

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.994-P/2019

Naseer Muhammad son of Saqi Muhammad,
 resident of village Adina District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :-	<u>Mr. Khurshid Khan, Advocate.</u>
State :-	<u>Mr. Mujahid Ali Khan AAG.</u>
For Respondent :-	<u>Mr. Aqil, Advocate.</u>
Date of hearing:	<u>23.10.2019</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- At a trial held by the learned Additional Sessions Judge/Judge Model Criminal Trial Court, Swabi, accused Naseer Muhammad, having been found guilty of committing murder of Asim and Shabir Hussain deceased, has been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life on two counts and to pay Rs.2,00,000/-, to legal heirs of each deceased, as compensation in terms of section 544-A Cr.P.C., and in default thereof to undergo 06 months S.I. in case FIR No.315 dated 17.04.2016, under sections 302/324/34 PPC, Police Station Kalu Khan, District Swabi. Benefit of section 382-B Cr.P.C. is extended to him.

2. The Naseer Muhammad convict, has filed the instant criminal appeal against his conviction and sentence,

whereas, Asif, the petitioner/complainant has filed the connected **Cr.R. No.176-P/2019**, seeking enhancement of sentence of the convict/respondent from life imprisonment to normal penalty of death as provided for the offence.

3. As both the matters are the outcome of one and the same judgment of the learned trial Court dated 28.06.2019, therefore, are being decided through this single judgment.

4. On 17.04.2016 at 10.10 A.M, complainant Asif, in company of dead body of his brothers, namely, Shabir Hussain and Asif deceased made report to Iftikhar ASI (PW.2) in civil hospital Kalu Khan to the effect that his brother Shabir Hussain deceased was serving in Frontier Constabulary (FC). On the fateful day he (complainant) along his brothers, namely, Kifayat Ullah (PW.11) and Asim deceased, accompanied Shabir Hussain deceased to see off him as he after availing his leave was leaving for the place of his posting at Mohmand Agency Nawgai. At 08.30 a.m. when they reached the field of Anwar Sher, their uncle, namely, Saqi Muhammad (now dead) and cousin Naseer Muhammad (the appellant), emerged and opened fire at them, as a result, Shabir Hussain deceased got hit and died at the spot. In order to save their lives, complainant along with his brothers Asim and Kifayat Ullah, started running towards the nearby hill. They were chased by the accused and the moment they arrived at Arhat of Rehmat Babu, the accused fired at them, as a

result, Asim got hit and died on the spot, whereas, he and PW Kifayat Ullah luckily remained unscathed. Motive behind the occurrence is that accused Saqi Muhammad was suspecting Asim deceased for having illicit relation with his wife, namely, Mst. Zahida. Report of complainant was recorded by Iftikhar ASI (PW.2) in the shape of Murasila Exh.PA/1, who also prepared injury sheets and inquest reports of the deceased Exh.PW.2/1 to Exh.PW.2/4, respectively and sent the Murasila to Police Station on the basis of which FIR Exh.PA was registered against the accused. He shifted the dead bodies of the deceased to the mortuary, where Dr. Fazli Junaid (PW.10), conducted autopsy on 17.04.2016. He noticed firearm entry wound measuring $\frac{1}{4} \times \frac{1}{4}$ inch on left side of neck of Shabir Hussain deceased with corresponding exit on right side of his face. Similarly, he observed a firearm entry wound measuring $\frac{1}{2} \times \frac{1}{2}$ inch on left side ear with charring marks having corresponding exit of 1x1 inch on back scalp of Asim deceased and opined that the aforesaid injuries resulted in death of the deceased.

5. Khalid Iqbal SI (PW.9) conducted investigation in the case, who on receipt of copy of FIR proceeded to the spot and prepared site plan Exh.PB on the pointation of complainant and PW Kifayat Ullah. During spot inspection he secured bloodstained earth from the places of Shabbir Hussain and Asim deceased vide recovery memos

Exh.PW.4/1 and Exh.PW.4/5, respectively. Vide recovery memos Exh.PW.4/2 and Exh.PW.4/5, he took into possession one 30 bore crime empty from the first place of occurrence and likewise a crime empty of the same bore from the second place of occurrence. Similarly, through recovery memos Exh.PW.4/3 and Exh.PW.4/6, he took into possession the last worn bloodstained garments of the deceased. He sealed all the above mentioned articles into parcels in presence of marginal witnesses of the recovery memos, produced Mst. Zahida wife of Saqi Muhammad before the learned Judicial Magistrate where she recorded her statement under section 164 Cr.P.C. and sent the bloodstained articles to the FSL report whereof is Exh.PK.

He also sent the two crime empties of 30 bore to the FSL for safe custody vide receipt No.314/21-K, initiated proceedings under section 204 and 87 Cr.P.C. against the accused. After arrest of the accused he produced them before the judicial Magistrate for obtaining their custody. During interrogation, on the pointation/discovery of Saqi Muhammad, he recovered a 30 bore crime pistol vide pointation memo Exh.PW.7/3. He prepare sketch of the place of recovery of pistol as Exh.PC. He added section 15 KP Arms Act, 2013 in the case. **Vide application marked “D” he sent the crime empties alongwith the recovered crime pistol to the FSL, report whereof is Exh.PK/1.** On completion of investigation, he handed over case file to the

SHO, who submitted challan against the appellant before the learned trial Court. During trial, accused Saqi Muhammad was murdered, resultantly, proceedings against him were abated. On conclusion of trial of the appellant, he was convicted and sentence as mentioned above.

6. We have heard the arguments of learned counsel for the parties and perused the record with their valuable assistance.

7. As per contents of FIR, the occurrence consists of two episodes. The first episode has been shown in the field of one Noor Sher, where Shabir Hussain deceased has been done to death. The second episode has been shown in the *Arhat* of Rehmat Babu, situated near the hill of village Adina, where Asim deceased has been shown done to death. The two crime spots have been shown/indicated in the site plan Exh.PB as Part-A and Part-B, respectively. The inter-se distance between the two crime spots has been shown as one Kilometer in the site plan Exh.PB. The said distance has also been admitted and disclosed by PW Kifayat Ullah in his statement recorded as PW.11. In the Murasila and FIR, the time of first episode has been shown as 8.30 a.m., however, the time of second episode has not been given therein. The occurrence has been reported by complainant Asif at 10.10. a.m. i.e. after a delay of 01 hours and 40 minutes. The distance between the place of first episode and the Police Station has been shown as 4/5

Kilometers. According to statement of Kifyat Ullah (PW.11), who poses himself to be the eyewitness, the distance between the crime spot and Civil Hospital Kalu Khan is 02 Kilometers and between the spot and Civil hospital is one Kilometer. He has deposed that after the occurrence many people attracted to the spot and that the dead body of deceased Shabbir Hussain was taken to the hospital prior to the dead body of Asim being shifted by co-villagers. Deceased Asim was brought to the hospital after 10/20 minutes of deceased Shabbir Hussain. No explanation, much less plausible, has been furnished by complainant Asif and PW Kifayat Ullah to cover up the delay of 1 hour and 40 minutes whereas it transpired from record that distance of two kilometers can easily be covered, even by foot, within 30 minutes. Complainant Asif in support of his FIR did not appear in the witness box. Admittedly, FIR is not a substantive piece of evidence unless its contents are affirmed on oath by its maker and the maker thereof is subjected to cross-examination. The delay in lodging FIR has not been explained either in the FIR or by PW Kifayat Ullah which cast serious doubt about presence of PWs at the spot at the time of occurrence. Thus, possibility of procuring the complainant and PW Kifayatullah who are brothers of the deceased and thereafter lodging the report after due consultation and deliberation cannot be ruled out of the consideration.

Guidance in this regard can be derived from the judgment of the Hon'ble Supreme Court of Pakistan rendered in case titled, **"Akhtar Ali and others v. The State" (2008 SCMR 6).**

8. complainant Asif has been abandoned by the prosecution because he is absconding in a criminal case, wherein he is charged for murder of co-accused Saqi Muhammad. This fact has also been confirmed by Kifyat Ullah (PW.11) in the very first part of his cross-examination by deposing that **"it is correct that accused Saqi Muhammad was released on bail and was done to death. It is correct that my brothers Aisf and Arif are charged for the murder of Saqi Muhammad"**. Similarly, Mst. Zahida widow of accused Saqi Muhammad, who had recorded statement under section 164 Cr.P.C., to the extent of motive part of the prosecution case, has also been abandoned by the prosecution.

9. The only evidence believed and relied upon by the learned trial Court is the testimony of Kifyat Ullah (PW.11), who pose himself to be the eyewitness of the occurrence coupled with circumstantial evidence in the shape of recoveries, mentioned above and medical evidence in the shape of autopsy report and statement of the medical Officer.

10. Kifayat Ullah while appearing as PW.11 deposed that he is the real brother of Shabbir Hussain and Asim

deceased. The former was serving in Frontier Constabulary and had come to his house on leave. On 17.04.2016, as Shabbir Hussain on expiry of his leave was leaving to report in his office at Nawagi Mohamand, so he along with Asif and Asim accompanied him. When they reached the field of Anwer Sher Khan, in the meanwhile, the appellant along with co-accused Saqi Muhammad (now dead), appeared from the wheat crops and opened fire at them, as a result, Shabbir Hussain got hit and died on the spot. He along with his brothers Asif and Asim started running towards the mountain so as to rescue themselves, but the accused chased them and opened fire at them when they reached Archat of Rehmt Babo, as a result, his brother Asif deceased got hit and died on the spot, whereas, he and complainant Asif luckily remained unscathed. He reiterated the same motive as set forth in the FIR. During cross-examination PW Kifayat Ullah was confronted with his statement recorded under section 161 Cr.P.C. by the defence. While replying to certain questions of defence PW Kifayat Ullah dishonestly improved his statement so as to bring it in line with the prosecution case. Relevant part of his statement to this effect is reproduced below:-

“I had stated in my statement to the police that the occurrence took place on 17.04.2016 (confronted not so recorded). I have stated in my statement that accused came out from the wheat crops (confronted not so recorded). I had stated in my statement to

police that one day prior to the occurrence, an altercation took place between the accused and deceased Asim regarding motive (confronted not so recorded).

Perusal of site plan Exh.PB (Part-I) reveals that PW Kifayat Ullah and Asif complainant were at a distance of 8 to 10 feet from the two deceased and at a distance of 14 to 16 feet from the accused. As per version of PW Kifatullah during the first episode the accused emerged in their front and opened fire at them, as a result, Shabbir Hussain deceased got hit and died at the spot. Medical evidence contradicts the aforesaid statement of PW Kifyat Ullah because as per mortem report deceased Shabbir Hussain has sustained firearm entry wound on left side of his neck having corresponding exit on his face. In the situation as disclosed by PW Kifayat Ullah the deceased should have received the fire arm entry wound from front to back. PW Kifyat Ullah and complainant, during the first episode has not received any injury despite the fact that they were in the direct firing range of the accused. Besides, when accused had direct motive with deceased Asim deceased why Shabbir Hussain was targeted in the first episode. To this effect no explanation has been furnished by the prosecution. Neither complainant in his report nor PW Kifayat Ullah has disclosed about the weapon of offence used by the accused in the commission of offence. Rather "firearm" which is a wider term and

covers all type of firearms has been purposely used in the initial report. Had the PWs been present at the spot with the deceased at the time of occurrence they would have specifically disclosed about the bore of the weapon. As stated earlier, the site plan has been prepared at the instant of complainant and PW Kifayat Ullah. According to them the distance between the first place of occurrence and the second crime spot is about one Kilometer. Chasing of PW Kifayat Ullah and complainant Asif by the accused upto one Kilometer seems quite beyond the comprehension of a prudent mind, particularly when the accused were having firearms. PW Kifayat Ullah in cross examination deposed that distance between the field of Anwar Sher and field of Rehmat Babu (the two crime spots) is one Kilometer and that while going from the field of Anwar Sher to the field of Rehmat Babu, one has to pass through village Abadi and fields/Arhat. He deposed that so many persons were present at the time when they were running from spot (Part-A to spot Part-B) but he cannot tell their names as by then they were in hurry and fear. No independent witness has been examined by the I.O. to substantiate aforesaid statement of PW Kifayat Ullah. The version of PW Kifayat Ullah is not less than an action movie. Keeping in mind the natural human conduct, particularly, of brothers, first the complainant and PW Kifayatullah would not opted to run from the spot leaving the dead body of their deceased

brother, and secondly, if for the sake of arguments it is presumed that their lives were also precious and they tried to save themselves, then at least they had the option to take shelter in any house of the Abadi falling in between the two crime spot. PW Kifayat Ullah further deposed that his sleeves and hands were smeared with the blood of deceased and he had shown the same to the I.O. Khalid Iqbal (PW.11), however, PW.11 has not uttered a single word in this regard. In the second episode if the accused were chasing deceased Asim, the deceased should have received the firearm entry wound from back to front but autopsy of the deceased contradicts the statement of PW Kifayat Ullah. Deceased Asim has received single firearm entry wound on left side ear with charring marks. The distance between deceased Asim and accused in the second episode has been shown as 10 to 12 feet and from such distance charring marks cannot be caused, particularly, when the weapon of offence is 30 bore pistol. The medical evidence produced by the prosecution was forcefully pleaded to support and corroborate the testimony of the purported eye-witness by the prosecution but the same is quite contrary to the ocular account of the purported eyewitness. It is settled that in the event of variation in ocular and medical evidence, ocular evidence has to be believed but when the ocular account itself is inconsistent,

contradictory and not confidence inspiring, then no reliance could be placed there-upon.

11. For what has been discussed above, we are firm in our view to hold that PW Kifyat Ullah being brother of the two deceased was not present at the spots at the time of occurrence rather his presence was procured within 01 hours and 40 minutes of the occurrence which also caused the aforesaid delay in lodging FIR.

12. As regards circumstantial evidence in the shape of recovery of blood from the crime spots the last worn bloodstained garments of the deceased coupled with positive Serologist report in respect thereof and the medical evidence, the same though confirm the crime spots to be the same as alleged by the prosecution and that the deceased have been done to death with firearm, but never tell the name(s) of culprit (s)/killer (s). Such pieces of evidence are always taken into consideration along with direct evidence and not in isolation. Similar, is the case of abscondence of the appellant. There is no cavil to the proposition, that abscondence may constitute corroborative evidence against a person accused for an offence. However, when there is no direct evidence against an accused or the evidence produced is not reliable or trustworthy to convict a person for a capital charge, then abscondence, even if for a prolonged period, would be of

no legal avail to the prosecution's case, as the people do abscond whether they were charged falsely or otherwise.

13. Adverting to another corroborative piece of evidence i.e. recovery of 01 crime empty of 30 bore each from the two spots. Khalid Iqbal (PW.9) has deposed that he sent both the empties to the FSL for safe custody vide receipts Mark A and Mark. B soon after the occurrence, but astonishingly, when dead co-accused Saqi Muhammad was arrested, on his pointation a 30 bore crime pistol was recovered vide memo Exh.PW.7/3, the I.O. again sent two 02 empties of 30 bore to the FSL along with the pistol. In cross-examination PW.9 has admitted it correct that he had not recorded statement of any person who had brought back the empties from FSL which he had sent for keeping in safe custody. As per FSL the two empties of 30 bore sent later on along with the pistol recovered from dead accused Saqi Muhammad, have been fired from the same pistol. This piece of the prosecution evidence being highly doubtful would not advance the prosecution case, particularly, when the direct evidence of the prosecution has been disbelieved and the alleged pistol has not been recovered from the appellant.

14. In view of the above, we have no hesitation to conclude that prosecution has miserably failed to prove the guilt of appellant through cogent and confidence inspiring direct or circumstantial evidence. Rather, the prosecution

case is pregnant with doubts, benefit of which should have been extended to the appellant but the learned trial Court by not appreciating the evidence in its true perspective reached to an erroneous conclusion by holding the appellant guilty of the offence. It is well settled principle of law that for recording conviction strong evidence of unimpeachable character is required. It is golden principle of criminal justice that finding of guilt against accused must not be based on probabilities to be inferred from evidence but must rest surely and firmly on tangible and concrete evidence; otherwise, the golden rule of benefit of doubt would be reduced to naught. The Courts by means of proper appraisal of evidence must be vigilant to dig out truth of the matter to ensure that no injustice is caused to either party. It is cardinal principle of administration of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt. If any reasonable doubt arises in the prosecution case, benefit of the same must be extended to the accused not as a matter of grace or concession, but as a matter of right. Likewise, it is also well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicial mind would be sufficient for acquittal of the accused.

15. Resultantly, this appeal is allowed. Conviction and sentence of the appellant recorded by the learned trial Court is hereby set aside and the appellant is acquitted of the charge leveled against him. He be set at liberty forthwith if not confined in any other case.

16. On acquittal of the appellant/convict, connected **Cr.R. No.176-P/2019**, has become infructuous which is hereby dismissed.

17. These are the reasons of our short order of even date, which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentence of appellant Naseer Muhammad, recorded under sections 302 (b) PPC on two counts, by the learned Additional Sessions Judge/Judge Model Criminal Trial Court, Swabi vide judgment dated 28.06.2019 in case FIR No.315 dated 17.04.2016, registered under sections 302/324/34 PPC, and hereby acquit him of the charge. He be set at liberty forthwith, if not confined in any other case”.

Announced:

23.10.2019

M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan;
Hon'ble Mr. Justice Ishtiaq Ibrahim.

