

**JUDGMENT SHEET**

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

**Criminal Appeal No.205-M/2014**  
**Ali Askar V/S The State & 1 another**

**JUDGMENT**

Date of hearing: 06.02.2018

**Appellant:- (Ali Askar) by Mr. Sher Muhammad Khan, Advocate.**

**Respondent:- (The State & 1 another) by Malak Sarwar Khan State counsel and M/S Rashid Ali Khan and Asif Wardag Advocates.**

**MOHAMMAD IBRAHIM KHAN, J.-** This is a criminal appeal within the meaning of section 410 of the Code of Criminal Procedure coming-out of conviction of the accused/Appellant Ali Askar for a sentence to undergo life imprisonment under section 302 (b) of the Pakistan Penal Code, 1860 along with compensation of Rs. 300,000/- (three lacs) within the meaning of section 544-A Cr. PC or in default thereof shall further suffer three (3) months simple imprisonment. However, benefit of section 382-B Cr. P.C was extended to the accused/Appellant. This

 judgment is edict dated 21.08.2014 in case FIR No. 351 dated 04.9.2011 charged U/S 302 PPC registered at Police Station Nawagai District Buner in Sessions Case No. 11/7 of the year 2013 decided by the Court

of learned Additional Sessions Judge-II/Izafi Zila Qazi Buner.

2. Facts of the prosecution case as deciphered from the contents of First Information Report (Ex. PA) are that complainant Israr while shifting the corpus of his deceased brother Zarsheed to the police station on 04.9.2011 at 13:00 reported that on the doomful day he was present in the sawmill of one Hazrat Islam situated within the local limits of Gharib Abad Jangai. In the meanwhile, the accused/Appellant Askar Ali duly armed with pistol came there and without saying anything started firing at his brother Zarsheed as a result of which he was hit on different parts of his body and died at the spot. In addition to the complainant, the occurrence was stated to be witnessed by Behroz and so many other persons present at the spot. At the time of lodging of the report, the complainant shown total ignorance in respect of the motive being unaware.

*3. Since the accused/Appellant soon after the occurrence was avoiding his lawful arrest, therefore, the proceedings under section 512 Cr.P.C was carried out against him on 30.4.2012 by producing the relevant witnesses of prosecution from PW-1 to*

PW-9 before the Court of learned Sessions Judge/Zila Qazi Buner.

**4.** Upon arrest of the accused/Appellant and conclusion of investigation, complete *challan* has been submitted against him before the Court of learned Sessions Judge/Zila Qazi Buner on 22.02.2013, wherein after fulfillment of codal and legal formalities he was charge-sheeted by the learned Trial Court on 27.02.2013. Since the asservations levelled therein were not acceptable to him, therefore, he posed innocence and thereby claimed trial.

**5.** In a full dressed trial, the prosecution examined Dr. Sher Zaman Khan Medical Officer as PW-1 who has conducted postmortem examination of the deceased and submitted his report as Ex. PM-1, Muhammad Shah Khan SHO as PW-2, Perwaiz Khan Constable bearing No. 79 as PW-3, Akhtar Rahman official of Frontier Constabulary bearing 1101 No. 706 as PW-4, Sher Shah as PW-5, Mudasar Shah as PW-6, Israr as PW-7 who is complainant and alleged eyewitness of this case, Ali Zar Shah as PW-8 who is another alleged eyewitness of the

occurrence, Ghulam Khan SI as PW-9, Ajmal Khan ASI as PW-10 and Lal Said Shah Khan as PW-11.

6. At the end upon conclusion of evidence of the prosecution, statement of accused/Appellant Ali Askar was recorded u/s 342 of the Code of Criminal Procedure, thereby posed innocence and stated to have falsely been implicated in the case. He, however, appeared in his own defence as DW-1 and recorded statements of Shah Jehan as DW-2 and Hazrat Islam as DW-3, who is the owner of sawmill wherein the allegedly occurrence took place. After hearing arguments of learned counsel for the parties at length the decision under conviction for the sentences was delivered.

7. Having heard arguments of learned counsel for the accused/Appellant, learned counsel for the complainant and learned State counsel, record was gone through with their able assistance.

8. Learned counsel for the accused/Appellant referred to 2001 SCMR 424 " Imran Ashraf and 7 others V/S The State", 2013 YLR 892 (Peshawar) "  
Mir Ahmad Shah V/S The State", 2012 MLD 441 (Peshawar) " Aimal Khan V/S The State", 2012 MLD 152 (Peshawar) " Lajbar Khan V/S The

*lha*

State" , 2012 YLR 2513 (Lahore) " Muhammad Saleem Iqbal alias Billa and another V/S The State", 2008 P Cr. LJ 881 (Shariat Court (AJ&K) "  
Mir Afzal V/S The State" 2013 P Cr. LJ 462  
(Supreme Court (AJ&K) " Muhammad Sadiq Bhatti V/S Muhammad Ashfaq and 2 others" and 1999 SCMR 697 " Sheral alias Sher Muhammad V/S The State. On the other hand learned counsel for the complainant duly assisted by learned Astt: Advocate General for the State placed reliance on PLD 2001 Supreme Court 107 " Muhammad Mushtaq V/S The State", 2003 SCMR 554 "  
Muhammad Basharat V/S The State and another", 2002 SCMR 1586 " Jan Muhammad V/S Muhammad Ali and 3 others", 2001 SCMR 177 "  
Riaz Hussain V/S The State", 2011 P Cr.LJ 966 "  
Muhammad Ilyas V/S The State and another", 2008 SCMR 784 " Muhammad Waris V/S The State", 2008 SCMR 1228 " Abdul Majeed V/S The State", 2001 SCMR 223 " Muhammad Aslam and others V/S The State and others", 2001 SCMR 387 " Waris Khan V/S The State", 2010 SCMR 1752 "  
Nizamuddin V/S The State", 2012 YLR 301 "  
Ghulam Shabbir alias Shabbu V/S The State",

2008 SCMR 1236 " Saif-ul-Islam V/S The State",

2011 SCMR 429 " Khizar Hayat V/S The State",

2007 SCMR 1639 " Naik Muhammad alias Naika

and another V/S The State", 2008 SCMR 849 "

Saeed Khan and 5 others V/S The State and

another", 2012 YLR 737 " Saifullah V/S The State

and another" and 2007 SCMR 1519 " Zahoor

Ahmad V/S The State"

9. In the light of thorough and valuable arguments addressed at the Bar by learned counsel for the parties including learned State counsel and in view of the dictums of the superior Courts relied upon by each of the party in respect of their divergent claims, the first and the foremost question which is to be determined by this Court is the presence of the alleged eyewitnesses of the occurrence i.e. PW-7 Israr the complainant/brother of the deceased Zarsheed and PW-8 Ali Zarshah at the venue of crime i.e. sawmill of one Hazrat Islam (DW-3)? As per statement of PW-7 the complainant

 of this case on the day of occurrence he was present in the sawmill of Hazrat Islam when at the relevant time the accused/Appellant Askar Ali came there duly armed with pistol and without uttering a single

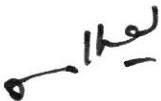
word from his mouth started indiscriminate firing at his deceased brother. Due to which he was hit on different parts of his body and died instantaneously.

The occurrence in addition to this PW was stated to have been witnessed by many other persons present at the spot. Here for the first time this PW introduced a specific motive which is stated to be procurement of 'Batta' (extortion of money through force) by the present accused/Appellant Askar Khan from the people of the locality and the deceased Zarsheed was vociferously opposing this act of the accused/Appellant, therefore he was done to death.

During cross-examination when this PW was confronted with the fact that he did not advance the motive at first instance in the First Information Report, he in an unequivocal terms clearly admitted that he was not aware of the motive at the time of lodging of the report and later on the police was informed in respect of the same. There is no cavil with this legal proposition that motive by itself is not a substantive piece of evidence but when a party specifically claimed certain fact in shape of motive then it is boundan duty of such party to prove the same on all counts. In context of the present case, the

*Ans*

complainant who is real brother of the deceased raised serious allegation in shape of procurement of extortion money by force locally known as "*Bhatta*" by the accused/Appellant then he is under an obligation to prove the same, otherwise, it would come under the category of improvement being not advanced at first instance at the time of lodging of the First Information Report. When in this regard evidence of the prosecution is delved deep into not even a single reference has been found via which an inference could be drawn that the accused/Appellant has ever received '*Batta*' money from any inhabitant of the locality and mere assertion at belated stage on behalf of the complainant being related witness to the deceased could not be considered as motive in context of the present case. Thus, it can be said with certainty that the prosecution on all counts failed to prove the factum of motive with regard to procurement of '*Bhatta*' by the accused/Appellant.

 10. Now coming to the introduction of another alleged eyewitness of the occurrence Ali Zarshah (PW-8). This revelation also came into existence in the cross-examination of PW-7 Israr for the first time in the following manner:-

"مجھے یاد نہیں کہ میرے اور بھروسہ اور زر علی شاہ کے علاوہ اور کتنے لوگ موجود تھے۔ دوبارہ کہا کہ ہمارے اور ملزم کے علاوہ کوئی دیگر فرد موجود نہ تھا"

It is to be noted that no clue whatsoever of this important prosecution eyewitness has been found in the First Information Report, rather this disclosure has come to surface with considerable delay. In ordinary parlance how it is possible that the complainant would forget the name of an eyewitness being standing with him witnessing the murder of his real brother. In such like situation as prevailed in the present guidance can be derived from case law cited as 2008 SCMR 158 "Muhammad Khalid Khan V/S Abdullah and others", wherein it has been held:-

*Testimony of eye-witnesses including the complainant did not inspire confidence, who were chance witnesses and they had not reasonably explained their presence at the spot at the relevant time--- Complainant though had introduced two eye-witnesses, yet had produced only one--- Names of the newly-added eye-witnesses were mentioned in the F.I.R., which had been disclosed to the Investigating Officer after some weeks of the occurrence--- Eye-witnesses being admittedly inimical towards the accused, unimpeachable evidence was required to corroborate the ocular testimony for sustaining conviction, which was lacking in the case--- Said grounds which found favour with High Court in passing the judgment of acquittal were neither fanciful nor conjectural and the same were backed by the material on record--- Crime emplies though secured from the spot were not even sent to Forensic Science Laboratory for comparison--- Motive also was not explicit and was rather vague--- Leave to*

*allow*

*appeal was declined to complainant in circumstances.*

Keeping in sight the above rational in mind it is basic principle of administration of criminal justice that if a witness is trustworthy and reliable then conviction can safely be based on his evidence but in the eventuality if such witness is unreliable his evidence cannot be utilized for the passing of conviction against an accused. At the same breath, if we look into the testimony of other alleged eye-witness Ali Zarshah, who has been introduced by the complainant later on in order to fill the loop-holes of his case. This PW though deposed the same story as advanced by the complainant in the FIR followed by his statement before the Court. Yet during cross-examination when he was confronted with his statement recorded under section 164 Cr. P.C. about mentioning of name of complainant Israr in his statement who asserted with utmost certainty that his name has been mentioned in the statement. *(H.S.)* Yet when the said statement was observed before the learned trial Court it did not find mention the name of complainant. So an inference could be gathered from such attitude of this alleged eyewitness that both the PWs (eyewitnesses of the occurrence) might

have not seen the occurrence in the mode and manner as advanced by the prosecution. Especially when the other important witness of prosecution the alleged owner of the sawmill Hazrat Islam (DW-3) did not support the version of prosecution.

**11.** Likewise, the another eyewitness namely Behroz though recorded his statement in the previous proceedings conducted under section 512 Cr. P.C as PW-6, however during regular trial this important prosecution witness was abandoned being won over for reasons best known to the complainant-party. Thus, it is also settled principle of law that if a best evidence is available with the party and the said party fails to produce the same before the Court then a presumption under Article 129 (g) of the Qanun-e-Shahadat Order, 1984 can be drawn that had the said evidence been produced before the Court it would have been unfavourable to the said party. Such presumption can fairly be drawn in the present case

*→ mej* that had PW Behroz (the alleged eyewitness) produced in the Court he would have not supported the prosecution case. Non-examination of the material witnesses has materially affected the prosecution case. Keeping in sight the same analogy

reliance has been placed on "Lal Khan v/s The State, reported in 2006 SCMR 1846", wherein it has been held:-

**"non-production of most natural and material witness of the occurrence would strongly lead to an inference of prosecutorial misconduct, which would not only be considered a source of undue advantage for prosecution but also an act of suppression of material facts causing prejudice to accused"**

It was further held under the same judgment in citation (d):-

**"Act of withholding of most natural and a material witness of occurrence would create an impression that had such witness been brought into witness box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid consequence".**

*(Note)*

12. It is further evident from bare perusal of the evidence put-forth by the prosecution in respect of guilt of the accused/Appellant that except the statement of the complainant Israr PW-7 there is uncertainty about presence of rest of the eyewitnesses

i.e. PW-8 Ali Zarshah being introduced later on as his name was not mentioned in the FIR by the complainant and the other alleged eyewitness Behroz was abandoned during regular trial. So in such circumstances, sole testimony of brother of the deceased Israr PW-7 would come under the category of interested/chance witness. In support of such plea reliance can safely be placed on PLJ 2012 Cr. C

(Lahore) 875 (D.B.) (Multan Bench Multan)

"Muhammad Ishfaq and others V/S State and others". The relevant citation therein speaks of:-

*" It is settled principle of criminal jurisprudence evidence of a witness who was inimical to the accused and a chance witness, as matter of caution and for safe administration of justice cannot be believed unless corroborated by independent, unimpeachable and trustworthy source.*

*" Eye-witnesses were interested being closely related inimical and chance witnesses, therefore, they could not be believed without strong corroboration.*

*" It is well settled principle that if inimical, interested witnesses were disbelieved qua some of accused, they cannot be believed against other accused without some strong and independent corroboration available on record."*

*the*

If presence of the alleged eyewitnesses PW-7 Israr complainant/brother of the deceased and Ali Zarshah PW-8 are ousted then it would be an unseen occurrence. In such scenario reliance has

been placed on 1997 P Cr. LJ 2075 "Muhammad Anwar vs The State", wherein it has been held:-

*Appreciation of evidence---Presence of eye-witnesses at the time and place of incident had not been established beyond doubt and the occurrence was an un-witnessed one. Other incriminating connected evidence like strong motive, recovery of blood-stained dagger and medical evidence, in the circumstances, could not be collectively or individually sufficient to form basis of conviction of accused---Accused was acquitted on benefit of doubt accordingly.*

At all side by side the veracity of prosecution witnesses statements are not alone to be considered for to bring home charges. It is equally important to appreciate the defence evidence. DW-3 Hazrat Islam has however whisked off the presence of these prosecution witnesses including the complainant Israr who had come to Police Station after abandoned PW Behroz reached the Police Station much earlier one hour. Had these witnesses were present on the spot there would have never been a gap of one hour between the two prosecution witnesses. In all probabilities the witnesses of the

prosecution who posed to be of ocular account they themselves exclude each other presence on the spot.

**13.** There is no need to reiterate this universal principle of administration of criminal justice that once the ocular account does not support the version of prosecution in its totality then there come a turn of corroborative or circumstantial evidence. In this case medical evidence has been furnished by PW-1 Dr. Sher Zaman Khan Medical Officer, who has duly submitted his report as Ex. PM/1. Yet during cross-examination he deposed that 'the dead body was brought to the hospital at 12:45 pm and at the same time I started examination in presence of police'.

When this narration of the concerned Medical Officer was put in *juxta* position with the contents of First Information Report lodged at 13:00 hours on the same day at Police Station Nawagai wherein the complainant Israr stated that after shifting of corpus

*W.L.*  
of his deceased brother to the police station he reported the matter to the local police. Here the question arises, that the Medical Officer would have definitely consumed sufficient length of time on conducting postmortem examination of corpus of the deceased then how it is possible that in such a short

span of time the body of deceased was shifted from the hospital to the police station where as stated earlier the report was lodged by the complainant in presence of corpus of his deceased brother at exactly 13:00 hours. Even otherwise, this situation has been somehow overcome by the complainant Israr PW-7 by deposing during his cross-examination in the following manner:-

"تھانیدار نے رپورٹ پر قریباً آدھا گھنٹہ صرف کیا۔ بعد ازاں ملکی نش اس ہسپتال روانہ کیا گیا جکہ میں تھانہ میں رپورٹ کیلئے رہ گیا۔"

Yet there remained uncertainty to some extent to the effect that the postmortem of the deceased might have been carried out even before lodging of the report in the concerned police station.

**14.** No doubt there is absconcence on the part of accused/Appellant and even proceedings under section 512 Cr. P.C. were carried out against him during his absence. Yet it is almost settled principle of law that absconcence by itself is not sufficient proof of guilt of an accused it ought to be corroborated by other supporting evidence, which element is missing in the present case. In this respect plea reliance can be placed on 2009 SCMR 803

"Haji Paio Khan V/S Sher Biaz and others",

wherein it has been held:-

*"Abscondence of accused is a supporting evidence of his guilt and it may be consistent with the guilt or innocence of accused, which is to be decided keeping in view the overall facts of the case.*

Same view has further been affirmed in case law cited as PLD 2004 Peshawar 20 "Ali Raza V/S Fazal Wahid". The relevant citation (f) of the judgment opines:

*" Abscondence is the weakest type of corroboratory evidence and where the ocular evidence is disbelieved it alone cannot form a basis for conviction.*

In search of the same analogy reliance can further be placed on 2012 MLD 1448 (Peshawar) "  
Muhammad Ashraf V/S Javed and another", wherein it has been held:-

*" When ocular testimony had not been considered worthy enough, then the importance of abscondance of accused as a corroborative evidence, would be diminished."*

In the case in hand too, where the direct or ocular-version is not of such caliber to be relied upon

mere absconcence of the accused/Appellant alone would be of no worth. It is to be noted here that in this part of the country the people do abscond not because they have committed an offence but due to fear of the police coupled with lack of awareness from law of the land.

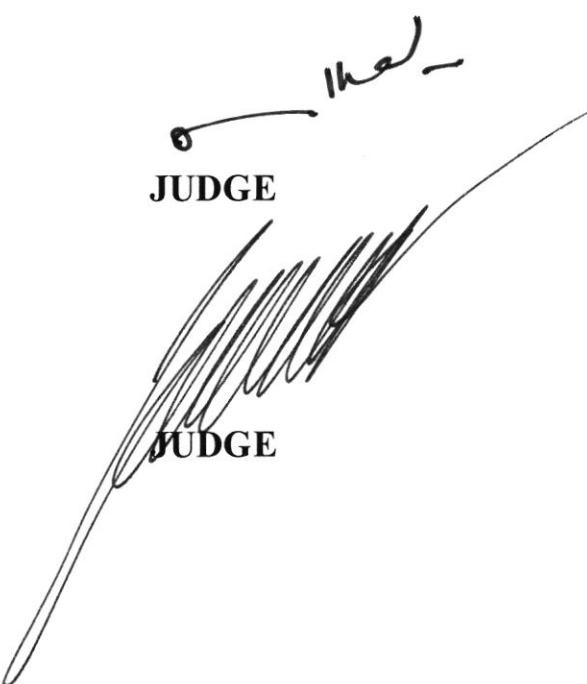
**15.** Whereas the factum of benefit of doubt is very much clear that if there exist a reasonable ground to believe that the accused/Appellant has not participated in the commission of crime then there is no need of numbers of circumstances to prove the innocence of accused even a single circumstance creating reasonable doubt is sufficient for the acquittal of the accused. In this regard guidance is derived from the judgment cited as **2015 P Cr.LJ 554 (Peshawar) “ Sahibzada vs the State and 2 others”.**

**16.** In the above backdrop, we after reappraisal of entire evidence are of the firm view that the prosecution case against the accused/Appellant has not been proved beyond reasonable doubt and the judgment of learned trial Court is based on wrong appreciation of evidence and the law on the subject. Hence, we accept this appeal and set-

aside the impugned judgment of conviction rendered by the learned trial Court. Ergo, the accused/Appellant is acquitted of the charges leveled against him. He is in custody and be set free if not required in any other case.

17. These are the reasons of our short order of even date.

Announced.  
Dt: 06.02.2018

  
JUDGE

JUDGE

Office  
15/02/18  
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