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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

Crl. Appeal No. 1461 of 2008.

Sohail Aslam

v.

The State etc.

JUDGMENT

Date of hearing: **01.11.2016.**

Appellant by: **Mr. Munir Ahmad Bhatti, Advocate with the appellant.**

State by: **Mr. Muhammad Akhlaq, DPG.**

Complainant by: **Mr. Gohar Razzaq, Advocate.**

AALIA NEELUM, J.- Sohail Aslam son of Muhammad Aslam, Caste Pathan, resident of Mianwali City (appellant) along with Tariq Javaid (since acquitted), Aamir Ali (since acquitted) and Shaukat Pervaiz (since acquitted) was involved in private complaint case titled **“Sarwar Maqsood v. Sohail Aslam etc”** filed under Sections 302/324/337-F/334/109/148/149 P.P.C and was tried by the learned Additional Sessions Judge, Mianwali. The learned trial court seized with the matter in terms of judgment dated 28.11.2008 and convicted **Sohail Aslam (the appellant)** as under:

- (1) Convicted under section 302(b)/34 PPC for committing ‘Qatl-i-Amd’ of Taj Muhammad-deceased and **sentenced him to imprisonment for life.** The appellant was further directed to pay Rs.2,00,000/- as compensation to the legal heirs of the deceased in terms of section 544-A Cr.P.C and in case of default in payment thereof, to further undergo SI for six months.

- (2) Convicted under section 324/34 PPC for causing injury to Sajid Masood and **sentenced him to imprisonment for ten years RI**. The appellant was further directed to pay Rs.50,000/- as fine to the victim Sajid Masood and in case of default in payment thereof, to further undergo SI for three months.
- (3) Convicted under section 337-F(iii)/34 PPC for causing injury to Sajid Masood and **sentenced him to imprisonment for two years RI**. The appellant was further directed to pay Rs.50,000/- as Damam amount to the victim Sajid Masood after its realization from the Jail.

The benefit of section 382-B Cr.P.C was also extended in favour of the appellant.

2. Feeling aggrieved by the judgment of the learned trial court the appellant impugned the same by way of filing Crl.Appeal No.1461 of 2008.

3. Prosecution story as contained in the private complaint (Ex.PZ) filed by Sarwar Maqsood-complainant (PW-7), subsequent complainant, mentioned therein that his brother Taj Muhammad (deceased) got recorded his statement on 04.02.2005 at about 02:20 p.m before Abdul Majeed, SI (PW-16) in the Emergency Ward of District Headquarter Hospital, Mianwali that,

“Taj Muhammad-deceased has submitted that he along with his brother Sarwar Maqsood (PW-7) and his sons Sajid Masood (PW-8) and Asif Masood was proceedings towards Masjid Hanfia Muslim Bazar on 04.02.2005 and at about 1:45 p.m, when they reached near the shop of Abdul Sattar, the co-accused Hizbullah (since PO) while armed with 222-bore, Sohail Aslam-appellant armed with repeater 12-bore, Aman Ullah armed with pistol 30-bore (since PO) along with two unknown accused persons and the names of two unknown accused persons were stated as Tariq Javaid, armed with gun 12-bore pump action (since acquitted) and Ahmad Khan, armed with rifle 222-bore by Sajid Masood (PW-8), Asif Masood-PW during their statements recorded under section

161 Cr.P.C before the Investigating Officer, suddenly came there by riding over on two motorcycles. Soon thereafter, the accused Hizbullah (since PO) raised Lalkara and made burst with 222-bore with an intention to commit murder, which were landed on different parts of his body. The appellant-Sohail Aslam made a fire shot with repeater 12-bore, which hit Sajid Masood on different parts of his body. The co-accused Aman Ullah (since PO) made two fire shots with pistol 30-bore, which landed upon Sarwar Maqsood (PW-7) on his right knee and on his hand towards back side and they all three were fell down after receiving the injuries. Asif Masood-PW rescued himself by getting shelter of the shop but the co-accused Tariq Javed (since acquitted) and Ahmad Khan made straight firing towards them. The occurrence was witnessed by Taj Muhammad (who later on died), Sajid Masood (PW-8), Asif Masood and Sarwar Maqsood (PW-7) and subsequently the accused fled away on their motorcycles”

4. The motive behind the occurrence was stated to be lodging of criminal cases against Aman Ullah and Sohail Aslam-appellant at Police Station City Mianwali and the accused persons refrained them not to pursue said cases and due to this grudge, the appellant along with co-accused persons in furtherance of their common intention committed the said occurrence on the abetment of one Shaukat Pervaiz, Ex-Councilor. The conspiracy hatched by the appellant-Sohail Aslam, Hizbullah (since PO), Aman Ullah Khan (since PO), Tariq Javaid (since acquitted) and Ahmad Khan regarding finishing them due to low caste was heard on 28.01.2005 by Abdul Aziz and Ameer Muhammad-PWs and this fact has been brought into the notice of the I.O by the complainant (PW-7), Sajid Masood (PW-8) and Asif Masood after recording their statements. The accused Aamir Ali, armed with pistol 30-bore (since acquitted) was also present at the time and day of occurrence near Awan Chowk Muslim Bazar and was raising Lalkara that anyone would come near to them, would also be finished and then he (Aamir Ali) decamped from the spot along with aforementioned accused persons after riding on the motorcycle. The Investigating Officer recorded the

statements of Ameer Ahmad (given up PW) and Fateh Muhammad (given up PW) to the extent of this incident regarding involvement of the accused. After the occurrence, Asif Masood-PW, shifted Taj Muhammad (deceased) and Sajid Masood (PW-8) to Civil Hospital Mianwali, where the Investigating Officer (PW-16) recorded the statement of Taj Muhammad-deceased in form of the FIR, which was verified by Abdul Majid, SI (PW-16).

5. On the statement of Taj Muhammad-deceased complaint (Ex.PZ) was recorded, whereas the private complaint was also exhibited with same Exhibit-PZ, the formal FIR (Ex.PJJ) was lodged under sections 324/109/148/149 PPC on 04.02.2005 and on the same day, Sarwar Maqsood (PW-7) reached at the place of occurrence and joined the investigation before the police. The investigation was conducted by Abdul Majid, SI (PW-16), who on receiving information reached at DHQ Hospital, Mainwali, where Taj Muhammad was admitted in the emergency ward. He correctly recorded the statement of Taj Muhammad (Ex.PZ) and on the basis of the same formal FIR (Ex.PJJ) was lodged. He (PW-16) prepared injury statements of Taj Muhammad (Ex.PB), Sarwar Maqsood (Ex.PF) and Sajid Masood (Ex.PD). On the same day, he (PW-16) submitted application (Ex.PKK) to the Medical Officer for permission to record statement of Sajid Masood (PW-8), whereupon, the Medical Officer granted permission for recording statement of the injured Sajid Masood (PW-8). Thereafter, the I.O (PW-16) recorded the statements of Sajid Masood (PW-8) and Asif Masood under section 161 Cr.P.C. Then, he (PW-16) visited the place of occurrence along with PWs namely Asif Masood and Sarwar Maqsood (PW-7). He (PW-16) also recorded the statements of Abdul Aziz (PW-14) and Ameer Muhammad (given up PW). Thereafter, he (PW-16) inspected the spot and secured blood stained earth from the places of where Taj Muhammad and Sajid Masood (PW-8) received injuries through sealed parcels vide recovery memos (Ex.PX and Ex.PY). Thereafter, Nasrullah 431/Constable (PW-5) produced before him (PW-16), the MLR of Taj Muhammad and blood stained *Shalwar* of Taj Muhammad (P-1), which he (PW-16) took into possession vide recovery memo (Ex.PM). Nasrullah 431/Constable (PW-5) also handed over to him (PW-16) the blood

stained *Shalwar* of Sajid Masood (P-2), which he (PW-16) also took into possession vide recovery memo (Ex.PN) and he (PW-16) recorded the statement of Nasrullah 431/C (PW-5) under section 161 Cr.P.C. The Investigating Officer (PW-16) had also prepared rough site plan (Ex.PLL) of the place of occurrence. On 19.02.2005, he (PW-16) received a telephone call through Asif Masood that Taj Muhammad had died in PIMS Islamabad and he proceeded to PIMS Islamabad and recorded Rapt No.12 regarding death of Taj Muhammad and amended the offence from section 324 PPC to 302 PPC. He (PW-16) prepared injury statement of the deceased (Ex.PFF), inquest report (Ex.PGG) and then dispatched the dead body of the deceased through Hafiz Ullah 312/C (PW-17) for postmortem examination. After postmortem examination, he (PW-16) recorded the statement of Hafiz Ullah 312/C (PW-17). The Draftsman, Muhammad Shafiq Khan, (PW-11) took rough notes on 20.02.2005 and thereafter, on 23.05.2005, he (PW-11) produced site plans (Ex.PBB) and (Ex.PBB/1) before the Investigating Officer. The Investigating Officer (PW-16) during investigation found the appellant-Sohail Aslam, Aman Ullah, Hizbullah (since PO) and Shaukat Pervaiz (since acquitted) as innocent and by placing their names in column No.2 of the Challan, he (PW-16) sent the same to the Court of Sessions enrooted through the learned Illaqa Magistrate as provided under section 190 (2) Cr.P.C. Khalid Mehmood Khan, Inspector (PW-21) was posted as SHO Police Station City Mianwali on 06.07.2005 and on the same day, the investigation of this case was entrusted to him (PW-21) on the direction of the District Police Officer, Mainwali, who conducted raid at the residences of the appellant-Sohail Aslam, Aman Ullah (since PO) and Hizbullah (since PO) but they could not be traced. He (PW-21) obtained non bailable warrants of arrest of the appellant-Sohail Aslam, Hizbullah (since PO) and Aman Ullah (since PO) from the learned Area Magistrate on 12.11.2005 and he (PW-21) handed over the said warrants for execution to Nasrullah 431/C (PW-5) on 17.11.2005, which were returned by him (PW-5) being unserved. He (PW-21) recorded the statement of Nasrullah 431/C on 17.11.2005 and on the same day, he (PW-21) obtained proclamations of the appellant-Sohail Aslam, Aman Ullah

(since PO) and Hizbullah (since PO) from the learned Area Magistrate, which were handed over to Nasrullah 431/C (PW-5) for effecting service upon the accused. He (PW-21) recorded the statement of Nasrullah 431/C (PW-5) about the proclamation and Nasrullah 431/C (PW-5) returned to him (PW-21) the proclamations of the above mentioned accused after service, which were put up before the learned Area Magistrate and he (PW-21) prepared incomplete challan on 01.12.2005. Subsequently, on the application of the complainant (PW-7), the investigation was changed and the same was entrusted to Zulfiqar Ali, Inspector/SHO (PW-19), who on 14.04.2006, on receiving spy information regarding presence of Sohail Aslam-appellant at Flying Coach Adda Mianwali, conducted raid and arrested Sohail Aslam-appellant on 14.04.2006. After death of Taj Muhammad, the eye witness of the occurrence namely Sarwar Maqsood (PW-7) became complainant in the private complaint and Sarwar Maqsood (PW-7) filed a private complaint before the learned Illaqa Magistrate on 25.03.2006 with considerable delay being dissatisfied with the investigation against the appellant and other co-accused persons. The learned trial court after hearing preliminary arguments summoned the accused to face the charge. The learned Illaqa Magistrate sent the same to the Worthy Sessions Judge, Mainwali for its entrustment to the Court of competent jurisdiction. After appearance of the accused, they were formally charge sheeted by the learned trial court in terms of order dated 21.09.2006, to which they pleaded not guilty and claimed trial.

6. The prosecution in order to advance its case produced as many as twenty one (21) prosecution witnesses during the course of trial in private complaint. Ocular account in this case consists of the statements of Sarwar Maqsood (PW-7) and Sajid Masood (PW-8).

7. Dr. Salah-ud-Din appeared as PW-3 and deposed that on 04.02.2005, he conducted medico legal examination of Taj Muhammad-deceased and found the following injuries on his person.

1. *There were multiple wounds of entries about 11 in number in an area of 10 x 10 cm on outer surface of right thigh. It was 34 cm proximal to the knee joint.*
2. *There was a grazing fire arm injury on anterior medial surface of right thigh in an area of 6 x 6 cm about 20 cm proximal to the right knee joint. Underline muscles were also damaged.*
3. *The penis was amputated about 2.5 cm was left behind.*
4. *There were multiple entry wounds about 15 in number on antero lateral surface of left upper thigh in an area of 24 x 7 cm. all the wounds were bleeding profusely, corresponding holes were present in clothes.*

All the injuries were kept under observation and were caused by firearm. The probable duration was within an hour.

On 04.2.2005, he (PW-3) conducted the medico legal examination of Sajid Masood (PW-8) and found the following injuries on his person, which are as under:-

1. *An entry fire-arm wound 1 x 1 cm on the medial surface of right thigh about 14 cm proximal to the knee joint.*
2. *An exit wound 7 x 6 cm on posterior surface of right thigh, 12 cm proximal to the knee joint.*
3. *An entry wound half x 1 cm on anterior surface of left big toe.*
4. *An exit wound 1.5 x 1 cm on palmer surface of left big toe.*
5. *An entry wound 1 x 1 cm on the outer surface of left knee about 2 cm proximal to the joint.*
6. *An entry wound 2 x 1 cm on posteriolateral surface of left thigh, 10 cm proximal to the joint.*
7. *An entry wound 1 x 1 cm on the posterior surface of left thigh about 14 cm from the joint.*

8. *Multiple entry wounds about eight in number in an area of 18 x 9 cm on the posterior surface of left thigh, about 24 cm proximal to the knee joint.*
9. *An exit wound 2 x 1 cm on the posterior medial surface of left thigh, 12 cm proximal to the joint.*
10. *An exit wound 2 x 1 cm on the posteromedial surface of the left thigh about 17 cm proximal to the injury No. 9. Corresponding holes were found present on the clothes which were signed and handed over to the police.*

On 04.02.2005, he (PW-3) also medically examined Sarwar Maqsood (PW-7) and found the following injuries in his person.

1. *There was a grazing firearm injury 2 x 1 cm x skin deep on the posterior surface of left hand.*
2. *A grazing firearm injury 1 ½ x 1 cm x skin deep on front of right knee joint. Corresponding holes were present in Shalwar.*

On 17.02.2005, the final result of Taj Muhammad-deceased was declared as under:-

1. *Injury No.1 Ghayr Jaifah Munaqqilah.*
2. *Injuries No.2 and 4 Ghayr Jaifah Mutalahimah.*
3. *Injury No.3 Itlaf-i-Udw.*

Dr. Tanvir Khaliq, Consultant Surgeon PIMS Islamabad appeared as PW-18, who deposed that on 04.02.2005 Sajid Masood injured was brought to PIMS at night time and on the following day, he medically examined the injured and also surgically operated him. The main femoral artery of the injured was damaged. The femoral vein was also damaged. The nature of injury was serious which could have lost the leg of injured.

8. On 21.02.2007, the learned SPP had given up Dr. Hameed and Muhammad Asghar 1474/C being unnecessary. On 26.02.2007 and on 28.02.2007, Malik Saleem Akhtar Ghanjera, Advocate for the complainant had also given up Mehr Khan, SI and Amir Muhammad being unnecessary and also given up Fateh Muhammad, Amir Ahmad having been won over by the accused and on 11.04.2007 closed the prosecution evidence after tendering Chemical Examiner Report (Ex.PNN) and report of Serologist as (Ex.POO). Thereafter, Rana Amjad Iqbal, Chief Editor of Daily Nawa-e-Sharar appeared as CW-1, Mehmood Javed appeared as CW-2, Abdul Rashid retired Educationalist appeared as CW-3 and Muhammad Khan 493/HC appeared as CW-4.

9. After closure of the prosecution evidence, the appellant was examined under Section 342 of Cr.P.C, wherein he opted to appear as his own witness in terms of Section 340 (2) Cr.P.C in disproof of allegations leveled against him in the prosecution evidence and also opted to adduce evidence in his defence. While replying to the question why this case is against him and why the PWs deposed against him, the appellant-Sohail Aslam made the following deposition:-

“Due to enmity.”

10. In defence evidence, the appellant himself appeared as DW-5, whereas Haji Ahmad Khan appeared as DW-1, Haji Ghulam Muhammad appeared as DW-2, Aamir Abbas, Inspector RIB appeared as DW-3 and Ghulam Muhammad, Inspector appeared as DW-4.

11. Learned trial court after evaluating the evidence available on record found version of the prosecution proved beyond any shadow of reasonable doubt against the appellant resulting into his conviction in the afore-stated terms.

12. Learned counsel for the appellant contends that there is discrepancy in between the medical evidence and ocular account; that the appellant has joined the investigation and during investigation, he was declared innocent by the Investigating Agency and he produced sufficient evidence in his defence; that the occurrence as narrated in the private complaint had not taken place at all and

that during the course of investigation nothing has been recovered from the possession of the appellant and if any that is fake and fictitious and the prosecution has failed to prove the case against the appellant and lastly prayed that he may be acquitted from the charge being falsely implicated in this case.

13. On the other hand, learned counsel for the complainant and the learned DPG have opposed the contention raised on behalf of the appellant and stated that there is no ill-will or mala fide on part of the complainant to rope the appellant in the false case; that the both the eye witnesses of the occurrence i.e (PW-7 and (PW-8) have strongly corroborated the prosecution story; that the appellant was specifically nominated in the FIR with the specific injury to the deceased and injured prosecution witnesses and lastly prayed that the prosecution has proved its case by producing 21 witnesses beyond any shadow of doubt.

14. I have heard the arguments advanced by the learned counsel for the parties and have minutely perused the record available on the file.

15. The entire case of the prosecution to the extent of Sohail Aslam accused-appellant rests upon the statement of two witnesses i.e. the complainant-eye-witness-Sarwar Maqsood (PW-7) and injured witness-Sajid Masood (PW-8), brother and son respectively of the deceased-Taj Muhammad. The enmity of the prosecution witnesses with the Sohail Aslam accused-appellant is admitted fact. The complainant-Sarwar Maqsood (PW-7) deposed during cross-examination that, *"I and my family is inimical to Sohail Aslam accused for the last two years."* Sajid Masood (PW-8) also deposed in the similar lines. For the safe administration of justice a very strong corroborative piece of evidence is required for relying both above stated prosecution witnesses. As per prosecution's own case Sohail Aslam accused-appellant made fires with his gun .12 bore repeater which landed on the right thigh, left thigh, left foot, left knee and on different parts of Sajid Masood (PW-8). Both prosecution witnesses i.e. Sarwar Maqsood (PW-7) and Sajid Masood (PW-8) deposed in the similar lines. However, there are material contradictions and discrepancies in the testimony of

the aforesaid witnesses regarding inflicting injuries on the person of injured witness-Sajid Masood (PW-8). It was not alleged in the FIR (Exh.PJJ) that during occurrence Sohail Aslam accused-appellant along with Tariq Javaid (since acquitted) and Ahmad Khan (since murdered during trial) also had fired causing injuries to the deceased and injured witness-Sajid Masood (PW-8). Sarwar Maqsood (PW-7) deposed during his court statement regarding injuries caused by co-accused Tariq Javaid (since acquitted) and Ahmad Khan (since murdered during trial). Let us now read what Sarwar Maqsood (PW-7) says in his court statement about the fires made by Tariq Javaid and Ahmad Khan:

Court Question: Whether the fires made by Tariq Javaid and Ahmad Khan accused hit anybody?

Answer:- The fires made by both the accused hit Taj Muhammad deceased and PW Sajid Masood on different parts of their body.

Sajid Masood (PW-8) also deposed in the similar lines. During cross examination Sarwar Maqsood (PW-7) deposed that, "***I did not mention in my statement before police, complaint and cursory statement that the fires made by Tariq Javaid and Ahmad Khan accused hit Taj Muhammad deceased, PW Sajid Masood on different parts of their bodies.***" Sajid Masood (PW-8) also deposed during cross-examination that, "***The accused Tariq Javaid, Ahmad Khan and Aamir Ali are residents of our Mohalla and I know them prior to the occurrence. It is correct that I have implicated Ahmad Khan and Tariq Javaid accused in lieu of two unknown persons. I stated before police in my statement u/s 161 Cr.P.C that the fires made by Tariq Javaid and Ahmad Khan accused landed on different parts of the body of my father and myself. Confronted with Ex.DB wherein the hitting of fires to the deceased and the witness is not recorded.***" Apart from above, all the injuries found on the person of Sajid Masood (PW-8) at the time of medical examination were caused by three different weapons in the opinion of Dr. Salah-ud-Din (PW-3). Whereas as per the first version of Sarwar Maqsood (PW-7) and Sajid Masood (PW-8) the appellant Sohail Aslam caused injuries with his gun .12 bore repeater on the

person of Sajid Masood (PW-8). Dr. Salah-ud-Din (PW-3) deposed during cross examination that, ***"It is correct to suggest that the dimension of injuries No.1,5 and 7 of Sajid Masood injured is the same i.e 1 x 1 cm. The possibility of the remaining injuries being caused by different kinds of Muzzles cannot be ruled out."*** It has been also noted that both prosecution witnesses i.e. Sarwar Maqsood (PW-7) Sajid Masood (PW-8) had not attributed specific injuries to Tariq Javaid (since acquitted) and Ahmad Khan (since murdered during trial) on the person of the injured witness-Sajid Masood nor both the witnesses had clarified the injuries on the body of Sajid Masood (PW-8) inflicted by Sohail Aslam accused-appellant. By increasing number of accused causing injuries on the person of the injured witness-Sajid Masood (PW-8) creates doubts about the truthfulness of the prosecution witnesses. Thus the prosecution witnesses improved their version and persecution version is also contradicted by medical evidence. It is also not the prosecution case that the injuries on the person of Taj Muhammad-the deceased were also caused by Sohail Aslam-accused/appellant. In these circumstances, Sohail Aslam accused-appellant deserves benefit of doubt from the charges leveled against him.

16. The eye witnesses are also not reliable, as the nature of injuries No. 1, 5 and 7 (1cm x 1cm) are in round shape whereas if the shot had been fired with gun .12 bore repeater from a distance i.e. 35 feet, it would form oval shape, whereas nature of injuries No. 1, 3 and 5 suggests that the shot was not fired from a distant place. To consider this vital question this court has perused the evidence of eye witness Sarwar Maqsood (PW-7), Muhammad Shafiq, Draftsman (PW-11) and Dr. Salah-ud-Din (PW-3) as well as rough site plan (Exh.PLL) and scaled site plans (Exh.PBB and Exh.PBB/1). Sarwar Maqsood (PW-7) has categorically stated during cross-examination that, **"Sohail Aslam accused made fires from a distance of 20/25 feet."** Whereas, Muhammad Shafiq, Draftsman (PW-11) deposed during cross-examination that, **"I drafted site-plan on the pointation of PWs Sarwer Maqsood and Asif Masood."** On perusal of rough site plan (Exh.PLL) it reveals that at point 2 Sajid Masood (PW-8) received firearm injuries caused by Sohail Aslam accused-appellant,

who was present at point six (6), the distance between point 2 and 6 was six karams, whereas in scaled site plans (Exh.PBB and Exh.PBB/1) distance between point 2 and 6 was shown as 35 feet at north. The evidence of prosecution witnesses and site-plans are fully consistent on this point that distance between assailant and injured prosecution witness was 30 to 35 feet which is not supported by medical evidence. Dr. Salah-ud-Din (PW-3), who conducted medical examination of Sajid Masood (PW-8), deposed during cross examination that, ***"It is correct to suggest that the dimension of injuries No. 1, 5 & 7 of Sajid Masood injured is the same i.e. 1 x 1 cm. It is correct to suggest that 1 x 1 cm is a rounded wound. There might be possibility of muzzle of weapon and seal of injury on the right angle in case of rounded wound."*** The eye witnesses are not reliable as the nature of injuries No. 1, 5 and 7 are in round shape which suggests that the fire shot was not made from a distant place i.e. 35 feet, the fire made from 35 feet would form oval shape instead of round shape with .12 bore repeater gun. Even the dimension of the injuries were also not result of 12 bore repeater gun. Looking to these facts, this court is of the opinion that true genesis of the occurrence has been withheld by the prosecution. Therefore, possibility of false implication of the appellant in the alleged crime cannot be ruled out and in my opinion, the prosecution has failed to bring home the charges framed against the appellant.

17. The motive set up by the prosecution in the private complaint (Exh.PZ) and F.I.R. (Exh.PJJ) and deposed about it by Sarwar Maqsood (PW-7) and Sajid Masood (PW-8) is that Taj Muhammad-the deceased had got registered case against accused Aman Ullah and Sohail Aslam at Police Station City Mainwali, under section 337/452/506 PPC and the accused persons refrained the complainant party to pursue the said case, the accused persons had committed the occurrence with their common intension, have been found by this court to have remained un-proved. Sarwar Maqsood (PW-7) deposed during cross-examination that:-

“I did not file any application before the Illaqa Magistrate for recording the statements of PWs in the said case or that Sohail Aslam accused is threatening us, for not pursuing the case. Volunteered that I verbally asked the learned Magistrate that Sohail Aslam accused is extending us threats. I had not mentioned in the complaint nor in my cursory statement in complaint that I stated before the learned Magistrate that Sohail Aslam accused is threatening me for not pursuing the case u/s 506 PPC.”

Enmity, as is well-known, is a double edged weapon, which cuts both ways. If on one hand, it provided a motive for the accused to commit the occurrence in question, on the other hand it equally provided an opportunity to the first informant to implicate his enemy. Proof of motive by itself may not be a ground to hold the accused guilty in presence of the admission on the part of the complainant-Sarwar Maqsood (PW-7), who deposed during cross-examination that, ***“I and my family is inimical to Sohail Aslam accused for the last two years.”*** Sajid Masood (PW-8) also deposed in the similar lines. The accused on the basis of his motive to commit the crime cannot by itself lead to a judgment of conviction.

18. Moreover, no crime empties were recovered from the place of the occurrence as well as weapon of offence was also not recovered from the appellant/accused.

19. In this case it is to be noted that the FIR (Exh.PJJ) was lodged on the oral complaint (Exh.PZ) of the injured-Taj Muhammad and the injured-Taj Muhammad afterwards died on 19-02-2005 and his statement (Exh.PZ) was recorded by the investigating officer-Abdul Majid, S.I. (PW-16) on the basis of which FIR (Exh.PJJ) was lodged was considered dying declaration by the learned trial court. The dying declaration could be accepted notwithstanding the fact that it was not made under apprehension of imminent death and without the certificate of doctor about the fitness of the maker thereof provided it is inspiring and was consistent with the attending circumstances. The complainant-

Sarwar Maqsood (PW-7) and injured witness-Sajid Masood (PW-8) made improvements in their court statements and their statements were not in the line with the contents of dying declaration regarding Sohail Aslam accused-appellant. The investigating officer-Abdul Majid, S.I. (PW-16) on receiving information of the occurrence visited the Civil Hospital Mianwali where the deceased (than injured) was admitted in the emergency ward but he (PW-16) did not get his statement recorded after obtaining opinion of doctor about his condition. At the time of recoding statement of the deceased (than injured) both prosecution witnesses i.e. Sarwar Maqsood (PW-7) and Sajid Masood (PW-8) were also admitted in the emergency ward along with the deceased (then injured). Sarwar Maqsood (PW-7) deposed during court statement that, "*I and Asif Masaood attended Taj Muhammad deceased and Sajid Masaood and shifted them to Civil Hospital, Mianwali. After 5/7 minutes police came in the hospital. Abdul Majid SI recorded statement of Taj Muhammad in the emergency ward. Police recorded my statement as well as of PW Sajid Masaood outside emergency ward of the hospital. The FIR was registered on the statement of Taj Muhammad.*" However Sarwar Maqsood (PW-7) denied the suggestion, "*It is incorrect to suggest that on the day of occurrence when the police allegedly reached the hospital and allegedly showed the recording of statement of Taj Muhammad deceased, I was also present with the deceased. Volunteered that I and Sajid Masaood were present outside the emergency ward.*" Sajid Masood (PW-8) deposed during court statement that, "*I, my father Taj Muhammad, PW Sarwar Maqsood went to DHQ Hospital, Mianwali after the occurrence where I was medically examined by the doctor. After some time police came to the hospital. Abdul Majeed SI recorded by statement as well as statement of Sarwar Maqsood outside the emergency ward. Police also recorded statement of my father in the emergency ward.*" The court statement of Sajid Masood (PW-8) was got confronted with his (PW-8) earlier statement (Exh.DB) recorded by the police, "*I do not remember whether I stated before police in my statement u/s 161 Cr.P.C that Abdul Majid SI recorded statement of my deceased father inside the emergency ward of DHQ Hospital, Mianwali*

and that the statement of PW Sarwar Maqsood was also recorded by Abdul Majid SI outside the emergency ward of the hospital and Abdul Majid SI recorded my statement outside the emergency ward. Confronted with Ex.DB not so recorded." The deposition made by Sarwar Maqsood (PW-7) and Sajid Masood (PW-8) in the court was also against the documentary evidence. It is well known axiom of law that man may tell lies, but, documents cannot. Abdul Majid, S.I. (PW-16) reduced into writing oral complaint (Ex.PZ) of Taj Muhammad-the deceased (then injured) and the police "karwai" written by the investigating officer-Abdul Majid, S.I. (PW-16) reads as under:

کاروائی پولیس:

اس وقت میں معہ نصر اللہ 431/C- محمد اشرف 700/C- محمد فیاض خان 160/C ملازمان کے اطلاع وقوعہ ہذا پر کرسول ہسپتال میانوالی پونچا ہوں۔ تاج محمد مستغیث بہرہ ساجد مسعود پر سرش۔ سرور مقصود برادرش کے ایمر جنسی وارڈ داخل ہے جو تاج محمد مضر وب مستغیث نے بیان بالا تقریری دیا جو ضبط تحریر میں لایا جا کر مذکورہ کو پڑھ کر سنایا و سمجھایا گیا جس نے صحت بیان خود کو درست تسلیم کرتے ہوئے زیر بیان خود اپنا بایاں انگوٹھ ثبت کر دیا جس کی میں تصدیق کرتا ہوں۔ تاج محمد، سرور مقصود، ساجد مسعود مضر وبان کے علیحدہ علیحدہ نقشہ جات مضر وبی مرتب کر کے مضر وبان کو برائے فوری علاج معالجہ و ملاحظہ ڈاکٹری زیر حفاظت نصر اللہ 431/C بھیجا جا رہا ہے۔ بیان بالا مستغیث و نوعیت ضربات و حالات واقعات سے سر دست صورت جرم 324/109/148/149 تپ پائی جا کر استغاثہ ہذا جرم مذکور بغرض قائمی مقدمہ مرتب کر کے بدست محمد فیاض خان 160/C ارسال تھا نہ ہے۔ مقدمہ درج رجسٹر کر کے نمبر مقدمہ سے اطلاع دی جاوے۔ میں مصروف بہ تفتیش ہوں اطلاع وقوعہ ہذا بخبر مت SHO صاحب بھیجی جاوے۔

From the Police "Karwai" written by the investigating officer it reflects that Taj Muhammad along with Sajid Masood and Sarwar Maqsood were admitted in the Emergency Ward of the Hospital. The police "Karwai" also reflects that the Investigating Officer (PW-16) had not observed legal formalities as required under the law neither he (PW-16) had taken any step to associate the doctor or took any step to bring Magistrate for recording dying declaration. The Investigating Officer-Abdul Majid, S.I. (PW-16) also did not turn out other relatives from the emergency ward before recording the statement of the deceased (then injured). The Investigating Officer-Abdul Majid, S.I. (PW-16) during cross-examination admitted that, *"I did not seek permission from the*

medical officer for recording statement of Taj Muhammad as he was fit to make statement. It is correct to suggest that the medical officer did not attest thumb impression of Taj Muhammad on the complaint Ex.PZ." The dying declaration was not verified by any member of the hospital to the effect that the deceased (then injured) had made statement. The deceased remained in hospital till 19.02.2005, during which there was sufficient time for the investigating officer to record the dying declaration through a Magistrate which exercise was not done. The Investigating Officer-Abdul Majid, S.I. (PW-16) deposed during cross examination that, "*Taj Muhammad injured was present in the emergency ward whereas Sarwar Maqsood and Sajid Masaood were present in the gallery of emergency. It is correct to suggest that I have mentioned in the complaint Ex.PZ that all the injured were present in the emergency ward. None of the injured had been medico legally examined prior to my arrival in the hospital. It is correct that the condition of Taj Muhammad and Sajid Masaood was critical. I did not try to make arrangement for recording alleged dying declaration of Taj Muhammad and Sajid Masaood.*" So, possibility that the deceased while in injured condition was tutored during recoding his statement and he had made the statement with consultation and deliberation, could not be ruled out. The testimony of the witnesses appeared to be after thought. In the result, there is no credible evidence to corroborate the dying declaration.

20. However, the factum of abscondance, even if established, could only be used as corroborative evidence and was not substantive piece of evidence. The Investigating Officer-Abdul Majid, S.I. (PW-16) deposed during cross examination that, "*It is correct to suggest that I obtained bail bond from Sohail Aslam accused u/s 169 Cr.P.C on 19.3.2005.*" The investigation of the case was entrusted to Muhammad Aslam Ghowri (DPO-since retired) on 09-06-2005, who deposed during cross-examination that, "*It is correct to suggest that when the investigation was entrusted to me, the name of Sohail Aslam accused had been mentioned in column No.2 of the challan by the previous I/O. It is correct that the investigation had already been completed and final challan prepared when the investigation was entrusted to me.*" This takes me to the

consideration of circumstance regarding abscondance of the appellant, the piece of evidence taken against the appellant is that he had absconded himself after the incident. Whereas record suggests that Sohail Aslam accused-appellant submitted bail bonds in terms of section 169 Cr.P.C. Muhammad Aslam Ghowri (DPO-since retired) on 09-06-2005, who deposed during cross-examination that, ***"I have seen photo copy of bail bond mark-C showing that Sohail Aslam Khan accused was granted bail by Abdul Majid SI u/s 169 Cr.P.C."*** From the record it is seen that the bail granted to the appellant was not withdrawn and subsequent investigating officers had concealed that the accused-appellant had submitted bail bonds in terms of section 169 Cr.P.C. Entire proceedings under section 87 and 88 Cr.P.C were initiated after submission of challan. On the other hand, Nasrullah 431/Constable (PW-5) deposed in his court statement that he received the warrants of arrest (Exh.PR) of the Sohail Aslam accused-appellant on 12-11-2005 which bears his (PW-5) report (Exh.PR/1). On 17-11-2005 he (PW-5) obtained proclamation (Exh.PU) and bears his (PW-5) report (Exh.PU/1) on its back. During cross-examination Nasrullah 431/Constable (PW-5) deposed that, ***"It is correct to suggest that I made my statement before Inquiry Magistrate court on 27.4.2006. It is correct to suggest that I did not mention in my statement before the Inquiry Magistrate that the warrant of Sohail Aslam accused was handed over to me for execution and I tried to arrest him, but he had absconded to avoid his arrest. I also did not make my statement before the Inquiry Magistrate that proclamation of Sohail Aslam accused was handed over me for service and I affixed one copy of proclamation on the outer door of the house of Sohail Aslam accused, second copy was affixed in the court premises and third was handed over to the I/O."*** There is nothing to show that the proceedings under Sections 87 and 88 of Cr.P.C were taken place against the appellant as prescribed in the law. It is established principle of law that mere absconsion is not a proof of guilt of an accused. Reliance is placed on "**Rasool Muhammad v. Asal Muhammad and another**" (PLJ 1995 SC 477). In the present case, the substantive piece of evidence in the shape of ocular and medical ground has been disbelieved, therefore, no conviction can be based on

absconson alone, if any. Reliance is placed on the case reported as “Rohtas Khan v. The State” (2010 SCMR 566).

21. Admittedly, co-accused namely Tariq Javed and Aamir Ali of the appellant have been acquitted by the learned trial court on the same set of evidence. Whereas the complainant assailed the judgment of acquittal to the extent of Tariq Javed through P.S.L.A No.83 of 2008, which was dismissed by this Court vide order dated 24.03.2009 and thereafter, the complainant had not challenged the order dated 24.03.2009 before the Higher Forum and the same attained finality. The major part of evidence of the prosecution was disbelieved qua the above named accused. The prosecution version cannot be believed qua the other accused in the absence of very strong corroboration.

22. Learned counsel for the appellant has relied upon the defence evidence and submitted that the appellant went to the house of his paternal aunt situated in Chak No.1-4/DB Tehsil Piplan, District Mianwali on 04.02.2005 at about 9.00 a.m as appellant’s paternal aunt was ill who died afterward due to illness. The appellant took plea of alibi that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. It is settled proposition of criminal law that accused is presumed to be innocent unless proved guilty and prosecution is supposed to prove its case on the record

beyond reasonable doubt by leading cogent, convincing and reliable evidence. Further it is a settled proposition of Criminal Law that to prove guilt of the accused, prosecution is to stand on its own legs and it cannot drive any benefit from the witnesses, if any, in the defence of the accused. In the case of “**Shera Masih and another v. The State**” (PLD 2002 Supreme Court 643), it has been held that,

“Defence plea of the accused even if is not supported by any evidence direct or circumstantial and is discarded being improbable, still it will not be a circumstance to prove the guilt of an accused and the prosecution has to establish its case by standing on its own legs.”

23. In view of the above circumstances, the conclusion I arrived at is that there is no credible evidence to establish that Sarwar Maqsood (PW-7) Sajid Masood (PW-8), the complainant-eye witness and injured witness, have brought true facts before the court. The prosecution had badly failed to lead incriminating, corroborative/independent evidence to bring home guilt of Sohail Aslam accused-appellant. In this background, the benefit of doubt is to be extended in favour of the accused. In the case of **Muhammad Akram v. The State** (2009 SCMR 230), wherein it has been held as under:-

“----Benefit of doubt---Principles---For given 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 right.”

The upshot of the above discussion is that the prosecution has badly failed to bring home charge against Sohail Aslam accused-appellant beyond any reasonable doubt, therefore, in the interest of safe administration of criminal justice, **Crl. Appeal No.1461 of 2008 filed by Sohail Aslam, appellant is accepted in toto.** The conviction and sentence awarded by the learned Additional Sessions Judge, Mianwali vide judgment dated 28.11.2008 is **set**

aside and the appellant, Sohail Aslam son of Muhammad Aslam is **acquitted** of the charge in a private complaint, offences under Sections 302/324/337-F/334/109/148/149 P.P.C, in case F.I.R. No. 22 of 2005, dated 04.02.2005, offence under Sections 324/109/148/149 P.P.C, registered at Police Station City Mainwali, District Mianwali. Since, the appellant is on bail, his bail bonds stand discharged.

(AALIA NEELUM)
JUDGE

Approved for reporting.

Judge

Tariq