JUDGMENT SHEET

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

(Judicial Department)

Cr.A. No.55-D/2017.

State through Advocate General
Khyber Pakhtunkhwa, Peshawar
Vs
Sajid Munir

JUDGMENT

For Appellant: Mr. Rehmatullah, Asstt: A.G.

For Respondent: Mr. Saif ur Rehman Khan, Advocate.

Date of hearing: **27.6.2022**

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MUHAMMAD FAHEEM WALI, J.- This appeal calls in question the judgment dated 25.5.2017, rendered by the learned Additional Sessions Judge-VI, D.I.Khan, whereby the respondent has been acquitted of the charges in case FIR No.115 dated 17.3.2014, under Sections 302, 324, 337(iii) PPC of Police Station City, D.I.Khan.

2. The prosecution story as disclosed in the FIR Ex: PA, registered on the basis of murasila, in brief, is that on 17.3.2014 at about 19:40 hours, complainant Muhammad Kamran (PW-7), while accompanying his injured mother Mst. Nahid Akhtar, aged about 50/55 years alongwith his nephew Muhammad Hassan, aged about 3/4 years and his son Muhammad Rizwan, reported the matter to

Rustam Khan S.I. at emergency room of civil hospital, D.I.Khan, to the effect that he alongwith his mother took Muhammad Hassan to Dr. Salim and were returning in a Qingqi rickshaw driven by him; that he stopped his rickshaw and went to purchase bread/Roti from a Tandoor alongside Green Marriage Hall; that it was about 7:30 hours (evening) that his uncle i.e. the accused/respondent, armed with pistol came there and started firing at his mother and nephew Muhammad Hassan, as a result whereof, they both sustained injuries. The occurrence was stated to be witnessed by his uncle Muhammad Azam (PW-8) and other people present on the spot. Motive for the offence was stated to be a domestic dispute. He charged the accused for the commission of offence. Subsequently, mother of the complainant died in the hospital.

3. On completion of the investigation, complete challan was submitted against the accused to the learned trial Court, where at the commencement of the trial the prosecution produced and examined as many as twelve witnesses, whereafter, accused was examined under section 342, Cr.P.C., wherein he denied the allegations and professed innocence, however, neither he opted to be examined on oath in terms of Section 342, Cr.P.C. nor produced defence evidence. After conclusion of the trial, learned trial Court vide judgment impugned herein acquitted the accused, hence the instant criminal appeal.

4. We have heard the learned Assistant Advocate General and the learned counsel for the respondent, and scanned the record with their valuable assistance.

5. Although the accused/respondent earned acquittal after a full-dressed trial, however, this being the Court of appeal is under its legal obligation to re-assess the already assessed evidence in order to arrive at a just conclusion. The matter was reported at emergency room of civil hospital by the complainant (PW-7), who while reporting the matter stated that he alongwith his mother took Muhammad Hassan to Dr. Salim and after taking medicine they were returning in a Qingqi rickshaw driven by him, he stopped his rickshaw and went to purchase bread/Roti from a Tandoor alongside Green Marriage Hall, it was about 7:30 hours (evening) when the accused/respondent, armed with pistol came there and started firing at his mother and nephew Muhammad Hassan, as a result whereof, they both sustained injuries and subsequently his mother succumbed to her injuries in the hospital. In the report, he introduced his uncle Muhammad Azam (PW-8) to be the eyewitness of the occurrence. So, this case mainly hinges on the testimony of complainant and his uncle Muhammad Azam and this Court is to scrutinize their testimony in order to see as to whether the occurrence took place in the mode, manner and at the stated time and as to whether both the witnesses were present on the spot at the

time of occurrence. The examination-in-chief of the complainant if placed in juxtaposition with the contents of FIR, same belies the FIR regarding mode and manner of the occurrence inasmuch as, same depicts that dishonest improvement has been made by the complainant with regard to number of fire shots, which fact was never mentioned in the FIR. It is also surprising when he stated that he took both the injured to emergency of DHQ hospital D.I.Khan and after a while the doctor came out and told him that his mother had died and that it was about 7/7:30 PM, whereas the time of occurrence is also 7:30 PM, while the matter was reported at 7:40 PM. It is also surprising when the complainant in the same breath stated that "after that my elder brother brought my nephew to DHQ Hospital D.I.Khan who was also injured with firearm". From this narration, it can safely be concluded that the complainant was not present on the spot at the time of occurrence. The matter does not end here, as the complainant further stated in his examination-in-chief that on the next day police took them to the spot, which is negated by the statement of the Investigating Officer as well as the recovery memo prepared on 17.3.2014, so much so the Investigating Officer stated to have visited the spot on said date at 9:00 PM. While going through cross-examination, we found the same as shaky and not worth reliance. In case titled

"Muhammad Mansha Vs. The State" (2018 SCMR 772), it was held by the Honourable Supreme Court of Pakistan that:-

> ***"Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statement. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence."***

6. The second alleged eyewitness Muhammad Azam was examined as PW-8, who stated that "they were coming back from doctor, stopped near Marriage Hall to purchase Roti; that suddenly the accused made firing and then he killed". During his statement it was observed that the witness was not deposing in a coherent way and seemed quite oblivion and disoriented and that he was speaking in general and quite inadequately. This statement by itself is not sufficient to be relied upon for sustaining conviction, that too, on a capital charge, as it clearly depicts that he was not present on the spot at the time of occurrence. Had he been present on the spot, the complainant while reporting the matter must have mentioned his company while taking his nephew to the doctor, rather his name was mentioned at the end of story to have witnessed the occurrence. His presence is nowhere established from any independent evidence. Needless to mention

that as earlier stated, the complainant stated in his examination-in-chief, that "After that my elder brother brought my nephew to DHQ Hospital D.I.Khan who was also injured with firearm". It is pertinent to mention here that Bashir Ahmad, father of the complainant and husband of the deceased was examined before the Court as PW-2, who is also identifier of the dead body. He contradicted both the complainant and alleged eyewitness by stating in his cross examination that at the time of occurrence he was present in his house situated at a distance of about 200 yards; that report was made in his presence; that he proceeded to the hospital from his house when he got information regarding the occurrence. Surprisingly, he stated that when he was at home, his brother brought the minor injured and then he took him to the hospital, that his brother did not accompany him to the hospital rather Muhammad Rizwan and he took the minor to the hospital on a motorcycle and they reached the hospital at 8:00 PM; that when he reached to the hospital, he found his sons Kamran and Adnan alongwith the dead body of his wife. He admitted that he had not signed the report lodged by his son. He also admitted that he was not eyewitness of the occurrence.

7. Dr. Farhat Jabeen SMO conducted autopsy on the dead body of deceased on 17.3.2014 at about 9:15 hours. During examination of the dead body she observed entry wound over left

angle ½" length of mandible below ¼" breadth left ear (went through/through till exit No.1), an entry wound over scalp left side temporal area ½" length & ¼" width, exit No.1 over right cheek ½" length and ¼" width, exit No.2 bleeding and entry continued. She also observed that scalp, skull, brain and membrane were injured. She mentioned probable time between injury and death to be 1/2 to 1 hour, time between death and postmortem as 1 to 1/2 hours. During cross examination, she stated that the names of identifiers on postmortem report are not in her handwriting and she did not know who had written those names. She stated that they do not write names in the column meant for identification of the dead body, rather same are to be written by identifier of the dead body himself. Similarly, Dr. Ghulam Muhammad SMO was examined as PW-9, who examined injured Muhammad Hassan on 173.2014 at 7:45 PM, who observed firearm entry wound at the poster lateral aspect of right mid chest and one bullet recovered from the patient's chest by a surgeon which was handed over to police. It is pertinent to mention that the matter was reported at about 19:40 hours, whereas the injured was examined at 7:45 PM. The time of examination of the injured by the doctor suggests that the witnesses were telling a lie regarding shifting the injured from the spot to his house and subsequently to the hospital.

8. It is 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. Reliance in this regard is placed on case ***Muhammad Khan and another Vs. The State, 1999 SCMR 1220.*** In the case reported as ***Irfan Ali Vs. The State (2015 SCMR 840)***, it was observed that:-

> ***"To award a capital punishment in a murder crime, it was imperative for the prosecution to lead unimpeachable evidence of a first degree, which ordinarily must get strong corroboration from other independent evidence if the witnesses were interested or inimical towards the accused".***

9. The Investigating Officer namely Faqir Muhammad Ameer was examined as PW-12, who stated to have prepared the site plan on the pointation of complainant, collected blood stained earth from the place of the deceased, two empties of .30 bore pistol, took into possession veil and a led bullet sent by the doctor, blood stained scarf belonging to the deceased, Qingqi, .30 bore pistol recovered from the accused alongwith three live

cartridges of same bore. He stated that the accused was arrested from Nizam Gate barricade by police constables namely Attaullah, Jan Bahadar and Farmanullah and was handed over to him on the same day. After receipt of FSL report as well as Arms Expert report, he annexed the same on file. During cross examination, he admitted that he had not taken into possession the registration book of the Qingqi rickshaw. It is an element of surprise when he stated that the entire proceedings were conducted in the light of torch. It is also astonishing that despite availability of proprietor of Tandoor, namely Abdul Hameed, neither he was cited as witness to the occurrence, nor he was associated with the investigation. On the request of defence counsel parcel No.3 was opened where it contained two empties of .30 bore pistol, however, the witness admitted that he had not mentioned the spare magazine in any recovery memo. He admitted that he himself had not recovered any weapon or ammunition from the accused, rather same were handed over to him by one constable Atta Ullah No.7457. Astonishingly, said Atta Ullah constable was not produced before the Court to support the Investigating Officer, rather he was abandoned by the prosecution. Even otherwise, arrest of the accused and recovery of pistol from the accused has become doubtful in view of the statement of Jan Bahadar constable, who was examined as PW-5.

He stated that he is marginal witness to the recovery memo vide which the Investigating Officer during personal search of the accused recovered and took into possession one pistol .30 bore i.e. weapon of offence alongwith three rounds of the same bore. It is also surprising when he stated during cross examination that Investigating Officer of the instant case got arrested only accused facing trial in his presence and no other proceeding was conducted by him in his presence either on the spot or in the police station. In this view of the matter, such recoveries have lost their evidentiary value, which could not be relied upon for safe dispensation of justice. Moreso, according to this witness the case property was sent to FSL by Moharrir concerned, however, statement of Moharrir was not recorded by him. It is pertinent to mention here that the crime empties were allegedly effected from the spot on 17.3.2014 and as per prosecution version, the accused was arrested with .30 bore pistol on said date, however, the crime empties alongwith .30 bore pistol were sent to the FSL on 20.3.2014. It is not established on the record that where remained the aforesaid articles during the intervening period till those were sent to the FSL. Neither Moharrir nor the official who allegedly took the said articles to the FSL were examined to ascertain the safe custody of same till their dispatch to the FSL. Even otherwise, it is now well settled that such type of evidence

(recoveries) is a corroborative piece of evidence and where direct evidence fails, corroborative piece of evidence is of no avail. Reliance placed on the case reported as ***Dr. Israr-ul-Haq Vs. Muhammad Fayyaz and another (2007 SCMR 1427), Muhammad Jamil Vs. Muhammad Akram and others (2009 SCMR 120), Abid Ali and 2 others Vs. The State (2011 SCMR 208), Muhammad Nawaz and others Vs. The State and others (2016 SCMR 267) and Tariq Zaman Vs. Muhammad Shafi Khan and 2 others (2018 MLD Peshawar 854).***

10. The prosecution alleged motive to be a domestic dispute, however, no reliable evidence was led in this respect to establish the motive. Although, it is well settled principle of law that prosecution is not bound to setup a motive in every case but once it is alleged, it become duty of prosecution to prove the same and otherwise to suffer consequences thereof. In case titled ***"Muhammad Ashraf alias Acchu Vs. The State" (2019 SCMR 652)***, it was held that:

> ***"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but***

> ***it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."***

In case titled "***Irfan Ali Vs. The State" (2015 SCMR 840),*** it was held that:-

> ***"To award a capital punishment in a murder crime, it is imperative for the prosecution to lead unimpeachable evidence of a first degree, which ordinarily must get strong corroboration from other independent evidence if the witnesses are interested or inimical towards the accused. In a criminal trial no presumption can be drawn against the accused person as it is a cardinal principle of justice that no one should be construed into a crime without legal proof/evidence, sufficient to be acted upon. No care and caution was observed in the present case in light of this principle. No evidence of believable nature was led with regard to the motive in the case to lend support to the prosecution version".***

11. The learned trial Court after proper reappraisal of evidence available on record, has rendered findings of acquittal in favour of respondents. In the cases titled ***"Raja Khurram Ali Khan and 2 others Vs. Tayyaba Bibi and another" (PLD 2020 Supreme Court 146)*** the august Supreme Court was pleased to hold:-

> ***"---Double presumption of innocence---Interference---Scope---In appeals against acquittal, the accused had a double presumption of innocence; the first when he was charged and tried and, the second arising on his acquittal---Dislodging such double presumption should be sparingly exercised by the Appellate Court, and that too, if the conclusion drawn was not based on fair reading of evidence, perverse, arbitrary or wholly unreasonable---Interference by the appellate Court in an acquittal order of the Trial Court merely for the reason that another view of the evidence was possible, would not be legally correct---However, if the very principle of appreciation of evidence was erred, and had caused failure of justice, then the order of acquittal would warrant to be set aside."***

12. In view of the above, this Court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/respondent. This is one of the celebrated principles of criminal jurisprudence that accused is the favourite child of law and he has a presumption of innocence in his favour and every benefit of doubt goes to him regardless of fact whether he has taken any such plea or not. Reliance may be placed on the case titled ***"Farvad Ali Vs. The State" (2008 SCMR 1086) and "Sher Zad Khan and another Vs. Mst. Zulekha and another" (2016 P.Cr.L.J. 541 Peshawar).***

13. The learned trial Court has correctly appreciated the evidence available on the file and the impugned judgment being well reasoned does not suffer from any infirmity which could call for interference. Accordingly, this criminal appeal being bereft of merits is dismissed.

Announced.
Dt: 27.6.2022.

Kifayat/PS

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Ijaz Anwar
Hon'ble Mr. Justice Muhammad Faheem Wali