JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH
(Judicial Department)

Cr.A.No.132-B/2022

Amir Mehmood

Versus

The State and another

JUDGMENT

For appellant: M/S Qaidullah Khan Khattak and Qaiser Rahim, Advocates.

For respondents: Mr. Saif-ur-Rahman Khattak, Addl: A.G. for State.

Muhammad Rashid Khan Dirmakhel, Advocate for respondent No.2.

Date of hearing: **21.02.2023.**

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SHAHID KHAN, J.- Through captioned appeal, Amir Mehmood, hereinafter, the appellant/accused, has called in question legality & validity of his conviction through the judgment, dated, 15.7.2022, of learned Additional Sessions Judge, Banda Daud Shah, Karak, whereby, on conclusion of trial, in case FIR No.109, dated, 23.11.2018, under Sections 302/324 PPC, of police station Khurram, Banda Daud Shah, Karak, recorded his conviction

under Sections 302(b) PPC and sentenced him for life imprisonment with compensation of Rs.5,00,000/- under Section 544-A Cr.PC, or in default thereof to further undergo six months simple imprisonment. He was further convicted & sentenced under Section 324 PPC for five years imprisonment with fine in the sum of Rs.50,000/-, or in default thereof to further undergo simple imprisonment for six months. Both the sentences shall run concurrently. However, benefit of Section 382-B Cr.PC was extended accordingly.

2. The complainant has also filed Cr.Rev.No.43-B/2022 for enhancement of sentence of the appellant and the amount of compensation under Section 544-A Cr.PC, both these matters, being the outcome of one and same trial, therefore, are to be disposed of by way of this single judgment.

3. The prosecution's case, as set forth in the crime report, is that on the fateful date, day & time (23.11.2018 at about 1100 hours), complainant Mst. Kausar Parveen, in the company of her son Shaheed-ur-Rahman and co-

villagers, brought the dead body of her father-in-law Aziz-ur-Rahman, in a Pick-up, to the police station Khurram, Karak and reported the matter to the effect that on the eventful day, she with her son Shaheed-ur-Rahman and deceased father-in-law were irrigating their fields. At about 0945 hours, appellant/accused Amir Mehmood, equipped with firearm, came there and started firing at them with intention to commit their Qatl-e-Amd, as a result of it, Aziz-ur-Rahman got hit and died on the spot, whereas, the complainant and her son, luckily, escaped unhurt. After the occurrence, the appellant/ accused fled away. Motive for the occurrence is alleged to be nonpayment of debt of the shop.

4. On completion of the investigation, challan was drawn within the meaning of Section 173 Cr.PC and after doing the needful, it was sent up to the Court of competent jurisdiction for trial accordingly.

5. On commencement of trial, copies of the evidence (oral and documentary) were delivered to the appellant/accused within the meaning of Section 265-C Cr.PC, followed by,

confronted him with the set of allegations through a formal charge. He denied the subject allegations, pleaded not guilty and claimed trial.

6. The prosecution, to bring home charge against the appellant/accused, produced twelve (12) witnesses to substantiate its version. At the closure of the prosecution's account, the appellant/accused was confronted with the evidence so furnished through formal questionnaires within the meaning of Section 342 Cr.PC, to which he professed innocence and claimed to have been falsely implicated in the subject case. However, he neither wished to be examined on Oath as required under Section 340(2) Cr.PC nor intended to produce evidence in defence. On conclusion of trial, scanning of record with due assistance of learned counsel for the parties and learned prosecutor, the learned trial Court/Additional Sessions Judge, Banda Daud Shah, Karak, arrived at the conclusion that the prosecution has successfully proved its case against the appellant/accused without any shadow of doubt, hence, vide impugned

judgment, dated, 15.7.2022, recorded his conviction, as referred to above.

7. We have heard the arguments of the learned counsel for the parties as well as learned Addl: A.G. representing the State and have gone through the record of the case.

8. It is an established principle of law that each & every criminal case has its own peculiar facts and circumstances and the same seldom coincide with each other on salient features. Admittedly, it is an unfortunate incident in which father-in-law of the complainant, namely, Aziz-ur-Rahman lost his life after sustaining firearm injuries but to put the facts and circumstances in equilibrium with the touchstone of safe administration of justice, the Court has scrutinized the entire evidence made available on record while weighing the same on judicial parlance. It has been observed by the Court that the prosecution has led evidence in the shape of ocular, medical & circumstantial evidence, as well as investigation besides other attending circumstances.

9. The ocular account is consisted of the statements of the complainant, Mst. Kausar Parveen (PW-7) and Shaheed-ur-Rahman (PW-8). According to the aforesaid PWs of the ocular account, the appellant/accused duly equipped with firearm made firing at them, as a result of it, the deceased Aziz-ur-Rahman got hit and died on the spot.

10. PW-7 & PW-8 closely related to the deceased Aziz-ur-Rahman, as PW-7 is her daughter-in-law and PW-8 is his grandson, therefore, their evidence has to be appreciated with due care & caution. No doubt, the evidence of the closed related witnesses cannot be discarded on the mere ground of their relation with the victim but if, it is found that testimony of the related witnesses do not find corroboration from attending circumstances of the event or the conduct & demeanor demonstrated by them at the time of occurrence or just thereafter, as such, the same shall not be expected from a prudent person, then under such circumstances the evidence furnished by related witnesses is hard to be

accepted. At the touchstone of the above, we now take into consideration the testimony furnished by the prosecution consists of the PW-7 & PW-8.

11. The presence of PW-7 & PW-8 is doubtful at the place of occurrence. The alleged occurrence took place on 23.11.2018 at 0945 hours, the in between distance of the place of occurrence and the police station Khurram, Karak is about 10/12 kilometers, whereas, the FIR has been lodged on the same day at 1100 hours, i.e. after a delay of one hour and fifteen minutes. On this score alone, strong presumption can no way be ruled out regarding the element of consultation and deliberation.

12. PW-8 stated that he and his mother (PW-7) reached first to the deceased after the accused decamped. PW-3 reduced the report of the complainant (PW-7) in the shape of FIR Ex.PW-3/1, duly verified by PW-8. He also prepared injury sheet Ex.PW-3/2 and inquest report Ex.PW-3/3. Admittedly, PW-7 and PW-8 are not the identifiers of the dead body of the deceased before the local police as well as

before the doctor, rather it was identified by PW-4 Azizullah, Musadiq ur Rahman and Aziz-ur-Rahman son of Abdur Rahman, ironically, the subject witnesses other than Azizullah have not been produced. Admittedly, PW-4, Musadiq ur Rahman and Aziz-ur-Rahman son of Abdur Rahman are not the eyewitnesses of the occurrence. Similarly, PW-7 & PW-8 on their turn stated in their respective statements that after lodging the report in the police station they proceeded to their house, whereas, the deceased was taken to the hospital. PW-7 stated that due to grief she had not counted the number of fire shots made by the accused upon them. The caliber of weapon is also not mentioned in the FIR. PW-8 stated in his examination-in-cross that the accused was armed with Kalashnikov and he was acquainted with the same. He stated that the report was read over to him but he had not disclosed to the police that the accused was armed with Kalashnikov. Non disclosure of kind and bore of the weapon used in the commission of the offence despite the fact that PW-8 could identify the arms with its bores is

a strong circumstance which makes his presence at the fateful time on the scene of occurrence is highly doubtful.

13. Per statements of PW-7 & PW-8, Musadiq and Abdul Nawaz attracted to the spot after 6/7 minutes of the occurrence and thereafter many others also attracted to the spot. Musadiq arranged the cot and the dead body of the deceased was shifted to the police station in vehicle of Idrees by PW-7, PW-8, Musadiq, Azizullah and Abdul Nawaz. However, the Idrees, driver of the vehicle, Musadiq and Abdul Nawaz have not been produced as witnesses during the trial. If, they could furnish their account it would have strengthened the case of the prosecution; but not to produce them as prosecution witnesses, it has adversely affected its case in view of the provisions of Article 129, Illustration (g) of Qanun-e-Shahadat Order, 1984. It is now settled law not to produce material witnesses, an inference can be drawn that had they stepped into the witness box, they would have not supported the prosecution's case. The Hon'ble Supreme Court of Pakistan in

the case of ***"Muhammad Rafique and others v. State and others"*** **(2010 SCMR 385)** held as under:-

> "that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129(g) of Qanun-e-Shahadat Order can fairly be drawn that if PW would have been examined, his evidence would have been unfavourable to the prosecution".

14. Similarly, due particulars of the vehicle, as its registration number, kind & type, colour etc, are neither part & parcel of the investigation nor that of the trial. While proceeding to the police station, it has been fairly conceded that the blood of the deceased was oozing in the vehicle but strangely enough, the subject circumstantial evidence is not part & parcel of the investigation followed by the trial. The Investigation Officer for the reasons best known to him has not collected the signs and symptoms of the subject circumstantial evidence from the rear portion of the vehicle through which the victim was shifted to the police station. The doctor (PW-1) stated in his

examination-in-cross that according to his report, the injury sheet, postmortem report and bloodstained garments of the deceased were handed over to the police on 29.11.2018. PW-12 escorted the dead body to the hospital on 23.11.2018. He pointed out in his examination-in-cross that on the same day the bloodstained garments and post-mortem documents, etc were handed over to him and he further delivered the same to the I.O at about 03:30 hours. Similar is the statement of PW-1 who is marginal witness of recovery memo Ex.PW-1/1.

15. Weapon of offence i.e. Kalashnikov has been recovered on the pointation of the appellant/accused from his house vide recovery memo Ex.PW-2/9. It was sent to the FSL with previously recovered four crime empties of 7.62 bore and in this regard, the report Ex.PW-2/12 shows that the crime empties were fired from the same local made 7.62 bore rifle (smg). However, the prosecution has not complied the requirements of Section 103 Cr.P.C as the alleged Kalashnikov was recovered from the house of the appellant/accused, but no

independent witness was associated with the process of recovery and even lady constable was not associated for the subject purpose in order to respect the sanctity of chaddar & chardewari, as such, the recovery of the weapon of offence so alleged and presented by the prosecution is prima facie tainted with doubts.

16. Other than the above, the alleged recovered weapon of offence has not been substantiated to be registered with the quarter concerned in the name of the appellant/accused and no pain, whatsoever, has been taken to confirm the factum of its ownership, therefore, the possibility to plant the subject weapon against the appellant/accused can no way be ruled out. Besides, in case titled, ***"Saifullah v. The State"*** **(1985 SCMR 410)**, it has been ruled by the Hon'ble Supreme Court that:-

> "When there is no eye-witness to be relied upon, then there is nothing, which can be corroborated by the recovery".

17. The nonpayment of debt has been alleged as motive for the occurrence in respect of a grocery shop. However, the I.O (PW-9)

stated in his examination-in-cross that the complainant party has neither produced the debt register nor he asked about it during his investigation, therefore, it could safely be concluded that prosecution could not be able to prove the motive part of the story. The prosecution is not bound to setup motive in each & every case but once, it is alleged and not proved, then the ocular account is required to be scrutinized with due care & caution. It has been held in the case titled ***"Hakim Ali Vs. The State"*** (1971 SCMR 432), that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence.

18. The medical evidence can no way pin point the accused nor can establish the identity of the accused. It is hard fact that medical evidence can never be considered to be a corroborative piece of evidence and at the most can be considered a supporting evidence only to the extent of specification of seat of injuries, the weapon of offence, duration, the cause of death

etc. ***"Muhammad Mansha Vs. The State"*** **(2018 SCMR 772),** ***"Tariq Hussain and another Vs. The State and 04 others"*** **(2018 MLD 1573 [Federal Shariat Court]).**

19. So far as abscondence of the appellant/accused is concerned, it is common culture and tradition even in this part of country that after a person is nominated as an accused in a criminal case, irrespective of the factum to has been nominated falsely or truly, not only the nominated person even his other family members, disappear from the scene and avoid to appear till the patience, cooling period for the reason as not to be targeted by the members of the bereaved family. Other than it, time and again, it is settled law that conviction on abscondence alone cannot be sustained. Reliance placed on ***"Amir Gul Vs. the State"*** **(1981 SCMR 182).**

20. It is well settled law that accused person is presumed to be innocent till the time he is proved guilty beyond reasonable doubt and this presumption of innocence continued until the prosecution succeeded in proving the

charge against the accused beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. In the instant case, the prosecution has failed to prove the guilt of the appellant through the above standard of evidence.

21. Crux of the above discussion is that the prosecution has miserably failed to bring home guilt of the appellant through cogent and confidence inspiring direct or circumstantial evidence beyond shadow of reasonable doubt. The prosecution's evidence is pregnant with doubts and according to golden principle of benefit of doubt; one substantial doubt is enough for acquittal of the accused. Reliance placed on case titled, ***"Muhammad Zaman v. The State and others"*** **(2014 SCMR 749)**.

22. There is no second opinion about the fact that the elemental principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of the innocent

persons alongwith guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt, if, found reasonable would be sufficient to record acquittal of the accused, giving him/them benefit of doubt because bundle of doubts are not required at all to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of "**Riaz Masih alias Mithoo Vs. State (NLR 1995 Cr.SC 694)**.

23. For the afore-stated reasons, the subject appeal is accepted, the impugned judgment, dated, 15.7.2022, of learned trial Court/Additional Sessions Judge, Banda Daud Shah, Karak is set aside and the appellant/ accused Amir Mehmood is acquitted of the charges levelled against him by extending the benefit of doubt. He be set free forthwith, if not required, in any other case.

24. Since the impugned judgment regarding conviction of the appellant/accused has been set aside, therefore, connected Cr.Rev.No.43-B/2022 for enhancement of his

sentence has become infructuous and dismissed as such.

25. By our short order of even date, we had accepted the appeal of the appellant Amir Mehmood and acquitted him of the charges levelled against him. Hereinabove are reasons for the same.

Announced.
Dt:21.02.2023.

Imran/*

JUDGE

JUDGE

21.2.2023

(D.B)
Hon'ble Mr. Justice Sahibzada Asadullah
Hon'ble Mr. Justice Shahid Khan

03/3/2023

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