Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

Criminal Appeal No.246-A/2022

Amanullah etc… **(Appellants)**

versus

The State etc… **(Respondents)**

Present: Mr.Abdul Saboor Khan, Advocate for appellant.

Malik Amjad Inayat, Assistant Advocate General for State.

Mr.Najeem-ul-Hassan Khan, Advocate for respondent/complainant.

Date of hearing: **24.01.2024.**
Date of Announcement: **31.01.2024.**

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- This single judgment is directed to decide the instant **Criminal Appeal No.246-A/2022** titled **"Amanullah etc vs. The State etc"** as well as the connected **Criminal Revision No.54-A/2022** titled "**Jan Muhammad vs. Amanullah alias Babu etc**" as both are the outcome of the one and same judgment of learned Additional Sessions Judge-I,

Battagram dated 12.10.2022 passed in a case registered vide FIR No.44 dated 19.08.2016 under sections 302, 324, 452, 109, 337-A(ii), 337-D, 34 PPC, at Police Station Pazang, Tehsil Allai, District Battagram, whereby accused Parvez and Aman Ullah (appellants herein) have been convicted under section 302(b) PPC and sentenced to imprisonment for life as Ta'zir on two counts each with compensation amount of eight hundred thousand rupees (Rs.800,000/-) each to be paid to the legal heirs of the deceased namely Mst.Gul Fareena and Jamil under section 544-A Cr.PC. Similarly, appellant Aman Ullah and Parvaiz were also convicted under section 324/452/34 PPC with seven/seven years rigorous imprisonment as Tazir for attempting at the lives of the injured through effective firing and at the lives of complainant and the eyewitnesses through ineffective firing by entering into their house. Accused Aman Ullah and Parvaiz were further convicted under section 337-A(ii), 337-D/34

PPC for two years simple imprisonment with compensation amount of two hundred thousand rupees (200,000/-) each to be paid to injured Mst.Fatima under section 544-A Cr.PC for causing injuries on her person. In default of payment of compensation amount, the convicts shall further undergo simple imprisonment for six months. All the punishments awarded to the appellant Aman Ullah and Parvaiz were ordered to run concurrently. Benefit of section 382-B Cr.PC was also extended to the appellants/ convicts, whereas co-accused Muhammad Nabbi was acquitted from the charges levelled against him.

2. Precisely, the facts of the present case are that the complainant namely Jan Muhammad (PW-12) alongwith the dead body of his mother Mst.Gul Fareena, nieces injured Mst.Bibi Fatima, minor Mst.Sabahat and nephew Jamil Ahmad came to Police Station Pazang and lodged report to the effect that he alongwith his family members were present in their house; at

about 08.00 P.M (Issha Vela), his cousin Parvaiz and nephew Aman Ullah (appellants herein) duly armed with deadly weapons entered into the house and started firing at them; the fire shot of appellant Parzaiz hit his mother Mst.Gul Fareena, whereas the fire shot of appellant Aman Ullah hit Bibi Fatima, minors Mst.Sabahat and Jamil Ahmad who sustained firearm injuries on their persons. It is further alleged that the appellants have committed the said offence on the abetment of co-accused Muhammad Nabbi. After the commission of the offence, the appellants fled away from the spot; the occurrence was witnessed by his father Aleem Ullah and his nephew Shakeel Ahmad; on their hue and cry, the people of the neighbourhood attracted to the spot and with their held the injured were brought to the Police Station for lodging of the report, however, his mother Mst.Gul Fareen succumbed to the injuries on the way to the Police Station; no motive was stated for the occurrence; report of the complainant was duly reduced into FIR (Ex.AR-PW-1/1).

3. After the completion of investigation, the complete challan was submitted before the court against appellant Amanullah and co-accused Muhammad Nabi upon which a full-fledged trial was conducted against them and on the conclusion thereof, appellant Amanullah was initially convicted and sentenced to imprisonment for life on two counts etc by the learned trial court, vide judgment and order dated 13.06.2019, however, being aggrieved of the said judgment and order, appellant Amanullah had filed appeal No.195-A/2019 before this court which was allowed and the aforesaid impugned judgment and order of the learned trial court was set aside and the case, for want of some deficiencies in the charge, was remanded back for denovo trial after reframing of the charge in accordance with guidelines penned down by this court vide order and judgment dated 09.03.2021. In the wake thereof, the learned trial court reframed the charge against both the appellants to which they

pleaded not guilty and claimed trial and commenced the denovo trial. Prosecution in order to prove its case against the appellants, produced as many as seventeen (17) witnesses including AR-PW-3 namely Ali Zaman ASI who is marginal witness to recovery memo Ex.PW-3/1 and conducted partial investigation in this case. AR-PW-5 is Hizbur Rehman HC. He is marginal witness to recovery memo Ex. AR-PW-5/1 vide which the SHO took into possession the Kalashnikov 7.62 bore alongwith 12 live rounds during the raid on the house of appellant Parvez. AR-PW-6 is lady Dr.Kausar Mehboob who conducted autopsy on the dead body of deceased Gul Fareena vide post mortem report Ex.AR-PW-6/1. She also examined injureds Mst.Sabahat and Bibi Fatima vide MLCs Ex.AR-PW-6/4 NSD Ex.AR-PW-6/5. AR-PW-7 is Dr.Gul Khan. He examined Jamli vide MLC Ex. AR-PW-7/1. PW-8 is Mehmood Ali Shah ASI. He also conducted partial investigation in this case and recovered

the weapon on the pointation of appellant Amanullah vide recovery memo Ex.PW-8/20. PW-8 is Ali Akbar (then) O.I.I. He also conducted partial investigation to the extent of appellant Parvez. PW-10 is Nosherwan son of Aleemullah. Though he was present at Abbottabad on the night of occurrence, however, he furnished some fact regarding post occurrence and stood marginal witness to recovery memo Ex.PW-8/20 as well as pointation memo Ex.PW-9/8. PW-11 namely Shakeel Ahmad, PW-12/complainant namely Jan Muhammad and PW-13 namely Mst.Bibi Fatima who are statedly eyewitnesses have provided ocular account of the occurrence. PW-15 is Dr.Nawab Ali Khan. He conducted autopsy on the dead body of deceased Jamil vide post mortem report Ex.PM/1. PW-16 is Muhammad Arshad Khan SHO. He alongwith Imtiaz Ali Shah SI/O.I.I, Ali Zaman ASI and other police officials conducted raid on the house of accused on 20.08.2016 and during raid

proceedings, accused Muhammad Nabi was arrested and from room of the residential house, he recovered one Kalashnikov bearing No.1975-AH-4177 loaded with 12 live cartridges vide recovery memo Ex.PW-16/1. PW-17 is Imtiaz Ali (then O.I.I). He conducted investigation in this case. When prosecution closed its evidence, statements of the appellants were recorded under section 342 Cr.P.C before the learned trial court, wherein they claimed innocence, however, they neither wished to produce the defense evidence nor desired to be examined as witness under section 340(2) Cr.PC. Then after hearing arguments of learned counsel for the parties, the learned trial court vide impugned order and judgment dated 12.10.2022 convicted and sentenced the appellants while acquitted co-accused Muhammad Nabi as detailed in Para No.1 of this judgment. The appellants have now called in question the aforesaid order/judgment of conviction and sentence through the instant

criminal appeal, while the complainant namely Jan Muhammad has filed the connected **Criminal Revision No.54-A/2022** for enhancement of sentence of the appellants.

4. Arguments of learned counsel for the parties and learned Assistant Advocate General were heard in detail and record perused with their able assistance.

5. It is the case of prosecution as set up by the complainant namely Jan Muhammad (PW-12) in the First Information Report (Ex.PA) when he brought the dead body of his mother namely Mst.Fareena accompanied by injured Bibi Fatima, Mst.Sabahat and Jamil Ahmad to the police station and reported to AR-PW-01 to the effect that he alongwith his family members were present in their house when at about 08.00 p.m. Ishha Vela, both the appellants who are father and son inter-se armed with the deadly weapons entered into their house and started firing at them and as a result thereof, the fire shot of appellant Parvaiz hit his mother Mst.Gul

Fareena, whereas fire shots of appellant Aman Ullah hit Bibi Fatima (PW-13), Mst.Sabahat and Muhammad Jameel and both the appellants have committed the said offence due to the abetment of acquitted co-accused Muhammad Nabbi. After the commission of offence, statedly both the appellants decamped from the spot. The occurrence was stated to be witnessed by his father Aleem Ullah and his nephew Shakeel Ahmad. No motive was disclosed in the First Information Report (FIR).

6. In this case, the ocular account has furnished by PW-11 Shakeel Ahmed, PW-12 the complainant namely Jan Muhammad and PW-13 namely Mst.Fatima, whereas PW-10 Nosherwan though has not been mentioned in the FIR as eyewitness of the occurrence, however, he too has appeared in support of the prosecution version. It may be noted that in evry criminal case before analyzing the credibility and legal worth of the evidence so furnished by the prosecution witnesses, first the

prosecution witness(es) have to prove their presence on the spot and at the relevant time. In the present case though the complainant namely Jan Muhammad and PW Shakeel Ahmad have alleged that they were present on the spot and have seen the occurrence, however, their presence on the spot is not established, which is to be highlighted as under.

7. As far as the presence of the complainant Jan Muhammad on the spot is concerned, it is part of the record that he is not residing in the house where the crime was committed as the spot house is the house of his brother namely Nosherwan and this fact has also been admitted by he himself as PW-12 as well as by PW-13 Mst.Bibi Fatima, who has categorically admitted that the complainant alongwith his kids were residing with his father Aleem Ullah in another house. It is also part of the evidence that father of the complainant namely Aleem Ullah is having two houses and it is also part of

the record that the other house of the complainant's father, where the complainant is residing, is situated at a distance of 10/15 minutes from the crime house, therefore, in the given facts and circumstances, the prosecution was required to establish the presence of PW-12 Jan Muhammad at the time and place of the occurrence and especially when the occurrence has taken place at nighttime. As far as the presence of PW-11 Shakeel Ahmad on the spot is concerned, the same too is highly doubtful as admittedly two of his younger sisters namely Mst.Fatima and Mst.Sabahat and one of his younger brother namely Jamil had sustained severe injuries on their bodies, however, he did not opt to stand as complainant of the instant occurrence and instead the prosecution opted to register the instant FIR through Jan Muhammad who is admittedly residing in another house and PW Shakeel even did not endorse and second the contents of the FIR. Had he been present he

would have definitely been acted either as a complainant of this case or at least a seconder of the contents of the FIR.

8. The presence-cum-conduct of PW Shakeel Ahmad on the spot is also highly doubtful because admittedly when two of his younger sisters, a younger brother and his paternal grandmother sustained severe injuries but he on his own did not make any effort to shift their injured siblings and grandmother to the hospital so as to save their lives and over and above when the dead body and the injured victims were statedly shifted to the local police station and when the report was lodged even thereafter, as admitted by PW-13 Shakeel Ahmad himself in his cross-examination, that he did not accompany the injured siblings to the hospital. Such conduct on the part of PW-13 Shakeel Ahmad casts a serious doubt on his presence at the time and place of the occurrence. The presence of PW-12 Jan

Muhammad and PW-11 Shakeel Ahmed on the spot also does not find support from the site plan (Ex.PW-17/2) as as per the entries of the site plan they were shown at points No.8 and 9 and they were well within the firing range especially from the place assigned to the appellant Aman Ullah and who instead of targeting the two minors Mst.Sabahat and Jamil Ahmad, could have easily targeted them had they been present at the time and place of the occurrence and specially when they were at a distance of a few feet from the appellants.

9. It is also relevant to mention here that the statement of injured witness Mst.Fatima recorded under section 161 Cr.PC as well as statement of her mother namely Sarzamina recorded under section 161 Cr.PC would also show that they have excluded the presence of Jan Muhammad and Shakeel Ahmad as eyewitnesses of the occurrence as she has not specifically named them to be the eyewitnesses of the occurrence. In view of the above

discussions, the prosecution has not been able to prove that PW-12 Jan Muhammad and PW-11 Shakeel Ahmad were present on the spot and thus their evidence could not be considered for the purpose of the impugned conviction and sentence. In the case titled "**SUFYAN NAWAZ and another vs. The STATE and others**" reported as **2020 SCMR 192**, the Supreme Court of Pakistan set aside conviction and sentence of appellant Sufyan Nawaz and acquitted him of the charge framed against him by observing that complainant is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt. Similarly, in another case titled "**ABDUL JABBAR and another vs. The STATE**" reported as **2019 SCMR 129**, the Supreme Court has held that it is the settled principle of law that once a single loophole is observed in a case presented by the prosecution where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. At the cost of reiteration, it has been

observed by us that, in a case, where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in lodging the FIR; the presence of eye-witnesses is not established; there are irreparable dents in the case of the prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from being proved and almost non-existent, the said Court fell in gross error in maintaining the conviction of the appellants. In these circumstances and after an independent evaluation of evidence available on record, we have no manner of doubt in our minds that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt. In another case titled "**KHALID @ KHALIDI and two others vs. THE STATE**" reported as **2012 SCMR 327**, the Supreme Court has observed that the ocular account is not of such a character which could be relied upon in order to convict a person on a capital charge when the same is not corroborated

by any other independent evidence as the presence of both the eye-witnesses at the place and time of occurrence is not established as their statements have been disbelieved by the learned appellate court regarding Sultan Mehmood acquitted accused. In the case titled "**Khawaja AHMAD KHAN and 2 others vs. THE STATE**" reported as **1998 PCr.LJ 1192**, this court by allowing an appeal against conviction has held the ocular testimony of related, interested and inimical witnesses has not been supported by any other independent and unimpeachable source. It was further held that the presence of the eye-witnesses is highly doubtful. Likewise, in the case titled **"ZAFAR vs. The STATE and others"** reported as **2018 SCMR 326,** the Supreme Court of Pakistan has observed that had they been present at the relevant time, they would not have waited for the murder of their father and would have raised alarm the moment they saw the accused and his co-accused standing near their father.

10. As far as the statement of PW-13 Mst.Bibi Fatima is concerned, though she has received injuries in the occurrence, however, it is settled law that injuries on the body of a PW is not a stamp that such witness is telling the whole truth as despite the fact that she being a victim of the occurrence was an important witness for the prosecution, however, she has not been associated with the investigation of the case as she in her cross-examination has categorically admitted that no proceedings were conducted before her by any police officer. It is also relevant to mention here that in the FIR (Ex.AR-PW-1/1), the complainant has not disclosed any motive for the occurrence but when she appeared in the court as PW-13 she introduced the motive of the occurrence by stating that infact her engagement had been made with her cousin namely Abdullah and that the appellant Aman Ullah was annoyed of the same as he wanted to marry her. She has also

contradicted her own stance as in initial portion of her cross-examination she has stated that no proceedings were conducted in her presence by any police officer but in the later portion she has stated that she has shown to the I.O. the place of her presence at the crime scene. In view of the contradictory and mutually destructive stance of this PW, her statement too could not be relied upon. The Supreme Court of Pakistan in the case titled **"Mst.ASIA BIBI vs. The STATE and others"** reported as **PLD 2019 Supreme Court 64**, while allowing the appeal, setting aside the conviction and sentence of the appellant recorded and upheld by the courts below and acquitting the appellant has observed that there were also discrepancies between the examination-in-chief of the complainant and the complaint lodged by him. Such material contradictions and inconsistent statements of the witnesses and complainant cast further doubts on the coherence of the evidence.

11. It is the case of prosecution that both the appellants who were duly armed with Kalashnikovs entered the house of complainant party and made indiscriminate firing at the inmates of the house, however, on the available record the prosecution has not been able to prove that both the appellants have in fact participated in the occurrence as the same appears to be the doing of a single person. It may be noted that as per the prosecution version, total seven empties of 7.62 bore were recovered, i.e. three from a place assigned to appellant Parvaiz, whereas four empties from a place assigned to appellant Aman Ullah, however, the I.O did not bother to send the said empties to the Forensic Science Laboratory to determine that as to whether they have been fired from a single weapon or more and the aforesaid lacuna in the prosecution case becomes more significant when it is seen that the I.O/PW-17 in his cross-examination has admitted that he had sent the empties to the Fire

Arm Expert to determine whether they have been fired from one weapon or more than one, however, astonishingly in this regard no report of the FSL is available on the file and even the learned defence counsel has confronted the I.O. with the suggestion that since the report was not supporting the version of the prosecution, therefore, the same has not been placed on file.

12. Another aspect of this case which casts a serious doubt on the participation of both the appellants in the occurrence is that it is the case of the prosecution that both the appellants were having Kalashnikovs with which they had fired, however, only seven empties are shown to have been recovered from the spot. It may be noted that in the chamber/Bandolier of a Kalashnikov, 30 cartridges could be loaded and thus if both the Kalashnikovs as attributed to the appellants were filled even to the half then there must have been recovery of more empties as alleged by the prosecution. Similarly, the number of injuries on the bodies of the victims i.e. <u>one</u> on

the deceased namely Gul Fareena, one injury on the deceased Jamil and one injury on PW Fatima and one injury on Mst.Sabahat would also show that in fact it is one-man doing occurrence, therefore, it is spelling out all around from the record that the complainant has implicated atleast one innocent person amongst the two and thus benefit of the same has to be extended to both the appellants.

13. It is also relevant to mention here that as per the prosecution case, the occurrence has taken place at 08.00 p.m. Ishha Vela, however, neither in the site plan (Ex.PW-17/2) any source of light has been shown nor the prosecution witnesses in their statements have explained that as to how they identified the appellants in the pitch-darkness of night and more specifically when it is not the case of complainant party that before starting firing any conversation has taken place between them so as to identify the appellants through their voices. Since under the established

jurisprudence when an occurrence is taken place in the darkness of the night then the prosecution is bound to explain the accurate identity of the assailant(s) which are apparently missing in the instant case. In the case titled **"USMAN alias KALOO vs The STATE"** reported as **2017 SCMR 622,** the Supreme Court of Pakistan on acceptance of appeal of the convict and by acquitting him of the charges, has observed that the occurrence in this case had taken place in the dead of a night, i.e. at 11.30 p.m. on 05.03.2005 and the investigating officer had stated before the trial court in black and white that no electric light was available at the spot. The occurrence in issue had taken place outside the house of the deceased and in the absence of any source of light at the spot the question regarding identification of the assailant had assumed pivotal importance but the prosecution had paid no heed to the same. Similarly, the Supreme Court in the case titled **"Mst.SHAZIA**

PARVEEN vs The STATE" reported as **2014 SCMR 1197,** on acceptance of appeal of the convict and by acquitting her of the charges observed that the incident in issue had taken place at about 10-30 p.m. inside the house wherein the appellant and her husband were living and no source of light at the spot had been disclosed or shown anywhere on the record. In the case titled **"The STATE vs. SHAH alias SHANA and 4 others**" reported as **1994 SCMR 152,** the Supreme Court of Pakistan has dismissed the appeal against a cquittal by observing that considering the state of evidence as it is, the High Court was justified in taking the view that there was no satisfactory material on the record to establish the identity of the culprits and in the circumstances it was difficult to hold that with any measure of certainty that the respondents had taken part in the occurrence. We find no basis for interfering with the judgment of acquittal recorded by the High Court.

(DB) Hon'ble Mr.Justice Kamran Hayat Miankhel,
Hon'ble Mr.Justice Muhammad Ijaz Khan.

(Jamil)

14. Another aspect of this case which casts doubt on the prosecution story is that the house, where the crime has been shown committed is described and depicted in the site plan (Ex.PW-17/2), the same would show that it is a house in lands having no boundary walls. It is also reflecting from the site plan (Ex.PW-17/2) that the said house is surrounded by the maize crops and thus the appellants could have attacked the complainant party from outside the house or from the nearby maize crops instead of taking any risk to enter the house of the complainant party especially when it appears that it was a house without any boundary walls.

15. It is also relevant to mention here that the prosecution has withheld the best available evidence as statedly the occurrence has taken place inside the house of Nosherwan who is the brother of the complainant namely Jan Muhammad and though Nosherwan who appeared as PW-10 has stated that on the night of the occurrence he was outside his home at

Abbottabad, however, PW Sarzamina, who is the wife of the aforesaid PW Nosherwan was very much present in her house and her statement under section 161 Cr.PC has also been recorded, however, she has not been produced by the prosecution. Similarly, another injured/victim namely Mst.Sabahat has also not been produced by the prosecution and over and above, one Aleem Ullah who is the husband of deceased Gul Fareena and father of the complainant and he was also shown as an eyewitness of the occurrence in the FIR, has also been abandoned by the prosecution being unnecessary, therefore, prosecution has withheld important pieces of evidence which could have been produced through production of these witnesses, therefore, an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984 has to be drawn that had the aforesaid witnesses been produced they would have not supported the version of prosecution. In the case tilted **"MUHAMMAD**

ASIF vs. The STATE" reported as **2017 SCMR 486** the Supreme Court of Pakistan has held that in our considered opinion these two independent witnesses could provide the first degree of evidence of reliable nature, thus, adverse inference has been drawn that because they were not supporting the prosecution case so set up, therefore, they were dropped at the trial. In this way, the best evidence, independent in nature, was withheld from the court for obvious reasons. This fact by itself is sufficient to discard the evidence of the interested and related witnesses because their evidence is not only of the second degree but also for the reason given above due to their unnatural conduct. In another case tilted **"MUHAMMAD RAFIQUE vs. THE STATE and others"** reported as **2010 SCMR 385** the Supreme Court has held that it is well-settled 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 P.W. Amir Ali would have been examined, his evidence would have been unfavourable to the prosecution.

16. It is also relevant to mention here that as per the contents of Crime Report (Ex.PA), appellant Amanullah has been charged for firing at the deceased Jamil and causing injuries to other victims, whereas the appellant Parvaiz has been charged for effective firing at the deceased Gul Fareena however, in their statements recorded under section 342 Cr.PC, as question No.6 the appellant Parvaiz has been asked that Mst.Gul Fareena was effectively fired by the co-appellant Aman Ullah. Similarly, as question No.2 the co-appellant namely Aman Ullah has been asked that he has made effective firing at Mst.Gul Fareena which is not at all the case of the prosecution as set in the FIR and court statements, therefore, on this score alone, the prosecution evidence could not

be considered against the appellants and thus they could not be convicted on the basis of aforesaid evidence.

17. It is also part of the record that in initial report, the complainant has not set any motive for the occurrence and it was lateron when PW-13 Mst.Bibi Fatima who introduced a motive, however, the prosecution has even failed to substantiate the belatedly set motive as no independent material or evidence was brought on record qua the fact that the engagement of Mst.Fatime was made with her cousin Abdullah and on which the appellants' side was annoyed. It was also noted that in order to prove the motive, Abdullah was an important witness but the prosecution even did not bother to produce him as well and thus even the belatedly introduced motive has not been proved by the prosecution. It is settled law that prosecution is not bound to set a motive, however, when once it opted to set a motive then it has to be proved and in case of its failure to do so, benefit

thereof has to be given to the accused. In the case titled **"TAJAMAL HUSSAIN SHAH vs The STATE and another"** reported as **2022 SCMR 1567,** the Supreme Court of Pakistan has observed that according to the prosecution the motive of the occurrence was previous quarrel between co-accused Nazakat Hussain Shah (tried separately) and Wajid, son of the complainant. However, the prosecution failed to produce the said Wajid in order to prove the motive part, therefore, it can safely be concluded that prosecution could not prove the motive part of the story. The Supreme Court of Pakistan in another the case titled **"SARFRAZ and another vs The STATE"** reported as **2023 SCMR 670**, has also held that it is now well established that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence. Otherwise, the same would go in favour of the accused.

(DB) Hon'ble Mr.Justice Kamran Hayat Miankhel,
Hon'ble Mr.Justice Muhammad Ijaz Khan.

(Jamil)

18. It also part of the record that seven empties of 7.62 bore were recovered from the scene of the occurrence on the second day of the occurrence i.e. 20.08.2016 and out of these seven empties, four were recovered from the place assigned to the appellant Amanullah, whereas three empties were recovered from the place assigned to the appellant Parvaiz. The record further reveals that these empties were not sent to the FSL then and there as when the appellant Amanullah was arrested after more than one year on 31.10.2017 and after six days of his custody when allegedly on his pointation, the rifle was recovered on 06.11.2017 and it was thereafter that both the empties recovered way back on 20.08.2016 and the rifle recovered on 06.11.2017 were sent together to the FSL, therefore, the positive FSL report is of no avail for the prosecution. Similarly, in the case of appellant Parvaiz though he was arrested on 30.12.2020 i.e. after more than four years of the occurrence, however, on the second day of the

occurrence, a Kalashnikov was shown recovered on the pointation of his father namely Muhammad Nabi from a room and beneath the cot and thus admittedly neither at the time of arrest of appellant Parvaiz nor on his pointation, the said rifle has been recovered, therefore, such recovery could not be considered as against the appellant Parvaiz. Furthermore, the empties recovered from the place of appellant Parvaiz and the alleged weapon of offence were also sent by the I.O. jointly to the FSL and thus any report thereof too would be of no avail for the prosecution. The Supreme Court of Pakistan in the case titled "**Nawab SIRAJ ALI and others vs. The STATE through A.G. Sindh**" reported as **2023 SCMR 16** by allowing the appeal and acquitting the accused/appellant has held that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Sending the crime empties

together with the weapon of offence is not a safe way to sustain conviction of the accused and it smacks of foul play on the part of the Investigating Officer simply for the reason that till recovery of weapon, he kept the empties with him for no justifiable reason. Similarly, in the case titled "**MUNEER MALIK and others vs. The STATE through P.G. Sindh"** reported as **2022 SCMR 14934** by allowing the appeals and acquitting the accused/appellants has observed that the record shows that eight empties of Kalashnikov and six empties of T.T. pistol were recovered from the scene of occurrence on the same day i.e. 17.05.2007 through recovery memo but the said crime empties were neither kept in safe custody nor sent to Chemical Examiner immediately after recovery. The weapons of offence and the crime empties were jointly sent to the office of Chemical Examiner after a delay of more than two months i.e. on 13.07.2007 for which no plausible explanation has been given by the

prosecution. In these circumstances, the recoveries are inadmissible in evidence and cannot be relied upon to sustain conviction of the appellants.

19. It is also relevant to mention here that Hizbur Rehman HC/PW-5, one of the marginal witnesses to recovery memo Ex.ARPW-5/1 vide which the SHO took into possession a Kalashnikov during a raid at the house of appellant Parvez, in his court statement has not even named the co-accused Muhammad Nabi, who had allegedly produced the said weapon to the SHO on behalf of the appellant Parvaiz. Furthermore, as per statement of Muhammad Arshad Khan SHO (PW-16), Imtiaz Ali Shah SI/O.I.I was accompanying him at the time of aforesaid raid, however, it is astonishing to note that when Imtiaz Ali O.I.I appeared as PW-17, he did not bother to mention the facts of the aforesaid raid or recovery of the weapon of offence which inconsistencies in the statements of the prosecution witnesses not only create

doubt regarding the alleged recovery but also give rise to two-fold impressions i.e. either PW-17 was not present with PW-16 at the time of alleged recovery or no such recovery whatsoever had ever been made in the mode and manner as alleged by PW-16.

20. It merits to mention here that though it is the case of the prosecution from the very inception that the appellants have committed the alleged offence because of the abetment of the co-accused Muhammad Nabi, however, during the course of the investigation as well as trial, the prosecution could not produce an iota of evidence that as to when, where and in whose presence the alleged conspiracy was hatched and thus due to the aforesaid reason, the learned trial court has acquitted the said co-accused of the appellants but astonishingly the complainant has not filed any appeal against his acquittal order and thus the prosecution has itself conceded that half of its allegations as set in the FIR were wrong.

21. It is settled law that for giving benefit to an accused, it is not essential that there should be many circumstances creating doubts, even a single doubt is sufficient to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case titled **"SAGHIR AHMAD vs The STATE and others"** reported as **2023 SCMR 241,** the Supreme Court has held that it is a well settled principle of law that for the accused to be afforded the right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. The august Supreme Court of Pakistan in its judgment rendered in the case titled **"BASHIR MUHAMMAD KHAN vs The STATE"** reported as **2022 SCMR 986**, has held that

single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable; trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. Similarly, in the case titled **"KHALID MEHMOOD alias KHALOO vs The STATE"** reported as **2022 SCMR 1148**, the Supreme Court has reiterated the same rational by observing that in these circumstances, a dent in the prosecution's case has been created, benefit of which must be given to the appellant. It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and

concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. In another case titled **"KASHIF ALI alias KALU vs. The STATE and another"** reported as **2022 SCMR 1515**, the Apex Court has held that it is settled law that a single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution case is to be resolved in favour of the accused. Reliance in this behalf can be made upon the following cases:-

i) **Tariq Pervez v. The State (1995 SCMR 1345),**

ii) **Ghulam Qadir and 2 others v. The State (2008 SCMR 1221),**

iii) **Muhammad Akram v. The State (2009 SCMR 230),**

iv) **Muhammad Zaman v. The State (2014 SCMR 749)** and

v) **Muhammad Mansha v The State" (2018 SCMR 772).**

22. For the reasons recorded hereinabove, this criminal appeal is allowed, all the convictions and sentences of the appellants namely Aman Ullah alias Babu and Muhammad Parvez recorded by the learned Additional Sessions Judge-I, Battagram through the impugned judgment dated 12.10.2022 are set aside and by extending them the benefit of doubt they are acquitted from all the charges levelled against them. They shall be released from the jail forthwith if not required to be detained in any other case.

23. Since we have allowed the instant Criminal Appeal No.246-A/2022 and set aside judgment/ order of Additional Sessions Judge-I, Battagram dated 12.10.2022 vide which the appellants were convicted and sentenced, therefore, the connected **Criminal Revision No.54-A/2022** titled "**Jan**

Muhammad vs. Amanullah alias Babu etc" for enhancement of their sentences has become infructuous and the same is accordingly dismissed.

ANNOUNCED
31.01.2024.

(Jamil)

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