IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Crl. Appeal No.568-P/2013

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-VIII, Mardan, appellant Usman Ghani having been found guilty of committing the 'qatl-i-amd' of Mst. Tilawat deceased his sister-in-law, vide judgment dated 28.10.2013, has been convicted under section 302 (b) P.P.C. and sentenced to undergo ***'rigorous imprisonment for life"*** as well as to pay a sum of Rs.3,00,000/-, as compensation to LRs of the deceased in terms of S.544-A Cr.P.C. or in default thereof, to undergo 06 months S.I. further. Benefit of S.382-B Cr.P.C. has been extended to him.

2. Through the instant appeal, the appellant has questioned his conviction and sentence, while Owais Rehman petitioner/complainant through connected ***Cr.R. No.162-P/2014 titled, "Owais Rehman Vs Usman Ghani"*** seeks enhancement of sentence of the convict from

life imprisonment to normal penalty of death as provided under the law.

3. Since, both the matters are the outcome of one and the same judgment of the learned Trial Court, therefore, this common judgment shall govern the same.

4. The prosecution case is that on receipt of information qua a murder in village Jamrah Salim Khan, Aman Ullah Khan ASI (PW.2), rushed to the said village, where Owais Rehman (PW.9), in company of dead body of his sister Mst. Tilawat deceased, reported him that some two years back the deceased got married to one Luqman and from their wedlock, a son Ihtesham was born who is now 6 months old; that the relation of Luqman became strained with the deceased as she was being suspected by him for illicit relation; that on 12.07.2008, he (complainant) alongwith PW Fahad visited the house of their deceased sister. An oral altercation took place between the spouses, during which course, Luqman husband of the deceased caught hold of her while Usman (appellant-convict herein)/ brother of Luqman, gave her axe blow, as a result, she fell and died on the spot. After commission of the offence, the accused decamped from the spot.

5. Aman Ullah Khan ASI (PW.2), incorporated report of complainant into murasila Exh.PA/, on the basis of which, FIR No.412 dated 12.07.2008 under sections 302/34 PPC, Police Station Sadar, District Mardan was registered against the appellant and absconding co-accused Luqman. He also prepared injury sheet and inquest report of the deceased Exh.PW.2/1 and Exh.Pw.2/2, respectively, and shifted her dead body to the mortuary under the escort of Constable Nihar Ali No.1107 for postmortem examination.

6. Lady Dr. Nasira Anjum (PW.4) on 12.07.2008 at 06.30 p.m. conducted autopsy on the dead body of the deceased and observed the following injuries on her person, vide postmortem report Exh.Pw.4/1:-

1. Two sharp injuries parallel to each other, one inch apart from left parietal bone of skull extending to temporal bone upto left ears, each 1 x 6 inch.
2. A sharp injury on left occipital bone of skull of about 1 x 6 inch. The skull bones found fractured and brain matter is out.

Opinion:

In her opinion the cause of death of the deceased was severe injury to brain matter and bleeding.

Probable time between injury and death has been observed as " Instantaneous" while between death and postmortem as "3 to 4 hours".

7. Fazal Malik SI (PW.13), proceeded to the spot and prepared site plan Exh.PB on the pointation of the eyewitnesses. During spot inspection, he secured blood stained piece of foam Exh.P.1, took into possession an axe Exh.P.2 from kitchen with which hairs were attached vide recovery memo Exh.PW.5/2. Vide recovery memo Exh.Pw.11/1, he took into possession the last worn bloodstained garments of the deceased, placed on file postmortem report, sent the bloodstained articles including the hair attached with iron part of the axe to the FSL for chemical analysis vide application Exh.PW.13/2, reports whereof are Exh.PW.13/3 and Exh.PW.13/4, initiated proceedings under section 204 and 87 Cr.P.C. against the accused, recorded statements of the PWs under section 161 Cr.P.C., placed on file the photographs of the crime spot and after completion of investigation, handed over the case file to SHO, who submitted challan in terms of S.512 Cr.P.C. against the accused.

8. Ayaz Mehmood Khan Inspector (PW.6), shifted accused-appellant to Mardan, who was arrested by Islamabad police under section 55/109 Cr.P.C., arrested

him in the instant case vide arrest card Exh.PW.6/34, obtained his physical remand, interrogated him and recorded his statement under section 161 Cr.P.C. After completion of necessary investigation, handed over the case file to the SHO, who submitted supplementary challan against the accused/appellant before the learned Trial Court, where he was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as thirteen witnesses. After closure of the prosecution evidence, statement of accused-appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations 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.

9. Learned counsel for the appellant argued that abnormal delay of three hours in reporting the incident despite a little distance of 6/7 Kilometers inter-se the crime venue and the Police Station, the unnatural conduct of PWs Owais Rehman and Fahad like silent spectators to demonstrate the murder of their sister and the mode and

manner of the incident as alleged by the PWs, are the hard facts which prima facie establish the absence of PWs on the spot at the time of incident. He contended that actually the incident is unseen and both the PWs named above, being brothers of the deceased, their attendance had been procured, later on, which caused delay of three hours in lodging report. Had the PWs been present on the spot, both being young men of 30 to 35 years of age, would not have allowed the assailant/ assailants to do away with their sister; that neither the alleged crime axe has been recovered from possession of the appellant nor on his pointation nor has he confessed his guilt before the competent court of law nor the same has been sent to the Expert for comparison with the finger prints of the appellant; that mere autopsy report of the deceased, recovery of axe, blood from the spot and positive Serologist report qua the bloodstained articles, being corroborative pieces of evidence, in absence of direct evidence, by itself would not be sufficient enough to sustain conviction of the appellant; that both the alleged eyewitnesses have badly failed to establish their presence on the spot at the time of incident through strong physical circumstances which create serious doubts in the prosecution case benefit of which is to be extended to the appellant, therefore, the learned Trial Court has wrongly

considered and believed their testimony for recording conviction. He argued that the impugned judgment being based on surmises and conjectures is liable to be set at naught. He requested for acceptance of the appeal and sought dismissal of the revision petition.

10. Conversely, learned AAG assisted by learned counsel for the complainant argued that appellant is directly charged by both the eyewitnesses for giving fatal axe blows on the person of the deceased; that there exists no reason or motive that the PWs being real brothers of the deceased would substitute the real culprits of their sister; that delay in lodging report has been satisfactorily explained; that the eyewitnesses have furnished straightforward and truthful account of the incident which is corroborated by medical evidence, recovery of blood and crime axe as well as positive Serologist reports in respect of bloodstained articles and unexplained noticeable abscondence of the appellant. They argued that prosecution has proved the guilt of the appellant up to the hilt through cogent and confidence inspiring evidence and defence failed to create any dent in the prosecution evidence, therefore, the learned Trial Court has rightly held the appellant guilty of the offence. They submitted that there exists no mitigating circumstance to warrant lesser

sentence, therefore, the appellant whose hands are coloured with the bloods of an innocent lady deserves maximum punishment of death provided for the offence. They sought dismissal of the appeal and requested for enhancement of sentence.

11. We have given our anxious consideration to the exhaustive arguments advanced from either side and perused the record carefully.

12. The incident took place on 12.07.2008 at 13.30 hours in the house of accused, situated in village Jamrah Salim Khan, at a distance of 6/7 Kilometers from Police Station Saddar Mardan, but has been reported by complainant Owais Rehman (PW.9) at 16.30 hours i.e. after three hours delay, for which period the deceased remained on the spot and when Aman Ullah Khan ASI, reached there, the matter was reported to him. The explanation furnished by complainant that non-availability of transport caused the delay in reporting the incident, does not appeal to our mind because in this era of advance technology usually vehicles are available in each and every village as well as each and every person is equipped with the facility of fast communication. If we presume that transport was not available in village Jamrah Salim Khan, the two PWs could at least inform the police on cell phone

or could easily arrange any vehicle from the nearby villages or vehicles Stands. In such like unfortunate incidents the kith and kin of the deceased/ injured even do not wait till arrangement of the vehicle rather by putting the injured/deceased in a Cot with the help of neighbours and co-villagers, endeavor to shift him/her on their shoulders to the hospital with the impression and expectation that he or she might be alive, so as to save his/ her life, what to speak of wait for a long time of three hours. Thus, delay of three hours in lodging report, prima facie indicates towards absence of the PWs on the spot at the time of incident, procurement of their attendance during this time and lodging of report after deliberation and consultation.

13. Owais Rehman complainant while appearing as PW.9 deviated from his version set forth by him in his initial report wherein he has alleged that on the fateful day there was oral altercation between the deceased and her husband Luqman, during which course, Luqman caught hold of her and the appellant gave her axe blow, which resulted her death, but in his statement he deposed that **"on the day of occurrence I alongwith PW Fahad were present in the room of the house of accused when accused entered and accused facing trial Usman gave**

axe blows to the deceased who fell on a bed. The accused decamped after the occurrence and deceased died on the spot". He did not utter a single word about any altercation between the spouses or anything about catching hold of the deceased by co-accused Luqman. Fahad while appearing as PW.10 reiterated the same story furnished by complainant in his report. Both the PWs are real brothers of the deceased. Admittedly, conviction can be recorded on the basis of testimony of close relations of the deceased provided the same is trustworthy, confidence inspiring and corroborated by other strong circumstances of the incident. Besides, a witness who claims to be the eyewitness of the incident must satisfy the mind of the court about his/her presence on the spot at the relevant time of incident through some strong circumstances of the case.

14. As per site plan Exh.PB this untoward incident has been shown in the house of absconding co-accused Luqman inside his room. The room is eight feet wide and fourteen feet long. Mst. Tilawat deceased has been shown at point No.1. Points No.2 and 3 are the places of PWs Owais Rehman and Fahad, respectively, while accused Luqman and appellant Usman, have been shown at points No.4 and 5, respectively. The distance between PWs and the accused is 02 to 4 feet, while between the deceased

and PWs is 3 to 4 feet. Both the appellants are real brothers of the deceased and young men of 30 to 35 years of age. If there was verbal altercation between their sister and absconding co-accused Luqman, they should have been conscious of the next moments keeping in view the nature and gravity of altercation or arguments. They should have been more conscious if the accused was having axe or any axe was lying there in the room, about which nothing has been stated by the complainant in his report. In such scenario, keeping in view the natural human conduct, particularly, the conduct of brothers, the PWs would have intervened between the spouses or at least would not have given a chance at any cost to the accused to do away with their sister because if the accused were two in number, the PWs were also not less in number, physique and strength, but none of the PWs has shown any effort to save the life of their sister. This unnatural conduct of the PWs/ brothers like silent spectators is a strong circumstance which speaks about their absence at the time of incident. None of them has sustained any injury to justify their presence on the spot because it cannot be expected from brothers, who are always considered as shields of sisters, particularly, in the pathan society, to allow someone even to cause a scratch on their sisters what to speak of their murder. The above

discussed facts and circumstances, further fortify the absence of the two PWs on the spot and that's why the incident has been reported with a delay of three hours, after procuring their attendance.

15. Yet there is another disturbing aspect that both the PWs are the residents of village Bhai Khel Mardan, situated at a distance of 10 Kilometer from the crime spot as evident from statement of PW Owais Rehman. PW Owais Rehman is mason by profession and usually goes for work at about 8.00 a.m. as stated by him in his cross-examination while PW Fahad is a daily wager and goes for work at 07.00 a.m. Their stance is that since on the fateful day it had been raining therefore they being off from work went to the house of the deceased, who had summoned them through their relative. None of the PWs has disclosed the name of the relative through whom they had allegedly been summoned by their deceased sister nor examined by the I.O. No shred of evidence, much less tangible, has been brought on record to prove that the fateful day was a rainy day and that both the PWs were not at work. Keeping in view the place of residence of the PWs and their routine work, they fall within the definition of a chance witnesses. A chance witness, in legal parlance, is a witness who claims his presence on the spot at the eventful time, albeit

his presence on the spot is a sheer chance, as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot, but at a place where he resided, carried on business or run day to day affairs. Testimony of a chance witness, in such context, is ordinarily not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time as in normal course, the presumption under the law that would operate would be that such witness was absent from the crime spot. In rare cases, the testimony of a chance witness can be relied upon, provided some convincing explanation appealing to a prudent mind of his presence on the crime venue are put forth, when the occurrence took place, otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt. Guidance in this regard can be derived from the judgment of the august Apex Court in case titled, **"Mst. Sughra Begum and another Vs Qaiser Pervez and others" (2015 SCMR 11).** 16.

16. The learned Trial Court while recording conviction on the basis of statement of these witnesses has squarely over sighted the above discussed facts and circumstances, and thus reached to erroneous conclusion

by holding the appellant guilty of the offence. Since, from the evidence available on record, we are not satisfied about the presence of the alleged eyewitnesses on the spot at the time of incident, therefore, it cast serious doubt in the prosecution case which destroys the entire superstructure of the prosecution case.

17. No doubt, a recovery of an axe from the kitchen of the house has been shown as a crime weapon, but the same has neither been recovered from direct or indirect possession of the appellant nor on his discovery nor has it been examined through any Finger Expert alongwith the finger prints of the appellant because the role of giving axe blow has been specifically attributed to the appellant, therefore, in such circumstances, this piece of evidence, would not advance the case of the prosecution. Besides, such like recoveries are always considered as corroborative pieces of evidence, which cannot be a substitute of direct evidence. Corroborative pieces of evidence are always taken into consideration alongwith direct evidence. Similarly, positive Serologist Report qua bloodstained articles and hair as well as autopsy report of the deceased, can only prove the unnatural death of the deceased with sharp object on a particular place, but by whom, it never tell the name/names

of the culprit/culprits. Since, we have disbelieved the direct evidence; therefore, these corroborative pieces of evidence by no mean would be sufficient to bring home the guilt of the appellant. Guidance may be derived from **Riaz Ahmed's case (2010 SCMR 846).** It has been held by the Hon'ble Supreme Court that in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541),** that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular evidence is to be read together and not in isolation. As per ratio of judgment of the Hon'ble Supreme Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410),** when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery. In case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730,** it has been observed by the august Apex Court that recovery of crime weapon by itself is not sufficient for conviction on murder charge. In case of **Siraj Vs Crown (PLD 1956 Federal Court 123),** it was observed that recovery of handle of blood-stained hatchet at the instance of the accused, when other evidence was disbelieved, then it was not enough for conviction. Similarly, mere abscondence of the accused in absence of confidence inspiring direct evidence would not be enough to warrant

conviction. It is settled law that abscondence alone, cannot be a substitute of real evidence. It has been observed by the apex Court in **Farman Ali and others' case (PLD 1980 SC 201),** that abscondence by itself would be of no avail to prosecution in absence of any other evidence against the absconding accused and mere abscondence of accused would not be enough to sustain his/her conviction. Reliance can also be placed on case titled, **"Muhammad Vs Pesham Khan (1986 SCMR 823).**

18. In light of the above discussion, we have reached to an irresistible conclusion that prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring evidence beyond shadow of reasonable doubt. The learned Trial Court failed to appreciate the available evidence in its true perspective and thus reached to erroneous conclusion by holding the appellant guilty of the offence. The prosecution evidence is pregnant with doubts, benefit of which is to be extended to the appellant not as a matter or grace or concession but as matter of right as per golden principle of benefit of doubt, according to which, one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in

accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " 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 the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Wisdom in this regard may be derived from the judgments of the august Apex court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**.

19. Resultantly, we allow this appeal, set aside the conviction and sentences of the appellant recorded by the learned Trial Court vide impugned judgment dated 28.10.2013 and hereby acquit him of the charge levelled against him. On acquittal of the appellant, connect Cr.R. No.162-P/2014, has become infructuous, which stands dismissed.

20. These are reasons of our short order of even date, which runs as under:-

"For reasons to be recorded later on, this appeal is allowed. The conviction and sentences of the appellant, namely, Usman Ghan, awarded to him in case FIR No.412 dated 12.07.2008 under sections 302/34 PPC Police Station Saddar District Mardan by learned Additional Sessions Judge-VII, Mardan vide impugned judgment dated 28.10.2013 are set aside and he is acquitted of the charges lvelled against him. He be released from jail forthwith, if not required in any other case".

Announced.
03.12.2015

J U D G E.

J U D G E.

**M.Siraj Afridi P.S. D*