IN THE PESHAWAR HIGH COURT, PESHAWAR,
[Judicial Department]

Cr.A. No.855-P/2023

Zafran s/o Kitab Khan,
r/o Shahkas Jamrud District Khyber

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-		Mr. Shabbir Hussain Gigyani, Advocate
For State	:-	Mr. Jalal ud Din Akbar-e-Azam Khan Gara, AAG.
For complainant :-		Mr. Ishtiaq-ur-Rehman, Advocate.
Date of hearing:		21.11.2023

JUDGMENT

ISHTIAQ IBRAHIM, J.- This criminal appeal, filed by Zafran, the appellant, is directed against the judgment dated 27.04.2023 (**"iImpugned judgment"**), passed by learned ASJ-II/Judge Juvenile Court, Khyber (**"Trial Court"**), whereby he has convicted the appellant under section 302(b) PPC and sentenced him to undergo rigorous imprisonment for life and to pay rupees five lac, as compensation to legal heirs of Iqrar deceased in terms of Section 544-A Cr.P.C. and in default thereof to further under six months simple imprisonment. He has also convicted the appellant under section 15 KP Arms Act, 2013 and sentenced him to undergo rigorous imprisonment for one year and to pay rupees ten thousand as fine and in default

thereof to further undergo one month simple imprisonment vide case FIR No.160 dated 24.05.2021, registered under sections 302, 324 PPC and section 15 KP Arms Act, 2013 at Police Station Jamrud District Khyber. Benefit of Section 382-B Cr.P.C. has been extended to him. The appellant has been acquitted under section 324 PPC.

2. The prosecution's case as per First Information Report (**"FIR"**) Exh.PA/1 is that on 24.05.2021 at 0915 hours, Saeed Khan complainant (PW.9), in company of dead body of his nephew Iqrar deceased, in civil hospital Jamrud, reported to Aziz Ullah ASI (PW.1) to the effect that on the fateful day i.e. 24.05.2021 he along with deceased was present at Bakar Abad when at 0750 hours appellant Zafran, duly armed with firearm, came there and opened fire at them with the intention to commit their murder, as a result, Iqrar deceased got hit and died on the spot whereas he luckily remained unscathed. A brawl over children between of the parties prior to the occurrence has been advanced as a motive behind the occurrence. Besides him, the incident is stated to have been witnessed by people present at the spot. Report of the complainant was recorded in the shape of Murasila Exh.PA by Aziz Ullah ASI (PW.1), who also prepared injury sheet Exh.Pw.1/1 and inquest report

Exh.PW.1/2 of the deceased and shifted his dead body to the mortuary for postmortem examination under the escort of Constable Hazrat Ullah.

3. On 24.05.2021 at 09.30 AM, Dr. Abdullah (PW.6), conducted postmortem examination on the dead body of Iqrar deceased aged about 12/13 years and found the following injuries on his person:-

i. A firearm entry wound 2x1 cm, located overhead, 10 cm above right ear.

ii. A firearm exit wound of 3x4 cm, located over head, 10 cm above left ear with exposed brain material and skull bone fracture.

Opinion:-According to his opinion, the deceased died due to injury to his brain due to firearm injury.

4. The task of investigation was handed over to Naseem Khan SI (PW.11), who proceeded to the spot and prepared site plan Exh.PB on the pointation of complainant. During spot inspection, he secured blood through cotton from the place of the deceased and 02 empties of 30 bore pistol vide recovery memo Exh.PW.2/1. Vide recovery memo Exh.PW.3/1 he took into possession the last worn bloodstained garments of the deceased and on 04.06.2021 he arrested appellant vide arrest Card Exh.PW.11/1. He also placed on file daily diary qua arrest of the appellant which is Exh.PW.11/2, obtained physical

remand of the appellant, interrogated him and on his pointation on 06.06.2021, recovered a 30 bore pistol along with five live rounds of the same bore from the bed of the appellant in his house. He took the same into possession through recovery memo Exh.PW.2/2, recorded statements of the PWs under section 161 Cr.P.C., sent the bloodstained articles as well as the pistol and crime empties to the FSL, reports whereof are Exh.PZ and Exh.PZ/1 respectively. He also placed on file extract of Register No.19 and after completion of investigation handed over case file to the SHO, who submitted challan against the appellant before the learned Juvenile Court, as the appellant was a juvenile.

5. On receipt of challan by the learned trial Court/Judge Juvenile Court, Khyber, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as eleven witnesses. After closure of the prosecution's evidence statement of the appellant was recorded under section 342 Cr.P.C wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath or 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 in the initial paragraph of the judgment, hence, this appeal.

6. We have heard the arguments of learned counsel for the parties and perused the record and evidence with their able assistance.

7. In this case the deceased was 12/13 years old. Similarly, the appellant at the time of occurrence was also below the age of eighteen years. As per contents of Murasila Exh.PA and FIR Exh.PA/1 occurrence in this case has taken place on 24.05.2021 at 0750 hours in village Bakar Abad, situated at a distance of 6/7 kilometers from Police Station Jamrud and has been reported at 0915 hours by complainant Saeed Khan in Civil hospital Jamrud to Aziz Ullah ASI (PW.1). The complainant in his report Exh.PA has mentioned "Baker Abad" as the place of occurrence but contrary in the site plan Exh.PB the place of occurrence is shown in the court yard of the house of the appellant. Azir Ullah ASI (PW.1), author of Murasila, in cross-examination has admitted it correct that place of occurrence in the Murasila is mentioned as "Bakar Abad". Naseem Khan SI (PW.11), Investigating Officer, in his cross examination has categorically stated that *Baker Abad* is a village consisting of so many houses; that in the FIR

complainant has not specifically mentioned the place of occurrence.

8. Complainant Saeed Khan while appearing as PW.9 tried his level best to cover the anomaly and flaw in his report with regard to the place of occurrence. He deposed that Iqrar deceased was his nephew. On the eventful day i.e. 24.05.2021, he along with deceased Iqrar, PW Ashraf and Iran Shah went to the house of the appellant to complain about the quarrel in between their children; that in the meanwhile the appellant pulled out pistol and fired at them, as a result, Iqrar deceased got hit and died at the spot; that they shifted his dead body to civil hospital Jamrud; that on his pointation, the I.O. prepared site plan Exh.PB. In cross-examination when he was confronted with his report Exh.PA he admitted that he has not stated in the report about their visit to the house of the appellant and pulling out of pistol by the appellant there; that in his report he has not mentioned that they shifted the dead body to civil hospital Jamrud; that he has not mentioned in his report the names of eyewitnesses; that names of the children who had quarreled prior to the occurrence has also not been mentioned by him in his report; that no report was lodged about the quarrel of the children; that the

occurrence has taken place in village Bakar Abad Sakhi Pull.

9. The complainant in his examination-in-chief has introduced certain new events which he has not disclosed in his report Exh.PA. The new events introduced by him amounts to dishonest and deliberate improvements so as to bring his testimony in line with the physical circumstances of the prosecution's case. Non-mentioning of the place of occurrence in his report, is a strong circumstance which belies the presence of the complainant at the spot at the time of occurrence. He has not given any explanation, much less, plausible as to why he did not disclose the exact place of occurrence to the author of the Murasila. The peculiar facts and circumstances of the case, particularly, the crime spot inside the house of the appellant, clearly speaks that there was something black in the bottom and the incident has not taken place in the mode and manner as alleged by the complainant rather in some other mode which remained shrouded mystery. The learned trial court has erred in law by believing the testimony of the complainant which is full of dishonest and deliberate improvements hence create serious doubts in the prosecution's case. Such dishonest and deliberate improvements made him unreliable and untrustworthy

witness. It is held in the case of **Amir Zaman Vs. Mahboob and others (1985 SCMR 685)** that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in **Akhtar Ali's case (2008 SCMR 6)** it has been held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. In **Khalid Javed's case (2003 SCMR 149)** such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of **Mohammad Shafique Ahmad Vs. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another Vs. The State (1993 SCMR 550), and Mohammad Saleem Vs. Mohammad Azam (2011 SCMR 474)**.

10. As stated earlier, from the peculiar facts and circumstances of the case i.e. not disclosing the exact place of occurrence by the complainant and recovery of blood of the deceased and empties from inside the house of the appellant, are strong facts from existence of which it can be inferred that the occurrence has not taken place in the mode and manner as alleged by the

complainant rather in some other mode which has been concealed. Under Article 129 of the Qanun-e-Shahadat Order, 1984 (**"QSO"**), court may presume existence of certain facts which it thinks likely to have happened, regarding 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. For the sake of convenience and ready reference Article 129 of the QSO is reproduced below along with the illustrations attached thereto.

> **<u>129. Court may presume existence of certain facts</u>: 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.**
>
> Illustrations The Court may presume—
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;
>
> (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars ;
>
> (c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

(e) that judicial and official acts have been regularly performed ; (f) that the common course of business has been followed in particular cases;

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

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Article 129 (ibid) deals with "presumption of fact". It enables the court to infer one fact from the existence of another proved fact having regard to the common course of natural events or human conduct. It furnishes prima facie evidence of the matter to which it relates and relieves the party of the duty of giving evidence unless his adversary has adduced proof to rebut the presumption. It raises such high degree of probability in its favour that it must prevail unless proof in rebuttal thereof is given to the satisfaction of the court. The Article does not prescribe any hard and fast rule with regard to the circumstances in which any fact or facts may be presumed to exist nor does it contain any exhaustive list of such facts though undoubtedly it

gives a few illustrations from various walks of life. The illustrations in Article 129 QSO are merely examples of circumstances in which certain presumptions may be made. The principle laid down in the Article is one of very wide application. It covers not merely the particular instances given in these illustrations but all sorts of analogous cases in which the actual facts are distinguishable from the facts presumed by any one of the illustration but are equally amenable to the general principle enunciated by the Article itself. Therefore, if a question arises as to whether the existence of a particular fact may be presumed, the criterion for decision must be the words of Article 129 of the QSO. This is because illustrations in the Article are but illustrations only and it is evidently open to a court to see the main Article itself and consider within its ambit whether it applies to any given set of facts and drew an inference therefrom.

11. As regards testimony of Muhammad Ashraf (PW.10), who also poses himself to be an eyewitness of the occurrence. Though he has verified report of the complainant, but his name is not mentioned therein as an eyewitness. Besides, he too, in his statement under section 161 Cr.P.C. has not disclosed the exact "place of occurrence" however, in his court statement introduced events as introduced by the complainant so

as to bring his testimony in line with him. He deposed that on the fateful day he along with PW Saeed, Iqrar deceased and Iran Shah went to the house of the appellant for complaint against quarrel between the children and in the meanwhile the appellant pulled out pistol and fired at them, as a result, Iqrar deceased got hit and died on the spot. In cross-examination, he stated that in his statement u/s 161 Cr.P.C. he has not mentioned the date and time of occurrence; that he has also not mentioned the date and place of quarrel between the children; that the quarrel between the children was also not reported to police; that none of the said children was produced before the police; **that at the time of occurrence I was standing outside the house adjacent to the door**.

12. The testimony of PW Muhammad Ashraf being suffering from deliberate and dishonest improvements is also not sufficient for recording conviction of the appellant, that too, in the capital charge.

13. No doubt, recovery of blood from the spot, last worn, bloodstained garments of the deceased, positive Serologist report Exh.PZ in respect thereof coupled with autopsy report of the deceased, prove the unnatural death of the deceased with firearm, but such pieces of circumstantial evidence never tell the

name(s) of the culprit(s). Such pieces of corroborative evidence are always taken in aid of the direct evidence and not in isolation. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of **"Muhammad Afzal alias Abdullah and others vs. The State and others" reported as (2009 SCMR 639)** has 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."

Hon'ble Supreme Court in another judgment rendered in the case of **"Imran Ashraf & 7 others v/s The State" reported as 2001 SCMR 424,** has also observed;

> "Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion".

In support of same ratio, further reliance may also be placed on the judgment reported as **2007 SCMR 1427.**

As far as medical evidence is concerned, the same is

also supporting piece of evidence, which may confirm the ocular account with regard to receipt of injury, nature of the injury, kind of weapon used in the occurrence but it would not tell the name of the assailant. Reference in this context may be made to the cases of **"Muhammad Tasaweer versus Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53), "Altaf Hussain versus Fakhar Hussain and another" (2008 SCMR 1103) and "Mursal Kazmi alias Qamar Shah and another versus The State" (2009 SCMR 1410).**

14. So far as recovery of 30 bore pistol on the pointation of the appellant from room of his house, recovery of 2 empties of .30 bore from the spot and positive FSL report Exh.PZ/1 are concerned, no private witness has been associated with the recovery proceeding. Besides, no evidence has been brought on record by the prosecution to prove the house to and the room to be the ownership of the appellant or in his sole occupation. In this view of the matter, plantation of the pistol against the appellant to make the prosecution's case strong cannot be ruled out of consideration. Besides, record depicts that occurrence has taken place on 24.05.2021 and on the same date the empties were also recovered but the empties have not been sent to the FSL soon after its recovery, rather, were kept in

Police Station and after arrest of the appellant on 04.06.2021 i.e. after about twelve days i.e. 08.06.2021, the empties along with 30 bore pistol, were sent to the FSL. It is by now well established proposition of law that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed on the case **of "Jehangir vs. Nazar Farid and another" (2002 SCMR 1986), "Israr Ali vs. The State" (2007 SCMR 525) and "Ali Sher and others vs. The State" (2008 SCMR 707).**

15. On reappraisal of the prosecution's evidence we have reached to an irresistible conclusion that prosecution has miserably failed to prove guilt of the appellant through cogent and confidence inspiring evidence. The prosecution evidence is pregnant with doubts and full of dishonest and deliberate improvement benefit of which is to be extended to the appellant not as a matter of grace or concession but as a matter of right. It is a settled principle of law that for giving the benefit of the doubt it is not necessary that there should be so many circumstances rather if only a single circumstance creating reasonable doubt in the mind of a prudent person is available then such benefit is to be extended to an accused not as a matter of

concession but as of right. The august Supreme Court of Pakistan in the case of **"Muhammad Mansha Vs. The State" (2018 SCMR 772)** has enunciated the following principle:

> "Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akramv. The State (2009 SCMR 230) and Muhammad Zamanv.The State (2014 SCMR 749)."

Reliance is also placed on the judgment of the august Supreme Court of Pakistan in case of **Najaf Ali Shah Vs. the State (2021 S C M R 736)** in which it has been observed in paragraph No.13 of page 236 as below:-

> "9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the

majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to Murder Reference No. 58 of 2016 34 cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of

guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused".

15. Accordingly, this appeal is allowed. Conviction and sentences of the appellant recorded by the learned trial court vide impugned judgment dated 27.04.2023, are hereby set aside. Consequently, the appellant is acquitted from the charge in this case. He be set at liberty forthwith if not confined in any other case.

Announced:
21.11.2023
M.Siraj Afridi CS

Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim Senior Puisne Judge; and Hon'ble Mr. Justice Sahibzada Asadullah