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

1) **Cr.A No. 222-M/2018**
Akbar Khan.....(Appellant)

Versus
The State and others.....(Respondents)

2) **Cr.A No. 230-M/2018**
Nameer Zada..... (Appellant)

Versus

The State and others.....(Respondents)

3) **Cr.R No. 53-M/2018**
Nameer Zada.....(Petitioner)

Versus

The State and another.....(Respondents)

Present: *Mr. Sher Muhammad Khan, Advocate for the appellant.*

Muhammad Parwesh Khan, Advocate for the complainant.

Mr. Razauddin Khan, A.A.G for the State.

Date of hearing: 07.10.2020

JUDGMENT

WIQAR AHMAD, J.- My this single order is directed to dispose of, criminal appeal (bearing No. 222-M of 2018) filed by the appellant namely Akbar Khan against the conviction and sentence awarded to him vide judgment dated 15.09.2018 of the Court of learned Additional Sessions Judge Khwazakhela, District Swat, and criminal appeal (bearing No. 230-M

of 2018) filed by the complainant against acquittal of accused Hakim Khan, Yar Muhammad Khan and Muhammad Khan, as well as criminal revision (bearing No. 53-M of 2018) filed by the complainant for enhancement of sentence of the appellant Akbar Khan.

2. Appellant in criminal appeal No. 222-M/ 2018 is aggrieved of his conviction and sentence recorded vide judgment 15.09.2018 of the Court of learned Additional Sessions Judge Khwazakhela, District Swat, whereby he has been sentenced as follows;

i. **Under section 302 (b) PPC to undergo life imprisonment as Ta'azir;**

ii. **Under section 544 (A) Cr. PC to pay Rs. 200,000/- to legal heirs of both the deceased in equal share and in default thereof, he was ordered to undergo simple imprisonment for six (06) months;**

iii. **Under section 15-AA to undergo three years simple imprisonment.**

He was also extended the benefit of Section 382-B Cr. PC. While complainant (appellant in criminal appeal No. 230-M/2018 is aggrieved of acquittal of accused Hakim Khan, Yar Muhammad Khan and Muhammad Khan made vide same judgment. Criminal revision No. 53-M/2018 has been

filed by complainant for enhancement of the sentence awarded to appellant namely Akbar Khan to that of death penalty.

3. Local police of Police Station Khurshid Khan Shaheed, District Swat received information that a double murder had taken place at Mohallah Manpetai of village Awar, District Swat. They went to the spot, where they found two dead bodies of a male and female deceased laying lathered in blood in a room. Appellant namely Akbar Khan was present there, and lodged the report by stating that he had come home after his daily labour work at evening time the day before the occurrence. He slept in his room. He heard some sound at about 21:30 hours and his suspicion drew him out of the room. On coming out, he found that the sound had been coming from his mother's room. His father had gone out of the house at evening time, whereafter he had not returned and the voice hitting his ears, had also been stranger, the appellant therefore peeped into the room of his mother over the door. He saw that another person namely Sherin son of Muhammad Gul was present there, about whom he had been hearing rumors that he had illicit relations with his mother. He locked the door from outside, went to

the nearby house of his uncle namely Hakim Khan, brought a 12 bore shotgun there-from and fired at both, his mother as well as the other person namely Sherin with the intention to kill them. They died as a result of the firing. The cause of occurrence was stated to be existence of the illicit relations between the two deceased during their lifetime.

4. Investigation in the case ensued, during which autopsy reports of the two deceased were obtained. Beside, other proceedings in investigation, weapon of offence was also shown recovered vide recovery memo Ex PW 2/3, from the appellant. Three empties had also been recovered from the spot, FSL report regarding comparison of the empties of the shotgun was also received and placed on record as Ex PW 11/21. On completion of investigation in the case, complete challan was put in Court. The prosecution examined fifteen (15) number of witnesses and closed their evidence, whereafter statement of the accused were recorded under section 342 Cr. PC. On conclusion of proceedings in the trial, the accused/ appellant Akbar Khan was convicted and sentenced as reproduced above, while co-accused namely Hakim Khan, Yar Muhammad and Muhammad Khan were

acquitted of the charges vide impugned judgment dated 15.09.2018.

5. Learned counsel for the accused/appellant submitted during the course of his arguments that prosecution have neither been having direct evidence against the appellant, nor have they been able to connect the appellant with commission of the offence on the basis of circumstantial evidence. He stated that F.I.R registered on report of the appellant cannot be given more worth than statement of an accused recorded under section 161 Cr. PC and that beside F.I.R, the only evidence that remained against the present accused/appellant is recovery of weapon of offence from his home. Learned counsel stated that PW-2 who was one of the marginal witness of recovery memo Ex PW 2/3 has not supported such recovery while the other witness namely Dosham Gul had not been examined. Recovery of the shotgun on pointation of the appellant did not stand proved in the circumstances of the case, according to the learned counsel. He relied upon judgments reported as ***PLD 1956 Supreme Court (Pak.) 420, PLD 1965 Supreme Court 366, 2017 SCMR 2036, 2018 YLR 1900*** and ***2018 P Cr. L J 1633,*** in support of his contentions.

6. Learned counsel appearing on behalf of complainant submitted in rebuttal that prosecution has been able to prove their case against the appellant through circumstantial evidence. He added that dead bodies of both the deceased had been recovered from the house of appellant and report of the occurrence has been lodged by the appellant himself, wherein he has owned his liability for commission of the offence. Learned counsel also added that recovery of weapon of offence has furnished the last ring in the chain of circumstantial evidence and had therefore connected the appellant with commission of the offence, whereafter he has rightly been convicted by the learned trial Court for commission of the offence. Learned counsel also made his submissions in the connected appeal against acquittal of co-accused namely Hakim Khan, Yar Muhammad Khan, Muhammad Khan and stated that prosecution have also successfully proved case against respondents/accused in Cr.A No. 230-M of 2018, therefore their order of acquittal also deserved reversal. He relied upon judgment reported as ***2008 SCMR 222*** as well as judgment of this Court passed in the case of **Haider Ali vs. The State (Cr.A No. 184-M/2017)**, in support of his contentions.

7. Learned Addl:A.G adopted arguments of learned counsel for the complainant.

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

9. Perusal of record reveals that there has been no direct evidence of the occurrence. Not only the prosecution have been relying upon contents of report of the occurrence lodged by the present appellant, but the learned trial Court has also made substantial reliance thereupon while convicting the appellant. We would therefore first discuss evidentiary value of lodging of such a report of occurrence by the appellant. The appellant was shown arrested on the night of occurrence i.e. on 28.01.2016, and on the following day i.e. 29.01.2016, he was produced by the local police before Magistrate with a request for recording his confessional statement. The accused refused to confess his guilty before the Magisterial Court and was thereafter remanded to judicial custody. While recording his statement under section 342 Cr. PC, he has been confronting with the factum of lodging of

report of occurrence by him in question No. 9, to which he has given the following answer;

"چونکہ میں نے کوئی جرم نہیں کیا ہے۔ بدیں وجہ مراسلہ میرے خلاف بطور ثبوت استعمال نہیں کیا جاسکتا ہے۔"

10. The fact that the accused had not recorded judicial confession before competent forum i.e. Ilaqa Magistrate, makes lodging of the report by the appellant, doubtful. He has subsequently denied commission of the offence in his statement recorded under section 342 Cr. PC on 11.04.2018. Had he voluntarily recorded his report of the occurrence with the assertions as contained in *Murasila*, he would have also confessed his guilt before Magistrate, when he was produced there, on the following day of his arrest. When he has not made such a confession, a lurking question exists about the veracity of lodging of report by him and owning responsibility for commission of the offence.

11. Lodging of such report even otherwise may not be construed, more than an extra judicial confession before the police who got attracted to the spot as first responders. Such a confession before Police Officer is not admissible in evidence, according

to Article 38 of Qanoon-e-Shahadat Order, 1984. Hon'ble Supreme Court of India while dealing with a somewhat similar situation, had held that first information report of the occurrence was not a substantive piece of evidence and could not be used to corroborate the statement of maker under section 157 of the Evidence Act. Relevant part of observations of the august Court in the case of **Nasar Ali vs. The State of Uttar Pradesh** reported as ***AIR 1957 S.C 366***, are reproduced hereunder for ready reference;

> **"A First Information Report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under s. 157 of the Evidence Act or to contradict it under s. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."**

We also find a similar treatment of the matter in judgment of Hon'ble Supreme Court of Pakistan in the case of **Muhammad Saleh vs. The State** reported as ***PLD 1965 Supreme Court 366***, wherein the august Court had observed;

> **"Muhammad Saleh himself went to the Police Station to report the matter. What he said was recorded at 11:30 am, on the 26th February. That statement was inadmissible evidence on account of its inculpatory nature."**

This Court in its earlier judgment given in the case of **Muhammadullah and another vs. The State through Additional Advocate General and another** reported as ***2018 P Cr. L J 1633***, has also held;

> **"First Information Report basically covers the information regarding a cognizable offence given to officer incharge of a police station the purpose of which is to set the law in motion for conducting investigation in the case. It is not a substantive piece of evidence unless the maker himself deposes in Court to confirm the contents of the FIR entered therein at his behest. Keeping in view the above status of the FIR, this document by itself cannot advance the prosecution case except it is recorded by a person who is near to die which is commonly known as dying declaration but that is also admissible in evidence under certain principles laid down by superior Courts."**

It was also held further ahead, in said judgment;

> **"To sum up, the learned trial Court has illegally taken into account the F.I.R against appellant Muhammadullah who allegedly made the report. Next is the question that whether it can be used against the co-appellant Hanifullah or not. Admittedly, he is not nominated in the F.I.R by co-accused Muhammadullah and was charged by relatives of both the deceased in their 164, Cr. PC statements recorded at a belated stage, therefore, there arise no question of taking into account the F.I.R against the co-appellant Hanifullah."**

We are not inclined to take a different view owing to the fact that preponderance of opinion of judicial *fora* existed, regarding the fact that an F.I.R lodged by an accused cannot be considered as evidence by itself, unless its maker cloth it with such a status by recording his confession according to law, or owns it during trial of the case.

12. Oral statement of brother of the accused recorded as PW-4, is of no worth for the prosecution as he had resiled from his earlier statement recorded under section 161 Cr. PC and he was though declared hostile but nothing beneficial to the prosecution could be extracted from his mouth. So far as statement of father of the appellant recorded as PW-14 is concerned, he is not an eye-witness of the occurrence and his statement is based on hearsay, which is not admissible in evidence. Same was the case with father of the deceased lady recorded as PW-13. He has given a new twist to the story by stating that accused Hakim Khan, Yar Muhammad Khan and Muhammad Khan had also been present with the appellant at the time of commission of the offence. A somewhat similar narration had also been recorded by wife of the deceased namely Mst. Muhammadia recorded as PW-8

but all the statements are based on hearsay and cannot therefore be relied upon safely in absence of direct evidence.

13. Other pieces of evidence available against appellant were recovery of shotgun, recovered vide recovery memo Ex PW 2/3, the empties recovered vide recovery memo Ex PW 2/4 and its matching F.S.L report Ex PW 11/21. One of the marginal witness of recovery memo Ex PW 2/3 namely Bailadar Khan was examined as PW-2. He has given a supporting narration in his examination-in-chief but in his cross-examination, he has stated that it was correct that his thumb impression had been taken by the local police on a blank paper. He has also stated that his statement had never been recorded under section 161 Cr. PC. This witness has resiled from his statement given in his examination-in-chief, while the other witness namely Dosham Khan has been abandoned. In such circumstances, recovery of weapon of offence cannot be taken to have been proved merely on the basis of statement of Investigating Officer. A substantial doubt has thus been created in respect of recovery of weapon of offence on pointation of the accused/appellant.

14. So far as factum of recovery of dead bodies from the house of appellant is concerned, it is important that the house had not been in exclusive possession of the appellant. As per prosecution evidence, his father and other brother namely Najeebullah have also been living in said house and his uncle namely Hakim Khan has also been living nearby. The house was not having a boundary wall around it, according to site plan Ex PW 11/1. In such circumstances, criminal liability cannot be fixed on the appellant, just for the reason that he had been living in the house.

15. So far as judgments relied upon by learned counsel appearing on behalf of complainant had been rendered on the basis of totally different set of facts, ratio of which cannot be applied to facts of present case. It has already been explained in the reasons recorded before that prosecution have failed in proving case against the accused/appellant, while in the case of **Zakir Hussain vs. The State** reported as ***2008 SCMR 222*** and relied upon by learned counsel for complainant, there had been an eye-witness account offered by a number of eye-witnesses, which had been found by the august Supreme Court of Pakistan to be

believable. There has not been a single eye-witness account offered in the case in hand, therefore ratio of said judgment cannot be applied to the present case. So far as unreported judgment of this Court rendered in ***Cr.A No. 184-M/2017*** is concerned, this Court had found the chain of all links of circumstantial evidence intact, with no link missing therein and had believed all the pieces of circumstantial evidence, netted together by prosecution in said case. Situation in the instant case is however, the other way round and the prosecution could not net together the chain of circumstantial evidence connecting the accused with commission of the offence. Hon'ble apex Court in the case of **Imran alias Dully and another vs. The State and others** reported as ***2015 SCMR 155***, has held in this respect;

> **"By now, it is a consistent view that when any case rests entirely on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain where on one end its noose fit in the neck of the accused and the other end touches the dead body. Any link missing from the chain would disconnect and break the whole chain to connect the one with the other and in that event conviction cannot be safely recorded and that too on a capital charge."**

Further reliance in this respect may be placed on judgments reported as ***2016 SCMR 274, 2017 SCMR 986*** and ***2017 SCMR 2026.***

16. In light of what has been discussed above, conviction and sentence of the appellant recorded vide judgment dated 15.09.2018 of the learned Additional Sessions Judge Khwazakhela, District Swat, impugned in the instant case, is set aside by allowing the instant appeal. The criminal revision No. 53-M/2018 filed by complainant for enhancement of the sentence has resultantly become infructuous and same is accordingly dismissed.

17. So far as appeal against acquittal of co-accused is concerned, it is stated that prosecution has failed to prove the case against principle accused namely Akbar Khan as well as against respondents in the instant appeal namely Hakim Khan, Yar Muhammad Khan and Muhammad Khan. It had been held by this Court in ***Muhammadullah's*** case **(2018 P Cr. LJ 1633)** in its observation reproduced hereinabove, that contents of an F.I.R disowned by maker itself, may not be used as evidence against him nor against co-accused, unless same is proved in

accordance with law. There had been no direct evidence available against respondents/accused, as discussed above. So far statements of PW-8, PW-9 and PW-13 are concerned, no doubt respondents-accused have been named therein for commission of the offence but all such statements were based on hearsay, as held earlier, and were not reliable therefore. The instant appeal against acquittal was found to have been lacking substance and same is accordingly dismissed.

18. These are reasons for our short order, which read as;

> **"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 15.09.2018 passed by learned Additional Sessions Judge Khwaza Khela Swat in case FIR No. 48 dated 28.01.2016 registered under sections 302, 34 PPC read with section 15 A.A at police station Khursheed Khan Shaheed (Khwaza Khela) District Swat and resultantly acquit the appellant namely Akbar Khan of the charges leveled against him. He be released forthwith if not required in any other case."**

Announced
Dt: 07.10.2020

JUDGE

JUDGE

Abdul Sabooh/*

(D.B.) Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Wiqar Ahmad

Office 25/10/2020 W/R