

JUDGMENT SHEET

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

(1) Cr.A No. 27-M/2018

Mudasar Shah son of Shaheen Shah

(Appellant)

Versus

(1) The State through A.A.G.

(2) Muhammad Faraz son of Muhammad Israr

(Respondents)

Present:

M/S Hazrat Rehman and Hus-ul-Maab, Advocates.

Mr. Raza-ud-Din Khan, A.A.G

Mr. Abdul Halim Khan, Advocate.

(2) Cr.A. No. 46-M/2018

Muhammad Faraz son of Muhammad Israr

(Appellant)

Versus

(1) The State through A.A.G

(2) Attaul Mabood son of Muhammad Pir Jan

(Respondents)

Present:

Mr. Abdul Halim Khan, Advocate.

Mr. Raza-ud-Din Khan, A.A.G

M/S Hafiz Ashfaq Ahmad and Hus-ul-Maab, Advocates.

(3) Cr.R. No. 12-M/2018

Muhammad Faraz son of Muhammad Israr

(Petitioner)

Versus

(1) The State through A.A.G

(2) Mudassir Shah son of Shaheen Shah

(Respondents)

Present:

Mr. Abdul Halim Khan, Advocate.

Mr. Raza-ud-Din, A.A.G

M/S Hazrat Rehman and Hus-ul-Maab, Advocates.

Date of hearing: 10.12.2020

JUDGMENT

WIQAR AHMAD, J.- Through this single judgment, we intend to dispose of Criminal Appeal No. 27-M of 2018, Criminal Appeal No. 46-M/2018 as well as Criminal Revision No. 12-M of 2018. All these connected appeals and revision arise out of judgment dated 31.01.2018 of the Court of learned Additional Sessions Judge Dir Lower at Chakdara, which had passed the following order;

“As sequel to above discussion, prosecution remained successful in bringing home charge against accused Mudashir Shah beyond any shadow of doubt for murder of deceased Mst. Ghazala as well as murder of Ihrar in furtherance of common intention and attempting at life of complainant. The minor short comings and deficiencies although worth ignoring are not denied in the prosecution case which do creep with passage of time, and in such circumstances, the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, may also be pressed in the matter of sentence. When the accused succeeds in casting some doubt on the version of prosecution case, is entitled to benefit in the matter of sentence. The accused is also of young age 20/21 years old therefore, in view of the peculiar facts of the case, capital punishment is avoided and accused namely Mudashir Shah is hereby convicted under section 302 (b) PPC and sentenced to life imprisonment (on two counts). The convict is also directed to pay amount of Rs. 100,000(One Lac each) as compensation amount within the meaning of section 544-A Cr.P.C to the legal heirs of each deceased and in case of default thereof convict shall further undergo six month SI. Accused Mudashir Shah is also convicted under section 324 PPC and sentenced to 7 years RI. Benefit of section 382-B Cr.P.C is extended to convict. The sentences awarded to the accused would run concurrently. Accused Muhammad Tahir Shah is still absconder, he is declared proclaimed

offender and his name be entered in the register of P.Os and perpetual warrant of arrest be issued against him. Accused Atta Ul Maboob was however acquitted of the charges by extending him benefit of doubt.

Feeling aggrieved therefrom appellant namely Mudasar Shah has filed his criminal appeal against conviction, while complainant (appellant) namely Muhammad Faraz has filed appeal against acquittal of accused/respondent namely Attaul Maboob. The complainant has also filed criminal revision for enhancement of the sentences awarded to the convicted accused (appellant herein).

2. Appellant and other co-accused faced trial in case FIR No. 05 (Ex.PW-7/1) dated 01.01.2016 under sections 302,324,34,109,212 PPC registered at Police Station Chakdara District Dir Lower on the basis of 'Murasila' (Ex. PW-1/1) sent by Zahid Khan, SHO. He has stated that he had received information of the occurrence and gone to the spot, where the complainant namely Muhammad Faraz had lodged first report of the occurrence. The complainant stated in his report that he along with his sister namely Mst. Ghazala had gone to the house of their brother-in-law namely Jehan Akbar. While they were coming back to their own house they found the absconding accused

Tahir Shah along with the appellant Mudasaar Shah near a place known as *Matoor* (ماتوڑ). The accused first made firing at their brother namely Ihrar and thereafter ran towards them. On reaching them they opened fire at the complainant and his accompanying sister with the intention to kill them. Brother of the complainant namely Ihrar received injuries on his head as a result of firing of the accused while his sister received injuries on her chest and died on the spot, while the complainant escaped un-hurt miraculously. Mst. Ghazala had earlier been engaged with absconding co-accused Tahir Shah whose engagement had later on ended, which fact was disclosed as motive for commission of the offence.

3. During the course of investigation, the Investigating Officer recovered blood through tissue paper (Ex. P-1) from the spot vide recovery memo Ex. PW-2/2 dated 02.01.20216. An empty of 30 bore (Ex.P-2) had also been recovered from the spot vide recovery memo Ex. PW-2/3 dated 02.01.2016. Two crime empties of 30 bore pistol were also taken in possession vide recovery memo Ex. PW-2/5 dated 02.01.2016. Weapon of offence i.e. 30 bore pistol was also recovered on pointation of the appellant vide

recovery memo Ex. PW-10/6 dated 29.02.2016. The pistol along with empties recovered from the spot were sent to Forensic Science Laboratory (hereinafter referred to as "*FSL*") for the purpose of comparison, report (Ex.PW-16/2) received therefrom was in affirmative.

4. On completion of investigation, complete *challan* was submitted against appellant and other co-accused before learned trial Court. Proceedings under section 512 Cr.P.C were initiated against absconding co-accused Tahir Shah. After compliance of proceedings of 265-C Cr.P.C, charge was framed against them on 09.05.2016, to which they pleaded "*not guilty*" and claimed trial. Prosecution produced as many as sixteen (16) witnesses, whose statements were recorded and placed on file. On conclusion of proceedings in the case, accused were examined under section 342 Cr.P.C. Learned trial Court convicted and sentenced the appellant namely Mudasar Shah vide impugned judgment dated 31.01.2018 as stated earlier, while co-accused namely Attaul Maboob was acquitted of the charges by extending him benefit of doubt.

5. We have heard arguments of learned counsel for the parties, learned Adll: A.G appearing on behalf of State and perused the record.

6. Perusal of record reveals that prosecution have mainly been relying upon testimony of the sole eyewitness namely Muhammad Faraz (PW-1), who had also been complainant in the instant case. In his examination-in-chief he has narrated the story as mentioned in the FIR, with the only addition that at the time of firing at his deceased sister he had run towards the nearby graveyard so as to save himself from the firing. This witness was cross-examined at length. There has been a delay 2 hours and 45 minutes in lodging first report of the occurrence, as the time of occurrence has been mentioned as 16:00 P.M on 01.01.2016 while the time of report has been shown as 18:45 P.M on said date in the 'Murasila' Ex. PW-1/1. In the context of delay as well as presence of the PW, a part of the cross-examination of this sole eyewitness is very important which needs reproduction herein for ready reference;

"فاہرنگ پر میں جانب قبرستان بھاگ گیا اور پھر گھر خود جا کر وہاں سے پستول ساتھ کر کے اپنے دیگر چچا زاد گان آم کے ہمراہ ملزمان کی تلاش میں نکلے۔ جو جانب شمال فرار ہوئے تھے اور بعد از تلاش ملزمان واپس ماسختن ویلہ گھر خود آئے تھے۔ ہم نے ملزمان کی تلاش

پر تقریباً دو گھنٹے اور چالیس منٹ صرف کئے تھے۔ ہم نے اس دوران پولیس کو کوئی اطلاع نہیں دی تھی۔ از خود کہا کہ ہم جب واپس آئے تو پولیس آئی تھی اور ہم نے اُن کو رپورٹ کی۔ میں نے خود برادر ام مقتول محمد احرار کو گھر خود نہیں لے گیا تھا۔ فائرنگ کے بعد ملزمان فرار ہوئے اور میں تقریباً 10/5 منٹ کے دوران گھر خود چلا گیا اور پستول سمیت چچا زاد گان ام کو لے کر ملزمان کی تلاش میں نکلے۔"

This is very strange that the complainant had left behind his injured brother, as well as his deceased sister and had rushed to the house where he had also taken his cousins with him, and chased the accused. During the long chase of 02 hours and 40 minutes, he had almost forgotten his brother and sister which he had left on the spot. It is very strange that nobody else from the house had come out and taken the injured to the hospital or lodged report of the occurrence with the promptitude which was need of the hour. Further ahead in his cross-examination this witness has also stated that the distance between their house and police post "Khadgazai" was about 1300 hundred meter while he was unable to disclose the distance of another police post namely "Badwan". He also stated that during search of the accused they had neither sent information of the occurrence to police post "Khadgazai" nor to police post "Badwan". It has come in the statement of

Investigating Officer PW-12 that the distance between police post "*Badwan* has been 3/4 kilometers (approximately) from house of the deceased. The witness i.e. PW-1 had also improved his statement in his examination-in-chief where he stated that he had run to the graveyard for taking shelter, while on the other hand he had stated in his first report of the occurrence that he had escaped the firing miraculously. Such an improvement might have been felt necessary by him, for the reason that his role has not been fitting in the story of prosecution. Had he been present in the company of his sister and fired at by two of the accused simultaneously, his escape in such a situation might be deemed requiring an explanation, for which purpose the assertion of running towards graveyard might have been added to the story. This display of unnatural conduct by the sole eyewitness, creates substantial doubt about presence of the PW and witnessing the occurrence. In the case of "*Pathan v/s The State*" reported as 2015 SCMR 315 Hon'ble Supreme Court of Pakistan had disbelieved the eyewitnesses, due to the unnatural conduct found described in their respective testimonies. Relevant part

of findings of the Hon'ble Apex Court is reproduced hereunder for ready reference;

"In this case, the deceased has received numerous stab/incised wounds on different parts of his body, numbering 19 in all. The appellant was armed only with scissors not a formidable weapon of destruction. The complainant is the son of the deceased while Baradi and the other P.W. Muhammad Yousaf are also related to the deceased. The causing of such large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to the pause in between the first injury and the last one but all the three P.Ws. including the son with a strong stature and built remained as silent spectators. They did not react or showed any response when the accused was causing the injuries. No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing nor attempted to chase the accused and apprehend him at the spot."

Further reliance in this regard may also be placed on judgment of Hon'ble Lahore High Court in the case of "Mst. Salamat Bibi v/s The State" reported as 1986 P Cr.LJ 111.

7. So far as recovery of the pistol on pointation of accused/appellant, vide recovery memo Ex. PW-10/6 is concerned, it is important to be noted that said pistol has been shown lying beneath a stone at a place known as *Khwar Sabar Shah* near an irrigation channel. The recovery was shown to have been witnessed by the witnesses mentioned there, among whom PW-10 namely Muhammad Naseer Khan Inspector has been produced in Court, who stated in his cross-examination that marginal witnesses to the

recovery memo Ex. 10/6 namely Mahmood Khan and Rahim Bakshah were relatives of the complainant-party. Even otherwise, when the prosecution has failed to prove the case against the appellant beyond reasonable doubt then the corroboratory evidence produced in the case could be of no help to the prosecution. In this respect, reliance is placed on judgment of Hon'ble Supreme Court of Pakistan in the case of "Imran Ashraf & 7 others v/s The State" reported as 2001 SCMR 424, wherein it has been held;

"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."

In support of same ratio, further reliance may also be placed on the judgment reported as 2007 SCMR 1427.

8. Prosecution have therefore not been able to prove its case against the appellant beyond reasonable doubt. The accused/appellant is therefore acquitted of the charges by allowing the instant appeal. Criminal Appeal No. 46-M of 2018 filed by complainant against acquittal of accused/respondent namely Atta-ul Maboob is also dismissed for the reasons recorded hereinabove. Criminal Revision No.

12-M of 2018 has become infructuous and same is also dismissed accordingly.

9. These are reasons for our short order of even date, which read as follows;

"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 31.01.2018 passed by learned Additional Sessions Judge Chakdara Dir Lower in case FIR No. 05 dated 01.01.2016 registered under sections 302, 324, 34,109,212 PPC at police station Chakdara District Dir Lower and resultantly acquit the accused/appellant namely Mudasar Shah of the charges levelled against him. He be released forthwith if not required in any other case."

Announced

Dt.10.12.2020



JUDGE



JUDGE

Offic
24/12/2020
w/R