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Opening Sheet for Criminal Appeal (U/S 410 Criminal Procedure Code)

IN THE PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Criminal Appeal No. 987-P /2016

District	Date of Filing Petition	Whether filed by complainant in person or by pleader or agent	Stamp on petition
Kohat	20.07.2016	Ghulam Mohy-ud-Din Malik Advocate, Peshawar	Nil

Afsar Khan..... .....Appellant

VERSUS

The State and another.....Respondents

Appeal	U/S 410 Cr.P.C
against the order of:	Additional Sessions Judge-II Kohat
Dated:	30.06.2016
Charge u/s:	302/324/427/34 PPC.
Sentence:	The appellant has been convicted and sentenced to suffer as under:-

a. U/S 302 (C)/34 to suffer Twenty (20) Year S.I and to pay Rs.100,000/- as compensation to the LRs and in default shall undergo six month S.I.

b. U/S 324/34 PPC to suffer Five (05) years S.I with fine of Rs. 20,000/- and in default he shall undergo two (02) months S.I.

c. U/S 427 PPC to suffer one (01) Year S.I. All the sentences were directed to run concurrently.

d. Benefit of section 382-B Cr.P.C is extended.

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Prayer: . . . . . .

It is therefore prayed that by accepting the appeal, impugned judgement and order of conviction dated 30.06.2016 passed by learned trial court may graciously be set aside and the appellant be acquired of all the charges.

FILED TODAY
Deputy Registrar
04 AUG 2016

(GROUNDS OF APPEAL ARE ATTACHED)

IN THE PESHAWAR HIGH COURT, PESHAWAR

Criminal Appeal No. 487-P/2016

Date of hearing: 18.7.2017

Appellant (s) : (Afsar Khan) by Mr. Ghulam Mohyuddin Malik, Advocate

Respondent(s) : (The State) by Syed Qaiser Ali Shah AAG

Arbab Sheraz Khan, Advocate for the complainant.

SEAL OF HIGH COURT PESHAWAR عدالت عالیہ پشاور

JUDGMENT

ABDUL SHAKOOR, J .- This appeal is directed against the judgment dated 30.6.2016 rendered by the learned Additional Sessions Judge-II, Kohat whereby he in trial held before it in case FIR No.90 dated 12.4.2014 under sections 302/324/427/34 PPC registered at Police Station, Lachi District Kohat having been found guilty convicted and sentenced the appellant Afsar Khan u/s 302-C/34 PPC to undergo simple imprisonment for 20 years as Tazir and he shall also pay an amount of Rs.one lac as compensation to the L.Rs. of the deceased within the

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meaning of section 544-A Cr.P.C. and in default of payment thereof he was to further undergo six months S.I. He was further convicted and sentenced u/s 324/34 PPC for attempting at the life of Wahab Gul, Hamid Akbar to undergo five years S.I. with fine of Rs.20,000/- and in default of payment thereof he was to undergo further S.I. for two months. He was further convicted and sentenced u/s 427 PPC to undergo one year S.I. All the sentences were ordered to run concurrently, however, benefit of section 382-B Cr.P.C. was extended to him.

Masood Akbar, complainant has also filed Criminal Revision No.181-P/2016 u/s 435 read with section 439 Cr.P.C. for the enhancement of the sentenced. As both the appeal and instant Criminal Revision are the outcome of the same judgment dated 30.6.2016, therefore, this single judgment shall govern the same.

2. Brief facts of the prosecution case are that on 21.4.2014 at 1140 hours, Masood Akbar (Complainant) reported the matter to the local police on duty at RHC, Lachi to the effect that on the eventful day and time he alongwith Ali Akbar

deceased Wahab Gul injured and Hamid Akbar were on the way to their village from Lachi Bazar and vehicle bearing registration No.C-1677-Bannu being driven by one Abdul Ghafoor, when reached the place of occurrence, meantime appellant alongwith absconding co-accused Liaqat Ali, Shahzad Khan and Hamazullah alias Ghungattu duly armed happened to be their co-villager emerged and started indiscriminate firing at them, as a result of their firing, Ali Akbar got hit and died on the spot, while Wahab Gul got injured, motive for the occurrence as stated to be previous blood feud enmity.

3. On completion of investigation, complete challan u/s 512 Cr.P.C. was submitted to the learned trial court as the appellant alongwith absconding co-accused were absconding at that time. During proceedings the appellant was arrested and supplementary challan against him was submitted. He was produced before the learned trial court where he was charge sheeted to which he is not pleaded guilty and claim trial, hence, the prosecution was invited to lead it evidence.

4. In order to prove its case, the prosecution examined 10 PWs in all. On close of the prosecution evidence, statement of accused was recorded u/s 342 Cr.P.C. wherein he denied the charges leveled against him. However, he did not want to be examined on oath nor opted to produce evidence in his defense. On conclusion of trial and hearing the arguments of learned counsel for the parties, the learned trial court vide impugned judgment dated 30.6.2016 convicted and sentenced the appellant as mentioned above, hence this appeal.

5. learned counsel for the appellant in support of this appeal contends that it is stated in FIR that all the four accused have fired simultaneously with Kalashnikov rifles at the deceased, who was travelling and sitting at the rear seat of pickup along with many passengers and some were travelling at the rooftop of that vehicle, but no other passenger received injury of that firing except injured PW Wahab Gul who neither appeared in the witness box nor charged the present convict/accused; that time of occurrence given in murasila report does not tally with the time of postmortem examination; that

injured eye witness namely Wahab Gul, driver of pickup Abdul Ghafoor and Hamid Akbar (now dead) and other passengers of vehicle have not been produced in witness box to support prosecution version; that no blood was recovered or taken to possession, for sending chemical examination to determine the blood as noted in site plan was of deceased; that non recovery of blood from the vehicle carrying the deceased create doubts about the place of occurrence and presence of complainant (PW5) and manner of incident; that in murasila report complainant was stated to be injured, whereas complainant (PW 5) in his cross examination has categorically admitted and stated that he was not injured, this also creates serious doubts in the prosecution version; that neither complainant (PW 5) nor any other eyewitness have been named as identifiers of the dead body of the deceased, PW-1 of (absentia trial of appellant) has been named as identifiers of the dead body of the deceased who in his cross examination stated that he has received the information about occurrence and the death of the deceased Ali Akbar when he was in Lachi, this fact

exclude the presence of complainant (PW 5) at the spot of occurrence; the solitarily eyewitness (PW 5) has made material contradiction, improvement and deviation from his first stance at the trial as indicated in his cross examination, therefore he was not to be believed by the trial court for recording the convection of appellant; that the witness who was entrusted with warrant under section 204 and 87 Cr.P.C. against the appellant/accused was not examined as prosecution witness to prove the charge of abscondence, the mere abscondance is not sufficient to prove the alleged guilt of the appellant; that motive setup in the FIR has not been proved; that non appearance of injured eye witness Wahab Gul in witness box has furnished no justification to the trial court for recording convection under section 324 PPC against the appellant, likewise the non-appearance of driver of pickup in Witness box has provided no justification to the trial court for recording conviction in term of awarding damages for the alleged damage of the vehicle; that solitary, interested and partisan witness (PW 5) on principle of safe administration of

justice is unbelievable; that seat of injury do not fit in the prosecution story because:-

(a) Entry and exit wound are through and through and per the prosecution story the firing was made from right side with Kalashnikov rifle with exit wound but no one sitting with the deceased was hit nor any Bullet mark was found inside the vehicle.

(b) injury No. 2: entry and exit wound have not been identified.

(c) Injury No. 3 : fracture, no description of injury has been recorded whether it was old fracture, fresh, with fir-arm or due to fall etc.

(d) Injury No. 4: it was on right side of chest with corresponding exit wound. If the deceased was seated at rear seat, facing South having his right side towards accused then injury on right side chest without corresponding exit wound was not possible at all.

(e) Injury No. 5: same as above.

(f) Injury No. 6: It is on left side at left temporal bone which is against the prosecution story, position of the accused given in the evidence and site plan.

(g) Injury No. 7: Again it is on left side which is against the prosecution story; that FIR was chalked out on the basis of murasila of police official which was recorded at the hospital is alien to the provision of section 154 Cr.P.C., thus, the basis of very FIR was not legal; that the prosecution has failed to prove his case against the appellant beyond any shadow of doubt, thus, appellant is entitled to acquittal.

6. While opposing the appeal the learned AAG assisted by the learned counsel of appellant contends that sufficient incrementing evidence available on the record in the form of statement of complainant (PW5), who stated before the trial court that he himself saw the appellant along with three other co-accused have fired simultaneously with Kalashnikov rifle at the deceased when he was travelling by a pickup, which inspire confidence and connect the appellant with the commission of the crime; that exhibit PM and exhibit PW2 (FSL Report) fully support the prosecution case; that the prosecution has proved his case against the appellant beyond any shadow of doubt, therefore, the appeal filed by the appellant against his conviction and

sentence be dismissed. Learned Counsel for the complainant has placed reliance on Noor Mohammad versus the State and another (2005 is SCMR 1958), Saeed and 2 others versus the State (2003 SCMR 747), Babbar Sher vs the State (2006 P.Cr.L.J 174).

7. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

8. The whole case of the prosecution is resting on the statement of PW5 who is complainant and the eyewitness of the occurrence. He stated in his statement before the trial court that deceased Ali Akbar was his real uncle, and on the fateful day of occurrence he in the company of deceased Ali Akbar and Hamid Akbar (now dead) an eye witness of the occurrence had come to Lachi for purchase of livelihood. At about 11 A.M. they moved from Lachi towards their village by Datsun pick up, the road leading towards their village was damaged due to which the vehicle became slow and stopped at the point of occurrence. In the meanwhile, accused liaqat Ali, Hamzullah Khan, Afsar Khan and Shahzad Khan appeared and started firing with

klashinkove rifle. As a result of that firing Ali Akbar his uncle got injured and died, whereas another passenger Wahab Gul got injured. The vehicle was also damaged due to firing of the accused. After the firing the accused fled away from spot on motorcycle. The deceased was shifted to hospital where he lodged the report of occurrence in RHC, Lachi. Motive for the occurrence was old enmity. He charged the accused named above for the commission of offence. The site plan was prepared by the I.O. at his instance. Now this court will analyze whether the PW5 withstood the test of cross examination and his narration as eye witness despite the above submissions of defense was of such worth in which trial court was justified in recording the conviction of appellant. It is very surprising PW5 in murasila has been shown as injured, whereas in cross examination he did not accept himself as injured of occurrence, this creates serious doubts in prosecution story, in cross examination PW5 stated that he had informed the Bashir Khan SI about the occurrence through call from the mobile of his co-villager, neither he disclosed his name nor

he produced him as witness of the occurrence, whereas PW6 Bashir Khan SI in his statement has negated the same by saying that he was informed about the occurrence by Moharrir of PS Lachi, this part of the statement of PW-6 has shattered the veracity of the statement of PW5. He has also stated in his cross examination that he took the body of deceased to hospital, but post mortem report Exh PM speaks otherwise, it clearly shows that body of deceased was brought by police and relative of the deceased namely Nasir Khan s/o Hassan Ali PW1 to the Hospital and they identified the body of deceased, this is a big question mark on PW5 as eye witness of the occurrence. PW-1 Nasir Khan in his statement has admitted that he has identified the body of the deceased and further stated he had received the information of occurrence at Lachi, and Police in his presence at Hospital has not recorded the statement of any body, likewise his statement was not recorded by Police. PW-5 in his report before police and examination in chief has stated 4 accused fled from the place of occurrence on motorbike, when realized that four persons cannot

board on single bike then in cross examination stated the accused ran away from the place of occurrence on two bikes, all this speak very loudly that PW-5 has made an improvement which has rendered his statement of no worth to be relied upon. The cross examination of the statement of PW-5 clearly demonstrate that he made material contradiction, improvements and deviation from his first stance at the trial, therefore he has become unbelievable and it was not safe for trial court to record the conviction of appellant on the basis of his statement. In similar situation the apex court in the case of Gulistan and others which is reported in (1995 SCMR-1789) has held:-

> The conviction of the appellant rested on the solitary statement of Muzaffar Khan PW-4. No doubt, in a criminal case the conviction of an accused can be based on the statement of one witness without corroboration but the condition is that the witness should be absolutely dependable. Applying this principle of appreciation of evidence in the instant case, we find that the evidence of Muzaffar Khan cannot attain and has not attained that high standard and he cannot, therefore, be accepted as an absolutely truthful witness or at least it is not of that standard on which conviction can safely be

based on his solitary testimony. Muzaffar Khan PW-4 is a related and partisan witness. (Emphasis is of this court)

9. Dr, Fahad Ajmal PW7 who conducted the post mortem, in his cross examination admitted that it is correct the size of entry wound of the deceased person is different from each other and similarly is the case with the exit wound. He also admitted in his cross examination that it is correct that the difference of the size of the entry wounds indicates that all injuries were caused from different weapons. This clearly indicates that medical evidence does not support to prosecution version.

10. As far as the statement of PW-8 is concerned , the same in view of the non appearance of PW Whab Gul injured , driver of pick up and alleged eye witness Hamid Akhtar (now dead) in the witness box is having no worth for the conviction of appellant and the PW5 only eye witness in view of his cross examination and Exh PM and statement of PW1 cannot be believed as true witness.

11. It is admitted fact that PW Wahab Gul injured eye witness, Driver of pick-up and

passengers of the vehicle i.e. the best evidence have not come to the witness box in support of prosecution case, which have adverse effect on the prosecution story. In this situation, Article 129 of Qanoon-e-Shahadat Order, 1984 says that withholding of the best evidence leads to conclusion that if that evidence is produced would not favour to prosecution case. In this regard, Peshawar High Court in the case of Jehad Ali reported in (2014 P.Cr.L.J. 1559) has held:-

> Another damaging aspect of the case is that the alleged eyewitnesses stated in their statements that, after the occurrence, people of the locality gathered and with their help they shifted the dead body of deceased to the police station but prosecution failed to produce any one from those persons to lend corroboration to the prosecution story. It is a case of murder in which death or life imprisonment can be awarded. In such like cases, the prosecution is always bound to corroborate through some independent sources-which is totally lacking in the instant case except the statements of two alleged eye-witnesses who are admittedly closely related to the deceased and having strained relations with the appellant family. It is settled principle of law that if a best piece of evidence available with a party is with-held, then it is presumed that the said party has some

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> sinister motive behind, for withholding the same piece of evidence. (Emphasis is of this court).

12. It is also in evidence that no blood was recovered taken into possession from the place of occurrence i.e. pick-up and sent to FSL for determination that it was of the deceased blood, none recovery of blood from the place of occurrence creates doubts about the place of occurrence, presence of complainant PW-5 and manner of incident. The Apex Court of Azad Jammu and Kashmir in the case of Muhammad Yousaf and another reported in (PLD 2008 SC-(AJK) page-6) while dealing with such situation has held:-

> Now the question emerges that when the blood or blood-stained clay was not recovered from the place of occurrence or if at all it was recovered, they why it was suppressed? It also could not be ignored at the same time that in the instant case no inquest report or injury sheet was placed before the Court alongwith the challan. The learned counsel for the complainant was also confronted that why the inquest report and injury sheet of the deceased prepared by the police were not placed on record. He simply stated that it shall not make any difference, but the question which perturbs our mind is that according to eye-

> witnesses the deceased sustained only one bullet injury, while according to medical report, he sustained two fire-arm injuries. According to the report of doctor, the death occurred due to a lot of bleeding but no blood or blood-stained clay was recovered from the place of occurrence. These factors create doubt regarding place of occurrence and the manner of occurrence.
> (Emphasis is of this court).

13. It is an admitted fact PW Wahab Gul injured witness has not appeared in witness box to support the case of prosecution regarding his injury then conviction of appellant for his injury cannot be recorded, it is also on the record that driver of vehicle has not examined himself to support the story of prosecution regarding the damage of his vehicle then it was not safe for the trial court to convict the appellant for causing damage to vehicle. The Apex Court regarding this situation in the cases of Sher Khan and others and Asghar Ali alias Sabah and others which are reported in (1991 SCMR 241 and 1992 SCMR 2088), has held:-

1991 SCMR-241

> Sher Khan was charged of causing an injury with spear on the neck of Bahadur (not

produced)which proved simple. In spite of the non-appearance of Bahadur Khan and of his having been won over, the conviction of Sher Khan was recorded only for the reason that in view of the close relationship that he had with the appellants, it was unlikely that he would appear as a witness. The relationship with the other witnesses who appeared was equally close. Therefore, such a relationship was not sufficient for justifying the non-appearance or non-production of Bahadur. The fact that he was not produced would lead us to draw an adverse conclusion. If a person does not make the statement in respect of his own injury then it is difficult to sustain the conviction with regard to that injury on the statement of others. In the circumstances, in view of this conduct of Bahadur it is not possible to record the conviction of Sher Khan. (Emphasis is of this court).

1992 SCMR 2088

22. Under the injunction of Islam, if an injured witness himself does not appear to charge an accused for his injury and the Court is not satisfied with his disability or incompetence or reason for not appearing then the conviction for his injury cannot be recorded on the basis of other evidence under Qisas provision, Qisas is a personal right and as it now stands, if the person aggrieved therefrom forgives it, and one way of forgiving the wrong doer is not appearing in support of the case against the wrong doer, there will be no Qisas.

> 24. The upshot of the above discussion is that the reluctance of Arshad Ali to make a statement on oath about his own injuries and that of his father have all pervasive effect on the whole prosecution case which considered with the other defects already pointed out, cannot be taken to be sufficient to make out a case of the prosecution reasonably beyond doubt so as to ensure the safe administration of criminal justice. The recoveries effected allegedly cannot, in the case in hand, play any decisive role where the ocular evidence is disbelieved and the investigation is suspect.

14. Admittedly, the motive set up in the FIR has not been proved, even the learned trial court in its judgment has disbelieved the same.

15. As observed hereinabove the PW-5 was interested and partisan witness, he on the principle of administration of justice was not true witness and trial court has wrongly placed reliance on his statement for recording conviction of appellant. Even otherwise, the statement of PW-5 which was contradicted by PW-1 and PW-8 has made the prosecution case highly doubtful. In this regard the case of Mahmood Khan reported in (1972 SCMR 620, and case of Ayub Mashi reported in PLD 2002

SC-108) are relied upon, wherein it was held by the Apex Court:-

1972 SCMR-620

> After hearing the learned counsel for the petitioner and examining the reasons advanced by the High Court for acquitting the respondents, we are of the view that it is not a case where it can be said that the view taken by the High Court was either perverse or not sustainable on the record. Once the evidence of Mst. Pari is ruled out, only the ocular account furnished by Fazle Mahmood remains in the field. It is unfortunate that he did not give any details whatsoever in the F.I.R. made by him and the medical evidence contradicts his story about two effective shots having been fired at the deceased. There is also doubt as to whether he was in fact able to see the assailants while sitting in his own Chappar at a distance of 200 paces from the scene of murder. In these circumstances, the High Court appears to have acted rightly, in accordance with correct principles governing the safe dispensation of criminal justice, in refusing to place reliance on the solitary testimony of Fazle Mahmood.

PLD 2002 SC-108

It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to

> the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State V. Mushtaq Ahmad (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

16. The prosecution version that appellant remained absconder for one year and this proves his guilt cannot hold the ground. Mere abscondence in absence of unimpeachable evidence is of no value, as we have observed hereinabove that the prosecution star witness PW-5 presence on the spot at the time of occurrence is highly doubtful. In the case of Ahmad

Ali which is reported in (2004 P.Cr.L.J. 788) the Hon'ble Peshawar High Court has held:-

> Mere abscondence per se is not sufficient for establishing the guilt of an accused person unless the prosecution is able to establish its case through unimpeachable nature of evidence, which is lacking in this case.

17. The contention of learned counsel for the appellant that FIR chalked out on the basis of murasila of police official which was recorded at the hospital is alien to the provision of section 154 Cr.P.C. and FIR cannot be chalked out on the basis of murasila is not valid. Even the minority view, which is cited in support of that contention from the judgment reported as 2015 SCMR 423, says that an FIR prepared at the crime spot without plausible reason was considered to be suspicious, so it does not support to the contention of learned counsel for appellant that FIR cannot be chalked out on the basis of murasila of police.

18. In the light of above discussions, this appeal is allowed, the impugned judgment of learned

Additional Sessions Judge-II, Kohat dated 30.6.2016 is set aside and the appellant is acquitted of the charges levelled against him in case FIR referred to hereinabove. He be released forthwith if not required in any other case.

19. As we have accepted the appeal of the appellant against his conviction, therefore, Criminal Revision No. 181-P/2016 for enhancement of sentence has become infructuous, which is accordingly dismissed.

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

Announced
18.7.2017

Sd/- Waqar Ahmad Seth J
Sd/- Abdul Shakoor Khan J