JUDGMENT SHEET

PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 284-M/2018

1. *Raham Bacha son of Swalay*
2. *Saleem Khan son of Bakht Badshah*

(Appellants)

Versus

(1) The State through A.A.G.
(2) Muhammad Tahir son of Muhammad Hilal.

(Respondents)

Present: *Mr. Sher Muhammad Khan, Advocate.*

Mr. Sohail Sultan, Astt: A.G.

Mr. Tariq Aziz, Advocate.

Date of hearing: **02.12.2020**

JUDGMENT

WIQAR AHMAD, J.- This judgment is directed to dispose of the appeal filed by appellants namely Raham Bacha and Saleem Khan against judgment of their conviction and sentences dated 15.10.2018 of the Court of learned Additional Sessions Judge-III Swat, whereby they have been sentenced as follows;

U/S 302 (b) PPC to life imprisonment as Ta'zir along with payment of compensation of Rs. 500,000/- (five hundred thousand) each under section 544-A Cr.P.C, payable to legal heirs of the deceased. The amount of compensation was ordered to be recoverable from both appellants as arears of land revenue.

U/S 324 PPC to five years rigorous imprisonment.

Both the appellants were however extended the benefit of 382-B Cr.P.C.

2. Appellants along with other co-accused faced trial in case FIR No. 160 (Ex. PA) dated 23.08.2016 registered under sections 302, 324, 147,148,149 PPC at police station Shamozai District Swat on the basis of *'Murasila'* (Ex. PW-3/1) sent by Akhtar Ali Khan, SHO (PW-3). The FIR has been registered on the report of Saleem Khan (one of the appellant herein) wherein he stated that his sister-in-law (بھابی) namely Mst. Shakila wife of Sultanat Khan had left the house moments before the occurrence, by saying that she had been going to house of one Ali Rehman for purchasing new clothes. She got late, the complainant was therefore searching her in the nearby houses. When he reached the drawing room (بھیٹک) of his uncle Jehan Bakht Badshah he found a stranger in said drawing room along with her. He locked the drawing room from outside and called father of the lady namely Raham Bacha (the other appellant). They then opened door of the room, pulled them

with a rope and started hitting both of them with stones causing them numerous injuries, whereafter people of the locality came and took them to the hospital. Complainant had then been unaware whether the injured had been alive or dead. The occurrence was stated to have been the result of rage and fury that was stirred in the mind of complainant when he found the lady in company of a stranger inside the drawing room. The report was also endorsed by Raham Bacha, the other appellant by affixing his thumb impression thereon.

3. Appellants were arrested on 23.08.2016 and on their pointation the Investigating Officer recovered blood stained rope (پٹہ), blood stained stone and three pieces of marbles (Ex.P-3) vide recovery memo Ex. PW-6/1 dated 23.08.2016. Blood stained earth was also taken in possession from the spot (Ex.P-4) vide recovery memo Ex. PW-6/2 dated 23.08.2016. On completion of investigation in the case, complete *challan* was put in Court. Charge was framed against accused/appellants and other co-accused on 20.12.2016, whereafter prosecution

was invited to produce evidence. Prosecution examined thirteen (13) witnesses and closed its evidence. Statements of the accused were recorded under section 342 Cr.P.C. On conclusion of proceedings in trial, both the accused/appellants were convicted for commission of the offences vide judgment dated 15.10.2018 of the Court of learned Additional Sessions-III Swat as stated earlier, while the co-accused namely Jehan Bakht Bacha and Akbar Ali were acquitted of the charges by extending them benefit of the doubt. The absconding co-accused namely Anwar Bacha was however declared proclaimed offender.

Accused/appellants challenged their conviction and sentences through the instant appeal before this Court.

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

5. Perusal of record reveals that prosecution have mainly been relying upon statement of the then complainant now appellant namely Saleem Khan contained in the

'*Murasila*' (Ex.PW-3/1) as well as its endorsement by the other appellant namely Raham Bacha. Besides, there has also been a statement of the hostile witness namely Mst. Shakila recorded as PW-1.

6. So far as statement of the lady namely Mst. Shakila is concerned, she has resiled from her earlier statement recorded under section 164 Cr.P.C on 25.08.2016. She had mainly shifted the blame of commission of the offence to absconding accused i.e. her brother namely Anwar Bacha in her statement recorded before the Court. She had though been declared a hostile witness and allowed to be cross-examined but nothing beneficial to the case of prosecution could be extracted from her mouth. Even if testimony of this witness is considered, same would make case of prosecution a case of two versions lying poles apart from each other. Both the versions, emerging from prosecution evidence itself, would be difficult to be reconciled together. In this respect, reliance is placed on judgment of Hon'ble Federal Shariat Court in the case of

"Nadeem and others v/s The State and others"

reported as ***2014 P Cr. LJ 374*** wherein it has been held;

"Thus it is clear from the above that there are two versions made by the P.Ws. themselves and both these versions are self-contradictory. Obviously two contradictory statements about the same occurrence cannot be considered truthful. Therefore, a genuine doubt has arisen about these P.Ws., who blew hot and cold in the same breath and showed least respect for telling the truth and, by being capable of changing their versions as and when it suited them, proved that they are worthy of no credence even if they are natural witnesses of the occurrence. If a witness deposes falsely under threat and that too on oath inside a court, on one occasion, how can he or she be relied upon and believed as truthful on another occasion. This mercurial behavior reflected from their conflicting depositions lends, in a way, support to the defence plea that Inayat complainant and Mst. Fouzia who had been residing at Agriculture Farm of Arif Badrana for the last so many years had implicated all the accused at his instance."

7. Mainstay of the case of prosecution has been report lodged by complainant namely Saleem Khan as well as its endorsement by co-appellant namely Raham Bacha. When appellant namely Saleem Khan was confronted with his statement recorded under section 342 Cr.P.C, in question No. 3 he replied;

سوال نمبر3: یہ امر شہادت استغاثہ میں ہے کہ مورخہ 23.06.2016
بوقت 1200بجے بمقام بیٹھک جان بخت باچا ، میں مسماۃ
شکیلہ کو سمی بلال ولد ہلال سکنہ زرہ خیلہ کے ساتھ دیکھ کر

تم ملزم اور تمارے شریک جرم ملزمان رحم باچا، جان بخت باچا، اکبر علی اور روپوش ملزم انور باچا نے اپنے مشترکہ نیت مجرمانہ کے حصول کے خاطر مقتول بلال اور مسماۃ شکیلہ کو رسی ڈال کر پتھروں سے گزارات کر کے شدید زخمی کر کے لہو لہان کر کے موقع پر موجود لوگ اُن کو ہسپتال لے گئے جہاں پر مسمی بلال زخموں کے تاب نہ لا کر جان بحق ہوا جبکہ مسماۃ شکیلہ شدید زخمی ہوئی۔ اس بارے میں تم ملزم کیا کہتے ہو؟

جواب: چونکہ میں نے کوئی قتل یا اقدام قتل نہیں کیا ہے اور نہ ہی ظاہر کردہ وقوعہ کے وقت ظاہر کردہ جائے وقوعہ پر موجود تھا اور نہ ہی بالواسطہ ظاہر کردہ وقوعہ سے کوئی تعلق ہے۔ اس لئے جملہ الزام غلط ہے۔

Similarly when appellant namely Raham Bacha was confronted with the factum of his endorsement on the report of complainant given and recorded as Ex.PW-3/1, in question No. 5 he replied in the following words;

سوال نمبر 5: یہ امر شہادت استغاثہ میں ہے کہ گواہ استغاثہ PW-3, SHO حسب اطلاع موقع پر آیا جہاں پر تمہارے شریک جرم ملزم سلیم خان نے اختر علی SHO کو وقوعہ کے نسبت رپورٹ کر کے جس نے بشکل مراسلہ Ex. PW-3/1 تمہارے شریک جرم ملزم کا رپورٹ ضبط تحریر میں لا کر جس پر تمہارے شریک جرم ملزم نے باقاعدہ طور پر اپنا دستخط بہ زبان انگریزی ثبت کیا جبکہ تم ملزم نے بطور تائیدی اپنا نشان انگشت تمہارے شریک جرم ملزم سلیم کے رپورٹ پر ثبت کیا۔ اس بارے میں تم کیا کہتے ہو؟

جواب: مذکورہ الزام غلط ہے، نہ میری روبرو کوئی رپورٹ ہوئی ہے اور نہ ہی میں نے کسی رپورٹ پر بطور تائیدی اپنا نشان انگشت ثبت کی ہے۔ نیز میں ان پڑھ ہوں جملہ کاروائی نسبت رپورٹ غلط، خلاف واقعات و ساز شی ہے۔

When scribe (appellants herein) of the report has resiled from their statements then same cannot be solely based upon to convict them for commission of an offence carrying a capital punishment. 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."***

Hon'ble Supreme Court of Pakistan in the case of ***Muhammad Saleh vs.***

The State reported as ***PLD 1965 Supreme Court 366***, has also held;

> "***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 in this respect;

> ***"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."***

Learned counsel representing respondent No. 2 (complainant) have relied upon judgment of Hon'ble Supreme Court of

Pakistan in the case of ***"Muhammad Khan v/s Dost Muhammad and 17 others"*** reported as ***PLD 1975 Supreme Court 607*** where the august Supreme Court, while dealing with evidentiary value of a cross report had observed;

Mr. Ijaz Hussain Batalvi next objected to the reliance by the trial Court, on, what was treated as F. I. R. Exh. P. F F F in the counter-case recorded at the instance of Dost Muhammad respondent. The objection was twofold firstly, the maker of the statement having disowned that statement. it could, at best, be regarded as his statement recorded under section 162, Cr. P. C. during the investigation of the instant case. In support of thin limb of his argument, learned counsel cited Privy Council case in Pakala Narayana Swami v. Emperor (A I R 1939 P C 47). Secondly, it was urged that, if at all, the statement is admissible, it must be accepted as a whole or not at all and in any event against the maker only and not against other respondents. It is true that the trial Judge relied on Exh. P. F F F as piece of confirmatory evidence in general support of the prosecution case against all the accused. The High Court however, did not treat Exh. P. F F F as "substantive evidence" and observed that even otherwise, "it had to be considered in it: entirety" and not the portion which supported the prosecution version. Nevertheless, as pointed out earlier, the High Court found that quite apart from Exh. P. F F F, other evidence on record showed that from among the seventeen accused, respondents 1 to 7 were guilty of rioting and curtain other offences, which in the opinion of the High Court, they had committed in the course of the incident, viz., offences under sections 304, Part 1, 307 and 436 rear with 149, h. P. C. This appeal being against the judgment of the High Court and not that of the trial Court, the objection raised by the learned counsel is hardly tenable.

On the merits of the objection, the first limb of the argument is without substance. The Privy Council case proceeded on entirely different facts. It was not a case of an F. I. R. being registered in the cross-case. The short question, which in so far as it is relevant to this case, was whether the statement made before the Police, during the investigation of a case, by a person who had not till then joined the investigation as accused, can subsequently be proved by the prosecution against him as his admission, in the same case. The prosecution in that case sought to prove an admission by the accused on the plea that the expression, "the person" in section 162, Cr. P. C. refers to a person, other than an accused or a potential accused and that therefore any admission (as distinguished from downright confession of guilt) made by an accused or a potential accused is provable against him. The argument was rejected, and their Lordships came to the conclusion that such "statement is not admissible even when made by the person ultimately accuser". Rather the matter is directly covered by this Court's Judgment in Ali Zaman v. The State (P L D 1963 S C 152), in which the initial report made by the accused as complainant in the case was held admissible against him as his admission. In the instant case too, Exh. P. F F F at best is an admission by Dost Muhammad respondent which under section 18 of the Evidence Act, 1872 is admissible against the maker only, and not against others, even if they are co-accused with him. To the same effect is Shaharmed v. The State (P L D 1956 S C (Pak.) 238).

What is important to be noted in the above reproduced Para is that case of the prosecution had not been based upon mere report of the maker being used against him. FIR in said case had been registered in a counter case. There had been other substantial evidence

in the case and narrations in the FIR had merely been used as confirmatory evidence by the learned trial Court. This fact was itself evident from Para of the judgment following the above reproduced Para where the august Supreme Court had held;

Therefore, the learned trial Judge was not right to treat Exh. P. F F F, as piece of confirmatory evidence in the -case except against the maker. But the point is only academic, because as pointed out earlier, other confirmatory evidence, so far as respondents Nos. 1 to 8 are concerned, is of over-whelming strength, which coupled with the direct evidence established the various offences with which they were charged by the trial Court, beyond any doubt.

Ratio of the said judgment cannot be applied to facts of the instant case where the prosecution was left with no evidence except statement of the accused reduced in the shape of *'Murasila'* Ex. PW-3/1 on the basis of which FIR in the case in hand had been registered. Consideration of the contents of a counter FIR is one thing but the question before this Court in the instant appeal has been; "*whether conviction in a capital charge, may solely be based upon statement of an accused given to the*

police (first responders) and incorporated into 'Murasila' or FIR in a case"? Our answer to such a question has definitely been "nays". Answering the question other way around would amount to dealing a statement recorded before police officer at par with a judicial confession, which can nowhere be found allowable in our criminal justice system, except in the case of a dying declaration, which is not the situation here.

8. In light of what has been discussed above, prosecution has not been able to prove its case against accused/appellants, beyond reasonable doubt. Both the appellants are therefore acquitted of the charges by extending them benefit of doubt by setting aside the impugned judgment dated 15.10.2018 of the Court of learned Additional Sessions-III Swat, on allowing of the instant appeal. They be released from jail forthwith if not required in any other case.

9. These are reasons for our short order of even date, which read as follows;

"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 15.10.2018 passed by learned Additional Sessions Judge-III Swat in case FIR No. 160 dated 23.08.2016 registered under sections 302,324, 147, 148,149 PPC at police station Shamozai District Swat and resultantly acquit the appellants namely Raham Bacha and Saleem Khan of the charges levelled against them. They be released forthwith if not required in any other case."

Announced
Dt. 02.12.2020

JUDGE

JUDGE

Office 15/12/2020 W/R

NAWAB

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