JUDGMENT SHEET

PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 857-P/2019

(1) Shoukat Ali son of Jalandar (Appellant)
Versus

(1) The State through A.A.G.
(2) Shah Haroon son of Muhammad Zaman
(Respondents)

Present: *Mian Kausar Hussain, Advocate.*

Mr. Haq Nawaz, Astt: A.G.

Mr. Abdul Salam Buneri, Advocate.

Cr.R. No. 62-M/2019

Shah Haroon son of Muhammad Zaman
(Petitioner)
Versus

(1) Shoukat Ali son of Jalandar.
(2) The State through A.A.G
(Respondents)

Present: *Mr. Abdul Salam Buneri, Advocate.*

Mian Kausar Hussain, Advocate.

Mr. Haq Nawaz, Astt: A.G.

Date of hearing: **13.11.2019**

CONSOLIDATED JUDGMENT

WIQAR AHMAD, J.- My this judgment is directed to dispose of Criminal Appeal No. 857-P of 2019 filed by the accused/appellant against his conviction and sentence awarded vide judgment dated 26.06.2019 of the Court of learned Sessions Judge/ Zila Qazi Buner

at Dagger and Criminal Revision No. 62-M of 2019 filed by the complainant for enhancement of the conviction and sentence awarded to accused/respondent.

2. FIR in the case was registered on the basis of '*Murasila*' sent by Mian Hussain Shah ASI (PW-3) on 23.05.2018 wherein he has stated, that he rushed to the emergency room of DHQ hospital Dagger on receiving information of the arrival of the injured, where he found the injured namely Shah Haroon son of Muhammad Zaman, Mujeeb-ur-Rehman son of Amir Zada Khan and Shams-ul-Islam son of Gul Roz Khan residents of Bampokha lying on the hospital beds in injured condition. One of the injured namely Shah Haroon (complainant) reported the matter to the police officer that sister of the accused namely Shaukat Ali had been engaged to his son namely Nawaz Sharif. The said engagement was broken later, due to the development of some misunderstanding between the parties. The accused Shaukat Ali and son of the complainant was stated to have been exchanging hot words on the said issue in the street that the complainant heard the noise and

came out of his house. Both were separated by the complainant along with the other neighbors namely Mujeeb-ur-Rehman and Shams-ul-Islam (the other two injured/persons). After some time, the accused namely Shaukat Ali was alleged to have appeared over the wall of his house and to have started firing upon the complainant as well as the other two (2) injured with the intention to kill them. The complainant received firearm injuries on chest and right arm, while Mujeeb-ur-Rehman was stated to have received injuries on left hand, left shoulder and right hand, whereas Shams-ul-Islam was stated to have got injured on chest and left side of belly. Motive for the occurrence was stated to be the dispute over women-folk. The complainant charged the accused for the commission of the offence. His report was also seconded by the other two injured namely Mujeeb-ur-Rehman and Shams-ul-Islam by affixing their thumb impressions on the *'Murasila'*. Later on, FIR No. 878 dated 23.05.2018 was registered against the accused/appellant under sections 324, 337-D, 337 F (i), 337 F (iii) PPC read

with section 15 of the Khyber Pakhtunkhwa Arms Act 2013 at the police station Jowar District Buner.

3. Investigation started in the case wherein the accused/appellant was arrested on 23.05.2018. Five (5) empties of 7.62 bore was also stated to have been recovered from inside the house of the complainant near the place assigned to him in the site plan. Another noticeable development in the investigation was that the weapon of offence was also recovered from the accused and same was sent to the FSL for matching it with the empties recovered in the case. The report in said respect was received in positive. Complete challan was put in court after completion of investigation and trial commenced in the case. On conclusion of proceedings in trial, the accused/appellant was convicted and sentenced as follows;

- *U/S 324 PPC to five (5) years rigorous imprisonment along with fine of Rs. 30,000/-, or in default thereof to suffer three (3) months simple imprisonment.*
- *U/S 337-D PPC to five (5) years rigorous imprisonment on two counts along with fine in shape of compensation of Rs. 200,000/- (two hundred thousand) for each injured, in default thereof, to suffer six (6) months simple imprisonment. The same fine shall be recoverable as land revenue and till its recovery the accused shall remain in jail as civil prisoner.*
- *U/S 337 F (i) PPC to one year rigorous imprisonment along with fine as Daman of Rs. 10,000/- for each*

injured, or in default thereof to suffer one month simple imprisonment.

- *U/S 337 F (iii) PPC to one year rigorous imprisonment along with fine in shape of Daman of Rs. 10,000/- for each injured, in default thereof to suffer one month simple imprisonment.*
- *U/S 15 A.A to three (3) years rigorous imprisonment along with fine of Rs. 10,000/-, or in default thereof to suffer one month simple imprisonment.*
- *All the sentences shall run concurrently.*

The appellant was extended the benefit of section 382-B Cr.P.C.

4. Feeling aggrieved from his conviction and sentence, the accused/appellant has filed appeal before this Court while the complainant has also filed Criminal Revision No. 62-M of 2019 for enhancement of the sentences awarded to accused.

5. Learned counsel for the accused/appellant referred to various pieces of evidences, recorded in the case and submitted that the prosecution have failed in proving the case against accused/appellant. He particularly laid stress on the fact that the other eye-witnesses particularly the two injured/eye-witnesses have been abandoned and the only statement of the complainant was not sufficient to prove the case against the accused/appellant beyond reasonable doubt. He further stated that the recovered empties had not been sent to the FSL earlier and same have been sent

to the FSL after recovery of the weapon of offence and therefore the report of the FSL would be of no help to the prosecution. The learned counsel also added that since the other two injured had not appeared before the Court for recording their statements, therefore conviction of the accused/appellant for causing injuries to them was unlawful. He further submitted that motive had not been proved by the prosecution also.

6. Learned counsel for the complainant submitted during the course of his arguments that the accused/appellant was named in a promptly lodged FIR and the prosecution have been successful in proving the case against him beyond any shadow of doubt through direct as well as corroboratory evidence. He also prayed for enhancing of the sentence by allowing the Criminal Revision No. 62-M of 2019.

7. The learned Astt: A.G. added that not only the direct evidence but the corroboratory evidence in the shape of recovery of Kalashnikov, blood stained earth and a matching FSL report were

sufficient to prove the case against the accused/appellant beyond any shadow of doubt.

8. I have heard arguments of learned counsel for the parties including learned Astt: A.G. for the State and perused the record.

9. Charge was framed in the case on 27.08.2018, whereafter the prosecution led its evidence. Beside the formal witnesses, Mian Hussain Shah ASI, who had recorded the first report was examined as PW-3. In his examination-in-chief, he had narrated the story of lodging of the report, obtaining the certificates of consciousness of the complainant as well as the other injured/ eye-witnesses, (which were also exhibited in his statement) and regarding the recording and affixation of thumb impressions of the witnesses on the *'Murasila'*. Nothing prejudicial to the case of prosecution could be brought out from the mouth of this witness during the course of cross-examination except that the '*Murasila*' had not been in his handwriting. He had also stated that the injury sheets as well as the consciousness certificates were not in his handwriting, he had however quickly added that same

were filled by his colleague and these documents bore his signatures also. He denied the suggestion that all the documents had not been drafted in his presence. The *'Murasila'* may have been drafted on his dictation which is not that much material so as to cause prejudice to the case of the prosecution. Lodging of report in the hospital have even otherwise been proved in the statement of the complainant as well as the supporting evidence in this respect. Dr. Asad Ullah Khan, Medical Officer, who had examined the injured in the case was examined as PW-4. In his statement, he has reproduced the detail description of the injuries found on the persons of the three (3) injured. He was cross-examined at length but nothing beneficial to the accused could be extracted from this witness. One constable Iftikhar Ahmad who had been marginal witness to the recovery memo Ex. PW-7/1 was examined as PW-7. The most important piece of document that was exhibited in his statement was Ex. PW-7/6, vide which the Investigating Officer had recovered the weapon of offence (Kalashnikov) along with a magazine having 03 live rounds of 7.62

bore, on the pointation of the accused/appellant. Nothing prejudicial to the case of the complainant in the cross-examination of this witness could be extracted from his mouth. One Gul Roz Khan was examined as PW-8. This witness stated in his examination-in-chief that the occurrence took place on 7th of *Ramadan* about 5/6 minutes prior to the opening of fast (روزہ). He stated that after hearing fire shots, he came out of his house but found no one present in the street, however someone shouted that his son had been hit with firing and had been in the house of their neighbor. He found his son in the house of Liaqat while lying on a bed (چارپائی), whereafter he was taken to the DHQ hospital Dagger and admitted for treatment, where he had also gone through various surgical procedures but his life was fortunately saved. He also stated that his statement was recorded under section 161 Cr.P.C by the local police, in the hospital on the following day. This witness was not cross-examined by the counsel for accused despite having the opportunity to do so. In the site plan blood has also been recovered from the same place where Liaqat, son of PW-8 was stated by

him to have taken refuge. The spot of occurrence, time and date of occurrence, shifting of the injured to the hospital and lodging of the report etc seems to be admitted that is why this witness was not opted to be cross-examined by the counsel for the accused. The complainant was examined as PW-9 on 16.02.2019 to the extent of his examination-in-chief. After recording his statement in the Court, the witness fell down on the ground and was shifted to the hospital, therefore cross-examination could not be recorded on him that very day. He was subsequently cross-examined on 13.05.2019. The learned counsel for the appellant, agitated the fact that the complainant had stated that his house was situated at a distance of about half kilometer from the place of occurrence, so how had he been able to hear the noise of heated debate of his son with the accused/appellant. In this respect, it is important to be noted that exchange of hot words between the accused and son of the complainant was an episode which preceded the crime. In the FIR as well as in the examination-in-chief the complainant have expressly stated that he came out and separated the accused and his son with

the help of the other two injured as well. That was the reason that the son of the complainant namely Nawaz Sharif had not been cited as eye-witness in the FIR as well as in the site plane. He had also stated in the FIR that after some time, the accused appeared from behind the wall of his house and started firing at the injured. This is clear from the evidence of prosecution that there was some timegape between the incident of exchange of hot words and the commission of the offence. The said circumstance, cannot therefore be construed adversely to the case of the prosecution. This injured eye-witness has fully stood the test of cross-examination and no contradiction in respect of the material particulars of the case could be brought in the cross-examination of this witness. This PW was an injured witness, who had fully supported the case of the prosecution. PWs Nawaz Sharif and Malak Aman were being abandoned as unnecessary. Investigating Officer of the case was examined as PW-10. Nothing beneficial to the accused has been brought out from the mouth of this witness also. He has successfully deposed in respect of conducting

investigation in the case particularly recovery of the weapon of the offence and sending the same to FSL for the purpose of matching it with the empties recovered in the case. The Investigating Officer has stood firm in the course of cross-examination and no material contradiction could be brought out from his mouth. The remaining PWs were thereafter abandoned as either been unnecessary, or won ever, or having effected compromise on 16.05.2019. In respect of abandoning of the other PWs, the learned counsel for the appellant argued that an adverse inference shall be drawn under Article 129 (g) of the *Qanun-e-Shahadat Order*, 1984 from non-appearance of the injured eye-witnesses in the case, but the circumstances of the case tells that the actual dispute existed between the accused and the complainant and the other injured received injuries just because of their misfortune, when they were present at the time of occurrence at the spot. In such circumstances, when deposing against the accused/appellant may have resulted in perpetuation of the enmity, it is understandable as to why they had not appeared before the Court for testifying

against the appellant. From the site plan as well as statement of PW-8 it is also clear that they were neighbors of the accused/appellant and in such circumstances their non-appearance cannot be construed fatal to the case of prosecution. Even otherwise, it has been settled by the Hon'ble Apex Court that if the prosecution succeeds in proving a case against an accused by producing reliable evidence, then it cannot be burdened or deemed bound to produce all the evidence at its disposal. Reliance in this respect is placed on the case ***"Khushi Muhammad v/s The State and another"*** reported as ***"1983 SCMR 697"***, wherein the Hon'ble Apex Court held as follows;

> ***"13. The learned counsel also laid stress on the fact that although Gul Muhammad Inspector Police had introduced a new and different version of the same case through his report under section 173, Cr.P.C, against 6 persons, five of whom are not mentioned as accused in the F.I.R, yet the prosecution did not produce and examine the witnesses cited in support thereof. This contention overlooks the fact that it is well established that it is not incumbent upon the prosecution to produce each and every witness in the calendar of witnesses and it can drop or not examine any witness that it does not consider necessary."***

In support of same ratio further reliance can also be placed on the judgments reported as ***"2007 SCMR 1519 and 2012 YLR 737 .***

10. Though the weapon of offence was statedly recovered from the accused/appellant but FSL report showing that the empties sent by the Investigating Officer had been fired from the same weapon, may not be entirely relied upon for the reason that there has been substantial delay in sending the empties as well as weapon of offence to the FSL for analysis and report. Empties were recovered in the case on 23.05.2018. The accused was arrested and Kalashnikov was recovered on his pointation on 25.05.2018, but same could not be swiftly dispatched to the FSL and it had been sent there on 28.05.2018. This delay could not be sufficiently explained in the evidence of prosecution. The prosecution has however proved their case through direct evidence and this delay in sending of the weapon of offence and empties to the FSL would not per se, reflect adversely on the case of the prosecution.

11. The contention of learned counsel for the appellant that the prosecution has not been able to prove motive in the case, is not holding any water. The complainant while deposing as PW-9 had stated in his examination-in-chief about the existence of the motive, which statement could not be shattered during

the course of cross-examination. As such, the existence of motive has also been successfully proved in the case in hand. Regarding the contention of learned counsel for the appellant, that the conviction recorded for causing injuries to the other two injured in the case was unlawful, it is important to be noted that the prosecution have proved the causing of injuries to all the three eye-witnesses in view of the statements of the doctor PW-4, the statements of witnesses i.e. PW-8 and PW-9 as well as the Investigating Officer PW-10. The other two injured eye-witnesses could not be produced in the Court, for establishing the fact that they had pardoned the accused and that they had not wanted to prosecute him further. From mere non-appearance as witness in the case, it could not be presumed that they had pardoned the accused under the law. The conviction of the accused/appellant on the said score was also lawful and do not suffer from any illegality.

12. For what has been discussed above, the appeal in hand is found to be without force and same is according dismissed.

13. So far as Criminal Revision No. 62-M of 2019 filed by the complainant for enhancement of the sentence is concerned, circumstances of the case show that the accused/appellant was first offender having no criminal history before the occurrence. Heated debate had also taken place before the occurrence, therefore in such circumstances, I find the sentences awarded to the accused/appellant by the learned trial Court as reasonable and justified, which warrant no interference. Criminal Revision No. 62-M of 2019 is also dismissed accordingly.

Announced
Dt.13.11.2019

JUDGE

Office 02/12/2019 W/R

Nawab (S.B.) Hon'ble Mr. Justice Wiqar Ahmad