JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
JUDICIAL DEPARTMENT

Cr. A No.84-P/2014

J U D G M E N T

Date of hearing: 29.09.2017

M/s Barrister Zahurul Haq and Mr. Altaf Khan, Advocates, for appellant.

Mr. Waqar Ahmad khan, AAG for State.

M/s Malik Danial Khan and Mr.Asad Yousafzai, Advocates, for complainant.

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LAL JAN KHATTAK, J.- Through this judgment, we shall also decide Cr.A.No. 367-P/2014 and Cr.R.No.25-P/2014 as all the three matters have arisen out of the common judgment dated 11.02.2014 of the learned Sessions Judge, Swabi delivered in case FIR No.378 dated 16.6.2006 u/s 302/324/427/34 PPC of Police Station, Topi District Swabi.

2. Brief facts of the case are that on 16.6.2006, complainant Sultan Sher (PW-9) lodged a report at police station, Topi to the effect that he, his deceased son Islam Sher and nephew Sher Ahmad Khan were coming home on an earth loaded trolley pulled by tractor. He and Sher Ahmad Khan

were sitting in the trolley while his son was driving the tractor. No sooner than they reached near Government High School Zarobi, there Waheedullah (absconder) and Mehbooullah (the appellant), were standing duly armed with lethal weapons, who fired at them with which his son was hit and died on the spot while he and nephew Sher Ahmad Khan escaped unhurt. Motive for the offence was stated to be previous blood feud.

3. After arrest of the appellant, complete challan was put in court where he was indicted for the crime to which he pleaded not guilty and opted to face the trial. Prosecution in order to prove its case examined 11 witnesses whereafter statement of the accused was recorded, wherein, he professed his innocence. The learned trial court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction u/s 302 (b) PPC sentenced him to rigorous imprisonment for life and with fine of Rs.2,00,000/- or in default whereof to further suffer simple imprisonment of one year. The appellant was also directed to pay compensation of Rs.10,00,000/- to the legal

heirs of the deceased. The learned trial court further convicted him u/s 427 PPC with a sentence of two years rigorous imprisonment with a fine of Rs.25,000/- or in default to pay the fine to further undergo six months S.I. however, the appellant was acquitted of the charge u/s 324 PPC. Benefit u/s 382-b Cr.P.C. was extended to him.

4. Appellant has impugned his conviction and sentence, the State has preferred its appeal against acquittal of the appellant u/s 324 PPC while the complainant has filed criminal revision for enhancement of the awarded sentence from imprisonment of life to the normal penalty of death.

5. Learned counsel for the appellant-convict contended that none of the two eyewitnesses was present on the spot when the occurrence had taken place and that attendance of both the eyewitnesses was procured subsequently. The learned counsel further contended that the version given in the FIR has been negated by medical examination of the deceased and also by site plan of the case. It was also argued by the learned counsel that the unnatural

conduct of both the eyewitnesses shows their non-presence on the spot at the time of occurrence. The learned counsel lastly argued that motive, as given in the FIR, has nothing to do with the appellant-convict.

6. As against the above, learned counsel for the complainant and the learned AAG argued that the prosecution has proved its case through trustworthy and confidence inspiring evidence. They further argued that for no valid reason lesser penalty has been given to the convict, which needs enhancement. The learned AAG also entreated for conviction of the convict u/s 324 PPC.

7. We have heard arguments of learned counsel for the parties and with their valuable assistance examined the case record.

8. In support of the prosecution case, complainant and eyewitness Sher Ahmad Khan appeared before the learned trial court as PW-9 and PW-10. Both have deposed that on the fateful day they were bringing earth in trolley, tugged by tractor, driven by his son Islam Sher, wherein, they were sitting. According to the eyewitnesses, as

they reached the spot there, they were fired at by the appellant and absconding accused Waheedullah with which Islam Sher was hit and died on the spot while they escaped unhurt. Escaping unhurt from the volleys of Klashinkoves fired from a minimum distance of 10 and maximum 30 paces excludes the presence of both the eyewitnesses on the spot at the time of occurrence. Had they been present on the spot, both of them must have sustained firearm injuries on their bodies. It is not the prosecution's case that one, two or few shots were fired. According to the medical examination, the deceased has sustained five entry and three superficial wounds on different parts of his body. Not only the multiple injuries, which the deceased has suffered, the Investigating Officer has collected 41 empties from the crime spot. As, according to the site plan, the deceased and both the eyewitnesses were in close proximity with each other, therefore, there was no chance for PW-9 and PW-10 to escape unhurt particularly when they were sitting on the earth dumped in the trolley and were visible to the accused. Even, if presence of both the eyewitnesses on the spot at the time of firing is presumed.

even then it cannot be said that whatever they deposed was the whole truth and our this conclusion gets support from the site plan and medical examination of the deceased. According to the site plan (Ex.PB), the appellant has been shown at point No.4, which is towards the southern side of the deceased and thus by this way right side of the deceased was exposed to him. But according to the medical examination (Ex.PM), the deceased has suffered 4 entry wounds on left side of his body, which aspect of the case falsifies the ocular account qua firing at the deceased by the appellant. No doubt, on the eve of firing, it would be natural for a victim to change his side as he is not a statue but while sitting on a driving seat and that too of a tractor, it is not expected from the driver to change his position as freely as is done by a man when he is attacked while walking or sitting in some open space, so the medical evidence and site plan, being circumstantial evidence, have falsified the ocular evidence furnished by both the eyewitnesses qua the present appellant.

9. Another important aspect of the case is that regarding the 41 crime empties recovered from the spot, there is no FSL report to show that whether same were fired from two weapons as is alleged. As two persons have been charged for firing, therefore, the Investigating Officer was supposed to get a laboratory report to show that more than one weapons were used in the offence. Getting no report to the ibid effect from FSL has caused colossal damage to the prosecution's case for which it shall suffer.

10. Furthermore, motive for causing murder of the deceased too does not relate to the appellant. It is worth to mention that in cross-examination, complainant has admitted it correct that the appellant had no enmity with them. In absence of any enmity and motive of the appellant with the deceased, his firing at the victim as alleged does not appeal to prudent mind.

11. Thorough and careful examination of the case record would show that neither medical evidence nor site plan of the case have supported the prosecution's case qua the appellant for his involvement in the case

nor the ocular account furnished by PW-9 and PW-10 against him is trustworthy, therefore, we hold that the prosecution has failed to bring home guilt to the appellant-accused. It is well settled that in order to record conviction of an accused, the prosecution has to prove its case beyond all reasonable doubts, which is hallmark of criminal jurisprudence. It is also a century old principle of criminal law that a slightest doubt arising in the prosecution case is sufficient to record acquittal of the accused, which principle fully applies to the instant case in respect of the appellant.

12. True that the appellant after his nomination in the case as accused has remained outlaw for a considerable period of time but mere abscondance of an accused, as has been held umpteenth times by the superior courts, alone is not enough to hold a person guilty of offence unless charge against him is established through concrete evidence, which is not the case in hand, therefore, no importance could be attached to the appellant's abscondance.

13. For what has been discussed above, this appeal is allowed, the impugned

judgment is set aside and the appellant is acquitted of the charges leveled against him. He be set free forthwith, if not required to be detained in any other case.

14. Above are the reasons of our short order of even date, which reads as under:-

> "For the reasons to be recorded later, this appeal is allowed, conviction and sentence recorded by learned Sessions Judge, Swabi vide judgment dated 11.02.2014 is set aside. The appellant is acquitted of the charge leveled against him and he be set free forthwith, if not required in any other case".

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Announced
29.09.2017.

Sadiq Shah, PS (D.B) (Hon'ble Justice Lal Jan Khattak & Hon'ble Mr. Justice Qalandar Ali Khan)