Judgment Sheet

PESHAWAR HIGH COURT, MINGORA BENCH/
DAR UL QAZA, SWAT

JUDICIAL DEPARTMENT

JUDGMENT

Cr.A. No. 113-M/2015

Date of hearing .... 06.03.2018.

Appellant: (Sardar Ali) by Mr. Rashid Ali Khan, Advocate.

Respondents: *(Hameedullah & 2 othrs and The State) by Mr. Sher Muhammad Shangla, Advocate and Mr. Suliman Khan, State counsel.*

MOHAMMAD IBRAHIM KHAN, J-.

This is a criminal appeal preferred by the Appellant/complainant Sardar Ali under section 417 (2-A) Cr.P.C read with Paragraph 10 (8) of the Sharia Nizam-e-Adl Regulation 2009 calling for setting aside of the judgment dated 07.5.2015 rendered by the learned Sessions Judge/Zila Qazi Shangla Camp Court at Swat, whereby the accused/Respondents No. 1 to 3 Hameedullah, Farman Ali and Rahat were acquitted of the charges leveled against them in case FIR No. 191 dated 22.9.2013 charged under sections 302,34 PPC registered at Police Station Besham District Shangla.

2. The prosecution story as advanced through '*Murasila*' Ex. PW-5/1 followed by lodging of First Information Report Ex. PW-7/1 would reveal that the complainant Sardar Ali (PW-1) on 22.9.2013 at 09:00 hours at the venue of crime (mountain) known as Ranjay situated within the local limits of Bar Butyal Besham District Shangla reported the matter to the police that he along with his father by the name of Ahmad Khan as usual early in the morning were busy in cutting of grass. In the meanwhile, all of a sudden accused Farman, Hameedullah sons of Muhammad Umar and Rahat son of Sartaj came there. Amongst these accused, Hameedullah was armed with shotgun and on seeing them started firing upon his father Ahmad Khan (deceased) with the intention to commit his *Qatl-e-Amad*, as a result of these fire shots his father was hit on different parts of his body and died at the spot. The occurrence was stated to be witnessed by the complainant. He also advanced specific motive which was a dispute over women-folk. These narrations of the complainant were reduced into *'Murasila'* and later on its basis FIR

ibid was lodged against the accused/Respondents.

3. The Investigation Officer, Muhammad Saeed ASI (PW-10), who upon receipt of information visited the spot along with other police '*Nafri*', where corpse of the deceased was lying and the complainant Sardar Ali (PW-1) reported him the matter. He dispatched the *'Murasila'* for registration of the case to the concerned police station and prepared injury-sheet and inquest report on the dictation of the SHO PW-5 and sent the dead body of the deceased to the hospital for postmortem examination. He prepared site plan at the instance of the complainant. The Investigation Officer as such carried out all the necessary proceedings in shape of Ex. PW-10/1 to Ex. PW-10/11 and upon completion of investigation, complete *challan* was submitted against the accused/respondents in the Court of learned Zila Qazi Shangla. After compliance of the proceedings under section 265-C, Cr.P.C the trial was formally commenced.

4. When charge-sheeted by the learned trial Court on 25.11.2013, each of the accused/Respondent did not plead his guilt and claimed trial. In order to bring home charges against the accused/Respondents, the prosecution examined the complainant/sole eyewitness of the occurrence Sardar Ali as PW-1, Abdur Razzaq as PW-2, Muhammad Hussain as PW-3, Rashid Ahmad as PW-4, Sher Hassan Khan SHO as PW-5, Fazal Hussain DFC as PW-6, Ziarat Khan Constable as PW-7, Anwar Zada Constable as PW-8, Dr. Khalil-ur-Rahman as PW-9 who has conducted postmortem of the deceased Ahmad Khan and Muhammad Saeed ASI as PW-10, who has conducted investigation in the present case.

5. After closure of the prosecution evidence, accused were examined under section 342, Cr.P.C, wherein they denied the charges, professed innocence and stated to have falsely been implicated in the case. They, however, did not wish to produce defence nor to examine themselves on oath as required under section 340(2), Cr.P.C.

6. On conclusion of the trial in Sessions Case No. 81/2 of 2013, the learned Sessions Judge/ Zilla Qazi Shangla Camp Court at Swat was not impressed with the evidence put-forward by the prosecution, thereby acquitted the accused/Respondents vide the judgment dated 07.5.2015,hence the present appeal.

7. Having heard arguments of learned counsel for the complainant (Appellant), learned counsel for the acquitted accused/Respondents and learned State Counsel appearing on behalf of the State, requisitioned record was delved deep into with their valuable assistance.

8. It appears from the record that initially the law of the land was put into motion when the complainant Sardar Ali being the sole eyewitness of the occurrence reported the matter to the local police that on the doomful day he (complainant) in the company of his father (deceased Ahmad Khan) were busy in cutting of grass as usual early in the morning in the mountain known as Ranjay situated at Butyal Besham. In the meanwhile, abruptly the accused/Respondents came there. Amongst

whom the accused Hameedullah was armed with shotgun and on sighting them he started firing upon his deceased father. Due to which he was hit on different parts of his body and died at the spot. The occurrence was witnessed by the complainant and he also advanced specific motive which was stated to be a dispute over women-folk. It is basic principle of administration of criminal justice that whenever there is sole eyewitness of the occurrence who being closely related to the deceased being his real son then in such circumstances his testimony qua guilt of the accused should have been taken with extra care and caution, as such solitary piece of evidence could make or break the case of prosecution. The complainant Sardar Ali though reiterated his stance taken in the *'Murasila'* followed by lodging of the First Information Report, yet during cross-examination he has admitted that at the time of occurrence the distance between him and the deceased was 5 feet and keeping in sight the place of occurrence which was admittedly a mountain as per site plan Ex. PW-10/1 being

situated at remote far-flung area, for sake of arguments how could the accused would spare the sole eyewitness being son of the deceased who could depose against them during trial especially when there was previous enmity in between the parties on account of dispute over women-folk. So, the mode and manner of the occurrence as advanced by the complainant is not appealable to prudent mind. In the context of the present case the testimony of PW-2 Abdur Razzaq would also be of paramount importance as he was introduced none else but the complainant himself to be the person who soon after the alleged firing upon the deceased father attracted to the spot. Who stated in his examination-in-chief that on the day of occurrence he was going to Besham Bazar in order to purchase grocery for his house and when crossed the place of occurrence near the turn he saw the accused Hameedullah duly armed with shotgun in the company of co-accused Farman and Rahat were fleeing from the venue of crime. Yet during cross-examination he deposed that he saw the accused from a distance of about 50/60

feet and when the accused were decamping from the spot they were visible to him from back side and they were also looking towards him, meaning thereby, that from such long distance how could this PW spotted the accused/Respondents with such clarity especially when the occurrence took place at mountainous area. This PW further stated in his cross-examination that on the next day of the occurrence at about 4:30 hours when the police were gathering information from the local villagers about the occurrence he met with them and on query narrated the whole story. Here the question arises, that why this PW kept mum for one day and reported the matter to the local police with such considerable delay.

9. The above contradictions and improvement makes the story of prosecution doubtful. The rule for safe administration of justice is that improvements made by an eyewitness in order to strengthen the prosecution case, lose their credibility and evidentiary value and when a witness made contradictory statement or changing his version to suit the

situation, if found to be deliberate and dishonest, would cause serious doubt on his veracity qua guilt of the accused. In this regard, reliance is placed on the case law cited as "***Farman Ahmad vs. Muhammad Inayat" (2007 SCMR 1825).*** In a case of this nature where there is contradiction in the ocular version being furnished by a sole eyewitness of the occurrence qua other corroborative/supporting evidence then it becomes duty of the prosecution to establish its case through cogent and convincing evidence, which element is missing in the present case. There is no denial of the fact that even testimony of a single eyewitness would be sufficient to bring home charges against an accused/person but when such an eyewitness made improvements and his version did not match with the actual occurrence, rather his testimony whisk off his presence from the spot and it prima facie seems that the occurrence was unseen and un-witnessed and the assertion of the complainant being sole eyewitness is not appealable to prudent mind then such ocular evidence is of no use to the prosecution which

has rightly been discarded by the learned Trial Court.

10. It is also an admitted fact floating on the surface of the record that the sole eyewitness of the occurrence is the real son of the deceased Ahmad Khan whether his testimony would fall under the category of 'interested witness' who advanced the whole story just to strengthen the case of murder of his father being committed by unknown accused/persons at mountainous area, thereby introduced himself as an eyewitness. In this context, the conduct of the complainant is also worth of to be looked into as it is story of the prosecution that the deceased Ahmad Khan was done to death through fire shots by the accused, yet at the relevant time no signs of resistance have been shown by the complainant in order to at least save his father from the grasp of assailants, rather he became a mere spectator, so, such kind of attitude of the complainant being sole eyewitness and real son of the deceased is beyond understanding of natural human conduct.

11. When ocular-account being furnished by sole eyewitness is not of such a caliber to be relied upon, the other corroborative and circumstantial evidence will come into field in order to prove the guilt of accused/Respondents. As per version of the complainant his deceased father was killed by the accused Hameedullah through fire shots of shotgun held by him at the time of occurrence and allegedly the accused made three (3) fire shots upon the deceased Ahmad Khan coupled with the fact that the complainant/eyewitness remained at the spot with the corpse of his deceased father till arrival of the police to the venue of crime. Yet during spot inspection no crime empty has been recovered, which totally negates the stance of prosecution as if the deceased was done to death by the accused Hameedullah with his shotgun and he would have made three (3) fire shots upon the deceased then there should have been crime empties existed on the spot. As the complainant was present at the spot till arrival of the police and nobody in his presence would dare to remove the crime empties from the place

of occurrence. So, this element too makes the case of prosecution doubtful.

12. During cross-examination PW-10 Muhammad Saeed Khan ASI admitted that the accused Hameedullah made judicial confession before him and further stated that the alleged weapon of offence was kept by him in the house of his relative Nisar. So, when the police party in the company of accused went to the house of Nisar, who came out of his house and stated that the gun is in possession of Sarbali Khan. Later on, the said gun i.e. weapon of offence was recovered from the house of Sarbali Khan. But for reasons best known to the prosecution the alleged witnesses of the recovery of weapon of offence i.e. shotgun Nisar and Sarbali Khan have not been produced as witnesses during trial proceedings.

13. Similarly, the version of prosecution is not supported by medical evidence being furnished by PW-9 Dr. Khalil-ur-Rahman who admitted during cross-examination that this possibility cannot be ruled out that between the death and postmortem of the deceased 9/10

hours had been passed. But as per assertion of the complainant in the FIR the occurrence had taken place on 7:30 A.M early in the morning while the report was lodged on the same day at 9:00 A.M. Likewise, the postmortem of the deceased was carried out on 10:25 A.M, so, if the duration between the death and postmortem of the deceased is taken as 9/10 hours then the occurrence might have been taken place during dark hours of the night. This deposition of the PW-9 during cross-examination goes against the version of prosecution. No doubt the motive is double edged weapon it can go in favour of either party, yet in view of the facts and circumstances of the present case in particular the motive in shape of dispute over the women folk as advanced by the complainant, the prosecution was duty bound to prove the same, which has not been done so through cogent and convincing evidence.

14. Thus, it can safely be said with certainty that the prosecution badly failed to prove the case against the accused facing trial on all accounts and the learned Trial Court was

justified to pass the impugned judgment of acquittal in favour of accused/Respondents, which being exceptional in nature calls for no interference by this Court.

15. It is cardinal principle of justice which 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 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 acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required 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" (N L R 1995 Cr.SC 694).**

Above all, there is no cavil with the proposition that the scope of interference in appeal against acquittal is most narrow and limited because in case of acquittal the

presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence that an accused shall be presumed to be innocent unless proved guilty. Simple is that the presumption of innocence is doubled and the Courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, based on gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence, such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his/their acquittal.

The principle attributed to the appeal against acquittal is laid down by the Hon'ble apex Court in its landmark judgment titled as **"Ghulam Sikandar and another Vs. Mamraiz Khan and others" (P L D 1985 S.C.-11)**, where their Lordships have ruled that:-

> ***"In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is***

slightly different from that in an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions; One initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence. The acquittal will not carry the second presumption and will also thus lose the first one if one points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

In either case the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the view expressed by the court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observance of some higher principle as noted above and for no other reason.

The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous".

16. In view of the above discussion, this appeal against acquittal has got no force, which is hereby dismissed accordingly.

Announced.
Dt. 06.03.2018

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