

JUDGMENT SHEET

PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A. No.287-B/2019.

Imran Ali Shah & another
Vs.
The State & another.

JUDGMENT

Date of hearing: **12.02.2020.**

For Appellants: **Syed Fakharuddin Shah, Advocate.**

For Respondents: **Mr. Shahid Hameed Qureshi, Addl:**
A.G. and Iftikhar Ahmad Durrani,
Advocate.

SAHIBZADA ASADULLAH, J.- This appeal is directed against the judgment dated 14.9.2019, rendered by learned Sessions Judge, Bannu, in case FIR No.269 dated 30.11.2010, under Sections 302/324/34 PPC, police station Ghoriwala, District Bannu, whereby the appellant Safid Ullah has been convicted under Section 302(b) PPC and sentenced to rigorous imprisonment for life. He was also held liable to pay Rs.8,00,000/- lacs as compensation to the legal heirs of deceased Barkat Ali in terms of Section 544-A, Cr.P.C. or in default thereto to further undergo four months simple imprisonment, similarly, accused Imran Ali Shah has been convicted under Section 324 PPC and sentence to suffer seven years rigorous imprisonment and was also held liable to

pay fine of Rs.1,00,000/- or in default thereof to further undergo two months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to both the convicts.

2. Brief history of the prosecution case, as reflected from the FIR Ex. PW 4/1, registered on the basis of murasila Ex. PW 3/1, is that on 30.11.2010, complainant Adnan Ali Khan (PW-5), in injured condition, at about 2150 hours, brought the dead body of his brother Barkat Ali Khan to Civil Hospital, Bannu and lodged a report to Miran Shah S.I (PW-3) to the effect that on the same night he was present in his house when his brother Barkat Ali Khan informed him that accused Safaid Ullah and Imran had snatched some articles from him, so he wanted to make a complaint to their parents; that complainant (PW-5), Barkat Ali Khan and one Dil Robaz Khan (PW-6) proceeded towards the house of accused, however, at about 2030 hours, when they reached near the house of one Rizwan, there accused Safaid Ullah and Imran emerged in their front, accused Safaid Ullah made firing at Barkat Ali, whereas accused Imran fired at complainant (PW-5). As a result of firing of the accused, they both were hit and got injured. The accused decamped from the spot after commission of the offence. While shifting both the injured to the hospital, Barkat Ali succumbed to his injuries on the way. PW-3

also prepared injury sheet Ex. PW 3/2 and inquest report Ex. PW 3/3 of the deceased, injury sheet Ex. PW 3/4 of injured complainant PW-5 and thereafter, sent the dead body to the mortuary for postmortem examination, where Dr. Khalid Mehmood (PW-7) conducted autopsy on the dead body of the deceased, whereas injured PW was medically examined by Dr. Muhammad Ismail PW-9.

3. Initially, the accused absconded, therefore, proceedings under Section 512, Cr.P.C. were conducted against them. After arrest of the accused and completion of investigation by Muhammad Hanif S.I. (PW-8), complete challan was submitted against them to the Court of learned Sessions Judge, Bannu, where at the commencement of the trial the prosecution produced and examined as many as twelve (12) witnesses, whereafter, accused were examined under section 342, Cr.P.C., wherein they denied the allegations, professed innocence and stated to have falsely been implicated in the present case, however, neither they opted to be examined under section 340(2), Cr.P.C., nor wished to produce evidence in their defence. The learned trial Court, on conclusion of the trial, convicted the appellants vide impugned judgment dated 14.9.2019, and sentenced them as mentioned above, hence the instant appeal.

4. Arguments heard and record perused.

5. It is the case of prosecution that on the eventful night the complainant was present in his house when his brother Barkat Ali Khan informed him that accused Safaid Ullah and Imran had snatched some articles from him, so he wanted to make a complaint to their parents, he in the company of his brother Barkat Ali Khan and one Dil Robaz Khan (PW-6) proceeded towards the house of accused, while proceeding to the house of the accused/appellants, it was at 2030 hours, when in front of the house of one Rizwan, the parties came across. On seeing them, the accused/appellant Safaid Ullah made firing at Barkat Ali, whereas accused Imran fired at complainant (PW-5). As a result of firing of the accused, they both were hit and got injured, whereas, Barkat Ali, on his way to the hospital lost his life. In the instant case, since the ocular account of the incident was furnished by the complainant (PW-5) and Dil Robaz Khan (PW-6), therefore, it is important to re-appraise their evidence for the purpose of sifting the grain from chaff and seeking independent corroboration from other reliable evidence.

6. While scanning the evidence of complainant PW-5, we found that his testimony is in line with the FIR and fits with the circumstances of the case. Though he faced the rigors of lengthy cross-examination, but nothing favourable to the accused could be extracted.

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The learned counsel for the defence stressed that the prosecution did not bring on record the description of snatched articles and the purpose was to register a complaint to their parents in this respect and to him, when the articles taken were not proved on record, then the purpose to kill does not appeal to a prudent mind. He further contended that how the accused came to know that the complainant was coming towards their house and that why the appellant approached them where in fact it was the complainant side to resort to aggression, as it was them to settle the scores. The learned counsel further contended that the inter se distance between the assailants/appellants and the deceased was more than six paces and the wounds carrying charring marks belies the story of the prosecution and it was lastly contended that how the witnesses identified the accused when the darkness had prevailed. The contentions of the learned counsel for the defence that it was the complainant side to settle the score, is not appealable as the matter was not that grave to urge the complainant side to go and revenge rather this was an attempt on the part of the complainant to go and register the complaint and if possible to recover the articles taken. The place of occurrence is established as the Investigating Officer recovered blood stained earth from the place of the deceased and even the spot could not be disputed. Yes, the time of occurrence is 2030

hours and there is the possibility that darkness was prevailed, but when PW Dil Robaz was examined, he stated that at the time of occurrence, an electric bulb was installed on the adjoining house which facilitated him to identify the accused, even the prosecution could not dislodge this stance of the witness. This is admitted on record that the parties are co-villagers and were known to one another and the inter se distances between the two sides were not so great to exclude the possibility of identification. The complainant has given specific role to both of accused and the stance of the learned counsel for the defence that one of the wound on person of the deceased was having charring marks and that the inter se distance between the parties belie the story of the prosecution. This is on record that both the sides were approaching one another and we cannot exclude the possibility that the deceased received one fire entry wound from the distance given in the site plan and the other when they came further close to the deceased.

7. The learned counsel for defence contended that the eyewitness namely Dil Robaz was not present on the spot and even his presence on the spot is not appealable as he was not connected with the alleged motive and that he was a chance and procure witness. The prosecution witnesses were thoroughly cross-examined, but the defence could not succeed to discredit

their testimony and to doubt their presence on the spot. Dil Robaz was examined as PW-6 and he explained that his house and that of the complainant are connected with a small door and by the time he came to the house of the complainant when the incident was narrated by the deceased to his brother and he too accompanied them to agitate the matter with the parents of the appellants. The defence could not establish otherwise. Nothing could be brought from the mouth of this witness in favour of the appellants despite searching cross examination and even no *mala fide* was suggested in respect of false implication of the accused. The accused were specifically charged and the role of firing was attributed to both of the appellants. The deceased and injured were rushed to the hospital where the matter was reported to the local police without loss of time and the shifting to the hospital was so sudden which occasioned no chance of consultation and deliberations to the complainant for bringing a false charge.

In case titled *Syed Azhar Hussain Shah and another Vs. The State and others (2019 SCMR 537)*, it was held that:

As regards the merits of the case of the appellant we have found that the occurrence in this case had taken place in broad daylight, an FIR in that respect had been lodged with sufficient promptitude and the appellant had been named in the FIR as the principal perpetrator of the alleged offences and

firearm injuries on the thigh, penis and below the belly of the victim had been attributed to him therein. The eye-witnesses produced by the prosecution included the injured victim namely Syed Ahsan Raza Shah (PW1) and the ocular account furnished by the victim and Syed Muhammad Raza (PW2) was consistent and the same had found full support from the medical evidence.

8. Dr. Khalid Mahmood M.O. (PW-7)

conducted autopsy on the dead body of deceased Barkat Ali, on 30.11.2010 at 1015 hours. In his opinion, the deceased died due to FAI to larynx and trachea and major vessels of neck leading suffocation and death. He pen down the probable duration between injuries and death, within forty minutes and between death and postmortem, 1-3 hours.

9. Muhammad Hanif S.I (PW-8) had investigated the case after receipt of FIR. He prepared site plan Ex. PB on the pointation of eyewitness Dil Robaz. He secured blood through cotton from the place of deceased Barkat Ali and sealed the same in parcel No.1, prepared recovery memo Ex. PW 8/1 in presence of marginal witnesses. He conducted house search of the accused vide memo Ex. PW 8/2 which is correctly signed by him. He stated that he was present on the spot when the postmortem documents and MLC report were produced by constable. He examined the PWs. He verified the site plan from complainant and no changes were made therein. To this effect he gave a note with red

ink on the site plan Ex. PW 8/3. He sent the blood secured through cotton to FSL and obtained the report Ex. PK. He placed on the list of legal heirs of deceased Ex. PW 8/6 on the file.

10. After scanning the entire evidence, this Court came to the conclusion that the prosecution has established its case to the hilt against the appellant Safaidullah, as the witnesses remained consistent on all material aspects of the case though the trial Court while appreciating the evidence on file drawn a different conclusion in respect of the accused Imran Ali Shah, by awarding lesser sentence. We are eager to scan the evidence as to whether the findings of the trial Court were correct in that respect or that the trial Court fell into error by taking another view, though in FIR, section 302/324/34 PPC were inserted and charge against the appellant was framed under the captioned sections of law, but the trial Court keeping in view the specific charge of the appellants bifurcated the case and sentenced one of the accused under section 302 PPC, whereas the other under section 324 PPC. In order to reach a correct conclusion, we deem it appropriate to see the contents of the FIR and the role played by each accused to determine as to whether the accused share common intention or not. It has never been the case of prosecution that the accused/appellants had come with

the intention to commit the murder of the deceased, as none of the party was of the knowledge that the other was coming with intention to kill rather this was a chance encounter where both the appellants were charged with specific injuries on persons of the deceased and the complainant. The approach of the trial Court was correct, but the trial Court failed to appreciate the evidence against the accused Imran Ali Shah, as this was the prosecution to prove the charge against him. The prosecution was supposed to establish on record the injury on the person of the complainant by producing the concerned doctor who examined the injured and prepared his medico legal report. We are surprised to see that in this particular case, a deviation was made from the established practice as the prosecution could not establish on record that who was the doctor who examined the complainant in the hospital. The medico legal report has been exhibited as Ex. PW 9/1, from one Dr. Muhammad Ismail, who was examined as PW-9, who stated that *"on 30.11.2010, Dr. Qamar Zaman was on emergency duty but due to some inevitable circumstances, he was not on duty and instead of him, I was assigned to perform emergency duty"*. The statement of this witness surprised us that if he was the witness who examined the injured in the hospital and prepared the medico legal report, why on the medico

legal report, he put his signature "*For Dr. Qamar Zaman*". Had he prepared the medico legal report and examined the injured himself, he would have stated that it was he who examined the injured and prepared his medico legal report and would have put his signature thereon. This witness was cross examined where he stated that "*Except the direction by MS Sher Jan for issuance of discharge slip and OPD chit, I have not signed any documents today produced by me before the Court*". This witness further stated that he did know that whether the patient was examined prior to his report or not. The prosecution submitted challan, but in the calendar of witnesses PW-9 Dr. Muhammad Ismail find mention nowhere and it surprises that how the prosecution came to know that this was the doctor who examined the complainant at the time when he was brought to the hospital. The defence went on to say that the complainant Andaz Ali was serving in the hospital and that PW-9 was his close relative. Keeping in view the conduct of PW-9, this Court reaches nowhere that the injury on the person of the complainant has not been established and even the medico legal report could not lead this Court to hold that in fact the complainant was injured and that he was examined by the doctor in the hospital. While assessing the role of the co-accused Imran Ali Shah and his specific charge for the injury

caused on person of the complainant, it can safely be hold that the charge against the co-accused/Imran Ali Shah has not been established beyond reasonable doubt and even otherwise the trial Court hold both the appellants responsible for the injuries specified to them by excluding the common intention.

In case titled Manzoor Ahmed Shah Vs. State (2019 SCMR 2000), it was held that:-

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“The alleged recoveries affected from the appellants during the investigation were legally inconsequential because no crime-empty had been secured from the place of occurrence connecting the recovered firearms with the alleged offences. In the absence of proof of the alleged motive sharing of common intention by the present appellants with their co-convict namely Mubarik Ali for the purposes of killing two persons and injuring two others in the present incident has been found by us to be quite suspect. It appears that something had happened at the spot leading to the present occurrence and it could well be that in such a sudden occurrence every accused person might have been responsible for his own individual act. In these circumstances, particularly when there is no evidence available regarding sharing of common intention by the present appellants with their co-convict namely Mubarik Ali, we have found it difficult to sustain the convictions and sentences of the appellants vis-a-vis the murder of Kashifa Bibi who had not been harmed by the present appellants at all”.

In case titled Oudratullah Vs. State (2017 PLD Peshawar 5), it was held that:

“Leaving apart the arguments advanced at the bar as any discussion thereon may prejudice the case of co-accused, suffice it to say that the appellant was charged

for sharing common intention with absconding co-accused in the commission of crime, but no overt act towards commission of the offence has been attributed to him as no evidence regarding his active participation in the crime is available on the file. Insofar as theme of section 34, P.P.C. is concerned, it deals with the acts done by several persons in furtherance of common intention. Neither it is a punitive section, nor does enact a rule of evidence but mainly relates to joint liability. It simply means that if two or more persons intentionally commit an offence jointly which amounts to as if each of them had committed it individually and they will have to share the consequences jointly subject to the proof that at the relevant time each one of them remained involved in the commission of the offence e.g. mere presence at the spot ipso facto would not be sufficient to hold a person vicariously liable and sufficient evidence should be available to prove the factum of sharing common intention even prior to the commission of offence. It must be proved that the offence was committed in concert pursuant to the prearranged plan. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof or prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.

The overall assessment of the prosecution case brings this Court to conclude that the prosecution has miserably failed to bring home charge against accused Imran Ali Shah.

11. For the reasons mentioned hereinabove, this appeal is partially allowed, the impugned judgment of

conviction dated 14.9.2019, rendered by learned Sessions Judge, Bannu to the extent of Imran Ali Shah is set aside, however, to the extent of respondent No.2, Safaidullah is maintained, consequently, appellant Imran Ali Shah is acquitted of the charges levelled against him. He be set-at-liberty forthwith, if not required in any other case.

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


Announced.
Dt: 12.02.2020.
Kifayat/*


JUDGE


JUDGE

(D.B)

Hon'ble Mr. Justice Ikramullah Khan
Hon'ble Mr. Justice Sahibzada Asadullah


28/4/2020