

**JUDGMENT SHEET**

**IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**Cr.A. No. 135-M of 2014**

**JUDGMENT**

Date of hearing: **27.09.2017**

**Appellant:- (Iftikhar) by Mr. Sher Muhammad Khan, Advocate.**

**Respondents:- (the State & 1 another) by Mr. Rafiq Ahmad, Astt: Advocate General and M/S Rashid Ali Khan & Muhammad Pervaish Khan, Advocates.**

**MOHAMMAD IBRAHIM KHAN, J.-** On the basis of avouchment as taken in FIR No. 826 dated 25.12.2012 registered at Police Station Khurshid Khan Shaheed (Khwaza Khela) District Swat accused Iftikhar is said to have committed *qatil-i-amd* of Umar Habib by firing at him which proved effective, later died. This offence falls within the purview of section 302 PPC. Upon recovery of the pistol 30 bore suspected to be crime weapon was recovered on 29.12.2012 on pointation of accused Iftikhar. As no license or permit was shown to be lawful weapon then under section 13 A.O. the offence being committed.

2. The learned Sessions Judge/Zila Qazi Swat on its basis framed the charge against the

accused Iftikhar on 07.02.2013. After compliance of the codal formalities provided necessary documents to the accused prior to framing of the charge then examined the witnesses whose statements were recorded under section 164 of the Criminal Procedure Code, thereby their names being entered in calendar of witnesses, these are PW-1 Umar Sadiq, PW-2 Abdur Rauf, PW-3 Nazir Ahmad, PW-4 Mst. Shahzma, PW-5 Jehan Akbar, PW-6 Khaista Muhammad, PW-7 Dr. Aziz-ur-Rahman, PW-8 Abdul Wakil, PW-9 Nazir Ahmad ASI, PW-10 Waqar Hassan Customer Relation Officer, PW-11 Muhammad Ayaz ASI, PW-12 Akbar Hayat CIO, PW-13 Ajab Khan Constable, PW-14 Tariq Khan Constable, PW-15 Rashid Ali Khan Head Constable, PW-16 Dr. Umair Medical Officer, PW-17 Rahmat Ali SHO/SI, PW-18 Dr. Alamgir Khan TMO and PW-19 Naeem Shah SI. When the prosecution evidence was over, the accused Iftikhar was examined under section 342 Cr.P.C he was put as many as 28 questions, he negated the same, posed innocence and stated to have no concern with the commission of *qatil-i-amd* of Umar Habib deceased.

3. By the judgment in Sessions Case No. 03/02 of 2013 decided on 17.04.2014 the following sentences were passed:

- 1) *U/S 302 PPC the accused/Appellant was convicted and sentenced to suffer imprisonment for life and to pay Rs. 02 million (twenty lacs) as compensation to the legal heirs of the deceased Umar Habib which amount shall be recoverable as arrears of Land Revenue. The accused shall suffer six months SI in case of non-payment of compensation.*
- 2) *U/S 13 A.O. the accused/Appellant was convicted to one year RI with fine of Rs. 2,000/- in default thereof he shall suffer further two months SI. Both the sentences shall run concurrently. However, benefit of section 382-B Cr.P.C was extended to the accused/Appellant.*

4. We have afforded fair opportunity of hearing to the learned counsel for the accused/Appellant Iftikhar, learned counsel for the complainant and learned Astt: Advocate General for the State, with their assistance we have gone through the entire record.

5. Learned counsel for the complainant assisted by learned A.A.G referred to PLD 2003

Supreme Court 704 " Sh. Muhammad Amjad vs the State", 2010 SCMR 670 " Gul Muhammad vs the State", 2011 SCMR 725 " Niaz-ud-Din and another vs the State and another", PLD 2008 Supreme Court 503 " Muhammad Latif vs the State", 2006 SCMR 1796 " Nasir Shah vs the State", 2015 SCMR 10 " Sikandar Shah vs Raza Shah and another", 2012 P Cr.LJ 588 (Peshawar) " Nadir Shah vs the State and others", 2010 SCMR 55 " Majeed vs the State" and 2001 SCMR 1474 " Farmanullah vs Qadeem Khan and another". In the light of these dictums of the Hon'ble superior Courts prayed for utter dismissal of the appeal and acceptance of the connected criminal revision as the accused/Appellant being fully connected with the commission of offence entitled to be awarded capital punishment of death.

6. By this commutual finding, we dispose of Criminal Appeal No. 135-M of 2014 and Criminal Revision No. 39-M of 2014 for enhancement of the sentence particular being awarded to the Accused Iftikhar to be enhanced from Life to Death.

7. It has been much emphasized that after the deceased then injured Umar Habib received bullet on his chest, he was taken to the hospital by PW-6

Khaista Rahman, the driver by profession plying the motorcar Ghawagai bearing No. PSKKS-760 and when reached to the place known as *Taroogai Road Khwaza Khela* he was already having two passengers. He then saw a young lad lying on the road in injured condition. All the three persons picked the injured, placed him in the motorcar and then took him to the hospital. This informer who has communicated to Umar Sadiq PW-1 that his brother is in injured condition and must rush to the hospital. This witness has categorically stated that on the way he has asked the then injured now deceased Umar Habib that as to how he has received the bullet on his body, who has replied to him that he should not be asked as to who has fired upon him but instead he be taken to the hospital. When evaluated this statement it seems that Khaista Muhammad PW-6 had no previous concern with the then injured who has used his mobile phone to inform his brother Umar Sadiq, but in the opening line of his cross-examination this PW admits that his house is situated near 5/6 minutes walking distance from the place of occurrence. While narrating time when he has taken up the then injured for onward transmitting him to the hospital many persons had gathered and it was the deceased

Umar Habib who told him to take him to the hospital, meaning thereby, in the cross-examination it has given the color that the then injured Umar Habib and PW-6 Khaista Rahman were not known to each other, rather during cross-examination an admission has come up to that extent that there exist identification between both of them as they lived near each one houses. By this time, it cannot be gathered that the then injured now deceased has ever named anyone to have fired upon him which proved effective.

8. Coming to the statement of PW-1 Umar Sadiq, who on receiving information that his brother has been injured, he rushed to the hospital. He has given certain details as to how he has implicated the accused Iftikhar by referring his mobile number. It is very clear that he being the brother was never given any clue of the involvement of the accused Iftikhar. This implication by PW-1 Umar Sadiq is on account of :-

*میرے بھائی کو مسی افتخار نے فون کر کے تاروگے روڈ پر بلا یا تھا اور اس پر فائر گ کر کے اس کو زخمی کیا تھا اور بعد میں انہی زخموں کے تاب نہ لا کر جان بحق ہوا۔*

About the veracity of the statement of PW-2 Abdur Rauf, who is more loyal being relative

of the deceased Umar Habib. He has given the information by the then injured cum deceased Umar Habib at night time that it is the accused Iftikhar who has fired upon him and in the morning then he charged the accused Iftikhar. This witness has categorically admitted that accused Iftikhar has remained his student. During cross-examination this witness admits like:-

"میرے روبرو خوازہ خیلہ ہسپتال میں متقتل عمر حبیب نے کوئی بیان نہیں دیا تھا البتہ میرے روبرو اپنا موبائل فون پولیس کے حوالے کیا تھا۔"

Then taken somersault, this witness has come up with another admission in the cross-examination that while recording the statement the then injured in his presence deposed that the accused Iftikhar was the one who fired upon him. The statement of this witness is also not worth consideration for the purpose of dying declaration.

Statement of another loyal relative is PW-3 Nazir Ahmad, he came to know on 26.12.2012 that his relative the then injured Umar Habib has received some fire shot who was taken to the hospital for treatment as he rushed there and asked the then injured Umar Habib as to who had fired upon him, he informed him that it was accused Iftikhar who has

fired upon him and in his presence the statement with regard to implication of the accused Iftikhar was given by the then injured cum deceased to the police. As this witness being the close relative was attracted to the hospital on the 2nd day of the happening who has chosen on account of being close relative has given the statement that the then injured Umar Habib had recorded statement before the police implicating the accused Iftikhar without any further corroboration to this effect. Thus, in the given circumstances statement of this PW would also loose its efficacy. While statement of PW-4 Mst. Shazma, widow of the deceased Umar Habib is also silent with regard to, she being conveyed that accused Iftikhar had fired upon her husband and this fact has been communicated to her, rather she has narrated all altogether new story that it was accused Iftikhar who likes her but was blatantly refused the offer for engagement as by the time she was going to marry the deceased Umar Habib and this offer for the first time was extended to her in the marriage ceremony of her aunt Mst. Nazia. In her cross-examination she admits that she has seen the accused Iftikhar for the first time in the marriage ceremony of her aunt Mst. Nazia, but during her cross-examination this witness

admitted that prior when the deceased has been killed she remained in contact with accused Iftikhar who often used to call her being her relative. In-fact there were rumours that the deceased Umar Habib and accused Iftikhar are in close relation, therefore a suggestion has been put in this behalf though denied by the PW-3 Nazir Ahmad close relative of the deceased Umar Habib to the effect that grandmother of accused Iftikhar and his grandmother are sisters inter se. PW-4 has witnessed to the effect that her brother-in-law Umar Sadiq and mother-in-law were present at the time of recording their statement before the police, but it is otherwise not corroborated by further evidence of any statement during trial.

9. From bare perusal of the oral evidence of these PWs, it transpires that none of the witness has seen the occurrence. All of them have been examined under section 164 Cr.P.C just to bring home the charges and to implicate accused Iftikhar in the dying declaration statement of deceased Umar Habib. It is absolutely clear that had accused Iftikhar been involved in the commission of firing at the deceased Umar Habib, his name would have been rightly placed in the First Information Report by the deceased himself but for reasons best known

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to him he kept mum even knowingly that it was the accused Iftikhar who fired upon him, but probably did not want disclosure of some real facts. There is absolutely no cavil with this proposition that all these witnesses have been closely related with the deceased but none of them have given any clue as to why the accused Iftikhar will kill the deceased Umar Habib without any reason. The most important aspect to skip-out the accused Iftikhar is that as the occurrence took place on 25.12.2012 at 17.25 hours when the deceased could there and then named the accused Iftikhar for the commission of occurrence who took the life of the deceased at many stages, the stage he was picked up by PW-6 Khaista Muhammad, the report was lodged in the hospital before the police, when his brother PW-1 Umar Sadiq and mother in the company of his wife PW-4 Mst. Shazma had gone to the hospital, but even then they did not disclose the name of real culprit to be the accused Iftikhar. It is miraculous that when the then injured cum deceased Umar Habib remained in his senses even after recovery from the operation if has recorded his statement under section 161 Cr.P.C shortly after leaving this transient world on 27.12.2012 evidence leading through CDR via hand

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written data collected from the Army Officials on 30.12.2012 as to how the Investigation Officer before collecting this CDR data when has no information that it was accused Iftikhar to have fired upon the deceased Umar Habib could record statement of the deceased under section 161 Cr.P.C named herein this accused Iftikhar. This query when put to the learned counsel for the complainant, he was unable to reply. According to the referred dictums reported in 2005 SCMR 1556 " Noor Muhammad vs the State ". The relevant citation (c) speaks off:-

*"Supplementary statement of complainant. Value. Any statement or further statement of the informant recorded during investigation by the police being neither equivalent to the FIR nor to be read as part of the same, its value will be determined keeping in view of the settled principles in this behalf."*

Likewise 2008 SCMR 1221 " Ghulam

*Qadir and 2 others vs the State* has been referred to, wherein the relevant citation (A) opines that:-

*"Belated statement of witnesses. Effect. Belated examination of a witness by police may not be fatal to prosecution but where delay is unexplained, accused has not been named in FIR and circumstances justify that open FIR and delay have purposely*

*been maneuvered to name accused later,  
such managed delay and gaps adversely  
affected prosecution case."*

As per wisdom contained in reported judgment cited as 2011 YLR 921 (Lahore) "Rifat Hussain and another vs the State". The relevant citation (b) reads in the following manner:-

*" Supplementary statement made by the complainant before Investigating Officer regarding the same occurrence is neither admissible in evidence, nor the same can be equated with the FIR or read as its part."*

**10.** Statements of the prosecution witnesses would reveal that these PWs are unaware about the information being given by the deceased Umar Habib regarding implication of the accused Iftikhar. These statements have been purposely maneuvered to name this accused as to cover the gaps adversely affecting the prosecution case.

**11.** We are unable to understand as to how the statement recorded under section 161 Cr.P.C at belated stage of the deceased Umar Habib when that too the words being spoken from the mouth of its author police official being Investigation Officer when such statement conspicuously lack corroboration. This statement is sole coming-out to

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be as dying declaration as obviously has no evidentiary value. Reliance has been placed on 1984

SCMR 1092 " Nazim Khan and 2 others vs the State". Citation (D) reads:

*"Prosecution case suffering from serious infirmity and material on record not capable of being relied upon. Conspicuous lack of independent corroboration. Accused entitled to benefit of doubt in accordance, with principles governing safe administration of criminal justice. "*  
*Conviction and sentence set aside.*

1978 SCMR 303 " Muhammad Yasin vs the State has been relied upon. The relevant citation envisages:

*" Dying declaration in order to form sole basis of conviction. Must be free from every sort of taint and be independently corroborated. Major portion of dying declaration found false and whole recorded during presence of deceased's relations, not excluding possibility of deceased having been tutored. Declaration also not corroborated.*

12. It is absolutely safe principle of administration of criminal justice that when there appears a dint in the prosecution evidence which even a single infirmity, it ought to benefit an accused facing the charges of capital punishment, but where at every step the witnesses being named to bring

home the charges and link the accused Iftikhar for commission of the murder of Umar Habib. Had Umar Habib wanted to implicate the accused Iftikhar he remained alive from the time he was hit by bullet and all time to remain in his senses in time and space he could name the accused Iftikhar, but because of maintaining secrecy and the motive behind the occurrence he failed to name the accused Iftikhar either before the Medical Officer who has examined him and operated him by taking out the bullet from his body or before the police or before anyone especially Umar Sadiq his brother who remained with him all the time in the hospital till the departed soul left his body. The most drastic feature of this case is that PW-1 Umar Sadiq admitted in his cross-examination that مقتول عمر حبیب نرم انسکار کو پہلے سے جانتا تھا. If so then

when coming in so close proximity and talking to him on phone, knowingly that it was accused Iftikhar to have fired on him but even then remained alive for sufficient days did not charge him either in his statement while making report (or) even latter which aspect would lead to an inference of high doubts.

13. Now coming to the recovery of 30 bore pistol allegedly recovered on the pointation of

accused/Appellant on 29.12.2012 vide recovery memo Ex. PW-11/2 after 3 days of the occurrence lying in the maize stripe (ٹانٹوں کے ٹوپ) adjacent to private link road Taroogai. In this respect, statement of witness to the recovery memo Muhammad Ayaz ASI (PW-11) is contradictory in nature and not confidence inspiring regarding recovery of pistol on the instance of the accused/Appellant. Apart from that, this PW in his cross-examination showed total ignorance about the mode and manner of the recovery and even he did not remember the distance between the main road Taroogai and the place of recovery of crime weapon. Thus, the statement of such witness cannot be relied upon as to whether the words coming out from his mouth are based on truth or otherwise. Therefore, the testimony of this PW would be of no help to the prosecution about genuineness of the recovery of crime weapon.

Moreover, no empties have been recovered from the spot so, this aspect of the case too cast serious doubts about the veracity of stance of the prosecution that whether this pistol has ever been used in the commission of offence or otherwise.

It is settled by now that the recovery of empties etc are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material put-forward by the prosecution in respect of guilt of the accused/Appellant has already been disbelieved. In this respect reliance has been placed on 1993 SCMR 417 "Ashiq Hussain vs the State", wherein the relevant citation (a) speaks off:-

*Recovery of gun from accused after 13 days of his arrest and matching of pieces of butt recovered from the spot with the said gun was highly doubtful. Accused was acquitted on benefit of doubt in circumstances."*

Similar view has further been affirmed by the Hon'ble Supreme Court of Pakistan in case cited as 2001 SCMR 424 " Imran Ashraf and 7 others vs the State" in the following manner:-

*"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered*

*simultaneously in order to reach for a just conclusion."*

**14.** The gist of the whole discussion is that the prosecution case against the accused Iftikhar is pregnant with doubts. It is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by the apex Court in the case of "Tariq Pervez v. The State 1995 SCMR 1345" that for giving the benefit of doubt it was not necessary that there should be many circumstances creating doubts". If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.

Similar citation of judgment 2008 SCMR 1221 "Ghulam Qadir and 2 others vs the State"

Supra enunciates:-

*"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creating reasonable doubt in the mind of a reasonable and prudent person*

*regarding the truth of charge, makes the whole case doubtful. "*

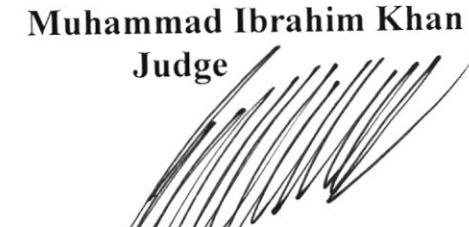
15. In view of the above discussion, we are of the firm view that the prosecution failed to prove its case against the accused/Appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, ergo, while extending the benefit of doubt, we accept the appeal preferred by the convict/Appellant by setting aside his conviction and sentence acquit him of the charges leveled against him. He be set free forthwith, if not required in any other case.

16. Similarly connected Criminal Revision bearing No. 39-M of 2014 filed for enhancement of the sentence by the complainant-party is also dismissed having become infructuous.

These are the detailed reasons for our short order of even date.

Announced.  
Dt: 27.09.2017.

  
**Muhammad Ibrahim Khan**  
**Judge**

  
**Ishtiaq Ibrahim**  
**Judge**

*Office  
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NIR*