IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A No.206-B of 2021

Hamayun
Vs
The State etc

JUDGMENT

For Appellant: Mr. Farooq Khan Sokari Advocate

For respondent: Mr. Salah-ud-Din Khan Marwat Advocate

For State: Sardar Muhammad Asif, Asstt: A.G

Date of hearing: 23.06.2022

SAHIBZADA ASADULLAH, J.--- Through this appeal, the appellant has called in question judgment dated 30.11.2021 passed by the learned Additional Sessions Judge-III, Lakki Marwat in case FIR No.422 dated 09.12.2009 under sections 302 / 324 / 427 / 148 / 149 PPC of Police Station Tajori, Lakki Marwat, whereby, he was convicted and sentenced as under:

i. under section 302(b)/149 PPC to imprisonment for life on three counts alongwith payment of Rs.2,00,000/- as compensation under section 544-A Cr.P.C to the legal heirs of each deceased or in default thereof, to undergo six months simple imprisonment;

ii. under section 324/149 PPC to five years rigorous imprisonment alongwith fine of Rs.50,000/- or in default thereof, to undergo three months S.I.

iii. under section 337-F(iii) PPC to two years rigorous imprisonment alongwith payment of Rs.10,000/- as Daman for causing hurt to Habib-ur-Rehman;

iv. under section 148/149 PPC to two years rigorous imprisonment and under section 427/149 PPC to two years rigorous imprisonment.

2. Benefit under section 382-B Cr.P.C was extended to the appellant and the sentences were ordered to run concurrently.

3. Feeling aggrieved, the appellant has questioned the legality of the impugned judgment and the awarded sentences through the instant appeal, whereas, complainant Habib ur Rehman being aggrieved of the quantum of sentences, has moved Criminal Revision No.49-B of 2021 for enhancement of the same. Since both the matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

4. The brief facts of the case are that on 09.12.2009 at 18:10 hours, complainant Habib-ur-Rehman, in injured condition, brought the dead bodies of deceased to Police Station Tajori in a tractor and lodged a report to the effect that on the day of occurrence, at 16:00 hours, he alongwith his brothers named Mujeeb-ur-Rehman & Hazrat Gul, nephew Saddam and one Haqdad went in a tractor to their landed property situated at Lora to

cultivate wheat. On returning back, when they reached near Ziarat Mullah Bakhtiar at about 16:30 hours, they saw the accused duly armed with Kalashnikovs, already waylaid in ditches & canyons (Kurrajat) and as soon as they reached near them, the accused started indiscriminate firing at them, due to which, complainant, Hazrat Gul, Saddam and Haqdad got hit. Complainant injured, whereas, his brother Hazrat Gul, nephew Saddam and Haqdad succumbed to their injuries, while Mujeeb ur Rehman escaped unhurt, luckily. Motive is alleged to be a dispute over landed property. Hence, the *ibid* FIR.

5. It is pertinent to mention that initially, the appellant Hamayun was tried by the learned trial Court and was convicted & sentenced to death vide judgment dated 09.12.2017. In appeal before this court, the said judgment was set aside, murder reference was answered in negative and the case was remanded to the trial Court to examine Imam Muhammad Khan ASHO, subject to cross examination by the defence, record statement of the accused within the meaning of section 342 Cr.P.C and provide the parties with an opportunity of hearing and thereafter, to pass the judgment afresh, in accordance with law vide judgment dated 21.09.2021 passed in Criminal Appeal No.258-B/2017. In compliance with the judgment of this Court, the learned Additional Sessions

Judge-III, Lakki Marwat recorded the statement of Imam Muhammad Khan as RPW-01. Statement of the appellant / accused was recorded under section 342 Cr.P.C, wherein, he professed innocence and false implication. He opted to be examined on oath as provided under section 340(2) Cr.P.C and wished to produce defence evidence as well. So, in his defence, the appellant produced defence witnesses. After hearing arguments, the learned trial Court vide the impugned judgment, convicted and sentenced the appellant Hamayun, as mentioned above.

6. The learned counsel for the parties alongwith learned A.A.G were heard at length and with their valuable assistance, the record was gone through.

7. A tragedy where three innocent souls were done to death and one got injured occurred on 09.12.2009. The matter was reported by the injured eye witness Habib ur Rehman when he brought the dead bodies of the deceased to Police Station Tajori. The report was made to one Imam Muhammad Khan, the scribe, who was examined as RPW-01. After registration of the case, the injury sheets and inquest reports of the deceased were prepared and thereafter, the dead bodies were sent to the doctor for postmortem examination. The investigating officer after receiving copy of the FIR, visited the spot and on

pointation of the eye witness, namely, Mujeeb-ur-Rehman, prepared the site plan. During spot inspection, the investigating officer collected eight empties from two different places, where the accused were shown present and bloodstained earth was collected from the driving seat of the tractor and from the respective places of the deceased, to which they fell after receiving firearm injuries. The tractor was taken to the police station, it was taken into possession and the same was got examined from an auto mechanic to assess the damage caused. Out of the accused, the appellant was arrested under section 54 of the Criminal Procedure Code, 1898 and was put behind the bars, wherefrom he was formally arrested and in that respect, his card of arrest was prepared. The convict / appellant faced trial, who was convicted vide judgment dated 09.12.2017, against which, criminal appeal No. 258-B/2017 was moved in this Court and after hearing the parties, this august Court was pleased to set aside the impugned judgment with certain directions to the learned trial Court. After doing the needful, the learned trial Court was convinced regarding the involvement of the appellant in the tragic incident and vide the impugned judgment, the appellant was convicted as stated above. Feeling aggrieved, the appellant

approached this Court through the instant criminal appeal.

8. We are conscious of the fact that in the instant case, as many as three persons lost their lives and one got injured. We understand the agonies of the prosecution and that of the bereaved families who were the worst sufferers. This was a tragedy where the assault led to the brutal killings of three innocent souls including a minor boy aging 12 years. There is no denial to the fact that every criminal case has a sad story to tell and that the attending circumstances of the cases shocks one's mind to the extreme, but this alone cannot be considered a determining factor to determine the fate of the parties involved. If on one hand, the families of those who lose their lives are the worst sufferers, then on the other, the accused charged and his family is also expecting fair trial from the courts of law; to be more specific, the courts of law are to travel with caution between the parties involved, as any favour to any of the side will frustrate the ends of justice and that's why the courts must be balanced in its approach in dilating upon the fates of all concerned, as that is the only remedy provided by the criminal jurisprudence. In the present case, the learned trial Court appreciated the available record and the recorded statements of the witnesses and thereafter,

through a comprehensive judgment, convicted the appellant for the offences he is charged with. Though, the learned trial Court took pain to dilate upon the material aspects of the case and after application of judicial mind to the attending circumstances of the present case, convicted the appellant, yet keeping before the complex circumstances of the present case, we, while sitting in appeal, feel it our obligation to re-assess and re-appreciate the already assessed and appreciated evidence, so that miscarriage of justice could be avoided. If on one side, we have three deceased and one injured before us, then on the other, seven accused of one and the same family have been charged for the deaths of the deceased. Keeping before the number of casualties and the number of accused charged, we are to assess as to whether it was the act of seven accused charged or that the number of accused has been exaggerated. Keeping in view the number of accused, it is the bounden duty of this Court to explore the unexplored avenues of this case so to exclude the possibility of convicting the innocent and acquitting the guilty. No doubt, the matter was promptly reported, that too, by an injured eye witness, but the same alone is not sufficient to give the true picture of the incident. We must take extra care to walk in the given circumstances of the present case, as any decision rendered in haste would

yield to drastic results which has never been and is not the intent and purpose behind the appreciation of evidence. We do accept that for reaching to a just and proper conclusion, it is a must to revisit the entire case and re-appreciate the available evidence on file.

9. The unfortunate incident allegedly occurred at 04:30pm, when the complainant, the eye witness and the deceased were returning home back after cultivating their fields. The place of incident is an unpaved path leading to the fields of the deceased from their houses and on either side of the thoroughfare, there are canyons (Kurajat). The site plan depicts that at the time of incident, the appellant alongwith his co-accused were present near the canyons (Kurajat) duly armed. It was reported by the complainant that no sooner they reached to the place of incident, the accused started indiscriminate firing at them, which resulted in the deaths of the deceased and to an injury on his body. We are to see as to whether the complainant alongwith the eye witness was present on the spot; and as to whether the incident occurred in the mode, manner and at the stated time; and as to whether the incident occurred at 04:30pm and soon thereafter, the dead bodies were shifted to the police station where the report was made and as to whether the witnesses witnessed the occurrence. There is no denial to the fact that from the place of

incident, bloodstained earth was taken into possession by the investigating officer and also, the damaged tractor was taken to the police station, where a report was sought from the auto mechanic. There is no denial to the fact that from two different places, eight empties of 7.62 bore were taken into possession, but what is important in this particular case is to ascertain as to whether the incident occurred in the mode, manner and at the stated time. When the report of the complainant is read in juxtaposition with the places assigned to the deceased and the tractor in the site plan, it disturbs the judicial mind of this Court, as at the time of incident, the tractor was allegedly moving from north to south with its right exposed to the assailants. This is interesting to note that lesser damage was caused to the tractor on its right, whereas, greater damage has been noticed by the mechanic as well as the investigating officer on its left, more particularly, its left rear tyre was burst due to receiving great number of fire shots. We are to assess as to whether while firing from extreme right, the damage caused and noted was possible. We are yet to ascertain as to whether the seat of injuries on persons of the deceased find support from the physical circumstances of the case, more particularly, when the accused were shown present on the extreme right. In order to resolve the controversy,

we deem it essential to go through the statements of the complainant and the eye witness, as they are in a better position to tell that when they left their houses, when they reached to the fields, when they cultivated the fields and how they reached to the place of incident? The complainant was examined as PW-10 who stated that on the day of incident, he alongwith the eye witness and the deceased left their house to cultivate the uncultivated portion of land; that they left their house at 03:45pm and reached to the field at 04:00pm; that after cultivating the remaining portion of the land, they started back for their houses in the tractor and that it was about 04:30pm that they reached to the place of incident; that no sooner did they reach to the place of occurrence, the assailants including the appellant were already present in trench duly armed and on noticing their presence on the spot, the accused stood up and started indiscriminate firing which resulted to the deaths of the deceased and injury on his body; that the dead bodies remained on the spot for an hour and thereafter, through another tractor and trolley, the dead bodies were shifted to the local police station, where the matter was reported. The witness was cross examined on material aspects of the case, where he went with dishonest improvements and he was also confronted with his report, where several inconsistencies are found.

The record tells and so admitted by the complainant that the field to which they were going to cultivate was situated at a distance of 3/4km from their houses. We are yet to know that when the complainant alongwith the deceased left their house at 03:45pm, how they reached within 15 minutes to the field and how they succeeded to cultivate the same by 04:00pm. This mechanical explanation and performance of the complainant and others ask us to intervene and assess the veracity of the witness as to whether the leaving of the house, reaching to the field, cultivating the same and returning to the spot was possible in that time; it is hard to appeal to a prudent mind. For this particular purpose, we went through the inquest reports prepared by the scribe after the report was made, but surprisingly, in all the three reports, the time regarding death mentioned in the relevant column has been tampered, which on naked eye, comes to be 18:30 instead of 16:30 hours. This tampering has never been explained by the scribe and as such, it attained a legal status which this Court is under the obligation to appreciate. To ascertain as to what should be the exact time of occurrence, we feel it essential to read the opinion rendered by the doctor alongwith the inquest reports prepared by the scribe and the statements of the eye witnesses recorded before the trial Court. An attempt was

made by the complainant as well as the eye witness to bring their statements in line with the inquest reports and the opinion of the doctor. The record tells that the doctor, during postmortem examination, mentioned the time between the injury and death as one to two hours, whereas, the complainant, during his Court statement, stated that the dead bodies remained on the spot for an hour and thereafter, those were shifted to the police station in a tractor and trolley arranged by their relatives. The complainant while reporting the matter, left no ambiguity in telling that the deceased soon after receiving firearm injuries fell to the ground and breathed their last. If the doctor was correct in his opinion regarding the time between the injury and death then the complainant should have disclosed the same, but after realizing the delay caused in reporting the matter, an attempt was made to convince this Court in holding that in fact, the incident occurred at 04:30pm and the matter was reported at 06:10pm. We cannot lose sight of the fact that the incident occurred in the month of December and if we take the initial mentioned time in the inquest report to be correct then by the time, the darkness had already prevailed and this was for the witness to tell that how could they identify the accused while present at a considerable distance.

10. The record tells that the place of incident is an abandoned thoroughfare with ditches and steeps on its either side. We are yet to know that when the accused had the intention to commit the murders of the deceased, then what forced them to expose themselves to enable the complainant and the eye witness to identify them, as the accused were allegedly present near the canyons (Kurajat), that too, duly Morchazan. The conduct displayed by the accused does not appeal to a prudent mind. The eye witness was examined as PW-11, who though, narrated the events in the same fashion as were disclosed by the complainant, but this witness too went in abnormal improvements with the utmost attempt to bring his case in line with the site plan and the medical evidence. The complainant while reporting the matter stated that when they reached to the place of incident, the accused started indiscriminate firing, which resulted in the casualties, whereas, during his Court statement, he improved this part of his statement and stated that all the accused fired in a single manner. The accused charged are seven in number duly armed with Kalashnikovs, but interestingly, the investigating officer succeeded in collecting eight empties of 7.62 bore from two different places. As the place is deserted and nobody was present around, then why the investigating officer succeeded in

collecting only eight empties of 7.62 bore despite the fact that the complainant stated that soon after firing, the accused decamped from the spot. The number of injuries on persons of the deceased and that on the complainant further increases the anxiety of this Court regarding the involvement of seven persons in the episode. When there was indiscriminate firing, then why greater damage was not caused to the tractor in question and that why instead of getting its right rear tyre burst, the left one received the fire shots. There is still prevailing the atmosphere of uncertainty regarding the credibility of the witnesses and the manner in which the incident occurred. The investigating officer collected bloodstained earth from the tractor, but he never mentioned as to whether the same were taken into possession from the driving seat or other parts of the tractor. The deceased and the complainant were shown initially present in the tractor at the time of firing and after receiving firearm injuries, they fell to the ground and in the site plan, both the places i.e. the initial places, where they were present before firing and the latter to which they fell after receiving firearm injuries. The design of the driving seat in a tractor is of such a nature that the driver while driving the tractor is sitting duly sunk with his feet extended on either side and there is hardly an occasion that after receiving firearm injuries,

the driver would fall to the ground. This aspect of the case has further troubled the judicial mind of this Court in holding as to whether the driver received firearm injuries while sitting on the driving seat or he received the same while present on the ground. When the tractor was taken to the auto mechanic for its physical examination, no spent bullet was extracted therefrom. The cumulative effect of what has been stated above leads this Court to hold that the incident did not occur in the mode, manner and at the stated time. Another important aspect of the case is that most of the deceased received firearm injuries either on their left or on their right chest with its exit on the right. In order to appreciate this particular aspect of the case, we deem it essential to look into the respective places of the deceased they were occupying at the time of firing. One of the deceased was shown occupying the extreme left of the driver with his face exposed to the accused, whereas, the other was shown seated on the rear plank located just behind the driving seat with his face facing south, whereas, the complainant is shown sitting on the plough of the tractor with his right exposed to the assailants, but the injuries caused on their bodies do not find support from the site plan, as in case of the deceased sitting on extreme left of the driver, would have received firearm injuries on his chest, whereas, the one sitting on

the plank would have received the same on his right, but the physical circumstances of the case do not support the stance of the complainant in particular and that of the prosecution in general. The investigating officer did not visit the fields, which a little earlier, the complainant party had cultivated and even, no documentary evidence was collected in that respect to tell that the landed property was owned by the complainant. The investigating officer appeared before the Court as PW-09, who was cross examined on material aspects of the case, but on one hand, admitted that he did not visit the fields, where the complainant side had gone to cultivate and that he did not record the statements of independent witnesses in that respect. Though, one Muhammad Khan was examined as PW-06, who stated that there was a dispute over landed property between the parties and the matter had been patched up in old good days and that the parties after satisfying each other on special oath, pledged to avoid differences in that respect, but apart from PW-06, no independent witness came forward to support the same and as such, the same cannot be taken into consideration to hold the accused responsible for the episode. When the Court finds inconsistencies, contradictions and improvements in the prosecution evidence and when it reaches to a conclusion that the occurrence has not taken

place in the mode and manner as alleged and presented by the prosecution then the benefit has always been extended to the accused charged. In this regard, wisdom can be derived case laws reported as ***"Jawad Vs The State and another" (2020 YLR 1462)*** and ***"Jalat Khan alias Jalo Vs The State" (2020 PCrLJ 503)***.

11. The presence of the eye witness does not spell out from the record, which further gets support from his statement recorded before the trial Court, where he stated that though, he put his thumb impression on the report made by the complainant, but the same was not read over to him. This portion of the statement of the eye witness has put us on guard regarding his presence at the time of report, as he did not disclose that the complainant reported the matter in his immediate presence, so there is every likelihood that the same was made in his absence. It was incumbent upon the police official, who registered the first information report to have explained the details provided by the complainant in his report to the eye witness.

12. The prime question for this Court to determine is as to whether the net has been thrown wide and that all the male members of the family were charged with ulterior motives. In order to appreciate this particular aspect of the case, we deem it essential to discuss the

inter se relationship between the accused. This has been brought on record that the accused are closely related to one another in the capacity of nephews, cousins and brothers, but the prosecution could not succeed in creating link of each / individual accused to the disputed property. The site plan depicts that the accused at the time of firing were present to the extreme right of the deceased in a row at two different places. The matter can better be understood when the seat of injuries both on the deceased and the tractor are taken into consideration with the places assigned to the accused at the time of firing. As is evident from the site plan, if the accused present at points No.9, 10, 11 & 12 would fire, then in that eventuality, the tractor must have received bullet marks on its front and major damage would have been caused, but the record does not support the stance of the complainant. If the accused at the above stated points would fire on the deceased, then the dimension and the locale of injuries would fall in harmony with the directions of the fire shots made by the accused from their respective places, but even, in that respect, we failed to find any harmony between the witnesses and the record. There is no denial to the fact that during spot inspection, the investigating officer collected eight empties of 7.62 bore from the places assigned to both the groups of the accused, but we

are yet to know that when the accused had gathered together to eliminate the complainant side, then why such a limited number of empties were procured from the spot despite the fact that the spot after the occurrence was under the control of the complainant party and that being a deserted area, there was no chance of its misplacing. The mode and manner coupled with the seat of injuries on the bodies of the deceased as well as the complainant help us in forming an opinion that the participation of all the seven accused charged does not appeal to a prudent mind and even, the same is not possible. If the eye witness was available at the time of occurrence, then he would have received firearm injuries, as rest of the people did, but his escaping unhurt is another factor, which overshadows the clarity and right from the beginning till the end, the mist regarding the involvement of seven accused in the incident could not be removed. We do not doubt the place of incident, the deaths of innocent souls and an injury on the body of the complainant, but we are not ready to accept that it was the doing of all the seven accused charged. When such an atmosphere is created, then it is the bounden duty of the courts of law to rescue the innocent and to punish the guilty. As all the accused charged are given the role of effective fire shots, so it is hard to determine the individual liability and participation

of each individual accused. Once the Court comes to a conclusion that the number of accused is exaggerated and once it forms an opinion from the attending circumstances of a particular case that the act committed was the doing of a limited number of accused then the exaggerated charge brought by the complainant will react upon the veracity and authenticity of the collected material and recorded statements. Since immemorial, it has been held that better to acquit ten culprits than to convict an innocent soul. Both the English Jurisprudence as well as our religion are in consonance on this particular aspect of acquittal and conviction. We went through the relevant record as keen observers, but could not lay hands on any concrete evidence which could convince that all the accused charged are responsible for the deaths of the deceased and injury to the complainant. When a stage comes, where it becomes impossible that who, out of the accused charged, committed the offence, then the courts are left with limited option to fix the liability and in such eventuality, the benefit of the same is always extended to all the accused charged and the present case is no exception. Once Court comes to a conclusion that the number of accused has been exaggerated, then extra care and caution is required to be taken while appraising the evidence. In this respect,

wisdom can be derived from the judgment rendered by the Apex Court in case titled ***"Muhammad Zaman Vs The State and others" (2014 SCMR 749)*** wherein it was held that:

> ***"The number of assailants in the circumstances of the case appears to have been exaggerated. It seems that most of the persons including the respondents have been charged because of previous enmity. The tragedy may have been enacted by Mukhtar who has gone into hiding or Munawar who has been acquitted because the deceased Shabbir was alleged to have illicit relations with their sister, but many who have no visible nexus with this part of the story have also been roped in. It is so because it is customary in this part of the country to throw wide the net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the one who is innocent or who is actually responsible for the commission of the***

crime. The Court, therefore, is required to exercise much greater care and circumspection while appraising evidence."

13. As the number of injuries also do not commensurate with the number of accused charged and *prima facie*, the net appears to have been thrown wide, so this aspect nullifies the mode and manner as alleged and presented by the prosecution, which, in turn, reacts qua the involvement of accused in the commission of offence. In this regard, wisdom can also be derived from the judgment rendered in case titled ***"Malik Aamir Sultan and 02 others Vs The State and another" (2018 MLD 1635)*** wherein it was held that:

The number of injuries does not commensurate with the number of accused party. More so, all the injuries bear one and the same dimension. It reflects that it is the job of one person but in order to throw the net wide, the number of accused has been exaggerated as three brothers and two unknown accused have been charged. The empties recovered were not sent in order to

ascertain whether the same were fired from one or different weapons. What was the reason that this opinion was not sought by the Investigating Officer, the answer of that is not available on the record of the case and it can be presumed that the Investigating Officer was conscious of the fact that number of the accused has been exaggerated and if such report is sought, that would be detrimental to the case of the prosecution. Thus, there is element of concealment and exaggeration as well which further nullifies the mode and manner as set out by the prosecution.

14. Keeping in view the recovery of limited number of crime empties, the number of injuries, the number of bullets which hit the tractor and the surrounding facts of the present case, it can safely be held that the act was not the job of seven accused, who too are shown to have fired indiscriminately through their respectively Kalashnikovs. Had seven assailants started indiscriminate firing through Kalashnikovs as alleged by the prosecution, the result

would have been more drastic than the present one. At this juncture, we would like to make reference to a judgment passed in case titled ***"Pasand Khan Vs The State" (2011 YLR 1664 Peshawar)*** where the Court, on having come to a conclusion that the offence committed was not the act of three accused, but the job of a single person, extended the benefit of doubt to the accused and acquitted him of the charges.

15. The medical evidence does not support the stance of the complainant and both the ocular account and the medical evidence is in conflict with each other. As discussed in the earlier part of this judgment, the seat of injuries on persons of the deceased and that of the complainant does not find support from the site plan. As the site plan depicts that at the time of firing, the accused were present on the extreme right and that one of the deceased, who was sitting to the extreme left of the driver, was facing the accused and in such eventuality, he would have received firearm entry wounds on his chest with their exit on his back, but the situation is otherwise. Similarly, the seat of injuries on person of the driver, who was occupying the driving seat of the tractor, also contradicts the statement of the complainant. We cannot ignore that one of the deceased was sitting just behind the driver on a wooden plank with his face exposed to the

assailants, but even, the seat of injuries on his body do not find support from the places assigned to the accused including the appellant. Though, medical evidence is confirmatory in nature and in presence of trustworthy and confidence inspiring eye witness account, it cannot overshadow the same, but in case where the eye witness account fails to convince on a particular aspect of the case, then the conflict between the two would creep down to the roots. As in the present case, the testimony of the complainant regarding the mode, manner and the number of accused charged does not convince the judicial mind of this Court, so this Court lurks no doubt in mind that the conflict between the ocular account and the medical evidence has damaged the prosecution case beyond repair. Even the time mentioned by the doctor between the injury and death contradicts the very statements of the witnesses and as such, its cumulative effect can be read only and only in favour of the appellant, that too, at the cost of the prosecution. In case titled ***"Najaf Ali shah Vs the State (2021 SCMR 736),*** it is held that:

> ***"The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the***

prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

16. The record tells that the investigating officer collected eight empties of 7.62 bore from the place of incident and the same were sent to the forensic science laboratory to ascertain as to whether the same were fired from one or different weapons. Though, the report received tells that the same were fired from different weapons, but the same is silent that the collected empties were fired from seven weapons. Keeping in view the limited number of empties and the laboratory report, we are not hesitant to hold that the number of accused is exaggerated. The investigating officer did not record statement of the Muharrir in whose custody the same were lying and even, the police official who took the same to the laboratory for the purpose, was not examined. The law is settled that once the safe custody and safe transmission of the collected empties is not established on record, then the same cannot be taken into consideration.

As the prosecution failed to prove its safe custody and safe transmission, so we are not ready to term the laboratory report as a valid piece of evidence and the same is discarded as such. In case titled ***Hayat Ullah Vs. The State (2018 SCMR 2092)***, it was held that:-

> ***"Much reliance was placed on the recovery of pistol from the appellant and empty from the place of occurrence, we observe that the empty was recovered on 11.02.2006 and pistol was recovered on 22.02.2006 and till the recovery of the pistol the empty was not sent to the firearm expert and the empty and the pistol both remained together in the Malkhana and thereafter transmitted to the office of the Forensic Science Laboratory. So the recovery is inconsequential. Even otherwise recovery alone is not sufficient for conviction and it is always termed as a corroborative piece of evidence. It is settled law that one tainted piece of evidence***

can't corroborate another tainted piece of evidence."

In case titled, ***"Muhammad Darvaish and others Vs the State" (2019 PCr.LJ Lahore 1086)*** it is held that:

"We have also embarked upon PFSA report (Exh.PP), according to which guns recovered from Darvaish and Muhammad Khan (appellants) were found wedded with crime empties secured from spot. However, after having noticed an anomaly, according to which prosecution failed to prove the safe custody and transmission of crime empties to PFSA, no sanctity can be attached to the report (Exh.PP)."

17. The complainant while reporting the matter, alleged the motive to be the landed property dispute, but the record tells that the parties had resolved their differences through elders of the locality many years earlier to the present incident and that the investigating officer did not record statements of independent witnesses in that respect. True that PW-06 appeared before the trial Court and stated that in good old days, the parties had landed property disputes, but he alongwith

others intervened and the differences were bridged and thereafter, the parties were living a happy life. As in the episode, seven accused of the same family are charged, so it was essential for the prosecution to have brought on record the individual interest of every individual accused in the landed property, which was allegedly shown as the subject matter of dispute. The record is silent that which accused had what interest and in such eventuality, we are not hesitant to hold that there was no common object with the accused to come to the place of incident duly armed. When the prosecution failed to convince on this particular aspect of the case, we lurk no doubt in mind that the alleged motive could not be proved on record. True that weakness or absence of motive hardly plays a decisive role, both in accepting and rejecting the prosecution story, but in particular cases, it has its importance and in case of its failure, the prosecution is the worst sufferer. As the bone of contention between the parties was the landed property dispute, so it was incumbent upon the prosecution to have proved the same by bringing independent witnesses, but it could not and as such, the involvement of seven accused with the same purpose is beyond comprehension.

18. It was argued that the appellant remained absconder for considerable long period with no

explanation on record and that the same is the strongest piece of evidence to help in convicting the appellant and that it was rightly considered by the learned trial Court. We are not in a happy mood to accede to what was submitted, as in that eventuality, this Court will venture in the realm of probabilities with an attempt to change the standard of appreciation of evidence. As the law is settled and so held by the superior courts of the country that abscondance is not the substantive piece of evidence, rather it is a circumstance which can only be taken into consideration, provided the prosecution nearly succeeds in bringing home guilt against the accused charged. As in the instant case, on one hand, the witnesses went with dishonest improvements and on the other, the physical circumstances of the present case do not support the prosecution story, so in the like situation, mere abscondence will hardly play a role. When the prosecution, due to exaggerated charge against the accused, failed to convince, so we lurk no doubt in mind that the abscondence alone will hardly turn the dice and the same hardly attracts our attention.

19. The cumulative effect of what has been stated above leads this Court nowhere, but to hold that the prosecution could not succeed in bringing home guilt against the appellant and that the impugned judgment is

suffering from inherent defects, which calls for interference. The learned trial judge while appreciating the available record misdirected himself both in law and on facts of the case. The impugned judgment is, therefore, set aside. The appellant is acquitted of the charges, he shall be released forthwith, if not required to be detained in connection with any other criminal case.

20. As the appeal of the appellant is allowed and he is acquitted of the charges, so in such eventuality, the instant Criminal Revision Petition No.49-B/2021 has lost its efficacy. The same cannot proceed further and is dismissed as such.

21. The above are the details reasons for our short order of even date.

Announced
23.06.2022
Ghafoor Zaman/Steno

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Sahibzada Asadullah