JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
JUDICIAL DEPARTMENT

Cr.A.No.289-P/2016

JUDGMENT

Date of hearing: 23.10.2017

Mr.Hizar Hayat Khazana, advocate for the appellant.

M/s Syed Abdul Fayaz and Bashir Ahmad, advocates for the complainant.

Mian Arshad Jan, AAG for the State.

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LAL JAN KHATTAK, J.- This criminal appeal and the Murder Reference are directed against the judgment dated 19.4.2016 of the learned Additional Sessions Judge-V, Charsadda delivered in case FIR No.171 dated 21.05.2004 u/s 302 PPC of Police Station Nisatta District Charsadda, whereby the appellant has been convicted and sentenced to death u/s 302 (b) PPC with direction to pay Rs.100,000/- as compensation to the legal heirs of the deceased or in default whereof to further suffer 6 months simple imprisonment with benefit u/s 382-b Cr.P.C.

2. Brief facts of the case are that on 21.05.2004, complainant Bagh Zadin

reported to SHO Murad Ali Khan (PW-12) on the spot of the case to the effect that on the day of occurrence after offering *Jumma* prayer, he, his son Laam Zer Gul, Majid Gul (PW-7) and Ayaz (abandoned) had come to the *hujra* of Nawaz Khan. His son was asleep on a cot while he, Majid Gul and Ayaz were sitting in the *hujra* when in the meanwhile appellant-accused Khan Munir came there and after taking out dagger from his folder, killed his son by slitting his throat. Motive was stated to be a verbal altercation having been taken place between the deceased and the appellant on the day of occurrence.

3. It is worth to mention that after commission of the offence, the appellant went into hiding and consequently proceedings u/s 512 Cr.P.C. were initiated against him.

4. On arrest of the appellant, complete challan was put in court which indicted him for commission of the offence to which he pleaded not guilty and claimed trial. Prosecution in order to prove its case examined 13 witnesses in all whereafter statement of the accused was recorded,

wherein, he professed his innocence. The learned trial court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction sentenced him as mentioned above, hence the instant appeal.

5. Arguments heard and record gone through.

6. Perusal of the case record would show that complainant of the case, namely, Bagh Zadin did not appear before the court and the reason given by the prosecution for his non-appearance was his infirmness and incapability to give evidence. The learned trial court, however, vide order dated 28.9.2015 allowed the prosecution to bring on record the statement of complainant Bagh Zadin, which he had recorded in the case during the proceedings u/s 512 Cr.P.C. No doubt, under Article 46 of the Qanoon-e-Shahadat Order 1984, statement of a person recorded u/s 512 Cr.P.C. can be transferred to the case subsequently if he has become incapable to give evidence but in order to give relevancy to such statement, it must be proved through reliable evidence that the person was dead,

infirm or was incapable to testify. In case, the above conditions are not fulfilled, then the statement recorded u/s 512 Cr.P.C. of a person cannot be given any credence for its having remained un-cross-examined. In the case in hand, the learned trial court has not given any reason for allowing the prosecution to bring the statement of complainant Bagh Zadin on record of the case. Whether the complainant was really incapable to give evidence in the court or not was a question to be resolved by the learned trial court by recording some observation to that effect. Failure to record reason to the above effect has prejudiced the prosecution's case for which it shall suffer. Though, it was the prosecution's stance that the complainant could not attend the trial court due to his infirmness but as there is no material on the case file to support the prosecution's version qua infirmness of the complainant, therefore, his statement recorded u/s 512 Cr.P.C. cannot legally be considered against the appellant.

7. Prosecution in support of its case against the appellant has also relied upon the testimony of Majid Gul, who appeared as

PW-7 before the learned trial court. No doubt, this witness does not relate to any of the party but on record there is no material, which could corroborate his deposition so as to make it a base for recording conviction. Neutrality alone of a witness would not be sufficient to hold that whatever he has deposed was a true picture of the occurrence unless his deposition is duly supported by attending circumstances of the case. If the evidence furnished by PW-7 is tested on the touchstone of the above, then it would appear that same is hardly corroborated by circumstantial evidence of the case. First, we will look at the conduct of all the three persons who, according to the prosecution, were present in the *hujra* when the appellant came there, took out dagger from the folder of his shalwar and killed the complainant's son by slitting his throat. The conduct of all the three is quite unnatural and cannot be expected from a sensible man. None of the three prevented the appellant from committing the offence nor they raised any hue and cry over the cruel act. They acted like a silent spectator, which conduct of theirs casts serious doubt on their presence on the spot. No doubt, PW-7

and Ayaz were not related to the victim so as to rescue him but the complainant, being father, must have come to the help of his son had he been present on the spot. The unnatural conduct of the complainant and PW-7 shows that they were not present on the spot when the occurrence had taken place.

8. Furthermore, the deceased was a young man of 25 years and his slitting cannot be the job of one person as reported and deposed by the prosecution witnesses because slitting of a young man, unless he is tied with any rope etc, cannot be done by a single person.

9. Another pronounced aspect of the case is that the occurrence had taken place on 1500 hours while the report was made on 1530 hours and as per the testimony of PW-7, none of the three persons had left the *hujra* till arrival of the police on the spot. It is worth to mention that the police had reached the spot at 1530 hours i.e. after 30 minutes of the occurrence. Sitting idle for 30 minutes by all the three persons on the spot after the gruesome murder is indicative of the fact that at the crucial time none of them was

present. Had they been present on the spot, they must have taken the dead body to the Police Station for legal proceedings or would have raised any hue and cry to attract other people to the spot. Failure to react, as is expected from a prudent man, shows their non-presence on the spot at the time of occurrence.

10. In addition to the above, PW-4 has admitted in his cross examination that father of the deceased had reached the spot after death of the deceased and that he was in his house. Testimony of PW-4 has negated what PW-7 has deposed qua presence of the complainant on the spot at the time of occurrence and as such testimony of the sole eyewitness cannot be relied upon for the safe administration of justice.

11. Thorough and careful examination of the case record would show that the prosecution has failed to prove its case against the appellant beyond any reasonable doubt, which is a hallmark of criminal law. The sole eye version account furnished by PW-7 is not confidence inspiring, hence cannot be relied upon.

12. True that the appellant has remained outlaw after commission of the offence but it has been held umpteenth times by the superior courts that absconsion of an accused alone would not be sufficient to record his conviction as for recording conviction of a perpetrator, reliable, tangible and corroborative evidence is required, which ingredients are very much missing in the case in hand, therefore, abscondence of the appellant is of no help to the prosecution.

13. The bottom line of the above discussion is that the prosecution has not been able to prove its case beyond any shadow of doubt against the appellant, therefore, we are constrained to accept this appeal, set aside the impugned judgment and acquit him of the charge leveled against him. He be set free forthwith, if not required to be detained in any other case.

14. The Murder Reference is answered in negative.

15. Above are the detailed reasons of our short order of even date, which reads as under:-

"For the reasons to be recorded later, this appeal is allowed, conviction and sentence of the appellant recorded by the learned Additional Sessions Judge-V, Charsadda vide impugned judgment dated 19.04.2016 delivered in case FIR No.171 dated 21.05.2004 u/s 302 PPC of Police Station Nisatta, Charsadda are set aside. He is acquitted of the charge leveled against him and be set free forthwith if not required to be detained in any other case".

JUDGE

JUDGE

Announced.
23.10.2017.

"Sadiq Shah, PS " (D.B) (Hon'ble Justice Lal Jan Khattak & Hon'ble Mr. Justice Qalandar Ali Khan)