

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR.**

**JUDICIAL DEPARTMENT**

**J U D G M E N T**

**Cr. Appeal No. 76-P/2022 with M. Reference**  
**No.02/2022.**

Date of hearing: 16.06.2022.

Appellant: (Shah Jehan) By M/s.  
Astaghfirullah & Yaseenullah,  
Advocates.

Respondent: (State), By Mr. Muhammad  
Nisar Khan A.A.G.  
(Gulistan Complainant) By Syed  
Mubashir Shah, Advocate.


**ISHTIAQ IBRAHIM, J.-** Shah Jehan son of Farman

Gul, the appellant, through this Criminal Appeal No.76-P/2022 has impugned the judgment and order dated 19.01.2022 rendered by the learned Additional Sessions Judge-III/Judge MCTC, Swabi, whereby the appellant was convicted under section-302(b) PPC and sentenced to death penalty. The appellant was also sentenced to pay Rs.400,000/- to be paid to the legal heirs of deceased Mawais Khan as compensation under section-544-A Cr.PC, in case FIR No-619 dated 12.04.2012 under section-302 PPC registered at Police Station, Kalu Khan, District Swabi. This judgment shall also dispose of

Criminal Revision No.13-P/2022 filed by Gulistan complainant-petitioner against the convict-respondent Shah Jehan for enhancement of compensation amount. The learned trial Court also sent Murder Reference No.2-P/2022 under Section 374 Cr.P.C for confirmation of death sentence.

2. The case of the prosecution, in a nutshell, as spelt out in the FIR (EX PA) is that on 12.04.2012 complainant Gulistan son of Umbara Khan with the help of co-villagers brought the dead body of his deceased son namely Mawais Khan to Police Station, Kalu Khan, in a Datsun Pickup, and reported the matter to the effect that he alongwith his brother namely Bostan and his son Mawais Khan were returning from the house of his nephew Muhammad Jan to their houses at night and when reached near the house of Fazal Muhammad, accused Shah Jehan son of Farman Gul duly armed with Kalashnikov appeared in front of complainant party and fired at Mawais Khan, who was proceeding ahead of the complainant and eyewitness Bostan and; as a result of such firing the deceased got hit and died on the spot; that a bulb was lit at that time; that

motive behind the occurrence was altercation took place between the accused and deceased over cutting of "*Bakayan Trees*" few days before the occurrence; that the occurrence was witnessed by the complainant and his brother Bostan. Report of the complainant was reduced into writing vide FIR (EX PA). After the occurrence, the accused went into hiding and remained absconders and after completion of investigation, complete challan under section-512 Cr.PC was submitted. Later on, accused Shah Jehan on 20.06.2019 came to Police Station and surrendered himself to the police and was arrested vide his card of arrest (EX PW 6/1).



3. After completion of investigation, supplementary challan against the accused-appellant was submitted before the Court. Formal Charge was framed against him to which he did not plead guilty and claimed trial.

4. The prosecution in order to prove its case, produced as many as twelve (12) witnesses. On conclusion of prosecution evidence, statement of accused under section-342 Cr.PC was recorded, wherein he professed innocence and falsely charged. He neither wished to record his

statement on Oath within the meaning of section-340 (2) Cr.PC nor opted to produce evidence in defence. After hearing the learned counsel for the parties and appraisal of evidence available on the file, the learned trial Court vide impugned judgment dated 19.01.2022 convicted and sentenced the appellant, as described in the opening paragraph of the judgment.

5. Feeling aggrieved from his conviction and sentences, the appellant has approached this Court by filing the instant Criminal Appeal with the prayer that the impugned judgment may be set aside and he may be acquitted from the charges leveled against him; while the complainant-petitioner has filed Cr. Revision No.13-P/2022 for enhancement of compensation amount.

6. We have heard arguments of the learned counsel for the parties and perused the record carefully with their valuable assistance.


7. In this case, the occurrence took place on 12.04.2012 at 20.00 hours, the complainant Gulistan (PW-08) lodged report in Police Station, Kalu Khan, with Police at 22.10 hours to the effect that on the night of occurrence,

he alongwith Bostan, his brother and Mawais Khan, his deceased son were returning from the house of Muhammad Jan, his nephew, when reached near the house of Fazal Muhammad, accused Shah Jehan was present there duly armed with Kalashnikov started firing at his deceased son Mawais Khan, who was few paces ahead of them, with which he got hit and died on the spot. The complainant in his report / FIR (EX PA) as well as Court Statement advanced the motive behind the occurrence to be altercation took place in between the accused Shah Jehan and deceased Mawais Khan over cutting of Bakayan trees. This PW in cross examination admitted that his father Umbara Khan had gifted 07 marlas landed property to Mst. Faqir Taja on which she had constructed house and used to reside in it alongwith the accused, he also admitted that accused wanted to sell out that house and he was willing to purchase the same at the market rate, but, he refused to sell it out to him. Contrary to the motive advanced by the complainant in his report (EX PA), the Investigating Officer (PW-10) during cross examination stated that; ***"It is correct that during the course of investigation, it***

*transpired that the actual dispute was not the cutting of trees, but, it was refusal of the accused to sell his constructed house to the complainant which was constructed by the accused on seven (07) marla piece of land donated to Mst. Faqir Taja by Umbara Khan, the father of complainant and Mst. Faqir Taja. In this connection, I have recorded the statements of Umbara Khan, Bostan, Gul Muhammad and Danish Khan in connection with the dispute mentioned above. Though the accused wanted to sell out the said house but had refused to sell it out to the complainant because the complainant wanted to purchase the house on lower market rate / value but the accused was not ready to accept the said price."* This PW further stated that he has recorded the statement of PW Bostan at about 11:30 pm and that the said Bostan had not disclosed the motive as altercation over cutting of trees rather had disclosed the dispute over not selling of the house by the accused to the complainant Gulistan. From the above quoted statement of the Investigating Officer (PW-10) that there is direct motive in between accused and complainant Gulistan over



the refusal of accused about non-selling of his house to the complainant on low market price. Since the direct motive was in between complainant and accused and; it is not possible that he would have been spared if he was present at the spot at the relevant time. In this regard reliance is placed upon the judgment rendered by the Hon'ble Apex Court in case titled "*Amin Khan..vs..Janab Gul and others*" (1984 SCMR-937).



The complainant in cross examination stated that he had pointed out the place of cutting of trees to the I.O and had also shown the cut trees to the I.O, but, contrary to the above narration, the I.O (PW-10) in cross examination stated that the complainant had not shown to him the place wherefrom the trees were cut nor he had taken into possession any cut trees or its branches. Complainant Gulistan (PW-8) in cross examination stated that they had gone to the house of Muhammad Jan for inquiring about his health and that they remained in the house of Muhammad Jan for about 15 minutes; while Bostan (PW-9) in his cross examination stated that they remained in the house of Muhammad Jan for about 4/5 minutes and

further stated that Muhammad Jan was not available at that time in the house and only women folk were available there. The Investigating Officer (PW-10) in cross examination stated that he has not recorded the statement of one Muhammad Jan whose house was allegedly visited by the complainant party prior to the occurrence, nor he has examined any other inmates of the said house. Bostan the eyewitness (PW-9) in cross examination stated that the deceased was fired at from Eastern side and that the firing was made from a distance of about 15 paces; while in the site plan (EX PB) the deceased has been shown at Point-1 while the accused has been shown at Point-4 and the distance between the deceased and the accused has been mentioned as 06 paces. In the site plan a bulb has been shown lit at Point-B, but the distance of Point-B with other points has not been mentioned in the site plan. It is also pertinent to mention here that the distance between Point-1 allotted to deceased and Point-4 allotted to accused has been shown 06 paces and that of complainant and eyewitness i.e points 2 & 3 and deceased has been shown as 10/11 paces respectively. On calculation of distance as






shown in between the complainant, eye witness and deceased and that of deceased and accused comes to 16/17 paces. The Investigating Officer (PW-10) during cross examination stated that PW Bostan had not disclosed any source of light to him in his statement recorded under section-161 Cr.PC and further stated that he has not examined Adal Muhammad whose *Dera* is situated near the spot even to the extent of recovery of bulb into his possession. It is also significant to note that the alleged bulb which was lit on the wall of room of hujra owned by the said Adal Muhammad no electricity bill in the name of Adal Muhammad was taken into possession by the I.O in order to establish ownership of the said hujra. As per murasila, the occurrence took place in a thoroughfare and on both sides of the said thoroughfare there is Abadi, however, the Investigating Officer (PW-10) in cross examination stated that he had not found any bullet marks on the walls of the houses etc nor have found any spent bullet / pellet.

The complainant in cross examination stated that Police Post Permoli is situated at a distance of 15/16 meter

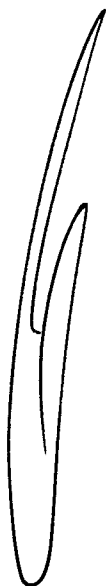
(K.M) from the spot and categorically admitted that he had not taken the dead body to Police Post Permoli for recording his report. He further stated that police station Kalu Khan is at a distance of 25/26 miles from the spot; while as per FIR EX PA, the distance between the place of occurrence and police station has been shown as 12/13 kilometers. The complainant in his cross examination further stated that;

*"Several persons attracted to the spot after the occurrence. I had not narrated the occurrence to those persons who attracted to the spot after the occurrence. The dead body remained on the spot for about 30 to 40 minutes. We placed the dead body on a Datsun Pickup on the spot. I alongwith PW-Bostan, Zaman Sher and other persons took the dead body to the PS from the spot."*




The occurrence had taken place on a thoroughfare and as per site plan (EX PB) on both sides of the thoroughfare there are houses and Hujra and that several persons attracted to the spot after the occurrence, but, even then the dead body of the deceased was lying on the spot for about 30 to 40 minutes and could not shifted the dead body to P.P Permoli which is situated at a short distance, which

could be covered within short time. It is also pertinent to mention here that as per Postmortem report (EX PM) the probable time between injury and death has been mentioned within 20 minutes. Complainant Gulistan (PW-8) and Bostan (PW-9) the eyewitness in their respective cross examination stated that they all placed the dead body of the deceased in a Datsun Pickup after about 30 minutes of the occurrence and all accompanied the dead body to the PS, but, they did not utter a single word that their hands and clothes were besmeared with the blood of deceased, but, even they did not produce their clothes besmeared with the blood of the deceased to the I.O. The Investigating Officer (PW-10) did not bother to record the statement of driver of the Datsun Pickup and other persons who accompanied the dead body to the PS in order to establish the prosecution version regarding shifting the dead body to the PS in Datsun Pickup. Moreover, there is an unexplained delay of more than two hours in lodging the report, however, the prosecution has advanced reason for it that the road leading from Sher Dara to PS Kalu Khan was a Kacha one at that time, but, it is not appealable to a



prudent mind keeping in view the distance between the spot and PS Kalu Khan, when the complainant voluntarily stated that there is metal road from Shewa Adda to PS Kalu Khan, which they had adopted for approaching the P.S. While I.O (PW-10) in his cross examination has stated that he reached the spot at 22:45 hours, obviously he went to spot after registration of FIR within 35 minutes as time of report is 22:10 hours. In our view an abortive attempt has been made by prosecution witnesses to overcome the question of delay in FIR.




Complainant Gulistan (PW-8) and eyewitness Bostan (PW-9) have alleged that they have identified the accused in the light of bulb. Even otherwise, if it is presumed for a while that the complainant and eyewitness have identified the assailant in the light of bulb even in that eventuality the identification of the appellant by the complainant and eyewitness at dark night hours is an important aspect of the case, which needs cautious attention by this Court. As per FIR EX PA, the time of occurrence has been mentioned as 20:00 hours in the month of April and according to prosecution, the

complainant and alleged eye-witness had identified the appellant in light of electric bulb installed in the thoroughfare, but, PW Bostan in his statement recorded under section-161 Cr.PC did not utter a single word regarding the bulb. Though vide recovery memo EX PW 7/3 a 100 watt bulb was taken into possession by the I.O, which was allegedly lit in the thoroughfare, but, Waraish Khan alias Quresh (PW-7) who is marginal witness to the said recovery memo in cross examination stated that it was about 10:00/10:30 p.m when he thumb impressed the above referred recovery memos and that he does not know if any house or Hujra were situated near the place of occurrence; while the Investigating Officer (PW-10) in the opening sentence of cross examination stated that he had reached the spot at 22:45 hours. Thus, the prosecution has badly failed to prove the source of light on or near the place of occurrence to corroborate the assertion of the complainant and eye-witness regarding identification of the appellant in the pitch dark, therefore, their testimony to this effect, being suspect evidence, is also not believable. Wisdom is drawn from



the judgment of the august Supreme Court of Pakistan rendered in the case of Muhammad Arshad v. The State (PLD 1995 SC 475). The principle laid down in the said judgment is as follows.

*"The principle to be extracted from the decided case thus is that the evidence of visual identification is one of the categories of 'suspect evidence' and that ordinarily it is not safe to convict on the basis of such evidence without a corroboration. Indeed, in exceptional circumstances, that is, where the evidence of visual identification is of exceptionally good quality, such as, where the offender was known to the witness, there was sufficient light, the witness had had an unobstructed view of the offender and there was a dialogue between the witness and the offender, the evidence may be acted upon."*




8. In addition to above, the assailants chose the nocturnal time for killing the deceased to conceal the identity and for that purpose he must have taken all necessary precautions in view whereof it was not so easy for the complainant and eyewitness to identify him in the mode and manner as narrated by them in their statements. In other words, if their statements are believed, it would mean that the assailant had willfully exposed his identity to the complainant at the time of firing, specifically when there is agricultural property owned by Qamar Zaman son of Dolat Khan, which is

adjacent to the place of occurrence mentioned in the site plan and the assailant could easily conceal his identity in the landed property and achieve the target. If that was the aim of the assailant he would have never chosen the night time for committing the crime rather he would have committed the same in broad daylight. So, keeping in view the time as well as mode and manner of the occurrence, identification of the appellant by the complainant and eyewitness is doubtful. Reference in this regard is made to the judgment of this Court rendered in the case of Muhammad Arif v. State and another (1999 PCr.LJ 707), wherein it is held that:

*"The occurrence had taken place at 0600 hours i.e. one hour before the sun-rise time. It is a matter of common observation that one hour before sun-rise time is always pitch dark. The said time was chosen by the assailant only and only in order to conceal his identity. That is why he fired from behind causing all the three inlet wounds at the back side of the body which also contained charring marks".*

Thus, looking at the attending circumstances of the present case through the prism of the above-referred case law, identification of the assailants by the complainant and eyewitness is not free from doubt, the benefit of which must be given to appellant as per well settled

principle of criminal justice. The mode and manner as narrated by complainant and eyewitness is not appealable and believable to a prudent mind.



The nutshell of the foregoing discussion is that the prosecution has not been able to prove the charge against the appellant beyond any reasonable shadow of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. In this regard we are fortified by the judgment of Hon'ble Supreme Court rendered in Tariq Pervez's (1995 SCMR 1345), wherein it was observed that 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.

9. As a sequel to what has been discussed above, we accept this Cr. Appeal No.76-P/2022, set aside the impugned judgment dated 19.01.2022 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.

As Cr.Appeal No.76-P/2022 filed by appellant Shah Jehan against his conviction and sentence, has been allowed, therefore, Murder Reference No.2-P/2022 sent by the trial Court is answered in negative and the Cr. Revision No.13-P/2022 filed by complainant Gulistan against convict-appellant Shah Jehan for enhancement of compensation amount has become infructuous and stands dismissed.

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

**Announced:**  
**16.06.2022**

(D.B)

Hon'ble Mr. Justice Lal Jan Khattak,  
Hon'ble Mr. Justice Ishtiaq Ibrahim,

(Kausar Ali PS)

  
JUDGE

  
JUDGE