

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 766-P of 2016.

With

Murder Reference No.19-P/2016

JUDGMENT

Date of hearing.....05.09.2017.....

Appellant(s)...(Basit) by Mr. Jalal-ud-Din Akbar Azam Gara,
Advocate.....

Respondent(s)...(The State etc) by Mr. Moeen-ud-Din Hamayun,
AAG, assisted by Mian Sher Akbar, Advocate, for
the complainant.



QALANDAR ALI KHAN, J:- This Criminal
Appeal by convict-appellant, Basit son of Mir
Aftab, resident of Sheikh Jana, Tehsil and
District Swabi, is directed against the judgment
and order dated 02.12.2016 of learned

Additional Sessions Judge-I, Swabi, whereby, the appellant was awarded the penalty of death as *Tazir* and also to pay Rs.2000000/- to the legal heirs of deceased, Zard Ali, under Section 302 (b) PPC; and also against conviction of the appellant under Section 324 PPC and penalty of seven years R.I with fine of Rs.50,000/- or in default to six months S.I, while extending benefit of Section 382-B Cr.PC to the convict-appellant.

2. The aforementioned convictions and sentences were awarded to the convict-appellant in case vide FIR No.169 dated 04.07.2014 under Sections 302/324/34 PPC registered in Police Station Purmoli, Swabi, on the report of complainant, Asghar Jan, (incorrectly recorded as Asghar Jang in the FIR) son of Mumtaz Bacha, resident of Sheikh Jana, District Swabi, who reported to the police in injured condition in Civil Hospital Kalo Khan about the *qatl-i-amd* of Zard Ali and firearm injuries to him by the convict-appellant, Basit,

and absconding co-accused and his brother Ajmal, his father Mir Aftab and Jamal Sher son of Bahadar when they, allegedly, suddenly emerged at the scene of occurrence situated in the limits of village Shewa duly armed with deadly weapons, and opened firing at him, deceased Zard Ali and their companion and brother of deceased namely Liaqat Ali son of Haider Khan, while they were on their way back from village Shewa. The motive for the occurrence was cited as dispute over women folk. The FIR was registered on the basis of murasila, which was drafted by Javed Iqbal ASI, who also prepared inquest report of deceased Zard Ali, injury sheet of the injured complainant, and referred both the deceased and the injured-complainant for Postmortem examination and medical examination, respectively.

3. The injury sheet of the injured-complainant showed one firearm entry wound about $\frac{1}{4} \times \frac{1}{4}$ inch in size on the right shoulder

with corresponding exit wound about 01 x 01 inch in size on posterior-lateral aspect of right side (Posterior auxiliary line). The Medical Officer, examining the injured complainant, also found another firearm entry wound about $\frac{1}{4}$ x $\frac{1}{4}$ inch in size on the lateral aspect of right thigh, with no corresponding wound. Likewise, the postmortem examination of deceased Zard Ali revealed a fire arm entry wound about $\frac{1}{4}$ x $\frac{1}{4}$ inch in size on the right side frontal bone, with corresponding exit wound about 03 x 03 inch in size on the right side skull, fracturing temporal bone, and brain matter lying outside. Another firearm entry wound about $\frac{1}{4}$ x $\frac{1}{4}$ inch in size lateral aspect of (Lt) thigh, with corresponding exit wound about 01 X 01 inch in size on the medial aspect of (Lt) thigh, fracturing (Lt) thigh.

4. The I.O, Shams Zaman (PW10), then, proceeded to the spot, conducted spot inspection, during which, he secured blood stained earth from the place assigned to

deceased Zard Ali in the site plan, and also recovered 15 empty shells of 7.62 bore, giving smell of fresh discharge lying in scattered condition, on the spot, besides a cell phone (Nokia) from the place assigned in the site plan to absconding accused Ajmal, and a charger of Kalashnikov 7.62 bore containing 4 rounds of 7.62 bore from the same place of absconding accused Ajmal; and also prepared the site plan. The blood stained garments of the deceased as well as injured complainant were also received by the I.O from the Medical Officer; and the I.O dispatched the blood stained earth along with blood stained garments of the deceased as well as the injured complainant to the FSL, Peshawar, and received report there-from in the affirmative. During investigation, the I.O also recorded statements of the PWs, and submitted challan under section 512 Cr.PC against the accused after fulfilling the requirements of warrants under Section 204 Cr.P.C and proclamation under Section 87

Cr.P.C. After arrest of the convict-appellant, by the local police of P.S Kalu Khan in case vide FIRs No. 731 and 724, he was formally arrested by the I.O and supplementary challan was, then, submitted against him.

5. After compliance with provision of Section 265-C Cr.P.C, formal charge was framed against the appellant under Sections 302, 324, 337-F (III) PPC read with Section 34 PPC, to which he pleaded not guilty and claimed trial.

6. After examination of Ali Gohar DFC (SW.1) with regard to absconsion of co-accused Ajmal, Mir Aftab and Jamal Sher, and proceeding to record evidence in their absence within the meaning of Section 512 Cr.P.C, the learned trial Court examined prosecution witnesses comprising as many as ten PWs, as under:-

- i. Ali Gohar, DFC (PW1) deposed about abscondence of accused facing trial.
- ii. Fawad Ali, ASI (PW2) was recorder of FIR (EXPA) on the strength of murasila.
- iii. Jawad Iqbal, ASI (PW3) deposed to have scribed murasila EX.PA/1 incorporating

therein whatever was stated by complainant. He also prepared injury sheet and inquest report EXPW3/1, EXPW3/2 and EXPW3/3.

- iv. Dr. Fazal Hadi, M.O (PW4) deposed that he had conducted autopsy on dead body of Zard Ali on 04.07.2016 and recorded Postmortem report EXPM. On the same date, he stated to have also examined the injured Asghar Jan and recorded MLR EXPW4/1.
- v. Iftikhar Ali (PW5) was identifier of dead body of deceased before Police as well as Doctor.
- vi. Sultan Mehmood Inspector/SHO (PW6) deposed that he had filed report under section 512 Cr.P.C against the accused. He further stated to have, after arrest of present accused, submitted supplementary report against him.
- vii. Syed Behramand (PW7) was witness of recovery memos EXPC, EXPC/1, EXPC/2, EXPC/3 and EXPC/4 vide which the I.O in his presence taken into possession blood stained earth from the place of occurrence, 15 empties of 7.62 bore, one set of cell phone (Nokia) of the accused Ajmal, Kalashnikov with 4 live rounds and blood stained clothes of the deceased.

- viii. Asghar Jan/complainant, while appearing as PW.8 narrated the entire eye account of the episode as reflected in murasila EXPA/1.
- ix. Liaqat Ali (PW9) was another eye witness of the occurrence who also narrated the same story as mentioned in the FIR.
- x. Shams Zaman SI, examined as PW10, gave a account of complete investigation conducted in the case by him.

7. After prosecution closed its evidence, statement of the convict-appellant was recorded under Section 342 Cr.PC, wherein, he not only refuted allegations of the prosecution against him, but also expressed his desire to produce defence and to appear as his own witness on oath in rebuttal of charges of prosecution. The two defence witnesses i.e. Hidayatullah (DW.1) and Rizwanullah (DW.2) supported plea of *alibi* raised by the convict-appellant in his statement under Section 340 (2) Cr.PC.

8. Thereafter, the learned trial Court heard arguments of learned defence counsel, learned

SPP for State assisted by learned counsel for complainant and rendered the impugned judgment dated 02.12.2016, whereby, while convicting the appellant, the learned Court awarded him the punishment of seven years R.I and fine of Rs.50,000/- and in default of payment of fine S.I for six months for his attempting at the life of Asghar Jan/complainant under Section 324 PPC. The appellant was also convicted under Section 302 (b) PPC and sentenced to the penalty of death as *Tazir* for causing the death of Zard Ali. The appellant was ordered to be hanged by the neck till he was dead i.e. till MO in presence of Judicial Magistrate on duty in Jail confirms the convict dead. The learned Court held the appellant also liable to pay compensation under Section 544-A Cr.PC to the tune of Rs.20,00,000/- (twenty Lac) to the legal heirs of deceased (Zard Ali), with further direction that the compensation shall be recoverable from his property as arrears of land revenue and that

owing to want of property, he shall further suffer S.I for six months. The benefit of Section 382-B Cr.PC was extended to the appellant. The other co-accused namely Ajmal, Mir Aftab and Jamal Sher were declared proclaimed offenders and perpetual warrants of arrest were issued against them; hence appeal by the convict-appellant and murder reference to this Court by the learned trial Court.

9. We had the advantage of hearing arguments of learned counsel for the convict-appellant and learned AAG assisted by learned counsel for the complainant; and going through the record with their valuable assistance.

10. The perusal of record would amply demonstrate that conviction of the appellant under Section 302 (b) PPC and award of sentence of death to him by the learned trial Court was largely influenced by the fact of complainant in the case carrying stamp of injury on his person, motive for the offence cited as dispute over a woman, daughter of Mir

Aftab (father of the appellant and also an absconding co-accused), medical evidence in line with ocular account, no chance of mistaken identity as both the parties were co-villagers, minor contradictions not having any bearing on case of the prosecution, belated plea of *alibi* taken by the appellant, the appellant nominated in the promptly lodged FIR, consistency in the statements of the complainant and the other eye witness and abscondence of the appellant for some time after the occurrence.

11. To begin with, the so-called promptly lodged FIR is based on the murasila (EXPA/1), which laid foundation of the case, but indeed a shaky one, as there seems to be addition/interpolation of Liaqat Ali as rider on the murasila. In any case, according to learned counsel for the appellant, the omission on the part of the scribe of the murasila to show time of the report, together with omission on the part of the complainant to specify types of

weapons of offence used in the commission of offence, would give rise to the suspicion that report of the complainant was later on recorded after consultation and deliberations.

12. In the FIR, dispute over women folk has been cited as motive for the offence, but the prosecution failed to prove on record that deceased Zard Ali had any such dispute with the appellant, who though belong to the same family, as co-accused Ajmal is his real brother and co-accused Mir Aftab is his father while the other absconding co-accused Jamal Sher has been shown as his nephew. The record on the other hand, would show that daughter of absconding co-accused, Mir Aftab, who was married to the complainant, committed suicide, but the accused had charged the complainant, who was acquitted in the case. It may be noted here that the other so-called eye witness, who did not sustain even a single scratch in the occurrence despite shown at a very close distance from the accused, is the real brother of

deceased Zard Ali Khan, but the complainant had no such relationship with the deceased who is distantly related to the latter; hence, possibility of false implication of the appellant owing to the aforesaid motive.

13. Although, the I.O secured blood stained earth from the place assigned in the site plan to the deceased Zard Ali, but no blood stained earth etc was recovered from the place assigned in the site plan to the injured complainant, who had also received a firearm injury on his shoulder with corresponding exit wound, and his blood stained garments were also taken into possession by the I.O, which were sent by the Medical Officer to the former after medical examination of the injured complainant. The absence of blood stained earth etc at the place assigned to the complainant in the site plan would, obviously, raise question about his presence on the spot at the time of occurrence.

14. During spot inspection, the I.O recovered 15 empty shells of 7.62 bore lying in

scattered condition adjacent to the place assigned in the site plan to absconding accused Ajmal, wherefrom a mobile phone (Nokia) and a Kalashnikov charger containing 4 rounds belonging to the accused were also recovered; but neither the crime empties nor the Kalashnikov charger and live rounds were sent to the firearms expert in order to determine this fact that whether all the empty shells were fired from the same weapon or different weapons, especially in view of the fact that 4 persons had been charged for indiscriminate firing on the deceased as well as injured-complainant, and the Kalashnikov charger along with the live rounds as well as empty shells were recovered from the close proximity of only one out of four accused, namely, Ajmal. This fact, together with the fact that all the four firearms entry wounds, two entry wounds on the body of the deceased and two entry wounds on the injured-complainant are of the same size and dimension i.e. $\frac{1}{4}$ x $\frac{1}{4}$ inch, would embrace the possibility of

commission of offence by a single person with the same weapon of offence, more-so, in the absence of report of firearms expert about use of different weapon of offence in the commission of the offence; thus creating reasonable doubt about involvement of more than one members of the same family in the commission of offence, especially the appellant, as the above referred recoveries were attributed only to absconding co-accused Ajmal.

15. We have seriously taken into consideration the contentions of learned counsel for the appellant that, the prosecution attempted to develop the story of the deceased, complainant and PW Liaqat Ali coming back together from village Shewa to their village Sheikh Jana. According to the PWs, the deceased and PWs had gone to the *Dera* of one Safdar situated in village Shewa for purchasing a cow from him; but neither the cow was brought by them nor the said Safdar was ever examined in the case to lend credence to the said story. The

statements of the two important witnesses of the prosecution, namely Asghar Jan/complainant (PW8) and Liaqat Ali/eye witness (PW.9) were shown not consistent with each other on this important aspect of the case. PW.8 stated that they had left for village Shewa at about 6.00 P.M, whereas PW.9 mentioned this time as 400/0500/05.30 PM. It was the month of *Ramadan*, and according to PW.8, they offered their prayers there and spent about 30 minutes with Safdar. According to PW.8, the distance between Sheikh Jana and village Shewa could be covered within one hour on foot. If statement of PW.8 is to be believed, after leaving for village Shewa at 6.00 PM, covering distance from Sheikh Jana to village Shewa on foot within one hour, spending 30 minutes with the said Safdar and then covering the distance from Hujra of Safdar to the place of occurrence within 25 minutes, they approximately reached the place of occurrence at 7.55/8.00 PM, which seemingly runs counter to the time of

occurrence shown in the FIR as 7.25 P.M. Likewise, PW.9 contradicts this position by saying that the place of their destination was at a distance of about 30 minutes walk from his house, as against the time of one hour on foot shown for such a distance in the statement of PW.8. There is also apparent inconsistency in the statements of these two PWs with regard to the price of cow settled between them and the said Safdar, as according to PW.8 the sale price was Rs.65000/-, while according to PW.9 the business was struck for Rs.40,000/-. In his statement before the Court, he and deceased Zard Ali were proceeding ahead while Liaqat Ali was following them at a distance of 10/12 paces and that distance between them and the assailants was 17 paces; but in his statement before the police, PW.9 had stated that he was ahead of the complainant and the deceased at the relevant time, and thus apparently made improvement in his statement before the Court by stating that he was following them. PW.8

stated that all the accused simultaneously opened fire at them, whereas, PW.9 made statement to the effect that first fire was made by the appellant and then the other accused. Intriguingly, the accused were not charged in the FIR for also attempting at the life of the other companion of the deceased and injured complainant namely Liaqat Ali, who reportedly escaped unheard in the occurrence.

16. No doubt, testimony of a witness carrying stamp of injury on his person is considered crucial for just and fair decision in such like cases, but such testimony ought to ring true and not tainted with contradictions and improvement or possibility of motive for false implication of the opposite side. The above stated discrepancies, rather contradictions and improvements, as well as fatal omissions on the part of the Investigating Officer, are bound to leave case of the prosecution, of course to the extent of the appellant, nowhere. It seems that all the above stated facts, perhaps, escaped the

notice of the learned trial Court while awarding the penalty of death to the appellant on the basis of such evidence. To say the least, the above stated facts formed part of material contradictions in the case qua the appellant, apart from plea of *alibi* which was, however, abandoned by learned defence counsel while arguing the case at the bar. Needless to say that an accused may take any plea in his defence, but his failure to substantiate such a plea would not automatically result in success of the case of prosecution, which is, otherwise, legally bound to prove its case to the hilt, beyond any shadow of doubt, regardless of weaknesses in the case of the defence. In the circumstances, explained above, the past criminal history of the appellant and his abscondence for sometime would, *ipso facto*, not make him liable to the penalty of death for the alleged *Qatl-i-Amd* of Zard Ali and attempt at the life of complainant, unless the same were credibly corroborated by truthful

and confidence inspiring evidence of the prosecution.

17. It needs be stressed that these findings are confined to the role of the appellant in the case, and shall have no bearing on the case against the absconding co-accused, who are still fugitive from law and have not surrendered for facing trial in the case registered against them on 04.07.2014.

18. In view of the forgoing discussion, the prosecution was unable to bring home charge against the appellant, who is, therefore, acquitted of the charges by extending him the benefit of doubt. The appeal is accepted and the impugned judgment/order dated 02.12.2016 of the learned trial Court/ASJ-I, Swabi, is, accordingly, set aside to the extent of the appellant, together with convictions and sentences awarded to him in the case. The appellant be set at liberty, if not required in any other case.

19. Murder reference No.19-P/2016 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
05.09.2017.

(Ayub)

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