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JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr. A No. 224-M/2022

(Iqbal Shah *Versus* The State and another)

Present: **M/S Badi-uz-Zaman and Rashid Ali Khan, Advocates for appellant/complainant.**

Mr. Kamal Khan, Assistant A.G. for State.

Mr. Shah Bros Khan, Advocate for complainant.

Date of hearing: **19.03.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Iqbal Shah son of Sakhawat Shah, herein appellant, has preferred instant appeal u/s 410, Cr.P.C. against the judgment of the learned Additional Sessions Judge-I, Buner at Daggar dated 29.07.2022 rendered in case FIR No. 276 dated 07.05.2021 u/s 302/34 PPC read with S. 15 A.A. of P.S Daggar, whereby he was convicted and sentenced as under:

i) ***u/s 302/34 PPC***

Imprisonment for life with payment of Rs.300,000/- to LRs of deceased as compensation u/s 544-A, Cr.P.C. In case of default, he was directed to suffer further six months S.I.

ii) ***u/s 15 A.A.***

One-year simple imprisonment with fine of Rs.10,000/-. In case of non-payment of fine, the appellant was directed to undergo further one-month S.I. Benefit of Section 382-B, Cr.P.C. was extended to him and the sentences were ordered to run concurrently.

2. Complainant Zeeshan Khan, who was present in the company of his relative Imran with dead

body of his uncle Jamshed son of Faridoon on 07.05.2021 in casualty of DHQ Hospital Daggar reported to police at 18.:25 hours that on the same day he was present in front of his house while his uncle was proceeding home when in the meanwhile Iqbal Shah (appellant) and his co-accused Bakhtyar Shah (still absconding) appeared from the fields duly armed with weapons and started firing upon his uncle Jamshed as result whereof he sustained serious injuries. He was shifted to hospital but he could not survive and died in his way to hospital. The occurrence was stated to have been witnessed by complainant Zeeshan Khan (PW-8), his uncle Junaid (PW-9) and relative Imran (abandoned). The motive was disclosed as previous blood feud with the accused.

3. Report of the complainant was recorded in shape of *Murasila* on the basis of which the *ibid* FIR was registered against the appellant and his other co-accused. The appellant was arrested on 17.05.2021 whereas his co-accused Bakhtiar Shah remained absconder. After completion of investigation, final report against the appellant was put in Court. Upon commencement of trial, formal charge was framed against him to which he did not plead guilty and opted to face the trial, therefore, prosecution produced and examined 11 out of 17 PWs listed in the calendar of

witnesses and closed the evidence. When examined under section 342, Cr.P.C. the appellant once again denied the charge, however, he neither opted to be examined on oath in terms of Section 340(2), Cr.P.C. nor he produced any witness in his defence. On conclusion of trial, the learned trial Court vide impugned judgment convicted and sentenced him in the manner already discussed in the earlier portion of this judgment, hence, instant appeal.

4. We have heard the arguments of learned counsel for the parties including the learned Assistant A.G. representing the State and perused the record with their able assistance.

5. The learned trial Court, while convicting the appellant, mainly considered the ocular account tendered by complainant Zeeshan Khan (PW-8) and Junaid (PW-9). The former is nephew of the deceased while the latter is his son. Learned counsel for the appellant have challenged the ocular account mainly on the ground that the eye-witnesses have failed to establish their presence on the spot whereas in rebuttal learned counsel for the complainant and learned A.A.G. contended that the occurrence took place near the house of deceased, therefore, presence of PW-8 and PW-9, being the natural eye-witnesses, cannot be doubted in any manner. The ocular account, mainly relied upon

by learned trial Court for conviction of the appellant, remained the chief focus of the cross debate. Since, both the eye-witnesses are closely related to deceased, therefore, the ocular account in the present case needs to be reappraised and scanned carefully in light of the law laid down in ***"Muhammad Zaman Vs. The State and others" (2014 SCMR 749)***.

6. According to narrations of complainant in the FIR, on the day of occurrence he was standing in front of his house while his uncle Jamshed was walking towards home when the appellant and absconding co-accused appeared from the fields with firearms and fired at Jamshed. Junaid (PW-9) and Imran (not produced) were mentioned as eye-witnesses of the occurrence. When appeared in the witness box as PW-8, complainant dishonestly improved his above version by narrating that he was present in front of his house; his uncle (deceased) came out of his house to the fields for checkup of the vegetables; his cousin Junaid was going to Masjid for *Asr* prayer while he (complainant) was going after him. That in the meanwhile the appellant and his co-accused appeared from the wheat crop and fired at his deceased uncle who was coming back from the field to his house as result whereof he got hit and moved onward for a few steps and fell on the ground. It is evident from the above deposition in

examination-in-chief that complainant has recorded a self-contradictory statement by showing himself in two different positions at one and the same time. While lodging the report, he informed the police that at the relevant time he was standing in front of his house but did not provide any detail regarding the other eye-witnesses namely Junaid and Imran (abandoned) that what were they doing at that time rather he simply mentioned their names as eye-witnesses of the occurrence. The new story introduced by complainant in his statement before the trial Court manifests his dishonest intention to bring the story of FIR in conformity with site plan and to justify the presence of his cousin Junaid near the spot at the time when the deceased had got bullet injuries on his person. No doubt, FIR is not an encyclopedia to cover each and every minute detail of the occurrence but the stuff which pricks our mind is that what had precluded the complainant to provide the detail about PW Junaid in the FIR in the same manner which he had offered regarding himself. Admittedly, only names of Junaid and Imran were mentioned in the FIR as eye-witnesses without disclosing the purpose for which they were shown in surrounding of the spot, as such, the matter was deliberately left open for the eye-witnesses to explain and justify his presence at the place of

occurrence in any manner of their choice. Had PW Junaid witnessed the occurrence, the complainant would have mentioned the purpose of his presence on the spot. Introduction of the said purpose at subsequent stage by complainant stating that Junaid was going for offering Asr prayer, appears to be deliberate and intentional. The defence counsel has confronted both the eye-witnesses with their statement u/s 161, Cr.P.C. for highlighting the dishonest improvements made by them on their appearance in the dock. As dishonest intention of both the ye-witnesses behind their mendacious improvements can easily be gathered from the record, therefore, they have lost their credibility in view of the law laid down in ***"Akhtar Ali and others Vs. The State" (2008 SCMR 6)*** that it is settled law that improvements once found deliberate and dishonest cast doubt on the veracity of such witness. In another case titled ***"Muhammad Arif Vs. The State" (2019 SCMR 631)***, the apex Court laid down that when a witness improved his statement dishonestly to strengthen the prosecution case, such portion of his statement was to be discarded and testimony of such witness could not be safely relied upon to maintain conviction and sentence of an accused on a capital charge.

7. It is settled principle of criminal jurisprudence that an eye-witness, who claimed his presence at the spot, must satisfy the mind of the Court through some physical circumstances or through some corroborative evidence in support of his presence at the spot, which are missing in the present case qua the eye-witnesses namely Zeeshan and Junaid. They claim to have accompanied the dead body from spot to hospital but their names as identifiers of the dead body neither appear in the Inquest Report nor in the postmortem report in view of which their presence on the spot at the time of occurrence is doubtful. Reliance is placed on ***"Ramzan alias Jani Vs. The State" (1997 SCMR 590)*** wherein it has been held that eye-witnesses not been mentioned in the FIR and the inquest report, their presence at the scene of occurrence was doubtful. Likewise in the case of ***"Liaqat Ali and another Vs. The State and others" (2021 SCMR 780)***, presence of the eye-witnesses on the spot was viewed with great suspicion due to non-mentioning of their names in the post-mortem report. The eye-witnesses have also stated that while shifting the deceased then injured from the ground to cot, their clothes got smeared with blood of the deceased but in the same breath they admitted that they had not handed over their blood-stained clothes to I.O. This

omission on the part of Investigating Officer suggests that neither the eye-witnesses were present on the spot at the time of occurrence nor their clothes were smeared with blood of the deceased, therefore, the same were not taken into possession by police. In a similar situation in the case of ***"Mst. Sughra Begum and another Vs. The State" (2015 SCMR 1142)*** the apex Court observed that the omission strikes at the roots of the case of the prosecution and bespeaks volumes about the dishonest and false claim of the eye-witnesses. Similarly, FIR and inquest report do not divulge the kind of weapon with which the accused were allegedly armed at the time of firing and it was simply noted that the accused were armed with 'firearms'. The learned trial Court has met this objection of the defence by stating that no question was put to complainant with regard to his knowledge about the weapons. It is pertinent to note here that being a part of the erstwhile PATA, the people of this area are well familiar with all types of arms especially light weapons usually kept by people in their houses for their protection, therefore, it would be quite illogical to presume that the complainant had no knowledge of types of weapons therefore he did not mentioned it in the FIR. Junaid (PW-9) was confronted with his statement u/s 161, Cr.P.C. wherein he had narrated regarding entry of complainant into his house and

making three fire shots with a repeater, as such, there is no possibility that the types of weapons were not mentioned by complainant for the sole reason that he had no knowledge about weapons. Thus, non-specification of the kind of weapons by complainant in his report and likewise non-mentioning thereof by the police in inquest report creates a reasonable doubt suggesting that complainant was neither present at the time of occurrence nor at the time of report otherwise there was no reason for the complainant not to specify the weapons the accused were carrying. Thus, it can safely be inferred that complainant Zeeshan Khan was not present at the time of report which was dishonestly attributed to him. The version of complainant that he was present in front of his house at the time of occurrence is also not supported by site plan wherein he has been shown on a throughfare at a distance of 35 feet from his house. Keeping in view the ocular account in juxtaposition with different pieces of circumstantial evidence discussed above, quite an abnormal and unmatching picture of the episode is emerging casting a serious doubt on presence of the eye-witnesses on the spot at the time of occurrence besides there is no physical circumstance in light of which the narrations of the eye-witnesses could be believed. It is settled principle of law that ocular evidence must, in order to

carry conviction on a capital charge, must come from an unimpeachable source; if such a source is not available, then it must be supported by some strong circumstance to enable the Court to overcome the inherent doubt, which such evidence must necessarily create. Reliance is placed on ***"Nadeem alias Kala Vs. The State and others" (2018 SCMR 153)***.

8. It would not be out of place to mention that the defence counsel confronted complainant with abduction of daughter of one Kan Farosh by deceased and thereafter her murder; likewise, questions were put to him regarding the allegation of murder of Ahmad Hussain against the deceased and allegations of murders of Kan Farosh, Muhammad Khan, Khaliq Shah and Ijaz against brothers of the deceased but complainant stated that he has no knowledge in this regard. Similar denial also appears in the statement of the other eye-witness Junaid (PW-9). Copies of previous FIRs are available on record and it has also been brought on record during cross-examination of the PWs that brothers of the deceased are absconders in a case of murders of four persons. The eye-witnesses were supposed to know the well-known facts and events with which they were confronted during their cross-examination, therefore, the suppression of the said facts by them shows their dishonest intention, as such,

testimony of such unreliable and dishonest witnesses cannot be relied upon for conviction of an accused on a capital charge. While facing a similar situation in the case titled ***"Ata Muhammad and another Vs. The State" (1995 SCMR 599)*** the Hon'ble Supreme Court ruled down that:

> **The eye witnesses appear to be basically dishonest as they gave evidence with a motive other than of telling the truth, in that, they even suppressed the facts which they were supposed to know in the ordinary course of events, e.g., when asked in cross-examination, whether Atta Muhammad got case under section 336/440, P.P.C. registered against them at Police Station Midh on 10-8-1988 vide F.I.R. No. 183, Bati P.W. replied "I do not know".**

9. The record shows that, per version of the complainant, PW Imran had also witnessed the occurrence in the backdrop of which his name was also mentioned in the Inquest Report and postmortem report as identifier of the dead body even he was shown to have verified Murasila. It means that he was an important witness of prosecution, as such, a witness whose testimony could have been independent was abandoned by the prosecution. Although he was a relative of the deceased but the option of prosecution not to examine him during the trial creates a doubt that he was abandoned presumably with some sinister motive. In this regard we would refer the case of ***"Muhammad***

Rafique and others Vs. The State and others" (2010 SCMR 385).

10. It is the version of prosecution that two accused had fired upon the deceased as result of which he sustained firearm injuries on his body. According to record, the I.O has alleged recovery of 03 empties of 30 bore pistol and same number of crime empties of M16. The dead body was examined by Dr. Muhammad Ali (PW-7) on 07.05.2021 at 06:00 P.M. He reported the following wounds on the body of deceased as per Postmortem report Ex.PW-7/4.

(1) Entry wound on mid-scapular line backside 1 to 1 ½ cm in length.

(2) Entry wound near spine on left side 1 to 1 ½ cm in length.

(3) Entry wound on right side near the spine 1 to 1 ½ cm in length

(4) Entry wound on right side on dorsum of hand 1 to 2 cm in length. Exit wound at opposite side at palmar side at thenar muscle 2 to 2 ½ cm in length.

(5) Exit wound above the fourth intercostal space and mid clavicular line 2 to 3 cm in length on right side.

(6) Exit wound on right side near the sternum lateral side 1 to 2 cm in length.

(7) Exit wound on right side lower rib above the liver right portion 1 to 1 ½ cm in length.

Close perusal of the above detail of wounds found on the dead body reveals that dimension of the entry wounds at serial No. (1) to (3) is one and the same i.e. 1 to 1½ cm which slightly varies from entry wound No. (4) with the dimension of 1 to 2 cm. The mentioned

difference of half centimeter of the last entry wound from the remaining three wounds was apparently due to the difference in the locale of injuries. Thus, the medical evidence suggests use of one weapon in the occurrence which goes against the basic version of prosecution that the murder had been committed by two accused including the present appellant. It appears from the afore-stated situation that the charge was exaggerated by complainant by implicating two members of the accused family. Thus, medical evidence is not in line with ocular account and the benefit of doubt arising out of the said conflict is to be given to accused. Reliance is placed on ***"Najaf Ali Shah Vs. The State" (2021 SCMR 736)***. It was observed by Hon'ble apex Court in the said judgment that:

> **"Once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused".**

11. Adverting to recovery of the crime weapon on pointation of the appellant, the Investigating Officer has alleged that the appellant during the course of investigation took him and other police party to a retaining wall (وٹہ) situated in the area of Naway Kalay and recovered a pistol with fix charger containing three empties which had been concealed by him in stones. The

I.O took the pistol in possession through recovery memo and prepared a sketch which shows a thoroughfare/unmetalled road adjacent to the wall from which the recovery was affected. The said place was thus accessible by everyone, therefore, plantation of the pistol against the appellant cannot be ruled out in the mentioned circumstances. The record further shows that the pistol was sent to the Forensic Science Laboratory along with the crime empties but the report in this regard shows the non-matching result creating a doubt of serious nature qua the authenticity of the prosecution case against the appellant. Guidance is taken from ***"Sardar Bibi and others Vs. Munir Ahmad and others" (2017 SCMR 344)*** wherein the apex Court held that when in the FIR no specific weapon was shown in the hands of the accused; no crime empty was recovered from the place of occurrence; and no positive report of Forensic Science Laboratory was available regarding matching of any crime empty with the allegedly recovered weapon, then the recovery of weapon from accused was inconsequential and could not be considered corroborative piece of evidence. Almost same is the doubtful position of the recovery of crime weapon in the present case, therefore, the said recovery is of no help to prosecution.

12. As per contents of the FIR, the motive behind the occurrence in the present case has been set up as previous blood-feud. Although the I.O has placed on record certain previous FIRs but the same do not specifically divulge enmity of the appellant with deceased Jamshed or his family except an FIR brought on the record as Ex.PW-8/D-1 registered on the report of one Feroz Shah against brothers of the deceased Jamshed wherein the present appellant has been shown as one of the eye-witnesses of the occurrence. After going through the record in light of arguments advanced by both the sides, the motive so set up by complainant has not been proved through any solid material as in this regard the complainant has not moved ahead beyond the bald assertions. Even otherwise, it is settled principle of law that motive is a double-edged weapon which cuts both sides in the like manner, therefore, false implication of the appellant by complainant because of the motive so set up and his status of being an eye-witness against his uncles cannot be ruled out. Reliance is placed on ***"The "State VS. Muhammad Sharif and others"*** **(1995 SCMR 635)** wherein it was held that:

> **So far as enmity is concerned, it is a double-edged weapon and cuts both ways. If it is considered as sufficient motive for commission of offence, it can also be considered as sufficient for false implication as well.**

13. Viewed and judged from all aspects, there are glaring inconsistencies in the prosecution which are sufficient to create serious doubts in prudent mind qua involvement of the appellant in commission of the offence. It is settled principle of law that benefit of even a single but reasonable doubt should be extended to accused and it is not necessary that for giving him benefit of doubt, there should be many circumstances creating doubts. In the case of ***"Ayub Masih Vs. The State"*** **(PLD 2002 S.C 1048)**, this principle was elaborately discussed by apex Court by holding that:

> **The rule of benefit of doubt, which is described as the golden rule, is essentially a 'rule of prudence' which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmed (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."**

14. Thus, in light of the above discussion, instant appeal is allowed, the impugned judgment is set aside and appellant Iqbal Shah is acquitted of the charge levelled against him by complainant in the present case.

He be released forthwith from jail if not required in any other case.

15. Above are the reasons of our short order of the even date.

Announced
Dt: 19.03.2024

JUDGE

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office 25/3/2024 WR