

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

1) Cr.A No. 236-M/2017
With Murder Reference No. 02-M/2017

*Kashar Khan son of Purdil Khan resident of village Tetar,
Tehsil Samarbagh, District Dir Lower.*

(Appellant)

Versus

1) *The State through A.A.G. Peshawar High Court Mingora
Bench*

2) *Anwar Khan son of Khan Zarin, resident of village Tetar,
Tehsil Samarbagh, District Dir Lower.*

(Respondents)

Present:

Mr. Hazrat Rehman, Advocate for the appellant.

Mr. Sohail Sultan, Assistant A.G. for State.

*Mr. Amir Gulab Khan, Advocate for the
complainant.*

Date of hearing: 16.01.2020, 10.02.2020 & 17.02.2020

Date of announcement: 17.02.2020

JUDGMENT

SYED ARSHAD ALI, J.- Through the instant appeal, the appellant/convict Kashar Khan has called into question the judgment of the learned Special Judge, Anti-Terrorism Court-III, Malakand Division at Timergara, Dir Lower dated 02.11.2017 whereby he was convicted and sentenced as under:

a) **under section 302 P.P.C & 7 (a) ATA.**

Death sentence on five counts for committing *Qatl-i-amd* of Mst. Kainat, Mst. Hussan Pari, Mst. Asia, Mst. Shabnam and minor Bilal with payment of Rs. 100,000/- to legal heirs of each deceased as compensation u/s 544, Cr.P.C. or to undergo further six months S.I, each, in default.

b) Under section 324, P.P.C, 7 (b) ATA.

Five years imprisonment on two counts for murderous attempt on Mst. Razia Bibi and Abdur Rashid

c) Under Section 337-D, P.P.C, 7 (d) ATA

Three years imprisonment on two counts with payment of Rs. 30,000/- as compensation to each of the above named injured persons or four months imprisonment in default.

d) Under section 427, P.P.C

Three months imprisonment with fine/ compensation of Rs.50,000/- or one month imprisonment in default.


2. The report was lodged by complainant Anwar Khan (PW-5) on 28.04.2013 at 07:15 hours stating that on the same day he was celebrating his marriage ceremony and the bridal procession/ (بارات) comprising of Mst. Kainat, his bride, Mst. Shabnam daughters of Muhammad Said, Hussan Pari wife of Said Afzal, minor Bibil son of Naimatullah, Mst. Razia Bibi wife of Naimatullah, were on their way in motorcar (*Ghwagai*) to village *Tattar Samarbagh*. When they reached to non-metalead road heading from Samarbagh to village *Tattar* at *Qashodal Mor*, the present appellant/convict Kashar Khan and his sons Sher Zaman and Amir Badshah, the absconding co-accused, who were already ambushed there, started indiscriminate firing on them. Resultantly, Mst. Hussan Pari, Mst. Asia, Mst. Kainat, Mst.

Shabnam and minor Bilal were hit and died whereas Mst. Razia Bibi and Abdur Rashid sustained injuries on their persons. The occurrence was stated to have been witnessed by complainant, Naimatullah and other injured persons whereas the motive behind the occurrence was mentioned as previous blood feud and property dispute.

3. The report was recorded in shape of *Murasila* by Amir Rehman S.I (PW-16). The dead bodies of the deceased as well as the injured persons were referred to hospital for examination/post mortem after preparing their injury sheets and inquest reports. Later the complainant and eye witness Naimatullah also charged co-accused Khan Badshah son of Kashar Khan, Jalat Khan, Taj Muhammad Khan & Amanullah sons of Sardullah, hence, they were also arrayed as accused in the case on 03.05.2013.

4. The present appellant/convict and co-accused Amanullah, Taj Muhammad Khan and Jalat Khan were arrested on 18.05.2013. After completion of investigation, they were sent to the trial Court where they were jointly charge-sheeted for the offences, however, they did not plead guilty and opted to face the trial. The prosecution produced as

many as sixteen witnesses and closed its evidence. After examination of the accused u/s 342, Cr.P.C the learned trial Court vide judgment dated 29.10.2015 convicted the present appellant under section 7 (a) ATA and sentenced him to death on five counts for committing the murders of above-named five deceased. He was also burdened to pay Rs.200,000/- to LRs of each accused. He was also convicted u/s 7 (c) ATA and sentenced to ten years imprisonment on two counts for injuring Mst. Razia and Abdul Rashid with fine of Rs.20,000/- on two counts. He was further ordered to pay Rs.20,000/- to each injured as compensation u/s 544-A, Cr.P.C. He was also convicted u/s 7 (d) ATA and sentenced to 10 years with fine of Rs.2000/- for causing damage to the car of PW Naimat Ullah. His other co-accused, who had faced the trial, were acquitted of the charge whereas the remaining co-accused were declared as proclaimed offenders.

 5. The appellant challenged his conviction and sentence before this Court through Cr.A No. 237-M/2015 whereas the trial Court had sent Murder Reference No. 09/2015 to this Court for confirmation of the death sentence. This Court vide judgment dated 05.09.2017, set aside the judgment

of the trial Court dated 29.10.2015 and remanded the case with directions to re-frame the charge against the present appellant/convict and examine the injured witnesses Mst. Razia Bibi and Abdul Rasheed and thereafter re-write the judgment in accordance with section 367, Cr.P.C. Acquittal of co-accused Jalat Khan, Taj Muhammad Khan and Amanullah was maintained though no appeal had been preferred either by complainant or State.

6. During the post-trial proceedings, the learned trial Court re-framed the charge against the present appellant/convict and also recorded the statements of the above named injured witnesses as APW-1 and APW-2 respectively. After recording supplementary statement of the appellant/convict u/s 342, Cr.P.C, the learned trial Court has convicted and sentenced him in the manner already discussed in the earlier part of this judgment, hence, this appeal.

7. Arguments heard and record of the case was perused with able assistance of learned counsel for the parties as well as learned Assistant A.G. for State.



8. In order to comprehend the case and complicity of the Appellant in the gruesome murder of almost the entire family i.e five persons from one family, it would be important to first refer to the crime scene. According to the site plan Ex.PW-14/1, the occurrence has taken place on an un-metalled road leading from the main road towards other villages including village *Tattar*. On one side of the road there is *shawara* mountain (pasture) whereas on the other side there is also barren mountain. There is no residential area surrounding the place of occurrence, however, according to the statements of witnesses it is situated at a distance of 500/600 yards from the house of PW Anwar Khan (the complainant bridegroom) which can be covered in 10 minutes while walking on foot whereas the house of PW Naimat Ullah (brother of the bride) is at a distance of one and a half kilometer from the spot. In this regard, Naimat Ullah (PW-6) has confirmed in his cross-examination that:


“The house of complainant Anwar Khan is at a distance of about 10/15 minutes from the spot while my house at a distance of about one and a half KM from the spot”.

The police station and hospital are situated within a radius of 2 ½ /3 KM. In this regard,

Shah Murad Khan (PW-8) has stated in his cross-examination that:

“PS Samarbagh is situated at about ½ KM away from the place of occurrence, and Hospital Samarbagh is about 3 KM away from the place of occurrence”.

At the relevant time, a portion of the hospital was occupied by Pak Army and they had also established a check-post on the road. The local police were able to hear the firing. The occurrence has taken place at 05:30 A.M. The police had attracted to the spot at 6:00/6:30 A.M. The injured Mst. Razia and Abdul Rashid as well as the deceased minor Bilal were present in the hospital at 06:30 A.M whereas according to medical reports, the dead bodies of all other deceased were present in the hospital at 07:15 A.M. *Murasila Ex.PA* is stated to have been recorded on the spot at 07:15 A.M. The convict Kashar Khan had no direct motive with the deceased family, however, there is a previous enmity between the complainant and his uncle Kashar Khan, the present appellant/convict.

 2. Having discussed the place of occurrence, we thus move on to the prosecution case. It is the case of prosecution that S.H.O of the police station (PW-16) had attracted to the spot after

receiving the information that a car taking the bride was fired at by some persons as a result thereof the persons boarded in the car were either killed or got injured. When he reached at the spot, Anwar Khan (PW-5) had reported the matter by stating that on the fateful day he had the marriage ceremony. Naimat Ullah (PW-6), who is brother-in-law of the complainant and also his relative, was taking the bride Mst. Kainat in his car who was accompanied by Mst. Hussan Pari, Mst. Shabnam, minor Bilal son of Naimat Ullah, Mst. Razia (APW-1) wife of Naimat Ullah, Mst. Asia and Abdul Rashid (APW-2). When they reached at the place of occurrence, the present appellant/convict Kashar Khan son of Purdil and the absconding accused Sher Zaman and Amir Badshah sons of Kashar Khan were already ambushed there who had started firing at them as a result thereof Mst. Hussan Pari, Mst. Asia, Mst. Kainat, Mst. Shabnam and minor Bilal had died by sustaining firearm injuries whereas Mst. Razia (APW-1) and Abdul Rashid (APW-2) had sustained injuries on their bodies. The complainant has stated that the occurrence was witnessed by him as well as by Naimat Ullah and other injured persons. The motive behind the occurrence is enmity between the

complainant Anwar Khan and the present appellant/convict.

10. The contents of the above report lodged by PW Anwar Khan was supported by Naimat Ullah (PW-6) in his statement under section 161, Cr.P.C. According to *Murasila*, the time of occurrence is 05:30 A.M which was reported at 07:15 A.M. The deceased as well as the injured were attended by Dr. Sardar Ali. Since, the said doctor was ill and had become blind of his both eyes, therefore, the medical reports prepared by him were exhibited by Dr. Shaukat Ullah M.O (PW-15). The said reports reproduced as under:

(1) Mst. Asia Bibi (deceased)

M.L.C 28.04.2013, 07:15 A.M F.A.I

The case done at 05:30 A.M

The dead body of Asia Bibi D/O Aziz-ur-Rehman, age 40 years brought to emergency ward THQ Hospital Samarabagh with wound at Rt Axillary area of 4 inches in square of injury deep bled with bone numerous fractures.

(2) Head injury (occipital) 2 inches in square bleeding.

Death cause is damage of vital organs "hemorrhage".

(2) Mst. Hussan Pari (deceased)

M.L.C 28.04.2013, 07:15 A.M.

The case done at 05:30 A.M

The dead body of Hussan Pari w/o Saeed Afzal age 60 years brought to emergency ward THQ Hospital at 07:15 A.M on date 28.04.2013.

Left side shoulder wound two inches in square deep due to FAI bled.

On back side (interior scapular region) two wounds one inch in square bled.

Death cause is damage of vital organs + Hemorrhage.

(3) Mst. Kainat (deceased)

M.L.C 28.04.2013, 07:15 A.M.

The case done at 05:30 A.M

The dead body of Kainat Bibi d/o Muhammad Saeed age 17 years brought to emergency ward THQ Hospital Samarbagh with neck wound one inch in square wound due to FAI bled. Right wrist joint injury 1.4 inch in length + width bled. On back (intra scapular region) wound of 1 inch in square bled.

Death cause is damage of vital organs + Hemorrhage.

(4) Bilal (minor) (deceased)

M.L.C 28.04.2013, 06:30 A.M.

The case done at 05:30 A.M

The dead body of Bilal Hilal s/o Naimat Ullah age 3 years reached to emergency ward THQ Hospital Samarbagh at 06:30 A.M with injury of FAI with Rt shoulder injury + right Thorax lateral side wound

The death cause is damage of vital organs + Hemorrhage.

(5) Mst. Shabnam (deceased)

M.L.C 28.04.2013, 07:15 A.M.

The case done at 05:30 A.M

The dead body of Shabnam d/o Muhammad Saeed age 15 years brought to emergency ward THQ Hospital Samarbagh. A wound on right shoulder back side 1.6 inches in square wound due to F.A.I bled.

(2) Head wound (occipital) 1.4 inch in square bled.

Death cause is damage of vital organs and Hemorrhage.

(6) Mst. Razia Bibi (injured)

M.L.C 28.04.2013, 06:30 A.M.

The case done at 05:30 A.M

The patient Razia Bibi w/o Naimat Ullah age 22 years brought to emergency ward THQ Hospital Samarbagh injured due to FAI on head occipital inferior two wounds of one inch in square bled near neck

(2) Rt shoulder wound with entry + exit bled.

(3) Rt chest injury bled of ½ inch in square.

(4) Rt side rib wound bled.

(5) 7 wounds on Rt + Lt abdomen ½ inch in square bled

Death cause is damage of vital organs + Hemorrhage.

(7) Abdul Rashid (injured)

M.L.C 28.04.2013, 06:30 A.M.

The case done at 05:30 A.M

The patient Abdur Rashid age 36 years reached to Emergency ward THQ Hospital Samarbagh at 6:30 A.M with injuries due to

(1) FAI left side back minute bled.

(2) and left side shoulder injury superficial (scratched wound bled) simple injury.

11. Amir Rehman S.I, who at the relevant time was S.H.O of P.S Samarbagh, has appeared before the Court as PW-16. In his statement he has stated that when he heard about the occurrence, he rushed to the spot and recorded report of the complainant Anwar Khan in shape of *Murasila*. He had prepared the injury sheets and inquest reports of the injured and deceased. In cross-examination he has confirmed that he had heard the firing at 05:30 A.M and reached the spot at about 06:00/06:30 A.M. He also confirmed that the distance of the place of occurrence from the police station is about 2/3 KM whereas the distance between the spot and hospital is 3/4 K.M. He had stayed on the spot for one and half an hour and he alongwith the I.O had reached the spot by foot.

12. The apparent contradictions between the time of report i.e 07:15 A.M at the spot and similarly the presence of the deceased at 07:15 A.M and availability of the injured persons including the minor deceased Bilal at 06:30 A.M in the hospital have put us on guard to carefully examine the

statements of the eye witnesses because it appears that the considerable delay in lodging the report has given an ample opportunity to the complainant, eye witnesses as well as police for preliminary inquiry regarding nomination of the accused. Admittedly, the S.H.O (PW-16) had reached the spot at 06:00/06:30 hours but he has recorded the report at 07:15 hours. The question arises that why he had not registered the report just on his arrival to the spot and delayed the same till 07:15 hours. This situation leads us to the conclusion that not only preliminary inquiry was conducted for nomination of the accused after deliberation and consultation but the said aspect of the case also casts a doubt on presence of the complainant at the place of occurrence. Wisdom in this regard is drawn from "Iftikhar Hussain and others Vs. The State" (2004 SCMR 1185) wherein the august Supreme Court of Pakistan has observed as following.

"..... 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.....”

13. Anwar Khan (PW-5) is the complainant in the present case. According to the evidence, deceased Mst. Kainat, the bride, was the sister of Naimat Ullah (PW-6) and as per custom in the locality, the said Naimat Ullah had left alongwith the bride and other inmates for taking her to the house of Anwar Khan. This Anwar Khan has stated that he was informed by Naimat Ullah regarding the departure of *Baraat* to the house of complainant in his car and thus, the complainant all alone had come to the place of occurrence to receive the bride at the spot which is at a distance of 500/600 yards from his house. According to him he has seen the occurrence but he has not taken any step to arrange for shifting the injured persons and dead bodies of the deceased to hospital. He does not inform his own family to come to the place of occurrence for shifting the injured and deceased nor does he inform the local

police about the occurrence despite the fact that the police station is situated at a distance of only two kilometers from the place of occurrence. The time of report i.e 07:15 and the time of examination of the deceased and injured i.e 06:30 and 07:15 suggest that the complainant had not accompanied the deceased and injured persons to the hospital. The aforesaid conduct of the complainant does not inspire confidence rather it is unusual which creates doubt and dent in his version, therefore, we are constrained to assume/draw adverse inference from his aforesaid conduct. Regarding such unusual conduct of the witness in the case of "Nasrullah alias Nasro Vs. The State" (2017 SCMR 724), the august Supreme Court of Pakistan has held that:

"It has been found by us to be intriguing that the above mentioned eye-witnesses had claimed to have seen the occurrence wherein Mst. Hameed Bibi had been critically injured but surprisingly the said eye-witnesses had never taken the injured victim to the hospital for medical treatment and till the arrival of the complainant at the house of occurrence the dead body of Mst. Hameed Bibi was still lying in that house and it was he who had statedly taken the dead body to the hospital. Such unusual conduct of the above mentioned eye-witnesses surely raised an eye-brow".

14. Another inconsistency in the present case is that the complainant in his initial report had

charged three accused i.e the present appellant/ convict Kashar Khan and his two sons. Later at the time of preparation of the site plan he has made addition of yet a fourth assailant/accused by assigning him a specific place in the site plan. Likewise, he has recorded his statement u/s 164, Cr.P.C wherein he has charged the acquitted accused for facilitating the present appellant. Such conduct of the complainant regarding belated and afterthought nomination of the accused also manifests that he had not seen the occurrence and, if so, he would have charged them in his initial report. The version of complainant regarding his presence at the spot at the time occurrence is negated by the statement recorded by Abdul Rashid (APW-2). According to this witness, no one was attracted to the spot soon after the occurrence. After half an hour of the occurrence, a few females of the locality and three males had come there but they did not help the deceased and injured rather kept standing near them till arrival of Shahab-ud-Din (PW-3) in his car who had shifted the injured and minor deceased to hospital. This statement of APW-2 clearly shows that the complainant was not present at the spot at the time of occurrence otherwise he would have

rushed near the deceased and injured persons soon after the occurrence. Even the learned trial Court has not believed the statement of complainant Anwar Khan because he has not established his presence at the spot at the relevant time. Since, the complainant has not established his presence on the spot besides, there are material contradictions in the statements of eye witnesses, therefore, many serious doubts arise in the prosecution case the benefit of which must be given to the appellant/convict. Guidance is sought from the judgment of the august Supreme Court of Pakistan in the case titled "Ifthikhar Hussain and others Vs. The State" (2004 SCMR 1185) wherein the Hon'ble Court observed as following.

"It is to be noted that in his cross-examination, defence successfully, brought on record material contradictions which have impaired the intrinsic value of his evidence. We are conscious of the fact that evidence of a chance witness cannot be brushed aside merely for the reason that he happened to be at the place of incident incidentally but to accept evidence of such witness his presence at the spot is deemed to be necessary and prosecution is supposed to bring on record convincing evidence to establish the same".

15. According to the prosecution case, the complainant, being nephew of the present appellant/convict, had direct enmity with him but it is

astonishing that prior to the occurrence the appellant/convict has made no attempt at the life of complainant Anwar Khan, despite the fact that one day prior to the occurrence he had seen him in the house of the acquitted accused; and had chosen to attack the bride and her family against whom he had no motive. In the circumstances mentioned by complainant in his report when he was all alone waiting near the spot for arrival of the *baraat*, he could be an easy prey for the assailants for satisfaction of their revenge but instead targeting other persons, against whom the appellant had no grudge or enmity, does not appeal to a prudent mind. The learned trial court has probably for the aforesaid reasons has discredited his testimony.

16. By disbelieving the testimony of complainant Anwar Khan (PW-5), the prosecution is left with eye witness Naimat Ullah and the two injured eye witnesses Mst. Razia Bibi and Abdul Rashid whose statements were recorded during the post-remand proceedings conducted pursuant to the directions of this Court. So far the ocular account of PW-6 Naimat Ullah is concerned, this witness is the real brother of deceased Mst. Kainat, the bride, and he was carrying her to the house of complainant

Anwar Khan as per custom of the area whereas his wife and child were also travelling in the car targeted by firing. Thus, his presence at the spot is quite natural. The mere fact that he did not sustain any injury from the firing despite the fact that all other persons, who were seated in the vehicle, had sustained serious injuries, is no ground to disbelieve his testimony because he could remain unhurt in the incident by a stroke of luck. However, the question arises that why this person had not promptly lodged the F.I.R when the police official had reached at the spot at about 6/ 6;30 am, rather his conduct shows that on each and every occasion he had re-affirmed the statement of complainant PW-5 who had initially charged only three persons in the F.I.R and this witness has re-affirmed his statement. Later the absconding co-accused Khan Badshah was charged by complainant (Pw-5) and this witness Naimat Ullah (PW-6) has re-affirmed the said narration. Subsequently, when the complainant while recording his statement u/s 164, Cr.P.C nominated the acquitted co-accused for providing logistic support to the appellant/convict, this witness has once again supported the said accusation despite the fact that he had not seen them providing shelter and

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food to the present appellant/convict. However, the crucial aspect of the case is that the occurrence had taken place at 05:30 A.M and the local police had reached at the spot by 06:00/06:30 A.M but till that time no report was registered though he was present at the spot. According to *Murasila*, the report was lodged at 07:15 A.M whereas at the same time all the deceased were shifted and they were available in the hospital which is situated at a distance of 3/4 K.M from the place of occurrence. This situation suggests that the *Murasila* was not prepared at the spot but was drafted in the hospital or police station and till the scribing of *Murasila* this PW Naimat Ullah did not know the names of assailants. Thus, it would be very unsafe and imprudent to rely on the statement of Naimat Ullah (PW-6) for maintaining the punishment of the present appellant/convict. A witness might be a natural witness to the occurrence, however if he himself does not spontaneously charge any one for the offence and just toe the line of another person whose presence is doubtful on the place of occurrence, then relying on his testimony will be very dangerous for awarding capital punishment, rather the safe course would be to give the benefit of doubt to the accused.



17. Regarding the testimony of injured witnesses Mst. Razia Bibi (APW-1) and Abdul Rashid (APW-2), who were examined during the post-trial proceedings, their statements not only suffer from glaring contradictions, but they have also followed the pursuit with the complainant. In her cross-examination, Mst. Razia stated that some of the accused were standing on the road in front of the motorcar and they started firing from the front side and when the motorcar crossed them the other accused started firing from the right side whereas PW Abdul Rashid has insisted by stating that the accused had fired at them only from the right side and no firing was made from the front side. The position of assailants was an important event of the occurrence, therefore, contradictions inter se the statements of the injured eye witnesses in this regard cannot be brushed aside. No doubt, they have stamps of injuries on their persons but the mere fact that they had sustained injuries is not a sufficient proof that they had told the whole truth. In this regard we would refer the judgment of the august Supreme Court of Pakistan in the case "Said Ahmad Vs. Zammured Hussaina and 4 others" (1981 SCMR 795) wherein it was observed that:

It is correct that the two eye-witnesses are injured and the injuries on their persons do indicate that they were not self-suffered. But that by itself would not show that they had, in view of the aforementioned circumstances, told the truth in the Court about the occurrence.

18. Mode and manner of the occurrence is also a relevant factor in the present case which needs some discussion. It is a prevalent custom in the area that on the occasions of marriages, normally male and female relatives including the children of the bridegroom go to the house of bride as bridal procession (بارات) for bringing her to the house of bridegroom alongwith the dowry, if any. But it is strange enough that no person from the house of the bridegroom had participated the *baraat* and only the relatives of the bride were accompanying her. The injured witnesses APW-1 and APW-2 have also admitted in their cross-examination that dowry of the bride in shape of 10/12 suitcases containing dresses and other articles arranged for her had been placed in trunk of the same vehicle and the suitcases were also hit by bullets but police have not taken into possession any of the dowry articles which were being carried with bride to the house of complainant. Abdul Rashid (APW-2) has also narrated in his cross-examination that after the occurrence he and

PW Naimat Ullah had de-boarded from the vehicle and had waited there for one hour till the arrival of Shahab-ud-Din (PW-3). During this period the said injured witness had only made a phone call through his cell phone to his relative in *Sakhakot* but did not inform the local police or his other local relatives or his family members to help them in shifting the injured and deceased to hospital. A person capable of making a phone call in injured condition accompanied by an unhurt person namely Naimt Ullah (PW-6) is not expected to de-board from the vehicle leaving five injured females and a child, their nears and dears, in pathetic condition inside the car without making any effort for their help and were waiting for one hour of the arrival of PW Shahab-ud-Din, whereas the place of their destination is just 500/600 yards away. Thus, keeping in view the manner of taking the bride to the house of the bridegroom that too early in the morning coupled with the unusual conduct of the injured witnesses Abdul Rashid (APW-2) and Naimat Ullah (PW-6), it appears that the occurrence has not taken place in the mode and manner as mentioned in the F.I.R. The august Supreme Court of Pakistan while deciding the case of "Mst. Shamim

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and 2 others Vs. The State and another” (2003 SCMR 1466) had disbelieved the prosecution version in view of the given surrounding circumstances by observing that:

“The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction”.

19. Moving on to the recovery of crime weapon. Admittedly, the present appellant was arrested by Pak Army and he was handed over to local police alongwith Kalashnikov No. 1975-kx-7230 with 68 rounds of 7.62 bore. In this regard recovery memo Ex.PW-2/1 was prepared which was attested by constable Abdul Qayum No. 1448 (PW-2) and Constable Naveed Alam (not produced) but the Army personnel who had handed over the weapon to police was neither shown as marginal witness of the recovery memo nor he was produced before the trial Court to substantiate the said recovery. Although constable Abdul Qayum (PW-2) has stated in his examination-in-chief that the

weapon was recovered from possession of the present appellant/convict but he has categorically admitted in his cross-examination that the weapon was not recovered from possession of the accused rather it was handed over by army personnel to police. The police have also failed to associate any independent witness with the said recovery. In such circumstances, the positive F.S.L report (Ex.PW-1/5) to the extent of 11 out of 22 crime empties recovered from the spot and the alleged crime weapon is of no help to prosecution most particularly when the prosecution has failed to establish the guilt of the present appellant/convict through ocular account and other circumstantial evidence.

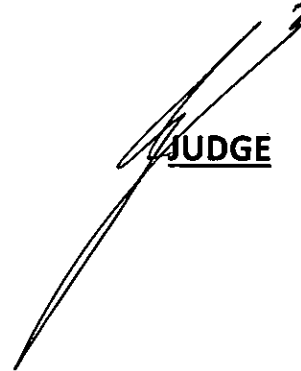
20. In view of what has been discussed above, the prosecution has failed to prove its case against the present appellant/convict beyond shadow of doubt, hence, his conviction and sentence recorded by learned trial Court in the impugned judgment are not sustainable. Therefore, this appeal is allowed, the impugned judgment dated 02.11.2017 of the learned trial Court is set aside and appellant/convict Kashar Khan son of Purdil Khan is acquitted of the charge leveled against him. Murder

Reference No.02/2017 is answered in negative. The appellant be released forthwith from jail if not required in any other case.

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

Announced.
Dt: 17.02.2020


JUDGE


JUDGE

office 6/3/2020