JUDGMENT SHEET
PESHAWAR HIGH COURT, BANNU BENCH
(*Judicial Department*)

SEAL OF PESHAWAR HIGH COURT BANNU BENCH

Cr.A. No.142-B/2015.

Raham Din
Vs.
State, etc.

JUDGMENT

For Appellant: **Muhammad Iqbal Khattak, Advocate.**

For Respondent: **Mr. Qudarat Ullah Khan Gandapur Asstt: A.G. and Mr. Shahid Naseem Khan Chamkani, Advocate.**

Date of hearing: **25.02.2020.**
Announced on:- 16.03.2020.

SAHIBZADA ASADULLAH, J.- Having faced trial in Sessions Case No.42/VII/2014, the respondent/accused Fazal Manan was acquitted by learned Additional Sessions Judge, Takht-e-Nausrati, Karak, vide judgment dated 05.10.2015, in case FIR No.08 dated 23.02.2014, registered under Section 302 PPC read with Section 15 Arms Act, at police station Khurram, District Karak.

2. The prosecution story as disclosed in the FIR Ex. PA, registered on the basis of *murasila* Ex. PA/1, in brief, is that on 23.02.2014, Asif Hayat ASI (PW-3) was on patrol duty when received information about an incident, rushed to the spot i.e. house of Fazal Manan situated in Anar Banda where he found dead bodies of Mst. Nazia Shaheen wife of Aurangzeb and Kamran Khan son of Raham Din, where Fazal Manan

made report to the effect that he alongwith his daughter-in-law Mst. Nazia Shaheen was residing in the said house whereas his son Aurangzeb was serving in Pak Arm; that on preceding night he and his daughter-in-law were asleep in one room of their house, in the morning (Azan Wela) at 0545, he got up and found his daughter-in-law missing from her bed, he came out of the room and heard murmuring from the second room, but the door was locked from inside. He asked to open the door but nobody did it, then he went to his room, took rifle alongwith bandolier and asked again to open the door which was not honoured, then he fired two fire shots upon which the door was opened. When he entered the room, he found his daughter-in-law Mst. Nazia Shaheen with one Kamran Khan, his co-villager, in objectionable condition upon which he got furious and fired at them, resultantly, both were hit and fell down. On hearing the fire shots, the co-villagers attracted to the spot to whom he narrated the incident. He stated that subsequently he came to know that both the injured had succumbed to their injuries. He handed over his 7.62 bore 5 shots rifle alongwith bandolier containing 15 rounds of 7.62 to PW-3. Hence, the FIR.

3. After completion of the investigation by Mir Shah Jehan SI (PW-4), complete challan was submitted before the trial Court. Accused was charged

for the offence to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as eight witnesses, whereafter, the accused was examined under Section 342, Cr.P.C, wherein, he denied the allegations and professed innocence, however, he neither opted to be examined on oath, nor produced evidence in his defence. The learned trial Court, after hearing arguments from both the sides, acquitted the accused/respondent vide impugned judgment dated 05.10.2015, hence the instant appeal.

4. Arguments heard and record perused.

5. Deceased Kamran aged 21/22 years and Mst. Nazia Shaheen aged about 28/29 years lost their lives in the house of respondent Fazal Manan after receiving fire arm injuries. The matter was allegedly reported by Fazal Manan the respondent to PW-3, who on information attracted to the spot house. The accused/respondent was arrested and the weapon of offence was shown recovered from his possession alongwith 15 live rounds.

6. To begin with, the deceased Mst. Nazia Shaheen was daughter-in-law of the respondent, whose husband Auranzeb Khan was serving in Pak Army, while she was stated to be living with accused/respondent in his house.

7. The prosecution story shown unfolded by the respondent was that on 23.2.2014, the respondent woke up and found the deceased Mst. Nazia Shaheen missing from her bed, to satisfy his curiosity, he came out and heard murmuring from a room with its door closed from inside; that he called to open but his demand was not honoured; so he picked up the rifle and fired on the door, at last, the door was unfastened from inside, it is in the report that the respondent went in and found the two in compromising position and killed the two by firing. The report further unfolds that the story was narrated to the local elders who informed the police.

8. The incident occurred inside the house of the respondent, with the two as the sole inmates, i.e. the deceased and respondent, on the day.

We are to judge as to whether the incident occurred in the mode and manner and as to whether the report was made by the respondent and that as to whether it was the respondent who killed?

The report tells that the incident occurred in the room with its door closed initially and that it was after fire shot on the door that the deceased unchained. As in criminal cases the behavior of both, the murderer and murdered are the determining factors coupled with the circumstances that prevail at the time and, so is the case. The report tells, that on initial call the door was not

opened and that it was the shot on the door which led the deceased to open. We are yet to resolve that when the deceased were confirmed that the caller was armed and that there was eminent threat to their lives, then why they unlocked the door, as to keep the door shut they had better chances to survive. If we move with what the report said, then a question will stand in the way that who out of the two unfastened the door and that how the deceased kept sitting on sofa and Mst. Nazia Shaheen went back and that how she was hit from the back as by then she was supposed to face the accused with the hope to struggle out and such should have been the position of deceased Kamran. Blood was recovered from two places i.e. the mattress on the ground where the deceased Mst. Nazia Shaheen fell after receiving fire shots and from the sofa lying near the door having been photographed where the deceased Kamran was shown sitting. The prosecution was to answer that how the deceased Kamran was hit from back when just behind was the wall and that how his back was exposed when the lady was the first target but the prosecution is yet to answer. The report says that when the door was relaxed from inside the accused entered but no point has been given at the footnote of the site plan, however, in the drawing one point has been introduced as 1-C, so we presume it the point the accused occupied when he

entered the room and fired at the deceased. All the three i.e. the accused, deceased Kamran and Mst. Nazia Shaheen were two feet away from one another, if deceased Nazia Shaheen was the first target in that eventuality the deceased Kamran had the chance to overpower or to run away, as the accused/respondent was facing the lady/deceased or if the deceased Kamran was the first target, then deceased Nazia Shaheen could avail the same opportunity but they did not despite the fact that by the time the respondent was 67/68 years of age, what a happy surrender this was to the accused to write their fate. We tried to voice yes with what the prosecution canvassed at the bar but we failed to concur the judicial wisdom in accepting the manner and the way the tragedy was enacted. We have two deceased i.e. Kamran and Mst. Nazia Shaheen with 5 and 4 injuries respectively, but the rifle used could accommodate five rounds at a time and that it has never been the case that it was reloaded after once it exhausted and yet again if this was not reloaded, then how seven empties and a missed cartridge were recovered from the spot.

9. The incident was stated to have occurred at 5:45 a.m, whereas the police was informed at 10:00 a.m, who reached in 30 minutes and it was 10:30 a.m. that the matter was reported and it was scribed by Asif Hayat ASI, who was later on examined as PW-3. PW-3, when

appeared before the Court, stated that he was informed by one Fareed, who was the Nazim, but admitted that his name was not mentioned in the report, he further stated that he disclosed the name of the informer to the Investigating Officer but his this stance was denied when the Investigating Officer was examined as PW-4 who stated that he was not told by the scribe that it was one Fareed, who conveyed the information. PW Asif Hayat stated that the Investigating Officer reached within 25/30 minutes after he reached to the spot, but the Investigating Officer stated that he went to the place of occurrence at 1:30 p.m, this conflict between the two leads this Court to hold that PW-4 never visited the spot, rather the investigation was conducted and the site plan was prepared by PW-3.

10. The time of occurrence has been given as 5:45 a.m, whereas the matter was reported as 10:30 a.m, and this abnormal delay in reporting the matter tells nothing but of an attempt on part of the police to charge the innocent and to favour the responsible and that was the reason that 161 Cr.P.C. statement of Tikka Khan, brother of the deceased Kamran, was recorded on 26.02.2014, showing their lack of interest to charge the respondent initially. The scribe shown recovered the rifle from personal possession of the accused/respondent and stated that at the time of making report the

accused/respondent was holding the rifle, we are surprised to see this abnormality that why for long five hours the accused was holding the rifle till it was handed over. The police official displayed dubious conduct as all the recovery memos except weapon of offence were witnessed by one Fareed, a Nazim, and when PW-3 was asked that why Fareed was not cited as witness thereto, he stated that the private people were not ready to witness the recovery, but we cannot accede to the statement so tendered, as the report was allegedly made by the accused/respondent and produced the weapon of offence, then there was no threats to the people of the locality if were cited as witnesses, as it was a happy surrender. The non-association of private witnesses with the process of recovery of the rifle tells nothing but that the weapon was later on planted to make the case a success. The delayed report doubt the veracity of the witnesses which gets support from the statement of the scribe, who stated that when he reached to the crime house, private people were present, if so, then why none from the public verified the report, especially one Sajjad Khan and Armsaz, whose 161 Cr.P.C statements were recorded and there was no danger of earning enmity, as it was the respondent who reported. The appellant alongwith his son Tikka Khan were present at the time of arrest and recovery, but they did not charge the

respondent for commission of the offence, but it was on 26.2.2014, when the police prevailed and they charged the respondent. The Investigating Officer stated that he produced the accused before the Court of Judicial Magistrate on 24.2.2014, where he refused to confess, we are anxious to know that what derailed the accused to disown the report on the very next day, when per prosecution it was he, who reported.

11. The bed rock on which the prosecution erected its structure, was the report allegedly made by the respondent and the weapon recovered, this Court is faced with a dilemma either to believe the disowned report or the circumstances that had gripped the story. If we accept the resiled story of the accused/respondent as correct that it was the respondent who killed the deceased with the recovered weapon, then the FSL report blocks the way, which tells that the empties were fired from different weapons. The doctor who conducted autopsy on the dead bodies stated that the injuries found had different dimensions and in the case of deceased Kamran it was mentioned that he received fire shots from different directions. The circumstances belie what the accused/respondent reported and it tells nothing but that more than one accused were involved in the episode and such could be the reason to report the matter after a long delay to shelter the real culprits, so we are

constrained to hold that *"Men may tell lies but circumstances do not"*.

12. The prosecution case hinges upon the report allegedly made by the respondent but no further evidence was either collected or produced to substantiate the stance of the appellant to hold the respondent as accused and convicted. The respondent while allegedly making the report stated that he narrated the incident to the local elders attracted to the spot after the incident, who informed the police but this is astonishing that why the dead bodies remained on the spot for long five hours and that why the elders did not inform the police soon after they reached. The persons who reached to the spot soon after the occurrence were including one Sajjad Khan and Aramsaz Khan and these were the witnesses who could tell as to whether it was the respondent who reported the matter or otherwise. The Investigating Officer recorded their statements under Section 161, Cr.P.C. and even their names were placed in the calendar of witnesses, but were not produced during trial, rather we heard no whisper in that respect and when so, what else could corroborate the story, hence, in this eventuality the report loses its worth and even otherwise, non-production of these witnesses suggests that had they been produced they would not have supported the prosecution case and benefit can be sought

from Article 129(g) of the *Qanun-e-Shahadat* Order, 1984.

In case titled ***Tahir Khan Vs. The State (2011 SCMR 646)***, it was held by Hon'ble Supreme Court that:-

> *"13. In the present case as observed above, the clouds over the veracity of the prosecution version began hovering with the substitution of the initially nominated persons in the F.I.R. and also that complainant did not appear as a witness. It assumes relevance as he (Ghulam Hussain), Sultan Mehmood and Ghulam Abbas were given up by the prosecution and not produced. The only possible conclusion is that the prosecution sensed the risk of producing them that they might not support the said version. Their production thus was withheld leaving doubts spreading all around".*

13. The prosecution wanted to harvest the benefits of the report made by the respondent, but the same did not find support from anywhere and nothing was brought on record to substantiate its worth, so much so even the respondent did not accept its authenticity, as on the very next day the respondent refused to confess when he was brought before the Court of Judicial Magistrate. The accused was examined under Section 342, Cr.P.C., where to a question that, "*What is your statement and why are you charged*", he replied that he was innocent and falsely implicated with the sole purpose to shelter the real culprits. The report so made loses significance when its maker resiles.

In case titled ***Rahmatullah Vs. The State (2018 P.Cr.L.J. Note 31 [Peshawar D.I.Khan Bench])***, it was held that:

> *"First of all, we would take the FIR and its probative value. As the record stands, the FIR was recorded on the basis of report made by the appellant himself. There is no cavil with the proposition that the FIR itself is not a substantive piece of evidence unless its contents are affirmed on oath and subjected to the test of cross examination. Legally, it is a previous statement which can be used for the purpose of contradicting and corroborating its maker and unless it is not proved in accordance with law, it is no evidence and therefore, cannot be taken as a proof of anything stated therein. But when it is based on a statement made by an accused before the police which tends to incriminate him with reference to the offence he is charged with, in that event, it being inadmissible in evidence is not even worth the paper it is written on, hence has to be left entirely out of account. In the instant case, admittedly neither the maker of FIR appeared in its support nor stood the test of cross-examination. In such circumstances, the report in the instant case is ruled out of consideration".*

14. On acquittal, an accused person earns twofold innocence particularly, in the case is the bedrock principle of justice. In a case of acquittal, the standard and principle of appreciation of evidence is entirely different from that in a case of conviction. Unless the findings of the trial Court are found perverse, fanciful, arbitrary and are based on misreading and non-reading of material evidence causing miscarriage of justice, the

High Court would not lightly disturb the same because on reappraisal, another view might be possible therefore, sanctity is attached under the law to such findings in ordinary course. We do not find any element of the nature discussed above, in the findings rendered by the learned trial Court, therefore, the acquittal of the respondent/accused is not liable to be reversed. Resultantly, we see no illegality or irregularity in the impugned judgment which could attract this Court to reverse the same. Hence, this appeal being without merit and substance is hereby dismissed.

Announced.
Dt: 16.3.2020.
*Kifayat/**

JUDGE

JUDGE

(D.B)
Hon'ble Justice Musarrat Hilali
Hon'ble Justice Sahibzada Asadullah

06/4/2020

CERTIFIED TO BE TRUE COPY

Examiner
Peshawar High Court Bannu Bench
Authorised Under Article 87 of
The Qanun-e-Shahadat Ordinance 1984

7/4/2020