JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(*Judicial Department*)

Cr. A No.167-B of 2012

Hayatullah
Vs
The State & another.

JUDGMENT

Date of hearing 10.04.2017.

Appellant-Petitioner: **By Muhammad Rashid Khan Dirma Khel & Muhammad Anwar Khan Maidad Khel, Advocate.**

Respondent : **State by Shahid Hameed Qureshi, Addl. AG and others Sultan Mehmood Khan, Advocate.**

ISHTIAQ IBRAHIM, J.--- This criminal appeal has been directed against the judgment dated 06.10.2012, rendered by learned Additional Sessions Judge-III, Bannu, whereby Hayatullah, appellant, involved in case F.I.R No. 86 dated 13.06.2005 charged under section 302/324/148/149 P.P.C Police Station Haved, Bannu, was convicted under section 302(b)/149 P.P.C and sentenced to imprisonment for life on

four counts with fine Rs.50,000/- on four counts under section 544-A Cr.PC, or in default thereof to further undergo six months SI. He was further convicted under section 324/149 P.P.C, and sentenced to seven years on three counts with fine Rs.20000/- for attempting at the lives of complainant Ali Abbas, Imranullah alias Imran and Hamza Ali, in effectively (on three counts) or in default thereof to further undergo four months SI. He was convicted under section 337-F (vi)/149 P.P.C, for causing injuries to complainant and sentenced to two years SI with Daman Rs. 2000/- or in default thereof to further undergo the appellant/ convict shall be treated under section 337-Y of the P.P.C. However, he was extended benefit of section 382-B Cr.PC and the awarded sentence was ordered to be run concurrently.

2. The complainant Ali Abbas has also filed Cr.R No.52-B/2012 for enhancement of sentence of appellant. As both the criminal appeal and criminal revision are outcome of the same impugned judgment and F.I.R are going to be decided through this single judgment.

3. The complainant Ali Abbas, on 13.06.2005 at 19.30 hours, in injured condition at Emergency room of Civil Hospital, Bannu reported the matter to Ayub Khan ASI, to the effect that on the same date, he alongwith his brothers Sabz Ali, Tariq Khan, Hamza Ali, Imran, Sardar Ali Khan and his nephew Sakhi Zaman son of Tariq Khan were busy in preparing of Embankment in their fields situated in village Kotka Ghulam Qadir Dakhli Bragi. Meanwhile, his co-villagers accused (1) Tehsil Khan (2) Bahader Khan (3) Gul Daraz (4) Shamaraz (5) Ihsanullah (6) Sharif (7) Hayatullah (8) Latif Khan (9) Atlas Khan (10) Muhammad Nawaz (11) Rehmatullah (12) Gul Zaman (13) Saifullah (14) Yousaf Khan and (15) Muqarab, all armed with Kalashnikovs, appeared, forbidden them not to make embankment and asked one another to kill, let they may not escape alive. All the accused with intention to commit their qatl-e-Amd, started firing at them, as a result whereof his brothers Tariq Khan, Sardar Ali and his nephew Sakhi Zaman hit and died at the spot, while the complainant and his brother Sabz Ali sustained injuries, whereas Hamza Ali and Imran escaped unhurt. Accused after the occurrence decamped from

the spot. Motive behind the offence as stated by the complainant was dispute over landed property. It is pertinent to mention here that the injured Sabz Ali was referred to Peshawar, but on the way he succumbed to the injuries.

4. Ayub Khan ASI, reduced the report of complainant in shape of Murasila, read over and explained to him, who after admitting contents of the same as correct, signed the same. Murasila was sent to the Police Station through Constable Abdur Rehman No.665, which culminated into above mentioned F.I.R. Ayub Khan ASI, prepared injury sheets, inquest reports and sent the injured and dead bodies of the deceased to Doctor for medical examination of the injured and Post mortem examination of the deceased. Copy of F.I.R sent to the investigation officer Amanullah Khan SI, who proceeded to the spot and prepared site plan (Ex: PW 12/2) on the pointation of PW Imranullah Khan, collected blood stained earth from the place of deceased Tariq Khan, blood stained hay (bhosa) from the place of deceased Sardar Ali Khan, and injured Sabz Ali and complainant, vide recover memo Ex:PW 12/1. He received blood stained garments of deceased vide recovery memo Ex:

PW 12/3. Placed on file F.S.L result regarding garments of deceased vide Ex:PW 12/4. He recorded statements of PWs. On completion of investigation he submitted case file to the S.H.O. concerned on 27.06.2005, as at that time all the accused were absconding, challan under section 512 Cr.PC was submitted before the court. The learned trial court after completion of trial, vide order dated 24.02.2006 declared proclaimed offenders and perpetual warrants of arrest were issued against them. On 12.07.2006 accused Sharifullah, on 14.08.2006 accused Gul Daraz Khan and Shama Raz were arrested and after completion of investigation against them, supplementary challan was submitted before the learned Additional Sessions Judge-V, Bannu, but during trial on materialization of compromise, the arrested accused alongwith accused Tehsil Khan were acquitted on the basis of compromise vide order dated 25.09.2006. Thereafter, accused Saifullah was arrested on 18.12.2006, on completion of investigation against him supplementary challan was submitted on 26.01.2007. The learned trial court on conclusion of trial convicted and

sentenced the accused vide judgment dated 03.06.2008, by the learned Additional Sessions Judge-III, Bannu.

5. The present accused/ appellant Hayatullah was arrested on 05.05.2011 and after completion of investigation against him, supplementary challan was submitted on 10.05.2011. After complying with legal formalities under section 265-C Cr.PC, the accused/ appellant was charge sheeted on 02.10.2012, to which he pleaded not guilty and claimed trial. The prosecution in order to prove guilt of accused/ appellant produced and examined as many as fifteen (15) witnesses. After close of prosecution evidence, it was pointed out by learned counsel for the parties, that accused/ appellant has not been charge sheeted to the extent of in effective firing at Imran Khan and Hamza Ali, due to which recharge was framed to that extent. Learned counsel for the parties, recorded their statement that they do not want to lead further evidence and rely upon the evidence already recorded. Thus, statement of accused was recorded under section 342 Cr.PC, wherein he professed his innocence, he did not opt to produce defense evidence or to be examined on oath as provided under section 340 (2) Cr.PC.

The learned trial court, after hearing arguments of learned counsel for the parties, convicted and sentenced the accused/ appellant vide impugned judgment dated 06.10.2012. The accused/ appellant challenged his conviction through this appeal, while the complainant filed criminal revision petition for enhancement of sentence, hence, both, appeal and revision are going to be decided through this single judgment.

6. Learned counsel for the accused/ appellant argued that the complainant exaggerated the charge by spreading wide net and implicated fifteen persons of different families of the village, in a delayed report lodged after consultation and deliberation. He further argued that no specific role has been attributed to the accused, while general role of firing has been given to all the accused. He developed his arguments by arguing that ocular account being closely related to deceased is smeared with interestedness and witnesses are not worthy of credence. He went on to say that no crime empty, whatsoever, was recovered from the spot, meaning there by that the occurrence has not taken place in the mode and manner as alleged by the complainant. He fortified his arguments by

saying that regarding the alleged motive F.I.R No.54 dated 08.06.2003 was registered, which was compromised, hence, on such motive no one can dare to commit such brutal offence. He further supplemented that medical as well as circumstantial evidence are in conflict with the ocular version and do not support the prosecution story. His last argument was that the accused/ appellant was away from the country since 1997, and was also arrested from UAE, but despite that learned trial court, being influenced by the conviction of co-accused Saifullah by learned Additional Sessions Judge- III, Bannu and the order of this court dated 01.06.2011, wherein the conviction of co-accused was upheld, while the present case is altogether on different footings. He concluded his arguments by saying that the prosecution has miserably failed to establish his case beyond any reasonable doubt, therefore, the judgment of learned trial court requires reversal.

7. On the other hand, learned Addl: A.G assisted by learned counsel for complainant vehemently opposed the arguments advanced by learned counsel for accused/ appellant by contending that the accused/ appellant is directly charged in

a broad day light occurrence for brutal murder of four deceased and causing injuries to the complainant with a strong motive, supported by F.I.R No.54 registered earlier. They went on to say that ocular as well as circumstantial and medical account very much supports the version of complainant and on the testimony of these witnesses co-accused namely Saifullah has been convicted by the learned Additional Sessions Judge-III, Bannu which judgment has been confirmed by this Court vide judgment dated 01.06.2011 and upheld by the august Supreme Court by refusing the leave to him, hence no exception could be taken. Their last argument was that the prosecution also has been able to prove guilt of accused/ appellant beyond any shadow of doubt, therefore, the judgment of learned trial court needs not to be interfered with, rather by accepting criminal revision petition, of the complainant/petitioner the sentence awarded to the appellants/ convicts be enhanced.

8. Arguments heard and record perused.

9. Before dilating upon the merits of the present case first we would like to discuss, the main grounds of prosecution

case, that evidence against co-accused namely Saifullah was believed and his Cr.A No.50/2010 was dismissed, vide judgment dated 01.06.2011, by this court and leave to appeal was also refused in Jail petition No.48 of 2012 by the apex Court vide order dated 18.12.2012. Law has provided holding independent trial to each accused, whenever he is arrested. Court is under obligation to assess the evidence led by the prosecution independently, without being influenced from acquittal or conviction of co-accused, whose trial was conducted earlier. Rationale behind holding of fresh trial would be a futile exercise, if courts subscribe to the result of trial conducted earlier. Our view is fortified by seeking guidance from the judgment rendered by this court in case of ***"Zalay Mir Vs the State" (1997 PCr. LJ 510) and "Sher Akbar Vs Mst. Sajida and another" (2011 YLR 1014)***, wherein this Court has dealt almost similar situation and has rendered judgments different to those earlier discussed.

10. We are conscious of the fact that evidence has been believed qua the convicted co-accused Saifullah, with utmost regards to the reasoning advanced by this court and

leave refusing order of the apex court, we proposed to differ with findings, while dealing with the case in hand, on the following grounds.

11. Ocular account in this case was furnished by complainant PW-13, Ali Abbas and PW-14, Hamza Ali Khan. Both these PWs are brothers of the three deceased and uncle of one deceased Sabz Ali, they are closely related to each other, therefore, their testimony is to be judged with care and caution. There is no denial that interestedness or disinterestedness is not the yardstick for believing or disbelieving a witness, rather intrinsic worth or inherent merit of the testimony of a witness is to be considered. In order to believe an interested witness first the prosecution has to satisfy the Court regarding presence of the witnesses at the spot and secondly whether they are credible truthful witnesses and thereafter conviction can be based on testimony of interested witness, if same is corroborated by some strong corroborative piece of evidence. Reliance is placed on case titled ***"Haroon alias Harooni Vs the State and another" (1995 SCMR 1627) and "Haji Rab Nawaz Vs***

Sikandar Zulqarnain and 7 others" (1998 SCMR 25), wherein it is held that:

> ***"One salutary principle laid down by this Court in this behalf and which is now firmly established is, that in a case involving capital punishment, the Courts will not base conviction of an accused solely on the testimony of interested witness unless such evidence finds corroboration by some other independent and unimpeachable nature of evidence or circumstance in the case. This rule of prudence though not statutory in nature, has been followed by Courts so consistently through years that it has come to be recognized almost as a rule of law. The departure from this rule is to be found rarely and in very exceptional circumstances of a case. Therefore, to say that the evidence of an interested witness is to be accepted solely on the ground that it remained unshaken during cross-examination is not a correct proposition."***

12. Complainant Ali Abbas no doubt sustained injuries during the incident. It is not the case that he got injuries somewhere else. We are not oblivion of fact that stamp of injuries are indicative of the presence of a witness and not of his

truth. Reliance is placed on case titled ***"Naseeb-ur-Rehman and 3 others Vs the State and another (2016 P Cr. LJ Note 17)*** wherein it is held that mere presence of stamp of injuries on the person of a witness, is not a yardstick for determining the truthfulness or falsehood of a witness. Every injured witness would not speak the truth and every uninjured eye-witness would tell a lie. Circumstances of the case and intrinsic worth of statement of witness would determine the veracity and his credibility.

13. Undoubtedly, its quadruplet murder case wherein four persons lost their lives, while complainant received fire arm injuries and for that fifteen persons are charged for indiscriminate firing equipped with sophisticated weapons, i.e. Kalashnikovs. Site plan would reveal that all the accused except Latif are standing in one row, firing at the complainant party, but strange enough not a single empty has been recovered from the crime scene, how the prosecution would reconcile the situation, where fifteen persons are charged for indiscriminate firing, more so, without specification or attribution of role to any accused.

14. Post Mortem report of all the deceased including medical report of complainant, shows that total injuries are seventeen in number out of which eleven (11) are entry wounds, while five are graze wounds.

1.	Ali Abbas Injured	One entry wound
2.	Tariq	Three entry wounds
3.	Sabz Ali Khan	Two entry wounds Two graze wounds
4.	Sardar Ali	Three entry wounds Three graze wounds.
5.	Sakhi Zaman	Two entry wounds.

If fifteen persons armed with Kalashnikov resort to firing the dead bodies would have been ridden with bullets, when the distance shown in the site plan is 16 to 20/22 paces. Even a single person can inflict or cause much more damage as to that of the present and most particularly when he is equipped with formidable weapon like Kalashnikov. Reliance is placed on case titled, ***"Sohni Vs Bahaduri and 5 others and the State" (PLD 1965 SC 111),*** wherein it is held that:

> ***"In view of number and nature of injuries one may legitimately ask whether this could possibly have been the result of assault by six accused persons or that they could have been easily caused by two or three persons. Viewing all the circumstances we are satisfied that the High Court was right in insisting on some corroboration of the evidence of the eye-witnesses connected the accused with the crime. As such corroboration was lacking, the High court was justified in giving the benefit of doubt to the accused persons.***

15. Apart from that all the entry wounds on the complainant as well as the deceased are of ¼ X ¼ dimensions, which further negate the version of complainant qua the participation of the accused nominated in the F.I.R. Reliance is placed on case titled ***"Farman Ali and 3 others Vs The State (PLD 1980 SC 201),*** wherein it is held that:

> ***"It is true that according to the prosecution each one of the three appellant brothers was armed with a .32 bore pistol: But the type of injuries suffered by Rashid Khan rather suggest that it was the work of one man. It is common knowledge that .32 bore pistol is an automatic weapon carrying in its***

> ***charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right supericr iliac spine, the inlet -size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants. There. is no evidence on the record to show, however, as to which one of the three had caused him the said injuries, therefore, no option is left but to hold that the prosecution has failed to bring home its case against any one of the appellants."***

In spite of the fact that firing at all the deceased was made from different directions and distances simultaneously.

16. Record also shows that prior to the present occurrence complainant side has so many blood feud in the area and even they were present at crime venue empty handed and were not possessing any firearm, which in our view and most particularly in this area is improbable and does not stand to reason rather it can be safely adjudged that the occurrence has

not taken place at the time mode and manner as asserted by prosecution.

17. Story of the prosecution that they were busy in making the embankment (*Bana*) is not supported by any independent evidence, only the IO has shown that embankment (*Bana*) in site plan, he has not bothered to take into possession the instruments through which the work was carried out, which was incumbent upon him, but it is not the case here. Reliance is placed on case titled, ***"The Stae Vs Muhammad Akram" (PLD 1985 Peshawar 116)***, wherein it is held that:

> ***"In the least, the non-recovery of sickles from the spot did create a doubt as to the correctness of the prosecution story disclosed at the trial."***

18.. From the above assessment of evidence it is discernible that the charge made by the complainant party is exaggerated, as fifteen persons of three different families have been implicated on the strength of the simple motive, to delete their enemies in one stroke. Reliance is placed on 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. It seems that most of the persons including the respondents have been charged because of previous enmity. The tragedy may have been enacted by Mukhtar who has gone into hiding or Munawar who has been acquitted because the deceased shabbier was alleged to have illicit relation with their sister, but many who have no visible nexus with this part of the story have also been roped in. It is so because it is customary in this part of the country to throw wide net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the one who is innocent or who is actually responsible for the commission of the crime. The court, therefore, is required to exercise much greater care and circumspection while appraising evidence.***

19. The prosecution version is that, all the fifteen accused persons have made indiscriminate firing at the complainant party. No specific role has been attributed to any of the accused. During the trial prosecution has failed to establish role of each accused and the event of non-recovery of

crime empties from the spot has went a step ahead to disprove the factum of firing by one person or more. It has been held that in view of size and number injuries inflicted upon the body of deceased and complainant, one person can inflict such number of injuries. On the other hand, six amongst the fifteen have been acquitted on the basis of compromise. In such events, who were the actual culprits, the persons who have effected compromise or the accused/ petitioners is in mystery, which creates serious dent in the prosecution case. It is the principle enshrined in Islamic jurisprudence, fourteen hundred years ago that “it would be better to acquit hundred culprits than convicting one innocent soul.” Which has now been transformed into the form of the principle that, “acquitting by error would be better than convicting by error”. The said commandment has evolved into the theory of benefit of doubt, which, invariably, is extended to the accused for safe administration of criminal justice.

20. It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicious mind is sufficient for acquittal

of the accused. Reliance is placed on case law ***"Tariq Pervaz Vs the State" (1995 SCMR 1345).*** The same principle has been reiterated by the Hon'ble Supreme Court in ***Muhammad Akram's*** case ***(2009 SCMR 230)***, wherein it is held that:

> ***"13. The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused*** would ***be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."***

21.. The learned trial Court has erred in law by convicting appellant on the basis of such a weak type of evidence. It would not be safe to maintain conviction on the basis of such shaky and scanty evidence, consequently, this

criminal appeal (Cr. A No.167-B/2012) is allowed, the impugned judgment of conviction dated 06.10.2012 of learned Additional Sessions Judge-III, Bannu is set aside and accused/ appellant Hayatullah is acquitted of the charges leveled against him. While Cr. R No. 52-B/2012 filed by complainant Ali Abbas stands dismissed. These are the reasons of our short order of the even date, which is as under:

> ***"For the reasons to be recorded later, this criminal appeal is accepted, the impugned judgment of conviction dated 06.10.2012, rendered by learned Additional Sessions Judge-III, Bannu is set-aside and consequently appellant Hayatullah is acquitted of the charges leveled against him. He be set at liberty forthwith, if not required in any other criminal case. Cr.r No.52-B of 2012 filed by complainant Ali Abbas, stands dismissed.***

Announced.
10.04.2017
Azam/P.S

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