JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Crl. Appeal No.584-P/2014

with Murder Reference NO.16-P/2014

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-IV, Mardan, appellant Mustaqeem, having been found guilty of committing the 'Qatl-i-Amd" of Jawad Hussain deceased and attempting at the lives of PWs Nawab Khan and Shah Faisal, vide judgment dated 25.10.2014, was convicted under section 302 (b) PPC and sentenced to normal penalty of death as well as to pay Rs.1,00,000/-, as compensation to LRs of the deceased in terms of S.544-A Cr.P.C. or in default thereof, to undergo 06 months S.I. further. The appellant has been further convicted under section 324 PPC and sentenced to undergo 07 years R.I. on two counts alongwith fine of Rs.50,000/- or in default thereof to undergo 06 months S.I. further. Benefit of S.382-B Cr.P.C. has been extended to him.

2. Through the instant appeal, the appellant has questioned his conviction and sentences, while the learned Trial Court has sent ***Murder Reference No.16-P/2014*** in terms of S.374 Cr.P.C. for confirmation of death sentence of the convict.

3. Since both the matters are the outcome of one and the same judgment of the learned Trial Court dated 25.10.2014, therefore, this common judgment shall govern the same.

4. Brief account of the prosecution case is that on 25.10.2003 at 08.50 hours, complainant Nawab Khan (PW.6), in company of dead body of his son Jawad Hussain, reported to local police in casualty of DHQ hospital Mardan that on the fateful day he alongwith his deceased son Jawad Hussain and grandson Shah Faisal, was on the way to Bazaar and when reached Akbar road in front of the shop of "Nanbai", Mustaqeem (appellant-convict herein) alongwith Arshad and Amanat Khan (acquitted co-accused), duly armed with Kalashnikovs, caught hold of him and started thrashing him with Butts of their weapons; that his deceased son and grandson tried to separate/ rescue him, but in the meantime, accused opened fire at them with the intention to commit their murder and

as a result of firing of appellant Mustaqeem, his son Hussain deceased, got hit and died; that because of the Butt blows inflicted on their persons by the accused, he and his grandson are feeling pain in different parts of their bodies. In addition to complainant, the incident is stated to have been witnessed by PWs Shah Faisal and Haji Ihsan ud Din. An altercation between the parties on preceding evening over a money dispute has been alleged as motive behind the incident. Report of the complainant was reduced in to writing in the shape of murasila, on the basis of which, FIR No.1256 dated 25.10.2003, was registered under sections 302/324/34 PPC, in Police Station Hoti, Mardan against the accused.

5. Dr. Khalid Hussain (PW.1) conducted autopsy on the dead body of the deceased on 25.10.2003 at about 09.30 a.m. and found the following injuries on his person:-

1. Firearm entry wound on left side of back near the spinal cord, size ½ x 1/2 inches.
2. Firearm exit wound on the left scapula corresponding to wound No.1, size ½ x 1/2".
3. Firearm entry wound on the left side of back below the scapula size ½ x ½ inch.

4. Firearm exit wound on the left arm near left shoulder joint, size 1 x 1 inch.

5. Firearm entry wound on the right side of back on right scapula, size ½ x ½ inch.

6. Firearm exit wound corresponding to wound No.5 on interior aspect or right axilla, size 2 x 3 inch.

7. Firearm entry wound on the lateral aspect of the left thigh, size ½ x ½ inch.

8. Firearm exit wound corresponding to wound No.7 anterior medical aspect of the left thigh size 3 x 3 inches.

Opinion: According to his opinion the cause of death was injury to vital organs like heart, lung, major vessels due to firearm injures.

Probable time between injuries and death has been given as ½ hours while between death and postmortem as about one hour.

On the same day, he also examined injured Nawab Khan at 10.20 a.m. and found small abrasion on his chin and face. Similarly, on examination of injured Shah Faisal, the medical officer observed a small lacerated

wound on his forehead and another small lacerated wound below his right eye.

6. Said Ghalib Khan SI (PW.8) conducted investigation in the case. He proceeded to the spot and prepared site plan Exh.PB, at the instance of eyewitnesses. During spot inspection, he secured blood from the place of the deceased vide recovery memo Exh.PW.8/1 and 10 spent bullets of 7.62 bore vide recovery memo Exh.PW.8/3. Vide recovery memo Exh.PW.8/2, he took into possession the last worn bloodstained garments of the deceased, recorded statements of the PWs, sent the bloodstained articles to the FSL, report whereof is Exh.PX. He also sent the empties to the FSL, report whereof, is Exh.PZ. The case property/ above articles being allegedly damaged in flood could not be exhibited. Liaqat Ali Khan SI (PW.4), initiated proceedings under sections 204 and 87 Cr.P.C. against the accused. He placed on file the postmortem and medico legal reports of the deceased and injured and after completion of investigation handed over the case file to the SHO for submission of challan.

7. Initially, co-accused Amanat Khan and Arshad Khan were arrested, tried and ultimately, acquitted vide judgment dated 15.12.2009.

8. Later on, accused-appellant was arrested. Gohar Ali Khan SI (PW.5), obtained his physical remand from the court of learned Illaqa Judicial Magistrate. During interrogation, the accused pointed out the crime spot and at his instance pointation memo Exh.PW.5/2 was prepared. After completion of investigation, supplementary challan was submitted against the appellant.

9. On receipt of challan by the learned Trial Court, appellant was summoned and formally charge sheeted, to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined eight 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 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 above, hence, this appeal.

10. Learned counsel for the appellant argued that impugned judgment of the learned Trial Court is against the law, facts and evidence available on record; that injured PW Shah Faisal has been abandoned by the

prosecution for no good reason; that PW Nawab Khan is untrustworthy and not a credible witness while PW Ihsan ud Din failed to establish his presence on the spot through some strong physical circumstance; that their testimony is suffering from material contradictions and discrepancies creating serious doubts in the prosecution case; that their escape from the firing of three accused being in their close proximity or being let off by the accused does not appeal to a prudent mind; that keeping in view position of PW Nawab, as shown in the site plan, he should have been the first target of the firing, but astonishingly he has not sustained any firearm injury; that the unnatural conduct of PW Ihsan ud Din is another disturbing factor about his absence on the spot; that site plan and medical evidence contradict the ocular account; that on the same set of evidence co-accused have already been acquitted and appeal against their acquittal has also been dismissed up to this Court; that mere positive FSL report qua the crime empties and alleged abscondence of the appellant which he has denied, in absence of direct evidence of unimpeachable character and recovery of crime weapon, would not be sufficient for recording conviction in a capital charge; that prosecution evidence being pregnant with doubts, benefit

of the same is to be extended to the appellant and he be acquitted of the charge.

11. Conversely, learned AAG assisted by learned counsel for the complainant argued that appellant is directly charged for effective firing at the deceased; that ocular account furnished by the PWs is straightforward and confidence inspiring which is corroborated by medical evidence, site plan, recoveries of blood and empties from the spot coupled with unexplained noticeable abscondence of the appellant; that it is the quality of evidence and not its quantity which is taken into consideration and conviction can be recorded even on the basis of testimony of single witness; that the role of the appellant is squarely different from that of the acquitted co-accused, therefore, acquittal of co-accused would have no bearing on the case of the prosecution as by now the principle of sifting grain from the chaff is vigorously followed by the Courts in the country, on account of which the prosecution has successfully proved the guilt of the appellant through overwhelming evidence available on record. They while supporting the impugned judgment sought dismissal of the appeal.

12. We have considered the respective submissions of learned counsel for the parties, learned AAG for the State and perused the record with their able assistance.

13. Ocular account of the incident has been furnished by complainant Nawab Khan (PW.6) and Haji Ihsan ud Din (PW.7). Former is father of the deceased and latter is his brother-in-law. No doubt, conviction can be recorded on the testimony of eyewitnesses having close relations with the deceased as well as on the testimony of solitary eyewitness, provided the same is trustworthy, confidence inspiring and corroborated by strong circumstances. In this case, complainant Nawab Khan, while appearing as PW.6, reiterated the same version as set forth by him in his initial report. He again assigned the role of firing to all the three accused on them, however, he specifically attributed the role of effective shots at the deceased to appellant Mustaqeem. A look over the site plan Exh.PB, reveals that complainant has been shown at point No.1, abandoned PW Shah Faisal at point No.2 and the deceased at point No.3. The places of PW Nawab Khan and abandon PW Shah Faisal, fell in front of the accused shown at points No.5, 6 and 7, whereas the deceased has

been shown on back side of the above named PWs at point No.3. In such eventualities, in case of firing by the three accused, the PWs should have been hit being closer to the accused in their front, as compared to deceased who is behind the PWs. PW Nawab Khan deposed that they were fired at from a distance of 4 paces by the accused, but none of the PWs has sustained any firearm injury. Moreso, if complainant Nawab Khan (PW.6), was being beaten by the accused and his son Jawad Hussain deceased and grandson Shah Faisal (abandoned PW), tried to rescue him, he should have been the first target of the accused being already in their clutches, but astonishingly he did not receive any injury and his son behind him at a distance of 14 paces from the accused got hit. It is not the case of the complainant that he and PW Shah Faisal took shelter during firing, hence, their escape or being let off by the accused being armed with automatic weapons ejecting number of shots in seconds, in presence of common motive, is quite disturbing fact which create serious doubts about the mode and manner of the incident as alleged by the complainant. Only ten empties of 7.62 bore have allegedly been shown recovered from the spot. In case of firing with three Kalashnikovs, ejecting number of empties in seconds,

much damage should have been caused to the deceased as well as the alleged eyewitnesses and much empties should have been recovered, but such is not the case herein. In his initial report complainant has not uttered a single word as to how and by which means the deceased was shifted to the hospital. In his court statement he deposed that the deceased was shifted in a car, but his statement in this regard has been contradicted by PW Ihsan ud Din as according to him the deceased was shifted in a Suzuki Van.

14. Haji Ihsan ud Din while appearing PW.7 deposed that on the fateful time on hue and cry, he came out of his clinic and saw the accused thrashing the complainant with butts of their Kalashnikovs; that deceased Jawad Hussain and Shah Faisal (abandoned PW) tried to separate them, but the accused opened fire at them, and the deceased got hit with the firing of accused Mustaqeem and died. This witness is the son-in-law of complainant Nawab Khan. In the site plan his presence has been shown at point No.4 near the shop of one Fayaz. He poses himself to be a dispenser in the clinic of doctor Jehangir, situated in Mohallah Sherdal Khan and originally resides in Guli Bagh, lying at a distance of 4/5 Kilometer

from the crime venue, as such falls within the definition of a chance witness. Chance witness, in legal parlance is a witness who claimed his presence on the spot at the eventful time, albeit his presence on the spot is 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 resided, carried on business or run day to day affairs. Testimony of a chance witness, in such context, is ordinarily not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time as in normal course, the presumption under the law that would operate would be that such witness was absent from the crime spot. In rare cases, the testimony of a chance witness can be relied upon, provided some convincing explanation appealing to a prudent mind of his presence on the crime venue 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. Guidance in this regard can be derived from the judgment of the august Apex Court in case titled, **"Mst. Sughra Begum and another Vs Qaiser Pervez and others" (2015 SCMR 1142).**

Deriving wisdom from the judgment (supra), we do not find any clinic of doctor Jehangir in the surrounding of the crime venue in the site plan Exh.PB. The place of occurrence is Akbar road while clinic of doctor Jehangir has been alleged to be situated in Mohallah Sherdal Khan. Neither doctor Jehangir has been examined by the Investigating Officer nor produced by PW Ihsan ud Din in support of his version. In cross-examination PW Ihsan ud Din deposed that complainant was being beaten by the accused for about then minutes and then suddenly firing started. According to him he did not try to separate/ rescue the complainant from the accused. The unnatural conduct of this PW like a silent spectator to see thrashing of his father-in-law for ten minutes, is beyond our understanding. Had he been present on the spot, he would have never acted in the alleged manner rather would have rushed towards his father-in-law to rescue him from the clutches of the accused. Keeping in view the above facts and circumstances, we are firm in our view that PW Haji Ihsan ud Din, failed to establish his presence on the spot at the time of incident and he being son-in-law of the complainant is a procured witness.

15. An altercation over a money dispute between the complainant party and the accused has been alleged as motive behind the incident. PW Nawab Khan deposed that he did not lodge any report regarding the altercation; that he had not stated as to where the altercation took place; that he had to pay Rs.165/- to the accused. On the one hand, no evidence, much less tangible has been led to prove the motive. i.e. altercation over Rs.165/-, while on the other hand, we fail to understand that for such a meager amount, one would opt to take the life of other, curtailing his own liberty and tarnishing his future. As per ratio of the judgment of the august Apex Court in case titled, "Pathan Vs the State" (2015 SCMR 315), motive in legal parlance is ordinarily not considered as a principal or primary evidence in a murder case, however, in rare cases, motive did play a very vital and decisive role for committing murder. The relevant Paragraphs of the judgment are reproduced below:-

> **" Para 6. The only cause/ motive for causing the murder of the deceased was that appellant was a teacher in the school where the deceased was a head teacher and the appellant was transferred to a village**

mosque school, on which he was annoyed and was driven to the extreme to take revenge. In the first instance, the motive has not been establish in any manner whatsoever through any documentary evidence or even secondary evidence of reliable nature, but we fail to understand and to rely on such artificial motive because under the law a head teacher has no authority to transfer a teacher of his school to another not under his control and management but he can only recommend his transfer to the Education Officer of the District or of the Circle for that end.

Para 7……..……

Para 8. True that, motive in legal parlance is ordinarily not considered as a principal or primary evidence in a murder case, however, in some rare cases like the present one, the motive would play a very vital and decisive role for committing a murder. As the motive has almost disappeared for want of proof and being entirely feeble, artificial

and not at all appealing to a prudent mind, therefore, it has rendered the entire episode of the tragedy doubtful. On this score too, the prosecution case is liable to be discarded as a whole".

16. Another disturbing aspect of the case is that the deceased and accused have been shown in one and the same level at the crime spot, but according to Dr. Khalid Hussain (PW.1), who conducted autopsy on the dead body of the deceased, entry wound No.1 on the person of the deceased was at higher level than its exit wound No.2 and same was the position of entry wound No.7 and exit wound No.8, meaning thereby that that at the time of firing the assailant was on higher position and the deceased on down level, thus, medical evidence negates the ocular account.

17. As regard positive FSL report qua ten empties of 7.62 bore, allegedly recovered from the spot, suffice it to say that on the one hand, these have not been exhibited during trial, while on the other hand, no crime weapon has been recovered from the appellant. These empties have not been specifically attributed to the appellant. Though, appellant has been attributed effective firing at the

deceased, but at the same time, the other two acquitted co-accused have also been assigned the role of ineffective firing. In absence of recovery of the crime weapon from the appellant and comparison of the crime empties with the same by the FSL, by no stretch of imagination these empties could be only be attributed to the appellant. Moreover, the empties have been sent to the FSL with a delay of about 11 days. Where these empties remained for a long period of 11 days and whether these were in safe hands till its dispatch to the FSL, are the disturbing question which have not been answered by the prosecution, hence, positive FSL report, in the circumstances, would lose its authenticity. Over and above, such like recoveries are always considered as corroborative pieces of evidence, which cannot be a substitute of direct evidence. Corroborative pieces of evidence are always taken into consideration alongwith direct evidence. Similarly, positive Serologist Report qua bloodstained articles as well as autopsy report of the deceased, can only to prove the unnatural death of the deceased with firearm on a particular place, but by whom, it never tell the name/names of the culprit/culprits. Since, we have disbelieved the direct evidence; therefore, these

corroborative pieces of evidence by no mean would sufficient to bring home the guilt of the appellant. Guidance may be derived from **Riaz Ahmed's case (2010 SCMR 846).** It has been held by the Hon'ble Supreme Court that in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541),** that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular evidence is to be read together and not in isolation. As per ratio of judgment of the Hon'ble Supreme Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410),** when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery. In case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730,** it has been observed by the august Apex Court that recovery of crime weapon by itself is not sufficient for conviction on murder charge. In case of **Siraj Vs Crown (PLD 1956 Federal Court 123),** it has been held that recovery of handle of blood-stained hatchet at the instance of the accused, when other evidence was disbelieved, then it was not enough for conviction.

18. So far as absconsion of the appellant is concerned, on the one hand, he has denied the same,

while on the other hand, it is settled law that abscondence alone, cannot be a substitute of real evidence. It has been observed by the apex Court in **Farman Ali and others' case (PLD 1980 SC 201),** that abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused and mere abscondence of accused would not be enough to sustain his/her conviction. Reliance can also be placed on case titled, **"Muhammad Vs Pesham Khan (1986 SCMR 823).**

19. For what has been discussed above, we have reached to an irresistible conclusion that prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring evidence beyond shadow of reasonable doubt. The learned Trial Court failed to appreciate the available evidence in its true perspective and thus reached to erroneous conclusion by holding the appellant guilty of the offence. The prosecution evidence is pregnant with doubts, benefit of which is to be extended to the appellant not as a matter or grace or concession but as matter of right, as per golden principle of benefit of doubt, according to which, one substantial doubt would be enough for acquittal of the accused. The

rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Wisdom in this regard may be derived from the judgments of the august Apex court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**.

20. In view of the above, we allow this appeal, set aside the conviction and sentences of the appellant recorded by the learned Trial Court vide impugned judgment dated 25.10.2014 and hereby acquit him of the charge levelled against him. Accordingly, Murder

Reference No.16-P/2014, sent by the learned Trial Court, is not confirmed and is answered in the ***Negative.***

21. These are reasons of our short order of even date, which read as under:-

> **"For reasons to be recorded later on, this appeal is allowed. The conviction and sentence of appellant, namely, Mustaqeem, awarded to him in case FIR No.1256 dated 25.10.2003 under sections 302/324/34 PPC, Police Station Hoti Mardan by learned Additional Sessions Judge-IV, Mardan, vide impugned judgment dated 25.10.2014, are set aside and he is acquitted of all the charges levelled against him. He be released from jail forthwith, if not required in any other case. The murder Reference sent by the trial Judge is not confirmed and answered in the negative".**

22. The Additional Registrar (Judicial) of this Court is directed to send copy of this judgment to the learned Trial Judge, Miss Ambrareen Navid the then learned Additional Sessions Judge-IV, Mardan.

Announced
06.10.2015

J U D G E

J U D G E

**M.Siraj Afridi P.S. D*