**JUDGMENT SHEET**

# IN THE PESHAWAR HIGH COURT, PESHAWAR

[JUDICIAL DEPARTMENT]

**Criminal Appeal No. 706-P/2005**.

Shah Jehan.. ….vs. Ilyas Gul.

**PRESENT: -**

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| For the appellant: - | Mr. Abdul Latif Akhunzada, Advocate. |
| For the State:- | Mr. Rab Nawaz Khan AAG. |
| For the accused/respdts: | Mr. Saif Ullah Mehmand, Advocate. |
| Date of hearing. | **14.12.2020** |

## J U D G M E N T

**MUHAMMAD NAEEM ANWAR, J.-** This criminal appeal has been directed against the judgment dated 13.09.2005 passed by learned Additional Sessions judge-V, Charsadda, whereby the accused-respondent, Ilyas Gul involved in a case FIR No. 651, dated 01.10.2000 under section 302/324/34 PPC of Police Station, Batagram, was acquitted of the charges.

2. The prosecution story, as reflected from the record, is that on 01.10.2000 complainant Malik Aman lodged a report to the effect that on the day of occurrence, he along with Arshad Khan and Murtaza was present on the thoroughfare situated near his house when at 09.45 hours accused Hamyun, Gulzar, Ijaz and Ilyas duly armed came and at once started firing at them, as a result of fire shot of

accused Ilyas, his brother Arshad was hit and died at the spot while he and his uncle Murtaza escaped from their firing. The accused after commission of the offence fled away from the spot. Motive for the offence was dispute over landed property. The report of complainant was recorded in shape of FIR Exh. PA by Syed Qasim Shah, ASI, (PW-9). He prepared inquest report and injury sheet of the deceased and sent dead body of the deceased to the mortuary under the escort of Inayat Ullah (PW-1).

3. Dr. Jahangir (PW-8) conducted postmortem examination of deceased Arshad Khan and found the following injury on his person:-

1. Firearm injury inlet wound on the chin 1 cm x 1cm.
2. Firearm injury inlet wound on the occipital region 1 ½ c.m.
3. Firearm injury grazing wound on the right side of throat.

He also found Scalp, skull, vertebrae, membranes, brain, spinal cord and blood vessels of thorax as injured. According to his opinion, the deceased died due to severe bleeding and shock caused by firearm injury. He recorded probable time between injury and death as half an hour while between death and P.M about one and half hour. The P.M documents are marked as Ex.PM, Exh.PM/1, Ex.PM/2 and Exh.PM/3.

4. Syed Qasim Shah (PW-9) after recording report of the complainant visited the spot and prepared the site plan

Exh.PQ at the instance of complainant and eyewitness Murtaza Khan. During spot inspection, he recovered two empties of 7.62 bore and blood stained earth from the spot vide recovery memo Exh PR and Exh.PR/1 in presence of the marginal witnesses. He also took into possession blood stained garments of the deceased sent by the medical officer vide memo ExPR/2. He also sent blood stained articles to Forensic Science laboratory and its report is ExPZ/1. Accused Hamayun, Gulzar and Ijaz were arrested in the case while accused-respondent Ilyas was avoiding his lawful arrest, therefore, warrant of arrest under section 204 Cr.P.C, followed by notices under section 87 Cr.P.C were issued against him. After completion of investigation, PW-9 submitted the case file to SHO concerned, who submitted complete challan in the case.

5. On receipt of challan under section 173 Cr.P.C, accused Hamayun, Gulzar and Ijaz faced the trial and after conclusion of the trial, learned trial court acquitted them, vide judgment dated 07.08.2003, while the present accused-respondent Ilyas was declared as proclaimed offender. After arrest of the accused-respondent on 14.05.2004 and submission of supplementary challan against him, it was forwarded to the court of Learned Additional Sessions Judge-V, Charsadda, for trial, who, on its conclusion, vide judgment dated 13.09.2005,

recorded his acquittal, hence, the instant appeal by the Complainant Shah Jehan.

6. Learned counsel for the appellant and AAG contended that it was a day light occurrence and the accused-respondent was also charged by the complainant, for effective firing at the deceased in a promptly lodged FIR but the learned trial court in presence of straightforward testimony of complainant (PW-6) and eyewitness Murtaza (PW-10) duly supported by the testimony of investigating officer (PW-9) as well as circumstantial evidence in shape of medical evidence, recovery of two 7.62 bore empties from the spot, blood stained earth and garments of the deceased coupled with longstanding abscondance of the accused-respondent as a result of misreading and non-reading of evidence its true perspective acquitted him of the charge by considering minor discrepancies which in no way were fatal to the prosecution case, therefore, the impugned judgment is liable to be set aside and the accused-respondent may be awarded punishment in accordance with law.

7. On contrary, learned counsel for the accused-respondent submitted that it was an unseen occurrence but complainant with the connivance of police procured the complainant and Murtaza Khan from the place of their business at Peshawar, who had falsely involved the accused-respondent along with three others for the

commission of offence. He contended not only there are glaring contradictions in the testimony of complainant and the alleged eyewitness Murtaza Khan but on the same set of evidence co-accused have already been acquitted which judgment is still in field and, as such, supported the impugned judgment.

8. We have listened arguments of learned counsel for the parties and gone through record of the case.

9. The record reveals that four persons, including the present accused-respondent, were charged by the complainant for indiscriminate firing at the deceased Arshad Khan, besides ineffective firing at the complainant and eyewitness Murtaza Khan, however, the effective role was attributed to the present accused-respondent. Three of the accused, namely, Hamayun, Gulzar and Ijaz after full-fledged trial were acquitted by the trial court on 07.08.2003. The entire case of the prosecution against the present accused-respondent hinges on the ocular account given by complainant Malik Aman (PW-6) and Murtaza Khan (PW-10), recovery of two empty shells of 7.62 bore and blood stained earth from the spot,Medical evidence, Motive and abscondance of the accused-respondent. Since the most important role in the case is that of the ocular account, therefore, in our view, we would like to discuss it first of all by making careful appraisal of the same to draw conclusion as to whether they were present

at the spot and, if so, their testimony is worthy of credence, believable and whether their conduct is natural and in accordance with the ordinary human conduct or otherwise. From the perusal of contents of FIR, it is evident that the complainant in his first report charged four persons for indiscriminate firing at them and further clarified that it was the fire shot of the present accused Ilyas, which proved effective but, strangely enough, he has not disclosed the type of weapons, which the accused were carrying at the time of occurrence despite the fact that, as per site plan the complainant and the assailants were very close to each other at the time of occurrence, therefore, there was no occasion or chance for the complainant to omit the description of the crime weapon possessed and used by each accused-respondent. Moreover, complainant in his cross examination admitted that during the days of occurrence, he used to run a shop in the Gor Mandy in Peshawar. Similarly, PW Murtaza Khan stated that during the days of occurrence he was running business of shopping bags in Bashir Abad Peshawar, while Alamzeb (PW-4), who is marginal witness to the recovery memo Ex.PR and Ex.PR/1 was also associated with him. They tried to give explanation of their presence at the spot and stated that on the day of occurrence it was Sunday but their explanation is not plausible because they were not government servants.

They were businessman and Sunday was not holiday for the business community. They also failed to explain as to for what purpose all the three were present on the thoroughfare. It has now been well settled that for conviction of an accused person it would be highly unsafe to rely upon testimony of a chance witness when remained uncorroborated and for conviction of a accused on capital charge on the basis of testimony of chance witness, the court has to be at guard and corroboration has to be sought for relying upon such evidence. Reliance: **2017 SCMR 1710 Anwar Begum vs. Akhter Hussain.** Besides the above, yet another attempt can be made to adjudge the truthfulness or otherwise of their evidence on merits to ascertain whether evidence furnished by them has any intrinsic value for bringing the guilt home against accused-respondent or not. As per contents of FIR, the deceased on receipt of injuries at the hands of the accused-respondent at 09.45 hours died at the spot but his this statement is totally belied by the medical evidence as well as statement of Inayatullah (PW-1) who had escorted the dead body of the deceased from Police Station to the Mortuary. The occurrence, as per record, took place at 09.45 a.m while the medical report reveals that the deceased died at 10.50 a.m. Dr. Jahangir Khan (PW-8), who had conducted autopsy, in the first line of his cross examination stated that it has correctly been recorded in

the column of death that it was occurred at 10.50 a.m. Similarly, PW-1 stated in his cross examination that he escorted the dead body of the deceased at 11.00 a.m from the Police Station while as per medical report the P.M was conducted at 10.50 a.m, before the receipt of dead body of the deceased. Apart from the above, Alam Zeb PW-4 in cross examination stated that he reached to the spot after 5/6 minutes of the occurrence and when he came out of the house the deceased Arshad Khan was lying dead on the spot. He further stated that at the time of recovery from the spot the dead body of the deceased was not yet brought from the Police Station while the complainant during cross examination stated that Alam Zeb PW came to the village along with the dead body. The reappraisal of statements of both the PWs lead us to draw an inference that evidence furnished by them suffer from inherent improbabilities, improvements and contradictions which are sufficient to discard their evidence. It is cardinal principle of jurisprudence that to disbelieve a witness it is not necessary that there should be numerous infirmities and if there is one which impeaches the credibility of the witness that may make the entire statement doubtful. From the perusal of their statements it is evident that presence of both the eyewitnesses on the spot is highly doubtful.

10. No doubt, medical evidence supports the prosecution story to the extent that the deceased died due to fire arm injury and not beyond but medical evidence does not establish either identity or the involvement of the accused in the crime. Medical evidence can be used to support the ocular testimony or any other incriminatory evidence but in the present case ocular testimony having been found not confidence inspiring, therefore, the same is of no use to prosecution.

11. So far as the abscondance of the accused-respondent is concerned, it is also of no use to prosecution because it can neither remove the defects of the oral evidence nor is itself sufficient to justify the conviction. Reliance is placed on the case **Rohtas Khan vs. The State (2010 S C M R 566)** wherein it has been held that conviction cannot be sustained on abscondance of accused alone.

12. The gist of the above discussion is that the presence of PW-6 and PW-10 was highly doubtful at the time of occurrence as they failed to explain their presence in a satisfactory manner at the place of occurrence and their testimony has not been corroborated by any independent evidence. It is well settled principle of law that prosecution primarily is bound to establish guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence

and if Court comes to the conclusion that the charge so leveled against the accused has not been proved beyond reasonable doubt, then the accused becomes entitled for his acquittal on getting benefit of doubt. Rule of benefit of doubt is essentially a rule of prudence which could not be ignored while dispensing justice in accordance with law. Said rule is based on the maxim "it is better that ten guilty person 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 (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". It has been now settled that 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. Wisdom is derived from the case titled reported as **Muhammad Khan and another vs. The State, 1999 SCMR 1220 and Muhammad Ikram vs. The State (2009 S C M R 230).**

13. Moreover, law relating to appraisal of evidence in appeals against acquittal is stringent, because the presumption regarding innocence of accused is doubled and multiplied after accused is found not guilty by a competent Court of law and such findings cannot be upset, disturbed and reversed except when the impugned judgment is found to be perverse, shocking, alarming,

artificial and suffering from jurisdictional error or misreading or non-reading of evidence. Wisdom is derived from the case **Muhammad Yaqoob .vs. Manzoor Hussain and three others (2008 S C MR 1549).**

14. In the light of above discussion, it is difficult to hold that the judgment of the trial court is either perverse or is a result of complete misreading or non-reading of evidence on record. As such, this appeal being without any merit is dismissed.

**Announced**
**14.12.2020** **J U D G E**
*M.Zafral PS*

**J U D G E**

(Hon'able Mr. Justice Syed Arshad Ali, J &
Hon'able Mr. Justice Muhammad Naeem Anwar).