

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

Cr.A No.77-B/2020

State
Vs.
Javed Iqbal & another.

JUDGMENT

For State/appellant: Mr. Umer Qayum Khan, AAG

For State/Respondents: (IN MOTION)

Date of hearing: 02.11.2023.

FAZAL SUBHAN, J.- Through instant criminal appeal under section 417 Cr.P.C, the State Advocate General Khyber Pakhtunkhwa has called in question the judgment/order dated 07.10.2019 passed by the learned Additional Sessions Judge-III/Model Criminal Trial Court (MCTC), Lakki Mwarat, whereby the accused/ respondents were acquitted in case FIR No. 526 dated 09.8.2015 registered under sections 302/324/148/149 PPC of police station Lakki District Lakki Marwat.

2. Record transpires that the complainant Gul Janan son of Sorat Khan took the dead bodies of deceased Rafi Ullah (son), Mujib-ur-Rehman son of Naseeb Ahmad, (grandson) and injured Saifulah, his other son, to City

Hospital, Lakki Marwat and reported at emergency room that on the day of occurrence at about 05:30 a.m., he along with his sons Rafi Ullah, Saifullah and grandson Mujib-ur-Rehman were present in front of the Baithak of Yousaf Khan, his brother, when in the meanwhile Munawar Khan, armed with pistol, Safdar Khan, having SMG, Javed Iqbal, armed with dagger, Saad Ullah, armed with 3x3 bore rifle and Farid Ullah, armed with pistol, came and were passing in front of the Baitakh and when they arrived near them, accused Munawar Khan made firing upon Rafi Ullah with the intention to cause his death and as a result he was hit, got injured and fell and at the same time Javed Iqbal gave dagger blows to Rafi Ullah.

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Due to firing they ran away, however, Saad Ullah ran after his grandson Mujib-ur-Rehman and made firing upon him, who also got hit and fell down while Munawar Khan and Farid Ullah fired on Saif Ullah and due to their firing he also got injured and fell down, whereafter all the accused left the spot. When he attended the injured Rafi Ullah, his son and Mujib-ur-Rehman, his grandson, they had already expired while Saif Ullah sustained serious injuries. According to him the incident was witnessed by him as well as injured son Saif Ullah and motive for the occurrence was described to be dispute over

womenfolk. He, therefore, charged all the above named accused for the commission of offence.

3. After registration of the case, investigation in the case was carried out and initially the accused were absconding and challan under section 512 Cr.P.C was submitted against them. Later on the accused Farid Ullah, Javed Iqbal and Munawar Khan were arrested and challan against them was submitted. The learned trial Court summoned the accused from jail, being in custody and after observing legal formalities under section 265-C Cr.P.C, formal charge was framed against them to which they did not plead guilty and claimed trial. In order to prove its case the prosecution examined 10 witnesses, the brief gist of prosecution evidence is as under:-

4. PW-1 is the statement of Arshad Ullah khan SHO, who submitted complete challan on 16.9.2015.

5. PW Muhammad Usman ASI deposed that on getting information of the occurrence he visited City Hospital Lakki Marwat and on the report of Gul Janan, he prepared murasila Ex.PW2/1 which was read over to him and after admitting it correct, he thumb impressed the same as a token of its correctness and forwarded the murasila to police station for registration of case. He prepared injury sheets of both the

deceased Ex.PW2/2 and Ex.PW2/4 and their inquest reports Ex.PW2/5 and Ex.PW2/6 respectively and referred the deceased and injured for post mortem examination as well as medical treatment.

6. Imtiaz Khan, ASHO Pezu was ASI police station Lakki Marwat at the relevant days and he incorporated the contents of murasila into FIR Ex.PW3/1. PW-5 is the statement of Zia-ur-Rehman son of Rehmat Ullah, who had identified the dead bodies of the deceased Rafi Ullah and Mujib-ur-Rehman before the doctor as well as before the police.

7. Statement of Gul Janan son of Surat Khan was recorded as PW-6, who narrated the same story as reported by him in his report. Similar statement was recorded by PW-7 Saif Ullah. Here it is to be mentioned that the cross-examination of these witnesses were reserved after recording their examination-in-chief, however, thereafter they failed to appear to conclude their statements by offering themselves for cross-examination for the reason that they stood charged in a murder case and had absconding.

8. PW-8 is the statement of Dr. Umar Hayat, who examined injured Saif Ullah son of Gul Janan and found the following wounds:-

1. One fire arm entry wound on front of right leg size 1/3x1/3 inch.

One exit wound of back on right leg size 1/2x1/2 inch

2. One fire arm entry wound on right shoulder size 1/3x1/3.

3. One fire arm entry wound on front of left leg with compound fracture of tibia and fibula.

4. Three fir arm entry wounds on left thigh with exit on back side.

5. One exit fire arm wound on hypogastria region left forearm entry and exit wound measuring 1/3x1/3.

Similarly, he conducted autopsy on the dead body of deceased Rafi Ullah and found the following injuries:-

1. One entry wound of F.A 1/3x1/3 left side of neck.

Exit right side of neck 1/2x1/2.

Stab wounds back of chest, left hand & left chest, stab wounds are superficial.

Remarks. In his opinion the death has caused due to injury to the spinal card in the neck.

Report of the injured is Ex.PW 2/1 and he also endorsed the injury sheet Ex.PW2/2 and endorsed the injury sheet of Rafi Ullah Ex.PW2/4 and inquest report Ex.PW2/5.

He also conducted autopsy on the dead body of deceased Mujib-ur-Rehman and found the following.

1. One entry wound of F.A 1/3x1/3 left side of chest.
2. Exit wound right side of chest 1/2x1/2.

Remarks. In his opinion the death has caused due to injuries to the vital organs i.e. heart and lungs.

His post mortem report is Ex.PW2/6, endorsement on injury sheet and inquest report Ex.PW2/7 and Ex.PW2/8 respectively.

9. Statement of Muhammd Waseem DFU CTD Tajori was recorded as PW-9, who executed warrants under section 204 and proclamation under section 87 Cr.P.C. Copies whereof were placed on file as Ex.PW9/2 and Ex.PW9/10 along with his report Ex.PW9/11 to Ex.PW9/2.

10. PW-10 is the statement of Abdur Rahim, Retired SI, who conducted investigation in the case and his detailed statement reveals proceeding carried out by him during the

investigation, hence being already available on the file needs no reproduction.

11. With these statements prosecution closed its evidence. Statement of Inam Ullah No.83 P.S Lakki was recorded as CW-1 and as per his statement he was entrusted with verification notice of death of dead accused Munawar Khan and according to him as per FIR No.790 dated 31.8.2019 under sections 302/34 PPC of P.S Lakki Marwat the said Munawar Khan has been murdered. His report was placed on file as Ex.CW 1/2. Similarly, statement of Naab Khan ASI, P.S Lakki Marwat was recorded as CW-2, to whom non-bailable warrant of arrest of complainant Gul Janan and Saif Ullah eye witness/injured were entrusted and according to him Gul Janan has been charged and is absconding in case FIR 790 dated 31.8.2019 under sections 302/34 PPC of police station Lakki Marwat. His report in this respect was placed on file as EX.CW2/1.

12. Thereafter statement of accused Javed Iqbal and Farid Ullah were recorded, wherein they pleaded innocence and contended to have been falsely implicated in the case. They both, however, declined to record their statements on oath or to produce any defence evidence. The learned trial

Court after hearing arguments in the case through impugned judgment acquitted the accused/ respondents on 07.10.2019 which judgment is now assailed by the State through instant criminal appeal.

13. Arguments of learned AAG for State heard and record gone through.

14. It is well settled law by now that the prosecution who brings a charge against an accused in any criminal case has to prove its case through cogent, reliable and conscious inspiring evidence. It is added that where the charge relates to capital punishment then standard of evidence is required to be of high quality to connect the accused with the commission of crime. Analyzing the present case on these principles it is evident that complainant Gul Janan lodged the report in respect of the murder of his son Rafi Ullah, grandson Mujib-ur-Rehman and injuries to his other son Saif Ullah in the occurrence at the hands of respondents and absconding co-accused Safdar Munir and Saad Ullah. The complainant Gul Janan and injured Saif Ullah were the two prime witnesses of the prosecution, whose evidence was of much worth and value for the reasons that both these witnesses have not only seen the entire episode but in the same incident PW-7 Saif Ullah had

sustained injuries. The complainant Gul Janan was not only to support the authenticity of the report lodged by him but he was also to describe the event that took place on the relevant day with all the facts relating to the death of deceased Rafi Ullah and Mujib-ur-Rehman and injuries sustained by PW Saif Ullah. These material witnesses appeared during the trial as PW-6 and PW-7 and on 29.8.2019. Their examination-in-chief was recorded and on perusal it is clear that their statements are reiteration of the report lodged by PW Gul Janan with some additions which need not to be discussed here. The test of veracity of a witness lies in the cross-examination. Article 132 of the Qanun-e-Shahadat Order, 1984 (Order) has described the mode and manner of examination of a witness and cross-examination. The said provision is reproduced below for better understanding:-

“132. Examination-in-Chief, etc.: (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross examination.

(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.”

The purpose of examination-in-chief is a mode of describing the assertion of a witness in respect of a fact seen, observed or

came into his knowledge through any other source. Thus examination-in-chief consists of revelation of material facts deposed by a witness. On the other hand the right of cross-examination of an adverse party is an inalienable right contemplated in Article 132 (2) of the above Order. The importance of cross-examination is to unearth the actual facts from the witnesses. Its purpose is also important for the reason that if a fact stated by a witness is not put to the test of cross-examination then the same shall be deemed to have been admitted. Reliance is placed on PLD 2011 SC 296. Thus right of cross-examination is not a mere formality but a valuable right available to the opposite side. In the case of Senator

Lt.Gen. (Rtd.) Saeed Qadir-Vs-The State, PLD 1997 Lahore

26, it was held that:-

“It is the cardinal principle of law that cross-examination is the greatest legal engine ever invented for discovery of truth, thus full latitude, be given to the learned counsel, who conducts the case in the trial Court to exercise this legal right.”

Similarly, in case title Muhammad Javed-Vs-The State, reported in 2001 MLD Karachi 1206, it was observed that:-

“The cross-examination has been held to be the "great legal engine" ever invented for the discovery of truth. The opportunity to cross-examine a witness contemplated by the law must be real, fair and reasonable. It is not an

empty formality but a valuable right and best method for ascertaining forensic truth.”

15. In the instant case complainant Gul Janan and PW Saif Ullah appeared on 29.8.2019 and recorded their examination-in-chief and their cross-examination was reserved on the request of learned defence counsel. Their cross-examination could not be recorded on the subsequent two dates, however, on 16.9.2019 a report was submitted before the trial Court that Munawar Khan, an accused facing trial in the case, was murdered and an FIR No. 390 dated 31.8.2019 under sections 302/34 PPC of PS Lakki Marwat was registered. A copy of the said FIR was also placed on file which reveals that accused Munawar Khan was fired at by accused Zahid son of Gul Janan and Gul Janan son of Sorat Khan. After being charged in a murder case complainant Gul Janan and PW Saif Ullah disappeared and despite warrants of arrest their attendance before the trial Court for recording their cross-examination could not be materialized, whereafter prosecution closed its evidence. Thus the complainant Gul Janan and PW Saif Ullah abstained from the Court to face the brunt of cross-examination. When they have failed to put appearance before the court and their cross-examination could not be recorded then the requirements of Article 132 of the

Order has not been completed/complied which requires that when an examination-in-chief of a witness is recorded then he/they shall be examined by adverse party through cross-examination. Due to abscondance of these two material witnesses it may be safely held that prosecution has withheld best evidence for proving its case beyond shadow of doubt. In this respect reliance can be placed on the case of Muhammad Shahzad and others-Vs-The State and others, reported in 2023 P.Cr.L.J 1054 [Lahore], wherein it has been held that:-

“xvi) All the more, the best evidence which could come either from the injured wife of the deceased Mst. Shazia Bibi or from the aforesaid Lumberdar, Head of Punchayat, has been withheld. Mst. Shazia Bibi got herself medically examined and her MLR was exhibited as Exh.PB, PB/1 and PC; she got recorded her statement under section 161, Cr.P.C. on 18.08.2015 but she being the star/direct witness was not produced before the learned trial Court, leading to adverse inference against prosecution.”

In case titled Ghulam Qadir and 2 others-Vs-The State, 2008 SCMR 1221, the august Supreme Court of Pakistan has held as under:-

“Best evidence has been with held without any justifiable reason. Needless to add that if, an injured witness himself does not appear to charge an accused for his injury and the Court is not satisfied with his disability or incompetence or reasons for not appearing then the conviction for his injury cannot be

recorded on the basis of other evidence under Qisas, as held by this Court in *Asghar Ali alias Sabah v. The State* 1992 SCMR 2088.”

Similarly, in case titled *Asghar Ali alias Sabah and others-Vs-The State and others*, reported in 1992 SCMR 2088, the apex Court has held that:-

“Under the Injunctions of Islam, if an injured witness himself does not appear to charge an accused for his injury and the Court is not satisfied with his disability or incompetence or reason for not appearing then the conviction for his injury cannot be recorded on the basis of other evidence under Qisas provision. Qisas is a personal right and as it now stands, if the person aggrieved therefrom forgives it, and one way of forgiving the wrong doer is not appearing in support of the case against the wrongdoer, there will be no Qisas.”


16. It is, therefore, held that in the absence of complete evidence of the complainant Gul Janan and injured Saif Ullah, the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt by withholding their best evidence.

17. Though prosecution has examined witnesses, total 8 in number, including the investigation officer, medical officer and the marginal witnesses of the recovery memos in support of prosecution case, however, the basic foundation of the case could not be established due to lack of material witnesses of the case. The complainant Gul Janan was to prove



each and every aspect of the report lodged by him through FIR Ex.PW3/1 as well as to prove the site plan Ex.PB and all its contents and recovery memos Ex.PW10/1 and Ex.PW10/2, however, he preferred to stay away from the trial which was heavily dependent upon his statement than other material collected during investigation was of no worth and value to the prosecution case and in these circumstances the learned trial Court was left with no other option but to acquit the respondents in the case.

18. We have gone through the impugned judgment and have found that it does not suffer from any illegality, infirmity and is based on proper appreciation of evidence and hold that the benefit of doubt was rightly extended to the respondent, therefore, the impugned judgment, whereby the respondent was acquitted is upheld and the appeal in hand being bereft of merits is hereby dismissed in *limine*.

Announced
02.11.2023.
*Ihsan *


JUDGE


JUDGE


17/11/23
SCANNED
16 NOV 2023

Khurshid Iqbal

(D.B)
Hon'ble Mr. Justice Fazal Subhan &
Hon'ble Mr. Justice Dr. Khurshid Iqbal.