JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 76-M/2013

JUDGMENT

Date of hearing: **19.1.2016**

Appellant: (Bakht Shad) by
Mr. Sher Muhammad Khan, Advocate

Respondents: (State) by Mr. Rafiq Ahmad, Assistant Advocate General.
(Riasat Khan) by
Mr. Naeemuddin, Advocate.

HAIDER ALI KHAN, J.- Through this criminal appeal under section 410, Cr.P.C Bakht Shad, the appellant herein, has challenged the judgment dated 19.3.2013 of the learned Sessions Judge/Zilla Qazi, Buner at Daggar, delivered in case FIR No. 687 dated 29.12.2011 under sections 302/34 PPC registered at Police Station Nawagai, District Buner, whereby the appellant was convicted under section 302 (b) PPC and sentenced to life imprisonment as *Tazir* with payment of Rs.5,00,000/- as compensation to the legal heirs of the deceased and

he was ordered to remain in jail untill payment of the compensation.

2. Precise and relevant facts of the case as per FIR are that on 29.12.2011 at 11:45 hours the complainant Riasat Khan reported to the local police at Emergency Ward of Nawagai Hospital to the effect that he was present in his village Koria when he got information regarding the murder of his father Afzal Khan. On inquiry it transpired that his father deceased Afzal Khan, accompanied by Nasar Khan and Nadar Khan, had visited one Said Nabi resident of Jangai, who had returned after performance of Hajj; on return from the house of the said Haji when his father alongwith his companions reached bazaar Jangi he was fired at by the accused Bakht Shad and his brother Zar Shad who were already present on the spot duly armed. As a result of firing caused by the two accused, Afzal Khan, father of the complainant sustained injuries and died on the spot.

Motive behind the occurrence was so stated that 10/12 years back the deceased Afzal Khan had caused firearm injury to father of the accused namely Amin Gul and although the matter had been patched up through compromise but the accused were still annoyed. The complainant mentioned the names of Nasar Khan and Nadar Khan to be the eye witnesses of the occurrence.

3. Report of the complainant was recorded by Inspector Bakht Zamin Khan (PW-8) in shape of *Murasila* Ex.PA/1 which was later on incorporated into FIR, Ex.PA at 12:45 hours on the same day. Accused Bakht Shad (the appellant herein) was arrested whereas his co-accused Zar Shad remained at large, therefore, after completion of investigation challan was submitted in the Court for trial of the accused Bakht Shad and carrying out proceedings under Section 512, Cr.P.C against the absconding accused who was later on declared as proclaimed

offender by the trial Court after completion of the said proceedings. The accused Bakht Shad was formally indicted by the trial Court for the offence to which he pleaded not guilty and opted to face the trial. After framing of charge, the prosecution produced nine witnesses in all in support of its case, whereafter, statement of the accused under section 342, Cr.P.C was recorded wherein he opted to be examined on oath and produced evidence in his defence. Consequently, the accused Bakht Shad recorded his statement on oath as DW-1 and produced Zahoor-ud-Din, Hazrat Aman and Ashtar Khan as DW-2 to DW-4, respectively. At the conclusion of the trial, the learned trial Court found the accused Bakht Shad guilty of the charge and sentenced him as mentioned in Para No.1 above vide judgment dated 19.3.2013. Being aggrieved, the appellant has challenged his conviction before this Court through the appeal in hand.

4. Learned counsel for the appellant/convict contended that the impugned judgment of the trial Court is against facts and material on the record; that the prosecution has badly failed to prove the guilt of the appellant beyond reasonable doubt and the impugned judgment is the result of non-appreciation, mis-appreciation and misjudgment of evidence; that the occurrence has taken place in main bazaar but no independent, disinterested and impartial witness has come forward to support the charge against the appellant/convict; that the complainant has not disclosed the source of information regarding the occurrence but astonishingly he immediately charged the appellant/convict for the murder of his father; that the appellant/convict was present at Police Station Nawagai at the time of the occurrence and in support of his contention he produced cogent evidence in his defence but the learned trial Court,

without any reason, did not consider the same evidence and recorded his conviction which is not legally sustainable. He further argued that FSL report regarding the crime weapon allegedly recovered and the crime empties collected from the spot is in negative which fact negates the story of the complainant. Learned counsel for the appellant/ convict submitted that case of the prosecution can from no angle be considered as proved beyond reasonable doubt, therefore, the impugned judgment of the learned trial Court is liable to be set aside and the appellant/convict be acquitted of the charge levelled against him. The learned counsel placed reliance on the judgments reported as **PLJ 1982 Supreme Court 592, PLD 1982 Supreme Court 429, 1990 P.Cr.L.J 1607, 2010 SCMR 846, PLJ 2012 Cr.C (Lahore) 875, PLJ 2012 Cr.C (Lahore) 860, 2008 SCMR 158, 2009 SCMR 230, PLJ 2008 SC 269 and 2006 YLR 1317**.

5. On the other hand, learned counsel for the complainant and the learned A.A.G, appearing on behalf of the State, vehemently defended the impugned judgment of the learned trial Court and argued that the prosecution has proved its case against the appellant/convict through confidence inspiring evidence. They further contended that there is a strong motive behind the occurrence which has duly been established by the prosecution besides, the eye witness of the occurrence is natural and he has put forth a true and straight forward account regarding the occurrence which has been considered by the learned trial Court after application of its judicious mind. They further argued that the evidence produced by the appellant/convict in his defence is not trustworthy and his involvement in the present case cannot be exonerated on the basis of the defence evidence which is neither convincing nor confidence

inspiring. Lastly, it was submitted that the judgment of the trial Court, being well reasoned and well founded, needs no interference by this Court. Reliance was placed on **2010 SCMR 1791, PLD 2005 SC 288, 2000 SCMR 1758, 2008 SCMR 1623, 2009 SCMR 99, 2005 SCMR 1958, 2004 SCMR 477, 2004 Supreme Court 663, 2003 SCMR 668, 2011 SCMR 1354 and 2000 SCMR 1805**.

6. We have heard the valuable arguments of the learned counsel for the parties as well as of the learned A.A.G and have gone through the record in light of their esteemed assistance.

7. It transpires from perusal of the FIR that the occurrence took place on 29.12.2011 at 11:00 hours which was reported by the complainant to the local police at 11:45 hours and the FIR was chalked on 12:45 hours. Above are the basic information which have duly been entered in the *Murasila* and

the FIR but according to the statement of Dr. Sher Zaman (PW-2) he examined the deceased at 11:30 hours and mentioned the time between the death of the deceased and postmortem report within about 3:00 hours. Similarly, the witness PW-4 who is the marginal witness of recovery memo Ex.PW-4/1, has stated that the I.O collected the blood stained earth from the spot which was taken therefrom at about 1:30 p.m. Regarding report by the complainant, the witness PW-4 stated in his cross-examination that:-

> "فرد مقبوضگی خون کے بعد ہم ایک ہی موبائل میں ہمراہ پولیس ہسپتال ناوگئی چلے گئے اور وہیں پر مدعی مقدمہ نے ہماری موجودگی میں وقوعہ کی نسبت پولیس کو رپورٹ کی"۔

Although, the witness has tried to correct his steps by stating afterwards that the report had been lodged prior to the process of recovery memo, however, the sequence of stating the events by the witness shows that the witness in his rhythm uttered the actual fact but later on realised his mistake and as such wilfully tried to conceal the

facts. Another amazing aspect of the case is that the complainant Riasat Khan, who is son of the deceased, while lodging the report did not disclose name of the eye witness Nasar Khan (PW-7) who first narrated the story to him about the murder of his father. According to the narrative of the complainant contained in the FIR, PW-7 was accompanying the deceased and after the occurrence he went to inform his son i.e the complainant who was present at his village. It is also pertinent to mention that PW-7 is a chance witness because he is not the resident of the same village where the occurrence took place. If statements of the two witnesses i.e the complainant and PW-7, are placed in juxtaposition with the statement of the Medical Officer (PW-2) it becomes crystal clear that the occurrence had taken place much earlier than alleged by the prosecution because if the occurrence took place at 11:00 a.m and PW-7 went to inform the

complainant (PW-6) in his village Koria situated at a distance of 15/20 minutes on foot and back to the place of occurrence in the same span of 15/20 minutes, then lodging of the report at 11:45 a.m is not possible. It would be appropriate to reproduce here the relevant portion of cross-examination of PW-7.

"وقوعہ کے فوراً بعد میں نے ریاست خان کو جاکر اطلاع دی ۔ ہم جب واپس آئے تو پولیس موقع پر تھی اور نعش بھی پڑی تھی-----میں موقع پر I.O کے ساتھ رک گیا ۔ میں موقع پر I.O کے ساتھ موقع پر نقشہ وغیرہ مرتب کرتے وقت موجود تھا ۔ اس کے بعد میں ہسپتال گیا ۔ I.O صاحب نے موقع پر 20-25 منٹ لیے ہونگے "۔

If for a while statement of the PW-7 be considered as true to the extent of time references narrated by him even then the investigation of the case preceded the lodging of the report which is a material irregularity committed by the I.O in the investigation. Record shows that the complainant did not mention the name of PW-7 as informer but later on stated that he was informed by PW-7 about the occurrence, thus, the contents of the FIR and

statements of the PWs are not in conformity. The mentioned improvement in the case, being deliberate and dishonest, cast serious doubt on the veracity of the witnesses, hence, their statements cannot be relied upon. Reliance in this regard is placed on **PLJ 2008 SC 269**.

8. Another important aspect of the case is that the appellant/convict has raised the plea of *alibi* in his defence and produced three witnesses in support of his this contention. The appellant/convict and his witnesses have stated in explicit terms that the appellant/convict was present in Police Station Nawagai when the S.H.O got information of the occurrence at 11:00 a.m and he left for Jangai; and thereafter the appellant and his companions also came out of the police station. The presence of the appellant and his other companions has been confirmed by Inspector Bakht Zamin Khan in his statement recorded as PW-8. If the plea of *alibi*

raised by the appellant/convict is considered in the light of statements of PW-2, PW-6 and PW-7, which have been discussed earlier in detail, it becomes clear that there is much weight in the said plea for the reasons firstly; that presence of the appellant/convict in the Police Station on the day of occurrence is an admitted fact confirmed by PW-8 and secondly; the contention of the appellant/convict that he was present in the police station at the relevant time i.e 11:00 gets support from the statement of the Medical Officer (PW-2) who examined the dead body at 11:30 a.m and mentioned the time between the postmortem and death of the deceased as three hours. Although, PW-8 has stated in his cross-examination that the appellant had left the police station 30/45 minutes prior to the occurrence but if the said statement be considered as true even then the prosecution version is negated by the statement of the Medical Officer (PW-2).

Moreso, the appellant/convict has recorded his statement on oath as DW-1 and produced three witnesses in his defence who have supported his contention in clear terms. In a judgment of the august Supreme Court reported as **PLD 1982 Supreme Court 429** even it has been held that the onus of proving affirmatively his *alibi* does not lie on the accused and in the sense onus lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The relevant portion of the referred judgment is reproduced herein below for convenience sake:-

> "the onus of proving affirmatively his *alibi* does not lie upon the accused, to the extent and in the sense onus lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. Therefore, the accused, in order to succeed on his plea of *alibi* need only to produce evidence sufficient to raise in the mind of the Court a reasonable possibility that he may be at the place where he asserts he was, rather than at the place of the crime at the time of occurrence. In such a case a reasonable doubt will have arisen as to his participation in the commission of the crime, the

benefit of which, must be given to him".

The question before this Court in light of the afore-referred judgment is that whether or not the plea of the appellant/convict has the force to plausibly convince the Court to divert towards the probability regarding his presence somewhere else at the time of occurrence and thereby a reasonable doubt is created in a prudent mind. No doubt, the evidence produced by the appellant/convict in his defence and the concocted evidence of the prosecution reasonably tends the Court to entertain a reasonable doubt regarding presence of the appellant/convict on the spot of the occurrence at the relevant time.

9. It is also observed that the prosecution has not taken the pain to examine the second eye witness namely Nadar Khan. Even, when the defence counsel cross-examined the I.O in this regard, he tried to save his neck by stating that the

witness Nadar Khan was not ready to record his statement. No doubt, the said Nadar Khan was an important witness for the prosecution and his evidence would be of much value being eye witness to the occurrence but he was given up by the prosecution for no good reason. In such like situation, the Court can fairly draw a presumption under illustration (g) of Article 129 of Qanun-e-Shahdat Order, 1984 that had the second eye-witness been examined in the Court his evidence would have been unfavourable to the prosecution. Reliance in this respect is placed on **2010 SCMR 846**.

No doubt, conviction of an accused can be recorded on the sole testimony of a single eye witness provided his deposition is corroborated by other circumstantial evidence collected by the prosecution. The present case mainly hinges on the statement of eye witness Nasar Khan (PW-7) who is closely related to the complainant. Although, the

evidence led by PW-7 cannot be discarded mere on the ground of close relationship with the complainant, however, the Court must be cautious while relying on the evidence of an interested witness for safe administration of justice. Reliance is placed on **PLJ 2012 Cr.C (Lahore) 875**. The relevant portion of the judgment is as under:-

> "It is a settled principle of criminal jurisprudence that evidence of a witness who is inimical to the accused and a chance witness, as a matter of caution and for safe administration of justice, cannot be believed unless corroborated by some independent, unimpeachable and trustworthy source".

In the present case, the statement of PW-7 has not been strongly corroborated by other trustworthy source, therefore, conviction of the accused/appellant on the basis of his testimony does not seem fair and just.

10. Record also shows that the crime weapon was allegedly recovered on the pointation of the appellant/convict. According to the statement of

the alleged eye witness (PW-7), the appellant/ convict and his co-accused were armed with Kalashnikovs but according to recovery memo Ex.PW-5/1 a gun of the kind *Punj-Zarbi* was allegedly recovered from the *baitak* of the appellant/convict on his pointation. Interesting aspect of the case regarding the recovery of crime weapon is that the I.O had searched the house and Hujra of the appellant/convict soon after the occurrence but he recovered nothing at that time and astonishingly recovered the crime weapon after 15 days of the occurrence from the *hujra/baitak* of the appellant/convict. Moreso, the said crime weapon and the crime empties recovered from the place of occurrence have been examined through laboratory but the report furnished by the FSL in this regard is in negative. Hence, there remains no doubt that the gun allegedly recovered from the *baitak* of the appellant/convict was not the weapon which had

been used in the occurrence. So far recovery of crime empties from the place of occurrence is concerned, no doubt the presence of crime empties and blood stained earth on the spot well establish the murder of the deceased but the prosecution has badly failed to connect the appellant/accused with the occurrence through convincing evidence. Therefore, it is held that recovery of the crime weapon has become highly doubtful keeping in view the facts and circumstances of the case.

11. So far as contention of learned counsel for the complainant is concerned that there is a strong motive behind the occurrence, it appears that the complainant without carrying out any probe straight away and immediately charged the appellant/convict and his brother in the present case because of the previous enmity which was mended. Contention of the complainant is that 10/12 years ago the deceased had caused firearm injury to father

of the appellant/convict which rivalry between the parties had been patched up through a compromise but the appellant/convict was annoyed because of this incident and committed the murder of his father. Record shows that the prosecution has produced no evidence regarding annoyance of the appellant/ convict despite they had effected compromise with him. There is nothing on the record to show that the appellant/convict or his brothers ever threatened the deceased or his other family members nor there is any evidence to show that they ever attempted at the life of the deceased in furtherance of the alleged motive during the said period of 10/12 years.. The prosecution has tried to bring on the record previous FIRs against the appellant/convict and his brothers and similarly counsel for the complainant has cross-examined the appellant/convict and other defence witnesses just to prove that they are hardened criminals, however, this Court is confined to the

present case only and involvement of the appellant/convict in other criminal cases cannot be considered as a corroborative piece of evidence for his conviction in the present case. Hence, it is held that the prosecution has failed to establish the motive against the appellant/convict.

12. The prosecution was duty bound to prove the guilt of the appellant/convict beyond reasonable doubt, however, from careful analysis of the material available on the record, serious doubts and dents in the prosecution case have come to the light. It is well settled that while extending the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt; a single circumstance creating a reasonable doubt in a prudent mind is sufficient for an accused to get its benefit. Guidance in this regard is sought from the reported judgment of the august Supreme Court **2009 SCMR 230**.

As each case has its own peculiar circumstances, therefore, the case law produced by learned counsel for the complainant one way or the other do not conform to the facts and circumstances of the present case, hence, cannot be considered for maintaining the conviction of the appellant/convict.

12. In view of what has been discussed above, the conviction of the appellant/accused recorded by the learned trial Court is not legally sustainable. Therefore, we allow this appeal, set aside the impugned judgment dated 19.3.2013 rendered by the learned Sessions Judge/ Zilla Qazi, Buner at Daggar, delivered in case FIR No. 687 dated 29.12.2011, under sections 302/34 PPC registered at Police Station Nawagai, District Buner and resultantly acquit the appellant Bakht Shad son of Amin Gul of the charge levelled against him. He be released forthwith if not required in any other case.

Above are the reasons for our short order of the even date announced in the open Court.

Announced.
Dt: 19.1.2016.

JUDGE

JUDGE