JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.46-D/2014.

Mira Jan
Vs.
Mir Abbas, etc.

JUDGMENT

Date of hearing: **13.02.2019.**

For Appellant: **Mr. Saif ur Rehman Khan, Advocate.**

For Respondents: **Mr. Salimullah Khan Ranazai, Advocate and Mr. Ilyas Ahmad Damani, Advocate for the State.**

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SHAKEEL AHMAD, J.- This judgment shall dispose of two appeals bearing Cr.A. No.46-D/2014 titled Mira Jan Vs. Mir Abbas, etc and Cr.A. No.50-D/2014, titled State through Advocate General Khyber Pakhtunkhwa Vs. Mir Abbas, as both the matters have sprung out from one and the same judgment dated 12.8.2014, passed by the learned Additional Sessions Judge-I, D.I.Khan, whereby the respondents-accused were acquitted of the charges in case FIR No.582 dated 14.12.2011, registered under Sections 302/427/34 PPC at Police Station Saddar, District D.I.Khan.

2. The prosecution story as disclosed in the FIR, in brief, is that on 14.12.2011 at 1445 hours,

appellant-complainant Mira Jan (PW-10), made report to Rehmatullah ASI, Incharge Reporting Centre, DHQ Hospital, D.I.Khan (PW-9), to the effect that his brother Sarwar Jan was driver of Datsun bearing registration No.2353/SGG, owned by Al-Hamd Fruit Commission Shop New Fruit And Vegetable Market and used to reside in New Fruit And Vegetable Market; that on the day of occurrence he alongwith his brother Sarwar Jan boarded in the aforesaid Datsun and were coming back to New Vegetable Market after dropping the owners of Al-Hamd Commission Shop, namely Aurganzeb, Tanvir, Sajjad, Abid and Safeer; complainant was seated in front seat of the Datsun while his brother was driving the vehicle; that at about 0215 hours, when they reached at Niazi Chowk, Sheikh Yousaf, accused Mir Abbas and Usman made *Lalkara* and Mir Abbas fired at his brother by firearm, as a result thereof his brother got hit and died on the spot while the Datsun was also damaged. Accused after the commission of offence succeeded to flee from the spot. Motive for the offence was stated to be illicit relations of the deceased with the wife of accused Mir Abbas. On this report, PW-9 drafted *murasila* Ex. PW 9/1 and sent the same to police station where Ghulam Farid ASI (PW-5) registered the case against the respondents-accused vide FIR Ex. PA.

3. After completion of the usual investigation, complete challan under Section 173, Cr.P.C. was submitted in the trial Court against the respondents-accused. After compliance of provision of Section 265-C, Cr.P.C, charge was framed against the accused to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as ten (10) witnesses. After closure of prosecution evidence, the accused were examined under Section 342, Cr.P.C, wherein, they denied the allegations and professed innocence, however, they neither opted to be examined on oath, nor produced evidence in their defence. The learned trial Court, after hearing arguments from both the sides, acquitted the accused-respondents of the charges vide impugned judgment dated 12.8.2014, hence this appeal.

4. Arguments heard and record gone through.

5. It is the case of prosecution that on the day of occurrence after dropping the owners of Al-Hamd Commission Shop, namely Aurganzeb, Tanvir, Sajjad, Abid and Safeer; Mir Jan complainant (PW-10) was seated in front seat of the Datsun, whereas his brother (now deceased) was driving the vehicle and at about 0215 hours, when they reached at Niazi Chowk, Sheikh Yousaf, accused Mir Abbas and Usman made *Lalkara*, and Mir Abbas fired at his brother through firearm,

which hit his brother who died on the spot while the Datsun was also damaged. The report in the present case was made at 2:45 p.m, i.e. within thirty minutes of the occurrence. Complainant PW-10 stated that after the occurrence he shifted the dead body of deceased in Chingchi Rickshaw, but during cross-examination, he deposed that "*As soon as I reached the hospital the dead body of my brother was shifted towards the doctor, there after I lodged the report in the hospital*". This clearly shows that neither he witnessed the occurrence, nor the dead body of deceased was shifted by him to the hospital. Similarly, PW-10 deposed that on the day of occurrence, he came to D.I.Khan to deliver clothes to his deceased brother and according to him the clothes were lying in the vehicle in question, but the record transpired that those clothes were neither recovered by the police/I.O, nor handed over to police in order to establish presence of the complainant PW-10 on the spot at the time of occurrence. In the FIR, PW-10 mentioned the weapon of offence as firearm, despite the fact that as per site plan, the accused were at a close distance from where the alleged weapon of offence could easily be identified. Needless to say that after recovery of 30 bore empty, specification of weapon of offence was mentioned in the site plan to be 30 bore pistol. Besides this, the prosecution has also not cited as

witnesses the owners of Al-Hamd Fruit Commission Shop namely Aurangzeb, Tanvir, Sajjad, Abid and Safeer to corroborate the version of complainant PW-10, as mentioned in the first information report.

6. According to site plan Ex. PW 6/1, prepared by Gul Marjan ASI (PW-6), accused Mir Abbas, who was charged for fatal injury, is mentioned at point No.3 and the deceased is shown at point No.1, whereas presence of complainant is indicated at point No.2. The place of presence of accused at point No.3 is almost in the same line as compared to place of the deceased at point No.1 and place of presence of complainant at point No.3. According to postmortem report, the deceased sustained single injury on the back of right side of the head with an exit wound through internal meatus of left ear. Keeping in view the points assigned to the deceased and the complainant mentioned in the site plan Ex. PW 6/1 and direction of the injury sustained by the deceased, as observed by Dr. Naimatullah Khan (PW-3), the complainant should not have escaped from the exit bullet. Needless to mention, that why the accused spared the complainant by not repeating the fire shot for becoming an eyewitness of the occurrence. According to recovery memo Ex. PW 4/1, Gul Marjan ASI (PW-6) recovered an empty of 30 bore Ex.P-3, giving fresh smell, from the place of accused

Mir Abbas, whereas complainant PW-10 stated during cross-examination that he handed over the empty to the police on the spot which he took from the seat of vehicle. In view of above glaring infirmities surfacing in the prosecution story, particularly in the statement of alleged eyewitness complainant PW-10, his presence was rightly disbelieved by the learned trial Court. In the case reported as **Bagh Ali Vs. State (PLD 1973 S.C. 321)**, it was observed that the appraisement of the evidence of eyewitnesses has to be based upon a full consideration and evaluation of all the circumstances appearing in the case where there is fatal absence of physical circumstances to connect the accused person with the crime and there is a motive and in such a situation, the ocular evidence must, in order to carry conviction on a capital charge, come from un-impeachable source and if such source is not available, then it must be supported by some strong circumstance which would enable the court to overcome the inherent doubt which such evidence must necessarily create.

7. There is no two opinion about the fact that the cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons alongwith guilty one by the prosecution, otherwise, the

golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of **"Riaz Masih alias Mithoo Vs. State (NLR 1995 Cr.SC 694).**

8. Regarding the golden principle of benefit of doubt, reference can be made to the celebrated judgment of the apex Court title **"Muhammad Luqman Vs. The State (1970 PLD S.C.-10)**, where the Hon'ble Bench have observed that:-

> "It may be said that a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case where to be decided merely on high probabilities regarding the existence of non-existence of a fact to prove the guilt of a person, the golden rule of "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the superior Courts, will be reduced to a naught".

The dicta laid down in the above precedent has been re-enforced by the august Supreme Court in the

cases of **Tariq Parvez Vs. The State (1995 SCMR-1345), Muhammad Khan and another Vs. The State (1999 SCMR-1220) and Muhammad Akram Vs. The State (2009 SCMR-230).**

9. Keeping in view the above infirmities in the prosecution case, motive as alleged, was of no use to the prosecution.

10. Adverting to abscondence of the accused, it is not denied that abscondence alone cannot be a substitute for real evidence because people do abscond though falsely charged in order to save themselves from agony of protracted trial and also to avoid duress and torture at the hands of police. In the instant case, abscondence is meaningless because it can neither remove defects of the oral evidence, nor is by itself sufficient to bring guilt home to the accused. In this respect, we are fortified by the judgments reported as **Niaz Muhammad alias Niazi Vs. The State (1996 P.Cr.L.J 394), Muhammad Khan and another Vs. the State (1999 SCMR 1220), Mehr Khan and another Vs. The State (PLD 1977 SC 41) and State Vs. Iftikhar (2002 MLD Peshawar 347).**

11. It is now settled that standards of assessing evidence in appeal against acquittal are quite different from those laid down from appeal against conviction. There is a marked difference between appraisement of

evidence in the appeal against conviction and in the appeal against acquittal. In the appeal against conviction, appraisal of evidence is done strictly and in appeal against acquittal, the same rigid method of appraisement is not to be applied as there is already finding of acquittal given by the trial Court after proper analysis of evidence on record. In the appeal against acquittal, interference is made only when it appears that there has been gross misreading of evidence which amounts to miscarriage of justice. The ordinary scope of appeal against acquittal of accused-respondents is considered narrow and limited, as held by the august Supreme Court of Pakistan, in a chain of consistent judgments. In this behalf, reference may be made to the cases, reported as **Muhammad Usman and 2 others Vs. The State (1992 SCMR 498) and The State Vs. Muhammad Sharif and others (1995 SCMR 635).**

12. The result of the above discussion is that there are inherent infirmities in the prosecution case and it appears that the occurrence has not taken place in the mode and manner as stated by the prosecution; so we are of the firm view that the trial Court has rightly extended the benefit of doubt to the accused on valid and cogent reasons by correctly appreciating the evidence on record and acquittal of the accused-respondents did not call for any interference by this Court, therefore, the judgment

passed by the learned trial Court is upheld. Consequently, both the appeals, being devoid of merits, are hereby dismissed.

Announced.
Dt: 13.02.2019.
Kifayat/*

JUDGE

JUDGE

(D.B)
Hon'ble Justice SM. Attique Shah
Hon'ble Justice Shakeel Ahmad

27/2/19