

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
JUDICIAL DEPARTMENT**

J U D G M E N T

Cr. Appeal No. 311-P/2022.

Date of hearing: 22-02-2023.

Appellant: (Abidullah) By Mr. Shabbir
Hussain Gigyani, Advocate.

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

Ejaz Ahmad By Mr. Yousaf Shah Mohmand,
Complainant: Advocate.

ISHTIAQ IBRAHIM, J.- This single

judgment shall dispose of the present Criminal Appeal No.

311-P/2022 filed by appellant namely Abidullah son of

Ehsanullah, Cr. Appeal No.302-P/2022 filed by appellants

namely Akhtar Ali son of Sabz Ali & Shaukat Ali son of

Akhtar Ali, and Cr. Appeal No.308-P/2022 filed by

appellants namely Abdullah & Amanullah sons of

Ehsanullah against their conviction and sentences and

Criminal Revision No.67-P/2022 under section-439 Cr.PC

filed by Ijaz Ahmad son of Anwar Shah, the petitioner,

against accused-respondents Abidullah, Abdullah,

Amanullah, Akhtar Ali and Shaukat Ali (the appellants in

the **ibid Appeals**) for enhancement of their sentences and Daman, as all the appeals and Cr. Revision stem from one and the same impugned judgment dated 30.03.2022 rendered by the learned Additional Sessions Judge/Judge Model Criminal Trial Court, Mardan, in case FIR No.33 dated 16.01.2018 under sections-302/324/148/149 PPC registered at Police Station Par Hoti, District Mardan, whereby the appellants named above were convicted and sentenced as follows;

- i. **Under Section-302 (b) PPC for the murder of Zia-ur-Rahman, appellant Abidullah was convicted and sentenced to life imprisonment as Tazir and to pay compensation u/s-544-A Cr.PC to the tune of Rs.400,000/- to the legal heirs of deceased and recoverable as arrears of land revenue, in default whereof shall further undergo simple imprisonment for six months.**
- ii. **Under Section-337-F(i)/149 PPC appellants Akhtar Ali and Shaukat Ali are convicted and sentenced to suffer Rigorous Imprisonment for one year each with payment of daman in lump sum amounting to Rs.10,000/- each to be paid to complainant-injured Ijaz Ahmad son of Anwar Shah or in default shall further undergo one month S.I each.**
- iii. **Under Section-337-F(ii)/149 PPC appellants Abdullah and Amanullah are convicted and sentenced to suffer Rigorous Imprisonment for two years each with payment of daman in lump sum amounting to Rs.10,000/- each to be paid to injured Sajjad Anwar son of Anwar Shah or in default shall further undergo one month S.I each.**

- iv. Under Section-148/149 PPC all the appellants namely Abidullah, Akhtar Ali, Shaukat Ali, Abdullah and Amanullah are convicted and sentenced to suffer Rigorous Imprisonment for one year each with fine of Rs.10,000/- each or in default shall further undergo one month S.I each.
- v. Benefit of section-382-B Cr.PC was extended to the appellants and all the sentences were ordered to run concurrently.

2. Facts of the prosecution case are that on 16.01.2018 complainant Ijaz Ahmad s/o Anwar Shah and his brother Sajjad Anwar in injured condition brought the dead body of their brother Zia-ur-Rahman to Casualty of DHQ, Hospital Mardan with the help of other persons in RESCUE 1122 Ambulance and at 20:20 hours the complainant Ijaz Ahmad reported the matter to the police to the effect that on the evening of 16.01.2018 he alongwith his brothers namely Zia-ur-Rahman, the deceased, and Sajjad were present in their grocery shop; that at 19:35 hours accused Abidullah duly armed with pistol, Abdullah and Amanullah duly armed with axes while Akhtar Ali

and Shaukat Ali having sticks came to their shop; that accused Abidullah made firing at his brother Zia-ur-Rahman with his pistol, resultantly who got hit and died on the spot while accused Abdullah and Amanullah gave axe blows to Sajjad Anwar and accused Akhtar Ali and Shaukat Ali started beating him with sticks and resultantly he and his brother Sajjad Anwar sustained bodily injuries. The motive was stated to be altercation / quarrel taken place on fuel wood prior to the occurrence between the appellants and brother of the complainant namely Shah Fahad. Besides the complainant, the occurrence was also witnessed by Sajjad Anwar, brother of complainant, and other people. Report of the complainant was reduced into writing in the shape of murasila and consequently the instant case FIR was registered against the accused.

3. After completion of investigation, complete / supplementary challans were submitted against the appellants 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 fifteen (15) witnesses. On conclusion of trial statements of accused-appellants under section-342 Cr. PC were recorded, wherein they professed innocence and false implication. They neither wished to record their statements within the meaning of section-340(2) Cr. PC nor opted to produce evidence in defence. After hearing arguments of learned counsels for the parties, the learned trial Court vide impugned judgment dated 30.03.2022 convicted and sentenced the appellants per details mentioned in the opening paragraph of the judgment. The appellants impugned the

judgment of the trial Court before this Court by filing the afore cited Cr. Appeals while the complainant Ijaz Ahad also filed Criminal Revision No.67-P of 2022 for enhancement of sentences daman awarded to the appellants-respondents.

5. We have heard arguments of the learned counsel for the appellants, learned A.A.G, for the State and learned counsel for the complainant party and gone through the evidence with their valuable assistance.

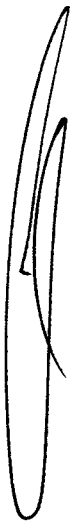
First we have to decide the Criminal Appeal No.311-P/2022 filed by convict-appellant Abidullah, who is charged for the murder of deceased Zia-ur-Rahman.

6. The complainant Ijaz Ahmad in his initial report i.e murasila (EX PA/1) as well as in his Court statement recorded as (PW-13) and injured eyewitness namely Sajjad Anwar (PW-14) have charged the appellant Abidullah for effective firing with his 30 bore pistol at the deceased Zia-ur-Rahman. Both of them in their respective

statements have stated that on the fateful evening they alongwith their deceased brother Zia-ur-Rehman were present in their grocery shop in the meantime at 19:35 hours all the convicts-appellants came to the place of occurrence duly armed with pistol, axe and sticks. The occurrence had taken place in front of the shop of complainant party. Presence of complainant Ijaz Ahmad, his brother Sajjad Anwar alongwith deceased Zia-ur-Rahman are natural and normally at evening time people do assemble at the shops, coupled with the fact that their house situates at the distance of 200 paces from the shop as stated by complainant in his cross examination. The complainant Ijaz Ahmad (PW-13) and injured eyewitness Sajjad Anwar (PW-14) have attributed the effective role of firing at the deceased to convict-appellant Abidullah with his 30 bore pistol. During spot inspection, Yousaf Khan

ASI Investigating Officer (PW-15) recovered two empties of 30 bore from point-A and took into possession the same vide recovery memo (EX PW 8/1) and vide recovery memo (EX PW 8/6) also took into possession one 25 watt energy saver bulb from point-B which was lit in front of the shop of complainant party at the height of 10 feet at the time of occurrence. The report was promptly lodged by the complainant in injured condition in the Casualty of DHQ Hospital, Mardan, at 20:20 hours i.e after 45 minutes of the occurrence which was consumed in calling of RESCUE and reaching of the Ambulance to the spot and other arrangements for shifting the dead body of the deceased as well as the injured persons, so the question of consultation and deliberation does not arise. Sardar Bacha son of Arsala Khan (PW-08), who is marginal witness to various recovery

memos, deposed that vide recovery memo (EX PW 8/1) the I.O took into possession blood through cotton from the place of deceased Zia-ur-Rahman and sealed in parcel No.1 ExP-1, vide recovery memo (EX PW 8/2) two empties of 30 bore were recovered and taken into possession by the I.O and sealed the same in parcel No.2 Ex P-2, bloodstained clothes of deceased vide recovery memo (EX PW 8/3) sealed in parcel No.3 ExP-3, and vide recovery memo (EX PW 8/6) the I.O took into possession one 25 watt energy saver bulb, which was lit at the time of occurrence, sealed the same in parcel No.7 Ex P-7. In addition to the above, the spot of occurrence is situated on main road, where besides the shop of complainant, there are so many shops and residential houses and the bulbs installed in front of the shops and street lights available on the road could not be ruled out while



in front of the spot a Filling Station, known as Liaqat Filling Station, which remains open around the clock, has also been shown, where a number of bulbs are installed and were lit at the time of occurrence which suffice that there was sufficient light on the spot of occurrence and rules out question of non-identification of the accused by the complainant and eye witnesses at the time of occurrence during dark hours of the eventful day. Furthermore, complainant party and accused are co-villagers, as avowed by PW-14 in his cross examination that accused are well known to them being co-villagers, thus the question of mis-identification is also not sustainable.

7. More so, Dr. Shah Zeb M.O posted at DHQ Hospital, Mardan, (PW-4) conducted autopsy on the dead body of deceased Zia-ur-Rahman son of Anwar Shah and found one firearm entry wound at

mid of sternum at the level of 3rd rib about 1cm in diameter having exit wound at the medial aspect of right scapula about 1-1/2cm in diameter and according to his opinion the cause of death was injury to vital organs i.e heart, lung and blood vessels.

8. Two empties of 30 bore pistol, recovered from the spot, were sent for forensic analysis, according to FSL report the same did not match with the pistol allegedly produced by the brother of accused Abid Ullah. Learned trial Court has rightly held that FSL report, in nature, is only corroborative and confirmatory or explanatory to the ocular or direct account of evidence. It is undeniable that when prosecution has proved its case through ocular account mere FSL report, being negative, would not be fatal to the case of prosecution. Because neither conviction nor



acquittal could be based solely on the basis on opinion of Ballistic Expert, in this regard we are fortified by Hon'ble apex Court judgment in **Yaqoob Shah's case (PLD 1976 SC 53)** wherein it has been held that evidence of a Medical or Ballistic expert is confirmatory in nature which is not of much significance in presence of direct, definite, forthright and creditworthy evidence, and such report/ evidence cannot outweigh direct evidence not deficient in quality. Here, in instant matter, Case of the prosecution mainly rest on direct and substantive evidence of complainant and injured eye witness, who witnessed the occurrence and narrated the same in confidence inspiring manner and despite of lengthy cross examination, nothing has been elicited from the mouth of complainant and Sajjad Anwar, the injured eyewitness, which could favour the accused-

appellant Abidullah. The motive advanced by the prosecution in the FIR, both the injured eyewitnesses have supported the same, which further corroborates the prosecution version.

9. For the foregoing reasons, without any slightest doubt in our mind to hold that the impugned judgment to the extent of convict-appellant Abidullah is well reasoned and based on proper appraisal of evidence, therefore, his conviction and sentence under section-302(b) PPC is maintained and as such Cr. Appeal No.311-P/2022 filed by appellant Abidullah is dismissed. Benefit of Section 382-B Cr.P.C has already been extended to the appellant by the learned trial Court.

Now coming to Criminal Appeals No.302 & 308-P/2022 filed by appellants namely Akhtar Ali son of Sabz Ali, Shaukat Ali son of Akhtar Ali, Abdullah & Amanullah sons of Ehsanullah respectively against their conviction and sentences.

10. The complainant (PW-13) and eyewitness Sajjad Anwar (PW-14) in their respective statements have attributed the role of inflicting axe blows to Sajjad Anwar by convict-appellants namely Abdullah and Amanullah while convict-appellants namely Akhtar Ali and Shaukat Ali have been attributed the role of beating complainant Ijaz Ahmad with sticks. Both the injured named above were examined by Dr. Shah Zeb (PW-4) and the injuries on the person of complainant Ijaz Ahmad were opined to be of small size i.e three abrasions on right hand posterior aspect while the injury on the person of injured Sajjad was found to be a lacerated wound at 2/3 posterior of forearm, however, according to the final report furnished by Radiologist, there is no bone fracture and that the wound was labeled as Ghair Jaiffa. Injured-complainant Ijaz Ahmad sustained small size



abrasions for which appellants Akhtar and Shaukat Ali are charged, while injured Sajjad Anwar sustained a lacerated wound and for the same appellants Abdullah and Amanullah are charged with no specific role. Perusal of the record transpires that none of the above accused have been allotted with a specific role as to which injury resulted due to the blow(s) inflicted by which one of the accused/appellants. To be more specific, Sajjad Anwar sustained only one injury for which appellants Abdullah and Amanullah both have been charged. Similarly for three small abrasions sustained by complainant Ijaz Ahmad two persons have been charged without specification that which of the injuries or blow has been inflicted by which one of the both accused/appellants. This fact give rise to a reasonable doubt in mind, benefit of which, being a settled principle by now, should be

accused as a matter of right and not as a grace. It is theme of the dispensation of criminal justice that for conviction of accused, prosecution is to prove guilt to fit all the four corners because conviction could be held in vacuum. Moreover, the injuries sustained by the injured Ijaz Ahmad and Sajjad Anwar are simple in nature. therefore, by extending benefit of doubt, the above cited appeals are allowed, the appellants are acquitted of the charges leveled against them under sections 337-F(i)/337-F (ii) PPC. They are on bail and their sureties are absolved from the liability of bail bonds furnished by them for their release on bail.

11. On the other hand, prosecution has successfully proved its case against the convict/appellant Abidullah through straight forward and confidence inspiring the testimony of injured witnesses. It is noteworthy to be highlighted

here that factors favouring the convict-appellants Akhtar Ali, Shaukat Ali, Abdullah and Amanullah will not benefit the convict/appellant Abidullah. Their acquittal, by extending benefit of doubt for safe administration of justice, would not create any suspicion in establishing their presence of the injured eyewitnesses on the spot at the relevant time and their credibility has not been shattered, however, the injuries sustained by them have been opined by the doctor as abrasions and lacerated and as such are simple in nature, which have not been specifically attributed to any of the appellants. At times, Courts, in plethora of cases, have been inclined to extend benefit of doubt to some of accused by acquitting them as an abundant caution, while on the same set of evidence have recorded conviction of co-accused. Learned Trial Court has rightly convicted and sentenced the appellant

Abidullah on the basis of specific role attributed to him by complainant and eye witnesses. The acquittal of appellants namely Akhtar Ali, Shaukat Ali, Abdullah and Amanullah will not entitle the appellant namely Abidullah to outright acquittal.

12. It is also pertinent to mention here that appellants Abidullah, Akhtar Ali, Shaukat Ali, Abdullah and Amanullah have also been convicted by the learned trial Court under sections-148/149 PPC being member of unlawful assembly and sharing their common object. It is a matter of record that first grappling took place between the parties over a trivial matter and thereafter the occurrence had taken place, so the question of their being member of unlawful assembly and sharing common object is open to serious doubt, therefore, the appellants could not be held liable u/s-148/149 PPC for sharing of their common object, hence,

they are acquitted from the charge u/s-148/149 PPC.

13. Record reveals that the occurrence taken place without premeditation, therefore, the learned trial Court has rightly awarded life imprisonment to the appellant Abidullah by considering the overall facts of the case, therefore the sentences awarded to the convict-appellant Abidullah by the trial Court in the circumstances of the case is appropriate while rest of the convict-appellants namely Akhtar Ali, Shaukat Ali, Abdullah and Amanullah have been acquitted. Hence, the Criminal Revision No. 67-P/2022 for enhancement of sentences and amount of *Daman* awarded to the appellants, stands dismissed.

Announced:

Dated. 22-02-2023.



JUDGE

JUDGE

(D.B.)
Hon'ble Mr. Justice Ishtiaq Ibrahim,
Hon'ble Mr. Justice Syed Arshad Ali.
(Kausar Ali, CS)