IN THE PESHAWAR HIGH COURT, BANNU BENCH.

(Judicial Department)

Cr. A No.345-B of 2019 with
M.R No.10-B of 2019

Nek Nawaz alias Shikar
Vs.
The State and Habibullah

JUDGEMENT.

Date of hearing 28.09.2020

Petitioner by: **M/S Mr. Anwar-ul-Haq & Sawal Nazir advocates**

Respondents by: **Mr. Haji Hamayun Khan Wazir advocate.**

State by: **Mr. Shahid Hameed Qureshi Addl: A.G**

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SAHIBZADA ASADULLAH, J.--- Through this criminal appeal the appellant has questioned the judgment dated 02.11.2019, passed by learned Additional Sessions Judge-III/Model Criminal Trial Court (MCTC) Lakki Marwat, where the appellant was awarded death sentence under section 302(b) P.P.C, on two counts for committing Qatl-e-Amd, of (1) Yasin Khan son of Gul Rehman and (2)Sahil Rehman son of Mumtaz Khan, and was also burdened under section 544-A Cr.P.C for an amount of Rs.10,00,000/- (one Million) each as compensation to the legal heirs of each deceased with further direction that the amount shall be recovered under section 544-A(2) Cr.P.C as arrears of land revenue or he shall undergo six months simple imprisonment in default. The appellant was further convicted under section 324 P.P.C as Tazir for attempt to commit Qatl-e-Amd of Muhammad Riaz and Obaidur Rehman on two counts for five(05)

years RI. along with fine of Rs.50,000/- (fifty thousand only) or in default of payment of fine, he shall undergo three months SI. He was further convicted under section 337- F(i) as Tazir for causing hurt to Muhammad Riaz and Obaidur Rehman, for one year RI as Tazir (on two counts), and to pay Daman Rs.5000/- to each of the injured. Benefit of section 382-B Cr.P.C was also extended to the convict.

2. The learned trial Court has also sent Murder reference No.10-B of 2019, for its confirmation or otherwise.

3. Brief facts of the case, as per contents of the F.I.R are that on 27.10.2016, at 02:00 hours, the complainant Habibur Rehman brought the dead-body of his nephew namely Yasin Khan son of Gul Rehman to the Police Station Tajori, and reported the matter to the local police, that on the eventful night his co-villager Rehmatullah son of Majeed Khan had arranged a musical show in an open field adjacent to his house on the eve of his engagement; that his nephew Yasin Khan also went to attend the program and he (complainant) was present in his house, when at 00:30 hours, he heard the firing shots, got worried and went to the musical show. On reaching there he found the electricity bulbs were on and many people were watching the activity; that he also saw his nephew Yasin at some distance from him, and it was 00:45 hours, when suddenly (1) Aqal Nawaz, (2) Nek Nawaz alias Shikar (accused facing trial) (3) Sharif Nawaz all sons of Muhammad Nawaz and (4) Muhammad Nawaz alias Khany son of Rabnawaz his co-villagers present there duly armed with Kalashnikovs, stood up and started firing with their respective weapons on his nephew Yasin with intention to commit his Qatl-e-Amd, as a result he got hit and fell

down, whereas all the accused thereafter decamped from the spot. When he attended his nephew he succumbed to the injuries after some time; that from the firing of above mentioned accused, Muhammad Riaz son of Muhammad Khan, Obaidur Rehman son of Muhammad Nawaz, and Rehmatullah son of Majeed Khan also sustained injuries while one Sahil Rehman son of Mumtaz Khan r/o Mir Hazar Khanzad Khel, of Police Station Ghazni Khel area, also got hit and died on the spot. Motive was shown to be the previous blood feud between the parties, hence, this case/F.I.R.

4. After completion of investigation, the complete challan against all accused was submitted for proceedings under section 512 Cr.P.C, as they were absconders at that time. Later on accused facing trial namely Nek Nawaz was arrested from Baluchistan and his supplementary challan was submitted for trial.

5. Accused was in custody, who appeared and after fulfilling the requirements under section 265-C, Cr.P.C charge against him was framed on 21.06.2017, to which he pleaded not guilty and claimed trial. Similarly, stamen of search witness (SW-1) was also recorded, in respect of abscondence of the remaining accused, and thereafter prosecution was allowed to produce its evidence which was produced accordingly. On close of prosecution evidence, the statement of accused was recorded under section 342 Cr.P.C, wherein he professed his innocence, however, he did not opt to be examined on oath as provided under section 340(2) Cr.P.C, however, he wished to produce defence and as such two witnesses, were examined as DW-1 and DW-2. After hearing learned counsel

for the parties, the learned trial Court convicted the appellant vide impugned judgment.

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

7. It was on 27.10.2016, when the complainant was fast asleep at his house, woke up on hearing the fire shots from the musical program arranged by Rehmatullah near his house. The complainant left his house and reached to the place of incident, where the musical program was in progress, that in the meanwhile the accused/appellant along with his absconding co-accused came forward and started firing at the deceased Yasin, which led to his death along with one Sahil Rehman and resulted into injuries on the persons of Muhammad Riaz, Obaidur Rehman and Rehmatullah. On arrival of the Datsun / Pickup the complainant shifted the dead-body of deceased Yasin to Police Station Tajori, where the report was made. After preparation of the injury sheet and inquest report the dead-body of deceased Sahil Rehman along with the injured reached to the Police Station and as such after preparation of the inquest report and injury sheets both the dead-bodies along with injured were sent to Civil Hospital Tajori, for medical examination of the injured and post mortem of the deceased, under the escort of Dilawar Khan FC.

8. It is admitted on record that in the episode three persons were injured where two lost their lives and the trial Court on conclusion of the trial convicted the accused/ appellant under section 302(B)P.P.C to death sentence as Tazir. The points for determination

before this Court are as to whether the presence of the complainant is established on the spot and as to whether the incident occurred in the mode and manner.

9. The complainant was examined as PW-06, who stated that a little earlier to the incident he was fast a sleep in the veranda of his house, and woke up after hearing the fire shots and also musical sounds as he knew that his nephew Muhammad Yasin had gone there, so he out of fear went out and reached to the place where Rehmatullah had arranged a musical show, to celebrate his engagement. The complainant stated that he reached to the place of incident at 12:30 a.m. and found huge gathering of people, some sitting on the cots, some on the ground whereas some were standing behind the cots watching the local dance called *'Athan'*, where the participants were dancing in a big circle, it was at 12:45 a.m. when the accused/ appellant along with absconding co-accused duly armed came forward and started firing at the deceased Muhammad Yasin, who after receiving the firearm injuries fell to the ground. It was further submitted that with the fire shots of the accused/ assailants one Sahil Rehman got hit, fell to the ground and three others got injured. The complainant stated that at the time of incident lights were glowing where he could see the accused and the deceased at the time of incident and prior to it. Though the motive was stated to be blood feud between the parties where brother of the complainant was murdered leading to a charge against the accused/ assailants and that the deceased was fell a prey to the same, but the presence of the complainant raise an eyebrow, that why he was not targeted being the prime target visible to the assailants as the bulbs were on. The

complainant is still to answer that why other male members of his house did not accompany to the spot as on one hand it was pitched dark and on the other, they had a blood feud. The complainant admitted that he had five sons where two were serving in FC, whereas three were present at home and even this is on record that his other brother namely Rehmatullah was also living in the said house and were present at the time when the complainant left the house, but his coming alone tells otherwise and it casts doubt on his veracity.

10. The place of occurrence was stated to be adjacent to the house of one Rehmatullah, who had arranged the musical program and it was an open yard heavily crowded by the villagers including the people from the neighborhood. The complainant as well as the injured eye-witnesses admitted that the number of the people gathered on the spot would be more than 80/90 and it was further admitted that the dancing *'Athan'* was in progress in a circle. It is pertinent to mention that the local *'Athan'* needs an area of 30 to 40 feet in circle, so that the participants could easily perform the activities. Keeping in view various places assigned to the assailants and the deceased along with injured we are surprised to see that how from their respective places the assailants resorted to indiscriminate firing and that why the people dancing in circle intervening between the parties did not receive firearm injuries, as in that eventuality numerous people should have received injuries, that too when four persons duly armed with sophisticated weapons were firing. Our anxiety has increased that when the deceased had left for the musical show after performing his Isha Prayer, and that when the assailants

were also present at the place of incident, right from the beginning, i.e. when the program was not yet started then what precluded the accused / assailants to kill the deceased soon after reaching to the place of incident and that what kept them waiting till arrival of the complainant, the situation tells nothing but that the complainant is a chance and interested witness.

In case titled ***"Mst. Sughra Begum and another Vs Qaiser Parvez and others" (2015 SCMR 1142)***, wherein it is held that:

> ***"14. A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of***

suspect evidence and cannot be accepted without a pinch of salt."

11 The complainant stated that soon after the incident efforts were made to arrange a Datsun / Pickup which took 45-minutes and till then the deceased was lying on the ground. The deceased was allegedly taken to the Police Station where the complainant reported the matter to PW-04, and on completion of the report rest of the injured and deceased Sahil Rehman were brought to the Police Station. It is pertinent to mention that the scribe i.e. Zafrullah Khan Inspector penned down the report and prepared the injury sheet along with inquest report of the deceased Muhammad Yasin and it was thereafter when the other three injured and deceased were brought to the Police Station, their injury sheets and inquest report were prepared. This is astonishing that when the injured reached to the Police Station and when they were conscious and were capable to speak, why the report was not verified from them and as to why none of the injured was put a rider to the report. We cannot ignore when the complainant stated that he took the deceased Muhammad Yasin to the hospital where he reported the matter. The conduct of the scribe went unnatural when on one hand he did not ask for verification of the report from the injured whereas on the other he did not include section 324 to the report rather section 302/34 was mentioned. Had he been a truthful witness he would have added section 324 P.P.C on arrival of the injured witnesses to the Police Station. The scribe was examined as PW-04, where he stated that as the F.I.R was a carbon copy, and while making entries in the original F.I.R section 302/324/34 were inserted

but it found missing in the carbon copy, which he later on corrected. At this juncture we felt the need to consult the original record, and on consulting we found that section 324 P.P.C was later on inserted, that too without any initial from the scribe. This particular aspect of the case casts doubt on veracity of the complainant as well as the scribe and we are constrained to hold that the deceased Muhammad Yasin was brought by the villagers to the Police Station where the injury sheet and inquest report was prepared and that it was on arrival of the complainant that the report was made. The PW-04, stated that he scribed the report in the shape of F.I.R whereas rest of the documents i.e. injury sheets and inquest reports were prepared on his dictation. This witness could not bring on record as what inability he had which led him to dictate the documents and even he could not bring on record that who was the official who drafted these documents on his dictation.

12. The prosecution witnesses made a conscious attempt to toe the lines but in their this attempt they went apart and could not reconcile one another. It is admitted on record that the report was made at 02:00 a.m. in the Police Station, whereas the dead-bodies along with the injured reached to the hospital at 03:15 a.m. The prosecution is yet to explain that why it took 1-hour and 15-minutes to reach the hospital which lies in a close proximity and that how all the injured were examined by the doctor at 03:15 a.m. The doctor was examined as PW-02, who stated that at the time when the injured were brought to the hospital, he was in his house and it was after the lapse of 15/20 minutes that he reached and examined the injuries of the injured to whom his Paramedical staff had already

provided the first aid. It is pertinent to mention that PW-03, stated that when he brought the injured to the hospital it was the doctor and none else, who examined and treated them, this conflict between the two tells nothing but that the real events were suppressed by the witnesses. The plea of preliminary investigation is further strengthened by the fact when the doctor stated that when the injured were brought to the hospital as per routine he on one side was busy in their medical examination whereas on the other the police were busy in preparing the injury sheets. His this statement when placed in juxtaposition with the statement of PW-04, leads us nowhere that an attempt was made by the prosecution to make the case success and that in fact the injured along with dead-bodies were brought either to the hospital or to the Police Station earlier than arrival of the complainant. The conduct of the complainant is also worth perusal, when he stated that soon after lodging the report he left the hospital, had he been present with the dead-body he would have definitely accompanied to the hospital. In the column of identification we find one Zareen along with Rehmatullah as the identifiers where out of the two PW Zareen was examined as PW-05, who stated that he received information regarding the incident at his village and reached to the spot wherefrom he accompanied the dead-body to the Police Station. We are yet to know that when the incident occurred in the odd hours of the night, when the complainant went from his house to the place of occurrence all alone and that when the relatives and family members were not informed by the complainant then what brought PW Zareen to the place of incident along with Rehmatullah who happens to the brother of

complainant. The cumulative effect of all this leads us nowhere, but to hold that the incident went unwitnessed and on arrival of the deceased and injured to the Police Station the complainant along with the identifiers reached there.

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."***

13. The Investigating Officer visited the spot and on pointation of the complainant blood stained earth was recovered from respective places of both the deceased along with 56-empties of 7.62 bore. The Investigating Officer was examined as PW-09, who stated that he initially visited the spot on 27.10.2016, and recovered blood stained earth but postponed further proceedings till next morning when on availability of complainant the site-plan was prepared, whereas the complainant stated that on the night of occurrence he visited the spot in the company of the Investigating Officer, as it was pitch dark, so the spot could not be examined. The variation between the two further troubles the prosecution case, despite the fact that the Investigating Officer prepared the site-plan at the

instance of the complainant but neither the cots were shown in the site-plan nor the musical instruments and even we find no mention of the people gathered there at the night of incident. In the episode we have three injured, Muhammad Riaz, Obaidur Rehman and Rehmatullah, but surprisingly the statement of the injured witness Muhammad Riaz was recorded after 40-days of the incident whereas Obaidur Rehman denied to have recorded his statement. This is on record that the injured Obaidur Rehman got discharged from the hospital on 05.11.2016, whereas injured Muhammad Riaz on 03.11.2016 and despite the fact they were conscious at the time of their examination by the doctor and thereafter, but the Investigating Officer did not take the pains to record their statements, we are further surprised when one of the injured stated that they were called by the Investigating Officer to the baithak of Habibur Rehman (complainant), where the Investigating Officer was present and they were shown the statement of the complainant, the site-plan along with other documents and were directed to record their statement in line with that of the complainant. Such belated statement of the prosecution witnesses tells nothing that they were prevailed upon by the complainant to support his charge against the appellant, when such is the state of affairs, what evidentiary value the statements of these witnesses have and we have no other option but to outrightly reject their testimonies. This is on record that one Rehmatullah who had arranged the musical show too got injured, who was medically examined and discharged from the hospital on the day of incident, when the doctor

declared his injury as simple, but neither the Investigating Officer recorded his statement nor he was produced as a prosecution witness to confirm the stance of the complainant and was abandoned as won over. The said Rehmatullah was the best witness to unearth the truth and his non production takes us to hold that he was not ready to support the false charge of the complainant. Article 129(g) of the Qanun-e-Shahadat Order, 1984 caters for the situation, as is held 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."***

14. The Investigating Officer recovered 56-empties of 7.62 bore from point A, lying behind the assailants and the

prosecution is yet to tell as to whether in such eventuality the recovery of empties from point A, was possible, keeping in view the ejection of empties from AK-47. The empties were recovered on 27.10.2016 along with blood stained earth, but these were received on 17.11.2016 and 08.11.2016 respectively, which surprised us that when both the recoveries were effected on the same day, then why the empties were received on 17.11.2016 after a delay of 20-days. The prosecution could not explain that where the empties were lying till its dispatch and receipt to the office of the chemical examiner and it failed to establish its safe custody on record, as neither the moharrir of the concerned Police Station was produced nor the abstract from register No.19 of the concerned Police Station was placed on file, so the empties and its report has lost its worth and no weight can be attached to the opinion tendered by the Forensic Sciences Laboratory.

15. The prosecution has brought a charge against the entire family including a father and three sons, with blood feud motive which tells no other way but that the charge is exaggerated. It does not appeal to prudent mind that how come a father along with his three sons will come to a musical show and would kill a minor boy of 18 years of age, and spare the complainant being the prime target. It is none else but the prosecution which through its exaggerated charge created further dents in its case, which favours none but the accused/ appellant.

In case titled "**The State Vs Muhammad Raja and 3 others" (PLD 2004 Peshawar 1)**, it is held that:

> ***"In Ghulam Sarwar v. The State PLD 1993 Pesh. 152 it was held that witness bearing injuries on his person, by itself, does not indicate that he has stated truth. Having assessed the eye-witness account furnished by complainant Muhammad Akbar and Mst. Parveen P.Ws., we find that the claim of these witnesses having seen the occurrence, stands belied by host of circumstances and cannot be accepted in absence of corroborative evidence. It appears that the occurrence has not taken place in the manner as suggested by the prosecution and a wide net has been thrown by the prosecution to implicate all the male members of the respondents family.....***

16. The motive was stated to be blood feud between the parties and it was stressed time and again that the appellant had the motive to commit the offence, but we cannot ignore that motive is a double-edged weapon which cuts either way. The prosecution could not produce convincing evidence in this respect and even the Investigating Officer did not record the statements of independent witnesses which could prove the motive on record. True that in each and every case the prosecution is not required to prove the motive and that its absence or failure will not help the accused/ appellant but

equally true that once the prosecution alleges a motive then it is under obligation to prove the same failing which none else but the prosecution will suffer, as is held in 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.

In case titled ***"Ali Bux and others Vs the State (2018 SCMR 354)***, it is held that:

> "***The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on a capital charge and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran @ Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal***

alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148)."

17. It was further submitted by the learned counsel for the respondent that accused/ appellant remained absconder for long long years which he could not explain; and that the long unexplained abscondence is alone sufficient to award conviction. We do not feel ourselves in agreement with what the learned counsel for the complainant submitted as the prosecution is to prove its case against the accused through cogent, coherent, and confidence-inspiring evidence, failing which mere absconding will not come to its rescue as in case in hand the prosecution failed to establish its case, so mere abscondence cannot be taken against the accused and even conviction cannot be awarded on this score alone.

18- 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. As the appellant is acquitted of the charges by setting aside the impugned judgment, hence, the Murder Reference No. 10-B/2019, is answered in negative.

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

Announced.
28.09.2020
Azam/P.S

JUDGE.

JUDGE.

30/X/2020

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