JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A. No.142-P/2012

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- This appeal is directed against the judgment dated 14.03.2012, rendered by learned Trial Court/ Additional Sessions Judge-XIII, Peshawar, whereby he convicted appellant Abdur Rehman alias Malang, under section 302 (b) PPC and sentenced him to undergo imprisonment for life as Ta'azir as well as to pay a sum of Rs.1,00,000/-, as compensation in terms of S.544-A Cr.P.C. to LRs of Zakir Khan deceased or in default thereof, to undergo 06 months R.I. further. He further convicted him under section 324 PPC and sentenced to undergo 10 years R.I. and to pay a fine of Rs.20,000/- to complainant Rahim Dad or in default thereof to undergo 02 months R.I further. Benefit of S.382-B Cr.P.C. has been extended to him and the sentences have been directed to run concurrently. .

2. The prosecution case is that on 26.03.2009 at 8.30 hours, when complainant Rahim Dad (PW.1) alongwith his brother Zahir Khan deceased, was removing mud from a thoroughfare near his house, situated in village Khandar Khel Jarndo Kala, their neighbour Abdur Rehman alias Malang (appellant-convict herein), came there and opened fire at them, as a result, Zahir Khan got hit and succumbed to the injuries on the way to hospital. An oral altercation, prior to the incident, has been alleged as motive of the incident.

3. The dead body of the deceased was shifted to Police Station Mathra, where on the report of complainant FIR No.174 dated 26.03.2009, under sections 302/324/34 PPC, was chalked out by Siraj Khan S.I (PW.3). He prepared injury sheet and inquest report of the deceased Exh.PW.3/2 and Exh.PW.3/3, respectively, followed by dispatch of the dead body of the deceased to the mortuary for postmortem examination.

4. Doctor Anwar ul Haq (PW.6), conducted autopsy on the dead body of the deceased on 26.03.2009 at 01.15 p.m. and found the following injuries on his person:-

1. Firearm entry wound on right side of front of chest, measuring 1 x 0.5 cm in size, 3 cm below nipple and 11 cm from midline.

2. Bullet recovered from left back of chest.

Opinion:-According to his opinion, the deceased died due to firearm injuries to his heart, right lung and vessels in the thorax.

Probable time between injury and death has been observed as " Immediate" while between the death and postmortem as "3 to 6 hours".

5. Waris Khan Inspector (PW.2), proceeded to the spot and prepared site plan Exh.PW.2/1 on the pointation of Rahim Dad complainant. During spot inspection, he vide recovery memo Exh.PW.2/2, secured bloodstained earth from the place assigned to deceased, took into possession two crime empties of 30 bore vide recovery memo Exh.PW.2/3, recorded statements of marginal witnesses to the recovery memos under section 161 Cr.P.C., took into possession the last worn bloodstained garments of the deceased vide recovery memo Exh.PC and sent the bloodstained articles to the FSL. On 14.04.2009, he took into possession a spent bullet, extracted from the dead body of the deceased during postmortem examination by the doctor, vide recovery memo Exh.PW.2/5, placed on file postmortem report of the deceased and FSL report qua the bloodstained articles Exh.PW.2/6. Since, the accused was avoiding his lawful

arrest, therefore, he initiated proceedings under sections 204 and 87 Cr.P.C. against him. On completion of investigation complete challan in terms of S.512 Cr.P.C. was submitted against the accused/appellant.

6. On arrest of the appellant, 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 as many as twelve witnesses. After closure of the prosecution evidence, statement of accused/appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He, however, declined to be examined on oath under section 340 (2) Cr.P.C. or 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, hence, this appeal.

7. Learned counsel for the appellant argued that learned Trial Court failed to appreciate the evidence available on record in its true perspective, particularly, the testimony of alleged eyewitness Rahim Dad, which suffers from major contradictions, discrepancies and dishonest improvements, creating serious doubt qua his presence on

the spot at the relevant time of incident; that PW Rahim Dad is a procured witness who charged the appellant on mere suspicions; that delay of more than two hours in lodging report has not been explained which proves the incident to have been reported with due deliberation and consultation after procuring the attendance of PW Rahim Dad; that medical evidence and site plan squarely negate the ocular account; that the appellant has not confessed his guilt before any competent Court of law nor any crime weapon, either from his direct or indirect possession has been recovered; that mere recovery of blood from the spot, two empties of 30 bore and positive Serologist report qua the bloodstained articles as well as abscondence of the appellant, which otherwise, have been denied by the appellant, being only corroborative pieces of evidence, in absence of direct evidence, would not be sufficient to bring home the guilt of the appellant. He submitted the prosecution has miserably failed to bring home the guilt of the appellant through cogent and confidence inspiring evidence beyond shadow of reasonable doubt, therefore, while extending benefit of doubts to the appellant he be acquitted of the charge.

8. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant is

directly and singularly charged for murder of the deceased in a broad day light incident; that parties being neighbours inter-se, question of mistaken identity does not arise; that there exists no reason to suggest that complainant would substitute the appellant for murder of his real brother; that ocular account furnished by PW Rahim Dad is straightforward, trustworthy and confidence inspiring, corroborated by recovery of blood and crime empties from the spot, autopsy report of the deceased coupled with unexplained noticeable abscondence of the appellant. They while supporting the impugned judgment, sought dismissal of the appeal.

9. We have given our anxious consideration to the respective arguments advanced from either side and perused the record with their able assistance.

10. The incident took place on 26.03.2009 at 08.30 hours, on a thoroughfare leading to Jrando Korona, lying at a distance of 2/3 Kilometers from Police Station Mathra, but has been reported by Rahim Dad (PW.1) at 11.10 hours i.e. after sufficient delay of 02 hours and 40 minutes, which has not explained by him in his report. However, complainant in order to cover up the delay, in court statement deposed that the deceased was first shifted to Police Station Mathra, wherefrom he was taken to

CMH, then to LRH, Peshawar and then again to Police Station Mathra. Not a single word about the aforesaid events has been uttered by him in his report, therefore, the subsequent stance of the complainant, amounts to dishonest improvements just to bring in line his case with the time of report. In cross-examination he further deviated from the version set forth by him in his initial report by deposing that at the relevant time accused came and started altercation with them over cleaning of mud from the thoroughfare, whereafter he went, scaled over a wall of his house and opened fired at them. What he has alleged in report is that at the relevant time of the incident when mud was being removed by them, appellant came there and opened fire at them, which hit the deceased. Altercation of the accused prior to incident, then his proceeding to the house and scaling over the wall of his house followed by opening of fire at the complainant party, does not find mention in the FIR. Rahim Dad complainant further deposed that appellant fired two shots, but in the FIR number of the fire shots has not been mentioned. In his report he has not stated about his taking shelter anywhere during firing, but in cross-examination he deposed that at the time of preparation of site plan he pointed out the place wherefrom he ran and took shelter, however, no such place

has been shown in the site plan. As manifest from the site plan, the crime venue is a straight street, having no house, shop or any other place which could be utilized for taking shelter. The distance between the deceased and complainant has been shown as 3 paces, while between the accused and the complainant as 05 paces, but despite such close proximity, he did not sustain any injury. Similarly, his let off by the accused having common motive with him and his deceased brother, is also beyond our understanding. Despite being a broad day light incident, complainant has not disclosed the kind of weapon allegedly used by the appellant in the commission of offence. All these facts and circumstances clearly indicate towards absence of the complainant at the time of incident. He admits in his statement that house of Jahangir brother-in-law of the deceased is situated at a distance of 10/20 feet from the crime venue. He further deposed that while shifting the dead body of the deceased, his hands and clothes were smeared with his blood, but no such clothes have either been produced by him before the I.O. nor has the I.O. been mentioned this fact anywhere in investigation. In the backdrop of the above discussed peculiar facts and circumstances, shifting of dead body of the deceased by his brother-in-law Jehangir, whose house

is situated at a distance of 10/12 paces and thereafter procuring the attendance of the complainant within 2 hours and 40 minutes, as suggested by the defence in cross-examination of PW Rahim Dad, does appeal to a prudent mind. It is settled law that an eyewitness, who claims his presence on the spot, must satisfy mind of the court through some strong physical circumstances or through some corroboration in respect of his presence at the spot, otherwise, his testimony would be of no help to the prosecution.

11. No doubt, appellant is directly and singularly charged for murder of the deceased and substitution of innocent person in a case single accused is named for murder is a rear phenomenon, but it depends from case to case as held by the Apex Court in case titled**, "Dr. Israr ul Haq Vs Muhammad Fayyaz and another" (2007 SCMR 1427)**. Admittedly, conviction of an accused can be based on the testimony of a single witness without corroboration, but the condition is that such witness should be absolutely dependable. We did not find Rahim Dad single witness of this untoward incident as dependable in light of major contradictions, discrepancies and dishonest improvements in his testimony coupled with other peculiar facts and circumstances of the case creating serious doubts qua his

presence on the spot at the relevant time of incident. In light or ratio of judgment of the august Apex Court in case titled, **"Muhammad Saleem Vs Muhammad Azan and another" (2011 SCMR 474),** a witness making dishonest improvements in his statement to strengthen prosecution case, such improvements would cast serious doubt on veracity of such witness, therefore would not be worthy of reliance. It has been held by the Hon'ble Supreme Court in case titled, **"Mst. Sughra Begum and another Vs Qaiser Pervez and others" (2015 SCMR 1142),** that ocular account in cases of qatl-i-Amd plays a decisive and vital role and once its intrinsic worth is accepted and believed then rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution, but to the contrary, once the ocular account has been disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge, therefore, probative value of the ocular account had to be seen in light of the facts and circumstances of each case.

12. Deriving wisdom from the judgment of the august Apex Court (supra), when we have disbelieved the ocular account, mere recovery of blood and crime empties from the spot coupled with abscondence of the appellant

would not be sufficient to bring home the guilt of the appellant because such pieces of evidence are always taken into consideration alongwith the substantive evidence as confirmatory and corroborative evidence, which in isolation would not be sufficient for recording conviction in a capital charge. In this regard guidance can be derived from **Riaz Ahmed's case (2010 SCMR 846), Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541),** case titled, **"Saifullah Vs the State" (1985 SCMR 410),** and case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730** as well as **Mst. Sughra Begum and other's case (2015 SCMR 1142).** Similar is the position of abscondence, which cannot be a substitute of real evidence. Abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused.

13. For what has been discussed above, the learned Trial Court failed to appreciate the evidence available on record in its true perspective in light of the principles laid down by the superior Courts and thus

reached to erroneous conclusion by holding the appellant guilty of the offence. Accordingly, we by allowing this appeal, set aside the conviction and sentences of the appellant recorded vide impugned judgment dated 14.03.2012, and hereby acquit him of the charge levelled against him. He be set at liberty forthwith, if not required in any other case.

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

Announced
14.10.2015.

J U D G E

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**M.Siraj Afridi P.S. D*