JUDGMENT SHEET

PESHAWAR HIGH COURT, BANNU BENCH

(*Judicial Department*)

Cr.A. No.145-B/2018

The State through A.G. KPK

Vs.

Faiz Ullah & 03 others

JUDGMENT

For Appellant: Mr. Shahid Hameed Qureshi, Addl: A.G.

For Respondent: Mr. Marghoob Hassan, Advocate.

Date of hearing: 29.4.2020.

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SAHIBZADA ASADULLAH, J.- At a trial held before learned Sessions Judge, Lakki, in case FIR No.442 dated 30.12.2014, registered under Sections 302/324/34 PPC at police station Tajori, District Lakki Marwat, the accused/respondents were acquitted vide judgment dated 26.4.2018, which has been assailed by the State through Advocate General, Khyber Pakhtunkhwa, Peshawar, through the instant appeal.

2. The prosecution story as disclosed in the FIR Ex. CW 1/1, registered on the basis of *murasila* Ex. PA/1, in brief, is that on 30.12.2014 at 1830 hours, complainant Ajmal Khan brought the dead body of his

son Hayat Khan and made report in the emergency room of civil hospital, Tajori to the effect that on the night of occurrence, he alongwith his son Hayat Khan was present in Mohibullah market situated in village Tajori, meanwhile, at about 1800 hours, their co-villagers accused Faizullah, Amin Khan, Amand Khan alias Muno and Hafiz ur Rehman, duly armed with Kalashnikovs came there and started indiscriminate firing at them with the intention to commit their *qatl-i-amd*, as a result of firing of the accused, his son Hayat Khan got hit and fell down, whereas he luckily escaped unhurt. After commission of the offence, the accused fled away from the spot. When he attended his son, by then he had succumbed to his injuries. Besides the complainant, the occurrence was stated to be witnessed by the people present on the spot. Motive for the offence is stated to be a dispute over women folk. On the report of complainant, instant case vide the captioned FIR was registered against the accused.

3. On completion of the investigation, complete challan was submitted before the trial Court.

Accused were charged for the offence to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as six witnesses, whereafter, the accused were examined under Section 342, Cr.P.C, wherein they denied the allegations and professed innocence, however, they did not opt to be examined under Section 340(2), Cr.P.C. In defence, the accused filed an application through their counsel for requisitioning the record mentioned therein, hence Zahid Niaz Incharge VRK and Rehman Ullah Khan No.16 were produced and examined as DW-1 and DW-2. The learned trial Court, after hearing arguments from both the sides, vide judgment dated 10.02.2017, convicted the accused Hafizullah alias Hafiz ur Rahman under Section 302(b) PPC and sentenced him to rigorous imprisonment for life with fine of Rs.2,00,000/-. He was also held liable to pay compensation of Rs.8,00,000/- to the legal heirs of the deceased in due shares as required under section 544-A, Cr.P.C. or in default thereof to further undergo six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to the convict,

however, co-accused Faizullah, Amin Khan and Amand Khan alias Mano were acquitted. The convict Faizullah assailed his conviction and sentence by filing Cr.A. No. 48-B/2017 before this Court. This Court vide judgment dated 09.10.2017, accepted the appeal, set aside the impugned judgment and remanded the case to learned trial Court for rewriting the judgment on the basis of evidence which the prosecution had already brought against all the accused. On receipt of the record, the learned trial Court heard arguments from both the sides and vide impugned judgment dated 26.4.2018, acquitted the accused/ respondents, hence this appeal.

4. Arguments heard and record perused.

5. It was on 30.12.2014 at 1800 hours when the complainant alongwith his son Hayat Khan was present in Mohibullah market situated in village Tajori, meanwhile, their co-villagers accused Faizullah, Amin Khan, Amand Khan alias Muno and Hafiz ur Rehman, duly armed with Kalashnikovs came there and started indiscriminate firing at them with the intention to commit their *qatl-i-amd*, as a result of firing of the

accused, his son Hayat Khan got hit, fell down and succumbed to his injuries, whereas the complainant luckily escaped unhurt. It is in the report that besides the complainant, the occurrence was witnessed by the people present on the spot. The complainant is the only eye-witness who was examined as PW-05, and the prosecution case hinges upon the testimony of this witness who is also father of the deceased. The relation between the two is so close that the Courts must be on guards while accepting the testimony of such a witness especially in the cases where capital punishment could be awarded. The complainant was examined as PW-05, who stated that after performing prayer he came out of the *Masjid*, and went to his house at 06.00 p.m where he was asked for purchase of house hold articles and for the purpose he came out from his house and reached to the shop where his son was standing. If this version of the complainant is accepted, then how it is believable that he was present on the spot at 6:00 p.m, which is also the time of occurrence. Similarly, complainant further stated in his cross examination that when he reached to the

market, his son Hayat Khan was already standing there and had not yet gone to the shop for purchase of any article. This was never stated by him in his report. We are also surprised to see that despite allegation of indiscriminate firing by four accused with the Kalashnikovs, how the complainant escaped unhurt, the explanation given by him does not appeal to prudence. The complainant further stated that when the Investigating Officer came to the spot, he was present on the road, on the other hand, Mamoor Khan ASI PW-6 stated that the complainant accompanied him from the police station to the spot. Though the complainant stated that after the occurrence they arranged a cot and datsun for the deceased and took the dead body to the hospital, however, he was unable to disclose the names of persons who arranged the cot and the datsun. Admittedly, the occurrence took place in a market and according to the complainant people were present at the time of occurrence, but none from them was cited as a witness, despite the fact that the place of occurrence was near the market, where at the time of incident the shops were

open but the Investigating Officer did not associate any one of the shop keepers to confirm the incident. Complainant admitted in his cross examination that at the time of occurrence Amanullah and Ghulam Muhammad were also present in the market and while shifting the dead body, they accompanied them to the hospital. These witnesses identified the deadbody before the police at the time of preparation of the inquest report and later on before the doctor when he was conducting the post mortem examination. The presence of these witnesses cannot be doubted on the spot at the time of occurrence as they were the people who accompanied the deadbody from the spot and their names were put in the calendar of the witnesses but during trial they were abandoned. The prosecution failed to explain that why these witnesses were not produced as both the witnesses who identified the deadbody were independent and disinterested, had they been produced would have told the truth, but their nonproduction gives an inference that they were not ready to support the false charge of the complainant against the respondent. The Article 129 (g)

of the Qanun-e-Shahdat Order, 1984 caters for the situation which reads as:

> **129. Court may presume existence of certain facts.** Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> **Illustrations**
>
> The Court may presume--
>
> (a)....
>
> (b)...
>
> (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

6. The prosecution came with an excuse that these witnesses could not be produced being close relatives of the accused and it feared that they would not support the prosecution case, but this explanation does not appeal to a prudent mind that had this been so then these witnesses would have not accompanied the deadbody to the hospital and would refrain to be witnesses of identification rather they whole heartedly rushed to the hospital but what can be gathered from is that, the complainant has brought a false charge against the respondents and the witnesses were not willing to

support the complainant. The law is settled that when the best possible evidence is withheld then its nonproduction will react against the prosecution with an otherwise inference. In this respect, reliance can well be placed on the case reported as **Lal Khan Vs. The State (2006 SCMR 1846)**.

7. 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 produced 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 molded, 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. Reliance placed on case reported as ***Muhammad Khan and another Vs. The State (1999 SCMR 1220)***.

8. Yet another damaging aspect to the prosecution case is non-recovery of even single empty from the spot notwithstanding the allegation that four persons made firing with Kalashnikovs. Even no explanation was furnished by the prosecution that why empties were not recovered from the spot. It is also an element of surprise that during spot inspection, no bullet marks were noted by the Investigating Officer in the surroundings of the spot. It touches the very roots of the case and cannot simply be brushed aside and that too for sustaining conviction on a capital charge.

9. The record further transpires that admittedly the deceased succumbed to his injuries on the spot, but his dead body was shifted to the hospital despite the fact that police station situates at a distance

of 1½ furlong from the spot. PW-2 Saif ur Rahman ASI, who scribed the report stated that the place of occurrence is situated in between the police station and hospital, so it is astonishing that why the report was not lodged in the police station, rather the dead body was shifted to hospital where report was lodged.

In case titled ***"Nazeer Ahmad and others Vs The State and others (2019 SCMR 594),*** wherein it is held that:

> ***"The FIR in respect of the incident in issue had not been lodged at the Police Station giving rise to an inference that the same had been lodged and registered after deliberations and preliminary investigation."***

10. While going through the judgment impugned herein, we found that there are other numerous infirmities in the prosecution case which have been highlighted by learned trial Court while recording acquittal of the accused/respondents. Besides, generally the order of acquittal cannot be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs

through the web of administration of justice in criminal cases is, that, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is casted upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, or the purpose of ascertaining as to whether the accused committed the offence or not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference.

11. For the reasons mentioned hereinabove, this appeal being without merit and substance is hereby dismissed.

Announced.
Dt: 29.4.2020.
Kifayat/PS*

JUDGE

JUDGE

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah