JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(*Judicial Department*)

Cr.A.No.50-D/2019

Zeshan Aziz

Versus

Hizbullah and others

JUDGMENT

For appellant: Mr. Saif-ur-Rahman Khan Advocate.

For respondents: Mr. Ahmad Ali, Advocate for respondents No.1 to 8.

Mr. Rahmatullah, Asstt: A.G. for State.

Date of hearing: **19.12.2022.**

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SHAHID KHAN, J.- Through the subject appeal, the appellant/complainant has called in question the judgment, dated, 15.5.2019, of learned Additional Sessions Judge/MCTC, D.I.Khan, whereby, on conclusion of trial, the respondents/accused namely, Hizbullah, Fazal Rahman, Khalid Jan, Ahmad Jan, Attaullah Khan, Abdullah Jan, Muhammad Taufeeq and Abdul Majeed were acquitted, in case FIR No.233, dated, 15.12.2014, under Sections 302/

324/148/149 PPC, of Police Station Daraban, D.I.Khan.

2. The prosecution's case, as set forth in the crime report, is that on 25.12.2014, at 1145 hours, appellant/complainant Zeeshan Aziz in injured condition with the dead body of his brother Kamran Aziz, aged about 17/18 years, reported the matter to the police, in the Emergency Room of Civil Hospital, Daraban, to the effect that he alongwith his deceased brother had gone to their landed property for its inspection. At 1100 hours, accused Hizbullah, armed with .12 bore shotgun, Fazal armed with 30 bore pistol, Khalid Jan, armed with 30 bore pistol, Ahmed Jan, armed with pistol, Attaullah, armed with axe, an unknown accused son of Attaullah and their tenants Attique son of Afzal, Majeed son of Saeed & Makhan son of Ramzan, armed with axe and clubs, came on the spot. The accused Hizbullah started firing at them with his .12 bore shotgun with intention to commit their Qatl-e-Amd, as a result of it, he and his brother sustained injuries, whereas, his brother succumbed to his injuries and expired on the

spot. The other accused also attacked at him with their respective weapons due to which he received injuries on his head and on his eyebrow. The motive, as alleged in the report, is dispute over landed property. The occurrence was stated to be witnessed by the complainant as well as his father, namely Abdul Aziz. After commission of offence, the accused fled away. He charged the accused for committing murder of his brother and effective murderous attempt. The report of the appellant/complainant was reduced into writing in the shape of murasila which culminated into registration of above referred FIR.

3. On completion of investigation, challan was drawn and routed through the relevant prosecution's branch followed by sent up for trial.

4. On commencement of trial, copies of the evidence (oral & documentary) were delivered to the respondents/accused. They were confronted with the statements of allegations through formal charge, they denied the

allegations and pleaded not guilty and claimed trial.

5. The prosecution to bring home charge against the respondents/accused, recorded the account of twelve (12) witnesses and closed its evidence. At the conclusion of prosecution's evidence, the respondents/accused were examined under Section 342 Cr.PC. They professed innocence and false implication in the case. However, they neither wished to be examined on Oath nor wanted to produce evidence in defence. On conclusion of trial, the learned Additional Sessions Judge/Model Criminal Trial Court, D.I.Khan, in view of the evidence so recorded and assistance at the bar, arrived at the conclusion that the allegations of respondents/accused are tainted with doubts, as such, vide impugned judgment, dated, 15.5.2019, recorded their acquittal.

6. We have heard the arguments of learned counsel for the parties as well as learned Asstt: A.G. representing the State and have gone through the record of the case.

7. It is an established principle of law that each criminal case has its own peculiar facts and circumstances and the same seldom coincide with each other on salient features. Admittedly, it is an unfortunate incident in which brother of the appellant/complainant namely, Kamran Aziz lost his life after sustaining firearm injury, but to put the facts and circumstances in equilibrium with the touchstone of safe administration of justice, we have scrutinized the whole evidence available on record while weighing the same on judicial parlance. It has been observed by us that the prosecution has led evidence in the shape of ocular, medical evidence, as well as investigation besides other attending circumstances.

8. As far as merits of the case are concerned, we have observed that the prosecution examined the appellant/ complainant Zeeshan Aziz as PW-2. He disclosed in his Court statement as well as in the murasila/FIR that on the eventful day he alongwith his deceased brother Kamran Aziz

had gone to their landed property for its inspection. At 1100 hours, accused Hizbullah, armed with .12 bore shotgun, Fazal armed with 30 bore pistol, Khalid Jan, armed with 30 bore pistol, Ahmed Jan, armed with pistol, Attaullah, armed with axe, an unknown accused son of Attaullah and their tenants Attique son of Afzal, Majeed son of Saeed & Makhan son of Ramzan, armed with axe and clubs, came on the spot. The accused Hizbullah started firing at them with his .12 bore shotgun with intention to commit their Qatl-e-Amd, as a result of it, he and his brother sustained injuries, whereas, his brother succumbed to his injuries and expired on the spot. The other accused also attacked at him with their respective weapons due to which he received injuries on his head and on his eyebrow. The motive for the occurrence is dispute over landed property and the occurrence was also witnessed his father Abdul Aziz. However, in his examination-in-cross, he pointed out that the accused Hizbullah had made a single fire and the accused Hizbullah and his deceased brother were face to face at the time of firing, whereas, the postmortem

report of the deceased shows firearm injury on lower back of chest on left side. He further stated that as he was injured and was not in full senses, therefore, he cannot say that when his brother died after sustaining injuries. He also stated that one Fazal-ur-Rahman and Khalid Jan also sustained firearm injuries and admitted that a cross FIR has also been registered, wherein, he has been nominated as an accused. He further stated that he was injured through the blows of hatchets and no one has fired at him, however, his medical report shows the injury sustained by him as blunt. The doctor (PW-1) admitted in his examination-in-cross that the injuries sustained by the injured are possible by falling on earth.

9. Father of the appellant/complainant namely Abdul Aziz is also stated to be eyewitness of the occurrence. He was examined as PW-3. He disclosed in his cross-examination that the accused Hizbullah and his son Kamran were face to face at a distance of three single paces. He was unable to tell the exact number of fire shots made by the accused.

10. PW-2 stated that he did not know who shifted him as well as deceased to the hospital as he was semi unconscious and regain his full senses after forty minutes of the occurrence, whereas, PW-3 stated that his injured son Zeeshan was in complete senses after the occurrence. PW-3 stated that they shifted the deceased and the injured to the hospital in a private Datsun, however, due particulars of the vehicle, as its registration number, the name of driver etc, are neither part & parcel of the investigation nor that of the trial. PW-3 further stated that so many people gathered on the spot and took the dead body of his son as well as injured but he was unable to disclose their names. He stated that as he had no watch at the time of occurrence so he cannot tell the time between injury and death of his son Kamran.

11. The I.O (PW-10) admitted that one independent witness Muhammad Ayub was allegedly present on the spot and his statement was recorded under Section 161 Cr.PC which is Ex.PW-10/D-2. The name of said Muhammad Ayub is neither mentioned in the

murasila/FIR nor he has been examined in the case as prosecution witness. He could have strengthened the case of the prosecution; but his non production as prosecution witness has adversely affected its case in view of the provisions of Article 129, Illustration (g) of Qanun-e-Shahadat Order, 1984. It is now settled law not to produce material witnesses, an inference can be drawn that had they stepped into the witness box, they would have not supported the prosecution's case. The Hon'ble Supreme Court of Pakistan in the case of ***"Muhammad Rafique and others v. State and others"*** **(2010 SCMR 385)** held as under:-

> "that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129(g) of Qanun-e-Shahadat Order can fairly be drawn that if PW would have been examined, his evidence would have been unfavourable to the prosecution".

12. The appellant/complainant (PW-2) and his father (PW-3) taken the stance that they were empty handed, therefore, could do nothing. However, during cross-examination reference was made to statement under Section

161 Cr.PC, wherein, it is mentioned that the accused taken away his licensed pistol and produced the same to Investigating Officer. The appellant/complainant improved his statement and repeatedly mentioned that he was semi conscious. There is no second opinion at all rather it is a settled maxim that when a witness improves his version to strengthen the prosecution case, his improved statement cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such a witnesses. Reference in this respect may be made to the case of ***"Farman Ahmad v. Muhammad Inayat and others"*** **(2007 SCMR 1825)** wherein it was held as under:-

> ".... It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness had improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious

> doubt on the veracity of such witnesses."

13. No doubt, appellant/complainant (PW-2) sustained injuries on his person during the occurrence but this fact alone cannot be considered sufficient to hold that he has spoken the whole truth. In the case of ***"Said Ahmad Vs. Zumured Hussain"*** **(1981 SCMR 795)**, it was observed:-

> "Fact of eye-witness being injured and injuries being not self suffered--- not by itself indicative of witness having told truth--witness closely related to deceased while other persons mentioned in F.I.R. not examined---Acquittal, was rightly not interfered with by the High Court."

Similarly, in the case of ***"Ghulam Sarwar Vs. The State"*** **(PLD 1993 Pesh. 152)**, it was held that witness bearing injuries on his person, by itself, does not indicate that he has stated truth. Having assessed the eye-witness account furnished by complainant Muhammad Akbar and Mst. Parveen P.Ws., we find that the claim of these witnesses having seen the occurrence, stands belied by host of circumstances and cannot be accepted in absence of corroborative evidence. It appears that the occurrence has not taken place in the manner as suggested by the

prosecution and a wide net has been thrown by the prosecution to implicate all the male members of the respondents family.

14. The medical evidence can no way pin point the accused nor can establish the identity of the accused. It is hard fact that medical evidence can never be considered to be a corroborative piece of evidence and at the most can be considered a supporting evidence only to the extent of specification of seat of injuries, the weapon of offence, duration, the cause of death etc. ***"Muhammad Mansha Vs. The State"*** **(2018 SCMR 772),** ***"Tariq Hussain and another Vs. The State and 04 others"*** **(2018 MLD 1573 [Federal Shariat Court]).**

15. The motive alleged by the prosecution was dispute over landed property. The burden to prove the motive part of the occurrence was upon the prosecution but record of the case would reveal that the same has not been proved. So mere alleging a motive would not be sufficient to accept and rely upon the same.

16. The peculiar facts and circumstances are sufficient enough that strong presumption can be ruled out that the occurrence has not taken place in the mode and manner so reported and presented by the prosecution and the prosecution failed to prove its case beyond shadow of any doubt.

17. It is well settled, benefit of doubt is not a grace but right of the accused and it is not necessary that there should be many circumstances creating doubts, even a single circumstance, creating reasonable doubt in a prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace & concession but as a matter of right. Reference is made to the case ***"Muhammad Akram v. State"*** **(2009 SCMR 230).**

18. Beside the above, generally the order of acquittal cannot be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence

adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is less than the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, or the purpose of ascertaining as to whether the accused committed the offence or not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, only then it is a compelling reason for interference.

19. For the afore-stated reasons, learned counsel representing the appellant/complainant could not point out any illegality and material

irregularity in the impugned judgment so that the Court could incline to interfere in it.

20. Resultantly, this appeal having no merit and substance stands dismissed.

Announced.
Dt:19.12.2022.

*Imran/**

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Wali
Hon'ble Mr. Justice Shahid Khan