JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 80-M/2017

Gul Zada son of Utmanzai (Appellant)
Versus

(1) Gul son of Yousaf Gul
(2) The State (Respondents)

Present: *Mohammad Usman Khan Turlandi, Advocate*

Mr. Rahim Shah, Astt: Advocate General for the State.

Gul, the complainant, in person.

Date of hearing:- **19.03.2019**

JUDGMENT

SYED ARSHAD ALI, J.- This criminal appeal is directed against the judgment dated 09.03.2017 rendered by the learned Sessions Judge/Zila Qazi Buner at Dagger, in case F.I.R No. 52 dated 05.03.2009 registered under section 302 of the Pakistan Penal Code 1860 (*"**PPC**"*) and section 13 of Arms Act (***"Act"***) at Police Station Nawagai District Buner, whereby the appellant Gul Zada was convicted under section 302 (b) PPC and sentenced to life imprisonment along with payment of compensation of Rs. 100,000/- (one lac) under section 544-A of the Criminal

Procedure Code ("***Cr.P.C***"). The appellant was further convicted under section 15 A.A. and sentenced to 2 months rigorous imprisonment along with fine of Rs. 3,000/-, or in default thereof, he shall further suffer 10 days simple imprisonment. However, the accused/appellant was extended the benefit of section 382-B Cr.P.C.

2. The appellant was charged by the complainant for the murder of his son. His reported was incorporated in *'Murasila'* Ex. PA/1, which culminated into FIR *ibid*, Ex. PA being registered against the accused/appellant at PS concerned on 05.03.2009. Investigation in the case was initially entrusted to Noor Jamal Khan, Inspector, PW-11 who had prepared the site plan Ex. PB and also recovered blood stained earth Ex. P-3 and blood stained shirt along with *shalwar* of the deceased Ex. P-1 & Ex. P-2. The appellant was proceeded under sections 204 & 87 Cr.P.C. Later, proceedings under section 512 Cr.P.C were also initiated against the

appellant and upon conclusion of the same, he was declared proclaimed offender.

3. On 19.05.2015 Muhammad Shah Khan, SHO PS Nawagai, PW-4 had arrested the appellant through card of arrest Ex. PW-4/1 and on his pointation allegedly the crime weapon i.e. pistol was recovered, thereby section 15 A.A. was also inserted in the FIR against the appellant.

4. After completion of investigation, complete *challan* was submitted before the Court. The charge was framed against the appellant, to which he pleaded not guilty and claimed trial. The prosecution in support of its case examined as many as eleven (11) witnesses, whose statements were recorded and placed on file. On closure of the prosecution evidence, accused was examined under section 342, Cr.P.C, wherein he denied the charges, claimed innocence and stated to have falsely been implicated in the case.

5. On conclusion of the trial, the learned trial Court convicted the appellant

vide the judgment impugned herein. Hence, the present appeal.

6. We have heard arguments of learned counsel for the accused/appellant, learned Astt: Advocate General appearing on behalf of the State and gone through the record with their able assistance. While the complainant appeared in person, in support of his case.

7. It is evident from record that on 05.03.2009 at 2:15 P.M the dead body of deceased Muhammad Sher son of Gul aged about 25 years was medically examined by the doctor Muhammad Farooq, PW-8 through injury sheet/medical report Ex. PW-5/1 and Ex. PW-8/1. According to the injury sheet, the dead body of the deceased was brought by Mr. Jamshed son of Azmat Khan, Mr. Habib Khan son of Fateh Muhammad Khan and Mr. Gul son of Yousaf Gul, the complainant, PW-9. According to the medical report, Ex. PW-8/1 the deceased had sustained fire arm injuries with multiple pellets. The cause of his death

was due to fire arm injury to the abdomen causing damage to internal blood vessels. On the same day at 14:30 hours, the complainant Gul, PW-9 who is father of the deceased had reported the matter in the emergency ward to the Noor Muhammad Khan ASI, In-charge Casualty DHQ Hospital Dagger to the effect that on the previous day i.e. 04.03.2009 in the primary school there was a fight between his children and the children of the accused/appellant Gul Zada. Hence, on the eventful day, his son deceased Muhammad Sher was going towards the house of the appellant Gul Zada for complaining against the matter, however, when he reached at the place of occurrence, Gul Zada, the appellant met him and he started firing at his deceased son through his pistol, which hit his deceased son at his back and he died on the spot. He has further stated that the matter was witnessed by Khan Muhammad son of Gul Ahmad, PW-10 and Nizar Muhammad son of Niaz Muhammad (abandoned witness).

8. The entire prosecution case rests on statement of the complainant namely Gul, PW-9, the two eye-witnesses of the occurrence namely Khan Muhammad, PW-10 and Nizar Muhammad who was abandoned by the prosecution and the recovery of the pistol, Ex. PW-5/1 on the pointation of the accused/appellant.

9. As stated above, the time of occurrence in this case is 13:15 hours. The deceased was medically examined at 2:15 P.M. and the report was made by the complainant at 2:30 P.M, therefore, there is prima facie a delay in registration of the case and the complainant-party had ample opportunity to make consultation before the nomination of the present accused/appellant in the matter. Such unexplained delay in lodging of FIR creates serious doubt on the authenticity of the prosecution version. In this regard, reliance is placed on the judgment of the august Supreme Court of Pakistan titled ***"Muhammad Akram vs the State (2009 SCMR 230)"***, wherein it was held that:-

"Conduct of the father of the abductee, who knew the accused, lodged the FIR after an ordinate delay of six months of the abduction and recovery of his son, had cast heavy doubt on the veracity of the FIR."

Thus, the evidence recorded by the prosecution has to be examined with due caution and care.

10. In the '*Murasila*' Ex. PA/1, the complainant has not stated that he is the eye-witness to the occurrence, however, he appeared before the Court with an improved version of the case as PW-9. In his statement, he has stated that he along with the deceased were going towards the house of the appellant for complaining against the fight between the children and when they met the appellant at the place of occurrence, he started firing on his son, resultantly, he died at the spot. This improvement in his statement prima facie appears to be dishonest, therefore, this witness does not appear to be a truthful witness and his testimony regarding the fact that he had seen the occurrence deserves to be excluded

from consideration. In this regard, reliance is placed on the judgment of the august Supreme Court of Pakistan titled ***"Muhammad Rafiq vs The State reported as 2010 S C M R 385"*** wherein it was held that:- ***"Improvement made by a witness in order to strengthen the prosecution case, lose his credibility and evidentiary value and when a witness made contradictory statement or improvement changing his version to in line his testimony with the story of prosecution, if found to be deliberate and dishonest, would cast serious doubt on his veracity***".

The same view further reflects in case titled ***"Muhammad Mansha vs. The State (2018 SCMR 772)"***, wherein it was held by the Hon'ble apex Court that:- ***"It is unsafe to rely on the statement of such witnesses who had made dishonest improvements in their statements."***

11. Nizar Muhammad, who according to the prosecution case had seen the occurrence, was unnecessarily abandoned by the prosecution despite being closely related

to the complainant. Thus, in the present circumstances, we are constrained to draw adverse inference under Article 129 (g) of the *Qanun-e-Shahadat Order, 1984* by holding that the purpose behind withholding of this witness appears to be based on sinister designs. We also infer from his non-appearance before the Court that if the said alleged eye-witness of the occurrence produced in the Court he would have not supported the prosecution case. Non-examination of the important witness had materially affected the prosecution case. In this regard, reliance is placed on the judgment of the august Supreme Court of Pakistan titled "***Lal Khan v/s The State, reported in 2006 SCMR 1846***, wherein it was held:- ***"Non-production of most natural and material witness of the occurrence would strongly lead to an inference of prosecutorial misconduct, which would not only be considered a source of undue advantage for prosecution but also an act of suppression of material facts causing prejudice to accused".***

12. Thus, the prosecution is left with the other alleged eye-witness Khan Muhammad, who appeared as PW-10. The said witness is the brother-in-law of the complainant. We are conscious of the fact that mere relation of the complainant-party with a witness is no ground to disbelieve his testimony provided that he is a truthful witness. This witness has also justified his presence at the spot because the occurrence had taken place at 1:15 P.M near the mosque and in normal routine the people do go to the mosque for offering their prayers. However, his statement contradicts the initial version of the complainant as advanced through *'Murasila'*, Ex, PA/1. As stated above, in the *'Murasila'* the complainant did not say that he was the eye-witness to the occurrence, whereas this witness has stated in his statement before the Court that the complainant was also present at the spot. Thus, this witness does not appear to be a truthful witness. Not only this, but his immediate conduct after the murder of the

deceased is unnatural. This witness had not accompanied the deceased to the hospital as evident from the injury sheet/medical report, Ex. PW-5/1 & Ex. PW-8/1. According to which, the dead body of the deceased was accompanied by Mr. Jamshed son of Azmat Khan, Mr. Habib Khan son of Fateh Muhammad Khan and Mr. Gul son of Yousaf Gul, the complainant, PW-9. Thus, being a close relative his normal conduct was that he should have accompanied the deceased to the hospital and should have also supported the statement of the complainant at the time of recording of *'Murasila'*.

Thus, it unsafe to rely upon the statement of this witness more particularly when we have excluded from consideration the statement of the complainant and the fact that prosecution has abandoned the other material witness to the incident.

13. Moving forward to the recovery of the crime weapon i.e. pistol on the pointation of the accused/appellant, Ex. PW-5/1. The occurrence in this case had taken

place on 05.03.2009 at 13:15 hours, whereas the crime weapon was recovered through recovery memo Ex. PW-5/2 from bushes on 12.05.2015. It is the case of prosecution that the said crime weapon was hidden in the bushes after commission of the offence by the appellant, however, it does not appeal to a prudent mind that the said pistol was lying there for a good more than 6 years and even then it was in the working condition. In this regard, Bakhti Rawan, ASI,PW-6 in his cross-examination has made the following admissions:-

"پستول جھاڑی بوٹیوں کے اندر پڑا تھا۔ جس جگہ پستول پڑا تھا، بارش کی صورت میں پانی پستول پر لگ سکتا تھا۔ پستول معمولی زنگ آلود تھی۔ پستول کی condition سے یہ اندازہ لگایا جاسکتا تھا کہ پستول ممکنہ طور پر 3/4 دن سے جائے برامدگی پر پڑا تھا۔"

This is also unbelievable that why the appellant would keep the pistol in the said place 3/4 days prior to his arrest. Even otherwise, this recovery was never supported by any private witness. It is settled law that when the ocular testimony fails to establish the case of prosecution against the accused then recovery of crime weapon being

corroborative piece of evidence also losses its evidentiary value. Reliance is placed on the judgment of the august Supreme Court of Pakistan titled ***"Imran Ashraf and 7 others vs the State(2001 SCMR 424)"***, wherein it was held that:- ***"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."***

Likewise, if any other law is needed on the same analogy, reference can be placed on the judgment of the Hon'ble Apex Court titled ***"Dr. Israr-ul-Haq vs Muhammad Fayyaz and another 2007 SCMR 1427"*** wherein it was observed that:- ***"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.***

14. In view of the above discussion, we are of the absolute view that the

prosecution has failed to prove its case against the accused/appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, resultantly, we accept this appeal by setting aside his conviction and sentence recorded by the learned trial Court through the impugned judgment dated 09.03.2017 and acquit him of the charge levelled against him, by extending him the benefit of doubt. He be set free forthwith, if not required in any other case.

15. These are the reasons of our short order of even date.

Announced
Dt. 19.03.2019

JUDGE

JUDGE

Office
27/03/2019
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