

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

J. CrI. Appeal No.759-P/2019

Mujahid son of Hikmat Khan,
R/O Allah Dher, Tehsil Lahor,
District Swabi.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant	:-	<u>Mr. Astaghfirullah Khan, Advocate.</u>
For State	:-	<u>Mr. Mujahid Ali Khan, Advocate.</u>
For Complainant	:-	<u>M/S Muhammad Khan & Aftab ud Din, Advocates</u>

Date of hearing: **26.01.2021**

JUDGMENT

ROOH-UL-AMIN KHAN, J:-At a trial held by learned Additional Sessions Judge-II/Camp Court Lahor Swabi, Mujahid, the appellant, having been found guilty of the offences under sections 302, 392 PPC and section 15 KP Arms Act, 2013 vide judgment dated 25.05.2019, has been convicted and sentenced as under:-

Under section 302 (b) PPC:- Death as Ta'azir on two counts for committing murder of Suleman and Abbas deceased and to pay Rs.5,00,000/- as compensation in terms of section 544-A Cr.P.C., to legal heirs of the deceased and in default thereof to further undergo 06 months simple Imprisonment (S.I.).

Under section 392 PPC:- To undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,50,000/- on in default

thereof to further undergo 03 months S.I. each.

Under section 15 KP Arms Act, 2013: To undergo rigorous imprisonment for one year and to pay a fine of Rs.20,000/- or in default thereof to undergo one month S.I.

The sentences of imprisonment shall run concurrently. Benefit of section 382-B Cr.P.C., has been extended to the appellant.

2. Through the instant Jail Criminal Appeal, the appellant-convict has questioned his conviction and sentences, whereas, the learned trial Court has sent **Murder Reference No.17-P/2019** for confirmation of death sentence of the convict.

3. As the matters are emanating from one and the same judgment dated 25.05.2019 of the learned trial Court, therefore, we propose to decide the same through this single judgment.

4. The prosecution case as unfolded in the First Information Report (FIR) Exh.PA is that on 09.12.2014, on receipt of information regarding presence of dead bodies of two unknown persons in the fields of Yar Ali Khan, situated at the bank of river Indus, Noor-ul-Islam SI (PW.6) along with other police officials reached the spot, where he noticed dead bodies of two young unknown persons done to death with firearms. He drafted *Murasila* Exh.PA/1, wherein he mentioned detailed features of the two deceased and sent the same to Police Station, on the basis of which,

FIR No.482 dated 09.12.2014 (Exh.PA) was registered in Police Station Lahor District Swabi against unknown culprit(s). Noor-ul-Islam SI (PW.6), also took into possession a motorcycle parked near the dead bodies vide recovery memo Exh.PW.6/1, prepared injury sheets and inquest reports of the deceased and obtained fingers prints of the deceased vide Exh.PW.6/3. Muhammad Ilyas and Aqil Muhammad (fathers of the two deceased) identified the dead bodies, he prepared identification memo Exh.PW.6/4 and sent the dead bodies RHC Kunda for autopsy under the escort of Ishtiaq FC, where Dr. Mubazir Ahmad (PW.1) conducted post mortem, reports of which is Exh.PM and Exh.PM/1 and opined the cause of death of the two deceased to be result of firearm injuries.

5. The task of investigation was entrusted to Aurangzeb Khan SI (PW.7), who proceeded to the spot and prepared site plan Exh.PB at the instant of Noor-ul-Islam Khan S.I. During spot inspection, he secured bloodstained earth and grass from the places of the deceased through recovery memos Exh.PW.7/1 and Exh.PW.7/2, respectively and also took into possession 06 empties of 30 bore Exh.P.8 and Exh.P.9, lying in scattered position at the spot vide recovery memos Exh.PW.7/3 and Exh.PW.7/4. Vide recovery memo Exh.PW.7/5, he took into possession the last worn bloodstained garments of the two deceased, sent the

bloodstained articles to the FSL for analysis. The appellant was arrested by relatives of the deceased Suleman and handed over to Zahid SHO on 15.11.2014 vide arrest card Exh.PW.7/14. PW.7 obtained police custody of the appellant, interrogated him and recorded his statement under section 161 Cr.P.C.

On 16.11.2014, statement of Yaqoob Khan (father of deceased Suleman) got recorded by the learned Illaqa Judicial Magistrate under section 164 Cr.P.C. wherein he charged the appellant for commission of the offence. On the alleged pointation of the appellant, the I.O. recovered .30 bore crime pistol along with 15 live rounds of the same bore and a spare charger Exh.P.10 from a hay dump situated in the landed property of one Shah Rasool. Similarly, a mobile Nokia set and cash amount of Rs.1,19,000/- consisting of 107 currency notes were also recovered on the pointation of the appellant from the said hay dump. The I.O. (PW.7) prepared pointation memo Exh.PW.7/19, sent the pistol along with six empties of 30 bore to the FSL for analysis, prepared identification memo Exh.PW.7/23 vide which Yaqoob Khan father of Suleman deceased identified the amount of Rs.1,19,000/-, and nokia mobile set recovered on the pointation of the appellant. He placed on file the positive Serologist report Exh.PK, recorded statements of the PWs under section 161 Cr.P.C. and after completion of

investigation handed over case file to the SHO, who submitted complete challan against the appellant.

6. On receipt of challan by the learned trial Court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as ten witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted to produce evidence in defense. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant as mentioned above, hence, this appeal and murder reference.

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

8. It appears from record that it is a case of no eyewitness because no one has come forward to furnish ocular account of the occurrence. As per Murasila Exh.PA/1, the dead bodies of Suleman and Abbas deceased were lying at the bank of Indus river in the fields of Yar Ali Khan which were shifted by Noor-ul-Islam S.I. (PW.6) to RHC Kunda on 09.12.2014. On the same day, Yaqoob Khan and Aqil Khan, fathers of deceased Suleman and

Abbas, respectively, identified the dead bodies before the police. Site plan Exh.PB totally negates the version of Noor-ul-Islam SI (PW.6) and contradicts the place of occurrence shown in the Murasila Exh.PA/1. In the latter document, the place of occurrence is shown as “*Kinara Daryay-e-Sindh Arazi Yar Ali Khan*” (river bank of Indus) whereas in the site plan Exh.PB, prepared by the I.O. on the pointation of Noor-ul-Islam (PW.6), the crime scene has been shown in the courtyard of Rest House of Yar Ali Khan, situated near Indus River. Said Yar Ali Khan was an important witness to explain about visit of the deceased to his rest house and events occurred on the day of occurrence, but he has neither been made as an accused nor examined by the I.O. under section 161 Cr.P.C. nor cited as a prosecution witness. The above circumstances create serious doubt about the place of occurrence.

9. Further evidence relied upon by the prosecution is the testimony of Yaqoob Khan, father of Suleman deceased (PW.4), recovery of .30 bore pistol, Nokia mobile set and Rs.1,19000/- on the pointation of the appellant as well as positive FSL report in respect of the pistol and 06 empties recovered from the spot.

10. Yaqoob Khan while appearing as PW.4 reiterated the version set forth by him in his statement under section 164 Cr.P.C. i.e. that he along with his son Suleman deceased

was running Arms and ammunition shop at Jehangira Bazaar. A month prior to the occurrence, appellant Mujahid, visited their shop and offered ten number of .30 bore pistols for sale, which were purchased from him by Suleman deceased. The appellant gradually developed relation with them. On the day of occurrence i.e. 09.12.2014, early in the morning, the appellant visited their shop and told Suleman deceased that he has some arms which he wants to hand over to him. At 10 A.M Suleman deceased along with his brother-in-law Abbas deceased took Rs.2,50,000/- with them and left the shop on a motorcycle 70 CC to meet the appellant, however, they did not return home till evening. He started search for them and also tried on their cell numbers to contact them but in vain. After evening, one Amjad son of Gul Rehman came and told him that the local police have shifted dead bodies of two persons to RHC Kunda. On this, he along with Aqil Muhammad (father of Abbas deceased) proceeded to PS Lahor and saw dead bodies of their sons and their motorcycle in the Police Station. He charged the appellant for murder of the deceased and forcibly snatching Rs.2,50,000/- from the deceased. He stated that on 22.12.2014, he identified cash amount of Rs.1,19,000/- and Nokia mobile of Suleman deceased recovered by the police on the discovery of the appellant from a hay dump.

11. Before adverting to cross-examination of PW Yaqoob Khan, we would refer to arrest card of the appellant (Exh.PW.7/14) wherein his arrest has been shown on 15.12.2014. According to statements of Yaqoob Khan (PW.4) and Muhammad Zahid (PW.3), the appellant was arrested by relatives of Suleman deceased at Jehangira Chowk within the jurisdiction of District Nowshera and then shifted to Swabi and handed over to Zahid Khan SHO Swabi. The factum of arrest of the appellant by relatives of deceased Suleman is also established from record. The relatives of the deceased who arrested the appellant have neither been examined by the I.O. nor cited as prosecution witnesses. Statement u/s 164 Cr.P.C. of Yaqoob Khan (PW.4) was recorded on 16.12.2014 i.e. on the next day of arrest of the appellant. Fact as to how and on the basis of which sources and circumstances relatives of the deceased got satisfied themselves about complicity of the appellant in the commission of offence has neither been explained by PW Yaqoob Khan nor by the Investigating Officer nor by Muhammad Zahid (PW.3). The story narrated by the PW Yqoob Khan in his statement has never been disclosed by him before the police on the very first day of the occurrence when he identified the dead body of his deceased son or since 09.12.2014 (the date of occurrence) till 16.12.2014 (the date of arrest of the appellant). If he was in the

knowledge of all events alleged by him in his statement under section 164 Cr.P.C, recorded after arrest of the appellant, he could have easily disclosed the same before the police on the very first day of the occurrence or at least he could mention before the police that on the eventful day the two deceased left shop along with cash amount to meet the appellant for the purpose of purchasing arms from him. Yet there is another thing which pinches a prudent mind about the belated version of PW Yaqoob Khan i.e. if the appellant could bring ten pistols to his shop prior to the occurrence for sale then what was the reason which prompted him to call the deceased for selling arms to him at another place. In cross-examination PW Yaqoob Khan deposed that he has not produced any witness regarding last seen of the deceased in the company of the appellant. He also denied recording of his statement under section 161 Cr.P.C. and statement u/s 164 Cr.P.C. recorded by the Judicial Magistrate. He admitted that appellant was overpowered by his relatives in Jehangira Bazaar and handed over to the local police on **09.12.2014**, which negates the arrest card of the appellant wherein arrest of the appellant has been shown on 15.12.2014. As per statement of Yaqoob khan he along with the father of deceased Abbas arrived at police station Lahore, where they saw the dead body of their sons and motorcycle. Perusal of inquest report

and postmortem report show that the corpse of both the deceased had not been identified by any person. It suggests that the PW Yaqoob Khan has never been to Police Station Lahore as no one was available as identifier at RHC Kunda, Swabi. The belated uncorroborated testimony of PW Yaqoob Khan seems to be a cook and bull story in which he has tried to implicate the appellant for commission of the offence for the reason best known to him. In this view of the matter, the learned trial Court has landed into the field of error by believing and relying upon the testimony of PW Yaqoob Khan for the purpose of conviction.

12. As regards positive FSL report in respect of 06 empties of 30 bore, shown recovered from the spot and 30 bore pistol, Nokia mobile set and Rs1,19000/- in cash, shown recovered on the pointation/discovery of the appellant from a hay dump (Bosarra), one may easily observe that the said hay dump (Bosara), has been shown situated in the fields of one Shah Rasool. The said Shah Rasool has neither been cited as a witness to the recovery proceedings nor his statement with regard to existence of the hay dump (Bosarra) has been recorded to substantiate that the alleged Bossara was his ownership and whether it was open and in use or sealed (not yet opened). Similarly the I.O. has also not clarified in the pointation memo as to whether the hay dump was open (in use) or sealed. Even

otherwise, cash amount and mobile set which can easily be accommodated and adjusted in pockets, its concealment in a hay dump of a stranger does not appeal to a prudent mind. Besides, the place of alleged discovery is situated in an open field, surrounded by fields of different people, hence, easily approachable; therefore, it would not be safe that such piece of evidence be made a basis for conviction of an accused in a capital charge, that too, in a case of no ocular account. The testimony of Noor ul Islam SI (PW.6), who reached the spot at first instance, totally shatters the evidentiary value of the alleged crime empties. In cross-examination, he deposed that he had not seen any empty shell in the surroundings of the spot. In this view of the matter, recovery of 06 empties by the I.O., who visited the spot at 6.00 A.M. in the month of December, when there remains complete dark at such time, seems to be planted and maneuvered evidence.

13. Yet there is another crucial aspect of the prosecution case that the 06 crime empties have been shown recovered from the spot on 09.12.2014, but were sent to the FSL on 23.12.2014 along with the 30 bore pistol shown recovered on the pointation of the appellant on 17.12.2014. Where the empties remained since 09.12.2014 till 23.12.2014 and whether these were in safe hands, has not been explained by the prosecution in its evidence. Similarly, no explanation

has been furnished by the prosecution regarding safe custody of the pistol since 17.12.2014 till its sending to the FSL on 23.12.2014. It is asserted in the evidence that PW Yaqoob Khan is running arms and ammunitions shop, therefore, the possibility remains that the pistol and empties might have been provided by PW Yaqoob Khan to the police and thereafter were sent together to FSL for analysis, report of which definitely be positive.

14. The matter of evidentiary value of the empties sent to the FSL with delay came up before the Hon'ble Supreme Court in case titled, *"Jehangir vs Nazar Farid and another"* (2002 SCMR 1986) wherein it was observed as under:-

“Accused was arrested on 01.02.1996, crime weapon was allegedly recovered from the accused on 12.02.1996 and the crime empties were received in the Laboratory on 19.02.1996. Such piece of evidence was not credible and was of no assistance to the prosecution against the accused in circumstances.”

Similarly, in case titled, *"Hamid Nadeem vs the State"* (2011 SCMR 1233), the Hon'ble Supreme Court has ruled that:-

“The crime weapon (pistol) which was recovered from the applicant on 08.07.2001 was handed over to PW.13 Kaleemullah Constable which he deposited in the office of FSL on 16.07.2001 and strangely, that too, with five live bullets for reasons best known to him. As stated above, the delay and safe custody has also not been explained. Report of FSL, in circumstances, loses sanctity especially in a case, with a capital charge, where abundant precaution is urgently required for safe administration of justice.”

15. Deriving guidance from the judgments (supra) of the Hon'ble Supreme and placing reliance thereupon, we are firm in our view to hold that this piece of evidence has no evidentiary value, therefore, has wrongly been relied upon by the learned trial Court.

16. Muhammad Yqoob (PW.4), in his statement under section 164 Cr.P.C., has neither given any description and features of Nokia mobile set of his deceased son nor has disclosed about denomination of the currency worth Rs.2,50,000/- allegedly taken by deceased Suleman to purchase arms from the appellant. In cross-examination he admitted that he has not brought any evidence that his son

took Rs.2,50,000/- with him. Further deposed that the motorcycle recovered from the spot was without number and he has not given any registration of the same to the police. That he identified the Nokia set and cash amount on 22.12.2014, however, no other mobiles or currency notes were placed with the recovered one at the time of identification. In this view of the matter, it would be unsafe to rely on such weak piece of evidence for sustaining conviction in a capital charge.

17. For what has been discussed above, on reappraisal of evidence, we have reached to an irresistible conclusion that it is a case of no ocular account and the circumstantial evidence brought on record by no stretch imagination is sufficient to prove the guilt of the appellant beyond shadow of reasonable doubt. The prosecution evidence is shaky and scanty as well as pregnant with doubts. It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single doubt is created, benefit of the same must go to the accused and entitled him for earning acquittal as the accused is always considered the most favorable child of law. Guidance in this regard can be derived from case titled, **“Tariq Pervaz Vs the State” (1995 SCMR 1345)** and case titled, **“Muhammad Akram Vs the State (2009 SCMR 230)** and **Faryad Alis 20 case (2008 SCMR 1086).**

18. The learned Trial Court has failed to appreciate the evidence in its true perspective and has arrived at an erroneous conclusion by holding the appellant guilty of the offence; hence, the impugned judgment is liable to be set aside.

19. Accordingly, this appeal is allowed. Conviction and sentences of the appellant recorded by the learned trial Court vide judgment dated 25.05.2019 along with the judgment are hereby set aside and the appellant is acquitted from the charge leveled against him. He be set at liberty forthwith, if not confined in any other case. On acquittal of the appellant, Murder Reference, sent by the learned trial Court is answered in the Negative.

20. These are the reasons of our short order of even date which is reproduced below:-

“For reasons to be recorded later, we, allow this appeal, set-aside the conviction and sentence of the appellant-convict, namely, Mujahid son of Hikmat Khan, recorded under section 302 (b) by learned Additional Sessions Judge-II/Camp Court Lahor, Swabi vide judgment dated 25.05.2019, in case FIR No.482 dated 09.12.2014, registered under sections 302/440 PPC read with section 15-Khyber Pakhtunkhwa Arms Act, 2013 at Police Station Lahor District Swabi and hereby acquit him from the charge leveled against him in the cited case. He be set at

liberty forthwith, if not confined in any other case.

On acquittal of the appellant-convict, **Murder Reference No.17-P/2019**, sent by the learned Trial Court in terms of section 374 Cr.P.C., is answered in the **Negative.**

Announced:
26.01.2021
M. Siraj Afridi PS

Senior Puisne Judge

JUDGE

* **DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Ijaz Anwar.**