JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
(*Judicial Department*)

Cr.A No. 712-P/2020

(Riaz and 01 other ___Versus___ The State and another)

Date of hearing: **14.09.2021**

Appellant(s): (Riaz and another) by
M/S Mian Sher Akbar Bacha, Syed Abdul Fayaz and Syed Mubashir Shah (Swabi), Advocates.

Respondents by: (State) by
Mr. Khalid Rehman, A.A.G.
(Mst. Amina Bibi) by
Mr. Munsif Saeed, Advocate

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellants Riaz and Rehman have jointly filed this appeal against the judgment dated 15.09.2020 handed down by learned Additional Sessions Judge-I, Swabi in case FIR No. 416 dated 25.07.2019 u/s 302/34 PC of P.S Yar Hussain, District Swabi whereby they were convicted u/s 302(b) PPC and sentenced to undergo life imprisonment with payment of Rs.200,000/- each to LRs of the deceased as compensation u/s 544-A, Cr.P.C or to undergo further six months S.I each in case of non-payment of the compensation. Benefit of section 382-B, Cr.P.C was extended to them.

We have also before us the connected Cr.R No. 125-P/2020 filed by complainant Mst. Amina Bibi against the same judgment of the

learned trial Court whereby she has prayed for enhancement of the sentences awarded to appellants. Both the cases, being inter connected and arising out of the same judgment, are decided together through this judgment.

2. The report was lodged by complainant Mst. Amina Bibi (PW-8) on 25.07.2019 at 13:00 hours in Civil Hospital Yar Hussain to the effect that on the same day she was present inside her house. On hearing noise she came out and saw that the present appellants duly armed with weapons were altercating with her son Ibne Amin during which they fired at him as result whereof he was hit and died on the spot. She further stated in her report that the occurrence has been witnessed by Fazal Aman (PW-9) whereas the motive behind the occurrence was mentioned as land dispute.

3. Report of the complainant was recorded in shape of *Murasila* on the basis whereof formal FIR was registered against both the appellants. The dead body was examined by Dr. Ertaza Ajmal (PW-01). His findings incorporated in the postmortem report (Ex.PM) are as under:

> **Condition of subject:** A young man of about 25/26 years old is brought to me wearing white qamees shalwar and banyan.

WOUNDS:

1. Firearm entry wound on right eyebrow having no tattooing mark.
2. Firearm exit wound on just behind the right ear.
3. Firearm entry wound on middle of right ear having no tattooing marks.
4. Firearm exit wound on occipital bone.
5. Another firearm entry wound on middle of right ear having no charring marks.
6. Firearm exit wound on occipital region.

Cranium and Spinal Cord:

Vertebrae and brain injured.

Abdomen:

All the contents of abdomen were normal while stomach was having semi digested food particles.

Muscles, bones and joints:

Skull was injured.

Remarks:

In my opinion the death has occurred due to excessive bleeding from skull due to firearm.

Probable duration:

Between injury and death: Instantaneously.

Between death and PM: within two hours

4. The appellants initially remained absconders and later on they moved petitions for their pre-arrest bail, as such, they were symbolically arrested on 11.09.2019. After completion of investigation, challan against them was put in Court and they were formally charge sheeted for the offence. On their not pleading guilty to the formal charge, prosecution produced twelve witnesses in support of the allegations against the appellants and closed the evidence. When examined u/s 342,

Cr.P.C, the appellants once again denied the charge leveled against them, however, they neither produced any witness in their defence nor opted to be examined on oath in terms of section 340(2), Cr.P.C. On conclusion of trial, the learned trial Court vide impugned judgment convicted and sentenced the appellants in the manner already noted in the earlier part of this judgment, hence, this appeal.

5. Arguments heard and record of the case was perused.

6. Prosecution has examined complainant Mst. Amina Bibi (PW-8) and Fazal Aman (PW-9) as eye witnesses of the occurrence. The former is mother while the latter is paternal cousin of the deceased. Since both the eye witnesses are closely related to deceased, therefore, their testimony needs to be thrashed out with great care and caution.

As per statement of the complainant, while present in her house, she came out on hearing noise and saw both the appellants altercating with her son during which they started firing at him with their Kalashnikovs as result whereof her son sustained injuries on his body and died on the spot.

According to the site plan, the distance between the spot and house of the complainant is 384 feet. She is admittedly a *parda nasheen* lady of 50/51 years of age and is not only in habit of using glasses meant for weak eye sight but was also not in the habit of coming in front of the public without wearing veil/covering sheet. The first claim of the complainant regarding hearing of the noise from a distance of 384 feet does not appeal to prudent mind more particularly when she was inside the boundary of her house. She also admitted in her cross-examination that usually she does not come out of her house in commotion, as such, her contention that she came out of her house on that particular occasion cannot be accepted being contrary to her customary habit. Though in response to a question of the defence counsel she explained that she came out of her house after wearing the covering sheet which her daughter was already holding in her hands but this explanation of the complainant, being repellant to reason, is mere a lame endeavor for bringing her statement in line with the evidence collected during the course of investigation. On keeping the statement of complainant in

juxtaposition with the site plan and Murasila/FIR, a clear disparity can be seen among the mentioned three pieces of evidence with regard to the place of occurrence. According to Murasila, the complainant mentioned the place of occurrence as اراضی ازاں مدعیہ واقع یارحسین شہیدا but contrary to above, in the site plan the deceased has been shown on Point No.2 which is the ridge between the land of one Gohar Rehman and the non-metaled thoroughfare leading to his house. It is important to note here that father name of the deceased is also Gohar Rehman but the person named as Gohar Rehman in the site plan is another person as verified by Abdullah (PW-6) during his cross-examination. Even otherwise, the I.O has specifically mentioned the land of complainant in the site plan as اراضی ازاں مدعیہ, hence, in this regard there remains no ambiguity. Keeping in view the contradictions between the site plan, statement of the complainant and Murasila, it can safely be concluded that complainant was not present at the time of occurrence otherwise she would have mentioned the exact place of occurrence in her report. In addition to above, complainant stated in her examination that after hearing noise she came

out of her house and kept walking on the path in between her two fields right in front of her house and when reached to the middle thereof the appellants fired at her son. Although Point-1A assigned to complainant in the site plan falls in-between her two fields but I.O Shehzad Khan S.I (PW-10) denied existence of any path between the two fields of complainant rather stated that there is a path between the fields of appellants and complainant. Thus, the statement of complainant gets no corroboration from the site plan. It is also noteworthy that according to complainant, she had attended her son soon after the occurrence and her clothes and covering sheet got stained with his blood but the I.O has not taken into possession her blood-stained garments to lend support to her above narrations. No doubt, her testimony could not be discarded on the sole ground that she is closely related to deceased and as per golden principle laid down by the apex Court for appreciation of evidence of such witness, it is not the question of enmity or relationship but the intrinsic value of the statement of prosecution witness which is required to be considered. Keeping in view the above

inconsistencies inter se the statement of complainant and other circumstantial evidence on record, her presence on the spot at the time of occurrence is highly doubtful, therefore, her testimony cannot be safely relied upon against the appellants/convicts. Guidance is sought from *Mst. Sughra Begum and another Vs. Qaisar Pervez and others* **(2015 SCMR 1142)**. The august Supreme Court held in the said judgment that:

> **8. It is cardinal principle of justice that ocular account in such cases plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution. To the contrary, once the ocular account is disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge therefore, we have to see the probative value of the ocular account in light of the facts and circumstances of the case.**

7. The other eye witness Fazal Aman appeared in the witness box as PW-9 and claimed that he had witnessed the present appellants committing murder of the deceased through firing. This witness, being resident of Mohallah Barees in village Yar Hussain situated at a distance of about 04 kilometers from village Shaheeda as per statement of the complainant, is a chance witness because he has not established his presence on the

spot with reasons. Though complainant has stated that house of this witness is situated adjacent to her house but in this regard too she has not spoken the gospel truth as neither the I.O has shown the house of PW Fazal Aman in the site plan nor the said witness himself has explained before the Court the very purpose for which he had come to village Shaheeda from Mohallah Barees Yar Hussain on the day of occurrence. He stated before the trial Court that he was present in the field of complainant at the time of occurrence but he has been shown at Point-5 in the site plan which is the junction of two roads leading to Yar Hussain and Dagai towards west and north respectively while towards south is the thoroughfare leading to the house of one Gohar Rehman. He admitted his presence on the road the existence of which he had earlier denied during his cross-examination. He has not only recorded a self-contradictory statement but his narrations are also not supported by site plan. The eye witness also stated that altercation between deceased and appellants continued for 5/6 minutes during which he watched them from a distance of 30 feet but did not interfere in their altercation and remained silent spectator. Similarly, though he claims to have

shifted the dead body to hospital but he did not identify the deceased before the doctor nor produced his clothes allegedly stained with the blood of deceased to Investigating Officer. The above unusual conduct of the eye witness casts further doubt on his presence on the place of occurrence at the relevant time. Thus, PW Fazal Aman is mere a chance witness and he has failed to establish his presence on the spot at the time of occurrence. Although evidence of a chance witness cannot be discarded on the sole ground that he happened to be at the place of incident incidentally but prosecution has failed to bring on record convincing evidence to establish his presence on the spot at the relevant time, therefore, his testimony cannot give any foundation for conviction of the appellants. Reliance in this regard is placed on *Muhammad Ashraf alias Acchu Vs. The State* **(2019 SCMR 652)** wherein the august Supreme Court observed that:

> **Concocted evidence provided by chance witnesses---Where the Court reached a conclusion that the eyewitnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story was concocted by the prosecution witnesses, then the case of the accused merited plain acquittal.**

8. In addition to above, not only the statements of both the eye witnesses are suffering

from glaring contradictions but they have also dishonestly improved their statements recorded during investigation. They do not agree in their statements regarding the place of residence of PW Fazal Aman and in this regard the complainant has tried to suppress the fact that the said PW is resident of Barees Yar Hussain. She also stated during the trial that her son had got out of the house on the phone call of appellant Riaz, however, the FIR is lacking her above narrations. Similarly, she duly specified the crime weapons as Kalashnikovs when appeared before the trial Court though in the FIR she had stated that the appellants had fired at the deceased with firearms/آتشین اسلحہ. Similar dishonest improvements were made by PW Fazal Aman with regard to time of occurrence, nature of the weapons and verification of the complainant's report when he was duly confronted by defence counsel with his statement u/s 161, Cr.P.C. Thus, the improvements so made by both the eye witnesses, being deliberate and dishonest, casts further doubt on their veracity. Reliance is placed on the judgment of the Hon'ble apex Court in the case titled *Akhtar Ali and others Vs. The State* **(2008 SCMR 6)** wherein it was held that:

When a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness.

9. Another aspect of the case which intrinsically makes the prosecution story unbelievable is the time of report and the time of examination of the dead body in hospital coupled with admission of the complainant that police had arrested 5/6 accused on the spot soon after the occurrence. According to Murasila, the occurrence took place on 25.07.2019 at 12:00 hours which was statedly reported on the same day at 13:00 hours. The doctor conducted postmortem at 12:50 P.M i.e ten minutes prior to lodging of the report. According to author of Murasila namely Imtiaz Khan ASI (PW-2), he reached hospital at 13:00 hours, recorded the report and prepared the injury sheet as well as inquest report of the deceased and thereafter referred the dead body to doctor under the escort of police official for post-mortem. PW-2 must have consumed some time on preparation of the mentioned three documents, then how the doctor could conduct the postmortem without intimation of police in shape of injury sheet and inquest report. Thus, the times

mentioned by both the doctor and author of Murasila in their respective reports appear to have been mentioned fictitiously. It appears that police recorded the report after conducting preliminary investigation and the complainant nominated the present appellants after consultation and deliberation. Our this apprehension is further substantiated by duration of death of two hours as mentioned by the doctor in the postmortem report. On calculating the said duration of death of the deceased from the time of postmortem i.e 12:50 P.M, the occurrence must have taken place at 10:50 A.M which has dishonestly been suppressed by prosecution. Most importantly, the complainant has admitted arrest of 5/6 accused by police on the spot soon after the occurrence meaning thereby that police had visited the spot soon after the occurrence and it appears that by that time complainant had no knowledge about the assailants, as such, the report was willfully delayed by police by concealing the real facts and preliminary inquiry was conducted whereafter the complainant charged the present appellants after speculation and deliberation. Though preliminary inquiry by itself is not a sufficient ground for disbelieving the prosecution story but in such situation presence of the eye witnesses becomes

doubtful and the Courts are required to scrutinize the evidence with great care and caution for arriving at a fair conclusion. Reliance is placed on *"State through Advocate General N.W.F.P Peshawar Vs. Shah Jehan"* ***(PLD2003 SC 70)*** wherein it has been held that:-

> **"The delay in lodging the F.I.R. has not been explained plausibly, which shows that it was lodged after preliminary inquiry/ investigation, deliberation and consultation, and the complainant (P.W.8) was called for from his village Dinpur, which was at a distance of about three miles from the house of the respondent".**

10. Although as per postmortem report the deceased died due to excessive bleeding from the firearm injuries he sustained on his person in the same occurrence but the said report alone cannot establish the charge against the appellants when otherwise the prosecution has failed to bring home their guilt through trustworthy and reliable ocular account. Even otherwise, according to medical evidence the deceased has sustained 03 entry wounds; one on his right eyebrow while the remaining two inlet wounds were found on middle of the right ear which can further be clarified from the pictorial annexed with the postmortem report (Page-44 of the record) . Though the doctor has not

mentioned the dimension of the entry wounds, however, when both the appellants were allegedly armed with Kalashnikovs and they made firing at the deceased, it can safely be held from the recoil of the weapons and the distance between the appellants and deceased that it was a one man job and one weapon has been used in the commission of the offence. Likewise, the locale of the said injuries and direction of the inlet and exit wounds also suggest that it was the doing of one person which can be clarified from postmortem report Ex.PM and pictorial appended with it. Hence exaggeration of the charge by complainant and false implication of innocent persons in the case cannot be ruled out in the mentioned circumstances.

11. As regards recovery of the crime weapons Kalashnikovs on pointation of the appellants, as per FSL report Ex.PK/2 the same have not matched with the five empties of 7.62 bore recovered from the spot. Similarly, the earlier FSL report Ex.PK/3 regarding the crime empties showing the same empties to have been fired from different weapons is also of no avail to prosecution in absence of trustworthy direct and circumstantial evidence.

12. Coming to the motive part of the case, though complainant has disclosed the motive as land dispute with the appellants but except placing on file the revenue record as Ex.PW-12/4, she has produced no evidence to this effect rather she admitted that no suit is pending regarding the alleged disputed property. It is in her statement that the appellants had purchased the land adjacent to her land, however, she denied the suggestion her annoyance over the said purchase by appellants and their false implication in the case. In the mentioned situation when the appellants were purchasers of the land adjacent to the land of complainant, the motive is naturally attributable to complainant side and not to the appellants to kill the deceased rather their false implication by complainant in view of the said motive cannot be ruled out because it is a settled principle that motive is a double-edged weapon which cuts both sides as observed by the august Supreme Court in the case titled *Muhammad Ashraf and 2 others Vs. The State* **(1998 SCMR 279)** in the following words.

> **Motive is a double-edged weapon, as while it may be a sufficient reason for commission of the offence by the accused, it can equally serve as a reason for the false involvement of the accused in the crime.**

13. Although the appellants have remained absconders for about 1 ½ months but prosecution has badly failed to prove the charge against them through ocular account and other circumstantial evidence of convincing nature, therefore, their conviction cannot be recorded solely on the ground of their abscondence which has always been considered by superior Courts as corroborative evidence. Reliance is placed on *Basharat and another Vs. The State* **(1995 SCMR 1735)** wherein it was held that:

> **After disbelieving the alleged motive, exclusion of the ocular evidence and the rejection of the incriminating recovery, there remains circumstance of abscondence of Ghulam Mustafa which per se is not sufficient for conviction under section 302, P.P.C.**

14. The prosecution case is suffering from many inconsistencies and infirmities sufficient to create serious doubts in prudent mind regarding involvement of the appellants in commission of the offence, therefore, their conviction and sentences recorded by trial Court in the impugned judgment cannot be maintained in the circumstances. Resultantly, this appeal is allowed, the impugned judgment is set aside and appellants are acquitted of the charge so leveled against them by prosecution. They be released forthwith from jail if not required

in any other case. The connected Cr.R No. 125-P/ 2020 is dismissed for having become infructuous.

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

Announced.
14.09.2021

JUDGE

JUDGE