JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A. No. 200-M/2014
&
Cr.A. No. 201-M/2014

CONSOLIDATED JUDGMENT

Date of hearing: **07.11.2017.**

Appellant:- (Minhaj) by Sahibzada Asadullah, Advocate.

Respondents:- (the State & 1 another) by Barrister Asad Hameed-ur-Rehman State counsel and Mr. Azim Khan, Advocate.

MOHAMMAD IBRAHIM KHAN, J.- In the attending circumstances of the case registered vide FIR No. 35 dated 21.01.2001, the accused/Appellant Minhaj is charged under sections 302, 34 PPC registered at Police Station Ouch Dir Lower and on his arrest by the recovery of the weapon Kalashnikov case vide FIR No. 53 dated 31.01.2013 was also registered against him under section 13 of the Arms Ordinance at the same police station.

2. There were separate trials held under the registration of the case of murder vide Sessions Case No. 45/II of the year 2013 and upon recovery of the weapon (Kalashnikov) the

trial was also held in A.O. Case No. 03/III of 2013. In the former trial the accused/Appellant Minhaj was found guilty and the following sentences were passed against him:-

> ***U/S 302 (b) PPC to life imprisonment with compensation of Rs. two million payable to the Legal Heirs of the deceased or in default thereof shall further undergo six months SI, however, benefit of section 382-B Cr. P.C. was extended to him.***

In the latter trial upon proof of the weapon of Kalashnikov, this accused/Appellant was convicted and sentenced in the following manner:-

> ***U/S 13 A.O. to three years imprisonment alongwith fine of Rs.5,000/- or in default thereof shall further suffer six months SI, however, benefit of section 382-B Cr. P.C was extended to him and the case property was confiscated in favour of the State.***

3. As the accused/Appellant has come up with the prayer for setting aside of the impugned conviction and sentences rendered by the learned Additional Sessions Judge Chakdara Dir Lower,

therefore has preferred these separate appeals Cr.A. No. 200-M of 2014 in the main case and Cr.A. No. 201-M of 2014 in the connected case of the recovery of weapon (Kalashnikov). The facts and the legal propositions are coming to be one and the same, therefore, these appeals are disposed of by way of this singled-out judgment.

4. In the sessions trial bearing case No. 45/II of 2013 after compliance of proceedings under section 265-C Cr. P.C, the accused/Appellant was charge-sheeted on 06.01.2014 that he alongwith acquitted co-accused Zartaj on 21st January, 2001 after *Zuhr* prayer near Masjid Kaskay Dehri falling within the criminal jurisdiction of Police Station Asbanr are said to have shared their common intention and committed *Qatl-i-amd* of Muhammad Zeb with fire arms, which offence is punishable under sections 302/34 PPC. In this case, the charge was denied, thereby in order to bring home the charges the prosecution examined PW-1 Haleem Khan, PW-2 Mst. Amir Zadgai, PW-3 Dilawar, PW-4 Bakht Zaman, PW-5 Fazal Rahman

Constable No. 959, PW-6 Shahi Bakht Khan SHO, PW-7 Bakht Jamal Khan SI, PW-8 Bakht Raj Khan SHO, PW-9 Muhammad Naeem Khan Circle Officer, PW-10 Zahir Khan Constable No. 899, PW-11 Muhammad Sabir Khan AMHC, PW-12 Dr. Muhammad Noor Khan Medical Officer, PW-13 Wazir Gul Constable No. 174 and PW-14 Wasiyat Khan ASI. Amongst these prosecution witnesses is PW-2 Mst. Amir Zadgai, who has shown herself to have witnessed the occurrence when her son was put to death while PW-3 Dilawar is father of the deceased. The mother (PW-2) has posed herself eye witness while father (PW-3) is not an eyewitness of the occurrence as he has been informed about the occurrence by his daughter. The other are formal witnesses and the Investigation Officer who have been examined as prosecution witnesses.

5. After closure of the prosecution evidence, the accused/Appellant was examined under section 342 of the Code of Criminal Procedure, wherein he negated the prosecution

evidence through his respective answers and posed innocence.

6. In the latter trial for the weapon (Kalashnikov), this accused/Appellant is said to have being arrested on 30.01.2013 at 19:40 hours near Gul Abad Bazar fallen within the criminal jurisdiction of Police Station Ouch. The police official recovered Kalashnikov bearing No. 78631012 alongwith charger and 10 cartridges possessed by him, thereby committed an offence within the meaning of section 13 of Arms Ordinance. When for this offence being charge sheeted on 10.03.2014, the prosecution examined PW-1 Fazal Rahman Constable No. 959, PW-2 Bakht Jamal Khan SI, PW-3 Muhammad Naeem Khan Circle Officer, PW-4 Zahir Khan Constable, PW-5 Muhammad Sabir Khan AMHC and PW-6 Zahid Khan SHO. After closure of the prosecution evidence in this case, the accused/Appellant was examined under section 342 Cr. P.C, who negated the prosecution evidence, posed innocence and stated to have falsely been implicated in the case.

6. At the end, in both the separate trials, the accused/Appellant was convicted and sentenced in the mode and manner as stated above through the impugned judgments.

7. We have afforded fair opportunity of hearing to the learned counsel for the accused/Appellant in both the connected appeals, learned counsel for the complainant and learned State counsel, record was delved deep into with their valuable assistance.

8. Learned counsel for the convict/Appellant referred to ***2016 YLR 905 (Peshawar) " Mushtaqeem vs Nawab Khan and another", 2015 P Cr. LJ 248 (Peshawar) " Umar Gul and another vs Samar Khan and another" and 1988 SCMR 940 " Muhammad Aslam and others vs The State"*** and prayed for acquittal of the accused/Appellant as the testimony of sole eyewitness is not worth to be relied upon. On the other hand, learned counsel for the complainant duly assisted by learned State counsel placed reliance on ***2011 MLD 1214 (Peshawar) " Yasir and 2 others vs Raqiaz***

Khan and another", 2008 MLD 1181 (Lahore) " Saif Ullah vs the State", 2009 SCMR 471 " Qaisar Khan and others vs The State and others", 2011 P Cr.LJ 1455 (Peshawar) " Saadullah vs Mst. Sardar Bibi and 2 others", thereby requested for utter dismissal of the appeal.

9. The important and foremost consideration would be for the disposal of the sessions case bearing No. 45/II, which is regarding the main occurrence whereby the accused/Appellant alongwith co-accused Zartaj were tried together while sharing their common intention and charge was framed against them for causing murder of deceased Muhammad Zeb. In this case, the only witness of ocular account is PW-2 Mst. Amir Zadgai. She has stated that she being mother of deceased Muhammad Zeb, her son was coming to home from the nearby mosque after offering *Zuhr* prayer, when on the way the accused Zartaj and Minhaj sons of Musafar fired at him. Her son Muhammad Zeb got injured who later on died. This occurrence is stated to have

been witnessed by Bakht Zaman and Jameel besides her. Her statement has been meticulously taken into consideration being solitary witness to the crime whereby her son was murdered by the accused/Appellant in the company of co-accused Zartaj. In her examination-in-chief while being administered oath she has stated that the occurrence has been witnessed by Bakht Zaman and Jameel. PW-4 Bakht Zaman has been examined, who has utterly stated in the opening line of his examination-in-chief:-

> بر حلف بیان کیا کہ میں موقع پر موجود نہیں تھا اس لئے مجھے وقوعہ کے متعلق کوئی علم نہیں ہے۔

While PW Jameel has not been examined, whereas statement of PW-2 Mst. Amir Zadgai is silent that she had ever witnessed the occurrence. In her cross-examination she has come up with an admission:-

> بوقت وقوعہ میں گھریلو کاموں میں مصروف تھی مگر مجھے یہ یاد نہ ہے کہ میں اُس وقت کیا کر رہی تھی۔

This witness posing to be an eyewitness of ocular account has also admitted:-

> میں یہ بھی نہیں کہہ سکتی ہر ایک ملزم نے کتنے فائر کئے البتہ کافی فائرنگ ہوئی تھی۔ فائرنگ میرے بیٹے پر تقریباً دس قدم کے فاصلے سے ہوئے تھے جو کہ مشرق کی طرف سے کی گئی تھی۔ میرا بیٹا جانب شرق سے جانب غرب جا رہا تھا۔ میں تقریباً دو منٹ میں مقتول کے پاس پہنچی تھی۔

In the site plan she has not been shown outside her house. She being *Pardanasheen* lady has herself stated that was busy in the household work. Even otherwise, in this advance age the *Pardanasheen* lady like Mst. Amir Zadgai is usually present in the house for performance of day to day routine household work. It is for the prosecution to prove presence of this witness. Reliance in this regard has been placed on ***1993 SCMR 417 "Ashiq vs The State***, wherein the relevant citation speaks of:-

> ***S.302---Burden of proof. Prosecution is duty bound to prove the case against accused beyond doubt and this duty does not change or vary in the case in which any defence plea is taken.***

Mst. Amir Zadgai is the solitary eyewitness of the occurrence, as the other witness Dilawar father of the deceased has admitted:

> یہ درست ہے کہ میں وقوعہ کا چشم دید نہیں ہوں۔ بروز وقوعہ میں ٹانگ بنڑ فاتحہ خوانی کے لئے گیا تھا جب گھر واپس آیا تو میری بیٹی نے مجھے بتایا کہ میرے بیٹے محمد زیب کو منہاج اور زرتاج پسران مسافر نے فائرنگ کر کے زخمی کیا ہے۔

If presence of this witness being father of the deceased and PW-2 Mst. Amir Zadgai is ousted then it would be an unseen occurrence. Reliance has

been placed on ***1997 P Cr. LJ 2075 " Muhammad Anwar vs The State"***, wherein it enunciates:-

> ***Appreciation of evidence---Presence of eye-witnesses at the time and place of incident had not been established beyond doubt and the occurrence was an un-witnessed one. Other incriminating connected evidence like strong motive, recovery of blood-stained dagger and medical evidence, in the circumstances, could not be collectively or individually sufficient to form basis of conviction of accused---Accused was acquitted on benefit of doubt accordingly.***

This view has further been re-affirmed in the case law cited as ***1995 SCMR 1627 " Haroon alias Harooni vs The State and another*** in the following manner:-

> ***S. 302---Appreciation of evidence General rule. Statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspire confidence in the mind of a reasonable prudent man. If these elements are present, then the statement of the worst enemy, of an accused may be accepted and relied upon without corroboration, but if these elements are missing, then statement of a pious man may be rejected without second thought."***

Here in this case the prosecution version is un-natural and unbelievable as no one has come forward to state the fact other than Mst. Amir Zadgai PW-2 and PW-4 Bakht Zaman. The other alleged eyewitness PW Jameel has not been examined. Reliance in this regard has been placed on ***2003 SCMR 1391 "Gul Muhammad vs The State and another***". The relevant citation of the said esteem judgment is reproduced as under:-

> ***----S.302---Constitution of Pakistan (1973), Art.185---Appeal against acquittal---Appraisal of evidence---Eye-witnesses were closely related to the deceased and in the background of enmity established on record--They were interested witnesses whose presence at the scene of occurrence was neither natural nor probable and explanation given by them for their presence lacked plausibility---No tangible proof was available on record that the accused and co-accused had fired at a particular place and prosecution story in that respect clearly smacked of fabrication on account of non-recovery of any empty from the said place---Conflict between the ocular and the medical evidence also excluded the presence of the eye-witnesses at the place of occurrence--Ocular evidence was too weak and unreliable to sustain conviction and its defects could not be cured by corroborative evidence and in any case it was not supported by the***

medical evidence---Motive set up in the F.I.R. was not directed against the deceased---Circumstances and incriminating recoveries could not serve as corroborative piece of evidence when the ocular evidence was not believable---Stereotyped reasons recorded by the Trial Court stood repelled in the face of the reasons leading to the acquittal of the accused which were not perverse, fanciful or speculative. Prosecution, in circumstances, had failed to prove its case against the accused persons beyond any reasonable doubt and the grounds of acquittal by the High Court could not be termed as perverse, fanciful and speculative which was a precondition for the reversal of judgment of acquittal---Supreme Court dismissed the appeal against acquittal.

It is also much significant that while examining PW-4 Bakht Zaman he was declared hostile. In the opening line of his examination-in-chief he has utterly denied that he was not present at the spot when this occurrence took place. Even cross-examined by the State counsel yet the probative worth of his testimony could not be shattered:-

یہ بھی غلط ہے کہ مذکورہ بیان میں میں نے کہا تھا کہ وقوعہ ہذا میرا چشم دید ہے۔

This means that this witness even if has not been declared hostile was telling lie as he was

not present at the spot. Reliance has been placed on ***PLD 1989 Supreme Court 20 " Habib-ur-Reham Khan vs Syed Mustafa Abbas"***, wherein the relevant citation (e) reads:-

> ***" Appreciation of evidence. Witnesses having had resiled from their earlier statements and turned hostile. No importance to be attached to the testimony of such witnesses.***

It is extremely hard when there is solitary eyewitness and to hold that she has seen the occurrence then statement of such an eyewitness must be of an unimpeachable character as it should come straight from all corners that the witness was present at the spot and had seen the occurrence. But the cross-examination of PW-2 Mst. Amir Zadgai would suggest that she being an old lady and besides being *Pardanasheen* when the occurrence had taken place the distance between the mosque and the house fallen to be 15/20 paces and was attracted to the place of occurrence within 2 minutes would definitely lead to an inference that the occurrence is un-witnessed. Reliance has been placed on ***PLJ 1978 Supreme Court 247 " Mumtaz-ud-Din vs The State***", wherein the relevant citation reads:-

> ***"Prosecution case resting on solitary eyewitness whose evidence was full of infirmities. Prosecution failing to prove***

guilt of accused beyond reasonable doubt. Appeal allowed.

10. Now coming to the recovery of Kalashnikov alongwith charger and 10 cartridges allegedly recovered from personal possession of the accused/Appellant, suffice it to say, that the alleged recovery of this weapon i.e. Kalashnikov has been effected after long lapse of 12 years as the occurrence in the main case was happened in the year 2001 whereas the alleged recovery of weapon was effected in the year 2013. Though, the FSL report has been furnished in positive to the effect that the Kalashnikov has been found in working condition yet when the evidence in the main case has already been disbelieved against the accused/Appellant in all probabilities, this recovery of weapon would hardly be of much significance in respect of guilt of the accused/Appellant in the present case. Even otherwise, it is settled by now that the recovery of empties etc are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when

the other material put-forward by the prosecution in respect of guilt of the accused/Appellant has already been disbelieved.

It has been affirmed by the Hon'ble Supreme Court of Pakistan in case cited as ***2001 SCMR 424 " Imran Ashraf and 7 others vs the State"*** in the following manner:-

> ***"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."***

Likewise, if any other judgment is needed on the same analogy, reference can be had of ***2007 SCMR 1427 " Dr. Israr-ul-Haq vs Muhammad Fayyaz and another"***, wherein the relevant citation (c) enunciates:

> ***"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.***

11. The gist of the whole discussion is that the prosecution case against the

accused/Appellant is pregnant with doubts. It is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by the apex Court in the case of "**Tariq Pervez v. The State 1995 SCMR 1345** *"that for giving the benefit of doubt it was not necessary that there should be many circumstances creating doubts*". *If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.*

Similar citation of judgment ***2008 SCMR 1221 "Ghulam Qadir and 2 others vs the State"*** Supra enunciates:-

> ***"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creating reasonable doubt in the mind of a reasonable and prudent person***

regarding the truth of charge, makes the whole case doubtful. "

12. In view of the above discussion, we are of the firm view that the prosecution failed to prove its case against the accused/Appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, ergo, while extending the benefit of doubt, we accept both these connected appeals by setting aside his conviction and sentences recorded by the learned trial Court through the impugned judgments of even date and acquit him of the charges leveled against him. He be set free forthwith, if not required in any other case.

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

Announced.
Dt: 07.11.2017

JUDGE

JUDGE

Office
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