

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 507-P of 2016.

With

Murder Reference No.11-P/2016

JUDGMENT

Date of hearing.....20.09.2017.....

Appellant(s)...(Sher Ali): By Mr. Shabbir Hussain Gigyani,
Advocate.

Respondent(s)/State: By Mian Arshad Jan, AAG assisted by Barrister
Zahoor-ul-Haq, Advocate, counsel for
Complainant.



QALANDAR ALI KHAN, J:- Sher Ali,
appellant, was charged for the *Qatl-i-amd* of
brother of complainant Ali Yar, namely, Shah
Room vide FIR No.553 dated 27.08.2010
under section 302 PPC Police Station Yar

Hussain, Swabi; and after facing trial in the Trial Court/Additional Sessions Judge, Lahor (Swabi), was convicted under section 302 (b) PPC, and awarded the sentence of death; and also held liable to pay compensation to the tune of Rs:500000/- or in default to suffer imprisonment for one year, with further order that the entire amount of compensation, if realized, be paid to the legal heirs of the deceased in terms of section 544-A Cr.P.C. In his impugned judgment dated 26.07.2016, the learned trial Court/Additional Sessions Judge, Lahor (Swabi) observed that the sentence of death shall be subject to confirmation by this Court; and as such, reference was forwarded to this Court for confirmation or otherwise of the sentence of death in terms of section 374 Cr.P.C.

2. On 27.08.2010, the complainant, Ali Yar son of Sher Aman Khan, brought the dead body of his brother, Shah Room Khan, to Yar Hussain Hospital and in the casualty of the Hospital, he reported to Shad Ali Khan S.I,

Police Station, Yar Hussain (PW-5), who reached the hospital on receiving information about the occurrence, that on the eventful day he alongwith his deceased brother Shah Room Khan, Zahid Khan son of Bahadar Khan and Ishtiaq Khan son of Safdar Ali Khan, his co-villagers, was present in his Mosque situated in village Sokhtha after offering *Juma* prayers; and, in the meantime, the appellant-accused, Sher Ali resident of Rashaka, presently *Nazir* of his younger brother Abne Aman Khan, came there duly armed with deadly weapon and opened fire at Shah Room, with which the latter was hit and died on the spot. Complainant claimed that they were empty handed, therefore, could do nothing, while the accused made good his escape after commission of the offence. The occurrence was stated to have been witnessed beside the complainant by Zahid Khan, Ishtiaq Khan and other people present in the Mosque. The motive for the occurrence was cited as altercation between his

deceased brother and appellant-accused in the morning over sale/purchase of orchards. The report of the complainant was reduced into writing in murasila (EX.PA/1) by the Sub-Inspector, mentioned hereinabove, and besides the complainant, also signed by Zahid Khan son of Khan Bahadar Khan, resident of Dobyen.

3. The Postmortem examination of the deceased revealed one firearm entry wound on left side of upper lip 0.5 X 1 cm dia, no charring; with corresponding exit wound on right side, lower back of skull 1 X 2 cm dia. During investigation, I.O also inspected spot, during which, he recovered one spent bullet in deformed shape from inside the cupboard and also secured a blood stained piece of the carpet in the Mosque. The blood stained piece of carpet and blood stained garments of the deceased were sent to the FSL, Peshawar, for chemical analysis, and report of the chemical examiner was received in the affirmative, showing human blood and of the same group.

The core of the bullet was found content of 7.62 MM bore bullet by the firearms expert. The I.O prepared site plan on the pointation of the complainant on the same day i.e. 27.08.2010. The appellant-accused remained at large and was, therefore, proceeded against under Sections 204 and 87 Cr.P.C and challan was submitted against him under section 512 Cr.P.C. The appellant-accused was declared P.O and perpetual warrant of arrest was issued against him vide order of the learned Additional Sessions Judge, Lahor (Swabi) dated 10.01.2011. He was, later on, arrested in injured condition from LRH, Peshawar on 26.07.2014; where he was under treatment being an injured complainant in case vide FIR No.98 dated 25.07.2014 under sections 302/324/148/149 PPC, Police Station Khan Mai, Charsadda; and on his, alleged, pointation, while in police custody, a Kalashnikov 7.62 bore with fixed charger containing 10 rounds was recovered from the vacant house of Abne Aman Khan. On the

expiry of his police custody, the appellant-accused was produced before the Judicial Magistrate, but he did not make confessional statement. The report of firearms expert about the recovered 7.62 MM bore SNG rifle No.56-1-32141006 was that the same was local made and in proper working order in its present condition. After recording statements of the PWs under section 161 Cr.P.C and completion of investigation, supplementary challan was submitted against the appellant-accused, leading to commencement of trial in the Court of learned Additional Sessions Judge, Lahor (Swabi), where, after compliance with provision of section 265-C Cr.P.C, formal charge under section 302 PPC was framed against the appellant-accused, to which he pleaded not guilty and claimed trial.

4. During trial, the prosecution produced eight PWs, as follows;

- Muhammad Ali DFC (PW-1), executed warrant of arrest under section 204

Cr.P.C as well as proclamation under section 87 Cr.P.C;

- Raj Wali S.I (PW-2), registered FIR (EX.PA) on the receipt of murasila (EX.PA/1);
- Ali Yar (PW-3), the complainant;
- Ishtiaq Khan (PW-4), the eyewitness;
- Shad Ali SHO/Inspector (PW-5), drafted murasila (EX.PA/1), on the report of the complainant, which was sent by him to the Police Station for registration of the FIR; and he also prepared injury sheet (EX.PW-5/1) and inquest report (EX.PW5/2);
- Doctor Akbar Ali Shah (PW-6), conducted autopsy on the dead body of deceased Shah Room Khan, and prepared P.M report (EX.PM);
- Mera Khan S.I (PW-7), arrested the accused on 26.07.2014 and issued his card of arrest (EX.PW7/1); and also, allegedly, recovered Kalashnikov on the pointation of the appellant-accused; and

- Wafadar Khan S.I (Rtd) (PW-8), conducted investigation in the case;

5. Muhammad Iqbal DFC No.119 (SW-1), recorded statement about PW Zahid Khan, thereby, informing the Court about murder of PW Zahid Khan in the year 2001 vide case FIR No.365/2011 under section 302 PPC, whereupon, PW Zahid Khan was abandoned by the prosecution; but, later on, vide order sheet No.20 dated 28.09.2015, statement of PW Muhammad Zahid Khan recorded during proceedings under section 512 Cr.P.C as PW-2 was transferred to the present case on the application of D.P.P; after learned defence counsel expressed his no objection over such transfer.

6. After prosecution closed its evidence, statement of the accused was recorded under section 342 Cr.P.C, wherein, he, though, refuted allegations of the prosecution, but declined to be examined on Oath or produce defence evidence. The learned trial

Court/Additional Sessions Judge, Lahor (Swabi), after hearing learned Deputy Public Prosecutor on behalf of the State, assisted by learned counsel for the complainant, as well as learned defence counsel, rendered impugned judgment dated 26.07.2016, whereby, the appellant was convicted under section 302 (b) PPC and sentenced to death, with further sentence to pay compensation to the tune of Rs:500000/- or in default to imprisonment of one year; hence the instant appeal.

7. Arguments of learned counsel for the appellant and learned AAG assisted by learned counsel for the complainants, heard; and record perused.

8. The prosecution case against the convict-appellant, Sher Ali, was that as a single accused directly charged in the FIR lodged within one hour and five minutes of the occurrence, he committed *qatl-i-amd* of brother of the complainant, who received single firearm injury, witnessed by other two

eye witnesses besides the complainant and other several people present in the mosque i.e. the place of occurrence, after 'Juma prayers; and that the occurrence was prompted by the motive of altercation between the deceased and the appellant/accused early in the morning over sale/purchase of orchards. However, when put to trial, inherent defects/discrepancies in the case of prosecution came to surface; which, unfortunately, escaped the notice of the learned trial Court while awarding capital punishment to the appellant/accused.

9. In the report lodged in the casualty of Yar Hussain Hospital at 1500 hours on the eventful day i.e. 27.08.2010, the time of occurrence was mentioned as 1355 hours; but the postmortem report showed examination of the dead body on 27.08.2010 at 02.20 PM, i.e. 1420 hours, which was 40 minutes earlier than the time of report to the police in the casualty of Yar Hussain Hospital; where, first, report of the complainant was reduced into

writing by Shad Ali Khan/S.I P.S Yar Hussain (PW5); and, then, inquest report was prepared by him and the deceased was referred to Medical Officer for P.M examination. In other words, P.M examination of the deceased was conducted prior to lodging of the report to the police by the complainant, thus shaking the very foundation of FIR. **{2012 SCMR 172 and 1990 SCMR 1134}**.

10. In the FIR, the complainant clearly stated that his deceased brother, Shah Room, was hit with the firing of the appellant/accused and died on the spot; but it is not clear as to why, then, the dead body was taken to the Hospital, instead of the Police Station. Moreover, the P.M report showing 10 to 20 minutes between injury and death, which is approximately the same time (15/20 minutes) for which the dead body was shown lying on the spot, after the occurrence, in the statement of the complainant (PW.3), without any step taken by the complainant and other persons present in the mosque for removing

the deceased, then injured, to the hospital; which would also cast doubt on the authenticity of the FIR, showing instantaneous death of the deceased and, further, serious doubt about presence of the complainant at the time of occurrence. The I.O not only collected a blood stained piece of carpet during spot inspection but also received blood stained garments of the deceased from the Medical Officer who conducted P.M examination of the deceased; but neither hands and clothes of the complainant nor that of the two eye witnesses mentioned in the FIR, were found smeared with blood, despite the fact, the complainant was real brother of the deceased and so-called eyewitnesses his closed relatives, and in a natural course, if, at all, they were present on the spot should have helped their near and dear to remove him to the hospital, after having received firearm injury and blood, admittedly oozing from his firearm injury having entry and exit wounds.

{2015 SCMR 1142, 1980 SCMR 126, 2015 P.Cr.LJ 416 (Peshawar)}

11. The very presence of the complainant and the so-called eye witnesses in the private mosque of the complainant and the deceased where the occurrence allegedly took place is open to doubt, as not only *Jaamia-Masjid*, where *Juma* prayers were offered, was situated at not a too distant place from the houses of the complainant and deceased, but the so-called eyewitnesses namely Ishtiaq Khan and Zahid Khan were 'chance witnesses' as they were not the inhabitants of village Sokhta, where the occurrence took place; because the former hail from village Daulat situated at a distance of 2/3 kilometers from the scene of occurrence, while Zahid Khan deceased PW belonged to another village, Dobian, situated at a distance of 5 kilometers from the place of occurrence. The non-recording of statement of *Pesh-i-Imam* and other number of persons shown present in the mosque in the FIR and their non-

production as prosecution witnesses would create further dent in the prosecution case, besides making presence of the complainant and the so-called eye witnesses on the spot at the time of occurrence doubtful. Apart from the above, the complainant and the so-called eye witnesses were shown very close from the place assigned to the deceased in the site plan, 1/2 paces from each other; but neither the complainant nor the so-called eye witnesses received a single scratch as a result of alleged firing by the appellant/accused from backside. **{2015 SCMR 1142, 1997 SCMR 441, 1995 SCMR 1293, 2010 SCMR 566, 2006 SCMR 1846, 2011 SCMR 646, 2015 P.Cr.LJ 416 (Peshawar), 2015 P.Cr.LJ 585 (Peshawar), 2015 P.Cr.LJ 1023 (Peshawar), 2016 YLR 905 (Peshawar) and 2016 MLD 757 (Peshawar)}**.

12. According to the FIR, the deceased, complainant, eye witnesses and other worshipers were present in the mosque after offering *Juma* Prayers, and presence of the

appellant/accused is shown on the back side of the deceased at the time of occurrence; but the postmortem report shows entry wound on left side of upper lip, while exit wound on right side, lower of scalp, thus showing the entry wound from the front side; and in order to cover this, apparently, conflicting positions, improvement were made in the statement of Ishtiaq Khan (PW4), by stating that the appellant/accused called "Aiwaz: the decd and made firing from front on him". Likewise, PW Muhammad Zahid Khan, in his statement during proceedings under Section 512 Cr.PC against the appellant/accused, made this improvement that the appellant/accused "called the deceased on which the deceased (wrongly written as accused in the statement) when attracted to him/accused, the accused made a fire shot at the deceased". These are, indeed, fatal improvements in order to bring the prosecution case in conformity with the P.M report, showing entry wound from front side, which was contrary to the FIR and the

site plan showing fire shot from backside of the deceased. Needless to say that such improvements caused further damage to the prosecution case against the appellant/accused. **{NLR 2003 C.R 577 (Supreme Court), 1970 SCMR 467, 1981 SCMR 132 and 2011 SCMR 474}**.

13. It needs be urged here that despite transfer of statement of deceased PW Muhammad Zahid Khan in proceedings under Section 512 Cr.PC against the appellant/accused, his statement in proceedings under Section 512 Cr.PC having not been subjected to cross examination would hardly be of any help to the prosecution case in view of judgments reported as **{2017 MLD 973 (Peshawar), 2017 MLD 883 (Peshawar) and 2013 MLD 810}**.

14. No doubt, the motive of altercation earlier in the morning between the deceased and appellant/accused over sale/purchase of Orchards was alleged in the FIR; but nothing was brought on record to substantiate the

motive. Admittedly, the prosecution is not bound to establish motive in each and every case; but once motive is alleged and not proved, then prosecution must suffer the consequences. **(2010 SCMR 97)**.

15. In the wake of so much doubts and contradictions in the case of prosecution against the appellant, neither the appellant/accused nominated as a single accused in the case nor his abscondence for considerable period would dis-entitle him to the benefit of doubt, guaranteed to him by all canons of justice, reflected in law of the land in unequivocal terms. **{2007 SCMR 1427, 2010 SCMR 566, 2016 YLR 1166 (Peshawar), 2016 YLR 905, 2016 MLD 557 and 2017 MLD 883 (Peshawar)}**.

16. In short, there were discrepancies, contradictions and improvements in the case of prosecution; which could, obviously, not lead to conviction of the appellant/accused, what to speak of award of death sentence to him; but it seems all such

doubts/discrepancies escaped notice of the learned trial Court while awarding sentence of death to the appellant/accused.

17. Consequently, the appeal is allowed, and conviction and sentence recorded by learned Additional Sessions Judge, Lahor (Swabi) dated 26.07.2016 are set aside. The appellant is acquitted of the charge leveled against him and be set free forthwith, if not required in any other case.

18. Murder Reference No.11-P/2016 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
20.09.2017.

J U D G E

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*(D.B) Hon'ble Mr. Justice Lal Jan Khattak.
Hon'ble Mr. Justice Qalandar Ali Khan.*