JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(*Judicial Department*)

Cr.A No.106-B of 2016

The State
VS
Arif Momen

J U D G M E N T

Date of hearing 04-05-2020.

Appellant (s) by: Mr. Qudratulllah Khan Asstt. AG

Respondent in person a/w Inamullah Khan Mandra Khel advocate.

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SAHIBZADA ASADULLAH, J:--- The State through learned Addl. A.G has called in question the judgment dated 20.05.2015 of learned Additional Sessions Judge-IV, Lakki Marwat, whereby accused/ respondent Arif Momin was acquitted in case F.I.R No.345 dated 12.10.2013 registered under sections 302/324 PPC at Police station Ghazni Khel, district Lakki Marwat.

2. The concise facts as disclosed through the First Information Report are that on 12.10.2013 at 08.45 hours,

complainant Haji Muhammad Yaqoob Khan (PW-8) brought the dead body of his maternal uncle namely Ajmal Khan with the help of co villagers to the police station Ghazni Khel and lodged a report to the effect that on the eventful day at 08.10 hours, he alongwith his maternal uncle Ajmal Khan, his cousin Asifullah, their co-villagers were coming to the market of cattle fair, situated at Adda Ghazni Khel and when they reached to the metal road situated at village Titter Khel and were waiting there for conveyance, in the meanwhile respondent/accused Arif Momin son of Momin Khan resident of Titter Khel, duly armed with Kalashnikov emerged on the scene and immediately started firing upon them with the intention to commit their *Qatl-i-Amd*, resultantly, his maternal uncle Ajmal Khan got hit, and fell to the ground, while they escaped unhurt luckily; that after the occurrence, respondent/accused fled away from the spot; that thereafter they immediately arranged a vehicle for his uncle to take him to Police station for lodging the report but on the way, he succumbed to the injuries. Motive for the offence was stated to be previous blood feud between the parties.

3. The report of the complainant Haji Yaqoob Khan was reduced into writing in shape of F.I.R (ibid) (Ex.PA) by Abdul Hai ASI (PW-4), prepared injury sheet Ex.PW 4/1 and inquest report Ex.PW-4/2 of the deceased and sent the dead body to the mortuary at RHC Titter Khel for post mortem examination under the escort of constable Islam-ud-Din No.763, while F.I.R was handed over to Abdur Rahim SI for investigation, who after completion of

investigation handed over the case file to the SI Mufiz Khan (PW-6), who submitted complete challan under section 512 Cr.P.C before the learned trial court and after arrest of accuse by Syed Azam SHO (PW-1), he submitted supplementary challan on 10-06-2014. On commencement of trial, accused/respondent was summoned; he was produced before the court in custody. The learned trial court after complying with codal formalities u/s 265-C framed the charge against him, to which he pleaded not guilty and claimed trial. Prosecution in order to prove guilt of accused produced and examined as many nine (9) PWs and closed its evidence. Statement of respondent/accused was recorded U/S 342 Cr.P.C, wherein he neither wished to be examined on oath nor withed to produce evidence in his defence.

4. On conclusion of trial, and hearing arguments of learned counsel for the parties, the learned trial court acquitted the respondent/accused Arif Momin vide judgment dated 20.05.2015, impugned herein through the instant Criminal appeal.

5. We have heard arguments of learned Asst. A.G appearing on behalf of the State, learned counsel for the respondent/accused and have scanned the available record with his eminent assistance.

6. It was on 13.10.2013, while waiting for transport at bus stop Tetar Khel, the deceased was fired at, who lost his life and charge was brought against the respondent. The story was unfolded by Yaqoob Khan that, while waiting for transport at but stop Tatar

Khel alongwith the deceased and one Arifullah, the respondent emerged duly armed, started firing at them to commit their murder, which proved effective for the deceased, who got hit whereas they escaped unhurt, while on their way to hospital the deceased breathed his last and so the matter was reported at Police Station, Ghazni Khel.

7. Both the complainant and eye-witness are cousins inter-se, whereas the deceased was their maternal uncle. The deceased and eye-witness Arifullah were stated to be living in a common house to west of the spot, whereas the complainant was dwelling towards east. It was the complainant, who disclosed the cause as blood feud by referring two incidents where he too was the victim of assault.

8. The learned Asstt. A.G while representing the state criticized the impugned judgment as being arbitrary and without application of judicial mind to the evidence available on file, both oral and documentary. It was submitted that single accused was charged and that substitution is a rear phenomenon. It was further submitted that the prosecution has proved its case to the hilt through trustworthy and confidence inspiring witnesses. True, that singe accused is charged and equally true that substitution in case of single accused is a rear phenomenon, but it never relaxes the courts to take it for granted and award convictions that too on capital charge. It is the bounden duty of the Courts of law to assess and reassess the material on file, so to avoid injustice having been committed.

In case titled, ***Ghulam Rabbani Vs Muhammad Younis and another (2016 P Cr. LJ Note-6)*** it is held that.

> ***"8. True that accused is singularly charged for murder of deceased Ghulam Muhammad and no doubt the Hon ble Supreme Court in plethora of judgments has held that substitution of single accused in a murder charge is a rare phenomenon, but still to put the rope around the neck of an accused charged singularly, there must be ocular account of unimpeachable character, trustworthy and confidence inspiring, corroborated by other material circumstantial evidence."***

9. The prosecution is to prove that witnesses were present on the spot and that the incident occurred in the mode and manner and that the report was promptly lodged without consultation and deliberations. The report tells that all the three were on their way to cattle fair, but it has not been brought on record that when and where they planed and left as the houses of the complainant and the deceased were lying west and east of the spot. Their reaching to the spot is nothing but a coincidence, as the purpose was not shared earlier. The complainant was examined as PW-08, who stated that when they reached to the spot the respondent emerged and started firing at them, which resulted into injuries on person of the deceased. He further stated that they escaped unhurt as they laid down and they got up when the respondent left the spot. We are not ready to accept

the explanation so tendered as the complainant stated that the deceased had no ill will, with the acquitted respondent and this is on record that in fact the blood feud did exist between the complainant and the respondent. It is astonishing that why the deceased was chosen as the target, when the complainant being the prime target was present on the spot. The complainant, eye-witness and the deceased were maintaining a distance of two paces, where as the respondent has been shown at a distance of 9 paces, with no hindrance in between, so while lying on the ground the complainant if present would have been the easiest target. The complainant could not maintain consistency in his own statement as initially he stated that the accused emerged and fired at them, but later on, he divulged that after firing three shots on the deceased they were fired at. The veracity of the witness lost its worth when he stated that at the time of incident he was armed with a Kalashnikov, but surprisingly, when the respondent was leaving the spot was not fired at, had he been present on the spot, duly armed, the result would have been otherwise. The prosecution failed to say that why the deceased was targeted, when the complainant had the blood feud.

10. This was argued that the matter was reported within the shortest span of time; and that the charge was not the result of consultation and deliberations, but mere promptness of report is not a guarantee to success and it alone cannot certify the witness as truthful, rather the Court is to see the accumulative effect of what the prosecution has collected. The prosecution is still struggling to

answer that who accompanied the deceased then injured to the hospital. The complainant displayed an unnatural conduct when he stated that the co-villagers accompanied dead-body to the hospital and he came to the spot from Police Station, surprisingly both the witnesses did not identify the deceased at the time when the inquest report was prepared and even at the time of post mortem examination. The prosecution could not establish presence of the complainant on the spot and it was none else but the complainant who placed himself to open doubt by making dishonest improvements. Though, the matter was reported in the Police Station, but when the complainant was asked that why no efforts were made to shift the deceased in injured condition to hospital to save his life, his reply stunned all, that the injured was initially shifted to the hospital, while on reaching they found the hospital deserted, so they went to Police Station to report, conversely, the Investigating Officer stated that there were numerous hospitals in the area and that all the hospitals are well equipped with doctors and equipments.

11. The report was made in Police Station Ghazni Khel, which was penned down by one Abdul Hai, Asstt: Sub Inspector, who was examined as PW-04, who stated that he also prepared the inquest report and injury sheet, he submitted that neither F.I.R No. nor section of law has been mentioned on the inquest report but what surprised us that the name of the deceased has not been mentioned therein and the prosecution is still to answer that whose inquest that

was, as its identity still requests an answer. What we gather from is that in fact the nearby people rushed the deceased to the Police Station where preliminary investigation was carried out and it was then when the complainant was procured and the report was made.

In case titled, ***"Muhammad Rafiq alias Feeqa Vs The State (2019 SCMR 1068),*** wherein it is held that:

> ***"In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eye-witnesses of the crime. In similar circumstances, this Court, in the case of Irshad Ahmad v. The State (2011 SCMR 1190), observed that the noticeable delay in post mortem examination of the dead body is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses before preparing police papers necessary for the same."***

12. The Investigating Officer visited the spot, where blood from the place of deceased was recovered and also three empties of 7.62 bore. The empties were sent to the Forensic Sciences Laboratory which were received on 22.10.2013, where it was opined that all the three empties were fired from one and the same weapon. Though learned counsel stressed that the report favours the prosecution and is a circumstance that asks for conviction, but he

ignored that to credit the prosecution with its benefits the prosecution is under the bounden duty to show that these were lying in safe custody in the intervening period; and that it was dispatched after observing the legal formalities. The Investigating Officer did not take pains to record the statements of Moharrir of the concerned Police Station and also that of the official who took empties to the laboratory, so much so no abstract from register No. 19, in that respect was collected and placed on file. The incident occurred on 12.10.2013, and on the same day empties were collected from the spot, but were received in the laboratory after 10-days of its collection, and the delay caused left unexplained. The prosecution miserably failed to make us believe, that the report with all the inherent defects could be taken against the respondent, when so the report has lost its efficacy to be considered as a valuable piece of evidence to facilitate in awarding conviction, that too in offences entailing capital punishment, thus we regret to honour the same.

In case ***titled "Bakht Munir Vs the State" (2016 PLD 634)***, wherein it is held that:

> ***"Besides, the crime pistol had been allegedly recovered on the same day of incident i.e. 14.01.2012, but has been sent to the FSL with the crime empties on 21.01.2012 i.e. after a delay of seven days, for which no explanation, much less plausible has been furnished by the prosecution as to where and in whose custody the pistol and empties remained for this period and whether these were in safe hands. Muhammad Akbar Khan S.I (PW.7/Investigating Officer deposed that he has not recorded statement of any***

concerned person regarding delay in sending the articles to the FSL. In the circumstances, two interpretations of this piece of evidence are possible, one that the alleged empties and pistol have not been tampered, and the other, that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. In this view of the matter, the positive FSL report qua the crime empties and pistol being delayed without any plausible explanation, would not advance the prosecution case, therefore, has wrongly been relied upon by the learned trial Court."

13. The report contains motive as blood feud, but the prosecution could not establish the same, while reading the record we found that two F.I.Rs were placed on file, but to none of them the deceased was shown involved, rather it was admitted both, by the complainant and the Investigating Officer that the deceased had no involvement in the previous episodes. The complainant admitted in his Court statement that the deceased had no ill will with the accused, rather it was the complainant who was at the daggers drawn. We have no other option but to hold that it was the complainant who wanted to grind his axe by charging the respondent. The Investigating Officer could not collect anything on record in support of the motive and there is no cavil with the proposition that motive is double edged weapon, which cuts either way. True, that absence and weakness of motive will not have a casting vote against the prosecution, but equally true that once the

motive was alleged and was not proved then it was none else but the prosecution to suffer.

In case titled ***"Muhammad Ashraf alias Acchu Vs The State" (2019 SCMR 652 Para-7)***, wherein it has been held: -

> ***"7. 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."***

14. It was argued for the appellant that the respondents soon after the occurrence went into hiding and proceedings under the relevant sections of law were carried out, but neither the respondent turned up nor could be arrested, so was declared as proclaimed offender. It was stressed that his long abscondence added to his guilt and that the findings of the learned trial Court in that respect are devoid of reasons. True that abscondence of accused is a relevant factor, but alone it cannot be considered a conclusive proof of a crime as the prosecution has to independently prove the charge on the basis of strong and cogent evidence to lead us there where to hold that the accused has committed the crime.

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."***

15. Besides the above, generally the order of acquittal cannot be interfered with because the presumption of innocence of accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is, that, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In case where admissible evidence is ignored, a duty is casted upon the appellant Court to re-appreciate the evidence in a case where the accused has been acquitted, or the purpose of ascertaining as to whether the accused committed the offence or not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for

doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. In case in hand, the prosecution miserably failed to establish the charges against the respondent through cogent, coherent and confidence inspiring evidence, so this Court has reached to an inescapable conclusion that the impugned judgment is well reasoned and based on proper appreciation of evidence available on file, resultantly, this criminal appeal is bereft of merit stands dismissed.

Announced.
04.05.2020
Azam/P.S

JUDGE

JUDGE

33/b/mo

(D.B) Ms. Justice Musarrat Hilali and Mr. Justice Sahibzada Asadullah