IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.536-P/2018
with Murder Reference No.15 of 2019.

Dilawar son Baghi Gul,
r/o Kheshgi Payan District, Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :- Mr. Shabbir Hussain Gigyani, Advocate.
State :- Mr. Mujahid Ali Khan, AAG.
For Respondent :- Mr. Saifullah Mohmand, Advocate.
Date of hearing: **08.10.2019.**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This appeal has been filed by appellant Dilawar son of Baghi Gul, against the judgment dated 10.09.2016, of learned trial Court/Additional Sessions Judge-V, Nowshera, whereby he has been convicted under section 302(b) PPC and sentenced to death and also to pay Rs.2,00,000/-, as compensation to legal heirs of Sartaj deceased, in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months S.I. in case FIR No.1023 dated 10.09.2016 registered under section 302 PPC at Police Station Nowshera Kalan. Benefit of section 382-B Cr.P.C. has been extended to him.

2. The learned trial Court has sent M**urder Reference No.15 of 2018** under section 374 Cr.P.C. for confirmation of death sentence of convict Dilawar.

3. Since both the matters are the outcome of one and the same judgment of the learned trial Court dated 25.05.2018, are being decided/answered through this common judgment.

4. On 10.09.2016 at 1930 hours, complainant Qasim Ali (PW.6), in company of dead body of his maternal uncle, namely, Sartaj deceased reported to police in DHQ hospital Nowshera Kalan to the effect that on the fateful day he along with the deceased was on the way to the playground for watching a volleyball match and at 1800 hours, when reached in front of house of Darakhshan near the graveyard of village *Kheshgi Payan*, the appellant duly armed with pistol suddenly emerged and opened fire at the deceased, as a result, the deceased got hit on various parts of his body and died there and then. After the occurrence, the appellant decamped from the crime scene. Motive behind the occurrence is stated to be that appellant was suspecting the deceased that he has received his head money. Report of complainant was incorporated in to Murasila (Exh.PW.9/3) by Zainoor Shah ASI (PW.9) which was verified by Mst. Muskan (widow of the deceased). PW.9 prepared injury sheet and inquest report of the deceased Exh.PW.9/1 and Exh.PW.2, respectively,

and shifted dead body of the deceased to the mortuary for autopsy. He sent the Murasila to Police Station on the basis of which FIR (Exh.PA), was registered against the appellant by Bashir Ahmad SI (PW.4). Dr. Tariq Shah CMO DHQ Hospital Nowshera Kalan (PW.2), conducted autopsy on the dead body of the deceased on the same day 07.30 p.m. and opined the cause of death as result of firearm injuries to his brain, heart and lungs vide PM report Exh.PW.2/1. The probable time between injuries and death has been opinion as "sudden".

5. Fazal Muhammad Khan SI (PW.8) conducted investigation in the case, he proceeded to the spot and prepared site plan Exh.PW.8/1 on the pointation of complainant Qasim Ali. During spot inspection he secured bloodstained sand Exh.P.1 from the place of the deceased and a 30 bore crime empty Exh.P.2 from the place of the appellant, giving fresh smell of discharge vide recovery memo Exh.PW.8/2. Vide recovery memo Exh.PW.8/3, he took into possession the last worn bloodstained garments of the deceased. He sent the bloodstained articles to the FSL for chemical analysis and the crime empty for safe custody and placed on file the Serologist report Exh.PZ, initiated proceedings under section 204 and 87 Cr.P.C. against the appellant, recorded statements of PWs u/s 161 Cr.P.C. and on completion of investigation handed over case file to SHO for submission of challan u/s 512 Cr.P.C.

against the appellant. On 10.10.2016 he arrested the appellant vide arrest card Exh.PW.8/10 and on his pointation/discovery recovered a 30 bore pistol No.KL556/1976 from a box inside his house, vide recovery memo Exh.PW.9/12. He prepared the sketch of house of the appellant and placed on file Fard Jambandi Exh.PW.8/16 regarding ownership of the house of the appellant, sent the crime pistol to the FSL for analysis whereas the crime empty has already been sent to the FSL. He placed on file the FSL report in this regard as Exh.PZ/1 which is in positive. After completion of investigation he handed over the case file to SHO, who submitted *challan* against the appellant before the learned trial Court.

6. On receipt of *challan* by the learned trial Court, the appellant was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove guilt of the appellant, the prosecution examined as many as nine 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 innocence. He, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above.

7. We have given our anxious consideration to the arguments of learned counsel for the parties advanced at the bar and perused the record with their valuable assistance.

8. It appears from FIR (Exh.PA) that the occurrence has taken place on 10.09.2016 at 06.00 p.m. which has been reported at 07.30 p.m. by complainant Qasim Ali (PW.6), wherein he has directly and singularly charged the appellant for murder of the deceased. As per prosecution's evidence during the days of occurrence PW Qasim Ali was a student of 9th class, meaning thereby that he was about 13/14 years old. A young boy of 13/14 age, who had never came across such like incident and had not yet seen the ups and downs of the life, could not be expected to cook a false story of murder of his maternal uncle and charge an innocent person by substituting the real culprit. Perusal of his report/FIR reveals that PW Qasim Ali has not exaggerated the charge despite the fact that he could have easily charged the appellant for an attempt at his life. His deposition contains a ring of truthfulness and demonstrates his straightforwardness. The appellant is the co-villager and neighbor of PW Qasim Ali and was well known to him prior to the occurrence. Being a broad daylight occurrence, question of mistaken identity does not arise. Qasim Ali while appearing in the witness box as PW.6 reiterated the same story as set forth by him in his initial report and once

again charged the appellant singularly for murder of the deceased. He stood firm by stating that site plan was prepared at his pointation by the Investigating Officer. He has been subjected to lengthy and taxing cross examination but nothing beneficial to defence could be extracted from his mouth. He remained stuck to his stance on each and every material aspect of the incident. A look over his cross-examination would reveal that many un-explained material facts have been explained through him by the defence itself making strengthen the prosecution case. Replying to questions of defence, PW Qasim Ali has deposed that deceased along with family was residing at Karchi, however, two days prior to the occurrence he along with his family had come to their house and was staying with them in their house; that he along with the deceased left their house at 5.40 P.M. for watching volleyball match; that inter-se distance of his house and the crime spot can be covered by foot within 15 to 20 minutes; that they might have reached the place of occurrence within 15 to 20 minutes; that after the occurrence he rushed to his house and informed his mother and maternal aunt who also reached the spot; that some 40 minutes were consumed in arranging vehicle for shifting the dead body of the deceased during which period the dead body remained at the spot. This part of statement fully corroborate the time of occurrence as well as the time of report as advanced by

him in the FIR and leaves no room for consultation and deliberation. Presence of PW Qasim Ali with the deceased at the time of occurrence was quite natural as the deceased was his maternal uncle and had visited along with his family to the house of PW Qasim Ali and stayed there for two days prior to the occurrence. As a routine observations nephews/kith and kin do feel pleasure to visit with their beloved uncles outside home for excursion. Leaving house by PW Qasim Ali alongwith deceased for volleyball match is quite natural . His his presence and proceeding to the playground with his maternal uncle/deceased being natural does appeal to a prudent mind as in our society after "Assar prayers" times people do approach the playgrounds for refreshment, playing or watching different physical games. The defence has miserably failed to shatter the testimony of eyewitness Qasim Ali, which otherwise is natural, trustworthy and confidence inspiring, corroborated by strong circumstantial pieces of evidence i.e. recovery of bloodstained sand from the place of the deceased at the spot, his last worn bloodstained clothes coupled with positive Serologist report Exh.PZ in respect thereof. Similarly, the medical evidence i.e. autopsy report wherein the medical Officer has observed so many firearm injuries on the person of the deceased and opined his cause of death to be the result of firearm injures.

9. Fazal Muhammad Khan SI (PW.8) arrested the appellant on 10.10.2016 and on his discovery recovered a 30 bore crime pistol No.KL556/1976 from a box lying in residential room of his house. The said crime pistol Exh.P.4 was sent to the FSL for analysis whereas the empty already sent to the FSL for safe custody. The FSL has furnished its report Exh.PZ/1, according to which the 30 bore crime empty has been fired from the crime pistol recovered on the pointation/discovery of the appellant. This strong piece of circumstantial evidence further corroborates the ocular account of PW Qasim Ali. No reason and circumstance has been brought on record by the defence so as to remotely suggest substitution and false implication of the appellant in the case. Admittedly, substitution of real culprit charged directly and singularly is a rare phenomenon in the system of criminal justice. Reference in this regard can be made to case titled, "**Allah Ditta Vs the State" (PLD 2002 Supreme Court 52) and case titled, "Muhammad Iqbal Vs the State" (PLD 2001 Supreme Court 222**.

10. No doubt, PW Qasim Ali is the nephew of the deceased who appeared as a solitary eyewitness, but it will not advance the case of defence because the general public in rural areas, always feel reluctant to depose against the culprits due to fear of earning enmity etc. It is well established principle of law that testimony of a witness

which is trust worthy and inspiring confidence cannot be discarded on mere ground of his close relation with the deceased. A close relative, if proved to be the natural and truthful witness of the occurrence, cannot be termed as interested witness. Statement of a witness on account of being interested can only be discarded if it is proved that he/she has ulterior motive on account of enmity or any other consideration. No evidence whatsoever has been brought by the defence to prove any enmity or grudge of PW Qasim Ali with the appellant. Reference in this regard can be made to case titled, **"Khizar Hayat Vs the State" (2011 SCMR 429)**. Thus, mere relationship PW Qasim Ali with the deceased would not detract his veracity, as he had absolutely no motive of his own to involve the appellant falsely by letting off the real culprit. Reliance in this regard can be placed on the judgments of the august apex court in case, titled, **"Saeed Akhtar and others Vs the State" (2000 SCMR 383).** In case titled, "Amal Sherin and another Vs the State through A.G." (PLD 2004 Supreme Court 371), the Hon'ble Supreme Court while dilating upon the evidentiary value of statement of related witnesses has ruled as under:-

> "The trial Court was not justified to reject eyewitness account furnished by complainant Khan Amir PW and Hakim Gul PW merely on the ground of being related and interested particularly when appellants

had not been able to establish on record that the above mentioned witnesses had nourished any grudge or ill will against them and deposed with a specific motive".

11. The next point for determination is that whether conviction can be recorded in a capital charge on the basis of solitary statement of an eyewitness? the answer is in the affirmative provided the solitary eyewitness is true, trustworthy, confidence inspiring and his testimony is corroborated by strong circumstantial evidence because what is required by the court is the determination of veracity and credibility of a witness and not the numbers and relationship. It is the quality and not the quantity of the evidence which matters for the Court in criminal dispensation of justice. By virtue of Article 17 of the Qanun-e-Shahadat Order, 1984, in financial matters, two male or one male and two female witnesses, have been made the requirement of law to prove the financial obligations, whereas, in all other matters including criminal, there is no such obligation, which clearly suggests that a single witness is sufficient to prove a fact. Wisdom may be derived from **Zar Badadar's case (1978 SCMR 136), case titled, "Muhammad Ahmad and another Vs the State and others"(1997 SCMR 89), case titled, Muhammad Mansha Vs the State" (2001 SCMR 199), case titled, "Dildar Hussain Vs Muhammad Afzaal alias Chala and 3 others" (PLD 2004 Supreme**

Court 663), case titled, "Farooq Khan Vs the State" (2008 SCMR 917).

12. For what has been discussed above, we have reached to irresistible conclusion that prosecution has successfully proved that appellant has committed murder of the deceased Sartaj on the day, date time and place with a 30 bore pistol as alleged by the prosecution and substantiated through cogent and confidence inspiring ocular evidence, supported by medical evidence and corroborated by strong circumstantial pieces of evidence. In this view of the matter, the learned trial Court has rightly held him guilty of the offence, to which no exception can be taken.

13. So far as the quantum of sentence awarded by the learned trial Court to the appellant is concerned, on thorough scrutiny of the evidence, we are of the considered view that the motive advanced by the prosecution does not seems true. In fact something happened prior to the occurrence which has been kept concealed by the complainant party, most particularly, family honour and modesty. It transpired from the prosecution evidence that the deceased was permanent resident of Kheshgi Payan and a few months prior to the occurrence he has shifted his abode to Karachi, whereas, two days prior to the occurrence he along with his wife, namely, Mst. Muskan had come to the house of his sister i.e. (mother of PW

Qasim, Ali). Record depicts that deceased had not willfully abandoned his residence from village Kheshgi, rather he was forcibly expelled by the elders of the locality from the village. In such an undisclosed situation, wisdom may be derived from judgment of the august apex Court rendered in case titled, **"Ghulam Muhammad and another vs the State" (2017 SCMR 2048),** wherein it has been held that:-

> "It is well settled by now that **once the prosecution alleges a motive and fails to prove the same during the trial, the same can be taken as a mitigating circumstance** while deciding the quantum of sentence of the convict. Therefore, Criminal Appeal No.73-L of 2009 is partly allowed and the sentence of death awarded to Wazir Ali appellant is altered to imprisonment for life". **(emphasis supplied).**

Similar view has been taken by the Hon'ble apex Court in case titled, **"Haq Nawaz vs the State" (2018 SCMR 21)** while placing reliance on the judgment rendered in cases of Ahmad Nawaz vs the State (2011 SCMR 593), Iftikhar Mehmood and another Vs Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz vs the State and another (2012 SCMR 267), Muhammad Imran @ Asif vs the State (2013 SCMR 782), Sabir Hussain alias Sabri Vs the State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another Vs the State and another (2013 SCMR 1602),

Naveed alias Needu and others vs the State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another vs the State (2014 SCMR 1658), Muhammad Asif vs Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others vs the State (2017 SCMR 148). The relevant parts i.e. Para No.3 and 4 of the judgment (supra) are reproduced below:-

> "After hearing the learned counsel for the parties and going through the record we have observed that the High Court had categorically concluded that the motive set up by the prosecution had not been proved by it. **The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder…**…
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> 4. For what has been discussed above this appeal is dismissed to the extent of appellant's conviction for the offence under section 302 (b) PPC, but the same is partly allowed to the extent of his sentence of death on the charge of murder which **sentence is reduced to imprisonment for life."**(emphasis supplied).

14. Deriving wisdom from the judgments (supra) of the august apex Court and placing reliance thereupon, we while maintaining conviction of appellant/convict under section 302(b) PPC, reduce his sentence from ***death to imprisonment for life***. However, his sentence to the extent of compensation and period of imprisonment in default of

payment thereof, shall remain intact along with benefit of section 382-B Cr.P.C.

15. With the above modification in the sentence of the convict Dilawar son of Baghi Gul, his appeal is disposed of accordingly, whereas, **Murder Reference No.15 of 2018**, sent by the learned trial Court is answered in the ***negative***.

Announced:
08.10.2019
M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and Hon'ble Mr. Justice Ahmed Ali.