JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A No. 903-P of 2021
Zarshad
Vs
The State & another

Date of hearing: **09.05.2023.**

Appellant (s) by: Syed Abdul Fayaz, Advocate.

State by: Mr.Jalal-ud-Din Akbar Azam Khan Gara, AAG.

Complt: by: Mr. Arif Rasool, Advocate

JUDGMENT

SAHIBZADA ASADULLAH, J.- Through this judgment, we shall also decide **Cr.R No.182-P of 2021** titled **"Muhammad Ayaz Vs Zarshad etc"** as both the matters have emanated from same judgment dated 07.10.2021 of the learned Additional Sessions Judge/Judge MCTC, Mardan delivered in case FIR No.329 dated 02.06.2008 under sections 302/324/148/149 PPC of Police Station Rustam District Mardan whereby appellant Zarshad has been convicted and sentenced in the following manner;

Under section 302 (b) PPC for life as Tazir on two counts with fine of Rs.4,00,000/- on each count which shall be payable to legal heirs of both the deceased as compensation under section 544-A Cr.PC, in default whereof he shall further undergo

SI for 06 months. The amount of fine so imposed shall be recoverable as arrears of land revenue from the person and estate of convict.

Under section 148/149 PPC imprisonment for three years with fine of Rs.10,000/- and in default of payment of fine, the appellant shall further undergo SI for one month.

Under Section 324 PPC for attempted murder of complainant Muhammad Ayaz, imprisonment for ten years with fine of Rs.20,000/-, in default whereof the appellant shall further undergo for one month SI. All the sentences shall run concurrently. Benefit under section 382-B Cr.PC has been extended to him.

2. Briefly stated facts in the FIR are that on 02.06.2008 at 2100 hours, complainant Muhammad Ayaz in injured condition reported the matter to the police at Rustam Hospital, Mardan to the effect that on the eventful night he alongwith his sons namely Ehsanullah and Qaiser Shah were proceeding to their house from Rustam Adda and when reached to the place of occurrence at about 2040 hours, there the accused Zarshad alongwith absconding co-accused Naseeb Zada, Gul Zada, Saleh Zada and Arshid were present duly armed with firearms in a yellow Suzuki motorcar, who on seeing them doboarded from the car and started indiscriminate

firing upon them. As a result of their fire shots, his son Ehsanullah got hit and died on the spot while he and his other son Qaiser got critically injured. The occurrence was witnessed by Qaiser Shah (the then injured), Ramzan and Qareebullah. Motive for the occurrence was that a few months prior to the occurrence an altercation had taken place between the complainant party and the accused. He charged the accused for the murder of his son Ehsanullash and causing injuries to him and his other son Qaiser Shah. Murasila was drafted and sent to the Police Station for registration of FIR. Later on the other injured namely Qaiser Shah also succumbed to the injuries sustained by him in the present incident.

3. After arrest of the accused and completion of investigation, case was put in Court where the appellant was indicted to which he pleaded not guilty and claimed trial. Prosecution, in order to prove its case, produced and examined as many as 10 witnesses, whereafter statement of the accused was recorded wherein he professed his innocence. The learned trial Court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction sentenced him as mentioned above, hence this appeal. It is worth to mention that the complainant through the criminal

revision has also sought enhancement of the awarded sentence.

4. Arguments heard and record gone through.

5. The unfortunate incident claimed the lives of two and the complainant survived after receiving firearm injuries. The dead bodies and the injured complainant were shifted to the hospital where the complainant reported the matter, verified by the eyewitness. The *murasila* was drafted, the injury sheets and inquest reports were prepared, and after doing the needful the injured complainant alongwith the dead bodies was sent to the doctor, where the complainant was medically examined and autopsy on the dead bodies of the deceased was conducted. The investigating officer after receiving copy of the FIR visited the spot and on pointation of the eyewitnesses prepared the site plan, during spot inspection the investigating officer collected blood stained earth from the respective places of the deceased and injured and also recovered 14 empties of 7.62 bore near from the places assigned to the accused. It is pertinent to mention that during spot inspection an electric Bulb was also taken into possession, which was installed on the outer wall of one Pervez Khan and the same was packed and sealed into a parcel. The accused after having been

charged remained fugitive from law and that it was on 20.07.2018 that the appellant was arrested, who faced the trial and ultimately was convicted by the learned trial Court vide the impugned judgment.

6. The learned trial Court took into consideration the material aspects of the case and that after scanning through the record convicted the appellant vide the impugned judgment. The impugned judgment was gone through with the able assistance of the learned counsel for the parties, where the learned trial Court dealt with the matter comprehensively, and while handing down the impugned judgment the learned judge was pleaded to highlight the material aspects of the case. The learned trial Court attempted to substantiate its findings from the record of the case and statements of the witnesses. This Court being the Court of appeal is shouldering the responsibility to assess and reassess the already assessed evidence, so that miscarriage of justice could be avoided. True that in the incident we have the injured complainant alongwith the eyewitnesses, who witnessed the incident, but the stamp of injuries on person of the injured complainant by itself are not sufficient to hold the appellant responsible for the death of the deceased, rather this Court is to see the veracity of

the statement of the complainant and also the worth of the statements of the eyewitnesses in order to ascertain as to whether the incident occurred in the mode, manner and at the stated time. This being the Court of appeal is under the bounded duty to walk with care, so that the innocent could be rescued and the guilty could be punished.

7. The questions which this Court deems necessary, to be determined are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the eyewitnesses were present at the time of incident and at the time of report; as to whether it was the injured complainant who reported the matter, or as to whether the report was made by the police from its own and after procuring the attendance of the witness the same was signed from the complainant and from the eyewitness; that as to whether the prosecution succeeded in establishing the alleged motive and as to whether the medical evidence supports the case of the prosecution.

8. There is no denial to the fact that the incident occurred at the stated place and that the investigating officer succeeded in collecting blood stained earth from the places of the deceased and also the crime empties from the place of incident,

this Court is to see as to whether the presence of the complainant and the eyewitness is established from the record and as to whether the complainant with the deceased was coming back from his shop situated in Rustam Bazaar. The record tells that both the accused and the complainant party were closely related but having strained relationship since long. The record further tells that both the parties are the residents of the same village, but with their houses situated away, from the place of incident. In order to ascertain as to whether the incident occurred in the mode, manner and at the stated time, we deem it essential to go through the statements of the witnesses i.e. the complainant and the eyewitness. The complainant was examined as PW-6, who stated that on the day of incident after getting released from their business, he alongwith the deceased was on his way back to his home when they reached to the spot they came across the eyewitness as well, when in the meanwhile the accused, including the appellant attracted to the spot in a motorcar, doboarded from the same and started firing at them; that after receiving firearm injuries the complainant got injured whereas one of the deceased died on the spot and the second in the hospital; that the incident was

witnessed in the light of a bulb installed on the outer wall of the house of one Pervez Khan; that he reported the matter in the hospital which was duly explained to him and the eyewitness PW Ramzan verified his report; that he was examined by the doctor and his medico legal certificate was prepared. The eyewitness was examined as PW-7, who in his examination in chief supported the report of the complainant and confirmed the source of identification, as the light of a bulb installed on the outer wall of one Pervez Khan. In order to know as to whether the witnesses supported each other on material aspects of the case and as to whether the witnesses succeeded in convincing that the incident occurred in the fashion as disclosed by them, we went through their statements. The witnesses failed to confirm the presence of their shops in the local Bazaar and even no independent witness was produced in that respect and as such the witnesses failed to convince this Court that it was because of their joint business that they were heading back to their houses when the tragedy occurred. Even the investigating officer could not collect any evidence in that respect, more particularly no witness from the said Bazaar was examined. When the most important piece of evidence was left undetermined

and when the parties were lacking interest in that respect, this Court is left with no other option but to hold that the returning back from the shop was introduced for the sole purpose to convince of their presence on the spot at the time of incident. The investigating officer did not investigate the case on these particular lines and even he did not visit the local bazaar to ascertain the veracity of the statements of the witnesses and even no witness was examined from the local bazaar who could disclose the availability of the shops of the complainant party, so the getting together of the complainant, the deceased and the eyewitnesses does not appeal to a prudent mind.

9. An other intriguing aspect of the case is the presence of PW Ramzan on the spot at the time of incident, he was examined as PW-7 who stated that during the days of occurrence he was having his business in Bunir and that it was his routine to reach his village at the stated time and would join the complainant party on his way to his home; that on the day of incident he reached in routine and met the complainant party near the place of incident and thereafter the incident occurred. The explanation tendered by the complainant regarding his presence on the day and at the time of incident is after

thought. As on one hand no witness was produced to confirm that during the days of occurrence PW Ramzan was working in Bunir and even the investigating officer did not visit Bunir to confirm the same. The presence of the complainant and PW Ramzan at the place of incident and at the time of incident is nothing but a co-incidence which does not appeal to a prudent mind and this particular situation has been dealt with by the Apex Court in case titled **"Naveed Asghar and two others Vs The State" (PLD 2021 Supreme Court 600)** which reads as follows:-

> "16. Reading of the statement of Mirza Muhammad Umar (PW-13) shows that he is a chance witness: a witness who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of the occurrence but claims to be there by chance. Testimony of such witness requires cautious scrutiny and is not accepted unless he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time."

10. The witnesses during their cross-examination disclosed that the accused attracted to the spot in a motorcar and when the complainant party reached to the place of incident, they deboarded and started firing at them. On one hand the witnesses remained inconsistent regarding the order in which the

accused were setting in the motorcar and on the other the witnesses failed to tell that in which manner they deboarded. This is astonishing to note that five persons, duly armed with sophisticated weapons, fired at the deceased, but the eyewitnesses did not receive a single firearm injury. In case all the accused would fire at the deceased, there was hardly an occasion for the eyewitnesses to survive.

11. This is admitted by the witnesses that the accused were identified in the light of the bulb, installed on the outer wall of one Pervez Khan. The witnesses while recording their statements under section 161 Cr.PC, before the investigating officer, left no ambiguity that the accused were identified in the bulb light which confirms that at the time of incident the darkness had prevailed and that the identity of the accused was possible only and only in the light of the bulb. As while reporting the matter the complainant remained silent that how the assailants were identified, so the introduction of the bulb is after thought and the same could not convince the judicial mind of this Court. The investigating officer, when appeared before the trial Court stated that the same was recovered at a belated stage and even the statement of the owner

of the house, from whose house the same was removed, was not recorded. When such is the state of affairs then this Court is not ready to accept the availability of the bulb at the time of incident and that in such eventuality the identity of the culprits could not be established on the record.

12. The number of accused has been exaggerated as for the death of the deceased and for the injuries of the complainant as many as five persons were charged, who were allegedly armed with sophisticated weapons, but the number of injuries on the dead bodies of the deceased and that on the complainant are the factors which run in conflict with the statements of the witnesses and report of the complainant. Had all the accused fired then the number of causalities would have been more than the one in hand and that the eyewitnesses would have not survived. The record tells that as many as five male members of the same family are charged and that it is for the prosecution to convince that all of them participated in killing of the deceased and causing injuries to the complainant. Another intriguing aspect of the case is, that the investigating officer during spot inspection collected 14 empties from the spot, but the same were not sent to the Fire Arms Expert to

determine that the same were fired from one or different weapons. Had a single accused been charged then it was less important to send the recovered empties to the laboratory but in case of five accused it was obligatory, but its non-sending to the expert is a circumstance which the prosecution could not overcome and which has damaged the prosecution case beyond repair. It is important to note that in the site plan Point B is given to the empties which are lying just behind Point No.6& 7 and the same cannot be taken to have been fired by all the five accused. Now this is for the prosecution to tell that who out of the accused fired the fatal shots. Once the effective role of the fire shots has been attributed to all the accused, then it was for the prosecution to prove that all the accused actively participated, but the circumstances suggest that the number of accused has been exaggerated. The exaggeration on part of the prosecution is a circumstance which shook the very foundation of the prosecution case and that despite efforts the witnesses could not reconcile. No ambiguity is left that on one hand the witnesses suffer from contradictions whereas on the other the number of accused has been exaggerated, this particular situation has beautifully been dealt with by the High

Court of Sindh in a case reported as **"Waleed Shah Vs The State" (2022 P Cr. L J Note 1)** which reads as:-

> "It is, therefore, obvious that the complainant has implicated as many persons as possible from the accused side. The net was thrown wide deliberately in order to ensure that no male member from the accused side was spared to pursue the criminal case."

13. There is no denial to the fact that the complainant was shifted to the hospital in injured condition, but there is no denial from the fact as well, that the complainant received injuries on the most vital parts of his body. In order to ascertain as to whether at the time of report the complainant was conscious and oriented in time and space, we deem it essential to go through the statement of the scribe, to whom the report was made and to read the statement of the doctor who examined the injured complainant. It is interesting to note that while reporting the matter, that too, in the hospital the scribe did not feel the need to ask from the doctor, a certificate, regarding the capability of the complainant to talk, admittedly, neither any certificate was obtained from the doctor, nor an opinion of the doctor was sought to confirm that the complainant was capable to talk. The severity of injuries on body of the complainant is a factor which

cannot be lightly ignored and the same has increased the anxiety of this Court regarding his physical condition at the time, when he allegedly, reported the matter. The doctor was examined as PW-4 who stated that the injured was produced to him alongwith the injury sheet and that thereafter the injured was examined and his medico legal certificate was prepared. The doctor also confirmed that no opinion was asked by the scribe at the time of report and that he was not associated with the process. When on one hand it is admitted on record that prior to report the doctor was not consulted, no certificate was asked regarding the capability of the complainant to talk and on the other the scribe was not a medical expert, then in that eventuality the report of the complainant needs corroboration from independent sources. The issue in hand has been dealt with by the august Peshawar High Court, Peshawar in a judgment reported as **"Wakeel Khan Vs the State and another" (2021 YLRN 62).**

> "This is pertinent to mention that despite the fact that the complainant was seriously injured with having multiple firearm injuries on his person but the scribe did not feel the need to consult the doctor and to request a certificate as to whether the injured by then was capable to talk and oriented in time and space. The scribe (PW-06) stated that as the patient was conscious and capable to talk so he did not feel the need either to consult a doctor before the report or to ask for a certificate, the conduct of the scribe is not only

> abnormal but unnatural as well. There is no denial to the fact that the matter was reported in the emergency room of D.H.Q Hospital, Lakki Marwat but despite the availability of doctor and other concerned the scribe went reckless knowing the fact that his this conduct will put a greater impact to the prosecution case, as the only available evidence was the statement of the complainant."

14. As in the instant case the eyewitness failed to establish his presence on the spot at the time of incident and also thereafter, so the sole statement of the complainant, which too, is suffering from inherent defects, by its self is not sufficient to hold the appellant and rest of the accused responsible for the tragedy. This is intriguing to note, that twice the signature of the complainant was obtained, on the *murasila,* but the scribe could not convince that why such an unusual exercise was under taken, his failure to explain, by itself is sufficient to tell that soon after his arrival the complainant was not in senses to report and that his signature was put by the eyewitness. It was after the complainant regained his senses that his genuine signature was obtained. When such is the conduct of the witnesses and when such is the conduct of the scribe, then it is for the prosecution to suffer.

15. The medical evidence is in conflict with the ocular account, as on one hand the consciousness

of the complainant, at the time of report, could not be established and on the other the number of injuries are not in consonance with each other, so we are confirmed that the medical evidence is in conflict with the ocular account. This conflict between the two has further created dents in the prosecution case and has added much to the scale of the appellant. True that medical evidence is confirmatory in nature and in presence of eyewitness account the same plays a little role, but we cannot ignore, that in case the witnesses are not worthy of credence, then in that eventuality, the conflict between the two plays a decisive role, more particularly, in determining the liability of accused charged.

16. The record tells that the motive between the parties was a previous ill-will and in that respect few FIRs are available on file, but the offences, for which some of the accused were charged, in those FIRs, were trivial in nature and the same would hardly urge the accused to eliminate the deceased. Even the investigating officer could not gather supportive evidence in that respect. As the manner in which the incident occurred does not appeal to a prudent mind and even in respect of the motive no independent witnesses were produced, which could

confirm that the motive was the only cause for the instant tragedy. True that weakness or absence of motive is hardly a ground to acquit the accused charged, but equally true that when motive is the constituent part, then the prosecution is under the obligation to prove the same and its failure will help only and only the accused charged.

17. The incident occurred way back in the year 2008, whereas, the convict-appellant has been arrested, on 20.07.2018 and that he failed to explain his long absence from the law enforcement agency, but we cannot forget that abscondence alone is not sufficient to convict, rather the prosecution must come with strong evidence in support of its claim and in that eventuality the abscondence is a factor which can be taken into consideration. In the instant case the witnesses failed to convince of their presence on the spot and to convince of the manner in which the incident occurred, so in the attending circumstances of the case the long abscondence on part of the appellant is hardly a ground to be pressed into service.

18. The cumulative effect of what has been stated above leads this Court to an irresistible conclusion that the prosecution failed in bringing home guilt against the appellant, and that the impugned

judgment is suffering from inherent defects, which calls for interference. The instant criminal appeal is allowed, the impugned judgment is set aside. The appellant is acquitted of the charge leveled against him. He be set at liberty forthwith, if not required to be detained in connection of any other criminal case.

19. As the appeal against conviction has succeeded so the connected criminal revision bearing No.182-P/2021 has lost its utility and the same is dismissed as such.

JUDGE

JUDGE

Announced
09.05.2023

Ihsan PS