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

Cr. A No.33-B of 2019

Farzand Ali & Yousaf Ali
Vs.
The State etc

JUDGMENT

For Appellants: Mr. Anwar-ul-Haq Advocate

For State: Mr. Saif-ur-Rehman Khattak, Addl: A.G.

For Respondent: Mr. Farooq Khan Sokari, Advocate.

Date of hearing: 08.02.2022

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Sahibzada Asadullah, J.- The appellants Farzand Ali and Yousaf Ali have called in question the judgment dated 11.02.2019, rendered by learned Additional Sessions Judge-III, Bannu, whereby they have been convicted and sentenced as under:-

> *(i) under section 302(b)/149 P.P.C. sentenced to imprisonment for life as ta'zir on two counts with fine of Rs.2,00,000/- (two lac) each as compensation to the legal heirs of each of the deceased in terms of section 544-A Cr.P.C, or in default thereof to suffer six months simple imprisonment on each count;*
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> *(ii) under section 148/149 P.P.C to rigorous imprisonment for two years each with fine of Rs.10,000/- each or in default to suffer one month SI each;*
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> *(iii) under section 324/149 P.P.C for attempting at the lives of complainant Asmat Ullah, Waqif Khan, Abdullah Noor, Asad Yar Khan and Sifat Ullah, sentenced to undergo seven years rigorous imprisonment each on five counts with*

fine of Rs.20,000/- each or in default thereof to undergo six months simple imprisonment;

(iv) under section 337-F(i)/149 P.P.C for causing contusion to the complainant Asmat Ullah on his left side of his neck, sentenced to pay Daman to the tune of Rs.20,000/- each to be paid to the complainant alongwith rigorous imprisonment of one year each or in default thereof they shall be kept in jail and be dealt with in accordance with section 337-Y, P.P.C;

(v) under section 337-F(vi)/149 for inflicting firearm injuries to complainant Asmat Ullah which resulted into fracture and dislocation of his left radius and ulna and are held liable to pay Daman to the complainant to the tune of Rs.50,000/- each and sentenced to rigorous imprisonment for three years each or in default of payment they shall be kept in jail and be dealt with in accordance with section 337-Y P.P.C;

(vi) under section 337-F(ii)/149 P.P.C for inflicting injuries to Abdullah Noor on his right foot, sentenced to pay Daman to the tune of Rs.30,000/- each, to be paid to Abdullah Noor with further sentenced to rigorous imprisonment for two years each or in default of payment they shall be kept in jail and be dealt with in accordance with section 337-Y P.P.C;

(vii) under section 337-F(ii)/149 P.P.C for causing injuries to Asad Yar Khan on his right flank and mid of his right forearm and sentenced to pay him Daman to the tune of Rs.30,000/- and sentenced to rigorous imprisonment for two years each or in default of payment they shall be kept in jail and be dealt with in accordance with section 337-Y P.P.C.

(viii) under section 337-F(ii)/149 P.P.C for causing injuries to Waqif Khan on his left leg foot and sentenced to pay him Daman to the tune of Rs.30,000/- each and sentenced to rigorous imprisonment for two years each or in default of payment they shall be kept in jail and be dealt with in accordance with section 337-Y P.P.C; and

(ix) under section 337-F(ii)/149 P.P.C for causing injuries to Sifat Ullah on his palmer surface of right hand and sentenced to pay him Daman to the tune of Rs.30,000/- each with

further sentenced to rigorous imprisonment for two years each or in default of payment they shall be kept in jail and be dealt with in accordance with section 337-Y P.P.C.

All the sentences were ordered to run concurrently. Benefit of section 382-B Cr.P.C was extended to the appellants.

2. The legal heirs of both the deceased moved Cr.R. No.09-B/2019 for enhancement of sentence, whereas Cr.A. No.35-B/2019 has been filed against acquittal of co-accused. Since all the matters are the outcome of one and the same judgment, therefore, we intend to decide the same through this common judgment.

3. Brief facts of the case as divulged from the FIR, registered on the basis of murasila, are that on 24.11.2015 at 18:30 hours, the complainant Asmat Ullah (PW-6), in injured condition, reported the matter at civil hospital, Bannu to the local police to the effect that on the eventful day he alongwith son Sifatullah and other relatives, PW Waqif Khan, Abdullah Noor, Asad Yar, Mujeeb (deceased) and Naqib Ullah Khan (deceased), after offering Maghrib prayer in the village Masjid, were proceeding to their houses, when they reached near the house of accused Farzand Ali, it was at about 17:30 hours, there accused Yousaf Ali, Farzand Ali, absconding co-accused Rifat Ullah & Taimoor Khan, armed with Kalashnikovs, whereas absconding co-accused Suleman and Roman, armed with pistol

and Kalakov, on the conspiracy of accused Rukhsar Ali, launched murderous assault on the complainant party by firing at them with their respective weapons, as a result of firing of all the accused, the complainant, Sifatullah, Waqif, Abdullah Noor, Asad Yar, Mujeeb Khan and Naqibullah Khan sustained firearm injuries, while Mujeeb Khan and Naqibullah succumbed to their injuries on the spot. Accused decamped from the spot towards their houses where they made firing as a result of which one of their own companions was hit. Complainant party could do nothing being empty handed. Motive for the occurrence was stated to be a dispute over landed property, hence, the F.I.R ibid.

4. After completion of investigation, prosecution submitted challan against the accused; Farzand Ali, Yousaf Ali and Rukhsar Ali, whereas rest of the accused remained fugitive from law and after recording statement of SW, they were declared as Proclaimed Offenders and perpetual non-bailable warrants against Rifatullah, Suliman, Roman & Taimoor Khan were issued. At the commencement of trial, the prosecution produced and examined as many as eleven witnesses, whereafter, the accused were examined under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they opted to be examined on oath as provided under section 340(2) Cr.P.C, nor produced defence evidence. After hearing arguments, the learned trial Court vide impugned

judgment dated 11.02.2019, convicted the accused/appellants and sentenced them, as mentioned above, whereas accused Rukhsar Ali was acquitted of the charges. Hence, the instant criminal appeal and the connected criminal revision.

5. We have heard learned counsel for the appellants, the learned A.A.G for the State assisted by learned counsel for the complainant at length and with their valuable assistance, the record was gone through.

6. The appellants after their arrest faced trial before the learned trial Court and on conclusion of the trial, they were convicted and sentenced as mentioned above. There is no denial of the fact that the learned trial Court dealt with the matter comprehensively and after applying its judicial mind to the collected evidence, convicted the appellants. True, that the learned trial Judge took pain to appreciate the available record but this Court is too under the obligation to re-assess the already assessed evidence and to see; as to whether the findings given by the learned trial Court were substantial to convict the appellants and as to whether the reasons advanced for awarding sentence are fully justified. This being the Court of appeal is under obligation to apply much care and caution, so that, miscarriage of justice could be avoided. True that in the incident two persons lost their lives, whereas five got injured, but equally true that it is

not the number of casualties, to play a decisive role in convicting the appellants, rather these are the witnesses and their veracity which is of prime importance, more particularly, in a case if proved the award would be capital punishment, and when life and liberty of the citizens are involved then extra care is needed, as a hasty approach will help to convict the innocent and acquit the guilty.

7. The incident occurred when the complainant and others after performing their Maghrib prayer reached near the house of one Farzand Ali, the accused who were already present duly armed started firing at them which resulted into injuries on witnesses and death of the deceased. The deceased then injured were hurriedly shifted to the hospital where the matter was reported to the local police who reached to the hospital after arrival of the dead-bodies and the injured. After drafting murasila the injury sheets and inquest reports of the injured as well as the deceased were prepared, whereafter dead-bodies were sent to the doctor for postmortem examination. The injured were referred to the doctor for medical examination, who were examined and their medico legal certificates were prepared. The Investigating Officer, after receiving copy of the F.I.R, reached to the spot at 08:30 PM and on pointation of one Inam Ullah, prepared the site plan. Blood-stained earth was collected from

places of the deceased and the injured witnesses and also 51 empties of different bores alongwith two spent bullets were taken into possession. The recovered empties were sent to the Firearms Expert in order to ascertain as to whether those were fired from one or different weapons. The report was received in positive mentioning the same were fired from different weapons. On the day of incident, one of the appellant namely Yousaf Ali was arrested from his house in injured condition, who was examined by the doctor and his physical custody was requested from the Court of Judicial Magistrate, which was granted and it was on the following day of the incident when he led the police party to his house who recovered a Kalashnikov on his pointation. It is pertinent to mention that the Kalashnikov taken into possession from the house of the appellant was sent to the Firearms Expert alongwith the collected empties. The report was received in positive where seven out of the collected empties matched with the weapon.

8. The moot question to be determined is as to whether the witnesses were present at the time of incident and that the incident occurred in the mode, manner and at the stated time. Yes, in the incident five received injuries whereas two lost their lives, but it is not the number of casualties to determine fate of the accused charged, rather the Courts of law must walk ahead

to ascertain as to whether the incident occurred as was portrayed and as to whether the number of accused was not exaggerated. In the episode as many as six accused are charged, whereas in all seven injures are inflicted on the dead bodies of the deceased as well as the injured witnesses. This Court is to see and the prosecution is to establish that all the accused had a common interest in the episode and that they attracted to the spot after making preparation for the purpose. The complainant was examined as PW-6, who stated that after performing Maghrib prayer when they reached near the house of appellant Farzand Ali, the accused including the appellants were present duly armed, who fired at them which resulted into injuries on bodies of the injured witnesses and into the death of the deceased. He further stated that after receiving firearm injury he took shelter in a nearby house whereas the people of locality arranged vehicles and the dead bodies alongwith the injured were shifted to the hospital. The complainant is to establish his presence on the spot and so the eyewitness. The site plan depicts that soon after receiving firearm injuries, the complainant took shelter in a nearby street where the Investigating Officer observed blood on the wall just behind the complainant. The report was made at 18:30 hours in the hospital, whereas the incident occurred at 17:30 hours. It is important to note that the doctor, who examined the injured while preparing their medico legal

certificates, mentioned the time of examination as 6:03 PM. The scribe was examined as PW-3, who stated that on receiving information, he alongwith others reached to the hospital where the dead bodies and injured had already arrived. He further stated that on his arrival to the hospital the matter was reported by the complainant, whereafter, the injury sheets and inquest reports were prepared and under the escort of PW-3, the injured were shifted to the doctor for their medical examination. PW-3 was examined, who stated that he alongwith the scribe was on gasht when at 6:10 PM, they received information, after receiving information they rushed to the hospital where the complainant reported the matter and after doing the needful he accompanied the injured to the doctor for medical examination. We are surprised to note that on one hand, the information was received at 6:10 PM, whereas on the other the doctor examined the injured at 6:03 PM, when the matter by then had not been reported. True that in case of injured witnesses the prime duty is to save their lives on priority instead of waiting for arrival of the concerned police official to report, but as in the instant case it was the scribe who stated that first the matter was reported in the shape of murasila, thereafter, he prepared the injury sheets and inquest reports followed by shifting the injured to the doctor for their medical examination. If we go with what the scribe submitted, then all the three i.e. the complainant, scribe and the

doctor do not support one another on this particular aspect of the case. The doctor who conducted autopsy on the dead body of the deceased was examined as PW-1, who confirmed that one of the deceased was examined at 8:30 PM, whereas the other at 9:30 PM. The postmortem report depicts the time between injury and death as 20 minutes to 01 hour in case of deceased Naqib Ullah. This opinion of the doctor further falsifies the statement of the complainant. If we admit that the incident occurred at 17:30 hours and the report was made at 18:30 hours, then in that eventuality, the time between injury and death in case of deceased Naqib Ullah does not lend support to the prosecution version. The prosecution is to answer that when the deceased survived for long one hour, what precluded them to shift the deceased then injured to the hospital to save his life. This can be interpreted in two different ways, either the complainant after receiving firearm injuries was shifted to the hospital after a considerable delay or the deceased Naqib Ullah, after receiving firearm injuries left the spot in injured condition. The circumstances do tell that the matter was reported after consultation and deliberation. The witnesses are not in unison on this particular aspect of the case and their this conflict puts us on guard to re-assess the already assessed evidence.

9. The Investigating Officer, after receiving copy of the F.I.R, reached to the spot at 8:30 PM and on pointation of one Inam Ullah, the site plan was prepared. The prosecution is to tell that when Inam Ullah was present in the hospital, as it was he who identified the dead body before the police at the time of report and before the doctor at the time of postmortem examination, it was he who received the dead bodies after postmortem examination. The record tells that the postmortem examination was completed at 9:30 PM and that right from beginning till end, Inam Ullah was shown present in the hospital. It surprises us that how could he be present on the spot at the same time. The Investigating Officer was examined as PW-10, who stated that on reaching to the spot many people were present, out of them one came forward, whose hands and clothes were besmeared with blood and introduced himself as Inam Ullah and claimed to have seen the incident. On one hand, the explanation rendered by the Investigating Officer does not appeal to a prudent mind and on the other, the name of this witness was neither mentioned in the calendar of witnesses nor his statement was recorded. The statements of the witnesses in respect of arrival of the dead-bodies alongwith injured witnesses to the hospital and their subsequent examination by the doctor when read in juxtaposition with report made by the complainant, the same contradict each other and in turn damaged the

prosecution case beyond repair, more particularly, affected veracity of the witnesses. When such is the state of affairs, then one must look for independent corroboration.

10. The witnesses went in conflict regarding the mode and manner of the incident. The complainant stated that after performing Maghrib prayer when they reached near the house of appellant Farzand Ali, the accused duly armed started firing at them which resulted in injuries to the injured witnesses and caused the death of the deceased. The site plan was gone through to judge as to whether the same supports the stance of the witness but the same does not, as the incident occurred a little ahead from the house of the appellant Farzand Ali, and by then the complainant side had already passed through the accused. Considering statement of the other witness where he disclosed that the moment, they passed through the accused they were fired at, but the medical evidence does not support the complainant on this particular aspect of the case, as in that eventuality the deceased should have received entry wounds from their back, which is not the case in hand. The circumstances do not support the statements of the witnesses and we cannot ignore that men may tell a lie but the circumstances do not.

11. While reading the postmortem reports and medico legal certificates, it tells that each of the deceased

received a single firearm injury and such was the case with injured. If all the accused duly armed would fire with the only intention to kill, the situation would have been different with multiple injuries to all the victims. We cannot ignore that all injuries on injured witnesses landed on non-vital parts of their bodies, had the intention was to kill, then the accused would have easily eliminated their targets, but the circumstances suggest that it was the doing of a single person. It troubles to accept that the injured and accused were not accompanied from mosque by the co-villagers, had they performed Maghrib prayer, many co-villagers would accompany, absence of co-villagers can only be translated in the other way. The complainant went on suppressing of facts as by the time when the Investigating Officer attracted to the spot, he observed many people including Inam Ullah, who posed himself to have seen the incident, but the complainant did not mention his presence on the spot at the time of incident. The witnesses astonished us when they disclosed that after firing at them, all the accused went inside the house of Farzand Ali, inside the house they fired as a result of their firing one of the appellant i.e. Yousaf Ali got injured. The complainant never ever stated regarding the source of his information in respect of the injury caused to Yousaf Ali. This disclosure on part of the complainant twisted the prosecution story and we are not hesitant to hold that in fact there was cross firing between the

parties which resulted into injuries from both the sides. When the complainant admitted injury on person of the appellant and when nothing was brought on record to convince that the same was self-inflicted, we can form the only and only opinion that the real facts were suppressed. It was argued that the appellant Farzand Ali instituted a private complaint regarding the injury caused to Yousaf Ali, where he charged numerous persons from the complainant side but the same was dismissed as withdrawn. The learned counsel tried to convince us that that act of instituting a private complaint and its subsequent withdrawal has helped the prosecution in bringing home guilt against the appellants. We are not persuaded with what the learned counsel for the complainant submitted, as law is settled that to invite conviction for an accused charged the incriminating piece of evidence must be put to him, especially when his statement under section 342, Cr.P.C. is to be recorded, failing which the same cannot be pressed into service against the accused charged. Law is settled that every incriminating piece of evidence must be put to the accused charged, failing which the same loses its evidentiary value, and the present case is no exception.

12. The medical evidence does not get support from the eyewitness account and even the site plan failed to substantiate the claim of the witnesses. True that medical

evidence is confirmatory in nature and in case of confidence inspiring eyewitness account, the same cannot overshadow the trustworthy eyewitness account but in case in hand the witnesses could not establish their presence on the spot and went in conflict on material aspects of the case, in such eventuality the importance of medical evidence cannot be ignored and the conflict between the two has damaged the prosecution case beyond repair. The dimension of injuries on bodies of the deceased and injured witnesses are nearly the same and possibility cannot be excluded that it was the doing of a single man.

13. In the incident, two unfortunate persons lost their lives, whereas five others received single firearm injuries on their bodies. Two of the injured witnesses were abandoned holding them unnecessary and one other could not be examined being abroad, so at present we are faced with four injuries and six accused. There is no cavil with the proposition that when an injured fails to appear in support of his charge, no conviction can be recorded in respect of the injury caused. The prosecution is to show that which out of the six accused were responsible for the remaining injuries, as the number of injuries do not commensurate with the number of accused. If the prosecution would succeed in bringing on record the common object for

which all the accused assembled at the place of incident, then the number of accused and the number of injuries caused would not play a vital role, but here when the prosecution could not succeed in proving the common object and common interest of the accused to eliminate the complainant side, in the like situation it gains importance to specify that which of the accused caused what injury, which the prosecution failed to specify. We are to determine that which of the accused caused which of the injury, but in absence of substantial evidence on this material aspect of the case, we are unable to fish out the real culprits, and even the complainant, who being the eyewitness, failed to specify. Law is settled that benefit of doubt when arises must be credited to the accused charged. We are not reluctant to apply the same principle to the benefit of all convicted.

In case titled ***Mukhtasir and 5 others. Vs. The State and another (2017 P.L.R 419)*** it was held that:-

> *"From the above assessment of evidence it is discernable that the charge made by the complainant party is exaggerated, as seven number of one family have been implicated on the strength of the motive which is more tempting than blood feud. Reliance is placed on the case titled "Muhammad Zaman. Vs. The State and others (2014 SCMR 749) wherein it is held that:- "The number of assailants in the circumstances of the case appears to have been exaggerated".*

In case titled ***"Munir Ahmed and others Vs. The State and others" (2019 SCMR 2006),*** it was held by the apex Court that:-

> *"Notwithstanding the magnitude of loss of lives, the totality of circumstances, unambiguously suggest that the occurrence did not place in the manner as is alleged in the crime report; argument that number of assailants has been hugely exaggerated, as confirmed by the acquittals of the co-accused with somewhat identical roles, though without specific attributions, is not entirely beside the mark and in retrospect calls for caution. It would be unsafe to maintain the convictions".*

14. The record tells that out of five injured witnesses, three were not produced and another important witness namely Inam Ullah, on whose pointation the site plan was prepared, was neither mentioned in the calendar of witnesses, nor produced before the Court despite the fact he claimed to have witnessed the incident. The conduct displayed by the prosecution by not producing the most important witnesses has further damaged the prosecution case and an inference can easily be drawn that the abandoned eyewitnesses were not ready to support false claim of the complainant, in the circumstances, Article 129(g) of the Qanune-e-Shahadat Order, 1984, can happily be pressed into service. In case titled ***Tahir Khan Vs. The State (2011 SCMR 646)***, wherein it was 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".*

15. It was stressed time and again that soon after his arrest, the appellant Yousaf Ali led police party to his house wherefrom the weapon of offence was recovered which matched with seven empties out of empties collected from the spot. It was argued that this valid piece of evidence is sufficient to implicate the appellant in the tragedy. True that after his arrest, a Kalashnikov was allegedly recovered from house of the appellant on his pointation, but neither the Investigating Officer nor all concerned could collect any evidence on record to substantiate that the house in question was the sole ownership of the appellant. It has not been clarified that the room wherefrom the weapon of offence was recovered was in exclusive possession of the appellant. Even the record is silent regarding the safe custody of the weapon and its safe transmission to the Firearms Expert for analysis. Another intriguing aspect of the case is that on the day of incident, the house of the appellant was

searched but nothing incriminating was recovered. It is for the seizing officer to tell that once they failed to recover despite thorough search, that too, on the day of incident, how they succeeded in recovering the same on the following day. The recovery of the weapon on pointation of the appellant is shrouded in mystery and the prosecution could not succeed in resolving the same, in such eventuality, this piece of evidence has lost its efficacy and cannot be taken into consideration, that too, to convict the appellants.

16. The motive was stated to be landed property dispute between the parties and in that respect Rukhsar Ali, the acquitted co-accused had registered an F.I.R under section 324 P.P.C against the complainant of the present case. The complainant was cross examined on this particular aspect of the case, who disclosed that the motive was between him and the acquitted co-accused. When the appellants had nothing to do with the motive, then what gathered them with the acquitted co-accused to kill the deceased. The Investigating Officer did not record statements of independent witnesses in support of motive alleged by the complainant. True that absence or weakness of motive alone is not a sufficient cause to disbelieve, but keeping in view the peculiar circumstances of the present case, that too, when the sole purpose was landed property dispute, then the

prosecution was under obligation to prove the same, failing which none else but the prosecution would suffer. In case titled ***"Nadeem Ramzan Vs the State (2018 SCMR 149)***, it is held that:-

> *"It has been held by this Court in many cases that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on a capital charge and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593)"*

17. The cumulative effect of what has been stated above brings this Court to an inescapable conclusion that the prosecution miserably failed to bring home guilt against the appellants and that the incident did not occur in the mode, manner and at the stated time. The impugned judgment is suffering from inherent defects and the learned trial Judge misdirected himself in law and on facts of the case, which calls for interference. The instant criminal appeal is allowed the impugned judgment is set aside and the appellants are acquitted of the charges, they shall be released forthwith if not required to be detained in connection with any other criminal case. Since we have set aside the impugned judgment of conviction, therefore, the connected criminal appeal No.35-B of 2019 and criminal revision No.09-B of 2019, are hereby dismissed for having become infructuous.

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

Announced

Dt: 08.02.2022
Azam/P.S

JUDGE

JUDGE

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

26/02/2022

SCANNED
26 FEB 2022