Judgment Sheet

PESHAWAR HIGH COURT, BANNU BENCH.

(Judicial Department)

Cr.A No. 32-B of 2019.

Zafar Iqbal
Versus
The State & another

JUDGMENT

Date of hearing: **21.12.2020.**

For Appellant: **M/S Danyal Khan Chamkani & Haroon-ur-Rasheed Khattak, Advocates.**

For State: **Mr. Qudratullah Khan Gandapur, Asstt: A.G.**

For Respondent: **Haji Malak Rahman, Advocate.**

SAHIBZADA ASADULLAH, J.- Through this judgment, we shall dispose of Cr.A. No.32-B of 2019, titled Zafar Iqbal Vs. The State & another and connected Cr.R. No.16-B of 2019, titled Nazirullah Vs. Zafar Iqbal, as both have arisen out of one and the same judgment dated 14.02.2019, rendered by learned Additional Sessions Judge-I, Karak, whereby the appellant, charged in case FIR No.143 dated 14.4.2016, under Section 302 PPC, police station Sabir Abad, has been convicted under Section 302(b) PPC and sentenced to imprisonment for life with fine of Rs.2,00,000/- to be paid to the legal heirs of deceased Mir Badshah, in terms of Section 544-A, Cr.P.C. or in default thereof to further suffer six months simple

imprisonment. Benefit of Section 382-B, Cr.P.C. has been extended to the convict/appellant.

2. Facts of the case as spelt out from the FIR Ex. PA, in brief, are that on 14.4.2016 at about 18:55 hours, complainant Nazir Ullah (PW-14) with the help of co-villagers, brought the dead body of his father to police station Sabir Abad where he made report to Noor Jahan Khan S.I (PW-9) to the effect that his father and one Aitebar Din were close friends; that on the eventful day, he alongwith his father, uncle Khumar Badshah went to the house of Aitebar Din and reached there at about 17:00 hours, where accused/appellant, duly armed with Kalashnikov came and started abusing his father, forbade him from visiting their house, became angry and started firing, as a result whereof, his father was hit and died on the spot. Besides the complainant, the occurrence is stated to be witnessed by Itebar Din and other relatives of the complainant. Motive for the offence is stated to be friendship of father of complainant with father of the accused upon which he was annoyed. He charged the accused for the commission of offence.

3. On completion of investigation, challan was submitted against the accused before the learned trial Court. After compliance of provisions of Section 265-C Cr.P.C, formal charge was framed against the accused to which he pleaded not guilty and claimed trial. In order to prove guilt of the accused, the prosecution examined as many as fourteen witnesses, whereafter, accused was examined under section 342 Cr.P.C, wherein he professed innocence and false implication, however, he opted to produce evidence in his defence. In defence, the accused produced Shahid Nawaz, Aitbar Din, Mst. Shamim Akhtar and Yar Muhammad as DW-1 to DW-4, respectively. On conclusion of trial, the learned trial Court vide impugned judgment dated 14.02.2019, convicted the accused and sentenced him, as mentioned above, which has been assailed by the appellant through the instant appeal, whereas complainant Nazir Ullah has filed connected criminal revision for enhancement of sentence awarded to the appellant.

4. The learned counsel for the parties alongwith Asstt: Advocate General were heard at length and with their valuable assistance the record was gone through.

5. It was at 17:00 hours, when the deceased met a tragic death resulting into a charge against the appellant. The incident in issue allegedly occurred in the house of the appellant and the cause of annoyance was the bromance between the two i.e. the deceased and his father. Much was argued regarding the innocence of the appellant and non-presence of the witnesses at the stated time when the deceased was done to death. The learned counsel went on to say that the deceased lost his life at a considerable distance from the house of the appellant/accused and that it was the father of the appellant who with the help of the co-villagers shifted the deceased to the police station and informed the complainant regarding death of his father. It was lastly submitted that the incident in issue went un-witnessed and that it was nothing but *mala fide* which prompted the complainant to charge the appellant. Contrarily, the other side advanced their arguments in total rebuttal of what was submitted for the appellant with an additional prayer for enhancement of sentence.

6. No doubt, the incident allegedly occurred in the house of appellant and that the appellant is singularly charged for murder of the deceased, but that alone is not sufficient

either to convict or maintain conviction rather the intricacies requires much prudence and caution to avoid a confused resolution that favours none but adds to injustice. No doubt, the substitution of single accused in a murder charge is a rare phenomenon, but at the same time the apex Court has also laid down the law through various dictum that to put the rope around the neck of an accused charged singularly, there must be ocular account of unimpeachable character, trustworthy and confidence inspiring, corroborated by circumstantial evidence.

In case titled, ***"Arshad Beg Vs. The State" (2017 SCMR 1727)***, it was held that:-

> *"Even otherwise this is a case of single accused and substitution in such like cases is a rare phenomenon as normally kith and kin of the deceased (in this case real brothers) would not implicate an innocent person by letting off the real culprits. Therefore, we hold that both the witnesses of ocular account were present at the spot and had witnessed the occurrence. Ocular account furnished by these witnesses is substantially supported by medical evidence as three firearm injuries were observed on the person of Sharif Beg (deceased) out of which only one was exit would whereas two were entry wounds. Therefore, the prosecution case stood proved against the appellant beyond any shadow of doubt and conviction of the appellant under section 302(b), P.P.C. is fully justified".*

7. We are to see as to whether the witnesses succeeded in establishing their presence on the spot and as to

whether the incident occurred in the mode, manner at the stated time and in the house of the appellant. We cannot ignore that the parties had no previous animosity, but the incident occurred as the appellant did not like the constant visits of the deceased to his father and his house. Though constant efforts were made by the appellant to establish that the deceased was done to death outside the house and that the death was the result of a quarrel that took place between the deceased and the unknown accused, it remained a mystery till the end that who were the unknown accused, as nobody was examined by the defence to have witnessed the quarrel, resulting into death of the deceased. This is the prosecution case that while sitting in the courtyard of the house the incident occurred and that father of Aitbar Din was also present and witnessed the occurrence. This is on record that at the time of report in the Police Station, Aitbar Din was also present and so at the time when the Investigating Officer visited the spot. In case titled ***"Aurangzeb Vs. The State (2020 SCMR 612)***, it is held that:-

> *"The incident was reported with a remarkable promptitude, followed by post mortem examination that cannot be viewed as delayed, factors excluding possibility of deliberations and consultations, in retrospect suggestive of witnesses' presence*

at the stated point of time, coinciding with the durations mentioned in the autopsy report. Though inconsequential for want of forensic verification, nonetheless, the weapon recovered on petitioner's disclosure is consistent with the nature of fatal injury. Occurrence being a broad daylight affair before a large gathering, does not admit hypothesis of substitution. Appraisal of evidence carried out by both the Courts below, on our own independent analysis, is found by us in accord with the principles of safe administration of criminal justice and as such does not call for interference".

8. The prosecution in support of its claim apart from other witnesses, produced and examined the complainant as PW-14, where the eyewitness Humar Badshah was examined as PW-13, who stated that both the deceased and father of the appellant were enjoying cordial relations since long and were on constant visiting terms and that on the day of incident all the three went to the house of the appellant to purchase woods, as his father Aitbar Din was running the business. This stance was not rebutted by the defence. The witness remained consistent regarding their leaving for the spot village on motorcycle at 04:00 p.m, their reaching to the spot house and parking the motorbike at a distance of 30 feet from the house. Both the witnesses were put to the test of searching cross-examination, but their testimony could not be shattered, they remained

consistent regarding the approach of the appellant and his calling the deceased. The complainant stated that after receiving fire shots, the deceased fell on the cot he was sitting and thereafter, was shifted to another cot with the help of the co-villagers, this fact was confirmed by PW-13, who witnessed the incident. In case titled ***"Akhtar Ali Vs. The State and another" (P.Cr.L.J. Peshawar Note 3)***, it was held that:-

> *"Both the eye-witnesses through their trustworthy and confidence inspiring testimony corroborated by medical and circumstantial evidence have successfully proved their presence on the spot with the deceased at the time of incident. They have not exaggerated the charge and have furnished the true account of the incident. It was much easier for them to charge the appellant for attempting at their lives too, but they did not, which shows their honesty and truthfulness, as in routine, we have observed that in such like incident the witnesses try their level best to implicate the accused under so many offences, possible for them. There seems no material contradiction in the statements of the eye-witness which may negate the basic fabric of the prosecution story. There may be some minor discrepancies in their statements but such like discrepancies are inbuilt proof of truthfulness of the PWs that they have come forward with natural account of the events, without being tutored or any fabrication. By now the principle of falsus in uno falsus in omnibus, has been done away with. Rather the Courts while appreciating evidence, apply the principle of sifting the grain from the chaff. It is settled law, that those contradictions in the prosecution evidence are considered as fatal, which totally negates the prosecution case. Mere minor discrepancies, occurring in the statements of*

the PWs, which are otherwise natural one would not be considered as fatal. Moreover, when the witnesses are subjected to lengthy and searching cross-examination by a skillful hand, such discrepancies do creep in from the simple and rustic villagers, who are never used to such tricky questions nor are mindful about the nature and consequences of answers thereof. The Courts are never supposed to decide the matter in a mechanical manner by taking such discrepancies as a tool to dislodge a genuine case. Rather, the Courts are supposed to go in depth of the evidence and assess it at the touch stone of natural course of events and human conduct in normal pursuit of the society by scrutinizing its intrinsic worth and if comes to the conclusion on their own assessment that such an occurrence had in fact taken place, it costs an obligation to redress the grievance of aggrieved party. Although, accused is considered as a beloved child of the Court but at the same time the aggrieved party is also not to be treated as an alien as, it is he, who approaches the Court for redressal of his grievance against aggression of accused".

9. True, that the incident occurred at 17:00 hours, whereas the report was made at 18:55 hours, but this can never be taken to hold that the report was made after preliminary investigation or that the appellant was charged after consultation and deliberation, as we cannot forget that the incident occurred in a remote village with no cellular facilities and absence of such facility excludes the possibility that someone from the village might have informed the complainant. The absence of cellular facility in the village was confirmed by the witnesses who stated that after putting the dead-body in the Datsun pickup for Police Station, when they reached Samandri, they received signals and informed the relatives who reached to

the Police Station after the F.I.R was registered, this fact was also confirmed by the Investigating Officer. It was argued that the complainant and the eyewitness failed to identify the deceased at the time of preparation of the inquest report and that in the relevant column of the postmortem report, instead of individual identification the word "relatives" is written. The learned counsel ignored that besides the complainant, 2/3 persons from the village including father of the appellant accompanied the dead-body to the Police Station and these were out of the 2/3 persons who identified the deceased before the police at the time of preparation of the inquest report. The defence further lost sight of that the complainant stated that after the report was made, he, the eye-witness, Aitbar Din and two others including Satar Badshah were to stay in the Police Station and the relatives took the dead-body under the escort of PW-6, to the doctor for postmortem examination. The plea of the learned counsel regarding identification before the doctor holds no ground, as these were the relatives who took the dead-body from Police Station to the hospital and got it identified. The delay is nothing but natural as the incident occurred in a remote village. The witnesses remained consistent that the relatives reached to the Police Station after the case was registered and the way they reached to the Police Station and afterwards to the spot. Humar Badshah, who was examined as PW-13, stated that he, Nazirullah and Aitbar Din accompanied police to the spot in their vehicle, whereas Nadeem, Satar

Badshah came on motorbike, this was what supported by the Investigating Officer. The main thrust of the argument was that the witnesses were not present on the spot and that it was the father of the appellant who informed them, but the consistent relevance of events overshadowed what he submitted. The issue before us, is to determine as to whether deceased lost his life owing to a quarrel outside the house, as stated by the Aitbar Din, who was examined as a defence witness, or inside the house, as stated by the witnesses. The Investigating Officer reached to the spot and on pointation of the witnesses the site-plan was prepared. The Investigating Officer recovered six empties of 7.62 bore from the spot alongwith two spent bullets from the southern and also blood-stained earth from beneath the charpoy, where the deceased received firearm injuries. The collected empties alongwith the spent bullets were received to the Forensic Science Laboratory on 18.4.2016, where these were found to have been fired from one and the same weapon. The laboratory report confirms the involvement of a single accused and so is the claim of prosecution.

10. We are anxious to know that whether the relation between the parties was so cordial that all the three were taken inside, instead asking them to sit outside the house. Both the complainant and eyewitness remained consistent that the parties were enjoying warm relationship and that they were on

constant visiting terms to the houses of each other and even the witnesses were not suggested otherwise. The claimed relationship has never been questioned, which proves the fact that the deceased and witnesses had no other purpose in the village but to visit Aitbar Din, father of the appellant. Record tells that on 15.4.2016, father of the appellant recorded his 164 Cr.P.C. statement, where on one hand, he admitted presence of all the three in his house and on the other, he charged the appellant for the murder of deceased. The matter does not end here, rather a specific question was put to the accused regarding the 164 Cr.P.C. statement recorded by his father, to which he replied that the statement was the result of pressure and physical torture. It was vehemently argued that 164 Cr.P.C. statement has no evidentiary value, as on one hand, it was recorded in absence of the accused and on the other hand, the Magistrate who recorded the same has not been produced. True, that the matter was not cross-examined and equally true that the Judicial Magistrate who recorded the same has not been produced, but we cannot ignore that the accused while recording his statement under section 342 Cr.P.C. did not deny the document, but questioned the manner it was executed by

terming it to be the outcome of threat, pressure and coercion and his this stance was reiterated by his father Aitbar Din, who appeared as a defence witnesses to favour his son, so in such eventuality, the statement is accepted to have been recorded, but stress was on its voluntariness, when so, the non-examination of the concerned Judicial Magistrate will not help the prosecution. What is left for this Court, is to see, as to whether this piece of evidence could wholly be relied against the appellant to convict him, our answer is in negative, but we cannot reject its status as a circumstantial evidence and it can be read for limited purpose only i.e. the coming of deceased and witnesses to the house on the day of incident and it tells that they had come. The appellant produced witnesses in his defence including Aitbar Din, who was examined as DW-2 and Shahid Nawaz, as DW-1. DW Shahid Nawaz stated that he was serving in Frontier Constabulary and during the days of occurrence, he was on leave. He further stated that on receiving information, he reached to the place of occurrence situated at a distance of 700/800 feet from the house of the appellant.

11. After evaluating the evidence on file, this Court has reached to an inescapable conclusion that the prosecution

has succeeded in bringing home charges against the appellant, through confidence inspiring evidence and that the witnesses remained consistent on material aspects of the case. Furthermore, the medical evidence fully supports the ocular account with no room for substitution, even otherwise in case of a single accused substitution is a rare phenomenon. The instant appeal alongwith revision petition, are bereft of merits stand dismissed.

Announced:
Dt: 21.12.2020.
Kifayat/*

JUDGE

JUDGE

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah