Judgment Sheet

PESHAWAR HIGH COURT, BANNU BENCH
(*Judicial Department*)

Cr.A. No.208-B/2019.

Noor Muhammad Khan
Vs.
The State, etc.

JUDGMENT

For Appellant:	**Mr. Inam Ullah Khan Marwat, Advocate.**
For State:	**Mr. Shahid Hameed Qureshi, Addl: A.G.**
For Respondent:	**Mr. Marghoob Hassan Khan, Advocate.**
Date of hearing:	**14.4.2021.**

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SAHIBZADA ASADULLAH, J.--- This appeal calls in question the judgment dated 27.6.2019, authored by learned Additional Sessions Judge-II, Lakki Marwat, whereby the accused/respondent Hanif Ullah, after facing trial in case FIR No.93 dated 01.5.2011, under sections 302/324/34 PPC, registered at police station Pezu, District Lakki Marwat, was acquitted of the charge.

2. The prosecution story, as divulged from the FIR, is that on 01.5.2011, complainant Noor

Muhammad Khan brought the dead body of his grandson Rafiullah, with the help of co-villagers in a private Datsun pickup to Adda Shahbaz Khel, and reported the matter to Ajmal Khan ASI PP Shahbaz Khel, to the effect that on the fateful day, he alongwith his grandson Rafiullah Khan were on the way to their house from Hujra/chowk on thoroughfare, that his grandson Rafiullah was going ahead followed by the complainant at some paces and at about 19:00 hours, when reached to the Baithak of Najib Shah, there accused Hanifullah, Suleman Shah, armed with Kalashnikovs, while Najib Shah, empty handed were already present at the door of their Baithak, that when his grandson was about to cross the accused, accused Najib Shah instigated his sons to kill him and in response thereto, both the accused Hanifullah and Suleman Shah immediately started firing at complainant party with the intention to commit their *qatl-i-a*md, as a result whereof complainant fortunately escaped unhurt while his grandson Rafiullah got hit and fell to the ground. The accused decamped from the spot after

commission of the offence. While shifting to PP Shahbaz Khel, the injured succumbed to his injuries. Motive for the offence was stated to be exchange of firing between the parties few days prior to the occurrence, though the matter was compromised but the accused were still annoyed.

3. Initially, accused absconded, therefore, he was proceeded against under Section 512, Cr.P.C. Subsequently, the accused/respondent was arrested and after facing trial, he was acquitted vide judgment impugned herein, hence the instant appeal.

4. Arguments heard and record gone through.

5. It was on 01.5.2011, at 19:00 hours, when the deceased was done to death, the incident was reported to the local police by the complainant charging the respondent and two others for the crime. The respondent was arrested, who faced the trial and ultimately earned acquittal of the charges vide the impugned judgment, feeling dissatisfied the same has been questioned through the instant criminal appeal.

6. As we are seized of an appeal against acquittal where undeniably the respondent has earned double presumption of innocence to his credit, to interfere and reverse the same, extraordinary circumstances are needed as parameters for an appeal acquittal and that of conviction are altogether different. In situation in hand, the Court is to re-assess the already assessed evidence to see as to whether the learned trial Court correctly appreciated the evidence on file and as to whether the impugned judgment is based on sound reasoning. It is pertinent to mention that while hearing an appeal, the jurisdiction conferred upon the appellate court is not limited and restricted, rather it can travel beyond the judgment questioned before and can form its own independent opinion, after taking pains to read and scan the record brought before, with the only and only purpose to avoid miscarriage of justice. The appellate Court is under the bounden duty to see that the order/judgment impugned is not arbitrary, mechanical and perverse coupled with the fact that it does not suffer from material irregularities and total illegalities, to

ascertain the same the collected material needs reappraisal and that is what the Code empowers.

7. No doubt, the incident occurred in front of the house of the accused/respondent and that the matter was reported within an hour by the complainant, who happens to be the grandfather of the deceased, but that alone is not sufficient, rather the prosecution will travel further and the complainant will toil hard to establish his presence at the stated time with his projected purpose. To begin with, it was on their way to their house when the deceased was fired at alongwith the complainant. The deceased received the fire shots whereas the complainant was fortunate enough to escape unhurt. The complainant is to show that what interest the accused had in the deceased to kill, as the motive was not directed to him. He is further to show that why he and his sons were not targeted as they used the same path to approach their home in routine. The prosecution is yet to establish that what prompted a father and two real sons to join hands and eliminate the deceased, who by then was only 18 years of age. The complainant was

examined as PW-6, who stated that he visited the local hujra/chowk for gossip, it was on his return that the accused fired at the deceased, who were present duly armed in front of their house. We are yet to know that when and where the deceased came across the complainant, as the complainant did not mention his presence in hujra. The record is silent regarding presence of the deceased with the complainant prior to the occurrence. The complainant stated his presence in the hujra before the incident but the site plan is silent in that respect and even the Investigating Officer did not mention the same. The complainant failed to establish his presence in hujra a little before the occurrence, he did not produce anyone to confirm his presence. The complainant was cross-examined on this particular aspect of the case who replied that his presence in the hujra was not in routine. The complainant did not utter a single word regarding presence of the deceased in the village hujra before they left for their house. In the site plan, the deceased has been shown at point No.1, whereas the complainant at point No.2 with no occasion

to talk, but the complainant stated that prior to the occurrence it was the deceased who disclosed the time as 7 PM. The complainant stated that he did not know how to read a watch, but to cure the defect he introduced the deceased who disclosed the time. If we admit what the complainant stated regarding the stated time, then it was for the complainant to show that they were together in the hujra and so on their way to home, but he could not and the entire record is silent in that respect.

8. The place of incident is shown situated in front of the house of accused/respondent where the respondent is shown at point No.4 with his co-accused at point No.3 and their father Najeeb Shah at point No.5. The complainant while reporting the matter disclosed that the accused were already present duly armed, we are yet to know that when the purpose was to kill, why they did not fire at them on their first visibility and that why they waited till they reached. We struggled hard to explore that why a father joined hands with his sons to kill the deceased and that why the respondent would wait till commanded, as by then he was 35 years of age

and such was the co-accused. The involvement of the father is a circumstance that the prosecution failed to explain, no evidence was led to connect Najeeb Shah with the purpose, this failure on part of the prosecution offers a premium to the accused/respondent. The deceased received two fire shots on his back i.e. lumber region with its exit on his front. In the site plan, the deceased is shown at point No.1 with his right exposed to the assailants, the seat of injuries run counter to the claim of the complainant. The situation in the site plan suggests that had the accused present at point No.3 and fired at the deceased, the bullet would have landed on his chest as the deceased was still to approach the accused Hanif Ullah. Another circumstance which troubles hard is the recovery of empties from point 'A' in the site plan. If we take it correct that accused fired while standing at point No.3 and 4, then the empties must have been recovered from the street as the Kalashnikov ejects its empties to right front, whereas the empties shown recovered, were lying at the back of the accused, possibility cannot be excluded that the

deceased was fired from his back and the locale of injuries further tells that it was the doing of a single person. We cannot ignore that towards south is situated the house of one Mir Ahamd, but only one bullet mark was found despite the fact that 6 empties were recovered from the spot. The complainant stated that he was fired at but he luckily escaped unhurt. Had the complainant been present, he would have been the prime target. If for a while we admit that the complainant was fired at, then in that eventuality the Investigating Officer must have observed bullet marks on the wall, but its absence tells negative of his presence at the time of incident.

9. The matter was reported at Bus Adda Shahbaz Khel to one Ajmal Khan ASI, who was examined as PW-4, who stated that while on *gasht* he received information regarding the occurrence and arrival of the dead body and that the incident was reported at Bus Adda Shahbaz Khel. We are curious to know that who reported the matter and where? To reach a correct conclusion, two circumstances are needed to be answered i.e. (1) The time between injury and death; and

(2) that why the dead body was initially shifted to RHC Titer Khel and then to Civil Hospital Lakki. As the complainant stated that while *en route* to police post the deceased breathed his last, when the deceased did not die on the spot, in that eventuality, the opinion of the doctor regarding the time between injury and death would prevail. At the same time, the statement of PW-11 Atlas Khan gains importance when he stated that first he escorted the dead body to RHC Titer Khel and then to Civil Hospital Lakki. We cannot presume the other way but that the deceased then injured was rushed to RHC Titer Khel in injured condition by the co-villagers and it was after his death that the complainant arrived and the matter was reported. The medical evidence suggests that the deceased was alive by 8:00 PM and then instead section 302/34 PPC, Section 324/34 PPC should have been inserted. A conscious effort was made to establish promptness in report but both the scribe and complainant ignored that the medical examination will tell otherwise. The delayed postmortem examination further

highlighted the conduct of the scribe and the complainant.

10. Another factor that strongly goes against the complainant and his family, is their constant involvement in criminal cases, with several admitted enmities. The record of numerous cases has been placed on file, with copies of FIRs duly exhibited, the family had several murder cases to their share. Their active involvement in criminal activities is a circumstance which goes against the complainant and helps us in forming an opinion that the respondent and others had no hand in the affair as admittedly, the matter of firing stood patched up, though denied by the respondent.

11. The Investigating Officer visited the spot and recovered 6 empties of 7.62 bore with blood stained earth from the place of deceased. The Investigating Officer was examined as PW-6, who stated that he visited the spot on the night of incident but could not inspect the spot as the complainant was not present. He further stated that to preserve the spot, he deputed two police constables. If he speaks the truth, then why he did

not mention the names of the deputed constables and that why their statements were not recorded. Another circumstance that goes against the prosecution is, that the empties were not collected on his first visit to the spot. The Investigating Officer admitted that he did not make efforts to record statements of the independent witnesses to confirm presence of the complainant in the village hujra prior to the occurrence.

12. Another intriguing aspect of the case is that the medical evidence does not support the case of prosecution. It is the case of the complainant that when the deceased reached in front of the house of the accused, firing was made upon him which resulted into injuries on his person. The postmortem report tells that the deceased received two firearm entry wounds on his back left right lumber region with its exit on the front, whereas the accused/respondent was shown standing at point No.4 and the co-accused Hanif Ullah, at point No.3. If the respondent fired from point No.4, then in that eventuality the deceased would have received firearm injury on his right with its exit on the left, and

similarly, if the co-accused Hanif Ullah would fire upon the deceased, the deceased would have received firearm injury on his chest with its exit on his back, as by the time when allegedly the firing was made, the deceased had not yet reached the accused standing at point No.3. The prosecution is still to explain that when both the accused who effectively fired upon the deceased were standing at a distance of 5 to 6 feet from the deceased, then how one of the entry bore charring marks and the second did not. The medical evidence does not support the case of the prosecution. True that medical evidence is confirmatory in nature and it cannot exclude the ocular account provided the same inspire confidence. As dissected earlier, the testimony of the complainant is not worthy of credence then in that eventuality the medical evidence has its own importance and when it comes in conflict with the ocular account of the nature, it is the medical evidence that would prevail, that is what is held by the apex Court in its case reported as ***"Akhter Saleem and another Vs the State and another" (2019 MLD 1107)***, it is held that:

> ***"12. The above factors, material contradictions between ocular and medical evidence create serious doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts."***

13. Much was stressed that the collected empties were sent to the Firearm Expert and the result received was in positive i.e. the collected six empties were shown to have been fired from different weapons and that in such eventuality, it has left no ambiguity to hold that it was the act of more than one person. We are to assess as to whether the prosecution proved the safe custody of the collected empties and as to whether these were recovered from the place of incident soon after the occurrence. We cannot ignore that the Investigating Officer was examined as PW-10 who stated that on the night of occurrence, he reached the place of incident but could not effect recoveries as the complainant was not available in his house. We are surprised to see that what precluded the Investigating Officer to search for the blood and empties on the spot on his first visit to the place of incident. The Investigating Officer did not

record the statement of the deputed police officials in respect of the empties and blood. Even the Investigating Officer did not mention that the empties and blood were preserved on the spot by deputing police officials. The collected empties were received to the Forensic Science Laboratory on 09.5.2011, after a considerable delay, but the Investigating Officer did not mention that where these empties were lying in the intervening period, so much so, neither the Moharrir of the concerned police station was examined nor the police official who took the same to the laboratory. The Investigating Officer could not prove that the empties were lying in safe custody and in such eventuality, we are not hesitant to hold that the prosecution could not establish the safe custody of the collected empties and its onward dispatch to the Forensic Science Laboratory, as such, this piece of evidence cannot be taken into consideration, that too, for awarding capital punishment. The apex Court has dealt with the situation in case titled ***Hayat Ullah Vs. The State (2018 SCMR 2092),*** wherein it was held that:-

> ***Much reliance was placed on the recovery of pistol from the appellant***

and empty from the place of occurrence, we observe that the empty was recovered on I 1.02.2006 and pistol was recovered on 22.02.2006 and till the recovery of the pistol the empty was not sent to the firearm expert and the empty and the pistol both remained together in the Malkhana and thereafter transmitted to the office of the Forensic Science Laboratory. So the recovery is inconsequential. Even otherwise recovery alone is not sufficient for conviction and it is always termed as a corroborative piece of evidence' It is settled law that one tainted piece of evidence can't corroborate another tainted piece of evidence.

14. The motive was stated to be an early exchange of firing between the parties which was allegedly compromised, but the Investigating Officer did not collect anything to explain that who out of the sides was involved in the said episode and that what role the deceased played therein, as the deceased was hardly 18 years of age. Even the complainant did not produce independent witnesses in that respect, more particularly, the people who patched up the matter between them. True that absence or weakness of motive does not play a decisive role in believing or disbelieving the prosecution case, but equally true that once the motive is alleged, the prosecution is under the bounden duty 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.

15. It was argued that the accused remained absconder for sufficient long time and that he did not surrender voluntarily, rather he was arrested in case F.I.R No.306, under Sections 365-B/376 P.P.C in District D.I.Khan and that it was from the judicial lockup that he was collected and formally arrested. True that the respondent was arrested and transported to the concerned District but equally true that abscondence alone is not sufficient for awarding conviction, rather it is a circumstance that can be taken into consideration

provided the prosecution succeeds in building its case against the accused, whereas in case in hand, the prosecution failed to establish its case beyond doubt.

16. The evidence is read with care and caution and so the impugned judgment, but there is hardly any occasion to interfere as the judgment impugned herein does not suffer from any illegality, irregularity and cannot be termed as arbitrary and perverse. Resultantly, the instant criminal appeal is bereft of merit stands dismissed.

Announced.
Dt: 14.4.2021.
*Kifayat/PS**

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Nasir Mahfooz
Hon'ble Mr. Justice Sahibzada Asadullah