

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr. A No. 63-B of 2015

Taj Ali Khan

Vs.

The State etc.

JUDGEMENT.

Date of hearing 17.05.2023

For petitioner: **Mr. Anwar-ul-Haq advocate**

For State: **Mr. Umer Qayyum, Asstt: A.G.**

For respondent: **Muhammad Ashraf Marwat advocate.**

F.I.R No. 323, dated 12.09.2010, Under Sections
302/324/34 P.P.C, Police Station Lakki Marwat

FAZAL SUBHAN, J.— Through this criminal appeal, the appellant Taj Ali Khan has challenged the judgment and order dated 25.03.2015, passed by learned Additional Sessions Judge-II, Lakki Marwat, whereby accused /respondents No.2 and 3, namely, Mashal Khan and Imtiaz alias Chuni both sons of Ghulam Muhammad have been acquitted from the charges.

2. Relevant facts of the case, as arises from the F.I.R, are that on 12.09.2010 at 20:45 hours, complainant Taj Ali Khan, while present with the dead-body of his brother Haji Mir Abbas Khan, in emergency room of City

hospital Lakki Marwat, reported that on the relevant day of occurrence he along with his brother Haji Mir Abbas Khan and other brother Gul Wali Khan, were returning from the house of their brother Sardar Ali Khan and at the relevant time deceased Haji Mir Abbas Khan was proceeding ahead of them for few paces and when at 17:30 hours, they reached near the house of Mehboob, respondent/ accused Imtiaz Khan and Mashal Khan sons of Ghulam Muhammad, were present duly armed with Kalashnikovs and started firing upon Haji Mir Abbas Khan with the intention to kill him and as a result he was hit, both the accused also fired upon the complainant and his brother Gul Wali Khan with the intention to cause death, but they luckily escaped unhurt. They being empty handed could not do anything, and the respondents/ accused after commission of offence decamped from the spot. When they approached their brother Haji Mir Abbas, he had already expired. Motive for the offence was stated to be dispute over landed property. He, therefore, charged both the accused for commission of the offence and upon his report, the present case was registered.

3. After investigation in the case challan against the accuse/ respondents was submitted and after

observing legal formalities under section 265-C Cr.PC, formal charge was framed against the accused/respondents, to which they pleaded not guilty and claimed trial. In order to prove their guilt the prosecution produced and examined eleven (11) witnesses and abandoned the remaining witnesses. The gist of already examined witnesses is as follows:

4. PW-01 is Dr. Ghulam Nabi, who conducted autopsy on the dead-body of Haji Mir Abbas Khan on 12.09.2010 at 09:30 p.m and found the following injuries:

1. Three entrance wounds of firearm at the left hypochondrium within an area of 3x3 inch: size of each wound is 1/4X1/4 inch. Skin, muscles and cavity deep.
2. An entrance wound of firearm about 4 inch below the left nipple. Size is 1/4x1/4 inch, skin, muscle and cavity deep.
3. An entrance wound of firearm about three inches below and medial to the left nipple, size 1/4x1/4 inch, skin muscle and cavity deep.
4. An entrance wound of firearm about 4 inch medial to the left nipple, skin muscle and cavity deep, size 1/4x1/4 inch.
5. An entrance wound of firearm about 4 inch to the left nipple, size is 1/4x1/4 inch skin muscle and cavity deep.

6. An entrance wound of firearm below the sternal notch, size 1/4x1/4inch, skin muscle and cavity deep.
7. An entrance wound of firearm about the sternal notch size 1x1 inch, skin, muscle and cavity deep.
8. An entrance wound of firearm at the right upper abdomen, size 1/4x1/4 inch, skin, muscle and cavity deep.
9. An exit wound of firearm at the lower angle of the right scapula, size 1/1/2 inch.
10. An exit wound of firearm on the back of the chest at the left scapula, size is 4x3 inch.
11. An exit wound of firearm on back at the root of the neck, size is 1x2 inch.
12. An exit wound of firearm on back at the root of the neck about 2 inch medial to the wound No.11 size 1/2x4inch.
13. An exit wound of firearm at the top of the vertex size is 2x2 inch.
14. An entrance wound of firearm at the anterior medial surface of the middle of the left forearm, size 1/4x1/4 inch, skin muscle deep.
15. An exit wound of firearm about 3 inch posterior to the wound No.14 size 1/3x1/3 inch.
16. An entrance wound of firearm at the lateral surface of the root of the index finger of the left hand, size is 1/4x1/4 inch, skin, muscle deep.

17. An exit wound of about one inch medial to the wound No.16 on the posterior surface of the index finger of the left hand, size 1/3x1/3 inch.

Internal examination.

Scalp fractured, membrane and brain injured.

Thorax.

Walls, pleura, larynx and trachea, right lung, left lung pericardium and heart and blood vessels injured.

Abdomen.

Walls, peritoneum, mouth, larynx and esophagus, diaphragm small and large intestine and liver injured.

Opinion.

In the opinion of Medical Officer, the death had occurred as a result of injury to the vital organs (brain, heart, left and right lungs, liver, small and large intestine) causing severe hemorrhage, shock and death.

Probable time between injury and death....00 to 02 minutes.

Time between death and PM.....04 to 05 hours.

5. PW 02, Daud Khan No.27/DFC has executed warrants under section 204 and proclamation notices under section 87 Cr.PC against both the accused.

6. Ghulam Muhammad ASI (PW-03) is scribe of report, he stated that on 12.09.2010 at 20:45 hours, he scribed the report of complainant Taj Ali Khan in emergency room of Civil Hospital vide Murasila Ex: PW 3/1, prepared injury sheet and inquest report of the deceased Ex: PW 3/2 and PW 3/3 respectively. He referred the dead-body to the doctor for PM examination under the escort of constable Rahim Ali No.6736, while sent the Murasila to the Police Station through constable Mirza Alam. No.547.

7. PW-04 is Salim Khan ASHO, who arrested the accused Imtiaz alias Chuni on 19.03.2013.

8. Rahim Ali FC No.6736 was examined as PW-05, who escorted dead-body to the doctor and after PM examination the medical officer handed over him the PM documents along with blood stained garments of the deceased, which he produced to the Investigating Officer.

9. Ayub Khan SI (PW-06), interrogated the accused Mashal Khan and Imtiaz alias Chuni,

and recorded their statements under section 161 Cr.PC.

10. The complainant Taj Ali Khan was examined s PW-07, who narrated the same facts as mentioned in the F.I.R. He further disclosed that the Investigating Officer prepared site-plan at his pointation.

11. Gul Wali Khan the alleged eye-witness was examined as PW-08. He also disclosed the same facts as narrated by the complainant. He further deposed that the site-plan was prepared at his pointation as well as that of complainant. He is marginal witness to the recovery memo, vide which the Investigating Officer collected blood stained earth from the place of deceased Haji Mir Abbas. He is also marginal witness to the recovery memo, through which the Investigating Officer took into possession 10 empties of 7.62 bore near the places of accused. In his presence constable Rahim Ali, produced blood stained clothes of the deceased to the Investigating Officer and prepared recovery memo in this respect.

12. Gul Badshah PW-09 identified the dead-body of the deceased before the police as well as before the doctor.

13. Abdur Rahim SI, was examined as PW-10, who is Investigating Officer of the case, and according to him, he on receipt of copy of F.I.R rushed to the spot, where he on pointation of the complainant and we prepared site-plan Ex: PW 10/1, he secured blood stained earth from the place of deceased vide recovery memo Ex: PW 10/2, recovered ten empties of 7.62 bore from the places of accused. vide recovery memo Ex: PW 10/2. On constable Rahim Ali No.6736 produced the Investigating Officer one blood stained Qamiz, Banyan and Chader of the deceased which he took into possession vide recovery memo Ex: PW 10/4. Thereafter he conducted house search of the accused, but neither accused nor any incriminating article were recovered from their house. He sent blood stained garments and crime empties to F.S.L through moharrir of the Police Station vide applications Ex: PW 10/7 and 10/8 respectively and placed on file their result Ex: PK and Ex: PK/1 respectively. In respect of motive he placed on file copy of F.I.R N.89 dated 26.03.2008 and copy of civil suit Ex: PW 10/9 and Ex: PW 10/10-A. The Investigating Officer recorded

statements of witnesses under section 161 Cr.PC. and on completion of investigation handed over the case file to the S.H.O for submission of complete challan.

14. The prosecution also examined one Jalil Khan inspector as PW-11, who incorporated the contents of Murasila into F.I.R Ex: PA.

15. Thereafter statements of accused under section 342 Cr.P.C were recorded, wherein they professed innocence, however, they did not wish to produce defence evidence or to be examined on oath as provided under section 340(2) Cr.P.C. Learned trial Court after hearing arguments from both the sides, vide impugned judgment dated 25.03.2015, acquitted the accused/ respondents. The complainant moved instant criminal appeal against acquittal of accused/respondents.

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

17. It is well settled and entrenched principle of criminal jurisprudence that the prosecution has to prove guilt of accused through cogent, convincing and reliable evidence and beyond any shadow of doubt, however, if the prosecution evidence is found shaky and material

inconsistent and at the same time suffers from the contradictions, then benefit of doubt is to be extended to the accused.

18. Analyzing the prosecution evidence upon this touch stone, it is clear that the complainant has alleged in his report Ex: PW 3/1, that the occurrence had taken place at 17:30 hours, that he along with the deceased and other brothers, namely, Gul Wali Khan were returning from the house of Sardar Ali Khan, there other brother, when they were attacked by the respondents/accused. The F.I.R reveals that the report was lodged at emergency room of City Hospital, Lakki Marwat at 20:45 hours. The complainant as per report, when approached to his brother he, at that time was already expired. It is also in his report that the distance in between the spot of occurrence and Police Station Lakki Marwat was 12/13 KM, however, it took the complainant and his brother 3-hours and 15-minutes to take the dead-body to the City Hospital Lakki Marwat, however, the delay in lodging the F.I.R has not been explained in the report, as well as the statement recorded before the court. It has been noticed that in many cases the complainant party shift the expired relatives to the hospital, whereas the police station or police post is always at a short distance and in case of report at Police Station/ Police Post, they may have saved a

lot of precious time to timely report the mater/ occurrence, which may avert the argument of consuming time for consultation and deliberation, but it has been commonly observed that despite the fact that the deceased had already succumbed to injuries, the dead-body is shifted to the hospital, with no explanation for doing so, as there exists no chance to save the life of the deceased. In such a situation the lodging of Murasila is always to be viewed with suspicion because it is scribed on a plain white paper, whereas the F.I.R is lodged in the Police Station on duly prescribed form and manipulation therein is always difficult. Anyhow, in the present case there is clear delay of more than three hours in lodging the report, for which no satisfactory and plausible explanation is forthcoming.

19.

The complainant Taj Ali Khan and his brother Gul Wali Khan have posed themselves to be the eye-witnesses of the case. As asserted in the report Ex: PA/1, they were proceeding along with the deceased at a short distance and allegedly had some dispute of land with the respondents /accused and in that situation if respondents/ accused had fired upon the deceased Haji Mir Abbas then being inimical to the complainant and his brother Gul Wali Khan, the respondents/accused would also not have spared them, however, in the incident they have not received even

✓ a scratch at the hands of respondent/ accused. This further gives the impression that the complainant and his brother Gul Wali were not present at the relevant time of occurrence.

20. The prosecution case mainly hinges on the testimony of PW 07, Taj Ali Khan (complainant) and PW-08, Gul Wali Khan. The complainant in his report has alleged that at the relevant time of occurrence he along with Gul Wali Khan were accompanying the deceased Haji Mir Abbas Khan and when they reached near the house of Mehboob Shah, the respondent/ accused assaulted them with Kalashnikovs and as a result deceased Haji Mir Abbas Khan was hit and died at the spot. During his statement complainant Taj Ali Khan was unable to state any plausible reason for accompanying the deceased. It is in his cross-examination that after the occurrence PW Gul Wali had gone to arrange Datson to shift dead-body of the deceased to the hospital and that he returned with the Datson at 18:45/19:00 hours. Despite arrangement of vehicle at the stated time, the complainant party further took one hour and 45-inutes to shift dead-body to the hospital despite the fact that Police Station was at a distance of 12/13 KMs from the spot and they could have reach there within 10/15 minutes. It is further replied by the PW Taj Ali Khan that cot was

also brought by same Gul Wali Khan. He further replied that when Datson reached with PW Gul Wali, he himself and nephews were present at the spot. Surprisingly, PW Gul Wali was active in arranging the cot as well as Datson, whereas it is in his cross-examination that several nephews of the complainant were present at the spot. It does not appeal to prudent mind that several able bodied nephews were present, but their uncle Gul Wali was running from pillar to post for making arrangements of datson and cot. The site-plan reveals that the occurrence had taken place in a street close to the house of Gul Badshah another brother of complainant, but despite firing in the street neither Gul Badshah was attracted to the spot nor he made any arrangement to bring cot from the nearby house. The cross-examination of PW Taj Ali Khan further reveals that at the time of lodging report Gul Wali Khan was not present with him, which also does not appeal to the mind because throughout the incident he was making arrangements for shifting dead-body to the hospital but at the crucial moment of lodging report he is shown to be absent. The complainant further answered in cross-examination that police arrived to the spot at 08:40 p.m, whereas he lodged the report and after narrating contents to him he signed the report at 09:20 p.m.

✓ 21. To the contrary, perusal of the Murasila reveals that the matter was already reported to the police at 08:45 p.m. whereafter the Murasila was sent to the Police Station and F.I.R was chalked out at 21:45 hours and had he signed the report 09:20 p.m. then it would not have been possible to register the case at 09:45 pm. In cross-examination he also replied that both the accused made firing in shot burst manner and after few seconds they also made shot burst upon them. He further replied that at the time of firing at his deceased brother they were standing and never tried to run away or take shelter.

22. PW Gul Wali in his cross-examination replied that the dead-body was shifted from the place of occurrence to the hospital at 07:00 p.m, whereas occurrence had taken place at 17:30 hours. He further replied that he brought cot from his house and then on arrival of Datson put the dead-body in the Datson and till arrival of the Datson the dead-body was placed on the cot. He further replied that prior to arrival of Datson, complainant and his nephews were present with the dead-body, and that, police arrived to the spot at 10:45 p.m. and he remained with the police till their departure. He further replied that his statement was recorded by the police at 11:40 p.m, after conducting house search of the accused. In response to another question he replied that

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he do not know interse distance between graveyard and the spot and that he cannot say in how much time he reached to the place of hiring of Datson and that he cannot remember as to where he offered Asar Prayer, but replied that it was after dispatching dead-body to the hospital. He also answered that soon after the occurrence he went to the house for bringing the cot and he cannot say that how much time was spent on bringing the cot. He also answered that they did not attempted to escape from the firing in the nearby street towards his house and that houses of Gul Badshah, Mehboob Shah and Hashim Khan were also situated around the spot and that these people did not came out from their houses after the occurrence. He also answered that fire was not repeated after first round of ineffective firing upon them.

23. Thorough consideration of evidence of PW Taj Ali Khan and Gul Wali Khan reveals that they have not disclosed the reason and purpose as to why they were accompanying the deceased at the relevant time. More so, had they been present with the deceased the respondent being inimical towards all the three brothers would have not spared them to leave an eye-witness for deposing against them during trial. At the same time, if they would have been present they may not have consumed more than three hours to shift the dead-body of the deceased to the hospital and

reporting the matter to the police. Their evidence also shows that allegedly they were also fired, but to this effect both these witnesses have contradicted each other, because PW Gul Wali Khan has stated that after first fire shot the accused did not repeated the firing, whereas PW Taj Ali Khan in cross-examination replied that after first burst the accused also made 2nd burst upon them. The incident has allegedly taken place right in front of the house of another brother of complainant Taj Ali Khan, whereas there are also other houses on both the sides of the street, but surprisingly no one from said houses came out after the firing, which is an unnatural conduct because people do come out of their houses to enquire after firing takes place in front of their houses. Both the above PWs are closely related to the deceased and were interested witnesses and, therefore, their evidence required independent corroboration, but none from the vicinity came forward to support the prosecution case. It is also evident that PW Gul Wali Khan, despite being resident of the same area had no knowledge of inter-se distance between graveyard and the spot of occurrence, while as per site-plan (Ex: PW 10/12/Ex: PB) the graveyard is shown right at the end of street/residential houses. It is also evident that the complainant himself did nothing to shift dead-body of the deceased to the hospital or Police Station and PW Gul Wali was arranging the vehicle for

shifting the deceased to the hospital or Police Station as well as arranging the cot from his own house, whereas the house of his another brother, namely, Gul Badshah shown right in front of the spot of occurrence in the site-plan. From the evidence of these witnesses as well as record there is no doubt in our mind that it was an unseen occurrence and after getting knowledge of the incident both the PWs arrived to the spot, where after they consumed more than three hours in shifting the dead-body of the deceased to the hospital, hence, without independent corroboration the evidence of these interested witnesses could not be relied upon. In the case of *"Khalid Mehmood and another Vs the State" 2021 SCMR 810 [Supreme Court of Pakistan]*, while disbelieving the presence of eye-witness on the spot have held that:

2 *"All the circumstances highlighted above lead us to a definite conclusion that the presence of eye-witnesses at the place of occurrence at the relevant time is not above board and prosecution has failed to prove its case against the petitioner beyond reasonable doubt. Therefore, the instant jail petition is converted into an appeal and the same is hereby allowed. The conviction and sentence of appellant Khalid*

Mehmood is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case."

24. In this case the investigation was carried out by the PW-10, Abdur Rahim SI and he collected blood from the spot of occurrence and also prepared site-plan at the instance of complainant Taj Ali Khan and PW Gul Wali. His statement reveals that he remained on the spot of occurrence from 22:45 till 24:00 midnight, however, no source of light is shown on the spot in which he conducted investigation at the spot. PW Gul Wali in his cross-examination stated that co-villagers informed them about arrival of police at the spot, whereafter they proceeded to the spot, while PW-10 Abdur Rahim in his cross-examination replied that on his way to the spot of occurrence he called upon the complainant through a child present nearby, who was aged about 12/13 years. Besides the contradictions between Investigating Officer and the complainant party, it is also worth noticing that how a child of 12/13 years of age was present when the Investigating Officer arrived to the place of occurrence at 22:00 hours. During cross-examination he has also admitted that, he has not recorded statement of constable who took case property

to the F.S.L, nor he placed copy of Register No.19 on file to ascertain that the case property was handed over to the Moharrir for onward dispatch to F.S.L. He replied in cross-examination that the injury sheet and inquest report was produced to him at the place of occurrence at 11:00 p.m, or 11:15 p.m, in the presence of complainant, eye-witness and police officials. In cross-examination he furnished his following answers.

“Particularly, in supplementary statement, the complainant never stated that eye-witness was present with him on the spot at the time of occurrence, but he stated that whatsoever the contents of the F.I.R which he narrated to the police that is correct and is his statement.”

8 He next replied in cross-examination that the complainant and the eye-witness had not stated duration of firing for which it continued nor the direction in which the accused escaped, self stated that, they have stated that accused went to a side. From the above statement of Investigating Officer, it not only contradict the statement of eye-witness, but at the same time, it is not believable in normal course that investigation is conducted at such belated time without showing any source of light. His reply during cross-examination that he informed the complainant party through a child of 12/13 years of age at odd hours also does not

appeal to the prudent mind. He has left material lacunas during investigation and for not placing extract of register No.19, the authenticity of recovered articles have been jeopardized

25. The medical evidence is always a corroborative piece of evidence and lent support to the prosecution case in respect of time of occurrence, seat of injuries, nature and diameter of the injuries, but it in no way point out to the accused in any manner. In this case, the postmortem report reveals the unnatural death of the deceased Haji Mir Abbas Khan through fire arm. The medical officer noted and reported nine entry and equal number of exit wounds at the time of report and during the evidence prosecution case is that both the respondents/ accused were present duly armed with Kalashnikovs and on their arrival they started firing at the deceased and as a result thereof he was hit and fell on the ground. This shows that both the respondents/ accused were attributed the role of firing through Kalashnikovs, however, despite been shown at the same distance from the deceased, the injuries sustained by the deceased through the same weapon of offence were shown to have been inflicted different size/ diameter ranging from 3 inches to 4 inches in injuries No.1 to 5, while injuries No.6 and 7 are totally of different size with 2x3 inch and 1x1inch. Similarly injury

No.8 is 1/4x1/4 inch in diameter and similar is the position of exit wounds with different size and diameter, thus when the deceased was fired from points No.3 and 4 with the same weapon then size and diameter of the injuries must have been the same, however, due to different in size and diameter there is every possibility that the different weapons were used for firing upon the deceased resulting into different size of injuries.

26. Motive of the commission of offence also play a very vital role in criminal cases and prosecution is expected that once motive is alleged for the commission of an offence, then the same must be proved convincingly, however, in the instant case except mere assertions, dispute over landed property with the respondents, the prosecution has not brought anything on record to prove that such motive did existed at the relevant time which prompted the respondents/ accused to take the life of the deceased. In absence of any such proof the motive aspect of the case has not been proved beyond doubt.

27. For all the above reasons, we are of the view that the prosecution has been unable to prove their case through cogent and reliable evidence. There are serious doubts about the presence of the PWs Taj Ali Khan and Gul Wali Khan at the time of occurrence; report was lodged after

delay of considerable time for which no explanation has been forwarded and it has to be presumed that such has been consumed for consultation and deliberation to falsely implicate the respondents in the case; the medical evidence also does not support the prosecution story in respect of kind of weapon used in the offence, whereas motive alleged in the F.I.R has also not been proved convincingly and therefore, learned trial court after correctly appreciating the record has rightly acquitted the respondents/accused in the case, hence, the impugned judgment is maintained and the appeal in hand being devoid of merits is hereby dismissed.

Announced.

17.05.2023

Azam/P.S


JUDGE.


JUDGE.

(D.B)

Hon'ble Mr. Justice Fazal Subhan and
Hon'ble Mr. Justice Dr. Khurshid Iqbal



SCALED
05 JUN 2023
