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

Cr.A. No.40-D/2022 with
Cr.M.No.23-D/2022.

Muhammad Uzair
Vs.
The State etc.

JUDGMENT

For Appellant: M/S Abdul Latif Khan Baloch,Muhammad Yousaf Khan, Ghulam Muhammad Sappal and Asad Aziz Mehsud, Advocates.

For State: Mr. Aamir Farid Saddozai, Asstt: A.G.

For Respondent: M/S Saleem Ullah Khan Ranazai and Ghulam Hur Khan Baloch, Advocates.

Date of hearing: **19.6.2023.**

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DR. KHURSHID IQBAL, J.- This judgment shall also dispose of the Criminal Revision No.03-D of 2022, as both the matters are the outcome of one and the same judgment dated 15.9.2022, rendered by learned Additional Sessions Judge-III, D.I.Khan, whereby the appellant has been convicted under section 302(b) PPC for committing *qatl-i-amd* of Khursheed Ahmad and sentenced to imprisonment for life and held liable to pay Rs.4,00,000/- as compensation to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. or in default thereof to undergo six months simple imprisonment. Benefit of

section 382-B, Cr.P.C has been extended to the convict/appellant.

2. The prosecution story as divulged from the FIR, registered on the strength of murasila, in brief, is that on 01.7.2020 at 20:30 hours, complainant Saud Khan (PW-12) brought the dead body of his brother Khursheed Ahmad to civil hospital, D.I.Khan, where he reported the incident to the local police that he alongwith his afore-named brother were proceeding from Kirri Shamozai to their house in a motorcar and at about 05:45 hours (Asar Wela) when they reached at Kirri Shamozai-Mangal Road near graveyard, the accused/appellant was standing there who signaled them to stop, whereupon his brother stopped the motorcar, deboarded therefrom and went to the accused, the accused took out his pistol and fired at his brother, who was hit and fell to the ground. After commission of the occurrence, the accused fled away; that he could do nothing being empty-hand; that he placed the injured in the motorcar and proceeded to civil hospital, D.I.Khan, however, the injured succumbed to his injuries on the way. Besides the complainant, the occurrence might have witnessed by someone. No motive was disclosed by the complainant. He charged the accused for the commission of offence.

3. On arrest of the accused and after completion of investigation, complete challan was submitted before the trial Court where at the commencement of trial, the prosecution produced and examined as many as thirteen witnesses, whereafter, statement of the accused under section 342 Cr.P.C, was recorded wherein he professed innocence and false implication, however, neither he wished to be examined under section 340(2) Cr.P.C, nor opted to produce defence evidence. The learned trial after hearing arguments, convicted the appellant and sentenced him, as mentioned above, which has been assailed by the appellant through the instant criminal appeal, while the complainant has filed the connected criminal revision for enhancement of sentence, which is being disposed of through this single judgment.

4. We have heard the learned counsel for the appellant, the learned A.A.G. assisted by learned private counsel for the complainant at length and with their able assistance, the record was perused from cover to cover.

5. Though the learned trial Court dealt with the matter comprehensively, by highlighting material aspects of the case while convicting the appellants, yet this being the Court of appeal is under obligation to re-appreciate the evidence, so

that miscarriage of justice could be avoided. This Court is to see; as to whether the approach of the learned trial Court to the material aspects of the case was correct and as to whether reasons advanced for convicting the appellants get support from the material available on file. We are conscious of the fact that if on one hand in case of single accused substitution is held to be the rarest phenomenon then on the other the Court deciding the fate of the accused is under obligation to search for independent corroboration and be vigilant while assessing the inherent worth of the evidence produced. It is advisable that the learned trial Court in case of a single accused must not be swayed with the impulse that substitution is a rare phenomenon and that it must not take it for granted that in case of single accused, the prosecution is not under obligation to prove its case and that once an accused is charged, he outrightly be declared guilty, if the trial Court travels with the impulse then the criminal justice system will always be in peril and in that eventuality one cannot think otherwise, but miscarriage of justice will always occasion which approach is neither permissible nor finds a room in the system, as Courts are the custodian of the rights of the parties and in all eventualities they will follow the guidelines provided and the principles evolved. In the

like situation, it is incumbent upon both the trial as well as the appellate Court to appreciate the evidence collected and after assessing the collected material the *lis* is to be answered so as to avoid miscarriage of justice.

6. It is the case of prosecution that on the day of occurrence, the complainant alongwith his brother Khursheed Ahmad (deceased) were proceeding from Kirri Shamozai to their house in a motorcar and at about 05:45 hours (Asar Wela), when they reached at Kirri Shamozai-Mangal Road near graveyard, the accused/appellant was standing there, who signaled them to stop, whereupon his brother stopped the motorcar, deboarded therefrom and went to the accused, the accused took out his pistol and fired at his brother, who was hit and fell to the ground. The complainant placed the injured in the motorcar for shifting to the hospital, however, he succumbed to his injuries on the way. In the present case, the ocular account of the incident was furnished by the complainant, who was examined as PW-12. We are conscious of the fact that no doubt mere relationship of a witness could not be a ground to discard his evidence, however, testimony of such witness is to be scrutinized with great care and caution, especially the

same should not be relied upon, without corroboration for sustaining conviction on a capital charge.

7. It is pertinent to mention that the incident in the present case allegedly occurred on 01.7.2020 at 05:45 hours, whereas the matter was reported at civil hospital, D.I.Khan on said date at about 20:30 hours. On the face of it there is delay of two hours and 45 minutes in reporting the incident which has not been plausibly explained by the prosecution. It is quite surprising that as per postmortem report of the deceased, firstly, in the column meant for "Whence brought: village.Thana, District" name of one Abdul Salam Khan son of Haji Alam Khan has been mentioned; secondly, the autopsy on the dead body of the deceased was conducted on 01.7.2020 at 08:05 hours. Now the question arises that if the complainant was present on the spot at the time of incident and had allegedly shifted the deceased, then injured, to the hospital, his name should have figured in the aforesaid column of the postmortem report. It is also quite surprising that the postmortem was conducted prior to the report. The afore-named Abdul Salam is identifier of the dead body, who was examined before the trial Court as PW-10. During cross-examination, he stated that he visited the hospital at his own and came from Ramak in a special vehicle. He stated that he has a

shop in village Ramak and on the day of occurrence he was present at said shop. He admitted that on his way reaching to hospital, he did not meet with the complainant. He reached the hospital after 08:30 p.m. According to him, when he reached the hospital, he thumb impressed the post-mortem report. He admitted that he alone came to D.I.Khan hospital. He also admitted that mouth of the deceased shown in the picture available on file was open. The above aspects could not simply be brushed aside as the same cut the very roots of the prosecution case inasmuch as same belied the presence of the complainant on the spot at the time of incident and thereafter in the hospital. In case titled **"Abdul Jabbar and another Vs. The State" (2019 SCMR 129),** it has been held that:-

> ***"At the cost of reiteration, it has been observed by us that, in a case, where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in lodging the FIR; the presence of eye-witnesses is not established; there are irreparable dents in the case of the prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from being proved and almost non-existent, the said Court fell in gross error in maintaining the conviction of the appellants particularly on a capital charge".***

8. It is pertinent to mention here as per deposition of Ghulam Habib (PW-2) and Atta-ur-Rahman (PW-8), they reached at DHQ Hospital D.I.Khan in two hours, however, no daily diary in this regard is available on the record. Even otherwise, as per deposition of PW-2, it was almost 5:30/6:00 p.m (Asar Vela) when he received information about the occurrence, whereupon he started for D.I.Khan hospital. In view thereof, he should have reached the hospital at 08:00 p.m, so when he reached the hospital, by then the postmortem on the dead body of deceased had already commenced and thereafter, the incident was reported at 08:30 p.m. This aspect of the case has also jolted the very foundation of prosecution case.

9. The complainant while appearing before the trial Court as PW-12, reiterated same story as narrated in the FIR, however, with regard to shifting of his brother, he stated that he shifted his brother into his car and proceeded towards DHQ hospital, D.I.Khan where the doctor apprised him that he had been died a while ago on the way, then he reported the matter. While perusing cross-examination of the complainant, it surprised us that as per his deposition, three hospitals fall on the way to civil hospital D.I.Khan, even then the deceased then injured was not

shifted there. The only inference which could be drawn therefrom, is that had the complainant been present at the crime scene and accompanied the deceased, then injured, in such eventuality, first priority of the complainant was that the deceased then injured should have been shifted to the nearest hospital in order to save his life by his brother, the complainant. Another astonishing aspect in the testimony of complainant is that according to him although he supported the deceased, then injured, in boarding him in the motorcar, however, his hands were not smeared with blood, notwithstanding the fact that *Qameez* and *Shalwar* of the deceased, then injured, were soaked with blood, as per the statement of Medical Officer (PW-7). Reliance in this regard is placed upon the case law reported as **"Bakht Nawas and another Vs. The State and another" (2020 YLR Peshawar 1685)**, wherein it has been held that, "*In case complainant was present at the spot, his clothes and hands would have been smeared with blood of the deceased in lifting him/shifting him to the hospital, but no such clothes had been produced before the Investigating officer. Said circumstances created serious doubts about presence of the complainant at the spot at the time of occurrence*". Even no blood was secured from the motorcar to

establish shifting of the deceased, then injured, to the hospital, as admitted by the complainant as well as the Investigating Officer (PW-11). PW-11 also admitted that in the entire investigation, he has not mentioned the fact that the hands or the clothes of the complainant were besmeared with blood; that no blood stains on the hands or on the clothes of the complainant were available.

10. Yet another intriguing aspect of the case is that as per deposition of the Investigation Officer, mouth and eyes of the deceased were open, which belies the presence of the complainant on the spot or in the hospital. In the case reported as **"Muhammad Rafique alias Feeqa Vs. The State" (2019 SCMR 1068),** it has been held by the apex Court that:-

> ***"What has further irked this Court is that in column No.9 of the Marg Report (Ex.PW 9/1), and even in the Post Mortem Report (Ex. PW 10/A), the mouth of the deceased has been stated to be open, which clearly indicates that the dead body was not attended to by his close relatives after being pronounced dead. However, the stance set up by the prosecution in the present case is that Arshad Ali- the brother, and Nazir Ahmad- the uncle of the deceased Muhammad Azam were present at the time of his death, and remained with him, even thereafter. Thus, the said posture of the deceased raises an adverse inference against the prosecution's version regarding the presence of the said persons at the place and time of occurrence".***

In another case reported as "Muhammad Asif Vs. The State" (2017 SCMR 486), it has been held that:-

> *"In column No.8 of the inquest report, the eyes and mouth of the deceased were found open, thus, if the parents, witnesses, and the two close friends were present then, at least after the death as is a consistent practice of such close relatives, they would have closed eyes and mouth of the deceased on his expiry. This fact by itself indicates that none was present with the deceased till his death and why his eyes and mouth remained open and were not set right by any one and his dead body was discovered late in the night".*

In view of the above, while disbelieving the ocular account so furnished by the complainant, we discard the same from consideration.

11. Another witness of the prosecution is the scribe of murasila, namely Ghulam Habib IHC, who was examined before the trial Court as PW-2. According to him, during the days of occurrence, he was posted at Police Station Chaudhwan. On the report of complainant, he drafted the murasila Ex. PA/1, which was read over to the complainant, who after admitting it correct signed the same, whereafter, he handed over the same to constable Abdur Rahman No.809, who took the same to Police Station for registration of FIR. He also prepared injury sheet and inquest report of the deceased and handed over the same alongwith the dead body to constable Atta-ur-

Rahman No.836 for postmortem examination. During cross-examination, he admitted that he received information in the Police Station about the incident from where he rushed to D.I.Khan hospital. However, he had not recorded his departure in the Daily Diary of Police Station. It is astonishing that when police officials are available at Reporting Center of DHQ Hospital, D.I.Khan round the clock, what prompted this witness to proceed to the hospital at D.I.Khan. Even he did not disclose that who informed him about the occurrence and on whose direction he went to DHQ Hospital, D.I.Khan for scribing the report. He also admitted that in the way there fall two hospitals i.e. THQ Hospital, Daraban and Mufti Mahmood Teaching Hospital, D.I.Khan. He was unaware about venue of occurrence. He further stated that as soon as he reached to the hospital, the complainant party also reached to the hospital. This deposition is belied by the statement of Atta-ur-Rahman constable (PW-8), who stated that the complainant arrived prior to their arrival at the hospital. He further admitted that the complainant party had not informed/visited the Reporting Center, D.I.Khan. He also admitted that he was not in contact with the complainant on telephone. He was confronted with his statement recorded under section 161, Cr.P.C. regarding handing over the

murasila to constable Abdur Rahman, preparing of injury sheet as well as inquest report and handing over the same to constable Atta-ur-Rahman, which was not so recorded therein.

12. So far as recoveries are concerned, same were allegedly effected from the spot on the following day of occurrence, however, there is nothing on record that after the occurrence till the time of spot inspection, the spot was secured by the police. In this view of the matter, presence of the alleged empties without being disturbed overnight also creates serious doubts about its recovery. In this respect, Muhammad Hanif Moharrir was examined before the trial Court as PW-5, who stated nothing about the empties or .30 bore pistol being handed over to him and only stated that on receipt of murasila, he chalked out the FIR Ex. PA. Although Juma Khan constable (PW-6) stated in his examination-in-chief that he took the case property to the FSL, however, during cross-examination, he admitted it correct that he was not in possession of any proof regarding his visit to the FSL alongwith the case property. Even copy of Register No.19 has not been placed on the record in this respect. In this view of the matter, the FSL report has lost its evidentiary value, which could not be relied upon for sustaining conviction and that too, on a capital charge. Moreso,

the said recoveries being corroborative piece of evidence could not outweigh the ocular account, which has already been disbelieved by us in the preceding paragraphs. In case reported as **"Nawab Siraj Ali and others Vs. The State through A.G. Sindh" (2023 SCMR 16),** it has been held that:-

> ***"This Court in a number of cases had held 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 looses its evidentiary value. Sending the crime empties together with the weapon of offence is not a safe way to sustain conviction of the accused and it smacks of foul play on the part of the Investigating Officer simply for the reason that till recovery of weapon, he kept the empties with him for no justifiable reason".***

In this respect, reliance can also be placed on the case law reported as **"Muhammad Bilal and another Vs. The State and others" (2021 SCMR 1039).**

13. The overall impact of what has been discussed above is that the prosecution has miserably failed to establish the case against the appellants, otherwise to extend benefit of doubt so many circumstances are not required to be brought forth. In this regard, guidance is sought from a judgment reported as ***"Tariq Pervez Vs. The State" (1995 SCMR 1345)***, wherein it has been held that:-

"The concept of benefit of doubt to any accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".

The above has been reiterated by the apex Court in a recent judgment reported as **"Ahmed Ali and another Vs. The State" (2023 SCMR 781),** wherein it has been held that:-

"Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as Tajamal Hussain v. The State (2022 SCMR 1567), Sajjad Hussain v. The State (2022 SCMR 1540), Abdul Ghafoor v. The State (2022 SCMR 1527 SC), Kashif Ali v. The State (2022 SCMR 1515), Muhammad Ashraf v. The State (2022 SCMR 1328), Khalid Mehmood v. The State (2022 SCMR 1148), Muhammad Sami Ullah v. The State (2022 SCMR 998), Bashir Muhammad Khan v. The State (2022 SCMR 986), The State v. Ahmed Omer Sheikh (2021 SCMR 873), Najaf Ali Shah v. The State (2021 SCMR 736), Muhammad Imran v. The State (2020 SCMR 857), Abdul Jabbar v. The State (2019 SCMR 129), Mst. Asia Bibi v. The State (PLD 2019 SC 64), Hashim Qasim v. The State (2017 SCMR 986), Muhammad Mansha

v. The State (2018 SCMR 772), Muhammad Zaman v. The State (2014 SCMR 749 SC), Khalid Mehmood v. The State (2011 SCMR 664), Muhammad Akram v. The State (2009 SCMR 230), Faheem Ahmed Farooqui v. The State (2008 SCMR 1572), Ghulam Qadir v. The State (2008 SCMR 1221) and Tariq Pervaiz v. The State (1995 SCMR 1345)".

14. For the aforesaid reasons, the prosecution has miserably failed to prove its case against the accused beyond a ray of doubt, therefore, the instant criminal appeal is allowed, the impugned judgment of conviction is set aside, resultantly, the appellant is acquitted of the charges levelled against him. He be released forthwith, if not required to be detained in connection with any other criminal case. Since we have accepted the captioned criminal appeal, the connected Criminal Revision No.03-D of 2022 has become infructuous which stands dismissed as such.

15. Above are the detailed reasons of our short order of even date.

Announced.
Dt: 19.6.2023.
Kifayat/ *

21/06

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Dr. Khurshid Iqbal