

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

1. Cr.A No. 216-M/ 2017
Zameen & 2 others
v/s
Mata Khan & another
2. Cr.A. No. 224-M/2017
Mata Khan & 2 others
v/s
The State & others
&
3. Cr.R. No. 76-M/2017
Mata Khan & 2 others
v/s
The State & others

Dates of hearing: - 28.01.2019 & 11.02.2019

CONSOLIDATED
JUDGMENT

Appellants:- (Zameen & 2 others) by
Sahibzada Assadullah, Advocate.

Respondents:- (Mata Khan & another) by
Muhammad Raziq Khan,
Advocate and Mr. Rahim Shah,
Astt: Advocate General.

SYED ARSHAD ALI, J.- Through this single judgment, we propose to decide this criminal appeal bearing No. 216-M/2017 as well as the connected Criminal Appeal No. 224-M of 2017 and Criminal Revision bearing No. 76-M/2017, as all these matters emanate from one and the same judgment dated 27.09.2017 handed down by the learned Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower at

Timergara, in case F.I.R No. 864 dated 26.09.2014 registered under sections 302, 324, 337 A (ii), 337 F (v), 34 PPC at Police Station Timergara District Dir Lower, whereby the appellants Zameen, Kameen Khan and Shah Zamin were convicted and sentenced under different sections of law in the following manner:-

- *The appellant Zameen was convicted u/s 302 (b) PPC and sentenced to life imprisonment alongwith payment of compensation of Rs. 200,000/- under section 544-A Cr.P.C payable to the legal heirs of the deceased, or in default thereof, he was ordered to undergo further 6 months S.I. However, the accused/appellant was extended the benefit of section 382-B Cr.P.C.*
- *Whereas the appellants namely Kameen Khan and Shah Zamin were convicted under sections 337 A (i), 337 F (i), 34 PPC and sentenced for the period already undergone.*

2. As per prosecution story, on 23.09.2014 at 9:25 hours, the complainant Mata Khan, PW-3 reported the incident to Khan Muhammad ASI, PW-14 at emergency ward of Timergara hospital to the effect that

on the day of occurrence, he (complainant) alongwith his father Bismillah Khan (deceased), Bakht Zamin, PW-4 and Zerullah, PW-5 were on their way to Hazrat Hotel Balambat road Timergara for selling of their milk. When they reached at the place of occurrence, near Hazrat Hotel, the accused Zameen, Kameen and Shah Zamin were already present there who had attacked the complainant-party with stick/*dhanda* blows. Whereas the accused Zamin with some sharp object injured his father Bismillah Khan on his head. While from stick blows of the accused Kameen and sharp object blows of said accused Bakht Zamin had received injuries on his head and finger of left hand, whereas Zerullah sustained injuries on left side of his skull, right hand and shoulder from the blows of accused Shah Zamin. The motive behind the offence was disclosed to be a dispute over irrigation of water. In addition to the complainant Mata Khan, PW-3 the occurrence was stated to have been witnessed by

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Tazamin, Lal Zada and Asil Zada, all these three eye-witnesses were abandoned by the prosecution. The report of the complainant was incorporated in *Mad* No. 13 dated 23.09.2014, Ex. PA. The said report was seconded by Wazir Zada. Thereafter, on 26.09.2014 at 04:55 A.M. the injured Bismillah Khan succumbed to the injury at Peshawar, hence, the FIR *ibid* was registered against the accused/appellants at PS concerned on the same date.

3. Investigation in the case was entrusted to Abdul Hameed Khan, Sub Inspector, PW-11 who visited the spot and prepared the site plan Ex. PB on the pointation of the complainant and other eye-witnesses. He had recovered weapons of offence Ex. P-1 & Ex. P-2 from houses of the accused Kameen and Shah Zameen vide recovery memo Ex. PW-6/1 and prepared recovery sketch of the said memo Ex. PB/1. He has taken into possession blood stained clothes of the deceased vide recovery memo Ex. PW-11/1. He had also



taken into possession an axe vide recovery memo Ex. PW-11/2 being handed over to him by one Lal Zada who stated that the same was snatched by him from the accused Zameen during the quarrel. He has also prepared the pointation memo Ex. PW-7/1 (already exhibited). Vide application Ex. PW-11/7 he had obtained warrant u/s 204 Cr.P.C (Ex. PW-11/8) and likewise vide application Ex. PW-11/9 he had obtained proclamation notice Ex. PW-11/10 from the Court concerned. On receipt of the medical report of the injured Bakht Zamin, the Investigation Officer had issued addition memo Ex. PW-11/12 for insertion of section 337-F (v) PPC against the accused. He has also arrested the accused Zameen on 30.10.2014 vide card of arrest Ex. PW-11/13. On receipt of the FSL report Ex. PZ the same was placed on file. Similarly, he has also placed on file the record of criminal cases/FIRs in respect of the motive as Ex. PW-11/16 to Ex. PW-11/17. Upon completion of the investigation, complete

challan was forwarded to the SHO concerned for onward submission.

4. During the course of trial, the prosecution examined as many as 15 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused were examined under section 342, Cr.P.C, wherein they denied the charges, posed innocence and stated to have falsely been implicated in the case.

5. On conclusion of the trial, the learned Additional Sessions Judge/Izafi Zila Qazi Dir Lower convicted and sentenced the accused/appellants vide the judgment impugned herein. Hence, these connected matters.

6. Arguments of the learned counsels for the parties including learned Asstt: Advocate General representing the State were heard at length and record of the case was perused with their able assistance.

7. According to the *Mad* report, Ex. PA dated 23.09.2014 the occurrence has taken

place at 6:55 A.M, whereas according to the medical report the deceased Bismillah Khan had reached the hospital at 7:45 A.M and the injured Bakht Zamin reached at hospital on 7:45 A.M, whereas the third injured Zerullah was taken to the hospital at unknown time as evident from his injury sheet Ex. PW-14/3. Whereas the matter was reported through *Mad* Ex. PA at 9:10 A.M. The place of occurrence is at a distance of half kilometer from the police station and the hospital where the injured were brought also falls within the same proximity. Thus, there is a delay of 2 hours and 15 minutes in lodging of the first report.

8. Although, the FIR was registered on 26.09.2014, however, the same appears to be for the reason that the prosecution had waited for the medical opinion of the doctor which resulted in delay in the registration of the FIR. Since this delay in registration of *Naqal Mad*, Ex. PA has provided ample opportunity to the complainant-party to

deliberate and consult in the matter. Therefore, not only the mode and manner of the occurrence has to be thoroughly examined but the ocular testimony requires a very careful probe albeit being supported/ corroborated by unimpeachable circumstantial evidence.

9. According to the prosecution case, the complainant Mata Khan, PW-3 who is the son of the deceased Bismillah Khan was present on the spot, the injured Bakht Zamin, PW-4 and the other injured Zerullah, PW-5 had received injuries, for which specific role was assigned to Zameen, Kameen sons of Barkat Khan and Shah Zamin son of Momin Khan to have attacked at them through sticks and further specific role was assigned to the appellant Zameen who has inflicted a blow on the deceased Bismillah Khan with some sharp edged weapon on his head. Similarly, specific role was also assigned to Kameen that he had inflicted stick blows as well as through a sharp edged weapon on the head of Bakht Zamin as well as on his finger. Whereas the accused

Shah Zamin was given a role that he had inflicted injuries on the body of PW-5 Zerullah on his head, right shoulder and hand.

10. Apart from the complainant and the two other injured/witnesses, Tazamin son of Munasib Gul, Lal Zada son of Shahzullah and Asil Zada son of Amir Zada are stated to be the eye-witnesses of the occurrence.

11. Mata Khan, the complainant appeared as PW-3. The addition/improvement in his court statement was that Zameen was having axe whereas Kameen and Shah Zamin were having sticks. Zameen had inflicted axe blow at Bismillah Khan which injured him on his head. He has further stated in his statement that at the time of said fight Lal Zada had snatched axe from the possession of Zameen which was later provided to the Investigation Officer. In his cross-examination, he has admitted that the said Lal Zada who was not produced before the Court was his cousin who is the resident of another village. The other witnesses and the injured were also related to

him. He has also made the following admissions in his cross-examination:-

- That the place of occurrence is situated in Bazar and number of people attracted to the spot.
- He took his father to the hospital at 7:12 A.M, whereas the Bakht Zamin was taken to the hospital at 7:15 in his Suzuki. When they reached at the hospital the police officials were available on the main gate. He had narrated the entire story to the police officials, who in turn told him that the complainant should look after his father and they would call the other police officials. At 9: 10 A.M their report was registered, whereas his father was referred to Peshawar through ambulance at 9:15 A.M.
- He sustained no injury during the scuffle.

12. Bakht Zamin, the injured/witness was examined as PW-4. He has stated in his

cross-examination that the police had recoded their statements in a room and when they reached at the hospital the police were present, however, they have stated that the other police officials will come and record their statements.

13. The 3rd injured/witness Zerullah appeared as PW-5. He has admitted the presence of his other relatives Lal Zada, Asil Zada and Tazamin at the spot, however, they did not participate in the quarrel. He has further stated in his cross-examination that when they reached at the hospital they had informed the police about the incident. However, he did not know as to whether his statement was recorded or not. He has also stated that when they reached at the hospital on 7:15 A.M, at that time the doctor was not available and he was examined by the doctor at 8:15 A.M, who had first examined the injured Bismillah. During the said examination, the police were present alongwith them, however, the other police

(from police station) did not reach there and he did not remember as to whether their statements were recorded in the said ward or not.

14. Indeed, the entire prosecution case stays on the ocular testimony of the aforesaid witnesses and the other alleged witnesses who have seen the occurrence including Lal Zada, who has allegedly snatched the axe from the appellant/convict Zameen was not produced before the Court.

15. According to record, the age of the complainant is 24/25 years, the age of his father Bismillah Khan was 48 years approximately, the age of the injured Bakht Zamin is 30/31 years and the age of injured Zerullah was 26/27 years. Whereas, the age of their other relatives, the alleged eye-witnesses i.e. Lal Zada, Asil Zada and Tazamin is not available on the record. Against that, the age of the appellant Zameen, who was given effective role at the relevant time was 54/55 years, the age of appellant Shah Zamin was

33/34 years, whereas the age of other accused Kameen Khan was 45/46 years.

16. The close perusal of the statements of the aforesaid PWs in *juxta* position with the site plan suggest that all of them were standing very close to each other and the complainant Mata Khan who is a young boy of 24/25 years had ample opportunity to have got hold of the appellant/convict Zameen who at the relevant time was 54/55 years old to protect from his blow his father. Interestingly, in the entire scuffle, he (complainant) did not receive any injury. Therefore, it is very unusual conduct on his part that someone would be hitting his father and he will make no effort to save his father. It is also further evident from his statement that their another relative Lal Zada was also present at the spot, who was able to snatch the said axe from the appellant/convict Zameen, however, neither they could catchhold of the accused who were less in numbers nor they had made any effort to hit them with



the axe which they had snatched from him. His further unusual conduct is evident from his initial report wherein he says that the appellant Zameen had hit his deceased father Bismillah Khan with some sharp edged weapon, however, he does not specifically mention the axe despite the fact that the report was lodged at 9:10 A.M. whereas the occurrence had taken place 6:55 A.M and at the same time he knew that the said axe was taken by Lal Zada from the appellant Zameen but even then he did not mention all these material facts in his initial report, which makes his presence at the spot very doubtful. The august Supreme Court of Pakistan had disbelieved the statement of an alleged eye-witness whose conduct remained unusual in a case law titled "Muhammad Khan and another v/s The State reported as 1999 SCMR 1220", wherein it was held that:- "*It is axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case*

must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been moulded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct perspective.

17. Moving on further to the testimony of the two other alleged injured/witnesses namely Bakht Zamin, PW-4 and Zerullah, PW-5. True that from the injuries on their bodies it appears that they were present at the spot and also received injuries. However, despite the fact that they have admitted in their testimony that their statements were recorded on the same day, but according to the record their statements under

section 161 Cr.P.C were recorded on 27.09.2014. This delayed recording of statement is not fatal to the prosecution case because at that time no FIR was registered and the FIR was subsequently registered on 26.9.2014, which led to delay in recording of their statements, however, the question mark on their credibility is that despite the fact that according to their testimony they reached at the hospital on 7:15 A.M and the police were also present in the said hospital but their version was not recorded by the police. Even in the first *Mad* report which was recorded at 9:10 A.M the use of axe has not been mentioned, which shows that they had concealed the material facts.

No doubt that the presence of the injured witnesses cannot be doubted at the place of incident, however, it is equally settled law that if the said witnesses are otherwise untruthful then their testimony is to be excluded from consideration. In this regard, we are fortified with the law laid down by the

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august Supreme Court of Pakistan in "Amin Ali and another v/s the State (2011 SCMR 323), wherein it was observed:- *" Certainly, the presence of the injured witnesses cannot be doubted at the place of incident, but the question is as to whether they are truthful witnesses or otherwise, because merely the injuries on the persons of PWs would not stamp them truthful witnesses."*

18. Another damaging factor to the prosecution case is that in the *Mad* report the complainant-party have stated that Bismillah Khan and other injured/ PW Bakht Zameen received injuries from sharp edged weapon, however, their this testimony is belied by the medical evidence, according to which, the injured and the deceased had received injuries from a blunt weapon. In order to bring their version in line with the medical evidence they have stated in their Court statements that the accused had inflicted axe blows by using the blunt side of the axe and not the sharp one. This improvement in our humble view is not

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appealable to a prudent mind being purely based on dishonesty.

19. Moving on further to the circumstantial evidence. In the present case, the site plan Ex. PB was prepared on 27.09.2014, however, no incriminating material was collected from the spot. The only incriminating material as circumstance was the recovery of axe, Ex. PW-11/2, the said axe was allegedly handed over to the Investigation Officer by Lal Zada after 3 days of the occurrence and the said Lal Zada never appeared before the Court in support of the same. Therefore, the recovery of the said axe not only appears to be doubtful but the same is an afterthought attempt to strengthen the prosecution case. Hence, evidentiary value of such circumstantial evidence in shape of doubtful recovery is of no help to the prosecution case.

20. Although, the motive for the offence has been established as the prosecution has placed on record copies of the

previous FIRs as Ex. PW-11/16 to Ex. PW-11/17, wherein the complainant-party were accused. However, motive is a double edged weapon which cuts both sides, therefore, when the ocular and circumstantial evidence being led by prosecution is not confidence inspiring then motive alone is inconsequential in respect of guilt of the accused/appellants.

21. We are conscious of the fact that in the alleged incident the father of the complainant namely Bismillah Khan was deprived of his precious life at the age of 47/48 years. However, instead of bringing on record the true mode and manner of the incident, the entire prosecution case is based on concoction and concealment.

22. Thus, the prosecution case is pregnant with serious doubts and it is settled law that in case of even a single doubt the benefit of the same is to be drawn in favour of the accused not as a matter of favour or grace but as his/their right.

23. Similarly, when we have disbelieved the testimony of the injured/witnesses against the appellant Zameen for injury caused on the body of the deceased Bismillah Khan then the same set of evidence is also to be disbelieved against the appellants Kameen Khan and Shah Zamin who are charged for injuring the injured/eye-witnesses Bakht Zamin and Zerullah.

24. In the above backdrop and after reappraisal of the entire evidence, this Court is of the firm view that the prosecution case against the accused/appellants has not been proved beyond any reasonable doubt and the judgment of learned trial Court dated 27.09.2017 is based on wrong appreciation of evidence. Hence, we accept this appeal and set-aside the impugned judgment rendered by the learned trial Court. Therefore, the accused/appellants are acquitted of the charges leveled against them. They be released forthwith if not required in any other case.

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25. Regarding the appeal against acquittal and criminal revision petition for enhancement preferred by the complainant-party, we have noted that the acquittal of accused/respondents No. 2 to 4 under sections 302 (b) and 324 PPC is in accordance with law, therefore, the impugned judgment to the extent of their acquittal is reasonable on all counts, which requires no interference. Resultantly, both the appeal and criminal revision are also dismissed being devoid of merits.

26. These are the reasons of our short order of even date.

Announced
Dt. 11.02.2019


JUDGE


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28/02/2019
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