JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 324-M/2020

(*Sher Alam Versus The State and another*)

Present: **M/S Hazrat Rehman and Muhammad Nabi, Advocates for appellant/ convict.**

Mr. Haq Nawaz Khan, Assistant A.G. for State.

Mr. Sabir Shah, Advocate for complainant.

Date of hearing: **08.12.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- This appeal has been preferred by appellant Sher Alam against the judgment of the learned Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower at Chakdara dated 16.12.2020 rendered in case FIR No. 592 dated 28.12.1999 u/s 302/34 PPC of P.S *Ouch*, District *Dir Lower*, whereby he was convicted u/s 302(b) PPC and sentenced to undergo life imprisonment as *Tazir*. He was also burdened for payment of Rs.200,000/- to LRs of deceased as compensation u/s 544-A, Cr.P.C or to suffer further six months S.I. in case of default thereof.

Complainant Mst. Noor Jehan has also filed the connected Cr.R No. 05-M/2021 for enhancement of the above sentence awarded to appellant to normal penalty of death. Both the cases,

being off-shoots of the same verdict, are decided together through this judgment.

2. The report had been lodged by complainant Mst. Noor Jehan on 28.12.1999 at 13:20 hours on arrival of police to her house. According to her narrations as per *Murasila*, on the same day, while busy in sewing clothes in her house, she came out on hearing noise and saw that accused Fazal Khan, Bacha Khan (already acquitted) and Sher Alam (appellant) were firing at her husband Sultani Mulk through Kalashnikovs as result whereof he was hit and died on the spot. She further stated that the occurrence has been witnessed by her as well as her mother-in-law Mst. Sabaz Pari and daughter Asia (PW-1). Motive behind the occurrence was disclosed as dispute over barren plot for construction (کھنڈر غیر آباد).

3. Muhammad Gul Khan ASHO reduced report of the complainant into *Murasila* and sent the dead body to civil hospital Gul Abad, however, on the request of relatives of the deceased, the dead body was examined by Dr. Arshad Nawaz in the house of complainant. Co-accused Fazal Khan and Bacha Khan were arrested, however, the present

appellant went into hiding, therefore, after completion of investigation complete challan was put against the co-accused while proceedings under section 512, Cr.P.C were conducted against the appellant. Prosecution examined seven PWs in support of its case and the co-accused were examined u/s 342, Cr.P.C. The learned trial Court vide judgment dated 25.02.2000 the co-accused found innocent, hence, acquitted them of the charge, while convicted the present appellant in absentia under the rule of *Qaza Alal-Ghayeb* and sentenced him for life imprisonment till death. It is noteworthy that this Court has maintained acquittal of the co-accused by dismissing Cr.A No. 106/2000 preferred by State vide judgment dated 09.10.2013.

4. The appellant was arrested on 09.08.2018 and committed to jail to serve the sentence awarded to him by trial Court in his absence, so, he challenged his conviction and sentence before this Court through Cr.A No. 208-M/ 2018 which was allowed vide judgment dated 17.12.2018 and the case was remanded to trial Court for conducting trial of the appellant in accordance with law.

5. On receipt of the case record and copy of judgment of this Court, the learned trial Court summoned the appellant from jail and framed formal charge against him to which he did not plead guilty and opted to face the trial. Prosecution produced Mst. Asia Bibi, Dr. Arshad Nawaz, Inspector Ibrahim Khan, ASI Muhammad Naeem and the then ASHO Muhammad Gul whose statements were recorded as PW-1 and PW-5 to PW-8 respectively. In view of illness and old age of complainant Mst. Noor Jehan, prosecution submitted an application for transposition of her statement recorded as PW-3 during proceedings u/s 512, Cr.P.C against the appellant/trial of acquitted co-accused. The learned trial Court vide order dated 07.09.2020, after examining the complainant through Standing Medical Board, transposed her statement to the trial of the present appellant as (PW-2). Similarly, on the request of prosecution, statements of PWs Abdur Rauf SHO and Muhammad Ghani IHC previously recorded during 512, Cr.P.C proceedings, were also transposed to the trial of appellant because of their illness. Their statements are PW-3 and PW-4 respectively. On closure of evidence, the appellant was examined u/s 342, Cr.P.C. He once again denied

the allegation of prosecution, however, he neither recorded his own statement on oath nor produced any evidence in his defence. On conclusion of trial, the learned trial Court vide judgment dated 16.12.2020 sentenced the appellant to life imprisonment on his conviction u/s 302(b) PPC with compensation of Rs.200,000/- payable to LRs of the deceased. Hence, this appeal and the connected revision petition.

6. We have heard the arguments of learned counsel for the parties including the learned Assistant A.G. for State and perused the record with their able assistance.

7. It is the version of prosecution in the initial report that the present appellant and his co-accused Fazal Khan and Bacha Khan had fired at deceased Sultani Mulk as result whereof he died on the spot. The same version is also emerging from examination-in-chief of Mst. Asia Bibi (PW-1) as well as complainant Mst. Noor Jehan (PW-2) whose earlier statement recorded as PW-3 has been transposed to the trial of the present appellant. The said witnesses have claimed that they had seen the appellant and his other co-accused firing at the

deceased. The eye-witnesses neither in their statements at trial stage nor the complainant in her report has specified the role of each accused rather they have attributed the role of effective firing to all the accused including the appellant but, as per medical report, the deceased has sustained a single firearm injury on his body which proved fatal and caused his death. After arrest of the co-accused, they were separately tried by trial Court for the said offence and were acquitted vide judgment dated 25.02.2000 on the ground of having been charged for ineffective firing. The learned trial Court through the same judgment sentenced the present appellant to life imprisonment till death in his absentia by holding that reliable evidence in shape of ocular account and circumstantial evidence coupled with his abcondence is available against him. The said judgment to the extent of the present appellant has been set aside by this Court and the case was remanded back to trial Court for trial of the appellant in accordance with law. The learned trial Court, on conclusion of post-remand proceedings, has convicted the appellant again mainly on the ground of his specific role in light of the answer of complainant in response to the Court question. It

would be appropriate to reproduce the said answer below.

> C.Q مقتول شیر عالم کے فائرنگ سے لگا تھا۔ ملزمان باچہ خان اور فضل خان کے فائرنگ کے وقت میں خاوند ام سے 15 قدم کے فاصلے پر تھا۔ انہوں 5/6 فائر کئے تھے۔ انکی فائرنگ مقتول کے پاس زمین پر لگے۔ اور ہ مقتول کے دائیں طرف گراونڈ پر لگے۔

For the time being, we have before us the ocular account of Mst. Asia and complainant Mst. Noor Jehan and both of them in their examination-in-chief have attributed the role of effective firing to all the accused including the present appellant while the deceased has sustained a single firearm injury on his person. Except the above-referred Court question, role of the present appellant has not been specified elsewhere on the entire record and the witness i.e PW Tariq Ahmad son of Khan Bahadar, who had specified his role in his statement, has been abandoned by prosecution. There are two pivotal questions for resolution before this Court firstly, whether conviction of an accused can be recorded on the basis of Court question, if not then what will be the fate of the case of the appellant when his other co-accused, having the same role in the FIR, have already been acquitted by trial Court and confirmed by this Court.

8. No doubt, Article 161 of Qanun-e-Shahadat Order, 1984 empowers the Court to compel a witness to answer any question or to produce any document that the Court may think necessary or relevant to discover the truth or obtain proper proof of the relevant fact, however, Courts are required to use these powers with great care and caution. The referred section reads:

> **161. Judge's power to put question or order production.** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he places in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant, and may order the production of any document or things and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question;
>
> Provided that the judgment must be based upon facts declared by this order to be relevant, and duly proved;
>
> Proved also that this Article shall not authorize any Judge to compel any witness to answer any question to or produce any document which such witness would entitled to refuse to answer or produce under Articles 4 to 14, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper of any other person to ask under Article 14 or 144; nor shall he dispensed with primary evidence of any document, except in the case hereinbefore expected.

However, it is the persistent view of superior Courts that such powers under the above provision are to be exercised by a Judge only in cases of absolute necessity in the interests of justice without being persuaded by the whims and fancy of any party

and while doing so the Court should keep in mind the benefit of defence rather than the prosecution. In this regard we would refer the judgment of Dacca High Court in the case of *'The State Vs. Balahari Das Sutradhar'* reported as **PLD 1962 Dacca 467** wherein it was observed that:

> **It is true that section 165 of the Evidence Act gives very wide power to the Judge to put any question he pleases to any witnesses in order to discover or obtain proper D proof of relevant facts. This power, however, should be used with great circumspection and only when it is absolutely necessary in the interest of justice and without assuming the role of any party to the proceeding..... That being the state of things, if the learned Additional Sessions Judge wanted to exercise his power under section 165 of the Evidence Act, in our opinion, he should have done so in the interest of justice for the benefit of the defence rather than the prosecution.**

A judge, while deciding the guilt or innocence of an accused, should always behave impartially without any bias otherwise he will defeat the ends of justice. Questions asked by a Court from a witness have a different impact on the witness as compared to the questions asked by a counsel during cross-examination. Thus, the possibility cannot be ignored that a witness may get intimidated or encouraged by questions of a judge and give the evidence other than that he had the desire and

intention to give. Obviously, a Judge cannot play his role like a lawyer due to lack of his knowledge regarding all the facts of a case as possessed by a counsel, therefore, when the judge apprehends that his questions will either intimidate or encourage the witness for which he will be blamed for favoritism, he should not make intervention by asking questions from a witness unnecessarily. Moreso, such powers under Article 161 of the Qanaun-e-Shahadat Order 1984 are required to be exercised only when the Court believes that certain ambiguities in light of different pieces of evidence need clarification but in the present case, both the eye-witnesses have recorded their examination-in-chief in the line of FIR and the defence counsel had cross-examined them almost on each and every aspect of the case, therefore, intervention of the trial judge by putting questions to PWs, for filling up lacunas in prosecution case, was not warranted under the law. Reference may be had to *'Javed Shamshad and others Vs. The State'* **(1996 PCr.LJ 3 Karachi)**. It was observed in the said judgment that:

> **Article 161 does not put any embargo or limitation in exercise of the power conferred on the Court. The proviso, however, clearly lays down that the judgment is to be based on the facts proved in accordance with the**

provisions contained in the Order. Looking at the above proviso the proper construction' of the said Article in its totality would be in our humble view that the above power is to be exercised by the Court to resolve any ambiguity or confusion found in the evidence and to clear away the doubts created by different pieces of evidence but while exercising such power the Court shall weigh the scales of justice evenly.

In view of the above discussion, the questions asked by learned Trial Judge in the present case were neither necessary nor there was any ambiguity which needed clarification by Trial Court. The questions having been so asked by trial Court have caused miscarriage of justice to appellant, therefore, the answers of complainant in response of the said questions cannot base his conviction.

9. On exclusion of the referred questions and answers thereof by complainant from the case, the role of the present appellant, in light of the FIR and ocular account, remains unspecified like his co-accused. They have already been acquitted by trial Court and the said order has attained finality. Complainant has charged all the accused including the appellant for effective firing at the deceased but the doctor has reported a single injury on the dead body. Irrespective of the fact that the doctor had visited the house of complainant for examination of the dead body

against the normal routine and procedure, medical report is in conflict with ocular account, therefore, the said report is of no avail to prosecution rather it creates a reasonable doubt in prudent mind regarding the guilt of the appellant. In addition, Mst. Asia Bibi (PW-1) has improved her earlier version by stating that accused Fazal Khan and Bacha Khan were on rooftop of their house while the present appellant was present on thoroughfare at the time of occurrence. Complainant stated that the dead body had been brought to P.S situated at a distance of 17/18 kilometres from the spot but neither any report was lodged in the P.S nor the dead body was examined in hospital though the same had been shifted to hospital as per contents of *Murasila*. Prosecution has not explained that why the dead body was carried back without being examined by doctor in hospital and medical examination of the corpse was conducted by Dr. Arshad Nawaz on the following day of occurrence in the house of complainant on the request of her relatives. In addition to above, the time of report mentioned in *Murasila* bears overwriting and it appears that figure 6 has been replaced with figure 3. If the delay of about 02 hours be considered forgiveable in view of hilly area and long distance of the spot from

P.S, even then the visible overwriting in *Murasila* suggests concealment of real facts of occurrence on the part of investigating agency. Similarly, 13 empties recovered from the spot have not been sent to FSL for confirmation of the fact that the same had been fired from the same or different weapons. There are various inconsistencies and contradictions in prosecution case creating serious doubts and appellant is entitled to get the benefit thereof as of right. Wisdom may be drawn from judgment in the case of *'Najaf Ali Shah Vs. The State'* **(2021 SCMR 736)**. It was observed by Hon'ble apex Court in the said judgment that:

> **"once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused".**

10. We are cognizant of the alleged vicarious liability of the appellant with his co-accused but not only the prosecution has failed to substantiate the said allegation against him through reliable evidence but the co-accused, to whom the same role had been attributed by complainant in the FIR, have also been acquitted of the charge on the same set of evidence, therefore, conviction and

sentence of the appellant cannot be sustained in the circumstances. Reliance in this regard is placed on *'Liaqat Ali and others Vs. The State and others'* **(2021 SCMR 455)** and *'Umer Khursheed and another Vs. Syed Tufail Ahmad and others'* **(2018 SCMR 1051)**.

11. Long abscondence of the appellant for almost two decades cannot be denied, however, abscondence per se has never been considered a proof of guilt, therefore, this factor alone cannot base conviction of the appellant when prosecution has otherwise failed to establish his guilt through trustworthy ocular account and circumstantial evidence of convincing nature. Wisdom is drawn from *'Basharat and another Vs. The State'* **(1995 SCMR 1735)** wherein it was observed that:

> **The occurrence took place on 20-4-1988. Basharat appellant was arrested on 28-4-1988. The blood-stained Chhuri was allege4 recovered from his house on 30-4-1988. It is not believable that he would have kept blood-stained Chhuri intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it. After disbelieving the alleged motive, exclusion of the ocular evidence and the rejection of the incriminating recovery, there remains circumstance of abscondence of Ghulam Mustafa which per se is not sufficient for conviction under section 302, P.P.C.**

12. In light of what has been discussed above, prosecution has not established the guilt of appellant Sher Alam beyond shadow of reasonable doubt, therefore, his conviction and sentence recorded by trial Court through the impugned judgment need reversal. Resultantly, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge leveled against him in this case. He be released forthwith from jail if not required in any other case. The connected Cr.R No. 05-M/2021 is dismissed for having infructuous.

13. Above are the reasons of our short order of the even date.

Announced.
Dt: 08.12.2021

JUDGE

JUDGE

Office
23/12/2021
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