JUDGMENT SHEET

PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)

Cr.A No. 162-M/2021

Saddam Hussain son of Muhammad Saeed.....(Appellant)

v/s

The State & others.....(Respondents)

Present: Muhammad Riaz (Muhammadzai), Advocate, for the accused/appellant.

Khwaja Salah-ud-Din, Addl: A.G, for the State and one of the legal heirs of the deceased i.e. Shakir Ullah, in person.

Dates of hearing: *21.11.2023*

JUDGMENT

SHAHID KHAN, J.- Through the subject criminal appeal, the appellant has challenged the order/judgment of his conviction & sentence passed by the learned Additional Sessions Judge/ Izafi Zila Qazi-II, Dir Upper, dated 03.06.2021, in respect of case FIR No. 15 dated 01.07.2020, U/Ss 302/311/114/34 PPC, R/W Section 15-AA, P.S, Thal, District, Dir Upper.

2. Reportedly, the complainant/SHO, Lal Bahadar Khan received prior information in respect of an offence of double murder committed at the vicinity of village *Lantoor*, therefore, he, along with other police party rushed to the venue of crime for confirmation & verification of the same. At the spot, the

complainant/SHO found the dead body of the female deceased, Mst. Rabia as well as that of male deceased, Hazrat Ali, lying in a pool of blood, in the landed property situated adjacent to the house of co-accused, Muhammad Saeed. Both the deceased were done to death through firearms as they have received multiple injuries on different parts of their bodies. At the spot, the complainant/SHO came to known that on the instigation of the co-accomplice, Muhammad Saeed, both the deceased were killed by the accused/appellant, Saddam Hussain, on the alleged pretext of honour. The event was reduced into in writing in the shape of *Murasila'* (Ex. PA/1) followed by the *ibid* FIR (Ex. PW-1/1) registered against the accused/appellant & other co-accused at P.S concerned.

3. Upon arrest of the accused/appellant & other co-accused followed by completion of the investigation, *challan* was drawn and was sent- up for trial to the learned trial Court. Accused were confronted with the statements of allegations through a formal

charge-sheet to which they pleaded not guilty and claimed trial.

4. To substantiate the guilt of the accused, the prosecution furnished its account consist of the statements of twelve (12) witnesses. The accused were confronted with the evidence so furnished through statements of accused within the meaning of section 342 Cr.P.C.

5. On conclusion of the proceedings/ trial, in view of the evidence so recorded and the assistance so rendered by the learned counsel for the accused/appellant and learned counsel for the complainant/learned State counsel, the learned trial Court arrived at the conclusion that the prosecution has successfully brought home charge against the appellant/ accused through cogent & worth reliable evidence, as such, the accused/appellant, Saddam Hussain, was convicted & sentenced as follows;-

U/S 302 (b) PPC to life imprisonment, with compensation of Rs. 100,000/- (one hundred thousand) each, U/S, 544-A, Cr.P.C, payable to the legal heirs of both the deceased.

U/S 15-AA to three years simple imprisonment.

Both the sentences were ordered to run concurrently, however, the accused/appellant has been acquitted U/S 311 PPC.

The accused/appellant has also been extended the benefit of section 382-B, Cr.P.C.

The co-accomplice, Muhammad Saeed, has been acquitted of the charges leveled against him, by extending him the benefit of the doubt.

6. It obliged the appellant/accused to approach this Court through the subject criminal appeal.

7. Learned counsel for the accused/ appellant as well as the learned Astt: A.G have been heard at a length and the record gone through with their valuable assistance.

8. At first & foremost instance, it shall be kept in mind that the subject occurrence of murder of both the deceased is an unseen event, on all counts. It is part of the record and as evident from the contents of the *'Murasila'* followed by the FIR that the complainant/SHO, Lal Bahadar Khan, proceeded to the place of occurrence, pursuant to receipt of prior information in respect of an offence double murder committed at the vicinity. At the spot, the complainant/SHO came to know that both the deceased i.e. Mst.

Rabia and Hazrat Ali were killed by the accused/appellant, Saddam Hussain through firearm, on the alleged instigation of his father i.e. the co-accused, Muhammad Saeed. The offence was alleged to have been committed on the pretext of honour. It is part of the record that the female deceased, Mst. Rabia was the wife of the accused/appellant, Saddam Hussain. The prosecution has also produced one Lal Khan, the father of the deceased lady Mst. Rabia. He appeared in the witness-box as PW-4. In his cross-examination, he stated that his house is situated in village *Loainel*, whereas, the occurrence took place at the vicinity of village *Lantoor* and the distance between the two villages is 02 kilometers. He also deposed in his examination-in-cross that he is not an eyewitness of the occurrence. Apart from the aforesaid PW, the prosecution could not produce any other witness qua the ocular-account of the occurrence, therefore, in all probabilities, the unfortunate incident of the

murder of both the deceased could be termed a *"blind murder"*.

9. The occurrence in the subject case is unseen & un-witnessed, as referred to above, and the case of the prosecution against the appellant/accused is mainly based on the fact that he was not only the husband of the female deceased, Mst. Rabia but his initial conduct & demeanor was dubious & suspicious in nature. The accused/appellant and his father i.e. the co-accomplice, Muhammad Saeed have neither lodged the report of the subject occurrence to the local police nor have they participated in the ritual proceedings of the deceased lady Mst. Rabia. No doubt, Hon'ble Apex Court has held in its judgment rendered in case titled ***"Saeed Ahmad v/s The State"*** reported as ***2015 SCMR 710*** that with regard to vulnerable members of society, such as children, women and the infirm, who were living with the accused or were last seen in his company, the accused ought to offer some explanation of what happened to them. If instead he remains silent or offers a false

explanation he casts a shadow upon himself. But it has also been noted therein that it did not mean that the burden of proof had shifted on to the accused as it is for the prosecution to prove its case. Ratio of the judgment of *Saeed Ahmad Supra* cannot however be applied to the case in hand for the reason that prosecution have not been able to discharge its onus as explained above. Initial burden of proof always lies on the prosecution, which though may get shifted to accused under Article 122 of the Qanun-e-Shahadat Order 1984, under circumstances justifying such shifting of burden, but in the case in hand, it is noticeable that prosecution has not been able, even to discharge its initial burden of proof. Hon'ble Supreme Court of Pakistan in the case of ***"Nasrullah alias Nasro v/s The State"*** reported as ***2017 SCMR 724*** had observed, in this respect;

> ***" It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the***

case, particularly when the medical evidence contradicted the same. Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder."

A somewhat similar findings have also been recorded by Hon'ble Apex Court in its judgment in the case of ***"Nazeer Ahmad v/s The State"*** reported as ***2016 SCMR 1628***, which are reproduced hereunder for ready reference;

"*It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Abdul Majeed v. The State (2011 SCMR 941) and Saeed Ahmed v. The State (2015 SCMR 710).*"

Likewise, in the case of ***"Muhammad Jamsheed and another v/s The State and others"*** reported as ***2016 SCMR 1019***, Hon'ble Apex Court had observed that suspicion howsoever grave or strong could never be a proper substitute for proof, beyond

reasonable doubt, required in a criminal case. In context of the case in hand, the prosecution has not been able to bring on record any ocular evidence which could connect the accused/ appellant with the murder of both the deceased nor there is any sort of circumstantial evidence against the appellant in the field except the recovery of weapon of offence i.e. Kalashnikov. The said recovery of weapon of offence is also doubtful in a sense that the crime empties recovered from the spot vide recovery memo, Ex. PW-2/2 dated 01.07.2020 have not been sent to the FSL earlier and were sent and received in the FSL on 08.07.2020 after recovery of the weapon of offence vide recovery memo, Ex. PW-6/2 dated 06.07.2020. A matching report of the FSL, Ex. PW-12/12, in such circumstances, cannot be relied upon. Hon'ble Apex Court in somewhat similar situation in the case of ***"Israr Ali v/s The State"*** reported as ***"2007 SCMR 525"*** has discarded such a report of matching of empty, by observing as;

> ***Crime empty was not sent to the expert immediately after taking into possession and***

the weapon of offence was recovered from the convict/appellant after his arrest as borne out from the statement of P.W.16. P.W.15 Muhammad Arshad had taken possession of Crime-empty Exh.P.7 vide memo. Exh.P.H. on 10-10-1999. His statement is silent to whom he had given the said memo. P.W.14 Muhammad Akhtar stated in his examination-in -chief that Muhammad Arshad S.-I. handed over to him sealed parcel containing crime-empty for safe custody in the Malkhana. This fact was not mentioned in his statement which was recorded by Investigating Officer under section 161, Cr.P.C. thrice on 10-10-1999 and 23-10-1999 as evident from cross-examination which is to the following effect:- -

> *"I narrated to the Investigating Officer that parcel containing crime empty was handed over to him by Investigating Officer confronted with Exh.D.C. where it is not so recorded."*

It was also admitted by him in cross-examination that he did not state before the Investigating Officer in his statement Exh.D.C. that the parcel containing crime empty was handed over to Khadim Hussain P.W.4. He also admitted that he did not send crime empty to expert till 1-12-1999. Khadim Hussain P.W.4 stated in examination-in-chief that he received parcel containing empty bullet on 3-11-1999 from Muhammad Akhtar P.W.14. He handed over to Muhammad Ramzan for onward transmission in the office of Forensic Science Laboratory. P.W.16 Khalid Rauf arrested appellant on 5-12-1999. He also got recovered the pistol from him on his pointation. Thereafter he had handed over pistol to P.W.4 Khadim Hussain. This type of recovery of crime empty does not provide strong corroboration qua the prosecution version

Further reliance in this respect may also be placed on the case of Apex Court reported as *2008 SCMR 707*, whereby, it was held that crime empties allegedly found at the place of occurrence were retained in police station and

were sent to FSL, along with the crime weapons, 12 days after the recovery of alleged weapons. Delay had destroyed the evidential value of such piece of evidence and the recoveries could not offer any corroboration to the ocular testimony. Even otherwise, when substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution's case. Hon'ble Supreme Court of Pakistan while giving its judgment in case titled ***"Muhammad Afzal alias Abdullah and others vs. The State and others"*** reported as ***2009 SCMR 639*** has also expressed almost a similar view in para-12 of its judgment, which is reproduced hereunder for ready reference;

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be."

Hon'ble Supreme Court of Pakistan in its judgment rendered in case titled

"Imran Ashraf & 7 others v/s The State" reported as *2001 SCMR 424*, has also observed;

"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."

In support of same ratio, further reliance may also be placed on the judgment reported as *2007 SCMR 1427*.

10. As far as the medical evidence is concerned, needless to highlight that the medical evidence may confirm the direct or ocular account, if any, with regard to the set of injuries, kind of weapon allegedly used in the commission of offence and at least the nature of injuries, however, in the subject case when the occurrence is undoubtedly unseen & un-witnessed then evidentiary value of medical evidence qua the guilt of the appellant as a sole piece of corroboratory evidence cannot be given much weight. Reliance in this regard is placed on the case titled *"Abdul Rashid v/s The State"* reported as *2019 P Cr. LJ 1456*, whereby it has been held that;-

"The medical evidence in this case has been furnished by PW-4 Dr. Nasreen Ahmad Tareen, Medical Officer, who has confirmed the unnatural death of deceased. However, the fact remain that medical evidence is only used for confirmation of

ocular evidence regarding seat of injury, time of occurrence and weapon of offence used, etc. but medical evidence itself does not constitute any corroboration qua the identity of accused person to prove their culpability. Reliance in this regard can be placed on the case of *"Muhammad Sharif & another v/s The State" (1997 SCMR 866).*

In context of the subject case, the medical evidence has been furnished by Dr. Muhammad Yaseen, PW-9. In the opening line of his cross-examination, he stated that no internal postmortem or autopsy of the dead bodies of the deceased could be conducted in the case in hand. In the same breath, he also stated that in his reports he has not mentioned the names of the identifiers of the dead bodies of the deceased, therefore, the medical evidence, if any, is of no use for the prosecution qua the guilt of the accused/appellant. Same was the case with other circumstantial evidence produced in the case in hand.

11. In view of the above, when neither any direct nor any circumstantial evidence is available on the face of the record, as such, the case of prosecution is full of doubt all-around; therefore, the accused/appellant has to be extended its benefit.

12. It is well settled, it is not essential at all to place reliance on multiple doubts coupled with multiple grounds to extend the benefit of doubt to an accused, even a single worth reliable doubt is sufficient enough to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case of ***"Tariq Pervaiz v/s The State"*** reported as ***1995 SCMR 1345*** , the Apex Court has held as under;-

That the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

Further reliance is placed on the case law cited as ***"Daniel boyd (Muslim name Saifullah) vs the State"*** reported as ***1992 SCMR 196***", where the following observations were recorded by the Apex Court;-

Nobody is to be punished unless proved guilty on the basis of reliable or true evidence. Benefit of every reasonable doubt is to go to the accused.

This view also reflects in the judgment of the apex Court titled as ***"Ghulam Qadir and 2 others vs the State"*** reported as ***2008 SCMR 1221***, wherein it was observed that:-

"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creates reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge, makes the whole case doubtful. "

In support of the same rational, further reliance is placed on the judgment of the august Supreme Court of Pakistan cited as ***"Muhammad Zaman vs. the State" (2014 SCMR 749)***, wherein it was held that;-

Even a single doubt if found reasonable, was enough to warrant acquittal of the accused.

13. For what has been discussed above, this Court is of the firm view that the prosecution has failed to prove its case against the accused/ appellant, Saddam Hussain beyond reasonable doubt, as such, his conviction cannot be maintained. Resultantly,

while extending him the benefit of the doubt the subject criminal appeal is allowed and the impugned order/judgment of conviction and sentence dated 03.06.2021 recorded by the learned trial Court is set aside and consequently the appellant named above is acquitted of the charges leveled against him. He be released forthwith from the Jail, if not otherwise required.

14. These are reasons for our short order of even date.

Date of announcement
Dt. 21.11.2023

JUDGE

JUDGE

Office 20/12/2023 WJR

Nawab (D.B) Hon'ble Mr. Justice Muhammad Naeem Anwar
Hon'ble Mr. Justice Shahid Khan