



Judgment Sheet

IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

Cr.Appeal.No.208-A/2020.

JUDGMENT

Date of Hearing 08.02.2023

*Appellants (Muhammad
Liaqat & another) by* *Mr. Muhammad Arshad
Awan, Advocate.*

Respondent (State) by *Sardar Ali Raza, AAG.*

Complainant by *Mr. Shad Muhammad Khan,
Advocate.*

WIQAR AHMAD, J:- Matter was reported by complainant Khanwaiz S/o Kala Khan on 15.12.2017 at 12:30 hours in Emergency Room of DHQ Hospital, Abbottabad, by stating that on the relevant day, he along with his father Kala Khan, brothers Sadiq and Khursheed had appeared before High Court. After

leaving Court, they reached near Mansehra Wagon Stand at 12:20 hours. Complainant along with his brother Khursheed were ahead while their father Kala Khan and brother Muhammad Sadiq were behind them at some distance. They heard firing and saw that Liaqat

and Abdul Qayyum had been firing at Sadiq while Haider Zaman and Rashid had been firing at Kala Khan, as a result of which both of them sustained firearm injuries. Accused also made firing upon complainant and his brother Khursheed, however, they rescued themselves by running from the spot. Thereafter, they shifted injured to DHQ hospital, Abbottabad. Occurrence was stated to have been witnessed by complainant, his brother Khursheed and other people present at the spot. Motive was disclosed to be previous blood feud enmity between parties. On the basis of said report of complainant, recorded in the shape of Murasila Ex PW-10/1, FIR Ex PA was registered against the accused.

2. Upon completion of investigation, complete challan was submitted against the appellants Liaqat and Abdul Qayyum as well as acquitted co-accused Haider Zaman whereas challan under Section 512 Cr.P.C. was filed against absconding co-accused Rashid. After supplying copies to the accused in compliance of Section 265-C Cr.P.C, learned trial Court framed charge against them to which they pleaded not guilty and claimed trial. In order to prove

its case against the accused, prosecution produced and examined 16 PWs and closed its evidence. The learned trial Court recorded statements of the accused/appellants under Section 342 Cr.P.C. After hearing arguments of learned counsel for the parties, the learned trial Court convicted appellants Liaqat and Abdul Qayyum, as mentioned above while co-accused Haider Zaman was acquitted.

3. Appellants-convicts Muhammad Liaqat and Abdul Qayyum sons of Kala Khan have filed instant appeal against conviction and sentence passed against them by the learned Additional Sessions Judge/Model Criminal Trial Court, Abbottabad, vide judgment dated 13.10.2020 in case FIR No. 1275 dated 15.12.2017 under Section 302/324/34 PPC of Police Station Cantt: Abbottabad, whereby the appellants-convicts had been convicted under Section 302-B PPC and sentenced to life imprisonment and to pay compensation amounting to Rs. 500,000/- under Section 544-A Cr.P.C. to the legal heirs of the deceased, in default whereof they had to further undergo SI for six months. Benefit of Section 382-B Cr.P.C had been extended to the appellants. Connected

Criminal Revision bearing No. 43-A/2020 had been filed by complainant Khanwaiz, seeking enhancement of sentence awarded to the appellants while in Cr. A No. 211-A/2020 complainant has assailed judgment of learned trial Court to the extent of acquittal of co-accused Haider Zaman. This single judgment is aimed at the disposal of instant criminal appeal as well as connected Criminal Revision No. 43-A/2020 and Cr.A No. 211-A/2020, as all the connected matters are the outcome of one and the same judgment of learned trial Court.

4. Learned counsel for the appellants argued that the learned Court below has acquitted Haider Zaman on same set of evidence while appellants Liaqat and Abdul Qayyum have been convicted thereon, which judgment should not be allowed to sustain. He also contended that when four persons had been charged for making firing, then damage should have been much more than the one sustained by the complainant party and therefore, the main story of prosecution was not believable, particularly due to the fact also that the PWs had escaped unhurt. He also contended that locale of the injuries received by

deceased Sadiq showed that he had been fired from different angles out of which some of the fires also appeared to be from a heighted place but site plan has not been supporting version of the complainant in this respect. The learned counsel also contended that report has though been shown lodged within ten minutes, but distance between place of occurrence and the hospital could not have been covered in said ten minutes and therefore, lodging of the report at the given time did not seem to be appealable to a prudent mind. Learned counsel for the appellant also placed his reliance on the judgments reported as “2017 SCMR 1155, 2018 MLD 1635, 2014 SCMR 749, 2022 YLR (Balochistan) 1620 and PLD 1990 Peshawar 10.

5. Learned counsel for complainant, while rebutting arguments of learned counsel for the appellants, contended that convicts/ appellants namely

Muhammad Liaqat and Abdul Qayyum had been arrested on the spot and therefore, their cases had been different from accused Haider Zaman to whom, the Court below had extended benefit of doubt. Learned counsel further contended that a human being cannot be treated to be a statue and that at the time of

occurrence, the deceased would definitely have been trying to save himself and change his positions, therefore receiving of injuries from different angles would not belied the prosecution story.

6. Learned AAG stated that the occurrence had taken place in city of Abbottabad and that hospital being at very close distance of half kilometer, could be reached within ten minutes. Learned AAG also stated that being a spot arrest case, regarding accused/appellants Liaqat and Abdul Qayyum, wherein report has also been promptly lodged, the chances of deliberation and consultations were not there prior to lodging of the report.

7. We have heard arguments of learned counsel for the parties and perused the record.

8. Perusal of site plan Ex PW-15/2 reveals that occurrence had taken place in the city of Abbottabad on main road. Appellants namely Liaqat and Abdul Qayyum have been arrested immediately after occurrence while they were fleeing from the spot. For proving their arrest in the stated manner, prosecution had been relying on statement of PW Tariq recorded as PW-4 and PW Ajmal Khan SHO

examined as PW-6. Both the appellants mentioned above have been assigned the role of making firing at deceased namely Sadiq. Deceased Muhammad Sadiq had four entry wounds as per Postmortem report Ex PW-9/1. Report in the case had been lodged with promptitude wherein motive of blood feud enmity has been mentioned. Prosecution have also been able to prove presence of PWs on the spot.

9. So far as eyewitness account of the occurrence is concerned, complainant of the case namely Khanwaiz has been examined as PW-13 who has stated in his examination-in-chief that on the day of occurrence, he along with his father Kala Khan, Sadiq and Khursheed had come to High Court as a bail application of Khan Muhammad and Sajawal had been fixed before the Court on 12.05.2017. When they had been returning from this Court and going towards Mansehra Wagon Stand, they were attacked by the opposite party, among whom Liaqat and Abdul Qayyum made firing on his brother Muhammad Sadiq while Rashid (absconding accused) and Haider Zaman (acquitted co-accused) made firing at his father Kala Khan. He has also stated that he and other PW

Khursheed had been going ahead while his father and brother were coming after them with a distance of 16/17 paces at the time of occurrence. He has also stated that he and his surviving companion namely Khursheed ran towards Adda and saved themselves, while other people present at the spot also fled away from the spot. They returned thereafter, lifted both the deceased then injured and took them to DHQ hospital, Abbottabad. He was also witness to the recovery memo vide which IO recovered five empties of 30 bore from the spot and sealed them in parcel. Similar narrations had also been offered by the other PW namely Muhammad Khursheed. It is important to be noted that both eyewitnesses have been subjected to extraordinary lengthy cross-examination, but both the eyewitnesses have remained firm and consistent regarding mode and manner of commission of the offence. No major contradiction could be solicited from their mouths. Among minor contradictions, learned counsel for the appellants has highlighted their narrations in the cross-examination that on their arrival in the hospital, Muhammad Sadiq died. By comparing said part of his statement with the statement of doctor

namely Dr. Muhammad Irshad, (PW-8), wherein he had stated that at 12:40 PM, he had examined Muhammad Sadiq, the learned counsel was arguing that the witness was telling lie and report had not been lodged with that promptitude as mentioned in Murasila i.e. at 12:30 hours, because according to doctor, Muhammad Sadiq had been alive at 12:40 hours. While stating that on their arrival at hospital Muhammad Sadiq had died, the witness had not mentioned any specific timing. It is important that as per Postmortem report, the time between injury and death of Muhammad Sadiq had been approximately 20 to 40 minutes. Thus difference of five or ten minutes in narration of the occurrence wherein brother and father of a person had been taken to hospital in an extreme emergency, was not something which would weaken the force of his statement. The hospital was

stated to be situated at a distance of half to 1 $\frac{1}{2}$ kilometer where also the exact distance could not be expected from the witnesses, but it is apparent that the hospital was situated in same vicinity. The occurrence had taken place near a wagon stand and availability of vehicle for taking the injured to hospital was also

beyond question. In emergency things get quicker and when complainant had started lodging report of the occurrence in ten minutes, then there is nothing unnatural therein.

10. What is important to be noted is that both the eyewitnesses have remained consistent regarding all the important aspects of the case. Nothing could be brought during their cross-examination which could have shaken intrinsic worth of their testimonies. Their presence was found proved for the reason that bail application of their two brothers had been fixed for arguments before this Court on the fateful day. Having enmity, coming of more than one person for court attendance was also understandable. Besides lodging of a prompt report also fortifies the factum of their presence. Inquest report Ex PW-10/5 in its column No. 4 indicated names of complainant as well as the other

PW as identifiers of the dead body. In such situation, their presence on the spot also stands proved and established.

11. The doctor (PW-8), who had examined deceased then injured namely Kala Khan, has given following narration of injuries;-

1. *Entrance wound: $\frac{1}{4}$ x $\frac{1}{3}$ inches left side base of neck interior aspect inverted margins.*
2. *Exit Wound: $1 \frac{1}{2}$ inch x $\frac{1}{3}$ inches back of right side of chest mid and lower section everted margins with profuse bleeding.*
3. *Gasping.*

Similarly, in respect of injured Muhammad Sadiq, he had also noted;

1. *Entrance wound: $\frac{1}{4}$ x $\frac{1}{4}$ inch left iliac fossa inverted margins with perfuse bleeding.*
2. *Entrance/exit wound across right forearm 6 inch x $1 \frac{1}{2}$ inches muscle deep.*
3. *Entrance wound $\frac{1}{2}$ inch x $\frac{1}{3}$ inch mid and back of left hand inverted margins with bleeding.*

Similar description of injuries has been given by Dr. Syed Imtiaz Ali Shah (PW-9) who conducted postmortem examination of the deceased. In this respect a part of cross examination of Dr. Syed Imtiaz Ali Shah (PW-9), who had conducted postmortem examination of both the deceased, would also be beneficial which part is reproduced hereunder;

"It is correct that the dimension of injury regard the entry wound No. A(2), entry wound No. C(1), entry wound No. D(1) is 1x1 cm whereas the dimension of entry wound B(1) is $\frac{1}{2}$ cm x $\frac{1}{2}$ cm. It is correct that the possibility cannot be ruled out that fire on the person of deceased Kala Khan were made from different ranges. Witness volunteered that the

difference between the dimension of injury B(1) as compared to other injuries may depend upon several factors including the distance of fire, the direction of the fire, the area where the bullet hit, the muscle mass etc.”

12. Both appellants i.e. Muhammad Liaqat and Abdul Qayyum have been charged for making firing at Muhammad Sadiq deceased. He had admittedly received firearm injuries. Injuries were also of different dimensions. So far as plea of learned counsel for the appellants that injuries had been caused by firing from different surface levels and ranges, are concerned, same is not supported by other evidence on record but the fact that the victims had received different injuries from different angels was because of the fact that neither the victims nor the assailants could be presumed to be static and in a constant state at the time of commission of offence. The description of injuries in medico-legal report as well as postmortem report have been corroborating testimony of the eyewitnesses, so far as the appellants namely Muhammad Liaqat and Abdul Qayyum are concerned.

13. Case of the respondent/acquitted accused (Haider Zaman) was however, different in this respect. He along with the absconding co-accused namely Rashid had been assigned the role of firing at deceased Kala Khan. Kala Khan was shown to have received one firearm injury, having a corresponding exit wound. It was one of the factor that the learned trial Court had given him benefit of doubt in the shape of his acquittal.

14. Besides, appellants in the conviction appeal namely Liaqat and Abdul Qayyum had been arrested by the local police in hot pursuit, immediately after the occurrence. Prosecution have examined Tariq No. 1039 (PW-4) and Amjad Khan SHO (PW-6) to prove arrest of the appellants immediately after the occurrence as well as for proving recovery of weapon of offence from possession of appellant Muhammad Liaqat at the time of his arrest. One of the issue highlighted by learned counsel for the appellants at bar, was that arrest had been made at 01:05/01:10 PM (noon) as per statement of PW-6. In this respect, it is important to be noted that case of prosecution has not been that of spot arrest but that of arrest in hot pursuit.

Appellants, after commission of offence have no doubt fled away from the spot and while running therefrom, they had been chased by the policemen. It is also in the evidence of Mushtaq No. 121/FC (PW-5) that appellant Abdul Qayyum, while fleeing from the spot, was having opportunity of throwing pistol in the Nalla near wall of Cantonment Board. Besides they had also been armed, having committed an offence moments before and policemen would have been on guard so as to ward off any damage to the chasing party. All this had consumed time which is reflected in time difference between the occurrence and arrest of the appellants. This fact is therefore, not vitiating the weight of prosecution evidence produced for proving arrest of the accused after the occurrence. Said evidence can, therefore, be safely used for the purpose of corroborating the eyewitness account.

15. So far as contention of learned counsel for the appellants regarding acquittal of co-accused namely Haider Zaman is concerned, we do not agree with learned counsel for appellants that prosecution was having same strength of evidence against the convicted appellants and the respondent/ accused

namely Muhammad Liaqat and Abdul Qayyum.

Eyewitness account have no doubt been same in respect of all accused but the difference was lying in corroboration. In respect of the convicted appellants namely Liaqat and Abdul Qayyum, the eyewitnesses account was fully corroborated by their arrest immediately after occurrence, recovery of weapons of offence from accused Liaqat at the time of his arrest (and in case of appellant Abdul Qayyum, on his pointation) and matching reports of FSL with the empties recovered from the spot. The medico-legal report of the injured was also lending support to eyewitness account. In the case of acquitted accused namely Haider Zaman, it is important to be noted that he could not be arrested immediately after the occurrence. The weapon of offence recovered on his pointation was also in rusty condition. FSL report Ex PW-16/12 though mentions that pistol in question was

found to be in working condition, however, there is no report of its matching with empties recovered from the spot. Moreover, no one having such enmity would use rusty pistol and that also for killing his enemy close to city center. The report of medical officer was also not

lending full support to eyewitness account to the extent of this person because two persons had been charged for making firing while deceased Kala Khan had received single injury. Possibility of missing one fire may not be ruled out but when there are two probabilities, the probability favouring accused would be preferred. Learned trial Court extended him benefit of doubt, as a measure of abundant caution. This court while reappraising evidence has got no reason to differ with opinion of learned trial Court in this regard. So far as argument of learned counsel for the appellants regarding the principle "*falsus in uno falsus in omnibus*", as expounded by honourable Supreme Court of Pakistan in its judgment reported as "**PLD 2019 SC 527**" is concerned, there is no cavil to such proposition, but while acquitting Haider Zaman, he had been extended benefit of doubt as a measure of abundant caution. Said factum of his acquittal cannot be dubbed as an affirmative proof of the fact that the eyewitnesses have been untruthful.

16. This Court while giving its judgment in the case of "**Ayaz Gul Vs. The State**" (Jail Criminal Appeal No. 863-P/2019) had also held that giving

benefit of doubt to an accused cannot be construed in all circumstances that the witnesses had been telling lies. Relevant observations given in this regard are reproduced hereunder for ready reference;

"True that initially four persons were charged in the FIR but subsequently during the preparation of the site plan as well as in the cross examination of the PWs the role of the accused has been distinguished. More-so, the appellant/accused has also made confession and the report of recovery of crime weapon and empties recovered from the spot is also in positive. The learned trial Court has rightly acquitted the co-accused while extending them the benefit of doubt by considering overall circumstances of the case, whereas convicted the present appellate Ayaz Gul. If the Court extends the benefit of doubt to an accused person it does not mean that the witnesses are not truthful witnesses. The prosecution has successfully proved its case against appellant through the testimony of injured witnesses and could not create suspicion in establishing the presence of the eyewitnesses on the spot as well as of the appellant at the relevant time and their credibility has not been shattered, however, same would only show a reasonable possibility in our mind that participation of acquitted co-accused has not been duly proved by the prosecution. At times, Court

extends benefit of doubt to some of accused as an abundant caution that will not certainly signify that the witnesses were not truthful. As such this Court holds that the learned trial Court has properly evaluated the prosecution evidence brought on record by extending benefit of doubt to acquitted co-accused and rightly convicted and sentenced the appellant Ayaz Gul. The acquittal of co-accused will not entitle the appellant Ayaz Gul to outright acquittal."

Witnesses in this case were related to the deceased and also inimical towards appellants because of previous enmity, and therefore some corroboration was required for relying their testimony. In the case of convicted appellants, there had been very strong corroboratory pieces of evidence against them as discussed above, while in case of acquitted accused namely Haider Zaman, corroboration of a similar standard had not been available. In such circumstances learned trial Court had rightly treated case of the convicted appellants differently from that of the acquitted accused (respondent in Cr. A No. 211-A/2020).

17. In view of what is stated above it was found that prosecution has proved guilt of the

appellants namely Muhammad Liaqat and Abdul Qayyum through cogent and confidence inspiring evidence. The learned trial Court has rightly made conviction and awarded sentences to them which needs no interference by this Court and the conviction and sentence awarded to the appellants are therefore, maintained and the appeal is dismissed.

18. So far as criminal revision for enhancement of sentence bearing No. 43-A/2020 is concerned, we have considered submissions of learned counsel for petitioner in this respect but we are not inclined to enhance the penalty awarded by learned trial Court. Minor weaknesses in the case of prosecution which could not be considered for acquittal of the accused, may well be taken into account for lesser punishment as held by the august Supreme Court of Pakistan in the case of "***Feroz Khan Vs. The State***" reported as ***2002 SCMR 1999***.

In this case also, the minor weaknesses highlighted by learned counsel for the respondents/convicts were not considerable for a case for acquittal, but same may well be kept in the background, while opting for a lesser sentence of life imprisonment. Sentence of life

imprisonment awarded to both appellants namely Muhammad Liaqat and Abdul Qayyum does not warrant a review in the instant Criminal Revision. Same was also found divested of merits and is accordingly dismissed. Similarly, connected criminal appeal bearing No. 211-A/2020, filed by complainant against acquittal of co-accused Haider Zaman, in view of discussions made hereinabove, had also been found divested of merits and same is also dismissed.

Heard and Announced on.

Dt. 08.02.2023

Prepared and signed on

21.02.2023

JUDGE


JUDGE