JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.730-P/2011

Date of hearing: ***01.04.2015***

Appellant (s) : Ismail by Mr. Abid Ali Khan, Advocate.

Respondent (s) : Imtiaz complainant by Mr. Saifullah Khalil, Advocate and the State by Mr. Mujahid Ali, AAG.

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- Questioned herein is the judgment dated 22.10.2011, rendered by learned Additional Sessions Judge Lahor, District Swabi, whereby appellant Ismail, has been convicted under section 302 (b) PPC, for committing the murder of Sher Zaman deceased and sentenced to undergo life imprisonment as Ta'azir and to pay Rs.2,00,000/- (two lacs) as compensation to LRs of the deceased within the meaning of S.544-A Cr.P.C. or in default thereof to undergo 6 months S.I. further. He has also been convicted and sentenced under section 324 PPC for attempting at the lives of complainant and PW Imtiaz, to suffer 2 years R.I. and to pay a fine of Rs.10,000/- or in default thereof to

undergo 01 month S.I. Benefit of S.382-B Cr.P.C. has been extended to him.

2. The prosecution case in brief, as divulging from First Information Report is that on 15.11.2009 at 1920 hours, complainant Imtiaz (PW-10), in company of dead body of his brother Sher Zaman deceased, reported to local police in hospital Kahanda that on the fateful day he along with his brothers Akhtar Zaman and deceased had gone to village "Jalo Wand" for purchasing husk heap and on their return when reached near the shop of Jan Said, Ismail (appellant-convict herein), duly armed with firearm, emerged and opened fire at them with intention to do them away, resultantly, the deceased was hit and died on the spot while he and PW Akhtar Zaman luckily remained unscathed. An oral altercation inter-se the accused and deceased, a month prior to the incident, has been alleged as motive behind the incident. In addition to him, the incident is stated to have been witnessed by said Akhtar Zaman.

3. Report of the complainant was recorded in the shape of murasila Exh.PA/1 by Muhammad Hussain Khan ASI

(PW.3), on the basis of which FIR Exh.PA No.887 dated 15.11.2009 was registered against the accused-appellant under sections 302/324 PPC at Police Station Lahor District Swabi. He prepared injury sheet and inquest report of the deceased Exh.PM/1 and Exh.PM/2 and shifted the dead body to the mortuary for autopsy.

4. Dr. Asghar Ali Shah (PW.6) conducted postmortem examination on the dead body of the deceased on 15.11.2009 at 8.00 p.m. and found the following injuries on his person:-

1. Firearm entrance wound size about ½ cm on right side of back.
2. Firearm exit wound size about 1x1 cm on right side chest.
3. Firearm entrance wound size about ½ cm on lumber region on back side.
4. Firearm exit wound 1 cm on abdomen above umbilicus.
5. Firearm entrance wound on right side back lumber region size about 1 cm.
6. Firearm exit wound on right side abdomen size about 1 x 1 cm.
7. Firearm entrance wound on left side lega on calf size 1 cm.
8. Firearm exit wound on left leg front size about 1 x 1 cm.
9. Firearm entrance wound on left palm size about ½ x ½ cm.

10. Firearm exit wound on the palm left side 1 x 1 cm.

Opinion:- According to opinion of the Medical Officer, death of the deceased occurred due to firearm injury to vital organs like lungs and liver leading to hemorrhage shock and death. Probable time between injury and death has been observed "within few minutes" while between death and postmortem as "about 3 hours".

5. Afsar Said Khan SI (PW.13) proceeded to the spot and prepared site plan Exh.PB at the instance of eyewitnesses. During spot inspection he secured blood stained earth from the place of the deceased vide recovery memo Exh.PW.13/1. Vide recovery memo Exh.PW.13/2 he took into possession the last worn bloodstained garments of the deceased, sent the bloodstained articles to the FSL and receipt the report Exh.PK, initiated proceedings under sections 204 and 87 Cr.P.C. against the accused, recorded statements of the PWs under section 161 Cr.P.C. and after completion of investigation handed over case file to the SHO, who submitted challan in terms of S.512 Cr.P.C. against the accused/appellant.

6. After arrest of the accused/appellant and completion of necessary investigation, supplementary challan was submitted against him before the learned Trial Court, where he

was formally charge sheeted, to which he pleaded not guilty and claimed Trial. To prove its case, prosecution examined as many as fourteen witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above, hence, this appeal.

7. Learned counsel for the appellant argued that appellant is squarely innocent and has been implicated falsely; that the occurrence is unseen and PWs Imtiaz and Akhtar Zaman being real brothers of the deceased are procured witnesses; that none of them has received a single scratch much less any firearm injury despite in close proximity of the accused and at his mercy; no bullet marks has been observed on the walls behind them falling in fire line as shown in the site plan; that both the PWs have not stated a single word about kind of firearm with the accused in the initial report; that Wazir

Kaka from whom the PWs allegedly purchased the husk heap, has not been examined to establish the association of the PWs with each other on the fateful day; that both have badly failed to establish their presence on the spot through some physical circumstances of the incident; that medical evidence squarely belies the ocular account; that no empty has been recovered from the spot; that motive alleged remained unproved; that from the record the deceased was involved in so many criminal cases and having enmity with many people, therefore, he might have been killed by his enemies; that mere recovery of blood stained garments of the deceased and his autopsy report coupled with alleged recovery of Kalashnikov in other case without any FSL report to prove the same to be the crime weapon, would not advance the prosecution case as these pieces of evidence being corroborative are always taken into consideration with direct evidence, which in the instant case is discrepant, untrustworthy and suffering from material contradictions, hence, cannot be relied upon; that mere abscondance which too is a corroborative piece of evidence in absence of direct evidence would not be sufficient to prove the

guilt of the appellant. He contended that prosecution has miserably failed to bring home the guilt of the appellant through cogent and confidence inspiring evidence thus the learned Trial Court reached to erroneous conclusion by holding the appellant guilty of the offence, therefore, impugned judgment is liable to be reversed.

8. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant is directly and singularly charged for murder of the deceased in a promptly lodged report eliminating the possibility of consultation, deliberation and concoction; that being a broad daylight incident and parties well known to each other, question of mistaken identity does not arise; that there exist no reason to prompt the PWs to falsely charge the appellant but letting off the real culprit; that eyewitnesses have established truthful and straightforward account of the incident and defence failed to shatter their testimony; that recovery of blood from the spot, bloodstained garments of the deceased, the unnatural death of the deceased with firearm as per autopsy report corroborate the ocular account; that after the incident

appellant remained fugitive from law which is another circumstance proving his guilty conscious; that mere non-recovery of empties would not damage the prosecution case in presence of direct and substantive evidence. They while supporting the impugned judgment sought dismissal of the appeal.

9. We have given our anxious consideration to the respective arguments advanced from both the sides and perused the record carefully.

10. Record divulges that deceased had been done to death on a thoroughfare near the shop of one Jan Said at 1730 hours in the month of November for which the appellant has been directly and singularly charged. No doubt, the Hon'ble Supreme Court has held in so many judgments that substitution of single accused in a murder charge is a rare phenomenon, but still to put the rope around the neck of an accused charged singularly, there must be ocular account of unimpeachable character, trustworthy and confidence inspiring, corroborated by other material circumstantial evidence. Besides, the apex Court in case titled, **"Dr. Israr**

ul Haq vs Muhammad Fayyaz and another" (2007 SCMR 1427) has observed that substitution of innocent person when a single accused is named in a murder case is a rare phenomenon, but it depends from case to case. The ocular account of the incident has been furnished by complainant Imtiaz (PW.10) and Akhtar Zaman (PW.11), both brothers of the deceased. Admittedly, mere relationship of a witness with the deceased is not a valid ground for excluding his testimony from consideration, but it is equally settled principle of law that an eyewitness who claims his presence on the spot must satisfy the mind of the Court for believing his statement and placing implicit reliance over the same by some physical circumstances.

11. In support of his version Imtiaz complainant appeared as PW.10. In his examination in chief he reiterated the same story set forth by him in his initial report. He charged the appellant for murder of the deceased as well as attempting at their lives. In cross-examination he totally negated his own version by deposing that he lodged report/murasila Exh.PA/1 on the spot and signed the same there and then before the

I.O. Same is the version of PW Akhtar Zaman who stood as rider on the murasila. He deposed that he signed the murasila Exh.PA/1 as a rider on the spot. Contrary to their version, according to murasila the same had been recorded by Muhammad Hussain Khan ASI (PW.3) in the hospital on the report of complainant. PW-3 has not stated a single word about any report of the complainant on the spot. No such report lodged by complainant on the spot, is available on the file, so in the circumstances, the very report of the complainant in the hospital is highly doubtful. In the site plan Exh.PB the appellant has been shown at point No.2 at a distance of seven paces from complainant at point No.3 and at a distance of 8 paces from PW Akhtar Zaman at point No.4. None of them has disclosed the specific kind of weapon in possession of the appellant at the time of incident despite such close proximity. In cross-examination both admit that they can differentiate between different types of weapons like pistols, Kalashnikov etc. So if they were able to differentiate and recognize different types of weapons, why did not they disclose specifically the kind of weapon allegedly used by the appellant in the

commission of offence, is a disturbing circumstance creating doubt about his presence on the spot, for which no plausible explanation has been furnished by them. Besides, Complainant has been shown at point No.3 at a distance of single space from PW Akhtar Zaman at point No.4 and their inter-se distance with the appellant has been shown as 7, 8 paces, but none of them has received a single scratch much less any firearm injury nor any bullet marks has been observed on the walls behind them i.e. shop of Jan Said. It is not the case of the prosecution that the PWs took shelter any where during the incident, so if they were at the mercy of the accused who was mentally prepared to do them all away, why were they let off, is another crucial circumstance creating doubt in a prudent mind about presence of the alleged eyewitnesses because no assailant would take a risk in such eventualities to leave evidence behind him or to leave a risk of revenge in future. Complainant in cross-examination deposed that he himself placed the dead body of the deceased on cot, in which process his hands and clothes smeared with the blood of the deceased. No such clothes have been taken by the I.O. in to possession

nor produced by the complainant to him to establish his presence on the spot. No independent witness has come forward from the nearby house to depose about presence of the alleged eyewitnesses on the spot. At least Jan Said shop keeper should have been examined by the I.O. in proof of presence of the PWs, but he has neither been examined nor cited as witness. Akhtar Zaman PW.11 deposed that they purchased husk heap from one Wazir Kaka and village Jalo Wand, but said Wazir Kaka has not been examined by the I.O. He should have been examined at least to prove the association of the PWs with the deceased and neither their visit to his village. All the above discussed circumstances, cast serious doubts about presence of the alleged eyewitnesses with the deceased at the relevant time of incident.

12. Yet there is another aspect of the case, which totally negates the ocular account. According to alleged PWs and as shown in the site plan the deceased was facing towards the accused at the time of incident, but as per autopsy report, the deceased has sustained all the entrance wounds from back to front, which belies the alleged eyewitnesses. If we presume

that a human cannot remain static in such situation and the deceased might have changed his position during firing, but at least he should have been received one injury from front in which circumstances, the above proposition then would be appealable to a prudent mind, but such is not the case herein. In view of the above discussion we are of the firm view that both the alleged eyewitnesses have not witnessed the incident and the occurrence has not taken place in the mode and manner as alleged by the prosecution, rather in some other mode.

13. No crime empty has been recovered from the spot. During court statements both the alleged eyewitnesses just to bring in line their testimony with the circumstance of non-recovery of the empties, deposed that after the occurrence, people who attracted to the spot removed the empties, which amounts to intentional dishonest improvement as not a single word has been uttered by them in the initial report. So far as recovery of blood, bloodstained garments of the deceased autopsy report wherein deceased met unnatural death due to firearm injuries and Kalashnikov allegedly recovered from the

appellant in other criminal case, are the only corroborative and confirmatory pieces of evidence, which in absence of direct evidence would not be sufficient to prove the guilt of the appellant. In this regard reference can be made to **Riaz Ahmed's case (2010 SCMR 846).** As per the dictum of the apex Court, 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. Wisdom in this regard may be derived from **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541).** It has been held by the apex Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410),** that when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery. Similarly, in case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730,** the honourable apex Court held that recovery of crime weapon by itself is not sufficient for conviction on murder charge. The same view has been expressed by the apex Court in **Saifullah's case (1985 SCMR 410).**

14. No doubt, proceedings under section 512 Cr.P.C. were initiated and completed against the appellant, however, he has denied his abscondence in his statement under section 342 Cr.P.C. It is settled law that abscondence alone, cannot be a substitute of real evidence. It has been observed by the apex Court in **Farman Ali and others' case (PLD 1980 SC 201)** that abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused. Mere abscondence of accused would not be enough to sustain his conviction. Reliance can also be placed on case titled, **"Muhammad Vs Pesham Khan (1986 SCMR 823).**

15. For the forgoing reasons, we are of the firm view that prosecution has miserably failed to bring home the guilt of appellant through cogent and confidence inspiring evidence beyond shadow of doubt. The prosecution evidence is pregnant of doubts and according to golden principle of benefit of doubt; one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while

dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Wisdom in this regard can also be derived from the judgments of the apex court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**. In the instant case, the prosecution evidence is highly discrepant, full of infirmities and doubts. The learned trial Court has not evaluated the evidence in its true perspective and thus reached to an erroneous conclusion by holding the appellant guilty of the offence. Resultantly, this appeal is allowed. Convection and sentences of the appellant are set aside and he is acquitted of

the charges leveled against him. He be set at liberty forthwith, if not required in any other case.

16. These are reasons of our short order of even date.

Announced.
01.04.2015

J U D G E

J U D G E

maintained that the learned Trial Court has the jurisdiction to entertain the suit and in case of decision of issue of the jurisdiction in favour of the petitioners, after conclusion of trail, it would be

respondent to suffer and she is ready to face the consequences of such scenario. He while supporting the impugned orders, sought dismissal of the instant petition.

5. Come what may, the issue raised, being a mixed question of law and fact, can properly be resolved, after recording pro and contra evidence of the parties by the learned Trial Court. In view of the above, the impugned orders of both the courts below are set aside and the matter is remanded to the learned Trial Court with the direction to frame a specific issue (qua) jurisdiction, if already not framed, to afford an opportunity to the parties for leading their evidence and then to decide the suit on merits in accordance with law. The learned Trial Court shall conclude the trial as early as possible, but not later than 4 months, on receipt of the record. Office shall ensure