Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

Judicial Department

Cr.A No. 58-P/2016
Zahid Vs the State & another

Date of hearing:	15.10.2019.
Appellant by:	Mr. Khizar Hayat Khazana, Advocate.
State by:	Mr. Rab Nawaz Khan, AAG.
Complainant by:	Mr. Altaf Khan, Advocate.

JUDGMENT

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AHMAD ALI, J. Through the instant appeal, the appellant, Zahid s/o Zahir Shah, has impugned the judgment of learned Additional Sessions Judge-I, Charsadda, dated 19.01.2016, whereby he was convicted and sentenced to life imprisonment and burdened with payment of Rs.100,000/- as compensation to LRs of the deceased u/s 544-A Cr.P.C or in default whereof to suffer 06 months SI, in case FIR No.260 dated 27.03.2013 u/s 302/34 PPC, Police Station Charsadda.

2. Brief facts of the case as per FIR are that on 27.03.2019, complainant/Nafees Khan

(PW11) while accompanying his brother (Taimoos Khan) in injured and unconscious condition to the Casualty of DHQ Hospital Charsadda, reported the matter to local police to the effect that he along with his brother was present in the thoroughfare in front of their house, when in the meanwhile, Zahid and Dawood Jan duly armed with firearms appeared and started firing at his brother Taimoos Khan with the intention of killing. As a result, he got hit and sustained injuries. Initially, FIR was registered u/s 324/34 PPC, but on the following day, the injured succumbed to his injuries and section 324 PPC altered into section 302 PPC.

2. Initially, challan under section 512 Cr.P.C was submitted against the accused. On completion of investigation, supplementary challan was submitted in Court where the present accused-appellant was charge-sheeted to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as 15 witnesses whereafter statement of the accused was recorded, wherein, he professed his innocence. The learned Trial Court, after conclusion of trial, found the appellant guilty of

the charge and, while recording his conviction, sentenced him as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court.

3. Arguments of heard and record gone through with the able assistance of learned counsel for the parties.

4. There is hardly any occasion to believe that prosecution has established its case against the present appellant. Perusal of the FIR reveals that the occurrence took place in the thoroughfare, however, as per site plan (Ex.PB) presence of the deceased (then injured) has been shown at point-1, but recovery of blood has been effected from point-1A which is, indeed, the room of the house of one Sher Nawaz. This initial loophole in the prosecution case ultimately disputed the place of occurrence.

5. The site plan further reveals that from point A, two (02) empties of 30 bore and from point 'B', six (06) freshly discharged empties of 30 bore have been recovered. Conversely, the recovery memo (Ex.PW2/3) shows recovery of 02 empties of 30 bore from '*dag/maidan'* while 04 empties of 30 bore,

freshly discharged, from inside the room. Moreover, the FSL report also shows that all the six empties were fired from different weapons. Thus, the site plan and recovery memo do not support the prosecution version rather these are in direct conflict on the material point of recovery of crime empties, whether these were 8 or 6 in total which definitely created serious doubt in the prosecution case. However, the FSL report (Ex.PZ) suggests that the recovered empties sent thereto were six and were fired from two different 30 bore pistols used in the commission of offence.

6. The site plan further reveals that there were 4 bulbs/energy savers installed on points C, D, E & F, but the recovery memo shows that the IO took into possession only two bulbs and sealed into parcels.

7. Perusal of the post-mortem report shows three entry and three exit wounds of the same dimension, the injuries sustained were shown to be on head, shoulder and buttock, whereas the inquest report of deceased shows that there were three wounds i.e. at the head, right

shoulder and on right hand, so these documents also speak different volume of the episode.

8. As per site plan one Shakir was shown to be an eyewitness, but he was abandoned by the prosecution, for unknown reasons. So, in the situation, adverse inference under Article 129(g) of Qanun-e-Shahadat Order 1984 can be safely drawn. In this regard reliance could be safely placed on case law reported in **NLR 2015 SCJ 121.** Even otherwise, in the situation legal inference could also be drawn that if the said witness had entered into the witness box then he would not have supported the prosecution case. Case law refers: **PLD 2016 SC 17.**

9. Perusal of record shows that one of the prosecution witness namely, Mazullah No.137 has been examined twice during trial. First as PW-2 on 27.10.2014 and second as PW-5 on 30.01.2015. This witness escorted the dead body of the deceased Taimoos Khan from the casualty to mortuary. Both his statements recorded before the trail Court are reproduced below:

PW-2 Mazullah No.137 (27.10.2014)

> ***"The injury sheet and inquest along with dead body was handed over to me***

and I escorted the dead body from DHQ Hospital to the Mortuary for PM examination. I handed over the dead body to the doctor for PM examination and no one interfered the dead body during my escort. After the PM examination the doctor handed over to me the last worn garments of the deceased to me, which I handed over to the investigating officer.

XX…The relevant documents and the dead body of the deceased were handed over to me on 28.03.2013 and it was after noon time…….".

PW-5 Mazullah No.137 (27.10.2014)

"I have escorted the dead body from casualty to Mortuary for PM examination. During my escort no one interfered with the dead body. After the PM examination I was handed over the PM report and garments of the deceased. The dead body was handed over to his legal heirs, whereas, the PM report and garments of deceased were handed over to the investigating officer in the police station. My statement was recorded by the investigating officer u/s 161 Cr.P.C.

XX…Nil. Opportunity given…"

However, this witness has never mentioned in his above statements that at what time he escorted the dead body for post-mortem.

10. PW-4 is the doctor who conducted the autopsy on the dead body of deceased, who deposed as under:-

PW-4

> ***"On 28.03.2013 at 00:45 hours, I had conducted autopsy on the dead body of deceased Taimoos Khan son of Akbar Khan r/o Quaid Abad Colony, Charsadda brought by the police and identified by Waheed Ullah and Shakir……..***
>
> ***Probable time b/w injury and death….one and half an hour…..B/w death and P.M…..one hour and fifteen minutes"***.

From perusal of the above statement of PW-4, it reveals that post-mortem of the deceased was conducted on 28.03.2013 at 12:45 pm (read with statement of PW-3 Nadeem Jan No.1433). The total time consumed between injury and death and between death and post-mortem has been shown to be 2 hrs and 45 minutes. Conversely, the time of occurrence has been shown in the FIR as 10:35 pm. So in the given scenario, time of occurrence would be the time when the deceased sustained injuries i.e. 10:00 am and not 10:35 pm as alleged by the complainant. It seems that the occurrence has not taken place in the mood and manner as alleged by the prosecution.

11. PW-9, who is the marginal witness to the recovery memos deposed during trail in the following manner (relevant portion):-

PW-9

> ***"I am marginal witness to the recovery memo Ex.PW9/1 vide which the investigating Officer took into possession blood through cotton from the place of deceased and sealed the same in parcel in my presence……..the investigating officer took into possession three energy savers from the main gate of the houses of Shakir, Shah Nawaz and Nafees which were lit at the time of occurrence and sealed the same in parcel……. ".***

Astonishingly, this witness has not disclosed about the exact place from where the blood was recovered. Moreover, as is evident from the above statement, there were four bulbs shown in the site plan, then why only three bulbs/energy savers were taken into possession and why the bulb/energy saver installed inside the room shown at point 'F' (from where the alleged recovery of blood has been effected) was not taken into possession. In view of the fact, that it was a night occurrence, and the energy saver installed inside the room was of utmost importance with regard to identification of the accused-appellant, would required to have been taken into possession and produced before the Court so as to prove its capability of light, but intentionally was not done so. To our

utter surprise, the recovered energy savers taken into possession from outside the hujra (mentioned in site plan) were not produced before the Court during the Trial. Leaving something, necessary for bringing home the guilt of accused, and not producing something taken into possession in connection with substantiating the crime, often results into disarray to prosecution case, as was done in the instant case. This conduct of the IO also indicates that there was something wrong at the bottom. Even otherwise, the evidence in support of a night occurrence could seldom believe rather placed in the valley of doubts unless proved unimpeachably and charismatically. Wisdom is derived from case law reported in **2016 SCMR 1515, 2017 SCMR 135, 2017 SCMR 1189 & 2017 SCMR 960**.

12. Moreover, the most important witness i.e. complainant while appearing before the learned Trial Court as PW-11, deposed as under:-

PW-11

> ***"On the night of occurrence I along with my brother deceased Taimoos Khan were present on the spot. In the meanwhile***

accused Zahid, Dawood Jan sons of Zahir Shah came duly armed with and started firing at us with intention to kill us, with their fire shots my deceased brother Taimoos Khan hit. After being hit the deceased entered the Hujra of one Sher Nawaz. I went towards another side to take shelter. When I came back my brother was seriously injured and we took him to DHQ Hospital, Charsadda, where, my report was recorded, which was read over and explained to me and after admitting it correct, I thumb impressed the same. One Shakirullah also verified my report. Haji Zareef has also witnessed the occurrence beside me. The accused suspected us to have informed the police who raided their house. The site plan was prepared.

XX…….I and my deceased brother Taimoos Khan, were standing closed side by side. No sooner did the accused appear they started firing at us. The distance of the place, where I took shelter from the spot might be 70/80 yards and when I was decamping for taking shelter my back was towards the accused. I went to the house of Shakirullah for shelter. The site plan was prepared at my instance and pointation which is correctly prepared at my instance……The investigating Officer had recovered blood, empties from the spot but not in my presence, however, in the presence of witnesses. I did show the bullet marks to the investigating officer at the surrounding walls…….I have no relation whatsoever with PW Zareef Khan. Zareef Khan belongs to village Prang Khaista Khel……I shifted Taimoos Khan deceased then injured to the hospital in a

> ***motorcar. The car was already parked there. I have not shown the place of the car where it was parked to the investigating officer. The car was brought to the spot from the place where it was parked, the time might be consumed 4/5 minutes. The car was driven by my nephew Usman……..”***

The above deposition of PW-11/complainant clearly suggests that he is improving in his stances beyond the insertions made in the initial report. It has not been mentioned in the FIR that how the deceased (then injured) was shifted to hospital and by what means. However, in his statement made before the Court the that the deceased (then injured) was shifted to hospital in a motorcar, but, the complainant could not disclose the registration number of the motorcar.

13. Prosecution witnesses while appearing before the Court made improvements in their statements to strengthen the prosecution case, such improvements had caused serious doubts on veracity of such witnesses, therefore, this court come to the conclusion that such statements are not worthy of reliance. Improvement once found to be deliberate and dishonest would cause serious doubts on veracity of witnesses. Both the eye witnesses

are closely related to the deceased. One showing extraordinary strange conduct as close relative after having seen brother of one of the eyewitness murdered and other tried his best to suppress certain facts proving that it was an unwitnessed occurrence and the witnesses had seen just the deceased (then injured) and not the occurrence in action. Exclusion of said two witnesses from consideration would result that no evidence was left on record to connect the accused with the crime because the rest of the evidence is corroborative piece of evidence. Reference can be made to case law reported in **1984 SCMR 42, PLD 1981 SC 472, 1972 SCMR 578, 2007 SCMR 1825, 1990 SCMR 158 & 2011 SCMR 474**.

14. Be that as it may, suffice it to say that driver of the car, namely, Usman (nephew of complainant) has not been examined during trial. Had it been, he would have been helpful and support the version of complainant Guidance could be safely sought from case law laid down in **2018 SCMR 153, NLR 2015 SCJ 121 & PLD 2016 SC 17.**

15. As is apparent from the statement of PW-11, two accused duly armed stated firing at

the complainant party. Question arises here that why the complainant remained unhurt in the volley of firing or why the accused tendered such an unnatural courtesy by spearing the complainant knowing well that he would depose against them. Such behavior on the part of the accused persons ran counter to natural human conduct and this behavior is well explained in the provisions of Article 129 of the Qanun-e-Shahadat Order 1984. Moreover, the phenomena suggest that neither the complainant nor the other eye witness was present at the spot of occurrence. In this regard we are forfeited to seek guidance from case law reported in **2017 SCMR 596**.

16. It is in the statement of complainant/PW-11 that one Zareef Khan (PW-12) was also shown present at the place of occurrence, as is evident from the site plan, but astonishingly, he was not shown in the initial report (FIR).

17. Last but not the least, PW-12, when produced before the Court, has not only negated the stance of complainant taken in his cross examination that "***the deceased then injured was shifted to hospital in a motorcar'***

by deposing that the deceased then injured was shifted to hospital by the complainant/PW-11 on a "cot" but has also proved himself to be a chance witness in the instant case as he has not justified his presence at the spot at such at late night coupled with the fact that he was the resident of Prang Khashta Khel situated at about 2/3 kilometers away from the spot of occurrence. Wisdom cane be derived from the dictum reported in **2016 P.Cr.L.J 30**. For ready reference, the statement of PW-12 is reproduced below:-

> ***"I am government contractor by profession. On 27.03.2013, I was present along with Inayatullah and Shakir Ullah in the Hujra of Sher Nawaz, as we were partners. Inayatullah went to his house for bringing writing pads, in the meanwhile one Taimoos Khan entered into the Hujra who had put his hand on his shoulder, felled down, followed by accused Zahid and Dawood and chased him both of them, fired at Taimoos Khan and decamped from the Hujra. Then Nafees Khan brother of Taimoos Khan and Inayatullah came there, put him in a cot and took to the hospital"***

2. Medical evidence is in conflict with ocular evidence, hence reliance on such ocular testimony is also unsafe.

3. In view of the law laid down in **NLR 2015 Cr.C 186**, the evidence of PW-11 & 12, in the stated circumstances of the instant case, could not be believed and discarded accordingly.

4. From perusal of the case evidence, we conclude that the prosecution witnesses were not telling the actual truth rather posing themselves to the principle of ***'falsus in uno, falsus in omnibus'*** meaning thereby "false in one thing, false in everything. Believing such assailable evidence by the Court of law would be definitely against the administration of criminal justice resulting into judicial death of an innocent accused.

5. The crux of afore-mentioned discussion is that either the prosecution witnesses were not present on the spot or they are not telling the truth. Prosecution has miserably failed to build any nexus of the accused-appellant with the commission of the offence. We are forfeited by the case law reported in **PLJ 2019 SC (Criminal Cases) 265.**

18. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to grant acquittal to an accused. For giving the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance creating reasonable doubt in the prudent mind about the guilt of accused makes him entitled to its benefit, not a matter of grace in concession, but as a matter of right. **Reliance could be placed on 2009 SCMR 230, 2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 P.Cr.L.J 376, 1994 PLD Peshawar 114, 2012 PLD Peshawar 01, 1999 P.Cr.L.J 1087, 1997 SCMR 449, 2011 SCMR 820 & 2006 P.Cr.L.J SC 1002**. The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

7. For what has been discussed above and while extending the benefit of doubt to the appellant, the instant appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required to be detained in any other case.

8. Above are the reasons of short order of even date.

J U D G E

J U D G E

Announced
15.10.2019

Amjad PS DB Hon'ble Mr. Justice Ikramullah Khan & Hon'ble Mr. Justice Ahmad Ali