

IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH

FORM OF ORDER SHEET

| Date of order or proceedings | Order or other proceedings with signature of Judge(s). |
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| 25.3.2019 | <p><u>Cr.A. No.88-D/2018.</u></p> <p><u>Present:-</u> Mr. Saif ur Rehman Khan, Advocate for the appellant. ***</p> <p><u>SHAKEEL AHMAD, J.-</u> Through the instant appeal under Section 417(2-A), Cr.P.C., the appellant has impugned the judgment dated 30.11.2018, passed by learned Additional Sessions Judge, Tank whereby the respondents-accused were acquitted of the charge in case FIR No.158 dated 27.5.2016, registered under section 302/324/148/149 PPC, at police station Mullazai, District Tank.</p> <p>2. The prosecution case as set-forth in the FIR Ex.PA, registered on the basis of murasila Ex. PA/1, is that on 27.5.2016 at 0735 hours, complainant Akber Khan (PW-12) made report to Allauddin S.I (PW-6) in the Civil Hospital, Tank, to the effect that on the day of occurrence, he alongwith his brothers Sher Ahmad Khan, Misal Khan (PW-14) and Mst. Bagho Jana, sister-in-law were going from village Kaka Khel to their house on foot, at about 0600 hours, when they reached to the place of occurrence</p> |

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near the house of Bahadur Khan situated in Sherin Khel, accused-respondents duly armed with firearms, emerged from the house of Bahadur Khan and started firing upon them, as a result whereof, the complainant, his brother Sher Ahmad Khan and his sister-in-law Mst. Bagho Jana got hit, sustained injuries and fell down on the ground, however, his brother Misal Khan remained unhurt, while accused decamped from the spot after the occurrence. Their relatives attracted to the spot and were shifting them to Civil Hospital Tank for treatment but his brother Sher Ahmad Khan succumbed to his injuries on the way to hospital. Besides the complainant, the occurrence was stated to be witnessed by Misal Khan (PW-14) and Bagho Jana (PW-13). Motive for the occurrence was stated to be a dispute over landed property. The complainant charged the accused for the commission of offence. On the report of complainant, instant case vide FIR mentioned above was registered against the accused-respondents.

3. After completion of investigation, complete challan was submitted before the trial Court. The formal charge was framed against the respondents-accused, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution produced as many as seventeen

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witnesses. After closure of prosecution evidence, the accused-respondent was examined under Section 342, Cr.P.C, wherein he denied the allegations and professed innocence, however, he neither opted to be examined on oath, nor produced evidence in his defence. At the conclusion of trial, the learned trial Court acquitted the respondent-accused vide impugned judgment dated 30.11.2018, hence this appeal.

4. Arguments heard and record gone through.

5. Perusal of the record reflects that the prosecution case mainly hinges on the testimony of complainant (PW-12), Mst. Bagho Jana (PW-13), Misal Khan (PW-14), medical evidence coupled with circumstantial evidence. Complainant while appearing as PW-11 stated in his cross-examination that at the time of occurrence they were present towards western side of the accused, which is belied by site plan Ex. PB, according to which the aforementioned PWs have been sown towards northern and eastern side of the accused. As per prosecution story and as stated by PW-14 Misal Khan, the accused emerged from the house of one Bahadur Khan and started firing upon them when they reached to the water channel, but PW-14 stated in his cross-

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examination that they had crossed the water channel/Khwarr when accused fired upon them. The record further transpires that the site plan was prepared on the pointation of PW-14, but neither his statement nor the statements of other PWs support the locations of deceased, injured and the accused. Moreover, PW-14 specifically stated in his cross-examination that there was no other house at the place of occurrence nor he had pointed out any other house to the Investigating Officer at the time of preparation of site plan. He also stated that after receiving injuries, Sher Ahmad was also lying on plain area till he was shifted to the Datsun. This version of the alleged eyewitness is belied by site plan, wherein two houses have been shown on the spot, while deceased then injured was shown in another vacant house at point 'B'. The Investigating Officer PW-16 admitted in his cross-examination that point No.2 assigned to the deceased in the site plan has been shown inside an abandoned/demolished house at point 'B', wherefrom he collected blood stained earth. Complainant PW-12 also stated in his cross examination that there were no other houses at the place of occurrence. The contradictions referred to above, have created serious doubt regarding presence of alleged eyewitnesses on the spot at the time of occurrence, therefore, the

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learned trial Court rightly disbelieved their presence on the spot.

6. According to FIR, the occurrence took place at 06:00 a.m, but the complainant as PW-12, stated in his statement that after the firing, accused decamped from the spot and they called for Datsun which reached to the spot and it was about 06:00 a.m. Complainant in his cross examination stated that there is only one entrance and exit way of the house of Bahadur Khan and only debris of 1/2 feet of the boundary wall is available, which is belied by PW-14, who stated in his cross examination that there are two entrances and exit of the house of Bahadur Khan. Similarly, PW-16 stated in his cross-examination that height of four boundary walls of the house of Bahadur Khan is man's height. These glaring infirmities in the testimony of alleged eyewitnesses created a serious doubt regarding their presence and the mode and manner in which the occurrence had taken place.

7. Besides the above, Dr. Uzair PW-11, who conducted autopsy on the dead body of deceased depicts that injury No.3 was shown as 6x4 inches in size, while no entry or exit was mentioned by the doctor in his report. The size of injury, referred to above, cannot be believed to be caused with firearm.

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Besides, the PW-11 did not endorse the injury sheet of injured-complainant and this fact is admitted by him in his cross-examination.

8. Motive as alleged by the prosecution is concerned, no reliable evidence was produced by the prosecution in this respect and in view of the above discussion motive if proved, was of no help to the prosecution.

9. So far as recovery of empties from the spot is concerned, general of firing has been attributed to all the accused. Needless to say that no empty was recovered from the place accused Saleh Khan and the alleged recovered empties from the places of co-accused were also not sent to FSL, which makes the same doubtful and could not be relied upon for the purpose of conviction. Even otherwise, this piece of evidence (recovery) is a corroborative one and in cases where direct evidence fails, corroborative piece of evidence is of no avail as in the instant case where direct evidence of PWs have already been disbelieved. In a case titled **Ghulam Akbar and another Vs. The State (2008 SCMR-1064**, it was observed by their Lordships that law requires that empty recovered from the spot should be sent to the laboratory without any delay, failing which such recovery evidence was not free from doubt and could

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not be used against the accused.

10. It is also fundamental principle of jurisprudence, that is, to disbelieve a witness, it is not necessary that there should be numerous infirmities. If there is one which impeaches the credibility of the witness, that may make the entire statement doubtful. It has been now settled that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted", which occupies a pivotal place in Islamic Criminal Jurisprudence and is enforced in view of the Hadiths of the Holy Prophet (P.B.U.H) that the "mistake of Qazi in releasing a criminal is better than his mistake in punishing the innocent". In this respect, wisdom may also be sought from the judgment of the Hon'ble Supreme Court of Pakistan, reported in the cases titled **Muhammad Khan and another Vs. The state (1999 SCMR 1220)** and **Muhammad Akram Vs. The State (2009 SCMR 230)**.

11. So far as the abscondence of the accused-respondents is concerned, in this part of the country people do abscond not because they are

guilty, but because of fear and torture of the police. Even otherwise, absconsion is not substantive piece of evidence, it is a corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case, where the evidence of eyewitnesses have been disbelieved. Needless to say that abscondence can neither cure the inherent defect of the ocular account nor by itself is sufficient to sustain conviction. In this respect, reference can be made to case "Islam Badshah and two others Vs. The State" (PLD 1993 Peshawar 7).

12. The whole discussion has led us to believe that the guilt has not been proved against the accused beyond any shadow of reasonable doubt. The benefit of doubt was rightly extended to the respondent-accused by the learned trial Court, therefore, the impugned judgment dated 22.11.2018, is upheld and acquittal of the respondent is maintained. Consequently, this appeal stands dismissed in *limine*.

Announced.
Dt: 25.3.2019.

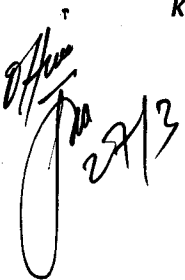

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Kifayat/*

(D.B)

Hon'ble Mr. Justice S.M. Attique Shah
Hon'ble Mr. Justice Shakeel Ahmad


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