JUDGMENT SHEET
PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.40-D/2020.

Hayatullah
Vs.
The State etc.

JUDGMENT

For Appellant: M/S Salimullah Khan Ranazai and Saif ur Rehman Khan, Advocates.

For State: Muhammad Adil Khan, Advocate.

For Respondent: Muhammad Saeed Bhutta, Advocate.

Date of hearing: **11.10.2022.**

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MUHAMMAD FAHEEM WALI, J.- At the trial held before learned Additional Sessions Judge-I, Tank, in Sessions Case No.74/2 of 2020, with reference to FIR No.54 dated 23.7.2004, under sections 302/324/34, P.P.C, of police station Mullazai, District Tank, learned trial Court, vide judgment dated 24.9.2020, convicted the appellant under section 302(b) PPC, and sentenced him to imprisonment for life and held liable to pay Rs.3,00,000/- as compensation to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. or in default thereof to undergo six months simple imprisonment. Benefit of section 382-B, Cr.P.C has been extended to the convict/appellant.

2. The prosecution story as disclosed in the FIR, in brief, is that on 23.7.2004 at 19:45 hours, complainant Zahir Shah (PW-8), and cousin Syed Badshah (PW-9) brought the dead body of his brother Itwar Shah to police station Mullazai, where he reported the matter to the local police, to the effect that on eventful day he alongwith his said brother and cousin had gone to look-after their landed property situated within limits of Kirri Khazani; that his brother was preparing protection Band with stones, at about Deegar Wela, absconding co-accused Fazal Shah, armed with 3x3 bore rifle, while the accused/appellant Hayatullah, armed with Kalashnikov came there and started firing at his brother with the intention to do him away, as a result whereof, he got hit, fell to the ground and died on the spot; that one Raheem Gul came there for their rescue, however, he was also fired at by accused Khan Gul and Gulap, standing nearby, as a result whereof, he got injured on his right foot. After commission of the occurrence, the accused fled away from the spot. Besides the complainant, the occurrence was stated to be witnessed by said Raheem Gul. Motive for the offence was stated to be previous blood-feud. He charged the accused for the commission of offence.

3. It is pertinent to mention that after commission of the offence, the accused went into hiding, therefore, they were proceeded against under section 512, Cr.P.C. and consequently they were declared proclaimed offenders by learned trial Court vide order dated 09.12.2006. On arrest of the accused, supplementary challan against them was submitted before the trial Court, however, vide order dated 13.02.2019, co-accused Khan Gul and Gulap Khan were acquitted on the basis of compromise, as they were charged only for effective firing at Raheem Gul (subsequently passed away in some other incident). At the commencement of trial against the accused/appellant, the prosecution produced and examined as many as twelve (12) witnesses, whereafter, statement of the accused under section 342 Cr.P.C, was recorded wherein he professed innocence and false implication, however, neither he wished to be examined under section 340(2) Cr.P.C, nor opted to produce defence evidence. The learned trial after hearing arguments, convicted the appellant and sentenced him, as mentioned above, which has been assailed by the appellant through the instant criminal appeal.

4. We have heard the learned counsel for the appellant, the learned State Counsel assisted by

learned private counsel for the complainant at length and with their able assistance, the record was scanned.

5. Though the learned trial Court passed a guilty verdict, yet this being the appellate Court is under the bounden duty to assess and re-assess the available evidence on the file and to appreciate as to whether the learned trial Court was correct in its approach by convicting the appellant. In order to ascertain as to whether the impugned judgment is based on proper reasoning and that the learned trial Court correctly applied its judicial mind to the facts and circumstances of the case keeping in view the evidence available on the file, so we deem it essential to thrash out the evidence so as to avoid miscarriage of justice.

6. The prosecution is under obligation to convince this Court regarding the mode, manner and the time of incident, and the complainant as well as the eyewitness, being closely related to the deceased, are to establish their presence on the spot and this Court has to scrutinize as to whether the incident occurred in the mode, manner and at the stated time.

7. It is the case of prosecution that the complainant alongwith his deceased brother and cousin Syed Badshah (PW-9) had gone to look-after

their landed property where his brother was preparing protection Band with stones, meanwhile, at about Deegar Wela, absconding co-accused Fazal Shah, armed with 3x3 bore rifle, while the accused/appellant, armed with a Kalashnikov came there and started firing at his brother with the intention to commit his *qatl-i-amd*, as a result whereof, he got hit, fell to the ground and died on the spot; that one Raheem Gul attracted to the spot for their rescue, however, he was also fired at by accused Khan Gul and Gulap, standing nearby, as a result whereof, he got injured on his right foot. In the present case, the ocular account of the incident was furnished by the complainant, who was examined as PW-8 and Syed Badshah, who was examined as PW-9. We are conscious of the fact that no doubt mere relationship of a witness could not be a ground to discard his evidence, however, testimony of such witness is to be scrutinized with great care and caution, especially the same should not be relied upon, without corroboration, for sustaining conviction on a capital charge. To begin with, complainant was examined before the trial Court as PW-8, who although reiterated same story as narrated in the FIR, however, he also added that on the following day of the occurrence the local police came to the spot and they

were waiting for arrival of the dead body when the local police came and they went to the spot where blood-stained earth from the place of deceased and injured was secured coupled with collection of five empties of 7.62 bore from the place of the appellant and were sealed into parcel by the Investigating Officer and that he spent 2 to 2:30 hours on the spot with the Investigating Officer, however, the above deposition is belied by Sabir Shah S.I (PW-3), who stated during cross-examination that the complainant and eyewitness were present with them when they proceeded from police station to the spot. Although he is a tractor driver by profession and used wrist watch as admitted by him and rightly so, because during the days of occurrence wrist watch was essential for a tractor driver to note working time i.e. ploughing etc, however, despite that no specific time of occurrence was mentioned in the report lodged by the complainant, rather it was mentioned as Deegar Wela. This witness admitted that in his report he did not mention the time of departure from their house to their landed property. According to his deposition, at the time of occurrence, left side of the deceased was towards the accused. If we accept this deposition of the complainant, in such eventuality, same is belied by the statement of Medical Officer (PW-7), who

although observed first entry wounds on left shoulder joint with its exit wound on right axilla, however, entry No.2 is on medial aspect of right forearm. It is in the statement of the complainant that the dead body remained on the spot for about 25/30 minutes after the occurrence, whereafter, Rasool Khan, Mashal Khan and so many other persons attracted to the spot, amongst whom, Niaz Gul arranged cot while the Datsun pickup was arranged by his co-villagers for shifting the injured and the dead body, however, these facts were not narrated by him in the first information report. Although he stated that after lodging the report, the dead body was brought to civil hospital, Tank and Naseeb Jan and Umar Daraz also accompanied the dead body, whereas he and his cousin Syed Badshah (PW-9) left the police station and proceeded to their village on foot, however, this deposition is not appealable to a man of prudence, firstly because there was no reason why he did not accompany the dead body of his brother to the hospital, rather than going to his house and secondly, his deposition is belied by the statement Aziz Khan, his own father, examined before the trial Court as PW-11, who stated that mother of the deceased and Zahir Shah accompanied the dead body to the police station for lodging the report. The question arises that

when the complainant, being brother of the deceased and father of the deceased were available, then what prompted the mother to accompany the dead body to police station for report. In this respect, cross-examination of Haroon Rasheed S.I. (PW-12) is worth perusal, who chalked out the FIR and also conducted investigation in the present case. According to his deposition, the dead body and injured were sent to civil hospital, Tank, under the escort of constable, while the complainant remained with them in the police station, wherefrom he alongwith the complainant and other police *Nafri* proceeded to the spot at about 8:05 PM and reached there at about 9:00 PM, which belies the statement complainant, who stated that after lodging the report, he alongwith alleged eyewitness proceeded to their house on foot. The only inference which could be drawn therefrom is that neither the complainant nor father of the deceased were available to accompany the dead body of deceased to the police station for reporting the matter. Moreover, the factum of deceased's mother going to the police station appears to be a true and voluntary account of the occurrence that other prosecution witnesses had deliberately tried to conceal. It is also pertinent to mention here that autopsy on the dead body of deceased was conducted on following day of

occurrence i.e. on 24.7.2004 at 8:00 AM. At very inception of cross-examination, the Medical Officer (PW-7) was specifically questioned by the defence, who replied that, *"It is correct that I have not fill up the column regarding the "body brought by"*. He explained that the dead body was brought on 23.7.2004, however, he had not mentioned the time of arrival of the dead body. The only inference which could be drawn from the above is that the postmortem was delayed to procure attendance of the complainant and the alleged eyewitness.

In case titled **"Mian Sohail Ahmed and others Vs. The State and others" (2019 SCMR 956),** it was held by the Apex Court that:-

> ***"According to the Doctor (PW-10), who did the post-mortem examination, the dead-body of the deceased was brought to the mortuary at 11:15 a.m. on 01.9.2006 and the post-mortem examination took place at 12 noon after a delay of 15 hours. This delay in the post-mortem examination, when the occurrence was promptly reported at 8:45 p.m. and formal FIR was registered at 9.00 p.m. on 31.8.2006 gives rise to an inference that the incident was not reported as stated by the prosecution".***

In another case reported as **"Muhammad Rafique alias Feeq Vs. The State" (2019 SCMR 1068),** it was held by the Honourable Supreme Court of Pakistan that:-

> ***"When the Additional Prosecutor General and learned counsel for the complainant***

were confronted to explain the marked delay in carrying out the post mortem of Muhammad Azam, they were unable to point out any justifiable reason for the same in the entire record. Such unexplained delay in the post mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution's evidence. In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eye-witnesses of the crime. In similar circumstances, this Court, in the case of Irshad Ahmad v. The State (2011 SCMR 1190), observed that the noticeable delay in post mortem examination of the dead body is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses before preparing police papers necessary for the same. This view has been followed by this court in Ulfat Husain v. The State (2018 SCMR 313), Muhammad Yaseen v. Muhammad Afzal and another (2018 SCMR 1549), Muhammad Rafique v. The State (2014 SCMR 1698), Muhammad Ashraf v. The State (2012 SCMR 419) and Khalid alias Khalidi and 2 others v. The State (2012 SCMR 327)".

Besides the above, testimony of complainant is also belied by PW-11, who stated that Itwar Shah deceased first went to the landed property/place of occurrence without being accompanied by the complainant. According to him, as he was not present in the house, therefore, he could not say that the complainant went to the place of occurrence after the occurrence.

The second alleged eyewitness, namely Syed Badshah was examined as PW-9, who although

reiterated same story as narrated in the FIR, however, according to him, first he reached the place of occurrence/landed property, whereas the complainant reached there after 5/10 minutes of his arrival. This deposition is contradicted by the report as well as statement of the complainant, wherein it has been stated that the deceased and PW-9 had accompanied the complainant to their fields. He admitted that at the time of report, he was present outside the police station. After lodging the report, he alongwith the complainant did not accompany the dead body to the hospital, rather returned to their village from police station, which is not appealable to a prudent mind. The question arises that if this witness had accompanied the dead body to police station, then in such eventuality, after lodging the report in police station, he should have accompanied the dead body to the hospital. Even he was unable to disclose the names of co-villagers who brought the cot to the spot. Even he was not in a position to tell that who arranged the Datsun pickup for shifting the dead body. He disclosed that after the occurrence Raees Khan and Zakam Khan attracted to the spot, while the complainant never stated so. Surprisingly, he stated that they reached to police station for lodging the report at about 5:30/6:00 PM, which is contradictory

to the statement of complainant, who stated to have reached the police station at Sham Vela. Even otherwise, the occurrence allegedly occurred on 23rd of July and in the said month evening falls at about 7:30 PM, while the time mentioned by this witness is almost before Asar prayers. This particular aspect of the case is sufficient to conclude that his statement was not reliable. According to him, he remained in police station for one and half hour in connection with lodging the report, however, same is also contradictory to the statement of complainant, who stated that they remained in the police station for about forty minutes and thereafter left for their village. It is also surprising that according to this witness, he and the complainant did not try to run away at the time of occurrence and kept sitting at their respective places. Again, this deposition is contradicted by the complainant, who stated that at the time of firing, he alongwith this PW were standing without doing any work. According to him, the firing lasted for thirty (30) minutes, whereas the complainant stated that the same continued only for five minutes. Thus, in view of the above discussion, when the very presence of the eye-witnesses is doubtful, then the veracity of their testimony would surely fall short of credence

to saddle capital punishment upon the present appellant.

In case titled **"Abdul Jabbar and another Vs. The State" (2019 SCMR 129),** it has been held that:-

> ***"At the cost of reiteration, it has been observed by us that, in a case, where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in lodging the FIR; the presence of eye-witnesses is not established; there are irreparable dents in the case of the prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from being proved and almost non-existent, the said Court fell in gross error in maintaining the conviction of the appellants particularly on a capital charge".***

In this respect, reliance can also be placed on the case law reported as "**Muhammad Ibrahim Vs. Ahmed Ali and others" (2010 SCMR 638) and "Mansab Ali Vs. The State" (2019 SCMR 1306).**

8. So far as recoveries are concerned, same were allegedly effected from the spot on the following day of occurrence, however, there is nothing on record that after the occurrence till the time of spot inspection, the spot was secured by the Investigating Officer, despite the fact that as per statement of Investigating Officer he visited the spot on the day of occurrence. In this view of the matter, presence of the

alleged empties without being disturbed over night also creates serious doubts about its recovery. Moreso, same being corroborative piece of evidence could not outweigh the ocular account, which has already been disbelieved by us in the preceding paragraphs. Needless to mention that the crime empties were allegedly sent to the FSL, however, report in that regard is not available on file. Even the Moharrir concerned was not examined before the trial Court to testify about sending of crime empties to the FSL for expert opinion. Moreso, in the present case, no recovery was effected from the convict/appellant.

9. The prosecution alleged motive to be previous blood-feud between the parties, however, it did not succeed in establishing the alleged motive and even no independent witness was produced in that respect. The prosecution, in all circumstances was to prove the same. In this view of the matter, when the prosecution did not succeed in establishing the motive, then it is for the prosecution to suffer, as is held in case titled ***"Hakim Ali Vs. The State" (1971 SCMR-432),*** that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The

above view has been reiterated in the case of ***"Amin Ullah Vs. The State" (PLD 1976 SC 629)***, wherein, it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of ***"Muhammad Sadiq Vs. Muhammad Sarwar" (1997 SCMR 214)***. Again, on the same principle, case laws titled ***"Noor Muhammad Vs. The State and another" (2010 SCMR 997) and "Amin Ali and another Vs. The State" (2011 SCMR-323)*** can also be referred.

10. It was highly agitated, that right from the day of incident till his arrest, the appellant remained in hiding with no plausible explanation. It was submitted that the long unexplained abscondence alone was sufficient to convict the appellant. Be that as it may, there is no cavil with the proposition that abscondence is not a substantive piece of evidence, rather it is a circumstance that can be taken into consideration, that too, when the prosecution succeeds in bringing home guilt against the accused by producing convincing evidence, but in the instant case the situation is

altogether different, so the abscondence alone cannot be taken into consideration to convict the appellant, that too, for awarding capital punishment.

11. There is no two opinion about the fact that the cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons alongwith guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in case titled ***Riaz Masih alias Mithoo Vs. State (NLR 1995 Cr.SC 694)***.

12. The overall impact of what has been discussed above is that the prosecution has miserably failed to establish the case against the appellants, otherwise to extend benefit of doubt so many circumstances are not required to be brought forth. In this regard, guidance is sought from a

judgment reported as ***"Tariq Pervez Vs. The State"*** ***(1995 SCMR 1345)***, wherein it has been held that:-

> ***"The concept of benefit of doubt to any accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".***

13. For what has been discussed above, the instant criminal appeal is allowed, the impugned judgment is set aside, consequently, the appellant is acquitted of the charges levelled against him. He shall be released forthwith, if not required to be detained in connection with any other criminal case.

14. Above are the detailed reasons of our short order of even date.

Announced.
Dt: 11.10.2022.
(Kifayat/ *)

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Shahid Khan