JUDGMENT SHEET

PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)

Cr.A No. 182-M/2020
With Cr.M No. 7-M/2022.

Aleem Ullah son of Said Rahman.....(Appellant)

v/s

Khan Pervez & others.....(Respondents)

Present: *Mr. Faraz Khan, AHC, for the appellant/complainant.*

Muhammad Riaz (Muhammadzai), AHC, for the accused/respondent No. 1, Khan Pervez.

Khwaja Salah-ud-Din, Addl: A.G, for the State.

Date of hearing: *27.02.2024*

SHAHID KHAN, J.- Impugned herein is the acquittal of Pervez Khan, respondent hereinafter, whereof, the complainant, now the appellant has called in question his acquittal in case of FIR No. 202 dated 31.08.2018, U/Ss 302/34 PPC, R/W Section 15-KPK Arms Act, 2013 P.S, *Barawal*, District Dir Upper, recorded by the Court of learned Additional Sessions Judge 1st /Izafi Zila Qazi/Judge Model Criminal Trial Court, Dir Upper, through the impugned order/judgment dated 02.07.2020.

2. It would not be out of place to clarify here that while hearing initial arguments qua admitting the subject criminal appeal for full-hearing or otherwise, the appeal in hand has been admitted to full hearing by this Court vide its order dated 28.09.2022 to the extent of accused/respondent No.1, Khan Pervez, whereas, it stands dismissed in *limine* to the extent of accused/respondent No. 2, Javaid Khan, therefore, the findings of this Court would be restricted to the acquittal of accused/respondent No. 1, Khan Pervez only.

3. Reportedly, the police party under the command & supervision of SHO, PS, *Barawal* rushed to the venue of crime i.e. the house of accused, Javaid, pursuant to receipt of information about an offence of murder of deceased, Irfan Ullah, whose dead body has been lying in the *Baitak* of accused, Javaid. Nobody was present with the dead body, therefore, it was shifted to *Barawal* hospital for further proceedings. At the hospital, the appellant/complainant, Aleem Ullah, father of

the deceased, Irfan Ullah, reported the subject event to local police in terms that on the fateful day his son, Irfan Ullah after offering of *Juma* prayers at his native mosque had gone to *Bazar Banda*. At *Asar Vela*, he received information about lying of the dead body of his son at Barawal hospital. The appellant/complainant after due satisfaction charged the accused/ respondents, Javaid & Pervez for committing the murder of his son through firearms. At the relevant time no motive was advanced by the complainant with further information that the occurrence might have been witnessed by anyone. The event was reduced into in writing in the shape *'Muasila'* (Ex. PW-2/1) followed by the *ibid* FIR (Ex. PW-2/6) registered against the accused/respondents at P.S concerned.

4. Upon arrest of the accused/ respondents followed by completion of the investigation, *challan* was drawn and was sent-up for trial to the learned trial Court. Accused/respondents were confronted with the statement of allegations through a formal

charge-sheet to which they pleaded not guilty and claimed trial.

5. To substantiate the guilt of the accused/respondents, the prosecution furnished its account consist of the statements of twelve (12) witnesses. The accused were confronted to the evidence so furnished through statements of accused within the meaning of section 342 Cr.P.C.

6. On conclusion of the trial, in view of the evidence so recorded and the assistance so rendered by the learned counsel for the accused/respondents and the learned counsel for the complainant/learned State counsel, the learned trial Court arrived at the conclusion that in view of the evidence so recorded and assistance so provided, allegations against the accused/respondents are tainted with the doubts, as such, by extending the benefit of doubt, the acquittal of the respondents/accused was recorded accordingly.

7. It obliged the appellant/ complainant to approach this Court through the subject criminal appeal.

8. Learned counsel for the parties as well as the learned Addl: A.G for the State have been heard at a length and the record gone through with their valuable assistance.

9. At first & foremost instance, it shall be kept in mind that the subject occurrence of murder of the deceased, Irfan Ullah, the son of the complainant is an unseen & un-witnessed event, on all counts, with the only exception of testimony of Ali Ahmad, PW-8, who had allegedly lastly seen the deceased and the accused/respondent, Khan Pervez in & around the place of occurrence, therefore, his account/testimony could at the most be termed as a last-seen evidence.

10. On her own turn, the appellant/complainant appeared in the witness-box as PW-7. In his examination-in-chief, he almost reiterated the same facts as advanced by him in his initial report in the shape of

'Murasila' followed by the *ibid* FIR qua implication of both the accused for committing the murder of his deceased son, however, on one hand, he failed to disclosed the source of his information or satisfaction in terms that why the accused were all-out to kill his son, especially, when admittedly there was no motive in field and on the other hand both the assailants have been assigned a general role without specifying the role of each & every accused qua committing the murder of his deceased son. Neither the appellant/ complainant himself is an eyewitness of the occurrence nor he has put-forward any ocular-account of the occurrence except mere mentioning of the general term that the occurrence might have been witnessed by anyone, therefore, on this score, the identity of the real culprit amongst the set of accused is shrouded in mystery. Likewise, the testimony of Ali Ahmad, PW-8 is of no help to the prosecution, as his name has neither been mentioned by the complainant in his initial report in the shape of *'Murasila'* followed by

the *ibid* FIR nor the Court statement of the complainant bearing his name. His testimony could at the most be considered as last-seen evidence, however, without any independent corroboration, the same has no evidentiary value qua guilt of the accused/respondent, Khan Pervez. In view of the above, the learned trial Court has rightly extended the benefit of doubt to the accused/respondent in the shape of his acquittal.

11. There is no denial at all that the subject event is an unseen occurrence in its kind & nature as during the investigation direct evidence regarding the commission of offence could not surface, therefore, the entire prosecution's case hinges upon the sole fact that the dead body of the deceased son of the complainant has been recovered from the *Baitak* of one of the accused, Javaid, therefore, the burden of proof lying on his shoulders to prove said aspect of the case. No doubt, Hon'ble Apex Court has held in its judgment rendered in case titled ***"Saeed Ahmad***

v/s The State" reported as *2015 SCMR 710* that with regard to vulnerable members of society, such as children, women and the infirm, who were living with the accused or were last seen in his company, the accused ought to offer some explanation of what happened to them. If instead he remains silent or offers a false explanation he casts a shadow upon himself. But it has also been noted therein that it did not mean that the burden of proof had shifted on to the accused as it is for the prosecution to prove its case. Ratio of the judgment of *Saeed Ahmad Supra* cannot however be applied to the case in hand for the reason that prosecution have not been able to discharge its onus. Initial burden of proof always lies on the prosecution, which though may get shifted to accused under Article 122 of the Qanun-e-Shahadat Order 1984, under circumstances justifying such shifting of burden, but in the case in hand, it is noticeable that prosecution has not been able, even to discharge its initial burden of proof. Hon'ble Supreme Court of Pakistan in the case of *"Nasrullah alias Nasro v/s The State"* reported

as ***2017 SCMR 724*** had observed, in this respect;-

" It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the case, particularly when the medical evidence contradicted the same. Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder."

A somewhat similar findings have also been recorded by Hon'ble Apex Court in its judgment in the case of ***"Nazeer Ahmad v/s The State"*** reported as ***2016 SCMR 1628***, which are reproduced hereunder for ready reference;-

"It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the

sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Abdul Majeed v. The State (2011 SCMR 941) and Saeed Ahmed v. The State (2015 SCMR 710)."

Likewise, in the case of ***"Muhammad Jamsheed and another v/s The State and others"*** reported as ***2016 SCMR 1019***, Hon'ble Apex Court had observed that suspicion howsoever grave or strong could never be a proper substitute for proof, beyond reasonable doubt, required in a criminal case.

12. The prosecution has not been able to bring on record any ocular evidence which could connect the accused/respondent with the murder of the deceased nor there is any sort of circumstantial evidence against the accused in the field except the recovery of weapon of offence i.e. a 30 bore pistol. The said recovery of weapon of offence was allegedly made on the joint pointation of both the accused from the landed property situated near the place of occurrence i.e. *Baitak* of the accused Javaid, therefore, in view of the joint recovery coupled with assignment of a general role to both the accused, the evidentiary value of the aforesaid

recovery is standing in vacuum. Even otherwise, when substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution's case. Hon'ble Supreme Court of Pakistan while giving its judgment in case titled ***"Muhammad Afzal alias Abdullah and others vs. The State and others"*** reported as ***2009 SCMR 639*** has also expressed almost a similar view in para-12 of its judgment, which is reproduced hereunder for ready reference;

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be."

Hon'ble Supreme Court of Pakistan in its judgment rendered in case titled ***"Imran Ashraf & 7 others v/s The State"*** reported as ***2001 SCMR 424***, has also observed;

"**Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and**

recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."

In support of same ratio, further reliance may also be placed on the judgment reported as ***2007 SCMR 1427***.

13. As far as the medical evidence is concerned, needless to highlight that the medical evidence may confirm the direct or ocular account, if any, with regard to the set of injuries, kind of weapon allegedly used in the commission of offence and at least the nature of injuries, however, in the subject case when the occurrence is undoubtedly unseen & un-witnessed then evidentiary value of medical evidence qua the guilt of the accused/respondent as a sole piece of corroboratory evidence cannot be given much weight. Reliance in this regard is placed on the case titled ***"Abdul Rashid v/s The State"*** reported as ***2019 P Cr. LJ 1456***, whereby it has been held that;-

"The medical evidence in this case has been furnished by PW-4 Dr. Nasreen Ahmad Tareen, Medical Officer, who has confirmed the unnatural death of deceased. However, the fact remain that medical evidence is only used for confirmation of ocular evidence regarding seat of injury, time of occurrence and weapon of offence used, etc. but medical evidence itself does not constitute any

corroboration qua the identity of accused person to prove their culpability. Reliance in this regard can be placed on the case of *"Muhammad Sharif & another v/s The State" (1997 SCMR 866).*

14. The prosecution has also not been able to prove the motive part of the subject offence in terms that why the accused were so desperate & all-out to kill the deceased son of the complainant and it seems that real facts have been suppressed by the complainant for the reasons best known to him. In case titled ***"Khalid Mehmood & another v/s The State"*** reported as ***2021 SCMR 810*** it was held by the Apex Court that;-

A specific motive was set out by the prosecution in the FIR inasmuch as hot words were being exchanged between Khalid Party and Sarwar Party in front of house of Javaid. There is no detail whatsoever why Khalid Party and Sarwar Party were quarrelling with each other; why both the parties at once started firing at the deceased; why and in which capacity deceased Muhammad Aslam intervened to pacify both the parties. The answers to these questions are not available on record. In these circumstances, the learned High Court has rightly not believed the motive set out by the prosecution in Para 12 of the impugned judgment.

Similarly, in case titled ***"Pathan v/s The State"*** reported ***2015 SCMR 315***, the Apex Court about relevancy of motive has held as under;-

Motive in legal parlance was ordinarily not considered as a principle of primary evidence in a

murder case, however, in rare cases, motive did play a very vital and decisive role for committing murder.

15. In view of the above, when neither any direct nor any circumstantial evidence is available on the face of the record, as such, the case of prosecution is full doubt all-around; therefore, the accused/respondent has rightly been extended the benefit of the doubt through the impugned order/judgment of acquittal, which is neither perverse nor arbitrary nor whimsical.

16. It is well settled, it is not essential at all to place reliance on multiple doubts coupled with multiple grounds to extend the benefit of doubt to an accused, even a single worth reliable doubt is sufficient enough to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case of ***"Tariq Pervaiz v/s The State"*** reported as

1995 SCMR 1345 , the Apex Court has held as under;-

That the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

Further reliance is placed on the case law cited as *"Daniel boyd (Muslim name Saifullah) vs the State"* reported as *1992 SCMR 196*", where the following observations were recorded by the Apex Court;-

Nobody is to be punished unless proved guilty on the basis of reliable or true evidence. Benefit of every reasonable doubt is to go to the accused.

This view also reflects in the judgment of the apex Court titled as *"Ghulam Qadir and 2 others vs the State"* reported as *2008 SCMR 1221*, wherein it was observed that:-

"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creates reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge, makes the whole case doubtful. "

In support of the same rational, further reliance is placed on the judgment of the august Supreme Court of Pakistan cited as ***"Muhammad Zaman vs. the State"*** ***(2014 SCMR 749)***, wherein it was held that;-

Even a single doubt if found reasonable, was enough to warrant acquittal of the accused.

17. For the afore-stated reasons, the subject criminal appeal being bereft of any merits is hereby dismissed.

Date of announcement
Dt. 27.02.2024

JUDGE

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Office
28/03/2024
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