JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 119-M/2021

(Mir Ali Shah ____Versus____ The State and another)

Present: ***Mr. Murad Ali, Advocate for the appellant.***

Mr. Razauddin Khan, A.A.G. for State.

Mr. Ashfaq-ur-Rehman, Advocate for complainant.

Date of hearing: **16.12.2021**

JUDGMENT

Ishtiaq Ibrahim, J.- This is an appeal preferred by Mir Ali Shah against the judgment dated 19.03.2021 of the learned Senior Civil Judge (Admn)/Judge MTMC, Swat rendered in case FIR No. 102 dated 21.01.2017 of P.S Rahim Abad, District Swat, whereby he was convicted and sentenced as under:

(i) **u/s 324 PPC**
Rigorous imprisonment for 07 years with fine of Rs.200,000/- or to undergo further two years S.I.

(ii) **u/s 337-F(vi) PPC**
Rigorous imprisonment for 07 years as Tazir with fine of Rs.200,000/- or to undergo further two years S.I.

(iii) He was also burdened with payment of Rs.200,000/- to LRs of the injured as compensation u/s 544-A, Cr.P.C, recoverable as arrears of land revenue or to undergo further six months S.I in case of want of property

(iv) **u/s 15 A.A**
03 years imprisonment with fine of RS.20,000/-. In case of default of fine, he was directed to undergo further one

month S.I. The sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C was extended to him.

2. Injured/complainant Bakht Sherwan, while conducting medical checkup of a child in his clinic situated at Gogdara on 21.01.2017 at 17:40 hours, was fired at by some unknown accused through Kalashnikov whereby he sustained injuries on backside of his left shoulder and left elbow. The above narrations were made by injured complainant while reporting the matter to Kifayat Ullah Khan S.I (PW-4) on the same day at 18:25 hours in casualty of Central Hospital, Swat. The report was reduced into Murasila which was verified by his Niaz Ali (PW-1). He further stated in his report that neither he nor his family is involved in enmity with anyone. On the strength of Murasila, formal FIR was registered initially u/s 324 PPC against some unknown accused.

3. Police was in search of accused and came to know through spy information that the culprit was the present appellant, so, he was arrested on the same day and the crime weapon Kalashnikov No.243333 with magazine containing 7.62 bore were recovered from his possession. The injured

complainant recorded his statement u/s 164, Cr.P.C wherein he charged the appellant for attempting at his life. While disclosing the motive, complainant stated that appellant was ill one year prior to the occurrence. His brothers had taken him to their house for inoculating Valium injection to appellant prescribed by doctor. The appellant had threatened him for dire consequences in case of passing the referred injection to him.

4. The injured was examined by Dr. Nasir Ullah Khan (PW-7) who in his report Ex.PW-7/2 reported one entry wound on left upper arm of about 1 ½ cm the exit whereof was fond on left shoulder about 3 cm in size. The second entry wound of 1 cm in dimension was observed on left elbow of the injured with exit of 2 cm. In light of the Radiologist Report, the injury was reported as *Ghayr Jaifa Munaqqilla* in light whereof section 337-F(vi) PPC was added in the FIR.

5. After completion of investigation, complete challan was put in Court and trial of the appellant was assigned to learned Additional Sessions Judge-III, Swat. Formal charge was framed against him to which he did not plead guilty and

opted to face the trial. During pendency of the trial, the issue of mental illness arose before the Court for which he was examined by Provincial Standing Medical Board and in view of the report so furnished, the Court suspended trial of the appellant vide order dated 13.06.2018 for a period of six months or his mental recovery, whichever may earlier. After his specialized treatment in Central Prison Peshawar, he was shifted back to District Jail Buner on 28.02.2019. The learned Additional Sessions Judge-III, Swat, on the request of prosecution, requisitioned the case file vide order dated 07.03.2019 for renovating the trail proceedings. In the meanwhile the case was transferred from the Court of learned ASJ-III to the Court of learned ASJ-II, Swat vide order dated 25.04.2019 of the learned Sessions Judge, Swat. Trial against the appellant commenced and his statement was recorded on 25.05.2019 for testing his mental capacity in light whereof he was found in good mental health. In the meanwhile the Court of learned Judicial Magistrate-I, Swat was declared as MTMC and the case was sent to the said Court vide order No.2891-99 dated 02.11.2019 issued by

learned Sessions Judge, Swat. Prosecution produced 09 PWs in support of its case. On closure of evidence, the appellant was examined u/s 342, Cr.P.C. He once again denied the allegations of prosecution, however, he neither recorded his own statement on oath nor produced any witness in his defence. It is noteworthy that complainant had died a natural death in December, 2019 and the said factum was confirmed by his son Niaz Ali (PW-1) and DFC Arif in their statements recorded on 23.12.2019.

6. I have heard the arguments of learned counsel for the parties including the learned A.A.G and perused the record with their able assistance.

7. Admittedly, the occurrence has remained unseen because prosecution has not examined any eye-witness of the occurrence. Even the injured complainant himself had not seen the present appellant at the time of firing nor he has claimed to have seen him fleeing from the spot after the occurrence, as such, he did not charge any accused in the initial report and the FIR was registered against some unknown assailants. As per prosecution version, the injured complainant was

busy in medical checkup of a child when was targeted of firing from backside but the I.O has failed either to examine the child u/s 161, Cr.P.C or the person who had brought him to get his medical treatment through the injured, a medical practitioner. No plausible explanation is available on record for the said omission on the part of investigating agency. It can easily be presumed from the said laxity of the I.O that the child and his attendant, if any, were not examined for the reason that they would have disclosed the real facts contrary to the version of prosecution. In this regard we have Article 129 of the Qanun-e-Shahadat Order, 1984 which reads.

> **129. Court may presume existence of certain facts.** The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Withholding of important evidence, as in the present case, has been mentioned in illustration (g) to Article 129 ibid which reads.

> (g) that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it;

While confronting similar situation in the case of *Muhammad Asif Vs. The State* **(2017 SCMR 486)**, the august Supreme Court observed that:

> **In our considered opinion these two independent witnesses could provide the first degree of evidence of reliable nature, thus, adverse inference has been drawn that because they were not supporting the prosecution case so set up, therefore, they were dropped at the trial. In this way, the best evidence, independent in nature, was withheld from the court for obvious reasons. This fact by itself is sufficient to discard the evidence of the interested and related witnesses because their evidence is not only of the second degree but also for the reason given above due to their unnatural conduct.**

8. The injured complainant has died a natural death, therefore, he could not be examined by prosecution during the trial proceedings. So far the evidentiary value of FIR lodged by complainant is concerned, the status of FIR lodged at instance of a person who died afterwards a natural death is that of his statement u/s 161, Cr.P.C and nothing more. It is settled law that statement of complainant cannot be relied upon unless cross-examined except when the said statement is recorded as dying declaration. In this regard I would refer the judgment of the august Supreme Court in the case of *'Ghaus Muhammad alias Ghausa and another Vs. The State'* **(1979**

SCMR 579). The rule laid down in the said judgment is as under:

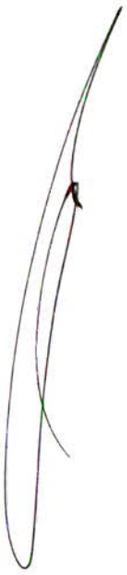
> **The maker of the F. I. R. has died. It cannot be used as corroboration of the testimony of another person, namely Nur Muhammad P. W. At best the prosecution can use it for showing that the name of Nur Muhammad is mentioned in the F. I. R. but that by itself would not advance the prosecution case.**

9. The learned trial Court, while convicting the appellant, has mainly relied upon statement of injured recorded u/s 164, Cr.P.C in support whereof prosecution has examined Muhammad Fayaz, the concerned Judicial Magistrate, as PW-5. Whether statement of a witness u/s 164, Cr.P.C can base conviction of an accused or not, this question needs cautious consideration of this Court. Before making further discussion on transposition of statement of a dead witness during the trial of accused, I deem it appropriate to first discuss background of the statement recorded in the present case by injured complainant u/s 164, Cr.P.C. The first question which pricks my mind with regard to genuineness of the said statement in the present case is its belated recording after five days of the occurrence. According to record, the occurrence took place on 21.01.2017 and police arrested the appellant on the same day on the basis of information received

through a secret source regarding his involvement in the occurrence. It appears that the injured himself was not sure in respect of the culpability of the present appellant for his attempted murder otherwise he would have charged him in the initial report or at least soon after his arrest. Thus, belated nomination of the appellant in the case suggests consultation and deliberation inter se the local police and complainant.

10. Statement of a witness under Section 164, Cr.P.C can be transferred under the provisions of Section 265-J, Cr.P.C, which reads.-

> ***"265-J. Statement under section 164 admissible.*** The statement of a witness duly recorded under section 164, Cr.P.C if it was made in the presence of the accused and if he had notice of it and was given an opportunity of cross-examining the witness, may, in the discretion of the Court, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provision of the Evidence Act, 1872 (II of 1872)".



No doubt, the Court is competent to transfer statement of a witness u/s 164, Cr.P.C into trial of accused in exercise of its powers u/s 265-J, Cr.P.C but subject to certain limitations i.e the accused must be present at the time of recording statement u/s 164, Cr.P.C, he must be given a notice of such statement and thereafter he should be afforded opportunity to cross examine the witness.

The above conditions, as are manifest from bare reading of Section 265-J, Cr.P.C, must be fulfilled before transposition of a statement u/s 164, Cr.P.C of a witness at trial stage. In the present case, neither the appellant was present at the time of recording 164, Cr.P.C statement of the injured complainant, though he had already been arrested on the day of occurrence, nor he was given notice of the statement nor any opportunity was afforded to him to cross-examine the injured complainant. Similarly, proviso to Article 47 of the Qanun-e-Shahadat Order, 1984 also lays down the limitation of cross-examination of a witness by adverse party otherwise his statement will not be admissible in evidence. Thus, the statement recorded by injured complainant in the present case does not fulfill the basic criteria provided u/s 265-J, Cr.P.C and Article 47 of the Qanun-e-Shahadat Order, 1984, hence, the learned trial Court has illegally based conviction of the appellant on the statement u/s 164, Cr.P.C recorded by injured complainant.

11. The legislature in its wisdom has intentionally used the words "duly recorded" in Section 265-J, Cr.P.C which have wider significance. The referred words contemplate that

statement of a witness is not "duly recorded" unless it is read over and explained to the witness in presence of the accused and will not be admissible under this Section. Admittedly, the appellant was neither given a proper notice of the statement recorded by injured complainant u/s 164, Cr.P.C nor he was afforded an opportunity of cross examining the injured through a lawyer of his choice, therefore, the said statement recorded by complainant cannot be considered as a substantive piece of evidence. Reliance in this regard is placed on the judgment in the case titled *"Abdul Hakeem and another Vs. The State"* ***(PLD 1982 Karachi 975"*** wherein it was observed that:

> **"A reading of this section makes it plain that the statement should be recorded in the presence of the accused, the accused should have notice of the recording of such statement and he should also be given an opportunity of cross-examining the witness. On the fulfillment of these conditions, the statement could be brought on the record within the discretion of the Court. Such discretion should be exercised if in the process of recording such statement sanctity attaches to it, as normally such statement are recorded only in cases involving capital sentences. The mere fact of a Police Officer stating that he had put the accused on notice would not be sufficient. Such notice should be in writing and should also state that he has a right to cross-examine the witness. Normally in these circumstances, an accused knowing the peril in the process would attempt to engage an advocate and ask for copies of the Police**

statements in advance, so as to effectively cross examine the witness. Non-compliance with the spirit underlying section 265-J exposes the statement to serious criticism. After all, if an accused is suddenly marched of the court and asked to cross-examine a witness, he cannot effectively exercise his right under the law. It is also a cardinal principle of law enshrined even in the Constitution that every person has a right to be defended by an advocate of his choice. In these circumstances, if no proper notice is given, failure of justice might inevitably result and the Court has to be on caution".

12. As discussed above, there is no eye-witness of the occurrence while statement of the injured complainant u/s 164, Cr.P.C cannot be taken into account against the appellant in view of the above discussion, the prosecution is left with only circumstantial evidence on record. There is no denial of the fact that injured complainant had sustained two firearm injuries on his person as per Medico-legal report Ex.PW-7/1 but the said report is in conflict with the basic version of prosecution incorporated in 164, Cr.P.C statement of the injured complainant. According to medical evidence, the injured had sustained one entry wound of 1 ½ cm on his left upper arm while the second bullet made its entrance on his left elbow the dimension whereof has been reported by doctor as 1 cm. Entry wounds of

different dimensions suggest the use of two different weapons, hence, it was not the job of one man.

13. Apart from the above-referred conflict between the version of prosecution and medical evidence, the place of occurrence is also doubtful because no blood has been recovered from the place where the injured has been shown in the site plan. The injured has sustained the first entry wound on his left upper arm and there was possibility of absorption of blood by thick garments commonly used in winter season but he has sustained the other wound on his left elbow, hence, the easy flow of blood from his arm towards the floor could naturally be expected but non-recovery of any blood from the spot creates a reasonable doubt in prudent mind that the occurrence has not taken place in the mode and manner as narrated by complainant in the FIR as well as in his statement u/s 164, Cr.P.C. Moreso, there is visible overwriting in Murasila qua the time of occurrence and it appears that real facts of the occurrence have been concealed by investigating agency. Medical report is also mute about the time of arrival of the injured to hospital nor the names of relatives of the injured have been mentioned in the said report, hence, presence of Niaz Ali (PW-1) with

his injured father at the time of his medical treatment is doubtful. Thus, there are major contradictions and inconsistencies in the case creating serious doubts in prudent mind regarding the guilt of the appellant qua attempting at the life of injured complainant and the benefit thereof must be extended in his favour as per well-established principle of criminal justice. Reliance is placed on *'The State Vs. Ahmed Umar Shikh and others'* **(2021 SCMR 873)**. The Honb'le apex Court observed in the said judgment that:

> **Even if a single circumstance create reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation.**

14. As regards the motive part of this case, complainant at the time of lodging the report narrated before police that neither he nor his family had any enmity with anyone but in his statement u/s 164, Cr.P.C he set up a motive behind the occurrence by stating that one year back brothers of the appellant had took him for passing Valium injection to him as advised by doctor and the appellant had threatened him for life in case of inoculating the injection to him. The aforesaid motive mentioned by complainant in his statement not only appears to be

after thought for having been introduced at a belated stage but the same also does not stand to reason. Had the appellant the intention to satisfy his vengeance because of the referred motive, he would have done so soon after the injured had injected him the intoxicating dose. Taking action of the appellant against him after one year of the said event does not stand to reason. Even otherwise, motive is a double-edged weapon which cuts both sides, as such, false implication of the appellant by complainant because of the motive so set up cannot be ruled out. Reliance is placed on *'The State VS. Muhammad Sharif and others'* **(1995 SCMR 635)** wherein it was held that:

> **So far as enmity is concerned, it is a double-edged weapon and cuts both ways. If it is considered as sufficient motive for commission of offence, it can also be considered as sufficient for false implication as well.**

15. Adverting to the recovery of Kalashnikov No. 243333 from possession of the appellant used for commission of the offence as per prosecution version. The weapon has been recovered from the appellant at the time of his arrest in presence of witnesses. Statement of the I.O (PW-8) in this regard has not been shattered by defence during cross-examination. The recovery of Kalashnikov from possession of the appellant gets

further support from the statement of Muhammad Ali Shah (PW-3), brother of the appellant. According to his statement, the weapon was his ownership and in respect whereof he exhibited copy of Permit No. 11784 dated 18.09.2008 issued by DCO Swat as Ex.PW-3/1. Moreso, as per FSL report Ex.PW-8/14, the recovered Kalashnikov has matched with 05 empties recovered from the spot. Thus, prosecution has duly established the guilt of appellant only to the extent of section 15 of the KP Arms Act, 2013 and findings of the learned trial Court in this respect do not call for any interference. However, the question here is that what will be the effect of conviction of appellant u/s 15 A.A on the remaining allegations leveled against him by prosecution with regard to section 324 & 337-F(vi) PPC? Recovery of crime weapon is only a corroborative piece of evidence and it is settled law that in absence of direct evidence, conviction of an accused cannot be based only on corroborative evidence. Reliance in this regard placed on *'Muhammad Afzal alias Abdullah and others Vs. The State'* **(2009 SCMR 436)** wherein it was held that:

> **After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being**

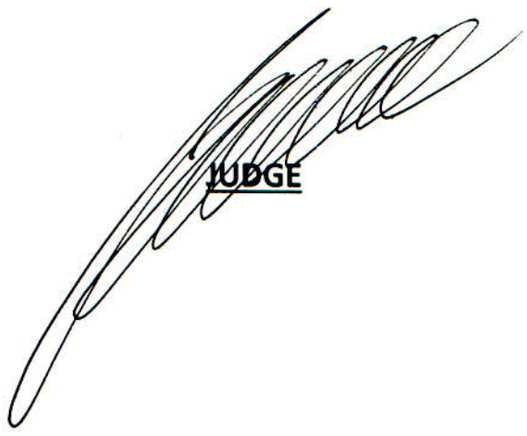
> **purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be.**

Further reliance in this regard is placed on *'Zeshan Ali alias Shani and another Vs. The State and another'* reported as **2013 SCMR 1602**.

16. In light of what has been discussed above, there is no reason before this Court to interfere with the findings of the learned trial Court with regard to conviction and sentence of the appellant u/s 15 A.A, however, his conviction and sentences u/s 324 & 337-F(vi) PPC need reversal in view of the reasons discussed in the preceding paras. Resultantly, this appeal is partially allowed, the impugned judgment dated 19.03.2021 rendered by learned trial Court is set aside to the extent of conviction and sentences of appellant Mir Ali Shah son of Shehzad Gul u/s 324 & 337-F(vi) PPC, hence, he is acquitted of the charge under the mentioned penal sections. His conviction and sentence u/s 15 A.A recorded by learned trial Court are maintained with benefit of section 382-B, Cr.P.C.

17. Above are the reasons of my short order of the even date.

Announced.
Dt: 16.12.2021



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Office
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