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

Cr.A.No.289-P of 2013.

Date of hearing: 06.09.2017.

Mr.Jalal-ud-Din Akbar-e-Azam Khan Gara, advocate for the appellants.

M/s Bashir Ahmad Khan and Syed Abdul Fayaz, advocates for the complainant.

Mian Arshad Jan, AAG for the State.

JUDGMENT

LAL JAN KHATTAK, J.- Through this judgment, we shall also decide the criminal revision petition bearing No.73-P of 2013 as both the matters are the outcome of same judgment dated 30.05.2013 of the learned Sessions Judge, Hangu delivered in case FIR No.59 dated 27.01.2012 u/ss 302/324/34 PPC of Police Station City, Hangu whereby appellants Saddar Khan and Nasveel Khan have been convicted and sentenced u/s 302(b) PPC to imprisonment for life with compensation of Rs.2,00,000/- each to be paid to the legal heirs of deceased Ashraf Khan as envisaged in Section 544-A Cr.P.C. The appellants have further been convicted u/s 324/34 PPC for their firing at complainant Jan Said and

sentenced to one year R.I. with fine of Rs.10,000/- each or in default whereof to further undergo one month simple imprisonment. Benefit u/s 382-B Cr.P.C. has been extended to the appellants, who have impugned their convictions and sentences while the complainant Jan Said too has filed a criminal revision for enhancement of the sentences from life imprisonment to the normal penalty of death. As both the matters have arisen from the same judgment, therefore, are being decided through this single judgment.

2. Brief facts of the case are that on 27.01.2012, complainant Jan Said (PW-2) reported to ASI Shaukat Hussain (PW-7) in the emergency room of Civil Hospital, Hangu to the effect that he and his father were returning from Hangu bazaar to their house and when they reached at the place of occurrence, there both the appellants emerged and opened firing at them with which his father was hit and critically injured while he escaped unhurt. The injured was taken to the hospital where he succumbed to his injuries.

3. After completion of the investigation, complete challan was put in court where both the accused were indicted for the crime to which they pleaded not guilty. In order to prove its case, prosecution examined 10 witnesses whereafter statements of the accused were recorded, wherein, by refuting the prosecution case, they professed their innocence. The learned trial court after conclusion of the trial found both the accused guilty of the charge and on conviction sentenced them as mentioned above.

4. Learned counsel for the appellants, while opposing the impugned judgment, argued that complainant Jan Said was not present with his father when the incident had taken place and that his attendance was procured subsequently to give impetus to the prosecution case. He argued that no worth reliable evidence has been produced by the prosecution to establish its case against the appellants. The learned counsel also argued that the solitary eye version account furnished by the complainant gets no corroboration from circumstantial

evidence of the case, therefore, no credence could be given to it. It was also argued that motive, as alleged in the FIR, too has not been proved.

5. As against the above, learned counsel for the complainant assisted by learned AAG defended the impugned judgment by arguing that the prosecution has successfully proved its case against the appellants. He also argued that there were no mitigating circumstances for awarding lesser penalty to the appellants, therefore, by accepting the criminal revision, the convicts be awarded the normal penalty of death.

6. Arguments heard and record gone through.

7. As the prosecution's case mainly hinges on the solitary statement of the complainant, who happens to be a son of the deceased, therefore, we would scrutinize the case evidence with utmost care and caution. No doubt, in a criminal case, conviction can be recorded on the testimony furnished by a solitary and related

eyewitness provided same is sufficiently corroborated by circumstantial aspects of the case. If circumstantial evidence of the case is in conflict with the solitary eyewitness account, then conviction cannot be recorded on such evidence being a century old principle of criminal law.

8. On the touchstone of the above, if we look at the evidence furnished by PW-2 i.e. the complainant, same hardly gets corroboration from the circumstances of the case. It is in the FIR that the complainant and the deceased both were returning their home after purchasing some commodities from the bazaar but on the case file there is no convincing evidence, which could corroborate the version given by the complainant that he had either gone with his father to bazaar or was returning with him when the occurrence had taken place as none of the purchased domestic commodities was produced before the Investigating Officer. In addition to the above, the occurrence had taken place at 17.25 hours on 27.01.2012 and the distance in between the complainant and both the

convicts as per site plan (Ex.PB) is 73 paces, therefore, there arises the question of proper identification of the appellants by the complainant. Identification of an accused by a witness from a distance of 73 paces in the month of January at 17.25 hours cannot easily be accepted as not only at that time sunlight is decreased but keeping in view the long distance it would not possible for the viewer to properly visualize the occurrence. (Wisdom is derived from **2017 SCMR 1155** and **1977 SCMR 139.**

9. Presence of the complainant on the spot at the time of occurrence further becomes doubtful from the fact that his hands and clothes were not besmeared with blood of the deceased despite the fact that as per his deposition he had lifted his father and took him to the hospital. Keeping in view the multiple injuries on the body of the deceased and oozing blood from the wounds, it would have been natural that hands and clothes of the complainant would have been besmeared with blood had he really been present on the spot and lifted

the deceased from the ground. Ibid aspect of the case shows that at the critical moment of the case the complainant was not present at the crime venue. It is worth to mention that as per testimony of PW-3 i.e. Dr.Nawab Hussain, the deceased was brought to the hospital by the police, which aspect of the case shows that the complainant was not present on the crime venue when the occurrence had taken place.

10. In addition, conduct of the complainant too shows that he was not present on the spot at the time of occurrence as he did not call anyone of the inmates of his house so as to apprise him about the occurrence despite the fact that his father was fired at just in front of his house nor any one of inmates came out of the house to know about the firing made just near to the deceased's house. Had the complainant been present on the spot at the time of occurrence, he must have made a call to attract the inmates of his house to inform them about the occurrence. The unnatural conduct of the complainant has

led us to believe that he was not with his father when he was fired at.

11. Apart from the above, motive of the case i.e. blood feud between the parties too has not been proved. No doubt, proving of motive is not necessary to bring home guilt to an accused as crimes are often committed without any motive but once a motive is alleged in the FIR, then its non-establishment becomes fatal for the prosecution. Not only that motive has not been proved by the prosecution but the defence has taken the plea that the appellants were falsely implicated in the case as there was a money dispute between the parties. The factum of dispute between the parties regarding money has been admitted by the Investigating Officer in his court statement, who appeared before the court as PW-10 and stated that the appellants had stated to him about the money dispute with the complainant's side.

12. No doubt, in support of its case, the prosecution has relied upon the immediate arrest of the appellants, recovery of klashnikoves from their possession and the

matching of crime empties with the recovered klashnikoves but ibid pieces of evidence are of no help to the prosecution as the recovered klashnikoves were kept un-sealed till their examination on the following day by the armourer, therefore, no credence could be attached to them. Besides, both the accused were arrested at 18.30 hours on 27.01.2012 when according to PW-8, they were seen fleeing. It is worth to mention that in the month of January at 18.30 hours, it would be very difficult to identify a person holding a klashnikov.

13. Thorough and careful examination of the case record has led this court to believe that the prosecution has not proved its case against the appellants beyond any shadow of doubt, which is a hallmark of criminal jurisprudence. The prosecution case is full of doubts benefit of which must go to the appellants being a century old principle of criminal law. It appears to us that the learned trial court has not appreciated the case evidence in its true perspective and has fallen in legal error to convict the appellants.

14. For what has been discussed above, we accept the appeal, set aside the impugned judgment of conviction and acquit the appellants of the charges leveled against them. They be set free if not required to be detained in any other case.

15. So far as the criminal revision is concerned, as we have acquitted the appellants, therefore, the criminal revision has become infructuous, which is dismissed as such.

16. 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, Hangu vide impugned judgment dated 30.05.2013 is set aside. The appellants are acquitted of the charges leveled against them and they be set free forthwith, if not required in any other case.

JUDGE

JUDGE

Announced
06.09.2017.

Sadiq Shah PS