Judgment Sheet
PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.03-D/2021 with
Cr.Misc.No.02-D/2021.

Arshad Ali
Vs.
The State etc.

JUDGMENT

For Appellant: Mr. Saleemullah Khan Ranazai, Advocate.

For State: Mr. Adnan Ali, Asstt: A.G.

For Respondent: Muhammad Ismail Alizai, Advocate.

Date of hearing: **17.5.2022.**

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MUHAMMAD FAHEEM WALI, J.- This judgment shall also dispose of the connected Criminal Revision No.01-D/2021, as both the matters are the outcome of one and the same judgment dated 14.01.2021, rendered by learned Judge, Model Criminal Trial Court, D.I.Khan, whereby the appellant was convicted under section 302(b) of Pakistan Penal Code for committing *qatl-i-amd* of Mehdi Hassan, and sentenced to life imprisonment with compensation of Rs.3,00,000/- (three lacs) to be paid to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. or in default thereof, to undergo simple imprisonment for six months. Benefit of section 382-B, Cr.P.C was extended to the convict/appellant.

2. The prosecution story as disclosed in the FIR Ex.PA, registered on the basis of *murasila* Ex.PA/1, in brief, is that on 10.8.2017 at about 20:45 hours, complainant Muhammad Mushtaq (PW-6A), while present with the dead body of his brother Mehdi Hassan, reported the matter to the local police in emergency room of Civil Hospital, Paharpur, to the effect that on said date at about 8:00 PM, after offering Maghrib prayer, he alongwith his brother Mehdi Hassan, Muhammad Aslam (PW-7), Habibullah and other co-villagers, were on the way to their houses; that his brother was ahead of them; that when they reached in a thoroughfare near the house of one Maulana Muhammad Ali, meanwhile, the accused appeared, raised *Lalkara* upon his brother that today he would not be spared, pulled out his pistol from the folds of his shalwar and fired at him, as a result whereof, he was hit and fell down; that after commission of the occurrence the accused fled away from the spot; that they attended to their injured brother who while shifting to Civil Hospital, Paharpur, succumbed to his injuries on the way. Besides the complainant, the occurrence was stated to be witnessed by Muhammad Aslam (PW-7), Habibullah and other co-villagers. Motive for the offence was

stated to be a dispute over the landed property. He charged the accused for the commission of offence.

3. On completion of the investigation, complete challan against the accused was submitted before the learned trial Court where at the commencement of trial, the prosecution produced and examined as many as twelve (12) witnesses, whereafter, statement of the accused under section 342 Cr.P.C, was recorded wherein he professed innocence and false implication, however, neither he wished to be examined under section 340(2) Cr.P.C, nor produced defence evidence. On conclusion of trial and after hearing arguments, learned trial Court convicted the appellant and sentenced him, as mentioned above, which has been assailed by the appellant through the instant criminal appeal, whereas the connected criminal revision has been filed for enhancement of sentence.

4. We have heard the learned counsel representing the appellant, the learned State Counsel assisted by learned private counsel at length and with their valuable assistance, the record was scanned.

5. It is the case of prosecution that on 10.8.2017 at about 8:00 PM, after offering Maghrib prayer, the complainant alongwith his brother Mehdi Hassan, Muhammad Aslam (PW-7), Habibullah and

other co-villagers, were on the way to their houses; that brother of the complainant was ahead of them and when they reached on the spot, the accused appeared, raised *Lalkara* upon brother of the complainant that today he would not be spared, pulled out his pistol from the folds of his shalwar and fired at him, as a result of whereof, he was hit and fell down and while shifting to Civil Hospital, Paharpur, he succumbed to his injuries on the way. Although the learned trial Court while rendering the verdict under challenge, highlighted material aspects of the case, yet this being the Court of appeal is under obligation to re-assess the already assessed evidence, in order to avoid miscarriage of justice. This Court is to see as to whether the approach of the learned trial Court to the material aspects of the case was correct and as to whether reasons advanced for conviction in the impugned judgment get support from the material available on file. We are conscious of the fact that if on one hand in case of single accused substitution is held to be the rarest phenomenon, then on the other, the Court deciding the fate of the accused is under obligation to search for independent corroboration and must be vigilant while assessing the inherent worth of the evidence produced. It is advisable that the learned trial Court in case of a single accused must not be

swayed with the impulse that substitution is a rare phenomenon and that it must not take it for granted that in case of single accused, the prosecution is not under obligation to prove its case and that once an accused is charged, he would outrightly be declared guilty, if the trial Court travels with the impulse then the criminal justice system will always be in peril and in that eventuality one cannot think otherwise, but miscarriage of justice will always occasion which approach is neither permissible nor finds a room in the system, as Courts are the custodian of the rights of the parties and in all eventualities, they will follow the guidelines provided and the principles evolved. In the like situation, it is incumbent upon both the trial as well as the appellate Court to appreciate the evidence collected to avoid miscarriage of justice.

6. In the present case, we have observed with great concern that neither the murasila was signed/ thumb impressed by the complainant, nor Abdur Rahim constable No.791, who allegedly brought the murasila to the police station was cited in the calendar of witnesses. This fact has created a serious dent in the prosecution case. Fazal Hussain Shah S.I, while appearing as PW-2, stated before the Court that he transmitted murasila to the police station through constable Abdur Rahim No.791. The Moharrir (PW-4)

also stated that actually the murasila was brought by said constable, but this alone is not sufficient to believe that actually the murasila (not signed or thumb impressed) was brought to the police station by said constable, when his name does not figure in the calendar of witnesses, what to talk of his appearance in the witness box. Ref: **'Javed and 2 others Vs. The State' (2020 YLR Peshawar-311.**

7. The case of prosecution mainly hinges on testimony of the complainant and Muhammad Aslam, who testified before the Court as PW-6A and PW-7, respectively, therefore, we would like to discuss their evidence in the light of principles enunciated by criminal dispensation of justice. Complainant while appearing in the witness box narrated almost same story as mentioned in the FIR, however, he added that they identified the accused in the light of a bulb lit at that moment. He further added that after recording his report the dead body was referred to the Medical Officer for postmortem while he and PWs Muhammad Aslam and Habibullah were directed by the police to reach the spot which they did accordingly and on reaching the spot, on arrival of the Investigating Officer, they pointed out the relevant places of their presence as well as that of the accused. He further added that during the course of investigation the site

plan was prepared by the Investigating Officer, who also seized blood from the place of presence of his brother, one bullet led and three empty shells besides one live round of pistol from the place of presence of accused, one bulb (energy saver) installed in the street outside the shop of one Muhammad Younas. During cross-examination, he was confronted with his report and statement/supplementary statement recorded during investigation to which the answers tendered by him were not recorded so, rather it appears that he made dishonest improvement while testifying in the witness box. There is no denial to the fact that the deceased was younger brother of the complainant, who according to the prosecution story, was ahead of the complainant and the eyewitnesses, however, it is not appealable to a prudent mind that elder brother was following the younger brother which is against the norms of our society. It remained the stance of complainant that at the time of occurrence, the deceased was ahead of them, who was fired at by the accused from front, but his this deposition is totally in conflict with the medical evidence because the concerned Medical Officer (PW-5) noted a lacerated wound over scalp, an entry wound on the back of head with its exit on left side of nose with visible brain matter, an entry wound on left side of back (over

scapula), an irregular wound with everted margin (exit wound on the front of chest (right side), a round entry wound with inverted margin on left lumber region and an irregular exit wound on left lateral aspect of abdomen. If the accused had fired upon the deceased from front side, surely all the bullets should have landed on front of the deceased, which is not the case here. Ref: **'Mansab Ali Vs. The State' (2019 SCMR 1306).** It is also not appealable to common prudence that soon after making report, the complainant left the dead body of his brother in the hospital and went to the spot alongwith the PWs for spot inspection. Arranging transport for shifting the deceased then injured to the hospital was also not mentioned in the FIR. Even the complainant while testifying before the Court did not mention the source of transportation of the dead body from the spot to the hospital, in his examination-in-chief, however, he stated during cross-examination that the dead body was transported to the hospital in a pickup. To a question, although he replied that one Ramzan was the driver of pickup through which the injured was transported to the hospital and said Ramzan attracted there because they heard the fire shots, however, said Ramzan has not been cited as witness in the present case to support stance of the complainant. It is also astonishing when

he stated that the dead body of his brother was received by one Mubarak Ali at the hospital after postmortem examination, but said Mubarak Ali was abandoned by the prosecution. This witness stated that the distance between the place of occurrence and Masjid is about 6/7 paces, which is negated by the Investigating Officer (PW-8), who stated that the Masjid was far away from the place of occurrence, that's why he had not noted/shown the same in the site plan. The complainant further testified that the blood was oozing from the body of injured which may have stained the cot as well, however, this stance is not supported by the Investigating Officer, who stated that he did not remember that whether the hands of the complainant and the witness were besmeared with the blood of deceased. Identification of the accused in the light of bulb, as stated by the complainant in his statement before the Court, is yet another major improvement, which can simply be brushed aside. To this effect, he stated that there was an electric bulb installed on western side of the wall of shop owned by one Muhammad Younas, however, he admitted it correct that he had not stated in his initial report about the installation of bulb on the shop of Muhammad Younas. Even otherwise, stance of the complainant is negated by Muhammad Aslam (PW-7), who stated

that when the police reached the spot the bulb was lit, the police officials later brought a search light during spot inspection and the bulb was not lit at that time. Even otherwise, the bulb was produced by PW-8 in pieces. Needless to mention that such type of bulbs are easily available in the market. Scanning of statement of this witness shows that it remained a mystery that where the deceased breathed his last. Last but not the least, keeping in view the alleged motive, the complainant was at the mercy of the accused, but he was not fired at, rather as per stance of the complainant, before firing the accused raised *Lalkara* at his brother. The accused spared the complainant to create evidence against himself is nothing but a mystery in itself because the accused had every opportunity to settle the score keeping in view the alleged motive. In view of the above, we have come to an irresistible conclusion that the complainant was not present at the time of occurrence and the events of the incident narrated by him are not in line with the story mentioned in the FIR.

8. The other eyewitness namely Muhammad Aslam was examined as PW-7, who narrated same story as mentioned in the FIR with additions as stated by the complainant in his examination-in-chief, however, during cross-examination, he stated that the

deceased was a little ahead of them. This witness was confronted with his 161, Cr.P.C. statement and he gave answers which are not so recorded in said statement, meaning thereby that he wanted to bring his deposition in line with the testimony of complainant. He admitted that the complainant and the deceased are his maternal cousins. He admitted that his house is situated at a distance of half kilometer from Masjid. He explained that it may have taken about five minutes while carrying the injured on a cot from the spot to the main road and further 2/3 minutes in reaching of the pickup. The Datsun driver was called by another person who after the occurrence ran towards the house of driver situated nearby, however, he was unable to recall the name of said person who informed the driver. This deposition is contradicted by the complainant, who stated that after hearing the fire shots the driver himself attracted there. Although he stated that his hands and clothes were smeared with blood of injured, however, he admitted that he had not shown his hands and clothes to the police officer who recorded the report. Again, it is surprising when he stated that the distance between the spot and Madjid would be 8/10 paces, but his this deposition is negated by the Investigation Officer, as discussed in previous paragraph. To a question, he answered that he did not

remember the time at which Mehdi Hassan died. He also admitted that he had not signed any document in the hospital, rather he put signatures whenever required. He further deposed that the police remained on the spot for half hour when he returned back from the hospital. It is also astonishing when he stated that when police reached to the spot the bulb was lit, however, he stated that the police officials had subsequently brought a search light during spot inspection and the bulb was not lit at that time. He stated that he returned to his house being relieved from the spot. His deposition regarding firing by the accused from front side is also negated by the medical evidence as discussed in previous paragraph. He admitted that Younas shopkeeper was not examined by the Investigating Officer. From the above, it can safely be concluded that this witness tried to bring his testimony in line with the deposition of the complainant, who has already been disbelieved by us while discussing his statement in previous para. It is pertinent to mention here that other alleged eyewitness, namely Habibullah was abandoned by the prosecution. Presumption would be that, had he been produced, he would have not supported the prosecution case.

9. In addition to the above, the case was investigated by Zulfiqar Khan S.I, who was examined in the present case as PW-8. He stated that on reaching to the spot, he prepared site plan, collected blood-stained dearth from the place of the deceased then injured, one bullet led from the place of accused, three empty shells and one live round of .30 bore around the place of accused. He seized one bulb energy saver installed at the corner of the shop of one Muhammad Younas. He examined PWs u/s 161, Cr.P.C. He received blood stained garments of the deceased sent by the Medical Officer, placed PM documents on judicial file. He examined PWs Syed Siftain Shah and Syed Rehmat Ali Shah with respect to motive. He also examined father of the deceased. He arrested accused on 31.8.2017 and from his personal search recovered .30 bore pistol alongwith fit magazine containing five live rounds. He prepared pointation memo on pointation of the accused. He placed FSL reports Ex. PK and Ex. PK/1 on the file. He was cross-examined where he admitted it correct that he has not shown Masjid in the site plan. He was questioned about sending of the empties/recoveries to the FSL, but he could not answer as no application in that respect was available on the file. He admitted that he had not recorded statement of any police official

for keeping the recovered empties in safe custody. This witness did not investigate the case regarding mode of transportation of the deceased then injured to the hospital. He admitted that neither the cot used for transportation of the deceased then injured to the hospital was taken into possession by him, nor any blood was secured from the vehicle used for the said purpose. He admitted that the Masjid was far away from the place of occurrence, that's why he had not shown the same in the site plan. He admitted it correct that complainant had not disclosed to him while recording his supplementary statement that on his arrival to the spot, in his presence blood was seized from the place of his brother, one bullet led and three empty shells beside one live round of pistol from the place of accused and one bulb energy saver installed in street outside the shop of Muhammad Younas. He admitted that the column meant for identification of the dead body has been left blank in the postmortem examination. With regard to condition of the bulb Ex.P-1, he stated that no expert report is available on file to ascertain that the same was in workable condition. At this stage on the request of defence counsel, the parcel was opened and a broken energy saver of 24 watt was found in pieces, packed into one packet containing title of 'Power incandescent Bulb'.

It is an element of surprise when he stated that constable Faridullah, who brought the postmortem documents and garments of the deceased was not examined under section 161, Cr.P.C. He admitted that name of said Faridullah was not mentioned in the calendar of witnesses. He admitted that he had not recorded the statement of any police official who took the crime articles including the alleged recoveries to the FSL. He further admitted that he had not verified the status of ownership of any shop of Muhammad Younas. To a question, he stated that the door of said shop opens towards the main street, however, he had not shown the door of said shop in the site plan. He did not remember that who took the empties and pistol to the FSL. He admitted that the pistol was recovered on 31.8.2017, whereas it was received in the FSL on 14.9.2017, however, he had not annexed any document on file regarding safe custody of the above articles. He further admitted that he did not annex the daily diary (Roznamcha) dated 10.8.2017 regarding his departure and arrival to the police station. In view of the discrepancies highlighted above, such statement could not be made the basis to sustain conviction on a capital charge.

10. Regarding recovery of pistol, marginal witnesses i.e. Mishkat Ullah HC and Muhammad

Asghar Khan SHO were examined as PW-3 and PW-9, respectively. PW-3 during cross examination admitted it correct that except Muhammad Aslam PW, the Investigating Officer had not associated any other notable person from the area in connection with Ex. PW 3/1, but nothing of the sort is forthcoming from the statement of said PW Muhammad Aslam. Similarly, the other marginal witness to the recovery i.e. PW-9 stated that he made entry in daily diary of the even date but the same is not available on the judicial file. It is pertinent to mention here that during course of cross-examination of this witness, the parcel was de-sealed on the request of learned defence counsel and No.FA663634/17 with some sharp object on the body beside the trigger was found on the pistol allegedly recovered from the accused, but astonishingly as per recovery memo Ex. PW 3/2, .30 bore pistol without number having fit magazine containing five rounds of .30 bore was allegedly recovered from the accused. In this view of the matter, recovery of pistol from the accused is disbelieved. It is to be observed that in such state of affairs, such type of pistols could easily be procured and after making some fire shots, the same alongwith empties are sent to the FSL to make the prosecution case a success. Needless to mention that why the empties allegedly

recovered from the spot were not sent to the FSL, rather same were sent to the FSL after arrest of the accused.

11. So far as the FSL report regarding the crime pistol allegedly recovered from the accused and empties collected from the spot is concerned, suffice it to say that the empties were collected on 10.8.2017, but the same were not sent to the FSL after those were recovered. Even there is nothing on the record which could suggest that the same remained in safe custody till those were received in the FSL on 14.9.2017 alongwith .30 bore pistol allegedly recovered on 31.8.2017, on the date at which the accused was arrested. As discussed earlier, the Investigating Officer stated that he could not find any application regarding sending of above articles to the FSL nor he remembered the name of official who took the same to the FSL. In this view of the matter, the positive FSL report could not be taken into consideration for sustaining conviction. Besides, when the ocular account of the prosecution case has been disbelieved, mere recovery of the pistol and crime empties, would not be sufficient for recording conviction in light of ratio of the judgment of apex Court in case titled, **"Mst. Sughra Begum and another v. Qaisar Pervez and others" (2015 SCMR 1142),** wherein it has been

held that once the ocular account was disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge.

12. Recovery of blood from the spot, the last worn blood-stained garments of the deceased and unnatural death of the deceased with firearm as per postmortem report, prove the factum of murder of the deceased, but never tell the name(s) of the culprit/killer. Such pieces of evidence are always considered as corroborative pieces of evidence and are taken along with direct evidence and not in isolation as held by the Hon'ble Supreme Court in **'Riaz Ahmed's case (2010 SCMR 846), Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541).** It has been held by the apex Court in case titled, **"Saifullah v. The State" (1985 SCMR 410),** that when there is no eye-witness to be relied upon, then there is nothing, which can be corroborated by the recovery.

13. So far as motive is concerned, it is always considered a double-edged weapon which cuts both sides. True that motive could be a reason for involvement of an accused and equally true that the same could be a reason for false implication of an accused. In the present case, although motive was

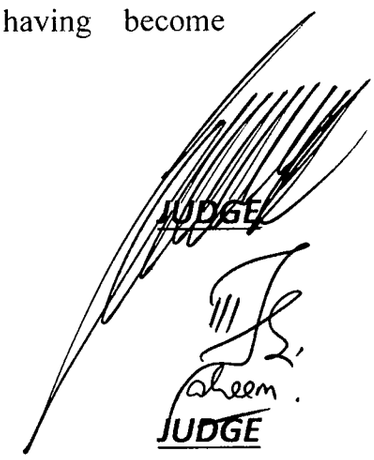
stated to be a dispute over landed property, but the evidence in this respect is deficient, therefore, same could not be taken into consideration.

14. The learned trial Court has not appreciated the evidence in its true perspective and thereby fell in error by convicting the appellant. We have minutely perused the judgment under challenge through all angles, which cannot face the test of judicious scrutiny and the same invites indulgence of this Court.

15. For what has been discussed above, we are of the firm opinion that the prosecution has miserably failed to establish the case against the appellant, otherwise to extend benefit of doubt so many circumstances are not required. The instant criminal appeal is, therefore, allowed, the impugned judgment is set aside, resultantly, the appellant is acquitted of the charges levelled against him. He shall be released forthwith, if not required to be detained in connection with any other criminal case. Since we have set aside the conviction and sentence awarded to the appellant, therefore, the connected criminal revision for enhancement of sentence has become infructuous which stands dismissed accordingly.

16. Above are the detailed reasons of our short order announced on 17.5.2022, which is reproduced herein below:-

> "For reasons to be recorded later in the detailed judgment, we allow this appeal, set aside the impugned conviction and sentence awarded to the appellant Arshad Ali son of Muhammad Jan, vide judgment dated 14.01.2021, rendered by learned Judge, Model Criminal Trial Court, D.I.Khan. Resultantly, appellant is acquitted of the charges levelled against him in the said case. He be released forthwith, if not required to be detained in any other criminal case. Since the impugned conviction has been set aside, therefore, the connected Cr.R.No.01-D/2021, for enhancement of sentence stands dismissed for having become infructuous."



(D.B)
Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Muhammad Faheem Wali

(Kifayat/PS*)