

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH

(Judicial Department)

Cr.A. No.65-D/2019

**Muhammad Ramzan
Vs
State and two others**

JUDGMENT

For Appellant: **Muhammad Ismail Alizai, Advocate**

For Respondents: **Nemo (Being in motion)**

Date of hearing **26.01.2021**

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SAHIBZADA ASADULLAH, J.- This appeal calls in question the judgment dated 26.6.2019, rendered by the learned Additional Sessions Judge Paharpur, D.I.Khan, whereby the respondents No.2 & 3 were acquitted of the charges in case FIR No.62 dated 09.04.2016, under Sections 302/324/109/34 PPC of Police Station Kirri Khaisore, District D.I.Khan.

2. The prosecution story as disclosed in the FIR Ex: PA, registered on the basis of murasila Ex. PA/1, in brief, is that on 09.4.2016 at about 17:50 hours, complainant Muhammad Ramzan (PW-12) while present with dead-body of his son Muhammad Ayub, reported the matter at Kirri Khaisore Adda to Ubaidullah ASI (PW-5),

to the effect that on the day of occurrence, he alongwith his son came to Adda Kirri Khaisore on a motorbike driven by his son, for purchase of household articles and at 05:30 p.m stopped at petrol agency of one Qayyum Nawaz for filling petrol in the motorbike. In the meanwhile, accused Maqbool Ahmad and Mushtaq Ahmad, while armed with pistols, came there and started firing at them with their respective pistols, as a result whereof, his son Muhammad Ayub got hit, fell on the ground and breathed his last, while he fortunately escaped unhurt. After commission of the offence, the accused succeeded to decamp from the spot. Motive for the offence is given as the deceased had contracted love marriage with Mst. Amna Bibi which matter was settled privately between both the families, however, the accused being paternal cousins of said lady committed the offence. The occurrence was stated to be witnessed by PW Ghulam Mursileen (abandoned being won-over). On the report of complainant, PW-5 drafted Murasila Ex.PA/1, prepared injury sheet Ex. PW 5/1, inquest report Ex. PW 5/2 and despatched the dead-body to hospital for post-mortem examination under the escort of constable Muhammad Nawaz (PW-6). The murasila was sent to the Police Station for the registration of FIR where FIR Ex.PA was registered against the accused while its copy was handed over to Zulfiqar Ali (PW-13) for investigation. The Investigating

Officer proceeded to the spot where he prepared site plan Ex. PW 13/1, secured two empties of 9 mm from places of accused and a led bullet, a motorbike of deceased vide recovery memo Ex. PW 10/1, received FSL reports regarding empties, led bullet and blood-stained earth, Ex.PK and Ex.PK/1 respectively. The I.O. conducted house search of accused where he took into possession a motorcycle belonging to accused which they used in the commission of offence. He recorded statements of witnesses and on completion of investigation handed over the case file to the S.H.O, who submitted complete challan against the accused to the learned trial Court, where at the commencement of the trial the prosecution produced and examined as many as thirteen (13) witnesses, whereafter, accused were examined under section 342, Cr.P.C., wherein they denied the allegations, professed innocence, however, they did not opt to be examined on oath in terms of Section 342, Cr.P.C. nor produced evidence in their defence. After conclusion of the trial, learned trial Court vide judgment impugned herein acquitted the accused, hence the instant appeal.

3. Heard. Record perused.
4. The learned counsel for the appellant submitted that the impugned judgment is arbitrary, mechanical, perverse and without application of judicial mind to the facts and circumstances

of the case. It was further argued that the prosecution proved its case against the respondents to the hilt; and that the learned trial court did not appreciate the available evidence in its true perspective and that the impugned judgment is based on conjectures and surmises which needs interference. He lastly submitted that despite the fact the prosecution produced two reliable witnesses who were thoroughly cross-examined but nothing favourable to the respondents was extracted.

5. This court is to see as to whether the witnesses were present on the spot at the time when the deceased was done to death and as to whether the incident occurred in the mode, manner and at the stated time, however, this court is conscious of the fact that it was after a full dressed trial that the respondents were acquitted of the charges, whose acquittal has been challenged through the instant criminal appeal. There is no cavil to the proposition that once an accused is acquitted of the charges he earns double presumption of innocence and extra ordinary circumstances are needed to upset the same. The parameter for an appeal against acquittal and that of conviction are altogether different. 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.

6. The incident occurred at 17:30 pm when the complainant alongwith his deceased son visited local petrol pump to fuel their motorcycle, when in the meanwhile the respondents appeared duly armed started firing at the deceased, who got hit fell to the ground and died on the spot. The matter was stated to be witnessed besides the complainant by one Mursaleen who though was later on abandoned being won-over, but at the earliest his statement was recorded by the investigating officer u/s 161 Cr.PC and later on by the court of Judicial Magistrate u/s 164 Cr.PC. Wherein, PW Mursaleen gave the detailed description of what he saw while present near the place of incident. He through his 164 Cr.PC statement unfolded the events in the manner, that on the eventful day he after purchasing cigarettes from the shop of one Ghulam Sadiq was standing on the road side when in the meanwhile the deceased Muhammad Ayub approached the local filling station to fuel his motorcycle, soon thereafter the respondents Mushtaq Ahmed reached to the filling station and started firing at the

deceased, who on receiving fire shots fell to the ground. On hearing the fire shots he alongwith other people rushed towards the deceased but by then the deceased had died. He further stated that after 15/20 minutes father of the deceased Muhammad Ramzan alongwith PW Abdul Hameed and one Yaqub reached to the place of incident and on arrival of the local police the complainant reported the matter.

7. The complainant was examined as PW-12, who stated that on the day of incident when he alongwith his deceased son reached to the petrol pump, the accused duly armed approached the petrol pump and started firing at the deceased which resulted into his death. He further stated that the incident was witnessed by one Mursaleen as well. When the statement of the complainant is placed in juxtaposition with the statement of PW Mursaleen, which he recorded before the court of Judicial Magistrate u/s 164 Cr.PC, both the statements do not support each other rather the statement of the complainant is in glaring contradiction with that of Mursaleen, as in his statement recorded by the court of Judicial Magistrate, he categorically stated that the deceased at the time of incident was all alone and that it was only the respondent Mushtaq Ahmed, who fired at the deceased. This witness remained silent on the presence of complainant at the time of incident and even he did not mention the presence of PW Muhammad Rafique at the time of incident. It is from there that we gathered an impression that the complainant alongwith two others reached to the spot after 15/20 minutes of the occurrence. The statement so recorded by PW Mursaleen is further

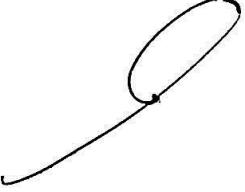
strengthened from the fact that the matter was reported by the complainant after 30 minutes of arrival of the local police. We are anxious to know that when the complainant was present on the spot at the time of incident why he did not shift the deceased to the hospital or police station to report the matter. It is intriguing that the complainant kept on waiting till arrival of the local police, to report the matter despite the fact that the vehicles were available to shift the dead body.

8. The delay caused in reporting the matter leaves no ambiguity in our mind that the complainant was not present at the time of incident and that it was after the deceased was done to death his attendance was procured. To clarify the issue in hand we deem it appropriate to touch the statement of the eye witness Muhammad Rafique, who was examined as PW-11. PW Muhammad Rafique stated that on the day of incident he had gone to a barber shop situated near the place of occurrence to shave, where he saw the deceased and the complainant fuelling their motorcycle at the local petrol pump/agency, where the respondent appeared and started firing at the deceased, which resulted into his death. This is surprising to note that during cross examination PW-11 stated that it was at 06:30 pm, when the police arrived to the spot and examined the dead body, but the report of the complainant was not taken down. He went on to say that after arrival of the investigating officer

at 07:30 pm, the complainant reported the matter and thereafter the dead body was shifted to the hospital. The explanation so tendered does not appeal to a prudent mind, rather an inference can be drawn that neither the complainant nor the eye witness were present when the deceased was done to death and that on arrival of the local police soon after the incident preliminary investigation was made and when the presence of the complainant was procured the matter was reported. The complainant who was examined as PW-12, stated that he did not put his signature or thumb impression on the document prepared by the investigating officer on the spot. He explained that on the day of incident he visited the local police station twice i.e. once soon after the incident and the second at 11:30 pm, when he was called from the police station to approach. Our anxiety increases to know that why the complainant was called to the police station two times on the day of incident when the report had already been made. The scribe was examined as PW-5, who stated that soon after the incident he received information and on his arrival to the spot he found the complainant present with the dead body, who reported the matter. PW-5 could not explain the source of information whereas the complainant stated that it was one Sharif Ullah, who informed the police on his mobile phone, but surprisingly his statement was not recorded.

9. The investigating officer visited the spot, recovered blood stained earth from the place of deceased, two empties of 9mm with a spent bullet alongwith the motorcycle of the deceased. The site plan was prepared at the instance of the complainant where the presence of PW Mursaleen is shown, whereas PW-11 figures nowhere. It is admitted on record that PW-11 is the first cousin of the complainant and was running a local flour machine at his village, when he was cross examined he admitted that he is running the flour mill all alone with no helper. If we take what he stated to be correct then this witness should have been present at the place of his work and his presence at the place of incident does not appeal to a prudent mind. Had he been present on the spot his name would have been mentioned by the complainant while reporting the matter. The prosecution is to explain that why two most important witnesses i.e. Mursaleen and Abdul Qayum were not examined, as they were the first, who rushed towards the deceased when he received the firearm injuries. This is undisputed that both these witnesses are independent and are not related to the complainant. The importance of PW Mursaleen cannot be ignored as he was the witness whose presence was admitted by the complainant as an eye witness. There is no cavil to the proposition that when a best available evidence is not produced an inference can be drawn that had he been produced he

would have not supported the case of the prosecution. The situation in hand is better guided and controlled by article 129(g) of the Qanoon-e-Shahdat Order, 1984, as is held in case titled Tahir Khan Vs. The State (2011 SCMR 646):



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".

10. The recovered empties were sent to Forensic Science Laboratory by the investigating officer to ascertain as to whether those were fired from one or different weapons. The empties were received to the Laboratory on 14.04.2016, where, after chemical analysis it transpired that the same were fired from one and the same weapon. The Laboratory report discredits the integrity of the complainant as the complainant has thrown the net wide by implicating two real brothers in the episode. There is no denial to the

fact that the Laboratory report is corroborative piece of evidence and cannot be used to discredit the trust worthy eye witness account provided the eye witness account is trust worthy, but in case in hand the eye witnesses failed to establish their presence on the spot and that their statements are in conflict with each other that too with dishonest improvements. 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:

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.

11. The medical evidence is in conflict with the ocular account. The site plan was prepared at the instance of the complainant where the deceased and the assailants are shown at a

distance of 03 paces from each other. We cannot ignore that the weapon used was stated to be 9mm pistol and that the charring and blackening marks occur only when a pistol is fired from a distance of 09 inches or less. In case in hand all the entry wounds are surrounded by blackening, which is not possible from the distance given by the complainant, which also indicates that the complainant was not present at the time of incident. 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:

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."

12. The motive was stated to be the elopement of Mst. Amina with the deceased, who was already married to one Muhammad Bilal in which respect case FIR No.90, dated 11.06.2014, u/s 496-A/506/342 PPC was registered. It is pertinent to mention that the said lady performed Nikah with the deceased and is still residing at his house. We cannot ignore that it was the complainant who stated that the matter between the parties had already been patched up, when the matter had already been patched up then what was the need for the respondents to kill the deceased. We have no other option but to hold that the prosecution failed to establish the motive. Even otherwise the investigating officer did not collect any independent evidence in that respect. He did not take pains to record the statement of Mst. Amina to confirm the motive. There is no cavil to the proposition that once the prosecution alleges a motive then it is its 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), wherein it has been held: -

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."

13. For what has been stated above, this court reaches to an inescapable conclusion that the prosecution failed to prove its case against the respondents and even the witnesses could not establish their presence on the spot. The learned trial court has comprehensively dealt with the matter in hand as such the impugned judgment is well reasoned which calls for no interference. This appeal is bereft of merit stands dismissed.

Announced.
Dt: 26.01.2021

Kifayat/

JUDGE

JUDGE

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