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

JCr. A No. 76-M/2021

(Islam Wali *Versus* The State)

Present: M/S Hazrat Rahman and Aurangzeb, Advocates for appellant.

Mr. Saeed Ahmad, Assistant A.G. for State.

Date of hearing: **15.02.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This appeal has been preferred by appellant convict Islam Wali son of Hazrat Wali through Superintendent Central Prison Mardan, assailing the judgment of the learned Additional Sessions Judge Samarbagh Camp Court at Lal Qilla, dated 15.02.2021 rendered in case FIR No. 49 dated 28.04.2019 u/s 302 PPC of P.S Lal Qilla, District Lower Dir, whereby he was convicted u/s 302(b) PPC on the charge of committing murder of his brother Jamil-ur-Rahman and sentenced to undergo life imprisonment as *Tazir*. In addition, he was also burdened to pay Rs.200,000/- as compensation to LRs of deceased in terms of section 544-A, Cr.P.C or to suffer six months S.I in case he defaults in payment of compensation. Benefit of section 382-B, Cr.P.C was extended to him.

2. Complainant Alamzeb (PW-2), who had brought dead body of his brother Jamil (later on corrected as Jamil-ur-Rahman) to civil hospital Lal Qilla on 28.04.2019, reported to police at 09:15 hours that on the same day he was present in front of the deceased's shop while the deceased himself was inside his shop; in the meanwhile at 08:30 hours his brother Islam Wali (appellant) came there, drew out a pistol from his trouser-fold and fired two shots at the deceased whereby he got hit on his chest and abdomen. He died in the way when he was being carried to hospital Lal Qilla for medical treatment. Complainant, while disclosing the motive behind the occurrence as land dispute, claimed that he, his brother Ahmad Wali (PW-4) and Momin Khan (not produced) had witnessed the occurrence.

3. On the above report of complainant, SHO Shah Faisal Khan S.I (PW-1) drafted *Murasila* and sent the same to P.S where FIR referred to above was registered against the appellant. After preparation of injury sheet and inquest report of the deceased, the dead body was examined by Dr. Syed Munib-ur-Rahman M.O (PW-7) who recorded his findings in his reports Ex.PW-7/1 to Ex.PW-7/3, the detail of which is as under:

Q.1. No charring marks present.

Q: Beyond close range

- Date and time: 28 April 2019, 09:20 A.M

- Place of examination: Emergency Room Cat: "D" hospital Lal Qilla.
- Name: Jamil s/o Hazrat Wali. Sex: Male, Address: Raidgai, Maidan.
- Brought in and body identified by: Ahmad Wali s/o Hazrat Wali (NIC No. 15302-4563215-5).

I examined the dead body of Jamil s/o Hazrat Wali R/O Raidgai Maidan by the request of SHO, P.S Lal Qilla. His age was 45/46 years.

The dead body mentioned above was having the following injuries.

1) An entry wound on the front, chest of the body circular in shape, regular and inverted margins, clotted blood on the wound margins about 1/2" x1/2" inches size present in the left 3rd intercostal space left to parasternal line."

   While exit wound present on the back side of the body irregular in shape, with everted margins, size about 1x1" traces of blood oozing out from wound. Present on the right side below the inferior border of the sight scapula.

2) An entry wound on front of the body, circular in shape, regular, and inverted margins, about 1/2" x 1/2" size, clotted blood on the margins and around the wound the epigastric region, left to the mid line, below the xiphoid of the sternum.

   While exit wound present on the posterior aspect of the body (back) with irregular shape, everted margins about 1 ½" in the sight lumbar regions, right to the 3rd Lumbar vertebra and above the iliac crest. Traces of blood oozing out of the wound.

3) An entry wound present on the dorsal aspect on the left-hand little finger, distal inter phalangeal joint, circular in shape inverted edges about 1.0 cm in diameter.

   While exit wound present on the left-hand little finger, palmar aspect on the distal interphalangeal joint irregular in shape, everted edges, about 1.5 cm size, with no active bleeding.

Kind of Weapons used FAI

Cause of death: FAI to the vital of Organs.

Time since death: Probably 30 to 45 mins.

1) Injury sheet.
2) Out Patient department slip.
3) Postmortem report handed over to police Shah Zamin Khan ASI, investigations.

4. The appellant was arrested on 29.04.2019, the following day of the occurrence. After completion of investigation, final report was submitted against him before the Court for his trial on commencement of which he was formally indicted for the offence but he denied the allegation and opted to face trial. Prosecution produced and examined 08 PWs in support of its case against the appellant whereafter he was examined u/s 342, Cr.P.C during which he once again professed innocence, however, he neither recorded his own statement on oath in terms of section 340(2), Cr.P.C., nor produced any witness in his defence. On conclusion of trial, the learned trial Court found him guilty of the charge, and sentenced him through the impugned judgment in the manner already mentioned above, hence, instant appeal.

5. Arguments heard and record perused.

6. First of all, Cr.Misc. No. 109-M/2021 for condonation of delay sent by appellant alongwith the main appeal requires disposal. The record shows that the impugned judgment was passed on 15.02.2021 while the instant appeal was received in the Institution Branch of this Court on 12.03.2021, as such, the appeal has been filed within the stipulated time of 60 days under Article 155 of

the Limitation Act, 1908 as well as under Paragraph 10(8) of the Sharia Nizam-e-Adl Regulation, 2009 which provides maximum time of 30 days for filing of appeal. Thus, the application, being misconceived, is disposed of accordingly.

7. The present appellant has been charged for murder of his brother Jamil-ur-Rahman. It is the version of prosecution that he entered the shop of deceased on 28.04.2019 at 08:30 A.M and fired two shots at him as result whereof he sustained injuries on his chest, abdomen and little finger of his left hand. He was put in a vehicle in injured condition for taking him to civil hospital Lal Qilla but he succumbed to the injuries, as such, he was received dead in the hospital. Before discussion on ocular account and circumstantial evidence on record, the mode and manner of reporting the matter to local police needs consideration of this Court. As per contents of FIR, the occurrence was reported by complainant Alamzeb in civil hospital Lal Qilla on the same day at 09:15 hours which was recorded in shape of *Murasila* (Ex.PA/1) drafted by SHO Shah Faisal Khan S.I (PW-1). When appeared in the witness box, he exhibited *Murasila*, injury sheet and inquest report of the deceased as well as the memo regarding handing over of the dead body to his relatives but he admitted in his cross-examination that he himself had not prepared the documents rather ASI Aziz-

ur-Rahman had prepared the same on his dictation. Prosecution has not examined ASI Aziz-ur-Rahman before the Court to verify preparation of the exhibited documents on the dictation of SHO. The version of SHO with regard to lodging of the report in hospital was categorically belied by complainant who stated in his examination-in-chief that local police had drafted *Murasila* on the spot which was read over to him and thereafter he impressed his thumb thereon. Ahmad Wali (PW-4) stated in his examination-in-chief that after the occurrence, he put the injured in a vehicle, took him to hospital where the doctor declared him dead whereafter he brought back the dead body to house of the deceased. This witness has not uttered a single word in his examination-in-chief with regard to lodging of the report by complainant either on the spot or in hospital or preparation of the injury sheet and inquest report by police that where those documents were prepared or when post-mortem on the dead body was conducted. Three important witnesses of prosecution have narrated the mode and manner of report in quite different ways, as such, the status of *Murasila* at the instance of complainant Alamzeb has become suspicious. Similarly, the inquest report and injury sheet have also lost their evidentiary value because it cannot be ascertained from the evidence on record that when and

where the mentioned documents were prepared by police. No doubt, generally FIR by itself has not been considered by superior Courts as a substantive piece of evidence as the only purpose of this document is to set the law in motion but it does not mean that FIR should be kept out of consideration at all. The Hon'ble Supreme Court, while highlighting significance of FIR in the case of ***"Iftikhar Hussain and others Vs. The State"*** **(2004 SCMR 1185)**, observed that FIR has got a significant role to play, as the same is a corner stone of the prosecution case to establish guilt of the accused involved in the crime. Further held that any doubt in lodging of FIR and commencement of investigation gives rise to a benefit in favour of accused. In another judgment in the case of ***"Subhan Khan and others Vs. The State"*** **(PLD 1960 (W.P) Lahore 1)**, it was held that when the story in FIR, which is the basic version of prosecution, is modified by complainant, discovery of the real facts becomes more difficult for the Courts. Same situation emerges in the present case in light of the divergent versions of the PWs regarding one and the same fact, the ultimate impact of which is that it has rendered the entire case of prosecution highly doubtful qua the mode and manner of the occurrence. If the version of SHO is admitted as correct even then he has recorded a self-contradictory

statement suggesting concealment of real facts on his part. In his cross-examination, at one stage he denied his visit to spot on the day of occurrence stating that he had not seen the place of occurrence on the same day but in the same breath took a U-turn from his earlier statement and narrated that he had visited the spot afterwards, however, being not an investigating officer of the case, there was no justification of his visit to spot on the same day more particularly when *roznamchas* with regard to his departure and return to P.S are not available on record. Thus, the foundation on which the prosecution has based its case against the appellant is weak and unstable from the very inception, as such, the benefit of doubt arising from the above stated position of the prosecution case can safely be extended to appellant.

8. Complainant narrated in FIR that he as well as Ahmad Wali and Momin Khan had witnessed the occurrence. Complainant appeared in the witness box as PW-2 and reiterated the contents of FIR claiming that he and his brother Ahmad Wali had witnessed the occurrence, however, he skipped the name of Momin Khan contrary to his earlier version in the FIR. It is noteworthy that though Point No.5 was assigned to Momin Khan in the site plan but his name was not included in the calendar of witnesses

which manifests the intention of Investigating Officer for his non-examination during the trial proceedings. Although prosecution is at liberty to produce witnesses of its choice and is not bound to examine all the witnesses mentioned in the calendar of witnesses as observed by august Supreme Court in the case of ***"Mandoos Khan V/s. The State"*** **2003 SCMR 884** that prosecution must produce best kind of evidence to establish accusation against accused facing trial but simultaneously it has no obligation to produce a good number of witnesses because it has an option to produce as many as witnesses which in its consideration are sufficient to bring home guilt against the accused but in the present case the situation is altogether different. PW Momin Khan, who was an important and impartial witness of the occurrence was associated with the process of investigation but he was willfully kept out of the list of prosecution witnesses and no reason was mentioned by I.O for the said omission. Abandoning of a witness mentioned in the calendar of witnesses is, no doubt, the choice of prosecution but the reason for non-inclusion of a witness duly named in the FIR and associated with the process of investigation should have been explained by prosecution in plausible terms. Thus, best evidence was withheld by prosecution which leads us to draw an adverse inference in terms of

Article 129(g) of the Qanun-e-Shahadat Order, 1984 that PW Momin Khan, being an independent witness of the occurrence, wanted to disclose real facts of the occurrence before the trial Court but his truthful account was not supporting the version of prosecution as brought forth on the record, therefore, his name was not mentioned in the calendar of witnesses. Guidance is sought from ***"Muhammad Rafique and others Vs. The State and others"*** **(2010 SCMR 385).**

9. Adverting back to the statement of complainant Alamzeb (PW-2) who narrated in his report as well as in his examination-in-chief that he was present in front of the deceased's shop when the appellant came there and fired at deceased who was sitting in a chair inside his grocery shop. Admittedly, house of complainant was at a distance of 400 yards from the place of occurrence, therefore, prosecution was bound to show some credible reason for his presence in front of the deceased's shop at the time of occurrence, however, neither any such reason was shown by complainant nor any evidence is available on record to justify his presence on the spot at the relevant time. Although he voluntarily stated in his cross-examination that he was running a shop near the shop of deceased but he has introduced this fact for the first time during his cross-

examination. A fact not disclosed by a witness in his statement u/s 161/164, Cr.P.C or in FIR, if he is complainant, but introduces the same voluntarily for the first time during his cross-examination, would amount to dishonest improvement on his part if same has probative value, hence, such portion of the witness's statement can safely be kept out of consideration. Even otherwise, complainant is serving as Class-IV in a primary school and his stance regarding his own shop near the place of occurrence is nothing more than his bald assertion because neither the I.O has shown any shop of the complainant near the shop of deceased in the site plan nor any other witness has supported him qua his above assertion. His presence on the spot also appears doubtful in view of his unusual and unnatural conduct. Though he claims to have accompanied the deceased to hospital but his name has not been mentioned as identifier of the dead body in the inquest report or post-mortem report. This omission casts serious doubts about the presence of complainant at the spot. Wisdom is drawn from ***"Mst. Sughra Begum and another Vs. The State"*** **(2015 SCMR 1142)**. Even PW Ahmad Wali, whose name appears in the inquest and postmortem reports as identifier of deceased, has not uttered a single word with regard to presence of the complainant on the spot at the time

of occurrence. Thus, keeping in view the distance between the house of complainant and shop of deceased where he was done to death, non-mentioning of his name in the inquest and post-mortem reports and inconformity of other circumstantial evidence with his version of seeing the appellant firing at the deceased, we do not think it safe to rely upon his testimony which neither rings true nor inspires confidence.

10. Ahmad Wali, whose name has been mentioned as eye-witness of the occurrence in the FIR, appeared in the witness box as PW-4 and stated in his examination-in-chief that a mosque was situated at a distance of 20/25 paces from the shop of deceased where he was present. On hearing two fire shots, he came and saw the appellant coming out of the deceased's shop; he asked him as to whether he has killed his brother, in reply he said 'no' and kept on walking. As pointed out earlier, this witness while recording his examination-in-chief, has not uttered even a single word regarding presence of complainant on the spot. If the complainant was present there at the time of firing, he would have mentioned the natural reaction of PW Ahmad Wali soon after the occurrence and likewise Ahmad Wali would have also explained natural behavior of the complainant as can be expected from a person of ordinary prudence in such

like alarming situation. The appellant, deceased and both the PWs are brothers inter se, hence, the statements of both the witnesses should contain common narrations showing their joint actions at the relevant time towards the appellant as well as deceased, however, the statements of eye-witnesses show that they have acted independently at the time of occurrence against the normal course of business at such occasions. The overall scenario presented by the eye-witnesses in their respective statements indicates that they were unaware of each other, which was not possible in the circumstances presented by prosecution. The mentioned state of affairs leads us to the irresistible conclusion that neither complainant nor his brother Ahmad Wali was present on the spot at the time of occurrence otherwise they would have confirmed the demeanor of each other they had exhibited at the time of occurrence. It means that a false story was subsequently cooked up which on the face of it is unnatural and unbelievable. If viewed from another angle, the statement of PW Ahmad Wali clearly shows that he had not seen the appellant firing at the deceased rather he stated that he had seen the appellant coming out of the shop of deceased after the firing. In cross-examination he admitted in unambiguous terms that he had seen no one firing at the deceased. The most important aspect of the testimony of PW

Ahmad Wali is that, from the very beginning of the case, he was presented as eye-witness of the occurrence, therefore, the fair and just course for the learned trial Court was to accept or reject his testimony as eye-witness of the occurrence. In other words, status of a witness as mentioned in FIR cannot be changed afterwards for example if prosecution shows a witness as last seen evidence in the FIR, then his testimony is required to be considered in the same line and not otherwise. In the present case, PW Ahmad Wali was shown as eye-witness of the occurrence in the FIR and he was shown at Point-4 in the site plan at a distance of 16 feet from deceased whereas complainant was shown at a distance of 14 feet from him, as such, according to site plan the distance between complainant and PW Ahmad Wali was only two feet. PW Ahmad Wali was unable to establish his status as eye-witness of the occurrence rather he had seen no person at all firing at the deceased, therefore, his testimony was liable to rejection being doubtful but the learned trial Court has considered his statement against the appellant under the principle of res gestae by holding that he had seen the appellant coming out of the deceased's shop soon after the firing, which was neither the version of prosecution in FIR or in site plan nor the attending facts and circumstances of the case suggest that he had seen the appellant at the time

of leaving the shop of deceased after the firing. In this respect, a few lines of his cross-examination are worth perusal.

مسجد کے جانب غرب و جنوب دکانات واقع ہیں۔ میں مسجد کے جانب جنوب والے دکانات میں موجود تھا۔
یہ درست ہے کہ مذکورہ دکانات سے جائے وقوعہ نظر نہیں آرہا ہے کیونکہ درمیان میں مسجد واقع ہے۔

It is a matter of general observation that a person, after making firing upon another person, naturally tries to decamp from the spot as soon as possible but same phenomenon does not appear in the present case. Not only there was an intervening Masjid between the shop of deceased and the place of presence of PW Ahmad Wali in view whereof his version of seeing the appellant coming out from the shop of deceased is repellent to reason but on the other hand the PW has alleged that he had questioned the appellant with regard to murder of his brother. It is not believable that the appellant, after his alleged firing at the deceased, had stayed inside the shop till arrival of the witness. It is also astonishing that the PW has not mentioned the name of even a single other individual to have attracted to spot soon after the firing as per usual practice of people in such like situation, though many shops had been shown in the site plan opposite to the shop of deceased. Admittedly, the appellant, who is brother of the deceased and eye-witnesses, was residing at Peshawar alongwith his family. If

the appellant was not in good terms with his brothers because of land dispute per version of prosecution, then his alleged entry inside the shop of deceased was definitely a signal of alarm, in such situation, both the eye-witnesses were required either to protect the deceased or apprehend the appellant if he had already succeeded in targeting the deceased, but no such effort appears on behalf of the eye-witnesses in the entire evidence. It is not the version of PW Ahmad Wali that he had seen any weapon with the appellant at the time of his exit from the shop of deceased, hence, his apprehension by both the PWs was not a difficult task. Insofar as the testimony of widow of deceased is concerned, admittedly she is not an eye-witness of the occurrence rather she claimed to have seen the appellant fleeing from the spot after the firing. Complainant and PW Ahmad Wali have also not mentioned arrival of widow of deceased to spot soon after the occurrence just like they have not confirmed the presence of each other in their respective statements. She and her son were examined by I.O after two days of the occurrence, which suggests that their introduction as witnesses of lastly seeing the appellant running from the spot was after thought and result of consultation and deliberation, therefore, their testimony is of no avail to prosecution.

__11.__ The learned trial Court, while believing presence of the appellant on the spot at the time of occurrence, mainly relied upon an application purportedly sent by appellant from jail, which is available at page 80 of the requisitioned record. According to contents of said application, the appellant had come to *Samarbagh* from Peshawar for visiting his ailing mother-in-law; after staying overnight in the house of his brother-in-law, the next morning he proceeded to village *Qamar Kotkay* for receiving outstanding amount from one Gul Khan but his phone was going off, as such, he returned to Peshawar. Perusal of the application shows that not only it is an unattested photocopy but it also does not bear signature or stamp of Superintend Jail. In addition, the application has not been put to appellant during his examination u/s 342, Cr.P.C, therefore, the mentioned document had no evidentiary value. Thus, the learned trial Court has committed an illegality while considering the application against the appellant in the mentioned circumstances. The law is settled by now that if any incriminating piece of evidence is not put to accused in his statement under S.342, Cr.P.C. for his explanation, then the same cannot be used against him for his conviction. Guidance is sought from ***"Muhammad Sadique Vs. The***

State" (2018 SCMR 71) and ***"Muhammad Shah Vs. The State"*** (2010 SCMR 1009).

12. As regards medical evidence, though it is an undeniable fact that deceased had met an unnatural death as result of firearm injuries but whether medical evidence in the present case is in line with the version of prosecution, if yes, whether conviction of the appellant could be recorded solely on the basis of medical evidence when we have already disbelieved the ocular account. Above are the important questions which need resolution by this Court. It is the version of prosecution as per contents of FIR and statements of the PWs that appellant had fired two shots at the deceased but according to MLR Ex.PW-7/1 furnished by Dr. Syed Munib-ur-Rahman (PW-7) the deceased has sustained three firearm entry wounds with corresponding exit wounds on his body; one entry wound was found on the chest of the dead body, the second entry wound on the front of the body in epigastric region while the third wound was found on the dorsal aspect of the left hand little finger. Thus, the number of fire shots as mentioned by PWs does not commensurate with the number of wounds on the body of deceased. Prosecution has not explained that how the third injury was caused to the deceased. In almost similar situation in the case of "***Muhammad Arif Vs. The State"***

(2019 SCMR 631), the Hon'ble Supreme Court observed. that:

> **"Dr. Iftikhar Ahmad (PW2) conducted postmortem examination on the dead body of deceased Javaid Hussain. He (PW2) stated in his cross-examination stated that there was only one injury in the MLC; that it was only the entry wound and that no exit wound was observed. However, in the post-mortem examination report two firearm injuries (injury No.1 4 cm x 2 cm and injury No.1 cm x 1/2 cm) were observed. There is no explanation whatsoever as to how the second injury was inflicted on the person of Javaid Hussain (deceased)".**

The learned trial Court has resolved the above disparity by holding that left hand of the deceased might be on his chest or epigastric region having sit in a chair due to human reflex defense mechanism; the projectile had penetrated the little finger and the chest, most probably the epigastric region thus creating two entry and corresponding exit wounds simultaneously. In absence of any evidence to prove that in what manner the deceased had responded to firing of assailant, it cannot be concluded on the basis of conjectures and probabilities that the deceased might have placed his left hand on his chest or epigastric region under the human reflex defense mechanism. Wisdom is drawn from ***"Naveed Asghar and others Vs. The State"*** **(PLD 2021 S.C 600)** wherein the Hon'ble apex Court observed that accused person could not be convicted on the basis of mere suspicion or probability unless and until the charge

against him was proved beyond reasonable doubt. It is a matter of general observation that a person apprehending attack from another person commonly tries to protect his head and face by covering the same with his hands in reflex action, however, neither this rule nor the observations of the learned trial Court are universally applicable rather it depends upon the facts and circumstances of each case that how the deceased or victim had responded to firing of the accused. Sometimes the victim also makes an attack on the assailant in his defence and sometimes, as a lost option, ties to run for saving his life or hides himself behind something. In order to determine that in what manner the deceased had reacted to the firing of assailant or what was the position of his forearms immediately before firing or attack upon him with some other object, evidence was required to be brought to this effect for consideration of the Court. In absence of evidence, any conclusion drawn by the Court on the basis of speculation and presumption with regard to existence or non-existence of a particular fact is not sustainable. Perusal of the medical report further shows that dimension of inlet wounds No.1 & 2 was ½ x ½ inches whereas inlet wound No.3 on little finger of left hand of the deceased at distal inter-phalangeal joint was 01 cm in diameter. On comparison of dimensions of inlet wounds No. 1 & 2 with

wound No.3 on the body of deceased, the difference invites the attention of prudent and curious mind. If it be presumed that inlet injury No.3 and one of inlet injuries No.1 & 2 had been caused with the same bullet, in that eventuality same dimension of inlet wounds No. 1 & 2 was not possible due to change in velocity of the bullet because of the intervening finger. Thus, the fair conclusion, which can be drawn from the different dimensions of the inlet wounds on the person of deceased, would be that three fire shots had been caused with two different weapons suggesting participation of two assailants in the occurrence, which was not the version of prosecution in the FIR as well as statements of the eye-witnesses. Thus, another conflict is emerging between the ocular account and medical evidence. In addition, in the site plan, which was prepared on pointation of the eye-witnesses, the distance between the appellant and deceased has been shown about 3½ feet but no charring marks were found by doctor on the wounds of deceased. The Hon'ble Supreme Court has held in the case titled ***"Barkat Ali Vs. Muhammad Asif and others"*** **(2007 SCMR 1812)** that blackening would appear in case deceased received injuries from a distance of four (4) feet. Same view appears in the case of ***"Mian Sohail Ahmad and others Vs. The State and others"*** **(2019 SCMR 956)**. On the mentioned ground too,

medical evidence in the present case is not in conformity with ocular account. Benefit of the aforementioned conflicts can be extended to appellant. Reliance is placed on ***"Mansab Ali V/s. The State"*** **(2019 SCMR 1306)** and ***"Muhammad Aslam V/s. Muhammad Shafique and 3 others"*** **(2005 SCMR 1507).** When the ocular account in the present case by itself is not worth credence being doubtful and same is also not supported by medical evidence, conviction of the appellant cannot be sustained on the sole ground that deceased had died because of sustaining firearm injuries on his person. It is settled law that medical evidence by itself cannot identify the accused and it can only prove the seat and nature of injuries, the cause of death, type of weapon etc. but such evidence cannot be considered in isolation for conviction of accused in absence of trustworthy ocular account or circumstantial evidence of convincing nature forming an unbroken chain to connect the accused with murder of deceased, which is not available in the present case. Reliance is placed on ***"Altaf Hussain Vs. Fakhar Hussain and another"*** **(2008 SCMR 1103)** and ***"Muhammad Ashraf and others Vs. The State"*** **(1998 SCMR 279).**

13. Adverting to incriminating recoveries, I.O has recovered two bullets, one crime empty of 30 bore pistol

from the spot and a blood-stained piece of cushion placed on the chair of deceased besides his blood-stained shirt was also taken into possession. I.O has also claimed recovery of crime weapon pistol and 03 live cartridges on pointation of the appellant. According to contents of recovery memo Ex.PW-6/4 prepared on 01.05.2019, appellant disclosed before police that after committing murder of deceased in his shop, he was walking on the bank of Maidan *Khwar* (stream); for relaxing himself, he sat in a place and unloaded the remaining three rounds from magazine of the pistol by throwing them there whereafter he proceeded ahead and threw the pistol into a field of maize crop. The story narrated in the recovery memo does not appeal to prudent mind because when the appellant, as per prosecution version, had made his mind to throw the pistol into a field, there was no need for him to unload the same. It is astonishing that the pistol was not sealed in the parcel on the same day on the sole pretext that it was to be examined by Armorer. On the following day i.e., 02.05.2019, the pistol was sealed in parcel without examination thereof by Armorer mentioning the reason that Armorer was busy in some official work. This explanation on behalf of I.O is not believable being absurd. The purpose of sealing the case property in parcels on the spot is to avoid manipulation or

tampering thereof by someone else and to ensure its uninterrupted dispatch to Forensic Lab for opinion of the expert. Delayed sealing of case property without plausible reason casts a doubt on its genuineness, hence, such recovery is of no avail to prosecution. Thus, the I.O was required to have kept the pistol in a sealed parcel on the spot in presence of witnesses. Even otherwise, there was no need of examination of the pistol through Armorer because one crime empty had already been recovered from the spot, hence, the best and proper course for the I.O was to send the pistol along with the recovered empty and bullets straightaway to FSL for opinion of Ballistic Expert. The record further shows that the parcels containing the pistol and crime empty with bullets were handed over to *Muharrir* Amjad Ali (PW-5) on 03.05.2019 though the empty and bullets had been recovered from the spot on 28.04.2019 whereas the pistol had been sealed on 02.05.2019. It is evident from receipts available on file that PW-5 had sent the parcels to FSL on the same date i.e., 03.05.2019 which means that the parcels had never been kept in *Malkhana* of the P.S for the purpose of its safe custody. Prosecution has not explained that where the parcels were kept during the intervening period, as such, safe custody of the parcels was compromised in the present case. Thus, the recovery of

pistol, being highly doubtful, cannot be used against the appellant. In addition, FSL report qua the empty and pistol is not available on record. The Investigating Officer has not offered any explanation that despite the empty and pistol had been sent to FSL for opinion of the expert then for what reason the same was not procured from the Forensic Lab. It appears that the report was not supporting the prosecution version, therefore, the same was willfully retained by police instead of placing the same on file. In absence of FSL report, the alleged recovery of pistol on pointation of the appellant, especially when the chain of safe custody thereof is broken, cannot be proved. **Rel: *"Ali Murad alias Niazo Vs. The State"* (2022 PCr.LJ 36 Sindh).**

14. While disclosing the motive, complainant stated in his report that the occurrence had taken place because of land dispute. During cross-examination he stated that:

> والدام سال 2007ء میں وفات شدہ ہے۔ میرے تین ہمشیر گان ہیں جو کہ شادی شدہ ہیں۔ ہمارا پدری جائیداد موجود ہے۔ جملہ پدری جائیداد میں ہم برادران و خواہران (ہمشیر گان) حصہ دار ہیں۔ ہماری جائیداد تقسیم شدہ ہے۔ خواہران کو بطور حصہ نقد رقم دی تھی۔ جسمیں ملزم اسلام ولی نے ادائیگی نہیں کی ہے۔۔۔۔ جائیداد کی تقسیم کی رو سے ہر برادر کا اپنا حصہ جائیداد ہے۔

Except the above narrations of complainant in his cross-examination which do not divulge any land dispute between the appellant and deceased, prosecution has failed to bring even an iota of evidence in support of the motive mentioned in the FIR. No doubt, motive is not the

requirement of law because sometimes murders are committed even for no motive while sometimes the motive is known only to accused, deceased and Almighty Allah, however, the law is settled that once a motive is set up by complainant then he is bound to prove the same through evidence. In case of his failure to do so, the prosecution must suffer the consequence and not the defence. In the case titled ***"Pathan Vs. The State"*** **(2015 SCMR 315)**, the Hon'ble apex Court observed that:

> **True that, motive in legal parlance is ordinarily not considered as a principal or primary evidence in a murder case, however, in some rare cases like the present one, the motive would play a very vital and decisive role for committing a murder. As the motive has almost disappeared for want of proof and being entirely feeble, artificial and not at all appealing to a prudent mind, therefore, it has rendered the entire episode of the tragedy doubtful. On this score too the prosecution case is liable to be discarded as a whole.**

Further guidance in this regard is sought from ***"Mst. Sughra Begum and another Vs. The State and others"*** **(2015 SCMR 1142)**. Thus, in light of the wisdom contained in the above referred dicta and keeping in view the facts and circumstances of the present case, failure of prosecution to establish the motive set up in the FIR has adverse bearing on the case of prosecution.

15. Upshot of the above discussion is that the case of prosecution is suffering from inherent infirmities and inconsistencies creating reasonable doubts in prudent mind

with regard to involvement of the appellant in murder of deceased. It is well celebrated principle for administration of justice that the burden is always on prosecution to prove its case against the appellant beyond shadow of reasonable doubt and even a single doubt, if found reasonable, is enough to warrant acquittal of the accused because the damage resulting from erroneous sentence is irreversible. Reliance is placed on ***"Ayub Masih Vs. The State"*** **(PLD 2002 SC 1048)** wherein the Hon'ble apex Court has held that:

> **It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. 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."**

16. For what has been discussed above, the learned trial Court has misinterpreted the evidence on record and

recorded conviction of the appellant on very flimsy grounds, hence, the impugned judgment needs reversal in the circumstances. Resultantly, instant appeal is allowed and appellant Islam Wali son of Hazrat Wali is acquitted of the charge leveled against him in the present case. He be released forthwith from jail, if not required in any other case.

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

Announced
Dt: 15.02.2023

JUDGE

JUDGE

Office 23/2/2023 WR

Tajamul/CS*

DB: Hon'ble Mr. Justice Muhammad Naeem Anwar
Hon'ble Mr. Justice Muhammad Ijaz Khan