

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, BANNU BENCH**  
**(Judicial Department)**

**Cr. Appeal No. 170-B/2018 &**  
**Murder Reference No.09-B/2018**

**Niaz Wali alias Naz Ali**

**Vs**

**Abizar and others**


For appellant: **Pir Liaqat Ali Shah, Advocate**

For State: **Mr. Shahid Hameed Oureshi, Addl. AG.**

For complainant: **Haji Hamayun Khan Wazir, Advocate.**

Date of hearing: **03.12.2019**

**JUDGMENT**

 **SAHIBZADA ASADULLAH, J.-** Impugned herein is the judgment dated 13.10.2018 rendered by learned Additional Sessions Judge, Lakki Marwat whereby the appellant Niaz Wali alias Naz Ali, involved in case FIR No.149 dated 21.8.2007, under sections 302/34 PPC of police station Tajori, District Lakki Marwat was convicted and sentenced to death with compensation of rupees two million payable to the L.Rs of the deceased or in default thereof to undergo six months S.I. further.

Murder Reference No.09-B/2018 has also been put up before us for confirmation.

2. Precisely stated facts of the instant criminal appeal, as spelt out from the record, are that on 21.8.2007 at 0110 hours, Wali Khan, the complainant made a report to the local police to the effect that on the day of occurrence, he alongwith his cousin Gul Khan were grazing their sheep and goats in their lands known as Kotana Wala near Manzar Faqir. A goat of Gul Khan entered into the field of accused while eating "Gowara" crop, accused Naz Ali armed with single barrel shot gun .12 bore, Hayatullah armed with 303 bore rifle were present, both of them on entering of the goat, altercated with Gul Khan, forthwith Hayatullah ordered his son Naz Ali to kill him, resultantly, Gul Khan got hit and severely injured, whereas accused bolted away from the crime spot. Motive behind the offence, as stated by the complainant, is entry of goat in the field of accused and eating "Gowara"

crops. He has charged the convict-appellant for commission of the crime.

3. Investigation was started in the case by the local police of Tojori. Since both the accused went into hiding, therefore, proceedings under section 512, Cr.P.C. were initiated against them, whereas challan was submitted against the respondent-accused to the Court of learned Additional Sessions Judge-III, Lakki Marwat, where at the commencement of the trial the prosecution produced as many as 11 witnesses whose statements were recorded and placed on file. After the closure of the prosecution evidence, respondent-accused was examined under section 342, Cr.P.C, wherein he denied the charges, professed innocence and stated to have falsely been implicated in the case. He, however, wished to produce no defence nor to examine himself on oath as required under section 340(2), Cr.P.C. The learned trial Court, on conclusion of the trial, convicted and sentenced the appellant, as mentioned and has also sent murder reference for its confirmation.

4. We have considered submissions of the learned counsel for the parties and gone through the record of the case with their valuable assistance.

5. It was on 21.8.2007 at 11:00 a.m., when the complainant in the company of deceased were grazing their sheeps at the place of occurrence, where one of the sheep went to the field of the appellant which allegedly resulted in exchange of hot words between the deceased and the appellant, resultantly, Hayatullah, the father commanded his son Niaz Ali Khan to kill, who fired with his .12 bore shotgun which resulted into a serious injury on person of the deceased. The deceased then injured was rushed to DHQ, hospital Bannu, where he was initially treated and the complainant reported the matter to the casualty police which was taken vide murasila at 1:10 p.m, but the injured later on died. The learned counsel for the defence vehemently argued that the complainant was not present at the time and at the place of occurrence and he further contended that it was an un-witnessed occurrence.


We, with the valuable assistance of the learned counsel for the parties, have gone through the record, the complainant while reporting the matter, stated that it was his goat which went into the fields of the accused to eat Gawara crops which resulted into the tragedy, but when the Investigating Officer prepared the site plan at the instance of the complainant, nowhere the fields of the accused were shown, nor the fields surrounded were having any Gawara crops and all the fields have been shown as un-cultivated. The complainant was examined as PW-7, who stated that his village was situated across the ravine and that they have their own property where they and the co-villagers graze their sheeps, if they had a common pasture, then why they brought their sheeps there. Even otherwise, the presence of the complainant seems somewhat doubtful, as he could not explain the exact location of his presence and the field to which the goat of the deceased had gone. The injured was taken to DHQ hospital Bannu in a Datsun pickup arranged by one Iqbal, his co-villager and he stated

that other co-villagers also accompanied the injured to the hospital but the Investigating Officer did not record the statements of these people to substantiate the stance of the complainant. The complainant stated that he reached to DHQ hospital Bannu at 12:50 p.m, whereas the scribe Gul Shehzad stated that he received the injured 1:10 p.m in the hospital and he further stated that one Gul Malook brought the injury sheet with him from police station Tajori. We are surprised to note, that if the injured was straightaway taken to the hospital, then how the injury sheet was prepared in the police station and that why the complainant remained silent on this particular aspect of the case. The prosecution case received jolts, when Gul Malook was examined as PW-4, who stated that he was informed by the Muharrir of Police Station Tajori at 11:50 a.m, that the injured was brought to the hospital and he should proceed. This PW further stated that when he reached to the hospital, Gul Shehzad Head Constable (PW-9) penned down the report of the complainant and handed him over

the injury sheet, but in the same breath he admitted that the matter was already reported and he had not seen the injured but he was in knowledge of the injuries, this is surprising that when he did not meet the injured, how could he say that he was in the knowledge of the injuries on the person of the injured but in fact inference can be drawn that the injured was first taken to police station Tajori where the report was made and the injury sheet was prepared. The scribe stated that it was 01:10 p.m when the injured was received, whereas the complainant stated that they reached to the hospital at 12:50 p.m, then how PW Gul Malook got information from the Muharrir at 11:50 a.m regarding the arrival of the injured to the hospital. All the witnesses contradicted one another, which indicates that in fact neither the complainant was present with the injured/deceased, nor the injured was taken straightaway to the hospital but the inference can be drawn that these were the nearby people who took the deceased then injured to

the police station Tajori and later on when the complainant was procured, he reported the matter to the police.

In case titled Mst. Anwar Begum Vs. Akhtar Hussain alias KAKA and 2 others (2017 S C M R 1710) it was held that:-



*It is well settled by now that in order to maintain conviction of a convict on capital charge on the basis of testimony of chance witnesses the court has to be at guard and corroboration is to be sought for relying upon any such evidence. But no corroboration is available in this case.*

6. The witnesses are at variance regarding the mode and manner in which the injured was shifted either to the hospital or to the police station. One Gul Badshah who was examined as PW-6 stated that at 2/3:00 p.m they received information and when they reached to Gambila Bus Stand the dead body also arrived to the police post Gambila where he identified the dead body before the police and thereafter, it was taken to RHC Gambila where too he identified the dead body before the doctor. Gul



Malook, who was examined as PW-4, constantly denied the taking of the dead body to the police post Gambila, rather he said that from DHQ Bannu the dead body was taken to RHC Gambila. The deceased was first taken to D.H.Q hospital Bannu, where he was initially examined but surprisingly, throughout the investigation neither the statement of the doctor who initially treated the deceased then injured was brought on record, nor medico-legal report was prepared, hence, the initial journey from the spot to the hospital is shrouded in mystery and it tells otherwise of presence of the complainant. When PW-6 was examined, he categorically denied the presence of the complainant in the police post Gambila as well as in RHC Gambila, whereas the complainant stated that when the dead body was brought to the Mortuary for postmortem examination, he left for his village, had he been present in the hospital, he would have waited till completion of the postmortem examination and then would have joined his co-villagers to bring the dead body to the village.

In case titled **Zulfiqar Ali Vs. Imtiaz & others**

**(2019 SCMR 1315)**, it was held that:-

*“According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses' presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition”.*

7. The Investigating Officer, after receipt of copy of the FIR visited the spot and he called for the complainant from his village and on his pointation the blood was recovered and site plan was prepared. In the site plan, the complainant has shown himself at a considerable distance from the deceased and also the distance between the accused/appellant and his co-accused Hayatullah. Keeping in view the long distances the exchange of hot words is not appealing to a prudent mind, if there was exchange of hot words, then the parties would have come closer and even the complainant would have tried to intervene but the complainant remained a silent spectator.

The purpose of presence was the grazing of sheep and the tragedy was stated to be the result of eating Gawara crops by the sheep but when the site plan is thoroughly gone through, neither there was any Gowara crop in the fields, nor the accused had property at the place of occurrence, if so, then why would they retaliate. The adjacent fields belong to one Maidal and Sattar Khan, but the Investigating Officer did not record their statements.

9 8. This is admitted on record that while going to D.H.Q. Hospital Bannu, Police Station Tajori, P.P Gambila and Police Station Sarai-e-Norang fall in the way and if so, the complainant should have reported the matter to the police in either of these stations. Similarly, Civil Hospital Tajori, RHC Gambila, Civil Hospital Norang and Civil Hospital Lakki lay in the way, then why the injured was not taken there so that his life could be saved at the earliest but the behavior of the complainant suggests that it was a blind murder and no one was a witness to it. There was a conscious attempt on part of the witnesses to improve their

statements to cover the delay, but these improvements cannot simply be ignored and it reacts otherwise, and we can safely hold that first the investigation was conducted and then the report was made. The prosecution case when is looked from all angles, leads us nowhere but to hold that preliminary investigation was conducted and on availability of the witnesses the report was made. In case titled Nazeer Ahmed Vs. State & others (2019 SCMR 594), it was held that:-

*As far as the alleged murder of Manzoor Ahmed is concerned the only eye-witness of the said murder was none other than Nazeer Ahmed complainant (PW1). According to the complainant there had been repeated exchange of hot words between the deceased and the complainant on the one hand and the accused party on the other and, thus, it was unlikely that the complainant and the deceased would go with respondent No. 2 to his house for repairing a computer. 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.*

In this respect, case titled *Allah Wasaya Vs. State (2018 P.Cr.L.J Note Peshawar 192)* can also be referred.

9. So far as abscondence in the instant case is concerned, it is not denied that abscondence alone cannot be a substitute for real evidence because people do abscond though falsely charged in order to save themselves from agony of protracted trial and also to avoid duress and torture at the hands of police. In the instant case, abscondence is meaningless, because it can neither remove defects of the oral evidence, nor is by itself sufficient to bring guilt home to the accused.

In case titled *Muhammad Sadiq Vs. State (2017 SCMR 144)*, it was 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.*

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In this respect case law reported as Muhammad

Salim Vs. Muhammad Azam and another" (2011 SCMR-474)

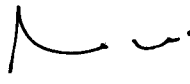

and Rohtas Khan Vs. State (2010 SCMR 566) can also be

referred. Needless to say that absconsion is corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case.

10. For what has been discussed above, this appeal is allowed, the conviction and sentences awarded to the appellant are set-aside and he is acquitted of the charge levelled against him. He shall be released forthwith, if not required to be detained in any other case. Murder Reference No.09-B/2018 is answered in negative.

The above are the reasons of our short order of the even date.

Announced  
Dt: 03.12.2019  
Hasnain/\*

  
JUDGE  
  
JUDGE

(D.B ) Mr. Justice Ikramullah Khan, & Mr. Justice Sahibzada Asadullah.