IN THE PESHAWAR HIGH COURT, PESHAWAR,
[Judicial Department].

Crl. Appeal No.874-P/2019

Rooh-ul-Amin son of Muhammad Amin,
r/o Nandrak (Jalaroona) Akora Khattak,
District Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :-	M/S Jalal ud Din Akbar-e-Azam and Ali Zaman, Advocates.
For State :-	Mr. Mujahid Ali Khan, AAG.
For respondent :-	Mr. Abdul Latif Afridi, Advocate Supreme Court.
Date of hearing:	**04.12.2019.**

ORDER

ROOH-UL-AMIN KHAN, J:- This criminal appeal, filed by Rooh-ul-Amin, the appellant, calls in question the legality and propriety of judgment dated 06.07.2019, passed by learned Additional Sessions Judge-III/Model Criminal Trial Court, Nowshera, whereby the appellant having been found guilty of committing murder of Azeem Ullah deceased, has been convicted under section 302 (b) PPC and sentenced to undergo life imprisonment and to pay Rs.2,00,000/-, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. vide FIR No.817 dated 24.09.2013, under sections 302/34 PPC, Police Station Akora Khattak, District Nowshera.

2. According to First Information Report (FIR), on 24.09.2013 at 2155 hours, complainant Fanoos Khan (PW.10), in company of dead body of his maternal cousin, Azeem Ullah deceased, in mortuary of District Headquarter (DHQ) hospital Nowshera Kalan reported the crime to Umar Hayat ASI (PW.1) to the effect that on the fateful night he along with Muhammad Arif, Ibrahim (PW.11) and the deceased, was present in the shop of his co-villager Ghulam Hassan, when at 1840 hours, appellant Rooh ul Amin along with Amresh Khan (acquitted co-accused), and Fazal Amin (absconding co-accused), duly armed with firearm, entered the shop. Accused Amresh Khan commanded co-accused named above to kill, on which Fazal Amin and appellant Rooh ul Amin, opened fire at the deceased; as a result he got hit and died at the spot. Bulb was lit in the shop at the time of occurrence. After the occurrence, the accused decamped from the spot. Besides the complainant, the occurrence is stated to have been witnessed by Muhammad Arif (abandoned) and Ibrahim Khan (PW.11). A previous blood feud between the accused and the deceased has been advanced as a motive behind the occurrence.

3. Report of the complainant was recorded in the shape of Murasila Exh.PA/1 by Umar Hayat ASI (PW.1), who also prepared injury sheet and inquest report Exh.PW.1/1 and Exh.PW.1/2 of the deceased and referred

his dead body for postmortem examination. Dr. Said Badshah SMO (PW.2) conducted autopsy on the dead body of the deceased on 24.09.2013 at 09.40 a.m. and found the following injuries on his person:-

1. Firearm entry wound ¼ x ¼ inches on right side of face. Exit wound about ½ x ½ inch on left neck.
2. Firearm entry wound ¼ x ¼ inches on right neck. Exit wound ½ x ½ inch on left shoulder front side.
3. Firearm entry wound ¼ x ¼ inches on left axillary region. Exit wound ½ x ½ inch on left axillary medial side.
4. Firearm entry wound about ¼ x ¼ inches on left lumber region external side. Exit wound 2 x 2 inches on left side chest.
5. Firearm entry wound ¼ x ¼ inches left lumber region front side. Exit wound 1 x 1 inch on right medial side.

Opinion: According to his opinion the deceased died due to firearm injuries to his vital organs i.e. both lungs and left kidney.

He opinion probable time between injury and death : **Within one hour.** And between death and postmortem about : 04 hours.

4. Bashir Ahmad Khan DSP (PW.14) was entrusted with the task of investigation, who proceeded to the spot and prepared site plan Exh.PW.14/1 on the pointation of complainant. During spot inspection he secured blood through cotton from the place of the deceased vide recovery memo Exh.PW.8/1. Vide recovery memo Exh.PW.8/2, he took into possession 12 empties of 7.62 bore from the spot. Similarly, through recovery memo

Exh.PW.8/3, he took into possession 25 Watt energy sever from inside the shop of Ghulam Hussain. Vide recovery memo Exh.PW.3/1, he took into possession the last worn bloodstained garments of the deceased. He sent the bloodstained articles and the empties to the FSL, reports whereof are Exh.PK/1 and Exh.PK, initiated proceedings under section 204 and 87 Cr.P.C., against the accused, recorded statements of the PWs and placed on file FIR No.577 dated 11.09.2008 in support of the motive. After completion of investigation he handed over case file to SHO for submission of challan against the accused under section 512 Cr.P.C.

5. Masood Khan SI (PW.12) arrested the appellant on 04.07.2017 vide arrest card Exh.PW.12/1. Accused Amresh Khan surrendered before the court and obtained ad-interim pre-arrest bail which was, later on, confirmed. On completion of investigation, challan was submitted against both the accused before the learned trial Court where they were formally charge sheeted to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as seventeen witnesses. After closure of the prosecution evidence, statements of the accused were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They, however, declined to be examined on oath or 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 in the first Para of the judgment, however, acquitted co-accused Amresh Khan, hence, this appeal.

6. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their valuable assistance.

7. It appears from record that occurrence has taken place on 24.09.2013 at 1840 hours (6.40 p.m), in the shop of one Ghulam Hassan, situated in village Jalarona, which has been reported by complainant Fanoos Khan (PW.10) at 2155 hours (9.55 p.m) i.e. after a delay of 03 hours and 15 minutes. No explanation, much less plausible, has been furnished by the complainant to cover the delay either in his initial report Exh.PA/1 or in his statement recorded as PW.10. Similar is the case of Ibrahim (PW.11), whose testimony is completely silent in this regard. Though, the distance between the crime spot and DHQ hospital Nowshera Kalan, has not been given in the Murasila, FIR and inquest report, however, the same can be deduced from the statement of complainant (PW.10) and Ibrahim (PW.11) recorded before the trial Court. The former in cross-examination deposed that if one travels from the place of occurrence in a vehicle to DHQ hospital Nowshera, he can reach within 45 minutes and that if one travels through Karnal Sher Khan Interchange then the

distance can be covered within 20 minutes to the said hospital. Similarly, according to Ibrahim (PW.11), the distance between DHQ hospital Nowshera and village Jalarona can be covered through a vehicle within 45 minutes. Complainant deposed that dead body of the deceased remained at the spot for about 20 minutes, whereas, according to PW Ibrahim it remained at the spot for 10/12 minutes. Thereafter, a datsun Pickup was arranged and the dead body was shifted to the hospital. In view of statements of the purported eyewitnesses, if 20 and 45 minutes are excluded from 3 hours and 15 minutes, then the dead body of the deceased should have reached the hospital at 19.45 hours (7.45 p.m), but report has been lodged in the hospital at 2155 hours (9.55 p.m). Similarly, Postmortem of the deceased has been conducted by Dr. Said Badshah (PW.2) on the same day/date at 9.40 p.m. i.e. 15 minutes prior to report. The unexplained delay in lodging FIR, shall raise an inference that facts have been tailored to sent a preconceived notion of suspicion or to falsely implicate the appellant, therefore, statement of such witness requires consideration with great care and caution. In this context the prosecution case has to be adjudged about the presence of complainant and alleged eyewitness. The first circumstance would be that report has been lodged after preliminary investigation i.e. after conducting autopsy of the deceased by the doctor. Had the

complainant and alleged eyewitness present at the spot, they would have taken the dead body to Police Station or to hospital hurriedly and before conducting postmortem by the doctor, must have lodged the report promptly. It is well settled law that FIR is always considered as a basic document in criminal cases, but if the same was recorded after preliminary investigation, it loses its sanctity and probative worth as such becomes a suspect document. In this regard guidance can be derived from the judgments in case titled, ***"Iftikhar Hussan and others Vs the State" (2004 SCMR 1185 and in case "Muhammad Waif Khan and others vs the State and others" (2011 P Cr L J 470 Lahore),*** such an FIR cannot be treated either sacrosanct or authentic, albeit, delay in reporting the occurrence shall cast serious doubts about presence of the complainant and eyewitness Ibrahim at the time of occurrence with the deceased.

8. Complainant Fanoos Khan (PW.10) and Ibrahim (PW.11) pose themselves to be the eyewitnesses of the occurrence, were under laden duty to make their testimony believable and reliable. They were required to satisfy the mind of the court about their presence at the spot at the time of occurrence through physical circumstances as well as through corroborative evidence, but the evidence produced by the prosecution most particularly the statements of above named two witnesses have

embellished their deposition with falsehood and exaggeration. The unnatural conduct of the witnesses can be adjudged from their stunning into silence and idle spectators even after witnessing the ghastly murder of their close relative with their own eyes.

9. Complainant Fanoos Khan and Ibrim while appearing as PW.10 and PW.11, respectively, in their examination-in-chief, though have reiterated the same story as set forth in the initial report Exh.PA/1, however, in cross-examination their deposition was shaken so harshly that they could not stuck firm on their statements. They disclosed they are residents of village Nandrak while the occurrence has taken place in the shop of Ghulam Hassan, situated in village Jalaroona. In cross-examination both the witnesses have admitted that Village Jalarona and Nandrak, are two separate villages, lying at a distance of about 12 Kilometers from each others. In this view of the matter, both being not the residents of village Jalarona, are chance witnesses. As per ratio of judgment of the Hon'ble Supreme Court in case titled, ***"Mst. Rukhsana Begum and others vs Sajjad and others" (2017 SCMNR 596),*** chance witness was one who, in the normal course was not supposed to be present on the crime spot unless he offered cogent, convincing and believable explanation, justifying his presence at the spot. No explanation, much less convincing and satisfying, has been furnished by PW.10

and PW.11 about their presence at the crime spot at the time of occurrence. In cross-examination complainant (PW.10) deposed that he can differentiate different kinds of weapons. Perusal of his report Exh.PA/1 reveals that he has not disclosed specifically about the description of weapons used by the accused, rather, words “Aslaha Atesheen” have been mentioned therein. “Aslaha Atesheen” is a general term having wider application, through which all types/kinds of firearms can be covered. Usually this term is used by a procured witness so as to show his presence at the spot and that the crime empties, crime weapon and the medical evidence may not contradict his version/report. As per prosecution version, the occurrence has taken place inside the shop of Ghulam Hassan and similarly, in the site plan, complainant (PW.10) and Ibrahim (PW.11), have been shown inside the said shop in close proximity with the accused. In such eventuality, had they been present at the spot, they would have easily recognized the weapon in possession of the accused. Thus, intentional non-mentioning of specific description of the weapons used in the occurrence is another strong circumstance which creates doubt about their presence at the spot at the time of occurrence. No blood has been shown recovered from the Cot/Bed or any bloodstained piece of rope of the Cott/Bed, on which the deceased was allegedly sitting at the time of occurrence

inside the shop. Thus, this aspect of the case does not corroborate the ocular version of the alleged eyewitnesses.

10. Both the PWs have deposed that after receiving injuries the deceased died at the spot, but medical evidence negates their version, as Dr. Said Badshah (PW.2), who conducted autopsy on the dead body of the deceased, has opined probable time between injuries and death as **within one hour**. Ghulam Hussan, in whose shop the occurrence has taken place, has not been examined. No bullet marks have been noticed by the I.O. on wall of the shop lying in the firing range from the place attributed to the appellant in the site plan. Adjacent to the crime shop, the shop of one Nabi Hssan has been shown, but he has also not been examined. The dead body of the deceased was allegedly shifted to the hospital by the complainant (PW.10) and Ibrahim (PW.11), but none of them has been shown as identifier of the dead body in the inquest report. Statements of both the purported eyewitnesses to the effect that they were not fired at by the accused and that they did not try to apprehend the accused having no concern with them, is also beyond the comprehension of a prudent mind. Ibrahim (PW.11) has admitted the fact that his father and uncle were charged in the murder case of Noor-ul-Amin son of Aresh (acquitted co-accused). If this witness was present on the spot, the assailants would never have forgiven him, because the assailants who were mentally prepare to kill

the deceased, they would have not spare the direct inimical person towards them so as to deposed against them in the court of law. The unnatural behavior of PW.11 viz after witnessing the crime, stood stunned into silence and petrified for sufficient time, particularly, when his father and uncle were directly charged for murder of the brother of appellant, is sufficient to prove that he was not present at the spot and was procured later on. In case titled, "**Mst. Rukhsana Begum and others Vs Sajjad and others" (2017 SCMR 596),** in identical situation has observed as under:-

> "Site plan positions would show that the complainant and the prosecution witnesses were at the mercy of the assailants but no threat was extended to them. Such unbelievable courtesy extended by the accused persons to the complainant and prosecution witnesses, knowing well that they would deposed against them create serious doubts in the prosecution case. Such behavior on the part of the accused persons ran counter to natural human conduct and the behavior explained in the provisions of Art.129 of the Qanun-e-Shahadat Order, 1984. Accused were acquitted of all the charges leveled against them.

The nutshell of the above discussion is that both the purported eyewitnesses failed to establish their presence at the spot through physical and corroborative evidence. Rather, their testimonies are suffering from major

contradictions and discrepancies, which makes their presence at the spot highly doubtful. Similarly, medical evidence also negates the testimonies of the purported eyewitnesses. From the peculiar facts and circumstances of the case it can be inferred that both the purported eyewitnesses being relatives of the deceased and residents of village Nandrak were not present at the spot, rather after the occurrence, they were informed. By then the dead body of the deceased had already been shifted to the hospital where autopsy had been conducted and thereafter the purported eyewitnesses reached the hospital and lodged the report after due deliberation, consultation and preliminary investigation and this why a delay of about 3 hours and 15 minutes occurred in lodging the report.

11. The above discussed facts and circumstances of the case appearing in the prosecution evidence escaped the notice of learned trial Court, resultantly, he reached an erroneous conclusion by holding the appellant guilty of the offence. Moreover, the learned trial court by disbelieving the same set of evidence, acquitted co-accused Amresh Khan but convicted the appellant, probably applying the principle of "sifting grain from the chaff", which principle has been done away with by the Hon'ble Supreme Court in its authoritative and elaborate judgment, rendered in case of **Hizar Hayat (PLD 2019 SC-527)** by thrashing out the

entire law on the principle right from 1925 till date. The relevant part of the judgment is reproduced below:-

> "We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that **the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit**." (Emphasis supplied)

12. No appeal has been filed against acquittal of co-accused Amresh Khan either by the State or complainant. In this view of the matter findings of the learned trial Court qua acquittal of co-accused disbelieving the same evidence, has attained finality.

13. On reappraisal of the evidence with care and caution, we have reached to an irresistible conclusion that prosecution has failed to prove its case against the appellant beyond any reasonable doubt. We, while

extending benefit of doubt to the appellant, allow this appeal and set aside his conviction and sentence recorded by the learned trial court vide impugned judgment dated 06.07.2019. The appellant is acquitted of the charge. He be set at liberty forthwith, if not required in any other case.

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

> For reasons to be recorded later, we, allow this appeal, set-aside the conviction and sentence of the appellant, namely, Rooh-ul-Amin son of Muhammad Amin, recorded under section 302 (b) PPC, by the learned Additional Sessions Judge-III/Model Criminal Trial Court Nowshera, vide judgment dated 06.07.2019, in case FIR No.817 dated 24.09.2013, under sections 302/34 PPC, Police Station Akora Khattak and hereby acquit him of the charges in the cited case. He be set at liberty forthwith, if not confined in any other case.

Announced:
04.12.2019
M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and Hon'ble Mr. Justice Ishtiaq Ibrahim.