JUDGMENT SHEET

PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 479-M/2019

Johar Ali son of Gohar Ali (Appellant)
Versus

(1) Amjad Ali son of Masood
(2) The State through A.A.G
(Respondents)

Present: *Mr. Shakil Ahmad Khan, Advocate.*

Mr. Said Hakim, Advocate.

Mr. Alam Khan Adenzai, Astt: A.G.

Cr.R. No. 112-M/2019

Amjad Ali son of Masood Ali Khan
(Petitioner)
Versus

(1) State through A.A.G.
(2) Johar Ali son of Gohar Ali
(Respondents)

Present: *Mr. Said Hakim, Advocate.*

Mr. Alam Khan Adenzai, Astt: A.G.

Mr. Shakil Ahmad Khan, Advocate.

Date of hearing: **02.06.2021**

JUDGMENT

WIQAR AHMAD, J.- Appellant namely Johar Ali has called in question judgment dated 15.10.2019 of the Court of learned Additional Sessions Judge/Model Criminal Trial Court Malakand at Batkhela, vide which the appellant was convicted and sentenced as follows;

- ***U/S 302 (b) PPC to life imprisonment along with compensation of Rs. 300,000/- (three hundred thousand) under section 544-A Cr.P.C, payable to legal heirs of the deceased. In default of payment of compensation, the appellant was ordered to further undergo six months simple imprisonment. The compensation was ordered to be recoverable as arrears of land revenue.***
- ***U/S 324 PPC to five years rigorous imprisonment along with fine of Rs. 100,000/-, or in default thereof to suffer four months simple imprisonment. The fine was ordered to be recoverable as arrears of land revenue.***
- ***All the sentences were ordered to run concurrently.***
- ***Appellant was also extended benefit of section 382-B Cr.P.C.***

2. Appellant faced trial in the case registered vide FIR No. 415 dated 15.12.2014 under sections 302, 324 PPC at Levy Post Dargai District Malakand, on the basis of '*Murasila*' (Ex. PW-5/1) sent by Aziz-ur-Rehman, IHC (PW-5) on 15.12.2014. Complainant namely Amjad Ali (PW-7) lodged report of the occurrence at emergency ward of Dargai hospital by stating that on the day of occurrence he along with his brother namely Wajid Ali (deceased) were going to their house, after offering of *Isha* prayers. As soon as the complainant-party reached near the house of one Hazrat Muhammad, the appellant namely Johar Ali started firing upon them. Due to firing of appellant his brother Wajid Ali got hit on his right eyebrow/face, while the complainant escaped un-hurt. Motive behind the occurrence was stated to be that his other brother

namely Jawad Ali had recorded his statement as a witness in an earlier criminal case registered against the appellant, due to which he had been feeling annoyed.

3. Since accused/appellant was initially avoiding his lawful arrest, therefore proceedings under section 512 Cr.P.C were initiated against him. During the course of investigation, the Investigating Officer recovered six empty shells of Kalashnikov from the spot vide recovery memo Ex. PW-5/4 dated 15.12.2014. He also prepared site plan Ex. PW-5/3 on pointation of the complainant, and took in possession blood stained earth from place of the deceased vide recovery memo Ex. PW-5/5 dated 15.12.2014. He also took in possession a bulb 100 watt from the spot vide recovery memo Ex. PW-5/6 dated 15.12.2014. The Investigating Officer also took in possession blood stained garments of the deceased vide recovery memo Ex. PW-5/8 dated 20.12.2014. The recovered items were sent to Forensic Science Laboratory (hereinafter referred to as ***"FSL"***) for the purpose of chemical analysis and comparison, wherefrom report Ex.PW-5/18 was received and placed on file. He submitted *challan* under section 512 Cr.P.C against the appellant on 14.01.2015. Evidence was recorded under section 512 Cr.P.C and accused/appellant was declared

proclaimed offender vide judgment dated 08.05.2015 of the Court of learned Additional Sessions Judge Malakand at Dargai.

4. Appellant was arrested on 08.08.2017, on whose pointation the Investigating Officer made necessary additions in the already prepared site plan vide pointation memo Ex. PW-5/15 dated 10.08.2017. On completion of investigation, supplementary *challan* was submitted against the appellant before learned trial Court. After compliance of proceedings of section 265-C Cr.P.C, charge was framed against him on 13.11.2017 to which he pleaded *"not guilty"* and claimed trial. Prosecution produced as many as eight (08) witnesses, whose statements were recorded and placed on file. On conclusion of proceedings in the case, accused was examined under section 342 Cr.P.C. The learned trial Court convicted and sentenced the appellant vide impugned judgment dated 15.10.2019 of the Court of learned Additional Sessions Judge Malakand at Batkhela, as stated earlier.

Feeling aggrieved from his conviction and sentences, accused/appellant has filed the instant appeal before this Court while complainant has also filed connected Criminal Revision No. 112-M of 2019

for enhancement of the sentences awarded to accused/respondent.

5. Learned counsel for appellant submitted during the course of his arguments that presence of complainant was not believable at the relevant time as he had not accompanied the deceased then injured to the hospital. In this regard, he referred to the initial report of medical examination brought in evidence as Ex. PW-1/1 wherein the injured had been shown by the doctor to have been accompanied by one Israr (PW-6) when he had first been brought to the hospital. The learned counsel also stated that complainant while deposing as PW-7 had also brought certain dishonest improvements in his statement which had further rendered his evidence unreliable. The learned counsel also argued that prosecution have not been able to prove commission of the offence in the mode and manner as stated in first report of the occurrence as well as statement of the eyewitness while deposing in Court as PW-7. In this regard, he referred to statement of the doctor who had conducted postmortem examination of the deceased and whose statement has been recorded as PW-3. He added that Kalashnikov has been stated by the complainant to

have been used in the occurrence but the metallic pieces shown stuck up in brainstem has made the mode and manner of occurrence doubtful. He added that, had the appellant fired at the deceased from a distance of 7/8 paces the bullet would have crossed the body through and through. In order to bolster his arguments, he placed reliance upon the judgments reported as ***2020 SCMR 319, 2021 P Cr.LJ 373, 2021 YLR 52, 2021 YLR 95 and 2021 P Cr. LJ 479***.

6. Learned counsel appearing on behalf of the complainant started his arguments by referring to the earlier complaint lodged by the deceased against accused (Ex. PD), in order to explain motive for commission of the offence. He also stated that injury to the deceased might have been caused through a rebound bullet or its pieces, but narration of the path of bullet and the fact of its rebound, could not be expected from the complainant, in such circumstances. He added that the prosecution have been able to prove that the appellant had made firing at the deceased as a result of which the deceased had received firearm injury and had died subsequently. In support of his assertions, he relied upon the judgments reported as ***2011 SCMR 429, 2016 SCMR 2152, 2020 SCMR 595,***

2013 YLR 895,2019 YLR 1109, 2020 YLR 1423, 2021 SCMR 298, 2020 YLR 654 and 2021 P Cr.L.J 705.

The learned Astt: A.G appearing on behalf of State also adopted the arguments of learned counsel for complainant.

7. We have heard arguments of learned counsel for the parties, learned Astt: A.G. appearing on behalf of State and perused the record.

8. Perusal of record reveals that eyewitness account of the occurrence has been offered by the complainant while deposing in Court as PW-7. The supporting evidence of last seen has been offered by Israr Ahmad while deposing as PW-6. The other corroboratory evidence shall however be discussed later. The complainant while deposing as PW-7 has stated that he along with his brother namely Wajid Ali (deceased then alive) had gone to the nearby mosque for offering *Isha* prayers. When they left the mosque they also met the other PW namely Israr, whereafter he and his brother moved towards their house. When they reached the house of one Hazrat Muhammad, the appellant namely Johar Ali made firing on them and on turning towards him, his brother received injury on his right eye. He has further narrated taking of the injured

to the hospital and his onward referral to the hospital at Mardan and then to Lady Reading Hospital (hereinafter referred as "***LRH***"), etc. In his cross-examination he was confronted with his initial report wherein it could not be found mentioned that on getting out of the mosque they had met PW Israr and that firing had been made upon them from their back. He also stated that it had been correct that the actual animosity had been existing between the appellant and brother of the PW Jawad Ali and added that the appellant had also made firing on said Jawad Ali. He also stated that he along with the deceased then alive as well as Israr had performed *Isha* prayers in congregation. He was not able to tell whether rapid firing had been made or whether firing had been made in a single mode of fire. He also stated that the injured had remained at the spot for about 20/30 minutes during which time they had been taking him to end of the street and then had put him in a vehicle so as to take him to the hospital. Regarding the injuries he has stated that the deceased had received 2/3 injuries. Further ahead in his cross-examination the witness has also stated that he had not accompanied the deceased then injured to the hospital

at Mardan or Peshawar and added that other brothers namely Jawad and Bakhti Zaman had accompanied him.

9. The other witness namely Israr had though not been an eyewitness but he has stated that he had offered *Isha* prayers with the complainant and the deceased and had stayed at a grocery store near the mosque while the deceased and complainant left for their house. On hearing sound of fire shots he had immediately rushed towards the place of occurrence and seen the appellant duly armed with Kalashnikov, running towards the shops, as well as the deceased lying in injured condition due to receipt of fire shots. In his cross-examination, the witness stated that the Investigating Officer had recorded his statement on the night of occurrence at about 21:30/21:45 hours. While he was confronted with his statement recorded under section 161 Cr.P.C it was not found therein that he had stated to the Investigating Officer that he had exchanged greetings (سلام) with the complainant and his brother after offering prayers and that he had remained in the grocery store, as well as mentioning of presence of Naveed Ali, brother of the complainant. He has stated in his cross-examination that the

deceased and complainant had been living in same house which was situated at a distance 15/20 meters from the mosque. He stated that the deceased had remained on the spot for 10/15 minutes. He also stated that when they reached the mosque for offering prayers the deceased and complainant had been present in the mosque already. Complainant has however stated that all the three had entered the mosque together.

10. Presence of the complainant cannot be doubted just for the reason that the doctor had, in his report of initial examination of the injured, stated that injured had been accompanied by Israr (PW-6). The doctor was not supposed to and he could not have mentioned all the people who had accompanied the injured to the hospital. The occurrence had taken place close to house of the deceased and beside Israr he might have been accompanied by a number of people including the neighbors, but all of them could not have been mentioned by the doctor, and that also in such an emergency. He was not supposed to document presence of the PWs but to give emergency treatment to the injured who had by then been critically injured. They had gone for offering *Isha* prayers in the nearby

mosque situated at a distance 15/20 meters. At *Isha* time presence of the PW in his house or going for offering *Isha* prayers to the mosque along with his brother had been quite natural. When the occurrence had taken place on their return to their house immediately after offering *Isha* prayers and the timings given in the *'Murasila'* as well as report of initial examination of the deceased then injured (Ex. PW-1/1) support such fact, then presence of the complainant along with his brother at the relevant time cannot be disbelieved. His presence along with his brother Wajid Ali (late) has also been mentioned by the other PW namely Israr Ahmad, in his 161 statement recorded same night on the place of occurrence, without any delay. Report in the instant case has been lodged by the complainant in the hospital after 55 minutes of the occurrence, which cannot in circumstances of the case be stated to be a delayed report. Arrival of the injured at the hospital shown as 07:45 p.m. and lodging of report at 07:55 p.m. would have been, after initial management of the patient and thus the report in circumstances of the case was reasonably prompt and also shows presence of the complainant along with the injured, in the hospital immediately after the

occurrence. So far as the improvements in the statements of two PWs are concerned these are of embroidery nature, offered as further explanations, and does not bear any decisive effect on the case of prosecution. Had these improvements not been there, the situation would have remained as it is now. The improvements have not been making any difference and same cannot be termed as dishonest improvements carrying the potential of damaging the evidentiary value of the statements of PWs.

11. There had no doubt been certain minor contradictions in statements of PW-6 and PW-7, but it is equally important that these two witnesses had been examined in the Court after more than four years of the occurrence and occurring of such minor contradictions as mentioned earlier had been quite natural. The minor contradictions had not been related to the actual occurrence but related to arrival of the complainant and his brother to the mosque as well as such other matters which cannot be called as discrepancy on material particulars of the case. When witnesses are examined after more than four years of the occurrence a photographic narration of the occurrence cannot be expected from them. Hon'ble Supreme Court of

Pakistan in its judgment given in the case of ***"Khadim Hussain v/s The State***" reported as ***PLD 2010 Supreme Court 669*** has held that creeping in of minor contradictions in testimony of PWs, with passage of time, have been natural and same could be ignored. Relevant part of observation of the august Court is reproduced hereunder for ready reference;

"We have also adverted to the contention of learned ASC that various contradictions in the statements of the prosecution witnesses have not been taken into consideration causing serious prejudice against the appellant. It has been held time and again by this Court that minor contradictions do creep in with the passage of time and can be ignored safely.

Similarly, in the case of ***"Muhammad Ilyas v/s The State"*** reported as ***"2011 SCMR 460"*** the Hon'ble Supreme Court had also observed;

Contradictions which are not grave in nature can be ignored safely as minor contradictions creep in with passage of time. Merely on the basis of contradictions, statement of a prosecution witness cannot be discarded if corroborated by other incriminating material.

Further reliance in this respect may also be placed on judgment of Hon'ble Apex Court rendered in the case of ***"Zulfiqar Ahmad v/s The State"*** reported as ***"2011 SCMR 492"***.

12. We would now discuss objection of learned counsel for appellant regarding proof of the mode and manner of the occurrence. Main focus of the

learned counsel for appellant in this respect had been on the claimed discrepancy between eyewitness account and the medical evidence. The deceased then injured had initially been taken to *Dargai* hospital where he had been examined by doctor Shehzad who appeared and testified in the case as PW-1. He has given the following narration of the injury found on body of the deceased;

"after profuse vomiting and blood stained face/body. At that very moment, he was searched in detailed for any obvious injury, but nothing was found, below the neck except a lacerated wound on medial side right eye, with eye swelling.

There was no other wound on scalp or face.

He was treated as case of raised intracranial (with fluid, diuretics, analgesic) as a provisional diagnosis of subdural/epidural hematoma. He was referred to Mardan Medical Complex neurosurgical ward, for CT brain (Report attached). CT show metallic pieces in brain secondary to fire-arm injury. He was then referred to LRH Neurosurgery from MMC. Where he expired on 23.12.2014. A proper postmortem was done in KMC, Forensic Department."

The injured had also remained under treatment in LRH and had expired later on. The doctor who had conducted his postmortem examination has been examined as PW-3. He has given the following description of injury found on the dead body of the deceased;

(1) ***Firearm entry wound right side face just inner to eye (0.5 x 0.5 cm).***

(2) ***The small pieces seen in CT brain could not be recovered despite extensive exploration.***

<u>CRANIUM AND SPINAL COR;</u>
scalp, skull, membrane, brain are injured.

<u>THORAX</u>;
All organs were found healthy.

<u>ABDOMEN;</u>
All organs were healthy, and stomach was empty.
<u>MUSCLES, BONES, JOINTS;</u>
Skull was fractured and the injury was as mentioned in the injury No. 1
<u>REMARKS BY MEDICAL OFFICER;</u>
In my opinion the deceased died due to injury to brain due to firearm."

In his cross-examination the witness stated that the metallic pieces shown in C.T. scan report of the brain could not be discovered despite exploration and that the single injury received by the deceased had not been having an exit wound. True that Kalashnikov was a formidable weapon, as argued by learned counsel for the appellant and that an injury caused from Kalashnikov at the distance of 7/8 paces normally have an exit wound, as it is supposed to be causing an injury through and through, but it is equally important to be noted that in the site plan (in the case in hand) bullet marks have been shown on the nearby wall. There was high probability that the deceased had received injury from pieces of a rebound bullet. This appears to be an injury caused as a result of ricocheted bullet or its pieces. Such a presumption may well be

drawn from the medical evidence as well, where the C.T. scan report has been shown to be indicating metallic pieces inside brain. The metallic pieces in the brain had however been categorically indicated to have landed there as a result of firearm injury in the right side face just inner to eye having an entry wound of 0.5 x 0.5 centimeter. Merely because of this instance the eyewitness account of the complainant cannot be called to be discrepant with the medical evidence, for the reason that when a firing takes place an eyewitness cannot be expected to trace the path of bullet with normal human vision. Whether the deceased had received the bullet directly or the injury was caused by ricochet, cannot be noticed and told by an eyewitness. When a person makes firing on another and causes death thereby, he ensues a liability for causing *qatl-i-amd* as defined in section 300 PPC, which is reproduced hereunder for ready reference;

"300. Qatl-e-Amd; Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

The offence of *qatl-i-amd* stands constituted when a person does an act;

(a) *with the intention of causing death or bodily injury to another person, by doing an act which in the ordinary course of nature is likely to cause death; or*

(b) does an act with the knowledge that his act is so imminently dangerous that it must in all probability cause death and thereby causes death of another person.

When the mens *rea* is followed by *actus reus* resulting into death of a person in any of the above-mentioned two situations the criminal liability for causing *qatl-i-amd* of another person ensues thereby. Not only the intention but even knowledge is sufficient if the act is so imminently dangerous that it have a definite potential of causing death of another person. In the case in hand the intention of the appellant was discoverable from facts of the case when he opened straight firing at the deceased from a close range, with a lethal weapon like Kalashnikov. The *mens rea* and *actus reus* had both been forthcoming in the instant case. The objective of the appellant has also been achieved as a result of death of the person intended by him. It does not matter whether the deceased had received the bullet directly or he had died due to the effect of a ricochet bullet. In both the cases the appellant cannot escape the ensuing criminal liability under section 302 (b) PPC.

13. Prosecution have also been able to successfully prove the motive in shape of Naqal Mad No. 11 dated 08.10.2014 (Ex. PD), which had been lodged by the deceased then alive Wajid Ali himself against the appellant and one Zafar Khan. It was alleged in the report that about six months back deceased Amir Rehman had been killed by appellant and co-accused Farman Ali due to unknown reasons. In respect of murder of said deceased a separate criminal case had earlier been registered vide FIR No. 100 dated 24.02.2014, a copy of which has also been exhibited in the instant case as Ex. PB. Jawad Ali brother of the deceased in the case in hand had testified in the earlier case registered against the appellant which fact had created a bad taste between the parties. Accused were also alleged to have threatened the complainant-party of dire consequences due to said statement and had also made aerial firing in front of house of the complainant party for intimidating them. Prosecution have thereby established existence of motive on part of the appellant for commission of the offence.

14. Accused/appellant have also remained absconder for more than two years. In order to prove

the factum of absconsion prosecution have relied upon testimony of Javaid DFC recorded as PW-4. He has stated in his statement that he had obtained warrant under section 204 Cr.P.C (Ex. PW-4/1) against the appellant from the Court of learned Judicial Magistrate along with proclamation under section 87 Cr.P.C (Ex. PW-4/3). In respect of execution of warrant under section 204 Cr.P.C he had visited village Wazir Abad and searched for the appellant in presence of witnesses but he could not be traced. He had also obtained signatures of elders of the locality on the warrant and submitted his report to the concerned Court. He has further stated that he had also visited village Wazir Abad for execution of proclamation notice, and in presence of the witnesses, affixed the same on door of house of the appellant as well as on the notice board of concerned District Courts and other conspicuous places of the village. Appellant had admittedly been resident of same village and locality. He could not be arrested by the local police despite being charged in a murder case. In this respect sufficient material in the form of warrant under section 204 Cr.P.C (Ex. PW-4/1) and proclamation under section 87 Cr.P.C (Ex.PW-4/3) has been brought by the prosecution on

record. It can thus safely be held that the accused/appellant had willfully absconded so as to avoid his lawful arrest, after the occurrence and lodging of the report.

15. Absconsion by itself cannot be held sufficient for recording conviction on a capital charge, but when other reliable evidence is available with the prosecution, then such a prolonged and unexplained absconsion may safely be taken into account as a corroboratory piece of evidence against an accused. Reliance in this respect may be placed on judgment of the Hon'ble Supreme Court of Pakistan rendered in the case of ***"Riaz Hussain vs. The State"*** reported as ***2001 SCMR 177***, wherein it has been held;

"If, after the commission of a crime, a person whose name is mentioned as a participator in the crime absconds, his conduct shows that he is concerned in the crime. Therefore, anything which tends to explain his conduct and furnishes a motive other than a guilty conscience, will be relevant under section 9, Evidence Act". (Gangaram Hari Parit v. E., 62 IC 545: 22 Cr. LJ 529). In view of what has been stated above the factum of absconsion cannot altogether be ignored and corroborative value of the abscondence of accused is to be judged in the light of facts and circumstances of each case.

The factum of abscondence having its own significance also lends corroboration to the eye account of Mst. Manzooran. If any reference is needed PLD 1978 SC 102 can be cited."

Further reliance in this respect may also be placed on the judgments of the Hon'ble Supreme Court

of Pakistan rendered in the case of ***Mawas Khan vs. The State and another*** reported as ***PLD 2004 Supreme Court 330*** as well as the case of ***M Anzur Elahi vs. The State*** reported as ***PLD 1965 (W.P.) Lahore 656.***

16. The weapon of offence i.e. Kalashnikov could not be recovered in the case in hand, but as stated earlier the appellant had remained absconder for more than two years and the possibility of disposing it of during such period could not be ruled out. The testimony of PW Israr is also providing added vigor to the case of prosecution in this respect as this PW had seen the accused/appellant duly armed with Kalashnikov decamping from the spot immediately after the occurrence. Besides six empty shells of Kalashnikov has also been recovered from the spot. Therefore non-recovery of the weapon of offence in the instant case would hardly make any difference. The occurrence had taken place during night time and in respect of identity of the appellant the Investigating Officer had taken in possession a source of light i.e. bulb vide recovery memo dated 15.12.2014.

17. For what has been discussed above, the appeal in hand was found lacking any substance and same is accordingly dismissed.

18. So far as criminal revision No. 112-M of 2019 is concerned, it is settled law that minor discrepancies in prosecution case may be considered in determining the quantum of sentence. The minor contradictions in statements of the PWs as discussed in earlier part of this judgment have though not been sufficient to entitle the appellant to outright acquittal, but such minor weaknesses in the case of prosecution may be considered in awarding him the lessor provided punishment. Reliance in this respect is placed on judgment of the Hon'ble Supreme Court of Pakistan rendered in the case of ***"Falak Sher v/s The State"*** reported as ***1999 SCMR 2432***. The learned trial Court have therefore rightly awarded life imprisonment to the appellant under section 302 (b) PPC instead of a death penalty. This Court, in circumstances of the case, does not find itself inclined towards interfering in the sentence. Learned counsel appearing on behalf of complainant could not show a good cause for such an exercise as well. Criminal revision No. 112-M of 2019

was therefore found divested of any force and same is also dismissed accordingly.

Announced
Dt.02.06.2021

JUDGE

JUDGE