JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. NO.277-P/2012

Date of hearing: ***08.04.2015***

Appellant (s) : Muhammad Noor by Mr. Jalal ud Din Akbar Azam Gara, Advocate.

Respondent (s) : Riaz Shah by Mr. Muhammad Amin Khattak Lachi, Advocate and the State by Syed Sikandar Hayat Shah, AAG.

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-V, Kohat, appellant Muhammad Noor having been found guilty of murder and attempt to commit murder, vide judgment dated 17.05.2012, was convicted and sentenced under section 302 (b) PPC to undergo life imprisonment and to pay Rs.1,00,000/-, as compensation to LRs of deceased, in terms of S.544-A Cr.P.C. or in default thereof to undergo 01 year S.I. more and under section 324 PPC to suffer 10 years R.I. Both the sentences have been directed to run concurrently and benefit of S.382-B Cr.P.C. has been extended to him.

2. Appellant-convict has questioned his conviction and sentences through the instant appeal, while Riaz Shah petitioner/complainant by way of connected Cr.R. No.81-P/2012, is seeking enhancement of sentence of the convict from life imprisonment to normal penalty of death. As both are stemming out from one and the same judgment of the learned Trial Court dated 17.05.2012, therefore, are to be disposed of through this common judgment.

3. The epitome of the prosecution case is that on 27.02.205 at 2115 hours, complainant Riaz Shah (PW.6), in company of dead body of Zahir Shah, reported to local police in emergency of LMH, Kohat that on the fateful day, he alongwith the deceased was on the way to the mosque of Mohallah Nandar Khel to offer *"Maghrib prayer"* and when reached near Government Girls Middle School Dhoda Sharif, Muhammad Noor (appellant-convict herein) alongwith Raza Khan and Farman absconding co-accused, duly armed with Kalashnikovs emerged there; that on command of accused Raza Khan, appellant and absconding co-accused Farman, opened fire at them with intention to do them away, resultantly, deceased got

hit and died on the spot while he luckily remained unscathed. An oral altercation little before the incident has been alleged as cause behind the incident.

4. Shaukat Salim SHO (PW.7) incorporated the report of complainant into murasila Exh.PA/1 and sent the same to Police Station, on the basis of which FIR No.159 dated 27.02.2005 under sections 302/324/109/34 PPC, was registered in Police Station Saddar, Kohat. He prepared injury sheet and inquest report Exh.PW.7/1 and Exh.PW.7/2 of the deceased and referred his dead body to the mortuary for post-mortem examination.

5. Dr. Ghulam Qadir (PW.4) conducted autopsy on the dead body of the deceased on 27.02.2005 at 08.30 p.m. and found the following injuries on his person:-

1. Firearm entry wound size ¼ x ¼ inch on medial of right elbow joint.
2. Firearm entry wound at the tip of right shoulder size ¼ x ¼ inch.
3. Firearm entry wound on the back of the right thigh below the gluteal region.
4. Firearm entry on the flexer surface of left forearm at the mid level size ¼ x ¼ inch.
5. Firearm entry wound on the edial aspect of right arm size ¼ x ¼ inch.

6. Firearm entry wound on right lower chest anterior aspect 2 inches below the mammary gland size ¼ x ¼ inch.
7. One large lacerated wound measuring 3 x 3 inches on the back of right calf just be4low the poputial fossa.
8. Firearm exist wound on the right condyl of right elbow joint size 1 x 1 inch.
9. Firearm exit wound on the left lower chest lateral aspect of chest 1 x 1 inch.
10. Firearm exit wound on anterior surface of left thigh 2 inches below the left inguinal region.
11. Firearm exit wound on the exhusor surface of left forearm size ½ x ½ inch.
12. Firearm exit wound on the later side of right upper arm.
13. Firearm exit wound on the lower lateral side of right chest.

Opinion: According to opinion of the Medical Officer, death of the deceased occurred due to injuries to his vital organs like heart, pleurae and liver as a result of firearm injuries. Probable time between death and injury has been observed by him as "Instantaneous" while between death and postmortem as "0-3 hours".

6. Abdul Latif SI (PW.10), proceeded to the spot and during spot inspection, secured bloodstained earth from the place of deceased as well as 09 empties of 7.62 bore from the

places of the accused. He also took into possession the last worn bloodstained garments of the deceased Vide recovery memo Exh.PC/1, recorded statements of the PWs under section 161 Cr.P.C. and sent the bloodstained articles to the FSL. On next day of the incident, Muhammad Hussain Khan SI (PW.11) prepared site plan Exh.PW.11/1 on the pointation of complainant, placed on file postmortem report of the deceased, recorded statements of the witnesses, initiated proceedings under sections 204 and 87 Cr.P.C., placed on file FSL report Exh.PZ qua the bloodstained articles and on completion of investigation handed over case file to SHO Jehangir Khan, who submitted challan in terms of S.512 Cr.P.C. against the accused.

7. After arrest of the appellant by Shah Duran SHO vide arrest card Exh.PW.1/1 and completion of necessary investigation, challan was submitted against him before the learned Trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed Trial. To bring home the guilt of appellant, prosecution examined as many as eleven witnesses. After closure of the prosecution evidence, statement

of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, neither wished to be examined on oath under section 340 (2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above.

8. Learned counsel for the appellant-convict argued that appellant is innocent and has been implicated falsely by complainant on mere suspicions; that the occurrence is unseen while complainant being nephew of the deceased is procured witness, who miserably failed to establish his presence on the spot at the time of incident through some physical circumstances that's why the incident has been reported with three hours delay, after due deliberation consultation and preliminary investigation; that medical evidence totally negates the ocular account; that charge has been exaggerated as according to medical evidence, the incident seems to be the doing of single person; that appellant has not confessed his guilt before any competent court of law nor anything

incriminating to connect him with the offence has been recovered either from his direct or indirect possession; that the alleged crime empties have not been sent to the FSL for analysis; that in absence of direct confidence inspiring evidence**,** mere recovery of crime empties, blood from the spot, bloodstained clothes of the deceased coupled with positive Serologist report, being corroborative pieces of evidence would not be sufficient to prove the guilt of appellant; that similarly, conviction cannot be sustained on abscondance of accused alone which is only a suspicious circumstance having no value by itself in absence of direct evidence; that prosecution evidence is suffering from material contradictions and discrepancies creating doubts in the mode and manner of the incident, benefit of which should have been extended to the appellant not as a matter of grace but as matter of right by the learned Trial Court, therefore, the impugned judgment being based on surmises and conjectures is liable to be reversed.

9. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellant has been

charged directly alongwith his absconding co-accused for committing the murder of the deceased; that ocular account furnished by complainant being straightforward, confidence inspiring and supported by medical evidence and recoveries from the spot, has rightly been believed by the learned Trial Court; that defence failed to shatter the testimony of complainant; that in presence of direct evidence of the complainant, mere non-sending of empties to the FSL, would not damage the prosecution case; that soon after the incident appellant went into hiding and remained fugitive from law for noticeable period for which no explanation, much less plausible, has been furnished by him, which is another corroborative piece of evidence proving his guilty conscious; that prosecution has proved the guilt of the appellant through cogent and confidence inspiring ocular evidence supported by corroborative pieces of evidence as well as medical evidence, therefore, the learned Trial Court was justified by holding him guilty of the offence. They contended that when the guilt of the appellant was proved and there was no mitigating circumstance, the learned Trial Court ought to have awarded

him maximum penalty of death. They sought dismissal of the appeal and requested for enhancement of sentence of the convict.

10. We have considered the respective submissions of learned counsel for the parties and learned AAG for the State. Record perused with their able assistance.

11. According to complainant Riaz Shah (PW.6), the occurrence took place near GGMS, Dhoda Sharif at 1815 hours, on a thoroughfare which has been reported by him on the same day at 2115 hours in LMH, Kohat i.e. after a delay of three hours. Non-availability of transport on the spot has been advanced a cause of the delay in lodging report, but in cross-examination complainant admits that vegetables supply to entire Khyber Pakhtunkhwa from village Dhoda Sharif via transport and a proper road leads to Kohat from the village. This admission of complainant squarely proves availability of transport in the said village, therefore, his explanation qua delay in reporting the incident after long three hours does not appeal to a prudent mind. The lying of dead body on the spot for more than two hours, when the house of complainant is

situated in little distance of 10 minutes walk, is beyond our comprehension as in such eventualities he could have shifted the dead body to the house and after arranging the vehicle could shift to the hospital. In view of the above, we are firm in our view that the time of three hours has been consumed in procuring the presence of complainant and deliberation and consultation to charge accused after thought. Guidance in this regard can be derived from case titled, **"Mehmood Ahmad and 3 others Vs the State and another" (1995 SCMR 127).** Moreso, time of report as alleged by the complainant is 09.15 p.m. whereafter Medical Officer conducted autopsy on the dead body of the deceased. In cross-examination, complainant categorically stated that it was about 8.30 p.m. when the dead body of the deceased was being shifted to the hospital from the spot and that they reached hospital within thirty or thirty five minutes, but postmortem report of the deceased speaks otherwise wherein the time of examination of dead body of the deceased has been given as 08.30 p.m. Dr. Ghulam Qadir (PW.4) deposed that he conducted autopsy on the dead body of the deceased at 08.30 p.m. which comes

to be about 45 minutes prior to time of report, negating the time of report alleged by complainant. We are confronted with two contradictory versions about time of report, one furnished by complainant, and the other by Medical Officer. However, version of complainant is unbelievable because if the dead body of the deceased was on the spot at 8.30 p.m, how the Medical Officer was able to conduct autopsy. Rather the peculiar facts and circumstances of the case suggest that the dead body of the deceased had already been shifted to the hospital by the people in absence of complainant and after preliminary investigation and postmortem report, complainant was procured and introduced as an eyewitness and lodger of report, as the incident has not been reported directly in Police Station in shape of FIR, rather in the shape of murasila and it has been held by the Hon'ble Supreme Court in case titled**, "Muhammad Asif Vs the State" (2008 SCMR 1001)** that FIRs, which are not recorded at Police Station, suffer from the inherent presumption that same were recorded after due deliberation.

12. The oral altercation between the parties prior to incident remained unproved. No shred of evidence whatsoever has been led to prove as to where and in whose presence the said altercation took place and what was the bone of contention of said altercation. It is settled law that where the motive remains unproved, then the ocular account would be considered with great care and caution. Complainant Riaz Shah, no doubt appeared as solitary witness, who happens to be the first cousin of the deceased. No doubt, conviction can be recorded on the basis of solitary statement of a witness having close relation with the deceased or victim provided the same is trustworthy, confidence inspiring and corroborated by strong circumstances of the case. Besides, an eyewitness who claimed his presence at the spot, to make his testimony believable and reliable, must satisfy the mind of the court through some physical circumstances or through some corroborative evidence about his presence at the spot.

13. PW Riaz Shah posing himself to be the eyewitness of the occurrence has been shown in the site plan at point No.2 in close proximity of 5 paces from the deceased. Two accused

including the appellant have been attributed the role of firing at the deceased and complainant with automatic weapons i.e. Kalashnikovs, which eject number of shots in seconds. It is not the case of complainant that he was not fired at by the accused rather he also charged the accused for attempting at his life, in the circumstances, much damage should have been caused to him, being in close proximity of the accused at a distance of 7/8 paces and squarely at their mercy. His escape or let off by the assailant, keeping in view the norms of criminals of the society, where in such eventualities such like witnesses are never spared due to risk of leaving evidence behind the crime as well as apprehension of revenge by such witness in future. This aspect of the prosecution case coupled with the above discussed aspects; create serious doubts about presence of the complainant on the spot with the deceased at the time of incident. Had he been present, damage to him at the hands of assailant/assailants was natural. He has not showed his hands or clothes smeared with the blood of the deceased because it would be against a natural human conduct that someone real cousin will be lying on the spot dead and he

would not even bother to touch him. The normal human conduct in such eventualities would definitely be to take his beloved in lap. No witness, much less independent has been examined to prove presence of complainant with the deceased at the relevant time, therefore, his testimony, which otherwise, is suffering from material contradictions and discrepancies has wrongly been believed and relied upon by the learned Trial Court.

14. As regard medical evidence, the same totally negates the ocular account. Dr. Ghulam Qadir PW.4 in cross examination deposed that dimension of all entrance wounds on the person of the deceased was one and the same except wound No.7, which is blunt injury. Complainant has never stated about infliction of any blunt injury on the person of the deceased. Besides, same dimension of all entrance wounds reflects the incidents to be the doing of single person in absence of FSL report qua the recovered empties of 7.62 bore which have not been sent to the FSL for analysis to determine as to whether these had been fired from one or more than one weapon. This aspect of the case, also create doubt in the

prosecution case that the occurrence has not taken place in the mode and manner as alleged by the complainant.

15. Mere recovery of blood from the spot, bloodstained last worn garments of the deceased coupled with positive Serologist report and recovery of empties from the spot, in absence of direct evidence, would not be sufficient to sustain conviction of accused in capital charge. Such recoveries are always considered as corroborative pieces of evidence, which are always taken into consideration alongwith direct evidence and not in isolation.

16. No doubt, proceedings under section 512 Cr.P.C. were initiated and completed against the appellant, however, he has denied his abscondence in his statement under section 342 Cr.P.C. It is settled law that abscondence alone, cannot be a substitute of real evidence. It has been observed by the apex Court in **Farman Ali and others' case (PLD 1980 SC 201)** that abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused. Mere abscondence of accused would not be enough to sustain his conviction. Reliance can also be

placed on case titled, **"Muhammad Vs Pesham Khan (1986 SCMR 823).**

17. For the forgoing reasons, we are of the firm view that prosecution has miserably failed to bring home the guilt of appellant through cogent and confidence inspiring evidence beyond shadow of doubt. The prosecution evidence is pregnant with doubts and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Wisdom in this regard can also be derived from the

judgments of the apex court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**.. The learned trial Court has not evaluated the evidence in its true perspective and thus reached to an erroneous conclusion by holding the appellant guilty of the offence. Resultantly, this appeal is allowed. Convection and sentences of the appellant are set aside and he is acquitted of the charges leveled against him. He be set at liberty forthwith, if not required in any other case.

18. On acquittal of the appellant/convict, connected Cr.R. No.81-P/2012, titled, "Riaz Shah Vs Muhammad Noor etc" has become infructuous, which stands dismissed as such.

These are the reasons for our short order of even date.

Copy of this judgment be sent to the then learned Trial Judge, for future guidance.

Announced.
08.04.2015

J U D G E

J U D G E

**M.Siraj Afridi P.S. D*