

JUDGMENT SHEET
PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Cr.A. No.14-D/2023.

Usman
Vs.
The State etc.

JUDGMENT

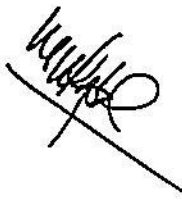
For Appellant: M/S Salimullah Khan Ranazai and
Farooq Akhtar. Advocates.

For State: Malik Muhammad Asad. Addl: A.G.

For Respondent: Husband of respondent No.2.

Date of hearing: 25.5.2023.

DR. KHURSHID IOBAL, J.- This appeal is directed against the judgment dated 15.3.2023, rendered by learned Additional Sessions Judge-III, D.I.Khan, whereby the appellant after facing trial in case FIR No.375 dated 07.12.2021, under Section 302/34 PPC of Police Station Kulachi, has been convicted under section 302(b) and sentenced to imprisonment for life and also to pay compensation of Rs.800,000/- to the L.Rs. of deceased in terms of Section 544-A, Cr.P.C. In default thereof, the convict shall undergo six months simple imprisonment. He was further convicted under Section 15 Arms Act and sentenced to one year rigorous imprisonment with a fine of Rs.1000/-. In default thereof, to undergo ten



days S.I. Both the sentences have been ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. has been extended to the convict. While co-accused was acquitted of the charge.

2. The prosecution story as divulged from the FIR, registered on the strength of *murasila*, in brief, is that on 07.12.2021, at about 11:20 hours, complainant Mst. Musarrat Bibi alongwith the dead body of her son Kamran, reported to the local police in the emergency room of civil hospital, Kulachi, that her son Kamran, Irfan @ Rizwan and Usman run combined business of grocery in a shop, situated in village Looni and her son used to come to house after *Isha* prayer. On 06.12.2021 at about 08:30 PM, her son came to the house after *Isha* prayer for taking meal and left the house for shop. However, he did not come back the whole night. They kept on waiting for him and also made call on his cell phone, but without any response due to missing of signals. On 07.12.2021, at morning time, the door was knocked at where the complainant was told by the co-villagers that the dead body of her son was lying in the street near the house of one Aslam, situated in village Looni, Mohallah Zohakzai. On this, the complainant alongwith her sister-in-law, namely Mst. Rozina Bibi wife of Rozi Khan proceeded to the spot, where she

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found her son murdered with firearm. The complainant explained the reason for delay in reporting the matter, that father of the deceased was in WANA, so she was consulting her relatives and after getting knowledge and confirmation regarding involvement of the convict and acquitted co-accused, she charged them for the commission of offence. Motive for the offence was stated to be a dispute over combined grocery business.

3. On completion of investigation, complete challan against the accused was submitted before the trial Court where at the commencement of trial, the prosecution produced and examined as many as ten witnesses, whereafter, statements of the accused under section 342 Cr.P.C, were recorded wherein they professed innocence and false implication; however, neither they wished to be examined under section 340(2) Cr.P.C, nor opted to produce defence evidence. The learned trial Court after hearing arguments, convicted the appellant and sentenced him, as mentioned above, while acquitted the co-accused from the charge levelled against him.

4. Complainant side did not want to engage counsel and stated to rely upon the arguments of learned A.A.G. We have heard the learned counsel representing the appellant and the learned Additional

Advocate General at length and with their able assistance, the record was minutely perused.

5. There is no denial of the fact that the incident in the present case allegedly occurred in the night of 06.12.2021 at unknown time, where the dead body of deceased was lying in a thoroughfare near the house of one Aslam. According to first information report, on the following morning i.e. 07.12.2021 at 07:00 a.m, the co-villagers came to the house of complainant and informed her regarding presence of the dead body of her son on the spot. While reporting the matter on 07.12.2021 at 11:20 hours, although the complainant charged the appellant and acquitted co-accused for committing murder of her son by firing at him with firearms. However, it is a matter of surprise that while reporting the matter, she stated that she was consulting with her relatives and after satisfying herself, she charged the accused for the commission of offence. The apex Court in plethora of judgments has held that an incident reported after due consultation and deliberation cannot simply be brushed aside, as the same creates reasonable doubt regarding involvement of an accused in the commission of offence. So far as the observation of learned trial Court regarding the delay occurred in reporting the matter is concerned, suffice it to say that law aids the

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vigilant and not the indolent. It is also astonishing that after getting information about the dead body of her son at about 7:00 a.m, the complainant reported the matter after lapse of more than four hours, while as per record the place where the dead body was lying is at a walking distance from the house of complainant. Needless to mention that the dead body of deceased was received in the hospital after lapse of four hours.

6. While going through the impugned judgment, we have observed that the learned trial Court while convicting the appellant was mainly swayed with the circumstantial evidence in the shape of recovery of empties from the spot and .30 bore pistol, allegedly recovered on pointation of the appellant coupled positive report of FSL in that regard. However, before we discuss the same, it would be appropriate to have a glance over the testimony of complainant Mst. Musarrat Bibi, who was examined before the trial Court as PW-6. Perusal of examination-in-chief of the complainant reveals that she did not name Aslam, rather mentioned the house of neighbor, where the dead body was allegedly lying. It is also surprising when she stated that she alongwith her sister-in-law went to the spot and found the dead body of her son where she lodged the report to police, which is belied by the initial report wherein it has


Musarrat Bibi

been stated that the matter was reported at civil hospital, Kulachi. The cross-examination of the complainant is also astonishing, wherein she stated that when they found the dead body of deceased, police arrived to her house at about 7:00 a.m, which is the time when she was allegedly informed by her co-villagers about the dead body of her son. She further stated that she in the company of her sister-in-law and all the police officials went to the spot and remained there till 12:30 noon. It is also an element of surprise when she stated that the dead body also remained with them till 12:30 noon and thereafter, the police officials took the dead body from the spot to civil hospital, Kulachi. The above deposition, in our firm opinion, was not sufficient to be relied upon for sustaining conviction of the appellant, that too, on a capital charge, as the same is totally in conflict with the contents of FIR and medico legal evidence.

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7. Additionally, another witness of the prosecution, namely Mst. Zarina Bibi (Rozamina Bibi) was examined before the trial Court as PW-5. Astonishingly, she stated that on the day of occurrence she was present in her house and it was 09:00 a.m, when some people of the vicinity came to their house and informed about the incident. That she went near the house of one Aslam and found the dead body of

her nephew. That she returned back to her house from where she went to the house of deceased and informed mother of the deceased about the dead body. That in the meanwhile, police came to their house and in the company of police she alongwith the complainant went to the spot and thereafter, to hospital, where her son PW Akhtar Zaman and the complainant lodged the report. The above portion of examination-in-chief is sufficient to discard the testimony of complainant and the story narrated in the FIR. Even statement of this witness regarding shifting of the dead body in police mobile/Datsun is also contradicted by the statement of scribe of the murasila (PW-10), who stated in his cross-examination that the dead body was brought in a private Datsun/pickup.

 8. Now six empties, allegedly recovered from the crime scene. There is no denial of the fact that the occurrence allegedly took place at odd hours of night in a thoroughfare. The empties remained unattended the whole night till the morning and that too, in a thoroughfare of thickly populated area. The I.O at the very inception of his cross-examination, stated that copy of FIR was handed over to him at about 12:00 hours and he reached on the spot at about 12:40 hours. This deposition is in conflict with the statement of the

complainant, who stated that she alongwith the police officials remained on the spot till 12:30 p.m (noon). The above discrepancy in the prosecution case could not lightly be ignored, particularly when the trial Court while convicting the appellant has based its findings on the recovery of aforesaid empties. Most importantly, the extract from Register No.19 has not been placed on the judicial file. However, extract from Register No.21 (Ex. PW 9/4) reveals that reference has been made to the present FIR, where surprisingly six empties of 7.62 bore have been mentioned alongwith .30 bore pistol with fit magazine. In this view of the matter, the positive FSL report regarding six empties could not be taken into account as the same had lost its efficacy. Needless to mention that the empties were allegedly recovered on 07.12.2021, which were received in the FSL on 23.12.2021. Although the I.O (PW-9) stated in his cross-examination that empties alongwith blood-stained cotton were handed over by him to the Moharrir at about 17:00 hours. However, the I.O did not remember that who transmitted the case property to the FSL. At the end of his cross-examination, the I.O stated that he himself sent the case property to FSL on 09.12.2021. In this respect, Asmat Ullah IHC was examined as PW-2. He stated to have registered the

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case on receipt of murasila. He received parcels containing blood stained cotton and six empties of .30 bore which were handed over to him by the I.O on his return from the spot. He made entry in the relevant register. He was examined by the I.O under section 161, Cr.P.C. The cross-examination of this witness is worth perusal, wherein he stated that the FIR Ex. PA is not in his handwriting. He admitted it correct that on the day of occurrence he was not posted as Moharrir at Police Station Kulachi. He clearly admitted that he did not send the case property to the FSL, except empties and blood-stained cotton which were handed over to him at about 06/6:15 p.m. However, he admitted that the case property remained in his possession only for about fifteen to twenty minutes. When such is the state of affairs, how it could be ascertained that who dispatched the case property to the FSL and when it was sent to the FSL. In this view of the matter, the belated dispatch of the case property to the FSL is shrouded in mystery. Needless to mention that there is contradiction between the statements of PW-2 and PW-9 with respect to sending the case property to the FSL. In view thereof, the FSL report regarding the empties and the pistol allegedly recovered on the pointation of accused is of no avail to the prosecution, therefore,

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same could not be relied upon for sustaining conviction on a capital charge.

9. The Apex Court in case reported as

"Navceed Asghar and 2 others Vs. The State" (PLD

2021 Supreme Court 600) has held that:-

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. In cases that rested entirely on circumstantial evidence, it was of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person was drawn. The process of inference and deduction involved in such cases was of a delicate and perplexing character, liable to numerous causes of fallacy. This danger pointed the need for great caution in accepting proof of the facts and circumstances, before they were held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which were supported by defective or inadequate evidence, could create a specious appearance, leading to fallacious inferences. Hence, it was necessary that only such circumstances should be accepted as the basis of inferences that were, on careful examination of the evidence, found to be well-established. A high quality of evidence was, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person was to be drawn”.

W. J. Khan

It was further held in the supra case that:-

“The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person was that, if, on the facts and circumstances proved, no

hypothesis consistent with the innocence of the accused person could be suggested, the case was fit for conviction of the accused person on such conclusion; however, if such facts and circumstances could be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case was to be treated one of insufficient evidence, resulting in acquittal of the accused person. Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touched the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances had to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain broke the whole chain and rendered the same unreliable; in that event, conviction could not be safely recorded, especially on a capital charge. Therefore, if the circumstantial evidence was found not of the said standard and quality, it would be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence would a better and a safer course."

W. M. J. P.

In the light afore-referred case law, we have examined the case and find that there are numerous missing links in the circumstantial evidence, which have been duly highlighted in the preceding paragraphs, therefore, it is concluded that the learned trial Court has not appreciated the

evidence in its true perspective and has committed an error by convicting the appellant.

9. The prosecution alleged motive to be a dispute between the accused and the deceased over a joint grocery business, however, it did not succeed in establishing the alleged motive and even no independent witness was produced in that respect. The prosecution, in all circumstances was to prove the same. When the prosecution did not succeed in establishing the motive, then it is for the prosecution to suffer, as is held in case reported as "Hakim Ali Vs. The State" (1971 SCMR-432), that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of "Amin Ullah Vs. The State" (PLD 1976 SC 629), wherein, it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of "Muhammad Sadiq Vs. Muhammad Sarwar" (1997 SCMR 214). Again, on the same principle, case laws titled "Noor Muhammad Vs. The State and another" (2010 SCMR 997) and

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"Amin Ali and another Vs. The State" (2011 SCMR-323) can also be referred.

10. The overall impact of what has been discussed above is that the prosecution has miserably failed to establish the case against the appellant. Accordingly, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted from the charge levelled against him. He shall be released forthwith, if not required to be detained in connection with any other criminal case.

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

Announced.
Dt: 25.5.2023.
(Kifayat*)


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JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Dr. Khurshid Iqbal