BEFORE THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH

Crl. A No 90-A/13

Abdullah Nasir alias Junejo son of Taj Muhammad resident of Timber Khola, Tehsil and District Mansehra, now lodged in condemned cell Central Prison, Haripur.

....APPELLANT

VERSUS

1. The State
2. Abdul Rasheed son of Muhammad Irfan resident of Timber Khola (father of Saqib)

.....RESPONDENTS

CHARGE UNDER SECTION 302/34 PPC VIDE FIR NO. 53 DATED 28/02/2010 PS KHAKI DISTRICT MANSEHRA.

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APPEAL AGAINST THE JUDGMENT / ORDER OF ADDITIONAL SESSIONS JUDGE-IV MANSEHRA DATED 27/06/2013 VIDE WHICH THE APPELLANT WAS CONVICTED UNDER SECTION 302-B PPC FOR THE QATL-E-AMD OF SAQIB RASHEED AND SENTENCED TO DEATH PENALTY AS TAZIR, AND BE DIRECTED TO HANG BY HIS NECK TILL HE IS DECLARED DEAD. THE SENTENCE OF DEATH SHALL NOT BE EXECUTED UNLESS IT IS CONFIRMED BY THE WORTHY PESHAWAR HIGH COURT AS REQUIRED UNDER SECTION 374

FILED TODAY
Additional Registrar
Peshawar High Court
Abbottabad Bench.
No 2062
2.7.13

Judgment Sheet

IN THE PESHAWAR HIGH COURT
ABBOTTABAD BENCH
JUDICIAL DEPARTMENT

Cr.Appeal No. 90-A/2013 with

Murder Reference No.07-A/2013

Abdullah Nasir alias Junejo

Vs

The State & another

JUDGMENT

Date of hearing.....22.03.2017.....

Appellant. (Abdullah Nasir alias Junejo) By M/s. Qazi Shams-ud-Din and Saeed Ahmad Awan, Advocates.

Respondents. (State) By Raja Muhammad Zubair, AAG & (Complainant) By Mr. Fazal-i-Haq Abbasi, Advocate.

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ISHTIAQ IBRAHIM, J.- Abdullah Nasir alias Junejo, appellant, has called in question the judgment dated 27.06.2013 delivered by the learned Additional Sessions Judge-IV, Mansehra whereby he was convicted under Section 302 (b) PPC and sentenced to death. In addition to the above, the appellant was also burdened to pay compensation amount of Rs.3,00,000/-, payable to the legal heirs of the deceased under Section 544-A Cr.P.C,

recoverable as arrears of land revenue and in default to suffer further six (06) months S.I.

2. Zakir Mehmood and Abdul Wahid, who were charged for catching hold of the deceased Saqib Rasheed and Waqas respectively, were acquitted through the same judgment, impugned herein, therefore, the complainant Abdul Rasheed has preferred an appeal against their acquittal, thus, through this single judgment, we intend to decide this and the connected **Cr.Appeal No. 93-A/2013** titled *"Abdur Rasheed Vs. The State & 02 others"* being the outcome of one and same impugned judgment.

3. Case of the prosecution is that Abdur Rasheed (PW-7) in the company of dead bodies of deceased (Saqib Rasheed & Waqas) reported the incident to Imtiaz Ahmad, ASI (PW-10) on 28.02.2010 at King Abdullah Teaching Hospital, Mansehra to the effect that on the fateful day at 17:00 hours he alongwith his brother-in-law, Abdul Nazeer (PW-8) were coming to the house of complainant, situated at Timber Khola, and when reached the place of

occurrence, he saw his son Saqib Rasheed and his nephew Waqas (both deceased), grappling with the appellant and his other three (03) companions namely, Zakir (acquitted co-accused), Ramzan (absconding co-accused) and Abdul Wahid (acquitted co-accused). It has further been alleged in the report that his son Saqib Rasheed was caught hold by Zakir while his nephew was caught hold by Abdul Wahid whereas the appellant and absconding co-accused namely, Ramzan both gave *Churi* blows to the victims respectively, with which they fell on the ground while the accused decamped from the spot. Motive for crime was stated to be that accused were suspecting one of the deceased i.e. Waqas to have relations with their cousin.

4. After authoring murasila (Ex.PA), Imtiaz Ahmad (PW-10) sent the same to police station through Constable Muhammad Ashraf, whereupon the ibid FIR was registered. The case was investigated and thereafter, challan was submitted before the learned trial court, who formally indicted the appellant alongwith the acquitted co-

accused, to which they pleaded not guilty and claimed trial while absconding co-accused was proceeded against under Section 512 Cr.P.C, thus the impugned judgment was rendered by the learned trial court.

5. Learned counsel for the appellant argued that impugned judgment of conviction is illegal and not in accordance with law as crucial features of the case are speculator and imaginary rather than on a solid tenable evidence; that the prosecution introduced the report outside the police station i.e. in the shape of murasila, which always creates doubt regarding the false involvement and fabricating the story as laid down by the apex court; that there is delay in lodging the report as the occurrence alleged to have taken place on 28th February, 2010 at 17:00 hours while the report was made at 18:45 hours and thereafter the case was registered at 23:40 hours in the police station, which is at a distance of hardly 10 / 11 kilometers from the place of occurrence and 15 kilometers from King Abdullah Teaching Hospital, Mansehra; that the

report was not lodged in the reporting center of King Abdullah Teaching Hospital rather the complainant waited till arrival of the local police from Police Station Khaki, which clearly indicates that there was sufficient time which lapsed between the alleged time of occurrence and report and in this period, the prosecution fabricated the story and involved the appellant in commission of the offence, which of course looses the evidentiary value; that though both the alleged eye witnesses i.e. PW-7 and PW-8 were shown to have been present at the time of occurrence but their names were omitted from the inquest report which manifests that they were not present at the time of alleged occurrence, being not cited as witnesses till the time of preparation of inquest report, besides being not shown witnesses at the time of autopsy and that both the eyewitnesses, being closely related to the deceased, did not receive a single scratch in the alleged incident nor they tried to rescue the deceased from the clutches of the accused, thus, it appears

that they were not present at the spot and the occurrence is an unseen one.

6. To the contrary, learned counsel for the complainant as well as Additional Advocate General opposed the contentions of the learned counsel for the appellant tooth and nail and submitted that the appellant has directly been charged for commission of the offence in a report made with promptitude; that the presence of the eye witnesses has been duly established. That there is no background of blood feud between the parties, the witnesses can be well regarded as disinterested witnesses. They further contended that it's a double murder case and the appellant alongwith his acquitted co-accused remained fugitive from law for sufficient time, thus the learned trial court has rightly held the present appellant responsible for commission of the offence while the evidence against the acquitted co-accused has wrongly been disbelieved and prayed for reversal of their acquittal into conviction.

7. In cases where the charge against accused is based on ocular account, it is the bounden duty of the prosecution to establish the presence of the eyewitnesses at the relevant time beyond the shadow of reasonable doubt. Whether the testimony of the eyewitnesses qualifies the test of common human conduct and the course of natural events or probabilities.

8. In the present case the ocular account was furnished by Abdur Rasheed (PW-7) who is father of deceased Saqib Rasheed and uncle of Waqas while PW-8 Abdul Nazir is the brother-in-law of complainant. Their stance as divulged from FIR that on the relevant day complainant has gone to village Barballa to visit his brother-in-law PW Abdul Nazir and while on their way back from the house of Abdul Nazir, when they reached the place of occurrence, the incident occurred within their sight and presence. It is very strange that the distance between the village of Abdul Nazir i.e. Barballa and that of complainant is four kilometers. The purpose of the visit has not been disclosed by the

complainant as for what he had gone to the village Barballa while PW Abdul Nazir is also mute regarding this aspect of the case.

9. It is also repellant to the common sense that the moment complainant and PW-8 reached the place of occurrence from village Barballa which is situated at a distance of four kilometers, the tragedy occurred in their presence. The complainant (PW-7) has admitted in his cross-examination that ***"it is correct that if per chance I would not have come to the place, I would have not witness the occurrence"***. Similarly, PW-8 has also stated that ***"it is correct that if I was not coming to village Timber Khola I would not have seen the occurrence".*** Both these witnesses are aged persons as complainant is aged about 60 / 61 years while PW-8 is aged about 50 / 51 years, which does not appeal to a prudent mind that they would travel a distance of four kilometers by foot rather they would have definitely hired a vehicle for covering such a long distance. If the complainant visited the house of

the PW-8, what was the justification of PW-8 to accompany the complainant to his village, we are unable to find anything from the record which justifies the above controversy.

10. Prosecution case is that both the witnesses were present when their nears and dears were slayed in their immediate presence, but it is not appealing to reason they are neither trying to interfere in the grappling / fight nor rescuing the deceased from the clutches of accused, instead they are standing there like silent spectators. Moreover, after the tragedy they did not bother to apprehend the accused or even tried to forbid them from the commission of the offence, inspite of the fact that one was the father of one of the deceased and the other was close blood relative, more particularly when the accused were not armed with any firearms as the case of prosecution is that the accused were equipped with knives only. This aspect of the case pricks the judicial mind of the court regarding the presence of the eyewitnesses at the relevant time.

11. The Hon'ble Supreme Court of Pakistan while dealing with almost similar situation in the case of Shahzad Tanveer Vs. The State reported as 2012 SCMR 172 has held as under: -

> ***"According to the prosecution, the appellant, his father Tanveer Ahmed and mother Mst. Irshad Begum had gone upstairs and assaulted Mst. Kaneez Akhtar. It is strange that none of the accused carried any weapon except a small kitchen knife, the total length and width of which was "6-1/2 x 1/2" including its handle while going to commit a capital offence. It is also more strange that none of the P.Ws. dared to physically intervene in order to save the victim or apprehend the accused at the spot. Neither the clothes of any P.W. got stained with blood nor had they received any scratch on their persons. In this view of the matter the presence of the P.Ws. at the time of occurrence appears to be doubtful."***

12. In addition to the above, the Indian Supreme Court while confronted with same proposition, involved in this

appeal, in a reported case titled *"Meharaj Singh Vs. State of U.P"* 1995 PSC (Crl.) 727 has held as under.

> ***"During her cross-examination she admitted that she took no steps to save her husband by either falling on her husband or taking the assault on herself. She admitted that she did not even receive a scratch during the entire occurrence and her clothes neither got torn nor even got stained with blood".***

13. The arrival of the witnesses at that point of time from a place situated at a distance of four kilometers would make them chance witnesses, as they have already admitted in their cross-examination that they arrived at the place of occurrence per chance otherwise they would have not witnessed the occurrence with their own eyes.

14. In the case of *"Abid Ali & 02 others Vs. The State"* reported as **2011 SCMR 208** the apex court while disbelieving the eyewitness account of the witnesses has held as under: -

> ***"We have thoroughly discussed the statements of two eye-witnesses claiming to be present at the scene of crime but***

they on their own admissions were chance witnesses and have admitted their enmity with the appellants. Both these witnesses could not reasonably explain their presence with the deceased Muhammad Azam rather their conduct runs against the natural behaviour of normal human, therefore, their testimonies appear to be unbelievable in the circumstances of the case."

15. Murasila was drafted in the instant case at 12:45 hours wherein the time of occurrence has been mentioned as 17:00 hours but if we go through the FIR, the formal FIR was chalked out at police station at 23:40 hours i.e. round about five hours of the alleged report which was made in the hospital for which there is no reasonable justification which would not appeal to the mind of this court to treat the report of complainant as a genuine document.

16. Motive for the crime was stated to be relation of the deceased (Waqas) with the cousin of accused party but there is nothing on record to suggest that the motive alleged by the prosecution was taken to its logical end by

producing some tangible evidence. Moreover, nothing incriminating has been recovered by the investigating agency during the course of interrogation which could prove the involvement of the appellant with the commission of the offence.

17. Though the record divulges that the appellant remained fugitive from law and proceedings against him were carried out under Sections 204 / 87 / 88 Cr.P.C but because we disbelieved the ocular account and other circumstantial pieces of evidence, therefore, mere abscondence would not entail penal consequences against the appellant.

18. It is settled principle of law that for extending benefit of doubt to an accused person, it is not essential that there should be bundle of doubts rather a single doubt, if found reasonable for a prudent mind, would entitle the accused to the benefit of it and would be entitled to acquittal.

19. In the case of *"Muhammad Ilyas Vs. The State"* reported as 1997 SCMR 25 the Hon'ble Supreme Court of Pakistan has held as under: -

> ***"It is well settled principle of law that where evidence creates doubt about the truthfulness of prosecution story, benefit of such a doubt had to be given to the accused without any reservation"***

20. The above view has further been strengthened by the Hon'ble Apex Court in the case of *"Muhammad Khan & another Vs. The State"* reported as 1999 SCMR 1220 by holding that ***"conviction must be based on impeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused."***

21. Judged and considered from all angles and keeping in view the combined study & careful reappraisal of the entire evidence in the above manner, we are of the considered view that the prosecution has failed to prove the guilt of appellant beyond any shadow of doubt thus, extending him the benefit of doubt, he deserves acquittal.

22. Accordingly, this appeal is allowed. Conviction & sentences of the appellant (Abdullah Nasir alias Junejo) recorded by the learned trial Judge vide impugned judgment dated 27.06.2013 are set-aside and he is acquitted of all the charges leveled against him. He be set at liberty forthwith, if not required in any other case. The Murder Reference, sent by the trial Judge for confirmation of death sentence of the appellant, is answered in the negative, while criminal appeal, filed by the complainant (Abdur Rasheed) against acquittal of the accused-respondents (Zakir Mehmood and Abdul Wahid) being bereft of any merits, stands dismissed.

These are the detailed reasons for our short order of the even date.

Announced:
22.03.2017.

J

Saif/