

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
[JUDICIAL DEPARTMENT]

Cr.A No.687-P/2021.

"Musafar versus The State & another"

Date of hearing: **09.03.2022**

M/S Astaghfirullah, Yaseen-Ullah & Nasrum-Minallah, Advocates for the appellant.

Mr. Arshad Ahmad, AAG for the State.

Mr. Zarbad Shah, Advocate for the respondent No.2/complainant.

JUDGMENT

SHAKEEL AHMAD, I.- Musafar s/o Sawab Gul by caste Afghan aged about 45 years faced trial under section 302/324/337-F(vi) read with section 34 PPC, for, in furtherance of common intention with his sister's son namely Abbas s/o Raza Khan aged about 17/18 years, committing the murder of his step brother Haroon aged about 19 years and under sections 324/34 PPC, for murderously assaulting at his father/complainant (Sawab Gul, PW-3), step brothers, Siddique PW-4, and grandson of the complainant namely Uzaima aged about 8 years (given up due to his tender age vide order dated 21.07.2020), on 16.09.2018 at 11:00 a.m in the field of one Muazzam Khan at Dagai Lar Sharifabad, Tehsil

& District, Swabi. The learned trial Judge by his judgment dated 17.07.2021 convicted and sentenced him as under: -

Offence under section	Sentence
302(b) read with Section 34 PPC	Imprisonment for life as Ta'zir and payment of Rs.800,000/- (Rupees eight lacs) as compensation under section 544-A Cr.P.C to the LRs of deceased and in default thereof, to suffer S.I for six months.
324-PPC read with Section 34 PPC	Five (05) years rigorous imprisonment and fine of Rs.50,000/- (fifty thousand) and in default of payment of fine, further undergo simple imprisonment for two months.
337-F(vi) read with Section 34 PPC	Three (03) years rigorous imprisonment with payment of Daman amounting to Rs.80,000/- (eighty thousand) and till payment of Daman, the accused shall be kept in jail and he shall be dealt with in the manner as if he is sentenced to simple imprisonment unless Daman is paid to the injured.
324 PPC read with Section 34	Five (05) years rigorous imprisonment and to pay a fine of Rs.50,000/- (fifty thousand) and in default of payment to undergo simple imprisonment for two months.
337-F(v) read with Section 34 PPC	Three (03) years rigorous imprisonment with payment of Daman amounting to Rs.80,000/- (eighty thousand) and till payment of Daman, the accused shall be kept in jail and he shall be dealt with in the manner as if

	<i>he is sentenced to simple imprisonment unless Daman is paid to the injured.</i>
<i>324 PPC read with Section 34</i>	<i>Five (05) years rigorous imprisonment and to pay a fine of Rs.50,000/- (fifty thousand) and in default of payment, he shall further undergo simple imprisonment for two months.</i>
<i>337-F (vi) read with Section 34</i>	<i>Three (03) years rigorous imprisonment with payment of Daman amounting to Rs.80,000/- (eighty thousand) and till the payment of Daman, the accused shall be kept in jail and he shall be dealt with in the manner as if he is sentenced to simple imprisonment unless Daman is paid to the injured.</i>

02. The convict has come up on appeal against the conviction and sentences passed by Mr. Muhammad Jamil, Additional Sessions Judge-III/Judge, Model Criminal Trial Court, Swabi per his judgment dated 17.07.2021, whereas, Sawab Gul has preferred Criminal Revision No.132-P/2021 for enhancement of sentence. We propose to decide the appeal and the revision through this judgment.

03. The facts of the prosecution case, briefly stated, are that the complainant is the tenant of one Muazzam Khan. On the relevant day & time, he and his sons (Haroon &

Siddique) & grandson Uzaima, were busy in Zamindara work in the field. The appellant and his sister's son (grandson of the complainant) came there and opened fire at them with the intention to kill them. As a result thereof, he, his sons Sadique, Haroon & minor grandson Uzaima sustained firearm injuries. The injured were removed to the casualty of Swabi Hospital in a Rickshaw. Haroon, who was critically injured, was referred to Peshawar, but he succumbed to his injuries on the way to hospital, on the same day at 11:50 a.m. It was Sawab Gul, PW-3, who lodged the report with Inspector Alam Shah (PW-7). The latter sent the murasila Ex.PA/1 to the Police Station, Swabi for registration of the case, prepared injury sheets of injured Haroon Ex.PM/7, and after his death, prepared injury sheet & inquest report (Ex.PM/9 & Ex.PM/10). He also prepared injury sheets of injured Uzaima and Sidique as per Ex.PM/3 & Ex.PM/5. The report in shape of murasila was incorporated into crime No.806 Ex.PA by Raz Muhammad, ASI. He also verified its contents as worded in the murasila.

04. Dr. Qamar Zeb Khan, Medical Officer,
DHQ Hospital, Swabi (PW-6) examined
Haroon on the same day at 11:45 a.m. and
found the following injuries on his person: -

"Injuries.

*Fire arm entry wound with posteriorly part of
skull measuring 1 x 1 cm*

*Fire arm exit wound on skull posteriorly more at
the left side of skull measuring 2 x 2 cm*

*Fire arm entry wound at left inguinal region
measuring 1 x 1 cm*

*Fire arm exit wound at left buttock posteriorly
1-½ x 1-½ cm*

*Fire arm injury at left upper part of thigh
anteriorly measuring 1 x 1 cm*

*Fire arm exit wound at left lateral part of thigh
measuring 1 x 1 cm*

*Fire arm entry wound on right upper part of the
thigh 1 x 1 cm*

*Fire arm exit wound at right medial part of
thigh 2 x 2 cm*

*Fire arm entry wound at left right shoulder
region laterally 1 x 1 cm*

*Fire arm exit wound at right shoulder posteriorly
measuring 2 x 2 cm.*

05. On the same day, he conducted the
postmortem examination on the dead body of
Haroon at 02:55 p.m and found the following
injuries on it: -

"External appearance.

Symptoms observed before the death.

*This patient was brought in critical
condition and referred to LRH Peshawar and
brought back dead.*

Condition of subject.

Stout.

Wounds.

*Fire arm entry wound with posteriorly part of
skull measuring 1 x 1 cm*

*Fire arm exit wound on skull posteriorly more at
the left side of skull measuring 2 x 2 cm*

Fire arm entry would at left inguinal region measuring 1 x 1 cm

Fire arm exit would at left buttock posteriorly 1-½ x 1-½ cm

Fire arm injury at left upper part of thigh anteriorly measuring 1 x 1 cm

Fire arm exit would at left lateral part of thigh measuring 1 x 1 cm

Fire arm entry would on right upper part of the thigh 1 x 1 cm

Fire arm exit would at right medical part of thigh 2 x 2 cm

Fire arm entry would at left right shoulder region laterally 1 x 1 cm

Fire arm exit would at right should posteriorly measuring 2 x 2 cm

Cranium and spinal cord.

Skull scalp, vertebra, membranes and brain were injured.

Muscles, bones and joint.

Skull bone fractured.

06. The doctor examined the injured Sawab Gul, the same day at 11:45 a.m and found the following injuries on him.

Injuries

Fire arm entry wound above proximal part of right thumb region measuring ½ x ½ cm.

Fire arm exit wound at right wrist region adjacent to finger size 2 x 2 cm.

Fire arm entry would at right arm humorous region size 1 ½.

07. The doctor also examined injured Uzaima the same day at 11:40 a.m. and found the following injuries on him: -

Injuries.

1. *Fire arm entry wound at right arm anteriorly measuring 1 x 1 cm.*
2. *Fire arm exit wound at right arm posteriorly would measuring 1- ½ x 1 ½ cm.*
3. *Fore arm entry wound above left elbow wound measuring 1x1 cm with inverted margin.*
4. *Fire arm entry wound at left elbow posteriorly wound measuring 2 x 2 cm.*

08. On the same day at 11:35 a.m., he examined injured Siddique and found the following injuries on his person: -

Injuries.

Fire arm entry wound at upper part of left arm wound measuring 1 x 1 cm.

Fire arm entry wound at left shoulder anteriorly wound measuring 2 x 2 cm with averted margin.

09. The site plan Ex.PB was prepared at the instance of eye witness Farhan Ali. The appellant was placed under arrest on 10.02.2019 by the SHO of Police Station, Swabi as is reflected from his card of arrest Ex.PW-13/1.


10. The motive attributed for the crime was dispute over domestic affairs.

11. The appellant denied the allegations of the prosecution and pleaded not guilty to the charge. He neither produced defence nor wished to be examined on Oath. On the

conclusion of trail, he was convicted and sentenced as stated above. His co-accused was acquitted by the learned Juvenile Court on the basis of compromise.


12. It appears from the record that the prosecution case mainly rests on the testimony of Sawab Gul (PW-3) and Siddique (PW-4) for an eye witness of the account of the incident and complainant Sawab Gul is the father while Siddique is the brother of the deceased Haroon, recovery of blood stained earth, 20 crime empties of 7.62 bore and two empties of 30 bore, from the crime scene, medical evidence and abscondence of the appellant.

13. No doubt, the complainant (PW-3) and Siddique (PW-4) are father and son inter-se and closely related to the deceased Haroon, however, it is equally true that appellant is the real son of the complainant Sawab Gul and step brother of the deceased, but there is nothing on the record to indicate that they have been inimical terms with the appellant or they deposed falsely against him or that they were not present on the spot and were not in a position to identify him, as one of the



assailant. It is by now well settled that mere relationship with a victim would not render the witnesses as interested, particularly, when the charge was brought against him by his real father. It was observed in the case reported as "Sohni vs. Bahaduri & 5 others" (PLD 1965 SC 111) that testimony of an interested witness should be corroborated by independent evidence, is not of universal application and that if his testimony is found reliable, the Court may accept it even without any corroboration, however, as a matter of prudence, the Court insists on corroboration where he inimically deposed towards the accused. We are of the view that both the witnesses in the instant case neither inimically deposed towards the appellant nor interested, and have no motive to implicate him falsely, particularly, keeping in view the relationship with the complainant. We may, for this view of the matter, refer to the dictum laid down in the case reported as "Shamsher & another vs. The State etc" (1973 SCMR 69) and would now proceed to scrutinize the testimony of both these witnesses.


14. Sawab Gul (PW-3), who is reporter of the incident, and also real father of the appellant deposed that he is tenant of Muazzam Khan and on the day of incident, he, his sons Farhan & Haroon and grandson Uzaima, were busy in Zamindara work in the field at 11:00 a.m., the appellant and his grandson Abbas (daughter's son) appeared on the crime scene and opened fire with the intention to kill them. The injured were removed to the hospital in a Rickshaw. It was in the hospital, he lodged the report at 11:50 a.m. Siddique (PW-4) supported him and stated that, he, his father Sawab Gul, brother Haroon & nephew Uzaima were busy in Zamindara work in the field, when, at 11:00 a.m, appellant and his step sister's son Abbas appeared on the crime scene and murderously assaulted at them. They were removed to the hospital in a Rickshaw.



15. Both the witnesses have given a simple and consistent account of the incident, which took place in the field of Muazzam Khan, who happens to be landlord of the complainant, and who can be deemed to be natural witnesses. Both of them have the stamp of

injuries on their persons and, as such, their presence at the time of incident cannot be doubted. Admittedly, the incident took place in a broad daylight and being close relative of the assailant, his identity was not difficult, particularly, in the absence of any visual hindrance as per site plan Ex.PB. The crime was reported within fifty (50) minutes in the hospital, about 2 kilometers away from Police Station, without any delay and the appellant and his acquitted co-accused, were specifically named as offenders for committing the crime. There is no reason to believe that the appellant was falsely implicated or substituted for the real culprit. The submission of the learned counsel for the appellant that both the witnesses being closely related to the victim, are not to be relied upon would not, in view of our observation made above, prevail. He further submitted that mere fact that the witnesses have received injuries would not by itself be indicative of their having told the truth. In support of his contention, he relied upon the judgment reported as "Said Ayub vs. Zamrood" (1981 SCMR 795). We have gone

through the above judgment relied upon by the learned counsel for the appellant. In our view, the reason recorded in the said judgment is based on the particular circumstances of the case and there is no absolute rule that an injured witness is not to be relied upon at all. Each case depends upon its own facts and circumstances and credibility of the injured witnesses is to be determined in the light thereof. We are unable to understand as to why a real father would bring a false charge against his innocent son and substitute him for the real culprit as discussed above. In the instant case there is nothing on the record to suggest even remotely that both the witnesses have not spoken the truth and have deliberately suppressed certain facts with an ulterior motive as pleaded by the learned counsel for the appellant.

 16. The learned counsel for the appellant vehemently submitted that the testimony of these witnesses was not in conformity with the medical evidence and as such, cannot be relied upon with confidence. This contention of the learned counsel for the appellant seems

to be based on misconception. In the case reported as "Yaqoob Shah vs. The State" (PLD 1976 SC 53), it was held that 'it is well established principle that expert evidence may it be medical or that of a Ballistic expert, is entirely in the nature of confirmatory or explanatory of direct or other circumstantial evidence. We found that in the instant case, not only there is a direct evidence, which is definite forthright and at the same time creditworthy and in conformity with the medical evidence. Scanning of evidence on record reflects that during cross-examination while replying to the questions put by the learned defence counsel for complainant (PW-3) stated that we had taken breakfast, after offering Fajar Prayer. I offered my Fajar Prayer in my house and soon after, we took our breakfast. We left for the field. At 10 or 10:15 a.m, they took tea, bread and eggs that time and during postmortem report semi digested food was found in the stomach of the dead body of the deceased by the Doctor, who conducted postmortem on the body of the deceased. There is nothing on the record to show that the injuries on the body of injured

were not caused by firearms or it were self-inflicted injuries. The incident had taken place at 11:00 a.m. The Doctor who examined the injured at 11:35, 11:40, 11:45 and opined that those injuries were fresh whereas, his opinion with regard to the death of Haroon was to have taken place about three hours and time between death and postmortem about one hour, which is probable. We noted that autopsy was conducted at 02:55 p.m. and time of death was given as 13:50 hours. The word about is significant and would in no way give rise to any doubt with regard to the time of incident given by these witnesses.

17. Adverting to the other grievance of the learned counsel appearing on behalf of the appellant was that both the injured witnesses were not present at the time of preparation of site plan Ex.PB and that it was the duty of the prosecution to have produced the injured witness Farhan on whose pointation, site plan was prepared and who claimed to be one of the eye witness of the occurrence but he was not named as an eye witness in the crime report. He submitted that non-production of injured Farhan & minor Uzaima is fatal to the

prosecution case. Statement of Fahim Khan, ASI (PW-5) reveals that the site plan (Ex.PB) was prepared by him at the instance of Farhan (*given up being won over*). This argument of the learned counsel for the appellant equally has no force. It has not been denied by the defence that the incident had not occurred on the place described by the prosecution. It was observed in the case reported as "Tajuddin vs. Yousaf and 2 others" (PLD 1976 SC 234). It was hardly realised that the site plan itself is not a substitutive piece of evidence which could be used to contradict or discredit the unchallenged evidence of the two eye witnesses. It is true that Farhan at whose pointation, the site plan was prepared was not produced at trial being won over, however, the learned counsel for the appellant could not show any judgment in support of his plea that on this ground the site plan is to be ruled out of consideration.

18. So far non-production of minor Uzaima is concerned, we observed that he could not be examined due to his immature understanding as is reflected from the order sheet dated 21.07.2020, hence, in our opinion,

it is neither fatal to prosecution case nor disadvantages to it.

19. The record depicts that the appellant alleged to have absconded after the incident and SHO PW-13 finally arrested him on 10.02.2019. The warrant of arrest under section 204 Cr.PC. entrusted to Constable Wasil Khan could not be executed and he effected service of proclamation under section 87 Cr.PC. When questioned at the trial as to how, he would account for his abscondence, after the occurrence till his arrest on 10.02.2019, he answered as under: -

"I am a poverty person for earning my livelihood, I had proceeded to Afghanistan in illegal way and when I came to my native village and learnt about the occurrence, I surrendered myself before the local police. Besides in a sit in, I had satisfied my father about my innocence, he had agreed, however, my step mother and brothers are bent upon my false implication and my conviction"

20. No doubt, on 10.02.2019, at the time of arrest, a Kalashnikov, alleged to have used in the commission of offence, was recovered from personal possession of the accused, however, in the absence of its matching report with the crime empties, it is of no help to the prosecution.

21. Turning to the applicability of section 34 Cr.PC, we have no hesitation in our minds to hold that the appellant and his sister's son came to the crime scene duly armed with deadly weapons ostensibly to use them as preplanned. The nature of the weapon would legitimately lead to the inference that they were prepared to use them on the complainant party. All the section 34 PPC requires that accused is one of the participator and the joint criminal action in the course of which the offence was committed. In this context reliance can well be placed on the judgment reported as "Rasool Bakhsh vs. The State" (PLD 1970 SC 316)

wherein, it was held as under: -

"There is no doubt that to bring a case within the ambit of section 34, P. P. C. it is necessary that some overt act or acts must be established to lead to the inference that the participators in the crime acted in pre-concert or under some pre-arranged plan but this does not mean that every participant in the crime must be shown to have committed the same kind of act. It is sufficient to show that they joined together in the commission of a particular act, for, then they must all be deemed to have intended the natural and inevitable consequences of that act even if some of them did nothing but

merely helped by their presence in the commission of the act. The question thus resolves itself into this, namely; as to whether the person sought to be made constructively liable did do anything with an intention to co-operate in the offence, if so, he is liable"


22. Emergence of the appellant and his sister's son Abbas carrying fire arms, on the crime scene and firing at the complainant party and fleeing from the spot together. This conduct indicates the existence of pre-concert and they did share common intention in committing the crime and as such, the appellant cannot escape his liability with regard to the commission of offence.

23. Coming to quantum of sentence, we found that the prosecution failed to establish motive as alleged in the crime report and it was considered as mitigating circumstance for awarding the lessor sentence of life imprisonment which in our opinion is sufficient to meet the ends of justice, therefore, needs no interference.

24. Judging the case from all angles, we are of the view that the prosecution has succeeded in establishing the guilt of the appellant beyond any shadow of doubt, his

conviction is based on proper appreciation of evidence and is well founded, therefore, the same is maintained, as a result, the appeal and criminal revision fail and are dismissed accordingly.

Announced
09.03.2022.


SENIOR PUISNE JUDGE


JUDGE

DB

Hon'ble Mr. Justice Rooh-ul-Amin Khan, SPJ
Hon'ble Mr. Justice Shakeel Ahmad

Himayat, CS