PESHAWAR HIGH COURT, BANNU BENCH

FORM OF ORDER SHEET

Date of order or proceeding	Order or other proceedings with signatures of Judge (s).
(1)	(2)
23.05.2018	**Cr.A No.218 -B of 2017** Present: Shahid Hameed, Addl: A.G for the State. ****** **SHAKEEL AHMAD, J.---** The State through Advocate General Khyber Pakhtunkhwa has filed under section 417 Cr.PC, this appeal against the judgment dated 28.04.2017 of the learned Additional Sessions Judge-II, Lakki Marwat, whereby, with reference to crime report No. 254 dated 11.06.2015 of Police Station Ghazni Khel, he had acquitted Islam Jan s/o Sakhi Jan and Sultan Jan s/o Akhya Jan residents of Tor Lawang Khel, district Lakki Marwat of the charges under section 302/34 P.P.C. 2. The prosecution case as set forth in the Murasila Ex:PA is that on 11.05.2015 at 13.00 hours Mst. Akhtar Bibi (PW-07) aged about 45/46 years reported the matter to the police that on the eventful day, she alongwith her son namely Waliullah were on

	their way back to their home from village Lawang Khel. At about 12.00 hours, when they reached at the place of occurrence, her son was ahead of her at few paces, whereas he was followed by her. In the meanwhile, from the back side Islam Jan son of Sakhi Jan and Sultan Jan son of Akhya Jan r/o Tor Lawang, duly armed with Kalashnikovs, riding on a motorcycle came and stopped their motorcycle near her son. Both of them came down from their motorcycle. Her son Waliullah on seeing them tried to run away, but they opened fire at him with their respective weapons. Form their firing her son got hit and fell down on the ground. After commission of offence the accused decamped from the spot on the same motorcycle. Motive as alleged in the crime report is previous blood feud. She charged the accused for commission of offence. 3. The accused Sultan Jan on getting knowledge of his nomination as an accused, obtained Transit bail Before Arrest from the Court of District

and Sessions Judge, Kohat, on 13.06.2015, surrendered to the process of law with his specific plea of alibi. To establish his absence from the spot at the time of commission of offence, he on 16.06.2015 submitted an application to superintendent of Police investigation Lakki Marwat for impartial investigation. After completion of usual investigation, challan was submitted against the accused Sultan Jan, while his co-accused Islam Jan was proceeded under section 512 Cr.PC. The accused Sultan Jan being in custody, was produced from jail. After compliance of provision of section 265-C Cr.PC, charge was framed against him, to which he pleaded not guilty and claimed trial, whereafter, the prosecution was directed to produce its evidence.

4. During trial co-accused Islam Jan was arrested on 18.02.2016, whereafter supplementary challan was submitted against him on 02.03.2016. The accused were again charge sheeted, wherein they denied the allegations and claimed trial. Again the

prosecution was directed to produce its evidence. In order to prove guilt of the accused, the prosecution produced as many as nine (9) witnesses. Rest of the prosecution witnesses were abandoned and thus the prosecution evidence was closed being completed. Thereafter, the accused were examined under section 342 Cr.PC, wherein they refuted the allegations of prosecution and professed innocence, however, the accused Sultan Jan wished to be examined on oath under section 340(2) Cr.PC and also opted to produce defence witnesses in support of his plea of alibi. In support of his contention he appeared as DW-1, and also produced DW2 to DW4, the learned counsel for the complainant was given opportunity to cross-examine the DWs, where-after, the learned defence counsel also closed his evidence. At the conclusion of trial the accused were acquitted of the charges vide judgment dated 28.04.2017, hence, this appeal.

5. It was argued by learned A.A.G representing the state that the accused have

specifically been nominated in the crime report for committing murder of Wali Ullah; that the version of complainant, site plan and medico-legal report, if placed in a juxtaposition, are consistent, inter alia; that the occurrence has taken place in a broad day light, therefore, there is no chance of misidentification; that plea of alibi taken by the accused Sultan Jan could not be proved; that the prosecution witnesses are consistent on all the material points, they were cross-examined at length, but no dent could be caused in their statements; that the prosecution has proved its case against the accused beyond a shadow of doubt; that the impugned judgment is the result of misreading and non-reading of the evidence on record, therefore, warrants interference.

6. We have heard the arguments of learned A.A.G appearing on behalf of the State and have scanned the record with his eminent assistance.

7. Perusal of the record reflects that the prosecution case hinges upon the statement of

	complainant PW-7, solitary eye witness, recovery of six empties through recovery memo Ex:PW 7/1; injury sheet Ex:Pw 4/1, inquest report Ex:PW 4/2; Statement of Ahmad Noor PMO, who conducted the Post Mortem of the dead-body, PM report Ex:PM, blood stained garments of deceased produced by PW3; Statement of I.O Haider Ali the S.H.O PW-4; Statement of PW-8, who recovered blood stained earth from the spot, recovered crime empties during spot inspection and partially investigated the case, and PW-9, who identified the deadbody of the deceased. 8. The prosecution case begins from the Murasila, Ex:PA recorded on the statement of the complainant Mst Akhtar Bibi (PW-7). In order to justify her journey with her deceased son, she stated that on the eventful day she had gone to the house of her parents, but, she failed to produce supportive evidence in support of her contention, during investigation or trial. Admittedly, as per site plan Ex:PB, the place of occurrence is redundant site,

surrounded by graveyard and self grown thick forestry/ trees.

9. Perusal of the record reflects that the occurrence has not taken place in the manner and mode as narrated by the complainant (PW-7). According to this PW-7, there is blood feud between the parties. It does not appeal to prudent mind that after committing murder of the son of the complainant the accused spared her to become a witness against them, particularly, when she was totally at the mercy of the accused and nothing precluded them to commit her murder.

10. Another notable point of the case is that at the time of occurrence the complainant was in possession of her personal mobile phone, but strange enough, she did not inform any of her relative about the incident and waited there till arrival of police. This speaks of unnatural conduct of the complainant and negates her presence on the spot. According to statement of PW-9 (brother of the complainant), he

	received information regarding the occurrence at 12.00 noon from one Imran s/o Asmatullah his cousin. **11.** Above all, it is written in the Murasila Ex:PA that the deceased was managed by the complainant on the spot, but astonishingly neither her hands nor clothes or at least veil besmeared with blood, which too falsifies her presence on the spot. More so, the complainant was neither shown as identifier of the deadbody on the inquest report ExPW 4/2, rather her two brothers were cited as identifiers. 12. Next we advert to the recovery of six (06) crime empties of 7.62 bore from the venue of crime, these empties were sent to the F.S.L, where it was opined that these empties were fired from one and the same weapon, which is reflected from F.S.L report Ex:PD/1, which too falsifies the assertion of complainant, that, the numbers of assailants were two, rather it clearly suggest that it was the act of a single man, resultantly, it also falsify presence of the complainant Pw-7, on the spot. The above discussion

	led us to the conclusion that it is an unseen occurrence. 13. Admittedly, as per statement of the complainant, after scribing Murasila, he prepared injury sheet Ex:PW 4/1 & inquest report Ex:PW 4/2. Perusal of the contents of *Murasila* clearly shows that the weapon of offence was specifically mentioned as "Kalashnikov" whereas in the Ex:PW4/1 and Ex:PW4/2 the column of weapon of offence has been filled as *Asleha Aatisheen*, despite the fact that the PW-4, deposed that the accused were armed with Kalashnikovs at the time of lodging the report, 9 empties of 7.62 bore were lying there, which leads to the conclusion that the above referred documents were prepared first & thereafter report of the complainant was recorded in shape of Murasila Ex:PA. 13. Coming to the post mortem report Ex:PM, admittedly, the PM examination was conducted by PW-1, Dr. Ahmad Noor in the hospital at 03.00 PM. According to statement of PW-4, who dispatched the

	deadbody of the deceased from the spot at 12:30 or 13:30 PM for postmortem examination, but according to PW-3, he took the deadbody for PM examination of deadbody at 01:00 PM. This late examination of deadbody, in view of development of rigor mortis & time elapsed between death and Post mortem i.e. 2 ½ to 4 ½ hours also creates serious doubt on the prosecution case concerning time of occurrence as alleged by the complainant. 14. It is the bounden duty of the prosecution to prove its case against the deceased beyond a shadow of doubt, but in the instant case, the prosecution has miserably failed to substantiate its case against the accused. So under the circumstances, there is no need of the accused to discharge the burden of his plea, but, even then the accused Sultan Jan in view of his own statement recorded on oath, wherein he stated that he is serving in PTCL Department, and during the days of occurrence, he was posted at Kohat, and that on the eventful day he

was busy in cable work from 0900/0930 Am to 0500 P.M and in support of his stance he produced his official colleagues as DW-2 to DW-4 respectively. They were cross-examined by the learned counsel for the complainant at length but no dent could be caused in their statements. All of them remained consistent on the day, and time of work as narrated by accused sultan Jan in his statement on oath. So the accused has successfully proved his plea of alibi through natural, trustworthy and confidence inspiring evidence. On the eventful day and time he established his presence at jindi Station at Kohat, there is long distance between the place of occurrence and place of duty of the accused & it is humanly not possible for a person to be present on one and the same time at two different places with such a long distance. This too belies the narration of the complainant and her presence on the spot and makes the testimony of eye-witness PW-7 against him doubtful.

15. We have minutely examined the record,

which led us to the definite conclusion that the learned trial Judge considered each and every aspect of the case in its true perspective and found that the statement of complainant (PW-7) not confidence inspiring and disbelieved her presence on the spot. In the above mentioned circumstances we agree with the findings of the learned trial Court. It is now settled that before the order of acquittal is reversed, it must be shown that the judgment of learned lower court was not reasonable or wrong or the result of misreading or non-reading of the evidence on record. In this respect we are fortified by the judgment of the august Supreme Court of Pakistan, reported as ***"Ghulam Sikandar Vs Mamraz Khan (PLD 1985 SC 11)***, wherein it was held as under:

> ***"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:***
>
> ***(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily***

interfere and instead would give clue weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for the re appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions: One initial, till found guilty, the accused is innocent: and two that again after the trial a Court below confirmed the assumption of innocence.

(2) The acquittal will not carry the second assumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below (a) disregarded material evidence (b) misread such evidence; (c) received such evidence illegally.

(3) In either case the well-known principle of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.

(4) The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably

reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualised in these cases in this behalf was that the finding sought to be interfered with after scrutiny under the foregoing searching light should be found wholly as artificial, shocking and ridiculous."

16. Similar view was expressed in ***Muhammad Iqbal's case (PLD 1997 SC 569). In this respect reliance can also be placed on case reported as "The State Vs Anwar Saifullah Khan" (PLD 2016 Supreme Court 276), wherein it was observed as follows:***

Art. 185--- Appeal against acquittal---Principles and scope---reversal of finding of acquittal of an accused was resorted exceptionally by an appellate Court---such an order was passed where the finding of the acquitting Court was found to be perverse, shocking or impossible."

In this behalf reliance can also be placed on the cases reported as Ahmad v. Crown (P L D 1951 F C 107) Fateh Muhammad v. Bagoo (P L D 1960 S C 286) Abdul Majid v. Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan (P L D 1964

S C 422) Feroz Khan v. Capt. Ghulam Nabi (P L D 1966 S C 424) Usman Khan v. The State (P L D 1969 S C 293) Noora and another v. The State (P L D 1973 S C 469) Abdul Rashid v. Umid Ali and another (P L D 1975 S C 227) Taj Muhammad v. Muhammad Yousaf and another (P L D 1976 S C 234) Farid v. Aslam (P L D 1977 S C 4) and Fazalur Rehman v. Abdul Ghani (P L D 1977 S C 529).

17. The whole discussion led us to the conclusion that solitary statement of complainant Akhtar Bibi PW-7 is neither trustworthy nor confidence inspiring hence, not worthy of credence. The findings recorded by the learned trial Judge, while acquitting the accused/ respondents were neither perverse nor arbitrary. Hence, the impugned judgment dated 28.04.2017 is upheld and the acquittal of the respondents Islam Jan and Sultan Jan is maintained.

Announced.
23.05.2018

J U D G E.

J U D G E.