

**IN THE PESHAWAR HIGH COURT.****PESHAWAR,**  
**[Judicial Department]****Cr. Appeal No.550-P of 2022**  
**With Murder Reference No.15/2022**Mumtaz son of Munawar Khan,  
r/o Suhbat Kalay Zando Banda Risalpur,  
District Nowshera.

Appellant (s)

**VERSUS**

The State etc

Respondent (s)

For Appellant (s) :-	<u>M/S Jalal-ud-Din Akbar-e-Azam (Gara) and Ijaz Muhammad, Advocates.</u>
For State :-	<u>Mr. Arshad Ahmad, AAG.</u>
For respondent No.2.	<u>Mr. Rehan Saeed, Advocate.</u>
Date of hearing:	<u>25.01.2023</u>

**JUDGMENT**

**ROOH-UL-AMIN KHAN, J:-** This criminal appeal under section 410 Code of Criminal Procedure, 1898 ("Cr.P.C."), has been filed by Mumtaz, the appellant, against the judgment dated 09.06.2022, passed by learned ASJ-III/Judge Model Criminal Trial Court, Nowshera, whereby the appellant having been found guilty of committing murder of Imran and Mujahid deceased with firearm, has been convicted under section 302 (b) Pakistan Penal Code, 1860 ("PPC") and sentenced to death as Ta'azir on two counts and to pay rupees five lacs, as compensation to legal heirs of each deceased in terms of section 544-A Cr.P.C. and in default thereof to further undergo six months simple imprisonment. Similarly, he has been further convicted under section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 and sentenced to undergo

*For the State*

imprisonment for one year and to pay rupees five thousand as fine and in default thereof to further undergo 02 months simple imprisonment vide case FIR No.77 dated 05.02.2020 , registered at Police Station Risalpur. Benefit of section 382-B Cr.P.C. has been extended to him.

2. The learned Trial Court has sent **Murder Reference No.05 of 2022**, for confirmation of death sentence of the convict.

3. Since, both the matters are the outcome of one and the same judgment dated 09.06.2022 of the learned Trial Court, therefore, we propose to decide and answer the same through this common judgment.

4. The prosecution's case as unfolded in the First Information Report ("FIR") Exh.PA is that on 05.02.2020 at 1945 hours, complainant Khan (PW.3), present with the dead bodies of his son, namely, Imran and one Mujahid son of Arsala Khan in the casualty of Qazi Hussain Ahmad Hospital Nowshera Kalan, reported to Usman Ghani SI (PW.1), to the effect that on 05.02.2020 both the deceased had gone to attend the engagement ceremony of Munir Khan. He was present in his house when received information about murder of both the deceased in the Baithak of Nowsher Khan, situated in village Zando and that their dead bodies are lying at the spot. On the said information, he reached the spot and noticed the dead bodies of his son Imran and Mujahid deceased. He came to know that the deceased have been done to death by Mumtaz (appellant) with firearm. The occurrence is stated to have been witnessed by Noshari Khan (PW.4) and Zain

*Kashmiri*

Ullah (PW.5). He did not disclose motive behind the occurrence. His report was recorded in the shape of Murasila Exh.PA/1 by Usman Ghani SI (PW.1), which verified by Shamsher. Usman Ghani SI (PW.1) prepared injury sheets and inquest reports of both the deceased Exh.PW.1/1 to Exh.PW.1/4, respectively and shifted their dead bodies to the mortuary for postmortem examination.

5. On 05.02.2020 at about 07.20 PM, Dr. Ansaar Ahmed (PW.9), conducted autopsy on the dead body of Mujahid Khan deceased aged about 65 years and found the following injuries on his person vide postmortem report Exh.PM:-

Firearm entry wound on his left cheek with charring marks. Exist absent.

**Opinion:** According to his opinion cause of death of the deceased was firearm injury leading to cardio pulmonary arrest.

On the same day at 7.24 PM he also conducted autopsy on the dead body of Imran deceased aged about 30 years and observed the following injures on his body vide postmortem report Exh.PM/3:-

1. Firearm entry wound about 3 cm with charring marks on right anterio lateral aspect of neck about 5 cm below ear lobe.
2. Exit wound on left anterio lateral aspect of neck about 4 cm below left ear lobe with exit wound about 1 cm.
3. Entry wound on right shoulder about 5 cm below acromion about 2 cm.
4. Exit wound on right mid clavicular b/w neck and right shoulder about 4 cm.
5. On left angle of mandible there was hematoma formation about 12-13 cm.

*Look Sami*

**Opinion:** According to my opinion case of death of the deceased is firearm injury leading to cardio pulmonary arrest.

6. Dilaram Khan SI conducted investigation in the case, who on receipt of copy of FIR, proceeded to the spot and prepared site pan Exh.PW.11/2 on the pointation of eye witnesses Noshir Khan and Zainullah. During spot inspection, he secured blood with the help of cotton from the places of the deceased vide recovery memo Exh.PW.8/1, 07 empties of 30 bore pistol from the place of the appellant vide recovery memo Exh.PW.8/2, an electric energy saver bulb vide recovery memo Exh.PW.8/3 and the last worn bloodstained garments of the deceased vide recovery memo Exh.PW.7/1. During trial of the appellant, PW Dilaram SI was dead therefore, documents prepared by him during investigation were verified and exhibited through the statement of Arshad Ahmad SDPO (PW.11).

7. On 21.07.2020 after rejection of his BBA, appellant was arrested by Muhammad Kashif SI (PW.10) who on the pointation of the appellant on 26.09.2020 recovered a 30 bore Pistol without number from a wooden cupboard. The appellant disclosed the same to be a crime weapon. To this effect he prepare sketch of the place of pointation as Exh.PB.1 and took the pistol into possession through vide memo Exh.PW.2/1 in presence of its marginal witnesses and drafted Parwana for addition of section 15 KP Arms Act, in the FIR. On completion of investigation, he handed over case file to the SHO who submitted challan against the appellant before the learned trial court.

*Kashif SI*

8. On receipt of challan, the learned trial court summoned the appellant from Jail and formally charge sheeted him under section 302 PPC and section 15 KP Arms Act 2013 to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as fourteen witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340 (2) Cr.P.C. nor opted 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 in the initial part of the judgment, hence, this appeal by the appellant and Murder Reference by the learned Trial Court.

9. We have heard the exhaustive submissions of learned counsel for the parties advanced at the bar and perused the record and evidence with their valuable assistance.

10. In this case two persons, namely, Imran and Mujahid deceased have been done to death with firearms for which complainant Khan (PW.3) has directly and singularly charged appellant Mumtaz. As per FIR, the incident has taken place on 05.03.2020 at 1815 hours (06.15 PM) inside the Baithak of one Noshir Khan, situated in village Zando Nowshera, which has been reported by complainant Khan (PW.3) in the casualty of Qazi Hussain Ahmad hospital Nowshera Kalan at 1945 hours (07.45 PM). As per version of complainant on 05.03.3030 his son

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Imran along with one Mujahid had gone to attend the engagement ceremony of Munir Khan. He was present in his house when received information qua murder of Imran and Mujahid deceased in the Baithak of Nosher Khan. On the said information he rushed to the spot and noticed his son Imran and Mujahid deceased lying murdered there. He disclosed that he came to know that both the deceased have been done to death by Mumtaz (appellant) with firearm and the occurrence is witnessed by Nosheri Khan (PW.4) and Zain Ullah (PW.5). He disclosed that he does not know about the motive behind the occurrence. He while appearing in the witness box as PW.2 reiterated the same story as set forth by him in the FIR. Bare reading of initial report, rather admittedly, the complainant is not an eyewitness of the occurrence. Neither in his report Exh.PA/1 nor in his examination-in-chief he could disclose the name of person who conveyed the information of incident to him. He has not stated that any one from the alleged eyewitnesses, namely, Nosheri Khan and Zain Ullah informed him about the incident. His report has not been signed/thumb impressed by any of the alleged eyewitnesses as its verifier. Similarly, none from the alleged eyewitnesses is verifier of the dead bodies of the deceased. Contradicting his own version, complainant Khan in cross-examination has stated that he was informed by PW Zain Ullah through mobile cell phone, however, he has neither disclosed his own cell phone number nor the cell phone number of PW Zain Ullah in his report and court statement so much so the Investigation officer has not made any effort to collect the cell

*Nosheri Khan*

phone number of the above mentioned witness what to say of call data record "CDR". He has stated that he along with other persons including PWs Zain Ullah and Noshier picked up the dead bodies of the deceased from the ground to the cots and thereafter shifted to the vehicles and in the said process his hands and clothes as well as the hands and clothes of PWs Noshier and Zain Ullah were smeared with the blood of the deceased. He further stated that they along with dead bodies reached hospital at 07.30 PM and at the same time his report was recorded while the doctor started Postmortem examination on the dead bodies of the deceased which took about 15/20 minutes or more. In his report Exh.PA/1 and statement as PW.2, complainant has not furnished any explanation as to why the incident was not reported by the alleged eyewitnesses, namely, Zainullah and Noshier Khan when according both of them were present with him in the hospital, however, answer and explanation to the said query can be find in the statement of Usman Ghani SI (PW.1), author of the Murasila Exh.PA/1, who in cross-examination has stated that **"had eyewitnesses, namely, Noshier and Zain Ullah been present in the hospital, he would have endorsed the report of complainant from them"**. Contrary the complainant in cross-examination has categorically stated that at the time of report both the eyewitnesses were present with him. As stated earlier none from the alleged eyewitnesses has either reported the occurrence or have verified report of the complainant or identified the dead bodies of the deceased before the police and doctor, therefore, this aspect of the prosecution's case create serious

*Usman Ghani*

doubt in a prudent mind about presence of the alleged eyewitnesses at the spot, particularly, at the time of occurrence. Another disturbing aspect of the prosecution case is that in the report Exh.PA/1 the time of occurrence is shown as 1845 hours (06.15 PM) and time of report as 1945 hours (07.45 PM), but as per statement of Dr. Ansaar Ahmed, he conducted autopsy on the dead body of Mujahid deceased on 05.03.2020 at 07.20 PM and on the dead body of Imran deceased on the same day at 07.24 P.M. The time of postmortem of both the deceased falls before the timing of report i.e. 07.45 PM. Noshari Khan the alleged eyewitness has further disputed the said timing by stating that they along with dead bodies of the deceased reached the hospital at about 06.00 PM, whereas 06.15 is the time of occurrence. The above disclosed contradictions in the statements of the complainant and eyewitness Noshari Khan cast serious doubts in the prosecution's case.

11. Noshari Khan while appearing as PW.4 deposed that on 05.02.2020 there was engagement ceremony of son of Munir Khan and in this respect he along with others went to village Gedar Gumbat Mardan. On the way to Gedar Gumbat, deceased Imran and accused Mumtaz were making over takes each other by their motorcar; as a result, there was an altercation between them at Gedar Gumbat. When they returned back to village and people dispersed, PW Zain Ullah and accused Mumtaz were present outside Baithak while he along with deceased Imran and Mujahid was present inside the Baithak. In the meanwhile, all of a sudden accused took out his pistol and started firing on Imran and Mujahid

*Noshari*



deceased with which both got hit and died on the spot while the accused decamped from the spot in a black motorcar No.6600. According to him, the complainant was informed by PW Zain Ullah, however, PW Zain Ullah while appearing as PW.5 has kept mum about conveying information to the complainant. He further stated that site plan was prepared at his instance.

12. In report Exh.PA/1 complainant Khan (PW.3) has not disclosed that he does not know about the motive behind the occurrence. Had PW Nosheri Khan present at the spot at the time of occurrence and present at the time of making report by the complainant, he would have disclosed the motive to the complainant and the latter would have mentioned the same in his very initial report. In cross-examination, PW Nosher Khan has stated that his hands and clothes were smeared with the blood of the deceased, but no such clothes have been taken into possession by the Investigating Officer or produced by PW Nosheri Khan to the I.O.. He has not disclosed the reasons and circumstances which prevent him from making report. He while further contradicting the prosecution's case stated that it was about 07.30 PM when they reached to village from the hospital whereas 07.45 PM is the time of report. If at 7.30 PM they returned to village from hospital then making report by complainant at 07.45 PM is beyond the comprehension of a prudent mind. In the site plan distance between the Imran deceased and appellant is shown as 18 paces and between Mujahid deceased and appellant as 19 paces. As per postmortem reports, injuries sustained by both the deceased were having



charring marks. Causing of charring marks from a distance of 18 and 19 paces by the deceased is solid and sufficient proof to prove that alleged eyewitnesses were not present at the spot at the time of occurrence. In this view of the matter, medical evidence contradicts the site plan prepared on the pointation of the alleged eyewitnesses. PW Nosheri Khan in cross-examination has further stated that distance between the house of complainant and spot can be covered in 8/10 minutes and same is the distance of the house of PW Zain Ullah from the spot. He had not shown the spot of overtake and altercation between the appellant and the deceased to the I.O. On reappraisal of testimony of PW Nosheri Khan we are of the considered view to hold that he was not present at the spot at the time of occurrence as he has miserably failed to establish his presence at the spot through some strong physical circumstances of the occurrence. He has not disclosed the registration number of the motorcar/vehicle of the deceased. Similarly, no driving license in the name of any of the two deceased has been taken into possession by the I.O. in support of the version of the alleged eyewitness. In this view of the matter, the learned trial court has erred in law while relying upon the testimony of Nosher Khan which is pregnant with doubts and suffering from material contradictions shattering the entire edifice of the prosecution's case.

13. Another eyewitness Zain Ullah has appeared in the witness box as PW.5. He deposed that on 05.02.2020 he along with his uncle Mujahid deceased participated in the engagement ceremony of Munir Khan and were going to village Gedar Gumbt

*Nosheri Khan*

Mardan. On the way to Gedar Gumbat deceased Imran and accused facing trail Mumtaz were making over takes over each other on which an altercation took place between them. Mujahid and Imran deceased were present inside the baithak with Nosheri Khan inside the room whereas he and accused Mumtaz were present outside the Baithak. All of sudden the accused took out his pistol and started firing at the deceased with which the deceased got hit and died. Accused made his escape good from the spot in a black colour motorcar. In cross-examination he stated that after the occurrence complainant reached the spot in a motorcar whereas according to complainant he had reached the spot on his foot. He stated that his hands and clothes were smeared with the blood of the deceased but he has not handed over his clothes to the I.O. Similarly, he had also not shown his hands to the I.O. That it was about 07.30 P.M. when they reached the hospital along with dead body. In post mortem reports the time of autopsy on the dead bodies of the deceased has been shown as 07.20 PM and 7.24 PM. He further stated that as soon as they reached the hospital the police came to the hospital. Contrary, PW Nosheri Khan has stated that when they reached the hospital the police was already present in the hospital. He while further contradicting the statement of Nowsheri Khan stated that it was about 9.00 PM when they reached their village. He while contradicting the site plan stated that bulb was installed outside the baithak and at the time of taking the same into possession PW Nosheri Khan was present at the spot. Contrary, PW Nosheri Khan

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has stated that at the time of taking the bulb by the I.O. into possession he was not present at the spot.

14. On reappraisal of testimony of this witness we have reached to an irresistible conclusion that he too is a procured witness and was not present at the spot at the time of occurrence. The learned trial court has thus erred in law while believing his statement.

15. Recovery of blood from the spot from the places of the deceased their last worn bloodstained garments and positive Serologist report in respect thereof coupled with medical evidence proves the unnatural death of the two deceased due to firearm injuries, however, these pieces of circumstantial evidence without direct evidence are not sufficient to tell the name of the killer(s). Such corroborative pieces of circumstantial evidence are always taken into consideration in aid of direct evidence. In this case, we have disbelieved the direct evidence therefore such pieces of evidence would not advance the prosecution's case.

16. So far as recovery of 30 bore pistol without number allegedly shown recovered on pointation of the appellant is concerned, record shows that the same along with 07 empties recovered from the spot was sent to the FSL and as per FSL report Exh.PK/2, the empties have been fired from the said pistol. Record depicts that the said pistol is without number. Its recovery has been shown from a wooden cupboard from the house of the appellant. No evidence with regard to ownership of the said house has been brought on record. Besides, the empties have been shown sent to

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the FSL after recovery of the 30 bore pistol on 07.02.2020. In case titled **Ghulam Akbar and another Vs. The State (2008 SCMR-1064)**, it has been observed by the Hon'ble Supreme Court that law requires that empty recovered from the spot should be sent to the laboratory without any delay, failing which such recovery evidence would not be free from doubt and could not be used against the accused. Again in the case of **Jehangir Vs. Nazer Farid and another (2002 SCMR-1986)**, the receipt of crime empties in the Forensic Science Laboratory after seven days was not only condemned but it was treated as of no assistance to the prosecution or for that matter against the accused. Reliance is also placed on a case law titled **"Muhammad Younus Khan Vs. The State" (1992 SCMR-545)**. It was also observed in the case of **Attaullah and others Vs. The State (PLD 1990 Peshawar-10)**, that the crime empties should be immediately dispatched to Arms Expert and should not be kept by the Investigating Officer because in that case objection regarding manipulation of recovery will hold good. It is, by now, well established proposition of law that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its significance and evidentiary value. Reliance in this respect is placed on the case of **"Jehangir vs. Nazer Farid and another" (2002 SCMR 1986)**, **"Israr Ali vs. The State" (2007 SCMR 525)** and **"Ali Sher and others vs. The State" (2008 SCMR 707)**.

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17. Besides, when we have already disbelieved the ocular account, such recovery would not be sufficient for recording conviction of accused in capital charge, because this type of corroborative pieces of evidence are always taken into consideration along with direct evidence. In case titled, "**Noor Muhammad Vs the State and another**" (2010 SCMR 97), it has been held by the august Supreme Court that recovery of crime empty or rifle with matching report of FSL is a corroborative piece of evidence, which by itself is not sufficient for conviction of the accused in absence of substantive evidence.

18. No doubt, appellant is directly and singularly charged for murder of two deceased and substitution of accused in such like cases is a rare phenomenon, however, the law in this regard has been settled by the Hon'ble Supreme Court in case titled, "**Dr. Israr ul Haq vs Muhammad Fayyaz and another**" (2007 SCMR 1427), that such phenomenon depends and varies from case to case. It is settled principle of law that for recording conviction strong and corroborative evidence of unimpeachable character is required and that findings of guilt against accused must not be based on probabilities to be inferred from evidence, rather, must rest surely and firmly on the evidence of unimpeachable character, otherwise, the golden rule of benefit of doubt would be reduced to naught. It is also settled principle of law that a witness who claims to be the eyewitness of the occurrence, must prove his presence at the spot at the time of occurrence and shall satisfy mind of the Court qua his presence through some physical circumstances or corroborative

*Laqman Sami*

evidence. We are also mindful of the dictum laid down by the Hon'ble apex Court in case titled, "**Mst. Sughra Begum and another vs Qaisar Pervez and others**" (2015 SCMR 1142), that ocular account in cases of Qatl-e-amd plays a decisive and vital role and once its intrinsic worth is accepted and believed then rest of the evidence, both circumstantial and corroborative, will be required as a matter of caution. To the contrary, once the ocular account was disbelieved then no other evidence, even of a high degree and value, will be sufficient for recording conviction on a capital charge, therefore, probative value of the ocular account has to be seen in light of the facts and circumstances of each case.

19. It is established law that prosecution is duty bound to prove its case against the accused beyond any reasonable doubt and if any single doubt arises, benefit of the same must be given to accused as the accused is always considered a most favourable child of law. Guidance in this regard can be derived from case titled, "**Tariq Pervaz Vs the State**" (1995 SCMR 1345) and case titled, "**Muhammad Akram Vs the State** (2009 SCMR 230) and **Faryad Alis case** (2008 SCMR 1086).

20. The learned Trial Court has not appreciated the evidence available on record in its true perspective, thus, has arrived at an erroneous conclusion by holding the appellant guilty of the offence, hence, the impugned judgment is not sustainable, as such, is liable to be set aside. Resultantly, this appeal is allowed. The impugned judgment along with conviction and sentences of the appellant recorded therein are hereby set aside and the appellant is

*Kashif*

acquitted of the charge leveled against him. He be set at liberty forthwith, if not wanted to be detained in any other case.

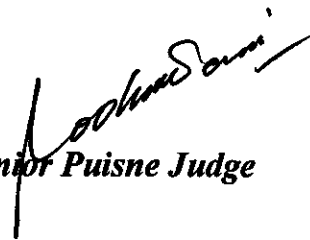
21. On acquittal of the appellant-convict, the **Murder Reference No.015 of 2022**, sent by the learned Trial Court, is answered in the **Negative**.

22. These are the reasons of our short order of even date, which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentence of appellant Mumtaz son of Munawar Khan, recorded under section 302(b) PPC and section 15 KP Arms Act 2013, by learned Additional Sessions Judge-III/Model Criminal Trial Court, Nowshera vide judgment dated 09.06.2022, in case FIR No.77 dated 05.02.2020, registered under sections 302/34 PPC and section 15 KP Arms Act, at Police Station Risalpur, Nowshera and hereby acquitted him of the charges in the cited case. The appellant be set at liberty forthwith if not want to be confined in any other case.

Murder Reference No.15 of 2022 is answered in the **Negative**.

**Announced:**  
25.01.2023  
M.Straf Afridi CS

  
Senior Puisne Judge

  
**JUDGE**

DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge:  
And Hon'ble Mr. Justice Shakeel Ahmad