

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr.Appeal No.1037-P/2019
With Murder Reference No.28-P/2019.

Umar Ali son of Mazhar Ali,
r/o Village Pabini District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>M/S Abdul Latif Afridi, Advocate and Barrister</u> <u>Sarwar Muzafar Shah.</u>
For State :-	<u>Mr. Niaz Muhammad, AAG.</u>
For Respondent No.1.	<u>Mian Sher Akbar, Advocate.</u>
Date of hearing:	<u>30.11.2022</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This Criminal Appeal under Section 410 Code of Criminal Procedure, 1898 ("Cr.P.C."), has been filed by Umar Ali, the appellant, against the judgment dated 31.07.2019, passed by learned Sessions Judge/Judge Special Task, Swabi, whereby the appellant has been convicted under Section 302(b) Pakistan Penal Code, 1860 ("PPC"), and sentenced to death as *Ta'azir* vide FIR No.843 dated 25.08.2017, registered under Sections 302& 324 PPC, at Police Station Swabi.

2. For confirmation of death sentence of the convict, the learned Trial Court has sent **Murder Reference No.28 of 2019,** whereas, Muhammad Jameel Khan, the petitioner/complainant, has filed **connected Cr.R. No.217-P of 2019,** seeking compensation for legal heirs of the deceased against the convict in terms of section 544-A Cr.P.C.

For the State

3. Since all the matters are the outcome of one and the same judgment dated 31.07.2019, passed by the learned Trial Court, therefore, we propose to decide and answer the same through this common judgment.

4. The prosecution's case as per FIR (Exh.PA) is that on 25.08.2017 at 2310 hours, Muhammad Jameel complainant (PW.8), in company of dead body of his son, namely, Waleed Ahmad, reported to Akram Khan ASI (PW.12), in casualty of DHQ hospital Swabi, to the effect that on 25.08.2017, he along with his deceased son and brother, namely, Sher Azam Khan (PW.9), was present in his grocery shop "*Karyana Dukan*", situated in Mohallah Orya Khel Pabini Swabi when at 2145 hours, appellant Umar Ali, duly armed with firearm, entered the shop and opened fire at them with the intention to do them away, as a result, Waleed Ahmad deceased got hit and died at the spot, whereas, he and PW Sher Azam, narrowly escaped unhurt. He identified the appellant in light of electric bulbs installed and lit outside and inside the shop. A dispute over women folk was advanced by him as a motive behind the occurrence. His report was reduced into writing in the shape of Murasila Exh.PA/1 by Akram Khan ASI (PW.12), who also prepared injury sheet Exh.PW.1/1 and inquest report Exh.PW.1/2 of the deceased and shifted his dead body to the mortuary for postmortem examination. On the basis of Murasila Exh.PA/1 FIR Exh.PA was registered against the appellant.

5. On 25.08.2017 at 2310 hours, Dr. Aamir Naseem Khan (PW.6), conducted autopsy on the dead body of Waleed Khan

deceased and noticed the following injuries on his person vide autopsy report Exh.PM:-

1. Large size multiple wounds on left upper arm with multiple fractures of left humors.
2. Two wounds on face 10x 10 cm and 5 x 5 cm on right upper arm due to slipping of the bullets.
3. Four entry wounds fire arm size 2x2 cm on the back and left side of flank region.
4. Firearm entry wound of size 2x2 cm on front side of the chest just below and lateral to the left nipple.

Vertebrae fractured while spinal cord injured.

Larynx and trachea found intact while other inner parts were found injured.

Opinion: According to his opinion death of the deceased has caused due to multiple fire arm injuries to the lungs, diaphragm and heart causing cardio respiratory compromise and immediate death.

Probable time between injury and death:

Immediate.

Time between death and postmortem: one hour and 25 minutes.

6. Tariq Saeed Khan SI (PW.10), conducted investigation in the case, who on receipt of copy of FIR and Murasila, proceeded to the crime spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection, he secured blood through cotton from the place of the deceased vide recovery memo Exh.PW.3/1. Similarly, through recovery memo Exh.PW.3/2 he took into possession 04 empties of 222 bore from the place of the appellant at the spot. He also took into possession the last worn bloodstained clothes of the deceased and two energy saver bulbs

For signature

Exh.P.2, one installed inside and another outside the shop of complainant vide recovery memo Exh.PW.3/3 in presence of marginal witnesses to the recovery memos. He sent the bloodstained articles to the FSL and Serologist report in this regard is Exh.PK. The recovered empties were also sent by him to the FSL for safe custody vide application Exh.PW.10/2. Since accused/appellant was avoiding his lawful arrest, therefore, he initiated proceedings under Sections 204 and 87 Cr.P.C. against him and after completion of investigation handed over case file to Munsif Ali SI/SHO, who submitted challan under section 512 Cr.P.C. against the appellant.

7. Accused/appellant was arrested by Zahid Khan SI and handed over to Ghani Said Khan Inspector (PW.11) on 04.03.2018. On completion of necessary investigation, complete challan was submitted against him before the learned Trial Court where he was formally charge sheeted under sections 302 and 324 PPC to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution's allegation and professed his innocence. He, however, opted to be examined on oath under section 340(2) Cr.P.C. and produce evidence in defence.

8. After recording statement of the appellant under section 340(2) Cr.P.C. and examining Majid ur Rehman as DW.1, the learned trial court after hearing both the sides, convicted and

Asadur Sami

sentenced the appellant as mentioned in Para No.1 of the judgment, however, the appellant was acquitted under section 324 PPC. Needless to say that the complainant has not filed an appeal against acquittal of the appellant under section 324 PPC.

9. We have heard the exhaustive submissions of learned counsel for the parties advanced at the bar and perused the record as well as evidence with their able assistance.

10. It appears from the FIR that occurrence, in this case, has taken place on 25.08.2017 at 2145 hours inside the grocery shop (Karyana store) of complainant Muhammad Jameel, situated in Mohallah Orya Khel Swabi, which has been reported by the complainant in Casualty hospital Swabi to Akram Khan ASI (PW.12). While furnishing ocular account, Muhammad Jameel complainant and PW Sher Azam Khan have directly and singularly charged the appellant for murder of Waleed Ahmad deceased and murder attempt at their lives. The ocular account of the case has furnished by the complainant (PW.8) and eyewitness, namely, Sher Azam Khan (PW.9). The former while appearing as PW.8 in the witness box deposed as under:-

“Deceased Waleed Ahmad was my son. PW Sher Azam Khan is my brother. Accused facing trial Umar Ali is my co-villager. On the eventful night, I along with my deceased son Waleed Ahmad and brother Sher Azam Khan was present in our grocery shop, situated in Mohallah Orya Khel, village Pabani. It was about 21.45 hours when the accused facing trial Umar Ali came duly armed to the shop and opened firing at us. With the firing of the accused my son Waleed Ahmad got

Waleed Ahmad

hit and died at the spot. I and my brother PW Sher Azam escaped unhurt. At the relevant time, light of bulbs was available inside and outside the shop. We being empty handed could do nothing. Motive behind the occurrence was women dispute. We took the dead body of the deceased to the casualty of DHQ Hospital Swabi where I made report which was recorded in the shape of Murasila Exh.PA/1 which duly bears my thumb impression. I have pointed out the spot to the Investigating Officer (I.O). I charge the accused for murder of my son Waleed Ahmad and ineffective attempt at my life as well as attempt on the life of my brother PW Sher Azam Khan".

11. Sher Azam Khan, eyewitness of the incident was examined as PW.9, who narrated the story of events occurred on the fateful evening of 25th August, 2017 in the following words:-

"Complainant Muhammad Jameel is my brother while deceased Waleed Ahmad was my paternal nephew and son of complainant Muhammad Jameel. On the eventful night I along with my brother Muhammad Jameel and Waleed Ahmad was present in our grocery shop, situated in Mohallah Orya Khel village Pabani. It was about 2145 hours, when Umar Ali accused came at the shop duly armed with firearm and opened firing at us. With the firing of the accused my nephew Waleed Ahmad deceased got hit and died on the spot while I and my brother Muhammad Jameel escaped unhurt. The occurrence was witnessed by me. Motive behind the occurrence was women dispute. I have pointed out the spot the I.O. who also recorded my statement. I charge the accused

Muhammad Jameel

for murder of the deceased and ineffective attempt on my life as well as on the life of my brother Muhammad Jameel.”

12. The eyewitnesses named above have been subjected to lengthy and taxing cross-examination but nothing of the sort to discredit their testimony could be extracted from their mouths. No reason and circumstance has been brought from their mouths, by the defence, to remotely suggest substitution and false implication of the appellant. It also does not appeal to a prudent mind that a father and uncle of the deceased will spare the real culprit(s) and charge an innocent person for murder of the deceased. Even otherwise, substitution of real culprit charged directly and singularly is a rare phenomenon in the system of criminal justice. Reference in this regard can be made to case titled, **“Allah Ditta Vs the State”** (PLD 2002 Supreme Court 52) and case titled, **“Muhammad Iqbal Vs the State”** (PLD 2001 Supreme Court 222). The eyewitnesses have corroborated each other on all material aspects of the occurrence such as the day, date, time and place of occurrence and the mode and manner in which the appellant arrived at the spot and committed the offence. Appellant is the co-villager of the eyewitnesses and was already known to them. Besides, recovery of the energy saver bulbs by the I.O. from inside and outside the shop and its exhibition in his statement before the court, is another strong circumstance, eliminating the possibility of mistaken identity of the appellant on the part of the eyewitnesses. Even otherwise, the defence, by putting certain questions to the eyewitnesses has itself established their presence at the spot at the

Arshad Sami

time of occurrence. Both the eyewitnesses in cross-examination in very accurate manner have disclosed about the points of their presence, presence of the deceased and the appellant at the time of occurrence as well as locations of the surrounding of the crime spot. The defence itself has brought from the mouths of the eyewitnesses in cross-examination that they along with the deceased are doing business in the said shop and their houses are adjacent to the spot. Replying to the questions of defence complainant Muhammad Jameel stated that he goes to the shop at morning at about 7/8 AM daily and his house is situated adjacent to his shop at a distance of two furlongs. PW Sher Azam is also residing with him in the same house. The said shop is rented to him by his maternal cousin which was being jointly run by him and his brother Sher Azam Khan. Similarly, in cross-examination Sher Azam eyewitness (PW.9) has fully corroborated the testimony of complainant by stating that he and his brother complainant Jameel run the shop jointly whereas Waleed Khan deceased used to bring different commodities from Swabi and Topi etc to the shop. The deceased besides bringing different commodities to the shop was also doing business in the said shop with them. In view of the above circumstances, presence of the eyewitnesses at the spot at the time of incident cannot be doubted. No doubt, they are father and uncle of the deceased, but in absence of any hostility, animosity or any other motive to depose falsely against the accused, their straightforward and confidence inspiring evidence corroborated by strong circumstantial evidence cannot be cast away.

for Mr. Sami

13. The testimony of the eyewitnesses is corroborated by strong circumstantial evidence in the shape of recovery of blood of the deceased from the spot and his last worn bloodstained garments in respect whereof the Serologist report Exh.PK is in the positive. Similarly, the unnatural death of the deceased due to firearm injuries as opined by Dr. Aamir Naseem Khan (PW.6), who has conducted autopsy of the deceased, further support the ocular account of the eyewitnesses. Recovery of energy saver bulbs Exh.P.2 from the spot by the I.O. and thereafter its production during trial also corroborates the ocular account of the prosecution's case and eliminate the possibility of mistaken identity of the appellant. The testimony of the eyewitnesses is also in line with the testimony of Investigating Officer, namely Saeed Khan SI (PW.10) in respect of the proceedings conducted by him at the spot. The testimony of the Investigating Officer and marginal witness to recovery memos vide which different recoveries have been effected have also not been shattered by the defence in their cross-examination. No doubt, eyewitnesses are close relatives of the deceased but they have remained firm and straightforward in their testimony, therefore, on the sole ground of their close association with the deceased, their testimony cannot be discarded. In case titled, **"Noor Muhammad vs the State and another", (PLJ 2006 SC 177)**, the august supreme court has ruled that:-

"Mere relationship or close association of prosecution witnesses with the deceased, in absence of hostility, animosity or any other motive to depose

Amir Naseem Khan

falsely would not be sufficient to hold them as interested witnesses and their testimony would not be discarded on such ground.”

14. The argument of learned counsel for the appellant that as the eyewitnesses have not sustained any injury in the occurrence, therefore, their presence at the spot at the time of occurrence is doubtful is not tenable for the reason that motive behind the crime was directly against the deceased. In the FIR as well as in the testimony furnished by the eyewitnesses, a dispute over women folk has been advanced as a motive behind the crime. The appellant while producing defence evidence has not denied the motive outrightly. DW.1 while replying to a question of the prosecution has only shown his ignorance about the cause of committing murder of the deceased by the appellant. In response to a question put to him by the prosecution in cross-examination he stated that he does not know that one Mst. Kulsoom was engaged to accused $\frac{3}{4}$ years prior to the occurrence and her engagement was broken and thereafter she was married to the deceased. From the above it is manifest that the appellant had direct motive with the deceased, it is therefore, he was the main target of the appellant. Even otherwise, the Honn'ble Supreme Court in its judgment rendered in case titled, **“Noor Muhammad vs the State and another”, (PLJ 2006 SC 177)**, has held that:-

“There could not be a presumption or rule that all the persons under attack from fire-arms ought to have received injuries and the fact that

Noor Muhammad

some of them had not received injuries would not make their presence at the place and time of incident doubtful.”

15. On reappraisal of the prosecution’s evidence we are firm in our view to hold that the prosecution has proved the commission of intentional murder of Waleed Ahmad deceased by the appellant, through cogent and confidence inspiring ocular evidence corroborated by strong circumstantial evidence and supported by medical evidence. The defence could not point out any major and glaring contradictions in the testimony of the prosecution’s witnesses. During arguments no discrepancy, divergence or contradictions was pointed out by the defence in the testimony of the PWs. Nevertheless, it is settled law that mere minor discrepancies in the statements of the PWs would not be sufficient for acquittal of the accused facing murder charge as with the passage of time it is very natural that the witnesses might have not been unanimous on minor narrations. Human behavior varies from person to person. Different people not only behave and react differently in different situation but their behavior also depends upon facts of each case as to how a person reacts and behaves in a particular situation, can never be predicted. Every person who witnesses a serious crime reacts in his own way In case titled, “Aijaz Nawaz alias Baba Vs the State” (2019 P Cr L J 1775), the Divisional Bench of the august Sindh High Court, while elaborating and dilating upon the conduct and behaviour of eyewitnesses has observed that in such a situation some persons

Footnote

turn stunned, some become speechless whereas some would see the incident whereas some would flee from the spot. No fixed rules of natural conduct are available. Similar is the situation of memory of different people. By and large people cannot accurately recall the sequences of events which take place in a short span. People can only remember the main purport of the incident.

16. No doubt it is well entrenched principle of law that accused is treated as a favorable child of the courts and law and benefit of even a single doubt is extended to him, but the doubt must be reasonably entertained by a person of common prudence on justifiable grounds. Said benefit could not be stretched to the extent of self-created, imaginary and hypothetical doubts in favour of accused at the cost of the family of the deceased who were the victim of the brutal acts of accused, they too, deserve equal treatment of the court of justice. Balance is to be maintained between accused and the complainant party in dispensation of justice before the court of law.

17. Adverting to the plea of alibi of the appellant taken by him in his statement under section 340(2) Cr.P.C.. The occurrence has taken place on 25.08.2017 whereas statement of the appellant on oath has been recorded on 20.07.2019. He deposed that at the time of occurrence he was present in village Palodhand and on his way to home on a motorcycle he was informed by his brother-in-law, namely, Majid about the occurrence and his nomination as accused for committing murder of the deceased. The said information was conveyed to him by Majid from Rawalpindi on

Hasan Sami

his cell phone. In cross-examination the appellant clarified that after 6/7 months of the occurrence he surrendered before the police. He has not disclosed this fact either himself or through any person to police or has tried to make any application to high ups of the police regarding his innocence. Even after arrest he has not submitted any application to the police regarding his innocence. He admitted it correct that when he was brought to the court for trial even then he did not make any application regarding his plea of alibi. He further admitted it correct that the occurrence has taken place about two years back and after two years he is taking the plea of alibi by making the statement before the court under section 340(2) Cr.P.C.

18. Majid ur Rehman, brother-in-law of the appellant, while appearing as DW.1 deposed that on the day of occurrence he was present in Rawalpindi, wherefrom he informed the appellant about murder of the deceased and his (appellant) nomination for commission of the same. He also contacted his father-in-law who told him that son of Jameel Kaka has been done to death and his dead body has been shifted to the hospital. In cross-examination DW.1 admitted that he has not brought any record in respect of the alleged telephonic calls made by him to the appellant or the calls on which he was informed about the incident in Rawalpindi from his house. He admitted correct that factum of non-submitting any application to High ups of the police regarding innocence of the appellant. Neither DW.1 has disclosed the source through which he learnt about the occurrence nor at any stage of investigation, he has

As per DW.1

appeared before the Investigating Officer or high ups of the police to give statement regarding innocence of the appellant. He has also shown ignorance about earlier engagement of Mst. Kalsoom with the appellant and after breaking of the said engagement, her marriage with the deceased despite the fact that he is brother-in-law of the appellant.

19. It is settled law that the plea of alibi shall be taken at the earliest time/ stage i.e. soon after arrest of the accused. In this case, since his arrest till recording of statement of the appellant under section 340(2) Cr.P.C. i.e. a long period of two years, no such plea has ever been taken by the appellant. He has also not furnished any explanation, much less, plausible with regard to his delayed plea of alibi. No independent witness has been produced by the appellant in support and proof of his plea of alibi. The defence version of the appellant is neither supported by any ocular account nor by documentary evidence. In this view of the matter, the plea of alibi taken after unexplained delay is after thought and has rightly been disbelieved by the learned trial Court.

20. The learned trial court while appreciating the available evidence on record, in its true perspective, has arrived at a just and proper conclusion by holding the appellant guilty of committing murder of Waleed Ahmad deceased to which no exception can be taken. We could not note any mitigating circumstance warranting reduction in the sentence of the appellant. Accordingly, the conviction and sentence of the appellant recorded by the learned trial Court under section 302(b) PPC vide judgment dated

Kalsoom Sami

31.07.2019, are maintained and his death sentence is confirmed.

Accordingly, the appeal of appellant/convict is hereby dismissed.

21. On confirmation of death sentence of the convict, the Murder Reference No.28-P of 2019, sent by the learned trial Court is answered in the affirmative.

22. As regards Cr.R. No.217-P of 2019, filed by petitioner/complainant Muhammad Jameel Khan, seeking compensation under section 544-A Cr.P.C. for legal heirs of the deceased, we have gone through the judgment of the learned trial court and noticed that neither any compensation for the legal heirs of the deceased has been awarded under section 544-A Cr.P.C., nor the learned trial court has furnished any reason for not doing so, which is against the mandate of section 544-A Cr.P.C. For the sake of convenience and ready reference we deem it appropriate and advantageous to reproduce section 544-A Cr.P.C.

“544-A. Compensation of the heirs to the person

killed, etc.: (1) Whenever a person is convicted of an offence in the commission whereof the death of, or hurt, injury or mental anguish or psychological damage, to any person is caused, or damage to or loss or destruction of any property is caused, the Court shall, when convicting such person, unless for reasons to be recorded in writing, it otherwise directs, order the person, convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property

Justice Sanjay

damaged, lost or destroyed, as the case may be, such compensation as the Court may determine, having regard to the circumstances of the case. And

(2) The compensation payable under subsection (1) shall be recoverable as an arrears of land revenue and the Court may further order that, in default of payment or of recovery as; aforesaid the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a Court of the Magistrate of the Third Class, for a period not exceeding thirty days.

(3) The compensation payable under sub-section (1) shall be in addition to any sentence with the Court may impose for the offence of which the person directed to pay compensation has been convicted.

(4) The provisions of sub-sections (2-B), (2-C), (3) and (4) of Section 250 shall as far as may be, apply to payment of compensation under this section.

(5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.

23. By use of words **"the Court shall"** in section 544-A Cr.P.C., the learned trial court was under obligation to award compensation to the heirs of the deceased in addition to the sentence awarded to the appellant or record reasons in writing, if he was not convinced for doing so. Since under sub-section (5) of section 544-A Cr.P.C., this court has the power to make an order under section 544-A Cr.P.C. while exercising its powers of

Handwritten signature


revision, therefore, we will not remand the case to the learned trial court for compliance of the mandatory provisions of section 544-A Cr.P.C., rather would meet this omission itself.

24. For the reasons stated above, the connected **Cr.R. No.217-P of 2019**, is allowed. The convict in addition to his sentence under section 302(b) PPC, shall also pay rupees five lacs as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. recoverable as arrears of land revenue and default thereof shall undergo six months simple imprisonment.

Announced:

30.11.2022

M.Siraj Afridi CS


Senior Puisne Judge



JUDGE

DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge:
And Hon'ble Mr. Justice Abdul Shakoore.