Judgment Sheet

PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.39-D/2019.

Ghulam Muhammad
Vs.
The State & another.

JUDGMENT

Date of hearing: **27.9.2021.**

For Appellant: **M/S Ghulam Hur Khan Baloch, Muhammad Yousaf Khan and Muhammad Waheed Anjum Advocates.**

For State: **Mr. Kamran Hayat Miankhel, Addl: A.G.**

For Respondent: **M/S Saleemullah Khan Ranazai & Saifur Rehman Khan Advocates.**

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SAHIBZADA ASADULLAH, J.- The convict/ appellant Ghulam Muhammad has called in question the judgment dated 22.05.2019, passed by learned Additional Sessions Judge-III, D.I.Khan, whereby the appellant being involved in case F.I.R No. 357 dated 01.08.2014, registered at Police Station Gomal University, District D.I.Khan, has been convicted under section 302(b) P.P.C and sentenced to life imprisonment with Rs.10,00,000/-, (ten lac) as compensation to the legal heirs of deceased under section 544-A Cr.P.C, or in default thereof, to further

undergo for six months simple imprisonment. Benefit under section 382-B, Cr.P.C was also extended to the convict, however, co-accused Zafar and Abdullah were acquitted of the charges.

2. The complainant Eid Nawaz being aggrieved from the impugned judgment filed Cr.R. No.10-D/2019, for enhancement of sentence of appellant and Cr.A. No.44-D/2019, against acquittal of co-accused. Since all the matters are the outcome of one and the same judgment, therefore, same are to be decided through this common judgment.

3. Brief facts of the case, as divulges from the first information report are that on 01.08.2014 at 19:00 hours, complainant Eid Nawaz along with dead-body of his brother Muhammad Jehangir, in emergency room of Civil Hospital, D.I.Khan reported the matter to the effect that, he along with his brother Muhammad Jehangir was present in the clinic of Dr. Farid, situated at Jhok Khalar, where they were waiting for the doctor for medical treatment of little daughter of his brother. At about 05:30 hours, appellant Ghulam Muhammad, duly armed with pistol, entered the clinic and started firing at his

brother, resultantly, he was hit, sustained injuries and died on the spot. The complainant could do nothing being empty-handed, accused Zafar and Abdullah, nephews of appellant also made aerial firing. Besides the complainant, the occurrence was stated to be witnessed by one PW Inayatullah, his relative and other persons present on the spot. Motive for the occurrence was stated to be political rivalry. Ghulam Muhammad ASI, reduced the report of complainant in shape of Murasila (Ex: PW 1/2) and sent the same to the Police Station for registration of F.I.R. He prepared injury sheet (Ex: PW 1/2 and Ex: PW 1/3) and inquest report and sent the dead-body to the doctor under the escort of HC Umar Daraz No.491. After completion of investigation complete challan was submitted by the S.H.O Abdul Ghaffar ASI (PW-5) before the learned trial Court. After commencement of trial the prosecution produced and examined as many as seven witnesses. On conclusion of prosecution evidence, statements of accused were recorded under section 342 Cr.P.C, wherein they professed their innocence, but neither they wished to be examined on oath as provided under section

340(2), Cr.P.C, however, accused Ghulam Muhammad wished to produce defence evidence and in this respect Muhammad Irfan Advocate and Muhammad Ramzan S.I. were examined as DW-1 and DW-2, respectively. Learned trial Court, after hearing arguments from both the sides, vide judgment dated 12.07.2016 convicted and sentenced the appellant Ghulam Muhammad as mentioned above, while acquitted the accused Zafar and Abdullah. The convict /appellant Ghulam Muhammad filed criminal appeal No.42-D/2016, while the complainant Eid Nawaz filed Cr.R. No.9-D/2016, for enhancement of sentence of appellant and Cr.A No.43-D/2016 and Cr.A. No.52-D/2016 against the acquitted co-accused. This Court after hearing arguments of both sides, vide judgment dated 08.10.2018, remanded the case back to the learned trial Court for trial de novo. The judgment of this Court was questioned before the apex Court, which was allowed vide judgment dated 31.01.2019, whereby judgment of this Court was modified and instead of remand of the matter to the trial Court for de novo trial of respondent No.2 (convict/appellant herein), it was directed to record

the statements of Eid Nawaz complainant and Inayatullah, afresh, in the presence of respondent No.2, whereafter a fresh statement of respondent No. 2, under section 342 Cr.P.C. was directed to be recorded to the extent of the fresh evidence brought on record by the prosecution and then the trial Court was to pronounce a fresh judgment in the case after hearing arguments of the learned counsel for the parties. Learned trial Court after doing the needful and hearing learned counsel for the parties vide impugned judgment dated 22.5.2019, again convicted the appellant Ghulam Muhammad and acquitted the co-accused Zafar and Abdullah. The convict/appellant Ghulam Muhammad filed instant Cr.A. No.39-D/2019, whereas the complainant Eid Nawaz filed Cr.R. No.10-D of 2019, for enhancement of sentence and Cr.A. No.44-D/2019 against the acquittal of co-accused Zafar and Abdullah.

4. We have heard learned counsel representing the appellant, Additional Advocate-General assisted by learned private counsel at length and with their valuable assistance, the record was gone through.

5. Though the effective fire shot was attributed to the appellant and that single accused is charged for commission of the offence, but that alone will not serve the purpose, rather this being the appellate Court, is under the bounded duty to assess and re-assess the available evidence on the file and to appreciate as to whether the learned trial Court was correct in its approach by convicting the appellant. True, that in case of single accused, substitution is a rare phenomenon, but equally true that to charge a single accused will not absolve the prosecution of its liability to prove the case through trustworthy and confidence inspiring witnesses. In order to ascertain as to whether the impugned judgment is based on proper reasoning and that the learned trial Court was pleased to apply its judicial mind to the facts, circumstances and evidence available on the file, we deem it essential to thrash out the evidence so to avoid miscarriage of justice.

6. The prosecution is under obligation to convince this Court regarding the mode, manner and the time of incident, and the complainant as well as the eyewitness are to establish their presence on the

spot and we are to see as to whether the incident occurred in the mode, manner and at the stated time. True, that the matter was reported to the local police in civil hospital, D.I.Khan at 19:00 hours, and that the time consumed in reaching to the hospital has been explained by the witnesses, but we are to assess as to whether the explanation so tendered has explained the delay caused. The complainant was examined as PW-7, who stated that at the relevant time, he alongwith his deceased brother and his little daughter, entered the clinic of one doctor Farid, and the moment they stepped into the clinic, the accused/appellant entered to the clinic and fired at the deceased with his .30 bore pistol and that after committing the offence, the accused went out of the clinic and decamped. He further stated that being empty-handed, he could do nothing, however, the moment the appellant left the clinic, he came after him and saw the acquitted co-accused making aerial firing. The dead body was shifted to the hospital and in that respect, PW-7 explained that initially after arranging a cot, they put the dead body on the cot and started towards the hospital on foot and that after covering distance for

long 45 minutes, they arranged a Dala/pickup and put the dead body therein and reached the hospital. We are to assess as to whether the events occurred in the mode as stated by the complainant, if we admit that the moment the complainant alongwith the deceased entered to the clinic of the doctor the deceased was fired at, then in that eventuality the deceased should have fallen on the ground and even his little daughter would have received injury but that is not the case. The complainant is yet to explain that whether the deceased was sitting on the bench when he received the firearm injury. The complainant wanted to make us believe that it was he who accompanied the deceased to the clinic, but he could not explain that at what time and where-from they started for the clinic. Even the Investigating Officer did not explain in the site plan the presence of the little daughter and even the presence of the doctor concerned. This is astonishing that the complainant, while reporting the matter, did not explain the presence of the eyewitness Inayat Ullah, and it is at the tale end of his report that he mentioned the said Inayat Ullah, as the eyewitness. The complainant, when appeared before the trial

Court, went in an abnormal explanation regarding the presence of the eyewitness. He stated that when he reached to the clinic of the doctor, he came across PW Inayat Ullah, and on his query, he explained that he was there in connection of his personal business. The complainant could not explain as to whether the eyewitness disclosed his purpose on the spot and as to whether the eyewitness had reached the moment, they reached the clinic. The complainant went on constant improvements and stated that soon after the deceased received the firearm injuries, he breathed his last, and thereafter, he informed his relatives who approached to the place of incident and the dead body was shifted to the hospital. This is surprising that when the complainant alongwith the eyewitness and other people were present on the spot, then what need was felt for the presence of the relatives. This suggests that in fact the complainant was not present at the time of incident, and that it was after arrival of the dead body to the hospital that he alongwith the co-villagers reached to the hospital. This is abnormal on part of the complainant that firstly the dead body was shifted to a cot and then they started on foot towards the hospital

and that it was after covering a long distance that the Dala/pickup was arranged and the dead body was shifted to the hospital. We cannot ignore that the occurrence took place at 5:30 PM, and the report was made at 7:00 PM, whereas the distance between the spot and the hospital was stated to be two furlongs, when such is the situation, then we are disturbed to know that what caused this abnormal delay and instead the dead body should have reached to the hospital much earlier than the stated time. The explanation so rendered does not suit the situation at hand. Inayat Ullah was examined as PW-8, who stated that on the day of incident, he was present at the place of occurrence owing to his personal engagement, though initially, he did not explain that what brought him to the place of incident, but it was during his cross-examination that he stated that earlier he had brought wheat to the adjacent grinding mill and he was waiting as the grinding mill was closed by the time. We are surprised that even the complainant was not certain regarding the engagements the eyewitness had at the time of incident, and even the eyewitness could not explain the same. Regarding presence of the

eyewitness, the Investigating Officer was examined, who stated that the eyewitness did not explain the purpose of his presence and even no wheat belonging to the eyewitness was either seen or taken into possession. This is intriguing on part of the eyewitness and even the Investigating Officer that the miller was neither associated with the process of investigation, nor his name was put in the calendar of witnesses, so much so, his statement was not recorded. The eyewitness failed to explain his presence on the spot, as no relevant witness in that respect was examined. The record tells that the incident occurred on the 3rd day of Eid and this is nothing, but abnormal that on the 3rd day of Eid, the eyewitness ran short of flour that he rushed to the grinding mill. Even the Investigating Officer was examined on this particular aspect of the case, who confirmed that being Friday, the grinding mill was closed.

7. The absence of the witness is further doubted from the fact that the eyewitness categorically stated that after making the report, he did not stay in hospital rather he left for his home and that it was thereafter that the complainant asked him to adduce

evidence in his favour, to which he replied that being natural witness of the occurrence, he must depose. Another intriguing aspect of the case is that the scribe, who was examined as PW-1, stated that he drafted the *murasila* after the complainant reported the matter and thereafter, the injury sheet and the inquest report were prepared. The scribe took us aback, when he stated that after drafting the *murasila*, he conveyed the information to the local police station on his wireless and it was on his dictation on his wireless set that the contents of *murasila* were incorporated in the FIR. He further stated that it took him ten minutes to dictate the same on wireless. If we accept what he stated to be correct, then we are surprised that why the time of registration of FIR has been mentioned as 20:00 hours, rather the FIR should have bene registered much earlier to the stated time. The cumulative effect of the above stated facts, takes us nowhere but to hold that a conscious attempt was made by the prosecution to cover the delay and to establish the presence of witnesses with the deceased at the time of incident and thereafter at the time of report. We are surprised to see, when the scribe stated that though he drafted the

murasila but the injury sheet and inquest report were prepared by one Umar Daraz Khan, on his dictation. Surprisingly, said Umar Daraz was not produced as the prosecution witness. We are yet to know that when Umar Daraz, being the most important witness was abandoned, then what value can be attached to the documents he prepared.

8. The Investigating Officer visited the spot and recovered one empty of .30 bore from the place of incident alongwith blood stained earth from the place of the deceased, he also prepared site plan on pointation of the complainant. Though the site plan was prepared and the places of the deceased, eyewitness and the acquitted co-accused are mentioned therein, but no empties of 7.62 bore were recovered from the places of acquitted co-accused. Even the Investigating Officer did not take into possession the motorcycle belonging to the deceased. The presence of the eyewitness is further belied by the fact that at the time of spot pointation he was not present with the complainant and that it was the complainant alone on whose pointation the site plan was prepared. The eyewitness was thoroughly cross-

examined on material aspects of the case and was confronted with his statement recorded, under Section 161, Cr.P.C, by the Investigating Officer. The facts which he did not disclose during his police statement, were elaborated when he appeared before the trial Court as PW-8. The learned defence counsel confronted this witness with his statement recorded under section 161, Cr.P.C. When both the statements, one recoded by the Investigating Officer and the other recorded by the eyewitness during trial, are placed in juxtaposition, we are not hesitant to hold that the eyewitness did not remain natural and consistent to his previously recorded statement and the improvements we found in his Court statement are dishonest which has put a question mark to his integrity. The prosecution is to explain that when the deceased died on the spot, then what compelled them to go to the hospital to report the matter despite the fact the police station was lying at a closer distance and also one must pass the police station to reach the hospital. The abnormal conduct displayed by the witnesses confirms their absence at the time of incident and we can form no other opinion but that at the time of incident the

deceased was all alone who after receiving firearm injuries died on the spot and his dead body was shifted to the hospital, by the people of the adjoining houses, where the matter was kept pending and it was on arrival of the complainant and the eyewitness, from their village that the matter was reported.

In case titled ***'Liaquat Hussain and others Vs. Falak Sher and others (2003 SCMR 611)***, it was held by the apex Court

> *"Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence".*

9. The Investigating Officer was examined as PW-3, who stated that on arrival to the spot the clinic of the doctor where the incident occurred was closed, it was on arrival of the owner of the shop, namely Bashir who provided keys to the Investigating Officer, that the door was opened. He further stated that two empties of .30 bore alongwith blood stained earth were recovered from the flour of the shop and on pointation of the complainant the site plan was prepared. The site plan is silent regarding the

availability of medicines, the furniture and more particularly the table and chair of the doctor, which added to our surprise as to whether it was in fact the clinic of a doctor. The Investigating Officer did not record the statements of the people who were allegedly present at the time of incident and even of the owner of the shop Muhammad Bashir. It further surprised us that it was he who provided cot for shifting of the dead body but the lack of interest on part of the prosecution further disturbs our judicial mind, that why such an important witness was not associated with the process of investigation. Never ever, the Investigating officer stated that he asked him for recording his statement and that he denied. The conduct displayed by the prosecution in general and the Investigating Officer in particular takes us there where we have no option but, to take an adverse inference. The Investigating Officer did not take pains to ask for the miller who was running the adjoining grind mill, to confirm the visit of the eyewitness and even he did not make efforts either to collect the wheat brought or its presence in the grinding mill. When the statement of the miller is not recorded and

the wheat has not been shown then in that eventuality we are not reluctant to hold that the eyewitness could not succeed in establishing the purpose of his presence at the time and at the place of incident. Another important witness namely Umar Daraz was not produced by the prosecution as the scribe stated that, it was he who on his dictation drafted the murasila and prepared the injury sheet and inquest report. When the author of such important documents was not produced then in that eventuality, it is the prosecution to suffer. The overall impact we see is that, had these witnesses been produced or their statements recorded, they would not have supported the false claim of the complainant. The law is settled that when the best available evidence is not produced, then it is the prosecution to suffer. The Qanun-e-Shahadat Order, 1984, in the shape of Article 129(g) has accorded protection to the accused and the benefit of the situation must be extended to the one charged.

10. The medical evidence is in conflict with the ocular account if we presume the statement of the complainant to be correct then in that eventuality the seat of injury instead down to upward must have been

through and through, as according to the complainant by that time the deceased had not resumed the seat when he was fired at. The doctor was examined as PW-2, who stated that the injury given in his detail at page No.1 and in diagram, suggested that it was from down to upward. The inter se comparison of what the complainant stated and the doctor opined, brings us nowhere but to hold that the medical evidence does not support the case of the prosecution. True, that medical evidence is confirmatory in nature and in case where the ocular account is trustworthy and confidence inspiring, it cannot be taken into account to discredit the eyewitness account but in case the eyewitnesses fail to convince then in that eventuality it is the medical evidence that steers the wheel. In the instant case, the conflict between the two suggests that the incident did not occur in the mode, manner and it also raises an eyebrow over the conduct and presence of the complainant at the time of incident.

In case titled ***'Akhtar Saleem and another Vs. The State and another (2019 MLD Peshawar 1107)***, it was held that:-

> *"The above factors, material contradictions between ocular and medical evidence create serious*

doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts".

11. The learned counsel for the appellant submitted that on one hand some of the prosecution witnesses including the Investigating Officer did not deny the stance of the complainant and on the other, the accused/appellant through an application requested for fair investigation. It was submitted that PW-4 and the Investigating Officer categorically stated that some of the people present at the place of occurrence did not support the case of the prosecution and there was a general rumour regarding innocence of the appellant. True, that the appellant submitted an application to the high-ups regarding fair investigation which was marked to the concerned Investigating Officer for probe. As the appellant took the plea of alibi, stating therein that a day before the occurrence he was in custody of the police of the police station Karror Lal Eisan, District Layyah, as his motorcar was taken from his possession under section 550 of the Criminal Procedure Code. Though the Investigating Officer visited the concerned police station and

recorded statements of all concerned including the police official who arrested the appellant and of an Advocate with whom the appellant and two others stayed for a night. The witnesses were produced on conclusion of the trial, as DW-1 and DW-2 and the relevant documents were exhibited. The issue before us is as to whether the evidence produced by the appellant in his defence could be relied upon and as to whether the witnesses appeared in defence are trustworthy. No doubt, the documents regarding interception of the motorcar were produced and placed on file and no doubt, the concerned witnesses stated of his confinement in the police lockup but, that alone is not sufficient to substantiate the claim of the appellant rather the appellant in order to prove his presence there at Punjab, must have produced reliable witnesses and reliable documents. The documents so produced cannot be taken into consideration in support of his plea of alibi. This Court is to determine as to whether the plea taken and not proved will weigh against the appellant and so was the submission of the learned counsel representing the complainant. There is no ambiguity that if an accused takes a plea regarding his

innocence and if he does not succeed to prove the same, it cannot be taken against him, as the prosecution is still under the bounded duty to establish its charges and the burden never shifts, however, when an accused takes the plea of right of self-defence then in that situation the accused is under the obligation to prove the same failing which the Court, dealing with the matter, can take it into consideration against the accused charged, but in the instant case the situation is otherwise as it is the prosecution to establish its case through cogent, convincing and trustworthy witnesses and the burden never shifts to the accused/appellant.

In case titled ***'Ali Ahmad and another Vs. The State and others' (PLD 2020 S.C. 201),*** it was held that:-

> *"In a case where the accused has taken a specific plea or has produced evidence in his defence, the Court should appraise the prosecution case and the defense version in juxtaposition, in order to arrive at a just conclusion. Even in such situation the burden remains on the prosecution to prove the necessary ingredients of the offence charged against the accused, and it does not shift upon the accused merely by taking a defence plea or producing evidence in his defence".*

It was further held in the said judgment that:

> *"The burden shifts upon the accused under Article 121 of the QSO to prove his defense plea, only when a prima facie case is made out against him by the prosecution on the basis of its evidence. If the prosecution fails to prove its case against the accused, the question of shifting of burden on the accused does not arise".*

12. The motive was stated to be the political rivalry between the parties, but the record is silent as to what status the deceased had, which prompted the accused to kill him and even the complainant failed to bring on record material evidence in that respect. The Investigating Officer did not investigate the case on that particular line and even no independent witnesses were examined in that respect. True, that the weakness or absence of a motive will not knock out the prosecution from contest, but we cannot ignore that once the motive is alleged and not proved, then it is the prosecution to suffer.

13. The cumulative effect of what has been stated above, leads this Court nowhere but to hold that the prosecution could not establish guilt of the appellant and the witnesses failed to establish their presence on the spot at the time of incident. As the learned trial Court failed to appreciate the material

aspects of the case, we feel that the impugned judgment is suffering from inherent defects which calls for interference. Resultantly, this appeal is allowed, impugned judgment is set aside and the appellant is acquitted of the charges levelled against him. He be set free, forthwith, if not required to be detained in connection with any other criminal case. As we have set aside the conviction and sentence, therefore, the connected criminal revision as well as criminal appeal do not hold ground, are dismissed as such.

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

Announced.
Dt: 27.9.2021.
*Kifayat/**

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice S.M. Attique Shah
Hon'ble Mr. Justice Sahibzada Asadullah