

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr. A. No.279-P/2021

With Murder Reference No.8-P of 2021

Haris son of Aleem ud Din,
r/o Muhammad Zai Kohat.

Appellant (s)

VERSUS

Zahoor Khan son of Esmail,
r/o Muhammadzai, District Kohat.

Respondent (s)

For Appellant (s) :-

Mr. Shabbir Hussain Gigyani, Advocate.

For State :-

Mr. Muhammad Nisar Khan, AAG.

For Respondent (s).

Mr. Fawad Hussain, Advocate.

Date of hearing:

22.03.2022

JUDGMENT

ROOH-UL-AMIN KHAN, J:- Appellant Haris has filed the instant criminal appeal against the judgment dated 20.03.2021, passed by learned Additional Sessions Judge-VI/Child Protection Court, Kohat, whereby he having been found guilty of committing murder of Abdullah deceased, has been convicted under section 302(b) PPC and sentenced to death as Ta'azir and to pay rupees two lacs as compensation in terms of section 544-A Cr.P.C., to legal heirs of the deceased and in default thereof to further undergo six month simple imprisonment, in case FIR no.858 dated 26.06.2019, registered under section 302 PPC, at Police Station Cantt. Kohat.

2. For confirmation of death sentence of the convict Haris, the learned Trial Court has sent **Murder Reference No.8 of 2021.** Since, both the matters are the outcome of one and the same

judgment of the learned Trial Court dated 20.03.2021, therefore, we propose to decide and answer the same through this common judgment.

3. The prosecution's case as unfolded in First Information Report ("FIR") Exh.PW.12/1 is that on 26.06.2019 at 2035 hours, complainant Zahoor Khan (PW.10) along with his brother Faiz Ullah, in company of dead body of his son Abdullah deceased, reported to Gulzar Khan ASHO (PW.8), in emergency room of Kohat Development Authority (KDA) hospital Kohat, to the effect that on the eventful day i.e. 26.06.2019 at evening time "*Sham Vella*" he along with his brother Faiz Ullah was going towards Madrassa Amer Ma'aviah, situated in village Muhammadzai Kohat. They noticed at some distance his son Abdullah sitting with appellant Haris and busy in chit chat. They suddenly heard report of fire shot and saw appellant Haris running from the spot. They rushed towards his son Abdullah lying dead in the pool of blood. Their co-villagers attracted to the spot and lifted the deceased. He does not know as to why the appellant committed murder of the deceased. Report of complainant was recorded in the shape of Murasila Exh.PW.8/1 by Gulzar Khan ASHO (PW.8), which was thumb impressed by him as well as his brother Faiz Ullah as verifier. Gulzar Khan ASHO (PW.8), prepared injury sheet Exh.PW.8/2 and Exh.PW.8/3 of the deceased and shifted his dead body to the mortuary for postmortem examination under the escort of Constable Munawar Shah.

For the Prosecution

4. On 26.06.2019, Dr. Javed Ullah (PW.5), conducted autopsy on the dead body of Abdullah deceased and found the following injuries on his body vide postmortem report Exh.PM:-

1. Firearm entry wound on left hypochondrium size 11 cm with charring marks.

2. Exit wound on left lower back 2x2 cm.

Walla and peritoneum perforated. Stomach was injured. Spleen shattered and left kidney injured.

Opinion: According to his opinion death of the deceased occurred due to excessive bleeding from his spleen, left kidney and stomach leading to shock and death.

Probable time between injury and death is opined as: 30 to 60 minutes and between death and postmortem 30 to 60 minutes.

5. On receipt of copy of FIR, Yousaf Khan OII (PW.2), proceeded to the spot and prepared site plan Exh.PB on the pointation of complainant Zahoor Khan. During spot inspection, he secured bloodstained pebbles and bloodstained earth Exh.PA from the place of the deceased vide recovery memo Exh.PW.2/1 and one crime empty of 30 bore Exh.PB. Vide recovery memo Exh.PW.2/2 he took into possession the last worn bloodstained garments of the deceased having bullet mark Exh.PZ, recorded statements of the PWs under section 161 Cr.P.C. On 03.07.2019 Kariman Ali SHO (PW.6), arrested the appellant during raid on his house and recovered 30 bore pistol bearing No.1929, having fixed charger and two spare chargers containing 34 live rounds of the same bore from folding of his shalwar vide recovery memo Exh.PW.6/1. In this

Yousaf Khan

regard, he registered separate case under section 15 KP Arms Act 2013 against the appellant. He handed over the appellant to Muhammad Iqbal SI (PW.4) along with arrest card, who obtained two days physical custody of the appellant from the court of learned Judicial Magistrate. Moharrir of the Police Station handed over him the pistol recovered from the appellant and he sent the bloodstained articles, empty and pistol to the FSL vide application Exh.PW.4/3 and road certificate is Exh.PW.3/2 reports whereof are Exh.PK/1 and Exh.PK./2. He annexed copy of register No.19 with record which is Exh.PW.4/5. After completion of investigation he handed over case file to the SHO, who submitted challan against the appellant before the learned trial Court.

6. On receipt of challan by the learned Trial Court, the appellant was summoned and formally charge sheeted under section 302 PPC to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence, this appeal.

Learned Sam

7. We have heard the exhaustive submissions of learned counsel for the parties and perused the evidence and record with their able assistance.

8. According to FIR, occurrence in this case has taken place on 26.06.2019 at *Sham Vela*, which has been reported on the same day at 2035 hours, in emergency room of KDA hospital Kohat at by Zahoor Khan (PW.12), father of Abdullah deceased, wherein he has directly and singularly charged appellant Haris for murder of the deceased with firearm. No doubt, appellant is directly and singularly charged for murder of the deceased and substitution of accused in such like cases is a rare phenomenon, however, it has been held by the Hon'ble Supreme Court in case titled, "**Dr. Israr ul Haq vs Muhammad Fayyaz and another**" (2007 SCMR 1427), that such phenomenon depends from case to case. It is settled principle of law that for recording conviction strong and corroborative evidence of unimpeachable character is required and that findings of guilt against accused must not be based on probabilities to be inferred from evidence, rather, must rest surely and firmly on the evidence of unimpeachable character, otherwise, the golden rule of benefit of doubt would be reduced to naught. It is also settled principle of law that a witness who claims to be the eyewitness of the occurrence, must prove his presence at the spot at the time of occurrence and shall satisfy mind of the Court qua his presence through some physical circumstances or corroborative evidence. We are also mindful of the dictum laid down by the Hon'ble apex Court in case titled, "**Mst. Sughra Begum and**

another vs Qaisar Pervez and others” (2015 SCMR 1142), that ocular account in cases of Qatl-e-amd plays a decisive and vital role and once its intrinsic worth is accepted and believed then rest of the evidence, both circumstantial and corroborative, will be required as a matter of caution. To the contrary, once the ocular account was disbelieved then no other evidence, even of a high degree and value, will be sufficient for recording conviction on a capital charge, therefore, probative value of the ocular account has to be seen in light of the facts and circumstances of each case.

9. Taking the case in hand at the touch stone of the principles laid down by the august apex Court in the judgments (*supra*), we will evaluate first the ocular account furnished by Zahoor Khan (PW.10), who is father of the deceased. In this view of the matter his testimony has to be subjected to close scrutiny, whereas, PW Faiz Ullah, the other alleged eyewitness has been abandoned by the prosecution.

10. Zahoor Khan complainant while appearing as PW.10, in his examination-in-chief reiterated the same story as set forth by him in his initial report Exh.PW.8/1, which has already been referred in earlier part of the judgment, therefore, in order to avoid repetition the same is not reproduce, however, he added in his court statement that he came to know about motive behind the occurrence that the appellant was forbidding the deceased from friendship with one Hobaib. In cross-examination, he stated that he is an electrician by profession and during the days of occurrence was working at Kohat Tunnel whereas PW Faiz Ullah was employed at Babri

Looked into

cotton Mills Kohat, situated on Bannu road Kohat. From the statement of complainant it is manifest that he is a chance witness. As per ratio of judgment of the Hon'ble Supreme Court in case titled, **"Mst. Rukhsana Begum and others vs Sajjad and others"** (2017 SCMNR 596), chance witness was one who, in the normal course was not supposed to be present on the crime spot unless he offered cogent, convincing and believable explanation, justifying his presence at the spot. He has not mentioned clearly time of occurrence in his initial report Exh.PW.8/1 rather has disclosed it as "Sham Vella". He admitted it correct that he can read a watch. Neither in his report nor in his court statement the complainant has disclosed the name of any persons who attracted to the spot and lifted the deceased. He further stated that there were about 30 religious teachers and 100 students in the Madrassah Ameer Ma'avia and that his deceased son was also a student of the said Madrassa. In his report Exh.PW.8/1, complainant has not mentioned that that he witnessed the appellant while firing at the deceased, rather his assertion is that **"suddenly they heard report of fire shot and saw the appellant running from the spot"**. He has not uttered a single word that he witness the appellant while firing at the deceased. Similarly, he has also not mentioned that he noticed the appellant armed with pistol or any other arm, while running from the spot. While making dishonest improvement to bring his testimony in line with the prosecution case he in cross-examination denied the suggestion of defence that he had not witnessed the appellant while firing at the deceased. He also

Handwritten signature

contradicted the place of occurrence by stating that the same is not situated inside the guava orchard rather closed to the guava orchard, whereas, as per site plan the place of occurrence is situated inside the guava orchard. He also contradicted statement of Yousaf Khan OII (PW.2), who had conducted initial investigation in the case. As per statement of Yousaf Khan OII (PW.2), he prepared site plan on the pointation of complainant Zahoor Khan and during spot inspection secured bloodstained pebbles and one 30 bore crime empty. Contrary, complainant Zahoor Khan has stated in his statement that no crime empty was recovered by the I.O. in his presence during spot inspection. He further stated that distance between the street and the spot where his deceased son was fired at might be 7/8 feet and people of the village used the said street while going to Madrassah. Not a single person has been produced by him or examined by the I.O. to substantiate presence of complainant at the spot at the time of occurrence. Medical evidence also belies the testimony of complainant. He deposed that after receiving fire shot the deceased died there and then at the spot. Contrary, as per postmortem report Exh.PM and statement of Dr. Javed Ullah (PW.5), probable time between injury and death is 30 to 60 minutes, meaning thereby that the deceased at the most had not succumb to injuries at the spot. The peculiar facts and circumstances of the case discussed above convince a prudent mind that the deceased was shifted to the hospital in injured condition by the villagers where attendance of the complainant was procured and thereafter he lodged report. In support of our view we will refer to

Verdict

inquest report of the deceased wherein one Shahid (PW.11) and Sultan are the identifiers of the dead body of the deceased. Had the complainant and PW Faiz Ullah, father and uncle of the deceased present in the hospital the scribe of the Murasila and inquest report must have mentioned their names in the inquest report. Besides, it is admitted by complainant in his statement that distance between his house and the place of occurrence can be covered within 10 minutes while going on foot to the spot in normal routine. In this view of the matter, the complainant being not an eyewitness of the occurrence and did not know about its time has purposely mentioned at random the time of incident as "Sham Vela". Had he been present at the spot at the time of occurrence he would have narrated the accurate time of occurrence and actual condition of the deceased at the spot because.

11. On reappraisal of the testimony of complainant Zahoor Khan (PW.12), we are firm in our view to hold that he was not present at the time of occurrence, as such is a procured witness. He has not furnished any explanation, much less plausible, about his presence at the spot along with his brother at the time of occurrence. He has also failed to prove his presence at the spot at the time of occurrence through some strong physical circumstance. It is settled law that testimony of a chance witness is ordinarily not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time, because in normal course, the presumption under the law would be that such witness was absent from the crime spot.

Justice Sana

12. Adverting to circumstantial piece of evidence relied upon by the prosecution and believed by the learned trial Court i.e. recovery of 30 bore pistol No.1929 Exh.P.1, from possession of the appellant and positive FSL report about the said pistol with 30 bore crime empty allegedly recovered by Yousaf Khan OII/Investigating Officer (PW.2). As stated earlier, complainant Zahoor Khan ASI (PW.10), in his statement has categorically denied recovery of any 30 bore crime empty from the spot by the I.O. in his presence. Besides, the 30 bore crime empty has been shown recovered from the spot by the I.O. on 26.06.2019 but the same has not been sent to the FSL on the same day, rather was allegedly handed over by him to Moharrir of the Police Station for safe custody. The appellant has been shown arrested on 03.07.2019 by Kariman Ali SHO (PW.6) during raid on his house. Kriman Ali SHO (PW.6) deposed that on receipt of spy information about presence of the appellant in his house, on 03.07.2019, he raided his house, arrested him and recovered a 30 bore pistol No.1929 having fixed charger and two spare chargers containing 34 live rounds of the same bore from folding of shalwar of the appellant. In cross-examination he stated that he had not given copy of daily diary to the I.O. showing his departure and return to Police Station on 03.07.2019. He admitted that there were residential houses around the house of the appellant. He further admitted it correct that he has not associated any elder of the locality during raid and recovery proceedings. He also admitted it correct that the appellant had not made any resistance at the time of his arrest. Alam Zeb Khan IHC (PW.1) is marginal witness to

Learned Senior

recovery memo Exh.PW.1/1 vide which the above mentioned pistol and ammunitions were taken into possession by the I.O. Muhammad Iqbal SI (PW.4) has stated that he has not recorded statement of the SHO who had recovered the aforesaid pistol from the appellant and that he had not investigated ownership of the pistol in question. He admitted it correct that SHO only handed over him the appellant and his arrest card and not the pistol and ammunition etc. He further stated that on 04.07.2019, Moharrir of the Police Station handed over him the recovered pistol. Arrest of the appellant inside his house without associating any note-able of the area coupled with the factum of no resistance of the appellant, create the serious doubt about in the recovery of the alleged crime pistol because it does not appeal to a prudent mind that a person charged for murder would keep pistol in folding of his shalwar inside his house and will not make any effort to escape on noticing the police officials. In view of the above, we are firm in our view to hold that pistol and ammunitions shown recovered from the appellant is a planted piece of evidence on the part of the I.O. just to strengthen the prosecution's case. Besides, the alleged crime empty of 30 bore has been shown recovered from the spot on 26.06.2019 and the crime pistol on 03.07.2019. As stated earlier the empty has not been sent to the FSL on the same day i.e. 26.06.2019. Similarly, the pistol along with crime empty has also not been sent to the FSL on 03.07.2019, rather sent to the FSL on 09.07.2019. Where the empty and the pistol remained during the said period and whether these were in safe custody or otherwise, no explanation,

Aslam

much less plausible has been furnished by the prosecution in this regard. No doubt, FSL report Exh PK/1 about the crime empty and pistol is in positive but in a case titled **Ghulam Akbar and another Vs. The State (2008 SCMR-1064)**, it has been observed by the Hon'ble Supreme Court that law requires that empty recovered from the spot should be sent to the laboratory without any delay, failing which such recovery evidence would not be free from doubt and could not be used against the accused. Again in the case of **Jehangir Vs. Nazer Farid and another (2002 SCMR-1986)**, the receipt of crime empties in the Forensic Science Laboratory after seven days was not only condemned but it was treated as of no assistance to the prosecution or for that matter against the accused. Reliance is also placed on a case law titled **"Muhammad Younus Khan Vs. The State" (1992 SCMR-545)**. It was also observed in the case of **Attaullah and others Vs. The State (PLD 1990 Peshawar-10)**, that the crime empties should be immediately dispatched to Arms Expert and should not be kept by the Investigating Officer because in that case objection regarding manipulation of recovery will hold good. It is, by now, well established proposition of law that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed on the case of **"Jehangir vs. Nazer Farid and another" (2002 SCMR 1986)**, **"Israr Ali vs. The State" (2007 SCMR 525)** and **"Ali Sher and others vs. The State" (2008 SCMR 707)**.

Besides, when we have already disbelieved the ocular account, such mysterious recoveries would not be sufficient for recording conviction of accused in capital charge, because this type of corroborative pieces of evidence are always taken into consideration along with direct evidence. In case titled, "**Noor Muhammad Vs the State and another**" (2010 SCMR 97), it has been held by the august Supreme Court that recovery of crime empty or rifle with matching report of FSL is a corroborative piece of evidence, which by itself is not sufficient for conviction of the accused in absence of substantive evidence.

13. Motive part of the prosecution story also remained shrouded in mystery. Hobaid from whose company and friendship, the appellant was allegedly forbidding the deceased has neither been examined by the I.O. nor produced in the witness box. Similarly, no other proof in respect of motive has been brought on record by the prosecution.

14. As far as medical evidence is concerned, on one hand it is in conflict with the ocular version of the prosecution's case, while on the other hand, medical evidence is only supporting piece of evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not tell the name of the assailant. Reference in this context may be made to the cases of "**Muhammad Tasaweer versus Hafiz Zulkarnain and 2 others**" (PLD 2009 SC 53), "**Altaf Hussain versus Fakhar Hussain and another**" (2008

Conclusion

SCMR 1103) and “Mursal Kazmi alias Qamar Shah and another versus The State” (2009 SCMR 1410).

15. It is settled law that prosecution is duty bound to prove its case against the accused beyond any reasonable doubt and if any single doubt arises, benefit of the same must be given to accused as the accused is always considered a most favourable child of law. Guidance in this regard can be derived from case titled, “Tariq Pervaz Vs the State” (1995 SCMR 1345) and case titled, “Muhammad Akram Vs the State (2009 SCMR 230) and Faryad Alis case (2008 SCMR 1086).

16. The learned Trial Court failed to appreciate the evidence available on record in its true perspective, thus, has arrived at an erroneous conclusion by holding the appellant guilty of the offence, hence, the impugned judgment is not sustainable, as such, is liable to be set aside. Resultantly, this appeal is allowed. The impugned judgment along with conviction and sentence of the appellant recorded therein, is hereby set aside and the appellant is acquitted of the charge leveled against him. He be set at liberty forthwith, if not wanted to be detained in any other case.

17. On acquittal of the appellant-convict, the **Murder Reference No.08 of 2021**, sent by the learned Trial Court, is answered in the **Negative**.

18. These are the reasons of our short order of even date, which is reproduced below:-

For reasons to be recorded later on, we allow this appeal, set-aside the conviction and sentences of

Conclusion

appellant Haris son of Aleem ud Din, recorded under section 302(b) PPC, by learned Additional Sessions Judge-VI/Child Protection Court Kohat vide judgment dated 20.03.2021, and hereby acquit him from the charge leveled against him in case FIR No.858 dated 26.06.2019, under section 302 PPC, Police Station Cantt Kohat. The appellant be set at liberty forthwith, if not confined in any other case. On acquittal of the convict, Murder Reference No.08 of 2021, is answered in the

Negative.

Announced:
22.03.2022

Rooh ul Amin Khan
Senior Puisne Judge

JUDGE

DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge;
And Hon'ble Mr. Justice Ishtiaq Ibrahim