JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Crl.Appeal No.490-P/2011

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.-

This appeal, filed by appellant Islam Gul, calls in question the legality and property of judgment dated 18.07.2011, rendered by learned Trial Court/ Additional Sessions Judge-V, Peshawar, whereby he convicted and sentenced the appellant as under:-

Under Section 302 (b) PPC:- For committing the murder of Hayat Gul deceased, to undergo imprisonment for life and to pay Rs.1,00,000/- as compensation within the meaning of

S.544-A Cr.P.C. to LRs of the deceased or in default thereof to undergo 06 months S.I. further.

Under Section 324 PPC:- For attempting at the life of injured Islam Gul, to undergo 10 years R.I.

Both the sentences have been directed to run concurrently. Benefit of S.382-B Cr.P.C. has been extended to him.

2. The prosecution case is that on 15.02.2009 at 2010 hours, complainant Sajjad (PW.5), in injured condition, in company of his brother Himayat Ullah (PW.6), reported to local police in Tangi hospital Charsadda that on the fateful night, after offering "Isha prayer" in village Mosque, when he alongwith his father Hayat Gul reached near their house situated in "Rehmat Kala", Islam Gul (appellant-convict herein) alongwith absconding co-accused Abdul

Hakeem, already ambushed there, opened fire at them, with the intention to commit their qatl-e-Amd, as a result, his father got hit and died on the spot, while he sustained injuries; that his sister Mst. Najia Begum, wife of the absconding co-accused Abdul Hakeem, due to strained relation with her husband, has left her house and is residing with them, which became motive behind the incident.

3. Report of the complainant was reduced into writing in the shape of murasila Exh.PA/1 by Fazal Hadi SI (PW.8), on the basis of which, FIR No.104 dated 15.02.2009 under sections 302/324/34 PPC, was registered in Police Station Umarzai. He prepared injury sheet of injured Sajjad Exh.PW.8/1, injury sheet and inquest report of deceased Hayat Gul Exh.PW.8/2 and Exh.PW.8/3 and referred the injured for medical examination as well as

shifted the dead body of the deceassed to the mortuary for autopsy.

4. Dr. Jamil (PW.9), examined injured Sajjad on 15.02.2009 at 08.10 p.m and found the following injuries on his person:-

1. Right little finger absent (blown out).
2. Right digit IV with severe damage to bone, some phalanges absent, bones are fractured.
3. Right hand palm has soft tissues loss with exposed bond (metacarpus).
4. A wound measuring 2 1/2 " x 1/2 " at posterior lateral of right buttock (exit wound).
5. Entry wound about ¼" at interior aspect of right mid thigh.
6. Left elbow joint totally damaged with fracture of bones. Bone ligaments and tendons are mostly destroyed and the rest are exposed with active bleeding.

Patient condition was serious, therefore, he was referred to LRH, Peshawar for further management and expert opinion.

Nature of injuries: Munaqilla.

Duration of injuries: one hour.

On the same day, he also conducted autopsy on the dead body of the deceased and found the following:-

1. Entry wound about ¼" at lower sternum.
2. Exit wound at back of right mid of chest about ½".
3. Entry wound at left posterio lateral side of chest wall near axilla about ¼".
4. Exit wound about ½" at left anterior of axilla.
5. Entry wound at left elbow joint about ¼" at front.
6. Exit wound at back of left elbow above elbow joint about ½".
7. Right side of maxila, mandubular ramus and right mastoid with right ear blown.
8. Entry wound about ¼" at left scapula with exit at right outer lateral of chest. Exit wound is about 2".
9. Entry wound about ¼" at right scapula with exit at right outer lateral of chest.
10. Entry wound about ¼" at right anterior thigh with exit at medial posterio of right thigh about ½".

11. Entry wound ¼" at left buttock with exit at anterior of left thigh about ½".

Thorax: Except lyrnx and trachea, rest of the organs were damage.

Opinion: According to his opinion the deceased met his un-natural death due to having blood loss because of firearm injuries.

Probable time between injury and death has been given as "sudden" while between death and postmortem as "1/2 to 01 hour.

4. Sabz Ali Khan SI conducted investigation in the case. He proceeded to the spot and prepared site plan Exh.PB on pointation of eyewitness Himayat Ullah. During spot inspection, he secured bloodstained earth and pebbles from the places of the deceased and injured vide recovery memo Exh.PW.3/2, took into possession 13 empties of 7.62 bore vide recovery memo Exh.PW.10/1. Vide recovery memo Exh.PW.10/2, he took into possession the last worn bloodstained garments of the deceased. Since accused were avoiding their

lawful arrest, therefore, he initiated proceedings under sections 204 and 87 Cr.P.C. against them, sent the bloodstained articles and the empties to the FSL, reports whereof are Exh.PZ and Exh.PZ/1, recorded statements of the PWs under section 161 Cr.P.C. and on completion of investigation, handed over case file to the SHO, who submitted challan under section 512 Cr.P.C. against the accused.

5. Later on, appellant-accused was arrested and supplementary challan was submitted against him before the learned Trial Court, where he was formally charge sheeted, to which he pleaded not guilty and claimed Trial. To bring home the guilt of appellant, prosecution examined as many as eleven 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 his innocence. He

declined to be examined on oath however, opted to produce evidence in defence. Gohar Ali was produced in defence as DW.1. On conclusion of trial, the learned Trial Court, after hearing both the sides, vide impugned judgment convicted and sentenced the appellant, as mentioned above, hence, this appeal.

6. Learned counsel for the appellant argued that being a night occurrence, complainant has not disclosed about any source of light on the spot therefore, identification of the accused is highly doubtful; that non-mentioning of specific kind of weapons by the complainant in his report, used in the commission of offence, is another fact which speaks that he was not able to identify the assailant/ assailants; that PW Himayat Ullah is not named in the FIR as an eyewitness, therefore, his testimony cannot be believed; that charge has been exaggerated because as per FSL

report, all 13 empties of 7.62, taken from the spot have been fired from single weapon; that the impugned judgment being based on surmises and conjecture is liable to be set at naught.

7. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant is directly charged by injured complainant in a promptly lodged report; that keeping in view the distance of few paces between the accused and the complainant as well as their close relation with each other, question of mistaken identity even in the dark does not arise; that injured complainant and PW Himayat Ullah have furnished truthful account of the occurrence and defence failed to shatter their testimony; that recovery of blood from the spot, the bloodstained garments of the deceased and injured coupled with positive Serologist report and recovery of 13 crime empties from

the spot, corroborate the ocular account; that prosecution has proved the guilt of the appellant through overwhelming ocular evidence supported by medical and circumstantial evidence, therefore, the learned Trial Court was justified by holding the appellant guilty of the offence. They sought dismissal of the appeal.

8. The incident is nocturnal having taken place at 07.50 p.m. after "Isha prayer time" in the month of February. The crime venue is a thoroughfare of "Rehmat Kala", near the house of the complainant. Complainant Sajjad has not disclosed about availability of any source of light on the spot at the time of incident, nor has any source of light been taken into possession by Investigating Officer during spot inspection nor shown in the site plan Exh.PB. Complainant has also not given specific kind of the weapon used in the commission of offence by the assailant. The argument of the learned counsel

for the complainant as well as the finding of the learned Trial Court that since the accused and complainant party are relatives, therefore, a relative can identify a relative even in the dark from close proximity of 5 to 6 paces on the basis of features and structure, are unpersuasive because on this analogy believing the identification of the accused, would amount to presumption and presumption how much strong may be, cannot be a substitute of proof. Had there been any conversation between the parties before the occurrence, then the aforesaid argument and finding of the learned Trial Court, would have some force, but such is not the case of the prosecution. The site plan has not been prepared at the pointation of injured complainant, rather on the pointation of one Himayat Ullah, who does not figure anywhere in the FIR as an eyewitness, therefore, the distance of 5 to 6 paces between the complainant and the

accused given by him, cannot be believed because it does not appeal to our mind that the assailant selecting a night time especially for concealing his identity, would commit such stupidity and blunder to come so closer to his target. The FSL report qua 13 empties of 7.62 bore to have been fired from single weapon, is another strong piece of evidence indicating towards the inability of complainant to identify the number of assailant and makes the identification highly doubtful. In view of the above, we are firm in our view that albeit, complainant Sajjad sustained injuries in the incident, on the basis of which his presence cannot be denied at the relevant time of incident, yet we are firm in our view that he was not at all able to identify the assailant because of the darkness, therefore, his testimony by virtue of having stamp of injuries, cannot be blindly believed and relied upon. It has been held by the Apex Court

in plethora of judgments that though presence of an injured witness on the spot at the relevant time of incident cannot be denied, but mere injuries on his person, cannot be a certificate of his truthfulness.

9. So far as the testimony of Himayat Ullah (PW.6), who poses himself to be the eyewitness of the incident, suffice it to say that he does not figure anywhere as an eyewitness in the initial report. He is the brother of complainant and in his presence the incident had allegedly been reported which he signed as a rider. Had he been present at the relevant time of incident, being brother of the complainant, the complainant would have disclosed him as eyewitness or at least PW Himayat Ullah while verifying the report of complainant could have brought this aspect into notice of the author of murasila, but such is not the position herein, which shows that PW Himayat Ullah is a

procured witness, therefore, his testimony has wrongly been taken into consideration and relied upon by the learned Trial Court. It has been held by the Apex Court in case titled, **"Rashid Ahmed Vs Muhammad Nawaz and others" (2006 SCMR 1152),** that testimony of the prosecution witness not mentioned in the FIR, but introduced subsequently, had no evidentiary value. Taking guidance from the judgment of the Apex Court, we straight-away exclude the testimony of PW Himayat Ullah from consideration.

10. In view of the above discussion we have reached to an irresistible conclusion that though injured Sajjad sustained injuries in the incident, but he was not in a position at all to identify the assailant and this aspect of the case alone would be sufficient to destroy the entire edifice of the prosecution case.

11. The identification of the appellant being highly doubtful, cast serious doubt in the prosecution case, benefit of which would be extended to the appellant not as a matter of grace or concession but as a matter of right. The rule of benefit of doubt is essential a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim that "it is better that ten guilty persons be acquitted rather than one innocent person be convicted", which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Reliance placed on case

titled, “Muhammad Khan and another versus the State” (1999 SCMR 1220) and case titled “Muhammad Ikram Vs the State” (2009 SCMR 230).

12. The learned Trial Court failed to evaluate the available evidence in its true perspective and thus reached to erroneous conclusion by holding the appellant guilty of the offence. We, by allowing this appeal, set aside the conviction and sentences of the appellant recorded by the learned Trial Court vide impugned judgment dated 18.07.2011, and hereby acquit him of the charges levelled against him. He be set at liberty forthwith, if not required in any other case.

These are reasons of our short order of even date, which read as follow:-

> “For reasons to be recorded later on, this appeal is allowed. The conviction and sentences of the

appellant, namely, Islam Gul, awarded to him in case FIR no.104 dated 15.02.2009, under sections 302/324/34 PPC, Police Station Umarzai District Charsadda by learned Additional Sessions Judge-V, Charsadda vide impugned judgment dated 18.07.2011 are set aside and he is acquitted of the charges levelled against him. He be released from jail forthwith, if not required in any other case".

Announced
10.09.2015

J U D G E

J U D G E

**M.Siraj Afridi P.S. D*