

Judgment Sheet  
**IN THE PESHAWAR HIGH COURT,**  
**D.I.KHAN KHAN BENCH,**  
*(Judicial Department)*

**Cr.A. No.63-D/2019**

Zain-ud-Din  
Versus  
Noor Muhammad etc

**JUDGMENT**

For Appellant: **Mr. Farooq Akhtar Advocate.**

For respondents: **Nemo (Being in motion).**

Date of hearing: **25.01.2021.**

\*\*\*

*S*  
**SAHIBZADA ASADULLAH, J.-** Zain-ud-Din appellant has assailed the judgment, rendered by learned Additional Sessions Judge/Judge Model Criminal Trial Court, Tank, in Sessions Case No.106/II of 2018 whereby the accused/respondents have been acquitted of the charge in case FIR No.104 dated 17.3.2017, registered under section 302/34 PPC of police station Mulazai, District Tank.

2. The prosecution story as disclosed in the FIR Ex.PA, is that on 17.3.2017 at 13:30 hours, complainant Zain-ud-Din (PW-8), with the help of co-villagers, brought dead body of his father Behram Khan to police station Mulazai in a Datsun pickup where he reported the matter to Kifayat Ullah ASI (PW-3), to the effect

that on 17.3.2017, he and his father, while riding on motorcycle and cycle, respectively, left for village Amma Khel to perform Jumma prayer, at about 12:30 hours, when they reached at Tank Road near the house of Abdul Qadeer in village Amma Khel, the accused/respondents, duly armed with pistols, were standing there and as soon his father reached near them, both the accused started firing at him, as a result whereof, his father was hit, fell down from the cycle and died on the spot. The accused fled away from the spot after commission of the offence. Besides the complainant, the occurrence is stated to be witnessed by his uncle Akbar Ali (PW-9). Motive for the offence is stated to be previous blood-feud between the parties. He charged the accused for the commission of offence. PW-3 also prepared injury sheet Ex. PW 3/1 and inquest report Ex. PW 3/2 of the deceased and sent the dead body to civil hospital, Tank under the escort of constable Azam, for post-mortem examination.

3. Initially, the accused absconded, therefore, challan under Section 512, Cr.P.C. was submitted before the trial Court. After arrest of the accused and completion of investigation, complete challan was submitted against them before the trial Court, where at the commencement of trial, prosecution produced and examined as many as eleven witnesses, whereafter, statement of accused was recoded under Section 342, Cr.P.C. wherein he professed innocence and false implication, however, neither he opted to be examined on oath in terms of section 340(2), Cr.P.C.

nor produced evidence in their defence. The learned trial Court, after hearing arguments, acquitted the accused/respondents vide judgment impugned herein, hence the instant appeal.

4. The learned counsel for the appellant submitted that the approach of the learned trial Court to the matter in hand is not only cursory but is without application of judicial mind to the evidence on file; and that the impugned judgment was passed in an unholy haste which has occasioned a great miscarriage of justice. He continued to say that the learned trial Court was swayed by impulsiveness and his preoccupation with imaginations resulted into the impugned judgment and as such the learned trial Court fell in error. It was voiced that the learned trial Court did not advance reasons to justify his decision and that the direct and trust worthy ocular account was ignored, by substituting its own observations. It was reiterated that the report was promptly made which in itself is sufficient to establish the presence of the complainant on the spot at the time of incident. He concluded that to presume an accused innocent unless proven guilty does not absolve the Courts of law of their liability to assess and reassess the evidence on file, which the trial Court failed to do.

5. Heard. Record perused.

6. There is no denial to the fact that once an accused is acquitted of the charges, he gets double presumption of innocence to his credit and to upset the same extra ordinary circumstances are

needed. While dealing with an appeal against acquittal the appellate Court is to see as to what illegality the trial Court has committed while acquitting the accused and that the judgment impugned is arbitrary, mechanical and perverse. The appellate Court is under the bounden duty to reappraise the evidence and after application of its judicial mind decide the fate of an appeal pending before, so that miscarriage of justice could be avoided. To upset the findings reached to, by a trial Court, extra care is needed especially, in an appeal against acquittal. Needless to emphasize that when an accused is acquitted from the charge by a Court of competent jurisdiction then, double presumption of innocence is attached to its order, with which the superior Courts do not interfere unless the impugned order is arbitrary, capricious, fanciful and against the record as the law relating to reappraisal of evidence in appeals against acquittal is stringent in that the presumption of innocence is doubled and multiplied after a findings of not guilty recorded by a competent Court of law. Such findings cannot be reversed until and unless extra ordinary circumstances are pointed out. Law requires that a judgment of acquittal shall not be disturbed even though second opinion may be reasonably possible.

7. It was 12.30 hours when the deceased was done to death while en-route to a local mosque, for performing Jumma prayer on his bicycle, situated in village Amma Khel. The report tells that the deceased left the house at 12.00 hours, followed by the complainant at 12.30 hours on his motorcycle, on reaching to the

place of incident the accused/respondents, who were present duly armed fired at the deceased, who after receiving firearm injuries fell to the ground and died on the spot.

8. The accused were acquitted of the charges, as to the learned trial Court both the complainant and eye witness could not establish their presence on the spot at the time of incident and that the witnesses were inimical and interested. This Court is to see as to whether the learned trial Court took the pains to assess and reassess the evidence on file and as to whether it was after application of judicial mind to the facts and circumstances of the case that the impugned judgment was passed. We are yet to see as to whether the witnesses could prove their presence on the spot when the deceased was done to death. This is yet to be seen as to whether the incident occurred in the mode, manner and at the stated time.

9. The complainant was examined as PW-8, who stated that he with his deceased father was residing in a joint house and that it was at 12.00 hours when the deceased took his bicycle and started for the mosque. He further stated that it was after 30 minutes of his father left, he started for the mosque on his motorcycle to perform his Jumma prayer. This is admitted on record that both, father and the son were residing in one and the same house and that on the day of incident they were present in the house when the deceased left for the mosque on his bicycle. We are

anxious to know that why the deceased did not wait and accompany the complainant to the mosque as he had a motorcycle to go by. This is astonishing that despite the fact that the complainant was in the knowledge that his father was leaving for the mosque which was situated at a distance of 05/06 KM, but he did not ask his father to wait, so that both could go together. The place of occurrence is situated at a considerable distance from the house of the deceased, but surprisingly all the three i.e. the deceased, complainant and PW Akbar Ali reached there at one and the same time. The complainant stated that when the deceased reached to the spot the appellants were already present duly armed and that they started firing at the deceased with their pistols, which resulted into his death. The complainant has been shown at a distance of 70 paces from the deceased and so the eye witness. The complainant could not explain that why he used a parallel path to travel and so the eye witness, as it was a metallic road which connects their village to village Amma Khel. It is intriguing that the complainant has been shown at point No.4 in the site plan which is situated in the middle of shrubs locally known as (parasa). Though the complainant pointed his presence at point No.4 in front of the shops, but he failed to convince the purpose of his presence as he was supposed to go to the mosque. PW Akbar Ali has been shown at point No.5 which is situated on a footpath, when he appeared before the trial Court he stated that he was also going to the mosque on his motorcycle, but he too failed to convince that

why he did not use the metal road instead of using the unpaved footpath, which is often used by the pedestrians. The conduct of the witnesses is unnatural on this particular aspect of the case. The eye witness who was examined as PW-9, stated that when he reached to point No.5, he stopped his motorcycle in order to inquire from one Saif-ur-Rehman regarding Jumma prayer, but the record is silent regarding the presence of one Saif ur Rehman and even no specific point was attributed to him in the site plan. So much so the Investigating officer did not record his statement.

10. The complainant stated that soon after receiving fire shots the deceased fell to the ground and died on the spot. He further stated that the accused/appellants were at a distance of one pace from the deceased and that they were facing the deceased at the time of incident. The doctor who conducted autopsy on the dead body of the deceased, opined that the deceased received 06 entry wounds on his back, whereas one on his front. When his statement is placed in juxtaposition with what the eye witness stated then both the ocular account and medical evidence are in conflict with one another, as it was the complainant who stated that at the time of firing the deceased was facing the accused/appellants, had it been so then all the bullets should have landed on his chest with its exits on the back. We cannot ignore that the site plan was prepared at the instance of the complainant, where the inter-se distance between the three i.e. the assailants and the deceased was given as one pace each, but when he appeared before the Court he

stated that the accused and deceased were at a distance of 06/08 paces from one another. This was a dishonest improvement on part of the complainant as he wanted to toe the lines with the medical evidence, as no charring marks were mentioned in the post mortem report. If we admit it correct that the site plan was prepared at the instance of the complainant then the inter-se distance between the accused and the deceased leaves no room to doubt the presence of charring marks. True that when a .30 bore pistol is fired from a distance of 09 inches, charring marks occur, but equally true that while using a .30 bore pistol to fire one has to extend his hand and in that eventuality the barrel of the pistol comes within the range. This conflict between the medical evidence and ocular account has crept deep into the roots of the prosecution case. True that the medical evidence is confirmatory in nature and when direct ocular account is available on file, then in that eventuality it is the ocular account which is to be preferred and taken into consideration, provided it is confidence inspiring, but in case in hand the presence of the witnesses at the time and at the place of incident is shrouded in mystery, so the conflict between the two cannot be ignored and it is for the prosecution to prove otherwise.

In case titled "Akhter Saleem and another Vs the State and another" (2019 MLD 1107), it is held that:

***"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."*

11. Record tells that PW Akbar Ali was serving in the police department as a constable during the days of occurrence, but he could not explain that why he did not join his duty on the day of occurrence, even he failed to bring on record his absence from his duties. The witnesses introduced one Qadeer, who approached the deceased soon after the incident and it was he who arranged the Cot and helped the witnesses in shifting the dead body of the deceased from the ground, but to our utmost surprise the investigating officer did not record his statement. The witnesses stated that they participated in shifting the dead body from ground to the Cot but their hands and clothes were not besmeared with blood, which is an unnatural phenomenon. Had the witnesses been present at the place of incident and participated in shifting the dead body from the ground then their hands and clothes would have been besmeared with blood and this particular aspect of the case puts a question mark to the veracity of the witnesses.

12. The investigating officer visited the spot and during spot inspection recovered 06 empties of .30 bore alongwith two spent bullets, a bicycle and blood stained earth from the place of deceased. The empties were sent to the Forensic Science

Laboratory to ascertain as to whether these were fired from one or more weapons. The report was received with an opinion that these empties were fired from one weapon. The laboratory report confirms that it was the doing of one person.

In case titled "The State through A.G Khyber Pakhtunkhwa Vs Subhan Ali and another" (2020 MLD 1901), wherein it is held that:

*"12. The Investigating Officer recovered three empties of 7.62 bore from the spot, which were sent to the office of chemical examiner with a request to tender its opinion, as to whether these were fired from one or different weapons, the report has been exhibited as Ex: PW10/6, where these empties were shown fired from one and the same weapon. The deceased has three inlet wounds and three empties were recovered from the spot with opinion from the Forensic Sciences Laboratory as having been fired from one and the same weapon belies the stance of the complainant regarding the involvement of two accused in commission of the offence.*

13. Both the motorcycles allegedly left on the spot were not taken into possession by the investigating officer, so much so

he did not take pains to record the statement of one Saif-ur-Rehman, in respect of his conversation with the eye witness. It is pertinent to mention that the investigating officer did not associate one Qadeer, who allegedly reached to the place of incident soon after the deceased was fired at. Had he been associated with the investigation he would have disclosed the presence or absence of the witnesses on the spot. The lack of interest on part of the prosecution to associate these two important witnesses with investigation tells nothing, but that they were not supporting the prosecution case. Article 129(g) of the Qanun-e-Shahadat Order, 1984 caters for the situation, as is held in case titled Tahir Khan Vs. The State (2011 SCMR 646), wherein it is held that:

*"13. In the present case as observed above, the clouds over the veracity of the prosecution version began hovering with the substitution of the initially nominated persons in the F.I.R. and also that complainant did not appear as a witness. It assumes relevance as he (Ghulam Hussain), Sultan Mehmood and Ghulam Abbas were given up by the prosecution and not produced. The only possible conclusion is that the prosecution sensed the risk of producing them that they might not support the said version. Their production thus was withheld leaving doubts spreading all around".*

14. The motive was stated to be the previous blood feud but the investigating officer failed to collect any evidence and even no statement was recorded in that respect. The motive advanced was stated to be the previous blood feud, but the Investigating Officer did not bring on record copies of the criminal cases between the parties and even the witnesses did not produce the same. If we admit that it was the blood feud between the parties which led to the death of the deceased, in that eventuality the complainant would have been the prime target if he was present on the spot. There is no cavil to the proposition that once the prosecution alleges a motive then it is under the bounden duty to prove the same, failing which it is the prosecution to suffer and the present case is no exception, as is held in case titled "Muhammad Ashraf alias Acchu Vs The State" (2019 SCMR 652 Para-7),

*"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."*

15. The learned counsel stressed hard and hard that the accused/respondents remained absconder for sufficient long time; and that they could not explain their willful absence and that this factor alone is sufficient to prove their guilt. True that the accused did not surrender for nearly six months, but it is equally true that they applied for bail before arrest to the Court of competent jurisdiction which was confirmed, but later on recalled by the apex Court. The conduct displayed by the respondents show that they were willing to surrender. There is no cavil to the proposition that absconce by itself is not sufficient to prove guilty an accused rather it is a circumstance which can aid to favor the prosecution provided the prosecution succeeds in proving its case through confidence inspiring evidence, which is not the case in hand.

In case titled "Muhammad Sadiq Vs. State (2017 SCMR 144), it is held that:

*"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."*

16. For what has been discussed above this Court reaches to an inescapable conclusion that the prosecution did not succeed in proving its case against the respondents and the learned trial Court has competently dealt with the issue in hand. The impugned

judgment is well reasoned, which calls for no interference. This criminal appeal is bereft of merit stands dismissed.

Announced.

Dt: 25.01.2020  
Kifayat/\*

JUDGE

JUDGE

(D.B)  
Hon'ble Mr. Justice Abdul Shakoor  
Hon'ble Mr. Justice Sahibzada Asadullah

  
J.Iqbal  
16/13