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JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
DERA ISMAIL KHAN BENCH.
(*Judicial Department*)

Cr. A No.35 -D of 2016 with
Murder Reference No.05-D of 2016

PESHAWAR HIGH COURT - BENCH DERA ISMAIL KHAN

NAZAK
Vs
The State.

JUDGMENT

Date of hearing 05.04.2017.

Appellant-Petitioner (Nazak) By:- Mr. Abdul Latif Khan Baloch, Advocate.

Respondent (State) By:- M/S: Kamran Hayat Miankhel AAG for the State & Saleemullah Khan Lanzazai Adv: for compl

ISHTIAQ IBRAHIM, J.--- Through this criminal appeal, the appellant Nazak has called in question the judgment dated 06.06.2016 rendered by learned Sessions Judge, Tank,. whereby the appellant Nazak has been convicted and sentenced as under:

i) Convicted under section 302 (b) PPC and sentenced to death as Ta'zir with compensation of Rs.50,00,000/- under section 544-A Cr.PC and in default thereof he shall further suffer six months S.I

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2. The murder reference has also been sent to this Court for its confirmation. The appeal and murder reference are going to be decided through this single judgment.

3. The prosecution case according to F.I.R (Ex: PA) is that:

منجانب ہا رون الرشید اے۔ایس۔آئی انچارج سٹی ایک تحریری مراسلہ بمراد قائمی مقدمہ بدست کینسٹیبل محمد اسلم 186 موصول ہوکر درج زیل ہے۔ رپورٹ گنڈہ پور ولد باران قوم جلال خیل پوندہ سکنہ گل کچ حال شیخ اوتار روڈ ڈیرہ بعمر 36/35 سال مورخہ 19-10-2001 وقت 1600 بجے ہمراہ نعش مقتول اختر خان ولد باران قوم جلال خیل پوندہ سکنہ گل کچ بمقام سول ہسپتال رپورٹ کرتا ہے کہ امروز میں ہوٹل ازاں مہربان واقع ڈیرہ آڈہ پر موجود تھا کہ بوقت تقریباً 15:00 بجے مسمی اختر خان ولد باران قوم جلال خیل سکنہ گل کچ ڈاٹسن سے اترا اوررمضان کےہوٹل کی طرف روانہ ہوا۔ تو مسمی نازک خان ولد خانڈو قوم سلیمان خیل سکنہ گل کچ حال عمر اڈہ جو کہ پہلے سے ڈیرہ اڈہ پر موجود تھا اسکے پیچھے روانہ ہوا۔ جونہی اس کے نزدیک پہنچا تو نازک خان نے اپنے پستول 30 بور سے بہ نیت قتل اختر خان پر فائرنگ کی جس سے وہ لگ کر زخمی ہوکر گر پڑا اور جانبحق ہوا۔ وقوعہ کو میں نے اور اڈہ پر موجودگان نے بچشم خود دیکھا۔ وجہ عداوت یہ ہے کہ عرصہ تقریباً ایک سال قبل مقتول ، ملزم کے درمیان کسی

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بات پر تنازعہ ہوا تھا۔ یعنی رقم کے لین دین پر تھا۔ میں اختر خان کے قتل کرنے کابر خلاف نازک خان ولد خانڈومزکورہ بالا دعویدار ہوں۔

4. Haroon-ru-Rashid ASI, reduced report of complainant in shape of ***murasila,*** which was read over and explained to him, who after admitting it to be correct thumb impressed the same in token of its correctness, whereafter, he prepared the injury sheets and inquest reports of the deceased. Sent the ***murasila*** to Police Station through constable Muhammad Aslam No.186, while the dead-body of the deceased was sent for post mortem to the hospital under the escort of constable Rafiullah No.198. Amir Abdullah SI (PW-4) on receipt of ***murasila*** incorporated its contents in shape of F.I.R (Ex:PA) and sent the same to the Faridullah SI (PW-5) investigation officer, who rushed to the spot and in presence of complainant he prepared site plan Ex:PB, recovered one empty of 30 bore, vide recovery memo Ex:PC, blood stained garments of deceased vide recovery memo Ex:PC/1 and recorded statements of witnesses. On completion of investigation he submitted complete challan

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under section 512 Cr.PC, as at that time accused/ appellant was absconding. After arrest of accused/ appellant the S.H.O Imam Shah submitted supplementary challan Ex:CW1/1. Accused/ appellant was summoned from jail and after complying with provision under section 265-C Cr.PC, formal charge was framed against the accused /appellant on 28.09.2015, to which he pleaded not guilty and claimed trial. The prosecution in order to prove case against the accused/ appellant produced and examined as many as six PWs. Statement of accused was recorded under section 342 Cr.PC, on 19.05.2016, wherein he professed his innocence, neither he wished to be examined on oath as provided under section 340 (2) Cr.PC nor he opted to produce defence evidence. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 06.06.2016 convicted and sentenced the accused/ appellant Nazak as mentioned above. The convict Nazak filed this Cr.A No.35-D of 2016, while the Court has sent murder Reference against the appellant for its confirmation. The

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appeal alongwith murder reference are going to be decided through this common judgment.

5. Learned counsel for the appellant argued that there is considerable delay in lodging the F.I.R, which is fatal to the case of prosecution. It appears to have been lodged with due deliberation, consultation and preliminary investigation by the police. He further argued that complainant is alleged eye witness of the occurrence, but he was abandoned. The place of alleged occurrence is the front of Manzoor Hotel, but said Manzoor was not produced by the prosecution, therefore, non production of important witnesses goes to the roots of the case of prosecution. He vehemently argued that the learned trial court has wrongly relied upon the statement of complainant recorded during proceedings under section 512 Cr.PC, despite the fact that on 23.12.2015 the complainant was present, but his statement was not recorded and was abandoned being won over. He lastly argued that there is no legal evidence, which connects the appellant with the commission of offence, therefore, the learned trial court has committed serious illegality by awarding capital punishment

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to the accused, which is not maintainable and liable to be set at naught.

6. On the other hand learned Addl: A.G for the State and learned counsel for the LRs of deceased, argued that single accused is charged for murder of an innocent person in a broad day light, witnessed by a disinterested persons, whose statements are fully corroborated by the other materials, recorded during proceedings under section 512 Cr.PC, which is admissible under Article 47 of the Qanun-e-Shahadat Order and has been kept away by the appellant. He went on to say that the crime empty of 30 bore pistol was recovered from the place of occurrence, while the deceased received single firearm wound, which corroborate's the version of prosecution. He vehemently argued that the accused after the occurrence went into hiding and remained fugitive from law for a considerable period of long fifteen years. His further argument was that there is strong motive behind the occurrence, which is fully established. He lastly argued that ocular account, medical evidence and other circumstantial evidence are in corroboration and prima facie

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establish guilt of accused/ appellant, therefore, the learned trial court has rightly convicted and sentenced the accused/ appellant, which needs not to be interfered with. In alternate he prayed for remand of the case for proper transposition of the statement of PW Gandapur.

7. Arguments heard and record perused.

8. Before adverting to the present case, we would like to discuss the provisions of law, which provide exceptions to the general rule, that oral evidence must be direct. In view of this Court there are mainly two exceptions (1) Dying declaration (under Article 46 of the Qanun-e-Shahadat Order, 1984) and (2) statement recorded under section 512 Cr.PC read with Article 47 of the Qanun-e-Shahadat Order 1984.

9. The above mentioned two provisions are exceptions to ordinary rule of law, as evidence is to be recorded in presence of the accused as provided under section 353 Cr.PC. The above referred two categories of evidence take away the right of accused of recording evidence in his

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presence. Evidence/ Dying declaration can be treated as substantive evidence and accused can legitimately be convicted on the strength of the ibid statements, subject to certain limitations prescribed by the law. Both the above referred statements can be admitted in evidence without cross-examination.

10. Now adverting to the facts of the present case, in this case PW Gandapur lodged the report, though he has not named any person as witness to the tragedy, but during the course of investigation one Manzor was also examined. It is pertinent to mention here that after the occurrence appellant absconded and statement of PW Gandapur was recorded under section 512 Cr.PC on 17.05.2006. After arrest of the appellant supplementary challan was submitted and charge was framed on 28.09.2015. On 23.12.2015 PW Gandapur (the complainant) appeared before the trial Court and was brought to the dock by the prosecution, but was abandoned being won over through a joint statement duly signed by the complainant's counsel and District Public Prosecutor on the same day.

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For convenience section 512 Cr.PC is reproduced as:

"512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial, to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, of trial for the offence with which he is charged, if the dependant is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) Record of evidence when offender unknown. If it appears that an offence punishable with death or imprisonment for life has been committed by some person unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person

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who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Pakistan."

11. Depositions recorded under section 512 Cr.PC are relevant to the truth of facts, stated therein under article 47 of the Qanun-e-shahadat, which is reproduced below as:

"47. **Relevancy of certain evidence for proving, in subsequent proceeding the truth of facts therein stated.** *Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.*

Provided that--

The proceeding was between the same parties or representatives-in-interest;

the adverse party in the first proceeding had the right opportunity to cross-examine;

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the questions in issue were substantially the same in the first as in the second proceeding."

Article 47 of the Qanun-e-Shahadat Order, 1984 lays down certain limitations for admitting statement of witnesses in evidence recorded earlier in accordance with law. There are five instances, which are as under:

1. ***When the witness is dead;***
2. ***When he cannot be found;***
3. ***When he is incapable of giving evidence;***
4. ***When he is kept out of the way by the adverse party; and***
5. ***When his presence cannot be obtained without an amount of delay of expense which the Court considers unreasonable."***

12. While in the instant case, the point for determination is, when a witness to the lis, who is present in the Court, is abandoned by the prosecution being won over, whether his statement recorded under section 512 Cr.PC can be transposed? In our view, the answer is in **negative**, because of the reason that he does not qualify any of the five conditions provided by Article 47 of the Qanun-e-Shahadat

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Order, 1984, rather the same is in contravention of section 353 of the Criminal Procedure Code, wherein it is clearly embedded that evidence is to be recorded in presence of accused.

13. The word "shall" has been used in section 353 Cr.PC, which clearly manifests the intention of legislature. Section 353 Cr.PC is reproduced as under:

> ***"353. Evidence to be taken in presence of accused.*** ***Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."***

The only exception in the ibid provision 353 of the Cr.PC is that if accused waives his right by dispensing with his presence and is represented by pleader. In the present case learned trial Court adopted the procedure which is alien to the law provided under the Code as well as under the Qanun-e-Shahadat Order.

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14. There is no cavil to the proposition that cross-examination is indefeasible right of the accused, which

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cannot be taken away except in exceptional circumstances, as referred in the preceding paragraphs.

15. Contention of the learned counsel that the witness has been "Kept away" by the appellant is misconceived, as he was physically present before the Court instead of abandoning him the prosecution could have examined and would have declared him hostile in case he was not supporting the charge or case of the prosecution. Reliance is placed on case titled ***"Braj Ballabh V. Akhony, (AIR 1926 Cal 705)***, wherein it is held that, **when a witness, who has made a statement in a prior proceeding, is in collusion with a party and avoids appearance before a court in a subsequent proceeding, his previous statement may be proved. The proof, that the witness was kept out of the way, is essential for admission of his or her previous statement. The fact that a witness is kept out of the way by the adversary must strictly be proved.**

16. We will not subscribe to the submission of the learned counsel for the complainant that the trial court has

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not formally transposed the statement of complainant PW Gandapur and due to the reason, the case be remanded back for transposition of his statement, whose maker was present in the court and was abandoned being won over. In our view, this would amount to putting the cart before the horse, hence repelled.

17. In view of this legal position, the statement of complainant Gandapur, recorded during earlier trial, cannot be transposed in the event of presence of complainant before the court during subsequent trial and as he was abandoned him by the counsel of complainant and learned DPP, his previous statement could not be considered in subsequent trial against the appellant. From the available record that is the F.I.R and PM report shows the parentage of both the deceased and complainant as Baran, caste Jalal Khel Pawanda, though that has not been clarified in evidence, but parentage of the deceased and the abandoned PW/ complainant is same, then how, he was abandoned being won over as apparent from the record he appears to be the brother of the deceased.

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18. Further more, other merits of the case are concerned, it is alleged by the complainant that other people who were present in the adda have seen the occurrence, but no one has been brought before the Court, even one Manzoor, in front of whose hotel the occurrence took place has not been produced rather abandoned being witness of the same facts as PW Gandapur. If the complainant Gandapur, was not examined being won over, the witness of same facts namely Manzoor could have been produced, but the prosecution has withheld the best evidence and adverse inference can be drawn, that if he is produced he would also have not supported the prosecution version, as that of the complainant.

19. Mere fact that single accused is charged is not an absolute rule regarding his guilt, rather it is bounden duty of the prosecution to firstly establish presence of the witness who has allegedly seen the accused and secondly to believe the testimony of eye witnesses, requires strong independent corroboration to prove guilt of the accused. In the present case, the alleged eye-witnesses have not been produced rather abandoned, which gives a serious blow to the prosecution

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case. When there is no ocular account or circumstantial chain to connect the accused with the commission of offence, mere corroborative evidence in shape of recovery of crime empty, blood stained clothes, site plan, post mortem report, is of no help to the prosecution case.

20. Recovery of one crime empty of 30 bore from the spot is concerned, it is of no use to the prosecution because no weapon of offence has been recovered, same is the situation of motive which is a double edge weapon, cuts either way.

21. It is evident from the record that appellant/ accused Nazak remained absconder for a sufficient long time. In this part of the country people do abscond not because they are guilty, but because of fear and torture of the police. Even otherwise absconsion is not substantive piece of evidence, it is a corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case, where the evidence of eye-witness have been disbelieved being defective, while

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abscondence can neither cure the inherent defect of the ocular account nor by itself is sufficient to sustain conviction. In this respect reference can be made to case ***"Islam Badshah and two others Vs the State"(PLD 1993 Peshawar 7).*** There are plethora of judgments of the august Supreme Court that the abscondance per se is not proof of the guilt of an accused person and in which respect wisdom can also be drawn from the case **"Rasool Muhammad Vs Asal Muhammad and 3 others" (1995 SCMR 1373),** Again reference can be made to case **"Murad Khan and another Vs The State' (2003 P Cr. L J 1295) [Peshawar]**, where it has been held that in the absence of any other corroborative evidence, evidence of abscondence, even if found convincing would not be sufficient by itself to warrant conviction of accused on a charge of murder.

22. It is the centuries old principle of administration of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt. If any reasonable doubt arises in the prosecution case, the benefit of the same must be

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extended to the accused not as a grace or concession, but as a matter of right lest no innocent be punished.

23. Likewise, it is also well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicious mind is sufficient for acquittal of the accused. Reliance is placed on case law ***"Tariq Pervaz Vs the State" (1995 SCMR 1345).*** The same principle has been reiterated by the Hon'ble Supreme Court in ***Muhammad Akram's*** case ***(2009 SCMR 230)***, wherein it is held that:

> ***"13. The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit***

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of doubt not as a matter of grace and concession but as a matter of right."

24. The learned trial Court has erred in law by convicting appellant on the basis of such a weak type of evidence. It would not be safe to maintain conviction on the basis of such shaky and scanty evidence. Consequently, appeal is allowed appellant/convict Nazak is acquitted while murder reference is answered in negative, vide our short order of the even date, which is reproduced as below:

"For the reasons to be recorded later, Criminal Appeal No.35-D/2016 is accepted, the impugned judgment of conviction and sentence dated 06.06.2016 recorded by learned Sessions Judge, Tank is set aside and the appellant Nazak is acquitted of the charges levelled against him in this case. He shall be set free forthwith if not required in any other case.

2. Murder reference No.5-d/2016 is answered in negative."

Announced.
05.04.2017
Azam/P.S

JUDGE

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EXAMINER
Peshawar High Court Bench D I Khan
Authorized Under Section 97 of
Qanun-e-Shahadat-Act

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