

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

**Cr. A No.138-B of 2019**

Muhammad Karim  
Vs.  
Gul Rehman etc

**JUDGMENT**

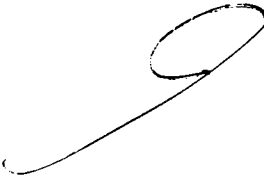
Date of hearing: **21.09.2021**

For Appellant: **Mr. Salah-ud-Din Marwat advocate**

For Respondents: **Complainant in person.**

For State: **Mr. Qudratullah Khan Gandapur, Asst:  
Advocate General.**

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**SAHIBZADA ASADULLAH, J.-** The appellant Muhammad Karim, through the instant criminal appeal, has assailed the judgment dated 29.4.2019, rendered by learned Additional Sessions Judge-II, Lakki Marwat, whereby the appellant was convicted under section 302(b) P.P.C and sentenced to life imprisonment for committing *qatl-i-amd* of deceased Sakhi Marjan, with Rs.2,00,000/- (two lac), as compensation under section 544-A Cr.P.C. to the legal heirs of deceased or in default thereof, to undergo six months simple imprisonment. He was further convicted under section 15 Arms Act and sentenced to three years rigorous imprisonment with a fine of Rs.10,000/- or in default thereof, to further suffer six months simple imprisonment. Benefit of section 382-B Cr.P.C was also extended to the convict.

2. Brief facts of the case, as divulged from the FIR, are that on 05.02.2017 at 13:30 hours, complainant Gul Rehman brought the dead-body of his brother Sakhi Marjan to City Hospital, Lakki Marwat, where he reported the matter to the local police, to the effect that on the eventful day, he alongwith his brother Sakhi Marjan came to Lakki Bazaar for purchase of groceries, that after purchase of groceries, when they reached at Adda Datson, near Habib Bank when at about 12:55 hours, accused Muhammad Karim and Jumma Khan sons of Muhammad Ali Khan, duly armed with pistols suddenly emerged in the street and started firing upon the complainant party with their respective weapons, with intention to do away with them, resultantly, his brother Sakhi Marjan got hit and fell down, while the complainant fortunately escaped unhurt. After the occurrence, both the accused fled away. When the complainant party attended the injured, by then he had succumbed to his injuries. Motive for the occurrence was stated to be the blood-feud between the parties, as some 29/30 years ago, father of the appellant was killed, hence, the instant F.I.R.

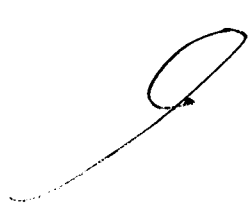
3. After completion of necessary investigation, prosecution submitted challan against the accused/appellant, while co-accused Jumma Khan remained fugitive from law. At the commencement of trial against the accused/appellant, prosecution produced and examined as many as nine witnesses, whereafter,

statement of accused was recorded under section 342 Cr.P.C, wherein he professed innocence, however, he neither opted to be examined on oath as provided under section 340(2) Cr.P.C. nor produced evidence in his defence. After hearing arguments of learned counsel for the parties, learned trial Court vide impugned judgment 29.04.2019, convicted the appellant and sentenced him, as mentioned in earlier part of the judgment, whereas the absconding co-accused was declared as Proclaimed Offender, hence, the instant appeal.

4. We have heard learned counsel for the appellant alongwith learned A.A.G for the State at length and with their valuable assistance, the record was gone through.

5. The gory incident claimed the life of deceased Sakhi Marjan, leading to a charge against the appellant and his brother namely Juma Khan. The incident was stated to be witnessed by the complainant Gul Rehman. It is pertinent to mention that from the fire shot alleged to the appellant and others, a passerby namely Aziz-ur-Rehman also received an injury. The matter was reported by the complainant to the local police at City Hospital Lakki. The appellant was shown arrested on the day of incident and from his personal possession a .30 pistol alongwith ammunicions were taken into possession. The appellant faced the trial and was ultimately

convicted for the offences charged, vide the impugned judgment dated 29.04.2019.



6. True, that the incident was witnessed by the complainant, and that the accused/appellant was arrested on the day of incident, but equally true, that mere arrest of the appellant and recovery of the alleged weapon of offence will not serve the purpose, rather the prosecution is under the bounded duty to establish the involvement of an accused, that too, by producing trustworthy and confidence inspiring evidence. The learned trial Court dealt with the matter comprehensively and through a detailed judgment awarded conviction to the appellant, but being the Court of appeal, this Court is to see, as to whether the learned trial Court fully appreciated the evidence and record on file; and as to whether the witnesses succeeded in establishing their presence on the spot. We cannot ignore that every criminal case is heinous in nature and the people involved from both the sides are the worst sufferers, waiting in return to the Courts of law to determine their fate. We are conscious of the fact that in such like cases families are ruined, especially, the one whose sole bread earners are killed. But let our emotions should not be the masters to decide the miseries of the wretched families, rather the Courts of law should apply its judicial mind to the facts and circumstances of the case, so to avoid miscarriage of justice. In case in hand, much is needed to unearth

the truth and to remove the prevailing mystery, so to do justice with the deserving. Though, the learned trial Court dealt with the matter comprehensively, but we are still searching to dig out as to whether the complainant was present at the time of incident and as to whether he came forward with nothing, but the whole truth.

7. The incident occurred in a busy cattle fair, where the complainant alongwith his deceased brother had come to purchase household articles. The report tells that after purchasing the household articles, they were supposed to leave for their house, when the accused emerged from eastern side and started firing at the complainant as well as the deceased, where the complainant escaped unhurt, but the unfortunate deceased fell a prey. Not only the deceased received firearm injuries, but also a passerby namely Aziz-ur-Rehman. The deceased was taken to the local hospital by the complainant and the injured was shifted by the people who were present near the place of incident. The matter was reported to the local police in the City Hospital, Lakki at 13:30 hours, which was penned down by one Ghulam Saboor Khan ASI, who also prepared the injury sheets and inquest report of the deceased. After doing the needful, the dead-body was sent to the mortuary where the autopsy was conducted. It is pertinent to mention that while examining the dead-body the doctor explained the time of arrival as 01:15 PM and the time of examination of the dead-body as 02:00 PM. The

complainant was examined as PW-8, who stated that he alongwith the deceased left their village for the cattle fair to purchase household articles. He further stated that, after purchasing the same they were leaving for their house when the accused emerged and started firing at them. Though, the complainant posed himself to be the sole eye-witness and that it was he who shifted the dead-body to the hospital, but we are to see as to whether he has succeeded in convincing the Court of law, in that respect. The complainant admitted that there existed blood-feud between the parties, as some 29/30 years ago father of the appellant was killed leading to a charge against the complainant. The complainant is to tell that when he was the singularly charged accused for the murder of father of the assailants, then why the accused did not kill the complainant, that too, when he was at their mercy, and that why the deceased was targeted and killed, as the best needed target was available to them. The record tells that it was the deceased who received the firearm injuries and no injury was caused to the complainant, though the complainant charged the accused for firing at him, but the same proved ineffective. The interse distance between accused and the complainant was so short, that had he been present and was fired at, he would not have survived, but the circumstances tell otherwise. The complainant is yet to explain that when the Investigating Officer reached to the spot, why he did not produce the purchased

items. This is interesting to note that when the deceased received fatal shot and fell to the ground even then the household articles were in possession of the complainant, which were handed over to one Yousaf Jan, belonging to his village. On one hand, the conduct of the complainant was unnatural and on the other, if the said Yousaf Jan was present at the time of incident, what precluded the complainant to disclose his name to the Investigating Officer and that why his name was not included in the calendar of witnesses. The prosecution travelled with strange behaviour, despite the fact the injured was available in the hospital at the time of report, but was not asked to verify the report made by the complainant, that too, in his presence. The presence of the complainant has put us in a fix and it is important to search for circumstances that substantiate his claim.

8. The complainant during Court statement, stated that he hurriedly transported the dead-body of the deceased to the hospital, knowing the fact that the deceased breathed his last on the spot. When the complainant knew that the deceased had died, then why the dead-body was not shifted to the local Police Station situated at a distance of three furlong and that why the incident was reported in the hospital. Another intriguing aspect of the case is that the report was made to the scribe at 13:30 hours who thereafter, prepared the injury sheet and inquest report, but the doctor

disclosed the time of arrival of the dead-body as 01:15 PM and the time of postmortem as 02:00 PM. When the dead-body was present before the doctor at 01:15 PM, then how the report was made at 13:30 hours and that why the doctor did not conduct the postmortem examination soon after the dead-body was produced before him. The delay caused gives an inference that all waited for arrival of the complainant, whose village is situated at a distance of one hour travel. The overall circumstances strengthen our belief that after receiving the firearm injuries the deceased was shifted by the people to the hospital, as the complainant was not available at the time of incident. This fact is further corroborated by the fact, that in his report, the complainant specified the weapon of offence as pistol, whereas in the inquest report the word "اسلحہ آتشین" has been used. Had the report been made in the mode and manner, then the scribe instead using the word "firearm" would have used the word "pistol" and the complainant would also figure in the columns of identification of both the inquest and postmortem reports.

9. The Investigating Officer after getting copy of the F.I.R, reached to the spot recovered blood-stained earth alongwith four empties of .30 bore from the place of incident. The site plan was prepared on pointation of the complainant. The Investigating Officer was examined as PW-9, who stated that on receiving copy



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of F.I.R, he reached to the place of occurrence, effected recoveries and prepared the site plan, but this witness did not make efforts to record statements of the nearby shopkeepers and even he did not mention the Datson Adda, where the complainant was supposed to go. The Investigating Officer did not inquire the whereabouts of one Yousaf Jan, who was stated by the complainant, to have witnessed the occurrence. The Investigating Officer collected four empties of .30 bore, where three out of four, matched with the recovered pistol and the one did not. Keeping in view the dimensions of the injuries and recoveries of empties from the spot the possibility cannot be excluded that it was the doing of one person. The complainant when appeared before the trial Court, stated that while present on the spot with the Investigating Officer, Ghulam Saboor Khan ASI alongwith police officials brought the accused and in his presence .30 bore pistol alongwith ammunicions were recovered from the accused by the Investigating Officer, whereas Ghulam Saboor Khan ASI, during his Court statement, stated that the appellant was arrested a little away from the Police Station and that it was he who recovered the pistol alongwith ammunicions from his personal possession.

10. Much was said regarding spot arrest and recovery of the weapon of offence from personal possession of the appellant, but the prosecution is still to establish the mode, manner and time

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of arrest of the appellant. Ghulam Saboor Khan ASI was examined as PW-7, who stated that after dispatching the dead-body to the doctor for postmortem examination, he went in search of the accused/appellant and that it was at a distance of one furlong from the Police Station that the accused was arrested. He further stated that at the time of arrest, he recovered .30 bore pistol alongwith fitted magazine containing live rounds, but while preparing the card of arrest he did not mention the recoveries effected from personal possession of the appellant. The prosecution is to tell as to whether it was PW-7, who arrested the accused and effected recoveries from his personal possession or, that it was the Investigating Officer who recovered the pistol alongwith ammunitions. Both the witnesses i.e. PW-7 & PW-9 did not support each other the way the recoveries were effected and the situation was further deteriorated by the complainant, when he stated that the Investigating Officer recovered the weapon of offence from personal possession of the accused in his presence. The conflict amongst the three spoiled the validity of this piece of evidence. Another aspect of the case is that soon after its alleged recovery, the pistol being the weapon of offence was not sealed into parcel and the possibility cannot be excluded of its having been tampered. This is surprising to note that the Investigating Officer did not record statements of the concerned police officials to establish its safe custody. We cannot deny the

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fact that the weapon was allegedly taken into possession on the day of incident but the same was received by the Forensic Sciences Laboratory on 06.03.2017, with a considerable delay of more than one month and that the prosecution failed to explain that where such important piece of evidence was lying in the intervening period. The prosecution could not explain the safe custody and its delayed sending to the laboratory. More interestingly, neither the statement of the police official in whose custody the said was lying, nor the statement of the concerned police official who took the same to the Forensic Sciences Laboratory, were recorded. The matter does not end here rather the prosecution is to prove the manner in which the appellant was arrested, what a surprising episode this is, that knowing the fact that he had killed the deceased, the appellant was still roaming around the concerned Police Station, that too, the weapon of offence in possession. It is hard to believe that right from the time of occurrence i.e. 12:55 PM, the convict/appellant was waiting the local police till 02:45 PM, to arrest him, despite having the opportunity to escape. The overall situation portrayed above, leaves no room to doubt that the appellant was not arrested at the stated time and in the given manner. When such is the state of affairs, then the recoveries effected and its matching report hold no ground and is not worth consideration. The prosecution failed to establish this valuable

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piece of evidence against the appellant and as such, the same is taken out of consideration.

In case titled Hayat Ullah Vs. The State (2018

SCMR 2092), 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 11.02.2006 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.”*

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11. To know, as to whether the incident occurred in the mode and manner, it is essential to see the seat of injuries, the presence of the deceased and the places wherefrom the accused fired. The complainant in his Court statement stated that after purchasing the house hold articles they were proceeding towards the Datson Adda situated near Habib Bank Ltd. The site plan depicts that while moving towards Adda from point of the complainant and deceased, one must face the east and in that eventuality, the deceased must receive firearm entry wounds on his front with its exit on his back, but the medical evidence does not

support the case of the prosecution. No doubt, medical evidence is confirmatory in nature and it cannot outweigh the ocular account, provided the ocular account is confidence inspiring. In case where a witness fails to establish his presence on the spot then, in that situation resort can be made to the medical evidence, and in that eventuality it is the medical evidence that steers the wheel. As in the instant case, the complainant could not convince us regarding his presence on the spot when the deceased was done to death, then we cannot ignore the conflict between the medical and ocular account. The conflict between the two has damaged the prosecution case beyond repair. Reference may be made to case law reported as 2011 SCMR 323 'Amin Ali and another Vs. The State and 2019 SCMR 1306 'Mansab Ali Vs. the State'.

12. Despite the fact, the prosecution had two important witnesses in its armory but with no plausible explanation is given that why they were not produced. The injured Aziz-ur-Rehman was one of the most important witness, that too, with stamp of injuries on his person, but neither he was produced before the trial Court nor the need was felt to verify the report of the complainant from him. The Investigating Officer did not mention the reasons which stopped him from producing the injured witness before the Trial Court. We cannot ignore the statement of the complainant, when he introduced the presence of one Yousaf Jan at the time of incident

but, he too was not produced before the Investigating Officer to record his statement regarding the incident. Law is settled that when the best available evidence is not produced, then inference must always and always be drawn against the prosecution, that had he been produced, he would not have supported the false claim of the complainant. Article 129(g) of the 'Qanun-e-Shahadat Order, 1984, caters for the situation, as is held in case titled **Tahir Khan Vs. The State (2011 SCMR 646)**, wherein it is held that:

*“13. In the present case as observed above, the clouds over the veracity of the prosecution version began hovering with the substitution of the initially nominated persons in the F.I.R. and also that complainant did not appear as a witness. It assumes relevance as he (Ghulam Hussain), Sultan Mehmood and Ghulam Abbas were given up by the prosecution and not produced. The only possible conclusion is that the prosecution sensed the risk of producing them that they might not support the said version. Their production thus was withheld leaving doubts spreading all around”.*

13. The cumulative effect of what has been discussed above, bring this Court to an inescapable conclusion that the prosecution did not succeed in bringing home guilt against the appellant. The impugned judgement is suffering from inherent defects and the learned Trial Court did not appreciate the available

record in its true perspective, the same calls for interference. Resultantly, the instant criminal appeal is allowed, the conviction and sentence of the appellant recorded by the learned Trial Court are set-aside and he is acquitted of the charges by extending him the benefit of doubt, he shall be released forthwith from jail, if not required to be detained in connection with any other criminal case.

14. Above are the detailed reasons of our short of even date.

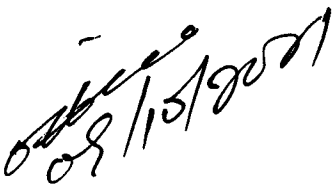
Announced  
Dt: 21.09.2021  
\*Yousaf Khan/C.O\*



JUDGE



JUDGE



(D.B)  
Mr. Justice Sahibzada Asadullah  
Mr. Justice Muhammad Naeem Anwar

SCANNED

11 OCT 2021

Khel  
J. Justice Asadullah