JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR, (DERA ISMAIL KHAN BENCH)

Criminal Appeal No. 109-D/2019.

The State through Advocate General, Khyber Pakhtunkhwa, Peshawar…… (Appellant).

Versus.

Noroz Khan alias Abu Bakar ……(accused-respondent)

For appellant: - Mr. Adnan Ali, AAG.

Date of hearing: **09.03.2021.**

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- This criminal appeal has been filed against the judgment dated 09.10.2019 passed by learned Judge, Anti-Terrorism Court, D.I Khan, whereby accused-respondent Noroz Khan alias Abu Bakar, involved in a case FIR No. 416, dated 15.09.2014, under sections302/324/458/337-D/148/149 PPC/7 ATA of Police Station, Gomal University, D.I Khan, was acquitted of the charge.

2. The case of prosecution, as divulges from the record, is that on 15.09.2014 at night time (00.15 hours), some 15/20 persons, duly armed with Kalashnikovs and hand grenades, entered into the house of complainant Azghar Khan (PW-10), awoke inmates of the house and after making identification of the complainant and his brothers, namely, Fakhar Zaman and Muhammad Ismail to be the brothers of Saif ur Rehman, the then SHO Police

Station, Kulachi, (PW-09), made firing at them, due to which Fakhar Zaman and Muhammad Ismail were hit and died at the spot while the complainant received injuries. As per contents of the report, before firing at the complainant party, one of the criminals having long hairs and beard introduced himself to be Amin Jan alias Malong, the Taliban Commander, while names of the rests of the culprits were disclosed by him as Nauroz alias Abu Bakar (the accused-respondent), Umar Baz, Bahadar, Najibullah, Naqib, Nadim, Qari Daud and Khalid Mansoor. Motive behind the occurrence was disclosed by him to be the killing of his Naib Commander Salim alias Shah Jee in a police encounter by Saif ur Rehman SHO, the then SHO Kulachi. The matter was reported by the complainant in injured condition at Civil Hospital, D.I Khan which was recorded in shape of FIR Exh.PW 2/1. Investigation of the case was entrusted to Ghazi Mar Jan DSP (PW-14), who visited the spot and prepared the site plan Exh.PB at the pointation of Amina Bibi (PW-11). During spot inspection, he took into possession blood stained earth from the places of deceased vide memo Exh.PW 7/1. He also recovered three rounds of 7.62 bore and one spent bullet, vide memos Exh.PW 7/2 and Exh.PW 7/3. He further recovered 57 empties of 7.62 bore from the places of accused vide recovery memo Exh.PW 7/4. He further took into possession blood stained

garments of the deceased and complainant coupled with three empty packets of biscuits and footprints vide recovery memo Exh.PW 7/5, Exh.PW 7/6 and Exh.PW 4/1. He also sent the blood stained garments and recovered empties to the FSL for opinion and its report is Ex.PW 14/6 and Exh.PW 14/7. Since the accused were avoiding their lawful arrest, therefore, warrants under section 204 Cr.P.C and notices under section 87 Cr.P.C were issued against them. After completion of investigation, he submitted the case file to SHO concerned, who filed a charge sheet against all the accused under section 512 Cr.P.C.

3. Subsequently, Nauroz alias Abu Bakar, the accused-respondent, was arrested in the case on 16.03.2019 and supplementary challan against him was submitted before the Court. Charge against him was framed wherein he pleaded not guilty and claimed trial. The prosecution in order to prove its case examined eighteen witnesses. After closure of the prosecution evidence, the accused-respondent was examined under section 342 Cr.P.C wherein he pleaded innocence and stated to have falsely been implicated in the case. However, he was neither ready to be examined on oath nor wished to produce defence. The learned trial after hearing the parties, recorded acquittal of the accused-respondent, vide judgment dated 09.10.2019. Feeling

aggrieved, the State through Advocate General has filed the instant criminal appeal.

4. Arguments heard and record perused.

5. As per contents of the FIR, the occurrence took place on 15.09.2014 at 00.15 hours while the report was lodged on the same night at 01.30 hours. Admittedly, this ill-starred event is nocturnal one and in the given position of the case the question as to identification of the accused-respondent is required to be closely scrutinized. As per prosecution story, 15/20 armed persons had entered into the house of complainant and after awakening the complainant and his two brothers, namely, Fakhar Zaman and Muhammad Ismail and after identifying them to be the brothers of Saif ur Rehman, the then SHO Police Station, Kulachi, made firing at them, due to which Fakhar Zaman and Muhammad Ismail were hit and died at the spot while the complainant sustained severe injuries. No doubt, this disastrous incident had taken place in the house of complainant but the question before the court is as to whether the present accused-respondent was identified beyond reasonable doubt by the complainant and eyewitness Mst. Amina Bibi to be amongst the lawbreakers. Presence of the complainant on the spot at the relevant time, keeping in view the stamp of injury on his person, is, no doubt, established, however, his testimony as to the identification of the accused-

respondent on the spot at the relevant time is not above board and rings true for the reasons that the complainant appeared before the trial court as PW-10 and stated in his examination in chief that 14/15 persons entered into his house while in his report he had stated that 15/20 persons had entered into his house. Likewise, in his cross examination, the complainant stated that accused Malang Jan, Nauroz and Abbas were on front and in the same breath he stated that the accused-respondent was not previously known to him. When the accused-respondent was not known to him then how he identified him to be Nauroz alias Abu Bakar, which makes his testimony equivocal. Moreover, his statement is also contradictory to the statement of Mst. Amina Bibi (PW-11) because in her cross examination she stated that the accused had muffled their faces while the complainant stated that none had muffled his face. Similarly, the former stated in her cross examination that first the injured Muhammad Asghar was taken to the hospital and after one hour the dead bodies of the deceased were taken to the hospital, while the latter in cross examination stated that he and his deceased brothers were put in the two vehicles on charpai. He further stated that profuse blood was oozing from him and his deceased brothers, however, he could not say as to whether cots were stained with blood or not. Presence of the complainant on the spot at the time of occurrence is not

doubted as he was having stamp of injuries on his person but it has now been settled that a confirmed presence by itself is not equivalence of truth, as held by the apex court in the case titled **"Ishtiaq Hussain and another vs. the State and others" (2021 SCMR 159).** It has also been well settled that injuries on a prosecution witness only indicate his presence at the spot but what he deposes cannot be accepted as gospel "truth". His testimony is to be tested and assessed on the principles applied for appreciation of any other prosecution witness. The apex court in the case titled **"Amin Ali and another vs. The State" (2011 SCMR 323)** has held that presence of injured witness cannot be doubted at place of incident merely because he has injuries on his person but does not stamp him to be a truthful witness. It is also settled law that the factum of the presence of a witness being natural would establish his presence on the spot but would not take the prosecution case any further. **Rel: Muhammad Iqbal vs. Abid Hussain alias Mithu and 6 others (1994 SCMR 1928) Said Ahmad v. Zammured Hussain and 4 others (1981 SCMR 795), Muhammad Hayat and another v. The State (1996 SCMR 1411), Muhammad Pervez and others v. The State and others (2007 SCMR 670), Amin Ali and another v. The State (2011 SCMR 323), Nazir Ahmad v. Muhammad Iqbal and another (2011 SCMR 527) and Atta Ullah and 3 others**

v. The State (2016 YLR 2148). It is also basic tenet of the jurisprudence that to disbelieve a witness, it is not necessary that there should be numerous infirmities and there is one which impeaches the credibility of the witness, which may make the entire statement doubtful.

6. Mst. Amina Bibi was examined as PW-11 and she during cross examination admitted that the accused was not known to her prior to the occurrence and when the accused-respondent was not known to her then how she identified him. The prosecution, though, produced Saif ur Rehman as PW-9 but his testimony too is not in harmony with the statement of complainant as he in cross examination stated that he reached to his house within an hour and when he reached to his house at that time the dead bodies were not present and the same were brought at about 03/3.30 a.m. He stated that the details about the occurrence was told to him by his cousin Asmatullah after his arrival at his house, while complainant as PW-10 stated in his cross examination that his brother Saif ur Rehman met him in hospital within an hour after their arrival in hospital. He further stated that Saif ur Rehman left the hospital along with the dead bodies of his deceased brothers.

7. Moreover, the complainant in his cross examination stated that after arrival to the hospital, first his report was recorded by the Incharge reporting Centre

and he was in senses but his statement has been belied by the statement of Doctor Ghulam Muhammad PW-1. He in cross examination stated that the injured complainant was in serious condition and was unable to speak. When the complainant was not able to talk, then how he lodged the report and named the accused-respondent in his report, which piece of evidence is also making cricks in the prosecution story.

8. Also the complainant has neither disclosed description of the accused-respondent in his first report nor after his arrest, was his identification parade conducted through the complainant and eyewitness. Yes, the complainant in his report and during his court statement unveiled that the names of the present accused-respondent was disclosed to him by the principal accused, namely, Amin alias Malang Jan but his such statement is not sufficient for conviction of an accused person, particularly, for the offences carrying capital punishment. It is a double murder case and the respondent-accused is facing a capital charge and in such like cases, evidence must come from some unimpeachable source, which should be corroborated and duly supported by some strong piece of evidence, which, in the present case, is missing.

9. There is no cavil with the proposition that the prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is

created, benefit of the same must go to the accused. It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicial mind is sufficient for acquittal of the accused. Reliance is placed on a case law **Tariq Parvez vs. The State (1995 SCMR 1345).** The same principle was reinforced by the Hon'able Supreme Court in a case titled **Muhammad Akram vs. The State (2009 SCMR 230)**

10. Apart from the above, 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 in gross violation of law, suffering from the errors of grave mis-reading or non-reading of the evidence. The principle attributed to the appeal against acquittal is laid down by the apex Court in its land mark judgment titled **"Ghulam Sikandar and another Vs. Mamraiz Khan and others" (PLD 1985 SC 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".

Similarly, in the case of ***"Mst. Jallan Vs. Muhammad Riaz and other" (PLD 2003 SC 644)*** it was observed by the august Supreme Court that:-

> "Once an accused had earned acquittal in his favour, he enjoyed double presumption of innocence and the Court while examining the case of such accused must be very careful and cautious in interfering with the acquittal order and normally should not set aside the same merely for the reason that some other view was also possible---interference, however, could be made in exercise of powers conferred upon the Court under S.417, Cr.P.C., if it was proved that the Court whose judgment was under scrutiny had misread such evidence".

Reference can also be made to case law titled **"Zaheer-ud-Din Vs. The State" (1993 SCMR-1628), "Khan Vs. Sajjad and 2 others" (2004 SCMR 215), "Barkat Ali Vs. Shaukat Ali and others" (2004 SCMR 249,. "Farhat Azeem Vs. Asmat Ullah and 6 others" (2008 SCMR 1285), "Haji Payo Khan Vs. Sher Baz and others" (2009 SCMR 803), "Muhammad Aslam Vs. Sabir Hussain and others" (2009 SCMR 985).**

11. In view of the above discussion and the case law relied upon, we do not propose to draw a conclusion

different from what the learned trial court has drawn and, hence, we do not feel hesitant to uphold the acquittal of the respondents-accused, resultantly, the same is maintained and, accordingly, **dismiss** the appeal.

Announced
08.03.2021 **J U D G E**
M.Zafral PS

J U D G E

DB (Hon'able Mr. Justice Ijaz Anwar, &
Hon'able Mr. Justice Muhammad Naeem Anwar)