6

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

Cr.A. No.42-D/2022 with
Cr.M. No.21-D/2022.

Naimat Ullah
Vs.
The State & another.

JUDGMENT

For Appellant: M/S Salimullah Khan Ranazai and Saif-ur-Rehman Khan, Advocates.

For State: Mr. Aamir Farid Saddozai, Asstt: A.G.

For Respondent: Mr. Sanaullah Shamim Gandapur, Advocate.

Date of hearing: 06.6.2023.

***

MUHAMMAD FAHEEM WALI, J.- This judgment shall also dispose of the connected Criminal Revision No.05-D/2022, as both the matters are the outcome of one and the same judgment dated 19.9.2022, passed by the learned Additional Sessions Judge-III, D.I.Khan, whereby the appellant was convicted under section 302(b) PPC for committing *qatl-i-amd* of Hizb Ullah, and sentenced to life imprisonment as Ta'zir with compensation of Rs.4,00,000/- (four lac) to be paid to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. or in default thereof, to undergo simple imprisonment for six months.

2. The prosecution story as disclosed in the FIR, in brief, is that on 11.4.2004, complainant Abdus Salam Khan, with the help of co-villages, brought the dead body of his brother Hizb Ullah to Police Station Kulachi, where he reported the matter to the local police that on the eventful day, he alongwith his afore-named brother had gone to the house of his nephew (sister's son), namely Aftab Khan, wherefrom they were returning to their home; that his brother was ahead of him while he was following him at some distance and at the relevant time, when they reached near the medical store of Gulli Doctor, the accused Naimat Ullah, duly armed with Kalashnikov emerged on the scene of occurrence and called his brother that he would not be spared and started firing at him, as a result whereof, his brother got hit and fell to the ground. After commission of the occurrence, the accused fled away from the spot. When the complainant attended his brother, he had already breathed his last. The occurrence was stated to be witnessed by the complainant. Motive for the occurrence was stated to be that the accused was teasing and harassing his nephew, who was restrained by the deceased, whereupon the accused was annoyed. He charged the accused for the commission of offence.

3. On completion of the investigation, complete challan against the accused was submitted before the learned trial Court where at the commencement of trial, the prosecution produced and examined as many as nine (9) witnesses, whereafter, statement of the accused under section 342 Cr.P.C, was recorded wherein he professed innocence and false implication, however, neither he wished to be examined under section 340(2) Cr.P.C, nor produced defence evidence. It is pertinent to mention here that on 27.01.2021, APP submitted an application before the trial Court for transposition of the statements of Ghulam Shabbir SHO, Muhammad Jan S.I and Dr. Shah Noor, recorded during proceedings u/s 512, Cr.P.C., on the ground that the witnesses were dead. The application was allowed vide order dated 26.10.2021 and pursuant thereto, statements of afore-named witnesses were transposed to the present trial. On conclusion of trial and after hearing arguments, the learned trial, convicted the appellant and sentenced him, as mentioned above, which has been assailed by the appellant through the instant criminal appeal, whereas the complainant has filed connected criminal revision for enhancement of sentence. Both the criminal appeal and criminal revision are being decided through this common judgment.

4. We have heard the learned counsel representing the appellant, the learned A.A.G. assisted by learned private counsel at length and with their valuable assistance, the record was gone through.

5. Though the learned trial Court passed a guilty verdict, yet this being the appellate Court is under the bounden duty to assess and re-assess the available evidence on the file and to appreciate as to whether the learned trial Court was correct in its approach by convicting the appellant. True, that in case of single accused, substitution is a rare phenomenon, but equally true that to charge a single accused will not absolve the prosecution of its liability to prove the case through trustworthy and confidence inspiring evidence. In order to ascertain as to whether the impugned judgment is based on proper reasoning and that the learned trial Court correctly applied its judicial mind to the facts and circumstances of the case keeping in view the evidence available on the file, so we deem it essential to thrash out the evidence so as to avoid miscarriage of justice.

6. It was on 11.4.2004, when the complainant alongwith his deceased brother were coming back from the house of their nephew Aftab Khan, situated in Mohallah Shakhi, Kulachi, towards their house situated in Mohallah Ranazai and when they reached opposite medical store of one Gulli Doctor at Shakhi

Gate, his deceased brother was walking ahead of him, meanwhile, accused duly armed with a Kalashnikov emerged on the spot and started firing at him, who was hit and died on the spot. This Court is conscious that in criminal dispensation of justice, direct evidence plays a pivotal role and no other evidence can be a substitute to the direct evidence. There can be no denial of the fact that conviction can be based upon the testimony of a related witness when it is found that the same rings true and natural. On the contrary, statement of related witness is to be scrutinized with great care and caution and that too, when an accused is charged in a murder case. In the present case, the ocular account of the incident has been furnished by the complainant (brother of the deceased), who was examined before the trial Court as PW-5, therefore, in order to reach at a just conclusion, at first instance we would like to discuss his testimony. The complainant, in his Court statement, while narrating the story as mentioned in the FIR, added/improved that after taking few steps, his brother fell down and succumbed to his injuries and that he recognized him in the light of bulb installed at front of Kashmir Bakers. It is in the statement of the complainant that at the time of incident, his deceased brother was walking at some paces ahead of him, when the accused armed with Kalashnikov came in front of them from the opposite

side, made Lalkara at his brother and started firing. This deposition of the complainant cannot be believed for two reasons, firstly, that the same is belied by the first information report where it has been narrated that after receiving fire shots the deceased fell to the ground and died on the spot; secondly, even if, for the sake of argument, it is accepted that the accused emerged from front side of the deceased, then according to site plan the complainant would be in the line of firing, however, the site plan speaks otherwise i.e. point No.2 ascribed to the accused is towards north east side of the deceased and complainant, whereas points No.1 and 3, assigned to the deceased and complainant are towards south and western side of the accused, respectively. The complainant further stated that after lodging the report, the dead body of his brother was shifted to hospital while he accompanied the Investigating Officer to the spot where he pointed out the place of occurrence to the Investigating Officer, who prepared site plan in the light of bulb as well as in the headlights of official vehicle, which is belied by the statement of Kifayatullah SI (PW-4), who stated during cross examination that, "We conducted all the proceedings on the spot with the help of headlight of official vehicle as it was pitch dark". It is also not appealable to a prudent mind that a brother would prefer to go to

the spot and would not escort the dead body of his brother.

The moot point for determination is the joint visit of the house to their nephew (sister's son) by two brothers i.e. the complainant and the deceased. In this regard, the complainant was specifically cross-examined to which he replied that "we both the brothers by chance went to the house of my sister", meaning thereby that he was a chance witness, however, he never disclosed the purpose of his visit to his sister's house. Even none from the family member of his sister's house was cited as a witness in order to establish the purpose for the joint visit of the two brothers.

7. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was by a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the

presumption under the law would operate about his absence from the crime spot. True, that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt. In case titled '***Liaquat Hussain and others Vs. Falak Sher and others (2003 SCMR 611)***, it was held by the apex Court that *"Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence"*. No cogent, convincing and believable explanation, justifying the presence of complainant on the spot at the time of incident is forthcoming from the evidence on record, therefore, it was sufficient to discard his testimony. In this respect, reliance can be placed on the cases of ***Mst. Rukhsana Begum and others Vs. Sajjad and others (2017 SCMR 596), Mst. Anwar Begum Vs. Akhtar Hussain alias Kaka and 2 others (2017 SCMR 1710) and Mst.***

Sughra Begum Vs. Qaiser Pervez and others (2015 SCMR 1142).

The complainant was not even aware of the distance/rough distance between the place of occurrence and the house of his sister. According to the complainant, the occurrence took place at western side of the Shakhi Gate, which is thickly populated area, surrounded by shops etc and people always remain there. He admitted that at the time of incident two shops were open. It is worth mentioning that the shop i.e. Kashmir Bakers relating to Gulli Doctor was opened at the time of incident, however, said Gulli Doctor has not been cited as witness. In this view of the matter, best available evidence was withheld for reasons best known to the prosecution, therefore, an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984, could be formed that had he been cited as a witness, he would not have supported the stance of the complainant/prosecution. Furthermore, the complainant admitted that the word 'in front of us' is not available in the FIR, nor in his supplementary statement. While contradicting his own statement, he admitted that the deceased fell down on the ground where he was standing. Factum of bulb is neither mentioned in the FIR, nor in examination-in-chief of the complainant nor in his supplementary statement. Further cross-examination of the

complainant is more astonishing when he was confronted with his supplementary statement, especially with regard to shifting of the dead body to the hospital. He stated that Ashraf and Zahoor Khan accompanied them in shifting the dead body to the hospital. According to him, both the afore-named persons alongwith others were attracted to the spot after hearing the firing and soon after that they shifted the dead body to the Police Station. The above deposition, in our opinion, is sufficient to discard testimony of the complainant for the reason that the same runs counter to the FIR. Even otherwise, none of the afore-named persons was examined before the trial Court to support the above deposition of the complainant. It is pertinent to mention here that according to transposed statement of Dr. Shah Noor (PW-9), the afore-named Ashraf and Zahoor Khan had identified the dead body before him, however, since they were not examined before the trial Court, therefore, it cannot be ascertained that who shifted the dead body from Police Station to the hospital. Even time of shifting of the dead body remained a mystery as yet, as no evidence is available on file in this respect. The learned trial Court while convicting the appellant has totally ignored the above glaring discrepancies surfacing in the prosecution case, especially in the statement of complainant, which

were otherwise sufficient to establish that the complainant was not present on the spot at the time of incident.

In case reported as *"Irfan Ali Vs. the State" (2015 SCMR 840)*, it was held by the Apex Court that:-

> ***"To award a capital punishment in a murder crime, it is imperative for the prosecution to lead unimpeachable evidence of a first degree, which ordinarily must get strong corroboration from other independent evidence if the witnesses are interested or inimical towards the accused. In a criminal trial no presumption can be drawn against the accused person as it is a cardinal principle of justice that no one should be construed into a crime without legal proof/evidence, sufficient to be acted upon. No care and caution was observed in the present case in light of this principle. No evidence of believable nature was led with regard to the motive in the case to lend support to the prosecution version".***

8. In addition to the above, Kifayatullah SI was examined before the trial Court as PW-4. While contradicting the complainant, he stated in his cross-examination that Sham Qaza Vela, he alongwith Investigating Officer reach on the spot and at that moment no private person was present; that they performed evening prayer on the spot, site plan was prepared by the I.O in the headlights of vehicle. He further contradicted the complainant by stating that they proceeded from Police Station before evening

prayer. He also contradicted the complainant by stating that the Investigating Officer had not summoned any private person to the spot, however, at that moment complainant was also not present and that at the time of spot inspection, no private person was examined by the I.O and only his statement was recorded on the spot. The above deposition of PW-4 clearly negates the version of the complainant, which is sufficient to establish that neither the complainant was present on the spot at the time of incident, nor he had accompanied the Investigating Officer from Police Station to the spot.

9. So far as recovery of seven empties of 7.62 bore, two spent bullets stuck into the wall opposite to the shop and a 60 watt bulb from shop of Kashmir Bakers coupled with the medical evidence, are concerned, suffice it to say that the same being corroborative evidence cannot overweigh the direct evidence which has already been disbelieved by us in the preceding paragraphs. In this behalf, reliance can be placed on the cases reported as *"Dr. Israr-ul-Haq Vs. Muhammad Fayyaz and another" (2007 SCMR 1427), "Muhammad Jamil Vs. Muhammad Akram and others" (2009 SCMR 120), "Abid Ali and 2 others Vs. The State" (2011 SCMR 208), "Muhammad Nawaz and others Vs. The State and others" (2016 SCMR 267) and "Tariq Zaman Vs.*

Muhammad Shafi Khan and 2 others" (2018 MLD Peshawar 854).

10. The prosecution alleged motive to be that the accused was teasing and harassing nephew (sister's son) of the complainant, who was restrained by the deceased, which annoyed the convict/appellant, however, the prosecution did not succeed in establishing the alleged motive and even no independent witness was produced in that respect. The prosecution, in all circumstances was to prove the same. When the prosecution did not succeed in establishing the motive, then it is for the prosecution to suffer, as is held in case reported as *"Hakim Ali Vs. The State" (1971 SCMR-432)*, that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of *"Amin Ullah Vs. The State" (PLD 1976 SC 629)*, wherein, it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of *"Muhammad Sadiq Vs. Muhammad Sarwar" (1997 SCMR 214)*. Again, on the same principle, case laws titled *"Noor Muhammad Vs.*

The State and another" (2010 SCMR 997) and "Amin Ali and another Vs. The State" (2011 SCMR-323) can also be referred.

11. It was highly agitated, that right from the day of incident till his arrest, the appellant remained in hiding with no plausible explanation. It was submitted that the long unexplained abscondence alone was sufficient to convict the appellant. There is no cavil with the proposition that abscondence is not a substantive piece of evidence, rather it is a circumstance that can be taken into consideration, that too, when the prosecution succeeds in bringing home guilt against the accused by producing convincing evidence, but in the instant case the situation is altogether different, therefore, abscondence alone cannot be taken into consideration to convict the appellant, that too, for awarding capital punishment.

12. The learned trial Court has not appreciated the evidence in its true perspective and thereby fell in error by convicting the appellant. We have minutely perused the judgment under challenge through all angles, which cannot face the test of judicious scrutiny and the same invites attention of this Court for interference.

13. Accumulative effect of the whole aspects taken into consideration, leads us to only conclusion that the prosecution has miserably failed to establish

the case against the appellant, otherwise to extend benefit of doubt so many circumstances are not required to be brought forth. The instant criminal appeal is allowed, the impugned judgment is set aside, resultantly, the appellant is acquitted of the charges levelled against him. He shall be released forthwith, if not required to be detained in connection with any other case. Since we have set aside the conviction and sentence awarded to the appellant, therefore, the connected criminal revision for enhancement of sentence has become infructuous which stands dismissed accordingly.

14. Above are the detailed reasons of our short order of even date.

Announced.
Dt: 06.6.2023.
Kifayat/*

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Dr. Khurshid Iqbal