JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.166-P/2015

Date of hearing: ***15.06.2015***

Appellant (s) : Mera Khan and two others by Sahibzada Assadullah, Advocate.

Respondent (s) : Nemo for complainant and the State by Mr. Mujahid Ali AAG.

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.-

This appeal calls in question the legality and propriety of judgment dated 10.03.2015, passed by learned Trial Court/ Additional Sessions Judge, Lahore, District Swabi, whereby he convicted and sentenced appellants (1) Mera Khan (2) Naeem Khan and (3) Bilal Hussain as under:-

> ***Under sections 324/34 PPC:-*** To undergo 05 years R.I. and to pay a fine of Rs.20,000/- each or in default thereof to undergo 05 months S.I. further.

Under Section 337-F (iii) PPC:- To undergo 02 years R.I. and to pay Rs.30,000/- as Daman, each and in failure thereof to be kept in jail and be dealt with in the manner as if sentenced to simple imprisonment till payment of Daman. ***Under Section 337-C PPC***: To undergo 04 years R.I. and to pay Rs.30,000/- as Daman each, and in failure thereof to be kept in jail and be dealt with in the manner as if sentenced to simple imprisonment till payment of Daman.

The sentences have been directed to be run concurrently. Benefit of Section 382-B Cr.P.C. has been extended to the appellants/convicts.

2. On 23.06.2014 at 01.10 a.m. Fazal Khaliq complainant, in injured condition, in company of injured Ikram , reported to local police

in RHC Yar Hussain, that on the night of incident he alongwith PW Ikram, came out of their Hujra to purchase snuff (Naswar) from the nearby shops, but the same were found closed and on their return to the Hujra when they reached the crime spot, Mera Khan, Hussain and Naeem (appellants-convicts herein), duly armed with firearm, present there, opened fire at them, with the intention to commit their Qatl-e-Amd, as a result they both got hit while the accused decamped from the spot. A previous blood feud enmity has been alleged as motive behind the crime.

3. Report of the complainant was recorded in the shape of murasila Exh.PW.6/1 by Mukhtiar Khan ASI (PW.5), who sent it to Police Station on the basis of which FIR No.296 dated 23.06.2014 under sections 324/34 PPC was registered at Police Station Yar Hussain against the appellants. He prepared injury sheets of the injured and left them

under the escort of Qadar Nawaz Constable No.563 for the purpose of medical examination.

4. Dr. Irtaza Ajmal Khan (PW.3), examined injured Ikram on 23.06.2014 at 1.00 a.m. and found an entry wound on his right flank about 1 x ½ inches in size with charring marks having corresponding exit near umbilicus region about 4 x 2 inches in size. On the same day he also examined injured Abdul Khaliq and found firearm entry wound on his left arm about 1 x ½ inches in size, with charring marks having exit wound on left arm about ¼ x ¼ inches in size on posterior interior side.

5. Mira Khan SI (PW.9), rushed to the spot and prepared site plan Exh.PW.9/1 in light of torch on the pointation of complainant Fazal Khaliq. During spot inspection he secured blood from the place of injured Fazal Khaliq with the help of cotton and 30 empties of 7.62 bore and an empty of 30 bore, vide recovery memo

Exh.PW.8/1. He took into possession the bloodstained garments of the injured, placed on file the medico legal reports of the injured, and FSL report Exh.PW.9/3, initiated proceedings under sections 204 and 87 Cr.P.C. against the accused, recorded statements of the PWs under section 161 Cr.PC. and after completion of investigation, handed over case file to SHO, who submitted challan in terms of S.512 Cr.P.C. Later on, all the three accused/appellants were arrested, he interrogated them and recorded their statements under section 161 Cr.PC. and after completion of investigation, submitted supplementary challan against them.

6. On receipt of challan by the learned Trial Court, appellants were summoned and formally charge sheeted, to which they pleaded not guilty and claimed Trial. To bring home the guilt of appellants, prosecution examined as many as ten witnesses. After closure of the prosecution

evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed their innocence. They, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellants as mentioned above.

7. Learned counsel for the appellants argued that the occurrence is odd hours of the night and complainant, has not disclosed any source of light on the spot nor has any source of light been shown in the site plan nor taken into possession during spot inspection by the I.O., therefore, identification of the appellants is highly doubtful; that complainant-injured Fazal Khaliq has been abandoned by the prosecution while the testimony of PW Ikram Khan injured does not find any corroboration from the site plan or medical

evidence; that mere stamp of injuries on his person cannot be a certificate that whatever he is speaking would be the truth. He contended that the impugned judgment being against the law facts and evidence available on record is liable to be set aside.

8. Despite issuance of process, complainant Fazal Khaliq did not turned up. He reportedly is absconding in some other criminal case that's why he has also been abandoned during trial. In these eventualities, this appeal cannot be kept pending for indefinite period on the ground to procure the attendance of the complainant, therefore, learned AAG was asked to assist the court on behalf of the State as well as complainant.

9. Learned AAG contended that the appellants are directly charged in a promptly lodged report; that injured PW Ikram Khan has furnished straightforward and confidence inspiring account of the incident, which is corroborated by

recovery of blood and recovery of empties of two kinds of weapons; that medical evidence supports the prosecution version. He while supporting the impugned judgment sought dismissal of the appeal.

10. I have heard the respective submissions advanced from both the sides and perused the record carefully.

11. On the face of record on file, I entertain no doubt about commission of the offence on the date, time and place, as alleged by the prosecution as well as the injuries sustained by complainant and PW Ikram Khan. What disturbs my mind to a great extent is my serious reservation about the identification of the assailant/ assailants and the mode and manner of the incident. The occurrence is nocturnal taken place in the month of June, 2014 at 00.15 hours. Injured-complainant Fazal Khaliq (abandoned during trial), has not disclosed about availability of any source of light whether electric

or moon on the spot at the time of incident, in which he identified the appellants. Similarly, no source of light has been shown by the I.O. in the site plan nor any such source has been recovered therefrom. Rather, admission of Mira Khan SI (PW.9)/I.O., qua preparation of the site plan in torch light, squarely establishes non-availability of light on the spot. Had there been any light, he would not have used torch while inspecting the spot. I did not found any justifiable explanation to remove my reservation about the identification of the assailant/ assailants. In the site plan complainant has been shown at Point No.1 while PW Ikram Khan as PW.2 and the appellants at points No.3 to 5. The distances between the three appellants and the two injured PWs have been shown from 10 feet to 22 feet, but medical evidence negates this stance of the prosecution, wherein Dr. Irtaza Ajmal Khan (PW.3), who examined both the injured, observed charring

marks over the wounds of the two injured, which proves that both the injured have been fired from a very close range/ distance not more than a feet. Thus, medical evidence belies the ocular version of PW Ikram Khan. No doubt, in hurt cases, conviction can be recorded on the solitary statement of an injured witness provided it rings true and is supported by medical evidence, but such is not the situation before me in the instant case. Though presence of injured PW Ikram cannot be denied having injuries on his person, but at the same time he cannot be held as a credible and truthful witness on mere ground of injuries on his person. Therefore, I am firm in my view that the incident has not taken place in the mode and manner as alleged by the prosecution. Moreso, departure of the two injured from their Hujra for the purpose of buying snuff (answer) at mid night, is also behind my comprehension. The findings of the learned Trial Court qua conviction of the

appellants for attempting at the life of injured complainant Fazal Khaliq and his injures, seems very strange as he did not appeared in the witness box and it is settled law that FIR by itself is not a substantive piece of evidence, unless proved by its maker/ lodger, hence, the exercise adopted by the learned Trial Court is squarely against the law and principle of appreciation of evidence.

12. For what has been discussed above, the prosecution has miserably failed to bring home the guilt of the appellants through cogent and confidence inspiring evidence beyond reasonable doubts. Rather, the prosecution evidence, discussed above, is suffering from material contradictions and discrepancies, creating serious doubts about the guilt of the appellants, benefit of which is to be extended to the appellants not as a matter of grace or concession but as a matter of right as according to golden principle of benefit of doubt; 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. Accordingly, I allow this appeal, set aside the conviction and sentences of the appellants-convicts, recorded and awarded by the learned Trial Court vide impugned judgment dated 10.03.2015 and hereby acquit them of the charges leveled against them. They be set at liberty forthwith, if not required in any other case.

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

> For reasons to be recorded later, this appeal is allowed, conviction and sentences of the appellants (1) Mera Khan (2) Naeem Khan and (3) Bilal Hussain, recorded and awarded by the learned Trial Court/Additional Sessions Judge Lahore Swabi, vide judgment dated 10.03.2015, in case FIR No.296 registered under sections 324/34 PPC at Police Station Yar Hussain

Swabi, are set aside and they are acquitted of the charge. They be set at liberty forthwith, if not required in any other case.

Announced.
15.06.2015

J U D G E

*M.Siraj Afridi P.S. D