SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Shariat Appellate Jurisdiction)

PRESENT:

Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Criminal Appeal No.11 of 2018
(Filed on 24.05.2018)

Muhammad Younas son of Gulab Hussain, caste Gujjar, r/o Boa-Gujjaran, presently detained in Judicial Lock-up, Mirpur, District Mirpur.

…. APPELLANT

VERSUS

1. The State.
2. Mst. Fazal Bibi, widow,
3. Muhammad Akhtar,
4. Rashid Mahmood, sons,
5. Nasreen Akhtar,
6. Yasmin Bibi,
7. Naseem Bibi, daughters, of Muhammad Akbar son of Nek Muhammad (deceased), legal heirs of Mohammad Akram Khan

(deceased), r/o Boa-Gujjaran, Chaksawari, District Mirpur.

…. RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 12.05.2018 in criminal appeals No.87 and 88 of 2017)

FOR THE APPELLANT: Mr. Abdul Majeed Mallick, Advocate.

FOR THE RESPONDENTS: Raja Inamullah Khan, Advocate and Mr. Mehmood Hussain Ch., Addl. Advocate-General.

Criminal Appeal No.19 of 2018
(Filed on 04.07.2018)

1. Mst. Fazal Bibi, widow,
2. Yasmin Bibi,
3. Naseem Bibi, daughters,
4. Arshad Mehmood son of Muhammad Akbar (legal heirs of Mohammad Akram deceased), r/o Boa-Gujjaran, Chakswari, District Mirpur.

…. APPELLANTS

VERSUS

1. Muhammad Younas son of Gulab Hussain, caste Gujjar, r/o Boa-Gujjaran, presently detained in Judicial Lock-up, Mirpur, District Mirpur.

…. RESPONDENT

2. The State through Advocate-General.
3. Muhammad Akhtar,
4. Nasreen Akhtar, daughters of Muhammad Akbar.

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 12.05.2018 in criminal appeals No.87 and 88 of 2017)

FOR THE APPELLANTS:	Raja Inamullah Khan, Advocate.
FOR THE RESPONDENT:	Mr. Abdul Majeed Mallick, Advocate.
FOR THE STATE:	Mr. Mehmood Hussain Ch., Addl. Advocate-General.
Date of hearing:	20.12.2018

JUDGMENT:

Raja Saeed Akram Khan, J.— The titled appeals have been directed against the judgment of the Shariat Appellate Bench of the High Court (High Court) dated 12.05.2018, whereby the appeals filed by both the parties have been dismissed.

2. The succinct facts forming the background of the instant case are that on 11.11.1985, the Station House Officer (SHO) Police Station Sadar, Mirpur was informed through a telephonic call that a person namely, Muhammad Akram has been murdered near the Khanda-Mor. The SHO along with the constables arrived at the scene where the dead body of the deceased was lying and the father of the deceased was also present at the spot. The father of the deceased verbally reported that after attending the job at the kiln of one Taj Muhammad at Dudyal, at

about 4:00 pm, when he reached Chaksawari, he came to know that his son Muhammad Akram, aged 22/23 years, has been murdered by Muhammad Younis, accused, by inflicting knife blows and Matloob Hussain, who was present at the spot, witnessed the occurrence and apprehended the accused. It was also reported that the people of the locality were divided in the different groups and a short-time ago, Muhammad Younis, accused, had joined the opponent group. The report was delayed because he was at work in the kiln at Dudyal, therefore, he could not receive information regarding the occurrence. On the verbal report of the complainant, the police registered the case against the convict-appellant in the offence under section 302, APC. The police arrested the convict-appellant and after completing the necessary investigation presented the *challan* in the

District Court of Criminal Jurisdiction, Mirpur on 26.12.1985. The trial Court during the pendency of trial granted the concession of bail to the convict-appellant vide its order dated 30.03.1989, thereafter; the convict-appellant went abroad and absconded himself for a period of about 25 years. However, on his arrest, the trial Court concluded the trial and after hearing the arguments convicted and awarded the sentence of 14 years' rigorous imprisonment to the convict–appellant under section 302 (C), APC. The convict was also ordered to pay Rs.10,00,000/- as compensation to the legal heirs of the deceased under the provisions of section 544-A, Cr.P.C and in default of payment it was held that the compensation shall be received as an arrears of Land Revenue. Feeling aggrieved from the judgment of the trial Court; both the parties filed appeals before the High Court.

The convict-appellant filed appeal for acquittal, whereas, the complainant filed appeal for enhancement of the sentence. The learned High Court vide impugned judgment dated 12.05.2018, dismissed both the appeals which is the subject matter of these appeals.

3. Mr. Abdul Majeed Mallick, Advocate, the learned counsel for the convict-appellant argued that the learned High Court failed to appreciate the evidence brought on record in a legal manner. He contended that at the time of occurrence, no one was present at the place of occurrence and it was a blind murder. He added that the witnesses have been planted in the case and the alleged eyewitness narrated such a fake story which is not even believable. The learned counsel while referring to the statement of the eyewitness, Matloob Hussain, submitted that there are glare contradictions in his statement and the case established by

the prosecution, thus, this aspect cannot be overlooked lightly. He drew the attention of this Court towards the contents of FIR and submitted that the same are based on the story narrated by the eyewitness, Matloob Hussain, but surprisingly neither the said witness came up as a complainant of the case nor he was present when the police reached the spot. Moreover, the name of informant has not been disclosed in the FIR and the contents of FIR have also not been verified by the complainant. The learned counsel also referred to the statement of Muhammad Rafique, the retired Head Constable, in whose presence, allegedly the whole proceedings, i.e. recovery of dead body and the blood stained articles etc. were conducted and submitted that the witness categorically stated in his statement that when police reached the spot, Matloob Hussain was not present there. He submitted

that the statement of the eyewitness, under section 161, Cr.P.C. was also recorded on the next day of occurrence which itself shows that when police reached the place of occurrence he was not present there, whereas, the eyewitness stated in his statement that he remained with the investigating officer on the faithful day for more than 5 hours. He added that the eyewitness stated that police recorded his statement under section 161, Cr.P.C. in the veranda of a Hotel owned by Fazal Karim, whereas, in the site plan no such veranda has been shown. He contended that the doctor categorically stated in his statement that he had given the findings on the instructions of the prosecution which shows that he failed to discharge his legal obligation. He forcefully contended that the evidence regarding the manner of occurrence/arrest of the accused was not put to the accused while recording his

statement under section 342, Cr.P.C., therefore, the same cannot be read against him. He maintained that both the Courts below wrongly considered the absence of the accused as abscondence as the accused is the nationality holder of United Kingdom (U.K) who went back for medical treatment and he also produced the documents in this regard before the Court. He lastly submitted that the convict-appellant has undergone the imprisonment for more than 10 years, whereas, it is a case of acquittal. The learned counsel referred to and relied upon the case law reported as *Manzoor v. The State* [1993 SCMR 1624], *Muhammad Mushtaq v. State* [2001 SCR 286] and *Tasawar Hussain v. The State & 9 others* [2016 SCR 373].

4. On the other hand, Raja Inamullah Khan, Advocate, the learned counsel for the complainant while controverting the

arguments advanced by the learned counsel for the convict-appellant submitted that the impugned judgment is perfect and legal which has been passed after due appreciation of the evidence available on record, therefore, interference by this Court in not warranted under law. He contended that the convict-appellant is the sole character in the whole episode of occurrence who is nominated in the FIR with a specific role. There was no previous enmity between the complainant and the convict-appellant to falsely implicate him in the occurrence. The prosecution proved the complicity of the convict-appellant in the occurrence through ocular account, therefore, the discrepancies pointed out by the learned counsel for the convict-appellant in the corroboratory evidence cannot be given any weight. He forcefully argued that the eyewitness has no relation with the

complainant party rather he is the relative of the convict-appellant, therefore, the testimony of the said witness cannot be disbelieved. He submitted that the manner, place and time of occurrence are admitted and all the witnesses got recorded their statement in line with each other. In this regard, he drew the attention of the Court towards the statements of the different witnesses and suggestions put by the defence side. He contended that the convict-appellant after getting concession of bail went abroad without the permission of the Court, therefore, both the Courts below rightly observed that he remained absconder for a period of more than 25 years and the argument of the learned counsel for the convict-appellant in this regard has no substance. The learned counsel referred to and relied upon the case law reported as *Sajawal Khan v. The State* [PLD 1979 SC AJK 130],

Muhammad Khalil v. The State [1992 SCR 249], *Khadim Ali and another v. The State* [1996 SCMR 1855], *Abdul Rashid and 3 others v. Abdul Ghaffar and 5 others* [2001 SCR 240], *Liaqat Hussain and another v. Ulfat Khan and another* [2007 SCR 39] and *Ali Imran v. The State* [2002 P.Cr.LJ Lah. 1856].

5. Mr. Mehmood Hussain Chaudhary, Additional Advocate-General while appearing on behalf of the State has also adopted the arguments advanced by the learned counsel for the complainant-appellant.

6. We have heard the arguments and gone through the record along with the impugned judgment and also considered the case law referred to by the counsel for the parties. Both the parties have filed appeals before this Court against the impugned judgment of the High Court, however, the

learned counsel for the complainant during the course of arguments supported the impugned judgment and has not pressed the appeal filed for enhancement of the sentence; therefore, in such development, the sole point requiring consideration by this Court is; whether the conviction as well as the sentence of 14 years' imprisonment awarded to the convict-appellant by the trial Court, maintained by the High Court, in view of the material available on record, are justified. To appreciate the point, we have minutely examined the record. It will be useful to reproduce here at first the contents of FIR which read as under:-

"بذریعہ ٹیلیفون تھانہ پولیس سٹی میرپور سے اطلاع ملی کہ کھنڈا موڑ کے قریب محمد اکرم نامی شخص کو قتل کر دیا گیا ہے۔ مزید تفصیلات موصول نہیں ہو سکیں۔ لہٰذا راقم مع محمد رفیق کانسٹیبل نمبر 1746 عبدالرشید 1808، 1903 محمد عارف 1885 کانسٹیبلان موقع پر کھنڈا موڑ پہنچا موقع پر نعش متوفی نزد کھنڈا موڑ پڑی ہے۔ متوفی کا والد محمد اکبر ولد نیک محمد نعش کے پاس موجود ہے جس نے رپورٹ زبانی کی کہ مظہر تاج محمد کے بھٹہ پر ڈڈیال کام کرتا ہے۔ آج

اتفاقاً 4 بجے چکسواری پہنچا تو پتہ چلا کہ محمد اکرم پسرم بعمر22/23 سال کھنڈا موڑ کے قریب محمد یونس ولد غلام حسین قوم گوجر ساکن بوعہ گجراں نے چاقو سے وار کر کے قتل کر دیا۔ موقع پر موجود مطلوب حیسن ولد صوفی احمد دین قوم گوجر ساکن دیہہ نے واقعہ پچشم خود دیکھا اور ملزم کو موقع پر ہی پکڑ لیا برادری میں شدید اختلافات کی وجہ گروپ بندی ہے اور محمد یونس کچھ عرصہ سے مظہر کے مخالف دھڑے حمید گروپ میں چلا گیا تھا۔ مظہر گزشتہ جمعہ کے دن سے ڈڈیال بھٹہ پر کام کرنے کے لئے چلا گیا تھا آج واپس آیا ہے اس لئے فوری طور پر اس واقعہ کے ظہور پذیر ہونے کا علم نہیں ہے تحت ضابطہ کارروائی کی جائے۔"

After going through the contents of FIR, it appears that the alleged motive behind the occurrence was the grouping between the members of the locality; moreover, one Matloob Hussain witnessed the occurrence and apprehended the accused on the spot. The further details as depicted from the record are that the convict-appellant inflicted the knife blows to the deceased and on the hue and cry made by the deceased, the alleged eyewitness, Matloob Hussain, went to the spot and apprehended the convict-appellant;

whereupon, the convict-appellant threw away the weapon of offence; the eyewitness at first stopped a vehicle and asked the driver, Mehmood Hussain, to arrange the water for the injured and after sometime a person namely, Gulbahar, reached there carrying the water and thereafter the eyewitness while catching hold the convict-appellant went to the hotel of Fazal Karim and locked him in a room of the hotel. The prosecution story that a person armed with a weapon after committing a heinous offence of murder surrendered himself before an empty handed person and even not made any sort of resistance normally does not appeal to a prudent mind and under law where ocular account is not appealing in nature the strong corroboration is required. Reference may be made to a case reported as *Waseem Hussain & 2 others v. Muhammad*

Rafique & another [2017 SCR 428], wherein it has been held that:-

> "Before entering into the merits of the case, we deem it appropriate to mention here that there is no cavil with the proposition that when a case is proved through ocular account the corroborative evidence can be ignored, however, if the Court reaches the conclusion that the eyewitnesses are interested and inimical towards the accused then testimony of said PWs cannot be relied upon safely without corroboration by the other evidence brought on record, moreover, the ocular account non-appealing in nature also requires strong corroboration."

It may be observed here that by the statements of the witnesses, who allegedly reached at the spot immediately after the occurrence, i.e. Mehmood Hussain Driver and Gulbahar Khan, the prosecution story could be

further corroborated, but unfortunately the record shows that they have not been produced before the Court. Thus, in view of the non-appealing ocular account and non-production of the aforesaid witnesses, the argument of the learned counsel for the convict-appellant that the origin of occurrence is shrouded in mystery, appears to have substance. The other important corroboratory evidence available to the prosecution was recovery of crime weapon etc., but the record shows that the prosecution has not proved the same by producing the evidence. It reveals from the perusal of the record that the prosecution abandoned most of the recovery witnesses and the only recovery witness appeared before the Court was Muhammad Rashid who has also not supported the prosecution version, whereupon, the prosecution declared him as hostile.

7. In the case in hand, it appears from the record that the occurrence took place on 11.11.1985, at about 1:30, pm, whereas, the information was given to the police regarding the occurrence after delay of hours. The silence of alleged eyewitness for a considerable time also cannot be ignored lightly. Moreover, the record shows that his statement under section 161, Cr.P.C., was not recorded at the relevant day rather the same was recorded on the next day of the occurrence and no plausible explanation in this regard has come on the record, whereas, under law the credibility of a witness is looked with serious suspicion if his statement under section 161, Cr.P.C. is recorded with delay without offering any reason, as has been held in a case reported as *Muhammad Khan v. Maula Bakhsh and another* [1998 SCMR 57]. There are also glaring contradictions in the

statements of the witnesses. The eyewitness stated in his statement that when the police reached the spot he was also present there and disclosed the whole story to the police, whereas, the only witness appeared before the Court from the police party, who visited the spot, is Muhammad Rafique Head Constable, who negates the version of the alleged eyewitness. The relevant portion of the statement of Muhammad Rafique is reproduced here which reads as under:-

> "جائے نعش کے قریب مظہر اور SHO تقریباً آدھ گھنٹہ رہے تھے۔ اس آدھ گھنٹہ میں مظہر کو مطلوب نامی آدمی وہاں نہ ملا تھا اور نہ دیکھا تھا۔ از خود کہا کہ پیچھے ہٹ کر چند مرد عورتیں کھڑی تھیں۔ اس آدھ گھنٹہ کے دوران مظہر کی موجودگی میں کسی آدمی نے SHO کو اپنا نام محمود اور مطلوب نہ بتایا تھا۔"

In the case in hand, out of 16 witnesses, cited in the calendar of witnesses, only the statements of 8 witnesses have been recorded. It also appears from the record that the evidence regarding the manner of

occurrence and arrest of the accused was not put to the convict-appellant while recording his statement under section 342, Cr.P.C., whereas, under law all the incriminating pieces of evidence available on record are required to be put to the accused, if the same are against him and if any such piece of evidence is not put to the accused then the same cannot be used against him. Reference may be made to a case reported as *Muhammad Shah v. The State* [2010 SCMR 1009], wherein, it has been held that:-

> "11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence,

> available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are 'For the purpose of enabling the accused to explain any circumstances appearing in evidence against him' which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984."

After examining the record it depicts that there are also a number of contradictions/flaws in the other evidence brought on record by the prosecution, however, there is no need to discuss the same in detail as the dents/flaws

already discussed are sufficient to form the opinion or draw the conclusion. The learned counsel for the complainant during the course of arguments drew the attention of this Court towards some suggestions put by the defence side to the prosecution witnesses and submitted that the same clearly demonstrated that the time, place and manner of occurrence are admitted. We deem it proper to observe here that the prosecution has to stand on its own evidence and mere on the strength of some suggestions pointed out by the learned counsel for the complainant it cannot be said that the case against the convict-appellant has fully been proved by the prosecution without reasonable doubt.

8. In the light of the flaws/dents in the prosecution case, discussed in the preceding paragraphs, although it can be said that the sentence of 14 years' imprisonment is hefty

one and the sentence already undergone, i.e. 10 years, is sufficient to meet the ends of justice, however, in view of the fact that the convict-appellant after getting the concession of bail, misused the same as he went abroad without the permission of the Court and remained absconder for a period of more than 25 years and during this period due to death of the investigating officer an important piece of evidence available to the prosecution was vanished coupled with the other factors that it is an admitted position that the eyewitness had no enmity with the convict-appellant to falsely implicate him in the commission of offence as well as the defence has not taken any stand as to why the case was registered against the convict-appellant;, it cannot be said that the convict-appellant is deserved for acquittal. The argument of the learned counsel for the convict-appellant that the convict-

appellant did not abscond rather he is a British National and he went back to U.K. for medical treatment and the learned High Court wrongly considered the absence as abscondence, has no substance as the convict-appellant instead of facing trial left the country without adopting the proper course and remained out of country for a long period, consisting of 25 years, thus, the learned High Court rightly considered such absence as abscondence. The argument of the learned counsel for the convict-appellant regarding the non-verification of the contents of FIR, is also not of worth consideration as under law it is not necessary for the complainant to verify the contents of FIR rather it is mere a practice and on such ground the convict-appellant cannot be acquitted of the charge.

In the light of the above discussion, we partly accept the appeal filed by the

convict-appellant and altered the sentence of 14 years' imprisonment awarded to him by the trial Court upheld by the High Court into the sentence already undergone. Except, this modification the impugned judgment stands upheld and the cross appeal filed by the complainant for enhancement of sentence is hereby dismissed.

Muzaffarabad, **JUDGE** **JUDGE**
__.01.2019