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

Cr. A No.242-B of 2019

Javedullah & Anwar Khan
Vs.
The State etc.

JUDGMENT

Date of hearing: **16.03.2021**

For Appellant: **Mr. Anwar-ul-Haq Advocate**

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

For Respondent: **Mr. Farooq Khan Sokarri Advocate.**

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SAHIBZADA ASADULLAH, J.- The appellants Javedullah & Anwar Khan have called in question the judgment dated 31.07.2019, rendered by learned Additional Sessions Judge-I, Bannu, whereby the appellants Javedullah & Anwar Khan have been convicted under section 302(b) P.P.C read with section 34 P.P.C and sentenced to life imprisonment for committing Qatl-e-Amd of deceased Abdullah with Rs.5,00,000/- (five lac) each, as compensation under section 544-A Cr.P.C. to the legal heirs of deceased or in default thereof, to undergo six months simple imprisonment. They were further convicted under section 324 P.P.C r/w section 34 and sentenced to 05 years Rigorous Imprisonment for an attempt to commit Qatl-e-Amd of complainant Arab Khan with a fine of Rs.1,00,000/- (one lac) each or in default 03 months SI. The benefit of section 382-B Cr.P.C has also been extended to the convicts.

2. Brief facts of the case are that on 17.08.2017 at about 19:50 hours, complainant Arab Khan alongwith dead body of his son Abdullah reported the matter to the police at Civil Hospital, Bannu, to the effect that on the eventful day, he alongwith his deceased son were present outside their house; that at about 1915 hours, the accused Javedullah & Anwar Khan duly armed with their respective Kalashnikovs came there and at once started firing at them, resultantly, his son got hit and fell down to the ground, while he luckily escaped unhurt. After commission of the offence, both the accused decamped from the spot. The complainant could do nothing being empty handed. Motive for the occurrence was stated to be previous blood feud between the parties.

On the report of complainant, Hidayatullah ASI (PW-8) the then Incharge Casualty D.H.Q Hospital, Bannu drafted Murasila EXPW-8/1, read over contents of the report to the complainant and after admitting it correct, he thumb impressed the same. He prepared injury sheet of the deceased and sent him to the doctor under the escort of Constable Inam Ullah (PW-6). Murasila was transmitted to the police station, where Khandan Khan ASI (PW-3) reduced report of the complainant in the shape of F.I.R (EXPW-3/1).

After completion of investigation, prosecution submitted complete challan against both the accused. After complying with the provision under section 265-C Cr.P.C, the accused were charge sheeted on 30.04.2018, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case produced and

examined as many as 14 witnesses, where after, the accused were examined under section 342 Cr.P.C, wherein 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 18.07.2019, convicted the accused and sentenced them, as mentioned above. The convicts/ appellants filed the instant criminal appeal against their conviction, while the complainant Arab Khan has filed **Criminal Revision, No.58-B of 2019** 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.

3. 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.

4. The unfortunate incident claimed the life of a minor boy aged about 13/14 years, which led to a charge against the appellants. The report was made by the complainant who happens to be the father of deceased. The tragedy occurred in front of the house of the complainant at 07:15 p.m. and the matter was reported at 07:50 p.m. to the casualty police of Civil Hospital, Bannu. The appellants were arrested when they failed to get their bail before arrest confirmed.

5. It was after a full dress trial that the appellants were convicted, which led them to this Court in an appeal against

conviction. Though, the matter was promptly reported, but this Court is to see as to whether the incident occurred in the mode, manner and at the stated time. True that complainant is the real father and substitution is a rear phenomenon, but equally true that the parties are involved in previous blood feud. The deadliest blood feuds between the parties put on guard this Court, first to assess the veracity of this witness, then to decide fate of the appellants in light of the collected material and the produced evidence, so that miscarriage of justice could be avoided. We cannot ignore that it was the statement of a solitary eye witness which found favour with the trial Court and in the like situation the Courts of law must proceed with great care and caution, to avoid an unholy haste, which leads to catastrophe and perpetuating injustice.

6. The deceased then injured soon after receiving firearm injury was rushed to Civil Hospital, Bannu, where the events were narrated to one Hidayat Ullah ASI, which led to the F.I.R (ibid), where after preparation of the injury sheet, the injured was produced before the doctor for his medical examination. It was one Inam Ullah, who escorted the injured to the doctor and handed over his injury sheet. The doctor examined the injured at 07:50 pm and prepared his medico-legal certificate.

7. The complainant was examined as PW-10, who stated that at the time of incident he alongwith his deceased son was present in front of his house, when all at once the accused appeared duly armed, started firing at them, where he escaped unhurt, but his

son, Abdullah got injured. We cannot ignore that the parties are locked in serious enmities, and that in that eventuality it was the complainant who should be the prime target and not the son. It needs appreciation that how the complainant escaped unhurt, despite the fact that both the accused were fully loaded with sophisticated weapons and he too was at their mercy. It is of prime importance to mention that the investigating officer observed bullet marks on the wall of his house just behind the complainant. Had the complainant been present at the time of incident, the bullet instead of striking the wall, lying behind, would have landed on the complainant. The complainant when appeared before the Court, stated that the deceased was hurriedly shifted to the hospital to save his life, and that PW Muhammad Niaz accompanied him to the hospital. We are yet to know that why Muhammad Niaz did not verify the report despite of his being present in the hospital. Though, the complainant stated that at the time of report Muhammad Niaz was not by his side, but he ignored that the injured was lying in the emergency room and the matter was reported there, had PW Muhammad Niaz visited the hospital, his presence would have been marked by the scribe, as he did of the co-villagers. Both the witnesses i.e. the scribe to whom the matter was reported and the doctor who examined the injured, without hesitation confirmed that the injured was oriented in time and space and was capable to talk. The scribe was asked, who replied that the injured was capable to talk. The doctor who prepared the medico-legal certificate, held that the injured was oriented in

time and space. If we admit that Muhammad Niaz was not in reach at the time of report, what restrained the police official to ask verification from the injured, as by then he was fully conscious. The prosecution is still to answer, that why the complainant chose to report instead of the injured, that too when the injured was fully conscious, oriented in time and space and was declared capable to talk. Comparing the two, we expect more honesty from the son than the father, as the father had an axe to grind, whereas the son who was hardly thirteen years, was alien to such influences, had he reported, the Courts would feel less hesitation to accede. It was the choice between the two to report, that burdened the prosecution to do more. The scribe, who was examined as PW-8, stated that he avoided the injured to report as he was minor, but never ever he stated that he attempted to record his statement and that he could not understand, as he was lacking maturity. In the situation at hand an inference can be drawn that the complainant came forwarded with twisted facts.

In case titled ***"Muhammad Javed Vs the State" (2020 SCMR 2116)***, it is held that:

> ***"The deceased, in injured condition, was medically examined at 7:15 p.m. under a police docket carried by Aamir Mehmood 1112/C (PW-6); he was noted with an entry wound on the right buttock; he was fully conscious, well-oriented with stable vitals; it is somewhat surprising that despite capacity, he did not opt for a statement. Position taken***

by the Investigating Officer that "As per opinion of the doctor, the injured was not in a condition to give statement" stands contradicted by the observations recorded by Dr. Faheem Khan, (PW-1) in MLR (Ex.PA)."

8. The witnesses failed to reconcile the time of incident, the time of report and the time at which the injured was examined. The complainant who appeared as PW-10, stated that it was 07:15 pm when the incident occurred and that the matter was reported at 07:50 pm. The doctor was examined as PW-2, who stated that the injured was produced before him at 07:50 pm. We are yet to know that how the injured was examined at 07:50 pm, when the matter was not reported by then. The scribe was examined as PW-8, who stated that the incident was reported at 07:50 pm, it took 25 minutes to report and prepare the injury sheet. In the like situation we cannot ignore one PW Inam Ullah, who escorted the injured to the doctor alongwith the injury sheet, who was examined as PW-6, who stated that he produced the injured before the doctor at 20:20 hours. When the statements of all the three are compared on this particular aspect of the case, no other inference can be drawn but that the incident did not occur at the stated time. This factor alone is sufficient for holding that the complainant was not present with the deceased at the time of incident.

9. The later entry of PW Muhammad Niaz further damaged the case. The complainant at the time of report did not name Muhammad Niaz to have seen the occurrence. When the complainant was asked on this particular aspect of the case, he

replied that had Muhammad Niaz been present at the time of report, he would have been named in the F.I.R, astonishingly, the investigating officer stated that it was at the time of spot inspection that Muhammad Niaz disclosed himself to be the eye witness. Though, the site plan was prepared at the instance of the complainant as well as the eye witness, but the abrupt appearance of PW Muhammad Niaz tells another story.

10. It is pertinent to mention that the complainant and the eye witness were found present at the spot when the investigating officer reached there. The investigating officer was accompanied by few police officials, where one of the marginal witness who was produced as PW-12, he stated that he alongwith the investigating officer reached to the place of incident within 20 minutes from the Police Station after receiving copy of the F.I.R, whereas the investigating officer stated that it consumed him one hour to reach to the spot. The conduct of the witnesses and their presence on the spot is not above board, as on one hand the deceased then injured was lying before the doctor in sever condition to be treated, whereas on the other the complainant and the eye witness had left the hospital for the spot, despite the fact that they were not invited by the investigating officer to reach there. We cannot ignore another aspect of the case, that on the day of incident an F.I.R bearing No.539 of the even date was registered, where one Hamid Ullah was the complainant, and the complainant of the present case i.e. Arab Khan alongwith another, were the accused. Presumption could be drawn

that the complainant was not present at the time of report in the hospital and so was his presence at the time of spot inspection, that is the reason that PW Muhammad Niaz posed himself to be the eye witness of the incident. PW Muhammad Niaz was not examined rather the prosecution preferred to abandon him, the reasons advanced for his non-production were stated to be his advanced age and his mental disability to understand the proceedings. We are anxious to know as to whether it was the learned counsel representing the complainant to determine the physical and mental condition of the witness or that it was the trial Court to determine the same. We are afraid to hold that it was the trial Court. Had PW Muhammad Niaz been present at the time of incident he would have been produced by the prosecution but his non-production takes us to draw an inference that his appearance on the scene was nothing more but a stopgap arrangement. Article 129(g) of the Qanun-e-Shahadat Order, 1984, caters for the situation. In case titled, ***"Riaz Ahmad Vs the State" (2010 SCMR 846)***, wherein it is held that:

> ***"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was***

not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

11. The investigating officer visited the spot and recovered 07 empties of 7.62 bore alongwith blood stained earth from the place of the deceased. It is pertinent to mention that he also observed bullet marks on the wall behind the complainant. The investigating officer prepared the site plan on pointation of the witnesses with specific points assigned to either side. The inter-se distance between the complainant, the deceased and the assailants has been given as 40/45 paces and from such a long distance it was hard for the accused to select the target, rather their prime target should have been the complainant. The site plan belies the stance of the complainant, had the complainant been present he would not have escaped unhurt, as he was within the firing range of the accused. This aspect of the case dispels the impression that the accused/appellants were interested in killing the deceased, as the motive was with the complainant. In case titled ***"Zahir Shah Vs the State" (2019 MLD 1562)***, wherein it is held that:

"Admittedly, the deceased along with PW-1 to PW-3 were standing closely and after making indiscriminate firing there were no chances of PWs to escape unhurt and also there was every possibility that the deceased had

received multiple bullet injuries, but the picture is quite different from the presumptions and expectations as suggests by the situation, when the deceased had only received two bullet injuries on his person, while all the PWs were escaped unhurt."

12. The empties were collected from the spot on 17.08.2017 and were received the Forensic Science Laboratory on 23.08.2017, but the Investigating Officer could not explain the delay caused. Neither the moharrir of the concerned Police Station was produced nor the police official who took the same to the office of the chemical examiner, what to say of collection of an abstract from the register No.19, when such is the state of affairs we do not confirm the evidentiary value of this piece of evidence and is as such excluded of consideration.

13. Two persons are charged for a solitary injury on person of the deceased and the prosecution is to answer that whose fire shot proved fatal. Though joint enmity was alleged to both of the appellants, but the prosecution could not collect the required substance and even it failed to prove the shared intention between the two. We cannot ignore that both the accused/ appellants were shown armed with Kalashnikovs, but the recovery of only seven empties from the place of incident negates the version of the complainant, rather it tells of the involvement of a single accused, had there been two accused the result would have been different with greater recoveries from the spot.

14. The medical evidence does not support case of the prosecution as the ocular account and the medical evidence are in conflict with each other. The doctor, who examined the injured was produced as PW-2, who stated that the deceased received a single firearm injury on his right chest with its exit on the left side of lower abdomen. The site plan depicts that the accused/appellants were at points No.3 & 4, whereas the complainant and the deceased were occupying points No.1 & 2, facing one another, in that eventuality the deceased should have received the firearm entry wound on his chest with its exit on his back, but the situation tells otherwise. Another intriguing aspect of the case is, that the direction of the wound is from above downwards which further negates the stance of the complainant. This conflict between the two shakes the very foundation of the prosecution case. True that the medical evidence is confirmatory in nature and when direct ocular account is available on file, then in that eventuality it is the ocular account which is to be preferred and taken into consideration, provided it is confidence inspiring, but in case in hand the presence of the witnesses at the time and at the place of incident is shrouded in mystery, so the conflict between the two cannot be ignored and it is for the prosecution to prove otherwise. In case titled ***"Akhter Saleem and another Vs the State and another" (2019 MLD 1107)***, it is held that:

> ***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."

15. The learned counsel for the prosecution stressed time and again that the accused/ appellants had strong motive to commit the offence, but the prosecution could not establish the motive through independent witnesses and from an independent source. Nothing was brought on record in black & white, that what was the urging factor for the accused/appellants to commit murder of the deceased, had it been so, the complainant would have been the prime target. The superior Courts of the country are consistent in their approach, that when motive is alleged it was the prosecution to prove the same, if the prosecution could not succeed then it is to reap the harvest. In case titled **"Muhammad Ashraf alias acchu Vs the State" (2019 SCMR 652),** wherein it is held that:

"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."

16. It was agitated time and again that the accused/appellants soon after the occurrence disappeared and surfaced after a long time, which absence they failed to explain and this factor alone is sufficient to term the accused guilty. We are unable to understand that how in absence of positive and convincing evidence abscondence alone can lead to conviction, if we accede to the submissions so forwarded, we are afraid the results would be drastic. There is no cavil to the proposition that abscondence alone cannot be a substitute for the direct evidence and this aspect has been beautifully dealt with by the apex Court in case titled, **"Muhammad Sadiq Vs the State" (2017 SCMR 144),** wherein 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."

17. After evaluating the evidence available on file, this Court reaches to an inescapable conclusion, that the prosecution could not succeed in bringing home guilt against the accused/appellants through confidence inspiring witnesses and that the witnesses failed

to establish their presence on the spot at the time of incident. The learned trial Court failed to appreciate the evidence available on file and did not apply its judicial mind to the facts and circumstances of the case. The impugned judgment is devoid of reasons which calls for interference, resultantly, the appeal in hand is allowed and the appellants are acquitted of the charges. They are to be released forthwith if not required to be detained in connection with any other criminal case. As the appeal filed by the appellants has succeeded, so the connected Criminal Revision bearing No.58-B of 2019, has become redundant, is dismissed as such.

Announced.
Dt: 16.03.2021
Yousaf Khan/C.O

Above are the detailed reasons.

JUDGE

JUDGE

19/3/2021

SCANNED
19 MAR 2021
Khalid Khan

(D.B)
Mr. Justice S.M Attique Shah and
Mr. Justice Sahibzada Asadullah