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

**Cr. Appeal. No.29-D of 2017**

**Inayatullah**

**Vs**

**The State**

Date of hearing	25.02.2019
For appellant	Mr. Abdul Latif Khan Baloch Advocate Mr. Saif ur Rehman Khan, Advocate.
For respondent	Muhammad Ismail Khan Alizai, Advocate.
For State	Mr. Illyas Ahmad Damani, Advocate

**JUDGMENT**

**SHAKEEL AHMAD, J.-** Inayatullah aged about 28/29 & Naimatullah aged about 29/30 were convicted under Section 302 (b) PPC and sentenced to life imprisonment and to pay a fine of Rs. 25,0000/- each or in default to undergo further six months simple imprisonment for the murder of Asmatullah, fine, if released was to be paid to the legal heirs of the deceased. Appellants have been further convicted under Section 324 read with Section 34 PPC and sentenced to suffer simple imprisonment for five years by Mr. Liaqat Ali, Additional Sessions Judge, Dera Ismail Khan by his judgment dated 08.04.2017. The convicts have brought criminal appeal No. 29-D of 2017 against their conviction and sentences, whereas the complainant Allah Wasaya has preferred Criminal Revision No. 09-D of 2017 for enhancement of their sentences.

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We propose to dispose of both these matters by this single judgment as both have sprung out of one and the same judgment dated 08.4.2017.

2. The prosecution story as unfolded in the FIR is that on 31.03.2015 at 13.00 hours, complainant Allah Wasaya (PW-7) reported the matter to the local police in emergency room of civil hospital Paroa, that he alongwith his deceased son, Asmatullah aged about 30/31 years were going to Jhoke Jehandeer to attend marriage ceremony of sons of Sona Khan. At 12.10 a.m, when they reached at Dus Dari Bridge on the road to Jhok Jhand, the accused namely Naqeebullah armed with pistol while Inayatullah armed with repeater (both sons of Ghulam Hussain by caste Ghanera), their co-villagers were coming from opposite side. On seeing them, they opened firing at them with intention to kill them, resultantly, Asmatullah got hit and fell down from the bridge into standing water while the complainant escaped un-hurt. After the occurrence, accused decamped from the spot, and upon his hue and cry people of the village attracted to the spot, who pulled out Asmatullah from water in injured/unconscious condition, then Asmatullah was brought to civil hospital through a private vehicle, however, he succumbed to his injuries before reaching to hospital.

3. The report was recorded by ASI Tasawar Hussain Shah (PW-8) who prepared injury sheet of the deceased Ex.PW-5/1 and inquest report Ex.PW-5/2, dispatched the

murasila Ex. PA/1 to police station through constable Ghulam Abbas, where it was incorporated into a formal FIR Ex. P.A.

4. On 31<sup>st</sup> March 2015, Dr. Abdul Rauf (PW-2) conducted the post-mortem examination on the dead body and found the following:-

**EXTERNAL APPEARANCE**

Condition of Subject

Stout wearing clothes

**WOUNDS**

1. An entry wound 5 mm in dia meter on left thigh above the left knee.
2. An entry 2 cm in dia near the wound No. 1.3 cm outwards.
3. An entry 4 mm in dia meter on right thigh.

**CRANIUM AND SPINAL CORD**

Healthy

**THORAX**

Healthy

**ABDOMEN**

Stomach healthy indistinguishable diet. Small intestines healthy containing digestive juices and large intestines healthy containing faecal matter. Bladder healthy and empty.

5. He opined that death was caused due to firearm injury on left femoral vessels leading shock and death. According to him, distorted bullet was recovered from left thigh, lastly worn garments of the deceased having corresponding cut marks were handed over to police, to him,

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probable time between injuries and death 30 to 45 minutes and probable time between death and PM fresh.

6. On receipt of Murasila, Ejaz Hussain Shah S.I (PW-11) conducted investigation. On arrival at the spot he prepared the site plan Ex. PB at the instance of eye witnesses. He recovered blood stained earth Ex.P-3, one pair of plastic chappal Ex.P-4 and two empties of .30 bore Ex.P-5 and 04 empties of 12 bore giving smell of fresh discharge in presence of Ahmad Bakhsh and Habib-ur-Rehman, searched house of the accused, but they made themselves scarce, and examined PWs. The warrants for the arrest of the accused under Section 204 Cr.P.C could not be executed, but it was returned unserved, applied for issuance of proclamation, made publication. On 20.04.2015, arrested both the accused. On their personal search, recovered one 30 bore pistol alongwith fitted magazine containing 07 live cartridges P-1 from accused Naimatullah and license of the pistol Ex.P.1-A. Likewise, from personal possession of accused Inayatullah recovered a repeater alongwith fitted magazine containing 05 live rounds Ex.P-2 and its license Ex. P.2-B, prepared pointation memo Ex. PB of the accused. Dispatched crime articles to FSL, placed its report on record as Ex. PK & PK/1 respectively. On completion of investigation, handed over the case file to the SHO for submission of challan.

ω 7. The motive for the crime as alleged by the complainant in the FIR is dispute over womenfolk.

8. It is alleged that the incident was witnessed by Allah Wasaya complainant (PW-7) and Ahmad Bakhsh (PW-8), Allah Wasaya is the father of the deceased and Ahmad Bakhsh is their caste fellow.

9. The accused had denied the allegations made by the prosecution against them and had pleaded not guilty to the charge. They produced no defence.

10. In support of its case, the prosecution at the trial relied upon the following pieces of evidence.

1. The ocular account furnished by Allah Wasaya (PW-7) and Ahmad Bakhsh (PW-8).
2. The evidence as to motive.
3. The incriminating recoveries, witnessed by Ahmad Bakhsh PW-8, and Fazal Raheem PW-9.
4. FSL report Ex. PK & PK/1.
5. The medical evidence.
6. Abscondence of accused.

11. It has been argued by learned counsel for the appellant that it is an unwitnessed crime; that Ahmad Bakhsh PW-8 has not been named as an eye witness in the crime report; that medical evidence does not support the ocular account; that nothing incriminating articles were recovered from personal possession of the accused; that the motive as alleged could not be proved; that abscondence is not sufficient to prove guilt of the accused. He lastly argued that prosecution

has failed to prove guilt of the accused beyond a shadow of doubt, and prayed for their outright acquittal.

12. On the other hand, learned counsel appearing on behalf of the complainant argued that the ocular account furnished by PW-7 & PW-8, site plan and medical evidence if placed in a juxtaposition are consistent. He next contended that recovery of crime weapon and its matching report with the empties fully supports the prosecution case. He further contended that PW-8 is a neutral and independent witness, he has no motive to falsely depose against the accused. He lastly contended that prosecution has proved its case against the accused beyond a ray of doubt, therefore, they deserve normal penalty of death.

13. Learned counsel appearing on behalf of the State added that after commission of offence, the accused remained absconder for quite sufficient time, which is a sufficient proof of their guilt.

14. We have heard learned counsel for the parties and have gone through the record with their eminent assistance.

15. The ocular account was furnished by Allah Wasaya PW-7 and Ahmad Bakhsh PW-8, the prosecution case hinges upon the credibility of testimony of these two prosecution witnesses. Keeping in mind the guiding principles laid down by the superior Courts for the safe administration of justice in criminal case

- (i) that an accused is presumed to be innocent till proved guilty;

- (ii) that prosecution is under obligation to prove guilt of the accused beyond a ray of doubt.
- (iii) that since accused being a favourite child of law has been given a license of telling the lies, which has also been recognized by the Courts, he cannot be punished for his flaws or falsities and his failure to prove the plea taken by him shall not strengthen the prosecution case or absolve it from the duty to prove the case on the strength of its own evidence.
- (iv) that if there is any doubt, of course, a reasonable and genuine doubt and not an artificial, the accused shall get its benefit not as a matter of grace or concession, but as a matter of right.

16. We proceed to evaluate the structure of the prosecution case and first of all deal with the initial report recorded in shape of murasila Ex. PA/1, subsequently incorporated into FIR Ex. PA. The prosecution case is that the occurrence took place dated 12.10 p.m on a metaled road of Dus Daripull, and after receiving the injury the deceased fell down from the bridge in the standing water beneath the bridge. PW-7 & 8 had seen the appellant causing the death of Asmatullah. At the trial, it is worth mentioning that the ocular account of evidence contained certain addition and

improvements as compared to the narration in the FIR, therefore, it is necessary to delineate upon it.

17. Admittedly, the complainant in his report recorded in shape of murasila Ex.PA/1 has not shown presence of Ahmad Bakhsh (PW-8) on the scene of crime, except him, and the deceased at the time of incident, as such the subsequent introduction of Ahmad Bakhsh (PW-8) in the prosecution's case, his examination as eye witness is a deliberate act with malafide intention and no credential value can be given to his testimony. Particularly, when it was alleged by complainant (PW-7) in his initial report recorded by the police that on his hue and cry people of the village attracted to the scene of crime who helped him in pulling out the body of his son from standing water, it does not appeal to a prudent mind that his name could be escaped by the complainant. Contrary to that, scanning of the statement of PW-8 reflects that he deposed that on the eventful day and time, he was proceeding to Paroa from his house and he has seen the incident with his own eyes and he helped the complainant in pulling out the body of his son and then subsequent proceedings including preparation of site plan were carried out before him.

18. From the above discussion, it can safely be held that Ahmad Bakhsh (PW-8) was introduced as an eye witness at a belated stage, after due deliberation and contemplation to



support the contention of the complainant. It is by now well settled principle of law that no value can be given to the evidence of witness, whose name does not appear in the crime report. Allah Wasaya complainant (PW-7) deposed that I had stated in my report that my son was shifted from the spot to the hospital in a Qingqi Rickshaw (confronted omitted). Apart from these, he introduced Ahmad Bakhsh as an eye witness by stating in his examination-in-chief that I immediately raised alarm on which one Ahmad Bakhsh was attracted to the spot he also helped me in pulling out my son from the semi watered area underneath the bridge, at that time, Asmatullah was unconscious. These facts were introduced for the first time in the deposition made before learned trial Court, which were not found in his initial report.

19. From the above position, it is clear that the complainant has improved his statement, from the statement which he had already made in the crime report and that too, by introducing new facts and Ahmad Bakhsh (PW-8) as an eye-witness. Had Ahmad Bakhsh been there, it does not appeal to reasons that he would have missed his name as witness. Improvements made by the complainant create serious doubts about his veracity and credibility. In this respect we are fortified by the judgments reported as *Amir Zaman vs Mehboob and others* (1985 SCMR 685), *Akhtar Ali's case* (2008 SCMR 6), *Khalid Javed's case* (2003 SCMR 149),

*Muhammad Shafique Ahmad vs The State (PLD 1981 SC 472), Syed Saeed Ahmad Shah and another vs The State (1993 SCMR 550) & Muhammad Saleem vs Muhammad Azam (2011 SCMR 474).*

20. In this behalf, reliance can also be placed on the case reported as *Sardar Bibi and another vs Munir Ahmad and others (2017 SCMR 334)*, wherein it was held that “dishonest and deliberate improvements and omissions made by the witness in unreliable and not trustworthy.”

21. Another interesting aspect of the case is that Muhammad Ashraf (PW-6) who is related to the deceased from maternal side deposed that:

I was at Paroa when I first of all got information about the death of deceased Asmat Ullah. The place of occurrence is at a distance of about 7 KM from Parao. I immediately proceeded to the spot on Quingqi and then brought the dead body to civil hospital Paroa. The dead body was examined by the medical officer at Parao Hospital at about 01:30 PM. I had taken the quingqi from Parao to the spot. When I reached the spot at first instance there was no police official available there.

22. He did not utter even a single word about presence of PW-7 & PW-8 on the scene of crime, his deposition totally falsifies presence of PW-7 & PW-8 on the scene of crime.

23. We noted that PW-7 & PW-8 deposed that after receiving firearm injuries the deceased fell down from the bridge in the standing water beneath the bridge. PW-8 stated in cross-examination that height of the bridge may be 4/5 feet higher than him, strange enough, falling from such a height, no injury was found on the body of the deceased, though there was a little water beneath the bridge but, neither clothes of the deceased nor injuries were found wet with water or mud by the police as well as by the doctor. PW-7 stated in his cross-examination that his cloth was stained with blood of his son when he picked and brought him to the hospital. He could have establish his presence on the spot by handing over such an important piece of evidence but he neither handed over his cloth to the I.O nor blood was noted by him on his cloth, it does not appeal to the prudent mind that such an important piece of evidence could have been ignored by the I.O which falsifies the presence of these PWs on the spot and suggests that occurrence has not taken in the manner or mode as described by the prosecution. Moreso, PW-8, is the resident of village Bhirki, he deposed that on the day of incident, he was going to Paroa but he has not stated that the reasons for what purpose he was going to village Paroa. He is a chance witness.

24. It was alleged by prosecution witnesses PW-7 & PW-8 that accused Inayat Ullah fired at the deceased from 12 bore shotgun while accused Naimatullah from 30 bore pistol. However, appraisal of post-mortem report and the deposition

of Dr. Abdur Rauf Khan, PW-2 does not reflect that injuries were caused by .12 bore shotgun. No pellet was found in the body of the deceased. Only a distorted bullet was recovered from his left thigh which too negates presence of these PWs on the spot.

25. After having considered the evidence of Allah Wasaya complainant PW-7 and Ahmad Bakhsh PW-8 carefully, we are of the opinion that no implicit reliance can be placed upon their testimony.

26. Coming to recovery of crime weapon and its matching report with the empties recovered from the spot, it was alleged by the prosecution that accused were arrested by PW-9 on 20.05.2015, and at the time of arrest, .12 bore shotgun alongwith license were recovered from the possession of accused Inayatullah, while .30 bore pistol and its license were recovered from possession of co-accused Naimatullah. Both these crime weapons alongwith empties were sent to FSL, where it was opined that empties of 12 bore were fired from .12 bore shotgun repeater, however, empties of .30 bore did not match with .30 bore pistol. As discussed above, no pellet injury on the body of the deceased was described in the post-mortem report. Therefore, its matching report would not help the prosecution, even otherwise, the recovery of crime empty or weapon with its matching report of FSL is a

corroborated piece of evidence, which by itself is not sufficient to convict the accused in the absence of substantive evidence. In this behalf reference is invited to *Ijaz Ahmad's Case (1997 SCMR 1279)*, *Asad-ullah Muhammad Ali's (PLD 1971 SC 541)*, wherein it was held by the August Supreme Court that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In *Saif-ullah's Case (1985 SCMR 410)*, it was observed that when there is no eye witness to be relied upon, then there is nothing which can be corroborated by recovery. In the present case, we have already disbelieved the ocular testimony as such there is no substantive piece of evidence which requires to be corroborated through the recoveries. Thus, the recoveries in the present circumstances of the case have no weight.

27. As regard to motive, though it was alleged by the prosecution that incident is result of dispute over womenfolk. Solitary statement of the complainant without any supporting evidence is unsafe to be relied upon. Thus the prosecution has failed to prove the motive. No doubt, prosecution is not bound to allege a motive, but once a motive is alleged, then prosecution is bound to prove the same, and failure to prove the same, then the prosecution must suffer the consequences and not the defence. In this behalf reliance can be placed on the case reported as *Muhammad Sadiq vs Muhammad*

*Sarwar (1979 SCMR 214)*, wherein it was observed that when motive is alleged but not proved then the ocular evidence required to be scrutinized with great caution. In *Hakim Ali's Case (1971 SCMR 432)*, it was held that the prosecution though not called upon to establish motive in every case, yet once it has set up a motive and failed to establish it, the prosecution must suffer consequence and not defence. In this behalf reference may also be made to the case reported as *Ameen-ullah vs State (PLD 1976 SCMR 629)*, wherein it was observed that where the motive is an important constituent and is found by the Court to be untrue, the Court, should be on guard to accept prosecution story.

28. As held above, the ocular account which forms the cornerstone of the prosecution case is devoid of the ring of truth, whereas this evidence is eliminated, the structure of the prosecution case tumbles down completely.

29. Now adverting to abscondence of the accused, suffice it to say that abscondence cannot be a substitute for real evidence because people do abscond though falsely charged in order to save themselves from agony of protracted trial or to be killed in retaliation. In this behalf reliance can be placed on the case reported as *Muhammad Khan and another vs The State (1999 SC 1220)*.


30. In the result, we would accept the appeal, set aside the conviction of the appellant and acquit them. They be set at liberty, if not required in any other case. Since the appeal of the accused/appellants against their conviction and sentence is allowed, therefore, criminal Revision Petition No.09-D/2017 fails and dismissed.

31. Above are the reasons of our short order of even date.

Announced  
Dt.25.02.2019  
Hasnain/\*

  
JUDGE

  
JUDGE

  
(D.B)  
Hon'ble Mr. Justice S.M Attique Shah  
Hon'ble Mr. Justice Shakeel Ahmad