JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Cr.A.No 348 of 2014

JUDGMENT

Date of hearing_____20/10/2015_____

Appellant_____Qudrat Sher_____

Respondent _____Mst. Mumtaz etc____

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NISAR HUSSAIN KHAN, J.- *Appellants Qudrat Sher and Quraish, have filed this criminal appeal against the judgment of learned Additional Sessions Judge, Lahor, District Swabi, dated 24.5.2014 whereby:*

- *Appellant Qudrat Sher has been convicted under Section 302(b) PPC and sentenced to death alongwith payment of compensation of Rs.one lac to the legal heirs of deceased in terms of Section 544-A Cr.P.C. or in default to undergo six months S.I. Whereas*
- *Appellant Quraish has been convicted under Section 302(b) PPC and sentenced to undergo imprisonment for*

life and has been ordered to pay compensation of Rs. One lac to the legal heirs of deceased in terms of Section 544-A Cr.P.C., or in default to undergo six months S.I. He has also been extended benefit of Section 382-B Cr.P.C.

2. Brief facts leading to the filing of instant appeal are that that on 6.9.2013, Mst.Mumtaza brought dead body of her daughter deceased Mst.Mosamma to the police station in a Datsun with the help of his co-villagers and reported the matter to the effect that her deceased daughter Mst.Mosamma was married to one Adalat Shah some seven years ago, who was presently serving abroad and due to strained relations with the in-laws, her deceased daughter was living with her parents. Further stated that on the fateful day, she and her deceased daughter were on their way to Gondal Town in a Tanga. On reaching near Mandi Mir Baz Khan, no sooner both of them deboarded from the Tonga, all of a sudden Qudrat Sher and Quaraish, both residents of their village Jalsai, emerged and on the command of Quraish, Qudrat Sher started firing at the deceased as a result of which, the deceased was hit and died on the spot. Motive advanced by the complainant for the gory incident was that deceased's character

was allegedly aspersed by her father-in-law. Accordingly, both the aforesaid accused were charged in the FIR No. 900, dated 6.9.2013 registered under Sections 302/34 PPC at P.S. Lahor, District Swabi.

3. After arrest of accused Qudrat Sher and Quraish, they were sent up for trial before the learned Additional Sessions Judge, Lahor, District Swabi. The prosecution in order to prove its case against the accused facing trial, examined 10 witnesses including sole eye-witness i.e.complainant Mst.Mumtaza who appeared as PW.10. After close of prosecution evidence, accused facing trial also opted to be examined on oath as well as to produce defence evidence. So both the accused stood examined as DW.1 & DW.2 while Kamdar Khan appeared as DW.3 and Shamsul Qamar as DW.4. Both the accused while appearing as DWs categorically stated that at the relevant time, both were busy "ploughing peanut produce" sic, in the fields of DW.4 Shamsul Qamar. They both claimed innocence. DW.3 Kamdar Khan is plying his Tonga in the said area as Taxi and at the relevant time both complainant and deceased Mosamma were travelling in the sameTonga.This witness stated that he witnessed the occurrence; & he could identify the assailants if produced before him and that

the deceased was not done to death by the accused facing trial. Similarly, Shamsul Qamar while appearing as DW.4 stated that both the accused facing trial were working in his fields at the time of occurrence as they had been with him from dawn to dusk. The learned trial court after scanning the evidence adduced by the prosecution, found the accused facing trial guilty for the commission of offence charged with and recorded the aforesaid conviction and sentence, vide judgment dated 24.5.2014, referred to above. Hence the instant appeal.

5. Learned counsel for appellants argued that presence of complainant at the venue of occurrence is not proved; that medical report is in conflict with ocular account; that prosecution has failed to prove motive; that complainant has made dishonest improvements in her court statement, so is not a reliable witness; that Tanga driver being impartial witness was not examined by the police who was testified as defence witness. He maintained that in the light of infirmities, impugned judgment of the trial court is based on surmises and conjectures, hence is not sustainable.

6. Learned counsel for complainant stated that he is under instructions of his client not to oppose the acquittal of the appellants because complainant Mst.Mumtaza and Adalat Shah, husband of the deceased, have pardoned the convicts/appellants on the basis of compromise.

7. Learned AAG while opposing the appeal contended that appellants remained absconder; that Kamdar DW had been persuaded by the convicts/appellants to favour them. He maintained that none of the DWs deposed that Ahmad, brother of the complainant, has committed crime. He maintained that though the husband and mother have pardoned the appellants but father is abroad, hence the compromise is not complete, so appeal is liable to be dismissed.

8. We have gone through the entire evidence carefully and have also considered the submissions made by the learned counsel for the parties.

9. According to prosecution version, deceased in the company of the complainant was proceeding in a horse-cart to Gondal Town. When they reached near Mandi Mir Baz Khan, in the precincts of Village Jalsai, they deboarded from it. In the

meanwhile Qudrat Sher S/O Bahadar Sher R/O Village Jalsai and Quraish S/O Sher, resident of same village, emerged, armed with pistols. The moment they sighted the deceased Mst. Musamma, Quraish ordered Qudrat Sher to kill her, on which Qudrat Sher fired at her, as a result of which, she was hit and died on the spot. The occurrence was also witnessed by many passer-byes. Motive of occurrence is that her father-in-law aspersed her charactor. It is pertinent to mention that Quraish is father-in-law of the deceased whereas Qudrat Sher appellant is remotely related to them in the sense that his sister is married to Ahmad, brother of the complainant. She did not narrate in her report that the deceased was brought to her house one day prior to the occurrence which she narrated in the court statement. She did not alleged in her first report that Qudrat Sher asked the Tanga Driver to stop and let the deceased step down which she added in her court statement. She stated in her cross-examination that six persons were travelling in the Tanga out of whom 3 were male and 3 were female including the deceased and the complainant but strangely none of them made statement before the I.O. Though Kamdar Tanga driver according to her own version, is their co-villager but he too made no statement before the I,O. nor the I.O. recorded his

statement. Strangely, she after the occurrence left the dead body of the deceased at the spot and rushed to the police station as per her cross-examination which is an unnatural conduct of a mother. She narrated in her cross-examination that on her way to Police Station, she met Inaamullah her co-villager who took her to the police station where she consumed 5 to 10 minutes. She came at the spot after 20 to 30 minutes and found the dead body at the spot which was already placed in the vehicle. She admitted in her cross-examination that her brother Ahmad did not participate in the condolence of the deceased who has strained relations with her after the occurrence. She further admitted that her two brothers are inimical towards her. She admitted that her brother Ahmad is not available in the village after the occurrence. She made startling disclosure in her cross-examination that her brother Ahmad came to her and confessed that it is he who committed the murder of deceased. She in the same breath further stated that such statement was made to save the skin of the accused facing trial. When she was confronted about presence of Tanga Driver, she with volte-face stated that he was not present at the time of report. She also knew the shopkeepers whose shops are located

near the venue of occurrence but surprisingly none of them made statement before the police nor accompanied her to the police Station, despite the fact that they were present at the spot at the time of occurrence as per her own admission.

10. The Investigating Officer Wafadar Khan S.I. P.S. Lahor was examined as PW.3 who in cross-examination stated that accused submitted application to the DPO, Swabi, about their innocence which was marked to him. He recorded statements of impartial witnesses, namely Ahmad Sher, Miskeen, Saddar, Shamas Khan, Shams ul Qamar, Taj Akbar and Kamdar Khan horse cart driver . He stated that according to their statements, offence was committed by someone else who has not been charged by the complainant. He further stated that in the light of investigation on application of the accused, he has expressed his opinion about their innocence. When this statement of the I.O. is put in juxtaposition with the admission of the complainant that Ahmad, her brother, confessed his guilt before her that her deceased daughter was done to death by him, it emerges without any shadow of doubt that the appellants have been falsely implicated by the complainant, reason based known to her. Though as per statement of Fazal Manan S.I. PW.6, he took into

possession one 30 bore pistol vide recovery Memo Ex.PW.6/3 on the pointation of accused Qudrat Sher but his cross-examination shatters the veracity of the recovery when he deposed that the pistol in question was in open condition and not sealed into parcel. He further admitted that the pistol in question was not sent to the FSL which slackness on his part is explained by him that since no empty was recovered, hence despatch of pistol to the FSL was a futile exercise. Firstly the I.O. was legally obliged to seal the recovered pistol into a parcel in presence of witnesses and sign the same. Lying of the crime weapon in an open condition can be substituted at any time or may be planted because it does not bear the signature of the I.O. and the date of recovery. Similarly, report of the FSL was sine qua non to establish that whether the crime weapon was in working condition or otherwise. Thirdly, the recovery is also of no use to the prosecution because according to the same witness it was effected from joint house owned by Muhammad, Shaukat and Zakir. It is not certain to whom this crime weapon did belong. It is not safe to rely on such recovery for recording conviction in an offence of capital punishment.

11. Statement of Doctor and Post-mortem report transpires that entry wound bore charring marks while distance between the deceased and the assailants as per site plan was 3 paces or 7 to 8 feet and the crime weapon is a pistol. Charring marks cannot be caused from such a distance when the crime weapon is 30 bore pistol and this opinion is forfeited by medical jurisprudence of Modi, Tailor and Parikh. One may extend concession on such minor discrepancies occurring in the prosecution evidence because he may not be expected to give inter se distance of deceased and the assailants with precision and photographic exactitude provided the other prosecution evidence is straightforward and trust worthy. However, when such infirmities are seen in the light of the shady ocular account, it also becomes doubtful.

12. In case Muhammad Ashraf Vs The State (2012 S C M R – 419), PWs made improvements in their court statements to bring their testimony in line with the medical evidence and were not believed. Like-wise in the case of Muhammad Rafique and others Vs The State and others (2010 S C M R – 385), the august Supreme Court observed that no explicit reliance can be placed on statement of a witness who

makes improvement in his statement before the Court, different from the one recorded in the FIR and consequently, appeal was accepted and accused was acquitted from the charge. Similarly, in case titled Akhtar Ali and others Vs The State (2008 S C M R – 6) , the august Supreme Court while reiterating the principle laid down in the cases of Muhammad Rafique and another Vs The State and others (1994 SCMR -1179), Qalab Ali through L.Rs and others Vs SIPAHIA and others (2005 SCMR – 1857), Rahab Vs Muhammad Ismail & two others (2001 SCMR 1745), Rahab Vs Muhammad Ismail and two others (2002 SCMR 233) and Khalid Javed and another Vs The State (2003 SCMR – 1419), held that once prosecution witness makes an improvement in his court statement, he renders his testimony as unreliable because of aspersion caused on her credibility for false improvements. Hence his statement cannot be relied upon for recording or maintaining conviction in an offence of capital punishment.

13. The principle of sifting of grains from the chaff in criminal jurisprudence is well entrenched in our judicial system. When case of appellants is analysed on the said principle, it is found that the testimony of the complainant is belied by herself in her cross-examination when she admits that her real brother

Ahmad did confess his guilt before her and after the occurrence, he is not available in the village. It is also strange to note that the motive is attributed to Quraish, father-in-law, but he himself did not fire at the deceased. Rather it was third person, remotely related to him, who was commanded to do away with the life of deceased. At the cost of repetition, it is yet again surprising to note that Kamdar, a natural witness of the occurrence who allegedly brought complainant and the deceased in his horse cart to the place of occurrence, has not been examined by the I.O nor was produced by the complainant before the police. Rather his statement was recorded by the I.O. during re-investigation of the case on application of accused in support of their innocence wherein he exonerated the appellants. Though the shopkeepers around the venue of occurrence were present at the time of occurrence but none of them was examined. The statement of complainant is not corroborated by any independent impartial witness. None of the persons present at the place of occurrence supported prosecution version. All these deficiencies and infirmities cast serious aspersion on the prosecution version. In view of the tainted ocular account, mere recovery of weapon of offence on the pointation of appellant which too is doubtful in its

character, cannot be accepted as a corroborative piece of evidence because a tainted piece of evidence cannot be used for corroboration of the tainted ocular account. No doubt in view of the P.M. report, an innocent soul has been done to death but who has committed the occurrence has not been established through confidence inspiring, trust worthy evidence of un-impeachable character.

14. Complainant alleged in her report, aspersion of immoral activity by father-in-law of the deceased as motive of occurrence. Though she made statement before the court too but did not produce any corroborative piece of evidence in support thereof which was essential in view of her unbelievable statement regarding commission of crime. She did not utter a single word that what was the nature of character of the deceased lady and how she was ascribed of infidelity and in whose presence such blame was thrown on her character. Though prosecution is not required to establish the motive but once the same is set up it is bounden duty of the prosecution to substantiate the same which prompted the assailants to commit such a callous act. If the prosecution fails to prove the motive, it would adversely affect the veracity of the prosecution version. Same was the principle set in

Noor Muhammad Vs The State and another (2010 S C M R – 97) .

In the report, in view of doubtful ocular account, recovery of crime empty and crime weapon with matching report of the FSL being a corroborative piece of evidence was not believed for maintaining conviction and the appellant was acquitted by accepting his appeal.

15. Though appellants have also testified on oath in terms of section 340(2) Cr.P.C. and have also examined defence witnesses in support of their innocence, more particularly Kamdar Khan horse-cart driver has been examined as PW.3 but we do not feel persuaded to dilate upon defence evidence in view of the basic principle of dispensation of criminal justice "primarily it is the bounden duty of the prosecution to prove its case beyond any shadow of doubt." Even if the defence evidence is not found to be trust worthy, prosecution is still under obligation to prove its case through natural, straightforward, trustworthy and confidence inspiring evidence of unimpeachable character. It cannot earn benefits from the weaknesses of the defence evidence. As such the evidence led in defence need not be dilated upon.

16. The learned trial court has failed to appreciate the glaring infirmities floating on the record and recorded conviction which is the result of flagrant misreading and wrong appraisal of evidence, causing grave miscarriage of justice.

17. It is cardinal principle of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt. If any reasonable doubt arises from the prosecution case which pricks the judicial mind, benefit of the same is to be extended to the accused not as a matter of grace or concession but as a matter of right. It is also settled principle of criminal justice that there is no need of existence of so many doubts in the prosecution case, rather single reasonable doubt arising from it, may crumble the whole edifice of the prosecution case. This analogy is well entrenched in our judicial system developed on Anglo-Saxon law but stemming out of divine law ordained way back fourteen centuries ago by The Holy Prophet (Peace be Upon Him) when he commanded that it would be better to acquit 100 culprits than convicting one innocent man, which is respectfully followed by the courts till date. Thus by applying the said principle, in the light of above discussion, appellants are also entitled to the benefit of doubt, barely floating on record.

18. For the reasons discussed above, this appeal is allowed, the conviction and sentence recorded by the learned trial court stand set aside and the appellants are acquitted of the charge. They be set at liberty forthwith, if not required in any other case.

19. The Murder Reference No.11/2014 is answered in negative.

J U D G E

Announced on **J U D G E**
20th Oct., 2015