JUDGMENT SHEET
PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.31-D/2022.

Irfan Ullah
Vs.
The State etc.

JUDGMENT

For Appellant: Mr. Farooq Akhtar, Advocate.

For State: Muhammad Adil Khan, Advocate.

For Respondent: Muhammad Ismail Alizai, Advocate.

Date of hearing: **10.11.2022.**

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MUHAMMAD FAHEEM WALI, J.- This judgment shall also dispose of the connected Cr.A.No.32-D/2022, Cr.A.No.34-D/2022 and Cr.R. No.02-D/2022, as all the matters are the outcome of one and the same judgment dated 05.7.2022, rendered by learned Additional Sessions Judge, Paharpur, D.I.Khan, in case FIR No.212 dated 12.7.2018, under sections 302/109/201/34 PPC of police station SNK, District D.I.Khan, whereby the appellants Irfan Ullah and Muhammad Shehzad have been convicted under section 302(b) read with Section 34 PPC, for committing *qatl-i-amd* of deceased Faisal Nawaz, and sentenced to rigorous imprisonment for life and also to pay compensation of Rs.10,00,000/- (Ten Lac) each to be paid to the L.Rs. of deceased in terms of Section

544-A, Cr.P.C. or in default thereof, to undergo six months simple imprisonment. Both the sentences have been ordered to run concurrently, however, benefit of Section 382-B, Cr.P.C. has been extended to both the convicts.

2. The prosecution story as disclosed in the FIR, registered on the basis of *murasila*, in brief, is that on 12.7.2018 at 7:15 hours, complainant Tarteel Ahmad Khan (PW-7), while present with the dead body of his brother Faisal Nawaz, aged about 45/46 years, reported the matter to the local police on the spot, to the effect that on 11.7.2018 at evening (Sham Wela), deceased left the house for Panyala in order to participate in the charity/Khairaat of late Javed Khan, however, he did not return therefrom; that in the morning at about 6:30 hours, his cousin Fatehullah came to his house and told him that his (complainant) brother was done to death by someone with firearm and the dead body was lying in football ground of Toi Panyala, whereupon he rushed to the spot where several people had gathered, while dead body of his brother was lying there, who was killed by unknown accused in the preceding night; that his brother was having friendship with his co-villager, namely Salman Khan; that the occurrence might have been witnessed by someone. It is further stated in the report that they had no enmity/motive with anyone, however, after

satisfaction he would charge the culprits. Subsequently, during investigation, one Muhammad Irfan son of Faiz Ullah, in his statement under section 161, Cr.P.C. followed by statement under section 164, Cr.P.C. disclosed that accused Irfanullah and Shehzad committed *qatl-i-amd* of Faisal Nawaz at the instigation of co-accused Abdul Latif. Later on, accused Zahoor was also implicated as an accused in the present case for abetment.

3. On completion of investigation, complete challan against the accused was submitted before the trial Court where at the commencement of trial, the prosecution produced and examined as many as twelve (12) witnesses, whereafter, statements of the accused under section 342 Cr.P.C, were recorded wherein he professed innocence and false implication, however, neither they wished to be examined under section 340(2) Cr.P.C, nor opted to produce defence evidence. The learned trial Court after hearing arguments, convicted the appellants and sentenced them, as mentioned above, which has been assailed by the appellants through this and connected criminal appeal No.34-D/2022, whereas the complainant has filed the connected criminal appeal as well as criminal revision challenging the acquittal of co-accused and for enhancement of sentence awarded to the

appellants, which are being decided through this single judgment.

4. We have heard the learned counsel representing the appellant, the learned State Counsel assisted by learned private counsel for the complainant at length and with their able assistance, the record was scanned.

5. It is the case of prosecution that on 11.7.2018 at evening (Sham Wela), deceased left the house for Panyala in order to participate in the charity/Khairaat of late Javed Khan, however, he did not return therefrom and in the morning at about 6:30 hours, cousin of the complainant, namely Fatehullah came to his house and disclosed to him that his brother was done to death by someone with firearm and the dead body was lying in football ground of Toi Panyala, whereupon he rushed to the spot where he found the dead body of his brother where several people had gathered on the spot. The complainant while reporting the matter on the spot did not charge anyone and also stated that they had no enmity with anyone else, however, it was Muhammad Irfan (PW-12), who during investigation disclosed involvement of the accused in the commission of offence and to this effect, his statement was also recorded under section 164, Cr.P.C. It is worth mentioning that as per prosecution version, Fatehullah, cousin of the

complainant informed him about the occurrence, however, to this effect he was not examined before the trial Court.

6. Perusal of the impugned judgment reveals that besides other material available on file, the learned trial Court mainly based its findings on the testimony of alleged eyewitness Muhammad Irfan (PW-12) and recovery of .30 bore pistol coupled with positive report of FSL regarding the said pistol and five empties allegedly recovered from the spot, therefore, in view thereof, we would like to re-appraise the evidence in order to reach at a just conclusion. Since the occurrence allegedly occurred in the night between 11/12.7.2018, therefore, it was bounden duty of the prosecution to establish the mode and manner of the occurrence and involvement of the accused in the commission of offence. According to PW-12, on 11.7.2018, he was called via cell phone by accused Shehzad to come to the Baithak of co-accused Abdul Latif, whereupon he reached there and found both accused Shehzad and Irfan, who placed their hands on a box pretending it to be Holy Quran and stated that they all the three are brothers and whatever was done by them will not be disclosed to anyone else, whereafter accused Shehzad took out a repeater shotgun from the said Baithak and accused Irfan also took a repeater shotgun and a pistol, whereafter, they

went to the Baithak of Pir Altaf Shah, situated in Panyala, where one Afnan, Thekedar and Imran were already present. It is pertinent to mention here that neither Afnan, nor Thekedar or Imran were produced before the Court to support the aforesaid story narrated by this PW. According to this PW, he alongwith accused Shehzad remained present with said three persons in the compound of said Baithak while accused Irfan handed over to him his pistol and then he went into the room of the Baithak with Pir Altaf Shah, however, said Altaf Shah was also not produced before the trial Court to support such stance. Further perusal of examination-in-chief of this witness reveals that from the Baithak of afore-referred Altaf Shah, he alongwith convicts/appellants went to Toi Panyala and sat in Akbar Football ground where they noticed few persons coming towards the football ground at some distance, whereupon accused Irfan asked accused Shehzad to go and inquire about those persons; that accused Shehzad handed over to him the repeater shotgun and went towards those persons and on return informed accused Irfan that those persons were from Tipi Sahiban and were going towards their homes; that after a while another person was noticed at some distance who was busy talking on a mobile phone and light of his cell phone was lit; that accused Irfan asked him to return his pistol which he handed

over to him; that accused Shehzad went to inquire about said person and on return told accused Irfan that it was Faisal Nawaz, a friend of one Salman, while Salman was enemy of acquitted co-accused Abdul Latif; that accused Irfan handed over the pistol to accused Shehzad and asked him to kill Faisal Nawaz, meanwhile, accused Irfan took his mobile set as well as his repeater shotgun and threatened him not to disclose it to anyone otherwise he would be killed; that accused Shehzad fired five time at Faisal Nawaz and killed him on the spot. This witness also disclosed further story ensued after the occurrence and in view thereof, Abdul Latif was arrayed as an accused in the present case. However, the story narrated by this witness is not supported by any independent witness, especially the persons whose names have been mentioned by him, because they were neither associated with the investigation nor produced before the Court. The cross-examination of this witness reveals that he is a Munshi with some lawyer at Paharpur and lives at D.I.Khan. Further perusal of cross-examination of this witness reveals that regarding most crucial questions put to him by the defence, he answered that he was unaware of the same, especially to a question regarding his confinement by the accused after the occurrence, he answered that he was unaware if his father had

reported the matter to the police about his missing and after his return to his house, nor he was aware of the fact that whether he had reported the matter to police. In view thereof, testimony of this witness could not be believed for sustaining conviction on a capital charge.

Another important witness of the prosecution is Tarteel Ahmad Khan complainant, who was examined before the trial Court as PW-7, he stated that although he charged unknown accused in his report, however, on the basis of disclosure of PW-12 before the police and statement u/s 164, Cr.P.C., he charged the accused for the commission of offence, however, he did not state a single word about recording of his statement by police or his statement recorded under section 164, Cr.P.C. It is worth mentioning that complainant while reporting the matter stated that he was informed by his cousin Fatehullah, who had come to his house in the morning at about 6:30 AM, however, while appearing before the trial Court deposed that he was called by said Fatehullah on cell phone at about 6:30 AM and informed him that his brother Faisal Nawaz was lying dead in football ground at Toi Khulla. In this view of the matter, the only inference which could be drawn therefrom is that neither he was informed by his cousin Fatehullah, nor he had been to the spot after such information, rather he tried to bring his testimony

in line with the testimony of PW-12, whose testimony has already been disbelieved by us in the preceding paragraph. It is pertinent to mention here that despite having prior information about the occurrence, the complainant reached the spot after arrival of the police. The anxiety of this Court prevailed with regard to information of occurrence allegedly communicated to the local police for the reason that the complainant while reporting the matter neither stated in his report to have informed the police, nor in his statement before the trial Court. According to him, although he accompanied the dead body to the hospital in a police van, however, he was unaware about names of persons present on the spot. Even he did not mention the names of the persons who identified the dead body before the doctor, notwithstanding the fact that as per his admission he accompanied the dead body which was handed over to them in the hospital after the postmortem at 8:00 AM. Although Muhammad Nawafil (brother of the deceased) was examined as PW-8, who allegedly signed the inquest report and identified the dead body before the police as well as before the doctor, however, complainant while appearing before the trial Court did not utter single word regarding presence of aforesaid witness on the spot, meaning thereby that the complainant was neither informed about the occurrence nor he had been

to the spot after gaining such information, rather the dead body was shifted to the hospital prior to his arrival to the spot. Although Aurangzeb ASI (PW-4) stated to have prepared the injury sheet and inquest report on the spot, however, PW-8 (identifier of the dead body) admitted in his cross-examination that he signed the inquest report at the time when his statement was recorded in the hospital. In this view of the matter, we discard testimony of the complainant from consideration.

7. To believe or disbelieve a witness, it entirely depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It primarily depends upon the rule of prudence and reasonableness to hold that a particular witness was present at the scene of crime and that he is making a true statement. A person who is reported otherwise to be very honest, above board and very respectable in society, if gives a statement, which is illogical and unbelievable, no prudent man despite his nobility would accept such statement. As a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of the evidence. It is not the person but the statement of

that person which is to be seen and adjudged. In case titled **"Abdul Jabbar and another Vs. The State" (2019 SCMR 129),** it has been held that:-

> ***"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 eye-witnesses is not established; there are irreparable dents in the case of the 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 another case reported as "**Irfan Ali Vs. the State" (2015 SCMR 840)**, it was held by the Apex Court that:-

> ***"To award a capital punishment in a murder crime, it is imperative for the prosecution to lead unimpeachable evidence of a first degree, which ordinarily must get strong corroboration from other independent evidence if the witnesses are interested or inimical towards the accused. In a criminal trial no presumption can be drawn against the accused person as it is a cardinal principle of justice that no one should be construed into a crime without legal proof/evidence, sufficient to be acted upon. No care and caution was observed in the present case in light of this principle. No evidence of believable nature was led with regard to the motive in the case to lend support to the prosecution version".***

8. So far as recovery of pistol, allegedly used in the commission of offence is concerned, suffice it to say that the same was allegedly recovered by Minhaj Sikandar Circle Officer, who was examined before the trial Court as PW-6. As per prosecution version, although accused Shehzad was given specific role of firing with pistol at the deceased, however, pistol was allegedly recovered by PW-6 from residential room of co-accused Irfan. It is quite surprising to note that PW-6 in his cross-examination admitted that the alleged house was abandoned house and doors were opened at that time. Neither he was aware of number of rooms nor he was in a position to tell that from which room the alleged recovery was effected. This Court is also conscious that Section 103, Cr.P.C. would apply to a case where the police conducts search of the house/place to recover a thing for which search is to be made and not to a case where anything is to be discovered in consequence of the information given by or on the pointation of the accused, however, in the present case, as stated above, the alleged recovery has not been effected on pointation of accused Shehzad, who has been charged for firing with pistol at the deceased and that too, in the darkness of night. In view thereof, such type of recovery and thereafter, positive report of FSL become inconsequential, which could not be

relied upon for sustaining conviction on a capital charge. Even otherwise, this piece of evidence (recovery) is a corroborative one and in cases where direct evidence fails, corroborative piece of evidence is of no avail as in the instant case where direct evidence of PWs have already been disbelieved. In this behalf, reliance can be placed on the cases reported as **"Dr. Israr-ul-Haq Vs. Muhammad Fayyaz and another" (2007 SCMR 1427), "Muhammad Jamil Vs. Muhammad Akram and others" (2009 SCMR 120), "Abid Ali and 2 others Vs. The State" (2011 SCMR 208), "Muhammad Nawaz and others Vs. The State and others" (2016 SCMR 267) and "Tariq Zaman Vs. Muhammad Shafi Khan and 2 others" (2018 MLD Peshawar 854).**

9. So far as call data record is concerned, suffice it to say that call data record is not a conclusive piece of evidence to ascertain the guilt or otherwise of an accused. CDR in isolation does not advance the prosecution's case until and unless some credible material in this regard has been collected. The Honourable Supreme Court of Pakistan in case reported as **"Mian Khalid Perviz Vs. The State through Special Prosecutor ANF and another" (2021 SCMR 522)** has held that:-

> ***"Mere production of CDR DATA without transcripts of the calls or end to end audio recording cannot be considered/used as evidence worth reliance. Besides the call transcripts, it should also be established on the record that callers on both the ends were the same persons whose calls data is being used in evidence. While considering such type of evidence extra care is required to be taken by the Courts as advancement of science and technology, on the other hand, has also made it very convenient and easy to edit and make changes of one's choice as highlighted and discussed in the case of Ishtiaq Abmad Mirza supra. We also can lay hand on the case of Azeem Khan v. Mujahid Khan (2016 SCMR 274) in this regard".***

10. The overall impact of what has been discussed above is that the prosecution has miserably failed to establish the case against the appellants. Resultantly, this and connected Cr.A.No.34-D/2022, filed by convict/appellant Muhammad Shehzad are allowed, the impugned judgment is set aside and the appellants are acquitted from the charges levelled against them. They shall be released forthwith, if not required to be detained in connection with any other criminal case. Since we have set aside the conviction and sentence awarded to the appellant, therefore, the connected criminal appeal against acquittal of co-accused as well as criminal

revision for enhancement of sentence have become infructuous which stand dismissed accordingly.

11. Above are the detailed reasons of our short order of even date.

Announced.
Dt: 10.11.2022.
(Kifayat/ *)

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Shahid Khan