IN THE PESHAWAR HIGH COURT, PESHAWAR,

[Judicial Department].

Crl. Appeal No.163-P/2018

Johar Ali son of Muzamil Khan,
r/o Mirjai PayanDistrict Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	Mian Arshad Jan, Advocate.
For State :-	Mr. Muhammad Nisar AAG.
Respondent No.2.	In person.
Date of hearing:	**09.12.2021**

JUDGMENT

ROOH-UL-AMIN KHAN, J:-This criminal appeal, filed by Johar Ali, the appellant, is directed against the judgment dated 14.02.20218, passed by learned Trial Court/Additional Sessions Judge-VI, Peshawar, whereby he has been convicted under section 302(b) PPC and sentenced to undergo life imprisonment and to pay Rs.50,000/-, as compensation in terms of section 544-A Cr.P.C. and in default thereof to undergo six months simple imprisonment, in case FIR No.159 dated 29.04.2014, under sections 302/34 PPC, Police Station Nowshera Kalan. Benefit of section 382-B Cr.P.C., has been extended to him.

2. The prosecution's case as per contents of First Information Report (**"FIR") Exh.PA** is that on 29.04.2014 at 2010 hours, complainant Asad Khan (PW.3), in company of dead body of his cousin Robaid deceased, reported to Umar Nasir ASI

(PW.6), in the mortuary of DHQ hospital, Nowshera, to the effect that on 29.04.2014 he along with the Amir Muhammad and the deceased was present in the fields of Gul Nazar, situated in village Miraji Payan, District Nowshera. At 1845 hours, he and Amir Muhammad left the deceased and started towards their houses, but in the meantime, a motorcar bearing registration No.IDF.9938, driven by Lazamin, accompanied by appellant Johar Ali and Khan Zamin, sitting in front and rear seat, respectively, arrived at the spot. The three accused came down of the motorcar and started firing at Robaid, as a result, he got hit and succumbed to injuries on the way when he was being shifted to the hospital. Besides the complainant, the occurrence is stated to have been witnessed by Amir Muhammad. Motive behind the occurrence is previous blood feud between the parties. Umair Nasir ASI (PW.6) recorded report of the complainant in the shape of Murasila Exh.PA/1 and sent the same to Police Station on the basis of which FIR Exh.PA was registered against the accused. He also prepared injury sheet and inquest report Exh.PW.6/1 and Exh.PW.6/2, respectively, of the deceased and referred his dead body for autopsy to the mortuary under the escort of constable Rafi ud Din.

3. Dr. Iftikhar Khan (PW.5) conducted autopsy on the dead body of the deceased on 29.04.2016 and found the following injuries on his body vide postmortem report Exh.PM:-

1. Firearm entry wound on left upper lateral chest ½ inch in size.

2. Firearm exit wound on right axilla 1 ½ inch in size.
3. Firearm entry wound on the left lateral lower chest area ½ inch in size.
4. Firearm exit wound on right lower chest 1 inch in size.
5. Firearm entry wound on anterior medial aspect of right thigh ½ inch in size.
6. Firearm entry wound on the anterior medial aspect of right thigh ½ inch in size.
7. Firearm entry wound on the medial aspect of the right thigh ½ inch in size.
8. Firearm exit wound on the lateral aspect of the right thigh near wound No.6 one inch in size.
9. Firearm entry wound on the lateral aspect of the left thigh ½ inch in size.
10. Firearm exit wound on antero medial aspect of the left thigh 3-4 inch in size and also causing lacerated wound of the penis due to bone piolees ½ inch in size.

Opinion: In his opinion the deceased die due to injuries to vital organs (lungs, major organs) and hypovaluemic shock. He opined the probable time between injury and death as : one to one and half hour and between death and postmortem as one to two hours.

4. Khayal Nawaz Inspector (PW.7), conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection, he secured bloodstained grass from the place of the deceased vide recovery memo Exh.PW.3/1 and 17 empties of 7.62 bore from the places of the accused vide recovery memo

Exh.PW.3/2 and bloodstained last worn garments of the deceased vide recovery memo Exh.PW.7/1. He initiated proceedings under sections 204 and 87 Cr.P.C. against the accused, recorded statements of the PWs under section 161 Cr.P.C. and after completion of investigation handed over case file to SHO who submitted *challan* in terms of 512 Cr.P.C. against the accused.

5. On arrest of the appellant and completion of necessary investigation, supplementary *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, hence, the prosecution's evidence was invited. To prove its case, the prosecution examined as many as ten witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation 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, the learned trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence, this appeal.

6. Arguments of learned counsel for the parties heard and record perused with their able assistance.

7. It appears from record that occurrence in this case has taken place on 29.04.2014 at 1845 hours, which has been reported by complainant Asad Khan (PW.3) vide Exh.PA/1 at 2010 hours wherein he has charged the appellant along with

absconding co-accused Khan Zaman and Lazmin for committing murder of Robaid deceased with firearms. Complainant Asad, the alleged eyewitness, is real cousin of the deceased. Though his evidence is not to be discarded on the sole ground that he is close relative and interested witness, but necessary caution has to be observed in accepting his evidence because it is generally approved proposition that in case of rivalries and enmities, there is general tendency that a person from victim side will pose himself as eye witness of the occurrence and shall rope in the influential members of rival side for participating in the assault, with a particular designed role, therefore, the veracity of this witness has to be examined with utmost care and caution, particularly, with regard to his presence at the spot at the time of occurrence when he has not disclosed the purpose of his visit to the spot. In his initial report Exh.PA/1, the complainant has not stated a single word as to when and how he met the deceased and they both reached the spot. Similarly, he has also not disclosed the purpose of his visit to the spot. In this view of the matter, complainant is also a chance witness. It has now been well settled that for conviction of an accused person it would be highly unsafe to rely upon testimony of a chance witness when remained uncorroborated and for conviction of a accused on capital charge on the basis of testimony of chance witness, the court has to be at guard and corroboration has to be sought for relying upon such evidence. Reliance may be placed on **2017 SCMR 1710 Anwar Begum vs. Akhter Hussain**. In case titled, **“Mst. Rukhsana Begum and others Vs**

Sajjad and others" (2017 SCMR 596), it has been held by the Hon'ble Supreme Court that single doubt reasonably shown that a witness's presence on the crime spot was doubtful during the occurrence, it would be sufficient to discard his testimony as a whole and that said principle may be pressed into service in case where such witness was seriously inimical or appeared to be chance witness. Keeping in view the above settled principles in mind, we will reappraise the evidence furnished by the complainant, the alleged eyewitness. He while appearing as PW.3 deposed as under:-

> "On the day of occurrence I along with deceased Robaid son of Mukhtiar was sitting at the place of occurrence. When I left him and went 10 paces ahead, in the meanwhile, a gray colour corolla motorcar bearing No.9938 driven by accused Raz Ameen accompanied by Johar Ali in front and Khan Zameen in rear seat arrived there. The said three persons on getting out of the vehicle started firing at Robaid and thereafter decamped from the spot. Robaid was hit. Other people also attracted to the spot. I took the injured Robaid to the hospital and reported the matter to police. On the way to hospital Robaid succumbed to injures. I also thumb impressed my report which was recorded by the police in the hospital. My other relatives came to the hospital; therefore, I went back to the place of occurrence. The I.O came at the spot and I pointed out the place of occurrence to him. The I.O prepared site plan in torch light. He collected bloodstained grass from the spot vide memo Exh.PW.3/1 and 17 empties of 7.62 bore vide recovery memo Exh.PW.3/2 in his presence. The

recovery memos bear my as well as signature of marginal witness".

8. In the initial report Exh.PA/1 the complainant has alleged that he along with Ameer Muhammad was sitting with the deceased prior to the occurrence and no sooner they left the deceased, the accused arrived in a motorcar and opened fire at the deceased, but in his court statement, he has not stated a single word about presence of Amir Muhammad when he was allegedly sitting with the deceased. For ready reference relevant part of his statement is referred:- "O**n the day of occurrence I along with deceased Robaid was sitting at the place of occurrence and when I left him and went 10 paces ahead, the accused arrived at the spot".** In cross-examination he has stated that he has mentioned in the initial report that after the death of Robaid deceased he was shifted to hospital in vehicle. This part of his statement also negates his report wherein he has mentioned that deceased sustained injuries and he succumbed to injuries on the way to hospital. He while further contradicting his report deposed that:- **"The dead body of Robaid was lying on the surface of barren land which was not cultivable. He took the dead body of Robaid from the spot and reached to the hospital within half an hour approximately".** This part of his cross-examination is total departure from his initial report, wherein he has stated that Robaid deceased was shifted in injured condition from the spot. He further deposed that he is illiterate, therefore, cannot sign. Murasila Exh.PA reveals that it also bears thumb impression of

the complainant and not his signature. Contrary, in examination-in-chief he while blowing hot and cold stated that he signed the recovery memos Exh.PW.3/1 and Exh.PW.3/2, in respect of blood and bloodstained articles taken into possession by the I.O. from the spot in his presence bear his signatures. It appears from initial report Exh.PA/1 that complainant has not leveled any allegation of firing against the accused at him and Amir Muhammad despite the fact that he was the real cousin of the deceased and on equal footing for the accused. In this view of the matter, letting of the complainant by the accused who was at their mercy is also beyond the comprehension of a prudent mind. Had he been present at the spot, at the time of occurrence, the strong probability is that he would not have been spared by the accused so as to leave no evidence behind them. The occurrence is that of a broad day light but the complainant while reporting the matter has not disclosed about the caliber of weapon used by the accused in the commission of offence. In cross-examination it is clarified and admitted by the complainant that he can identify between different bores of the weapons i.e. shot gun, 12 bore, Kalashnikov, M-16 pistol etc. He also admitted that at the time of initial report he has not disclosed about the kind of weapons, the accused were having in their possession. Self stated that when the I.O. inspected the spot and collected the empties he then identified the weapon. Non-disclosure of bore of the weapons used in the commission of the offence despite the fact that the complainant could identify different bores is another strong

circumstance which makes his presence at the time of occurrence highly doubtful.

9. One of the eyewitnesses, namely, Amir Muhammad is not only abandoned by the prosecution being won over but the complainant in his statement before the court has excluded him as an eyewitness of the occurrence which is suggestive of the fact that Amir Muhammad was not present at the spot a the time of occurrence, however, he being a close relative of the complainant was cited as an eyewitness in the FIR and later on, when he was not supporting the prosecution's case, he was not brought in the witness box.

10. Except bald statement of complainant, not single evidence has been brought on record either by the complainant or Khial Nawaz Inspector I.O. (PW.7) in proof of the motive. In cross-examination the I.O. has stated that **"It is correct that I have not collected any evidence pertaining to the motive part. It is further correct that the complainant had failed to produce any evidence in this regard".** It is settled law that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence.

11. Medical evidence is also not supporting version of the complainant. The complainant has charged three accused for indiscriminate firing at the deceased, whereas, as per post mortem report all the entrance wounds sustained by the deceased are having one and the same dimension of ½ inch. Besides, the I.O.

has not sent the alleged crime empties to the FSL, therefore, it remained shrouded in mystery as to whether occurrence is the job of one person or more than one. It is settled law that any eyewitness, who claimed his presence at the spot, must satisfy the mind of the court through some physical circumstances or through some corroborative evidence in support of his presence at the spot at the time of occurrence. On reappraisal of the evidence, we have arrived at an irresistible conclusion that complainant has miserably failed to prove his presence at the spot at the time of occurrence through some strong and physical circumstances or through some corroborative evidence. In this view of the matter, the learned trial court has landed into the field of error by believing and relying upon his evidence.

12. Recovery of bloodstained grass and bloodstained garments of the deceased coupled with positive Serologist report in respect thereof and postmortem report of the deceased, prove the unnatural death of the deceased with firearm at the place as alleged by the prosecution, but these supporting and corroborative pieces of evidence by no stretch of imagination tell the name(s) of the culprits. Such pieces of evidence are always taken in aid of the direct evidence and not in isolation. In this regard 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".

13. So far as abscondence of the appellant is concerned, it is settled law that conviction on abscondence alone cannot be sustained. Reliance placed on Amir **Gul vs the State (1981 SCMR 182).**

14. It is well settled law that accused person is presumed to be innocent till the time he is proved guilty beyond reasonable doubt and this presumption of innocence continued until the prosecution succeeded in proving the charge against the accused beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. In the instant case, the prosecution has failed to prove the guilt of the appellant through the above standard of evidence.

15. Crux of the above discussion is that the prosecution has miserably failed to bring home guilt the appellant through cogent and confidence inspiring direct or circumstantial evidence beyond shadow of reasonable doubt. The prosecution's evidence is pregnant with doubts and according to golden principle of benefit of doubt; one substantial doubt is enough for acquittal of the accused. Reliance placed on case titled, **"Muhammad Zaman Vs the State and others" (2014 SCMR 749).** Basically, it is the principle enshrined in Islamic jurisprudence, fourteen hundred years ago that "it would be better to acquit ten culprits than convicting one innocent soul." which has now been

transformed into the form of the principle that, “acquitting by error would be better than convicting by error”. The said commandment has evolved into the theory of benefit of doubt, which, invariably, is extended to the accused for safe administration of criminal justice.

16. Accordingly, this appeal is allowed. Conviction and sentences of the appellant recorded by the learned trial court vide impugned judgment are set aside and he is hereby acquitted of the charge leveled against him in the instant case. He be set at liberty forthwith, if not required and confined in any other case.

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

> “For reasons to be recorded later on, we allow this appeal, set-aside the conviction and sentences of appellant Johar Ali son of Muzamil Khan, recorded under section 302(b)/34 PPC by the learned Additional Sessions Judge-VI, Nowshera vide judgment dated 14.02.2018, in case FIR No.159 dated 29.04.2014, under sections 302/34 PPC, Police Station Nowshera Kalan and hereby acquit him from the charge in the cited case. He be set at liberty forthwith, if not required/confined in any other case”.

Announced:
09.12.2021
M.Siraj Afridi PS

Senior Puisne Judge

JUDGE

DB of Mr. Justice Rooh ul Amin Khan Hon’ble Senior Puisne Judge; AND
Hon’ble Mr. Justice Ijaz Anwar