B/R

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

J.Cr. A No. 47-M/2019

(Nowsherawan *Versus* The State and one another)

Present: Mr. Aurangzeb Khan, Advocate for the appellant.

Mr. Alam Khan Adenzai, Asst:A.G for the State.

Date of hearing: **03.11.2022**

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. We propose to dispose of the instant criminal appeal against the judgment dated 20.03.2018 of the learned Additional Sessions Judge/Izafi Zilla Qazi, Khwaza Khela, District Swat, by which, he has convicted Nowsherawan (hereinafter "appellant") son of Mian Mosamar, u/s.302(b) PPC, to life imprisonment as Tazir for *Qatl-e-Amd* of one Rozi Alam, and fine of Rs.100,000/- which if realized, shall be paid to the legal heirs of the deceased as compensation u/s.544-A Cr.P.C. In default of payment of the fine, the appellant was further convicted to undergo simple imprisonment for a term of 06 months. The amount of fine was also ordered to be recoverable as arrears of land revenue from the person and estate of the appellant. The appellant was further convicted u/s 324 PPC and sentenced to 05 years SI and fine of Rs.50,000/-; In default whereof, he was

further convicted to undergo simple imprisonment for 06 months. The appellant was extended the benefit of Section 382-B Cr.P.C.

2. The incident in respect of which the instant case was registered, was reported to have occurred on 11.03.2006 at 16:00 hours and reported at 17:00 hours by one Arsala Khan. The story Arsala Khan narrated to the police in the emergency ward of hospital in Khwaza Khela town, was that at 16:00 hours, he and Rozi Alam his brother, were sitting in a shop in their village called Tikdarai, when the appellant came there, having a pistol with him. No sooner he reached their shop, he opened fire at both of them. With his fire shot Rozi Alam was hit on his head at several places and fell on the ground. The complainant, however, remained unhurt. He stated that the appellant decamped from the spot, while waving his pistol. With the help of the residents of the village, the complainant shifted Rozi Alam in injured condition to the hospital, who succumbed to his injuries while on the way. The complainant told to the police that there is no motive of the occurrence, he was still satisfied that the appellant committed the murder of his brother on the abetment of Ali Shah s/o Muhammad Ali Khan and Majat Khan s/o Sher Muhammad both residents of village Chalyar.

The reasons he showed was that he has blood feud enmity with those people. He further stated that the occurrence was witnessed by Sohrab Khan, Muhammad Didar and Sher Zada

3. ASI Shah Mumtaz Khan recorded the report in the form of a Murasila in the hospital, which he read over to the complainant, who acknowledged it as correct and signed it. He also prepared injury sheet of the deceased. He sent the Murasila and the injury sheet through Constable Abid Ali to the Police Station of Khwaza Khela, where it was converted into FIR No.109.

4. SI Meskin Ali conducted investigation of the case. He prepared the site plan, took into possession the blood stained *Qamis* of the deceased, one empty of .30 bore pistol and blood stained earth from the spot, put all these in parcels, which he sealed. He prepared memos of the aforementioned articles. He arrested the appellant on 13.03.2006; issued his card of arrest and obtained his three days police custody from the learned Judicial Magistrate/Illaqa Qazi, Khwaza Khela. It is worth mentioning here that when the appellant was produced before the Medical Officer, before the period of his police custody, the Medical Officer observed that he was stated to be a mental patient. While the

Medical Officer recorded the information in black and white, he noted that the appellant seems to be sound and fit. After expiry of his police custody, the appellant was again produced before a medical officer, who, too, found him fit. The Investigation Officer produced him before the Illaqa Magistrate with an application that the appellant wanted to record his confession. The appellant refused to confess to his guilt. Then, the learned Illaqa Qazi, sent the appellant to the judicial lockup. While in police custody, on 15.03.2006, the appellant made pointation of the place where he had allegedly concealed the pistol, the weapon of offence. He was taken to that place, which was the vacant house of one Javid *Zargar*(goldsmith). On his pointation, the I.O recovered the pistol from the aforesaid vacant house and prepared a site plan as well as a recovery memo. He also put the weapon of offence in a parcel and sealed it. He sent the blood stained earth and blood stained shirt of the deceased as well as the one crime empty and pistol to the FSL, who returned positive results in respect of those articles. He also examined the PWs u/s 161 Cr.P.C.

5. After completion of investigation, final report (*challan*) was submitted before the learned Sessions Judge, Swat. On 25.09.2006, the case was assigned to the learned Additional Sessions Judge/Izafi Zilla

Qazi-II, Swat, for trial. The learned trial Court supplied copies of the relevant documents to the appellant and other accused u/s 265(c), Cr.P.C. He then framed charge against the accused, to which, they pleaded not guilty and claimed trial.

6. The prosecution examined as many as seven (07) PWs till 07.03.2007. The record of the trial Court shows that the learned Sessions Judge, during his jail visit on 28.02.2007, found that the appellant seemed to be a mentally ill person. The learned Sessions Judge issued directions for examination of the appellant through a Medical Board. On 07.06.2007, after receipt of the report of the Medical Board that the appellant was a mentally ill person, the trial against the appellant was suspended u/s. 465, Cr.PC, till his recovery, while it continued against the two other co-accused. The learned trial Court, on 26.09.2007, acquitted the co-accused and kept the remaining proceedings against the appellant suspended till a declaration of his recovery and fitness by the Medical Board from Central Jail, Peshawar. Since then, the appellant was examined by the Medical Boards for as many as four times. He was twice declared fit to face the trial and on conclusion of the trial convicted twice. In the first round, the trial of the appellant was resumed on 26.08.2010 in light of the report of the

Medical Board. On conclusion of the trial, the appellant was convicted vide judgment dated 23.12.2010. This Court allowed his appeal (No.46-P/2011) and remanded the case to the learned trial Court with the direction to provide him full opportunity of cross examination of all prosecution witnesses. In the second round, the prosecution examined 11 PWs and one Najibullah DFC, as CW1. The CW testified that the I.O was reported to have passed away. Muhammad Ghafoor was examined as PW11, who furnished evidence of the fact that he was acquainted with the signatures of I.O. On conclusion of the trial in the second round, the appellant was again convicted by the trial Court vide judgment dated 20.03.2018, impugned herein.

7. We have heard arguments of learned counsel for the appellant and the learned Assistant Advocate General for the State and perused the record.

8. The instant appeal relates to the second round of the trial. The mental illness issue of the appellant by the Medical Boards has passed through chequered history. We heard the instant appeal a couple of times from the perspective of that issue. The main point raised in this respect was that none of the Medical Boards endeavoured to determine as to what was the mental condition of the appellant at the time of the commission

of the offence. We, therefore, deemed it appropriate to examine the merits of the case in the first instance and examine the mental illness issue later on.

9. On merits, the main point for determination before us is that whether the learned trial Court has arrived at a correct conclusion by recording conviction of the appellant. In other words, the question is that whether the prosecution has successfully proved the charge against the appellant. This requires reappraisal of evidence of the prosecution.

10. At the heart of the prosecution case lies the evidence of Arsala Khan, the complainant (PW4), Muhammad Didar (PW5) and Sohrab Khan, father of the deceased (PW6). The complainant, brother of the deceased, in his initial report recorded in the shape of *Murasila*, reiterated the report he made to the police in the emergency room of the hospital in Khwaza Khela. He stated that on 11.03.2006 at 16:00 hours, while he and Rozi Alam (his deceased brother) were sitting in their shop in their village Tikdarai, the appellant came there, having a pistol in his hand and opened fire at him and his brother. As a result of the firing, he added, his brother was hit on several parts of his body, whereas he remained unhurt. The appellant decamped from the

place of the occurrence. No motive of the occurrence was stated. Besides the appellant, two other persons namely Ali Shah and one Fajat were also charged but for abetment. The complainant deposed that apart from him, Sohrab Khan, his father, Muhammad Didar and Sher Zada were the eye witnesses of the occurrence.

11. The Investigation Officer prepared the site plan at the instance of the complainant and aforesaid eye witnesses. According to the site plan, the shop, where the occurrence took place, is situated on the road of village Tikdarai. The shop was part of the house of the complainant party. The road of the village Tikdarai was situated towards south. There was also a path leading from south towards north which joins the road of village Tikdarai. The door of the shop is towards the aforesaid path. The deceased and the complainant were shown at points 1 & 3, whereas the accused was shown at point No.2, inside the house. The eye witnesses, namely, Sohrab, Muhammad Didar and Sher Zada were shown at points 4, 5 & 6, respectively, which are lying on the road of the village. According to the medical report, the fire shots hit the deceased at the back of his head occipital region.

12. Arsala Khan, the complainant (PW4), deposed that at the time of firing, he was talking with the deceased. He and the deceased were facing each other. It means that the right side of the face of the deceased was open to firing from point No.2, where the deceased was shown to have fired at him. In such a situation, the deceased should have been hit somewhere on the upper portion of his right side. If the appellant had first fired at the deceased, then, the deceased must have been hit at his right side. Soon after the firing, the position of both the deceased and the complainant would have changed. It follows that the statement of the complainant materially contradicts the medical evidence. The eyewitness Muhammad Didar (PW5) deposed that the appellant fired at the complainant and the deceased, while standing in the door of the shop. He stated that both the deceased and the appellant had their faces towards him. This situation, when seen in juxtaposition with the site plan, creates another material doubt in the prosecution case. PW5 was shown at point No.5, outside the shop though the deceased and the appellant were visible to him from that position. The medical evidence and the deposition furnished by the complainant are contradictory to each other. While firing at the deceased, the appellant had his back towards the PW. If the

deceased was having his face towards the complainant at point No.3, it was not possible for him to have his face towards PW5 at point No.5, which is situated towards south of the shop. If the deceased has turned his face towards south, he would have been hit on his front.

13. Statement of Sohrab Khan (PW6) reveals that at the time of firing, he was present inside his house. It means that he was present inside his house, he came out from his house on hearing the fire shots and that he did not see with his own eyes while the appellant fired at the deceased, as such he could not be considered typically as an eyewitness. He deposed that when the appellant was entering the shop, he was present in the veranda of his house. He admitted that from the veranda of his house, the street, (i.e., the road of village Tikdarai) was not visible. Two points are worth mentioning here. *Firstly*, in the site plan that shows the house of the complainant, the veranda was not shown. *Secondly*, if the street was not visible from the veranda, then it was not possible for him to see the appellant while entering the shop. These facts further shatter his deposition as an eyewitness of the occurrence.

14. According to the *Murasila*, the occurrence took place at 16:00 hours (04:00PM) and it was reported

to the police at 17:00 hours (05:00 PM). The Medical Officer Dr. Muhammad Ali Jan (PW3) recorded post-mortem examination of the dead body of the deceased on page 3 of the inquest report presented to him by the police. The report (Ex:PW3/1) reflects that the examination was conducted at 03:45 PM. The time of the occurrence mentioned in the *Murasila* was 16:00 hours. It follows that the examination of the dead body was conducted 15 minutes before the occurrence. Next, according to the *Murasila,* when Rozi Alam was hit and got injured with the fire shots of the appellant, he was shifted to the hospital for medical treatment. He was reported to have died on the way to the hospital. The medical report shows that Rozi Alam died within one to two hours. While it is not clear as to what was the distance between the village Tikdarai and that of the hospital Khwaza-Khela, it is quite clear that the deceased passed away on the way to the hospital, which means that he died within almost less than one hour.

15. In light of our above discussion, we find that the prosecution has failed to prove the charge against the appellant beyond reasonable shadow of doubt.

16. We would now come to the mental illness issue of the appellant in greater details. The main

question here is that whether the mental illness issue of the appellant was treated according to law. The appellant was arrested on 13.03.2006, the second day of the occurrence. On 13.03.2006, he was produced before the Magistrate for his police custody which was allowed for three days. When produced for pre-custody medical examination, the Medical Officer made the following observation:

> ***"I have examined Mr. Nowsherawan son of Mian Moshamar r/o Tikdarai, Khwaza Khela, stating of mental patient. There is no proof of his mental illness. He seems sound and fit."***

17. On 16.03.2006, when he was again presented for examination to the medical officer after expiry of his custody, the Medical Officer found him "*normal and fit*". The above observation of the Medical Officer evinces that there was such information regarding the mental illness issue. But neither the Medical Officer, nor did the IO attend to it. There is no evidence in support of the allegation that the appellant fired at the instance or on the abetment of the acquitted accused. In the *Murasila*, there is no information whether the appellant has any relationship with the accused or not. The Investigation Officer also did not make any investigation in this respect. The *Murasila* reflects that the appellant came to the shop of the complainant party and opened

fire without any conversation or altercation with them. The complainant Arsala Khan was asked under cross-examination in this regard. He deposed that no altercation took place at the time of the occurrence. Rather, he categorically stated that as soon as the appellant came to their shop, he fired at them. It does not appeal to a prudent mind that the appellant fired at the complainant party without any justification. Rather, this fact coupled with the above observation of the Medical Officer shows that the accused did suffer with mental illness. In such a situation, without first determining the mental condition of the appellant right at that time, the pointation by and the recovery of the weapon of offence at the instance of the appellant appeared to be materially doubtful.

18. As noted above, the factum of mental illness of the appellant was immediately disclosed when he was produced before the Medical Officer on the day of his arrest, i.e., 13.03.2006. It is not clear who informed the Medical Officer at that time. However, it is an undeniable fact that the information was disclosed at the right time and before the right person. As observed above, the Medical Officer simply noted that there was no proof of mental illness. The Medical Officer at the expiry of the police custody also made no observation

regarding the mental illness of the appellant. Had the Magistrate gone through the judicial record with alacrity of mind, he would have surely seen that there was an information about the mental illness of the appellant. That would have prompted the Magistrate to pass an appropriate order, most particularly, re-examination of the appellant by a Medical Officer in the hospital, or even more appropriately, by a Medical Board.

19. Order No.24 dated 19.07.2007 of the trial Court shows that on 28.02.2007, during his jail visit, the learned Sessions Judge issued directions to the Superintendent Jail for medical examination of the appellant by a psychiatrist in the jail. The Superintendent Jail submitted a report to the learned Sessions Judge on 02.03.2007, and then the trial Court passed his order dated 20.03.2007 referred to above.

20. The appellant was shifted to the Police Services Hospital, Peshawar, for his medical examination, where a Medical Board examined him and submitted its report on 07.06.2007. The Board expressed its opinion that the appellant was unable to understand proceedings of the case and could not defend himself in the Court of law; he was thus found unfit to plead in the Court. In his order passed on 19.07.2007, the learned

trial Court postponed the proceedings/trial u/s 465, Cr.PC. As the proceedings against the co-accused continued, on 26.09.2007, they were acquitted, whereas in respect of the appellant the postponement order was kept intact with the direction that the Medical Board shall examine the appellant after every six months and, if found fit, he be produced again for trial.

21. In the year 2010, a second Medical Board examined the appellant which found him fit to face the trial (report dated 12.08.2010). Pursuant to that report, the remaining proceedings at the trial were conducted and the appellant was convicted u/s 302/324, PPC vide judgment passed on 23.10.2010. On 03.03.2014, this Court after hearing the appeal, set aside the conviction and remanded the case to the trial Court to proceed with the trial afresh strictly in accordance with law by affording the appellant full opportunity of cross examining all the prosecution witnesses.

22. During the trial, the appellant was again examined by a Medical Board (third one) which gave its report on 28.08.2014. The Medical Board opined that the appellant was suffering from chronic paranoid schizophrenia and advised that his case may be disposed of according to the mental health Law. The learned trial

Court, vide his order dated 01.10.2014, observed that the Mental Health Ordinance, 2001, was not extended to the erstwhile PATA. The learned trail Court, then, directed re-examination of the appellant by the Medical Board. Vide its report dated 23.10.2014, the Medical Board (the fourth one) opined that the appellant was well enough and stable and posed no threat to the society at large and observed that he may be released provided his family takes responsibility of his behavior. The learned trial Court against resumed the trial. However, vide its report of 19.03.2015, the Medical Board once again found the appellant unfit to face the trial. Thus, vide his order dated 07.04.2015 the learned trial Court again postponed the trial u/s. 465, Cr.P.C. On 06.10.2016, the learned trial Court while recording the history of the case, observed that on 30.08.2016, the appellant was shifted to District Jail Timergara along with report of the Medical Board to the effect that the appellant was fit to face the trial. It was for the second time, that the appellant was convicted by the learned trial Court vide his judgment dated 20.03.2018.

23. The conclusion of above discussion is that the prosecution has failed to bring home the charge against the appellant. The FIR story, the site plan and the medical evidence materially contradict each other. The

sitting position of the deceased and the complainant, the direction of firing alleged by the complainant and the presence of the appellant on the spot stated by the eye-witnesses do not support each other beyond reasonable shadow of doubt. It is settled law that a single reasonable doubt is sufficient for acquittal of an accused. Reliance is placed on **Tariq Pervez v. The State (1995 SCMR 1345)**, wherein the august Supreme Court has held that:

> **"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."**

24. The time of post-mortem examination of the deceased at the hospital and the time of the occurrence are materially different; the former being earlier than the latter. The motive was set up in the FIR but not proved. The mental illness issue was duly considered by the trial Court in the light of the reports of the Medical Boards. However, at the initial stage, the Medical Officer and the I.O did not attend to it properly. The Medical Boards examined the appellant's condition as it prevailed at the time of the medical examination. Had the

Medical Officer attended to the issue at the very beginning, there could have been a specific findings about the mental condition of the appellant at the time of commission of the offence. Circumstantially, it has been proved that the appellant suffered as a mentally ill person at the time of the occurrence. Guidance may be sought from the case of **Abdul Wahid alias Wahdi v. The State** reported as **1994 SCMR 1517**. In this case, august the Supreme Court has held that if the Court reaches to the conclusion after holding an inquiry that the accused was incapable of understanding the nature of act constituting the offence for reasons of unsoundness of mind, the accused will be acquitted, but the Court shall give a specific finding whether he committed the act or not. For ready reference, relevant findings of the august Court are reproduced as under:

> **"Apart from the obligation of the Court to hold an inquiry into the fact of unsoundness of the mind of the accused in the above-stated circumstances, the combined effect of sections 469 and 470, Cr.P.C. is that the Court shall also hold an inquiry, if it appears from the evidence produced before it, or if it has reasons to believe that the accused was incapable of understanding the nature of offence at the time he committed it for reasons of unsoundness of mind, into the fact of unsoundness of the mind of the accused at the time he committed the offence. If the Court reaches the conclusion after holding such inquiry, that the accused was incapable of understanding the nature of act constituting the offence for reasons of unsoundness of mind, the accused will be acquitted, but the Court shall give a specific finding whether he**

committed the act or not. The above finding by the Court is necessary as further action against the accused upon his acquittal in the case is to be taken by the Court under sections 471, 474 and 475, Cr.P.C. in the light of such findings. The evidence recorded in the case prima facie supports the contention that the appellant/ accused at the time of commission of offence was of unsound mind and, therefore, this fact should have been inquired into by the Court as provided under Chapter 34 of the Code of Criminal Procedure."

In **Naseebullah v. Special Judge, Anti-Terrorism Court-II, Quetta and another** (**PLD 2017 Baluchistan 37**), it was held that:

"The principles embodied in Section 84 of the P.P.C. is based upon the Maxim, *"actus non facit reum nisi mens sit rea"* i.e. an act is not criminal unless there is criminal intent. It is the mandate of law that nothing is an offence, which is done by a person, who, at the time of committing an offence, by reason of unsoundness of mind, if incapable of knowing the nature of the act or that whatever he is doing is wrong or contrary to law. Once a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to get the benefit of aforementioned provision of law."

This Court in the case of **Muhammad Idrees v. The State and 2 others** reported as **2011 P Cr. LJ 925**, has held:

"16. Viewing the case from every angle, it has been established on record that appellant at the time of occurrence was suffering from serious psychiatric illness and was declared unpredictable and dangerous by the Standing Medical Boards constituted from time to time. The appellant due to such precarious condition was incapable of knowing the nature

of the act or that he was doing what was either wrong or contrary to law. This particular degree of insanity brings the case within exception. Even on merits, we found no tangible or confidence inspiring evidence leading to the guilt and conviction of accused.

17. In the facts and circumstances of the case, we find that the prosecution has not been able to prove its case against the appellant and in this view of the matter while extending benefit of doubt, the appellant deserves acquittal."

25. Consequent upon the above discussion, we allow the instant appeal, set aside the conviction and sentence recorded by the learned trial Court vide its judgment dated 20.03.2018 and acquit the appellant from all the charges levelled against him. We direct the family members of the appellant to take due care of the appellant, make arrangement for his proper medical treatment, and take responsibility of his behaviour in respect of his own self and others in the community.

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

Announced
Dt: 03.11.2022

JUDGE

JUDGE

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