

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT JUDICIAL DEPARTMENT.

**Criminal Appeal No.1119-P/2022
with Murder Reference No.25-P/2022**

J U D G M E N T

Date of hearing : 5th July, 2023

Appellant : By M/s Khizar Hayat Khazana and
(Junaid Ahmad) Barrister Azam Khan,
Advocates.

Respondents : By Mr. Danial Khan Chamkani,
(State) AAG

Complainant : By Nemo
(Aurangzaib)

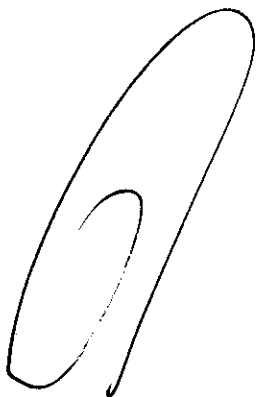
Faqir Hussain (father of : By Malik Fida Hussain Khalil,
deceased Mst. Kainat & Advocate.
Mst. Eisha)

S. M. ATTIQUE SHAH, J.- Appellant Junaid

Ahmad was charged for the murder of deceased Yahya, Mst. Kainat, Mst. Eisha, minors Shoaib and Zohaib while acquitted co-accused Ameer Khan was charged for abetment in the commission of the offence. A case under sections 302 / 109 / 201 PPC was registered against them vide FIR No.286 dated 20.03.2018 in Police Station Chamkani, Peshawar. Likewise, the appellant was separately charged under section 15 of the Arms Act. Both of them were tried by the learned Additional Sessions Judge-XIX, Peshawar, who, on conclusion of the proceedings / trial, convicted the appellant under Section 302(b) PPC and sentenced him to death on five counts as Tazir with the direction to pay Rs.5,00,000/- to the legal heirs of the deceased as compensation under Section 544-A, CrPC or in

default thereof to undergo six months S.I, however, co-accused-respondent Ameer Khan was acquitted from the charges levelled against him vide judgment dated 31.10.2022. The appellant was also convicted under section 15 of the Arms Act and sentenced to three years simple imprisonment with a fine of Rs.5,000- or in default thereof to undergo two days S.I. Benefit of section 382-B CrPC was, however, extended to him by the learned trial court vide separate judgment of the even date i.e. 31.10.2022. Against his convictions, the present appellant filed the instant Criminal Appeal No.1119-P/2022 and connected Criminal Appeal No.1128-P/2022 while one Faqir Muhammad, father of deceased Mst. Kainat and Mst. Eisha, filed the connected Criminal Appeal No.1215-P/2022 against the acquittal of the acquitted co-accused. The learned Trial Court has also forwarded Murder Reference within the meaning of Section 374, CrPC. Since the appeals and murder reference are interlinked with each other and outcome of the same subject matter, therefore, these are being disposed of through this single judgment.

2. Brief facts of the case are that on 20.03.2018 at about 0200 hours, complainant Aurangzaib reported the matter to Khan Zaib, SI (PW-6), that as to how he was present at his home when he received information about the occurrence and pursuant thereto he rushed to the spot i.e. house of his nephew Yahya where he found him murdered / killed alongwith his



wife Mst. Kainat, sister-in-law Mst. Eisha and minor sons Shoaib and Zohaib. Initially, he charged some unknown culprits for the commission of the offence.

3. On completion of investigation, the appellant and the acquitted co-accused were challaned to the court for trial. The copies of the relevant documents under Section 265-C, CrPC were supplied to them. The charge was framed against them, to which they pleaded not guilty and claimed trial. The appellant was separately charge-sheeted for committing crime under section 15 of the Arms Act.

4. At the trial, the prosecution, in order to prove the charge and substantiate the allegations levelled against the appellant and the acquitted co-accused, produced as many as thirteen witnesses. The gist of their statements is as under:-

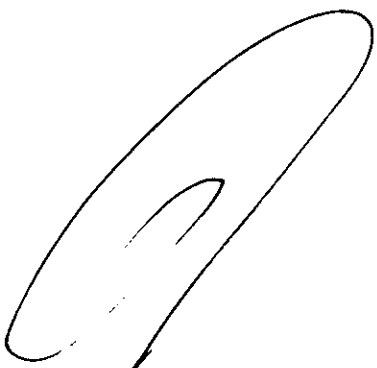
PW-1 Sikandar constable escorted the dead bodies of deceased Yahya, Zohaib and Eisha from the spot to KMC, Peshawar for postmortem examination and brought back their garments and handed over the same to the investigating officer.

PW-2 Zahid constable escorted the dead bodies of deceased Mst. Kainat and Shoaib from the spot to KMC, Peshawar for postmortem examination and brought back their garments and handed over the same to the investigating officer.

PW-3 Amjad Khan, ASI is the marginal witness to the recovery memos Ex.PW-3/1 to Ex.PW-3/9, vide which, in his presence, the investigating officer made the following recoveries;

- | | |
|---|--------------------------|
| a) blood through cotton from the places of deceased Yahya, Mst. Kainat, Mst. Eisha, Shoaib and Zohaib and sealed the same into different parcels No.1 to 5 respectively; | } Vide memo
EX-PW-3/1 |
| b) seven and six empties of 9MM from Points No.A & B respectively and sealed into parcel No.6; | |
| c) two spent bullets from the places of deceased Yahya and Kainat and two spent bullets from the places of deceased Eisha and Shoaib and sealed the same into parcel No.14; | |
| d) bloodstained plastic near the house of deceased and blood through cotton from the side of water channel and sealed the same in parcels No.7 & 8 respectively; | } Vide memo
EX-PW-3/2 |
| e) motorcar bearing registration No.LOG-8001 Suzuki Alto along with its registration copy from the house of deceased Yahya, his CNIC, driving licence, service card and UBL internet master card; | |
| f) bloodstained garments of deceased Yahya, Kainat, Eisha, Shoaib and Zohaib, sent by doctor, and selected into parcels No.9 to 13 respectively; | } Vide memo
EX-PW-3/3 |
| g) six mobiles of deceased Yahya with IMEI numbers; | |
| h) blood through cotton from the places of deceased Yahya, Kainat, Eisha, Shoaib and Zohaib for the purpose of DNA and sealed the same into parcels No.1-A, 2-A, 3-A, 4-A and 5-A respectively. | } Vide memo
EX-PW-3/4 |
| i) One pair of shoes brown colour from the possession of appellant Junaid having blood traces and sealed the same into parcel No.16. | |
| j) one bulb from point-B and one bulb from point-C of the place of occurrence at the pointation of appellant Junaid and sealed the same into parcel No.17. | } Vide memo
EX-PW-3/5 |
| k) investigating officer made addition in the site plan with read ink | |

PW-4 Munir Khan Inspector while partly investigating the case made two applications to CKC vide Ex.PW-4/1 & Ex.PW-4/2 for obtaining IMEI data of mobile set and CDR data of the SIM mentioned therein. He visited the spot, collected blood through cotton from the places of deceased Yahya, Mst. Kainat, Mst. Eisha, Shoaib and Zohaib



and sealed the same into parcels No.1-A, 2-A, 3-A, 4-A & 5-A respectively vide recovery memo Ex.PW-3/6 and sent the same for obtaining the DNA report from concerned authority vide application, already exhibited as Ex.PW-4/3, report whereof is Ex.PW-4/6. He recorded the statements of the complainant and PW Faqir Hussain and vide application Ex.PW-4/7, he produced both of them before the learned Judicial Magistrate for recording their statements under section 164 CrPC. Vide application Ex.PW-4/8, he also produced both the accused for obtaining their physical custody and accordingly three days' custody was granted. On the pointation of both the accused, this PW made entries in the site plan Ex.PA with red ink and thereafter prepared pointation memo, already exhibited as Ex.PW-3/9. Vide recovery memo already exhibited as Ex.PW-3/8, he took into possession two energy savers one from the veranda and other from the room and sealed the same in parcel No.17, which is Ex.P-1. He also recorded the statements of witnesses and accused under section 161 CrPC. Vide applications Ex.PW-4/9 and Ex.PW-4/10, he sent recovered shoes of appellant Junaid for DNA test and also produced him before the DNA office for DNA analysis, report whereof is already exhibited as PW-4/6. Vide application Ex.PW-4/11, he sent to the FSL the received fingerprints of both the accused on simple slip on which report is available as Ex.PW-4/12. Vide application dated 27.03.2018, Ex.PW-4/12, he made addition of sections 109 / 201 PPC. Vide application Ex.PW-4/13, he produced the accused before the learned JMIC concerned for recording their confessional statements, however, they refused to confess their guilt and were sent to judicial lockup. Vide application, Ex.PW-4/14, he took into possession CDs Ex.PB, consisting of two CDs regarding audio and video of confessional statements of both the accused. Vide application Ex.PW-4/15, he sent already seized pistol and empties for FSL analysis, report whereof is Ex.PW-4/16. He

also placed on file postmortem reports of all the deceased and CDR reports along with the family trees Ex.PW-4/17. He recorded statements of all the PWs and after completion of investigation, he submitted the case file to the SHO concerned for submission of complete challan.

PW-5 Dr. Saima Noreen, TMO conducted the autopsies of deceased Mst. Eihsa and Mst. Kainat vide postmortem reports Ex.PM & Ex.PM/1 and also endorsed their injury sheets and inquest reports vide Ex.PW-5/1&2 & Ex.PW-5/3&4 respectively.

(parentage of deceased Mst. Kainat has wrongly / inadvertently been mentioned as Mujtaba instead of Faqir Hussain in the postmortem report as well as in the statement of this witnesses)

PW-6 Khan Zaib, Sub-Inspector recorded the report of complainant Aurangzaib in the shape of murasila Ex.PA/1 and also prepared the injury sheets and inquest reports of all the deceased vide Ex.PW-6/1 to Ex.PW-6/10 respectively. He sent the dead bodies to mortuary for postmortem examination and sent the murasila to the police station for registration of case.

This PW was re-examined as **RePW-6** wherein he disclosed the arrest of the appellant and the acquitted co-accused, prepared their cards of arrest Ex.RePW-6/2 & Ex.RePW-6/3 and recovered a pistol of 9MM along with five live bullets (Ex.PZ) from the possession of the appellant. Recovery memo in this respect is Ex.RePW-6/1.

PW-7 Umar Khan Afridi, SI submitted complete challan against accused before learned trial court.

PW-8 Faqir Hussain, father of both the deceased ladies, father-in-law of deceased Yahya and maternal grandfather of minors Shoaib and Zohaib charged the appellant and the acquitted co-accused for the commission of the offence. Motive for the offence was alleged to have some domestic dispute between both the brothers i.e. appellant Junaid and deceased Yahya.

PW-9 Shaukat Ullah SI partial investigated the case. He prepared the site plan Ex.PW-9/1, took into possession blood through cotton from the places of deceased Yahya, Mst. Kainat, Mst. Eisha, Shoaib and Zohaib and sealed the same into parcels No.1 to 5 respectively; recovered seven and six empties of 9MM from Points No.A & B respectively and sealed into parcel No.6 Ex.P-A/1. Vide recovery memo already exhibited as Ex.PW-3/1, he took into possession two spent bullets from the places of deceased Yahya and Kainat and two spent bullet from the places of deceased Eisha and Shoaib and sealed the same into parcel No.14 Ex.P-A/2. Likewise, vide recovery memo exhibited PW-3/2, he took into possession bloodstained plastic and blood through cotton from the side of water channel and sealed the same in parcels No.7 & 8 respectively. Similarly, vide recovery memo already exhibited as Ex.PW-3/3, he took into possession motorcar bearing registration No.RC-8001/LOG along with its registration book from the house of deceased Yahya, his CNIC, driving licence, UBL internet master card. Equally, vide recovery memo already exhibited as Ex.PW-3/4, he took into possession bloodstained garments of deceased Yahya, Kainat, Eisha, Shoaib and Zohaib and sealed into parcels No.9 to 13 vide Ex.P-A/4 to Ex.P-A/8 respectively. Vide recovery memo Ex.PW-3/5, he took into possession IMEI numbers of deceased Yahya. He received fingerprints from the Incharge Crime Scene, who took the same from the crime scene vide recovery memo Ex.PW-9/2 and placed the same on file vide Ex.PW-9/3 & 9/4 respectively. Vide application Ex.PW-9/5, he sent parcels No.01 to 05 to FSL. Similarly, vide application Ex.PW-9/6, he sent parcel No.6 to arms expert and through application vide Ex.PW-9/7, he sent parcels No.7 & 8 for DNA analysis. He also prepared fard superdari vide Ex.PW-9/8 and recorded statements of PWs under section 161 CrPC.

Thereafter, the case was transferred from him to Munir Khan, SI.

PW-10 Zahid constable escorted the dead bodies of deceased Zohaib and Mst. Kainat from the spot to KMC for postmortem examination. After the same, he handed over the dead bodies to their legal heirs while their garments were handed over to the investigating officer in P.S.

PW-11 Kaleem Ullah constable alongwith Yasir and Khanzaib Khan arrested the appellant and acquitted co-accused and recovered a pistol of 9MM from the possession of the appellant.

PW-12 Dr. Mian Saad Ahmad, Assistant Professor conducted the autopsies of deceased Yahya, Zohaib and Shoaib vide postmortem reports Ex.PM/2, Ex.PM/3 & PM/4 and also signed their injury sheets and inquest reports.

PW-13 Sajjad Khan SI, on receipt of murasila, incorporated its contents into FIR vide Ex.PW-13/1.

The prosecution after abandoning the remaining PWs as unnecessary closed the evidence on 26.07.2022. Out of them, complainant Aurangzaib and PWs Shoaib and Tahseen Ullah were abandoned being won over.


5. On conclusion of prosecution evidence, the appellant and the acquitted co-accused were examined under Section 342, CrPC on 01.08.2022 and 28.07.2022 respectively. They, in their statements, denied the charges, levelled against them and pleaded innocence. They, however, did not opt to lead any evidence in their defence or to appear as their own witnesses in terms of Section 340(2), CrPC.

6. The learned Trial Court, after hearing the arguments of both the parties and on appraisal of evidence, convicted and sentenced the appellant as stated above while acquitted co-accused Ameer Khan from the charges levelled against him through the impugned judgment. Being aggrieved, the appellant against his conviction and Faqir Hussain against acquittal of acquitted co-accused have come to this court through their respective appeals.

7. The learned counsel appearing on behalf of the appellant by referring to the story narrated in the FIR and the statements of the PWs recorded in the court, tried to project the inference that the occurrence has not taken place in the manner as described by the prosecution. They further contended that it is an unseen occurrence and the charge at the doorsteps of the appellant has been flung without any rhyme or reason. The story, they added, also appears to be improbable if seen in the light of statements of material witnesses as well as medical evidence. The learned counsel by referring to star witnesses of the prosecution namely, Aurangzaib, complainant as well as Shoaib and Tahseen, witnesses of recovery memo whereby fingerprints from the spot were lifted, who were abandoned, tried to canvass at the bar that they could have furnished actual story but their non-production would not only militate against the veracity of the prosecution version but also give rise to the inference that they

would have gone against the prosecution if they were produced. They further contended that one Muntazir, in whose name the suspected mobile number, was registered, was neither made an accused nor prosecution witness in the case, which itself raise eyebrow about the performance of the investigating officers. Next argued that chain of the circumstantial evidence is totally incomplete as fingerprints were not lifted/secured as per standard protocols and likewise the alleged pistol was not sealed in proper manner, then, what to talk of evidentiary value of the same. The learned counsel, by concluding their arguments, contended that the conviction and sentences recorded on the basis of doubtful evidence cannot be maintained.

8. As against that the learned Assistant Advocate General appearing on behalf of the State duly assisted by the learned counsel representing the father of the deceased ladies vehemently argued that it is the case of circumstantial evidence and the entire chain in the shape of recoveries, fingerprints, CDR data etc., is complete insofar as the involvement of the appellant and the acquitted co-accused is concerned as such being consistent and confidence inspiring, has rightly been relied upon by the learned Trial Court. By referring to the contradictions, they contended, that the minor discrepancies may occur in the statements of the witnesses who are perfectly honest. Above all, they, by concluding their



arguments, contended that unexplained absconsion of the appellant after the occurrence and despite being sole male member of his family after the murder of his brother, sister-in-law, two minors and sister-in-law of his brother would plug all the loopholes, if any, in the prosecution evidence and bring guilt home to the appellant beyond any shadow of reasonable doubt. They by concluding their arguments submitted that the learned Trial Court has rightly awarded death sentence to the appellant, therefore, it does not call for any leniency or interference in the well-reasoned judgment of the learned Trial Court. In the same breath, the learned counsel representing the father of the deceased ladies vehemently opposed the acquittal of acquitted co-accused as he was the person, who actually, responsible for the entire tragedy and without his facilitation / help / assistance / connivance, the appellant was not able to even think such like brutal act, and as such, he was liable to be given full doze, which fact has not properly been appreciated by the learned trial court while acquitting him from the charges levelled against him.

9. Heard. Record perused.

10. Instant case is the result of an unfortunate unseen occurrence in which five persons, three major and two minors of one and the same family have lost their precious lives who are closely related to the appellant, therefore, we are under legal obligation to carefully re-appraise and analyze the entire

evidence so brought on record by the prosecution in order to arrive to a proper conclusion qua the conviction and sentence of the appellant as on one hand, three young persons and two minors had lost their valuable lives while on the other hand a young man, who happens to be their close relative i.e. brother of deceased Yahya has been awarded death sentence on five counts.

The inter se relation of the parties is as under:-

Deceased Yahya	With	Appellant Junaid	Brothers
Deceased Yahya and appellant Junaid (brothers of Mst. Nihayat)	With	Acquitted co-accused Ameer (husband of Mst. Nihayat).	Brothers-in-law.
Deceased Yahya	With	Deceased Mst. Kainat.	Spouses.
Deceased Yahya & Mst. Kainat	With	Deceased minors Shoaib and Zohaib	Parents
Deceased Mst. Kainat.	With	Deceased Mst. Eisha	Sisters
Deceased Yahya			Brother-in-law
Deceased Mst. Kainat & Mst. Eisha	With	PW Faqir Hussain	Daughters
Deceased minors Shoaib and Zohaib			Maternal Grandchildren
Deceased Yahya & appellant Junaid	With	Complaint Aurangzaib	Nephews

11. According to the prosecution version, complainant Aurangzaib (abandoned PW) on the fateful day on the receipt of information qua the commission of the offence rushed to the house of his nephew deceased Yahya where he found him dead along with his wife Mst. Kainat, sister-in-law Mst. Eisha and two minor sons Shoaib and Zohaib. The complainant neither was present on the spot nor had witnessed the occurrence with his own eyes and as such

he is not the eyewitness of the crime and that is how he charged some unknown culprits for the crime in his initial report, which was lodged in the shape of murasila Ex.PA/1 by PW Khan Zaib SI, contents whereof were reduced into FIR vide Ex.PW-13/1.

12. The role of the complainant in the entire episode is nothing but only as an informer. However, the record is completely silent that, who was the person, who first seen the occurrence and informed the complainant about the sad incident. No investigation in this respect had been carried out by the IO of the case nor the complainant disclosed his source of information in his initial report and in his magisterial statement as well, as such, identification of such an important person is still a mystery and its credit definitely goes to the investigating officers, who did not bother to trace him out. Such fact was also established from the cross-examination of Khan Zaib SI (PW-6) in the manner: -

It is a fact that as per the Murasila Ex.PA/1, the complainant himself is not the eyewitness of occurrence. It is also correct that as per Murasila, it is not mentioned that who informed the complainant regarding the occurrence.

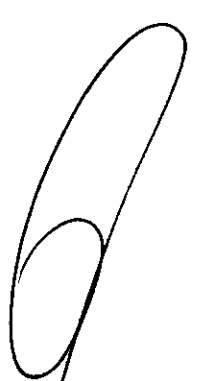
13. In fact, the case of prosecution is fully based upon circumstantial evidence, as the occurrence is unwitnessed one. What tempts the Court to believe this type of evidence is based upon the maxim that men may lie but circumstances cannot. We rather use this centuries-old

wisdom as a touchstone for assessing and evaluating the evidentiary worth of the circumstantial evidence. Inference about the guilt of the accused could well be drawn from the circumstances as are well authenticated. But where the circumstances so reported are tampered with or manufactured and fabricated, then the same cannot be accepted without careful and critical analysis. We are mindful of the fact that in such like cases, for the conviction of an accused exclusively on the basis of circumstantial evidence, the circumstances proved in the case must be irreconcilable with his innocence and the chain of circumstances must be so strong as to rule out any reasonable hypothesis of his innocence and certainly such chain requires to start from the body of the deceased and stop on the neck of the accused in an unbroken manner. Indeed, in the absence of such an unbroken chain, it would be extremely risky rather hazardous to rely upon such circumstantial evidence, which is not of high standard and quality and as such, the courts are supposed to take extraordinary care and caution before relying on the same, particularly by imposing a death penalty on an accused. *Azeem Khan & another vs. Mujahid Khan & others (2016 SCMR 274); Nasir Javaid & another vs. State (2016 SCMR 1144) and Ayesha Khatun & another vs. State [1968 PCrLJ (Dacca) 53]*.

14. In the case in hand, after the registration of the FIR Ex.PW-13/1 on 20.03.2018, the investigating officer spur

into action to nab the actual culprits, started the investigation through different angles being a blind occurrence and that is how adopted a scientific manner for securing fingerprints from the spot.

15. On 20.03.2018, the date when the occurrence took place, the Incharge Crime Scene Unit lifted the fingerprints from the backdoor of the house of deceased Yahya and secured the same through the scotch tape in presence of two witnesses namely, Tehsin Ullah Jan and Muhammad Shoaib, vide Ex.PW-9/2. However, neither the aforesaid Incharge was cited as witness nor was examined before the court and it is also remained a mystery that who called the Crime Science Unit to the spot; who secured the fingerprints and whether he was competent enough to do so or otherwise. When the star person who lifted / secured the alleged fingerprints from the crime scene was not produced before the court to be confronted with such evidence, then, a mere positive report of such fingerprints is not sufficient for maintaining conviction under capital charge. ***State vs. Ilam Din & another [1986 PCrLJ (Lahore) 2072].***



Perusal of the ibid memo clearly shows that none of the police officials was present at that time during such proceedings that is how the private persons were cited as marginal witnesses of the fingerprints, lifted / secured from the spot. Rather under prescribed rules, it was the bounden

duty of the investigating officer to call the mobile forensic lab to respond to the crime scene, which was supposed to work under his supervision insofar as collecting and securing of fingerprints and gathering of other circumstantial evidence from the spot is concerned, but in the case in hand, he did not do so that is how only private persons namely, Tehsin Ullah Jan and Muhammad Shoaib were cited as marginal witnesses of the fingerprints, who too were abandoned by the prosecution being won over, more-so, they did not disclose the factum of securing of the fingerprints from the crime scene which fact is also evident from the testimony of Munir Khan Inspector / IO (PW-4) wherein, he clearly admitted that:-

I have recorded the statement of one Shoaib S/O Fazal Elahi u/s 161 CrPC who does not mention regarding the fingerprints has been recovered / secured in his presence.

16. We have before us the site plan Ex.PW-9/1 and have perused the same carefully time and again with the support of the learned counsel representing the parties and the worthy AAG for our own satisfaction but we are unable to find a single word or sketch, which could disclose that indeed the alleged fingerprints were lifted / secured from the crime scene by any official in presence of any witness. Meaning thereby that the site plan, which is most essential piece of evidence does not support the prosecution version to that extent. Such fact has also been confirmed from the cross-

examination of Shaukat Ullah, SI / IO (PW-9) in the following manner:-

It is a fact that the finger prints were not secured by me from the spot rather the same were secured by the official of the crime scene expert. The presence of crime scene officials have not been shown by me in the site plan. It is correct to suggest that I have not recorded the statement of crime scene officials nor their names and numbers of the said officials are available on the record.

Further admitted that:-


It is correct that I have not mentioned as to where from the fingerprints were taken specifically.

With regard to the point where from the finger prints were lifted, this PW stated that:-

As per my investigation, the fingerprints were obtained from the main gate, rooms and veranda.

But as against that, the memo Ex.PW-9/2 (*the word Ex.PW-9/2 has inadvertently been not mentioned*), reveals that the alleged fingerprints were lifted / secured from the backdoor of the house of the deceased.

17. Moreover, if at all, the fingerprints were actually lifted / secured from the spot by any official / authority in the presence of witnesses, then, the aforesaid witness namely, Shoaib would have definitely disclosed such factum to the



investigating officer while recording his statement under section 161 CrPC, which is not the case in hand. The non-examination of the marginal witnesses including the complainant would certainly hit by the mischief of the provision of Article 129(g) of the Qanun-e-Shahadat Order, 1984, and as such an adverse inference would be drawn that had those witnesses been examined before the court they would not have supported the stance of the prosecution. ***Farid Bakhsh vs. Jind Wadda & others (2015 SCMR 1044).***

18. Likewise, regarding the fingerprints of the appellant, it is evident from the record that after his arrest, his fingerprints were obtained / secured by Munir Khan Inspector / IO (PW-4) on 23.03.2018 but as against that the same were received by the FSL on 26.03.2018 as is evident from the report Ex.PW-4/11. This fact was also affirmed by the said PW in his cross-examination, wherein he admitted that:-

Accused was arrested on 23.03.2018 whereas the fingerprints were sent to FSL on 26.03.2018, however, I have not offered any explanation regarding the delay.

19. No doubt, opinion of the Fingerprint Expert Ex.PW-4/11 may point towards the complicity of the appellant in the alleged commission of the offence but simultaneously we cannot shut our eyes from the fact that the fingerprints of the appellant were not taken/secured in proper mode and manner as there is nothing on the record that in whose



presence, the investigating officer has taken/secured such fingerprints and who was the person/official, through whom, the same were sent to the laboratory for analysis and in whose custody the same were lying/kept during the intervening period as the record is completely silent in this respect. The IO was also required to have obtained the fingerprints of the appellant through Judicial Magistrate or fingerprints expert in the presence of witnesses and certainly in absence of such legal requirement the positive report of fingerprints is of no avail to the prosecution. Besides, no answer much less satisfactory comes forth regarding non-securing such evidence in accordance with the mandate provided by the law, then, in that case, the fingerprint's evidence by itself cannot constitute/establish a solid ground/basis for recording or upholding/maintaining the conviction of the appellant even in presence of positive report of the Firearms Expert notwithstanding such type of evidence can be cooked up by the investigating agency at later stage. ***Bahader Khan vs. State [2012 PCrLJ (Peshawar) 24].***

20. So far as the date of arrest of the appellant is concerned, suffice it to say that, we have before us two samples of his fingerprints i.e. Ex.PW-9/3 & Ex.PW-9/4, allegedly collected / secured by Munir Khan Inspector (PW-4) after the arrest of the appellant. However, Ex.PW-9/3 shown the date of his arrest as 23.03.2018 while that of as per


Ex.PW-9/4 is 20.03.2018. Meaning thereby that the appellant was arrested on 20.03.2018 but as against that, his card of arrest Ex.PW-6/2 shown his arrest on 23.03.2018. When so, how the investigating officer could able to secure the fingerprints of the appellant much prior to his alleged arrest, which has indeed disputed his alleged arrest and securing of his fingerprints. Such fact is also strengthened from the statement of Faqir Hussain (PW-8), father of both the deceased ladies, who in his cross-examination categorically admitted that:-

“My statement was recorded after three days of the arrest of the accused facing trial. Self stated that in P.S Chamkani the police shown me the accused and told me that they are your culprits.”

Magisterial statement of this PW was recorded on 24.03.2018 and hope so his police statement was recorded on the same very date or one day prior to it, then it reflects that the appellant was arrested on 20.03.2018 and not on 23.03.2018, as alleged by the prosecution. Moreover, as per Naqal Mad No.38 dated 23.03.2018, both the accused were allegedly present at the place, where from they were shown arrested by Khan Zaib SI (PW-6) but, interestingly, neither, on seeing the police party, they made any effort to flee away from the spot nor have showed any resistance to them, in spite of the fact that the appellant was allegedly duly armed with a pistol of 9mm and was standing in front of the police party

like a 'Statue' so as to arrest him. Rather he was having ample opportunity to conceal or destroy each and every piece of evidence or to throw the alleged weapon of offence anywhere in the field, water canal, well or other place after the alleged commission of the offence instead of choosing to keep the crime weapon with him.

21. Another important feature of the case is that, as stated above, undoubtedly, Khan Zaib, SI (PW-6) had arrested the appellant along with pistol of 9mm and live rounds but strangely, this witness somehow did not disclose such arrest and recovery while recording his statement as PW-6 and that is how, to fill up such lacuna, he was recalled and accordingly reexamined as RePW-6 with regard to the alleged arrest and recovery. Moreover, the pistol was allegedly recovered from the possession of the appellant at the time of his arrest on 23.03.2018 but interestingly it was not sealed on the spot which fact has also been admitted by this PW in his testimony. Likewise, the same was sent to firearms expert for analysis on 30.03.2018 and even during the intervening period, the same was not in sealed condition as is evident from the cross-examination of Khan Zaib SI (PW-6), wherein he admitted that:-



It is a fact that as per recovery memo Ex.RePW-6/1 there is no mentioned that whether the same was sealed or not. Self-stated that I handed over the pistol to IO in open condition. In memo

Ex.RePW-6/1 I have not mentioned the place of the recovery of the pistol.

This fact was also admitted by Kaleem Ullah Constable (PW-11) in whose presence the arrest and recovery was made.

The relevant portion is as under:-

It is correct that the whole time of possession of the pistol by us, it was lying in open condition.

Such fact was also affirmed by Munir Khan Inspector / IO (PW-4) in his cross-examination in the following manner:-

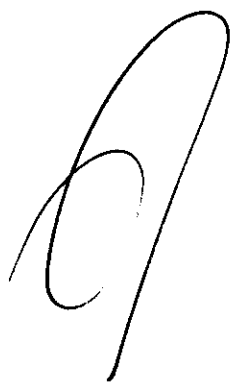
The pistol in question was not sealed by the PW Khanzeb rather the same was handed over to me in open condition.

It is correct that I have recorded statement of PW Khanzeb which does not mention a time and place of recovery of pistol.

Further admitted that:-

I have not recorded statement of Muharrir regarding the depositing of the case property in store room or entry of the same in register No.19 as well as there is nothing about the safe custody of the case property. It is a fact that no evidence has been brought by me on the record of the case that with whom the case property was lying.

22. Moreover, nothing satisfactory has come forth to show plausible reasons for such delay in sending the alleged crime weapon to the FSL or who dispatched the same for analysis/opinion insofar as the prosecution evidence is concerned. Being so, the safe custody of the recovered articles



is highly doubtful and even possibility could not be excluded of its having been tampered with, which fact goes to the very roots of the prosecution case. Hence, the recovery of pistol and Firearms Expert's report were unworthy of reliance in the given facts and circumstances of the case. *Muhammad Saleem vs. Shabbir Ahmad (2016 SCMR 1605); Zahid Hussain & others vs. State [2020 YLR Note 102 (Federal Shariat Court)] & Muhammad Karim vs. State & another [2022 MLD (Peshawar) 1097]*.

23. Assuming for the sake of arguments that if at all the recovery of pistol was actually effected from the possession of the appellant at the time of his arrest on 23.03.2018, then, pursuant thereto a separate FIR on the same very date should have been registered against him but in the case in hand, no separate FIR was lodged to that extent rather addition of section 15 of the Arms Act was made in the existing FIR, which was indeed of dated 20.03.2018, which is certainly beyond comprehension in the attending circumstances of the case.

Now we are facing with two conflict situations, if we take into account the aforesaid date i.e. 20.03.2018 as date of arrest and recovery of the appellant, then, Naqal Mad No.38 dated 23.03.2018 and his card of arrest Ex.PW-6/2 would be of no legal sanctity and the entire case of the prosecution

story, when seen in this backdrop, would fall like a house of cards notwithstanding date of recovery of the alleged pistol has been mentioned as 20.03.2018 in the charge sheet dated 07.09.2019, which of course raise the eyebrows in the given circumstances.

24. Another striking aspect of the case is that though as per memo Ex.PW-4/5, a mobile of one Muntazir was found to be suspected one but as against that, neither the said person was made an accused nor a prosecution witness and to this effect no plausible explanation has come forth on behalf of the prosecution. The ibid memo reveals that it was exhibited in the statement of PW-4 Munir Khan Inspector. The examination-in-chief of the said PW was recorded in two parts one on 26.01.2021 and second on 28.04.2022 while the date of exhibition, mentioned in the ibid memo is 28.06.2021. Even the entire statement of the said PW did not disclose an oblique reference to that memo, which negligence also goes to the prosecution.

25. Now coming to the medical evidence. The autopsies of deceased Yahya, Zohaib and Shoaib were conducted by Dr. Mian Saad Ahmad, Assistant Professor (PW-12) between 4.30 a.m. to 5.00 a.m. vide postmortem reports Ex.PM/2, Ex.PM/3 & PM/4 while those of deceased Mst. Eisha and Mst. Kainat were conducted by Dr. Saima Noreen, TMO (PW-5) between 5.15 a.m. to 5.30 a.m. vide

postmortem reports Ex.PM & Ex.PM/1. When we minutely peruse the postmortem reports of all the deceased, the same reveal that time between their injury and death is "Immediate". However, the time between deaths and postmortems of the two ladies and two minors deceased is one and the same i.e. 4—8 hours while that of deceased Yahya is 2—4 hours. This fact has been affirmed by Dr. Mian Saad Ahmad (PW-12) in his cross-examination in the following manner:-

It is correct that there is a possibility of 08 hours gap between death and postmortem examination of deceased Sohaib and Zohaib.

Likewise, Dr. Saima Noreen (PW-5) also affirmed such fact in the following term:-

The time elapsed between death and postmortem of both the deceased was 04 to 08 hours.


Meaning thereby that the occurrence had not taken place in one row as alleged by the prosecution rather deceased Yahya was done to death much after the murder of two ladies and two minors and in that event, he might have raised some resistance or for that matter tried his level best to save the lives of his other inmates but the prosecution story is altogether different from it.

26. So far as the alleged CDR data is concerned, might be some conversation was made by the appellant with the acquitted co-accused in the crucial dates but it would be

natural fact in view of their inter se relationship, as hinted to above in the earlier paragraphs of the judgment, as such, the same data would not be sufficient for awarding conviction to the appellant that too when the other material facts do not support the prosecution version.

27. No doubt, the motive for such a brutal murder of five innocent persons alleged to have some domestic dispute but no investigation in this respect has been conducted by any of the investigating officers as such they miserably failed to bring on the record actual motive/reasons of the alleged occurrence. Even one Nihayat, who happens to be the sister of the appellant and deceased Yahya, was not produced before the court so as to give actual account of the alleged dispute, as such false implication of the appellant in untraced case could not be ruled out.

28. Given, that the entire case based upon circumstantial evidence and certainly conviction can be maintained on such evidence provided the same is trustworthy and confidence-inspiring and forms an unbroken chain starting from the body of the deceased and stopping on the neck of the accused which excludes all hypothesis of his innocence. The narrations given by the star witnesses of the prosecution, even if true, at their best, raise suspicion as to the involvement of the appellant in the commission of the crime as the same do not provide the required link which could form an unbroken



chain and connect him therewith. Once the chain is broken and the circumstances on the record are rendered capable of explanation on other reasonable hypothesis, it cannot be said that the case against the appellant is proved beyond any shadow of doubt, because suspicion, however, strong it may be, cannot take the place of truth. It is settled principle of criminal jurisprudence that circumstantial evidence can only form basis for conviction when it is incompatible with the innocence of the accused and is incapable of explanation on all other reasonable hypotheses than that of the guilt of the accused. Even otherwise, where the case is resting on the basis of circumstantial evidence, no chain in the link should be missing and that all the circumstances must lead to the guilt of the accused, therefore, the prosecution has miserably failed to prove such links.

29. The learned Trial Court while awarding conviction and sentences to the appellant had merely acted on presumptions and probabilities. No one can be convicted on presumptions how strong it may be or probabilities how high it may be as the same could not be the substitute of real evidence. The finding as regards the guilt of an accused should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence rather than mere conjectures and probabilities cannot take the place of proof. When seen in this




backdrop, we come to the safe conclusion that the prosecution did not prove its case beyond any shadow of doubt and, any doubt, if arising in links of the chain of prosecution story, the benefit of same would go to accused as such type of evidence does not justify the conviction and sentence of the appellant for the safe administration of criminal justice. It is not necessary that there should be many circumstances creating doubt. If there is a circumstance, which creates reasonable doubt in the prudent mind about the guilt of accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right and even a single doubt, if found reasonable, is sufficient to warrant the acquittal of the accused. In this view of the matter, we do not think, the case against the appellant has been proved in accordance with the requirements of law, therefore, it will not be in accord with safe administration of justice to maintain conviction of the appellant as the prosecution could not prove the case against him beyond reasonable doubt. It is settled that presumption and probabilities howsoever strong may be, cannot be considered as proof of a case. One of the most celebratory principles of Islamic jurisprudence is that it's better to acquit ten guilty persons than to convict a single person. Ayub Masih vs. State (PLD 2002 SC 1048). Conviction can only be based upon unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved



in favour of accused. Muhammad Hussain vs. State (2011 SCMR 1127.


30. For the reasons discussed above, this and the connected Criminal Appeal bearing No.1128-P/2022 are allowed, the conviction and sentences recorded by the learned Trial Court vide the impugned judgments dated 31.10.2022 are set aside and the appellant namely, Junaid Ahmad, is acquitted of the charges, levelled against him. He be set free forthwith, if not required in any other criminal case. Murder Reference No.25-P/2022, sent by the learned Trial Court in terms of Section 374, CrPC for confirmation of death sentence of the appellant, is thus, answered in "Negative".

31. So far as the third Criminal Appeal No.1215-P/2022, titled Faqir Hussain vs. Ameer Khan etc., against the acquittal of accused-respondents namely, Ameer Khan is concerned, it was the argument of the learned counsel appearing on behalf of the father of the deceased ladies that the acquitted accused-respondent has fully facilitated / supported the appellant in the execution of this tragic incident rather he was the person, who actually, responsible for the entire tragedy and without his facilitation / connivance, the appellant was not able to even think such like brutal act, therefore, instead of acquittal, the acquitted accused-respondent is deserved to be given full doze/punishment under the relevant law. Such argument has not impressed us for the



reason that no doubt the acquitted accused-respondent is charged to have aided and abetted the appellant in the commission of the offence but simultaneously as discussed above mere conversation between them is not sufficient ground for awarding conviction in any manner. Such argument holds no water and is thus overruled. Even otherwise, the case of the prosecution is full of loopholes and contradictions and as such it could not bring home charge against the accused-respondent, therefore, the impugned findings of acquittal are the result of proper appreciation and; appraisal of evidence and; material available on record of the case, which do not require any interference by this court in exercise of its appeal jurisdiction in terms of section 417 CrPC, which can only be exercised where such findings are arbitrary, fanciful and resulted into grave miscarriage of justice, which is certainly not the case here.

32. Quite apart from this, since the initial presumption of innocence is strengthened on the acquittal of an accused, this Court is always very slow in interfering therewith, even if on reappraisal of evidence, a view advanced by the learned counsel for the appellant, is equally possible. In this background, we do not think that the judgment recording acquittal can be held to be arbitrary or whimsical by any attribute, so as to justify interference therewith. Needless to say that even a single doubt if found reasonable is sufficient to



warrant acquittal of an accused. Accordingly, Criminal Appeal No.1215-P/2022 being without merit is dismissed.

Before parting with the judgment, we have observed with a great degree of concern that the performance of worthy investigating agency in the instant case is very poor as the hidden truth qua the murder of five innocent persons is still un-surfaced and definitely its benefit goes to the actual culprit. Due to such like inefficiencies of investigating officers, the culprits alone get benefits in the shape of their acquittals. In the case in hand as earlier discussed there were two strong pieces of circumstantial evidence, however, their evidentiary value and worth were destroyed by the investigating officers as the same had not been secured in accordance with law. It is settled principle of criminal jurisprudence that conviction under capital charge can be recorded and maintained on the basis of circumstantial evidence, however, the same must be of a high degree excluding thereby any doubt in its authenticity. Therefore, the worthy Deputy Inspector General of Police (Investigation), Peshawar is directed to look into the matter personally and take strict disciplinary action against the delinquent investigating officers namely, M/s Munir Khan Inspector (PW-4) and Shaukat Ullah SI (PW-9) by conducting proper inquiry under intimation to the Additional Registrar (Judicial) of this Court. We wonder as to why these incompetent and inefficient police officials are being



permitted to investigate such like sensitive cases and that too in a very negligent, casual and callous manner as highlighted in the preceding paras, which indeed is a big question mark on the performance of the entire investigating agency. As such, the worthy Deputy Inspector General of Police (Investigation), Peshawar is also directed to look into the affairs of the investigating agency because such poor performance of the police certainly increases the agonies of the general public. He is simultaneously directed to arrange proper regular trainings and refreshment courses with modern technology to all the investigating officers and henceforth depute those officials in the investigating wing, who are competent, honest, well-educated, well-trained in the field and specially serious and sincere to their work / job. Accordingly, a copy of this judgment be endorsed to the worthy Inspector General of Police, Khyber Pakhtunkhwa for his information and necessary action and circulation amongst the investigating officers.

Above are the reasons for our short order of even date.

Announced
05. 07. 2023

J U D G E

J U D G E

(Fayaz)

(D.B) Justice S. M. Attique Shah, HJ & Justice Wiqar Ahmad, HJ