

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

**Criminal Appeal No.73-D/2015**

**Malik Aamir Sultan and two others**

**Versus**

**The State and another**

**JUDGMENT**

Date of hearing                      04.4.2018

**Appellants by:** M/S Sanaullah Khan Gandapur, Salimullah Khan Ranazai, Ahmad Ali Khan, Muhammad Ismail Alizai and Shah Shujaullah, Advocates.

**Respondents by:** Mr. Kamran Hayat Miankhel, Addl: A.G and Abdul Latif Khan Baloch, Advocate.

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**ISHTIAQ IBRAHIM, J.-** Through this single judgment, we propose to dispose of instant Criminal Appeal No.73-D/2015 filed by appellants Malik Aamir Sultan and two others against their conviction and sentence and Criminal Revision No.16-D/2015 filed by complainant Muhammad Amin for enhancement of sentence awarded to the appellants, as both the matters arise out of one and the same judgment dated 13.10.2015 of learned Additional Sessions Judge-II, D.I.Khan, whereby they were convicted under sections 302(b)/34 PPC and sentenced to life imprisonment on two counts with fine of Rs.200000/- against each under section 544-A Cr.P.C and in default of payment of fine, to undergo imprisonment for six months. The sentences were

ordered to run concurrently and benefit of section 382-B Cr.P.C was extended to them.

2. The prosecution story as divulged from the FIR lodged by complainant Muhammad Amin is that on 17.6.2012 at 1335 hours, he in the company of his injured brother Mehrban who was unconscious and dead body of deceased Inayatullah reported the matter at Emergency Room of Civil Hospital, D.I.Khan to the effect that he and his brother Mehrban and friend Inayatullah had obtained landed property in dairy colony on lease; that on the said date, he alongwith his brother and friend, after irrigating the land, were taking rest beneath the '*chapri*' when at about 1245 hours, Aamir Sultan and his two brothers boarded in Quingqi whereas two unknown persons on motorcycle came there and diverted the water to their land; that Mehrban and Inayatullah forbade them, upon which they (accused) hurled abuses and opened fire at them with their pistols. With the firing of accused, Mehrban and Inayatullah got hit and fell down and the accused decamped in Quingqi and motorcycle. The complainant and his relative Safdar Salim who had fetched lunch for them in his motorcar, shifted the injured to hospital but on the way to hospital, Inayatullah succumbed to the injuries. The complainant stated that

there was no previous motive, but the occurrence was the result of dispute over water. On the said date, Mehrban injured also succumbed to the injuries in the hospital.

3. After completion of usual investigation, complete challan against the appellants was put in Court. They were formally charged, to which they did not plead guilty and claimed trial. In order to prove its case against the appellants, the prosecution examined fifteen witnesses including complainant and Safdar Salim. After closure of prosecution evidence, the appellants were examined under section 342 Cr.P.C. They professed innocence and false implication. However, they neither appeared as their own witnesses on oath nor produced any evidence in their defence. On conclusion of the trial, the learned trial Court convicted and sentenced the appellants as mentioned above vide impugned judgment dated 13.10.2015.

4. The learned counsels representing the appellants vehemently contended that the complainant and alleged eyewitness Safdar Salim were not present at the spot at the time of alleged occurrence and were procured later on; that there are material contradictions in the statements of P.Ws which rendered their testimony unbelievable; that the medical evidence and the site plan

are not in line with the ocular testimony; that neither the utensils which PW Safdar Salim had allegedly taken with lunch were taken into possession nor there was any blood in the motorcar wherein the injured were shifted to the hospital. Concluding their arguments, the learned counsels were of the view that the learned trial Court has not properly appreciated the evidence on record and has fallen into the field of error by convicting the appellants.

5. As against that, the learned Addl: A.G representing the State assisted by learned counsel for the complainant supported the impugned judgment and while refuting the arguments of learned counsels for the appellants prayed for enhancement of the sentence awarded to the appellants.

6. We have considered the submissions of learned counsel for the parties and carefully gone through the record.

7. The prosecution case mainly hinges on the ocular testimony furnished by complainant Muhammad Amin (PW-11) and Safdar Salim (PW-12), medical evidence, recovery of empties from the spot and the F.S.L report.

8. The first and the foremost requirement for the proof of charge against particular set of accused is as to whether the prosecution has been able to establish the presence of witnesses at the spot when the occurrence took place. In the present case, the ocular account flows from the mouth of Muhammad Amin, brother of deceased Mehrban who appeared as PW-11 and Safdar Salim, relative/cousin of the complainant and deceased Mehrban who was examined as PW-12. The stance of these two witnesses is that they were irrigating their land and the accused diverted the water on which an altercation took place and thereafter firing was made, as a result of which the two deceased lost their lives. PW Muhammad Amin was the elder brother of deceased Mehrban whereas deceased Inayatullah was their friend. The site plan shows that both the P.Ws were also in the close proximity at the time of firing and they could have easily been targeted by the accused when the incident took place but their unhurt escape throws doubt on their presence at the spot at the relevant time. Even otherwise, PW Muhammad Amin was elder and when two persons were already murdered, how they were spared. The stance of Safdar Salim (PW-12) is that he had taken meals to the deceased and Muhammad Amin complainant. During cross examination, this PW

admitted that he did not use to visit the Dairy Farm on daily basis and on the day of occurrence, he had visited the shop of Inayatullah on Sheikh Yousaf road opposite Qurtaba University in connection with his personal affair and since Inayatullah was not present there, this witness called him on phone who told that he was at Dairy Farm and if this witness wanted to visit him, he could go there on transport. The presence of this witness at the spot at the relevant time appears to be doubtful because no utensils of meals were either noticed by the Investigating Officer during spot inspection nor the same were taken into possession. It is also in the evidence that the deceased then injured were shifted to the hospital in the motorcar of PW Safdar Salim but strangely, neither the said motorcar was taken into possession on the same day nor any blood was noticed in the same. Thus, the testimony of this witness for this reason alone is disbelieved. The record transpires that even no instrument of husbandry belonging to the complainant party was taken into possession which was being possessed by them at the relevant time. The field irrigated by the complainant has also not been observed by the Investigating Officer at the time of preparation of site plan. From the above discussion, it is manifest that both the P.Ws were not present at the spot at the time of

occurrence and were procured subsequently, therefore, their testimony is ruled out of consideration. In this respect, reliance can be placed on the case of **Gul Faraz alias Paley Khan. Vs. The State (2015 SD 139)** wherein it was held that:-

*“Moreover, the deceased and eyewitnesses were on same footing before the accused being brother inter-se. Both the eyewitnesses being real brothers of the deceased have not shown any effort to rescue their brother. It is also the case of prosecution that when the deceased was hit with the firing of accused and fell on the ground, the deceased thrashed him with Butt of their Kalashnikovs, but none of the PWs has shown any effort to move towards their brother and rescue him from the clutches of the accused despite that they were having axes, which does not appeal to a prudent mind being against the natural human conduct as well as against the customs and usages of our society, particularly this part of the country where in such like situation a brother would not hesitate to sacrifice his life for the sake of life of his other brother. The conduct of eyewitnesses like silent spectators creates reasonable doubt about their presence with the deceased. Had they been present with the deceased, they must have made some efforts for rescue of their brother.”*

Similarly, in the case of **Mst. Rukhsana Begum and others. Vs. Sajjad and others (2017 SCMR 596)** it was held that:-

*“The site plan positions would show that, he and the other PWs were at the mercy of the assailants but being the prime target even no threat was extended to him. Blessing him with unbelievable courtesy and mercy shown to him by the accused knowing well that he and the witnesses would depose against them by leaving them unhurt, is absolutely unbelievable story. Such behaviour, on the part of the accused runs counter to natural human conduct and behaviour explained in the provisions of Article 129 of the Qanun-e-Shahadat Order, 1984, therefore, the Court is unable to accept such unbelievable proposition.”*

9. The case of the prosecution is that deceased Inayatullah was their friend. It is pertinent to mention here that complainant party belongs to village Jhok Massu while the address of deceased Inayatullah is Basti Ghayanwali. Both these places are distantly situated from each other. The occurrence took place in the month of June and almost noon time. How it is possible that a guest would be taken to such a place in the hot weather and that too in D.I.Khan. It appears that deceased Inayatullah was not only a guest/friend, but he was brought by the complainant party for the accomplishment of some job as this has been consistently suggested to both the alleged eyewitnesses that deceased Inayatullah was having criminal history and was involved in several cases. This fact is further fortified by postmortem report



of deceased Inayatullah, wherein two firearm entry wounds were observed on his person, while Mehrban deceased, who had direct motive with the accused, sustained solitary injury. Moreover, two firearm entry wounds were observed by the doctor on the dead body of deceased Inayatullah with corresponding exit wounds whereas one firearm entry wound with corresponding exit wound was observed on the dead body of deceased Mehrban. All the entry wounds are carrying the dimension of 1/4x1/4 inches while on the other hand, three real brothers, the appellants, and two unknown accused are charged for simultaneous firing at the deceased. 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. In this respect, guidance is sought from the case of **Mukhtasir and 5 others. Vs. The State and another (2017 P.L.R 419)** wherein it was held that:-

*“From the above assessment of evidence it is discernable that the charge made by the complainant party is exaggerated, as seven number of one family have been implicated on the strength of the motive which is more tempting than blood feud. Reliance is placed on the case titled “Muhammad Zaman. Vs. The State and others (2014 SCMR 749) wherein it is 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 relation 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 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.”*

10. A cross report was referred by learned counsels for the appellants but in that case, unknown accused are charged and the place of occurrence also appears to be different from the one shown in the present case and the case was filed being untraced by the order of Illaqa Judicial Magistrate. The same cannot be used by either of the parties for the proof of guilt or innocence of the present appellants.

11. For what has been discussed above, we are of the view that the prosecution case is full of doubts, the benefit of which should have been given to the appellants. In the case of *Muhammad Akram. Vs. The State (2009 SCMR 230)* it was held that:-

*“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.”*

12. Resultantly, we, accept Criminal Appeal No.73-D/2015, set aside the impugned judgment of conviction and sentence dated 13.10.2015 and acquit the appellants Malik Aamir Sultan, Malik Muhammad Kamran and Malik Muhammad Farhan of the charges levelled against

them in this case. They be set free from Jail forthwith if not required in any other case.

13. So far as Criminal Revision No.16-D/2015 for enhancement of sentence of the appellants is concerned, since the appellants have been acquitted of the charges, therefore, the Criminal Revision has become infructuous and is dismissed accordingly.

14. Above are the detailed reasons for our short order of even date.

Announced.  
Dt:04.4.2018.  
Habib/\*

**JUDGE**

**JUDGE**

(DB)  
Hon'ble Mr. Justice Ishtiaq Ibrahim  
Hon'ble Mr. Justice Shakeel Ahmad