Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

Criminal Appeal No.846-P/2018.

Muneeb Hassan..Vs..The State & another

JUDGMENT

Date of hearing: 05.07.2022.

Syed Abdul Fayaz, Advocate, for the appellant.

Mr. Muhammad Nisar Khan, AAG, for the State.

Mian Sher Akbar, Advocate, for the complainant.

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ISHTIAQ IBRAHIM, J:-This single judgment in the instant criminal appeal by convict/appellant, Muneeb Hassan, is also directed to dispose of Criminal Revision No.119-P/2018, under section 439 Cr.P.C for enhancement of the sentence of life imprisonment awarded to the convict/appellant and Criminal Appeal No.862-P/2018 filed by appellant Abdul Qayum against acquittal of co-accused Muhammad Ibrahim as both the criminal appeals and criminal revision pertain to the same case vide F.I.R

No.79 dated 07.12.2012 under sections 302/34 PPC registered in Police Station Parmoli, District Swabi.

2. It is the case of prosecution that Tariq Ahmad ASI on receiving information regarding the occurrence rushed to Civil Hospital Kalu Khan where complainant Abdul Qayum present with his deceased maternal uncle Aurangzeb reported the matter to the police to the effect that he alongwith his maternal uncle Aurangzeb (deceased), Ayaz son of Wisal and Tahir son of Khan Sher his co-villagers, after *Asar* prayer were present in front of the *Hujra* of deceased Aurangzeb situated in Mohallah Choora Khel Village Shewa and were busy in gossiping, in the meantime, at about 16:05 hours, accused Yasir son of Noor-ul-Basar (absconding co-accused), Muneeb son of Abu-Al-Hassan and Ibrahim son of Muqtadir his co-villagers duly armed with firearms came there and all the three accused started firing upon deceased Aurangzeb with the intention to commit his *qatl-i-amd*, as a result whereof he was hit and injured. They took the deceased then injured to the hospital Kalu Khan but on the way he succumbed to his injuries. Motive behind the occurrence was stated to be previous blood feud enmity between the

parties. Beside the complainant the occurrence was witnessed by Ayaz and Tahir. Hence, the case was registered against the accused for the commission of the offence.

3. After registration of the case, complete *challan* was submitted in the Court. Accused Ibrahim applied to the Court for his bail before arrest which was recalled on 19.12.2012. Accused Muhammad Ibrahim was summoned, who appeared before the Court on bail. Statement of Muhammad Iqbal DFC recorded as SW-1. In the light of the statement of the DFC proceedings under section 512 Cr.P.C were initiated against absconding co-accused Muneeb Hassan and Yasir. Accused Muhammad Ibrahim appeared before the Court on 29.03.2013 and formalities of section 265-C Cr.P.C was complied with. Formal charge against accused Muhammad Ibrahim was framed to which he pleaded not guilty and claimed trial.

4. During trial, accused Muneeb Hassan was also arrested by the local police in the present case. The prosecution submitted supplementary *challan* against him. Accused Muneeb Hassan was produced in custody and the provision of section 265-C Cr.P.C

was complied with. Joint charge against accused Muhammad Ibrahim and Muneeb Hassan was framed to which they pleaded not guilty and claimed trial. The prosecution was directed to produce its evidence. In support of its case, the prosecution produced and examined thirteen (13) witnesses.

5. After prosecution closed its evidence, statements of the accused were recorded under section 342 Cr.P.C, wherein, they refuted allegations of the prosecution. Accused Muneeb Hassan did not opt to be examined on Oath nor desired to produce evidence in his defence while accused Muhammad Ibrahim wished to be examined on Oath and also produce evidence in his defence. Therefore, the statement of accused Muhammad Ibrahim was recorded under section 340(2) Cr.P.C whereas statements of Noor Hussain and Ayaz Ali were recorded as DW-1 and DW-2. Having heard arguments of learned APP assisted by learned counsel for the complainant and learned counsel for accused, the learned trial Court/Additional Sessions Judge-I, Swabi, rendered the impugned judgment dated 29.09.2018, whereby, appellant Muneeb Hassan was convicted u/s 303(b) PPC for committing

murder of Aurangzeb (deceased) and sentenced to undergo imprisonment for life as Ta'zeer. He shall also be liable to pay compensation under section 544-A Cr.P.C to the tune of Rs.300,000/-(rupees three lacs) to the legal heirs of the deceased. The same shall be recoverable as arrear of land revenue and in default of payment of such compensation the convict shall suffer further S.I for six (06) months. Benefit of section 382 (B) Cr.P.C was also extended to appellant Muneeb Hassan, hence criminal appeal for his acquittal by convicted accused/appellant, and criminal revision for enhancement of the punishment of sentence by the petitioner. The learned trial Court acquitted co-accused Muhammad Ibrahim by giving him the benefit of doubt, hence criminal appeal No.862-P/2018 was filed by appellant/complainant Abdul Qayum for setting aside the impugned judgment and the conviction of acquitted co-accused Muhammad Ibrahim.

6. Arguments of learned counsel for the appellant and learned AAG assisted by learned counsel for the complainant heard; and record gone through with their valuable assistance.

7. Admittedly there is intense enmity between the parties which was alleged in the F.I.R and as well as during trial by the PWs. The witnesses are closely related to the deceased. Complainant Abdul Qayyum (PW-10) is the nephew while Tahir Zaman (PW-11) is the paternal cousin of the deceased Aurangzeb. They are closely related to the deceased. They can be well regarded as interested witnesses. They are locked in blood feud since long therefore their testimony is to be taken with great care and caution.

8. It is the case of prosecution that on the eventful day at 16:05 hours they were present in front of the Hujra of the deceased and were busy in gossiping, in the meantime, appellant Muneeb Hassan alongwith the acquitted co-accused Muhammad Ibrahim and the absconding co-accused Yasir came there duly armed with firearms and started indiscriminate firing at the deceased, as result whereof the deceased got hit and sustained injuries. If we look at the site plan the Hujra of the deceased has been shown comprising of rooms, veranda and courtyard as well. There was no occasion for the deceased and the PWs to be present in the thoroughfare for the purpose of chatting when the

gate of the Hujra is quite closed to the point on which the deceased has been shown to be present at the time of occurrence. Otherwise when they are locked in such intense enmity the presence of the deceased and the PWs for the above referred purpose is not appealing to prudent mind. If we have a look at the site plan the deceased has been shown on one side of the road while the complainant and PWs have been shown at the other side of the road. If they were present for the purpose of gossiping then they should have been closed to each other instead of standing at a considerable distance from each other. Another feature of the case is ages of the PWs and the deceased. The deceased was aged about 75/76 years and the complainant Abdul Qayum (PW-10) is aged about 47/48 years while PW Tahir Zaman (PW-11) is aged about 38 years. They are from different age groups and their assemblage at that point of time for the purpose of gossiping is also repellent to common sense keeping in view the difference in between their ages. The house of the complainant is situated at a distance of 300/400 meters from the Masjid as well as from the Hujra of the deceased where they offered Asar prayer before the occurrence. Likewise, the

Mosque is also available closed to the house of another eyewitness Tahir Zaman (PW-11) and he has stated that he normally perform his prayer in the Mosque of "Awan" which is near to our house and he used to perform his prayers in routine over there. The prosecution has tried to show the presence of these PWs at the relevant time but in our view the same has not been proved for the reason that both the witnesses are residing far away at a considerable distance from the Hujra of the deceased. The complainant has further stated that they were present in Hujra from noon time till Asar time while on the contrary Tahir Zaman (PW-11) has stated that he was present in the Hujra of the deceased since morning. None from the Mosque even the *Pesh Amam* has been examined only to prove the presence of the PWs alongwith the deceased at the time of Asar prayers, at least to the extent of their presence of the PWs to be present at the time of Asar prayers. The story of the prosecution on which the entire superstructure of the prosecution case was erected appears to be falls and does not stand to reason. Indeed the prosecution story must be natural, coherent and shall not lead to any other interpretation

for the reason that otherwise both the witnesses are residing in different houses situated in same village but away from the place of occurrence. Allegedly the report was made within 45 minutes of the occurrence but it is in the statement of Tahir Zaman (PW-11) eyewitness that it consumed three hours from the occurrence till lodging of the FIR. Therefore, the time of the report as alleged by the prosecution seems to be incorrect and that is why inspite of the fact the deceased was dead. He was not taken to the police station and was shifted to Civil Hospital Kalu Khan. Therefore, we hold no hesitation in holding that the prosecution has miserably failed to prove the presence of the PWs. Reliance is placed on ***"MUHAMMAD IRSHAD and another..Vs..THE STATE"*** **(1999 SCMR 1030)**, wherein it is held that;

> ***"It is evident from these circumstances that the complainant party was inimically disposed towards the appellant. The eye-witness examined by the prosecution are closely related to one and other and rule of prudence required that there should have been some independent corroboration available for placing implicit reliance on their testimony but the same is lacking and it would be highly unsafe to act upon the uncorroborated testimony of eye-witness examined by the prosecution, particularly when it is full of material contradictions"***

9. The above statements show that the occurrence had not taken place in the mode and manner as put forth by the prosecution. The above statements are full of contradictions and improvements, are not confidence inspiring and trust worthy. The prosecution has been miserably failed to establish the presence of complainant (PW-10) and eyewitness (PW-11) at the spot. It seems that the occurrence is un-witness one. Reliance is placed on **1999 SCMR 1220**, titled ***"Muhammad Khan & other..vs..The State"***, wherein it is held that;

> ***"It is axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been moulded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined***

in its correct perspective. It is unfortunate that neither the trial Court nor the High Court thoroughly studied the record so as to reach correct conclusion, rather they dealt with the matter in a very cursory manner which naturally resulted in miscarriage of justice. As noted above, the eye-witness account in this case is so unreasonable and inherently improbable that no amount of corroboration can rehabilitate it"

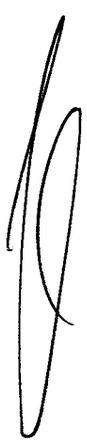
Further reliance is placed on ***"Mst. SUGHRA BEGUM and another..Vs..QAISER PERVEZ and others"*** **(2015 SCMR 1142).**

10. In this case three persons are charged for effective firing at the deceased with firearms. During the spot inspection 18 empties of *Kalashnikov* were secured from point-A shown in the site plan which has been shown in front of the accused. The investigation officer has admitted that *Kalashnikov* ejects its empties towards its right side. When three persons are charged for firing without specifying the role of each accused and when the empties were not sent to the expert by the investigating officer. It can be safely assumed that it is doing of one man by looking into the dimension of the injuries i.e. all the entry wounds are of 1/4 x 1/4 inches in size. It appears to be doing of one person. In this regard

reliance is placed on ***"titled Farman Ali and 03 others...Vs...The State"*** **(PLD 1980 Supreme Court 201),** It is an admitted position that an ordinary magazine of *Kalashnikov* accommodates 30 rounds. Another words a single person equipped with *Kalashnikov* can inflict as many as 30 firearm injuries.

11. The Investigation Officer (PW-13) recovered 18 empties of 7.62 bore from the spot but he has not sent the same to the FSL for opinion that whether it was fired from one or different weapons. PW-13 in his cross examination stated that *"I have not sent the empties to the FSL in order to find out that whether they were fired from one weapon or from different weapons either of the same bore or of different bores."* The non sending of the alleged crime empties to the FSL makes the same as doubtful and same cannot be relied upon for purpose of conviction. Moreso, this Piece of evidence is a corroborative one and in a case where direct evidence fails, corroborative piece of evidence is of no avail as in the instant case direct evidence of PWs have already been disbelieved. In a case titled ***"Ghulam Akbar and another v. The State"*** **(2008 SCMR 1064)** it

was observed by the Hon'ble Supreme Court that law required that empty recovered from the spot should be sent to the laboratory without any delay, failing which such recovery evidence is not free from doubt and could not be used against the accused. Though the trial Court has held that the appellant has remained absconder and that the abscondance was taken as additional evidence against the appellant. Yet another co-accused Yasir is also absconding. He is still at large. So abscondance alone in our view would not be sufficient enough to hold an accused responsible for the commission of the offence when otherwise the substantive evidence has been disbelieved against him.



12. The other accused/respondent namely Muhammad Ibrahim in Criminal Appeal No.862-P/2018 was acquitted by the learned trial Court on the plea of Alibi which was taken by him at the earliest and the same was believed and he was extended the benefit of doubt. He has also produced defence witnesses namely Noor Hussain as DW-1 and Ayaz Ali as DW-2.

13. The prosecution has failed to prove the presence of the PWs. We have disbelieved the

presence of the PWs on the spot at the relevant time and the mode and manner of the occurrence, therefore, Muhammad Ibrahim has rightly been acquitted by the learned trial Court. The plea of Alibi accused/respondent Muhammad Ibrahim also indicates that the witnesses are not truthful and confidence inspiring.

14. There is a background of blood feud between the parties. It appears from the record that an attempt has been made to implicate as many persons as possible in the crime and the prosecution has thrown its net too wide. Where innocent persons were found to have been dishonestly implicated in crime the Court was entitled to acquit even those accused who were not proved to have been falsely implicated. Reliance is placed on ***"ZAAB DIN and another Vs. The STATE"*** **(PLD 1986 Peshawar 188).** Per tendency of social set up of this Country too, at times, people do charge innocents person of the family amongst the guilty persons for different reasons. By no viewpoint, the ocular, circumstantial as well as the medical evidence would suggest that the crime was doing of all the accused. In this regard, reliance is placed on the case of "***Sohni Vs.***

Bahaduri etc" **(PLD 1965 SC 111)**, wherein the august Supreme Court of Pakistan has held that;

> ***"In this case the village where the occurrence took place was torn by faction and therefore, false implication of innocent persons cannot be altogether ruled out. Furthermore, according to Doctor Muhammad Yamin Khan out of the 9 injuries found one Maulo deceased 2 were contused wounds, 1 incised wound, 1 was abrasion and the rest were contusions. Death was due to the shock and compression of brain caused by blood clots due to fracture of skull which was caused by injuries Nos. 1 and 2 that were found on the deceased. Most of the remaining injuries were on the leg of the deceased. In view of the number and nature of injuries one may legitimately ask whether this could possibly have been the result of assault by 6 accused persons or that they could have been easily caused by two or three persons. Viewing all the circumstances we are satisfied that the High Court was right in insisting on some corroboration of the evidence of the eye-witnesses connecting the accused with the crime. As such corroboration was lacking, the High Court was justified in giving the benefit of doubt to the accused persons.***

15. Needless to say that because of the exaggerated number of culprits in the case and attributing them same role of indiscriminate firing at the deceased, the available prosecution evidence would not be sufficient to identify the guilty persons by separating the innocents while the prosecution has failed to discharge its burden of proving the case against all accused in the alleged mode and manner. In other words, finding of truth is impossible in circumstances of the case and therefore the famous legal maxim relating to the

criminal justice would well fit here that ***'it is better that ten guilty persons be acquitted rather than one innocent persons be convicted'***. Hon'ble Supreme Court of Pakistan in the case of ***'Muhammad Zaman Vs. The State and another'*** **(2014 SCMR 749)** has acquitted accused Muhammad Zaman who alongwith 16 persons were charged for murder of two deceased persons besides causing injuries to PWs. Relevant portion of said judgment reads as follows:

> ***"...The number of assailants in the circumstances of the case appears to have been exaggerated. It seems that most of the persons including the respondents have been charged because of previous enmity. The tragedy may have been enacted by Mukhtar who has gone into hiding or Munawar who has been acquitted because the deceased Shabbir was alleged to have illicit relations with their sister, but many who have no visible nexus with this part of the story have also been roped in. It is so because it is customary in this part of the country to throw wide the net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the one who is innocent or who is actually responsible for the commission of the crime. The Court, therefore, is required to exercise much greater care and circumspection while appraising evidence."***

16. This Court too through judgment rendered in the case of ***"Malak Amir Sultan and two others Vs. The State and another"*** **(2018 MLD 1635, Peshawar)** has acquitted three real brothers who were charged for murder of a single deceased by holding that:

> ***"....It reflects that it is the job of one person but in order to throw the net wide, the number of accused has been exaggerated as three brothers and two unknown accused have been charged....."***

17. It is a cardinal principle criminal justice that the benefit of even a slight doubt is to be extended in favour of the accused. In this regard reliance is placed on the case of ***"Fazal Muhammad Vs. Zia ul Haq and another"*** **[2016 PCr.LJ Note 30 (Peshawar)],** wherein it has been held by this Court that;

> ***"Prosecution was bound to prove its case beyond any reasonable shadow of doubt; if any reasonable doubt would arise in the prosecution case, benefit of the same must be extended to accused, not as a grace or concession, but as a matter of right. Better to acquit hundred culprits, than convicting one innocent soul. Acquitting by error, would be better than conviction by error."***

18. In views of above and considering overall circumstances of the case, criminal appeal No.846-P/2018 filed by appellant-convict, namely, Muneeb Hassan is accepted; and the impugned judgment dated 29.09.2018 of the learned trial Court, together with conviction of the appellant-convict and sentences awarded to him, is set aside; and appellant-convict Muneeb Hassan is acquitted of the charges. He be set free, forthwith, if not required in any other case.

19. Consequent upon acceptance of the criminal appeal (Cr.A No.846-P/2018) and acquittal of appellant-convict, namely, Muneeb Hassan, Criminal Revision No.119-P/2018 by petitioner for enhancement of the sentence and Criminal Appeal No.862-P/2018 filed by appellant/complainant Abdul Qayum against acquittal of respondent/accused Muhammad Ibrahim are dismissed.

Announced
05.07.2022

JUDGE

JUDGE

(D.B) *Hon'ble Mr. Justice Mohammad Ibrahim Khan & Hon'ble Mr. Justice Ishtiaq Ibrahim.*

(M. Iqbal, SSS)