

Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

Cr.A No.147-A of 2015

JUDGMENT

Date of hearing.....28.11.2018.....

*Appellant...(Akhtar Saleem etc) by Mr. Wajih-ur-Rehman Khan Swati,
Advocate.....*

*Respondent...(The State etc) by M/s Yasir Zahoor Abbasi, AAG and Ghulam Mustafa
Khan Swati, Advocate.....*

SYED MUHAMMAD ATTIQUE SHAH, J:-

Appellants, Akhtar Saleem and his father, Fazal-i-Rabbi, faced trial in case F.I.R No.117 dated 19.05.2012 under sections 302/34 PPC, Police Station Baffa, Mansehra in the Court of learned Additional Sessions Judge-II, Mansehra, and subsequently at the conclusion of the trial, they both were held guilty of ‘*Qatl-i-Amd*’ of deceased Ghulam Mustafa and Muhammad Asif, and consequently convicted under section 302(b) PPC and sentenced to imprisonment for life as ‘*Tazir*’ and were also held liable to pay compensation of Rs.400,000/-each, under section

544-A Cr.P.C to the legal heirs of both the deceased, or in default thereof, they shall further undergo eight months simple imprisonment. Benefit of Section 382-B Cr.P.C was also extended to the appellants.

2. The facts, as narrated in the F.I.R., lodged by Habib-ur-Rehman, complainant, on 19/05/2015 at 09.00 hours that on that day he alongwith his sons Ghulam Mustafa, Muhammad Asif and Shahbar Khan son of Tahiroon was doing farming work in Tomatoes crop, when at 08.30 hours, Fazal-i-Rabbi son of Allah Dad and his son, Akhtar Saleem, duly armed with firearms came there; that they altercated and Akhtar Saleem fired at Ghulam Mustafa and Fazal-i-Rabbi fired at Muhammad Asif, who both sustained injuries and died on the spot. Motive for the offence was stated to be desertion of wife of Saleem Akhtar, appellant. The occurrence was stated to have witnessed by Habib-ur-Rehman, complainant (**PW-5**), Shahbar Khan (PW-6) and Feroz son of Alam.

3. The SHO, Hakam Khan, (**PW-7**), who reached the spot on getting information about the

occurrence and found dead bodies of the deceased lying in the fields. After reducing report of complainant in shape of '*Murasila*' (**Ex.PA**), he prepared injury sheet (**Ex.PW 7/1**) and inquest report (**Ex.PW 7/2**) of deceased Ghulam Mustafa and injury sheet (**Ex.PW 7/3**) and inquest report (**Ex.PW 7/4**) of deceased Muhammad Asif. He sent the dead bodies to the Civil Hospital for postmortem examination through constable, Tufail No.1120. He arrested appellant Akhtar Saleem and recovered 12 bore repeater bearing No.1200 FP 12GA (**Ex.P-1**) vide recovery memo (**Ex.PW 7/5**) and registered a case against him under section 13 A.O. After completion of investigation, he submitted complete challan against the accused in the case.

4. Appellants were formally charged by the learned trial Court, who pleaded not guilty, and claimed trial. The Prosecution examined as many as eighteen witnesses to bring home charge against the appellants. After close of the Prosecution evidence, the appellants were examined under section 342,

Cr.P.C. who pleaded innocence and denied their involvement in the commission of the crime. They did not opt to appear on oath as their own witness, as required under section 340(2) Cr.P.C. or to produce defence evidence.

5. After hearing arguments, the learned trial Court found the case of the prosecution to be based on *promptly lodged FIR, Malafide of complainant, Ocular account furnished by P.Ws 05 and 06, Medical Evidence, Circumstantial Evidence and Motive behind the occurrence*. Consequently, the learned trial Court convicted and sentenced both the appellants as mentioned hereinabove.

6. Appellants, Akhtar Saleem and Fazal-i-Rabbi assailed the impugned judgment of the learned trial Court by filing instant **Criminal Appeal No.147-A/2015**, whereas, Habib-ur-Rehman, complainant filed **Criminal Revision No.40-A/2015** for enhancement of sentences awarded to appellants, which are being disposed of through this single judgment.

7. Arguments of learned counsel for the parties heard and record of the case perused with their valuable assistance.

8. Admittedly, the SHO himself on getting information about the occurrence reached the spot and found the dead bodies of both the deceased lying in the fields, however, it could not be established as to how the police got information about the occurrence. Anyhow, the important piece of evidence in this case is the ocular account, which has been furnished by complainant Habib-ur-Rehman, (PW-5), father of deceased and Shahbar Khan (PW-6), who was allegedly residing in the cattle-shed of the complainant. The complainant during cross-examination admitted that they had not informed the police about the occurrence, however, the police came to know about the occurrence from someone. He showed his ignorance as to who had informed the police. PW-6 also stated during cross-examination that he has not informed the police. Moreover, they have not raised hue and cry, when they saw appellants

having firearms in their hands coming towards them or at-least they should have prevented them not to altercation with the deceased or to make some efforts to save them from the hands of appellants. This conduct on the part of the complainant and eyewitnesses was absolutely unnatural, as despite death of two persons, they are not doing any effort to inform the police about the occurrence, which creates doubts regarding their presence at the spot at the relevant time. PW-7 SHO during cross-examination stated that he was in PS when he received the information regarding the occurrence between 8.00 to 8.30 AM, which was conveyed to him by the Moharrar of the PS. PW-5 during cross-examination stated that they remained at the spot from 7.00 AM to 11.00 AM, whereas, PW-6 stated that he remained present at the spot up to 1.00 P.M. and he did not go anywhere during this period and remained at the spot. He further stated that PW Feroz and complainant also remained with him at the spot throughout this period. Moreover, PW-6 stated that at the time of occurrence, Asif deceased was

working in his own land, whereas, in the site plan (Ex.PW 18/1), the deceased Asif was shown present at point No.3, which was the land of one Raheem Khan. In this way, the statements of both the eyewitnesses are contradictory with the I.O. who prepared the site plan on their pointation. Moreover, the complainant stated that they were working in their field, whereas, other people were also working in their field and after the occurrence, those who working in their field, they also arrived at the spot. He showed ignorance about their names. PW-6 contradicted the complainant in this regard by saying that there was no other person in the surrounding fields at the time of occurrence. Similarly, PW-5, complainant stated that soon after the occurrence PWs Behram and Attae Khan, related to him, came to the spot, whereas, this statement of complainant was contradicted by PW-6, who stated during cross examination that after the occurrence police arrived at the spot and no other civil person arrived there. Moreover, PW-5 admitted in his cross-examination that they were busy in farming

work, with the pick-axes in the Tomatoes fields, however, the same were neither produced to the I.O nor the I.O had taken the same into his possession. All these material contradictions in the statements of both the alleged eyewitnesses would lead to obvious inference that the occurrence was not witnessed by them and their presence at the spot was doubtful. The medical evidence also not supported the version of the complainant. The complainant in his statement though have not disclosed the exact time of taking breakfast, however, he stated that they had their breakfast just before leaving the house at 6.30 AM, whereas, the Dr. Muhammad Amjad Khan, who conducted postmortem examination on the dead bodies of the deceased found digested food in their stomach, which showed that deceased might had taken food 4 to 5 hours prior to the occurrence. Thus, the ocular account furnished by the eyewitnesses is in clear conflict with the medical evidence. Therefore, the evidence of the alleged eyewitnesses in peculiar facts and circumstances of the case could not be

believed. The Honourable Apex Court in **Mst. Sughra**

Begum's Case (2015 SCMR 1142) has held that:

“It is cardinal principle of justice that ocular account in such cases plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution. To the contrary, once the ocular account is disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge”

9. Thus, in view of above material contradictions, the ocular account furnished by the complainant and eyewitnesses (PW-5 and PW-6) is not trustworthy, therefore, their testimonies in these peculiar circumstances could never be relied upon in a case involving capital punishment unless corroborated by independent, impartial, non-partisan and trustworthy witnesses. No independent person was produced, if at all, they were present at the spot at the time of occurrence in the nearby fields, as alleged by PW-15.

10. Similarly, the recovery of 12 bore shot gun on the pointation of the appellant Fazal-i-Rabbi or recovery of 12 bore shotgun from possession of

appellant Akhtar Saleem at the time of his arrest could not be proved and the marginal witnesses to the recovery memos, namely, Khalil-ur-Rehman (PW-3), Gujar Khan (PW-8) were related to the complainant and no independent person was associated by the I.O to prove the said recovery. Moreover, the I.O had taken into possession two empty shells of 12 bore from the spot, where presence of appellants Akhtar Saleem and Fazal-i-Rabbi was shown in the site plan, however, the empty shell allegedly recovered from the place of appellant Fazal-i-Rabbi does not match with the 12 bore shot gun recovered on his pointation. Thus, the recovery of alleged 12 bore shot gun from possession of appellant Akhtar and positive report of the firearms expert would be of no avail to the prosecution.

11. The motive which is alleged by the complainant in the present case does not relate directly to the deceased party. The wife of appellant Akhtar Saleem is daughter of Attai Khan (**PW-17**), therefore, the aversion, if any, exists on the part of the

appellants would be with the family of his wife and not the complainant, who is maternal grandfather of his wife. Thus, the motive in view of peculiar facts and circumstances of the present case would not be considered sufficient to prompt the appellants to commit the murder of deceased.

12. The above factors, material contradictions between ocular and medical evidence create serious doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts. Reliance is placed on case titled '**Ghulam Qadir Vs. The State**' (2008 SCMR 1221), wherein, it has held that:

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of charge-makers the whole case doubtful. Merely because the burden is on accused to prove his innocence it does not absolve the prosecution to prove its case against the accused beyond any shadow of doubt in this duty does not change or vary in the case."

Reliance is also placed on case law reported as **2009 SCMR 230, 1995 SCMR 1345, 2017 SCMR 596** and **2017 SCMR 709**.

13. Thus, this Court, in the light of above discussion, is of considered opinion that the charge against the present appellants-convicts has not been proved beyond any shadow of doubt and the findings of the learned trial Court qua conviction of the appellants were based on wrong and improper appreciation of evidence, which requires interference by this Court in its Appellate jurisdiction.

14. As a sequel to what has been discussed above, this appeal is accepted and the impugned conviction recorded and the sentences imposed by the learned Additional Sessions Judge-II, Mansehra on 10.12.2015 are hereby set aside and the appellants are acquitted of the charges under section 302 PPC. Appellants are directed to be released forthwith, if not required in any other case.

15. In view of acquittal of appellants, the Criminal Revision No.40-A/2015 filed by petitioner

for enhancement of sentence of the appellants, stands dismissed.

Above are the detailed reasons for short order of this Court of even date.

J U D G E

Announced.
Dt.28 /11/2018.

J U D G E

/*M. Saleem*/

(DB) Mr. Justice Lal Jan Khattak and Mr. Justice Syed Muhammad Attique Shah