Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH.
(Judicial Department)

Cr. A No.128-B of 2020

Lais Khan & another
Vs.
The State etc.

JUDGMENT

Date of hearing: **16.02.2021**

For Appellant: **M/S Muhammad Rashid Khan Dirma Khel Advocate.**

For State: **Mr. Shahid Hameed Qureshi Addl: A.G.**

For Respondents: **Mr. Qaidullah Khan Khattak Advocate.**

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SAHIBZADA ASADULLAH, J.- The appellants Lais Khan & Abdullah have called in question the judgment dated 21.09.2020, authored by learned Additional Sessions Judge, Banda Daud Shah, District Karak, whereby the appellants Lais Khan & Abdullah have been convicted under section 302(b) P.P.C read with section 34 P.P.C and sentenced to life imprisonment each with Rs.1,00,000/- (one lac) compensation under section 544-A Cr.P.C. to the legal heirs of deceased or in default thereof, to undergo six months simple imprisonment. The benefit of section 382-B Cr.P.C has also been extended to the convicts.

The complainant Mst Razmina has also filed **Criminal Revision, bearing No.30-B of 2020** for enhancement of sentence awarded to the appellants. Since both

the matters are the outcome of one and the same judgment, therefore, we intend to dispose of the same through this common judgment.

2. Brief facts of the case are that on 10.07.2016 the complainant Mst. Razmina alongwith her deceased husband and sister-in-law (Mst. Shaida Bibi) alongwith kids were proceedings to the relatives towards village Makori in a Dotson pickup, when they reached near Dalun (Charaee), at 1630 hours, accused appeared there. Accused Abdullah was duly armed with Kalashnikov while accused Lais Khan was empty handed. The complainant and her sister-in-law were in the front of seat of the Dotson while deceased (Imtiaz Ahmed) alongwith kids were present in the rear portion of the Dotson. Soon the vehicle reached near the accused, the accused Abdullah signaled to stop, and the vehicle was stopped. Accused Abdullah called the deceased to deboard from the Dotson pickup. On this the complainant and Mst. Shaida Bibi deboarded from the vehicle and proceeded towards the accused. The deceased was immediately come on Paidan (پائیدان) of the vehicle. Meanwhile, accused Abdullah saw towards his father/accused Lais Khan wherein his father commanded his son/accused Abdullah to kill the deceased whereas he fired upon the deceased. Resultantly, the deceased fell down in the pickup. Complainant and Mst. Shaida Bibi

tried to overpower the accused Abdullah but he aimed his Kalashnikov over them and due to fear they stopped. The accused after commission of offence decamped from the spot. Motive behind the occurrence was stated that accused Abdullah had divorced the sister of deceased. Deceased succumbed to his injuries on the way to civil hospital Teri.

3. Fazal Subhan ASHO (PW-9) reduced report of the complainant in shape of F.I.R (Ex: PA), obtained the thumb impression of the complainant on it, prepared injury sheet and inquest report of the deceased and sent him to the doctor under the escort of Constable Zahid Ullah (PW-2).

4. After completion of investigation, prosecution submitted complete challan against the accused Lais Khan on 14.12.2016, while the accused Abdullah remained absconder. After complying with the provision under section 265-C Cr.P.C, the accused facing trial Lais Khan was charge sheeted on 19.01.2017, to which he pleaded not guilty and claimed trial. Proceedings u/s 512 Cr.P.C was initiated against accused Abdullah vide order dated 19.01.2017 and the prosecution was allowed to produce evidence against the absconding accused also. Statements of some of the witnesses were recorded but subsequently, co-accused Abdullah was arrested and prosecution submitted supplementary challan against him. After complying with the provision under section 265-C

Cr.P.C, accused Abdullah formally charge sheeted to which he pleaded not guilty and claimed trial. The prosecution was invited to produce its evidence. The prosecution to prove its case produced and examined as many as 11 witnesses, where after, the accused were examined under section 342 Cr.P.C, where they professed innocence and false implication, however, they did not wish to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce defence evidence. After hearing arguments from both the sides, the learned trial Court vide impugned judgment dated 21.09.2020, convicted the accused and sentenced them, as mentioned above, hence, this appeal and the connected criminal revision.

5. The learned counsel for the parties alongwith Addl: Advocate General representing the State were heard at length and with their valuable assistance the record was gone through.

6. The tragedy occurred on 10.07.2016 at 16:30 hours, when the deceased along with his family, including the complainant, Mst. Shaida and their kids were travelling in the Datsun/ pickup to village Makori to visit the house of their relative. The report tells that when the vehicle reached to the place of incident the accused / appellants were present there, signaled the driver to stop the vehicle. When the vehicle stopped the complainant along with the eye-witness rushed towards the appellants, when in the meanwhile the appellant

Lais Khan commanded his son to kill the deceased, who opened fire at the deceased, who after receiving the firearm injury fell down from the vehicle. It was further alleged by the complainant that they rushed towards the appellant to catch hold of them but being empty handed they could not succeed and the accused/ appellants decamped from the spot. While on their way, to hospital the deceased breathed his last, eventually the dead-body was taken to Police Station Teri, where the matter was reported to one Fazal Subhan ASHO, who was later on examined as PW-09. After the report was penned down, the injury sheet and inquest report were prepared where after the dead-body was dispatched to the hospital under the escort of Zahidullah No.752, who was examined as PW-01.

7. The learned trial Court on conclusion of the trial convicted and sentenced the appellants as stated above, but this court is to see as to whether the learned trial Court applied its judicial mind to the facts and circumstances of the case and that the prosecution evidence was fully appreciated. True that the matter was reported by the complainant posing herself and another, as the eye-witnesses and equally true that blood-stained earth along with an empty of 7.62 bore were recovered from the spot, but this Court is to see as to whether the prosecution proved its case to the hilt and as to whether the witnesses could prove their presence on the spot at the time of incident. This court is under the bounden duty to assess and reassess the available evidence on file and to apply its judicial

mind to the material collected on file, so to avoid miscarriage of justice.

8. This court is to see as to whether the witnesses could establish their presence on the spot at the time of incident and as to whether the testimony of the witnesses is confidence inspiring. The complainant was examined as PW-04, who stated that on the day of incident they arranged to visit the house of their relative at village Makori, and for the purpose a datsun/pickup was arranged and so the family including kids boarded in the vehicle, where the deceased with his kids sat in the rear portion of the pickup, whereas the complainant along with the eye-witness took the front seat. It was for the prosecution to establish that what led the women to occupy the front seat with an unrelated driver and that why the deceased chose for himself the rear portion of the vehicle, as in Pashtoon society this practice is not respected, that too when no relation exists between the driver and the complainant. We are to see as to whether the incident in issue occurred in the mode, manner and at the stated time and also the presence of witnesses at the time of incident. The investigating officer assigned different places to the appellants, the eye-witnesses and the deceased but surprisingly no place was assigned to the driver, and even the site-plan is silent in this respect. We cannot ignore that the complainant stated that soon after the incident they deboarded the vehicle and rushed towards the appellant, whereas the driver was still inside the vehicle, but when the Investigating Officer recorded the statement of the driver under section 161 Cr.P.C, he told another story and stated that when he

reached to the place of incident, he saw the appellants, who signaled him to stop and so he surrendered. He went on to say that as he was all in fear so on coming down from the vehicle, he fell down to the ground to avoid personal harm, on the other hand the complainant and the eye-witness remained silent on this particular aspect of the case. It is pertinent to mention that the Investigating Officer produced the driver before the court of Judicial Magistrate, who recorded his 164 Cr.P.C statement, where he stated that he could witness the appellant Abdullah only at the time of incident and did not observe the presence of Lias Khan. The contradiction between the statements leads us nowhere but to hold that the witnesses went in conscious attempt to bring their testimony in line with the material on record and their this conscious attempt has created dents in the prosecution case beyond repair. Both the witnesses categorically stated that the accused/ appellant Lais Khan commanded his son to kill the deceased, and on hearing the noise the deceased emerged from the rear portion of the pickup, who was fired at by the accused/ appellant Abdullah. The complainant and the Investigating Officer did not support each other on this particular aspect of the case, as the Investigating Officer stated that the deceased after receiving firearm injury fell to the ground and so blood was recovered from point No.4, whereas the complainant stated that the deceased did not fell to the ground rather after receiving firearm injury he fell in the rear portion of the Datsun/ pickup. This major contradiction between the two has increased our anxiety to search for independent corroboration, this is again

alarming that the Investigating Officer when realized what the complainant stated he improved his statement and stated that the deceased fell in the rear portion of the vehicle after receiving firearm injury. If we admit what the witnesses stated then prosecution will have to explain that how the blood stained earth was recovered from point-'B', which is situated on the road. When the complainant appeared as PW-04, she was particularly questioned as to whether while placing the deceased in the Datsun/ pickup her hands were besmeared with blood to which she categorically denied by offering an abnormal explanation, that as the deceased did not fell to the ground so the witnesses did not touch his body and in the said condition he was shifted to the Police Station, her this explanation lacks confidence as she being the wife of the deceased and when the deceased received firearm injury he fell to the ground and these were the witnesses and none else who should have placed his body in the vehicle and in that eventuality her hands and clothes must have been besmeared with blood. We are yet to know that when the dead-body was taken to Police Station Teri in the Datsun/pickup driven by the driver who too was present at the time of incident, what precluded the scribe to ask for his signature as a rider to the report and that why his statement was not recorded, despite the fact that the registration number of the vehicle finds mention in the report. The prosecution is still to travel a long way to prove the charges against the appellants as well as their presence at the time of incident and at the time of report. None of the witnesses including the driver finds mention in the columns

of identification both in the inquest as well as post mortem reports, rather two witnesses from the village finds mention there. We are still searching for an answer that how the co-villagers were informed who were attracted to the Police Station at the time of report and identified the dead-body before the police and afterwards before the doctor at the time of post mortem examination. We cannot ignore that it was the complainant who stated that soon after the incident no one attracted from the village to the spot and that these were the witnesses and the driver who took the deceased to the Police Station. The record is silent that how and from what source the co-villagers attracted to the Police Station despite the fact that neither the deceased nor the witnesses were in possession of mobile phones. We are still looking for an answer that how Eid Muhammad father of the deceased reached to the hospital as none of the witnesses got connected with him and that he reached to Police Station after 30-minutes of arrival of the dead-body. The scribe who was examined as PW-09 categorically stated that soon after arrival of dead-body to the Police Station the matter was reported at 18:30 hours, but he failed to explain that when Eid Muhammad was not present at the time of arrival of the dead-body to Police Station and also at the time of report then how his signature was obtained as a rider, when the report had already been made. PW Fazal Subhan could not account for, that when the driver along with eye-witness Mst. Shaida was present in the Police Station at the time of report, why none out of the two was asked to verify the report as allegedly these were the witnesses who were

present at the time of incident and report as well. The dead-body was examined by the doctor at 08:35 p.m. and after post mortem prepared the post mortem report, where he mentioned the time between injury and death as "instantaneous" and between death and post mortem as "within four hours". The statement of the complainant on this particular aspect of the case is worth perusal, where she stated that the deceased then injured after receiving firearm injury survived for long 20-minutes and it was on the way to hospital that he breathed his last. She further stated that after receiving the firearm injury they remained on the spot for 10/15 minutes and thereafter started for the hospital, we do not agree with what she stated, if the deceased was alive after receiving firearm injury it would have been the prime duty of the witnesses to rush to the hospital instead of waiting for long 10/15 minutes with no purpose, on the spot, whereas PW-05 when appeared before the trial Court she contradicted what the complainant stated, by stating that the deceased soon after receiving firearm injury fell down and died on the spot. PW-05 further stated that they rushed towards the hospital without loss of time. The conflict between the witnesses and the way they explained their presence on the spot leaves this court nowhere but to hold that the witnesses were not present on the spot, when the deceased was done to death. Guidance can be taken from the judgment reported as, **"Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a),** *wherein it has been held:-*

> ***"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation***

for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence"

9. We are anxious to know that when father of the deceased was present at the time of report what precluded him to accompany the dead-body of his son to the hospital for post mortem examination and he hurriedly went to the spot, his this conduct speaks nothing but mala fide and an inference can be drawn regarding his absence at the time of report and thereafter. The complainant stated that after making the report she along with the other witnesses reached to the spot along with the Investigating Officer in his official vehicle, but when the Investigating Officer was examined on this particular aspect of the case, he stated that when he reached to the spot, the complainant, eye-witness, Eid Muhammad and other people were present on the spot. The witnesses went in conflict throughout and their this inconsistency caused great damage to the prosecution case. We are still struggling hard to know as to whether the complainant was present at the time of incident and these were the witnesses who took the deceased to Police Station to report the matter. When both the documents i.e. the first information report and the inquest report are placed in juxtaposition, it surfaced that the complainant while reporting the matter specifically mentioned the weapon used as Kalashnikov whereas in the relevant column of inquest report the word "اسلحہ

"اتشین" has been mentioned. Another intriguing aspect of the case is that the inquest report does not bear the F.I.R number and sections of law, had the complainant been present and reported the matter on her very arrival to the Police Station then this discrepancy would not have occurred, but what can be gathered from that the complainant and the eye-witness were not present at the time of incident and even at the time of report, rather the deceased soon after his death was taken to the Police Station by the co-villagers and it was on later arrival of the complainant the report was made whereas the injury sheet and inquest report had already been prepared. This court feels no hesitation to hold that the preliminary investigation was conducted and thereafter the report was made.

10. The Investigating Officer visited the spot, recovered blood-stained earth along with an empty of 7.62 bore and on pointation of the eye-witnesses the site-plan was prepared. The record tells that the blood-stained earth was recovered from point 'B' where initially to the Investigating Officer the deceased after receiving firearm injury fell down, though the Investigating Officer soon thereafter changed his version by stating that the deceased did not fall to the ground after receiving the fatal shot. We are to see as to which of the witness was telling the truth and which not, and in order to ascertain as to whether in fact the deceased did not fall to the ground it was essential for the Investigating Officer to recover the vehicle but he did not take the pains. Despite the fact that the registration number of the vehicle finds mention in the report and even it was the vehicle which was used for transporting the

deceased to Police Station but even then it was not taken into possession which tells otherwise. If the statement of the driver is taken into consideration regarding the ownership of the vehicle where he stated that the vehicle belong to one Munawar Din and even this fact was mentioned in his 164 Cr.P.C statement, but the Investigating Officer did not associate the said Munawar Din with the process of investigation. This lack of interest on part of all concerned leads us nowhere but to hold that either the incident did not occur in the mode and manner or that no blood was found in the vehicle and in order to wriggle out from the glaring contradiction the Investigating Officer chose to conceal this material piece of evidence without realizing the fact that his this concealment will spoil the prosecution case.

11. The Investigating Officer recorded the statement of the driver under section 161 Cr.P.C after three days of the occurrence and his this belated statement has reduced the evidentiary value of the statement of this witness. Though the driver was produced before the court of Judicial Magistrate where his statement under section 164 Cr.P.C was recorded, but thereafter he did not turn up, so was not produced during the trial and was abandoned. The driver was an important witness and his non-production tells otherwise, had he been present at the place of incident he would have come to the Court of law to depose against the appellants. In situation in hand no other inference can be drawn but that if was produced he would have not supported the

prosecution case. Article 129 (g) of the Qanun-e-Shahadat Order, 1984, caters for the situation.

In case titled ***Tahir Khan Vs. The State (2011 SCMR 646)***, wherein it is held that:

> ***"13. In the present case as observed above, the clouds over the veracity of the prosecution version began hovering with the substitution of the initially nominated persons in the F.I.R. and also that complainant did not appear as a witness. It assumes relevance as he (Ghulam Hussain), Sultan Mehmood and Ghulam Abbas were given up by the prosecution and not produced. The only possible conclusion is that the prosecution sensed the risk of producing them that they might not support the said version. Their production thus was withheld leaving doubts spreading all around".***

12. The medical evidence does not support the prosecution case, rather both contradicted each other when the doctor was examined as PW-03, he stated that the deceased received a single firearm injury and that the entry and exit wounds were through and through. It is important to note that the deceased at the time of receiving firearm injury was standing in the rear

portion of the vehicle at a considerable height whereas the appellant was standing on the road, and in such eventuality the direction of fire should have been from down to upward, but the opinion of the doctor tells otherwise and it can safely be concluded that the incident did not occur in the manner as narrated. True that medical evidence is confirmatory in nature and it cannot outweigh the ocular account provided it springs from unimpeachable source, which is not the case in hand and this conflict between the two belies the stance of the prosecution, more particularly regarding their presence at the place of incident. The situation has beautifully been done by the apex Court in its reported case, titled ***"Akhter Saleem and another Vs the State and another" (2019 MLD 1107)***, it is held that:

> ***"12. The above factors, material contradictions between ocular and medical evidence create serious doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts."***

13. The motive was stated to be the strained relations between the accused and sister of the deceased which culminated into a divorce and that it was the sense of revenge which led the appellants to kill the deceased. The Investigating Officer did not record the statement of the divorced lady i.e. sister of the deceased

and even her name did not figure throughout. The Investigating Officer did not visit the house of deceased in order to inquire about the strained relations between the two and even the sister of the deceased did not come forward to confirm the stance of the complainant. The prosecution failed to establish motive on record that too in a situation where the cause of death was only and only the strained relations between the husband and wife. The Investigating Officer did not examine independent witnesses in this respect and as such the motive alleged could not be proved. There is no cavil to the proposition that once the prosecution alleges a motive it is under the obligation to prove the same, failing which no one else but the prosecution will suffer.

In case titled **"Muhammad Ashraf alias Acchu Vs The State" (2019 SCMR 652 Para-7),** *wherein it has been held: -*

> ***"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."***

14. The learned counsel representing the complainant stressed hard and hard that the appellants remained absconder for

sufficient long time and that they could not explain their willful absence and that this factor alone is sufficient to prove the guilt of the accused. We are afraid that the learned counsel went in error as, there is no cavil to the proposition that abscondence by itself is not sufficient to prove guilty an accused rather it is a circumstance which can aid to favor the prosecution if the prosecution succeeds in proving in case through cogent and confidence inspiring evidence which is not the case in hand.

In case titled "**Muhammad Sadiq Vs. State (2017 SCMR 144),** it is held that:

> ***"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."***

15. The basic principle of criminal administration of justice is that prosecution is under bounden duty to prove its case beyond any shadow of doubt and if any reasonable doubt arises in the prosecution case, the benefit of the same must be extended to the accused not as a grace or concession, but as a matter of right, the wisdom behind the same is that, lest no innocent be punished. In view of unbelievable prosecution story, unnatural conduct of witnesses and their presence, contradiction among the statements of complainant, doctor and the Investigating Officer, whole edifice of prosecution case has razed to the ground, which benefits only and only the appellants. This Court reaches to an inescapable conclusion

that the prosecution has miserably failed to prove its case against accused/appellants, resultantly the instant criminal appeal is allowed, the impugned judgment of conviction is set aside and the accused/ appellants are acquitted of the charges. They be released forthwith if not required to be detained in connection of any other criminal case. As the appeal against conviction has succeeded, so the criminal revision No.30-B of 2020 for enhancement of sentence has lost its utility stands dismissed.

Above are the reasons of our short order of the even date.

Announced.
Dt: 16.02.2021
Azam/P.S

JUDGE

JUDGE

15/2/2021.

SCANNED
15 MAR 2021
Khalid Khan

(D.B)
Ms. Justice Musarrat Hilali and
Mr. Justice Sahibzada Asadullah