JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)
Cr.A No.621-P/2019

Shahzad vs. Akhtar Ali

J U D G M E N T

Date of hearing:	**27.07.2022**
Appellant (s): by:	Mr. Naveed Maqsood Sethi, Advocate
State by:	Mr. Babar Shehzad, AAG
Complainant by:	Mr. Asfandyar Yousafzai, Advocate

Dr. Khurshid Iqbal, J.- Through this Criminal Appeal, Shahzad son of Muhammad Amin (the appellant-accused) has challenged the judgment of learned Additional Sessions Judge-III, Mardan dated 07.05.2019, whereby, vide case FIR No. 418 dated 26.05.2013 u/s 302, 449, 34 PPC, Police Station Hoti, Mardan, he was convicted under section 302 (b), PPC, and sentenced to life imprisonment as *Tazir* with a fine of Rs.5,00,000/-, to be paid to the legal heirs of the deceased as compensation within the meaning of section 544-A ,Cr.P.C.; under section 449 PPC, he was sentenced to rigorous imprisonment for five years with fine of Rs.1,00,000/-.

2. Briefly stated facts of the case are that complainant Akhtar Ali reported the matter in the casualty hospital Mardan, where the dead body of his brother Liaqat Ali was lying. The complainant stated in his report that on 25.05.2013,

the eventful day, he, along with his brother Liaqat Ali (deceased), was present in his house. In the meanwhile, accused Jehad (absconding accused) and Shahzad (the present appellant) duly armed with firearms, entered their house and swiftly started firing at his brother Liaqat Ali, as a result of which he was hit and died on the spot. After the occurrence, the accused decamped from the spot. However, being empty handed, he could do nothing. Motive behind the occurrence was that half an hour prior to the occurrence, a verbal altercation has taken place between the deceased and the present appellant. The occurrence was witnessed by complainant, Mst. Amtari Bibi, his mother and other inmates of the house. The report of the complainant was reduced in the form of a Murasila (Ex.PA/1) by Muhammad Arif, IHC, on the basis of which the case was registered.

3. After completion of investigation, complete challan within the meaning of section 512 Cr.P.C. was submitted against the accused. Later, after the arrest of present appellant-accused, supplementary challan was submitted against him. Charge was framed against him, to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as eleven witnesses. After closure of the prosecution evidence, statement of appellant-accused was recorded under section 342 Cr.P.C. wherein he denied the allegations and professed his innocence. On conclusion of

trial, the learned trial Court, convicted the appellant-accused as mentioned in the first para of this judgment, whereas, declared co-accused Jehad as proclaimed offender.

4. We have heard the arguments of learned counsel for the appellant, as well as learned A.A.G, assisted by learned counsel for the complainant and perused the record with their valuable assistance.

5. The prosecution case significantly hinges on the ocular account which Akhtar Ali (complainant/PW3), Mst. Amthari (PW2) and Mst. Gul Naz (PW3) furnished at the trial. These PWs are brother, mother and sister of the deceased, respectively. In their statements recorded in examination-in-chief they deposed that the appellant and other co-accused having firearm weapons entered their house, opened fire at Liaqat Ali (deceased) which resulted in the death of Liaqat Ali. They further deposed that the firing took place in their presence at the relevant time. While disclosing the motive, they stated that on the eventful day, the deceased had an altercation in a wedding with the accused. The ocular account could be decisively seen from two perspectives: first, the presence of the eye witnesses on the spot; and, second, the entry of the appellant (and non else) duly armed with firearm weapon in the house of the complainant party with the intention to commit murder.

6. First, we would examine the issue of presence of the eye witnesses. Admittedly, the occurrence has taken place inside the house of the complainant at Asr time, and the eye witnesses are the residents of the house, therefore, in the normal course, their presence at the place of the occurrence cannot be doubted. The eye witnesses unanimously confirmed in their cross examination that they as well as the deceased were present in their house. The complainant (PW3) and Mst. Amthari (PW4), his mother, were asked about the jobs of the complainant and the deceased with a view to establish that they were not supposed to be there. PW3 replied that the he was running a tailoring shop and the deceased, a grocery shop, in their village bazaar. PW4 replied that the complainant and the deceased were doing labour job and they used to work as masons during the days of the occurrence. The question is that of their presence on the spot and an affirmative answer has come. As regards, the job they were doing, no doubt there is a discrepancy in the statements of PW-3 and PW-4, however, this is not material. The primary fact is her presence on the spot which was not shattered. PW-4 is an old lady, apparently illiterate, as such, it could not be expected of her to know the exact nature of the work her sons were doing for their livelihood. Such a statement of PW-4 could not be termed as false. The evidence also reflects that there was a marriage ceremony in the locality and at the time of *rukhsati* (called

"*Janj*" in Pashto) an altercation took place between the deceased and the appellant which triggered the occurrence. Moreover, the time of the occurrence is evening, a time on which ordinarily people rush back to their homes from whatever jobs they do. Thus, the plea that the deceased and the complainant were not supposed to be present in their house does not stand to reason.

7. Another aspect of the presence of the eye witnesses the defence challenged was the presence of the particular persons in the house. In the murasila, the presence was shown by stating the words "*deegar ahl-e-khana*". PW4 has confirmed this fact in his examination-in-chief that he had stated the words "other family members." While under cross examination, he stated that he had mentioned the name of his sister Gul Naz (PW-6). However, when confronted, it was found that the above referred Urdu words were stated there only. In the next breath, he denied a suggestion that he introduced Gul Naz for the first time. He further denied that he used general words in order to introduce a witness of his choice later on. Gul Naz, in her statement (PW-6) buttressed the fact of her presence. It appears from her statement that she was a student and had passed class 9 those days. The statement of PW5 Mst. Amthari further lends support to PW-4 and PW-6 by stating the she and Gul Naz did not participate in

the marriage ceremony. It follows that both the women were present on the spot.

8. The eye witnesses also testified that the IO prepared the site plan as they pointed out the place of the occurrence. While under cross examination, PW-4 mother of the complainant and the deceased deposed as under;

> "I was in severe shock so I do not know what happened as soon as the deceased was hit I remained unconscious for 2 days. Unconscious means that a person knows nothing."

A question arises whether this statement is confidence inspiring. Certain points are worth consideration here. First, the IO deposed that he prepared the site plan in the presence of the eye witnesses, including, of course, PW4. Why the IO would have necessarily involved PW4 if, at all, she was unconscious, especially when the complainant and PW6 were there to point out the spot for preparation of the site plan. Second, the deposition of PW4 was recorded on 16/05/2018, after about 5 years of the occurrence. This is a long time to recollect oral facts in minute and specific details. Third, she is an illiterate old woman, above all, mother of deceased. Her statement that she fell unconscious need not be understood within the literal meaning of the English words written in her statement. When a mother comes to know about the natural death of her son, she would be obviously gripped by severe shock. The shock will be severer, even abrupt

unconsciousness, when the news is the death of her son as murder; and that would be quite natural. For a mother the loss of her son is a life-long heartache. If the death of the son was a murder and right in front of her, one can imagine what will be her persistent feelings. More so, such feelings never fade away as the time goes by.

9. Next, the kind of weapon was shown as simple firearm in the murasila. The complainant (PW-3) said it was a Kalashnikov, however, during cross examination, he deposed that he can differentiate between a Kalashnikov and a pistol. He explained that in the murasila he stated "machine" (a word ordinarily an ordinary person in the Khyber Pakhtunkhwa would use for Kalashnikov in Pashto) and further recollected that he stated firearms. From the spot, shells of 7.62 bore (Kalashnikov) were recovered. It needs no emphasis that the word "firearm" was stated in the murasila, it happened to be a Kalashnikov though PW3 was asked about pistol. Undeniably, both are firearm weapons. At the time of firing, an eye witness would not be necessarily in a position to look at the kind of the weapon used. Hence, the use of the word firearm would be sufficient to means a Kalashnikov.

10. The place of the report is another key aspect of the case. Admittedly, the report was made in the Casualty room of the hospital in Mardan. PW-3 admitted that many police posts fall on the way between the place of the occurrence and the

hospital. He denied that this aspect belies the fact of his presence on the spot. If he had popped into a police post for a report, even then he was to be referred to the hospital as post mortem examination was to be held. Every hospital has a police post where reports of such like crimes are lodged. The FIR clearly reflects the report was made in the hospital at 1820 hours, 50 minutes after the occurrence. The IO (PW-11) was also asked about the police posts lying on the way to Mardan city. He stated that there is a police post near the graveyard of Mayar, the village of the parties, and also the Police Station Hoti, but he explained that there are other approach roads, too, on which no police post/station is situated. It is not clear which road the people followed while they were taking the dead body to the hospital. Nor was the complainant asked about any such road on which a police station would fall. No suggestion relating to consultation and deliberation was put to the complainant. Soon after a murder occurrence, people rush to the spot and the report is never made exactly at that specific moment. It does take a while even if the police post is around the corner. Deliberation and consultation could be seen in the peculiar circumstances of a case. The circumstances of the case in hand don't indicate any scope of such deliberation and consultation as, noted above, the report was lodged after 50 minutes. The mere fact that the police was available on the way couldn't, in the circumstances, be seen as fatal as to lay

axe at the roots of the prosecution case. Indeed, the occurrence took place in the daylight; reported promptly followed by post-mortem examination, which leave no possibility of consultation or deliberation. Reliance is placed on ***Rooh Ullah and others v. The State and others, reported as 2022 SCMR 888*** **[Supreme Court of Pakistan]**, in which the honourable Court held that:

> Incident, a daylight affair, was reported a remarkable promptitude followed by examination of the injured as well as autopsy, circumstances that cumulatively exclude possibility of consultations or deliberations (para. 3).

11. PW3 denied that the dead body of the deceased was shifted to hospital by co-villagers. In examination-in-chief, he deposed that *he* shifted the dead body to the hospital. He denied a suggestion that had he been present on the spot he would have lodged the report in a police station lying on the way to the hospital. These suggestions, if at all, are not substantial enough so as to lead to an adverse inference on the main core of the prosecution case. It is quite natural that the village people shift the dead body and even accompany it to the hospital to help the complainant party as the village fraternity. Usually, those people do include nearest relatives of the complainant party. The deposition of the complainant that *he* shifted the dead body doesn't mean he did it all alone. Indeed, it couldn't be assumed that the complainant did the

shifting literally as a single individual. Culturally, it never happens, nor can anyone singly do it.

12. The second perspective is that the eye witnesses saw the appellant entered their house duly armed, opened fire at the deceased with the intention to commit his murder. The complainant (PW-4) stated:

> On 06.05.2016, I along with my deceased brother and other family member[s] were present in our house. In the meanwhile, at 18.40 hours the accused facing trial Shahzad and absconding co-accused Jihad duly armed with Kalashnikov entered into our house situated at village Akakhel Mayar and started firing at my brother deceased Liaqat Ali in order to commit Qatl-i-Amd, who was hit and died on the spot. Thereafter, the accused party escaped from the spot and we being empty handed we could not doing anything.

PW-4 (Mst. Amthari) said:

> On the day of occurrence I along with complainant and deceased Liaqat Ali and PW Gul Naz were present in our house. After the Asr prayer the accused facing trial along with absconding accused Jihad duly armed with deadly weapon entered into our house and started firing at deceased. Liaqat Ali as a result of which he was hit and died on the spot.

Pw-6 (Gul Naz) deposed:

> On the day of occurrence I along with complainant and deceased Liaqat Ali as well as my mother Mst. Amthari were present in our house. Meanwhile, the accused facing trial along with absconding accused entered our house duly armed with deadly weapon and at once started fire at the deceased as a result of which he was hit and died on the spot.

13. The above details the PWs spelt out are substantially the same: the PWs were present in their house and the

appellant duly armed with firearm entered their house and fired at the deceased with the intention to kill him. As discussed above, attempts were made during cross examinations to shatter the presence of the PWs on the spot and we have examined that aspect. No question was asked that the appellant didn't enter the house of the complainant part and/or he was not known to the PWs. PW-5 stated in her cross examination that she doesn't know whether accused Jehad (absconding) and Shahzad (appellant) were residing separately or in one house. She denied a suggestion that she doesn't know the appellant but his name and the name of absconding accused was put in her mouth to charge them. She maintained that the PWs were not fired at and that the firing lasted 4/5 seconds. It amounts to rather confirmation from under cross examination that the appellant trespassed into the house with intention to kill the deceased.

14. To sum up, the presence of the eye witnesses on the spot was proved. The defence failed to successfully pinpoint deliberation and consultation on the part of the prosecution. Neither any suggestion was made that eye witnesses were not residing in the house, nor was that the house was not their ownership. Further, there was also no suggestion that the appellant was not from the same Mohallah and village. Furthermore, no enmity or ill was set up in their evidence. In this respect, guidance is sought from the case of **Muhammad**

Sadiq v. The State reported 2022 SCMR 690 [Supreme Court of Pakistan], in which it was held that:

> **So far as the question that the complainant was mother of the deceased, therefore, her testimony cannot be believed to sustain conviction of the petitioner is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case (para.6).**

15. Another point for determination before this Court is that the murasila was verified by Irsahd Ali, brother of the complainant. The prosecution didn't produce Irshad Ali. The complainant said the Irshad Ali lives separately from, at 4/5 furlongs from his house. He added that Irshad Ali came to spot after 20 minutes of the occurrence. It follows that Irshad Ali was not an eye witnesses of the occurrence. The prosecution, however, produced the police official (Muhammad Arif Khan, ASI/PW-7) who recorded the report in the shape of murasila. PW-7 denied any deliberation and consultation was done prior to the recording of the murasila. While under cross examination, PW-7 deposed that he didn't mention the names of the relatives who accompanied the complainant, the names of the eye witnesses and the kind of weapon used by the appellant. These facts were not necessary to be disclosed at that time. The first information is meant just to set in motion

the lawful authorities about the commission of a crime. More and greater details come forth during investigation.

16. The spot is situated inside the house of the complainant party in Mohallah Akakhel in village Mayar. It depicts that the house is situated to the north of the 8-feet *pukka* path of Mohalla Akakhel. To the south of the path lies the Masjid of the Mohallah. The site plan demonstrates that the appellant entered the house of the complainant party and while at point # 6 there, he opened fire at the deceased from 14 feet near the wall of a room. From point 'A' right the back of the appellant (point # 6), four shells of a 7.62 bore (Kalashnikov) giving smell of having been freshly discharged were recovered. Point 'B' is the wall of the room, the place where the deceased was present and fired at by the appellant, which was hit at different points. The bullet marks were found at four and four and a half feet there. Blood was also recovered from point 1, the place where the deceased was hit with fire shots and breathed his last.

17. The post mortem report shows that one entry wound near left exile, two entry wounds on left side of abdomen near the left renal region and one entry wound on left temporal region on the scalp (total four wounds) were caused on the body of the deceased. The entry wounds were on front side. It means the deceased was fired at his front and on vital parts which bespeaks the criminal intention of the appellant to

commit murder. The injuries being of firearm weapon, the post mortem report supports the recovery of the four shells of 7.62 bore. The post mortem also supports the site plan and the recovery inasmuch as four shells of the bullets were found and recovered from the spot.

18. The marginal witnesses of the memo vide which the four shells of 7.62 bore taken into possession were not produced as PWs. They were private persons. The reason the prosecution showed, was that they were won over. Be that as it may, the prosecution proved that the shells were found inside the house of which the eye witnesses furnished direct evidence. In other words, the eye witnesses, who had seen the firing by the appellant and the shells having fallen on the crime scene. It was only on the memo that two private persons were cited as marginal witnesses. In this view of the matter, the non-production of the marginal witnesses though does not satisfactorily prove the recovery, but this being circumstantial evidence, becomes of little weight in face of the direct evidence furnished by the eye witnesses. For this view, we are fortified by the dictum laid down the case of **Haroon Rashid and 6 others v. The State and another 2005 SCMR 1568 [Supreme Court of Pakistan]**. For the sake of ready reference, the relevant para. is reproduced below:

> **17. So far recovery of crime weapon and empties, learned Division Bench of the High Court has rightly observed that the same were pieces of evidence of**

corroboration and <u>even if recovery is not proved, in the presence of reliable, confidence inspiring and unimpeachable ocular testimony and other circumstantial evidence, it would not adversely affect the prosecution case</u> as the said weapon and its recoveries if held to be tampered with subsequently (underlining applied).

19. Finally, the motive the prosecution set up was that an altercation was held between the deceased and the accused party in a marriage ceremony in the Mohallah on the day of the occurrence. Learned counsel for the appellant emphatically argued that motive once shown must be proved by the prosecution. Legally, motive is immaterial. From the evidence of the prosecution, motive was not established. The learned trial Judge noted that the non-attribution of specific role to the appellant was a mitigating circumstance in determining the quantum of the sentence. We consider the non-proof of the motive as a mitigating circumstance in the case.

20. The appellant remained absconder for three and a half years. He offered no plausible explanation for his absconsion. Like motive, abscondence is also a double edged weapon. Where the prosecution has successfully proved the charge, absconsion will throw its weight in favour of the prosecution.

21. In the light of the above discussion, we have reached to the conclusion that the learned trial Judge has proved the charge against the appellant beyond reasonable shadow of doubt on the basis of basis of unimpeachable and confidence inspiring evidence of the prosecution. Consequently, the

appeal is dismissed and conviction and sentence passed by the learned trial Judge are maintained. We hold that motive not being proved, the learned trial Judge has rightly considered it a mitigating circumstance while awarding life imprisonment u/s 302 PPC, as *tazir*. For this reason, the Criminal Revision petition filed by the complainant is dismissed.

Announced
27.07.2022

**Abdul Ghaffar* SSS*

JUDGE

JUDGE

(DB) Hon'ble Mr. Justice Syed Arshad Ali & Hon'ble Mr. Justice Dr. Khurshid Iqbal.