

IN THE PESHAWAR HIGH COURT,  
PESHAWAR  
(Judicial Department)

Cr.A. No.537-P/2015

Date of hearing: \_\_\_\_\_

Appellant (s) : \_\_\_\_\_

Respondent (s) : \_\_\_\_\_

**JUDGMENT**

**ASSADULLAH KHAN CHAMMKANI, J.-** At a trial held by learned Sessions Judge, Charsadda, appellant Tehseen Ullah, having been found guilty of the offences, vide judgment dated 08.09.2015, was convicted and sentenced as under:-

**Under Section 324 PPC:-** To undergo 05 years R.I. and to pay a fine of Rs.1,00,000/- or in default thereof to undergo 06 months S.I. further.

**Under section 337-F (iii) PPC:-** To pay Rs.50,000/- as Daman to the injured and to undergo 01 year R.I. as Ta'azir.

Under section 337-D PPC: To pay Arsh equal to one third of Diyat as well as to undergo 05 years R.I. as Ta'azir.

The sentences have been directed to run concurrently. Benefit of S.382-B Cr.P.C. has been extended to him.

2. Through the instant appeal, the appellant has questioned his conviction and sentences while petitioner/complainant has filed connected Cr.R. No.109-P/2015, titled, “Zulfiqar Ali Vs Tehseen Ullah” for enhancement of his sentence. Since, both the matters are the outcome of one and the same judgment of the learned Trial Court, therefore, this single judgment shall govern both.

3. The prosecution case as unfolded in First Information Report is that on 15.09.2012 at 1330 hours, complainant Zulfiqar Ali (PW.10) alongwith his brother Muhammad Ali, was present on a thoroughfare in front of the house of Kifayat Ullah, situated in village Dhab Banda, when in the meantime, Tehseen Ullah (appellant-convict herein) accompanied by absconding co-accused Maqsood ur Rehman, Jamil ur Rehman and Najeeb ur Rehman, duly armed with firearms came there and opened fire at them, as a result, he got hit and sustained injuries; that due to indiscriminate firing of the accused a passerby, namely, Zia ur Rehman, also sustained injuries. In addition to him, the incident is stated to have been witnessed by

Muhammad Ali (not produced). Motive behind the incident is stated to be a dispute over landed property.

4. Report of the complainant was recorded in the shape of murasila Exh.PA/1 by Muhammad Zaman Khan Inspector (PW.1) in DHQ hospital Charsadda. He prepared injury sheet of injured Zulfiqar Ali Exh.PW.1/1 and that of injured Zia ur Rehman Exh.PW.1/2 and referred them for medical examination. He sent the murasila to Police Station on the basis of which FIR No.1191 dated 15.09.2012 under section 324/34 PPC, was registered in Police Station Charsadda against the accused.

5. Dr. Manzoor Ullah (PW.4), examined injured Zulfiqar and found the following injuries on his person:-

1. Firearm entry wound size about  $\frac{1}{2}$  x  $\frac{1}{2}$  cm on right side wrist on posterior side.
2. Firearm entry wound  $\frac{1}{2}$  x  $\frac{1}{2}$  cm on left side abdomen.

After administering first aid, he referred the injured to LRH, Peshawar for further management.

Kind of weapon: Firearm

He also examined injured Zia ur Rehman and found a firearm entry wound size about  $\frac{1}{2}$  x  $\frac{1}{2}$  cm on left side buttock.

6. Mukhtiar Khan ASI (PW.7) proceeded to the spot and prepared site plan Exh.PB at the instance of PW Muhammad Ali. During spot inspection he took into possession three empties of 7.62 bore Exh.P.1 vide recovery memo Exh.PW.7/1. Vide recovery memo Exh.PW.7/2 and Exh.PW.7/3 he took into possession bloodstained garments of the two injured, secured blood from the place of injured Zulfiqar vide recovery memo Exh.PW.7/4, initiated proceedings under sections 204 and 87 Cr.P.C. against the accused, sent the bloodstained articles to the FSL, reports whereof are Exh.PZ and Exh.PZ/1, recorded statements of the PWs and after completion of investigation handed over case file to the SHO who submitted challan in terms of S.512 Cr.P.C. against the accused.

7. Later on, accused/appellant was arrested. Supplementary challan was submitted against him before the learned Trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case prosecution examined eleven witnesses. After closure of the prosecution evidence, statement of the accused/appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegation and professed his innocence. He, however, neither wished to be

examined on oath under section 340 (2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above.

8. Learned counsel for the appellant argued that appellant is innocent and has been implicated falsely; that injured Zia ur Rehman has never charged the appellant from the very first day nor did he appear in the witness box; that PW Muhammad Ali has been abandoned for no good reasons while the solitary testimony of injured complainant being in contrast with medical evidence and other circumstances of the incident create serious doubts about his credibility, reliability and truthfulness and mere stamp of injuries on his person would not be a certificate of his truthfulness as the intrinsic worth of statement of a witness is the test of his veracity and not injuries; that by throwing net wide four real brothers have been charged whereas one and the same dimensions of entrance wounds on the persons of the two injured and FSL report qua the recovered empties being fired from one and the same weapon, suggest the incident to be the job of single person; that escape of Muhammad Ali or his left off by the accused having common motive does not appeal to a prudent mind; that four persons have been charged for

indiscriminate firing therefore, much damage should have been caused to the complainant and large number of the empties should have been recovered from the spot, but situation is quite contrary as only three empties have been recovered and two injuries have been observed on the person of the injured complainant; that since general role of firing has been given to four accused, therefore, corroboration qua participation of each accused in the incident was to be proved, but the prosecution miserably failed to do so as neither the appellant has confessed his guilt before the competent Court of law, nor the crime weapon or anything incriminating to prove his participation in the incident has been recovered either from his direct or indirect possession, therefore, the learned Trial Court while squarely oversighting the aforesaid facts and circumstance, reached to a wrong conclusion by holding the appellant guilty of the offence; that the impugned judgment being against the law, facts and evidence on record is liable to be reversed.

9.           Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant is directly charged for the incident with specific role of firing alongwith absconding co-accused in a promptly lodged report; that being a broad daylight incident question of

mistaken identity does not arise; that straight forward testimony of injured complainant corroborated by medical evidence as well as recovery of blood and empties from the spot coupled with unexplained noticeable abscondence of the appellant is sufficient to bring home the guilt of the appellant; they while supporting the impugned judgment sought dismissal of the appeal and requested for enhancement of sentence of the appellant as according to them there is no mitigating circumstance to warrant lesser sentence.

10. I have heard the arguments and have gone through the record.

11. Injured-complainant Zulfiqar Ali in support of his version while appearing as PW.10, reiterated the same story as set forth in his initial report. According to his stance the incident took place at 13.30 hours i.e. in broad day light. In the site plan he has been shown at point No.1, passerby injured Zia ur Rehman at point No.2 and PW Muhammad Ali (abandoned) at point No.3. The inter-se distance of injured complainant and Muhammad Ali has been shown as four paces while between the complainant and the accused as 8 to 10 paces. A land dispute has been alleged as motive between the parties. As per medico legal report injured Zulfiqar has sustained only two firearm

entry wounds, one on right side wrist and other on left side abdomen while Muhammad Ali has not sustained any injury. The role of indiscriminate firing has been attributed to four accused. Though complainant in his report has not specifically disclosed the description of weapon used in the commission of offence, but since 03 empties of 7.62 bore have been shown recovered from the spot, therefore, it can be presumed that Kalashnikov has been used in the incident, which is a common weapon particularly in the Pathan society and is recognized even by kids. Complainant and abandon PW Muhammad Gul are real brothers inter-se and having common motive were on equal footings for the accused, therefore, sparing of Muhammad Gul and targeting of his brother complainant by the accused is beyond my comprehension. The non-mentioning of weapon of offence specifically in his initial report by injured-complainant despite being a broad daylight incident keeping in view the distance of 8 to 10 paces of the accused from him, is sufficient proof that he did not notice the culprit fired upon him while PW Muhammad Gul keeping in view the above circumstances was not at all present on the spot. Had he been there, he would have also been targeted. Since, indiscriminate firing by four accused with automatic weapons which eject



number of shots in seconds, has been alleged, therefore, much damage should have been caused to the complainant or at least large number of empties should have been recovered from the spot, but only three empties have been recovered and two injuries on the person of complainant has been observed by the medical officer and this aspect of the case also creates doubt about the mode and manner of the incident that the same has not taken place as alleged by the complainant which fact further got support from one and the same dimensions of entrance wounds on the person of injured complainant and passerby Zia ur Rehman as well as the FSL report qua the empties recovered from the spot to have been fired from one and the same weapon and suggests the incident to be the doing of single person, which create doubts about the credibility and truthfulness of injured complainant. The presence of injuries on his person can only be indication of his presence at the spot but would not be affirmative proof of his credibility and truth because the intrinsic worth of testimony of a witness is the test of his veracity. The charge has been exaggerated by complainant and he has not come forward with truthful account of the incident. Not an iota of evidence is available in the shape of direct or circumstantial evidence to prove that single person to be the appellant.

12. For what has been discussed above, the prosecution evidence is pregnant with doubts benefit of which is to be extended to the accused not as a matter of grace or concession but as a matter of right in light of golden principle of doubt according to which one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim “ it is better that ten guilty persons be acquitted rather than one innocent person be convicted” which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the “mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent”. Wisdom in this regard can also be derived from the judgments of the apex court in case titled, **”Muhammad Khan and another Vs the State” (1999 SCMR 1220)** and case titled, **”Muhammad Ikram Vs the State” (2009 SCMR 230)**.

13. The learned Trial Court failed to appreciate the available evidence in its true perspective in light of golden principle of appreciation of evidence and thus reached to erroneous conclusion by holding the appellant guilty of the offence. Resultantly, this appeal is allowed, the conviction and sentences of the appellant recorded by the learned Trial Court are hereby set aside and the appellant is acquitted of the charge leveled against him. He be set at liberty forthwith, if not required in any other case. On acquittal of the appellant connected Criminal Revision No.109-P/2015, has become infructuous which stands dismissed as such.

14. These are reasons of my short order of even date which read as under:-

For reasons to be recorded later, I allow this appeal, set aside the conviction and sentences of the appellant Tehseen Ullah, recorded by the learned Trial Court/ Sessions Judge Charsadda, under sections 324/337-F (iii) and 337-D PPC, in case FIR No.1191 dated 15.09.2012, Police Station Charsadda, vide impugned judgment dated 08.09.2015, and hereby acquit him. He be set at liberty forthwith, if not required in any other case.

On acquittal of the appellant, convicted Cr.R.  
No.109-P/2015, titled, “Zulfiqar Ali Vs  
Tehseen Ullah” has become infructuous,  
which stands dismissed as such.

**Announced**  
**25.01.2016.**

**J U D G E**