

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A.No.622-P of 2018.

Date of hearing: 03.10.2019.

Mr.Shabbir Hussain Gigyani, advocate for appellants.

Mr.Muhammad Sohail, AAG for State.

Mr.Hussain Ali, advocate for complainant.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This criminal appeal is directed against the judgment dated 13.06.2018 of learned Sessions Judge, Peshawar, delivered in case FIR No.1353 dated 08.09.2016 u/ss 302/324/34 PPC of Police Station Pishtakhara, Peshawar, whereby the appellants have been convicted and sentenced as under:-

- i. u/s 302(b)/34 PPC to life imprisonment as Ta'azir with payment of Rs.1,50,000/- each as compensation payable to the legal heirs of the deceased within the meaning of Section 544-A Cr.P.C. or in default whereof to suffer six months SI.
- ii. u/ss 324/34 PPC to 03 years SI with fine of Rs.10,000/- or in default whereof to undergo one month SI each.

All the sentences were directed to run concurrently while benefit of Section 382-B Cr.P.C. was extended to them.

2. As per prosecution version, on 08.09.2016, Syed Abid Hussain (PW-13) while reporting the matter to the police at casualty ward of Khyber Teaching Hospital, Peshawar, alleged that on the relevant day he, his younger brother Syed Tajamul Hussain and paternal cousin Syed Dildar Hussain Shah were present in Pishtakhara Payan near the Hujra of Noor Shad Hussain when his maternal cousins, who are also his co-villagers, namely, Malik Iftikhar, Malik Inam ((present appellants), Malik Sharafat and Malik Irfan came duly armed with deadly weapons and started firing at them with intention to kill as result Syed Tajamul Hussain received injuries on different parts of his body and succumbed to the injuries while on way to the hospital whereas he/complainant and his paternal cousin Syed Dildar Hussain Shah escaped unhurt. Besides them, the occurrence is stated to have been witnessed by people present on the spot. The culprits were identified by complainant and Syed Dildar

Hussain Shah in light of the bulb installed outside the gate of the Hujra. Motive for the crime was stated to be dispute over land, hence on the basis of murasila, case FIR (Ex.PA) was registered.

3. After completion of investigation, the accused were charge sheeted to which they pleaded not guilty and claimed trial.

4. The prosecution in order to substantiate its case against the accused produced and examined 16 witnesses in all. Where-after the statements of accused were recorded, wherein, they professed their innocence. The learned trial Court, on conclusion of trial, found the appellants guilty of charge and while recording their conviction, sentenced them, as mentioned above, where against they have preferred the instant appeal whereas the complainant has filed Cr.R No.80-P/2018 for enhancement of sentence, therefore, being outcome of the same judgment, they are decided through this single judgment.

5. Perusal of record would reveal that the entire case of prosecution hinges upon ocular account furnished by complainant (PW-13) and eyewitness, namely,

Syed Dildar Hussain Shah (PW-14), medical evidence, recovery of klashnikov from the appellant Malik Iftikhar, recovery of 7.62 bore from the spot, its matching report Ex.PZ/1, wherein, the microscopic examination resulted into opinion as that three 7.62 bore crime empties marked C1 to C3 fired from 16 MM SMG rifle No.19753311 in question, in view of the following major points i.e. striker pin mark, breach face mark, ejector marks, etc” and the motive.

6. Before analyzing the decisive role of ocular account, we would like to discuss the motive at first. In legal dictionary motive is defined; “it is an inducement, reason, or willful desire and purpose behind the commission of offence. Whether the purpose was good, like helping someone commit suicide, or bad, like committing murder, however, it is not the deciding factor in deciding guilt or innocence. In psychology, this is what energizes people to action determines their choice or behavior, as concerns, desire, emotion or need”. In this case, in First Information Report, motive was specifically taken a dispute over the

property in between both families i.e. of complainant and accused. Record depicts that Mst.Naseem Jan (mother of complainant & deceased) was allegedly deprived of her inheritance by his brother, namely, Malik Shah Khan (father of convict/appellants) for which she has instituted a suit, which was decreed in her favour on 24.05.2014, however, the appeal was pending, during which occurrence took place on 08.09.2016. In the cross-examination of PW13 (complainant, convict/appellant had placed on file that “in the year 2009, my mother filed an application against the accused for her share in the property in the court”. Copies of documents of civil dispute i.e. plaint, mutation, judgment & decree were placed on record as Mark I. the date of decree in civil suit was 25.04.2014, whereby the inherited property of complainant’s mother was decreed in her favour, the occurrence took place in order to get revenge of the aforesaid civil litigation. Reliance is placed on case title **Khadija Saddique and another vs. Shah Hussain and another**

(PLD 2019 SC 261), wherein, it has been

held:-

“The High Court had observed that motive set up by the prosecution had not been proved by it because on the one hand Khadija Siddiqui (PW6) had maintained that she had refused to marry respondent No.1 but on the other hand a letter written by her to respondent No.1 showed that she was quite willing and eager to marry him. The High Court had failed to read that portion of the statement of Khadija Siddiqui (PW6) wherein she had explained that she was being harassed by respondent No.1 and she wanted to complain against him to her mother and, therefore, an attempt was made by respondent No.1 to silence her. Khadija Siddiqui (PW6) had also been suggested by the defence itself that respondent No.1 had shunned her company but the young lady persisted in continuing her relationship with respondent No.1 which suggestion clearly showed that there was a break in the close friendship between that young lady and respondent No.1 prompting the respondent to make an attempt to get rid of her which provided a plausible motive to respondent No.1”.

7. The prosecution has proved the motive as alleged by it in FIR. Though motive alone could not be considered for conviction but shall be considered with the ocular account of the case. Since the decisive role was that of ocular account of complainant & PW14, therefore, in our view, we would like to discuss it by making careful appraisal of all to draw a conclusion as to whether their presence on the spot at the time of occurrence has been established by prosecution and whether their testimony is worthy of credence, believable and whether their conduct is natural and in accordance with the ordinary human conduct or otherwise.

8. It has been noticed that instant occurrence took place on 08.09.2006, at about 1930 hours, whereas the matter was reported to the local police at 2010 hours within 40 minutes after the occurrence. Appellants-convict, their brother Malik Sharafat (convicted by the learned Sessions Judge/Judge Juvenile Court and Malik Irfan declared proclaimed offender), were nominated in promptly lodged FIR, with specific role of causing firearm injuries on

right, left lungs, heart, small & large intestines to Syed Tajamul Hussain Shah (deceased). The eyewitness, PW14, has also been nominated in the FIR. Such promptly lodged FIR excludes chances of consultations and deliberations. The ocular account in the case has been furnished by Syed Abid Hussain (PW-13) and Syed Dildar Hussain Shah (PW14) have fully supported the prosecution's version as narrated by the complainant in FIR (Ex.PA). They in their respective statements deposed that on the day of occurrence they alongwith deceased were present at the spot after Maghrib prayer when in the meanwhile appellants alongwith Sharafat and Malik Irfan (proclaimed offender) while armed with deadly weapon came to the spot, who were identified by them through electric light installed on the outer gate of Hujra of Noor Shad Hussain Shah and on seeing them started firing at them as a result of which Tajamul Hussain (deceased) sustained injuries on different parts of body whereas they escaped unhurt. After firing accused decamped from the spot whereas they took deceased then injured to the

hospital, but in the way Tajamul Hussain succumbed to the injuries.

9. Although Syed Abid Hussain complainant is the real brother of Tajamul Hussain deceased whereas PW14 Syed Dildar Hussain Shah is the cousin of deceased, therefore, their testimony cannot be discarded merely on account of their relationship with deceased (Syed Tajamul Hussain) rather they are natural witnesses and their evidence is confidence inspiring and trustworthy. Though occurrence took place at night time i.e. after Maghrib prayer, yet PWs Syed Abid Hussain and Syed Dildar Hussain Shah cousin, have given the source of identification by stating that they identified the appellants and two others at the spot in the light of energy saver "bulb". Perusal of evidence of aforementioned PWs reveals that they remained consistent on all material points and there was no discrepancy in their statements. They have given all details of occurrence leading to the murder of Syed Tajamul Hussain deceased at the hands of appellants. Both PWs 13 and 14 were cross-examined at length but defence

failed to shatter the evidence of said witnesses. Undoubtedly and undeniably, the complainant and deceased were brothers, similarly PW14 and deceased were first cousins but the eye witnesses are consistent regarding mode and manner in which the occurrence has taken place. They were cross examined at length but there was no material contradiction in their statements. Moreso, their statements were further corroborated by medical evidence. The mere relationship would not detract the veracity of natural witnesses, if they had absolutely no motive of their own to involve the appellants falsely by letting off the real culprits. Reliance is placed on case title **Iqbal versus State (2014 SCMR 1227)**, wherein, it was held as under:

“Mere relationship of these two P.Ws. with deceased cannot render their evidence unreliable unless it is established that they had motive implicate the appellant falsely.”

10. The apex court of the country in case titled **Hasil Khan vs. The State (2012 SCMR 1936)** has held that:-

“The ocular account in this case was furnished mainly by P.W.1 Dil Murad(complainant) and Zareef Khan P.W.2. The former is the brother whereas the latter is the nephew of the deceased. though both are relative but mere relationship would not make a witness unworthy of reliance if his testimony is corroborated by any independent evidence or circumstance appearing on record. Both the witnesses have reasonably explained their presence at the spot i.e. the reason of their travel was that they were returning from a marriage ceremony and this reason has not been specifically challenged by defense during cross examination. Their testimony is corroborated medical evidence and recovery of T.T pistol. All the eye witnesses were subjected to lengthy cross examination but their credibility could not be shaken as they not only corroborated each other but also remained consistent on all material particulars of the prosecution case.”

11. It is pertinent to mention here that appellants and their brothers are first cousins of complainant and who is the real brother of deceased (Syed Tajamul Hussain), so it cannot be expected for complainant that he would let off the real culprit and would falsely involve appellants in the murder of his real brother.

12. Medical evidence further corroborates the ocular account furnished by the prosecution. For further clarity of the injuries on the person of Syed Tajamul Hussain deceased, prosecution produced Dr.Muhammad Kabir (PW8), who conducted the postmortem examination of the dead body of deceased. The doctor observed multiple firearm injuries (as many as seventeen in number, entry & exit) on the person of deceased. Cause of death was shown by Dr.Muhammad Kabir PW8 as injuries to right, left lungs, heart, small and large intestine due to firearm injuries. According to the opinion of Doctor, wall, ribs, cartilages, pleurae, right & left lung, pericardium, heart and blood vessels were injured, pertaining to Thorax in internal examination besides abdomen. The

probable time between injuries & death was immediate and between death & postmortem examination was 1 to 4 hours, therefore, medical evidence of Syed Tajamul Hussain deceased corroborates the seat of injuries, weapon used by appellants & Malik Sharafat establishes the time of occurrence. The medical evidence of deceased is in line with ocular account furnished by prosecution. One of the contention of learned counsel for appellants pertaining to the place of occurrence as mentioned in FIR & the one in site plan (Ex.PB) where in former it is mentioned as Hujra Noshad but in latter as Hujra Bahadar was also of no weight because Bahadar is the father of Noshad.

13. Recovery of klashnikov with 21 live rounds from personal possession of appellant Malik Iftikhar, recovery of 30 bore pistol without number with 25 live rounds from personal possession of appellant Malik Inam were properly corroborated by report of Forensic Science Laboratory (Ex.P2/2), Ex.PW11/7 & Ex.PZ/1, which further strengthened the version of prosecution as given by the PW13 & PW14.

Reliance is placed on case titled **Nasir Iqbal alias Nasra Vs. The State (2016 SCMR 2152)**, wherein it is held as under: -

“In the above circumstances, we found that the ocular evidence furnished by the eye-witnesses to be credit worthy and confidence inspiring and we have not been able to observe any defect or material lacunas in their evidence; their presence at the spot had been established beyond any shadow of doubt; both the eye-witnesses were of course closely related to the deceased but fact of the matter remains that their mere relationship would not render them to be interested or partisan witnesses when the same has been corroborated with the medical evidence as well as the recoveries of crime weapon and the motive has fully been proved as such in our view no interference is required in conviction of the appellants”.

14. Thus, keeping in view that ocular account is in consonance with medical evidence, recoveries of weapon of offence, empties recovered from the place of occurrence with positive report from Forensic Science Laboratory, proof of theory

of motive as expounded by the complainant, we are of the view that learned trial court has rightly held the appellants guilty of offence.

15. Another important question would be the quantum of sentences to be awarded to the appellants, we are of the view that the question of quantum of sentence always requires utmost care and caution on the part of the court, as such decisions relate to the life of the accused. It is settled by now that the prosecution is obliged to exclude every mitigating circumstance from its case and once it fails to do so, the convicts can be awarded lesser punishment provided under the law. Law is also settled that while deciding the question of sentence, the accused are entitled for benefit of every mitigating circumstance. Learned trial court, while determining the quantum of sentence, has kept in mind that for the murder of Syed Tajamul Hussain, four persons have been charged due to which capital punishment would not be proper and as such the appellants were sentenced for life imprisonment, thus, the quantum of sentence for appellants was properly

determined by the learned trial court. Guidance can be sought from the case titled **Sharafat Ali Khan Vs. The State (2010 SCMR 1205)**, wherein, it was held by the Supreme Court that: -

“In Muhammad Riaz and another Vs. The State (2007 SCMR 1413) while considering the penalty for an act of commission of qatl-e-amd it was observed that “no doubt, normal penalty for an act of commission of qatl-e-amd provided under law is death, but since the life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts & circumstances warrant mitigation of sentence, because no hard and false rule can be applied in each and every case”.

16. The Hon'ble Supreme Court, while deciding the case titled **Haji Muhammad Sadiq Vs. Liaqat Ali and others (2014 SCMR 1034)** has held that: -

“A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of case differs from the other, however, it become the essential obligation of Judge in awarding one or the other sentence

to apply his judicial mind with a deep thought to the facts of particular case. If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows, so it is better to respect the human life, as far as possible, rather to put it at and, by assessing the evidence, facts & circumstances of particular murder case, under which it was committed”.

17. Thus, the learned trial court has properly appreciated the facts and circumstances of the case while determining the quantum of sentence of appellants, therefore, no exception could be taken to it, as such, for the reasons discussed above, this appeal has no merit, which is hereby dismissed. Similarly, keeping in view the quantum of sentence as discussed above, Cr.R No.80-P/2018 is dismissed.

JUDGE

JUDGE

Announced.

03.10.2019.

Sadiq Shah PS (DB) Hon'ble Mr. Justice Rooh-ul-Amin Khan and Hon'ble Mr. Justice Muhammad Naeem Anwar.