JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR

[JUDICIAL DEPARTMENT]

Criminal Appeal No. 791-P/2019.

Wazir Muhammad…. vs…….. Abdul Jabir ctc.

PRESENT:-

For the appellant:-	Syed Abdul Fayaz, Advocate.
For the State:	Mr. Umar Farooq, AAG.
For the accused/respdts:	Mr. Shabbir Hussain Gigyani, Advocate.
Date of hearing.	01.09.2020

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- Mst. Sakina Bibi, who was wife of the complainant Sanab Gul, and a stranger, namely, Rauf Shah, were done to death on the night of the 12th October, 2017, for which he (complainant) lodged a report in a emergency room of Civil Hospital, Hangu. He stated in his report that on the eventful night, he along with his wife Mst. Sakina Bibi was sleeping in the veranda of his house, when at 03.10 hours, Rauf Shah son of Khial Wazir entered into his house with evil intention. He woke up on hue and cry and in the meantime his nephews, namely, Jabir and Dilber came, who overpowered Rauf Shah and locked him in the room, thereafter, Jabir took out his pistol and made firing at his wife and Rauf Shah with which they both sustained injuries. The occurrence was stated to be witnessed by inmates of the house. The report of the complainant was

reduced into writing in shape of murasilla, Exh. PA, and on the basis of which case FIR No. 1007 was registered against both the accused under section 324/34 PPC at Police Station, City Hangu, on 12.10.2017. Later on, both the injured succumbed to their injuries and, accordingly, a case under section 302 PPC was registered against them.

2. After registration of the case, investigation was entrusted to Ali Ahmad Khan Inspector (PW-12), who visited the spot and prepared the site plan, Exh.PB, at the instance of complainant. During spot inspection, he collected blood through cotton and three empties of .30 mm bore from the spot and took the same vide recovery memo Exh.PW 8/1. He also took into possession blood stained garments of both the deceased, vide memo Exh. PW 7/2. On the arrest of both the accused, they were produced before learned Judicial Magistrate, where they recorded their confessional statements. He also sent the pistol, recovered from personal possession of accused Dilber Jan, and empties to the FSL and its report is Exh.PZ/1.

3. After completion of investigation, the accused-respondents were sent to the court of learned Additional Sessions Judge-I, Hangu, for trial, who, on its conclusion, vide judgment dated 30.05.2019, recorded their acquittal, hence, the instant appeal.

4. Learned counsel for the appellant contended that sufficient evidence against the accused-respondents in shape of their direct nomination in the FIR, promptly lodged by their uncle/complainant, retracted judicial confessions, medical evidence, recovery of weapon of offence, three empties from the spot and its matching report coupled with venue of occurrence, which exclusively ruled out the hypothesis of their innocence but the learned trial court due to misreading and non-reading of evidence acquitted them, while, on the other hand, learned counsel for the accused-respondents contended that it was a blind and unseen occurrence, took place in the pitch dark and odd hours of the night, entirely hinges on circumstantial evidence, thus, not forming a chain to connect the accused-respondents and findings of the learned trial court being in line with the principles laid down by the superior courts for appraisal of evidence in criminal cases, thus, not open to any exception.

5. We have considered arguments of learned counsel for the parties and gone through record of the case.

6. From the record the homicidal death of both the deceased, Mst. Sakina Bibi and Rauf Shah, has been established from the statements of lady Dr. Naeelab (PW-2) and Dr. Mubarak Khan (PW-6) rather this fact was not disputed by the defence counsel and the question before the Court is as to whether it was the respondents-

accused, who committed murder of the deceased or otherwise. Perusal of the record would reveal that the accused-respondents, no doubt, have been charged by the complainant in his first report but when he appeared before the Court as PW-4, he entirely deviated from the story as narrated by him in his report. He stated in his examination in chief that on the eventful night, he was sleeping in his house and had taken tranquilizer and on hearing the fire shots, he got up, found man and a woman lying in injured condition and, thereafter, the police came to his house, who took the injured along with him to the hospital where the female succumbed to the injuries while the male injured succumbed to his injury at Peshawar. He stated that one Shah Ayaz Councilor, the relative of male deceased Rauf Shah was also present and on his direction he lodged the report. He was declared as hostile and, accordingly, he was cross examined by the prosecution. In cross examination, he stated that he did not know as to who made fire because at the time of firing he was sleeping. He further stated that his wife was done to death inside the room while the male deceased in the door of the room. He admitted that he had signed the white blank paper inside the ambulance and his identity card etc was taken from him in the presence of Shah Ayaz Councilor. He stated that he did not know as to what the local police had written in the report. He further stated that site plan

was not prepared at his instance. During cross examination, nothing was extracted from his mouth to connect the present respondents-accused with commission of the offence. It was held by the apex Court in a case titled **Muhammad Sadiq vs. Muhammad Sarwar etc (1979 SCMR 214)** that "now, there can be no dispute about the proposition that as a rule of prudence, the evidence of a hostile witness in a criminal case requires corroboration, but the primary question in a case is not whether the witness is a hostile witness or a disinterested witness, but whether he is an honest witness or a dishonest witness. Sometimes, even a hostile witness may speak the truth, whilst a totally disinterested witness may be bribed or pressurized into giving false evidence, therefore, if he may be permitted to say so, the test of enmity is a rule of thumb method for ascertaining the veracity of a witness, and the question will always be of the veracity of the witness, and therefore, in addition to the question whether a witness is interested or hostile or disinterested, the Courts should also examine the question whether the evidence is inherently probable and whether it is consistent with the circumstantial evidence. It is by now established that statement of hostile witness cannot be discarded in toto and has to be considered like the evidence of any other witness, but with a caution. Reliance is placed on the case titled **Zahid Khan v. Gul**

Sher and another (1972 SCMR 597) and Muhammad Sadiq v. Muhammad Sarwar (1979 SCMR 214). Since the statement of the complainant is not worthy of credence, therefore, no reliance can be placed on his testimony, particularly, in a case entailing capital punishment.

7. The next piece of evidence against the accused-respondents is their retracted judicial confessions. Retracted judicial Confession may be treated to be sufficient to sustain a conviction if found voluntary and true, but as a rule of prudence, the same should not be acted upon unless corroborated by some other reliable evidence. For acceptance of judicial confession, two essentials are the *sine qua none*, which must be fulfilled, first that the confession was made voluntarily and was based on true account of facts leading to the crime and, second, the same was proved at the trial. ***Rel:*** **(2017 SCMR 986).** Section 164 Cr.P.C deals with the recording of statements and confessions at any stage before the commencement of an enquiry or trial while section 364 Cr.p.C provides the mode in which the examination of an accused person is recorded. According to the said provisions, the questions put to the accused and the answers given by him should be clearly and accurately recorded as the evidential value of a confession depends upon its voluntary character and the accuracy with which

it is, reproduced and, hence, the section provides safeguards to secure this end, which is of great importance and rationale behind it is that the same are often retracted at a later stage and it becomes necessary for the Court to determine whether the alleged confession was actually and voluntary made but here in the case in hand the provisions of section 364 Cr.P.C have blatantly been violated. The perusal of confessional statements would reveal that in both the cases questionnaires and answers are in printed forms, thus, all the relevant warning allegedly communicated before recording of their statements have been made recklessly and hastily and without due care which aspect of the case is also evident from the record that the accused-respondents were arrested on 12.10.2017 while their confessional statements were recorded on 16.10.2017, after four days of their arrest but in both the cases in reply to question No.3, i.e., how long have you been in police custody, the answers are available in the printed form as "they did not remain in custody". Again, we have placed both the confessional statements in juxtaposition with the contents of FIR and found that the statements are contradictory to the story as narrated by the prosecution. Thus, the confessions of the respondents-accused are neither true nor voluntary. Wisdom is derived from the case titled **Muhammad Azhar Hussain and another vs.**

The State and another (PLD 2019 SC 595), Muhammad Ismail vs. the State (2017 SCMR 317), & Azeem khan vs Mujahid Khan (2016 SCMR 274). It has also been held by the Hon'able apex Court in the case titled **"The State vs. Minhun 1964 SCMR 813, Nadir Hussain vs. The Crown 1969 SCMR 442 and the State vs. Waqar Ahmad 1992 SCMR 950,** that confession whether retracted or not, as a rule of caution must be supported by some connecting evidence, which element in the instant case is also missing.

8. Another piece of incriminating evidence in the account of accused-respondents is three crime empties allegedly recovered from the spot and FSL report, according to which the recovered empties were fired from 30 bore pistol recovered from accused-respondent Dilber, but the same too is of no avail to the prosecution as the complainant has stated in his cross examination that the site plan was not prepared at his instance. The apex Court in the case reported as **2001 SCMR 424** that site plan loses its evidentiary value if not prepared on the pointation of witnesses. Even otherwise, the opinion of the Expert has a corroborative value only and is useful for ascertaining whether the direct evidence is true or not. Reliance is placed on case of **Noor Muhammad vs. The State 2010 SCMR 97,** wherein it has been held that the recovery of crime empty, rifle with matching report of

FSL is a corroborated piece of evidence which by itself is not sufficient to convict the accused in the absence of substantive evidence. Reliance is also placed on case titled **Zeeshan vs. The State 2012 SCMR 428 and Nasir Javaid and another vs. the State 2016 SCMR 1144.**

9. The last piece of evidence against the accused is P.M reports of the deceased, which may confirm the ocular evidence with regards to receipt of injuries, nature of the injuries, kinds of weapon used in the commission of offence but it would not connect the accused with the commission of the offence. In the case titled **Sajjan Solangi vs. The State (2019 SCMR 872)** it has been observed by Hon'able the apex Court that medical evidence at the most could be supporting evidence to the ocular account but it could not identify the assailant by itself.

10. It is established from the record that the occurrence took place in the house of accused-respondents, who happened to be the nephews of the complainant. Deceased Mst. Sakina Bibi was better half of the complainant while deceased Rauf Shah was a stranger. Learned counsel for the appellant stressed hard that it was the accused-respondents who committed murder of both the deceased but on the record there is no credible evidence which could be made basis for the conviction of the accused-respondents. Principally, a criminal case is to

be decided on the basis of evidence adduced by the prosecution and suspicion, howsoever, grave or strong could never be a proper substitute for the standard of proof required in a criminal case, i.e., beyond reasonable doubt. Hon'able the apex Court of the country in a case titled **Muhammad Pervaiz vs. the State and other (PLD 2019 S C 592)** observed that:-

> Suspicions are after all suspicions and cannot substitute the legal proof nor can a suspect be condemned on the basis of moral satisfaction in the absence of evidentiary certainty.

11. It is the bounded duty of prosecution to produce a strong evidence even if of circumstantial nature which is not so in the case in hand to convict a person entailing capital punishment. Now, it is established principle of administration of criminal justice that for the accused the right of benefit of the doubt to be afforded and it is not necessary that there should be many circumstances creating uncertainty and if a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused then he shall be entitled to such benefit not as a matter of grace and concession but as a right. We have perused the impugned judgment and evidence available on file and found that the learned trial court has attended to the relevant evidence on record on its true perspective and its findings find support from the material available on the file.

12. Apart from the above, it is by now well settled that acquittal carries double presumption of innocence and judgment of acquittal cannot be set aside unless is perverse, ridiculous, artificial and resulting into miscarriage of justice but here in the instant case, no such element has been pointed out on behalf of learned counsel for the appellant. Reliance is placed on the case titled **2014 SCMR 479, 2019 SCMR 1045 and 2019 SCMR 1315.** Thus, in view of above of above discussion, we hold that the view taken by learned trial Court as to existence of doubt in the prosecution case being possible view and the same cannot be portrayed as perverse or shocking, therefore, the acquittal recorded by the learned trial court, vide the impugned judgment, is maintained and the appeal, being without any substance, is hereby dismissed.

Announced
01.09.2020. **J U D G E**
M.Zafral PS

J U D G E

(DB: Hon'able Mr. Justice Lal Jan Khattak and
Hon'able Mr. Justice Muhammad Naeem Anwar)