JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
JUDICIAL DEPARTMENT

JUDGMENT

Cr. Appeal No. 978-P/2022.

Date of hearing: *30-11-2022.*

Appellant: *(Sahib Shah) By Mr. Naqeebullah Khalil, Advocate.*

Respondent: *(State) By Mr. Muhammad Nisar Khan, AAG.*

ISHTIAQ IBRAHIM, J.- Through the present Criminal Appeal, Sahib Shah son of Akram Shah, the appellant, has challenged the legality of the judgment dated 29.09.2022 of the learned Judge Anti-Terrorism Court-I, Peshawar, rendered in case FIR No. 1861 dated 25.12.2016 under sections-324/353/427 PPC read with section-15 of Khyber Pakhtunkhwa Arms Act, 2013 read with section-7 of Anti Terrorism Act, 1997, registered at Police Station, Chamkani, District Peshawar, whereby the appellant has been convicted and sentenced as follows;

i. **Under section 324/34 PPC sentenced to suffer five years R.I with a fine of Rs.10,000/- or in default whereof he shall suffer seven days further simple imprisonment.**
ii. **Under section 353/34 PPC sentenced to suffer two years R.I with a fine of Rs.5,000/- or in default**

whereof he shall suffer three days further simple imprisonment.

iii. **Under section 7(h) of the ATA,1997, sentenced to suffer two years R.I with a fine of Rs.5,000/- or in default whereof he shall suffer three days further simple imprisonment.**

iv. **Under section 427 PPC sentenced to suffer six months R.I with a fine of Rs.2,000/- or in default whereof he shall suffer two days further simple imprisonment.**

v. **Under section 428 PPC sentenced to suffer six months R.I with a fine of Rs.5000/- or in default whereof he shall suffer two days further simple imprisonment.**

vi. **Under section 337-F(i) PPC for causing hurt to complainant Tahir Khan sentenced to suffer six months R.I with a fine of Rs.10,000/- as Daman payable to the injured.**

vii. **Under section 15 of Khyber Pakhtunkhwa Arms Act, 2013, sentenced to suffer three years R.I with a fine of Rs.5000/- or in default whereof he shall suffer two days further simple imprisonment.**

viii. **Benefit of Section-382-B Cr. PC was extended to the convict-appellant and all the sentences were ordered to run concurrently.**

2. The succinct facts of the prosecution case are that on 25.12.2016 complainant Tahir Khan SI in injured condition at Casualty LRH, Peshawar, at 20:35 hours reported the matter to the police to the effect that he, alongwith Arshad, Meena Dar and Adnan constables were on routine patrol; that when they reached Tarnab Farm, there a Suzuki Pickup bering registration No.B-9388-Mardan was parked and near to the Suzuki Sahib Shah son of Akram Shah (convict-appellant) alongwith

two unknown accused duly armed with firearms were standing; that he alongwith police party were moving to arrest them, Sahib Shah forbade them from coming closer to them and in the meanwhile all the three accused started firing at the police party, as a result of which he (complainant) got hit and sustained injury on his right shoulder; that the police party also retaliated; that due to firing of the accused, their Suzuki pickup also got damaged and dog in the said vehicle also received fire shots and as a result of which died; that the accused while continuing the firing fled away from the spot. Report of the complainant was reduced into writing in the shape of murasila (EX PA/1), the injury sheet of the injured-complainant was prepared and referred him to the doctor for examination and treatment. The murasila was sent to the police station for registration of case FIR against the accused. Later on, the complainant nominated the unknown two accused as Zahid and Saad. Later on,

accused Zahid Ali, Sahib Shah, and Saad were arrested in the case and were thoroughly interrogated in the case.

3. After completion of investigation, complete challan was submitted against them before the competent Court. Formal charge against them was framed, to which they did not plead guilty and claimed trial.

4. The prosecution in support of its case, examined as many as eighteen (18) witnesses. On conclusion of trial and hearing arguments, vide judgment dated 29.09.2022 convict-appellant Sahib Shah was convicted and sentenced and; he being aggrieved of the judgment of the learned trial Court has filed this Cr. Appeal before this Court. However, co-accused namely Saad and Zahid Ali were acquitted of the charges while absconding co-accused Kamran alias Phalawan was declared proclaimed offender and perpetual warrant of arrest was issued against him.

5. We have heard arguments of the learned counsel for the parties and gone through the evidence with their valuable assistance.

6. Case of the prosecution is that the occurrence in this case had taken place at 19:40 hours i.e 07:40 p.m in the territorial jurisdiction of Police Station, Chamkani, while the sunset time in this area is almost 05:08 hours, which is after about two hours and thirty minutes of the sunset time, meaning thereby that the occurrence had taken place at nocturnal hours and no source of identification has been given by the complainant in his report and Court statement. Even in the site plan (EX PB), no source of light has been shown by the I.O nor has been taken into possession from the place of occurrence. We have to see as to whether the time given by the complainant in the murasila coincides with the facts and circumstances of the present case or not.

7. From the contents of the FIR, it is imminently clear that when the complainant spotted the persons and he was trying to apprehend them, the appellant warned him that not to come close to them and thereafter the occurrence had taken place. This is a case, where the identification of the appellant has been made through voice, which is the most week type of evidence. More so, when the complainant is a police officer posted there and as per record he has once arrested the accused in some case under the arms Act, it is very difficult to rely on such a suspect evidence without strong and independent corroboration. In addition to that initially three persons i.e the appellant by name and later on the acquitted co-accused namely Zahid and Saad were charged while during the course of investigation the absconding co-accused namely Kamran was nominated as accused in the case. It is also pertinent to mention here that the complainant sustained a single injury on his shoulder for

which initially three persons were charged and subsequently the absconding co-accused namely Kamran was also nominated in the case, therefore, it is very difficult to believe the version of the complainant in the present scenario and overall attending circumstances of the case. In absence of any evidence regarding source of light at that time, we are left only with identification by voice which is always considered to be a week type of evidence and by itself is not sufficient for awarding capital punishment to an accused in the circumstances of the case. Reliance is place upon the judgment rendered in case titled ***"Ahmad Sher and another V/s. State"*** **(PLJ 1995 FSC 109),** wherein it has been held that:-

> **"19. Identification by voice i.e where the witnesses had not seen the face of the accused because the accused had muffled his face or on account of darkness but had heard the voice of the accused. Identification of an accused on the basis of voice has been considered to be a weak piece of evidence".**

In the case titled ***"The State V/s. Fazal Ahmad and another"*** **(1970 PCr.LJ 633 [Peshawar])** it was observed that:-

> **"10. Further, it was argued that the respondents had talked and they could have been identified by their voice. We are also not impressed with this argument for the reason that identification by voice has always been held doubtful by the superior Courts".**

In another judgment in the case ***"Hamzo and 2 others V/s. The State"*** **(1972 PCr.LJ 478 [Karachi])** it was held that:

> **"We are quite clear in our mind that this witness according to his own statement first was not sure about the clear visibility of moon light, sufficient to identify the appellants because he says that there were some clouds also and the moon light was dim. Secondly he is not very sure about the identification of the appellants because he states that he identified the accused on voice also and that first he suspected them on the light of moon and later on he became sure about the identity of the accused when they gave hakals to us. Therefore, no value can be attached to the statement of this witness whose identification appears to be only that on voice. The identification on voice is a very weak piece of evidence and it has been repeatedly held that without other strong circumstantial evidence an accused cannot be held guilty on the ground of having been identified by voice, therefore, we do not attach any value to the statement of this witness".**

We would also refer the judgment of Lahore High Court in the case titled ***"Abdul Rashid and 3 others V/s. The State"*** **(1973 PCr.LJ 428 [Lahore])** wherein similar view was followed;

> **"In fact she had stayed in the courtyard for only a few seconds after the arrival of the accused as she immediately slipped outside to inform Abdul Ghafoor about it and remained outside due to fear till their escape from the *haveli* as stated by her during the cross-examination. She could thus have no more than a casual glace on the accused and could not have identified all of them in the hurry and worry of this moment. In view of her admission that she had not seen Imam Ali and Ziladar accused since her childhood she could not be so familiar with their voice as to be able to recognize either of them. Her claim that she had identified these two assailants from their voice was apparently incredible. It would therefore be unsafe to rely on her testimony with**

regard to the participation of these two accused in this occurrence".

Similar view was taken by High Court of Sindh in the case of ***"Misri and 03 others V/s. The State"*** **(PLJ 1984 Cr.C (Karachi) 327)** by holding that:-

"In addition to this, identification of appellant Misri as person, who called the deceased, on the basis of voice, is also doubtful and cannot be relied upon".

8. In the present case, since no other source of identification of the appellant has been established through any evidence except the version of the complainant that once he has arrested the accused in some case under the Arms and identified the appellant by voice, therefore, in light of the above referred judgments, the alleged identification of the appellant by the complainant through his voice is doubtful and being a weak type of evidence, cannot be used for conviction of the appellant.

9. The learned AAG argued that after the arrest of the appellant, he was also duly identified by the complainant in a test identification parade conducted by Miss. Saima Irfan, Judicial Magistrate, Peshawar, vide identification report (EX PW 15/2). However, to prove the same the

prosecution examined Tariq Mehmood, Stenographer as (PW-15) and he deposed that the proceedings were conducted by the said Judicial Officer. This witness in his cross examination stated that the said Judicial Officer is alive. It is also pertinent to mention here that when the complainant in his initial report i.e murasila (EX PA/1) has already named the appellant, then there was no need of test identification parade and the manner the same is exhibited is also not permissible by law. So the identification parade has also got no legal value in the facts and circumstances of the case.

The learned AAG also referred to certain portion of cross examination and admitted that the same are admission on the part of the defence and also submitted that so many things have been clarified by the defence during the course of their cross examination. The objection of the learned AAG is not sustainable for the reason that admission in criminal case are not having

binding effect on the client and in this regard reliance is placed on the judgment rendered by the Hon'ble Supreme Court in case titled **"Abdul Khaliq..vs..The State"** reported as **(1996 SCMR-1553).** It is also well settled that the prosecution has to establish its case on its own evidence and could not take advantage of the weaknesses of the defence.

10. During the spot inspection, the I.O recovered two empties of 30 bore and 41 empties of 7.62 bore, which were sent to the FSL for ascertaining as to whether these were fired from one weapon or more than one weapon. As per FSL report (EX PW 14/12) the two 30 bore empties were reported to have been fired from one and the same 30 bore weapon while the empties of 7.62 bore were fired from different 7.62 mm bore weapons, but, the complainant in his initial report i.e murasila (EX PA/1) has mentioned that the accused were armed with ***"Aslaha Atasheen"*** and has not mentioned the caliber of weapons

which the accused were possessing. It is also pertinent to mention here that the complained sustained a single firearm injury on his shoulder, for which no specific role was attributed to any of the accused.

11. Besides the above, the appellant after his arrest in the instant case, on his pointation the I.O recovered the Kalashnikov with fixed charger containing 08 live rounds and took into possession vide memo (EX PW 11/2) in presence of its marginal witnesses. Muhammad Yousaf Shah SI (PW-11) who is marginal witness to the recovery memo, in his cross examination stated that; *"It is correct that the place of occurrence was already visited by us. ..... I do not know as to the provision of 161 Cr. PC. My statement was not recorded by the I.O u/s-161 Cr. PC."* The I.O (PW-14) in his cross examination stated that; *"It is correct that I have not recorded statement of any independent witness ascertaining the house in question. ..... As per sketch EX*

PW 14/5 recovery of KK was not shown from the room of accused facing trial Sahib Shah..... It is correct that KKs are easily available in open markets." No person from the locality was associated with the recovery proceedings, but, mere recovery of Kalashnikov is of no good for prosecution.

12. Keeping in view the above discussion the prosecution has not been able to bring home charge beyond reasonable shadow of doubt with particular reference to the appellant, possibility of his false implication cannot be ruled out. He, therefore, deserves to get the benefit of doubt in the attending circumstances of the case. By now it is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. For giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a

prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.

13. As a sequel to what has been discussed above, we accept this Criminal Appeal, set aside the impugned judgment dated 29.09.2022 passed by the learned trial Court, and acquit the appellant of the charges leveled against him. He be released forthwith, if not required in any other case.

Announced.

Dated.30-11-2022.

JUDGE

JUDGE

(D.B.)
Hon'ble Justice Musarrat Hilali,
Hon'ble Mr. Justice Ishtiaq Ibrahim,

(Kausar Ali, CS)