

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

Cr.A.No.273-P of 2012.

Date of hearing: 25.09.2017.

Barrister M.Zahur-ul-Haq for appellant.

Mr.Muhammad Riaz Khan Paindakhel, AAG
for State.

Nemo for complainant.

JUDGMENT

LAL JAN KHATTAK, J.- Through this judgment, we shall also decide Cr.A.No.695-P of 2015 as both the appeals are the outcome of same FIR bearing No.574 dated 26.10.2002 u/ss 302/324/34 PPC of Police Station Sardheri District Charsadda albeit arising out of different judgments passed by the learned Sessions Judge and Additional Sessions Judge-I, Charsadda dated 16.05.2012 and 16.11.2015, respectively, whereby appellants Shahzeb and Javed Iqbal have been convicted and sentenced to imprisonment for life with fine of Rs.1,00,000/- each or in default whereof to undergo 06 months SI with benefit u/s 382-b Cr.P.C.

2. Brief facts of the case are that on 26.10.2002 at 4.30 PM, complainant of the case, namely, Fakhr-e-Alam reported to Muhammad Khan, ASHO of PS Sardheri (PW-10) to the effect that on the day of occurrence he and his brother Muhammad Siyar (the deceased) were returning home from their lands and when they reached the lands of one Ihsan-ud-Din, there Javed Iqbal, Asad Iqbal and Shahzeb emerged, who opened firing at them with their respective pistols as a result his brother Muhammad Siyar got hit and died on the spot while he escaped unhurt. The occurrence was stated to have been witnessed by another brother of the complainant, namely, Muntaj Gul. Motive for the crime, as alleged, was a money dispute between appellant Javed Iqbal and the deceased. On the basis of ibid report, case FIR was registered against the appellants.

3. It is worth to mention that after the occurrence, all the three accused went into hiding and resultantly proceedings u/s 512 Cr.P.C. were initiated against them,

wherein, statements of the complainant and Muntaj Gul were recorded. Record shows that on 09.02.2011, appellant Shahzeb was arrested, who was put to face the trial. He pleaded not guilty to the charge and claimed trial. Prosecution in order to prove its case examined 10 witnesses. It is pertinent to mention that in the course of trial, the complainant and his brothers were not available to record their evidence and their statements recorded during the course of proceedings u/s 512 Cr.P.C. were transferred to the case file so as to use the same against the accused.

4. After the prosecution evidence, statement of the accused was recorded, wherein, he professed his innocence and refuted the case against him. The learned trial court, after conclusion of the trial, found appellant Shahzeb guilty of the charge and while recording his conviction sentenced him as mentioned above.

5. Appellant Javed Iqbal (convict in Criminal Appeal No.695-P of 2015) was taken into custody on 20.09.2013. He was indicted by the learned trial court for the

crime to which he too pleaded not guilty. Prosecution, in order to prove its case against him, produced 11 witnesses coupled with transferring the statements of complainant and Muntaj Gul to the file of the case as per Section 512 Cr.P.C. and Article 46 of the Qanun-e-Shahadat Order, 1984. After closure of the prosecution evidence, statement of the accused was recorded, wherein, he confessed his innocence. The learned trial court, after conclusion of the trial, found him guilty of the charge and while recording his conviction sentenced him as mentioned above. Both the appellants have filed their separate appeals but as FIR is one and the same, therefore, their appeals are being decided through this single judgment.

6. It would not be out of place to mention here that complainant of the case has died and his brother Muntaj Gul too is not traceable as per report of the local police to this effect. Likewise, other legal heirs of the deceased were ordered to be served qua the appeals but none appeared on behalf of the complainant's side,

therefore, on 23.05.2017, this court had ordered the learned AAG to argue the case in absence of the complainant's side.

7. Barrister M.Zahur-ul-Haq argued the case for the appellants while the learned AAG represented the State. We, with the assistance of the learned counsel and the learned AAG also gone through the case record.

8. Noticeable aspect of the case is that none of the eyewitnesses appeared before the learned trial court at the time of trial against the appellants. Record shows that on 16.02.2012, the learned prosecutor had moved an application for transferring the statements of the aforesaid PWs recorded during the course of Section 512 Cr.P.C. on the ground that their attendance could not be procured. The learned trial court vide order dated 21.03.2012, accepted the application and transferred the statements of the PWs to the file of the case.

9. No doubt, under Article 46 of the Qanun-e-Shahadat Order, 1984, and u/s 512 Cr.P.C., deposition given by a

person before a competent court of law can be tendered in evidence, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience but it has been held umpteenth times by the superior courts that much sanctity cannot be attached to the statements of witnesses recorded u/s 512 Cr.P.C. for safe administration of justice unless strong independent corroboratory evidence is brought by the prosecution in support of depositions recorded u/s 512 Cr.P.C.

10. In the context of the above, if we examine the statements recorded by the two eyewitnesses of the case under the *ibid* provisions of law, which have been transferred by the learned trial court to the file of the instant case, it would appear that the *ibid* evidence gets no corroboration from medical and circumstantial evidence of the case. According to the FIR (Ex.PA), the deceased was fired at by all the three accused with their respective pistols but medical evidence furnished by PW-4 shows that the four wounds sustained by the

deceased are of same dimensions i.e. 1.5x1.5. Similarity in dimensions of the wounds shows that firing at the deceased was the job of one man. It is worth to mention that the Investigating Officer of the case had collected two empties of .30 bore pistol from the spot and sent the same to FSL for ascertaining whether same were fired from one or more than one weapon. The FSL report is available on the case file according to which both the crime empties have been fired from same weapon, which aspect of the case shows that the firing was made by one person. Not only the above but according to the site plan of the case (Ex.PB) on both sides of the spot, there have been shown sugarcane crops and in the month of October, sugarcane crops reach to its maximum height. In a situation where on both sides of the spot, there were sugarcane crops of maximum height, there was no logic and necessity for the appellants to come across the complainant side face to face. They could have easily achieved their target while hiding in the sugarcane crops without exposing themselves to the opponents. Ibid aspect of

the case shows that both the eyewitnesses were not present on the spot. Even, if for the sake of arguments, it is presumed that they were present on the spot, then keeping in view the medical evidence of the victim and the FSL report, it can be held that they have given an exaggerated account of the occurrence and on this score too, their evidence cannot be accepted.

11. A further pronounced aspect of the case is that in support of the convictions, the learned trial courts have relied upon the confessional statement of appellant Shahzeb. Record shows that said appellant was arrested on 09.02.2011 and his confession was recorded on 13.02.2011. Not only that the confession was recorded on the 3rd day of his arrest but same goes quite contrary to what the complainant has alleged in his FIR. According to the FIR, all the three accused fired at the deceased when they emerged on the spot. In the FIR, the complainant has given a story, which is not in consonance with the retracted judicial confession of appellant Shahzeb. In his retracted judicial confession, the appellant

has said that on the spot, the deceased had planned to fire at them but before he could do so, appellant Javed Iqbal fired at him whereafter he also fired. It appears from the confessional statement that initial firing was made by appellant Javed Iqbal and not appellant Shahzeb but leaving aside the ibid aspect of the case, as the retracted judicial confession was recorded after about 9 years of the incident and after about 3 days of the appellant's arrest, therefore, no sanctity could be attached to it because it is not appealable to prudent mind that after about 9 years, all of a sudden, a culprit would confess his guilt. In the above circumstances of the case, it would not be safe to rely upon the retracted judicial confession for its not being voluntary one and getting no corroboration from circumstantial aspect of the case.

12. Thorough and careful examination of the case record would show that the prosecution has not proved its case against the appellants beyond any reasonable doubt, which is hallmark of criminal jurisdiction. It has been held umpteenth

times by the superior courts that in order to convict an accused, the prosecution has to prove its case beyond reasonable doubt and if a single doubt accrues in the prosecution case benefit of that will be given to the accused being a century old principle of law. It appears to us that the learned trial courts have not appreciated the case evidence in its true perspective and in line with the settled principle of criminal law and have fallen in error by convicting the appellants for which the impugned judgments are not sustainable.

13. For what has been discussed above, this and the connected appeal are allowed, conviction and sentence of the appellants are set aside and they are acquitted of the charges leveled against them.

14. Above are the reasons of our short order of even date, which is reproduced as under:-

“For the reasons to be recorded later, this appeal is allowed, conviction and sentence recorded by learned Sessions Judge, Charsadda vide impugned judgment dated 16.05.2012 is set aside. The

appellant is acquitted of the charge leveled against him and be set free forthwith, if not required in any other case”.

JUDGE

JUDGE

Announced
25.09.2017.

Sadiq Shah, QS (D.B) (Hon'ble Justice Lal Jan Khattak & Hon'ble Mr. Justice Qalandar Ali Khan)