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

Cr.A.No.314-P of 2016.

Date of hearing: 18.01.2017.

Appellant (Amjid Ali) by
Barrister Zahur-ul-Haq.

Mian Arshad Jan, AAG for State.

Mr.Jalal-ud-Din Akbar Azam Khan Gara, advocate for complainant.

JUDGMENT

LAL JAN KHATTAK, J.- Through this judgment, we shall also decide Cr.A.No.292-P of 2016 and Cr.R.No. 71-P of 2016 as all the three matters have emanated from same judgment dated 11.04.2016 of the learned Additional Sessions Judge-V, Nowshera delivered in case FIR No.353 dated 18.09.2006 u/ss 302/324/337-A(i)/337-A(ii)/337-D/34 PPC of Police Station Risalpur whereby the appellants Amjid Ali and Inayat-ur-Rehman have been convicted and sentenced as under:-

U/s 302 (b) PPC	sentenced to imprisonment for life as Ta'zir on three counts with fine of Rs.1,00,000/- on three counts or to further suffer SI for six months in default whereof.
U/s 324 PPC	Sentenced to 10 years imprisonment with fine of Rs.20,000/- each or to undergo one month SI in default whereof.
U/s 337-A(i) PPC	Sentenced to 2 year RI as Ta'zir.
U/s 337-D PPC	Sentenced to 10 years as Ta'zir.

2. All the sentences were ordered to run concurrently with benefit u/s 382-B Cr.P.C. It was also ordered by the learned trial court that on realization of the fine, as a recovery of land revenue, same shall be paid to the legal heirs of the deceased.

3. Both the appellants-convicts have impugned their convictions and sentences through their separate appeals while the complainant has filed criminal revision for enhancement of the

sentence, awarded to the appellants, from imprisonment of life to the normal penalty of death. As all the three matters have arisen from same judgment, therefore, are being decided through this single judgment.

4. Brief facts of the case are that on 18.09.2006, Muhammad Musa, son of deceased Khawaja Muhammad Khan (PW-8) reported to Nawar Khan SI (PW-16) in the casualty ward of District Headquarter Hospital, Nowshera to the effect that on 18.09.2006 he and his father Khawaja Muhammad Khan (deceased) alongwith Akhtar Zeb alias Khkuley Khan (deceased), Zafar Iqbal (deceased), Muhammad Shafi (injured), Iqbal Hussain and Mir Afzal (both abandoned PWs) had come to Nowshera for their some domestic matter. According to the FIR, deceased Khawaja Muhammad Khan, Akhtar Zeb, Zafar Iqbal and Muhammad Shafi were proceeding in motor car No.0910/LZG

while complainant and the abandoned PWs were following them in a taxi. As per the contents of FIR, after finishing work at Nowshera, they left for their village at Mardan in their vehicles and when they reached at *Rashakai* Interchange, there an Alto car and a corolla car 1988 model overtook them. According to the report, in the Alto car appellant Amjid Ali son of Roshan Din and Inayat-ur-Rehman son of Ahmad Ashiq were present with weapons alongwith unknown driver while Zar Alam and Shams Alam alongwith unknown driver were present in the corolla motor car, who too were armed with weapons. It is prosecution case that on reaching *Rashakai* Interchange the appellants and acquitted accused, namely, Zar Alam opened firing at the car, wherein, Khawaja Muhammad Khan, Akhtar Zeb, Zafar Iqbal and Muhammad Shafi were proceeding, who were hit with the fire shots and resultantly Khawaja Muhammad Khan,

Akhtar Zeb and Zafar Iqbal died while Muhammad Shafi was critically injured.

5. After arrest of the accused and conclusion of investigation, the case was put in court, which indicted the accused for commission of the offence to which they pleaded not guilty and claimed trial.

6. Prosecution in order to prove its case against the accused, produced and examined 17 witnesses in all, whereafter statements of the accused u/s 342 Cr.P.C. were recorded, wherein, they professed innocence. The learned trial court, after conclusion of the trial vide judgment impugned herein, found the appellants-accused guilty of the charge and while recording their convictions sentenced them as mentioned in para No.1 of this judgment.

7. It is worth to mention that earlier both the appellants were put to face the trial and the learned trial court vide judgment dated 20.11.2012 had

convicted them for imprisonment of life whereagainst they had preferred appeal, which was allowed by this court on 20.10.2015 and after setting aside their conviction and sentence the case was remanded to the learned trial court for *denovo* trial as there was legal defect in the formal charge. It is further worth to mention that on the basis of compromise co-accused Zar Alam has been acquitted by the learned trial court on 04.01.2014.

8. Learned counsel for the appellants argued that complainant of the case, namely, Muhammad Musa (PW-8) was not present on the spot at all and that his presence was procured after the occurrence just to strengthen the prosecution case. It was argued that though PW-9 bears the stamp of injury on his person but mere stamp of injury on the body of his person would not be sufficient to hold that whatever he has testified was accurate and correct to the

hilt qua involvement of the appellants in the case. Learned counsel for the appellants further argued that it was not possible for the prosecution witnesses to identify the appellants in the given circumstances of the case as the eyewitnesses at the relevant time were proceeding in their cars on Highway. It was also contended by learned counsel for the appellants that there is no report of FSL to show that the recovered empties were fired from one or more than one weapons of offence.

9. As against the above, learned counsel for the complainant argued that participation of the appellants in the crime has been established through worth reliable evidence, which has been furnished by one injured witness and also by son of deceased Khawaja Muhammad Khan, who was present on the spot when the occurrence had taken place. He further argued that the prosecution has successfully proved its

case against the appellants through ocular and circumstantial evidence. Learned counsel also argued that for no valid reasons and justification sentence of imprisonment for life has been given to the appellants by the learned trial court, which according to the learned counsel, needs enhancement to death.

10. Learned AAG appearing for the State adopted the arguments advanced by learned counsel for the complainant.

11. We have heard learned counsel for the parties and gone through the case record.

12. Perusal of the case record would show that in the case there are two eyewitnesses, out of whom, one is Muhammad Musa (PW-8), who is son of deceased Khawaja Muhammad Khan while the other is Muhammad Shafi (PW-9). First of all we would take the testimony of PW-8 for its appreciation. As this witness is related to one of the

deceased, therefore, his testimony needs cautious scrutiny and analysis. Though testimony of a related witness cannot be discarded on the mere ground of his being related to a victim but at the same time it has been held time and again by the superior courts that evidence of a related witness is acceptable only if same is corroborated by circumstantial aspects of the case such as medical evidence of the victim, reason of his presence on the spot, recovery of incriminating materials from the spot and the conduct shown by him at the time of occurrence. On the touchstone of the above, when we see the testimony furnished by PW-8, we will draw a conclusion that he was not present on the spot at the time when the occurrence had taken place. We have drawn our above conclusion as the witness has not given any explanation for his being in the company of his father when the deceased and other victims of the case had left for Nowshera. He has

also not given the nature of work for which he and his father had been to Nowshera. In cross examination he has admitted that his father used to visit Nowshera off and on and that he did not accompany him when he would visit Nowshera. This disclosure shows that normally his father used to go out of Mardan without his son but on the day of occurrence complainant joined him, which association of the witness is open to serious doubt. Furthermore, the complainant did not take the Investigating Officer to the place where he and his father had gone to Nowshera nor he produced someone from Nowshera to tell the Investigating Officer about presence of the complainant at Nowshera. Bringing above facts on record were necessary so as to give corroboration to the testimony furnished by PW-8 i.e. the complainant regarding his company alongwith his father and other victims of the occurrence.

13. Not only the above but circumstantial aspects of the case too do not support what the complainant has deposed. There is no report of FSL, which could show that the firing was made from more than one weapon of offence. Report of FSL to the ibid effect was material as firing has been attributed to more than one person. Moreover, complainant has admitted in his cross examination that his clothes were not smeared with blood and that only his hands were tainted with blood but before lodging his report, he had washed his hands. Ibid aspect of the case shows nothing but absence of the complainant at the time when the occurrence had taken place. Had he been present on the spot at the time of occurrence, he would have taken the victims out of car and in that process his clothes and hands must have been bloodstained, which is quite natural. Explanation furnished by the witness that he had washed his hands prior to

lodging the report too does not fit sound in the circumstances of the case as a prudent man would not prefer to go to a wash room for washing his hands leaving his deceased father and other victims alone. Absence of blood on his clothes and hands would show that at the time of occurrence he was not present on the spot. Moreover, distance between the car in which the complainant was proceeding and the one from which firing was made by the appellants, as per site plan, is 32 paces. It is in the complainant's statement that at the time of firing both the vehicles were moving. In such a situation, it was not possible for the complainant to identify the appellants as not only both the parties were present inside the cars but the firing had taken place all of a sudden. In normal course, when some body is traveling in a vehicle and all of a sudden firing takes places from another car at a distance of 32 paces, it would not be possible to identify the assailant.

For the above reasons, we have reached to a conclusion that the complainant (PW-8) was not present on the spot when the occurrence had taken place and for safe administration of justice, we exclude his evidence from consideration.

14. After discarding the testimony of PW-8, prosecution is now left with the evidence of PW-9. No doubt, this witness bears the stamp of injury on his person and generally an injured witness is deemed to be present at the time of occurrence. There is no cavil to the above but it has also been held umpteenth times by the superior courts that mere having a stamp of injury on the body of a person would not mean that whatever he has said is nothing but a whole truth. Acceptance of testimony furnished by an injured witness qua all aspects of the matter is subject to corroboration. If circumstantial aspect of a case does not support the ocular

account furnished by an injured witness, then his evidence cannot be taken into account despite the fact that he has suffered injuries on his person.

15. On the touchstone of the above criteria, when evidence furnished by PW-9 is appreciated, it would appear that his evidence does not get corroboration from prevailing circumstances of the case. It is in the statement of PW-9 that the Suzuki Alto car, in which the appellants were proceeding, was behind their car, wherefrom the appellants opened firing at them. It is also in his evidence that after getting injury, he went unconscious. Question arises that how PW-9 was in a position to identify that the assailants were the appellants. It is not in his evidence that prior to the firing, the car wherein the appellants were seated, had come very close to his car and that he had properly identified the assailants. In the ordinary course of nature, a person

seated in a car running even at a normal speed would not be in a position to identify a person proceeding in another car unless something extraordinary happens, which could attract the persons traveling in different cars to look at each other, which is not the case of PW-9. As stated earlier, it is also on record that just after receiving his injury, PW-9 had become unconscious, therefore, it cannot be said that he had the time to identify the appellants just after the firing opened by them. For the above reasons, it can be concluded that PW-9 had no chance to identify the appellants before or after the incident, therefore, for the safe administration of justice, his evidence too is kept out of consideration, albeit he has suffered injury on his person. Wisdom is drawn from **2011 SCMR 323.**

16. True that the appellants had remained fugitive from law and the complainant has given motive for the

occurrence but it is well settled that neither abscondence alone is sufficient to record conviction of an accused nor motive *per se* can be a ground to convict an accused as above aspects of a criminal case are only corroboratory pieces of evidence, which cannot substitute for ocular evidence.

17. It is cardinal principle of criminal law that in order to bring home guilt to an accused, the prosecution must prove its case through worth reliable and confidence inspiring evidence and beyond reasonable doubt, which is not the case in hand. The learned trial court has not appreciated the case evidence in its true perspective and committed illegality to record conviction of the appellants.

18. For what has been discussed above, we are of the considered view that the prosecution has not proved its case against the appellants beyond any shadow of doubt, benefit of which must

go to them being a century old principle of criminal law, therefore, we allow both the appeals, set aside the convictions and sentences of the appellants and acquit them of the charges leveled against them. They be set free forthwith, if not required in any other case.

19. As we have accepted appeals of the appellants, therefore, the connected criminal revision bearing No.71-P of 2016 has become infructuous and is dismissed as such.

20. Above are reasons for our short order of even date.

JUDGE

JUDGE

Announced
18.01.2017.