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

Cr.A.No.39-D/2018

Shafiullah

Versus

Junaid Khan & the State.

JUDGMENT

For appellant: Mr. Ehsanullah Marwat Advocate.

For respondents: Mr. Saif-ur-Rahman Khan, Advocate for respondent No.1.

Muhammad Adil Khan, Advocate for State.

Date of hearing: **22.11.2022.**

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SHAHID KHAN, J.- Through the subject appeal, under Section 417(2-A) Cr.PC, Shafiullah, appellant/complainant, has called in question the judgment dated 18.5.2018, of learned Additional Sessions Judge-III, D.I.Khan, whereby, on conclusion of trial of the respondent/accused Junaid Khan, charged in case FIR No.526, dated 26.5.2016, under Sections 302/454/404 PPC, of police station Cantt, D.I.Khan, he was acquitted by extending benefit of doubt to him.

2. The facts, in brief, are that the on 26.5.2016 at 1345 hours, the appellant/ complainant namely, Shafiullah reported to the local police in his house, situated in Iqbal Town, that on the eventful day at 12:30 p.m, his relative Muhammad Gul informed him through his mobile phone that his wife Mst. Zeenat Bibi and daughter Mst. Shahzad Bibi alias Shahzadi have been killed, in their house, by unknown assailants. On the subject information, he rushed to the spot/house and found his wife and daughter lying murdered with a sharp edge weapon. He reported the event against unknown accused and disclosed to have no enmity with anyone. The report of the appellant/complainant was reduced into writing in the shape of murasila which culminated into registration of above referred FIR.

3. On 29.5.2016, the appellant/ complainant recorded his supplementary statement, wherein, he charged the respondent/ accused for the commission of offence.

4. On arrest of the respondent/accused followed by completion of investigation, challan

was drawn and routed through the relevant prosecution branch followed by sent up for trial.

5. On commencement of trial, copies of the evidence (oral & documentary) delivered to the respondent/accused. He was confronted with the statements of allegations through formal charge, but he denied the allegations and pleaded not guilty and claimed trial.

6. The prosecution to bring home charge against the respondent/accused, recorded the account of thirteen (13) witnesses including CW-1 followed by closure of its evidence. At the conclusion of prosecution evidence, the respondent/accused was examined under Section 342 Cr.PC. He professed innocence and false implication in the case. However, neither he wished to be examined on Oath as required under Section 340(2) Cr.PC nor wanted to produce evidence in the defence. On conclusion of trial, the learned Additional Sessions Judge-III, D.I.Khan, in view of the evidence so recorded and assistance at the bar, arrived at the conclusion that the allegations against the respondent/accused are tainted with doubts, as

such, vide impugned judgment, dated, 18.5.2018, his acquittal was recorded accordingly.

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

8. According to the appellant/ complainant (PW-7), on the eventful day he was on his routine duty as Forest Guard, whereof, received telephonic information through his relative, Muhammad Gul (PW-8) that someone had killed his wife Mst. Zeenat Bibi and daughter Mst. Shahzad Bibi alias Shahzadi in the house. PW-8 contended that on the day of occurrence he was present in his house. At 12:15 p.m., Hizbullah (PW-9), son of the appellant/complainant, who was shaky and was weeping, came and informed him that his mother and sister had been killed by somebody. He accompanied the PW-9 to his house and saw that Mst. Zeenat Bibi and Mst. Shahzad Bibi were lying dead in a room of their house. Hizbullah (PW-9) stated in his examination-in-chief that on

the day of occurrence he had gone to his college and on his returned to the house at about 12:10 p.m., he saw his mother and sister smeared with blood in the bed room.

9. The subject disclosure of PW-9 (Hizbullah) is sufficient enough to prima facie observe that the event is an unseen occurrence. Likewise appellant/complainant Shafiullah, Muhammad Gul & and Hizbullah on their turn as PW-7, PW-8 and PW-9 respectively, in their respective examination-in-cross have conceded that they have no direct account of the event for the reason that they are not eyewitnesses of the occurrence.

10. Appellant/complainant on his turn in the witness box as PW-7 did reveal facts of the event but close perusal of his statement shall reflect improvements in is statement to the effect that "On 29.5.2016, I returned to the D.I.Khan and found boxes in broken condition. I also found missing my official Kalashnikov, 04 mobile phone, and Rs.1,50,000/. In this respect I also recorded my supplementary statement, wherein, I reported the same. Later on, I also

charged the accused facing trial namely, Junaid for the commission of offence in my supplementary statement."

11. There is no second opinion at all rather it is a settled maxim that when a witness improves his version to strengthen the prosecution case, his improved statement cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such a witnesses. Reference in this respect may be made to the case of ***"Farman Ahmad v. Muhammad Inayat and others"*** **(2007 SCMR 1825)** wherein it was held as under:-

> ".... It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness had improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witnesses."

12. During investigation, from Call Data Record (CDR) it surfaced that the respondent/accused was using mobile phone of the appellant/ complainant by installing his own sim in it, therefore, he was arrested from Karachi. The prosecution has not mentioned any number of mobile phone of the appellant/ complainant which was allegedly recovered from the respondent/accused. The appellant/ complainant stated in his examination-in-cross that out of four mobile phones, highlighted by him in his examination-in-chief, one was in use of his son, the other was in the use of his daughter and the remaining two mobile sets were not in use of anyone. The prosecution failed to produce a tangible evidence regarding the ownership of mobile phone, so recovered from the respondent/accused. Similarly, the names of the marginal witnesses of the recovery memo Ex.PW-5/6 in this regard, do not figure in the list of witnesses and likewise they could not have been highlighted in the relevant calendar followed by have not been produced before the Court.

13. The I.O has taken into possession the CDR data of the mobile of the respondent/ accused. It is not clear as to whether the telephone/SIM number was in the name of the respondent/accused or otherwise, as the same fact has not been established through record. Therefore, just by placing mobile data on the record would hardly be of any advantage to the prosecution. It is also to add here that the CDR so furnished and relied by the prosecution was neither attested nor signed by the competent/ issuing authority, nor credible witness was either associated during the investigation nor produced before the Court during the trial to substantiate the same, therefore, reliance on the subject CDR data in respect of mobile/sim number of the respondent/accused would be unwise and it would be appropriate as not to rely upon such an evidence.

14. According to the pointation memo Ex.PW-6/2, on 07.6.2016, recovery of weapon of offence i.e. axe was effected on the pointation of the respondent/accused from the maize crop in the landed property of one

Abdur Rashid Dhap. PW-11, who is marginal witness of pointation memo Ex.PW-6/2, stated that during the search process in the fields, accused, duly in handcuffs, was standing near the police mobile. PW-6 is also marginal witness of pointation memo Ex.PW-6/2. He stated in his examination-in-cross that the axe was recovered from the fields. He further stated that four persons including him, the I.O, one Aslam and the respondent/accused went for the recovery of axe. It is not mentioned as to whether the alleged recovered axe was bloodstained or otherwise. Similarly, it was also not sent to the FSL to substantiate that the same is the weapon of offence and used in the commission of crime. In absence of report of Forensic Science Laboratory as it is matching with the blood cannot be considered as the corroborative piece of evidence against the respondent/accused. Therefore, the prosecution evidence as to recovery of axe to have been used for the commission of offence is not found sufficient enough to connect the respondent/accused with the commission of the offence.

15. The evidence of recoveries of mobile phone, CDR and axe, the alleged weapon of offence, being corroboratory in its nature, is not capable to bring home charge against the respondent/accused in the circumstances where direct evidence is lacking because it is well settled that unless direct or substantive evidence is available conviction cannot conviction cannot be recorded on the basis of any other circumstantial evidence, howsoever, convincing it may be. In the case of ***"Saifullah Vs. The State"*** **(1985 SCMR 410),** it was held that when there is no eyewitness to be relied upon, then there is nothing which can be corroborated by the recovery.

16. After cautious analysis of the evidence on record and considering the pros and cons so put forth by the learned counsel for the parties, we have gathered that the prosecution's entire case rests upon the circumstantial evidence, whereas, substantive evidence of high degree to be relied upon is lacking. The unfortunate event of murder of a

mother and daughter is a drastic and unbearable trauma, having a stigmatic effect upon all the family members in particular and on the society in general. However, the Courts have to decide the fate of a crime committed by a felon on the basis of impeachable evidence and not at the cost of emotions.

17. The circumstantial evidence requires to be appreciated on the dictum that in such like matters, while appreciating the evidence and holding an accused guilty of the charge, the facts of the case must be consistent with guilt of the accused, chain of evidence must be complete in all respects leaving no reasonable ground about the innocence of the accused. The suspicious, however, strong, cannot be given preference upon the proof. The chain of events shall not break, which must be conclusive beyond any shadow of a doubt.

18. It is well settled, benefit of doubt is not a grace but right of the accused and it is not necessary that there should be many circumstances creating doubts, even a single circumstance, creating reasonable doubt in a

prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace & concession but as a matter of right. Reference is made to the case ***"Muhammad Akram v. State"*** **(2009 SCMR 230).**

19. Beside the above, generally the order of acquittal cannot be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is less than the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, or the purpose of ascertaining as to whether the accused committed the offence or

not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, only then it is a compelling reason for interference.

20. For the afore-stated reasons, learned counsel representing the appellant/complainant could not point out any illegality and material irregularity in the impugned judgment so that the Court could incline to interfere in it.

21. Resultantly, this appeal having no merit and substance stands dismissed.

Announced.
Dt:22.11.2022.

*Imran/**

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Shahid Khan