IN THE PESHAWAR HIGH COURT, PESHAWAR,
[Judicial Department]

Cr.A. No.1709-P/2023

1. Kamal Jalal s/o Said Jalal;
2. Bilal s/o Bacha Gul; and
3. Farhad s/o Banaras,
   Residents of Ghari Fazail, Faqir Kalay
   And Charpariza,
   District, Peshawar, respectively.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :- Syed Abdul Fayaz, Advocate
For State :- Mr. Amir Zeb, AAG
For Respondent No.2 Mr. Sajid Khan, Advocate
Date of hearing: **02.10.2024**

JUDGMENT

ISHTIAQ IBRAHIM, CJ.- Tried by learned Additional Sessions Judge-XVII, Peshawar (**"Trial Court"**), in case FIR No.956 dated 22.10.2021, registered under Sections 302, 324, 338-C and 34 PPC, at Police Station Michni Gate, Peshawar, (1) Kamal Jalal (2) Bilal and (3) Farhad, the appellants, having been found guilty of committing murder of Mst. Hameeda deceased and an unborn child in her womb as well as attempting at the lives of the complainant party, have been convicted and sentenced vide judgment dated 18.12.2023 (**"impugned judgment"**), as under:-

> **Under Section 302(b)/34 PPC:-**To undergo imprisonment for life as Ta'azir each and to pay rupees two lacs collectively to legal heirs of the deceased in terms of Section 544-A Cr.P.C. and

in default thereof to further undergo six months simple imprisonment, each.

Under Section 338-C/34 PPC:- To pay 1/20th of Diyat to legal heirs of the deceased.

Benefit of Section 382-B Cr.P.C. has been extended to the appellants.

2. Through the instant appeal, the appellants have questioned their conviction and sentences.

3. The prosecution's case as unfolded in First Information Report (**"FIR"**) Exh.PW.3/1 is that on 22.10.2021 at 1550 hours, complainant Sher Dil Khan (PW.9), in company of dead body of his wife Mst. Hameeda deceased, in trauma room of Lady Reading Hospital (**"LRH"**) Peshawar, reported to Gul Nabi Shah SI (PW.2) to the effect that on the fateful day he along with his deceased wife was present in his house, situated in *Faqir Kalay Garhi Fazil;* that on commotion of children, when he along with the deceased came out of their house, appellants along with co-accused Faisal, duly armed with firearms present there opened fire at them, as a result, his wife Mst. Hameeda deceased got hit and succumbed to injuries on the way when she was being shifted to hospital, while he luckily remained unscathed. Besides him, the occurrence is stated to have been witnessed by his nephew Sabir Umar (PW.10). No motive was advanced by him behind the occurrence. Report of the complainant was reduced into writing in the shape of Murasila Exh.PW.2/1 by Gul Nabi Shah SI, who also prepared injury sheet Exh.sPW.2/2 and inquest report

Exh.PW.2/3 of the deceased and shifted her dead body to KMC through constable Farman for postmortem examination. On the same day, Gul Nabi Shah SI, also arrested appellant Kamal Jalal vide arrest Card Exh.PW.2/4. On 11.12.2021 he also arrested appellant Bilal vide arrest Card Exh.PW.2/5 and from his possession recovered one 30 bore pistol along with bandolier containing 10 live rounds of the same bore vide recovery memo Exh.PW.2/6. A separate FIR No.1061 dated 11.12.2021 under section 15 KP Arms Act was registered against appellant Bilal.

4. On 22.10.2021 at 1526 hours, lady doctor Mustajab Begum conducted postmortem examination on the dead body of deceased and found the following injuries on her person.

1. A firearm entry wound 3x2 cm in size on top of skull on left side 3 cm away from midline and 13 cm above forehead.
2. A firearm exit wound on left lateral side of head. 05 cm below left ear and 20 cm away from midline of 2x2 cm in size.

Scalp, skull, membranes, brain. **Injured.**

Gravid uterus contains male fetus of four months POG 150 gram weight.

Opinion: According to her opinion the deceased died due to firearm injury to her brain and its associated blood vessels due to firearm.

5. After registration of the FIR, Safdar Khan Inspector (PW.11), proceeded to the spot and prepared site plan Exh.PB on the pointation of the complainant, recorded statements of the PWs under section 161 Cr.P.C. During spot inspection, he secured blood through cotton from the place of

the deceased, 05 empties of 7.62 bore from the places of appellant Bilal and Faisal and one empty of 30 bore from the place of appellant Kamal Jalal vide recovery memo Exh.PW.1/1. Vide recovery memo Exh.PW.1/2, he took into possession bloodstained garments of the deceased. He obtained physical remand of the appellants from the Court of learned Judicial Magistrate, interrogated them and recorded their statements under section 161 Cr.P.C., initiated proceedings under section 204 and 87 Cr.P.C. against the absconding co-accused Faisal, sent the bloodstained Articles, empties and pistol to the FSL, reports whereof are Exh.PZ and Exh.PZ/1, respectively. Vide recovery memo Exh.PW.11/19 he took into possession 30 bore pistol along with 10 live rounds recovered from appellant Bilal, produced by Moharrir. On completion of investigation he handed over case file to the SHO, who submitted challan against the appellants before the learned trial Court.

6. On receipt of challan, the appellants were summoned by the learned trial Court and formally charge sheeted under sections 302, 324, 338-C and 34 PPC to which they pleaded not guilty and claimed trial. To prove guilt of the appellants, the prosecution's examined as many as twelve witnesses. After closure of the prosecution's evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution's allegations and professed their innocence. They, however, neither wished to be examined on

oath under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides, convicted and sentenced the appellants as mentioned in the initial paragraph of the judgment, hence, this appeal.

7. We have heard the arguments of learned counsel for the parties and perused the record and evidence with their valuable assistance.

8. As per version of complainant Sher Dil Khan (PW.9), occurrence in this case has taken place in front of his house, situated *in Faqir Kalay Garhi Fazil* at 1440 hours, which has been reported by him in LRH Peshawar at 1550 hours. In his report, complainant has alleged that on the eventful day on the commotion of children when he along with his wife Mst. Hameeda deceased came out of their house, the appellants along with absconding co-accused Faisal present there, opened indiscriminate firing at them, as a result, his wife got hit and succumbed to injuries on the way when she was being shifted by them to hospital. Besides him, the occurrence is stated to have been witnessed by his nephew, namely, Sabir Umar (PW.10).

9. Complainant Sher Dil while appearing in the witness box as PW.9, has reiterated the same story as set forth by him in the FIR. Neither in his initial report nor in his statement before the court, he has advanced any motive behind the occurrence. In cross-examination he admitted that during the

days of occurrence he was serving as a Hawaldar in FC Intelligence Branch and was performing his duties in *Qilla Balahisar* Peshawar; that his duty timining was from 08.00 AM to 06/7.00 PM; that he had no enmity with the appellants prior to the occurrence rather their relations were cordial. He admitted it correct that all the three appellants belong to three different villages; that appellants and absconding co-accused had come to the spot to target him only; that he does not know as to why the appellants and absconding co-accused had come to his house to target him; that the accused were intending to target his whole family for no reason; that the accused had no enmity with him and his family members; that his children, namely, Muskan, Shah Said, Aiman and Yahya were crying in the street when they saw the accused armed with firearms; that no sooner he along with his wife came out of their house, the accused opened firing at them; that he came out first while his wife followed him after 3, 4 seconds; that all the four accused started firing abruptly; that none of the accused made firing from the roof top at the deceased. He admitted it correct that the deceased had sustained single firearm injury on her skull.

10. The cross-examination of complainant create serious doubt about his presence at the spot at the time of occurrence for the reasons, firstly, if he was serving as a Hawaldar in FC and posted in Qilla Balahisar and his duty timing was from 08.00 AM to 06/07.00 PM then his presence at 02.40 PM

(time of occurrence) in the house would not accept a prudent mind. Though he has stated that he was on leave from duty on the eventful day and in this regard also produced a leave certificate Exh.PW.9/X-1, but the said certificate on the one hand, is a photocopy, while on the other hand, has not been produced/exhibited by any official from Qilla Balahisar. It has also not been produced by him before the Investigating Officer during investigation (I.O) of the case. The I.O. has also not recorded statement of any official of the FC in this regard. In this view of the matter, the leave certificate on the part of the complainant is an abortive attempt to justify his presence at the spot. Secondly, if he was the first target of the accused then his escape or let off by four accused armed with automatic weapons ejecting numbers of shots in seconds is another strong circumstance which makes his presence at the spot at the time of occurrence highly doubtful. Thirdly, keeping in view the customs and traditions of people of this party of the country, the women folk are strictly observing *pardha* and in presence of male members in the house, they are not allowed to go out of the house in case of any commotion or brawl outside the house rather male members in such like situation go out of the house to see what is happening. Thus, coming out of the Mst. Hameeda deceased on the commotion of children is another strong circumstance which convince a prudent mind that complainant was not present at the spot at the time of occurrence. Coming of four

accused to the house of the complainant with whom they had no ill will or enmity rather had cordial relation and then opening firing for no reason or motive, is also a disturbing circumstance pinching a prudent mind. No bullets marks have been noticed on the gate and walls of the house of the complainant. No spent bullet has been shown recovered from the spot. As per autopsy report the deceased has sustained a solitary firearm entry wound with corresponding exit, direction of which is from upward to downward, meaning thereby that the assailant was on top position than the deceased at the time of firing which is not the case of the prosecution. Only 05 empties of 7.62 and one empty of 30 have been shown recovered from the spot despite the fact that four accused have been assigned the role of indiscriminate firing. In case of firing by four accused with automatic weapons, much damage should have been caused to the deceased and the complainant and there should have been bullet marks on the main gate as well as walls of the house of the complainant but such is not the case herein. The above discussed facts and circumstances clearly suggest that the occurrence has not taken place in the mode and manner as alleged by the prosecution rather in some other mode best known to the complainant.

11. So far as the following admissions on the part of learned counsel for the defence in the cross-examination of complainant are concerned?

> **"It is correct that all the three accused were firing from their weapons with single, single fire shot; It is incorrect to suggest that accused facing trial were firing on each other and the deceased got hit due to aerial firing in her own house.**

By now it is settled law accused in a criminal case is not bound by the admission made by his counsel. In this regard we would refer to the case of **Abdul Khaliq vs the State (1996 SCMR 1553),** wherein it has been held by the august apex court that even if a question in cross-examination by the defence counsel, amounts to an admission, the same cannot bind the appellant. Relevant part of the judgment is reproduced below:-

> "Abdul Jabbar admitted to the defence suggest that he was informed by deceased Abdul Wahabt that he was fired at by Abdul Khaliq and Khudaidad. **This statement was ought to be used by the learned Additional Advocate General against the appellant, as his admission to the effect that he had fired at the deceased. Even if putting of such question in cross-examination by the defence counsel, amounts to an admission, the same cannot bind the appellant. In a criminal case an accused is not bound by the admissions made by his counsel.** Reference can be made to the case of Sh. Abdul Hamid and another Vs the State (1973 P Cr L J 858).

It is also settled principle of criminal jurisprudence that prosecution is duty bond to prove its case through cogent and confidence inspiring evidence beyond shadow of reasonable doubt and it cannot derive any benefit from the weakness of defence. In this regard reference can be made to the case of **"Rab Nawaz and others vs the State" (PLD 1994 Supreme Court 858)**. Relevant part of the judgment is reproduced below:-

> "It is well-established principle of criminal jurisprudence that the prosecution has to establish its case beyond any shadow of reasonable doubt and that they cannot derive any benefit from the weakness of defence.

12. Placing reliance on the judgments (supra) of the Hon'ble Supreme Court, admissions in cross-examination of the complainant would not advance the prosecution's case.

13. Coming to the testimony of another alleged eyewitness, namely, Sabir Umar, who is nephew of the complainant. He while appearing in the witness box deposed that on 22.10.2021 he was coming to the house of his uncle and when reached near his house, the children started crying, upon which his uncle Sher Dil and his wife came out of their house and the accused started firing at them with the intention to commit their Qatl-e-Amd; that from the firing of the accused he escaped unhurt while his deceased Aunt got hit and injured who was shifted to LRH by him with the help

of his uncle Sher; that on the way to LRH she succumbed to injuries.

14. Complainant Sher Dil in his statement has not assigned the role of firing to the accused on PW Sabir Umar. Contrary, PW Sabir Umar has charged the accused for firing at him also. In cross-examination PW Sabir Umar admitted it correct that he is resident of Bara District Khyber and during the days of occurrence was residing in Mohallah Garhi Sohbat Khan Peshawar. He has not stated a single word qua the purpose of his visit to the house of his uncle. In cross-examination he has stated that he was present in front of house of the complainant at the time of firing. This PW has also not sustained a single scratch what to say of receipt of firearms injuries. Escape of PW Sabir Umar from the firing of four accused having sophisticated weapons or his left off by them to stand an eyewitness against them is also a strong circumstance which makes his presence at the spot highly doubtful. The alleged eyewitnesses have not furnished confiding inspiring explanation so as to establish their presence at the spot at the time of occurrence.

15. It needs no elaboration that presence of eyewitnesses at the spot is not to be inferred rather is to be proved by prosecution beyond scintilla of doubt. In the absence of some confidence inspiring explanation regarding their presence at crime scene, the two eyewitnesses are found to be chance witnesses and their testimony can safely be termed as suspect

evidence. In arriving at such conclusion, we are enlightened from the cases of ***"Ibrar Hussain and another versus The State" (2020 SCMR 1850), "Mst. Mir Zalai versus Ghazi Khan and others" (2020 SCMR 319), and "Naveed Asghar and 2 others versus The State" (PLD 2021 Supreme Court 600)*** wherein the Hon'ble Supreme Court of Pakistan while dealing with a case of chance witness observed as under:-

> "Reading of the statement of Mirza Muhammad Umar (PW-13) shows that he is a chance witness; a witness who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of occurrence but claims to be there by chance. Testimony of such witness requires cautious scrutiny and is not accepted unless he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time."

The Hon'ble supreme court in case of ***Mst. Sughra Begum and another versus Qaiser Pervez and others (2015 SCMR 1142)*** at para No.14, has observed regarding the chance witnesses as under:--

> "14... A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was sheer chance as in the ordinary course of business, place of residence and normal course of events, he was

> not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspect evidence and cannot be accepted without a pinch of salt.."

A similar view was reiterated by the apex court in the case of ***Muhammad Irshad versus Allah Ditta and others (2017 SCMR 142).*** The relevant part of the said judgment at Para No.2 reads as under:-

> "...Muhammad Irshad complainant (PW8) and Rab Nawaz (PW9) were chance witnesses and the stated reason for their presence with the deceased at the relevant time had never been established before the trial court through any independent evidence...."

Likewise, in the case of ***Sufyan Nawaz and another versus the State and others (2020 SCMR 192)*** at Para No.5, the Hon'ble apex court has observed as under:--

> ".....He admitted that in his statement before police, he had not assigned any reason for coming to village on the day of occurrence. In these circumstances, complainant Muhammad Arshad (PW.7) is, by all means, a chance witness and his presence at the spot at the relevant time is not free from doubt.."

16. Medical evidence also does not support the prosecution's case. The deceased has sustained a solitary fire arm entrance wound, direction of which is from upward to downward. None of the accused has been shown on higher position than the deceased at the time of firing, therefore, the entrance wound on the person of the deceased is a serious blow to the prosecution's case. Though, positive Serologist report with regard to the blood secured from the spot and the last won bloodstained clothes of the deceased prove the place of occurrence to be the same as alleged by the prosecution and postmortem report proves the unnatural death of the deceased due to firearm injury but such corroborative and confirmatory pieces of evidence, in absence of direct evidence, by no stretch of imagination tell the name(s) of the culprits. Such pieces of evidence are always taken in aid of

the direct evidence and not in isolation. The hon'ble Supreme Court of Pakistan in its judgment rendered in the case of **"Imran Ashraf & 7 others v/s The State" reported as 2001 SCMR 424**, has observed that;

> "Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion".

17. As regards positive FSL report Exh.PZ/1 to the effect that one 30 bore crime empty recovered from the spot has been fired from the pistol shown recovered on the pointation of appellant Kamal Jalal from his house on 24.10.2021, suffice it to say that appellant Kamal Jalal has been shown arrested on the day of occurrence i.e. 22.10.2021, while the alleged pistol was recovered on his pointation on 24.10.2021. No explanation, much less plausible, has been furnished by the prosecution as to why the empty was kept in the PS till recovery of the pistol on 24.10.2021. Again, no explanation has been furnished by the prosecution as to which the pistol and empties were sent to the FSL on 26.10.2021. In a case titled **Ghulam Akbar and another Vs. The State (2008 SCMR-1064**, it is observed by their Lordships that law requires that empty recovered from the spot should be sent to the FSL without any delay, failing which such recovery evidence was not free from doubt and could not be used against the accused. It is observed in the

case of **Attaullah and others Vs. The State (PLD 1990 Peshawar-10),** that the crime empties should be immediately dispatched to Arms Expert and should not be kept by the Investigating Officer because in that case objection regarding manipulation of recovery will hold good. Similarly, it is by now well established proposition of law that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed on the case **of "Jehangir vs. Nazar Farid and another" (2002 SCMR 1986), "Israr Ali vs. The State" (2007 SCMR 525) and "Ali Sher and others vs. The State" (2008 SCMR 707).**

18. On reappraisal of the evidence available on record, we are firm in our view to hold that the prosecution case is pregnant with doubts, benefit of which is to be extended to the appellants not as matter of grace or concession but as a matter of right. This cardinal principle of criminal administration of justice is based on the concept of justice in Islam which is to be observed more consciously and carefully. Benefit of doubt features appearing in the case invariably are required to be given full effect while deciding a criminal case. Benefit of doubt, if any favourable to the accused cannot be withheld in the exercise of discretion of the Court at any stage. It is an axiomatic principle of law that the benefit of doubt is always extended in favour of the

accused. The case of the prosecution, if found to be doubtful, then every doubt, even the slightest, is to be resolved in favour of the accused. In this regard reliance can be placed on **"Muhammad Masha vs the State" (2018 SCMR 772)** and relevant observations of their lordships appearing in para No.4 of the judgment can advantageously be reproduced hereunder:-

> "Needless to mention that while giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilty of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made to the cases of **"Tariq Pervez vs the State (1995 SCMR 1345), Gulam Qadir and 2 others vs the State (2008 SCMR 1221), Muhammad Akram vs the State (2009 SCMR 230) and Muhammad Zaman vs the State (2014 SCMR 749).**

In another judgment titled, **"Abdul Jabbar vs the State and another (2019 SCMR 129),** their lordships have observed that:-

> "It is settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict...benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

19. Placing reliance on the judgments (supra), we allow this appeal, set-aside the conviction and sentences of the appellants recorded by the learned trial Court through the impugned judgment and hereby acquit them from the charges levelled against them in the instant case. They be set at liberty forthwith, if not confined in any other case.

Announced:
02.10.2024

M.Siraj Afridi CS

CHIEF JUSTICE

JUDGE

DB of Mr. Justice Ishtiaq Ibrahim Hon'ble the Chief Justice
And Hon'ble Mr. Justice Wiqar Ahmad.