JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

(*Judicial Department*)

Cr.A No. 14-A/2014 with
Murder Reference No.04-A/2014

Mukhtasir & 5 others.
Vs.
The State & Bin Yamin.

JUDGMENT

Date of hearing 28.03.2017.

Appellant-Petitioner _____

_____

Respondent _____

_____

ISHTIAQ IBRAHIM, J.- This Criminal Appeal No.14-A/2014, has been filed by convicts/ appellants, Murder Reference No.04-A/2014 against accused/ appellant Mukhtasar and the connected Criminal Appeal No.25—A/2014 against acquitted accused, and Criminal Revision No.07-A/2014 for enhancement of sentence of appellants in Cr.A No.14-A/2014 filed by Muhammad Afzal, legal heir of deceased, arise from the judgment of learned

Sessions Judge, Kohistan, whereby he on 30.01.2014, while acquitting Maulana Javed, Maulana Noor-ul-Haq, Moasam Khan, Jehangir, Baseer and Munshi, convicted appellant No.1 Mukhtasir under section 302-b PPC, to death, while convicted appellants No.2 to 6 under section 302 (b) PPC and sentenced to life imprisonment with compensation of Rs.200000/- (two lac) each for murder of deceased Sher Wali and Rafi-ud-din or in default thereof to further undergo six months S.I each.

2. Since both appeals, murder reference and criminal revision are the outcome of one and the same occurrence/ F.I.R, therefore, these are being disposed of by way of this single judgment.

3. Initially, complainant Binyamin reported the matter to the local police on 04.01.2013 at 04.00 hours, to the effect that on 03.01.2013 at 13.00 hours he alongwith Shah Faisal, Sher Wali and Rafi-ud-Din

were busy in ablution for "***Zohar***" prayer in a canal near their house, in the meanwhile the accused Mukhtasar, Awal Khan, Shams-ud-din, Jantazir, Taus, Purdil and Munshi duly armed with firearms emerged and started firing, resultantly, Shah Faisal was hit with the fire shot of deceased Mukhtasar, Sher Wali was hit with the fire shot of accused Awal Khan, while Rafi-ud-Din was hit with the fire shot of accused Jantazir, Taus and Purdil and all the three injured died on the spot and the complainant was hit with the fire shot of Munshi and sustained single injury on heel of his left foot. After commission of offence, the accused decamped from the spot. The accused have committed the offence at the instance and consultation of accused Maulana Javed, Maulana Noorl-ul-Haq, Musam Khan, Jehangir and Bashir. It was alleged that the occurrence was witnessed by the complainant as well as Alam Sher and Gulab. Motive for the offence, as alleged by the complainant, was previous dispute over women folk.

4. Sheraz Ahmad SHO (PW-3) reduced the report of the complainant, in shape of *murasila* (Ex:PA) at the spot. It was read over and explained to the complainant, who after admitting it to be correct thumb impressed the same in token of its correctness, whereafter, he prepared the injury sheets and inquests reports of all the three deceased as well as injury sheet of injured/ complainant and referred them for Post mortem and medical treatment of the complainant under the escort of Sher Ghazi IHC and Constable Khan Muhammad 427. The *murasila* was also sent to the Police Station concerned though Constable Rahim Dad No.744, where on the basis of which F.I.R as Ex: PA/1 was registered against the accused under sections 302/324/109/1148/149 PPC.

5. Investigation started in the case and on its completion, complete *challan* was submitted to the Court of learned Sessions Judge, Kohistan. Learned trial Court delivered the copies of relevant

documents to accused in compliance with provision of section 265-C Cr.PC and charge was framed against them, to which they did not plead guilty and claimed trial. In order to prove the charge against the accused, the prosecution produced and examined as many as eleven (11) PWs. On conclusion of prosecution evidence, statements of accused were recorded, wherein all the accused professed their innocence, however, neither they wished to be examined on oath as provided under section 340(2) Cr.PC nor opted to produce defence evidence. After hearing arguments of learned counsel for the parties, the learned trial court vide impugned judgment dated 30.01.2014 acquitted the accused Munshi, Maulana Javid, Maulana Noor-ul-Haq, Mosam Khan, Jehangir and Baseer, while convicted accused Mukhtasar under section 302(b) PPC and sentenced to death, whereas accused Awal Khan, Shams-ud-Din, Jantazir, Taus and Yadool were convicted under section 302(b) PPC and sentenced to life

imprisonment with compensation Rs.200000/-(two lac) each to the legal heir of deceased, or in default whereof to further undergo six moths SI. The convicted accused/ appellants have filed this criminal Appeal No.14-A/2014, while the complainant filed Cr.A No.25-A/2014 against acquitted accused/ respondents and Cr. R No.07-A/2014 for enhancement of sentence against convicted accused. Appeals, murder reference and criminal revision are going to be decided through this common judgment.

6. Learned counsel for accused/ appellants argued that the report has been lodged at the spot with a considerable delay without any explanation after consultation and deliberation by maneuvering a concocted story, that too after preliminary investigation. He further argued that no specific firearm in the hands of accused/appellants have been mentioned and it was alleged by the complainant in the F.I.R that all the appellants have started firing, so

identity of specific shot to specific deceased by specific appellants is not possible. He supported his argument by submitting that as per site plan the accused were almost at a distance of 38/39 paces, about 94 feet from the complainant party, therefore, identification of specific short by a specific accused to a specific deceased or injured is not possible. He went on to say that prosecution evidence is contradictory, pregnant with jumble of dents and doubts, smeared with interestedness, hence, could not be based for conviction. His next argument was that previous enmity of complainant with other people was admitted by PWs at trial, hence, it may be the act of others to counter their enmity. Developing his arguments he argued that the occurrence is not taken place in the mode and manner as setup by the prosecution. Lastly, learned counsel for the appellants urged that the learned trial Court by not adverting to the facts and circumstances

of the case, has felled into error and therefore, the impugned judgment is liable to be reversed.

7. As against that, learned counsel for the complainant, who was also assisted by learned AAG argued that prosecution has fully established the guilt of the appellants through cogent, coherent and confidence inspiring evidence in the shape of recovery of blood, crime empties from the spot of occurrence and as well through medical evidence and thus they have rightly been convicted by the learned trial Court. He further argued that the learned trial court by not relying on the same evidence erred in law by acquitting the accused/ respondents of connected criminal appeal. He lastly prayed that acquitted accused/ respondents be also convicted under the law and sentence of accused/ appellant may be enhanced to meet the ends of justice.

8. Arguments heard and record perused.

9. Perusal of the record reveals that admittedly, the report was made to the local police with the delay of fifteen (15) hours, as the occurrence took place on 03.01.2013 at 13.00 hours, while the report was lodged on 04.01.2013 at 04.00 hours at the spot, whereas distance between the place of occurrence and police station has been shown to be 39/40 kilometers. So non-availability of traffic or any other ground urged by the prosecution would be of no use to them and delay in the circumstances of the case reacts on the genuineness of the story set up by the prosecution. Wisdom is derived from case titled ***"State through the Advocate General N.W.F.P Peshawar Vs. Shah Jehan" (PLD2003 SC 70).***

10. The report was not lodged by the complainant in the police station, rather he reported the occurrence to the police on their arrival at his residence, where he was present alongwith the dead bodies and had made no effort to shift the deadbodies

to the hospital or to the police station. It has been held time and again that FIR which is not recorded at Police Station, suffers from the inherent doubts. Reliance may be placed on case titled ***"Allah Bachaya and another Vs the State (PLD 2008 SC 349)***.

11. It is in the evidence that after the occurrence, despite the fact that complainant also received injury at the heel of his left foot, did not consult the doctor for his treatment and remained present at the spot for about 14 hours, till arrival of police, which fact is not appealable to a prudent mind, rather it gives an inference that the story was tailored during the interregnum.

12. As per narration in the FIR (Ex:PA/1) the specific role were given to all the seven accused/appellants, who were shown to be present at the time of occurrence, duly armed with sophisticated weapons side by side to each other and

made indiscriminate firing at the complainant and the deceased, while according to site plan (ExPW9/1) approximate distance between the accused and the deceased was 39/40 paces, then how can the complainant identify the shot of each accused and specify for specific casualty which is quite unnatural and unbelievable, rather against the human perception and repellant to human conduct.

13. Besides, if we take the case of each deceased qua the accused charged for their murder, it is apparent from the post mortem reports that deceased Faisal sustained injury which was attributed to accused/ appellant Mukhtasar, while deceased Sher Wali was hit with the firing of Awal Khan and Shams-ud-Din appellant and likewise, Rafi-ud-din got hit from the firing of appellants Jantazir, Taus and Yadol. This is quite strange that in case of deceased Faisal sustained solitary injury and for that only Mukhtasar was charged, while deceased Sher

Wali received two firearm entry wounds for which two appellants namely Awal Khan and Shams-ud-din were charged and deceased Rafi-ud-din sustained three firearm entry wounds and for that three appellants Jantazir, Taus and Yadol, were charged. This aspect of the case clearly depicts that the FIR was purposely lodged after considerable delay and preliminary investigation was conducted in this case in order to make the charge commensurate with the number of accused charged qua each deceased, otherwise that narration of the complainant, noticing the bullet oozing from muzzle of the weapon of each accused and hitting specific deceased, is far from human capacity and observation.

14. Both the witnesses are closely related to all the deceased, as well as each other, therefore these witnesses can legitimately be termed as interested witness and statements of these witnesses are to be looked into with great care and caution.

Undoubtedly the statement of interested witness which even for that matter inimical witness can be taken into consideration but the rule of appraisal is that the same is supported by some strong corroboration from some independent source. In order to believe a witness first the prosecution has to satisfy the Court regarding presence of the witnesses at the spot and secondly whether they are credible truthful witnesses and thereafter conviction can be based on testimony of inimical witness, if same is corroborated by some strong corroborative piece of evidence. Reliance is placed on case titled ***"Haji Rab Nawaz Vs Sikandar Zulqarnain and 7 others"(1998 SCMR 25),*** wherein it is held that:

> ***"One salutary principle laid down by this Court in this behalf land which is now firmly established is, that in a case involving capital punishment, the courts will not base conviction of an accused solely on the testimony of interested witness, unless such evidence finds corroboration by some other independent and unimpeachable***

nature of evidence or circumstance in the case."

15. Now it is to be seen whether the narration by above noted PWs are truthful, correct, reliable, coherent and supporting each other or not. Complainant Binyamin (PW-7) has attributed firearm injury sustained by him to accused/ respondent Munshi, but on the other hand the medico-legal examination conducted by Doctor Muhammad Geer, (PW-11), shows that:

"There is a skin deep lacerated wound at the heel of left foot. The wound is 3x2 cm in diameter. There is no bleeding. Nature of injuries Ghair-Jaifah-Damiyah. Probable duration of injury 25/26 hours."

In cross-examination he affirms, that the injury was caused to the injured by sharp edged stone. He further admits that blunt injury can be caused through stone. If this is the position of the prime witness of the prosecution, how this court could rely on the testimony of such witness and

award capital punishment to the accused charged in the FIR, where his own narration is negated by the medical evidence regarding injuries sustained by him. Reliance is placed on case titled, ***"Bashir Ahmad alias Mannu Vs The State" (NLR 1996 criminal 234) and "Muhammad Irshad and another Vs the State (1999 SCMR 1030), wherein it is held that:***

> ***"The eye-witness examined by the prosecution are closely related to one and other and the rule of prudence required that there should have been some independent corroboration available for placing implicit reliance on their testimony but the same is lacking and it would be highly unsafe to act upon the uncorroborated testimony of eye-witnesses examined by the prosecution, particularly when it is full of material contradictions. It is in conflict with the medical evidence, also with regard to the distance from which the deceased and the injured P.Ws were reportedly fired at. The deceased***

> ***and the eye-witnesses were not persons of good antecedents as apparent from record, showing them involved in several criminal cases.***

Even stamp of injury on the person of complainant would not per see tantamount to a stamp of credence on his testimony. Reliance is placed on case titled ***"Muhammad Hayat and another Vs the State" (1996 SCMR 1411), wherein it is held that:***

> ***"There is no cavil with the proposition laid down in the case of "Zaab Din and another Vs the State" (PLD 1986 Peshawar 188) that merely because the PWs had stamp of fire-arm injury on their person was not per see tantamount to a stamp of credence on their testimony.***

16. Another eye-witness who was examined by the prosecution is Gulab son of Patang (PW-8), deposes that he was present in his house, on the report of fire shots he came out from the house and noticed the appellants firing at the complainant party.

It is strange enough that investigation officer has observed and have mentioned all the places in the site plan, but house of this PW has not been cited in it. Moreover, foot note of the site plan shows that it was prepared at the instance of complainant, the eye-witnesses Ahmad Sher (abandoned witness) and Gulab (PW-8), but he (Gulab) squarely disown the preparation of site-plan at his court statement. Meaning thereby that the statement of Ghulab Khan is contradictory to the site plan (ExPW9/1).

17. Both the parties are at daggers drawn since long, when the tragedy of ***"Kohistan girl's video scandal"*** came into lime light. Houses of both the parties are situated in the same area and they are having such a touchy and sensitive motive between them, then it is highly improbable that in this particular tribal area they would not equipped themselves with the firearms.

18. All the deceased were busy in making ablution by removing trousers (*Shalwar*), in presence of each other which is also against the tradition of our society and it shows falsity of the story of the prosecution. Moreover, the accused have been shown in the site plan at upper level, while the deceased were at the bank of canal and were on lower level to the appellants, but it is strange enough that all the injuries on the bodies of deceased are from downward to upward. The site plan and medical evidence are contradictory to each other.

19. On the other hand, 4 empties of 303 bore and 30 empties of 7.62 bore were recovered from the spot, which were never sent to the FSL to ascertain whether the same were fired from one or different weapons, which would have fortified the charge of participation of more than one accused and would have rendered strong corroboration to the ocular testimony furnished by complainant Binyamin

(PW-7) and Gulab (PW-8). More particularly, when case of the prosecution was that seven accused made indiscriminate firing at the complainant party effectively. Ironically the empties were sent to the FSL alongwith two weapons allegedly recovered from the house of accused Awal Khan and Taus Khan only to the effect whether the same were fired from the weapons mentioned above are not, and in this respect the report of FSL Ex: PW-9/40 and Ex: PW 9/41 are in negative, which smacks of concealment, as seven accused were allegedly involved in the case.

20. From the above assessment of evidence it is discernable that the charge made by the complainant party is exaggerated, as seven members of one family have been implicated on the strength of the motive which is more tempting then blood feud. Reliance is placed on 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 shabbier 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.***

21. Learned counsel for the complainant submitted that this case is offshoot of ***"Kohistan girls video scandal***", which was nationally & internationally publicized and the accused are also not entitled to the leniency at all, as they have brought bad name to the country. The courts are not supposed to be swayed away by emotions or sentimental submissions of the parties, while deciding fate of criminal cases, rather they are supposed to administer justice by strictly adhering to the recognized principles of criminal justice. Heinousness of offence would not be the yardstick for adjudging guilt of the accused rather Court has to see the evidence which has been adduced by the prosecution, whether it is up to the mark and is of unimpeachable character, which in this case, in our view, is not forthcoming.

22. Motive no doubt that is ***"Kohistan girl's video scandal"***, same is double edge weapon, which

cuts either way. Moreover, the corroborative piece of evidence, which by itself is not sufficient to adjudge the accused guilty. Admittedly, it is also matter of record that two persons, who were involved in the video scandal, they are still alive. Hence, motive is not helpful to the case of prosecution.

23. It is settled law that for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts. Single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefit, not as a matter of grace and concession but as a matter of right. Reference is made to case **"Muhammad Akram v. State" (2009 SCMR 230).** All these serious issues created doubts in our mind regarding the guilt of the accused/appellants beyond reasonable doubt and these material facts favouring the accused/appellants were not considered by the learned trial Court, while appraising the evidence of

the prosecution. In the absence of truthful, trustworthy, reliable and confidence inspiring evidence, the learned trial Court has wrongly not extended the benefit of doubt to the accused/appellants.

24. So for as acquitted accused/ respondents in criminal appeal No.25-A/2014 are concerned, admittedly all the accused/ respondents except accused/ respondent Munshi, have been charged for abetment. The prosecution has badly failed to bring on record an iota of evidence regarding their abetment with the principal accused. So for as accused/ respondent Munshi is concerned, evidence of complainant and medical evidence with respect to injuries caused to complainant by accused/ respondent Munshi have been belied, the learned trial court has also disbelieved the evidence to the extent of accused/ respondent Munshi, hence, he has been rightly acquitted by the learned trial court. Moreover,

when this court has discarded the evidence of prosecution with respect to the principal accused, no case is made out for interference against the acquitted accused/respondents.

25. In view of what has been discussed above, We, accept this criminal Appeal No.14-A/2014 filed by accused/ appellants Mukhtasir and 5 others, as a result whereof, conviction and sentence recorded by the learned trial court vide judgment dated 30.01.2014 is set aside and the appellants are ordered to be acquitted of the charges in case FIR No.02 dated 04.01.2013, under sections 302/324/109/148/149 P.P.C., at Police Station, Palas, Kohistan. They shall be released forthwith if not required in any other case.

26. Murder Reference No.07 -B/2014 forwarded by the learned trial court for confirmation of sentence of death inflicted upon the convict Mukhtasar is answered in **NEGATIVE**.

27. So far as Cr.A No.25-A/2014 against acquitted accused and Cr. R No. 07-A/2014 for enhancement of sentence of convicts, both filed by the complainant Binyamin, for the reasons afore-stated, the same being devoid of any legal force are accordingly dismissed.

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

Announced.
Dt: 28.03.2017
Azam/PS

J U D G E

J U D G E