months of the occurrence and handed over the site plan on 25<sup>th</sup> July, 2004. As per endorsement, Jawad Haider and Zeeshan Haider made pointation, suggesting the bed room of respondent as place

of occurrence. Record is totally silent about the identification of said persons. The I.O. (P.W.18) in his evidence named said person adding that they disclosed about the information furnished to them by respondent about the place of occurrence. Both informers were cited as a witness, who were permitted to be given up by learned Trial Court vide order dated 11<sup>th</sup> June, 2005, having been won over on the application submitted on behalf of complainant-appellant.

Deposition of I.O. (P.W.18) reveals that he conducted raid at the house of respondent on the day of occurrence and found 30 bore pistol from the top of house which according to him was lying in "dismembered shape on the *mumti* of the house", taken into custody vide Memo (Ex.PN).

Since he conducted the raid at the house of respondent and searched the same (as per his own saying), why he did not make inspection minutely in order to determine the place of occurrence particularly, when pistol though in parts was lying on the top of house and there was an allegation of murder against respondent. His conduct un-deniably smacks inaction with malice.

17. The respondent as per saying of Investigating Officer (P.W.18) while insisting, got the place of occurrence pointed out through memo (Ex.PC) on 22<sup>nd</sup> May, 2004, which is CDA Park from where statedly empty of 30 bore pistol was recovered. Recovery of

empty from a public place after seven days of occurrence is unusual and strange.

**18.** As referred earlier, there is no eye-witness of the occurrence. Muhammad Siddique, Inspector (P.W.18) conducted investigation in very un-usual and careless manner, which cannot be appreciated.

**19.** Evidence collected and adduced is not helpful to determine the place of occurrence. Pistol was recovered in dismembered shape from the *mumti* of the house, taken into custody vide memo (Ex.PN). Simultaneously, empty was shown to be recovered from the park on 22<sup>nd</sup> May, 2004, after nine days of the occurrence, when place of occurrence was pointed by the respondent as is evident from memo (Ex.PC). We are positive in our mind that recovery of empty from the park, a public place, after nine days of the occurrence by itself is not sufficient to act upon the version of respondent but simultaneously, we do not find any evidence to prove that occurrence took place in the house of respondent.

Report of Chemical Examiner (Ex.PV) suggests that crime-empty was fired from 30 bore pistol. Opinion was also given with reference to dismantled pistol, concluding that since it is in several pieces and hammer is stuck, therefore, it is not in working order.

This evidence is also of little help to determine exact place of occurrence, which if determined, would have been helpful to suggest, whether occurrence is result of homicide or suicidal act.

**20.** We also do not find even a clue to complete tale on this aspect.

Omission on the part of Investigating Officer (P.W.18) to collect evidence has given fatal blow to the case of prosecution.

**21.** The prosecution banked upon evidence of "Motive".

**22.** Submissions advanced about motive while making reference to contents of F.I.R. (Ex.PE-1), evidence of Parveen Akhtar Malik (P.W.16), (paternal aunt of deceased) and appellant, Mehboob Ahmad Malik (P.W.17) have least impressed us keeping in view facts and circumstances of case.

**23.** Motive is more or less a guess on the part of prosecution witnesses.

The deceased and the respondents were friends, having opportunities to meet each other as and when desired. As per prosecution stance, the respondent made promise with the deceased to marry but refused to act upon his commitment due to pressure of his mother and got engaged with daughter of his uncle, Zafar-Ullah Khan.

In the estimation of both the witnesses, the respondent in order to remove deceased from the scene, called her in his house and committed her murder.

**24.** First part of the deposition of both the witnesses, even if taken as gospel truth, cannot persuade to prudence about the consequences ensued. Refusal to honour promise by respondent, if any, though may cause anger to deceased, persuading her to retaliation but nevertheless cannot provide incentive to the respondent for the commission of act attributed to him.

**25.** Even otherwise, deposition of Parveen Akhtar Malik (P.W.16) suggesting motive cannot be taken into consideration being product of conscious improvement as is evident from the copy of her statement recorded during the course of investigation (Ex.DE), with which she was confronted which even otherwise was recorded on 5<sup>th</sup> October, 2004, though occurrence took place on 13<sup>th</sup> May, 2004.

Position would have been different one if there was any accusation followed by evidence that due to engagement of respondent with his cousin, there was strong protest-re-action on the part of the deceased, making difficult rather impossible for respondent to reconcile with the situation.

**26.** Viewed from whichever angle, suggested motive is neither convincing nor reasonable.

**27.** Another type of evidence produced and relied upon with vehemence is the “last seen” coming from the mouth of Sheeraz Ahmed Abbasi (P.W.8) who in his deposition stated that on the day of occurrence at about 4:45 p.m., he saw the deceased in the company of respondent, standing at the outer gate of house of respondent, who went inside in his view.

**28.** Proximity of time between last seen and death is important and vital to rely upon such type of evidence in order to exclude every possibility of getting away any of them. (Either accused or the deceased). The prosecution also must prove the object and circumstances, prompting the deceased to accompany the accused. Motive is another important factor on the part of the accused to kill the deceased. Reporting the matter without any unjustified delay is also essential. There must be independent corroboration having an un-impeachable source keeping in view the nature and binding force of such evidence. Recovery of weapon of offence from the accused and the opinion of expert to exclude all possible doubt is another factor to be kept in mind. In case murder was not pre-arranged, question of contributory role of deceased had also to be examined by the Court.<sup>1</sup>

**29.** Keeping in view the parameters highlighted when evidence of Sheeraz Ahmed Abbasi (P.W.8) is examined, it does not inspire

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<sup>1</sup> “FAYYAZ AHMAD v. THE STATE”(2017 SCMR 2026)

confidence, clearly demonstrating element of embroidery on the part of the prosecution. According to the witness, he was going to People's Secretariat situated in the area of G-6/4 from Aabpara on foot and while passing in front of House No.13, Street No.79 (house of the respondent), he saw the deceased in the company of respondent standing outside the gate of house of the respondent and they both entered in the house. Claiming himself to be President of one group of People Youth, Islamabad, the witness claimed his visit to People's Secretariat but purpose and object of visit was not disclosed, which is an important factor to bank upon his evidence. There were three passages leading to People's Secretariat as disclosed by him. The witness claimed acquaintance with deceased and respondent but nothing is available on record to explain the detail of alleged acquaintance, particularly, when the deceased and respondent are not related to each other, resident of different Sectors of Islamabad. It is interesting to note that the witness got knowledge regarding the names and relationship of P.W.7 and P.W.16 with deceased. Such information clearly demonstrates close liaison of the witness with the family of deceased. Madia Niyar (P.W.7), sister of the deceased while controverting the suggestion with reference to her terms with witness stated that she used to purchase clothes from his shop. One

thing which is crystal clear is the intimacy of the witness with family of deceased.

**30.** According to the witness, the deceased and the respondent were seen by him at 4:45 p.m. while occurrence took place approximately at 7:30 p.m., which was intimated to Madia Niyar (P.W.7) at 7:54 p.m.

During this interval, possibility of leaving the house of respondent by the deceased cannot be ruled out as admitted by the witness.

Introduction of witness due to his failure to justify his visit to the stated destination, using a particular passage passing from the house of respondent despite availability of two others appears to be an afterthought.

We are conscious that respondent was found in the company of deceased, who took her in injured condition to the hospital, also informing sister of the deceased (P.W.7) about the occurrence, which aspect shall be dealt with while examining version of respondent. The discussion made in preceding paras is with reference to quality of evidence led by prosecution, required to be dealt with as prosecution has to prove its case beyond shadow of doubt leaving aside defence plea.

**31.** Madia Niyar (P.W.7), real sister of deceased highlighted the factum of extra-judicial confession made by respondent before her on 20<sup>th</sup> May, 2004, while visiting her house.

Perusal of her evidence in totality clearly reveals that deceased and respondent were friends which fact was in the knowledge of said witness. She also used to be an instrument to make reconciliation between them in case of dispute.

**32.** Deposition of the witness stating visit of respondent at her residence on 20<sup>th</sup> May, 2004, just after seven days of the occurrence, admitting his guilt by making statement of fire upon the deceased due to anger, submitting apology, showing willingness to pay compensation, also admitting love affair with deceased, desire of deceased to marry with him (respondent) but refusal on the part of his parents appears to be an afterthought. It does not appeal to the reason that respondent who has been named as an accused in crime-report will visit the house of real sister of deceased, though known to him earlier just after seven days of the occurrence, and will make confession, disclosing the detail. It appears to be conscious attempt on the part of investigation agency to coin and fabricate evidence.

**33.** Purpose and object of making extra-judicial confession by the accused is to seek help and grace for himself and that too by associating influential persons. Admission of guilt by assailant and

that too before close relative of deceased going alone and within week of occurrence neither appeal to the reason nor probable.

**34.** Even otherwise, extra-judicial confession is a weak type of evidence. Seeking conviction on this score is not permissible particularly, when it is tainted. <sup>1</sup>

**35.** Aspect of “motive” and “last seen” already dealt with by no stretch of imagination can provide corroboration.

**36.** Recovery of pistol of 30 bore (in seven pieces), through memo (Ex.PN) from the “*Mumti*” of house of respondent is inconsequential as the same was not in working order and was dismantled.

**37.** Medical evidence is very important keeping in view facts and circumstances of present case. Autopsy on the dead body was conducted by Dr. Shahid Iqbal (P.W.10). Cause of death was firearm injury but there is no opinion about the nature of death.

Admittedly, Medical Board was constituted headed by Dr. Anwar-ul-Haq (P.W.14-A), Dr. Muhammad Abdul Zahid (P.W.12) and Dr. Robina Kamran (P.W.13) as its members. Opinion of Board (Ex.PL), which is unanimous, is re-produced for ready-reference:

“1. There was no mentioning of suicidal attempt in Inquest form.

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<sup>1</sup> IMRAN alias DULLY and another v. The STATE and others” (2015 SCMR 155)  
“AZEEM KHAN and another v. MUJAHID KHAN and others”(2016 SCMR 274)  
“MST. ASIA BIBI v. The STATE and others”(PLD 2019 SC 64)

2. from the description of the site of the entry and exit wounds the direction of bullet which it traversed and the efforts required to press the trigger in such a position was not possible by self."

First reason to reach conclusion was omission of I.O. to mention suicidal attempt in the inquest report, which is not worthy of credit.

The Board also ruled out infliction of self-injury keeping in view the site of the entry and exit wound, direction of bullet and impossibility of effort required to press the trigger in such situation.

38. Parikh in his textbook of Medical Jurisprudence and Toxicology (Fifth Edition) at page-292 (Section III) has summarized the salient features of suicidal, homicidal and accidental firearm injuries, which reads as under:

	Suicide	Homicide/ Accident
1. Victim	Generally adult male	Any
2. Site	Side of temple, centre of the forehead, roof of mouth, under the chin, and front and left side of chest, and <u>occasionally epigastrium</u>	Any part of the body
3. Distance	Contact or close shot	Usually distant shot occasionally close
4. Direction	Consistent with self firing	Any
5. Number of shots	Generally one. Hesitation shots may have been fired at random	Any
6. Cadaveric spasm	Weapon may be firmly grasped by cadaveric spasm, which is difficult to be simulated by a murderer to give an impression of suicide	Weapon may be missing or not found, and no cadaveric spasm.
7. Scene of Crime	No evidence of disorder generally	Evidence of disorder and struggle may be there

(Underlining is ours)

Describing kind of victim, the author has attributed act of suicide generally to adult male. However, has not ruled out such like act by female.

One of the reason given by the board is site of entry and exit wound and the direction of bullet. However, Parikh while explaining "site" has also mentioned area of epigastrium though occasionally to determine nature of death. Locale of Injury No.2 which is entry wound is 0.5 c.m. right circular, inverted above the 4 cm Umbilicus. Pictorial diagram (Ex.PK/1-2) makes clear the locale of entry wound (Injury No.2).

So far as locale of exit wound is concerned, suffice it to say that bullet takes its own course. No hard and fast rule can be described.

There is only one shot on the person of deceased. There was blackening and charring around entry wound. Availability of blackening sign suggests close shot or contact.

39. It is not disputed that no attempt was made for exhumation of dead body.

40. Opinion of the Medical Board further suggests that "effort required to press the trigger in such situation was not possible by self".

However, Dr. Robina Kamran (P.W.13), a member of Medical Board replying a question in cross-examination stated as follow: "If one is right handed person, by holding the said pistol his hand

could reach the place where the injuries is seated of Shafaq deceased.”

Though, there is nothing on record to suggest that deceased was right or left handed person but general presumption is of right handed.

It has also came in the statement of said witness that deceased was powerful and stout built. Her height as per postmortem report was five feet six inches, which according to the witness is a big height in the women folk.

Keeping in view the receipt of one shot, locale of injury, presence of blackening suggesting contact or close shot, opinion of Dr. Robina Kamran (P.W.13), height of deceased having stout built, possibility of suicidal act cannot be ruled out though no definite opinion can be formulated.

It is further to be noted that there was 27 c.m. long surgical wound with stitches on the midline of the abdomen (Injury No.1) as the deceased was operated when brought in Pakistan Institute of Medical Sciences. Perusal of pictorial diagram clearly reveals that Injury No.2 (Entry wound) is very close to Injury No.1. In the circumstances, no definite opinion could have been given.

**41.** Pursuant to above, no premium can be granted to the prosecution.

42. We have also gone through the report of Chemical Examiner (Ex.PS) concluding that vaginal swabs were stained with semen. The positive report by itself is not sufficient to prove the case of prosecution though could have been used as a strong corroborative factor that deceased was subject to "zina" but when and by whom? It is a big question-mark due to non-availability of evidence.

43. Let us make comments in brief to the evidence led by prosecution.

Motive agitated as discussed is weak and feeble. Evidence of "Last seen" and "Extra-judicial Confession" as examined was coined.

Postmortem report is not helpful to determine nature of death. Report of Medical Board though in favour of prosecution but pursuant to discussion made, possibility of other view cannot be ruled out.

Positive report of Chemical Examiner, suggestion commission of rape with deceased with un-determined duration and culprit cannot be used against respondent on the basis of suspicion.

Report of Medical Board with positive sign though in favour of prosecution but possibility of forming other view in view of

discussion makes the case of probability and suspicion against the respondent which by itself is not sufficient to record conviction.”<sup>1</sup>

**44.** There was an important witness, Muhammad Khan, a taxi driver, who took the deceased in injured condition to Capital Hospital, whose statement under Section 164 of The Code was also recorded on 28<sup>th</sup> May, 2004, but was permitted to be given up on the application made on behalf of prosecution having been won over vide order dated 18<sup>th</sup> October, 2005.

**45.** Now we will examine the stance of the respondent upon which great stress was laid down on behalf of appellant/prosecution. There is no need to make reference to the questions put in cross-examination and stance taken by the respondent in his statement after conclusion of prosecution evidence with which he (the respondent) was confronted.

It is not disputed that factum of occurrence was intimated to Madia Niyar (P.W.7) elder sister of deceased by the respondent. Since source of information is not a fact-in-issue, therefore, there is no need to deal with the divergent stance of adversaries, whether information was communicated by respondent through mobile phone or public call office. The respondent in his statement recorded under Section 342 of The Code, while replying question No.10, admitted that he took the deceased to the hospital in injured

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<sup>1</sup> “YASIN alias GHULAM MUSTAFA v. THE STATE” (2008 SCMR 336)

condition. The deceased later on was shifted to Pakistan Institute of Medical Sciences by the respondent as also deposed by Zafeer Ahmed (P.W.14), Receptionist, Capital Hospital.

Referring to these admitted facts, we were persuaded to believe and act upon the version of prosecution-appellant.

46. The argument though appears to be attractive in form but is of little help to the prosecution in substance in view of rule of law enunciated in the case of "ARSHAD KHAN"<sup>1</sup> in which it has been held that in such like cases, some part of the onus lies on the accused person but in case of failure of prosecution to discharge initial onus, no part of the onus is shifted upon the accused.

After re-appraisal of evidence led by the prosecution, we have concluded that motive alleged, is un-reasonable. Evidence of "last seen" and "Extra Judicial Confession" is result of conscious attempt to fabricate evidence. Evidence of recovery is insignificant. Report of Standing Medical Board though rules out element of self-infliction but in view of discussion, possibility of self-infliction may not be ruled out, particularly, keeping in view reply given in cross-examination by Dr. Robina Kamran (P.W.13). Prosecution as such remains unable to prove its case against the respondent beyond shadow of doubt.

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<sup>1</sup> "ARSHAD KHAN v. THE STATE" (2017 SCMR 564)

47. We may advantageously make reference to the opinion of the Apex Court in the case of "NAZIR AHMAD v. The STATE" (2018 SCMR 787), concluding at pages 790-791 as follow:

"4. It has been argued by the learned Deputy Prosecutor-General, Punjab appearing for the State that the deceased in this case was a vulnerable dependent of the appellant and, thus, by virtue of the law declared by this Court in the cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) some part of the onus had shifted to the appellant to explain the circumstances in which his wife had died an unnatural death in his house during the fateful night which part of the onus had not been discharged by the appellant. We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above mentioned cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him."

48. Keeping in view the above-yardstick, we will examine defence version.

The stance of the respondent about suicidal act on the part of the deceased could not be proved. He remained with the deceased till her last breath. He has to explain the compelling circumstances

due to which deceased committed suicide. His statement under Section 342 of The Code is totally silent in this regard.

Recovery of crime-empty from the CDA Park on 22<sup>nd</sup> May, 2004, as is evident from memo (Ex.PC) cannot provide corroboration to the defence since recovery was effected after nine days of the occurrence and that too from a public place. Whereabouts of weapon of offence used were not disclosed. Pointation of place of occurrence (CDA Park) as per stance of the respondent is not admissible evidence.

However, possibility of self-infliction in view of examination of medical evidence cannot be ruled out, providing some space to the respondent.

**49.** We have also noted another circumstance, leaning in favour of respondent, keeping in view general human conduct.

If the deceased sustained injuries due to the act of respondent, he should have been last person to take her to the hospitals to save her life. Intimation communicated to Madia Niyar (P.W.7) elder sister of deceased by him in the circumstances is also not understandable. The acts amount to create incriminating evidence, which normally is not possible.

**50.** Un-successful attempt on the part of respondent to substantiate his plea by itself is not sufficient to make interference

in the impugned judgment in view of failure of prosecution to prove its case against the respondent beyond shadow of doubt.<sup>1</sup>

51. Matter can be examined from another angle as well. In view of the discussion under “Medical Evidence”, we have reached to the conclusion that possibility of both the eventualities, one taken by the prosecution, other adopted by respondent, are probable.

In the circumstances, probability of conclusion in favour of respondent being accused has to be given preference.<sup>2</sup>

52. Needless to state that conviction cannot be recorded on the suspicion, however strong, as the same cannot take the place of “proof”.<sup>3</sup>

53. Viewed from whichever angle, we do not find any perversity in the conclusion assailed. View in favour of respondent being possible was preferred by learned Trial Court to which no exception can be taken.

54. Before parting with the judgment, we are constrained to make comment upon the conduct of Muhammad Siddique, Inspector, the then S.H.O. Margalla Police Station (P.W.18) as Investigating Officer, serving as Sub-Inspector at Police Station Aabpara at the time of occurrence. He right from the very

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<sup>1</sup> “MUHAMMAD IKRAM BUTT and others v. SAJJAD HUSSAIN and others” (PLD 2004 SC 244)  
“AZHAR IQBAL v. THE STATE” (2013 SCMR 383)

<sup>2</sup> “JAVAJD AKBAR v. MUHAMMAD AMJAD AND JAMEEL @ JEELA and another” (2016 SCMR 1241)

“FATEH JAN v. THE STATE” (2006 SCMR 1234)

<sup>3</sup> “YASIN alias GHULAM MUSTAFA v. THE STATE” (2008 SCMR 336)

“VIJANT KUMAR and 4 others v. STATE through Chief Ehtesab Commissioner, Islamabad and others” (PLD 2003 SC 56)

beginning dealt with investigation in a casual manner, prima facie clothed with extraneous consideration. He did not determine the place of occurrence, which was important to determine the nature of death. When he secured 30 bore pistol (though in pieces) from the "Mumti" of house of respondent on the very day of occurrence, why he did not inspect the house of respondent in order to collect evidence for determination of place of occurrence keeping in view the allegations contained in the F.I.R. He prepared site plan (Ex.PQ) on 21<sup>st</sup> June, 2004, with inordinate delay, showing the room of respondent as place of occurrence.

Had there been inspection of house of respondent on the same day, Investigating Officer would have been able to note signs of disorder, if any, one of the factor to determine nature of death. He prepared more than one site planes, suggesting two places of occurrence.

Being a case of circumstantial evidence, he has to collect evidence to settle the moot point but there is failure on his part.

**55.** Let copy of the judgment be sent to the Inspector-General of Police, Islamabad, with the direction to initiate disciplinary proceedings against the said Investigating Officer on the charge of defective investigation, apparently result of extraneous consideration, conclude the same within four months positively

and submit report to the Registrar of this Court for placing the same before the Hon'ble Chief Justice.

56. On 20<sup>th</sup> February, 2019, after hearing arguments, we dismissed the appeal through short order. Above-mentioned are the reasons for our conclusion.

**SH. NAJAM UL HASAN**  
CHIEF JUSTICE

**MEHMOOD MAQBOOL BAJWA**  
JUDGE

**DR. FIDA MUHAMMAD KHAN**  
JUDGE

Dated, Islamabad the  
20<sup>th</sup> March, 2019.

*Mubashir\**