JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(*Judicial Department*)

Cr.A No.159-B of 2017 with
Murder Reference No.09-B of 2017

Noor Alam Khan
Vs
Abdul Wahab etc.

JUDGMENT

Date of hearing 11.01.2018.

Appellant-Petitioner: **By Ahmad Farooq Khattak, Advocate.**

Respondent: **State By Shahid Hameed Qureshi, Addl: AG & Others by Muhammad Nisar Khattak, Advocate.**

ABDUL SHAKOOR, J.-- This criminal appeal is directed against the judgment dated 03.07.2017, passed by the learned Sessions Judge, Karak, whereby Noor Alam Khan, the appellant was convicted under section 302 (b) PPC and sentenced to death with a compensation of Rs.2,00,000/- (two lac) under section 544-A Cr.PC to the legal heirs of deceased or in default thereof the same be r ecovered as arears of land

revenue at proper time, failing which he shall suffer six month SI. However, the convict/ appellant was extended benefit of section 382-B Cr.PC.

2. Murder reference has also been put up before us for confirmation.

3. The story of prosecution as disclosed in the F.I.R may briefly be narrated as follows:

On 05.10.2015 at 1500 hours Abdul Wahab (PW-8), the complainant brought the dead-body of deceased Abdul Nawab to Civil Hospital, Karak and made a report to Umer Ayaz HC (PW-3) to the effect that:

" میں بوقت بمقام بالا پر موجود تھا کہ اسی اثنا میں برادرم مقتول نواب علی بسواری موٹر سائیکل پر مین بازار کرک سے آکر بمقال بالا پر پہنچے۔ جو مسمی نور عالم ولد عزیز خان سکنہ پرانا بازار کرک جو ماموں ام بھی ہے، مسلح با پستول پہلے سے موجود تھا۔ برادرم پہنچتے ہی مزکورہ بال نور عالم کے ان پر با ارادہ قتل فائرنگ کر دی، جن کے فائروں سے برادرم لگ کر زخمی ہوا۔ میں معہ دیگر اہلیان دیہہ نے فوراً اٹھا کر بغرض علاج معالجہ سول

ہسپتال کرک لا رہے تھے، جو راستے میں زخموں کی تاب نہ لا کر جان بحق ہوا۔ ملزم بعد وقوعہ کے بھاگ گیا۔ وقوعہ ہذا میرے علاوہ کافی لوگوں کا چشم دید ہے۔ وجہ عداوت یہ ہے کہ بردرام نے ملزم بالا کو موٹر سائیکل دیا تھا، جو واپس لینے پر ناراض تھا۔ میں بر خلاف ملزم بالا برادرام کو قتل کرنے کا دعویدار ہوں۔ "

4. After writing report of the complainant, it was read over and explained to him, who after admitting it to be correct thumb impressed the same in token of its correctness, and his brother Munawar Shah signed the same as rider, whereafter, Umer Ayaz, HC prepared the injury sheet and inquest report in respect of the deceased and thereafter referred the dead-body for post mortem examination under the escort of Taimur and the *murasila* Ex:PA was sent to the police station through constable, Hazrat Imam. The contents of *murasila* were culminated in to F.I.R No.519 dated 05.10.2015 under section 302 P.P.C, in Police Station Karak.

5. Copy of F.I.R was handed over to Noor Sali, Sub Inspector for investigation, who on reaching at the spot,

prepared site plan (Ex:PB) at the instance of complainant/ eye witness; recorded statements of prosecution witnesses under section 161 Cr.PC; conducted house search of the accused; took into possession blood stained garments of the deceased alongwith P.M documents vide recovery memo Ex:PC; placed on file F.S.L report. Muhammad Riaz S.H.O, Police Station Karak, arrested the accused on 06.10.2015 with .30 bore pistol bearing No.1845 alongwith fixed charger and a bandolier containing seven rounds of the same bore and registered a separate case under section 15 AA. During interrogation under section 161 accused admitted his guilt and let the police party to the place of occurrence and pointed out various places as mentioned in the site plan and I.O prepared pointation memo to this effect. He was presented before the learned area Magistrate for recording his confessional statement, but he refused and was remanded to judicial lock-up. On completion of investigation complete challan was submitted against him for trial. The convict/ appellant was summoned, delivered copies in compliance

with provision of section 265-C Cr.PC and was formally charge sheeted, to which he did not plead guilty and claimed trial. The prosecution in order to prove its case produced as many as eleven (11) witnesses. On conclusion of prosecution evidence, statement of convict/ appellant was recorded under section 342 Cr.PC, wherein he professed his innocence, however, he did not wish to produce defence evidence nor opted to be examined on oath as required under section 342 (2) Cr.PC. Learned trial court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 03.07.2017 convicted the appellant, as mentioned above. Hence, this criminal appeal.

6. Learned counsel appearing on behalf of convict/ accused argued that as per complainant many persons witnessed the occurrence, but no private person came forward as eye witness of the occurrence, except the complainant, who may give his independent statement. He next argued that the convict/ appellant surrendered before the police and the pistol was recovered from his house, but a false story has

been incorporated by the local police with the connivance of complainant and thereby charged under section 15 AA in separate F.I.R No.528. He went on to say that prosecution has failed to connect the said pistol, as crime weapon. He developed his arguments by saying that accused has been shown in the site plan at a close distance, but as per medical evidence no charring marks were found on the body of deceased. He strengthened his previous argument by saying that no crime empty and blood stained was recovered from the spot and the complainant has failed to prove his presence on the spot and there are major contradictions in his deposition with respect to mode and manner of occurrence. He lastly argued that prosecution has failed to prove its case beyond any reasonable doubt, hence, by accepting this appeal, the impugned judgment of conviction deserves reversal.

7. On the other hand, learned Addl: A.G representing the State, assisted by learned counsel for complainant opposed arguments advanced by contending that

the convict/ appellant is directly charged for murder of his own nephew (son of his sister) in day light occurrence. They next argued that the convict/ appellant is sole assailant and has been arrested on the following day of occurrence with crime weapon, for which a separate case F.I.R No.528 dated 06.10.2015 was registered and in which case the accused/ appellant has also been convicted. They further argued that Site plan, recoveries, medical evidence, F.S.L reports, corroborate the ocular account furnished by the complainant/ eye witness and despite lengthy and taxing cross-examination the defence could not shatter the prosecution evidence. They lastly argued that the prosecution has proved its case up to the hilt and the learned trial court rendered a detailed and reasonable judgment after rightly appreciating the entire evidence, which needs not to be interfered with.

8. We have heard arguments of learned counsel for the parties and scanned the record with their valuable assistance.

9. Perusal of the record reveals that Abdul Wahab, the complainant charged the accused for making effective firing with .30 bore pistol at the deceased, when he was present at main bazaar, near the shop of his brother deceased Nawab Ali. The occurrence is of broad day light, i.e 14.20 hours, but the investigation officer did not record the statement of any independent witness nor the prosecution could brought any witness before the Court, who may testify the story of occurrence.

10. Abdul Wahab, is the sole eye witness/ complainant of the case, who also happened to be the brother of deceased, hence, he legitimately be termed as an interested witness and the statement of such a witness is to be thrashed out with due care and caution. In the instant case, the complainant, the sole eye witness, charged a single accused for firing at the deceased. Mere fact that single accused is charged is not an absolute rule regarding his guilt, rather it is bounden duty of the prosecution to firstly establish presence of the witness who has allegedly seen the accused and

secondly to believe the testimony of solitary eye witness, requires strong independent corroboration to prove guilt of the accused. Reference in this behalf may be made to the case of ***"Gul Muhammad Vs State and another" (PLJ 2014 Cr.C (Peshawar)334 (DB)***, wherein it is held that:

> ***"Though even a solitary statement would be a base for conviction but in case when it rang true, confidence inspiring and trustworthy otherwise, uncorroborated solitary statement of an interested and inimical witness shall not be made basis for conviction of accused."***

11. The complainant/ eye witness recorded his statement as PW-8. He stated the story crime in his examination in chief as:

> ***"My brother when alighting from his motorcycle, in the meantime, accused Noor Alam, who was already present there made firing at my brother Nawaz Ali with his pistol."***

In cross-examination he stated that:

> ***"My deceased brother alighted from the motor cycle at a distance of about 10 paces from the place, where I was sitting in front of the shop. 02/03 fire shots were made by the accused at my brother, however, the deceased was hit with first fire shot made by the accused. Accused was not on the motorcycle, but he was on foot at the time of making firing at my brother."***

While, the investigation officer, when visited the spot and prepared site plan, (Ex:PB) he has shown point A, where the motorcycle was standing and deceased sitting on it, and after firing of accused he was hit on the motorcycle and fell down from it. The statement of complainant recorded as PW-8, contradicts the mood and manner of occurrence, as disclosed in the site plan by him to the IO.

12. The prosecution produced Umer Ayaz No.256/HC, as PW-3. During the days of occurrence, he was posted at Civil Hospital, Karak. He in examination in chief stated that he recorded statement of complainant in emergency room at 15.00 hours, thereafter the injury sheet, inquest report of deceased were prepared and sent the dead-body under the escort of levy

cop Taimur to Doctor for PM examination. He in cross-examination stated that the dead-body was brought to the hospital at about 02.45 hours. While the Doctor Munaim Kaka Khel MO BHU Dabli, Lawaghar, (PW-06), in examination in chief stated that ***"At 02.45 P.M on 05.10.2015, I have conducted autopsy on the deadbody of the deceased Nawab Ali.".*** In such state of affairs, it is clear then crystal that injury sheet, inquest report and Post mortem was conducted before scribing the report of the complainant at 15.00 hours. We have no hesitation in holding that the complainant lodged report after preliminary investigation. The F.I.R being basic document in criminal case vested with much greater sanctity, but when it was recorded after preliminary investigation, as in the instant case, it would lose its sanctity and probative worth and as such would become a suspect document, rather than one giving a natural, spontaneous and straightforward account of occurrence. The F.I.R. if recorded after preliminary investigation could not be treated either sacrosanct or authentic. Similar view was rendered in case **"Muhammad Wasif Khan and others Vs The State and others" (2011 PCr.L J 470 Lahore)** that:-

> ***"F.I.R. has a very significant role to play, being a corner stone of the prosecution case to establish guilt of the accused involved in the crime-- Any doubt in lodging of F.I.R. and***

commencement of investigation give rise to a benefit in favour of accused- - F.I.R. lodged after conducting an inquiry loses its evidentiary value."

Reference can also be made to the case "**Iftikhar Hussain and others Vs the State" (2004 SCMR 1185).**

13. According to site plan (Ex:PB), the deceased Nawab Ali was standing on motorcycle, at point A, whereas the accused having .30 bore pistol was at point 2, the distance between the Point A and 2 has been shown as 2 to 4 feet, as per medical jurisprudence, when a fire shot is made from a distance of less than 3 feet, there may be blackening or charring marks on the corresponding wounds, but in the instant case, when we go through the Post Mortem report, we find no blackening or charring marks, even the Doctor Munaim Kaka Khel, (PW-6) in his cross examination states that: ***"No blackening or charring marks was found on the entry wound"*** hence, medical report and site plan are contradictory to each other, which gives a clear inference that

the complainant was not present on the spot and has not witnessed the occurrence.

14. It has not been mentioned by the complainant in the F.I.R that how many fire shots were made by the accused, rather this fact was disclosed in his statement that he made 2/3 fire shots, but strange enough that no crime empty was recovered from the spot. The accused was arrested on the following day with a .30 bore pistol, which was allegedly without any license, hence, a separate case F.I.R No. 528 under section 15 AA was registered against them. The crime pistol was sent to the F.S.L, which shows that it was in working condition, but the same result is not sufficient to prove that the deceased was fired at by the said pistol, in absence of crime empties. The crime pistol was not recovered just after the occurrence and further that the accused has not confessed that the said crime pistol was used in the instant crime.

15. So for as connected Cr.A No.155-B/2017 with respect to conviction under section 15 AA, of the same

convict/ appellant is concerned, it has other facts and circumstances of the case. Conviction in said case, has no bearing upon the facts of instant case, as the prosecution has failed to prove any nexus of the alleged recovered pistol with the instant crime, hence, it being a separate offence, has been decided separately.

16. The contention of learned counsel for complainant that the convict/ appellant has admitted in his statement under section 161 Cr.PC that the crime weapon recovered from him, was used in the commission of offence. Admittedly the convict/ appellant has not confessed his guilt before any Magistrate, however, according to prosecution he has admitted before the local police that the weapon recovered from him was used in the commission of crime. In our humble view, admission by the accused before the police for having committed the offence with some specific weapon is not admissible in evidence as per Art. 38 of the Qanun-e-Shahadat, 1984. Reliance is placed on case titled ***"Riasat Ali***

and another Vs The State and others" (2015 PCr.LJ 995 Lahore).

17. So for as motive is concerned, in the F.I.R it has been alleged that:

"برادرام نے ملزم بالا کو موٹر سائیکل دیا تھا
جو واپس لینے پر ناراض تھا۔"

The complainant in his statement with respect to said motive stated that:

> ***"Motive for the occurrence was that the accused was given a motorcycle by my other younger brother and the accused was annoyed as my said brother had taken back his motorcycle from the accused."***

Meaning thereby, the motive was with younger brother of the deceased and not with the deceased or eye-witness/ complainant. Hence, it is held that there was no motive with the accused to fire at the deceased and if he fired at him, then on the analogy of above motive, the accused may have fired at the complainant as well, but it is not the case here. Thus prosecution has failed to prove motive and presence of eye

witness on the spot. On such week and shaky type of motive conviction for a capital charge cannot be based. Reliance is placed on case titled ***"Muhamamd Ali Vs the State" (2017 SCMR 1468).***

18. Apart from the above dents and discrepancies in the prosecution case, it is also smeared with other doubts, such as non recovery of crime empty from the spot, non recovery of blood stained earth from the place of occurrence, absence of bullet/cut marks on the blood stained garments of the deceased, non recovery of alleged motorcycle, which deceased allegedly was parking at the time of occurrence, by the I.O. Hence, the case of prosecution is pregnant with jumble of doubts. Reliance is placed on case titled ***"Muhammad Ali Vs The State" (2017 SCMR 1468).***

19. In the present case, no sort of corroborative evidence is available and even otherwise when the substantive evidence, which in the present case is the solitary statement of complainant, is not appealable to reason being unnatural, contradictory and against natural probabilities, the

same could not be made basis for capital charge. Law on this subject is clear that direct evidence of high unimpeachable character required for recording conviction on capital charge against the accused, while it is not the case here, as the statement of solitary eye witness is full of doubts, contradictions and not corroborated by any other material patent on record, therefore, benefit of the same must go the accused.

20. It is well settled principle of administration of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt. If any reasonable doubt arises in the prosecution case, the benefit of the same must be extended to the accused not as a grace or concession, but as a matter of right lest no innocent be punished. In view of doubtful contradictory and non-corroborative statement of complainant, whole edifice of prosecution case has razed to the ground, benefit of which is extended to the appellant, as conviction of an accused could only be based on concrete evidence, which beyond reasonable doubt led the Court to the

conclusion that the accused before it was guilty of committing the reported crime. Reliance, is placed on case titled, ***"Muhammad Sadiq Vs the State" (2017 SCMR 144)***.

21. It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicious mind is sufficient for acquittal of the accused. Reliance is placed on case law ***"Tariq Pervaz Vs the State" (1995 SCMR 1345).*** The same principle has been reiterated by the Hon'ble Supreme Court in ***Muhammad Akram's*** case ***(2009 SCMR 230)***, wherein it is held that:

> ***"13. The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary***

> ***that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."***

22. The learned trial Court has erred in law by convicting appellants on the basis of such a weak type of evidence, hence it would not be safe to maintain conviction. Consequently, this appeal of the appellants/convict Noor Alam is allowed and he is acquitted from the charges alleged against him, vide F.I.R No. 519 dated 05.10.2015 under sections 302 P.P.C, Police Station Karak. Accordingly, murder reference No.09-B/2017 is answered in negative. These are the reasons for our short order, which is re-produced herein below:-

> ***"For the detailed reasons to be recorded later on, this Criminal appeal is accepted the impugned judgment of conviction and sentence dated 03.07.2017, rendered by***

learned sessions Judge, Karak, is set aside and consequently appellant Noor Alam involved in case F.I.R No.519, dated 05.10.2015 under sections 302 P.P.C, Police Station Karak, district Karak is acquitted of the charge leveled against him. He be set at liberty forthwith, if not required in any other criminal case. Murder reference No.09-B/2017 is answered in negative."

Announced.

11.01.2018

J U D G E

J U D G E

**Azam Khan/P.S* (D.B) Mr. Justice Ikramullah Khan & Mr. Justice Abdul Shakoor.*