

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
**JUDICIAL DEPARTMENT**

**J U D G M E N T**

**Cr.Appeal No. 80-P of 2017.**

Date of hearing: 22.05.2019.

Appellants: (Khalil-ur-Rehman & Gulzar)

By Sahibzada Asadullah, Advocate,

Respondent: (State) By Syed Sikandar Hayat Shah,  
Addl.A.G.

(Complainant) By Mr. Imtiaz-ur-Rehman Khan,  
Advocate.

**ISHTIAQ IBRAHIM, J.-** The appellants namely Khalil-ur-Rehman son of Roidar and Gulzar son of Sardar have filed the present appeal whereby they have challenged the legality of the judgment passed by the learned Additional Sessions Judge, Charsadda at Tangi dated 19.01.2017 in case FIR No.833 dated 13.08.2001 under sections-302/324/148/149 PPC registered at Police Station, Tangi, District Charsadda, whereby the appellants were convicted and sentenced as follows;

- i. Under section 148 PPC for committing rioting to suffer rigorous imprisonment for one year each and also to pay fine of Rs.3000/- each or in default thereof to suffer one month S.I each.
- ii. Under section 149 PPC for forming unlawful assembly and commission of offence in prosecution of common object to suffer rigorous imprisonment for one year each and also to pay fine of Rs.3000/- each or in default thereof to suffer one month S.I each.
- iii. Under Section-302 (b) PPC for committing murder of deceased Arshad Kamal in prosecution of common object of unlawful assembly to suffer rigorous imprisonment for life each and also to pay compensation of Rs.400,000/- each under section 544-A Cr.PC to be paid to the legal heirs of the deceased according to their shari shares or in default of payment of compensation, they shall further undergo six months S.I each.
- iv. Under section 324 PPC for attempt at the life of complainant Bahadar Sher in prosecution of common object of unlawful assembly to suffer rigorous imprisonment for two years each and also to pay fine of Rs.20,000/- each or in default thereof to suffer two months S.I each.
- v. Benefit of section 382-B Cr.PC was extended to the appellants and all the sentences was ordered to run concurrently.

2. Brief facts of the prosecution case, as depicted in the Murasila (EX PA/1) are that on

13.08.2001 Shafiullah ASI Police Post Gandheri received information to the effect that a murder took place in Moza Haya Gul Mian Killay, upon which he rushed to the spot, found the dead body of Arshad Kamal son of Bahadar Sher, where Bahadar Sher son of Said Jamal at 1200 hours reported the matter to the effect that he alongwith his deceased son Arshad Kamal and nephew Hamayun son of Muhammad Umar had gone to village Sra Shah in connection with some work; that on return when they reached the thoroughfare leading to village Haya Gul Mian Kallay near the house of Rooh-ul-Amin, accused Sher Bahadar son of Khan Qadar, Gulzar son of Sardar (convict-appellant), Farman son of Bakhtiar, Khalil-ur-Rehman son of Roidar (convict-appellant) and Burhan son of Mukhtiar duly armed with Kalashnikov came out from the sugarcane crop and started firing at them,

resultantly his son Arshad Kamal was hit and died on the spot while the complainant Bahadar Sher and his nephew Hamayun escaped unhurt; that after the commission of offence, the accused decamped from the spot. The motive for the commission of the offence was reported that Bakhtiar son of Sardar died due to heart attack, but the accused party suspecting the deceased Arshad Kamal to have murdered him. The injury sheet and inquest report of the deceased was prepared and the dead body of the deceased was referred to Civil Hospital, Tangi, for conducting autopsy under the escort of constable Saleh Shah No.46. The report of the complainant was reduced into writing in the shape of murasila (EX PA/1) and sent to police station through Saeed-uz-Zaman for registration of the case FIR against the accused. The accused after the commission of the offence, went into hiding and

avoiding their lawful arrest, the investigating officer obtained warrants of arrest u/s-204 Cr.PC and proclamation notices u/s-87 Cr.PC against the accused and were entrusted to the DFC for execution. After completion of investigation, complete challan under section-512 Cr.PC was submitted against the accused. The prosecution examined 08 PWs within the meaning of section-512 Cr.PC and vide order dated 15.07.2003 declared the accused as proclaimed offenders and perpetual warrants of arrest were issued against them. Accused Khalil-ur-Rehman was arrested on 05.08.2015 while co-accused Gulzar Khan was arrested on 08.05.2016. They were interrogated and after completion of necessary investigation, supplementary challans were submitted before the Court.

3. The accused were summoned and provisions under section 265-C Cr.PC were complied with. Formal charge against the accused was framed on 03.06.2016, to which they did not plead guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 08 witnesses while on the request of prosecution, statements of Bahadar Sher complainant and Gul Amir Khan SHO/I.O recorded before the Court as (PW-7) and (PW-8) respectively within the meaning of section-512 Cr.PC were transposed to the trial of the accused-appellants, as the complainant and the I.O were reported to be dead. **Dr. Imtiaz (PW-2)** deposed that on 13.08.2001 at 02.20 p.m he conducted post mortem examination on the dead body of Arshad Kamal son of Bahadar Sher and found the following;

*“Smartly stout with face showed wearing light blue shalwar, qamees bloodstained.*

**Injuries.**

1. *An entrance wound 1/4"x 1/4" on the lateral side of right elbow.*
2. *Exit on the medial side of right elbow 1/2" x 1/2" in size.*
3. *An entrance wound of 1/4" x 1/4" on the left side of chest at 5/6 spaded (inter costal).*
4. *Exit on the left side of back of chest of 1/2" x 1/2" in size.*
5. *Entrance wound on right side of abdomen 1/2" x 1/2".*
6. *Exit of the above on left side of abdomen 1/2" x 1".*
7. *Entry wound of 2 x 3" on right axilla of chest.*
8. *Exit of above 2" x 3" on right scapula of back.*
9. *Entry wound of 1/4" x 1/5" hypogestum.*
10. *Exit on the right back of 1/2" x 1/2" on the right buttock.*
11. *Entry wound of 1/4" x 1/4" on lateral side of right thigh.*
12. *Exit wound on the medial side of 1/4" x 1/4" on right thigh.*
13. *Entry wound of 1/4" x 1/4" at the interial aspect of thigh with exit on the posterial side of right thigh.*

**Cranium and Spinal Cord.**

*Scalp, skull and vertebrae..Not injured.*

**Thorax.**

*Walls, ribs and cartilages injured. Pleurae injured on both right and left sides. Right lung, left lung, pericardium, blood vessels, walls.....injured.*

**Abdomen.**

*Walls, peritoneum, stomach, small intestines and large intestines, kidney, bladder.....injured.*

**Muscles, Bones and Joints.**

*Fractured, right elbow bones.*

**Opinion.**

*In his opinion, the deceased died of severe blood loss and direct injury to the heart, lung and urinary bladder.*

*Time between injuries and death....about 20 minutes.*

*Between death and PM 2 to 6 hours.*

*Postmortem report is (EX PM) and injury sheet is (EX PM/1).”*

Gohar Khan Inspector (PW-3) deposed that accused Khalil-ur-Rehman was arrested by the operation staff. He produced the accused before the Court of Judicial Magistrate, vide application (EX PW 3/1) and obtained his two days police custody, interrogated him and recorded his statement under section 161 Cr.PC. Gul Shed Khan SHO (PW-3) arrested accused Gulzar on 8.5.2016 and issued his card of arrest (EX PW 3/1) and submitted supplementary challan against the accused. Hazrat Ali SI (PW-4) on receipt of murasila, incorporated its contents into FIR ( EX PA). He is also marginal witness to recovery memo (EX PW 4/1) vide which the SHO Gul Amir Khan took into possession bloodstained garments of deceased. Saeed-uz-Zaman No.407 (PW-5) deposed that he is marginal witness to recovery memo (EX PW 5/1) vide which the I.O took into possession bloodstained earth



from the place of deceased and sealed the same in parcel No.1. He is also marginal witness to recovery memo (EX PW 5/2) vide which the I.O recovered and took into possession 03 empties of 7.62 bore from the places of accused Sher Bahadar and Gul Raz and 05 empties of 7.62 bore from the places of accused Burhan, Farman and Khalil-ur-Rehman, which were sealed into separate parcels. Shafiullah (Rtd) Inspector (PW-6), who is author of murasila (EX PA/1) reiterated the same facts, which he has recorded in the murasila. He prepared the injury sheet and inquest report of deceased (EX PW 6/1 & EX PW 6/2) respectively. He prepared the site plan (EX PW 5/1) at the instance and pointation of complainant and eyewitness. During spot inspection, he also recovered and took into possession bloodstained earth from the place of deceased. Similarly, vide recovery memo (EX PW

5/2) he recovered and took into possession 03 empties of 7.62 bore and 05 empties of 7.62 bore from the places of accused. Khadim Shah Khan SI (PW-7) deposed that he produced accused Gulzar before the Judicial Magistrate Tangi, vide application (EX PW 7/1) and obtained his one day police custody and interrogated the accused. He also produced accused Khalil-ur-Rehman before the Court and obtained his two days police custody and interrogated him.

5. The prosecution closed its evidence and thereafter accused-appellants were examined under section 342 Cr.PC, they neither wished to be examined on Oath under section 340 (2) Cr.PC nor opted to produce evidence in defence and denied the allegations leveled against them. After hearing the learned counsel for the parties, the learned trial Court vide impugned judgment dated 19.01.2017

convicted and sentenced the appellants in the manner already discussed above, hence the instant appeal.

6. Arguments of learned counsel for the parties heard and record perused with their able assistance.

7. It is the duty of the prosecution to bring home charge against the accused beyond any reasonable shadow of doubt, and most particularly in cases where capital punishment is provided, the prosecution is under statutory obligation to bring on record unimpeachable and lucid evidence, which shall satisfy the judicial mind of the Court with regard to the proof of charge leveled by the prosecution against the accused indicted for the crime.

8. Bahadar Sher, the complainant, was examined as (PW-07) during the proceedings under section-512 Cr.PC, but at the trial of the convict-appellants,

the complainant was reported to be dead, therefore, on the request of the prosecution, his statement and that of the Investigating Officer namely Gul Amir Khan, were transposed to the trial of the appellants.

True that the statement of a witness duly recorded under section 512 Cr.PC can be transposed to the trial of accused subsequently arrested and the same falls within the category of substantive evidence yet the Court has to evaluate the same on case to case basis with care and caution while considering the intrinsic worth of the statement in the circumstances of each case for the reason that the same has not been subjected to cross examination.

It is also desirable that the Courts shall strive for strong independent corroboration while placing reliance on such statement, which in opinion of the Court would be sufficient enough to establish the guilt beyond any reasonable shadow of doubt.

Judicial assessment of a statement recorded u/s 512 Cr.PC would require careful scrutiny by placing the other evidence in juxtaposition with the statement or statements recorded u/s 512 Cr.PC.

**9.** Presence of the complainant at the time of occurrence is not believable for the reason that he has neither disclosed the purpose of his visit to village Saro Shah nor he is taking the dead body of the deceased to the police station or for that matter to the Hospital and is waiting for the arrival of the police at the spot and thereafter lodging the report, whereas it is admitted that the place of occurrence is near to Police Post Gandheri, which is at a distance of two kilometers.

**10.** As per contents of murasila (EX PA/1) the complainant namely Bahadar Sher (now dead) alongwith his deceased son Arshad Kamal and nephew Hamayun, when reached the place of

occurrence, the accused (five in number) duly armed with Kalashnikov came out from the sugarcane crop and started firing at them, as a result of which Arshad Kamal was hit and died on the spot while the complainant and PW Hamayun escaped unhurt. Perusal of postmortem examination report (EX PM) reveals that there are seven entry wounds on the dead body of the deceased and the size of entry wounds No.1, 3, 9, 11, 13 are 1/4" x 1/4" with corresponding exit wounds measuring 1/2" x 1/2" while the size of entry wounds No.5 & 7 are 1/2" x 1/2" and 2" x 3" respectively. In this regard we are fortified by the judgment of the Hon'ble Apex Court rendered in *Farman Ali's case* (PLD 1980 SC 201), wherein it was held that;

*“In his dying declaration, Rashid Khan has involved the three brothers as well as their friend, Farman Ali. But the medical evidence and the evidence of the Ballistic Expert do seem to cast doubt on his veracity. The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan' is that the size of inlet of all the wounds suffered by*

*him was the same meaning thereby that he had been shot from one or more than one weapon of the same calibre. It is in the evidence of the Ballistic Expert, however, that the- four empties sent to him for examination' were found to have been fired through .32 bore pistol which was also sent to him by the Investigation Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. It is true that according to the prosecution each one of the three appellant brothers was armed with a .32 bore pistol. But the type of injuries suffered by Rashid Khan rather suggest that it was the work of one man. It is common knowledge that .32 bore pistol is an automatic weapon carrying in its charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right superior iliac spine, the inlet -size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants. There. is no evidence on the record to show, however, as to which one of the three had caused him the said injuries, therefore, no option is left but to hold that the prosecution has failed to bring home its case against any one of the appellants”.*

11. Despite firing by all the five accused with sophisticated weapons, the complainant Bahadar Sher and PW Hamayun did not receive a single firearm or lacerated injury. During spot inspection, the I.O recovered five empties of 7.62 bore from

points No.6,7, & 8 assigned to accused namely Farman, Khalil-ur-Rehman, and Burhan while from points No.4 & 5 three empties of 7.62 bore were shown to have been recovered from the places of accused Bahadar Sher and Gulzar, which are inside the sugarcane crops, but these empties were not sent to the FSL for ascertaining as to whether these were fired from one weapon or more. The true mode and manner of the occurrence appears to have been suppressed. The charge appears to have been exaggerated and the net has been thrown wide by implicating five persons without assigning any specific role to any of them, possibility of false implication could not be ruled out. In this respect reliance is placed upon the judgment of Hon'ble Supreme Court rendered in ***Sohni's case*** (PLD 1965 Supreme Court-111), wherein it was held that;



*“Furthermore, according to Doctor Muhammad Yamin Khan out of the 9 injuries found one Maulo deceased 2 were contused wounds, 1 incised wound, 1 was abrasion and the rest were contusions. Death was due to the shock and compression of brain caused by blood clots due to fracture of skull which was caused by injuries Nos. 1 and 2 that were found on the deceased. Most of the remaining injuries were on the leg of the deceased. In view of the number and nature of injuries one may legitimately ask whether this could possibly have been the result of assault by 6 accused persons or that they could have been easily caused by two or three persons. Viewing all the circumstances we are satisfied that the High Court was right in insisting on some corroboration of the evidence of the eye-witnesses connecting the accused with the crime. As such corroboration was lacking, the High Court was justified in giving the benefit of doubt to the accused persons.”*

12. Besides the complainant namely Bahadar Sher, Hamayun (PW) was also the eyewitness of the prosecution, but he was abandoned being won over by the defence. So, there is no ocular account, which could establish the guilt of the convict-appellants. It is also admitted that he was nephew (sister son) of the complainant, an adverse inference is to be drawn in the circumstances of the case against the prosecution.

13. The only circumstance in the account of the appellants is their abscondance but on this point the law is by now well-settled that the same alone is not sufficient to record conviction on a capital charge and it can be used only as a corroboratory and confirmatory in support of ocular account but when there is no ocular account then it is of a very little value for court for consideration. Reliance in this regard is placed on the case of **Rasool Muhammad v. Asal Muhammad and 3 others** reported in **1995 SCMR 1373**, wherein it has been held that:--

*"Abscondence per se is not proof of the guilt of an accused person. Disappearance of a person named as a murderer/culprit after the occurrence is but natural, whether named rightly or wrongly"*

Keeping in view the above discussion, case of the prosecution is pregnant with doubts and dents benefit whereof shall go to the appellants. We hold that the prosecution miserably failed to prove its

case against the appellants beyond reasonable shadow of doubt. Accordingly, this appeal is allowed, the impugned judgment dated 19.01.2017 passed by the trial Court is set aside, the appellants are acquitted of the charges leveled against them, and be set free forthwith if not required in any other case.

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

**Announced:**

Dated. 22.05.2019.

SENIOR PUISNE JUDGE

**JUDGE**

(D.B.)  
Hon'ble Mr. Justice Qaisar Rashid Khan  
Hon'ble Mr. Justice Ishtiaq Ibrahim

(K. Ali, PS)