

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

J.Cr.A No.541-M/2019

Zeshan Akbar s/o Muhammad Akbar Khan, r/o Gulkada No.1, Saidu Sharif, District Swat (presently confined at Central Jail, Mardan).

(Appellant)

Versus

The State

(Respondents)

Present: Barrister Asad-ur-Rehman, Advocate for the Appellant.
Mr. Haq Nawaz Khan, A.A.G for the State.
Qazi Farid Ahmad, Advocate for the Respondent/
Complainant.

Date of hearing: **26.05.2021**

JUDGMENT

WIQAR AHMAD, J.- Appellant namely Zeshan Akbar is aggrieved of judgment dated 06.05.2019 of the learned Additional Sessions Judge (Model Criminal Trial Court), Swat whereby he was convicted and sentenced as follows;

1. u/s 302 (b) P.P.C to undergo life imprisonment, with directions to pay Rs.200,000/- as compensation to the legal heirs of the deceased within the meaning of section 544-A Cr.P.C or in default to undergo six months simple imprisonment;
2. u/s 324 P.P.C to undergo five (05) years R.I; and
3. u/s 19 of the Arms Act to undergo six (06) months imprisonment with a fine of Rs.2,000/- or in default to undergo one month S.I.

All the substantive sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C.

SCANNED

2. F.I.R No.306 (Ex.PW7/1) dated 10.07.2016 under sections 302, 324, 201 P.P.C and section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 was registered at Police Station Saidu Sharif, Swat on the basis of *murasila* (Ex.PW9/2) sent by Hazrat Jamal IHC (PW-9) from Casualty of Saidu Sharif Hospital to the police station. Report of the occurrence was lodged by complainant Kamran Akbar (PW-11) in injured condition to the effect that on the eventful day, he was sleeping in his room, situated inside the spot house. He woke up on hearing fire shot, came out of his room and saw a pistol with his brother accused Zeshan Akbar while his father Muhammad Akbar Khan was laying in injured condition as he had been fired at, by appellant Zeshan Akbar. When complainant was lifting his injured father, appellant Zeshan Akbar also fired at the complainant, as a result of which, he also sustained injury on his left knee joint. Both the injured were taken to the hospital by Imran Akbar (PW-12). Motive behind the occurrence was stated to be frequent quarrels of accused Zeshan Akbar with his father Muhammad Akbar Khan, regarding which, his father had also filed an application for initiation of legal action against the appellant. Beside the injured person, the occurrence was

also stated to have been witnessed by other inmates of the house.

3. Injury sheets of both the injured persons were prepared by Hazrat Jamal IHC (PW-9), scribe of the report. Muhammad Akbar Khan succumbed to his injuries while he was being treated in the hospital. Accordingly his inquest report Ex.PW9/6 was prepared and section 302 P.P.C was also inserted in record of the case. Injured/complainant was medically examined by Dr. Saifullah (PW-5) vide his medico legal report Ex.PW5/1 while autopsy on dead body of deceased Muhammad Akbar Khan was conducted by Dr. Jamil Ahmad (PW-6), same day and accordingly the post-mortem report Ex.PW6/1, was prepared.

4. Sher Alam Khan A.S.I (PW-15) conducted investigation in the case. He drafted sketch (Ex.PW15/1) of the crime scene on pointation of the eyewitnesses. During spot inspection, 02 empties of 9mm were taken in possession through recovery memo Ex.PW2/1. Blood stained garments of the injured/complainant and deceased then injured, were taken in possession through memos Ex.PW13/1 and Ex.PW14/1. He also recorded statements of PWs u/s 161 Cr.P.C. Copy of the application allegedly constituting immediate cause of

commission of offence, was also obtained and subsequently placed on record as Ex.PW15/13. Likewise, copy of complaint u/s 107/151 Cr.P.C filed against appellant Zeshan Akbar before the concerned Magistrate was also obtained and subsequently placed on record as Ex.PW15/14.

5. The appellant was initially absconding, therefore *challan* for proceeding u/s 512 Cr.P.C was submitted against him, however, during said proceedings, he was arrested by the police of District *Malakand*. After transferring the appellant to District Swat, he was formally arrested in this case on 02.8.2016 vide his card of arrest Ex.PW15/25. During interrogation, on 03.08.2016, he disclosed that after commission of the offence, he had delivered the crime pistol to one Bakht Afsar. The appellant also led the police to house of Bakht Afsar, who produced the crime pistol by bringing it from the house of his neighbour Aminullah. In this regard, Bakht Afsar and Aminullah got recorded their statements u/s 164 Cr.P.C on 06.08.2016 before the learned Judicial Magistrate, wherein they disclosed to have kept the crime pistol as fiduciary for the appellant besides disclosing that the appellant had also narrated them the story of commission

of the offence, hence, both the above named persons were also made accused in the case and accordingly sections 201 P.P.C and 15 of the Arms Act were inserted in the case through memo Ex.PW15/36. On 21.08.2016, both the subsequently nominated accused (Bakht Afsar and Aminullah) were arrested vide their card of arrest Ex.PW15/37. On completion of investigations against all the accused including the present appellant, supplementary *challan* (Ex.PW8/2) was submitted for trial before the learned trial Court. They were formally indicted for commission of the offence on 19.12.2016, to which they did not plead guilty and claimed trial. It is pertinent to mention here that during trial, the injured/complainant and legal heirs of deceased had effected compromise with co-accused Bakht Afsar and Aminullah and therefore they were acquitted by the learned trial Court on the basis of compromise vide order dated 01.02.2017. In order to substantiate its case against the present appellant/convict, the prosecution produced and examined as many as 15 witnesses followed by statement of the appellant recorded u/s 342, Cr.P.C, wherein he denied the prosecution allegations, however he neither wished to be examined on oath nor desired to produce evidence in defence.

6. On conclusion of the trial, the appellant was convicted and sentenced by the learned trial Court as stated above vide its judgment dated 06.05.2019, hence, this jail criminal appeal.

7. Arguments heard and record of the case was perused with the valuable assistance of learned counsel for the parties and learned Assistant A.G representing the State.

8. It is case of the prosecution against the present appellant that he had committed murder of his father Muhammad Akbar Khan beside causing injury to his brother complainant Kamran Akbar (PW-11) by firing at them. The incident had taken place inside joint house of the deceased and his sons. In support of its allegations against the appellant, the prosecution mainly relies upon ocular account furnished by the complainant namely Kamran Akbar and another eyewitness namely Imran Akbar. They were examined in the case before the learned trial Court as PW-11 and PW-12, respectively.

From critical analysis of their statements, it appears that their testimonies were trustworthy, confidence inspiring and unimpeachable, as on all the materials points they have remained consistent. Their testimonies were also fully in line with the initial prosecution version. It is

necessary to note here that the occurrence had taken place on 10.07.2016 whereas both these eyewitnesses were examined by the prosecution, after a considerable time on 30.04.2019, before the learned trial Court, despite that both these witnesses were in conformity with each other qua time and place of occurrence beside being unanimous regarding all other events having relevancy with the incident. Despite of confronting these eyewitnesses, during their cross examination by the defence in a very hectic and confusing manner, they had successfully explained the respective points assigned to them, deceased and other inmates of the house in the site plan (Ex.PW15/1) qua their presence on the spot at the relevant time of the occurrence. It may be observed here that the defence, despite strenuous effort, had not been able to elicit even a single word from the mouths of these two eyewitnesses in favour of the appellant/convict. Overall testimony of these eyewitnesses of the occurrence could not be shattered and there was not a single occasion on the entire record to render their presence on spot at the relevant time doubtful. The complainant (PW-11) had got injuries in the incident while eyewitness Imran Akbar (PW-12) had shifted the deceased then injured and the complainant (PW-11) to the hospital, soon after the occurrence. This fact would

be of importance to reiterate here that Imran Akbar (PW-12) was also son of deceased as well as brother of the complainant as well as the appellant. He was admittedly residing with his family members in same house.

9. Time of this unfortunate incident was 07:30 hours i.e. early in the morning and same was also corroborated by the time noted in the medial reports and other circumstantial evidence available on the record. As per statement of doctor (PW-5), he had examined injured/complainant Kamran Akbar at 07:50 AM i.e. just after 20 minutes of the occurrence. Therefore, in the circumstances, the presence of eyewitness Imran Akbar (PW-12) on the spot at the relevant time was quite natural.

10. There is no denial of the fact that complainant was son of the deceased who had himself sustained injury in the occurrence and thus his presence is established on the spot as there is no clue establishing that he had self-inflicted the injury to falsely enrobe the appellant (real brother) for the murder of his father. Presence of the eyewitness Imran Akbar (PW-12) on the spot at the relevant time was also well established by the prosecution being inmate of same house where the

occurrence had taken place. His testimony cannot be discarded even on the reason that he was closely related to the deceased and injured, because he was also similarly related to the appellant. There is nothing on record which would transpire that the PWs had any motive to falsely implicate the appellant in the case. Their established natural presence on the spot at the relevant time could not be brushed aside on the ground of mere close relationship with the deceased. In this respect, reliance may also be placed on judgment in the case of "Zafar Iqbal and others V/s. The State" reported as **2014 SCMR 1227** wherein it was held by the august Supreme Court of Pakistan that:

"Mere relationship of prosecution witnesses with deceased cannot render their evidence unreliable unless it is established that they had motive to implicate accused falsely".

No reason could be pointed out on record which may have motivated the prosecution witnesses to falsely depose against the appellant.

11. In addition to the above, the occurrence had taken place at 07:30 hours whereas the report had been lodged by the complainant at 08:10 hours, just after 40 minutes. Keeping in mind the distance between hospital and spot house, it was a promptly lodged report

excluding the possibility of substitution of real culprit. It was a broad daylight occurrence and both the parties were residing in a joint house and were closely related, therefore, the question of misidentification would also not arise. It would not be out of place to mention here that except allegations of keeping the crime pistol in their possession and screening off such evidence, no role had been attributed to acquitted co-accused Bakht Afsar and Aminullah while the role of effective firing upon the deceased then injured and complainant had specifically been attributed to the present appellant. In such circumstances, we would feel no hesitation to hold that it was a case of single accused. In view of the facts that it was a broad day light occurrence, the parties being closely related and a prompt report was lodged, the substitution of real culprit, in the circumstances, was a rare phenomenon. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of 'Khan Naveed and another Vs. The State and others' reported as **2008 SCMR 1480**, had, *inter alia* held that appellant in the case had singly been charged and that in absence of any animosity existing earlier, there had been rare chances of his false implication. Relevant findings of apex Court recorded therein are reproduced hereunder for ready reference.

"It may also be borne in mind that the appellant/ accused has been only single person held to be liable in the commission of murder and no animus has been suggested to the P.Ws. for his false implication in the crime, therefore, there could not be any mistaken identity or substitution in place of the real culprit/assailant i.e. the appellant. The learned Judge in Chambers also after scrutiny, analysis and assessment of the entire evidence, on record has arrived at the conclusion that prosecution has proved the guilt of the appellant/convict accused beyond reasonable doubt and thus, has maintained the conviction and sentence passed by the trial Court."

Further reliance in this respect may also be placed on the cases of 'Miran Bux and another Vs. Muhammad Amir and another' reported as 1986 SCMR 1225 and 'Muhammad Basharat Vs. The State and another' reported as 2003 SCMR 554.

12. Injured was medially examined by the doctor (PW-5) who had got his medico-legal report Ex.PW5/1 prepared while post-mortem of deceased then injured Muhammad Akbar Khan was conducted by the doctor (PW-6) vide post-mortem report Ex.PW6/1. The medical evidence furnished by the prosecution in the shape of statements of PW-5 & PW-6 was fully supporting the ocular account of the occurrence as statements of the complainant (PW-11) and eyewitness (PW-12), were in line with initial report Ex.PW9/2, site plan Ex.PW15/1, injury sheets (Ex.PW9/4 & Ex.PW9/3) and medical reports of the deceased as well as the

injured/complainant. Remarks of the doctors regarding sustaining firearms injuries by both the complainant his and deceased father were further supporting the prosecution version.

13. The crime pistol was also recovered on pointation of the appellant vide pointation/recovery memo Ex.PW10/2. Appellant was a licensee of said pistol and copy whereof was also brought on record. With regard to the recovery of the crime pistol, the testimonies of the relevant witnesses could not be shattered by the defence during their cross examination. The matching report (Ex.PE) of F.S.L regarding the crime pistol and crime empties was also strengthening the prosecution version against the appellant.

14. During interrogation, the appellant had also pointed out the crime scene to the I.O in presence of marginal witnesses vide pointation memo Ex.PW10/4. The prosecution had produced one Gulzar constable, the marginal witness of the pointation proceedings as PW-10. This witness was cross examined at length and he has have given very credible testimony by confirming all events he had witnessed during the pointation proceedings, therefore this piece of corroboratory evidence could be used against the appellant.

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15. Motive alleged by the prosecution in initial report (*murasila* Ex.PW9/2) was that the appellant had frequently been quarreling with his deceased father prior to the occurrence. In the first report, reference of filing a complaint against the appellant by his deceased father for legal action was also given. Same fact was further corroborated by the prosecution witnesses (PW-11 & PW-12) before the Court in their respective statements. In this regard, the investigating officer (PW-15) had also placed on record copy of the application filed by the deceased before D.P.O, Swat for legal action against the appellant. Copy of the complaint u/s 107/151 Cr.P.C lodged on behalf of the deceased against the appellant before the Magistrate was also brought on record. The referred documents were produced and duly exhibited during trial as ExPW15/13 & Ex.PW15/14, respectively. These documents were bearing the date of 04.07.2016 i.e. about 06 days prior to the occurrence. In the circumstances, it could safely be inferred that relations between the appellant and his deceased father had been strained.

16. Learned counsel for the appellant had also raised a plea that the appellant had been a drug addict at the relevant time, which fact had also been admitted by the prime prosecution witnesses (PW-11 & PW-12) before the Court during their cross examination. To support his assertion, learned counsel for the appellant referred to certain portions of cross examination of said PWs. Said part of cross-examination of PW-11 is reproduced as under for ready reference.

یہ بھی درست ہے کہ ملزم ذیشان وقوعہ ہذا سے تقریباً دو سال قبل ice addict ہو چکا تھا۔ یہ بھی درست ہے کہ اسی نشہ کی وجہ سے ہفتہ اور دس دس دن تک جاگتا رہتا تھا اور نہیں سوتا تھا۔ یہ درست ہے کہ وقوعہ کے روز ہمارے والد نے ملزم ذیشان کے لیے ناشتہ تیار کیا تھا۔

Further ahead in his cross-examination, the witness also stated that;

یہ بھی درست ہے کہ ملزم ذیشان کو ہم نے Drug Rehabilitation Centre میں برائے علاج داخل کیا تھا۔ از خود کہا کہ ملزم کچھ دن بعد ہسپتال سے فرار ہوا تھا۔ یہ غلط ہے کہ ملزم ذیشان سے والد ام بغیر ارادہ اور خطائی سے لگ گیا ہے۔

Almost similar narration had been given by PW-12, therefore his statement need not to be reproduced. Taking of intoxicants by a person on his will and commission of an offence during such state of intoxication has never been recognized as an exception from the criminal liability that is ensued as a result of doing of the act. Section 85 P.P.C has only been

providing an exception in those cases where the intoxicant is administered against will of a person and due to such intoxication he lands in such a state that he does not know the nature of the act or what he is doing is either wrong or contrary to law. Section 85 P.P.C is reproduced hereunder for ready reference.

85. Act of a person incapable of judgment by reason of intoxication caused against his will.— Nothing is an offence which is done by a person who at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law, provided that the thing which intoxicated him was administered to him without knowledge or against his will.

The proviso at the foot of section 85 P.P.C makes it manifestly clear that if a person gets intoxication out of his free will then he cannot claim the benefit of the general exception provided in section 85 P.P.C. It had been made clear during the course of cross-examination of PWs that the appellant had been taking the intoxicants on his own will. There is nothing on record which could have suggested that the appellant had been suffering from any debilitating mental condition at the time of commission of the offence nor as such a defence has ever been taken during the course of trial or during pendency of the instant appeal. Whatever state of mind had been produced by consuming intoxicants by the appellant, was the direct result thereof and not because

of any mental illness, which fact is clear from evidence of the prosecution. In such a case, the defence of section 85 P.P.C shall not be available to the appellant. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of 'Hazrat Hayat Vs. The State' reported as **1974 SCMR 295**, had dealt with a case of the influence of intoxicants consumed by a person on his will in the following manner;

"Even assuming that he was under the influence of intoxicants, he was so by his own volition as admitted by him and, therefore, this plea could not exculpate him. Under section 85 of the Penal Code, an offence done by a person, who at the time of doing it is incapable of knowing the nature of the act, by reason of intoxication, is excused provided that the thing which is intoxicating him has been administered to him without his knowledge or against his will. In the present case, the admission of the appellant is that he himself was a drug addict and, therefore, this was not a case which comes within the terms of section 85. It could nevertheless have been treated as a mitigating circumstance, if there was any evidence on the record to show that at the time that the act was done or immediately before or after it the appellant was under the influence of intoxicants."

In the case in hand, there is nothing on record to suggest that the intoxicant was administered against will of the appellant or that he had been suffering from any mental debilitating condition. Besides the manner in which the offence had been committed, escape of the appellant after commission of the offence and then going in abscondence nowhere shows that he had ever been suffering from any mental illness.

17 For what has been discussed above, the prosecution had proved its case against the appellant beyond reasonable doubt, therefore, the impugned judgment of the learned trial Court does not call for any interference of this Court. Resultantly, the impugned judgment is upheld and this appeal, being bereft of merits, is accordingly dismissed.

Announced.

Dt: 26.05.2021

JUDGE

JUDGE

Office
29/05/2021
W/R