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**Judgment Sheet**  
**PESHAWAR HIGH COURT, BANNU BENCH**  
(Judicial Department)

**Cr.A No.249-B/2022**

**Fazal Nawaz alias Muhammad Shafi**

*Versus*

**The State etc.**

**JUDGMENT**

For appellant: **Mr. Inamullah Khan Mandra Khel,**  
**Advocate.**

For respondent: **Muhammad Rashid Khan Dhirma Khel,**  
**Advocate.**

For State: **Hafiz Muhammad Hanif, A.A.G.**

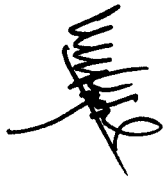
Date of hearing: **15.11.2023**

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**Dr. Khurshid Iqbal, J.-**

1. By this single opinion, we intend to dispose of both the instant criminal appeal and Criminal Appeal #11-B/2023. Both of them arise from a judgment, dated 06.12.2022, passed by the learned Additional Sessions Judge-V, Bannu. Through the judgment, rendered in case FIR # 338, dated 12.06.2019, registered at Basia Khel Police Station in District Bannu, the appellant Fazal Nawaz alias Muhammad Shafi was convicted under section 302(b) PPC and sentenced to life imprisonment. He was made liable to pay Rs.5,00,000/- (five hundred thousand rupees) as compensation to the legal heirs of the deceased Muhammad Haleem, as per section 544-A Cr.P.C. In default of this payment, he was ordered to suffer 01 year simple imprisonment. The benefit under section 382-B Cr.P.C was extended to him, while he was acquitted of the charge under section 324 PPC, pertaining to an ineffective murderous assault at the complainant's life.

2. Briefly, on 12.06.2019, at 08:15 hours, the complainant, Hayat Ullah Khan, while present at the crime scene with the dead body of his deceased brother Muhammad Haleem, reported that on the fateful morning, he and his deceased brother were en route to a shop in Torka Bazar, traveling by foot from their residence. Muhammad Haleem was going a few paces ahead while the complainant was following him. On reaching the fields near Maizer Chowk, at 08:00 hours, they encountered the appellant Muhammad Shafi, a fellow villager, accompanied by two unidentified assailants, duly armed with pistols. Upon spotting the complainant and his brother, they started firing at them in order to commit their qatl-i-amd. As a result, Haleem Khan sustained injuries from the shots fired by the appellant Muhammad Shafi, while the complainant luckily escaped unhurt. Post-incident, the assailants fled the scene. The complainant being empty handed could do nothing. On being attended by the complainant, Haleem Khan succumbed to his injuries at the spot. The disclosed motive behind the incident points to a dispute over a pathway wall.



3. After completion of the investigation, complete challan under Section 173 Cr.P.C was prepared and submitted against the appellant for proceedings under section 512 Cr.P.C due to his abscondence. Subsequently, after his arrest, supplementary challan was submitted. The appellant, being in custody, was produced before the court through Zamima Bay. Copies of statements and documents, as per the provisions of section 265-C Cr.P.C, were provided to him. Subsequently, charge was framed, to which he pleaded not guilty, opting for trial. The prosecution produced 11 witnesses to substantiate its case. During the appellant's examination under Section 342 Cr.P.C, he denied the charges and refuted the prosecution's evidence. However, he chose not to avail the opportunity to present evidence in his defence or to provide a statement on oath, as mandated by section 340(2) Cr.P.C. After hearing arguments, the trial court adjudged the appellant guilty, leading to his conviction and sentencing under Section 302(b) PPC to life imprisonment as aforesaid.

However, he was acquitted of the charge under Section 324 PPC. Dissatisfied with his conviction, the appellant has filed this appeal, while the complainant, aggrieved by the appellant's acquittal, has filed the connected appeal.

4. Arguments heard. Record perused.

5. The foundation of the prosecution case relies on multiple pillars. Those include the ocular account, circumstantial evidence, medical evidence, abscondence, and the alleged motive. Primarily, the ocular account, representing the firsthand testimony, takes precedence. This pivotal aspect centers on the solitary statement provided by the complainant (PW-10), who, as an eyewitness, plays a fundamental role in elucidating the sequence of events leading to the occurrence and the proceedings that followed. In scrutinizing the credibility and coherence of the complainant's account, this court has meticulously examined the intricate interplay of evidence, endeavouring to unveil the truthfulness of the events as narrated and presented.

6. The deposition of the complainant, as mentioned in the FIR, is straightforward. According to him, he and the deceased were en route to their shop. Upon reaching the spot, the appellant, accompanied by two unidentified assailants, armed with pistols, started gunfire at them with the intent to commit their qatl-i-amd. Consequently, the deceased was hit by the appellant's gunfire, while the complainant fortunately escaped unhurt. Following the incident, the accused immediately fled the scene. When the complainant attended to his brother, he succumbed to his injuries on the spot.

7. The FIR does not mention that following the assailants' gunfire, the complainant took shelter in a nearby house. However, when asked, he replied to have taken shelter in a house situated 28 to 30 feet away from the spot. Under cross-examination, the complainant asserted that he had pointed out this house to the I.O. during the spot inspection. While reviewing the site plan (Ex.PB),

nothing was found regarding the existence of the mentioned house near the spot, nor did it indicate that the complainant had taken shelter anywhere. Furthermore, both the complainant and the I.O. provided conflicting statements, with the latter asserting that there was no place of shelter near the spot. PW-03, Qamar Zaman Khan, the report's scribe, also affirmed the absence of any shelter near the spot. The I.O. denied the complainant disclosing any shelter during the spot inspection. In light of these circumstances, the eyewitness account is not only inconsistent with the details in the FIR, but also contradicts the information presented in the site plan and the statements of the scribe and the I.O. This aspect of the case raises questions about the credibility of the complainant's account. The lack of mention of seeking shelter in the FIR, coupled with discrepancies between the complainant's version and the site plan, creates a miracle regarding the truthfulness of the events so described.

8. The prosecution asserts that all three assailants simultaneously discharged firearms at the complainant from a short proximity of 40 feet, with the only intent to commit his murder. However, he remained unhurt given that he took shelter in a house after covering a distance of about 28 to 30 feet. This is particularly noteworthy considering the complainant was unarmed, and the site plan does not indicate any obstruction between him and the assailants. The record indicates open fields, where the likelihood of escaping unhurt under such circumstances is nothing short of a miracle which raises doubt qua the prosecution's narrative.

9. According to the site plan Ex.PB, there existed bushes between the complainant and the assailants. The I.O. admitted that the assailants could easily conceal themselves in the bushes, rendering them invisible from point #2, where the complainant asserted his presence. This aspect casts doubt qua the complainant's ability to exactly identify the appellant as the only

assailant responsible for firing at the deceased, given the potential impediment posed by the bushes.

10. The complainant stated that the I.O. arrived at the spot 30 minutes after the occurrence, a claim inconsistent with the established timeline of the events. The occurrence took place at 08:00 hours, the report was lodged at 08:15 hours, and the FIR's registered at 09:05 hours. The I.O. said that he received the FIR copy within 30 minutes of its registration and reached to the spot within 15 to 20 minutes, suggesting his arrival at around 09:50 hours. This discrepancy raises doubts regarding the complainant's presence at the scene at the relevant time, as the disclosed timings do not align with the documented sequence of the events. Additionally, the complainant promptly reported the occurrence to the local police within 15 minutes. The inquest report (ExPW-3/3) was prepared at the scene, but in the identification column, Hafeez Ullah and Rafi Ullah identified the deceased, not the complainant. While it's not mandatory for the complainant to be the identifier of the dead body in every case, the circumstances in this case are peculiar. As noted above, the presence of the complainant is otherwise doubtful. This omission when considered conjointly would raise further concerns about his presence at the scene. PW-09 Hafeez Ullah, the identifier, is the complainant's brother-in-law from a different village, located 18 to 20 kilometers away from the spot, reached the spot and identified the dead body of the deceased before the scribe. He claimed his presence at the complainant's house on the day of the incident, but didn't disclose the purpose of his visit. He also never informed the I.O. about visiting the complainant's house that day. The witness failed to explain convincingly why he was at the complainant's house when, usually, male relatives avoid sitting at home when other males are out. Considering the local customs and traditions, along with the peculiar facts and circumstances as aforesaid, it can be inferred that the witness arrived from his village upon learning about the death of the deceased, and the complainant may not have been present at the scene at the



relevant time, and for this reason, the dead body was not identified by the complainant. The scribe Qamar Zaman Khan (PW-03), openly acknowledged that he first inspected the deceased's body and subsequently drafted the complainant's report at the spot. He also admitted to have noticed the crime empties at the spot, but explained that he left them for the I.O. to collect. This admission raises concerns, as it suggests that the report was lodged after the preliminary investigation, a procedural misstep that has consistently been deemed detrimental to the prosecution's case. Legal precedents, such as Muhammad Zahir Shah v. Amin-ur-Rehman (2023 YLR 2023 Peshawar), Sajid v. State (2023 PCrLJ 19 Peshawar), Muhammad Sheeraz v. State (2021 PCrLJN 26 Peshawar), and Naeem Gulzar v. State (2021 PCrLJ 1586 Lahore), underscore the potential adverse impact of such a lapse in the prosecution's case.

11. Constable Muhammad Shabir, examined as PW-05, testified that he escorted the dead body of the deceased to the hospital in a private vehicle, accompanied by 2/3 private persons. Notably, the witness did not speak about the presence of the complainant at the spot. If the complainant had indeed been present with the deceased, it would be expected for him to accompany the dead body of his real brother to the hospital. However, he claimed to have stayed at the spot while the deceased was taken to the hospital, which appears unnatural given the closest relationship between them. This is yet another circumstance which raises doubt qua the presence of the complainant.

12. The circumstances surrounding the instant case unequivocally suggest that the complainant was not present at the time of the occurrence and, thus, he failed to establish his presence at the spot through convincing evidence. Hence, when the complainant, as the solitary eyewitness, has failed to establish his presence at the time of the occurrence, and the collected evidence also lacks the requisite standard to reasonably link the

appellant with the alleged offence, then, the benefit of the doubt would lean in his favour. This perspective is supported by a notable judgment from the Supreme Court in the case of Khalid Mehmood and another Vs The State and another (2021 SCMR 810), wherein it was observed:

All the circumstances highlighted above lead us to a definite conclusion that the presence of eye-witnesses at the place of occurrence at the relevant time is not above board and prosecution has failed to prove its case against the petitioner beyond reasonable doubt. Therefore, the instant jail petition is converted into an appeal and the same is hereby allowed. The conviction and sentence of appellant Khalid Mehmood is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case.

13. A similar view was also expressed in Najaf Ali Shah Vs the State (2021 SCMR 736), which reads:

The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused.



14. Moreover, the scribe arrived at the spot within 15 minutes of the occurrence. He stated to have found the deceased with the head and feet tied with cloth. However, the absence of nearby houses and the lack of blood on the complainant's clothes or hands raise significant questions as to who could have executed such actions in such a short time. These questions, however, remain unanswered, which cast doubt on the mode and manner of the occurrence. Legal precedents, as exemplified in cases like Jawad v. The State and another (2020 YLR 1462) and Jalat Khan alias Jalo v. The State (2020 PCr.LJ 503) establish that when serious inconsistencies and contradictions exist in the prosecution's evidence, and it is found that the occurrence did not unfold in the manner as described, the benefit should be resolved

in favour of the accused. The High Court of Balochistan unequivocally affirmed and reiterated the impact of such position in the case of Rafaat Shah Vs The State (2022 PCr.LJ Note 39 Balochistan). It reads:

The mode and manner of the occurrence itself by the prosecution is not appealable to the prudent mind, therefore, it was highly unsafe to rely on the statement of both these witnesses to maintain conviction and sentence of the accused on a capital charge.

15. Examining the medical evidence, it is revealed that the autopsy on the dead body of the deceased was conducted by PW-07 Dr. Hamid Farman, M.O. According to the ocular account and the site plan, the deceased was allegedly shot from the left side. However, discrepancies arise as the post-mortem report indicates that the most of the injuries were received by the deceased from the right side, suggesting a contradiction in the direction of the gunshots. The complainant asserts that he attended to his brother immediately after the incident, but he succumbed to his injuries on the spot. It implies that according to the ocular account, the deceased died instantaneously. This conflicts with the post-mortem report, which states a probable duration of 30 minutes to 01 hour between the injuries and the deceased's death. In the nutshell, the medical evidence contradicts both the ocular account and the site plan, raising questions as to the truthfulness of the reported events. The ocular account is, therefore, disbelieved in line with the law laid down by this Court in Mehboob alias Booba v. The State and others (2014 YLR 989 Peshawar), wherein it was held:

It is settled that in the event of variation in ocular and medical evidence, ocular evidence has to be believed, but when the ocular account itself is inconsistent, contradictory and not confidence inspiring, then no reliance could be placed there-upon.

16. Turning to the circumstantial evidence, it transpires that during the spot inspection, the I.O. collected 05 crime empties of 30 bore and bloodstained earth from the spot, subsequently sent to



the FSL for analysis. The FSL reports indicate that the crime empties were discharged from different 30 bore weapons, and the bloodstained earth was found as of human, belonging to the same blood group. The circumstantial evidence strongly supports the prosecution's case, although it alone is not sufficient to sustain a conviction for two primary reasons. Firstly, the evidentiary value of circumstantial evidence is considered in favour of the prosecution when the ocular account is reliable and inspires confidence, which is not the case before us. The lack of confidence in the ocular account diminishes the strength of the circumstantial evidence. Secondly, while the circumstantial evidence establishes a connection to the crime, it fails to explicitly identify the accused charged as the actual perpetrator. Consequently, the circumstantial evidence in the present case does not contribute significantly to the proof of the charge against the appellant.

17. Regarding the alleged motive, the complainant asserted a dispute over a pathway wall between the parties. The I.O. acknowledged the complainant's failure to provide any evidence supporting the alleged motive. Additionally, the I.O. conceded to have not collected any evidence to substantiate the alleged motive. Consequently, the prosecution failed in establishing the motive, and in such circumstances, the burden falls on the prosecution. While the absence of a motive does not always decisively undermine the prosecution's case, it is a perfect legal obligation of the prosecution to prove what it alleged as motive. In the instant case, the motive served as the sole link between the parties, and the failure to establish it significantly undermines the foundation of the prosecution's case. We affirm that the prosecution did not succeed in establishing the motive, and it is the prosecution that must bear the consequences of this failure. In this context, guidance can be sought from the Supreme Court's judgment in Muhammad Akram alias Akrami Vs. The State (2019 SCMR 610), where it observed:

*Muhammad Akram*

We are of the view that the motive set out by the prosecution remained far from being proved. It is well settled that when prosecution alleges something against an accused person and then fails to prove the same, the premium of such failure must go to an accused person. In this case as well, prosecution's failure to prove the motive set out by it certainly benefits the appellant.

18. Insofar as the abscondence is concerned, it revealed that the appellant remained absconder for more than a year without providing any explanation. However, it is crucial to note that abscondence alone does not serve as a conclusive proof of guilt. While it can be considered as a corroborative piece of evidence, its weight is contingent on the prior establishment of an accused person's guilt through compelling evidence. As articulated in the case of Rafaqat Ullah alias Paka v. Umar Fayaz (deceased) through brother Muhammad Riaz (2020 PCr.LJ 1361 Peshawar), when direct evidence falls short, abscondence as a piece of evidence becomes inconsequential. The present case is no exception to this principle.

19. On reappraisal of the evidence presented, it is abundantly clear that the prosecution's case is riddled with uncertainties, doubts, and inconsistencies. No substantive evidence exists to firmly link the appellant to the commission of the offence beyond any reasonable doubt. A fundamental principle of criminal jurisprudence dictates that any doubt that raises questions in the judicial mind must be resolved in favour of the accused, and the burden of proof invariably rests on the prosecution to establish its case beyond a reasonable doubt. Furthermore, numerous circumstances are not required to cast doubt upon the guilt of an accused; even a solitary factor that creates a reasonable doubt in the mind of a prudent person is sufficient to benefit the accused. Noteworthy legal precedents supporting this perspective include, but not limited to, Ayub Masih v. The State (PLD 2002 SC 1048) and Tariq Pervaiz v. The State (1995 SCMR 1345).

20. For these reasons, we allow this appeal, acquit the appellant by setting aside the impugned judgment, dated

*Muhammad*


06.12.2022, and order his release, with the caveat that his detention is not otherwise required.


21. As the instant criminal appeal ended in acquittal, therefore, the connected Criminal Appeal #11-B/2023 becomes infructuous. It is, therefore, dismissed.

22. The foregoing are the reasons for our short order of even date.

Announced  
Dt: 15.11.2023  
(Ghafoor Zaman)

  
J U D G E

  
J U D G E

Office  
27/11  
SCANNED  
18 NOV 2023  
  
Khalid Khan

(D.B)  
Hon'ble Mr. Justice Fazal Subhan  
Hon'ble Mr. Justice Dr. Khurshid Iqbal