

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr. A No. 28-B of 2014 withCr. JA No. 26-B of 2014Aqal ZameerVsMohi-ud-Din and the State.JUDGMENTDate of hearing 27.01.2016Appellant-Petitioner by Mr. Amirul HafeezMr. Aqal ZameerRespondent by Mr. Amirul HafeezState - by Mr. Amirul HafeezMUHAMAMD YOUNIS THAHHEEM, J:- The appellant,

Aqal Zameer, through the instant appeal has challenged his conviction and sentence recorded by the learned Additional Sessions Judge, Karak vide judgment dated 27.02.2014, whereby he has been convicted under Section 302 (b) PPC and sentenced to death with fine Rs.200000/- (two lacs). The amount of fine realized, shall be paid to the legal heirs of the deceased as compensation under section 544-A Cr.PC. In case

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of default of payment of fine, the convict shall undergo simple imprisonment for a term of six months. He was further convicted under section 324 PPC and sentenced to imprisonment for ten (10) years and also fined to the tune of Rs.50,000/- (Fifty thousand). In case of default of payment of fine, the convict shall undergo simple imprisonment for two (02) years. He was further convicted under section 337-A (i) PPC and sentenced to imprisonment for two (02) years with daman Rs.40,000/- (Forty thousand) to injured-complainant Mohi-ud-Din. Benefit of section 382-B Cr.PC also extended to the convict. The amount of fine recoverable as arrears of land revenue from the person and estate of the convict. All the sentences shall run concurrently.

2. Alongwith instant criminal appeal, the convict also filed criminal jail appeal No.26-B of 2014 against the same judgment of conviction and sentence. As the above mentioned appeal has been filed through counsel is argued before us, the Criminal Jail Appeal No.26-B of 2014, has become in fructus, hence, disposed of as such.

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3. Murder reference has also been put up before us for confirmation.

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4. The story of prosecution as disclosed in the F.I.R Ex:PA may briefly be narrated as follows:

5. On 14.01.2013 at 12.40 hours, the complainant Mohi-ud-din alongwith Bakhtawar Jan in injured condition and incorrect senses reported the matter to the incharge local police at Emergency Room of District Headquarter Hospital, KDA Karak, to the effect that at 11.45 hours, they on their motorbike were going towards for condolence of Molvi Muhammad Shafi Ahmad Khel when reached near Mosque, village Kotay Kala Algadi, accused Aqal Zameer alias Sarkay armed with Double Barrel shotgun was present who on seeing, started firing at them with the intention to kill us, as a result of which they both injured, while the accused decamped from the spot. The occurrence was witnessed by him and injured Bakhtawar Jan. No motive has been alleged by the complainant in their report.

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6. After writing report of the complainant, in shape of *Murasila* Ex: PW 7/1 it was read over and explained to him, who after admitting it to be correct signed the same as a token of its correctness. The *Murasila* was sent to the Police Station, which culminated into registration of FIR Ex:PA. The report receiving officer, Namatullah Khan SI, (PW-12) prepared injury sheet of both the injured (Ex:PW 12/1 & Ex: PW12/2) and sent for medical examination under the escort of Noor Aslam No.374 (PW-5). Both the injured were medically examined vide medical reports Ex:PW 1/3 and PW 1/1, while the condition of injured Bakhtawar Jan was found serious, therefore, he was referred to CMH Kohat, where he succumbed to the injuries on 18.01.2013 at 1410 hours, therefore, section of law was altered from 324 PPC to 302 PPC. Death certificate of deceased Bakhtawar Jan is Ex:PW11/9. Raufullah S.I (PW-11) during investigation prepared the site plan (Ex:PB), took into possession one Motorcycle No.LB-199 Yamaha, red colour, blood stained white cap and blood stained chaddar,

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belonging to injured- complainant, blood stained small pebbles from the place of injured vide recovery Memo Ex:PW 9/1. Two empties shells of 12 bore vide recovery memo Ex. PW 9/2. The IO also took into possession the blood stained garments of injured/ complainant vide recovery memo Ex:PC and blood stained garments of deceased including phial containing pellet recovered from the body of deceased Ex:PW 10/1. The IO conducted raid at the house of accused, who was not found, however, from the residential room of accused/ convict a Double barrel shotgun alongwith a bandolier containing 20 live rounds was recovered, for which a separate case under section 13 AO was registered. Recovered blood stained garments as well as articles were sent to FSL and report of FSL Ex:PW 11/5 and Ex: PW 11/6 were placed on file by the IO. The IO recorded statements of PWs under section 161 Cr.PC and after completion of investigation submitted complete challan for trial.

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7. For the commencement of trial, the learned trial court complied with the provision of 265-C Cr.PC and thereafter framed the charge against the appellant, to which he pleaded not guilty and claimed trial. The prosecution in order to prove guilt of appellant produced and examined as many as twelve (12) PWs. On close of prosecution evidence, statement of accused/appellant was recorded under section 342 Cr.PC, wherein he professed his innocence, however, he did not opt to be examined on oath. The learned trial Court after hearing arguments of learned counsel for the parties while holding guilty the appellant convicted and sentence him vide impugned judgment as referred above.

8. We have heard arguments of learned counsel for the parties and gone through the record of the case.

9. It appears from the F.I.R (Ex: PA) that in this case the occurrence took place on 14.01.2013 at 11.45 hours, whereas the report has been lodged on the same date

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at 12.40 hours. As per record, distance between the place of occurrence and DHQ hospital, KDA, Karak where the report has been lodged is about 15 K.M, hence, in view of the facts and circumstances of the case, the report has been lodged within reasonable time of one hour of the occurrence.

10. The place of occurrence, as alleged by the complainant, is established by the recoveries of two 12 bore, empties from the places of the appellant-convict, recovery of blood stained Chader, a cape, blood stained pebbles, and a motorcycle No.199/LM, Yamaha, red colour, vide recovery Memo Ex: PW 9/1, during spot inspection by the I.O. While the defence has neither challenged the venue of occurrence during the trial nor any argument has been advanced on this aspect of the case. Besides that, the FSL report is also in line in this regard that these were fired from 12 bore DBBL Shotgun No. B 2640, recovered from the house of appellant/ convict. So by this recovery, it

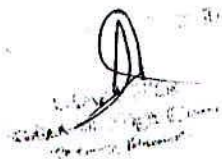
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established that the assailant was the convict/ appellant, present at the spot.

11. Now the question is left that whether the complainant was present with the deceased at the time of occurrence or not? According to the complainant's version, he was proceeding for offering Fatiha in company of deceased on motorcycle on the demise of Molvi Muhammad Shafi Ahmed Khel, when they reached at the place of occurrence, the appellant/ convict fired at them, as a result of which both were hit and sustained injuries, while Bakhtawar Jan lateron succumbed. FSL report regarding blood stained pebbles from the place of occurrence, as well as blood stained garments of the injured/ complainant and deceased, established that the complainant as well as deceased were present at the spot. Learned counsel for appellant could no bring on record or even rebut the stance that they were not present at the spot, so there is no reason to disbelieve this version of the complainant unless there are

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some compelling or reasonable circumstances to disbelieve their presence.

12. Besides, it is undisputed that wives of both the complainant and deceased Bakhtawar Jan were sisters inter se and the deceased having blood feud with the appellant, while complainant having neither any motive, nor any blood feud with the appellant. Thus there is no reason to falsely implicate the appellant. It is also unbelievable that the complainant would substitute the appellant with the real culprit by charging him falsely. Even otherwise, substitution for the real culprits is a rare phenomenon, because nobody would spare the actual culprits for such a heinous crime and would falsely implicate an innocent person and that too, when there is no previous enmity.

13. The complainant Mohi-ud-Din injured as per FIR, is the star eye-witness of the occurrence, who during the occurrence also received injuries and his presence at the spot

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has also been proved as discussed above. He narrated the same facts, as mentioned in the FIR. § 2

14. Learned counsel for appellant was of the view that the complainant in his statement made improvements, as that *"when he saw the accused aiming with his double barrel shot gun at them, he turned back the motorcycle"* and secondly *"PW Mst. Khalida Nasreen was not mentioned as witness in the FIR and her statement u/s 161 Cr.PC was recorded by I.O afterward who also witnessed the occurrence are improvements."*

15. No doubt, this part of the statement has not been mentioned in the FIR, but this fact does not shatter the entire prosecution case, as the fact alleged in his statement corroborate the medical and circumstantial evidence, if at least, its benefit extended to the appellant, it may be considered a mitigating circumstance in his favour.

16. So far as witnessing of the occurrence, by Mst. Khalida Nasreen, wife of deceased is concerned. Statedly she was standing near the door of her house, from where she saw

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the occurrence which took place near Hujra adjacent to their house and the complainant and deceased, then injured, were taken to the hospital from the place of occurrence, there is strong presumption that he (complainant) might have not seen Mst. Khalida Nasreen that he was witnessing the occurrence behind them, hence his name is omitted in the FIR. Hence, such omission is also not fatal to the case of prosecution. Statements of both the eye-witnesses are in line with the prosecution story, corroborating each other on other facts and circumstances of the case and both were subjected to lengthy and searching cross-examination. If statement of one witness Mst. Khalida Nasreen is discarded, then too case against the appellant is proved by cogent, reliable, trustworthy and natural evidence of complainant, the eye-witness. In case titled, "Khurshid Vs The State" P L D 1996 S C, 305, in Paragraph

No.11, the Hon'ble Supreme Court observed as follows:-

"The Court's approach, while appraising the evidence, should be dynamic and not static. It should keep in

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view all the facts and circumstances of the case and if it is satisfied that factually the person charged with the offence has committed the same, it should record the conviction though there might have been some technical lapses on the part of the investigating agency/prosecution, provided the same have not prejudiced the accused in the fair trial. The people are losing faith in the criminal judicial system for the reason that in most of the criminal cases the criminals get away without being punished on technicalities".

17. We are of the view that guilt of the appellant has been proved from the confidence inspiring testimony of the eye-witnesses, which lends support from the site plan, recovery memos, particularly, recovery of crime weapon from the residential house of the appellant and report of experts. It is a case of single accused and in the circumstances, it is highly improbable to say that the appellant has been substituted with the real culprit and thus we have no doubt in our mind that the charge against the


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appellant has been proved beyond any shadow of doubt and that he has rightly been convicted.

18. Now the question for determination of this court is as to what was the quantum of sentence and whether penalty of death would meet the ends of justice?

19. According to the F.I.R, appellant Aqal Zameer, made firing at the complainant and as well as on Bakhtawar Jan, as a result of which both sustained injuries, while later on Bakhtawar Jan succumbed to his injuries. Medical report of both the injured as well as deceased are placed on file, while after death of Bakhtawar Jan, his death certificate has been brought on record, while his post mortem report is not available as he died in Combined Military Hospital Kohat and only non-availability of Post Mortem report does not entitle accused/appellant for his acquittal particularly in view of the medical reports as well as ocular account. Keeping it as a mitigating circumstance into consideration, we are not inclined to maintain the sentence of death of the appellant but

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are of the view that sentence of life shall be sufficient to meet the ends of justice.

20. We thus as discussed above, while maintaining the conviction of appellant under section 302 (b) P.P.C. commute the sentence of death to imprisonment for life. The other sentences shall remain intact. Benefit of section 382-B Cr.P.C. shall also be extended to the appellant.

18. With above modification, we dismiss the appeal of the appellant-convict and the Murder Reference is answered in negative as death sentence is not confirmed.

Announced.

27.01.2016

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Peshawar Bench
Authorised Under Article 87 of
The Qanun-e-Shahadat Order 1984

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