JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

JUDGMENT

Cr. Appeal No. 661-P of 2018.

Date of hearing:	*20.12.2022*
Appellants:	*(Fazal Khaliq) By Mr.Mohammad Sajid Khan, advocate.*
Respondent:	*(State), By Mr. Muhammad Riaz Khan, A.A.G.*
Complainant Fazal Wajid:	*By Mr.Hayat Ullah Khan, advocate.*

SAHIBZADA ASADULLAH, J.- This single judgment shall dispose of the instant Criminal Appeal No.661-P/2018 filed by appellant namely Fazal Khaliq son of Abdur Rab against his conviction and sentences, **Criminal Appeal No.722-P/2018** and **Criminal Revision No.96-P/2018** filed by appellant-complainant Fazal Wajid son of Fazal Rehman against acquittal of accused-respondent namely Fazal Nadeem son of Fazal Khaliq and for enhancement of sentences awarded to accused-respondent Fazal Khaliq respectively vide the impugned judgment dated 07.07.2018 rendered by the learned

Additional Sessions Judge-II/Camp Court Lahor, District Swabi, in case FIR No.333 dated 23.03.2014 under sections-302/324/34 PPC, registered at Police Station Yar Hussain, District Swabi, whereby, the appellant Fazal Khaliq was convicted and sentenced as follows;

> **Under Section-302 (b) PPC for committing Qatl-i-Amd of deceased Fazal Ahmad sentenced to imprisonment for life and shall pay compensation of Rs.500,000/- to the legal heirs of deceased Fazal Ahmad or in default of payment of compensation, he shall further undergo six months S.I and the amount of compensation shall be recoverable from him u/s-544-A Cr. PC.**
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> **Under Section-324 PPC for effective firing upon PW Fazal Rehman sentenced to rigorous imprisonment for five years with a fine of Rs.20,000/- or in default of payment of fine, he shall further undergo two months S.I.**
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> **The appellant was further sentenced to payment of Arsh (five percent of Diyat amount for the year 2017/2018) amounting to Rs.96,775/- under section-337-A(ii) PPC which shall pay to injured Fazal Rehman for causing injury on his head. All the sentences were ordered to run concurrently. Benefit of section-382-B Cr. PC was extended to the appellant.**

2. Laconic facts of the prosecution case are that on 23.07.2014 at 18:15 hours the complainant Fazal Wajid s/o Fazal Rehman reported the matter to the local police at RHC Yar Hussain to the effect that on the day of

occurrence at the relevant time he along with his father, brother and cousin Fazle Raziq along with other relatives after offering Asar prayer, came out of the Masjid and were present in front of their house, when in the meanwhile, his uncle Fazal Khaliq along with his son namely Fazal Nadeem duly armed came out of their house and suddenly started firing upon them. Resultantly, father of the complainant namely Fazal Rehman and his brother Fazal Ahmad got hit seriously and became unconscious, whereas, the complainant and his cousin escaped unhurt. Motive for the offence was disclosed to be a money dispute with the accused. Report of the complainant was reduced into writing in the shape of murasila, on the basis whereof the instant case FIR was registered against the accused. Later on Fazal Ahmad succumbed to the injuries.

3. Initially, the accused were absconding, however, after their arrest and completion of investigation, challan against them was submitted before the trial Court. Formal Charge was framed against them to which they did not plead guilty and claimed trial.

4. The prosecution, in order to prove its case, produced as many as thirteen (13) witnesses and on closure of prosecution evidence, the accused were examined under Section 342 Cr.P.C, wherein they denied the prosecution version. They neither wished to be examined on oath within the meaning of section 340(2) Cr.PC, nor desired to produce evidence in their defense. On conclusion of trial, after hearing the learned counsel for the parties and appraisal of evidence available on the file, the learned trial Court vide impugned judgment dated 07.07.2018 convicted and sentenced the appellant Fazal Khaliq, as described in the opening paragraph of the judgment.

5. Feeling aggrieved from his conviction and sentence, the appellant has approached this Court by filing Criminal Appeal No.661-P/2018 with the prayer that the impugned judgment may be set aside and he may be acquitted from the charges leveled against him. Fazal Wajid complainant being not satisfied from the impugned judgment, filed Criminal Revision No.96-P/2018 for enhancement of sentence awarded to the appellant. The complainant also

filed Criminal Appeal No.722-P/2018 against acquittal of co-accused Fazal Nadeem.

6. We have heard arguments of the learned counsel for the parties and perused the record carefully with their valuable assistance.

7. In the unfortunate incident, one lost his life, whereas, the other got seriously injured. The matter was reported by the complainant in RHC Yar Hussain, Tehsil Lahor, in the shape of murasila. The scribe after drafting the murasila prepared the injury sheet and inquest report and thereafter the injured was referred to the doctor for his medico legal examination, whereas, the deceased was taken to the doctor for post mortem examination. The Investigating Officer, after receiving copy of the FIR visited the spot and on pointation of the eye witnesses prepared the site plan. During spot inspection the Investigating Officer collected blood through cotton and also 10 empties of 7.62 bore, five each, from the respective places of the accused charged. The appellant Fazal Khaliq was arrested and from his personal possession, a Kalashnikov along with four spare

chargers, a bandolier with 150 live rounds without license, were taken into possession and thereafter a case vide FIR No.170 dated 13.07.2015 under section 15-AA / 13 of Khyber Pakhtunkhwa Arms Act, 2013 was registered against the appellant. It is pertinent to mention that the Investigating Officer, who was investigating case FIR No.333 under section 302/324/34 PPC, took into possession the weapon of offence. Both, the Kalashnikov recovered from personal possession of Fazal Khaliq appellant and empties collected from the spot were sent to the firearms expert for opinion, as to whether the collected empties were fired from the recovered weapon. This is pertinent to mention that a report was received in positive, with the explanation that all the collected empties were fired from the recovered weapon. The co-accused namely Fazal Nadeem was also arrested in the instant case and as such both the appellant and the acquitted co-accused were charge sheeted and the trial commenced. On commencement of the trial, the accused/appellant Fazal Khaliq was convicted and sentenced vide the impugned

judgment, whereas, the co-accused was acquitted from the charges. Feeling aggrieved, the appellant approached this court through the instant criminal appeal, whereas, the respondent / complainant approached this court in the connected criminal appeal against acquittal. Interestingly, the prosecution too did not feel satisfy with the awarded conviction also approached this court through the connected criminal revision bearing No.96-P of 2018 for enhancement of conviction awarded to the appellant.

8. As in the instant case one of the accused has been convicted for life imprisonment, whereas, the co-accused has been acquitted of the charges, so this court is to see as to whether the approach of the learned trial court was correct in that respect and as to whether the learned trial judge fully appreciated the evidence available on file. As two similarly placed accused met different treatment from the learned trial court, that too, on the basis of the same collected evidence and recorded statements, so this being the court of appeal is under obligation to see as to what led the trial court to reach to such a conclusion and this court is

further to see that whether the approach of the learned trial judge is correct in that respect, more particularly, when the learned trial court was swayed only and only with the positive report in respect of the recovered weapon, from the personal possession of the convict/appellant. As the relationship between the parties is too close, so in order to avoid miscarriage of justice, we deem it essential to scan through the record once again, with the valuable assistance of learned counsel for the parties. True that in the present case, we have an injured eye witness, and equally true that he charged both the convicted and acquitted accused for the offence in hand, but it is not the rule of universal application that whenever an injured witness appears before the court of law, then no other presumption can be drawn, but that he would be telling the truth. If the courts of law would travel with this concept in mind, then on one hand, the criminal jurisprudence will suffer, whereas, on the other, the possibility of miscarriage of justice cannot be excluded, so in the circumstances, both the learned trial court as well as this court must be conscious enough to

apply its judicial mind strictly, in accordance with the evidence collected and statements recorded.

9. The moot questions for determination before this court are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the complainant and eye witness were present on the spot at the time of incident; as to whether the prosecution succeeded in proving the motive on record and as to whether the accused was arrested in the mode and manner and the weapon was recovered from his possession.

10. The record tells that the unfortunate incident occurred just in front of the houses of the parties, where one of the party i.e. the complainant, witnesses and the deceased came out of the mosque and the other i.e. the accused from their house and on seeing the complainant party, the accused started firing at them and that from the firing made by the accused the witness got injured and the deceased lost his life, whereafter both the injured and the deceased were rushed to the hospital for treatment and management. We are to see as to whether the witnesses

remained consistent on material aspects of the case and as to whether the statement of the complainant is running in harmony with that of eye witness. In order to appreciate this particular aspect of the case, we deem it essential to go through the statements of the witnesses. It is an undoubted fact that out of the firing made, one got injured and the other lost his life. It is further evident from the record that both the parties are closely related to each other, but this aspect of the case alone is not sufficient to hold the accused responsible for the tragedy, but without having been influenced from this aspect of the case, we deem it essential to ascertain from the record as to whether the incident occurred in the manner as was portrayed. The learned trial Court, on one hand, acquitted the co-accused, whereas, on the other, on the same set of evidence, convicted the appellant. We are to determine as to whether the incident was preplanned and the accused, charged, attracted to the spot to execute the plan. We are yet to see as to whether the coming together of the accused is a sufficient circumstance to convince this court that both the accused charged fired at

the deceased and the injured with common intention. For this particular purpose, we are to revisit the entire record to ascertain as to what led to the present tragedy and as to what prompted the accused charged to eliminate the complainant party. As both the parties are closely related and that nothing was brought on record that apart from the alleged motive, they ever nourished a grudge against each other, so in particular circumstances of the present case, this court is under the obligation to see as to whether the same could be a cause for the accused to do away with the complainant party and as to whether the prosecution could succeed in bringing on record that there was preplanning and consultation between the accused charged. In order to appreciate this particular aspect of the case, we deem it essential to go through the site plan prepared by the investigating officer. The site plan was prepared on the instance of the eye witnesses, where both the accused as well as the complainant party have been assigned their respective places. It is pertinent to mention that the inter-se distance between the accused charged and the complainant

as well as the deceased is shown as 3 to 4 paces. In order to assess the common intention on part of the accused, it is a must for this court to take into consideration the act performed by the accused a little before the incident and at the time of incident. There is no denial of the fact that according to the complainant, both the accused i.e. the convict appellant and the acquitted co-accused were armed with sophisticated weapons. We are surprised to see that when the accused were having the common intention and that when they were in possession of deadly weapons, then what precluded them to eliminate the abandoned eye witness, the injured witness and the deceased as well, but this particular aspect of the case is indicative of the fact that neither the accused came to the spot with a common intention nor the purpose was to eliminate the complainant side. We cannot ignore that the deceased received a solitary injury on his forehead and the injured witness a single lacerated wound. When the intention was to do away with the complainant side then there was hardly an occasion for the witnesses to escape unhurt, as the assailants were in full

control of the situation, that too, having sophisticated weapons in their possession. When the prosecution failed to convince this court regarding the preplanning, premeditation and preconcert on part of the accused, then we lurk no doubt in mind that the incident occurred at spur of the moment. When the common intention is not established from the record, then every accused is to be held responsible for his individual act and in that eventuality, this is for the prosecution to tell that which of the accused caused which injury. The august Supreme Court of Pakistan in the case of ***"Maqsood Pervez alias Billa and another Vs The State (2000 SCMR 1859)*** has held that:

> ***"It is clear that evidence on record is not sufficient to come to a conclusion that the appellants had at any stage common intention with the principal accused to commit the murder. In the absence of the common intention the appellants would be liable for their individual act which they committed in the episode. We thus hold that the prosecution has not been able to***

prove beyond any reasonable doubt the common intention of the appellants alongwith the main accused to commit the murder of Hakim Ali in furtherance of pre-planned design. Thus we extend the benefit of doubt to the appellants and acquit them of the charge of murder and while accepting their appeal to that extent modify the impugned judgment."

11. During spot inspection, the investigating officer collected 10 empties, 5 each from the place of each accused. The collected empties were sent to the firearms expert along with the recovered weapon from possession of the convict appellant, wherefrom a report was received in positive. It is pertinent to mention that the site plan was prepared on the pointation of the witnesses and it was in their presence, that the empties were collected from the places assigned to the accused, but the laboratory report tells that all the 10 empties were fired from the recovered weapon. This particular aspect of the case has shaken the very foundation of the prosecution case to a greater extent. If we believe that the empties collected were fired from the

recovered weapon, then in that eventuality, we are to accept that it was the doing of a single accused, but as the recoveries were effected from two different places, then the laboratory report, in itself, goes against the prosecution case and even the report, so tendered, by the firearms expert has belied the story narrated by the complainant. The complainant while reporting the matter charged both the convict/appellant and the acquitted co-accused for general role of firing, with no specification, as to which of the accused caused which of the injury. The prosecution could not succeed in proving that who out of the two should be held responsible for which of the injury, as the injured received a lacerated wound, whereas, the deceased, a fatal shot. As both the injuries carry different punishments and in case of individual liability, every accused charged is to be held responsible for the act he committed, so this is for the prosecution to tell that which injury was caused by the appellant and which, by the acquitted co-accused. When such is the state of affairs, this court is not hesitant in holding that the evidence failed to

convince that it was the convict/appellant, who fired the fatal shot and in such eventuality, this court cannot restrain itself from extending the benefit of doubt to the convict/appellant, as the law is settled that benefit of doubt, if arises, must be extended to the accused charged. In this respect, reliance could also be placed on judgment of the Apex Court in case titled ***"The State through P.G. Sindh and others Vs Ahmed Omar Sheikh and others" (2021 SCMR 873)*** wherein it was held that:

> ***"Even if a single circumstance create 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."***

12. The complainant while reporting the matter disclosed that besides him, the incident is witnessed by one Fazle Raziq and other people of the locality, but when the complainant and the injured eyewitness were examined before the trial court, they deviated from the previous

stance and stated that apart from the complainant, the eyewitness, the deceased and the injured, no other person was present on the spot. This is the case of the prosecution that soon after performing Asar Prayer, they came out of the mosque and were busy in chitchat, when the incident occurred. If we accept that in fact, the incident occurred soon after Asar Prayer, then numerous co-villagers must have been present in the thoroughfare, but the witnesses made a willful attempt to deny their presence for the simple reason that no one was ready to support the claim of the complainant. This is interesting to note that one Fazal Raziq was cited as the eyewitness, but he was not produced before the trial court, despite the fact that the complainant, in his report, stated that he was also fired at by the accused. No plausible reasons are available on record as to why PW Fazal Raziq was not produced, so in such eventuality, we are constrained to form an opinion that he was not ready to support the stance of the complainant and had he been produced, he would have disclosed the real facts before the court of law. When the best available evidence is not

produced then an inference can be drawn that had he been produced, he would have not supported the claim of the complainant, so this court is constrained to draw an inference adverse to the prosecution. Article 129 (g) of the Qanoon-e-Shahadat Order, 1984 caters for the situation. The Hon'ble Supreme Court in one of its judgments reported as ***"Lal Khan Vs The State" (2006 SCMR 1846)*** was pleased to hold that:

> ***"The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness-box, he might not have supported the***

prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."

13. The record tells that during spot inspection, the investigation officer collected from the spot 10 empties of 7.62 bore, but the same were not sent to the laboratory either for safe custody or for ascertaining the fact that the same were fired from one or different weapons, but the same were sent to the laboratory by the time when the weapon of offence was allegedly recovered from possession of the convict/appellant. As on one hand, the prosecution could not bring on record as to where the empties were lying from the date of its recovery till the arrest of the appellant and on the other, the recovered weapon along with the empties were received to the laboratory after a considerable delay, then we lurk no doubt in mind that the prosecution could not succeed in proving the safe custody of both the empties and the weapon. This is interesting to note that at the time of arrest, it was one Khalid Iqbal Khan, who took into possession the Kalashnikov from the possession of the appellant and in

that respect, an FIR under section 15-AA was registered and the same was sealed into a parcel by the investigating officer. As one of the parcel was sealed by Khalid Iqbal Khan ASI and the other by Muhammad Khan, who affixed the monogram of M.K, but the laboratory report discloses that all the three parcels were having the monograms in the name of M.K i.e. Muhammad Khan, the Investigating Officer. This uncertainty regarding sealing and affixing monograms is a factor which has disturbed the veracity of the collected evidence to a greater extent and as such, this piece of evidence has lost its efficacy. When the prosecution failed to prove on record the safe custody of the collected weapon and recovered empties, and when the recovered empties were not sent to the laboratory soon after its recovery for ascertaining the fact that the same were fired from one or different weapons, no other opinion can be drawn, but that this piece of evidence is lacking credence, that too, when the prosecution could not convince regarding its safe custody. There is no cavil to the proposition that firearms expert report is not a

corroborative piece of evidence, rather it is a circumstance, which can be pressed into service, only and only, when the prosecution otherwise succeeds in bringing home guilt against the accused charged.

14. The motive was advanced as a dispute over an outstanding amount, which the injured witness spent on the trial of the convict / appellant, but neither the complainant could produce independent evidence in that respect nor the Investigating Officer took pain to collect any oral or documentary evidence in that regard and in such eventuality, the prosecution could not succeed in establishing the alleged motive. When the injured eyewitness was examined on this particular aspect of the case, he stated that several Jirgas were convened to resolve the dispute, but the Jirgas could not succeed. Neither the complainant could mention the names of the Jirga members, who undertook the task to resolve the differences between the parties in respect of the outstanding amount, nor the Investigating Officer could trace out the local elders to record their statements in that respect. The lack of

interest on this particular matter both, by the complainant and the Investigating Officer, has rocked the very foundation of the prosecution case. True that weakness or absence of motive is not the sole determining factor to ascertain the veracity of the prosecution case, but equally true that when the prosecution case is the only outcome of the alleged motive, then under those circumstances, the prosecution cannot be absolved of its liability to prove the same. In case, the prosecution in the circumstances could not prove the alleged motive, then it is the prosecution to suffer. As, the cause of death was the outstanding amount between the parties, so the failure of the prosecution to convince that in fact, the amount was outstanding will put the prosecution at the losing end. The Apex Court in its judgment reported as ***"Muhammad Ali Vs The State" (2017 SCMR 1468)*** has held that:

> ***"The motive set up by the prosecution was the only factor which could have propelled the appellant into aggression against the deceased and with failure of the prosecution to prove the alleged***

> ***motive there was no earthly reason left with the appellant to do away with the deceased who was a lady."***

Similarly, in the case of ***"Muhammad Ilyas Vs Ishfaq alias Munshi and others (2022 YLR 1620)***, it was held that:

> ***"It is well settled that once a motive is set up it is imperative for the prosecution to prove the same. On failure whereof adverse inference can be dawn against the prosecution. Reference is made to the cases of Muhammad Khan v. Zakir Hussain PLD 1995 SC 590 and Hakim Ali v .The State 1971 SCMR 432."***

14. True that the accused/appellant remained absconder for sufficient long time, but abscondence alone is not sufficient for holding an accused guilty, rather it is a circumstance which can be weighed against the accused charged, but only when the prosecution otherwise succeeds in proving its case. As the prosecution failed to bring home guilt against the accused charged, by producing trustworthy and confidence inspiring witnesses, so this piece of evidence cannot be pressed into service to favour the

prosecution. Reliance could also be placed on ***2008 SCMR 1549 (Muhammad Yaqoob Vs Manzoor Hussain)*** wherein it was held that:

> ***"Insofar as the abscondence of respondent is concerned, it may be stated that mere absconsion is not conclusive proof of guilt of an accused person. It is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicions after all are suspicions. The same cannot take the place of proof. The value of absconsion, therefore, depends on the facts of each case. The courts have admitted it is a supporting evidence of the guilt of accused. The absconsion of the accused may be consistent with the guilt or innocence of the accused, which is to be decided keeping in view overall facts of the case."***

15. The cumulative effect of what has been stated above leads this court to an irresistible conclusion that the learned trial court fell into error while handing down the impugned judgment and as such, misdirected itself both on facts and in law. The impugned judgment is suffering from inherent defect which calls for interference. The instant

criminal appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charges. He shall be released forthwith, if not required to be detained in connection with any other criminal case.

16. As the appeal against conviction is allowed and the impugned judgment has been set aside, so the criminal appeal filed by the respondent/complainant against acquittal of co-accused as well as the criminal revision bearing No.96-P/2018 filed by the respondent/petitioner for enhancement of the sentence awarded to the appellant, have lost the efficacy and the same are dismissed as such.

17. The above are the detailed reasons for our short order of even date.

Announced
20.12.2022

Signed on:
30.12.2022

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Lal Jan Khattak
Hon'ble Mr. Justice Sahibzada Asadullah
(Asif Jan Sr.S.S)