

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.52-P/2017

1. Bakht Nawas son of Sher Nawas; and
2. Jihad Ali son of Abdul Hakeem,
both residents of Gara Kol, Bhai Khan,
District Mardan.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellants :-	<u>M/S Muhammad Saeed Khan & Shabbir</u> <u>Hussain Gigyani, Advocates.</u>
For State :-	<u>Mr. Mujahid Ali Khan, AAG.</u>
For respondent No.2.	<u>Qari Shoaib brother of complainant.</u>
Date of hearing:	<u>19.11.2019.</u>

ORDER

ROOH-UL-AMIN KHAN, J:- This criminal appeal under section 410 Cr.P.C., has been filed by appellants/convicts, namely, (1) Bakht Nawas and (2) Jihad Ali against the judgment dated 19.01.2017, passed by trial Court/Additional Sessions Judge-II, Mardan, whereby the appellants have been convicted under sections 302/34 PPC and sentenced to undergo life imprisonment each and to pay Rs.50,000/- each, as compensation to legal heirs of Habib Ullah deceased in terms of section 544-A Cr.P.C., in case FIR No.68 dated 23.01.2013, registered under sections 302/324/109/34 PPC, at Police Station Rustam, District Mardan, however, they have been acquitted under section 324 PPC. Similarly, co-accused Sher Nawas has also been

acquitted, whereas, co-accused Ahmad Nawas has been declared as Proclaimed Offender. Benefit of section 382-B Cr.P.C. has been extended to the convicts.

2. The convicts have filed the instant appeal against their conviction and sentences, whereas, Qari Shoaib, the petitioner, has filed **Cr.R. No.23-P/2017**, seeking enhancement of sentences of the convicts/respondents from life imprisonment to normal penalty of death as provided for the offence of murder.

3. No appeal has been filed by the prosecution/complainant against acquittal of co-accused Sher Nawas as well as acquittal of the convicts under section 324 PPC.

4. As both, the appeal and the criminal revision arise out from one and the same judgment of the learned trial Court dated 19.01.2017, therefore, are being decided through this common judgment.

5. According to FIR (Exh.PA, the prosecution case is that on 23.01.2013 at 10.30 A.M, complainant Qeemat Ullah (PW.7), in company of dead body of his son Habib Ullah deceased reported to Zahir Shah ASI (PW.3), in casualty DHQ hospital Mardan to the effect that on the fateful day he along with his brother Qari Shoaib (PW.8) and son Habib Ullah deceased, was busy in cutting clover (*Shaftal*). They sent Habib Ullah deceased to the house of his (complainant's) sister in connection with some work

and at 09.30 A.M when he reached the crime spot, the appellants along with Ahmad Nawas (absconding co-accused) duly armed with firearms emerged there and opened fire at the deceased, as a result, he got hit and fell on the ground. On hue and cry of the complainant and PW Qari Shoaib, the accused also fired at them, however, they luckily remained unscathed. A dispute over landed property has been alleged as motive behind the crime. The deceased succumbed to injuries on the way to hospital. Complainant alleged that the occurrence was initiated by the accused named above at the instigation/behest of Sher Nawaz (acquitted co-accused). Zahir Shah Khan ASI (PW.3), recorded report of complainant in the shape of Murasila Exh.PA/1, which was verified by PW Qari Shoaib, on the basis whereof FIR Exh.PA, was registered against the accused. PW.3 prepared injury sheet and inquest report Exh.PW.3/1 and Exh.PW.3/2 of the deceased and shifted his dead body to the mortuary for port-mortem examination under the escort of Sohail FC No.2545.

6. Dr. Amjid Kakakhel DHQ Hospital Mardan (PW.1) conducted autopsy on the dead body of the deceased on 23.01.2013 at 10.50 A.m. and observed a firearm inlet wound measuring 1x2 inch on front lateral aspect of thorax, 4 inches below the axilla (left). He recovered a bullet from posterior body wall of the deceased

just beneath the skin near scapula. He further noticed a perforating firearm wound on the right deltoid of the deceased half inch in size. According to his opinion, the deceased died due to firearm injuries to his left lung and its blood vessels leading to shock and death. Probable time between injury and death was opined to be with **45 minutes.**

7. Nooran Shah Khan SI (PW.9) was entrusted with the task of investigation, who proceeded to the spot and prepared site plan Exh.PB at the pointation of eyewitnesses. During spot inspection, he secured bloodstained earth from the place of the deceased vide recovery memo Exh.PW.6/1 and recovery memo Exh.PW.6/2, two empties of 7.62 bore from the places of the accused. Through recovery memo Exh.PW.6/3, he took into possession the last worn bloodstained garments of the deceased, sent by the doctor through Constable Sohail. Similarly, vide recovery memo Exh.PW.6/4 a phial containing spent bullet, sent by the doctor, extracted from the dead body of the deceased was taken into possession. He sent the bloodstained earth and garments of the deceased to FSL and empties for safe custody to the FSL, report of the former is Exh.PZ, initiated proceedings under sections 204 and 87 Cr.P.C. against the accused, recorded statements of the PWs and after completion of investigation, handed over the case file to SHO, who

submitted challan under section 512 Cr.P.C., against the accused.

8. After arrest of the appellants/convicts and acquitted co-accused Sher Nawas and completion of necessary investigation, supplementary *Challan* were submitted against them before the learned trial Court, where they were formally charge sheeted to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution evidence, statements of the appellants and acquitted co-accused were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They, however, declined to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial court after hearing both the sides, convicted and sentenced the appellants as mentioned above, however, acquitted co-accused Sher Nawas vide judgment impugned herein.

9. Reader of the Court apprised us that in early hours, Syed Mubashir Shah, Advocate, counsel for the complainant appeared and marked his attendance with him but at the time of call, the learned counsel did not turn up despite sufficient wait. The conduct of the learned counsel being against the professional ethic is highly deplorable. This being appeal pertaining to the year 2017, cannot be

kept pending for more period, particularly, when learned counsel for the complainant is in the know of fixation of date of hearing, hence, after hearing learned counsel for the appellant and learned AAG for the State, the appeal and connected revision petition are being decided on the available record.

10. It appears from record that occurrence has taken place on 23.01.2013 in a broad daylight at 09.30 A.M which has been reported by complainant Qeemat Ullah (PW.7) at 10.30 A.M. i.e. after one hour in DHQ hospital Mardan. In the FIR, Qeemat Ullah complainant (PW.7) himself and Qari Shoaib (PW.8), has been shown to be the eyewitnesses of the occurrence. Both of them are closely related to the deceased because the former is father and the latter is uncle of the deceased. Complainant (PW.7) has admitted that he was serving in police department for the last 20/25 years. Similarly, Qari Shoaib (PW.8) in the very first line of his cross-examination has admitted that he was *Pesh Imam* (Prayer Leader) in *Gul Bahar Peshawar* for the last 15 years and that a day or two in a week he used to visit his village. In cross-examination complainant (PW.7) deposed that accused had direct enmity with him and PW Qari Shoaib. In this view of the matter both the alleged eyewitnesses being closely related to the deceased, living in different areas, having direct enmity/motive with the appellants are interested, inimical as well as chance

witnesses. Chance witness is one who should not normally be where and when he professes to have been. No doubt, on mere close relationship of a witness with the deceased having motive with the accused or being a chance witness, his/her testimony cannot be discarded provided the same is trustworthy, confidence inspiring and corroborated by other strong circumstances of the occurrence. Similarly, for believing and relying upon the testimony of an eyewitness, who claims his/her presence at the spot at the time of occurrence must satisfy mind of the Court about his purpose of presence through some physical circumstance or through some corroborative evidence.

11. Taking the case in hand on the touch stone of the above principles, we will reappraise the testimonies of Qeemt Ullah (PW.7) and Qari Shoaib (PW.8), the purported eyewitnesses. The former while appearing as PW.7 reiterated the same story as set forth by him in the initial report/Murasila Exh.PA/1. In cross-examination, he deposed that he was serving in police department for the last 20/25 years, during which tenure; he remained in various Police Stations, namely, Police Station Kalu Khan, Topi and Industrial area of District Swabi. He admitted that during the days of occurrence he was posted in Police Station Kalu Khan District Swabi. He further deposed that his brother Qari Shoaib (PW.8) was Pesha Imam in Peshawar during the days of occurrence. Record depicts

that deceased has been done to death in field of the complainant, situated in Garakol Bhai Khan, District Mardan. An iota of evidence either oral or documentary in the shape of attendance Register/record of Police Station Kalu Khan has not been brought on record by PW.7 to substantiate that on the crucial day he was on leave from duty. He has not furnished any explanation, much less plausible, as to how he along with deceased and PW Shoaib got to gathered or accompanied each other on the day of occurrence to the spot, particularly, when complainant has admitted that PW Shoaib is residing in separate house. Complainant and PW Shoaib have not sustained any injury despite the fact that accused were having direct enmity with them. Complainant has stated that accused did not come a step towards them after firing at the deceased. In his initial report, the complainant has not stated a single word about taking shelter at the time of occurrence but in his court statement he while making improvement to bring his stance in consonance of prosecution case, deposed that PW Shoaib had taken shelter from firing behind the (Bosara). Making target an innocent chap/the deceased and letting off the complainant and PW Shoaib by the accused who had direct motive with them is beyond the comprehension of a prudent mind. In the FIR, general role of firing upon the deceased has been attributed to the appellants and absconding co-accused by

the complainant. In addition, it was narrated by complainant that on raising hue and cry by them, they were also fired by the accused, but neither he nor PW Shoaib has sustained any injury, therefore, in order to bring his testimony in line with the prosecution case by taking summersault he deposed that he had not stated in his report that accused also made firing at them, which not only amounts to dishonest improvement, but by taking U-turn, he has negated his version originated in the FIR and even in his examination in chief. Complainant showed his inability about the time on which they left for the field for cutting Shaftal. He admitted that Bala Garhi hospital falls in the way while coming from the spot to Mardan but they did not take the deceased then injured to the said hospital. He admitted that there are so many Police Stations while proceeding from the spot to hospital at Mardan. Dr. Amjid Khan (PW.1) has opined about the time between injury and death of the deceased as **“within 45 minutes”**. Had the complainant (PW.7) been present at the spot, he would have shifted his deceased then injured son to Bala Garhi hospital so as to save his life within 45 minutes and would have informed the Police Stations falling in the way from spot to Mardan. Had he been present at the spot, his clothes and hands would have been smeared with blood of the deceased in lifting him/shifting him to the hospital, but no such clothes have been produced before the I.O. The above

discussed circumstances create serious doubts about presence of the complainant at the spot at the time of occurrence.

12. Qari Shoaib while appearing as PW.8 deposed that on the day of occurrence he along with his brother Qeemat Ullah complainant (PW.7) and deceased Habib Ullah was present in their fields and were busy in cutting fodder for the cattle. They sent Habib Ullah deceased to the house of their sister for some work when in the meanwhile the appellants along with their absconding co-accused duly armed with firearms emerged there and opened fire at the deceased, as a result, he got hit and injured. On their hue and cry, the accused also fired at them but they luckily escaped unhurt. The deceased then injured succumbed to the injuries on the way to hospital. In the hospital the complainant reported the occurrence and he verified his report.

In cross-examination PW.8 deposed that he was Pesh Imam in Gul Bahar Peshawar for the last 15 years. He used to visit his house in the village for a day or two in a week, while the remaining days of the week he used to stay at Peshawar. He further deposed that he does not remember whether they had collected, stocked any heap of the cut clove (Shaftal). He disclosed that he was listening report of his brother (complainant) when it was being recorded, wherein he (complainant) stated to the author of report that

accused were armed with Kalashnikovs. A look over the initial report Exh.PA/1 reveals that only words “Aslaha Atesheen” has been mentioned by complainant. As two crime empties of 7.62 bore have been shown recovered from the spot, therefore, PW Qari Shoaib in order to bring in line his testimony with the prosecution case introduced Kalashnikovs in the report of complainant. This dishonest improvement made by him negates the report as well as testimony of complainant. He deposed that at the time of occurrence other co-villagers were busy in the Zamidara work at some distance from them and the accused might have seen those persons at the time of occurrence. Contrary, complainant PW.7 deposed that except them no one was there in the fields at the time of occurrence. PW.8 while contradicting the testimony of complainant deposed that they had not taken shelter behind the hayrick (Bosara). The testimonies of both the alleged eyewitnesses are contradictory with each other on material events and circumstances of the occurrence. Both have failed to prove their presence at the spot through physical circumstance or corroborative evidence. Neither any grass allegedly cut by the PWs nor any sickle has been shown recovered from the spot so as to corroborate their testimonies and establish their presence.

12. The Investigation Officer has visited the spot on the same day, but the spot inspection report is silent about

availability of any sheet (chadar) or sickle. Even no area has been noticed by the I.O. wherefrom fodder had been reaped by the alleged eyewitnesses. The deceased has sustained single firearm entry wound and a perforating firearm wound on his body. A general role of firing has been attributed to three accused including the appellants. The effective fire shots on the person of the deceased have not been specifically attributed to the appellants. No crime weapon has been recovered either from direct or indirect possession of the appellants. No FSL report is available about the two 7.62 bore empties as to whether these have been fired from one or more than one weapon, however, from recovery of 7.62 bore empties one thing can be inferred that weapon used in the offence was Kalashnikov which is an automatic weapon ejecting number of shots in seconds. For the sake of arguments if the occurrence is considered to be the job of three accused then much damage would have been caused to the deceased and large number of empties might have been recovered from the spot, but such is not the case herein. Similarly, escape or letting off the complainant and PW Shoaib, with whom the appellants had direct motive is yet another strong circumstance which pinches a prudent mind about their presence at the spot. In view of the above, we are firm in our view that both the purported eyewitnesses being closely related to the deceased and inimical towards the

appellants are interested and procured witnesses. Their testimonies being suffering from major contradictions and discrepancies cutting the very roots of the prosecution case cannot be belied and relied upon for conviction in a capital charge.

13. Recovery of blood from the spot, the last worn bloodstained argument of the deceased, positive Serologist in respect thereof coupled with postmortem of the deceased, though confirm the unnatural death of the deceased with firearm at the spot as alleged by the prosecution, but never tell the names of the culprit (s). Such pieces of supporting and corroborative evidence are always taken into consideration along with direct evidence and not in isolation. In support, reliance can be placed in on the judgments rendered by the Hon'ble apex court in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541).** Besides, in case titled, **"Saifullah vs the State" (1985 SCMR 410),** it has been ruled by the Hon'ble Supreme Court that:-

“When there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery”.

14. As regards abscondence of the appellants, on one hand it has been denied by the appellants in their statements under section 342 Cr.P.C., while on the other hand, it is settled law that mere abscondence of accused,

cannot be a substitute of real evidence. Abscondence by itself would be of no avail to the prosecution in absence of any other evidence against the absconding accused. Mere abscondence of accused would not be enough to sustain convict. Guidance in this regard can be obtained from the judgment of the Hon'ble Supreme Court in case titled, **“Muhammad Vs Pasham Khan” (1986 SCMR 823)**.

15. For the reasons discussed above, we are firm in our view to hold that prosecution has miserably failed to prove the guilt of the appellants through cogent and confidence inspiring direct evidence or circumstantial evidence making an unbroken chain, one end of which touch the dead body of the deceased and another end the neck of the appellants. The prosecution evidence is pregnant with doubts benefit of which should have been extended to the appellants but the learned trial Court by not appreciating the evidence in its true perspective landed into the field of error by holding the appellants guilty of the offence. As per golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. Under principle enunciated by the august apex court of the country through different pronouncements, by now it is settled law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in prosecution case must be resolved in favour of the accused. Indeed, this rule is based on the

maxim that “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 Holy Prophet (PBUH) that “Mistake of Qazi (judge) in releasing a criminal is better than his mistake in punishing an innocence person”. Guidance derived from case titled, **“Muhammad Khan and another vs the State” (1999 SCMR 1220) and “Muhammad Ikram vs the State” (2009 SCMR 230).**

16. Yet there is another aspect of the case, the learned trial Court has convicted and sentenced the appellants under section 302/34 PPC, by believing and relying upon the testimony of the purported eyewitnesses, however, acquitted them under section 324 PPC on the same set of evidence, by applying the principle/rule of “sifting grain from the chaff” which principle/rule has been done away with by the Hon’ble Supreme Court in its authoritative and elaborate judgment, rendered in case of **Hizar Hayat (PLD 2019 SC-527)** by dilating upon the entire law on the principle right from 1925 till date. The relevant part of the judgment is reproduced below:-

“We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a

compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that **the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit.**” (Emphasis supplied)

17. Accordingly, this appeal is allowed, conviction and sentences of the appellants/convicts recorded vide impugned judgment dated 19.01.2017, are hereby set-aside and both are acquitted from the charges leveled against them. They be set at liberty forthwith, if not confined in any other case.

18. On acquittal of the convicts, the connected **Cr.R. No.23-P/2017, titled, “Qari Shoaib vs Bakht Nawas etc”** has become infructuous, which is hereby dismissed.

19. These are the reasons of our short order of even date, which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentences of the appellants, namely, (1) Bakht Nawas and (2) Jihad Ali, recorded under section 302/34 PPC by the learned trial Court/ Additional Sessions Judge-II, Mardan, vide judgment dated 19.01.2017, in case FIR No.68 dated 23.01.2013, under sections

302/324/109/34 PPC, Police Station Rustam Mardan
and hereby acquit them from the charge in the cited
case. They be set at liberty forthwith, if not confined
in any other case.

Announced:
19.11.2019

M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Muhammad Nasir Mehfooz. .