

Judgment Sheet

IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH.

JUDICIAL DEPARTMENT

Cr. Appeal No. 365-A/2019.

JUDGMENT

Date of Hearing

05.10.2022

Appellant (Muhammad Tahir) by

Mr. Maqbool Hussain Advocate.

Respondent (State) by

Sardar Ali Raza, AAG.

Sardar Ali Raza and Fazal-e-Haq

Abbassi, Advocates,

FAZAL SUBHAN, J:- This single judgment shall dispose of this Criminal Appeal filed against the judgment of conviction passed against the appellant/convict and connected Criminal Revision No.55-A/2019 filed by the complainant for enhancement of sentence, awarded to the appellant/convict, as common question of law and facts are involved therein.

2. Appellant Muhammad Tahir son of Gul Rehman has filed instant appeal against the judgment and order passed by the learned Additional Sessions Judge-I, Haripur, dated 07.10.2019 in case FIR No. 176 dated 17.05.2010 under Sections 302/109 PPC of Police Station KTS Haripur, whereby the appellant was convicted and sentenced to life imprisonment and Rs. 200,000/- as fine to be paid to each legal heir of

deceased as compensation and in default of payment of fine, to undergo simple imprisonment for six months while benefit of section 382-B Cr.P.C was extended to him.

3. Brief facts narrated in the FIR Ex.PA are that complainant Azam Khan after receiving information that his maternal uncle, wife and children have been killed, he alongwith his other relatives reached the house of maternal uncle and found the dead bodies of deceased Doran Khan, Mst. Imtiaz Bibi, Sajid, Saqib and Mst. Shaheen were lying. A small boy Ismail son of Tahir was found present in the house who disclosed that at night time his father Tahir came and killed all the family members with firing. Motive for the occurrence was disclosed to be that Mairaj Bibi daughter of Doran Khan had taken divorce from Tahir and as a result he developed aversion and dislike towards his in-laws and on the night of occurrence he entered into their house and caused their death through firing. On the report of complainant Azam Khan, case was registered against the appellant/convict.

4. Upon completion of investigation, challan against the appellant/convict was submitted for trial and the learned trial Court, after observing legal formalities under section 265-C Cr.P.C framed formal charge against him, to which he pleaded not guilty and claimed trial, and in order to bring home the charge against the accused, prosecution produced and examined

14 witnesses and closed its evidence, where after statement of the appellant/convict was recorded under Section 342 Cr.P.C. wherein he denied the charge and pleaded his innocence. He, however, neither wished to produce defense evidence nor opted to be examined on oath. The learned trial Court heard arguments and vide impugned judgment and order dated 07.10.2019, convicted him to the above sentence, hence, he has filed instant appeal.

5. We have thoroughly considered the submission of both the learned counsels and AAG for State and have carefully gone through all the material available on record.

6. This unfortunate and gruesome incident has taken place in the night between 16th and 17th of May 2010, in the house of deceased Doran Khan, Situated at Mohallah Turbaila, Sector 2 Kalabat Township (KTS), at a distance of 1 KM from PS KTS. The incident was reported by one Azam Khan son of Baldar Khan, resident of Sector 4 KTS at 11:00 hours, at DHQ Hospital Haripur, wherein he at the very outset disclosed that after getting knowledge of the occurrence, he alongwith other relatives visited the house of his maternal uncle and found the dead bodies of all the deceased and one child Ismail aged about 5 years, who happened to be the son of applicant/convict, was present, who upon asking disclosed that his father came in the night and murdered all the deceased through firing. From the

record it is clear that Azam Khan complainant did not live longer and died before recording his statement in the trial of accused, and therefore, several questioned remained unanswered, like who conveyed him the information of the occurrence, and which of the relatives come alongwith him to the spot, however, it is clear from the murasila and FIR that, he being closely related to the deceased and living few sector away had come to the house of maternal uncle and as no other close family member was present therefore after shifting the dead bodies to the hospital he lodged the report. Throughout the statements, of PW-3 Mst.Mehraj Bibi and PW-4 Imran Khan, it was brought on record that Azam Khan was aware of the internal affairs of the family of his maternal uncle and this could be the reason that he described the facts and circumstances of the murders. Anyhow, admittedly Azam Khan arrived to the crime home after getting information and has only made a report to the police. Section 154 Cr.P.C does not lay any restriction that an information of commission of a cognizable offence is to be conveyed by a person directly effected of such crime, and therefore every person, even an unrelated person or a stronger can even lodge a report to the police, however, three conditions must be complied before lodging the report, i.e the information must be relating to the commission of cognizable offence, that such information shall

be reduced into writing and the same shall be signed by the person giving such information. It is also well recognized rule that, basic purpose of lodging of an FIR is to set the law into motion for collection of evidence. Undeniably, Azam Khan (now dead) complainant has only conveyed the information of cognizable offence hence, absence of his statement would not dilute the gravity of the offence reported by him.

7. Ismail Khan, a 12 years old boy, was examined as PW-2. As per record he was 5 years of age at the time of occurrence and Azam Khan complainant, while lodging the report at DHQ Haripur, reported that when he reached to the crime house, all the deceaseds were lying dead except Ismail, who was present alive, and on inquiry, he disclosed the occurrence. The said PW is the real son of appellant/convict and it is proved from the record throughout that after developing aversion with her husband, Mst. Meraj Bibi (PW-3) was living separate from him. Deceased was maternal grandfather of PW Ismail and he used to live with him and therefore presence of Ismail on the night of occurrence in the crime house was natural and it cannot be said that he is a planted witness. It is brought on record that at the time of separation of appellant/convict and Mst. Meraj Bibi, PW Ismail was about 2-1/2 years.

8. As stated above, at the time of occurrence PW Ismail was 5 years of age and soon after the occurrence his statement

Ex.PW2/D-1 and Ex.PW2/2 was recorded by Ilaqa Judicial Magistrate on 22.05.2010 and before recording his statement his intelligence and capacity of understating were put to test by the Magistrate and after due satisfaction that the child was giving rational answer, his statement was recorded. Again, during trial statement of Ismail was recorded, at the age of 12 years and his capability to understand the proceedings were tested where-after, his statement was recorded. His statement, on careful analysis, reveals that he described the entire episode with precision. Though certain variations and omissions in between his statement recorded under section 161 Cr.P.C and court statement were highlighted by appellant's counsel but these cannot be described as major contradictions, causing any serious damage to the prosecution case. Defence counsel has made special reference to the cross examination of PW-2 Ismail wherein he admitted that after separation of his father and mother, he never saw his father except at the time of commission of offence. We are of the considered view that this reply cannot be taken and evaluated in isolation, rather the entire statement and sequence of narrations of events shall be considered conjointly. He has described each and every aspect of the occurrence with consistency and accuracy. His subsequent reply to a suggestion is of ultimate significance when the defence itself put suggestion about the recognition of

his father to which he answered that “it is incorrect to suggest that I did not recognize my father by face” This leave no room to nurture any doubt about his veracity. He has been put to lengthy and scorching cross examination but despite his tender age he stood firm to his stance. The appellant/convict is the real father of PW-2 Ismail and at the time of occurrence he was only 5 years of age and therefore, it cannot be said that he was tutored or his statement was derived through outside influence. In such circumstances when 5 persons were done to death, then substitution of real culprits with the appellant/convict, would not appeal to mind. Thus the statement of PW-2 Ismail was found to be straight forward and conscious inspiring and any minor contradiction shall not be sufficient to discard his testimony. For arriving to this conclusion, guidance is taken from case law reported in 2002 SCMR page-1247, wherein the August Supreme Court of Pakistan has laid that’-

We have carefully examined the contentions as agitated on behalf of petitioner in the light of relevant provisions of law and record of the case. We have minutely perused the judgment dated 21-6-2000 passed by the learned Special Court and the judgment impugned. The entire evidence has been evaluated with care and caution. We have not been persuaded to agree with the prime contention of Mr. Rab Nawaz Khan Niazi, learned Advocate Supreme Court who appeared on behalf of petitioner that the statement of Salman (P.W.14)- should have been discarded being a child witness

coupled with the fact that he was not present at the spot for the reason that the said plea has been raised in oblivion of the reality as record is indicative of the fact that Salman (P.W.14) used to accompany his sister Kiran to the house of petitioner being their tutor as such the question of his absence from the place of occurrence does not arise by whom information of unfortunate incident was communicated to his father. A careful scrutiny of his statement would reveal that it is not only worthy of credence and confidence-inspiring but consistent and straightforward having the ring of truth and innocence. Salman (P.W.14) stood firm to the test of cross-examination in spite of various searching questions and nothing advantageous could be elicited. The learned trial Court has put various questions and on the basis of answers given by Salman (P.W.14) he was found intelligent enough to portraiture the facts of event and accordingly his statement was recorded. In such view of the matter we are of the considered view that the statement of Salman (P.W.14) has rightly been considered and relied upon by the learned trial Court as well, as learned Division Bench of the High Court. We have absolutely no hesitation in our mind that on the basis of such statement conviction could safely be awarded.

To further fortify this view, reliance can be placed on the case of Haroon Rasheed and 6 others –Versus—State 2005 SCMR 1568 (d) in para 11, wherein the august Supreme Court, while placing reliance on the testimony of ocular evidence, have held that;-

“It may also be observed that no material inconsistencies have been pointed out by

the learned counsel for the defence considering that it would only be material discrepancies coming into conflict with the material probabilities that would militate against the credibility of witnesses justifying the rejection of testimony.”

The ocular testimony of PW Ismail is further corroborated by recovery in the shape of garments of the deceased Ex.P-10 to Ex.P-16, having blood and bullet corresponding cut marks, taken vide recovery memo Ex.PW6/2 , one magazine loaded with 6 rounds of 30 bore ExP-6, 12 empties of 30 bore ExP-2, 3 spent bullet ExP-8 pieces of quilt ExP-1 to ExP-5, two bulbs recovered from the wall near the kitchen and from inside the room Ex.P-9. All the articles containing blood i.e garments and pieces of quilts were sent to the FSL and report Ex.PW7/14 confirms the same to have human blood. Similarly, post mortem of all the five deceased were conducted and these confirms not only the death through fire arms but the probable duration of 6 to 7 hours between death and post mortem. Thus all recoveries completely corroborate the prosecution version.

9. Besides, PW-2 Ismail, prosecution also examined PW-3 Mst. Meraj Bibi, mother of Ismail, PW-4 Imran Khan, PW-6 Muhammad Fazal, the recovery memo witnesses, while statement of Abdul Aziz (Retd) SI was recorded as PW-7. Though there may be some minor variations and contradictions

in their statements but when an incident of such a magnitude occur, wherein the entire family is massacred, then it is not expected that witnesses would remember each and every fact in a mechanical manner, especially when the witnesses are examined after 8/9 years of the occurrence. Thus, in all, prosecution has convincingly proved that it was the appellant/convict who committed the offence.

10. Record divulge that appellant/convict Muhammad Tahir remained fugitive from law for almost 6 years and he was arrested on 15.10.2016 and at the time of arrest one 3 bore pistol, without number, alongwith a magazine loaded with 5 live rounds and a separate case FIR No.365 dated 16.10.2016 under section 15 AA KTS was registered against him. The said pistol as produced to the IO by the moharrir of PS who took the same through recovery memo Ex.PW8/1. The pistol alongwith empties recovered from the scene of occurrence, were dispatched to the FSL and report thereof is Ex.PW.13/3 which shows that twelve, 30 bore crime empties C-1 to C-12 were fired from 30 bore pistol and result is positive. Thus it further provided corroboration to the prosecution story.

11. As stated in the preceeding para of this judgment, the appellant/convict soon after the occurrence got absconded and was arrested on 15.10.2016. Though accused may abscond to avoid his arrest due to false implication or fear of police and

therefore abscondence alone is not to be made basis for conviction but when there is sufficient material available on record to connect the accused with the crime then abscondence would be considered a strong corroborative piece of evidence. In this respect guidance can be derived from the case law of Qaiser Khan and others –Versus- The State, reported in 2009 SCMR 471, wherein the August Supreme Court of Pakistan in para No.11 has authoritatively held that :-

“No doubt abscondence by itself is not sufficient to convict an accused person but is strong piece of corroborative evidence of the other direct and circumstantial evidence in the case. When an accused person remains fugitive from the law for long time without any plausible and reasonable explanation, then his conduct after the occurrence becomes indicative of his guilt when it is considered in conjunction with the ocular and circumstantial evidence, as held by this Court in Mst. Roheeda v. Khan Bahadur and another 1992 SCMR 1036.”

12. In view what has been discussion above, it is held that prosecution has successfully proved its case beyond shadow of doubt against the appellant/convict and the learned trial court, after thoroughly considering all aspect of the case, has properly appreciated the record which is unexceptionable, hence, findings recorded by the learned trial court and conviction and sentence passed thereon are upheld and resultantly this Criminal Appeal No.365-A/2019 is dismissed.

13. So far as Criminal Revision filed by the complainant Imran Khan is concerned, irrespective of the fact that prosecution has proved that it was the appellant/convict who committed the offence but is on record that his wife was living separately one year prior to the occurrence and she had also filed suit for dissolution of marriage etc, however, it has not surfaced on the record as to what has prompted him to murder entire family of his wife, who he could kill his wife easily, which means that something had happened immediately before the occurrence which compelled him to kill the entire family of his in-laws hence, this provide a valid mitigating circumstance to award lesser punishment to him, and therefore, conviction and sentence awarded to the appellant/convict seems appropriate hence the connected Criminal Revision No.55-A/2019 is also dismissed.

Announced.
Dt.05.10.2022.

J U D G E

J U D G E

Muhammad Tariq SSG

*(DB) Honourble Mr. Justice Wiqar Ahmad
& Honourable Mr Justice Fazal Subhan.*