

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Crl. Appeal No.364-P/2012

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-III, Kohat, appellant Habib Khan, having been found guilty of committing the murders of Abdul Saboor deceased, vide judgment dated 02.07.2012, has been convicted under section 302 (b) PPC and sentenced to undergo ***‘imprisonment for life’*** and to pay Rs.1,50,000/-, as compensation in terms of S.544-A Cr.P.C. to LR's of the deceased or in default thereof, to undergo 06 months S.I., further. Benefit of S.382-B Cr.P.C., has been extended to him.

2. Through the instant appeal, appellant has questioned his conviction and sentence, while connected Cr.R. No.106-P/2012, has been filed by petitioner-complainant, seeking enhancement of sentence of the

convict-respondent from life imprisonment to normal penalty of death, as provided under the law.

3. Since, both the matters are the outcome of one and the same judgment of the learned Trial Court dated 02.07.2012, therefore, this common judgment shall govern the same.

4. The prosecution case as unfolded in First Information Report is that, on 09.10.2004 at 09.20 hours, complainant Sajid Mehmood (PW.5), in company of dead body of his father Saboor Khan deceased, reported in Police Station Lachi, that on the fateful day, Habib Khan (appellant-convict herein) alongwith Khana Gul and two unknown co-accused, later on, named as Hussain Bahadar and Aurangzeb (acquitted), duly armed with Kalashnikovs, visited their house, met with his father in Baithak and after taking tea, when they were about to leave, appellant Haib Khan and acquitted co-accused Khana Gul, opened fire at his father, as a result, he got hit and died on the spot. After the incident, the accused decamped from the crime scene towards hills. In addition to complainant, the incident is stated to have been witnessed by PW Mst. Minhaja (abandoned). A monetary dispute has been alleged as motive behind the incident.

5. On the report of complainant, Mir Shah Alam Khan (PW.7) registered FIR Exh.PW.7/1 No.202 dated 09.10.2004, under sections 302/34 PPC, Police Station Lachi. He also prepared injury sheet and inquest report of deceased Abdul Saboor Exh.PW.7/2 and Exh.PW.7/3, respectively, and shifted his dead body to the mortuary for postmortem examination, where doctor Javed Ali Shah (PW.2), conducted autopsy and opined the cause of death of the deceased to be firearm injuries to his vital organs i.e. heart, lungs and blood vessels. Time between injury and death was observed by him as "5 to 10 minutes" while between death and postmortem as "3 to 4 hours". Mir Shah Alam Khan Inspector (PW.7), then rushed to the spot and prepared site plan Exh.PW.7/4 on the pointation of complainant. During spot inspection he secured bloodstained earth Exh.P.1, from the place of the deceased and 10 crime empties of 7.62 bore from the places of the accused vide recovery memo Exh.PW.7/5, recorded statements of the PWs under section 161 Cr.P.C., took into possession the last worn bloodstained garments of the deceased, sent by doctor from the hospital through constable Mian Dad vide recovery memo Exh.PW.7/6, sent the bloodstained articles and empties to the FSL, report in respect of the bloodstained articles is

Exh.PW.7/7. He produced PWs Khalid and Sajid Mehmood, before the learned Illaqa Judicial Magistrate for recording their statements under section 164 Cr.P.C., wherein they nominated unknown culprits to be Hussain Bahadar and Aurangzeb (acquitted co-accused). Since, accused were avoiding their lawful arrest, therefore, he initiated proceedings under sections 204 and 87 Cr.P.C. against them and on completion of investigation he handed over case file to the SHO, who submitted challan in terms of S.512 Cr.P.C. against the accused.

6. Initially, accused Hussain Bahadar was arrested, tried and ultimately acquitted by the learned Trial Court/ Additional Sessions Judge-II, Kohat vide judgment dated 11.01.2007. Subsequently, accused Khana Gul and Aurangzeb were arrested, tried and finally acquitted vide judgment dated 27.03.2014, by learned Additional Sessions Judge-IV, Kohat. Record divulges that against acquittal of the above named accused, no appeal has been filed either by the complainant or by the State.

7. Finally, accused/appellant Habib Khan was arrested and on completion of necessary investigation, supplementary challan was submitted against him before the learned Trial Court, where he was formally charge-

sheeted, to which he pleaded not guilty and claimed trial. To bring home the guilt of the appellant, prosecution examined seven 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 his 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.

8. Learned counsel for the appellant argued that impugned judgment of the learned Trial Court is against the principle of appreciation of evidence as the same set of evidence which had been disbelieved qua acquitted co-accused, has been believed against the appellant despite the fact that his role is akin to that of the acquitted co-accused, particularly accused Khana Gul, who like the appellant had been attributed the role of firing at the deceased; that no shred of evidence, much less tangible, has been led to prove the effective shots on the person of the deceased to be the result of firing of the appellant; that no appeal has been filed against acquittal of co-accused, therefore, the acquittal findings of co-accused have

attained finality and in the circumstances the learned Trial Court was not justified to record conviction of the appellant on the basis of same set of evidence which has already been disbelieved; that case of the appellant being at par with the acquitted co-accused, he also deserves acquittal.

9. Learned AAG assisted by learned counsel for the complainant while supporting the impugned judgment, sought dismissal of the appeal and requested for enhancement of sentence of the appellant by accepting the revision petition.

10. We have considered the respective submissions advanced from either side and perused the record carefully.

11. A look over the First Information Report reveals that in all four accused have been charged by complainant Sajid Mehmood (PW.5), out of whom, appellant Habib Khan and acquitted co-accused Khana Gul, have been named and have been attributed specifically a general role of firing at the deceased. The two unknown accused mentioned in the FIR were nominated, later on, by the complainant Sajid Mehmood and PW Khalid to be Hussain Bahadar and Aurangzeb, in their statements recorded under section 164 Cr.P.C..

Three accused, namely, Hussain Bahadar, Aurangzeb and Khana Gul, have been acquitted vide judgments dated 11.01.2007 and 27.03.2014, respectively, against which no appeal has been filed by the complainant or the State, as such findings of their acquittal have attained finality. The role of the present appellant is not distinguishable from acquitted accused Khana Gul, as both of them have been charged by the complainant for firing at the deceased without attributing the fatal shots on the person of the deceased to any of them. Same set of the prosecution evidence, has been disbelieved by the learned Trial Court while recording acquittal of co-accused including Khana Gul. No shred of evidence, much less tangible, has been led by the prosecution to distinguish the role of the appellant from the acquitted co-accused Khana Gul, to prove that it was only the firing of the appellant which hit the deceased. The appellant has not confessed his guilt before the competent court of law nor has any crime weapon been recovered either from his direct or indirect possession or on his pointation. FSL report qua the crime empties depicts that these have been fired from more than one weapon. After acquittal of co-accused Khana Gul, to whom same and similar role like the appellant has been attributed, how in absence of strong

corroboratory evidence, the appellant can be convicted on the same quality of evidence, which has been disbelieved qua the co-accused and no appeal has been filed against his acquittal. We are surprised while going through the impugned judgment, as the learned trial Court has not discussed the evidence under which it came to the conclusion that the role of the appellant was different from that of acquitted co-accused Khana Gul and that it was the appellant whose fire shot landed on the person of the deceased. We are conscious of the fact that the doctrine of **“falsus in uno falsus in omnibus”** has been done away with in criminal justice system of the country and now the golden principle of **“separating the grain from the chaff”** is followed while appraising the evidence, but on thorough scrutiny and assessment of the testimony of the complainant Sajid Mehmood we observed it indivisible getting no strong and independent corroboration from unimpeachable source to distinguish the role of the appellant i.e. to prove that it was the firing of the appellant which proved fatal, therefore, we are helpless in applying the golden principle of sifting grain from the chaff. The Hon’ble Supreme Court in case titled, **“Ghulam Sikandar Vs Mamraz Khan (PLD 1985 SC 11)**, has laid down a guiding principle to the

effect that when case of the convict is not distinguishable from that of the acquitted accused and the evidence is indivisible in nature then in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made basis for conviction qua the convict. Same is the view of the august apex Court in case titled, **“Muhammad Banaras Vs the State” (2002 SCMR 1855)**. In case titled, **“Irfan Ali Vs the State” (2015 SCMR 840)**, it has been held by the Apex Court:-

“that that whenever witnesses were found to have falsely deposed with regard to the involvement of one co-accused then, ordinarily, they could not be relied upon qua the other co-accused unless their testimony was sufficiently corroborated through strong corroboratory evidence, coming from unimpeachable source. Evidence of a witness was divisible, however, pre-condition was that evidence of the same set of witnesses may be rejected against some of the accused and it could be relied upon with regard to the other set of the accused, provided it was getting strong independent corroboration from

**unimpeachable source while recording
conviction on a capital charge”.**

Deriving wisdom from the judgment of the august apex Court (supra), the testimony of complainant Sajid Mehmood, the solitary eyewitness, by no stretch of imagination is divisible. Moreso, in his initial report he has only assigned the role of firing to the appellant and acquitted co-accused Khana Gul, but in his court statement in cross-examination when he was confronted with his earlier statement recorded in the trial of acquitted co-accused Hussain Bahadar, he admitted that in that very statement he has also charged accused Hussain Bahadar for firing at the deceased. On further confrontation with his earlier statement, he deposed that he had correctly stated therein that at the time of incident he had been sent by his father for bringing milk and biscuit. This part of statement of PW Sajid Mehmood is total deviation from his earlier stance and amounts to dishonest improvements. Besides, it also creates serious doubts about his presence on the spot at the time of incident. We do not find any strong independent corroboration from unimpeachable source to distinguish the role of the appellant from that of the acquitted co-accused, particularly, Khana Gul and Hussain Bahadar, whose acquittals have attained finality.

12. For what has been discussed above, we have reached to an irresistible conclusion that learned Trial Court proceeded on wrong premises while recording conviction of the appellant on the same set of evidence, already disbelieved qua acquitted co-accused, squarely ignoring the dictum of the Hon'ble Supreme Court on the subject.

13. Accordingly, we by allowing this appeal, set aside the conviction and sentence of the appellant recorded by the learned Trial Court vide judgment dated 09.10.2004, and hereby acquit him of the charges levelled against him. He be set at liberty forthwith, if not required in any other case.

14. On acquittal of convict/respondent, connected Cr.R. No.106-P/2012, titled, "Sajid Mehmood Vs Habib Khan etc" has become infructuous, which stands dismissed as such.

These are reasons of our short order of even date.

15. The Additional Registrar (Judicial) of this Court is directed to communicate copy of this judgment to Mr. Amjad Zia Siddiquee, the learned Trial Judge/ the then learned Additional Sessions Judge-III, Kohat for future guidance.

Announced
30.09.2015

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