

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

Cr.A. No.130-B/2014
with Murder Reference No.11-B/2018

Abdul Basit son of Nawab Jan,
r/o Damgari Siraj Khel, Takht-e-Nasrati,
District Karak.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :-	<u>M/S Syed Abdul Fayaz and Zahir Shah</u> <u>Marwat Advocates.</u>
For State :-	<u>Mr. Arshad Ahmad, AAG.</u>
For complainant:	<u>Mr. Ghulam Mohyuddin Malik, Advocate</u>
Date of hearing:	<u>16.06.2020</u>

ORDER

ROOH-UL-AMIN KHAN, J:- At a trial held by learned Additional Sessions Judge, Karak at Takht-e-Nasrati, accused Abdul Basit, having been found guilty of committing murder of Abdul Jawad deceased, has been convicted under section 302 (b) PPC and sentenced to death as well as to pay Rs.2,00,000/-, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months simple imprisonment, vide judgment dated 19.01.2014, in case FIR No.157 dated 13.05.2011, registered under sections 302/324/34 PPC, at Police Station Yaqook Khan Shaheed Takht-e-Nasrati, District Karak.

2. The appellant-convict has filed instant appeal against his conviction and sentences, whereas,

complainant/petitioner Lal Marjan has filed Cr.R. No.01-B/2015, for enhancement of compensation amount and Cr.A. No.11-B/2015, against acquittal of the accused Abdul Basit under section 324 PPC.

3. Since all the matters are arising out from one and the same judgment of the learned trial Court, therefore, we propose to decide the same through this single judgment.

4. The prosecution case as unfolded in First Information Report (FIR) is that on 13.05.2011 at 18.45 hours, complainant Lal Marjan (PW.1), in company of dead body of his son Abdul Jawad deceased, reported to Haji Rehman SHO (PW.5) to the effect that on the eventful day he along with sons Abdul Samad (PW.2) and the deceased arrived from Karachi to their house, situated in village Damgari Siraj Khel. At about 18.15 hours, they left home to see his daughter Mst. Abdia Rehman (PW.3), (wife of appellant Abdul Basit). The moment, they came out from the house, appellant along with co-accused Nawab Khan (acquitted on the basis of compromise), duly armed with pistols present there opened fire at them. Due to firing of appellant; Abdul Jawad deceased got hit and died at the spot, whereas, he and PW Abdul Samad luckily remained unscathed from the firing of the acquitted co-accused. Motive for the occurrence is that appellant Abdul Basit used to tease his wife Mst. Abida Rehman (PW.3). Report of the complainant was recorded into

writing in the shape of Murasila Exh.PW.1/1 by Haji Rehman SOH (PW.5), on the basis of which FIR Exh.PW.6/1, was registered against the accused. He also prepared injury sheet Exh.PW.5/1 and inquest report Exh.PW.5/2 of the deceased and sent his dead body to the mortuary for autopsy. Dr. Gul Sanat Shah SMO (PW.8) conducted postmortem examination on the dead body of the deceased on 13.05.2011 at 07.30 p.m. and found a firearm entry wound on front of his chest at 4th left intercostals space measuring ¼ inch x ¼ inch, with corresponding exit wound on right lower side chest. According to him, direction of the injury was from upside to downward and slightly from left to right side. He opined the probable time between injury and death as 20 to 25 minutes and between death and postmortem as 1 ½ hours. He further opined that firearm injury to vital organs i.e. heart, lungs and blood vessels resulted into the death of the deceased.

5. Mir Shah Jehan SI (PW.11) was entrusted with the task of investigation. He proceeded to the spot and prepared site plan Exh.PB at the pointation of eyewitnesses. During spot inspection, he secured bloodstained earth Exh.P.2 from the place of the deceased vide recovery memo Exh.PW.4/2 and 2 empties of 30 bore giving fresh smell of discharge vide recovery memo Exh.PW.4/2. Similarly, vide recovery memo Exh.PW.10/1,

he took into possession the last worn bloodstained garments of the deceased; recorded statements of the PWs under section 161 Cr.P.C.; sent the bloodstained articles and the empties to the FSL, reports whereof are Exh.PZ and Exh.PZ/1, respectively. As the appellant was avoiding his lawful arrest therefore, he initiated proceedings under section 204 and 87 Cr.P.C. against him. After completion of investigation he handed over case file to the SHO who submitted challan u/s 512 Cr.P.C. against the appellant.

6. The appellant was settled at Karachi, hence, Muhammad Nazeer SI (PW.9), proceeded there and arrested him in the instant case vide arrest card Exh.PW.9/1. He shifted the appellant to District Karak and after expiry of his physical remand on 28.07.2013, he was sent to judicial lockup.

7. On completion of investigation, supplementary challan was submitted against the appellant before the learned trial Court, where he was charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, neither wished to be examined on oath nor opted 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 above.

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

9. Ocular account of the occurrence has been furnished by complainant Lal Marjan (PW.1), Abdul Samad (PW.3) and Mst. Abida Rehman (PW.3). The former is father and the latter two are the brother and sister of the deceased. Needless to mention that PW Mst. Abida Rehman is not cited as eyewitness in the FIR, whereas, Abdul Samad (PW.2) did not accompany his father and the deceased brother to the hospital. No doubt, conviction can be recorded on the basis of evidence of close relatives provided their testimony is trustworthy, confidence inspiring and corroborated by strong independent circumstances of the case.

Complainant Lal Marjan appearing as PW.1 while reiterating the same version as set forth by him in the initial report Exh.PW.1/1, introduced a lot of innovations about mode of occurrence, citing Mst. Abida Rehman as eyewitness, arrangement of vehicle for shifting the deceased to the hospital coupled with addition of attributing two fire shots to each accused. In the initial report, he has categorically and in unequivocal words mentioned that after receiving fire shot, the deceased

succumbed to injury and died there and then at the spot, whereas, according to Dr. Gul Sanat Shah (PW.8), probable time elapsed between injury and death is 20 to 25 minutes. In this backdrop, complainant (PW.1), in order to bring his testimony in line with the medical evidence by making dishonest improvement in his court statement deposed that Abdul Jawad after receiving injury, was picked up by Abdul Samad (PW.2), in injured condition and he arranged a datsun in which the injured was shifted to the hospital. Abdul Samad while appearing as PW.2 deposed that after receiving injury Abdul Jawad expired at the spot. The version of the complainant in the initial report about death of the deceased at the spot and that of PW Abdul Samad is belied by the medical evidence, while addition by complainant in his examination-in-chief, qua death of the deceased is nothing but a dishonest improvement so as to bring his testimony in line with medical evidence. In cross-examination, he was confronted with his initial report wherein he admitted it correct that he has not given details and number of fire shots fired by each accused as well as the total fire shots in the initial report. He further deposed that he did not notice any blood oozing from the wound of the deceased rather saw that Abdul Samad who had taken Abdul Jawad in his lap. Abdul Samad (PW.2) in cross-examination deposed that wound of the deceased did not bleed on the ground and a very small

quantity of blood besmeared shirt of the deceased. He further deposed that he had not noticed any blood fallen on the ground from the wound of the deceased. The aforesaid versions of PW.1 and PW.2, is not only contradicting and negating the site plan Exh.PB and the testimony of Mir Shah Jehan (PW.11)/I.O., who during spot inspection has secured allegedly bloodstained earth Exh.P.2 from the place of the deceased which was sent to the FSL along with last worn bloodstained clothes of the deceased, report whereof Exh.PZ is secured in positive, but is also making the alleged place of occurrence highly doubtful and controversial. Abdul Samad PW.2 is not rider of the report of complainant. Complainant deposed that while shifting the deceased to the hospital he did not accompany him and that he shifted the deceased all alone. Similar is the stance of PW Abdul Samad, who deposed that he did not accompany the deceased to the hospital, rather went home. The conduct of PW Abdul Samad is extremely against the natural human conduct and beyond the comprehension of a prudent mind as he being real brother of the deceased put his corpse in the vehicle and let his aged father to shift it to the hospital. In such like situation a brother cannot be expected to leave the dead body of his deceased brother at the mercy of his old father and opt to go an abandoned house. Neither complainant nor PW Abdul Samad is verifier of dead body of the deceased, rather one Khair

Zaman and Fazal ur Rehman, uncle of the deceased, have been mentioned as verifiers of the dead body in the inquest report. Complainant in cross-examination has disclosed that house of the accused is situated in front of their house and that when they reached in front of the accused's house, the accused started firing at them. He also disclosed that place of the deceased is at a distance of 20 to 22 paces from the house of the accused. Contrary, in the initial report complainant has mentioned that no sooner they came out from the house the accused fired at them. He while contradicting his earlier version deposed that deceased was ahead of them whereas he and PW Abdul Samad were following him. Similar is the stance of PW Abdul Samad. The complainant and PW Abdul Samad deposed that the accused did not fire simultaneously rather accused Abdul Basit made firing first. He made first fire on all of them and thereafter fired second shot at Abdul Jawad deceased. The above mentioned details do not find mention in the initial report or in the statement of PW Abdul Samad. Besides, the above mentioned improvements, direction of the firearm injury on the person of the deceased from upward to downward, as opined by the doctor, is yet another disturbing aspect of the case, as the appellant has not been shown on some high level than the deceased in the site plan or in the initial report of the complainant. How the deceased received injury from upward to downward has

not been explained by the prosecution witnesses. The above discussed contradictions in the testimony of the two alleged eyewitnesses coupled with deliberate dishonest improvements create serious doubts in the prosecution case, particularly, about presence of the alleged eyewitnesses. In this view of the matter, we are firm in our view to hold that both, the complainant (PW.1) and Abdul Samad (PW.2), were not present at the spot at the time of occurrence. The peculiar facts and circumstances of the cases strongly suggest that the dead body of the deceased was shifted to the hospital by his uncle Fazal ur Rehman and one Khair Zaman, identifiers, whereafter presence of the complaint was procured in the hospital and there he lodged the report. Similarly, PWs Abdul Samad and Mst. Abida Rehman are also procured witnesses that's why their testimony is suffering from material contradictions, discrepancies and deliberate dishonest improvements. It has been held by Hon'ble the Supreme Court in the case of **Amir Zaman Vs. Mahboob and others (1985 SCMR 685)** that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in **Akhtar Ali's case (2008 SCMR 6)** it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and

dishonest, cast serious doubt on the veracity of such witness. In **Khalid Javed's case (2003 SCMR 149)** such witness who improved his version during the trial was found wholly unreliable. Reliance in this respect may also be placed on the cases of **Mohammad Shafique Ahmad Vs. The State (PLD 1981 SC 472)**, **Syed Saeed Mohammad Shah and another Vs. The State (1993 SCMR 550)**, and **Mohammad Saleem Vs. Mohammad Azam (2011 SCMR 474)**.

11. So far as testimony of Mst. Abida Rehman is concerned, admittedly, during the day of occurrence she was having cordial relation with appellant Abdul Basit, however, after the occurrence she left his abode and shifted to Karachi with her parents where dissolution of her marriage with the appellant took place through Khula. She is not named in the FIR as an eyewitness. In examination-in-chief she narrated the story set forth by complainant in the initial report but in cross-examination she disclosed that the accused did not fire at her father and brothers in the first instance, rather when they covered 20/22 paces, the accused fired at them. She stated that her presence at the spot was noticed by her father (complainant) and PW Abdul Samad. She admitted that she is observing "Pardha". She deposed that she was present in her house i.e house of the accused when she saw both the accused whispering with each other having pistols in their hands, so

she sensed some danger therefore, she followed them, but she was feeling that accused will not harm her father and brothers. Such an assertion of Mst. Abida Rehman cannot be woven into prosecution story, as according to complainant on the day of occurrence, on arrival from Karachi to their house, he along with his sons left house to see his daughter Mst. Abida Rehman wife of the appellant. The moment, they came out of their home, the accused started firing at them. How the appellant or his wife Mst. Abida Rehman came to know about arrival of the complainant along with his sons from Karachi is a fact which remained shrouded in mystery and has never been explained by any witness, including Mst. Abida Rehman (PW.3). We have found that testimony of PW.3 is also not in line with the testimony of other purported eyewitnesses. If her presence was noticed by her father/complainant and PW Abdul Samad, she would have been named as eyewitness in the FIR. If she was present at the spot, she would have not lifted her deceased brother along with her father and definitely accompanied them to the hospital. In this view of the matter, she is also a procured witness, therefore, her testimony has wrongly been believed and relied upon by the learned trial Court. In case titled, **“Rashid Ahmed Vs Muhammad Nawaz and others” (2006 SCMR 1152)**, it has been held by the Hon’ble Supreme Court that testimony of the prosecution witness

not mentioned in the FIR, but introduced subsequently, had no evidentiary value.

12. So far as motive part of the prosecution case is concerned, suffice it to say that search of the record would suggest that appellant and his wife Mst. Abida Rehman (PW.3), were living prosperous life. So much so, the appellant in connection of his job was settled with his uncle (complainant) at Karachi and returned to his native village just a day before the occurrence. From the testimony of Mst. Abida Rehman it is apparent that on the day and time of occurrence she was living in the house of her husband appellant Abdul Basit, meaning thereby that her relation with him were cordial and this fact goes against the version of the complainant. Cordial relation between the spouses has also been admitted by PW Abdul Samad by deposing that after her Rukhsati, Mst. Abida Rehman had never left house of her husband/appellant before the occurrence. She was happy in the house of her husband/appellant. No evidence either oral or documentary has been brought on record by the prosecution to prove the motive as alleged by the complainant. If, for the sake of arguments, relations between Mst. Abida Rehman and the appellant are considered to be strained then she should have been the first target of the appellant and not the deceased. Evidence available on record is not sufficient to prove the motive.

13. As regards recovery of two crime empties of 30 bore and FSL report Exh.PZ/1 in respect thereof that these have been fired from one and the same 30 bore pistol, on one hand, no crime pistol has been shown recovered from the appellant, therefore, mere recovery of empties would not advance the prosecution case while on the other hand, when we have disbelieved the direct/ocular account of the occurrence then mere this piece of circumstantial evidence which is always taken along with direct evidence, would not be sufficient to sustain conviction of the appellant. In this regard reliance can be placed in on the judgments rendered by the Hon'ble apex court in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541)**. Besides, in case titled, **"Saifullah vs the State" (1985 SCMR 410)**, it has been ruled by the Hon'ble Supreme Court that:-

“When there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery”.

14. As regards abscondence of the appellant, it is settled law that mere abscondence of accused, cannot be a substitute of real evidence. Abscondence by itself would be of no avail to the prosecution in absence of any other evidence against the absconding accused. Mere abscondence of accused would not be enough to sustain convict. Guidance in this regard can be derived from the

judgment of the **Hon'ble Supreme Court in case titled, "Muhammad Vs Pasham Khan" (1986 SCMR 823).**

15. For what has been discussed above, we are firm in our view to hold that prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring direct or circumstantial evidence. The prosecution evidence is pregnant with doubts and dishonest improvements benefit of which should have been extended to the appellant but the learned trial Court by not appreciating the evidence in its true perspective landed into the field of error by holding the appellant guilty of the offence. As per golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. Under principle enunciated by the august apex court of the country through different pronouncements, by now it is settled law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in prosecution case must be resolved in favour of the accused. Indeed, this rule is based on the maxim that *"It is better that ten guilty persons be acquitted rather than one innocent person be convicted"*, which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of Holy Prophet (PBUH) that "Mistake of Qazi (judge) in releasing a criminal is better than his mistake in punishing an innocence person". Guidance derived from case titled, **"Muhammad Khan**

and another vs the State” (1999 SCMR 1220) and “Muhammad Ikram vs the State” (2009 SCMR 230).

16. There is a legal aspect of the case i.e. the learned trial Court has framed charge against the appellant under section 324 PPC, however, has not given any findings qua his guilt or innocence under the said offence. The learned trial Court has also not mentioned in the impugned judgment as to whether the appellant has been convicted or acquitted under section 324 PPC, however, during the course of arguments learned counsel for the appellant did not stress on said legal point, rather argued that since charge framed under section 324 PPC has been framed against the appellant, therefore, passing of no order with regard to his conviction or sentence under the said offence by the learned trial Court, shall amount to acquittal of the appellant under section 324 PPC, as such no prejudice would be caused to the appellant if the case is decided on merits. Record divulges that the occurrence pertains to the year 2011 and appellant is behind the bars since 2013. Admittedly, appeal is the continuation of trial. Had the prosecution made out a case of conviction then remand of the case to the trial Court for re-writing of judgment would have been inevitable, but where the conviction and sentence awarded to the appellant is sustainable and the legal flaw is not causing any prejudice to the appellant then remanding the case for to the learned trial Court for

re-writing judgment will not only be a futile effort, but will further increase agonies of the parties.

17. Resultantly, this appeal is allowed, conviction and sentence of the appellant recorded by the learned trial Court vide impugned judgment are hereby set-aside and the appellant is acquitted from the charge leveled against him. He be set at liberty forthwith, if not confined in any other case. On acquittal of the appellant connected Cr.A. No.11-B of 2015 and Cr.R. No.01-B/2015, have become infructuous, which are hereby dismissed.

18. Murder Reference No.11-B/2018 is hereby answered in the Negative.

19. 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 sentences of the appellant-convict Abdul Basit, under section 302(b) PPC, recorded by the learned Additional Sessions Judge, Karak at Takht-e-Nasrati vide judgment dated 19.12.2014, in case FIR No.157 dated 13.05.2011, under sections 302/324/34 PPC, Police Station Yaqub Khan Shaheed, District Karak. The appellant is acquitted from the charge in the cited case. He be set at liberty forthwith, if not confined in any other case.

On acquittal of the appellant, Murder Reference No.11-B/2018, sent by the learned

trial Court, is answered in the *Negative*. Cr.R.

No.01-B/2015 having become infructuous is also
dismissed.

Announced:

16.06.2020

M.Siraj Afridi PS

JUDGE

JUDGE

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

And Mr. Justice S.M. Attique Shah