

**Judgment Sheet**  
**IN THE PESHAWAR HIGH COURT**  
**BANNU BENCH**  
(Judicial Department)

**Cr.A No.31-B of 2020 with**  
**MR No.03-B of 2020**

Ali Nawaz  
Vs  
The State etc.

Date of hearing: **09.6.2021**  
For Appellant: **Mr. Ahmad Farooq Khattak,**  
**Advocate**  
For State: **Mr. Saif-ur-Rahman Khattak,**  
**AAG**  
For respondents: **Mr. Salah-ud-Din Khan Marwat,**  
**Advocate**

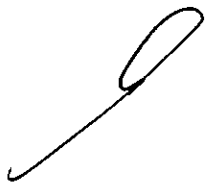
**JUDGMENT**

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**SAHIBZADA ASADULLAH, J.-** Through the instant criminal appeal, the appellant (Ali Nawaz) has called into question the judgment dated 20.02.2020, rendered by learned Additional Sessions Judge-III/MCTC, Lakki Marwat, in case FIR No.266 dated 28.5.2017, under sections 302/34 PPC, Police Station Ghazni Khel (District Lakki Marwat), whereby the appellant has been convicted under Section 302(b) PPC and awarded death sentence for committing *Qatl-i-Amd* of deceased Farmanullah, burdened with payment of Rs. 10,00,000/-(rupees ten lac) as compensation under Section 544-A Cr.P.C to the legal heirs of deceased, recoverable as

arrears of land revenue or owing to want of property or in default thereof, to undergo six months simple imprisonment.

The appellant was directed to be hanged by the neck till confirmation of his death by the Medical Officer in presence of Judicial Magistrate on duty in Jail, however, subject to confirmation by this Court.



2. The prosecution story, as disclosed in the first information report (F.I.R), in brief, is that on 28.5.2017 at 12:00 hours, complainant Qismatullah (PW-6) brought the dead body of his brother Farmanullah, in a private Datsun to the Police Station Ghazni Khel where he reported the matter to the effect that on the same day, he and his brother Farmanullah were sitting under the "*keekar*"/acacia tree outside their house, meanwhile, Ali Nawaz and Haq Nawaz sons of Muhammad Nawaz, came there on a motorbike driven by accused Haq Nawaz, whereas accused Ali Nawaz was sitting behind him, duly armed with repeater .12 bore shotgun; both the accused came down from the motorcycle and accused Ali Nawaz aimed his repeater upon him (complainant) and forcibly took his brother Farmanullah and fled away on said motorcycle; that he alongwith his another brother namely Irfanullah also went behind them on a motorcycle and when both the accused reached in the vacant field near their house,

they deboarded Farmanullah from their motorcycle and at about 11:15 am, accused Ali Nawaz made firing upon Farmanullah with his repeater, resultantly, his brother Farmanullah got hit and fell down to the ground. It is further in the report that complainant party could do nothing being empty handed and accused decamped from the spot after commission of the occurrence. When they attended their brother, he had succumbed to his injuries. Motive for the offence was stated to be exchange of hot words in football game few days before the occurrence, hence, the instant FIR.

Nizam Khan ASI (PW-4) registered the case vide FIR Ex.PA. PW-4 also prepared injury sheet and inquest report of the deceased and sent the dead body to the doctor for postmortem examination under the escort of constable Waheed Khan No.62 (PW-1).

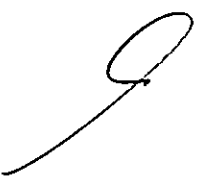
3. After completion of investigation, prosecution submitted complete challan under Section 512 Cr.P.C against both the accused, however, later on accused Ali Nawaz was arrested and his supplementary challan was submitted, while the other co-accused remained fugitive from law. Accused Ali Nawaz being in custody was produced before the Court from Jail; and after complying with the provision of section 265-C Cr.P.C, he was charge sheeted on 12.12.2017, to which he

pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as nine (9) witnesses, whereafter, the accused was examined under Section 342-Cr.P.C, wherein he professed innocence and false implication, however, he did not wish to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce evidence in his defence. After hearing the arguments from both the sides, the learned trial Court vide impugned judgment dated 20.02.2020, convicted the accused under Section 302(b) PPC and sentenced him, as mentioned above, hence, this appeal.

4. The learned counsel for the parties alongwith Additional Advocate-General representing the State were heard at length and with their valuable assistance, the record was gone through.

5. The unfortunate incident claimed the life of deceased Farmanullah and the matter was reported by the complainant at Police Station Ghazni Khel, bringing a charge against the appellant and another. The motive was stated to be an early altercation between the parties in football ground.

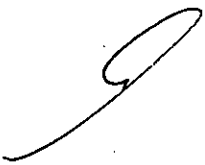
6. The appellant after his arrest faced trial and it was on conclusion of the trial that, he was awarded death sentence. No doubt, the trial Court took pains to appreciate



the evidence on file, but keeping in view the gravity of the awarded sentence, we deem it appropriate to re-appraise the collected evidence on file. Though the learned trial Court went in detailed discussion of the evidence collected, the recoveries effected from the spot, the manner in which the incident occurred and the seat of injuries on the body of the deceased, yet this Court being the Court of appeal is under heavy obligation to apply its judicial mind to the collected evidence so to avoid miscarriage of justice. This Court is to see as to whether the incident occurred in the mode, manner and at the stated time. We are to assess the presence of the witnesses on the spot, their reaction to the events and their subsequent conduct. There is no denial to the fact that in criminal cases, behaviour and conduct of the witnesses and that of the accused play a vital role, which cannot be lightly ignored.

7. The incident occurred in front of the house of the deceased and complainant, when they were sitting under the shade of acacia tree. It is alleged that the appellant and absconding co-accused arrived while riding their motorcycle, the appellant was armed with a repeater 12-bore occupying the pillion, whereas the absconding co-accused was driving. The report contains that the complainant was stopped to move

as the gun was aimed at him, the deceased was made to sit on motorcycle and they drove away. It was allegedly on arrival of eyewitness Irfan with his motorcycle from the house that they chased the accused. The report further tells that when they reached to the football ground, situated in front of the house of the accused, the deceased was deboarded and fired at.



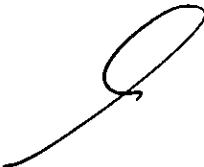
We cannot ignore the *inter se* relation of the complainant, the deceased and the emotional attachment of an elder brother with the youngest, who is hardly fifteen. The complainant is to tell that why he did not resist the use of force by the appellant to take the deceased, that too, on a motorcycle and that, despite ample opportunities, no efforts were made to overpower the appellant, especially, when the appellant was holding the deceased, while riding the motorcycle. The complainant appeared before the trial Court and was examined as PW-6, who stated that soon after the deceased was taken on motorcycle, PW Irfan brought out his motorcycle from the house, he narrated the story to him and they started to chase. The conduct of the complainant is unnatural, had he been present, instead of narrating the story to his brother, he would follow in haste to rescue his brother. The complainant stated that it was few days earlier that an altercation took place between them, this portion of his

statement puts us on guard that, why the youngest was selected and that why, being the eldest, he was afforded an opportunity to live.

8. If we admit what the complainant stated to be correct, then what prompted the appellant to fire at the deceased and not the complainant, while fully armed and that why the appellant ran the risk to transport the accused to the place situated in front of his house. What a coincidence this was that the deceased was fired at, when the complainant and eyewitness reached to the spot.

9. This is surprising that the *inter se* distance between the assailants and the complainant party has been shown as less than seven (7) feet, but neither the complainant nor the eyewitness made any efforts to rescue their brother from the firing made by the appellant. We are yet to know that why the appellant did not kill the complainant and the eyewitness, as it was in the statement of the complainant that a few days back an altercation took place between them and the accused. The conduct displayed by the complainant is unnatural on one hand, whereas on the other, he is struggling hard to establish his presence on the spot. We are eager to know that what the appellant wanted to achieve by bringing the deceased just in front of their house and to kill him. Had

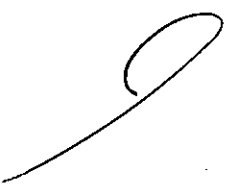

this been the motive, the accused would have easily achieved their target in front of the house of the complainant instead of shifting the deceased to the spot.



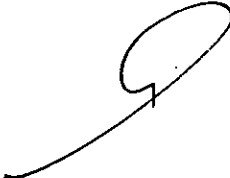
10. There is no denial to the fact that both, the complainant and the eyewitness were laborers and working in the brick kiln of one Karim Khan and this is on record that the distance between the place of occurrence and place of their business is not more than two (2) kilometers. The complainant, who was examined as PW-6, stated that after receiving firearm injuries, the deceased fell to the ground and survived for five minutes; and the accused decamped from the spot. Though it has been stated that the cot was arranged from the nearby house but the complainant categorically stated that neither he nor the eyewitness helped in shifting the dead body of the deceased from the ground to the cot, which conduct does not appeal to a prudent mind, as in that eventuality the real brothers would have attracted to the dead body soon after the incident and thereafter. This part of the statement of the complainant gives inference that he was not present on the spot at the time of incident and soon thereafter.

11. The dead body was shifted to the local police station where the matter was reported by the complainant and verified by the eyewitness. The injury sheet and the inquest






report were prepared after registration of the case, but surprisingly, the inquest report does not bear the FIR number and the sections of law. It invites our attention that when the report was made at the police station in the shape of first information report, then why the inquest report is lacking the FIR number and the relevant sections of law, it cannot be interpreted in any other way, but that the matter was not reported in the mode and manner. Another important aspect of the case, which puts this Court on guard, is the manner in which the dead body of the deceased after making the report was shifted to the hospital for postmortem examination. There is no denial to the fact that both, the complainant and eyewitness are real brothers of the deceased but for no valid reasons they did not accompany the dead body of the deceased to the hospital. The witnesses were examined on this particular aspect of the case, where they explained that soon after making the report they left the police station for their house with the only purpose to associate the Investigating Officer during spot proceedings. The Investigating Officer was examined as PW-8, who stated that after registration of the case, copy of the FIR was handed over to him for the purpose of investigation, and while leaving the police station, he did not notice the complainant and eyewitness with the



dead body. This portion of the statement of the Investigating Officer indicates that by the time he was leaving the police station, the dead body was lying there and if we take what the Investigating Officer stated to be correct, then in that eventuality, the complainant and the eyewitness must have been present with the dead body. This explanation by the Investigating Officer further overshadows the presence of the witnesses at the time the dead body was brought to the police station.

12. The witnesses are yet to explain that who, out of the two i.e. complainant and eyewitness accompanied the dead body from the police station to the hospital and, as to who identified the dead body before scribe at the time the report was made and before the doctor at the time of postmortem examination. The complainant when appeared before the trial Court stated that he in the company of his brother i.e. PW Irfan after making the report came to their house and from their house they went to the spot for spot pointation on arrival of the Investigating Officer. He further stated that initially the eyewitness was present at the time of spot pointation, and thereafter he went to the hospital after the dead body. This portion of the statement is hard to be believed, as once the witnesses did not opt to accompany the



dead body from the police station to the hospital then what urgency was there for the eyewitness to go to the hospital, that too, at a belated stage. Another intriguing aspect of the case is that if the statement of complainant is taken to be correct regarding the presence of the eyewitness at the time of spot pointation, then how his name finds mention in the column of identification at the time of postmortem examination. When the statement of both the witnesses are read in juxtaposition, the two contradicted each other to a greater extent, as the complainant stated that they both pointed out the spot to the Investigating Officer and that the recoveries were effected from the spot in their presence, but the eyewitness when appeared before the trial Court, he categorically stated that he was not present with the Investigating Officer and the complainant at the time of spot pointation. He admits his subsequent arrival to the spot. The overall impact of the statements of the witnesses gives an impression, that the witnesses, more particularly, the eyewitness Irfan was not present on the spot. The presence of the witnesses is further doubted from the fact that instead of absence at the time of postmortem examination, the doctor mentioned his name in the column of identification, this aspect of the case leads this Court nowhere but that the

postmortem examination was conducted earlier to the report made; and so the inquest report was prepared and, we cannot refrain ourselves from holding that preliminary investigation was made in the case.

In case titled "Javaid Akbar Vs. Muhammad

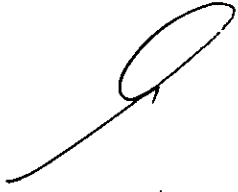
Amjad and Jameel @ Jeela and another" (2016 SCMR

1241), it was held that:-

*Both these eye-witnesses were closely related to the complainant party and have given reasons of their presence of having visited the father who was admitted in Civil Hospital, Okara, but no documentary proof of admission of father and discharge from the Hospital was produced. The appellate Court also seriously doubted the presence of eye-witnesses at the spot for the reason that while Shakir Akbar was dead and Naveed Akhtar was in injured condition, none of the PWs had cared to carry Naveed Akhtar, injured, to the Hospital rather the complainant/PW-8 proceeded to Police Station for registration of FIR. Even the Driver of private car, who was a witness, was not produced either during investigation or trial to support the prosecution version so much so that his name was also not disclosed.*

13. The prevailing circumstances put this Court on guard regarding presence of the witnesses on the spot at the time of report and even the atmosphere created compels us to assess the manner in which the report was made.

14. The Investigating Officer was examined as PW-8, who stated that while leaving the police station for the spot, he did not see the complainant and eyewitness present in the

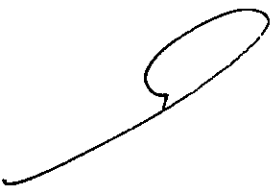


police station alongwith the dead body. When the Investigating Officer could not observe the presence of the witnesses in the concerned police station when the dead body by then was present, then no other inference can be drawn but that the complainant and the eyewitness did not accompany the dead body from the spot to the police station. While reading the cross examination of the complainant we got surprised when he replied to a question, that the Datsun Pickup was arranged by his maternal uncle, but in the same breath he stated that he did not know his exact name, however, the people used to call him "تصوفى ماما". This is surprising that on one hand the complainant admitted the person who arranged the Datsun Pickup to be his maternal uncle whereas, on the other, he did not know his exact name. This tells that even the complainant did not witness that who brought the Datsun Pickup, to shift the dead body to the police station.

15. It finds mention in the record that the complainant and eyewitness went to the police station on the motorcycle, which they were in possession at the time of incident, and they came back to their house using the same, but astonishingly the same was not produced before the Investigating Officer either in the police station or on the spot

during the spot pointation. Its belated production leads to an inference that it was nothing but an attempt to heal the defects.

16. The Investigating Officer visited the spot and during spot pointation collected blood stained earth from the place of the deceased alongwith an empty of .12 bore and its remainings but, the Investigating Officer did not associate any independent witness while effecting the recoveries from the spot. Even the Investigating Officer did not record the statement of the inmates of the surrounding houses to confirm the occurrence at the stated time and at the stated place. The presence of complainant and the eyewitness with the Investigating Officer on the spot during spot pointation is not established from record, as regarding the presence of the eyewitness i.e. Irfan, the complainant put forward different explanation during his cross-examination he stated that when the Investigating Officer approached to the spot for investigation, he alongwith the eyewitness reached to the spot and on their pointation the recoveries were effected and the site plan was prepared, he further explained that lateron the eyewitness left the spot for the hospital. Contrarily, the eyewitness who was examined as PW-7 stated that he was not present at the time of spot pointation and that he attracted lateron to the spot, when these statements are read together,



we can gather an impression that there was a conscious attempt on part of the complainant to make us believe that both of them were present at the time of incident, at the time of report and at the time of spot pointation. We cannot ignore the statement of PW Irfan who himself negated his presence at the time of spot pointation. The cumulative effect of what has been stated above takes us nowhere, but to hold that the witnesses were not present at the time of incident and that the report was not made in the manner, rather the dead body was shifted from the spot by the co-villagers to the police station and on arrival of the complainant, the matter was reported. One of the witness categorically stated that the distance between police station and hospital is about 10/11 kilometers, if so, then it is for the prosecution to explain that when the matter was already reported at 12:30 pm, then why the dead body was produced to the doctor at 2:37 pm, after a considerable delay of two (2) hours, but the prosecution could not explain the same. The belated examination of the dead body strengthens our belief regarding the absence of witnesses, and their conduct. It spells out from record that both i.e. the complainant and the eyewitness were working in the brick kiln of one Karim Khan and a particular question was asked in this respect, to which the witnesses confirmed.

The record is silent and even the statements of the witnesses to give an otherwise explanation regarding their presence at home on the day and at the time of incident, in such eventuality, we lurk no doubt in mind that the witnesses were present in the brick kiln in connection of their routine work. The prosecution story receives another blow when the complainant stated that he did not identify the dead body of the deceased before the scribe.

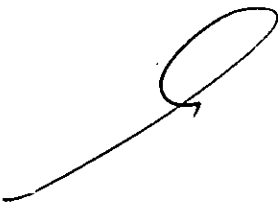
In case titled "Basharat Ali Vs. Muhammad

Safdar and another" (2017 SCMR 1601), it was held that:-

*"Keeping in view the above bulk of contradictions in the statements of the PWs., the prosecution's story cannot be believed and that too when the same has been disbelieved to the extent of all the acquitted co-accused as such Respondent No.1 has rightly been acquitted by the High Court through the impugned judgment. In criminal cases if material contradictions are found in the statements of the witnesses the benefit thereof would go to the accused party."*

17. The Investigating Officer though investigated the matter from different angles, but he did not take pains to collect any evidence in respect of the alleged motive. Though he visited the spot but he did not record the statements of any independent witness regarding the altercation between the parties, few days earlier to the incident. The complainant while reporting the matter stated that the altercation took





place in the football ground, but he himself could not produce any witness who was present at the time of altercation in the ground. What we can gather is that, the motive is afterthought, with an attempt to connect the appellant with the commission of the offence. True that absence or weakness of motive cannot be taken into consideration as a sole factor to discredit the prosecution and to disbelieve the charge, but equally true that once a motive is alleged then the prosecution is duty bound to establish the same, failing which no one else but the prosecution will suffer. Yes, every criminal case has its own peculiar circumstances; and these are the facts of every criminal case which need an independent application of mind; and that the common approach and single yardstick for all criminal cases, to be treated in the same fashion, will give birth to drastic results. In every criminal case, the set of circumstances are altogether different and such is the behaviour of the people involved. In the peculiar circumstances of the present case, as the motive was the sole urging factor so, in case of presence of the complainant and his brother PW-Irfan, the youngest brother i.e. the deceased, would not have been alone, the target. After scanning the record we could not come across any substantial evidence on the file, which could convince us regarding the motive and its

aftermath. We are not hesitant to hold that the prosecution could not establish the motive on record and in such eventuality, it is the prosecution to reap the harvest.

In case titled "Hakim Ali Vs. The State" (1971 SCMR-432), it was held that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of "Amin Ullah Vs. The State" (PLD 1976 SC 629), wherein, it was observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story.

18. After thoroughly evaluating the evidence available on file, we feel no hesitation in concluding that the prosecution has miserably failed to prove its case against accused/appellant beyond any reasonable doubt and the learned trial Court has not appreciated the evidence in its true perspective and fell into error by convicting the accused. Resultantly, this appeal is allowed, the conviction and sentence of the appellant recorded by learned trial Court is set-aside and he is acquitted of the charge by extending him

the benefit of doubt, he shall be released forthwith from jail, if not required to be detained in connection with any other case.

19. As we have acquitted the appellant from the charge, therefore, the Murder Reference No.03-B of 2020, sent by learned Trial Court, is answered in the negative.

20. Above are the detailed reasons of short order of even date.

Announced:  
09.6.2021

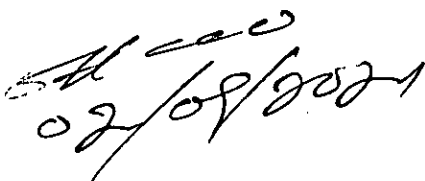


JUDGE




JUDGE

(D.B)  
Mr. Justice Sahibzada Asadullah  
Mr. Justice Muhammad Naeem Anwar



SCANNED

03 SEP 2021  
  
Khair Khan