

**2022 P Cr. L J 1623**

**[Balochistan (Turbat Bench)]**

**Before Muhammad Kamran Khan Mulakhail and Rozi Khan Barrech, JJ**

**SULEMAN and another---Appellants**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. (T) 48 of 2021, decided on 4th December, 2021.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Night time occurrence---Source of light---Scope---Accused were charged for committing murder of the deceased by firing---Motive behind the occurrence was that the deceased entered into the house of his neighbour during night time upon which the mother of one of the accused threatened the deceased for dire consequences, later on occurrence took place---Ocular account of the incident had been furnished by two eye-witnesses---Complainant stated in his statement before the court as well as in his report that due to non-availability of electricity, the deceased and other family members were sleeping in the courtyard of the house---Both the eye-witnesses also stated in their statements that they were sleeping in the courtyard of the house---Occurrence took place at 12 O'clock at night, and by such time, the darkness completely prevailed---Said witnesses neither in the report nor in their court statement uttered a single word about the source of light in which they identified the accused persons---Site plan was also silent about the availability of any source of light at the spot---Investigating Officer did not take any article into possession as to prove that sufficient light was present at the time and place of occurrence for the witnesses to make a positive identity of the assailant---Identification of the assailants at such darkness was impossible what to speak of identifying firing of a particular person hitting the deceased---Said sole ground was sufficient for discarding the testimony of the eye-witnesses that they were not truthful witnesses---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Gulfam and another v. The State 2017 SCMR 1189 rel.

**(b) Penal Code (XLV of 1860)---**

---Ss. 302(b) & 34---Criminal Procedure Code (V of 1898), S. 161---Qatl-i-amd, common intention---Appreciation of evidence---Delay of two days in recording the statements of witnesses---Scope---Accused were charged for committing murder of the deceased by firing---Occurrence took place at 12 O'clock at night while eye-witnesses claimed to have seen the

occurrence, who were closely related to the deceased---Statements under S. 161, Cr.P.C. of the said witnesses were recorded and one of the eye-witnesses stated during cross-examination that her statement was recorded after two days of the incident---Said eye-witness further stated during cross-examination that the Investigating Officer recorded her statement and statement of other eye-witness together---Investigating Officer of the case on the other hand stated during cross-examination that he recorded statements of eye-witnesses under S. 161, Cr.P.C., a day earlier---No plausible explanation whatsoever had come on record as to why the statements of the said witnesses were recorded with a delay of two days---Said fact rendered the case of the prosecution extremely doubtful---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

Muhammad Asif v. The State 2017 SCMR 486; Muhammad Sadiq v. The State PLD 1960 SC 223; Tariq Gul v. Ziarat Gul 1976 SCMR 236; Muhammad Iqbal v. The State 1984 SCMR 930; Haroon alias Harooni v. The State and another 1995 SCMR 1627 and Muhammad Khan v. Maula Bakhshah 1998 SCMR 570 rel.

**(c) Penal Code (XLV of 1860)---**

---Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Motive not proved---Scope---Accused were charged for committing murder of the deceased by firing---Motive behind the occurrence was that the deceased entered into the house of his neighbour during night time upon which the mother of one of the accused threatened the deceased for dire consequences, later on occurrence took place---Record showed that no evidence had been produced by the prosecution except the report of the complainant that threats were extended by the mother of the accused to the deceased, no other corroborative piece of evidence was available on record---Even otherwise eye-witnesses did not state a single word in that regard---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

**(d) Penal Code (XLV of 1860)---**

---Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of crime weapon---Reliance---Scope---Accused were charged for committing murder of the deceased by firing---In the present case, the other piece of evidence was the recovery of crime weapon, i.e. 9 mm pistol from the accused and positive report of the Firearms Arms Expert---Perusal of the statements of the recovery witnesses revealed that the Investigating Officer, after registration of the FIR, went to the hospital and place of occurrence, and till 1:35 a.m., he was present at the place of occurrence, and thereafter, he went to the police station---On the other hand, official witness stated that recovery was effected from the accused at 2:30 a.m.---Record showed that the place of occurrence and the place of recovery of the alleged pistol was at a distance of about 135 kilometers---Impossible that one person, i.e. the Investigating Officer, was present at two different places at the same time, which rendered the prosecution case doubtful---Even otherwise, official witness stated in his statement that the accused was alighted from the vehicle, and during his personal search, one

9 mm pistol was recovered from him---Investigating Officer did not state a single word about the vehicle---Said aspect of the matter also caused reasonable doubt in the prosecution case--  
-Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

**(e) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Delay of about one month and twenty two days in sending the pistol to Ballistic Expert---Scope---  
Accused were charged for committing murder of the deceased by firing---Recovered pistol along with empties was sent to the Ballistic Expert after a delay of one month and twenty two days---Such delay was not explained by the prosecution---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt--  
--Appeal against conviction was allowed, in circumstances.

**(f) Criminal trial---**

----Recovery of crime weapon---Scope---Recovery of a crime weapon was a corroboratory piece of evidence---In the absence of direct ocular evidence, mere recovery of a crime weapon could not be based for conviction.

Dr. Israr-ul-Haq v. Muhammad Fayyaz and another 2007 SCMR 1427 rel.

Waseem Naseem for Appellant.

Sudheer Ahmed, D.P.G. for the State.

Date of hearing: 10th November, 2021.

**JUDGMENT**

**ROZI KHAN BARRECH, J.**---The appellants Suleman, son of Soomar and Rehmatullah, son of Hassan, murdered Zakir (deceased) by causing him injuries with firearms within the precincts of Police Station Pasni District Gwadar on 17.07.2020. For the commission of the said offences, the appellants were booked in case FIR No. 98/2020 registered at the said police station on the day of the incident at 1:10 a.m. After a regular trial, the appellants were convicted vide judgment dated 15th April 2021 ("impugned judgment") passed by learned Sessions Judge Gwadar in P.P.C. case No. 04/2020 and sentenced to suffer R.I for life as Ta'zir under section 302(b) read with section 34, P.P.C. and to pay Rs.100,000/- (rupees one lac) each to the legal heirs of deceased Zakir under section 544-A, Cr.P.C. in default whereof they were further directed to undergo S.I for six months each with the benefit of section 382-B, Cr.P.C.

Being aggrieved from the impugned judgment, the appellants have assailed their conviction and sentence through the instant appeal.

2. Arguments advanced from both sides have been heard. We have also minutely gone through the record available on file with the able assistance of learned counsel for the parties.

3. For the purpose of safe administration of the justice, it is essentially required of the court to satisfy itself whether the eye-witnesses are natural and their presence on the spot could reasonably be believed and whether the testimony is free from any kind of intrinsic improbabilities and in the case of interested witness whether any corroboration is forthcoming.

4. The Court, in the case involving capital punishment, will not base the conviction of an accused solely on the testimony of an interested witness unless such evidence finds corroboration by some other independent and unimpeachable piece of evidence or circumstances in the case. On a capital charge, when the accused is tried, there has to be evidence of unimpeachable character, which must lead to the only inference that the accused is found guilty beyond a reasonable doubt.

5. Adverting to the ocular testimony produced by the prosecution, the prosecution in order to substantiate the charge, has produced seven witnesses in all, but the complainant of the case, namely Ismail, son of Faqir Muhammad, (PW-1) is not an eye-witness of the occurrence. However, on the night of the occurrence, he received a telephonic message that his nephew had been murdered. He reached the house of the deceased Zakir. The inmates of the house told him that due to the non-availability of electricity, deceased Zakir and other inmates were sleeping in the courtyard of the house. At about 12 O'clock, two persons entered the house and made firing upon the deceased, who died on the spot.

6. The motive behind the occurrence was that Mst. Saleema, who is a neighbor of the deceased Zakir, made an allegation against the deceased that on the last night, he entered into the house of Mst. Saleema upon which Mst. Saleema threatened him for dire consequences, and on 17.07.2020, sons of Mst. Saleema, namely Suleman, son of Soomar and son-in-law of Mst. Saleema, namely Rehmatulla residents of District Mashkay, were seen at the area of Pasni; therefore, he was sure that the accused Suleman and Rehmatullah had murdered the deceased.

7. The alleged occurrence was witnessed by two females, namely Mst. Zohra (PW-2) and Mst. Nagina (PW-3). Both the above witnesses stated in their statement before the trial court that on 17th of July 2020 at 12 O'clock at night they were sleeping in the courtyard of the house. They woke up on hearing gunshots. They saw the accused Suleman was firing upon the deceased Zakir, and the accused Rehmatullah was also standing by his side. They made noise on which the accused persons left the house, started their vehicle and ran away. They saw the deceased Zakir lying in severely injured condition, and the family members took him to the hospital and later on, they came to know that he had died. It is worthwhile to mention here that the complainant/PW-1 stated in his statement before the court as well as in his report Ex.P/1-A that due to non-availability of electricity the deceased Zakir and other family members were sleeping in the courtyard of the house. Both the above witnesses also stated in their statements that they were sleeping in the courtyard of the house. The occurrence took place at 12 O'clock at night, and by such time, the darkness completely

prevailed. The above witnesses neither in the report nor in their court statement uttered a single word about the source of light in which they identified the accused persons. The site plan Ex.P/7-C is also silent about the availability of any source of light at the spot. PW-7 Abid Ali SI, who conducted an investigation of the case, during the investigation he did not take any article into possession as to prove that sufficient light was present at the time and place of occurrence for the witnesses to make a positive identity of the assailant. The prosecution failed to establish the fact that such availability of light source and in the absence of their ability to do so we cannot presume the existence of such a light source. We are firm in our view to hold that identification of the assailants at such darkness was impossible what to speak of identifying firing of a particular person hitting the deceased. This sole ground is sufficient for discarding the testimony of the PW-2 and PW-3 that they are not truthful witnesses. Reliance is placed on the case of *Gulfam, and another v. The State* 2017 SCMR 1189, wherein the august Supreme Court of Pakistan observed as under:-

"Courts below had incorrectly presumed that as the occurrence had taken place at a medical store, therefore, some electric light must be available at the spot".

8. It is important to mention here that the occurrence took place on 17.07.2020 at 12 O'clock at night while Mst. Zohra (PW-2) and Mst. Nagina (PW-3) claimed to have seen the occurrence, who are closely related to the deceased but statements under section 161, Cr.P.C of the above witnesses were recorded on 19.07.2020. PW-3 Mst. Nagina stated during cross-examination that her statement was recorded on 19.07.2020. She further stated during cross-examination that the investigation officer recorded her statement and statement of PW-2 Mst. Zohra was recorded together. On the other hand, PW-7 Abid Ali SI, who conducted an investigation of the case, stated during cross-examination that he recorded statements of Mst. Zohra and Mst. Nagina under section 161, Cr.P.C. on 18.07.2020 at 11:00 a.m. The name of the above two witnesses are also not mentioned in the FIR lodged by the complainant/PW-1 Ismail, but PW-1 stated in his statement that he knew that Mst. Saleema, who is the neighbor of the deceased Zakir, made an allegation upon the deceased Zakir that on the night before the night of occurrence, the deceased entered into her house, and she threatened him. The accused/appellant Suleman is the son of Mst. Saleema and the co-accused Rehmatullah is the son-in-law of Mst. Saleema and they were seen at the area of Pasni; as such, he is sure that the accused/appellants Suleman and Rehmatullah had committed the murder of the deceased, meaning thereby that at the time of occurrence, no one told the complainant that the accused/appellants made firing upon the deceased Zakir. No plausible explanation whatsoever has come on record that why the statement of the above witnesses was recorded with a delay of two days.

9. The above facts render the case of the prosecution extremely doubtful. The delay of even one or two days without explanation in recording the statements of witnesses has been found fatal for the prosecution and not worthy of reliance by the august Supreme Court in the case of *Muhammad Asif v. The State* reported as 2017 SCMR 486 as under:

"There is a long line of authorities/precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses cannot be safely relied upon."

In this regard, reliance can also be placed on "Muhammad Sadiq v. The State (PLD 1960 SC 223), Tariq Gul v. Ziarat Gul (1976 SCMR 236), Muhammad Iqbal v. The State (1984 SCMR 930) and Haroon alias Harooni v. The State and another (1995 SCMR 1627).

Similarly, it has been settled by the august Supreme Court of Pakistan in Muhammad Khan v. Maula Bakhshah (1998 SCMR 570) that:

"It is settled law that credibility of a witness is looked with serious suspicion if his statement under section 161, Cr.P.C is recorded with delay without offering any plausible explanation."

10. So far the motive alleged in the FIR is concerned, no evidence has been produced by the prosecution except the report of the complainant that threats were extended by the mother of the appellant to the deceased Zakir no other corroborative piece of evidence available on record. Even otherwise PW-2 and PW-3 did not state a single word in this regard.

11. The other piece of evidence is the recovery of crime weapon, i.e. 9 mm pistol from the accused/appellant Suleman and positive report of the Firearms Arms Expert. PW-5 Chakar constable who stated in his statement that on 17.07.2020, he along with constable Naseer Ahmed and SI Abid Ali were in pursuit of the culprits, and they came to know through a source that the accused/appellants were proceeding in a vehicle bearing registration No. ATO-011. At about 2:30 am, they reached the area of Talar, and there they stopped the vehicle, which was driven by the accused Suleman. During the personal search of the accused/ appellant, Suleman, one 9 mm pistol was recovered from his shalwar. He stated during cross-examination that the distance between the place of occurrence and Talar is 135 Kilometers. On the other hand, the prosecution produced PW-6 Mehmood Head Constable, who is the recovery witness of the bullet empties. According to his version, on 17.07.2020, he constable Sanaullah and SI Abid Ali were present at the place of occurrence, and in his presence SI Abid Ali took two bullet empties from the place of occurrence. He stated during cross-examination that they reached the place of occurrence at 1:45 a.m. at night. He further stated during cross-examination that at 1:15 am, they reached the hospital. He further stated during cross-examination that they reached the police station at 2:30 a.m. SI Abid Ali (PW-7) who conducted an investigation of the case, stated that after registration of the FIR the investigation of the case was handed over to him. He reached the hospital after conducting an inquiry under section 174, Cr.P.C and thereafter he went to the place of occurrence, and from there he took two bullet empties of 9 mm pistol and recorded the statement of recovery witnesses under section 161, Cr.P.C and after completion of all the proceedings at the place of occurrence he went in pursuit of the culprits and arrested the accused and during the search of the accused Suleman one 9 mm pistol was recovered.

After perusal of the statements of the above witnesses, it revealed that the investigation officer, after registration of the FIR, went to the hospital and place of occurrence, and till 1:35 a.m., he was present at the place of occurrence, and thereafter, he went to the police station. On the other hand, PW-5 Chakar constable stated that recovery was effected from the accused at 2:30 a.m. It has also come on record that the place of occurrence and the place of recovery of the alleged pistol is at a distance of about 135 kilometers; how was it possible that one person, i.e. the investigation officer, was present at two different places at the same

time, which renders the prosecution case doubtful. Even otherwise, PW-5 stated in his statement that the accused was alighted from the vehicle, and during his personal search, one 9 mm pistol was recovered from him. The investigation officer did not state a single word about the vehicle. This aspect of the matter also causes reasonable doubt in the prosecution case.

This fact remains unresolved, besides the alleged recovered pistol along with empties was sent to the Ballistic Expert after a delay of one month and twenty two days as the recovery was effected on 17.07.2020 whereas the parcels were received by the Ballistic Expert on 09.09.2020, and such delay was not explained by the prosecution. Even otherwise, the recovery of a crime weapon is a corroboratory piece of evidence, and in the absence of direct ocular evidence, mere recovery of a crime weapon cannot be based for conviction. In the case in hand, the ocular evidence of PW-2 Mst. Zohra and PW-3 Mst. Nagina has already been disbelieved. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in case title Dr. Israr-ul-Haq v. Muhammad Fayyaz and another (2007 SCMR 1427), wherein it has been observed as under:-

"It is also a settled law when ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of the weapon of offence does not by itself prove the prosecution case".

12. From the facts and circumstances narrated above, we are persuaded to hold that conviction passed by the learned trial court against the appellants Suleman, son of Soomer and Rehmatullah, son of Hassan, in the circumstances is against all canons of law recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused. Resultantly the Criminal Appeal No. 48 of 2021 is accepted while setting aside the conviction and sentence recorded by the trial court in terms of the judgment dated 15.04.2021 passed by learned Sessions Judge Gwadar in P.P.C. case No. 04/2020, the appellants Suleman, son of Soomer and Rehmatullah son of Hassan are acquitted of the charge under sections 302 and 34, P.P.C. in FIR No. 98/2020 of Police Station Pasni District Gwadar. The appellants are ordered to be released forthwith if not required in any other case.

JK/193/Bal.

Appeal allowed.