JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

J.Cr.A.No.126-P of 2018 with Murder Reference No.01 of 2018.

Date of hearing: 12.09.2019.

Mr.Daniyal Khan Chamkani, advocate for appellant.

Mr.Arshad Ahmad Khan, AAG for State.

Mr.Khalid Mehmood, advocate for complainant.

JUDGMENT

SAHIBZADA ASADULLAH, J.- This jail criminal appeal is directed against the judgment dated 20.01.2018 recorded by learned Additional Sessions Judge-II, Camp Court Lahor, Swabi delivered in case FIR No.26 dated 12.02.2014 u/s 302 PPC of Police Station Tordher District Swabi, whereby upon conviction, the appellant has been sentenced to death and to pay Rs.5,00,000/- as compensation to the legal heirs of the deceased or in default whereof to suffer imprisonment for six months.

2. As per prosecution version, on 12.02.2014, complainant Mst.Mumlikat wife of Noor Rehman brought dead body of her son Shafi-ur-Rehman with the help of

co-villagers to Police Station Tordher and alleged that on the eventful day at the relevant time, she along with her deceased son Shafi-ur-Rehman and Tufail were present in their house when in the meantime Ghani-ur-Rehman, her brother-in-law, called his son Shafi-ur-Rehman from outside upon which her deceased son Shafi-ur-Rehman went out where oral altercation started between the two, upon which she came out of her house and saw that Ghani-ur-Rehman appellant has caught hold of her son from his hand and was forcibly taking to the hujra of Ismail where said Ghani-ur-Rehman made firing at her son Shafi-ur-Rehman with the intention to kill as result her son got hit and died on the spot. Ghani-ur-Rehman appellant after commission of the offence decamped from the spot. Motive for the crime is stated to be an altercation took place 2/3 days prior to the present occurrence between deceased Shafi-ur-Rehman and Ghani-ur-Rehman appellant, hence the case was registered.

3. After completion of investigation, challan was submitted in court, which indicted the accused for commission of the

offence to which he pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced and examined ten witnesses in all, whereafter statement of accused was recorded, wherein, he professed his innocence. The learned trial court, on conclusion of trial, convicted and sentenced the appellant, as mentioned above, whereagainst he has filed the instant appeal.

4. The arguments of learned counsels for the parties are heard and with their valuable assistance the record was read from cover to cover.

5. Yes, it is a case of single accused having been charged for commission of the murder of the deceased where, mother of the deceased and uncle of the deceased are shown as eyewitnesses, we further affirm that accused charged is the uncle of the deceased but this should not be the sole basis for conviction and is not enough to get satisfaction rather the prosecution will still have to go a long way to prove its case against the appellant to quench the thirst of appreciation and judicial satisfaction of the mind.

6. The prosecution story begins when the complainant Mst.Mumlikat (PW-5) reported the death of her son to the local police at Police Station Tordher District Swabi. The complainant shown herself and her deceased son along with Tufail, her second son, at home when at the knock of the accused at her door, the deceased went out, who was caught hold of by the accused and dragged him to the Hujra of one Ismail, which figures in the site plan. It is the version of the complainant that she followed them and at the same time she called Shafi-ur-Rehman, the eye witness, who also followed till they reached to the Hujra of Ismail and when the accused took the deceased dragging in front of the Hujra, the accused caught one hand of the deceased and fired, which led to his death. Shafiq-un-Nabi was examined as PW-6, who too in his court statement explained that he was informed by the complainant at 07:45 AM and started chasing the accused and deceased and at last reached to the place of occurrence at 08:00 AM. Both the witnesses were taught conscious improvements and

when the two are read together they run apart. The complainant says that when she reached near the place of occurrence, the accused/appellant fired at the deceased and the deceased was still in his clutches, she goes along way that the eye witness shouted not to kill but the deceased fired.

7. The eye witness, who was examined as PW-6, improved his court statement and said that when he reached at the place of occurrence, the deceased and accused were altercating and scuffling with each other and the scuffling continued for five minutes in their presence.

8. We feel it necessary to scan it again and again, as the statements of the two on this particular aspect of the case contradict each other. The complainant says that when the two reached chasing the accused fired at the deceased but she kept mum regarding the scuffling for five minutes. The question is lurking about in mind that whether their presence on the spot is natural and as to whether the two have come with nothing but the truth. The postmortem report has shown only one entry and exit wound but nowhere it is mentioned that the

deceased had any marks of violence or bruises on his body.

9. This is strange that the complainant came after the deceased all at once but her other son Tufail did not follow rather felt himself comfortable at home. We are again unable to understand that when the house of the complainant and the eye witness PW-6 are separate, then how at the neck of time the complainant informed the eye witness and when they started from different houses at different places and with considerable distance from each other, how did they reach together at the place of occurrence as at the time of communicating to the eyewitness (PW-6) by the complainant, the destination of the accused and deceased was not even known to the complainant. This is unnatural that at 07:45 AM the accused caught hold of the deceased and the distance to the Hujra of Ismail took 15 minutes to reach ,why people in the streets and on the way did not help in rescuing the deceased from the accused and why the destination was fixed as the Hujra of Ismail, which even at the time of occurrence was

closed and even the owner of the Hujra has not been examined.

10. What keeps us on guard is that, the site plan was prepared on the pointation of the complainant and the eye witness but nowhere the houses of the two are shown. We fail to understand that if the houses of the complainant and eye witness were in the same vicinity where-from they took 15 minutes to reach the place of occurrence, then why they are shown approaching from two different directions and both in opposite side 13 paces each from the deceased. The complainant later tried to justify that she informed the eye witness through telephone which was hushed by the eyewitness as he kept mum on this aspect of the case, so much so no CDR or mobile phone was given to the police and collected, we cannot hold but to say that the witnesses are interested and chance witnesses.

11. The time of occurrence has been shown as 8.00 A.M., the place of occurrence is on the brink of main Swabi Jehangira mettaled road and the inter-se distance between the spot and Police Station though shown as 15/16 kilometer, but in fact this

distance is less than 3 kilometer, which was also conceded by the learned AAG appearing for the State as he hails from the same area, and the report was made at 9.40 A.M., the complainant to cover the delay spoke that the dead body was lying on spot for 30/40 minutes on cot and thereafter shifted to the Police Station for report. This does not end here, PW-8, who identified the dead body before the police, stated that he being zamindar by profession was informed by the eyewitness of the occurrence on which he rushed to the Police Station and reached sharp at 9.30 A.M. and in his presence the complainant reported the matter. The Investigation Officer was examined as PW-9, who without any hesitation stated that he was busy on the spot at 9.30 A.M. and this 9.30 is the time when the report had then not been made. It troubles more as the doctor mentions the time of occurrence as 12.00 A.M. The collective effect leads to an irresistible conclusion that the report was made after preliminary investigation.

12. The pistol has been shown recovered from possession of the accused, which was

sent to Laboratory on 15.02.2014 along with 30 bore empty allegedly recovered from spot. This evidence moved the learned trial court heavily but to our surprise the learned trial court went in ignorance and did not take the exercise to assess as to when the accused was arrested, when the pistol was recovered and that when the pistol with empty was received to the FSL. This is on record that the accused was arrested on the same day i.e. on 12.02.2014 by the police of the same Police Station and a 30 bore pistol was shown recovered from the accused and in this respect FIR No.27 dated 12.02.2014 u/s 13 AO/15 AA Police Station Tordher was registered and the Moharrir says that the pistol was kept in the Malkhana and it was on 14.02.2014 that the accused/appellant during investigation declared it the weapon of offence. The Investigating Officer on 15.02.2014 wrote application to the Director FSL and both the pistol and empty was received to the FSL on 17.02.2014. We are curious to know that when the accused was arrested on 12.02.2014, which is the date of occurrence along with the pistol by the police of the same Police Station where the

report was made and even the Investigating Officer was of the same Police Station and pistol was placed in the Malkhana of the same Police Station, then why not it was taken as case property or the weapon of offence on the day it recovered and why the empty was not sent earlier, it leads nowhere but to hold that the pistol was later on planted and the empty was later on created, so this takes us to hold that the recovery and positive report cannot be taken as evidence and it has lost its sanctity.

In case titled **Abdul Jabbar and another Vs. The State (2019 SCMR 129)** it has been held that:-

"Apart from stated above only three empties were recovered from the place of occurrence which were taken into possession on 18.11.2003. The appellant Abdul Jabbar as well as Akhtar Abbas were arrested on 24.11.2003 and the recovery of their respective weapons i.e. pistol .30 bore and revolver .32 bore were affected on the same day, but due to inefficiency of local police, the empties which were recovered on 18.11.2003 were sent to the Forensic Science Laboratory on 03.12.2003. Till then recovery from the appellants was already effected, therefore, such a lapse at the part of the investigating officer had made the recovery from the appellants ineffective and of no consequence. The benefit of the same is surely to be extended in favour of the appellants....."

13. The medical evidence is in conflict with the ocular account. If we go with the statement of the complainant that at the time of firing, the accused/appellant was holding the deceased, if we say yes to her stance, then the distance comes to inches and in such a situation the barrel would touch the body of the deceased, then the injury would have the charring marks, so the ocular account of the complainant even on this aspect of the case holds no ground and it labels the complainant as untrustworthy and yet again the eyewitness mentions five minutes scuffle between the two but no bruises and marks of violence were present on body of the deceased.

In case titled **Abdul Jabbar Vs. The State (2019 SCMR 129)**, it has further been held that:-

"it is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eyewitnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. At the cost of reiteration, it has been observed by us that, in a case where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in lodging

the FIR; the presence of eyewitnesses is not established; there are irreparable dents in the case of prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from being proved and almost non-existent, the said court fell in gross error in maintaining the conviction of the appellants particularly on a capital charge. In these circumstances and after an independent evaluation of evidence available on record, we have no manner of doubt in our minds that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt".

14. The motive advanced was not proved as no independent witness was produced to confirm the motive part of the story and when motive alleged is not proved, then it is only and only the prosecution to suffer. We are conscious of the fact that it is a case of single accused and substitution is a rare phenomena but this aspect alone will not absolve the court of its liability to judge with care and caution. The courts, while awarding sentence on capital charges, are to be very careful and vigilant lest the innocent will suffer and the wrong done can never be undone.

15. The discussion made above leads us to an inescapable conclusion that the prosecution had failed to prove its case

against the appellant beyond reasonable doubt. This appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set aside and is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith, if not required to be detained in connection with any other offence.

The Murder Reference No.01 of 2018 is answered in the negative.

16. Above are the reasons of our short order of even date, which is as follows:-

"For the reasons to be recorded later on, this appeal is accepted, the conviction and sentence imposed upon the appellant by the learned Additional Sessions Judge-II, Camp Court, Lahor, Swabi, vide his judgment dated 20.01.2018 is set aside and the appellant namely Ghani-ur-Rehman s/o Habib-ur-Rehman, charged under section 302 PPC vide FIR No.26 dated 12.02.2014, is acquitted of the charges levelled against him. He shall be released from jail forthwith, if not required to be detained in connection with any other case.

The Murder Reference is answered in the negative".

JUDGE

JUDGE

Announced.

12.09.2019.

Sadiq Shah PS (DB) Hon'ble Mr.Justice Rooh-ul-Amin Khan & Hon'ble Mr.Justice Sahibzada Asadullah.