JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.657-P/2013
with
Murder Reference No.13 of 2013

Date of hearing: ***20.05.2015***

Date of announcement: ***04.06.2015***

Appellant (s) : ***Rehmanullah by Barrister Zahoor ul Haq.***

Respondent (s) : ***Muhammad Inam by Syed Abdul Fayaz, Advocate and the State by Mr. Mujahid Ali, AAG.***

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-IV, Mardan, appellant ***Rehman Ullah,*** having been found guilty of committing the murder of Muhammad Islam and Mian Said Ghani deceased, has been handed down death sentence on two counts under section 302 (b) PPC and also to pay Rs.2,00,000/-, as compensation in terms of S.544-A Cr.P.C. to LRs of the two deceased, recoverable as arrears of land revenue or in default thereof to undergo 06 months S.I.

further. Benefit of S.382-B Cr.P.C. has been extended to him.

2. Through the instant appeal, appellant-convict has challenged his conviction and sentence. The learned Trial Court has sent ***Murder Reference No.13 of 2013***, for confirmation of death sentence of the convict in terms of S.374 Cr.P.C. Both being the outcome of one and the same judgment of the learned Trial Court, therefore, we propose of dispose of the same through this common judgment.

3. The prosecution case as unfolded in First Information Report is that on 02.02.2011 at 17.30 hours, complainant Muhammad Inam (PW.8), in company of dead body of his deceased brother Muhammad Islam and his farmer Mian Said Ghani, reported in Police Station Rustam, District Mardan that on the eventful day he alongwith the above named two deceased and his brother PW Siraj Munir, was present in his field known as ***"Drey Pulay Wand"***; that the two deceased were busy in ploughing the field while he alongwith PW Siraj Munir,

was sitting near them on a ***"Pulla"/*** ridge of the field, when in the meantime at 16.30 hours, Rehman Ullah (appellant-convict herein), alongwith absconding co-accused Abid, duly armed with firearms, came there and opened fire at the two deceased, as a result, both got hit and died on the spot. The accused decamped from the crime venue after commission of the offence. Motive behind the incident was that little before the incident; deceased Muhammad Islam, thrashed the younger brothers of the accused on the ground that they were damaging his crop by cutting the same. In addition to complainant the incident is stated to have been witnessed by his brother PW Siraj Munir.

4. Report of the complainant was recorded by Fazal Elahi Bacha SHO (PW.10) in the shape of FIR Exh.PA No.111 dated 02.02.2011 under sections 302/34 PPC Police Station Rustam. He prepared injury sheets and inquest reports of the two deceased Exh.PM/1 to Exh.PM/4

and shifted their dead bodies to the mortuary for postmortem examination.

5. Dr. Muhammad Tariq Khan SMO (PW.4) conducted autopsy on the dead body of deceased Muhammad Islam on 02.02.2011 at 07.00 p.m. and found the following injuries on his person:-

1. Firearm entry wound about 1 x 1 inch on right side of neck in the centre.
2. Firearm exit wound 2 x 2 inches on left occipital region of the scalp.
3. Firearm entry wound about 1 x 1 on right side of chest in 8th intercostals space.
4. Firearm exit wound 2 x 2 inches on right side of back about 1 inch from thorasic spine.
5. Firearm entry wound about 1 x 1 inch about 2 inches below the umbilicus in abdomen.
6. Firearm exit wound about 2 x 2 inches on right side of back about 1 inch from the lumber spine.
7. Firearm entry wound about 1 x 1 inch on the anterior aspect of the right thigh in middle.
8. Firearm exit wound about 2 x 2 inches on the post aspect of the right thigh in the middle.

Opinion: According to his opinion the deceased died because of firearm injuries to vital organs i.e. brain, esophagus and trachea along with haemorrhage. Probable

time between injuries and death has been given as, 5-10 minutes, while between death and post mortem as, 3-31/2 hours.

On the same day he also conducted postmortem examination on the dead body of deceased Mian Said Ghani Shah and found the following injuries on his person:-

1. Firearm entry wound 1 x 1 inch on the occipital region of the scalp.
2. Firearm exit wound 2 x 2 inches on left perital bones.
3. Firearm entry wound about 1 x 1 inch on right side of the chest in 4th intercostals space on mid axillary line.
4. Firearm exit wound about 3 x 2 inches in size on the upper border of the right scapula.
5. Firearm entry wound about 1 x 1 inch on the anterior aspect of left upper arm.
6. Firearm exit wound about 2 x 2 inches on post aspect of left elbow joint.
7. Firearm entry wound 1 x 1 on the anterior aspect of the left shoulder.
8. Firearm exit wound about 2 x 1 inch on post aspect of left shoulder.

Opinion: According to his opinion the deceased died due to firearm injuries to his lungs, heart and brain. Probable time between injuries and death has been observed by him as 3-5 minutes, while between death and post mortem as 2 ½ hours.

6. Munir Khan SI (PW.9), proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection he secured blood Exh.P.1 from the place of the deceased and 7 empties of 222 bore Exh.P.2 from the places of the accused vide recovery memo Exh.PW.8/1. Vide recovery memo Exh.PW.8/2, he took into possession small bundle of "Shaftal crop" Exh.P.4 allegedly cut down by brother of the accused. He also took into possession the last worn bloodstained garments of the deceased vide recovery memo Exh.PW.8/3, sent by doctor from hospital after postmortem examination of the deceased. Vide application Exh.PW.9/2, he sent bloodstained articles to the FSL report whereof is Exh.PW.9/3. He also sent the empties for

safe custody to the FSL. Since, the accused were avoiding their arrest, therefore, he initiated proceedings under sections 204 and 87 Cr.P.C. against them, recorded statements of PWs under section 161 Cr.P.C. and after completion of investigation handed over case file to the SHO, who submitted challan in terms of S.512 Cr.P.C. against the accused. Appellant was later on arrested. Nooran Shah Khan SI (PW.5) obtained his physical remand, interrogated him and recorded his statement under section 161 Cr.P.C. After completion of necessary investigation, he handed over case file to the SHO, he submitted supplementary challan against him on 12.10.2011.

7. On receipt of challan by the learned Trial Court, accused/appellant was summoned and formally charge-sheeted under section 302 PPC, to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as ten 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, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above.

8. The main thrust of the argument of learned counsel for the appellant was that the incident is unseen and PWs Muhammad Inam and Siraj Munir being real brothers of deceased Muhammad Islam and tenants of deceased Mian Said Ali Shah, are highly interested and procured witnesses, who badly failed to establish their presence on the spot at the time of incident through some strong physical circumstances of the incident that's why their testimony is suffering from material contradictions and discrepancies creating serious doubts in the prosecution case; that let off of the PWs the brothers of deceased Muhammad Islam having common motive and doing away with innocent person Mian Said Ghani by the

appellant does not appeal to a prudent mind; that site plan does not support the ocular version, as neither any ploughing instrument nor the filed allegedly ploughed have been shown therein; that no ploughing instrument has been taken into possession in support of the ocular version; that medical evidence also negates the ocular account and indicates that the charge has been exaggerated as dimensions of all entrance wounds on the person of the two deceased are one and the same, which proves the incident to be the doing of single person; that empties recovered from the spot has been shown sent to the FSL, but no FSL report in this regard is available on file, from which it can be determined as to whether these have been fired from one or more than one weapon; that mere recovery of blood, empties, bloodstained garments of the deceased, positive Serologist report and postmortem reports, coupled with abscondance of the appellant, which otherwise, he has denied the same in his statement under section 342 Cr.P.C., in absence of substantive evidence,

being only corroborative and confirmatory pieces of evidence, would not be sufficient enough to prove the guilt of the appellant. He contended that the prosecution evidence is pregnant with doubts, benefit of which is to be extended to the appellant.

9. Conversely, learned AAG for the State assisted by learned counsel for the complainant contended that appellant is directly charged alongwith absconding co-accused for committing murder of two deceased, in a promptly lodged report, eliminating the possibility of concoction and fabrication; that being a day light incident and parties well known to each other, question of mistaken identity does not arise; that there exists no previous ill will or serious enmity between the parties therefore it does not appeal to a prudent mind that complainant would substitute the real culprits by implicating innocent persons; that ocular account furnished by PWs is straightforward, trustworthy and confidence inspiring and they have successfully established their presence on the spot with the

deceased at the time of incident and defence failed to create any dent in their testimony; that medical evidence, site plan, recoveries from the spot, the bloodstained garments of the deceased with positive FSL report coupled with noticeable unexplained abscondance of the appellant, squarely corroborate the ocular account, therefore, the learned trial Court was justified by holding the appellant guilty of the offence. They contended that the impugned judgment being well reasoned and based on proper appraisal of evidence, is not open to any interference by this Court.

10. We have given our anxious consideration to the respective arguments advanced at the bar from either side and perused the record carefully.

11. It is well settled principle of law that for recording conviction strong and corroborative evidence of unimpeachable character is required and that the findings of guilt against accused must not be based on probabilities to be inferred from evidence, rather, findings must rest surely

and firmly on the evidence of unimpeachable character, otherwise, the golden rule of benefit of doubt would be reduced to naught. It is settled law that a witness who claims himself to be the eyewitness of the occurrence, must prove his presence on the spot and shall satisfy the mind of the Court qua his presence through some physical circumstances or corroborative evidence.

12. Taking the case in hand at the touch stone of the principles referred above, we have to evaluate the ocular account furnished by Siraj Munir (PW.7) and Muhmmad Khan (PW.8). Thrashing the younger brother of the appellant by deceased Muhammad Islam on the ground of damaging the crop of his field, has been advanced as motive behind the incident. Complainant has not specifically mentioned "Shaftal crop" in his report, however, later on, the I.O. has taken some "Shaftal" allegedly cut down by the brother of the deceased. The crime venue has been shown the fields known as "Darey Pulay". The two deceased have been shown in the site plan

Exh.PB at points No.1 and 2, while PWs Siraj and Muhammad Inam at points No.5 and 6. The appellant has been assigned point No.3 and absconding co-accused point No.4. The distance inter-se the deceased and the accused has been shown round about 7 paces, while between the PWs and accused as 18 to 20 paces. The stance of the PWs is that the appellant alongwith absconding co-accused came to the spot and opened fire at the two deceased, resultantly; they got hit and died on the spot. The crucial aspect which disturb our mind is that if the appellant had got annoyed on thrashing of his younger brother by deceased Muhammad Islam, their target should have been Muhammad Islam deceased and his other two brothers i.e. PWs Inam and Siraj Munir, only, and not deceased Mian Said Ghani Shah, but astonishingly it is not the stance of the PWs that they were also fired at but this version of the PWs is unbelievable because no assailant, in such eventualities, would take a risk to leave evidence behind him or to let off the real brothers of the person being done to death by them in their

presence so as to leave a risk of taking vengeance behind or the ocular evidence. Both the PWs have not furnished any justification as to why they were spared by the accused and why deceased Mian Said Ali, who had no motive whatsoever with the appellant, was done to death. This aspect of the case create serious doubts about the presence of the PWs. Had they been present on the spot, the assailant/ assailants who committed the two murders, would not have spared them. Both in cross-examination admit that they can differentiate between different kinds of weapons, but none of them has specifically mentioned about the kind of weapon used in the commission of offence, rather, a general word "firearms", has been used by them, which speaks about their non-availability on the spot at the time of incident. Had they been there, they would have disclosed the specific kinds of weapons the accused were allegedly having in their possession. It has been specifically mentioned by complainant in his initial report that they being empty handed did not chase the accused, but

contradicting his version PW Siraj Munir in his statement recorded during proceedings under section 512 Cr.P.C. deposed that they chased the accused after commission of the offence. He was confronted with his statement but he denied his earlier version which amounts to dishonest improvement. Complainant Muhammad Inam (PW.8) deposed that he was having a shop in his village during the day of occurrence and on the day of occurrence the same was being run by his servant. He has not produced the said servant to substantiate his stance, in absence of which it can be safely held that he was present in his shop at the time of incident. Both the PWs have deposed about availability of the ploughing instrument on the spot, but no such instrument whatsoever has been shown in the site plan or taken into possession by the I.O. during spot inspection to substantiate their version. Similarly, the area allegedly being ploughed by the two deceased has also not been shown in the site plan Exh.PB. Munir Khan SI (PW.9) in cross-examination deposed that though he noticed

ploughing machine on the spot, but did not consider it necessary to take the same in possession. The explanation furnished by him does not appeal to our mind because if he was so conscious to collect the "Shaftal" allegedly cut down by the brother of the appellant, then if any ploughing machine was there on the spot, he would have definitely shown the same in the site plan and would have taken it into possession. The non-recovery of ploughing machine from the spot cast serious doubts in the prosecution story.

13. In view of the above discussion, we are firm in our view that the occurrence has not taken place in the mode and manner as alleged by the PWs, posing themselves to be the eyewitnesses of the incident. The peculiar facts and circumstances of the incident discussed above clearly speak about non-presence of the two PWs on the spot at the time of incident. Both have badly failed to establish their presence on the spot at the time of incident with the deceased through some strong physical circumstances of the incident, therefore, the learned Trial Court has wrongly

believed and relied upon their testimony. Their testimony being shaky and scanty suffering from material contradictions, discrepancies and negated by the medical evidence as well as the peculiar facts and circumstances of the case, cannot be believed. It has been held by the Hon'ble Supreme Court in case titled, ***"Basharat and another Vs the State" (NLR 1996 Criminal Supreme Court 26)*** that **"evidentiary value of eyewitnesses in case where there is no judicial certainty or circumstantial guarantee about presence of eyewitnesses on spot, but there are cogent reasons to doubt that eyewitnesses were present on spot and had seen occurrence, then in such case, there would be no option but to exclude the ocular evidence from consideration".**

Similarly, in case titled, "***Mst. Shamshad Vs the State" (NLR 1998 Criminal Supreme Court 385)*** the august apex Court held as under:

"Eye-witnesses would be unreliable when they were not present at scene of

occurrence and account given by them is found to be unnatural".

Taking guidance from the judgment of the august apex Court (Supra), we exclude the testimony of the alleged eyewitnesses from consideration.

14. The recovered crime empties have allegedly been sent to the FSL, but no FSL report regarding the fact that whether these have been fired from one or more than one weapon is available. The one and the same dimensions of entry wounds on the person of two deceased speak about the occurrence to be the doing of single person, therefore, in the circumstances, corroboration qua each accused to prove his guilt is the essential requirement of the law, which is lacking in the instant case. Besides, crime weapon has neither been recovered from the direct or indirect possession of the appellant nor on his pointation nor has he confessed his guilt before the competent Court of law, therefore, mere recovery of empties, blood from the spot, bloodstained garments of the deceased and positive

Serologist report in respect thereof, coupled with the autopsy reports, being corroborative and confirmatory pieces of evidence, in absence of direct evidence would not be sufficient to prove the guilt of the appellant. In this regard guidance can be derived from **Riaz Ahmed's case (2010 SCMR 846).** As per the dictum of the apex Court, corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. Wisdom in this regard may be derived from **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541).** It has been held by the apex Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410),** that when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery. Similarly, in case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730,** the honourable apex Court held that recovery of crime weapon by itself is not sufficient for conviction on murder charge.

The same view has been expressed by the apex Court in **Saifullah's case (1985 SCMR 410).**

15. It is borne out from the record that proceedings under section 512 Cr.P.C. had been initiated and completed against the appellant, which on the one hand, he has denied the same in his statement under section 342 Cr.P.C. while on the other hand, it is settled law that abscondence alone, cannot be a substitute of real evidence. It has been held by the Hon'ble Supreme Court in **Farman Ali and others' case (PLD 1980 SC 201)** that abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused. Mere abscondence of accused would not be enough to sustain his conviction. Reference in this regard can also made to case titled, **"Muhammad Vs Pesham Khan (1986 SCMR 823).**

16. For what has been discussed above, we have reached to an irresistible conclusion that prosecution has miserably failed to bring home the guilt of appellant

through cogent and confidence inspiring evidence beyond shadow of reasonable doubt. The prosecution evidence is pregnant with doubts and as per golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially 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".*** Guidance in this respect may also be derived from the judgments of the Hon'ble Supreme Court in case titled, **"Muhammad Khan and**

another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230).

17. Resultantly, this appeal is allowed. Conviction and sentences of the appellant recorded and awarded by the learned Trial Court vide impugned judgment dated 13.12.2013, are hereby set aside and he is acquitted of the charges leveled against him. He be set at liberty forthwith, if not required in any other case.

18. Accordingly, death sentence of the appellant-convict is not confirmed and the ***Murder Reference No.13 of 2013,*** sent by the learned Trial Court is thus answered in the ***Negative***.

Announced.
04.06.2015

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