JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.94-P/2012

Date of hearing: ***14.05.2015***

Date of Announcement: ***02.06.2015.***

Appellant (s) : ***Hasham Ali by Sahibzada Assadullah, Advocate.***

Respondent (s) : ***Complainant by Syed Abdul Fayaz Advocate and the State by Mian Arshad Jan, AAG.***

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-VII, Peshawar, appellant ***Hasham Ali,*** having found guilty of committing the murder of Shahid and Mehar Din deceased and attempt to commit murders, was convicted and sentenced as under vide judgment dated 15.09.2012:-

> ***Under Section 302 (b) PPC:-*** To undergo imprisonment for life on two counts and to pay Rs.4,00,000/-, as compensation to LRs of deceased in terms of S.544-A

Cr.P.C. on in default therefore to undergo 06 months S.I.further.

Under section 324 PPC: To undergo 02 years R.I. and to pay a fine of Rs.20,000/- or in default thereof to undergo 01 month S.I. further.

The sentences have been directed to run concurrently and benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. Through the instant appeal, appellant-convict has questioned his conviction and sentence while through connected Cr.R. No.23-P/20-12, titled, "Sajjad Vs Hashim Ali" petitioner seeks enhancement of sentence of the convict from life imprisonment to normal penalty of death. Since both, the appeal as well as revision petition, are the outcome of one and the same judgment of the learned Trial

Court, therefore, we propose to dispose of the same through this common judgment.

3. The prosecution case as unfolded in First Information Report Exh.PA is that, on 28.12.2009 at 17.35 hours, complainant Muhammad Din (PW.1), in company dead body of his deceased son Shahid, reported in Police Station Mechani Gate, Peshawar, that on the fateful day he alongwith his deceased son, brother Mehar Din as well as Asif and Irfan Ullah, was present on a thoroughfare of village Hassan Ghari, when at 17.05 hours, Hasham Ali (appellant-convict herein) alongwith absconding co-accused Sardar Ali, Asim Ali and Amin, came there in a white colour motor car, deboarded from the same and opened fire at them with the intention to do them away, resultantly, his deceased son got hit and died on the spot, while his brother Mehar Din, sustained injuries, however, he and his other companions luckily remained unscathed. A dispute over a house has been alleged as motive behind

the occurrence. Report of the complainant was recorded in the shape of FIR Exh.PA by Muhammad Ejaz Khan ASI (PW.3). He prepared injury sheet and inquest reports of the deceased Exh.PW.3/1 and Exh.PW.3/2, respectively, and shifted his dead body to the mortuary for post mortem examination under the escort of constable Irfan Ullah. Injured Mehar Din was shifted to LRH, Peshawar, where Khan Abbas Khan SI (PW.2), prepared his injury sheet Exh.PW.2/1 and referred him for medical treatment, who later on, succumbed to injuries, therefore, he also prepared his inquest report Exh.PW.2/2 and shifted his dead body to the mortuary for post mortem examination.

4. Dr. Iftikhar Ahmad (PW.8) conducted autopsy on the dead body of deceased Shahid on 29.12.2009 at 09.00 hours and found the following injuries on his person:-

1. Firearm entry wound on left side of face 0.5 x .05 cm in size, 4 cm from the angle of eye and 3 cm infront of ear.

2. Firearm exit wound on right side of forehead 3x2 cm in size, 4 cm from midline and 2 cm above the eye brow.

3. Firearm entry wound on the outer aspect of left arm 1 x 0.5 cm in size, 5 cm above the elbow joint and 21 cm below the tip of the shoulder.

4. A firearm exit wound on the inner aspect of left arm 1x 0.5 cm in size, 8 cm above the elbow joint and 9 cm below the exialla.

5. Firearm entry wound on the left outer aspect 1x0.5 cm in size, 26 cm from mide line and 7 cm below exilla.

6. A firearm entry wound on the left side of chest, 8 cm from nipple 17 cm below the axilary fold.

7. A firearm entry wound on the left side of chest 1 x 1 cm in size, 17 cm from midline and 10 cm above the costal margin.

8. A firearm entry wound on left side of front of chest 1 x 0.5 cm in size, 15 cm from midline and 2 cm below nipple.

9. A firearm gutter wound on front of chest 14 x 2 cm in size, 10 cm below the sternal.

10. A firearm exit wound on the right front of shoulder joint 2 x 1 cm in size, 2 cm below the tip of shoulder joint and 19 cm from midline.

11. A firearm exit wound on the right front of chest 3 x 2 cm in size, 16 cm from midline and 7 cm below the nipple.

12. Firearm exit wound on the right of outer chest 3 x 2 cm in size, 2 cm below the axilla and 20 cm from the midline.

13. Firearm exit wound on the right outer chest 2 x 1 cm in size, 6 cm below the axilla and 18 cm from the nipple.

Opinion: According to opinion of the Medical Officer, the deceased died due to injuries to brain, heart and its vessels, right and left lungs and pleura due to firearm.

Probable time between injuries and death has been given as immediate while between death and postmortem as 09-18 hours.

5. Dr. Naveed Alam (PW.9) conducted postmortem examination on the dead body of deceased Mehar Din on 30.12.2009 at 08.45 hours and found the following:-

1. Firearm entry wound 1/1 cm on left lower back.

2. Firearm exit wound 2 x 2 cm on left from chest, 6 cm from midline and 4 cm above the costal margin.

Opinion: According to opinion of the doctor, the deceased died due to injuries to left lung, stomach, pancreas, spleen, intestines and left kidney due to firearm.

Probable time between injury and death, hospitalized.

Between death and Postmortem 09-18 hours.

6. Hassan Khan SHO (PW.6) proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection he secured blood with the help of cotton from the place of the deceased, a spent bullet Exh.P.6, 2 empties of 7.62 bore P.10, 3 empties of 30 bore Exh.P.11, vide recovery memo Exh.PW.6/1, in presence of witnesses and recorded their statements under section 161 Cr.P.C. On 29.12.2009, he took into possession the last worn bloodstained garments of the two deceased, brought by constable Irfan Ullah vide recovery memos Exh.PW.4/1 and Exh.PW.4/2, sent the empties and bullet to the FSL, vide application Exh.PW.6/3. He also sent the bloodstained articles to the

FSL vide application Exh.PW.6/5, and placed on file the FSL reports Exh.PW.6/6 and Exh.PW.6/7. Accused-appellant Hasham Ali was arrested by local police of District Nowshera in case under section 13 A.O. vide FIR No.4 dated 03.01.2010 PS Azakhel, so he was transferred to Peshawar vide order Exh.PW.6/8. He arrested the accused/appellant in the instant case and obtained his judicial remand vide application Exh.PW.6/12. He interrogated him and recorded his statement under section 161 Cr.P.C. Since, pistol was recovered from the accused/appellant in the above mentioned case FIR, therefore, he applied for transposition of the said pistol to the instant case being case property, his request was acceded to by the Sessions Judge, Peshawar. He took the said 30 bore pistol alongwith 10 rounds Exh.P.12 from Police Station Azakhel Nowshera vide recovery memo Exh.PW.4/3, placed on file recovery memo of the pistol prepared in case registered under section 13 A.O. against

the appellant alongwith copy of the FIR Exh.PW.6/19 and Exh.PW.6/20. He sent the pistol Exh.P.12 to the FSL vide application Exh.PW.6/21 for analysis with the empties already sent to the FSL, report whereof is Exh.PZ. Since, co-accused were absconding, therefore, he initiated proceedings under sections 204 and 87 Cr.P.C. against them. On completion of investigation he submitted complete challan against the appellant and challan in terms of S.512 Cr.P.C. against the absconding co-accused.

7. On receipt of challan by the learned Trial Court, accused/appellant was charge sheeted, to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as ten witnesses, whereas, statements of Roshan Khan S.I. and Said Rehman were recorded as CWs. 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, however,

declined to be examined on oath or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above.

8. Learned counsel for the appellant-convict argued that appellant is innocent and has been implicated falsely in the case on mere suspicions; that it is unseen occurrence while complainant Muhammad Din (PW.1), being real brother of deceased Mehar Din and father of the deceased Shahid, is a procured witness, who miserably failed to establish his presence on the spot at the time of incident through some strong physical circumstances of the incident; that medical evidence and site plan negate the ocular version; that appellant has already been acquitted in the case registered against him under section 13 A.O. in Police Station Aza Khel, therefore, positive FSL report qua the pistol and empties would not advance the case of the prosecution; that PW Asif has been abandoned for no good

reason by the prosecution, therefore, adverse inference within the meaning of Article 129 (g) of the Qanun-e-Shahahdat Order, 1984 would be drawn against the prosecution that had he been produced in the witness box, he would not have supported the prosecution case; that motive alleged has not been proved; that the testimony of solitary witness i.e. complainant is suffering from material contradictions and discrepancies creating serious doubts in the prosecution case; that the learned Trial Court has not appreciated the evidence available on record in its true perspective, hence, reached to an erroneous conclusion by holding the appellant guilty of the offence; that the impugned judgment being based on surmises and conjectures, is liable to be set at naught.

9. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant alongwith absconding co-accused are directly charged in a promptly lodged report; that complainant Muhammad Din

has furnished truthful and straightforward ocular account of the incident, supported by medical evidence, site plan and recoveries from the spot coupled with positive FSL reports qua empties and pistol as well as the bloodstained articles; that defence failed to create any dent in his testimony; that mere close relationship of the complainant with the two deceased cannot be a ground for discarding his confidence inspiring testimony; that PW Irfan Ullah who was nephew of the complainant has been done to death by brother of the appellant during the trial at the instance of the appellant, in which incident the complainant also sustained injuries while PW Asif refused to appear in the witness box because of threats of the accused party and this aspect of the case further indicates that accused party are hardened and desperate criminals; that defence cannot take benefit from acquittal of the appellant in a case registered against him under Section 13 A.O. as he had been acquitted in that case on sole ground

of non-production of the case property, which was in fact taken into possession in the instant case as a weapon of offence and sent to the FSL, report whereof is positive that's why the same was not produced before the learned Trial Court/Judicial Magistrate; that prosecution has successfully proved the guilt of the appellant through cogent and confidence inspiring evidence, therefore, the learned Trial Court has rightly held him guilty of the offence. They added that being a double murder case and there being no mitigating circumstance to warrant lesser punishment, therefore, the learned Trial Court ought to have awarded the appellant normal penalty of death as provided for the offence. They sought dismissal of the appeal and requested for enhancement of sentence of the appellant.

10. In this untoward incident two persons, namely, Shahid and Mehar Din, have been done to death, for which, appellant-convict alongwith absconding

co-accused Sardar Ali, Asim Ali and Amin, have been directly charged by complainant Muhammad Din (PW.1), who is father of the former deceased and uncle of the latter. The crime venue is a thoroughfare of village Hassan Ghari. The incident took place on 28.12.2009 at 17.05 hours, which has been reported with promptitude at 17.35 hours i.e. within 30 minutes of the incident, eliminating the possibility of deliberation, consultation and fabrication on the part of complainant because it does not appeal to a prudent mind that the complainant, who was confronted with the dead body of his deceased son and his injured nephew, would have been in a position to fabricate a concocted story within 30 minutes, which time he would have definitely consumed in arranging vehicle and in shifting the dead body of the deceased as well as injured. Being a broad daylight incident and parties well known to each other, having a dispute over shop, question of mistaken identity does not arise.

11. In support of his version, complainant Muhammad Din appeared as a solitary witness. As regard PWs Irfan Ullah and Asif, named in the present FIR as eyewitnesses, PW Irfan Ullah, who was nephew of the complainant, has been done to death during pendency of trial of the appellant, for which brother of the appellant has been charged vide FIR No.473 dated 18.09.2010 under sections 302/324/34 PPC Police Station Miechni Gate, Peshawar. Similarly, in the aforesaid incident complainant also sustained injuries. PW Irfan Ullah being dead/murdered was abandoned while PW Asif due to fear of the accused/appellant refused to appear in the witness box.

12. Complainant Muhammad Din, while appearing as PW.1, reiterated the same episode of the incident as mentioned in his initial report coupled with motive. He charged the appellant and absconding co-accused for committing the murder of the two deceased

and attempting at their lives. He added in his statement that PW Irfan Ullah has been murdered by brother of the appellant at the instance of appellant during pendency of the trial in which incident he also sustained injuries. In support of his statement he produced copy of the FIR. He was subjected to lengthy and taxing cross-examination by the defence, but nothing beneficial could be brought from his mouth. He remained stuck to his stance and remained consistent on each and every material aspect of the incident. Defence also failed to create any doubt about his presence on the spot despite lengthy cross-examination of complainant. Shifting of dead body from the spot to Police Station within 30 minutes is an important aspect of the case which speaks about presence of the complainant with the deceased on the spot at the time of incident. The incident has been reported directly in the FIR, therefore, question of manipulation on the part of police to procure his attendance, does not arise.

13. Medical evidence in the shape of statements of doctors Iftikhar Ahmad and Naveed Alam, who conducted autopsy on the dead bodies of the deceased, coupled with autopsy reports of the deceased, according to which, both the deceased met their unnatural death due to firearms, further supports the ocular account. Similarly, recovery of blood from the places of the two deceased during spot inspection by the I.O. and last worn bloodstained garments of the two deceased coupled with positive Serologist report also corroborate the ocular account and confirm the crime spot to be the same as alleged by the complainant.

14. Three crime empties of 30 bore pistol recovered from the spot, have sent to the FSL alongwith 30 bore pistol recovered from the appellant in case FIR No.04 dated 03.01.2010 under Section 13 A.O. Police Station Aza Khel Nowshera Exh.PW.6/19, positive report whereof Exh.PZ, further corroborates the ocular account.

15. The argument of learned counsel for the appellant that in the aforesaid case, appellant had been acquitted by learned Judicial Magistrate-III, Nowshera vide order dated 10.12.2010, therefore, this piece of evidence would not advance the prosecution case is not tenable because according to the record produced/ exhibited by the Hassan Khan SHO/I.O. in the instant case during his statement, the said pistol had been taken into possession by him in the instant case vide recovery memo Exh.PW.4/3 by proper order of the Sessions Judge. He also made recovery memo of the case FIR No.4 dated 03.01.2010 as part and parcel of the instant case and thereafter sent it to the FSL for chemical analysis, report whereof is Exh.PZ. The acquittal order of the appellant recorded by learned Judicial Magistrate, Nowshera reveals that because of non-availability of the Firearm Expert report and non-exhibition of the pistol, she recorded acquittal of the appellant, without adverting to the record

vide which the pistol in question had been taken into possession and shifted from District Nowshera to Peshawar in the present case. Roshan Khan SI who arrested the appellant alongwith 30 bore pistol and 10 live rounds and registered a case under section 13 A.O. against him in Police Station Azakhel Nowshera, has been examined as CW.1. He deposed that on receipt of information about presence of the appellant near Aman Garh Head Bridge on 03.01.2010, rushed there and arrested him alongwith 30 bore pistol and 10 live rounds vide recovery memo Exh.PW.6/20. Said Rehman Constable No.1044, in whose presence the recovery of pistol had been effected by Roshan Khan S.I CW.1, has been examined as CW.2. In his statement he fully corroborated the version of Roshan Khan S.I. Both these witnesses have been subjected to cross-examination by the defence, but nothing beneficial could be extracted from them. They remained consistent with each other on all

material aspects of the arrest of the appellant and recovery of 30 bore pistol from his direct possession, which is weapon of offence in the instant murder case. The irregularity committed by the learned Trial Court is that both the cases should have been tried together, but such exercise has not been adopted by the learned Trial Court, which created a disturbing situation. Similarly, the learned Judicial Magistrate, without taking into consideration the pistol in question to be the weapon of offence of the murder case, haphazardly recorded acquittal of the appellant without any solid ground, because when the pistol in question was sent to the FSL in the instant case, how its production was possible before the learned Trial Court. As per the dictum laid down by the Hon'ble Federal Court in case titled, ***"Sadiq and others Vs the Crown" (PLD 1951 FC 114),*** the offences being form part of the same transaction can legally be tried at one trial. To

avoid conflicting findings, trial of both the offences in one and the same court was essential requirement.

16. So far as the argument of learned counsel for the appellant that the learned Trial Court has wrongly recorded conviction of the appellant on the basis of solitary witness, who too, was closely related to the deceased, suffice it to say that in criminal cases what is more essential for the Court, is the determination of veracity and credibility of a witness and not the numbers and relationship, because it is quality and not the quantity of the evidence which matters. In this case complainant Muhammad Din appeared as a solitary witness for the reason that PW Irfan Ullah had been done to death during trial for which brother of the appellant has been charged. In the said incident complainant also sustained injuries but survived. PW Asif has been abandoned by the prosecution and the justification of the learned counsel for the complainant that he was threatened by the appellant party

and that's why he refused to appear in the witness box, does appeal to reason keeping in view the previous criminal history of the accused party as manifest from the FIRs collected by the I.O during investigation and placed on file. Even otherwise, by virtue of Article 17 of the Qanun-e-Shahadat Order, 1984, in financial matters, two male or one male and two female witnesses, have been made the requirement of law to prove the financial obligations. Whereas in all other matters including criminal, there is no such obligation, which clearly suggest that a single witness is sufficient to prove a fact. When the law permits a fact to be proved through the statement of a single witness, there is no reason or logic to call for more witnesses than one. Guidance in this regard may be derived from **Zar Badadar's case (1978 SCMR 136).** In case titled, **"Muhammad Ahmad and another Vs the State and others"(1997 SCMR 89),** it has been held by

the Hon'ble Supreme Court that "prosecution is not required to examine every eyewitness of a crime"**.**

17. In case titled, ***Muhammad Mansha Vs the State" (2001 SCMR* 199),** the Ho'ble Supreme Court while dilating upon the spirit of Article 17 of the Qanun-e-Shahadat Order, 1984, held the following:-

> "A bare perusal would reveal that the language as employed in the said Article 17 (1) (b) is free from any ambiguity and no scholarly interpretation is required. The provisions as reproduced hereinabove of the said Article would make it abundant clear that particular number of witnesses shall not be required for the proof of any fact meaning thereby that a fact can be proved only by a single witness".

In the Judgment Supra it has been held by the Apex Court that conviction can be recorded on the testimony of a single witness. Guidance in this regard can also be derived from cases titled, **"Dildar Hussain Vs Muhammad Afzaal alias Chala and 3 others" (PLD 2004 Supreme Court 663),**

and case titled, "Farooq Khan Vs the State" (2008 SCMR 917). The Hon'ble Supreme Court in case titled, ***"Farooq Khan Vs the State" (2008 SCMR 917)*** observed as under:-

> "**The credence of statement of solitary witness has already been examined by this Court in a number of cases. In this context reference can be made to Mali v. The State 1969 SCMR 76; Muhammad Ashraf v. The State 1971 SCMR 530, Muhammad Siddique alias Ashraf alias Achhi and 3 others v. The State 1971 SCMR 659 and Muhammad Mansha v. The State 2001 SCMR 199. Moreover, conviction in any murder case can be based on the testimony of a single witness, if the Court is satisfied that the witness is reliable. In other words, the "emphasis" is on quality of evidence, and**

not on its quantity. In this behalf reliance can be placed on the case of Allah Bakhsh v. Shammi PLD 1980 S C 225".

Similarly, mere relationship of the prosecution witness with the deceased is no ground to discredit his evidence, if his testimony is proved to be straightforward and confidence inspiring. Guidance in this regard can be derived from case titled, **"Umarzad Vs the State" (1990 SCMR 571), "Sahib Khan Vs the State" (2008 SCMR 1052), "Bashir Khan Vs the State" (1995 SCMR 900) and "Nazir Ahmad Vs Muhammad Sidique " (1995 SCMR 1740).**

18. For what has been discussed above, we are firm in our view that prosecution has successfully proved the guilt of the appellant through cogent and confidence inspiring ocular evidence corroborated by strong circumstantial pieces of evidence as well as medical evidence, therefore, the learned Trial Court was justified

while recording the conviction of the appellant, to which no exception can be taken.

19. Now coming to the question of sentence. Two persons have been done to death in the present incident. General role of firing has been attributed to four accused including the appellant. The question as to whose fire shots proved fatal is not discernible from the evidence available on record, therefore, considering the same as a mitigating circumstance, maximum penalty of death in the circumstances, would not be a step justified in law, therefore, the sentence awarded by the learned Trial Court in the circumstances seems to be just, which would meet the ends of justice. Admittedly, the appellant has been acquitted in case under Section 13 of the Arms Ordinance registered in Police Station Azakhel Nowshera, against which no appeal has been filed by the State therefore, in the circumstances, conviction of the appellant under section 13 of the Arms Ordinance, would not be justified. However,

positive FSL report qua the empties and the crime pistol can be taken as a corroborative piece of evidence in support of the prosecution case.

20. Resultantly, the appeal as well as the revision petition for enhancement of sentence being without any substance stands dismissed. Conviction and sentence of the appellant recorded and awarded by the learned Trial Court vide impugned judgment, are hereby upheld.

21. Before parting with the judgment, we deem it appropriate to direct all the learned Judicial Magistrates of the Province, that they shall not try a case of any recovery, if such recovery is case property in any other criminal case, triable by the Court of Sessions and shall henceforth submit the same to the Court of the respective Sessions Judge, for appropriate orders. Similarly, the learned Trial Courts confronted with the trials, if at any stage come to know about registration of a separate case qua recovery in a case pending adjudication before them, shall forthwith, stop the

proceedings unless the case of the recovery registered separately, is not procured and thereafter shall try both the cases, simultaneously, so as to avoid conflicting findings.

The Additional Registrar (Judicial) of this Court is directed to circulate copy of this judgment amongst all the learned Judges of the subordinate judiciary for convenience and future guidance, with intimation to this court.

Announced.
02.06.2015

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