JUDGMENT SHEET

PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.03-D/2019.

Faiz Muhammad
Vs.
The State & another.

JUDGMENT

For Appellant: **Muhammad Khurshid Qureshi, Advocate.**

For Respondents: **Mr. Ilyas Ahmad Damani, Advocate for the State & Mr. Ghulam Hur Khan Baloch, Advocate for the complainant.**

Date of hearing: **26.11.2019.**

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SAHIBZADA ASADULLAH, J.- This appeal is directed against the judgment dated 10.01.2019, rendered by learned Additional Sessions Judge-II, D.I.Khan, whereby the appellant Faiz Muhammad, charged in case FIR No.174 dated 13.10.1994, registered under Section 302 PPC at police station Parova, was convicted under Section 302(b) PPC and sentenced to life imprisonment. He was also held liable to pay Rs.10,00,000/- as compensation in terms of Section 544-A, Cr.P.C. or in default thereof to further suffer six months S.I. Benefit of Section 382-B, Cr.P.C. was also extended to the appellant.

2. Facts of the case, as reflected from the FIR Ex. PA, registered on the basis of murasila Ex. PW 4/1, are that on 13.10.1994 at 2000 hours, complainant Riaz

Hussain (PW-6) made report to the then SHO Police Station Parova, in his house situated in village Miran, to the effect that on the day of occurrence at about 1600 hours, he was busy in fastening cattles in his house, in the meanwhile his uncle Faiz Muhammad, duly armed with 12 bore shotgun came there and made three fire shots upon his mother Mst. Karmu, as a result thereof, she got hit and succumbed to her injuries on the spot. The accused decamped from the spot after commission of the offence. Besides the complainant, the occurrence was stated to be witnessed by brothers of the complainant Bilal Hussain and Kifayat Ullah. Motive for the offence was stated to be a dispute over women-folk. He charged the accused for the commission of offence.

3. Initially, the accused absconded and proceedings under Section 512, Cr.P.C. were conducted against him and pursuant thereto he was declared proclaimed offender by the trial Court. After arrest of the accused and completion of the investigation, complete challan was submitted against the accused to the learned trial Court, where at the commencement of the trial the prosecution produced and examined as many as eight witnesses, whereafter, accused was examined under section 342, Cr.P.C., wherein he denied the allegations, professed innocence and opted not to produce evidence in his defence. After conclusion of the trial, the learned trial Court

vide impugned judgment dated 10.01.2019, convicted the accused and sentenced him as mentioned above, hence the instant appeal.

4. We have heard arguments of learned counsel for the parties and have gone through the record with their valuable assistance.

5. It is the case of prosecution that on the day of occurrence at the relevant time, complainant (PW-6) was present in his house and was busy in fastening the cattles when in the meanwhile, accused armed with 12 bore shotgun entered into his house, made three fire shots upon his mother Mst. Karmu, who got hit and died on the spot; that besides the complainant the occurrence was witnessed by his two brothers Bilal Hussain and Kifayat Ullah. In view of the above explanation of the occurrence given by the complainant, if we believe presence of three brothers at the relevant time in their house, then it is against the normal human conduct that all the three did not make any effort to save the life of their mother and left her at the mercy of accused. The question that being empty-handed they did nothing to save their mother, would not prevail as it is against the ordinary human prudence as nobody would like to become a silent spectator and would let a person to kill his/their mother. In view of the above, the observation in impugned judgment in this respect cannot face the test of judicious scrutiny for the reason that in ordinary course of

events, even a brother would not let or spare another brother or father to kill his mother, what to talk of close relationship of the three brothers with the accused, before whom their mother was allegedly killed by the accused. The surprising aspect is that according to the prosecution story, the accused made three fire shots with a single barrel shotgun. If this was the situation, then admittedly, before loading the shotgun for the second and third time, all the three brothers, who were allegedly present on the spot, had ample opportunity to have reacted and overpowered the accused, but they remained silent spectators. In view of the above, the story of prosecution advanced by complainant Riaz Hussain and Bilal Hussain in their statements as PW-6 and PW-7, is unbelievable, which casts serious doubt regarding their presence on the spot at the relevant time. Complainant has also made dishonest improvement while appearing in the witness box by saying that on the day of occurrence he alongwith his brothers Bilal Hussain and Kifayat Ullah were present in their house, as nothing of the sort is mentioned in the initial report, rather it was stated at the end of narration of the story that besides the complainant, the occurrence was witnessed by his brothers Bilal Hussain and Kifayat Ullah. Similarly, the other alleged eyewitness Kifayat Ullah was not produced, meaning thereby that best available evidence was withheld by the prosecution and an adverse inference under Section

129(g) of the Qanun-e-Shahadat Order, 1984, could be drawn that had this witness been produced, surely he would not have supported the prosecution case.

6. In the present case, the occurrence has allegedly taken place on 13.10.1994 at 1600 hours, whereas the report was lodged by the complainant at 2000 hours i.e. with a delay of four hours notwithstanding the fact that the distance between the crime village and the police station is 14/15 kilometers and no explanation whatsoever has been tendered for such delay. Delay of four hours cannot simply be brushed aside. In a recent judgment reported as ***Mst. Asia Bibi Vs. The State and others (PLD 2019 S.C. 64)***, the Honourable Supreme Court held that:

> "*In absence of any plausible explanation, the Supreme Court had always considered the delay in lodging of FIR to be fatal and it casted a suspicion on the prosecution story, extending the benefit of doubt to the accused---If there was any delay in lodging of FIR and commencement of investigation, it gave rise to a doubt, which, could not be extended to anyone else except to the accused".*

7. Another aspect of the case is the alleged recovery of 12 bore shotgun from the house of accused regarding which the separate FIR No.97 dated 22.7.1997 under Section 13 A.O. was registered. It is worth mentioning that on 13.10.1994, vide recovery memo Ex. PW 4/3, the Investigating Officer during spot inspection had recovered three empty shells of 12 bore shotgun, but

same were not sent to the FSL. The referred shotgun, as per the statement of PW-5 and recovery memo dated 21.9.2016, Ex. PW 5/1, was taken out from Malkhana. It surprised us that the above referred shotgun and the empties were received in the FSL on 04.10.2016, where it was opined that those were not fired from the shotgun in question. It creates serious doubt that where remained the empties from the date of recovery and under the law, why those were not sent to the FSL in time, rather same were kept till alleged recovery of shotgun and were sent to the FSL after a considerable delay, therefore, such recovery had lost its sanctity and could not safely be relied upon for sustaining conviction on a capital charge.

In a case titled ***Ghulam Akbar and another Vs. The State (2008 SCMR-1064,*** it was observed by their Lordships that law requires that empties recovered from the spot should be sent to the laboratory without any delay, failing which such evidence was not free from doubt and could not be used against the accused. Even otherwise, this piece of evidence is a corroborative one and in cases where direct evidence fails, corroborative piece of evidence is of no avail as in the instant case where direct evidence of PWs have already been disbelieved. In this respect, case reported as ***Muhammad Ashraf alias Acchu Vs The State (2019 SCMR 652),*** can also be referred.

8. If we peruse the site plan Ex. PW 4/13, it comes to mystery that neither pellets were recovered from the spot, nor any pellet marks were noticed on or around the point of the deceased despite the fact that the occurrence had allegedly taken place in a house.

9. There is no two opinion about the fact that the cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons alongwith guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. ***Muhammad Akram Vs. State (2009 SCMR 230), Muhammad Zaman Vs. State (2014 SCMR 749), Hashim Qasim Vs. The State (2017 SCMR 986), Muhammad Mansha Vs. State (2018 SCMR 772) and Mst. Asia Bibi Vs. State (2019 PLD S.C. 64).***

10. So far as abscondence of the accused is concerned, it is not denied that abscondence alone cannot be a substitute for real evidence because people do abscond though falsely charged in order to save themselves from agony of protracted trial and also to avoid duress and torture at the hands of police. In the instant case,

abscondence is meaningless, because it can neither remove defects of the oral evidence, nor is by itself sufficient to bring guilt home to the accused. ***Muhammad Sadiq Vs. State (2017 SCMR 144), Muhammad Salim Vs. Muhammad Azam and another" (2011 SCMR-474), Rohtas Khan Vs. State (2010 SCMR 566), Muhammad Sadiq Vs. Najeeb Ali (1995 SCMR 1632) and Muhammad Arshad Vs. Qasim Ali (1992 SCMR-814).*** Needless to say that absconsion is corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case.

11. Insofar as motive is concerned, same was not proved by the prosecution through conclusive evidence on record. It is now well settled that once the motive is alleged, the prosecution is bound to prove the same, failing which negative inference shall be taken against the prosecution.

In case reported as ***Muhammad Ashraf alias Acchu Vs The State (2019 SCMR 652)***, it was held that:-

> *"The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."*

We know that prosecution is not bound to setup motive in every case but once it is alleged and not proved, then ocular account is required to be scrutinized

with great caution. It has been held in the case of ***Hakim Ali Vs. The State (1971 SCMR-432)***, that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish it, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of ***Amin Ullah Vs. The State (PLD 1976 SC 629),*** wherein it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of ***Muhammad Sadiq Vs. Muhammad Sarwar (1997 SCMR 214).*** Again, on the same principle, case laws titled ***Noor Muhammad Vs. The State and another (2010 SCMR 997) and Amin Ali and another Vs. The State (2011 SCMR-323)*** can also be referred.

12. For the reasons mentioned hereinabove, we allow this appeal, set-aside the impugned conviction and sentence awarded to the appellant vide judgment dated 10.01.2019. Resultantly, the appellant is acquitted of the charge levelled against him. He shall be released forthwith, if not required to be detained in any other case.

13. Above are the reasons of our short order announced on 26.11.2019, which reads as follows:-

> *"For reasons to be recorded later in the detailed judgment, we allow this appeal, set*

aside the impugned conviction and sentence awarded to the appellant Faiz Muhammad, vide judgment dated 10.01.2019, passed by the learned Additional Sessions Judge-I, D.I.Khan. Resultantly, appellant is acquitted of the charge levelled against him in the said case. He be released forthwith, if not required to be detained in any other case. While Cr.M. No.04-D/2019 stands dismissed for having become infructuous".

Kifayat/ ***JUDGE***

JUDGE

(D.B)
Hon'ble Mr. Justice S.M. Attique Shah
Hon'ble Mr. Justice Sahibzada Asadullah