

THE PESHAWAR HIGH COURT,
BANNU BENCH.
[Judicial Department].

Cr.A No. 120-B of 2019 with
M.R No.04-B of 2019.

Ikramullah

Vs.

The State etc.

JUDGMENT

Date of hearing: **22.06.2020**

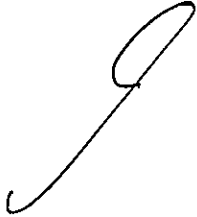
For Appellants: **M/S Muhammad Rashid Khan Dirma**
Khel and Masood Adnan advocates.

For State: **Mr.Shahid Hameed QureshiAddl:A.G.**

For respondent. **Haji Hamayun Khan Wazir advocate.**

SAHIBZADA ASADULLAH, J.--- This criminal
appeal is directed against the judgment dated 26.04.2019,
in Sessions Case No.58/SC of 2016, passed by learned
Additional Sessions Judge-II, Lakki Marwat, whereby the
appellant Ikramullah involved in case F.I.R No. 466 dated
29.12.2014 registered at Police Station Ghazni Khel, Lakki
Marwat was convicted under section 302(b) P.P.C and
sentenced to death, with compensation Rs.200000/- (two
lacs) under section 544-A Cr.P.C, or in default to further
undergo six months imprisonment. M.R No.4-B of 2019
has also been sent by the learned trial Court, hence, this
judgment shall decide both.

2. The prosecution story, in brief, is that on 29.12.2014 at 1730 hours, complainant Shafiullah brought the dead-body of his brother Sadam Hussain with the help of co-villagers in a private datsun, to the Police Station Ghazni Khel, and reported the matter that he alongwith his brother Sadam Hussain were present at the place of occurrence for watching volleyball match; that he was sitting on the ground, whereas his brother Sadam Hussain was sitting at top of the said *Band*. Meanwhile at about 16.30 hours accused Ikramullah duly armed with Kalashnikov appeared and both the deceased and the accused went in altercation, where after accused Ikramullah Khan started firing at his brother, as a result of which he was hit and fell down, while the accused decamped from the spot. When the complainant attended his brother he was breathing his last. Motive for the occurrence alleged by the complainant was exchange of hot words/ altercation between the accused and the deceased a few days prior. The report of complainant was reduced in shape of F.I.R Ex: PA by Ghaos Ullah Khan ASI (PW-04), who prepared injury sheet Ex: PW-4/1 and inquest report Ex: PW 3/2, of the deceased and handed over the same alongwith dead-body of deceased to constable Munawar Khan No. 22 (PW-03) who escorted it to RHC Titar Khel, where Dr. Matiullah M.O. (PW-01) conducted post mortem of the deceased. Zeri Gul ASI, PW-10 investigated the case, who on receipt of copy of




F.I.R proceeded to the spot, prepared site-plan (Ex: PB), secured blood stained earth from the place of deceased alongwith two empties of 7.62 bore, which were taken into possession vide recovery memo Ex: PW 9/1. He also took into possession blood stained garments of the deceased vide recovery memo Ex:PW 9/2, post mortem report Ex: PM, F.S.L. reports Ex: PW 10/4 and 10/5, regarding the crime empties and blood stained earth and placed the same on file. He after recording statements of witnesses and conducting further necessary investigation submitted the case file to Abdul Hakim SHO, Police Station Ghazni Khel (PW-01), for submission of complete challan, which was accordingly submitted on 10.01.2015, proceedings under section 512 Cr.P.C. were initiated and ultimately the appellant was declared as proclaimed offender vide order dated 26.01.2016.

3. The accused Ikramullah was arrested on 11.05.2016 and after completion of necessary investigation supplementary challan was submitted against him on 25.05.2016, by Haider Ali Shah S.H.O. (PW-8) and the case was entrusted to the learned trial Court. The formalities provided under section 265-C Cr.P.C were complied with. Charge was framed against the appellant on 30.08.2016, to which he did not plead guilty and claimed trial. The prosecution in order to prove guilt of the accused produced and examined as many as ten (10) witnesses. On close of prosecution evidence statement of accused was

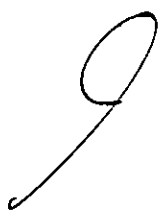
recorded under section 342 Cr.P.C, wherein he professed his innocence, however, he neither wished to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce evidence in his defence. After hearing arguments of learned counsel for the parties, the learned trial Court vide impugned judgment dated 26.04.2019 convicted and sentenced the accused to death, hence the instant criminal appeal alongwith murder reference.

4. The learned counsel for the parties alongwith Addl: Advocate General representing the State were heard at length and with their valuable assistance the record was gone through.

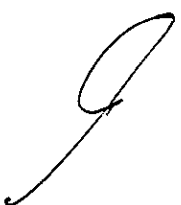
5. It was on 29.12.2014, that the complainant reported the matter to the local police in Police Station Ghazni Khel regarding the death of the deceased that on eventful day it was at 1630 hours, when the deceased was present on Lorra Band (raised surface) when the appellant approached there and after altercation he resorted to firing which hit the deceased, who fell on the ground and died after some time. The complainant stated in his report that he alongwith the deceased were watching volleyball match near the place of occurrence. The place of occurrence is situated at a distance of 2 and a half kilometre from the Police Station and is surrounded by vacant / barren lands, and to its east there is a ravine, whereas to the west at a distance of 54 feet from the said band the complainant disclosed his presence and watching volleyball match. It is



pertinent to mention that 'Lorrah Band' has a height of 12 feet with a 10 feet width where the deceased at the time of incident was shown all alone and was done to death. We are surprised to see that when the complainant was present on the ground watching volleyball match, what led the deceased to go up and watch the match from such a long distance, when his brother (complainant) was present on the ground. We are yet to see that wherefrom the appellant approached and how the complainant witnessed his coming to the spot and heard the altercation between the two. The distance between the deceased and the appellant is given as 15 feet and it is in the evidence that an altercation started between the two and thereafter the appellant resorted to firing. The complainant was examined as PW-10, who stated that when the convict/ appellant attracted to the spot, he started altercating with the deceased and the altercation went on where after the appellant started firing on the deceased. The distance between the deceased and the appellant is given as 15-feet and if the appellant started altercation then instead he should have come much closer to the deceased but this long distance excludes the possibility of the two having altercated. The complainant stated that a few days earlier the deceased and the appellant had altercated with each other and that the previous episode was the motive which attracted the convict/ appellant to the site of occurrence to settle the score. If the present incident was the aftermath of previous altercation



then instead of entering into altercation the assailant soon on arrival would have fired upon the deceased, had he come with the intention. It is in the evidence that soon after the fire was made the complainant rushed to the deceased and found him struggling between life and death, but he lost the battle. The time between injury and death is given as 20-40 minutes, whereas the deceased was put in the datsun for Police Station when he breathed his last. This is an element of surprise that when the complainant soon after the incident attracted to the deceased and so the other people, who were watching the volleyball match then why they did not immediately shifted the injured to the hospital to save his life; and that why all arrangements were made when the deceased breathed his last. The conduct displayed by the complainant is not only strange but abnormal as well, that no immediate efforts were made to save the life of the deceased by shifting him immediately to the hospital when there were still chances to survive. The presence of the complainant on the spot is yet a mystery as the scribe, who was examined as PW-04, stated that the dead-body was brought by 7/8 co-villagers, but he did not utter a single word regarding presence of the complainant with the deceased. The report was made in the Police Station which was taken down by one Ghousullah Khan ASI, who was examined as PW-04, who stated that he prepared the injury sheet and the inquest report and admitted that he did not put the F.I.R number and sections of law there on, which



indicates that these documents were prepared when the dead-body was brought to Police Station by the co-villagers and that by then the F.I.R was not registered. Had the F.I.R been registered, then definitely the inquest report would bear the F.I.R number as well as the sections of law. The presence of the complainant is further doubted that despite presence in the Police Station, he did not identify the dead-body of the deceased to the police at the time of preparation of inquest report, and so before the doctor at the time of post mortem examination, rather we find one Aneesullah and Raheemullah, who identified the dead-body before the police and the doctor. Both the complainant and the scribe are not in harmony as the complainant stated that it was he who accompanied the dead-body from the spot to Police Station, but contrary when the scribe was examined as PW-04, he stated that the dead-body was brought to the Police Station by 7/8 co-villagers and he did not mention presence of the complainant at the time of arrival of the dead-body. The presence of the complainant is further doubted when he stated that after the report was made the dead-body was sent to the mortuary under the escort of one constable Munawar whereas he was directed by the police officials to go home. We are surprised that what urgency was there that the complainant was directed to go home instead accompanying the dead-body to the mortuary for post mortem examination. The conduct displayed by the

complainant on leaving for home from the Police Station is not natural and even it has questioned his veracity to a greater extent, that how a brother could leave the dead-body of his real brother unattended. The complainant did not identify the dead-body of his brother before the police at the time when the inquest report was prepared and thereafter, had he been present in the Police Station when the police was preparing the inquest report, he would have been figured in the column of identification. Another intriguing aspect of the case is that the complainant stated that after making report he left for home on his motorcycle, whereas nowhere on record he was shown in possession of a motorcycle, it was in a datsun pick up that he alongwith others allegedly brought the dead-body of his brother to the Police Station, the statement of the complainant in this respect tells nothing but that he was present in his house and that it was after receiving information from Police Station regarding the incident that he rushed to the Police Station and thereafter the report was made.

In case titled "Muhammad Ashraf alias Acchu Vs the State" (2019 SCMR 652), wherein it is held that:

"It is well settled that benefit of slightest doubt must go to an accused and in a case where the Court reaches a conclusion that eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs,

then the case of the accused merits plain acquittal."

6. Aneesullah was examined as PW-07, who stated that he was watching a football match at a distance of some 500/550 meters from the place of occurrence and that it was at 1630 hours when on hearing of the incident he rushed to the spot and reached there at 1640 hours. He further stated that on reaching there he found the complainant alongwith Raheemullah present. The complainant stated that the incident was also witnessed by Junaid, Irfanullah, Raheemullah, Hanifullah and one Bilal. Surprisingly, Raheemullah who identified the dead-body before the police and the doctor was abandoned despite the fact that he too was stated to be the eye-witness of occurrence. Withholding of the best available evidence speaks nothing but that had he been produced he would not have supported the charge of the complainant against the convict/ appellant and this is what Article 129(g) of the Qanun-e-Shahadat Order, 1984 caters for.

In case titled, "Riaz Ahmad Vs the State" (2010 SCMR 846), wherein it is held that:

"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-

witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

7. The Investigating Officer visited the spot and on pointation of the complainant blood was secured from the place of the deceased alongwith two empties of 7.62 bore. The Investigating Officer was examined as PW-10, who stated that he reached to the spot at 06.40 p.m. and he called the complainant on his mobile phone to reach the spot, who accordingly approached and the needful was done on his pointation. The Investigating Officer stated that he did not record the statements of any independent person in this regard and even he did not try to trace the persons who were engaged in playing the volleyball match at the time of incident. This is astonishing that the complainant stated that some five others besides him witnessed the occurrence and he also mentioned their names but the Investigating Officer did not take the pains to record their statements and this lack of interest on part of the Investigating Officer as well as the complainant tells

nothing but that the murder was unwitnessed; and that no volleyball match was in progress at the time of occurrence. This factor finds support when the complainant stated in his Court statement that he alone was watching volleyball match and when he realized the blunder, he improved his statement and stated that they all were five. There is no denial to the fact that a volleyball team is consisting of 12 players, six playing on each side then how in all there were five persons. The complainant on each step tells nothing but lie. Though the complainant stated that the datsun was arranged by one Irfanullah, but even the Investigating Officer did not record his statement, the overall impact which can be gathered from, is that the complainant was later on procured and that it was after the preliminary investigation that the report was made. Admittedly, Raheemullah who identified the dead-body was present with the deceased in the Police Station but even he did not sign the report of the complainant as rider.

8. We know that prosecution is not bound to setup motive in every case but once it is alleged and not proved, then ocular account is required to be scrutinized with great caution. It has been held in the case titled "Hakim Ali Vs. The State" (1971 SCMR-432), that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the

case of "Amin Ullah Vs. The State" (PLD 1976 SC 629), wherein, it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of "Muhammad Sadiq Vs. Muhammad Sarwar" (1997 SCMR 214). Again on the same principle, case laws titled Noor Muhammad Vs. The State and another" (2010 SCMR 997) and "Amin Ali and another Vs. The State" (2011 SCMR-323) can also be referred.

9. The learned counsel for the appellant vehemently argued that the appellant remained absconder for sufficient long time, but mere absconcion of accused is not conclusive guilt of an accused person; it is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicions after all are suspicions, the same cannot take the place of proof, the value of absconcion, therefore, depends on the facts of each case. In case titled "Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a), wherein it has been held:-

"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not

inspire confidence and fell for short of sounding probable to a man of reasonable prudence---Abscondence of accused in such circumstances could not offer any useful corroboration to the case of prosecution"

10. 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 he 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. The connected Murder Reference No.4-B of 2019 is answered in negative.

11. Above are the reasons of our short order of the even date.

Announced.

22.06.2020

Azam/P.S


JUDGE


JUDGE


(D.B) Ms. Justice Musarrat Hilali and Mr. Justice Sahibzada Asadullah

THE PESHAWAR HIGH COURT,

BANNU BENCH.

[Judicial Department].

Cr.A No. 120-B of 2019 with
M.R No.04-Bof 2019.

Ikramullah

Vs.

The State etc.

JUDGMENT

Date of hearing: 22.06.2020

For Appellants: M/S Muhammad Rashid Khan Dirma Khel
and Masood Adnan advocates.

For State: Mr.Shahid Hameed QureshiAddl:A.G.

For respondent. Haji Hamayun Khan Wazir advocate.

SAHIBZADA ASADULLAH, J.--- For the reasons to be recorded later on, this Criminal Appeal is allowed, the impugned judgment dated 26.04.2019 rendered by learned Additional Sessions Judge-II, Lakki Marwat, is set aside and accused/ appellant Ikramullah is acquitted of the charges leveled against him. He be set at liberty forthwith if not required in any other case. Murder Reference No. 04-B of 2019 is answered in negative.

Announced.
22.06.2020

SCANNED

23 JUN 2020
Khalid Khan

JUDGE

JUDGE.