

THE PESHAWAR HIGH COURT,
BANNU BENCH.

[Judicial Department].

Cr.A No. 162-B of 2018

Anwar Kamal

Vs.

The State etc.

JUDGMENT

Date of hearing: **19.11.2019.**

For Appellants: **Mr.Anwar-ul-Haq & Mr. Sawal Nazir**
Advocate.

For State: **Mr.Shahid Hameed Qurashi Addl:A.G.**

For Respondents: **Mr. Muhammad Rashid Khan Dhirma**
Khel Advocate.

SAHIBZADA ASADULLAH, J.--- The convict/ appellant

Anwar Kamal has called in question the judgment dated 27.09.2018, passed by learned Additional Sessions Judge-II, Bannu, whereby the appellant being involved in case F.I.R No. 145 dated 07.04.2011, registered at Police Station Saddar, District Bannu, has been convicted under section 302(b) P.P.C and sentenced to life imprisonment with Rs.100000/-, as

compensation to the legal heirs of deceased under section 544-A Cr.P.C, or in default thereof to further undergo for six months SI. He was also convicted under section 324 P.P.C, and sentenced to imprisonment for three (3) years with fine Rs.25000/-, or in default thereof to further undergo two (2) months SI. Benefit under section 382-B Cr.P.C was also extended in favour of accused/ appellant.

2. The complainant being aggrieved from the impugned judgment filed Cr. R No. 53-B/2018, for enhancement of sentence of appellant.

3. As both the appeal and revision petition are outcome of same F.I.R as well as judgment, are going to be decided through this common judgment.

4. Succinct facts as divulges from the first information report Ex:PW 9/1, are that on 07.04.2011, the complainant Mir Zakam Khan, with dead-body of his son Shafiqur Rehman, in emergency room of civil hospital, Bannu reported the matter to the local police, that he alongwith his

son Shafiqur Rehman and his nephew Rais Khan were on the way towards Sikander Khel and when they reached at the spot at about 08.45 a.m, accused/respondent Anwar Kamal, duly armed with 12 bore rifle, already present there, after seeing them started firing at them, as a result of which Shafiqur Rehman hit and fell down, while the complainant and his nephew Rais Khan luckily escaped unhurt. Accused/respondent after commission of offence decamped from the spot. When the complainant attended his son, he was at his last breath. Motive for the offence alleged by the complainant was dispute over killing of a drake. The report of the complainant was reduced in shape of *murasila* Ex:PW1/1 by Abdul Hameed Khan S.H.O and sent to the Police Station through constable Hikmatullah No.1471 for registration of F.I.R. while dead-bodies were sent to the Doctor for postmortem examination under the escort of Abidullah No.302/HC. Syed Ayaz Khan S.H.O, incorporated the contents of *murasila* into F.I.R Ex:PW3/1 and sent copy of the same to investigating office, who after completion of investigation submitted

complete challan before the learned trial Court. On commencement of trial, accused Shahid was summoned from judicial lockup and on his appearance provision of section 265-C Cr.P.C was complied with and formal charge was framed, where he pleaded not guilty but claimed trial. On conclusion of the trial the appellant was convicted and sentenced for the offence, vide impugned judgment dated 27.09.2017. Hence, the instant criminal appeal as well as revision petition.

5. We have heard arguments of learned counsels for the parties and gone through the record with their valuable assistance.

6. On 07.04.2011, the complainant in the company of the deceased Shafiqur Rehman (son) and one Rais Khan left their house for some urgent work for Salema Sikander Khel Bala, when they reached to the place of occurrence which is situated in the middle of a graveyard, the accused/ appellant emerged and on seeing them opened fire, which hit the deceased on different parts of his body. The complainant with the help of co-villagers arranged a vehicle and transported the

deceased to DHQ hospital Bannu, where he reported the matter to the local police, which was taken vide *murasila* Ex:PW1/1.

The complainant was examined as PW-09, where he stated that, when they reached to the hospital, no police in the reporting center was present and it was after some time that the local police attracted to the hospital, where his report was taken down. The time of occurrence is 08.45 a.m whereas time of report in DHQ hospital is 09.35 a.m, whereas the distance between the spot and hospital was given as 7/8 Kilometers, so there is an abnormal delay in reporting the matter to police.

This is an admitted fact that the deceased succumbed to the injuries soon after he received the fire shots, but instead of reporting the matter in the Police Station the dead-body was taken to the hospital, on one hand to cover the delay, whereas on the other it indicates that the complainant was not present at the time when the deceased was done to death. We are surprised to see that the complainant while recording his statement before the trial Court explained that he called for the eyewitness Rais Khan to join them for going to Saleema

Sikander Khel Bala, but the complainant throughout his statement could not explain that what was the purpose behind to go to the village and that what was the need for calling Rais Khan to accompany them. Despite the fact that Rais Khan was the nephew of the complainant but he did not come to record his statement before the trial Court, and as such was abandoned as won over, in fact this PW was not present on the spot at the time of occurrence and so was not ready to depose against the appellant and when this is the situation then Article 129 (g) of The Qanun-e-Shahadat, 1984, will come into play and negative inference is to be taken against the prosecution.

The complainant is the father of the deceased and PW Rais Khan was the nephew of the complainant, but their presence at the place and at the time of occurrence is not established on record. The complainant was thoroughly cross-examined and questions were put to him that who brought the cot and who from the village accompanied the dead-body to the hospital, but he failed to explain and replied that he did not remember the names of people who brought the cot and went to the

hospital with the deceased. The complainant stated that he took the deceased in his lap and his hands and clothes were besmeared with blood but neither the clothes were handed over to the police nor his hands were examined by the investigating officer. The case is one of preliminary investigation, because this witness clearly stated that on reaching to the hospital the deceased was first examined and thereafter the report was taken down. This witness further lost his integrity when the investigating officer stated that he called the complainant from the hospital and he reached within five to ten minutes to the spot, we are surprised that if the said distance could be covered in five to ten minutes from the hospital, then why it took about two hours to reach the hospital from the place of occurrence, which tells nothing but that it was a blind murder and no one witnessed the occurrence. In case titled, "Gulfam and another Vs the State" (2017 SCMR 1189), wherein it is held that:

"The prosecution had relied upon two eye-witnesses, i.e. Muhammad Rafiq complainant (PW-17) and Muhammad Ishaq (PW13) out of whom the

complainant was a brother of Muhammad Hanif deceased and Faheem Abbas deceased was an uncle of the complainant. The said eye-witnesses lived at some distance from the place of occurrence and they had claimed that at the relevant time they were available near a Dahi Bhalay cart on a roadside. Availability of the said eye-witnesses on a roadside near a cart at about midnight and doing nothing and for no purpose was a circumstance which was sufficient to raise many an eyebrow. The said eye-witnesses were, thus, nothing but chance witnesses who had failed to establish any reason for their availability near the place of occurrence at the relevant time."

7. The time given by the complainant has further been falsified by the post mortem report when the doctor gave time between death and postmortem as 2-3 hours, and if the opinion of the doctor was taken to be correct, then the deceased died at 07.50 a.m and all this suggest that preliminary investigation was conducted as initially the dead-body was taken by the co-villagers and thereafter efforts were made to procure the attendance of the complainant to report.

8. The mode and manner of the occurrence is shrouded in mystery and if the accused/ appellant was to kill the deceased then why he left the witnesses alive as he had the ample opportunity to do away with them. The witnesses were within the firing range of the accused/ appellant that too when a 12 bore shotgun was used, so the escaping unhurt of the witnesses does not appeal to mind. The distance between the deceased and the appellant was given as 18 to 20 paces and from such a long distance the pellets loose the capacity to penetrate and kill. The postmortem report clearly mentioned that one of the entry wound had no exit and no foreign body was collected during the postmortem examination to substantiate the claim of the complainant. The investigating officer recovered one live cartridge and also an empty of 12 bore alongwith blood stained earth from the place of occurrence, the empty was sent to the FSL for opinion but onward silence prevailed. It is pertinent to mention that the police raided the house of the accused wherefrom a 12 bore rifle bearing No.15217 was recovered and an F.I.R was

registered against his father. The accused was arrested on 10.04.2017 by PW-07 and on his pointation from his house on 13.04.2017, again the same 12 bore gun was taken into possession and it was sent to the FSL alongwith the empty and requested the opinion. The FSL report was received in positive, which has been exhibited and was placed on file, but the malafide on part of the prosecution is clear from the fact that initially when the gun was recovered from the house of accused/ appellant why it was not sent to the FSL as the investigating officer was well of the knowledge that a 12 bore gun was used in commission of the offence, so this laxity on part of the prosecution will definitely favour the accused/ appellant.

9. The medical evidence is in conflict with the ocular account and the seat of injuries can hardly explain that these were caused by using a 12 bore shotgun and also the doctor did not recover the pellets lying inside the body and no X-ray was made. Keeping in view the dimensions of injuries

given in the postmortem, it hardly persuades that the weapon used was 12 bore shotgun.

10. The complainant allegedly forwarded a motive i.e. the shooting of ducks but throughout the investigation nothing was brought on record either oral or documentary to prove the motive, but the motive is a double edged weapon which cuts both ways and this view was consistently held by Hon'ble Supreme Court, in case titled "Muhammad Ashraf alias acchu Vs the State" (2019 SCMR 652), wherein it is held that:

"The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."

11. Though the learned counsel representing the complainant stressed that the accused/ appellant soon after the

occurrence absconded and to him the abscondence alone is a sufficient pointer towards guilt of the accused, we are unable to understand that how in absence of positive and convincing evidence the abscondence alone can lead to conviction and if we accede to the submissions so forwarded, we are afraid the results would be drastic. There is no cavil to the proposition that abscondence alone cannot be a substitute, for the direct evidence and this aspect has been beautifully dealt with by the apex Court in case titled, "Muhammad Sadiq Vs the State" (2017 SCMR 144), wherein it is held that:


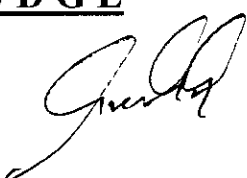
"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."

12. Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

13. After thoroughly evaluating the evidence available on file this court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and the appellant is acquitted of the charge by extending him the benefit of doubt, He shall be released forth with from jail, if not required to be detained in connection with any other case. So far as the connected *Criminal Revision No.53-B/2018* is concerned, the same stands dismissed.

14. These are the detailed reasons for our short order of the even date.

Announced:
19.11.2019


JUDGE

JUDGE

