Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.1164 -P/2022

Saddam Vs. The State etc

JUDGMENT

Date of hearing ------ 18.04.2024.

Appellant by: Mr. Hussain Ali, Advocate

State by: Mr. Ayub Zaman, AAG

Complainant by: Mr. Batol Rafaqat, Advocate

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SAHIBZADA ASADULLAH, J-. Through this criminal appeal, appellant has questioned the legality and validity of the judgment dated 03.11.2022, passed by learned Additional Sessions Judge-XI, Peshawar, delivered in case FIR No. 155, dated 24.02.2020, under sections 302 / 324 /34 / 109 PPC, registered at Police Station East Cantt:, Peshawar, whereby the appellant has been convicted and sentenced in the following manner:-

> i. "U/s 302(b) PPC, the appellant has been convicted and sentenced to imprisonment for life as Tazir and also to pay compensation amount of Rs. 5,00,000/- in terms of Section 544-A Cr.PC. In case of default of payment of compensation, the convict-appellant shall be liable to further undergo simple imprisonment for one year.
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> ii. Benefit of Section 382-B Cr.P.C has been extended to the appellant."

2. Facts, in brief, as per contents of the FIR (Ex.PA) are that on 24.02.2020 at 11:30 hours complainant Abid Ullah while present with the dead body of his brother at trauma room of Lady Reading Hospital, Peshawar, reported the matter to the police that on the day of incident he alongwith his deceased brother Ibrar Ullah Khan and Muhammad Raza Khan had gone to the Courts for attending the Court proceedings and on return when they reached to the place of incident, all of a sudden accused Saddam, duly armed with firearms came and opened firing at them with murderous intention, as a result whereof his brother Ibrar Khan got injured critically, while they luckily escaped unhurt. His injured brother was shifted to LRH, Peshawar through Rescue 1122, but there he succumbed to the injuries. Motive behind the occurrence was previous blood feud between the parties. The accused Saddam Ali has committed the offence at the instigation of his relatives Nasir Ali Khan and Zahid Ali. He charged the accused for commission of the offence, hence, the FIR ibid.

3. On arrest of the accused and on conclusion of the investigation, challan was submitted before the Court against accused Saddam and co-accused Nasir Ali, Zahid Ali and Amjad Ali. The appellant alongwith co-accused was summoned and provided copies of the relevant documents under section 265-C Cr.PC, and thereafter, charge was framed against them, to which they pleaded not guilty and claimed trial. In order to prove its claim the prosecution produced and examined as many as 10 witnesses. Thereafter, statements of accused-appellant and that of the co-accused were recorded under section 342 Cr.PC wherein, they professed innocence, however, neither opted to produce defense evidence nor wished to be examined on Oath under section 340(2) Cr.PC. After full-fledged trial, the learned trial Court acquitted the accused Nasir Ali, Amjad and Zahid Ali, whereas the appellant Saddam was convicted and sentenced in the earlier part of this judgment, hence, the instant appeal.

4. The learned counsel for the parties were heard at length alongwith learned Addl. AG

and with their valuable assistance the record was scanned through.

5. In the unfortunate incident the deceased after receiving firearm injuries died on the spot and his dead body was shifted to the hospital through rescue 1122. The matter was reported to the local police by the complainant and after the report injury sheet and inquest report were prepared. The dead body was sent for postmortem examination. The investigating officer visited the spot and on pointation of the witnesses prepared the site plan. During spot inspection the investigating officer collected blood from the place of the deceased and six (06) empties of .30 bore from the spot. The accused was arrested near from the spot and from his possession a .30 bore pistol was recovered. The pistol and the recovered empties were sent to the firearms expert to ascertain as to whether the same were fired from the recovered pistol. A report was received confirming the fact that the empties were fired from the recovered pistol. The accused faced the trial and conclusion of the

trial was convicted and sentenced vide the impugned judgment.

6. The learned trial Court after full dressed trial found the appellant guilty and as such was convicted and sentenced. As in the instant case not only single accused is charged, but the appellant was also shown arrested from the place of incident with a pistol in his possession, so this Court deems it essential to look into the matter by applying extra care and to appreciate the approach of the learned trial Court to the facts and circumstances of the case. True that in case of single accused substitution is a rare phenomenon, but equally true that single accused by itself is not a ground for holding him responsible, unless the prosecution establishes the charges through confidence inspiring and trustworthy evidence. We are to see as to whether it was the spot arrest of the appellant which helped the learned trial Court in pronouncing him guilty or that the learned trial Court did appreciate the attending circumstances of the present case. We are not hesitant in holding that the accused is shown arrested near from the spot and from

his personal possession a .30 bore pistol was recovered which wedded with the recovered empties, but this is for the prosecution to tell the manner in which he was arrested and to convince the safe custody of the recovered pistol and its safe transmission to the firearms expert. As this case because of its peculiar circumstances needs extra care, so for the same the entire record was scanned through and we want to reassess the already assessed evidence, so that miscarriage of justice could be avoided.

7. The points for determination before this Court are that; as to whether the incident occurred in the mode, manner and at the stated time; as to whether the witnesses were present on the spot at the time of occurrence and in the hospital at the time of report; as to whether the accused/appellant was arrested soon after the incident and that from his personal possession a .30 bore pistol was recovered; as to whether the recovery of the weapon, its safe custody and its safe transmission to the firearms expert is proved on record; as to whether the same can be

taken into consideration for holding the appellant responsible for the murder of the deceased and as to whether the prosecution succeeded in bringing home guilt against the appellant.

8. The tragic incident claimed the life of the deceased and that for the same the appellant is charged, but to ascertain the manner in which the incident occurred and the manner in which the appellant was arrested, it is essential that the statements of the witnesses must be taken into consideration and also the respective recoveries made either from the spot or from the appellant, at the time of his arrest. The complainant while reporting the matter disclosed that on the day of incident he alongwith the deceased and the eyewitness had come to District Courts, Peshawar, in connection of their pending cases; that after doing the needful, they left the Courts and reached to the place of incident; that the accused attracted to the spot duly armed and started firing at the deceased; The deceased received firearm injuries, died on the spot; that they were also fired at, but they luckily

escaped unhurt; that the dead body of the deceased was shifted to the hospital and he reported the matter. The witness was examined on material aspects of the case with the only intention to extract something favourable to the appellant and to confirm his presence on the spot. The eyewitness did not appear before the Court and instead he submitted a sworn affidavit regarding his absence and that of the complainant, at the time of incident. As the eyewitness was not supporting the case of the prosecution, so he was not produced and was declared as won over and as such the complainant is the sole eyewitness. As one of the witness did not support the case of the prosecution and as the complainant is the real brother of the deceased, so we are under obligation to take extra care while determining the fate of the appellant, that too, on the strength of a single eyewitness. We are anxious to know the purpose of his presence on the spot and we are keen to discover that on the day of incident the complainant, the eyewitness and the deceased had come to the Courts to pursue his case. We are to see as to whether the

complainant had a case in the Courts and that what evidence is brought on record in that respect. As the complainant is the resident of a village lying away from the place of incident, so it is for the complainant to convince that on the day of incident he, the deceased and the eyewitness visited Peshawar in connection of his pending cases. We despite efforts could not come across any evidence showing his activities, in Courts, on the day of incident. Neither the complainant nor the eyewitness could provide the relevant documents to the investigating officer and even the investigating officer failed to collect any evidence from the concerned quarters. The complainant could not disclose the nature of his case, the Court he attended and the advocate whose services were hired. When the most relevant evidence was neither collected, nor brought on record so, this Court is hesitant to accept his presence and that of the eyewitness, at the place of incident and at the time of incident, rather this Court is to walk an extra mile to appreciate their presence on the spot.

9. As the complainant and the eyewitness are the residents of village Bakhshu Pull, lying away from the place of incident, so his presence at the spot is to be judged from his presence in the hospital and from the manner in which he reported the matter. It is pertinent to mention that the dead body was collected from the spot by rescue 1122 and that soon thereafter the same was shifted to the hospital, but the matter was reported at 1220 hours after the delay of more than fifty (50) minutes. As the hospital is situated at a little distance from the place of occurrence and as the dead body was collected from the spot by rescue 1122, so the time spent in reporting the matter cannot lightly be ignored. When the same is taken into consideration, it further increases the anxiety of this Court regarding the presence of the complainant at the time of incident and at the time of report. True that the matter was reported by the complainant, but the dead body was neither identified by the complainant, nor the eyewitness, even at the time of report and even at the time of its examination. The identifiers were belonging to the village of the complainant, so their arrival to the hospital at

the time of report is a circumstance which indicates that they accompanied the complainant to the hospital after receiving information regarding the incident. The circumstances do tell that the complainant after receiving information regarding the incident reached to the hospital alongwith the identifiers and thereafter the report was made. As the complainant failed to establish his presence with the deceased and as the purpose to visit Peshawar was not proved through the relevant witnesses, so an impression can be gathered, that first the injury sheet and inquest report were prepared, and thereafter the report was made. We cannot exclude the possibility of preliminary investigation in the present case.

10. In the site plan the accused, the deceased, the eyewitnesses and the police officials are shown at their respective places. The deceased is shown at Point No.1, whereas the appellant at Point No.2. The complainant and the eyewitness are shown at Point No.3 and Point No.4 respectively. The distance between Point No.1, 3 and 4 is shown 25 paces, as at the time of incident the deceased

was present on the Railway track. This is for the witnesses to tell that when they came out to the road to go to the village, then what for the deceased went to the Railway track, as complainant, the deceased and the eyewitness were to arrange a vehicle from the main road. It is surprising that the deceased was shown 25 paces ahead of the complainant and the eyewitness, at a place where the deceased had no purpose to visit. The site plan depicts that to the extreme East of the Railway track there is a boundary wall of the doctor colony, and the Railway track being abandoned is often used by the drug addicts and the defence also suggested the same to the witnesses, but no positive reply was given. When all the three reached to the main road, then at what time the deceased went so fast to cover the distance of 25 paces and even the witnesses could not explain that what for the deceased went to the Railway track. The complainant also disclosed that he and the eyewitness was fired at, but they escaped unhurt. Had the witnesses been present and had they been fired at, then there was hardly an occasion for them to escape unhurt, but the record

suggests that neither they were fired at, nor they were present on the spot. Reliance is placed on the judgment in case titled **"Muhammad Imran Vs The State" (2020 YLR 1139)**, wherein it is held that:-

> "The alleged motive was against the complainant, but it is noted that the appellant did not cause any injury to the complainant, though he was present within the range of firing, thus it supports the contention of the learned counsel of appellant that P.Ws. were not present at the place of occurrence."

11. The investigating officer was examined as PW-6, who stated that after receiving copy of the FIR he visited the spot and that on pointation of the witnesses prepared the site plan. It is pertinent to mention that regarding arrest of the accused the investigating officer explained that the appellant was arrested by the security incharge, Central Prison Peshawar, and that it was he who recovered a .3o bore pistol from his possession. Interestingly, the said police official was neither examined in the trial Court, nor his statement under section 161 Cr.P.C was recorded. The investigating officer surprised us by telling that

the appellant was arrested alongwith three other suspects, when the appellant was arrested from the spot soon after the incident, then what for other persons were taken into custody on suspicion. The statement of the investigating officer get support from the statement of PW-2, who is also the marginal witness of the recovery memo through which the pistol was taken into possession. This witness also disclosed that the appellant was arrested alongwith three other suspects, when so, then the arrest of the appellant is shrouded in mystery, more particularly, when the very person, who arrested him, was not produced. In respect of arrest of the appellant the prosecution came forward with different explanation through different witnesses. PW-2 explained in his examination in chief that the appellant was arrested by him with the help of constable Bilal and he further explained that after arrest of the appellant a sub-inspector reached to the spot and recovered a .30 bore pistol from the possession of the appellant, but in his cross-examination he narrated the incident in a different manner. The relevant

portion from his cross-examination reads as follows:-

"The persons who made firing were not visible to us. I do not know that whether other persons armed with weapons were arrested or not on the day of occurrence. I do not remember that whether the three other people who were arrested by us were armed with weapons or not because sufficient time has elapsed. My statement was recorded by the investigating officer in the police station. I do not remember that after how much time of the arrest of the accused he was handed over to the local police." *Similarly, the investigating officer claimed the arrest of the appellant and so the relevant portion from his examination in chief is reproduced,* ***"On 24.02.2020 I was present on special duty Assembly Corner Chowk, when at about 1130 hours I heard fire shots from High Court gate side. I rushed towards the place of occurrence and saw that a person having a pistol in his hand was running towards Central Jail, Peshawar....I arrested the accused in front of gate No.2 of Central Jail adjacent to Nishtar Hall. The accused was holding a pistol in his hand which I took into possession vide recovery memo already exhibit Ex.PW2/1."*** *This witness in his cross-examination explained the arrest of appellant in a different manner,* ***"It is true that on the day and time of occurrence total four persons who were armed were***

shown arrested by the Jail security officials and were handed over to the Police Station East Cantt: including accused facing trial Saddam. Witness volunteered that after the incident so many suspects were arrested by the Jail security."

The investigating officer gave self contradictory statements and when his statements are read with that of the PW-2 i.e. Haris, then the arrest of the appellant becomes disputed. As on one hand PW-2 claimed to have arrested the appellant with the help of one Bilal, whereas the investigating officer in his examination in chief claimed to have arrested the appellant, but in his cross-examination he denies the same and explains the circumstances in a different manner. In his cross-examination he confirmed that the appellant was arrested by the security officials of Central Jail, Peshawar, whereas in his further statement he disclosed that the appellant alongwith other suspects was handed over to him in the police station. Regarding the recovery of pistol PW-2 Haris stated that when the appellant was arrested by him, an SI attracted to the spot and recovered a pistol from his possession, but the

investigating officer in his cross-examination disclosed that it was he who arrested the appellant and recovered a pistol from his possession. When the arrest of the appellant is disputed and when the investigating officer as well as PW-2 contradicted each other regarding the arrest of the appellant, then the recovery from possession of the appellant by the investigating officer also does not appeal to mind. The most crucial aspect of the case is the cross-examination of PW Haris which reads as, "My statement was recorded in police station East Cantt: on the following day of the occurrence. It is also correct that memo Ex.PW2/1 was signed by me in police station East Cantt: on the following day of occurrence." When admittedly, the recovery memo was not signed by the marginal witness on the day when the pistol was recovered and when the witness admitted that he visited the police station on the next day of the incident and signed the recovery memo Ex.PW2/1, then the recovery of pistol, from the appellant, on the day of incident has lost its utility and the prosecution failed to convince that the appellant was arrested soon after the incident

and that the pistol was recovered from his possession. The arrest of the appellant and the recovery of pistol from his possession could not be proved and the witnesses remained inconsistent on this particular aspect of the case. Once the eyewitness fails to establish his presence on the spot and once the arrest of the appellant is disputed and also the recovery of pistol from his possession, then the prosecution is left with no evidence to connect the appellant with the murder of the deceased. True that the learned trial Court was influenced from his arrest and from recovery from his personal possession, but equally true that the learned trial Court fell into error while relying upon the same. We are benefited from the judgment of apex Court in case titled **"State through Advocate General, Sindh, Karachi Vs Abdul Hameed and another" (1984 P.Cr. LJ 1508)**, which reads as follows:-

> "Story about arrest of accused becoming doubtful by conflicting version of eye-witness and Investigating Officer on this point---- Prosecution failing to produce evidence of satisfactory nature to connect accused with commission of offence and pieces of evidence produced by prosecution all tainted and prosecution failing to prove case against accused beyond doubt."

The complainant while reporting the matter introduced one Muhammad Raza Khan (maternal cousin) as the eyewitness, but he did not support the prosecution case and sworn an affidavit regarding his absence and that of the complainant at the time of incident. True that the affidavit alone would hardly be a circumstance to exclude the presence of the complainant, but equally true that the eyewitness was related to the complainant and he should have come forward to support his case. The non-appearance of the eyewitness and the submission of an affidavit, regarding his presence on the spot can be taken into consideration in favour of the appellant. Not only the appellant, but two others were also charged for abetment, with whom the complainant had blood feud. As on one hand the complainant could not convince that how and through whom he came to know about the consultation of the acquitted co-accused with the appellant and that when he received the said information. The circumstances do tell that the complainant is not the eyewitness and that the appellant and two others were charged because of previous blood feud. As the most

relevant witness was not produced, so an inference can be drawn that the witness was not ready to support the false claim of the complainant and had he been produced he would have not supported the case of the prosecution. On one hand the complainant failed to establish his presence on the spot, whereas on the other the most important witness was abandoned as won over, so an adverse inference can be drawn that the witness was not ready to support the false claim of the complainant. The like situation is covered by Article 129(g) of the Qanun-e-Shahadat Order, 1984. In the like circumstances wisdom is drawn under Article 129 (g) of the Qanoon-e-Shahadat Order 1984 and the present case is no exception, as is held in case titled **"Riaz Ahmed Vs. the State (2010 SCMR 846)**, which reads as follows:-

> "One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied

> upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

12. The pistol was recovered on 24.02.2020 and so the empties, but the same were received to the laboratory on 28.02.2020, i.e. after four days of its recovery, but the investigating officer could not explain the delay. As on one hand the witnesses remained inconsistent on the arrest and recovery of pistol from possession of the appellant, whereas on the other the recovery memo was prepared on the next day and signed by the marginal witness in the police station, so its recovery from the appellant is shrouded in mystery and the contradictory statements of the witnesses questioned its authenticity. As the recovery of the weapon is not in accordance with law and as the same was sent to the firearms expert after long four days of its recovery so, it's safe custody and its safe

transmission to the firearms expert could not be established, when so, then this Court lurks no doubt in mind that this piece of evidence has lost its utility and the same cannot be taken into consideration. As is held in case titled **"Bakht Munir Vs the State" (2016 MLD 934)**, it is held that:

> "Besides, the crime pistol had been allegedly recovered on the same day of incident i.e. 14.01.2012, but has been sent to the FSL with the crime empties on 21.01.2012 i.e. after a delay of seven days, for which no explanation, much less plausible has been furnished by the prosecution as to where and in whose custody the pistol and empties remained for this period and whether these were in safe hands. Muhammad Akbar Khan S.I (PW.7/Investigating Officer deposed that he has not recorded statement of any concerned person regarding delay in sending the articles to the FSL."

13. The motive is given as previous blood feud between the parties, but neither the complainant, nor the investigating officer could collect any evidence in that respect and even no independent witness was examined to confirm the involvement of the deceased in the earlier episode, so we are confident in holding that the prosecution failed to establish the

motive. True that absence or weakness of motive would hardly be a circumstance to be taken for the acquittal of an accused, but equally true that once the eyewitness account fails, then the absence of motive can be taken into consideration even for the acquittal of an accused and the present case is no exception. Reliance is placed on case titled "Muhammad Bux Vs Abdul Aziz and others" (2010 SCMR 1959), which reads as follows:-

> In this case motive is an important fact, which has not only been alleged in the F.I.R. but .the evidence has been led. The said motive has not been relied upon by the trial Court and the High Court as the prosecution failed to prove the same. In such a situation, the Court should be very careful in accepting prosecution story and the evidence of such witnesses who not only gave evidence on motive and incident should be accepted with great caution. It has been held in the case of Muhammad Sadiq v. Muhammad Sarwar (1979 SCMR 214) that when motive is alleged but not proved then the ocular evidence required to be scrutinized with great caution."

14. The cumulative effect of what has been stated above leads this court to an irresistible conclusion that the prosecution failed to bring home guilt against the appellant and the

learned trial Court while handing down the impugned judgment misdirected itself, both on facts and in law, hence, the same calls for interference. The instant criminal appeal is allowed, the impugned judgment is set aside. The appellant is acquitted of the charge. He shall be released forthwith, from jail, if not required to be detained in any other criminal case.

Above are the detailed reasons for our short order of even date.

Announced.
18/04/2024.

JUDGE

JUDGE

HON'BLE MR.JUSTICE SHAKEEL AHMAD &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH.

Ihsan PS