JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(*Judicial Department*)

Cr. Appeal No.12-D/2017

Masood Khan
Vs.
The State

JUDGMENT

Date of hearing: **19.02.2018**

Appellant-Petitioner By: M/S Saleem Ullah Khan Ranazai and Tanveer Ahmad Baloch Advocate

Respondent By: M/S Saifur Rehman Khan Advocate and

Mr. Kamran Hayat Khan Miankhel AAG

SHAKEEL AHMAD, J.- By this single judgment, we propose to dispose of criminal appeal No. 12-D/2016 filed by the appellant Masood Khan against his conviction & sentence and Cr. Revision No. 04-D/2016 preferred by the complainant Shoukatullah for enhancement of sentence of the appellant, as both the matters have sprung out of the one and same judgment dated 29.01.2016, passed by the learned Additional Sessions Judge-II, D.I.Khan, whereby the appellant was convicted under Section 302(b) PPC and sentenced to life imprisonment and also held him liable to pay the compensation of Rs.2,00,000/- to be paid to the legal heirs of the deceased as provided under section 544-A Cr.P.C. Benefit of Section 382-B Cr.P.C was extended to the accused/convict.

2. The facts of the prosecution case as disclosed in the FIR (*murasila*) Ex:Pw-9/1 by Shoukatullah son of Zahoor Khan aged about 25/26 years, brother of the deceased Aftab were that the complainant Shoukatullah brought his injured unconscious brother Aftab in Civil Hospital, Kulachi and reported the matter to the police in its Emergency Room, and stated that his brother is working in the shop of one Pappu, on the eventful day at sham-vela, he, his brother Aftab and Nauman son of Suleman were present in the shop, in the meanwhile his paternal uncle Masood/convict duly armed with 30 bore pistol came there and while standing at the door of the shop raised *lalkara* stating that "*Aaj Bach ker nahi jao gay*" and opened firing at him with his pistol with the intention to kill him, as a result of firing, his brother sustained injuries on abdomen and wrist of right arm and became unconscious. He could do nothing being empty handed. After commission of offence, the accused fled away from the spot. Subsequently, the injured succumbed to his injuries. The occurrence was witnessed by Nauman, besides the complainant. The motive as alleged in the FIR is that an altercation had taken place between deceased and accused 3/4 days prior to the occurrence.

3. After completion of usual investigation, complete challan was submitted against the

accused/convict under section 512 Cr.P.C on 20.11.2013, and he was declared proclaimed offender vide order dated 08.4.2014. The accused was arrested on 25.9.2014, whereafter, he was put to trial. After compliance of provision of Section 265-C Cr.P.C, charge was framed against the appellant on 15.12.2014, to which, he pleaded not guilty and claimed trial

4. In order to prove its case the prosecution examined as many as 12 witnesses. Statement of the appellant was also recorded under section 342 Cr.P.C, wherein, he denied the allegations, but neither opted to make his statement on oath as provided under section 340 (2) Cr.PC nor did adduce any defence. After hearing the arguments advanced by the learned counsel appearing on both side, the learned Additional Sessions Judge-II, D.I.Khan convicted and sentenced the appellant as mentioned above, hence, the instant appeal and criminal revision.

5. It is, inter alia, contended by the learned counsel for the appellant that it is an un-witnessed crime, though, Nauman has been cited as an eye-witness of the alleged occurrence, however, he was abandoned by the prosecution, which amounts to withholding the best evidence available with the prosecution and his non-production would be hit by Article 129(g) of the Qanoon-e-Shahadat Order,1984; that the complainant is

serving in Pak Army and was posted in Khashmir Chump Sector during the days of occurrence; that neither the dead body of the deceased was identified by the complainant nor autopsy was conducted on the same day, which clearly suggests that the appellant was not present at the spot; that the occurrence took place in the *'bazar'* but non amongst the locality has been examined to corroborate the version of the complainant, even the statement of one Pappu in whose shop the deceased was working was not recorded by the police in support of the contention of the complainant; that the medico-legal report is in conflict with the ocular account furnished by the complainant; that the trial court has based conviction of the appellant on the suggestion put to PW-9 Investigating Officer of the case, which is alien to law; that complainant is the real brother of the deceased, therefore, no reliance can be placed on his statement and no conviction can be based on his solitary statement; that the prosecution has miserably failed to prove its case against the appellant beyond a ray of doubt.

5. Conversely, the learned counsel for the complainant assisted by the learned Additional Advocate General jointly contended that the prosecution has proved its case against the appellant beyond any shadow of doubt; that the convict is paternal uncle of the complainant ruling out the possibility mis-identification

and false implication; that the solitary statement of the complainant is unambiguous, reliable and confidence inspiring and his simple statement can be based for conviction; that the version of the complainant, site plan and medico-legal report, if placed in a juxta position are consistent inter alia; that the motive as alleged has been proved. He lastly argued that the learned trial court has reached to the conclusion that the appellant was guilty of the charges levelled against him, however, he assailed the judgment to the extent that lesser punishment has been awarded to him and sought enhancement of the same contending that the convict deserves normal penalty of death.

6. We have heard the arguments of the learned counsel for the parties and have perused the record including the impugned judgment minutely.

7. The prosecution rested its case on the ocular testimony, furnished by PW-11, brother of deceased, the motive, medical evidence, of course, given by Dr. Muhammad Younas, SMO, PW-4 who had examined the then injured (now deceased) and after death performed postmortem examination and his opinion Ex:PW-4/1, Ex:PW-4/2, and Ex:PM, and recoveries from the scene of crime i.e blood through cotton Ex:P-I, two empties of 30 bore pistol Ex:P-2 and bloodstained garments of the deceased brought by Constable

Jamshaid Ex.P-3. The FSL report Ex.PK vide which it was opined that two 30 bore empties were fired from one and the same 30 bore weapon. The FSL report Ex.PW-3/6 vide which it was reported that the bloodstained cotton and shirt were found to be of human blood and of the same group, abscondance of accused for one year, 03 months and 24 days and site plan Ex.PB.

8. We have considered the arguments of the learned counsel for the parties from both the sides keeping in view the settled principles governing the appreciation of evidence and dispensation of Justice in criminal matters and have found no ground to interfere with the impugned judgment of the learned trial court.

9. The ocular account, as stated above, was furnished by complainant Shoukatullah, PW-11 brother of the deceased Aftab, who deposed in simple words that on the eventful day, he alongwith his brother and Nauman (cousin) were present in the shop, his uncle Masood came there and stood at the door and said "*aaj bach ker nahi jao gy*" thereafter fired at the deceased due to which, the deceased sustained injuries on his belly and right wrist. The medical and circumstantial evidence fully support and corroborate the statement of complainant. According to MLC Ex.PW-4/1, injury sheets Ex.PW-4/2 and post-mortem report Ex.PM, the

deceased had sustained firearm injuries and seat of injuries were in the right sub costal region and on right wrist posteriorly. Perusal of the site plan reveals that two empties of 30 bore were recovered from the scene of occurrence, these empties were sent to the FSL, where it was opined that these were fired from one and the same crime weapon. In this case single accused, who happens to be uncle of the complainant was charged for committing murder of his nephew (brother of the complainant) ruling out the possibility of mis-identification.

10. The defence also failed to create doubt about the presence of complainant on the spot rather his presence on the spot was confirmed by the defence counsel by putting a positive question to PW-9 in the following words:-

> "It is correct that at the time of occurrence three persons were present in the shop of mobile i.e Aftab (deceased), complainant Shoukatullah and PW Nauman.

Moreso, the complainant is also witness of recovery memo Ex.PW-9/1, vide which recoveries were made from the spot, which too proves his presence on the spot.

11. We would also like to observe that though the complainant Shoukatullah is real brother of the deceased has been rightly believed by the learned trial

court. He, undoubtedly, was a witness of the occurrence which took place in his presence with no possibility of mistaken identity. Being a brother of the deceased, he would not allow the real culprit to escape by implicating an innocent person. The question as to whether the conviction can be based on the testimony of a single witness or not, the answer is, obviously, in affirmative. In this respect, we are fortified by the judgment reported in case titled ***Allah Bakhsh V. Shammi (PLD 1980 S.C 225)*** wherein it has been held that conviction can be based on the testimony of a single witness if the same is found reliable by the court.

12. Converting to the plea of the appellant that the deceased was related to the complainant, therefore, no credibility can be attached to it. This contention is erroneous and based on misconception. It is now consistent view of the superior courts in Pakistan that mere relationship with the deceased is not sufficient to discard his evidence unless he is proved to have an ulterior motive to involve the accused in the case. In this respect, reliance can be placed on the case of ***Dildar Hussain V. Muhammad Afzaal alias Chala and 3 others (PLD 2004 Supreme Court 663)*** wherein it was held as under:-

> "Relationship of the witness with the complainant party alone is not

> sufficient to discard his evidence unless he is proved to have an ulterior motive to involve the accused in the case"

13. Coming to the objection of the learned counsel for the appellant that time of occurrence was given by the complainant as '*sham-wela*' instead of exact time of occurrence, to cover up the delay in lodging the FIR is erroneous. The PW-11 was cross-examined at great length, but no dent could be caused in his statement. Nothing could be brought on record to show that exact time of occurrence was not given to cover up the delay in lodging the FIR. The PWs were not cross-examined on these lines. The objection of the learned counsel can be answered from another angle, the occurrence took place in the month of May, the '*sham vela*' i.e time of evening prayers or prior to that in the end of month can safely be held to fall in between 7.00 PM to 7.30 PM and time of lodging report was given as 7.50 which seems to be promptly lodged report ruling out the possibility of consultation and deliberation some time must have consumed in taking the deceased to the hospital for providing medical treatment where report was lodged, therefore, it cannot be termed as delay.

14. Now adverting to the contention of the learned counsel for the appellant that non-examination

of PW Nauman is fatal to the prosecution case. The reason for non-production of the said prosecution witness was plausibly explained by PW-10 in his cross-examination in the following words:-

> I recorded the statement of eye-witness Noman on 20.7.2013. Witness volunteer that the said eye-witness asked me that although I am eyewitness of the occurrence but I am unable to become witness because there is a personal enmity between the parties who are closely related to each other and it will create problems for me to become the witness.

The plain reading of the aforesaid portion of the cross-examination of PW-10 shows that Nauman avoided to appear as prosecution witness to avoid annoyance/ enmity with the accused. It is now consistent view of the superior Courts that in view of social condition prevalent in the society people avoid to poke their nose in the affairs of other people, therefore, non-production of Nauman or private witness from the locality is not fatal to the prosecution case. In this respect, reliance can well be placed on the case of ***Mumtaz Khan V. The State (1993 P.Cr.L.J 333 Lahore)*** wherein it was held that:-

> "Non-production of some independent witnesses by itself was no ground to disbelieve ocular version furnished by prosecution witness in view of fact that normally people avoid to become eye-witnesses in a murder case to avoid wrath of accused party"

Reference can also be made to the cases titled ***Awais and another V. The State and another (2004 P Cr.L.J 377) Peshawar, Safeer Ahmad and others V. The State (2015 P Cr. L J 1380) Lahore and Rashid alias Baou Masih Vs The State (2006 YLR 2180) Lahore***.

15. After commission of offence the accused remained absconder for a period of one year, three months and 24 days. No doubt, that it is consistent view of the august Supreme Court of Pakistan that mere abscondance of an accused after commission of crime does not serve to establish accused's guilt, however, it gives supportive corroboration to prosecution evidence. Reference in this behalf may be made from the Judgment of this Court reported as ***Bashir v. The State (PLD 1974 Peshawar 113)***

16. The motive as asserted by the prosecution could not be proved and the actual motive remained shrouded in mystery, therefore, the conviction and sentenced recorded by the learned trial court does not warrant interference and sentence of imprisonment for

life is sufficient to meet the ends of justice. A reference in this respect may be made to the case titled ***Haq Nawaz Vs State (2018 SCMR 21)*** wherein it was held as under:-

> S. 302(b) Qatl-i-amd …. Sentence, reduction in… Death sentence reduced to imprisonment for life … mitigating circumstances… Motive not proved… where the prosecution asserted a motive but failed to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder. (p.23) B.

In this respect, reliance can also be placed on the case titled ***Nadeem Ramzan V. The State (2018 SCMR 149).*** Reference is also made to the case titled ***Ghulam Muhammad and another V. The State (2017 SCMR 2048)*** and another, wherein the sentence of death was reduced to imprisonment for life on the ground that the motive as alleged by the prosecution was not believed by the High Court.

17. For what has been discussed above, we find no illegality, mis-reading or non-reading of evidence in the impugned judgment, therefore, the same is maintained and the appeal as well as revision for

enhancement of sentence being bereft of merits are dismissed.

Announced.
Dt: 19.02.2018
*Hasnain/**

JUDGE

JUDGE

(D.B)

Hon'ble Mr. Justice Ijaz Anwar
Hon'ble Mr. Justice Shakeel Ahmad