

Judgment Sheet
IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT
Criminal Appeal No.1222-P of 2019.

JUDGMENT

Date of hearing: 19.07.2021.

Astaghfirullah, Advocate, for the appellant.

Mr. Muhammad Nisar Khan, AAG, for the State.

Mr. Shahab Khattak, Advocate, for the complainant.



SYED ARSHAD ALI, J.- Through this appeal, appellant/convict, Saeed Ayaz son of Ibrahim has assailed judgment dated 23.09.2019 of learned Additional Sessions Judge-XII, Peshawar, rendered in case F.I.R No1085 dated 05.12.2000 registered under sections 302/324/34 P.P.C at Police Station *Badhber*, Peshawar, whereby, he was convicted u/s 302 (c) P.P.C and sentenced to undergo fifteen (15) years R.I as *Ta'zir*, with directions to pay Rs.50,000/- (rupees fifty thousand) as compensation to the legal heirs of deceased Waris Khan in terms of section 544-A

Cr.P.C or in default to undergo six months S.I. He was further convicted u/s 324/34 P.P.C and sentenced to undergo five (05) years R.I for attempt at the lives of PWs Baras Khan and Anwar Khan, with a fine of Rs.20,000/- or in default to undergo six months S.I. Benefit of section 382-B Cr.P.C was extended to the convict-appellant.

2. On 05.12.2000 at 22:00 hours, complainant Baras Khan (PW-6) reported the matter before the police to the effect that his sons namely Waris Khan and Anwar Khan would work in a bricks kiln situated at *Maira Musazai*. In the same kiln, present appellant and his co-accused namely Riaz and Mir Wali were also working. On eventful day at 20:30 hours, on hearing some noise, the complainant attracted to the spot/kiln, where he saw a scuffle between his sons and present appellant and co-accused on some matter. All the three accused were armed and they started firing at complainant-party, as a result of which, his son namely Waris Khan sustained firearm injuries while he (complainant) and his son PW Anwar escaped unhurt. Injured Waris Khan succumbed to his

injuries on the way to the hospital. No motive was disclosed by the complainant for the murder of the deceased. This report of the complainant was reduced in shape of *murasila* (Ex.PW6/1) by Abdul Hamid (Rtd) Inspector (PW-10), on the strength whereof the F.I.R was registered against the appellant and co-accused.

3. Complainant Baris Khan (PW-6) through the FIR ibid had charged the present appellant Saeed Ayaz as well as Riaz and Mir Wali already convicted for the murder of his son Anwar.

4. Initially, co-accused namely Riaz and Mir Wali were arrested and convicted in the case while the present appellant was absconding and thus was proceeded under section 512 Cr.P.C. On his arrest on 25.04.2018 and completion of investigation, supplementary *challan* was submitted against the appellant before the learned trial Court. After the compliance of the provision of section 265 (c) Cr.P.C, on 30.07.2018 the appellant was formally indicted to which he pleaded not guilty and claimed trial. In order to substantiate its charge against the appellant

the prosecution produced as many as 13 witnesses besides constables Amir Muhammad and Fazal Qayum as CW-1 and CW-2. Thereafter, statement of the appellant was also recorded u/s 342 Cr.P.C, wherein he denied the allegations of the prosecution, however, he neither wished to be examined on oath nor desired to produce evidence in defence.

5. On conclusion of trial, the appellant was convicted and sentenced by the learned trial Court in the manner mentioned above through its judgment dated 23.09.2019, hence, this criminal appeal.

6. Learned counsel appearing on behalf of the complainant as well as learned AAG has raised a preliminary objection that on the same set of evidence which was recorded in earlier trial, co-accused, namely, Riaz and Mir Wali were convicted, therefore, this appeal also requires the same treatment and as such the conviction be maintained as the prosecution evidence remained successful in establishing case against the present appellant.

7. Mr. Astaghfirullah, Advocate, learned counsel representing the appellant while rebutting the

arguments of learned counsel for the State/complainant has argued that under the criminal law evidence recorded in the earlier proceedings even in the same FIR cannot be considered for conviction of an accused who is subsequently arrested and tried through a separate trial. He has placed reliance on **“ZALEY MIR alias ZALEY..Vs..STATE” {PLJ 1999 Cr.C.(Peshawar) 1022}**. In this view of the matter this court would first address the aforesaid objections/legal issue.

8. Arguments of learned counsel for the appellant and learned AAG for the State assisted by learned counsel for the complainant heard and record perused.

9. The concept of independent and fair trial is engrained in our criminal administration of justice and for that reason when number of accused are charged for an offence and some of them are arrested in time and their case is investigated and then sent for trial the outcome of this trial will have no bearing on the trial of the accused who has been subsequently arrested and tried. The Court seized of the subsequent trial has to apply his independent judicial mind while

appreciating the evidence recorded in the said trial. However, in exception circumstances when any of the witness who had recorded his statement in the earlier trial is not available in terms of Article 47 of the Qanun-e-Shahadat, 1984, his testimony can be transposed to the subsequent trial but the said statement should be very carefully examined keeping in view the surrounding circumstances of each and every case. The apex Court in the case of **“ALLAH DITTA..Vs..The STATE”** {PLD 1960 Supreme Court (Pak) 18} while hearing an appeal against the judgment of the High Court where the High Court while dealing with a case of absconder whose co-accused faced the trial and were convicted, had literally relied upon the findings recoded in earlier judgment of the High Court of the co-accused and sentenced the subsequently arrested accused. The apex Court had remanded the case with direction that the High Court has to apply independent mind to the evidence recorded in a separate trial of the absconder which was indeed the only case before the Court. This issue was elaborately dealt with by the Indian Supreme Court in case of ***“Megh Singh..Vs..State of***

Punjab” (2004 SCC CrI. 58) wherein it has observed;

“The acquittal of some of the co-accused based on appreciation of evidence in their case is no ground to bar a criminal trial as the appreciation by the concerned judge in a criminal trial is not binding when the latter case is tried in the case of the other co-accused and it is for the learned trial Judge to appreciate the evidence adduced in the latter case. In that regard, possibly a particular witness may or may not be believed and his reliability may also be tested in the light of what he has stated in the earlier case etc. But those are all matters for the trial Judge to do. All that we want to say is that it will not preclude the trial of the case for the mere reason that the co-accused were acquitted”

This issue was reaffirmed in the case of “Gorle Section Naidu..Vs..State of AP” (AIR 2004 SC 1169). Similarly the full Court of Kerala High Court in case of “Moosa..Vs..Sub Inspector of Police” (2006 KHC 184) has observed;

“The acquittal of some of the accused by itself is not a reason to bar the trial in the case of the other accused. Here, the other accused was absconding. It was also held by the Full Bench that in a trial against the co-accused the prosecution is not called upon, nor is it expected to adduce evidence against the absconding co-accused”

Our own High Court in the case of **“HAYATULLAH..Vs..ALI ABBAS and another”** (2018 YLR Note 43) has also held a similar view. Hence the objection is overruled.

10. Moving on to the merit of the case. The incident was reported by complainant Baras Khan (PW-6) on 15.12.2000 at about 2200 hours in Police Post Mumraiz to the effect that his sons namely Waris Khan and Anwar Khan would work in a bricks kiln situated at *Maira Musazai*. In same kiln, present appellant and his co-accused namely Riaz and Mir Wali were also working. On eventful day at 20:30 hours, on hearing some noise, the complainant attracted to the spot/kiln, where he saw a scuffle between his sons and present appellant and co-accused on some matter. All the three accused were armed and they started firing at complainant-party, as a result of which, his son namely Waris Khan sustained firearm injuries while he (complainant) and his son PW Anwar escaped unhurt. Injured Waris Khan succumbed to his injuries on the way to the hospital. No motive was disclosed by the complainant. This report of the complainant was

reduced in shape of *murasila* (Ex.PW6/1) by Abdul Hamid (Rtd) Inspector (PW-10), on the strength whereof the F.I.R was registered against the appellant and co-accused.

11. On the following day, Abdul Hamid Inspector/Investigation Officer (PW-10) had visited the spot and prepared the site plan (Ex.PB) wherein the deceased has been shown at point-1 scuffling with Riaz and in the same time he received firearms injuries. The complainant Baras Khan is shown at point No.2 and in between Riaz, deceased and complainant there is a Hut (Chappar) having four pillars. Anwar Khan (PW-7) has been shown at point No.3 i.e. towards west of the Hut (Chappar) whereas the complainant, deceased and Riaz convicted accused were present on the northern and southern side of the Hut (Chappar). Accused Saeed is shown at point No.5 whereas Mir Wali the convicted accused is shown at point No.6 of the site plan.

12. The deceased was examined by Dr. Shahida (PW-8), according to which she has found the following injuries:

1. F.A entry wound 0.5 cm in diameter on back left chest 15 cm from midline and 10 cm below top of shoulder.
2. F.A entry wound 0.5 cm in diameter on back right chest 3 cm from midline and 7 cm below inferior angel of scapula.
3. F.A entry wound 0.5 cm in diameter on right lateral chest 19 cm below axilla and 19 cm from midline.
4. F.A exit wound 3x1 cm on front right chest 13 cm from midline and 10 cm above nipple.
5. F.A exit wound 4x2 cm on front right chest 2 cm from midline and 8 cm above coastal margin.
6. F.A exit wound 5x3 cm in size on front left chest 1 cm below top of shoulder and 10 cm from midline.
7. F.A gutter wound 9x1 cm on right thigh 9 cm below iliac crest and 35 cm above knee.
8. F.A lacerated wound 7x4 cm on right forearm 3 cm above wrist.
9. F.A lacerated wound 4x2 cm on back left hand 3 cm above thumb.

13. The star witnesses i.e. complainant Baras Khan and Anwar Shah appeared before the trial Court as PW-6 and PW-7 respectively. Complainant Baras Khan (PW-6) while appearing in the Court has reaffirmed his allegation as recorded in the FIR whereas Anwar Khan has appeared as PW-7. Needless to mention that at the time of occurrence he was a 12 years old boy. It appears from the statement

of PW-12 that Riaz (convicted accused) had some sexual desire for PW-12 and that is the probable motive for the occurrence. He in his statement, states that he alongwith with deceased brother Waris Khan would work in a brick kiln of Zaman Khan. On the relevant date when they finished their work and were preparing to leave the brick kiln for their house, accused Riaz asked him that he should stay behind, on this his deceased brother retaliated, which resulted into firing. The accused/appellant who was facing trial had fired at his brother, resultantly he died on the spot and in the meanwhile his father also reached at the spot. In his cross examination he states that he cannot say that from whose fire shot the deceased was hit and died. He also confirms that at the time of occurrence it was dark however later he has voluntarily stated that there was a light present near the place of occurrence.

14. The close perusal of the evidence, site plan and medical evidence (the place and size of the injuries) shows that the occurrence has taken place at the spur of the time most probably for the reason that the convicted accused Riaz had a sexual desire for Anwar

Khan who was a 12 years old boy. It was the doing of one person for which three persons have been charged. Whereas, all the three persons have been charged for the said offence. Two of the accused have already undergone their conviction. Thus keeping in view the safe administration of justice the present appellant has earned benefit of doubt as right. In the case of **“Farman Ali and 03 others...Vs...The State”** (PLD 1980 Supreme Court 201), the apex Court while granting benefit of doubt to the accused facing trial had observed;

“In his dying declaration, Rashid Khan has involved the three brothers as well as their friend, Farman Ali. But the medical evidence and the evidence of the Ballistic Expert do seem to cast doubt on his veracity. The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan is that the size of inlet of all the wounds suffered by him was the same meaning thereby that he had been shot from one or more than one weapon of the caliber. It is in the evidence of the Ballistic Expert, however, that the four empties sent to him for examination were found to have been fired through 32 bore pistol which was also sent to him by the Investigation Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. 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 superior 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”

15. Apart from the above, the time of occurrence 08:30 hours in the month of December and thus it was dark at the time of occurrence. More particularly in the circumstances when PW-7 in his cross examination admits that he does not know that whose fire shot had hit the deceased creates serious doubts in the prosecution story that all the accused while committing the murder of the deceased Waris Khan were sharing common intention.

16. The only circumstance in the account of the appellant is his abscondence but on the point the law is by now well-settled that the same alone is not sufficient to record conviction on a capital charge and it can be used only as a corroboratory and confirmatory in support of ocular account but when the ocular account is disbelieved then it is of a very little value for court for consideration. Reliance in this regard is placed on the case of **Rasool Muhammad..vs..Asal Muhammad and 3 others** reported in 1995 SCMR 1373, wherein has been held that:--

“Abscondence per se is not proof of the guilt of an accused person. Disappearance of a person named as a murderer/culprit after the occurrence is but natural, whether named rightly or wrongly”

17. For the said murder accused Riaz and Mir Wali have already been convicted, thus, keeping in view the safe administration of justice and by extending the benefit of doubt in the circumstances, the conviction and sentence of the appellant/convict recorded by learned trial Court in the impugned judgment is not sustainable. Therefore, this appeal is allowed, the impugned judgment dated 23.09.2019 of the learned

trial Court is set aside and appellant/convict is acquitted of the charge leveled against him. The appellant be released forthwith from jail if not required in any other case.

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

Announced.
19.07.2021.

J U D G E

(M. Iqbal, SSS) (S.B) Hon'ble Mr. Justice Syed Arshad Ali.