IN THE PESHAWAR HIGH COURT, PESHAWAR,
[Judicial Department].

Crl. Appeal No.821-P/2019

Jawad son of Muzafar,
r/o Rashakai District Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :- Mian Arshad Jan, Advocate.
For State :- Mr. Muhammad Sohail Khan, AAG.
For Respondent :- Hafiz Nawab Ali Khan, Advocate.
Date of hearing: **03.10.2019**

JUDGMENT

ROOH-UL-AMIN, J:- This criminal appeal under section 410 Cr.P.C., filed by Jawad, the appellant, is directed against the judgment dated 26.06.2019, passed by learned trial Court/ASJ-III/Modal Criminal Trial Court, Nowshera, whereby he having been found guilty of committing murder of Mst. Basraja, has been convicted under section 302(b) PPC and sentenced to undergo imprisonment for life and to pay Rs.2,00,000/-, as compensation to legal heirs of the deceased within the meaning of section 544-A Cr.P.C., in case FIR No.148 dated 12.04.2017, registered under section 302/114 PPC, at Police Station Risalpur, District Nowshera.

2. The prosecution case is that on 12.04.2017 at 1955 hours, Mst. Shah Jehana complainant (PW.9), in company

of dead body of her daughter, namely, Mst. Basraja, reported to police in DHQ hospital Nowshera Kalan to the effect that on the eventful day she along with her deceased daughter, son, namely, Shoaib (PW.13) and relative Ubaid Khan (PW.15), was present in the house, situated in *Mohallah Khattak Risalpur.* Appellant Jawad and his father, namely, Muzafar (acquitted co-accused), had come to her house so as to settle a dispute in respect of her granddaughter, namely, Mst. Saba Gul. During conversation/negotiation, there was exchange of hot words between the accused and complainant party. Muzafar (acquitted co-accused), commanded his son (appellant) to kill Mst. Basraja, on which the latter fired at her, resultantly; she got hit and died at the spot. Motive behind the occurrence is that some 45 days prior to the occurrence, Mst. Saba Gul daughter of Mst. Basraja deceased was abducted by appellant Jawad. In addition to complainant, the incident is stated to have been witnessed by Shoaib (PW.13) and Ubaid (PW.15). Her report was incorporated in the shape of *Murasila* Exh.PW.4/1 by Gulshan Khan ASI (PW.4), on the basis of which, FIR mentioned-above, was registered against the accused. Gulshan Khan ASI (PW.4), prepared injury sheet and inquest report of the deceased Exh.PW.4/2 and Exh.PW.4/3, respectively, and shifted her dead body to the mortuary for post mortem examination. Lady Dr. Bushra Nisar (PW.1), conducted

autopsy on the dead body of the deceased on the same day at 8.00 p.m. and observed a firearm entry wound circular in shape 2x2 inches in size, 3 inches above lateral to left ear with its corresponding exist in front of the right ear. According to her opinion, the death of the deceased was instantaneous due to fire arm injury to her brain.

3. Muhammad Alam Khan SI (PW.11) conducted investigation in the case, he proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitness. During spot inspection he secured blood through cotton Exh.P.1 from place of the deceased and a 30 bore crime empty from the place of the appellant, vide recovery memo Exh.PW.11/1. Vide recovery memo Exh.PW.5/1 he took into possession the last worn bloodstained garments of the deceased and sent the same to the FSL along with blood secured from the spot. He also sent the crime empty to the FSL and placed on file the FSL reports Exh.PK and PK/1, recorded statements of the PWs u/s 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.

4. Akhtar Hussain Khan SI (PW.3), arrested the accused and placed on file copy of FIR No.107 dated 09.03.2017 under section 365-B/34 PPC Police Station Risalpur qua abduction of Mst. Saba Gul by the appellant.

5. On completion of investigation, challan was submitted before the learned Trial Court against the appellant and his co-accused Muzafar, where they were charge sheeted to which they pleaded not guilty and claimed trial. To prove the guilt of the accused, prosecution examined as many as fifteen witnesses. After closure of the prosecution evidence, statements of the accused were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed their innocence. They, however, declined to be examined on oath u/s 340 (2) Cr.P.C. and to produce evidence in defence. On conclusion of trial, the learned trial Court acquitted co-accused Muzafar, however, convicted and sentenced the appellant as mentioned above, hence, this appeal. The prosecution/complainant has not filed any appeal against acquittal of co-accused Muzaffar.

6. Argument of learned counsel for the parties heard and record perused with their able assistance.

7. It appears from record that the occurrence in this case has taken place on 12.04.2017 at 1745 hours, which has been reported by Mst.Shah Jehana (PW.9) at 1955 hours i.e. after about 02 hours and 10 minutes of the occurrence. No explanation whatsoever has been furnished by her in the initial report with regard to the aforesaid delay. Muhammad Shoaib (PW.13), is the brother-in-law of the deceased. In cross-examination he has admitted that

one can reach from their village to *Nowshera Kalan* within 15 minutes in a vehicle or by motorcycle. He deposed that after the occurrence, the dead body of the deceased remained on the spot for about 15 minutes, whereafter; it was shifted to the hospital. If 15 minutes are subtracted from 2 hours and 10 minutes then the dead body of the deceased should have been in the hospital at 1830 hours or at least 1900 hours, but same is not the case herein, rather the report has been lodged in the hospital at 1955 hours, which creates serious doubt about presence of the alleged eyewitnesses at the spot at the time of occurrence. Mst. Shah Jehana (PW.9) during her cross-examination has negated her version in the FIR and has totally shattered the prosecution case as well as her credibility and veracity. She deposed that she does not remember that who had informed the police about the occurrence who reach the spot and shifted the dead body of the deceased to the hospital. She further deposed that her report was not recorded by the police at the spot i.e. her house, rather in DHQ hospital. She disclosed that the police officials while shifting the dead body of the deceased to the hospital were talking to her in the vehicle. She further deposed that she does not remember that who accompanied the dead body to the hospital as she and the dead body of the deceased were shifted severally in different vehicles. As stated above, this part of her statement is complete departure from her earlier

version in the FIR as she has not stated therein a single word about arrival of the police at the spot and shifting of the dead body of deceased to the hospital. The other two purported eyewitnesses, namely, Shoaib (PW.13) and Ubaid (PW.14), have denied arrival of police at the spot and shifting of the dead body to the hospital by the police. In this view of the matter, there are three versions about shifting of the dead body to the hospital, one furnished by the complainant in her initial report, second in her court statement and the third advanced by the scriber of the *Murasila* and the purported eyewitnesses Shoaib and Ubaid. Which of these versions is correct would be best known to the PWs, however, this create doubt in the prosecution. In view of the above, we are of the considered view that complainant Mst. Shah Jehana is not a truthful witness, hence, the learned trial Court has erred in law while believing her testimony and relying upon the same for the purpose of conviction of the appellant in case of capital charge.

8. Yet there are other circumstances which create serious doubt to the effect that the occurrence has not taken place in the mode and manner as alleged by the purported eyewitnesses. Muhammad Shoaib (PW.13), in cross-examination, has admitted that his niece Mst. Saba Gul was abducted by the appellant, on which his brother Misbah Ullah used to fight with his wife/the deceased. He

admitted it correct that his brother Misbah Ullah was blaming his wife (deceased) for having hands in the abduction of his daughter Mst. Saba Gul. Complainant Mst. Shah Jehana, the grandmother of Mst. Saba Gul, in cross examination admitted that in the case of abduction of Mst. Saba Gul, the abductee/her granddaughter has recorded her statement to the effect that she had not been abducted rather she left the house with the appellant with her own free will and contracted marriage with him. She further admitted that Mst. Saba Gul is now the legally wedded wife of the appellant, however, she is not on visiting terms with her family.

9. Whether Mst. Saba Gul was abducted by the appellant or she eloped with him and contracted marriage with him is a fact in issue in another case of abduction duly registered on the report of complainant party, however, it makes one thing crystal than clear that relations between the appellant and complainant family were not cordial, therefore, it does not appeal to a prudent mind that appellant against whom there was charge of abduction of daughter of the deceased or he had married her without consent or will of her family, would himself go to the house of complainant along with father for settlement of the said dispute. In a society, particularly, in this part of the of the Province, in a matter of family honour, the accused even would never think to sit in front of the victim's family

what to speak of resolving the matter by himself so much so in such like matters, the elders of locality think otherwise, what to say of approaching the victim party for settlement of the dispute. In this view of the matter, version of the complainant and purported eyewitnesses that appellant along with his father had come to their house for settlement of the matter of Saba Gul, is beyond comprehensions. A glance over the site plan Exh.PB depicts that the purported eyewitnesses along with deceased and the accused have been shown in one room. Acquitted co-accused aged about 57 years has been shown empty handed at the spot. The only role given to him is that of commanding. As per version of the prosecution after the occurrence both the accused made their escape good from the spot which also does not appeal to a prudent mind, because the purported male eyewitnesses, namely, Shoaib and Ubaid could at least easily apprehend the empty handed accused, if not the armed one or they could at least chased the appellant by picking up arms from their house because usually arms and ammunitions are available/kept in each house for protection. The conduct of the purported eyewitnesses like silent spectators further confirms that they were not present at the spot; therefore, the dead body was shifted to the hospital after more than two hours of the occurrence by the local police where a story was cooked. The purported eyewitnesses have not established their

presence at the spot at the time of occurrence through any physical strong circumstances of the case, therefore, their testimony have wrongly been believed and relied upon by the learned Trial Court.

10. The contradictions and discrepancies in the prosecution evidence discussed above, are sufficient for holding that the occurrence has not taken place in the mode and manner as alleged by the alleged eyewitnesses, rather in some other mode which the PWs have concealed. The husband of the deceased has never appeared before the police or the Court. Similarly, Mst. Saba Gul daughter of the deceased has also not given any statement. She has not charged the appellant/her husband for murder of her mother. She is still residing in the house of the appellant as his wife. The peculiar facts and circumstances of the case i.e. annoyance of family members of the deceased on the elopement Mst. Saba Gul with the appellant coupled with the fact that husband of the deceased and other male family member were blaming the deceased in the matter of elopement of Mst. Saba Gul on the ground that the deceased was in the knowledge of prior relationship/contact between the appellant and her daughter Mst. Saba Gul but she concealed the same, suggests that the deceased might have been done to death by her family members but charged the appellant so as to settle their goals with the appellant.

11. The learned trial Court has squarely over looked the material contradictions and discrepancies in the prosecution evidence and thereby has arrived at an erronous conclusion by holding the appellant guilty of the offence. The learned trial Court has also erred in law by convicting the appellant on the same set of evidence which has been disbelieved to the extent of acquitted co-accused Muzafar. By now the principle of sifting grain from the chaff has been done away with and the principle of falsus in uno and falsus in omnibus has been made applicable in dispensation of criminal justice by the Hon'ble Supreme Court in its authoritative judgment dated 04.03.2019, rendered in **Crl. Misc.Appln.No.200 of 2019 in Crl. A No.238-L of 2013, reported as (PLJ 2019 SC (Cr.C.) 265**. In the judgment (supra) the principle of rule of *"falsus in uno, falsus in omnibus"* and *"shifting grain from the chaff*" was the main point for consideration. After exhaustive discussion, the Hon'ble Supreme Court held that rule falsus in uno, falsus in omnibus shall henceforth be an integral part of the jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. The relevant part of the judgment is reproduced below:-

> "*We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerate it is destined to self-destruct. Truth is the foundation of justice and*

> *justice is the core and bedrock of a civilized society and thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against for committing perjury."*

Copy of the judgment (supra) has been sent to the Registrars of all the High Courts in the country with a direction to provide a copy of the same to every judge and Magistrate within the jurisdiction of each High Court handling criminal cases at all levels for their information and guidance. The judgment impugned in the instant appeal has been passed on 26.06.2019, i.e. after judgment (supra) of the Hon'ble apex Court, therefore, following the principle of sifting grain from the chaff i.e. acquitting one accused and convicting the appellant on the same set of evidence would be a complete departure from the principle of falsus in uno, falsus in omnibus. The prosecution has not filed any appeal against acquittal of co-accused as such his acquittal has attained finality which means that the findings

of learned trial Court disbelieving the same set of evidence to the extent of acquitted co-accused are still intact. This aspect of the case would advance the case of the appellant. Besides, as stated above, the prosecution evidence is pregnant with doubts and according to 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 quote "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". Wisdom in this regard can also be derived from the judgments of the apex 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).**

12. For what has been discussed above, we allow this appeal, set-aside the conviction of the appellant recorded by the learned trial Court vide judgment dated 26.06.2019

and hereby acquit him of the charge. He be set at liberty forthwith, if not confined in any other case.

13. These are the reasons of our short order of even date, which is reproduced below:-

> For reasons to be recorded later, we allow this appeal, set aside the conviction and sentence of the appellant Jawad recorded by the learned trial Court/ASJ-III/MCTC, Nowshera under section 302 (b) PPC vide judgment dated 26.06.2019, in case FIR No.148 dated 12.04.2017, registered under sections 302/114 PPC at Police Station Risalpur, Nowshera and hereby acquit him of the charge leveled against him in the cited case. He be set at liberty forthwith, if not confined in any other case.

Announced:
03.10.2019
M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and Hon'ble Mr. Justice Muhammad Naeem Anwar.