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

Crl. Appeal No.785-P/2017

Muhammad Nawaz son of Abdul Nawab,
r/o Nawa Kala Jehangira Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :- Mr. Shabbir Hussain Gigyani, Advocate.
State :- Mr. Mujahid Ali Khan AAG.
For Respondent :- Malik Anwar ul Haq, Advocate.

Date of hearing: **16.10.2019**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This appeal under section 410 Cr.P.C., filed by Muhammad Nawaz, the appellant, is directed against the judgment dated 14.11.2017, passed by the learned Sessions Judge/ASJ at Nowshera, whereby the appellant having been found guilty of committing murders of his sister, namely, Mst. Maria and one Farhad, has been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life on two counts as well as to pay Rs.1,00,000/-, as compensation to LRs of each deceased in terms of section 544-A Cr.P.C. and in default of payment thereof to undergo 06 months S.I. further on each count in case FIR No.227 dated 05.05.2017, registered under section 302 PPC at Police Station Akora

Khattak, District Nowshera. Benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. The prosecution case is that on 05.05.2015 at 1626 hours, complainant Jamroz Khan (PW.3), in company of dead bodies of his brother Farhad and Mst. Maria deceassed, reported to Shahid ASI (PW.10), in presence of Mst. Hussan Zeba (PW.2) (mother of Mst. Maria deceased), in DHQ hospital Nowshera Kalan to the effect that some 15/20 days prior to the occurrence Mst. Maria deceased eloped with Farhad deceased. On the day of occurrence, the two deceassed were called by appellant Noor Muhammad (brother of Mst. Maria deceased) to his house, situated in Nawab Kala Jehangira for the purpose of settlement of the matter, where he committed their murders with firearm. The incident is stated to have been witnessed by people present at the spot. Elopement of Mst. Maria deceased with Farhad deceased has been alleged as motive behind occurrence. His report was recorded in the shape of Murails Exh.PA/1 which was verified by Mst. Hussan Zeba (PW.2), on the basis of which FIR Exh.PA, was registered against the appellant. Shahid ASI (PW.10), prepared injury sheets and inquest reports of the two deceased Exh.PW.10/1 to Exh.PW.10/4 respectively, and shifted their dead bodies of Mst.Maria and Farhad to the mortuary where, Dr. Erum and Dr. Farman Ali conducted their autopsy, respectively.

3. Ihsan ur Rehman Khan S.I (PW.5), conducted investigation in the case, who as per his assertion, proceeded to the spot and prepared site plan Exh.PB at his own. During spot inspection he secured blood through Cotton Exh.P.1 and Exh.P.2 from the places of the deceased vide recovery memo Exh.PW.5/1. Vide recovery memo Exh.PW.5/2, he took into possession 07 crime empties of 30 bore Exh.P.3 from the crime spot and sealed the same in parcel. Bakht Sher Khan SHO (PW.1), arrested the appellant in a raid over his house and prepared his arrest card Exh.PW.1/1 and from his possession recovered a 30 bore crime pistol. To this effect he registered a separate case FIR No.228 dated 05.05.2015 under section 15 KP Arms Act, 2013 Police Station Akora. The appellant was handed over to Inshan ur Rehman (PW.5), who produced him before the learned Judicial Magistrate for his physical remand. He made additions with red ink Exh.PC in the site plan Exh.PB on the pointation of the appellant. He also took into possession the crime pistol bearing No.FF.1653 Exh.P.4, recovered from the appellant, produced by Shahid Khan MHC vide recovery memo Exh.PW.5/1. He also took into possession a Cot having bullet marks vide recovery memo Exh.PW.5/6, recorded statements of the PWs under section 161 Cr.P.C and vide recovery memo Exh.PW.5/8 he took into possession the last worn bloodstained garments of the

deceased Exh.P.5 to Exh.P.6 and a phial spent bullet, sent by the doctors. He draw snapshots of the deceased and the crime spot marked as Exh.P.9 to P.18; sent the bloodstained articles, the crime pistol and empties to the FSL, reports whereof are Exh.PZ/1 and Exh.PZ/2. On completion of investigation he handed over case file to the SHO, who submitted challan against the appellant.

4. On receipt of challan by the learned trial Court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the 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 under section 340 (2) Cr.P.C. 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, hence, this appeal.

5. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance.

6. Record depicts that the occurrence has taken place at 1430 hours in the house of Mst. Hussan Zeba (PW.2), but it has been reported at 1625 hours i.e. after a delay of about 02 hours for which neither any explanation, much

less plausible, has been furnished by complainant Jamroz Khan (PW.3) nor by Mst. Hussan Zeba (PW.2). No doubt, the appellant has been directly charged by the complainant in his initial report for double murder and we are mindful of the fact that substitution of single accused in a murder charge is a rare phenomenon, but at the same time the Hon'ble Supreme Court has also laid down the law through various dictums that to put the rope around the neck of an accused charged singularly, there must be ocular account of unimpeachable character, trustworthy and confidence inspiring, corroborated by circumstantial evidence. In case titled, "**Dr. Israr ul Haq vs Muhammad Fayyaz and another" (2007 SCMR 1427),** the Hon'ble Supreme Court has ruled that substitution of innocent person when a single accused is named in a murder case is a rare phenomenon but it depends from case to case.

7. A look over the FIR and statement of Jamroz Khan (PW.3), reveal that he is not eyewitness of the occurrence. In his statement he has deposed that on the eventful day he was on duty when received information about the occurrence, upon which he reached his house and from his house he along with his mother reached hospital where he lodged report in presence of Mst. Hussan Zaiba (PW.2). No doubt, Mst. Hussan Zeba (PW.2) has also verified report of the complainant but perusal of her statement would reveal that she is also not an eyewitness of the

occurrence. She has deposed that on the eventful day on the report of fire shots, she rushed to the Baithak of her house and saw the two deceased murdered and their dead bodies were lying on a Cot. In cross-examination she admitted that she has not witnessed the appellant while committing the offence; that after 30/45 minutes of the occurrence she informed Jamroz Khan Complainant (PW.3), who reached the spot, wherefrom they shifted the dead bodies of the deceased to the hospital. Contrary, Jamroz Khan has deposed that after 15/20 minutes of the occurrence he received information during his duty, on which he proceeded to his house and accompanied his mother to the hospital. No other inmate of the house of Mst. Hussan Zaiba, has come forward to furnish ocular account of the occurrence. In view of statements of complainant and rider of Murasila, the occurrence is un-seen and the prosecution case is entirely based on the circumstantial evidence in the shape of recovery of blood of the deceased from the spot, their last worn bloodstained garments and positive Serologist report Exh.PZ in respect thereof, which admittedly proves the crime spot to be the same as alleged by the prosecution. Similarly, autopsy reports of the deceased also proves the unnatural death of the two deceased with firearm, however, these pieces of evidence do not tell the name(s) of the culprit(s). The main question for determination is that who committed these

murders? To answer the above query, we searched the prosecution evidence, but did not find an iota of direct evidence to the effect that the appellant had invited the deceased to his house and then committed their murder in the Baithak. The only circumstance that the appellant is brother of Mst. Maria deceased would not be sufficient to prove the guilt of appellant because report of complainant is based on hearsay. According to FIR, Mst. Hussan Zeba was present in DHQ hospital Nowshera along with dead bodies of Mst. Maria and Farhad deceased, where complainant charged the appellant in his report on the ground that he being aggrieved on elopement of his sister Mst. Maria with Farhad deceased, invited the two deceased to his house on the pretext of settlement of the matter and committed their murder. Through, statement of complainant has been verified by Mst. Hussan Zeba (PW.2), but complainant has not uttered a single word about the source of information regarding culpability of the appellant. It is also manifest from Murasila that before arrival of complainant, Mst. Hussan Zeba (mother of Mst. Maria deceased) was already present in the hospital but she did not lodged the report. During trial, Mst. Hussain Zeba recorded his statement wherein she has admitted the fact that on elopement of her daughter Mst. Maria deceased, the appellant and her another son, namely, Munir were annoyed. She also admitted the fact

that they resides in the house jointly. She deposed that at the time of firing she was offering prayer and thereafter went to the Baithak, where she saw the dead bodies of her daughter Mst. Maria and son-in-law Farhad. She straight formally stated that she has not seen the appellant on committing the offence. She may be termed as natural witness of the occurrence, but her admission to the effect that another brother of the appellant was also annoyed on elopement of Mst. Maria deceased and that she has not seen the appellant on committing murder of the deceased, creates serious doubt in prosecution case. The above mentioned star witness of the prosecution has neither supported the FIR nor has posed herself as an eyewitness of the occurrence, while the complainant reached the hospital when the dead bodies of the deceased were already shifted to the hospital by unknown person.

8. So far as recovery of 7 crime empties of 30 bore from the spot and a 30 bore crime pistol No.FF.1653 from possession of the appellant and positive FSL report Exh.PZ/1 in respect thereof is concerned, Bakht Sher Khan SHO (PW.1), in cross-examination has deposed that he arrested the appellant along with pistol and to his effect he scribed Daily Diary No.29 dated 05.05.2015, wherein he has not mentioned the pistol number recovered from the appellant. He further deposed that he had only mentioned 30 bore pistol and five live rounds with a magazine in the

aforesaid daily diary, whereas, pistol No.FF.1653 was mentioned by him in the Murasila and recovery memo. He admitted it correct that such like pistols are easily available in the Arms and ammunitions market in each city.

9. It is amazing, rather ridiculous that arrest of the appellant has been shown during a raid on his house on the same day of occurrence i.e. 05.05.2015 and that too, keeping the crime weapon in his possession. It is beyond the imagination and comprehension of a prudent mind that a culprit after committing murder of two persons would dare to wait in his house for the arrival of police to offer his arrest. A normal human conduct in such like situation is quite contrary to the story of prosecution as the culprit(s) after committing offence used to go into hiding so as to avoid arrest. Thus arrest of the appellant in his house along with crime weapon soon after the occurrence is nothing but a dramatic scene staged by the police just to show their efficiency and this fact can be well established from the fact that the alleged crime empties and pistol have been sent to the FSL on 14.05.2015 i.e. after eleven days of the occurrence/recovery. No explanation, much less plausible has been furnished by the prosecution that where the pistol and empties remained during the period of eleven days and whether these were in safe custody of a responsible Officer. In absence of any explanation, it can be safely held

that during the interregnum period there are chances of manipulation of alleged crime pistol and empties by the local police. Besides, no independent witness has been associated with the process of arrest of the appellant and alleged recovery of the crime pistol from his possession. There is another pinching aspect of the case regarding arrest of the appellant recovery of the pistol from fold of his trouser inside his house at 08.00 p.m. The Investigation Officer left the Police Station for spot at 1740 hours, where he prepared the site plan of his own, followed by recoveries from the spot, but in the same house could not arrest the appellant, while Bakht Sher SHO (PW.1), on getting information at 2000 hours, came to the spot and arrested the appellant along with crime pistol. The arrest card of the appellant is silent about the place of his arrest and recovery of pistol from his possession. The mode and manner of arrest of the appellant being not appealable to a prudent mind coupled with the fact of sending the alleged crime empties and the pistol to the FSL with a delay of eleven days, makes the evidentiary value of this piece of circumstantial evidence highly doubtful, hence, would not be sufficient for recording conviction of the appellant, that too, in case of capital charge. An iota of circumstantial evidence of the standard that all the circumstances so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other

the neck of the accused, has not been brought on record by the prosecution to prove the guilt of the appellant. It is settled law that any missing link in the chain in case of circumstantial evidence would destroy the prosecution case and shall render the same unreliable for recording a conviction on a capital charge. Reference is made to the cases of ***Muhammad Aslam v. The State (PLD 1992 SC 254) and Ch. Barkat Ali v. Major Karam Elahi Zia (1992 SCMR 1047)***.

10. As stated above, recovery of blood from the spot, the last worn blood stained garments of the deceased and unnatural death of the deceased with firearm as per postmortem reports, could only prove the factum of murders of the deceased with firearm at the place as alleged by the prosecution, but never tell (s) the name (s) of the culprit(s)/killer(s). Such pieces of evidence are always considered as corroborative evidence and are always taken along with direct evidence and not in isolation as held by the Hon'ble Supreme Court in ***Riaz Ahmed's case (2010 SCMR 846), Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541)***.

11. For what has been discussed above, we are firm in our view to hold that the prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring evidence direct or circumstantial evidence beyond shadow of reasonable doubt. It is settled

law that prosecution is duty bound to prove its case beyond shadow of reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused. Guidance in this regard can be derived from case titled, **"Tariq Pervaz Vs the State" (1995 SCMR 1345) and case titled, "Muhammad Akram Vs the State (2009 SCMR 230) and Faryad Alis 20 case (2008 SCMR 1086).**

12. The learned Trial Court has failed to appreciate the evidence in its true perspective and has arrived at an erroneous conclusion by holding the appellant guilty of the offence, therefore, the impugned judgment is liable to be set aside. Accordingly, this appeal is allowed. Conviction and sentence of the appellant recorded through impugned judgment dated 14.11.2017, are hereby set aside. He is acquitted of the charge leveled against him in the instant case. He be set at liberty forthwith if not confined in any other case.

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 appellant-convict Muhammad Nawaz son of Abdul Nawab, recorded under section 302 (b) PPC by learned Sessions Judge/ASJ at Nowshera vide judgment dated 14.11.2017, in case FIR No.227

dated 05.05.2015, registered under section 302 PPC at Police Station Akora Khattak and hereby acqit him of the charge in the cited case. He be set at liberty forthwith, if not confined in any other case".

Announced:
16.10.2019
M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Ishtiaq Ibrahim.