IN THE PESHAWAR HIGH COURT, PESHAWAR,

[Judicial Department].

Crl. Appeal No.12-P/2016
With Murder Reference No.2/2016

Date of hearing:- 28.02.2017

Date of decision:_____

Petitioner(s):- Said Umar by Mr. Taimur Haider Khan, Advocate.

Respondent (s):-Complainant by Mr. Sana Ullah, Advocate, and the State by Mr.Mian Arshad Jan, AAG.

JUDGMENT

ROOH-UL-AMIN KHAN, J:- At a trial held by learned Trial Court/Additional Sessions Judge-XI, Peshawar, accused Said Umar (appellant herein), having been found guilty of committing the *'Qatl-e-Amd'* of Said Rehman deceased, has been convicted under section 302 (b) PPC and sentenced to death as well as to pay Rs.2,00,000/-, to LRs of the deceased, as compensation in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months S.I. further, vide judgment dated 07.06.2016, in case FIR No.944 dated 08.10.2012, under section 302 PPC, Police Station Shaheed Gulfat Hussain, District Peshawar.

2. Through instant appeal, the appellant-convict has questioned his conviction and sentence while the learned Trial Court has sent ***Murder Reference No.2 of 2016***, in terms of section 374 Cr.P.C for confirmation of death sentence of the convict. Since, both the matters arise out

from one and the same judgment of the learned Trial Court, hence, we propose to decide the same through this single judgment.

3. As per contents of *Murasila* Exh.PA/1, based FIR Exh.PA, on 08.10.2012 at 16.40 hours complainant Abdul Ghafar (PW.4), in company of his injured brother Said Rehman, reported to Rooh-ul-Amin Khan S.I. (PW.2) in casualty of Lady Reading Hospital (LRH), Peshawar, that his injured brother was laburer in *Gurh Mandi,* Peshawar. On the fateful day, he was informed that during an altercation, Said Umar (appellant-convict) fired at his brother, as a result he got hit and has been shifted to LRH, in injured condition, so he (complainant) rushed to the hospital and found his injured lying unconscious condition. Complainant disclosed that they had no previous enmity with the appellant. His report was recorded in the shape of Murasila Exh.PA/1 by Rooh-ul-Amin Khan SI (PW.2), on the basis of which FIR No.944 dated 08.10.2012 under section 324 PPC (Exh.PA), was registered in Police Station Shaheed Gulfat Hussain, Peshawar. PW.2 prepared injury sheet of the injured Exh.PW.2/1 and referred him for medical examination.

4. Dr. Muhammad Amin MO (PW.13), LRH, Peshawar, examined the injured and vide Medico legal report Exh.PW.13/1, observed the following:-

> Patient is unconscious and gasping.

1. Firearm entry wound at 8th left intercostals space, measuring about ½ cm.
2. Exit wound at 6th right intercostals space measuring about 1 cm.

After an hour, the injured succumbed to the injuries, so Rooh-ul-Amin Khan SI (PW.2), prepared his inquest report Exh.PW.2/2 and shifted his dead body to KMC, Peshawar for autopsy under the escort of Constable Nawaz Khan, wherein Dr. Muhammad Ismail MO (PW.12), on 8.10.2012 at 6.15 p.m. and vide PM report Exh.PM, found the following injuries on his person:-

1. Firearm entry wound on right outer chest size 1x1 cm, 6 cm below right nipple and 13 cm from midline.
2. Firearm exit wound on left outer chest, size 1.5x1 cm, 14 cm from anterior midline and 03 cm above costal margin.

Opinion: In his opinion the deceased died due to injury to lungs, heart and thoracic blood vessels due to firearm.

5. Muhammad Hassan S.I. (PW.10), conducted investigation in the case. He proceeded to the spot and prepared site plan Exh.PB on the pointation of purported eyewitnesses Abdullah and Usman Ali. During spot inspection, he secured bloodstained earth from the point of the deceased and 03 empties shells of 30 bore Exh.P.4 from the point of the appellant, vide recovery memo Exh.PW.1/1, recorded statements of the PWs under section 161 Cr.P.C. and on receipt of information about arrest of the appellant by Malang Jan SI, rushed to Police Station where the appellant along with 30 bore pistol Exh.P.1 and

3 live rounds of the same bore Exh.P.2 as well as recovery memo Exh.PW.3/1 were handed over to him. He sent the pistol and empties to the FSL for expert opinion, obtained physical custody of the appellant, interrogated him and recorded his statement under section 161 Cr.P.C. Vide recovery memo Exh.PW.3/1, he took into possession the last worn bloodstained attires of deceased consisting of Shalwar Qameez and vest-coat Exh.P.3. Vide application Exh.PW.10/5, he produced PW Usman Ali for recording his statement under section 164 Cr.P.C., sent the bloodstained articles to the FSL and received FSL reports Exh.PY and Exh.PZ regarding the bloodstained articles and the empties and pistol. After completion of investigation, he handed over the case file to the SHO, who submitted challan against the appellant before the learned Trial Court.

6. On receipt of challan by the learned Trial Court, appellant was formally charge sheeted under section 302 PPC, to which he pleaded not guilty and claimed Trial. To prove its case, prosecution examined as many as fifteen witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, neither wished to be examined on oath under section 340 (2) Cr.P.C., nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, convicted

and sentenced the appellant as mentioned above, hence, this appeal.

7. Learned counsel for the appellant argued that appellant is innocent and has been made scapegoat for an untraced murder; that complainant Abdul Ghafar is not the eyewitness of the occurrence and the hearsay evidence furnished by him is nothing but a cook and bull story; that purported eyewitness Usman Ali (PW.5) does not figure anywhere in the FIR, therefore, his belated statement cannot be believed and relied upon; that another purported eyewitness Abdullah (PW.6), has badly failed to establish his presence on the spot through some strong and physical circumstances of the incident and his unnatural conduct like a silent spectator at the time of incident is sufficient to prove him as a procured witness. He submitted that if for the sake of argument, the testimony of the purported eyewitnesses are taken into consideration, even then the same being full of serious contradictions, dishonest improves and discrepancies would not be sufficient for recording conviction in a capital charge; that arrest of the appellant and recovery of alleged crime pistol from his possession, in light of the two versions, one furnished by the complainant and purported eyewitnesses and the other advanced by Malang Jan SI, is highly doubtful, therefore, the positive FSL report would not advance the prosecution case; that the learned Trial Court failed to appreciate the

evidence in its true perspective and reached to erroneous conclusion by holding the appellant guilty of the offence, hence, the impugned judgment being against the law and evidence on record is liable to be set at naught.

8. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant is directly and singularly charged for murder of the deceased in a promptly lodged report; that substitution of the accused charged singularly in such like incidents is a rear phenomena; that there exists no reason or motive that the complainant would charge innocent person for murder of his brother by letting off the real culprit; that the straightforward and confidence inspiring ocular account is corroborated by red handed arrest of the appellant along with 30 bore crime pistol, recovery of blood and crime empties from the spot coupled with positive FSL report qua the bloodstained articles, crime pistol and empties as well as medical evidence, hence, the learned Trial Court has rightly held the appellant guilty of the offence and awarded him normal penalty of death as there is no mitigating circumstance to warrant lesser sentence. He sought dismissal of the appeal and requested for confirmation of death sentence of the appellant/convict.

9. We have considered the respective submissions of learned counsel for the parties and scrutinized the record

and evidence available on record with their valuable assistance.

10. It appears from the record that appellant is directly and singularly charged for murder of the deceased committed on the roof top of *Gurh Mandi* on 08.10.2012 at 16.10 hours. No doubt, the substitution of single accused in a murder charge is a rare phenomenon, but at the same time the apex Court has also laid down the law through various dictum that to put the rope around the neck of an accused charged singularly, there must be ocular account of unimpeachable character, trustworthy and confidence inspiring, corroborated by circumstantial evidence. In case titled, **"Dr. Israr ul Haq vs Muhammad Fayyaz and another" (2007 SCMR 1427)**, the Hon'ble apex Court has observed that substitution of innocent person when a single accused is named in a murder case is a rare phenomenon, but it depends from case to case.

11. Since, ocular account in case of *'Qatl-e-Amd'* as held by the Hon'ble Supreme Court in case titled, **"Mst. Sughara Begum and another Vs Qaisar Pervez and others" (2015 SCMR 1142),** plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, is required as a matter of caution, but to the contrary, once the ocular account is disbelieved, then no other evidence, even of a high degree

and value, would be sufficient for recording conviction on a capital charge, therefore, probative value of the ocular account is to be seen in light of the facts and circumstances of each case on the touchstone of principle laid down in the judgment (Supra), we would like to discuss the ocular account, first.

12. The ocular account of the incident has been furnished by Abdullah (PW.4) and Usman Ali (PW.5), while complainant Abdul Ghafar (PW.4), has furnished a hearsay evidence. PW Abdullah is the nephew and complainant is the brother of deceased. True that conviction can be recorded on the testimony of witnesses having close relationship with the deceased provided the same rings true and is corroborated by independent strong circumstances of the occurrence.

13. According to statement of complainant Abdul Ghafar, on the fateful day he along with his son PW Abdullah, after closing shop at Faqirabad came to *Hashtnagri Phatak*. He told Abdullah to see his uncle (the deceased) at *Gurh Mandi* and also bring some Gurh from him. When Abdullah reached *Gurh Mandi*, he noticed a brawl between the deceased and the appellant. He informed his father/complainant on mobile, who arrived at the spot and noticed the appellant along with 30 bore pistol in his hand coming down stairs. He asked him as to what had happened, but the appellant did not answer him and

fled down stairs. Complainant went up the roof and saw his brother lying there in injured condition and his son Abdullah and Usman were lifting him. Complainant then came down and saw that people had caught hold the accused-appellant along with crime pistol. According to complainant the deceased then injured was shifted to the hospital by PW Abdullah and two other persons in a taxi while he remained at the spot with the accused-appellant and on arrival of the police, and arrest of the appellant, he proceeded to the hospital.

14. Perusal of report Exh.PA/1 depicts that complainant has not disclosed therein the above narrated events. He has urged in his report that he on getting information about firing at his brother by the appellant and his shifting to LRH in injured condition by PW Abdullah and Mehmood, rushed to the hospital and lodged a report. He has even not disclosed the name of the person or the source through which he was informed about the incident, but during his statement before the Court, while taking somersault, he has innovated a different story to bring his version in conformity with the prosecution case. The disclosure of the new events in his Court statement, amounts to dishonest improvements. Even for the sake of discussion, believing the testimony of the complainant, shall give birth to certain crucial questions i.e. why the complainant did not make a report to the police who

allegedly reached at the spot and the appellant were handed over to them along with crime pistol? Why PW Abdullah, the nephew of the deceased, did not make any report who shifted the deceased then injured to the hospital and wait for the arrival of the complainant? Why complainant did not narrate the events stated in his Court statement in his report when he was in the know of the same? Why PW Abdullah did not sign and verified the report of the complainant if at all he was there in the hospital with the deceased then injured? The above mentioned deviation from the normal and common order are definitely disrupting for a prudent mind. We tried our level best to find answers of these questions from the available evidence but remain unsuccessful. Stay of complainant at the spot of occurrence, not accompanying his injured brother to the hospital is an act beyond the human imagination and comprehension, as in such a crucial eventuality the first priority near and dear would always be to accompany the injured to save his precious life. It is also astonishing that the complainant did not try to nab the appellant, particularly, when he came across him in the stairs and that too when he was having information of brawl between the appellant and his brother. In such like situation, a brother cannot be expected for such a reaction viz letting a person free without grapple. The conduct demonstrated by the complainant is quite against the natural human behaviour.

The peculiar facts and circumstances appearing from the testimony of the complainant are rather suggestive of the fact that he after getting information qua the incident has straight away rushed to the hospital where the deceased then injured had already been shifted by the people and the complainant having no detail about the events of the incident reported in two/three lines. He has squarely modified his version in his Court statement which amounts to dishonest and deliberate improvements just to bring in line his testimony with PW Abdullah, therefore, the learned Trial Court has landed in the field of error by relying on the testimony of the complainant.

15. Adverting to the statement of purported eyewitness Abdullah, we would like to mention that the prime consideration for the Court to accept the testimony of an eyewitness is to see whether he has established his presence on the spot at the time of incident as it is settled law that a witness who claims his presence at the spot must satisfy mind of the Court through some physical circumstances or through some corroborative evidence in support of his presence at the spot. Abdullah while appearing as PW.6 deposed that on the fateful day at Hashtnagri Phatak, his father Abdul Ghaffar by giving him money, send him to see his paternal uncle in *Gurh Mandi* and also to bring some Gurh from him. When he reached *Gurh Mandi*, he saw from the road that Said Rehman, Said

Umar and PW Usman Ali were sitting on the roof of Gurh Mandi. He also went towards them and noticed a brawl between the appellant and his deceased uncle. He informed his father about the quarrel. During the quarrel, the appellant took out his pistol and fired at Said Rehman, as a result, he sustained injury. He and PW Usman Ali brought the injured down stairs and shifted him to the hospital in a taxi where he succumbed to the injuries in five minutes.

16. A look over the statement of PW Abdullah, reveals that he has not uttered a single word about arrival of his father at the spot when the deceased then injured was being shifted by them to the hospital, while according to complainant when he reached the spot, he saw his brother in injured condition and his son Abdullah and Usman were lifting him and that he after seeing the episode, came down stairs. The mobile data of PW Abdullah and complainant has also not been brought on record to corroborate their testimony qua their contact at the time of the occurrence. Moreso, the conduct of PW Abdullah like a silent spectator at the time of brawl is also against the natural human conduct, particularly, in this part of the world a nephew is not expected to re-act like a silent spectator in such like situation. Had there been a brawl between the deceased and appellant before firing, PW Abdullah being a young boy of 18 years, would have definitely retaliated against the received threat to the life of his uncle and would have

overpowered the appellant, but missing any such activity, indicate symptoms of his absence at the spot, particularly, at the occasion of scuffle. This PW has also not explained as to why he did not make a report about the incident when he shifted his injured uncle to the hospital and awaited the arrival of his father/complainant. The statement of PW Abdullah to the effect that the deceased then injured died after five minutes of arrival at the hospital also belied the story narrated by his father, because according to complainant, deceased then injured was still alive till his arrival, who statedly had stayed till arrival of the police on the scene of occurrence and arrest of the appellant by them which might have consumed more than five minutes. PW Abdullah has also not furnished any explanation as to why he did not narrate the entire episode of the incident to his father/complainant at the time of making report. Moreso, it is an admitted fact that PW Abdullah has neither reported the matter to casualty police nor has signed/ verified the report as a rider, which create a serious dent in the prosecution case and makes the version of complainant and alleged eyewitness doubtful regarding the mode and manner of the occurrence. The inquest report of the deceased Exh.Pw.2/2 does not bear the name of PW Abdullah as identifier of the dead body. Only Abdul Ghafar is cited in the inquest report as identifier. This witness also deposed about arrest of the appellant by the

public at large along with crime weapon and handing over to the police at the spot.

17. The above discussed facts and circumstances appearing from the statement of PW Abdullah, we are of the considered view that he was also not present at the spot at the time of occurrence. Had he been present, he would have never let off the appellant, rather his normal re-action would have been an attack over the appellant. Likewise, had this PW been present with the deceased then injured, the assailant would have never speared him too, so as to eliminate evidence behind him. In this view of the matter, PW Abdullah has squarely failed to establish his presence at the spot.

18. The version of PW Abdullah and complainant Abdul Ghafar regarding arrest of the appellant on the spot by the public at large along with crime pistol is negated by Malang Jan S.I (PW.7), who has tendered a divergent statement regarding arrest and recovery of crime pistol from the appellant, as according to him on receipt of information about presence of the appellant involved in case FIR No.944 dated 08.10.2012 under section 302 PPC, PS Shaheed Gulfat Hussain (the present case), he alongwith other police officials rushed to *Grain Market Gurh Mandi* and arrested the appellant and recovered 30 bore pistol loaded with three live rounds of the same bore from his trouser folder, resultantly, separate FIR No. 945

dated 08.10.2012, under section 13 West Pakistan Arms Ordinance, 1965, was registered against him. The time of arrest of the appellant in case FIR No.945 is shown as 17.25 hours, viz after registration of the instant case FIR. This fact found support from record, rather from having a glance at FIR No.945, wherein reference has been made to the FIR of the instant case. The haphazard contrastive and incompatible stances of complainant and Malang Jan S.I. has created a state of disarray and confusion with regard to the time of occurrence, arrest of the appellant and recovery of pistol from his possession. Admittedly, the appellant was arrested at the spot in presence of the complainant and was handed over to the police and thereafter, the complainant left for the hospital, where he lodged the report about the occurrence. In such an eventuality, making reference to the instant FIR in FIR No.945 is not a mystry, whilst artifacts suggestive on an artificial and artly contrived story. We have also noted that Malang Jan SI has not uttered a single word about arrest of the appellant along with pistol by the public at large as stated by complainant and PW Abdullah. In this view of the matter, there are two versions about the arrest of the appellant and recovery of the alleged crime pistol, one furnished by complainant and PW Abdullah and the other by PW Malang Jan SI, which one is correct, will be best known to them, however, this create serious doubts about the arrest and recovery of the

alleged crime weapon, thus, the learned Trial Court has fallen in error while believing and relying on the testimony of this witness.

19. So far as the the testimony of PW Usman Ali is concerned, the complainant has not named him as eyewitness in his report/FIR. He has been introduced as eyewitness, later on, after a delay of eight days of the occurrence and his statement under section 164 Cr.P.C. was recorded on 16.10.2012. Though, this PW has charged the appellant for the commission of the offence, but has not furnished any explanation, much less plausible, qua his long silence. Albeit, statement of a witness recorded at a belated stage will not be fatal if a plausible and convincing explanation is furnished qua the delay, but where the delay is not explained and said witness has been introduced at a later stage purposely maneuvered to implicate the accused such a delay would adversely affect the prosecution case and no explicit reliance can be placed on the evidence of such witness. Same is the position of PW Usman Ali, as complainant Abdul Ghafar deposed that when he reached on the roof top of the building, he saw his son Abdullah along with one Usman Ali lifting the injured, which means that it was in the knowledge of PW Abdullah and complainant that Usman Ali has also witnessed the occurrence, but this PW has neither been cited as eyewitness nor was examined by the I.O. on the same day

of occurrence. In case titled, **"Syed Saeed Muhammad Shah and another Vs The State" (1993 SCMR 550),** the Hon'ble Supreme Court has laid down the principle about testimony of such witness in following words:-

> "In the absence of satisfactory nature of explanation normally rule is that statements recorded by police after delay and without explanation are to be ruled out of consideration".

In case titled, **"Ismail and others Vs the State (1983 P Cr L J 823), referred by the Hon'ble Supreme Court in (1993 SCMR 550),** evidence of witnesses was ruled out of consideration on the ground that their police statements were recorded after 08 days and prosecution offered no explanation. Similarly, in case titled, **"Sirajuddin Vs Kala and another" (PLD 1964 SC 26)**, evidence of such a witness was held to be not reliable for the reasons of patent doubt as to the time as he first appeared before the police for his statement. Same view has been reiterated by the Hon'ble apex Court in case titled, **"Muhammad Khan Vs Maula Bakhsh and another" (1998 SCMR 570)** in the following words:-

> "It is a settled law that credibility of a witness is looked with serious suspicion if his statement under section 161 Cr.P.C. is recorded with delay without offering any plausible explanation".

Same is the view of the Hon'ble apex Court in case titled, **Ghulam Qadir & 2 others Vs the State" (2008 SCMR 1221),** the hon'ble apex Court.

20. Deriving wisdom from the judgments of the Hon'ble apex Court, the learned Trial Court has wrongly believed and relied upon the testimony of PW Usman Ali.

21. So far as the FSL report qua the 30 bore crime empty and pistol allegedly recovered from the appellant, is concerned, as stated earlier, this piece of evidence being highly doubtful about the arrest and recovery of the pistol in light of the statement of purported eyewitnesses and Malang Jan SI, the seizing Officer, would not advance the prosecution case. Besides, when the ocular account of the prosecution case has been disbelieved, mere recovery of the pistol and crime empty, would not be sufficient for recording conviction in light of ratio of the judgment of apex Court in case titled, **"Mst. Sughra Begum and another Vs Qaisar Pervez and others" (2015 SCMR 1142),** wherein it has been held that once the ocular account was disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge.

22. Recovery of blood from the spot, the last worn blood stained garments of the deceased and unnatural death of the deceased with firearm as per postmortem report, prove the factum of murder of the deceased, but

never tell the name (s) of the culprit/killer. Such pieces of evidence are always considered as corroborative pieces of evidence and are taken along with direct evidence and not in isolation as held by the Hon'ble Suprme Court in **Riaz Ahmed's case (2010 SCMR 846), Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541).** It has been held by the apex Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410),** that when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery.

23. In light of our above discussion, we would not hesitate to hold that the prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring evidence, beyond shadow of reasonable doubt, rather the prosecution evidence is pregnant with doubts, contradictions, dishonest improvements benefit of which has to be extended to the appellant. It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is crated, benefit of the same must got to the accused and entitled the accused for acquittal as the accused is always considered the most favourable child of law. Guidance in this regard can be derived from case titled, **"Tariq Pervaz Vs the State" (1995 SCMR 1345)** and case titled, **"Muhammad Akram Vs the State (2009 SCMR 230) and Faryad Alis**

case (2008 SCMR 1086). The learned Trial Court has failed to appreciate the evidence in its true perspective and has arrived at an erroneous conclusion by holding the appellant guilty of the offence, hence, the impugned judgment is liable to be set aside.

24. Accordingly, this appeal is allowed. The conviction and sentence of the appellant recorded by the learned Trial Court vide impugned judgment are hereby set aside and the appellant is acquitted of the charge leveled against him. He be set at liberty, if not wanted in any other criminal case.

25. On acquittal of the appellant, the Murder Reference No.2 of 2016, sent by the learned Trial Court for confirmation of death sentence of the appellant is answered in the ***Negative.***

Announced:

M.Siraj Afridi P.S.

JUDGE

JUDGE