(B)

JUDGMENT SHEET

PESHAWAR HIGH COURT
MINGORA BENCH
(*Judicial Department*)

Cr.A No. 46-M/2022

Syed Bahadar son of Nadir Khan (Appellant)
Versus

The State & another
(Respondents)

Present: *Mr. Sher Muhammad Khan, ASC, for the appellant.*

Mr. Sohail Sultan, Astt: A.G for the State

Mr. Hazrat Rehman, ASC, for the complainant.

Date of hearing: ***22.11.2022***

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- Appellant namely Syed Bahadar has called in question the judgment of his conviction and sentence passed by the learned Sessions Judge/Judge Model Court Dir Lower at Temergara dated 10.02.2022, vide which he was convicted and sentenced as follows;

- ***U/S 302 (b) PPC to life imprisonment along with compensation of Rs. 500,000/- (five hundred thousand) under section 544-A Cr.P.C payable to legal heirs of the deceased, or in default thereof, the accused shall further undergo six months simple imprisonment. The compensation was ordered to be recoverable as arrears of land revenue.***
- ***The Appellant was also extended the benefit of section 382-B Cr.P.C.***

2. The appellant faced trial in the criminal case registered against him vide FIR No. 662 dated 21.12.2018 under sections 302/324/34 PPC at Police Station Timergara District Dir Lower. As per prosecution story, the complainant namely Muhammad Ismail (PW-2) reported the matter to local police at emergency ward of Timergara hospital to the effect that on the fateful day he along with his deceased father namely Rozi Khan, sister namely Mst. Rifat Bibi, uncle namely Munir Khan (the abandoned PW) and his other sister namely Hameeda Bibi (PW-3) were present in the thoroughfare outside their house, when in the meanwhile, the accused namely Sher Khan (absconding accused) and Syed (the appellant herein namely Syed Bahadar) while being duly armed with pistols came there and due to the firing of the absconding co-accused namely Sher Khan his father namely Rozi Khan got hit on different parts of his body and died on the spot, whereas from a fire shot of the present appellant his sister namely Mst. Rifat Bibi got injured, whereas rest of the complainant-party escaped un-hurt. Motive behind the occurrence

was stated to be a previous blood feud enmity between the parties.

3. Upon arrest of the appellant, *challan* was submitted against him before the learned trial court, whereas the proceedings under section 512 Cr.P.C were initiated against the absconding co-accused namely Sher Khan. The charge was also framed against the appellant, to which he pleaded not guilty and claimed trial. In the earlier trial, the appellant was convicted and sentenced to life imprisonment along with compensation of Rs. 500,0000/- payable to the legal heirs of the deceased by the Court of learned Sessions Judge/Zila Qazi Dir Lower vide judgment dated 20.02.2020. Feeling aggrieved from the aforesaid judgment of conviction, the appellant had preferred criminal appeal No. 84-M of 2020 before this Court, which was allowed vide judgment dated 14.01.2021 and the case was remanded back to the learned trial Court for framing of an amended charge.

4. After remand, the charge was framed against the appellant on 17.02.2021, to which he again pleaded as not guilty and claimed trial. The

parties were afforded an opportunity to produce their respective evidence, however, the prosecution relied on their already recorded evidence and in this respect a joint statement of the learned public prosecutor as well as defence counsel was recorded. The statement of the appellant was recorded under section 342 Cr.P.C and thereafter he also produced one Javid Iqbal as DW-1. On conclusion of proceedings in trial, the accused/appellant was convicted and sentenced by the Court of learned Sessions Judge Dir Lower vide the impugned order/judgment dated 10.02.2022, as stated hereinabove. The appellant has now challenged the aforesaid order/judgment by filing the instant appeal before this Court.

5. Arguments of learned counsel for the parties as well as learned Astt: A.G. appearing on behalf of the State were heard in considerable detail and the record perused with their able assistance.

6. It is the case of prosecution as lodged by the complainant namely Muhammad Ismail, son of the deceased as well as brother of the second deceased to the effect that his father namely Rozi Khan after performance of *Juma* prayers was present

in front of his house along with other inmates of the house including the injured Mst. Rifat Bibi, his uncle Munir Khan and his other sister namely Mst. Hameeda Bibi, when in the meanwhile, the absconding accused namely Sher Khan and the appellant namely Syed duly equipped with their respective pistols came there and the absconding accused namely Sher Khan made a fire shot with his pistol at his father due to which he sustained injury on his right hand and chest and as such died on the spot, whereas from the fire shot of the appellant his sister namely Mst. Rifat Bibi received injury on her umbilicus and as such she too was seriously injured, whereas from their firing rest of the complainant-party escaped unhurt. The occurrence was stated to be witnessed by Munir Khan and his sister namely Mst. Hameeda Bibi and the motive was stated to be a previous blood feud enmity between the parties.

7. In this case the prosecution has mainly relied upon the ocular account furnished by PW-2 namely Muhammad Ismail and PW-3 namely Hameeda Bibi who are respectively the son and daughter of one of the deceased and brother and

sister of another deceased, however, on the available record the prosecution has not been able to prove their **presence** on the spot, which is a pre-condition before relying or discarding their evidence which is to be highlighted as under;-

(i) As far as the presence of PW-2 namely Muhammad Ismail on the spot and at the relevant time is concerned, it may be noted that he has himself admitted in his cross-examination that when his father and sister got injured he did not try to attend or console them or to do any other efforts to save their lives, rather he stated that after the occurrence the local people attracted to the spot and they shifted the deceased and the injured to the hospital. This conduct of PW-2 namely Muhammad Ismail who is the real son of one of the deceased and brother of another, is highly unnatural and improbable. Had he been present on the spot he would have out of psychological compulsion attended his loving father and caring sister and in the process of providing First aid to them he should have been on the front foot and as such while dealing with such seriously injured persons his hands and clothes

ought to have been smeared with blood, however, neither he has claimed any such exercise nor the same is spelling-out from the record, therefore, his presence on the spot do not fit in the matrix of this case.

(ii) Another aspect of this case which makes the presence of PW-2 on the spot as doubtful is that had he been present on the scene of occurrence and truly accompanying the deceased and the injured to the hospital then his name should have been reflected in the preliminary documents prepared by the local police as well as by the doctor in the form of injury sheets, inquest report and medical report/post-mortem report, however, his name is nowhere find mentioned, rather it is his uncle namely Munir Khan whose name is reflected everywhere, therefore, in the post occurrence events, the presence of PW-2 is prima facie not established, which obviously means that he has reached to the hospital after completion of preliminary investigations and just before the lodging of the report.

(iii) Another aspect which would reflect that PW-2 was not present on the spot is that the doctor namely Muhammad Saleem (PW-8) who conducted the postmortem of his father has stated in the opening sentence of his examination-in-chief that he examined the deceased at **02:20 p.m** and who has admitted in his cross-examination that at the time of conducting the postmortem report the police handed him over the injury sheet and inquest report and who has also admitted that before him the dead body was identified by Munir Khan who is uncle of the PW-2, whereas the time of lodging of report in the *'Murasila'* is shown as 14:30 hours (02:30 p.m.) which obviously means that at the time of arrival of the deceased and injured to the hospital and at the time of preparation of injury sheet, inquest report and conducting of post-mortem report PW-2 was not present and in-fact it was Munir Khan who was present with the deceased and injured, therefore, this fact too shows that PW-2 was not present at the relevant time and in-fact the local police have waited till 02:30 (time of lodging the report) for the arrival of PW-2 so as to plant him as a complainant of this

case, when by then even the injury sheet, the inquest report, and the postmortem were already prepared/ conducted by the doctor at 02:20 p.m.

8. As far as the presence of PW-3 namely Mst. Hameeda Bibi is concerned, the same too has not been established on record. It is a matter of record that the time of occurrence is peak hours of the day and it happened to be Friday and especially when by then people of the locality have just got free from *Namaz-e-jumma* and as such at the relevant time there ought to be hustle and bustle of the people of the locality by leaving the Mosque and to go to their houses and other destinations but despite that PW-3 namely Mst. Hameeda Bibi who is a grown up girl of 15 years of age and who has admitted in the opening line of her cross-examination that for the last 4/5 years she is observing *Parda* but even then she was shown present in a public thoroughfare without caring of her *Parda* and that too at the peak hours of the day, therefore, the presence of PW-3 at the relevant time and place appears to be highly unreasonable and unnatural and thus the prosecution has not been able to prove the presence of both these

PWs on the scene of occurrence and at the relevant time and thus their evidence could not be relied upon for the purpose of conviction. In the case of ***Liaqat Ali and another v/s The State and others*** reported as ***2021 SCMR 780***, the Hon'ble Apex Court has held that all the circumstances highlighted above lead us to a definite conclusion that presence of eye-witnesses at the place of occurrence at the relevant time is not free from doubts and the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Similarly, in the case of ***Khalid Mehmood and another v/s The State and others*** reported as ***2021 SCMR 810***, the Hon'ble Apex Court has observed the same view that all the circumstances highlighted above lead us to a definite conclusion that presence of eye-witnesses at the place of occurrence at the relevant time is not above board and prosecution has failed to prove its case against the petitioner beyond reasonable doubt.

9. The statement of PW-3 namely Mst. Hameeda Bibi qua the specific charge by name and role assigned to the present appellant for causing injury to her sister is prima facie the result of

tutoring her as this PW-3 is a female of tender age of 15/16 years of age and she is residing in village *Koz Kalay Timergara* whereas the appellant is resident of another village namely *Tora Tega* and when both the parties are admittedly not relatives and when they have past history of enmity spreading over several years and when PW-3 in her cross-examination has admitted that she has never been to *Tora Tega* (the village of the appellant) then how she could have an opportunity to see, know and identify their enemies including the appellant, therefore, her statement to this extent too could not qualify the test of prudence and reasonableness and thus it would be too risky to rely on the evidence of such an eyewitness for the purpose of conviction or to maintain an order of conviction.

10. Another damaging aspect for the prosecution case is that as transpires from the contents of the FIR and as stated by the complainant in his Court statement that his uncle namely Munir Khan is one of the eyewitness of the occurrence and it was the same Munir Khan whose name find mentioned in all the relevant record at the time of

initial investigation as it was he who seconded the contents of the report and it was he who identified the dead body before the police and it was he who was accompanying the deceased at the time of conducting the postmortem and who identified the dead body before the doctor at the time of preparation of postmortem report Ex.PW-8/4, but astonishingly, he was not produced by the prosecution and was abandoned being unnecessary, therefore, he being an important witness of the prosecution especially when there was past history of enmity between the parties and as against the two eyewitnesses who are of tender age of 15/16 years, PW Munir Khan being one of the elder of the family would have been in a better position to clearly identify with perfection their enemies, but he was abandoned and the prosecution took the risk to establish their case on the evidence of young eyewitnesses who ought to have a rear opportunity to see their enemies in decades long enmity and as such the prosecution has withheld the best available evidence, therefore, under Article 129 (g) of *The Qanun-e-Shahadat Order, 1984* an adverse inference

has to be drawn that had Munir Khan been produced he would have not supported the case of prosecution. In a similar situation akin to the present one, the Hon'ble Apex Court in the case of ***"Lal Khan v/s State"*** reported as ***2006 SCMR 1846*** has held a material witness of occurrence would create an impression that had such witness been brought into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid consequence. Similarly, in the case of ***"Mandoos Khan v/s The State"*** reported as ***2003 SCMR 884*** it was observed by the Apex Court that prosecution must produce best kind of evidence to establish accusation against accused facing trial but simultaneously it has no obligation to produce a good number of witnesses because it has an option to produce as many as witnesses which in its consideration are sufficient to bring home guilt against the accused, following the principle of law that to establish accusation, indeed it is not the quantity but quality of the evidence, which gets preference.

11. In this case the medical evidence of one of the deceased then injured has furnished by PW-13 namely Dr. Saima who has categorically stated in her cross-examination that at the time of examining Mst. Rifat Bibi (who died after 76 days of the occurrence) she was fully conscious, therefore, she was the most natural witness being an injured witness of the occurrence to lodge the instant report, however, the prosecution instead of lodging the report through her has opted to introduce PW-2 for the same. It is also a matter of record that after 08 days of the occurrence her statement was recorded under section 161 Cr.P.C, however, her this statement has also not been exhibited by the prosecution in the evidence and as such the prosecution has tried its level best to play their cards as per their own understanding which cast a doubt on the authenticity and veracity of the prosecution story and statements of PWs.

12. The record and evidence produced by the prosecution would also show that the prosecution has conducted preliminary investigation before the registration of the FIR. It is part of the evidence and

as stated by PW-8 namely Dr. Muhammad Saleem that on the relevant day he examined the dead body of the deceased at 02:20 p.m. He has also admitted that before conducting the postmortem of the dead body of the deceased the local police handed him over the inquest report and the injury sheets which means that the local police have already prepared these documents, however, the time of lodging report as transpires in the *'Murasila'* Ex. PA is 14:30 hours i.e. 02:30 p.m, which obviously and definitely speaks of dual eventualities ***firstly*** that there was preliminary investigation before the registration of this case and ***secondly*** that by then PW-2 namely Muhammad Ismail was not present; and as such the local police was waiting for his arrival so as to plant and show him as a complainant of the instant case and thus it is a classical case of preliminary investigation before the registration of the case . In a situation akin to the present one in the case of ***Sher Ali v/s The State through A.G Khyber Pakhtunkhwa*** reported as ***2018 YLR 1836*** this Court has held that record showed that report was lodged in the hospital at 03.00 p.m, whereas time of

occurrence was mentioned as 01.55 p.m but the postmortem report showed examination of the dead body on the same day at 02.20 p.m, which was forty minutes earlier than the time of report to the police in the hospital. Said facts showed that postmortem examination of the deceased was conducted prior to lodging the report to the police by the complainant and thus had shaken the very foundation of the FIR and as such the appellant therein was acquitted of the charge by extending him the benefit of doubt.

13. It is also an astonishing aspect of the case that PW-2 namely Muhammad Ismail the complainant has stated in his statement that after the occurrence local people attracted to the spot and that the dead body and the injured were shifted by the locals of the area to the hospital and out of whom he remembered the names of Amir Rehman, Ubaid and Owais, however, none amongst them has been produced as a witness by the prosecution to support this stance of the complainant, therefore, on this score too, the prosecution has not been able to establish the very inception of its case.

14. The record further shows that despite the fact that the two persons received serious injuries on their bodies which were later on found fatal for them, and as per statements of PW-2 and PW-3 the deceased/ injured were laying on the spot for 2/3 minutes but unbelievably during spot inspection by the Investigating Officer no blood was recovered from the spot and as such the very place of occurrence too is doubtful.

15. It is also a matter of record that the complainant namely Muhammad Ismail, while lodging report has specifically stated that the motive for the occurrence was the previous blood feud enmity, however, when he appeared as PW-2 in the Court he has shown his ignorance regarding the existence of a previous blood feud enmity between the parties by stating that he could not say about previous enmity as by then he was a child, therefore, the alleged motive as advanced by the complainant in the FIR has not been proved by the prosecution. It is true that prosecution is not bound to set a motive as it may be in the exclusive knowledge of the accused and deceased, however, when once a motive

is set up by the prosecution then they are bound to prove the same and as such its failure would seriously damage their stance/case.

16. In view of the above discussion, the prosecution has not been able to prove the presence of alleged eyewitnesses on the spot and at the relevant time, it has also withheld the best available evidence, it has also took the risk to rely on the evidence of PWs whose evidence could not qualify the test of reasonableness and thus such lacunas and flaws have created doubts in the prosecution case and as such the appellant is entitled for its benefits.

17. It is settled since long that for giving benefit to an accused, it is not essential that there should be many grounds for the same, even a single doubt is sufficient to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case of ***"Bashir Muhammd Khan v/s The State"*** reported as ***2022 SCMR 986***, the Hon'ble Apex Court has held that single circumstance creating reasonable doubt in a prudent

mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable; trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. Similarly, in the case of ***"Khalid Mehmood alias Khaloo v/s The State"*** reported as ***2022 SCMR 1148***, the Hon'ble Apex Court has reiterated the same rational by observing that in these circumstances, a dent in the prosecution's case has been created, benefit of which must be given to the appellant. It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. In the case of ***"Muhammad Mansha v/s The State"*** reported as ***2018 SCMR 772***, the Hon'ble Apex Court has also held that while

giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". In the case of ***"Tariq Pervaiz v/s The State"*** reported as ***1995 SCMR 1345*** , the Hon'ble Apex Court has held that the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

18. In light of what has been discussed above, the instant appeal is allowed, the impugned order/judgment passed by the learned Sessions Judge/Zila Qazi Dir Lower dated 10.02.2022 is set aside and consequently the appellant namely Syed Bahadar is acquitted of all charges leveled against him. He be released forthwith from the Jail, if not required in any other case, however, the observations recorded by this Court shall not prejudice the mind of the learned trial Court while dealing with the case absconding co-accused namely Sher Khan and his case is to be decided by the learned trial Court on the basis of evidence brought by the prosecution in his trial.

19. These are reasons for our short order of even date.

Announced
Dt.22.11.2022

JUDGE

JUDGE

Office
13/12/2022
W/R