

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

**Cr.A No. 344-M/2018**

Muheeb Ullah son of Haidar Khan resident of village Ziam, Syar Dara, Tehsil Timergara, District Dir Lower.

*Versus*

1. State through Additional Advocate General K.P.K Peshawar High Court, Mingora Bench.
2. Aman Ullah Khan son of Haidar Khan, resident of village Ziam, Syar Dara Tehsil Timergara, District Dir Lower.

**Present:**

Mr. Shabbir Hussain Gigyani, Advocate for the appellant/convict. (Through Video Link).

Mr. Murad Akmal Mirkhel, Advocate for State.

Syed Abdul Haq, Advocate for the complainant.

Date of hearing: **25.11.2020**

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** Appellant/convict

Muheeb Ullah was indicted in case F.I.R No. 420 dated 16.06.2016 registered u/s 302 P.P.C at Police Station Timergara, District Dir Lower on the charge of committing murder of his step-brother Adam Khan through firing. He was tried for the said offence before the Court of learned Additional Sessions Judge, Chakdara at Camp Court Timergara who vide judgment dated 22.11.2018 sentenced him to undergo life imprisonment on his conviction u/s 302 (b) P.P.C. He was also directed to pay an amount of Rs.500,000/- to LRs of the deceased as compensation u/s 544-A, Cr.P.C or in case of default

thereof to suffer further six months S.I. Benefit u/s 382-B, Cr.P.C was extended to him.

2. According to the initial report made by complainant Aman Ullah Khan (PW-11) recorded through *Murasila* (Ex.PW-11/1) on 16.06.2016 at 04:30 hours in emergency ward of D.H.Q Hospital Timergara, he was present in his house after taking *sehri*; on hearing fire shots, he came out of his house and saw his brother Adam Khan lying in injured condition. His niece Mst. Samania Bibi (PW-12) (daughter of the deceased), who was present near her injured father, informed him that her uncle Muheeb Ullah (the present appellant) caused injuries to her father through firing. The motive behind the occurrence was stated to be domestic quarrels. The complainant further informed the police that the occurrence has been witnessed by Mst. Samania Bibi and other inmates of the house.

3. After recording report of the complainant, Sher Zada Khan S.I (PW-17) prepared injury sheet (Ex.PW-17/1) of deceased then injured and also obtained certificate (Ex.PW-14/3) from Dr. Imdad-ul-Haq (PW-14) who was on duty in the casualty room at the relevant time. According to the

said certificate, the doctor opined that the deceased then injured was unable to talk. After examining the deceased then injured, the doctor gave the following findings in his report Ex.PW-14/1 on the injury sheet.

Adam Khan S/O Haidar Khan was brought to Emergency Room on 16.06.2016 at 4.09 A.M as firearms injury case.

1. An entrance of about 3 mm<sup>2</sup> on left perinatal of the scalp with mild bleeding and crush bones.
2. An exit wound of about 6 mm<sup>2</sup> with averted edges on the right side of the temporal region at the same level of entry wound. The exit wound contained brain contents and broken bones.

GCS (Glasgow Coma Scale) was 3/15 (E-1, V-1, M-1) with constricted left pupils.

Patient was referred to Peshawar with paramedical cover but was died in the way.

Nature of Trauma: FAI.

Nature of injury: Homicidal.

Cause of death: Damage to the brain caused by firearm.

Time of death: 08:45 A.M.

As I have finished my shift of duty at 08:00 A.M and I did not act any call for the post-mortem of the said deceased, as such, post mortem was not conducted by me.

4. The matter was initially investigated by Fazal Ghafoor Khan SI (PW-13). During spot inspection, he prepared site plan Ex.PW-13/1 on pointation of Mst. Samania Bibi (PW-12). He recovered two crime empties of 7.62 bore as well as blood-stained earth from the spot and secured the same through recovery memo Ex.PW-13/5 and Ex.PW-8/1 respectively. He also took into

possession torn clothes of the deceased vide recovery memo Ex.PW-13/3 and took six photographs of the dead body and place of occurrence which are available on the record as Ex.PW-13/6. Since the appellant was absconder, therefore, the I.O moved application for issuance of warrant 204 consequent upon which non-bailable warrant of arrest Ex.PW-16/1 was issued against the appellant, however, he could not be arrested, therefore, proclamation u/s 87, Cr.P.C (Ex.PW-16/3) was issued against him on 23.06.2016.

5. After arrest of the appellant on 06.09.2016 by SHO of P.S Balamabat, further investigation in the case was conducted by Noor Ghani Khan SI (PW-4) who received two CNICs (Urdu and English version) with passport, an affidavit and mobile phone from *Muharrir* of P.S Balamabat which had been recovered from the appellant at the time of his arrest. He also recovered a Kalashnikov, the alleged crime weapon, with nine rounds on pointation of the appellant from the house of one Rehan Gul. The recovery memo in this regard is Ex.PW-4/3, pointation memo is Ex.PW-4/4 whereas the sketch of recovery is Ex.PW-4/5. The weapon alongwith the crime empties were sent to

F.S.L, the non-matching report received in this regard from the lab is Ex.PW-4A/1.

6. After completion of investigation supplementary challan was put in Court against the appellant. On commencement of trial, he was confronted with the formal charge, however, he did not plead guilty and opted to face the trial, hence, the prosecution produced and examined as many as eighteen witnesses in support of its case against him and closed the evidence. When examined u/s 342, Cr.P.C, the appellant once again denied the allegation of prosecution by claiming innocence. He recorded his own statement on oath in terms of section 340(2), Cr.P.C as DW-1 wherein he raised the plea of *alibi* by narrating that at the relevant night of the occurrence he was in Kashmir in connection with earning his livelihood, however, he did not produce any witness in support of his above version. On conclusion of trial, the learned trial Court found him guilty of the charge and sentenced him in the manner already discussed in the earlier part of this judgment, hence, this appeal.

7. We have paid our anxious consideration to the arguments advanced by learned counsel for

the parties including the learned counsel representing the State and perused the record with their able assistance.

8. Complainant Aman Ullah Khan (PW-11) is admittedly not an eye witness of the occurrence as he had attracted to the spot after hearing the fire shots, however, Mst. Samania Bibi (PW-12) claims to have witnessed the appellant firing at her father. According to her, she was carrying water in ewer for her father for the purpose of ablution and while going in front of him towards the washroom situated outside of the main gate, the appellant fired at her father and she identified him in the light of bulbs. The credibility of this witness is to be adjudged in light of evidence regarding two crucial points i.e her presence on the spot at the time of occurrence and her claim that she had identified the appellant at night time.

According to the injury sheet and photographs of the deceased on record, the deceased was a healthy man of 49/50 years of age. There is no evidence on the record to suggest that he was an infirm or ailing person and was depending on others in carrying out his routine activities including

carrying of water to washroom for making ablution. Thus, there is no logic in the prosecution version that the eye witness was performing a job for her father which he could easily accomplish without the help of his daughter. Even otherwise, the eye witness was a young girl of 25/26 years at the time of occurrence; the washroom is situated outside of the main gate and a thoroughfare is also passing in front of the house of deceased. In the mentioned setup, the stance of the eye witness that despite of her fair sex and young age she was leading her father at mid night outside of her house for a pity job also seems ludicrous keeping in view the general temperament of the people of the society. Thus, the reason mentioned by the eye witness regarding her presence near her father is not believable. Moreover, the I.O has also failed either to take the ewer in possession through a recovery memo or assign any point to it in the site plan to prove the aforesaid version of the alleged eye witness.

Close perusal of the statement recorded by the eye witness further shows that she had woke up at 02:30 A.M but exactly the same time has been shown as the time of occurrence in *Murasila*. She admitted in her cross-examination that after washing

her face and hands she had taken the *sehri* which would have obviously consumed some time then how it was possible for her to accompany her father at 02:30 hours for the purpose of taking water for him to washroom. No doubt, photographic narrations of the occurrence from a witness cannot be expected more particularly when he/she records statement after two years of the occurrence, however, the events and time mentioned by the eye witness in her statement do not coincide with the contents of *murasila* vis-à-vis the time of occurrence, hence her presence on the spot with her father at the time of firing is doubtful, therefore, her statement cannot be relied upon for maintaining conviction of the appellant.

2. Even otherwise, if it is presumed for a while that the alleged eye witness was present on the spot even in that eventuality the identification of the appellant by her at midnight is an important aspect of the case which needs cautious attention by this Court. The time of occurrence is 02:30 A.M at midnight and according to prosecution, the alleged eye witness had identified the appellant in light of electric bulbs installed in the surrounding but the I.O neither took any bulb from any place around the



place of occurrence nor he assigned any point to a single bulb in the site plan to support the above claim of the PW. Thus, the prosecution has badly failed to prove the source of light on or near the place of occurrence to corroborate the assertion of the alleged eye witness regarding identification of the appellant in the pitch dark, therefore, her testimony to this effect, being suspect evidence, is also not believable. Wisdom is drawn from the judgment of the august Supreme Court of Pakistan in the case of Muhammad Arshad Vs. The State (PLD 1995 S.C 475). The principle laid down in the said judgment is as follows.

The principle to be extracted from the decided case thus is that the evidence of visual identification is one of the categories of 'suspect evidence' and that ordinarily it is not safe to convict on the basis of such evidence without a corroboration. Indeed, in exceptional circumstances, that is, where the evidence of visual identification is of exceptionally good quality, such as, where the offender was known to the witness, there was sufficient light, the witness had had an unobstructed view of the offender and there was a dialogue between the witness and the offender, the evidence may be acted upon.


No doubt, in the present case the eye witness is closely related to the appellant and there was possibility of his identification by the eye

witness through his voice, however, there is no evidence on the record to prove that prior to the occurrence the appellant had either talked with the deceased or with the eye witness, therefore, her claim with regard to identification of the appellant in the mentioned circumstances does not inspire confidence. Further reliance is placed on Haroon Shafique Vs. The State and others (2018 SCMR 2118) and Abdul Hayat Vs. The State (2011 MLD 886 Peshawar).

10. In addition to above, the assailant chose the nocturnal time for killing the deceased to conceal his identity and for that purpose he must have taken all necessary precautions in view whereof it was not so easy for the eye witness to identify him in the mode and manner she has narrated in her statement. In other words, if the statement of the eye witness is believed it would mean that the assailant had willfully exposed his identity to her at the time of firing. If that was the aim of the assailant he would have never chosen the night time for committing the crime rather he would have committed the same in broad daylight. In addition to that, it is also in the evidence of prosecution that the deceased had enmities and

disputes with other people in the area. So, keeping in view the time as well as mode and manner of the occurrence, identification of the appellant by the eye witness is doubtful. Reference in this regard is made to the judgment of this Court in the case of Muhammad Arif Vs.State and another (PLJ 1999 Cr.C (Peshawar) 579 (DB) wherein it was held that:

**"The occurrence had taken place at 0600 hours i.e one hour before the sun-rise time. It is a matter of common observation that one hour before sun-rise time is always pitch dark. The said time was chosen by the assailant only and only in order to conceal his identity. That is why he fired from behind causing all the three inlet wounds at the back side of the body which also contained charring marks".**




Thus, looking at the attending circumstances of the present case through the prism of the above-referred case law, identification of the appellant by the alleged eye witness Mst. Samania Bibi is not free from doubt, the benefit of which must be given to appellant as per well settled principle of criminal justice.

II. Coming to circumstantial evidence of the case, no doubt, death of the deceased per medical evidence was the result of firearm injury on his head, however, the medical evidence by itself cannot

prove that the said firearm injury was caused to deceased by the present appellant. Moreso, according to the site plan, the eye witness has been shown at Point No.3 falling between the deceased and appellant. The appellant has been shown at Point No.2 near the southern wall of the washroom which is not visible from Point No. 3 because of the intervening corner of the washroom between them. The I.O has taken photographs of the place of occurrence but no photo is available on record to show all the points i.e 1, 2, 3 & A at the same time to confirm visibility of Point No.2 from Point No.3 assigned to the appellant and eye witness respectively in the site plan. Similarly, the direction and locale of entry and exit wounds on the head of deceased are also not supported by site plan. Furthermore, according to F.S.L report Ex.PW-4/7, the alleged crime weapon recovered on pointation of the appellant/convict is not matching with the two crime empties recovered from the spot. Thus, the different pieces of circumstantial evidence, being in conflict with each other, do not support the prosecution version.

12. The complainant has alleged the motive behind the occurrence as the domestic quarrels but prosecution has not produced any evidence in support of the said motive. No doubt, absence or weakness of motive by itself is not a proof of innocence of an accused, however, this shortcoming of the case in addition to other evidence of doubtful nature brought on the record is sufficient to create further suspicion in the story of prosecution.



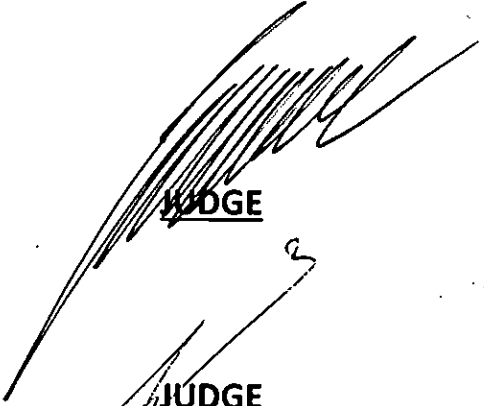
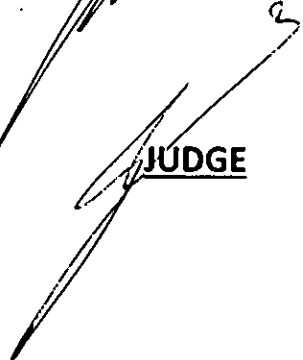
13. Although the appellant has remained absconder for almost three months but abscondence per se is not a proof of his guilt. It is settled law that conviction of an accused cannot be based only on his abscondence when otherwise the prosecution fails to prove its case through direct and circumstantial evidence of unimpeachable character. Reliance is placed on the judgment of the august Supreme Court of Pakistan in the case titled "Muhammad Sadiq V/s. The State" (2017 SCMR 144) wherein it was held that:

**"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions".**

14. For what has been discussed above, prosecution has failed to prove its case against the appellant beyond shadow of reasonable doubt, therefore, his conviction and sentence by the trial through the impugned judgment cannot sustain. Resultantly, this appeal is allowed, judgment of the trial dated 22.11.2018 is set aside and appellant Muheeb Ullah son of Haidar Khan is acquitted of the charge in the present case. He be released forthwith from jail if not required in any other case.

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

Announced.  
Dt: 25.11.2020

  
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