

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A. No.461-P/2012

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.-

This appeal calls in question the legality and propriety of judgment dated 17.09.2012, rendered by learned Additional Sessions Judge-IV, Swabi, whereby he convicted and sentenced appellants *(1) Fida Muhammad and (2) Aman Ullah*, as under:-

Under section 302 PPC:- To

undergo imprisonment for life each

and to pay a fine of Rs.1,00,000/-, as

compensation in terms of S.544-A

Cr.P.C. to LRs of deceased Qayum

or in default hereof to undergo one year S.I. further, each.

Under sections 324 PPC:- To undergo five years R.I. each for attempting at the life of injured complainant Momin Khan and to pay him Daman to the tune of Rs.50,000/- each, within the meaning of section 337-E(vi) PPC.

Under section 324 PPC:- To undergo 02 years imprisonment each for attempting at the life of PW Adnan.

The sentences have been directed to run concurrently. Benefit of Section 382-B Cr.P.C. has been extended to them.

2. The prosecution case is that on 22.06.2011 at 1900 hours, Momin Khan injured (PW.11), in company of injured Qayum and

Shams ur Rehaman, reported to local Police that on the fateful day he alongwith PW Adnan and injured Qayum, was on the way to home from Swabi Bazaar on a motorbike, being driven by him, while the latter two were sitting behind him; that at 1900 hours when they reached the Clinic of Dr. Saeed, Fida Muhammad and Aman Ullah (appellants-convicts herein) alongwith absconding co-accused Said Ghalib Shah, duly armed with firearms, present there, opened fire at them, with the intention to do them away, as a result, he and Qayum got hit alongwith a passerby riding on a bicycle, namely, Shams ur Rehman, however, his son PW Adnan, luckily remained unscathed. A previous blood feud has been alleged as motive behind the incident.

3. Report of the complainant was reduced into writing by Amir Hamza Khan SI (PW.1) in the shape of murasila Exh.PA/1, verified by

injured Qayum and Shams ur Rehman, on the basis of which FIR No.842 dated 22.06.2011 under sections 302/324/34 PPC, was registered in Police Station Swabi against the appellants and absconding co-accused. He prepared injury sheets of the injured Exh.PW.1/1 to Exh.PW.1/3 and referred them for medical examination. Injured Qayum, later on, succumbed to injuries on the way to LRH, Peshawar, therefore he was brought back to the aforesaid hospital, so he prepared his inquest report Exh.PW.1/5 and shifted his dead body to the mortuary for autopsy and conveyed information to Police Station concerned for insertion of section 302 PPC.

4. Dr. Bawar Shah (PW.7) conducted autopsy on the dead body of the deceased Qayum on 22.06.2011 at about 8.45 p.m. and found the following injuries:-

1. Entry wound 1/3 x 1/3 cm on the right

upper arm anterior side near the
shoulder joint.

2. Exit wound 4 x 3 cm on the right axial.
3. Entry wound 1/3 x 1/3 cm on the right
side of back the chest.

Opinion:- According to his opinion, the deceased died due to severe bleeding from vessels particularly from his right axillary artery.

Probable time between injury and death has been given as 01 to 2 hours while between death and postmortem as 30 minutes to 02 hours.

Dr. Mukamil Khan (PW.10) examined injured Shams ur Rehman on the same day at 07.20 pm and found the following injuries on his person:-

1. Lacerated wound (looking perforating at one point) 6 x 2 cm muscles deep in most of the area on the right side of

back of the chest. No charring marks.

2. Lacerated wound 2x0.5 cm on the back of left chest. The wound is muscles deep. Here are no charring spots.
3. Lacerated wound 1x 1.5 cm in size, skin deep in the back of chest in the mid line.

Kind of weapon: firearm

Duration of injuries: 30 to 60 minutes.

He also examined injured Momin Khan and found the following injuries on his body:-

1. Entry wound 0.5 cm on lateral side of left leg. No charring marks.
2. Exit wound 4 cm x 2 cm encircle on the medial side of left leg.

Leg having deformity i.e. fracture of the bone. The patient was referred to LRH for further treatment.

Nature of injuries: firearm

Duration: within 30 to 60 minutes.

5. Aurangzeb Khan ASI (PW.13) conducted investigation in the case. He proceeded to the spot and prepared site plan. During spot inspection he secured blood from motorcycle of complainant vide memo Exh.PC. The motorcycle having damaged mudguard, was also taken into possession vide recovery memo Exh.PC/4. He secured blood from the place of deceased Qayum through cotton vide memo Exh.PC/1, took into possession 02 empties of 7.62 bore Exh.P.4 from the place of accused Aman Ullah vide memo Exh.PC/2, 4 empties of same bore Exh.P.5 from the place of absconding co-accused vide memo Exh.PC/3. Vide memo Exh.PC/5 he took into possession bicycle of injured Shams ur Rehman. Vide memo Ex.PW.9/1 the last worn blood stained garments of deceased Qayum, and vide memo Exh.PW.9/3 the bloodstained garments of injured were taken into possession.

He placed on file the medico legal reports of the injured and postmortem report of the deceased, sent the bloodstained articles to the FSL, reports whereof are Exh.PK/1 to Exh.PK/3. Appellants Fida Muhammad and Amanullah were arrested by SHO Fayyaz Khan and Ijaz Khan SI, so he obtained their physical remand from the court of learned Judicial Magistrate, interrogated them and during interrogation, accused Amanullah disclosed about crime Kalashnikov which was recovered on his pointation alongwith fix charger containing 5 live rounds of same vide memo Exh.PW.2/1. Separate FIR under the Arms Ordinance was registered against him copy of which is Exh.PW.13/7. Both the appellants pointed out the place of occurrence and on their pointation, pointation memo Exh.PW.2/2 was prepared. He took into possession registration slip regarding motorcycle produced by PW

Adnan, attested copy of which is Exh.PW.13/11. Vide application Exh.PW.13/13, he sent the crime empties alongwith the recovered Kalashnikov to the FSL, report whereof is Exh.PK/4, initiated proceedings under sections 204 and 87 Cr.P.C against absconding co-accused Said Ghalib Shah, and after completion of investigation, handed over the case file to the SHO, who submitted challan against the appellants.

6. On receipt of the challan by the learned Trial Court, appellants were summoned and formally charge sheeted, to which they pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as fourteen witnesses. After closure of the prosecution evidence, statements of the appellants were recorded under section 342 Cr.P.C, wherein they denied the prosecution allegations and professed their innocence. They, however,

neither wished to be examined on oath nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, convicted and sentenced the appellants as mentioned above, hence, this appeal.

7. Learned counsel for the appellants argued that appellants are innocent and have been implicated falsely on mere suspicions; that presence of PW Adnan is highly doubtful because of his dramatic escape, therefore, his testimony has been wrongly believed and relied upon by the learned Trial Court while injured complainant though his presence cannot be denied on the spot, has not come forward with true account of the incident as his version does not find support from the medical evidence and site plan, hence, mere stamp of injuries on his person would not be sufficient to believe him blindly; that injured Shams ur Rehman, who

was an independent witness has been abandoned by the prosecution for no good reason, therefore, adverse inference within the meaning of Article 129 (g) of the Qanun-e-Shahadat Order, 1984, would be drawn that had he been examined, he would not have supported the prosecution case; that a new motive has been introduced at belated stage by the PWs; that the testimony of complainant and PW Adnan, both father and son inter-se, are not in line with each other on material aspects of the incident, they have contradicted each other on important aspects of the incident, which create serious doubts in the prosecution case; that the prosecution has miserably failed to prove the incident in the mode and manner as alleged in the FIR; that the peculiar facts and circumstances of the case suggest that incident to have been taken place in some other mode and manner which has been concealed by the

PWs and the present appellants have been made scapegoats hence, by extending them benefit of doubt, they be acquitted from the charge.

8. Conversely, learned AAG assisted by learned counsel for the complainant contended that appellants are directly charged for the offence by injured complainant in a promptly lodged report, which has been verified by the deceased then injured Qayum and injured Sham ur Rehman; that being a daylight incident and parties co-villagers, question of mistaken identity does not arise; that presence of complainant Momeen Khan having stamp of injuries on his person cannot be denied; that PW Adnan being the son of injured, his presence with his father at the relevant time was natural as he was ill and was taken to doctor for medical checkup; that both the PWs have furnished truthful account of the incident and are consistent with each other on all material

aspects of the incident; that defence badly failed to shatter their testimony despite their taxing cross-examination; that medical evidence and site plan support the version of the prosecution; that recovery of blood from the spot, the positive Serologist reports, recovery of crime empties, Kalashnikov on the pointation of one of the appellant and positive FSL report in respect thereof, further corroborate the ocular account; that the prosecution has successfully proved the guilt of the appellants through overwhelming ocular evidence supported by circumstantial and medical evidence, therefore, the learned Trial Court was justified by recording their conviction, to which no exception can be taken. They sought dismissal of the appeal.

9. We have given our anxious consideration to the respective submissions

advanced from both the sides and perused the record carefully.

10. The ocular account of the incident has been furnished by injured Momin Khan (PW.11) and Adnan (PW.12). Former is father of the latter. In his examination-in-chief, injured Momin Khan (PW.11) reiterated the same version as advanced by him in his initial report. He, however, introduced a new motive that daughter of Aman Ullah appellant was married to one Rahat Shah, son of absconding co-accused Said Ghalib Shah, who was bad named with his son Adnan, as a result, the present incident was initiated by the accused. On one hand, this motive has not been alleged by him in his initial report, while on the other hand, if we believe the newly introduced motive to be true, then a disturbing question which prick our minds is that, if the daughter of Aman Ullah was bad named with PW Adnan, then

PW Adnan should have been the first target of the appellants keeping in view the norms of taking revenge of disgrace in the pathan society, but amazingly, PW Adnan has been let off despite that he was at the mercy of the accused and an innocent persons whom they had no motive had been targeted. At the relevant time of incident, PW Momin Khan has been shown driving the motorcycle, while PW Adnan and Qayum, sitting behind him, on the same bike. PW Adnan has been shown in between injured Momin Khan and deceased Qayum, but he did not sustain any injury neither from the firing of the accused nor from the bullets hitting injured Momin and deceased. For the sake of arguments, if we presume his escape as a miracle, at least his clothes should have been smeared with the blood of injured Momeen and Qayum, but such is not the case herein, which create serious doubts

about the presence of PW Adnan. According to version of complainant when he sustained injuries at point “A” as shown in the site plan he alongwith motorbike and PW Adnan as well as deceased Qayum fell at point “A-1”, in which circumstances, PW Adnan at least should have sustained graze wounds or scratches on his person. Momin Khan injured (PW.11) deposed that they left their house at 6.00 p.m. for Swabi Bazaar and reached there at about 6.20 or 6.15 p.m., but contrary to his version, Adnan PW.12 says that they left their house for Swabi Bazaar at about 3.00 p.m. to see doctor and reached the clinic of the doctor within half an hour and remained there for an hour or above. Contrary to PW Adnan, PW Momin Khan deposed that they had come to Jamal Medical Center and examined his son Adnan through Doctor Waheed Khan and remained there for 20/25 minutes; that they had not

purchased any house hold articles at bazaar but had only purchased medicines for his son which were available with them at the time of incident. Same is the version of PW Adnan. According to him they had only purchased medicines which were fastened with motorcycle. Neither the alleged medicines have been produced before the I.O. nor the I.O. had taken any such medicines from the spot nor shown in the site plan nor noticed at the time when the motorcycle of the complainant was being taken into possession nor has examined doctor Waheed Khan, who allegedly examined PW Adnan on the day of incident. The complainant was confronted with his initial report by the defence, wherein not a single word has been stated about any medical checkup of his son or medicines. Similarly, PW Adnan was also confronted with his statement under section 161 Cr.P.C. wherein he has not

stated about his medical examination or medicines, therefore, this aspect of the testimony of both the PWs amounts to dishonest improvements, but even then the presence of PW Adnan has not been established as neither any record of the clinic of the doctor has been produced, later on, nor he has been examined in the witness box to testify to the extent of visit of the complainant alongwith his son PW Adnan to his clinic on the day of occurrence.

11. In light of the above discussed evidence, we are firm in our view that PW Adnan was not present on the spot at the time of incident as he failed to establish his presence through some strong physical circumstances of the incident, therefore, he being a procured witness, cannot be believed and relied upon.

12. So far as PW Momin Khan is concerned, no doubt, in presence of injuries on

his presence, we cannot deny his presence on the spot, however, we cannot blindly accept his testimony, unless we find it trustworthy, confidence inspiring and supported and corroborated by other strong circumstantial evidence. In the site plan Exh.PB, the appellants have been shown on left side of the complainant party i.e. towards the West. At the relevant time of the incident complainant alongwith his companions was proceedings towards the North from the South on a motorbike, in which situation the left sides of the deceased and injured complainant were in the fire line of the appellants, but firearm entry wound on the right upper arm near shoulder joint of the deceased and the other entry wound on his right side of back chest, falsify the version of injured complainant. Not disclosing specifically about the kind of weapon used in the commission of offence by the accused on

the part of the complainant in his initial report is another circumstance which create doubts that complainant had not actually seen the assailants at the time of incident. Empties of 7.62 bore have been recovered from the spot, which means that a Kalashnikov had been used in the incident, which is a common weapon, particularly in our society, and is even recognized by kids. Had the complainant seen the assailants he would have specifically mentioned the kind of weapons in his very initial report and would not have relieved himself by just disclosing a general phrase “firearms”. We have observed in majority of cases that where the occurrence is unseen, the complainant usually uses general phrase “firearms” avoiding the name of specific weapon keeping in view the subsequent apprehension of damaging his case by the medical evidence and recoveries from the spot.

The peculiar facts and circumstances of the case suggests that the incident has not taken place in the mode and manner as alleged by the complainant rather in some other mode and he has not identified the actual assailant/assailants, therefore, his testimony cannot be believed and relied upon. It has been held by the apex court in case titled, **“Amin Ali and another Vs the State” (2011 SCMR 323)** that presence of injured witnesses cannot be doubted at place of incident but merely because they had injuries on their person do not stamp them to be truthful witnesses. Similarly, the apex court while discussing the credibility of an injured witness in case titled, **“Nazir Ahmad Vs Muhammad Iqbal and another” (2011 SCMR 527)** observed that injuries of a prosecution witness only indicate his presence at the spot, but are not affirmative proof of his credibility and truth. Guidance in this regard

can also be derived from **Said Ahmed's case (1981 SCMR 795) and Muhammad Pervez case (2007 SCMR 670), Muhammad Hayat case (1996 SCMR 1411), and case titled, State Vs Muhammad Raja (PLD 2004 Peshawar 01).**

13. As regard alleged recovery of Kalashnikov on the pointation of appellant Aman Ullah on 25.06.2011 and positive FSL report in respect thereof, suffice it to say that the empties had been recovered on the very first day of incident on 22.06.2015, but the same had not been sent to the FSL immediately, rather, these have been sent to the FSL on 12.07.2011 i.e. with a delay of 17/18 days after recovery of the Kalashnikov on 25.06.2011, for which no plausible explanation has been furnished by the prosecution as to where the Kalashnikov and the empties remained for this long period and whether these were in safe hands or not. In

absence of any such explanation, and when the direct evidence of the prosecution has already been disbelieved by us, the mere positive FSL report, would not advance the prosecution case. Similarly, autopsy report of the deceased, recovery of blood from the spot, bloodstained garments of the deceased and injured coupled with positive Serologist report, would not be sufficient to prove the guilt of the appellants in absence of substantive evidence. Such pieces of evidence are always taken into consideration alongwith the substantive evidence as confirmatory and corroborative evidence, which in isolation would not be sufficient for recording conviction in a capital charge. In this regard reference can be made to **Riaz Ahmed's case (2010 SCMR 846)**. As per the dictum of the apex Court, corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative evidence and ocular testimony are to be read together and

not in isolation. Wisdom in this regard may be derived from **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541)**. It has been held by the apex Court in case titled, **"Saifullah Vs the State" (1985 SCMR 410)**, that when there is no eyewitness to be relied upon, then there is nothing, which can be corroborated by the recovery. Similarly, in case titled, **"Riaz Masih Vs the State" 1995 SCMR 1730**, the honourable apex Court held that recovery of crime weapon by itself is not sufficient for conviction on murder charge. The same view has been expressed by the apex Court in **Saifullah's case (1985 SCMR 410)**.

14. For what has been discussed above, the learned Trial Court by not properly appreciating the evidence, reached to erroneous conclusion by holding the appellants guilty of the offence. Resultantly, we by allowing this appeal, set aside the conviction and sentences of the

appellants recorded and awarded by the learned
Trial Court vide impugned judgment
dated 17.09.2012, and hereby acquit the
appellants of the charges leveled against them.
They be set at liberty forthwith, if not required
in any other case.

These are reasons of our short order of even
date.

Announced
25.06.2015.

J U D G E

J U D G E

