JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

Cr. Appeal No.132/2015.

JUDGMENT

Date of hearing.....**28.06.2018**.....

Appellant(s) (Bilal) By **Mr. Sohail Akhtar, Advocate.**

Respondent (s) (State) By **Ms. Nazia Irfan, Advocate**
(Mohammad Zaman Complt) By **Hizar Hayat Daudzai, Advocate**.

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SHAKEEL AHMAD:-J: The appellant Bilal was adjudged guilty by the learned Additional Sessions Judge-I/Judge Juvenile Court, Nowshera, under section 302(b) PPC, and was convicted and sentenced to imprisonment for life on two counts with the direction to pay a sum of Rs.1,00,0000/- to the legal heirs of the deceased according to their *shari* shares, in default of payment of compensation to suffer six months S.I. The sentences were ordered to run consecutively, with the facility provided under the Juvenile Justice System Ordinance, 2000. Benefit of section 382-B, Cr.PC, was extended vide judgment dated 21.2.2015.

2. The prosecution story, as set forth in the *murasila* (Ex. PA/1), are that Naheed Hussain ASI (PW-11), on receipt

of information on 31.5.2010, rushed to the Civil Hospital, Pabbi, and found dead body of Sikandar, aged about 26/27 years and Gohar Zaman, aged about 34/35 years, sons of Muhammad Zaman, where Muhammad Zaman son of Shadi Khan caste Khattak, aged about 65/66 years, reported the matter to the police stating that he along with his wife Mst. Jan Bibi, aged about 60/62 years, Akbar Zaman son of Shah Zaman, (PW-6) and his son, namely Sikandar Zaman and Gohar Zaman, were proceeding from their house to Peshawar. As soon as they reached the place of occurrence, the accused namely, Saeed, Bilal sons of Ghulam Haider and Ghulam Haider son of Haider Khan, who are his co-villagers, were already present there and started indiscriminate firing at Sikandar and Gohar Zaman, from their respective firearms, due to which his sons were hit and expired on the spot, the complainant could do nothing being empty handed. The occurrence was reported to have been witnessed by the complainant, his wife Mst. Jan Bibi and grandson Akbar Zaman son of Shah Zaman. The motive, as alleged in the FIR, is dispute over women folk. After commission of offence, the

accused decamped from the spot. The report of the complainant was reduced into writing by drafting the ibid *Murasila*, which was thumb impressed by his wife Mst. Jan Bibi, subsequently, *Murasila* was incorporated into FIR (Ex PA). Since the accused had gone into hiding, therefore, challan under section-512 Cr.PC, was submitted against them. After recording statements of the PWs, they were declared as proclaimed offenders and perpetual warrants of arrest were issued against them vide order dated 22.2.2011. Meanwhile, the appellant Bilal was arrested on 26.3.2012, by (PW-7), whereafter, supplementary challan was submitted against him to be tried under Juvenile Justice System Ordinance, 2000. After compliance of provisions of section 265-C Cr.PC, formal charge was framed against him, to which he pleaded not guilty and claimed trial.

3. In order to prove its case, the prosecution produced as many as 17 witnesses. The medical evidence was furnished by Dr. Ijaz Akbar (PW-1), who on 31.5.2010 conducted the Post Mortem on the dead body of the deceased Sikandar. Anwar Ali Khan SI (PW-2) submitted challan under section

512 Cr.PC against the accused. Muhammad Ashraf SI (PW-3) incorporated the contents of Murasila into FIR (Ex PA). Shakeel Ahmad Inspector (PW-4), submitted challan against appellant under Juvenile Justice System Ordinance. The ocular account of the incident in question was furnished by Muhammad Zaman (PW-5) and Akbar Zaman (PW-6). Jehan Akbar (PW-7) arrested the appellant and also recovered Kalashnikov (Ex P-1) along with 25 rounds (Ex P-2) vide recovery memo (Ex PW 7/1) and issued card of arrest (Ex PW 7/2). Zia ur Rehman (PW-8) is the marginal witness to the recovery memo (Ex PW 7/1). Hazrat Ali SI (PW-9) produced the appellant before the trial court for obtaining his physical custody and obtained two days physical custody of the accused, stated about the various steps taken by him during this period. Jehan Ali (PW-10) is the marginal witness to the recovery memo (EX PW 9/5). Naheed Hussain (PW-11) recorded the Murasila (EX PA/1) prepared inquest report (EX PW 11/1) and injury sheet (Ex PW 11/2) of the deceased Sikandar and inquest report (EX PW 11/3) and injury sheet (Ex PW 11/4) of the deceased Gohar Zaman. Fazal Akbar (PW-12) is marginal

witness to the recovery memo (Ex PW 12/1) vide which the I.O took into his possession the blood stained earth from the spot and recovery memo (Ex PW 12/2) vide which the I.O took into possession 17 empties of 7.62 bore and one empty of 30 bore from the spot. He is also marginal witness to the recovery memo (Ex PW 12/3) and (Ex PW 12/4) vide which the I.O took into possession the bloodstained garments of the deceased. Musharaf Shah (PW-13) is identifier of the dead body of the deceased Sikandar Zaman. Haji Akbar (PW-14) is the identifier of the dead body of deceased Gohar Zaman. Muhib Gul SI (PW-15) is the I.O stated about the various steps taken by him during the investigation of this case. Jehangir Khan (PW-16) was entrusted with warrants under section 204 Cr.PC (Ex PW 16/1), whereon his report is (Ex PW 16/2), he also took notices under section 87 Cr.PC (Ex PW 16/3), whereafter he submitted his report (Ex PW 16/4). Dr. Muhammad Nazir (PW-17) conducted post mortem on the dead body of the deceased Gohar Zaman. After closure of prosecution evidence, the accused was examined under section 342 Cr.PC, wherein he professed innocence, however, he wished to be examined on Oath and

also opted to produce defence, but subsequently, brother of the appellant submitted affidavit that DW has been threatened by the complainant party and police as well, therefore, they are reluctant to appear before the Court, under these circumstances he backed out from his earlier plea and refused to produce defence witness and denied to be examined on Oath. At the conclusion of trial, the accused was convicted and sentenced as stated above, hence, this appeal.

4. It has been argued by the learned counsel for the appellant that it is an un-witnessed crime; that (PWs-5 & 6) are not only related inter-se with the deceased but they are inimical towards the appellant; that presence of (PWs-5 & 6) was highly doubtful, as purpose was not shown for coming out from the house and proceeding to Peshawar; that witnesses deposed that indiscriminate firing was made by the accused, the eye-witnesses were also in their range of firing as is reflected from the site plan, and it does not appeal to the common sense that they were left alive to become witnesses against the appellant; that the investigating officer carried out dishonest investigation in the instant case at the behest of one Fazal Akbar SHO of

District Nowshera, whose sister was married to deceased Sikandar; that 17 empties of 7.62 bore were recovered from the spot, but these empties were not sent to FSL to ascertain as to whether these were fired from one, and the same weapon or from different weapons, therefore, it speaks volumes on the part of the investigating officer; that post mortem report, site plan and version of the eye-witnesses, if placed, in a juxtaposition are contradictory inter-alia; that abscondence of the accused has no value, when the oral evidence is not believable; that motive is a double edged weapon, has got both ends; that the prosecution has miserably failed to prove its case against the appellant beyond a ray of doubt.

5. Conversely, the learned counsel representing the complainant and the learned A.A.G appearing on behalf of the State supported the impugned judgment by jointly arguing that (PWs-5 & 6) are the natural witnesses; that the incident took place at a short distance from the house of the complainant; that the evidence of the witnesses is corroborated by medical evidence coupled with abscondence of the appellant; that the

prosecution has proved its case against appellant beyond a ray of doubt and prayed for dismissal of the appeal.

6. We have heard arguments of learned counsel for the parties at length and have carefully gone through the record of the case.

7. The incident in the present case according to the prosecution had taken place at 8.45 AM on 31.5.2010 on the thoroughfare of village Jarooba near the house of one Gulab Khan, as is reflected from site plan (Ex PB), the distance between place of occurrence and police station was not recorded, the matter was reported by Muhammad Zaman (PW-5) father of deceased at the Civil Hospital, Pabbi, through Murasila (Ex PA/1) recorded by Naheed Hussain ASI (PW-11) on 31.5.2010 at 9.50 AM under section 302/34 PPC, subsequently it was incorporated into FIR (Ex PA) by (PW-3).

8. It is cardinal principle of criminal jurisprudence that ocular account in such cases plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution. To the

contrary, once the ocular account is disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge, therefore, we have to see the probative value of the ocular account in the light of the facts and circumstances of the case.

9. Scanning of the record discloses that in the FIR address of the complainant (PW-5) is shown village Jarooba, however, when his statement was recorded before the trial Court, his residential address was recorded Madina Colony Phase-II, Nowshera. Similarly, residential address of Akbar Zaman eyewitness (PW-6) is written as Ashoor Abad, Nowshera. His residential address is neither mentioned in the FIR nor his signature was taken on the initial report recorded in the shape of Murasila (EX PA/1) rather it was thumb impressed by the wife of the complainant namely Jan Bibi. The residential addresses recorded in the statement of both the Pws are far away from the scene of crime. Neither the I.O has taken the pain to verify the place of their residence nor the witnesses provided anything in black and white to show that in fact they were residing in village Jarooba during the days of occurrence

and that after occurrence they had abandoned their residence from village Jarooba; admittedly, both the PWs are residing in different places at District Nowshera, as is reflected from their residential addresses recorded in their statements. Both these witnesses deposed that on the eventful day and time they were going to Peshawar, but they did not give any reason for going to Peshawar, they were bound to give reasonable explanation for going to Peshawar along with the deceased and Mst. Jan Bibi, but they failed to give the reasons for going to Peshawar. (PW-5) has admitted in the cross examination that he had a shop at Peshawar during the days of occurrence. This PW (PW-5) in his cross examination stated that Akbar Zaman (PW-6) was studying at Peshawar and resided at Sadar Ahmad Khan Colony. Muhammad Naheed (PW-11), who recorded the initial report in the shape of Murasila (Ex. PA/1) admitted in his cross examination that no specific reason for going to Peshawar was given by the complainant. This fact is also admitted by the I.O (PW-15) in his cross examination. The prosecution has failed to bring anything on record to show that for what purpose (PWs-5

& 6) had come to the village and accompanied the deceased and Mst. Jan Bibi for Peshawar on the day of incident.

10. In the absence of such proof the eye-witnesses i.e. complainant and Pw Akbar Zaman could be held to be chance witnesses, as on the day of incident, the complainant was running business in a shop at Peshawar, and (PW-6) Akbar Zaman was studying at Peshawar and residing there. Peshawar is several miles away from the scene of crime.

11. Chance witness, in legal parlance, is one who claims that he was present on the crime spot at the fateful time, albeit his presence there was a sheer chance as in the ordinary course of business, place of residence in normal course of events, he was not supposed to be present on the spot, but at the place where he resides, carries on business and runs day to day life affairs. It is in this context that the testimony of chance witness ordinarily, is not accepted unless justiciable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied

upon, provided some convincing explanation appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspected evidence and cannot be accepted without a pinch of salt. In this respect reliance can well be placed on the case reported as **Khalid Javed and another vs. The State (2003 SCMR 1419)**, wherein it was observed that evidence of chance witness would be acceptable subject to establishing his presence at the place of incident and in the absence of corroborative evidence to support the version of a chance witness the same had to be excluded from consideration. In this behalf reliance can also be placed on the cases reported as **Javed Ahmad alias Jaida vs. The State (1978 SCMR 114), Muhammad Ahmad & another vs. The State & others (1997 SCMR 89), Imran Ashraf & others vs. The State (2001 SCMR 424) and Zafar Hayat vs. The State (1995 SCMR 896).** In the case of **Allah Ditta vs. The State (1999 YLR 1478),** the Hon'ble Lahore High Court held that chance witnesses cannot safely be relied upon on a capital charge in the absence of satisfactory explanation regarding their

presence near the place of occurrence where they were ordinarily expected to be present. In the case of **Muhammad Akram vs. The State (2008 P.Cr.L.J 993)**, it was observed that chance witness cannot be believed safely if he fails to offer cause of his presence at the spot at a given time.

12. The matter does not end here, in the initial report recorded in the shape of Murasila (Ex PA/1), the nature and description of weapon was not given by the complainant, this fact was also admitted by Muhammad Naheed (PW-11) as well as Investigating Officer (PW-15) in their statements. However, when the I.O visited the spot and made recovery of 17 empties of 7.62 bore and one empty of 30 bore pistol, the nature and description of weapon of offence was recorded in the site plan (Ex PB). The accused Saeed and Bilal were given the role of firing from Kalashnikov and Ghulam Haider was attributed the role of firing from pistol. The Investigating Officer did not bother to send 17 empties of 7.62 bore (recovered from the scene of crime) to FSL to ascertain as to whether these empties were fired from one weapon or more. However, when the appellant was arrested and a Kalashnikov was allegedly

recovered from his possession, and a separate FIR No.207 dated 26.3.2017 under section 13 A.O was registered against him at Police Station Pabbi, these empties of 7.62 bore along with Kalashnikov were sent to FSL to ascertain as to whether these empties were fired from the Kalashnikov allegedly recovered from possession of the accused or not. However, its report was received in negative, therefore, it is of no help to the prosecution, as it has not been proved that this Kalashnikov was used in the commission of offence.

13. Another interesting feature of the case is that none of the PWs i.e complainant (PW-5) and Akbar Zaman (PW-6) were cited as identifier of the dead bodies in the inquest report and post mortem report of the deceased. The inquest report prepared by Muhammad Naheed (PW-11), Haji Jehan Akbar was shown as the identifying witness of the dead body of Gohar Zaman, while that of deceased Sikandar Zaman Musharaf Shah and Maroof Shah. It was urged by the learned defence counsel that the dead bodies were brought to the hospital in the absence of complainant and Akbar Zaman (PW6), therefore, they were not shown as identifier of the dead bodies. This glaring

omission casts serious doubt about the presence of the two self claimed eyewitnesses at the spot.

14. There is another glaring aspect of the case that the complainant (PW5), eyewitness Akbar Zaman (PW6) and Mst. Jan Bibi, all of them were in the firing range of the accused, as is evident from the site plan (Ex PB) but the accused did not fire at them and spared them to become eyewitnesses against them, having same degree of motive against them as alleged by the prosecution, this too supports contention of the learned counsel for the appellant that the eyewitnesses were not present on the spot. Complainant (PW-5) admitted in his cross examination that his son namely Qamar Zaman was charged for committing murder of Zarin Akbar son of Said Akbar, about 1/2 years prior to the instant occurrence, meaning thereby, that the complainant party had blood-feud enmity with the other person.

15. Next we have to see the evidentiary value of the "motive" as given in the FIR for the commission of offence. The same to our mind, has not been proved during the trial by producing cogent evidence. The same has not been disclosed

with full details. Besides, it is vague, it is hazy. Strangely, even in the statement recorded before the Court, neither the complainant (PW-5), nor Akbar Zaman (PW-6) unfolded the details of motive. This fact alone injects an element of falsehood regarding the alleged motive as setup in the FIR. No doubt, the prosecution is not required to disclose/setup a motive, but once it chooses to do so, then it becomes its obligation to prove it by cogent evidence. Failure to do so shall not only damage the credibility of the prosecution case beyond repair, but it would also be fatal for the prosecution case.

16. We have also noticed that the sister of (PW-12) Fazal Akbar, was married to deceased Sikandar Zaman, he was SHO at District Nowshera during the days of occurrence. It was urged by the learned counsel for the appellant that the entire investigation was carried out at his behest. This PW has admitted in the cross examination that his sister was married to deceased Sikandar Zaman. This fact was also admitted by the complainant (PW-5) in his cross examination. He also admitted that during the days of occurrence, the said Fazal Akbar was

posted as SHO at District Nowshera. Therefore, the defence plea carries weight.

17. Adverting next to the abscondence of the appellant, no doubt it is a relevant fact and it can be used as corroborative piece of evidence, which cannot be read in isolation, but it has to be read along with substantive piece of evidence. The Hon'ble Supreme Court of Pakistan in the case of **Asad-Ullah vs. Muhammad Ali (PLD 1971 SC 541)**, held that corroborative and ocular evidence are to be read together and not in isolation. As regards abscondence the Hon'ble Apex Court in the case of **Rasool Muhammad..vs..Asal Muhammad 1995 SCMR 1373** observed that abscondence is only a suspicious circumstance. In the case of **Muhammad Sadiq Vs. Najeeb Ali (1995 SCMR 1632)**, the august Supreme Court of Pakistan held that abscondence itself has no value in the absence of any other evidence. It was also held in the case of **Muhammad Khan Vs. The State (1999 SCMR 1220)**, that abscondence of the accused can never remedy the defects in the prosecution case. In the case of **Gul Khan..vs...State (1999 SCMR 3004)** it was observed that abscondence per se is not

sufficient to prove guilt of the accused, but can be taken as a corroborative piece of evidence. In the cases of **Muhammad Arshad Vs. Qasim Ali (1992 SCMR 814), Pir Badshah Vs. State (1985 SCMR 2070) & Amir Gul Vs. State, (1981 SCMR 182)**, it was held by the Hon'ble Apex Court that conviction on abscondence alone cannot be sustained. In the present case, substantive piece of evidence in the shape of ocular account has been disbelieved by us, therefore, no conviction can be based on abscondence alone.

18. Lastly, coming to refusal of the accused to produce defence witness or to be examined on oath, once opted for the same, it does not go against him, the brother of the appellant submitted an affidavit before the learned trial Court, that the DW has been threatened by the complainant party, therefore, he is reluctant to depose before the Court and also explained the reason for refusing to be examined on oath. This does not go against the accused. The principle that legal burden of proof always rests upon the prosecution, is the most fundamental principle of criminal jurisprudence.

19. Viewed and discussed from all angles, we are of the firm opinion, that it is an un-witnessed crime, the motive has not been established, non-sending of empties of Kalashnikov to FSL to ascertain as to whether these empties were fired from one and the same weapon or different weapons, therefore, it could not be proved that firing from Kalashnikov was made by more than one assailant, the eyewitness can convincingly be held to be a chance witness and when they are interested in the prosecution of the appellant because their testimony is not corroborated by a single shred of evidence.

20. In view of the opinion formed by us, it is difficult to subscribe to the view taken by the learned trial Court, we are therefore, of the considered view that the impugned judgment whereby the appellant was convicted cannot be sustained in law.

21. Resultantly, this appeal is allowed and the impugned judgment of the learned trial Court is set aside. The appellant stands acquitted of the charge, he shall be set-at-liberty forthwith, if not required in any other case.

Above are the reasons of our short order of even date.

Announced:
28.06.2018
Kausar/*

JUDGE

JUDGE

(D.B)

Mr. Justice Lal Jan Khattak
Mr. Justice Shakeel Ahmad