

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH.
(Judicial Department)

Cr.A No. 68-B/2015

Afzal Khan and 2 others.
Vs.
The State & another.

JUDGMENT

Date of hearing 12.10.2017 .

Appellant-Petitioner: **By Anwar-ul-Haq,**
Advocate.

Respondent: **State By Shahid Hameed**
Qureshi, Addl: AG and
others By Muhammad
Anwar Khan Maidad Khel,
Advocate.

ABDUL SHAKOOR, J.- This Criminal Appeal No.68-B/2015, has been filed by convicts/appellants, the connected Criminal Appeal No.69-B/2015 filed by complainant Qadir Khan against acquittal of accused under section 324 PPC, and Criminal Revision No.14 -B/2015 for enhancement of sentence of appellants. All the three appeals and revision petition arise from the impugned judgment dated 06.05.2015 of learned Additional Sessions

Judge-II, Lakki Marwat, whereby the accused/ appellants involved in case FIR No. 631 dated 28.11.2013 under sections 302/324/34 PPC, Police Station Naurang, District Lakki Marwat, were convicted under sections 302 (b) PPC and sentenced to imprisonment for life alongwith compensation Rs.200000/- under Section 544-A Cr.PC or in default whereof to further undergo six months SI, however, benefit of section 382-B Cr.PC extended to the accused/ appellants.

2. Since both appeals and criminal revision are the outcome of one and the same occurrence/ F.I.R as well as impugned judgment, therefore, these are being disposed of by way of this single judgment.

3. The story of prosecution as narrated in the FIR, mentioned above, is that on 28.11.2013 at 1255 hours, the complainant Qadir Khan alongwith deadbody of his son Adnan reported the matter to the local police in the Emergency Room of Civil

Hospital, Naurang, to the effect that some $\frac{3}{4}$ months prior to the instant occurrence, a scuffle had taken place amongst sons of Afzal Khan and Adnan son of the complainant. At 12.55 hours, the complainant alongwith his son Adnan Khan were on the way from Naurang towards their village in Qing Qi Rikshaw, when they reached near the village road they deboarded from Qing Qi rikshaw and started towards their village. Adnan was ahead,while complainant was at some paces behind. In the meanwhile accused Afzal Khan duly armed with Kalashnikov alongwith his son Alamgir, Armed with Kalashnikov and Zeeshan armed with double barrel 12 bore rifle, already standing there. They shouted upon them to stop and all of them started firing upon them simultaneously with the intention to commit their Qatl-e-Amd as a result of which son of the complainant Adnan was hit and fall to the ground, while the complainant luckily escaped unhurt. Accused decamped from the spot after the

occurrence. During shifting of injured Adnan to the hospital, he succumbed on the way.

4. Najeebullah IHC (PW-2) reduced the report of the complainant, in shape of *murasila* (Ex:PA). It was read over and explained to the complainant, who after admitting it to be correct thumb impressed the same in token of its correctness, whereafter, he prepared the injury sheet Ex:PW 2/1 and inquests report Ex:PW 2/2 of the deceased Adnan and referred for Post mortem under the escort of Abdul Qayum FC No.456 (PW-1), while sent the Murasila to the Police Station through Constable Zakir Khan No. 6501, where on the basis of which F.I.R as Ex: PA/1 was registered against the accused under sections 302/324/34 PPC.

5. Investigation started in the case and on its completion, *challan* was submitted to the Court of learned Additional Sessions Judge-II, Lakki Marwat. Learned trial Court delivered the copies of relevant

documents to accused in compliance with provision of section 265-C Cr.PC and charge was framed against them, to which they did not plead guilty and claimed trial. In order to prove the charge against the accused, the prosecution produced and examined as many as eleven (09) PWs. On conclusion of prosecution evidence, statements of accused were recorded, wherein all the accused professed their innocence, however, neither they wished to be examined on oath as provided under section 340(2) Cr.PC nor opted to produce defence evidence. After hearing arguments of learned counsel for the parties, the learned trial court vide impugned judgment dated 06.05.2015 convicted the accused/ appellants under section 302(b) PPC, while acquitted under section 324/34 PPC. The appellants filed this Cr.A No.68-B of 2015, challenging their conviction, while the complainant Qadir Khan filed Cr. Revision against enhancement of sentence under section 302 (b) PPC, and Cr. Appeal against acquittal of accused/

appellants under section 324/34 PPC. Hence, all the three appeals and revision petition are going to be decided through this common judgment.

6. Learned counsel for appellants argued that the instant case hinges upon the statement of sole eye-witness, who is father of the deceased, hence, being interested witness his testimony cannot be relied upon. He next argued that there is no circumstantial evidence, which may support or corroborate the statement of sole eye-witness. He went on to say that complainant failed to establish his presence on the spot, while matter is also reported to the Police with inordinate and unexplained delay. His next argument was that ocular account contradicts the medical evidence and site plan. He lastly argued that learned trial Court has given weight to the absconsion and recoveries, which are also not proved under the legal parameters. He concluded his arguments by saying that prosecution has miserably failed to establish his case against the

accused/ appellants, hence, the impugned judgment requires reversal.

7. On the other hand learned A.A.G representing the State assisted by learned counsel for the complainant, vehemently rebutted the arguments advanced by learned counsel for the accused/ appellants and contended that the accused/ appellants are charged directly by name for committing brutal murder of son of the complainant before his eyes. They next argued that the accused/ appellants have not successfully achieved his target rather also attempted at the life of complainant. They pressed their vehemence on the argument that the prosecution has fully established presence of sole eye witness of the occurrence beyond any doubt and his testimony is fully corroborated by medical evidence and site plan, which is gone unshaken in their lengthy cross-examination. They supported their previous argument by saying that the recoveries of crime empties from the place of accused remained

unshaken and positive FSL report in this respect coupled with other circumstantial evidence are in line with the prosecution version as put forth by the complainant. Their contention was that unexplained abscondance of accused/ appellant for sufficient time is a step forward towards their guilt. They lastly argued that the learned trial court has committed error by not convicting the accused under section 324/34 PPC, as once the case has been proved against the accused/ appellants, then they should have been punished for the offence under section 324/34 PPC. They requested that on acceptance of criminal appeal No.69-B/2015 and Cr. R No.14-B/2015, the convict/appellants may have been given condign punishment by enhancing the sentence and convicting under section 324/34 PPC.

8. We have heard arguments of learned counsel for the appellant, learned A.A.G representing the State and learned counsel for the complainant and

gone through the record with their valuable assistance.

9. Perusal of the record reveals that, as per contents of FIR accused/ appellants Afzal Khan and Alamgeer Khan have been attributed the role of firing at the deceased as well as ineffective firing at the complainant with their Kalashnikov, while the accused/ appellant Zeeshan Khan has been attributed the role of firing with 12 bore rifle.

10. The occurrence has been witnessed by Qadir Khan, father of the deceased, who just after the occurrence took the then injured to the hospital and within 25 minutes of the occurrence in emergency room of Civil Hospital, Naurang reported the matter to the local police. The time consumed in lodging the report, cannot be termed as delay, hence, it cannot be said that the matter was reported after consultation and deliberation.

11. The complainant alleged in his first information report (Ex:PA/1) that his son, the then injured during shifting to hospital succumbed to the injuries. The Doctor, who conducted Post mortem of the deceased opined in his report (Ex:PW 5/1), time between injury and death as 10 to 20 hours, which also support version of the complainant.

12. First information report is a most important document in a criminal case which furnishes the clue of the possible truth of the allegation against the accused and also causes a firm impression of the prosecution case. It is a statement which is made soon after the occurrence, when the memory of the informant is fresh, who shows himself to be present on the scene. In the instant case, the complainant Qadir Khan, father of the deceased is the only eye witness of the occurrence, therefore, the witness can legitimately be termed as interested witness and statement of this witness is to be looked into with great care and caution.

Undoubtedly the statement of interested witness which even for that matter inimical witness can be taken into consideration but the rule of appraisal is that the same is supported by some strong corroboration from some independent source. In order to believe a witness, first the prosecution has to satisfy the Court regarding presence of the witness at the spot and secondly whether he is credible truthful witness and thereafter conviction can be based on testimony of inimical witness, if same is corroborated by some strong corroborative piece of evidence.

13. In the instant case, son of the complainant has been done to death before the eyes of his father, who is no doubt interested witness, but substitution in such like cases is rare phenomena. It is not attractive to a reasonable mind that how a father of deceased would get free the real culprit and charge an innocent person without showing any false motive.

14. Appearing as PW-8, Qadir Khan complainant of the case has stated in support of his stance as narrated in his initial report Ex.PA/1. He was subjected to lengthy and taxing cross-examination by the learned counsel for the convict/appellants but nothing could be extracted from his mouth which could diminish the probative worth of his testimony. Moreover, the statement of the witness on account of being interested witness can only be discarded if it is proved that an interested witness has ulterior motive on account of enmity or any other consideration. In absence of any reason leading to show that for some ulterior motive or an enmity, the statement can be relied upon. In this regard, reference can be made to the case of **Muhammad Ehsan..Vs..State (2006 SCMR 1857)** wherein while considering the plea raised by accused that evidence of widow of deceased could not be relied upon because she was interested witness being related to deceased, it was held that she was widow

of deceased would not by itself sufficient to held that she was interested witness as she had no enmity with the accused and even if deceased had enmity with accused it would not have any serious affect upon the credibility and reliability of the testimony of widow.

15. Admittedly and as urged by counsel for the appellants, abscondence of an accused can never remedy the defect in the prosecution case, that abscondence of accused by itself has no value in the absence of any other evidence, that abscondance can be used as corroborative piece of evidence which cannot be read in isolation but has to be read alongwith substantive piece of evidence. Reliance is placed by learned counsel for the appellant on the case law titled **Rohtas Khan..Vs..The State (2010 SCMR 566).**

16. There is no two opinion about the proposition that abscondance of the accused by itself is not sufficient to prove his guilt but can be taken as

a corroborative piece of evidence. In the cases of **Muhammad Arshad..Vs..Qasim Ali (1992 SCMR 814), Pir Badshah..Vs..The State (1985 SCMR 2070) and Amir Gul..Vs..The State (1981 SCMR 182)**, it was observed by their Lordships that conviction on abscondance alone cannot be sustained but so far as the case under consideration is concerned, here the position is altogether different as the version of prosecution is duly corroborated by medical evidence, recoveries effected from the place of convict/appellant, motive behind the occurrence and other attending circumstances of the case and all these facts, when taken together, lends support from the ocular account of PW Qadir Khan. Rel: **Mst. Roohaida..Vs..Khan Bahadur and another (1992 SCMR 1036), Qaiser Khan and others..Vs..The State and others (2009 SCMR 471 and Mir Afzal Khan..Vs..The State (2011 SCMR 171)**.

17. According to post mortem report, the deceased received firearm injuries, while one goes through the size of injuries, which are 1/2" and 1/3", it pricks the conscious of the Court that these injuries can only be caused through the fireshots of Kalashnikovs. Accused/ appellants Afzal Khan and Alamgir have been given the role of firing with Kalashnikovs, while accused/ appellant Zeeshan has been given the role of firing with 12 bore rifle, hence, it is obvious that the deceased has not been done to death by the fire shot of accused/ appellant Zeeshan, nor the complainant received any firearm injury, hence, a serious doubt creates in the case of prosecution to the extent of participation of accused/ appellant Zeeshan in the alleged offence, hence, under the safe administration of justice, the case of accused/ appellant Zeeshan is on different footing. It is cardinal principle of criminal administration of justice, that if a single reasonable doubt in the prosecution case is created, the accused should have

been extended its benefit, therefore, in the instant case benefit of reasonable doubt is extended to the accused/ appellant Zeeshan.

18. Once the case has been proved against the accused/ appellants for commission of murder of deceased on the basis of statement of complainant, father of the deceased, then its allied offence, attempting at the life of complainant is also proved, but learned trial court erred in law by acquitted the accused/ appellants from the charge under section 324 P.P.C, hence the accused/appellants Afzal Khan and Alamgeer also deserve to be convicted and sentence under section 324 PPC.

19. As a corollary to what is discussed above, we partially accept this Cr. A No.68-B of 2015 filed by accused/ appellants by acquitting the accused/ appellant Zeeshan from the charges. He be set at liberty forthwith if not required in any other case. Cr. ANo. 69-B/2015 is partially allowed to the

extent of accused/ respondents Afzal Khan and Alamgeer Khan, they are convicted under section 324/34 P.P.C, and sentenced to ten years RI each with fine Rs.100000/- each or in default whereof to further undergo to six month SI. Benefit of section 382-B Cr.PC extended to them. The sentences under section 302(b) P.P.C and 324 P.P.C, shall run concurrently. Resultantly, Cr. Rev. No.14-B of 2015, stands dismissed.

Announced.

Dt: 12.10.2017

Azam/PS

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DB, Justice Ikramullah Khan and Justice Abdul Shakoor.