

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Cr. A. No.40-D of 2012

Mehmood Alam

Versus

Hidayatullah etc.

JUDGMENT

Date of hearing 04.12.2018.

Appellant by: **M/S Saif-ur-Rehman Khan and
Muhammad Saeed Bhutta, Advocates.**

Respondent by: **Muhammad Ismail Alizai, Advocate for
respondent No. 1.**

State by: **Mr. Adnan Ali, Asstt: A.G.**

SHAKEEL AHMAD, J.- Hidayat-ullah son of Gohar Ali Shah, Kundi by caste, resident of village Amma-Khel Tehsil and District Tank, was tried for the murder of Aftab Ali and attempting at the life of Muhammad Alam complainant, Muhammad Nazif cousin of complainant and father of the complainant namely Muhammad Aslam, by the learned Sessions Judge, Tank in crime No. 150 dated 22.10.2008, registered under Sections 302/324/34 P.P.C at police station Mullazai. The trial Judge by the judgment dated 14.06.2012, acquitted Hidayat-ullah.

2. Through separate trial, vide judgment dated 05.01.2017, the learned Sessions Judge acquitted co-accused Muhammad Yusuf Shah s/o Gohar Ali Shah, on the same allegations with reference to crime No. 150,

dated 22.10.2008, registered under Sections 302/324/34 P.P.C, at Police Station Mullazai.

3. Complainant Mehmood has challenged acquittal of both the accused through Cr. Appeal. No. 40-D of 2012 and Cr. A. No. 04-D of 2017, respectively, we propose to decide both these appeals, through this single judgment as both these appeals have sprung out of one and the same crime report and same set of evidence involving identical question of law and facts.

4. The occurrence in which respondents were involved was alleged to have taken place on 22.10.2008 at 9 a.m. in front of baithak of the complainant situated at Amar-Khel within the jurisdiction of Police Station Mullazai Tehsil and District Tank. Initial report in shape of Murasila Ex. PA/1 was lodged by Mehmood Alam PW-8, subsequently incorporated into FIR Ex. PA. The matter was reported to Muhammad Hussian Inspector (PW-12) in emergency room of Civil Hospital, Tank, on 22.10.2008 at 10.30 a.m., stating that on the eventful day and time, he alongwith his father, his cousin Muhammad Nazif son of Mastan Ali Shah were sitting in front of his baithak. In the meantime, his cousin Hidayat-ullah Shah son of Gohar Ali Shah came and angrily asked him as to why he had not permitted them to connect wire from the transformer and slapped him in his face. His father and his cousin

Muhammad Nazif separated them. Hidayat-ullah went back to his home and after a while, he alongwith his brother Yusuf Shah armed with Kalashnikov came there and with the intention to kill fired upon them, on hearing fire shots, his brother Aftab Ali who was busy in his study inside baithak, came out and accused with the intention to kill him made firing upon him and severally injured him. After commission of offence the accused fled away from the spot. The injured Aftab was taken to the hospital in an official ambulance for medical treatment, but succumbed to his injuries, on the way to hospital. Besides, complainant, the occurrence was witnessed by his father Aslam and cousin Muhammad Aslam. Motive as alleged, was that the accused was stopped from taking connection from the transformer.

5. The prosecution evidence in this case consists of ocular version furnished by the first informant Mehmood Alam (PW-8), Muhammad Nazif (PW-9), Muhammad Aslam was given up. The other evidence pertains to the recovery of blood stained earth, 05 empties of 7.62 bore and two leads spent bullet from the scene of crime, the postmortem examination, FSL report Ex. PY and abscondence of accused.

6. Learned counsel appearing on behalf of the complainant took us through the ocular evidence, then

referred to the recoveries, FSL report and finally the postmortem report.

7. While dealing with the ocular accounts he submitted that they were natural witnesses. They gave reasonable explanation of their presence on the scene of crime. They were not inimical in any way to the respondents. It was further submitted that on the ground of relationship with the deceased their evidence is not to be discarded. Learned counsel argued that the eye witnesses account is corroborated by the recovery of blood stained earth and 05 empties of 7.62 bore which according to FSL report were fired from different weapons, which clearly suggests that assailants were more than one. Postmortem report (Ex. PM) further proved that the weapon used could be fire arms.

8. Learned counsel then challenged the reasons given by the trial Court for acquittal of the respondents and vociferously contended that these were contrary to the record.

9. The learned counsel representing the State supported the contentions of the learned counsel for the complainant and added that all the PWs are consistent on the mode, manner and place of occurrence, they were cross-examined at length but no dent could be caused in this statement.

10. We have also heard the learned counsel for the respondents at length who opposed the appeal on the ground that the trial Court acted in accordance with law and principles concerning the administration of criminal justice. He submitted that the ocular evidence did not inspire confidence, therefore, their presence on the spot was rightly disbelieved. He lastly contended that the impugned judgment is based on proper appreciation of evidence and needs no interference.

11. We have given our anxious consideration to the submissions made by the learned counsel for the parties and have gone through the record with their able assistance.

12. It is cardinal principle of criminal jurisprudence, which has been settled since decades by the apex Court of the country that when an accused is acquitted of the charge, he can be brought into barriers of jail when the findings of the learned Court acquitting the accused are proved to be perverse, arbitrary, whimsical, unreasonable, fake, concocted artificial, ridiculous, shocking, based on misreading of material evidence, on inadmissible evidence, on a view not possible to gather from the evidence on the record, highly conjectural, or based on surmises unwarranted in law. It is also settled that an accused, who has been acquitted is credited with

two advantages, one that is available to him of his innocence at the pre-trial stage and the other which is earned by him on the basis of the judgment of acquittal from a Court of competent jurisdiction. The following authorities noted below, are worth consideration in this regard:-

- (1) *Ahmad vs The Crown* PLD 1951 FC 107,
- (2) *Fateh Muhammad vs Bagoo and others* PLD 1960 SC 286, (3) *Abdul Majid vs Superintendent and Remembrance of Legal Affairs, Government of East Pakistan* PLD 1964 SC 422, (4) *Feroze Khan vs Captain Ghulam Nabi Khan and another* PLD 1966 SC 424, (5) *Usman Khan and others vs The State* PLD 1969 SC 293, (6) *Noora and another vs The State* PLD 1973 SC 469, (7) *Abdur Rashid vs Umid Ali and 2 others* PLD 1975 SC 227, (8) *Taj Muhammad vs Muhammad Yusuf and two others* PLD 1976 SC 234, (9) *Farid vs Aslam and 4 others* PLD 1977 SC 4, (10) *Ali Sher vs The State and 3 others* PLD 1980 SC 317, (11) *Mst. Habibunnisa alias Mst. Bivi vs Zafar Iqbal and another* 1981 SCMR 95, (12) *Capt. Mahmood Jan vs Madad Khan and another* 1981 SCMR 474, (13) *State through Advocate General, N.W.F.P . Peshawar vs Amir Nazar and others* PLD 1981 SC 286, (14)

Nazir Ahmad vs Muhammad Din and others
1981 SCMR 415, (15) *Ghulam Sikandar and*
another Vs Mamraz Khan and others PLD
1985, SC 11, (16) *Muhammad Mansha Kausar*
vs Muhammad Asghar and others 2003 SCMR
477, (17) *Khan vs Sajjad and two others* 2004
SCMR 215, (18) *Mst. Moodan vs Saifullah and*
2 others 2004 SCMR 923, (19) *Qamar Zaman*
vs Waseem Iqbal and 5 others 2004 SCMR
1209, (20) *Mst. Zahida Saleem vs Muhammad*
Naseem and others PLD 2006 SC 427, (21)
Abdul Majeed vs Mulazim Hussain and others
PLD 2007 SC 637, (22) *Barkat Ali vs*
Muhammad Asif and others 2007 SCMR 1812.

13. Keeping in view, these principles, we have examined the instant case and have not found any wrong having been committed by the learned Sessions Judge, Tank, while delivering the judgment of acquittal. We are in agreement with the view of innocence taken by the learned trial Judge.

14. Mehmood Alam (PW-8) the first informant is brother of deceased (Aftab Alam), Muhammad Nazif (PW-9) being cousin of the deceased is also relative. The learned trial Court has disbelieved presence of eye-witnesses on the spot. He has discussed evidence of each one of them and given cogent reasons for disbelieving

them. About complainant Mehmood Alam and PW Muhammad Nazif it is stated that they are highly interested and inimically deposed towards the accused/respondents. First reason for disbelieving them was that their presence on the spot was not natural, that had they been present at the spot they would have received some injuries by the bullets fired at them by the accused/respondents, though they were totally at the mercy of accused/respondents, they have tried to suppress their interestedness. Secondly, it was alleged by the prosecution that complainant, PW Muhammad Nazif and Muhammad Aslam (father of the complainant) were sitting in front of the complainant's baithak. In cross-examination PW-8 was asked to clarify their actual places on the spot, he replied that he was at point No. 4, Nazif at point No. 5 and his father was at point No. 6, but perusal of the site plan Ex. PW-3, reflects that their presence has not shown been in front of the baitakh, rather their presence has been shown towards Northern side of the baithak. Thirdly in cross-examination PW-9 stated that he is employed as PTC teacher since 01.09.1985 and was posted at GPS, Sultan Keroona Amma Khel. He further stated that during the days of occurrence, the school used to be started at 8.45 a.m. He admitted that there were no holidays in the school during those days. He added that he

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was on casual leave for two days. He further stated that he was granted leave for 22 & 23-10-2008, as he had to attend ploughing of his fields and his fields/lands are situated two mile away from the scene of offence. He had no business to be with the complainant at 9 a.m, which is the time of the incident, on that day there was no holiday. The prosecution has not brought anything in black and white to show that he was on leave on the day of occurrence. In the ordinary course this witness should have been in the school at the relevant time and if for the sake of arguments, even if it is admitted that he was on leave on that particular day, he should have been in his fields at the time of incident. His presence on this ground at the scene of offence is found to be doubtful.

15. Muhammad Aslam father of the deceased, was also cited as an eye witness of the incident but he was given up on the pretext that he is witness of the same fact and unnecessary. How could it be? A question for declaring him the unnecessary may not arise as being a father he is closely related to the deceased. His non appearance may show that he was not to support the prosecution story which definitely creates a lawful presumption against the prosecution that he would not have deposed in favour of the prosecution, if produced and

that he was, for being father, just named as an eye witness on the hope of securing his evidence.

16. No impartial evidence could have come from the neighbourhood to corroborate the prosecution case, which of course could have been available due to noise of fire. Such being the case, the indication and production of only interested and inter-related persons as witness out of whom one refrained from appearing as witness to support them, may not inspire confidence.

17. Another interesting feature of the case is that the accused had no motive to fire at the deceased. It was alleged by the prosecution that the accused was restrained from taking electricity connection by the complainant and the accused Hidayat ullah came to him on the day of incident, slapped in his face, thereafter, left the place and came back with his brother Yusuf Shah duly armed with Kalashnikov and fired at them, but they escaped unhurt without receiving a scratch in the incident though they were empty handed at the time of the incident and were totally at the mercy of the accused, they were left alive and selected to kill the brother of the complainant with whom they have no direct motive and so it may be inferred that the incident did not take place in the mode and manner, as it was alleged.

and

18. No doubt, FSL report Ex. PY depicts that 5 empties of 7.62 bore recovered from the spot were sent to FSL, where it was opined that these were fired from different weapons. The empties were recovered from the scene of crime on 22.10.2008, but sent to the FSL on 08.11.2002, admittedly, after sixteen days of the incident and no explanation what to speak of a plausible explanation was offered by the prosecution for sending the empties to FSL with inordinate delay. The record is even silent that who took the empties to FSL, even otherwise the same being corroborative in nature and if substantive charge is not proved it would be of no help to prosecution.

19. Again on the question of motive, the learned trial Court came to the conclusion that it was not established. It was alleged that the complainant had restrained the respondent from taking electricity connection from transformer, was shown as motive. The accused had nothing to do with the murder of Aftab Alam. They had come to commit murder of the complainant. If the respondents wanted to kill him by way of revenge, they could have easily killed him, but he was spared by the respondents for no apparent reason and killed his brother. Had the motive as alleged by the prosecution been correct, then complainant rather than his brother

would have been target of the two respondents who had came to the spot with fire arms.

20. Adverting to abscondence of the accused. No doubt they were absconder for quite sufficient time and were declared proclaimed offenders. It is by now settled that abscondence cannot be made basis for conviction, because the people do abscond out of fear to be killed in retaliation and to avoid torture at the hands of police. In this behalf reliance can be placed on the judgment reported as *Muhammad Sadiq vs The State (2017 SCMR 144)* wherein it was held that:

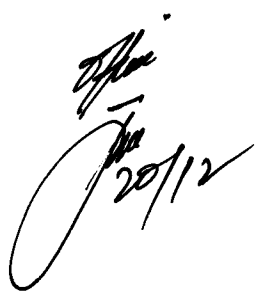
“abscondence of accused for about ten years. Such abscondence could not be made sole basis for conviction of accused when the other prosecution evidence was doubtful and riddled with contradictions.”

In this context, I am also fortified by the judgment reported as *Rohtas Khan vs The State ((2010 SCMR 566)*, wherein it was held that

“Abscondence of accused, no doubt, is a relevant fact, but it can be used as a corroborative piece of evidence, which cannot read in isolation but has to be read alongwith substantive piece of evidence.”

21. In view of the above legal position and state of evidence as discussed alone, we do not find any reason to interfere with the order of acquittal rendered by the learned trial Judge in this case. Consequently, this appeal and connected appeal No. 04-D of 2017, being bereft of merits, are hereby dismissed.

Announced.
Dt: 04.12.2018.
Minhas


JUDGE
JUDGE

(D.B)
Hon'ble Mr. Justice Ijaz Anwar
Hon'ble Mr. Justice Shakeel Ahmad