JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, BANNU BENCH.

(*Judicial Department*)

Cr.A No. 48-B of 2018 with
Cr. R No.14 -B of 2018 and
Cr. Appeal No. 52-B of 2018.

Musharaf Khan and another
Vs
The state etc.

JUDGMENT

Date of hearing 28.04.2020.

Appellant-Petitioner by: Anwar-ul-Haq advocate
Respondents by: M/S Ahmad Farooq Khattak and Zafar Jamal advocates.

State by: Shahid Hameed Qureshi Addl: A.G.

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SAHIBZADA ASADULLAH, J.- Musharaf Khan, Raqeem Khan and Shafiullah were tried by the Additional Sessions Judge, Takht-e-Nasrati, Karak, for committing Qatl-e-Amd of Maula Jan and attempting at the life of the complainant and PW Sarwar Jan ineffectively, in which respect case F.I.R No. 102 dated 16.08.2015, under sections 302/324/34 P.P.C, at Police Station Shah Salim, Karak, was registered. The accused Shafiullah was acquitted, while accused/ appellant Raqeem Khan was convicted under section 302 (b) P.P.C,

and sentenced to rigorous imprisonment for life, with compensation Rs.200000/- to the LRs of the deceased or in default to further undergo six months S.I. and accused/ appellant Musharaf Khan was convicted under section 302 (c) P.P.C and sentenced to undergo rigorous imprisonment for five years with Rs.100000/- as compensation to the Legal heirs of deceased, under section 544-A Cr.P.C. while they earned acquittal for offence under section 324 P.P.C.

2. Aggrieved from the order of conviction and sentence the appellants Musharaf Khan and Raqeem Khan impugned the judgment dated 24.02.2018 by way of instant Criminal Appeal No. 48-B/2018, while the complainant preferred Cr. A No. 52-B/2018 against the acquittal of accused Shafiullah and Cr. R No. 14-B of 2018 for enhancement of sentence of the appellants. We intend to dispose of both Criminal Appeals as well as Criminal revision, through this single judgment.

3. Brief facts of the case are that on 16.08.2015 at about 14.45 hours, the complainant Amanullah alongwith Sarwar Jan brought the dead-body of his uncle Maula Jan to the Civil Hospital, Takht-e-Nasrati, Karak and reported the matter to Aqleem Khan S.H.O (PW-09) to the effect that he alongwith Sarwar Jan and his uncle Maula Jan were present near the shop of one Azeem Khan, it was at about 13.00 hours, that the accused i.e. Musharaf Khan, Raqeem Khan

and Shafiullah, approached on motorcycle to the spot and started indiscriminate firing targeting them, where the fire shots of accused Musharaf and Raqeem Khan went effective by hitting the deceased on different parts of his body, while they luckily escaped unhurt. While shifting the injured to the hospital he succumbed to the injuries. Motive behind the occurrence was stated to be previous blood feud. The report of complainant was reduced in the shape of *Murasila* Ex:PA/1, which was sent through constable Azizur Rehman No.112, to the Police Station, where Mohammad Ismail IHC Mouharrir (PW1) culminated the contents of *Murasila* into F.I.R Ex:PA. Aqleem Khan S.H.O (PW-9) prepared the injury sheet Ex:PM/3 and inquest report Ex:PM/2 and sent the dead-body for post mortem examination through constable Nazeer Ullah No844 (PW-04). After completion of investigation complete challan under section 512 Cr.P.C. was submitted followed by a supplementary challan, after arrest of the accused, before the learned trial Court.

4. The accused were summoned and the formalities under section 265-C Cr.PC were adhered to, the charge was framed against the accused on 23.11.2016, to which they did not plead guilty and claimed trial. The prosecution in order to prove guilt of the accused produced and examined as many as fourteen (14) witnesses. After close of the prosecution evidence, statements of accused were recorded under section 342 Cr.PC, wherein they

professed innocence. Neither they wished to produce defence nor opted to be examined on oath as provided under section 340(2) Cr.P.C. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 24.12.2018 acquitted the accused/respondent Shafiullah, while convicted and sentenced the accused/ appellants Musharaf Khan and Raqeeb Khan. The convict / appellants filed this **Cr.A No.48-B of 2018**, while the complainant has challenged acquittal of accused/ respondent Shafiullah vide **Cr.A No.52-B/2018 and criminal revision petition for enhancement of sentence, bearing No.14 - B/2018.** We intend to decide all the three through this common judgment.

5. Arguments heard and record perused.

6. It was the 10th of August, 2016, when the deceased alongwith the complainant and another reached to the spot and were fired at by the appellants and the acquitted co-accused Shafiullah, which resulted into the death of the deceased while the other two escaped unhurt. The motive was stated to be the blood feud. The place where the incident occurred is a deserted metal road with fields situated on its either side, though a little away from the spot was situated the shop of one Azeem Khan, but the shop keeper could not be examined as whenever the Investigating Officer approached it was found closed. The time of incident was

stated to be 01.00 p.m in the month of august, a time where presence at such a place demands nothing but urgency, as the atmosphere was controlled by the scorching heat with no shelter around. It will ever remain a question that what for all the three were present there. The complainant, while making the report did not explain the purpose of their presence and even kept mum when appeared before the trial Court. It was an unusual company of all the three i.e. the deceased who had touched the threshold of 70 years of his age, the complainant his son-in-law and PW Sarwar Jan his brother. The eye-witness Sarwar Jan was examined as PW-12, who stated that on the day of occurrence they left their village for the house of his friend namely Chammo, where at 12.15 p.m they were served with tea in his baithak, where after they left his house and reached to the spot where the tragedy occurred. The explanation lacks confidence when the custom of the land is placed before. The traditions of the area cannot be ignored, that how they were served with tea at the time when the villagers sit for lunch and that what generosity was shown by the person they visited. We are still travelling under surprise that why soon after the incident the said Chammo did not attract to the spot and that why the Investigating Officer did not associate him with the process, who could have better explained that whether in fact all the three had visited him or not. Yet again, who out of the three claimed his friendship is not known, even otherwise the

deceased would not enjoy comfort in this company that too when the visit and presence was purposeless. It was essential for the prosecution to examine the said Chammo, as it was he alone and alone who could have established their presence on the spot soon after leaving his baithak, but the lack of interest from both i.e. the Investigating Officer and the complainant leads us nowhere but to hold that the story narrated by the complainant is not worthy of credence rather a vague attempt was made on part of the witnesses to make the story and the presence appealable to mind. There is no cavil with the proposition that when best available evidence is with held it is the prosecution to suffer and that is what Article 129 (g) of the Qanun-e-Shahadat Order, 1984 caters for.

7. The complainant is yet to travel the hardest journey to establish his presence with the deceased at the time of incident. What the complainant portrayed is yet to be accepted as he walked with abnormalities in his statement. The Investigating Officer prepared the site-plan on pointation of the witnesses with different points assigned to all. All are placed at a distance of 7 to 9 feet from one another, despite blood feud the assailants went so generous that the witnesses were left alive with the happiest purpose to facilitate their journey to the gallows. The complainant stated that they were fired at but went unhurt but our understanding fails that why having been armed with sophisticated weapons just a few feet away the assailants could not accomplish the task

i.e. to eliminate all the three. The complainant stated that the appellants with the acquitted co-accused arrived on motorcycle, stepped down and started firing with their respective weapons, where the fire shots of the appellants went effective leading to the death of the deceased but they were blessed with life when divinity intervened. Both the complainant and the eye-witness remained consistent in saying that all the three had blood feud with all the three but they could not tell that why out of the three, it was only and only the deceased who appeased the appetite of the assailants. It was nothing but the abnormalities that shrouded the episode, it was stated by the witnesses that the convicts reached on motorcycle duly armed and soon after firing left the motorcycle and decamped from the spot, what a conduct was displayed by the assailants, that despite in possession of a motorcycle they chose to walk away by leaving motorcycle on the spot that too when the appellant Musharaf was admittedly, unable to walk, the situation was further clarified when one Sattar Khan, SI was examined as PW-05, who explained the physical condition of the appellant Musharaf in the following words ***"It is correct that I have correctly recorded in my investigation paper that the accused Musharaf Khan was disabled and was unable to ride on motorcycle at that time".*** This is again surprising that why and how all the three duly armed with Kalashnikovs rode the motorcycle and that why Musharaf joined hands with the

other two, who could have conveniently achieved their desired goal, this was brought from the mouth of the witnesses that the appellant was an elderly and notable person who also contested election for the seat of member of the Provincial Assembly, this was his notoriety that tightened the noose around his neck. Both the complainant and the eye-witnesses kept on struggling to establish their presence on the spot, but the circumstances did not suit their conduct. The complainant when entered the witness box stated that on receiving fire shots the deceased while injured fell to the ground and on arrival of *charpaies* (cots) he was placed there on but neither his hands nor his clothes were stained with blood and even the Investigating Officer did not take the note of it.

8. The complainant was examined as PW-11, who stated that while reaching to the hospital one is to pass through the police station that falls in the way. It was further admitted that the injured breathed his last while en-route to the hospital but surprisingly, was not diverted to the police station. The complainant stated that after their arrival the police of police station Shah Salim reached to the hospital, where the SHO Aqleem Khan penned down the report. The complainant is to explain that who informed the scribe as he was neither in possession of a mobile set nor any one was sent to the police station for the purpose, though the scribe was examined as PW-09, who stated that he alongwith the

Investigating Officer was present in Seerak Adda, when at about 01.30 p.m the Moharrir of Police Station Shah Saleem informed him and that he in the company of the investigating officer reached to the hospital at 02.00 p.m. He further stated that it took him 15/20 minutes in preparation of the injury sheet and the inquest report, if so then how the report was made at 14.25 hours. Another alarming aspect of the case is that the post mortem examination was conducted at 13:50 hours by Dr Arif Mumtaz, who was examined as PW-07, who stated that he conducted autopsy on the deceased at 13.50 hours and that the deadbody was brought 5/10 minutes earlier for the purpose. There is no denial to the fact that post mortem examination is conducted after the report is made followed by the preparation of injury sheet and inquest report. The scribe appeared as PW-09, who stated that he reached to the hospital at 02.00 p.m and it take him 15/20 minutes in preparing the injury sheet and inquest report and that it was there after that the deadbody was dispatched to the doctor for post mortem examination, meaning thereby that all those formalities were finalized by 02.20 p.m, we are posed with a question that how post mortem could be conducted when the report was not yet made. Who out of the three i.e. the doctor, complainant or the scribe was telling the truth, we say with certainty that it was the doctor who was telling the truth and the two did not. The incident occurred at a deserted place, when the deceased was all alone, who was rushed to

the hospital and after his death was placed before the doctor at 13.50 hours and the matter was delayed till arrival of the complainant. The murder went un-witnessed, had the witnesses been present they would have reported the matter at the earliest, the witnesses admitted that there was a reporting center in the hospital with police present round the clock, but the matter was not reported to them and it was the later arrival of PW-09, i.e. Aqleem Khan (S.H.O.) of Police Station Shah Salim that the matter was reported to him. Another astonishing aspect of the case is, that when the complainant admitted that he could not inform his family as he was not in possession of a mobile set, then how the other relatives reached to the hospital by the time they reached.

In case **"Muhammad Wasif Khan and others Vs The State and others" (2011 PCr.L J 470 Lahore)** that:-

> ***"F.I.R. has a very significant role to play, being a corner stone of the prosecution case to establish guilt of the accused involved in the crime-- Any doubt in lodging of F.I.R. and commencement of investigation give rise to a benefit in favour of accused-- F.I.R. lodged after conducting an inquiry loses its evidentiary value."***

9. The scribe stated that when he reached to the hospital the complainant was present with the dead body, he did not mention the presence of the eye-witness with the

complainant. Had the eye-witness been present he being the real brother would himself have registered the case, what to say of reporting the matter, he did not verify the report of the complainant. None of the two i.e. the complainant and the eye-witness identified the dead-body before the police when the inquest report was prepared and before the doctor at the time of post mortem examination, all this tell nothing but that the witnesses are chance and interested witnesses. When the record was read we found that one Amir Badshah and his wife were murdered, where Sanab Gul son of Amir Badshah, (the deceased) was charged who was later on killed leading to a charge against the deceased Maula Jan and it was suggested to the witnesses that these were the sons of deceased Sanab Gul who killed the deceased. The veracity of the witnesses was further doubted when PW-06 Shamim Khan SI appeared before the trial Court and stated that the co-accused Shafiullah took the plea of alibi that he was present at Khushab working in a coal mine and that he was assigned the task to visit and confirm, so he went to Khushab and found that Shafiullah on the day of occurrence was present at Khoshab.

In case titled ***"Muhammad Ashraf alias Acchu Vs the State" (2019 SCMR 652)***, wherein it is held that:

> ***"It is well settled that benefit of slightest doubt must go to an accused and in a case where the Court reaches a conclusion that***

eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs, then the case of the accused merits plain acquittal."

10. It was argued with vehemence that the medical evidence was in conformity with the evidence led by the prosecution and that the number of injuries commensurate with the number of the assailants. It was further submitted that the Investigating Officer recovered 20 empties of 7.62 bore, which were sent to the arms expert and that the report was received in positive i.e. it was opined that the empties were fired from different weapons. We would like to deal the formulated submissions one by one. The learned counsel representing the complainant went wrong by stating that the medical evidence honours what the prosecution portrayed, as this was the case of the prosecution that the deceased was facing south when he was fired at, but while consulting the relevant record we found that some of the injuries were caused from the back, the dimension of the injuries tells nothing but that it was the job of a single person. The complainant stated that both the deceased and the accused were standing at the time of firing but to the contrary the doctor stated that the direction of injuries was from down to upward. All the entry wounds were having blackening around, that too do not support what the witnesses stated, and

we are confirmed to hold that the medical evidence is in conflict with the ocular account.

In case titled ***"Akhter Saleem and another Vs the State and another" (2019 MLD 1107)***, it is held that:

> ***"12.The above factors, material contradictions between ocular and medical evidence create serious doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts."***

11. The last in row was that, the forensic report in respect of the empties supports the charge qua the number of accused. We cannot happily accede to what the prosecution claimed, yet it has to pass the acid test. The empties were collected from the spot on 16.08.2015 and received to the laboratory on 19.08.2015, but the investigating officer did not record the statement of the concerned official who took the same to the laboratory for comparison. Needless to mention that when the direct evidence fails then rest of the evidence loses its grip and cannot be taken singularly to facilitate conviction that too on capital charge.

In case titled ***"Bakht Munir Vs the State" (2016 MLD 934)***, it is held that:

> ***"11. Besides, the crime pistol had been allegedly recovered on the same day of incident i.e. 14.01.2012, but has been sent to the FSL with the crime empties on 21.01.2012 i.e. after a delay of seven days, for which no explanation, much less plausible has been furnished by the prosecution as to where and in whose custody the pistol and empties remained for this period and whether these were in safe hands. Muhammad Akbar Khan S.I (PW.7/Investigating Officer deposed that he has not recorded statement of any concerned person regarding delay in sending the articles to the FSL."***

12. We know that prosecution is not bound to setup motive in every case but once it is alleged and not proved, then ocular account is required to be scrutinized with great caution. It has been held in the case titled ***"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 "Amin Ali and another Vs. The State" (2011 SCMR-323)*** can also be referred.

13. The learned counsel for the appellant vehemently argued that the appellant remained absconder for sufficient long time, but mere absconscion of accused is not conclusive guilt of an accused person; it is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicions after all are suspicions, the same cannot take the place of proof, the value of absconcion, therefore, depends on the facts of each case. In case titled ***"Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a),*** wherein it has been held:-

> ***"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence---Abscondence of accused in such circumstances could not offer any useful corroboration to the case of prosecution"***

14. Before parting ways with the judgment, we deem it appropriate to caution the trial Courts from adopting an approach, while awarding sentences, which has never been permitted by the law. These were the whims which swayed the trial Court while sentencing the convict/ appellant Musharaf under section 302(c) P.P.C. as we see no justification in doing so, old age or physical deformity has never been the determining factor for awarding lesser sentence, while convicting an accused under section 302(c) P.P.C, it was not the age but the circumstances of that particular case that steers the wheel, the trial Court went astray in awarding two different sentences to accused who were similarly placed. Would that, the trial Court could go through the judgment reported as ***PLD 1996 SC 274, "Ali Muhammad and another Vs Ali Muhammad and another"*** then the erroneous conclusion would have easily avoided.

15. After thoroughly evaluating the evidence available on file this court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case.

The connected Criminal Revision No.14-B/2018 and Cr.A No.52-B of 2018 are dismissed.

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

Announced.
28.04.2020

Azam/P.S

JUDGE

JUDGE

24/6/2020

(D.B) Ms. Justice Musarrat Hilali and Mr. Justice Sahibzada Asadullah