PESHAWAR HIGH COURT ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

JUDGMENT SHEET

Cr.A. No.128-A of 2009

Date of hearing: _____*05/11/2015*_____

Petitioner _____Tahir Khan _____

Respondents _____*The State*_____

LAL JAN KHATTAK, J. This criminal appeal is directed against the judgment dated 02.11.2009 of the learned Additional Sessions Judge, Ghazi, District Haripur, delivered in case FIR No.218 dated 17.08.2007 under Sections 302/324/201/34 PPC of Police Station Ghazi, whereby appellant Tahir Khan has been convicted for the *qatl-e-amd* of Mst. Fouzia wife of complainant Zahoor Khan and sentenced to suffer imprisonment of life with direction to pay an amount of Rs.1,00,000/- as compensation to the legal heirs of the deceased or in default to further undergo simple imprisonment of six months. Benefit under Section 382-B, Cr.P.C., however, has been extended to him. It is worth to mention here that through same judgment co-accused Mst. Zeenat and Mst.Rozina were acquitted by the learned trial Court. It is further noteworthy that appellant was acquitted by the

learned trial Court of the charge of attempting at the life of the complainant. Being aggrieved, the appellant has impugned his conviction and sentences through the instant appeal.

2- Brief facts of the case are that on 17.08.2007, complainant Zahoor Khan (PW-5) reported to Ishtiaq Khan, SHO PS Ghazi (PW-3) in the emergency room of Civil Hospital, Ghazi, to the effect that on the day of occurrence at about 08.00 a.m., his brother Tahir Khan, the appellant, told him to take the pups out of house, on which he replied that they are too little, whereupon he hit him with a brick on his head and further inflicted him fist and kicks blows but their step brother Hasrat Iqbal intervened and rescued him. It was further the complainant's case that thereafter the appellant brought a pistol from his house with which he fired at him but the fire shot hit his wife Mst. Fauzia, who later on succumbed to her injury in the hospital.

3- After arrest of the accused and completion of the usual investigation, case was put in Court, which indicted the appellant on 0512.2008 alongwith his co-accused. All of them pleaded not guilty and claimed trial. Prosecution in order to prove its charge examined eight witnesses whereafter statements of the accused under Section 342 Cr.P.C. were recorded wherein they

professed innocence. After conclusion of the trial, the learned trial Court on 02.11.2009 acquitted the co-accused but found the appellant guilty of the charge and on conviction sentenced him, as mentioned above.

4- It is worth to mention that notices were issued to the complainant of the case and father of the deceased, namely, Abdul Qayyum. The complainant did not appear before the court despite his service while father of the deceased argued his case in person.

5- Arguments heard and record gone through.

6- Learned counsel for the appellant contended that case of the prosecution against the appellant is absolutely of no evidence; that even the testimony of hostile witness gets no corroboration from attending circumstances of the case; that the recovery of pistol is of no legal worth, as same has been planted to give strength to the prosecution case; that medical evidence of the case negates the prosecution version and that the site plan of the case too contradicts the prosecution story.

7- As against the above, learned State counsel supported the judgment of conviction on the grounds stated therein while father of the deceased also supported the impugned judgment of conviction.

8- In order to prove and substantiate its case against the appellant, prosecution has placed reliance on

the testimony of complainant Muhammad Zahoor Khan (PW-5), who has been declared hostile, recovery of crime pistol with crime empty of .30 bore (Ex.PW4/6), report of FSL (Ex.PW4/9), medical examination of the deceased (Ex.PM) and site plan (Ex.PB).

9- It is worth to mention that when complainant Muhammad Zahoor Khan, who was the only eyewitness of the occurrence, did not depose in line with his report (Ex.PA) he was declared hostile by the learned trial Court on 27.08.2009 and prosecution was allowed to cross-examine him. No doubt, a witness, who has been declared hostile would not become unreliable and his testimony cannot be rushed aside provided same is found credible one but since a hostile witness speaks in different voices, therefore, his deposition has to be evaluated with great care and caution and utmost attempt be made to get independent corroboration thereof from surrounding circumstances of the case in order to base conviction of the accused. In the case in hand necessary corroboration to the evidence of the hostile witness is lacking very much. Admittedly, no blood has been recovered from the scene though mother and wife of the appellant namely Mst. Zeenat and Mst. Rozina were charged for causing disappearance of such evidence by wiping the blood from the crime scene but as they have been acquitted of the charge and there is no appeal against their acquittal,

therefore, the first corroboratory evidence i.e. the site plan does not support and corroborate the evidence of the complainant. Secondly, it is in the FIR, that the complainant was also hit by the appellant with a brick on his head but on record there is no evidence which could show any injury on the person of the complainant despite the fact that the learned trial Court had afforded an opportunity to the prosecution to locate injury sheet of the complainant but in spite of that nothing was produced before the Court to the above effect.

10- Medical evidence of the deceased too does not corroborate the evidence of the hostile witness. According to the FIR the appellant had allegedly fired, which had hit the deceased on left side of her belly but according to the evidence of Dr.Fauzia Yasmeen (PW1), the deceased had an entry wound on her right shoulder just one inch behind the tip of shoulder joint with an exit wound. The medical evidence has negated the prosecution case. Prosecution has sought corroboration from the recovery of crime pistol and the empty shell fired from it but such recoveries hardly advance its case as not only the pistol was recovered from a joint kitchen but the independent marginal witness to the said recovery namely Hashmat Khan was abandoned for his being unnecessary. Furthermore, the place wherefrom the alleged crime pistol was recovered is doubtful as in the site plan of the main

case under Section 302 PPC (Ex.PB), the kitchen has been shown situated towards the eastern side of the house where the occurrence had taken place whereas in the site plan prepared pursuant to the ibid recovery, i.e. site plan of the case under Section 13 of the Arms Ordinance, the said kitchen has been shown situated towards western side of the house, so the recoveries of pistol and the crime empty are of no help to the prosecution.

11- In addition, PW-3 Ishtiaq Khan has admitted in his cross-examination that the case *murasila* was not scribed by him rather same was dictated by him to ASI Shabir Shah (PW-4) but witness Shabir Shah has deposed nowhere that he had drafted the *murasila* pursuant to the dictation of SHO, Ishtiaq Khan. When lodger of a report denies his making the report or resiles therefrom then it becomes the boundened duty of the prosecution to produce scribe of such report which has not been done in the case in hand by the prosecution.

12- Above resume of the prosecution evidence nowhere corroborates the version given by the hostile witness. Of course, evidence of a hostile witness remains admissible and conviction can be based on such testimony but for the safe administration of criminal justice in such a case adequate and necessary corroboration is need of the hour sans which no conviction can be recorded on an accused.

13- Over all aspect of the case is that the prosecution has not proved its case against the appellant through any reliable and convincing evidence and has failed to bring the guilt home to him beyond any shadow of doubt, which is the hallmark of a criminal case. It is the cardinal principle of criminal law that one slightest doubt is sufficient to acquit the accused because to free someone criminal mistakenly is better than to punish someone innocent mistakenly.

14- For what has been discussed above, in our considered opinion, the prosecution has failed in proving its case against the appellant, therefore, we accept this appeal, set aside the impugned judgment of conviction and sentence and acquit him of the charge. He is on bail and his sureties are discharged from their liabilities.

Announced.
05.11.2015.

J U D G E

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Muhammad Rustam,
P/S