IN THE PESHAWAR HIGH COURT, PESHAWAR,
[Judicial Department].

Crl. Appeal No.362-P/2017

Rukhtaj son of Khan Dad,
r/o Ghari Daulat Zai, District Mardan.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :- Mr. Jalal-ud-Din Akbar-e-Azam Khan Gara, Advocate.
For State :- Mr. Mujahid Ali Khan AAG.
For respondent No.2:- Nemo.

Date of hearing: **18.12.2019**

ORDER

ROOH-UL-AMIN KHAN, J:- Through this criminal appeal under section 410 Cr.P.C., filed by Rukhtaj, the has appellant, calls in question the legality and propriety of judgment dated 09.06.2017, passed by learned trial Court/Additional Sessions Judge-II, Mardan, whereby the appellant having been found guilty of committing *'Qatl-e-Amd'* of Nauman deceased, has been convicted under section 302 (b) PPC and sentenced to undergo life imprisonment as Ta'azir and to pay Rs.1,00,000/-, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C., and in default of payment thereof to undergo 06 months S.I., in case FIR No.146 dated 23.02.2011, registered under sections 302/324/34 PPC and

section 15 Khyber Pakhtunkhwa Arms Act, 2013, in Police Station Ghari Kapoor, District Mardan.

2. According to First Information Report (FIR), on 23.02.2011 at 1300 hours, complainant Jehanzeb (PW.11), in company of dead body of his nephew Nauman deceased, reported to Zahir Shah SI((PW.2) in casualty of District Headquarter (DHQ) hospital Mardan, to the effect that on the fateful day he alongwith the deceased was on the way to Bazaar Adda situated near Mandi Aziz Khan Ghari Kapora Mardan. The deceased was going a few paces ahead of him when at 1215 hours, the appellant along with Fida Hussain (absconding co-accused), duly armed with firearms, emerged and opened indiscriminate firing him, as a result, he got hit and died on the spot. Due to firing of the accused, a passerby, namely, Intizar also sustained firearm injuries. A previous blood feud between the deceased and the accused has been advanced as a motive behind the occurrence. Besides the complainant, the incident is stated to have been witnessed by people present at the spot. Report of the complainant was recorded in the shape of Murasila Exh.PA/1 by Zahir Shah SI (PW.2), on the basis of which FIR (Exh.PA) was registered in Police Station Ghari Kapura. PW.5 also prepared injury sheet and inquest report Exh.PW.2/1 and Exh.PW.2/2, respectively, of the deceased as well as injury sheet Exh.PW.2/3 of injured Intizar and referred the injured for medical treatment and

the dead body to the mortuary for postmortem examination.

3. Dr. Amjad Kakakhel (PW.4), conducted autopsy on the dead body of the deceased on 23.02.2011 at 01.10 a.m. and opined that firearm injuries to right lung and brain of the deceased resulted into his death. He opined probable time between injury and death as **with thirty minutes** and between the death and postmortem within one hour.

4. Zahir Shah SI (PW.12) conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB on the pointation of the complainant. During spot inspection, he secured bloodstained earth from the place of the deceased and injured Intizar vide recovery memos Exh.PW.6/1 and Exh.Pw.6/3, respectively. Vide recovery memo Exh.Pw.6/2 he took into possession two spent bullets of 7.62 bore from the spot and through recovery memo Exh.PW.6/4 the last worn bloodstained garments of the deceased. Similarly, through recovery memo Exh.PW.12/1 he took into possession the bloodstained clothes of the deceased, sent the bloodstained articles to the FSL for analysis, initiated proceedings under sections 204 and 87 Cr.P.C., against the accused, recorded statements of the PWs including injured Intizar and handed over case file to SHO for submission of challan under section 512 Cr.P.C. against the accused.

5. The appellant was arrested on 10.05.2015 and was handed over to Iqbal Khan SI (PW.10), who obtained his physical remand and interrogated him. During interrogation, on the pointation of appellant, PW.10 recovered a 30 bore pistol without number from the tube well concealed in a dump of bricks vide recovery memo Exh.PW.10/3. He prepared sketch of the place of recovery Exh.PW.10/4 and added section 15 KP Arms Act in the case and sent the pistol along with fixed charger and 6 live rounds Exh.P.1 to Armourer for examination.

6. On completion of investigation challan was submitted against the appellant before the learned trial Court where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To substantiate the guilt of the appellant, prosecution examined as many as twelve witnesses. After closure of the prosecution evidence statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed innocence. He, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial the learned trial Court, after hearing both the sides convicted and sentenced the appellant, as mentioned above, hence, this appeal.

7. We have heard the exhaustive arguments of learned counsel for the parties advanced at the bar and perused the record with their able assistance.

8. In the initial report, complainant Jehanzeb and injured Intizar are shown as eyewitnesses of the occurrence. Besides them, other people present at the spot, have also allegedly witnessed the incident, however, the complainant neither in his report nor in his statement as (PW.11), has disclosed the names of those persons. Similarly, those persons have not been examined by the Investigating Officer nor anyone from them has been produced by the complainant in the witness box.

9. Complainant Jehanzeb is admittedly maternal uncle of deceased, who posed himself as eye witness of an occurrence, which was committed in sequence and consequence of old enmity. Though his evidence is not to be discarded as close relative and interested witness, but the necessary caution has to be observed in accepting his evidence, because it is generally approved proposition that in case of rivalries and enmities, there is general tendency that a person from victim side will pose himself as eye witness of the occurrence and shall rope in the influential members of rival side for participating in the assault, with a particular designed role, therefore, the veracity of this witness has to be examined with utmost care and caution. On the analogy of above mentioned tendency of charging

accused in criminal cases, we are constrained to consider the statement of complainant, who while appearing as PW.11, in his examination-in-chief, reiterated the same version as set forth by him in his initial report. In cross-examination he deposed that he is running a motorcar Bargain in village Ghari Kapura but is residing in Mohallah Garhi Daulatzai, which is at a distance of 1 ½ furlongs from the house of the deceased. He has not furnished any explanation with regard to his visit to the house of the deceased as well as his visit with the deceased to the Adda Bazaar near Mandi Aziz Khan Ghari Kapoor neither in the initial report nor in his statement. In cross-examination when he was confronted about non-mentioning of purpose of his visit to the house of the deceased and then to the Adda Bazaar, he by making dishonest improved stated that he visited the house of the deceased so as to see his ailing niece i.e. the sister of the deceased. His said niece has not been examined by the I.O nor produced before the court so as to substantiate the stance of the complainant. As admitted by the complainant, he and the deceased were the residents of different Mohallahs and that during the days of occurrence he was indulged in the business of motorcar bargain. In this view of the matter, firstly he falls within the definition of related witness and secondly he be termed as chance witness, because he resides in a separate house at different place i.e.

Mohallah Ghari Daulatzai situated at a distance of more-than one furlong from the house of his nephew and niece. Indeed he is a person who in the normal course is not supposed to be present on the crime spot. He has not offered cogent, convincing and believable explanation to justify his presence at the spot. In his report, he has categorically mentioned that after receiving injuries, the deceased died at the spot, whereas, according to statement of doctor Amjad Kakakhel (PW.4), probable time between injuries and death was within thirty minutes, meaning thereby that death of the deceased was not instantaneous as alleged by the complainant. Contradicting his own version in last portion of his cross-examination the complainant deposed that the dead body of the deceased was shifted to the hospital at 12.15 hours and report was written at 1300 hours. He further deposed that the dead body was already shifted for postmortem examination and in the Police Post the I.O. recorded his report. In the Murasila Exh.PA/1 the complainant (PW.11) has given the time of occurrence as 12.15 p.m. and time of report as 1300 hours. If the occurrence took place at 12.15 p.m. then how the complainant lodged report at 12.15 p.m. in the hospital as alleged by him in the cross-examination. Similarly, no report written in any Police Post is available on file. Statement of complainant that the deceased was already shifted for postmortem and he made report to the I.O. in

Police Post, is suggestive of the fact that the dead body of the deceased had already been shifted to the hospital by people, and he reached after him and lodged the report. In the occurrence in the broad daylight role of indiscriminate firing was attributed to two accused including the appellant by complainant, who has admitted that he can differentiate between various kinds of weapons, but in his report he has not specifically disclosed the descriptions or caliber of the weapons allegedly used by the accused. We are conscious of the fact that disclosing the description of weapon is not necessary by the complainant but for a person, who posed himself as eye witness and conversant with different kind of weapon and remained mum about the kind of weapon then invariably inference can be drawn that complainant was not present on spot and was not taking risk to contradict the recovery from spot and medical examination, because lateron, three spent bullets of 7.62 bore have been shown recovered from the spot which indicate the use of Kalashnikov in the commission of offence. Likewise, in the sketch of site (Exh.PB) the deceased has been shown at point No.1 and complainant at point No.2. As per version of complainant, at the time of occurrence, the deceased was a few paces ahead of him. In this view of the matter the complainant behind the deceased was also in direct firing range of the appellant, but astonishingly he was not targeted. According to complainant, he and deceased left

the house together for market just to get a round in bazaar. In such a situation, i.e. during walk, the close relative like uncle and nephew shall go along for chatting to each other. Keeping sixteen paces distance by the uncle and going behind the nephew is not only against the norms and custom prevailing in the area, but also not appealable to prudent mind. All the above facts and circumstances create serious doubt about presence of the complainant at the spot at the time of occurrence, hence his deposition being interest and chance witness cannot be believed, resultantly cannot be based for conviction of appellant. The place of occurrence is a thoroughfare surrounded by from two sides i.e. North and South by houses and shops but no person has come forward to furnish the ocular account of the occurrence or at least to the extent of presence of the complainant at the spot at the time of occurrence. In case titled, ***"Mst. Rukhsana Begum and others Vs Sajjad and others" (2017 SCMR 596),*** it has been held by the Hon'ble Supreme Court that single doubt reasonably shown that a witness's presence on the crime spot was doubtful during the occurrence, it would be sufficient to discard his testimony as a whole and that said principle may be pressed into service in case where such witness was seriously inimical or **appeared to be chance witness**. Similarly, in case titled, **"Muhammad Ali Vs the Stat"**

(2017 SCMR 1468) it has been held by the Hon'ble Supreme Court that:-

> "A bare look at the site plan of the place of occurrence shows that the incident in issue had taken place at an open and uninhabited place. The ocular account of the incident in issue had been furnished before the trial Court by two eyewitnesses and they were Shaukat Ali complainant (PW.7) and Atta Muhammad (PW.8). Both the said eyewitnesses were very closely related to Mst. Naseem Bibi deceased inasmuch as the complainant was a brother of the deceased and the other eyewitness was an uncle of the deceased. Both the said related eyewitnesses were also chance witnesses as both of them lived about three miles away from the scene of the crime. In the FIR the reason stated for their availability at the spot at the relevant time was that they were proceeding in connection with a personal work but no such personal work had been disclosed in the FIR. We have gone through the statements made by the said eyewitnesses before the trial court and have pertinently observed that both the said eyewitnesses had advanced no reason whatsoever before the trial Court explaining why they were present at the spot at the relevant time. **Such related and chance witnesses who did not explain any particular reason for their availability at the scene of the crime could not readily be believed and this is more so when they did not receive any independent corroboration.".** (Emphasis supplied).

10. In the site plan Exh.PB, prepared at the pointation of the complainant, besides introducing new events therein one Fawad has also been introduced as eyewitness of the occurrence and his presence has been shown at point No.3 therein. Similarly, in the site plan the role of running in the

Bazaar by the accused after the occurrence has been shown followed by firing at the injured Intizar. All these events do not find mention in the initial report of the complainant. In the site plan injured Intizar has been shown at point No.7 where he allegedly received injuries which is not only situated in different street/Bazaar of Ghari Gumbat road falling at a distance of 720 feet from the place of the deceased, but is also not visible from the place where the complainant and alleged eye witness have posted in the sketch of site of occurrence. Thus, the site plan Exh.PB does not corroborate the version of complainant. The above named subsequently introduced eyewitness, Fawad was abandoned during trial. Similarly, injured Intizar, who was an impartial witness, was also abandoned by the prosecution which amounts to withholding of best available evidence, hence, an adverse inference within the meaning of Article 129 (g) of the Qanun-e-Shahadat Order, 1984 will be drawn against the prosecution that had the injured witness been produced in the witness box, he would not have supported the prosecution case.

11. As regards, recovery of bloodstained earth from the spot, the last worn bloodstained garments of the deceased, positive Serologist in respect thereof as well as medical evidence prove the unnatural death of the deceased with firearms at the spot, but do not tell the name(s) of the culprits. Besides, such pieces of evidence are always taken

into consideration in aid of the direct evidence and not in isolation. In the preceding para-9 of this judgment the direct evidence furnished by the purported eyewitness Jehanze (PW.11), has already been disbelieved, therefore, these corroborative pieces of evidence would not advance the prosecution case.

12. So far as recovery of 30 bore pistol shown recovered from the appellant is concerned, firstly it has not been proved as weapon of offence because only spent bullet of 7.62 have been shown recovered from spot and secondly under said charge the appellant has been acquitted and no appeal against acquittal has been filed by the State.

12. For what has been discussed above, the prosecution has miserable failed to prove the guilt of the appellant beyond reasonable doubt and also that the purported eyewitness produced by the prosecution in support of its case was nothing but planted and procured. The learned trial Court by not appreciating the evidence in its true perspective has landed into the field of error by holding the appellant guilt of the offence, hence, conviction and sentence of the appellant recorded by the learned trial court are not sustainable in the eye of law.

13. Resultantly, this appeal is allowed, conviction and sentences of the appellant recorded by the learned trial Court vide impugned judgment dated 09.06.2017, are hereby set aside. The appellant is acquitted of the charge

leveled against him in the instant case. He be set at liberty forthwith, if not confined in any other case.

14. These are the reasons of our short order of even date which is reproduced below:-

> For reasons to be recorded later, we, allow this appeal, set-aside the conviction and sentence of the appellant, namely, Rukhtaj son of Khan Dad, recorded under section 302 (b) PPC by the learned Additional Sessions Judge-II, Mardan vide judgment dated 09.06.2017, in case FIR No.146 dated 23.02.2011, registered under sections 302/324/34 PPC and section 15 KP Arms Act, 2013, Police Station Garhi Kapoora, and hereby acquit him of the charge in the cited case. He be set at liberty forthwith, if not confined in any other case.

Announced:
18.12.2019
M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and Hon'ble Mr. Justice Ishtiaq Ibrahim.