

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Criminal Appeal No.479-P/2021.

Shah Hussain..Vs..The State & another

JUDGMENT

Date of hearing: 23.11.2022.

M/s. Saif Ullah Khalil and Abid Qureshi, Advocates, for the
appellant.

Mr. Muhammad Nisar Khan, AAG, for the State.

Mr. Tafseel Khan Afridi, Advocate, for the complainant.



ISHTIAQ IBRAHIM, J:-This single judgment in the instant criminal appeal by convict/appellant, Shah Hussain, is also directed to dispose of Criminal Revision No.86-P/2021 under section 439 Cr.P.C for enhancement of the sentence of life imprisonment awarded to the convict/appellant and Criminal Appeal No.505-P/2021 filed by appellant/complainant Muhammad Farooq against acquittal of co-accused Jehangir as both the criminal appeals and criminal revision pertain to the same case vide F.I.R

No.540 dated 16.11.2017 under sections 302/324/34 PPC registered in Police Station Mathani, Peshawar.

2. Brief facts of the prosecution case are that complainant Muhammad Farooq son of Muhammad Hanif aged about 24/25 years brought the dead body of his brother namely Muhammad Irfan Ullah aged about 20/21 years in a private Suzuki to the Police Station Mattani and reported that on the day of occurrence he alongwith his deceased brother Muhammad Irfan Ullah had left their house and were going towards *Passani Bazar* on motorbike (United company and applied for registration) which was being driven by the deceased, when they reached to the spot, at 12:15 hours, accused, namely, Jehangir son of Muhammad Noor alias Hawaldar, Saeed Ullah son of Jalat Khan and Shah Hussain, their co-villagers who were already present there duly armed with firearms, on seeing them started firing with the intention to commit their *qatl-i-amd*, as a result whereof he/complainant escaped unhurt while his brother deceased Muhammad Irfan Ullah was hit and died on the spot with the firing of Jehangir. The complainant could do nothing being empty handed.

Motive behind the occurrence was stated to be dispute over womenfolk. The complainant charged all the three accused for the murder of his brother deceased Muhammad Irfan Ullah and for ineffective firing at his life. The report of the complainant was reduced into the shape of FIR Ex.PW3/1.

3. After registration of the case, initially *challan* u/s 512 Cr.P.C was submitted against all the accused after compliance of formalities u/s 204 and 87 Cr.P.C. After arrest of accused Saeed Ullah and Shah Hussain, supplementary *challan* against them was submitted by the prosecution. Accused Saeed Ullah and Shah Hussain were summoned who appeared before the Court on bail and the provisions of section 265-C Cr.P.C were complied while proceedings u/s 512 Cr.P.C was initiated against accused Jehangir as he was absconding. Thereafter, accused Saeed Ullah has died due to his natural death and proceedings against him was abated vide order dated 02.04.2019. Subsequently, accused Jehangir was arrested in the case and supplementary *challan* against him was submitted. Accused Jehangir was summoned who was produced before the Court in custody and the

provision of section 265-C Cr.P.C was complied with. Formal charge against accused Jehangir and Shah Hussain was framed to which they pleaded not guilty and claimed trial. The prosecution was directed to produce its evidence. In support of its case, the prosecution produced and examined eleven (11) witnesses.

4. After prosecution closed its evidence, statements of the accused were recorded under section 342 Cr.P.C, wherein, they refuted allegations of the prosecution and claimed their innocence. After hearing of arguments of learned Dy.P.P assisted by learned counsel for the complainant and learned counsel for accused, the learned trial Court/Additional Sessions Judge/Model Criminal Trial Court, Peshawar, rendered the impugned judgment dated 24.05.2021, whereby, appellant Shah Hussain was convicted u/s 302 (b) PPC for committing murder of Muhammad Irfan Ullah (deceased) and sentenced to undergo imprisonment for life. He shall also be liable to pay compensation under section 544-A Cr.P.C to the tune of Rs.500,000/-(rupees five lacs) to the legal heirs of

the deceased or in default to further undergo for simple imprisonment for three (03) years. Benefit of section 382 (B) Cr.P.C was also extended to appellant-convict Shah Hussain, hence criminal appeal for his acquittal by appellant-convict, and criminal revision for enhancement of the sentence by the petitioner/complainant. The learned trial Court acquitted co-accused Jehangir, hence criminal appeal No.505-P/2021 was filed by appellant/complainant Muhammad Farooq for setting aside the impugned judgment and to convict the acquitted co-accused Jehangir.


5. Arguments of learned counsel for the appellant and learned AAG assisted by learned counsel for the complainant heard; and record gone through with their valuable assistance.

6. The core question for determination before us is that as to whether the prosecution has been able to establish the presence of complainant Muhammad Farooq at the spot with the deceased at the time of occurrence beyond shadow of reasonable doubt. In this case, as per F.I.R the deceased was riding the motorbike and the complainant was pillion with him.

As per version of the complainant, they were proceeding from their house to *Passani Bazar* and on the way they were fired at by accused i.e. appellant Shah Hussain, Jehangir (acquitted co-accused) and Saeed Ullah (dead co-accused) who were already present on the spot duly armed with firearms. Admittedly, complainant/PW-6 is the sole eye-witness of the occurrence and there is no denial that conviction can be based on the testimony of a solitary eye-witness, as a rule of prudence, Court do not base a conviction on the evidence of a solitary eye-witness, unless that eye-witness is absolutely reliable or his evidence is corroborated by reliable evidence. If we look at the medical evidence i.e. the statement of the doctor and post mortem report Ex.PM the deceased has sustained 07 group entry wounds are on left back and right back of chest of the deceased while their corresponding exit wounds on the left front and right front of the chest. It is in the evidence of complainant/PW-6 that he spotted the accused while proceeding to *Passani Bazar* and the accused started firing at them. In the site plan prepared at the instance of the complainant, acquitted

co-accused Jehangir and appellant Shah Hussain has been shown at point No.3 and 5 and i.e. in the front of the deceased and the complainant. If it is interpreted other way around and for the time being it is assumed that the firing was made from the back even in that situation the survival of the complainant was also impossible. In other words whether firing is made from the front or back at the deceased, survival of the complainant with the deceased on the motorbike is beyond our comprehension and his presence cannot be believed in either situation. Though, in his cross examination complainant/PW-6 has stated that when the accused started firing he rushed to take refuge and remained at the place of occurrence. In our view this is an attempt on the part of the complainant/PW-6 at such belated stage to justify his presence which is not supported by the record of the case i.e. the *murasila*, site plan and even the statement of Investigation Officer (PW-7). The prosecution failed to prove the presence of the complainant/PW-6 on the spot at the relevant time beyond shadow of doubt, therefore, his statement is not worth consideration for basing the conviction of

the appellant-convict Shah Hussain and the accused/respondent Jehangir notwithstanding their respective roles. Therefore, we hold no hesitation in holding that the prosecution has miserably failed to prove the presence of the PWs. Reliance is also placed on "MUHAMMAD IRSHAD and another..Vs..THE STATE" (1999 SCMR 1030), wherein it is held that;



"It is evident from these circumstances that the complainant party was inimically disposed towards the appellant. The eye-witness examined by the prosecution are closely related to one and other and rule of prudence required that there should have been some independent corroboration available for placing implicit reliance on their testimony but the same is lacking and it would be highly unsafe to act upon the uncorroborated testimony of eye-witness examined by the prosecution, particularly when it is full of material contradictions"

7. The above statement shows that the occurrence had not taken place in the mode and manner as put forth by the prosecution. The statement of the complainant is not confidence inspiring and trust worthy. The prosecution has been miserably failed to establish the presence of complainant (PW-6) with the deceased at the place of occurrence. It seems that the occurrence is un-witness one. Reliance is placed

on 1999 SCMR 1220, titled "Muhammad Khan & other..vs..The State", wherein it is held that;

"It is axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been moulded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct perspective. It is unfortunate that neither the trial Court nor the High Court thoroughly studied the record so as to reach correct conclusion, rather they dealt with the matter in a very cursory manner which naturally resulted in miscarriage of justice. As noted above, the eye-witness account in this case is so unreasonable and inherently improbable that no amount of corroboration can rehabilitate it"

Further reliance is placed on **"Mst. SUGHRA BEGUM and another..Vs..QAISER PERVEZ and others"** (2015 SCMR 1142).

8. The learned AAG and learned counsel for the complainant referred to certain portion of the cross examination and contended that same are admissions. We will not subscribe to this contention of the learned AAG and learned counsel for the complainant for the reason that the prosecution has to stand on his own legs and charge is to be brought home from the evidence led by them during the course of trial. Any short coming, laxity or at times carelessness of the defence would not mean that the burden has been switched to the defence. The so-called admissions by the defence counsel during trial cannot be looked into and the same cannot be considered to be detriment of the accused as held by the Apex Court in the case of **"ABDUL KHALIQ V. THE STATE"** (1996 SCMR 1553), wherein it is held that;


"In his cross-examination P.W. Abdul Jabbar said that he saw from distance of 10/15 paces deceased Abdul Wahab being chased by Abdul Khaliq. That Khudaidad (acquitted accused) was simply standing there, armed with a pistol.

Abdul Jabbar admitted to the defence suggestion that he was informed by deceased Abdul Wahab that he was fired at by Abdul Khaliq and Khudaidad. This statement was sought to be used by learned Additional Advocate-General against the appellant, as his admission to the effect that he had fired at the deceased. Even if putting of such question in cross-examination by the defence counsel, amounts to an admission, the same cannot bind the appellant. In a criminal case an accused is not bound by the admissions made by his counsel. Reference can be made to the case of Sh. Abdul Hamid and another v. The State (1973 PCr.LJ 858)”

9. The Investigation Officer (PW-7), during spot inspection recovered and took into possession 06 empties of 7.62 bore from near the place of accused which were sent to the Forensic Science Laboratory (FSL) and the report whereof Ex.PA/1 is that the same were fired from one and the same 7.62 MM bore. The occurrence had taken place on 16.11.2017 and the Investigation Officer (PW-7) recovered 06 empties from the spot on the same day and the same were again sent to FSL on 02.07.2019 alongwith the *Kalashnikovs* recovered from accused Shah Hussain and Jehangir with a delay of about one year and eight months and

report whereof Ex.PZ/2 is that the same were fired from 7.62 bore SMG rifle No.1975 UN 7504 which was recovered from accused/appellant Shah Hussain. We find no difficulty to hold that the FSL report of the Forensic Science Laboratory, marked as Ex.PZ/2 cannot be given any weight for the reason that the empties were sent to the FSL and then again were sent to the Forensic Science Laboratory till the crime weapon were recovered and then *Kalashnikovs* and empties both were lying in the police station and, later on, were sent together and that too, after the delay of about one year and eight months of the occurrence. No explanation was offered as to where the same were lying during this period; therefore, no reliance can be placed on the FSL report as the possibility of substitution of the empties cannot be ruled out. Delay of one year and eight months in sending the empties and weapon of offence to FSL definitely destroyed the evidentiary value of the recoveries. In case of "Ali Sher and others v. State", reported in (2008 SCMR 707), it was held by the apex court that:-

“Crime empties allegedly found at the place of occurrence were sent to Forensic Science Laboratory along with the crime weapon 12 days after the recovery of alleged weapons. Delay had destroyed the evidential value of such piece of evidence and the recoveries could not be offering any corroboration to the ocular testimony”



10. So far as the recovery of crime weapon i.e. *Kalashnikov* from the possession of appellant Shah Hussain is concerned, appellant-convict Shah Hussain was charged for ineffective firing at the deceased and complainant. Moreover, appellant-convict Shah Hussain has allegedly pleaded his guilt in case F.I.R No.973 dated 11.12.2018 under section 15-AA of Police Station Mathani but that Order/judgment of the case u/s 15-AA wherein the appellant had pleaded guilty was not brought on the file of instant case through any prosecution witness. It is a well settled principle of law that while deciding criminal case evidence recorded in another case cannot be taken into consideration and the case should be decided on the evidence available on its own record.

11. Coming to Criminal Appeal No.505-P/2021 filed by appellant/complainant Muhammad Farooq against acquittal of co-accused Jehangir. The accused/respondent Jehangir was acquitted by the learned trial Court vide impugned judgment dated 24.05.2021. The prosecution has failed to prove the presence of the complainant with the deceased at the time of occurrence. We have disbelieved the presence of the complainant on the spot at the relevant time and the mode and manner of the occurrence, therefore, respondent/accused Jehangir has rightly been acquitted by the learned trial Court.

12. In views of above and considering overall circumstances of the case, criminal appeal No.479-P/2021 filed by appellant-convict, namely, Shah Hussain is accepted; and the impugned judgment dated 24.05.2021 of the learned trial Court, together with conviction of the appellant-convict and sentence awarded to him, is set aside; and appellant-convict Shah Hussain is acquitted of the charges. He be set free, forthwith, if not required in any other case.

13. Consequent upon acceptance of the criminal appeal (Cr.A No.479-P/2021) and acquittal of

appellant-convict, namely, Shah Hussain, Criminal Revision No.86-P/2021 by petitioner/complainant for enhancement of the sentence and Criminal Appeal No.505-P/2021 filed by appellant/complainant Muhammad Farooq against acquittal of respondent/accused Jehangir are dismissed.

Announced
23.11.2022


SENIOR PUISNE JUDGE


JUDGE

(D.B) *Hon'ble Mr. Justice Rooh-ul-Amin Khan & Hon'ble Mr. Justice Ishtiaq Ibrahim.*

(M. Iqbal, SSS)