

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

Cr.A No. 03-M/2020

Muhammad Zahir Shah 01 other

Versus

Amin-ur-Rehman and another

Present: Hafiz Ashfaq Ahmad, Advocate for the appellant/
convict.

Mr. Razauddin Khan, A.A.G. for State.

Mr. Rahim Zada, Advocate for complainant.

Date of hearing: **04.11.2021**

Date of announcement: **11.11.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- The present appellants were indicted u/s 302/324/311/34 PPC, 15 A.A vide case FIR No. 13 dated 05.03.20219 of P.S Kamach, District Shangla, on the charge of committing murders of Shamsher Khan son of Sher Ali, and Mst. Zar Khewa on the pretext of honor. After their regular trial before the learned Sessions Judge/Zilla Qazi/MCTC Shangla, Camp Court Swat, both the appellants were convicted and sentenced vide judgment dated 25.11.2019, the detail whereof is as under:

(i) u/s 302 (b) PPC (both appellants)

Life imprisonment for committing murder of deceased Shamsher Khan with payment of Rs.300,000/- each as compensation u/s 544-A, Cr.P.C to legal heirs of the deceased

or to undergo further six/six months S.I in case of default thereof.

(ii) **u/s 302 (b) PPC (appellant Ahmad Shah)**

Life imprisonment for committing murder of deceased Mst. Zarkhewa with payment of Rs.300,000/- as compensation u/s 544-A, Cr.P.C to legal heirs of the deceased or to undergo further six months S.I in case of default thereof.

(iii) **u/s 15 A.A (both appellants)**

03 years imprisonment with fine of Rs.2,000/- each as or to undergo further 03/03 months S.I in case of default thereof.

2. The report was lodged by Mst. Bakhti Rojan (PW-11), sister of deceased Shamsher Khan, on 05.03.2019 at 11:00 hours on the spot i.e thoroughfare of *Petao Kambelo, Hasham Khel Banda*. According to her report, her deceased brother was residing at Karachi. A few days ago he had visited his parents living in their ancestral village *Surgah*, District Shangla. He was leaving for Karachi at morning on the day of occurrence whereas complainant, Mst. Sufia (abandoned PW mother of the deceased) and Mst. Bibi Saina (PW-12) (sister-in-law of the deceased), while carrying his luggage, were accompanying him towards *Hasham Khel Dabb* to see him off. When they reached the place of occurrence at 09:00 A.M, the present appellants duly armed came out of their house and started firing at them, as result whereof Shamsher Khan was hit on different parts of his

body and died on the spot, while the ladies escaped narrowly from the firing. Complainant stated ahead in her report that the appellants thereafter ran in the direction of *Petao Warsho* where Mst. Zarkhewa, wife of appellant Ahmad Shah, was busy in cutting grass with Mst. Sakina and Mst. Lubna etc. They fired at her thereby causing multiple firearm injuries on her body due to which she also died on the spot.

SHO Sirajul Haq S.I (PW-1) drafted *Murasila* on the report of complainant and sent the same through a constable to P.S *Kamach* where FIR was chalked out against the present appellants on the basis of *Murasila*.

3. The author of *Murasila* also prepared injury sheets and inquest reports of both the deceased and sent the dead bodies to THQ Hospital, Puran. Post-mortem on the dead body of deceased Mst. Zarkhewa was conducted by Dr. Najma Begum (PW-2) whose report is available on record as Ex.PM. Dead body of deceased Shamsher Khan was medically examined by Dr. Imran Khan (PW-5). Post-mortem report of the said deceased is Ex.PM, pictorial is Ex.PM/1, answers to questionnaire of police is Ex.PM/2 whereas endorsement of the doctor on inquest report is Ex.PM/3.

4. Appellant Ahmad Shah was arrested on

the following day of the occurrence. On 09.03.2019

he confessed his guilt before Judicial Magistrate by

recording his statement u/s 164/364, Cr.P.C.

Appellant Muhammad Zahir Shah was arrested on

24.03.2019. During the course of investigation,

statements u/s 164, Cr.P.C of Syed Ahmad Shah,

brother of deceased Mst. Zakhewa, Mst. Sakina Bibi

and Mst. Lubna, daughter-in-law and daughter of

appellant Ahmad Shah respectively, were recorded

on 14.03.2019. The crime weapon 9 mm pistol was

recovered on pointation of appellant Ahmad Shah

which was sent to FSL alongwith 02 crime empties

of the same bore besides five empties of 30 bore

pistol recovered from the spot of first occurrence

were also sent to FSL. The FSL report Ex.PK is

positive for pistol and empties of 9 mm bore with

further observations that the five 30 bore crime

empties were fired from one and the same pistol.

After arrest of appellant Muhammad Zahir Shah, the

other crime weapon 30 bore pistol was recovered on

his pointation which, as per FSL report Ex.PK/2 has

matched with the above referred five crime empties

of 30 bore.

5. On completion of investigation, complete challan was put in Court and the trial commenced against the present appellants with framing of formal charge. The appellants denied the charge and opted to face trial, therefore, prosecution produced and examined 13 PWs in support of its case and closed the evidence. When examined u/s 342, Cr.P.C, both the appellants denied the allegations of prosecution besides appellant Ahmad Shah also retracted his judicial confession, however, they neither recorded their own statements on oath nor produced any witness in their defence. On conclusion of trial, the learned trial Court vide impugned judgment convicted and sentenced the appellants in the manner already discussed in detail in the earlier part of this judgment, hence, this appeal.

6. We have heard the arguments of learned counsel for the parties including the learned Assistant A.G. for State and gone through the record with their able assistance.

7. Prosecution has based its case against the present appellant on ocular account furnished by complainant Mst. Bakht Rojana (PW-11) and Mst.

Saina (PW-12), confessional statement of appellant Ahmad Shah and incriminating recoveries in shape of blood-stained earth/grass, crime empties collected from both the spots, blood-stained clothes of both the deceased and recovery of crime weapons i.e 30 bore pistol on pointation appellant Muhammad Zahir Shah and pistol of 9 MM bore on pointation of appellant Ahmad Shah.

8. One of the eye-witnesses is complainant Mst. Bakht Rojana (PW-11), who is sister of the deceased while the second eye-witness is Mst. Saina (PW-12) who is sister-in-law of the deceased. Admittedly, both the eye-witnesses, being closely related with the deceased, are interested witnesses besides they are chance witnesses as they have claimed that they were accompanying the deceased at the relevant time, as such, it is the foremost duty of prosecution to establish that they were present on the spot in the company of deceased at the time of occurrence. It was observed by august Supreme Court in the case of 'Mazhar Iqbal and another Vs. The State and others' (**2017 SCMR 2036**) that testimony of a chance witness cannot be readily accepted unless they justify their presence at the crime spot through cogent reasons. Thus, the

statements of the eye-witnesses in the present case, in view of their above-stated position, is required to be adjudged with great care and caution.

It is the version of eye-witnesses that the deceased, who was residing at Karachi with his family, had come to *Shangla* to see his parents and they alongwith mother of the deceased namely Mst. Sophia, were accompanying him to see him off as he was going back to Karachi on the day of occurrence.

It is also the version of prosecution that complainant was carrying bag of the deceased while Mst. Saina was having a shopping bag in her hands while moving alongwith the deceased towards the main road at *Hasham Khel Dabb* situated at a walking distance of 30 minutes from their house. The above version of both the eye witnesses is repellent to reason because as per prevalent customs of this area women folk seldom accompany their male relatives for seeing them off as the said job is usually performed by male members of the family. It is also astonishing that no other male was in their company except the deceased at the relevant time and they would have to come back all alone after parting with the deceased, the said manner of departure and return

of the eye-witnesses is repellent to traditions and culture in this area.

It is also a matter of record that the dead body remained on the spot for two hours till arrival of police but neither the eye witnesses nor anybody else shifted the dead body to police station or hospital. How can it be expected from eye-witnesses that their near and dear was done to death in their presence but they remained silent spectators for two hours without making any effort either to inform male members of their house or to inform the local police or other relatives though their house is at walking distance of only 30 minutes from the spot. In the present era of modern technology when the entire world has become a global village and imparting a message now a days is just a matter of seconds, how the dead body laid unattended on the spot for two hours inspite of the fact that so many people had attracted to the spot soon after the occurrence as per prosecution version. It is also an admitted fact on the record that the eye witnesses have not even touched the dead body though the assailants had decamped from the spot and for the said reason their clothes did not smear with the blood of deceased. This conduct of the eye-witnesses is also unusual because women

folk by their nature usually become more emotional as compared to males on the occasions of death of a family member. At such events women usually embrace and hug the dead bodies of their nears and dears especially when the matter is that of unnatural death but the eye-witnesses in the present case have not displayed the same conduct which is their epithet at such occasions. The unusual and unnatural conduct of the eye-witnesses create doubts about their presence at the place and time of occurrence. In the case of '*Muhammad Ismail and others Vs. The State*' (2017 SCMR 898), the august Supreme Court, disbelieved the ocular account of a witness in view of his unusual and unnatural conduct by observing that:

The prosecution had produced Haq Nawaz (PW4) and Abdul Shakoor (PW5) who had claimed to have seen some of the appellants throwing two dead bodies in a well during the fateful night which throwing of the dead bodies had statedly been seen by them in the light of a torch. The conduct displayed by the said witnesses has been found by us to be far from being satisfactory, usual or even natural because on their own showing the said witnesses had, after witnessing throwing of the dead bodies in a well, gone to their own houses and had slept during the night and when they returned to the relevant place in the morning the local police had already reached there.

9. As per prosecution version, complainant was carrying the bag of deceased while the other

eye-witness Mst. Saina was having a shopping bag of the deceased while on their way to *Hasham Khel Dabb* in the company of deceased. It is strange enough that the Investigating Officer has neither taken the referred luggage of deceased into possession nor shown the same in the site plan to have corroborated the version of complainant regarding departure of deceased to Karachi on the day of occurrence. Said omission on the part of I.O shows that the version of complainant as narrated in

the FIR regarding departure of the deceased is only a concocted story. Reliance in this regard is place on

"The State V/s. Muhammad Akram" (PLD 1985

Peshawar 116) wherein it has been held that:-

"The sickles were, however, not recovered from the spot and we can, therefore, presume that they were not there because they had not been carried by Mst. Karam Jan (PW-7) and her brother Mian Dad (PW-8). The statement given at the trial by Mst. Karam Jan (PW-7) in this regard appears to be a concoction. Now, if the story of carrying of sickles by Mst. Karam Jan and her brother Mian Dad was not to be accepted, then the presence of these two witnesses on the spot at the relevant time shall also stand excluded as there would have been no reason for them to be present there. In the least, the non-recovery of sickles from the spot did create a doubt as to the correctness of the prosecution story disclosed at the trial.....The Investigating Officer has not shown in the site-plan any such damage to the crop by the she-buffalo of Akram, accused-respondent, although he was

aware of this fact being the immediate cause of the attack allegedly made by the accused-respondents on the deceased. We are not prepared to accept that if the 'jowar' crop of the deceased had actually been damaged by the she-buffalo of Akram, accused-respondent, then such fact, though forming immediate cause of attack on the deceased by the accused-respondents, could go unnoticed by the Investigating Officer at the time of investigation or the preparation of the site-plan. Had such damage to the crop been caused, the Investigating Officer, in all probability, would have shown it in the site plan prepared by him. Once this fact was removed out of the chain of facts started at then the whole chain was broken and the prosecution story became doubtful, if not false, as there would have been no immediate cause for the accused-respondents to have attacked the deceased. It was also possible that the incident had taken place not in the manner alleged by the prosecution and disclosed at the trial but in some other way, and if that were so, the prosecution was to suffer therefor and not the accused-respondents".

Even otherwise, carrying of loads is usually the job of males and it cannot be expected from the deceased to let his sister and sister-in-law, being of fair sex, carry his bag and shopping bag without carrying any luggage himself. There is no evidence on record to show that the deceased was sick or otherwise incapable of carrying any load himself at the relevant time.

10. Statements of both the eye-witnesses are also unreliable for the reason that not only they

have contradicted each other on material particulars of the occurrence but they have also dishonestly improved their statements to bring the same in conformity with circumstantial evidence on record. Complainant stated in her cross-examination that on arrival of police, the dead body of Mst. Zarkhewa had not been brought to the spot of first occurrence while PW Mst. Saina stated that dead body of Mst. Zarkhewa and police reached the spot at the same time. The aforesaid divergent versions of both the eye-witnesses regarding the same material fact do not tally with the version of SHO Siraj-ul-Haq SI (PW-1) in FIR as according to him the dead body of Shamsher Khan was lying on the spot while the people had shifted the dead body of Mst. Zarkhewa from *Petao Warsho* to *Hasham Khel Banda*. When appeared in the witness box, complainant stated that Mst. Saina was walking in the front who was followed by Mst. Sophia while she herself was walking behind Mst. Sophia and at the last deceased Shamsher Khan was walking. She stated ahead that the appellants appeared armed with pistols; Zahir Shah made first firing at the deceased hitting him on right side of his neck then the deceased was hit on right side of his chest below axilla by the firing

Ahmad Shah and thereafter Zahir Shah again made firing thereby hitting the deceased on his right thigh.

The complainant also stated in her examination-in-chief that the appellants threatened them and decamped from the spot by making aerial firing.

Almost similar statement was recorded by PW Mst. Saina during the trial proceedings. The above narrations of the eye witnesses with regard to their order of walking on the thoroughfare, specification of firearms and specification of the roles of both the

appellants with regard to injuries sustained by deceased do not occur in the FIR. The defence counsel has confronted both the eye witnesses with their statements u/s 161, Cr.P.C during their cross-examination which shows that the eye-witnesses have dishonestly improved their initial version to bring their statements in line with site plan and medical evidence. Dishonest improvements on the part of a witness casts a serious doubt on his veracity and the topic was elaborately discussed by august Supreme Court of Pakistan in a recent judgment in

the case of 'Naveed Asghar and 02 others Vs. The State' (**PLD 2021 S.C 600**) by observing that:

17. Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case

cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives corroboration from some other independent piece of reliable evidence.¹⁷ In the case of *Shahzada v. Hamidullah*,¹⁸ a five-member Bench of this Court, on appraising the evidence of a witness, found that he had improved upon the version he had earlier given to the police while making statement in Court, and upon such finding held that the improvement had affected his veracity rendering it unsafe to rely upon his evidence. Hamoodur Rahman, J., speaking for the Bench observed: "[The witness] also tried to improve upon the version he earlier gave to the police by introducing the story of his having seen the [accused] respondent Hamidullah actually loading his gun in the middle of the bazar. In his police statement he had only stated that when he saw Hamidullah first he appeared to be proceeding to the shop of the deceased to purchase snuff. This definite attempt at embellishment clearly affected his veracity and rendered it unsafe to rely upon his evidence." In the case of *Akhtar Ali v. State*,¹⁹ the complaint initially made statement that four unknown persons had committed the offence and did not name any person therein, but subsequently nominated the accused persons in his supplementary statement despite the fact that one of the accused person was already known to him. A four-member Bench of this Court, which heard the case, noted with concern that improvement made by the complaint even during investigation and discarded his testimony making the observations that "when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful."

Even both the eye-witnesses have belied their claim with regard to companionship of Mst. Sophia, mother of deceased, with them at the relevant time by admitting in cross-examination that Mst. Sophia was ill and she could not walk. Though the complainant has tried to rectify the said mistake of her tongue by stating that Mst. Sophia was going to consult a doctor but that is not at all the version of prosecution because both the eye-witnesses have stuck only to their stance that they were accompanying the deceased to see him off. Another striking fact on record which casts a doubt on presence of the two ladies on crime scene is that the I.O has examined them u/s 161, Cr.P.C on the following day of the occurrence though the statements u/s 161, Cr.P.C of daughters and daughter-in-law of deceased Mst. Zarkhewa were recorded on the day of occurrence. Prosecution has not explained that what were those unfavorable circumstances that precluded the I.O to record statements of the eye-witnesses on the same day.

II. According to FIR, the occurrence took place at 09:00 A.M but the report was lodged at 11:00 A.M with delay of two hours. Even the said entries in the FIR appear to be fictitious because

Sher Zada (PW-9), who has seconded the report of complainant, admitted in his cross-examination that he had reached the spot at 08:15 A.M and on his arrival police were already present on the spot. It appears that the occurrence had taken place at least before 07:00 A.M and this fact can be confirmed from the contents of the FIR wherein the complainant stated that they had set off early in the morning. The term 'early in the morning' generally denotes the time before sunrise. The date of occurrence is 05.03.2019 and the time of sunrise in this area as per calendar is 06:35 A.M. Statement of PW Sher Zada clearly shows that on his arrival to spot at 08:15 A.M police were already present on the spot meaning thereby that real facts of the occurrence have been suppressed by prosecution.

The mentioned circumstances on record suggest that police had deliberately delayed lodging of the report to procure the attendance of eye-witnesses. Had the eye-witnesses accompanied the deceased upto the spot, police would have recorded the report at least at 08:00 A.M but it appears that they had deferred recording of the report till arrival of the females to the spot at 11:00 A.M. Thus, preliminary investigation was conducted in the matter and

relatives of the deceased charged the present appellants for the murder after deliberation and consultation as is evident from clear cut admission of PW Sher Zada that from 08:15 till 11:30 A.M they consulted each other for charging the accused. The factum regarding preliminary investigation and procurement of the eye-witnesses can further be confirmed from the fact that even post-mortems on the dead bodies were delayed till 04:00/04:30 P.M on the same day otherwise there was no reason for such belated examination of the dead bodies by the doctor at civil hospital *Puran* where the P.S is also situated at a distance of only 7/8 kilometers from the spot which can be covered within half an hour. Wisdom in this regard may be derived from "Iftikhar Hussain and others Vs. The State" (2004 SCMR 1185) wherein the august Supreme Court of Pakistan has observed that.

“..... it is a case in which F.I.R. has been registered after consultation and conducting preliminary investigation. If both these witnesses in fact had witnessed the incident, there was no occasion to cause delay in lodging of F.I.R. It is significant to note that delay in lodging F.I.R. under section 154, Cr.P.C. is condonable keeping in view the facts and circumstances of each case particularly in those cases where the accused persons have not been nominated in the F.I.R. and the names of the witnesses who have seen

the incident have also not been mentioned but where the complainant is fully aware about the culprits and the names of the witnesses are also known to him then if delay in lodging F.I.R. is caused, it creates heavy duty upon the prosecution to explain the same satisfactorily otherwise the prosecution case would become doubtful.....”.

12. Not only there is perceptible disparity in the prosecution case with regard to the place of first occurrence but the version of prosecution that the appellants had committed murder of deceased Shamsher Khan right in front of their house after pre-planning also pricks our mind. As per site-plan Ex.PB, the spot of first occurrence is thoroughfare passing in front of the houses of the present appellants. The four-corners of the said spot have been mentioned in the site plan as under:

| | |
|-------------|--|
| North-west: | Houses of appellants |
| South-west: | Land of appellants |
| East-north: | Houses of Gul Sharif and Gul Nawab Shah |
| West-north: | Land of Sahib Shah |

The I.O has not shown any stream (خون) in the site plan and it appears that the pathway on which the occurrence took place, is leading towards a stream as the words راستہ روندہ خون have been mentioned in the site plan. From careful perusal of the statements of PWs, we have reached to the

conclusion that a stream was intervening between the spot of occurrence and houses of the appellants but the site plan is mute regarding existence of stream in-between the houses of appellants and the first crime post. In this regard the relevant statements of the PWs are worth perusal, which are reproduced below for the sake of convenience.

"Distance between village Sorgah Cham (village of deceased) and Hasham Khel Dabb (spot of first occurrence) is about 30 minutes by walk. Main road is situated from village Sorgah cham at the distance of 30 minutes. It is correct that while leading towards main road from Sorgah Cham, there is khwar in-between the house of accused and thoroughfare. Thoroughfare is at the distance of two minutes from houses of accused" (the words in brackets added and underlined supplied for emphasis)

Although PW Mst. Saina has denied the suggestion of defence counsel with regard to existence of Khwar/stream in-between the spot and house of appellants but admitted in her cross-examination that:

Except the thoroughfare, there is no other way leading to main road. Distance between place of occurrence and house of accused is about 10 minutes.

From bare perusal of the above extracts from the statements of eye-witnesses, one thing is abundantly clear that the walking distance between the place of first occurrence and house of accused

ranges from 02 to 10 minutes as per independent analysis of the eye witnesses. Even if the minimum time i.e 02 minutes (120 seconds) is considered for covering the said distance between the first spot and house of accused, the result so appearing is shocking because a person while walking with slowest speed of taking one step per second can easily take 120 steps in the equal number of seconds. In light of the statements of the eye-witnesses, the place of first occurrence is doubtful because the same has been shown adjacent to the house of appellants in the site plan. This situation suggests concealment of real facts of the occurrence on the part of prosecution for the purpose of showing nexus of the present appellants with the murder of deceased Shamsher Khan. The disparity between the ocular account and site plan creates a reasonable doubt in prudent mind, hence, the story narrated in the FIR cannot be believed.

Even otherwise, the version of prosecution does not stand to reason that the appellants, after consultation and deliberation, attacked the deceased right in front of their house and killed him for the sake of their honour.

Admittedly, the villages of both the parties are

situated in mountainous area where the thoroughfares generally pass through ravens and secluded spots. If the appellants had the intention to kill the deceased for satisfaction of their anger and revenge, they would have never chosen the front area of their house for committing his murder rather they would have done away with him at some other isolated place.

13. The second occurrence, wherein Mst. Zarkhewa was done to death, has remained un-witnessed because prosecution has not produced any eye-witness to establish involvement of appellant Ahmad Shah with the said murder which was attributed to him by prosecution. Though Mst. Sakina Bibi, who is daughter-in-law of the female deceased, was examined as PW-14 but she was declared as hostile witness on the request of learned DPP. During her cross-examination, she was only confronted with her statement u/s 164, Cr.P.C and nothing material could be brought from her on record to establish that the assailant was appellant Ahmad Shah. Postmortem though shows that the female deceased had met an unnatural death due to firearm injuries, however, the said evidence alone is

not sufficient to prove that the firearm injuries were caused to deceased Mst. Zarkhewa by her husband/appellant Ahmad Shah. The remaining corroborative evidence in shape of recovery of blood and crime empty, in view of its doubtful nature, is of no avail to prosecution in absence of direct evidence. Thus, prosecution has badly failed to prove the charge of murder against appellant Ahmad Shah.

14. Adverting to circumstantial evidence on record, medical evidence is in conflict with ocular account for the reason that complainant in her examination-in-chief has attributed two effective fire shots upon deceased Shamsher Khan to appellant Muhammad Zahir Shah while appellant Ahmad Shah was assigned only one fire shot thereby causing injury on the right side chest of the said deceased. But according to medical report Ex.PM of deceased Shamsher Khan, the doctor has observed three inlet wounds all of 1/2 inch in size. It is the version of prosecution that appellant Muhammad Zahir Shah was armed with 30-bore pistol while appellant Ahmad Shah had fired at the deceased with 9 MM pistol. Definitely, fire shots with two

pistols of different bores would have caused entry wounds of different dimensions on the deceased but the situation here in this case is different. In response to a question by defence counsel, Dr. Imran Khan (PW-5), who had examined deceased Shamsher Khan, stated that similar characteristics of wounds suggest firing from one and the same weapon. Thus, the entry wounds of same size on the dead body of deceased Shamsher Khan suggest that it was one man job but the charge was exaggerated by complainant by implicating two persons in the case, however, it cannot be determined from the evidence on record that which one of the two appellants had killed deceased Shamsher Khan.

Moreso, Lady doctor Najma Begum (PW-2) has reported two entry wounds both of 1.5 cm in size which do not tally with the size of inlet wounds on the dead body of Shamsher Khan. Wisdom may be drawn from judgment of the august Supreme Court in the case of "Farman Ali and 03 others Vs. The State" (PLD 1980 Supreme Court 201), wherein it was held that:

"In his dying declaration, Rashid Khan has involved the three brothers as well as their friend,

Farman Ali. But the medical evidence and the evidence of the Ballistic Expert do seem to cast doubt on his veracity. The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan is that the size of inlet of all the wounds suffered by him was the same meaning thereby that he had been shot from one or more than one weapon of the same calibre. It is in the evidence of the Ballistic Expert, however, that the four empties sent to him for examination were found to have been fired through .32 bore pistol which was also sent to him by the Investigation Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. It is true that according to the prosecution each one of the three appellant brothers was armed with a .32 bore pistol. But the type of injuries suffered by Rashid Khan rather suggest that it was the work of one man. It is common knowledge that .32 bore pistol is an automatic weapon carrying in its charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right superior iliac spine, the inlet -size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants. There is no evidence on the record to show, however, as to which one of the three had caused him the said injuries, therefore, no option is left but to hold that the prosecution has failed to bring home its case against any one of the appellants".

The Investigating Officer has visited the spot on 05.03.2019, the day of occurrence, alongwith police constables and allegedly recovered crime empties and blood from the two spots. Prosecution has examined Tahir Shah ASI as PW-3, who is marginal witness of different recovery

memos including Ex.PC and Ex.PC/1. According to Ex.PC, the I.O has recovered 05 empties of 30-bore pistol from the first spot, which were attributed to appellant Muhammad Zahir Shah while a single empty of 9 MM bore pistol was recovered from the spot allegedly fired by appellant Ahmad Shah. As per Ex.PC/1, one empty and one live round of 9 MM bore pistol were recovered from the second spot and the same have been attributed to appellant Ahmad Shah. Similarly, constable Muhammad Ayaz was examined as PW-4 who is one of the attesting witnesses of recovery memos Ex.PC/4 and Ex.PC/5 vide which blood-stained earth was recovered from the first spot while blood-stained earth/grass and sickle were recovered from the second spot. It is not the stance of prosecution that I.O had recovered the blood and crime empties from the spots during different visits at different times on the same date rather the Investigating Officer (PW-13) has admitted it in clear terms that:

Beside me Tahir Shah ASI, constable Muhammad Ayaz and other private persons were present..... At the time of recovery of empties Muhammad Ayaz constable was also present.

Thus, in light of the evidence on record, the aforesaid marginal witnesses namely Tahir Shah

ASI (PW-3) and Constable Muhammad Ayaz (PW-4) were present on the spots at the time of recovery of blood-stained earth/grass and crime empties but PW Muhammad Ayaz has denied recovery of empties from any spot. He stated in his cross-examination that:

When the I.O was inspecting the spot in my presence, no empties were recovered, as I am not witness to that recovery..... When I reached to place where allegedly female deceased was murdered, empties were not recovered in my presence.

It is evident from the above statement of PW Muhammad Ayaz that no empty was recovered by I.O from both the spots in his presence though he was present there at the relevant times alongwith I.O and Tahir Shah ASI, the witness of recovery of empties. A particular fact which is asserted by one witness but denied by another cannot be accepted in evidence provided presence of both the witnesses at the same place and time with regard to that particular fact is established on record notwithstanding they were formally shown as witnesses of different facts or posted as attesting witnesses of different recovery memos regarding different articles recovered from the same crime spot. The mentioned state of affairs tends us to

conclude that actually no empties were recovered by police from both the spots otherwise PW Muhammad Ayaz constable would have verified the said factum during his cross-examination. Same is the doubtful status of recovery of crime weapons on pointation of both the appellants. Admittedly, the I.O had raided the houses of appellants on 05.03.2019 for the purpose of their arrest and recovery of crime weapons but no weapon was recovered from their houses on the same date. The recovery of 30-bore pistol has been shown from fodder-husk spread over the goat-yard inside the house of appellant Muhammad Zahir Shah whereas 9 MM pistol was allegedly recovered on pointation of appellant Ahmad Shah from the top of cupboard in veranda of his house. Prosecution has not explained that why the pistols were not recovered from the mentioned places inside the houses of appellants during the first raid of police on their houses on the day of occurrence. The matching FSL reports Ex.PK and Ex.PK/2 are of no avail to prosecution in view of the doubtful recoveries of crime empties and crime weapons. In addition to above, the parcels containing empties were handed over to constable Muhammad Ayaz (PW-4) on

10.03.2019 but he delivered the same in the forensic lab on 13.03.2019. He has not explained that for what purpose he had retained the empties with him for several days, hence, manipulation of the crime empties cannot be ruled out in the circumstances.

Corroborative recoveries of such doubtful nature cannot be relied upon against the appellants.

15. Although appellant Ahmad Shah has recorded his confessional statement before the Judicial Magistrate (PW-6) but the said confession on the face of it neither appears to be true and voluntary nor inspires confidence enough to base conviction of the appellants. The confessional statement is reproduced below of the sake of convenience.

بیان کیا میری شادی ہمراہ مسماۃ زر خیوہ دختر حاضر شاہ جو کہ میری سگی چکار
بیٹی تھی، کے ساتھ تقریباً 26/25 سال قبل ہوئی تھی۔ میری اور مسماۃ
زر خیوہ کے ہاں نو (09) عدد اولاد پیدا ہوئی جن میں چار (04) عد
پسر ان اور پانچ (05) بیٹیاں زندہ حیات موجود ہیں۔ عرصہ تقریباً
12/10 سال قبل سے مجھے میری بیوی مذکوریہ اور مسکی شمشیر خان ولد
شیر علی خان سکنہ سورگاہ، جو کہ میرا سگا ماموں زاد تھا، کے مابین ناجائز
تعاقبات کا شہر تھا تاہم میں نے دونوں کو مشتبہ حالت میں نہیں پایا تھا۔ چند
یوم قبل شمشیر خان مذکور، جو کہ عرصہ 6/7 سال سے کراچی میں ہمراہ بال
بچوں کے رہائش پذیر تھا، کراچی سے واپس آیا تھا اور وقوعہ ہذا سے تقریباً
9/10 یوم قبل میرے گھر آیا تھا اور اسی طرح میں نے شمشیر خان مذکور کو
رات کے قریباً 3/2 بجے کے وقت میری بیوی مسماۃ زر خیوہ مذکوریہ کے
ساتھ مشتبہ حالت میں پایا جس سے میری شک کو تقویت ملی کہ دونوں

مذکور ان پہلے بھی ملتے تھے۔ پونکہ یہ حرکات میری غیرت کو ناگوار گز رے کہ ہماری خاندانی ساکھ کو ٹھیس پہنچا ہے لہذا میں نے اپنے بھائی مسی ظاہر شاہ کے ساتھ صلاح و مشورہ کر کے دونوں کے قتل کرنے کی منصوبہ بندی کی اور دو تین رات پہرہ داری کرتے رہے لیکن شمشیر خان مذکور بھی ہوشیار ہو چکا تھا اور وہ موقع پر نہ آیا بروز و قوعہ مجھے پہلے سے ہی اطلاع ملی تھی کہ شمشیر خان مذکورہ کراچی واپس جانے والا ہے۔ لہذا میں ہمراہ برادر ام مذکور ظاہر شاہ پہلے سے ہی تاک میں بیٹھے ہوئے تھے جو نبی شمشیر خان مذکور بہ ہمراہیت والدہ خود مسماۃ صوفیہ، بھائی خود مسماۃ سائلہ اور بہن مسماۃ بختی رو جان ہمارے گھر کے سامنے پہنچے میں نے اور میرے بھائی ظاہر شاہ مذکور نے نمودار ہو کر شمشیر خان مذکور پر بارادہ قتل فائز نگ کی۔ بعد ازاں میں نے پہاڑ اور شوپر جا کر اپنی بیوی مسماۃ زر خیوہ جو کہ گھاس کاٹنے کے لیے معبد ختر ان اور بہو گئی تھی کو آواز دے کر بلا یا اور ادھر ہی مذکور یہ پر بارادہ قتل فائز نگ کر کے قتل کیا بروز و قوعہ میں پہاڑ پر چلا گیا اور اگلے روز اپنی گرفتاری پیش کر کے آلہ قتل پستول از قسم MM 9 حوالہ پولیس کیا ہی میر ایمان ہے۔



It has been suggested to Investigating Officer as well as Judicial Magistrate that confession of the appellant was almost verbatim copy of his statement u/s 161, Cr.P.C. The I.O stated in his cross-examination that:

Statement u/s 161, Cr.P.C and confessional statement of accused u/s 164, Cr.P.C are almost same.

Likewise, the Judicial Magistrate also did not disprove the said fact by stating that:

Before recording confessional statement of accused I had gone through Judicial file and at that time statement u/s 161, Cr.P.C of accused was part of police file. It is correct that statement of accused recorded u/s 161, Cr.P.C recorded by police and confessional statement

of accused recorded u/s 164/364, Cr.P.C are ditto copy of each other.

We have gone through the statement of appellant u/s 161, Cr.P.C. It appears that while recording confessional statement of appellant, the words of his statement 161, Cr.P.C were moved back and forth by reproducing events of the story almost in the same order. Keeping in view the afore-referred doubtful position of the confessional statement, we do not think it safe to consider it against the appellants.

16. Keeping in view the alleged background of the motive, doubtful statements of the PWs, visible conflict between the ocular account and medical evidence which is suggestive of exaggerated charge and false implication of the appellants, murder of deceased Shamsher Khan nearby the houses of appellants, preliminary investigation in the case and unconvincing confessional statement of appellant Ahmad Shah, we have come to the irresistible conclusion that the occurrence has not taken place in the mode and manner as alleged by prosecution and depicted by complainant in the FIR.

The mentioned aspects of the case create various

reasonable doubts in prudent mind regarding guilt of the appellants and they deserve to get the benefit thereof as per well-established principle of criminal justice. While deciding the appeal titled 'State through PG Sindh and others Vs. Ahmed Omar Sheikh and others' reported as 2021 SCMR 873, the august Supreme Court observed that:

In this case, regarding each and every piece of evidence the doubts are emerging from the mouth of the witnesses, and it is settled since centuries that benefit of doubt automatically goes in favour of an accused. Even if a single circumstance creates reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation.

17. After due consideration, we are of the opinion that prosecution has badly failed to prove the charge against the present appellants beyond shadow of reasonable doubt, therefore, their conviction and sentences recorded by learned trial Court cannot be sustained in the circumstances. Resultantly, this appeal is allowed, the impugned judgment is set aside and appellants Muhammad Zahir Shah and Ahmad Shah are acquitted of the

charge in the present case. They be released forthwith from jail if not required in any other case.

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

Announced.
Dt: 11.11.2021

JUDGE

JUDGE

Office
2/12/2021
WR