

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 582-P of 2016.

With

Murder Reference No.15-P/2016

JUDGMENT

Date of hearing.....11.09.2017.....

Appellant(s)...(Arab Shah) by Mr. Imtiaz-ur-Rahman, Advocate.

Respondent(s)/State by Mian Arshad Jan, AAG assisted by
Mr. Muhammad Asif, Advocate, counsel for
Complainant.



QALANDAR ALI KHAN, J:- This criminal appeal has arisen out of conviction of the appellant, Arab Shah, under Section 302 (b) PPC; and sentence of death awarded to him by the learned trial Court/Additional Sessions Judge-V, Charsadda, vide impugned

judgment dated 21.09.2016; whereby, the appellant was also held liable to payment of compensation amounting to Rs.200000/-; which, on recovery, was to be paid to the legal heirs of the deceased as required under Section 544-A Cr.PC; with further order that the amount of compensation shall be recoverable as arrears of land revenue under Section 544-A (2) Cr.PC or in default thereof the appellant shall undergo S.I for six months. The appellant was also convicted under Section 324 PPC for attempt on the life of complainant, Rehmat Shah, and sentenced to five years R.I and fine of Rs.50,000/-, or in default of payment of fine to six months S.I. The appellant was ordered to be hanged by neck till he was dead; and benefit of Section 382-B Cr.PC was extended to him. Simultaneously, a reference under Section 374 Cr.PC was sent to this Court for confirmation of the sentence awarded to the appellant; with direction that the death sentence shall not be executed until it was

confirmed by this Court. In the same judgment, co-accused Shabbir Khan and Noor Jamil were declared proclaimed offenders, and perpetual warrants of arrest were issued against them.

2. The case vide FIR No.481 dated 28.08.2014 under Sections 302/324/34 PPC Police Station Charsadda was registered on the report of Rahat Shah, complainant, who reported to Iftikhar Ahmed ASI (PW.2) in the casualty of Charsadda Hospital that he along with his brother Azeem Shah, were present at 07.30 hours on 28.08.2014 in Gul Baba Kanday, Rajjar, when in the meantime his father Arab Shah son of Khuidad Shah i.e. the appellant and his brother Shabbir Khan son of Arab Shah, the absconding co-accused, and Noor Jamil, the other absconding co-accused, came there and opened firing at them, with which his brother Azeem Shah was hit while he escaped unhurt. The motive for the offence was cited as dispute over landed property. The occurrence was shown to have been witnessed by the other

people present there at the time of occurrence. The *murasila* drafted by the said Iftikhar Ahmed ASI was thumb impressed by the complainant and also signed by one Abdul Qayyum son of Sardar Khan as rider. After reducing into writing the report of the complainant, the ASI prepared injury sheet of injured Azeem Shah, and referred him to the Medical Officer for Medical examination and report.

3. The injured, Azeem Shah, was shown to have been received unconscious by the Medical Officer at 08.05 A.M; and the Medical Officer, on examination, found 8 firearm entry wounds of 1 x 1 cm, with the exception of 4th fire arm entry wound of 2 x 1 cm, with corresponding exit wounds of 2 x 1 cm and 2 x 2 cm as well as 2 x 3 cm, and with no charring marks visible around any wound. The injured Azeem Shah, reportedly, succumbed to the injuries at 5.30 AM on 29.08.2014 and was later on subjected to Postmortem examination at 9.00 AM by the Medical Officer at DHQ Hospital, Charsadda. The

Postmortem report also showed injuries of the same nature, but with different sizes and dimensions of 1.5 x 1.5 cm and 1 x 1.5 cm with corresponding exit wounds of 2 x 2 cm, 2 x 3 cm and 3 x 3 cm.

4. The site plan, reportedly, prepared by the I.O on the pointation of the complainant showed presence of the complainant, deceased Azeem Shah, then injured, and all the three accused named in the FIR, including the appellant, and recovery of blood stained earth from the place assigned in the site plan to deceased Azeem Shah, and five empty shells of 30 bore from point 'A' in the site plan located behind the accused at some distance. The blood stained secured from the spot and blood stained garments of the deceased were examined by the Chemical examiner, who reported that the same was human blood. Likewise, the report of firearms expert with regard to five 30 bore crime empties was to the effect that all the five crime empties were fired from one and the

same 30 bore weapon. After recording statements of PWs under Section 161 Cr.PC, and completion of investigation, complete challan was submitted to the learned trial Court against the appellant; and at the same time, challan under Section 512 Cr.PC was submitted against the two absconding co-accused.

5. On receipt of challan in the Court, after compliance with the provision of 265-C Cr.PC, formal charge against the appellant/accused facing trial was framed under Sections 302/324/34 PPC, to which he pleaded not guilty and claimed trial. The learned trial Court examined, Tauheed Khan DFC (SW1) in support of search warrants under Section 204 Cr.PC and proclamations under Section 87 Cr.PC. The learned trial Court also examined as many as 12 PWs, including important PWs like Iftikhar Ahmed ASI P.S Charsadda (PW.2), who recorded report of the complainant in the shape of *murasila* (EXPA); Dr. Amin Khattak, DHQ Hospital, Charsadda (PW.5), examined Azeem

Shah, then injured; Dr. Waseem DHQ Hospital Charsadda (PW.7), conducted the postmortem examination of the deceased; Rahat Shah (PW.9), the complainant; and Khawaja Muhammad ASI (PW.10), conducted investigation in the case.

6. After prosecution closed its evidence, the appellant/accused facing trial was examined under Section 342 Cr.PC, wherein, he refuted allegations of the prosecution against him, but declined to be examined on oath in rebuttal of the prosecution case or produce defence evidence. Thereafter, the learned trial Court heard the learned APP assisted by learned counsel for the complainant and learned Defence counsel; and rendered the impugned judgment, whereby, the appellant/accused facing trial was convicted and sentenced to the penalty of death under Section 302 (b) PPC and five years R.I under Section 324 PPC; along with compensation and

fine etc mentioned hereinabove; hence this appeal.

7. Arguments of learned counsel for the appellant and learned AAG, assisted by learned counsel for the complainant heard; and record perused.

8. This is a unique and rare case of its kind in the sense that son has charged his father and brother along with another person for the *qatl-i-amd* of his brother, because of an unspecified dispute over landed property. If falsely charging of father by the son for murder of his brother could be regarded as unimaginable, it is equally beyond imagination that an aged father would join his other son for *qatl-i-amd* of his son over a dispute which is still shrouded in mystery, and having not been proved on the record by the prosecution, despite the motive alleged by the complainant in the FIR.

9. Having considered respective submissions at bar by learned counsel for the parties and gone through record with their

valuable assistance, we arrived at this irresistible conclusion that neither the occurrence took place in the manner alleged by the prosecution nor presence of the appellant on the spot at the time of occurrence and his participation in the commission of crime was proved beyond any shadow of doubt, so as to justify dismissal of appeal and upholding the death penalty and other sentences awarded to the appellant by the learned trial Court/Additional Sessions Judge-V, Charsadda, vide impugned judgment dated 21.09.2016.

10. In the *murasila*/FIR, the time of occurrence has been reported as 0730 hours, whereas time of report is mentioned as 0815 hours on the same day i.e. 28.08.2014; and the *murasila*/FIR contains a foot note of its scribe to the effect that deceased Azeem Shah, then seriously injured, was referred to the Medical Officer after preparation of his injury sheet; but the time of examination on the injury sheet has been recorded by the Medical Officer as 08.05

AM i.e before the time of report i.e. 08.15 hours, mentioned in the *murasila*/FIR.

11. One Abdul Qayyum son of Sardar Khan also signed the *murasila* as token of affirmation of the report of the complainant; but he was not produced as PW in the case, for the reason, best known to the prosecution, thus leaving the complainant as the sole eye witness in the case to carry the burden of proof against the appellant. Besides, neither weapons of offence were mentioned in the FIR, nor any detail of opening of 'unprovoked' indiscriminate firing by all the three accused, simultaneously, has been given, and not a single supporting ocular account has been furnished by the people shown present on the spot in the FIR at the time of occurrence.

12. The site plan would show both the complainant and the deceased in the same direction from all the three accused, but only the deceased was seemingly made target for indiscriminate firing by the three accused

named in the FIR, while sparing the complainant, who escaped unhurt and did not receive a single scratch in the firing. This appears something hard to believe in view of the fact that the motive for the offence i.e. unspecified dispute over property was not imputed to the accused only against the deceased, who was the real brother of the complainant, son of the appellant, and brother of absconding accused Shabbir Khan. Even in the site plan, the vacant plot of Azeem Shah deceased has not been shown as the bone of contention between the parties.

13. The I.O recovered five empty shells of 30 bore from point 'A', shown in the site plan behind the three accused named in the FIR; at almost equal distance from them, which were sent to the firearms expert, who opined that the five 30 bore crime empties were fired from one and the same 30 bore weapon; thereby suggesting commission of offence by one person, whereas three persons have been

charged for firearm injuries to the deceased, having the same size and dimension of 1 x 1 cm, barring injury No.4 of 2 x 1 cm size, in the injury sheet; and 1.5 x 1.5 cm in the postmortem report, and only two entry wounds No.2 and 8 of the size of 1 x 1.5 cm. Both the medical and P.M reports show five out of 8 firearms entry wounds on the back side of the deceased, whereas the deceased has been shown in the site plan in front of the accused.

14. According to the *murasila*/FIR, complainant, Rahat Shah reported the occurrence in the casualty of Charsadda Hospital, where the report, in the ordinary course, should have been recorded by the police officer/official present on duty in the casualty; but in this case scribe of the *murasila* i.e. Iftikhar Ahmed ASI (PW.2), reportedly, received information about the occurrence and proceeded to the casualty of Charsadda Hospital where the complainant lodged the report to him; which fact would indeed create

suspicion about the recording of the *murasila*, and FIR based thereupon, particularly in the light of the fact that complainant, Rahat Shah (PW9), categorically stated in his statement before the Court that he had made report in the hospital to the doctor and that the doctor reduced his report in to writing and obtained his thumb impression on the same and further that he had made report to the doctor in the emergency. It may also be noted that the complainant, according to his own statement, was running his business on a donkey cart during the days of occurrence, and he did not furnish any explanation, let alone plausible explanation, for his presence in his house on the day of occurrence.

15. The above noted discrepancies in the case of prosecution against the appellant, perhaps, escaped notice of the learned trial Court while awarding death penalty and other sentences to the appellant. The abscondence of the appellant for some time, which alone

cannot lead to his conviction unless corroborated by other incriminating evidence against him, notwithstanding , the case of prosecution against the appellant is replete with doubts, and falls short of the required standard of proof, essentially required for recording the judgment of conviction of an accused and awarding him sentence of death.

16. While empathetically observing that these findings are confined only to the case of the appellant, having no bearing on the case against the absconding co-accused who are still fugitive from law and have not yet surrendered to the process of law like the appellant, the appeal is accepted and the impugned judgment dated 21.09.2016 of the learned trial Court/Additional Sessions Judge-V Charsadda is set aside. Consequently, the appellant is acquitted of the charges, and he be released from jail, if not required in any other case.

17. Murder Reference No.15-P/2016 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
11.09.2017.
(Ayub)

(Lal Jan Khattak)

J U D G E

(Qalandar Ali Khan)

J U D G E