THE PESHAWAR HIGH COURT, BANNU BENCH.

[Judicial Department].

Cr.A No. 45-B of 2019 with
Murder Reference No.02-B of 2019

Zafar Saeed

Vs.

The State & Gul Daraz Khan

JUDGMENT

Date of hearing: ***16.03.2020***

For Appellants: ***Mr.Pir Liaqat Ali Shah advocate.***

For State: ***Mr.Shahid Hameed Qurashi Addl:A.G.***

For Respondents: ***Mr. Danial Khan Chamkani advocate.***

SAHIBZADA ASADULLAH, J.--- Zafar Saeed, the appellant assailed the judgment dated 25.02.2019 of learned Additional Sessions Judge-II, Karak, whereby the accused/ appellant involved in case F.I.R No. 14 dated 09.02.2017, registered at Police Station, Sabir Abad, District Karak, has been convicted under section 302 (b) P.P.C and sentenced to death with fine Rs.500000/- (five lacs), as compensation to the LRs of deceased under section 544-A Cr.P.C, in default thereof to further undergo six months SI. Murder Reference No.2-B/2019 has also

been sent by the learned trial Court, hence this judgment shall decide both.

2. The background of the prosecution case according to the FIR, is that on 09.02.2017 at 13.00 hours, complainant Gul Daraz Khan brought dead-body of his brother Gul Riaz Khan alias Gula Khan to the Police Station Sabir Abad and reported the matter to Nazeer Badshah ASI, to the effect that he alongwith his brother Gul Riaz alias Gula Khan went to the house of Haji Gul Shaheed. They were sitting in the courtyard of his *baithat* and were busy in gossiping, in the meanwhile at about 10.49 hours, accused Zafar Khan son of Abdul Saeed Khan, duly armed emerged and started firing at Gul Riaz with intention to kill, as a result of which he was hit and died on the spot. He and Gul Shaheed Khan present there could do nothing being empty handed. The accused after commission of the offence decamped from the spot. Motive for the offence alleged by the complainant was dispute over women folk. The report was taken vide F.I.R Ex:PA. Yar Muhammad ASI (PW-08) conducted investigation and on its completion submitted complete challan against the accused/ appellant. Accused Zafar Saeed alias Zafar Khan was summoned, who was produced in custody and after providing relevant copies under section 265-C Cr.P.C, he was formally charge sheeted on 26.02.2018, to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case against the accused/ appellant produced and

examined as many as nine (09) witnesses. After conclusion of prosecution evidence, statement of accused was recorded under section 342 Cr.P.C, wherein he professed innocence, he did not wish to be examined on oath as provided under section 340 (2) Cr.P.C, nor opted to produce defence evidence. The learned trial Court after hearing arguments of learned counsel for the parties vide impugned judgment dated 25.02.2019 convicted and sentenced the accused/ appellant as mentioned above, hence, the instant criminal appeal and murder reference.

3. We have heard arguments of learned counsel for the parties and learned Addl. A.G representing the state and perused the record with their valuable assistance.

4. It was on 09.02.2017, when the complainant alongwith the deceased visited the baithak / hujra of one Gul Shaheed for a personal errand. On reaching there they met Gul Shaheed PW-07 and sat in the courtyard of the baithak, when in the meanwhile the accused/ appellant emerged duly armed with AK47, started firing upon the deceased, who died on the spot and the appellant made his escape good. The matter was reported by the complainant to the local police at Police Station Sabir Abad, which was penned down in the shape of F.I.R Ex:PA dated 09.02.2017 under section 302 PPC.

5. The learned counsel representing the accused/ appellant submitted that presence of the complainant has not been

established and that the FIR was lodged with a considerable delay after consultation and deliberation and that the witnesses were interested to falsely implicate the accused/appellant in the case. He lastly contended that the prosecution could not establish the charges against the appellant, through independent and disinterested witnesses.

6. This is on record that the incident occurred at 10.49 hours, whereas the matter was reported to the local police at 13.00 hours, i.e. after a delay of 2 hours. The distance between the spot and Police Station Sabir Abad, is given as 7/8 kilometres. Now this Court has to see, as to whether the incident occurred at the place, in the manner and at the time and as to whether the complainant and PW Gul Shaheed were present with the deceased. In the FIR it was stated that the complainant alongwith the deceased had gone to the spot baithak in order to see the grandson of PW-07, who happened to be a councillor and such was the status of the deceased. The story narrated by the complainant depicts that the purpose was only and only to see the grandson of PW Gul Shaheed as the deceased had some personal work, the complainant and deceased reached to the spot baithak, where they met PW-07 and took their seats on the ground, the anxiety of this Court increased that if the purpose was to see the grandson of the eye-witness then why it was not demanded and that why PW Gul Shaheed did not call for his grandson. Throughout the episode, the said grandson of the PW-07

did not come to surface and even afterwards nothing was heard of him. PW-07, owned the spot baithak, which was comprising of three rooms and a courtyard, but surprisingly the deceased and the complainant were not shown in and even no cot and chair was offered to sit being guests. The complainant did not state, while reporting the matter to the police, that their sole purpose was to see the grandson of PW Gul Shaheed, but it was later on when the complainant appeared as PW-05 he improved his version and stated that the deceased was to see the grandson of PW-07. This witness was asked time and again as to what was the specific purpose of such meeting, he astonished us to say that the purpose was known to the deceased who did not share the same, he was further asked as to whether the complainant and the grandson of the witness were known to each other, he replied that he did not know. The parties belonging to the same village and the interse distance between the house of the complainant and the spot is one kilometre so it is beyond understanding that how the complainant and the grandson of PW-07 were not known to each other. The site plan depicts the places of the deceased, complainant, the eye-witness and the accused. The interse distances among the three has been shown as 11-feet and above, if the stance of the complainant was taken to be correct that they were engaged in gossip then all the three should have been in closer proximity rather than sitting 12-feet apart. Furthermore the age of PW-07 was given as 69/70 years which

questions the close intimacy between the complainant, deceased and him. The accused/ appellant was shown at point No.4 who fired from a distance of 12-feet on the deceased and the deceased received five inlet wounds where injuries No.2 and 5 were caused from the back, whereas one of the injury was having blackening around, if the statement of the witnesses is taken to be correct then, we are confronted with a situation that how the two entry wounds were received from the back, when the assailant and deceased were facing each other and that how blackening could be caused from a distance of 12-feet, but the prosecution failed to answer.

In case titled, ***"Amin Ali and another Vs the State" (2011 SCMR 323)*** wherein it is held that:

> ***"All the three witnesses deposed that the deceased had received three injuries, but the Medical Officer found six injuries on the person of the deceased. One of them had blackening. None of the witnesses deposed that any of the appellants had caused the injuries from a close range, but on the contrary in the site plan the place of firing has been shown 8-feet away from the deceased. Thus from such a distance injury with blackening cannot be caused, as it can be caused from a***

distance of less than three feet as per Modi's medical jurisprudence."

7. This Court is anxious to know that why only the deceased was targeted, as the motive was against one Umar Saddique, another brother of the deceased and if so than both the brothers should have been the targets. It is an element of surprise that when the deceased and complainant were empty handed, why the complainant was left unhurt, as he too was within the firing range. The time of occurrence has been given as 10.49 hours whereas the matter was reported at 13.00 hours, despite the fact that the spot and the Police Station are lying at a distance of 7/8 kilometres, after realizing the fact that if the delay is not explained, it would cost a lot, so an attempt was made to explain the same. The complainant explained the delay that initially it took 30-minutes to arrange a Dotson and thereafter the dead-body was taken to KDA Hospital Karak, where they spent 20/40 minutes as the deceased was examined by the doctor, he further stated that the police was not present in the hospital, so they were advised to shift the deceased to the Police Station, which they did accordingly. It was the prosecution to convince this Court through its evidence that the delay caused was not for consultation and deliberation. The statements of both the witnesses that is the complainant and the eye-witness are worth perusal, PW-07 admitted in his cross-examination that he owned a tractor and a Dotson during the days

of occurrence but he did not say that as the Dotson was not available so they made efforts to arrange another and that it took 30-minutes, the explanation does not end here he kept on going to say that the dead-body was initially taken to KDA hospital Karak, where they spent 20/40 minutes and after examination by the doctor they approached the Police Station, as according to this witness none from the police was present in the hospital to scribe the report. The complainant while reporting the matter to the police stated that after receiving the fire shot the deceased died on the spot, if so, why the dead-body was taken to the hospital, instead of Police Station Sabir Abad, which falls in the way, even otherwise the KDA hospital Karak has its own reporting center where the police officials are present round the clock, with the only purpose to enter such cases. We are surprised that how the doctor could examine the dead-body when no report is made. There is no entry on record to suggest that in fact the deceased was taken to KDA hospital and that he was examined by the doctor nor the doctor who allegedly examined the dead-body finds mention on the record, so the explanation tendered leads us nowhere but to hold that the presence of the complainant on the spot and later on in the hospital has not been established.

In case titled ***"Muhammad Wasif Khan and others Vs The State and others" (2011 PCr.L J 470 Lahore)*** it is held that:-

"F.I.R. has a very significant role to play, being a corner stone of the prosecution case to establish guilt of the accused involved in the crime-- Any doubt in lodging of F.I.R. and commencement of investigation give rise to a benefit in favour of accused-- F.I.R. lodged after conducting an inquiry loses its evidentiary value."

8. The report was made to one Nazir Badshah ASI, (PW-09) by the complainant who also prepared the injury sheet and inquest report. This witness when appeared before the Court as PW-09, stated that he prepared the injury sheet, inquest report and thereafter dispatched the dead-body under the escort of one Qismat Ali constable to RHC Sabir Abad. This witness frankly admitted that he did not mention the nature of injuries in the injury sheet, he further stated that he did not mention the F.I.R number and section of law in the inquest report. If it was PW-09, who scribed the report and prepared the injury sheet and inquest report then why the inquest report did not find mention of the section of law and F.I.R number, it indicates that initially the injury sheet and inquest report was prepared and it was than when the complainant reached to the Police Station the report was recorded. In the inquest report the nature of blood was mentioned as fresh (Raqeeq) which further

disputed the time of incident as it was after two hours of the occurrence the report was made so for long two hours, the blood cannot remain fresh (Raqeeq) rather it clots (*Munjamind*). This deliberate attempt on part of the prosecution witnesses caused serious dents to the prosecution case and it also questions the presence of the complainant at the time of occurrence with the deceased and that these were co-villagers, who brought the dead-body to the Police Station and later on, on receiving information regarding the occurrence and dispatch of the dead-body to the Police Station the complainant alongwith others reached there, which indicates nothing but to hold that it was a case of preliminary investigation. Qismatullah PW-03, escorted the dead-body from the Police Station to RHC Sabir Abad for post mortem examination. PW-01, Disfaraz alongwith one Khalid Usman were present in the hospital, who identified the dead-body before the doctor. Difaraz happens to be the brother of the deceased, who was examined as PW-01, who stated that on the day of occurrence he left for Sabir Abad to purchase vegetable where he felt unwell so he went to the hospital to consult a doctor and that it was after some time that the dead-body was brought to the hospital. This witness categorically stated that he was not in possession of the mobile phone as it was left at home. He further stated that he received information regarding the occurrence and arrival of the dead-body to the hospital, despite the fact that he was not in possession of the mobile

phone he received information but failed to explain that what was the source of his knowledge, regarding the occurrence and arrival of the dead-body to RHC Sabir Abad. What a coincident this was that he reaches the hospital a little before the dead-body was brought. The reaching of PW-01 to the hospital suggests that he got information in his village wherefrom he alongwith Moiz, Khalid Uand Usman and the complainant reached to the hospital and reported the matter.

9. The conduct of the complainant is not above board as he stated that after reporting the matter he went to his house and so did PW Gul Shaheed, what abnormality this was that a brother leaves for home when the dead-body of his real brother still lies before the doctor. Yar Muhammad ASI, the Investigating Officer was examined as PW-08, he stated that it was 01.40/01.45 p.m that he reached to the spot and on pointation of the complainant and PW-07 the recoveries were made and the site plan was prepared. The Investigating Officer stated that he alongwith PWs remained on the spot for two to three hours, whereas the dead-body was handed over to the legal heirs at 15.50 hours in the hospital and it is still a mystery to resolve that whether the legal heirs were present with the Investigating Officer as he stated or they were in the hospital to receive the dead-body, this creates dents in the prosecution case regarding the availability of the witnesses on the spot with the Investigating Officer. Though stress was given that a

single accused has been charged and that substitution in case of single accused is a rear phenomena, true but the prosecution has never been absolved from its liability to prove the case beyond the shadow of reasonable doubt. The Court while dealing with the case of a single accused has to take great care and caution and to judge the available evidence coupled with circumstances of the case and if it comes to the conclusion that the witnesses were interested or chance witnesses then the concept of single accused and his substitution should not be a clog in the way to acquittal. In case in hand the witnesses went on abnormal improvements and the behavior shown has caused greater dents to the case and in such eventuality we are left with no option but to hold that the prosecution has failed to bring home charges against the appellant.

Reliance is placed on case titled, ***"Bashir Ahmad alias Mannu Vs The State" (NLR 1996 criminal 234) and "Muhammad Irshad and another Vs the State (1999 SCMR 1030), wherein it is held that:***

> ***"The eye-witness examined by the prosecution are closely related to one and other and the rule of prudence required that there should have been some independent corroboration available for placing implicit reliance on their testimony but the same is lacking and it would be highly unsafe to act upon the uncorroborated***

testimony of eye-witnesses examined by the prosecution, particularly when it is full of material contradictions. It is in conflict with the medical evidence, also with regard to the distance from which the deceased and the injured P.Ws were reportedly fired at. The deceased and the eye-witnesses were not persons of good antecedents as apparent from record, showing them involved in several criminal cases.

10. The Investigating Officer was examined as PW-08, who stated that he was provided with the copy of F.I.R in Police Station and he alongwith other police officials reached to the spot, though the complainant stated that he came to the spot alongwith police from the Police Station but neither the Investigating Officer confirmed his statement nor PW-02 Tahir Ayub deposed in this respect. The venue of occurrence was disputed by the learned counsel for the defence and our attention was brought to the contradictions in the statements of the Investigating Officer and the eye-witnesses. PW-07, stated that the accused / appellant appeared and started firing on the deceased and that in all 24 fire shots were made where 13/14 hit the walls of the baithak whereas six fire shots were stuck in the ground, the Investigating Officer when appeared before the Court he did not utter a single word in this respect and he admitted that neither he mentioned the bullet marks on the

surrounding walls nor recovered spent bullets there from. Some photographs were placed on file, which were created by the Investigating Officer at the time of spot inspection and these photographs show heaps of gravel and sand on the places where the witnesses and the deceased were sitting and in presence of the debris it was not only hard but impossible to sit thereon. The house of the complainant and the spot was stated to be one kilometer apart and there was every possibility that the complainant and other witnesses attracted after the occurrence. The recovered empties were sent to FSL on 09.02.2017, whereas these were received on 15.02.2017, but nothing was brought on record that where these empties were lying in the intervening period neither the Moharrir of the Police Station was examined nor abstract from register number 19 was collected. PW-02 Tahir Ayub was examined, who was the person per investigating officer to have taken the empties to the Forensic Science Laboratory, who appeared before the Court stated in respect of other facts, but remained silent of his taking the empties to the Laboratory for chemical examination, his this silence destroy the evidentiary value of the empties and its report.

11. One Moiz who identified the deceased before the police at the time of report and also verified the report of the complainant was not produced, the non-production of this witness tells otherwise, that had he been produced he would have not

supported the stance of the complainant and Article 129 (g) of the Qanun-e-Shahadat Order, 1984 caters for the situation.

Inc case of ***"Tahir Khan Vs. The State, (2011 SCMR 646),*** the Hon'ble Supreme Court affirmed this view in the following words:

> ***"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."***

12. The motive was stated to be a dispute over women folk, but the complainant did not specify that who out of the brothers was connected with. It was later on when the complainant stated that the motive was against his other brother, namely, Umer Sadique. The Investigating Officer did not collect anything in this respect nor the statement of any independent person was recorded and when he was questioned in this respect he frankly conceded that nothing was brought on record in black and white in this

respect. If the statement of the complainant to the extent of motive is taken to be correct then we are failed to understand that why the deceased was selected and why the complainant was left scot free where the accused could have easily killed both the brothers that too when they were at his mercy being empty handed. Thus, the prosecution has failed to prove the motive, it has been held in case of ***"Muhammad Sadiq Vs Muhammad Server" (1997 SCMR 214)*** that when motive is alleged, but not proved then the ocular evidence is required to be scrutinized with great caution in case ***"Hakim Ali Vs the State (1971 SCMR 432)*** it has been held that the prosecution though not called upon to establish motive in every case, yet once it has set up a motive and failed to establish it, the prosecution must suffer consequence and not the defence.

In case titled **"Muhammad Ashraf alias acchu Vs the State" (2019 SCMR 652),** *wherein it is held that:*

> ***"The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."***

13. The learned counsel representing the respondents / complainant stressed that the accused remained absconder for a sufficient long time and to him the abscondence is an urging factor to hold that the accused was responsible for commission of the offence, but we failed to understand that how abscondence can alone be taken into account when the prosecution failed to establish its case. There is no cavil to the preposition that abscondence alone cannot be a substitute, of the direct evidence and this aspect has been beautifully dealt with by the apex Court in case titled, ***"Muhammad Sadiq Vs the State" (2017 SCMR 144),*** wherein it is held that:

> ***"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."***

14. Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

15. 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, Whereas the Murder Reference No.2-B of 2019, is answered in negative.

Above are the reasons of our short order of the even date.

Announced:
16.03.2020
Azam/P.S

JUDGE

JUDGE

19/3/2020

(DB) Ms. Justice Musarrat Hilali and Mr. Justice Sahibzada Asadullah