

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(Judicial Department)

J.Cr.A No.03-B of 2018

Zahir Shah
Vs
The state etc

J U D G M E N T

Date of hearing _____ 03-12-2019 _____


Appellant (s) by: Muhammad Rashid Khan
Dirma Khel Advocate.

Respondent by: Muhammad Farooq Khan Sokarri
Advocate.

State by: Shahid Hameed Qureshi Addl: A.G.

SAHIBZADA ASADULLAH, J.- Through this single
judgment we intend to dispose of instant Criminal
appeal as well as connected ***Criminal Revision No.04-***
B of 2018, titled Mst. Anwar Bibi Vs The State etc,
being arisen out of one and same judgment dated
20/12/2017.

2. Zahir Shah, the appellant/convict through present criminal appeal preferred under section 410 Cr.P.C has impugned the judgment dated 20-12-2017, passed by the learned Additional Sessions Judge-IV, Bannu, whereby he was convicted and sentenced in case FIR No.415 dated 19/09/2014, under section 302 PPC, registered at Police station Ghoriwala, district Bannu, the details whereof are as under: -

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- i. U/S 302(b) PPC, he was convicted and sentenced for Qatl-e-Amd of Haji Abdul Samad to imprisonment for life with compensation of Rs.10,00,000/- (rupees ten lac) payable to the legal heirs of the deceased as provided U/S 544-A Cr.P.C, and in case of default in payment of compensation, the same shall be recovered as arrears of land revenue from the person and estate of accused/appellant.*
 - ii. Benefit of Section 382-B Cr.P.C is also extended to the convict/appellant.*

3. The complainant Mst. Anwar Bibi has also filed a criminal revision No. 04-B of 2018 against

the convict / appellant Zahir Shah for enhancement of his conviction.

4. Concisely the facts, as is evident from the F.I.R Ex: PW-3/1, lodged by the complainant Mst. Anwar Bibi in the emergency room of civil Hospital Bannu are that on the eventful day, her husband Abdus Samad was busy in recitation of Holy Quran in the courtyard of *Masjid* adjacent to her house, while she was taking breakfast for him from her house; that as soon as she reached near the *Masjid*, it was about 0615 hours, in the meanwhile the accused/ appellant Zahir Shah S/O Mirali Resident of Ameen Mughal Khel armed with repeater 12 bore shot gun and Kalashnikov came there, first he fired with repeater 12 bore shot gun and then made firing at him with Kalashnikov, resultantly deceased was hit and fell to the ground. Thereafter accused fled away from the spot, when she attended her husband, he was breathing his last and died on the spot. There was a money dispute between

the accused and the appellant/accused. Allegedly the occurrence was also witnessed by another wife of deceased namely Mst. Mehtab Jani.

5. The report of the complainant was reduced into writing in shape of *murasila* (Ex.PW 4/1) by Rahmatullah ASI and thereafter he prepared the injury sheet and inquest report of deceased Haji Abus Samad and handed over to constable Samiullah No.5870 FRP for escorting the dead body to the doctor for PM examination, while *murasila* was sent to the Police station through constable Rashid No.5890 for registration of case against the accused, the contents of which were incorporated into F.I.R (Ex.PW 3/1). Copy of F.I.R was handed over to Muhabbat Khan ASI CTD for conducting investigation, who on receipt of it, proceeded to the spot, where he prepared site plan (Ex.PW 11/1) on the pointation of complainant Mst. Anwar Bibi. During spot inspection, he also secured blood through cotton from the mate and also took into

possession 02 empties of 12 bore from the place of appellant/ accused as well as blood stained *Qamees* of deceased, sent by the doctor through constable, Samiullah No.5870, from the hospital, packed and sealed in parcels on the spot and in this respect, also prepared recovery memos Ex.PW 9/1 and Ex.PW 9/2 respectively. He also placed on file the result of blood stained articles and that of empty shells which were available on as Ex.PW 11/2 and Ex.PW 11/3 respectively. After completion of codel formalities, he submitted complete challan against the appellant/ accused for the purpose of proceedings U/S 512 Cr.P.C.

6. After arrest of accused/appellant on 13-10-2015, supplementary challan was submitted against him in the trial court. He was summoned from Central Jail Bannu. Copies U/S 265-C Cr.P.C were supplied to him. Thereafter he was charge

sheeted, to which he pleaded not guilty and claimed trial.

7. In order to prove its case, prosecution examined as many as (11) witnesses. After closure of the prosecution evidence, statement of appellant/ accused Zahir Shah was recorded under section 342 Cr.P.C, wherein he professed innocence. He neither wished to be examined on oath, as required under section 340 (2)Cr.P.C. nor opted to produce defence evidence. After hearing the prosecutor and defence, learned trial court convicted and sentenced appellant/ accused, as mentioned earlier, hence the instant appeal.


8. Arguments of learned counsel for the parties heard and record perused with their valuable assistance.

9. The complainant Mst. Anwar Bibi widow of the deceased Haji Abdus Samad reported the matter

at 07.30 hours on 19.09.2014 at DHQ Hospital Bannu, to one Rehmatullah ASI, PW-04, regarding the death of her husband in the mosque of the village. The story narrated in the F.I.R that the deceased, while reciting the Holy Quran in the mosque situated near his house that accused/ appellant Zahir Shah came duly armed with a 12 bore repeater (shotgun) and a Kalashnikov and opened firing initially, with his 12 bore shotgun and thereafter with his Kalashnikov and the occurrence was stated to be witnessed by the complainant Mst. Anwar Bibi and eye-witness Mst. Mehtab Jani who was examined as PW-10. The parties are closely related as the accused is brother-in-law of the deceased and PW-10 Mehtab Jani is sister of the accused/ appellant, though issueless. The spot is a small mosque comprising of one room and a little courtyard where the deceased was shown at point No.1, while reciting the Holy Quran, the accused/ appellant was shown at point No.4 and the complainant alongwith PW-10 at point

No.3 and 4 respectively. The complainant was examined as PW-09, who when appeared before the trial Court, stated that as per routine she in the company of PW-10, her *soken* (2nd wife of her husband) used to take breakfast for the deceased to the mosque and that on the eventful morning when they were near to reach the mosque, while in possession of breakfast, that the accused emerged and with loud voice addressed the deceased "*Haji Gul how are you*" with the voice the deceased stood up and the accused started firing which landed on his chest with two entry wounds. The complainant while reporting the matter did not say a word regarding addressing of deceased by the accused, but during her court statement she improved and the only purpose behind was to bring her statement in line with the medical evidence, as on record the deceased was shown with his face towards west, while reciting the Holy Quran, whereas his back was exposed to the accused/ appellant and if this was so then the seat of

injuries must have been on the back, but in fact nobody witnessed the occurrence rather the witnesses are chance witnesses and the report was made after preliminary investigation. In case titled **“Noor Muhammad Vs The state and another” (2010 SCMR 97)**, it is held that:

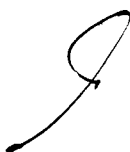


“There was no impediment or any hurdle in the way of the complainant or any other witness to have gone to the police station for lodging the report. It appears that when the deceased was removed from the place of incident to the hospital they must had passed from Rawat Police Station and could have easily stop therefore, for a little while for lodging the report and at that time the deceased was also in his senses he could have given the true facts about the incident to the police but the complainant and P.Ws. did not choose to do so. Even one of the P.Ws. could have been dropped at the Rawat for lodging the report but this had also not happened.”

10. The distance between the mosque and the house of the deceased was nearly forty / fifty feet and there was hardly any occasion for the deceased to be provided with breakfast as he could easily afford coming home for the same. This introduction of breakfast by the complainant is after thought with the only purpose to establish her presence on the spot. During spot inspection neither the Thermos, tea cups nor pot containing Parathas was produced to the investigating officer and so the *Rahil* and the Holy Quran, while preparing the site-plan. The presence of these two witnesses is doubtful as both of them were *Parda Nasheen* Ladies and their coming to the mosque in this part of the country does not appeal to a prudent mind. Admittedly, both the ladies are illiterate and it was hard for them to specify the weapons as in routine the women of these areas are alien to the weapons and what to say of its bore. The witnesses were chance witnesses as they could not establish their presence on

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spot and the story so tailored does not appeal to prudent mind that the accused at the time of occurrence was armed with two weapons and used one after the other for commission of the offence. This aspect was further belied by the circumstantial evidence, as no empty of 7.62 bore was recovered from the spot and even the F.S.L report in respect of the empties so collected could not connect the appellant with commission of the offence. In case titled “G.M Niaz Vs the State” (2018 SCMR 506), wherein it is held that:



“The said eye-witnesses were not only very closely related to the deceased but they were also chance witnesses who had utterly failed to bring anything on the record establishing their claimed presence with the deceased at the relevant time.”

11. The prosecution story is full of infirmities with all efforts made to improve so that harmony could be achieved between the circumstantial and medical evidence. The complainant stated that soon after the occurrence the dead-body was wrapped in a *Chadar*

and was placed in a Flying Coach and was taken to the Hospital, where the matter was reported. The identification before the police and the Doctor during Post Mortem, examination show that the identifiers were the brothers of the complainant which suggests that in fact the people attracted to the spot and also brothers of the complainant, who took the dead-body to the hospital and that the complainant was not accompanying the dead-body, this was further clarified when PW-04 Samiullah constable was examined, who categorically stated that they rushed to the spot on receiving the information and escorted the dead-body from spot to the hospital, this contention of PW-07 takes the cart in another direction and his testimony cannot be ignored and if we trust this witness then we cannot hold otherwise but to say that the report was made on the spot after the police arrived and thereafter the dead-body was taken to the hospital after preliminary investigation. In case titled "Nazeer

Ahmad Vs the State and others” (2019 SCMR 594),

wherein it is held that:

“The FIR in respect of the incident in issue had not been lodged at the Police Station giving rise to an inference that the same had been lodged and registered after deliberations and preliminary investigation. The record of the case shows that some stranger had informed the police about the occurrence and that stranger had never been identified or produced during the trial.”


12. The investigating officer came to the spot, who effected recoveries on pointation of the complainant and thereafter the site-plan was prepared. The pointation was made only by the complainant whereas PW-10, Mst. Mehboob Jani figures nowhere and we are surprised that when the Post Mortem was conducted and the investigating officer reached to the spot why the male members of the family were not associated with the process of recovery, that why the

complainant being a lady was preferred to be a marginal witness and that why the complainant or the investigating officer kept silence regarding presence of PW-10, Mst. Mehboob Jani, who too was the wife of the deceased. The investigating officer appeared as PW-11, and was cross-examined who stated that he recovered 2 empties of 12 bore from the spot alongwith blood, but neither the *Rahil* nor the Holy Quran was taken into possession. This witness was further cross-examined and he admitted that he observed no bullet marks on the surrounding walls of the mosque. PW-10 during her Court statement stated that when the deceased fell on the ground the complainant took his head in her lap and by then blood was oozing from the wounds, but surprisingly neither her hands nor her clothes were besmeared with blood. The complainant was asked regarding caliber of the weapons, who stated that she learnt it from her husband as he was fond of weapons. The complainant further stated that the

weapon used were taken by the accused from their house as the relation between the two i.e. the accused and deceased were cordial. Nothing was brought on record that what prompted the accused to kill the deceased, though the complainant introduced a dispute over an outstanding amount which had brought them at daggers drawn, to her it was the said cause which led to the death of the deceased.

13. The witnesses made improvements with the sole purpose to bring their statements in line with the story they forwarded. The witness stated that the deceased had longstanding civil dispute with his nephews where the accused/ appellant took active part and supported the deceased and when the dispute came to an end the accused demanded Rs. 50,00,000/-(Fifty lacs) from the deceased and the deceased was not ready to honour the demand so this incident. The prosecution could not bring anything on record to justify the claim. The investigating officer failed to

collect any material and the complainant did not produce any witness to substantiate her stance, the introduction of money dispute was after thought with malafide intentions. The motive alleged could not be proved. The motive once alleged, if not established will weigh against the prosecution. 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 prosecution case even lacks its support from the medical evidence as admittedly the

deceased was reciting Holy Quran in the mosque and was facing west whereas the accused/ appellant was standing at point No.4, just behind the deceased at a distance of 16 feet and the deceased received two firearm entry wounds on his chest and even the Doctor opined that an X-Ray was done and the pellets were lying in group form. The medical evidence is in conflict with the ocular account, on one hand if the statement of the complainant was taken to be correct the entry wounds should have been from the back. Keeping in view the distance as per medical jurisprudence a 12 bore shotgun cause an entry wound from 12 feet as 5X8 inches, and the pellets will enter separately, the doctor has given the dimension 1"x1" which cannot be caused from such a long distance.


15. The learned counsel stressed again and again the inter-se relationship between the parties and he vehemently contended that how a sister i.e. PW-10, would depose against her brother and to the learned

counsel on this score alone the appeal merits dismissal, but we say sorry, if his contention was acceded to then results would be dangerous. This Court cannot go with emotions and sentiments of the people involved but to follow the dictates of law, failing which the desired goals can never be achieved and its failure will bring the judicial machinery to a halt. This being the Court of appeal and is under heavy obligations to scan and scan the record, so that a just and fair conclusion could be drawn. In case in hand the relation is admitted but the presence of the witnesses on the spot at the time of the occurrence was not established.

16. The learned counsel for the appellant vehemently argued that the accused/ appellant remained absconder for sufficient long time, but mere absconsion of accused is not conclusive guilt of an accused person; it is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicions after all are suspicions,

the same cannot take the place of proof, the value of absconion, therefore, depends on the facts of each case.

In case titled "*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---Abscondence of accused in such circumstances could not offer any useful corroboration to the case of prosecution"

17. Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

18. After thoroughly evaluating the evidence available on file this court reaches to an inescapable

conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case. So far as the connected Criminal Revision No.04-B/2018 is concerned, the same stands dismissed.

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

Announced.
03.12.2019


JUDGE.

JUDGE.

