

IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(Judicial Department)

**Cr.A No.22-B of 2015 with
Murder Reference No.01-B of 2015.**

Rahamzad Khan Vs The State and another.

Connected Cr.A No.37-B of 2015

Hukamzad Vs. Rahamzad etc.

JUDGEMENT

Date of hearing _____ 20.12.2016 _____.

Appellant-Petitioner: Rahamzad Khan by Anwar-ul-Haq,
Advocate.

Respondent: State By Shahid Hameed
Qureshi, Addl: AG.

Hukamzad By Muhammad Anwar Khan Maidad Khel,
Advocate.

ISHTIAQ IBRAHIM, J.--- This criminal appeal is directed against the judgment dated 21.02.2015, recorded by learned Additional Sessions Judge-II, Bannu, whereby the appellant Rahamzad Khan involved in case F.I.R No. 666 dated 23.12.2013 under section 302/324/34 P.P.C,

Police Station Saddar, has been convicted ***under section 302 (b) PPC and sentenced to death, with compensation of Rs.2,00,000/- payable to the legal heirs of the deceased or in default thereof to undergo six months SI further.***

2. The complainant Hukam Zad has also filed a Criminal appeal No. 37-B of 2015 being dissatisfied with the same impugned judgment, against acquittal of appellant under section 324/34 P.P.C.

The Murder reference against the appellant has also been sent to this court for its confirmation.

3. Since both the appeals and murder reference are the outcome of one and the same occurrence/ F.I.R, therefore, these are being disposed of by way of this single judgment.

3. Brief facts of the case as mentioned in the FIR (Ex.PA) are that on 23.12.2013 at 0930 hours complainant

Hukam Zad (PW-5) in DHQ Hospital Bannu reported the matter to Muhammad Aslam ASHO (PW-4) to the effect that on the eventful day he along with his two sons, Khandan Khan and Sher Akbar Khan left the house in connection with some business in Bannu Bazar. Accordingly, the said Sher Akbar Khan was going ahead at some distance from them and when they reached near the shop of Hamzali Khan on the thoroughfare at 0730 hours the accused/appellant Rahamzad Khan along with absconding co-accused Rehmatullah and Farid Nawaz, duly armed with Kalashnikovs, emerged on the spot and started firing at them. As a result of which Sher Akbar Khan was hit and fell down on the ground, while the complainant and his son Khandan escaped unhurt. They being empty handed could do nothing. The accused thereafter decamped from the spot and when the complainant attended Sher Akbar Khan, he had succumbed to the injuries. Motive behind the offence stated to be previous blood feud between the parties.

4. After registration of the FIR, Balqiaz Khan SI (PW-7) proceeded to the spot where he prepared the site plan (EX.PW7/1) at the instance of complainant and PW Khandan. During spot inspection vide recovery memo (Ex.PR/1) he took into possession ten empties (Ex.P-1) from the place of accused Rahamzad, nine empties (Ex.P-2) from the place of accused Rehmatullah, twelve empties (Ex.P-3) from the place of accused Farid Nawaz of 7.62 bore. Through the same memo he took into possession three spent bullets (Ex.P-4) from the place of deceased, out of which one spent bullet was extracted in deshaped condition from the wall. While vide recovery memo (Ex.PR/2), the IO took into possession one shirt (P-5), one Shalwar (P-6), blood stained belonging to the deceased sent by the doctor. Vide the same recovery memo he also took into possession one sealed phial (P-7) and PM report. During investigation from the spot the IO also took into possession blood stained with the help of cotton through recovery memo (EX.PR). He recorded Statements of PWs under section 161 Cr.P.C.

He applied for initiation of proceedings u/ss 204/87 Cr.P.C against the accused through applications (Ex.PW7/3 and Ex.PW7/4). He sent the empties, spent bullets and sealed phial to the FSL. He placed on file the fire arms expert report (ExPW7/6). On 15.01.2014 after cancellation of ad interim pre arrest bail, he arrested the accused by issuing his card of arrest. On 16.1.2014 he produced accused before the Court along with application (Ex.PW7/7), from where he was sent to judicial lock up. He submitted complete challan in the present case on 02.1.2014 and supplementary challan after arrest of accused Rehamzad on 17.1.2014.

5. Initially complete challan under section 512 Cr.PC was submitted before the learned trial court against all the three accused, but after arrest of accused/ appellant Rahm Zad supplementary *challan* was submitted. On 12.02.2014, the learned trial court formally indicted the appellant/accused, to which he pleaded not guilty and claimed trial. The prosecution to substantiate its charge against the appellant examined eight (08) witnesses.

6. Substantive evidence in shape of ocular account in this case has come from the depositions of complainant Hukamzad (PW-5), eye-witness namely Khandan (PW-6). Dr. Noor Saeed Khan, Medical Officer, DHQ Hospital Bannu (PW-3), who conducted autopsy on the dead body of the deceased-Sher Akbar Khan on 23.12.2013 at 10.9 a.m and found the following:-

External appearance.

Condition of subject: Wearing Qamis and shalwar. PM staining present at the back.

Wounds.

1. One FA entry wound right lateral on occipital area, size 1/4x1/4`` in size.
2. One FA entry wound just lateral to wound No.1, size 1/4x1/4``.
3. One exit wound on right eye laterally 1/2x1/2`` in size.
4. One exit wound on right eye blow, 1/2x1/2`` in size.
5. One FA entry wound front neck left laterally 1/4x1/4``.
6. One exit wound 2x1`` on right shoulder anteriorly.

7. One Graze wound on left shoulder 3x1/2``.
8. Four entry wounds, side by side on left buttock 1/4x1/4``.
9. One exit wound in left groin 3x2`` anteriorly.
10. One entry wound below the right buttock 1/4x1/4``.
11. One entry at right, first toe, 1/4x1/4``.
12. One exit at second Toe, 1/2x1/2``.
13. One entry wound on left lateral chest 1/4x1/4``.
14. One exit on right shoulder 1/2x1/2``.
15. FA entry wound 1/4x1/4`` on right forearm posteriorly.

CRANIUM & SPINAL CORD.

Scalp, skull, membrane and brain are injured.

THORAX

Larynx and trachea healthy, while rest injured.

ABDOMEN

Healthy.

Muscles, Bones & Joints.

Muscles injured at the site of injury, Femur right fractured.

Remarks.

In his opinion the deceased died due to injury to vital organs i.e. lungs, brain, heart and also massive hemorrhage and due to multiple injuries.

Probable time between injury & death Within half an hour

Probable time between death & P.M 02 to 03
hours.

After P.M examination the doctor handed over the P.M
(Ex.PW3/1) report along with Qamees, shalwar and bottle
having two bullets to the constable Sher Wali.

The statements of remaining prosecution
witnesses are formal in nature.

7. After close of prosecution evidence, statement
of accused/appellant, Rahamzad was recorded under section
342 Cr.P.C, wherein he denied the allegations leveled
against him. However, he neither opted to be examined on
oath under section 340 (2) Cr.P.C nor wished to produced
defence evidence.

8. The learned trial court after evaluating the
evidence available on record in light of arguments advanced
from both sides, found the accused/appellant guilty of the
offence and recorded his conviction, as mentioned above
vide **impugned judgment dated 21.02.2015.**

9. Learned counsel for the appellant argued that

impugned judgment of the learned Trial Court is against the law, facts and evidence available on record; that the complainant and eye witness failed to establish their presence on the spot through cogent and confidence inspiring evidence; that there is considerable delay in lodging the FIR which is the result of consultation and deliberation; that the prosecution story in shape of FIR is not supported even by the site plan as the place of occurrence is different from that shown in column No.4 of the F.I.R; that the motive behind the occurrence was alleged to be blood feud between the complainant and absconding co-accused Rehmatullah but the complainant has failed to explain as to why the deceased was going ahead or separate from the complainant and eye witness; that the complainant has also failed to explain that how he was spared when he was the prime target of the assailants as he had committed murder of father of the co-accused Rehmatullah; that their testimony is suffering from material contradictions and discrepancies creating serious doubts in the prosecution

case; that site plan and medical evidence contradict the ocular account; that mere positive FSL report qua the crime empties and blood stained articles of the deceased, in absence of direct evidence of unimpeachable character and recovery of crime weapon, would not be sufficient for recording conviction in a capital charge; that prosecution evidence being suffering from doubts, benefit of the same is to be extended to the appellant and he be acquitted of the charge.

10. Conversely, learned AAG assisted by learned counsel for the complainant argued that appellant is directly charged for effective firing at the deceased; that ocular account furnished by the PWs is straightforward and confidence inspiring which is corroborated by medical evidence, site plan, recoveries of blood and empties from the spot; that the occurrence has been reported within two hours after arranging a cot for the dead body of the deceased and then shifting the same to the Addah of Shahbaz Azmat Khel, where a Suzuki was arranged for

transporting the same to the hospital, hence the time consumed has been sufficiently explained; that the FSL report Ex.PW7/6 also corroborates the prosecution case by elaborating that the firing has been made from different weapons of 7.62 bore; that the prosecution has successfully proved the guilt of the appellant through overwhelming evidence available on record and sought dismissal of the appeal of the appellant Rahamzad and also prayed for his conviction under section 324/34 PPC.

11. We have heard the learned counsel for the parties as well as the learned Addl: AG and have gone through the evidence on record.

12. Perusal of the record reveals that as per first information report, the occurrence took place in the manner that on the eventful day, when the complainant Hukam Zad with his sons Sher Akbar Khan and Khandan Khan, were going towards Bannu for some business and reached at the spot, near the shop of one Hamza Ali Khan, Sher Akbar was ahead, while they were following him at some distance;

that in the meanwhile accused /appellant and co-absconding accused duly armed with Kalashnikovs appeared and started firing at them, as a result of which Sher Akbar Khan got hit sustained injuries, while they escaped unhurt. The deceased on the way succumbed to the injuries.

13 The ocular account of the occurrence has been furnished by Hukam Zad (PW.5) and Khandan (PW-6) who being father and brother of the deceased are closely related with the deceased and admittedly there is blood feud between the parties, therefore these witnesses can legitimately be termed as interested witness and statements of these witnesses are to be looked into with great care and caution. Undoubtedly the statement of interested witness which even for that matter inimical witness can be taken into consideration but the rule of appraisal is that the same is supported by some strong corroboration from some independent source. In order to believe a 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 inimical witness, if same is corroborated by some strong corroborative piece of evidence.

14. The complainant in his statement as PW-5 stated that **“we were proceeding to Bazar for business of old tyres shop at Bannu Naurang road in Kotka Jumma Khan. Both of my sons are running the said shop jointly.”** So the complainant was not going with his sons in routine to the said shop except on the eventful, so he is a chance witness and his explanation regarding his presence is not satisfactory, rather inimical towards the accused. Reliance is placed on case titled **“The State Vs Mohammad Sharif and 3 other” (1995 SCMR 635) and “Khalid Javid and another Vs the State” (2003 SCMR 1419).**

The fact of enmity has been admitted by the complainant (PW-5) in his cross examination by stating that:

“ It is correct that that some 17/18 years back, I was charged in a case, wherein Murtaza Khan, father of accused Rehmatullah and Haqdar Khan , first cousins of father of accused Farid Nawaz were murdered. It is correct that I used to wonder with weapon whenever I come out of my house. I cannot tell any reason that whey Sher Akbar was ahead of us and Khandan was behind me”.

When direct motive was with relatable to the complainant, because he had allegedly committed the murder of father of absconding accused Rehmatullah, then why the complainant was spared and the deceased was done to death. In this respect reliance is placed on case titled **“Amin Khan Vs Jana Gul and others” (1984 SCMr 937)**

Khandan Khan (PW-6) during his cross examination has admitted that:

“It is correct that I used spectacles as my eye sight is weak. I can identify a person from the distance of 10 to 15 paces. The accused Rahamzad was present at a distance of 54 paces from me, Rehmatullah 50 paces and Farid Nawaz at a distance of 46 paces from me.”

He in his cross examination further stated that:

“I cannot tell that from whose, firing the deceased was hit.”

He went on to state that:

“Rehmatullah accused had come close towards Sher Akbar Khan to make firing for the second time at him, however, the same has also not been disclosed by me to the I.O at the time of spot inspection.”

In such a situation, when the eye witness cannot identify a person beyond 10/15 paces, how he had identified the accused/ appellant from a distance of 54 paces. He cannot tell that from whose firing the deceased was hit and he only saw accused Rehmatullah, who had come close towards Sher Akbar Khan to make firing. In this view of the matter, the possibility cannot be ruled out that the appellant being maternal uncle of the absconding accused Rehmatullah has been implicated on the strength of his relationship and enmity with the absconding accused, otherwise he is an aged man of 59/60 years. The statements of eye witnesses are smeared with interestedness, seems to be the result of inimical intent, did not inspire confidence, on the basis of

which capital punishment could not be awarded, hence, are discarded.

15. As per first information report the occurrence took place at 07.30 hours while the report was made at the hospital at 09.30 hours. The record is also suggestive of the fact that the occurrence has taken place within the limits of city or the suburb area and the complainant along with PW Khandan were coming to Bannu Bazar by foot, so in such like circumstances there is strong possibility that the time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the prosecution before preparing police papers. Moreover, the distance has not been brought on record neither by the prosecution nor by the defence but it is clear from the statement of the Investigating officer that he reached to the spot within **20/25 minutes** from the Police Station to the place of occurrence. In column No.2 of inquest report (Ex.PW4/3) distance between spot and Police Station is shown as **“towards East a km from police station”**. Undoubtedly

the occurrence has taken place within the jurisdiction of Police Station Saddar, Bannu. So the non-availability of traffic or any other ground urged by the prosecution would be of no use to them and delay in the circumstances of the case when the parties are tagged in blood feud reacts on the genuineness of the story set up by the prosecution and of course presence of eye witnesses at the relevant time.

Wisdom is derived from case titled **“State through the Advocate General N.W.F.P Peshawar Vs. Shah Jehan” (PLD2003 SC 70).**

16. Another striking feature of case is that at the time of report complainant (PW-5) had stated that **“when we reached near the shop of Hamza Ali Khan, the tragedy occurred.** On contrary the complainant being an aged man of 60/62 years and resident of the same village is supposed to be well conversant with the location of his native village. According to the statement complainant and FIR, the place of occurrence is a thoroughfare near the shop of Hamza Ali, while in the site plan the deceased and the

eye witnesses have been shown in the fields. Disparity of place of occurrence in the FIR and in the site plan clearly manifests that the complainant and the eye witness were not present at the relevant time. Had they been present over there they would have definitely pointed out the exact place where the occurrence had taken place.

17. The younger always follows the elder one as a matter of respect and tradition of the area. The stance of the prosecution that since they were having enmity that is why they were at a distance from each other is not appealable to the mind, because if they are having such intense enmity in the same village and were roaming in the same area, then they should have firearm with them as deposed by the complainant mentioned above.

18. There is no denial to the fact that there are multiple injuries, 12 entry, 11 exit one graze wound on the person of the deceased but with a formidable weapon like Kalashnikov ordinary magazine accommodates 30 rounds.

Now the old principle of law that multiple injuries would be the doing of more than one person has changed after introduction of the Kalashnikov. Now one person can inflict as many as 30 entry wounds, so multiple number of injuries would not ordinarily mean that it is the doing of more than one person.

19. As per recovery memo (Ex.PR to Ex.PR/2) the I.O had taken into possession blood stained articles, 31 empties of Kalashnikov and a phial containing bullets on the day of the occurrence i.e. 23.12.2013 but astonishingly the blood stained articles were received to the FSL on 26.12.2013 while the empties and bullets were received to the fire arms expert on 01.01.2014. Even if report of the fire arms expert is considered to be correct then in the site plan no points were given by the I.O to the empty shell.

20. It is settled law that for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts. Single circumstance creating

reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefit, not as a matter of grace and concession but as a matter of right. Reference is made to case "**Muhammad Akram v. State**" (2009 SCMR 230). All these serious issues create doubts in our mind regarding the guilt of the appellant beyond reasonable doubt and these material facts favouring the appellants were not considered by the learned trial Court while appraising the evidence of the prosecution. In the absence of truthful, trustworthy and reliable and confidence inspiring evidence, the learned trial Court has wrongly not extended the benefit of doubt to the accused/appellant.

21. In view of what has been discussed above, We, accept Criminal Appeal No.22-B/2015 filed by Rahamzad Khan, appellant, as a result whereof, conviction and sentence recorded by the learned trial court vide judgment dated 21.02.2015 is set aside and the appellant Rahamzad Khan is ordered to be acquitted of the charge in case FIR

No.666 dated 23.12.2016, under sections 302/324/34, P.P.C., at Police Station, Saddar, Bannu. He shall be released forthwith if not required in any other case.

22. Murder Reference No.01-B/2015 forwarded by the learned trial court for confirmation of sentence of death inflicted upon the convict is answered in NEGATIVE.

23. So far as Cr.A No.37-B/2015 filed by the complainant, namely Hukamzad Khan against acquittal of Rahamzad Khan under section 324/34 PPC, for the reasons afore-stated, the same being devoid of any legal force is accordingly dismissed.

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

Announced:
20.12.2016

J U D G E

J U D G E

Ihsan*/-

