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JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 217-M/2017

(1) *Ghafoor Khan s/o Akbar Khan (Appellant)*
Versus

(1) *The State through Additional Advocate General.*
(2) *Naseeb Gul s/o Khamangay*
(Respondents)

Present: *Mr. Sher Muhammad Khan, Advocate for the appellant.*

Malik Akhtar Hussain Awan, A.A.G

*M/S. Mukaram Shah and Salimzada Khan,
Advocates for the complainant/respondent.*

Cr.R No. 86-M/2017

Shamash Gul s/o Khamangay
Versus
(Petitioner)

1) *Ghafoor Khan s/o Akbar Khan*
2) *State through A.A.G.*
(Respondents)

Present: *M/s Mukaram Shah and Salimzada Khan,
Advocates for the petitioner.*

Malik Akhtar Hussain Awan, A.A.G

Mr. Sher Muhamad Khan, Advocate for the respondent/convict.

Date of hearing: **24.09.2018**

Date of announcement: **03.10.2018**

CONSOLIDATED
JUDGMENT

SYED ARSHAD ALI, J.- Through this single judgment, we propose to decide this criminal appeal bearing No. 217-M/2017 as well as the connected Criminal Revision bearing No.

86-M/2017, as both these matters emanate

NAWAB/PS* DB: Mr. Justice Muhammad Ghazanfar Khan
Mr. Justice Syed Arshad Ali

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from one and the same judgment dated 11.10.2017 rendered by the learned Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower at Chakdara, in case F.I.R No. 452 dated 05.7.2002 under sections 302,324 PPC registered at Police Station Asbanrh, District Dir Lower, whereby the appellant Ghafoor Khan was convicted under section 302 (b) PPC and sentenced to life imprisonment with payment of compensation of Rs.200,000/- (two lacs) payable to the legal heirs of the deceased under section 544-A, Cr.P.C or in default thereof he was ordered to undergo further 6 months S.I. However, the accused/appellant was extended the benefit of section 382-B Cr.P.C.

2. The complainant Nasib Gul on 05.07.2002 at 14:00 hours reported the incident to the Sub-Inspector Muhammad Iqbal now dead transposed as PW-12, wherein he charged the present appellant for the murder of his brother Sher Zada. The motive disclosed was altercation on fare.

3. Investigation in the case was entrusted to Muhammad Iqbal SI, PW-12 who drafted the '*Murasila*' Ex. PA/1 upon the report of the complainant Nasib Gul, prepared injury sheet Ex. PW-12/1 of the deceased Sher Zada alongwith inquest report Ex. PE. He has prepared site plan Ex. PB in presence of eyewitnesses of the occurrence. The said PW has taken into possession cartridges 79 in number of 303 bore from house of the accused vide recovery memo Ex. PW-10/1 in presence of the recovery witnesses alongwith blood stained earth and one crime empty of 7.62 bore vide recovery memo Ex. PW-8/1. The dead body of the deceased was handed over to his legal heirs through receipt Ex. PW-1/1. He has taken into possession blood stained *Qameez* of the deceased Ex. P-2 vide recovery memo Ex. PW-9/1 having bullet marks on it alongwith blood stained "*Chadar*" Ex. P-3. Through an application Ex. PW-12/2 he has procured warrant u/s 204 Cr.P.C against the accused alongwith proclamation within the

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meaning of 87 Cr.P.C and in this respect statement of search witness was recorded. He has sent blood stained earth and garments of the deceased to the FSL through an application Ex. PW-12/3. He has recorded statements of the eyewitnesses and the pickup bearing No. B-PES- 5616 was taken into possession vide recovery memo Ex. PW-11/1. Upon completion of the investigation, complete *challan* was forwarded to the SHO concerned for onward submission.

4. During proceedings under section 512 Cr.P.C the prosecution examined the complainant Nasib Gul as PW-1, Shams Gul eyewitness of the occurrence as PW-2, Mst. Fatoornai wife of the deceased as PW-3, Badshah zad Gul as PW-4, Rozi Rahman as PW-5, Dr. Fida Muhammad, SMO as PW-6, Abdul Hameed Khan, SHO as PW-7, Afzal Khan as PW-8, Mamin Khan as PW-9, Sher Afzal Khan as PW-10, Amin-ur-Rahman Constable as PW-11 and Muhammad Iqbal, SI as PW-12.

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5. Upon completion of investigation and conclusion of proceedings under section 512 Cr.P.C, the accused/appellant was declared "proclaimed offender" by the learned trial Court vide its order dated 13.06.2003.

6. Later, on 08.03.2011 at 06:00 hours when Mir Azam, ASHO of PS Asbanr in view of prior spy information conducted raid at the house of the proclaimed offender Ghafoor Khan (appellant) expecting his arrest, the accused could not be arrested however, during search of his house, he recovered a Kalashnikov bearing No. 2250517 alongwith charger and 20 rounds of 7.62 bore from residential room of the house of accused, which was taken into possession by him vide recovery memo Ex. PW-1/1. A separate FIR No. 76 was registered against the accused/appellant u/s 13 A.O at PS Asbanrh on 08.03.2011.

7. On 23.03. 2015 the present Appellant was arrested, a supplementary

challan was submitted against him before the learned trial Court. During the trial, the prosecution examined as many as 16 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused was examined under section 342, Cr.P.C, wherein he denied the charges, posed innocence and stated to have falsely been implicated in the case.

8. It is pertinent to mention here that despite the fact that the complainant Nasib Gul was available for recording his evidence on six (6) consecutive dates of hearing i.e. from 09.6.2015 to 28.09.2015, however, the learned counsel representing the accused on every occasion requested for adjournment and as such the said PW had left the country, resultantly, his statement recorded under section 512 Cr.P.C was transposed to the file of present case. The same order of transposition was challenged before this Court as well as before the august Supreme Court of Pakistan but was concurrently affirmed.



9. On conclusion of the trial, the learned Additional Sessions Judge/Izafi Zilla Qazi Dir Lower at Chakdara convicted and sentenced the accused/appellant vide the judgment impugned herein, hence these connected matters.

10. The learned counsel appearing on behalf of the appellant has drawn the attention of this Court to the statement of Badshahzad Gul whose statement was recorded as PW-4 in proceedings under section 512 Cr.P.C and stated that he has narrated altogether a different story, which contradicts the allegations of the complainant. He has further argued that although the statements of the PWs were transposed to the present case but the documents exhibited during proceedings under section 512 Cr.P.C were not transposed and some the documents do not contain signature of the presiding officer, therefore, the said documents cannot be relied upon. He next argued that both PWs are interested witnesses and in absence any independent

corroboration their testimony cannot be taken into consideration. Conversely, the learned counsel for the complainant and learned A.A.G appearing on behalf of the State have argued that it was a broad day light occurrence and the prosecution has established its case beyond reasonable doubts. They have further argued that the witnesses were although related to the deceased but were not interested witnesses as there was no motive to substitute the present Appellant for actual culprit.

11. Arguments of the learned counsels were heard at length and the record was perused with able assistance.

12. It is the case of prosecution that the then Sub-Inspector Muhammad Iqbal now dead, PW-12 (transposed witness) in pursuit of information when reached to the hospital situated in village Gul Abad, where he found dead body of deceased Sher Zada. The complainant Naseeb Gul (PW-1) on 05.7.2002 at 14:00 hours reported him the matter that on the day of occurrence he (complainant)

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alongwith his brothers Shams Gul (PW-13) and Sher Zada (deceased) had gone to Tehsil Courts Chakdara and after attending the Court proceedings, they were on their way back to home. All of them (complainant-party) when reached to village Asbanr, boarded in the vehicle of accused Ghafoor Khan and on the way conductor of the vehicle demanded fare of Rs. 15/- for three (3) persons from his brother Sher Zada (deceased) but instead he gave him Rs. 10. Due to which an altercation had taken place between both of them, therefore, we (complainant-party) de-boarded from the vehicle and proceeded towards our village on foot. At about 12.30 hours when the complainant-party reached to the place of occurrence, the accused Ghafoor Khan duly armed with Kalashnikov came there in his vehicle and made a fire shot upon the deceased in order to commit his *Qatl-e-amd*. Due to a fire shot of accused, brother of the complainant Sher Zada was hit on his right side and succumbed to the injury on the way

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to hospital. The Complainant in his statement had put forward the motive for the commission of offence as altercation on far. In addition to the complainant the occurrence is stated to have been witnessed by his brother Shams Gul (PW-13).

13. In support of the prosecution case although the complainant Nasib Gul did not record his statement before the trial Court in the subsequent proceedings for obvious reasons that despite his availability, the learned counsel for the accused for more than three (3) months i.e. from 09.6.2015 to 28.9.2015 dragged the matter and did not make himself available for cross-examination of the complainant. Resultantly, the said witness had to leave the country for his livelihood abroad and his testimony recorded in proceedings under section 512 Cr.P.C was transposed to the present case as PW-1. The said order of transposition was upheld up to the august Supreme Court of Pakistan. The said PW in his statement has attributed a

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single fire shot to the present appellant and the motive behind the said act is altercation on fare while they were travelling in the Suzuki of the appellant. His statement is also supported by the medical evidence, which also suggest that the deceased had received a single firearm injury on his body. In this regard, the report Ex. PW-6/1 is reproduced as under:-

1. *Oval round wound ¼ inch all around edges inverted 9 inches below armpit towards right side at lumber area (entrance).*
2. *Oval round wound 2 inches from all side with averted edges 6 inch below nipple 2 cm later to meet axillary line.*
3. *Weapon: firearm.*
4. *Postmortem may be needed for confirmation of cause of death if needed.*

We are also conscious of the fact that the august Supreme Court of Pakistan while affirming the transposition of PW-1 Nasib Gul to the record of the present case has observed that the evidentiary value of his testimony is to be considered by the trial Court. It is by now settled that the evidence of the eyewitness in the form of examination-in-chief was an admissible piece of evidence

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which could be taken into consideration by the Court in peculiar facts and circumstances but with extra care and caution i.e. its corroboration by medical and other evidence. In the similar situation, the august Supreme Court of Pakistan has relied upon such a testimony in case of "Arbab Tasleem vs. The State" reported as PLD 2010 Supreme Court 642.

14. Be that as it may, however, it is not the sole statement of the complainant which was considered for the conviction of the appellant but in support of his testimony the other eyewitness who is also the brother of the deceased appeared as PW-13, who fully supported the incident. Though there are certain minor discrepancies in his cross-examination but the same are for obvious reason that the occurrence had taken place on 05.07.2002 and he was cross-examined on 04.11.2016, therefore, with passage of time it is human nature that he would not remember the scene with photographic view and

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precision of the happening. Hence, on that minor discrepancy, his testimony cannot be disregarded.

15. We are also conscious of the fact that these said two witnesses are the real brothers of the deceased but in absence of any deep rooted enmity they are not expected to substitute the actual culprit for the present appellant. We do not agree with the learned counsel for the Appellant that they are interested witness, because interested witness is a person who had a motive to falsely implicate the other person and mere their relationship with the deceased cannot be made a base to discard their testimony. In this regard wisdom is drawn from the law laid down by the august Supreme Court of Pakistan reported as 'Niaz vs the State PLD 1960 Supreme Court 387', Sharafat Ali vs the State 1999 SCMR 329', 'Abdur Rauf vs the State, 2003 SCMR 522', 'Dilawar Hussain vs the State, PLD 2008 S.C. 131'.

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In Sharafat Ali's case *Supra*, the august Supreme Court of Pakistan while considering the testimony of the witnesses, one of whom was the husband of the sister of the deceased and the other was his brother has held:- *"Considering the testimony of these two eye-witnesses on the touchstone of the aforesaid criteria, we do not find that their testimony is tainted or they had any motive to falsely implicate the appellant nor any enmity worth the name has been brought on record to show that they were implicating the appellant in this case falsely."*

In Abdur Rauf 's case *Supra*, it was held by the august Supreme Court of Pakistan:- *"We may observe that relationship itself is no ground to discard and discredit the testimony of eye-witnesses unless it is shown that they are partisan and interested witnesses. The eye-witnesses in the present case undoubtedly are related to the deceased but they have been found entirely independent and truthful, therefore, their*

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testimony without looking for any other corroborative evidence, would alone be sufficient to establish the charge. The evidence of related witnesses who are not found inimical and are confidence-inspiring would hardly need any corroboration. However, in the present case as discussed above, the ocular account is seeking ample support from the motive, the medical evidence and the attending circumstances."

In Dilawar Hussain's case *Supra* regarding the relationship of the witnesses, the august Supreme Court of Pakistan has held:-
"The parties as well as the witnesses were closely related inter se and also have good relations except that appellant was annoyed with the deceased for his purchase of land from his father and thus in absence of any enmity or ill-will, mere relationship is not a valid ground to discard the evidence of a person and similarly a witness non-resident of locality, is not as such unnatural witness, therefore the evidence of such witness cannot

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be excluded from consideration for mere reason that he was related to the deceased or was not resident of the area in which crime was committed."

Therefore, the learned trial Court has relied upon their testimony.

16. Furthermore, we are also convinced from their testimony that their presence at the spot was confidence inspiring because not only they promptly lodged the FIR but their statements that the deceased had sustained a single firearm injury on right side of his body was also corroborated by the medical evidence. Although, the prosecution has failed to establish the recovery of Kalashnikov from the appellant, however, the non-recovery of the Kalashnikov is no ground to disbelieve the prosecution case because the ocular testimony of the prosecution witnesses is duly corroborated by the circumstantial evidence i.e. recoveries effected from the spot of blood-stained earth and garments of the deceased alongwith one crime empty of 7.62

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bore fully established the prosecution case against the present appellant.

17. Moving on to the arguments of the learned counsel that statement of PW-4 recorded during proceedings under section 512 Cr.P.C narrates altogether a different story cannot be considered, because the said statement was not part and parcel of the record of the present case as the same was neither transposed by the prosecution nor the defence has taken the same as his defence. The assertions of learned counsel that the exhibited documents were not transposed alongwith the statement of PW-1 Nasib Gul, the complainant is also without any substance because the testimony of PW-1 and PW-12 were transposed in its full form and furthermore all the materials i.e. *Murasila* Ex. PA/1, FIR Ex. PA, injury sheet Ex. PW-2/1, sketch memo Ex. PE, medical report of the doctor concerned Ex. PW-6/1, site plan Ex. PB, and other recoveries being effected from the spot were also put to the accused/appellant for his

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defence in his statement recorded under section 342 Cr.P.C, therefore, no prejudice was caused to him and he was duly confronted with the said recovery memos.

18. In view of the above discussion, we do not find any merits in the appeal on the question of guilt of the accused/appellant, therefore, the judgment of conviction and sentence recorded by the learned trial Court is maintained and this appeal is dismissed accordingly.

19. Regarding the revision petition for enhancement preferred by the complainant-petitioner, we have noted that in view of the present facts and circumstances of the case the conviction of life imprisonment awarded to the accused/respondent is justified and does not warrant further enhancement. Therefore, the criminal revision in hand for enhancement also stands dismissed.

Announced
Dt. 03.10.2018


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08/11/2018
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